IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

DANIEL TAYLOR, Petitioner/Defendant-Appellant.

NO. SCWC-28904

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28904; CR. NO. 07-1-0253)

DECEMBER 15, 2011

RECKTENWALD, C.J., NAKAYAMA, DUFFY, AND MCKENNA, JJ.,
WITH ACOBA, J., CONCURRING AND DISSENTING SEPARATELY

OPINION OF THE COURT BY RECKTENWALD, C.J.

In 2006, Daniel Taylor pled guilty in the United States District Court for the District of Hawaiʻi to conspiracy to traffic in Native American cultural items that were obtained in violation of the Native American Grave Protection and Repatriation Act (NAGPRA). The items were native Hawaiian artifacts that had been repatriated to Kanupa Cave on the island of Hawaiʻi, and that were subsequently taken from the cave by

Taylor and an accomplice. Approximately a year later, a State of Hawaiʻi grand jury indicted Taylor for Theft in the First Degree in violation of Hawaiʻi Revised Statutes (HRS) §§ 708-830(1) and 708-830.5(1)(a), quoted infra, with regard to the same events. Taylor moved to dismiss the indictment on various grounds. The circuit court denied Taylor's motion,[1] and Taylor appealed.

In the Intermediate Court of Appeals, Taylor argued, inter alia, that the evidence presented to the grand jury failed to establish that the artifacts were "property of another" as required under HRS § 708-830(1). Taylor further argued that his prosecution in state court was barred by HRS § 701-112, quoted infra, because he was previously convicted in federal court for conspiracy to traffic in Native American cultural items, i.e., the Kanupa Cave artifacts.

The ICA affirmed, holding that the evidence was sufficient to support the indictment and noting that "specification of the actual owner of the property for purposes of this theft charge is not required and only evidence that the property was not that of Taylor is required." State v. Taylor, No. 28904, 2011 WL 661793, at *9-10 (App. Feb. 23, 2011) (mem. op.). The ICA further held that HRS § 701-112 did not bar Taylor's theft prosecution, because theft in the first degree requires proof of facts not required for the federal conspiracy

[1] The Honorable Glenn S. Hara presided.

and trafficking offenses, and the primary purposes behind the state and federal offenses differed. Id. at *3-4.

In his application for a writ of certiorari, Taylor raises the following two questions:

> 1. . . . Does the State establish that an item is "property of another" simply by proving that the defendant did not own it, or must the State prove something more to establish that an item is an article of value that someone other than the defendant possesses or has some other interest in and therefore within the statutory definition of "property of another"?
>
> 2. . . . Does the offense of first-degree theft, as alleged against [Taylor] in this matter, require proof of a fact that the federal offense of conspiracy, as it was proven to convict [Taylor], did not require?

We conclude that the ICA erred in stating that "only evidence that the property was not that of Taylor [was] required" to establish that the artifacts were the "property of another." However, we hold that the State nonetheless presented sufficient evidence to the grand jury to find probable cause that the property taken was "property of another." We further hold that Taylor's prosecution in state court is not barred by HRS § 701-112 because the theft charge requires proof of a fact not required for his federal conspiracy offense, and the purposes behind the state and federal statutes differ. Accordingly, we affirm the judgment of the ICA.[2]

[2] We note that the ICA's Memorandum Opinion and Judgment on Appeal purported to affirm the circuit court's December 13, 2007 "Order Granting Ex Parte Motion to Certify Order Denying Defendant's Motion to Dismiss Indictment and Second Motion to Dismiss for Interlocutory Appeal Pursuant to H.R.S. § 641-17." Taylor, 2011 WL 661793, at *10. However, Taylor's Notice of Interlocutory Appeal appealed from the circuit court's November 14, 2007 order denying his motion to dismiss the indictment. Moreover, Taylor's opening (continued...)

I. Background

The following factual background is taken from the record on appeal, including a transcript of the grand jury proceeding and transcripts of the proceedings before the circuit court on Taylor's first motion to dismiss. The record also contains copies of documents from Taylor's federal prosecution, including the charging document, Taylor's plea agreement, and transcripts of proceedings before the federal district court.

A. Proceedings in federal district court

On March 24, 2006, the United States charged Taylor by information with Conspiracy to Traffic in Native American cultural items in violation of 18 United States Code (U.S.C.) § 371, quoted infra, and Trafficking in Native American cultural items in violation of 18 U.S.C. § 1170(b),[3] which imposes

---

[2](...continued)
brief to the ICA presented argument solely as to that order. In addition, the ICA's memorandum opinion concluded that the circuit court properly denied Taylor's motion to dismiss the indictment. Id. at *9. Neither Taylor's opening brief nor the ICA's memorandum opinion asserted that the circuit court erred in granting Taylor leave to file an interlocutory appeal. See id.

Accordingly, we view the reference in the ICA's judgment to the circuit court's December 13, 2007 order as a clerical error. We thus affirm the ICA's judgment, which, as corrected by this opinion, affirmed the circuit court's November 14, 2007 order denying Taylor's motion to dismiss the indictment.

[3] 18 U.S.C. § 1170(b) (1994), concerning illegal trafficking in Native American human remains and cultural items, provides:

> Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or

(continued...)

sanctions for violations of NAGPRA, discussed infra.

That same day, the federal government filed a Memorandum of Plea Agreement (Plea Agreement) in which Taylor agreed to plead guilty to conspiring to sell, use for profit, and transport for sale and profit Native American cultural items, which were obtained in violation of 18 U.S.C. § 1170(b), in the time period "by and including June 2004."[4] In exchange for Taylor's guilty plea, the federal government dismissed the trafficking charge against Taylor and agreed not to seek additional charges related to the taking and selling of Native American cultural items from about June 2004 through August 2004. Taylor was subsequently found guilty on the conspiracy count.

In the Plea Agreement, Taylor admitted the following facts, outlining "what happened in relation to the charge to which [Taylor pled] guilty:"

> a. From a precise earlier date unknown but by and including June 2004, in the District of Hawaii, [Taylor] did knowingly and willfully conspire and agree with others both known and unknown, including with his co-defendant, JOHN CARTA, to commit offenses against the United States, namely, to sell, use for profit, and transport for sale and profit Native American cultural items obtained in violation of [NAGPRA], to wit: Native Hawaiian artifacts that had been repatriated and re-buried at Kanupa Cave located on the island of Hawaii, violations of [18 U.S.C. §§ 371 and 1170(b)].
>
> b. In 2000, JOHN CARTA had a conversation with an individual identified by initials as M.F., who informed him of the existence of a cave containing

---

[3](...continued)
both.

[4] The Plea Agreement was incorporated into the record on appeal as an exhibit to Taylor's motion to dismiss.

Native Hawaiian artifacts. According to M.F., the cave was located on the Kawaihae side of the island of Hawaii.

c. Subsequently, but at some precise date prior to June 16, 2004, [Taylor] and JOHN CARTA agreed to find the cave with the understanding that they would sell any artifacts they discovered for a profit.

d. On or about June 16, 2004, [Taylor] and JOHN CARTA acted on their agreement to find the cave. On or about June 17, 2004, [Taylor] and JOHN CARTA obtained directions from M.F. and found the cave, later identified as Kanupa Cave. They pushed aside a rock sitting across the cave's entrance and entered. [Taylor] and JOHN CARTA discovered a number of items wrapped in woven lauhala baskets and black cloth. They unwrapped the items and determined they were Native Hawaiian artifacts, including items such as wooden bowls, a gourd, a holua sled runner, a spear, kapa, and cordage. Several of the artifacts contained labels indicating they belonged to the J.S. Emerson Collection, which was a collection of artifacts taken from Kanupa Cave in the late 1800's and sold to museums, including the Bishop Museum in Honolulu, Hawaii. These items were repatriated and re-buried at Kanupa Cave in November 2003.

e. [Taylor] and JOHN CARTA removed approximately 157 artifacts from Kanupa Cave.

f. [Taylor] sold or attempted to sell artifacts obtained from Kanupa Cave for a profit as follows:

(i) On or about June 17, 2004, [Taylor] contacted a collector and attempted to sell to that collector a palaoa taken from Kanupa Cave for $40,000.

(ii) On or about June 26, 2004, [Taylor] sold a piece of kapa from Kanupa Cave to a tourist for $150.

(iii) On or about July 11, 2004, [Taylor] sold a fisherman's bowl and cover taken from Kanupa Cave to a collector for $2,083.

iv. [sic] On or about July 13, 2004, [Taylor] had posted for sale on the internet a kupee taken from Kanupa Cave for $5,600.

g. [Taylor] knew the artifacts belonged to the J.S. Emerson Collection. To conceal the fact that some of the artifacts belonged to a well-known collection, [Taylor] removed the J.S. Emerson Collection labels from these artifacts.

On June 12, 2007, the federal district court filed its

judgment, adjudicating Taylor guilty and sentencing him to, inter alia, eleven months of imprisonment followed by one year of supervised release.

B. Proceedings in circuit court

1. Grand jury proceedings

On May 23, 2007, the State sought a grand jury indictment against Taylor for Theft in the First Degree in violation of HRS §§ 708-830(1)[5] and 708-830.5(1)(a).[6] The State presented the testimony of one witness: Abraham Kaikana, a special agent with the Office of the Attorney General. Agent Kaikana testified that he had reviewed reports from both the state and federal investigations in Taylor's case, interviews from the federal investigation, and Taylor's memorandum of plea agreement with the federal government. Agent Kaikana also testified that he interviewed various individuals in relation to Taylor's case.

With regard to the artifacts, Agent Kaikana testified that a surveyor named Joseph Swift Emerson "was shown Kanupa Cave at one time in the 1800s and he took artifacts out of that cave

---

[5] HRS § 708-830(1) (1993) provides:

> A person commits theft if the person . . .[o]btains or exerts unauthorized control over property. A person obtains, or exerts control over, the property of another with intent to deprive the other of the property.

[6] HRS § 708-830.5(1)(a) (1993) provides: "A person commits the offense of theft in the first degree if the person commits theft . . . [o]f property or services, the value of which exceeds $20,000[.]"

and then he sold part of that to the Bishop Museum and the Peabody [Essex] Museum in Massachusettes [sic]." Agent Kaikana testified that J.S. Emerson would put tags or labels on the items he collected "to document them for future use."[7] Some of the items taken by J.S. Emerson were "eventually repatriated from both the Bishop Museum and the Peabody Essex [Museum]" and were "reburied" at Kanupa Cave. The groups involved with the reburial included "Hui Malama, . . . OHA, [the] State, and the Bishop Museum."[8]

Agent Kaikana also testified that Taylor and his wife "own or owned an antique shop" in Captain Cook, Hawaiʻi, where "they would sell, buy, [and] trade, [] antiquities." Agent Kaikana testified that he interviewed and reviewed the federal government's interview of two witnesses who identified artifacts from the "J.S. Emerson Collection" in Taylor's shop. Agent

[7] Agent Kaikana testified that Taylor acknowledged in his memorandum of plea agreement that he "saw Emerson tags on the items when he went into the cave[,]" and that he removed the tags "[t]o hide or conceal the sale of these items[.]"

[8] Agent Kaikana did not explain to the grand jury what "Hui Malama" or "OHA" were, although the latter was presumably a reference to the Office of Hawaiian Affairs. NAGPRA identifies Hui Malama I Na Kupuna O Hawaiʻi Nei as a "nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues." 25 U.S.C. § 3001(6) (1990). NAGPRA identifies the Office of Hawaiian Affairs as an entity "established by the constitution of the State of Hawaii." 25 U.S.C. § 3001(12); see also Haw. Const. art. XII, § 5 (establishing the Office of Hawaiian Affairs); HRS chapter 10 (concerning the Office of Hawaiian Affairs). NAGPRA further defines a "Native Hawaiian organization" as "any organization which – (A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawaiʻi Nei." 25 U.S.C. § 3001(11).

Kaikana also testified regarding the recovery of Kanupa Cave artifacts from Taylor's home after the federal government executed a search warrant on Taylor's home and shop. Agent Kaikana testified that other Kanupa Cave artifacts, including a palaoa and kūpeʻe, bearing J.S. Emerson and Bishop Museum labels were recovered in a Tupperware container at the Puʻuhonua o Hōnaunau National Park on the island of Hawaiʻi. The agent testified that it appeared that they had been "dumped" there. Finally, Agent Kaikana testified that he met with an appraiser, who valued the items Taylor had taken from Kanupa Cave, including the palaoa and kūpeʻe, from $800,000 to $1.2 million. The grand jury returned a true bill.

On May 24, 2007, the grand jury's indictment was filed, charging Taylor with Theft in the First Degree in violation of HRS §§ 708-830(1) and 708-830.5(1)(a). The indictment provided:

> On or about the 17th day of June, 2004, in the County of Hawaii, State of Hawaii, [] TAYLOR, did obtain or exert unauthorized control over the property of another, to wit: artifacts from Kanupa Cave, having a value which exceeds Twenty Thousand Dollars ($20,000), with intent to deprive the other of the property, thereby committing the offense of Theft in the First Degree in violation of [HRS §§ 708-830(1) and 708-830.5(1)(a)].

2. Taylor's motions in circuit court

On July 24, 2007, Taylor filed a motion to dismiss the indictment. Taylor argued, inter alia, that "the artifacts predicating the State's indictment are not the 'property of

another' under HRS § 708-800"[9] and that the indictment charged Taylor for an offense that he already had been prosecuted for in federal district court in violation of HRS § 701-112.[10] The State argued, inter alia, that it was only required to prove that the property belonged to someone other than Taylor. The State also argued that the instant prosecution was not barred by HRS § 701-112 because the two-pronged exception set forth in HRS § 701-112(1)(a) was met in this case. The State contended that the offense of theft in the first degree "require[d] proof of a fact not required by the former prosecution in the [federal district court], namely that the value of the property exceeds $20,000[,]" and that "the law defining each of the offenses is intended to

[9] HRS § 708-800 (1993) defines "property of another" for purposes of HRS § 708-830(1) as "property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful; however, a security interest is not an interest in property, even if title is in the secured party pursuant to the security agreement."

[10] HRS § 701-112 (1993) provides, in pertinent part:

> When behavior constitutes an offense within the concurrent jurisdiction of this State and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under any of the following circumstances:
>
> > (1) The first prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3), and the subsequent prosecution is based on the same conduct, unless:
> >
> > > (a) The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil[.]

prevent a substantially different harm or evil."

On August 30, 2007, the circuit court held a hearing on Taylor's motion to dismiss. Regarding Taylor's "property of another" argument, the circuit court indicated that it thought HRS chapter 6E, concerning historic preservation, applied and ordered the parties to provide a supplemental memorandum on the topic. At the conclusion of the hearing, the circuit court took the matter under advisement. The State subsequently filed a supplemental memorandum in opposition to the motion to dismiss in which it argued that the artifacts were the "historic property" of the State, pursuant to HRS § 6E-7.[11] Attached to the supplemental memorandum was a declaration of Deputy Attorney General Mark K. Miyahira, declaring that "documentation indicates that Kanupa Cave is located on State-owned land on the island of Hawaii," and that "the artifacts that are the basis of this prosecution are more than fifty (50) years old." Taylor argued in his supplemental memorandum in support of his motion to dismiss that "neither the State nor anyone else has possession of the artifacts[]" because, pursuant to HRS § 6E-7(c),[12] the "State's interest in the artifacts

[11] HRS § 6E-7(a) (1993) provides: "All historic property located on lands or under waters owned or controlled by the State shall be the property of the State. The control and management of the historic property shall be vested in the [Department of Land and Natural Resources]."

HRS § 6E-2 (1993) defines "historic property[,]" as used in HRS chapter 6E, as "any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old."

[12] HRS § 6E-7(c) (1993) provides: "The State shall hold known burial sites located on lands or under waters owned or controlled by the State in trust for preservation or proper disposition by the lineal or cultural

(continued...)

is solely to 'preserve' them for 'proper disposition' to the lineal or cultural descendants of the people with whom the artifacts were interred."[13]

3. Circuit court ruling

On October 5, 2007, the circuit court issued a Memorandum of Decision on Defendant's Motion to Dismiss, denying Taylor's motion. The circuit court found, inter alia, that the indictment properly charged Taylor with obtaining control over the "property of another" pursuant to State v. Nases, 65 Haw. 217, 218, 649 P.2d 1138, 1139 (1982),[14] and that Taylor's theft prosecution was not barred by his federal conviction pursuant to HRS § 701-112.

On November 14, 2007, the circuit court issued its Findings of Fact (FOFs), Conclusions of Law (COLs), and Order denying Taylor's motion to dismiss the indictment. In its

---

[12](...continued)
descendants."

HRS § 6E-2 defines "burial site" as "any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods are interred, and its immediate surrounding archaeological context, deemed a unique class of historic property and not otherwise included in section 6E-41."

HRS § 6E-2 defines a "burial good" as "any item reasonably believed to have been intentionally placed with the human skeletal remains of an individual or individuals at the time of burial."

[13] On September 13, 2007, Taylor filed a second motion to dismiss, arguing primarily that a theft conviction would violate the rule set forth in State v. Modica, 58 Haw. 249, 250-51, 567 P.2d 420, 421-22 (1977). The circuit court denied the motion. Because this second motion to dismiss is not at issue in the instant appeal, we do not discuss it further.

[14] As discussed further infra, Nases held that the "naming of the person owning the property in the indictment is surplusage." 65 Haw. at 218, 649 P.2d at 1139 (citations omitted).

FOFs/COLs, the circuit court recounted the factual background leading up to Taylor's federal prosecution and his indictment in state court and then stated, in relevant part, as follows:

> **FINDINGS OF FACT**
>
> . . . .
>
> 9. . . . this [c]ourt finds and concludes that [Taylor] has not shown at this time that one of the sovereigns is acting as a tool of the other or that the second prosecution by the state in this case is a sham or cover for the federal prosecution.
>
> **CONCLUSIONS OF LAW**
>
> . . . .
>
> 4. The charged offense of Theft in the First Degree in this state prosecution requires the proof of elements not required by the federal offense of Conspiracy to Traffic in Native American cultural items. Theft in the First Degree requires proof that the defendant obtained and exerted unauthorized control or [sic] property of another. This requirement is substantially different and more stringent than the requirement of the overt act under the federal charge, in this case being the removal of property from the Kanupa Cave. Additionally, the state charge requires the property be that of another. There is no allegation of this element in the federal information against [Taylor]. The state charge also requires the additional element of proof that the value of the property taken exceeds $20,000, while the federal charge requires no such proof. There is also the specific intent requirement under the state charge, that the offense be committed "with intent to deprive the other of the property," which is not a requirement under the federal charge. Therefore, it is clear that the state offense requires proof of a fact not required by the former offense.
>
> 5. The law defining each of the offenses is intended to prevent a substantially different harm or evil. The federal offense charged is a conspiracy in violation of 18 U.S.C[.] §371. The offense against the United States, which is the target of the conspiracy, is the illegal trafficking of Native American cultural items in violation of 18 U.S.C. §1170(b). The obvious import of this law is to discourage the illegal marketing of such cultural items. Apparently such illegal trafficking can occur even when an object is obtained in a manner that may not constitute theft. In U.S. v. Corrow, 941 F. Supp[.] 1553 (D.N.M. 1996), aff'd 119 F.3d 796 (10th Cir. 1997), the defendant was convicted for agreeing to sell a Navajo ceremonial

> mask which he had purchased from a Navajo chanter's widow, in violation of 18 U.S.C. §1170(b). This case illustrates that it is the trafficking of these cultural objects and not their theft that constitutes the acts prohibited by 18 U.S.C. §1170(b). Arguably, 18 U.S.C. §1170(b) seeks to protect the interests of the various Native American cultures and the objects related to their cultural heritage and history. This is a far different interest from Hawaii's theft statute which protects persons from being deprived of property rights by unauthorized takings. Therefore, it is clear that the law defining each of the offenses is intended to prevent a substantially different harm or evil.
>
> 6. Since the conditions of H.R.S. §701-112(1)(a) have been shown to exist in this case, the current state prosecution is not barred by the [Taylor's] conviction in the federal case.
>
> . . . .
>
> 15. The indictment in the state theft cases alleges, *inter alia*, that [Taylor] "did obtain or exert unauthorized control over the property of another..." [Taylor] alleges that the property belongs to no one. The State alleges that it has a property interest in the property due to [HRS § 6E-7] which states "All historic property located on lands or under waters owned or controlled by the State shall be the property of the State."
>
> 16. The statutory definitions in [HRS] § 708-800, [] of the terms, "control over property", "obtain", "property of another", and "unauthorized control over property" leads to the conclusion, as held in [Nases, 65 Haw. at 218, 649 P.2d at 1139], that "where the offense is obtaining control over the property of another, proof that the property was the property of another is all that is necessary and the naming of the person owning the property in the indictment is surplusage." In other words, the elements, "unauthorized control of the property of another" of theft, make it an offense for a person to exert control over property when he is not authorized by the person who has possession of or any other interest in the same property.

(Some ellipses in original).

On December 13, 2007, Taylor filed, and the circuit court granted, a motion for an interlocutory appeal pursuant to

HRS § 641-17.[15] On December 14, 2007, Taylor filed a notice of interlocutory appeal.

C. ICA Appeal

1. Taylor's arguments

In his opening brief to the ICA, Taylor contended that the circuit court erred in denying his "claim that, as a matter of law, the artifacts were not 'property of another' for purposes of HRS §§ 708-800, 708-830(1), and 708-830.5(1)(a)." Taylor argued that the indictment was based on the State's theory that the artifacts were "property of the museums that once cared for them[,]" but "neither [the Bishop nor the Peabody Essex Museums] possessed the artifacts or retained any sort of property interest in them after they were repatriated under NAGPRA." (Emphasis in original). Taylor contended that "NAGPRA confirms that ownership in such artifacts resides solely in the appropriate Native Hawaiian organization[.]" Consequently, Taylor argued that "[t]o properly indict someone for stealing repatriated artifacts from a site such as Kanupa Cave, the State's presentation to the grand

[15] HRS § 641-17 (Supp. 2004) provides:

> Upon application made within the time provided by the rules of court, an appeal in a criminal matter may be allowed to a defendant from the circuit court to the intermediate appellate court, subject to chapter 602, from a decision denying a motion to dismiss or from other interlocutory orders, decisions, or judgments, whenever the judge in the judge's discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to allow an interlocutory appeal to the appellate court shall not be reviewable by any other court.

jury must identify the Native Hawaiian organization to whom the artifacts were repatriated, since that entity is the only 'person,' for purposes of HRS § 708-800's definition of 'property of another,' who possess[es] and retains all other property interests in such artifacts." Taylor also argued that NAGPRA preempted HRS §§ 6E-1 and 6E-7.

Taylor further argued that the circuit court erroneously denied his HRS § 701-112 claim because the state offense of theft in the first degree and the federal offense of conspiracy to traffic in native Hawaiian artifacts required proof of the same facts. Taylor also argued that the legislatures that enacted the laws defining each of the two offenses did not intend to prevent substantially different harms or evils.[16]

2. The State's arguments

The State did not explicitly address Taylor's sufficiency of the evidence argument, but instead contended that it need not, under Nases, "name the artifacts' actual owner in the charging document[]" and that the "indictment contain[ed] the necessary charging information: that [Taylor] 'did obtain or exert unauthorized control over the property of another.'" The State further argued that it was "important" that Taylor could not claim "ownership in the stolen property[and, f]or this reason, it makes no difference whether the artifacts are owned by the

[16] Taylor raised two other points of error to the ICA that are not challenged in his application and will not be addressed further.

repatriating museums, the Native Hawaiian groups that reburied the artifacts, or the State itself." Moreover, the State argued that it has a statutory interest pursuant to HRS chapter 6E to all historic property on State land and a common law interest in property buried on its land.

Regarding Taylor's HRS § 701-112 claim, the State argued that Taylor "was federally convicted, and then prosecuted by the State, for entirely different criminal conduct[,]" (emphasis in original) and that the charged offenses required proof of "different elements[.]" The theft indictment focused on Taylor "obtaining control over another's property, with the intent to deprive[,]" while the federal conviction involved "conspiracy to illegally traffic Native Hawaiian cultural items obtained in violation of NAGPRA." (Emphasis omitted). The State also argued that the statutes defining the state and federal offenses were "intended to prevent 'substantially different harm[s] or evil[s].'" (Brackets in original).

3. The ICA's decision

In its February 23, 2011, Memorandum Opinion, the ICA found, relying on Nases,

> that the artifacts did not belong to Taylor in light of evidence that the artifacts once were possessed by Emerson and the museums and that the State, Hui Malama, OHA, and Bishop Museum participated in the repatriation and reburial at Kanupa Cave. The identity of the actual owner of the artifacts is not required, and the evidence on appeal reveals the previous possession of the artifacts by the Emerson Collection, its sale of the artifacts to the Bishop and Peabody [Essex] Museums, and the involvement by the State and other entities in the repatriation of

> the artifacts from the museums and reburial in Kanupa Cave. Irrespective of the State's later assertion that it owned the artifacts, specification of the actual owner of the property for purposes of this theft charge is not required and only evidence that the property was not that of Taylor is required.

Taylor, 2011 WL 661793, at *9 (emphasis added).

The ICA declined to address Taylor's preemption arguments, which it found were not necessary to the disposition of Taylor's case. Id.

Regarding Taylor's HRS § 701-112 claim, the ICA found that theft in the first degree "requires proof of the facts that the item taken had a value of over $20,000 and the person intended to deprive the owner of the property[,]" which "were not required for the federal conspiracy and trafficking offenses." Id. at *3. The ICA also held that the primary purpose of the state theft statute was to "protect[] owners from the deprivation of their property." Id. at *4. The ICA concluded that this purpose differed from the two purposes of the federal conspiracy statute, which are to "protect[] society from the dangers of concerted criminal activity" and stop "threat[s] to social order[,]" and of NAGPRA, whose primary purpose "is to assist Native Americans in the repatriation of items that the tribes consider sacred[.]" Id. at *4 (internal quotation marks and citations omitted).

Accordingly, the ICA affirmed the circuit court's December 13, 2007, order.[17] Id. at *10. The ICA entered its

[17] As noted supra in note 2, we interpret the reference to the December 13, 2007 order as a clerical error.

judgment on March 16, 2011. Taylor timely filed his application for a writ of certiorari on May 18, 2011. The State timely filed a response on June 2, 2011.

II. Standards of Review

A. Sufficiency of evidence to support an indictment

In their briefs to the ICA, the parties disputed the applicable standard of review for a motion to dismiss an indictment. Taylor asserted that the applicable standard was de novo based on Wright v. Home Depot U.S.A., Inc., 111 Hawaiʻi 401, 407, 142 P.3d 265, 271 (2006), because the questions before the ICA involved statutory interpretation. The State argued that the applicable standard for appellate court review of a circuit court's motion to dismiss was an abuse of discretion pursuant to State v. Akau, 118 Hawaiʻi 44, 51, 185 P.3d 229, 236 (2008).

In cases involving allegations of prosecutorial abuse or misconduct, this court has applied an abuse of discretion standard when reviewing a motion to dismiss an indictment. See, e.g., State v. Mendonca, 68 Haw. 280, 282-83, 711 P.2d 731, 733-34 (1985) (involving an allegation that the State improperly indicted the defendant under one statute instead of a second statute). Nevertheless, in cases involving sufficiency of the evidence to support an indictment, this court appeared to apply a de novo standard. See, e.g., State v. Ontai, 84 Hawaiʻi 56, 59, 64, 929 P.2d 69, 72, 77 (1996) (discussing a conclusion of law, but evaluating the evidence presented to the grand jury de novo);

see also State v. Ganal, 81 Hawaiʻi 358, 367, 917 P.2d 370, 379 (1996) (although this court did not explicitly identify the standard of review it was applying, this court evaluated the totality of the evidence presented to the grand jury and concluded that the evidence presented to the grand jury was sufficient to elicit a strong suspicion and to support an inference that the defendant committed a crime).

Therefore, because the instant case involves sufficiency of the evidence to support an indictment, we review the circuit court's order de novo. See Ontai, 84 Hawaiʻi at 59, 64, 929 P.2d at 72, 77; Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379.

Moreover, as this court noted in Ganal:

> In reviewing the sufficiency of the evidence to establish probable cause before the grand jury, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment and neither the trial court nor the appellate court on review may substitute its judgment as to the weight of the evidence for that of the Grand Jury. The evidence to support an indictment need not be sufficient to support a conviction.

Id. at 367, 917 P.2d at 379 (internal quotation marks, citation and brackets omitted).

B. Motion to dismiss indictment pursuant to HRS § 701-112

"As the issue on appeal is strictly a matter of law, the standard of review is de novo." State v. Meyers, 100 Hawaiʻi 132, 134, 58 P.3d 643, 645 (2002) (citation omitted).

III. Discussion

As set forth below, Taylor's indictment for theft alleged all of the essential elements of the offense and the State presented sufficient evidence to the grand jury to find probable cause that the artifacts were "property of another." When taken as a whole, the evidence submitted to the grand jury was sufficient for "a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion" that the artifacts were "property of another." See Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379. However, the ICA erred in stating that "only evidence that the property was not that of Taylor [was] required" to constitute "property of another." Finally, the ICA did not err in affirming the circuit court's holding that the state prosecution was not barred by HRS § 701-112.

A. Taylor's indictment for theft was supported by probable cause

It is undisputed that Taylor's indictment is facially valid because it alleged all essential elements of the charged offense, and Taylor does not argue that he was not informed of the "nature and cause of the accusation against him[.]" See State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977) (internal quotation marks and citation omitted); State v. Stan's Contracting, Inc., 111 Hawaiʻi 17, 34, 137 P.3d 331, 348 (2006) (internal citation omitted). Instead, Taylor argues that the evidence presented to the grand jury was insufficient to support

the theft charge[18] because "the only basis [the State] proffered to the grand jury for finding probable cause to find that the artifacts were 'property of another,' is legally impossible, since NAGPRA unambiguously divested the museums of any type of property interest in the artifacts upon their repatriation and reburial in Kanupa Cave." Taylor also argues that the State's theory that it has an interest in the artifacts pursuant to HRS chapter 6E is invalid because HRS chapter 6E is preempted by NAGPRA.

Both Taylor and the State discuss NAGPRA at length, and both assume that it governs the determination of who had "possession of or any other interest in" the artifacts when Taylor took them from the cave. However, at no point was the grand jury advised of the existence or provisions of NAGPRA,[19] or given any direct evidence about whether or how it applies here. Similarly, the parties vigorously dispute whether the State had an interest in the artifacts pursuant to HRS chapter 6E based upon the State's ownership of the land where the cave is located. However, although evidence of the State's ownership of the land

[18] Although Taylor argues in his application that the indictment should be dismissed "due to insufficiency of the evidence before the grand jury[,]" Taylor did not explicitly make this argument to the circuit court. Nevertheless, the arguments he advanced to the circuit court, including his arguments that "no one had possession of the artifacts when [Taylor] took them from the cave" and that the State did not adduce evidence before the grand jury that a native Hawaiian organization had a property interest in the artifacts, are properly characterized as a sufficiency of the evidence argument.

[19] The only law on which the grand jury was instructed was the applicable provisions of the Hawaiʻi Revised Statutes.

was presented to the circuit court in connection with the motion to dismiss, the grand jury was presented with no evidence whatsoever regarding the ownership of the land.

Our task here is to determine whether the grand jury had sufficient evidence before it to infer probable cause that a violation of HRS § 708-830 took place, and not what, if this case were to go to trial, the evidence might show with regard to the identity of those with an interest in the property. Accordingly, although we briefly discuss NAGPRA and its potential applicability for background purposes, our decision is governed by the evidence that was in fact presented to the grand jury, and whether that evidence supported a finding of probable cause.

1. NAGPRA

NAGPRA was enacted on November 16, 1990, to "facilitate the return of Native American cultural items and remains to the tribes with whom those items are affiliated."[20] Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006); see 25 U.S.C. § 3001 et seq. NAGPRA essentially functions as a "dual statute[.]" Fallon Paiute-Shoshone Tribe, 455 F. Supp. 2d at 1217; see 25 U.S.C. § 3001 et seq. First, NAGPRA provides for the return of "cultural items

[20] NAGPRA applies to both "Native American" and "Native Hawaiian" cultural items. See 25 U.S.C. § 3001 et seq. A "Native American" is defined as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). A "Native Hawaiian" is defined as "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 25 U.S.C. § 3001(10).

that are excavated or discovered on Federal or tribal lands[21] after November 16, 1990[.]" 25 U.S.C. § 3002(a). Second, NAGPRA provides for the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony that are held by federal agencies, and museums or institutions that receive federal funding.[22] 25 U.S.C. § 3005.

In the instant case, it is undisputed that the Kanupa Cave artifacts were taken from the cave "in the late 1800s" by J.S. Emerson and were then repatriated in 2003. Therefore, although Taylor cites to NAGPRA's "ownership or control" provisions set forth in 25 U.S.C. § 3002(a)(1)-(2), involving artifacts excavated or discovered on Federal or tribal lands after November 16, 1990, it appears that those provisions are not directly applicable to the instant case. See 25 U.S.C. § 3002(a)(1)-(2) (providing for the "ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990") (emphasis added). Instead, assuming that the artifacts were in fact repatriated pursuant to NAGPRA, it appears that 25 U.S.C. §§ 3003, 3004 and 3005 are the provisions of NAGPRA that would

[21] Relevant to the instant case, NAGPRA's definition of "tribal land" includes "any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3." 25 U.S.C. § 3001(15)(C). Neither party argues that Kanupa Cave is located on tribal land, as that term is defined in NAGPRA.

[22] NAGPRA "does not apply to items found on private or state land," or "items held by museums that do not receive federal funds[.]" State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 753 (Tenn. Ct. App. 2001) (citation omitted).

directly apply.

25 U.S.C. § 3003 requires federal agencies and museums with "possession or control over holdings or collections of Native American human remains and associated funerary objects" to inventory such items and identify the cultural affiliation[23] between these objects and "present-day Indian tribes and Native Hawaiian organizations." 25 U.S.C. § 3003(a) (emphasis added); 43 C.F.R. § 10.9 (2003). 25 U.S.C. § 3004 requires agencies or museums with "holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony" to complete a summary of these items "in lieu of an object-by-object inventory[,]" and to describe the cultural affiliation of the collection "where readily ascertainable." 25 U.S.C. § 3004(a) (emphasis added); see also 43 C.F.R. § 10.8. In the instant case, the record does not establish whether the artifacts were within 25 U.S.C. §§ 3003 or 3004.[24]

25 U.S.C. § 3005(a) provides detailed requirements for the repatriation of "Native American human remains and objects

[23] "'[C]ultural affiliation' means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2).

[24] The dissent appears to conclude that the artifacts at issue in the instant case were classified as "sacred objects or objects of cultural patrimony" under NAGPRA. Dissenting opinion at 24-25. However, the record does not contain any evidence indicating how the artifacts were classified. Accordingly, we do not express an opinion on this issue.

possessed or controlled by Federal agencies and museums[.]"[25] See also 43 C.F.R. § 10.10. For example, pursuant to 25 U.S.C. § 3005(a)(1) and 43 C.F.R. § 10.10(b)(1), a federal agency or museum must "expeditiously" return human remains and associated funerary objects upon request by a lineal descendant, Indian tribe or native Hawaiian organization, where a cultural affiliation with the tribe or organization has been established pursuant to 25 U.S.C. § 3003 and 43 C.F.R. § 10.10(b). Similarly, 25 U.S.C. § 3005(a)(2) and 43 C.F.R. § 10.10(a)(1) provide for the "expeditious[]" return of "unassociated funerary objects, sacred objects or objects of cultural patrimony" upon request by an Indian tribe or native Hawaiian organization, where a cultural affiliation with the tribe or organization has been shown pursuant to 25 U.S.C. § 3004 and 43 C.F.R. § 10.10(a)(1), and where the affiliated tribe or organization "presents evidence which . . . would support a finding that the museum or Federal agency does not have a right of possession to the objects"[26] as

[25] In addition, 25 U.S.C. § 3005(a)(5) and 43 C.F.R. § 10.10(c) set forth several exceptions to the general requirements for repatriation.

[26] "[R]ight of possession" is defined in 25 U.S.C. § 3001 as:

> possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by

(continued...)

required under 43 C.F.R. § 10.10(a)(1)(iii).

In sum, when remains or cultural objects held by a museum subject to NAGPRA are determined to be affiliated with a Native American tribe or native Hawaiian organization, the remains or cultural objects "are to be repatriated expeditiously upon request." See Fallon Paiute-Shoshone Tribe, 455 F. Supp. 2d 1218 (citing 25 U.S.C. § 3005(a) and 43 C.F.R. § 10.10(b)).[27] In addition, "[t]he return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items." 25 U.S.C. § 3005(a)(3); see also 43 C.F.R. § 10.10(d). Moreover, with regard to unassociated funerary objects, sacred objects, and objects of cultural

---

[26](...continued)
> the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

25 U.S.C. § 3001(13).

The regulations similarly define "[r]ight of possession" with regard to unassociated funerary object, sacred object or object of cultural patrimony, but do not extend this definition to human remains or associated funerary objects. 43 C.F.R. § 10.10(a)(2). In the instant case, it is undisputed that J.S. Emerson "took" the artifacts from Kanupa Cave and there is no evidence to suggest that he obtained the consent of an individual or group that had authority of alienation.

[27] Although Fallon Paiute-Shoshone Tribe solely concerned "remains," 455 F. Supp. 2d 1218, as noted herein, funerary objects, sacred objects, and objects of cultural patrimony that are subject to NAGPRA also must be expeditiously repatriated upon a showing of cultural affiliation. 25 U.S.C. § 2005(a)(1)- (2); 43 C.F.R. § 10.10.

patrimony, a museum must generally return the objects upon request "unless it can . . . prove that it has a right of possession to the objects." 25 U.S.C. § 3005(c); see also 43 C.F.R. § 10.10(a)(iii)-(iv).

In the instant case, the State did not provide evidence to the grand jury regarding whether a cultural affiliation between the Kanupa Cave artifacts and a native Hawaiian organization had been established pursuant to 25 U.S.C. §§ 3003 or 3004. However, assuming that the Kanupa Cave artifacts were repatriated pursuant to NAGPRA as Taylor suggests, the artifacts would have been repatriated to a culturally affiliated organization or to a lineal descendant. See 25 U.S.C. § 3005(a). Accordingly, the individual or organization to whom the artifacts were repatriated would have had a right of possession in the artifacts at the time the artifacts were repatriated.

2. The State presented sufficient evidence to the grand jury to maintain Taylor's indictment

Taylor contends in his application that the State presented insufficient evidence to the grand jury regarding the "property of another" element of the offense. Specifically, Taylor argues that the State only presented evidence to the grand jury that the Bishop and Peabody Essex Museums previously owned the artifacts, and further argues that the museums do not own the

artifacts after repatriation.[28]

"A grand jury indictment must be based on probable cause." Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379 (quotation marks and citations omitted). "Probable cause" has been defined as "a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." Id. (citation, internal quotation marks, and brackets omitted). Furthermore, in order to support an indictment, the prosecution must provide evidence of each essential element of the charged offense to the grand jury. Ontai, 84 Hawaiʻi at 63-64, 929 P.2d at 76-77. "If no evidence is produced as to a material element of the offense, a person of ordinary caution and prudence could not have a 'strong suspicion' that the defendant is guilty of the [charged] crime." Id. at 64, 929 P.2d at 77.

Therefore, in order for the grand jury to have found probable cause to support Taylor's indictment for first degree theft, the State must have produced evidence of each essential element of the offense. See Ontai, 84 Hawaiʻi at 64; 929 P.2d at 77. This court has held that there are three material elements for theft in the first degree under HRS §§ 708-830(1) and 708-

[28] In its answering brief, the State disputed Taylor's characterization of the theory it presented to the grand jury and argued that "it never relied on evidence that the artifacts were property of 'the museums that once cared for them' in order to prove particular ownership" and that "[t]he charging instrument was not, contrary to [Taylor's] suggestion, obtained under this theory." It appears that the State is correct, in that it did not explicitly identify any specific theory of ownership during its presentation to the grand jury.

830.5(1)(a): that "the defendant intended to: (1) obtain or exert control over the property of another; (2) deprive the other of his or her property; and (3) deprive another of property that exceeds $20,000 in value." State v. Duncan, 101 Hawaiʻi 269, 279, 67 P.3d 768, 778 (2003). HRS § 708-800 defines "[p]roperty of another" as "property which any person, other than the defendant, has possession of or any other interest in[.]"[29] Id. Because Taylor does not dispute that the State presented evidence satisfying the second and third elements for theft in the first degree, we focus on the first element – that Taylor obtained or exerted control over the property of another. See id. at 279, 67 P.3d at 778.

The following facts were presented to the grand jury through the testimony of Agent Kaikana: (1) in the 1800s, J.S.

[29] Because the plain language of HRS § 708-800 mentions both "possession" and "any other interest in" property, the statute appears to contemplate that multiple parties could have a concurrent or shared property interest in the property at issue. However, "other interest" is not defined in the Hawaiʻi Revised Statutes nor is it defined in the Model Penal Code, from which Hawaiʻi derived its definition of "property of another." Judicial Council of Hawaii, Hawaii Penal Code (Proposed Draft) at 356 (1970); see Model Penal Code and Commentaries article 223 (1962).

The State asserts that it "provided evidence of at least four named entities with a clear cut 'other interest' in the artifacts[,]" i.e., the State, Hui Malama, OHA, and the Bishop Museum, and that NAGPRA does not "preclude those four groups from having an 'other interest' in the artifacts[.]" More specifically, the State argues that "[b]ecause Hui Malama and OHA (and perhaps Bishop Museum as well) have at least a cultural interest in the artifacts, [HRS] § 708-800's 'other interest' standard is easily satisfied." However, the State cites no authority for the position that an "other interest" encompasses a "cultural interest[.]" The State further argues that "the Bishop Museum and the State also have an 'other interest' in the artifacts because they, like Hui Malama and OHA, participated in the repatriation and reburial." Because we conclude that the State presented sufficient evidence to the grand jury to establish that someone other than Taylor had a possessory interest in the artifacts, we do not address the State's arguments concerning "other" interests, and express no opinion with regard to their merits.

Emerson "took artifacts out of [Kanupa Cave,]" some of which he then sold to the Bishop Museum and the Peabody Museum Essex in Massachusetts; (2) those artifacts were "repatriated" from the museums and "reburied" at Kanupa Cave;[30] (3) "Hui Malama, . . . OHA, [the] State, and the Bishop Museum . . . . all got together, brought the thing [sic] back to Kanupa and it was repatriated"; (4) Taylor, who owned a store in Captain Cook that sold antiquities, and an accomplice went to the cave "with the direction of some third party"; (5) Taylor and the accomplice "removed the rock that was blocking the cave entrance" and went inside; (6) there they found "a lot of artifacts or items that were in woven lauhala basket [sic] and wrapped in black cloth"; (7) they took about 157 artifacts from the cave and tried to sell them; (8) some of the artifacts bore "Emerson tags or [] labels"; (9) Taylor knew that the artifacts belonged to the J.S. Emerson Collection; (10) Taylor, "[t]o hide or conceal the sale of these items, [took] the Emerson tags off of the items, the artifacts, to sell [them]"; and (11) the estimated value of the artifacts was between $800,000 and $1.2 million.

Based on the foregoing evidence, "a person of ordinary caution or prudence" could "believe and conscientiously entertain a strong suspicion" that the artifacts were "property of

[30] The grand jury was not provided with a definition of "repatriated"; however, it is commonly defined as "to restore or return to the country of origin, allegiance, or citizenship." Merriam-Webster's Collegiate Dictionary 1055 (11th ed. 2009).

another." See Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379. Most notably, the grand jury heard evidence that artifacts were worth at least $800,000. It further heard evidence from which it could reasonably be inferred that the artifacts had been purposely secreted in the cave and not simply discarded, including the fact that the cave entrance had been covered with a rock, the items were enclosed in lauhala and black cloth, and reburial had been undertaken in a joint effort involving the State of Hawaiʻi, as well as "Hui Malama, . . . OHA, . . . and the Bishop Museum[.]"

Thus, the evidence before the grand jury did not suggest that the artifacts were abandoned.[31] If the artifacts were abandoned, they could not, by definition, be "property of another," and an indictment for first degree theft could not be maintained. Indeed, in his application Taylor analogizes his case to an environmentalist picking up a discarded soda can to recycle it or a small boy picking up a penny by the side of the road, and suggests that their conduct would be criminalized by the ICA's holding. However, those hypothetical cases are clearly distinguishable, since they did not involve property worth at least $800,000 which the evidence reasonably suggested had been carefully wrapped and secreted in a cave as part of a multi-party

[31] Abandoned property is generally defined as "that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his or her ownership, but without vesting ownership in any other person, and with the intention of not reclaiming any future rights therein." 1 Am. Jur. 2d Abandoned, Lost, and Unclaimed Property § 3 (2005) (footnote omitted).

repatriation effort.

Nor did the evidence in the grand jury suggest that Taylor owned the items or that he had permission to take the artifacts. To the contrary, the evidence of Taylor's conduct after he took the items (removing the tags so that they would be more difficult to trace) supports the reasonable inference that he neither owned them nor had permission to take them.

Rather, the value of the items and the manner and circumstances in which they were reburied were sufficient to create a "strong suspicion" that someone other than Taylor retained a right of possession in the artifacts and that the items were accordingly the "property of another" when Taylor took them. It is true, as Taylor points out, that the evidence presented to the grand jury was not sufficient to establish exactly which entity or entities had a possessory or other interest in the artifacts.[32] However, our caselaw does not require that level of specificity in order to sustain an

[32] Accordingly, we respectfully disagree with the dissent's assertion that Agent Kaikana's testimony "left the impression" that the artifacts belonged to the Bishop Museum or the Peabody Essex Museum. Dissenting opinion at 36-37. Agent Kaikana testified that J.S. Emerson "took artifacts out of that cave" and sold some of them to the Bishop Museum and Peabody Essex Museum, and that those artifacts were in turn "repatriated from both the Bishop Museum and the Peabody Essex [Museum]" and were "reburied" at Kanupa Cave by "Hui Malama, . . . OHA, [the] State, and the Bishop Museum." Inasmuch as Agent Kaikana testified that the artifacts were "eventually repatriated from both the Bishop Museum and the Peabody Essex [Museum]," his testimony did not "[leave] the impression" that the artifacts continued to belong to either of the museums. Moreover, although Agent Kaikana testified that items recovered during the investigation in Taylor's case bore J.S. Emerson Collection labels and/or were part of the museums' collections, this testimony was relevant to prove that the items in Taylor's possession were the same items that had been removed from Kanupa Cave.

indictment. See Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379 ("[T]he evidence to support an indictment need not be sufficient to support a conviction.").

This point is illustrated by our holding in Nases, where the defendant was charged with and convicted of theft of a calculator pursuant to HRS § 708-830. 65 Haw. at 218, 649 P.2d 1139. On appeal, the defendant argued that there was a fatal variance between the charge and the evidence presented against him at trial. Id. The charged offense alleged that the calculator was the property of "Setsuko Yokoyama and Setsuko Yokoyama doing business as Kalakaua Kleaners, whereas it was actually the property of Kalakaua Kleaners, a corporation." Id. This court held that it was "undisputed that the calculator did not belong to [the defendant] but was the property of another. The particular ownership of the property in question was not an essential element in proving the crime and there is no fatal variance between the charge and the proof." Id. at 218, 649 P.2d at 1139-40. Rather,

> [i]t has long been settled that where the offense is obtaining control over the property of another, proof that the property was the property of another is all that is necessary and the naming of the person owning the property in the indictment is surplusage.

Id. (emphasis added) (citations omitted).

Although the facts of Nases differ from the instant case in that Nases involved a variance between the indictment and the evidence presented at trial, Nases supports the proposition

that the State need only prove that the property taken is that "of another." Id. Therefore, because the State presented sufficient evidence that the artifacts were "property of another," it was not required to present evidence to the grand jury establishing which entity or entities had a possessory interest in the artifacts.[33]

However, the ICA erred when it stated that "specification of the actual owner of the property for purposes of this theft charge is not required and only evidence that the property was not that of Taylor is required." Taylor, 2011 WL 661793, at *9 (emphasis added). As discussed supra, HRS § 708-800 defines "property of another" in HRS § 708-830(1) as "property which any person, other than the defendant, has possession of or any other interest in[.]" "Property" is defined in HRS § 708-800 as "any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind." Consequently, as Taylor correctly contends, "something may well be 'property' (because it is an article of value of some kind) but not yet 'property of another' (because someone does not possess it or have any other interest in it)." Therefore, the ICA erred when it stated that "only evidence that the property was not that of Taylor is required." Id.

[33] Accordingly, we respectfully disagree with the dissent's conclusion that the indictment could not be sustained absent "the presentation of facts supporting a property interest in a Native Hawaiian organization[.]" Dissenting opinion at 26; see also dissenting opinion at 40.

In sum, because the State presented evidence that "a person of ordinary caution or prudence" could "believe and conscientiously entertain a strong suspicion" that the artifacts were the "property of another," there was sufficient evidence to support Taylor's indictment, and the circuit court did not err in denying his motion to dismiss on this ground.

B. The ICA did not err in affirming the circuit court's holding that the state prosecution was not barred by HRS § 701-112

Taylor argues that "the ICA gravely erred in holding that [Taylor's] prior federal conviction did not bar the State's prosecution in this matter under HRS § 701-112," because the state prosecution required proof of the same facts as the federal prosecution. For the reasons set forth below, Taylor's argument is without merit.

HRS § 701-112 provides in relevant part:

> When behavior constitutes an offense within the concurrent jurisdiction of this State and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under any of the following circumstances:
>
> > (1) The first prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3), and the subsequent prosecution is based on the same conduct, unless:
> >
> > > (a) The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil[.]

(Emphasis added).

Thus, assuming arguendo that the theft and conspiracy

offenses in the instant case were based on the same underlying conduct,[34] Taylor's theft prosecution was permissible under HRS § 701-112(1)(a) if (1) the theft offense required proof of facts not required for the conspiracy offense; and (2) the law defining each of the offenses is intended to prevent a substantially different harm of evil. See HRS § 701-112(1)(a).

This court has addressed HRS § 701-112 only once, in State v. Myers, 100 Hawaiʻi 132, 134, 58 P.3d 643, 645 (2002). However, Myers is inapposite because the sole issue considered by this court was "whether [a Uniform Code of Military Justice] Article 15 nonjudicial punishment is equivalent to a criminal 'conviction' as defined in HRS § 701-110(3)." Id. This court held that the Article 15 nonjudicial punishment was not equivalent to a conviction, as required under HRS § 701-112(1), and thus the court was not required to consider whether the exceptions set forth in HRS § 701-112(1)(a) applied. Id. at 137, 58 P.3d at 648. Thus, this court did not address the meaning of the phrases "proof of a fact not required by the former offense" and "substantially different harm or evil," and therefore there is no controlling authority on this point. See id.

1. Proof of a fact not required

In interpreting a statute, "where the statutory

[34] While the State argued in the ICA and this court that the offenses were not based on the same underlying conduct, this issue was not raised in the circuit court. Because we conclude that the theft prosecution was permissible under the two-pronged exception set forth in HRS § 701-112(1)(a), we do not address this issue.

language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." Awakuni v. Awana, 115 Hawaiʻi 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted). The unambiguous language of HRS § 701-112(1)(a) states that a subsequent prosecution is permissible if, inter alia, the subsequent offense requires proof of some fact not required by the former offense. The drafters of the Hawaii Penal Code noted that "it seems very unjust to permit the defendant to be prosecuted twice simply because of the fortuitous circumstance that the defendant's behavior constitutes an offense in more than one jurisdiction[,]" unless the requirements set forth in HRS § 701-112(1)(a) are met. HRS § 701-112 cmt. (1993).[35]

In the instant case, Taylor was charged in state court with theft in the first degree. HRS § 708-830.5(1)(a) provides that "[a] person commits the offense of theft in the first degree if the person commits theft . . . [o]f property or services, the value of which exceeds $20,000[.]" HRS § 708-830(1) further provides that "[a] person commits theft if the person . . . obtains or exerts unauthorized control over the property of another with intent to deprive the other of the property." As noted supra, this court explained in Duncan that there are three material elements for theft in the first degree: that "the defendant intended to: (1) obtain or exert control over the

[35] Although the commentary accompanying the Hawaii Penal Code "may be used as an aid in understanding the provisions of [the] Code," it is "not [] evidence of legislative intent." HRS § 701-105 (1993).

property of another; (2) deprive the other of his or her property; and (3) deprive another of property that exceeds $20,000 in value." 101 Hawaiʻi at 279, 67 P.3d at 778.

In contrast, in his federal prosecution, Taylor pled guilty to conspiracy under 18 U.S.C. § 371 to commit trafficking under 18 U.S.C. § 1170(b). 18 U.S.C. § 371 (1994) defines conspiracy, in relevant part, as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1170(b) defines the trafficking crime as:

> Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of [NAGPRA] shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.

Therefore, in order to prove Taylor's conspiracy offense, the federal government was required to prove that (1) Taylor and one or more persons conspired to commit an offense against the United States; (2) the offense involved the knowing sale, purchase, use for profit, or transport for sale or profit of items; (3) the items were Native American cultural items; (4) the items were or would be obtained in violation of NAGPRA; and (5) Taylor and/or one of his co-conspirators committed an act in furtherance of the conspiracy. See 18 U.S.C. §§ 371 and 1170(b).

Thus, Taylor's federal prosecution, unlike his state prosecution, did not require proof of facts that the property involved had a value in excess of $20,000. Compare 18 U.S.C. §§ 371 and 1170(b) with HRS §§ 708-830(1) and 708-830.5(1)(a). The value element of the first degree theft offense is an additional fact required by HRS § 701-112.[36] Therefore, the ICA correctly concluded that the state theft offense requires proof of a value element, which the federal conspiracy offense does not.[37]

Nevertheless, Taylor argues that HRS § 701-112(1)(a) precludes the theft charge because all the facts required to convict under HRS §§ 708-830(1) and 708-830.5(1)(a) are admitted to in his plea agreement.[38] For example, Taylor

---

[36] Taylor argues that HRS § 701-112(1)(a) does not set forth a "same elements" test, but rather requires a more fact-specific approach. However, even assuming arguendo HRS § 701-112(1)(a) does not set forth a "same elements" test, Taylor's argument fails because Taylor's prosecution for theft in state court requires proof of facts not required by his federal conspiracy conviction, i.e., that the property involved had a value in excess of $20,000.

[37] Since the requirement that the property involved have a value in excess of $20,000 clearly satisfies the requirement set forth in HRS § 701-112(1)(a) that the subsequent prosecution involve "proof of a fact not required by the former offense[,]" we do not address whether the element of "intent to deprive" was required in both the federal and state prosecutions, although this element was raised and discussed by the ICA. See Taylor, 2011 WL 661793, at *3.

[38] In support of this assertion, Taylor cites Yates v. United States, 354 U.S. 298, 312 (1957), overruled on other grounds by Burks v. United States, 437 U.S. 1 (1978), for the proposition that "[i]n pleading guilty, [Taylor] admitted to numerous overt acts and thus, much like a general verdict, each of those facts predicated and were required by his federal conviction." However, Yates is inapposite because it considered alternative theories of guilt offered in support of a single charge. Id. There, the Court noted that a verdict must be set aside "in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Id. (citations omitted). Accordingly, Yates stands for the proposition that, where the jury returns a general verdict, a (continued...)

argues that "[t]he factual basis for [his] guilty plea in the federal case also included the facts that he attempted to sell one artifact for $40,000 and another for $5,600, and actually did sell two others for $150 and $2,083." Although Taylor's federal plea agreement mentions the prices at which Taylor attempted to sell and did sell several items, neither 18 U.S.C. § 371 nor 18 U.S.C. § 1170(b) has a value requirement, and thus such facts were unnecessary to Taylor's conviction. The values listed in Taylor's federal plea agreement did not become required elements of his conspiracy offense merely by their placement in the plea agreement.

2. Substantially different harm or evil

Additionally, HRS § 701-112(1)(a) requires the former and subsequent offenses be intended to prevent substantially different harms or evils. Taylor does not challenge the ICA's conclusion that HRS §§ 708-830(1) and 708-830.5(1)(a) and 18 U.S.C. §§ 371 and 1170(b) are intended to prevent substantially different harms or evils. Moreover, any such argument is without merit.

In determining the harm or evil a statute is intended to prevent, this court looks primarily to the language of the statute. See, e.g., State v. Rapozo, 123 Hawaiʻi 329, 338, 235

[38](...continued)
conviction will not stand unless each theory of guilt offered is supported by the evidence. See id. It does not, as Taylor argues, stand for the proposition that all of the facts Taylor pled to were "required" for his federal conviction, as that term is used in HRS § 701-112(1)(a).

P.3d 325, 334 (2010) ("HRS § 702-236 further requires consideration of 'the harm or evil sought to be prevented by the law defining the offense [.]' As with all efforts to determine legislative intent, that inquiry relies primarily on the plain language of the statute.") (brackets in original) (citations omitted); State v. Kupihea, 98 Hawaiʻi 196, 206, 46 P.3d 498, 508 (2002) (citation omitted) (noting that legislative intent is "obtained primarily from the language of the statute"). This court has explained that the purpose of Hawaii's theft statute is to "protect[] owners from the deprivation of their property[.]" State v. Freeman, 70 Haw. 434, 439, 774 P.2d 888, 892 (1989).

As noted by the ICA, the United States Supreme Court has identified the harm or evil intended to be prevented by 18 U.S.C. § 371, concerning conspiracy, as follows:

> It is well settled that the law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense. Because of this, consecutive sentences may be imposed for the conspiracy and for the underlying crime. Our decisions have identified two independent values served by the law of conspiracy. The first is protection of society from the dangers of concerted criminal activity. . . .
>
> The second aspect is that conspiracy is an inchoate crime. This is to say, that, although the law generally makes criminal only antisocial conduct, at some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law. The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed.

United States v. Feola, 420 U.S. 671, 693-94 (1975) (citations

omitted).

Applying the rationale of Feola here, the state theft offense with which Taylor was charged addresses a harm or evil (the deprivation of property rights) different from that addressed by the federal conspiracy statute, which addresses the threat posed by agreements to commit criminal conduct.

Moreover, the purpose of NAGPRA has been articulated by the federal courts as follows:

> The primary purpose of NAGPRA, which is to assist Native Americans in the repatriation of items that the tribes consider sacred, differs from that of the Antiquities Act, which is directed against the unlawful taking or destruction of property. Because the intended purposes of the two acts differ significantly, they should not be treated similarly for sentencing calculations.

United States v. Corrow, 941 F. Supp. 1553, 1567 (D.N.M. 1996), aff'd, 119 F.3d 796 (10th Cir. 1997).

Accordingly, NAGPRA and the state theft statutes were intended to prevent substantially different harms or evils, because the protection of graves and cultural items that is the purpose of NAGPRA and the protection from the deprivation of property that is the purpose of Hawaii's theft statute, constitute substantially different interests. While both statutes involve a deprivation of some interest, the theft statue seeks to protect general property interests, while NAGPRA protects a very specific interest in Native American cultural items and graves. Moreover, NAGPRA contains a savings provision that expressly states that the statute is in no way intended to

interfere with either state or federal theft law. 25 U.S.C. § 3009(5) ("Nothing in this chapter shall be construed to. . . limit the application of any State or Federal law pertaining to theft or stolen property.").

Therefore, the ICA correctly held that Taylor's theft offense required proof of facts which his federal conspiracy offense did not, and was designed to prevent a substantially different harm. Accordingly, Taylor's prosecution in state court is not barred under HRS § 701-112 and the circuit court did not err in denying Taylor's motion to dismiss in this respect.[39]

IV. Conclusion

Although the ICA erred in stating that "only evidence that the property was not that of Taylor [was] required" to establish that the artifacts were the "property of another," we hold that the State nonetheless presented sufficient evidence to the grand jury to find probable cause that the property taken was "property of another." We further hold that Taylor's prosecution in state court is not barred by HRS § 701-112 because the theft charge requires proof of a fact not required for his federal conspiracy offense, and the purposes behind the state and federal statutes differ. Accordingly, we affirm the judgment of the ICA,

[39] In the ICA, Taylor similarly argued that his state prosecution was barred by article I, section 10 of the Hawaiʻi Constitution, concerning double jeopardy. The ICA rejected this argument, and Taylor does not challenge this holding in his application. Accordingly, we need not address this issue. See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 40.1(d)(1).

which, as corrected by this opinion,[40] affirmed the circuit court's November 14, 2007 order denying Taylor's motion to dismiss the indictment.

Todd Eddins for petitioner/defendant-appellant.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

Kimberly Tsumoto Guidry and Girard D. Lau, Deputy Attorneys General, for respondent/plaintiff-appellee.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna

[40] See supra n.2.