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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ERIC PARKER, ET. AL,  
Defendant.

2:16-cr-00046-GMN-PAL

**MOTION IN LIMINE AND**  
**OPPOSITION TO GOVERNMENT'S**  
**INTENT TO USE SUMMARY EXHIBITS**  
**AND EXPERT WITNESS**

Comes now the defendants, ERIC PARKER, by and through his counsel of record, JESS R. MARCHESE, and STEVEN STEWART, by and through his counsel of record, RICHARD TANASI, ESQ., and hereby submit this opposition to the government's notice of intent to use summaries and summary charts that will allegedly summarize the testimony of the government's witnesses and outline the alleged criminal conduct.

This opposition addresses notices and exhibits filed by the government which pertain to their intention to introduce summary testimony and exhibits through Federal Bureau of Investigation (FBI) Special Agent Chad Simkins. (See Docket #1250<sup>1</sup>, Exhibit 1<sup>2</sup>, Exhibits 2 and

<sup>1</sup> Government's Notice and Disclosures Under FRE 16(a)(1)(G)

<sup>2</sup> Overhead of area with agent's markings

1 3<sup>3</sup>) In Docket #1250, the government notified the Court that intends to submit the  
2 aforementioned exhibits summary testimony and exhibits through the summary witness.

3 The government also notified this Court in Docket #1250 that Mr. Simkins will offer  
4 testimony that is in essence his assessment of the alleged illegal activity. Mr. Simkins was then  
5 tasked with creating a diagram, plotting the positions, of persons carrying, using, brandishing,  
6 pointing firearms relative to know the positions of the law enforcement officers and over time,  
7 establishing the timeline and summary of movements of the persons with the firearms.” #1250 3-  
8 4; *id.* at 6 (“Mr. Simkins will testify that he used his firearms training and skills to identify  
9 persons carrying, using, brandishing, or pointing firearms, and will further describe his  
10 observations and understanding of how the weapons were deployed as released by the images.”);  
11 *id.* at 4 (He will further testify that during these two intervals of time, he tallied the number of  
12 firearms and types, delineated as handguns and long guns, present in the Wash and on the  
13 bridges.); *id.* at 4 referring to Exhibit 2; (He compiled the images into a PowerPoint presentation  
14 that serves as a summary timeline of the movement and/or position of the defendants in the  
15 Wash). This testimony, however, would invade the province of the jury, and therefore should be  
16 disallowed.  
17

18 For the reasons outlined in the attached memorandum of points and authorities, the  
19 defendants respectfully request that this Court enter an order denying the government’s motions.

20 DATED this 17th day of January 2017,

21  
22 /s/  
23 By \_\_\_\_\_  
24 JESS R. MARCHESE, ESQ.  
25 Counsel for PARKER  
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3 Excel spreadsheets of agents findings in reference to who had firearms and what types; where certain pictures originated

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Legal Standard Applicable to the Use and Introduction of Summary Evidence**

Under Federal Rule of Evidence (FRE) 1006, “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.” In other words, if records are too voluminous to be examined by the jury, then a summary of their contents may be substituted.

In general, the Ninth Circuit “do[es] not approve of receiving summary exhibits of material already in evidence.” *United States v. Boulware*, 470 F.3d 931, 936 (9th Cir.2006), *vacated and remanded on other grounds*, *Boulware v. United States*, 552 U.S. 421 (2008). “Such pedagogical devices,” the Circuit has cautioned, “should only be used as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations.” *United States v. Wood*, 943 F.2d 1048, 1504 (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir.1984) *United States v. Abbas*, 504 F.2d 123, 125 (9th Cir.1974)).

Under FRE 403, relevant evidence may nonetheless be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

**II. The Government Should Not Be Permitted to Introduce Summary Evidence.**

The Court should not allow the government’s to admit or even use so-called summary charts with its expert Special Agent Chad Simkins. There are several reasons for denying this motion and excluding the use of these charts in our upcoming trial.

First, the Ninth Circuit has made clear that charts summarizing admitted testimony cannot be admitted into evidence and provided to the jury, particularly when the material has already been admitted into evidence. *See Wood*, 943 F.2d at1053.

...  
...

1 As noted by the government in Docket #1250, Mr. Simkins will be testifying that evidence that  
2 the government will presumably have already submitted into evidence—various videos and  
3 pictures that must be entered into evidence through alternative means prior to him testifying.  
4 Thus, Agent Simkins’ testimony would be impermissibly duplicative of evidence already entered  
5 into evidence and submitted to the jury.

6 Second, these proposed spread sheets should not be permitted even as testimonial aids  
7 because the information the government intends to include in the sheets are not summaries at all.  
8 The Ninth Circuit has been clear that, to the extent spread sheets are even permitted to be used as  
9 testimonial aids, they must merely summarize testimony and nothing more. *Abbas*, 504 F.2d at  
10 124-125. With each entry, the government submits that the agent will testify about the validity as  
11 to which defendants and conspirators (both identified and unidentified) had firearms, where, and  
12 what kind of firearm. As described by the government, these proposed spreadsheets first make the  
13 credibility determination—which should be reserved for the jury—that the government’s disputed  
14 assertions about the information regarding the firearms is true. The government then proposes to  
15 apply the agent’s interpretation of the firearms to this disputed testimony. This is improper  
16 bolstering of a witness’ disputed testimony and it is not a summary. Thus, these charts would fall  
17 far outside of the narrow exception for the testimonial use of summary charts permitted by the  
18 Ninth Circuit.

19 Finally, this Court should not permit the admission of summary evidence because of the  
20 risk of prejudice to Parker and Stewart. When both a summary and the underlying pictorial  
21 evidence are admitted into evidence and present in the jury room, there is a risk of prejudice to  
22 the defendant. Accordingly, courts must take the “precautionary measure” of “not admit[ting]  
23 the charts as evidence or allow[ing] their use by the jury during deliberations.” *United States v.*  
24 *Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984); *See United States v. Abbas*, 504 F.2d 123, 125  
25 (9th Cir. 1974); *see also United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983)  
26 (discussing “obvious dangers posed by summarization of evidence”). Charts have the potential to  
27 take on “an existence of their own, independent of the evidence which gave rise to them.” *Abbas*,  
28 504 F.2d at 124 (internal quotation marks omitted).

1 First, there is a “danger” that the jury will be “unfairly and unduly impressed by the  
2 apparent authenticity of a government witness’ chart computations, . . . rather than by the truth  
3 and accuracy of the underlying facts and figures supporting them.” *Id.* (internal quotation marks  
4 omitted). Second, there is a “danger . . . that a jury will treat the summary as additional evidence  
5 or as corroborative of the truth of the underlying” evidence. *Lemire*, 720 F.2d at 1348; *see also*  
6 *id.* (noting that even with limiting instructions about the significance of summary evidence, “a  
7 summary may be considered too conclusory, or as emphasizing too much certain portions of the  
8 Government’s case, or as presenting incompetent facts”). Finally, the summary chart may “act as  
9 a speaking, continuous witness throughout the jury’s deliberation of certain specific, isolated—  
10 albeit significant—testimony to the exclusion of the totality of the evidence taken at the trial  
11 which must be viewed in its entirety.” *Abbas*, 504 F.2d at 125. For these reasons, courts must  
12 take great care “to insure that an accused is not unjustly convicted in a ‘trial by charts,’ however  
13 impressive the array produced.” *Id.* (internal quotation marks omitted).

14 For all of these reasons, this Court should deny the government’s request to admit  
15 summary evidence and charts through Mr. Simkins. To the extent the Court is considering  
16 admitting or allowing the use of these ‘spreadsheets,’ the defense requests that the Court follow  
17 the precautionary measures for the use of charts set forth by the Ninth Circuit in *United States v.*  
18 *Soulard*, 730 F.2d 1292, 1300 (9<sup>th</sup> Cir. 1984)(requiring hearing outside presence of jury to  
19 discuss accuracy and use of charts before testimony or closing using them).

21 **III. This Court Should Not Permit FBI Agent Chad Simkins to Provide**  
22 **Testimony About the Validity of the Defendant’s Actions Because Such**  
23 **Testimony Would Impermissibly Invade the Province of the Jury.**

24 FRE 702 governs the admissibility of expert opinion testimony. Using broad language,  
25 the rule requires that the testimony “help the trier of fact to understand the evidence or to  
26 determine a fact in issue” and that the expert be sufficiently qualified to give the opinion.  
27 Fed.R.Evid. 702; *United States v. Lukashov*, 694 F.3d 1107, 1115–16 (9th Cir. 2012) (citing  
28 *Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir.2010)). Expert testimony should be excluded “if it  
concerns a subject improper for expert testimony, for example, one that invades the province of

1 the jury.” *United States v. Binder*, 769 F.2d 595, 602 (9th Cir.1985), *overruled on other grounds*  
2 *by United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir.1997) (en banc).

3 As noted above, the government intends to have Mr. Simkins testify that, in his  
4 expert opinion, that he used his firearms training and skills to identify persons carrying, using,  
5 brandishing, or pointing firearms, and will further describe his observations and understanding of  
6 how the weapons were deployed (Docket #1250 at 5.) The basis for his conclusion was that  
7 through the course of his investigation he reviewed hundreds of hours of video footage as well as  
8 thousands of pictures taken on April 12, 2014. This proposed, conclusory testimony invades the  
9 province of the jury.

10 In Counts 1,-3, 5, 6, 8, 9, 12, 14-16, the government alleges that Parker and  
11 Stewart, as well as 17 co-conspirators engaged in illegal activity including but not limited to the  
12 use and carry of a firearm in a crime of violence (18 U.S.C. §924(c)). Ninth Circuit Jury  
13 Instruction 8.71 lays out the applicable elements for the 924(c) count. That instruction states in  
14 pertinent part that “during deliberations, the jury must in part determine whether the government  
15 has met its burden of proving that 1) the defendant committed the crime of violence listed the  
16 indictment; and 2) the defendant knowingly [used] [carried] [brandished] the [specify firearm]  
17 during and in relation to that crime.” The instruction goes on to further define use, carrying, and  
18 brandishing in relation to the rule.

19 As the sole factfinder, the jury alone is tasked with determining whether Parker and  
20 Stewart was in violation of the applicable laws of the United States Code. Permitting Mr.  
21 Simkins to testify about his opinion as to whether the defendants actually had firearms,  
22 brandished firearms, carried firearms or used firearms would invade the province of the jury.  
23 Parker and Stewart therefore respectfully requests that this Court enter an order limiting the  
24 scope of Mr. Simkins’ testimony in a manner consistent with FRE 702 and applicable Ninth  
25 Circuit precedent.  
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**CONCLUSION**

For the reasons stated, Parker and Stewart respectfully request the Court deny the government's motion to use or admit the summary charts of its expert Chad Simkins and other summary evidence. If the Court does not deny the defense's request, Parker and Stewart request, pursuant to Ninth Circuit precedent, a hearing outside the presence of the jury to validate the charts and discuss how they can be used. Additionally, Parker and Stewart requests this Court enter an order limiting the scope of Mr. Simkins's proposed testimony.

DATED this 17th day of January 2017,

/s/  
By \_\_\_\_\_  
JESS R. MARCHESE, ESQ.  
Counsel for ERIC PARKER

**CERTIFICATE OF ELECTRONIC SERVICE**

The undersigned hereby certifies that she is an employee of the Law Offices of MARCHESE LAW OFFICES for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 17<sup>th</sup>, he served an electronic copy of the above and foregoing **MOTION IN LIMINE TO GOVERNMENT’S NOTICE SUMMARY EXHIBITS AND EXPERT WITNESS**, by electronic service (ECF) to the person named below:

- Mr. Steven Mhyre, Esq.
- Mr. Nicholas Dickison, Esq.
- Ms. Nadia Ahmed, Esq.
- Ms. Erin Creegan, Esq.

*/s/ Jess R. Marchese*

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Employee of MARCHESE LAW OFFICES

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