

07-10327

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[INSERT NAME],)
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 Plaintiff-Appellee,)
)
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 v.)
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 [INSERT NAME],)
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 Defendant-Appellant.)
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Appeal from the Judgment of the United States District Court
The Honorable Marilyn Hall Patel, Judge Presiding

OPENING BRIEF OF APPELLANT

[INSERT NAME]
Attorney at Law
Address Line 1
Address Line 2
California State Bar No. 00000
Tel: (831) 000-0000

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UNITED STATES COURT OF APPEALS
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[INSERT NAME],)
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OPENING BRIEF OF APPELLANT

INTRODUCTION

This is an appeal from a sentence following the entry of a guilty plea to two counts of smuggling Eurasian Eagle Owl eggs from Austria to the United States, and two counts of making a false statement to a government official involving the failure to declare the eggs on a customs form and a false statement about the origin of the eggs on a permit. Of the twelve eggs smuggled, three hatched producing live birds which the appellant subsequently trained for his pest bird abatement business. Although only three birds were acquired from the eggs, and the eggs had no value apart from their potential to

produce live birds, the court sentenced appellant as though appellant had acquired six or seven birds resulting in a four-level increase in his sentence rather than a one-level increase. The court also double counted the fact that appellant intended to use the birds in his business for purposes of calculating the market value enhancement and in imposing the commercial purpose enhancement.

STATEMENT OF JURISDICTION

This is an appeal from a judgment following a plea of guilty in a criminal case before the United States District Court for the Northern District of California, and this court has jurisdiction to hear the appeal under 18 U.S.C. § 3742(a)(2) and 28 U.S.C. § 1291. The judgment was entered on July 3, 2007. II ER 15-20.¹ The notice of appeal was filed on July 5, 2007. II ER 21.

ISSUES PRESENTED

1. Did the District Court err in using bird value rather than egg value in calculating the fair market value of the eggs appellant smuggled into the United States, and if bird value was appropriate, did the court err in calculating the bird value?
2. Was the District Court's imposition of offense specific sentencing enhancements for market value and commercial purpose based upon appellant's intended business use of the birds impermissible double counting?

STATEMENT OF THE CASE

¹. "ER" refers to the Excerpts of Record filed contemporaneously with this brief. There are two volumes designated "I ER" and "II ER."

On January 24, 2006, the government filed a four-count indictment charging appellant with two counts of smuggling goods into the United States on or about March 7, 2005 and April 5, 2005 in violation of 18 U.S.C. § 545 (Counts 1 & 3), and two counts of making false statements in that he checked “no” on a customs declaration form if he had animals or wildlife, and later presented a form to the U.S. Fish and Wildlife Service falsely declaring that he had bred the birds by “A.I.” in violation of 18 U.S.C. § 1001(a)(3) (Counts 2 & 4.) II ER 1-3. On November 28, 2006, appellant entered a guilty plea to all four counts without a plea agreement. II ER 4-5.

On March 22, 2007, the government filed notice of intent to introduce expert testimony at the sentencing. II ER 85. Appellant followed suit with a witness list and both parties filed sentencing memoranda. II ER 86. On May 25, 2007, the district court held an evidentiary hearing on the issue of how the value of the eggs was to be determined for purposes of sentencing. II ER 87.

On July 3, 2007, the district court sentenced appellant to a prison term of 21 months on each count to be served concurrently. II ER 16. Appellant was also charged with an assessment of \$400 and a \$5,000 fine. II ER 19. Appellant’s timely notice of appeal was filed on July 5, 2007. II ER 21.

On August 24, 2007, appellant voluntarily surrendered himself to the U.S. Marshall and he is currently serving his sentence in the federal penitentiary. II ER 23. Appellant’s estimated release date is November 2008.

On October 11, 2007, appellant filed a motion for release from custody pending appeal. II ER 91. The government filed opposition, conceding that the issue presented a “substantial question of law or fact,” but argued that appellant had failed to meet his burden of showing that upon remand and resentencing his term would not exceed the time taken for this court to resolve the appeal. On this basis, the district court denied the motion for release without prejudice to refile if appellant could show the appeal would not be resolved before November 2008. II ER 73-74.

STATEMENT OF THE FACTS

The defendant made two trips to Austria where he obtained Eurasian Eagle Owl eggs from a breeder, [INSERT NAME]. II ER 6-7. The breeder was downsizing his Eagle Owl business because there was a surplus of Eagle Owls in Europe. II ER 44-45. [INSERT NAME] told Austrian authorities who interviewed him at the bequest of the U.S. authorities that he was no longer incubating the eggs and that he was getting a “50% natural selection.” II ER 45. [INSERT NAME] did not give [INSERT NAME] any money for the bird eggs he acquired. II ER 7. He later wrote to [INSERT NAME] and offered to pay him for the birds that had hatched. The possibility of an exchange was also mentioned where [INSERT NAME] would exchange Red-tailed Hawk eggs for Eagle Owl eggs, but a recent arrest of someone smuggling eggs made that venture too risky. I ER 121.

On the first trip to Austria, [INSERT NAME] acquired three eggs, and on the second trip nine. II ER 6, 126. [INSERT NAME]'s trips corresponded with the Christian and Greek Orthodox Easter holidays and he painted the eggs and stored them in an Easter basket on the plane to disguise them. I ER 115. He used hand warmers to incubate the eggs while he was on the plane. I ER 59. In 2001, the Wild Bird Conversation Act effectively prevented the importation of nonnative raptor species like Eagle Owls. I ER 75.

When he arrived in the United States, [INSERT NAME] placed the eggs in an incubator at his business/residence. I ER 58; Amended Presentence Inv. Report at 5.

[INSERT NAME], a professional falconer, planned to use the birds in his pest bird abatement business. He had received accolades for his business from various clients from schools to refineries. II ER 21-22, 28.

Of the twelve eggs that [INSERT NAME] brought into the United States, three hatched and produced Eagle Owls which were later confiscated by Agents of the United States Fish & Wildlife Service. I ER 5; Amended Presentence Prob. Rep. at 5. It was surprising that [INSERT NAME] was able to get any of his eggs to hatch. I ER 58.

The parties stipulated that the value of an adult Eagle Owl in the United States at the time of sentencing was \$2,500. I ER 3. An egg in the U.S. would be valued at one-tenth the value of an adult bird or \$200 to \$250. I ER 65.

SUMMARY OF ARGUMENT

Appellant smuggled twelve Eurasian Eagle Owl eggs into the United States. His intention was to use the birds of prey in his bird abatement business where he would fly birds of prey to rid businesses of pest birds. Of the twelve eggs, three produced live birds. The “loss” occasioned by crimes involving the smuggling of wildlife is the “fair market retail price” of the wildlife. Advisory Guideline Section 2Q2.1(b)(3)(A). The eggs had no market value apart from their potential in creating live birds. In other words, the eggs represented only a probability of producing a live bird.

The court measured the fair market retail value based upon the number of live birds one would expect to acquire from the twelve eggs under ideal conditions multiplied by the value of those birds in the United States. This formula employed by the

court using hypothetical values based upon ideal conditions had no relationship to appellant's crime. Appellant's crime was smuggling eggs, not birds. The crime of smuggling is not a continuing crime, and the crime was complete upon appellant's entry in the United States. The market value of the eggs was readily ascertainable at the point of entry into the United States.

Additionally, the court's analysis of market value assumed that appellant should be charged with the hatch rate under hypothetical ideal conditions because his conduct was responsible for the reduced hatch rate. However, the record does not bear out the court's assumption that appellant's conduct reduced the hatch rate. In fact, the Austrian breeder from whom appellant acquired the eggs had a hatch rate no better than that achieved by the appellant. Further, there was no evidence that appellant expected more birds to hatch and survive than the three he actually got. Nonetheless, the court valued eggs that did not hatch the same as eggs that did hatch, even though the eggs that did not hatch were of no value to the appellant or anyone else and should not have been counted as part of the loss.

Further, in applying the hypothetical hatch rate the court forgot to factor in the fertility rate incorrectly assuming all twelve eggs were fertile and could produce birds when in fact only six eggs were fertile. This error resulted in a several thousand-dollar overage in the valuation of the eggs.

Lastly, the court assumed that the hatched and unhatched eggs should all be valued at the price of an adult bird for sale in the United States. The court made this

assumption because appellant hoped to obtain birds for his business in the United States. However, appellant's intended use of the birds for a commercial purpose was already the subject of a specific offense characteristic enhancement and the court should not have used this purpose again to enhance the market value of the eggs from egg value to bird value.

ARGUMENT

I.

THE DISTRICT COURT SHOULD HAVE USED THE FAIR MARKET RETAIL VALUE OF THE EGGS AS THE MARKET VALUE RATHER THAN A VALUE BASED UPON HATCHED AND UNHATCHED BIRDS USING A SPECULATIVE PROBABILITY ANALYSIS UNRELATED TO THE FACTS OF THE CASE.

Appellant's position in the district court was that the court should use the number of eggs multiplied by the value of each of the twelve eggs brought into the United States as the "market value" of the eggs. I ER 4-5, 125. The government's position was that the court should use the value of an adult bird multiplied by the number of eggs as the market value. I ER 112. At the sentencing hearing, the district court determined egg value by multiplying the number of eggs by the hatch rate under ideal conditions by the price of an adult bird in the United States ($12 \times [.6 \text{ or } .7] \times \$2,500$) to come up with values of \$18,000 or \$21,000 for the eggs. I ER 139.

One need only look at the value that appellant actually obtained from his smuggling, three birds worth \$7,500 minus the cost of raising them, to see how inflated the values obtained by the court were in this case. The eggs that did not hatch had no value. The court in calculating market value used a formula with incorrect multipliers and variables which grossly inflated the market value of the eggs.

A. *The Standard of Review is De Novo.*

The court of appeals reviews de novo whether the district court applied an improper measure of value in calculating “loss” under the guidelines. *See, e.g., United States v. Kelly*, 993 F.2d 702, 704 (9th Cir.1993).

B. *The Market Value of Smuggled Wildlife is the Fair Market Retail Price.*

Appellant pled guilty to a violation of 18 U.S.C. § 545, which provides in pertinent part: “Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law . . . shall be fined under this title or imprisoned not more than 20 years, or both.” Federal wildlife and wildlife-related crimes committed by an individual, Class A misdemeanors or felonies, including smuggling violations involving wildlife (18 U.S.C. § 545), have a base offense level of 6, pursuant to U.S.S.G. Section 2Q2.1 (Offenses Involving Fish, Wildlife, Plants).² Webb, *Prosecuting Wildlife*

². U.S.S.G. § 2Q2.1 provides in pertinent part:

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by 2 levels.

(2) If the offense (A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants increase by 2 levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount. . . .”

Traffickers: Important Cases, Many Tools, Good Results, 2 Res Communes: Vt's. J. Env't 2, 26. Section 2Q2.1(b)(3)(A) provides that “[i]f the *market value* of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud). [*Italics added.*]

Application Note 4 to section 2Q2.1 provides: “When information is reasonably available, “market value” under subsection (b)(3)(A) 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 or the acquisition and preservation (e.g., taxidermy) cost.” “[T]he language of Application Note 4 is authoritative and constitutes a binding interpretation of the meaning of “market value” within § 2Q2.1(b)(3)(A).”

United States v. Eyoum, 84 F.3d 1004, 1007 (7th Cir. 1996).

C. *The Fair Market Retail Price Was Easily Ascertained By Reference to the Established Market Value of the Eggs.*

The fair market value of the eggs was easily ascertainable because the parties stipulated to the value of a bird (\$2,500), and reliable expert testimony established that an egg was worth 10 percent the value of a bird. 1 ER 61. The estimate the expert gave for the cost of an egg was \$200 to \$250. 1 ER 64-65. The expert’s estimate of the price per egg seemed high in relationship to egg prices quoted in Canada which were at

most about 6 percent the value of a bird (i.e., \$5 to \$25 an egg for a \$400 bird). I ER 61.³ Nonetheless, using the expert's valuation the market value of twelve eggs would be \$2,400 to \$3,000.

In *United States v. Oehlenschlager*, 76 F.3d 227 (8th Cir.1996), the defendant was convicted of illegally importing bird eggs. There was no ascertainable market from which to determine a market value for the eggs, so the district court calculated the market value by multiplying the number of eggs by the price per bird on a price list prepared by the defendant. The Eighth Circuit upheld the District Court finding the valuation was reasonable in the absence of any reliable information on egg price. *Id.* at 230. In contrast to *Oehlenschlager*, there was reliable evidence on the market price of the eggs and no reliable evidence that the market price for the eggs was equal to that of live birds. *Ibid.* Accordingly, the court should have used egg price for the market value.

³. The government's expert never made a determination of egg value. I ER 29, 35.

D. *The Market Value Enhancement for the Price of Adult Eagle Owls Did Not Have a Sufficient Nexus to the Offense of Smuggling Eggs.*

Specific offense characteristic enhancements, such as the market value enhancement in this case, must have a “nexus” with the offense. The Eighth Circuit has applied “the ‘relevant conduct’ concept when considering the nexus between the offense of conviction and an enhancement based on a specific offense characteristic.” *United States v. Plumley* 207 F.3d 1086, 1091 (8th Cir. 2000) “Relevant conduct includes ‘all acts or omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.’ U.S.S.G. § 1B1.3(a)(1).” *Ibid.*

Appellant’s offense was smuggling eggs and not birds. This Court has held that ordinarily “[a] crime is complete when each element of the crime has occurred.” *United States v. Smith*, 740 F.2d 734, 736 (9th Cir.1984); *see also United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007). In this case, the crime of smuggling was complete when the eggs arrived in the United States. *See United States v. Lemper*, 319 F.Supp. 249, 251 [crime of smuggling marijuana complete when the package arrived ashore]. The hatching of the birds did not occur in preparation for or during the act of smuggling the eggs. After the act of smuggling occurred, appellant expended his own time, effort, and money to incubate the eggs and care for the birds until they reached adulthood. Those activities

after the crime was complete cannot be used to enhance his sentence under a specific offense characteristic enhancement.

E. *The District Court's "Expected Value" Calculation of Fair Market Retail Value Is Flawed .*

The District Court used what is known as an “expected value” formula to calculate the value of the eggs. The formula she used was (hatch rate under ideal conditions) x (number of eggs) x (value of an adult bird). I ER 91, 138-139. The court’s rationale for using a hatch rate under ideal conditions was that the appellant should not get “any benefit because some of them may have not hatched because of how he cared for them in bringing them in.” I ER 36. The “hatch rate” she used was that achieved by the defense expert in hatching Saker falcons under ideal conditions of natural incubation by the parent birds followed by artificial incubation. I ER 60, 74, 139.⁴ The court thought that United States values rather than Austrian values should be used because the eggs were brought into the United States for the purpose of hatching birds. I ER 138. From this, the court extrapolated that it would use United States values for the birds that did not hatch but might have hatched under ideal conditions. I ER 91. The problem with the court’s analysis is that the ideal conditions hatch rate used by the court had no relationship to the facts of the case.

⁴. The defense expert testified that he had never raised Eagle Owls, but guessed that the fertility and hatch rates would be similar. I ER 64-65, 74-75.

In using United States values for the birds, the court should have calculated the probabilities based upon the probability of a bird hatching in the United States under the actual rather than ideal conditions. The retail market price a willing seller and a willing buyer would pay for the eggs would be dependent upon the number of eggs expected to hatch in the United States. *See United States v. Heuer*, 749 F.Supp. 1541, 1543 [market value of wildlife is retail price in the ordinary course of business]. The defendant certainly did not expect the number of birds to hatch as would have hatched under ideal conditions because his conditions were far from ideal. A willing buyer would not have paid more money for the eggs in Austria than he would have expected to obtain from the eggs once they hatched in the United States, but the court's calculation assumed that this would be the case.

Under the guidelines, “[l]oss does not include the interest that could have been earned had the funds not been stolen.” USSG, § 2B1.1, 18 U.S.C.A; Historical Notes for 2001 Amendments. If the eggs had been left in Austria rather than taken to the United States, then it is possible some of the eggs would have hatched and the Austrian breeder could have sold them cheaply. However, the possibility that more birds might have hatched if the eggs had not been stolen should not be factored into the determination of value. And even if the court could assess some value for eggs that might have hatched in Austria, the appellant certainly should not be charged \$2,500 for an unhatched egg that might have garnered \$150 if it had hatched in Austria.

Additionally, the hatch rate also would have been lower than that used by the district court because the conditions under which the eggs were transported were not ideal. The defense expert testified that he was surprised the defendant got any eggs to hatch at all. I ER 58. The defendant could not bring eggs to the United States under ideal conditions. He could not put an incubator on a plane. If appellant had not taken the eggs, the eggs that would have remained at the breeder's farm in Austria and would have had no greater likelihood of survival than the conditions on the farm allowed. The breeder was "downsizing" his Eagle Owl business because the birds were not selling and had ceased using artificial incubation to increase the hatch rate. As a result, the fertility rate was down to 50 percent as opposed to 70 or 80 percent under ideal conditions. II ER 45; Amended Presentence Investigation Report at 7.⁵ If appellant had not taken any eggs from the Austrian farmer, about 25 percent would have hatched with a value of \$150 or less. II ER 48, 68, 71-72. Appellant's hatch rate was also 25 percent, three out of twelve.

Additionally, in its calculations, the District Court forgot to factor in the probability that an egg is fertile, taking instead the probability that a fertile egg will hatch. In other words, the court implicitly assumed a 100 percent probability that the eggs were

⁵. The breeder, [INSERT NAME], told Austrian authorities that he was downsizing his Eagle Owl breeding operation and had "stopped breeding the Eagle Owl eggs in the incubator. [INSERT NAME] allowed the eggs to remain in the nests of the Eagle Owls under the natural care of the Eagle Owls. [INSERT NAME] further explained that by using this natural process, a 50% natural selection takes place." (Amended Presentence Investigation Report, p. 7.)

fertile.⁶ This assumption finds no support in the record. The defense expert indicated that his average fertility rate for Saker falcons under ideal conditions was 70 or 80 percent fertility rate if the eggs were raised by the parents and then subsequently kept in incubators under ideal conditions of heat and humidity. I ER 74. This was far better than the actual fertility rate of the eggs that appellant acquired which was 50 percent. II ER 48, 71-72.⁷

If the court had factored in the fertility rate into the “expected value” of the eggs, the formula the court would have used would have been as follows:

$EV = N \times Ph \times Vc$, where

x is a multiplication sign,

EV is the expected value of the eggs,

Ph is the probability that an egg will hatch, and

Vc is the value of a newly-hatched chick.

This formula is similar to the famous "negligence formula" developed by Judge Learned Hand (*United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947) referenced in Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little Brown, 1986).⁸

⁶. The fact that the District Court failed to factor in the fertility rate is evident in the court’s calculation. The court took 12 birds times \$2,500 a bird times the hatch rate (.6 or .7) (12 x 2,500 x .6 or .7) to get values of \$18,000 and \$21,000, respectively. I ER 139.

⁷. The number of fertile eggs appellant actually had was the subject of dispute. He gave varying estimates in his emails, but the detailed daily records he kept indicated that six of the twelve eggs, or fifty percent, were fertile. I ER 58.

⁸. For more on expected values, see any introductory textbook on statistics and probability. *See, e.g.*, Mendenhall, William and Richard L. Scheaffer, *Mathematical*

Focusing on P_h , the probability that an egg will hatch, this value is itself a function of two other probabilities that will be called P_f and P_{fh} . P_f is the probability that a given egg is fertile. P_{fh} is the probability that a fertile egg will hatch and yield a live chick. By a well-known principle in probability theory, P_h is the product of P_f and P_{fh} . That is, $P_h = P_f \times P_{fh}$.

Looking at the actual probabilities in this case, the fertility rate was 50 percent. The hatch rate the Austrian seller was achieving was also 50 percent. II ER 48, 71-72. Appellant's hatch rate would have been even lower because the eggs had no natural incubation from the parents. I ER 59. Assuming a range of 20 to 40 percent for P_{fh} , the probability that a fertile egg would hatch, the lower and upper bound probability that a given egg with a 50 percent chance of fertility will hatch is 0.5 (the fertility rate) times 0.4 (the estimated maximum probability of a fertile egg hatching under below optimum conditions) or 0.2. The lower bound is 0.5 times 0.2 or 0.1. The upper-bound value, based on the above estimates, would be:

$$12 \times .2 \times \$2,500 = \$6,000.$$

The lower-bound value, based on the above estimates, would be:

$$12 \times .1 \times \$2,500 = \$3,000.$$

Statistics with Applications at 85 (North Scituate, Massachusetts: Duxbury Press, 1973).

A simple split-the-difference approach, taking the average of the lower and upper bound would yield, therefore, an overall value of \$4,500. This is the bottom line of the approach the court attempted to apply in this case.

F. *The Court's Probability Analysis Was Unnecessary Because the Actual Outcome Was Known.*

The reason for conducting an “expected value” analysis is to determine value when the actual outcome is unknown. In this case, however, the actual outcomes are known and there is no reason to speculate about how many birds appellant might have acquired from the eggs that did not hatch.

The eggs had no value apart from their potential in creating live birds. In other words, the eggs only represented a probability of a live bird, and the probability was zero for eggs that did not produce birds. If, for the sake of argument, the court could use bird value rather than egg value in determining market value, then the relevant time period for determining market value was after the eggs had hatched instead of when the eggs arrived in the United States. After the eggs had hatched, the value was that of the birds that had hatched and not birds and unhatched eggs. The court could not assign values to both birds and unhatched eggs as the unhatched eggs had no market value because they no longer represented a probability of producing a bird.

However, use of the actual outcome rather than egg value again has the potential for unfair results. Imagine that the appellant had figured out a way to raise the probability that an egg would hatch and yield a live bird and that a high number of live

birds resulted. If that were the case, then using an expected value formula or the value of the birds that had hatched would yield a high number for the value of the eggs. In essence, the appellant would be charged with a higher value simply because he was good at incubating birds, not because he smuggled them. Indeed, appellant showed such a proficiency here where the odds were he would hatch at most two birds but he ended up hatching three.

G. *Conclusion*

The defendant imported eggs, not birds. He had no intent to sell the birds he would derive from the eggs, and there was no guaranty that any birds would come of his smuggling activity. The crime of smuggling was complete when appellant landed on American soil with the eggs. The value of the eggs in his possession at that point was \$2,400 to \$3,000. Under the guidelines, he could not be charged with the increased value after he undertook to incubate the eggs because this activity occurred after the crime was completed.

Additionally, the court's expected value formula was flawed and the variables used in the formula had no relationship to the facts. A correct application of the formula with the correct variables yielded an expected value of \$4,500. Using the correct market value, the specific offense characteristic adjustment for market value would yield a 1-level increase rather than the 4-level increase used by the court U.S.S.G. § 2Q2.1, and appellant's adjusted offense level would be 13 yielding a range of 12-18 months for the sentence instead of the 21-27 month range the court used in sentencing. U.S.S.G.

Sentencing Table, ch. 5, pt. A. If the relevant time period for valuation is after the birds hatched because appellant intended to use the birds in his business, then there would be a two-level market value enhancement based upon the \$7,500 value of three birds instead of a four-level enhancement. *Ibid.* Accordingly, this court should reverse the judgment and remand the case for resentencing.

II.

THE ENHANCEMENTS IMPOSED FOR THE MARKET VALUE OF THE UNHATCHED BIRDS AND THE BUSINESS USE OF THE HATCHED BIRDS CONSTITUTED IMPERMISSIBLE DOUBLE COUNTING.

The District Court's rationale for using the bird value instead of the egg value as the market value was that the eggs were "brought in for the purpose of hatching the eggs and producing birds." 1 ER 138. However, the court also found that appellant "did intend to use these owls for purpose [sic] in his business" (1 ER 137), and increased appellant's offense level by two points because it involved a commercial purpose under U.S.S.G. 2Q2.1(b)(1)(A). Amended Presentence Investigation Report, p. 9; 1 ER 136, 141.

Appellant contends that the court's use of appellant's intended purpose for the birds to impose two enhancements, one for market value and the other for commercial purpose, constituted impermissible double counting. This court reviews de novo challenges to the interpretation and application of the Sentencing Guidelines. See *United States v. Smith* 196 F.3d 1034, 1036 (9th Cir. 1999).

"Double counting is permissible if it accounts for more than one type of harm caused by the defendant's conduct or where each enhancement of the defendant's sentence serves a unique purpose under the guidelines." *United States v. Parker*, 136 F.3d 653, 654 (9th Cir. 1998), cert. denied, 525 U.S. 942, 119 S.Ct. 363, 142 L.Ed.2d 300 (1998). Here, the court's use of bird value for the market value and commercial purpose

enhancements served the same purpose, to deter future efforts by the appellant to acquire birds for business purposes. The harm addressed was also the same because it ultimately concerned appellant's intended use for the eggs.

The harm would have been different if the court had used egg value instead of bird value as the market value because then the quantity of eggs imported would have been at issue rather than the reason behind the importation of the eggs. However, in using the value of unborn birds to establish the market value, the court assumed that appellant's intent to have more birds hatch for use in his business was of greater importance than the actual quantity of birds he acquired from his activities. In other words, the court valued an unhatched egg at the price of a live bird because appellant intended to use the bird if it had hatched for a business purpose. Thus, the purpose for the use of the eggs dictated the market value of the eggs instead of the quantity and price of the eggs themselves.

In *United States v. Asper*, 753 F.Supp. 1289, 1291 (M.D. Pa.1990), a case involving various wildlife offenses, the Government contended that the sentencing guidelines did not take into account income derived from the illegally imported wildlife and that this could be used as grounds for a departure from the guidelines. The District Court rejected the Government's argument, opining that "we are of the view that the enhancements for commercial purpose and market value adequately address this concern." *Id.* at 1291.

Likewise, in this case, the enhancement for commercial purpose should have adequately addressed the court's concern that appellant intended to use the birds for

a commercial purpose. Accordingly, the court should reverse the judgment and remand the matter for resentencing.

CONCLUSION

Using any of the three possible alternatives for sentencing in this case, egg value, expected value using actual conditions, or the actual outcome, the sentence range would be 12-18 months. If the court had used the market value of the eggs, there would have been a one-level market value enhancement with an adjusted offense level of 13 and a sentence range of 12-18 months. If the court had used expected value of the eggs using hatch rates, there would have been a one-level adjustment for market value, no adjustment for commercial purpose because of double counting, an adjusted offense level of 11, and a sentence range of 12-18 months. If the actual values of the hatchlings had been used, there would have been a two-level enhancement for market value, no commercial purpose enhancement, an adjusted offense level of 12, and a sentence range of 12-18 months. The judgment should be reversed and this matter remanded for resentencing.

DATED: November 7, 2007

Respectfully submitted,

[INSERT NAME]
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7), I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 5,919 words in the brief.

Dated: _____ . _____
[name of attorney]

STATEMENT OF RELATED CASES

Counsel for appellant is aware of no other cases pending in this Court which relate to this action.