NO. 11-1487

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. BANKS,

Defendant-Appellant.

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

APPELLANT'S APPLICATION FOR RELEASE PENDING APPEAL

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To avoid duplication of background facts and legal arguments for release pending appeal, Defendant-Appellant Banks pursuant to F.R.A.P 28 (i) and 10th Cir. R. 9.2 joins in the Motion and separate Memorandum In Support of Joint Motion For Release Pending Appeal filed by Defendants Barnes, Harper, Stewart, Walker and Zirpolo (Case Nos. 11-1488, 11-1489, 11-1490, 11-1491, 11-1492; Doc. Nos. 01018903009, 01018903019).

Defendant-Appellant Banks hereby applies for an order permitting release pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3143(b), and Federal Rule of Appellate Procedure 9, pending the disposition of Defendant Banks' appeal to the Tenth Circuit. He is not a flight risk or a danger, and his appeal is not for the purpose of delay. Defendant Banks will file his opening brief as required by the Tenth Circuit, and that appeal will raise "substantial questions[s]" for review. 18 U.S.C. §3143(b)(1)(B); *United States v. Affleck,* 765 F.2d 944, 952 (10th Cir. 1985). Defendant Banks was required to immediately surrender to the U.S. Marshall's office in spite of probation's recommendation that he be allowed to self-report. Doc. 716, p. 29. Defendant Banks has remained free on bond through sentencing without incident since the indictment. His bond is secured by family and church members. Doc. 594. The Trial Court's sole reason for denying continued bail was that the sentence of 11 years imposed now made Defendant Banks a flight risk in spite of the fact that Defendant has been aware of the

investigation of this case since 2004 at least. Doc. 822, pp. 92-99. Under the Guidelines, Defendant is a low risk to be a recidivist. Doc.738, pp. 24-28. The crimes involved are non-violent. It is not disputed Defendant has no prior criminal history only traffic offenses.

Defendant Banks was convicted of conspiracy and 15 mail fraud/wire fraud counts. Doc. 479. Staffing companies agreed to advance payment of wages and taxes to individuals providing services to the Defendants' companies for IT development of the Defendants' software. Doc. 540, para. 5.

Defendant Banks is Entitled to Dismissal of all Charges Under the Speedy Trial Act and/or the Sixth Amendment

While pro se, the Defendant moved to dismiss his case on Speedy Trial grounds before trial which was denied. Doc. 445; Doc. 463. Defendant's criminal activities occurred between 2002 - 2005. Doc. 1, Indictment para. 4. The Government's investigation started in 2004. The Government had seized all of Defendant's computers and office information by 2005. Doc. 75, pp. 2-3. The Defendant was not arraigned until June 26, 2009. Doc. 38. Defendant did not proceed to trial until September 26, 2011. Doc. 447.

The investigation was to gather up the unpaid invoices and the statements from witnesses who the Government claimed were given false information about Defendants' ability to repay the staffing companies for software work.

There were 5 continuances requested in this case. Four were requested by former counsel for Defendants and one continuance request was by Defendants after they were permitted to proceed pro se. The pro se Defendants complained that their former counsel were not prepared to proceed to trial. Doc. 646, pp. 10, 20. Defendant Banks is not claiming that any time is excluded for his pro se request for a continuance.

While there are other legal issues and speedy trial violations that will be addressed on appeal, due to page limitation, Defendant Banks focuses on the Fifth Amendment issues and Speedy Trial violations that presents a substantial question based on the amount of time excluded. Previous requests by former counsel for Defendant Banks' continuances were lacking in detailed inquiry or findings by the Court to meet the ends of justice requirements discussed in *United States v. Toombs* , 574 F.3d 1262 (10th Cir. 2009), and as important, the tailoring of time requirements for motions in *Bloate v. U.S* **,** 130 S. Ct**.** 1345, 1356-1357 (2010). When the pro se Defendants made their request for a continuance, the Government and the Court complied with the requirements of *Toombs,* making the detailed inquiry and finding to support the request. Doc. 646. The Government and the District Court in its Order totally ignored even mentioning *Bloate,* much less stating why it was not applicable. Doc. 646, Doc. 710.

After Defendant was arraigned on June 26, 2009, Defendants filed an unopposed ends of justice motion on July 6, 2009 to exclude 90 days of time under the Act. Doc. 49. The Court granted this motion without a hearing on July 9, 2009. Doc. 63. On August 18, 2009, Defendant Stewart filed for a further exclusion of time from October 7, 2009 to January 29, 2010 for an additional 110 days. This time the motion is described as a Motion To Declare the Case Complex. Doc. 75.

The Court, in granting the continuance, made limited inquiry or requests for an explanation from the Government or the Defendants as to what specific progress has been made or what was causing the delay in progress. Doc. 647, pp.4-9.

On December 14, 2009, Defendants filed a motion for further exclusion of time from January 29, 2010 (deadline for Speedy trial) to January 25, 2011. Doc. 119; Doc. 240. This motion for continuance was a generalized repeat of its earlier requests for continuances and there was no inquiry by the Government and the Court as required by *Bloate* or *Toombs*. Doc. 240. Missing at a minimum is why there had been no progress in over seven months to accomplish what Defendants stated would be accomplished in their first two requests, nor is there an explanation why no motions had been filed . Doc. 240, pp. 2-14. Defense counsel admit the Government had streamlined the case by this time. Doc. 240, pp. 11-12.Yet at this

point defense counsel are still discussing how they "planned to set up their files" and review the materials. Doc. 240, pp. 7-8.

At the status conference held on December 18, 2009, the Court and the parties acknowledge the case was not as complicated as originally claimed. Doc 240 pp. 4-5. *U.S. v. Williams*, 511 F.3d 1044, 1058, 1060 Ftnote 13 (10th Cir. 2007)(The simplicity of the case cuts against granting an ends of justice continuance.) . With next to no questioning by the Court, (3 questions of Defendants) [Doc. 240, pp. 4, 6, 8] the Court decides, "… I will take you at your words that this is the time that was needed. ..." Doc. 240, p. 13.

With no motions pending, the earliest activity revealed from the docket is an April 15, 2010 motion to continue a discovery motion and a hearing on sufficiency of the Indictment. Doc. 171. The motion is granted on April 26, 2010 making motions due on May 21, 2010. On May 21, 2010 some motions are filed. Doc. 188-192. The first hearing was not set until June of 2010, with remaining hearings set over the holiday period. Doc. 240, pp. 17-24. The year long continuance allowed for this first continuance to file motions, and the later requests for additional extensions to file motions. Doc. 240. Plaintiff submits under *Bloate*, 154 days *(*December 18, 2009 through May 21, 2010) should be non- excluded time or using April 26, 2010, there would be 129 days of non-excludable time from December 18, 2009. Assuming that all time between May 21, 2010 through

January 31, 2011 is excludable time because of the lap over of motions, speedy trial has still run. At the December 18, 2009 status conference all motions to be filed were discussed, but there was no discussion why over four months of dead time would be inserted before motions started getting filed. Doc. 240. pp. 14-27.

Additionally, when this third request for continuance was granted on December 18, 2009, there was still 41 days left until Speedy Trial ran on January 29, 2010 Doc. 240. These 41 days are pure dead time, not addressed by the Court and are just allowed to swallow up this block of time that should not have been excluded. Doc. 240. pp. 25-27.

On November 19, 2010, Defendants asked for an additional 120 days. The represented Defendants' motion spends only 3 pages explaining why it is asking to do what they agreed they would not do, i.e. ask for another continuance. Doc. 240 p. 12, lines 13-25; Doc. 324, pp. 3-5. Defendants' claim they have only 56 days to prepare for trial." Doc. 324, p. 2. This calculation leaves out and ignores the additional 17 days available between January 14, 2011 and the trial date of January 31, 2011. (56 days plus 17 days alone equals 73 days) The need and reasons to extend the case for an additional three months versus one month, or two months to address Defendants' problems are not offered, nor questioned by the Court (three page transcript). Doc. 359. There is no mention of Court congestion or why motions were set over the holidays in the prior continuance request. Doc.

359. Doc. 240 pp. 14-27. In this next motion for continuance, the defense counsel continue to argue old news: "12. Despite counsel's good faith efforts, counsel have been unable to and will be unable to review and analyze the massive amounts of discovery in this case, perform necessary investigation, and adequately do trial preparation." Doc. 324, pp. 5-6.

At this late date, Defendants are still discussing travel to interview witnesses. Doc. 324, paras. 9, 10. As it turns out, no interviews or requests to travel for interviews was made by any of the six prior counsel. The Court in its order stated: 2. Due to the voluminous discovery, multiple defendants, and complex nature of the allegations in this matter, denying the requested continuance would result in a miscarriage of justice.... Doc. 327, para. 2. The Government agreed to all of these continuances. Compare to the Court's inquiry when the pro se Defendants requested a continuance. Doc. 646 , Transcript of Motions Hearing.

SPEEDY TRIAL ARGUMENT

Trial must commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1). Prior to Trial, Defendant moved to dismiss the case on speedy trial grounds. This motion was denied. Doc. 445; Doc. 463.

Defendant did not earlier in the case prospectively waive his right to speedy trial, nor can he be forced to. *Zedner v. United States*, 547 U.S. 489, 501-503 (2006); *Toombs*, 574 F.3d at 1273 (The district court and the Government are no less responsible under the Speedy Trial Act merely because it is a defendant who requests a continuance. ..... The Court also noted that it will consider the Government's lack of inquiry and passiveness in allowing the continuances.)

The Government should never rely on a defendant's unilateral waiver of his rights under the Act. This point is also the opinion of the Government. Doc. 396, p. 4, footnote 1. It is the prosecution's burden (and ultimately the court's) and not the defendant's responsibility to assure that cases are brought to trial in a timely manner. *U.S. v. Seltzer*, 595 F.3d 1170, 1179 (2010); *United States v. Williams*, 511 F.3d 1044, 1055 (10th Cir. 2007). A court can attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, *Barker v. Wingo* , 407 U.S. 514, 529 (1972).

The judge must set forth, its ends of justice findings, orally or in writing, his reasons for granting the continuance under the requirements of 18 U.S.C. § 3161(h)(8)(A). Reviewing its prior decisions, the Court in *Toombs* held in *Williams* and *Gonzales* the district court and the moving party, must provide an explanation of why the mere occurrence of the event identified by the party as necessitating the

continuance results in the need for additional time. *Williams*, 511 F.3d at 1058; *Gonzales*, 137 F.3d at 1434-35; *Toombs*, 574 F.3d at 1275. The court noted in *Toombs*, that the relevance or importance of the discovery is a factor as is why the district court thought it proper to grant an approximately two-month continuance in each of the orders. "Instead, the court twice erroneously relied upon conclusory statements lacking both detail and support in granting the continuances." *Toombs*, 574 F.3d at 1272. (Emphasis added)

In *Bloate*, the Court stated:

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

No dead time should have been allowed as happened here, whether it be the four months plus allowed in the third continuance before any motions are filed, or a blanket 120 days added to Defendants' trial preparation time when they still had 73 days to prepare for trial and had no legitimate reason for such an additional long request. Compare when the pro-se Defendants requested an additional 130 day continuance to take over the defense of their case and prepare for trial, Doc. 394, the Government objected and detailed questioning by the Government and Court occurred for the first time, complying with *Toombs* and *Bloate*. Doc. 646, April 4, 2011 Transcript, pp. 3-23. "(P)retrial motion preparation time may be

automatically excluded under subsection (h)(1) only when "the judge has expressly granted a party time for that purpose.""....*Bloate,* at 1357.

In considering the factors under the Act, a district court should consider the reasons for delay, the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution on the administration of this chapter and on the administration of justice" (emphasis added));18 U.S.C. § 3162(a)(1), see also *United States v. Taylor*, 487 U.S. 326, 343, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988). *Bloate* at 1358. Defendant submits under the Act the case should be dismissed without prejudice at a minimum, but a strong argument exists for dismissal with prejudice.

Defendant submits under either a Sixth Amendment analysis or under the Act that Defendant's rights were violated when all factors are considered under the applicable tests, including the four part balancing tests of *Barker v. Wingo* , 407 U.S. 514 (1972). Under a constitutional analysis, the courts still hold the district court and the government responsible for bringing a defendant to trial on a timely basis. *Seltzer* at1775-1776.

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

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

"The individual claiming the Sixth Amendment violation has the burden of showing prejudice." *Toombs*, 574 F.3d at 1275. The courts have identified three main interests: applicable here: (ii) the minimization of anxiety and concern of the accused; and (iii) minimization of the possibility that the defense will be impaired. *Id*. (citing *Barker*, 407 U.S. at 532, 92 S.Ct. 2182), because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Seltzer* at 1179-80.While the pre-indictment delay is not a direct element of the above factors, the courts have considered other delays. *U.S. v. Yehling,* 456 F.3d 1236, 1243 (10th Cir. 2006) (considering delays between arrest through the appellate process) Pre-Indictment delay should be considered as it impacted the continuous delays after indictment. As reviewed above, the pre-trial delays and trial delays should not automatically be blamed on the defendant himself.

To trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from `presumptively prejudicial' delay." *Doggett v. United States,* 505 U.S. 647, 651-52, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (quoting *Barker,* 407 U.S. at 530-31, 92 S.Ct. 2182). Post-accusation delay is “presumptively prejudicial” as it approaches

one year. *Doggett,* at 652 n.1. Mr. Banks has satisfied the first prong because the delay was more than a year, in fact, it was over two years.

The court must also factor in the reasons offered by the government for not bringing a timely action. *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). The burden belongs to the government to provide an acceptable rationale for the delay. *Jackson*, 390 F.3d at 1261; *Seltzer* at 1177. Based on the simplicity of the case and the evidence gathered by 2005, this delay requires a good explanation, but was not given. Doc. 63, Doc. 240, Doc. 647; *Seltzer*, at 1177. It should also be considered that had Banks been indicted sooner, he would have had the protection of the Speedy Trial act. *Seltzer,* at 1181. Negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered. *Barker*, 407 U.S. at 531; *Seltzer,* at 1177.

As discussed above, Defendant did not waive and preserved his Speedy Trial argument. Doc. 445. Under the category of minimization of anxiety and concern, Defendant Banks, as noted in Defendants' other motions, was subject of a media release that has impacted the Defendants since 2005. Doc. 679, pp. 33-37. The allegations in the media were serious. The allegations immediately impacted his ability to sell his product to law enforcement, aside from any staffing issues. Instead of moving quickly as if this was a serious case, the Defendant was left under a cloud for years. Courts have found that delay: "may 'seriously interfere

with the defendants liberty, whether he is free on bail or not, and ...may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'" *U.S. v. Biggs*, 419 F.Supp.2d 1277, 1282-83 (Dist. Court, D.Montana, 2006). The Government should be given no pass whether the delay was pre-indictment or pre-trial delay, the damage is just as real. *Biggs* at. 1283.

Memory was clearly an issue for every Government witness, which worked to the detriment of the Defendants. *Barker*, at 532. With Government witnesses motivated to provide favorable testimony, cross-examination was hampered. Doc. 677, p. 38. The courts recognize "the longer the delay, the greater presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial ...." *Biggs*, at 1282-1283. A delay from 2002-2005, the span of the conspiracy, to September of 2011, the date of trial, is a substantial delay of 7 to 9 years.

The factors that the court considers in determining whether the case is dismissed with or without prejudice are considered meaningful standards and must ensure the purpose of the Act is carried out. *U.S. v. Saltzman*, 984 F.2d 1087, 1092 (10th Cir. 1993).

The Seriousness of the offense.

Defendants did not make much money from their efforts according to the Government. Doc. 677, p. 39. The case at its heart was a civil debt collection case.

Had the Defendants' product sold, we would not be having this discussion. This was not a Nacchio case. There was no violence involved in the case.

Facts and Circumstances

The next aspect of the test focuses on what led to the dismissal of the case. (Where applicable). This aspect should focus on the culpability of the delay-producing product. *Saltzman,* at 1093,1094. This factor takes into consideration delay causing prejudice. While not a dispositive factor, there is little doubt it is a factor Congress intended the court to consider. *Saltzman,* at 1094. A delay in a case that spans 2005 to 2009 before indictment, lack of profit, the factors underlying the alleged criminal acts, should be considered heavily in favor of Defendant short of a good explanation for the delay in prosecution. *Saltzman*, at 1094-1095 (seven month delay in filing an information).

Reprosecution and the Administration of Justice

Deterrent effect is minimal. Obtaining free services from a staffing company is not a reported and certainly not a highly reported crime. *Saltzman*, at 1094-1095. Doc. 677, p. 40. The Government should have the burden of showing otherwise.

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

> MR. WALKER: Your Honor, I'm going to move that Mr. Barnes plead the Fifth Amendment, and ask for a retrial based on our –
>
> MR. KIRSCH: Objection, Your Honor. Can we approach the bench, please?
>
> THE COURT: Overruled. Trial Transcript Day 11, p.129.

There should have been a curative instruction to address Walker's inflammatory motion. A claim of Fifth Amendment protection is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination. *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974). In this case, the problem is worse as it impacts other co-Defendants, Mr. Banks.

The Court was required to give prompt instructions which were "well designed to cure whatever prejudicial impact." *Singer v. U.S.*, 380 U.S. 24, 38 (1965)(Emphasis added); *U.S. v. Lauder*, 409 F.3d 1254, 1262 (10th Cir. 2005). The Government's request to provide a curative instruction related to Walker's motion was denied. Trial Transcript, Day 11, p. 131. No instruction was ever given that clarified this matter. Trial Transcript Day 11, pp. 129-162. Doc. 678, pp. 8-9.

Barnes had taken the stand and was examined by co-defendants and by the Government when Walker made his motion. The Court determined, originally and correctly, he had waived the Fifth Amendment privilege. The Court then changed its position and permitted Barnes to repeatedly invoke the Fifth in response to the

Government's further cross-examination. Defendant Barnes should not have been allowed to retake the stand and repeatedly invoke the Fifth. Trial Transcript Day 11, pp. 131, 135, 136, 150, 153-155, 162-168. The Court instructed the jury they could consider his non-answers. Trial Transcript Day 11, pp. 158 - 162.

XVI. Inconsistent Application of the Law is Reversible error

Where the Court applies the law inconsistently, a reversal is mandated even under the plain error standard where such error affected defendant's "substantial rights," or had a high probability of affecting the outcome. *U.S. v. Hasan,* 526 F.3d 653, (10th Cir. 2008). See, *In re Brogna,* 589 F.2d 24 (1st Cir. 1978); *In re U.S. Hoffman Can Corp.*, 373 F.2d 622 (3d Cir. 1967). Had the Court stuck with its initial correct ruling, co-Defendants would have been offered some, albeit not much, protection. Prior to allowing Barnes to retake the stand, the Government offered to allow Defendant's testimony to be stricken with the stated goal in mind of eliminating any prejudice to the other co-Defendants. Trial Transcript Day 11, p. 134, 135. The Court did not do this.

The critical issue is that the inconsistent application of the well-settled law that prejudiced the rights of the co-Defendants. Under *U.S. v. Hasan,* 526 F.3d 653, 664,665 (10th Cir. 2008). The Fifth Amendment requirements and protection were not uniformly applied, to the detriment of the co-Defendants. Defendant Banks' protection to not take the stand was negated by the implication that another

co-Defendant anticipated a damaging answer that impacted all co-Defendants and the outcome for Banks. There was no way to determine if the jury could separate this implication from its duty to consider each defendant separately.

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

The Government became the benefactor of a third-party's effort to invoke the privilege that was solely Barnes' right to claim. A defendant or a third party may not use a witness's privilege to their own benefit by invoking it. *United States v. Colyer*, 571 F.2d 941 (5th Cir.1978); Also see, *Namet v. United States*, 373 U.S. 179, 186, 189, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963); *Bowles v. United States*,

supra, 142 U.S.App.D.C. 26, 439 F.2d 536, 541 (footnote omitted); *Lacouture*, 495 F.2d at 1240.

The Fifth Amendment issue was treated as if the trial involved only a single defendant. Trial Transcript Day 11, p. 152-153. A judge has a duty to protect a co-Defendant's interest independent of a party's actions. *United States v. Colyer*, 571 F.2d 941, 945, 946 (5th Cir. 1978).

When it became apparent that Barnes intended to claim the privilege as to essentially all questions, the Court could have, in its discretion, refused to allow him to take the stand. *Lacouture*, 495 F.2d at 1240; also see *Bowles v. United States*, 439 F.2d 536 (DC Cir. 1970). Defendant Banks submits the problem is critical where there are co-Defendants. As demonstrated by the Government's various proposed instructions and concerns with limiting prejudice to the co-Defendants, even the Government recognized the problem. Trial Transcript Day 11, p.131, 135, 136, 147, 148, 150, 153-156, 159. There were limited requests for input from Banks when the other instructions were discussed. Trial Transcript Day 11, pp. 131, 135, 136, 150, 153-155. The stock instructions were not adequate. Doc. 480-1.

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

Horowitz, 482 F.2d 72, 82 n.11 (2d cir.), cert. denied, 414 U.S. 867 (1973). See *U.S. v. Reynolds*, 345 U.S. 1, 8-9 (1953); *Brown v. U.S.*, 276 U.S. 134 (1928). A refusal to testify must not be permitted where a narrower application of the privilege adequately protects the witness' rights, in this case Barnes and the other co-Defendants. *Id*. See e.g., *U.S. v. Harris*, 542 F.2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *U.S. v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976). See, *In re Brogna*, 589 F.2d 24 (1st Cir. 1978); *In re U.S. Hoffman Can Corp.*, 373 F.2d 622 (3d Cir. 1967); *U.S. v. Frascone*, 299 F.2d 824 (2nd Cir.), cert. denied, 370 U.S. 910 (1962). The court must determine that the witness will assert the privilege as to essentially all questions which may be asked of him, *U.S. v. Reese*, 561 F.2d 894 (D.C. Cir. 1977), and whether reasonable grounds exist to fear incrimination, *U.S. v. Melchor Moreno*, supra.

When Barnes informed the Court he would take the Fifth to every question, he should not have been allowed to retake the stand. While no instruction could have fixed the problem, Banks was entitled to prompt curative instructions, whether offered by Defendant or not. The Government realized that both they and the Court had an independent duty to protect co-Defendant Banks.

CONCLUSION

Based on the foregoing fact and assertions , Appellant respectfully submits that he has demonstrated by clear and convincing evidence that he does not pose a

risk of flight or a threat to any other person or the community; that this appeal is not taken for the purpose of delay; and that the issues that they will present on appeal raise substantial questions of law or fact and are likely to result in a reversal, new trial, or reduced sentence.

APPELLANT'S CUSTODIAL STATUS

The District Court remanded Appellant to the custody of the U.S. Marshal's Service pending execution of his sentence. Defendant Banks is currently in the custody of the Federal Bureau of Prisons, and is imprisoned in USP Florence Admax Prison Camp.

Respectfully submitted this 27th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2012, I electronically filed the foregoing **APPELLANT'S APPLICATION FOR RELEASE PENDING APPEAL** 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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