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' REPLY BRIEF

Gwendolyn Maurice Solomon, Esq.*
Post Office Box 62654
Colorado Springs, Colorado 80962
gms@solomonlaw.org
www.solomonlaw.org
719.287.4511
*Lead Counsel

Joshua Sabert Lowther, Esq.
National Federal Defense Group
915 Bay Street, Suite 200
Beaufort, South Carolina 29902
jlowther@nationalfederaldefense.com
www.nationalfederaldefense.com
866.380.1782

Attorneys for Defendants-Appellants Barnes, Harper, Stewart, Walker and Zirpolo

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COME NOW KENDRICK BARNES ("Barnes"), DEMETRIUS K. HARPER ("Harper"), CLINTON A. STEWART ("Stewart"), GARY L. WALKER ("Walker") and DAVID A. ZIRPOLO ("Zirpolo") (collectively "Appellants"), by and through their undersigned counsel, Gwendolyn Maurice Solomon, Esq. and Joshua Sabert Lowther, Esq., pursuant to Fed. R. App. P. 28(c), and hereby reply to the United States' Consolidated Answer Brief as follows:

I. Factual Background

The Government states that the Appellants falsely represented that Leading Team ("LT"), IRP Solutions, Inc. ("IRP"), or DKH, LLC ("DKH") were on the verge of signing a contract to sell Case Investigative Life Cycle ("CILC") software to one or more major law enforcement agencies, or were already doing business with such law enforcement agencies. Testimony by current and former employees of Department of Homeland Security ("DHS"), Paul Tran and William Witherspoon evidenced that DHS was interested in a module presented by IRP and provided IRP with scenarios for software implementations, and after a second meeting with IRP,

Requested information on costs.[1] Doc 610. Paul Tran testified that DHS found an interest in CILC and if passed Immigration and Customs Enforcement ("ICE") testing would be admitted to the approved list. *Id*. He further stated that they made feature suggestions that DHS would need available in the application. *Id*. Therefore, there was no free labor, but workers dedicated to producing a product compatible with the needs of DHS, which may take several phases or customizations, as stated by Mr. Tran. *Id*. In order to modify modules or customize modules, a workforce of Information Technology ("IT") individuals is required. Thus IT professionals were staffed at IRP to customize the modules to present to DHS and other law enforcement agencies. As a result, the staffing agencies did not staff workers at IRP for free labor.

Exculpatory evidence obtained during the discovery process revealed that IRP was engaged in negotiations with the City of Philadelphia Police Department ("PPD") Chief Investigator Lorelei R. Larson. Discussions

[1] Then we gave them a scenario situation, and they took it back, and they came back and gave us a second demo based on the scenario we provided to them. It would have been between -- it would have been between October of the first meeting and before this, because we had time to look at that product and evaluate it, and then I asked for information on costs. Mr. Cooper said, hey, I am not sure if we can use the CILC total solution because it doesn't cover everything we needed, but I did like the confidential informant module. Doc 610. And, Mr. Cooper, subsequent to your viewing of the IRP Solutions' CILC product that you mentioned, did you continue to have interest in that product? A. We had an interest in the product as it related to completing our information gathering, our research, our market survey. There were a number of products that we looked at in concert to completing our market research. Transcript, October 17, 2011, pp. 1993.

between IRP and PPD included information request involving fees and costs for customization, configuration, maintenance and support. However, after the FBI contacted Gery Cardenas ("Cardenas"), Director of Information for the PPD, and informed him that IRP was under investigation, all communications and any interactions between IRP and PPD ceased. (FD-302, File No. 318A-DN-63228, 02192009.) Cardenas stated that PPD was very close to having the product installed prior to his discovery of the IRP investigation. *Id.* at p.3. This evidence was not submitted to the jury. During the second day of deliberations the jury asked for more evidence, with the presumption that they were not fully persuaded that a crime existed. Doc 619. Additional evidence as noted above would have rendered a different verdict in favor of the Appellants providing that there was no showing of criminal intent.

The Government argues that witnesses relied upon statements from Appellants that a contract existed between themselves and DHS and the New York City Police Department ("NYPD") to make a decision to do business with IRP. This is untrue. The witnesses that testified were not involved in negotiations with the Appellants and testified that they were not the decision makers to enter into the risk of business. The customary

standard of business practices to enter into a contract with the staffing companies, of which the witnesses acknowledged, was based upon Dunn & Bradstreet reports, list of references, or credit rating; not statements. Doc 466. When asked if decision was made to engage in business with the staffing agency, it was not based on the contract with law enforcement agencies, but a reliance of the terms of the contract. *Id*. The business standards and practices could have been further affirmed if Appellants witnesses, Andrew Albarelle and Kelly Baucom, were allowed to testify about the IT staffing industry. The facts present that there were no misrepresentations as witnesses were impeached time and time again acknowledging that they had no discussions that IRP affirmatively stated that had an existing contract with DHS or NYPD. There is no crime to be in negotiations and have a belief based upon the circumstances that with an interest in the viable product and staff needed to customize the product to present functionality requested that a potential sale is foreseeable. There were no false misrepresentations made. If there had not been a raid and the product had sold, the staffing agencies would have been paid and there would be no case.

All of the contract employees that testified affirmed they received their monies directly from the staffing companies and none of those funds passed through the Appellants hands. Doc 557, 614, 616. The staffing agencies affirmed that their employees were directly paid to their employees. The financial statement analyzed and provided by, Dana Chamberlin, Financial Analyst with the Federal Bureau of Investigation, evidences that the Appellants did not receive $5 million dollars. Exh. 902, 903. Consequently, there was no evidence of a conspiracy.

II. Speedy Trial Act Violations

The fundamental basis of the Government's argument that no Speedy Trial Act violation occurred is its assertion that the Appellants failed to properly oppose such delays until their Motion to Dismiss was argued on the first day of the trial. Gov't. Br. 40-41. This argument is shockingly disingenuous, as all parties fully acknowledge that the motions for excludable time and the reasoning offered in support for those continuances were not advanced by the Appellants, but rather by their prior counsel (Doc. 49, 75, 119, 324; Vol. I, pp. 71, 95, 102, 562), coupled with the lack of Counsel's due diligence led to the Appellants' terminating their attorneys and elected to represent themselves at trial; the

Government's claim now that the Appellants endorsed the delay is a gross misapplication of the facts on appeal. (Doc. 607, pp. 21-22; Vol. II, pp. 645-646).

Further, the Government never acknowledges its or the Court's responsibility to assure the adherence to the requirements of the Speedy Trial Act. Also, the Government minimizes the decision in *United States v. Toombs,* 574 F.3d 1262 (10th Cir. 2009) and importance of the Court's compliance with 18 U.S.C. § 3161(h)(7)(B)—listing the factors justifying proper continuances of excludable time and glossing over the Court's responsibility to meet the requirements on the record. (the record consisting of only short, conclusory statements lacking in detail is insufficient and simply identifying the event and adding conclusory statement that the event requires more time for counsel to prepare, is not enough). *Toombs*, 574 F.3d at 1271-72; *United States v. Larson*, 627 F. 3d 1198, 1204 (10th Cir. 2010.) The Court improperly granted and excluded time that violated the Speedy Trial Act. This very argument is a tacit admission that the court failed to consult 18 U.S.C § 3161(h)(7)(B) as mandated by *Toombs* and did so adopting defense counsels' unsubstantiated reasoning as to advance the argument that the Appellants' rights to a speedy trial

were virtually, and justly, waived. It is worth noting that this position has been endorsed by the district court as well. (Doc. 754; Vol. I, p. 1594). Regardless, the Appellants have never waived their speedy trial rights. The Appellants strongly disagree with both the Government and the district court, retaining their position that defense counsels' excuses—which the court endorsed wholly and without any inquiry—were both misinformed and unjustified. The actions of the Government and the Court do not preclude their obligation to enforce the Appellants speedy trial rights.

a. The July 9, 2009 Continuance

In refuting the Appellants' position that the July 9, 2009 continuance was improperly granted, the Government generally lists the Appellants' recitation of factual circumstances—as outlined within their Principle Brief—and summarily concludes all to be "meritless." Gov't. Br. 24-25. The Government then continues to recite the very boilerplate explanations as defense counsel did, contemporaneously admitting that the bases of their very arguments came before any personal review of discovery. *Id.* at 25. The Government disgorges the generic "voluminous discovery," and "multi-defendant," clichés, but conspicuously ignores the simplicity of the

case, the number of attorneys involved, and the lack of any proactive inquiries from the court. *Id.* All in all, the Government fails to eradicate the fact that the district court failed to comply with *Toombs* in its granting the ninety day continuance.

A district court has a duty, *i.e. Toombs*, to properly devote time in considering motions for excludable continuances, particularly where the reasoning offered by the defense is both nonspecific and premature. *Bloate v. U.S.*, 130 S. Ct. 1345, 1357 (2010). Just because rationale is included within a motion does not mean that a district court is allowed to routinely accept the reasoning, without further verification or review. *Id.*

This only supports the Appellants' position, because if the district court had conducted a proper inquiry, it would have realized the Government's lack of due diligence.

b. The August 20, 2009 Continuance

In its response brief, the Government reiterates some of the same facts that the Appellants discussed in their Principle Brief; in contrast, the Government claims that *Toombs* was satisfied. Gov't. Br. 25-28. The Government's unqualified sustenance for such a conclusion: "The motion and hearing transcript refute these allegations." *Id.* at 28. Yet, the

Government provides no evidence, facts, transcripts or documentation, supporting its opinions. *Id.* Contradictory enough the record exhibits the district court's cursory and vague proclamations when improperly granting a continuance of 110 days.

The Appellants, therefore, restate their position that the district court failed to comply with *Toombs*. The Government recites that "the court concluded that the case was sufficiently unusual and complex…." *Id.* at 27. All parties deduced that the case was, in actuality, a straightforward mail and wire fraud case, and while certain aspects of the same may have been tedious, the case itself was far from complicated. (Doc. 240, pp. 4-10; Vol. II, pp. 64-70). If the district court had fulfilled its judicial duties by complying with the requirements, the 110 day continuance would not have been granted.

c. The December 18, 2009 Continuance

The Government, in great detail, recites what seems to be a vast amount of very sound rationale for a continuance of 361 days of excludable time, Gov't. Br. 28-32; however, in regurgitating the exact reasoning of prior defense counsel, and while accusing the Appellants of wrongfully alleging "inaction and dithering," the *only* evidentiary support the

Government can muster to show progress and to refute such claims are "*ex parte* documents… which *likely* are…requests for…reimbursement." *Id.* at 32 (emphasis added) and does not exclude any time from the Speedy trial clock. These documents are not even a part of the record on appeal. Since the district court did not comply with either *Toombs* or *Bloate*, the Government does not have any evidentiary support available to its argument.

In citing the district court's justifications for granting such a continuance, the Government quotes the district court as saying "that failure to grant the joint motion 'would likely result in a miscarriage of justice by precluding the defendants from adequately being able to prepare for trial'" *Id.* at 32. The Government continues, "the court more specifically found... the case was 'so unusual and complex….'" *Id.* Yet, there is nothing *case-specific* related to these statements, and, thus, there lies the problem. These are the standard, boilerplate remarks a court must make, on the record, so to grant an excludable time continuance, but these judicial observations *must* be coupled with supporting case-specific facts that definitively explain a district court's justifications, as *Toombs* and *Bloate* unreservedly hold.

The Government suggests that Appellants' understanding of *Bloate* is inaccurate; yet, it describes the *Bloate* holding in the exact manner as the Appellants did within their Principle Brief. *Id.* at 34-35. The difference between the Government and the Appellants' understanding of *Bloate* is not one of legal interpretation, but one of factual application.

d. The November 22, 2010 Continuance

It is true that prior defense counsel's reasoning for an excludable time continuance was shared with the district court. (Docs. 49, 75, 119, 324; Vol. I, pp. 71, 95, 102, 562). It is also true that a court does not retain the duty of "separately [reciting]…," Gov't. Br. 37, counsel's professed rationale for a continuance request. *United States v. Toombs*, 574 F.3d 126. However, it is incorrect to suggest that a district court does not have the responsibility of "separately… [analyzing]," Gov't. Br. 37, such rationales. *Bloate, supra.* In fact, the Appellants strongly maintain that calls for the most intricate of inquiry and verification were necessary to defense counsel and the government after requesting a 361 days adjournment with no objection by the government. The Government's position assumes that defense counsel's reasoning, for the fourth continuance of excludable time, is plainly obvious and above repudiation. This is the *fourth* request. The

Government suggests that "[the] district court was presiding over these matters…and would have been personally familiar with the problems cited by defense counsel." Gov't. Br. 37. The Appellants respectfully submit that this statement is an admission that the district court failed to comply with Tenth Circuit precedent. 18 U.S.C. § 3161, in conjunction with both *Toombs* and *Bloate*, demand judicial considerations be put "on the record." 18 U.S.C. § 3161(h)(7)(A). A district court cannot ignore these duties merely because it presides over a legal dispute. There was no time whatsoever devoted to assuring that the defendants and the public's right to a speedy trial had been protected, and made clear upon the record; hence, there is neither a *Toombs* nor *Bloate* analysis.

The position that both the district court and the Government have taken—in that a thorough vetting into all reasoning offered for excludable time requests is not necessary, as long as defense counsel filed "very well drafted joint motion[s]" (Doc. 240, p. 14; Vol. II, p. 74)—amounts to an admission that *Toombs* and *Bloate* were *directly* ignored. The question, therefore, is whether *Toombs* and *Bloate* may have been *indirectly*—or even unconsciously—satisfied. Just because a district court issues the boilerplate "denying the requested continuance would result in a miscarriage of

justice…" reasoning, does not mean that the said court withstood its judicial responsibilities. Gov't. Br. 37. The government continues to evade or address its responsibility to enforce the Speedy Trial Act.

The Speedy Trial Act was violated on four occasions, any one of which justifies a reversal.

III. Fifth Amendment Prohibition of Compulsory Testimony

The prosecution's case ended a week and a half sooner than advised with no notice except the day they rested their case, placing the Appellants in the difficult position of rescheduling the presentation of their entire defense. App. Br. 51; Doc 614. The Government argues—with regard to the eleventh day of trial, in particular—that this very predicament is virtually irrelevant, as the eleventh day of trial was five days after the defense began presenting their case. Gov't. Br. 50. The Government then attempts to mitigate the district court's compulsory actions and lack of judicial assistance to enforce subpoenas, by stating that the trial judge "found it necessary to repeatedly admonish defendants for not having witnesses available to testify" as examples of unpreparedness. *Id.* The Appellants view these incidents as direct examples in which the difficult position that the Government's premature conclusion, coupled with the district court's

inflexibility, placed the Appellants. Nevertheless, the Government seems to be unable or at least unwilling, to grasp the issue the Appellants are actually arguing. Where defendant testimony has been improperly compelled, no voluntary waiver can exist; therefore, all statements made by Appellant Barnes were in direct violation of the Fifth Amendment protection from such action, rendering the Government's testimony-specific position moot. U.S. Const. amend V.

In actuality, the issue on appeal is twofold: The first component concerns compulsion, as the trial court refused to grant a mere forty minute continuance, by demanding that one of the Appellants take the stand immediately, or else all of the Appellants would forgo their right to present a plenary defense. (Doc. 557, pp. 53-54). Several of the district court's compulsory comments are not within the record on appeal, as an accurate transcription of the pertinent bench trial has yet to be produced. The second portion concerns judicial oversight. Following Walker's improper invocation of Barnes' Fifth Amendment right, the district court decided that no curative instruction—or any other just measure—was appropriate; instead, a lengthy lunch break was the intended cure. *Id.* at 131.

a. Compulsory Action

28 U.S.C § 753(b) states, in pertinent part, that "each session of the court and every proceeding…*shall* be recorded verbatim [by a court reporter, in]…all…criminal cases had in open court" *Id.* (emphasis added). Bench conferences, in particular, must be transcribed. *Stansbury v. U.S.*, 219 F.2d 165, 172 (5th Cir. 1955). To obtain relief for due process violations—owing to an inadequate, or missing, transcript—an appellant must show that the absent portions-at-issue relate to a matter material to the case, which, in turn, materially affects the appellant's ability to obtain meaningful appellate review. *U.S. v. Kelly*, 535 F.3d 1229, 1243 (10th Cir. 2008); *see also*, *Witjaksono v. Holder*, 573 F.3d 968, 975 (10th Cir. 2009). Tenth Circuit precedent reigns wholly applicable to this case on appeal for the minutes, as discussed below, are both missing (both the Government and district court concur) and relate directly to whether substantive due process may have been violated.

Though the incomplete record *does* indicate—despite the proclamations of the Government—that the district court offered the Appellants the impossible choice of offering defendant testimony, or abruptly—and involuntarily—halting the presentation of their defense, the

compulsory testimony issue cannot be adequately resolved until the missing transcript is produced. *Id.* Though the Government attempts to convince this Court that the missing transcript is "immaterial," Gov't. Br. 54, nevertheless, the Government never denies that the transcript is missing. *Id.* at 42-60. In fact, the Government essentially attempts to sell this Court an indisputable supposition that "nothing *in the record*…supports [the Appellants'] claim of compulsion." *Id.* at 54 (emphasis added). Only without the transcript can this mode of thinking be considered seemingly arguable; even so, the Appellants believe that even the incomplete record speaks for itself, and that it positively indicates compulsion. Regardless, as exhaustively stated before, the issue cannot be resolved without the missing transcripts, which the Government and the district court admit are nowhere to be found. *Id.*

Pursuant to the Court Reporters Act, 28 U.S.C.A. § 753(b), Congress has mandatorily required that a court reporter shall record all proceedings verbatim in criminal cases had in open court which includes sidebar conferences. *Fowler V. U.S*, 310 F.66, 67 (5th Cir. 1962); *U.S. v. Brumley*, 560 F. 2d 1268, 1280 (5th Cir. 1977); *U.S. v. Sierra,* 981 F.2d 123, 127 (3rd Cir. 1992). When a criminal defendant is represented on appeal by counsel

other than the attorney at trial, the absence of a substantial and significant portion of the record will result in a presumption of prejudice to mandate reversal. *Brumley*, 560 F.2d. at 1281. The government attempts to diminish the violation by briefly mentioning that a side bar occurred but refuses to state its position on the record as to what was stated at the sidebar. Gov't. Br. 35. Further, the government stated that the bench conference was recorded contrary to the acknowledgment by the Court that it was not. Doc 652, 841, 846.

The Appellants assertion at the bench conference that they were not going to testify injects an objection to the Court. The Court denied the objections, hence, denying the Appellants their constitutional right against self incrimination and violating their rights by compelling one of the defendants to take the stand with a threat to not continue their case. Appellants placed further objections on the record by requesting a copy of the transcript that was refused to be released by the Court Reporter, Darlene Martinez, and then shortly thereafter informed by Ed Butler via the Court Reporter that the transcript was destroyed. Doc 636. Counsel for the Appellants filed motions to request release of the transcript which was denied and motions for reconsiderations were denied. Docs 631, 633, 635,

636, 652. The Court acknowledges that the transcript is missing and verbiage and provides its rendition which is directly in conflict of the six Appellants recollection of events. Doc 652, 846.

Moreover, others attending the bench conference were the bailiff which statement has not been placed on the record or the court reporter, who has failed to state why the record is missing and now destroyed. In such situations, an individual's only protection against the mobilized power of the State is his Fifth Amendment privilege, but it is a protection of which there must be safeguards to make him aware. *United States v. Mandujano*, 425 U.S. 564, 595 (1976). Careful measures are needed if the privilege is "still [to stand] guard when so much is attempted by inquisition, however subtle, at any stage of the [criminal] proceedings." *Id.*; *Wood v. United States*, 128 F.2d 265, 279 (1942).

It is a duty of a federal court in the trial of a criminal case to protect the right of the accused to counsel, and, if he has no counsel, to determine whether he has intelligently and competently waived the right. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). This not only applies to Sixth Amendment right but also Fifth Amendment. *Wood,* 128 F.2d at 277; *U.S. v. Robinson*, 459 F.2d 1164, 1169 (D.C. Cir. 1972). Prior to Barnes originally taking the stand

there is no indication in the record that Appellant Barnes knowingly and intentionally waived his right against self incrimination guaranteed by the Fifth Amendment. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Zerbst*, 304 U.S. at 464. The Appellants have filed Joint Statements of the Evidence pursuant to Fed. R. App. P. 10 (c) to reconstruct the record. Doc 847. The prejudice is substantial to a violation of the defendants' constitutional right. The prejudice continued when the AUSA with full knowledge and intent presented the Appellants guilty in the eyes of the jury by allowing Appellant Barnes to proceed to testify with full knowledge that when put back on the stand that he was going to assert his Fifth Amendment privileges. This is a conspiracy case and, as a result, prejudiced all Appellants. In light of the government's request for a curative instruction, the Court disregarded such request. There was no instruction given to cure the confusion before the jury or to verify that Appellant Barnes was voluntarily waiving his right to remain silent. Thus, due to the missing transcript and intentional destruction, without the arguments on record of counsel, the Appellants and the district court, this Court is unable to determine whether the district court made the prejudicial orders and

reversal is required. The prejudice is substantial to a violation of a defendants' constitutional right. Therefore, the Appellants request judgment of conviction and sentences be reversed.

b. Judicial Mitigation (i.e., Curative Instructions, etc.)

After Walker attempted to invoke Barnes' Fifth Amendment right—before a sitting jury—the district court dismissed the jury panel for a lunch recess, without offering any pertinent judicial instruction beforehand. (Doc. 557, p. 131). The Government concedes this point. Gov't. Br. 44-45. Regardless, the Government argues that because the Appellants subsequently declined curative instructions, thus exhibiting "intent," a waiver transpired, and the Appellants failed to preserve this issue for appeal. *Id.* at 54-57. Yet, only moments *before* the Appellants are seeking to retain the very rights the Government unashamedly proclaims were "knowingly and intelligently relinquished;" *Id.* at 55, even if those rights were retained in a manner of makeshift and spontaneous preservation. It is unwarranted to claim that the Fifth Amendment issue—in its entirety—was not preserved for appeal. (Doc. 557, pp. 132-155).

As the Government acknowledges, the analysis for plain error involves a clear and obvious legal mistake, which consequently affects the

Appellants' substantial rights, and the fairness of a judicial proceeding. Gov't. Br. 56, citing *United States v. Fabiano,* 169 F.3d 1299, 1301-02 (10th Cir. 1999). Here, Barnes was compelled by the trial court to testify against his will, leading to the Walker's improper invocation of a co-defendant's Fifth Amendment right, and all for the jury panel to behold. In response, the court decided to recess for lunch, and, subsequently, *not* directly referencing Mr. Barnes' and Mr. Walker's invocations and motion for mistrial, but reminding the jury that statements and objections…were not evidence…" *Id.* at 46 (emphasis added). The Government believes that the testimony at issue was not incriminating, conveniently dismissing the Court's long, historical view that the Fifth Amendment protection comes with it major potential for prejudicial implications. *Baxter v. Palmigiano,* 425 U.S. 308 (1976), *supra.* This is what is at issue, and plain error seems fully evident.

IV. Sixth Amendment Right to Present a Plenary Defense

As the Government recounts its rendition of facts within its Response Brief, it references several witness statements: testimony from staffing firm employees, law enforcement procurement personnel, and more. Gov't. Br. 12-14. In conjunction with these references, the Government describes the

communiqués between these parties and the Appellants; and, in so doing, generally reassert that staffing firms "…relied on [certain] representations in deciding whether to do business with the [Appellants]" *Id.* at 13, and that law enforcement "…established not only that [the Appellants] had made no sales of CILC to…agencies, but that the [Appellants] had no basis even for believing that such sales were imminent." *Id.*

Besides these accounts being subjectively partial, they explicitly exhibit the *importance* of this issue on appeal. The Government mentions its perspective of the case matter-of-factly, in abhorrent fashion, as they knowingly fail to state that—inopportunely contrary to their position—that law enforcement witnesses encouragingly explained in full detail their positive, supportive meetings they underwent with the Appellants (*see,* Doc. 609, pp. 434-449, Doc. 558, pp. 214- 251, 265-283; Vol. II, pp. 1136-1151, 2524-2561, 2575-2593). Further, the Government fails to mention law enforcement representatives' willingness to explain and guide the Appellants through the inefficient, bureaucratic processes that proved necessary for such potential sale. *Id.* The Government goes as far as quoting John Shannon as stating that the NYPD was "furious" when the department received, via mail, CILC software prototypes, Gov't. Br. 14.,

when in fact, the NYPD *procurement personnel*—whom the appellants were already engaged with in constructive, and reciprocating, discussion—wanted to confine the process to standard procedures, without exposing the software prematurely to precincts. (Doc. 558, 223-251; Vol. II, 2533-2561). Nonetheless, and as the Government conveniently omits, those very precincts—similar to the NYPD Information Technology procurement liaisons themselves—were impressed with the software, displayed positive receptivity towards the CILC product and requested cost information. *Id.*

The Government further conveniently fails to mention that staffing firm employees admitted to standard—yet surprisingly superficial and perfunctory—confirmation checks, product and sales verification procedures (often in the hands of distant credit department personnel, and customary Dunn & Bradstreet database queries), before willingly entering into business contacts with information technology firms similar to the Appellants.' (*see,* Doc. 610, pp. 232-258, Doc. 611, pp. 926- 930; Vol. II, pp. 1393-1419, 1628-1632). For example, when asked if the typical vetting process involves application submission or credit checks to determine whether a prospective payrolling investment is sound or not, Mr. Krueger, an information technology staffing specialist, answered, "[i]t is a

determination of good-faith relationship;" directly confirming that it is nothing more than a routine "*subjective* exercise." (Doc. 610, p. 255; Vol. II, p. 1416). These remain the same background inquiries for which the Appellants' venture qualified, and surpassed, each and every time a staffing firm conducted such review.

The Government moreover ignores its role in adversely affecting the viability of the CILC product for purchase; that a mere sale of CILC was made infinitely more difficult after the Government made public press releases speaking of criminal investigations, and FBI search warrants, amidst Appellants' efforts to sell their software.

a. Exclusion of Expert Witnesses

In making its argument, the Government notes that the Appellants "reported substantially overlapping, if not identical, hours for the same employee," Gov't. Br. 16, and that Appellants "increased… loss to the staffing companies." *Id.* at 17. The Government is only able to paint such a picture, here on appeal, because the Appellants were disallowed from calling witnesses that would have directly attacked these very assertions. (Doc. 616, pp. 1636-1657; Vol. II, pp. 2338-2359). Both Mr. Andrew Albarelle, and Ms. Kelly Baucom, as mentioned in the Appellants' Principle

Brief, would have explained that the aforesaid payrolling practices were not abnormal, and that all staffing firms anticipate, and plan for, certain business-related risk-taking corollaries, which include monetary losses. App. Br. 65-66.

Predictably, the Government argues that Appellants failed to adhere to the provisions of Federal Rule of Criminal Procedure 16, and the pertinent provisions of the Federal Rules of Evidence, *inter alia*, making it appropriate for the district court to disallow said testimony. Gov't. Br. 60. In its argument, the Government suggests that the Appellants knew better, as is exemplified by their prior adherence to the rules regarding witness Donald Vilfer. *Id.* 61-62. In using Mr. Vilfer's disclosure as an example of the Appellants' alleged disregard for proper procedure, the Government is extraordinarily insincere. The Government—within the very same document—explains that Mr. Vilfer's disclosure transpired while the Appellants were represented by prior defense counsel, and not after their election to proceed *pro se*. *Id.* Further, the Appellants' have continually held that the Government had not requested disclosure for expert witnesses—as the minutes indicate—and, that regardless, disclosure had

been provided via the letters to the United States Attorney for the District of Colorado, John Walsh. App. B. 59-71.

The Government asserts that the Appellants did not follow the technical requirements of Fed. R. Crim. P. 16; Although in a footnote, the Government alleges that there is an inference of bad faith on the part of the Appellants, yet inadvertently admitting that no actual bad faith can be shown. Gov't. Br. 66. Without an affirmative showing of bad faith, the action of exclusion was inappropriately harsh. Fed. R. Crim. P. 16. Again, the Appellants felt that there had been no prosecutorial request for disclosure, and that the letters—submitted to the United States Attorney for the District of Colorado—were sufficient nevertheless. In the light of those letters, the witness list and the email notifications—of which the prosecutorial team received—the Appellants submit that there only lay an inference of *good* faith. App. Br. 70. While the district court penalizes the Appellants for their oversight in Fed. R. Crim. P. 16 and are sanctioned by not allowing critical witnesses, AndrewAlbarelle (Albarelle) and Kelly Baucom (Baucom), the Court allows witness Joseph Thurman to testify through the same formalities by submitting a letter with his credentials twenty-four hours prior to his testimony. Doc 558. The testimony was not

duplicitous as Albarelle is an owner of a staffing agency with over eighteen years of experience with the knowledge to testify to all aspects of the staffing industry. Baucom is an account manager with fourteen years of experience and able to testify in aspects of and how account managers recruit businesses, decision makers, payrolling and time reporting. Whereas, Joseph Thurman was a Director of Business Development with a different aspect of business recruiting and recruiting of employees.

V. Structural Error

The Government attempts to define structural error which it states include "the lack of an impartial judge…" Gov't. Br. 39. Appellants filed a motion for recusal based on bias toward the Government, which was denied. Doc 558. It is obvious in the record and throughout transcript where bias has been displayed toward the Government, such as, the defense requested assistance with subpoenas (duty of the Court to enforce) instead were scolded for their efforts, critical evidence was precluded and destroyed, witness tampering was presented to the Court and not addressed, constitutional rights were violated and diminished, 99% motions presented by the pro se Appellants which were denied. Docs 557, 558, 617.

The Government's entire supposition of the case, as is indicative of its Statement of the Case and Facts section, relies wholly on the theory that the Appellants' business practices were improper and fraudulent, Gov't. Br. 11-17; however, that very fundamental and qualified scheme has not yet been contested fully in a court of law, since key defense witnesses were excluded from testifying. Had the jury heard sworn statements concerning the faults within the procurement and staffing processes, the customary rituals of the Information Technology sector, and more—all in conjunction with the inconsistencies that the Government's case-in-chief had already portrayed—an objective fact-finder may not have viewed things in the sole manner that was judicially, and narrowly, permitted. The Appellants have a constitutional right to present a plenary defense, and the extreme sanction of disallowing vitally significant witnesses—so to bar such full explanatory elucidation—was extreme, unjust, and unreservedly improper.

VI. Conclusion

Based on the foregoing reply, the Appellants again respectfully pray that this Court reverse their convictions and remand this case to the District Court with an order to dismiss the indictment based on a violation of the Speedy Trial Act with Prejudice, or in the alternative, dismiss the

convictions based on constitutional violations and structural error; or in the second alternative, grant a new trial based on the District Court's exclusion of Appellants' expert witnesses.

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

This reply brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B)(ii) by its containing 5,563 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 for Mac 2011™ in Book Antiqua 14-point font.

s/ Gwendolyn Maurice Solomon, Esq.
Gwendolyn Maurice Solomon, Esq.
P.O. Box 62654
Colorado Springs, Colorado 80962
gms@solomonlaw.org
www.solomonlaw.org
(719) 287-4511

CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that (1) all privacy redactions have been made; (2) the CM/ECF Appellate submissions of this brief and its attachments are exact reproductions of the originals of the same; and (3) the said electronic submissions of this brief and its attachments have been scanned for viruses with the most recent version of a commercial virus scanning program, which has indicated that the brief and its attachments are free of viruses.

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s/ Gwendolyn Maurice Solomon, Esq.
Gwendolyn Maurice Solomon, Esq.
P.O. Box 62654
Colorado Springs, Colorado 80962
gms@solomonlaw.org
www.solomonlaw.org
(719) 287-4511

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, a true and correct reproduction of the APPELLANTS' REPLY 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:

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

Mr. Matthew T. Kirsch, Esq.
Assistant United States Attorney
District of Colorado
matthew.kirsch@usdoj.gov

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

s/ Gwendolyn M. Solomon, Esq.
Gwendolyn M. Solomon, Esq.
P.O. Box 62654
Colorado Springs, Colorado 80962
gms@solomonlaw.org
www.solomonlaw.org
(719) 287-4511