

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA :

- v. - : 14 Cr. 506 (LTS)

XIAO JU GUAN, :
a/k/a Tony Guan, :

Defendant. :

----- X

GOVERNMENT’S SENTENCING MEMORANDUM

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States of America

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

Janis Echenberg
Assistant United States Attorney

Richard A. Udell
Senior Litigation Counsel
Environmental Crimes Section
U.S. Department of Justice

The Government, by and through the attorneys below, respectfully submits this memorandum in connection with the sentencing of defendant Xiao Ju Guan, a/k/a Tony Guan (“Guan” or the “defendant”), which is scheduled for March 25, 2015 at 11 a.m. The Presentence Investigation Report (“PSR”) prepared by the United States Probation Department (“Probation Department”), dated February 13, 2015, has correctly calculated the applicable United States Sentencing Guidelines (“Guidelines” or “U.S.S.G.”) total offense level of 21, with a Guidelines range of 37 to 46 months’ imprisonment, and concluded that there are no circumstances requiring a departure or variance. The Probation Department recommends a sentence of 37 months’ imprisonment. (PSR at 15.)

In the plea agreement between the parties, the Government and the defendant jointly agreed to recommend a Guidelines calculation pursuant to 2Q1.2 of at least 22 (base offense of 6 levels with a 2-level enhancement for commercial purpose and a wildlife market value between \$400,000 and \$1,000,000 (an additional 14 levels)). However, the Government and the defendant disagreed on the applicability of a 2-level role enhancement pursuant to 3B1.1. The offense level computed by the Probation Office appropriately includes that role enhancement, resulting in a total offense level of 24. With a 3-level reduction for acceptance of responsibility the final offense level is 21, which corresponds to a sentence of incarceration of 37 to 46 months. Absent the 2-level role enhancement, at offense level 19, a Guidelines sentence would result in a sentence of 30 to 37 months.

The defendant seeks a substantial variance to achieve a sentence of time served (approximately 10 months by the time of sentencing). Consistent with the Probation Department’s recommendation, and for the reasons set forth below, given the nature and

circumstances of the offense – which was deliberate, ongoing and involved a significant amount of seriously endangered and threatened wildlife – and the need in this case to promote deterrence, respect for the law and ensure just punishment, a sentence within the applicable Guidelines range of 37 to 46 months is entirely appropriate in this case.

I. Overview of the Case

The Government's prosecution of Guan is part of a multi-district law enforcement operation known as Operation Crash.¹ Operation Crash is an ongoing effort to detect, deter and prosecute those engaged in the illegal killing of rhinoceros and the unlawful trafficking of rhinoceros horns. Operation Crash is being conducted by the U.S. Department of the Interior's Fish and Wildlife Service ("FWS"), in coordination with other federal, state and foreign law enforcement agencies and it has resulted in more than two dozen arrests, including prosecutions in the Southern District of New York (*U.S. v. Hausman*, *U.S. v. Wang*), Eastern District of New York (*U.S. v. Slattery*) and the District of New Jersey (*U.S. v. Li*).

Guan, the president and sole owner of Bao Antiques, in Richmond, British Columbia, was initially charged by criminal complaint on May 23, 2014. As set forth therein and below, the basis for the complaint was evidence that he and his company had purchased uncarved raw rhinoceros horns from auction houses in Ohio and Florida *via* an internet business located in Manhattan, and intended to purchase two rhino horns from an undercover special agent with the U.S. Fish and Wildlife Service in New York, with the intention of smuggling them to Canada. He did ultimately purchase the horns in New York and attempt to smuggle them to Canada, and expressed interest in buying more horns from the undercover agent.

¹ A "crash" is the term for a herd of rhinoceros.

The uncontested evidence, including emails and records of transactions as well as statements by the defendant, shows that the defendant willfully and knowingly located, purchased and smuggled from the United States items made from protected wildlife species -- rhinoceros, elephants and coral -- and involved at least four others to work on his behalf in doing so. The market value of the wildlife in this case is approximately \$500,000. Guan located items to buy, purchased items at auction and on the internet, asked others to make purchases and arrange shipping, hired interpreters and smugglers to make deals and drive wildlife items across an international border, and falsely declared the contents and value of packages. The evidence also shows that the defendant organized, supervised and employed others to assist him in his criminal endeavors.

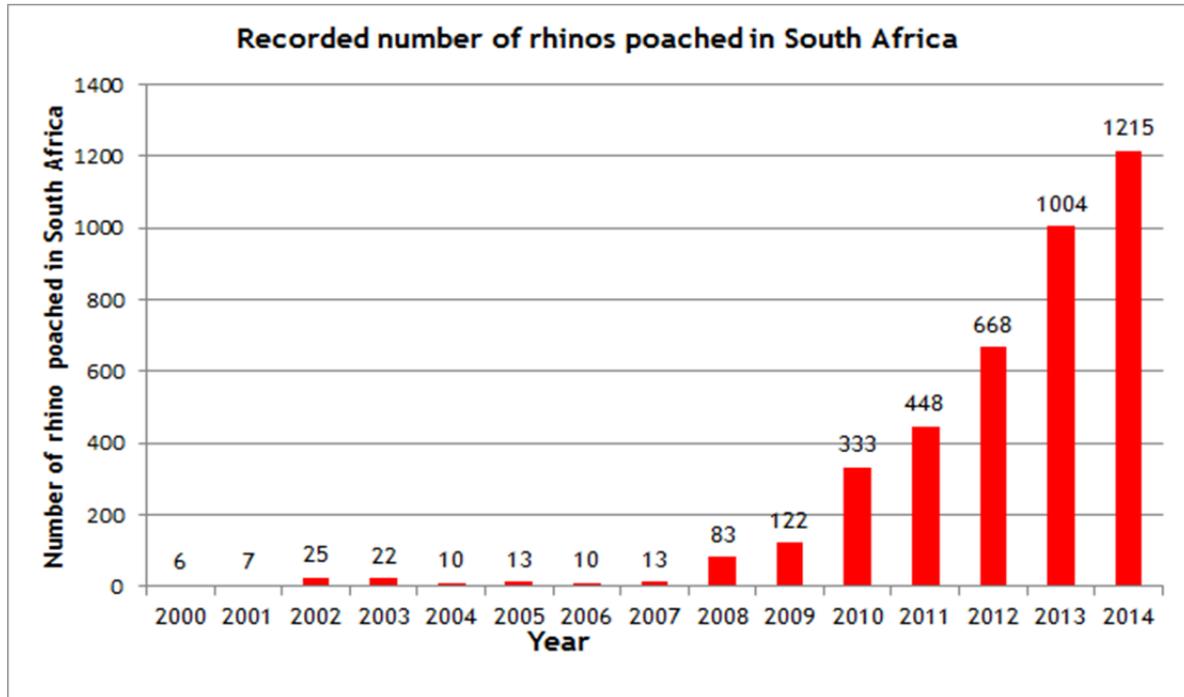
BACKGROUND

A. Wildlife Trafficking of Rhinoceros Horn, Elephant Ivory and Coral

Guan ran a company which attempted to profit from, and deliberately undermine, a legal regime designed to protect some of the last iconic species from extermination and, in the course of doing so, also undermined the integrity of customs and border enforcement at home and abroad. Among the goals of our nation's wildlife protection laws is the elimination of the commercial trade in endangered species. Without markets for endangered species products, there is no demand. Without demand, there is no market or profit in supply. Without profit, there is no motive to kill, or reward for killing, endangered species in the wild.

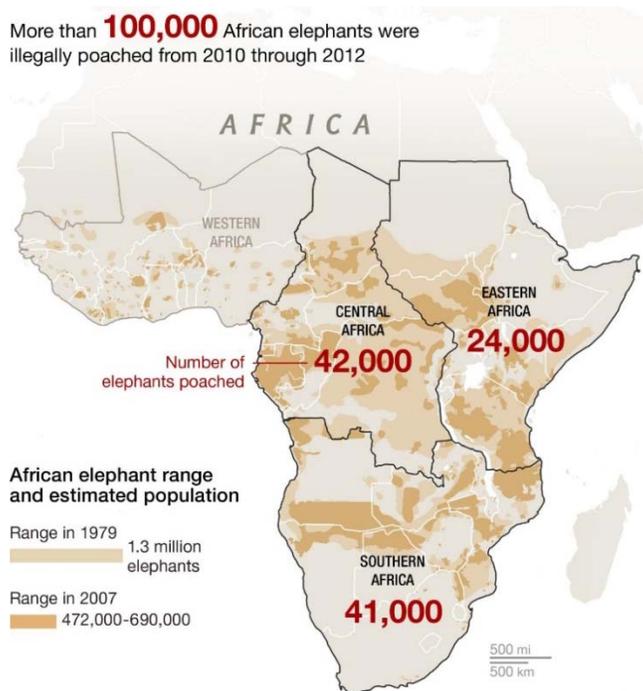
The trade in rhinoceros horn and elephant ivory, as reflected in the rate of poaching, has climbed sharply in recent years. Demand for rhinoceros horn has picked up dramatically in recent years as has the price. Unscrupulous profiteers like Guan have chosen to illegally supply

rhinoceros horn to meet this growing demand. More than 3,000 rhinos have been poached in South Africa alone since 2008, a more than 7,000 percent increase compared to the previous 17 years. See <http://www.fws.gov/wildlife-trafficking-questions-and-answers.html> (last viewed May 21, 2014). Last year, 1,215 rhinoceros were poached illegally in South Africa, the most on record.



Source: http://www.savetherhino.org/rhino_info/poaching_statistics (last viewed March 16, 2015).

The situation of African elephants is similarly dire:



(Source: <http://news.nationalgeographic.com/news/2014/08/140818-elephants-africa-poaching-cites-census/> (last viewed March 14, 2015). Elephants are not only in jeopardy as a protected species, but their demise due to poaching to fund the illicit ivory trade threatens other wildlife because they are a “keystone” species that play a pivotal role in the survival of the ecosystem and other animals. They clear paths, fell trees and dig water holes that are then used by humans and other animals.

Although Guan may not have personally slaughtered a rhino or an elephant, he nevertheless shares direct culpability for the illegal trade. While he argues that he is the “lowest level of offender in the wildlife trade” (Defense Submission at 2), without people capitalizing on the skyrocketing price of rhinoceros horn, and continuing to drive up demand as he did, there would not be such a crisis for the existence of these stoic creatures.

Coral, a living organism that forms a natural habitat for numerous species of marine life, is also threatened due to an increasing demand for coral and objects made from it. Coral is the equivalent of the rain forest of the sea supporting entire ecosystems. The illegal trade in coral, in which Guan also participated, threatens not only remaining coral reefs, but the fish that inhabit them and other wildlife that depend upon this habitat.

On July 1, 2013, President Barak Obama issued an Executive Order entitled “Combating Wildlife Trafficking.” Section 1 of the President’s EO states:

The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as “wildlife trafficking”) represent an international crisis that continues to escalate. Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases. For these reasons, it is in the national interest of the United States to combat wildlife trafficking.

<https://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking> (last viewed March 16, 2015).

Long before the President’s recent call to action, rhinoceros horn and elephant ivory have been regulated, since 1976, Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), a treaty signed by over 170 countries around the world, including the United States and Canada, to protect fish, wildlife, and plants that are or may become imperiled due to the demands of international markets. Nevertheless, as described above, the demand for rhinoceros horn and elephant ivory, and black market prices for it, have skyrocketed

in recent years due to the value some cultures have placed on ornamental carvings, good luck charms, or alleged medicinal purposes, leading to a decimation of global populations of these animals. Various stakeholders, including law enforcement and wildlife preservation groups have become increasingly concerned about the serious criminal activities involved in illegal wildlife trade, involving organized criminal groups, money laundering, corruption of officials and sophisticated smuggling across international borders. *See Exhibit A* (June 2013 issue of *Criminal Nature*, focusing on the global security implications of illegal wildlife trade.)

Specifically with regard to rhinoceros, a significant proportion of the trade is illegal. An estimated minimum of 1,500 rhinoceros horns entered illegal international trade from Africa to Asia from 2006 - 2009. This increased demand has also led to increased sourcing of rhinoceros horns from pre-existing private ownership. These horns generally enter international trade for destinations in consuming countries in East Asia. Significantly, this increased sourcing of horns has coincided with a rise in rampant poaching in South Africa, which has led to the rapid depletion of the species and, therefore, an increase in the value of rhinoceros horn. The increase in value of these horns has resulted in the trafficking of both raw and carved horns. According to both INTERPOL and EUROPOL, trade in rhinoceros horn has become so lucrative that organized crime groups are involved at various levels from poaching, to trafficking, to even robbing museums and private dealers. *See, e.g.*, <https://www.europol.europa.eu/content/press/europol-and-ireland-identify-organised-crime-group-active-illegal-trading-rhino-horn-9> (Last viewed March 14, 2015). While increased law enforcement and conservation efforts have decreased the slaughter somewhat, continued efforts are needed to keep rhinoceros, and, in particular, the black rhinoceros, from becoming extinct.

The rise in poaching has also coincided with the increase in the number and value of antiques, alleged (*i.e.*, fake) “antiques” and raw horns being sold at auction houses and in private sales. And, the rise in poaching has coincided with criminal smuggling, including that of this defendant and others engaged in similar crimes.

B. Guan’s International Wildlife Trafficking

1. The Investigation

The Guan investigation began when FWS investigators working on Operation Crash learned that individuals associated with Bao Antiques – the defendant’s company -- had purchased rhinoceros horns from auction houses in Ohio and Florida. (PSR ¶9.) In Ohio, records showed that an individual using the name “Tony Guan” purchased a raw (uncarved) black rhinoceros horn in December 2012. When told by the Ohio Dealer that it could take sixty days to obtain a CITES permit, defendant Guan (through his assistant and translator Ken Guan) sent a message “Thank you for letting me know the process. But 2 months is too long for us. Probably I can give you a US address tomorrow so you can mail it to there.” Defendant Guan then asked that the rhino horn be mailed to a package receiving business in Point Roberts, Washington, located a short distance from the Canadian border and Guan’s business, and indicated “I can arrange people to pick it up.” As the defendant has admitted, and as Ken Guan confirmed during undercover calls, Ken Guan sent and received these on-line messages on the defendant’s behalf and responded as directed by the defendant.

In Florida, another accomplice named “Tim Juan,” also working at the defendant’s direction, purchased an uncarved rhino horn and six ivory carvings in June 2012. When the auction house’s third-party shipper refused to export the items from the United States without

required permits, Juan asked the auction house to identify a different shipper that would mail the items. This resulted in a different third-party shipper mailing the rhino and ivory items directly to Bao Antiques in Canada without declaration or permits, and with a customs declaration that described the rhinoceros horn as “Wooden Horn” and omitted all mention of the word ivory.

In both instances, the smuggling took place after the defendant, through his underlings – Ken Guan and Tim Juan – was advised that the rhino horn could not be exported from the United States without required permits.

2. The New York Deal

Based on these apparent smuggling efforts, an undercover agent with the FWS offered two endangered black rhino horns for sale. Guan was first told about the possible deal by another auction house, who advised Guan it had declined to be involved because the transaction was likely illegal. Guan was forwarded photos of the rhino horns and the email address of what turned out to be an undercover agent. Guan initiated contact by email. Contrary to the allegation in the defense submission that he was “lured” to the United States (Def. Mem. at 5), Guan’s first email to the undercover agent shows that he proposed the travel. The email from “Tony Guan” stated:

I would like to know about the price of two rhino horns. If the deal is possible, I will get to US and purchase in person.

My best

Tony Guan

Defendant Guan quickly agreed to purchase two rhino horns from the undercover agent for \$45,000. On May 4, 2014, the undercover agent received an email from Guan stating: “My wife just transferred 1000 USD to you, her name is Tie Jun Jian, please

check your account to confirm. I'm currently in china, I think we can still get in touch by email." Guan was in fact in China. Paperwork submitted to the bank – by Guan's wife – stated that the wire transfer was "for a watch." (PSR ¶ 13.)

When the undercover agent first called the number provided by "Tony," she learned that she had actually been corresponding with defendant Guan through Ken Guan, his 20 year old nephew. Ken Guan is the same person who corresponded with the Ohio auction house at Tony Guan's instruction. During recorded phone calls leading up to the deal, the undercover agent specifically told Ken Guan that she did not have CITES permits. Ken Guan could be overheard speaking in a Chinese dialect with another male voice. In a recorded call on May 16, 2014, Ken Guan told the undercover agent that he and Tony Guan knew that she lacked required permits but that defendant Guan just wanted the horns. (PSR ¶ 14.)²

In a recorded call on May 17, 2014, the undercover agent asked Ken Guan what Tony was going to tell Customs if he was asked why he had so much cash. Ken Guan stated that defendant Guan would say that the money was for traveling. The undercover agent said that was good because she did not want to get into trouble.

3. Undercover Transaction

On May 28-29, 2014, Guan and a young woman, who he paid to accompany him and act as his interpreter, took a red-eye flight from Vancouver to New York. Upon arrival at JFK International Airport, they took a taxi to a storage facility in the Bronx, where Guan completed the purchase and took possession of the rhinoceros horns from two undercover agents. Once

² Because the rhino horns Guan sought to purchase from the undercover agents were from a critically endangered black rhinoceros, and he was told they were not antique, he could not have obtained permits under State or Federal law to transport them in interstate or foreign commerce.

defendant Guan and his female companion arrived at the Bronx storage unit, the undercover agent and a second undercover agent showed Guan and the interpreter the two black rhinoceros horns. Guan examined both rhinoceros horns. (PSR ¶ 15.)



Undercover Video Showing Guan Examining Rhino Horns at Storage Facility

At the conclusion of the discussion, Guan turned around and pulled down the door to the storage unit with himself, his interpreter and the agents still inside. (PSR ¶ 16.)



Defendant Guan Counting Cash after Closing Door to Storage Unit

Because a down payment of \$1,000 had already been sent *via* wire transfer by the defendant's wife in Canada (along with a false notation that the transfer was "for a watch"), Guan paid the

agents the remaining \$44,000 -- \$16,000 in cash (all in \$100 bills) and a cashier's check for \$28,000, drawn on the Bank of Montreal Harris N.A, bearing the name "Yichu Guan." (PSR ¶ 16.) Both Guan and his interpreter had carried a portion of the cash in their respective bags. Defendant Guan told the undercover agents that Yichu Guan was his (Tony Guan's) Chinese name. Tony Guan's actual name is Xiao Ju Guan. Yichu Guan is also known as Edward Guan and has been identified as a different unrelated individual who has made purchases of ivory and coral on behalf of Bao Antiques, using the same business address, but different email addresses. On June 4, 2014, after the defendant's arrest, the FWS attempted to deposit the \$28,000 check and it bounced. According to the bank, payment had been stopped.

During the recorded conversation in the storage unit, the interpreter stated "We want delivery to Canada" at which point Guan corrected her by saying "No, no. USA." Guan then said, in Chinese, "Deliver it to the USA." The interpreter explained to the agents that they wanted UPS, DHL, or another shipping company to deliver the rhinoceros horns to a location on the U.S. side of the Canadian border. The interpreter stated that Guan had a mailbox at the border between Seattle and Canada and that "we can drive to pick up at the border."

The defendant and the interpreter asked the undercover agents to help them locate, and transport them to, a local UPS store. The agents made it clear that they did not want to participate in the actual shipping of the rhino horns because the agents didn't want to get in trouble. Guan was asked what he planned to write on the paperwork when he shipped the horns. The interpreter responded that Guan was going to write "artificial" on the shipping documents. Guan then showed the UC agent his iPhone and pointed to the screen where the UC agent

observed what appeared to be a Chinese to English dictionary showing the English word “handicrafts.” (PSR ¶ 17.)

During the covertly recorded conversation, defendant Guan and the woman he brought to assist him with English made statements indicating that they had previously purchased ivory in the United States and would be utilizing this same method of getting the rhino horn back to Canada, *e.g.*, shipping it to a location in Washington state and smuggling it across the border to Canada. For example, the interpreter stated: “We did lot of things just like this, and no problem, no problem.” In Chinese, Guan stated: “This address, I use it every time when I buy items in the auction in the United States. It is very safe, including all things.” In response to a question about whether Guan would take the rhino horns back to Canada, Guan stated, “Yeah, yeah, yeah.” The interpreter stated: “Yeah, yeah. We have some people who do that...So you – you don’t worry. We buy it, also we have, you know, we also take...risk.” During the conversation, Guan also stated (through the interpreter) that he had purchased ivory at U.S. auctions, specifically in Las Vegas, Nevada and California. Guan stated that he makes these purchases over the internet. The interpreter inquired if the agents could get ivory. Guan said that he did not want ivory pieces over one meter in size because they were too large to get back to Canada. (PSR ¶ 18.)

Guan asserted that he already had a Chinese buyer located in Canada for the two black rhinoceros horns. In Chinese, Guan explained that it is none of his business where the buyers go after they make a purchase from him. Guan also claimed that he had an antique business in Hong Kong,³ and stated that his business in Canada was more successful than the one in Hong Kong.

³ The Government has been unable to verify that defendant Guan actually has a business in Hong Kong.

While they were inside the storage pod, the undercover agents told defendant Guan that they had more rhino horns for sale – specifically a rhinoceros mount with two horns. The undercover agents showed Guan the mount which was in the storage pod. Guan appeared to recognize this particular rhinoceros mount as one that he had seen in an auction. Guan immediately offered to buy it in a “private manner.” Guan made hand gestures instructing the agents where the horn should be cut off in order to remove it from the head. Defendant Guan indicated that the horns should be removed because the entire mount was too big to get back to Canada. Guan offered that since he and the undercover agents now knew and trusted each other, they would not have to meet in person to complete future deals. (PSR ¶ 18.)

Later, on the way to the UPS store, Guan asked about the horns on the mount in the storage unit and was told that the price would be \$70,000. Guan then asked the undercover agents to send him pictures and said that he would discuss the price with his “partner,” who Guan stated was not Ken Guan. He advised that Ken is his nephew who is an eighteen year old student in Canada. Guan stated that he pays Ken approximately \$1,000 per deal for Ken’s assistance in helping him with translation and making purchases. Guan also stated that he was interested in purchasing more rhino horn. He stated that the undercover agents should mail future shipments of rhino horn and describe it as “ox” which the interpreter translated as “cow.” Guan and the interpreter agreed with the agents that the reason to call rhino horns “cow” was because no one (*i.e.*, the authorities) cares about cow and will not pay attention to it. (PSR ¶ 19.)

Once inside the UPS store, Guan selected a box and packed the horns. Guan and the interpreter then walked to the counter to finish sealing the box and ship the horns. The UPS clerk completed the shipping documents based upon information provided by Guan. When the

clerk asked for a return address, the interpreter looked up a number on her phone and provided a return address in Times Square that corresponds to the hotel where Guan had made a reservation to stay that night. When asked for the shipper's name, Guan told the clerk it was "Tony Guan" and then spelled his last name in English as "G-O-A-N." Guan gave the clerk the piece of paper on which he had handwritten the address in Point Roberts, Washington – a location less than a mile from the Canadian border, and approximately 16 miles from Guan's business in Richmond, B.C. The UPS Store clerk asked what was in the box. Guan responded by telling the interpreter in Chinese, in sum and substance, that it was "handicraft inside." Guan paid for 3-day shipping at a cost of \$89. (PSR ¶ 20.)

4. Post-Arrest Statement

Guan was arrested after leaving the UPS store. The advice of rights was administered orally through a court-certified interpreter and *via* a printed copy in Mandarin. Guan voluntarily waived his rights and signed the printed Chinese language Miranda form. All statements were made through the interpreter. In agreeing to speak with the agents after his arrest, Guan lied and stated that this was his "first time" buying rhinoceros horn. (PSR ¶ 21.)

Guan stated that he owned Bao Antiques in Richmond, B.C., claimed that he was the company's only employee and that there were no other paid employees. He stated that he had paid the woman with him \$1,000 (USD) to act as his interpreter on this trip, as well as paying for her airfare and hotel. He identified Ken Guan as the son of his sister who was currently a student in Canada, and not an employee. He confirmed that the email address used with the undercover agent (which also had been used for the Ohio deal) belonged to Ken. Guan stated that Ken lives in his home and that he enlists Ken to send business emails on his behalf since he (Tony) cannot

communicate in English. Guan stated that he used other people's email addresses including those of his wife and "Tim" (Chieh-Ting Juan). Guan stated that Chieh-Ting "Tim" Juan is another friend of his that assists him with communicating in English when doing business deals. Guan stated that Tim Juan was a student who has since moved to Taiwan.

Guan claimed that the purpose of this trip to New York was to take a tour of New York City. He asserted that he did not want to carry the two black rhinoceros horns around the city, so he decided to ship them to his post office box in Washington state. Guan stated that this post office box belonged to him and that he has previously shipped auction items including carved ivory purchased at U.S. auctions to this address. He claimed that he planned to travel to Seattle after his return to Vancouver to pick up the horns and consign them to an auction house in Seattle, WA. Upon questioning, Guan was unable to provide the name of the auction house where he planned to consign the horns. He again lied about the extent of his criminal activity, claiming that this was his "first time" purchasing rhinoceros horns and that he thought it was legal.

The interviewing agent advised Guan that she had information proving that he previously purchased raw rhinoceros horns from U.S. auction houses. Guan then replied that he purchased a rhino horn at an auction in the U.S. and had the horn shipped to a package receiving store in Washington state.

Guan was asked if he knew that a CITES permit was needed in order to export ivory and rhino horn from the U.S. to Canada. Guan stated that he didn't know that it was illegal to ship ivory and rhino items from the U.S. to Canada and that he was not aware of the laws. The interviewing agent indicated that she had seen emails related to purchases of rhino and ivory

from the Florida auction house. These emails showed that after the first shipping company stated they could not ship the rhino and ivory to Canada, Tim Juan asked the auction house for the name of a shipper who would do so. Guan then admitted to recalling this email and admitted that the email exchanges by Tim Juan had been sent at his direction. While he claimed that he did not remember the specifics about how the rhino and ivory purchased from the Florida auction house were smuggled, Guan admitted that he received the items in Canada and that he sold the rhino horn that he had purchased for \$30,000 to a Chinese customer who flew from China to Vancouver for the deal, and paid \$42,000 to purchase the horn from Guan.

The interviewing agent asked Guan if he had purchased any other rhino horns. Guan again lied and said the rhino horn from the Florida auction house was the only rhino horn he had purchased at a U.S. auction house. The agent then showed Guan a picture of an uncarved rhinoceros horn offered for sale by an Ohio auction house. Guan admitted that he had purchased this horn with the assistance of his nephew, Ken Guan. Guan was asked if the horn was shipped to Canada or Washington. Guan initially stated he did not remember where the horn was shipped. The agent advised Guan the Government had emails showing that after being advised about the requirement and time it would take to obtain a CITES permit, that Guan then told the Ohio auction house he would provide an address for the rhino horn to be shipped to in the United States. Guan admitted that he directed Ken Guan to send these emails on his behalf. When the agent asked Guan if he knew the individual to whom the package was addressed to in Point Roberts, WA, Guan stated this person is a friend of Tim Juan. In the post-arrest interview, Guan denied remembering how the rhino horn purchased from the Ohio auction house was smuggled to Canada, but he admitted that he received the rhino horn at Bao Antiques in Canada and that he

sold it to a Chinese client for \$42,000. In response to questioning, Guan told the interviewing agent he has items shipped to Point Roberts, WA, so that they can be smuggled across the border.

5. Search of Guan's Business in Canada

On the same day as the above-described undercover transaction in New York, Environment Canada (Canada's environmental protection agency) executed a search warrant at Bao Antiques' in Richmond, B.C., based on the probable cause documented by the U.S. investigation. During the search, Canadian authorities seized a number of wildlife objects, nine of which have been identified as objects purchased in the U.S. via a Manhattan-based internet auction business. See **Exhibit B** (photographs from the search and investigation as described therein). These items, made from elephant ivory and coral, were also exported contrary to law because they were not declared upon export nor were CITES permits obtained. (PSR ¶ 23.)

During the execution of the search warrant of Guan's business, Canadian law enforcement also discovered a large quantity of illegal narcotics, baggies and a scale, including approximately 50,000 ecstasy pills, as well as personal use quantity of marijuana. Authorities with the Royal Canadian Mounted Police Organized Crime Unit have indicated that a quantity of white powder found at Guan's business and determined not to be narcotics was likely a cutting agent used in the distribution of illegal drugs. *Id.*

In pleading guilty, Guan admitted that all of the alleged smuggling described in the Indictment (including the items found during the search of his business) should be included in the calculation of loss amount, and has abandoned and forfeited all right, title and interest in the wildlife items seized by Canada.

C. Argument

A Guidelines sentence is warranted in this case. This is a criminal wildlife trafficking case in which the defendant's conduct deliberately violated the regime designed to protect some of the last remaining mega fauna from extermination. Criminal violations of wildlife statutes harm the public and our natural resources. They create demand and a market for the exploitation of endangered species such as rhinoceros and elephants. For all the reasons set forth below, a Guidelines sentence is appropriate in this case.

I. Applicable Law

a. The Guidelines

Although they are no longer mandatory, the Guidelines still provide strong guidance to the Court following *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). “[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range” – that range “should be the starting point and the initial benchmark.” *Gall v. United States*, 128 S. Ct. 586, 596 (2007). As the Second Circuit has remarked *en banc*, although the Guidelines do not dictate a presumptively reasonable sentence, they are not merely a “body of casual advice.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (internal quotation marks omitted). The Guidelines’ relevance throughout the sentencing process stems in part from the fact that, while they are advisory, “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives,” *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), and the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of

thousands of individual sentencing decisions,” *Gall*, 128 S. Ct. at 594; *see also Rita*, 127 S. Ct. at 2464.

After making the initial Guidelines calculation, a sentencing judge must then consider seven factors outlined in Title 18, United States Code, Section 3553(a): “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1); the four legitimate purposes of sentencing, *see id.* § 3553(a)(2); “the kinds of sentences available,” *id.* § 3553(a)(3); the Guidelines range itself, *see id.* § 3553(a)(4); any relevant policy statement by the Sentencing Commission, *see id.* § 3553(a)(5); “the need to avoid unwarranted sentence disparities among defendants,” *id.* § 3553(a)(6); and “the need to provide restitution to any victims,” *id.* § 3553(a)(7). *See Gall*, 128 S. Ct. at 596 & n.6.

In determining the appropriate sentence, the statute directs judges to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing, including:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). To the extent District Court imposes a sentence outside the range recommended by the Guidelines, the Court must “consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Cavera*, 550 F.3d at 189 (quoting *Gall*, 128 S. Ct. at 596).

b. Guan’s Role and the Role Enhancement

With regard to Guan’s role, Section 3B1.1(a) of the Guidelines provides for a two-level increase in offense level if “the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in [the other subsections of that section].” U.S.S.G. § 3B1.1(c). The sentencing court must make a factual determination that the defendant organized, led, managed or supervised at least one other participant in a criminal activity. *Id.* Note 1, 2; *see also United States v. Rawls*, 523 F. App’x 772, 779 (2d Cir.); *United States v. Zichettello*, 208 F.3d 72, 107 (2d Cir.2000); *see also United States v. Si Lu Tian*, 339 F.3d 143, 156 (2d Cir.2003). In making such a determination, the court considers “the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over other members of the conspiracy.” *United States v. Paccione*, 202 F.3d 622, 624 (2d Cir. 2000). Further, the Second Circuit has adopted Application Note 1 of section 3B1.1, requiring the participant to be “criminally responsible for the commission of the offense,” but “need not have been convicted.” U.S.S.G. § 3B1.1, Note. 1.; *see also Si Lu Tian*, 339 F.3d at 156; *United States v. Gaskin*, 364 F.3d 438, 467 (2d Cir. 2004).

The defense submission suggests that Guan was the equivalent to a drug mule and that those he enlisted in support of his criminal activity lacked all knowledge that they were involved in criminal activity. Neither suggestion is supported.

i. Guan’s Role

Defendant Guan played an organizing role in a wildlife smuggling enterprise. He was the president and owner of a business located outside of Vancouver, Canada. He specialized in

Asian artifacts, which he sold from his store in Canada. He purchased items made of rhino horn, elephant ivory and coral which he smuggled out of the United States and into Canada, thereby violating the laws of both countries. In order to make purchases, defendant Guan organized and ran a business, he dealt with the logistics of identifying items to purchase, he hired others to assist him in making purchases and arranging shipping, he used a shipping addresses on the U.S./Canadian border to assist in smuggling efforts, he employed others to arrange shipping and drive across the border, and he dealt with the logistics of importing and exporting.⁴

The comparison of Guan to “street-level, hand-to-hand drug dealer” as suggested in the defense submission, at 2, is entirely misplaced. Rather, Guan was the supervisor, who hired lower level hand-to-hand dealers. And, “unlike a naïve, infrequent peddler” as alleged by the defense submission, *id.*, was very much engaged in a frequent and ongoing pattern of criminal conduct that he planned to expand had it not been for his arrest.⁵ As Guan says during the recorded undercover transaction, he wanted to purchase “*more more more*” rhino horn. Guan’s known criminal activity spanned approximately two years and involved numerous individual acts of concealment and smuggling. But most telling is the fact that Guan continued to smuggle after being specifically notified by auction houses and shippers that exporting wildlife to Canada without permits was illegal. He took a risk by not insuring his shipments and continued to smuggle even after one of his illegal shipments had been apparently confiscated.⁶

⁴ The defense suggests that the applicable law is complicated. The principle violation for which the defendant has been charged is actually straightforward. Wildlife may not be exported from the U.S. without declaration and CITES protected species – which include all rhino and elephant products – always require a CITES document from the U.S. and may also require a CITES import permit from the destination country.

⁵ The defense contention that Guan was a small business owner of a one-man sole-proprietorship, see, e.g., Def. Mem. at 3, also strongly suggest that he was involved in or otherwise knowledgeable about the narcotics found at his business.

⁶ As the defense acknowledges, Guan did not insure his valuable purchases. This is by no means a mitigating fact. It was because he was involved in deliberate concealment from both U.S. and Canadian authorities. Had he declared

The defense seeks to minimize Guan's role by stating that wildlife smuggling was a "small portion" of his business, he did not make a lot of profit, and he did not conduct his business "in the shadows or underground" since he displayed the items in his shop for re-sale. None of these allegations are supported by the record, and none are relevant to the issues pending before the Court. The defendant was purchasing rhino horn in the United States because he could turn a substantial profit. He purchased ivory and coral with the same goal. There is no evidence to suggest that Guan had or would display raw rhino horn in his store. Rather, the uncontested facts set forth in the Indictment show that Guan's conduct took place in the "shadows" and "underground" since he used false mailing addresses, employed others to smuggle merchandise across the border, and used false customs declarations and values to conceal his illegal activities. All of these acts of concealment are indicative of the defendant's state of mind and consciousness of guilt.

ii. The Knowledge of Guan's Subordinates

As set forth below, the record shows that Guan exercised a supervisory role over others who knowingly participated in his criminal offenses. The defense has conceded that Guan directed others to engage in criminal activity as alleged in paragraphs 1-12 of the Indictment. *See* Plea Agreement, A(5), p. 2. Rather, the defense now contends that none of those carrying out Guan's instructions, including Ken Guan, Edward Guan and the interpreter who participated in the undercover transaction (Jia Jia Dai), knew that what he was directing them to do was illegal.⁷

the accurate value of his goods, he would have had to pay import duties and taxes and it could have alerted both countries to the violation of mutually shared wildlife laws.

⁷ Even if this were true, it hardly speaks well of the defendant. The basis for the defense argument about role admits that Guan used relatives and young adults (students) to commit crimes. However, as set forth above, the record also shows that these individuals were criminally responsible for their conduct.

Shaojie “Ken” Guan: The defendant’s nephew, Ken Guan, was told by the Ohio dealer that the rhino horn could not be sent to Canada without a permit. In a message dated December 11, 2012, the Ohio dealer stated he was working with “U.S. Customs to try and get clearance to ship this to you.”⁸ The defendant responded – through Ken Guan – to circumvent the process and instead offer a U.S. shipping address. While the defense submission carefully states that Ken Guan had no reason to believe he was involved in anything but a legitimate and lawful transaction with the Ohio auction house, Def. Mem. at 9, any college-age student who has been working on obtaining items for a shop owner in Canada would be likely to grasp that smuggling is involved when he requests sending something to a US address near the Canadian border after learning the item cannot be lawfully shipped abroad.

Even if it were true that Ken Guan did not understand the legal significance of the Ohio deal, certainly he was on notice four months later when an auction house introduced a potential “client” (who was actually the undercover agent) who the auction house did not want to deal with because of legal concerns. On April 2, 2014, Ken Guan received an email stating: “I was recently contacted by a client who is interested in consigning 2 black rhino horns. Unfortunately, the laws regarding selling of rhino horn now make it really difficult to conduct a legal sale...so I have decided not to try to sell them at a public auction.” Defendant Guan, through Ken Guan, wrote back on April 4, 2014, stating that that he would like to buy the horns, and requested contact information for the seller. And then, in correspondence dated April 11, 2014, from the undercover agent to Tony Guan, the undercover agent made it additionally explicit:

⁸ As both the defendant and Ken Guan told the undercover agent (and the defendant later admitted in his post-arrest interview), the online messages between Tony Guan and the Ohio Dealer and the undercover agent were written, received and translated by Ken Guan.

Thanks for your offer for the rhino horns. We've been discussing your offer, but we were really expecting more than \$40,000. We agree, it's a lot harder to find buyers now with all the laws being so strict, everyone is nervous about getting caught.

On May 16, 2014, when Ken Guan spoke with the undercover agent, the agent explained that she did not have any permits for the horns and that she had been told CITES permits were necessary. In English, Ken Guan indicated he and Tony were aware the undercover agent did not have any permits. After speaking with Tony, Ken Guan told the agent that Tony just needed the horns. On May 17, 2014, the agent asked Ken Guan what the defendant would tell Customs if they asked about the cash he was bringing to the United States to buy the rhino horns. Ken Guan said that Tony Guan would say the money was for traveling. The undercover agent said that would be a good response because she did not want to get in trouble.

These facts, which were set forth in the Indictment and in discovery, show that Ken Guan was a willing and knowing participant in the illegal activity.

Yichu "Edward" Guan: The defense submission does not mention Yichu "Edward" Guan, who is identified as the fourth co-conspirator ("CC-4") in the Indictment. Evidence produced in discovery shows that Edward Guan asked auction houses and shippers to falsify customs documents in order to smuggle wildlife merchandise out of the United States and into Canada. For example, as alleged in the Indictment, Edward Guan instructed California Dealer #1 to falsely state that a coral object purchased in September 2013 for \$19,680 actually cost only \$200 in order to avoid taxes. Records show Edward Guan used a UPS store in California to ship the piece directly to Bao Antiques in Canada.

Records relating to the purchase of ivory by Edward Guan for Bao Antiques on October 15, 2013, from another auction house located in Florida, show it was declared as a "ceramic

vase” valued at \$100. The package was sent on November 7, 2013, but when it did not arrive, Edward Guan wrote an email on November 14, 2013, to the auction house directing that if the shipment did not go through then they could arrange to ship it to the “US boarder [sic]” instead.

On October 1, 2013, Edward Guan registered with the Manhattan- based internet auction site to participate in an auction later that month by a California auction house. In communicating with the auction house through a chat feature of the Manhattan-based auction service, Edward Guan utilized an account with the username “Guans Antiques.” (emphasis added). The messages from Guans Antiques were signed “Ed.” On October 12, 2013, Edward Guan was the successful bidder of three lots containing elephant ivory and one lot made of red coral for a total of \$17,169. On October 21, 2013, Edward Guan emailed the auction house and asked that the items purchased be declared as worth \$300 and to not mention ivory in the declaration. Subsequent correspondence shows that the coral sculpture was received in Canada and declared as “stone” but that the ivory was not received. In one email dated November 22, 2013, Edward Guan tells the auction house that he is “...just for communication. The guy who opens the box is the actual buyer.” The shipments were not insured.

A review of emails to and from Edward Guan, some of which were obtained recently by the Government (after the defendant pleaded guilty), indicate that Edward Guan’s father also financed several ivory purchases made by defendant Guan. These emails, which provide further evidence of Edward Guan’s criminal culpability, reflect the following:

In November 2013, using an account registered to Bao Antiques with the username Guans Antiques, Edward Guan purchased two items made of coral for \$107,690 from an auction house in Florida. The correspondence between Edward Guan, the auction house and the shipper

demonstrates that Edward Guan was knowingly engaged in smuggling wildlife. For example, on November 13, 2013, Edward Guan requested that the auction house create a false invoice showing a lower value for the coral carvings in order to “reduce the import tax.” Then, after a third-party shipper informed Edward Guan that a CITES permit was needed to ship coral to Canada, and sent him a declaration form to fill out along with instructions, Edward Guan requested the item be sent to an address “close to Canada” since that would be easier to show their customer and so they could apply for the permit on the West Coast. In fact, no permit was sought or obtained, and one of the items was found at Bao Antiques during the search by Environment Canada. In an email dated March 5, 2014, Edward Guan stated:

One thing I would like you to do it for me is to declare the value as \$1000 and do not mention Red coral in the item description. You can say antique carved stone, etc. The reason for that is I want to keep it as low profile as possible, since I will not be the receiver in the first place.

The shipper refused this request since they knew the purchaser was actually located in Canada, and negotiations to ship the items to Canada had already taken place. Edward Guan then contacted the Florida auction house and obtained a referral to another shipper. The new shipping company agreed to prepare documents indicating that the value of both coral pieces was only \$4,180, and shipped the coral pieces to Washington state.

Another example of Edward Guan’s criminal intent is a purchase of twelve lots containing elephant ivory in April 2014. This time, Edward Guan reached out to two different third-party shippers. One shipper responded that it could no longer ship ivory between countries because of “new federal laws” but suggested that it would agree to ship the items to a U.S. address. Guan chose the other shipper which warned in pertinent part: “As you may know, it is illegal to export ivory newer than 100 years old, or imported after 1989, from the U.S. While

this law is almost impossible to enforce, the burden of proof is on the consumer, not on the government.” Edward Guan had the ivory sent to a U.S. address in Point Roberts and sent the shipper an email stating: “When you write the description for those Ivory items, please avoid to put down ‘Ivory’ in the description. I’m afraid people may steal it, if they know they are Ivory.”⁹

The Female Interpreter (Jai Jai Dai): The defense memo claims that “the government already has conceded” that defendant Guan’s female interpreter during the undercover purchase was not criminally responsible. Def. Mem. at 9. The Government has made no such concession regarding her criminal culpability. She may well have known nothing of the defendant Guan’s criminal intent until she was inside the storage pod, but the recording shows that once she is meeting with agents and learns the conduct is criminal, she *ad libs* and attempts to further Guan’s purpose. In particular, she willingly aids and abets defendant Guan in mailing the rhino horn to Point Roberts, Washington, falsifying the mailing documents, and helping to encourage future transactions.

II. The Nature and Circumstances of this Offense Warrant a Sentence of Imprisonment

As set forth below, during the undercover operation, Guan expressed an interest in purchasing more raw rhinoceros horns after talking with his partners. Had defendant Guan not been apprehended, he would still be involved in wildlife trafficking. The defendant received and was promised payment for his efforts, payment that appears to far exceed what financial records show, and what even he claims his “fledgling antiques store” business was otherwise generating.

⁹ Canadian law enforcement interviewed both Ken Guan and Edward Guan (as well as the defendant’s wife). While both admitted to having corresponded with U.S. auction houses and shippers on the defendant’s behalf, neither admitted knowledge of illegal activity. Both also made statements that are directly contradicted by their own communications with auction houses and shippers.

The defendant claims he had “limited involvement in the wildlife trade.” Def. Mem. at 3. It cannot be said, however, that this defendant engaged in a single criminal transaction, that his criminal conduct did not involve significant planning, or that it was of limited duration, thus a departure along the lines of aberrant behavior would be inappropriate. See U.S.S.G. § 5K2.20. To the contrary, Guan’s business plan involved participation in an ongoing criminal activity and the relevant conduct, set forth herein, indicates that he was interested in expanding his criminal behavior in the face of explicit knowledge of the illegality of his conduct.

Guan was a willing participant over a substantial period of time and engaged in complex efforts to conceal the criminal activity from law enforcement. While the defendant violated any number of felony statutes which alone compel a Guideline sentence, Guan’s offenses occurred in the context of massive poaching and extermination of species that have roamed the earth since the age of dinosaurs. It cannot be said that these are victimless crimes. The rampant and unchecked trade in threatened and endangered species, including those at issue here – rhinoceros, elephants and coral – has a direct relationship to fostering a booming market that, in turn, is responsible for the decimation of these protected, threatened and endangered species.

Unfortunately, these crimes are difficult to detect and the defendant’s numerous violations were only uncovered as a result of a pro-active investigation. Consequently, adequate deterrence is essential. This is especially true when the violations were intentional, repetitive, and involved concealment and obstruction.

The criminal conduct engaged in by the defendant is serious for many reasons including the following:

- Numerous and repetitive violations of the law;
- Financial motive combined with a complete disregard for the impact on

species in peril;

- Acts of concealment, including international financial transactions, use of fake addresses, and false labeling to avoid detection.
- Recruitment and supervision of others.

Guan's criminal conduct did not involve a solitary violation or mistake that might be explained as a single instance of bad judgment. Rather, the violations at issue in this case were repetitive and demonstrative of an illegal business and his consciousness of guilt.

III. Guan's History and Characteristics Also Support a Prison Sentence in This Case

Many defendants have family and have people who rely on them. These factors are not unusual to this defendant. In fact, in this case, Guan induced his own young family members and associates to commit crimes with him. He coached them how to lie and paid them to participate in what he knew was criminal activity.

The defendant baldly asserts that he never made a profit from the sale of wildlife items. (Def. Mem. at 5). That assertion belies credulity given the number of items he purchased, the fact that he was willing to fly to New York and spend such a significant sum on a rhino horn, his obvious experience and comfort with smuggling items from Washington to Canada, and his expressed interest in purchasing more horns from the undercover officers. Obviously Guan purchased the rhino horns and the ivory and coral items because he intended to sell them at a profit.

IV. The Need to Promote Respect for the Law, to Ensure Just Punishment, and for Deterrence in This Case

There is a critical need in this case to promote respect for the law and ensure just punishment. While the defendant argues that the market value of the items unfairly drives up the

Guidelines (Def. Mem. at 11), it is the skyrocketing market value of these wildlife items – to which the defendant stipulated but now is trying to diminish¹⁰ -- that is leading to their slaughter and bringing them to the brink of extinction. Accordingly, there could be no better driver of the Guidelines than the market value for these items, as each one sold contributes to the fate of these animals.

The defense submission seeks to substitute the defendant's assessment of the seriousness of the offense for that of the Sentencing Commission. A decision to devalue wildlife crimes and sever them from market value in cases such as this – with high values driving the market and the poaching – could have a profound impact beyond this case. The defendant has offered no basis for departing from the framework for determining all wildlife sentences. Accordingly, a Guidelines sentence in this case would have an important specific and general deterrent effect. Unfortunately, there is a desperate need for general deterrence since Guan's crimes are not unprecedented or uncommon.

V. A Guidelines Sentence Would Not Result in An Unwarranted Sentencing Disparity

The defendant erroneously asserts that a below-Guidelines time-served sentence would be in line with the majority of sentences in similar cases. In fact, considering a larger swath of cases, consistent with the Sentencing Guidelines' purpose to ensure nationwide consistency in sentencing, demonstrates the flaw in the defendant's argument.

¹⁰ Guan attempts to undermine the market value to which he has stipulated by arguing that he sold horns for less than \$30,000 per pound. Because he makes an argument that contradicts statements made when he proffered with the Government, the Government is permitted to advise the Court that Guan stated that he sold the rhinoceros horns from the Florida and Ohio auction houses for more than \$20,000 per pound. In his post-arrest statement, Guan also stated that he sold these rhinoceros horns to Chinese clients. The \$30,000 per pound figure agreed upon by the parties is based in large part on the market value for raw horns in Asia.

There are many examples of significant sentences in wildlife cases based on the market value of the wildlife, including the following: *United States v. Tania Siyam*, No. 1:04-CR-00098 (N.D. Ohio) (upward departure in 2008, 60 months for Lacey Act and smuggling charges involving ivory with market value of \$158,000); *United States v. Olivia Terrance et al.*, No. 8:12-CR-00376 (N.D. N.Y.) (18 months for Lacey Act and ESA conspiracy to smuggle reptiles out of the U.S.); *United States v. Dennis E. Rodebaugh et al.*, No. 1:10-CR-00444 (D. Colo.) (41 months for Lacey Act violations involving hunting of elk and deer); *United States v. Tamba Kaba*, No. 1:09-CR-00858 (E.D.N.Y.) (33 months for Lacey Act and smuggling involving smuggling of ivory); *United States v. Ivan and Gloria Chu*, No. 10-CR-0003 (D.V.I.) (30 and 20 month sentences for smuggling black coral); *United States v. David Place et al.*, Nos. 1:08-CR-10098 and 1:09-CR-10152 (D. Mass.) (33 months for Lacey Act and smuggling violations involving sperm whale teeth and narwhal tusks); *United States v. Steven Patrick Garcia, Jr.*, No. 12-CR-00039 (D. Mont.) (24 months for Lacey Act and MBTA violations involving sale of eagle feathers); *United States v. Eliodoro Soria Fonseca*, No. 3:11-CR-03328 (S.D. Calif.) (24 months for smuggling iguana meat); *United States v. James Bobby Butler, Jr., et al.*, No. 6:10-CR-10089 (D. Kansas) (41 and 27 month sentences for Lacey Act interstate trafficking and other offenses related to deer hunting); *United States v. Enrique Gomez De Molina*, No.1:11-CR-20808 (S.D. Fla.) (20 months for smuggling wildlife for taxidermy pieces); *United States v. Karen Blyth et al.*, No. 1:10-CR-00011 (S.D. Ala.) (33, 24 and 13 month sentences for Lacey Act and other violations related to smuggling and mislabeling of seafood); *United States v. Danny Parrott*, No. 2:09-CR-00045 (S.D. Ohio) (21 months for Lacey Act violations involving deer hunting); *United States v. Christopher Rowland*, No. 5:08-CR-00001 (D. Alaska.) (37 months for Lacey Act and

Marine Mammal Protection Act violations involving hunting and export of sea otters, sea lions and seals); *United States v. Herman Oyagak*, No. 04-CR-00034 (D. Alaska) (84 months for illegally taking walruses); *United States v. George Waters*, No. 03-CR-230 and 231 (S.D. Iowa) (57 months for Lacey Act violations involving poaching of deer and elk); *United States v. Arnold Bengis et al.*, No. 1:03-CR-00308 (S.D.N.Y.) (46, 30 and 12 month sentences for Lacey Act violations involving smuggling of rock lobster and toothfish); *United States v. Michael Barrera et al.*, Nos. 03-CR-166 and 04-CR-203 (M.D. Fla.) (37 and 24 month sentences for reptile smuggling); *United States v. Robert Gehl et al.*, No. 93-CR-300 (N.D.N.Y.) (Lacey Act and other offenses resulting in sentences of 87 and 70 months in conspiracy to sell tainted salmon roe); *United States v. Lawrence Wee Soon Chye*, No. 6:03-CR-166 (M.D. Fla.) (37 months for smuggling reptiles); *United States v. Tony Silva*, 94-CR-760 (N.D. Ill.) (82 months and \$100,000 fine for smuggling CITES protected wildlife and tax charges). *United States v. David H. McNab et al.*, No. 00-CR000079 (S.D. Ala.) (97 months for Lacey Act, smuggling and other offense in sale of undersized spiny lobsters from Nicaragua). *United States v. George Waters*, No. 03-CR-230 and 231 (S.D. Iowa) (57 months Lacey Act offenses for illegal hunting of deer and elk); *United States v. Anson Wong*, No. 98-CR-165 (N.D. Cal.) (71 months for Lacey Act and other offense related to trafficking in reptiles); *United States v. Mariusz Chomicz*, No. 03-CR-20915 (S.D. Fla) (30 months for smuggling caviar); *United States v. Panhandle Seafood et al.* N.D. Fla (51 months for Lacey Act and other offenses for illegal import of catfish). Similarly, a review of sentences of incarceration for all violations of 18 U.S.C. § 554, for the time period in or about 2008 to 2014, regardless of the items smuggled, shows 453 cases with periods of incarceration where the *average* period of incarceration was 43 months.

The Lacey Act, our nation's oldest wildlife protection law, was codified in or around 1900. Congress later sought to strengthen laws pertaining to exports with the passage of 18 U.S.C. § 554. Congress and the Sentencing Commission have determined that wildlife crimes and smuggling offenses are serious crimes. The defendant has not asserted that smuggling crimes are not inherently serious or that the penalties for smuggling have only been relatively minor. In essence, the defense submission is asking the Court to find that smuggling of wildlife is somehow less serious than other types of smuggling. This proposal conflicts with public policy, the U.S. criminal code, and the Guidelines. The President's Executive Order has focused attention on the need to treat wildlife trafficking as a serious crime.

Under the sentencing Guidelines, wildlife crimes are determined in part based upon the market value of the species. The Guidelines specifically use the term "market value" and Application Note 4 provides guidance that "'market value' under subsection (b)(3)(A) shall be based on the 'fair-market retail price.'" See 2Q2.1(b)(3) Note 4.¹¹ In this case, the parties agreed that the wildlife, including raw rhinoceros horns and carved objects made from elephant tusks and coral that were smuggled and attempted to be smuggled, from the United States had a total market value of approximately \$500,000. As a result, defendant's offenses fall within the \$400,000 to \$1 million range set forth in § 2B1.1(b)(1)(H). That other courts have imposed lower sentences in other cases is not particularly relevant, especially in those cases involving a different market value and, therefore, a different Guidelines range. See *United States v. Jiminez*, 513 F.3d 62, 91 (3d Cir. 2008) ("[that one defendant] can find another case where a defendant

¹¹ Case law interpreting 2Q2.1(b)(3) has made clear that the "smuggler's price" or "crook's price" is not the relevant standard. See, e.g., *United States v. Eyoum*, 84 F.3d 1004, 1007 (7th Cir. 1996) (rejecting defendant's assertion that "market value" should be calculated using the price agreed upon by defendant and a willing buyer as "squarely against the meaning of 'market value' under § 2Q2.1(b)(3)(A)"); *United States v. Dove*, 247 F.3d 152, 159 (4th Cir. 2001) (holding that district court's calculation of market value using highest price for which it had reliable evidence was correct).

charged with a somewhat similar crime and facing the same advisory guidelines range received a sentence outside the applicable range does not make [the original defendant's] within Guidelines sentence unreasonable”).

The defense submission mentions several other cases that are part of Operation Crash including the following in this or nearby districts: *United States v. Jeffrey Wang*, 13 Cr. 452 (KBF) (S.D.N.Y.), *United States v. Michael Slattery*, 13 Cr. 15 (E.D.N.Y.), *United States v. Zhifei Li*, 13 Cr. 552 (D. NJ), *United States v. David Hausman*, 12 Cr. 576 (JPO) (S.D.N.Y.), and *United States v. Lin Feng Xu*, 11 Cr. 777 (E.D.N.Y.). The defense incorrectly asserts that each of these cases support a variance in this case when, in fact, each of these cases suggest a variance would be unreasonable as applied to defendant Guan.

Jeffrey Wang and Zhifei Li: Wang received a 37-month Guideline sentence without any variance or departure. Wang's final adjusted offense level was 21 (37 to 46 months) which reflected a higher market value (more than \$1 million and less than \$2.5 million) and no role enhancement due to his status as a subordinate of Zhifei Li, a more culpable organizer who received a 4-level enhancement for his role in the offense. Wang's case involved no purchases or sales of raw rhinoceros horn. Rather, his case involved a relatively small number of known transactions of exceptionally high dollar value items, including several very expensive and perhaps authentic antiques made from rhinoceros horn. By comparison, Wang had no underlings or employees as did Guan. Defendant Guan's criminal conduct also appears to have involved more individual purchases of lower quality merchandise without provenance. As a result, there is no reasonable basis to find that Guan's offense qualifies for a variance when Wang's did not. Li appropriately faced higher Guidelines given his role, and similarly received a Guidelines

sentence of 70 months. The fact that Wang and Li received a Guidelines sentence supports the issuance of a Guidelines sentence here.

Michael Slattery: Slattery was one of several members of a group known as the Irish Travelers who was involved in two unrelated instances of interstate trafficking in raw rhinoceros horns. The facts of the case involved interstate trafficking, not smuggling. Unlike the business enterprise established by defendant Guan, Slattery appears to have been an opportunist. The market value of his case was estimated at \$245,000 and, like Wang, Slattery received no role enhancement. Thus, his adjusted offense level was 17 compared to Li's level 27, and Guan's 21. Slattery's Guideline range was 24 to 30 months and he received 14 months. At the time of the offense, Slattery was 22 years old. While the sentencing court found that he was part of an organized criminal activity, it found a lesser sentence would suffice and that there were mitigating circumstances due to his young age and that his father and brothers had brought him into a life of crime.

David Hausman: Hausman pleaded guilty to Lacey Act interstate trafficking of raw rhinoceros horn and obstruction. He faced a stipulated Guidelines range of 18-24 months. Judge Oetken stated at the sentencing that Hausman's conduct justified a sentence of up to two years but that given his age and medical problems such a sentence would be more punitive for Hausman. Judge Oetken therefore sentenced Hausman to a below-Guidelines sentence of six months' imprisonment. Guan does not, and cannot, argue for a similar variance.

Lin Feng Xu: Xu, who was caught at the airport attempting to smuggle a small piece of luggage containing ivory pieces worth \$50,000 to China. The items were purchased by Xu's father and co-conspirator. His final offense level was 12 (including acceptance) with a

Guideline range of 10 to 16 months. Judge Weinstein's below-Guidelines sentence of time served was based on the fact that Xu worked for his father, who was more culpable and had been involved in similar conduct over a longer period of time.

The other Operation Crash case cited by the defendant is similarly distinguishable. In *United States v. Harris*, 14 Cr. 2034 (S.D. Fla.), the defendant was neither the buyer nor the seller of a rhino taxidermy mount containing two horns. Harris brokered the sale of four rhino horns valued at between \$120,000 and \$200,000. Harris received a sentence of home confinement due to his age (76 years old) and medically documented progressive mental deterioration (mild dementia or Alzheimer's) that would be exacerbated by incarceration or any significant variations in normal routines.

Of these cases, Wang's is perhaps the most similar to Guan's. Both were involved in the purchasing of Asian artifacts in the United States and smuggling them out of the country. In sentencing Wang, Judge Forrest stated: "I do find that this is a case, which, in particular, calls out for general deterrence. There are few cases in fact where general deterrence is as important because of the nature of the case, the newness, and the relatively strong emphasis more recently being put upon it. It is a very serious offense and general deterrence does play a role." Wang Sent. Tr. at 40.

VI. A Fine and Forfeiture

In connection with the defendant's plea, the defendant agreed to forfeit all of the wildlife seized from his store and further agrees that he will not participate in the trade, purchase, or sale of any wildlife in the United States, including items containing rhinoceros, ivory or coral.

In addition to a Guideline sentence of incarceration, the Government respectfully suggests that the Court impose an appropriate fine.

VI. Conclusion

For the foregoing reasons, the Government respectfully submits that a sentence within the Guidelines range of 37 to 46 months is sufficient, but not greater than necessary, to meet the goals of Section 3553(a).

Respectfully Submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

PREET BHARARA
United States Attorney

By: ___/s/_____
Richard A. Udell
Senior Litigation Counsel
Environmental Crimes Section
(202) 305-0361

By: ___/s/_____
Janis M. Echenberg
Assistant United States Attorney
(212) 637-2597