Case No. 18-1273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. WALKER,

Defendant-Appellee

COLORADO SPRINGS FELLOWSHIP CHURCH,

Movant - Appellant.

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/D. Ct. No. 1:15-CV-02223-CMA

APPELLANT'S OPENING BRIEF

Appellant does not seek oral argument.

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GLOSSARY

CSFC ……..Colorado Springs Fellowship Church

PRIOR OR RELATED APPEALS

This appeal is related to *United States v. Banks, et. al,* 761 F.3d 1163 (10th Cir. 2014), cert. denied, 135 S. Ct. 308 (October 6, 2014); *U.S. v Walker*, 17-1415.

JURISDICTIONAL STATEMENT

The United States District Court exercised jurisdiction over the habeas corpus proceeding under 28 U.S.C. §2255. Appellant-Movant Colorado Springs Fellowship Church filed Motion for Order to Unseal Court Records on February 1, 2018 and First Motion for Order to Request Forthwith Ruling on Motion to Unseal or in the Alternative to Request that the Motion be Addressed on April 25, 2018. On April 27, 2018 the district court denied the Motion for Order to Request Forthwith Ruling on Motion to Unseal or in the Alternative to Request that the Motion be Addressed stating "an order on 1106 Motion to Unseal Court Records

will issue in due course." On June 1, 2018, the district court issued an order denying the Motion to Unseal Court Records asserting that "the nature and degree of potential injury to Mr. Walker and other witnesses." A Notice of Appeal was filed on June 29, 2018, appealing the U.S. District Court's Order from June 01, 2018. This Honorable Court properly exercises jurisdiction over this appeal pursuant to 18 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion by denying public access to all judicial records in the habeas proceeding including the 2255 motion initiating the proceeding, the government's answer brief, and its order restricting access

STATEMENT OF THE FACTS

Background

For over 30 years defendant Gary L. Walker, President and CEO of the IRP Solutions Corporation and Leading Team Inc. was a member of CSFC under the spiritual leadership of Pastor Rose M. Banks who is also his mother-in-law by virtue of being married in 1988 to her oldest child, Yolanda. Mr. Walker was indicted on June 9, 2009 on a single count of violating 18 U.S.C 1349, Conspiracy to Commit Wire and Mail fraud (Doc.#1). According to the indictment, Mr. Walker led a conspiracy where he and five other executives allegedly made false statements to dupe staffing companies into entering into contractual agreements to

provide staffing and pay rolling services. *Id*. On October 20, 2011, Mr. Walker was convicted by a jury on the conspiracy count. (Doc.# 478). On July 23, 2012, the district court assessed CEO Walker a 4-point enhancement as a leader/organizer of the conspiracy, sentenced him to 135 months in prison and immediately remanded him to the custody of the U.S. Marshals to be incarcerated at the federal prison camp in Florence, Colorado. (Doc. #773). Appeal was denied by 10th Circuit in 2014. *See United States v. Banks, et. al*, 761 F.3d 1163 (10th Cir. 2014), cert. denied, 135 S. Ct. 308 (October 6, 2014); (Doc. # 892).

On October 5, 2015, after defending his innocence for 10 years, which included conducting a pro se joint defense with his codefendants, the 52-year-old imprisoned Walker filed his 2255 petition in the district court with new claims he was religiously coerced into representing himself because he heard the "voice of God" speaking through his mother-in-law who he says told him to fire his attorney. Walker also claimed that the one of the attorneys he chose to jointly represent him and his codefendants during sentencing, specifically Gwendolyn Solomon (now Gwendolyn Lawson), ineffectively represented him because she, being a parishioner of CSFC, was also being controlled by and under the religious influence of Pastor Banks which created a conflict of interest in representing him. (Doc. # 900). On December 7, 2015, the government filed its answer brief in

opposition to Walker receiving habeas relief, (Doc.# 922), which the district court demanded of the government to seal.

On June 12, 15, and 16, 2017, trial judge Christine Arguello held an evidentiary hearing to consider Walker's claims of religious coercion on him and attorney Solomon. (Docket #1061, 1063, 1064). Walker called former CSFC members who had left the church and had no knowledge of his trial or sentencing matters to presumably testify about how Walker was allegedly coerced by the voice of God and how Solomon was allegedly controlled by Pastor Banks. On June 28, 2017, the day of the resentencing colloquy and 12 days after the completion of the evidentiary hearing, Mr. Walker requested that the transcript of the evidentiary hearing be sealed, which was granted by the district court. (Doc. # 1086). On the same day the district court resentenced Walker from 135 months to 70 months. (Doc. # 1082). The colloquy transcript shows Judge Arguello said the following: "Now, during the evidentiary hearing there was evidence demonstrating the extent of coercion that you and others were subjected to by Pastor Banks and your inability to evade the directions received from her as a result of the duress that was imposed...[T]he court finds it hard to fathom how someone who holds herself out to be a prophet of God and as a Christian could be as vindictive and mean-spirited as Pastor Banks...I believe that a sentence of 70 months imprisonment and 3 years supervised release does reflect the seriousness of this offense and is sufficient and

that I vary the necessary sentence to achieve the purpose is the same." (Doc. # 1087, Aplt. App. at p. 21).

Mr. Walker was released from prison on July 7, 2017. On July 21, 2017, advocacy organization A Just Cause, who has reported extensively on the case at both the local and national levels for the past 7 years, filed a judicial complaint against Judge Arguello on behalf of Pastor Banks, CSFC parishioners, Mr. Walker's wife and son, and codefendants (David Banks, Demetrius Harper, Clinton Stewart, David Zirpolo and Kendrick Barnes) for:

(1) displaying invidious religious animus and making demonstrably egregious, hostile and slanderous comments about Pastor Banks, (2) abusing legal process and the Establishment Clause by using her bench for the impermissible purpose of conducting a religious inquisition against Pastor Banks and CSFC, (3) engaging in discriminatory sentencing practices by willfully disregarding 2255 habeas law and arbitrarily releasing a single defendant (Mr. Walker) out of six who was found guilty in a jury trial of being an organizer/leader in a conspiracy to commit mail and wire fraud for impermissible purposes, and (4) engaging in a continuing pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards related to the sentencing laws of the United States. (Judicial Complaint, 10th Cir. case no. 10-17-90034).

On January 12, 2018, CSFC, as a member of the public and on behalf of the public at large, filed a motion to unseal court records in Mr. Walker's habeas proceeding based on legitimate concerns about its reputation and denial of the public's First Amendment and common law right of access to court proceedings for the purpose of understanding the judicial process associated with the resentencing of Mr. Walker and the right to inspect and copy judicial records from those proceedings. (Doc. # 1106).

On June 1, 2018, the district court issued an order denying CSFC's motion to unseal claiming it had "overwhelming evidence" supporting Mr. Walker's contentions in his habeas petition that entitled him to having his sentence cut in half and the "evidentiary and legal support" to justify its broad sealing of proceedings based on "very real safety concerns" it had for Mr. Walker and his witnesses who claimed they feared "retaliatory harassment" from Pastor Banks and CSFC parishioners. (Doc. # 1114).

LONG HISTORY OF PUBLIC INTEREST & PUBLICITY

Long before being indicted Mr. Walker and his codefendants (all decades-long members of CSFC) made this case very public, and that publicity has continued to grow until this present day, even exploding onto the national stage thanks to the aggressive reporting of advocacy organization A Just Cause, who has issued probably over a hundred national press releases and discussed the case extensively

on its Internet radio program that has a listening audience of up to 30 million people.

After the February 9, 2005 raid on their business, Mr. Walker and his codefendants publicly proclaimed their innocence and decried the injustice against them by releasing four online videos by discussing the legitimacy of their business, harshly criticizing the government and the district court judge. (See https://vimeo.com/1195525 - http://bit.ly/2sdCTVA - http://bit.ly/2ubWLKc - http://bit.ly2szeGIH). On or around December 11, 2013 (just 22 months before filing his habeas petition), Mr. Walker, while imprisoned, appears on the Sirius XM radio show of Dr. Wilmer Leon to discuss the case, the business and his innocence (www.youtube.com/watch?v=BxloNlzOXqw). On April 5, 2014, Mr. Walker gave another interview from prison to the Associated Press, who reported that Walker stated, "he saw his arrangements with staffing companies as akin to an extension of credit and that "he never hid from them that he had little revenue but stressed to them he hoped to repay his debts." The AP discussed how Walker hired engineers through staffing companies" and "when the business didn't come in... the staffing companies refused to extend their contracts and so IRP would turn to others." Another interview Walker gave while in prison was to Dr. Alan Bean, Executive Director of the Friends of Justice who conducted a six-month investigation into the case that involved CSFC and the racial bias in the case.

After interviewing Walker's codefendants and dozens of CSFC members, Dr. Bean released his 2013 report online titled "Money for Nothing: how racial bias destroyed six lives, stymied a Black owned business and outraged a congregation." (http://bit.ly/2gGWGue).

Below is a list of articles expressing innocence of Walker and his co-defendants, many with contributions by Walker himself:

1) July 14, 2010 - Denver Post - "Members of Springs Church Protest Fraud Case, FBI Raid" by ELECTA DRAPER - www.denverpost.com/2010/07/14/members-of-springs-church-protest-fraud-case-fbi-raid/

2) November 11, 2011 - Gazette Telegraph - "Springs Pastor Claims Bias in Ruling" by LANCE BENZEL - https://www.gazette.com/news/springs-pastor-claims-bias-in-ruling/article_299a30f6-e11b-5e36-8db1-f4ea309daee6.html

3) April 5, 2014 - Associated Press - "Tight-knit Colorado Community Shaken by Fraud Case" - https://www.denverpost.com/2014/04/05/tight-knit-colorado-community-shaken-by-fraud-case/

4) April 15, 2014 - A Just Cause Coast2Coast Radio Program - "Federal Judge H. Lee Sarokin Discusses Mysterious Disappearance of Court Transcript in IRP6 Case" - www.blogtalkradio.com/ajcradio2/2014/04/16/a-just-cause-coast2coast-discusses-jury-instructions-and-the-appellate-process

5) May 5, 2014 - Huffington Post - "The Case of the Missing Transcript" by Former Federal Judge H. LEE SAROKIN - https://www.huffingtonpost.com/judge-h-lee-sarokin/the-case-of-the-missing-transcript_b_5267338.html

6) May 16, 2014 - Huffington Post - "The Case of the Missing Transcript Becomes More Curious - Part II" by Former Federal Judge H. LEE SAROKIN - https://www.huffingtonpost.com/judge-h-lee-sarokin/the-case-of-the-missing-transcript-ca_b_5334328.html

7) May 16, 2014 - Huffington Post - "The Case of the Missing Transcript Solved - Part III" by Former Federal Judge H. LEE SAROKIN - https://www.huffingtonpost.com/entry/the-case-of-the-missing-t_1_b_5340397.html

8) July 25, 2014 - Huffington Post - "The Case of the Missing Transcript Becomes Stranger - Part IV" by Judge H. LEE SAROKIN - https://www.huffingtonpost.com/judge-h-lee-sarokin/the-case-of-the-missing-t_2_b_5619097.html

9) August 6, 2014 - Huffington Post - "The Case of the Missing Transcript Faces Another Defeat (Part V)" by Former Federal Judge H. LEE SAROKIN - https://www.huffingtonpost.com/judge-h-lee-sarokin/the-case-of-the-missing-t_3_b_5651489.htm

10) March 31, 2015 - National Press Release - "Advocacy Group, A Just Cause, Calls for Congressional Inquiry into Possible IRS Violations of Religious Rights of a Colorado Church" by A JUST CAUSE - http://www.marketwired.com/press-release/advocacy-group-a-just-cause-calls-congressional-inquiry-into-possible-irs-violations-2005411.htm

11) October 8, 2015 - A Just Cause Coast2Coast Radio Program - "Former House & Judiciary Committee Lawyer Says IRP6 Case Was Civil Matter, Not A Crime as Alleged by Federal Government - http://www.blogtalkradio.com/ajcradio2/2015/10/09/a-just-cause--spotlight-on-capitol-hill-former-counsel-ron-legrand

12) November 3, 2015 - San Diego Union Tribune - "Famed Judge Makes Case for Theater"- http://bit.ly/2hcNdsx

13) December 28, 2015, - Huffington Post - "The Guilty Have a Better Chance for Parole or Pardon Than the Innocent" by Former Federal Judge H. LEE SAROKIN - https://www.youtube.com/watch?v=Y94O5mMJqHU

14) Prosecutor's Secret Attack on Their Church" by A JUST CAUSE - https://www.newswire.com/news/grand-jury-witnesses-discuss-prosecutors-secret-attack-on-their-church-10863281

15) May 8, 2016 - Federal Judge H. Lee Sarokin Publishes Online Play About IRP Injustice and Missing Court Transcript on YouTube titled "The Race Card Face Up" - www.youtube.com/watch?v=Y9405mMJqHU

14) July 5, 2016 - Washington Post - Judge who freed 'Hurricane' Carter now helping six imprisoned men but only Obama can save them" by TOM JACKMAN - https://www.washingtonpost.com/news/true-crime/wp/2016/07/05/judge-who-freed-hurricane-carter-now-helping-six-imprisoned-men-but-only-obama-can-save-them/

15) July 21, 2016 - Huffington Post - "A Company Small Enough to Prosecute" by Former Federal Judge H. LEE SAROKIN - https://www.huffingtonpost.com/judge-h-lee-sarokin/a-company-small-enough-to_b_11072152.html

16) September 2016 - Advocacy Organization A Just Cause publishes "Dossier of Prosecutorial and Judicial Misconduct in IRP6 Case" and forwards to members of Congress - http://bit.ly/2wBaCyJ

17) March 5, 2017 - National Press Release - "Government Witnesses Expose IRP6 Indictment as a Fraud but Judge Refused to Dismiss" by A JUST CAUSE - http://www.releasewire.com/press-releases/release-782431.htm

18) November 1, 2017 - Four members of Congress that included a member of the House Judiciary Committee and House Oversight and Government Reform Committee, sends a letter to DOJ requesting answers about alleged prosecutorial and judicial misconduct in AJC Dossier - http://bit.ly/2HuvgTc

SUMMARY OF THE ARGUMENT

The Colorado Springs Fellowship Church (hereafter "CSFC") appeals the district court's order denying its motion to unseal court records in the habeas proceeding of defendant Gary L. Walker. (Docs 1106, 1114). The district court abused its discretion by denying public access to all judicial records in the habeas proceeding including the 2255 motion initiating the proceeding, the government's answer brief,

and its order restricting access. (Docs 899, 900, 902, 922, 1114). This complete blackout of judicial records is highly irregular, constitutionally offensive and grossly contravened well-settled law.

LEGAL ARGUMENT

I. Whether the district court abused its discretion by denying public access to all judicial records in the habeas proceeding including the 2255 motion initiating the proceeding, the government's answer brief, and its order restricting access

a. Standard of Review and Discussion

"What transpires in a courtroom is public property." *Craig v. Harney*, 331 U.S 367, 374 (1947). "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions...are without question events of legitimate concern to the public." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Indeed, such information is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Id.* at 495. To assuage legitimate public concerns about possible unfair treatment and government misconduct in U.S. courts, especially where liberty interests are at stake, both criminal and civil proceedings are open, and all citizens have a First Amendment right of access to personally attend those proceedings. Moreover, when attendance is not possible, the public is allowed to inspect and

copy judicial records under the common law right of access to judicial records associated with such proceedings.

In *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme court recognized that the public and the press have a qualified First Amendment right to attend criminal trials, the major purpose of which, as was determined by *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), to protect "the free discussion of government affairs." The Supreme Court explained that public scrutiny of proceedings (1) enhances the quality and safeguards the integrity of the fact-finding process, (2) fosters an appearance of fairness, (3) heightens public respect for the judicial process, and (4) permits the public to participate in and serve as a check upon the judicial process. Id. at 606. *See* also *Goesel v. Boley, Int'l.,* 738 F.3d 831, 833 (7th Cir. 2013); *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597-598 (1978); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002); *In Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984).

The Supreme Court established a two-prong test for determining whether a First Amendment right attaches to a particular type of proceeding or document: (1) whether the proceeding has been historically open to the public and the press; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question," *Press-Enterprise Co. v Superior Court*, 478 U.S. 1,

8-9 (1986). These are respectively called the "experience" and "logic" prongs. "The public has a strong First Amendment claim to access evidence admitted in a public sentencing hearing." *United States v. Carpentier*, 526 F. Supp. 292, 294-95 (E.D.N.Y. 1981) (citing *Richmond Newspapers* supra).

Under the common law, there is a "strong presumption in favor of access" to judicial documents and records, especially those records central to judicial reasoning in adjudication of a criminal or civil case. *See United States v. Pickard*, 733 F.3d 1297, 1303 (10th Cir. 2013); I*n Matter of Continental Illinois Securities Litigation* supra; *Joy v. North*, 692 F.2d 880, 893 (2nd. Cir. 1982); *United States v. Hani El-Sayegh*, 131 F.3d 158, 163 (DC Cir. 1997). In no area is that concern more acute than proceedings related to the sentencing of defendants where it is not uncommon for the local and national public to express outrage over judicial sentencing decisions. Case and Point: The recent national outrage and subsequent actions by Santa Clara County, California citizens to successfully recall Superior Court Judge Aaron Perksy after sentencing a Stanford University student to only six months imprisonment after being convicted of sexually assaulting an unconscious woman behind a dumpster after a fraternity party.

See https://www.cbsnews.com/news/stanford-sexual-assault-case-judge-aaron-persky-recalled-northern-california-voters-brock-turner-sentencing/

Because of the exceptionally strong public interest in sentencing matters and the positive benefits of public scrutiny on judicial proceedings identified by *Globe* supra, restricting public access to judicial records is "rarely the proper protection." *United States v. Hickey*, 767 F.2d, 705, 711 (10th Cir. 1985) (Judge McKay dissenting) (quoting *In re National Broadcasting Company, Inc*., 653 F.2d 609, 615 (D.C. Cir. 1981) unless there are "exceptional circumstances" warranting closure. *See Joy v. North* supra; *See also In Matter of Continental Illinois Securities Litigation* supra. Sealing an entire proceeding should only be done for the most "extreme cases." *Jessup* supra.

It's hardly surprising that the courts have recognized that habeas proceedings where a defendant like Mr. Walker is seeking to modify or vacate his sentence are subject to the strong presumption in favor of public access to its judicial records and a First Amendment right of access to the proceeding. *See CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of Cal*., 765 F.2d 823, 826 (9th Cir. 1985) (finding a presumptive right of access to documents filed in connection with a motion to reduce a sentence); *United States v. Santarello*, 729 F.2d 1388, 1390 (11th Cir. 1984) ([T]he public has a First Amendment right to see and hear that which is admitted into evidence in a public sentencing hearing.").

A detailed explanation of the sentencing decision made on the record by a district court and its rationale behind it advances the fairness of the proceeding by "holding

open to public scrutiny the judiciary's reasoning behind depriving a person of a most fundamental right --- liberty." *United States v. Pruitt*, 502 F.3d 1154, 1163 (10th Cir. 2007). The public also has significant interest in understanding the facts and judicial reasoning related to the resentencing of criminal defendants in habeas proceedings because it's an extension of the criminal case where defendants present evidence and witness testimony to get their sentences modified or vacated by the judge (not jury) based on claims of constitutional error. Given the absence of the jury, which has been "long recognized as inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge [,] makes the importance of public access...significant." *Press-Enterprise Co.*, 478 U.S. at 12-13 (quoting *Duncan v. Louisiana,* 391 U.S. 145,156 (1968). Because of the significant positive role public scrutiny plays in safeguarding the integrity of court proceedings and judicial behavior, judges are required to undertake critical analysis before sealing judicial records or otherwise denying public access to court proceedings, and it starts with the judge determining whether the record requested to be sealed constitutes a judicial record.

"A finding that a document is a judicial document triggers a presumption of public access" and therefore the court is required "to make specific, rigorous findings before sealing the document or otherwise denying public access." *Bernstein v. Bernstein, Litowitz, Berger & Grossman,* LLP, 814 F.3d 132, 141 (2nd Cir. 2016).

"In determining whether a document is a judicial record, a judge must evaluate the 'relevance of the document's specific contents to the nature of the proceeding' and the degree to which access to the document would materially assist the public in understanding the issues before the...court, and in evaluating the fairness and integrity of the court proceeding." (Quoting *Newsday LLP v. City of Nassau*, 730 F.3d 156, 1660167 (2nd Cir. 2013). Documents filed to initiate proceedings such as indictments, civil complaints and 2255 habeas proceedings as in the instant case are "presumptively public" and "the cornerstone of every case." *Bernstein*, 814 F.3d at 140 (quotation omitted). Access to judicial documents that initiate proceedings are "almost always necessary if the public is to understand the court's decision." *Id*. *See also Smith v. Patriot News Co*., 776 F.2d 1104, 1112 (3rd Cir. 1985) (holding that because of historic experience and societal interests access to information and indictments is protected by the First Amendment and the common law right of access to judicial records).

With regards to the present case, the district court conducted no such rigorous analysis. It's bad enough that the district court sealed both the 2255 motion initiating the habeas proceeding and the government's responding answer brief (Doc. # 922), which was originally filed in the open. But the fact that the public is completely in the dark, left totally blind by a district court judge who sealed the entire habeas proceeding, much of it done sua sponte with full approval of the

government, raises justifiable suspicions about this legitimacy of this secret proceeding that resulted in the rare resentencing of a criminal defendant. Although district courts have supervisory power over its records and the discretion to seal those records, that "discretion is not unlimited." *Hickey*, 767 F.2d at 708. The law requires the district court, "before taking such and unusual step as sealing an entire record" to "articulate the compelling countervailing interests to be protected, make specific findings on the record concerning the effects of disclosure, and provide interested third parties the right to be heard." *In re: Cendant Corp*., 260 F.3d 263, 294 (3rd Cir. 2001).

Standing alone, the district court's sealing of both Mr. Walker's 2255 habeas motion and the government's answer brief was an exceptionally egregious abuse of discretion. The public not only has the right to know and understand the content of Mr. Walker's motion but also the government's response. Furthermore, the district court states in its order that during the evidentiary hearing, "Mr. Walker and former members of the CSFC testified at length in line with representations made in his 2255 petition" and that "the evidence supporting Mr. Walker's allegations that his constitutional rights were violated was compelling." Without access to Mr. Walker's motion and affidavit, the government's answer brief and transcript of the witness' testimony, the public can't possibly understand the issues before the court or evaluate the fairness and integrity of the judge's decision to cut Mr. Walker's

sentence from 135 months to 5 years, 10 months. It was the district court who originally found Mr. Walker to be the leader/organizer of the criminal conspiracy related to two small business he controlled as President and CEO, both of which were alleged by the government to be part of his alleged criminal activity. The court's drastic change of position certainly warrants public scrutiny, especially given a possible unfair sentencing disparity to the other 5 codefendants who worked under Mr. Walker as well as similarly situated defendants nationwide. "Sentencing disparities" are "unfair to both offenders and to the public." *Pepper v. United States,* 562 U.S. 476 (2011) (Justice Breyer concurring) (quoting S. Rep. No. 98-225, p. 45 (1983) (U.S. Senate report on Precursor to Federal Sentencing Reform Act of 1984)). Once a court imposes a sentence it "may be modified only in very limited circumstances," *Pepper,* 562 U.S. at footnote 14 (citing 18 U.S.C 3582(c)), which heightens the need of the public to understand the evidence relied on by the district court and the judicial reasoning it employed in resentencing Mr. Walker.

The district court's order takes umbrage with CSFC discussing its legitimate concern about their "reputation in the community" and the public's overriding interest in Mr. Walker's sentence reduction, but public scrutiny "serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct." *In re: Washington Post Co*., 807 F.2d 383, 389

(4th Cir. 1986). Furthermore "the presence of the public operates to check any temptation that might be felt by either the prosecutor or the court...to seek to impose an arbitrary or disproportionate sentence." *Id*. Moreover, "sentencing proceedings are of paramount importance to friends and family members of the defendant being sentenced" and "are also extremely significant to victims of crimes, to family members of victims, and to members of the community..." *United States v. Alcantara,* 396 F.3d 189, 198 (2nd Cir. 2005). A sentence reduction can also "compromise the public reputation of judicial proceedings," especially if done for an improper or illegitimate purpose. *Puckett v. United States*, 556 U.S. 129, 143 (2009).

The district court, as "the primary representative of the public interest in the judicial process," *Citizens First Nat'l Banks v. Cincinnati Insurance Co*., 178 F3d 943, 945 (7th Cir. 1999), showed absolutely no sense of public responsibility and grossly abused its discretion by blacking out an entire habeas proceeding. The district court committed procedural error by failing to notify the public of its intent to seal documents where a First Amendment right of access was implicated in this case. "[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives" and "if objections are made, a hearing on the objections must be held as soon as possible." *Hearst Newspapers, LLC v. Cardenas-Guillen*, 641 F.3d

168, 182 (5th Cir. 2011) (quoting *Phoenix Newspapers, Inc. v. U.S. Dist. Ct*., 156 F.3d 940, 949 (9th Cir. 1998). The government was also procedurally culpable and shirked its responsibility to the public because "the Department of Justice has issued guidelines [that] generally prohibit a government attorney from consenting to [, inter-alia,] a closed...sentencing proceeding when the public has not been given notice of proper closure." *Id.* (quoting *United States v. Alcantara*, 396 F.3d 18, n.9 (2nd Cir. 2005) (citing C.F.R. section 50.9)).

The district court engages in factual and legal fiction by claiming in its order denying CSFC's motion to unseal that it has the "evidentiary and legal support" to overcome the very heavy burden of sealing Mr. Walker's entire proceeding. Grand juries have a history and tradition of blanket secrecy, habeas proceedings do not. The courts have reserved the sealing of judicial records for when there is a "compelling interest in secrecy, as in the case of trade secrets, the identity of confidential informants and privacy of children." *Jessup* Supra. None of those compelling concerns are at play in this case and certainly nothing 'extreme' enough to justify the court's unusual application of grand jury secrecy on Mr. Walker's broad, unsupported assertions that he and his witnesses (disgruntled former CSFC members) fear "continued retaliatory harassment from of all people his mother-in-law of 30 years, his wife and current CSFC parishioners who he called friends for three decades. "Broad allegations of harm bereft of specific examples of

articulated reasoning are insufficient to justify sealing judicial records." *In re: Cendant Corp.*, 260 F.3d at 194.

The district court failed in its requirement to determine whether the disclosure of judicial documents requested to be sealed by Mr. Walker worked a "clearly defined and serious injury" to him and his witnesses. *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3rd Cir. 1994). Claims of fearing harassment, even if true, wouldn't overcome "serious injury" analysis. As you will see in later discussion, the district court's flawed definition of harassment is based on Mr. Walker receiving a letter from Pastor Banks (his mother-in-law and religious leader) allegedly telling him God will punish him and his father with disease (a biblically-backed tenant of the Christian faith) for conspiring together to make false accusations against her and the church. Certainly, if Mr. Walker and his witnesses were so distressed from serious harassment they would have filed for a restraining order with their local court and provided verifiable proof of this harassment to the district court. If the district court had credible specific examples of actual or potential serious injury being done to Mr. Walker and his witnesses, it would have certainly cited those compelling examples on the record without any restrictions to public viewing. Furthermore, if the potential harm and injury to Mr. Walker was that serious, the district court would've certainly issued a protective order against Pastor Banks, Walker's wife and CSFC parishioners for the benefit of the habeas proceeding.

If Mr. Walker was so distressed from this alleged harassment, why did he wait 12 days after the evidentiary hearing to ask for sealing of the evidentiary hearing transcript? After Mr. Walker and his cabal of disgruntled former CSFC members used a public court to gratify their private spite and promote a public scandal against Pastor Banks and CSFC, the district court granted them privacy based on frivolous claims of harassment. But absent extreme circumstances, privacy interests are extinguished when witness testimony and judicial records have been presented in open court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 494-495, ([T]he interests in privacy fade when the information involved already appears in the public record."); *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2003) (finding that claims of privacy to statements about medically sensitive information lose forces after defendant articulates ailments in public sentencing hearing); *Globe Newspaper v. Polaski*, 868 F.2d 497, 506 n.17 (1st Cir 1989) (noting that prior publicity weighs strongly against sealing); *Doe v. Munoz*, 507 F.3d 961, 965 (8th Cir. 2007) ("Where the information disclosed is already public, there is no valid expectation of privacy..."); *See also Sheetz v. The Morning Call, Inc*., 946 F.2d 202, 207 (3rd Cir. 1991).

The district court attempts to put some meat on the bones of its frail sealing arguments by citing inapposite cases, specifically *Rikers v. Federal Bureau of Prisons,* 315 Fed. Appx 752 (10th Cir. 2009) (unpublished), *United States v.*

Amodeo, 71 F.3d 1044, 1051 (2nd Cir. 1995), *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989), and *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

In *Rikers*, the 10th Circuit affirmed the district court's denial to unseal a judicial document where the defendant, a federal prisoner had admitted to being a confidential informant ("snitch") and faced "imminent danger and the "risk of physical harm" both in an out of prison. In *Amodeo*, specifically 71 F.3d at 1048, the 2nd Circuit would not unseal an investigative report because it would subject the appellant to the public airing of accusations that were "anonymous, unverified, and... of doubtful veracity." In *Davis*, closure was done to protect the government interest of protecting the privacy rights of vulnerable 16-year-old rape victims. The *Waller* case hurts rather than helps the district court in that the Supreme Court faulted the court's closure of an entire suppression hearing to when it could have narrowly tailored the closure to accommodate the government's legitimate sealing interest of a two-and-a-half-hour wiretap audio tape. The district court's blackout of Walker's entire proceeding runs counter the findings of *Waller* in the context of the sealing issue and implicates its abuse of discretion in its absurdly broad sealing of an entire habeas proceeding. Mr. Walker faced no serious injury, was not in imminent danger or risk of physical harm like *Riker* and comparing the 54-year-old Walker and his other adult witnesses to vulnerable 16-year-old rape victims is not

only ridiculous but should offend the sensibilities of this court. The district court clearly abused its discretion in this case with its blanket sealing of judicial records. There was never any harassment of Mr. Walker and the district court knew it. During the June 28, 2017 resentencing colloquy Judge Arguello confirmed with her own words that Mr. Walker had no contact with his mother-in-law, his wife, codefendants or CSFC parishioners, thereby making harassment impossible. Judge Arguello stated the following:

1) "Pastor Banks...CUT YOU OFF from everyone associated with the Colorado Springs Fellowship." (Doc. #1087, Aplt. App. at p.20).
2) "...you lost your wife, son and entire social ground, including the camaraderie of your codefendants and the other parishioners, because Pastor Banks forbade them to have any contact with you." (Doc. #1087, Aplt. App. at p.21).
3) Pastor Banks "excommunicated you from the only community you had known for the past 30 years, and she unconditionally ALIENATED you from your wife and son." (Doc. #1087, Aplt. App. at p.22).
4) "And despite all she has done to you, to try and control you by ISOLATING ad ALIENATING you from anyone outside the church," (Doc. #1087, Aplt. App. at p.23).
5) "... [Pastor Banks] sought to punish you by ISOLATING you from your son and wife, your fellow church members and your codefendants." *Id.*

If Walker was CUT OFF, ISOLATED and ALIENATED from his wife, son, codefendants and every parishioner at CSFC as Judge Arguello contends, how could he be seriously injured from retaliatory harassment from people who couldn't get to him? The district court and the government clearly had another motive for sealing proceedings. Mr. Walker manufactured claims of harassment and requested sealing of hearing transcripts to avoid potential family and public

scrutiny. This Court held that sealing judicial records to protect a petitioner's privacy interest from an ongoing feud with family does not overcome the strong presumption in favor of public access to judicial records. *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007). Furthermore, "those using the courts must be prepared to accept the public scrutiny that is an inherent part of public trials." *Femedeer v. Haun,* 227 F.3d 1244, 1246 (10th Cir. 2000).

The district court is correct that Walker was isolated because he was in prison which made harassment from Pastor Banks and CSFC parishioners impossible. There's no way for anyone to contact Mr. Walker by phone in prison which eliminates the possibility of phone harassment. There's no way for anyone to visit with Mr. Walker while in prison unless they are approved by Mr. Walker, placed on his visiting list and Mr. Walker voluntarily goes to the visiting room to see them. After the fall of 2014 not a single CSFC parishioner visited Mr. Walker. His wife visited him once, his mother-in-law (Pastor Banks) had a 3-minute conversation while she was visiting her son David Banks, Walker's brother-in-law and codefendant. And his codefendants, who were friends of Walker for 30 years and incarcerated with him in Florence, had a few conversations with him where they encouraged him to stop lying and do the right thing. When Walker didn't listen, as Judge Arguello correctly stated, they cut him off. Mr. Walker did, however, receive letters from his wife, son and mother-in-law while in prison.

Some of the letters expressed anger while others encouragement. After Mr. Walker was released from prison on July 7, 2017, his wife had a few meetings or conversations with him to accommodate divorce proceedings. Neither Pastor Banks, Walker's son or any CSFC parishioner has had any contact with Walker or his witnesses. Judge Arguello's claim of having "evidentiary and legal support" to justify sealing judicial records is wholly refuted by the June 28, 2017 transcript. There is absolutely no legal basis for the district court's denial of public access to judicial records in this case. This was a clear abuse of discretion by the district court.

The June 28, 2017 resentencing transcript indicates the district court conflated letters from Walker's family members expressing their displeasure about his false accusations and telling him God will punish him as harassment. (Doc. #1087, Aplt. App. at p.21). When you consider that Mr. Walker, as President and CEO of IRP Solutions and Leading Team, had proclaimed the innocence of him and his codefendants for 10 years, then, suddenly and publicly, accused his wife of 30 years and her mother of being involved and/or leading an alleged criminal conspiracy of which he was convicted related to those companies, anger from his wife and son, mother-in-law and other family and friends is an understandable and a natural human reaction. Literally millions of marital and family arguments and disputes take place around the world every day and they in no way can be

considered harassment. It's not shocking in the least that Mr. Walker's outrageous claims in his affidavit would start a family feud, and as the 10th Circuit held in *Mann* supra., a petitioner's desire to seal proceedings to protect their privacy interests from an ongoing feud with family does not overcome the strong presumption in favor of public access to judicial records. It's clear from the colloquy transcript the district court was highly-offended by alleged statements made by Pastor Banks in a letter to Mr. Walker, her son-in-law, concerning him and his father being punished by God with disease for making false accusations against the church and her. (Doc. #1087, Aplt. App. at p.21).

The transcript shows an irascible Judge Arguello making extra-judicial comments about Pastor Banks and her religious beliefs, stating she was a "vindictive and mean-spirited" prophet of God (Doc. #1087, Aplt. App. at p.21). God's judgment and punishment with disease, death and hell are well-chronicled in both the old and new testament of the Bible and is a central, widely-accepted tenant of the Christian faith.

In the King James Bible, the book of Acts, Chapter 5, discusses how God killed a husband and wife in the church for lying. In the book of Numbers, Chapter 16, God killed 250 princes for making false accusations against Moses, God's leader. In Numbers, Chapter 12, God afflicted a woman with leprosy for speaking against

Moses, and in Acts, Chapter 12, God punished King Herod with a disease, worms ate up his body and he died.

Judge Arguello may disagree with biblical scripture concerning God's punishment and obviously didn't approve of the alleged statement made to Mr. Walker, but Pastor Banks, CSFC parishioners and every other U.S. citizen have a First Amendment right to practice their religious beliefs according to the respective consciences. A mother-in-law, who is a Pastor, expressing God's punishment to her son-in-law who followed those teachings for 30 years is not harassment or coercion irrespective if Judge Arguello was offended by it.

Determination of what is a religious belief or practice does "not turn on a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others" or Judge Arguello to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Div.,* 450 U.S. 707, 714 (1981). Furthermore, "judges are ill-equipped to examine the breath and content of an avowed religion." *Africa v. Pennsylvania*, 552 F.2d 1025, 1031 (3rd Cir. 1981).

How court's deal with issues of religion are of immense public interest as shown by the national attention U.S. citizens gave to the Colorado *Masterpiece Cake Shop Co. v. Colorado Civil Rights Commission* case (U.S. Supreme Court no. 16-111), where the intersection of religious freedom and anti-discrimination laws collided.

There, the owner of *Masterpiece* refused to use his artistic talents to design a cake signifying a gay marriage because it offended his Christian beliefs. "There is a strong public interest in a citizen's exercise of religion, a public interest clearly recognized by Congress when it enacted the [Religious Freedom Restoration Act]." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc) (Concurring opinion by Judge Seymour, joined by Tacha, Porfolio, Henry, Briscoe and Lucero).

In the present case, the intersection of religion and sentencing collided when Judge Arguello cut Mr. Walker's sentence in half based on his 2255 allegation that Pastor Banks religiously coerced him into firing his attorney and committing criminal acts. In other words, Mr. Walker said the devil made him do it, except he replaced the devil with Pastor Banks, his mother-in-law of 30 years. The implications here are that convicted defendants can get released from prison by simply accusing his pastor, church or religion for controlling his actions and decisions. The government discussed Walker's absurd claims in its answer brief:

"Mr. Walker claims that when he made the decision to proceed pro se, he was operating under the spell of Rose Banks, his mother-in-law, who he claims was also his pastor. According to Mr. Walker, when he waived his right to appointed counsel at trial, he was convinced that Pastor Rose spoke 'with the voice of God,' and that God wanted him to waive his right to counsel. Having time to reflect

further upon the matter in the Bureau of Prisons, Mr. Walker has seemingly concluded that God did not want him to proceed pro se after all." (Doc. # 922 pp. 6-7). "Although Mr. Walker alleges that he was bowing 'to pressure from a third-party exercising undue influence,' Motion at 68, he provides no evidence of this other than his own self-serving affidavit, which asserts little more than that Sister Rose told him to fire his lawyer, and that he viewed Sister Rose as the voice of God." (Doc. # 922 p. 19).

If that claim wasn't fantastic enough, Mr. Walker shockingly claimed that one of his attorneys (Gwendolyn Solomon), a close friend and parishioner at CSFC who he chose to jointly represent him and his codefendants, had a conflict of interest in representing him during sentencing because she was unduly influenced from being under the spell and control of Pastor Banks and was conflicted about representing him due to her allegiance to Pastor Banks. (Doc. # 902). On page 27 of its brief, the government points out that a conflict of interest was impossible because "the sentencing transcript shows that Joshua Lowther appeared for Mr. Walker and handled the hearing" and that Ms. Solomon did not "play any role" in representing him during sentencing. "Mr. Lowther handled virtually all significant sentencing duties," wrote the government. (Doc. #922).

If there's ever a place for the famous quote, "truth is stranger than fiction," it is this bizarre habeas proceeding. In its answer brief, which is currently sealed, the

government thoroughly dismantled Mr. Walker's 'voice of God' claim by discussing how the Supreme Court in the case of *Connelly v. Colorado*, 479 U.S. 157, 167-171 (1986) rejected a defendant's argument that his confession to the police was not the product of his "free will" because "the voice of God was telling him to either confess or to commit suicide." (Doc. # 922 at 19). Given its stiff opposition based on substantive law, it's incomprehensible that the government would do a sudden 180-degree reversal and abandon its adversarial ship in favor of releasing Mr. Walker. Remember what the district court said to Walker during the resentencing colloquy:

"Now, during the evidentiary hearing there was evidence demonstrating the extent of coercion that you and others were subjected to by Pastor Banks, and your inability to challenge or evade directions received from her as a result of the duress that was imposed." (Doc. #1087, Aplt. App. at p.21).

What evidence of duress? What evidence of coercion? What was Mr. Walker's testimony? What exactly was the 'others' testimony? The public hasn't got a clue because their First Amendment and common law rights of access have been violated by the district court's improper sealing of virtually every judicial record in the case, including Mr. Walker's affidavit that the government references in its brief. The 10th Circuit recently stated there is no case law to support Mr. Walker's claims of religious coercion.

Just a few years ago the 10th Circuit utterly rejected a defendant's claim that his perceived religious and family pressures forced him into pleading guilty. "We have found no case, and the parties have cited none, squarely addressing the question of what effect...perceived religious and familial ramifications...have upon a guilty plea." *United States v. Palmer*, 630 Fed. Appx 795, 797 (10th Cir. 2015). (unpublished). In distinguishing 'between motivation which induces and a force which compels the human mind to act,' the 10th Circuit held that a 'defendant's religious beliefs regarding the merits of confessing one's wrongdoing and his desire to mollify his family or give in to their desires are self-imposed coercive elements and do not vitiate the voluntary nature of the defendant's guilty plea.' *Id*. (Quoting *Craker v. State*, 66 Wis. 2d 222, 223 N.W.2d 872, 876 (Wis. 1974).

If three 10th Circuit judges couldn't find the legal authority to support the defendant's religious and family coercion claim in *Palmer*, and, as the government pointed out in its answer brief, the Supreme Court in *Connelly* rejected coercive voice of God claims similar to Mr. Walker's, the public has the right to access records supporting the district court's self-described "evidentiary and legal support" it says it relied on in substantiating Mr. Walker's absurd claim, that at 54 years-old, he couldn't help but bow to the will of Pastor Banks.

CSFC is aware that a young woman by the name of Shauna Ruff testified at the evidentiary hearing. Ms. Ruff was born and raised in CSFC, attended services

every week and heard the same biblical doctrine about God's love and punishment just like Mr. Walker. Ms. Ruff, at the age of 21, exercised her 'free will' and left CSFC. How could Ms. Ruff, who certainly testified about the alleged duress Pastor Banks imposes on its parishioner, chose to leave CSFC at 21? But the 54-year-old Mr. Walker, who came to CSFC in 1984 as a college student from the University of Colorado, couldn't overcome this alleged duress Pastor Banks had him under and bowed to the alleged coercion of Pastor Banks in firing his attorney? Couldn't Mr. Walker, like Ms. Ruff, have evaded the so-called directions and duress of Pastor Banks and exercised his free will many years ago and not wait until he came to prison to break this so-called "allegiance" to Pastor Banks as the district court contended during the resentencing colloquy?

The district court claims there was "overwhelming evidence" substantiating Mr. Walker's claims of religious coercion and "evidentiary and legal support" of Mr. Walker's alleged fear of retaliatory harassment but denies the public its First Amendment and common law right of access to inspect the judicial records concerning the evidence and legal support it relied on in determining coercion, harassment and the cutting of Mr. Walker's sentence in half by sealing virtually every judicial record in the proceeding. Also, the government's substantive answer brief and other transcripts showing government opposition should be unsealed for the public to scrutinize the reasons behind the government's sudden and secret

abandonment of its brief filed on behalf of the American public that not only opposed Mr. Walker receiving habeas relief but also refuted claims that attorney Lawson had a conflict of interest in representing because she actually never represented him during the sentencing hearing. (Doc. #922, p. 7). There's some reason (likely a nefarious one) why both the district court and the government are hiding information from the public. This is clearly gross abuse of discretion by the district court.

The circumstances surrounding the sealing of this proceeding wreaks of either incompetence by the district court (unlikely), or perpetration of a collusive fraud by the district court and government to release Walker based on an ulterior motive. The public needs an explanation and needs to understand the actions of the district court and government in resentencing Walker because "federal courts are forbidden, as a general matter, to "modify a term of imprisonment once it has been imposed." *Freeman v. United States*, 564 U.S. 522, 527 (2011)(citing 18 U.S.C. 3582(c)).

"[T]he bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." *Amodeo*, 71 F.3d at 1048 (citation omitted).

Based on Mr. Walker's sealed 2255 motion, his sealed self-serving affidavit, his sealed testimony, the sealed testimony of his witnesses and the sealed testimony of attorney Solomon, the district court secretly disregarded the government's sealed answer brief, made sealed factual and legal findings and determined that (1) Mr. Walker was helpless, under the duress of Pastor Banks, and coerced by her into firing his attorney because he heard the voice of God through her telling him to fire his attorney, (2) Mr. Walker received ineffective assistance of counsel from attorney Solomon having a conflict interest based on the undue religious influence exerted on her by Pastor Banks, (3) Mr. Walker was suffering retaliatory harassment from Pastor Banks, his wife and CSFC parishioners while at the same time being alienated, isolated and cut-off from him, (4) Mr. Walker's witnesses were being harassed, (5) because of the alleged retaliatory harassment, Mr. Walker and his witnesses have suffered or could potentially suffer a serious injury and (6) Mr. Walker should receive a downward departure of his sentence from 135 months (11 years) to 5 years 10 months. (Doc. #1087, Aplt. App. at p.4).

Because the district court made "complex factual and legal determinations" on these issues in the evidentiary hearing "the presumption of access applies to evidence introduced in connection" with its judicial decision-making and adjudication of Walker's resentencing. *In Matter of Continental Illinois Securities Litigation*, 732 F.2d at 1309; *See also Kravetz*, 706 F.3d at 56-57 (holding that

sentencing memoranda and third-party sentencing letters which influence the judge's sentencing decisions are judicial records subject to the common law right of access.).

"Judges deliberate in private but issue public decisions after public arguments based on public records." *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). In the judicial branch of government, judges "claim legitimacy" by their judicial "reason[ing]" and any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Id*. *See also In Matter of Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992) ("Public argument is norm even, perhaps especially, when the case is about the right to suppress publication of information).

In the 7th Circuit case of *In Matter of Continental Illinois Securities Litigation* supra, the court found that the public was presumptively entitled to a report that was admitted into evidence in connection with a pending motion to dismiss claims against several defendants and the fact the district court expressly relied on the report in reaching a "tentative" disposition on the motion. How much more so should motions, briefs and testimony relied on by Judge Arguello for a number of substantial decisions central to the adjudication of Mr. Walker's habeas proceeding be afforded public scrutiny consistent with the First Amendment and common law right of access. "[T]here is a basic distrust of secret proceedings." *Carpentier*, 526

F. Supp at 295 (citing *In re: Oliver*, 333 U.S. 257, 273 (1948)) and "to delay or postpone disclosure undermines the benefit of public scrutiny." *Lugosch v. Pyramid Co.,* 435 F.3d 110, 127 (3rd Cir. 2005).

Conclusion

Defendant Gary L. Walker was a major force in the publicizing his case and proclaiming his innocence for 10 years and shouldn't have been given absolute privacy by the district court in his habeas proceeding at the expense of the public's First Amendment and common law right of access to proceedings and judicial records. The district court's own statements during the resentencing colloquy prove Mr. Walker's claims of harassment were baseless and were obviously manufactured to avoid family and public criticism after he changed his 10 year proclamation of his innocence against the government's criminal charges into accusing his wife and mother-in-law being co-conspirators, even accusing his mother-in-law, Pastor Banks, of controlling him and his personal decision to represent himself as well as being the organizer of the alleged conspiracy he was convicted as President and CEO of his companies. The district court's conflating that an alleged letter from Pastor Banks conveying her religious belief to her son-in-law, Mr. Walker, that God will punish him and his father for doing wrong does not qualify as harassment but is an affront on Pastor Banks' First Amendment right to freely believe and practice her religion according to her own conscience.

As we also discussed, Mr. Walker's claims of coercion, conflict of interest by attorney Solomon and Mr. Walker receiving habeas relief and a sentence reduction were stridently challenged by the government in its substantive answer brief but what weight (if any) did the district court give to the government's argument and why did the government abandon its opposition? What was the content of both Mr. Walker's 2255 motion and the government's answer brief? What were the district court's specific findings in its order granting Mr. Walker's request to restrict access to the evidentiary hearing and how did the witness testimony contribute to the judicial decision-making of the district court in all these matters including the resentencing of Mr. Walker? So many questions for the public but so few answers because proceedings were held in secret because the district court, who is the primary representative of public interest in the judicial process, egregiously abused its discretion by taking the extreme measure of applying grand jury secrecy to a habeas proceeding without any arguable legal basis for doing so.

CSFC respectfully requests that the court immediately order the unsealing of Mr. Walker's 2255 motion, the government's answer brief, the evidentiary hearing including witness testimony and government argument (if any), the district court's order restricting access to the evidentiary hearing (Doc. #1086) and all other 'judicial records' in his habeas proceeding related to the resentencing of Mr. Walker and adjudication matters.

Respectfully Submitted, July 31, 2018.

s/ Gwendolyn M. Lawson
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CERTIFICATE OF COMPLIANCE

Pursuant to this document the page limitation complies with Fed. R. App. P., Rule 32(a)(7)(B) it contains 48 pages and complies with the word limit of 8992 words and the type volume limitation.

/s/ Gwendolyn M. Lawson

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing: (1) all required privacy redactions have been made; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CC Cleaner, and according to the program are free of viruses. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after responsible inquiry.

/s/ Gwendolyn M. Lawson

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Opening Brief was filed using CM/ECF filing system which will send notification of such filing to the following e-mail addresses on July 31, 2018 was served on:

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(*See* Fed. R. App. P. 25(b))

s/ Gwendolyn M. Lawson
Gwendolyn M. Lawson
Signature of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. WALKER,

Defendants-Appellee

COLORADO SPRINGS FELLOWSHIP CHURCH,

Movant - Appellant.

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/D. Ct. No. 1:15-CV-02223-CMA

ATTACHMENTS TO OPENING BRIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 15-cv-02223-CMA
Crim. No. 09-cr-00266-CMA-3

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

3. GARY L. WALKER,

Defendant-Movant.

UNITED STATES' ANSWER TO
DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255

Pursuant to this court's order (#905), the United States responds to defendant's motion to set aside, vacate, or correct his sentence, under 28 U.S.C. § 2255 (#902).

DEFENDANT'S CLAIMS

Having chosen, together with his co-defendants,[1] to proceed *pro* se at trial, Mr. Walker now claims that the court's *Faretta* advisements were inadequate and that his decision to proceed *pro se* was not knowing and voluntary. Although he was represented by counsel at sentencing and on appeal, Mr. Walker complains that his counsel suffered from a conflict of interest, were incompetent, and failed to raise the proper issues on appeal. Mr. Walker's claims are without merit and his § 2255 motion should be denied.

[1] Co-defendants at trial were David Banks, Kendrick Barnes, Demetrious Harper, Clinton Stewart, and David Zirpolo.

TIMELINESS

Title 28, U.S.C. § 2255 requires in most cases that a motion be filed within one year of the date on which the judgment of conviction becomes final. Final judgment entered in this court on July 25, 2012. Doc. 782. The defendant's conviction was affirmed on appeal. *United States v. Banks, et al.*, 761 F.3d 1163 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 308 (Oct. 6, 2014). When a defendant appeals, finality attaches on the later of the expiration of the 90-day time for filing a certiorari petition with the Supreme Court or the Court's final disposition of the petition. *United States v. Burch*, 202 F.3d 1274, 1276 (10th Cir. 2000). The defendant's petition for certiorari was denied Oct. 6, 2014. His § 2255 motion was filed October 5, 2015, and is timely.

Pursuant to Rule 5(b) of the Rules Governing § 2255 Proceedings, the United States notes that this is the defendant's first post-conviction motion attacking his conviction or sentence.

LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE CLAIMS

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's performance prejudiced him in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). In reviewing

such claims, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

Strickland sets a high standard for post-conviction relief. In *United States v. Addonizio*, 442 U.S. 178, 184 (1979), the Supreme Court held that "[i]t has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Thus, according to the Rules Governing Section 2255 Proceedings, "the appropriate inquiry is whether the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice" and whether the error presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Rule 1, Advisory Committee Notes, 1976 Adoption (next to last ¶), quoting *Davis v. United States*, 417 U.S. 333 (1974).

Following these holdings, the Tenth Circuit has held that a defendant may establish his entitlement to habeas relief only by providing evidence that failure to hear his claims will result in a miscarriage of justice, *e.g.*, by showing that the claimed error in the trial proceedings probably resulted in the conviction of one who is actually innocent. *See United States v. Cervini*, 379 F.3d 987, 990-91 (10th Cir. 2004) (quoting *United States v. Barajas Diaz*, 313 F.3d 1242, 1245 (10th Cir. 2002)).

OFFENSE CONDUCT & TRIAL EVIDENCE

Following a lengthy jury trial before this court, the defendant was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349. This court sentenced him to 135 months' imprisonment. Co-defendants David Banks, Kendrick Barnes, Demetrius Harper, Clinton Stewart, and David Zirpolo were also found guilty of participating in the conspiracy. In addition, the co-defendants were found guilty of numerous counts of mail and/or wire fraud. The operation of the scheme is set forth in detail in the presentence report. *See* doc. 760 at 3-12 (under seal). As to Mr. Walker's role in the offense, at his sentencing hearing this court, having presided over the trial, noted that Mr. Walker's sentencing objections "appear to be based on Mr. Walker's rejection in whole of the jury's verdict finding him guilty." Doc. 824 (doc. 902-4) at 6-7. The court then reviewed the trial evidence:

"The evidence presented at trial established that conduct relevant to the offense began in October 2002. At that time, the defendants operated or were associated with entities called Leading Team, Inc., which I will refer to as LT; and DKH, LLC, which I will refer to as DKH, sometimes doing business as DKH Enterprises. Now, defendant Walker was the president of LT. Defendant Banks was an executive of that company, as well. Defendant Harper was the president of DKH, and defendant Stewart was the vice president of DKH. Now, sometime in 2003, the defendants stopped operating LT and began operating a third entity, IRP Solutions Corporation, which I will refer to as IRP. Defendant Walker was the president of IRP. Defendant Banks was the chief operating officer. And the remaining defendants held other executive positions. These entities were all involved in some fashion with the development of a software program known as Case Investigative Life Cycle or CILC. The entities initially operated from an office, in what trial witnesses described as a strip mall in Colorado Springs. DKH and IRP later moved to the second floor of an office building located at 7350 Campus Drive in Colorado Springs.

Beginning around October 2002, the defendants began contacting staffing companies and attempting to set up "payrolling" arrangements with staffing companies. Defendants Banks, Harper, Stewart, Zirpolo or someone else acting as their agent, initiated contact with each staffing company. Witnesses from over 20 different staffing

companies testified that during these initial contacts, the defendants falsely represented that LT, IRP, DKH or a combination of DKH and one of either LT or IRP, was on the verge of signing a contract to sell CILC to one or more major law enforcement agencies or had already signed such a contract or were already doing business with such law enforcement agencies. The agencies most often mentioned by the defendants included the United States Department of Homeland Security, DHS; New York City Police Department, NYPD; and the United States Department of Justice or DOJ. Staffing company witnesses testified that these representations gave them confidence that the defendants' companies would be able to pay the staffing companies' invoices, and that they relied on these representations as part of their process of deciding whether to do business with the defendants. [interruption omitted]

E-mails seized during a search of 7350 Campus Drive and admitted at trial demonstrate that defendants Walker and Barnes, while not necessarily involved with the initial contacts with staffing companies, helped identify potential victim staffing companies. Testimony from representatives of the law enforcement agencies referenced by the defendants establish not only that the defendants had made no sales of CILC to these agencies and that they were nowhere near making such sales, but that the defendants had no basis for even believing that such sales were imminent.

In addition to making false statements about current or impending contracts with major law enforcement agencies, the defendants used other tactics to prevent victim staffing companies from learning that the defendants had no intention of paying them. For example, the defendants used related entities, including DKH and SWV, Inc. as references in credit applications. SWV, Inc. is an entity run by defendant Banks' sisters, Charlisa Stewart, who also worked at IRP; Lanita Pee; Lawanna Clark, who also reported time to the staffing companies; and Yolanda Walker, Mr. Walker's wife, who was bookkeeper for IRP. The defendants' conspirators took steps to prevent staffing companies from realizing that payrolled employees had previously worked for other unpaid staffing companies. For example, Samuel K. Thurman, who payrolled through four different staffing companies at IRP, testified that he was instructed by defendant Harper to act as if he had not previously been employed at IRP through other staffing companies when he began working for a new staffing company. On days when he was to meet with a representative of a new staffing company, Mr. Thurman and other employees were told to leave the building before the staffing company representative arrived. They were then directed to sign in as visitors upon re-entry, even though he and the other employees already had access badges for the office. Internal e-mail messages seized during the search warrant also illustrated this practice of employees acting as if they had not previously been payrolled. When acting on behalf of IRP, defendants Harper and Stewart often used their middle names rather than first names to hide their previous association with DKH. All of the defendants submitted time cards in their own names to staffing companies where they were payrolled. Additionally, trial evidence indicated that the defendants were either reporting time to staffing companies using aliases or were allowing their names to be used as aliases for this purpose. All of

the defendants, except defendant Barnes, approved time cards for each other and for other payrolled employees in whose name time was reported, and the approved time cards in many cases reported substantially overlapping, if not identical, hours for the same employee to two or even three different staffing companies. For example, Government Exhibit 901.00 is a summary of overlapping hours reported to staffing companies, [and] demonstrated that each of the defendants, except Defendant Barnes, approved overlapping time cards on at least one occasion and often more. Defendants Harper and Stewart approved overlapping time cards for 10 different staffing companies, while defendant Zirpolo approved overlapping time cards for four different staffing companies. Defendant Barnes reported work 24 or more hours in a day for three different staffing companies on approximately 23 different days.

Staffing company witnesses further testified that once they began questioning the defendants about their failure to pay the initial invoices from staffing companies, they received additional false assurances that the defendants were just about to pay them. During these assurances, the defendants often furthered the false impression that they were actively doing business with large governmental agencies by making references to "slow government payment/procurement/business cycles." These assurances caused the staffing companies to continue to payroll employees at LT or DKH or IRP, which ultimately increased the loss to those companies. Witnesses from multiple staffing companies, including Dottie Peterson from Snelling; Katherine Holmes from AppleOne; and Greg Krueger from PCN, testified that they attempted to personally visit the IRP offices as part of their collection efforts and were turned away at the door by security guards. Testimony from Ms. Chamberlin and Government Exhibit 903.00 establish that, A, there were 42 victim staffing companies who fell prey to defendants' conspiracy and fraudulent scheme. And, B, after giving the defendants credit for the partial payments they made to three of the 42 victims, the total outstanding invoices for the 42 different companies is $5,018,959.66."

Doc. 824 (tr. 7/23/2012) at 7-13.

ARGUMENT

I. MR. WALKER'S DECISION TO PROCEED *PRO SE* AT TRIAL WAS MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY

Mr. Walker argues that his decision to waive his Sixth Amendment right to counsel and proceed *pro se* at trial was not knowing and voluntary.[2] Mr. Walker claims

[2] The United States here responds to Mr. Walker's issues IV and V. The government believes the issues presented by Mr. Walker are best understood when considered chronologically. Hence, the government first addresses trial issues, then sentencing issues, then appeal issues.

that when he made the decision to proceed *pro* se, he was operating under the spell of Rose Banks, his mother-in-law, who he claims was also his pastor. According to Mr. Walker, when he waived his right to appointed counsel at trial, he was convinced that Pastor Rose spoke "with the voice of God," and that God wanted him to waive his right to counsel. Having time to reflect further upon the matter in the Bureau of Prisons, Mr. Walker has seemingly concluded that God did not want him to proceed *pro se* after all. Mr. Walker also alleges, more mundanely, that the district judge improperly delegated his *Faretta* advisements to a magistrate judge, and that the advisements themselves were inadequate. *See* Motion at 72-79.[3]

A. Legal Standard for Waiver of Counsel

A criminal defendant has a Sixth Amendment right to defend himself. *Faretta v. California*, 422 U.S. 806, 819 (1975). But the right to competent counsel is also guaranteed by the Sixth Amendment. Hence, it is the duty of a court to ascertain that a defendant's decision to defend himself is knowing and voluntary. *Id*. at 835; *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

The Tenth Circuit employs a two-part test in determining whether a defendant has effectively waived his right to counsel. First, the court must determine whether the defendant voluntarily waived that right; second, the court must determine whether the defendant's waiver was knowing and intelligent. *United States v. Vann*, 776 F.3d 746, 763 (10th Cir. 2015), *cert. denied*, 2015 WL 5786498 (Nov. 2, 2015), citing *United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir.1997).

[3] Citations are to Mr. Walker's pagination (bottom of page), not the pagination imposed by the court upon filing (top right of page).

As to the first part, "[a] waiver is voluntary if the defendant was given a clear, alternative choice to the waiver." *United States v. Springer*, 444 Fed.Appx. 256 (2011) (unpublished), citing *United States v. Burson*, 952 F.2d 1196, 1199 (10th Cir.1991). In *Taylor*, the court held that "a refusal without good cause to proceed with able appointed counsel is a voluntary waiver." 113 F.3d at 1140 (quoting *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir.1976)). *See also United States v. Padilla*, 819 F.2d 952, 955-56 (10th Cir.1987) (defendant must not be required to choose between incompetent counsel and representing himself).

As to the second part, "the tried-and-true method" for establishing that a waiver is knowing and intelligent is to "conduct a thorough and comprehensive formal inquiry of the defendant on the record" to demonstrate that the defendant is fully informed of the risks of proceeding pro se. *United States v. Vann*, 776 F.3d at 763; *see also United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir.1991).

In all cases, a court must "reflect on the totality of the circumstances to decide whether a defendant has knowingly decided to proceed pro se. As we have noted, the true test for an intelligent waiver 'turns not only on the state of the record, but on all the circumstances of the case, including the defendant's age and education, his previous experience with criminal trials, and representation by counsel before trial.'" *United States v. Vann*, 776 F.3d at 763 (quoting *United States v. Padilla*, 819 F.2d at 958).

B. Factual Background For Waiver of Counsel Issue

Shortly after return of the indictment on June 9, 2009, CJA counsel (Boston Stanton) was appointed to represent Mr. Walker, and he was released on a personal

recognizance bond. Doc's 15, 31. Mr. Walker was represented by Mr. Stanton at his arraignment and discovery hearing. Doc. 35. Over the next year, while continuing to be represented by Mr. Stanton, Mr. Walker joined with other defendants in a vigorous motions' practice, which included discovery motions, scheduling motions, a speedy trial motion, *etc*. *See* doc's 119, 172, 179, 188, 189, 190, 191, 192, 224, 226, 227, 235, 237, 238, 247, 251, 256-258, 261, 280, 283, 284, 296, 298. Mr. Walker also filed, through his CJA counsel, an objection to the government's *James* proffer. Doc. 320. Shortly thereafter, Mr. Walker joined with other defendants in filing a counseled motion to continue the trial. Doc. 324. On November 19, 2010, Mr. Walker was represented by Boston Stanton at a motions' hearing. Doc. 325. On December 6, 2010, he joined in a counseled motion for extension of time to file additional suppression motions. Doc. 332.

Having been represented by counsel for over a year and a half, on December 16, 2010, Mr. Walker filed through counsel a motion asking his attorney to withdraw and stating he wished to proceed *pro se*. Doc. 350.[4] Mr. Walker's reasoning is set forth in a *pro s*e letter he sent to this court stating, in salient part, that he and his co-defendants wished to pursue "major strategy decisions" which their attorneys had not supported. Doc. 339.

On December 20, 2010, a hearing took place before Magistrate Judge Michael Hegarty, where Mr. Walker was advised of the risks of *pro se* representation, as

[4] On at least two prior occasions, the docket sheet reflects that Mr. Walker moved to excuse his counsel and permit substitute counsel. *See* doc's 32 and 310. However these were counseled motions filed due to conflicts in the schedule of CJA counsel; they do not reflect any dissatisfaction with his CJA counsel.

required by *Faretta v. California*, 422 U.S. 806 (1975). Magistrate Judge Hegarty established, *inter alia*:

- Mr. Walker has a bachelor's of science degree in computer science from the University of Colorado.
- He has some prior experience with civil litigation against him for debt, where he was represented by counsel.
- He was not under any pressure to proceed without a lawyer; he wanted to represent himself in order to form a defense strategy of his own choosing. He
- understood the charge against him and the sentencing consequences. He had discussed those with his appointed counsel.
- He understood that having a lawyer would give him many advantages at trial and that there were substantial risks and disadvantages to representing himself at trial.
- He understood that the court could appoint standby counsel to assist him, but he did not want standby counsel.

At the conclusion of a lengthy colloquy, the Magistrate Judge informed Mr. Walker that, while the Judge thought it unwise, Mr. Walker had the right to represent himself, and the Judge concluded that Mr. Walker knowingly, voluntarily, and intentionally waived his right to a court-appointed lawyer. Doc. 902-2 at 36-51. Docket entries for December 20-21, 2010, reflect that Boston Stanton is withdrawn as counsel, and that Mr. Walker is proceeding *pro se*. Doc's 360 & 361.

During the ensuing nine months, Mr. Walker and the other defendants mounted a vigorous joint motion practice, supplementing the counseled motions already filed. Defendants filed, *inter alia*, motions for expert disclosure, motions to continue the trial, motions in limine, a motion to dismiss the indictment, and a motion for change of venue.

Jury trial began September 26, 2011, and continued for 17 trial days. Doc's 447 478. The defendants actively participated in the trial, challenging the government's evidence, and cross-examining witnesses. Mr. Walker personally cross-examined numerous government witnesses. The defendants also called witnesses in their defense and offered exhibits as evidence.

C. This Court Did Not Err In Delegating Mr. Walker's *Faretta* Hearing To A Magistrate Judge

Mr. Walker argues that the court erred in delegating his *Faretta* hearing to a Magistrate Judge. Motion at 72. His argument is groundless. Fed.R.Crim.P 59(a) provides that "[a] district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense." The referral in question does not dispose of a charge or defense and hence was appropriate. The cases cited by Walker do not establish the contrary. He cites *United States v. Padilla*, 819 F.2d 952, 956-57 (10th Cir. 1987), for his argument that only a trial judge, "not an inexperienced magistrate," can advise a defendant under *Faretta*. Motion at 72. *Padilla* does not say that; the decision makes no distinction between a trial judge and the district court, which a magistrate judge is part of. *Padilla* addressed the adequacy of the advisement below, not which judicial officer delivered it. Nor do any of the other cases cited by Walker support his argument that a *Faretta* hearing may not be delegated to a magistrate

judge. The remainder of Walker's arguments at this portion of his motion do not address the delegation issue, but rather attack the adequacy of the advisement.

1. The Court Did Not Err By Reminding Mr. Walker Of His Fifth Amendment Rights

At the hearing's inception, the Magistrate Judge reminded Mr. Walker of his Fifth Amendment right against self-incrimination, cautioning that "you just need to be careful about the responses you give." Doc. 902-2 at 6.[5] Mr. Walker argues this was error, claiming that the right against self-incrimination "has no applicability at a *Faretta* hearing." *Id*. at 73-74. This is a startling proposition. Walker was being advised and questioned by a judicial officer in a court proceeding that concerned, *inter alia*, the criminal charges pending against him. He had not been given immunity, nor waived his right against self-incrimination. His Fifth Amendment rights apply at all stages of the criminal proceedings. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (Fifth Amendment applies to any proceeding where answers to official questions may incriminate defendant); *Kastigar v. United States*, 406 U.S. 441, 445 (1972) (Fifth Amendment applies in any proceeding where disclosures could be used against the witness). A defendant participating in such a discussion could easily incriminate himself. In any event, the cases Walker cites do not establish that it is error to advise a criminal defendant of his Fifth Amendment rights at a *Faretta* hearing.

[5] Mr. Walker also complains that the magistrate did not exclude the prosecutors, but cites no authority requiring this. Two defendants were present at the hearing, both represented by counsel. Neither defense counsel objected to allowing the prosecutors to remain. The parties and the court agreed that if privileged communications arose, the defendants could request the courtroom be sealed. Doc. 902-2 at 3-4. Although Mr. Walker alleges privileged communications took place, Motion at 73, he cites none.

2. The *Faretta* Advisement Adequately Advised Mr. Walker Of The Dangers Of Self-Representation

Mr. Walker complains of omissions in his advisement. Motion at 74-79. His laundry list of alleged deficiencies does not demonstrate his *Faretta* advisement was inadequate. In *Faretta* itself, the Court merely held that before a defendant is permitted to represent himself, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)). The Court confirmed that "[w]e have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). The Tenth Circuit has held that a *Faretta* hearing is "probably the best way" to ascertain this, but the court has acknowledged that a *Faretta* hearing is only "a means to an end" of ensuring that a defendant's waiver of counsel is valid, and that even the complete omission of such a hearing is not error as a matter of law. *United States v. Vann*, 776 F.3d at 763, citing *United States v. Stanley*, 739 F.3d 633, 645 (11th Cir), *cert. denied*, 134 S.Ct. 2317 (2014). And in *United States v. Turner*, 287 F.3d 980 (10th Cir.2002), the court confirmed that there is "no precise litany of questions that must be asked of defendants who choose self-representation." *Id*. at 983, citing *Padilla*, 819 F.2d at 959.

Of the "advisements" Mr. Walker claims were omitted, most were either given to him, or are not required in order to establish a knowing and voluntary waiver. Mr. Walker complains, for example, that he was not advised of his right to obtain discovery materials from the government, to file pre-trial motions, to limit the government's evidence at trial, or to engage in plea bargaining. But Mr. Walker had been represented by counsel for nearly a year and a half. It is preposterous for him to claim ignorance of such matters. By the time of the advisement, Mr. Walker had filed large numbers of motions through counsel. These motions addressed discovery matters and raised suppression issues. As to plea bargaining, Mr. Walker had made clear that his defense was that their business, of which he was President (Leading Team and IRP Solutions), was engaged in legitimate activity. There was no reason to think he would acknowledge guilt by entering a plea. To the contrary, the very reason for dismissing his counsel was in order to proceed to trial, where he would be free to pursue the strategy of his choice. And his argument that the magistrate judge should have advised him that he was the least culpable defendant in the case is self-serving and argumentative. Based upon trial evidence, it also is assuredly wrong. Nonetheless, the magistrate judge cautioned Mr. Walker that he would be better off with an attorney, "rather than being lumped in with people who may be more culpable than you are." Doc. 902-2 at 39.

Mr. Walker alleges at length that the charge was not explained to him. Motion at 76. That is not true. Mr. Walker agreed that he had read the indictment, understood the nature of the charge brought against him, understood the sentencing consequences, and that he had discussed those matters with his appointed counsel. Doc. 902-2 at 40.

He certainly had abundant opportunity to do so, because during the preceding year and a half he had been represented by counsel. Mr. Walker also argues that specific elements of the conspiracy charge were not explained to him. But at the *Faretta* hearing, the magistrate judge repeatedly sought to impress upon Mr. Walker that he would be better off with an attorney representing him at trial, particularly when it came to dealing with the rules of court and jury instructions. *Id*. at 43. The elements of an offense are not always a cut-and-dried matter. The exact elements to be proven, and the definitions accompanying those elements, is a matter for jury instructions and goes far beyond the purposes of a *Faretta* advisement.

The situation in U*nited States v. Forrester*, 495 F.3d 1041, 1044 (9th Cir. 2007), which Walker cites, was very different. In *Forrester*, the district court had not apprised the defendant of the charge against him at the *Faretta* hearing, and had misadvised him of the potential sentence that he faced. That is not the situation here.

Finally, Mr. Walker faults the magistrate judge for not discussing with him possible defenses to the charge or the viability of seeking a severance. But the magistrate judge had no reason to do that. Mr. Walker had enjoyed the services of court-appointed counsel for 18 months. Had he any sincere desire to discuss legally viable defenses – assuming any such thing existed – he had ample opportunity to do so. He had made clear in a letter to the court, about a week before the *Faretta* advisement, that his defense was that his company was a legitimate business and was not engaged in fraudulent practices. Doc. 339. That letter made clear that he and his codefendants, who were also his co-workers, intended to present that joint defense at trial.

Nothing about the circumstances suggested he would be interested in a severance. Nor do the circumstances suggest, as he claims, that he had an antagonistic defense.[6] In any event, he had ample opportunity to discuss such issues with his appointed counsel.

What Mr. Walker really wanted from the magistrate judge, it now appears, was legal advice. Similar issues arose in *United States v. Williamson*, 806 F.2d 216 (10th Cir. 1986), where the defendant contended that he should have been advised of, *inter alia*, possible defenses to the charge. The court found "no merit in Williamson's contention that a valid waiver of counsel requires an explanation of the law of aiding and abetting, or an explanation of the possible defenses to the charge and a discussion of pretrial motions." *Id*. at 220. Later in the decision, in considering a plea colloquy, the court observed that "[w]e can think of no reason why a judge would be aware of possible defenses to a charge unless he is made aware of them by the defendant in the course of establishing a factual basis for the plea. Even then, the judge would be unable to suggest all possible defenses. We hold that due process, in and of itself, does not require any such thing." *Id*. at 222.

The decision Walker relies upon, *United States v. Taylor*, 113 F.3d 1136 (10th Cir. 1997), concerned circumstances very different from those before this court. In *Taylor*, it does not appear that the defendant was ever provided a *Faretta* advisement. Shortly after indictment, the defendant filed an entry of appearance form stating he

[6] Mr. Walker claims he had an "antagonistic" defense because he acted in good faith and his codefendants acted in bad faith. Motion at 78. That is not an antagonistic defense. *See United States v. Pursley*, 474 F.3d 757, 765 (10th Cir. 2007) (defenses are antagonistic if belief in one defense necessarily requires disbelief in other defense), citing *United States v. Linn*, 31 F.3d 987, 992 (10th Cir.1994). Mr. Walker's *post-hoc* argument that he is innocent and his coworkers are guilty merely goes to the weight of the evidence.

would be *pro se*. Trial took place only a few months later and, from the decision, it seems the trial judge did little more than encourage the defendant to use his standby counsel. The trial judge did not advise the defendant of the charges, the dangers of self-representation, or seek his reasons for proceeding *pro se*. *Id*. at 1141. Indeed, the reviewing court found the defendant never even stated he would not accept a court-appointed attorney. *Id*. at 1142. And the defendant never filed any substantial pre-trial motions. *Id*. Mr. Walker's situation stands in sharp contrast. He received a detailed *Faretta* advisement; he enjoyed the benefits of court-appointed counsel for nearly 18 months; filed many pre-trial motions (both before and after firing his lawyer); and made clear he wanted to represent himself because he and his appointed lawyer did not agree on major strategy decisions. For all these reasons, Mr. Walker's case is distinguishable from the situation in *Taylor*.

D. Mr. Walker's Decision to Dismiss His Counsel And Proceed *Pro Se* Was Voluntary, Knowing, and Intelligent

Mr. Walker's waiver of counsel was voluntary, because he had a clear, alternative choice between proceeding with his court-appointed counsel, whose competence was unchallenged, or representing himself.[7] Court appointed counsel had represented Mr. Walker for nearly a year and a half. Mr. Walker has not argued, and the record would not support an argument, that his counsel's performance was lacking. Mr. Walker's counsel, on his behalf, engaged in an active motions practice, addressing bond, continuances (including trial), disclosure of discovery and grand jury materials, dismissal of counts, and expert witness issues. Counsel represented Mr. Walker at

[7] The legal standards are set out at Section I(A) above.

several hearings. Mr. Walker's reason for dismissing his counsel was clearly set forth in his December 10, 2010, letter to the court (#339), where he said that he and his co-defendants wanted to represent themselves because of "overall lack of support" from their counsel for "major strategy decisions." This letter made clear that their defense was that they were a legitimate business enterprise and were not engaged in a criminal scheme.[8] Because Mr. Walker had a clear alternative choice to proceeding *pro se*, *i.e.*, keeping his appointed counsel, his decision to dismiss counsel and represent himself was a personal strategy decision and was voluntary.

Mr. Walker insists he was not exercising free will, but rather was "bowing to the inevitable" and following the orders of his mother-in-law and pastor, Sister Rose, who he says he viewed as the "voice of God." *See* Motion at 67-68. He cites several cases in support of this argument, but none support his position (or even involved such a claim). Mr. Walker faults the court for not inquiring "who advised him to proceed to trial without a lawyer," or "[w]ho is telling you to represent yourself?" Motion at 68. But Magistrate Judge Hegarty addressed the relevant issue when he inquired of Mr. Walker, "if there is any coercion. Are you under any kind of pressure to proceed without a lawyer?" Doc. 902-2 at 38. Mr. Walker answered, without qualification, that he was not under any pressure, saying "This is my own individual decision." He also indicated he wished to

[8] The trial record shows the defendants had no legitimate business activity and extensively engaged in acts of deception that resulted in over $5 million in losses to their victims. The defendant's letter does not say what the "major strategy decisions" were, but one may surmise they involved these matters. A formal inquiry into the reasons for defendant's dissatisfaction with counsel is unnecessary where a defendant's reasons are clear on the record. *Sanchez v. Mondragon*, 858 F.2d 1462, 1466 (1988), citing *Padilla*, 819 F.2d at 956 n.1.

pursue "a strategy of my own choosing . . . ." *Id.* at 38-39. This reason is consistent with the reason stated in his letter to the district court judge.

Although Mr. Walker alleges that he was bowing "to pressure from a third party exercising undue influence," Motion at 68, he provides no evidence of this other than his own self-serving affidavit, which asserts little more than that Sister Rose told him to fire his lawyer, and that he viewed Sister Rose as the voice of God. This allegation is not sufficient to establish that his choice was constitutionally involuntary. In *Colorado v. Connelly*, 479 U.S. 157 (1986), the defendant argued that his confession to police was not the product of "free will" because the voice of God was telling him to either confess or to commit suicide. *Id*. at 518-19. The Court rejected the argument, holding that in the absence of coercive police activity, the confession would not be deemed involuntary under the Fifth and Fourteenth Amendments. *Id*. at 167. In *United States v. Sims*, 428 F.3d 945 (10th Cir.2005), the court rejected a defendant's argument that he lacked free will to consent to a search because of his mental condition, holding that the Fourth Amendment was not violated where the defendant's aspect did not suggest any mental impairment to officers and there was no evidence officers sought to exploit any such impairment. *Id*. at 953. Once again, government coercion was necessary before a constitutional violation would be found. This is essentially the same concern that the Tenth Circuit has expressed in evaluating the voluntariness of a defendant's waiver of counsel. The waiver of the Sixth Amendment right to counsel will be deemed voluntary so long as the defendant is not being coerced to choose between ineffective counsel and proceeding pro se. *See United States v. Padilla*, 819 F.2d at 955-56; s*ee also*

United States v. Taylor, 113 F.3d at1140 (10th Cir.1997) (defendant must not be "forced to make a 'choice' between incompetent counsel and appearing pro se"), citing *United States v. Silkwood*, 893 F.2d 245, 248 (10th Cir.1989). The record reflects no coercion by the district judge or magistrate judge, and Mr. Walker's decision to proceed *pro se* was made voluntarily.

As to whether Mr. Walker's wavier was knowing and intelligent, the record shows that Magistrate Judge Hegarty conducted "a thorough and comprehensive formal inquiry" of Mr. Walker that fully informed him of the risks of proceeding pro se. *See United States v. Vann*, 776 F.3d at 763 (quoting *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir.1991)). The *Faretta* advisement has been discussed at length above, and the United States refers the court to those arguments. Mr. Walker was represented by competent counsel for nearly a year and a half, before choosing to proceed pro se. He has a college degree, was President of Leading Team and IRP Solutions. His actions taken in defending himself, both before and after his dismissal of his counsel, show beyond cavil that he was fully informed of the risks of representing himself. His decision to do so was a considered strategic decision, made with considerable knowledge of the court system. His arguments that he was not acting knowingly and intelligently are meritless.

II. MR. WALKER HAS NOT ESTABLISHED HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS SENTENCING PROCEEDINGS

Trial concluded October 20, 2011. Doc. 478. The same day, Gwendolyn Solomon entered her appearance as counsel for all six defendants, including Mr.

Walker. Doc. 508.[9] Mr. Walker now claims that during his post-trial sentencing proceedings, Ms. Solomon labored under actual conflicts of interest. In addition, he argues generally that Ms. Solomon and other counsel provided ineffective assistance during his sentencing proceedings.

A. Proceedings re Joint Representation

Fed.R.Crim.P. 44(c) provides that when one or more defendants are represented by the same counsel, the court "must promptly inquire" about the propriety of the representation. Acting *sua sponte*, this court held a hearing on November 16, 2011. As required by Rule 44(c), the court personally advised each defendant of the right to effective assistance of counsel and separate representation. This court advised each defendant of the possibility of a conflict of interest. The court specifically inquired of Ms. Solomon regarding her prior employment with the defendants' staffing agencies. It was also established that Ms. Solomon attended the same church as the defendants. The court observed that Ms. Solomon appeared to have a lack of experience in handling criminal matters in federal court (or anywhere else). *See* doc. 902-3 at 22-25, 29.[10] The court offered to appoint separate CJA counsel for each defendant, but the defendants advised the court that they wished to proceed with joint representation. The court ultimately found that each defendant knowingly and voluntarily waived his right to separate court-appointed counsel (including stand-by counsel). *Id*. at 27-29. The court

[9] Ms. Solomon later withdrew as counsel for David Banks, who retained separate counsel.

[10] A portion of the proceedings were placed under seal, involving a colloquy between the court and the defendants, because of concern with privileged communications. *Id*. at 25.

reserved a final ruling and invited additional briefing, to give the defendants a chance to consult with other counsel, if they chose to do so.

The United States subsequently filed a motion asking the court to hold an additional hearing regarding Ms. Solomon's potential conflicts of interest. Doc. 622. The defendants responded, insisting upon their constitutional right to counsel of choice. The defendants acknowledged that the court had advised them of their rights to separate representation, vigorously insisted they had waived those rights, and pointed out that the court had found their waivers to be knowing and voluntary. The defendants reaffirmed that they "consented to voluntarily, knowingly and intelligently waiving any conflict of interest and any claim of ineffective assistance of counsel." Doc. 639 at 4.

The court issued an order, on January 20, 2012, denying the government's motion for a further hearing. The court found, yet again, that each defendant had executed a waiver of any conflict of interest and had "knowingly, voluntarily, and intelligently waived his Sixth Amendment right to effective assistance of counsel." Doc. 653 at 3. However, exercising caution, the court then appointed separate stand-by counsel for each defendant, although the court acknowledged it could not compel the defendants to utilize these counsel. *Id*. at 4.

On January 23, 2012, this court appointed Michael David Lindsey as (standby) counsel for Mr. Walker. Doc. 659. On February 23, 2012, Joshua Lowther entered his appearance as (retained) counsel for Mr. Walker and four co-defendants (all except Mr. Banks). Doc. 671.

B. Mr. Walker Has Waived His Right to Challenge The Effectiveness of Ms. Solomon's Assistance As His Counsel

Mr. Walker has waived the right to challenge Ms. Solomon's representation. He alleges this court erred in permitting joint representation, *see* Motion at 25-31, but his arguments are flatly contradicted both by the record and case law.

First, Mr. Walker argues the court should have conducted an evidentiary hearing and should have entered findings. This court did both those things, and examined each defendant in accordance with Rule 44(c). The court denied *the government's* motion suggesting an additional hearing, finding correctly that the record adequately reflected the court's advisements and each defendant's knowing and voluntary waiver. The defendants *opposed* a further hearing. Mr. Walker's *post-hoc* change of position is patently transparent and self-serving.

Second, Mr. Walker argues that Ms. Solomon's connections to IRP Solutions and their church in Colorado Springs (apparently presided over by Sister Rose), should have been deemed conflicts of interest. All of this however, and more, was adequately aired at the Rule 44(c) hearing. Mr. Walker knew of all of this at the time he chose Ms. Solomon to jointly represent him. The Tenth Circuit has held that "[a]n ineffectiveness-due-to-conflict claim is waived if the defendant 'consciously chose to proceed with trial counsel, despite a known conflict to which the defendant could have objected but chose to disregard.'" *United States v. Migliaccio*, 34 F.3d 1517, 1528 (10th Cir. 1994) (quoting *Moore v. United States*, 950 F.2d 656, 660 (10th Cir.1991)) (further citation omitted).

Mr. Walker relies heavily upon *Edens v. Hannigan*, 87 F.3d 1109,1114 (10th Cir. 1996), in arguing the court's procedures were erroneous. Motion at 28. But the situation

there was very different. In *Edens*, the court addressed a conflict of interest in representation at trial. Edens and a co-defendant, who were charged with robbery, were represented by the same counsel. The court found that these defendants had clearly inconsistent defenses, to the extent that a successful defense of Edens would have damaged the co-defendant. The court held that "[t]he limited colloquy that occurred during the pretrial hearing does not reflect that Edens was at all apprised of the possibility of conflicts arising from inconsistent defenses." *Id*. at 1118. The situation here is starkly different. Throughout the prosecution, and specifically at the Rule 44(c) hearing, Mr. Walker and the other defendants made clear they wished to present a common defense. As Walker said in a letter to the court (co-authored by Banks), their joint defense was that they were a legitimate business enterprise and had not engaged in criminal conduct. Doc. 339. Unlike in *Edens*, this court, at the Rule 44(c) hearing, examined in detail the potential conflicts that Mr. Walker now complains of. Because he was aware of those issues at the time, he has no basis now for complaint.

C. Mr. Walker Has Not Shown Any Actual Conflict of Interest That Adversely Affected His Counsels' Performance

Even absent a waiver, Mr. Walker has not shown he is entitled to a new sentencing proceeding. To show ineffective assistance of counsel arising from a conflict of interest in this situation, a defendant must demonstrate two things: that his counsel represented actively conflicting interests, and that the alleged conflict of interest adversely affected his counsel's performance. No separate demonstration of prejudice needs to be made. *See Strickland v. Washington*, 466 U.S. at 692; *Cuyler v. Sullivan*,

446 U.S. 335, 348 (1980).[11] The Tenth Circuit has held that to establish an actual conflict, a defendant must show "the attorney has an interest in the outcome of the particular case at issue that is adverse to that of the defendant." *Hale v. Gibson*, 227 F.3d 1298, 1312 (10th Cir. 2000); *United States v. Soto Hernandez*, 849 F.2d 1325, 1329 (10th Cir. 1988). With joint representation, an actual conflict of interest arises if the codefendants' interests "diverge with respect to a material factual or legal issue or to a course of action." *Cuyler*, 446 U.S. at 356 n. 33; *see also United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) (holding that "defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others....").

Mr. Walker has shown no such conflict. Mr. Walker argues that Ms. Solomon's work at the staffing companies was a conflict of interest because she "could have been indicted" and "was a potential witness for the prosecution." Motion at 18. Neither allegation is supported by the record. The record shows that Ms. Solomon received payment while employed at the staffing companies. This does not establish that Ms. Solomon had an interest adverse to Mr. Walker, or that her prior employment precluded her from pursuing a strategy favorable to Mr. Walker. A defendant has the burden of showing specific instances to support his claim of a conflict of interest. *Edens v.*

[11] The standard is different If a defendant objects below to his counsel's conflict of interest, and the court fails to make inquiry. Then, prejudice may be presumed and reversal is automatic. *See Holloway v. Arkansas*, 435 U.S. 475, 488-89 (1978). That is not the situation here.

Hannigan, 87 F.3d at 1114, citing *United States v. Martin*, 965 F.2d 839, 842 (10th Cir.1992). Mr. Walker has failed to do this; his arguments are purely speculative.

Mr. Walker also alleges that Ms. Solomon's joint representation gave rise to an active conflict of interest at sentencing, because his interests were different than those of co-defendant Banks. Motion at 31. But Ms. Solomon was not representing David Banks at sentencing. Charles Torrez represented Banks at his sentencing hearing. Doc. 785. Mr. Walker implies that Sister Rose was paying for both lawyers, and a conflict of interest arose from this fact. Assuming *arguendo* this is true, such an arrangement in and of itself does not establish a conflict. Banks was the son, and Walker the son-in-law, of Sister Rose. Both Banks and Walker held executive positions in the staffing companies. Given their joint defense that the company activity was legitimate, it is difficult to see any advantage in one defendant diminishing the other.

However Mr. Walker maintains that joint representation precluded Ms. Solomon from arguing in his interests with regard to the role enhancement under USSG § 3B1.1, and the sentencing factors of 18 U.S.C. § 3553(a). Motion at 21. But as to the leader/organizer enhancement, there was no apparent conflict. There can be more than one leader or organizer of criminal activity. It was not, as Walker suggests, an either/or situation with regard to him or Banks. At the sentencing hearing, Mr. Lowther took the position that there was no leader or organizer. The court disagreed, finding that trial evidence showed that both Banks and Walker were the leaders of the fraud scheme. Doc. 902-4 at 21. As to the sentencing factors of § 3553(a), contrary to Mr. Walker's argument, his counsel (Mr. Lowther) did file a motion seeking a variant, non-guideline

sentence, and argued the § 3553(a) factors at the sentencing hearing. Doc. 756; doc. 902-4 at 24-25. The court denied the motion. Doc. 773; doc. 902-4 at 38.

These facts suggest another, more primary, problem with Mr. Walker's allegations that Ms. Solomon had a conflict of interest: she was not the lead attorney during the sentencing proceedings. The sentencing transcript shows that Joshua Lowther appeared for Mr. Walker and handled the hearing. Although Ms. Solomon was at counsel table, she did not appear to play any role in representing Mr. Walker. Court appointed stand-by counsel, Michael David Lindsey, was also present initially. Mr. Lindsey told the court that he could not meaningfully participate because Mr. Walker did not want him to. After Mr. Walker confirmed this, the court excused Mr. Lindsey. Doc. 902-4 at 3. As noted above, Mr. Lowther filed the motion for variant sentence, doc. 756; he also filed the objections to the presentence report, doc. 740.

To establish an active conflict of interest under the circumstances before the court, Mr. Walker is required to show not only actively competing interests, but that those interests adversely affected his representation at sentencing. Because Mr. Lowther handled virtually all significant sentencing duties, Mr. Walker has not shown his sentencing was adversely affected by any conflicts Ms. Solomon may have suffered.

D. Mr. Walker Has Not Shown He Was Prejudiced By His Counsels' Alleged Shortcomings In Handling His Sentencing Proceedings

Conflicts aside, Mr. Walker argues his sentencing counsel were ineffective in representing his interests. As shown earlier, in reviewing such claims, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at

697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Mr. Walker's complaints with his sentencing counsel are many, but these alleged shortcomings do not appear to have affected the sentence he received. Hence, the United States focuses upon whether Mr. Walker was prejudiced, which in this context means the outcome of the proceeding would have been different, *i.e.*, his sentence would have been lower.

Mr. Walker first argues that his counsel failed to advise him that his statements during the pretrial interview could be used against him and, as a result, his sentence was enhanced for being a leader or organizer. Motion at 31-34, citing *United States v. Washington*, 619 F.3d 1252 (10th Cir.2010). In *Washington*, the court found that the defendant's voluntary disclosures to the probation officer regarding drug quantities he had been involved with precluded him from receiving a reduction in offense level he otherwise would have qualified for. *Id*. at 1262-63. This was sufficient to constitute prejudice under *Strickland*. Something similar might suffice to show prejudice here, if Walker's own words were the basis for the leader/organizer enhancement. However the presentence report, in recommending the enhancement, does not cite Walker's own words, but rather the government's sentencing statement. *See* doc. 760 at 8. The addendum to the PSIR states: "The government's sentencing statement outlines the evidence relied upon to make this determination, which was presented at trial. This is an issue to be determined by the Court at the time of sentencing." Doc. 761 at A-1. And at the sentencing hearing, this court summarized the trial evidence, not admissions by Mr.

Walker. Doc. 902-4 at 7-13. The enhancement was based upon this trial evidence. *Id*. at 21. Hence, Mr. Walker has not been prejudiced by any failure of his counsel to advise him regarding a pre-sentence interview.

Next, Mr. Walker claims that Ms. Solomon did not understand the Federal Sentencing Guidelines. Motion at 34. Mr. Walker does not allege (at least here) that he suffered any prejudice as a result. He also alleges that Ms. Solomon failed to present mitigating factors at the presentence interview. He quotes himself (his affidavit) at length in support of this claim. Motion at 37. Again, he alleges no prejudice. Because Ms. Solomon was not the primary counsel for sentencing proceedings,[12] prejudice seems especially unlikely.

Widening his scope, Mr. Walker alleges his counsel failed to investigate or make proper objections to the PSIR. He focuses again upon the leader/organizer enhancement. He concedes his counsel objected to the PSIR's recommendation for the enhancement – and the record shows objection was also made at the sentencing hearing – but argues that trial evidence proved that Banks, not he, was the true leader/organizer. Motion at 38. Mr. Walker's assertion is conclusory and unsupported by argument or evidence.[13] As this court found at sentencing, the trial evidence showed Mr. Walker was one of the leaders/organizers of the fraud scheme. In addition to other evidence, trial evidence showed that the CILC software was originally Mr. Walker's creation; he supervised its development and sales efforts; he was the CEO of both

[12] As shown above, Mr. Lowther filed objections to the PSIR, filed a motion seeking a downward variance, and handled the sentencing hearing.
[13] Such arguments are insufficient. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991) (conclusory allegations insufficient to support claim).

Leading Team and IRP during the relevant time period; he and co-defendant Banks directed other participants in the crime (including co-defendants and other payrolled employees who were participants). Mr.Walker also had control over the LT bank accounts. Whether or not Mr. Banks was a leader or organizer is largely immaterial, because there can be more than one leader or organizer of criminal activity. *See* USSG §3B1.1, App. n.4. Because the trial evidence strongly supports the leader/organizer enhancement, no prejudice accrued to Mr. Walker from any shortcomings in his counsels' handling of the issue.

Finally, Mr. Walker directs harsh words at Mr. Lowther's handling of the sentencing hearing. Mr. Walker complains yet again of the leader/organizer enhancement, Motion at 40, 44, and the government has already addressed this issue. He also alleges that his counsel failed to object to facts found by the court to enhance his sentence, based upon the conduct of his wife, Yolanda Walker (the bookkeeper for IRP). Motion at 41. But the transcript citation he provides does not reflect the sentence enhancement, merely a recitation of the trial evidence regarding his wife. The sentence enhancement for the number of victims was based upon other evidence. So also with numerous other items. Mr. Walker quarrels with the court's factual findings, but neglects to identify the significance of these facts to his sentence. Motion at 42-44. The remainder of the arguments presented against the advocacy of his sentencing counsel, *see* Motion at 45-47, have been made before (in some cases, numerous times), and either the government has already responded to them, or Mr. Walker fails to identify any prejudice resulting from his counsels' alleged shortcomings.

III. MR. WALKER HAS NOT SHOWN HIS COUNSEL ON APPEAL WERE INEFFECTIVE

Mr. Walker was represented on appeal by Gwendolyn Solomon and Joshua Lowther.[14] Mr. Walker repeats his earlier allegations that Ms. Solomon suffered a conflict of interest. These have been addressed. He alleges more specifically that Ms. Solomon: (1) failed to respond to allegations contained in the government's answer brief; (2) failed to address the trial court's finding that Mr. Walker was a leader of the fraud scheme; (3) failed to address factually incorrect statements contained in the government's closing arguments at trial; (4) failed to address weak evidence he maintains the government relied on in the presentence investigation report; and (5) failed to address her own and co-counsel's conflicts of interest. Motion at 51-63.

A. Mr. Walker's Direct Appeal & Standard of Review

Mr. Walker's appellate counsel raised three issues during his direct appeal: a speedy trial violation (based upon defendants' own multiple requests for continuances); a violation of their Fifth Amendment privilege against self-incrimination; and error in the exclusion of witness testimony. The issues Mr. Walker now claims that his counsel should have raised on appeal were not raised. In *United States v. Cox*, 83 F.3d 336, 342 (10th Cir. 1996) the court held that "[a] § 2255 motion is not available to test the legality of a matter which should have been raised on direct appeal." *Id*. at 342, citing *United States v. Warner*, 23 F.3d 287, 291 (10th Cir.1994). Hence, "[w]hen a defendant fails to raise an issue on direct appeal, he is barred from raising the issue in a § 2255 proceeding, unless he establishes either cause excusing the procedural default and

[14] Both counsel entered their appearances in the Tenth Circuit Court of Appeals on August 24. 2012. *See United States v. Walker*, No. 11-1491 (per PACER)

prejudice resulting from the error or a fundamental miscarriage of justice if the claim is not considered." *Id*. The United States concedes that ineffective assistance of counsel may provide cause for failure to raise an issue on appeal. See *Massaro v. United States*, 538 U.S. 500, 508 (2003); *Murray v.Carrier*, 477 U.S. 478, 488 (1986).

The Tenth Circuit has held that "[w]hen a defendant alleges his appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, we examine the merits of the omitted issue." *United States v. Cook*, 45 F.3d 388, 392-93 (10th Cir. 1995), citing *United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993). "If the omitted issue is without merit, counsel's failure to raise it "does not constitute constitutionally ineffective assistance of counsel." *Id*.[15] Claims of ineffective assistance on appeal are of course evaluated under the standards set forth in *Strickland*, and that standard is higher than on direct appeal. "[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Addonizio*, 442 U.S. at 184. Mr. Walker's conclusory allegations do not establish that his appellate counsels' performance was constitutionally deficient.

[15] In *Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001), the court qualified certain language in C*ook*, holding that a defendant need not show an argument was a "dead-bang winner," only that there was a reasonable probability that the omitted claim would have resulted in a reversal on appeal.

B. Mr. Walker's Arguments

As to Mr. Walker's specific claims, the United States responds *seriatim*.

1. Failure To Respond To Allegations In Government's Brief

Mr. Walker alleges that the government's answer brief cited "the evidence that it claimed supported the criminal conviction of each defendant," and that the government "attempted to convince the Appellate Court that all six of the co-defendants participated in a single conspiracy." Motion at 51.That is inaccurate. Mr. Walker ignores the issues on appeal. The government never undertook to describe the evidence against each defendant, because the sufficiency of the evidence was not challenged on appeal. The factual background section of the government's brief expressly states it is intended only to provide a general factual background for those issues, none of which pertained to Mr. Walker's role in the offense. *See United States' Consolidated Answer Brief*, Case Nos. 11-1487 through 11-1492, at 2 n.1. Hence, he is off-base in faulting Ms. Solomon for not convincing the appellate court "that there was insufficient proof" that he was involved in the criminal activity.

The remaining arguments here are quarrels with the trial evidence. Mr. Walker seems to suggest, but does not actually argue, that his appellate counsel should have challenged the sufficiency of the evidence against him.[16] If he means to argue this, he has not shown a meritorious issue, because he had no prospect of prevailing. The sufficiency of the evidence against him was a fact question for the jury to decide. An appellate court will not "weigh conflicting evidence or consider witness credibility."

[16] Because his § 2255 motion was filed through counsel, it should not be liberally construed to raise issues that are not adequately raised and argued.

United States v. Flanders, 491 F.3d 1197, 1207 (10th Cir. 2007). Although a jury verdict is reviewable on appeal, the Tenth Circuit has held that in "reviewing the jury's decision, we must view all of the evidence, both direct and circumstantial, in the light most favorable to the government, and all reasonable inferences and credibility choices must be made in support of the jury's verdict." *United States v. Small*, 423 F.3d 1164, 1182 (10th Cir. 2005) (quoting *United States v. Evans*, 970 F.2d 663, 671 (10th Cir. 1992)). The court noted in *Evans* that "the restrictive standard of review for a sufficiency of the evidence question" provides the court with very little leeway in conducting a review of the evidence. *Id*.

Mr. Walker's arguments do not show that he could have met this standard on appeal. He argues repeatedly that his co-conspirators committed certain acts, not him. In some cases that is true, but his co-conspirators were charged with specific acts of mail and wire fraud and Mr. Walker was not. The jury was not required to find, for example, that Mr. Walker personally initiated contact with staffing companies (although he may have in some cases), or that he made specific false representations to staffing companies that LT and IRP were about to close a contract to sell software to law enforcement agencies (although he may have done that also). Mr. Walker was charged with conspiracy, the gist of which is an *agreement* to participate in a fraud scheme. The jury was required to find only that Mr. Walker agreed with one other person to violate fraud laws, knew the essential objectives of the conspiracy, knowingly and voluntarily involved himself in the conspiracy, and was interdependent. Doc. 480 at 31 (instr. 15). The trial evidence recounted by this court at sentencing readily supplies that evidence.

2. Failure to Address the Trial Court's Finding That Mr. Walker Was A Leader of the Fraud Scheme

Mr. Walker argues that the 4-level enhancement to his offense level was based upon the use of "references in credit applications." He claims he had nothing to do with this, and that Ms. Solomon neglected to point this out. Motion at 54. Once again, Mr. Walker's argument is misdirected. This was not the basis for his sentence enhancement. The government has already addressed the evidence showing that Mr. Walker was a leader or organizer of the fraud scheme. That evidence easily supports the court's findings. Here, as with the jury verdict, Mr. Walker's burden on appeal would have been great. An enhancement under USSG § 3B1.1 (for being a leader/organizer) is a factual finding by the sentencing court and is reviewed on appeal only for clear error. This is a high standard, because a reviewing court owes great deference to the trial court's fact-finding. *See United States v. Zhou*, 717 F.3d 1139, 1149 (10th Cir.2013); *United States v. Snow*, 663 F.3d 1156, 1162 (10th Cir.2011). As argued above, this court's findings at sentencing easily support the enhancement for reasons Mr. Walker chooses to ignore.

3. Alleged Misstatements in the Government's Closing Argument

The fallacy of Mr. Walker's argument is evident from his first paragraph, where he claims that evidence of the time cards of Willie Pee, who supposedly worked at Analysts International, was "the only evidence the government presented against Walker . . . ." Motion at 55. Mr. Walker persistently ignores the remainder of the trial evidence. In any event, his claimed misstatement is puzzling. He claims the prosecutor said that Walker received money from Analysts International, and that this is not

supported by the testimony of the government's own witness. *Id*. at 55-56. He then quotes testimony from that witness, government auditor Dana Chamberlain, that "Analysts International money was paid to Mr. Walker and Mr. Banks." Ms. Chamberlain also testified that the money "got deposited into the DKH account." *Id*. at 56. There seems to be no misstatement by the prosecutor.

Mr. Walker also complains that the prosecutor misrepresented that Walker approved Willie Pee time cards. But in the closing remark quoted by Walker, the prosecutor said only that Mr. Walker "approved time cards and he worked time cards." He also said that a folder seized from Mr. Walker during execution of a search warrant contained time cards for Willie Pee. He invited the jury to compare the signatures with other time cards of Willie Pee. Motion at 55. Subsequent testimony showed that co-defendant David Zirpolo approved one of the time cards. *Id*. at 58. There is no inconsistency here.

Mr. Walker has not shown any misstatements, but even if he had, his arguments are quibbles and could not have been a basis for appeal. He has not alleged he objected below to any of these statements, and hence, had his counsel appealed, review would have been for plain error. *See United States v. Oberle*, 136 F.3d 1414, 1421 (10th Cir.1998) ("[u]nder a plain error analysis, reversal is appropriate only if, after reviewing the entire record, we conclude that the error is obvious and one that would undermine the fairness of the trial and result in a miscarriage of justice"). Here, Mr. Walker has shown no misstatements, much less ones that might have undermined the fairness of his trial.

4. Failure To Address "Weak Evidence" In the PSIR

The allegations here largely reiterate Mr. Walker's insistence that evidence did not establish his guilt or his role as a leader of the fraud scheme. His argument focusing upon the PSIR is, like some of his other arguments, misguided. The PSIR's statement of facts was based upon the government's sentencing statement, which itself reflected evidence presented at trial. He also alleges that government trial exhibit 901, a summary chart, was "highly contradictory and confusing." Motion at 60. But he does not explain why, cite any evidence or authority, or show how exhibit 901 might have changed the outcome of the trial. Similarly, Mr. Walker claims that his counsel should have objected to sentence enhancements reflecting that there were 42 victims of the fraud scheme; that the loss was over $5 million; and that he was ordered to pay restitution in an amount over $5 million. But Mr. Walker fails to make a supporting argument showing that these enhancements were erroneous. *Id*. at 61. Arguments not supported by reasoned argument or citation of authority are waived. *See United States v. Hardwell*, 80 F.3d 1471, 1492 (10th Cir.1996). In any event, Mr. Walker has not shown that these were meritorious issues for appeal.

5. Ms. Solomon's Failure to Raise Her Own Conflict of Interest

Lastly, Mr. Walker argues that his counsel failed to raise their own conflict of interest during his direct appeal. Motion at 61. As argued above, Mr. Walker has waived any claims of ineffective assistance against Ms. Solomon arising from joint representation or conflict of interest. In addition, Mr. Walker has not shown that his

counsel suffered from an active conflict of interest that adversely affected his representation. His arguments to that effect are purely speculative.

His counsel on appeal can hardly be faulted for failing to raise issues that Mr. Walker waived. The primary basis for his claim of conflict of interest arising from joint representation is the alleged influence of Sister Rose upon his defense strategy. Although defense counsel may have known of Sister Rose, they had no reason to anticipate Mr. Walker's implausible argument that the sinister shadow of Sister Rose overbore his will. That "defense" is newly concocted by Mr. Walker for purpose of this collateral attack upon his conviction. Hence, they had no basis for even considering whether there was a meritorious issue lurking in the scenario.

Such *post-hoc* developments are why direct appeal is not ordinarily the appropriate place to bring claims of ineffective assistance. As this court has many times noted, ineffective assistance claims should not ordinarily be brought on direct appeal. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed"). It is the rare case where the record is sufficiently developed to permit consideration of such issues on appeal, *see United States v. Beaulieu*, 930 F.2d 805, 807 (10th Cir. 1991), and this is not one of those cases.

Mr. Walker's arguments in this § 2255 motion are directly contrary to his arguments below, where he welcomed Ms. Solomon's and Mr. Lowther's representation. Hence, the factual record at the time of the appeal could not have

supported the "Sister Rose" arguments that Mr. Walker now advances and his counsel had no reason to raise the issue.

Conclusion

Even accepting for the sake of argument Mr. Walker's factual averments, his motion does not establish his entitlement to relief. Hence, the United States respectfully requests that this court deny defendant's § 2255 motion without a hearing.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on December 7, 2015, I electronically filed the foregoing **UNITED STATES' ANSWER TO DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255** using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Patrick Joseph Collins
pcollins@lawcc.us,
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s/ *Ma-Linda La-Follette*
Ma-Linda La-Follette
U.S. Attorney's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 15-cv-02223-CMA
Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY L. WALKER

Defendant.

MOTION TO UNSEAL COURT RECORDS

This Court held an evidentiary hearing on June 12, 15, and 16, 2017 on Defendant's Petition for relief pursuant to 28 U.S. Code § 2255. The Court received both documentary evidence and testimonial evidence over the course of the hearing. Based on information publically available and statements made by the Court at Defendant's resentencing hearing, it is clear that misinformation and innuendo about the Colorado Springs Fellowship Church ("CSFC") was laced throughout the 2255 hearing. The CSFC and the American public have a right to know what misinformation about the CSFC was disseminated during the 2255 hearing. The continued sealing of the transcript of the 2255 hearing (requested in Docket Nos. 1080 and 1081) as well as the continued sealing of all exhibits associated with the 2255 hearing, denies the public an understanding of the basis of the Court's reduction in Defendant's sentence and denies the CSFC and the public the right to access information regarding the misstatements made about the CSFC.

On behalf of the public, which has a constitutional "right of access to criminal proceedings and documents filed therein," the CSFC moves to unseal the above described records. *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985). This Motion should be granted because the sealing orders issued by this Court violate the public's common law right to inspect judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Valley Broadcasting Co. v. U.S. Dist. Court*, 798 F.2d 1289 (9th Cir. 1986). These rights cannot be sacrificed by the stipulation of the parties, nor by Defendant's derogatory, unsupported assertion that sealing is required to protect Defendant from "suffering continued retaliatory harassment from [CSFC]." *See* Docket No 1089 ¶4. "The District Court . . . should not turn [the determination as to whether or not filings should be made available to the public] over to the parties." *Procter & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). The CSFC states the grounds for this Motion as follows:

BACKGROUND

The CSFC is a non-denominational church, and an institution where a relationship with God is stressed. Church members are taught how to form and maintain a relationship with God, and the Bible is the basis for all of the CSFC's teaching. The CSFC believes in showing God's love by being his hand extended, reaching out with kindness to help meet the needs of others, and the community at large, at every opportunity.

The CSFC Loving Kindness Program continually reaches out to the community with acts of goodwill. People of all ages and backgrounds have been touched in profound ways by the kindness and generosity of the CSFC family. The CSFC takes pride in the fact that it is known throughout the Colorado Springs area as "The Loving Kindness Church".

The CSFC strives to build a better community and unite all people through the following activities: the "Community Let's Talk" forum where the CSFC presents a multi-cultural panel of community organizers and leaders for questions and an open discussion; the CSFC's military appreciation programs – including providing free daycare and other assistance to military families, and a free dinner for military veterans once per month; the Homeless Outreach Program Engaged (HOPE) – helping to feed and transport the homeless population; and honoring and assisting law enforcement, medical workers, firefighters, motel and hotel workers, women in crisis, and the prison population. The CSFC is a major positive contributor to the community at large, and strives to make this world a better place for all.

Due to the CSFC's standing in the community, CSFC is deeply concerned about the unfounded adverse impact on its ministry caused by the disparaging comments about the CSFC that appear to have been made during the 2255 hearing. The fact that the Court appears to have relied on those comments as a basis to reduce Defendant's sentence underscores the significance of the testimony content in question. The public has a right to know the facts underlying the Court's decision to resentence Defendant, especially if the decision was even partially based on misleading and/or untrue statements.

The efficacy of the ministry of the Church hinges on its credibility in the community it seeks to impact. Having a former member and leader testify to matters that challenge the sincerity and *bona fides* of a faith institution undermines the very message that institution seeks to deliver to the public. In that sense, the very legitimacy of the CSFC is now at stake. Thus, the CSFC requests the immediate unsealing of all documents associated with and introduced at the hearing, along with the immediate unsealing of the transcript associated with the proceeding.

STANDING

As the Supreme Court has held, all members of the public must be given a right to be heard on the question of their exclusion from court hearings and records. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982). Further, it is well-settled that non-party members of the public and press do have standing to challenge the sealing of court hearings and records. *Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993) (newspaper had standing to challenge sealing of settlement agreement); *U.S. v. McVeigh*, 918 F. Supp. 1452, 1456 (W.D. Okla. 1996) ("movants have standing to present these questions on behalf of themselves and the general public"); *see also Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988 (public advocacy group had standing to challenge protective order in tobacco litigation).

It is also well-settled that an interested third party may bring its motion to unseal after the underlying proceedings have ended. *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (third party intervened after judicially approved settlement in order to challenge sealing), *FDIC v. Ernst & Ernst*, 677 F.2d 230, 231-32 (2nd Cir. 1982) (third party intervened to challenge stipulated confidentiality order two years after settlement); *Mokhiber v. Davis*, 537 A.2d 1 100, 1104-06 (D.C. Cir. 1988) (reporter permitted to intervene four years after a judicially-approved consent decree in order to challenge a protective order); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000) (media intervened and compelled unsealing of records a year after settlement of a products liability case). Accordingly, as the Defendant has been resentenced and his case is closed, the CSFC has standing to bring this Motion before the Court requesting this Court to unseal evidence and transcripts related to the 2255 hearing.

THE CSFC AND THE PUBLIC HAVE A RIGHT OF ACCESS TO THE DOCUMENTS AND TRANSCRIPTS ASSOCIATED WITH THE 2255 HEARING

The CSFC and the public at large have a right to access and review the documents associated with the 2255 hearing under the First Amendment and pursuant to common law.

I. The First Amendment Provides A Right Of Access To Documents Related To The 2255 Hearing.

Long standing authority permits that the public a right of access to virtually all proceedings and records in a criminal case. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trial); *Press Enterprise I*, 464 U.S. at 511, 513 (*voir dire* and transcripts); *Waller v. Georgia*, 467 U.S. 39 (1984) (suppression hearings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*") (preliminary hearings). The Tenth Circuit has assumed that a First Amendment right of access applies to pretrial documents filed in a criminal case. *U.S. v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1997); *see also U.S. v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997). "[T]he public and the press have a right of access to criminal proceedings and documents filed therein. The right of access is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings as well as in the trial itself." *CBS, Inc.*, 765 F.2d at 825 (citations omitted).

The Supreme Court has prescribed a two-part test for recognizing a constitutional right of access: (1) "the document is one which has historically been open to inspection by the press and the public; and, (2) 'public access plays a significant positive role in the functioning of the particular process in question.'" *McVeigh*, 119 F.3d at 812 (*quoting Press-Enterprise II*, 478 U.S. at 8). The information sought by the CSFC falls squarely into categories that the federal courts have acknowledged a right of access, such as motions, briefs, orders and transcripts from

pretrial hearings. *See, e.g., In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (pretrial motions and briefs, including discovery-related motions); *U.S. v. Ellis*, 90 F.3d 447, 451 (11th Cir. 1996) (transcripts of *in camera* hearings once the case was concluded); *Associated Press*, 705 F.2d at 1145 (all pretrial documents); *Seattle Times Co. v. U.S. Dist. Court.* 845 F.2d 1513, 1517 (9th Cir. 1988) (pretrial release proceedings and documents filed therein); *In re Washington Post*, 807 F.2d 383, 390 (4th Cir. 1986) (plea and sentencing documents in espionage case).

The second part of the test is met where public access to the document "would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." *In re Washington Post*, 807 F.2d at 389 (citing *Press-Enterprise II*, 478 U.S. at 8) (other citations omitted). Here, the Court decided to significantly reduce Defendant's sentence based on evidence admitted during the 2255 hearing. To provide the public with a better understanding of the judicial system and the Court's decision regarding Defendant's sentence and to enable the CSFC to assess the extent to which its ministry has been maligned by the self-serving testimony provided by or on behalf of the Defendant, unsealing is warranted in this case.

Additionally and notably, while both above factors must be considered, the Supreme Court and other circuits have held that it is not mandatory that a document meet both prongs for the First Amendment right of access to attach. *Globe Newspaper Co.*, 457 U.S. at 605 n. 13 (recognizing right of access to testimony of minor sex crimes victim despite lack of history of access); *Seattle Times*, 845 F.2d at 1516 (same regarding bail proceedings); *U.S. v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (same regarding suppression hearings). Especially in a criminal trial, a lack of a tradition of access to a particular document or proceeding cannot alone justify sealing. *Globe Newspaper Co.*, 457 U.S. at 605 n. 13 (the argument that a specific

proceeding did not enjoy a tradition of public access was "unavailing" because "as a general matter criminal trials have long been presumptively open"). Rather, the Court must consider whether, in the context of our modern justice system, public access serves society's general interest in open trials and an accountable judiciary. *Brooklier*, 685 F.2d at 1170. Because "the first amendment is to be interpreted in light of current values and conditions," and in light of the "increasing importance of pretrial procedures in the modern era," a right of access attaches even to records not traditionally open where, as here, the value of access is apparent. *Id.* Therefore, even if the Court finds that some documents under seal in this case do not have a long tradition of access, the First Amendment right would still attach because public access subjects the judiciary to "healthy public scrutiny," *Seattle Times*, 845 F.2d at 1516, and is crucial to a full understanding of the way in which "the judicial process" is functioning. *Associated Press*, 705 F.2d at 1145.

II. The Common Law Provides A Right Of Access To Documents Related To The 2255 Hearing

The public also has a common law right to inspect and copy public records and documents, including judicial records and documents. *U.S. v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985); *Nixon*, 435 U.S. at 598. The common law right of access is separate and independent from the constitutional right, and attaches, presumptively, to all documents filed in a criminal or civil case. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"). The common law right attaches even where the court does not reach the constitutional issue or does not find a constitutional right of access. *U.S. v. Schlette*, 842 F.2d 1574, 1582-83

(9th Cir. 1988); *Valley Broadcasting Co.*, 798 F.2d at 1293; *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63-64 (4th Cir. 1989).

To assert a common law right, the CSFC merely needs to make a threshold showing of a legitimate need for disclosure. *U.S. v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998). Here, where Defendant's sentence was reduced significantly by the Court, the requested unsealing will serve the ends of justice by "[m]aking the public aware of how the criminal justice system functions," *Schlette*, 842 F.2d at 1583. The burden then shifts to the parties that requested the sealing of the documents to articulate a "legitimate reason for preserving ... secrecy," *Id*. This "legitimate reason" must outweigh the public's "overriding concern with preserving the integrity of the law enforcement and judicial processes," *Hickey*, 767 F.2d at 708 (internal citations omitted).

CONCLUSION

The documents related to the 2255 hearing should be immediately unsealed to prevent any further violation of the constitutional and common law rights of the CSFC and the public.

WHEREFORE, for all of the foregoing reasons, the CSFC respectfully requests that this Court grant this Motion and lift all sealing orders related to all documents associated with, and introduced at, the Defendant's 2255 hearing, along with the immediate unsealing of the transcript associated with the hearing forthwith, or in the alternative, that the Court hold a hearing on the relief requested in this Motion.

Respectfully submitted,

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s/ *Patrick Fitz-Gerald*

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, a true and correct copy of the above Motion was filed and served by ECF and/or electronic mail as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 15-cv-02223-CMA
Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY L. WALKER

Defendant.

MOTION TO REQUEST FORTHWITH RULING ON MOTION TO UNSEAL OR IN THE ALTERNATIVE TO REQUEST THAT THE MOTION BE ADDRESSED

The Colorado Springs Fellowship Church (CSFC), having filed a Motion to Intervene and Unseal the Record on January 12, 2018, and having received no ruling or date upon which a ruling is expected, files this Motion to request of the court a ruling on that Motion or in the alternative an update as to when the Motion will be ruled on if that is known by this court.

WHEREFORE, for all of the foregoing reasons, the CSFC respectfully requests that this Court grant this Motion, and the previously submitted Motion and lift all sealing orders related to all documents associated with, and introduced at, the Defendant's 2255 hearing, along with the immediate unsealing of the transcript associated with the hearing forthwith, or in the alternative, that the Court hold a hearing on the relief requested in this Motion.

Respectfully submitted,

Driskell, Fitz-Gerald & Ray, L.L.C.

s/ *Patrick Fitz-Gerald*

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2018, a true and correct copy of the above Motion was filed and served by ECF and/or electronic mail as follows:

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_____

s/ *Samantha Rico*
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04/27/2018	1113	ORDER denying 1112 Motion for to Request Forthwith Ruling. An order on 1106 Motion to Unseal Court Records will issue in due course. SO ORDERED by Judge Christine M. Arguello on 4/27/2018. Text Only Entry (cmasec) (Entered: 04/27/2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Case No. 15-cv-02223-CMA
Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

3. GARY L. WALKER,

Defendant.

ORDER DENYING MOTION TO UNSEAL COURT RECORDS

This matter is before the Court on a Motion, filed by Colorado Springs Fellowship Church (CSFC), to Unseal Records that have been restricted in Mr. Gary Walker's habeas case. (Doc. # 1106.) For the following reasons, the Court denies the motion.

I. BACKGROUND

Mr. Walker was originally charged by Indictment dated June 9, 2009 with violation of 18 U.S.C. § 1349 – Conspiracy to Commit Wire and Mail Fraud. (Doc. # 1.) After a full jury trial, he was found guilty and convicted of that count. (Doc. ## 447–79.) The Court thereafter sentenced Mr. Walker to 135 months in prison. (Doc. # 782.)

On October 5, 2015, Mr. Walker filed his Motion and Memorandum of Law Pursuant to 28 U.S.C. § 2255 (2255 Petition), wherein he outlined several troubling circumstances that he asserted led to a serious injustice in his case. (Doc. # 902.) The

Court held an evidentiary hearing on the 2255 Petition, which lasted for three days: June 12, 15, and 16, 2017. During that hearing, numerous witnesses, including Mr. Walker and former members of CSFC, testified at length in line with representations Mr. Walker made in his 2255 Petition. The evidence presented supporting Mr. Walker's allegations that his constitutional rights were violated was compelling.

Subsequent to the conclusion of the hearing, Mr. Walker and the Government filed a joint motion requesting that this Court grant in part Mr. Walker's 2255 Petition based on the evidence presented at the hearing and in the 2255 Petition. (Doc. # 1066.) They asked this Court to find that Mr. Walker was entitled to re-sentencing as soon as practicable. (*Id*.) This Court agreed with the parties that overwhelming evidence supported Mr. Walker's contentions and thereby granted in part his 2255 Petition and re-sentenced Mr. Walker to 70 months imprisonment. (Doc. ## 1069, 1079.)

On June 28, 2017, Mr. Walker requested that this Court restrict access to the transcripts from the 2255 evidentiary hearing. (Doc. # 1080.) The Government did not oppose restriction. Although the hearing was not sealed, this Court agreed with Mr. Walker that access to the transcripts should be restricted. (Doc. # 1086.) The Court found, with evidentiary and legal support, that protecting Mr. Walker and the testifying witnesses far outweighed the public's right to access. (*Id.*)

CSFC now objects to that restriction, contending that "misinformation and innuendo about [CSFC] was laced throughout the 2255 hearing" and that "CSFC and

the American public have a right to know what misinformation about CSFC was disseminated." (*Id.*) CSFC's motion follows numerous other requests by CSFC's affiliates for access, including phone calls and emails to this Court, some of which have threatened congressional and disciplinary action if the transcripts are not unsealed. Because CSFC's motion has not altered this Court's conclusion that interests favoring nondisclosure outweigh CFSC's and the public's right of access, the Court denies CFSC's request and maintains the Level 2 restriction of the transcripts.

II. LAW

Although it is clear that the courts of this country recognize a general right of the public to inspect and copy judicial records and documents, it is also uncontested that "the right to inspect and copy judicial records is not absolute." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982) ("Although the right of access to criminal trials is of constitutional stature, it is not absolute."). Indeed, documents may be sealed "if the right to access is outweighed by the interests favoring nondisclosure." *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir 1997). In considering whether to restrict the public's access, the court balances the public's right against the need to protect vulnerable witnesses, including the petitioner. *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *see Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989) ("An accused's right under the Sixth Amendment must be carefully balanced against the government's competing interest in protecting vulnerable witnesses from embarrassment and harm.").

A proper basis exists to seal court documents when the nature and degree of movant's potential injury are significant. *See Rikers v. Federal Bureau of Prisons*, 315 Fed. Appx. 752 (10th Cir 2009); *see also United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995.).

III. ANALYSIS

The Court finds that, based on the reasons set forth in its previous Order restricting access to the transcripts (Doc. # 1086), including the nature and degree of potential injury to Mr. Walker and other witnesses, a Level 2 restriction to the transcripts remains appropriate in this case. CSFC's reason for needing access—to see whether "its ministry has been maligned"—is insufficient to overcome the very real safety concerns present in this case. Although CSFC purports to be concerned with "better understanding" the judicial process, it appears to this Court that CSFC's true concern is with its reputation in the community and its self-serving belief that Mr. Walker's sentence should not have been reduced. With respect to the former, the Court's restriction of access to the transcripts protects CSFC's interest in protecting its reputation in the community because it limits the public's access to this information. With respect to the latter, CSFC spends much of its motion explaining its belief that Mr. Walker's sentence was improperly reduced based on "untrue" and "misleading" information about CSFC. The motion rings as a masked objection to Mr. Walker's sentence reduction, which CSFC has no standing to raise. *Whitmore v. Arkansas*, 495 U.S. 149, 156 (1990) (discussing a non-party's standing to object to a defendant's

sentence). Although this Court believes that it is beneficial to have public scrutiny of criminal and related civil proceedings, this is not a case where those public benefits outweigh the potential harms. *Cf. Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (allowing media access to post-conviction proceedings and documents in part because citizens expressed a legitimate interest in learning which inmates are being released from prison and why; whether state officials are recommending the release of only those who are most deserving or those who have political or other influential connections; and whether said releases might aid in the prevention of overcrowding prisons).

Indeed, CSFC's motion does nothing to counter or assuage this Court's concerns about its need to protect the witnesses at Mr. Walker's 2255 hearing. If anything, it heightens this Court's concerns. Ultimately, for the reasons set forth in this Court's previous order (Doc. # 1086), the public's right to access is far outweighed by the overwhelming need to prevent Mr. Walker and other witnesses from being harmed. *See United States v. McVeigh*, 918 F. Supp. 1452, 1466 (W.D. Okla. 1996) (Proceedings concerning material witnesses were properly sealed because "they are within the tradition of secrecy and there is no reasonable alternative to denial of any public disclosure of them.").

It also remains apparent to this Court that no alternative to sealing the transcripts from public access is practical. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (if closure is warranted, the restriction on access must be narrowly

drawn with only that part of the proceeding as is necessary closed). CSFC presents this Court with no less intrusive alternatives, instead requesting complete and unfettered access to "all documents associated with and introduced at the hearing, along with the immediate unsealing of the transcript associated with the proceeding." (Doc. # 1106 at 3.) Because of this Court's need to protect virtually all of the witnesses at the hearing, including Mr. Walker and his reasons for requesting habeas relief, which were discussed throughout the three-day hearing, sealing the transcripts in their entirety is warranted.

IV. CONCLUSION

For the foregoing reasons and those set forth in this Court's previous Order restricting access (Doc. # 1086), the Court DENIES CSFC's Motion to Unseal Court Records (Doc. # 1106). The transcripts of the evidentiary hearings held on June 12, 15, and 16, 2017, shall therefore remain under a Level 2 restriction.

DATED: June 1, 2018

BY THE COURT:

Christine M Arguello

CHRISTINE
M.
ARGUELLO
United States
District Judge

Docket No. 1087, Transcript of Re-sentencing Hearing for Gary L. Walker held 06/28/2017, Date of Filing:08/01/2017,
…….[1, 4, 20-23, 26].

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA-03

UNITED STATES OF AMERICA,

Plaintiff, V.

3. GARY L. WALKER,

Defendant.

REPORTER'S TRANSCRIPT
(Re-Sentencing Hearing)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 3:00 p.m. on the 28th day of June, 2017, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:
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FOR DEFENDANT WALKER:
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DARLENE M. MARTINE2, RMR, CRR
United States District Court
For the District of Colorado

that one of Mr. Walker's attorneys at the time of sentencing, Gwendolyn Lawson, had an actual conflict of interest that adversely affected her representation of Mr. Walker.

In particular, Ms. Lawson was prevented, both by her duties to her other clients but, more importantly, by her allegiance to her pastor, Rose Banks, the mother of David Banks, one of Mr. Walker's co-defendants, from presenting argument and evidence that would have affected this Court's determination about whether to assess a 4-level aggravating role enhancement against Mr. Walker under Section 3B1.1(a) of the United States Sentencing Guidelines.

The only two defendants who received this 4-level aggravating role enhancement were Mr. Walker and David Banks. However, David Banks was represented by his own independent counsel.

In accordance with Strickland v. Washington, 466 U.S. 668, 1984, this Court found that Ms. Lawson's representation of Mr. Walker was adversely affected by an actual conflict of interest and determined that Mr. Walker's 2255 habeas petition should be granted for the limited purpose of the sentencing.

That is the purpose of today's hearing, to resentence Mr. Walker. I have reviewed the original

installment payments ordered herein.

Now, Mr. Walker, at your original sentencing I told you, and I will tell your parents, since they are here now, that I do take my task of sentencing very seriously, because I understand how it impacts your life, whatever sentence I impose. And I want to be fair to you. I want to be fair to everyone in meting out the justice that is required for the crime that you committed.

On the other hand, I also have an obligation to the public and to society to protect them from further crimes, to promote respect for the laws of the United States, to provide a just punishment, but one that will deter you and others from committing similar criminal conduct.

Now, you indicated to me that it took you more than 2 years to break your allegiance from Pastor Banks and the Colorado Springs Fellowship and to accept full responsibility for your actions and your conduct and to appreciate the economic harm that you caused others by your conduct.

And, I agree with you, you were really fortunate that you came to see the light and that your questioning of the morality of the conduct of your co-defendants and the others involved in this conspiracy, caused Pastor Banks to put you out of the church and to cut you off from everyone associated with Colorado Springs Fellowship,

because that was the way you were able to escape her exercise of pervasive influence over all aspects of your life.

And I know it came at a heavy price, in that you lost your wife and your son and your entire social group, including the camaraderie of your co-defendants and the other parishioners, because Pastor Banks forbade them to have any contact with you.

Now, during the evidentiary hearing, there was evidence demonstrating the extent of the coercion that you and others were subjected to by Pastor Banks, and your inability to challenge or evade the directions received from her as a result of the duress that was imposed.

Now, this Court finds it hard to fathom how someone, who holds yourself out as a prophet of God and as a Christian, could be as vindictive and mean-spirited as Pastor Banks. But it is clear that she was doing all she could to retain her hold on you.

In the letter that she wrote to you after you questioned the authenticity of her claims to have provided the IRP-6 with directives from God and the morality of what you and your co-defendants had done, Pastor Banks wrote that you were a "traitor" and "the king of [her] enemies." She excommunicated you from the only community you had known for the past 30 years, and she

unconditionally alienated you from your wife and son. She also went on to vilify and "prophesy" cancer on your parents, and indicates that she dreams of life in a wheelchair for you. That is not something that somebody who is Christian would do or say.

She says, "Your dad has cancer in his mouth because of all the lies he talked about to whoever would listen. Your mom and dad are quick to believe evil about people because they are evil. Watch it, your dad and mom will suffer with cancer and pay the price for what they have said against me, our family and our church."

With respect to you, she says, "The muscle disease will bring you down and you will acknowledge that you lied." "God is going to bring you down and people will look at you and pity you. The muscle condition will continue to get worse every day. The dream will come true; you will be in that wheelchair." That is not something that a Christian person would ever wish on anyone.

Your personal history and the characteristics that you presented demonstrate that although you have been on this earth for 54 years, you have lived, with the exception of this crime, a law-abiding life. You have no criminal history whatsoever.

At your original sentencing, I told you that I

found it very sad that you were in this position, because you are a very bright, intelligent, and personable man who exhibits a lot of charisma and leadership. And, as I told you then, based on your representation of yourself at trial, it is clear to me that you would have made a great lawyer.

Yet, instead of using your God-given gifts and talents to advance yourself legally, you chose to use them in a way that was fraudulent and criminal.

But after your hearing, I have a better understanding of why you did what you did. I could see the hold Pastor Banks had on you. And despite all she has done to you, to try to control you by isolating and alienating you from anyone outside the church, including your parents for 10 years, then after you began to slip out from under her control when you were in prison, she sought to punish you by isolating you from your son and wife and your fellow church members and your co-defendants when you raised the slightest question about the morality of the conduct in which you were all involved with in this fraud.

Yet, during your testimony here, you continued to refer to her in a very respectful and almost reverent manner, despite all of that. So I advise you to be very careful.

REPORTER'S CERTIFICATE

I, Darlene M. Martinez, Official Certified Shorthand Reporter for the United States District Court, District of Colorado, do hereby certify that the foregoing is a true and accurate transcript of the proceedings had as taken stenographically by me at the time and place aforementioned.

Dated this 31st day of July, 2017.

s/Darlene M. Martinez

RMR, CRR

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing: (1) all required privacy redactions have been made; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CC Cleaner, and according to the program are free of viruses. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after responsible inquiry.

/s/ Gwendolyn M. Lawson

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Attachments to Opening Brief was filed using CM/ECF filing system which will send notification of such filing to the following e-mail addresses on July 31, 2018 was served on:

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(*See* Fed. R. App. P. 25(b))

s/ Gwendolyn M. Lawson
Gwendolyn M. Lawson