

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DAVID A. BANKS;
2. DEMETRIUS K. HARPER, a/k/a KEN HARPER;
3. GARY L. WALKER;
4. CLINTON A. STEWART, a/k/a C. ALFRED STEWART;
5. DAVID A. ZIRPOLO; and
6. KENDRICK BARNES,

Defendants.

REPORTER'S TRANSCRIPT
(Jury Trial Day 15)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 10:35 a.m. on the 18th day of October 2011, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MATTHEW T. KIRSCH and SUNEETA HAZRA, U.S. Attorney's Office - Denver, 1225 17th St., Suite 700, Denver, CO 80202

FOR THE DEFENDANTS:

Pro Se

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OCTOBER 18, 2011

(Proceedings commence at 10:35 a.m.)

(The following is had in open court, outside the hearing and presence of the jury.)

THE COURT: You may be seated.

All right. I got a previous note from the jury at 10:25 a.m. that said, "May we view the white board?" And based on our conversations yesterday, I just essentially indicated yes. The CSO should just show them in the courtroom. So they did come view that, I believe. I don't know. Ms. Barnes is shaking her head yes. Okay.

Then, just at 10:10 -- I think they put the wrong time. I think it was 9:25, not 10:25, because that one came in earlier. Then, at 10:10 this morning, I got this note, which I believe you all have copies of; is that correct? "Does mail fraud include private companies such as UPS and Federal Express?"

The statute, itself, does say, "Deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Therefore, it would be my intention to respond with the following message. "Yes. 18 United States Code, Section 1341, the mail fraud law includes 'any private or commercial interstate carrier.'"

MR. KIRSCH: Your Honor, we would support that

1 response. And just for the record, we would further point
2 out that the Indictment, itself, also charged mailings
3 both through the U.S. Mail and through private commercial
4 interstate carriers.

5 THE COURT: Right. I had seen that.

6 Defendants, any objection to that language?

7 MR. WALKER: No objection, Your Honor.

8 THE COURT: All right. So let me write this in
9 here. So what I have written is: "Answer from the Court:
10 Yes. 18, United States Code, Section 1341, the mail fraud
11 law includes 'any private or commercial interstate
12 carrier.'" Then I have signed it.

13 All right. Ms. Barnes, can you give this to the
14 CSO to take back in to the jury.

15 And we are in recess.

16 (Deliberations continue.)

17 THE COURT: You may be seated.

18 You have before you, at 3:16 this afternoon, the
19 jury sent in another question. "Is all of the evidence
20 present in the jury room the only evidence available for
21 us to consider, excluding the white board in the
22 courtroom?"

23 They say "evidence," but they mean exhibits. They
24 have all of the exhibits that they can consider, excluding
25 the white board, but they can also consider any of the

1 testimony. So I am not sure how you want to respond to
2 this.

3 MR. KIRSCH: Your Honor, that's the Government's
4 concern, is that it appears that they may mean exhibits,
5 but that's not what they say. They say "evidence." I
6 think what we would propose is, in the answer repeating a
7 portion of Instruction No. 5, which defines the evidence.
8 In particular, I think what we're proposing is essentially
9 re-reading the sentence that forms the second paragraph.

10 THE COURT: Ms. Barnes, do you have the jury
11 instructions?

12 MR. KIRSCH: I do, Your Honor, if you don't have
13 those, or I can read it if that is easier.

14 THE COURT: Instruction No. 5?

15 MR. KIRSCH: Right. So we would propose beginning
16 the answer by reading the second paragraph of Instruction
17 No. 5, "The evidence in this case includes only what the
18 witnesses said while they were testifying under oath and
19 that the exhibits that I allowed in evidence." Then,
20 following that with, "All of the exhibits I allowed into
21 evidence are present in the jury room, with the exception
22 of the white board."

23 THE COURT: Okay. So it would read, essentially,
24 "The evidence" -- what I would say is "See Instruction No.
25 5, evidence defined. In particular, the second paragraph,

1 'The evidence in this case includes only what the
2 witnesses said while they were testifying under oath and
3 the exhibits that I allowed into evidence.'"

4 MR. KIRSCH: And then the only other thing, Your
5 Honor, is that we would propose saying that, "All of the
6 exhibits that I allowed into evidence are in the jury
7 room, with the exception of the white board."

8 THE COURT: Okay. What do the defendants propose?

9 MR. BANKS: Can we have a second, Your Honor?

10 THE COURT: You may.

11 MR. BANKS: Your Honor, we're okay with the
12 paragraph identified by the Government in Instruction No.
13 5. We also would like Instruction No. 9 to be included as
14 a part. They did ask for evidence and, obviously, an
15 expert witness is considered evidence, as well.

16 THE COURT: That would be the witness that
17 testified. It's what the witnesses said while they were
18 testifying.

19 MR. BANKS: Correct.

20 THE COURT: But I don't think we need to point out
21 particular evidence, other than the witnesses and the
22 exhibits, in general.

23 MR. BANKS: Okay.

24 MR. KIRSCH: Your Honor, we agree with that. We
25 think that it would be a problem to direct the jury's

1 attention to a particular piece or kind of evidence.

2 MR. BANKS: Well, Your Honor, with all due respect,
3 Mr. Kirsch -- they actually -- the instruction has
4 actually directed them, to some extent, to Mr. Barnes
5 during the trial in that particular jury instruction. I
6 think --

7 THE COURT: Well, I can essentially not mention
8 Instruction 5 and just indicate, "As I instructed you, the
9 evidence in this case includes only what the witnesses
10 said while they were testifying under oath and the
11 exhibits I allowed into evidence." And I don't have to
12 make reference to Instruction No. 5.

13 MR. BANKS: That will be more beneficial.

14 THE COURT: I think that would probably be better.

15 MR. KIRSCH: That's fine, Your Honor.

16 THE COURT: All right. So what I would state is,
17 essentially, then, "As I instructed you, 'The evidence in
18 this case includes only what the witnesses said while they
19 were testifying under oath and the exhibits I allowed into
20 evidence.' All of the exhibits that I allowed into
21 evidence are in the jury room, with the exception of the
22 white board." Is that acceptable?

23 MR. KIRSCH: That is acceptable to the Government,
24 Your Honor.

25 MR. WALKER: That is acceptable for the defendants,

1 Your Honor.

2 THE COURT: Okay. So let me write it out here. So
3 what I have written; "As I instructed you, 'The evidence
4 in this case includes only what the witnesses said while
5 they were testifying under oath and the exhibits that I
6 allowed into evidence.' All of the exhibits that I
7 allowed into evidence are in the jury room, with the
8 exception of the white board."

9 MR. WALKER: That's fine, Your Honor.

10 THE COURT: All right. Ms. Barnes, if you could
11 take this in to the CSO to give to the jury.

12 And we will be in recess.

13 (Deliberations continue.)

14 **R E P O R T E R ' S C E R T I F I C A T E**

15 I, Darlene M. Martinez, Official Certified
16 shorthand Reporter for the United States District Court,
17 District of Colorado, do hereby certify that the foregoing
18 is a true and accurate transcript of the proceedings had
19 as taken stenographically by me at the time and place
20 aforementioned.

21 Dated this 5th day of December, 2011.

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24 _____
s/Darlene M. Martinez

25 RMR, CRR