

CR-10-00757-PHX-ROS, May 16, 2012

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

1			
2			
3			
4			
5	United States of America,	)	
6		)	
7	Plaintiff,	)	
8	vs.	)	
9		)	CR10-00757-PHX-ROS
10	James R. Parker,	)	
11		)	
12	Defendant.	)	
13		)	May 16, 2012
14		)	3:03 p.m.
15		)	

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL (EXCERPT) PRETRIAL CONFERENCE

Official Court Reporter:  
**Elaine Cropper, RDR, CRR, CCP**  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 35  
Phoenix, Arizona 85003-2151  
(602) 322-7249

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

A P P E A R A N C E S

For the Government:

**PETER S. SEXTON, ESQ.**  
**WALTER PERKEL, ESQ.**  
U.S. Attorney's Office  
40 North Central Avenue, Suite 1200  
Phoenix, AZ 85004-4408  
602.514.7500

For the Defendant:

**MICHAEL LOUIS MINNS, ESQ.**  
**ASHLEY BLAIR ARNETT, ESQ.**  
Minns Law Firm, P.L.C.  
9119 S. Gessner, Suite 1  
Houston, TX 77074  
713.777.0772/(fax) 713.777.0453

For the Defendant:

**MICHAEL D. KIMERER, ESQ.**  
Kimerer & Derrick, P.C.  
221 E. Indianola Avenue  
Phoenix, AZ 85012-2002  
602.279.5900/(fax) 602.264.5566

Also Present:

Joy Bertrand, Esq.

CR-10-00757-PHX-ROS, May 16, 2012

P R O C E E D I N G S

1 (Court was called to order by the courtroom deputy.)

2 (Proceedings begin at 3:03.)

3 THE COURT: Please be seated.

4 COURTROOM DEPUTY: This is case number CR 10-757,

03:03:21

5 *United States of America v. James R. Parker*, on for final  
6 pretrial conference.

7 MR. SEXTON: Good afternoon. Peter Sexton and Walter  
8 Perkel on behalf of the United States.

9 THE COURT: Good afternoon.

03:03:33

10 MR. MINNS: Good afternoon, Your Honor. Michael  
11 Minns, Mr. Kimerer, and Ms. Arnett on behalf of Mr. Parker. We  
12 have a representative in the back from the accounting firm but  
13 not at counsel table.

14 And Mrs. Parker's lawyers asked me to note to the  
15 Court that she is present because she's been brought up on  
16 several of these things. Ms. Parker's counsel, Ms. Bertrand,  
17 is present behind the bar.

03:03:51

18 THE COURT: All right. And the individual you  
19 mentioned in the courtroom is not someone who is going to  
20 testify?

03:04:08

21 MR. MINNS: No. The government -- but she works for  
22 one of the witnesses. The government and the defense have  
23 agreed on three people who, with the Court's permission, will  
24 be allowed to listen to the testimony, summary witnesses on

03:04:24

25 United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 both sides, the government's witness, so she works for the 03:04:27  
2 summary witness who was not able to be here today.

3 THE COURT: Okay. Counsel, first of all, I apologize  
4 for taking so long. I couldn't get off the phone with  
5 Washington. You know how it is when you're talking to the 03:04:45  
6 President of the United States; right?

7 So I am sorry to say that we have to start late but  
8 we are. We have my order on the motions in limine. There's  
9 only one that we need to take up that I'm a little confused  
10 about, and that is the confusion I think both counsel have 03:05:02  
11 about the advice of counsel or the advice defense to the  
12 charges in this case.

13 I hope that you have talked since the motion was  
14 filed and the response was given. These are the questions that  
15 I hope emerged from my order. 03:05:29

16 Number one is, I don't know if the government intends  
17 to call an expert that the defense might be able to ask  
18 questions of concerning advice of counsel to defense. That  
19 seems to be looming. There's no question that the defendant  
20 doesn't have to testify. There's no question that seems 03:05:50  
21 stipulated that if he does testify on this issue and relies on  
22 attorney-client privilege, work product privilege, that he may  
23 likely, and is likely, to waive that privilege, certainly with  
24 anything inextricably interrelated to his testimony.

25 And then there is the question always in my mind 03:06:14

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 whether or not if the defendant does take the stand and  
2 testify, of course his motive and his state of mind is always  
3 relevant. So he could testify that he relied on certain  
4 statements.

03:06:17

5 I've always wondered if whether or not, however, the  
6 fact that he was told something is to be -- or must be offered  
7 for the truth of what is asserted; that is, that he was told  
8 something.

03:06:31

9 So there's always a question of whether or not he was  
10 told something or was not told something. And that to me seems  
11 to be hearsay unless it's stipulated that he did have a  
12 conversation with somebody and whether or not that conversation  
13 actually occurred, it seems to me to be, unless it's stipulated  
14 that it did occur, seems to be a question of whether or not  
15 that is being offered for the truth of what is asserted. And  
16 if there's a stipulation, no problem.

03:06:58

03:07:20

17 Then the question is, is the content of that  
18 conversation, the jury is going to be told, would be told, that  
19 if he was told these things, these facts, and he relied on  
20 them, that they are not to consider those to have been  
21 truthful. But they may, if he did rely on them, if they did  
22 occur, then that may relate to his state of mind. So that to  
23 me has always been in this area, and other areas, always a  
24 complex question. So that only is an issue if he takes the  
25 stand.

03:07:47

03:08:14

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1           If somebody else takes the stand on his behalf, then  
2 there's two issues: Can that individual testify to what he or  
3 she told the defendant? And I would say that that is not  
4 hearsay, that that individual can testify to what he told or  
5 she told the defendant.

03:08:14

03:08:37

6           And then the question is, the jury would decide  
7 whether or not, first of all, that communication was made. And  
8 then they would have to decide whether or not that would be  
9 a -- if you relied on that, it could be a defense.

10           So -- but then the question is whether or not any of  
11 those individuals could give opinion testimony. And that is an  
12 issue that was raised recently that I have ruled on. I can't  
13 imagine I'm going to change my mind about whether or not I'm  
14 going to allow an expert for this purpose.

03:09:00

15           So with all of that as background, we will get to  
16 that issue in a moment.

03:09:19

17           First of all, we have a substantial number of  
18 potential juror questionnaires to go through to determine what  
19 are -- or who will be on our -- will be our jury pool. And so  
20 I think we need to start doing that. And I know that the U.S.  
21 Attorney's Office has been in front of me before for this  
22 purpose and I believe Mr. Kimerer has but I do not believe that  
23 you have. So let me explain my procedure. I don't twist any  
24 arms.

03:09:50

25           You may be seated.

03:10:09

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 I don't twist any arms when it comes to these 03:10:10  
2 questionnaires. The whole idea is to save a lot of time.

3 If people have, on the face of it, a legitimate  
4 excuse for not being here, for example, they have nonrefundable  
5 tickets, they have illnesses, they have child care issues, 03:10:23  
6 then, and my view is, we'll let them go. I'm not going to  
7 bring them in and question them and twist their arms and try to  
8 get them to understand that their civic duty and force them to  
9 stay here for a couple of months.

10 The other thing is there are some flash points in the 03:10:45  
11 questionnaire. First of all, if they answer yes to question  
12 number two, which is essentially after the very synoptic  
13 statement of what this case is all about, they say they can't  
14 be fair and impartial, they are gone. Again, I don't twist  
15 their arms. Sometimes they are just trying to be 03:11:03  
16 straightforward and candid and say, well, I'll wait until later  
17 until I see all of the facts. Of course that's a neutral  
18 answer. Then there are, of course, some hot points later on  
19 where the questions were drafted I think appropriately to ask  
20 people whether or not they could be fair and impartial and they 03:11:22  
21 would answer yes to one question or another that they had a  
22 problem with something and that would also imply they couldn't  
23 be fair and impartial.

24 Some of the answers there were a bit ambiguous. So  
25 what we'll do, go through them with that in mind. What I will 03:11:37

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 do is go through them first. I think I have them in 03:11:43  
2 alphabetical order; but I can tell you I had to go through a  
3 number of these, so I may have completely messed up here. But  
4 I will try to do that and then I will give you the opportunity,  
5 first the government, to go back and tell me, well, I think 03:12:01  
6 this particular individual should be excused or -- this may be  
7 one of the largest number of questionnaires that I have  
8 received in a case, although I know Mr. Sexton was involved in  
9 one a long time ago involving Mr. Eames that may have taken us  
10 half a day to get through because that was a three- or 03:12:21  
11 four-month trial.

12 Okay. So we'll go forward with that in mind and I  
13 hope that each of you have a full opportunity to go through  
14 these questionnaires so that we can get through them in a  
15 relatively short period of time. 03:12:38

16 Yes.

17 MR. MINNS: I apologize, Your Honor. What we've done  
18 is we received these Friday. I started working Monday. We had  
19 to catch a plane. I divided them today. The government  
20 helped, actually, on this and I divided them between five 03:12:54  
21 lawyers and so -- we decided, in the absence of a long period  
22 of time, we would just go to those specific questions that the  
23 Court has just brought up because I felt inadequate to do it  
24 there. So we've gone to those, and I believe and the  
25 government says they have no objection if I can get help when I 03:13:15

United States District Court



CR-10-00757-PHX-ROS, May 16, 2012

1 come to the ones that I didn't personally --

03:13:18

2 THE COURT: Absolutely. All the help you need,  
3 you'll have.

4 MR. MINNS: Thank you, Your Honor.

5 (The following proceedings were designated under seal  
6 until further order of the court, discussion of juror  
7 questionnaires, 3:13 to 4:20 p.m.)

03:13:23

8  
9 (This concludes the proceedings that were designated  
10 under seal until further order of the court.)

04:20:29

11 THE COURT: This is what we do for picking the jury.  
12 We have spent a lot of time. It shouldn't take much time to  
13 pick this jury; even in the most controversial cases, and the  
14 most celebrated cases, those juries have been chosen before  
15 noon.

04:20:48

16 Counsel will have not more than five minutes apiece  
17 to ask the jurors question in a plenary fashion. That means  
18 while they are all here. You can ask them some questions, not  
19 opening statement type of questions.

20 Then you can give me a list and we will talk at the  
21 sidebar and the list will be no more than six individuals  
22 apiece that you would like to talk to in confidence. Everyone  
23 excused for a break. We bring them in seriatim and you ask  
24 them questions. I don't really get engaged in this unless I  
25 need to, if there's some ambiguity.

04:21:05

04:21:25

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1           After that, you exercise your strikes, bring the jury  
2 back in. We have the jury chosen and we start with my  
3 instructions and opening statements. And usually we won't have  
4 a witness the first day. But the United States government  
5 should plan on that if necessary.

04:21:28

04:21:49

6           Now, the other two issues are whether or not you  
7 wanted to agree, and both sides must agree, to let the jury ask  
8 questions during the trial but both sides have to agree. And  
9 this is the procedure. If you decide to allow the jurors to  
10 ask questions, then I don't turn to them and ask them if they  
11 have any questions, but I will tell them in the instructions  
12 that they can ask questions as follows, that after the colloquy  
13 with counsel is finished, they can write down the question. We  
14 go to the sidebar, take a look at the question. Any attorney  
15 has an automatic veto.

04:22:15

04:22:35

16           So you can just decide for any reason, "I don't want  
17 this question asked." It won't be asked.

18           You don't have to give a reason. You don't have to  
19 persuade me it that shouldn't be asked. It just won't be  
20 asked.

04:22:49

21           You'll want to make sure that you don't shake your  
22 head at the sidebar. The jury is going to know who it is that  
23 didn't want the question asked. And then I tell the jury, I  
24 take all of the heat and, I say, "The question can't and  
25 asked," and I explain, in a very brief fashion, why it can't be

04:23:04

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 asked. 04:23:07

2 So that is up to you. Both sides must agree.

3 The other thing is, it's not often in cases, although

4 I've had counsel agree during a criminal case that the jury can

5 discuss the case while they are all together in the jury room 04:23:20

6 before deliberations. That is something that is left up to

7 both counsel and you have to agree to that, once again. So I

8 don't know if you're prepared today to make a decision on

9 whether or not you want to allow the jurors to ask questions.

10 Mr. Sexton? 04:23:40

11 MR. SEXTON: As to both, we have no objection to

12 either.

13 THE COURT: All right.

14 And, Mr. McBee, any questions?

15 MR. MINNS: I am fascinated by both of them and my 04:23:53

16 inclination is that they are good things to do. But I never

17 have done either. So I really feel that it would be

18 incompetent of me to make a decision without talking to

19 counsel.

20 THE COURT: That's fair. You don't have to make up 04:24:07

21 your mind until the day of trial. So you can deliberate.

22 MR. MINNS: Thank you, Your Honor.

23 THE COURT: Okay.

24 So that's all I have to say on jury selection.

25 And in terms of the objections to the jury 04:24:22

CR-10-00757-PHX-ROS, May 16, 2012

1 instructions, I'm going to get those out to you. I did note 04:24:27  
2 that in some cases, the United States government didn't explain  
3 why you wanted certain jury instructions and there was an  
4 objection to the instruction. I suppose your view is that it's  
5 clear, as a matter of law. Take a look, go back and look at 04:24:43  
6 whether or not you explain. I am not going to do your work for  
7 you or for defense counsel.

8 So resubmit your request for jury instructions,  
9 explain why you wanted the instruction, and the same for  
10 defense counsel, Mr. McBee and your group; okay? 04:25:05

11 MR. MINNS: My name is Minns, Your Honor. I  
12 apologize.

13 THE COURT: I'm sorry.

14 MR. MINNS: No. It's my fault. I thought perhaps he  
15 was standing behind me. 04:25:18

16 THE COURT: And I couldn't see. I'm sorry. You're  
17 not listed here and that is very sad. So how do we spell your  
18 name? I've seen you a number of times and I apologize.

19 MR. MINNS: M-I-N-N-S, Your Honor.

20 THE COURT: Okay. Like Minnesota. I'll not forget 04:25:37  
21 it.

22 MR. MINNS: Yes, Your Honor.

23 THE COURT: Okay. Then, Mr. Minns, if you have  
24 instructions that the government has objected to and you have a  
25 reason for it, then set it forth. 04:25:49

CR-10-00757-PHX-ROS, May 16, 2012

1           The way we do this is the instruction is requested by 04:25:51  
2 counsel. Objection is made. Response, all on the document  
3 itself. Then I'll rule on it and get back to you. They are  
4 not really significant questions that I think that I can't  
5 resolve on an expedited basis. So you'll have them very soon, 04:26:09  
6 that is my rulings on them, as soon as I have from you by  
7 Friday exactly what instructions you are proposing and what  
8 your reasons are for them, confer with counsel to see if  
9 there's any objection after you have provided your reason for  
10 the particular instruction before it's submitted to me by 5 04:26:30  
11 o'clock on Friday.

12           Okay.

13           Now, on the motions in limine, I raised this issue  
14 about the advice of counsel for the defense. As I said, I'm  
15 confused about what the government is going to offer and 04:26:50  
16 there's some -- Mr. Minns has made the statement in his  
17 response that it should be a surprise to the government as to  
18 what experts there were going to be. These people or  
19 individuals were going to testify to this and, as I stated in  
20 my order, the government is not entitled to discovery unless 04:27:17  
21 there's been agreement between counsel as to what these  
22 witnesses would testify to unless they're expert witnesses.

23           So let me hear from counsel based upon my ruling and  
24 if you can answer my questions or persuade me otherwise.

25           MR. SEXTON: The reason for our in limine motion on 04:27:52

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 this, Judge, was that we believe the evidence, if it comes in  
2 on advice of counsel, will come in through the defendant  
3 himself for the first time stating in direct examination what  
4 advice he got and how he relied on it.

04:27:54

5 We do not have any records from any -- we don't know  
6 which of the -- he's had seven attorneys since we have been on  
7 this case. We think they are focused on one attorney named  
8 Greg Robinson. There are no files, there are no documents as  
9 to any communications that we've seen in which Mr. Minns would  
10 have communicated the facts that he wanted a legal opinion  
11 on --

04:28:15

04:28:37

12 THE COURT: Let me stop you. Why are you entitled to  
13 that? It's not *Brady* material.

14 MR. SEXTON: Well, it's not *Brady* material but I  
15 would suggest to the Court that it's sort of a fundamental  
16 fairness thing that for the first time he will say something  
17 that is hearsay --

04:28:47

18 THE COURT: But, you know, you'll have to have --  
19 under the rules, this may not be fair to the government, but,  
20 you know, the defense is, unfortunately for the government, and  
21 we all know this, you know, they can ambush you at any time  
22 they want. So unless they are going to offer expert testimony  
23 or they are going to offer exhibits that they haven't turned  
24 over and if they -- and, Mr. Minns, if you intend to turn over  
25 any -- use any Rule 16 documentation in your case, assume that

04:29:00

04:29:23

CR-10-00757-PHX-ROS, May 16, 2012

1 you're going to have one, then you're going to suffer the 04:29:30  
2 consequences if you haven't turned them over.

3 And as I mentioned, the date for -- I'm not going to  
4 allow expert witness testimony. It's too late.

5 So I've answered your question I think. Is there 04:29:46  
6 anything else under the law that would allow you to peek into  
7 the defense before they are allowed to put on their defense and  
8 ambush you if they choose to do so?

9 MR. SEXTON: I understand the Court's point of view  
10 on that. I guess I would ask, alternatively, that if that 04:30:10  
11 occurs, that we be given perhaps some latitude in which to  
12 explore with Mr. Robinson whether or not those opinions were  
13 actually given and have time to check --

14 THE COURT: Mr. Robinson, you said if the defendant  
15 is going to testify. 04:30:28

16 MR. SEXTON: The defendant will testify as to  
17 something he was told by Attorney Greg Robinson.

18 THE COURT: You have every right to subpoena  
19 Mr. Robinson.

20 MR. SEXTON: But the process by which Mr. Robinson 04:30:38  
21 will have to be worked on with us will be that he will have to  
22 hear first what the defendant said on the stand to know the  
23 nature of any waiver that Mr. Robinson would feel comfortable  
24 discussing with us.

25 So what we're trying to do -- 04:30:53

CR-10-00757-PHX-ROS, May 16, 2012

1 THE COURT: The waiver issue in this area is pretty 04:30:56  
2 broad. As soon as Mr. -- if Mr. Parker testifies, then that's  
3 really fair game for anything. If he says Mr. Robinson told  
4 him this and that and all of this, then subpoena Mr. Robinson.  
5 You can do it now. And if we have to have a special hearing to 04:31:15  
6 determine whether or not it's privileged, we'll do that. You  
7 can subpoena his records, whatever. You don't know even if  
8 Mr. Parker is taking the stand at this point. So I don't  
9 see -- you haven't cited anything to me, nor am I aware of  
10 anything that would allow you to interview. 04:31:35

11 MR. SEXTON: All right.

12 THE COURT: So in terms of whether or not Mr. Parker  
13 can testify to what he was told by Mr. Robinson or anything  
14 else, I'll deal with that because, as I said, there may be  
15 hearings objections to that. There may be a variety of other 04:31:54  
16 objections to that. I don't know what they are.

17 As I said, I'm not quite sure, based upon the case  
18 law I've read, whether or not -- whether he actually had the  
19 conversation with Mr. Robinson, can be offered for the truth of  
20 what is asserted. Certainly if that is stipulated by counsel, 04:32:17  
21 then, as I said, then we're beyond that question.

22 MR. SEXTON: Yes. We will be posing a hearsay  
23 objection. We believe the only way it can come in is that they  
24 have to state to you that it's not being offered for the truth  
25 of the matter asserted. 04:32:36



CR-10-00757-PHX-ROS, May 16, 2012

1 THE COURT: Yeah. I know that. But what I'm saying 04:32:38  
2 is I'm asking another question. Maybe I can answer it myself,  
3 is what is being offered is for -- not for the truth of what is  
4 asserted, is what Mr. Robinson or anyone else would have said  
5 to him. But that assumes that they did say saying some to him. 04:32:57  
6 That is being offered for the truth.

7 So I guess he can testify that I had this  
8 conversation. But then I have to tell the jury that that is  
9 not necessarily true, that he had this conversation. What's  
10 more, then, the second part of it is, is the truth of what is 04:33:19  
11 asserted. I need to tell the jury twice and I think that is  
12 the way I would do it.

13 Mr. Minns, in terms of an expert witness, I am not  
14 going to allow it. I am not going to allow your using anyone  
15 as an expert that you intend to call, that is to opine on 04:33:45  
16 whether or not the information that was provided to your client  
17 is the type that could have been relied on by him for the  
18 purpose of determining whether or not he had tax liability.

19 MR. MINNS: I'm a little confused. I apologize, Your  
20 Honor. 04:34:12

21 THE COURT: Well, let me ask you, are you offering an  
22 expert witness other than -- I already ruled you're not going  
23 to -- I'm not going to allow one late. So is there anyone else  
24 that you intended to call who is going to give opinion  
25 testimony? 04:34:27

CR-10-00757-PHX-ROS, May 16, 2012

1 MR. MINNS: Well, the summary witness will probably 04:34:30  
2 disagree with their summary witness.

3 THE COURT: So the summary witness is not going to  
4 give opinion testimony for either the government or the  
5 defense. 04:34:39

6 You're not offering opinion testimony through your  
7 summary witness?

8 MR. SEXTON: No. He's just going to summarize  
9 voluminous records for the benefit of the jury.

10 THE COURT: Okay. So that is what your summary 04:34:48  
11 witness will do, too?

12 MR. MINNS: The summary witness will also say that  
13 the work, professional work product, was not competently done.

14 THE COURT: That's an opinion.

15 MR. MINNS: Yes, Your Honor. 04:35:02

16 THE COURT: Well, I'm not sure that will be allowed.  
17 You can talk to the government about it. Generally, that is  
18 not a summary witness. When a witness summarizes, they  
19 summarize all admissible evidence; but beyond that, I'm not  
20 sure. Check with the government. If they have an objection, 04:35:22  
21 make it, I'll rule on it.

22 So that's why I'm teasing this out now, so we won't  
23 have a lot of time at the sidebar discussing whether or not  
24 it's opinion testimony or summary witness testimony.

25 MR. MINNS: Two things on that, if I could go into 04:35:41

CR-10-00757-PHX-ROS, May 16, 2012

1 two things.

04:35:44

2 Mr. Liggett is named by the government as one of  
3 their witnesses, not an expert. We intended to add him today  
4 as a witness in case they decided not to call him.

5 Mr. Liggett was the CPA that dealt with two of the  
6 tax returns for which Mr. Parker is charged with. Mr. Liggett  
7 had previously refused to talk to us. He talked to the  
8 government on three separate occasions for hours and he refused  
9 to talk to us, refused to return phone calls, so I went to his  
10 office today and knocked on the door and he was very pleasant  
11 and he told me that the government wasn't going to call him.  
12 So --

04:35:59

04:36:22

13 THE COURT: Well, you're going to subpoena him, then?

14 MR. MINNS: Yes, Your Honor.

15 THE COURT: As a fact witness?

04:36:31

16 MR. MINNS: We're not going to vouch for his expert  
17 opinions. We disagree with them. To go more toward what the  
18 Court said, the statements made by the various experts that  
19 Mr. Parker relied on we think are mostly wrong. So we're not  
20 going to vouch for the truth of any of them. And a hearsay  
21 instruction is, in my opinion, completely appropriate. A  
22 double instruction tends to emphasize that -- I have not had  
23 that before.

04:36:49

24 THE COURT: Well, and I'm not quite sure exactly  
25 how -- it depends upon who is testifying. Now, you're saying

04:37:09

CR-10-00757-PHX-ROS, May 16, 2012

1 that this is a witness that was going to be called by the 04:37:13  
2 government, but you're now going to call the witness perhaps  
3 for the purpose of testifying to what the witness told your  
4 client; right?

5 MR. MINNS: Perhaps, yes, Your Honor. I mean, I -- 04:37:29

6 THE COURT: That wouldn't be offered for the truth,  
7 certainly.

8 MR. MINNS: No.

9 THE COURT: It would be offered to establish that  
10 that witness told your client something. 04:37:37

11 MR. MINNS: Yes.

12 THE COURT: And then if it was helpful to you, you  
13 can argue to the jury, "Well, my client relied on that," et  
14 cetera.

15 MR. MINNS: Sharing this with the Court, the witness 04:37:48  
16 is not terribly competent so I'm not excited about putting the  
17 witness on. And I've not decided in my mind to put the witness  
18 on. I thought he to be a totally hostile witness. And after  
19 talking to him today, I don't think he is total hostile witness  
20 and I don't -- he did not agree with everything on the 04:38:05  
21 memorandum.

22 And when he told me the government wasn't calling  
23 him, I surprised. So I have been planning only a  
24 cross-examination of the witness. I thought he would be the  
25 primary witness in the government's case, actually. 04:38:24

CR-10-00757-PHX-ROS, May 16, 2012

1 THE COURT: Well, are you calling him, Mr. Sexton? 04:38:26

2 Let's get beyond this.

3 MR. SEXTON: We are not planning to, no.

4 THE COURT: Okay.

5 So that takes care of that. You can decide whether 04:38:33

6 you need him or not. So are there any other witnesses that you

7 were planning on calling for fact purposes to establish your

8 client's defense, assuming that you are going to rely on it?

9 MR. MINNS: That we haven't named on our witness  
10 list. I believe everybody has been named on the witness list, 04:38:53

11 Your Honor. The only one not on our witness list that we --

12 Jim Liggett is not on our witness list. He was on the

13 government's witness list and apparently they are taking him

14 off and we are putting him on.

15 THE COURT: Is there anyone else on your list that 04:39:12

16 you are not calling so Mr. Minns can determine whether or not

17 he needs to subpoena those individuals?

18 MR. SEXTON: We can talk with counsel about that. We

19 have listed a lot of witnesses that, depending on evidentiary

20 disputes, are there as contingencies. We told them earlier 04:39:28

21 today that we're looking at somewhere in the 25 to 30 range

22 although the list shows 75. A lot of them are in case there

23 are some concerns by the Court on a foundational or such.

24 But we also told them today that as we begin our

25 presentation, we will alert them to what we think are the 04:39:51

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 witnesses coming up so that they don't spend any time wasting, 04:39:53  
2 looking at things they don't need to.

3 THE COURT: Okay.

4 So the bottom line is that you'll let Mr. Minns know  
5 so that he won't have to subpoena the witnesses. You'll let 04:40:03  
6 him know close enough to trial whether or not he needs to  
7 consider subpoenaing them because you likely will not call him?

8 MR. SEXTON: That is correct. I believe everybody on  
9 our list is subpoenaed. We haven't released anybody from that.  
10 So to the extent that he needs cooperation with that, we would 04:40:23  
11 be happy to assist him in that regard.

12 THE COURT: All right. Fine.

13 Anything else, Mr. Minns?

14 MR. MINNS: I would like -- I understand the Court  
15 has ruled against us on the expert witness and I understand 04:40:45  
16 that that determination was made late and I don't know if we  
17 have a legitimate plea but I -- I think that we do. And so I  
18 would ask that the Court's favoring at least hearing it out.

19 The motions that came which have spent most of the  
20 Court's time on today had to do with Mr. Robinson. The 04:41:11  
21 unethical conduct that the gentleman would be testifying to is  
22 predominantly Mr. Robinson's. We realized the need for an  
23 ethics expert because of the government's approach in these  
24 motions and had they not done that, we probably would have not  
25 realized it. 04:41:33

CR-10-00757-PHX-ROS, May 16, 2012

1           The ethics expert, Mr. Stewart, has published books           04:41:34  
2           on the subject, has lectured all over the United States and has  
3           been on both sides of the bar for ethics, not just defense  
4           side, explained things to me that he says he has routinely been  
5           able to explain to jurors and even judges and why the ethics of           04:41:51  
6           this profession are so important.

7           And the relationship of the two Robinson brothers,  
8           one of them got into a partnership with Mr. Robinson and  
9           received money from him while the other brother -- both  
10          lawyers, both partners in the same law firm, the other brother           04:42:11  
11          advised him, you know, whether or not his brother was being  
12          fair. His brother partner to Mr. Parker and his brother  
13          partner to himself, I guess.

14          Extremely inappropriate conduct that laymen will not  
15          understand and maybe some lawyers didn't. Until Mr. Stewart           04:42:33  
16          explained it to me, I did not fully understand it. Mr. Stewart  
17          also explained the specific rules in Arizona.

18          I concur we are late. I think we have adequate  
19          reason for being late and I apologize to the Court. And if we  
20          prejudiced the government in any way by our tardiness, I think           04:42:57  
21          it would be appropriate. But the case has not started. It  
22          starts in two weeks. We gave them immediately his credentials.  
23          We are still trying to develop this. It would be -- in  
24          rebuttal, in large part depending on whether or not, as I  
25          understand it, they may put Mr. -- they may subpoena           04:43:17

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 Mr. Robinson. They may put Mr. Robinson on the stand. At that 04:43:22  
2 point, the things he says may need to be rebutted by the  
3 expert.

4 We've attached bills, for example. Mr. Robinson  
5 graciously agreed to talk to me about the case. I will not 04:43:42  
6 reveal a word of what he said, but he agreed to talk to me  
7 about the case, for which his client stands indicted on 32  
8 counts, if I agreed to pay him for his time. I was highly  
9 offended by that but I did pay him and I attached the bills  
10 that Mr. Robinson forced us to pay in order to talk to us about 04:44:04  
11 the problem that he put his client in.

12 So it's an overwhelming issue and it seems to be more  
13 overwhelming based on the government's whole thrust in this for  
14 lack of a better word, gentleman. And I think Mr. Stewart has  
15 enlightened all of us. He has already enlightened me. It was 04:44:25  
16 not out of intention. I don't think the government has  
17 suffered -- I believe the test would be, and it's a fair test  
18 and I believe this Court, weighing it, would find the  
19 government hasn't been prejudiced in any way. The trial hasn't  
20 started. They have the ability to read the professor's works 04:44:44  
21 and prior stuff. We've given him his CV. He will not testify  
22 about the advice. He will testify about unethical conduct.

23 THE COURT: Mr. Sexton?

24 MR. SEXTON: We do not intend to call Greg Robinson.  
25 At best, we would consider Greg Robinson, depending on what the 04:45:23

United States District Court



CR-10-00757-PHX-ROS, May 16, 2012

1 defendant testifies that he says Greg Robinson told him on the 04:45:27  
2 stand. So we're not calling him on our case-in-chief, so  
3 there's no need for them to have this expert opine upon what  
4 they have just talked about.

5 And the problem with it is it's a multi-layered issue 04:45:41  
6 here in the terms of we still don't know what's going to come  
7 out in the advice of counsel. So now we have a second layer of  
8 an expert who is going to opine on some aspect of that  
9 representation and we're just hearing about this last week.

10 So right now I still don't -- as he says, he's still 04:46:01  
11 trying to develop this and so from an expert standpoint, it's  
12 unfair to do this at this late date under these circumstances.  
13 And we still don't have specific information as to what he's  
14 talking about, because we don't know what the attorney -- what  
15 the defendant may say on the stand that will develop the 04:46:19  
16 information that would make an ethics person relevant because  
17 we're not calling Greg Robinson.

18 MR. MINNS: I apologize if I was not clear about some  
19 specific unethical conduct that is germane to this specific  
20 case. 04:46:42

21 Mr. Robinson's brother entered into a partnership  
22 with Mr. Parker. He took significant sums of money which is on  
23 the government's record, and they intend to offer it into  
24 evidence, this money. Some of it went to pay for the home  
25 which was in the trust, which the government calls the trust a 04:46:55

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 sham. And some of it only Mr. Robinson's deceased brother can 04:46:58  
2 identify where the funds disappeared to.

3 The operation here is unethical in almost every state  
4 and it is strongly unethical in the State of Arizona. And  
5 there's no state whereby a lawyer can put his interest over the 04:47:12  
6 interest of the client, meaning the lawyer, not a trust fund,  
7 but has a business thing where only he can sign on it and the  
8 client can't.

9 This created ethical obligations and makes all of the  
10 advice of Mr. Robinson, whose advice he was the lawyer on all 04:47:27  
11 four of the offers in compromise. He was aware of everything  
12 that existed. He visited Mr. Parker in the home that was not  
13 on the offer in compromise which is the basis of the  
14 government's case. They claim it should have been on the offer  
15 in compromise. 04:47:46

16 So expert and ethics will explain to a jury  
17 specifically why lawyers can't do this and the disadvantage  
18 that it puts the client at.

19 I firmly believe had there been ethical conduct, we  
20 wouldn't be here today. 04:48:04

21 THE COURT: Well, at this point, it's speculative.  
22 We don't know what the opinions would be. We don't know if  
23 they would be admissible under Rule 702. It sounds to me when  
24 they are as obtuse at this point that they likely would not be  
25 admissible for a number of reasons, even in their obtuse state, 04:48:28

United States District Court

CR-10-00757-PHX-ROS, May 16, 2012

1 I should say. 04:48:33

2 First of all, if it's ethics, then ethics are almost  
3 a matter of law. So my question is whether or not the jury  
4 would need it anyway.

5 The jury could be told or be given the ethics 04:48:46  
6 opinions or the ethical rules and then, if necessary, ethical  
7 opinions with respect to those rules rather than having an  
8 expert opine on what constitutes ethical conduct.

9 So starting from the beginning, we don't know what  
10 the opinions are and we don't know what they would be 04:49:10  
11 responding to. I'm very unclear about what Mr. Robinson did or  
12 didn't do. And, thirdly, the question as to whether or not  
13 they would be helpful to the jury. No lawyer can testify to  
14 what the law is, and that includes what ethics are. The ethics  
15 are essentially what the law is. 04:49:37

16 So -- and it's too late. I mean, if, in fact it was  
17 clear today precisely what the opinions were under Rule 16, you  
18 had all of the evidence to support those opinions, then I would  
19 consider it. But it's too late for that.

20 So my ruling stands on whether or not you can call an 04:49:59  
21 expert witness. Whether or not you can cross-examine any of  
22 the government's evidence and, in essence, brings out expertise  
23 is a question I'll rule on at trial, plus the issue about  
24 whether or not anything is hearsay is another question.

25 Counsel are to work on -- assuming that this 04:50:22

CR-10-00757-PHX-ROS, May 16, 2012

1 testimony is offered one way or the other on the defense of 04:50:28  
2 advice of counsel, you need to propose to me what the  
3 instruction should be to the jury on it not being offered for  
4 the truth of what is asserted. And that is dependent upon who  
5 was testifying. 04:50:49

6 Okay.

7 Is there anything else now?

8 MR. SEXTON: We're still trying to work out two  
9 issues with counsel, one dealing with an opinion expressed by  
10 the special agent in the special agent's report in which the 04:51:06  
11 December of 2008 when the report was prepared. The agent  
12 opined in two sentences about what the agent thought the  
13 knowledge of the wife was as to the tax evasion side of this  
14 case. And she opined that she didn't think the wife was  
15 sufficiently involved with the business aspects to be culpable 04:51:33  
16 under the evasion. But as to the false statements and the  
17 offers and compromise, that ultimately was what the wife was  
18 charged with.

19 We believe that that opinion, that hearsay opinion in  
20 the SAR about the wife is an improper thing to raise in an 04:51:50  
21 opening statement or to try to elicit at trial. We're still  
22 trying to see if we can convince counsel that -- we are  
23 actually briefing that in our trial memorandum, so I just wish  
24 to alert the Court --

25 THE COURT: Are you asking, Mr. Sexton, that that 04:52:09

CR-10-00757-PHX-ROS, May 16, 2012

1 question and that evidence not be admitted? 04:52:13

2 MR. SEXTON: Yes.

3 THE COURT: All right. Well, then that is a motion  
4 in limine which I don't have in front of me. So it's not a  
5 matter of just briefing it in your trial brief. 04:52:23

6 If you are asking this Court to exclude that  
7 testimony, that is something that I need to resolve before  
8 trial. When you say you're trying to work it out with counsel,  
9 it seems to me what you're saying is counsel doesn't agree.

10 MR. SEXTON: At this point. 04:52:41

11 And the other one that I wish to raise is that there  
12 is a suspicious activity report that we're trying to discuss  
13 whether or not we can -- we're trying to avoid having a witness  
14 have to acknowledge that a suspicious activity report was  
15 prepared by the bank. 04:52:57

16 THE COURT: A witness -- who is the witness?

17 MR. SEXTON: It's a witness for the bank, for a bank  
18 in Oklahoma.

19 THE COURT: Now, the testimony, the evidence would be  
20 that someone prepared a suspicious activity report? 04:53:11

21 MR. MINNS: Right.

22 THE COURT: And you want to exclude that?

23 MR. MINNS: Right.

24 THE COURT: And tell me more about that. Who is this  
25 individual who suggested that the report should be issued and 04:53:21

CR-10-00757-PHX-ROS, May 16, 2012

1 why is it not relevant?

04:53:27

2 MR. SEXTON: Well, the specific individual, there's  
3 two people from the bank who might be asked the question. One  
4 is the bank president --

5 MR. PERKEL: Former bank president.

04:53:40

6 MR. SEXTON: And the other is --

7 MR. PERKEL: The head secretary.

8 MR. SEXTON: The head secretary and so one is, we  
9 don't think it's relevant. And, two, there is actual law  
10 statute that precludes a person from disclosing that a  
11 suspicious activity report was filed. So we don't think it's  
12 relevant and I've actually just proposed to them -- they don't  
13 wish to physically disclose it but the parties can stipulate  
14 and I propose that and they are considering that whether or not  
15 we stipulate that such a report was filed. That way you don't  
16 place a witness in the dilemma of answering that question to  
17 their belief that they are violating the law.

04:53:52

04:54:12

18 THE COURT: That sounds like something you are  
19 working out. Okay.

20 Anything else?

04:54:24

21 MR. SEXTON: The only other thing is that as to the  
22 notice of the rejection of the plea agreement, I wish to put on  
23 the record that I sent a draft of that to Mr. Kimerer the day  
24 before it was filed. I talked with him the next day before it  
25 was filed and asked him whether he had any objection to that.

04:54:41

CR-10-00757-PHX-ROS, May 16, 2012

1 He did not and that was what it was filed, so I just wanted to 04:54:45  
2 add that to the record at this time.

3 THE COURT: Okay.

4 Mr. Minns, anything else?

5 MR. MINNS: Not unless the Court wants me to comment 04:55:11  
6 on what the government just said.

7 THE COURT: I'm not ruling on it. I'll take that up  
8 later. As I said, if it's a motion in limine, it needs to be  
9 presented to me as such. It's a little bit late for motions in  
10 limine. However, sometimes issues like this will occur after 04:55:24  
11 the resolution of the final pretrial conference. If you can't  
12 work it out with counsel, then you file the motion by the end  
13 of the week, response is due by next Tuesday, if there's  
14 opposition to it.

15 All right. 04:55:44

16 Anything else?

17 MR. MINNS: No, Your Honor. I would like to remind  
18 the Court, and it hasn't hit me hard yet and I -- part of it is  
19 when the trial is going on, it's much more stressful than it is  
20 just with us here. But I was in the Mayo Clinic for a week and 04:55:58  
21 I left the last trial before it ended. The judge -- to go to  
22 the hospital. The judge was gracious enough to postpone it for  
23 three days and I got to give closing argument and justice  
24 prevailed, acquittals.

25 But I have -- 04:56:15

CR-10-00757-PHX-ROS, May 16, 2012

1 THE COURT: So every time you want an acquittal, you 04:56:16  
2 go to the Mayo Clinic?  
3 MR. MINNS: No, I couldn't afford to. No, Your  
4 Honor. I do have a kidney problem at times and --  
5 THE COURT: I think you mentioned that and I will do 04:56:27  
6 everything to accommodate your problem.  
7 MR. MINNS: Thank you, Your Honor. I apologize for  
8 bringing it up.  
9 THE COURT: Anything else?  
10 MR. SEXTON: Not from the government. Thank you, 04:56:35  
11 Judge.  
12 THE COURT: We're adjourned.  
13 COURTROOM DEPUTY: All rise.  
14 (Proceedings concluded at 4:56 p.m. and this  
15 concludes this transcript of this excerpt.) 04:56:49  
16 \* \* \* \* \*  
17  
18  
19  
20  
21  
22  
23  
24  
25



CR-10-00757-PHX-ROS, May 16, 2012

C E R T I F I C A T E

I, ELAINE M. CROPPER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 22nd day of May, 2012.

s/Elaine M. Cropper

Elaine M. Cropper, RDR, CRR, CCP

United States District Court