IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,
v.

2. DEMETRIUS K. HARPER,
a/k/a Ken Harper,
3. GARY L. WALKER,
4. CLINTON A. STEWART,
a/k/a C. Alfred Stewart,
5. DAVID A. ZIRPOLO,
and,
6. KENDRICK BARNES,

Defendants.

JOINT MOTION TO DISMISS INDICTMENT AND CONVICTION FOR SPEEDY TRIAL ACT VIOLATION AND THE SIXTH AMENDMENT

COMES NOW, Defendants, Demetrius K. Harper, Gary L. Walker, Clinton A. Stewart, David A. Zirpolo, and Kendrick Barnes, by and through their attorneys, Gwendolyn M. Solomon, Attorney at Law and Joshua Sabert Lowther, Esq. and hereby adopts Co- Defendant Banks' Motion to Dismiss Based on Speedy Trial Violations With Prejudice or in the Alternative a Hearing on the Motion and submits this Joint Motion to Dismiss the Indictment and Conviction for Speedy Trial Act Violation pursuant to 18 U.S.C. § 3161 and Sixth Amendment with amendments, in support of this Defendants state:

Background

An investigation by the Federal Bureau of Investigation (FBI) was initiated in 2002 against the defendants. A warrant was executed in February 2005. A grand jury convened on February 06, 2007. The grand jury was dismissed and no indictment was

returned. The prosecution convened a second grand jury on March 14, 2007. On June 09, 2009, defendants were indicted and all were charged with multiple counts of mail fraud, wire fraud, and one count of conspiracy to commit mail fraud and wire fraud pursuant to 18 U.S.C. §§ 1341, 1342, and 1349. (Indictment). Defendants initially appeared on summons on June 23, 2009 and were appointed counsel and released on personal recognizance bond. At the discovery conference before Magistrate Kristen L. Mix, trial time was estimated at four (4) weeks. During pre-trial, several continuances were requested by Defense Counsel and not objected to by the government with the exception of the last request when defendants were pro se. Defendants filed a Joint Motion to Dismiss Indictment for Inexcusable Pre-Indictment Delay that was denied. Prior to the trial, Defendants filed a Joint Motion to Dismiss the Indictment for Speedy Trial Act violation. The Motion was denied. The jury trial was commenced on September 26, 2011. On October 20, 2011, a guilty verdict was returned against each Defendant for conspiracy to commit mail fraud and wire fraud and numerous counts of mail fraud and wire fraud. The defendants were not afforded a speedy trial pursuant to the Speedy Trial Act and the Sixth Amendment. As a result, the defendants' rights have been violated and they request dismissal of the indictment and conviction with prejudice.

Standard of Review

Pursuant to 18 U.S.C. § 3161(c)(1), Speedy Trial Act, where a defendant is charged or indicted with a commission of an offense and in any case that a plea of not guilty is entered, the trial shall commence within seventy days from the filing date (and

making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Despite the provisions of 18 U.S.C. § 3161 (c), for the first twelve-calendar-month period following the effective date set forth in section 3163 (b), the time limit with respect to the period between arraignment and trial imposed by subsection (c) shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days. 18 U.S.C. § 3161 (g).

Provisions set forth in section 3161 (h)(1)(D), provide periods of delay that shall be excluded from the computation of time for which the trial shall commence, included, but not limited to, and in pertinent part, a delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. *Bloate vs. United States,* 130 S. Ct. 1345, 1352 (2010). When any period of delay is granted as a result of a continuance by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, the judge shall clearly set forth his findings, orally or written, on the record and that the reasons for granting the continuance serves the ends of justice and outweigh the best interests of the public and the defendant in a speedy trial. 18 U.S.C. § 3161 (7)(A); *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009). Time to prepare pretrial motions is not automatically excludable and other

periods are only excludable when the court enters appropriate findings pursuant to § 3161 (h)(7). *Bloate,* 130 S. Ct. at 1353. When making a ruling, the court must tally the excludable days that requires identifying the excluded days. 18 U.S.C. § 3161 (h)(7)(A); *Zedne*r *v. United States*, 547 U. S. 489, 507 (2006).

Other factors that the court may consider in granting a continuance are:

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

18 U.S.C. § 3161 (7)(B)(1), (ii) and (iv).

> Continuances shall not be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government. 18 U.S.C. § 3161 (7)(C). *Zedner*, 547 U. S. at 511.
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> If a defendant is not brought to trial within the time limit required, the information or indictment shall be dismissed on motion of the defendant. 18 U.S.C. § 3162 (a)(2); *Zedner,* 547 U. S. at 508.

Every defendant in a criminal prosecution shall enjoy the constitutional right to a speedy and public trial. U.S. CONST. amend. VI. When a defendant is deprived of his

constitutional right to a speedy trial the only remedy is dismissal. *Strunk v. United States*, 412 U.S. 434, 435 (1973); *Barker v. Wingo*, 407 U.S. 514, 522 (1972). In evaluating a violation of speedy trial pursuant to the Sixth Amendment, the court should assess the factors established by the Supreme Court in *Barker*, the length and reason for delay, the defendant's assertion of his right and prejudice to the defendant. *United States v. Seltzer*, 595 F.3rd 1170, 1176 (10th Cir. 2010).

The defendants move to have the indictment dismissed for violations to the Speedy Trial Act and the Sixth Amendment with prejudice.

Argument

I. Speedy Trial Act

Upon the charge or indictment of a defendant and a not guilty plea is entered, the trial shall commence within seventy days either from the filing of the indictment or from the date that the defendant appears before the judicial officer that the charges are pending, whichever date occurs last. 18 U.S.C. § 3161 (c)(1). Generally, speedy trial attaches when the defendant is arrested or indicted whichever comes first. *Seltzer*, 595 F.3d at 1176. 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. *Id*. at 1175-76; *Barker,* 407 U.S. at 529; *Toombs*, 574 F.3d at 1273. "Once federal prosecutors bring an indictment against a defendant, they have a duty to notify the District Court that the defendant should be arraigned and appointed counsel, and to bring the defendant to trial expeditiously." *Seltzer*, 595 F.3d. at 1177. The indictment and summons for each

defendant was issued on June 09, 2009. (Docs 1-7). On June 18, 2009, the summons was executed for each defendant. (Docs 8-13). On June 23, 2009, all of the Defendants appeared before the judicial officer, Magistrate Judge Boyd N. Boland. (Doc 15). Counsel was appointed for each of the defendants. *Id.* Defendants were released on personal recognizance bond. *Id*. On June 29, 2009, the defendants appeared for arraignment before, Magistrate Judge Kristen L. Mix and entered not guilty pleas. (Doc 33). An estimated time for trial was set for four weeks. *Id*. The speedy trial clock began to run from the initial appearance of June 23, 2009. (Docs 15, 75, 77).

The Supreme Court has established a four part balancing test to establish if a defendant's right to speedy trial has been violated. *Seltzer*, 595 F.3d at 1176; *Barker*, 407 U.S. at 540. The four factors the court considers are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his desire for a speedy trial; and (4) if the defendant was prejudiced by the delay. *Seltzer*, 595 F.3d at 1176; Barker, 407 U.S. at 540. Since the factors are related they must be considered together along with the surrounding circumstances. Barker, 407 U.S. at 533.

A. The Balancing Test

(1) Length of the Delay

In order to trigger a speedy trial analysis, the defendant must first allege that the interval between accusation and trial exceeded an ordinary delay to a presumptively prejudicial delay. *Seltzer*, 595 F.3d at 1176; *Doggett v. United States*, 505 U.S. 647, 648 (1992). Second, if the defendant makes that showing, then the court must consider, along with other factors, the extent that the delay went beyond the bare

minimum generally sufficient to trigger judicial review. *Id*. "Delays approaching one year, generally, satisfy the requirement of presumptive prejudice." *Seltzer*, 595 F.3d at 1176; *United States* v. *Batie*, 433 F.3d 1287, 1290 (10th Cir. 2006). In this case, there were five continuances granted, 07/09/2009, 08/20/2009, 12/18/2009, 11/22/2010 and 04/04/11. (Docs 63, 77, 123, 327, 403). The trial started two years and two months after the indictment and defendants' initial appearance, a lengthy delay. The delays were presumptively prejudicial. The Speedy Trial Act was violated. Defendants request the convictions be dismissed with prejudice.

(2) Reason for the Delay

It is ultimately the government's responsibility to justify the delays. *Seltzer*, 595 F.3d at 1179; Barker, 407 U.S. at 531. The prosecution and the courts bear the responsibility to bring the case to trial and safeguard the defendant rights to avoid any constitutional violation. *Zedner*, 547 U. S. at 501. Another factor that the court should consider is the nature of the charges when evaluating an unreasonable delay and why the government did not proceed to prosecute the suit in a timely manner. *Seltzer*, 595 F.3d at 1176. Defendants were represented by counsel from June 23, 2009 through December 2010 and during that period, counsel requested continuances from July 06, 2009 through May 23, 2011 based upon the same grounds, to review discovery, interview witnesses, multiple defendants, and alleged complex nature of the allegations. (Doc 49, ¶¶ 5-6; Doc 75, pp. 3-4; Doc 119, ¶¶ 2e-f, 5a, c, e, f, 10, 13; Doc 324, ¶¶ 2, 3, 9, 10). Defendants were charged with one count of conspiracy to commit mail fraud and wire

fraud[1] and various counts of mail fraud and wire fraud[2]. 18 U.S.C. §§ 1341, 1342, and 1349. The allegations were that the defendants defrauded 42 staffing agencies of monies via wire and mail through payroll, nothing complex. (Indictment, ¶ 9). There were six competent appointed attorneys to review the discovery. The CJA attorneys had access through Criminal Justice Act (CJA) to request additional assistance to review documents, experts and other pretrial work to include interviewing of witnesses, if necessary. There was no reason for a major delay.

After nearly a one year delay, no witnesses had been interviewed, the defense attorneys were still regurgitating nearly the same identical reasons for an extension of time to review the same discovery, (i.e. payroll records), and the process in which payments were made by mail or wire. (Doc 49, ¶¶ 5-6; Doc 75, pp. 3-4; Doc 119, ¶¶ 2e-f, 5a, c, e, f, 10, 13; Doc 324, ¶¶ 2, 3, 9, 10). The court consistently granted the continuances on the same basis. (Docs 63, 77, 123, 327). Defense Counsel alleged at least two times that they would request travel to interview witnesses. (Docs 119, ¶ 5e; 324, ¶ 9). No motions were ever filed to pursue that request. *Id*. In fact, Defense Counsel advised the court that they had obtained assistance to review the discovery. (Doc 75). "The defense started reviewing the discovered material as it arrived. Defendants have engaged computer consultants to make the existing material more accessible and to efficiently arrange for review of the server and computer data." *Id*. at p. 3.

[1] An agreement of more than one person to engage in criminal activity. 18 U.S.C. § 1349.

[2] A fraudulent scheme devised or intended to devise to deprive another of money by means of false or fraudulent pretenses via mail or wire communications. 18 U.S.C. §§ 1341 and 1342.

The prosecution failed to justify any need for the continuances and failed to prosecute this case in adherence to the Speedy Trial Act. See *Seltzer*, 595 F.3d at 1176 -77 (finding that the prosecution secured an eyewitness, co-conspirator testimony, along with the nature of the charges, factors that the court considered and determined that the government waited too long to prosecute the case). Here, the motions for a continuance 07/09/2009 and 08/20/2009 were unopposed by the government. (Docs 49, 75). The government had not identified its progress or preparation for trial to proceed nor did the court make an inquiry. *Id*. The government did not inform the court that it was unable to secure witnesses and was aware that the defense had identified its witnesses. In December 2009 and November 2010, the prosecution agreed and did not object to a further continuance proposed to allow defense to prepare for trial to review discovery after an already lengthy delay. (Doc 119, ¶ 7; Doc 324 ¶ 20). During the motions hearings, nothing was discussed regarding the safety of the public's interest except the boiler plate language. After a year and a half delay, the defendants terminated their attorneys due to lack of preparation and due diligence in preparing for trial.

Once the defendants became pro se, a continuance was granted particularly based on new evidence received from the government and time for adequate preparation. (Docs 394, 403). In April 2011, once the defendants became pro se, and after a twenty-one month delay, the government asserted an objection for the first time to a continuance. There was no reason for the previous extensive delays presented except for case management. There was no reason as to why the government did not

proceed with its prosecution. The Speedy Trial Act was violated. Defendants request this court dismiss the indictment without prejudice.

(a) Exceptions Excluded from the Delay

Delays may occur and shall be excluded from the computation of time resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. 18 U.S.C. § 3161 (h)(1)(D). July 06, 2009, co-defendant David Banks filed a motion for continuance for trial for a ninety day extension. (Doc 49). On July 07, 2009, Co-Defendant David Zirpolo filed a motion to join co-defendant Bank's motion to continue trial. (Doc 52). The Motion was granted July 09, 2009. (Docs 63, 69). Defendants Walker, Harper, Barnes and Stewart did not join in on the July 06, 2009 Motion for Continuance for Trial. (Doc 49). The extension granted in documents 63 and 69 were not applicable to Walker, Harper, Barnes and Stewart and thus not excluded from their speedy trial time.

On August 18, 2009, co-defendant, Clinton Stewart, filed a Motion to continue trial from October 07, 2009 through January 29, 2010. (Doc 75). On August 20, 2009, a status conference was held and the court asked the other co-defendants if they were in agreement with an extension/continuance of the trial date and all co-defendants concurred. (Doc 77). On August 20, 2009, the court granted a continuance of the trial date from October 07, 2009 through January 29, 2010. *Id*.

> THE COURT: Okay. I assume that is correct for the rest of the defendants. Anybody disagree with that statement? Nobody.
>
> All right. Court is going to grant the motion pursuant to 18 U.S.C. Section 3161 (h)(7)(A) and (B).

> Defendant Stewart has moved for a 110-day exclusion of time under the Speedy Trial Act, thereby excluding the days from *October 7, 2009 to January 29, 2010*. (Emphasis added).

(Doc 647, August 20, 2009, Transcript, p. 6, lines 13-21).

Over a five month span, from July 06, 2009 through December 14, 2009, no other pre-trial motions were filed with the exception of continuances. On December 14, 2009, another request was filed for a continuance and granted through January 31, 2011. (Doc 119). During the December hearing, the court agreed to allow co-counsel to file joint motions waiving the new local rule that disallows motions to join. (Doc 240, December 18, 2009 Transcript, p. 10, lines 18-23; p. 24, lines 24-25; p. 25, lines 1-9; [United States District Court District of Colorado, Local Rules of Criminal Procedure 42.1]). A four hundred and nine (409) day continuance was granted to extend the trial date to January 31, 2011. (Doc 123). On November 18, 2010, co-defendants, Bank's, Harper, Zirpolo, Barnes, and Walker filed a joint motion to continue jury trial. (Doc 324). Co-defendant Stewart did not join this motion. "Defense counsel has discussed this motion with counsel for co-defendant CLINTON A. STEWART who stated that, although he does not join in this motion, he does not oppose this motion." (Doc 324, ¶ 19). The court did not inquire or address as to why co-defendant Stewart did not join the motion.

> MR. KIRSCH: Your Honor --
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> THE COURT: We do have the motion.
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> MR. KIRSCH: And I just wanted to ask in terms of the timing of the supplements. Could I have until Monday, the 29th, in order to submit that supplement, just because of the intervening holiday?
>
> THE COURT: That's fine. 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 that motion.
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> THE COURT: I don't know what your speedy trial issues are in that case.
>
> MR. BERGER: Well, we took care of them. I will go forward. Thank you, Your Honor.
>
> THE COURT: All right. So we are scheduled for 6 weeks beginning May 23rd for trial. And I will issue a written order granting that motion, the ends of justice continuance motion.
> Anything further?
>
> MR. KIRSCH: From the Government, Your Honor, thank you.

(Doc 359, November 19, 2010 Transcript, p. 127, lines 2-12; p. 129, lines 5-15).

The continuance was granted on November 22, 2010 extending the trial date of May 23, 2011 for a six week trial. (Doc 324).

On March 16, 2011, all defendants, now pro se, filed a Joint Motion to Continue Trial for 120 days. (Doc 394). A hearing on Defendants Joint Motion to Continue Trial was set for 04/01/2011 at 2:30 PM. (Doc 398). Due to a conflict on the Court's docket, the motion hearing set for 04/01/2011 was reset to 04/04/2011 at 9:00 AM. (Doc 399). On April 04, 2011, the Motion to Continue Trial date scheduled for May 23, 2011 was granted and continued for trial to begin September 26, 2011. (Doc 403).

The motions for the continuances were improperly and erroneously granted and/or did not meet the requirements provided for in the Speedy Trial Act. Due to the noncompliance set forth in the provisions for exceptions in the Speedy Trial Act,

defendants' rights were violated. Defendants request this motion be granted and the conviction be dismissed with prejudice.

(b) Ends of Justice

The primary burden to assure cases are brought to trial is upon the courts and the prosecutors. *Barker*, 407 U.S. at 529. The Tenth Circuit recognizes the importance that the court articulate clear findings on the record when granting a continuance based on the ends of justice exception. *Toombs*, 574 F.3d at 1277. It assures that the court has considered the relevant factors and provides an adequate record to review. *Id.* at 1269. If the court fails to create a clear record, it takes the risk of granting continuances for the wrong purposes. *Id*. In granting an extension under the ends of justice exception, the court is to tally and identify the days in its ruling. *Zedner*, 547 U. S. at 507. In *Toombs*, the court analyzed *Gonzales* and applied the abuse of discretion standard to the district court's decision to determine if the district court made sufficient findings adequately supported in an ends of justice continuance under the Speedy Trial Act. *Id*. at 1268; *United States v. Gonzales*, 137 F.3d 1431, 1433 (10th Cir. 1998). In *Gonzales*, there were six different motions to continue the trial date. *Id*. at 1270. The motions, in all material respects, were practically identical in the request for continuance with the exception of the dates. *Id*. The prosecutor claimed he would be out of town for certain periods of the delay and would not be able to prepare for trial by the dates offered by the court. *Id*. The court did not inquire into the time frame of absence, or if another prosecutor could be ready to proceed to trial. *Id*. The court granted an ends of justice continuance and stated in the written order that the time was excluded for

purposes of the Speedy Trial Act because the interest of justice outweighed the interest of the public and the defendant in speedy trial. *Id*. The court also noted that the case was presumed complex and did not inquire as to the complexity. *Id*. The Court of Appeals considered the content of the order and concluded that the district court failed to establish an adequate record for granting its continuance and purport reasons why the granting of the continuances outweighed the best interest of the public. *Id*. at 1271.

Similarly, in this case, there were several motions presented for continuances, July 06, 2009, August 18, 2009, December 14, 2009, November 18, 2010 and March 16, 2011. (Docs 49, 75, 119, 324, 394). The government did not object to the continuances. In fact, the government and defense counsel had meetings, without defendants present, and agreed on the continuances. "All defense counsel and government attorneys met in person to discuss the contents of this motion. There is no dispute with respect to any of the facts set forth herein." (Doc 119, ¶ 7). The content of the motions and statements at the hearings conceded that the government made no objections. (Docs 49, 75, 119, 324). The investigation spanned over approximately a seven year period. During that period, the government had interviewed its witnesses. The court did not inquire of the prosecution's preparedness for trial nor did the prosecution volunteer its readiness. The motions presented for the continuances were materially identical in all respects. *Id.* The court granted relief on the basis of complexity and ends of justice but later agreed that the case was not complex. *Id*. On, one occasion, the court miscalculated the speedy trial dates and did not exclude time from the speedy trial clock for four of the co-defendants. (Doc 77). The court is required to

tally and identify the excludable days in the order. This was not done on every order. (Doc 49). This caused an instant constitutional violation of their speedy trial rights. This court continuously abused its discretion in granting the continuances and did not make the proper findings to support its rulings based on an ends of justice exception. Thus, the indictment should be dismissed with prejudice.

(c) The Case was not Complex

In *Toombs*, the Court of Appeals considered and analyzed the fact that the district court had not inquired into the nature or complexity of the case as required by § 3161(h)(7)(B)(ii) and (iv) a problem. *Toombs*, 574 F.3d at 1270. On August 18, 2009, Defense Counsel Berger, representing Defendant Stewart, filed an Unopposed Motion for Further Exclusion of Time Under 18 U.S.C. § 3161 (h)(7)(A) and (B). (Doc 75). When the motion was filed through the electronic case filing system (ECF) the motion was titled Unopposed Motion to Declare Case Complex and for Further Exclusion of Time. *Id.* In the contents of the motion, Counsel Berger referenced 18 U.S.C. § 3161 (h)(7)(B). *Id*. However, there are two sections that deal with complexity. The complexity was never addressed in Defendants motion nor did the court inquire as to the complexity of the case. (Doc 75). Moreover, Counsel Berger never requested relief based upon complexity as a factor to be considered by the court. *Id.* Neither Counsel for the Defendants nor the government presented a factor for the judge to consider the case complex. The relief requested and considered was massive, discovery and about 100 witness interviews. (Doc 647, August 20, 2009 Transcript, p. 8, lines 16-24). The

Court took upon its own initiative to declare the case unusual and complex without ever defining the complexity. *Id.*

> The Court finds the following facts. One, this case involves allegations of fraud against six defendants, all of whom are out on bond. The Government contends that the defendants' engaged in a complex financial scheme occurring over the course of a nearly 7-year period; from October 2002 through June 2009. Defense counsel will need to conduct at least 50, and potentially upward of 100 witness interviews to investigate the Government's allegations.

(Doc 647, August 20, 2009 Transcript, p. 6, lines 21-25; p. 7, lines 18-20).

> The number of defendants; six, and the nature of the prosecution and intricate 7-year financial conspiracy involving the massive amount of discovery described above, render this case so unusual and complex that it would be unreasonable to expect defendants to prepare for trial; that is, it would be unreasonable to expect the defendants to review the discovery and interview the necessary witnesses within the time limits set forth by the Speedy Trial Act and this Court's previous order.

(Doc 647, August 20, 2009 Transcript, p. 8, lines 16-24).

As time went on, the court and defense counsel acknowledged that the case was not complex.

> Court: And so I guess I want to inquire a little bit more about what has already been done in this case. I know that there are a number of witnesses. There are documents. But this is not -- it may be a 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, December 18, 2009 Transcript, p. 4, lines 13-18).

> MR. BAKER: Mitchell Baker, Your Honor.

> We consulted with defense amongst ourselves and then met with Mr. Kirsch. And 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 that we have been on, that have taken 3 years or so, but it is a case that has a voluminous amount of material. And as we tried to set forth with some specificity in the motion, it is necessary for us to review this material before we can do the other things that we need to do as defense attorneys, such as interview witnesses and draft some of the motions that we have to draft.

(*Id*. at p. 4, lines 24, 25; p. 5, lines 1-10).

Counsel Berger argued voluminous discovery to review and several witnesses to interview, which does not define complexity or nature of the prosecution. (Doc 75); *See also Toombs*, 574 F.3d at 1271 (finding that the court considered that the prosecutor made statements that the case was of a complex nature but did not inquire as to the nature or complexity of the case as required by 3161(h)(7)(B)(ii)). Without this necessary inquiry, the court found it inadequate to determine if the continuances outweighed the best interests of the public. *Id*. at 1271. As here, in this case, the court did not delve into a reason that the prosecution concluded that this case was complex. There were six attorneys appointed to review discovery and interview 100 witnesses. This was not an unusual or complex lawsuit. The case should not have been defined as complex. For the said reasons, these extreme continuances should not have been granted. The defendants rights to a speedy trial were violated according to the Act and the indictment should be dismissed.

Defendants Assertions

An important factor that the court considers is the defendant's assertion of his speedy trial right. *Seltzer*, 595 F.3d at 1179; *Barker*, 407 U.S. at 531-32. If the defendant makes the assertion, he is entitled to a strong evidentiary weight in determining whether he was deprived of his right. *Id.* To promote compliance with the requirements, the Speedy Trial Act contains provisions for enforcement and sanctions. *Zedner*, 547 U. S. at 499. If a defendant files a meritorious and timely motion to dismiss the charges, before the start of trial or the entry of a guilty plea, the district court must dismiss the charges, although it may choose to dismiss with or without prejudice. *Id.* The Defendants asserted their right to speedy trial as they were appointed counsel with the expectation that pre-trial motions would be filed, witnesses would be interviewed and there would be diligent preparation. This did not occur. The defendants filed a Joint Motion to Dismiss *Indictment for Inexcusable Pre−Indictment Delay* on June 25, 2010. (Doc 215). The court should have inquired more deeply into the reasons as to the delay.

After one year and a half delay, in the November 18, 2010, Defendant Banks's, Harper's, Walker's, Zirpolo's and Barnes's Joint Motion to Continue January 31, 2011 Jury Trial, defense counsel used as a basis for extension that they were solo practitioners and had to prepare for the case alone. (Doc 324). "All undersigned counsel are sole-practitioners and, therefore, there are no associated counsel who could relieve undersigned counsel of other litigation obligations." (*Id.* at ¶ 16). CJA has access to request experts and other assistance necessary to diligently prepare for trial.

This was an unnecessary delay due to lack of diligence by Defense Counsel. Defendants recognized the lack of due diligence to prepare for trial by their CJA Counsel and thus, terminated their counsel. While Defendants requested the delays, the government did not object, with exception of the latter. The defendants made several assertions for a speedy trial, including filing a meritorious and timely Joint Motion to Dismiss Indictment for Speedy Trial Act Violation, prior to the start of trial on September 26, 2011. (Doc 445). The motion was addressed prior to the empanelling of the jury. The Motion was denied. (Docs 447, 463). Trial commenced on September 26, 2011. The indictment should have been dismissed. The defendants request the indictment be dismissed.

(3) Prejudice to the Defendants

In determining prejudice, the court considers three interests designed to be protected by the Speedy Trial Act: (1) prevention of oppressive pretrial incarceration, (2) minimization of the accused's anxiety and concern, and (3) minimization of the possibility that a delay will hinder the case. *Toombs*, 574 F.3d at 1275; *United States v. Batie,* 433 F.3d at 1292. Prejudice may also occur, when witnesses' memories change or fade over time. *Id*. The governments' misconduct should be considered, i.e., if the government engaged in conduct to hamper the defense. *Id*. at 1293. *Seltzer*, 595 F. 3d at 1177. In this case, prevention of oppressive pretrial incarceration is not applicable. However, all of defendants experienced a great deal of anxiety and concern. All of the defendants were the main providers for their families. The government provided information to the defendants' employers regarding the indictment. This remained a

cloud over their heads during the pre-trial period living under suspicion and hostility. As a result, majority of the defendants struggled off and on to maintain employment. The prolonged delay caused each defendant, their families and friends a level of emotional stress that could have been alleviated by a prompt trial. In particular, Defendant Walker has a son that suffers from seizures. As the case progressed, the seizures increased.

Moreover, the unreasonable delay prejudiced the defense ability to present a strong defense. Defendants counsel did not diligently prepare for trial. As a result, Defendants terminated all of their attorneys and proceeded to represent themselves. A jury trial was held from September 26, 2011 through October 20, 2011. During the trial, the defendants were denied their right to present sufficient evidence, i.e., expert witnesses and or witness testimony, to defend their case. On October 11, 2011, the Defendants were compelled to testify, violating their Fifth Amendment rights. (Doc 557, October 11, 2011 Transcript, pp. 129-168). 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. Further, the government engaged in conduct to hamper the defense. The government did not object to the lengthy delays, interfered with the availability of a witness and failed to prosecute the case in a timely manner. The prejudice to the Defendants in this case is obvious. The motion to dismiss pursuant to the Speedy Trial Act should be granted.

B. The Public's Interest was not Protected

The Defendant is not permitted to waive his right for a speedy trial, because the right is not just his alone to relinquish but the Act was designed with the public's interest as well. *Zedner*, 547 U. S. at 501; *Gonzales*, 137 F.3d at 1432. 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 has a duty to bring a defendant to trial swiftly, and represent society and is the one to protect society's interest. *Barker*, 407 U.S. at 527. The government's responsibility does not decrease or is minimized simply because the defendant requests a continuance. *Id*. Here, the defendants did not waive their right to speedy trial and the Speedy Trial Act prevents them from doing so. *See Zedner*, 547 U. S. at 501 (finding that the Act recognizes that the public's interest cannot be served if the defendants may opt out of the Act). Defense counsel and the government met and agreed to four (4) lengthy and unreasonable delays failing to protect the public's interest. (Docs 49, 75, 119, 324). The Defendants did not attend these meetings and were under the belief that counsel was advocating in their best interest. After, obvious lack of due diligence by defense counsel, the defendants decided to represent themselves and terminated their attorneys. In this case, the government did not protect the public's interest. The government did not adhere to the requirements of the Speedy Trial Act. By the extreme delays and no objections to the delays, the government very passively disregarded the public's interest. The defendants request this court to consider the government's

blatant disregard to protect the public interest and grant the motion to dismiss with prejudice.

C. Abuse of 18 U.S.C. §3161(g)

Notwithstanding the provisions of 18 U.S.C. § 3161(c), for the first twelve-calendar-month period following the effective date as set forth in section § 3163 (b) of this chapter, the time limit with respect to the period between arraignment and trial imposed shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days. 18 U.S.C. § 3161 (g). During each twelve month calendar period set forth above, the rule was abused and all of the defendants' right to a speedy trial was violated.

Defendant Zirpolo's speedy trial excludable time was from July 07,2009 – July 09, 2009 – 3 days, (Docs 51, 60, 61, 63); then a 90 day extension from Jul 10, 2009 through October 07, 2009; extension from October 07, 2009 through January 29, 2010 (October 07, 2009 already excludable from the original extension, not double counted) – 104 days, (Docs 75, 77); next extension January 30, 2009 thru January 31, 2011 – 367 days, (Docs 119, 123). Within one year from June 23, 2009 thru June 23, 2010, (12 months), speedy trial excludable days were 342 days as opposed to 180 days per statute; Second twelve month period – June 24, 2010 thru June 23, 2011 was 365 days as opposed to the 120 days, 3 times the amount allotted, and then the 3rd time period

from June 24, 2011 through September 26, 2011 was 95 days over a 3 month period versus 80 days over a 12 month period. (Docs 119, 123, 324, 327, 394, 403).

Defendant Stewart's speedy trial excludable time was from August 18, 2009 – August 20, 2009 – 3 days, (Docs 75, 77); then an extension from October 07, 2009 through January 29, 2010 (October 07, 2009 – 103 days, *Id*.; next extension January 30, 2009 thru January 31, 2011 – 253 days. (Docs 119, 123). Within one year from June 23, 2009 thru June 23, 2010, (12 months), speedy trial excludable days were 253 days as opposed to 180 days per statute; Second twelve month period – June 24, 2010 thru June 23, 2011 was 365 days as opposed to the 120 days, 3 times the amount allotted, and then the 3rd time period from June 24, 2011 through September 26, 2011 was 95 days over a 3 month period versus 80 days over a 12 month period. (Docs, 119, 123, 324, 327, 394, 403).

Defendants Walker, Harper and Barnes speedy trial excludable time was on August 20, 2009 – 1 day, (Doc 77); then an extension from October 07, 2009 through January 29, 2010 (October 07, 2009 – 105 days; next extension January 30, 2009 thru January 31, 2011 – 253 days. (*Id*.) Within one year from June 23, 2009 thru June 23, 2010, (12 months), speedy trial excludable days were 251 days as opposed to 180 days per statute; Second twelve month period – June 24, 2010 thru June 23, 2011 was 365 days as opposed to the 120 days, 3 times the amount allotted, and then the 3rd time period from June 24, 2011 through September 26, 2011 was 95 days over a 3 month period versus 80 days over a 12 month period. (Docs 119, 123, 324, 327, 394, 403).

The extensions were abused for this case and far exceeded the statute pursuant to 18 U.S.C. § 3161 (g). The Defendants Speedy trial rights were violated by the government's non adherence and passive disregard for not only the defendants' rights but the public's interest as well. Defendants request this case be dismissed for violation of their speedy trial rights.

D. No Continuances Shall be Granted due to the Court's Calendar Congestion, Lack of Diligent Preparation or Unavailability of Government Witnesses

No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government. 18 U.S.C. § 3161 (7)(C). *Zedner*, 547 U. S. at 511. The court must also consider the reasons offered by the government for not bringing a timely suit. *Seltzer*, 595 F. 3d at 1177. "A deliberate attempt to delay the trial in order to hamper the defense should be weighed against the government." *Id*. In this case, no continuances were made due to general congestion of the court's calendar and are therefore not applicable. In the meantime, after several continuances were requested and granted on the basis to review discovery and prepare pretrial motions and prepare for trial, no pre-trial motions, except for the continuances, were filed in the case until April 20, 2010. Discovery had been released to Defendants approximately one month after initial appearance and appointment of counsel. (Doc 75, p.3; Doc 119, ¶ 2e). There were several continuances extending from July 2009 through September 2011. While being represented by counsel, no witnesses had been interviewed nor scheduled to be interviewed. Counsel for Defendants continued to request continuances based upon

the same considerations that amounted to lack of diligent preparation. No continuance should have been granted due to lack of diligent preparation.

The government attempted to deliberately delay the trial in order to hamper the defense. The government made no objections until the March 16, 2011 request for an extension made by the pro se defendants. The government never advised the court that they were unable to obtain any witnesses. Yet, the government continuously disregarded the public's interest and allowed several continuances with no objections with the exception of the latter and failed to expeditiously prosecute the case. The government continuously estimated its case and chief would take approximately three weeks. The government rested its case and chief after nine (9) days. During the trial, several witnesses, including the governments witnesses' memories had faded and the witnesses were unable to recollect various accounts of what took place over a span of ten years. (*See* Exhibit A, attached). In addition to the lack of memory, the defense had to scramble for witnesses to appear earlier than estimated. Many of the witnesses were out of state. When the defendants attempted to contact some of the witnesses via subpoena, a few were evading service because they were government employees and many contacted the United States Attorney's office despite the contact information on the subpoenas were for the defense. (Doc 617, October 13, 2011 Transcript, pp. 1778-1782). Defense witness Hillberry testifies under oath that he had been in contact with the prosecution before appearing and testifying. "Q. But you did contact the Government related to the subpoena; correct? A. Yes, I did." (*Id*. at 1880, lines 4-6).

The prosecution intentionally interfered with service of a witness for the defense, FBI Agent Moen. *See* Exhibit B, attached; (Doc 618, October 17, 2011 Transcript, p. 1956, lines 1-19; p. 1965, lines 2-25; p. 1966, lines 1-25; p. 1967, lines 1-4; p.1968, lines 17-25; p. 1969, line 1). Defense sent a person to serve Agent Moen and was advised that he was not to be served. *Id*. The defendants requested relief from the court for assistance to enforce service but instead the court reprimanded the defendants. (Doc 557, October 11, 2011 Transcript, pp. 107, 108, lines 1-2; Doc 618, October 17, 2011 Transcript, pp. 107, 108, lines 1-2). The defendants were not afforded the right to a speedy trial. Neither the government nor the court proceeded to bring the case in a timely manner. The government did not offer any valid reasons to justify the delay in prosecution. Neither the government nor the court ensured adherence to the Speedy trial act to protect the interest of the public. Defendants' constitutional right to a speedy trial was violated. Defendants request the conviction be dismissed with prejudice.

II. Sixth Amendment Violation

The Sixth Amendment guarantees a defendant the right to a speedy trial. U.S. CONST. amend. VI. If the right is violated, the conviction shall be dismissed, the "only possible remedy" for deprivation of this constitutional right. *Strunk*, 412 U.S. at 434; *Barker*, 407 U.S. at 522. All defendants right to a speedy trial were violated and each variance is addressed below. Delays may occur resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt

disposition of, such motion and shall be excluded from the computation of time. 18 U.S.C. § 3161 (h)(1)(D).

In adherence to the Speedy Trial Act, trial was to commence no later than September 01, 2009. On July 06, 2009, co-defendant Banks filed an Unopposed Motion for an Ends of Justice Continuance and Excludable Time Pursuant to Title 18 U.S.C. § 3161(h)(8)(A) for the trial date to be extended for ninety days. (Doc 49). Co-defendant David Zirpolo joined in on Banks' Motion on July 07, 2009. (Doc 52). The Judge granted an extension for continuance of trial for ninety days for the two co-defendants. (Doc 63, 69). There was a stay for the two defendants with the clock stopping July 06, 2009 through October 07, 2009. Neither of the other co-defendants, Barnes, Stewart, Harper or Walker, nor their attorneys filed a motion for continuance of trial nor joined co-defendants Banks or Zirpolo's Motion to continue the trial.

Defendant Stewart

On August 18, 2009, co-defendant Stewart filed an Unopposed Motion for Further Exclusion of Time Under 18 U.S.C. § 3161 (h)(7)(A) and (B) to continue the trial date through January 29, 2010. (Doc 75). On August 20, 2009, a hearing was held and the motion was granted to extend the trial date to January 29, 2010. (Doc 77). At time of the hearing, all co-defendants orally concurred to extend the trial date to January 29, 2010. *Id*. Co-defendant Stewart's, active speedy trial dates were from initial appearance, June 23, 2009 through August 17, 2009, pursuant to FRCP 5 (1)(A). From the filing of the motion, August 18, 2009 through, the resolution of the motion, August 20, 2009, the speedy trial clock stops, excluded three days. The court further excluded

October 07, 2009 through January 29, 2010 from the speedy trial time. (Doc 647, August 20, 2009 Transcript, p. 9, line 2-4). However, co-defendant Stewart was never subject to the July 06, 2009 motion filed by co-defendant Banks. (Docs 49, 52, 63, 69). The non-excludable days for co-defendant Stewart, calculating speedy trial days effective from June 23, 2009, to August 17, 2009, is fifty-six (56) days. The court did not exclude the period from August 21, 2009 through October 06, 2009 equaling 47 days added with the previous 56 days totals 103 days. The court did not properly calculate the days of exclusion applicable to Defendant Stewart. Therefore, granting an extension from October 07, 2009 through January 29, 2010 exceeded the threshold of the speedy trial time. Further, Mr. Stewart did not oppose the motion to extend on the December 14, 2009 motion to continue but he stated that he would not join that motion. This was not addressed by the court. Mr. Stewart should have been severed from the other defendants or there should have been a more detailed inquiry and his position made clear on the record. This time should not have been calculated to be excludable in his speedy trial time. Thus, the period of non-exclusion automatically and constitutionally violated co-defendant Stewart's Sixth Amendment right to a speedy trial. Mr. Stewart request the conviction be dismissed based upon the violation of his Sixth Amendment rights.

> I have read Mr. Berger's motion, and it was quite thorough, and I appreciate that. Sometimes I get motions and they don't say a whole lot, but I thought this was very thoroughly done.
> But, does anybody else wish to supplement or, Mr. Berger, do you wish to add anything to your motion?
>
> MR. BERGER: I really don't have anything to add,

> Your Honor. As I told the Court before, I discussed this with all counsel and Government counsel, as well, plus read a lot of what we have already, so I could put those facts in the motion. And I think we need this much time to get a handle on this case.
>
> THE COURT: All right. Is the Court correct in assuming that if the defendants and counsel use even their most diligent efforts to prepare this case for trial, that they could not adequately do so without my granting this continuance?
>
> MR. BERGER: Yes, for Mr. Stewart.
> THE COURT: Okay. I assume that is correct for the rest of the defendants. Anybody disagree with that statement? Nobody.
>
> All right. Court is going to grant the motion pursuant to 18 U.S.C. Section 3161(h)(7)(A) and (B).

(Doc 647, August 20, 2009 Transcript, p. 5 lines 20-25; p. 6, lines 1-17).

Court makes a ruling without any verbal response on the record from Co-Defendants or Counsel.

> "The Court will exclude 110 days from speedy trial calculations, beginning on October 7, 2009, through January 29, 2010."

(*Id.* at p. 9, lines 2-4.)

Defendants Walker Harper and Barnes

Co-defendants Walker, Harper and Barnes active speedy trial dates are from initial appearance, June 23, 2009 through August 19, 2009, calculated at fifty-eight (58) days. On August 20, 2009, Co Defendants agreed orally on the record to extend trial dates and exclude October 07 through January 29, 2010 from the speedy trial clock. (Doc 77). "Defendants Banks, Harper, Walker, Zirpolo and Barnes state that they

concur in Defendant Stewart's Unopposed Motion for Further Exclusion of Time." *Id*. The Motion was resolved on August 20, 2009 and 1 day is excludable for speedy trial calculations. Co-defendants Walker, Harper and Barnes were never subject to the July 06, 2009 motion filed by co-defendant Banks. (Docs 49, 52, 63, 69). From August 21, 2009 through October 06, 2009 equals forty-seven (47) days. A total of one hundred and five (105) days (58, 47) were not excluded for speedy trial purposes. Therefore, Mr. Walker, Harper and Barnes' speedy trial rights were automatically and constitutionally violated. Walker, Harper and Barnes request the conviction be dismissed.

Defendant Zirpolo

In calculating speedy trial days for co-defendant Zirpolo, effective from June 23, 2009, first appearance, to July 06, 2009 is 14 days, non-excludable. Defendant Zirpolo joined co-defendant Bank's motion on July 07, 2009. (Doc 49). The court granted a ninety (90) day extension through October 07, 2009. (Doc 63). The clock stopped for speedy trial purposes for co-defendant Zirpolo, to include the time motion filed to disposition of the motion three days (July 07, 2009 to July 09, 2009), for ninety days is 93 days. On August 20, 2009, co-defendant Zirpolo consented orally on the record to an additional extension from, and to include, October 07 through January 29, 2010. (Doc 77). This continuance added an additional one hundred and four (104) days to the speedy trial time, equaling a total of one hundred and ninety (194) days excludable from the speedy trial calculations. Mr. Zirpolo's calculations extend beyond the one hundred and eighty day (180) period allowed within the first twelve months pursuant to 18 U.S.C.

§ 3161 (g). Another continuance was filed on December 14, 2009, further extending the trial date from January 29, 2010 to January 25, 2011, an additional three hundred and sixty one (361) days. (Doc 119). On November 18, 2010, a continuance was granted to continue trial until May 23, 2011. (Doc 327). Defendant Zirpolo's constitutional right to a speedy trial was violated. Defendant Zirpolo request the conviction be dismissed.

Case to be Dismissed with or without Prejudice

Once the court has determined that a speedy trial violation has occurred, the only remedy is to reverse the conviction, vacate the sentence and dismiss the indictment. *Strunk*, 412 U. S. at 435. The district court shall consider whether to dismiss the case with or without prejudice. *Toombs*, 574 F. 3d at 1276. The court shall consider the following factors: (1) the seriousness of the offense, (2) the facts and circumstances of the case which led to the dismissal, and (3) the impact of a reprosecution on the administration and on the administration of justice. 18 U.S.C. § 3162(a)(1); *United States v. Saltzman*, 984 F.2d 1087, 1092 (10th Cir. 1993).

Seriousness of the Offense

The court evaluates the seriousness of the offense to make the determination to dismiss with or without prejudice. *Saltzman*, 984 F.2d at 1093. The defendants were in business to sell a viable software product. Instead of making a profit, the defendants ended up owing a debt. This was a civil collection matter. If the defendants had sold their product, the debt would have been paid and the case would not exist. This was not a serious offense as compared to a case of violence or drugs.

Facts and Circumstances

When evaluating the facts and circumstances that resulted in a dismissal, the court should concentrate "on the culpability of the delay-producing conduct." *Id.* at 1093-94. The burden is on the government to expeditiously bring a case to trial and adhere to the Speedy Trial Act. *Seltzer*, 595 F.3d at 1176 -77. The government has a duty to protect the defendant and the public's interest in prosecute the case swiftly. *Barker*, 407 U.S. at 527. Here, the government agreed to several continuances disregarding the defendant's constitutional rights and the public's interest. (Docs 49, 75, 119, 324). The government and defense counsel had meetings, without the defendants' participation, to concede to the extensions. (Doc 119, ¶ 7). The defendants were gravely concerned about their court appointed counsels' adequacy and lack of due diligence to prepare for trial. Consequently, they terminated their attorneys. During any of the hearings for the continuances, the government did not inform the court of its lack of preparedness or readiness to proceed to trial. There was no reason for the lengthy delays. The government did not comply with the requirements of the Speedy Trial Act. The government failed to prosecute this case in a timely manner.

The Impact of Reprosecution on the Administration and Justice

In considering reprosecution, the court should analyze the importance of the effects on the administration of justice and weigh generalized and public interest. *Saltzman*, 984 F.2d at 1094; *United States v. Hastings*, 847 F.2d 920, 926 (1st Cir. 1988). When determining reprosecution, the court should consider the factors under § 3162(a)(1) and the prejudice suffered by the defendants from the delay and the further

exposure to prejudice. *Saltzman*, 984 F.2d at 1094. The prosecutor represents the people and has an obligation to protect their interest and ensure adherence to the Speedy Trial Act which was not done in this case. cf. *United States v. Caparella*, 716 F.2d 976, 980-82 (2d Cir.1983), (The oversight and administrative negligence may justify dismissal with prejudice if offense not serious)[.] The investigation in this case was lengthy. There was a prolonged delay in bringing the indictment and prosecution, spanning over a nine year period from 2002 through 2011. Reprosecution of this case expands a greater extent of delay provoking further prejudice and direct proof of actual prejudice. The longer the delay, witnesses become sparse and many unavailable, memories increasingly fade impairing the defense and costs escalate for the defense. The prosecution bears the effects not only of increasing costs to the administration but the public's resources with consideration in protection of the public's interest as well. The court found this was not a complex case. The government bears the burden going forward. The delay-causing conduct attributes heavily on the government and weighs in favor of the defendants of dismissal with prejudice.

Conclusion

All Defendants speedy trial rights were egregiously violated. The government did not comply with the Speedy Trial Act. The government disregarded its duty to prosecute the case in a timely manner. The government failed to protect the defendants' rights and the public's interest. Pursuant to the Speedy Trial Act and the Sixth Amendment, dismissal is evident by the improper ends of justice findings and the

clearly inaccurate calculations that were incorrectly excluded in the speedy trial time. The record supports grounds for dismissal with prejudice.

Wherefore, based on all the foregoing reasons, the Defendants respectfully request that the conviction be reversed, the sentence vacated and the indictment dismissed with prejudice, in the alternative, a hearing be held.

March 20, 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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