Case Nos. 11-1488, 11-1489, 11-1490, 11-1491 and 11-1492

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENDRICK BARNES (11-1488), DEMETRIUS K. HARPER a/k/a Ken Harper (11-1489), CLINTON A. STEWART a/k/a C. Alfred Stewart (11-1490), GARY L. WALKER (11-1491) and DAVID A. ZIRPOLO (11-1492),

Defendants-Appellants.

On appeal from the
United States District Court for the District of Colorado
Honorable Christine M. Arguello
D. Ct. No. 1:09-CR-00266-CMA

APPELLANTS' PRINCIPAL BRIEF

Appellants respectfully request an oral argument.

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STATEMENT OF RELATED CASES

This joint appeal is related to *United States v. David A. Banks*, No. 11-1487 (10th Cir.); Banks was a co-defendant of Appellants in the court below, and is a co-appellant of them in this Court.

In support of this appeal, KENDRICK BARNES ("Barnes"), DEMETRIUS K. HARPER ("Harper"), CLINTON A. STEWART ("Stewart"), GARY L. WALKER ("Walker") and DAVID A. ZIRPOLO ("Zirpolo") (collectively "Appellants") state the following:

JURISDICITONAL STATEMENT

The United States District Court for the District of Colorado properly exercised jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231. The District Court entered judgments against Appellants on July 25, 2012 (Walker) and August 3, 2012 (Barnes, Harper, Stewart and Zirpolo), and Appellants' notices of appeal, which were filed on October 21, 2011, became effective on those dates. This Honorable Court properly exercises jurisdiction over this appeal pursuant to 18 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the trial court erred by denying Appellants' motion to dismiss the indictment based on multiple violations of the Speedy Trial Act.

Whether the trial court violated Appellants' Fifth Amendment right against self-incrimination by ordering them to choose one of their own to testify in their joint defense or alternatively closing the evidence, and their

Sixth Amendment right to a fair trial by failing to instruct the jury regarding the resulting testimony presented by Barnes.

Whether the trial court erred by excluding Appellants' two expert witnesses from testifying.

STATEMENT OF THE CASE

Appellants and their co-appellant David A. Banks ("Banks") were indicted on September 09, 2009 on one count of Conspiracy to commit Mail Fraud and Wire Fraud in violation of 18 U.S.C. § 1349, and multiple counts of Mail Fraud and Wire Fraud in violation of 18 U.S.C. §§ 1341 and 1343, respectively. (Doc 1; Vol. I, p. 29.) On June 23, 2009, Appellants and Banks initially appeared before Magistrate Judge Boyd N. Boland, were appointed counsel and released on personal recognizance bonds. (Doc. 15). The speedy trial clock began to run. Appellants and Banks were arraigned before Magistrate Judge Kristen L. Mix on June 29, 2009, all entered Not Guilty pleas and trial was estimated at four weeks. (Docs. 33-38). On July 06, 2009, Banks filed an Unopposed Motion to Exclude Time Pursuant to 18 U.S.C. § 3161(h)(8)(A) and Zirpolo joined that motion on July 07, 2009. (Docs. 49, 52; Vol. I, pp. 70, 82). On July 09, 2009, the Motion to Exclude for Banks and Zirpolo was granted. (Doc. 63; Vol. I, p. 89). On August 18, 2009,

Stewart filed a Motion to Exclude Time. (Doc. 75; Vol. I, p. 95). Upon submission via electronic filing, the motion was titled Unopposed Motion to Declare Case Complex and for Further Exclusion of Time by Stewart, filed by Robert Berger, Esq. *Id.* The content of the motion does not argue an extension based upon complexity of the case but effective preparation. *Id.* The Unopposed Motion for Further Exclusion of Time under 18 U.S.C. § 3161 was granted on August 20, 2009. (Doc. 77; Vol. I, p. 100). On December 14, 2009, a Joint Motion for Speedy Trial Exclusion of Time and Proposed Scheduling was filed and granted December 18, 2009. (Docs. 119, 123; Vol. I, pp. 102, 112). The District Court excluded 409 days from December 18, 2009 until January 31, 2011 and set a six-week jury trial for January 31, 2011 to March 11, 2011. *Id.* Defendants filed a Joint Motion to Dismiss Indictment for Inexcusable Pre-Indictment Delay that was denied. (Docs. 190, 238; Vol. I, pp. 119). On November 18, 2010, a Joint Motion to Continue Jury Trial was filed and granted on November 19, 2010. (Docs. 324, 325; Vol. I, pp. 562). On December 16, 2010, Appellants and Banks' then-attorneys filed motions to withdraw at Appellants and Banks' request. (Docs. 342-344, 348, 350, 351). Appellants and Banks, *pro se*, filed a Motion to Continue for 120 days, which was granted April 01, 2011. (Docs. 394, 403;

Vol. I, pp. 706). The District Court granted a 130-day continuance from May 23, 2011 to September 30, 2011. (Doc. 403). Trial commenced September 26, 2011 and concluded on October 20, 2011. The jury returned a verdict of guilty on all counts pertaining to Appellants and Banks, with the exception of Banks' being acquitted on Count Two. (Doc. 478). That day, Appellants and Banks appeared before Magistrate Boyd N. Boland for detention hearing and all were detained. (Doc. 486). On October 21, 2011, Appellants and Banks filed Notices of Appeal. (Docs. 483, 487, 490, 493, 496, 499; Vol. I, pp. 880, 881, 882, 883, 884, 885). Appellants and Banks filed a Motion for Bond hearing on November 03, 2011. (Doc. 533). Appellants and Banks were released on November 22, 2011 with strict conditions. (Docs. 570-575). On December 01, 2011, Appellants and Banks were released pending sentencing. (Doc. 583). Appellants and Banks filed a Motion to Inspect Unedited Transcriber Notes and Note File for the Bench Conferences held on October 11, 2011, which was denied on December 16, 2011. (Docs. 631, 633; Vol. I, pp. 966). A Motion and Joint for Reconsideration re 631 Motion to Inspect Unedited Transcriber Notes and Note File for the Bench Conferences October 11, 2011 was filed on December 20, 2011 and denied on January 20, 2012. (Docs. 635, 636, 652;

Vol. I, pp. 980, 1001, 1120). On March 05, 2011, Banks filed a Motion to Dismiss on Speedy Trial Violations with Prejudice or in the Alternative a Hearing on the Motion, Motion for Acquittal Motion for Judgment of Acquittal under Fed.R.Crim.P. 29(c) and, Alternative Motion for New Trial under Fed.R.Crim.P. 33 Based on the Courts Disallowance of Witnesses Who Could Establish a Lack of a Scheme To Defraud Creditors, Lack of Specific Intent of Defendant Banks and Establish Defendant Banks Good Faith Action. (Docs. 677-679; Vol. I, pp. 1141-1274). On March 20, 2012, Appellants filed Joint Motion for Speedy Trial to Dismiss the Indictment and Conviction Pursuant to Speedy Trial Act and Sixth Amendment with Prejudice and on April 02, 2012 filed Joint Motion to Dismiss on Speedy Trial, Joint Motion for Acquittal, or in the Alternative, New Trial. (Docs. 687, 696, 697; Vol. I, pp. 1275, 1335, 1339). All post-conviction motions were denied. (Docs. 753-755; Vol. I, pp. 1578-1618.) Appellants and Banks were sentenced on July 23, 2012 (Walker and Barnes), July 27, 2012 (Banks, Harper and Stewart) and July 30, 2012 (Zirpolo). Appellants and Banks were remanded into the custody of the United States Marshals Service on those dates. (Docs. 773, 775, 785, 787, 789, 790). Abatements of the appeals were lifted on August 17, 2012 (Doc. 829), and on that day, Appellants filed

motions for release pending appeal, which were denied on August 08, 2012 (Docs. 791-795, 817). Appellants filed a Joint Motion for Release Pending Appeal, Memorandum in Support of Joint Motion for Release Pending Appeal and Reply to the Government's opposition to their motion in this Court on August 24, 2012, and release was denied on September 14, 2012. (Docs. 01018903009, 01018903019, 01018915691, 01018920491.) Appellants filed a Proposed Stipulation on August 30, 2012, pursuant to Fed. R. App. P. 10(c); the Government filed its objection on September 13, 2012; Appellants and Banks filed replies on September 14, 2012 and September 17, 2012. (Docs. 832, 841, 844, 845). The District Court rejected the Proposed Stipulation October 17, 2012. (Doc. 846). A Joint Motion to Reconsider Release Pending Appeal with was filed October 10, 2012, and was denied October 19, 2012 (Docs. 01018930096, 01018935598). Appellants filed a Joint Statement of the Evidence on October 19, 2012. (Doc. 847).

STATEMENT OF FACTS

a. Background, Investigation and Indictment

Leading Team, Inc., ("LT"), DKH, Inc. ("DKH") and IRP Solutions Corp. ("IRP") were companies formed to produce and assist in the production of software. (Doc. 466, p. 17: 8-9, 13, 23-24; Vol. II, p. 828: 8-9,

13, 23-24). IRP particularly was formed to produce software to assist law enforcement agencies place information in a database that would be accessible nationwide as a client server. *Id*. at pp. 20: 17-18, 21: 3-11; Vol. II, pp. 831: 17-18, 832: 3-11. Appellants and Banks worked to create and customize the software to accommodate potential clients. *Id*. at 20: 3-25; Vol. II, p. 831: 3-25. Various law enforcement agencies were interested in the software, including but not limited to the Department of Homeland Security. *Id*. at p. 24: 16-17; Vol. II, p. 835: 16-17. Additional manpower was needed in order to complete production and enhancements to the product. *Id*. at 20: 3-25; Vol. II, p. 831: 3-25. Staffing agencies were recruited to assist in placement and payrolling of Information Technology individuals and administrative staff support to complete production. *Id.* Among the individuals recruited to work on the project, based on their experience, were former Federal Bureau of Investigation ("FBI") agents Hillberry, Epke and Fuselier. (Doc. 617, pp. 1879-1882: 15-23; Vol. II, pp. 2839-2842). The Government never denied that the software product was viable and requested that this critical point be omitted from the jury. Appellants and Banks had a legitimate business with a viable product. *Id*. at p. 1889:19; Exhibit D405. In fact, Appellants and Banks sold the software product to

law enforcement agencies. (Doc. 614 pp. 1478: 8-9, 23-24, 1479: 6-9; Vol. II, pp. 2180: 8-9, 23-24, 2181: 6-9).

Appellants and Banks continued to enhance and market the product. (Doc. 466, pp. 20: 11-18; 25: 13-20; Vol. II, pp. 831: 11-18; 836: 13-20). During this process, Appellants and Banks continued to recruit staffing agencies to assist with placement and payrolling. While awaiting a major sale of the product, the debts to the staffing agencies increased. Appellants and Banks were confident that upon a major sale, they would be able to pay all of their debts. The FBI began an investigation in 2002 on IRP, which continued through 2005. During the investigation, on or about January 18, 2005, former FBI agent Hillberry completed an affidavit from and interview with the FBI. (Doc. 617, p. 1889: 2-20, Exhibit D405; Vol. II, p. 2849: 2-20). Agent Hillberry completed assignments for IRP from January 2004 to October 2004. (Exhibit D405). Agent Hillberry advised the FBI by affidavit that Appellants and Banks had a viable software product; they appeared to be moving forward to acquire federal and state contracts for their product; and he decided to continue to assist them in the effort. *Id.* at 1886: 10-14, 1889: 12-20; Vol. II, pp. 2849: 10-14, 2852: 12-20. In February 2005, the FBI's Colorado Springs, Colorado office obtained a warrant to collect financial

records. (Doc. 264-1). On February 07, 2005, the FBI executed a search warrant at IRP with twenty-one armed FBI agents. (Doc. 466, p. 46: 3-10; Vol. II, p. 857: 3-10). After searching the office for fourteen hours, the financial records, which were in plain view, were left at the business. *Id.* The FBI imaged the computers for patent pending and copyright information of the software. *Id.* Due to the raid and interference with the business operations, Appellants and Banks were unable to complete production and sale of the product and repay the staffing agencies for the monies advanced through payrolling. *Id.* at p. 37: 8-16; Vol. II, p. 848: 8-16. On August 08, 2005, the FBI's Denver, Colorado office declined to conduct an investigation or pursue criminal charges, stating that the case would be best handled civilly. (Doc. 617, pp. 1921: 22-25; 1922; Vol. II, pp. 2881: 22-25; 2882). The prosecution convened a grand jury in February 06, 2007 and no indictment was returned. (Doc. 75; Vol. I, p. 95). On March 14, 2007, the Government convened a second grand jury and an indictment was returned. *Id.* On July 09, 2009, Appellants and Banks were indicted on multiple counts of Conspiracy to commit Wire Fraud and Mail Fraud, Wire Fraud and Mail Fraud in violation of 18 U.S.C. §§ 1349, 1341 and 1342, respectively. (Doc. 1; Vol. I, p. 29). Trial commenced September 26, 2011.

On November 19, 2010 and October 13, 2011, FBI Agent John Smith testified that if the product was sold and the debts were paid there would be no case. (Exhibit D407; Docs. 359, pp. 92: 2-4; Doc 617, pp. 1938-1940: 1-2; Vol. II, pp. 471: 2-4; Vol. II, pp. 2898-2900: 1-2). The Government's financial analyst, Dana Chamberlin, testified at trial regarding where the monies from the staffing agencies were dispersed. (Doc. 614, pp. 1421: 22-25, 1422; Vol. II, pp. 2123: 22-25, 2124). The monies were not only paid to Appellants and Banks, but also to the contractors, who were employees of the staffing agencies. (Exhibit 903.) Appellants and Banks did not profit from the income received. (Doc. 466, p. 15: 14-15; Vol. II, p. 826: 14-15). From 2002 to 2005, Appellants and Banks earned the following salaries: $172,102.53 (Banks); $183,363.99 (Harper); $141,407.64 (Walker); $67,010.00 (Stewart); $66,923.76 (Zirpolo); $243,846.71 (Barnes). (Exhibit 902.) Appellants and Banks acknowledge and assume responsibility for their debt. (Doc. 466, p. 56: 2-3; Vol. II, p. 867: 2-3). This was a civil matter not a criminal matter. (Doc. 617, p. 1925: 1-11; Vol. II, p. 2885: 1-11).

b. Speedy Trial Act and Sixth Amendment Violations

In preparation for trial, Appellants and Banks' court-appointed counsel, without Government opposition, requested four continuances

from July 06, 2009 through May 23, 2011 (Docs. 49, 52, 75, 119, 324, 394; Vol. I, pp. 70, 82, 95, 102, 562, 706), which the District Court granted on July 09, 2009, August 20, 2009, December 18, 2009 and November 22, 2010 (Docs. 63, 77, 123, 327; Vol. I, pp. 89, 100, 112, 571). The continuances on July 09, 2009, August 20, 2009, December 1, 2009 and November 22, 2010, while Appellants and Banks were represented by counsel, were granted on the same bases: travel to interview witnesses, interview prosecution and defenses witnesses, interview potential customers for the product, review discovery, multiple defendants and a purported complex case. *Id.* Over a period of eighteen months, no witnesses were interviewed, no travel requests were submitted and there was no review of the discovery. *Id.* Later, the District Court, the Government and Appellants and Banks' counsel agreed that this case was not complex. (Doc. 240, p. 4: 13-18; Vol. II, p. 64: 13-18). Consequently, due to the lack of preparation, Appellants and Banks terminated their attorneys, electing to represent themselves. (Docs. 342-344, 348, 350, 351).

Appellants and Banks did not waive their rights to a speedy trial, and neither the District Court nor the Government adhered to the Speedy Trial Act's requirements. The District Court never inquired about the

prosecution's preparedness or readiness (Docs. 63, 77, 123, 327, 403, 240, 359, pp. 127-129; Vol. I, pp. 89, 100, 112, 571; Vol. II, pp. 61, 506-508), and the continuances did not comply with the ends-of-justice standards. (Docs. 75, 77; Vol. I, pp. 95, 100).

c. Fifth Amendment Violations and Missing Transcript

The District Court compelled Barnes to testify on October 11, 2011(Docs. 631, 635, 636; Vol. I, pp. 965, 980, 1001) without advising him of his Fifth Amendment right against self-incrimination (Doc. 557, p. 54). There was a bench conference to discuss the invocation of the privilege and its presentation. *Id*. at pp. 129: 9-25; 130-158: 3. The Court stated that the Defendants could take the matter up on appeal. *Id.* Barnes presented testimony a second time, and the District Court failed to provide a curative instruction. *Id*. at pp. 158: 18-25 to 162: 22. The portion of the transcript that could attest to what took place at the bench conference regarding the compulsion of Barnes' testimony is missing and the Court has declined Appellants many requests to have a hearing to attempt to resolve the dispute and reconstruct the crucial discussion at the side bar. (Docs. 631, 635, 636, 652, 557, pp. 138: 21-25, 139: 1-22, 149: 21-25, 150: 1-11, 618, pp. 2062: 22-25, 2063: 1-11; Vol. I, pp. 965, 980, 1001, 1120, 3022: 22-25, 3023).

Appellants and Banks have requested a copy of that transcript multiple times, but those requests have been denied. (Docs. 631, 633, 635, 636, 652; Vol. I, pp. 965, 980, 1001, 1120). On October 11, 2011, Stewart filed a request for the unedited transcript of the bench conference, but the same was never received by him. (Doc. 618, pp. 2062: 22-25; 2063: 1-11; Vol. II, pp. 3022: 22-25, 3023). On November 14, 2011, Appellants' undersigned counsel, Gwendolyn Maurice Solomon, Esq. ("Solomon"), requested the aforementioned transcript directly from the court reporter, Darlene Martinez ("Martinez"). (Docs. 631, 635, 636; Vol. I, pp. 965, 980, 1001). Martinez advised Solomon that the transcript was available, but exercised her discretion not to release it even after the court directed Ms. Martinez to release a copy to Appellants. *Id*. That day, Solomon requested a copy of the unedited transcript from Martinez' supervisor, Charlotte Hoard ("Hoard"). *Id*. Hoard advised Solomon that the unedited transcript was available at $3.05 per page, but the same was never released. *Id.* On December 09, 2011, Solomon was directed by the District Court to contact Ed Butler ("Butler"), the legal officer for the said Court. Butler advised that Martinez and Hoard advised him that the unedited version of the transcript had been destroyed. *Id*. Appellants moved for a stipulation of the contents of the missing

transcript pursuant to Fed. R. Crim. P. 10(c); the Government objected (Docs. 832, 844, 845); and the District Court rejected the proposed stipulation (Doc 846). The Government never disputed Appellants' recollections and misstates the District Court's recollection. (Doc 841). The District Court admits that a portion of the transcript remains missing and the court reporter no longer has a copy of the unedited version, but it does not recollect exactly what was stated. (Doc 652; Vol. I, p. 1120). The Court Reporter never affirms or states that she had problems with hearing the entire side bar as the court speculates, "For whatever reason, whether the parties spoke too far from the microphone or the court reporter took off her headphones, the court reporter did not hear everything that was said at the sidebar and therefore did not transcribe anything besides what is contained in the edited transcript." *Id.* Ms. Martinez did advise Attorney Solomon that she does not wear earphones. (Doc. 847). Appellants filed a Statement of the Evidence on October 19, 2012. *Id.* The violation cannot be adequately addressed without the crucial context of the missing transcript or a hearing to reconstruct what took place at the side bar.

d. Expert Witnesses

On the ninth day of trial, Appellants and Banks offered two expert witnesses, Andrew Albarelle ("Albarelle") and Kellie Baucom ("Baucom"). Abarelle was sworn and proceeded to testify regarding his credentials. (Doc 615, p. 1584: 16-22, 1585; Vol. II, p. 2286: 16-22, 2287). The Government objected based on Appellants and Banks' lack of notice of the witnesses pursuant to Fed. R. Crim. P. 16 and Fed. R. Evid. 702. *Id.* at 1587: 11-15; Vol. II, p. 2289: 11-15. The Government acknowledged its receipt of two letters, one from each of the witnesses, and admitted to the District Court that the witnesses were included on Appellants and Banks' witness list. *Id.* at pp. 1587: 7, 16, 17, 23-25, 1588: 1-18, 1592: 15-21; Vol. II, pp. 2289: 7, 16, 17, 23-25, 2290: 1-18, 2294: 15-21. The District Court excluded both Albarelle and Baucom on the grounds that the Government was not noticed pursuant to Fed. R. Crim. P. 16 or Fed. R. Evid. 702. *Id.* at 1585-1594: 1-6; Vol. II, pp. 2287-2296: 1-6. The experts would have provided testimony regarding the industry standards of the staffing business regarding staffing, payrolling and related transactions, such as recruitment of employees. *Id.* at 1585-1594; Exhibit 1008; Vol. II, pp. 2287-2297). The District Court denied Appellants

and Banks the right to present a proper defense by denying the testimony of Albarelle and Baucom as either expert or lay witnesses. *Id.*

SUMMARY OF THE ARGUMENT

Appellants respectfully submit that the District Court violated their statutory right to a speedy trial by its improvidently granting four ends-of-justice continuances, each of which exceeded the Speedy Trial Act's seventy day time limit in which a criminal case must be tried, that did not meet the ends of justice requirements and causing a cumulative trial delay of over two years. The District Court granted the continuances without conducting any meaningful analysis regarding whether their duration should have been excluded from the Speedy Trial Act's aforementioned time limitation. Each of the continuances exceeded seventy days, and therefore, the District Court's improper exclusion of any one of them was a violation of the Speedy Trial Act warranting a dismissal of the indictment.

Appellants further respectfully submit that the District Court violated their Fifth Amendment right against self-incrimination by ordering them to select one of their own to testify in their joint defense or alternatively, resting their case prematurely. That admonishment resulted in Barnes' testifying in Appellants and Banks' case-in-chief, and after his

repeatedly asserting his right against self-incrimination on cross-examination, the District Court violated Appellants' Sixth Amendment rights by failing to curb the prejudicial effect of such compelled testimony in the form a curative instruction. The Fifth Amendment-related episode—which unfolded all before the jury—unquestionably called for judicial mitigation; yet, the District Court—in the face of inevitable prejudice—deferred its judicial duty, choosing instead to exclude and discount any curative instruction entirely. The improper compulsory actions of the court, compounded with its determination that mitigating instructions were not necessary, violated Appellants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a fair trial, respectively.

Lastly, this Court has held that in the event a defendant of a criminal action fails to comply with the black letter law of the Federal Rules of Evidence, a court shall act objectively when considering just remedy or judicial sanction. Appellants attempted to comply with Federal Rule of Criminal Procedure 16, and the applicable Federal Rules of Evidence, regarding two invaluable expert witnesses. Undeterred by clear evidence of Appellants' good-faith effort, the District Court disallowed the expert testimony, while contemporaneously acknowledging the perilous position

in which the District Court itself was placing Appellants' defense. As a result, Appellants were unable to adequately confront the Government's evidence, as the very testimony that was excluded attacked the very essence of the Government's case-in-chief. The District Court's chosen remedy was unwarranted and immoderate, and was rendered despite any finding of bad-faith by Appellants whatsoever. The District Court abused its discretion by ignoring established precedent, and its unjust rulings violated Appellants' Sixth Amendment right to a plenary defense.

ARGUMENT

I. Whether the trial court erred by denying Appellants' motion to dismiss the indictment based on multiple violations of the Speedy Trial Act.

a. Standard of Review

Appellants filed a motion to dismiss the indictment based on a violation of the Speedy Trial Act pretrial on September 26, 2011 (Doc. 445; Vol. I, p. 778.), and the District Court denied the motion orally on September 26, 2011. (Doc. 607 at 18; Vol. II, p. 642.).

This Court reviews a trial court's denial of a motion to dismiss the indictment based on a Speedy Trial Act violation for an abuse of discretion. *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008). This Court

also reviews a trial court's decision to grant an ends-of-justice continuance for an abuse of discretion. *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009). "However, the district court's compliance with the legal requirements of the Speedy Trial Act is reviewed *de novo*, and its underlying factual findings are reviewed for clear error." *Id.*

b. Discussion

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" U.S. Const. amend. VI.

In distinguishing whether there has been a violation of a defendant's Sixth Amendment right to a speedy trial, the Tenth Circuit Court of Appeals has adopted a balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). The Court, under a *de novo* standard of review, will apply a four-factor analysis, in which "none of the factors are necessary or sufficient; rather, the factors are related and should be considered together with other relevant circumstances." *U.S. v. Gould*, 672 F.3d 930, 936 (10th Cir. 2012). To determine whether delay violates a defendant's Sixth Amendment right to a speedy trial, the Court will consider the length of delay, the reason for the delay, the defendant's assertion of his/her right, and prejudice towards the defendant. *Id.* at 936.

In 1974, Congress sought to delineate a manner in which the constitutional right to a speedy trial may be aptly discharged by statutory scheme. *Speedy Trial Act*, 18 U.S.C § 3161, *et seq*, (1974).

The Speedy Trial Act of 1974 ("Act") requires that a criminal defendant's trial commence within seventy days of the filing of the indictment or the defendant's initial appearance, whichever occurs later, and entitles the defendant to dismissal of the indictment if that deadline is not met. 18 U.S.C. § 3161(c)(1). "The right to a speedy indictment belongs to both the defendant and society…. Therefore, provisions of the Speedy Trial Act cannot be waived by a defendant acting unilaterally…." *United States v. Saltzman*, 984 F.2d 1087 (10th Cir. 1993). Further, as Justice Thomas explained in *Bloate v. U.S.*, 130 S. Ct. 1345, 1356 (2010), "[a] defendant may not opt out of the Act even if he believes it would be in his best interest; 'allowing prospective waivers would seriously undermine the Act because there are many cases…in which the prosecution, the defense, and the court would all be happy to opt out to the detriment of the public.'" Yet, it remains the prosecution's burden and the court's responsibility to assure that a defendant is brought to trial in a timely manner. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

Compliance with the seventy-day requirement may be jeopardized where a court may grant a continuance of *excludable time* upon a judicial finding that comports with the justifications for such continuance in 18 U.S.C. § 3161(h). "No such period of delay resulting from a continuance granted by the court…shall be excludable…unless the court sets forth, in the record of the case, *either orally or in writing*, its reasons for finding that the ends of justice [are] served..." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). In justifying whether there is a proper ends-of-justice finding, a court must consider the factors listed *under 18 U.S.C. § 3161(h)(7)(B)(i-iv)*, and must do so "*on the record.*" *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009) (emphasis added). "No continuance…shall be granted because of…lack of diligent preparation." 18 U.S.C § 3161 (h)(C).

The United States Supreme Court rendered its opinion in *Bloate v. United States*, 130 S. Ct. 1345 (2010) on March 8, 2010; therefore, its holding applies to this appeal. Thus, when a court considers granting excludable time for reasons relating specifically to the preparation of *pretrial motions*, there exists an additional determination. *Bloate, supra.* 18 U.S.C § 3161(h)(1)(D) allows for excludable delay resulting for pretrial motions "*from filing of the motion through the conclusion of the hearing on, or the prompt*

disposition of, such motion;" the statute does not allow automatic exclusion of time for additional pretrial motion-related delays, whether it be before filing, or post-disposition. *Id.* Consequently, a court must nevertheless conduct the appropriate *Toombs* analysis, as mandated for granting all ends-of-justice continuances; yet, when a pretrial motion is under consideration, the court, supplementary to *Toombs,* must make "specific findings" justifying the reason for such pretrial continuances. *Id.* at 1357. If approved, the court must tailor and limit those continuances to only that time which is strictly necessary. *Bloate, supra*.

"In considering any request for delay, whether the exclusion of time will be automatic or not, trial judges *always* have to devote time to assessing whether the reasons for the delay are justified, given both the statutory and constitutional requirement of speedy trials." *Id.* at 1357 (emphasis added). If a court fails to satisfy its obligations to the aforesaid rules, dismissal is appropriate. *Id.*

Within the record on appeal, there are a total of five excludable-time continuances granted by the trial court below (Docs. 63, 647, 240, 359, 403; Vol. I, p. 89, Vol. II, pp. 21, 61, 380); the first four of which are at issue in this appeal. The first two continuances (Docs. 63, 647; Vol. I, p. 89, Vol. II,

p. 21.) relate to requests for excludable time pertinent the ends-of-justice, and the latter two (Docs. 240, 359; Vol. II, pp. 61, 380) concern excludable time requested for the preparation of pretrial motions. Consequently, the former must comply with *Toombs*, and the latter must satisfy both *Toombs* and *Bloate*. If any single continuance failed to do so—independently of one another—the Speedy Trial Act was violated.

1. The July 9, 2009 Continuance

Appellants first appeared before the court on June 23, 2009, which established a trial deadline date of September 1, 2009. (Doc. 15). On July 6, 2009, former-counsel for defense filed an unopposed motion for an ends of justice continuance, requesting excludable time because of "…voluminous discovery, multiple defendants, and the complex nature of the allegations in this matter." (Doc. 49, p. 2; Vol. I, p. 71). The District Court, concluding the same and granted the motion, ignoring the fact that—within the motion itself—defense counsel anticipated receipt of all discovery materials by July 27, 2009, over a month before the seventy day speedy trial period was due to expire. *Id.* Hence, defense had yet to receive the discovery before making its plea to the Court.

Even though defense counsel specifically mentioned the Speedy Trial Act's "balancing of factors" requirement (Doc. 49, p. 2; Vol. I, p. 71), on July 9, 2009, the Court granted the motion, adopting defense counsel's cursory position, without any implementation of its judicial duties as required by either the Act or *Toombs.* (Doc. 63; Vol. I, p. 89). Most notably, however, the Court never scheduled, nor held, a subsequent hearing on the matter at any time. The Court—in conjunction with its perfunctory and customary language—granted a ninety-day continuance, based on little to no adequately drawn judicial findings or analysis. *Id.*

What caused this continuance to be an even greater affront to the Act was the Government's failure to voice any opposition to the motion whatsoever. (Doc. 49 p. 3; Vol. I, p. 72.) The Government was aware of the facts of the case and its lack of complexity, and certainly understood its role in supporting Appellants' right to a speedy trial; yet, the Government remained silent on defense counsel's misinformed prejudgment—that the case be considered complex, even before the discovery was available—while refusing to ensure that the Court complied with both the Act and *Toombs*. *Id.*

Though both the Court and Appellants' counsel could not have known whether the case was complex on July 9, 2009 – especially as discovery had not been provided to opposing counsel – both parties eventually admitted that the case was *not* as complex as they initially asserted. (Doc. 240; Vol. II, p. 61). This acknowledgment supports Appellants' current claim that the Court and counsels' premature conclusion was improper, and even more so when such an unfounded supposition is used as the basis for a continuance of excludable time.

Therefore, the Court failed to comply with the provisions of the Act and the directives of *Toombs* by its directly adopting counsels' vague and baseless assertions that the anticipation of voluminous discovery and the existence of multiple defendants and victims necessarily result in a case's being complex. Counsel, and certainly the Court, should never have made that assumption prior to a determination before its *own* actual review and analysis of the case. Thus, the ninety-day continuance violated the Act to the detriment of no party but Appellants.

2. The August 20, 2009 Continuance

After the court granted the continuance on July 9, 2009 (Doc. 63; Vol. I, p. 89), no pretrial motions were filed between that time and counsels'

second such motion on August 18, 2009 (Doc. 75; Vol. I, p. 95). Hence, it can only be inferred that during the interim, particularly absent any judicial inquiry, that no progress had been made in preparing the case for trial, and that such deliberate inaction effectively squandered the valuable ninety-day period of excludable time previously granted by the Court.

On August 18, 2009, defense counsel moved the court for an additional 110 day continuance of excludable time. (Doc. 75; Vol. I, p. 95). Though counsel attempted to explain the voluminous and tedious aspects of the discovery materials, and their intention to interview potential witnesses, respectively, they notably failed to mention any basis justifying an additional 110 day continuance. *Id.* There were six attorneys involved in the case; surely not all components of the discovery warranted equal attention. Furthermore, there was no mention of what had been accomplished up to the point of filing the second motion during the previous lengthy 90 day period, in addition to an obvious lack of any description regarding what defense counsel intended to do if an additional 110 day continuance was granted. *Id.*

On August 20, 2009, the Court held a hearing concerning this second request for an ends-of-justice continuance. (Doc. 647; Vol. II, p. 21). The

Court began the hearing by complimenting defense counsel on drafting what it considered a "very thoroughly done" motion. *Id.* at 7; Vol. II, p. 27. As the hearing proceeded, the Government, unopposed to the motion, specifically requested that the Court comply with *Toombs*, now concerned for the Court's duty to justify the continuance. *Id.* at 5; Vol. II, p. 25. In response, the Court stated "I definitely will." *Id.* Although Appellants acknowledge the Government's plea, its entreaty, alone, does not absolve it of its duty to assure compliance with the Act.

After assuring itself that Appellants agreed with the joint motion for continuance, the Court pronounced its position and unjustifiably granted 110 days of excludable time. (Doc. 647; Vol. II, p. 21). Appellants assert that the Court fell short of providing an adequate examination for granting a second-ends-of-justice continuance, particularly one concerning such an expansive adjournment. Rather than explicitly considering the factors under 18 U.S.C. § 3161(h)(7)(B)(i-iv), the Court did little more than recite counsels' vague proclamations concerning voluminous paperwork and numerous witnesses. The only substantive inquiry made by the Court was not toward the defense, but rather to the Government regarding the Government's position. *Id.* at 5; Vol. II, p. 25. The Government responded

that "[we] agree with the factual recitations in the motion related to the amount of discovery and the number of witnesses, *that sort of thing*." *Id.* (emphasis added).

Not only was there a complete lack of inquiry into whether any progress had been made during the course of the initial continuance, but also no request was made for any future assurances that the excludable time would be used properly. *Id.* at 5-9; Vol. II, pp. 25-29. Quite to the contrary, the Court actually elaborated its justifications in order to grant the motion. *Id.* For example, the Court stated "[t]he Government contends that the defendants' engaged in a complex financial scheme occurring over the course of a nearly seven year period; from October 2002 through June 2009." *Id.* at 6-7; Vol. II, pp. 26-28. This statement is incorrect on multiple levels: First, the Court, as mentioned above, eventually admits that the so-called "scheme" is not as complex as initially believed. (Doc. 240; Vol. II, p. 61). The discovery may have been voluminous, but there certainly existed nothing overly difficult in appraising the materials. Further, and most troubling, is the latter part of the court's statement. The FBI executed its search warrant in 2005. Assuming that the Court believed that a conspiracy occurred, it could then suppose that the alleged conspiracy would have

ended at the moment that a federal investigation became obvious. Hence, it is quite an exaggeration to claim that there is a seven year investigation's worth of discovery materials to assess, when in reality, there is only three. In other words, the time between 2005, when the search warrant was executed, and up until 2009, the time of indictment, there was no discoverable materials being collected, for the so-called conspiracy occurred only between 2002 and 2005. If the Court had conducted an appropriate inquiry into these issues at all, it would have discovered counsels' vague rationale to be unfounded.

Additionally, the Court stated "for purposes of this motion, defense counsel and the Government have been diligent in conforming to their discovery obligations and obtaining the appropriate witnesses." (Doc. 647, p 7; Vol. II, p. 27). The Court could not know this without any inquiry or request for any proof of counsels' progress. In fact, there was a noticeable lack of progress, as there had not yet been a single pretrial motion filed, and not a single affirmative commitment to due diligence in the future. These assertions are based on little or no facts to support them and fail to substantiate the Court's reasoning in granting the motion.

It is both the Court and the Government's responsibility to assure a defendant's right to a speedy trial. *Id.* It is obvious that the Court chose not to adhere to the *Toombs* analysis. *Id.* The prosecution was present, and well aware of the Court's failure to apply appropriate law as required. *Id.* at 5; Vol. II, p. 25. A mere rudimentary petition by counsel is insufficient to pardon the Government's responsibility.

For a second time, the Court and the Government substantively ignored the directive of *Toombs*. Consequently, the 110 day continuance of excludable time violated the provisions of the Act once again. Both the Court and the Government failed to uphold their duties.

3. The December 18, 2009 Continuance

Between August 18, 2009, the date upon which the Court granted counsel a 110 day continuance of excludable time, and December 14, 2009, *not a single* pretrial motion was filed. Again, the general inference is one of inaction and dithering.

On December 14, 2009, counsel, for a third time, moved the Court for an additional *361 day* continuance of excludable time. (Doc. 119; Vol. I, p. 102). Though counsel seemed to have been more informed regarding their

reasoning, they once again wrongfully and inadequately reiterated both the length of the alleged conspiracy, and its supposed complexities. *Id.*

Further, counsel admitted that the discovery had been delivered to them on July 23, 2009; accordingly, at the time of filing the third such motion for a continuance, counsel had been involved in the case for approximately four months. *Id.* at 2; Vol. I, p. 103. Again, there were six attorneys involved in the defense of this case that informed the Court that it had assistance to manage and review the discovery. ("Defendants have engaged computer consultants to make the existing material more accessible and to efficiently arrange for review of the server and computer data," Doc. 75, p. 3; Vol. I, p. 96).

On December 18, 2009, the Court held a hearing on the motion requesting the 361 day continuance. (Doc. 123; Vol. I, p. 112). The record indicates that the Court initially recognized the extraordinary delays prior to that time by stating that "I will tell you 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." (Doc. 240, p. 4; Vol. II, p. 64). Most telling, however, is the Court's immediate admission that the case—in contradiction to the assertions of counsel that it had

unquestioningly accepted so readily twice before—was *not* as complex as it had once believed: "I know that there are a number of witnesses. There are documents. But this is not—it may be complicated—somewhat complicated by the documents, but this is not the most complicated case I have ever seen. And so I am not sure why we need to delay trial by the extent that you all have indicated." (Doc. 240, p. 4; Vol. II, p. 64). The Court then deferred to defense counsel, asking that they produce a sound reason for such an elongated period of excludable time. *Id.* During the hearing, counsel—in arguing for further excludable time—generally relied on the "specificity in the motion," *Id.* at 5; Vol. II, p. 65, a motion, nevertheless, premised on the erroneous assumption that the case was not complex. (Doc. 119; Vol. I, p. 102). However, during the course of the hearing, counsel agree with the Court's initial assertion that the case is not as complex as first believed—and then reiterate that same opinion several times. (Doc. 240; Vol. II, p. 60). Initially, counsel answered the Court's original inquiry by stating that "this may not be the most complicated case ever, which is why it isn't taking nearly as much time as some of the more complicated cases…" *Id.* at 5; Vol. II, p. 65. Later, counsel voluntarily described the proceedings, stating that " the size of the case, which is a big,

complex case, but as [the Court] said, [is] not the most complex case ever." *Id.* at 10; Vol. II, p. 70. Counsel then complements this description by stating "so we agree, I think, that this is not the most complicated case ever." *Id.*

Moreover, counsel could not state definitively whether they—together, representing Appellants and Banks in a joint defense—were working collectively and efficiently, so as to reduce any duplication of efforts. *Id.* at 8; Vol. II, p. 68. Counsels' position on the issue was "in some respects, yes, but in some respects, no...." *Id.* Though somewhat understandable regarding individual client interests, counsel later cites conflicting caseloads, *Id.* at 9; Vol. II, p. 69, contradictory organizational methods, *Id.* at 7-8; Vol. II, pp. 67-68, age and lack of computer savvy, *Id.* at 5 and a failed attempt at "[setting] out a comprehensive schedule to get done what we actually say we are going to get done in a timely manner..." *Id.* at 10; Vol. II, p. 70 as several of the reasons justifying the need for additional time. In contrast, however, counsel displayed overwhelming confidence in coordinating their respective efforts when filing *joint* motions for continuances, considering there had been no other type of pretrial motions filed. *Id.* at 9; Vol. II, p. 69. It is notable that counsel complimented

the Government for providing pre-organized and indexed discovery materials, asserting that their inevitable examination of the materials will now be made *easier*. *Id.* at 7; Vol. II, p. 67.

When the Court inquired regarding the Government's position on the issue, the Government deferred to counsel, stating "the Government is essentially relying on the estimate that the defendants are making about how long it will take them to review these materials. [The Government doesn't] have *any* reason to question this estimate." *Id.* at 11; Vol. II, p. 71. (emphasis added). The Government then explained that based on its experience with complex cases, a continuance of 361 days of excludable time "is not inconsistent with the amounts of time [the Government has] seen defense attorneys request and receive and use in order to *work on preparing motions* in a case like this." *Id.* (emphasis added). The Government never requested that either *Toombs* or *Bloate* be addressed, nor did it request either proof of progress to that point or an assurance that the third such continuance of excludable time would be used prudently and for its intended purpose. *Id.*

The Court's entire analysis, inquiry and ruling was as follows:

> All right. *Well, you all are much more experienced at this than I am, so I will take you at your words* that this is the time that was needed. The schedule that you set forth, I think, does make a lot of sense, because at any point in time if the defendants prevail, that will be the end of it. So I am going to go ahead and switch now and say, okay, you've convinced me that the ends of justice, based on what is set forth in the *very well drafted joint motion*, do justify an ends of justice continuance in this case.

Id. at 14; Vol. II, p. 74. (emphasis added).

Subsequently to the Court's ruling above, it engaged in a discussion, on the record, with all parties concerning a revised motion schedule. *Id.* Though discussions similar to these may or may not satisfy the requirements of *Bloate*, depending upon the circumstances of the particular case, they nevertheless must transpire prior to a court's granting a continuance involving excludable time—not afterward. The requirement is one of justifiable analysis, not of summary assumption. Here, the Court ruled before any pretrial motion-related dialogue had begun. *Id.* Regardless, it remains Appellants' assertion that the subsequent discussions are irrelevant, as they fail to substantively provide any arguably valid reasons for the excludable preparatory periods of time, and they utterly lack any specificity as required by law.

The Court, the Government and counsels' reasoning, as outlined in counsels' motion for continuance (Doc. 119; Vol. I, p. 102), and reiterated through the hearing on the same (Doc. 240; Vol. II, p. 61), failed to satisfy the necessary analysis in accordance with the Act, which both *Toombs* and *Bloate* specifically require. The Court and the Government's failure to adhere to the provisions of the Act serve as a third and blatant violation of their responsibilities to protect Appellants' right to a speedy trial. Their apparent disregard is magnified by the fact that the continuance was granted for 361 days: not merely days or weeks, but almost one year. The fact that the motion was granted in such superficial fashion demonstrates both the Court and the Government's lack of recognition of the Act's true purpose; as a direct result, the Act was violated in this case for a third time.

4. The November 22, 2010 Continuance

On November 19, 2010, counsel filed a motion to continue the jury trial that was scheduled to commence on January 31, 2011 for at least 120 days. (Doc. 324; Vol. I, p. 562). In the motion, counsel reminds the Court of the breadth of discovery while citing, more specifically, pending brief submission deadlines and two anticipated out-of-state trips. *Id.* at 3-4; Vol. I, pp. 564-565. Additionally, counsel refer to "the Thanksgiving and

Christmas holidays" *Id.* at 2; Vol. I, p. 563, throughout the motion for further justification for the continuance. *Id.*

Reason dictates that the Court, in its considering a *fourth* motion for continuance, would overlook the three prior continuances that it had already granted. This fundamental postulation, however, did not daunt counsel from asserting that "these defendants have not previously requested a continuance of the jury trial in this matter." *Id.* at 2; Vol. I, p. 563. Though the statement technically was correct, it remains an impressively brazen proclamation within its greater context. Counsel later explained that five of defendants joined in the motion and the sixth, Stewart, did not oppose it. *Id.* at 7; Vol. I, p. 568. The Government – only now beginning to exercise some caution – took the position that it did not oppose the continuance if "all of the defendants join in the motion." *Id.* That condition was never satisfied, nor subsequently addressed.

On November 19, 2012, the issue came before the Court for a hearing (Doc. 359, pp. 127-129; Vol. II, pp. 506-508). The Government remained silent on the same. *Id.* Yet, it is the *de minimis* amount of attention that the Court gave the issue that remains clearly indicative of the Court's lack of recognition for the Act, and its constitutional purposes. The Court's entire

analysis was as follows: "We do have the Motion to Continue that was filed by the defendants, and I do appreciate you all letting me know ahead of time. So I am going to issue a written order, ends-of-justice continuance granting the motion." (Doc. 359, p. 127; Vol. II, p. 506).

The Court's aforesaid statements may have sufficed if its ruling had been supported by a thorough and proper analysis, conducted after a meaningful inquiry, and memorialized in a written order. However, such did not happen; rather, the Court cited and adopted the exact rationale within counsels' motion (including all three subsections of 18 U.S.C. § 3161) without *any* further inquiry or consideration. (Doc. 327; Vol. I, p. 571). Therefore, the Court again failed to comply with the directives of the Act by abrogating its duties pursuant to both *Toombs* and *Bloate*, and as a direct result, the Act was violated for a fourth time.

The government and the court have a duty to protect the public's interest. In *Toombs*, the government was very passive and did not object to the continuances failing to protect the public's interest. *Toombs,* 574 F.3d at 1273. The government's responsibility does not decrease or is minimized simply because the defendant requests a continuance. *Barker*, 407 U.S. at 527. It is the prosecution's burden (and ultimately the court's)

responsibility to assure that the defendant is brought to trial in a timely manner and to protect the interest of the public in adherence to the Speedy Trial Act. *United States v. Seltzer*, 595 F.3d 1170, 1175-76 (10th Cir. 2010); *Barker*, 407 U.S. at 529; *Toombs*, 574 F.3d at 1273. By the extreme delays and no objections to those delays , the government very passively disregarded the public's interest.

c. Conclusion

The Court granted four continuances of extraordinarily long periods of excludable time, each of which violated Appellants' statutory right to a speedy trial and wholly lacked even the most basic requisite findings to justify the tolling of the metaphorical speedy trial "clock." The Court's official position remains that it did not necessarily have to conduct the statutory analysis as demanded by the Act, *Toombs* and *Bloate*, as counsels' calculations were made *plainly obvious*. (Doc. 754; Vol. I, p. 1594). Not only does this stance unmistakably imply that that *no* proper analysis was conducted, but it also expressly ignores, if not rejects, the relevant Supreme Court and Tenth Circuit precedent cited herein. It also is now apparent that counsels' computations, upon which the Court so readily relied, were

fraught with significant inaccuracies and discrepancies, further exhibiting the absence of proper inquiry.

The speedy trial "clock" deadline was determined to have expired on September 1, 2009, but the trial commenced on September 26, 2011. (Doc. 607; Vol. II, p. 625). Thus, the continuances contributed to a delay in excess of two years. Meanwhile, the Court's rationale for its granting such inordinate lengths of excludable time lacked all proper consideration, as mandated by the aforementioned statutory and common law precedent. The Court made no inquiry as to the government's preparation of trial. The Court and the prosecution failed to adhere to the requirements of the Speedy Trial Act. The unreasonable delay prejudiced the defense ability to present a strong defense. Defendants' counsel did not diligently prepare for trial. The defense was impaired due to the length of time from investigation, indictment and trial. The defense was hampered due to witnesses' unavailability and witnesses' memory loss and accountability of the facts and circumstances surrounding the case. The content of the witnesses, defense and government, testimonies changed and they could not adequately recollect specific instances. (Docs. 557, 558, 617; Vol. II, pp.

2516, 2733). Appellants respectfully submit that their statutory right to a speedy trial was egregiously violated.

II. Whether the trial court violated Appellants' Fifth Amendment right against self-incrimination by ordering them to choose one of their own to testify in their joint defense or alternatively closing the evidence, and their Sixth Amendment right to a fair trial by failing to instruct the jury regarding the resulting testimony presented by Barnes

a. Standard of Review

Appellants orally moved the Court to grant a mistrial based on its violating their Fifth Amendment right against self-incrimination on October 11, 2011. (Doc. 557, at 137). The Court orally denied the motion on the same day *Id.* at 153.

When a district court's discretionary actions effect a party's constitutional rights, the appellate court shall "consider whether [the] error is subject to review for harmlessness." *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). More specifically, "[structural errors] defy analysis by harmless-error standards because they affect the framework within the trial proceeds, and are not simply an error in the trial process itself." *Id.* (*quoting Arizona v. Fulminate*, 499 U.S. 279, 309-310 (1991)). Appellants' respectfully submit that the Court's discretionary actions that affected their Fifth and

Sixth Amendment rights are both structural errors.

b. Discussion

"*No* person shall be…*compelled* in any criminal case to be a witness against himself…" U.S. Const. amend. V (emphasis added). A defendant's invocation of his or her Fifth Amendment right against self-incrimination prohibits any adverse inference as a result of that silence. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Furthermore, "[i]n all criminal prosecutions, the accused shall enjoy the right to…trial, by an impartial jury...." U.S. Const. amend. VI. The United States Supreme Court held in *Bruton v. United States*, 391 U.S. 123 (1968), that when there is an encroachment upon one's right to confrontation in violation of the Sixth Amendment, curative instructions may be adequate when aiming to retain a jury panel's impartiality; however, "a jury cannot 'segregate evidence into separate intellectual boxes.'" *Id.* at 130.

This Court utilizes a five-factor test to determine whether constitutional error has occurred when a defendant chooses to invoke his or her Fifth Amendment right. *U.S. v. Lauder*, 409 F.3d 1254, 1261 (10th 2005). "Namely [the court will] consider (1) the use to which the prosecution puts the silence, (2) who elected to pursue the line of

questioning, (3) the quantum of other evidence indicative of guilt, (4) the intensity and frequency of the reference, and (5) the availability to the trial judge of an opportunity to grant a motion for mistrial *or to give curative instructions*." *Id.* at 1261 (emphasis added).

"It constitutes error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed." *Parrot v. U.S.,* 314 F.2d. 46 (10th Cir. 1963).

As the jury trial progressed in the court below, the Government rested its case much sooner than it initially indicated that it would, and that misrepresentation left Appellants with the difficult task of re-structuring and expediting the presentation of their defense. (Doc. 557 at 54-55). This arduous position led to the following events on October 11, 2011, the eleventh day of trial:

On that morning, Appellants presented witnesses Michael McKinley, Paul Pinkney and Sunny Ackerman, respectively. (Doc. 557). The last said witness completed her testimony at approximately 9:50 a.m. *Id.* Following the Government's brief cross-examination of her, the following exchange transpired:

> The Court: …Defense may call its next witness.
>
> Mr. Walker: Your Honor, the defense – can we approach?
>
> The Court: You may.
>
> (A bench conference is had, and the following is had outside the hearing of the jury.)
>
> Mr. Walker: Our next witness is scheduled at 10:30. We anticipated - it's going quicker.
>
> The Court: 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 taking too long. *We are going to go*. The eight you named, you still have time. So you better get them here. *So call your next witness*.
>
> Mr. Walker: Yes, Your Honor.
>
> (The following is had in the hearing of the jury.)
>
> Mr. Walker: Your Honor, we would like to check to see if Mr. Reese is in the witness room.
>
> The Court: You may.
>
> Mr. Walker: Your Honor, defense calls *Ken Barnes*.

Id. at 53-54 (emphasis added).

Though the Court remained aware of Appellants' precarious position, it nonetheless compelled them to produce a witness immediately;

therefore, Appellants were forced to call Barnes to the stand, as a short recess obviously was not an option. *Id.*

Following Barnes' direct examination, the Government began its cross-examination, and during the same, Walker invoked Barnes' Fifth Amendment privilege against self-incrimination in front of the jury, while moving for mistrial. *Id.* at 129-146.

The Government immediately objected and requested the Court to allow the parties to approach the bench. *Id.* at 129. During the bench conference, Walker stated "Your Honor,…we failed to have control over this; to put Mr. Barnes on the stand by your statement that if we didn't have other witnesses here one of us would have to testify." *Id.* After a subsequent sidebar argument, and after the Court decided that a lunch recess was appropriate, the Government requested that the Court "…tell the jury *now* that any Fifth Amendment privilege is Mr. Barnes' to assert on his behalf, not Mr. Walker's, and that the jury should disregard any statement made by Mr. Walker about another defendant's constitutional rights." *Id.* at 131 (emphasis added). The Court's answer was that "I *will not instruct* them as to anything until I rule on the matter." *Id.* (emphasis added). The Court then dismissed the jury for the aforementioned lunch

recess, leaving each of the finders of fact pondering the bizarre event that they had just witnessed—adverse, prejudicial, and obvious—not for mere moments, but for an entire lunch adjournment. *Id.*

Following the break, the Court considered Walker's motion for mistrial. *Id.* Appellants based their argument upon their unwavering and universal conviction that they had been judicially compelled to call one of their own to the stand, resulting in a severe prejudicial impairment. *Id.* at 132-162. In so doing, Appellants sought to obtain the missing transcript of that bench conference, which further would prove their assertion of judicial compulsion. *Id.* at 138- 156. That transcript has never been produced, although neither the Court, the Government, Butler nor Martinez can agree on the reason why. (Doc. 832). During the discussions, the Government argued that no compulsion took place. Doc 557, p. 147. The Government also offered its recommendations for curative instructions. *Id.* at 153-154. In response to the Government's request, the Court merely deferred its decision to Appellants in two specific instances. *Id.* at 157 and 161.

> The Court: You want no curative instruction?
>
> Mr. Barnes: No curative instruction.

Id. at 161.

Consequently, the Court admonished the jury with a cursory and wholly insufficient instruction: "Immediately before the break, there was an objection, and I just wish to remind you again that statements or objections made by attorneys or defendants while not testifying are not evidence, and they should not be considered by you in any way...." *Id*. at 162.

It has been the Court's opinion that no Fifth Amendment violations occurred. For example, when Walker sought to preserve the issue for appeal, the Court defiantly, and somewhat surprisingly, snapped "[y]our Fifth Amendment rights were not violated." *Id.* at 155: 4-5. Subsequently, the Court opined that the "...Defendants were attempting to perpetrate chaos in order to obtain a mistrial…" (Doc. 753, p. 5; Vol. I, p. 1582).

It remains Appellants' position that the incident never would have occurred but for the Court's compelling them to call one of their own to testify in their joint defense, an issue that the Court compounded by its election to disregard its duty to minimize the obvious prejudice to the jury, so as to maintain as much of its impartiality as possible. Hence, both the Court and the Government continue to confuse Appellants true positions regarding this error. (Docs. 753, 01018911242; Vol. I, p. 1578).

The Court believes that it never conveyed to the Appellants a mandate to produce a witness immediately; and if they were unable to do so, that one of them had to take the stand. (Doc. 557, pp. 136-146). The record, however clearly contradicts that position. *Id.* First, the *incomplete* transcript itself implies compulsion within the record. *Id.* at 53-54. Further, it is not a single Appellant that vehemently attests to the compulsion; instead, each and every one of the appellants, universally, understood the Court's comments as a clear, unequivocal demand to produce a witness or rest the case; there is no other possible meaning of "or else" in this context. (Doc. 832).

"Your Honor, there is extreme prejudice…caused by the compelling of one of my co-defendants to testify. And so I move for a mistrial on the grounds of improper evidence…and for the violation of defendant's constitutional rights." (Doc. 557, p. 137). When Appellants confronted the issue, the Court's reaction was one of anger and a proactive effort to dismiss and disregard the accusations from the outset. The Court became so incensed that the Appellants eventually had to describe the incident for the record: "[t]o be honest, Your Honor, *the Court is angry*." *Id.* at 141

(emphasis added). Furthermore, when the Court asked "how did [Barnes'] testimony prejudice you?" the following exchange occurred:

> The Defendant: Because we did not choose to put him on, we were compelled to put him on.
>
> The Court: *Put that aside.*
>
> Mr. Banks: I can't put that aside, Your Honor.
>
> The Court: Yes. You can tell me what testimony he gave that prejudiced you.

Id. at 144 (emphasis added).

The Court's defensive reaction infers recognition of error.

In further support of this position, the Government remained surprisingly neutral throughout the exchange. Appellants position remains that they did not chose to testify and they certainly had not committed to doing so *on the eleventh day of trial*, despite the Government's vague proclamations otherwise. (Doc. 01018911242, at 16). Regardless, it is not the role of the Government or the Court to dictate the manner in which a defendant should present his or her case-in-chief. The only method for sufficiently resolving this issue requires production of the missing transcript. (Doc. 832). As Appellants have argued on several occasions, and while moving the court accordingly, the transcript that has been

provided fails to include the sidebar discussions in their entirety. *Id*. The Court agrees. (Doc. 846, p. 4.)

As mentioned above, the Court and the Government has the affirmative duty of assuring that a defendant in a criminal case is granted a fair trial before an impartial jury. It is axiomatic the mere invocation of one's right to remain silent holds great potential for adverse inferences and prejudicial effects, particularly to jurors during a criminal trial. Due to the Court's compulsion of Barnes' testimony, the dramatic events of the eleventh day of trial ensued all before the jury. (Doc. 557, p. 129). The incident's detrimental consequences were obvious undoubtedly impacted the jury's partiality toward Appellants.

Nonetheless, the Court declined to instruct the jury within the immediate aftermath of the injurious episode, other than directing the panel to take lunch recess. *Id.* at 131-132. This is wholly insufficient. In fact, because of the adjournment, the jurors were given ample time to both ponder and determine what it was they had just witnessed; hence, they had ample time to refine their deleterious interpretations. An immediate instruction was necessary, regardless of whether it was affirmatively

requested or declined by any party, but the Court chose instead to defer the mitigation. *Id*.

Worse yet was the Court's ultimate remedy. The judge asked Appellants twice whether they wanted the jury to receive curative instructions. *Id*. at 157 and 161. Appellants declined. *Id.* Regardless of Appellants wishes, the Court held the sole responsibility to do whatever is necessary to uphold an objective and unbiased trial. The incident unquestionably required curative instructions, but the Court elected to forgo them. *Id.* at 162. The Court's abrogation of that duty resulted in an irreparable and prejudicial harm to Appellants.

c. Conclusion

The five-factor test in *Lauder, supra,* encompasses both the concept of compulsion and the principles of curative instruction. On the eleventh day of trial, it was the Court that decided one of the Appellants should testify. (Doc. 557). Consequently, a sudden improper invocation of another's Fifth Amendment right against self-incrimination, an immediate motion for mistrial and a prolonged, repetitive incantation of one's right to remain silent played out before the jury, which the said jury observed with no legal guidance to correct their understandably negative impressions. *Id.*

The only conclusions that the jury could have drawn were those of a guilty inference, based wholly upon subjectivity and partiality. And all the while, the Court remained silent, while the Government enjoyed an extreme prosecutorial advantage, and Appellants suffered irreparable harm. Furthermore, the aforementioned missing transcript continues to compound the error, and must be resolved for truth to be found. (Doc. 832).

Appellants respectfully submit that the Court's improper compulsion of Barnes' testimony is a violation of their Fifth Amendment right against self-incrimination, and the Court's failure to make any effort to cure the jurors' minds of the resulting prejudice and to preserve the integrity of the judicial process is a violation of Appellants' Sixth Amendment right to a fair trial, both of which, in this instance, result in structural error requiring a reversal of Appellants' convictions.

III. Whether the trial court erred by excluding Appellants' two expert witnesses from testifying.

a. Standard of Review

Appellants moved to introduce expert witnesses on October 6, 2011, during the ninth day of the jury trial (Doc. 615, p. 1584; Vol. II, p. 2286); the

trial court denied the motion on October 7, 2011, on the tenth day of trial. (Doc 616, pp. 1641-42; Vol. II, pp. 23-43-2344).

This Court reviews a district court's decision whether to impose a discovery sanction, and its choice of sanction, for an abuse of discretion. *United States v. Golyansky*, 291 F.3d 145 (10th Cir. 2002). "In the absence of a finding of bad faith, the court should impose the least severe sanction that will accomplish prompt and full compliance with the discovery order…. The preferred sanction is a continuance." *Id.* at 1249.

b. Discussion

"In all criminal prosecutions, the accused shall...be informed of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." US Const. amend VI.

Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). "Due process guarantees are implicated whenever the exclusion of evidence acts to obstruct this right." *U.S. v. Rodriguez-Felix*, 450 F.3d 1117, 1121 (10th Cir. 2006).

Fed. R. Evid. 702, 703 and 704 govern expert witness testimony, defining the requirements for allowing opinion evidence. *Id.* In sum, if a witness is positively qualified as an "expert witness," he or she

> may testify in the form of an opinion…if [,]…the expert's…specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and, the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Furthermore, Fed. R. Evid. 703 establishes the bases on which an expert can testify, allowing the facts of the case be utilized when rendering specialized judgment, while Fed. R. Evid. 704 disallows expert opinions concerning a defendant's guilt or innocence.

Upon the Government request, a defendant must provide "a written summary of any [expert] testimony that the defendant intends to use under Rules 702, 703… of the Federal Rules of Evidence as evidence at trial…. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(b)(1)(C).

If a party fails to comply with the requirements of Fed. R. Crim. P. 16, the court may "…permit the discovery or inspection…and prescribe other just terms and conditions; grant a continuance; prohibit a party from introducing the undisclosed evidence; or enter any other order that is *just under the circumstances*" Fed. R. Crim. P. 16(d)(2)(A-D) (emphasis added). "This Court has held that it would be 'a rare case where, *absent bad faith*, a district court should exclude evidence rather than continue the proceedings.'" *U.S. v. Sarracino*, 340 F.3d. 1148, 1170 (10th Cir. 2003) (*quoting U.S. v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002)) (emphasis added). This Court has repeatedly recognized that the sanction of excluding a witness's expert testimony is almost never imposed in the absence of either a constitutional violation or a statute authorizing such exclusion. *Id; see also, U.S. v. Charley*, 189 F.3d 1251, 1262 (10th Cir. 1999); *U.S. v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999). "*[A] rigid…requirement* would be at odds with the liberal thrust of the Federal Rules [of Evidence] and their general approach of relaxing the traditional barriers to opinion' testimony." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 587 (1993) (*quoting Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)) (internal quotations omitted) (emphasis added). Hence, a defendant's notice may be

considered sufficient if it ensures that the expert testimony is "not going to take the government by surprise." *United States v. Mehta*, 236 F. Supp. 2d 150, 157 (D. Mass. 2002).

In presenting their case before the jury, Appellants sought to call Albarelle and Baucom as expert witnesses, respectively. (Doc. 615, pp. 1586-1593; Vol. II, pp. 2288-2295). Appellants intended the witnesses to testify to the customary standards of the information technology industry's payrolling practices, and in so testifying, they would have illustrated that Appellants lacked any intent to defraud. (Doc. 615, pp. 1613-1632; Vol. II, pp. 2315-2334). The Court disallowed both Albarelle and Baucom's expert testimony, finding that Appellants failed to disclose them in accordance with Fed. R. Crim P. 16 and Fed. R. Evid. 702. (Doc. 616, pp. 1636-1642; Vol. II, pp. 2338-2344).

Appellants concede that their efforts to assure disclosure of anticipated expert testimony did not comply with the technical requirements of Fed. R. Crim. P. 16 and Fed. R. Evid. 702; however, the record reflects that their efforts were made in good faith, and the Court's chosen remedy of exclusion was in contravention to established precedent.

It was apparent at the conclusion of the ninth day of trial that

Appellants believed that the Government had failed to make a pretrial formal request for Fed. R. Crim. P. 16 disclosure; the Government disagreed, by concurring with the Court's position that a request was made by way of a pretrial discovery order (Doc. 287):

> Mr. Banks: Your Honor, with regard to Rule 16, the rule states that the Government—that the defendants must provide Rule 16 disclosure at the Government's request. The Government in this case, Your Honor, had made no formal request. They did complain about not getting a request, but they did not issue a formal request of any particular expert witnesses' testimony.
>
> The Court: I believe there was a Discovery Order in this case, was there not?
>
> Ms. Hazra (Government): Yes, Your Honor.
>
> The Court: What did the Discovery Order provide?
>
> Ms. Hazra: Your Honor, the Government requests expert notice under Rule 16 and Rule 702.
>
> The Court: So that was taken care of in the Discovery Order, Mr. Banks.

(Doc. 615, pp. 1613-1614; Vol. II, pp. 2315-2316).

It remains Appellants' position that the error on appeal does not originate from their non-compliance, but rather from the Court's chosen remedy.

On July 18, 2011, Albarelle mailed a letter to the attention of John F. Walsh ("Walsh"), United States Attorney for the District of Colorado. (Exhibit 1008). In the letter, Albarelle stated his professional opinion concerning Appellants' criminal proceedings, and did so based upon his personal experience within the information technology industry's staffing market. *Id.* Albarelle informed Walsh of his credentials that he had been

> in the staffing industry business for 15 years… 12 of which as…Principle Executive Officer. [He had] been President of the Staffing Industry User Group from 2003 [through] 2007 along with being the Co-President of the Oracle Mountain States User Group from 2003-2008. [Albarelle had] been a finalist for Ernst and Young's Entrepreneur of the Year for 2003 and 2004 and [had] been Honorably Discharged from the United States Military.

Id. at 1. Albarelle further stated a summary of his opinion to Walsh regarding his qualified belief that there had been no criminal wrongdoing, supported by a detailed recitation concerning the customary practices of staffing in the information technology industry. *Id.* Most notably, several of Albarelle's opinions directly contradicted the Government's allegations against the Appellants, explaining that "[writing] off bad debt [is] a very normal business practice," *Id.* at 2, and that "it is common practice for contractors to simultaneously work multiple contracts and charge the

contracting company full-time hours weekly. This often occurs with full knowledge or even encouragement by the staffing company." *Id.* at 2.

On June 20, 2011, Baucom submitted a letter to Walsh in support of Albarelle's aforementioned letter. (Exhibit 1009). Baucom introduces herself as an "Information Technology Recruiter and Account Manager…[of] over (13) thirteen years." *Id.* at 1. Baucom explains her impressive credentials and expresses her professional insight concerning the ordinary practices of the information technology staffing industry. Several of her statements, like Albarelle's, directly dispute the Government's allegations against Appellants. For example, Baucom directly explains the common "risk involved in the Staffing/Recruiting business," *Id.* at 1, and that "'bad debt' is written off every year [as companies]…chose to assume the risk." *Id.* at 2.

Both letters were submitted approximately three months before the jury trial began on September 26, 2011. (Doc. 447). According to the United States Attorney's Manual, federal prosecutors have an obligation to review potentially inconsistent proffers—within their regular course of business—upon receipt of such communiqués. (Doc. 679, pp. 21-22; Vol. I, pp. 1245-1246).

Additionally, both prosecutors in this case personally received email notification of Appellants' intent to call Albarelle as an expert witness, (Doc. 616, p. 1645; Vol. II, p. 2347), and both Albarelle and Baucom were included on Appellants' witness list, which Appellants provided to the Government prior to the commencement of trial. (Doc. 615, p. Vol. II, p. 2289.) The jury trial lasted seventeen days, and Appellants did not begin presenting their case until the ninth day (Doc. 615, p. 1587; Vol. II, p. 2336); with its receipt of both aforementioned letters and email, the Government was acutely aware of Appellants' intent to present both Albarelle and Baucom as witnesses almost two weeks in advance of their anticipated testimony.

When the Court heard the issue, a third expert witness, Joseph M. Thurman ("Thurman"), was under consideration in addition to Albarelle and Baucom. (Doc. 615, pp. 1613-1632; Vol. II, pp. 2315-2334). Thurman had submitted an affidavit to the Government that it believed "[did] not contain [his] opinion in the form that is required under the rules…" *Id.* at 1622; Vol. II, p. 2324. Nonetheless, on the following morning, the Court ruled on the issue, surprisingly allowing Thurman's testimony, but excluding Albarelle and Baucom's, based on Appellants' technical non-

compliance with Fed. R. Crim. P. 16 and Fed. R. Evid. 702. (Doc. 616, pp. 1636- 1657; Vol. II, pp. 2338-2359).

After the Court ruled, it unilaterally declared Thurman's testimony as inevitably cumulative of Albarelle's. *Id*. at 1646; Vol. II, p. 2348. The Appellants explained to the court that Thurman would testify to an entirely different aspect of the information technology and staffing industries than Albarelle, and even stated "…Your Honor, we will ensure that there is no cumulative testimony." *Id.* at 1647; Vol. II, p. 2349. Appellants explained that Thurman's specific expertise about staffing was in a different area and could not testify to those aspects of the aforementioned industries to which Albarelle could; *Id.* at 1647-1649; Vol. II, pp. 2349-2351; undeterred, the Court declared "…I am not going to allow cumulative evidence on the same issue." *Id.* at 1649; Vol. II, p. 2351.

Albarelle was an executive and owner in the information technology and staffing industries, with several years of successful expertise in those fields. (Exhibit 1008). In contrast, Thurman had merely ten years of experience as an information technology specialist; and he was much younger than Albarelle. (Doc. 616, pp. 1646- 1649; Vol. II, pp. 2348-2351) Albarelle's testimony cannot reasonably be considered cumulative to

Thurman's, as there existed obvious differences and disparities in their expertise and there were definitive credential differences. After Appellants cited multiple legal precedents contradicting the Court's decision, it nevertheless admitted to both the import, and consequence, that its decision embodied: "I realize this is critical to your defense…. But, because *it was critical to your defense*, you should have taken the appropriate steps." (Doc. 616, pp. 1653-1654; Vol. II, pp. 2355-2356) (emphasis added).

There may be a dispute between Appellants and the Government regarding the manner in which disclosure occurred, but there is no dispute that the disclosure *actually* occurred. (Doc. 615, pp. 1613-1624; Vol. II, pp. 2315-2326). Consequently, Appellants were unable to call multiple witnesses that would have testified regarding the common practices within the information technology industry, vindicating Appellants' actions regarding any alleged questionable payrolling transactions. Without such testimony, Appellants were irreparably harmed based on their inability to adequately present their case to the jury. (Doc. 615, pp. 1589-1590; Vol. II, pp. 2291-2292).

The result of the Court's remedy of disallowing Appellants from calling two witnesses in their defense—both encompassing unquestionable

importance—was totally inappropriate and intemperate. As this Court has repeatedly held, there must be a positive finding of *bad faith intent* to justify such a severe sanction. Under the circumstances of this case, as the record reflects and the Court concurs, Appellants were *pro se,* (Doc. 615, p. 1613; Vol. II, p. 2315); they believed they had never received a proper request for disclosure, (Doc. 615, pp. 1613-1614; Vol. II, pp. 2315-2316); they attempted to comply with the procedural rules, as evidenced by the letters to Walsh and Thurman's affidavit (Doc 615, pp. 1613-1632; Vol. II, pp. 2315-2334); and they included both Albarelle and Baucom in their witness list. (Doc. 615, p. Vol. II, p. 2289.). These facts clearly demonstrate Appellants' *good faith* efforts to comply with the rules of procedure, and any claim by the Government that it these witnesses took it by surprise is disingenuous, at best.

c. Conclusion

The Court's extreme remedy of excluding Albarelle and Baucom's testimony in this case, despite Appellants' good faith efforts to comply with the procedural rules, and most notably, after the Court's acknowledging the critical nature of the testimony, cannot reasonably be

considered the least severe sanction as contemplated in *Golyanski*, and therefore, was an abuse of the Court's discretion.

IV. Adoption of Co-appellant Banks' Argument

Pursuant to Fed. R. App. P. 28(i), Appellants hereby adopt by reference the Argument in Appellant Banks' Opening Brief in *United States v. David A. Banks*, No. 11-1487 (10th Cir.).

CONCLUSION

Appellants, based on the foregoing argument, pray that this Court reverse their convictions based on structural error; or in the alternative, remand this case to the District Court with an order to dismiss the indictment based on a violation of the Speedy Trial Act, or in the second alternative, grant a new trial based on the District Court's exclusion of Appellants' expert witnesses.

STATEMENT REGARDING ORAL ARGUMENT

Based on the complexity of the issues presented, counsel respectfully submit that oral argument may benefit this Court.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIRMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B) by its containing 13,173 words, excluding those parts of the same exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(6) by its having been prepared in a proportionally spaced typeface using Microsoft Word 2010™ in Book Antiqua 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, a true and correct reproduction of the APPELLANTS' PRINCIPAL BRIEF was served by way of the United States Court of Appeals for the Tenth Circuit's CM/ECF Appellate System upon the following attorneys of record for the appellee:

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