Nos. 11-1487, 11-1488, 11-1489, 11-1490, 11-1491, 11-1492
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID A. BANKS; KENDRICK BARNES;
DEMETRIUS K. HARPER, aka Ken Harper;
CLINTON A. STEWART, aka C. Alfred Stewart;
GARY L. WALKER; DAVID A. ZIRPOLO,

Defendants-Appellants.

UNITED STATES' CONSOLIDATED ANSWER BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Christine M. Arguello
District Judge
D.C. No. 09-cr-266-CMA

JOHN F. WALSH
United States Attorney

JAMES C. MURPHY
MATTHEW T. KIRSCH
Assistant U.S. Attorneys
1225 17th Street, Suite 700
Denver, CO 80202
(303) 454-0100

Attorneys for Plaintiff-Appellee
United States of America

ORAL ARGUMENT REQUESTED
December 20, 2012

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES. vi

PRIOR OR RELATED APPEALS. . . . . Page 1 of 65

JURISDICTIONAL STATEMENT. . . . . Page 1 of 65

ISSUES. . . . . Page 1 of 65

STATEMENT OF THE CASE & FACTS. . . . . Page 2 of 65

SUMMARY OF ARGUMENT. . . . . Page 8 of 65

ARGUMENT . . . . Page 11 of 65

I. Defendants' Right to a Speedy Trial Was Not Violated When the District Court, at Defendants' Own Request, Granted Multiple Continuances of the Trial Date. . . . . Page 11 of 65

A. The Issue Below. . . . . Page 11 of 65

B. Standard of Review . . . . Page 11 of 65

C. Argument . . . . Page 12 of 65

1. The Speedy Trial Act: Ends-of-Justice Continuances.. . . . . Page 12 of 65

(a) Continuance of July 9, 2009. . . . . Page 14 of 65

(b) Continuance of August 20, 2009. . . . . Page 17 of 65

(c) Continuance of December 18, 2009 .. . . Page 20 of 65

(d) Continuance of November 22, 2010. . . . . Page 26 of 65

2. The Sixth Amendment. . . . . Page 28 of 65

(a) The Length of Delay. . . . . Page 29 of 65

(b) The Reason for the Delay. . . . . . . Page 30 of 65

(c) Defendant's Assertion of His Right to a Speedy Trial . . . . Page 31 of 65

(d) Whether the Delay Prejudiced the Defendant. . . . . Page 32 of 65

II. The Trial Court Did Not Compel Co-Defendant Barnes to Testify in Violation of His Fifth Amendment Privilege; Defendants Have Not Shown Any Error In the Court's Curative Instruction. . . . . Page 33 of 65

A. The Issue Below. . . . . Page 34 of 65

B. Standards of Review. Page 38 of 65

1. Fifth Amendment. . . . . Page 38 of 65

2. Sixth Amendment - Jury Instructions. . . . . Page 38 of 65

3. Alleged Structural Error. . . . . Page 39 of 65

C. Argument.. . . . . Page 40 of 65

1. Defendant Barnes Voluntarily Chose to Testify Under Direct Examination By His Fellow Defendants and In Doing So Waived His Privilege Against Self-Incrimination.. . . . . Page 40 of 65

2. Defendants Refused One of The Curative Instructions The Court Offered to Give and Failed to Object To The Curative Instruction That Was Given.. . . . . Page 45 of 65

3. Defendants Have Not Shown Prejudice And In Any Event Have Waived Any Claim of Prejudice Resulting From Their Own Deliberate Acts.. . . . . Page 48 of 65

III. The Trial Court Did Not Abuse Its Discretion In Excluding The Testimony of Two Purported Expert Witnesses. . . . . Page 51 of 65

A. The Issue Below. . . . . Page 52 of 65

B. Standard of Review.. . . . . Page 55 of 65

C. Argument.. . . . . Page 56 of 65

1. Rule 16 Violations & Lack of Notice . . . Page 56 of 65

2. Testimony as Expert Witnesses. . . . . . . Page 59 of 65

3. Testimony as Fact Witnesses. . . . . Page 61 of 65

4. Cumulative Testimony. . . . . Page 62 of 65

CONCLUSION. . . . . Page 63 of 65

ORAL ARGUMENT STATEMENT. . . . . Page 63 of 65

CERTIFICATE OF COMPLIANCE.. . . . . Page 64 of 65

CERTIFICATE OF DIGITAL SUBMISSION. . . . . Page 64 of 65

CERTIFICATE OF SERVICE. . . . . Page 65 of 65

TABLE OF AUTHORITIES

FEDERAL CASES

Page No.

Arizona v. Fulminante,
499 U.S. 279 (1991). 39

Barker v. Wingo,
407 U.S. 514 (1972). 29, 32

Bloate v. United States,
130 S. Ct. 1345 (2010). 25

Caminetti v. United States,
242 U.S. 470 (U.S. 1917). 44

Chapman v. California,
386 U.S. 18 (1967). 40

Davis v. North Carolina,
384 U.S. 737 (1966). 38

Dodge v. Cotter Corp.,
328 F.3d 1212 (10th Cir.2003). 61

Doggett v. United States,
505 U.S. 647 (1992). 32

Harrison v. United States,
392 U.S. 219 (1968). 44

Marchetti v. United States,
390 U.S. 39 (1968). 48

Mitchell v. United States,
526 U.S. 314 (1999). 43, 48

Ralston v. Smith & Nephew Richards, Inc.,
275 F.3d 965 (10th Cir. 2001). 60

Taylor v. Illinois,
484 U.S. 400 (1988). 58

United States v. Adams,
271 F.3d 1236 (10th Cir. 2001). 38

United States v. Batie,
433 F.3d 1287 (10th Cir. 2006). 31

United States v. Bruton,
391 U.S. 123 (1968). 50

United States v. Byrne,
171 F.3d 1231 (10th Cir. 1999). 12

United States v. Chalan,
812 F.2d 1302 (10th Cir.1987). 38

United States v. Cornelius,
696 F.3d 1307 (10th Cir. 2012). 39, 46

United States v. Crockett,
435 F.3d 1305 (10th Cir. 2006). 43

United States v. Fabiano,
169 F.3d 1299 (10th Cir. 1999). 39, 47

United States v. Fishman,
645 F.3d 1175 (10th Cir. 2011). 42

United States v. Garcia,
994 F.2d 1499 (10th Cir. 1993). 62

United States v. Gonzales,
137 F.3d 1431 (10th Cir. 1998). 12, 13, 26

United States v. Hanrahan,
508 F.3d 962 (10th Cir. 2007). 43

United States v. Irving,
665 F.3d 1184 (10th Cir. 2011). 62

United States v. Kalady,
941 F.2d 1090 (10th Cir. 1991). 29

United States v. Larson,
627 F.3d 1198 (10th Cir. 2010). 12, 29, 31, 32

United States v. Lauder,
409 F.3d 1254 (10th Cir. 2005). 40, 43

United States v. Lawrence,
405 F.3d 888 (10th Cir. 2005). 48

United States v. Lott,
310 F.3d 1231 (10th Cir. 2002). 39

United States v. Madden,
682 F.3d 920 (10th Cir. 2012). 28-29

United States v. Magleby,
241 F.3d 1306 (10th Cir. 2001). 48

United States v. McGehee,
672 F.3d 860 (10th Cir. 2012). 47

United States v. Moreira,
416 Fed.Appx. 803 (10th Cir. 2011) (unpublished). 25

United States v. Nacchio,
555 F.3d 1234 (10th Cir. 2009). 56, 60, 61

United States v. Nichols,
169 F.3d 1255 (10th Cir. 1999). 59

United States v. Occhipinti,
998 F.2d 791 (10th Cir. 1993).................................. 13, 14

United States v. Olano,
507 U.S. 725 (1993).. 47

United States v. Rice,
52 F.3d 843 (10th Cir. 1995)................................. 40

United States v. Rivas-Macias,
537 F.3d 1271 (10th Cir. 2008)................................ 49

United States v. Russell,
109 F.3d 1503 (10th Cir. 1997)........................ 55, 57, 58, 59

United States v. Sarracino,
340 F.3d 1148 (10th Cir. 2003)................................ 50

United States v. Seltzer,
595 F.3d 1170 (10th Cir. 2010).............................. 29, 32

United States v. Toombs,
574 F.3d 1262 (10th Cir. 2009)........................ 12, 14, 31, 32

United States v. Wicker,
848 F.2d 1059 (10th Cir. 1988)........................... 55, 58, 59

Wood v. Milyard,
132 S. Ct. 1826 (2012)...................................... 46

FEDERAL STATUTES & RULES

18 U.S.C. § 3161(c)(1)...................................... 11, 12

18 U.S.C. § 3161(h)... 14

18 U.S.C. § 3161(h)(1)...................................... 25

18 U.S.C. § 3161(h)(7)...................................... 25

18 U.S.C. § 3161(h)(7)(A). 13, 25

18 U.S.C. § 3161(h)(7)(B). 13, 25

18 U.S.C. § 3231. 1

28 U.S.C. § 1291. 1

Fed.R.App.P. 4(b)(2). 1

Fed.R.Crim.P. 16.. . . . . passim

Fed.R.Crim.P. 16(b)(1)(C).. 56

Fed.R.Crim.P. 16(d)(2). 56

Fed.R.Crim.P. 52(b). 39

Fed.R.Evid. 404(b).. 22

Fed. R. Evid. 602.. 61

Fed.R.Evid. 701.. 61

Fed.R.Evid. 702.. . . . . passim

Fed.R.Evid. 801(d)(2)(E).. 21

Graham, Handbook of Federal Evidence, §701.1 (3rd ed. 1991). 61

PRIOR OR RELATED APPEALS

No prior or related appeals exist.

JURISDICTIONAL STATEMENT

Jurisdiction in the district court arose under 18 U.S.C. § 3231, where defendants were convicted at trial of one or more counts of mail fraud and/or conspiracy to commit mail and wire fraud. Vol. I at 806-815. After the jury returned its verdict, but before entry of final judgment, all defendants filed notices of appeal. *Id*. at 880-885. *See* Fed.R.App.P. 4(b)(2). Final judgments have now entered as to all six defendants. *Id*. at 1687, 1701, 1712, 1723, 1734, 1745. Defendants appeal their convictions and this court's jurisdiction arises under 28 U.S.C. § 1291.

ISSUES

I. Whether defendants' statutory or constitutional right to a speedy trial was violated when the district court, at defendants' request, granted multiple continuances of the trial date.

II. Whether the trial court compelled co-defendant Barnes to testify in violation of his Fifth Amendment privilege against self-incrimination or failed to adequately instruct the jury regarding his testimony.

III. Whether the district court abused its discretion at trial in excluding the testimony of two witnesses the defense sought to call, after finding that defendants had failed to satisfy the requirements of Fed.R.Crim.P. 16 and Fed.R.Evid. 702.

STATEMENT OF THE CASE & FACTS

Following a lengthy jury trial in the District of Colorado, the six defendants were convicted of one or more counts of mail fraud and/or conspiracy to commit mail and wire fraud and sentenced to terms of imprisonment ranging from 87 to 135 months. Vol. I at 806-815.

Factual Background[1]

Starting around October, 2002, the defendants operated or were associated with entities called Leading Team, Inc. ("LT") and DKH, LLC ("DKH"), sometimes doing business as DKH Enterprises. *See, e.g.,* Vol II at 694-95. Defendant Walker was the President of LT and Defendant Banks was an executive as well. *Id.* at 702, 3058. Defendant Harper was the President of DKH and Defendant Stewart was a vice president. *Id.* at 227, 1397-98. Sometime in 2003, the defendants stopped operating LT and begin operating a third entity, IRP Solutions Corporation ("IRP"). Defendant

[1] This statement is intended only to provide factual background for the issues on appeal. Facts directly relevant to those issues are stated, with record citations, in the argument section to which the facts pertain.

Walker was the President of IRP, Defendant Banks was the Chief Operating Officer, and the remaining defendants held other executive positions. *Id.* at 423, 1586. These entities were all involved with the development of a software program known as Case Investigative Life Cycle, or CILC. *Id.* at 2950.

Beginning around October, 2002, the defendants began contacting staffing companies and attempting to set up "payrolling" arrangements with the staffing companies. *Id.* at 694-95, 701, 21-2527. A "payrolling" transaction typically involves a staffing company hiring employees who have been pre-selected by the staffing company's client and then placing those employees with the client. *See, e.g., id.* at 693, 741. In a payrolling transaction, a staffing company is paid a premium, in addition to the wages it pays to employees, for its handling of administrative tasks such as tax withholding and reporting related to these employees. *Id.* at 693, 741-42.

Defendants Banks, Harper, Stewart, Zirpolo, or someone else acting as their agent, initiated contact with a staffing company. *See, e.g., id.* at 694-95, 743, 771-72, 1984-85. Witnesses from over twenty different staffing companies testified that during these initial contacts, the defendants falsely represented that LT, IRP, or DKH, was on the verge of signing a contract to sell CILC software to one or more major law enforcement agencies, or were

already doing business with such law enforcement agencies. *See, e.g.,* Vol II. at 695-96, 744-45, 1431-32, 1986-88. The agencies most often mentioned by the defendants included the United States Department of Homeland Security ("DHS"), New York City Police Department ("NYPD") and the United States Department of Justice ("DOJ"). *See, e.g., id.* at 744, 757, 1986-87. Staffing company witnesses testified that these representations led them to believe that the defendants' companies would be able to pay the staffing companies' invoices and that they relied on these representations in deciding whether to do business with the defendants. *See, e.g., id.* at 777, 1399-1400, 1432.

Testimony from representatives of the law enforcement agencies cited by the defendants established not only that they had made no sales of CILC to those agencies, but that the defendants had no basis even for believing that such sales were imminent. Three witnesses from DHS, including Steven Cooper, William Witherspoon, and Paul Tran, testified that they met with some of the defendants, including Banks, Walker, and Stewart, as a part of an information-gathering process conducted by DHS in 2003-2004, related to case management software. *Id.* at 1125-29, 1131-33 (Tran), 1169-77 (Witherspoon), 2942-43 (Cooper). All three testified that DHS did not purchase the CILC software and that no one from DHS told any of the defendants that DHS would purchase the software. *Id.* at 1135-36 (Tran),

1178-79, 1200 (Witherspoon), 2977-78 (Cooper). Mr. Cooper, the head of the DHS component that was conducting the research, testified that no money had ever been budgeted to purchase case management software during the relevant time period. *Id.* at 2958-59, 2968. Price Roe, former assistant to the DOJ's Chief Information Officer, provided similar testimony about the defendants' interactions with DOJ and the lack of any representations by DOJ that it would buy defendants' software. *Id.* at 901-10. Finally, Frank Bello, Assistant Commissioner for Contract Administration for the NYPD, testified that all procurements for the NYPD went through his department. *Id.* at 1202. He further explained that IRP had not even registered to bid on NYPD contracts until February, 2004, and that neither IRP, any of the individual defendants, nor their other companies had ever actually bid on or been awarded a contract with the NYPD. *Id.* at 1207-10. Testimony from former NYPD officer John Shannon established that, in early 2005, the defendants mailed free copies of CILC to the NYPD. Mr. Shannon testified that the NYPD was "furious" about receiving the software outside of proper channels and returned it to IRP. *Id.* at 2551-55.

In addition to making false statements about current or impending contracts with major law enforcement agencies, the defendants used other tactics to prevent victim staffing companies from learning that the defendants

had no intention of paying them. For example, the conspirators used related entities, controlled by them, as references in credit applications. *Id.* at 1778-82, 1806-09. The conspirators also took steps to prevent staffing companies from realizing that payrolled employees had previously worked for other staffing companies who had not been paid. For example, Samuel K. Thurman, payrolled through four different staffing companies at IRP, testified that he was instructed by defendant Harper to act as if he had not previously been employed at IRP through other staffing companies when he began working for a new staffing company. *Id.* at 2081-85. On days when he was to meet with a representative of a new staffing company, Mr. Thurman and other employees were told to leave the building before the staffing company representative arrived. They were then directed to sign in as visitors upon re-entry, even though he and the other employees already had access badges for the office. *Id.* at 2087-89. When acting on behalf of IRP, defendants Harper and Stewart often used their middle names rather than their first names to hide their previous association with DKH. *See, e.g.*, *id.* at 449, 1430-31, 1434-35, 2453-57.

All of the defendants submitted time cards in their own names to staffing companies where they were payrolled. The defendants were either reporting time to staffing companies using aliases or were allowing their

names to be used as aliases for this purpose. *See, e.g.*, *Id.* at 2024-25, 2029-30, 2037-38. All of the defendants except Barnes also approved time cards for each other and for other payrolled employees in whose name time was reported, and the approved time cards in many cases reported substantially overlapping, if not identical, hours for the same employee to two or even three different staffing companies. *Id.* at 2129-58. Each of the defendants except Barnes approved overlapping time cards on at least one occasion and often more. *Id.* Defendants Harper and Stewart, for example, approved overlapping time cards for ten different staffing companies, while defendant Zirpolo approved overlapping time cards for four different staffing companies. *Id.* Defendant Barnes reported working a total of twenty-four or more hours in a day for three different staffing companies on approximately twenty-three different days. *Id.*

Staffing company witnesses testified that, once they began questioning the defendants about their failure to pay the initial invoices from staffing companies, they received additional, false assurances that the defendants were just about to pay them. *See, e.g., id.* at 712-13. During these assurances, the defendants often furthered the false impression that they were actively doing business with large government agencies by making references to "slow government payment/procurement/business cycles." *See, e.g.*, *id.* at 785-86,

789-90, 1406-08. These assurances caused the staffing companies to continue to payroll employees at LT/DKH/IRP, which ultimately increased the loss to the staffing companies. *See, e.g.*, *id.* at 786-87. Witnesses from multiple staffing companies, including Dottie Peterson from Snelling, Katherine Holmes from AppleOne, and Greg Krueger from PCN, testified that they attempted to visit the IRP offices as part of their collection efforts and were turned away at the door by security guards. *Id.* at 1084-85, 1409-11, 1700.

Testimony from U.S. Attorney's Office auditor Dana Chamberlin established the loss suffered by the victim staffing companies as a result of the defendants' conspiracy and scheme. After giving the defendants credit for the partial payments they made to three of the forty-two victims, the total outstanding invoices for the forty-two different companies was over $5,000,000. *Id.* at 2164-68.

SUMMARY OF ARGUMENT

I. The trial court's findings in support of the ends-of-justice continuances under the Speedy Trial Act specify in great detail why the continuances of the trial date were necessary. The record shows that the number and type of charges, the number of defendants, and the voluminous discovery materials, necessitated the continuances in order to allow defense counsel to prepare for motions practice and trial. Defendants sought all of the continuances they

now complain of and did not assert their speedy trial rights until the first day of trial. The length of the delay – somewhat over two years – was reasonable given the number of charges, defendants, and the large volume of discovery. And defendants have not supported their claims of prejudice: their allegations are speculative and conclusory. Hence, the delay in bringing defendants to trial did not offend the Sixth Amendment.

II. The trial court did not compel co-defendant Barnes to testify.

Defendants had repeatedly delayed the trial by not having witnesses available. When on the eleventh day of trial, defendants again announced they had no witnesses available, the court acted reasonably and within its authority in telling defendants that the court intended to proceed. The government had rested its case five days before, and defendants had ample time to plan their case. Defendants made no mention at the time of Barnes' right against self-incrimination, and Barnes testified at length, and without objection, under direct examination of numerous co-defendants. Only after the government began its cross-examination did defendants attempt to assert Barnes' privilege against self-incrimination. By taking the stand, however, Barnes waived the privilege.

Defendants also argue they were prejudiced when the court failed to give an adequate curative instruction regarding Barnes' testimony or

Walker's attempt to invoke Barnes' privilege against self-incrimination. Defendants did not object to the instruction given by the court and have shown no error, plain or otherwise. Defendants refused an additional instruction the court offered to give and have waived the issue.

III. The trial court correctly excluded the testimony of two defense witnesses, Andrew Albarelle and Kellie Baucom. Defendants sought at trial to qualify these witnesses as experts without prior notice to the government, as required by the pretrial order and Fed.R.Crim.P. 16. Defendants were familiar with the need to do so, because they had disclosed another expert using the correct procedures. The trial court correctly found that these witnesses were not qualified to offer expert testimony under Fed.R.Evid. 702. The only expert "disclosures" provided were letters mailed by the witnesses to the U.S. Attorney for Colorado expressing support for the defendants. These letters did not indicate the authors wished to testify, much less provide a summary of expert testimony and the facts and data underlying such testimony. These witnesses had no personal knowledge of defendants' businesses or other relevant facts and thus the witnesses were also not qualified to testify as fact witnesses. Any testimony these witnesses might have offered would have been cumulative anyway, given the testimony of another purported expert called by the defendants.

ARGUMENT

I. Defendants' Right to a Speedy Trial Was Not Violated When the District Court, at Defendants' Own Request, Granted Multiple Continuances of the Trial Date

Defendants argue their statutory right to a speedy trial, under 18 U.S.C. § 3161(c)(1), was violated when the district court granted numerous continuances of their trial date. Defendant Banks also argues his Sixth Amendment right to a speedy trial was violated.

A. The Issue Below

The defendants first raised a speedy trial issue below by filing motions to dismiss the indictment on the first day of trial. Vol. I at 778. The district court orally denied the motions. Vol. II at 642. In a subsequent written order, the court confirmed its ruling. Vol. I at 788. Defendants, including defendant Banks, then filed post-trial motions reasserting a violation of their statutory and constitutional speedy trial rights. *Id*. at 1141, 1275, 1335. The district court issued a written order denying the motions. *Id*. at 1594.

B. Standard of Review

This court reviews the district court's denial of defendants' motions to dismiss, and its decisions to grant ends-of-justice continuances, for abuse of discretion. *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009); *United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010). This is a high

standard that generally requires a defendant to show the court below rendered a decision that is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Byrne*, 171 F.3d 1231, 1235-36 (10th Cir. 1999). A district court's legal interpretation of the Speedy Trial Act is reviewed de novo and underlying factual findings are reviewed for clear error. *United States v. Gonzales*, 137 F.3d 1431, 1433 (10th Cir. 1998).

Whether a defendant's Sixth Amendment speedy trial right has been violated is reviewed de novo. *United States v. Larson*, 627 F.3d at 1207.

C. Argument

1. The Speedy Trial Act: Ends-of-Justice Continuances

Defendants argue that four of the continuances granted by the court fail to comply with the requirements of the Speedy Trial Act. The Speedy Trial Act [STA], 18 U.S.C. § 3161(c)(1), requires that the trial of a defendant commence within seventy (70) days from the filing of the indictment or the date on which the defendant has first appeared before a judicial officer, whichever last occurs. The indictment was filed June 9, 2009, and defendants first appeared before the court on June 23, 2009.

The Act excludes from its time constraints certain periods of delay, "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public

and the defendant in a speedy trial." A court is required to set forth on the record, orally or in writing, its reasons for making such findings. *See* 18 U.S.C. § 3161(h)(7)(A).

In accordance with these statutory requirements, this court has held that before granting a continuance under § 3161(h)(7)(A), a district court: (1) "shall consider" the factors listed in § 3161(h)(7)(B), such as whether failure to grant the continuance would result in a miscarriage of justice; whether the complexity of the case, in light of the number of defendants and the existence of novel questions of fact or law justifies a continuance; whether failure to grant the continuance would deny counsel adequate time to prepare; and (2) must set forth in writing its reasons for finding the ends of justice served by the continuance outweigh the best interest of the public and defendant in a speedy trial. *United States v. Gonzales*, 137 F.3d at 1433. *See also United States v. Occhipinti*, 998 F.2d 791, 797 (10th Cir. 1993)("the trial court must make explicit findings regarding why granting the continuance will strike a proper balance between the ends of justice and the best interest of the public and the defendant in a speedy trial").

This court more recently addressed these issues in *United States v. Toombs*, 574 F.3d 1262 (10th Cir. 2009), where it emphasized that the record must disclose more than conclusory allegations as to why the events

identified in support of a requested continuance actually necessitate the delay. In *Toombs*, the court found a Speedy Trial Act violation where there was "absolutely no explanation in the record for why the events, receiving newly disclosed discovery, resulted in defense counsel requiring additional time to prepare for trial." *Id*. at 1272. The court found that neither the motions nor orders revealed "the nature of the recently disclosed discovery, the relevance or importance of the discovery, or why the district court thought it proper to grant" the continuances. *Id*. However, the *Toombs* court held it was not necessary for a court to restate "facts which are obvious and set forth in the motion for the continuance itself." *Id*. at 1269 (citing *United States v. Occhipinti*, 998 F.2d at 797).

(a) Continuance of July 9, 2009

On July 6, 2009, then-counsel for co-defendant Banks filed a motion for an ends-of-justice continuance of ninety (90) days, under 18 U.S.C. § 3161(h). As grounds, defense counsel alleged:

‣ A twenty-five count indictment had been returned against six defendants, following a multi-year investigation, involving forty-two alleged victims;

‣ Discovery material occupied over thirty boxes and, while provided in part, would not be complete (according to the government) until July 27, 2009. The seventy (70) day speedy trial deadline was September 1, 2009.

‣ It was unreasonable to expect counsel to prepare for trial within the existing time frame;

‣ A status conference was already set for August 20, 2009, and at that time counsel could provide more information regarding the amount of time it would reasonably take to prepare for trial;

‣ The government did not oppose the ninety (90) day continuance.

Vol. I at 70-72.

On July 9, 2009, the court issued an order granting the motion, finding that the ends of justice would be served by excluding the ninety day period requested and that providing defendants adequate opportunity to prepare for trial outweighed the best interest of the public and defendants in a speedy trial. *Id*. at 89-90. The court reconfirmed a status conference was set for August 20th.

Defendants now argue the continuance granted to them violated the STA because the defense had yet to receive discovery; the court did not hold a hearing on the motion; the court's findings and analysis were inadequate; and the government failed to oppose the motion, although purportedly aware the

case was not "complex." Appellants' Principal Brief [APB] at 23-25.[2] These arguments are meritless. The motion of defense counsel correctly alleged he was defending a multi-defendant case involving voluminous discovery. The government was releasing this discovery in stages – while attempting to organize and scan the materials into a digital format – over a period of about 30 days from defendants' first appearances before the court. *Id*. at 71. Defense counsel expected to have received all the materials by July 27th – slightly more than 30 days before when trial otherwise would commence. The government spent years investigating the case, and it is unreasonable to expect defense counsel to review voluminous materials and prepare for trial in such a short time period. Hence the government did not oppose the ninety (90) continuance. The undisputed allegations of the motion were more than sufficient for the court to make its findings, and there is no requirement that a court hold a hearing on such a motion.

(b) Continuance of August 20, 2009

Two days before the scheduled August 20th status hearing, counsel for co-defendant Stewart filed his own motion under 18 U.S.C. § 3161(h), seeking an ends of justice continuance of one hundred and ten (110) days. Vol. I at 95.

---

[2] This is a joint brief filed on behalf of all defendants except Banks. Banks' brief will be cited as "Banks' Opening Brief" [BOB].

The government did not oppose the motion, *id*., and all co-defendants concurred. *Id*. at 101. Counsel alleged:

▸ The case originated with an FBI investigation that began in 2004 and resulted in the execution of a search warrant at defendants' offices in 2005, which involved as many as 20 law enforcement officers and lasted over a period of 14 hours;

▸ The indictment was based upon this evidence and other evidence gathered by the government through the return of the indictment in 2009, a period of nearly five years;

▸ The government provided discovery materials to the defendants on July 6th, 10th, 20th, and 23rd, 2009, which consisted of approximately 20,000 scanned images, and the government offered to make available to defendants the 1.8 terabytes of data contained in images from defendants' servers and computers;

▸ The defense was in the process of reviewing the discovery material and had engaged computer consultants to make the material received more accessible and to arrange for review of the server and computer data;

▸ The indictment charged a conspiracy beginning in 2002 and involving 42 victim companies, requiring defense counsel to investigate events and interview witnesses that occurred over a nearly seven year time period;

‣ Reviewing the discovery materials and conducting their own investigation of matters was necessary for defense counsel to effectively prepare for pretrial proceedings;

‣ Defense counsel conservatively estimated that nearly 100 interviews would be necessary during the pretrial preparation period.

Vol. I at 95-98.

At the status hearing, the court considered the motion and made oral findings and conclusions that the ends of justice were served by granting the requested continuance. *Id*. at 101. All defendants agreed with the motion and the government confirmed that the factual allegations made by defense counsel were accurate. Vol. II at 25. The court queried defense counsel and determined that even using "their most diligent efforts to prepare this case for trial," they could not do so without the requested continuance. *Id*. at 26. The court then made detailed findings, reciting, *inter alia*, the extensive discovery provided and the potential number of witness interviews defense counsel might find it necessary to conduct. *Id*. at 27. Based upon the undisputed facts contained in the motion, the court expressly concluded that the ends of justice served by granting the continuance outweighed the interest of the public and defendants in a speedy trial. *Id*. at 28. The court concluded that the case was sufficiently unusual and complex that failure to

grant the continuance would likely result in a miscarriage of justice by precluding defendants from adequately preparing for trial. *Id*. The court then sought to determine from counsel how long they might need in order to be in a position to estimate when pretrial motions might be filed and when a trial date might be set. *Id*. at 29. The court set a further status conference for December 18, 2009, expecting at that time to consider scheduling pretrial motions' deadlines, hearing dates, and a trial date. *Id*. at 30.

Defendants argue that the motion lacked any description of what defense counsel intended to do during the one hundred and ten (110) day continuance; that the court did not consider the statutory factors under § 3161(h); and that the court failed to inquire regarding what progress had already been made. APB at 26-29. The motion and hearing transcript refute these allegations. The court's findings were made only after it accepted the defendants' detailed factual recitations, and they easily satisfy *Toombs*' requirement that a court's findings and conclusions be supported by factual detail.

(c) Continuance of December 18, 2009

On December 14, 2009, defense counsel jointly moved for an additional ends of justice continuance of three hundred and sixty-one (361) days. Vol. I at 102. The joint motion recounted the history of the case and reiterated the

factual detail contained in earlier motions regarding the length of investigation, the quantity of documents produced in discovery, the number of alleged victims, and the number of potential witnesses. *Id.* at 103-04. Defense counsel explained that they had used the time granted through the previous continuances "to become familiar with the mass of information that had been provided by the government." *Id.* Now that "more extensive review" had occurred, defense counsel sought to summarize the work remaining to be done:

▸ The volume of material – nearly 20,000 pages of discovery – made it "not enough" to merely review the material. To master the specifics, counsel found it necessary to cross-reference documents, such as emails, letters, FBI 302's, and civil pleadings, so they could be "reviewed, compared and contrasted." *Id.* at 105.

▸Evaluating the computer discovery – now estimated at 1.7 terabytes – was necessary to advise their clients, evaluate potential pre-trial motions, and prepare a defense.

▸ Based upon the review of documents to date, counsel now estimated at least 130 potential witnesses, many of whom needed to be interviewed. Many also resided outside Colorado. However, further review of the discovery

materials was necessary before interviewing the witnesses (to assure defense counsel could ask intelligent, fully informed questions).

‣ Counsel had also identified complex legal issues they needed to address. For example, a conspiracy was charged and defense counsel understood the government would seek to introduce co-conspirator hearsay under Fed.R.Evid. 801(d)(2)(E). (Thus, it would be necessary to set deadlines for the government to make a *James* proffer and for defendants to respond.) Because of the potentially large number of statements, defense counsel anticipated the process would be unusually time consuming.

‣ Based upon their analysis of the tasks facing them, defense counsel proposed a detailed scheduling order, setting forth deadlines for discovery motions and motions attacking the indictment (April 30, 2010); suppression motions (June 30, 2010); expert disclosures and *James* motions (August 30, 2010); and severance motions (fifteen days after the ruling on the *James* motions). After conferring with government counsel, defense counsel also proposed deadlines for government responses and disclosures under Fed.R.Evid. 404(b).

See vol. I at 108-09.

The status hearing took place on December 18, 2009. Although the joint motion was quite detailed regarding the need for the continuance, the judge

did not accept unquestioningly counsels' representations. To the contrary, the court informed counsel up front "that I am very hesitant to enter an order that would extend this case by almost a year, especially given the other extensions I have already granted on this." The court then expressly queried counsel regarding "what had already been done in this case." Vol. II at 35. While conceding the case was complicated, the court questioned whether it really was so complicated as to require the lengthy continuance requested. *Id*. The court heard detailed argument from both defense counsel and the government regarding the large amount of discovery materials, the need to retain and work with computer experts, and the need to coordinate with other defense counsel. Defense counsel argued to the court that they had only a handful of months to come up to speed on an investigation the government had spent five years pursuing. Defense counsel agreed this was "not the most complex case ever," but argued it was nonetheless "a big, complex case . . . ." *Id*. at 41. After considering counsels' argument, the court indicated it was convinced that, based upon the "very well drafted joint motion," the ends of justice required another continuance. *Id*. at 45.

With the assistance of counsel, the court then set specific deadlines for motions, with particular emphasis on deadlines and hearing dates for motions addressing expert witness testimony and co-conspirator hearsay. *Id*. at 45-52.

Having established a detailed schedule upon which to proceed, the court found that failure to grant the joint motion "would likely result in a miscarriage of justice by precluding the defendants from adequately being able to prepare for trial." The court more specifically found that because of the number of defendants and the nature of the prosecution, and the fact that the case involved an intricate financial conspiracy involving massive amounts of discovery, the case was "so unusual and complex that it would be unreasonable to expect the defendants to prepare for trial in a shorter period of time and within the time limits set forth by the Speedy Trial Act and the Court's previous orders."*Id*. at 54. After further discussions regarding the need for a final trial preparation conference and setting a trial date, the court set trial for six weeks from January 31, 2011, through March 11, 2011, and ordered that time would be excludable through the beginning trial date of January 31st, 2011. *Id*. at 58. The total was 409 days. *Id*. at 113.

Defendants accuse their former counsel of "inaction and dithering," arguing that as of December 18th, not a single pretrial motion had been filed in the case. The docket sheet shows this is not literally true; and in the months leading up to December, 2009, the docket sheet shows dozens of entries for ex parte documents – which likely are defense requests for investigative resources and reimbursement. Defendants' argument also

ignores the situation set forth in detail in the continuance motion: that before counsel could competently file critical pretrial motions, counsel needed time to review the extensive discovery and conduct their own investigation. Defendants have provided no factual basis for their suggestion that their counsel should have filed additional motions by this point in time. The extent of the discovery and potential number of witnesses provide strong support for defense counsels' argument that they were not yet prepared to file motions addressing discovery, suppression of evidence, or trial issues.

Defendants' argument that the case was not complex is undermined by their own *pro se* motion for a one hundred and twenty (120) day ends of justice continuance, filed March 16, 2011. Vol. I at 706. All six defendants signed the motion, which referred to the case as being classified "complex" and noted "the tens of thousands of documents" provided by the government in discovery. Defendants insisted that an additional continuance was necessary to allow them to prepare and assured the court that "adequate preparation time is a clearly permissible reason" for granting such a continuance. *Id.* at 707. Defendants do not challenge the court's grant of this continuance, which the government opposed. Yet the findings made by the court in support of the continuance are far less detailed and compelling than

the findings made by the court in granting the earlier continuances. *See* vol. II at 542-573.

Defendants argue that the court's findings are not consistent with the Supreme Court's decision in *Bloate v. United States*, 130 S.Ct. 1345 (2010), reasoning that *Bloate* grafted an additional requirement onto 18 U.S.C. § 3161(h)(7)(A) & (B). APB at 21-22, 35. This is incorrect. In *Bloate*, the Court held that time granted to a party to prepare pretrial motions is not automatically excludable under § 3161(h)(1). The time at issue in *Bloate* was not excluded under § 3161(h)(7), and the case does not hold that time to prepare pretrial motions is never excludable. To the contrary, the Court in *Bloate* concluded that time to prepare pretrial motions *may* be excluded if a court enters appropriate findings under § 3161(h)(7). *Id*. at 1352. The court below did so, and *Bloate* does not support defendants' claims. *See United States v. Moreira*, 416 Fed.Appx. 803, 808 (10th Cir. 2011) (unpublished) (holding *Bloate* deals only with the excludability of time under § 3161(h)(1)).

Defendants also argue that a court's ruling must take place prior to granting a continuance, and that the court below ruled only after granting the continuance. APB at 35. That is incorrect. This court has held that findings supporting an ends-of-justice continuance must be made contemporaneously with the granting of the continuance, that is at the outset of the excludable

period. *See, e.g., United States v. Gonzales*, 137 F.3d at 1433. The court's ends of justice findings were entered at the time it granted the continuance and complied with this requirement.

(d) Continuance of November 22, 2010

Defendants filed yet another motion on November 18, 2010, seeking a one hundred and twenty (120) day continuance of the trial date. Vol. I at 562. The motion argued that the government's *James* proffer, submitted October 28, 2010, listed 401 co-conspirator statements. In addition to noting the complexity of the case and the large quantity of discovery, counsel indicated:

‣ They had encountered difficulties in finding and opening some of the computer discovery materials containing the statements at issue. They needed additional time to review and consider the statements in the context of the case. *Id*. at 564.

‣ Following a hearing on suppression motions, further briefing had been ordered which required the parties to order transcripts of witness testimony at the hearing. Final defense briefing was due December 24, 2010. Allowing time for government responses and defense replies, the parties would not have sufficient time to complete this briefing and still prepare for the January 14th final trial preparation conference. *Id*. at 564-65.

▸ Certain Western Union documents had been disclosed on November 8th by the government, and, while they were not to be used by the government at trial, defense counsel needed time to obtain, review, and analyze the documents for themselves.

▸ Defense counsel needed time to schedule a trip to the east coast – and possibly the west coast – to interview prosecution and defense witnesses from the 42 staffing companies. Based upon the results of the interviews, defense counsel would probably need to subpoena records from these companies. *Id.* at 565-66.

At the conclusion of a *James* hearing on November 19, 2010, the court addressed the continuance motion and informed counsel it would issue a written order granting the motion. Vol. II at 506. That order issued November 22, 2010, and found that under the circumstances before the court "denying the requested continuance would result in a miscarriage of justice by denying Defendants an adequate opportunity to prepare for trial, despite the exercise of due diligence." The court excluded an additional 120 days, finding the continuance outweighed the best interest of the public and the defendants in a speedy trial. The final trial preparation conference and six week jury trial were reset accordingly. Vol. I at 571-72.

Defendants argue the court's findings were inadequate because they did not separately recite and analyze the rationale for granting the continuance. However *Toombs* and earlier precedent make clear this is unnecessary. The motion cited specific problems defense counsel were encountering with the computer discovery materials, with supplemental briefing on suppression motions, and with witness preparation. The district judge was presiding over these matters – in conducting hearings and approving many travel and expense vouchers – and also would have been personally familiar with the problems cited by defense counsel. No purpose would have been served by restating in its order the rationale the court found in the motion, which was the basis for the order.

2. The Sixth Amendment

Defendant Banks also argues that his Sixth Amendment right to a speedy trial was violated. BOB at 16. The Sixth Amendment guarantees an accused the "right to a speedy and public trial." Banks begins his argument section with an irrelevant discussion of pre-indictment delay. BOB at 17. A defendant's constitutional speedy trial right attaches when he is arrested or indicted on federal charges, depending upon which comes first. *See United States v. Madden*, 682 F.3d 920, 931 (10th Cir. 2012). The indictment against Banks was returned on June 9, 2009, and he first appeared through a

summons on June 23, 2009. Vol. 1 at 13 (docket entries 1 & 13). No colorable claim of pre-indictment delay exists.

The Supreme Court has decreed that when a violation of the Sixth Amendment's guarantee of a speedy trial is alleged, the claim must be evaluated by balancing four factors: (a) the length of the delay, (b) the reason for the delay, (c) whether the defendant has asserted his right to a speedy trial, and (d) whether the delay prejudiced the defendant. *Larson*, 627 F.3d at 1207 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (other citations omitted). No one factor, taken by itself, is necessary or sufficient to establish a deprivation of the right to a speedy trial. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *United States v. Kalady*, 941 F.2d 1090, 1095 (10th Cir. 1991) (quoting *Barker v. Wingo*, 407 U.S. at 533).

(a) The Length of Delay

The length of the delay, between defendants' indictment and trial, was somewhat longer than two years. Delays longer than one year are usually viewed as presumptively prejudicial. *Larson*, 627 F.3d at 1208. However in *United States v. Seltzer*, 595 F.3d 1170 (10th Cir. 2010), the court observed that "even a two-year interval between charges and trial may not be deemed a '"delay' when the charges are complex." *Id*. at 1176. Banks argues "the

charges were not complicated as recognized by the Court and supported by the record," and that the delay was excessive given "the simplicity of the case." BOB at 18. The indictment alleged twenty-five counts of conspiracy and fraud against six defendants. Vol. I at 29. The investigation spanned a period of at least five years (although the scheme began seven years before indictment). As discussed at length above, thousands of pages of discovery materials were disclosed to defense counsel. Banks' portrayal of the case as simple is not supported by the record. Nor did the district judge so portray the case. In the rulings cited above, the court observed this was not the most complicated case she had seen, but acknowledged the case involved complex issues and extensive discovery. Given all the circumstances, the two year period between indictment and trial was not unreasonable.

(b) The Reason for the Delay

The record clearly discloses the reason for the delay. Defendants moved for multiple, lengthy continuances and, having persuaded the court to grant them, now claim to be victims of their own advocacy. Defendants' arguments are disingenuous. None of the continuances defendants challenge were sought by the government. Although the government did not oppose the motions, that is because defendants insisted they would be prejudiced if forced to go to trial without adequate preparation. Defendants repeatedly argued below,

with considerable cause, that the government had many years to investigate and assemble the case, but they had only a few months to respond to it. When a defendant's own actions are the primary cause of the delay, this factor weighs heavily against the defendant. *Larson*, 627 F.3d at 1208, citing *Toombs*, 574 F.3d at 1274.

(c) Defendant's Assertion of His Right to a Speedy Trial

This court has held that *when* a defendant has asserted his speedy trial right is a factor entitled to "strong evidentiary weight" in determining whether that right has been violated. The defendants here did not demand a speedy trial until the first day of the trial itself (which had most recently been continued on their own, *pro se* motion). The pointlessness of requesting a speedy trial once trial has begun underscores that defendants' actions were manipulative and disingenuous. In *Larson*, this court held that "this factor weighs against a defendant who requests continuances and waits for months to assert his speedy trial right." 627 F.3d at 1208. In *Toombs*, the court found this factor weighed heavily against the defendant where many continuances had been granted, most requested by the defendant, and he waited until after the continuances to assert his right to a speedy trial. 574 F.3d at 1274-75. And in *United States v. Batie*, 433 F.3d 1287, 1292 (10th Cir. 2006), this court observed that the defendant's persistent request for continuances "scarcely

demonstrate a desire for a speedier process." So also in the present case, defendants' decision to wait until trial to assert their right to a speedy trial was violated undermines the sincerity of their arguments.

(d) Whether the Delay Prejudiced the Defendant

When there is extreme delay, a defendant need not present evidence of prejudice. *Toombs,* 574 F.3d at 1275, citing *Doggett v. United States*, 505 U.S. 647, 655 (1992). That is not the case here. In *Toombs*, this court found that a twenty-two month delay – the vast majority of which was attributable to the defendant – did "not constitute extreme delay." 574 F.3d at 1274 (citations omitted). *See also Larson*, 627 F.3d at 1210 (two-and-one-half year delay not sufficient to support presumption of prejudice); *Seltzer*, 595 F.3d at 1180 n.3 (finding courts often require a delay of six years for prejudice to be presumed).

In determining whether a defendant has made "a particularized showing of prejudice," this court has identified three main interests: (i) the prevention of oppressive pretrial incarceration; (ii) the minimization of anxiety and concern of the accused; and (iii) minimization of the possibility that the defense will be impaired." *Larson*, 627 F.3d at 1209. *See also Barker*, 407 U.S. at 532. The *Larson* court held the first and third factors were the most important and neither of these factors favors the defendants.

Defendants were not detained before trial. As to the delay impairing the defense, Banks' opening brief presents a laundry list of record citations unsupported by argument, other than the conclusory assertion that memory problems of government witnesses "worked to the detriment of the defense." BOB at 22. Defendants also make a variety of other conclusory statements concerning cross-examination being "hampered," and defendants' inability to call witnesses "that could have addressed the Government's testimony . . . ." Yet defendants have not identified a single specific witness – for the government or defense – whose testimony was meaningfully affected. Defendants have merely recited legal conclusions, without providing factual support, and their arguments do not show their defense was impaired by the two year delay in bringing the case to trial.

II. The Trial Court Did Not Compel Co-Defendant Barnes to Testify in Violation of His Fifth Amendment Privilege; Defendants Have Not Shown Any Error In the Court's Curative Instruction

Defendants argue they were compelled by the court to call co-defendant Barnes as a witness, in violation of his Fifth Amendment privilege against self-incrimination, and that the trial court failed to give the jury an appropriate curative instruction regarding issues that arose when defendants themselves improperly sought to invoke that privilege.

A. The Issue Below

On October 5, 2011, the government informed the court and defendants that it was ahead of schedule and was calling its last witness. Vol. II at 2203. The court discussed with defendants the need to have their witnesses available and ready to go. *Id*. at 2204-05, 2207. The next day, October 6th, the government rested. *Id*. at 2229. Defendants began to present their defense, but in the afternoon announced they had no other witnesses. As a result, the court had to send the jury home early. *Id*. at 2291-95, 2314. The next trial day, October 7th, after the lunch break, defendants announced they had only one witness left, whose testimony was quickly completed. *Id*. at 2470. Before recessing – at 1:43 p.m. – the court again admonished the defendants to have their witnesses available "so that we don't have these gaps and the jury isn't kept waiting." *Id*. at 2473.

The issues surrounding testimony by co-defendant Barnes arose when the court reconvened the following Tuesday, October 11th, the eleventh day of trial. During a sidebar conference at approximately 9:50 a.m., the defendants informed the Court they were again expecting to run out of witnesses. The court responded:

> That is unacceptable. I told you to have witnesses here. We are not going to recess again until 10:30. That is 40 minutes away. I told you to be prepared. They need to be here. Your witnesses are not taking long. We are going to go. The eight you named [during an earlier discussion
>
> of defense witnesses for the day], you still have time. So you better get them here. So call your next witness.

Supp.Vol. I at 149-150.

At the time this sidebar occurred, another witness – whom defendants would call two days later – was present and available to testify. *Id.* at 182, 243;vol. II at 2864. The defendants did not, however, choose to call this witness. Instead, after a brief conference and without lodging any objection, defendants called co-defendant Barnes to the stand. Barnes was examined by defendants Walker, Banks, and Harper, and readily answered their questions. *Id.* at 150-175. Shortly after the government began cross-examining him, however, defendant Walker – who had called Barnes to the stand – moved for a mistrial, claiming that he was asserting defendant Barnes' Fifth Amendment privilege against self-incrimination. *Id.* at 225.

The government objected and asked the court to instruct the jury that one defendant may not assert the Fifth Amendment privilege of another defendant and that they should disregard Walker's remarks. The court deferred the matter until after its ruling. *Id.* at 227.

After the lunch break, but before the jury returned, the court advised the defendants as suggested by the government. *Id.* at 228, 249. The court then inquired of Barnes if he wished to assert his personal right against self-incrimination. Barnes said he did. *Id.* at 228. The government then suggested a second possible instruction: that Barnes' previous testimony be stricken and the jury be instructed not to consider the testimony as evidence. *Id.* at 231, 249.

By this point in time, both defendant Walker and defendant Barnes were insisting that Barnes was forced to testify against his will. The court rejected these arguments and found that Barnes' decision to testify was voluntary. *Id.* at 247-49. The court offered to strike Barnes' previous testimony and to provide a curative instruction, as proposed by the government. Barnes refused that instruction. *Id.* at 253. The court then advised Barnes that, based on his decision to begin testifying, he did not have the right to selectively invoke his Fifth Amendment privilege. *Id.* at 254-55. The court further advised him that the jury could be instructed that it could draw adverse inferences against him from any additional invocations of his Fifth Amendment privilege. *Id.* Barnes requested and received approximately twenty more minutes to decide how to proceed. *Id.* at 256-57. When the court reconvened, Barnes indicated that he wanted to continue testifying on cross-

examination. *Id*. at 253-55, 257. Barnes again told the court he did not want a curative instruction. *Id*. at 253, 257.

Immediately after the jury returned, the Court gave a cautionary instruction, not directly referencing Mr. Barnes or Mr. Walker's outburst, but reminding the jury that statements and objections made by attorneys or non-testifying defendants were not evidence and should not be considered in any way. *Id*. at 258. This was a revised version of the government's earlier (first) proposed instruction regarding Walker's outburst. *Id*. at 250; *cf*. *id* at 227. Although the court asked for their position on this curative instruction, *id*. at 250, the defendants did not object. *Id*. at 258. Similar language was incorporated in the jury instructions given at the close of the evidence. Vol. I at 823 (instr. 5). Once Barnes re-took the stand, he invoked his Fifth Amendment privilege in response to all additional questions from the government. *Id*. at 258-64.

At the close of trial, the government did not ask the court to instruct the jury they could draw adverse inferences from defendant Barnes' invocation of his Fifth Amendment privilege. The instruction proposed and given merely stated: "You should weigh Defendant Barnes' testimony and evaluate his credibility in the same way as that of any other witness. You may consider his refusal to answer certain questions in assessing his

credibility." Vol. I at 825 (instr. 7). During closing arguments, the government made no mention of defendant Barnes' invocation of his Fifth Amendment privilege. Vol. II at 3024-3056, 3124-3138.

B. Standards of Review

1. Fifth Amendment

Whether a defendant's Fifth Amendment right against self-incrimination was violated is a legal issue this court reviews de novo, while according deference to the district court's findings on factual questions. *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966); *United States v. Chalan*, 812 F.2d 1302, 1307-08 (10th Cir.1987).

2. Sixth Amendment - Jury Instructions

The opening brief of co-defendants Barnes, *et al.*, argues that the court's instructional errors violated their Sixth Amendment right to a fair trial. The government does not agree that this is an issue of constitutional dimension. Defendants' arguments are addressed not to a fundamental right, but rather to alleged inadequacies in the court's instructions at trial, which defendants claim to have discovered post-trial. *See, e.g.*, *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001) (defendant's arguments addressed to evidence rulings confused "a fundamental right, the right to present a theory of defense, with one that is not fundamental, the right to present that theory in whatever

manner and with whatever evidence he chooses." *Id.* at 1243. Defendants' challenges to the court's instructions do not implicate the Sixth Amendment.

When the legal sufficiency of an instruction is challenged, the court reviews "a jury instruction de novo when an objection is made at trial, and for plain error when no objection was made." *See United States v. Fabiano*, 169 F.3d 1299, 1302-03 (10th Cir. 1999) and Fed.R.Crim.P. 52(b). However when a party acts intentionally to induce a court ruling, rather than through inadvertence or neglect, review of the issue is waived. *See United States v. Cornelius*, 696 F.3d 1307, 1319-20 (10th Cir. 2012).

3. Alleged Structural Error

All defendants argue the district court committed structural error, but the errors they allege are not structural in nature. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991); *United States v. Lott*, 310 F.3d 1231, 1250-51 (10th Cir. 2002). In *Arizona v. Fulminante,* the Court held that most constitutional errors can be harmless, including violations of the Fifth and Sixth Amendments. Structural errors include the total deprivation of the right to counsel, the lack of an impartial judge, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to a public trial. 499 U.S. at 309-10. This appeal presents no such issues, and defendants cite no authority

supporting their arguments that the alleged errors below are structural. To the contrary, the case defendants primarily rely upon in arguing a Fifth Amendment violation, *United States v. Lauder*, 409 F.3d 1254 (10th Cir. 2005), holds that "[c]onstitutional violations such as the one at issue here" are subject to harmless error analysis. 409 F.3d at 1261, citing *Chapman v. California*, 386 U.S. 18, 24 (1967). *Cf. United States v. Rice*, 52 F.3d 843 (10th Cir. 1995) (when no objection regarding defendant's Fifth Amendment self-incrimination privilege raised at trial, issue reviewed for plain error). The court need not reach this issue however, because the defendants have failed to show errors of any kind in the district court's rulings.

C. Argument

1. Defendant Barnes Voluntarily Chose to Testify Under Direct Examination By His Fellow Defendants and In Doing So Waived His Privilege Against Self-Incrimination

Defendants argue they did not voluntarily choose to call Mr. Barnes to the witness stand, but rather were compelled to do so by the district court. The trial record tells a different story.

Defendants first allege the government rested its case "much sooner" than expected and as a result they were left "with the difficult tasks of re-structuring and expediting the entire presentation of their defense." APB at 43. Defendants make no attempt to explain what they did, or why they

needed, to re-structure their defense. In any event, the government's decision to rest did not come as a surprise. The events at issue took place on October 11th. The government rested its case in chief on October 6th, and had informed the court and defense counsel it would do so the preceding day, October 5th. Thus, *six days* before the events complained of, defendants knew when the government would rest and that they would need to begin the presentation of their own case.

Defendants argue as if their (apparent) inability to have sufficient witnesses present on October 11th was an isolated event. To the contrary, the district court had found it necessary to repeatedly admonish defendants for not having witnesses available to testify. On at least two occasions, the court had to send the jury home early because the defendants did not have witnesses available. The court had made clear that this practice would not be tolerated and that they were required to have witnesses available and ready to testify.[3] So when defendants persisted in these practices – telling the court mid-morning on October 11th they had no witness available to testify – the court was entirely justified in telling the defendants that the situation was

[3] Later in the trial, defendants continued their practice of delaying the trial by informing the court they did not have witnesses available. *See* vol. II at 2464, 2471, 2473, 2523.

"unacceptable," that the court intended to proceed with the trial, and demanding that they call a witness.

At this point in time, the record shows the defendants requested and received permission to check the witness room, but defendants made no mention on the record as to whether other witnesses had arrived. However one witness was available, John Smith, whom defendants would choose to call as a witness two days later, on October 13th. Thus, when defendants, after conferring among themselves, called Mr. Barnes to the witness stand, they made a voluntary choice to do so. And when Barnes chose to testify without raising this issue, he waived the privilege against self-incrimination. *See United States v. Fishman*, 645 F.3d 1175, 1185 (10th Cir. 2011) (silence regarding Fifth Amendment right indicates defendant waived it by testifying before grand jury).

As the court observed at trial, defendants expressed no concern with the privilege against self-incrimination until after they had elicited favorable testimony from Mr. Barnes. Supp.Vol. I at 238. Barnes testified at length on direct examination by numerous co-defendants (including Banks), without expressing any concern with incriminating himself. When defendants attempted to invoke the privilege to block the government's cross-examination, it was too late. By testifying on direct, Barnes waived his Fifth

Amendment privilege as to all matters within the scope of the direct examination. *See Mitchell v. United States*, 526 U.S. 314, 321 (1999); *United States v. Crockett*, 435 F.3d 1305, 1313 (10th Cir. 2006).

Defendants have never claimed, nor can they claim, that they were unaware of the privilege. Prior to any evidence being heard, the jury was instructed – in defendants' presence – that the Constitution granted the defendants the right to remain silent and the right not to testify. *See* vol. I at 852, 864. That defendants were well aware of their right not to testify may also be seen in their vigorous assertion of that right after the government began to cross-examine Mr. Barnes.

Relying upon *United States v. Lauder*, defendants urge this court to apply "a five-factor test" to determine if constitutional error occurred. APB at 42, 51. But in *Lauder,* the defendant had invoked his right to remain silent before trial. While testifying, a government agent impermissibly made reference to that decision. 409 F.3d at 1261. That is not the situation here. In *United States v. Hanrahan*, 508 F.3d 962 (10th Cir. 2007), the court itself made the distinction, holding that if a defendant chooses not to testify, the Fifth Amendment prohibits the government from commenting on that decision, but that under the Fifth Amendment, "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect

to the testimony he gives." *Id*. at 967 (quoting *Harrison v. United States*, 392 U.S. 219, 222 (1968)). Here, in contrast with *Lauder*, Mr. Barnes attempted to invoke his Fifth Amendment right to silence on cross-examination only after choosing to testify under direct examination by his co-defendants.

Notwithstanding Mr. Barnes' selective and self-serving invocation of the privilege against self-incrimination, the prosecutors in their closing remarks refrained from comment – although under the circumstances they had every right to do so.[4] Defendants have not shown any error in the court's or the government's handling of the situation.

Defendants maintain the trial transcript is inaccurate and that the district court compelled one of them to testify because they had no other witness present. The existing transcript contains no such ultimatum and when the defendants advanced this argument at trial, the court rejected it, holding that "I never told you you had to put anybody on the stand today other than you needed a witness." Supp.Vol. I at 176. When the court noted that defendants had earlier indicated all six of them intended to testify, Mr. Walker responded: "your Honor, we were evaluating that, and had not made a final decision." *Id*. at 205. Walker conceded however that the defendants had

[4] *See Caminetti v. United States*, 242 U.S. 470, 493-95 (U.S. 1917) (if defendant takes the stand and then refuses to answer questions, jury may properly be instructed it can draw adverse inferences from the refusal).

placed themselves on their "may-call" witness list. *Id*. at 206. Thus, prior to the time of calling Mr. Barnes to the witness stand, defendants had considered that they would testify and had communicated that possibility to the district court. Because nothing in the record other than the defendants' own self serving assertions supports their claim of compulsion, the exact language used by the district court during the sidebar conference is immaterial. The instant record – and most cogently defendants' own conduct – conclusively refutes defendants' argument that they were compelled to call Mr. Barnes to the witness stand.

2. Defendants Refused One of The Curative Instructions The Court Offered to Give and Failed to Object To The Curative Instruction That Was Given

Defendants argue that the trial court failed to give adequate curative instructions. Two separate instructions were considered at trial. The first concerned Mr. Barnes' testimony on direct examination and decision to invoke his Fifth Amendment privilege during cross-examination by the government. This instruction would have informed the jury that Barnes' testimony was being stricken and should not be considered as evidence. The second instruction under consideration addressed Mr. Walker's outburst before the jury: his attempt to invoke Barnes' Fifth Amendment privilege and motion for a mistrial. *See, e.g.,* Supp.Vol. I at 249.

The first instruction was never given because Mr. Barnes chose to continue his testimony and, on two separate occasions, refused the court's offer to give a curative instruction regarding his testimony. Defendants concede this occurred. BOB at 51 (noting "Appellants declined" court's offer of curative instructions.) Undeterred by their own arguments below, defendants insist that "[r]egardless of Appellants wishes," the court was required to give a curative instruction. *Id*. Banks argues the language suggested by the government at trial should have been used. However the language he suggests in his opening brief is largely his own language, proposed for the first time in his post-trial motions. APB at 26. In any event, having induced the court at trial not to give such an instruction, defendants have waived the right to argue the trial court erred. Banks alludes to the plain error standard in his opening brief, *id*. at 29, but review for plain error is not appropriate. In *United States v. Cornelius*, 696 F.3d 1307 (10th Cir. 2012), this court addressed, in the context of jury instructions, the difference between waiver and forfeiture."A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." *Id*. at 1319, citing *Wood v. Milyard*, 132 S.Ct. 1826, 1832 n. 4 (2012) and *United States v. Olano*, 507 U.S. 725, 733 (1993). *See also United States v. McGehee*, 672 F.3d 860, 873 (10th Cir. 2012) ("Waiver is

accomplished by intent, but forfeiture comes about through neglect").
Defendants acted intentionally below in refusing a curative instruction and are not entitled to reverse course on appeal.

The second curative instruction was given largely as proposed by the government. Banks argues that the government's request to provide a curative instruction regarding Walker's outburst was denied. BOB at 27. That is wrong. This was the subject matter of the second instruction and the court merely deferred consideration of the issue until after its ruling. Banks argues the defendants were not consulted regarding their position on both instructions. BOB at 25-26. That is wrong also. As shown above, defendants affirmatively declined the first instruction. As to the second instruction, the court asked for a response from defendants, but they declined initially to take a position. Supp.Vol. I at 250. And when the instruction was given they voiced no objection. *Id*. at 258. Review of that instruction is only for plain error.[5] The content of the instruction was innocuous: it merely advised the jury that

[5] To demonstrate plain error, a defendant must show: (1) some legal error was made; (2) the error is clear or obvious under existing law; (3) the error affected his substantial rights (prejudice); and (4) the error seriously affected the fairness and integrity of the proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993); *United States v. Fabiano*, 169 F.3d 1299, 1301-02 (10th Cir.1999).

statements or objections by attorneys or non-testifying defendants (Mr. Walker) were not evidence. This instruction was repeated at the end of trial.

In reviewing jury instructions, this court reviews "the instructions as a whole to determine whether the jury may have been misled, upholding the judgment in absence of substantial doubt that the jury was fairly guided." *United States v. Lawrence*, 405 F.3d 888, 896-97 (10th Cir. 2005) (quoting *United States v. Magleby*, 241 F.3d 1306, 1309-10 (10th Cir. 2001)). Defendants have not shown that the jury was in any way misled by the court's instructions. Thus, defendants have not identified any error in the court's instructions, much less plain error.

3. Defendants Have Not Shown Prejudice And In Any Event Have Waived Any Claim of Prejudice Resulting From Their Own Deliberate Acts

The gist of defendants' argument is that the court's curative instruction to the jury was inadequate to cure the prejudice resulting from Walker's remarks and Barnes' testimony. However defendants have not established that they suffered any prejudice. To receive protection under the Fifth Amendment, compelled testimony must be self-incriminating. *Mitchell v. United States*, 526 U.S. at 326. The incriminating nature of the testimony must be substantial and real. *See Marchetti v. United States*, 390 U.S. 39, 53

(1968); *United States v. Rivas-Macias*, 537 F.3d 1271, 1279 (10th Cir. 2008) (testimony covered if it would provide "authentic" risk of increased sentence).

The testimony given by Mr. Barnes was not incriminating. Under direct examination by his co-defendants, he provided only information favorable to their defense. When the possibility of self-incrimination arose during the government's cross-examination, Barnes invoked the privilege. Hence, Mr. Barnes has not shown that the testimony he gave was protected by the Fifth Amendment. To the extent defendants argue that the invocation of the privilege itself prejudiced them, that argument is waived because defendants' conduct was intentional.

Nor have any of the other defendants shown how Mr. Barnes' testimony incriminated them. Mr. Banks argues that the district court should not have allowed Barnes to continue to testify in light of Barnes' assertion that he had been compelled to testify in the first instance. However a defendant has a right to testify and when given a choice, Mr. Barnes told the court he wanted to continue and "finish my cross-examination." Supp.Vol. I at 253, 257.

Banks argues that before allowing Mr. Barnes to invoke his Fifth Amendment right, the court should have conducted an *in camera* hearing to "address how each response [taking the Fifth] might tend to incriminate" the other defendants. BOB at 31. There was no reason for such a hearing,

because there was no reason to believe that Mr. Barnes' invocation of his own Fifth Amendment right would incriminate anyone else. What matters at this point in time, of course, is whether the answers actually given by Mr. Barnes in fact incriminated any of his co-defendants. The defendants have advanced no coherent argument that this is the case. Without exception, their arguments are conclusory and speculative, and fail to establish that the events of this day in any way prejudiced their substantial rights.

Banks argues his right "to not take the stand was negated," but his following argument is incomprehensible. BOB at 29. Banks did not testify, and that shows his right "to not take the stand" was honored not negated. Bank also cites this court's decision in *United States v. Sarracino*, 340 F.3d 1148 (10th Cir. 2003), calling it a similar situation. BOB at 30. It is not. *Sarracino*, in relevant part, concerned a murder prosecution and the admission of a non-testifying defendant's confession (Sarracino's), that implicated a co-defendant. The prosecution used the inculpatory statements "repeatedly in the trial." *Id*. at 1161. This court found a violation of *United States v. Bruton*, 391 U.S. 123, 131 (1968). In the case at hand, there is no confession, no inculpatory statement, no reference to a co-defendant, and no application of the venerable rule in *Bruton*.

Banks describes the invocation of a Fifth Amendment right as "high courtroom drama," and implies this itself suggests prejudice. BOB at 27. The proceedings below may indeed have been high drama, but it was the defendants themselves who were directing the show, and having willfully and intentionally invoked their Fifth Amendment privilege against self-incrimination before the jury, they are not entitled to claim prejudice, thereby benefitting from their own misconduct. They have waived such claims, just as they have waived review of other issues arising from conduct that was willful and intentional, rather than negligent or inadvertent.

III. The Trial Court Did Not Abuse Its Discretion In Excluding The Testimony of Two Purported Expert Witnesses

Defendants argue their ability to present a defense was impaired when the trial court excluded the testimony of Andrew Alberelle and Kellie Baucom, whom defendants sought to call to testify regarding normal business practices for staffing companies. All defendants argue the testimony should have been admitted as expert testimony; Banks argues in the alternative that Alberelle and Baucom should have been permitted to testify as fact witnesses. Defendants have not shown the trial court abused its discretion in excluding this testimony, nor have they shown how the testimony if presented might have assisted their defense.

A. The Issue Below

Expert disclosures for the defendants were originally due on September 30, 2010. *See* District Court Docket Entry no. 287.[6] On October 8, 2010, after the court granted several motions by defendants for extensions of this deadline, the defendants, then acting through counsel, filed an expert disclosure in accordance with the requirements of Fed.R.Crim.P.16, which included a curriculum vitae and a summary of the opinions to be offered by another witness, Donald Vilfer. Those opinions largely pertained to computer software defendants claimed to be developing. Vol. I at 364. The government subsequently moved to exclude much of Mr. Vilfer's testimony, arguing that his methodology was unsound and/or his opinions irrelevant to the issues before the court. *Id*. at 554.

During the pre-trial conference on September 1, 2011, the parties and the Court discussed the admissibility of Mr. Vilfer's testimony. Vol. II at 577, *et seq*. At this time, the defendants provided no additional disclosures concerning expert witnesses they might call.

However in their opening statements at trial, several defendants indicated they would present evidence from experts concerning normal

[6] Defendants did not include this order in the record on appeal, however the date is reflected on the docket sheet.

business practices in the staffing industry. *Id*. at 843-44, 878-80, 887. After the defendants concluded their openings and the jury was excused, the government informed the court that it had not received any disclosure of such expert testimony under Rule 16 or Fed.R.Evid. 702, and put the court and defendants on notice that the government would object to such testimony. *Id*. at 807-08. The defendants made no response.

At the close of its case-in-chief, the government again put the defendants and court on notice that the government intended to object to expert testimony not previously disclosed. *Id*. at 2285. The defendants again made no response. However as their first witness, defendants called Andrew Albarelle and almost immediately sought to qualify him as an expert. *Id*. at 2288. In response to the government's objection, defendants argued that trial exhibit 1008 – a two-page letter from Mr. Albarelle to United States Attorney John Walsh – satisfied their Rule 16 disclosure obligations. *Id.* at 2289-92.[7] Anticipating perhaps that this argument would not be well received, defendant Walker also suggested that Mr. Albarelle and another potential "expert" witness, Kellie Baucom, might testify as lay witnesses. Walker proffered that these witnesses could: "[t]alk about the staffing industry. We

---

[7] This letter and a similar letter from Ms. Baucom are located in vol. I at 1271-1274. Mr. Albarelle's letter is dated 18 July 2011; Ms. Baucom's letter is dated July 20, 2010.

would not state they are experts. They do work in the staffing industry, and they – how companies engage staffing companies, how staffing companies interact with contractors and employees, as well as 1099 contractors for employees." *Id.* at 2292. Walker's proffer made it clear that these two witnesses had no personal knowledge of relevant events. The court found that the proffered testimony would be expert testimony, not lay testimony. *Id.* at 2292-93. The defendants then abandoned efforts to offer lay witness testimony from Mr. Albarelle and Ms. Baucom.

The court initially ruled that defendants could not offer testimony from Mr. Albarelle, Ms. Baucom, or a third proffered expert on the staffing industry, Joseph Thurman. *Id.* at 2315-16. The next day, however, the court issued a revised ruling: this ruling affirmed the exclusion of Mr. Albarelle's and Ms. Baucom's testimony, but allowed Mr. Thurman to testify. The court provided a comprehensive explanation of its revised ruling. The court found that the personal letters from Mr. Albarelle and Ms. Baucom did not satisfy the disclosure requirements of Rule 16 or establish a predicate for admissibility of their testimony under Rule 702. *Id.* at 2343. The court acknowledged that the exclusion of evidence should not be done lightly, but found that exclusion of this testimony was appropriate because the defendants had no legitimate reason for providing inadequate disclosures and

had failed to provide required notice to the Government – despite repeated requests – that they would offer expert testimony from anyone other than Mr. Vilfer. *Id.* at 2341-42. The court also found that the proffer before the court – reflected in these two letters – completely failed to establish any of the criteria for assessing reliability under Rule 702. *Id.* at 2342-44.

Although the court found that defendants' disclosure about Mr. Thurman was also inadequate, the court concluded the government had some notice that Mr. Thurman would be called and therefore allowed him to testify as an expert regarding the staffing industry. *Id.* at 2344-47. The court also ruled that in light of the anticipated testimony from Mr. Thurman, testimony from Mr. Albarelle and Ms. Baucom would be cumulative. *Id.* at 2348-51.

B. Standard of Review

A trial court's decision to exclude witness testimony – whether expert or lay testimony – as a sanction for violation of Fed.R.Crim.P. 16, is reviewed for abuse of discretion. *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988); *United States v. Russell*, 109 F.3d 1503, 1512 (10th Cir. 1997) .

As to the admission or exclusion of expert witness testimony under Fed.R.Evid. 702, this court reviews de novo "whether the district court employed the proper legal standard and performed its gatekeeper role." However the court reviews for abuse of discretion the manner in which a

district court carries out its gatekeeping role, *i.e.*, in deciding what testimony should be admitted. This court has held it will not disturb a discretionary ruling admitting or excluding evidence unless it is arbitrary, capricious, whimsical or manifestly unreasonable, or the court is convinced the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *See United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (numerous citations and quotations omitted).

C. Argument

The district court excluded the testimony of Albaraelle and Baucom for numerous reasons, all of them supported by the record.

1. Rule 16 Violations & Lack of Notice

Fed.R.Crim.P. 16 sets forth a framework for the pre-trial discovery of evidence and expressly provides for discovery of expert witnesses. Based upon the pre-trial order below, the defendant was required to provide, *inter alia*, a summary describing "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed.R.Crim.P. 16(b)(1)(C). When a party fails to comply, a court has discretion to order compliance, grant a continuance, prohibit the party from introducing the undisclosed evidence, or fashion any other just solution. Rule 16(d)(2).

Although defendants now claim ignorance of these requirements, they followed the procedures below in identifying one expert witness, which shows they were aware of the requirement to do so. Upon receiving that disclosure, the government promptly moved to exclude portions of the testimony. In light of these earlier proceedings, defendants' failure to identify additional experts they planned to call – in the face of repeated government requests – may reasonably be seen as a tactic to subvert the rules of evidence and prevent the government from filing pre-trial motions that might result in the exclusion of the "expert" testimony. This intention may be seen from the fact that as their first witness, defendants called Andrew Albarelle and almost immediately sought to qualify him as an expert – without any prior announcement of their intentions to the court or the government.

Defendants' attempts to evade the disclosure rules for tactical advantage in itself justifies exclusion of the evidence.[8] *See United States v. Russell*, 109 F.3d 1503, 1512 (10th Cir. 1997) (if bad faith is involved, exclusion of evidence is proper regardless of prejudice or the feasability of a

[8] The defendants argue the district court did not make a finding that they acted in bad faith. However the court found that "defendants have not offered any legitimate reasons" for failing to comply with Rule 16. Vol. II at 2341. While no express finding of bad faith was made, neither was it required, and the circumstances easily support an inference that defendants acted in bad faith.

continuance); *Taylor v. Illinois*, 484 U.S. 400, 413 (1988) (when case suggested bad faith and willfulness, exclusion of defense witness did not offend Sixth Amendment even when less drastic sanctions were available).

When a court is confronted with a Rule 16 violation, it typically will consider: (1) the reason for the delay; (2) whether the delay prejudiced the other party; and (3) the feasibility of curing the prejudice with a continuance. *United States v. Wicker*, 848 F.2d at 1061. These factors guide the court's discretion, but are not exhaustive or dispositive. *Russell*, 109 F.3d at 1511 and n.6. None of these factors favor defendants. The record contains no explanation for defendants' repeated decisions to flout disclosure requirements and leaves no conclusion but that the reason for the delay was to seek tactical advantage in not providing notice to the government of "expert" witness testimony. The tactic, had it prevailed, surely would have prejudiced the government. A party cannot adequately assess the qualifications of a witness offered as an expert, or the relevance of the testimony, without advance notice and an opportunity to conduct its own inquiry into the person's background, experience, and knowledge of the events at issue. Such notice is a prerequisite to effective cross-examination. *See Russell*, 109 F.3d at 1512 (government prejudiced when it received notice of new witnesses on same trial day the witnesses were to be called). The third

factor also cuts heavily against the defendants. They attempted to call Albarelle and Baucom as experts on day nine of the trial. Although a trial court is expected to impose the least severe sanction that will accomplish compliance with the court's orders, this does not require a court, when trial is underway, to grant a continuance merely to cure defendants' neglect in failing to disclose its witnesses. *See Wicker,* 848 F.2d at 1060-61*; Russell*, 109 F.3d at 1511-12. In any event, the proffers made by defendants concerning Albarelle and Baucom gave the court no reason to consider a continuance, because those proffers revealed that these witnesses could not competently provide either expert or lay testimony.

2. Testimony as Expert Witnesses

Fed. R. Evid. 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact, a witness qualified as an expert may testify "in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *See also United States v. Nichols*, 169 F.3d 1255, 1265 (10th Cir. 1999) (party seeking to offer expert testimony must show testimony is reliable and will assist trier of fact).

The proponent of expert testimony bears the burden of showing that its proffered expert's testimony is admissible. *United States v. Nacchio*, 555 F.3d at 1241, citing *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n. 4 (10th Cir.2001).

Defendants have provided no basis from which a court could conclude that this standard is satisfied. The only "disclosures" they cite to establish the admissibility of this testimony are two letters mailed to John Walsh, the United States Attorney for Colorado. These letters were not expert reports and did not summarize expected testimony. Both Albarelle and Baucom express in their letters a personal belief that the defendants are good people who have done nothing wrong. Neither letter establishes the "facts or data" founding the opinions or shows that such opinions are the product of reliable principles and methods. The trial court characterized them as letters of support advocating on behalf of the defendants, and correctly found the letters totally failed to meet the requirements of either Fed.R.Crim.P. 16 or Fed.R.Evid. 702. The court also noted that "there was no indication in these letters that Ms. Baucom or Mr. Albarelle were intending to testify at trial, let alone as experts." *See* Supp.Vol. I at 108. The letters confirm this finding. Mr. Albarelle's letter concludes with the request that the case be dismissed. Vol. I at 1274. Ms. Baucom ended her letter by observing that she was "looking

forward to the day these men can say, 'I told you so!'" *Id*. at 1272. Neither letter states that the author expects to testify at trial and neither letter provides any basis from which a court could conclude that whatever unwritten method the authors employed is "scientifically sound and that the opinion is based on facts which satisfy Rule 702's reliability requirements." *United States v. Nacchio*, 555 F.3d at 1241 (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir.2003)). Thus, the trial court did not abuse its discretion in excluding the testimony of Mr. Albarelle and Ms. Baucom.

3. Testimony as Fact Witnesses

Banks' opening brief argues in the alternative that Albaraelle and Baucom should have been permitted to testify as fact witnesses. Fed.R.Evid. 701 permits opinion testimony by lay witnesses, but only if the opinion is "rationally based on the witness's perception," and is helpful to the jury. At trial, co-defendant Walker made a proffer that if Albarelle and Baucom were accepted as lay witnesses, they would talk about standards in the staffing industry. Vol. II at 2292. The trial court found this would be expert testimony, *id*. at 2293, and Rule 701 supports this finding. "Prior to testifying to his opinion or inference, the witness must first lay a foundation establishing personal knowledge of the facts which form the basis of the opinion or inference, Rule 602." Graham, Handbook of Federal Evidence, §

701.1 (3rd ed. 1991). Fed.R.Evid. 602 permits witness testimony "only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *See United States v. Garcia*, 994 F.2d 1499, 1506-07 (10th Cir. 1993). Neither the proffer made by co-defendant Walker, nor the letters sent to USA Walsh by Albarelle and Baucom, establish first-hand knowledge of the operation of defendants' business operations or any other facts in issue. Absent personal knowledge of such matters, neither Mr. Albarelle nor Ms. Baucom would have been competent to testify about the matters charged in the indictment.

4. Cumulative Testimony

In excluding the testimony of Mr. Albarelle and Ms. Baucom, the court found that in light of its decision to admit the testimony of defense "expert" witness Joseph Thurman, defendants would not be prejudiced because the excluded testimony "would be duplicative and cumulative to that of Mr. Thurman." Supp.Vol. I at 109.[9] The record supports this finding. Mr. Thurman was the director of business development for an IT (information technology) staffing firm in Denver. His testimony concerned payrolling

[9] For the same reason, any error in the trial court's ruling necessarily would be harmless, because it could not have had a substantial influence on the outcome of the case. *See United States v. Irving*, 665 F.3d 1184, 1209 (10th Cir. 2011).

transactions; the distinction between W2 employees and 1099 contractors; how staffing companies are compensated; and a variety of other issues concerning the relationship between staffing companies and clients. Vol. II at 2618, *et seq*. This testimony was essentially what co-defendant Walker proffered, *see* vol. II at 2292, as the testimony of Mr. Albarelle and Ms. Baucom.

CONCLUSION

Defendants' convictions should be affirmed.

ORAL ARGUMENT STATEMENT

The United States requests argument, which may assist the court in understanding the lengthy trial record.

Respectfully Submitted,

JOHN F. WALSH
United States Attorney

s/ *James C. Murphy*
JAMES C. MURPHY
MATTHEW T. KIRSCH
Assistant U.S. Attorneys
1225 17th Street, Suite 700
Denver, Colorado 80202
(303) 454-0100
Email: USACO.ECFAppellate@usdoj.gov;
James.Murphy3@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed.R.App.P. 28.1(e)(2) & 32(a)(7)(C), that the **UNITED STATES' CONSOLIDATED ANSWER BRIEF** is proportionally spaced and contains 13, 771 words, according to the Corel WordPerfect X5 software used in preparing the brief.

s/ *Ma-Linda La-Follette*
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, TREND MICRO Office Scan for Windows, Version 10.5.1997, Engine Version 9.700.1001, Virus Pattern File 9.595.00, dated 12/14/12, and according to the program are free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ *Ma-Linda La-Follette*
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on December 20th, 2012, I electronically filed the foregoing **UNITED STATES' CONSOLIDATED ANSWER BRIEF**, using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Charles Henry Torres
joseph.machatton@gmail.com

Gwendolyn Maurice Solomon
gmjewell@yahoo.com

Joshua Sabert Lowther
jlowther@nationalfederaldefense.com

s/ *Ma-Linda La-Follette*
Ma-Linda La-Follette
U.S. Attorney's Office