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# THE JOURNAL OF ENVIRONMENTAL AND SUSTAINABILITY LAW

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## Where the Wild Things Are...Properly Valued: A Look into Methods Used by Courts to Assign Monetary Value to Wildlife

*KatieLee Kitchen*

# WHERE THE WILD THINGS ARE...PROPERLY VALUED: A LOOK INTO METHODS USED BY COURTS TO ASSIGN MONETARY VALUE TO WILDLIFE

*United States v. Bertucci, 794 F.3d 925 (8th Cir. 2015).*

## I. INTRODUCTION

Section 2Q2.1 of the United States Sentencing Guidelines, guides courts in sentencing when the offense involves wildlife.<sup>1</sup> In recent years, courts have interpreted and applied § 2Q2.1 inconsistently in the assignment of monetary value to wildlife for sentencing. Different methods of valuing wildlife have included: strict application of valuation tables created by the United States Fish and Wildlife Service,<sup>2</sup> use of the offender's intended profit from the illegal sale of the wildlife,<sup>3</sup> use of testimony from experts in wildlife rehabilitation,<sup>4</sup> and use of taxidermist estimations of the costs of acquisition, scientific value and rarity of the wildlife involved.<sup>5</sup>

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<sup>1</sup> U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 (2015).

<sup>2</sup> See *U.S. v. Bertucci*, 794 F.3d 925 (8th Cir. 2015).

<sup>3</sup> See *U.S. v. Oehlenschlager*, 76 F.3d 227 (8th Cir. 1996).

<sup>4</sup> See *Bertucci*, 794 F.3d at 925 (8th Cir. 2015).

<sup>5</sup> See *U.S. v. Asper*, 753 F. Supp. 1260 (M.D. Pa. 1990).

This note will focus on the implications of the recent *Bertucci* decision and whether this decision is reflective of the protection and preservation of the Midwest's environment. The issues in *Bertucci* raise interesting questions as to how the country currently values, and how it should value, its wildlife.

## II. FACTS AND HOLDING

In 2014, Lamar Bertucci plead guilty to the shooting and killing of a bald eagle and a rough-legged hawk in violation of 16 U.S.C. §§ 668(a),<sup>6</sup> 707,<sup>7</sup> and 707.<sup>8</sup> After Bertucci plead guilty, the district court ordered the

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<sup>6</sup> 16 U.S.C. §668(a) (2012):

(a) Prohibited acts; criminal penalties:

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than \$10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not to exceed \$2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or

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transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle. *Id.*

<sup>7</sup> § 703(a):

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976. . . *Id.*

<sup>8</sup> § 707:

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall knowingly--

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

preparation of a presentence investigation report (“PSR”).<sup>9</sup> The PSR found that Bertucci had a criminal history score of two and that his total offense level was ten.<sup>10</sup> The PSR incorporated a four-level enhancement on the basis that the total “loss” amounts for the eagle and hawk exceeded \$10,000, but did not exceed \$30,000.<sup>11</sup> The PSR also included a two-level enhancement for a “pattern of similar violations” because of Bertucci’s previous conviction for possession of bald eagle feathers, in violations of § 668(a).<sup>12</sup> The PSR also included several paragraphs focusing on alleged

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(c) Whoever violates section 704(b)(2) of this title shall be fined under Title 18, imprisoned not more than 1 year, or both.

(d) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior. *Id.* *Bertucci*, 794 F.3d at 926.

<sup>9</sup> *Bertucci*, 794 F.3d at 926.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 926-27.

<sup>12</sup> *Id.* at 927 (citing 16 U.S.C.S. § 668 (2015)); 16 U.S.C.S. § 668:

(a) Prohibited acts; criminal penalties. Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as hereinafter provided, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or

previous assaults committed by Bertucci.<sup>13</sup> Bertucci objected to both sentence level enhancements and to the allegations of assault.<sup>14</sup> The district court denied the objections and sentenced Bertucci to eight months' imprisonment with one year of supervised release along with a \$6,500 "financial obligation,"<sup>15</sup> and mandatory anger-management counseling.<sup>16</sup> The Defendant argued on appeal that the court committed

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import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this Act [16 USCS §§ 668-668d], shall be fined not more than \$ 5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after the date of the enactment of this proviso [Oct. 23, 1972], such person shall be fined not more than \$ 10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not exceed \$ 2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this Act [16 USCS §§ 668-668d] of the provisions relating to preservation of the golden eagle. *Id.*

<sup>13</sup> *Bertucci*, 794 F.3d at 927.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 926 (unclear if district court meant for the "financial obligation" to be restitution or fine).

<sup>16</sup> *Id.* at 932-33. The court ultimately decided that the district court abused its discretion by requiring anger-management counseling. *Id.*

multiple procedural errors with respect to its application of the Sentencing Guidelines, in that the sentence level was, in part, based on an incorrect monetary valuation of the birds.<sup>17</sup> Bertucci also argued that court lacked the authority to order restitution and that the court had insufficient factual basis to require anger-management counseling.<sup>18</sup>

Bertucci's sentence level, in accordance with Sentencing Guidelines §§ 2Q2.1 (b) (3) (A) (ii),<sup>19</sup> and 2B1.1 (b) (1) (C),<sup>20</sup> was based on replacement costs<sup>21</sup> of \$10,000 and \$1,750 for the eagle and hawk,

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<sup>17</sup> *Id.* at 927.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 (2015).

Offenses Involving Fish, Wildlife, and Plants:

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.

*Id.*

<sup>20</sup> § 2B1.1.

<sup>21</sup> § 2Q2.1:

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. Market value, however, shall not be based on measurement of aesthetic loss (so called "contingent valuation" methods). *Id.* (emphasis added).



respectively.<sup>22</sup> Bertucci argued that the district court erred by adopting “a flawed valuation process” to value the eagle and hawk.<sup>23</sup> Bertucci, in support of his argument, noted, “that both the government *and* the district court had adopted a mere \$2,000 valuation for bald eagles in the 2009 prosecutions of both him and his brother.”<sup>24</sup> Instead of relying on a valuation table prepared by the United States Fish and Wildlife Service,<sup>25</sup> which was previously applied by this court in the 2009 prosecution of Bertucci, the court relied on valuations from an affidavit of Edward Clark Jr., President of the Wildlife Center of Virginia.<sup>26</sup> Clark’s valuations were significantly higher than the valuations that the court had previously adopted.<sup>27</sup> The district court imposed a “financial obligation” of \$5,000 for the eagle in addition to \$1,500 for the hawk, which was consistent with Clark’s valuations.<sup>28</sup>

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<sup>22</sup> *Bertucci*, 794 F.3d at 927.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* See U.S. v. Bertucci, No. 8:09CR84, 2009 U.S. Dist. LEXIS 119230 (D. Neb. Nov. 25, 2009).

<sup>25</sup> In Re: Forfeiture of Collateral Schedule—United States Fish and Wildlife Service, General Order No. 96-13 (E. Tex. June 19, 1996).

<sup>26</sup> *Bertucci*, 794 F.3d at 928.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 927.

On Appeal, the court vacated the district court’s sentence and remanded the case for further proceedings consistent with its opinion, finding that Clark’s valuations did “not constitute reliable evidence to justify the new and dramatically increased eagle and hawk valuations proffered.”<sup>29</sup> Citing the Guidelines, the appellate court reasoned that when deciding wildlife valuations for sentencing, where fair-market price is difficult to ascertain, the court must only consider reliable information that is consistent with previous valuations or reliable information that justifies new valuations.<sup>30</sup> In determining the reliability of Clark’s valuations, the court critically viewed Clark’s consideration of policy issues<sup>31</sup> and the fact that much of the information contained in Clark’s analysis was derived from conversations with third parties, some of which occurred decades ago, making it impossible to discern the reliability of the information.<sup>32</sup>

### III. LEGAL BACKGROUND

The United States Sentencing Commission (the “Commission”) is an independent agency in the judicial branch that exists to establish

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<sup>29</sup> *Id.* at 929, 932.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 929.

<sup>32</sup> *Id.*

sentencing policies and practices for the federal criminal justice system to ensure ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.<sup>33</sup> The Sentencing Reform Act of 1984 (the “Act”) delegates broad authority to the Commission to review and set standards for the federal sentencing process.<sup>34</sup> The Act contains “detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics.”<sup>35</sup> The Commission prescribes guideline ranges specifying appropriate sentences for each class of convicted persons which are determined by coordinating the offense behavior categories with offender characteristic categories.<sup>36</sup> Offense behavior categories typically describe details of the crime committed, whereas offender characteristic categories typically include details specific to the offender.<sup>37</sup> For example, an offense behavior category may state “bank robbery/committed with a gun/\$2500 taken,” and an offender characteristic category may state, “offender with

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<sup>33</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1) (2015).

<sup>34</sup> *Id.* at pt. A(1)(2).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

one prior conviction not resulting in imprisonment.”<sup>38</sup> The nature of what is included in these categories can result in statutory sentence enhancements or adjustments.<sup>39</sup> In regards to crimes involving wildlife, there are sentence enhancements, for example, based on the value of the wildlife involved in the offense and the offender’s criminal history.<sup>40</sup> The sentencing court must select a sentence from within the prescribed guideline range.<sup>41</sup> However, if a particular case presents atypical features, the court is allowed to depart from the Guidelines’ prescribed sentence range, so long as the court specifies in writing its reasoning.<sup>42</sup>

The Sentencing Guidelines went into effect November 1, 1987.<sup>43</sup> Shortly after the implementation of the Guidelines, defendants began challenging the constitutionality of the Guidelines on the bases of improper legislative delegation and violation of the separation of powers doctrine.<sup>44</sup> In *Mistretta v. United States*,<sup>45</sup> the Supreme Court rejected

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* See In Re: Forfeiture of Collateral Schedule—United States Fish and Wildlife Service, General Order No. 96-13 (E. Tex. June 19, 1996).

<sup>41</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1) (2015).

<sup>42</sup> *Id.*

<sup>43</sup> Office of Legislative and Public Affairs, *An Overview of the United States Sentencing Commission 2*, [http://isb.ussc.gov/files/USSC\\_Overview.pdf](http://isb.ussc.gov/files/USSC_Overview.pdf) (last visited Nov. 29, 2015).

<sup>44</sup> *Mistretta*, 488 U.S. at 361.

these challenges.<sup>46</sup> The Court upheld the constitutionality of the Commission as a judicial branch agency,<sup>47</sup> finding that Congress did not delegate excessive legislative power or upset the constitutionally-mandated balance of powers among the coordinate branches of government.<sup>48</sup> Since their implementation in 1989, federal judges have sentenced more than a million defendants using the Guidelines.<sup>49</sup>

According to the Sentencing Guidelines, the base offense level for offenses involving fish, wildlife, or plants is six.<sup>50</sup> In the *Bertucci* case, the presentence investigation report (“PSR”) concluded that Bertucci had a criminal history score of two and incorporated a four-level enhancement under the Sentencing Guidelines because the “total ‘loss’ amounts for the eagle and hawk exceeded \$10,000 but did not exceed \$30,000.”<sup>51</sup> The PSR also incorporated a two-level enhancement for Bertucci’s pattern of similar violations because of his 2009 conviction<sup>52</sup> for possession of bald

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<sup>45</sup> *Mistretta v. U.S.*, 488 U.S. 361 (1989).

<sup>46</sup> Office of Legislative and Public Affairs, *supra* note 43, at 2; *Mistretta*, 488 U.S. at 361.

<sup>47</sup> *Mistretta*, 488 U.S. at 361.

<sup>48</sup> *Id.*

<sup>49</sup> Office of Legislative and Public Affairs, *supra* note 43, at 2.

<sup>50</sup> U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 (2015).

<sup>51</sup> *U.S. v. Bertucci*, 794 F.3d 925, 926 (8th Cir. 2015).

<sup>52</sup> *Id.* See *U.S. v. Bertucci*, No. 8:09CR84, 2009 U.S. Dist. LEXIS 119230 (D. Neb. Nov. 25, 2009).

eagle feathers.<sup>53</sup> With the statutory enhancements based on his criminal history and the value of the “total loss” resulting from his offense, Bertucci’s total offense level was ten.<sup>54</sup> The enhancements are important in this case because if the court had used the \$2,000 valuation for the harmed wildlife that the state and the district court had used in Bertucci’s previous 2009 prosecution,<sup>55</sup> his offense sentence level, and thus, his ultimate sentence would have been less.<sup>56</sup>

In regards to the “market value” of wildlife, the Sentencing Guidelines are clear that “when information is reasonably available, ‘market value’ . . . shall be based on the fair-market retail price.”<sup>57</sup> 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.<sup>58</sup> *Bertucci* is centered around the question of what counts as reliable information for a reasonable estimate.<sup>59</sup>

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<sup>53</sup> *Bertucci*, 794 F.3d at 927.

<sup>54</sup> *Id.* at 926.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 928.

<sup>57</sup> *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 cmt. n. 4 (2015)).

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.*

In *United States v. Oehlenschlager*,<sup>60</sup> the Eighth Circuit Court of Appeals, similar to the *Bertucci* case, was tasked with determining a “fair-market retail price” of wildlife.<sup>61</sup> The defendant, Oehlenschlager, plead guilty to illegally importing wildlife and aiding and abetting the illegal importation of wildlife in foreign commerce.<sup>62</sup> In *Oehlenschlager*, the defendant illegally imported “36 White-Winged Scoter eggs, 100 American Goldeneye eggs, 13 Red-breasted Merganser eggs, 50 Common Merganser eggs, and 1 Sandhill Crane.”<sup>63</sup> The government argued the value of the eggs was established by the value of the adult version of the respective species.<sup>64</sup> For these values, the government referred to the defendant’s own price list for resale, which valued adult ducks at over \$50,000.”<sup>65</sup> Giving the eggs the adult value would have enhanced the offense level by five points according to the Guidelines.<sup>66</sup> The defendant argued that this method of valuation would be unfair due to high egg

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<sup>60</sup> U.S. v. Oehlenschlager, 76 F.3d 227 (8th Cir. 1996).

<sup>61</sup> *Id.* at 229.

<sup>62</sup> *Id.* at 228.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 229.

<sup>65</sup> *Id.* at 230.

<sup>66</sup> *Id.* at 229 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(F) (2015)).

mortality rates.<sup>67</sup> The court was not persuaded by this argument.<sup>68</sup> Rather, the court found it reasonable to value illegally imported water bird eggs, for which there was no reasonably available market price, as the value that defendant himself placed on the live birds, i.e. the profits that he intended to realize from his illegal activity.<sup>69</sup> The court utilized the defendant's price list for the wildlife rather than the valuation table prepared by the United States Fish and Wildlife Services used in *Bertucci*.

Additionally, in *United States v. Asper*,<sup>70</sup> Paul Asper was charged under the Endangered Species Act of 1973, Title 16, United States Code, §§ 1531-1543,<sup>71</sup> and Title 18, United States Code, § 545,<sup>72</sup> and 2.<sup>7374</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 230.

<sup>69</sup> *Id.*

<sup>70</sup> *U.S. v. Asper*, 753 F. Supp. 1260 (M.D. Pa. 1990).

<sup>71</sup> 16 U.S.C.S. § 1531 (2015):

(a) Findings. The Congress finds and declares that--

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--
  - (A) migratory bird treaties with Canada and Mexico;



Asper was charged for the unlawful possession of animal body parts under 16 U.S.C. § 1538(c)(1) and 1504(b)(1).<sup>75</sup> Six species of wildlife involving nine animals were the subjects of the charges.<sup>7677</sup> The District Court of

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- (B) the Migratory and Endangered Bird Treaty with Japan;
  - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
  - (D) the International Convention for the Northwest Atlantic Fisheries;
  - (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
  - (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
  - (G) other international agreements; and
- (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage. *Id.*

<sup>72</sup> 18 U.S.C. § 545 (2012) provides in part:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced. . . . Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United states contrary to law. . . [S]hall be fined not more than \$ 10,000 or imprisoned not more than 20 years, or both. *Id.*

<sup>73</sup> 18 U.S.C. § 2 (2012) provides:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. *Id.*

<sup>74</sup> *Asper*, 753 F. Supp. at 1263.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Pennsylvania found that “where market value is difficult to ascertain, a district court may use a reasonable method to measure loss . . . and is not limited to a strict market valuation of loss.”<sup>77</sup> Further, the court found that when determining the market value of wildlife, when there is no legal market for endangered wildlife, the court may consider the appraisal of taxidermists, based on the cost of replacement and acquisition of the wildlife and other data.<sup>79</sup> The court in *Asper*, considered the testimony of a curator at the Carnegie Museum credible in regards to the effect the killings had on the world population of the wildlife.<sup>80</sup> Four witnesses also testified regarding the value of wildlife: an experienced auctioneer, an appraiser, and two taxidermists.<sup>81</sup> The court considered factors such as the cost of acquisition or replacement, profit, scientific value, artistic value, and rarity when determining valuations.<sup>82</sup> Ultimately, the court utilized a

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<sup>77</sup> *Id.* The animals involved, included: Serows, a Jentink’s Duiker, a Black-faced Impala, an African Wild Dog, Gorals, and Huemuls. *Id.*

<sup>78</sup> *Id.* at 1281.

<sup>79</sup> *Id.* at 1281-82.

<sup>80</sup> *Id.* at 1282.

<sup>81</sup> *Id.* at 1270.

<sup>82</sup> *Id.*

valuation based on cost of acquisition, scientific value, and rarity persuasive, adjusting the taxidermist's values as the court saw fit.<sup>83</sup>

In another factually similar case, *United States v. Ross*,<sup>84</sup> the defendant was found guilty on four counts of aiding and abetting in the unlawful taking of various species of hawks under 16 U.S.C. §§ 703<sup>85</sup> and 707(a).<sup>86</sup><sup>87</sup> Sixteen hawk remains were recovered from a garbage dump on

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<sup>83</sup> *Id.* at 1282.

<sup>84</sup> *U.S. v. Ross*, 2012 U.S. Dist. LEXIS 146285 (D.S.D. Oct. 10, 2012).

<sup>85</sup> 16 U.S.C. § 703(a) (2012):

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976. *Id.*

<sup>86</sup> § 707(a):

Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said

the defendant's property in addition to feather fragments at another site on his property.<sup>88</sup> The court reasoned that determining the value of each hawk would be "difficult, if not impossible, because federal law makes it unlawful to sell, barter, purchase, ship, import, export, deliver, or transport hawks," meaning, there is no marketplace, and thus no market value, for them.<sup>89</sup> The court utilized the determinations reached by another court in the district which fixed the value of hawks at \$1,750.<sup>90</sup> The court found "the testimony of Edward Clark, who appeared as an expert witness in another Migratory Bird Treaty Act case, is also instructive. In that case, the presiding District Judge found Mr. Clark's valuation opinions to be both credible and reliable."<sup>91</sup> The *Ross* court agreed with the other judge's findings and adopted Clark's valuations.<sup>92</sup> Ultimately, the court ordered

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conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.

*Id.*

<sup>87</sup> *Ross*, 2012 U.S. Dist. LEXIS 146285, at \*1 (D.S.D. Oct. 10, 2012).

<sup>88</sup> *Id.* at \*13-14.

<sup>89</sup> *Id.* at \*14.

<sup>90</sup> *Id.* at \*14-15.

<sup>91</sup> *Id.* at \*15.

<sup>92</sup> *Id.*

the defendant to pay Clark's valuation of \$1,750 per hawk for a total restitution amount of \$28,000.<sup>93</sup>

#### IV. INSTANT DECISION

In the instant case, the United States Court of Appeals for the Eighth Circuit found the trial court erred in applying § 2Q2.1,<sup>94</sup> finding that Clark's valuations from the affidavit did not constitute sufficiently reliable evidence to justify the new and increased eagle and hawk valuations.<sup>95</sup> Finding the defendant's argument persuasive, the court noted that "the District of Nebraska (the district court in this case) has specifically adopted the Valuation Table<sup>96</sup> to establish the replacement

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<sup>93</sup> *Id.* at \*16.

<sup>94</sup> Critically, with respect to the "market value" of the wildlife, Application Note 4 to § 2Q2.1 clarifies that:

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 or the acquisition and preservation (e.g., taxidermy) cost.

(Emphasis added.) Thus, even assuming there was no "reasonably available" information to determine the "fair-market retail price" of the bald eagle and rough-legged hawk (which the district court implicitly found), substitute estimates must nevertheless be "reasonable" and based on "reliable information." With this procedural safeguard in mind, we now analyze the reliability of the valuation-related evidence in the record before us.

U.S. v. Bertucci, 794 F.3d 925, 928 (8th Cir. 2015).

<sup>95</sup> *Id.* at 929.

<sup>96</sup> In Re: Forfeiture of Collateral Schedule—United States Fish and Wildlife Service,

values of various types of birds — including eagles and hawks.”<sup>97</sup> The court found the state failed to prove how the value of an eagle quintupled between 2009, when the court used the Valuation Table’s \$2,000 valuation, and 2014, when the government asked the court to use Clark’s valuation of \$10,000.<sup>98</sup> The court further emphasized the testimony of a United States Fish and Wildlife Service special agent who testified that “bald eagles were recently taken off the endangered species list”<sup>99</sup> and that it would be proper to “assume that their populations are growing,” making the point that increased endangered-ness could not be the reasoning behind the increase in value.<sup>100</sup>

Further, the court also found Clark’s affidavit to contain weaknesses which, according to the court, cast doubt on the affidavit’s reliability.<sup>101</sup> For instance, the court noted that the affidavit suggested Clark may have structured his analysis and high valuations to comport with his own beliefs that a bird’s replacement value should be deemed to

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General Order No. 96-13 (E. Tex. June 19, 1996).

<sup>97</sup> *Bertucci*, 794 F.3d at 928.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

exceed the bird's average rehabilitation costs as a legal policy matter.<sup>102</sup> The court noted that although Clark may be correct in his conclusion that ensuring replacement costs exceed average rehabilitation costs constitutes good legal policy, Clark's "proper role in submitting the affidavit was limited to assessing the true valuations of the birds per the Guidelines and not assessing what valuations would make for good policy."<sup>103</sup> The court also noted that Clark's affidavit discussed irrelevant valuations ranging from \$475, the market price valuation of a Kestrel in Great Britain, to \$50,000, the estimated process to propagate and release a California Condor.<sup>104</sup> The court further took issue with the fact that Clark subjectively factored in eagle and hawk "scarcity and roles in the ecosystem" in order to arrive at his final estimated replacement costs.<sup>105</sup>

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<sup>102</sup> *Id.* at 928-29. As Clark averred:

In considering replacement cost within the context of illegal activity, I feel strongly that the ultimate determination of that cost should not inadvertently create an incentive to kill the affected birds rather than to simply displace or injure them. . . . Therefore, even in the absence of a comparable market value or propagation cost upon which to base the replacement value of dead birds, a determination of reasonable restitution payments can be reached by beginning with the average cost to properly care for, rehabilitate and release to the wild an individual bird of the affected species. . . . Then, this cost basis can be adjusted to account for [other] factors. *Id.*

<sup>103</sup> *Id.* at 929. See U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1(b)(3)(A) (2015).

<sup>104</sup> *Bertucci*, 795 F.3d at 929.

<sup>105</sup> *Id.*

The court also found that because much of the information used in Clark’s analyses was derived from decades old, third party conversations which he may not have been present during, it was impossible to discern how Clark learned of the information or its reliability.<sup>106</sup> The court ruled that Clark’s valuations did not constitute sufficiently reliable evidence to justify the increased valuations proffered by the government in this case.<sup>107</sup> Thus, the court remanded the case for resentencing consistent with its opinion.<sup>108</sup>

#### V. COMMENT

According to § 2Q2.1 of the Sentencing Guidelines, “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.”<sup>109</sup> *Bertucci* puts this comment in the Guidelines to the test in the Eighth Circuit. In this case, the government sought out Edward E. Clark Jr., co-founder and president of the Wildlife Center of Virginia, to submit an affidavit on how to properly value the eagle and hawk for

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 932.

<sup>109</sup> U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 cmt. n. 4 (2015)(emphasis added).



sentencing purposes.<sup>110</sup> The Wildlife Center of Virginia is considered one of the world's leading teaching and research hospitals for native wildlife and has treated nearly 60,000 wild animals, representing over 200 species since its founding in 1982.<sup>111</sup> Birds of prey, like those at issue in *Bertucci*, represent about 10-15 percent of the hospital's intake.<sup>112</sup>

Clark has experience in drafting legislation and regulation governing the use of natural resources and the use and possession of wildlife.<sup>113</sup> Over the last 24 years, Clark assisted both state and federal law enforcement in establishing reasonable replacement costs for illegally taken wildlife, including eagles and other birds of prey.<sup>114</sup> His wildlife replacement costs in cases involving crimes in violation of the Migratory Bird Act have been used in Carrolton, Texas; Little Rock, Arkansas; and in Charlottesville, Virginia.<sup>115</sup> He also consulted with nearly a dozen state wildlife agencies along with congressional and legislative staff on a wide

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<sup>110</sup> *Bertucci*, 794 F.3d at 928.

<sup>111</sup> Affidavit of Edward E. Clark Jr., President, Wildlife Center of Virginia (Oct. 29, 2014) (on file with author).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

variety of wildlife and enforcement issues.<sup>116</sup> Clark received national recognition for his work, including: the Chuck Yeager Award from the National Fish and Wildlife Foundation and designation as one of 500 Environmental Achievers by the U.S. committee for the UN Environment Programme.<sup>117</sup> Additionally, in 2007, the Wildlife Center of Virginia was named Conservation Organization of the Year for the United States.<sup>118</sup>

Clark's affidavit outlined the factors he considered when determining a reasonable replacement cost of birds of prey protected under the Migratory Bird Treaty Act: "1) the cost of captive propagation, conditioning and release to the wild of relevant species, 2) the cost of treating, rehabilitating and restoring to health, an individual victim of the type of crime committed (shooting, poisoning, trapping), and 3) the market value of an individual from the affected species, or similar species, where a legal commerce in these birds exists."<sup>119</sup> Clark stated "for the purposes of this affidavit, the replacement value will be the cost to *simply produce or restore an individual bird that can exist as a living,*

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

*functioning, wild creature in its normal habitat.* No effort is made to assign or assess the specific value of that animal's role in the ecosystem.”<sup>120</sup>

The court criticized Clark’s valuations, in part because he included “policy” concerns in his valuation process.<sup>121</sup> Clark’s experience with wildlife legislation, as well as his founding and working for the Wildlife Center, make him a reliable and qualified source, if not more qualified than the court, to determine these valuations. Accordingly, his policy considerations are reliable and should be taken seriously. Clark worked with wildlife in rehabilitating and reintroducing them into their environments; his policy concerns are those the court should consider in valuing wildlife. It is difficult to imagine what harm could come from the court being more inclusive when considering factors to value wildlife.

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<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> U.S. v. Bertucci, 794 F.3d 925, 928-29 (8th Cir. 2015). As Clark averred:

In considering replacement cost within the context of illegal activity, I feel strongly that the ultimate determination of that cost should not inadvertently create an incentive to kill the affected birds rather than to simply displace or injure them. . . .

Therefore, even in the absence of a comparable market value or propagation cost upon which to base the replacement value of dead birds, a determination of reasonable restitution payments can be reached by beginning with the average cost to properly care for, rehabilitate and release to the wild an individual bird of the affected species . . . . Then, this cost basis can be adjusted to account for [other] factors . . . . *Id.*

Clark emphasizes a very important policy concern that should be addressed by the court: putting the replacement value of a dead bird below the value to restore a bird will only encourage defendants to kill the birds after merely injuring one in an effort to avoid harsher punishment.<sup>122</sup> This policy issue is obvious, but important, and, if not already considered by the court when making valuation decisions, it should be. Therefore, the mere fact that Clark discussed policy considerations should not disqualify his suggestions for valuing the wildlife

Other courts in the United States have found Clark's valuation "credible and reliable."<sup>123</sup> In fact, the court in *Ross* relied solely on Clark's valuations.<sup>124</sup> The *Ross* court suggested the entire district had accepted Clark's valuations of hawks.<sup>125</sup> Further, Clark's wildlife valuations have been used in Carrolton, Texas; Little Rock, Arkansas; and in Charlottesville, Virginia.<sup>126</sup> The Eighth Circuit should follow these courts and use Clark's expert wildlife valuations.

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<sup>122</sup> *Id.*

<sup>123</sup> *See* U.S. v. Ross, 2012 U.S. Dist. LEXIS 146285, at \*15 (D.S.D. Oct. 10, 2012).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Affidavit of Edward E. Clark Jr., President, Wildlife Center of Virginia (Oct. 29, 2014) (on file with author).

One of the methods of valuation used by the Eight Circuit, and demonstrated by the *Oehlenschlager* court, is logically flawed. In the *Oehlenschlager* case, rather than relying on the valuation table prepared by the United States Fish and Wildlife Service applied in *Bertucci*,<sup>127</sup> or allowing the valuations to be based on a highly qualified and knowledgeable expert, the Eighth Circuit relied on the defendant's handwritten price list when valuing the illegally imported wildlife.<sup>128</sup> It is counter-intuitive that the court would look to a wildlife offender's projected profit to determine how wildlife should be valued. Offenders, whether buyers or sellers, do not take into consideration the cost to replace an animal in the environment or the costs to rehabilitate an injured animal so that it may be re-introduced into its environment. Offenders do not appreciate the impact that removing an animal will have on the rest of the environment. It seems obvious that Clark is immensely more qualified and capable to determine the true value of wildlife than an offender convicted of a crime against wildlife.

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<sup>127</sup> *Bertucci*, 794 F.3d at 929.

<sup>128</sup> *U.S. v. Oehlenschlager*, 76 F.3d 227, 230 (8th Cir. 1996).

Additionally, the court in *Asper* found that taxidermists were capable of determining the replacement valuations of endangered wildlife based on the cost of acquisition, scientific value, and rarity.<sup>129</sup> After seeing first-hand what it actually costs to replace or rehabilitate wildlife from his work at the Wildlife Foundation, surely, Clark's valuations are more reliable and more inclusive than a taxidermist's. Although, the *Asper* case dealt with valuing endangered species of wildlife, it is difficult to find a legal reason that supports the idea that some wildlife crimes are worse than others just because of the species involved.

I criticize the court in *Bertucci* for not being more inclusive of other factors when it comes to the valuations of the eagle and hawk. Using the wildlife valuation table just for the sake of being consistent underestimates the true value of wildlife. After reviewing the wildlife valuation table created by the Department of the Interior's Fish and Wildlife Service, it is unclear what factors the Department considered when creating the valuations. Seeing that the court in *Bertucci* stands for the proposition that strict application of the valuation table is required, I wonder how long the court will consider this table to be accurate. I wonder

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<sup>129</sup> U.S. v. *Asper*, 753 F. Supp. 1260, 1281 (M.D. Pa. 1990).

what will happen in regards to the valuation table if we see significant inflation or a sudden influx in wildlife related crime. The *Bertucci* decision does not answer these questions. Being consistent just for the sake of being consistent, as the court ruled in *Bertucci*, underestimates wildlife value and in turn harms our country's wildlife.

While the implications of the court's decision to strictly adhere to the Wildlife Foundation's valuation table are not obvious and immediate, there are concerns that offenders, especially repeat offenders like the defendant in *Bertucci*, will continue to harm or take wildlife illegally, while calculating the risks and future punishments involved with the crime. The deterrence goal of punishment will not be achieved because offenders will likely continue to commit crimes against wildlife at a level that will cover their costs if they are caught by law enforcement, evidenced by Mr. Bertucci's pattern of repeated illegal wildlife behavior. The court should have taken a more inclusive stance and considered Clark's exceedingly reliable valuations when determining the values of the eagle and hawk in *Bertucci*.

## VI. CONCLUSION

*Bertucci* represents the proposition that the valuation table created by the United States Fish and Wildlife Service is the correct method of valuation in instances where the market value of wildlife is difficult to ascertain. However, it seems the court only applied this valuation method for the sake of staying consistent with Mr. Bertucci's previous conviction in 2009. In doing so, the court demonstrates how this method of valuation fails to deter offenders from recommitting the same crimes involving wildlife. Mr. Bertucci was not deterred by the sentence he received in 2009, which was based on the United States Fish and Wildlife Service valuation table. This obvious lack of deterrence is a concerning implication of the *Bertucci* case.

The court should have utilized Clark's expert replacement valuations, which were based on years of experience working to restore birds to their natural habitat, and should have been more inclusive in considering factors when valuing wildlife in order to deter wildlife offenders from re-offending.

**KATIELEE KITCHEN**







