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 BANKS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

With limited exception, the Government attempts to lump Banks' arguments together with the other Defendants. Banks' brief makes different arguments on legal issues and factual issues. The impact and prejudice to a co-conspirator in Banks' position is a major separate concern as the trial played out.

SPEEDY TRIAL REPLY

Defendant Banks' main arguments address the Court's failure to comply with *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009) and *Bloate v. U.S.*, 130 S. Ct. 1345, 1356-1357 (2010).

The District Court Failed to Comply with *Toombs*

The Government offers a *Toombs* "light" interpretation of the Speedy Trial Act. This Court's opinion in *Toombs* provides several reasons why this interpretation is not appropriate. The Government, while citing to limited portions of *Toombs*, overlooks this Court's requirement to review the District Court's actions de novo for compliance with the legal requirements of the Act, (*Id*. at 1268), and that the ends of justice requirement is meant to be rarely used. *Id*. at 1269. The majority in *Toombs* rejected the dissent's position that a more limited inquiry and finding would be sufficient to exclude time, pointing out that "this court's precedent and the words of Congress would be eviscerated." *Id*. at 1272, 1273. The Government also ignores the majority's discussion that delays are not

automatically attributed to the defendant. *Id*. The Government ignores this Court's reaffirmation that the defendant's responsibility for continuances does not unwind Speedy Trial Act Violations. *Id*. at 1273. Banks will not repeat the additional rationale for placing compliance with the Act on the Court and the Government, which was previously reviewed in Banks opening brief. Banks Br. 12, 13. As previously noted, the Court may consider defense counsel's requests for continuances separate from a defendant's acquiescence in the requests. Banks Br. 13.

Banks submits that the first request for a continuance could probably pass muster based on the amount of discovery, potential number of witnesses, and need to become familiar with the case. On the other hand, Banks submits that the Court's lack of inquiry and findings in granting the second continuance provides an argument that the inquiry and finding required under *Toombs* was lacking. Banks makes this argument based in part on the fact that there is a clear misunderstanding on what was to be accomplished during the second continuance, which is not accurately reviewed by the Government. Banks submits that the lack of inquiry and findings during the hearing on Defendants' second request for a continuance made the requirements of *Toombs* mandatory in granting the third and fourth continuance requests, as the same boilerplate requests continue to be the basis for requesting additional continuances.

The Second Continuance Request August 10, 2009

There was no discussion during this request questioning why co-conspirator statements would not be available sooner for Defendants to review, or why their disclosure had not been requested sooner. The Government cannot and does not dispute that discovery for Defendants' proposed motions attacking the indictment and motion to suppress had been available since July 2009. Gov. Br. 15. As pointed out in Banks' opening brief, no trips to interview witnesses were taken. Banks Br. 12. The record does not address any of these issues. In that regard, the Government makes the weak unsupported argument that Defendants were in-fact filing "motions" during the continuance. Gov. Br. 23. First, the motions the Government refers to are based on speculation and were not pre-trial motions that impact the Speedy Trial Act. Two, the Government provides no evidence to support their speculation and are welcome to supplement the record. Banks will provide any waiver required. The Government cannot dispute that there were no witness interviews by previous counsel or travel to interview witnesses, evidenced by the fact that during the fourth continuance request, Defendants are still discussing travel to interview witnesses. Gov. Br. 27. The above discussion, rather than occurring now, is the discussion that should have been occurring no later than

the second continuance request. In any event, there is no record for this Court to review to support the Government's arguments.

The Government fails to address the mistaken position stated by the Court in granting the second continuance that the conspiracy covered a seven-year time span, when in fact it only covered a little over two years.

> The Court: ….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. Vol. II, pp. 26:23-25, 27:1.

Trying to lump the four-year delay in returning the indictment in 2009 onto the two-year conspiracy ending in 2005 is no small oversight in justifying a continuance under *Toombs,* even though it suggests a convincing argument for a continuance, but does not accurately reflect the reality of the case.

Banks reviews the inquiry and findings involved in the first and second continuances to contrast with the lack of inquiry and findings involved in the third and fourth continuances. The comparison reveals that by the fourth request, counsel for the Defendants are no further along than they were after their first continuance request, stating in their fourth request:

> "12. Despite counsel's good faith efforts, counsel have been unable to and will be unable to review and analyze the massive amount of discovery in this case, perform necessary investigation, and adequately do trial preparation." Vol. I, p. 566.

The Government clearly avoids addressing the assurances made by the Government and Defendants in obtaining the third continuance: "that absent some

unforeseen catastrophic circumstance", no party was intending to request or expecting a continuance to be granted. Vol. II, p. 43:2-25.

Defense counsel spent only three pages explaining why they are asking to do what they stated they would not do short of extraordinary circumstances. Banks Br. 11, 12. In spite of this, the Court, in granting a fourth continuance, gives the generic statement that has been the continued basis for granting continuances:

> Due to the voluminous discovery, multiple defendants, and complex nature of the allegations in this matter, denying the requested continuance would be result in a miscarriage of justice. Vol. I, p. 571.

The inquiry and findings required by *Toombs* are not form requirements. The reviewing court must have a sufficient record to review in order to determine whether a continuance was granted for the wrong reason, and to not "encourage overuse of this narrow exception". *Id.* The District Court makes no mention of the standard "unforeseen catastrophic circumstance" agreed to by the parties that would be considered in allowing an additional continuance. Instead, the Court, in granting the fourth continuance, states:

> 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. Vol. II, p. 506:8-12.

This is all there is - no inquiry - no discussion of the additional time still available to Defendants to prepare for trial. There is no discussion of trial

preparation not accomplished, aside from outstanding briefing because hearings were set right up against the trial date. Banks Br. 9-12. Banks submits these are not unforeseen circumstances. There is no discussion why any shorter period of time would not address counsel's concerns. The Court's calendar through May 23, 2011 is not discussed. Vol. II, pp. 506-508. To the extent there are other issues raised in the fourth request, the issues are tied to matters that should have been addressed by the District Court in the second and third requests for continuances. Banks Br. 6-12.

The Government makes Banks' point in attempting to argue that the District Court was justified in granting the fourth continuance. The Government points to the James proffer offered by the Government on October 28, 2010. Gov. Br. 26, 27. All parties knew since the time of the Indictment that this was a conspiracy case which involved numerous potential witnesses and co-conspirator statements, yet it is some 19 months later that the lateness of the disclosure of co-conspirator statements is raised by defense counsel. Gov. Br. 26. Waiting to schedule trips to interview witnesses until the eve of trial would have seemed to have prompted some concern by the Court, i.e. what have you been doing up to this point? There is no indication from any discussion on the record that any traveling for witness interviews had occurred that would support the Government's position that reimbursements had been requested by any defense counsel for travel or costs

associated with interviewing witnesses prior to the fourth request for a continuance. Gov. Br. 27. Nor does the Government adequately address why defense counsel waited for 19 months to figure out they were having trouble "opening" some discovery files. Gov. Br. 26. It is undisputed that Defendants had hired an IT expert months earlier and the Defendants were all software IT specialists who had access to all of the computer information seized by the Government. No mention is made or inquiry undertaken by the Court to sort out these questionable problems that continue to repeat themselves. The Western Union documents are acknowledged to be non-issues. Gov. Br. 27.

The Third Continuance - December 14, 2009

The Government now suggests for the first time that the third continuance was set to consider pre-trial motions and deadlines. Gov. Br. 19. This is not exactly accurate. In considering the second request for a continuance, the District Court expected pretrial motions would be scheduled at that status conference:

> THE COURT: Counsel, we are here today on a status conference. We were originally scheduled to set pretrial motions and a trial date, but I do have before me an unopposed motion for further exclusion of time under 18 U.S.C. Sections 3161(h)(7)(A) and (B).
> Vol. II, p. 23:17-21.

Then, in granting the second continuance, the District Court specifically set an early status conference to address pre-trial motions that should have been filed:

> THE COURT: Well, January -- the speedy trial runs January 29th. I would like to set something in December. I was looking at probably the first week of December to give us enough time to get motions in, get them ruled on, and then move forward. So I was looking at probably the first or second week in December. Vol. II, p. 29:15-20.

Instead, no motions were filed. In spite of this stated goal, Defendants are able to come in with minimal inquiry and ask for, in their own words, an arbitrary exclusion of time, which the Government is hard pressed to argue is tailored to meeting either *Toombs* or *Bloate* requirements:

> MR. BAKER: And that is what we were essentially shooting for in drafting the motion. We indicated that we would like a trial toward end of January, so we tolled speedy to right about that time. <u>That 361 days was kind of an arbitrary number.</u> So whatever the correct number of days to get us to January 31st is fine with us. (Emphasis added) Vol. II, p. 87:10-15.

The problematic approach to handling the exclusion of time is further demonstrated by the discussion that occurs between the prosecutor and the Court where additional time is arbitrarily excluded from the previous speedy trial calculation in spite of the fact that no motions had been filed or were pending when the Court granted the 361 day continuance from the previous speedy trial deadline of January 31, 2010. Vol. II, pp. 56-58. The Government can't argue that there is a lap over of time between pending motions that would allow for exclusion of time from the previous calculation by the Court. As previously argued by Banks, this

meant that an additional 41 days was excluded without any justification on top of the four-plus months of excluded time.

The Government's brief fails to address the fact there was no discussion of identifying specific motions during the first 14 pages of the hearing or tailoring the time needed for motions to the specifics of the motions and/or any problems that would result in setting motions up against the holidays and trial. Vol. II, pp. 35-44. Certainly there was no discussion why the 361 days chosen by defense counsel as an arbitrary number should not have some connection to motions to be filed versus when the trial was to be set. This is the *Bloate* problem addressed by Banks.

While the Court expresses an initial concern, when the third continuance is requested, (Vol. II, p. 64:6-12), there is next to no inquiry, and certainly no in-depth inquiry, to either the Government or Defendants about the hold up in filing motions or the lack of progress in reviewing discovery. As the Government acknowledges in their response, the Government had provided the bulk of discovery by July 23, 2009. Gov. Br. 17. The Government makes no other credible claim that Defendants' late-filed motions were being held up by discovery problems. To the contrary, it is clear that the Government promptly turned over and streamlined discovery early in the case for the Defendants. Banks Br. 8; Gov. Br. 27. As previously noted, the Court asked only three questions in fourteen pages of transcript before granting the continuance without requiring any

justification for the length of time supposedly needed, instead handing off to the defense counsel, who already announced the time requested was an arbitrary designation:

> THE COURT: All right. Well, you all are much more experienced at this than I am, so I will take you at your words that this is the time that was needed.… Vol. II, p. 44:18-20.

The Government Misstates the Holding and Reasoning in *Bloate*

For the first time, the Government discusses *Bloate*. Gov. Br. 25. If Defendant Banks' position on *Bloate* was inaccurate, the District Court and the Government would have pointed this out much sooner. Nor does the Government address how the four-plus month exclusion of time was addressed by the parties or the Court in granting the third continuance under *Bloate* or *Toombs*. Certainly the unused 41 days from the previous calculation is not addressed or justified by the Government. Banks Br. 11, 12. Even at this late date, the Government is left with making a transparent non-relevant statement about *Bloate*. Instead of analyzing the purposes of the court's decision in *Bloate*, the Government merely states the obvious result of the court decision in Bloate: "the time granted to a party to prepare pre-trial motions is not automatically excludable" and "the time at issue in *Bloate* was not excluded under Sec. 3161 (h)(7)." Gov. Br. 25. The court's discussion in *Bloate* covered a little bit more ground in discussing the language and goal of the statute. *Id*. at 1354-1358. The court specifically wanted to avoid an

automatic exclusion of time "resulting from virtually any decision to continue a deadline." *Id*. at 1354. The court wanted to guard against a reading of the statute that provided no limitation on the definition of a proceeding concerning the defendant that would allow the "loophole" that would defeat the purpose of the 70-day rule. *Id*. at 1355. The court in *Bloate*, as did the court in *Toombs*, recognized the danger of prospective waivers, recognizing there are many cases where all parties would be more than happy to opt out of the Act. *Id*. at 1356. As Banks argues here, based on the pattern of reasons offered for continuances by former counsel, the case could have been delayed indefinitely. *Id*. at 1357. As previously noted, the Government ignores the Court's analysis by failing to state what the trial court must consider in making appropriate findings under Sec. 3161 (h)(7):

> "(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.

Wholesale exclusion of time without a connection to the pre-trial motion under consideration is not what *Bloate* had in mind. While this case started out with the potential for a lot of documents and potential witnesses, the underlying facts did not present a complicated scheme over the short time of the allegations-two years.

Finally, not sure why *United States v. Moreira*, 416 Fed.Appx. 803 (10th Cir. 2011) (unpublished) is cited, based on the court's opinion in *Moreira*. The

defendant there entered a plea to a charge and failed to address Sixth Amendment issues addressing dismissal with prejudice. *Id.* There is next to no discussion of the issues addressed in this case.

The Pro-Se Defendants' Continuance

The Government misstates the reasoning and process followed in granting the pro-se Defendants' request for a continuance. As previously noted, the Government and the Court for the first time challenged the request, asking for detailed responses and more than conclusory statements about the event causing the request. Vol. I, pp. 706-709; Banks Br. 6, 7; Vol. II, pp. 542-574. The request for additional time was modest in view of the fact that the Defendants would now take over a case that was still not ready to go to trial and now being prepared by non-lawyers.

The Sixth Amendment Violation

Banks was hindered in presenting a defense, and the Government can't push off its obligation under the Act or Sixth Amendment to prevent unnecessary delays. Banks Br. 18-23. Banks did not present one or two examples of failed memory. Banks Br. 22, 23. The memory lapse demonstrated by numerous witnesses on multiple occasions clearly revealed that the Defendants were impacted by the fog of time versus a flat out denial of conversations by Government witnesses. *U.S. v. Yehling*, 456 F.3d. 1245 (10th Cir. 2006). Banks

Br. 19-23, 36-39, 42-44. As previously argued, 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 ...." *U.S. v. Biggs*, 419 F.Supp.2d 1277, 1282 Dist. Court, D. Montana 2006). This is especially a concern where Government witnesses were motivated to provide favorable testimony, i.e. recover funds through the criminal process versus civil suits. Details about who had authority to approve staffing agreements and terms, what was stated during negotiations, and what Defendants stated exactly about sales or potential sales of their product were the key issues in the case. Banks Br. 19-23, 36-39, 42-44. Impeaching or refreshing memories is extremely difficult where witnesses are able to fall back on the passage of time as a "legitimate" excuse for not being able to answer a question.

The Government should have to provide a better reason than given for the delay in bringing the case. Gov. Br. 30; Banks Br. 18-22. The Government does not address *Yehling*, at 1236, 1243-1245 (10th Cir. 2006), or that the reason for delay is not limited to any one factor. *United States v. Kalady*, 941 F. 2d 1090, 1095 (10th Cir. 1991). The Government's reason for delay in prosecution is a vague "take my word for it" explanation. In a similar manner, the Government never provides, now or then, an explanation of the complex nature of the case, other than the number of potential witnesses and number of documents, which turns out to be

a generic claim, but not an actual problem. For all the reasons argued by Banks, the case should be dismissed with prejudice.

The Government Misstates and Fails to Address Banks' Fifth Amendment Arguments

With limited exception, the Government does not argue that cases cited by Banks are inapplicable or distinguishable; rather they merely attempt to avoid a discussion of the major issues raised by the cases. The Government fails to adequately address the jury instruction issues. Gov. Br. 36-39, 45-48. The Government fails to distinguish the Fifth Amendment issues that impacted Barnes as the holder of the privilege from those who were impacted by the abuse of the privilege. Banks Br. 28-36.

The Government does not address the problem or the cases that recognize the invocation of the privilege by itself is a high drama response that has only negative ramification, and requires different treatment from testimony, depending on how it finds its way into a trial and how often the privilege is invoked, and in this case, how many others were impacted. Banks Br. 27-34. Nor does the Government explain how the negative implications can be overcome by cross-examination. *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974). In spite of cases cited by Banks holding the opposite, the Government argues that repeatedly invoking the privilege after Walker's outburst could have no impact on

a jury. Gov. Br. 33-48; Banks Br. 24-36. This is interesting in that the Government actually cites to cases that references Tenth Circuit decisions that address the delicate situation created by improper reference to the invocation of the privilege. Gov. Br. 40. *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995). In *United States v. Burson*, 952 F.2d. 1196, 1201(10th Cir. 1991), cited in *Rice*, the court reviewed factors it would consider in determining whether there was improper comment on a defendant's silence. As reviewed in this case, there was no reason, and the Government provides no reason to repeatedly invoke the privilege by the prosecution when Barnes retook the stand. In fact, the prosecution was willing to strike all of Barnes' testimony. The Government can't deny the intensity of Walker's "Outburst" or the frequency of the invocation of the privilege caused by the Government. The Court had a full opportunity to consider the potential problems for the other co-Defendants and took no action. With the other limitations placed on Defendants to have input on instructions and offer a complete defense, the Walker/Barnes gaffe doomed Banks.

The Government offers next to no response why the problem in this case is not more serious than the situation in *Bruton v. United States*, 391 U.S. 123 (1968), recognizing an exception to the rule that jurors are presumed to follow all instructions, or the statement by this circuit in *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). Here, the Government cannot argue that invoking the privilege in the manner it occurred and then repeatedly causing Barnes to invoke the privilege would not create "an inculpatory inference"… "immediately in the mind of a reasonable juror" against the other co-Defendants. In the setting of this case, the Government does not offer and cannot offer the assurance that the situation presented was "not too 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 co-defendants". *U.S. v. Sarracino*, 340 F.3d 1148, 1160(10th Cir. 2003); *Bruton*, 391 U.S. at 131. Banks submits that no curative instruction would have been sufficient, as the case was allowed to proceed.

The Government's attempt to now downplay the dramatic impact of what the Court itself identified as an "outburst" (Supp.App. p. 255), and overlooks both the District Court's and the Government's recognition of the damaging problem created by Walker :

> The Court**: ….**We recessed because I have not had this issue arise before. Mr. Walker also moved for mistrial. And I will tell you now, on the record, Mr. Walker, if you ever blurt out something like that again in front of the jury, we will have to have some further proceedings. …. Supp.App. p. 229.

With that, the Government's rendition of the discussion of the proposed jury instructions is less than accurate. The Government's suggestion that effective

instructions were eventually given is inaccurate. The Government ignores the fact that input by Banks as a co-Defendant, and input from other co-Defendants was limited by the statements of the Court after the Walker "outburst," by instructing the parties that only Barnes could address the Fifth Amendment issue:

> THE COURT: You cannot advise him of anything. You are not his lawyer.
> MR. WALKER: I understand he can plead the Fifth.
> THE COURT: He can plead the Fifth, but you cannot advise him. Supp.App. p. 226.
>
> …….
>
> Mr. Kirsch: Mr. Walker's inappropriate objection made in the presence of the jury prior to trial, and that brief -- that brief instruction that we captioned "Proposed limiting Instruction" would help address any prejudice that might have been generated by Mr. Walker's comment.
>
> THE COURT: All right. Mr. Walker?
>
> MR. WALKER: Your Honor, Mr. Barnes was not advised.
>
> THE COURT: This is not for you to argue. It is for Mr. Barnes to argue.
>
> Supp.App. pp. 232, 233.
>
> ……
>
> MR. WALKER: Your Honor, I am talking collectively of the co-defendants' rights.

> THE COURT: No, you have no right to talk collectively. I told you that when you decided not to have counsel, that you each have to represent yourselves. So speak on your own behalf. Supp.App. pp. 233, 234.
>
> MR. WALKER: And, Your Honor, I join Mr. Barnes' objection of not being advised of his Fifth Amendment right.
>
> THE COURT: That is not your right to raise. Supp.App. p. 234.

Finally, the Government's statement that the Defendants were asked for input on a curative instruction is wrong. Gov. Br. 37, 45-48. The Government cites to Supp.App. pp. 250, and 258, leaving out that when this last tendered instruction is discussed, the Government argued and the Court agreed that only Barnes had the right to address the issue. Supp.App. pp. 252, 253, 257, 258. The Court's position clearly told the other Defendants that they were not part of the discussion or had input into the remedy of the problem created by Walker and Barnes. The Government offers no other testimony or statements by the Court to the contrary.

Instruction addressing Walker's "Outburst"

The Government fails to address the fact that Walker's "outburst" and the Government's objection, and the Court's response was sandwiched together, which was confusing and not clarified by the Court. Banks Br. 24-26. Initially, while

conceding the prosecutor recommended a specific instruction informing the jury that Walker could not invoke the privilege for another co-Defendant, the Government attempted to dilute the point by stating after the recess that "the Court advised the *defendants* as suggested by the government". Gov. Br. 36. This was not the problem. The problem was correcting the highly dramatic action by Walker for the jury. The Government, rather than acknowledging that this instruction was never given to the jury, moves on to another point. Gov. Br. 35-37. Only later does the Government inaccurately attempt to suggest that the Court gave a "revised version of the government's earlier instruction". Gov. Br. 37. The second instruction is hardly a revised instruction of the Government's initial proposed instruction. Supp. App. pp. 227, 258. The "revised instruction" was a stock instruction and was silent on the issue. Short of a trial attorney sitting on the jury correctly speculating on what was meant by the Court in overruling the Government's "objection" to Walker's outburst, the jury was left believing Walker's action was proper. The Court compounded the problem by not mentioning the "motion" made by Walker, and instead emphasized that the Government's "objection" should be disregarded:

> The Court: …Immediately before the break, there was an objection, and I just wish to remind you again that statements or objections made by attorneys or the defendants while not testifying are not evidence, and they should not be considered by you in any way. (Emphasis added) Supp.App. p. 258.

If the issue involved only Walker and Barnes, the problem might have been more manageable. To make its argument, the Government has to ignore the cases cited by Banks that discuss the fact that the Fifth Amendment can be abused, and the courts do not permit a misuse of the Fifth Amendment against any party. Banks Br. 24-36. In this case the prosecutor, after knowing Walker's outburst would not be addressed, and knowing Barnes would repeatedly take the Fifth when he resumed the stand, exploited the opportunity with repeated questions to Barnes. The prosecutor's proffered but rejected instruction is intentionally not discussed, because it is obvious why it was offered by the Government. The Government's comment that the prosecutor did not raise Barnes' refusal to testify in closing is of no solace. One, exploitation of this action can occur either in questioning or in closing. Two, Barnes repeatedly was asked questions by the Government, who knew the privilege would be invoked by Barnes. Three, the final instruction given by the court clearly called attention to Barnes' repeated invocation of the privilege.

The Government's argument that there were no answers by Barnes that "in fact incriminated any of his co-Defendants" is naive. What is more incriminating than hearing defendants in a conspiracy case continually invoking the privilege? At least with an incriminating statement by a co-Defendant, discussed in *Bruton*, a juror has some idea who is being implicated and how. With a conspiracy charge and against the background of another co-Defendant raising the privilege in the

first instance, and the Court appearing to have ruled in Walker's favor with Barnes then repeatedly invoking the privilege, a juror at a minimum is left to wonder that if any other co-Defendant takes the stand, will Walker again invoke the privilege for another Defendant, resulting in the same Barnes' scenario? The Government did not and cannot point to anything in the record that explained Barnes' invocation of the privilege upon retaking the stand had nothing to do with the Court's earlier overruling of the Government's objection to Walker's "attempted invocation of the privilege" for a co-Defendant.

If Banks chose not to take the stand, was he merely exercising his constitutional right, or was he foregoing providing testimony out of fear that Walker would tag his testimony as incriminating, resulting in Banks being forced to take the same action as Barnes? With each co-Defendant being charged with similar activity, did the Walker action and Barnes' follow-up invocation of the privilege provide the strong message that the Government hit on a damaging line of questioning? Supp.App. p. 239.

Without a hearing outside the presence of the jury to address the impact of Barnes' decision to invoke the privilege, no consideration was given to the impact on the co-Defendants. None of the safeguards found in *United States v. Turrietta, 11-2033*, August 29, 2012 (10th Cir. 2012), can be found in this record. The only way this resulting conclusion could have been avoided was to address the

prosecutor's proposed questions out of the presence of the jury and determine how the jury would interpret the new exchange. Under any circumstance, prompt curative instructions were also required, but were not given. Additionally, the Government is wrong when it states that this recognized procedure was not required. A hearing was required to determine if Barnes' additional answers were not incriminating for himself or others. If the answers were not incriminating to Barnes, then there was no reason for the negative impact of repeatedly invoking the privilege, which impacted the rest of the Defendants. Again the Government cites to no cases that argue against this approach or counters the cases cited by Banks. Banks Br. 31-34. If the Government was willing to instruct the jury that all of Barnes' testimony should be disregarded, it should have had no problem in foregoing any further questioning of Barnes, well-knowing the impact on the co-Defendants. This is especially true where the Walker outburst would not be addressed by the court.

Inconsistent Application of the Law

The Government fails to address *United States v. Hasan*, 526 F.3d 653 (10th Cir. 2008). Banks Br. 29-35. The inconsistent application of the law should have been avoided in this case. There was a recognized procedure that would have protected both Barnes and the other co-Defendants. The Government offers no defense to why a procedure to prevent an inconsistent application of the law was

not implemented. If the Court would have stayed with its ruling that Barnes had waived his right to the privilege, and/or conducted a hearing to determine if Barnes had the right to refuse to answer additional proposed questions by the prosecution, the Court would have been well within its right to prohibit further testimony from Barnes, where a narrower application of the privilege protects the parties, including Banks. *U.S. v. Harris*, 542 F.2d 1283 (7th Cir. 1976) cert. denied, 430 U.S. 934 (1977). Banks Br. 29-35. What happened here was the insertion of enough "inculpatory inferences," which prevented this Court from being able to know whether co-Defendant Banks was convicted based on damaging inferences that had no curative instructions to guide the jury, or if he was convicted based on other evidence. As previously reviewed, there are situations were no curative instructions can provide the needed assurances. Banks Br. 30. Banks submits in this situation no curative instructions would have solved the problem.

Structural Error

The cases cited by the Government in support of its structural error position are not on point. The Government's cite to *United States v. Lott* 310 F. 3d 1231 (10th Cir. 2002), dealt with the deprivation of legal counsel. The Government's reference to *Chapman v. California*, 386 U.S. 18, 23, 24 (1967) is also not on point, but confirms that it is the Government's obligation to show harmless error in

this case, where it allowed the highly prejudicial repetition of the privilege by Barnes without a proper curative instruction.

On the other hand, the Government fails to address this Court's most recent discussion of structural error in *United States v. Turrietta*, 11-2033, August 29, 2012 (10th Cir. 2012); and *United States v. Wiles*, 102 F.3d 1043, 1056 (10th Cir.1996), which involved issues closer to the facts of this case. Gov. Br. 39, 40. The Government alternatively argues that Walker's actions should be attributed to the other Defendants, and the Government and the court has no obligation to take any corrective action. The Government cites to zero cases for this proposition, and fails to address Defendant Banks' cases that take a different position. Banks Br. 32. Finally, there were enough serious errors in the case that, under the cumulative error doctrine, Banks' case should be remanded for a new trial.

The Issue of Compelling Barnes to Testify

The Government spends a considerable amount of time on this issue and not enough time on the issues reviewed above. Initially, the Government misstates the record. Walker, not Banks, "improperly sought to invoke the privilege." Gov. Br. 33, 42, 51. Banks submits that the outstanding issue to resolve addressing whether Barnes was compelled by the Court to testify regardless of "Defendants' other intentions" is still not addressed by the Government. The District Court ordered the court reporter to provide the complete transcript of the sidebar to the Defendants.

The court reporter did not provide the complete, unedited version of the transcript. The court reporter initially acknowledged an unedited version existed, but refused to turn it over as previously reviewed by counsel for all defendants. Vol. I, Dkt. 631, pp. 965-978; Vol. I, Dkt. 635, pp. 980-999; Vol. I, Dkt. 636, pp. 1001-1039. Requests to clarify this issue by having a hearing and having the court reporter testify were denied. Vol. I, Dkt. 652, pp. 1120-1122. There were differences in recollection of what was stated, apart from what the edited transcript reveals. Vol. I, Dkt. 652, pp. 1120-1122. There were enough issues raised by the parties, the court reporter, counsel for Barnes, and the District Court to require this matter be clarified for this Court. It is of note that throughout the debate on the issue, the Government attorneys present for the sidebar have never stated at any time what they heard the District Court state at the sidebar, even though their opinion would have aided the District Court during the multiple times the issue arose. Supp.App. pp. 242, 243. The problem for appellate counsel is that he was not present in trial to evaluate the issue. *U.S. v. Stacy* 337 Fed. Appx. 837; 2009; U.S. App. LEXIS 16950; *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1212 (11th Cir. 1993). Depending on what the Court stated at the sidebar, there may be a legitimate issue that the District Court should not have placed Barnes or the Defendants in the position of believing they were compelled to testify. There is no

complete record; therefore, the matter should be remanded. *Parrot v. United States*, 314 F.2d 46 (10th Cir. 1963).

EXPERT/LAY WITNESS REPLY

In arguing that Defendants purposely delayed providing the Government timely notice, the Government minimizes the information provided to them three months prior to trial. The Government is forced to take this position because it exposes the argument that the lack of information provided would prejudice the Government. Gov. Br. 58. The Government states that it was unaware of the witnesses' qualifications. The qualifications of witness Andrew Albarelle are listed in paragraphs one and two of his letter to the U.S. Attorney's Office. Supp.App. p. 94. What additional qualifications were necessary? The Government questions the relevancy of the information. The letter demonstrates the witness's familiarity with the Defendants' product, staffing operations, how clients are evaluated, and the financial goals of staffing companies. This witness identifies his experience with helping the FBI with staffing fraud cases. This witness is familiar with the circumstances staffing companies choose to involve themselves in, namely the hopes of future business. The witness discusses due diligence undertaken in evaluating new clients. The witness discussed working on multiple contracts, which is a major issue in this case. The same is true for the other offered witness. Supp.App. p. 92. What issue was the Government uninformed of? It is telling that

the Government gives no examples of matters it would be unprepared to address. But more to the point, the Government had this information for three months, to investigate and to evaluate the witnesses' credibility, connection with the FBI, and credibility of this witness's statements about staffing company procedures and practices based on his own personal experience. As previously argued, the Government can't sit back and avoid its obligations to investigate all information brought to its attention in evaluating the merits of the cases it brings to court. Banks Br. 37. This is part of the Government's basic obligations. When the Government complains that the Defendants intentionally waited until the last minute to offer two of its witnesses to gain a 'tactical advantage", the question arises that did the Government also involve itself in "tactical gamesmanship" by waiting and specifically not challenging the testimony of Albarelle and Baucom prior to trial? The Government can't deny that both individuals were listed as witnesses by Defendants. Unlike other lay witnesses, the Government had notice ahead of time that if these witnesses were called, they would challenge the heart of the Government's contentions. It is difficult to believe the Government thought the witnesses were merely offering an interesting aside to the predicament of the Defendants. The comment that the witnesses were acting "as advocates in support of the Defendants" is exactly what experts do, they offer opinions for a price supporting either the position of the Government or Defendants, albeit here there is

nothing in the letters of these witnesses that suggests they were paid for their statements. Under any circumstance, the Court failed to make a required finding of bad faith. *Turner v. Pub. Serv. Co. of Colo.*, 53 F.3d 1136, 1149 (10th Cir. 2009); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc*., 244 F.R.D. 614, 635 (D. Colo. 2007).

Conclusion

The Government fails to adequately address Banks' issues. The case should be dismissed under the Act and dismissed with Prejudice under the Sixth Amendment or remanded for a new trial for the other reasons stated.

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Fed. R. App. P. 32(a)(7)(C), this appellate brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6610 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

I hereby further certify that this appellate brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using WordPerfect 12.0 for Windows in Times New Roman Typeface and 14 point font size.

__/s/ Charles Torres_____

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2013, I electronically filed the foregoing Reply Brief of Appellant David Banks with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing and copy of this brief to the following:

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I further certify the foregoing document meets the required privacy redactions; it is an exact copy of the paper document; and, the document has been scanned and is virus free.

__/s/ Charles Torres_____