

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

<b>UNITED STATES OF AMERICA,</b>	
<b>Plaintiff-Appellee,</b>	<b>C.A. 12-30209</b>
<b>vs.</b>	
<b>WILLIAM ESLEY HUGS, SR.</b>	<b>D.C. No.: CR 11-55-BLG-RFC</b>
<b>Defendant-Appellant.</b>	

**BRIEF OF APPELLEE UNITED STATES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. . . . . iv

INTRODUCTION. . . . . 1

STATEMENT OF JURISDICTION. . . . . 2

STATEMENT OF THE ISSUE. . . . . 3

STATEMENT OF THE CASE. . . . . 3

STATEMENT REGARDING ORAL ARGUMENT. . . . . 4

STATEMENT OF FACTS. . . . . 4

    I.    Hugs Sr. Is snared by “Operation Rolling  
          Thunder”. . . . . 4

    II.   Hugs Sr. Pleads Guilty Under a Plea Agreement. . . . . 5

    III.  The Court Uses Clark’s Replacement Values to  
          Estimate Loss. . . . . 5

SUMMARY OF ARGUMENT. . . . . 9

ARGUMENT. . . . . 9

    A.    Clark’s Values Are the Most Current. . . . . 12

    B.    Double-Hearsay Is Not Per Se Unreliable. . . . . 15

    C.    Values From Other Countries Do Not Directly  
          Translate to Fair Market Value in the United  
          States. . . . . 18

D.    The Clark Methodology and Merrill Affidavit Have  
      Been Used and Relied Upon in Other Federal  
      Cases. . . . . 21

CONCLUSION. . . . . 23

CERTIFICATE OF SERVICE. . . . . 25

STATEMENT OF RELATED CASES. . . . . 26

CERTIFICATE OF COMPLIANCE. . . . . 27

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>United States v. Alonso</i> , 48 F.3d 1536 (9 <sup>th</sup> Cir. 1995).....	16
<i>United States v. Eyoum</i> , 84 F.3d 1004 (7 <sup>th</sup> Cir. 1996). ....	20
<i>United States v. Grisson</i> , 525 F.3d 691 (9 <sup>th</sup> Cir. 2008).....	10
<i>United States v. Hanna</i> , 49 F.3d 572 (9 <sup>th</sup> Cir. 1995). ....	11
<i>United States v. Huckins</i> , 53 F.3d 276 (9 <sup>th</sup> Cir. 1995). ....	11
<i>United States v. Kelly</i> , 993 F.2d 702 (9 <sup>th</sup> Cir. 1993).....	10
<i>United States v. Notrangelo</i> , 909 F.2d 363 (9 <sup>th</sup> Cir. 1990). ....	10
<i>United States v. Petty</i> , 982 F.2d 1365 (9 <sup>th</sup> Cir. 1993). ....	2, 11, 17
<i>United States v. Tawahongva</i> , 456 F. Supp. 2d 1120 (D. Ariz., 2006). ....	19
<i>United States v. Wilgus</i> , 638 F.3d 1274 (10 <sup>th</sup> Cir. 2011). ....	14
<i>United States v. Wilson</i> , 900 F.2d 1350 (9 <sup>th</sup> Cir. 1990).. ....	20
<i>Wade v. Lewis</i> , 561 F. Supp. 913 (D. Ill., 1983). ....	19
<i>Williams v. Oklahoma</i> , 358 U.S. 576 (1950).....	2, 10
 <u>Statutes</u>	 <u>Page</u>
18 U.S.C. § 371. ....	3
18 U.S.C. § 3231. ....	2

19 U.S.C. § 1677(b). . . . . 20

28 U.S.C. § 1291. . . . . 2

The Bald and Golden Eagle Protection Act  
    16 U.S.C. § 668. . . . . 3

The Migratory Bird Treaty Act  
    16 U.S.C. § 703(a). . . . . 3-9

<u>Other Authorities</u>	<u>Page</u>
Fed. R. App. Proc. 34(a). . . . .	4
USSG § 2B1.1 Application Note 3(C)(1). . . . .	19
USSG § 2Q2.1. . . . .	18
USSG § 2Q2.1(b)(3)(A)(ii). . . . .	15
USSG § 6A1.3(a). . . . .	10

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**BRIEF OF APPELLEE UNITED STATES**

**INTRODUCTION**

Defendant William Esley Hugs, Senior (“Hugs Sr.”), appeals his sentence for conspiracy to kill and illegally traffic in eagles and hawks. Hugs Sr. argues that the district court violated his right to due process when it relied on the affidavit of Fish & Wildlife Service Special Agent Brad Merrill to establish the value of the eagles and hawks Hugs Sr. killed and sold. Hugs Sr. claims the affidavit is unreliable double hearsay. But the affidavit is a sworn document by a law enforcement officer that summarizes the valuation studies of five experts conducted

over 22 years. At sentencing, the district court may “consider responsible . . . ‘out- of-court’ information relative to the circumstances of the crime. . . .” *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959). Due process requires only that a “minimal indicia of reliability accompany a hearsay statement.” *United States v. Petty*, 982 F. 2d 1365, 1369 (9th Cir. 1993). The affidavit here easily clears these low hurdles, and the district court correctly determined that it was reliable. Thus, Hugs Sr.’s sentence should be affirmed.

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on June 13, 2012. ER Vol. II, 5.<sup>1</sup> Hugs Sr. filed his timely notice of appeal on June 18, 2012. ER Vol. II, 3.

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<sup>1</sup> Cites to the Hugs Sr.’s Excerpts of Record (ER) will specify Volume I (“Vol. I”) or Volume II (Vol. II”), followed by the appropriate page number. These volumes were not numbered seriatim, so there are two sets of excerpts with pages numbered 1-32.

## **STATEMENT OF THE ISSUE**

Did the district court violate Hugs Sr.'s due process rights by relying upon the Merrill affidavit at sentencing?

## **STATEMENT OF THE CASE**

William Hugs Sr. and three co-defendants were charged in a ten count indictment on May 23, 2011. ER Vol. II, 66-74. Count I alleged that from December 5, 2010 through February 2011, Hugs Sr. conspired to traffic in eagles and migratory birds, in violation of 18 U.S.C. § 371. ER Vol. II, 67-70. Counts II, VI, VII, VIII, and X charged Hugs Sr. with unlawfully trafficking in eagles in violation of The Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. ER Vol. II, 70-73. Counts III, IV, and V, charged Hugs Sr. with unlawfully trafficking in migratory birds in violation of The Migratory Bird Treaty Act, 16 U.S.C. §§ 703(a) and 707(b). ER Vol. II, 71.

Hugs Sr. entered into a plea agreement, and pled guilty to the conspiracy charged in Count I of the indictment, in exchange for dismissal of the remaining counts. ER Vol. II, 47-65. The district court sentenced Hugs Sr. to 18 months in prison, based in part upon a guidelines calculation that enhanced Hugs Sr.'s offense level according



to the replacement value of the hawks and eagles. ER Vol. I, 6-7. Hugs Sr. now appeals his 18-month prison sentence.

### **STATEMENT REGARDING ORAL ARGUMENT**

Under Federal Rule of Appellate Procedure 34(a), the United States advises the Court of its view that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record.

### **STATEMENT OF FACTS**

#### **I. Hugs Sr. is snared by “Operation Rolling Thunder.”**

In 2008, U.S. Fish & Wildlife Service agents initiated a covert investigation, “Operation Rolling Thunder,” into individuals whom they suspected were trafficking protected migratory birds, primarily bald and golden eagles. PSR ¶ 15. The investigation used a confidential informant, and conducted a series of controlled purchases of protected birds and bird parts. *Id.*

In early November 2010, the agents received an anonymous tip that a group of people were killing and selling eagles around Hardin, Montana. *Id.* at ¶ 16. The individuals were subsequently identified as Hugs Sr. and three co-conspirators. *Id.* Between December 2010 and

February 2011, agents recorded approximately seven illegal transactions in which Hugs Sr. sold to the informant the body parts and/or whole-carcasses of one adult bald eagle, one juvenile bald eagle, one adult golden eagle, three juvenile golden eagles, and eight hawks. *Id.* Hugs Sr. also assisted his son and co-conspirator (William Esley Hugs, Jr.), in selling an additional adult bald eagle, three juvenile bald eagles, two adult golden eagles, four juvenile golden eagles, and 13 hawks. *Id.*

## **II. Hugs Sr. pleads guilty under a plea agreement.**

On January 31, 2012, Hugs Sr. accepted a plea offer from the government. ER Vol. II, 55. Pursuant to the plea agreement, Hugs Sr. would plead guilty to Count I and the government would dismiss the remaining charges. ER Vol. II, 57. The district court accepted Hugs Sr.'s change in plea on February 16, 2012. ER Vol. II, 82. Sentencing was subsequently scheduled for June 13, 2012. ER Vol. II, 82.

## **III. The court uses Clark's replacement values to estimate loss.**

On June 7, 2012, the government filed its sentencing memorandum, which utilized Agent Merrill's affidavit to substantiate a replacement value for the raptors. ER Vol. II, 24-40. In the affidavit,

Merrill avows that the affidavit will assist in the determination of the reasonable replacement costs for bald and golden eagles, and various hawks, under guidelines § 2Q2.1, Application Note 4. *Id.* at 37-38.

Application Note 4 states:

When information is reasonably available, ‘market value’ ... shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost... .

Merrill goes on to state that there is no fair market value for eagles and hawks in the United States because the purchase, sale, or trade in such birds is illegal. ER Vol. II, 38. The most accurate way to gauge reasonable replacement and restitution costs is to rely on experts that propagate, rehabilitate, and prepare such birds for release into the wild. *Id.*

In 1995 and 2000, in support of a valuation conducted by another U.S. Fish & Wildlife Service Agent (Robert L. Prieksat), three such experts estimated the costs of “hacking” eagles into the wild to be \$5,000 per bird, and one estimated the cost to be \$7,000 per bird. *Id.* Seven years earlier, in 1988, another expert, Edward E. Clark, Jr., president of the Wildlife Center in Virginia, had established a process

for estimating the replacement costs for federally protected migratory birds, including eagles and hawks. *Id.* at 39. Mr. Clark updated his calculations in December, 2010, and estimated replacement costs based upon the known costs of propagating a bird in captivity, raising it, and releasing it into the wild in a scientifically accepted way. *Id.* Mr. Clark also considered the costs of rehabilitating injured raptors, and the market prices in countries where the trade in eagles and hawks is legal. *Id.* Based on all these factors, Mr. Clark estimates the cost of replacing federally protected raptors as follows:

Small raptors	=	\$1,000 per bird
Medium to large hawks	=	\$1,750 per bird
Falcons and rare hawks	=	\$2,500 per bird
Immature bald / golden eagles	=	\$5,000 per bird
Mature bald / golden eagles	=	\$10,000 per bird

*Id.* at 40.

The PSR adopted this valuation methodology, and calculated the loss associated with Hugs Sr.s' conspiracy at \$98,500 for "(21) hawks, (7) juvenile golden eagles, (3) adult golden eagles, (4) juvenile bald eagles, and (2) adult bald eagles." PSR ¶ 30. In a sentencing memorandum, Hugs Sr. objected to this method of valuation, arguing among other things that it was predicated on unreliable double

hearsay. ER Vol. II at 13-14. The government responded that the “FWS replacement method is reliable,” and constituted a “reasonable estimate” of value here, where the fair market value of the trafficked raptors was “difficult to ascertain” and where the actual transaction amounts undervalued the birds. *Id.* at 29-30.

The district court held that “the fair market retail price is, to say the least, difficult to ascertain... .” ER Vol. I at 6. The court further found that the amount of money that actually changed hands in the transactions in this case undervalued the birds: “...even if you use the amount of money that was paid by the undercover agents, it does not adequately, in my opinion, measure the harm.” *Id.* at 7. Accordingly, the court determined to use the “reasonable replacement cost.” *Id.* at 6. The court stated that the replacement cost methodology outlined by the U.S. Fish & Wildlife Service was “a credible, well-documented, and detailed account of the replacement or hacking of such protected birds.” *Id.* at 7.

Based on the estimated replacement value of \$98,500, the district court increased the offense level by eight for an adjusted level of 16. *Id.* at 7, 9-10. The court also decreased the offense level by three for

acceptance of responsibility and timely notification of Hugs' intent to plead guilty. *Id.* at 10. The total adjusted offense level was 13. *Id.* at 11. With a criminal history category III, Hugs Sr.'s advisory sentencing range was 18-24 months. *Id.* The court sentenced Hugs Sr. to the low end of the calculated guideline range (18 months), followed by three years of supervised release. *Id.* at 19. No fine was imposed and no restitution was ordered. *Id.* at 20.

### **SUMMARY OF ARGUMENT**

The district court's reliance on the Merrill affidavit, and the valuation methodology therein, was proper. The affidavit and valuation methodology contained the minimal indicia of reliability required for due process at sentencing.

### **ARGUMENT**

#### **I. The Merrill affidavit and Clark methodology are accurate and reliable.**

##### **Standard of review:**

This Court reviews "the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of a case for abuse of discretion, and

the district court's factual findings for clear error." *United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 008) (internal quotation marks and citation omitted). The Court reviews de novo arguments that the district court applied an improper measure of value in calculating loss under the guidelines. *United States v. Kelly*, 993 F.2d 702, 704 (9th Cir. 1993).

**Argument:**

It was permissible for the court to use the affidavit of Agent Merrill in determining the appropriate sentence for Hugs Sr. At sentencing, the court may "consider responsible . . . 'out-of-court' information relative to the circumstances of the crime. . . ." *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959). "The procedural safeguards and evidentiary limitations afforded defendants in criminal trials are not required at sentencing." *United States v. Notrangelo*, 909 F.2d 363, 366 (9 Cir. 1990). A sentencing court can consider relevant information in determining an appropriate sentence "without regard to its admissibility under the rules of evidence applicable at trial...." U.S.S.G. § 6A1.3(a).

Hugs Sr. claims the district court's reliance on a double-hearsay affidavit violated his rights to due process. Br. 17-20. But due process requires only that a "minimal indicia of reliability accompany a hearsay statement." *Petty*, 982 F. 2d at 1369. In the cases that Hugs Sr. relies upon, like *United States v. Huckins*, 53 F.3d 276, 279 (9<sup>th</sup> Cir. 1995), that "minimal indicia of reliability" was missing because the sole basis for the information was the unsworn, uncorroborated hearsay of another criminal, an accomplice, that was trying to negotiate a plea. The accomplice had an incentive to lie (to reduce his own sentence), and the government admitted that his statements were unreliable. *Id.*

Functionally identical is *United States v. Hanna*, 49 F.3d 572, 578 (9<sup>th</sup> Cir. 1995). Br. 16-17. In *Hanna*, as in *Huckins*, the disputed hearsay at sentencing was inconsistent with accounts from other witnesses, and came from a co-defendant that had an incentive to lie, and that the government disbelieved. *Hanna*, 49 F.3d at 578. Thus, the hearsay in *Hanna* lacked a "minimal indicia of reliability."

By contrast, in the instant case, a law enforcement officer submitted a sworn affidavit. ER Vol. II, 37, 40. The affidavit recounts Agent Merrill's research into the replacement value of various raptors,



and how he established those values through consultations with five scientists and experts in the field, like Edward E. Clark, Jr., who has developed and refined a valuation methodology over 22 years. *Id.* at 38-40. Mr. Clark, President of the Wildlife Center of Virginia, “has previously served as an expert witness in Federal Court proceedings concerning replacement costs for federally protected migratory birds.” *Id.* at 39.

There is nothing in the record to gainsay the reliability and credibility of Agent Merrill’s sworn affidavit. Not a single fact in the affidavit has been legitimately contested or disputed, and Agent Merrill has no reason to misrepresent Mr. Clark’s valuation methodology. The government has never suggested or admitted that Agent Merrill’s affidavit is unreliable. In this case, unlike those cited by Hugs Sr., Agent Merrill’s affidavit clearly provides a “minimal indicia of reliability.”

**A. Clark’s values are the most current.**

Hugs Sr. argues that the “reliability of the figures provided by Edward E. Clark Jr. is highly questionable” because the Merrill affidavit “provides figures from other highly qualified experts who

conducted more current calculations and arrived at figures that were half the amount provided through the double hearsay of Mr. Clark.”

Br. 19. That argument misrepresents the record.

As noted in the Merrill affidavit, these other experts provided affidavits in support of a valuation conducted by another U.S. Fish & Wildlife Service Agent (Robert L. Prieksat) in 1995 and 2000. ER Vol. II, 38, ¶¶ 5-6. Three experts reported the cost of “hacking” (i.e., the process of returning a bird of prey to the wild) to be \$5,000 per eagle, while another reported the cost at \$7,000. *Id.* at ¶ 6.

Mr. Clark established his **process** for valuing the replacement costs of federally protected migratory birds in 1988. *Id.* at 39, ¶ 9. But contrary to Hugs Sr.’s claim, that does not mean the 1995 and 2000 valuations are “more current” than Mr. Clark’s.

Since 1988, Mr. Clark has reviewed, updated, and refined the values to account for changing dollar values and to factor in the different replacement costs for juvenile and adult birds.

*Id.* at ¶ 9. Thus, Mr. Clark was not relying upon 1988 data. To the contrary, Clark was using data that were at least 10 to 15 years more current than the data utilized for the Prieksat valuation. *Id.* at ¶ 8 (“Mr. Clark advised your Affiant that he last updated his calculations

concerning replacement costs ... in December 2010.”). Mr. Clark’s data were the most current, and therefore the most reliable.

Hugs Sr. insinuates that the large increase in value (from \$5,000 or \$7,000 in 1995 / 2000 to \$10,000 in 2010) undermines the reliability of Mr. Clark’s valuation. Br. 19. This increase in value not only reflected the diminishing value of the dollar over the 10-15 years between the Prieksat valuation and the Merrill affidavit (which included the “Great Recession” of 2008), it also factored in the differing value of juvenile eagles as against adult eagles: Only half of all eagle eggs produce viable young, and only half of those eaglets survive to adulthood. *United States v. Wilgus*, 638 F.3d 1274, 1282 (10<sup>th</sup> Cir. 2011). Thus, adult eagles are more valuable, and this is reflected in the Clark methodology updated in 2010. Hugs Sr. offers nothing to undermine the reliability of this methodology.

But moreover, even if the district court had relied upon the Prieksat valuation, and the 1995 and 2000 data that supported it, the result would be no different. The Prieksat valuation did not differentiate between adult and juvenile eagles: any eagle was valued

at \$5,000 or \$7,000. Mr. Clark's method does differentiate: Adult eagles are valued at \$10,000, juvenile eagles at \$5,000. ER Vol. II, 40.

Here, Hugs Sr. was held accountable in the PSR for the loss of four (4) adult eagles. PSR ¶ 30-31. Even if those four birds are valued at \$5,000 (instead of the \$10,000 indicated by the Clark method), the total amount of loss attributed to Hugs Sr.'s conspiracy still amounts to \$78,500 (\$98,500 minus \$20,000). This figure is still more than \$70,000, and less than \$120,000, and would still warrant an eight-level increase in the offense level under guidelines § 2Q2.1(b)(3)(A)(ii). ER Vol. I, 9. In other words, even if the district court had used the "figures from other highly qualified experts" (Br. 19), Hugs Sr.'s sentence would have been the same. Therefore, even if the Merrill Affidavit and Clark methodology were unreliable (they are not), the district court's reliance on those values would be harmless error.

**B. Double-hearsay is not *per se* unreliable.**

Hugs Sr. argues that, even if Agent Merrill's hearsay affidavit is reliable as a sworn document, submitted under penalty of perjury, that nothing corroborates the hearsay statements within that document.

Br. 18. In effect, Hugs Sr. argues that all double hearsay lacks

“minimal indicia of reliability.” *Id.* (“...in cases such as Hugs where the information relied upon is hearsay within the affidavit of another individual there is no such indicia of reliability as the original declarant...”). That, however, is not the law.

Neither the guidelines nor due process require the categorical exclusion of all double hearsay evidence at sentencing. In fact, this Circuit has specifically stated that district courts can rely upon double hearsay at sentencing:

We recognize that the district court, in finding that Alonso had threatened Peloché, relied on double hearsay... .

Despite the fact that we know of Peloché’s statement regarding threats from Alonso only through two levels of hearsay, we nonetheless find that the statement bears “sufficient indicia of reliability to support its probable accuracy.” ... Alonso has proffered no reason why we should distrust a statement made in these circumstances and we can conceive of none. Peloché appears to have had nothing to gain by seeking protection. Thus, we decline to engage in fanciful speculation regarding potentially malevolent motivations for his statement, and hold that the statement is sufficiently reliable to support the district court’s finding.

*United States v. Alonso*, 48 F.3d 1536, 1546-47 (9<sup>th</sup> Cir. 1995). Thus, the critical inquiry is simply whether the hearsay (or double hearsay) exhibits some “minimal indicia of reliability.” As in *Alonso*, in this case

Hugs Sr. has failed to show any reason why the district court, or this Court, should distrust the statements from Mr. Clark regarding the costs of hacking eagles. Mr. Clark has nothing to gain by his statements, or by misrepresenting hacking values. This Court should “decline to engage in fanciful speculation regarding potentially malevolent motivations for [Mr. Clark’s] statement,” and should “hold that the statement is sufficiently reliable to support the district court’s finding.” *Id.*

Hugs Sr. argues that “[t]he question of how the figures [in Mr. Clark’s valuation] were reached and updated remain unanswered and without corroboration.” Br. 19. But, as noted in *Alonso*, “the guideline does not by its terms impose any ‘corroboration’ requirement.” *Alonso*, 48 F.3d at 1546. Such a corroboration requirement also cannot be divined from *Petty*, which articulated the “minimal indicia” standard. *Alonso*, 48 F.3d at 1546.

...at its absolute broadest, *Petty* stands for the proposition that a sentencing court should rely on statements made by unidentified informants and statements that are presumptively unreliable only if there is corroborating evidence in the record. The district court here faced neither of those situations.

Neither Pelоче's lawyer nor Pelоче himself is an unidentified informant. Moreover, a sworn statement of an officer of the court is not presumptively unreliable, and ... we think that Pelоче's statement bears indicia of reliability.

*Id.* at 1546-47.

The situation here is the same. Neither Agent Merrill nor Mr. Clark are unidentified informants. Agent Merrill is a law enforcement officer whose statement was submitted under oath, and his affidavit cannot be considered "presumptively unreliable." Mr. Clark has no reason to lie about the bird valuation, and Hugs Sr. has shown no reason why the Court should distrust his statements. Thus, as with the declarant in *Alonso*, Mr. Clark's statements are not "presumptively unreliable," and do not require corroboration.

Despite the fact that it entails double hearsay, the Merrill affidavit bears the required "minimal indicia of reliability," and the district court's reliance on the affidavit was neither erroneous nor an abuse of discretion.

**C. Values from other countries do not directly translate to fair market value in the United States.**

As noted above, Application Note 4 to guidelines § 2Q2.1 states that "market value" shall be based on fair-market retail prices when

that information is “reasonably available.” The reasonable replacement cost should only be used to gauge value where “the fair-market retail price is difficult to ascertain.”<sup>2</sup> *Id.* Hugs Sr. argues that replacement value should not be used to estimate loss in this case because, in other countries, “the trade in eagles and hawks is lawful,” so the information on “fair-market retail prices” is “reasonably available.” Br. 19. There are several problems with this argument.

First, there can be no fair market value for bald eagles in other countries because the only population of such eagles is in North America. *Wade v. Lewis*, 561 F.Supp. 913, 920 (D.Ill.,1983). In both Mexico and Canada, trafficking in bald eagles is illegal. *United States v. Tawahongva*, 456 F.Supp.2d 1120, 1122 fn 2 (D. Ariz., 2006). Thus, there are no countries with a broad and lawful free market in bald eagles.

Second, even if the golden eagle is found in several continents outside of North America, and even if golden eagles are legally available for purchase on those other continents, that does not

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<sup>2</sup> Or where the fair-market value undervalues the harm. See guidelines § 2B1.1, Application Note 3(C)(I).



automatically establish a fair market value in the United States. The objective of valuation is to assess the harm to the victim and the gain to the defendant – both of whom are in the United States. *United States v. Wilson*, 900 F.2d 1350, 1356 (9th Cir. 1990). Market value in other countries may be useful data, but it does not constitute a fair market value in the United States in its own right. In order to translate market values from another country to the United States, one must account for market differences and the manner they effect value. *See* 19 U.S.C. § 1677b (in order to determine whether golden eagle sales in foreign countries are representative of “fair value,” there must be “a fair comparison ... made between the export price ... and normal value.”).

One major market difference “in the circumstances of sale” here would be the illegality of trafficking in the United States versus the source country. *Id.* at subsection (a)(6)(C)(iii). “The prices for smuggled animals ... rise as they go from smuggler to wholesaler to retailer.” *United States v. Eyoum*, 84 F.3d 1004, 1008 n 5 (7<sup>th</sup> Cir. 1996). Thus, the “fair market price” in any source country would be lower than the value assigned to golden eagles in this country — where

there is no legal market. Accordingly, Mr. Clark did not merely adopt the foreign market value whole hoc: foreign market prices were one data point in his replacement valuation. ER Vol. II, 39, ¶10. Even if a lawful foreign market exists, the fair-market retail price of eagles and hawks in the United States remains “difficult to ascertain.” As such, the court correctly used reasonable replacement costs.

**D. The Clark methodology, and Merrill affidavit, have been used and relied upon in other federal cases.**

Hugs Sr. argues that the Clark methodology is not reliable because, despite the submission of Agent Merrill’s affidavit in *United States v. Solberg*, CR 11-30074-MAM (Dist. SD, 2011), the court assessed the loss at less than the eagle and hawk values in the Clark methodology. Br. 19-20. As Hugs Sr. notes, however, the outcome in *Solberg* was the result of a plea deal between the parties. *Id.* at 20. Hugs Sr. readily admits that he does not know “how the Defense and the Government reached the stipulated amount.” *Id.*

Any number of case-specific factors in *Solberg* could have induced the government to settle at an amount below the Clark valuation methodology (for example, the AUSA prosecuting that case could have

agreed to value the loss at a set amount before receiving the actual replacement values from Mr. Clark). The fact that those amounts were the product of plea negotiations means Hugs Sr. cannot legitimately claim the court found the Clark methodology to be unreliable. Indeed, the same rationale underpinning FRE 408 augurs against consideration of the negotiated amounts in *Solberg* to dispute the Clark valuation methodology, i.e., evidence of furnishing or accepting valuable consideration in compromising a claim is not admissible to prove or disprove the amount or validity of the disputed claim.

Moreover, *Solberg* is not the only federal case wherein the Merrill affidavit and Clark valuation methodology have been used — it was merely the first. The methodology was explicitly addressed and relied upon in *USA v. Shane Jones, AKA Shane Redhawk*, CR 11-30016-01 (Dist. SD, June 2011). The valuation methodology was also challenged, and upheld, in *USA v. Charles Ross, d/b/a/ Scattergun Lodge*, CR 11-30101 (Dist. SD, Oct. 2012).

Two other judges in the Billings Division of the District of Montana considered, accepted, and relied upon the Merrill affidavit and Clark methodology before Hugs Sr. was sentenced. *See United States v.*

*Stewart*, CR 12-34-BLG-JDS (D. Mont. 2012) (sentenced May 9, 2012); and *United States v. Harvey Hugs*, CR 11-55-BLG-RFC-CSO (D. Mont. 2012) (sentenced January 27, 2012).

The judge that sentenced Hugs Sr. in this case had also previously seen, accepted, and relied upon the Merrill affidavit and Clark methodology when sentencing Hugs Sr.'s son (who was a co-conspirator in this eagle trafficking ring) on May 2, 2012 (*United States v. William Esley Hugs, Jr.*, CR 11-55-BLG-RFC (D. Mont. 2012)) and when sentencing another eagle trafficker on May 4, 2012 (*United States v. Walks*, CR 11-65-BLG-RFC (D. Mont. 2012)). Thus, federal courts have repeatedly utilized and found this valuation methodology to be reliable.

The Merrill affidavit and Clark valuation methodology clearly bear the “minimal indicia of reliability” required by due process at sentencing.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that the sentence of the district court be affirmed.

**DATED** this 17<sup>th</sup> day of October, 2012.

MICHAEL W. COTTER  
United States Attorney

/s/ Mark S. Smith  
Assistant U.S. Attorney  
Attorney for Appellee

## **CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

MICHAEL W. COTTER  
United States Attorney

/s/ Mark S. Smith  
Assistant U.S. Attorney  
Attorney for Appellee

## **STATEMENT OF RELATED CASES**

There are no related cases.

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 4341 words.

MICHAEL W. COTTER  
United States Attorney

/s/ Mark S. Smith  
Assistant U.S. Attorney