

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 52

IN THE MATTER OF AN APPLICATION FOR A  
WARRANT TO SEARCH THE PREMISES OF SAFANI  
GALLERY, INC. LOCATED AT 7 E 75<sup>TH</sup> STREET,  
SUITE 2D, NEW YORK, NEW YORK, 10021 (“THE  
TARGET PREMISES”)

APPLICATION FOR  
TURNOVER ORDER

MATTHEW BOGDANOS, an attorney admitted to the practice of law in the State of New York, affirms the following under penalties of perjury:

1. I am a Senior Trial Counsel in the Office of New York County District Attorney Cyrus R. Vance Jr. (“Office”) and am familiar with the facts of this case.

2. The People submit this application in support of an Order pursuant to Penal Law §450.10 and Criminal Procedure Law §690.55, authorizing the transfer of a marble Head of Alexander the Great as Helios, the Sun God (the “Head of Alexander”), from the custody of this court to its lawful owner: the Government of the Italian Republic. *See* Exhibit 1 (Photograph of Head of Alexander). In support of this application, the People will establish that the Head of Alexander constitutes stolen property under New York law because it was excavated from the Roman Forum Complex, housed at the Antiquarium Forense Museum, and thereafter stolen. The Head of Alexander also constitutes stolen property under New York law because it was illegally exported from Italy after 1909.<sup>1</sup>

**Procedural Background**

3. On February 22, 2018, this Office seized the Head of Alexander from Alan Safani, owner of Safani Gallery, Inc. Both the Government of the Republic of Italy and Mr. Safani were immediately notified of this Office’s intention to release the stolen property after 15

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<sup>1</sup> As will be seen, these are two independent bases for a finding of stolen property under New York law.

days under PL §450.10(2)'s mandate that "[u]nless extended by a court order...property shall be released...after satisfactory proof of such person's entitlement to the possession thereof." On February 27, 2018, the People "return[ed] to the court the warrant and property seized," as required under CPL §690.50(6) and shared with Mr. Safani and his counsel, Mr. David Schoen, evidence that the Head of Alexander was stolen. I then consented to counsel's request, under PL §450.10(3), for a five-day extension of the mandatory release date.

4. On March 13, 2018, and then again on June 4, 2018, Mr. Schoen requested that this Office investigate certain claims concerning the theft and subsequent history of the subject Head. In order to accommodate counsel's reasonable requests, the People sought for, and received on consent, court-authorized extensions on March 13, April 4, May 7, and June 12, 2018—with the latest deadline being July 23, 2018—to investigate those claims. On May 7 and July 12, 2018, the People provided counsel with interim summaries of the investigation to date. *See* Exhibit 2 (Letter, dated May 7, 2018) and Exhibit 3 (Letter, dated July 12, 2018).

5. Having thoroughly investigated the theft and history of the subject Head, the People now set forth the facts establishing that this Head of Alexander constitutes stolen property under New York law and must, therefore, be returned to the Italian Republic.

## **Facts**

### **The Excavation of the Roman Forum**

6. The Head of Alexander was discovered during excavations at the site of the Roman Forum in Italy. An open-air, multipurpose, public gathering place and market, the Forum was the most important civic center in ancient Rome from 800 B.C. to 600 A.D. Hosting everything from meetings, legal proceedings, and gladiatorial contests to religious and secular

ceremonies, the Forum contained many of ancient Rome's most prized temples, monuments, and basilicas.

7. In 1899, Italy began state-sponsored scientific excavations of the Roman Forum and nearby Palatine Hill. Professor Giacomo Boni directed the excavations until 1925, at which point his former assistant, Professor Alfonso Bartoli, took over as Excavation Director until 1939.<sup>2</sup> Both written and photographic records documented the excavations.

8. The written record was contemporaneously prepared by Professor Bartoli in his "*Giornale dello Scavo in corso*" (Journal of Excavation in Progress) ("Bartoli Journal"), but contained only general descriptions of excavated objects. For each Forum building under excavation, Professor Bartoli documented the discovery of some, but not all, excavated artifacts in his journal. Each entry included three columns labeled as follows: a sequential number in the left-hand margin (1, 2, 3, etc.); a description of the object or group of objects discovered; and the date of that discovery. *See* Exhibit 4 (Bartoli Journal). Professor Bartoli did not, however, assign unique inventory numbers to the listed artifacts, and his descriptions often refer to multiple objects in a single entry. It is, therefore, not always possible to determine with certainty which journal entry and date of discovery correspond to any specific find, including the Head of Alexander.

9. In 1908, the excavators also began creating a photographic record of the finds. From 1899 until 1908, larger finds had been kept where they were found, but smaller finds—fragments, heads, vases—had been stored in a storage facility at the Forum. That changed in

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<sup>2</sup> Professor Giacomo Boni (1859-1925) served as Excavation Director of the Roman Forum and Palatine Hill from 1899-1925. Professor Alfonso Bartoli (1874-1957) served as Excavation Director of the Roman Forum and Palatine Hill from 1925-1939.

1908 when the Italian Government opened a state-owned archeological museum, the Museo Forense, dedicated to finds from the Forum and Palatine Hill. Renamed the Antiquarium Forense in 1935, the museum was located in the Forum complex inside the newly renovated convent of Santa Maria Nova. As soon as the museum opened, smaller finds—especially heads from statues—were brought inside, placed on a table against a black backdrop, and photographed in the museum’s cloister using ambrotype technology.<sup>3</sup> The glass negatives for those photographs were then placed in individual, sequentially numbered files in the archives of the *Soprintendenza alle Antichità Palatino e Foro Romano* (Department of Antiquities at the Palatine and Roman Forum). As will be seen, there is an ambrotype photograph of the Head of Alexander taken in the museum’s cloister.

### **The Excavation of the Head of Alexander**

10. The Head of Alexander was discovered during the excavations of one of the ancient buildings within the Forum, the Basilica Emilia located in the northern portion of the Forum on the Via Sacra—an ancient road between the Capitoline Hill and the Colosseum on the eastern side of the Forum complex. Built in 179 B.C. and originally called the “Basilica Fulvia and Aemilia,” the Basilica Emilia was a luxurious public hall once decorated with precious marbles and columns. In Exhibit 5, a map of the Forum complex, the Basilica Emilia is structure number 9. *See* Exhibit 5 (Map of the Roman Forum). Among the

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<sup>3</sup> Introduced in the 1850’s, ambrotype photographs were made using a variant of the wet-place collodion process and printed on glass.

marbles found at the Basilica Emilia was a series of “Statues of Parthian Barbarians”—including the Head of Alexander—that once decorated the building’s exterior.<sup>4</sup>

11. Professor Boni initially ordered the Basilica Emilia to be excavated for only one season, from 1899-1909, during which excavators discovered several fragments from the Barbarian statues. These statue fragments were moved to an enclosed, stone-walled room in the Basilica Emilia that had been used for on-site storage and restoration until the opening of the museum in 1908. *See* Exhibit 6 (Photograph of Storage Room). But excavators recovered no heads during that first season and certainly did not recover the Head of Alexander. In 1903, G. Tognetti—who was present during the first season—wrote a summary of the Basilica Emilia excavation, describing the discovery of several fragments of pavonazzetto marble, and noting that “[n]one of these fragments of statues has the head or the arms.” *See* Exhibit 7 (Tognetti Summary of Excavation, pg. 10).<sup>5</sup> No heads would be discovered at the Basilica Emilia for another 9 years.

12. It was not until excavations of the Basilica Emilia resumed in September of 1909 under Professor Bartoli that the team first excavated *any* heads from the Barbarian statues. *See* Exhibit 8 (Bartoli Publication, dated 1912).<sup>6</sup> Professor Bartoli recorded these finds in his “*Ufficio Scavi: Palatino E Foro Romano, Basilica Emilia Giornale dello scavo in corso*,” (Office of Excavation: Palatine and Roman Forum, Basilica Emilia Journal of excavation in progress). *See* Exhibit 4 (Bartoli Journal). For example, on March 2, 1910, archaeologists discovered a “[f]ragment of a virile head. Fourth part of the face, from the nose to the top of the

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<sup>4</sup> Steppe warriors from the Achaemenid province of Parthia—modern-day Iran and Turkmenistan—Parthians were viewed by Romans as uncivilized “barbarians.” Professor Boni calls these “Statues of Orientals.”

<sup>5</sup> All journal entries are translated from Italian.

<sup>6</sup> Alfonso Bartoli, “*Ultime vincende e trasformazioni della Basilica Emilia*” in *Rendiconti della Reale Accademia dei Lincei*, Vol. 21 (1912).



forehead. Almost a half larger part of a real one.” See Exhibit 4 (Bartoli Journal, listing no. 6). Then, on June 12, 1910, archaeologists discovered another “[f]ragment of a virile head. Found at 0.60 [meters] from the ancient ground, about one meter from the column in place (no. 8), but in the back part of this.” See Exhibit 4 (Bartoli Journal, listing no. 27).

13. Although it cannot be said that either of these entries definitively refers to the Head of Alexander—nor is there any other definitive listing in the Bartoli Journal—it is clear beyond cavil that the Head must have been excavated after September 1909 during the second phase of excavations. Not only were no Barbarian statue heads recovered during the 1899-1900 Basilica Emilia excavations, but the Basilica itself was not excavated again until September 1909, and there are no documented discoveries of heads until March-June 1910,

14. Additionally, it is evident that in antiquity, the Head of Alexander must have been located alongside the heads excavated in 1910. A fire in late antiquity heavily damaged the Basilica Emilia and left a grey residue on all statues that decorated the building at that time. This residue is visible both on the Barbarian statue heads excavated in 1910 as well as on the neck and face of the Head of Alexander. See Exhibit 9 (First Photograph of Head of Alexander) and Exhibit 10A (Photograph of Heads with Black Backdrop). The written record and evidence of fire damage, therefore, establishes that the Head of Alexander *must* have belonged to the Basilica Emilia decorations and *must* have been excavated after September of 1909, most likely in mid-1910 with the other heads from this statue series.

### **The Head of Alexander at the Museo Forense**

15. Independent of the written record, the photographic record also establishes the Head’s presence in the Forum after the Head’s excavation. The first known photograph of

the Head of Alexander is an ambrotype photograph taken on a table against a black backdrop. *See* Exhibit 9 (First Photograph of the Head of Alexander). Contemporaneously taken photographs demonstrate that this photograph of the Head was taken on a table in the Museo Forense's cloister. One of those contemporaneous ambrotype photographs shows four heads on the same table and with the same black backdrop as seen in the photograph of the Head of Alexander. *See* Exhibit 10A (Photograph of Heads with Black Backdrop).

16. These four heads are displayed in the same way (with the same table and black backdrop) in a second photograph with a wider angle that shows the cloister in the background. *See* Exhibit 10B (Photograph of Heads with Cloister Wall). The wider angle allows the viewer to see the cloister's stone wall and metal drain above the second head from the left. It also depicts one of the cloister's windows above the heads to the right. Because the background of the four heads in this photograph is identical to the background in the photograph of the Head of Alexander, it is clear that the photograph of the Head of Alexander was taken in the museum's cloister. This is relevant because the cloister was not used for this purpose until after the museum's renovation was completed in 1908.

17. Redolent of the millennia-old idiom that all roads lead to Rome, here all lines of evidence lead to the conclusion that the Head of Alexander was stolen from the Museo Forense in or after 1910. Not only does the written record of excavation clearly show that the Head of Alexander could not have been excavated until after September of 1909, but the completely independent photographic record demonstrates with equal clarity that the Head of Alexander had to have been excavated alongside the other fire-damaged Barbarian-series heads in the summer of 1910 and photographed thereafter in the museum's cloister.

## **The Disappearance of the Head of Alexander**

18. Although it is incontrovertible that the Head of Alexander was stolen from the museum after 1909 (again, likely in or after 1910), it is unclear exactly when it was stolen. In 1935, the Museo Forense was renamed the Antiquarium Forense for its grand opening for which several antiquities excavated from the Forum—including heads from the Barbarian statues—were displayed and photographed. Three photographs of the upstairs gallery show some of these heads being displayed. *See* Exhibit 11A (Photograph no. 1683: Heads on Display, 1935), Exhibit 11B (Photograph no. 1690: Heads on Display, 1935), and Exhibit 11C (Photograph no. 1689: Heads on Display, 1935). These photographs do not display the Head of Alexander, making it possible that the Head had already been stolen by the time of the Antiquarium Forense's opening in 1935—although it could just as easily have been displayed in a different gallery in which photographs were not taken. Either way, the actual theft of the Head of Alexander appears to have gone unnoticed for at least years, if not decades—not terribly surprising given the size of the Forum and the intervening world war.

## **The Discovery of the Theft**

19. In August of 1958, the Department for the Archaeological Heritage of Rome began a *de novo* inventory of all objects excavated from the Forum, a process that subsequently revealed that the Head of Alexander had been stolen at some unknown date. The staff began the inventory by matching photographs of objects excavated at the Forum with objects in the museum's collection. Each photographic negative was removed from its file at the *Soprintendenza alle Antichità Palatino e Foro Romano* and assigned an inventory number that was entered in a register. *See* Exhibit 12 (Register Format A – 9x12). The register itself



contains five columns for each object: 1) the date the photograph was entered into the register; 2) the inventory number; 3) the number of the museum file containing that photograph; 4) a description of the object(s); and 5) the value of the object(s) in the photograph.

20. Each photograph was then placed onto a card with the heading “*Soprintendenza alle Antichità Palatino e Foro Romano*.” In addition to the heading and photograph (some cards have two photographs), each card also has a description of that antiquity, the number of the file containing the photographic negative, and the inventory number assigned to the photograph.

21. In November of 1960, as the inventory continued, museum staff retrieved the photographic negative of the Head of Alexander from file 404, assigned it inventory number 5862, and—after searching for the Head in the museum—realized it was gone. Also gone was the head depicted in the photograph from file number 403 and assigned inventory number 5861. These two photographs were entered into the register in November of 1960 and labeled “perduta” (“lost”). See Exhibit 12 (Register Format A-9x12, listing nos. 5861-2, dated Nov. 1960). Both photographs were then placed on the same card, with the Head of Alexander appearing in the bottom photograph (5862), reading that the two heads are from the “Antiquarium Forense—from the Basilica Emilia: decorative idealized heads” and marked “perdute” (Italian feminine plural for “lost”). See Exhibit 13 (Photograph Card for nos. 5861 and 5862).

22. It cannot be stated precisely *when* the Head of Alexander was stolen from the Antiquarium Forense prior to November of 1960, therefore; only that it *was* stolen before

November of 1960. Regardless of when it was stolen, it is undeniable that the Head of Alexander constitutes stolen property under New York law, because its removal from the Roman Forum was illegal, constituting a classic theft—indistinguishable from a standard breaking and entering and subsequent wrongful taking.

### **Illegal Exportation of the Head of Alexander**

23. Moreover, the separate act of removing the Head of Alexander from Italy was also illegal—establishing a second, separate basis for finding that the Head constitutes stolen property under New York law. As discussed, it simply vanished from the Antiquarium Forense without a trace. From the time of its theft at some point after 1910, it remained underground until it surfaced in New York City in 1974—on consignment to Sotheby Parke Bernet, the auction house known today as Sotheby’s New York.<sup>7</sup> But how did it get out of Italy? As is usually the case with stolen antiquities—there is not a single piece of paper documenting *anything* about the Head of Alexander from its theft and disappearance until its sudden appearance on the New York art market.

24. The lack of any record of the Head of Alexander leaving Italy means it left the country illegally. As is addressed in detail in the legal section below, the laws regulating the ownership of antiquities from the Italian Republic have required government-approved licenses for the exportation of archaeological objects since at least June of 1909. According to Lieutenant Colonel Nicola Candido, Commander of the Italian Carabinieri Command for the Protection of Cultural Heritage in Rome, however, no export license was ever issued for the Head of Alexander authorizing its removal from Italy. *See* Exhibit 14 (Affidavit from

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<sup>7</sup> Sotheby’s Auction House acquired Parke Bernet Galleries in 1964, and adopted the name Sotheby Parke Bernet throughout much of the 1970’s.

Candido, dated Feb. 22, 2018). This is not surprising: since the 1909 law vested title to the Italian government over all antiquities found by chance or during archaeological excavations in Italy, the Italian government has never authorized objects to be sold from state collections and exported from the country. The Head of Alexander's export, therefore, had to have been illegal.

25. Nor can this conclusion be undermined by idle speculation and conjecture. For example, it should not be speculated that the Head of Alexander might have been legally removed from the Antiquarium Forense and sold by authorities of the Italian Government during, or prior to, the Second World War. To be clear, this Head was excavated from one of the most important archaeological sites in the world—one that has been protected by law since at least 1909. Thus, and to take this scenario to its logical extreme, even if Mussolini himself walked into the Antiquarium Forense, took the Head of Alexander, and sold it to a third party, the Head of Alexander—like many of the works that passed through the hands of Hermann Göring—would still be stolen property because it was not *Il Duce's* to sell.

26. Similarly, it should not be speculated that export records might have been destroyed or lost through the passage of time. To take *this* scenario to its logical extreme, even if the Second World War resulted in the destruction of every governmental record in Italy, there would still be a paper trail recording the sale because the original copy of an export permit would have accompanied the Head of Alexander to get it through customs and out of Italy. Moreover, such a permit would have been preserved by every legal buyer because it would have exponentially increased the market value of the Head: a legally exported antiquity documented to have come from the Roman Forum could command its own price. Yet, no

one has ever produced such a permit, receipt, invoice, shipping document—anything concerning the Head’s removal from Italy. The silence is deafening. And telling.

27. Thus, because the Head of Alexander was incontrovertibly discovered after the second phase of Basilica Emilia excavations commenced in September of 1909 and was photographed thereafter at the Museo Forense, the Head of Alexander *must* have been exported from Italy *after* Italy’s June 1909 patrimony law prohibiting such export. The Head of Alexander is therefore—and as will be explained in more detail in the legal section—stolen under New York law under this second theory as well.

### **Post-Italy History: Hagop Kevorkian and Sotheby’s**

28. The silence remained unbroken until the Head of Alexander’s sudden re-appearance in 1974, when the Hagop Kevorkian Fund consigned it to Sotheby Parke Bernet, New York, as lot 317 for their November 22, 1974, Antiquities Auction.<sup>8</sup> *See* Exhibit 15 (Sotheby Park Bernet Auction Catalogue, dated Nov. 22, 1974). For this auction, the catalogue described the Head of Alexander as a “[m]arble head fragment of Apollo, Roman, c. Late 1<sup>st</sup>/2<sup>nd</sup> century A.D., or earlier.”

29. Notably, the Hagop Kevorkian Fund also consigned in this same auction the other missing head—the one that appeared in Photograph 5861 on the same card as the Head of Alexander—as lot 318, a “Roman marble head of Alexander the Great, c. 2<sup>nd</sup> century A.D., or earlier.”<sup>9</sup> At the risk of understatement, the fact that *two* heads that had been excavated

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<sup>8</sup> An Armenian archaeologist and collector, Hagop Kevorkian (1872-1962) established the Hagop Kevorkian Fund in 1951 to promote interest in Near and Middle Eastern art via funding for exhibitions and fellowships.

<sup>9</sup> The Head of Alexander in this application is lot 317 in the Sotheby Parke Bernet catalogue, where it was referred to as a “marble head fragment of Apollo.” Confusingly, however, the second missing head, lot 318, is referred to in the same catalogue as a “Roman marble head of Alexander the Great.”

from the Roman Forum after September 1909 inexplicably disappeared from the Museo Forense—only to suddenly and simultaneously appear at the same New York auction in 1974—ought to have sounded an alarm. It did not, despite the fact that the conclusion is inescapable: both the Head of Alexander and the head in Photograph 5861/Lot 318 were stolen together from the Museo Forense and remained together until the 1974 auction. Equally alarming is that Sotheby Park Bernet's catalogue failed to include *any* ownership history of either piece prior to the Hagop Kevorkian Fund or to provide any further attribution of origin or provenance.

30. Nor do any other records place the Head of Alexander in the possession of Hagop Kevorkian or shed any light on Sotheby's reference to the Hagop Kevorkian Fund or when and how the Fund acquired it. It is possible that the Head of Alexander may have been one of the acquisitions Kevorkian bequeathed to his Fund—or maybe not. We will never know because, although Kevorkian was an experienced antiquities collector who ought to have been familiar with ethical acquisition practices and the required documentation therefor, no records appear to exist that catalogue his collections and acquisition process for this Head.

31. Since Sotheby's published a catalogue claiming that the Kevorkian Fund owned the Head, it is reasonable to assume that the auction house would have also acquired relevant records (from elsewhere if not available through Kevorkian) detailing the Head's history and explaining their attribution to Kevorkian's collection. Equally surely, it is reasonable to assume that Sotheby's would have maintained those records. However reasonable, such assumptions would be wrong. In fact, Sotheby's maintains a single document related to the 1974 consignment of the Head of Alexander: an annotated copy of the 1974 Antiquities



Auction catalogue page advertising the Head of Alexander. *See* Exhibit 16 (Sotheby Parke Bernet Catalogue, Annotated). This annotated catalogue page states *nothing* about when or how Kevorkian or his Fund acquired the Head. Nor does the catalogue even so much as mention Italy. If Kevorkian or his Fund had legally acquired the Head, surely that knowledge of its origin would have been passed to Sotheby Parke Bernet and advertised in the 1974 catalogue to boost the Head's value. The absence of any country of origin ought to have sounded yet another alarm.

32. While Sotheby's did record who purchased the Head of Alexander in 1974, a lack of information on that "buyer" casts further doubt on the Head's provenance. The catalogue page has two things written on it related to this sale: "Alertum Ltd." and "650." According to Sotheby's standard practice at the time of writing the buyer's name and price on their auction catalogue pages, it appears that these annotations mean that Sotheby's sold the Head of Alexander to Alertum Ltd. for \$650.00.

33. But therein lies another problem: there is no record of this company ever having been registered in the United States—or any other country this Office investigated. Since Alertum is German for "antiquity," perhaps the company was German. According to the Art and Antiquities section of the Bundeskriminalamt in Germany, however, Alertum Ltd. has never existed in Germany. According to the Art and Antiquities Unit of the Metropolitan Police in London, there is not, nor has there ever been, a company called Alertum Ltd. registered in the United Kingdom either. In fact, Alertum Ltd. does not appear in any known database, the acquisition records of the British Museum, the catalogues of the Berlin or Heidelberg art libraries, or the Getty Research Institute's Primo Search

Provenance database. Given that no records of this company or its purchase of the Head of Alexander exist, it is impossible to dismiss the possibility that this was a strawman purchase to launder the Head by creating a false paper trail through a non-existent buyer. The other possibility—that Altertum Ltd. was established as an offshore company for this single sale and then immediately dissolved—raises equally disturbing concerns: why go through so much trouble for the purchase of an antiquity?

34. To date, no one has ever produced any records or bill of sale for any pre-1974 transaction for the Head of Alexander. Nor has anyone ever produced any records or invoice for the 1974 sale by Sotheby's to "Altertum Ltd." Nor has any party ever produced an export visa or stamp authorizing the Head's removal from Italy. No bill of lading. No transportation documents. No insurance documents. No mention in any written record of any kind. Nothing exists except questions: How did the Head leave Italy? Directly from Rome to New York? Or were there intermediary, laundering countries? If so, what countries did it pass through? Where is a single customs declaration from or for any of those countries? Did the thief or the smuggler (if they are different people) carry the approximately fifty-pound Head (and its partner?) in carry-on luggage? Was the Head ever insured? Was it ever mentioned in a will? A letter? A card? Anything?

35. Experience tells us that this is exactly what the black market in looted antiquities always looks like: a disappearance from a source country and then a miraculous reappearance many years later in a market country with no paper trail followed by a questionable sale designed to create an ownership history. A neon sign flashing "stolen" would be less subtle.

36. Moreover, surely Sotheby's, as a leading actor in the New York art market, was aware of the importance of lawful title in 1974—especially following the United Nations Educational, Scientific, and Cultural Organization's (UNESCO) 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The United States ratified UNESCO's Convention in 1972, two years prior to the Head of Alexander's consignment. By establishing 1970 as the baseline for documented ownership history, the UNESCO Convention provided dealers, auction houses, collectors, and museums with notice that all post-1970 transfers needed to be properly recorded and that all post-1970 buyers should seek evidence of pre-1970 provenance before purchasing an object. That does not appear to have been done here.

37. In this case, there is no indication that any attempt was made to fill in the gaps in the Head's ownership history or to establish that the Head of Alexander was lawfully owned. Undoubtedly, because Roman artifacts can be found anywhere from Italy to the Middle East and beyond, tracing the country of origin can be difficult for Roman objects. But such difficulty has never absolved post-1970 purchasers from the legal responsibility to make reasonable efforts to try. If there had been an attempt, however minimal, surely some record of that inquiry would exist. Instead, there is not a single piece of paper—not one entry, annotation, or even hand-scribbled note hinting at the Head's whereabouts between the theft and the auction. Thus, on the record before us, it does not appear that anyone ever asked about the Head's pre-1974 ownership or provenance.

38. Some may argue that this is simply how much of the trade operated in the 20<sup>th</sup> century, that industry standards concerning the acquisition of antiquities were less stringent

or conscientious in 1974 than they are today despite UNESCO's best efforts. Perhaps. But that same claim could be made about many other issues—racial discrimination, sexual harassment, religious intolerance, among others. Yet, no one should argue that such relaxed standards justified past incidents of racism, sexual assaults, or religious bigotry. Nor should the mantra of “relaxed standards” be used to justify past acquisitions of stolen property. The absence of any inquiry into the lawfulness (or any aspect of prior ownership) of the Head of Alexander, regardless of the “standards of the time,” is hardly a ringing endorsement for good faith. While the standards for acquisition were undeniably lower in 1974 than they are now, “lower” does not justify “nothing.” Even in 1974, “nothing” was unreasonably insufficient.

39. This all-too-common failure to ask any questions about provenance—depending on the circumstances surrounding a consignment, sale, or purchase—is often best viewed as circumstantial evidence of the consciousness of guilt of the parties involved. To put it another way, and applying common sense and logic to the known facts of this case, there is certainly a fair argument to be made that Sotheby's appears on the record before us to have subscribed to one of the fundamental tenants of antiquities acquisition. Call it Rule #1: do not ask a question if you do not want to know the answer. Those that follow that rule of “discretion” are often most accurately (and charitably) described as having acted, not in good faith or in bad faith, but rather in neutral faith—the antiquities-acquisition version of see no evil, hear no evil. Like Louie, the French police captain in *Casablanca* who was shocked to find that gambling was going on in Rick's Café (even as the good captain collected his

winnings), some collectors, auction houses, dealers, and museums are “shocked” to discover they have trafficked in stolen goods.

40. Indeed, the Head of Alexander can be seen as a case study in the corruption of the antiquities trade in the 20<sup>th</sup> century. With notable exceptions, far too many collectors, museums, and auction houses around the world proudly displayed looted and stolen antiquities without regard to the consequences of their actions. Consider Marion True—the now-disgraced former Curator of Antiquities at the J. Paul Getty Museum whom an Italian court indicted in 2005 for conspiracy to traffic in illicit antiquities.<sup>10</sup> In her own words,

*I knew, in fact, that the antiquities market...included many unscrupulous dealers, who had no qualms about selling fakes or objects that had been stolen or exported illegally from their country of origin...The [Getty Museum] had to accept the premise that the majority of antiquities available on the market had, in all probability, been exported illegally from their country of origin.<sup>11</sup>*

Moreover, and as will be discussed in detail below, Sotheby’s opportunity to investigate the Head of Alexander’s history did not end in 1974: following the sale to “Altartum Ltd.,” the Head disappeared again for 37 years.

### **The Head of Alexander’s Reappearance in 2011 with New Provenance**

41. The Head did not resurface again until 2011, once again appearing on the Sotheby’s auction block—this time with a new provenance that prompts more questions than answers. In 2011, Dr. Martin C.J. Miller consigned the Head of Alexander to Sotheby’s as lot 9 for the December 8, 2011, “Egyptian, Classical, and Western Asiatic Antiquities Auction.”<sup>12</sup> See Exhibit 17 (Sotheby’s Auction Catalogue Lot 9, dated Dec. 8, 2011). Sotheby’s 2011

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<sup>10</sup> In 2010, the Italian court dropped all charges against True, because the statute of limitations had expired.

<sup>11</sup> Watson, P. and Todeschini, C., *The Medici Conspiracy*, (Public Affairs) (2006), p. 303.

<sup>12</sup> Dr. Martin C.J. Miller, an Associate Professor of History at Metropolitan State College of Denver from 2000-2005, is the Executive Editor of *The Ancient World: A Scholarly Journal for the Study of Antiquity*.



catalogue included *some* post-1974 history, but then added *new* pre-1974 provenance: “Hagop Kevorkian (1872-1962). New York, *most likely acquired prior to World War II*; The Hagop Kevorkian Fund (Sotheby Parke Bernet, New York, November 22<sup>nd</sup>, 1974, no. 317. Illus.); A.N. (Nikolaeos) Oikonomides. Chicago.” (Emphasis added.)

42. This new and improved ownership history raises many concerns. After all, when Sotheby’s sold the Head in 1974, all they published about it was that it was the “*Property of the Hagop Kevorkian Fund*.” But in 2011, that single fact was transformed into “*most likely acquired [by Hagop Kevorkian] prior to World War II*.” How did Sotheby’s come to acquire that additional information so many years later? Due diligence? Reasonable inquiry between 1974 and 2011? Or perhaps Sotheby’s knew that information in 1974, but simply neglected to publish it in that catalogue, and an employee in 2011, searching through Sotheby’s original research files for that second sale, found the documentary evidence and corrected that oversight by including that information in the 2011 catalogue. In fact, it was none of these.

43. In 2018, Sotheby’s produced a total of 11 pages of documents related to this 2011 consignment. *See* Exhibit 18 (Sotheby’s Documents Related to Dec. 8, 2011 Auction). Of those 11 pages, two are blank, five contain financial information and provide instructions for the buyer on paying Sotheby’s and retrieving the Head, two are copies of the 2011 catalogue entry, one is the cover of the 2011 catalogue, and one is the 1974 catalogue entry. Once again, as was the case for the 1974 sale, Sotheby’s did not produce a single document indicating that it had inquired into or received information about the provenance or ownership history of the Head. Thus, there is no documentation from the 2011 sale explaining or documenting Sotheby’s assertion that Kevorkian *most likely acquired [the Head]*

*prior to World War II*. Indeed, there is no documentation indicating that Sotheby's ever asked for such information from the consignor, Dr. Miller. Nor is there a single piece of paper about any of the other owners between 1974 and 2011—including the mysterious "Altertum, Ltd." Nothing except the stunning lack of documentation showing any reasonable inquiry in 2011. This is how a stolen antiquity gets on the art market.

44. Even worse, according to Dr. Miller, Sotheby's never asked him any questions about the Head of Alexander's provenance or how he had acquired it. Dr. Miller stated that he had been bequeathed the Head of Alexander by his friend and former professor, Nikolaeos Oikonomides, when the professor passed away in 1988.<sup>13</sup> Dr. Miller did not receive any documentation with the Head, but when he consigned the Head to Sotheby's in 2011, he told Sotheby's what he had been told: that Professor Oikonomides had purchased the Head of Alexander while vacationing in Cairo, Egypt, sometime between 1984-1986, and believed the Head to have originally come from Turkey. At no point did Sotheby's ask for any proof as to how the Head had travelled from their own New York sale to "Altertum Ltd." in 1974 to Egypt in the 1980's before appearing in Professor Oikonomides' possession.

45. In other words, forty years after the landmark 1970 UNESCO Convention, Sotheby's was asked in 2011 to accept on consignment an antiquity that had no documentation whatsoever proving its background, provenance, ownership history, country of origin, or legality before 1974. Sotheby's was presented with a Hobson's choice: offer an antiquity for sale in 2011 with no listed pre-1970 history—in clear contravention of industry standards since the 1970 UNESCO Convention—or decline the consignment. They chose a third

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<sup>13</sup> Professor Alcibiades Nikolaeos Oikonomides (d. 1988) was a Classics professor at Loyola University and an art collector.

option: Sotheby's attempted to create an aura of pre-1970 history by publishing in its catalogue the new words '*acquired prior to World War II*'—even as they maintained plausible deniability by including the legally generated, caveat emptor words '*most likely*.'

46. Though a mere façade, the added provenance worked in their favor: at the 2011 auction, Sotheby's sold the Head of Alexander to Mr. Saad Abdulla Shartub Al-Dehaimi of Doha, Qatar, for \$75,000. *See* Exhibit 19 (Invoice, dated Aug. 19, 2013).<sup>14</sup> Thereafter, it crossed multiple international borders yet again—ultimately arriving in the United Kingdom.

### **From the United Kingdom to the United States**

47. In May 2017, the Head of Alexander surfaced in the United Kingdom in the possession of the Sheikh Saoud bin Mohammed Ali Al Thani Foundation. A former Qatari official and no stranger to illicit activities in the art market, Saoud bin Mohammed Ali Al Thani had been appointed in 1997 by the Cultural Ministry in Qatar to obtain art for their national collections. In 2005, he was placed under house arrest for engaging in a conspiracy with a London dealer named Oliver Hoare to create grossly inflated invoices for objects he was buying for the Qatari government, pocketing the difference, and then using State funds to purchase objects for his personal collections. The Qatari government eventually dropped the charges but dismissed him from their employ. He lived in London from 2005 until his death in November of 2014. On May 24, 2017, his foundation consigned the Head of Alexander to Classical Galleries Limited, UK. *See* Exhibit 20 (Invoice, dated May 24, 2017).

48. It was while the Head of Alexander was consigned to Classical Galleries in June 2017 that Safani appears to have become interested in the Head, leading him to request a search

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<sup>14</sup> The sale date is listed as December 8, 2011 but the document is dated August 19, 2013. This investigation draws no conclusions from this discrepancy.

of the Art Loss Register (ALR) database to determine if the Head had ever been reported stolen. Established in London in 1991 as a commercial company, the ALR purports to have the world's largest private database of lost and stolen art. But an ALR search standing alone is no guarantee that an object is not stolen. After all, the ALR itself stresses that its "database does not contain information on illegally exported artefacts unless they have been reported to us as stolen...[and]...Not every loss or theft is reported to us." Of course, even when a theft is reported to the ALR, that is no guarantee it will be discovered. Because the database is not searchable by any facial-recognition-type of software, the searchers are reliant on the description provided for the search and the quality of the photographs provided (if any). Not surprisingly, the Head of Alexander did not appear in the ALR database, and Safani received a certificate to that effect—meaning simply that the Head had not been reported as stolen to the ALR. *See* Exhibit 21 (ALR Certificate, dated Jun. 6, 2017).

49. Nor was the Head of Alexander present in the Carabinieri's Banca Dati or Leonardo databases—two listings of stolen objects maintained by the Carabinieri Tutela Patrimonio Culturale, the Italian law enforcement agency responsible for policing cultural property. As with the ALR, the Carabinieri are reliant on affirmative reporting: if the theft is not reported directly to the Carabinieri, the object(s) would not appear in either database. As will be discussed below, the theft of the Head was not reported to the Carabinieri until 2018. But even if the Head of Alexander had been reported to the Carabinieri sooner, it is not clear the Head's whereabouts would have been discovered sooner. Given that Sotheby's catalogue

never listed the Head of Alexander's country of origin, it is understandable that lacking this information no Carabinieri officer would have investigated this piece.<sup>15</sup>

50. On June 20, 2017, Safani Gallery purchased the Head of Alexander from Classical Galleries for \$152,625.00. *See* Exhibit 22 (Invoice, dated Jun. 20, 2017). The Head of Alexander arrived in New York on August 7, 2017. *See* Exhibit 23 (Customs Entry Form, dated Aug. 16, 2017).

### **Safani's Ownership of the Head of Alexander**

51. In November of 2017, Safani contacted Maud Leclair, now a Research Assistant for Asian Art at the Metropolitan Museum of Art in New York, for assistance in investigating his new acquisition's provenance. Safani asked Leclair to help clarify its earliest known acquisition history—commendably demonstrating what reasonable inquiry looks like. Leclair's research was inconclusive, but she was not concerned: she assumed that Sotheby's had verified the legality of the Head's pre-1970 ownership history in 1974 and again in 2011.

52. On November 1, 2017, the Hagop Kevorkian Center for Near-Eastern Studies at New York University informed Leclair that Kevorkian's "personal papers, If (sic) there are any preserved, could potentially be with the Kevorkian Fund, which may now be dissolved. Unfortunately (sic) we don't really have contact with them and I have no information to pass along." *See* Exhibit 24 (Email from Scharnweber to Leclair, dated Nov. 1, 2017). The Fund had already begun the dissolution process, however, and Leclair was unable to retrieve any documentation pertaining to its possession of the Head of Alexander.

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<sup>15</sup> Its identification in the catalogue as a "Roman" head would not automatically have alerted Italian authorities to conduct a search. Given the size of the Roman Empire and its extensive trade, a "Roman" antiquity might have been looted from several dozen modern nation states throughout Europe, North Africa, and the Middle and Far East.



53. Safani exhibited the Head of Alexander at The European Fine Art Fair's (TEFAF) Fall 2017 show in New York from October 28 to November 1, 2017. As it did not sell in New York, Safani prepared to offer it at the TEFAF art fair in Maastricht to take place March 10-18, 2018. *See* Exhibit 25 (TEFAF Advertisement, dated Mar. 2018).

### **The Seizure of the Head of Alexander**

54. On February 19, 2018, in what can only be described as extraordinary attention to detail—and a healthy dose of serendipity—a member on the staff of Dr. Patrizia Fortini, Director and Coordinator of the Archaeological Site of the Roman Forum and Palatine Hill, saw Safani's TEFAF Maastricht advertisement and recognized it as the long-ago missing Head from the Antiquarium Forense archives.

55. It is evident that the Head of Alexander in question is the same statue fragment found at the Roman Forum and subsequently stolen from the Museo Forense. Comparing the Head in Safani's advertisement to the one in the photograph in the Museo Forense's cloister reveals that they are one and the same. *See* Exhibits 9 and 16.<sup>16</sup> Additionally, both Dr. Fortini as well as Warrant Officer Angelo Ragusa, member of the Rome Office of the Archaeological Section of the Carabinieri Tutela Patrimonio Culturale, have confirmed that the Head of Alexander is one of the two missing statues.

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<sup>16</sup> In advance of offering the Head of Alexander for sale, Safani sent the Head to Aetos Art & Design for restoration of the neck. *See* Exhibit 26 (Restoration Photograph of the Head of Alexander). Thus, owing to this restoration, there are currently slight differences to the Head, specifically in the neck area.

56. Dr. Fortini immediately notified the Carabinieri. *See* Exhibit 27 (Theft Statement, dated Feb. 19, 2018) and Exhibit 28 (Theft Report, dated Feb. 22, 2018).<sup>17</sup> On the following day, February 20, 2018, the Carabinieri notified me of Dr. Fortini’s report. Two days after that, on February 22, 2018, Lieutenant Colonel Nicola Candido, Commander of the Italian Carabinieri Command for the Protection of Cultural Heritage in Rome, notified me that the Head of Alexander was “stolen from *Antiquarium Forense in Rome (Italy)—an Archaeological Site that belongs to the Italian State*,” and that “[t]he Italian Republic has never issued a state-approved license for the exportation of the [Head] from Italy; and has never transferred the ownership of the [Head] from Italy to any third party.” *See* Exhibit 14 (Affidavit from Candido, dated Feb. 22, 2018) (italics in original).

57. That same day, on February 22, 2018, and in keeping with this Office’s insistence on affording equal treatment to all potential defendants—regardless of socio-economic background or residential zip code—and consistent with the Antiquities Trafficking Unit’s self-imposed practice of seeking independent judicial review where possible before any seizure, this Office applied for and received a warrant to seize the Head of Alexander. *See* Exhibit 29 (Search Warrant for Safani Gallery, dated Feb. 22, 2018). The Head of Alexander remains safely with this Office.

### **Legal Argument**

58. Turning to the legal issues raised by these facts, the People will first address an easily resolved procedural issue—the use of a New York State Court applying New York law in

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<sup>17</sup> Although Dr. Fortini opines that the Head must have been in the museum during the inaugural exhibition in 1935 because its absence would have been noted—and she may well be correct—this investigation has not uncovered sufficient evidence to prove the Head’s presence in the museum in 1935.

effecting the repatriation of stolen property located in New York County (“New York’s Choice of Law Controls”). Then the People will address the single substantive question at bar: whether the Head of Alexander is stolen property under New York law.

## **New York’s Choice of Law Controls**

### **Choice of Law and Forum**

59. The standard in New York is well established: the “law of the jurisdiction having the greatest interest in the litigation will be applied.” *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347 (1991) (quoting *Schultz v. Boy Scouts*, 65 N.Y.2d 189, 197 (1985) (quoting *Miller v. Miller*, 22 N.Y.2d 12, 15-16 (1968)) (noting that interest-based analysis had replaced the traditional, “territorially oriented” approach in choice of law matters). Thus, the fact that the Head of Alexander was originally stolen in Italy does not divest New York of its overriding interest. The controlling question, then, is what is New York’s interest?

60. New York State has the same overriding interest in the Head of Alexander that it has in all antiquities sold through New York’s robust art markets—arguably the most lucrative and comprehensive in the world—namely, that the market be honest and law-abiding. Any art dealers and collectors who actively avail themselves of the benefits of such markets must also be subject to the laws designated to protect those markets. In *Kunstsammlungen Zu Weimar v. Elicofon*, for example, the Weimar Museum sought to recover paintings in New York that had been stolen from Germany during the Allied occupation. 536 F.Supp. 829, 846 (E.D.N.Y. 1981). Holding that New York law controlled, the court applied the “significant relationship” concept from §222 of the 2<sup>nd</sup> Restatement of Conflict of Laws:

*The interests of the parties in a thing are determined...by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties.*

In language applicable here, the court found that New York's interests were overriding: "the residence of the true owner is not significant for the New York policy is not to protect resident owners, but to protect owners generally as a means to preserve the integrity of transactions and in preventing the state from becoming a marketplace for stolen goods." *Elicofon* at 846.

61. After all, as an art capital, New York is home to many millions of dollars spent annually on the sale of arts and antiquities. In addition to creating tax revenue for the city's coffers, New York's vibrant and robust art market (including world-famous auction houses, galleries, museums and private dealers) draws large numbers of people to New York every year and enhances New York City's reputation as an international cultural mecca. But the continued success and vibrancy of New York's art market depends on its integrity. Thus, New York courts have an undeniable obligation to ensure that the city does not become "a marketplace for stolen goods." *Elicofon* at 846.

62. New York's interest in denying safe haven to possessors of stolen cultural property is similarly demonstrated in *Bakalar v. Vavra*, 619 F.3d 136 (2010), *aff'd*, 500 F. Appx. 6 (2d Cir. 2012), wherein a 1917 drawing by Egon Schiele had been stolen from a cabaret performer (who was murdered by Nazis in 1941) and subsequently purchased by a Swiss gallery before landing in a New York gallery. The court noted that, although the piece was purchased in Switzerland by a Swiss gallery, Switzerland's interest was *de minimis*: "the application of New York law here would not have any adverse effect on the Swiss art gallery. Nor would it

affect any other Swiss citizen or Swiss interest.” This same standard was used recently in an unreported case of a Modigliani painting that had allegedly been looted in Europe during the Nazi genocide.<sup>18</sup> The court ruled that the ownership determination would be made in New York, because “New York does **NOT** permit a thief to pass good title to a painting and has a vested interest in ensuring stolen works of art do **NOT** enter its stream of commerce.” *See* Exhibit 30 (Transcript, Index No. 650646-2014, dated Apr. 18, 2018) at 48-49 (Bransten, J.) (emphasis in original). The rationale is particularly applicable here: the Head of Alexander was seized pursuant to a search warrant signed by a New York Supreme court judge based on criminal activity in this jurisdiction.

### **Stolen Property**

#### **A Thief Can Never Acquire Good Title in New York**

63. New York civil law has always favored the true owner of stolen property, even over a good-faith purchaser: “New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it’s in the possession of a good faith purchaser for value.” *Solomon R. Guggenheim Foundation v. Lubell* 77 N.Y. 2d 311, 317 (N.Y. 1991). *See also Bakalar* at 140, confirming that “a thief cannot pass good title in New York.” Moreover, “[i]n a title action under New York law, a good faith purchaser of an artwork has the burden of proving that the work was not stolen.” *Id.* at 147. New York criminal law also reflects this protection: an “owner” of property “is any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.” CPL §155.00(5).

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<sup>18</sup> *George W. Gowen as Limited Ancillary Administrator of the Estate of Oscar Stettiner vs. Helly Nahmad Gallery, Inc., Helly Nahmad, (New York), individually, David Nahmad, and International Art Center S.A.*



64. The facts of *Depetris v. Warnock*, 2000 N.T. Misc. LEXIS 428, 2 (Just. Ct. Mar. 21, 2000), are particularly illustrative. Warnock's watch was stolen and sold to a pawnbroker who then resold it to Depetris, a collector of fine watches. After the thief in that case was convicted, the Assistant District Attorney had the watch returned to the original owner (Warnock); but the collector-purchaser (Depetris) sued to get it back, claiming he had acquired good title under the Uniform Commercial Code (UCC). The court held that "[t]he first transaction was the theft of the watch and obviously no title passed to the thief." *Id.* Therefore, "[w]hen the thief sold the watch to the pawnbroker, the thief did not have title to sell. The pawnbroker did not acquire title." *Id.*

65. These facts are indistinguishable from those at bar. Using the exact language from *Depetris* and simply inserting the names from this case yields the following: "[t]he first transaction was the theft of the [Head of Alexander] and obviously no title passed to the thief." *Id.* Therefore, "[w]hen the thief sold the [Head of Alexander] to [Kevorkian or the party from whom Kevorkian acquired it], the thief did not have title to sell." *Id.* Perforce, because the thief never acquired title, he had no title to pass to Kevorkian, Sotheby's, Altermum Ltd., Oikonomides, Miller, Al Thani, or Safani. *See also Candela v. Port Motors*, 208 A.D.2d 486 (2nd Dept. 1994) (neither a thief, nor a successor of a thief, can convey good title to a subsequent purchaser).

66. Nor is it relevant that there has not been any conviction (or even a criminal charge) in this case or that the theft took place in Italy. *See* PL §165.60(3) (it is not a defense that the theft of the property did not occur within the State) and PL §165.60(1) (it is not a defense

that the person who stole the property has not been convicted, apprehended, or even identified).

67. Thus, if the Head of Alexander is stolen property under New York law, no subsequent purchaser could *ever* acquire title. The first question to be addressed in this section, therefore, is whether the Head of Alexander constitutes stolen property under New York law. To answer that question, however, it is necessary first to address briefly the treatment of illegally imported archaeological material under international and federal law.

### **Stolen Antiquities under International Law**

68. As has already been seen, the first international attempt to prevent the importation of cultural property stolen or illegally exported from source nations was UNESCO's 1970 Convention. The 1970 Convention, aimed at restricting the illicit trade in cultural property and ratified by 130 countries (including the United States in 1972), requested States to prohibit the importation of property that was illegally exported from another State. The UNESCO Convention had no self-implementing or policing power, but the enforcing mechanism for its protections in the United States is the 1983 Convention on Cultural Property Implementation Act, which places the initial burden of proving the lawful possession of the artifacts on the possessor. The crux of the Convention was to establish that unprovenanced antiquities that appear on the market after 1970 are presumed to be looted *unless proven otherwise*. On the other hand, the Convention also provided a grandfather clause: the presumption would not apply to unprovenanced cultural property owned before 1970 (because no one had notice that documented provenance was *required* before 1970).

69. In other words, the 1970 Convention did not create a new subset of criminal law. It simply created an evidentiary presumption that applies to material whose date of theft or export from the source country cannot be determined because of the lack of witnesses to the theft, photographs of the piece *in situ*, etc.—particularly relevant for objects clandestinely looted from an archaeological site. The 1970 Convention did not, however, immunize pre-1970 thefts from prosecution. Where there is some other evidence of the theft or of the illegal export—such as from a witness, a photograph, documents, or a confession, etc.—then authorities would proceed as they always have in stolen-property cases. For thefts from existing collections or known archaeological sites with pre- and post-theft photographs—as in this case—any prosecution would proceed based on the evidence of the theft, without recourse to the post-1970 presumption.

### **Stolen Antiquities Under Federal Law**

70. Federal law is in accord: under the National Stolen Property Act (“NSPA”), it is a criminal offense to transport or receive in interstate commerce any goods knowing they are stolen. 18 U.S.C.A. §§2314-15. In *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), the court considered whether pre-Columbian artifacts exported in violation of Mexico’s customs laws could be considered “stolen” under the NSPA. The *McClain* court held that U.S. courts will enforce violations of the clear pronouncements of patrimony by a foreign nation defending its cultural heritage: “a declaration of national ownership suffices to render an

illegally exported item stolen.” *McClain*, 595 F.2d at 1001, n.28.<sup>19</sup> See also *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

71. In *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), the court expanded the *McClain* holding by affirming the conviction and finding that a defendant may not evade liability under the NSPA by arguing he did not know foreign law had made the exportation illegal. In that case, antiquities dealer Frederick Schultz was convicted for smuggling antiquities out of Egypt in contravention of Egypt’s patrimony law that designated all antiquities discovered after 1983 to be the property of the state.

72. Under U.S. federal law, then, if the unauthorized exportation took place after the effective date of the source country’s patrimony law, the object is stolen property—whether the defendant knew of the patrimony law or not. Taken together, the holdings from these two cases have come to be called the *McClain-Schultz* doctrine.

### **Stolen Antiquities under New York Law**

73. Under New York law, an antiquity is considered stolen whenever the evidence proves either that a) it was stolen by the more traditional form of theft (i.e., a wrongful taking), or b) it constitutes stolen property under the *McClain-Schultz* doctrine. For both theories, the property must have been “wrongfully take[n], obtain[ed], or with[c]ld from an owner thereof,” PL §155.00(1), with the “owner” being “any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.” PL §155.00(5). In this case, the Head of Alexander constitutes stolen property under both theories.

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<sup>19</sup> The Court reversed the conviction of the four defendants on the substantive count charging a violation of the NSPA—finding that Mexico’s 1897 laws were not sufficiently clear—but affirmed the conspiracy conviction because the acts underlying that count were clearly illegal under either Mexico’s less-clear 1897 or sufficiently clear 1972 law.

74. Under the first theory—that of the more traditional form of theft—the elements have been overwhelmingly established. The Head of Alexander was excavated at the Roman Forum sometime after 1909, housed at the Museo Forense, and photographed at the Museo Forense shortly thereafter. Additionally, the later inventory of artifacts in the Antiquarium Forense collection demonstrates that the Head of Alexander was stolen from the museum before November of 1960.

75. Under the second theory—that of the *McClain-Schultz* doctrine—the question is whether the Head of Alexander was exported after the effective date of Italy’s applicable patrimony law and without Italy’s authorization. As already seen, the earliest that the Head could have left Italy was after Forum excavations had resumed in September of 1909. Moreover, “[t]he Italian Republic has never issued a state-approved license for the exportation of the [Head of Alexander] from Italy.” See Exhibit 14 (Affidavit from Candido, dated Feb. 22, 2018). The only question, then, is the effective date of Italy’s applicable patrimony law. See Exhibit 31 (Italian Patrimony Laws) for a translated version of the 1909 and 1939 Italian Patrimony Laws.

76. According to Leila A. Amineeddoleh, an expert in Italian law who is also a professor of art law at Fordham University School of Law and New York University, the first antiquities law governing modern Italy is Law No. 185 of June 12, 1902, giving the state the right of first refusal in the sale of archaeological objects. This 1902 law was expanded in the June 20, 1909, Law No. 364, to clearly and unambiguously vest ownership in the state of all antiquities found by chance or during archaeological excavations within the borders of Italy since 1909. This law was, in turn, incorporated into the Law of June 1, 1939, No. 1089.



77. Article 5 of the 1909 law establishes that it is illegal to transfer property or title to property without notifying governmental authorities. Article 8 of the 1909 law provides that “[t]he exportation from the Kingdom of items that are of historic, archaeological or of artistic interest, is prohibited when their export constitutes a serious harm to the history, archaeology or the fine arts.” At the risk of stating the obvious, according to multiple representatives of the government of the Italian Republic, the Head of Alexander is an object of historic, archaeological, and artistic interest, and its export is prohibited as constituting a serious harm to the history and archaeology of the Italian Republic.

78. Moreover, Article 8 of the 1909 law also requires an owner or possessor to file a report with the export office—meaning that an owner or exporter would have paperwork to prove the lawful export of items of “archaeological or of artistic interest.” In 1939, the 1909 law was expanded to include all “moveable and immovable things of artistic, historic, archaeological or ethnological interest” and has been maintained under the new Code of Cultural Property and Landscape enacted in 2004.

79. Thus, the effective date of Italy’s patrimony law as it applies to the Head of Alexander is June 1909 at the latest. Indeed, at least one U.S. federal court has recognized the effective year to be even earlier. In *U.S. v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999), the court examined Article 44 of Italy’s law of June 1, 1939, No. 1089, and held that “[t]he presumption is that the object belongs to the Italian state unless a possessor is able to prove private ownership prior to 1902.” Given that the earliest possible excavation date of the Head of Alexander was September of 1909—and therefore after the effective date of the 1909 law—this court need not determine whether the effective year is 1902 or

1909: the Head had to have been discovered *after* either of the two effective dates, thereby making the Head the property of the Italian government.

### **Statute of Limitations**

80. Obviously, the civil-law doctrine of laches is inapplicable in this criminal matter. Even if it were, the test under laches is not whether the Italian Republic *should* have known of the Head's location, but whether it *was* aware of the Head's location. After all, the law does not expect victims of theft to purchase, and then scour, every catalogue of every auction, exhibit, and fair in the world every year to determine whether any of the objects in that catalogue might have been stolen from them. Laches is applied only "where it is clear that a plaintiff unreasonably delayed in initiating an action." *Robins Island Preservation Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 423 (2d Cir. 1992). And "if the applicable legal statute of limitations has not expired, there is rarely an occasion to invoke the doctrine of laches." *Ikelionwu v. United States*, 150 F.3d 233, 238 (2d Cir. 1998). But for most of the last 100 years, the Head has been concealed from public view. It was not until February 19, 2018, that Italian authorities learned of the whereabouts of the stolen Head. Even in a civil case, therefore, laches would not apply: once the Italian government learned of the Head's location, they acted in fewer than 24 hours.

81. In a criminal-law context, the only limitation is that posed by the five-year statute of limitations. Since possession of stolen property is a continuing crime, ending only when the possessor is no longer in possession of the property, that five-year statute did not begin to run until the Head of Alexander was seized from Mr. Safani on February 22, 2018.

## Conclusion

82. It has been proven that the Head of Alexander was excavated from the Basilica Emilia in the Roman Forum after September 1909 and then stolen from a state-owned museum collection. It has also been proven that the Head of Alexander was exported from the Republic of Italy without permission after the enactment of Italy's relevant patrimony law of June 20, 1909—after all, it was not even discovered until after the effective date of the law. Under either theory, then, the Head of Alexander constitutes stolen property under New York law and belongs to the Republic of Italy.

83. Under PL §450.10(5), the warrant-issuing court *must* deliver the demanded property to the owner, “on satisfactory proof of his title.” *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 N.Y. 2d 729, 740 (1999) (PL §450.10 “provides a mechanism for returning allegedly stolen property to an owner prior to, or during the pendency of, a criminal proceeding”). CPL §690.55(1) similarly authorizes the warrant-issuing court to determine the property's ultimate disposition. *Simpson v. St. John*, 93 N.Y. 363, 366 (1883) (property seized pursuant to a court order “cannot be taken away until that custody is ended by...an order of the magistrate permitting its surrender to the owner”). *See also In re Matter of Documents Seized Pursuant to Search Warrant*, 124 Misc. 2d 897, 899 (Sup. Ct. N.Y. County 1984) (Rothwax, J.).

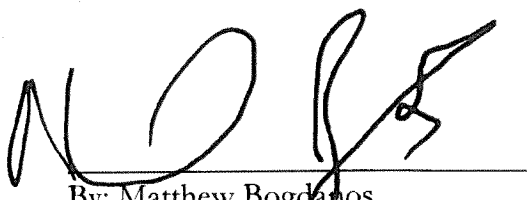
84. Finally, N.Y. County Law §935 also mandates the return of seized property to its rightful owner: “[a]ll property delivered into the custody and held and kept by the district attorney of the county of New York, for use as evidence or otherwise, in any criminal

investigation, action, appeal, *or other proceeding*, shall be returned by him to its rightful owner upon proper demand therefore.” (Emphasis added.)

WHEREFORE, it is respectfully requested that the Court grant this Application for an Order returning the Head of Alexander to representatives of the Italian Republic.

Dated: 7/23/2018  
New York, New York

HON. CYRUS R. VANCE, JR.  
DISTRICT ATTORNEY  
NEW YORK COUNTY

  
By: Matthew Bogdanos  
Assistant District Attorney

## Exhibits

1. Photograph of Head of Alexander
2. Letter, dated May 7, 2018
3. Letter, dated July 12, 2018
4. Bartoli Journal
5. Map of the Roman Forum
6. Photograph of Storage Room
7. Tognetti Summary of Excavation
8. Bartoli Publication, dated 1912
9. First Photograph of the Head of Alexander
- 10A. Photograph of Heads with Black Backdrop
- 10B. Photograph of Heads with Cloister Wall
- 11A. Photograph no. 1683: Heads on Display, 1935
- 11B. Photograph no. 1690: Heads on Display, 1935
- 11C. Photograph no. 1689: Heads on Display, 1935
12. Register Format A – 9x12
13. Photograph Card for nos. 5861 and 5862
14. Affidavit from Candido, dated Feb. 22, 2018
15. Sotheby Park Bernet Auction Catalogue, dated Nov. 22, 1974
16. Sotheby Parke Bernet Catalogue, Annotated
17. Sotheby's Auction Catalogue Lot 9, dated Dec. 8, 2011
18. Sotheby's Documents Related to Dec. 8, 2011 Auction
19. Invoice, dated Aug. 19, 2013
20. Invoice, dated May 24, 2017
21. ALR Certificate, dated Jun. 6, 2017
22. Invoice, dated Jun. 20, 2017
23. Customs Entry Form, dated Aug. 16, 2017
24. Email from Scharnweber to Leclair, dated Nov. 1, 2017
25. TEFAF Advertisement, dated Mar. 2018
26. Restoration Photograph of the Head of Alexander
27. Theft Statement, dated Feb. 19, 2018
28. Theft Report, dated Feb. 22, 2018
29. Search Warrant for Safani Gallery, dated Feb. 22, 2018
30. Transcript, Index No. 650646-2014, dated Apr. 18, 2018
31. Italian Patrimony Laws



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 52

IN THE MATTER OF AN APPLICATION FOR  
A WARRANT TO SEARCH THE PREMISES OF  
SAFANI GALLERY, INC. LOCATED AT 7 E  
75<sup>TH</sup> STREET, SUITE 2D, NEW YORK, NEW  
YORK, 10021 ("THE TARGET PREMISES")

Upon the application of Assistant District Attorney Matthew Bogdanos dated July 23, 2018,

WHEREAS the New York County District Attorney has shown the following item to have been stolen: a marble Head of Alexander the Great as Helios, the Sun God (the "**Head of Alexander**"), circa 1<sup>st</sup> century AD, which is approximately 14 inches tall;

WHEREAS the New York County District Attorney has shown the proper notice to have been given pursuant to Penal Law §450.10 of the intention to release stolen property;

WHEREAS all parties having been given an opportunity to be heard; and

WHEREAS proof having been received that the Head of Alexander was stolen from, and should be returned to, the Government of the Italian Republic, it is hereby

ORDERED, in accordance with CPL §690.55, that the New York County District Attorney be authorized to transfer custody to representatives of the Government of the Italian Republic.

Dated: \_\_\_\_\_

\_\_\_\_\_  
J.S.C.