NO. 11-1487

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. BANKS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE ARGUELLO
DISTRICT COURT N0. 09-cr-00266-CMA

APPELLANT BANKS' OPENING BRIEF

Charles H. Torres
Charles H. Torres, P.C.
303 East 17th Ave., Suite 920
Denver, CO 80203
(303) 830-8885
(303) 830-8890 fax
Chas303@aol.com

Counsel for Defendant-Appellant

Dated: October 29, 2012

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF RELATED CASES

This appeal is related to KENDRICK BARNES (11-1488), DEMETRIUS K. HARPER a/k/a Ken Harper (11-1489), CLINTON A. STEWART a/k/a C. Alfred Stewart (11-1490), GARY L. WALKER (11-1491) and DAVID A. ZIRPOLO (11-1492); Banks was a co-defendant of Appellants in the court below, and is a co-appellant of them in this Court.

STATUTES, RULES, OTHER AUTHORITIES

Page(s)

Pursuant to F.R.A.P 28(i), Defendant-Appellant Banks, hereby adopts by reference co-Defendants' statement of the case and statement of facts on Appeal and co-Defendants' arguments, filed by Defendants Barnes, Harper, Stewart, Walker and Zirpolo. Opening Brief of co-Defendants, pp. 1-15, 41-51.

JURISDICTIONAL STATEMENT

The court entered final judgment and sentence on August 2, 2012. Defendant Banks filed timely notices of appeal. The court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. §3742.

STANDARDS OF REVIEW

Banks deserves an acquittal based on violations of the Speedy Trial Act and Sixth Amendment. "We apply an abuse of discretion standard to a district court's decision to grant an ends-of-justice continuance...." *United States v. Gonzales*, 137 F.3d 1431, 1433 (10th Cir.1998). The court reviews de novo, however, the district court's compliance with the legal requirements of the Speedy Trial Act. *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir.2008). The district court's factual findings are reviewed for clear error. *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009).

Banks argues for an acquittal or new trial for harmful instructional errors and/or prejudicial evidentiary calls involving abuse of the Fifth Amendment privilege impacting co-Defendant Banks, and disallowance of Defendant's

witnesses. This Court reviews jury instructions de novo to determine whether they provided "the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *U.S. v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006). Here, the court failed to promptly instruct the jury on issues that suggests that the jury "may have convicted on an improper basis." *U.S. v. Zimmerman*, 943 F.2d 1204, 1213-14 (10th Cir. 1991); *U.S. v. Kline*, 922 F.2d 610, 612-13 (10th Cir. 1990). Banks was entitled to instruction on the controlling law. *Crockett*, 435 F.3d at 1314. Instructional error and evidentiary exclusions restraining jury consideration of Defendant Banks' complete defense likewise requires a new trial. *U.S. v. Velarde*, 214 F.3d 1204, 1211 (10th Cir. 2000).

While the evidence is viewed in the light most favorable to the Government, there must be "substantial evidence from which a jury might properly find the accused guilty beyond a reasonable doubt." *Kline*, 922 F.2d at 611; *see also U.S. v. Santistevan*, 39 F.3d 250, 256 (10th Cir. 1994) (prosecution's failure to prove an essential element of crime beyond a reasonable doubt offends fundamental sense of due process.

If the court determines that a miscarriage of justice has occurred, resulting in an unfair trial or faulty jury verdict, it may grant the defendant's motion. *U.S. v. Evans,* 42 F.3d 586, 593 (10th Cir. 1994). A motion for new trial may be based on a number of different grounds that influenced the jury verdict or deprived the defendant of a fair trial. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Berger v. U.S.*, 295 U.S. 78, 89 (1935); *U.S. v. Gabaldon,* 91 F.3d 91, 93-94 (10th Cir. 1996); *U.S. v. Farinella,* 558 F.3d 695, 700 (7th Cir. 2009).

Defendant Banks submits the errors involved in this case invoke consideration of structural error, which requires the reversal of Defendant's convictions. *United States v. Wiles*, 102 F.3d 1043,1056 (10th Cir. 1996). If the court finds only harmless error it must still consider the cumulative effect of individual harmless errors and whether they deprived the defendant of the right to a fair trial. *United States v. Labarbera,* 581 F.2d 107, 110 (5th Cir.1978).

Summary of Argument

The issues presented in Defendant Banks' motions are unique in many aspects and presented a difficult challenge to the trial court, where it was also dealing with six co-Defendants.

Requests by former counsel for Defendant Banks' continuances were lacking in detailed inquiry or findings by the Court to meet the ends-of-justice requirements discussed in *Toombs,* and as important, the tailoring of time

requirements for motions in *Bloate v. U.S.*, 130 S. Ct**.** 1345, 1356-1357 (2010). The Government and the District Court in its Order totally ignored even mentioning *Bloate*, much less stating why it was not applicable. Vol. I, pp. 1370-1382; Vol. II, pp. 542-574.

During trial, co-Defendant Walker attempted to invoke the Fifth Amendment protection for another co-Defendant. Co-Defendant Barnes had taken the stand, believing he was pressured to testify. This issue was not promptly addressed by the District Court in spite of the prosecution's request to instruct jurors so as not to prejudice the other co-Defendants. Invocation of the Fifth Amendment by a defendant is high courtroom drama (*United States v. Lacouture,* 495 F.2d 1237, 1240 (5th Cir. 1974)), which was made worse, as it impacted other co-Defendants, including Mr. Banks. The Court was required to give prompt instructions which were "well designed to cure whatever prejudicial impact." When Barnes retook the stand he repeatedly invoked the Fifth Amendment, compounding the confusion and prejudice to the other co-Defendants. Where there are multiple co-defendants, there is more than one way to abuse an invocation of a claim of the Fifth Amendment by a co-defendant for another co-defendant, allowing in this case the Government to take advantage of this dramatic event.

Two of Defendant's important witnesses were not allowed to testify for procedural reasons. This was a civil case about business relationships, negotiations

which omitted important contract elements related to expectations of staffing companies, and requirements of the staffing companies to enter into staffing agreements with the Defendants. The understanding of the parties was left to the finder of fact to reconstruct without direction. The importance of allowing the Defendants to present their entire case is supported by the Constitutional protections of the Sixth Amendment. The witnesses had been endorsed, albeit not named as experts, and proffers provided to the Government three months prior to trial, although not specifically identified as expert summaries. Banks submits that short of finding his actions in bad faith, the District Court's sanction of disallowing his important witnesses was reversible error. Banks submits that the non-technical nature of the testimony, which was probably admissible non-expert testimony, failed to provide Defendant with an even playing field to present his complete defense.

ARGUMENT

I. Whether the Court Erred in Failing to Dismiss the Case Under the Speedy Trial Act

After Defendant was arraigned on June 29, 2009, Defendants filed an unopposed ends of justice motion on July 6, 2009 to exclude 90 days of time under the Act. Vol. I, pp. 70-73. The Court granted this motion without a hearing on July 9, 2009. Vol. I, pp. 89-90. On August 18, 2009, Defendant Stewart filed for a

further exclusion of time from October 7, 2009 to January 29, 2010 for an additional 110 days. Vol. I, pp. 95-99.

The second request described the Government's investigation and results. The motion describes the activities surrounding the search warrant and manner of the search. The motion states that the Government has analyzed materials from the computer information seized and notes the Government has provided those materials to the Defendants between July 6-23 of 2009. Vol. I, pp. 95-99. The Government by this time has had the computer information for almost five years since the date of the execution of the search warrant in 2005.

Defendants provide an estimate of the number of potential witnesses to be interviewed. There is no indication of the number of witnesses that need to be interviewed or how this work would be spread among six attorneys. Defendants do not address any issue that discloses any complexity of the case, aside from the number of documents and witnesses. (These questions, as demonstrated below, should have been asked to meet the ends-of-justice requirements.) This motion is described as a Motion To Declare the Case Complex. Vol. I, pp. 95-99.

During the August 20, 2009 hearing, the Court made no real inquiry or request for an explanation from the Government or the Defendants as to what specific progress has been made and why the continued lack of progress or what is causing the delay in progress. Vol. II, pp. 21-31. Compare to the Court's inquiry

when the *pro se* Defendants request the final continuance, discussed below. Vol. I, pp. 706-709; Vol. II, pp. 542-574.

Defendants' other statements at this hearing indicates they have engaged experts to make the computer information more accessible. Defendants suggest that they must investigate events that transpired over a seven year period, but fail to state what investigation was carried out over seven years, the documents involved, and the difficulties faced in covering this issue. Vol. I, p. 97; Vol. II, pp. 21-31. As noted below, the charged conspiracy lasted only a little over two years, not several years, as claimed by the prosecution. Vol. II, pp. 26-27; Vol. II, p. 416. The Court does not obtain any particulars of this claim from the Government and what difficulties it raises to assess whether the 110 day request is needed. Motions are not discussed. Vol. II, pp. 21-31. The motion is granted based on oral findings and conclusions of law. The matter is then set for another status conference on December 18, 2009. Vol. I, pp. 99-100.

With the above information in mind, on December 14, 2009, Defendants filed a motion for further exclusion of time from January 29, 2010 (deadline for Speedy trial) to January 25, 2011. Vol. I, pp. 102-111; Vol. II, pp. 61-89. This motion for continuance was a generalized but less specific repeat of its earlier requests for continuance. At the hearing on the motion there was no inquiry by the Government and the Court as required by *Bloate* or *Toombs*. Vol. II, pp. 61-89.

Missing at a minimum is why there had been no progress in over seven months to accomplish what Defendants stated would be accomplished in their first two requests, nor is there an explanation why no motions had been filed. Vol. II, pp. 62-74.

Defense counsel, in requesting a year long continuance, still do not identify the complicated issues in the case, they only argue the management of information is a problem. This is in spite of the acknowledgment that the Government has indexed discovery for them. Vol.II, p. 67. Additionally, during this hearing, the Government addressed outstanding issues that clearly appear to shorten the investigation time for the defendants. Vol. II, p. 67. Key documents from the computers were narrowed down to 1,300 documents. Vol.II, p. 72. There is no discussion of how this change of events would impact the Defendants' request for a year long extension.

Defense counsel are still discussing how they "planned to set up their files" and review materials. Vol. II, pp. 67-68. Former defense counsel admit the Government had streamlined the case by this time. Vol. II, pp. 71-72. The Court and the parties acknowledge the case was not as complicated as originally claimed. Vol. II, pp. 64-65. *U.S. v. Williams*, 511 F.3d 1044, 1058, 1060 Ftnote 13 (10th Cir. 2007)(The simplicity of the case cuts against granting an ends of justice continuance.) . With next to no questioning by the Court, (3 questions of

Defendants) [Vol. II, pp. 64, 66, 68] the Court agrees to the continuance, "… I will take you at your words that this is the time that was needed. ..." Vol.II, p. 73. Only after granting the year-plus continuance are the scheduling of motions even discussed.

Motions hearing dates are set for unexplained reasons, some six months to twelve months down the road. Even the most basic of motions, such as discovery motions, attacks on the indictment, co-Defendant statements requiring a *James* hearing, are not set early enough to anticipate additional briefing or issues that normally accompany these motions and might delay the trial. Vol. II, pp. 74-81. On the other hand, other motions are set up against the final pre-trial conference. It was never explained why boilerplate motions such as the *James* motions or severance motions were not set earlier. Confusing and unanswered by the Court, the Government, or Defendants in granting the continuance was the statement by the Court that:

> .....and the fact that this case involves an intricate 7 year financial conspiracy involving massive amounts of discovery..... Vol. II, p. 83.

As pointed out above, the conspiracy was not an intricate "7 year" conspiracy. The conspiracy covered at best a little over two years, running from October 2002 through February of 2005. This point was not corrected by either defense counsel or the Government. This case was a straightforward mail fraud/wire fraud case with no novel legal or factual issues.

With no motions pending, the earliest activity revealed from the docket is an April 15, 2010 motion to continue a discovery motion and a hearing on sufficiency of the Indictment. Doc. 171. The motion is granted on April 27, 2010 making motions due on May 21, 2010. On May 21, 2010 some motions are filed. Docs. 188-192. The first hearing was not set until June of 2010, with remaining hearings set over the holiday period. Vol. II, pp. 77-84.

It is not until August 30, 2010 that the Defendants file a motion for notice of Government evidence of out of court statements to be offered by the Government. Vol. I, pp. 347-351. The Defendants note that the scheduling order of December 18, 2009 provided for the *James* Proffer by October 29, 2010, with a hearing on the matter not set until December 10, 2010. The Defendants point out that severance motions would then be due 10 days later, on December 20, 2010. In this motion, the Defendants state that the due date for the *James* Proffer and severance motions will not compromise the scheduled trial date. Vol. I, p. 350.

The 409 day continuance allowed for an unexplained delay to start filing motions and the later requests for additional extensions to file motions. Vol. II, pp. 61-89. Plaintiff submits under *Bloate*, 154 days *(*December 18, 2009 through May 21, 2010) should be non- excluded time or using April 26, 2010, there would be 129 days of non-excludable time from December 18, 2009. Assuming that all time between May 21, 2010 through January 31, 2011 is excludable time because

of the lap over of motions, speedy trial has still run. There was no discussion why over four months of dead time would be inserted before motions started getting filed. Vol. II, pp. 74-87.

Additionally, when this third request for continuance was granted on December 18, 2009, there was still 41 days left until Speedy Trial ran on January 29, 2010. Vol. II, pp. 61-89. These 41 days were pure dead time, not addressed by the Court and were just allowed to swallow up this block of time that should not have been excluded. Vol. II, pp. 85-87.

On November 19, 2010, Defendants asked for an additional 120 days. Former defense counsel's motion spends only 3 pages explaining why it is asking to do what they agreed they would not do short of extraordinary circumstances, i.e. ask for another continuance. Vol. II, p. 72; Vol. I, pp. 564-566.

Defendants claim they have only 56 days to prepare for trial. Vol. I, p. 563. This calculation leaves out and ignores the additional 17 days available between January 14, 2011 and the trial date of January 31, 2011. (56 days plus 17 days alone equals 73 days). The need and reasons to extend the case for an additional three months versus one month, or two months to address Defendants' problems are not offered, nor questioned by the Court (three page transcript). Vol. II, pp. 506-508. There is no mention of Court congestion or why motions were set over the holidays in the prior continuance request. Vol. II, pp. 506-508; Vol. II, pp. 74-

87. In this next motion for continuance, the defense counsel continue to argue old news: "12. Despite counsel's good faith efforts, counsel have been unable to and will be unable to review and analyze the massive amount of discovery in this case, perform necessary investigation, and adequately do trial preparation." Vol. I, p. 566.

At this late date, Defendants are still discussing travel to interview witnesses. Vol. I, p. 565-566, paras. 9-10. As it turns out, no interviews or requests to travel for interviews was made by any of the six prior counsel. Vol. II, p. 561. The Court in its order stated: 2. Due to the voluminous discovery, multiple defendants, and complex nature of the allegations in this matter, denying the requested continuance would result in a miscarriage of justice.... Vol. I, pp. 571-572, para. 2. The Government agreed to all of these continuances.

A. SPEEDY TRIAL ARGUMENT UNDER THE ACT

Trial must commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1). Prior to Trial, Defendant moved to dismiss the case on speedy trial grounds. This motion was denied. Vol. I, pp. 771-777; Vol I, pp. 788-791.

Defendant did not earlier in the case prospectively waive his right to speedy trial, nor can he be forced to. *Zedner v. United States*, 547 U.S. 489, 501-503

(2006); *Toombs*, 574 F.3d at 1273 (The district court and the Government are no less responsible under the Speedy Trial Act merely because it is a defendant who requests a continuance. ..... The Court also noted that it will consider the Government's lack of inquiry and passiveness in allowing the continuances).

The Government should never rely on a defendant's unilateral waiver of his rights under the Act. This point is also the opinion of the Government. Vol. I, p. 713, footnote 1. It is the prosecution's burden (and ultimately the court's) and not the defendant's responsibility to assure that cases are brought to trial in a timely manner. *U.S. v. Seltzer*, 595 F.3d 1170, 1179 (2010); *Williams*, 511 F.3d at 1055. A court can attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client. *Barker v. Wingo* , 407 U.S. 514, 529 (1972).

A judge must set forth its ends of justice findings orally or in writing, and his reasons for granting the continuance under the requirements of 18 U.S.C. § 3161(h)(8)(A). Reviewing its prior decisions in *Williams* and *Gonzales*, the Court in *Toombs* held that in the district court, the moving party must provide an explanation of why the mere occurrence of the event identified by the party as necessitating the continuance results in the need for additional time. *Williams*, 511 F.3d at 1058; *Gonzales*, 137 F.3d at 1434-35; *Toombs*, 574 F.3d at 1273-1275.

The court noted in *Toombs* that the amount of time granted for discovery issues should not rely on conclusory statements lacking both detail and support in granting the continuances." *Toombs,* 574 F.3d at 1272. (Emphasis added).

Defendant Banks submits when Defendants requested their third continuance for 361 days (which the Court granted for 409 days) that those requests should have been tailored to the particular motion. In *Bloate*, the Court stated:

> To avoid a result so inconsistent with the statute's purpose—i.e., "to avoid creating a big loophole in the statute," citing, *United States v. Tibboel*, 1357 F.2d 608, 610 (C.A.7 1985)—these courts have found it necessary to craft limitations on the automatic exclusion for pretrial motion preparation time that their interpretation of subsection (h)(1) otherwise would allow. *Bloate,* at 1356-57.

Defendant submits granting ahead of time a large block of time for motions is not allowed. Nor is doing the same allowed without crafting a time period directed to the specific motion or motions with findings that would have started to address the open-ended problem. "(P)retrial motion preparation time may be automatically excluded under subsection (h)(1) only when "the judge has expressly granted a party time for that purpose.""....*Bloate,* at 1357.

No dead time should have been allowed as happened here, whether it be the four months plus allowed in the third continuance before any motions are filed, or a blanket 120 days added to Defendants' trial preparation time when they still had

73 days to prepare for trial and had no legitimate reason for such an additional long request. Again, compare when the pro-se Defendants requested an additional 120 day continuance to take over the defense of their case and prepare for trial, Vol. I, pp. 706-709, the Government objected and detailed questioning by the Government and Court occurred for the first time, complying with *Toombs* and *Bloate.* Vol. II, pp. 544-564.

Defendant submits under the Act the case should be dismissed without prejudice at a minimum, but a strong argument exists for dismissal with prejudice. Based on the amount of time (7 months) to accomplish discovery and file motions, the additional requests for a third and fourth continuance violated the Act.

Under the Act, the judge must consider:

> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the *existence of novel questions of fact or law*, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the *exercise of due diligence.*

18 U.S.C. § 3161(h)(7)(B)(i), (ii), & (iv).

Banks submits that under 18 U.S.C. § 3161 sections (h)(7)(B)(i),(ii),(iv) the case against Defendant Banks should be dismissed for failure to inquire and make the appropriate findings to justify the continuances granted in the third and fourth continuance requests. *Toombs,* 574 F.3d at 1273-75. Banks submits that the case against him should be dismissed with prejudice for violation of 18 U.S. C. § 3161 (h)(7) for excluding either 154 or 129 days (infra p. 10) where the District Court failed to make appropriate findings under subsection (h)(7) in the third continuance request. *Bloate*, at 1352, 1357, 1358.

II. Whether the Court Erred in Failing to Dismiss the Case Under the Sixth Amendment

While the requirements are more stringent for a Constitutional violation, Defendant Banks submits that when all facts are considered under the four part balancing tests of *Barker,* that his case should be dismissed with prejudice. Again, under a constitutional analysis, the courts still hold the district court and the government responsible for bringing a defendant to trial on a timely basis. *Seltzer,* 595 F.3d at 1175-1176.

Barker established a four-part balancing test to establish if the defendant's right to a speedy trial has been violated. As the *Barke*r court stated, "[a] balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis."

Barker, 407 U.S. at 530. No single factor is determinative or necessary, rather all four are considered to determine whether a violation has occurred. *Id.* at 533.

"The individual claiming the Sixth Amendment violation has the burden of showing prejudice." *Toombs*, 574 F.3d at 1275. The courts have identified three main interests: applicable here: (ii) the minimization of anxiety and concern of the accused; and (iii) minimization of the possibility that the defense will be impaired. *Id*. (citing *Barker*, 407 U.S. at 532), because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Seltzer* at 1179-80.While the pre-indictment delay is not a direct element of the above factors, the courts have considered other delays. *U.S. v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (considering delays between arrest through the appellate process). Pre-Indictment delay should be considered, as it impacted the continuous delays after indictment. As reviewed above, the pre-indictment delay and trial delays should not automatically be blamed on the defendant himself.

The Government does not dispute that the speedy trial analysis is triggered in this case. Vol. I, pp. 1370-1382; *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The delay was over two years. Defendant Banks was arraigned on June 29, 2009. Trial started on September 26, 2011. The delay was over 2 years. See *United States v. Batie*, 433 F.3d 1287,

1290 (10th Cir.2006). As reviewed above, the charges were not complicated as recognized by the Court and supported by the record.

The court must also factor in the reasons offered by the government for not bringing a timely action. *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). The burden belongs to the government to provide an acceptable rationale for the delay. *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004); *Seltzer* at 1177. Based on the simplicity of the case and the evidence gathered by 2005, this delay requires a good explanation, but was not given. Vol. I, pp. 89-90; Vol. II, pp. 61-90; Vol. II, pp. 21-31; *Seltzer*, at 1177. It should also be considered that had Banks been indicted sooner, he would have had the protection of the Speedy Trial act. *Seltzer*, at 1181. Negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered. *Barker*, 407 U.S. at 531; *Seltzer*, at 1177.

A. Reason for Delay

The reasons offered by the government for not bringing a timely suit is important." *Loud Hawk*, 474 U.S. at 315. Here, the Government had all of the Defendants' records by 2005. Was there a deliberate attempt to delay the indictment of this case? At least in *Seltzer*, the Government claimed a state prosecution as the reason for the delay. Here, there is no known explanation, as required. *Seltzer*, 595 F.3d at 1179. It should also be considered that had

Defendant Banks been indicted sooner, he would have had the protection of the speedy trial act. *Seltzer*, 595 F.3d at 1181.

The Court in S*eltzer* held that different considerations would be given for different reasons for delays, with some weighed more heavily against the Government. *Seltzer*, 595 F.3d at 1177.

B. Prejudice to the Defendant

There was no pre-trial incarceration. Under the category of minimization of anxiety and concern, there are legitimate issues raised even if there was no pre-trial incarceration. Defendant Banks was subject of media leaks that could have only come from the Government that has impacted the Defendants since 2005. The allegations in the media were serious. Vol. I, p. 1257; Vol. II, pp. 105-107, 115. The allegations immediately impacted his ability to sell his product to law enforcement, aside from any staffing issues. Instead of moving quickly as if this was a serious case, the Defendant was left under a cloud for years. As noted above, there was not an Indictment until 2009, and another 2 years of living under the Indictment. The length of any delay is a serious issue when considering this factor.

Inordinate delay between public charges and trial, (in this case public release of information in 2005 in connection with the search warrant) should be a factor. Courts have noted that aside from prejudice, delay:

> may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and ...may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'" *United States v. Biggs*, 419 F.Supp.2d 1277, 1282-83 (D.Mont. 2006).

Aside from the staffing allegations, these Defendants were delivered a devastating blow to sell their product in any form while they waited for the Government to bring their case. But for a leak on a preliminary investigative step by the Government, the Defendants had a good faith chance to sell their product with no more staffing agency support. Instead, the product was contaminated by the media leak. More than likely, no media outlet would have picked up on the search warrant or this case at such an early stage without disclosure by the Government. Vol. I, p. 1257; Vol. II, pp. 105-107, 115; Opening Brief of co-Defendants, pp. 8-9.

The best evidence is that the search warrant information was released to the media before the search warrant was unsealed and made public. Vol. II, pp. 105-107. This is a clear violation of the DOJ requirements, as stated in the U.S. Attorney Manual requirements. Per U.S. Attorney Manual requirements, 1-7.40, DOJ and USAM 1-7.320 to l-7.330, only authorized press releases are permitted to comment on ongoing investigations. The Government's response to this issue is not adequate. The Government does not provide evidence that the search warrant

information was not shared before it was unsealed, the Government just claims it is not sure of the situation. Vol. II, p. 106.

Where there is a direct and clear prohibition of releasing this information in this fashion, the presumption should be that there is prima facie evidence of intent to injure Defendants' chance for a fair trial. Even the Court recognized that this action by the Government might be the basis for some "other cause of action." Vol. II, p. 106. The coverage was inflammatory and prejudicial. Adverse pretrial publicity implicates the accused's right to due process, *Rideau v. Louisiana,* 373 U.S. 723, 729 (1963), and Sixth Amendment right to an impartial jury, *United States v. Skilling,* 130 S. Ct. 2896, 2912-13 (2010).

The theory of the judicial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. *Patterson v. Colorado,* 205 U.S. 454, 462 (1907). Inflammatory media coverage will enter the subconscious of prospective jurors, destroying their collective objectivity and with it the defendant's hope for a fair trial. *Irvin v. Dowd,* 366 U.S. 717, 727 (1961) (The Courts recognize that the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man.); *accord Rideau v. Louisiana,* 373 U.S. 723 (1963); *Estes v. Texas,* 381 U.S. 532 (1965); *Sheppard v. Maxwell,* 384 U.S.333 (1966).

The Government should not be given a pass. Whether the delay was pre-indictment or pre-trial delay, the damage is just as real. *Biggs*, 419 F.Supp.2d at 1283.

C. Hindrance in Presenting a Defense

The case was delayed for at least six years. Memory was clearly an issue for almost every Government witness, which worked to the detriment of the Defendants. By way of example, see: Vol II, Doc. 608, pp. 694, 695, 709, 712, 717, 745, 761, 780, 783, 786, 802; Doc. 609, pp. 905, 906, 907, 911, 912, 936, 939, 941, 950, 951, 952, 1007, 1008, 1010, 1103, 1107, 1109, 1110; Doc. 610, pp. 1185, 1196, 1216, 1219, 1228, 1229, 1240, 1242, 1266, 1330, 1365, 1370, 1371, 1376, 1382, 1391, 1395, 1398, 1406, 1416; Doc. 612, pp. 1436, 1442, 1446, 1454, 1456, 1457, 1461, 1463, 1467, 1471, 1478, 1511; Doc. 611, pp. 1526, 1532, 1535, 1536, 1537, 1550, 1553, 1554, 1555, 1557, 1563, 1574, 1577, 1583, 1585, 1586, 1603, 1607, 1609, 1615, 1616, 1622, 1689, 1690, 1698, 1703, 1704, 1706, 1712; Doc. 613, pp. 1814, 1821, 1823, 1824, 1825, 1826, 1827, 1830, 1832, 1835, 1836, 1850, 1851, 1854, 1863, 1875, 1876, 1877, 1892, 1897, 1901, 1903, 1905, 1909, 1911, 1913, 1916, 1924, 1925, 1938, 1943, 1944, 1948, 1949, 1961, 1984, 1985, 2003, 2004, 2005; Doc. 557, Supp.App., pp. 132, 140, 146, 148, 266, 285, 288; Vol. II, Doc. 558, pp. 2526, 2530, 2531, 2536, 2541, 2542, 2547, 2548, 2557, 2563, 2567, 2596, 2597; Doc. 617, pp. 2799, 2806, 2810, 2813, 2824, 2829, 2830,

2842, 2847, 2848, 2872, 2873, 2892, 2893, 2894, 2897. The pattern was repeated with every witness. Short of a good excuse, Defendant Banks should not be penalized for the Government's delay in bringing its indictment, especially when the Government had all of the Defendants' records since 2005. Whether it was witnesses who considered purchasing the Defendants' product, or staffing witnesses, there was a systematic problem with accurate memories. *Barker*, 407 U.S. at 532. With Government witnesses motivated to provide favorable testimony, cross-examination was hampered. Identification and interviews of Government witnesses were delayed until the Indictment revealed witnesses involved in the case. As discussed below, Defendant was not able to call all of the witnesses that could have addressed the Government's testimony, supra. The Courts recognize "the longer the delay, the greater presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial .... *Biggs*, 419 F.Supp. 2d at 1282.

D. Reprosecution and the Administration of Justice. The Seriousness of the Offense.

Obtaining free services from a staffing company is not a reported and certainly not a highly reported crime. *U.S. v. Saltzman*, 984 F.2d 1087, 1094-1095 (10th Cir. 1993); Vol. I, p. 1180. Therefore deterrent effect to impact a widely practiced scheme is minimal in this case. The Government should have the burden of showing otherwise. The Government admitted that Defendants did not make

much money from their efforts according to the Government. Vol. I, p. 1179. The case at its heart was a civil debt collection case. This was not a Nacchio case. There was no violence involved in the case.

III. The Court Erred In Not Protecting Co-Defendant Banks when Co-Defendant Walker Invoked the Fifth Amendment Protection for Defendant Barnes In The Presence of the Jury Resulting In a Number of Prejudicial Errors including Structural Error Impacting this Co-Defendant

Banks joins in do-Defendants Sidebar and Transcript argument. Co-Defendants' Opening Brief, pp. 41-51. While this issue presents a separate serious problem, the other issues that followed are independent issues that prejudiced Defendant Banks' right to a fair trial and discussed here. During Defendants' presentation of evidence, co-Defendant Barnes took the stand and the following occurred:

> MR. WALKER: Your Honor, I'm going to move that Mr. Barnes plead the Fifth Amendment, and ask for a retrial based on our –
>
> MR. KIRSCH: Objection, Your Honor. Can we approach the bench, please?
>
> THE COURT: Overruled. Supp.App., p. 225.

The question, partial answer, objection by the Government, and the Court's ruling were sandwiched too close together. Supp.App., p. 225. The jury had to be confused by the Government's objection immediately following Defendant Walker's motion. The jury had to believe that the Government was objecting to

Walker's motion, not Barnes answer. This meant the Government was objecting to Walker's attempt to invoke the Fifth Amendment on behalf of another Defendant, (which would make sense), but then the Court overrules the objection, which is never adequately addressed. Supp.App., pp. 225 227, 258. This clearly had to mean to the jury, among other things, that one Defendant can invoke the Fifth Amendment protection for another Defendant. The question, partial answer and Walker's motion should have been immediately stricken to immediately cut down on any jury confusion, along with a curative instruction.

A. Lack of Prompt Curative Jury Instructions

The Government requested a curative instruction:

> MR. KIRSCH: Your Honor, I would ask the Court to tell the jury now that any Fifth Amendment privilege is Mr. Barnes' to assert on his behalf, not Mr. Walker's, and that the jury should disregard any statement made by Mr. Walker about another defendant's constitutional rights.
>
> THE COURT: I will not instruct them as to anything until I rule on this matter. Supp.App., p. 227.

The stock instruction eventually given was not adequate. Vol. I, pp. 852-878; Supp.App., p. 258. The instruction does not address what the jury heard or clarify what the District Court overruled. Co-Defendant Banks and the other co-Defendants were only asked for their position as it related to one of the curative instructions. Supp.App., pp. 250, 252. There was no apparent request for input

when the other instructions were discussed. Supp.App., pp. 227, 231, 232, 246, 249-251.

The instruction that should have been given should have included the Government's proposed language (Supp.App. 227, 249, 250), and covered at least the following points, as offered in Banks' Rule 29 Motion:

> During cross-examination you heard Mr. Walker make a motion to invoke the Fifth Amendment for Mr. Barnes and a request for a mistrial. You heard the Government object, and you heard the Court overrule the Government's objection. It is important you understand what the Court's ruling was addressing . What the Court meant when it stated "overruled" is that .....
>
> Next, Mr. Walker has been advised and admonished by the Court that the right to invoke the Fifth Amendment can only be invoked by an individual Defendant or witness, acting on his own behalf, and that another Defendant or attorney can never invoke the privilege for another Defendant or witness. This would be true whether the objection was raised by a *pro se* Defendant or counsel representing a Defendant.
>
> Additionally, you are instructed that Mr. Barnes did not have an opportunity to complete his answer before the motion was made by Mr. Walker, therefore, you should disregard the motion and the partial answer of Mr. Barnes, and not consider the misplaced or misstated motion by Mr. Walker, or the partial answer given by Mr. Barnes, against any co-Defendant. The jury should remember that the only evidence you are to consider is testimony that this Court has found to be admissible. That does not include motions or objections by counsel, or *pro se* Defendants acting on their own behalf. Additionally, an answer not completed is not admissible evidence and should be disregarded in determining the weight to be given to any testimony from any witness or Defendant, and whether any individual Defendant is guilty or not guilty of any of the individual charges against any individual Defendant. Vol. I, pp. 1197-1198.

A claim of Fifth Amendment protection is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination. *Lacouture*, 495 F.2d at 1240. In this case, the problem is worse, as it impacts other co-Defendants and Mr. Banks.

The Court was required to give prompt instructions which were "well designed to cure whatever prejudicial impact." *Singer v. U.S.*, 380 U.S. 24, 38 (1965)(Emphasis added); *U.S. v. Lauder*, 409 F.3d 1254, 1262 (10th Cir. 2005). The Government's request to provide a curative instruction related to Walker's motion was denied. Supp.App., p. 227. No instruction was ever given that clarified this matter. Supp.App., pp. 225-258; Vol. I, pp. 1189-1190.

It is important for purposes of this argument that Mr. Walker's position was stated as a motion, not an objection, with an inflammatory implication. Jurors had some familiarity with the concept of an objection, but not the impact of a motion or how one might not equal the other.[2] More important ,Walker's motion was clearly an emotionally charged statement capable of impacting a juror's evaluation of evidence.

[2] While trial attorneys might include Walker's motion under the category of an objection, there was no instruction or reason for the jury to have understood the difference.

The additional problem is that Mr. Barnes did not finish his answer before the objection was made:

> Mr. Barnes....If they came by me, I would probably say, hey, Gary, how are you doing? Because they sent them my name – Supp.App., p. 225.

If completed, the answer may or may not have been incriminating. Walker's motion makes the partial answer appear incriminating. Barnes' invoking of the privilege when retaking the stand confirmed that the incomplete answer or finished answer would be incriminating. Had Barnes' answer been left alone by Walker and Barnes, there may have been no inference from the answer. In other words, the damage or prejudice is not coming from admissible testimony, i.e. a complete answer, which could be fair game, but from Walker's invocation of the privilege for another defendant and Barnes' acquiescence in Walker's motion.

The Court determined, originally and correctly, that Barnes had waived the Fifth Amendment privilege after taking the stand and being examined by co-Defendants and by the Government. Supp.App., pp. 228-229. The Court then changed its position and erred in permitting Barnes to retake the stand and repeatedly invoke the Fifth in response to the Government's further cross-examination. Supp.App., pp. 227, 231, 232, 246, 249-251, 258-264. The Fifth Amendment issue was treated as if the trial involved only a single defendant. Supp.App., pp. 248, 249. A judge has a duty to protect a co-defendant's interest,

independent of implication to Barnes. *United States v. Colyer*, 571 F.2d 941, 945, 946 (5th Cir. 1978).

B. Inconsistent Application of the Law is Reversible Error

Where the Court applies the law inconsistently, a reversal is mandated even under the plain error standard where such error affected defendant's "substantial rights," or had a high probability of affecting the outcome. *U.S. v. Hasan,* 526 F.3d 653, (10th Cir. 2008). See, *In re Brogna*, 589 F.2d 24 (1st Cir. 1978); *In re U.S. Hoffman Can Corp.*, 373 F.2d 622 (3d Cir. 1967). Had the Court stuck with its initial correct ruling, co-Defendants would have been offered some, albeit not much, protection. As noted, the Government offered to allow Barnes testimony to be stricken, to eliminate any prejudice to the other co-Defendants. Supp.App., pp. 231, 232. The Court did not agree.

The critical issue here is the inconsistent application of well-settled law that prejudiced the rights of a co-Defendant. *Hasan,* 526 F.3d at 664, 665. The Fifth Amendment requirements and protection were not uniformly applied, to the detriment of Banks. Banks' protection and right to not take the stand was negated by the implication that two other co-Defendants anticipated a damaging answer that impacted all co-Defendants and the outcome for Banks. There was no way to determine if the jury could separate this implication from its duty to consider each defendant separately.

The Court in *U.S. v. Sarracino*, 340 F.3d 1148, (10th Cir. 2003) was faced with a similar situation, reviewing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The Court noted that the court in *Bruton* created an exception to the rule that jurors are presumed to follow all instructions. The Court held that the impact of a confession that incriminates another co-defendant is likely to be too great for the jurors to be able to put the matter out of their minds in considering the case against the other. *Sarracino,* at 1160; *Bruton*, 391 U.S. at 131; *United States v. Rahseparian*, 231 F.3d 1267, 1278 (10th Cir. 2000)(where an inculpatory inference can be made immediately in the mind of a reasonable juror, the statement is protected by *Bruton* and any curative instruction insufficient). No jury instruction could separate the damaging "gaffe" of co-Defendants Walker and Barnes from co-Defendant Banks in the conspiracy scheme as charged.

It is recognized that a defendant or a third party may not use a witness's privilege to their own benefit by invoking it. *Colyer*, 571 F.2d 941; Also see, *Namet v. United States*, 373 U.S. 179, 186, 189 (1963); *Bowles v. United States*, 439 F.2d 536, 541 (D.C. Cir. 1970)(footnote omitted); *Lacouture,* 495 F.2d at 1240.

It should make no difference whether the inference is raised by a witness or a co-defendant. *Lacouture,* 495 F.2d at 1240; also see *Bowles v. United States*, 439 F.2d 536 (DC Cir. 1970). Defendant Banks submits the problem is more

serious if the inference arises from a co-Defendant in a trial charging a conspiracy/ scheme to defraud. *Lacouture*, 495 F.2d at 1240. The problem identified in *Lacouture* is applicable here. There, defense counsel attempted to get the witness's refusal to answer questions in front of the jury, or be in a position to comment on a witness's failure to testify. *Id.* at 1240. Here the Government became the benefactor of the abuse of the privilege.

Defendant Barnes' invoking of the Fifth upon retaking the stand increased the "high drama" to a whole new level involving two co-Defendants. Here we are not dealing with some generic mistrust, discussed in *Lacouture*, *Id*., rather evidence alleging joint action of the Defendants to defraud a number of companies.

C. Protecting the Integrity of the Judicial Process

When it became apparent that Barnes intended to retake the stand and claim the privilege as to essentially all questions, the Court should have refused to allow him to take the stand (*Lacouture*, 495 F.2d at 1240; also see *Bowles v. United States*, 439 F.2d 536 (DC Cir. 1970), weighing, as did the Government, the concern of limiting prejudice to the co-Defendants. Supp.App., pp. 227, 231, 232, 243, 244, 246, 249-252, 255.

In the alternative, an *in camera* hearing should have been held to determine if further questioning of Barnes would even require Barnes to take the Fifth, but also address how each response might tend to incriminate other Defendants. *In re*

Horowitz, 482 F.2d 72, 82 n.11 (2d cir.), cert. denied, 414 U.S. 867 (1973). See *U.S. v. Reynolds*, 345 U.S. 1, 8-9 (1953); *Brown v. U.S.*, 276 U.S. 134 (1928).

The issue no longer revolved around the impact to Barnes but to Mr. Banks and others charged in a scheme/conspiracy. By asking Barnes questions upon retaking the stand that covered the conspiracy and scheme, knowing that Defendant Barnes would invoke the Fifth Amendment even to questions that did not require the invocation of the privilege, Defendant Barnes contaminated not only his own testimony but the rights and protections of all the other Defendants. Supp.App., pp. 251-262. Each Defendant had a right to have their individual guilt determined by admissible evidence, not the speculation created by a co-Defendant's invocation of the Fifth Amendment privilege for another Defendant and Barnes' unexplained agreement with Walker's action.

The concept that a refusal to testify must not be permitted where a narrower application of the privilege adequately protects the witness's rights should have been applied in this case. *Id.* See e.g., *U.S. v. Harris*, 542 F.2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

The concept that a judge has a duty to protect a witness's interest is even more applicable here. *Colyer*, 571 F.2d at 945, 946. The Court in *Colyer* discussed this important function, whether the right impacts a witness or defendant:

> This claim ignores a number of important factors. First, the Judge is present as the embodiment of the Constitution, charged with the firm duty to see that

> the rights of all are upheld—the defendants, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his Fifth Amendment rights, a careful one never hesitates.Id. at 1139. …. After the claim is asserted, the judge must handle it in a way which does not prejudice the defense. In *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974), ….

Once the privilege is asserted, the court must use discretion and "personal perceptions of the peculiarities of the case" to determine if the claim is valid, in this case examine whether a fair trial was possible for Banks and the inquiry should have been expanded to the impact of answers or claims of privilege on the co-Defendants. *Hoffman v. U.S.*, 341 U.S. 479, 486-87 (1951).

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). It is against the above background that structural error should be applicable. First, the errors are not issues of first impression, but involve established law. The Fifth Amendment protection to put the Government to proof at trial is a long standing protection in a criminal case. Defense strategy is built around invoking this protection, which is nullified after the error finds its way into a trial. The error builds in opportunity for a third party to exploit the error, as was done here by the Government, even where the Government initially recognized the prejudice that could occur to the co-Defendants. Supp.App., p. 227. Putting a co-defendant’s fate in the unknown is fundamentally unfair, where the courts have recognized there is an exception to the

rule that jurors are presumed to follow all instructions, and that in certain cases the task is too difficult for the jurors to be able to put certain matters out of their minds in considering evidence against each co-defendant in a multi-defendant case. *Sarracino,* at 1160; *Bruton*, 391 U.S. at 131. Here, the instructions to address the unique issues were non-existent and certainly not prompt to serve the function and purpose of curative instructions. *United States v. Turrietta,* 11-2033, August 29, 2012, p. 11 (10th Cir. 2012). Defendant Banks was certainly entitled to consistent application of the law, which should have prevented Barnes from retaking the stand if the only purpose was to repeatedly invoke the privilege.

Balancing the interests, there was no downside, and probably a benefit to Barnes by not being allowed to retake the stand. There was no upside for Banks by the Court's decision. Without a hearing outside the presence of the jury to address the impact of Barnes' decision, no consideration was given to the impact on the co-Defendants.

Here, in a perfect storm of problems, the issue goes beyond the analysis of plain error, and prejudice should be assumed. A structural error in a criminal trial always requires reversal of a conviction because such error renders the trial an unreliable vehicle for the determination of guilt or innocence. *Wiles,* at 1056 (Cite omitted Structural error constitutes a "defect[] in the constitution of the trial mechanism" which defies analysis under Fed.R.Crim.P. 52. *Wiles*, at 1056. (Cite

omitted). Balancing the benefit to the Government of joint trials which rarely offer a co-Defendant the best opportunity for a fair trial, this case demonstrates the extreme need for some basic protection of an individual co-Defendant caught in the crossfire of the Walker/Barnes gaffe. These errors were then complicated by the Court's disallowance of Banks' witnesses, discussed below, limiting Banks' ability to present a complete defense. With no manner to assess the damage of the Walker/Barnes situation, Defendant finds it hard to assume any other conclusion from a jury, other than to lump all the co-Defendants together as having only incriminating testimony if they chose to take the stand. But worse, as Banks chose not to take the stand, his shield to not incriminate himself was lost and turned on him by the Government's sword-like usage of the Walker/Barnes gaffe.

This Court's opinions in *Wiles* and *Turrietta* provides two ends of the spectrum in evaluating structural error. In *Wiles,* the jury was not instructed on the contested issue of materiality. In *Turrietta,* the court found that whatever protections were lost by the omission of the jury oath, other factors outweighed the consideration of structural error or plain error, and provided a fair trial. Banks submits that unlike *Turrietta,* where the Court found it was doubtful whether the absence of the oath would have made a difference in the jury's determination, here, with five black defendants charged in a scheme and the Fifth Amendment privilege turned into a spectacle, Banks' presentation of his defense was nullified.

Stated another way, the standard of proof was changed or lowered with the high courtroom drama and its ineradicable interest, which provided nothing but damaging non-evidential impact. The only probative force was negative, with no balance. *Lacouture,* 495 F.2d 1240. None of the safeguards found in *Turrietta* can be found in this record. *Turrietta,* at p.11. The Government cannot point to a "drumbeat of instructions" that addressed the prejudicial impact of the Walker/Barnes gaffe. In *Turrietta,* the issue for the jury was a more straightforward issue that could be addressed by other instructions referencing the role of the oath. *Turrietta,* at p. 11. In *Turrietta,* defense counsel had the clear opportunity to prevent the error that he later relied on for reversal, here, over protests by the Government, the District Court failed to safeguard co-Defendant Banks. Sticking to its analysis that the Fifth Amendment issue was a Barnes issue, the District Court addresses the broader Fifth Amendment challenges as if there was only a single defendant and failed to consider the concept that the Fifth Amendment can, and in this case was, abused.

IV. Whether The District Court Erred in Not Allowing the Testimony of Defendants' Witnesses Kelly A. Baucom and Andrew Albaraelle

The witness testimony of Kelly A. Baucom and Andrew Albaraelle was incorrectly treated as expert testimony, rather than fact testimony of persons

operating staffing businesses. If their testimony was expert testimony, the testimony should have still been allowed.

There were numerous Government witnesses from staffing companies that gave fact testimony about their business practices aside from their interaction with Banks. Additionally, the potential Government customers of the Defendants were allowed to testify about the process that was used by the Government agencies in communicating with companies like the Defendants. Vol. II, pp. 1523, 1526-1529, 1531-1536. This was not expert testimony.

The test of admissible evidence is based on its helpfulness to the jury in understanding the issues. The goal in Anglo-American jurisprudence is to admit all admissible evidence, relevant, helpful evidence. *Beech Aircraft Corp. v. Rainy*, 488 U.S. 153, 169 (1988). As discussed below, the proffers sent to the U.S. Attorney three months ahead of trial should have led to further inquiry by the Government if there were additional issues to clarify, [Vol. I, pp. 1271-1272, 1273-1274 (Trial Exhibits 1008, 1009); Vol. II, pp. 2342, 2350 lines 4-25], per the U.S. Attorney Manual. To the extent these defense witnesses would testify to the business practices of their companies, there were no *Daubert* technical issues and the Government does not identify such issues, and to that extent, at a minimum, this testimony should have been allowed. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); Doc. 616, Trial Transcript Day 10, pp.

1647, 1648. The Government to this date has cited to no cases that require the detail that was discussed by the Court and the Government. Vol. II, pp. 2347, 2348.

This business case resembles thousands of cases in bankruptcy court where individuals and companies, for various reasons, are unable to pay their debts. The key issues dealing with the staffing companies was what was discussed between the parties. The criteria used by staffing companies who agreed to do business with the Defendants was an issue. As noted below by the Tenth Circuit, not every breach or misrepresentation is automatically a crime.

This case presents a slippery slope, illustrated by Federal court decisions. *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997). The defendant in *Cochran* was charged with both a Section 1343 wire fraud, and an honest services fraud Section 1346 allegation. In reversing the convictions, and relevant to this case, is the court's statement in *Cochran*, that every breach of contract or misstatement made in the course of dealing was not a violation of the statute. *Cochran*, 109 F.3d at 667. Of note, while Section 1346 deals with honest services, the courts state it is to be read against a backdrop of the mail and wire fraud statutes. *Id.*

Defendant Banks agrees and argues that the same analysis and evidentiary considerations should be given to a fraud prosecution with so many contract issues/

business relationship considerations discussed by both the Tenth Circuit and cases before the Supreme Court, *Skilling*, 130 S. Ct. at 2930-2935, which should allow a full presentation of a defense.

The standard question posed to the staffing company employees by the Government in this case was– would you have wanted to know..... .? Example, Vol. II, p. 1484; Vol. II, p. 1545. The more puzzling question that was never answered is – why didn't they ask the questions of the Defendants in the first place? Vol. II, pp. 1550-1552, 1716. Defendants' witnesses who were not allowed to testify could have answered that question. [Vol. I, pp. 1271-1272, 1273-1274 (Trial Exhibits 1008, 1009).

In a civil fraud claim, the sophistication of the parties and what they should have known or investigated is part of the analysis.

The amounts of money staffing companies in this case were willing to advance in term of the project presented by the Defendants indicates what Defendants argued, i.e. that staffing companies also target and invest monies in customer potential and future ongoing business. Unfortunately, Defendants could not get two important witnesses on the stand to testify. The Government was allowed to develop their theory with the faded/suspect memories of many staffing witnesses. Vol. II, pp. 1428, 1455; Vol. II, pp. 1687, 1707-1711. This pattern of faded memories continued throughout the trial. Infra, pp. 22-23. These witnesses'

motivations to provide favorable testimony for the Government was highly suspect.

A. Defendants' Experts Should Have Been Allowed to Testify as Experts or as Fact Witnesses

The holding in *U.S. v. Sarracino,* 340 F. 3d 1148, 1170 (10th Cir. 2003) addresses the present issue. The Tenth Circuit held that the district court did err in not allowing defendant's expert to testify. *Id*. at 1170, 1171. It found the error for the very reasons cited by the Defendant in this case. *Id.* at 1171. In the present case, there was no consideration of the three-prong approach that the Court was required to use. That being said, the facts in *Sarracino* were different.

The two witnesses in question were identified on the Defendants' witness list as witnesses, (Vol. II, p. 2289) just not as experts, which, as this counsel argues, was probably not expert testimony anyway, which would prevent the Court from ordering summaries be provided to the Government.

In evaluating harmless error, the burden shifts to the Government:

> [t]he question is not whether, omitting the inadmissible statements, the record contains sufficient evidence for a jury to convict the defendant". The burden of proving that an error is harmless falls on the government. *U.S. v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999).

In the present case, the testimony from two independent company executives would have explained to the jury a business experience unique to IT work

methods. This did not require probabilities of an individual surviving a severe beating. *Sarracino,* 340 F.3d at 1170-71. Unless a juror had this personal knowledge from experience, the Defendants' only route for independent confirmation of this practice was absolutely necessary to rebut the Government's allegations to the contrary. Withholding this information from the jury does not further any goals of justice.

In *U.S. v. Sarracino,* 340 F. 3d 1148 (10th Cir. 2003), the Court held:

> that it would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings." *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002).

A review of the Court's ruling in this case does not show the Court found bad faith on the part of the Defendants. Vol. II, pp. 2342-2357.

The Government acknowledged reviewing the proffers provided to the Government which were provided three months prior to trial. Vol. II, pp. 2323, 2328; Vol. I, pp. 1271-1272, 1273-1274 (Trial Exhibits 1008, 1009). As noted in *United States v. Nacchio,* 519 F.3d 1140, 1150-1152 (10th Cir. 2008), that unlike in civil cases, the expert is not required to provide an expert report, only a summary. This Court imposed a higher standard for disclosures than what is required under these facts. The Court in *Nacchio* was faced with the more difficult issue of *Daubert,* which is not present here. The prosecution only needs to be informed of information to avoid surprise, reduce the need for continuances, and

provide the opponent a fair opportunity to test the merits of the testimony. Fed.R. Crim. P. 16 (b) advisory notes. As noted above, the Government failed to raise any of these issues other than in the vaguest of terms. Vol. II, pp. 2342-2359.

More to the point, the testimony these individuals were going to give was probably not even expert testimony, and should not have been excluded under very clear Tenth Circuit holdings. In *United States v. Caballero*, 277 F.3d 1235, 1247(10th Cir. 2002), the Court held that INS witness testimony about INS procedures was lay witness testimony, as they proffered no opinion, just personal experience.

The Trial Court here exceeds its authority under Rule 16, if it ordered pretrial summaries of non-expert witnesses, whether by the Defendant or Government, *United States v. Grace*, 493 F.3d 1119, 1128 (9th Cir. 2007), which would be reversible error, where witnesses were not allowed to testify.

V. The Sixth Amendment Right to Present a Complete Defense was Violated in Disallowing Defendant's Witnesses

The right to present testimony has constitutional protection. The courts review evidentiary rulings regarding presentation of evidence for abuse of discretion, but where the Confrontation Clause is implicated, [it will] consider the matter *de novo*. *United States v. Kenyon*, 481F.3d 1054, 1063 (8th Cir. 2007). A violation is shown when a defendant demonstrates that a reasonable jury might have received a significantly different impression of [a witness's] credibility had

counsel been permitted to pursue the proposed line of cross-examination. *United States v. Morton*, 412 F.3d 901, 907 (8th Cir. 2005). The same should be true for presentation of witness testimony that impeaches material Government witness testimony. The Sixth Amendment requires the accused be given an opportunity to present alternative theories of the case in his own defense. *United States v. Mulinelli-Navas*, 111 F.3d 983, 992 (1st Cir. 1997); *United States v. Muhammad*, 928 F.2d 1461, 1467 (7th Cir. 1991).

The right to present a complete defense is a constitutional one, *infra*, requiring *de novo* review. *United States v. Rodriguez*, 581 F.3d 775, 796 (8th Cir. 2009).The point is not a small one, because deference to the District Court would significantly alter the prism through which the Court views the record. To protect the constitutional right to a fair trial, no deference to the District Court is owed. *See* 1 Steven A. Childress & Martha S.Davis, *Federal Standards of Review* § 2.19 (3rd ed. 1999).

This Defendant, not involved in the Fifth Amendment issue and pretrial publicity but affected by it in the jury's eyes, needed a complete presentation of evidence to overcome this major problem. The jury can't pass on a theory unless it sees the evidence that was denied here because of the Court's orders and rulings.

Defendants' witnesses, without becoming experts, should have been able to testify how they work with start up companies, how they bill, and what is

allowable billing in their operations. Defendant was entitled to show good faith by presentation of evidence *See, e.g., United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985).

Cumulative Error

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. "[T]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir.1998); *Labarbera*, 581 F.2d at 110.

Conclusion

The charges should be dismissed with prejudice against this Defendant for Speedy Trial violations, or in the alternative, for the other above stated reasons the Defendant should be granted an acquittal or new trial.

ORAL ARGUMENT REQUESTED

Defendant/Appellant requests oral argument to help the Court determine the issues raised in this appeal.

CHARLES H. TORRES, P.C.

s/ Charles H. Torres
By: Charles H. Torres, #7986
303 E. 17th Ave, Suite 920
Denver, CO 80203
Telephone: (303) 830-8885
Facsimile: (303) 830-8890
Email: Chas303@aol.com
Counsel for David Banks

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Fed. R. App. P. 32(a)(7)(C), this appellate brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 10,598 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

I hereby further certify that this appellate brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using WordPerfect 12.0 for Windows in Times New Roman Typeface and 14 point font size.

__/s/ Charles Torres_____

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2012, I electronically filed the foregoing revised opening brief of Appellant David Banks with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing and copy of this brief to the following:

Mr. James C. Murphy, Esq.
Assistant United States Attorney
District of Colorado
james.murphy3@usdoj.gov

Ms. Suneeta Hazra, Esq.
Assistant United States Attorney
District of Colorado District of Colorado
suneeta.hazra@usdoj.gov

Matthew T. Kirsch
Assistant U.S. Attorney
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
E-mail: Matthew.Kirsch@usdoj.gov
Attorney for the United States

I further certify the foregoing document meets the required privacy redactions; it is an exact copy of the paper document; and, the document has been scanned and is virus free.

__/s/ Charles Torres_____

REQUIRED ATTACHMENTS

Judgment in a Criminal Case (Banks) (Doc. 797)

Order Granting Ends of Justice Continuance and Excludable Time (Doc. 63)

Partial Transcript; August 20, 2009; motion for continuance granted (Doc. 647)

Partial Transcript; December 18, 2009; motion for continuance granted (Doc. 240)

Order granting Ends of Justice Continuance and Excludable Time (Doc. 327)

Order Denying Motion to Dismiss Indictment for Speedy Trial Act Violation (Doc. 463)

Partial Transcript; October 11, 2011; denying mistrial based on Fifth Amendment issue (not included in Record on Appeal although designated)

Partial Transcript; October 10, 2011; excluding expert witnesses (Doc. 616)