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

JOINT MOTION FOR RELEASE PENDING APPEAL

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COME NOW KENDRICK BARNES ("Barnes"), DEMETRIUS K. HARPER a/k/a Ken Harper ("Harper"), CLINTON A. STEWART a/k/a C. Alfred Stewart ("Stewart"), GARY L. WALKER ("Walker") and DAVID A. ZIRPOLO ("Zirpolo"), defendants-appellants (collectively "Appellants") in the above-referenced cases, by and through Joshua Sabert Lowther, Esq. and Gwendolyn Maurice Solomon, Esq., their attorneys of record,[1] pursuant to Fed. R. App. P. 9(b) and 10th Cir. R. 9, and hereby respectfully move this Honorable Court to release them pending appeal. In support of this motion, Appellants state the following:

I. Relevant Procedural History

A federal grand jury in the District of Colorado indicted Appellants and David A. Banks ("Banks")[2] on June 9, 2009, in various combinations,

[1] Undersigned counsel are aware that an attorney's representation of more than one defendant before a trial court or more than one appellant before an appellate court in a single criminal case is not a common occurrence, and an attorney should not undertake such representation until after careful consideration of the ethical and constitutional issues in the same. In this case, Appellants retained Gwendolyn Maurice Solomon, Esq. immediately after they were convicted at trial on October 20, 2011 (Doc. 508) for the purposes of her representing them at sentencing and on appeal. The trial court, pursuant to Fed. R. Crim. P. 44(c), held an inquiry regarding Ms. Solomon's joint representation of Appellants (Doc. 559) and ultimately determined that such representation was permissible. (Doc. 653.) Ms. Solomon elected to undertake such representation only after her having confirmed that no actual conflict had arisen among the Appellants at trial (or at any other time) and her obtaining written waivers of any potential conflict of interest from them. The Appellants retained Joshua Sabert Lowther, Esq. on February 23, 2012 (Doc. 671) to assist Ms. Solomon in her aforementioned representation of them, and Mr. Lowther agreed to do so only after his confirming the absence of any actual (and the improbability of any potential) conflict among Appellants, evidenced by a written waiver of the same from them.

[2] Banks is the Appellants' co-defendant in *United States of America v. David A. Banks, et al.*, No. 1:09-CR-00266 (D. Colo. June 6, 2009) and the appellant in *United States of America v. David A. Banks*, No. 11-1487 (10th Cir. August 3, 2012).

on one count of Conspiracy to Commit Mail Fraud and Wire Fraud in violation of 18 U.S.C. § 1349; fifteen counts of Mail Fraud in violation of 18 U.S.C. §§ 1341 and 2; and eight counts of Wire Fraud in violation of 18 U.S.C. §§ 1343 and 2. (Doc. 1.)[3] The Appellants, in response to summonses (Docs. 3-7), appeared before United States Magistrate Boyd N. Boland ("Judge Boland") for their initial appearances on June 23, 2009 (Doc. 15). Judge Boland, pursuant to 18 U.S.C. §§ 3142(a)(1) and (b), released Appellants on personal recognizance bonds. (Docs. 22-26.)

Appellants remained on pretrial release until a jury found them guilty on October 20, 2011 of all counts in which they were charged in the indictment. (Doc. 476.) United States District Judge Christine M. Arguello ("Judge Arguello") remanded Appellants to the custody of the United States Marshals Service ("U.S.M.S.") immediately after her receiving the verdict, and directed Judge Boland to hold a hearing to determine whether Appellants should remain on release pending sentencing. (Doc. 478.) Judge Boland temporarily detained Appellants on October 20, 2011 (Docs. 482 and 486), but after a hearing regarding the aforementioned issue

[3] Appellants and Banks were charged with Conspiracy to Commit Mail Fraud and Wire Fraud. Additionally, Barnes was charged with eight counts of Mail Fraud; Harper was charged with eight counts of Mail Fraud and six counts of Wire Fraud; Stewart was charged with six counts of Mail Fraud; and Zirpolo was charged with eleven counts of Mail Fraud and two counts of Wire Fraud.

on November 18, 2011 (Doc. 563), Judge Boland, pursuant to 18 U.S.C. §3143(a)(1), ordered Appellants released on secured bonds, each in the amount of $40,000.00 with conditions (Docs. 571-575).

Appellants remained on release until their sentencing hearings on July 23, 2012 (Walker and Barnes), July 27, 2012 (Harper and Stewart) and July 30, 2012 (Zirpolo), during which Judge Arguello sentenced them, *inter alia*, to terms of imprisonment of 135 months (Walker), eighty-seven months (Barnes), 121 months (Harper), 121 months (Stewart), 121 months (Zirpolo) and again, immediately remanded them to the custody of the U.S.M.S. (Docs. 782, 797-800). Appellants moved the trial court to release them pending appeal on July 30, 2012 (Docs. 791-795); the United States of America ("Government") filed its response in opposition on August 3, 2012 (Doc. 802); and the trial court denied Appellants' motions on August 8, 2012 (Doc. 817).

II. Grounds and Relief Sought

Appellants, pursuant to 10th Cir. R. 9.2(A), will file a memorandum in support of this motion.

III. Disclosure of Opponent's Position

The Government opposes this motion.

IV. Conclusion

Based on the assertions and submissions contained in the memorandum of law that will be filed contemporaneously with and in support of this motion, Appellants pray that this Court release them pending appeal.

This, the 24th day of August, 2012.

Respectfully submitted,

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I have filed electronically the within and foregoing JOINT MOTION FOR RELEASE PENDING APPEAL with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF Appellate system, which will automatically generate a Notice of Docket Activity ("N.D.A."), and thereafter send such N.D.A. to the following:

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MEMORANDUM IN SUPPORT OF JOINT MOTION FOR RELEASE PENDING APPEAL

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I. Statement of Facts[1]

Appellants and Banks formed three Colorado-based for-profit corporate entities for the purposes of developing, marketing and servicing a computer software program that had been designed, preliminarily, by Walker: Leading Team, Inc. ("LT"), DKH, L.L.C. ("DKH") and IRP Solutions Corporation ("IRP"). The software program, known as Case Investigative Life Cycle or "CILC," was designed to be used by federal, state and local law enforcement agencies as a tool for the management and sharing of information obtained by those agencies during criminal investigations.

The Government's theory of prosecution as alleged in the indictment was that Appellants and Banks used the aforementioned corporate entities to defraud forty-two employment staffing companies of $5,018,959.66 in an employment augmentation or "payrolling"[2] scheme. The Government asserted at trial that Appellants and Banks conspired to make false

[1] The Statement of Facts is an abbreviated version of the allegations in the indictment (Doc. 1) and the probation officer's assertions in the Offense Conduct sections of Appellants' revised Presentence Investigation Reports, which were adopted by the trial court at sentencing (Docs. 760, 769, 767, 758 and 779).

[2] "Payrolling" refers to an employment staffing company's placing a temporary employee, who has been pre-selected by its customer, in that customer's business and advancing the employee's wages (including federal and state withholdings) to the employee and the appropriate governmental taxing agencies on behalf of the customer. The customer then pays the staffing company a premium for its rendering administrative services, which include reimbursement for the advanced wages.

representations by mail and wire to those staffing companies regarding LT, DKH and IRP's imminent sales of CILC to certain federal and local law enforcement agencies, which would have resulted in substantial earnings to LT, DKH and IRP, and thereby causing the staffing companies to continue advancing wages to their employees on behalf of LT, DKH and IRP, when in fact, no viable prospects of any such sales existed. Appellants and Banks defended the accusations by refuting that they made any misrepresentations to any of the staffing companies' representatives.

II. Grounds for Relief

"A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing...a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction." Fed. R. App. P. 9(b). "The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143 and 3145(c)." Fed. R. App. P. 9(c).

18 U.S.C. § 3143(b)(1) states, in pertinent part, that

> ...the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal..., be detained, unless the judicial officer finds –

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
>
> (i) reversal;
>
> (ii) an order for a new trial;
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term or imprisonment less than the total of the time already served plus the expected duration of the appeals process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) of this title....

Id. A substantial question of law or fact is defined generally as "one of more substance than would be necessary to a finding that it was not frivolous. It is a close question or one that very well could be decided the other way." *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (*quoting United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)) (internal quotations omitted).

a. Clear and Convincing Evidence Exists that Appellants are not Likely to Flee or Pose a Danger to the Safety of any Other Person or the Community

More than four years after Appellants became aware that they were under criminal investigation in this case, they voluntarily appeared, pursuant to summonses, for their initial appearances in the same. Judge Boland, pursuant to 18 U.S.C. § 3142(b), found by a preponderance of the evidence that Appellants were not likely to flee or pose a threat to any other person or the community and released them on personal recognizance bonds. While on release pending trial, Appellants dutifully attended every court appearance, including their seventeen-day trial by jury, which did not commence until over two years and three months after their initial appearances. Nonetheless, after the verdict of guilty was rendered, Judge Arguello remanded them to the custody of the U.S.M.S. pending a hearing before a magistrate to determine whether they should be released pending sentencing.

Judge Boland presided over the hearing regarding Appellants' release pending sentencing, and pursuant to 18 U.S.C. § 3143(a)(1), he found by clear and convincing evidence that Appellants were not likely to flee or pose a threat to any other person or the community and released

them on secured bonds with conditions. While on release pending trial and sentencing, Appellants were "completely compliant with the terms and conditions of release." (Docs. 758, ¶ 4; 779, ¶ 4; 767, ¶ 4; 760, ¶ 4 and 769, ¶ 4.) Notwithstanding Appellants' exemplary conduct on release pending trial and then sentencing, each of their attending the others' sentencing hearings that were held before his own over a period of seven days (witnessing each other be sentenced to the exact term of imprisonment previously recommended by the probation officer in the revised Presentence Investigation Reports), and there being no change in Appellants' burden to demonstrate that they should remain on release pending the execution of their sentences pursuant to 18 U.S.C. §3143(a)(1), Judge Arguello remanded each of them to the custody of the U.S.M.S. immediately after imposing sentence.

The Government's primary argument in opposition to Appellants' being released pending the execution of their sentences was the same as its argument in opposition to their release pending appeal:

> ...[A]lthough the government concedes that [Appellants] complied with their bond conditions before sentencing, they have all now received lengthy sentences between 87 and 135 months of imprisonment. The [Appellants'] appearances at

> their sentencing hearings, even with an expectation that they might receive lengthy sentences, does not demonstrate by clear and convincing evidence that they will not pose a significant flight risk between now and the time that they may be ordered to actually serve their sentences.

(Doc. 802, p.2.) In support of this argument, the Government cites a district court opinion, *United States v. Bailey*, 759 F. Supp. 685 (D. Colo. 1991), which holds that "the imposition of sentence heightens the risk of flight. Reliance on presentence compliance with bond conditions, alone, does not meet the statutory burden." *Id.* at 687. Appellants concede that the imposition of a lengthy sentence may heighten the risk of flight in certain cases, and a defendant's mere compliance with the conditions of his or her release does not necessarily eviscerate that risk in those cases. However, Appellants respectfully submit that the mere imposition of a lengthy sentence does not necessarily cause every defendant to become a flight risk, and furthermore, such defendant's continued dutiful compliance with the conditions of his or her conditions of release (even when facing the inevitability of a significant term of imprisonment and immediate remand to the custody of the U.S.M.S., as in this case) should weigh heavily in favor of a court's determination that such defendant has successfully

overcome that risk.

Based on the foregoing assertions, Appellants respectfully submit that they have again demonstrated, clearly and convincingly, that they continue to pose absolutely no risk of flight or threat to any other person or the community.

b. **The Appeal Is Not Taken for the Purpose of Delay and Raises a Substantial Question of Law or Fact Likely to Result in a Reversal, New Trial or a Reduced Sentence**

Appellants entered pleas of not guilty to the indictment in this case (Docs. 36, 45, 34, 35 and 37) and were convicted after a lengthy jury trial (Doc. 479); therefore, they respectfully submit that this appeal is not taken for the purpose of delay. Furthermore, Appellants intend to raise the following issues, *inter alia*, on appeal:

1. Speedy Trial Act Violation

The Speedy Trial Act of 1974 ("Act"), which is codified at 18 U.S.C. § 3161, *et seq.*, requires that a criminal defendant's trial commence within seventy days from the public filing of the indictment or the defendant's initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1). The Act entitles the defendant to a dismissal of the indictment if that deadline is not met. *Id.* A trial court may grant continuances of time that are excludable

from the deadline imposed by the Act if the said court finds that the ends of justice in granting those continuances outweigh the public and the defendant's interest in a speedy trial. *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010). A trial court, in its justification of a continuance, must consider the factors under 18 U.S.C. § 3161(h)(7)(B)(i-iv) *"on the record."* *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009) (emphasis added). Further, a judge must tailor all subsequent time requirements and scheduling requisites accordingly. *Bloate, supra.* It is the prosecution's burden and the court's responsibility to assure that a defendant is brought to trial in accordance with the Act. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

Appellants initially appeared before the magistrate on June 23, 2009 (Doc. 15); however, their jury trial did not commence until September 26, 2011 (Doc. 447). *Bloate* was decided on March 8, 2010; thus, its holding is applicable to this case.

The record indicates that the District Court granted five continuances, all of which were considered with varying degrees of scrutiny: four were requested by Appellants' former counsel and one was requested by Appellants after their terminating their counsel and electing to represent themselves. Although the District Court stated the reasons for

the continuances on the record as required by *Toombs*, it failed to conduct any meaningful analysis regarding whether those continuances should have been granted as required by *Bloate*. As a consequence, all of the continuances violated the Act.

The three most notable examples are (1) the District Court's failing to hold a hearing regarding an unopposed request for a ninety day continuance that was submitted on July 6, 2009 (Doc. 63); (2) the District Court's failing to inquire regarding the reasons for the delay or soliciting any information regarding the parties' progress in resolving the cause for that delay regarding a motion for a 110 day continuance that was submitted on August 18, 2009 (Doc. 77); and (3) the District Court failing to inquire regarding the reasons for the further delay or demanding any details of the progress that had been made by the parties to resolve the cause of that delay regarding a motion for a 361 day continuance that was submitted on December 14, 2009 (Doc. 123). The District Court and the parties acknowledged that the case was not as complex, if at all, as they originally had predicted. (Doc. 240.)

2. Fifth Amendment Violation

"No person shall be…compelled in any criminal case to be a witness

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

A defendant's invocation of his or her Fifth Amendment privilege has been a historic subject of prejudicial effect; nonetheless, in criminal cases, the common law prohibits any judge or prosecutor to permit adverse inferences as a result of a defendant's silence. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). As the Supreme Court of the United States held in *Bruton v. United States*, 391 U.S. 123 (1968), when there is an encroachment upon one's right to confrontation, curative instructions may be inadequate when aiming to retain a jury panel's impartiality; "a jury cannot 'segregate intellectual boxes'" *Id.* at 130.

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

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

As the trial proceeded, the Government rested its case much sooner than the parties initially predicted; as a result, Appellants were faced with the difficult tasks of re-structuring and expediting the entire presentation of their case. (Doc. 467, pp. 54-55.) Although the District Court specifically was aware that Appellants intended to present testimony from witnesses who were traveling from outside of the District of Colorado in their case-in-chief, the said Court – on the eleventh day of trial – essentially forced Appellants to produce witnesses immediately. *Id.* During a sidebar, the District Court made clear that Appellants had no choice but to call a witness to testify immediately; a short recess was not an option. (Doc. 467, pp. 54-55.)

In response, Appellants decided that Barnes would testify. As the Government's cross-examination proceeded, Walker improperly invoked Barnes' Fifth Amendment privilege in front of the jury, while moving for a mistrial. (Doc. 467, pp. 129-146.) The incident had an obvious and adverse

effect on the jury's perception of Appellants and on the case, generally.

The District Court maintains that it never conveyed to Appellants – through the aforementioned sidebar – a mandate to produce an immediate witness. (Doc. 467, pp. 136-146.) The record, however, significantly contradicts that position: Appellants state several times that they understood the District Court's comments as a clear and unequivocal demand to produce a witness. (Doc. 467, pp. 136-146.) The District Court, in response, displays a coinciding level of apparent frustration. (Doc. 467, pp. 136-146.)

The issue cannot be resolved fully because the transcript remains missing. However, Walker's improper invocation of Barnes' Fifth Amendment right never would have transpired but for the District Court's actions. Following a recess, the Government continued its cross-examination of Barnes, who invoked his Fifth Amendment privilege multiple times in response to the remainder of the Government's questioning.

When applying these facts to the aforementioned *Lauder* analysis, this Court should conclude that reversible error resulted. For example, the defendants did not choose, voluntarily, to have one of their own testify;

instead, they were compelled to do so by the District Court. (Doc. 467, pp. 129-163.) Following both the initial, improper solicitation of a co-defendant's Fifth Amendment privilege, and a corresponding motion for a mistrial, all before the sitting jury, the District Court allowed the Government to pursue further testimony, despite the defendants' previous reservations. (Doc. 467, pp. 129-163.) Barnes' subsequent invocations of his Fifth Amendment right to remain silent occurred repeatedly over during the Government's lengthy cross-examination of him. (Doc. 467, pp. 154-163.)

Most troubling, however, is that although the District Court subsequently gave a curative instruction to the jury, it failed to do so in a manner befitting the incident. (Doc 467, pp. 129-163.) Proper instruction and immediate corrective actions unquestionably were necessary, but not given. (Doc. 467, pp. 154-163.) Only a mere curt and cursory directive was offered to the jury, after a lunch recess. If the District Court had instructed the jury properly, the likelihood of prejudicial affect may have been diminished or eliminated. However, the lack of curative action leaves only the probability of a predisposed and unjust verdict.

3. Improper Exclusion of Expert Witnesses

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

Fed. R. Crim. P. 16 requires a defendant to provide the Government with a written summary of any expert testimony that the defendant intends to present at trial, describing the expert's opinions, the bases for his or her reliance on those opinions and his or her expert qualifications. Fed. R. Crim. P. 16(b)(1)(C). A defendant's notice is sufficient if it ensures that the testimony is "not going to take the government by surprise." *United States v. Mehta*, 236 F. Supp. 2d 150, 157 (D. Mass. 2002). Furthermore, Fed. R. Evid. 702 allows expert testimony of witnesses whose sworn statements and opinions are a result of their specialized knowledge, based on sufficient facts, according to reliable principles and methods, when those principles and methods apply to the facts of the case at bar. *Id.*

The defendants sought to call Andrew Alberelle ("Alberelle") and Kellie Baucom ("Baucom") as expert witnesses in the defendants' case-in-

chief. (Doc. 615, pp. 1586-1593.) The defendants expected Alberelle and Baucom to testify regarding the information technology industry's standards for payrolling transactions, and in their so testifying, illustrating to the jury the defendants' lack of any intent to defraud. (Doc. 615, pp. 1613-1632.) The District Court disallowed Alberelle and Baucom's expert testimony, finding that the defendants failed to properly disclose them in accordance with Fed. R. Crim. P. 16 and Fed. R. Evid. 702. (Doc. 616, pp. 1636- 1642.)

In its disallowing Alberelle and Baucom's testimony, the District Court declined to recognize two letters - written by Albarelle and Baucom, respectively - and mailed by them to the attention of John Walsh, United States Attorney for the District of Colorado. (Doc. 616, pp. 1636-1645.) The letters explicitly outlined their relationship to this case; their experience within the pertinent trades; and their professional opinions. (Doc. 615, pp. 1613- 1624). There may be a dispute between Appellants and the Government regarding the manner in which the disclosure occurred, but not regarding whether the disclosure actually occurred; Appellants maintain the position that the Government was notified in accordance with the aforementioned procedural and evidentiary rules. (Doc. 615, pp. 1613-

1624.) Albarelle and Baucom's appearances thus would have been of no surprise to the Government. (Doc. 615, pp. 1613-1624.) Consequently, the defendants were unable to call multiple witnesses that would have evidenced the common practices within the information technology industry, vindicating Appellants' actions regarding any payrolling transactions. However, without such expert testimony, the defendants were irreparably harmed based on their inability to adequately present their case-in-chief to the jury. (Doc. 615, pp. 1589-1590.)

III. Conclusion

Based on the foregoing fact and assertions in §§ I and II, Appellants respectfully submit that they have demonstrated by clear and convincing evidence that they do 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.

IV. Appellants' Custodial Status

The District Court remanded Appellants to the custody of the U.S.M.S. pending execution of their sentences. All but Harper are in the

custody of the Federal Bureau of Prisons; Harper remains in the custody of the U.S.M.S. pending designation to a federal correctional institution.

This, the 24th day of August, 2012.

Respectfully submitted,

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