No. _____

In The
Supreme Court of the United States

DAVID BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals for the Tenth Circuit violate the Petitioner's rights under the First Amendment when it sealed almost the entire transcript and almost all of the filings in a related habeas corpus proceeding?

Do the Rules of the District Court for the District of Colorado unfairly and unconstitutionally restrict the ability and discretion of the trial court in ruling on a motion for sealing?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 19

APPENDIX

United States v. Banks, 2023 WL 109968
(10th Cir. Jan. 5, 2023) A1

United States v. Banks, 09cr266
(D. Colo. Nov. 3, 2021) A43

United States v. Walker,
838 Fed. App'x 333 (10th Cir. Dec. 2, 2020) A46

United States v. 3. Gary L. Walker,
09cr266 (D. Colo. Dec. 9, 2019) A58

United States v. 3. Gary L. Walker,
2019 WL 6215641 (D. Colo. Nov. 21, 2019) A67

In re Colorado Springs Fellowship Church,
19-1246 (10th Cir. Aug. 12, 2019) A93

Walker v. United States,
761 Fed. App'x 822 (10th Cir. Jan. 23, 2019) A98

TABLE OF AUTHORITIES

SUPREME COURT

Gannett Co., Inc. v. DePasquale,
443 U.S. 368 (1979) 15

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 13

Globe Newspaper Co. v. Superior Court for County of Norfolk,
457 U.S. 596 (1982) 14, 15

Mills v. Alabama,
384 U.S. 214 1966) 13

Nixon v. Warner Communications, Inc.,
435 U.S. 589 (1978) 10, 14

Press-Enterprise Co. v. Superior Court of California for County of Riverside,
464 U.S. 501 (1986) (*Press-Enterprise I*) 15

Press-Enterprise Co. v. Superior Court of California for County of Riverside,
478 U.S. 1 (1986) (*Press-Enterprise II*)..... 15

Richmond Newspapers Inc. v. Virginia,
448 U.S. 555 (1984) 15

COURT OF APPEALS

Application of Sarkar,
575 F.2d 870 (C.C.P.A. 1978)..... 12

Binh Hoa Le v. Exeter Finance Corp.,
990 F.3d 410 (5th Cir. 2021) 19

Center for Auto Safety v. Chrysler Group, LLC,
809 F.3d 1092 (9th Cir.),
cert. denied sub nom. FCA U.S., LLC v. Center for Auto Safety, — U.S. — (2016)..... 12

Colony Ins. Co. v. Burke,
698 F.3d 1222 (10th Cir. 2012) 15

Colorado Springs Fellowship Church, In re,
19-1276 (10th Cir. Aug. 12, 2019)..... 4, 11

Demetriades, In re,
58 F.4th 37 (2d Cir. 2023) 10, 17

Foltz v. State Farm Mutual Auto Ins. Co.,
331 F.3d 1122 (9th Cir. 2003) 12

Hardaway v. District of Columbia Housing Auth.,
843 F.3d 973 (D.C. Cir. 2016) 11

Kamakana v. City & County of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 15

Leopold to Unseal Certain Electronic Surveillance Applications and Orders, In re,
964 F.3d 1121 (D.C. Cir. 2020) 10

Matter of Continental Illinois Securities Litigation,
732 F.2d 1302 (7th Cir. 1984) 10

Matter of Search of 1638 E. 2d St., Tulsa, Okla.,
993 F.2d 773 (10th Cir.), *cert. denied sub nom. Lawmaster v. United States*,
510 U.S. 870 (1993) 11

McClatchy Newspapers, Inc., In re,
288 F.3d 369 (9th Cir.), *cert. denied sub nom. Unidentified Private Citizen v. McClatchy Newspapers, Inc.*, 537 U.S. 944 (2002) 10

Ohio Execution Protocol Litigation, In re,
2022 WL 2317856 (6th Cir. 2022) 17

Payne El-Bey v. Amazon, LLC,
2022 WL 17958639 (3d Cir. 2022) 11

Perrigo Co., In re,
128 F.3d 430 (6th Cir. 1997) 10

Perry v. City and County of San Francisco,
2011 WL 2419868 (9th Cir. 2011) 19

Total Recall Technologies v. Luckey,
2021 WL 5401664 (9th Cir. 2021) 10

United States v. Bacon,
950 F.3d 1286 (10th Cir. 2020) 11

United States v. Banks,
2023 WL 109968 (10th Cir. Jan. 5, 2023) .. 1, 2, 7, 9, 14

United States v. Blakely,
375 Fed. App'x 565 (6th Cir. 2010) 11

United States v. Cushing,
10 F.4th 1055 (10th Cir. 2021), *cert. denied*
— U.S. — (2022) 11

United States v. Doe,
629 Fed. App'x 69 (2d Cir. 2015),
cert. denied sub nom. Dwyer v. United States,
577 U.S. 1218 (2016) 12

United States v. Martinez, 2023 WL 1069705
(3d Cir. 2023) 17

United States v. Poff,
2021 WL 4467641 (5th Cir. 2021), *cert. denied*
— U.S. — (2022) 11

United States v. Thomas,
905 F.3d 276 (3d Cir. 2018) 3, 15

United States v. Walker,
838 Fed. App'x 333 (10th Cir. 2020) 5

Virginia Dep't of State Police v. Washington Post,
386 F.3d 567 (4th Cir. 2004), *cert. denied*
544 U.S. 949 (2005) 15

Walker v. United States,
761 Fed. App'x 822 (10th Cir. 2019) 1, 11, 17

Woven Electronics Corp. v. Advance Group, Inc.,
1991 WL 54118 (4th Cir. 1991) 11

DISTRICT COURT

Doe 1 v. Wolf,
2020 WL 8746023 (N.D. Cal. Sep. 22, 2020) 12

Sunshine v. Jividen,
2021 WL 3557655 (S.D. W. Va. Aug. 11, 2021) 10

United States v. 3. Gary L. Walker,
09cr266 (D. Colo. Dec. 9, 2019) 1

United States v. 3. Gary L. Walker,
2019 WL 6215641 (D. Colo. Nov. 21, 2019) 1, 4, 13

United States v. Banks,
09cr266 (D. Colo. Nov. 3, 2021) 1, 7

United States v. Paulus,
2017 WL 908409 (E.D. Ky. Mar. 7, 2017),
vacated on other grnds. 894 F.3d 267
(6th Cir. 2018) 1, 3

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 12, 13

The Petitioner, David Banks, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on January 5th, 2023, *United States v. Banks,* 2023 WL 109968 (10th Cir. 2023).

JURISDICTION

The decision on the Tenth Circuit was entered on January 5, 2023, and the Mandate issued on January 27, 2023. Thus, this Petition is timely. See *Clay v. United States*, 537 U.S. 522, 525 (2003). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Rules 10(a), 13(1), Rules of the U.S. Supreme Court.

OPINIONS BELOW

The relevant opinions of the United States Court of Appeals for the Tenth Circuit, and the District of Colorado, are reproduced in the Appendix hereto, *viz.*,

Walker v. United States, 761 Fed. App'x 822 (10th Cir. Jan. 23, 2019)
In re Colorado Springs Fellowship Church, 19-1276 (10th Cir. Aug. 12, 2019)
United States v. 3. Gary L. Walker, 2019 WL 6215641 (D. Colo. Nov. 21, 2019)
United States v. 3. Gary L. Walker, 09cr266 (D. Colo. Dec. 9, 2019)
United States v. Walker, 838 Fed. App'x 333 (10th Cir. Dec. 2, 2020)
United States v. Banks, 09cr266 (D. Colo. Nov. 3, 2021)
United States v. Banks, 2023 WL 109968 (10th Cir. Jan. 5, 2023)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the federal Constitution states: "No person shall . . . be deprived of life, liberty or property without due process of law."

The First Amendment to the federal Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . ."

STATEMENT OF THE CASE

INTRODUCTION

This case involves the Petition for a Writ of Certiorari of David Banks (hereinafter referred to as "Banks"), following the decision of the Tenth Circuit Court of Appeals on his motion to secure an unredacted copy of a habeas transcript, and related filings in the District Court. The ruling in the Tenth Circuit, in *United States v. Banks,* 2023 WL 109968 (10th Cir. 2023), was three to one, with the concurring and dissenting judge (the Hon. Carolyn McHugh, C.J.), ruling that the pleadings (or at least some of them) should have been released. See **Appendix A1**.

This case arises out of the conviction of David Banks, Demetrius Harper, David Zirpolo, Kendrick Barnes, Gary Walker, and Clinton Stewart, in October 2011, in the District of Colorado. *United States v. Banks, et al.*, 09-cr-00266. The case was tried before the Hon. Christine Arguello, U.S.D.J. (ret.). The defendants were convicted of all charges

in the indictment, and received varying sentences of from 87 to 135 months. On October 7th, 2015, Defendant Gary Walker filed a petition for habeas corpus relief in the District Court. *Walker v. United States*. 09-cr-00266, Dkt. Entry No. 904.[1] Based upon certain allegations contained in Walker's habeas pleadings, the third party, Colorado Springs Fellowship Church (hereinafter referred to as the "the Church"), intervened in the case, and, along with Walker's co-defendants, sought access to the pleadings, and transcripts. At the time of the arrest, trial and conviction of the above-named Defendants, including Mr. Banks, all were members of the Church. The District Court denied this relief, and ordered that the hearing transcripts and most of the filed pleadings would be granted status as a Level 2 Restricted Document, *i.e.*, not to be made publicly available.[2]

Under the rules of the District of Colorado, a Level 2 designation "limits access to the filing party and the court." See Local Rule 7.2(b), Levels of Restriction.

This denial of access to Walker's co-defendants was appealed to the Tenth Circuit (18-1273), in which a lengthy opinion was issued on January 23rd, 2019. See *United States v. Walker*, 761 Fed. App'x 822 (10th Cir. 2019). See **Appendix A98**. In this

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[1] As per practice in the District of Colorado, the habeas petition received a civil docket number, 15-cv-002223. All filings, however, were made in the criminal docket, and all Docket Sheet Entries, are to that docket sheet.

[2] The District of Colorado has an all but unique system of classifying documents at various "Levels", based upon what the presiding judge determines to be available to the public, or the parties, or not. See discussion *infra*.

ruling the Court remanded the matter to Judge Arguello to review her sealing order and unseal those portions of the record that should have been made publicly available (as, obviously) available to the intervenor, Colorado Springs Fellowship Church.

After a lengthy time of inaction by the District Court a petition for a writ of mandamus relief was filed with the Circuit Court. *In re Colorado Springs Fellowship Church*, 19-1246 (July 14th, 2019). This petition sought both compliance with the January 2019 Court of Appeals order, and that the matter, on remand, be assigned to another Article III judge. On August 12th, 2019, the Court of Appeals issued a ruling in the mandamus petition, remanding the matter to the lower court, and directing it to timely comply with the earlier order of January 23, 2019. *In re Colorado Springs Fellowship Church*, 19-1246 (10th Cir. Aug. 12, 2019). The Court of Appeals, further, denied the request of the Church to re-assign the case to another District Court Judge. See **Appendix A93**.

In November 2019 the Church moved, in the District Court, for Judge Arguello to recuse herself from this case. On the same date the District Court — almost three months after the Circuit Court Order — delivered its unsealing Orders for portions of the *Walker* habeas corpus transcript. *United States v. 3. Gary L. Walker*, 2019 WL 6215641 (D. Colo. Nov. 21, 2019).

On December 13th, 2019, pursuant to Judge Arguello's ruling on November 21, 2019, the Court Reporter, made publicly available the redacted transcripts of Mr. Walker's habeas proceeding. Dkt. Entry Nos. 1150, 1151, 1152. These redacted

transcripts totaled almost the entire 700 pages of the hearing transcript.

This decision of the lower court was appealed by the Church, as intervenor (20-1037), and on December 2d, 2020, the Court of Appeals issued its ruling. See *United States v. Walker*, 838 Fed. App'x 333 (10th Cir. 2020). **Appendix 46**. In this ruling the Court of Appeals did not rule on the validity of the District Court's November 21, 2019 order "complying" with the requirement to elucidate the bases for any sealing of the record. While the appeal did raise the issue of whether the District Court's Order was in compliance, it also sought review of the lower court's recusal denial. The Court of Appeals "dismiss[ed] the appeal of the Access Order for lack of jurisdiction and affirm the Recusal Order." As to the former issue, the Court of Appeals did not rule on the merits, but, rather, found that the notice of appeal was not timely filed, and hence, the issue was not ripe for review. 838 Fed. App'x at 336-37. As to the issue of recusal, the Court of Appeals found that the issue was untimely raised (though not necessarily devoid of proof of bias and prejudice). *Id.* at 337-39.

Still seeking access to a transcript record that was more than 85% under seal, and almost the entire filing similarly under seal, on February 5th, 2021 the Petitioner Banks, individually, filed a motion to unseal the record. In his Motion he argued that

> (a) as a co-defendant of Walker in the original criminal proceeding he has a right to a copy of the demanded records, and (b) in any event, the unsealing

> Order of the lower Court violates the basic tenets of the law that there is an all but irrebuttable presumption that trial records and judicial proceedings should be open and available to the public at large.

Id. at p. 3. ECF No. 1171.

On November 3d, 2021 Judge Arguello finally issued her three-page Order denying the relief requested (after several inquiries to the Court as to why the motion had still not been ruled upon; see ECF No. 1173). Specifically, she based her Order on the following grounds:

> A. "Mr. Banks and his confederates have a demonstrated history of harassing and intimidating witnesses and jurors and of making misrepresentations to the Court. The Court has serious concerns that granting Mr. Banks's motion to access the requested records would facilitate further harassment and intimidation. These concerns for witness and juror safety outweigh Mr. Bank's interest in accessing the requested records."
>
> B. "Furthermore, Mr. Banks has failed to demonstrate a legitimate reason for accessing the requested records. The records in question do not concern Mr. Banks; rather, they concern another defendant's claim that he received ineffective assistance of counsel at certain phases of his criminal prosecution. (Doc. ## 902). Mr. Banks

> fails to explain how such records are relevant to his case."

Order of Nov. 3, 2021, ECF No. 1178, at p. 2. *United States v. Banks*, 09cr266 (D. Colo. Nov. 3, 2021), ECF No. 1178. See **Appendix A43**.

On November 22d, 2021 Banks filed a Notice of Appeal of this ruling in the civil habeas case, 15-cv-02223. ECF No. 1179.

Following the filing of Briefs by both parties, the Court of Appeals, on October 21, 2022, requested that the parties address the issue of "issue preclusion", based upon the earlier rulings of the Court. ECF No. 10949520.

As a result, thereof, subsequent filings were made addressing this issue. ECF Nos. 10951048, 10952973.

On November 17, 2022 the Court of Appeals heard Oral Argument, and, on January 5, 2023, delivered its decision. *United States v. Banks*, 2023 WL 109968 (10th Cir. Jan. 5, 2023). See **Appendix A1**.

The Court of Appeals, in a 3-2 ruling, on January 5, 2023, affirmed the November 3d, 2021 Order of Judge Arguello.

THE DECISION OF THE CIRCUIT COURT

The decision of the Court of Appeals merits review and vacatur by this Court. As the history of this case makes clear, over the past more than four years, the Petitioner, and others, have sought to gain access to the record in the *Walker* habeas proceeding. It is important, if not dispositive, to recognize, what this case was not. This was not a case involving national security. It was not a case in

which documents were submitted that had some sort of security classification. This was not a case in which undercover agents, informers, members of national intelligence agencies, or other persons whose identity or testimony that, in and of itself, necessitated some protection from public disclosure. What this was, was a simple Section 2255 habeas proceeding filed by one of the defendants in the original criminal case. Indeed, what makes this case cry out more than others is the fact that at no time did the District Court judge, who sealed the record — both the filings and the transcript — ever seal the courtroom itself, and only permit denominated individuals to be present during the hearing. Furthermore, this was not a proceeding in which individuals testified as "John Does" in order to protect their identity.

What this was, rather, was a bare faced attempt to conceal the record, with no legitimate basis under the law, from members of the public, who had a constitutional right to have access to these records and documents. And, the danger in the District Court's rulings in December 2021, and the affirmance by the Tenth Circuit in January 2023 is that these rulings make a mockery of this Court's long and storied recognition, rooted in the common law, of the presumptive public nature of judicial proceedings.

Furthermore, the manner in which the District of Colorado actually handles such requests (ignoring for the moment the flagrant disregarding of these rules by the District Court Judge, as set forth below), in a manner all but unique in the federal judicial system, renders this Court's rulings (such as *Press-Enterprise, et al.*) meaningless. The District Court's

2021 Order, and the Court of Appeals January 2023 Order set forth a dangerous, if not fatal injury to the notion of public access to judicial proceedings.

The Circuit Court's Opinion, after providing a chronology of the events in this litigation, and a selective summary of the rulings of the District Court as to why the record needed to be kept under seal, devoted almost no explanation, that addressed the fundamental issues of public access, in affirming the lower court's ruling. Applying an abuse of discretion standard, and mischaracterizing the record, and Petitioner's status in seeking unsealing, the Court of Appeals abruptly affirmed the lower court's Order. *Banks v. United States, supra*, 2023 WL 109968 at *8-*9.

REASONS FOR GRANTING THE WRIT

THE RULING OF THE COURT OF APPEALS IN DENYING THE PETITONER ACCESS TO THE TRANSCRIPTS AND FILINGS IN THE DISTRICT COURT CONSTITUTED A DIRECT AND IMPROPER DENIAL OF THE FUNDAMENTAL RIGHT OF PUBLIC DISCLOSURE OF JUDICIAL PROCEEDINGS; THE MANNER IN WHICH THE DISTRICT OF COLORADO ADDRESSES REQUESTS FOR SEALING IS IMPROPER AND CONSTITUTES A DENIAL OF THE FIRST AMENDMENT RIGHTS OF THE PETITIONER AND THE PUBLIC AT LARGE

The Rulings Below Do Direct and Fatal Injury to the Presumption of Public Access to Judicial Proceedings as Interpreted Under the First Amendment

Courts have long recognized "the existence of a common-law right of access to judicial records. . .". *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The basis for this is a fundamental aspect of American democracy, that being the recognition that the public, either having a direct interest in the outcome of a judicial proceedings (*see, e.g., Sunshine v. Jividen*, 2021 WL 3557655 at *1 (S.D. W. Va. Aug. 11, 2021)), or, merely a "citizen's desire to keep a watchful eye on the workings of public agencies", should be granted such access. *Ibid*. See also *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 370 (9th Cir.), *cert. denied sub nom. Unidentified Private Citizen v. McClatchy Newspapers, Inc.*, 537 U.S. 944 (2002).

In *Nixon*, *supra*, Justice Powell recognized that the issue of public access to judicial proceedings was one that was the "infrequent subject of litigation, its contours have not been delineated with any precision." 435 U.S. at 597.

Those "contours", in a number of decisions of the Courts, have made it clear that "there is a 'strong presumption in favor of public access to judicial proceedings,' including judicial records." *In re Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1127 (D.C. Cir. 2020). In accord see *In re Demetriades*, 58 F.4th 37 (2d Cir. 2023) (the Court of Appeals speaking of "'the "weighty" standard for overriding the presumptions of open records and public access." *Id*. at 46.); *Total Recall Technologies v. Luckey*, 2021 WL 5401664 at *1 (9th Cir. 2021); *In re Perrigo Co.*, 128 F.3d 430, 447 (6th Cir. 1997); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-09 (7th Cir. 1984).

And, indeed, the Tenth Circuit, itself, has, at least repeated this mantra (*see, e.g., United States v. Cushing*, 10 F.4th 1055, 1081 (10th Cir. 2021), *cert. denied* — U.S. — (2022); *United States v. Bacon*, 950 F.3d 1286, 1292-93 (10th Cir. 2020)), indeed, including having done so in the litigation herein. *See, e.g., Walker v. United States, supra*, 761 Fed. App'x at 835; *In re Colorado Springs Fellowship Church*, 19-1246, *supra*, "our decision in *Walker* was grounded on the strong presumption in favor of the public's right of access to court records." However, as the record herein demonstrates, these words have not been translated into effective action, resulting in a denial of an essential right under the First Amendment.

It is also essential to recognize that in the records sealed herein, there is no claim that the records, in and of themselves, inherently necessitated non-disclosure. For example, in *Payne El-Bey v. Amazon, LLC*, 2022 WL 17958639 (3d Cir. 2022), the Court of Appeals took note that the motion to seal would be granted as the subject records included "medical records and other personal documents". *Id.* at *3 n. 4. See also *United States v. Poff*, 2021 WL 4467641 at *1 (5th Cir. 2021), *cert. denied* — U.S. — (2022) (sealing of medical records); *Hardaway v. District of Columbia Housing Auth.*, 843 F.3d 973, 981 (D.C. Cir. 2016) (same).

Or, under other circumstances, such as preserving an informant's identity (*see, e.g., United States v. Blakely*, 375 Fed. App'x 565, 566 n. 1 (6th Cir. 2010); *Matter of Search of 1638 E. 2d St., Tulsa, Okla.*, 993 F.2d 773, 775 n. 3 (10th Cir.), *cert. denied sub nom. Lawmaster v. United States*, 510 U.S. 870 (1993)), or trade secrets (*see, e.g., Woven Electronics*

Corp. v. Advance Group, Inc., 1991 WL 54118 at *2 (4th Cir. 1991); *Application of Sarkar*, 575 F.2d 870, 871-72 (C.C.P.A. 1978)), or national security (*see, e.g., United States v. Doe*, 629 Fed. App'x 69, 71-72 (2d Cir. 2015), *cert. denied sub nom. Dwyer v. United States*, 577 U.S. 1218 (2016); *Doe 1 v. Wolf*, 2020 WL 8746023 at *2 (N.D. Cal. Sep. 22, 2020) ("This document contains highly sensitive counterterrorism intelligence, methods, and techniques. . . . If disclosed, this information would provide terrorists, their associates, and other criminals with a roadmap of a procedure by which law enforcement gathers, evaluates, analyzes, and shares information concerning them or other terrorists or criminals.").

However, in the case at Bar, absolutely none of these examples are present. All of the rulings as to sealing were not only as broadly brush stroked as one could ever imagine, but, many were based upon pure conjecture, or the mere possibility of some event happening in the future without any corroborating evidence.

A court may seal records only when it finds "a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture." *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Emphasis added. See also *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir.), *cert. denied sub nom. FCA U.S., LLC v. Center for Auto Safety*, — U.S. — (2016)

In the case at Bar, Judge Arguello provided no "articulable facts", merely supposition, guessing, and unsupported conclusions. *Black's Law Dictionary* defines a "fact" as "something that actually exists; an aspect of reality" or, "an actual or alleged event or

circumstance." BLACK'S LAW DICTIONARY (10th ed. 2014). In accord see *United States v. Paulus*, 2017 WL 908409 (E.D. Ky. Mar. 7, 2017), *vacated on other grnds.* 894 F.3d 267 (6th Cir. 2018) (a fact is defined as "a piece of information presented as having objective reality." *Id.* at *6, quoting MERRIAM-WEBSTER.). Here, the actions of the District Court, as affirmed by the Court of Appeals, were based upon anything except "articulable facts". See *United States v. 3. Gary L. Walker*, 2019 WL 6215641 (D. Colo. Nov. 21, 2019). **Appendix A67**.[3]

The District Court clearly sealed parts of the record based solely upon conjecture. Regarding, for example, "Witness #3", Judge Arguello wrote

> Witness #3 is an expert witness. Because full disclosure of Witness #3's testimony could embarrass one of the CSFC members, Ms. Lawson, the Court is concerned that Witness #3 is at risk of being a target of harassment by CSFC.

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[3] Just one glaring example was that the District Court relied on a Press Release critical of the court's and the U.S. Attorney's actions —criticism clearly protected by the First Amendment. While the lower court may have found such comments, statements, and opinions, in the subject Press Releases, objectionable (either personally or professionally), as the Supreme Court has made clear, "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1304 (1991). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

Id. at *9. Emphasis added.

No evidence is presented that such testimony would, in fact, "embarrass" a member of the Church. This is only phrased as a guess by the court. And, even if such testimony might cause embarrassment, this is no legitimate reason to seal this witness's testimony.

Indeed, Judge Arguello relied upon repeated expressions of mere possibility as an excuse for sealing the record. *See, e.g.*, Witness #5, Witness #6, Witness #15, *id*. at *9-*10.

In the Circuit Court's affirmance, the majority devoted much of its discussion to a history of the litigation, and the acknowledged repeated efforts of the various litigants on the plaintiff's side (*e.g.*, the Colorado Springs Fellowship Church, and the Petitioner herein, David Banks) to secure access to the sought after records. *Banks*, *supra*, at *1-*7. In what can only be described as a results-oriented opinion, the Court of Appeals relied upon its repeated mantra that any ruling on sealing is decided under an abuse of discretion standard, "because the decision whether to seal or unseal is 'necessarily fact-bound.'" *Id*. at *8. Citation omitted.

There are, however, multiple flaws in this analysis, as applied by the Tenth Circuit, both as to the law and the "facts". First of all, while paying homage to the fundamental principal of a presumption of public access (*id*. at *2, *5), the Court of Appeals ignored the fundamental holding of *Nixon v. Warner Communications, supra*, and more established precedent that directly tie into the public nature of judicial proceedings as a fundamental First Amendment issue. *See, e.g., Globe Newspaper Co. v. Superior Court for County of Norfolk,* 457 U.S. 596,

603-04 (1982); *Press-Enterprise Co. v. Superior Court of California for County of Riverside,* 478 U.S. 1, 10-13 (1986) (*Press-Enterprise II*); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 393 (1979). The Court of Appeals failed to address the fact that no matter what role the Petitioner phrased himself as (for example, seeking the records based upon possible pleas for a pardon), there existed a fundamental First Amendment right to these records, and that right, was only "overcome where countervailing interests heavily outweigh the public interests in access" to the judicial record. *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012).

In accord see *United States v. Thomas*, 905 F.3d 276, 282-83 (3d Cir. 2018); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004), *cert. denied* 544 U.S. 949 (2005).

See generally *Press-Enterprise Co. v. Superior Court of California for County of Riverside,* 464 U.S. 501, 509-10 (1986) (*Press-Enterprise I*); *Globe Newspaper Co., supra*, 476 U.S. at 606-07; *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572 (1984).

Mere conjecture, assumption, hypothesis or possibility is not enough. Articulable facts underlying the sealing order are required, and the sealing court may not so order "relying on hypothesis or conjecture". *Center for Auto Safety, supra.*

Yet, as the Petitioner made clear in his pleadings, all of the alleged bases for sealing were merely

conjectural or guesses, or hypothetical scenarios that could or could not occur.[4]

The decision of the Court of Appeals is further fatally flawed based upon the broad-brush stroke applied by the District Court and sanctioned by the Circuit Court. This was the basis for the concurring/dissenting opinion of Judge McHugh. In her opinion Judge McHugh recognized that many of the documents submitted for sealing not only did not abide by the Court's own rules (see below), but were, clearly subject to public access, *viz*.,

> consists of documents that (1) contain passing discussion of conduct by the CSFC or its members; (2) include the names and other identifying information of witnesses or individuals involved in the medical examination of Mr. Walker; and/or (3) involve matters likely to garner increased public interest, such as the Federal Bureau of Prisons' failure to timely comply with certain orders issued by the district court. *See*, *e.g.*, *Walker*, No. 1:09-cr-00266-CMA-3, ECF Nos. 949, 953, 962–63, 971, 976, 988, 1021, 1026, 1047.

Id. at *14.

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[4] As a further example, the District Court judge made repeated references to conduct that would constitute juror harassment or witness intimidation. Yet, if such behavior actually rose to the level that it merited a sealing of all but the entire record then certainly a violation of Sections 1512 and or 1513 of Tit. 18 would have been established. Yet, no such charges were ever made (or even investigated by the FBI or law enforcement). The reason is clear — because no such threats or intimidation ever took place.

Indeed, the record shows that all that the lower court required for the movant to have a document or record sealed was a one-page motion offering no explanation as to why that document needed to be sealed. And, each of these motions was, verbatim, the same as every other one! *See, e.g.*, ECF Nos. 936, 946, 969. Apparently, all that the movant needed to do was change the dates each time for the motion to be granted.

This broad-brush approach of the District Court, as affirmed by the Circuit Court, makes a complete mockery of the principle of relying upon the informed discretion of the sealing judge. See *United States v. Walker*, *supra*, 761 Fed. App'x at 836. In accord see *United States v. Martinez*, 2023 WL 1069705 at *2 (3d Cir. 2023); *In re Demetriades, supra*, 58 F.4th at 45 n. 2; *In re Ohio Execution Protocol Litigation*, 2022 WL 2317856 at *2 (6th Cir. 2022).

Beyond this is the fact that the District of Colorado has a detailed method of sealing records, which effectively removes the element of informed discretion from the judge. In the District of Colorado there is a multi-level format for the sealing of records, which creates a format restricting the manner in which records can be sealed, and to whom such records may be disclosed. Under Local Civ. R. 7.2,

> **PUBLIC ACCESS TO DOCUMENTS AND PROCEEDINGS**
>
> **(a) Policy.** Unless restricted by statute, rule of civil procedure, or court order, the public shall have access to all

> documents filed with the court and all court proceedings.
> **(b) Levels of Restriction.** There are three levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party and the court. Level 3 limits access to the court.

The Rule, furthermore, sets forth a detailed procedure for the sealing of records, including identifying the document or record for which sealing is sought, the interest to be protected, what "clearly defined and serious injury" would occur if sealing was denied, and why no other practical solution is available. See L.Civ.R. 7.2(c).

First of all, the District of Colorado is unique in its setting forth "levels of sealing". No other District Court does so, relying instead upon the informed discretion of the presiding judge, and established precedent, and the overarching rule that a presumption of disclosure is to be assumed.[5] *See, e.g.*, E.D. Tenn. L.R. 26.2(a).

The District of Colorado creates a unique system that encourages the sealing of records by setting up differing levels of secrecy, that have the ultimate effect — as clearly demonstrated in this Petition — of encouraging sealing of what should otherwise constitute a publicly available record.

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[5] *See e.g.*, S.D. Ind. (L.R. 5-11); S.D. Fla. (L.R. 5.4); M.D. Pa. (L.R. 5.8, 49); E.D.N.C. (L.Cr.R. 5-5.2); E.D. Va. (L.Civ.R. 5); E.D. Tex. (L.R. CV-5(7)); E.D. Mich. (L.Civ.R. 5.3); E.D. Cal. (L.R. 141); D.N.J. (L. Civ.R. 5.3); D.D.C. (L.Civ.R. 5.1(h)); D. Md. (L.R. 11); D. Vt. (L.R. 5.2); D. Nev. (L.R. I.A. 10-5); D. Idaho (L.Civ.R. 5.3); D. Hawaii (L.R. 5.2); D. Ore. (L.R. 5-2(e)).

This lack of a defined standard of "discretion", and the fact that this particular District creates vague and ill-defined levels of sealing creates a legal loophole that any judge can utilize (such as Judge Arguello did), and requires more specific standards from this Court, meriting the granting of this Petition.

This need is demonstrated where there exist differing standards as to whether a judicial record proceeding should be disclosed. For example, in *Perry v. City and County of San Francisco*, 2011 WL 2419868 (9th Cir. 2011), the Ninth Circuit found, as a dispositive factor, in denying sealing of a judicial record, the fact that "[t]he 12–day trial in this case was open to the public and since its conclusion, . . ." *Id*. at *21. Yet, in the case at Bar, as set forth above, the entire proceeding was open to the public (including the supposedly offending members of the Colorado Springs Fellowship Church), yet the Tenth Circuit took no decisional note of this fact.

CONCLUSION

As one Court has put it, in citing to, and quoting from the New Jersey Provincial Charter of 1674,

> With great respect, we urge litigants and our judicial colleagues to zealously guard the public's right of access to judicial records—*their* judicial records—so "that justice may not be done in a corner."

Binh Hoa Le v. Exeter Finance Corp., 990 F.3d 410, 421 (5th Cir. 2021). Footnote omitted.

For all of the reasons set forth herein, Petitioner would respectfully request that this Petition be granted.

Respectfully submitted,

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Dated: 4 April 2023
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No. _____

In The
Supreme Court of the United States

DAVID BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX

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APPENDIX TABLE

United States v. Banks, 2023 WL 109968
(10th Cir. Jan. 5, 2023) A1

United States v. Banks, 09cr266
(D. Colo. Nov. 3, 2021) A43

United States v. Walker,
838 Fed. App'x 333 (10th Cir. Dec. 2, 2020)..... A46

United States v. 3. Gary L. Walker,
09cr266 (D. Colo. Dec. 9, 2019)..... A58

United States v. 3. Gary L. Walker,
2019 WL 6215641 (D. Colo. Nov. 21, 2019)..... A67

In re Colorado Springs Fellowship Church,
19-1246 (10th Cir. Aug. 12, 2019)..... A93

Walker v. United States,
761 Fed. App'x 822 (10th Cir. Jan. 23, 2019)..... A98

FILED: January 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-1410
(D.C. No. 1:09-CR-00266-CMA-1)
(D. Colo.)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

DAVID A. BANKS,
Defendant - Appellant.

ORDER AND JUDGMENT*

Before McHUGH, BALDOCK, and BRISCOE,
Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Defendant David Banks and several codefendants were convicted in 2011 of mail fraud, wire fraud, and conspiracy to commit mail fraud and

wire fraud. After the convictions and sentences were affirmed on direct appeal, one of Banks's codefendants sought and was granted a new sentencing proceeding pursuant to 28 U.S.C. § 2255. That codefendant then successfully moved to seal portions of the hearing transcripts and records in his § 2255 proceeding. Banks filed a motion effectively challenging the district court's sealing order and, alternatively, seeking a new order unsealing the sealed transcripts and documents. The district court denied Banks's motion. Banks now appeals. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's order.

I

The original criminal proceedings

Banks is a former member of the Colorado Springs Fellowship Church (CSFC). Banks's mother, Rose Banks, is the pastor of CSFC. Banks, along with other members of CSFC, including Gary Walker, Demetrius Harper, Clinton Stewart, David Zirpolo, and Kendrick Barnes, "helped run IRP Solutions Corporation [(IRP)], a software development company." *United States v. Walker*, 761 F. App'x 822, 826 (10th Cir. 2019). "IRP was formed to produce computer software . . . that would supposedly provide a nationally accessible database for law-enforcement agencies, 'computerize their systems,' and 'prevent hacking and identity theft.'" *United States v. Banks*, 761 F.3d 1163, 1170 (10th Cir. 2014). "Banks was the Chief Operating Officer" for IRP. *Id.* at 1171. Banks and the other five

members who helped run IRP were collectively known as the IRP-6.

In the course of running IRP, the IRP-6 "falsified employee time cards and hired several staffing companies without having any ability to pay for their services." *Walker*, 761 F. App'x at 827. To persuade the staffing companies to work for IRP, the IRP-6 falsely claimed that IRP was doing business with various local and federal law enforcement agencies. Later, when IRP failed to pay the staffing companies' invoices and the staffing companies questioned defendants about this, the IRP-6 "gave false assurances that payment would be forthcoming, and they continued to imply that they were doing business with large government law-enforcement agencies." *Banks*, 761 F.3d at 1173. The IRP-6 also "employed various tactics to prevent the victim companies from learning that they would not be paid," including "us[ing] entities they controlled as references in credit applications," "submit[ing] time cards to staffing companies in which they reported time using various aliases," and "report[ing] overlapping hours for the same employee at multiple staffing companies." *Id*. "In the end, forty-two different staffing companies were left with outstanding invoices totaling in excess of $5,000,000—amounts [defendants and IRP] had not paid (and apparently could not pay)." *Id*.

In June 2009, a federal grand jury indicted the IRP-6 "on multiple counts of conspiracy to commit mail fraud and wire fraud, and committing mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1349, 1341, and 1343." *Id*. The case proceeded to trial in September 2011. "Although defendants were represented by counsel prior to trial, they elected to

proceed pro se during trial." *Id.* "On October 20, 2011, the jury returned guilty verdicts as to all [d]efendants on one or more counts of mail fraud and wire fraud, and conspiracy to commit mail fraud and wire fraud." *Id.* at 1174. "Defendants were sentenced to terms of imprisonment ranging from 87 to 135 months." *Id.* at 1170.

Banks and his codefendants appealed their convictions. This court consolidated the appeals and affirmed the judgment of the district court. *Id.* at 1170 and 1174.

Walker's § 2255 motion

In 2015, Gary Walker, one of Banks's codefendants, "filed a 28 U.S.C. § 2255 motion, in part raising a claim of ineffective assistance of sentencing counsel." *Walker*, 761 F. App'x at 826. "The district court convened an evidentiary hearing, at which sixteen witnesses testified, including . . . Walker; former CSFC members; and Gwendolyn Maurice Lawson and Joshua Lowther, counsel for . . Walker at sentencing." *Id.* "The district court concluded . . . Lawson, who is a member of the CSFC, operated under a conflict of interest because Pastor Rose Banks of . . . CSFC dictated counsel's strategy." *Id.* Accordingly, the district court granted Walker relief in the form of a resentencing proceeding.

Walker's motion to restrict access to the transcript of his § 2255 hearing

"Walker moved to restrict access to the transcript of his § 2255 hearing, and the district

court granted the motion." *Id*. "Lawson, on behalf of herself and . . . Walker's codefendants, twice moved to obtain the hearing transcript." *Id*. "The district court predominantly denied the motions but permitted . . . Lawson access to the portion of the transcript containing her own testimony." *Id*.; *see* ECF Nos. 1090 and 1092. "Lawson, again on behalf of herself and . . . Walker's codefendants, noticed an appeal."[1] *Walker*, 761 F. App'x at 826. "Thereafter, . . CSFC moved to unseal the transcript." *Id*. "The district court denied . . . CSFC's motion, concluding that releasing the transcript was likely to result in CSFC members harassing and threatening . . . Walker, as well as the former CSFC members who testified at the § 2255 hearing." *Id*.; ECF No. 1114. CSFC appealed from the district court's order denying its motion.

The original appeals

In their respective appeals, Lawson and CSFC argued "that the strong presumption in favor of the public right of access to judicial records exceeded . . . Walker's interest in restricting access to the transcript." *Walker*, 761 F. App'x at 826. Lawson

[1] In her appellate brief, Lawson repeatedly listed herself as the "Attorney for Barnes, Banks, Harper, Stewart, and Zirpolo." Appellant's Principal Brief, *United States v. Walker*, No. 17-1415 (10th Cir. Mar. 12, 2018). The notice of appeal also identified Lawson, Harper, Barnes, Stewart, Banks, and Zirpolo as parties to the appeal. Ultimately, however, this court concluded that Banks was not a party to the appeal. 761 F. App'x at 829 ("We . . . conclude that . . . Lawson lacked a basis to file the motions and notice of appeal on behalf of . . . Banks and we do not include him as an appellant in Case Number 17-1415.").

asserted "four additional arguments for vacating or reversing the district court's denial of the[] motions to receive the transcript." *Id.*

On January 23, 2019, this court issued an order and judgment "vacat[ing] the district court's order as to . . . CSFC and remand[ing] for further proceedings because the district court did not adequately account for the strong presumption in favor of public right of access to judicial records and did not narrowly tailor its orders restricting access to the transcript." *Id.* This court also "affirm[ed] the district court's rulings on the motions to receive the transcript by" Lawson, who "did not raise a public right of access argument" and whose other arguments the panel concluded were either "unpreserved or wholly without merit." *Id.*

The proceedings on remand

On June 9, 2019, the CSFC filed a motion asking the district court to direct the court reporter to provide CSFC a certified copy of the transcript of Walker's habeas corpus proceedings, and directing the clerk of the district court to unseal all documents and other records in Walker's habeas corpus proceedings.

On November 21, 2019, CSFC's attorney entered appearances on behalf of Banks, Harper, Stewart, and Zirpolo. On that same date, CSFC, Banks, Harper, Stewart, and Zirpolo filed a joint motion asking the district court judge to recuse herself from all further proceedings in the case and to reassign the case to a different district court judge.

On November 21, 2019, the district court issued an order unsealing, in part, the evidentiary hearing

transcripts from Walker's habeas corpus proceedings. In the opening section of its order, the district court recounted the procedural history of the case and noted, in particular, that "[t]he record show[ed] that Pastor Banks and some CSFC members ha[d] engaged in a consistent pattern of harassment against anyone who d[id] not strictly comply with the demands of Pastor Banks." ECF No. 1146 at 4. The district court also noted that Lawson, "at the conclusion of her testimony" at Walker's habeas corpus evidentiary hearing, "surreptitiously substituted a 'dummy binder' of the same size and color as the Court's Exhibit Notebook, but which contained only tabbed dividers and blank sheets of paper, for one of the Court's Exhibit Notebooks and walked out of the courtroom with the Court's Exhibit Notebook."[2] *Id.* at 4–5. Considering this court's directions in *Walker*, the district court concluded "it [wa]s evident that the safety of many of the witnesses [wa]s still at risk, and therefore, some, but not all, of the testimony must remain restricted." *Id.* at 10. The district court explained that "[t]he safety and welfare risk to many of the witnesses" who testified at Walker's evidentiary hearing "remain[ed] high." *Id.* It noted in support:

> A Just Cause, an organization founded by CSFC to act on behalf of and in coordination with the IRP-6, has engaged in a campaign

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[2] The district court noted that "[t]here had previously been similar unprofessional activity on the part of the Defendants" during their criminal trial. ECF No. 1146 at 5. In particular, the district court noted that defendants removed one of the jury rosters on the first day of trial, and proceeded thereafter to harass multiple jurors. *Id.*

> to harass all involved with this case, and the Court has no reason to conclude that it will halt its pattern of harassment. As recently as October 22, 2019, A Just Cause alleged, without evidence, that the Court is concealing misconduct and "secretly used her court to conduct personal attacks against [IRP-6's] Pastor (Rose Banks) and Church (Colorado Springs Fellowship Church)." A Just Cause, Colorado Federal Judge and Prosecutor Entangled in Misconduct Cover-Up (Oct. 22, 2019), http://www.digitaljournal.com/pr/4481574[https://perma.cc/68RSCNM] If all witness testimony from the § 2255 hearing were to be unsealed, the Court is concerned that CSFC would turn its attention away from the Court and begin harassing these witnesses. Therefore, the Court determines that circumstances have not changed significantly, and as such, those witnesses who testified about CSFC must remain protected and their testimony will remain sealed.

Id. at 10–11.[3]

The district court also purported to weigh the public's right to access judicial transcripts against the risks to the witnesses. In doing so, it began by noting that "the relevant facts and circumstances [we]re such that restricting public access [wa]s essential to preserving the safety and security of

[3] The article cited by the district court is no longer available at the Digital Journal hyperlinked URL address. The Perma citation, however, does link to the cited article.

many of the testifying witnesses." *Id.* at 11. The district court noted it was "particularly concerned that, because CSFC ha[d] previously engaged in harassment and intimidation tactics, it m[ight] do so again, this time targeting witnesses from the § 2255 hearing." *Id.* The district court found that "CSFC lashes out—unrelentingly—towards those whom Pastor Banks perceives to have wronged her or her church," and that CSFC "staged a coordinated effort to contact and repeatedly harass members of the jury" after the initial trial. *Id.* The district court also found that "Lawson's intentional swapping of a 'dummy binder' for the Court's Exhibit Notebook and CSFC's harassment of the jurors demonstrate[d] that CSFC members w[ould] go to great, even possibly illegal, lengths on behalf of CSFC." *Id.* at 12. The district court in turn concluded that CSFC's claim that it needed the hearing transcripts "to determine the extent to which it ha[d] been maligned by the testimony" was "disingenuous" because "[m]embers of the CSFC were present in the courtroom throughout the § 2255 hearing . . . and . . . generally kn[e]w what was said." *Id.* The district court stated it "believe[d] that CSFC want[ed] transcripts of the testimony so that its members . . . c[ould] threaten and harass witnesses who were critical of CSFC." *Id.* The district court in turn concluded that if it "were to release the detailed testimony of all the witnesses, the precise language would serve only to enflame CSFC and put the witnesses at risk of harm." *Id.* The district court concluded "that this is one of those cases in which the right of public access to judicial records is outweighed by the importance of protecting certain witnesses from further harm." *Id.* at 13.

The district court then proceeded to "consider[] in detail the three particular factors that [this court] highlighted" in *Walker*, i.e., "reliance on sealed records to determine substantive rights; the absence of a jury; and whether sealed information has already been disclosed." *Id.* With respect to the first of these factors, the district court noted that "in determining . . . Walker's resentencing," it "considered only testimony given in open court," and it in turn concluded that "[t]his public access mitigate[d] concern about using the restricted testimony to determine . . . Walker's substantive legal rights and undermine[d] any argument that [its] ruling was made based on testimony unavailable to the public." *Id.* at 14. The district court therefore concluded "that, because it allowed public access to the proceedings, restricting access to the testimony of witnesses who are at risk of harassment [wa]s the most appropriate way to 'carefully balance[]' the public's right of access to the transcripts with safety concerns for those witnesses." *Id.* (quoting *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989)). With respect to the second factor, i.e., the absence of a jury, the district court again noted that it "allowed full public access to" Walker's resentencing hearing, "which was attended by members of the public," and it also noted that "A Just Cause even issued multiple press releases about the hearing, which amplified the public's awareness of the Court's decisions." *Id.* Thus, the district court "f[ound] that, although there was no jury present, there was attendance by and engagement from the public, which help[ed] keep [it] accountable." *Id.* at 15. The district court also noted that "Walker, the defendant, [wa]s not at risk of unfair treatment

regarding the sealing of the transcripts because he was the party who requested the restrictions." *Id.* Indeed, the district court noted, it was "concerned about unfair treatment and harassment of . . . Walker, as well as other witnesses, if the records are not sealed." *Id.* (emphasis omitted) It therefore concluded that "one of the ultimate goals of having a jury present for court proceedings—protecting the defendant—[wa]s actually best accomplished by upholding the Level 2 restriction on certain witness testimony."[4] *Id.* As for the third factor, i.e., whether the sealed information had already been disclosed, the district court noted that "all the witness testimony in [Walker's] § 2255 hearing was given in an open courtroom." *Id.* The district court concluded that "[w]here, as here, witnesses face a significant risk of harassment, the distinction between merely hearing their testimony audibly as opposed to accessing transcripts of the testimony matters significantly." *Id.* The district court in turn noted that it if "were to release the testimony of many of the witnesses, those [persons] not present at the hearing could identify, locate, and harass those who gave testimony critical of CSFC." *Id.* at 15–16. Concern about the harassment of witnesses, the district court noted, was real rather than "theoretical" based upon "CSFC members' prior harassment of Jurors." *Id.* at 16. "Therefore," the district court concluded, "the testimony of many of the witnesses must remain under Level 2 restriction," depending upon "the relevant facts and

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[4] The district court's local rules define Level 2 access as "limit[ing] access to the filing party and the court." D. Colo. Civ. R. 7.2(b) (outlining three levels of restriction on court documents and proceedings).

circumstances of the testimony of each of the witnesses." *Id*. (quotation marks omitted).

The district court then turned to narrowly tailoring the restrictions that it placed on public access to the hearing transcripts. To begin with, the district court stated that it intended to refute A Just Cause's public allegations that the district court "want[ed] to keep transcripts sealed to hide the Court's misconduct" by "releasing all statements by the Court during the § 2255 hearing, except any names of witnesses whose identities are sealed." *Id*. at 17. The district court noted CSFC's concerns that the testimony at the hearing contained misinformation and innuendo regarding CSFC, and concluded that "CSFC's reputation w[ould] be best protected by not releasing testimony that criticizes it." *Id*. at 18. With that in mind, the district court noted "that the testimony of thirteen witnesses w[ould] remain under Level 2 restriction, while the testimony of two witnesses [would be] released in full." *Id*. The district court proceeded to summarize the reasons it was maintaining Level 2 restriction on the testimony of the thirteen witnesses:

> ▪ Walker: The district court concluded that Walker's testimony should "remain at Level 2 restriction because he spoke critically about CSFC, and therefore, the public disclosure of his testimony could threaten his personal safety." *Id*. at 19.
>
> ▪ Witness #2 and Witness #7: The district court found that both of these witnesses "work at the Federal Bureau of Prisons in Florence, Colorado," and "may have daily contact with incarcerated CSFC members."

Id. at 19–20. "Because their testimony reflects negatively on some CSFC members," the district court concluded that both were "at risk of harassment." *Id*. at 20. The district court further concluded that "[r]edacting their names w[ould] not sufficiently protect [them] because their identities may easily be determined through the particular details of the testimony." *Id*. In sum, the district court concluded that "maintaining a level 2 restriction [wa]s essential to preserving [their] safety, and that this overc[ame] any legitimate interest the public has in viewing the transcript." *Id*.

- Witness #3: This witness "[wa]s an expert witness." *Id*. The district court concluded that "full disclosure of [this witness'] testimony could embarrass" Lawson. *Id*. Consequently, the district court expressed concern "that Witness #3 [wa]s at risk of being a target of harassment by CSFC." *Id*. The district court noted that it "considered the Tenth Circuit's suggestion of releasing the testimony with narrowly tailored redactions of Witness #3's identity," but it noted that "because the witness' identity could be determined through docket entries, simply redacting Witness #3's name would not be sufficient, as CSFC could then connect Witness #3's identity with the corresponding testimony." *Id*. at 20–21.
- Witness #5: The district court found that this witness "ha[d] already endured harassment from Pastor Banks," and it therefore expressed "concern[] that Pastor

Banks and other CSFC members could use Witness #5's testimony to 'gratify private spite' by harassing this witness with additional vigor." *Id.* at 21 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). As a result, the district court "maintain[ed] the level 2 restriction on Witness #5's testimony." *Id.*

- Witness #6: This witness was "an expert witness" who "testified extensively about [their] examination of, and conversations with, . . . Walker." *Id.* "Because this testimony describe[d] what . . . Walker experienced and how this relate[d] to Witness #6's determination that . . . Walker was under the undue influence of Pastor Banks," the district court expressed "concern[] that both Witness #6 and . . . Walker could be retaliated against for Witness #6's testimony." *Id.* The district court concluded that "[p]reserving both Witness #6's and . . . Walker's safety [we]re interests that outweigh[ed] the presumption of public access to the testimony." *Id.* at 21–22. The district court therefore "ke[pt] Witness #6's transcript at a Level 2 restriction." *Id.* at 22.
- Witnesses #9 through #14: These six witnesses were former members of CSFC and they each "testified about their experiences with the church, their treatment by Pastor Banks, and their treatment by members of CSFC who remained in the church after they left." *Id.* The district court stated that it "remain[ed] extremely

> concerned for the safety of the former CSFC members who testified, and fear[ed] that any of their testimony m[ight] be used by CSFC in retaliation against those witnesses." *Id*. The district court noted that these witnesses "spoke very personally about the circumstances that led to either their expulsions from CSFC or their choices to leave CSFC," and it therefore concluded that "simply redacting their names would not protect their identities." *Id*. The district court ultimately concluded "that the public's general right to access to these records [wa]s outweighed by the 'higher value[]' of preserving the safety of these witnesses." *Id*. (quoting *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 10 (1986)).
>
> - Witness #15: This was an expert witness whose "testimony contradict[ed]t he public image that CSFC seeks to project to the Colorado Springs community." *Id*. at 23. As a result, the district court concluded that this witness "could be at risk of harassment if this witness' testimony [wa]s released." *Id*. The district court also expressed "concern[] that the identity of Witness #15 c[ould] be determined through docket entries," which in turn could result in this witness "incur[ring] significant harassment." *Id*.

The district court also described the two witnesses whose testimony it was unsealing. First, the district court noted that Witness #4, Vernon Lee Gaines, "was the second process server who attempted to serve Pastor Banks with a subpoena,"

and he "describe[d] the steps he took to locate Pastor Banks and serve process on her." *Id.* at 23. The district court "conclude[d] that . . . Gaines [wa]s not at risk of harassment because he d[id] not speak negatively about CSFC." *Id.* at 23–24. Second, the district court noted that Witness #8, Joshua Lowther, "was co-counsel for . . . Walker and his codefendants during their sentencing and other post-conviction matters." *Id.* at 24. The district court concluded "that . . . Lowther's testimony [wa]s not likely to be used for a spiteful or scurrilous purpose," and it in turn concluded that "the public's right to access judicial records outweigh[ed] other competing concerns." *Id.* (internal quotation marks omitted). Consequently, the district court ordered "Lowther's testimony [to] be released in full." *Id.*

On the same day that it issued its order unsealing in part the hearing transcripts, the district court also issued a separate order denying the joint motion for recusal as moot. CSFC and the other defendants filed a motion for reconsideration of the district court's order. On December 9, 2019, the district court granted in part and denied in part the motion for reconsideration. More specifically, the district court "analyze[d] the arguments in" the motion for recusal "without focusing on the issue of mootness," and ultimately denied the request for recusal on the merits. ECF No. 1149 at 1–2.

CSFC's second appeal

On February 7, 2020, CSFC filed a notice of appeal from the district court's orders granting CSFC limited access to the evidentiary hearing transcript and denying CSFC's motion to recuse. On

December 2, 2020, this court issued an order and judgment dismissing as untimely the portion of the appeal that sought to challenge the district court's November 21, 2019 order denying CSFC's motion for access to the entire transcript,[5] and affirming the district court's December 9, 2019 order granting reconsideration but denying CSFC's motion to recuse. *United States v. Walker*, 838 F. App'x 333 (10th Cir. 2020) (*Walker II*).

Banks's motion

On February 5, 2021, approximately two months after this court rejected CSFC's appeal, Banks, represented by the same counsel who represented CSFC in its unsuccessful appeal, filed a pleading entitled "MOTION TO DIRECT COURT REPORTER TO PROVIDE TRANSCRIPT TO DEFENDANT-MOVANT, AND TO UNSEAL ALL DOCUMENTS SUBMITTED THEREIN." ECF No. 1171 at 1. The motion, at its outset, asked the district court to issue an order (a) "[d]irecting the Court Reporter to provide a certified copy of the transcript" of Walker's habeas corpus proceedings, and (b) "[d]irecting the Clerk of the Court to unseal all documents and other records" in Walker's habeas corpus proceedings. *Id*. The motion then outlined the procedural history of the case and noted, in particular, this court's rulings in *Walker* and *Walker II*. Banks asserted in the motion that, because of this court's ruling in *Walker II*, "there ha[d] been no final

[5] This court concluded that CSFC filed its notice of appeal seventeen days too late to timely challenge the district court's order denying CSFC's request for access to the evidentiary hearing transcript.

determination, by the Court of Appeals, as to the validity of the November 21, 2019 ruling of [the district court] regarding the unsealing of the *Walker* Habeas proceeding." *Id*. at 3. Banks then asserted that it was his "position . . . that . . . as a co-defendant of Walker in the original criminal proceeding he ha[d] a right to a copy of the demanded records," and that, "in any event, the unsealing Order of the [district court issued on November 21, 2019] violate[d] the basic tenets of the law that there is an all but irrebuttable presumption that trial records and judicial proceedings should be open and available to the public at large." *Id*. Banks further argued, in apparent reference to the district court's November 21, 2019 order, that the district court "failed, not only to properly apply [its own local rules regarding the sealing of documents], but also, in its attempted explanation as to what was being sealed, and why it was being sealed did not comply with either the [local rule] or the established precedent." *Id*. at 5. Banks also asserted that he was "the only one of the original Defendants who [wa]s still under the supervision of U.S. Probation," and "[a]s a co-defendant of . . . Walker[,] he ha[d] a fundamental right to access all judicial proceedings that m[ight] impact his sentence, and any consequences—civil or criminal—that m[ight] arise out of his conviction." *Id*. at 6. That "include[d]," Banks asserted, "any motion he m[ight] seek for the restoration of his civil privileges, denied as a result of his conviction, and any relief he m[ight] seek for expungement of his record." *Id*. In particular, Banks mentioned the possibility of seeking an expungement of his convictions "under the All Writs Act," or "seek[ing] a pardon from the President." *Id*.

The district court denied Banks's motion on November 3, 2021, noting as follows:

> The Court has already considered, at length, the arguments in favor of unsealing the relevant transcripts, and the Court incorporates that analysis here. (*See* Doc. #1146). The Court has reviewed Mr. Banks's motion (Doc. #1171), the relevant portions of the record, and the Court's prior order on the matter (Doc. # 1146). Having considered all of Mr. Banks's arguments in light of the present circumstances, the Court stands by its prior conclusion that "this is one of those cases in which the right of public access to judicial records is outweighed by the importance of protecting certain witnesses from further harm." (Doc. #1146). Specifically, Mr. Banks and his confederates have a demonstrated history of harassing and intimidating witnesses and jurors and of making misrepresentations to the Court. The Court has serious concerns that granting Mr. Banks's motion to access the requested records would facilitate further harassment and intimidation. These concerns for witness and juror safety outweigh Mr. Banks's interest in accessing the requested records.
>
> Furthermore, Mr. Banks has failed to demonstrate a legitimate reason for accessing the requested records. The records in question do not concern Mr. Banks; rather, they concern another defendant's claim that he received ineffective assistance of counsel at certain phases of his criminal

> prosecution. (Doc. []#902). Mr. Banks fails to explain how such records are relevant to his case. To the contrary, Mr. Banks appears to concede that the records will not have any practical impact on his conviction or sentence. (Doc. #1171, pp.6–7). Though Mr. Banks claims that he intends to seek a presidential pardon, he fails to explain how the records in question would help him achieve that goal. (Doc. #1171, pp. 6–9).
>
> In sum, Mr. Banks has failed to provide any basis for unsealing those transcripts that this Court has not already considered and rejected. (*See* Doc. #1171).

ECF No. 1178 at 1–2.

Banks filed a timely notice of appeal.

II

In his appeal, Banks seeks to challenge what he describes as "(a) the continued refusal of the lower court to unseal portions of the record notwithstanding both the earlier rulings of this Court, and the case law," and "(b) the reliance of the lower court upon unfounded claims as to a basis for denying relief." Aplt. Br. at 19.

The threshold question we face in addressing Banks's arguments is how to properly characterize the motion that he filed in the district court. We conclude, after examining the substance of the motion, that Banks was both seeking reconsideration of the district court's November 21, 2019 sealing order and, alternatively, asking the district court to

issue a new order removing the seal that it had placed on portions of the transcripts and other documents from Walker's § 2255 proceeding. Consequently, we shall compartmentalize and address his appellate arguments accordingly.[6]

A

We review for abuse of discretion a district court's denial of a motion for reconsideration. *United States v. Barajas-Chavez*, 358 F.3d 1263, 1266 (10th Cir. 2004). Although the Federal Rules of Criminal Procedure do not expressly authorize motions for reconsideration, such motions are proper and may be filed by the defendant or the government. *United States v. Randall*, 666 F.3d 1238, 1241–42 (10th Cir. 2011). "Because motions to reconsider in criminal cases are not grounded in a rule or statute, the time limits are not well established." *Id.* at 1242. Recognizing the problems that would occur if motions for reconsideration could "be brought at simply any time," this court has held that such "motion[s] must be brought within the time for appeal." *Id.* Thus, for a criminal defendant such as Banks, a motion for reconsideration must be filed within fourteen days of the entry of the order for

[6] We previously directed the parties to file supplemental briefs addressing the issues of issue and claim preclusion. We ultimately do not reach those issues, however, because "[t]he 'determination of identity between litigants for the purposes of establishing privity is a factual question'" that we are not comfortable deciding in the first instance in this case. *Lowell Staats Mining Co. v. Phila. Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989) (quoting *Astron Indus. Assocs. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968)).

which reconsideration is sought. *See* Fed. R. App. P. 4(b)(1)(A).

It is beyond dispute that Banks filed his motion more than fourteen days after the district court's November 21, 2019 order. We therefore conclude that the district court did not abuse its discretion in denying Banks's motion to the extent that the motion challenged and effectively sought reconsideration of the court's November 21, 2019 order.

Most of Banks's appellate arguments, in our view, challenge the propriety of the district court's November 21, 2019 order. For example, Banks argues in his opening brief that the district court "failed to follow established precedent and sealed almost the entire record[,] . . . and ignored the prior Orders of this Court to conduct a proper analysis as to what, if any, portions of the record should be under seal." Aplt. Br. at 19. Relatedly, Banks questions "[h]ow . . . the lower court can take the position, in its November 21st, 2019 Order, that sealing 85% of the transcript constitutes a narrow tailoring of the record" and argues that this "is unexplained . . . and baffling." *Id*. at 24 n.8. Banks further argues that the district court's decision "not only mis-characterizes [sic] the supposed 'threats' that served as [the district court's] basis for sealing the record, but has no basis in law." *Id*. at 25. And he complains that there is no "indication in the record that [the district court] referred the matter to either federal or state law enforcement for investigation." *Id*. at 26. Because we construe all of these arguments as challenges to the district court's November 21, 2019 order, we conclude that they are

all foreclosed due to Banks's failure to timely seek reconsideration of that order.

B

We now turn to Banks's remaining arguments regarding the district court's refusal to issue a new order removing the seal it placed on portions of the transcripts and records in Walker's § 2255 proceeding. We review for abuse of discretion a "district court's decision to seal or unseal documents," but we review de novo "any legal principles the district court applied when making its decision." *Walker*, 761 F. App'x at 833. "We apply the overarching abuse of discretion standard because the decision whether to seal or unseal is 'necessarily fact-bound.'" *Id.* (quoting *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985)).

In *Walker*, this court outlined the general legal principles that apply regarding the sealing of judicial records and documents. Of relevance here is the following:

> After a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents. This is true even if the case in which the documents were sealed has ended. If after a court seals its records a motion is made "to remove such a seal, the district court should closely examine whether circumstances have changed sufficiently to allow the

> presumption allowing access to court records to prevail.

Id. at 835 (quotation marks and citations omitted).

We conclude, after reviewing the district court's order and the record on appeal, that the district court did not abuse its discretion in refusing to remove the seal that it placed on portions of the transcripts and records in Walker's § 2255 proceeding. The district court determined, as we read its order, that circumstances had not changed sufficiently to allow the presumption of public access to the transcripts and records to prevail. Notably, Walker does not seriously suggest otherwise. To be sure, he argues that the district court did not find that he personally represented a threat of misusing the transcripts and records. But that is immaterial because the district court determined that the threat of misuse of the transcripts and records by Banks's mother and members of CSFC remained and Banks does not challenge that finding. Banks does complain that the district court has never referred his mother or members of CSFC "to either federal or state law enforcement for investigation." Aplt. Br. at 26. But that is irrelevant to our review of the district court's decision.

III

AFFIRMED. The motions filed by the United States to seal Volumes II through V of its supplemental appendix and to take judicial notice of seven documents (ECF Nos. 1088, 1090, 1091, 1092, 1106, 1114, and 1171) filed in the district court are GRANTED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

21-1410, *United States v. Banks*
McHUGH, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority's assessment that the district court did not abuse its discretion in maintaining a restriction on portions of the transcript from the hearing on Gary Walker's § 2255 motion. Where I diverge from the majority is with respect to the documents in Mr. Walker's § 2255 proceeding. Through his motion, David A. Banks asked the district court to "unseal all documents and other records" related to Mr. Walker's § 2255 proceeding. Nothing in the record suggests the district court performed the tedious review necessitated by this request. For, had the district court reviewed each of the documents presently under a Level 2 restriction, it would have discovered that many of the documents dealt with routine court proceedings and did not discuss the Colorado Springs Fellowship Church ("CSFC"), Pastor Rose Banks, any member of the CSFC, or the testimony of any § 2255 hearing witness. Therefore, I respectfully dissent in part and would order the district court to unrestrict access to many of the documents filed in Mr. Walker's § 2255 proceeding.

I. BACKGROUND

The majority provides a detailed factual and procedural history, with which I take no disagreement. I merely supplement and highlight a few facts relevant to the issue of the restricted documents, on which I dissent.

In October 2015, Mr. Walker pursued relief under § 2255 and first moved the district court to place a Level 2 restriction on documents filed in his § 2255 proceeding.[1] Thereafter, when filing documents in his § 2255 proceeding, Mr. Walker also filed motions for leave to restrict. The Government did not oppose Mr. Walker's motions for leave to restrict and, on occasion, itself moved for leave to restrict. The district court granted Mr. Walker's and the Government's requests that a significant number of documents in the § 2255 proceeding be filed under a Level 2 restriction. In total, the district court approved a Level 2 restriction on seventy-eight documents.[2] *See* Banks's App. at A-122–24, A-127–40 (ECF Nos. 899, 902, 913–14, 917, 921, 930–31,

[1] Under the District of Colorado Local Rules, a Level 2 restriction limited access to a document such that only Mr. Walker, the Government, and the district court could access a document. *See* D. Colo. Local Civ. R. 7.2(b); D. Colo. Local Crim. R. 47.1(b).

[2] Of the seventy-eight documents, seven documents filed by Mr. Walker are restricted at Level 2 access but list Mr. Banks as an individual capable of accessing the documents. *See* Banks's App. at A-125–28 (ECF Nos. 921, 930–31, 937–38, 947–48). The record does not reveal why the docket lists these seven documents differently than the other seventy-one Level 2 restricted documents, and I cannot say whether Mr. Banks actually has access to these seven documents. In any event, the public does not have access to these seven documents.

937, 940– 41, 947–49, 952–56, 960–64, 966, 970–71, 973, 976–77, 980, 984, 986, 988–89, 992–93, 995, 999–1000, 1003, 1005–08, 1011, 1014–16, 1020–23, 1025–27, 1029–30, 1033–36, 1042, 1044, 1047, 1050, 1055–56, 1059, 1065–66, 1068, 1071, 1074, 1076, 1081, 1085). The district court also placed a Level 2 restriction on almost the entire transcript of the hearing on Mr. Walker's § 2255 motion, allowing more expansive access to only the testimony of Gwendolyn Lawson, a CSFC member who is an attorney and represented Mr. Walker and several of his co-defendants during phases of the criminal case.

In 2019, after this court vacated in part the district court's orders placing a Level 2 restriction on the transcript of Mr. Walker's § 2255 hearing, *see United States v. Walker*, 761 F. App'x 822, 840 (10th Cir. 2019) (*Walker I*) (unpublished), the CSFC filed a motion to unrestrict.[3] In its motion, the CSFC asked for an order directing (1) the court reporter to provide a transcript of the § 2255 hearing; and (2) "the Clerk of the Court to unseal all documents and other records as submitted in [Mr. Walker's § 2255] proceeding." Motion to Direct Court Reporter to Provide Transcript to Movant, and to Unseal all Documents Submitted Therein at 1, United States v. Banks, No. 1:09-cr- 00266-CMA (D. Colo. June 9, 2019), ECF No. 1131. The CSFC further stated, "it is respectfully requested that the Court direct the Clerk of the Court to provide to counsel for the

[3] I discuss the CSFC's motion because the district court "incorporate[d]" its ruling on the CSFC's motion into its ruling on Mr. Banks's motion. Gov. App. Vol. I at 221. Thus, any reasoning offered by the district court when ruling on the CSFC's motion supports its decision to deny Mr. Banks's motion.

Movant, a copy of all of the Exhibits, Documents, and other Pleadings as submitted in the aforesaid action, that are currently under Seal." *Id.* at 2.

The district court granted the motion in part and denied the motion in part. After discussing prior conduct by CSFC members and its concerns that the CSFC would harass certain witnesses or use the restricted material for a spiteful purpose if the CSFC gained access to portions of the transcripts, the district court (1) maintained the restriction as to thirteen witnesses; (2) removed the restriction as to two witnesses; and (3) removed the restriction as to some statements made by the court. In the conclusion, or decretal, section of its order, the district court stated:

> For the foregoing reasons, the Court UNSEALS the transcripts IN PART:
>
> 1. The Court MAINTAINS the Level 2 restriction with respect to the testimony of Witness #1, Witness #2, Witness #3, Witness #5, Witness #6, Witness #7, Witnesses ##9–14, and Witness #15;
>
> 2. The Court LIFTS the Level 2 restriction with respect to the testimony of Witness #4 and Witness #8; and
>
> 3. The Court LIFTS the Level 2 restriction with respect to any statements by the Court, except those which reveal the identities of protected witnesses. Any interested parties may submit a request and payment to the Court Reporter for a certified transcript of statements that are no longer under a Level 2 restriction.

Gov. App. Vol. I at 201–02. The docket text entry describing the order used identical language. *See* Banks's App. at A-148–49. The order's decretal and the docket text entry omitted any reference to the CSFC's request to unrestrict the documents, exhibits, and pleadings filed in Mr. Walker's § 2255 proceeding. And no discussion or analysis of whether to unrestrict the documents, exhibits, and pleadings can be found in the district court's order. In fact, the word "document" or "documents" appears but eight times in the order, seven times when the district court stated the general legal standards governing restrictions on public access and once when the district court quoted a press release issued by A Just Cause. Likewise, the district court did not discuss the need to maintain the restriction on any exhibits, using the word "exhibit" only when discussing Ms. Lawson's theft of an exhibit binder during the § 2255 hearing.

Turning to Mr. Banks, he filed a motion entitled "Motion to Direct Court Reporter to Provide Transcript to Defendant-Movant, and to Unseal all Documents Submitted Therein." Banks's App. at A-155. And Mr. Banks began his motion by asking the district court to issue an order directing (1) the court reporter to provide a copy of the § 2255 hearing transcript and (2) "the Clerk of Court to unseal all documents and other records as submitted in [Mr. Walker's § 2255] proceeding." *Id*. After discussing the case's procedural history and the governing standards regarding restricting access to judicial documents and proceedings, Mr. Banks argued the district court did not comply with its own local rules or with Supreme Court and Tenth Circuit precedent when permitting Mr. Walker to file documents under

a Level 2 restriction. In concluding his motion, Mr. Banks reasserted his need for "access to all of the records and proceedings in the *Walker* matter" and "requested that the Court direct the Clerk of the Court to provide to counsel . . . a copy of all of the Exhibits, Documents, and other Pleadings as submitted in the aforesaid action, that are currently under Seal." *Id.* at A-161–62. And Mr. Banks contended "the same principles and reasoning that the Court of Appeals relied upon [in *Walker I* when vacating the district court's orders] regarding the access to the transcript applies to all other documents, exhibits and pleadings." *Id.* at 162.

The district court denied Mr. Banks's motion. As the majority quotes, the district court began its analysis by stating that it had "already considered, at length, the arguments in favor of *unsealing the relevant transcripts*, and the [c]ourt incorporates that analysis here." Gov. App. Vol. I at 221 (emphasis added). The district court then summarized its position that release of the "requested records" could jeopardize witness and juror safety, which outweighed the interests advanced by Mr. Banks. The district court concluded its order by stating,

> In sum, Mr. Banks has failed to provide any basis *for unsealing those transcripts* that this [c]ourt has not already considered and rejected. Therefore, for the reasons stated above and in the [c]ourt's prior order, it is
>
> ORDERED that Banks's *motion to unseal the transcript* is DENIED. It is
>
> FURTHER ORDERED that Banks's

> motion for a status update is DENIED AS MOOT.

Id. at 222–23 (emphasis added) (docket citations omitted).

Mr. Banks timely appealed from the district court's order. *See* Fed. R. App. P. 4(a)(1)(B)(i) (permitting sixty days to file notice of appeal in action where the United States is a party); *see also United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) (concluding sixty-day time period in Federal Rule of Appellate Procedure 4(a) applies to appeal from order in § 2255 proceeding). On appeal, Mr. Banks challenges the district court's denial of his motion to permit access to both portions of the transcript of the hearing on Mr. Walker's § 2255 motion and the documents and pleadings submitted in the § 2255 proceeding.

Specific to the documents and pleadings, Mr. Banks remarks that "[t]hroughout this entire proceeding the District Court ordered that almost all of the submitted pleadings be filed under seal." Appellant's Br. at 12 (citing as examples ECF Nos. 1065, 1066, and 1071). In summarizing his argument, Mr. Banks contends the district court "failed to follow established precedent and sealed almost the entire record — both the transcripts of the Walker habeas evidentiary proceeding, *and the filings made by both [Mr. Walker's] counsel and the Government* — and ignored the prior Orders of this Court to conduct a proper analysis." *Id.* at 19. In more detail, Mr. Banks argues the district court's maintenance of the Level 2 restriction on the filings and on most of the transcript (1) ran contrary to the

presumption of public access; (2) was not narrowly tailored; (3) did not comply with the District of Colorado Local Rules; (4) did not take into account Mr. Banks's personal interest in reviewing the restricted materials; and (5) was based on speculation and holding Mr. Banks responsible for actions of other CSFC members, including Pastor Banks. *Id.* at 20–27; *see also* Reply at 10–11 (noting the district court did not deny a single motion to restrict access and arguing that "review of [Mr. Walker's motions for leave to restrict] makes it clear that they were filed for every single document and record in the case with no differentiation as to the content of the subject documents or records"). Mr. Banks concludes his opening brief by asking this court to remand the case so the district court can "conduct a proper analysis *of the entire record — both pleadings* and transcripts — and only seal those portions that should be properly kept confidential under the existing case law."[4] Appellant's Br. at 28 (emphasis added).

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[4] The Government argues that, although Mr. Banks "moved the district court to unseal all documents and other records submitted in the § 2255 proceeding," he waived this court's review of the district court's order as to the documents and pleadings by not advancing any argument specific only to the documents and pleadings. Appellee's Br. at 34. However, as the above paragraph demonstrates, Mr. Banks's opening brief presents numerous arguments applicable to the Level 2 restriction placed on the documents by the district court. Further, Mr. Banks, although incarcerated at the time of the hearing on Mr. Walker's § 2255 motion, may have some knowledge of the general nature of the testimony at the hearing given the hearing was open to the public and attended by CSFC members. The same, however, cannot be said for the documents. Under the District of Colorado Local Rules, when a party moves for leave to file with restricted access, access to a

II. DISCUSSION

I start by summarizing the standard of review, as well as the legal standard for restricting public access to judicial proceedings and court documents. Then I briefly explain why I concur with the majority's affirmance as to the § 2255 hearing transcript. Further, I explain why I dissent in part from the majority's affirmance of the district court's maintenance of restricted access as to all documents in Mr. Walker's § 2255 proceeding. Finally, I discuss why I dissent in part from the majority's decision to grant the Government's motion to file four appendix volumes under seal.

A. Standard of Review

We review a district court's decision to seal or unseal documents for an abuse of discretion, but we review any legal principles the district court applied in considering a motion to seal or unseal de novo. *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013). We apply the abuse of discretion standard because the decision whether to seal or unseal is "necessarily fact-bound." *United States v. Hickey*,

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document is automatically restricted until the district court rules on the motion for leave to file with restricted access. *See* D. Colo. Local Civ. R. 7.2(e) ("A document subject to a motion to restrict shall be filed as a restricted document and shall be subject to restriction until the motion is determined by the court."); D. Colo. Local Crim. R. 47.1(e) (same quotation). Thus, unlike the hearing transcript, Mr. Banks has no way of knowing what a specific document contains and is not in a position to advance specific arguments about a given document or set of documents. Accordingly, I reject the Government's waiver argument.

767 F.2d 705, 708 (10th Cir. 1985). "An abuse of discretion has been characterized as an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass'n, Inc.*, 685 F.3d 977, 981 (10th Cir. 2012) (internal quotation marks omitted). A district court abuses its discretion where it "(1) commits legal error, (2) relies on clearly erroneous factual findings, or (3) where no rational basis exists in the evidence to support its ruling." *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1295 (10th Cir. 2018). Further, a district court abuses its discretion if it issues its ruling without sufficiently developing a record that allows for "meaningful appellate review." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1031 (10th Cir. 2007). But, under the abuse of discretion standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1213 (10th Cir. 2010).

B. Legal Standard for Restricting Public Access

The majority and *Walker I* adequately state the legal standard governing access to judicial documents and proceedings. *See* Maj. Order. at 21; *Walker I*, 761 F. App'x at 834–36. I, nonetheless, highlight three points. First, "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Walker I*, 761 F. App'x at 834 (quoting *Nixon v. Warner*

Commc'ns, Inc., 435 U.S. 589, 597 (1978)). From this, "'there is a *strong presumption* in favor of public access' as 'the interests of the public are presumptively paramount when weighed against those advanced by the parties.'" *Id.* (brackets and ellipsis omitted) (quoting *Pickard*, 733 F.3d at 1302). Second, any order restricting access to judicial records "must be '*narrowly tailored* to serve the interest' being protected by . . . restricting access to the records." *Id.* at 835 (brackets omitted) (quoting *Press-Enter. Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 13–14 (1986)). Third, when "denying a motion to unseal, 'the trial court must articulate the interest warranting sealing along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Id.* at 836 (brackets omitted) (quoting *Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for the Dist. of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998)).

C. Hearing Transcript

I concur with the majority's conclusion that the district court did not abuse its discretion by maintaining the restriction of access on the transcript of the testimony of thirteen of the witnesses at Mr. Walker's § 2255 hearing. The district court expressed concern that granting public access to these portions of the transcript might result in harassment of the witnesses. And the district court rooted this conclusion in the past conduct of CSFC members, including the harassment of jurors and Ms. Lawson's alleged theft

of an exhibit binder during the § 2255 hearing.[5] Further, in its order, the district court discussed the testimony of each witness and included copious citations to the record, demonstrating that the court, as to the § 2255 hearing transcript, engaged in the

tedious analysis required when considering a motion to unrestrict. Accordingly, I am unable to conclude that the district court reached an arbitrary, whimsical, or manifestly unreasonable result by maintaining the restriction as to the thirteen witnesses. ***D. Documents Filed in Mr. Walker's § 2255 Proceeding*** For two primary reasons, I reach

[5] Mr. Banks argues he should not be held responsible for the actions of CSFC members and that the district court employed a guilt-by-association approach when denying his motion to unseal. However, Mr. Banks relied primarily on a public-right-ofaccess argument in his motion. Mr. Banks did not explicitly propose the lesser remedy of a change in the restriction level from Level 2 to Level 1 so that he, but not the public, could access the hearing transcript. *See* D. Colo. L. Civ. R. 7.2(b) ("There are three levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party and the court."); *see also* D. Colo. L. Crim. R. 47.1(b) ("Unless otherwise ordered, there are four levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party, the affected defendant(s), the government, and the court."). Nor did Mr. Banks, despite being aware of the district court's reasons for maintaining the restriction, provide any assurances, including proposing safeguards, that release of the full transcript to him would not result in the CSFC and Pastor Banks gaining access to the transcript. Accordingly, the district court was within its right to consider what might happen to witnesses should the transcript be made public and the CSFC gain access to the transcript.

a different conclusion regarding the documents.[6] First, as I read the district court's orders and reasoning, I am unconvinced the district court considered Mr. Banks's request that it unrestrict access to the documents, exhibits, and pleadings filed in Mr. Walker's § 2255 proceeding. Unlike with the hearing testimony where the district court took a witness-by-witness approach, the district court did not discuss any individual document or group of documents in its orders. Nor did the decretals in the district court's orders make any mention of the documents and pleadings, be it to unrestrict or maintain the restriction of them. Further, as discussed next, the substance of many of the

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[6] In addition to my two primary reasons for dissenting in part, I observe the majority construes part of Mr. Banks's motion in the district court as a motion for reconsideration. For several reasons, I do not adopt this approach. First, the district court did not construe Mr. Banks's motion as one for reconsideration that raised arguments in an untimely manner. Second, the Government never contended Mr. Banks's motion was a motion for reconsideration and this court never received any briefing on the matter. Third, this was Mr. Banks's first attempt to gain access to the transcript and documents and the interests he asserted in these records, including hoping to use the records to seek a presidential pardon, are not identical to the interests advanced by the CSFC in its motions to unrestrict. Fourth, the Government conceded at oral argument that a party may file a new motion to unrestrict. Thus, nothing compelled Mr. Banks to pursue access to the transcripts and documents through a motion for reconsideration rather than a standalone motion to unrestrict. Fifth, where the district court had already ruled on the CSFC's motion to unrestrict, which raised some of the same arguments as Mr. Banks's motion, it was logical for Mr. Banks, in pursuing his own motion, to address the arguments previously adopted by the district court. Therefore, Mr. Banks's discussion of the district court's prior order does not, in my opinion, convert his motion into a motion for reconsideration.

documents demonstrates that, had the district court reviewed each document and employed the approach it did with the transcript, it would have quickly and easily realized that many of the documents do not contain materials falling within its reasons for maintaining the restriction on parts of the transcripts. Finally, the continued restriction on some of the documents, specifically the district court's orders that contain its own analysis, is inconsistent with the district court's decision to unrestrict many of the statements it made during the § 2255 hearing. This also supports the conclusion that, despite Mr. Banks's clear request for access to the documents, the district court did not review the documents. Accordingly, I would conclude the district court failed to review the documents and necessarily abused its discretion.

Second, even if one could read the district court's orders as suggesting it reviewed each of the restricted documents because it used the word "records" in its order denying Mr. Banks's motion, in my estimation, the district court's decision to maintain the restriction on all documents would be an abuse of discretion. Given the subject and characteristics of the seventy-eight restricted documents, I view the documents as falling into three categories.

One category involves documents that contain discussion of the merits of Mr. Walker's § 2255 motion and/or a significant number of statements critical of the CSFC, Pastor Banks, or other members of the CSFC. *See e.g.*, *United States v. Walker*, No. 1:09-cr-00266-CMA-3 (D. Colo.), ECF Nos. 899, 902, 921, 930–31, 937, 941, 947– 48, 952, 956, 966, 970, 986, 989, 992–93, 999–1000, 1005,

1008, 1011, 1014, 1020, 1023, 1025, 1042, 1044, 1055, 1059, 1081, 1085. As to these documents, I would affirm the district court's order on harmless error grounds because the reasons offered by the district court for maintaining the restrictions on the transcript unquestionably apply to these documents. And I have no reservations that if this court were to remand for the district court to assess these documents in the first instance, the district court would maintain the restriction on these documents. *Cf. United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987) (conclusion on appeal that district court abused its discretion "does not require reversal if that abuse amounted to harmless error"); *United States v. Lane*, 474 U.S. 438, 449 (1986) (explaining that abuse of discretion is harmless unless it impacts a litigant's substantial rights by influencing the outcome of the proceedings).

A second category consists of documents that (1) contain passing discussion of conduct by the CSFC or its members; (2) include the names and other identifying information of witnesses or individuals involved in the medical examination of Mr. Walker; and/or (3) involve matters likely to garner increased public interest, such as the Federal Bureau of Prisons' failure to timely comply with certain orders issued by the district court. *See*, *e.g.*, *Walker*, No. 1:09-cr-00266-CMA-3, ECF Nos. 949, 953, 962–63, 971, 976, 988, 1021, 1026, 1047.[7] As to this category of documents, I would direct the district court to

[7] In identifying these documents, as well as the third category of documents, I look only at the primary docket entry and do not suggest that I would order the district court to unrestrict any or all of the exhibits filed as attachments to some of these two categories of documents.

unrestrict the documents but remand to give the district court the opportunity to permit redactions of materials within the documents that invoke the concerns raised by the district court when maintaining the restriction of portions of the § 2255 hearing transcript. Such an approach would draw the proper balance between the strong presumption in favor of public access and the need to protect witnesses. And it would result in restrictions to public access that are narrowly tailored to the reasons supporting restriction.

The third category of documents involves (1) motions seeking what I will call relatively routine matters of procedure, such as seeking extensions of time or leave from the court to file documents or to take preliminary or discovery-based steps in pursuing § 2255 relief; and (2) orders of the court, often addressing these types of motions, which do not discuss in any great detail the arguments relative to Mr. Walker's § 2255 motion or the conduct of the CSFC, Pastor Banks, or other members of the CSFC.[8] *See*, *e.g.*, *id.* at ECF Nos. 913–14, 917, 938, 940, 954–55, 960–61, 964, 973, 977, 980, 984, 995, 1003, 1006–07, 1015–16, 1022, 1027, 1029–30, 1033–36, 1050, 1056, 1065–66, 1068, 1076. None of the district court's reasons for maintaining the restriction on portions of the transcript apply to these documents. And having reviewed each document, I do not believe the district court could articulate any non-arbitrary reason for maintaining the restriction to access on these documents. Accordingly, at present, the district

[8] Because these documents remain restricted in light of the majority's decision, I describe them with a certain degree of generality.

court's restriction of access as to this third category of documents neither complies with the requirement that any restriction be narrowly tailored nor adequately accounts for the strong presumption of public access to judicial documents. Therefore, I am unable to concur with the majority's affirmance of the district court's denial of Mr. Banks's motion relative to these documents. Instead, I would order the district court to fully remove the restriction on access as to these documents.

E. Government's Motion to File Appendices under Seal

Finally, the Government has moved to submit four volumes of its proposed appendix under seal. The majority grants this motion. The volumes of the proposed appendix that the Government moves to file under seal contain some of the restricted documents discussed in the previous section, as well as the transcript of the testimony of fifteen witnesses from the hearing on Mr. Walker's § 2255 motion. While I recognize the Government attempts to assist this court by filing the proposed appendix, I am unable to conclude that the governing law permits the Government to file the appendix volumes under seal in their current form. Specifically, the transcript submitted by the Government includes the testimony of two witnesses that the district court already unsealed. Thus, while I would consider granting the motion to the extent the Government seeks to provide this court with a copy of the restricted portions of the transcript,[9] I would deny

[9] In the alternative, I would consider denying the motion as unnecessary and striking the four sealed volumes of the

the motion to the extent the proposed appendices include transcripts of witness testimony already made accessible to the public by the district court. *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (where information has already been exposed to public view, the interest of the party seeking to restrict access is diminished); *see also Pickard*, 733 F.3d at 1305 (noting that sealed information that was once "made public suggests that much of the information . . . could be unsealed").

III. CONCLUSION

I respectfully dissent in part. While I would affirm the district court's decision to maintain the restriction on part of the § 2255 hearing transcript and some of the documents filed in Mr. Walker's § 2255 proceeding, I would order the district court to unrestrict a wide swath of documents filed in the proceeding. I would also deny, in part, the Government's motion to file four volumes of its appendix under seal.

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appendix submitted by the Government because this court can already access these transcripts and documents through the district court.

FILED: November 3, 2021

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-01

UNITED STATES OF AMERICA,
Plaintiff,
v.

1. DAVID A. BANKS,
Defendant.

ORDER

This matter is before the Court on David Banks's "Motion to Direct Court Reporter to Provide Transcript to Defendant-Movant, and to Unseal All Documents Submitted Therein" (Doc. # 1171) and "Motion Request Regarding Status of Pending Motion" (Doc. # 1177). The motions are denied.

The Court has already considered, at length, the arguments in favor of unsealing the relevant transcripts, and the Court incorporates that analysis here. (*See* Doc. # 1146). The Court has reviewed Mr. Banks's motion (Doc. # 1171), the relevant portions of the record, and the Court's prior order on the matter (Doc. # 1146). Having considered all of Mr. Banks's arguments in light of the present circumstances, the Court stands by its prior conclusion that "this is one of those cases in which the right of public access to judicial records is

outweighed by the importance of protecting certain witnesses from further harm." (Doc. # 1146). Specifically, Mr. Banks and his confederates have a demonstrated history of harassing and intimidating witnesses and jurors and of making misrepresentations to the Court. The Court has serious concerns that granting Mr. Banks's motion to access the requested records would facilitate further harassment and intimidation. These concerns for witness and juror safety outweigh Mr. Bank's interest in accessing the requested records.

Furthermore, Mr. Banks has failed to demonstrate a legitimate reason for accessing the requested records. The records in question do not concern Mr. Banks; rather, they concern another defendant's claim that he received ineffective assistance of counsel at certain phases of his criminal prosecution. (Doc. ## 902). Mr. Banks fails to explain how such records are relevant to his case. To the contrary, Mr. Banks appears to concede that the records will not have any practical impact on his conviction or sentence. (Doc. # 1171, pp. 6-7). Though Mr. Banks claims that he intends to seek a presidential pardon, he fails to explain how the records in question would help him achieve that goal. (Doc. # 1171, pp. 6-9).

In sum, Mr. Banks has failed to provide any basis for unsealing those transcripts that this Court has not already considered and rejected. (*See* Doc. # 1171). Therefore, for the reasons stated above and in the Court's prior order (Doc. # 1146), it is

ORDERED that Banks's motion to unseal the transcript (Doc. # 1171) is DENIED. It is

FURTHER ORDERED that Banks's motion for a status update (Doc. # 1177) is DENIED AS MOOT.

DATED: November 3, 2021

BY THE COURT:

/s/ CHRISTINE M. ARGUELLO
United States District Judge

FILED: December 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-1037
(D.C. Nos. 1:15-CV-02223-CMA &
1:09-CR-00266-CMA-3)
(D. Colo.)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

GARY L. WALKER,
Defendant - Appellee.

COLORADO SPRINGS FELLOWSHIP CHURCH,
Movant - Appellant.

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata,

and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

CSFC challenges the district court's orders granting CSFC only limited access to a hearing transcript (Access Order) and denying CSFC's motion to recuse the district court judge (Recusal Order). We dismiss the appeal of the Access Order for lack of jurisdiction and affirm the Recusal Order.

Background

Our decision in the first appeal involving this litigation details the relevant background, *see United States v. Walker*, 761 F. App'x 822, 826-29 (10th Cir. 2019), so we need not repeat it here. We do, however, provide the following abbreviated version as context for our consideration of the issues before us.

The underlying case is a proceeding under 28 U.S.C. § 2255 brought by Gary L. Walker, a former member of CSFC, challenging his conviction of conspiracy to commit mail fraud arising out of a business CSFC members operated. As relevant here, his § 2255 motion claimed he received ineffective assistance of counsel at sentencing. After an evidentiary hearing, the district court granted that portion of the motion, concluding Walker's sentencing counsel (Gwendolyn Lawson) operated under a conflict of interest because CSFC's pastor (Pastor Banks) dictated counsel's strategy. The court then vacated Walker's prior sentence and resentenced him.

At Walker's request, the district court restricted access to the transcript of his § 2255 hearing. The court later unsealed the portion of the transcript containing Lawson's testimony, but it denied CSFC's motion to unseal the entire transcript, concluding that releasing it was likely to result in CSFC members harassing and threatening Walker and former CSFC members who testified at the hearing. In *Walker*, we held that the district court abused its discretion in denying the motion because it "did not adequately account for the strong presumption in favor of public right of access to judicial records and did not narrowly tailor its orders restricting access to the transcript." 761 F. App'x at 826. In particular, we noted it was not apparent why Walker's interest in not being harassed and threatened was advanced by restricting access to the testimony of Joshua Lowther, who, with Lawson, served as counsel for Walker and several codefendants, and the testimony of the process server who served process on Lawson. *Id.* at 836-37. We did not order the district court to unseal the transcript but vacated its order and remanded the matter to the district court with directions to consider the appropriate legal standard in deciding whether, and to what extent, to restrict access to the transcript. *Id.* at 838.

On November 21, 2019—about eleven months after we issued our decision in *Walker*—CSFC filed a motion in district court seeking the district court judge's recusal and reassignment of the matter to a different judge pursuant to 28 U.S.C. §§ 144 and 455. CSFC claimed the judge's delay in resolving the matter on remand and comments she made at Walker's resentencing hearing about CSFC and Pastor Banks reflected judicial bias against them.

Those comments are summarized in *Walker*, 761 F. App'x at 827-28, and we do not repeat them here.

That same day (November 21), the district court issued the Access Order, unsealing the portions of the transcript containing statements the court made (other than those identifying witnesses) and the testimony of Lawson, Lowther, and the process server. The court denied CSFC's motion to unseal the remainder of the transcript, however, finding it necessary to restrict access to the remaining witnesses' testimony based on concerns about CSFC's harassment of its former members.

Also on November 21, the court entered a separate minute order denying CSFC's recusal motion as moot, noting there was nothing left for the court to decide after it ruled on CSFC's motion to unseal the transcript. CSFC sought reconsideration of that order. On December 9, the court issued the Recusal Order, granting reconsideration but denying the recusal motion, holding that it was untimely and that the allegations of bias in the motion and Pastor Banks's supporting affidavit did not require the judge's disqualification.

Discussion

1. Access Order

CSFC first challenges the Access Order, claiming the district court abused its discretion by denying CSFC's request to unseal the entire transcript. Because the appeal of that order is untimely, we lack jurisdiction to review it and therefore do not address CSFC's arguments.

The timely filing of a notice of appeal is a "jurisdictional threshold to appellate review." *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1274 (10th Cir. 2011) (internal quotation marks omitted). A post-judgment ruling on a non-party's motion for access to sealed court records is immediately appealable, either as a final order under 28 U.S.C. § 1291 or as a collateral order. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990) (holding that post-judgment order granting intervenors' motion for modification of protective order and for access to sealed records was immediately appealable); *see also United States v. Pickard*, 733 F.3d 1297, 1300-01 & n.2 (10th Cir. 2013) (recognizing that district courts have continuing jurisdiction to enforce sealing orders and to grant access to sealed documents "even if the case in which the documents were sealed has ended," and concluding that post-judgment orders regarding sealed records may be appealed in § 2255 proceedings without a certificate of appealability). CSFC therefore had sixty days from the date the Access Order was entered to appeal it. *See* Fed. R. App. P. 4(a)(1)(B)(i); *see also United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) (recognizing that the sixty-day appeal period applies to orders entered in § 2255 proceedings). The order was entered on November 21, 2019, so the deadline was January 21, 2020. *See* Fed. R. App. P. 26(a)(1)(C) (providing that filing deadline that falls on a holiday is extended to the next court business day). CSFC filed its NOA on February 7, 2020—seventeen days late—and while

the appeal was timely as to the December 9 Recusal Order, it was untimely as to the Access Order.[1]

CSFC's failure to timely appeal the Access Order deprives us of jurisdiction to review it, and we cannot overlook jurisdictional defects. *Raley*, 642 F.3d at 1278. We thus do not reach the merits of CSFC's arguments and dismiss the appeal of the Access Order.[2] *See id.* at 1278-79 (dismissing untimely appeal for lack of jurisdiction).

2. Recusal Order

CSFC claims the district court erred by denying its recusal motion as both untimely and insufficient to establish judicial bias. We disagree.

We review the denial of motions seeking disqualification of a judge under §§ 144 and 455 for an abuse of discretion. *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987) (per curiam).

A motion to recuse must be filed as soon as the movant learns of the facts demonstrating the basis for disqualification. *Id.*; *see also United States v.*

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[1] We note that the government raised this jurisdictional issue in its response brief, and although it is the appellant's burden to establish this court's jurisdiction, *Raley*, 642 F.3d at 1275, CSFC did not meaningfully address the timeliness issue in its reply brief. And contrary to CSFC's suggestion, neither the fact that it did not gain access to the unsealed portions of the transcript until December 13 nor the fact that some of the evidentiary issues addressed in the Access Order and Recusal Order overlap affects the calculation of the deadline for appealing the Access Order.

[2] In light of our conclusion that the appeal of the Access Order is untimely, we need not address the government's alternative jurisdictional challenge based on CSFC's failure to designate the Access Order in its notice of appeal.

Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (recognizing that a "motion to recuse . . . must be timely filed" (internal quotation marks omitted)). Granting such a motion "many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1029 (10th Cir. 1988) (per curiam).

Disqualification is required both when a judge has "a personal bias or prejudice" against a party, § 144; *see also* § 455(b)(1) (same), or when presiding over the case would create an appearance of bias, *see* § 455(a). Recusal for an appearance of bias is required when "sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality." *Cooley*, 1 F.3d at 992. The party seeking a judge's disqualification must show that "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Id.* at 993 (internal quotation marks omitted). Because this standard is an objective one, "[t]he inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." *Id.*

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion," and when, as here, the movant does not allege an extrajudicial source of bias, adverse rulings rarely "evidence the degree of favoritism or antagonism required" to disqualify the judge. *Liteky v.United States*, 510 U.S. 540, 555 (1994); *see also Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) ("[A]dverse rulings cannot in themselves form the appropriate grounds for disqualification." (internal quotation marks omitted)). Likewise, "opinions formed by the judge on the basis of facts introduced

or events occurring in the course of the . . . proceedings" are not a basis for disqualification "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

We find no abuse of discretion in the district court's determination that CSFC's motion was untimely. The motion sought recusal primarily based on comments the judge made about CSFC and Pastor Banks at Walker's June 2017 resentencing hearing. At the latest, CSFC became aware of those comments in late January 2019, when we described them in *Walker*. *See* 761 F. App'x at 827-28. But CSFC did not file its motion until eleven months later, and it did not even acknowledge, much less attempt to justify, its delay in seeking the judge's disqualification based on those comments. Nor did CSFC explain why it waited so long to seek recusal based on what it perceived as the judge's delay in ruling on its motion to unseal the transcript on remand. CSFC was plainly aware of both the judge's comments and her failure to rule long before it filed its recusal motion. Indeed, it filed a petition for a writ of mandamus in July 2019—over four months before it filed the recusal motion—raising the exact same concerns and asking this court to direct that the district court case be reassigned to another judge for a ruling on the motion to unseal the transcript. Under these circumstances, the district court did not abuse its discretion when it determined that CSFC's recusal motion was untimely. *See Green*, 108 F.3d at 1305 (motion filed five weeks after magistrate judge issued recommendation reflecting alleged bias was untimely); *Willner*, 848 F.2d at 1029 (motion filed ten months after discovery of alleged bias was

untimely); *Hinman*, 831 F.2d at 938 (motion filed three and five months after movant discovered allegedly disqualifying facts was untimely).

We also find no abuse of discretion in the district court's determination that the motion and supporting affidavit alleged insufficient facts to warrant disqualification. First, despite CSFC's efforts to show bias by highlighting the various ways in which it disagrees with the substance of the district court's ruling on its motion to unseal the transcript, adverse rulings do not establish bias. *See Green*, 108 F.3d at 1305; *see also Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 744-45 (10th Cir. 2005) (denying request to assign different district judge on remand based on adverse rulings, concluding that claim that judge's "'track record' in this case would ca[u]se a reasonable person to question whether justice was being done in this case" amounted to dissatisfaction with the court's legal rulings).

Second, contrary to CSFC's contention, nothing in the record suggests that the judge "bas[ed] her rulings on her own perception of how a Christian should behave," Aplt. Br. at 53, or that her "decisions directly related to her opinions" about CSFC and Pastor Banks, *id.* at 54 n.16. True, the judge's comments at the resentencing hearing and her observations in the Access Order and Recusal Order about the conduct of CSFC members during and after Walker's trial reflect a negative opinion about how CSFC and Pastor Banks treated Walker and how they conducted themselves throughout the proceedings. But the judge did not make those comments and observations in a vacuum. Walker argued at resentencing that he had been under the undue influence of CSFC and Pastor Banks when he

committed the underlying offense. Their conduct vis-à-vis Walker was thus directly relevant to the court's sentencing decision, and its observations about the degree of control they held over him were based on testimony and other evidence presented at the habeas and resentencing hearings. Their harassment of and retaliation against him and their conduct during his trial were also relevant to issues before the court, including whether CSFC and Pastor Banks should have access to the transcript. With one exception—the remark questioning whether they espoused values consistent with Christianity—the judge's comments were findings based on the evidence. The fact that the evidence might have left her "ill disposed toward" CSFC and Pastor Banks was not a basis for disqualification "since [her] knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and [were] . . . necessary to completion of the judge's task." *Liteky*, 510 U.S. at 551- 52 (also noting that it is "normal and proper for a judge to sit in the same case upon its remand"). And that one remark, while arguably inappropriate, was not disqualifying because when read in context it would not cause a reasonable person to doubt the judge's impartiality.

We acknowledge CSFC's supplemental authority—an order issued by the same district court judge sua sponte recusing herself from presiding over a defamation suit CSFC, Pastor Banks, and her sons brought against two former CSFC members. But that order was issued ten months after entry of the Recusal Order in a case involving people who are not parties to the litigation at issue here, and the order does not explain the factual basis for the

decision to recuse. Accordingly, that order does not undermine our conclusion that the judge did not abuse her discretion by declining to recuse herself in this case.

3. Motions to Supplement the Record on Appeal

CSFC and Walker both filed motions seeking to supplement the record with materials that were not before the district court. All documents filed in the district court are part of the record available for our review. *See* Fed. R. App. P. 10(a). Rule 10(e) allows for correction and modification of the record to ensure that it "truly discloses what occurred in the district court," *id.* R. 10(e)(1), and permits supplementation with material items omitted or misstated in the record. But it does not allow parties to supplement the record with documents not before the district court in an effort to "build a new record." *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (internal quotation marks omitted). CSFC and Walker are no doubt aware of that rule given our denial in *Walker* of their motions to supplement the record with documents that were not part of the district court record. *See* 761 F. App'x at 832. And neither has shown that the new materials present the "rare exception" to that rule. *See Kennedy*, 225 F.3d at 1192 (recognizing our "inherent equitable power to supplement the record" exceeding the power provided in Rule 10(e) but declining to exercise it). We thus deny both motions.

Conclusion

We dismiss the appeal of the district court's November 21, 2019 order denying CSFC's motion for access to the entire transcript, affirm the December 9, 2019 order granting reconsideration but denying CSFC's motion to recuse, and deny CSFC's and Walker's motions to supplement the record.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

FILED: December 9, 2019

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 GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

This matter is before the Court on Colorado Springs Fellowship Church's[1] ("CSFC") Motion for Re-Consideration [sic] to the Hon. Christine Arguello, U.S. District Judge, to Recuse Herself from All Proceedings Going Forward and Re-Assign [sic] the Case ("Motion for Reconsideration"). (Doc. #

[1] The Court notes that, although the Motions at issue were purportedly filed on behalf of five of the six individual Defendants, none of those Defendants are parties to the habeas action filed by Defendant Gary Walker. Moreover, the vast majority of the arguments in the Motions are particularized to Rose Banks and CSFC, none of whom were parties to Mr. Walker's § 2255 petition. The Court will refer to the Motions as "CSFC's." The Court deems it unnecessary to address arguments that are specific to the five Defendants who are not parties to this matter.

1148.) For the following reasons, the Motion is granted in part and denied in part. Specifically, the Motion is granted in that the Court will analyze the arguments in CSFC's Motion for Recusal (Doc. # 1145) and Motion for Reconsideration (Doc. # 1148) without focusing on the issue of mootness. However, CSFC's request for recusal is denied.

The Court recently recounted the factual background of this case in its Order Unsealing, in Part, Hearing Transcripts. (Doc. # 1146.) The Court incorporates those facts in full and proceeds to a discussion of CSFC's Motion for Recusal.

I. DISCUSSION

CSFC asserts that recusal is warranted based on 28 U.S.C. §§ 144 & 455. The Court will address each alleged basis for recusal in turn.

A. 28 U.S.C. § 144

1. Legal Standard

If a party believes that a judge is biased against him, he may file a "timely and sufficient affidavit [alleging] that the judge before whom the matter is pending has a personal bias . . . against him or in favor of any adverse party." 28 U.S.C. § 144. If a timely and sufficient affidavit is filed, the allegedly biased "judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." *Id*. "The affidavit [must] state the facts and the reasons for the belief that bias or prejudice exists . . . ." *Id*. An untimely affidavit requires proof of "good cause" to be considered. *Id*.

When a party raises a motion pursuant to § 144, a judge is "not automatically disqualif[ied]." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). Rather, the judge is required to consider the sufficiency of the filing. *See id*. The judge's investigation of sufficiency entails evaluating both whether the allegations rise beyond conclusory and whether the affidavits are timely filed. *See Hinman v. Rogers*, 831 F.2d 937, 938–39 (10th Cir. 1987). "Disqualification under 28 U.S.C. § 144 places a substantial burden on the moving party to demonstrate that the judge is not impartial, not a burden on the judge to prove that [she] is impartial." *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004).

Further, although the Court must accept the facts alleged in the supporting affidavit under § 144 as true, the affidavit is construed strictly against the moving party. *See Glass v. Pfeffer*, 849 F.2d 1261, 1267 (10th Cir. 1988). Judicial rulings alone are almost always insufficient to establish bias, as are mere "speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters . . . ." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1050 (10th Cir. 2017) (citations omitted).

2. Analysis

In support of its Motion, CSFC submitted the affidavit of Rose Banks. (Doc. # 1145-1.) Ms. Banks' affidavit is insufficient for two reasons:

(1) It is untimely; and

(2) Ms. Banks' allegations are conclusory, and the statements Ms. Banks asserts demonstrate bias are merely the Court's recitation of the testimony

presented by witnesses at Mr. Walker's § 2255 hearing.

a. The Motion is not timely

"A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." *Scott v. Rubio*, 516 F. App'x 718, 723 (10th Cir. 2013) (citation omitted). "Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Pride v. Herrera*, 28 F. App'x 891, 895 (10th Cir. 2001) (quoting *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1029 (10th Cir. 1988)). Moreover, "a timely filed recusal motion alleviates the concern that the motion is motivated by adverse rulings or constitutes an attempt to manipulate the judicial process." *Id*. (citing *United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000)).

This case is ten years old. However, CSFC waited until December 2019 to file its Motion for Recusal. Additionally, the Motion recycles and regurgitates accusations that CSFC has maintained for at least five months. *See* (Doc. # 1137-1 at 17–19) (Petition for Writ of Mandamus filed in July 2019); (Doc. # 1138 at 4) (Tenth Circuit Order dated August 12, 2019, noting that CSFC had not sought recusal in this Court). Notably, courts have held that motions for recusal filed under §§ 144 and 455 have been untimely when they are filed **five weeks** after the event on which the motion is based. *See Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997). Accordingly, CSFC's delay of at least **five months** renders the Motion untimely especially because CSFC offers no justification for the delay.

b. Conclusory allegations

Ms. Banks' allegations in the affidavit at issue are paradigmatic conclusory statements. In her affidavit, Ms. Banks recites several statements which she attributes to this Court. (Doc. # 1145-1 at 2.) After that recitation, Ms. Banks simply concludes — without explanation — that the statements are "false and malicious." (*Id*. at 3.) Notably, Ms. Banks' conclusory and subjective opinion is the only support that she provides for her allegation that this Court has exhibited bias. However, all of the statements set forth in Ms. Banks' affidavit in support of her allegation that this Court is biased are merely the Court's reiteration and interpretation of the evidence presented during the hearing on Mr. Walker's habeas petition, or a description of events the Court observed during the course of the underlying criminal trial and the habeas hearing.

Moreover, the statements about which Ms. Banks complains are about her alone. However, Ms. Banks is not a party to the underlying habeas petition of Mr. Walker, the only remaining matter in this case. Finally, the Court rejects as unpersuasive CSFC's argument that statements about Ms. Banks apply "by reasonable transference" (*see* Doc. # 1145 at 9) to various Defendants, none of whom were parties to the underlying habeas matter. There is simply no rational basis for statements about Ms. Banks to be "transferred" to anyone else.

B. 28 U.S.C. § 455

1. Legal Standard

Title 28 U.S.C. § 455(a) provides a broader scope for claims of prejudice and bias. *Glass*, 849 F.2d 1267. Under this section, a judge "shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned," and § 455(b)(1) provides that a judge shall also disqualify herself where she "has a personal bias or prejudice concerning a party[.]" The goal of this provision is to avoid even the appearance of partiality and thereby "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

Pursuant to § 455, the Court is not required to accept all factual allegations as true, "and the test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Glass*, 849 F.2d 1268 (internal quotation marks omitted); *see also Hinman*, 831 F.2d at 939. "A judge should not recuse [herself] on unsupported, irrational, or highly tenuous speculation." *Hinman*, 831 F.2d at 939. The standard is objective, and the inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). However, the statute should not be used as a veto power over judges or as a "judge shopping device." *Nicols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995).

2. Analysis

As a preliminary matter, CSFC's Motion is untimely for the reasons stated in Section I(A)(2)(a). *See, e.g.*, *Scott v. Rubio*, 516 F. App'x 718, 723 (10th Cir. 2013) (noting timeliness requirement applies to § 455 in addition to § 144); *Cooley*, 1 F.3d at 993 ("A motion to recuse under section 455(a) must be timely filed." (citation omitted)). However, assuming, *arguendo*, that the Motion were timely, this Court's recusal is not warranted.

CSFC's Motion appears to argue that recusal is necessary based upon:

(1) statements the Court has made from the bench that Ms. Banks disagrees with;

(2) rulings that have been adverse to CSFC; and

(3) the length of time it took for the Court to issue an order regarding CSFC's request to unseal various transcripts.[2]

However, unfavorable decisions are not sufficient to demonstrate that disqualification is appropriate pursuant to either § 144 or § 455(a) because "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Furthermore, opinions held by judges as a result of what they learned in earlier proceedings are not subject to characterization as "bias" or "prejudice" unless they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

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[2] The Court issued the Order in question on November 20, 2019. The length of time it took to issue the order resulted from this Court's extensive efforts to analyze voluminous transcripts and narrowly tailor the Order in accordance with the Tenth Circuit's instructions.

The Court finds that no reasonable person, knowing all the relevant facts, would harbor doubts about this Court's impartiality. The relevant facts include what the Court has learned about CSFC from the Court's direct observations of members of CSFC during various proceedings. Members of CSFC or their representatives have:

- Absconded with jury rosters;
- Absconded with an exhibit notebook by surreptitiously replacing it with a look-alike dummy notebook;
- Engaged in a pattern of harassment toward jurors; and
- Disobeyed direct orders from the Court.

See generally (Doc. # 1146).

The Court is also aware of important facts concerning Ms. Banks as a result of extensive evidence in the record. Specifically, the evidence strongly indicates that members of CSFC often act on Ms. Banks' orders, and they go to great—and possibly illegal—lengths to carry out those orders. *See* (*id*. at 4–5).

In the context of this factual background, an objective analysis of this Court's conduct does not show bias or prejudice towards any party in this case. Importantly, "[i]mpartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, [she] could never render decisions." *Liteky*, 510 U.S. at 551 (citation omitted). Therefore, this Court's informed judgment regarding CSFC and Ms. Banks—which is based on the overwhelming weight

of the evidence in this case—does not constitute an impermissible bias or prejudice.

This Court harbors no personal bias or prejudice against any party in this case. The Court has impartially adjudicated the case for the past ten years, and it will continue to do so. *Hinman*, 831 F.2d at 939 ("There is as much obligation for a judge not to recuse when there is no occasion for [her] to do so as there is for [her] to do so when there is.").

II. CONCLUSION

Based on the foregoing, CSFC's Motion for Reconsideration (Doc. # 1148) is GRANTED IN PART AND DENIED IN PART as follows:

- the Motion is **granted** in that the Court considered the arguments in CSFC's Motion for Recusal (Doc. # 1145) and Motion for Reconsideration (Doc. # 1148) without focusing on the issue of mootness; and
- the Motion is **denied** insofar as it requests this Court's recusal in this case.

DATED: December 9, 2019

BY THE COURT:

/s/ CHRISTINE M. ARGUELLO
United States District Judge

FILED: November 21, 2019

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 UNSEALING, IN PART, HEARING TRANSCRIPTS

This matter is before the Court on remand from the Tenth Circuit Court of Appeals (Doc. # 1124), which vacated this Court's Order (Doc. # 1114) denying a Motion by the Colorado Springs Fellowship Church ("CSFC") to Unseal Records (Doc. # 1106) that this Court has restricted. After reviewing the Tenth Circuit's Order and Judgment, the Court unseals, in part, the hearing transcripts (Doc. ## 1107–1109).

I. BACKGROUND

On July 2, 2009, Mr. Gary Walker and five other defendants (together, the "IRP-6") were charged by indictment with conspiracy to commit wire and mail

fraud. (Doc. # 1.) All of the IRP-6 members belonged to the same church—CSFC—which is led by Pastor Rose Banks. Mr. Walker and the other defendants were assigned court appointed attorneys. (Doc. # 15.) However, before trial, they all terminated the employment of their respective attorneys and proceeded *pro se*. (Doc. # 361.) After a full jury trial, the members of IRP-6 were found guilty and convicted on multiple counts. (Doc. ## 447–79.)

To assist them in sentencing and other post-conviction matters, the IRP-6 elected to retain another CSFC member, Ms. Gwendolyn Lawson[1], as their attorney. The IRP-6 also retained Mr. Lowther, an attorney located in Georgia (Doc. # 1108 at 159), because Ms. Lawson had very little federal court experience (*id.* at 164). On July 23, 2012, with the assistance of Ms. Lawson and Mr. Lowther, Mr. Walker participated in his sentencing hearing. The Court sentenced Mr. Walker to 135 months in prison. (Doc. # 782.)

As Mr. Walker served his sentence, however, he began questioning some of the teachings of Pastor Banks and the amount of control she exerted over his life. Eventually, Mr. Walker left CSFC. *See generally* (Doc. # 1108 at 149–157). He then terminated Ms. Lawson's and Mr. Lowther's representation of him and obtained other counsel. On October 5, 2015, in coordination with his new counsel, Mr. Walker filed a Motion and Memorandum of Law Filed Pursuant to 28 U.S.C. §

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[1] Gwendolyn Lawson was formerly known as both Gwendolyn Jewell and Gwendolyn Solomon, and she changed her name during the years that this case was active. Throughout this Order, the Court refers to her as Ms. Lawson, which is her current name.

2255. (Doc. # 902.) He claimed that (1) his waiver of his right to counsel before the trial was neither informed nor voluntary; and (2) he received ineffective assistance of counsel at sentencing. (*Id.*) The Court granted Mr. Walker's § 2255 petition and scheduled a three-day evidentiary hearing. (Doc. # 995.)

Before the hearing commenced, Mr. Walker's counsel requested that the hearing be closed. After carefully considering the importance of public access to judicial proceedings, the Court denied the request. The Court explained that counsel had "not met the burden . . . that is necessary to restrict the public's right to access" the hearing. (Doc. # 1107 at 9.)

After hearing the testimony of sixteen witnesses during the course of the § 2255 hearing, the Court concluded that Mr. Walker's 28 U.S.C. § 2255 habeas petition should be granted because the evidence demonstrated that Mr. Walker's counsel, Ms. Lawson, represented actively conflicting interests and that this conflict actually and adversely affected her performance on his behalf. These conflicts included her duties to her other clients, and possibly her allegiance to her pastor, and prevented her from presenting evidence that might have affected the Court's determination about whether to assess a 4-level aggravating role enhancement against Mr. Walker under Section 3B1.1(a) of the Sentencing Guidelines.

Although Mr. Walker was also represented by another attorney at sentencing, Joshua Lowther, the evidence adduced during the § 2255 hearing did not allow the Court to find that Mr. Lowther had sufficient authority as counsel to overcome the effect of Ms. Lawson's actual conflict. *Strickland v.*

Washington, 466 U.S. 668, 692 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 348–350 (1980); *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 . . . ."). In this specific circumstance, prejudice is presumed and need not be proven. *Strickland*, 466 U.S. at 692.

After the § 2255 hearing, Ms. Lawson, acting on behalf of Mr. Walker's other five codefendants, moved to continue the resentencing hearing so that she could present rebuttal testimony in opposition to Mr. Walker's requested sentence reduction. (Doc. # 1075.) The Court denied Ms. Lawson's motion and proceeded with Mr. Walker's resentencing, reducing his sentence to 70 months. (Doc. # 1082.)

Mr. Walker then moved to restrict public access to the transcripts of the § 2255 hearing to preserve the safety of the witnesses. (Doc. # 1080.) As a result of both the the original trial and § 2255 hearing, the Court became privy to facts and circumstances that are pertinent to whether the transcripts should be unsealed. The record shows that Pastor Banks and some CSFC members have engaged in a consistent pattern of harassment against anyone who does not strictly comply with the demands of Pastor Banks.[2]

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[2] In the interests of protecting the safety and welfare of these witnesses, the Court has determined that their testimony should remain under restriction. Because the principal concern of CSFC is that the testimony of the witnesses impugned CSFC's reputation, the Court will not reiterate or disclose, in this Order which is public, the specifics of that testimony.

Moreover, at the conclusion of her testimony, Ms. Lawson, who was subpoenaed to testify at the § 2255 hearing, surreptitiously substituted a "dummy binder" of the same size and color as the Court's Exhibit Notebook, but which contained only tabbed dividers and blank sheets of paper, for one of the Court's Exhibit Notebooks and walked out of the courtroom with the Court's Exhibit Notebook. *See* (Exhibit 1).

There had previously been similar unprofessional activity on the part of the Defendants which led this Court to conclude that CSFC members and Pastor Banks had no respect for the rights of others, especially those with whom they disagreed. For example, on the first day of trial after selection of the jury, the Court directed the Defendants to turn in all of the jury rosters, which contained the names and addresses of the jurors. Defendants violated the Court's order and removed one of the rosters from the Courtroom. The roster was returned the next day and the Defendants swore that they had not copied it. However, after the jury returned a verdict of guilty as to all defendants, in violation of this Court's explicit directive that the parties could not contact any of the jurors, members of CSFC, acting on behalf of the IRP-6, began harassing the jurors. One of the jurors reported CSFC's harassment to the Court. The Court then issued an Order *sua sponte*, reiterating that the defendants and any of their representatives are prohibited from contacting members of the jury. (Doc. # 582.) Additionally, as a condition of their release prior to sentencing, the defendants agreed that they would refrain from any additional contact with jurors absent a court order. (Doc. # 592.)

However, **even after this stipulation**, members of CSFC acting on behalf of the defendants continued to harass multiple jurors.[3] (Doc. ## 851, 883.)

For these reasons, the Court granted Mr. Walker's request and placed all transcripts from Mr. Walker's § 2255 proceeding (Doc. ## 1107–1109) under a Level 2 Restriction (Doc. # 1085). The Court subsequently unsealed the portions of the transcript which contained testimony of Ms. Lawson. (Doc. # 1090.) CSFC moved to unseal the remaining fifteen transcripts, arguing both that it had a private interest in the transcripts of the testimony from the hearing because the witnesses impugned CSFC's reputation and that it had a general First Amendment and common law public right of access to judicial records. (Doc. # 1106.) The Court denied CSFC's motion and kept the transcripts under seal. (Doc. # 1114.)

CSFC appealed this Court's decision to the Tenth Circuit. (Doc. # 1115.) After considering the briefs and the record, the Tenth Circuit vacated this Court's Order (Doc. # 1114) denying CSFC's previous Motion to Unseal Records. (Doc. # 1106.) The Court now considers the Tenth Circuit's instructions in its Order on remand.

II. LEGAL STANDARD

The United States has a long tradition of making its courts open to the public. In fact, "[j]udicial

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[3] *See generally* Press Release, A Just Cause, Advocacy Group, A Just Cause, Questions Juror's Silence Following Guilty Verdict of Six Colorado Executives (IRP6) (Feb. 11, 2014), https://www.prweb.com/releases/2014/02/prweb11573276.htm [https://perma.cc/7MQ2-J9DE].

records are public documents almost by definition, and the public is entitled to access by default." *Riker v. Fed. Bureau of Prisons*, 315 F. App'x 752, 755 (10th Cir. 2009) (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 110, 121 (2d Cir. 2006)). Both the accused and the public benefit from this right to access court proceedings because public access helps promote fair trials. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986). An appearance of fairness, in turn, heightens public respect for the judiciary. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Furthermore, "[t]he institutional value of the open criminal trial is recognized in both logic and experience." *Id*. Public access to the court system extends not only to public proceedings, but to judicial records as well. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 596 (1978).

However, this right of public access to the courts and its records is not absolute. *Id.* at 598. In some cases, the right to an open trial can give way to other interests. *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989). An accused's right to a public trial must be "carefully balanced against the government's competing interest in protecting vulnerable witnesses from embarrassment and harm." *Id*. Courts have concluded that the presumption of public access "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values . . ." *Press-Enter. Co.*, 478 U.S. at 10.

The decision to restrict public access "is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599. "Every court has supervisory

power over its own records and files," and courts may deny public access to court files if the files might become vehicles for improper purposes, such as "to gratify private spite or promote public scandal." *Id.* at 598.

There is "no comprehensive formula" to guide trial courts in determining when public access to judicial documents is properly limited because "[t]he analysis of the question of limiting access is necessarily fact-bound." *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (citing *Nixon*, 435 U.S. at 598). As the Tenth Circuit explains in its Order and Judgment, courts have articulated three relevant factors to consider. (Doc. # 1124 at 20–21.) First, when the district court uses "the sealed documents to determine litigants' substantive legal rights," there is a strong presumption of public access. *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (internal quotation marks omitted). Second, if a criminal hearing is conducted without a jury present, public access is an important way to hold the judge accountable. *Press-Enter. Co.*, 478 U.S. at 12–13. Third, if a court proceeding was already made public, the party's interest in sealing the transcripts of the testimony is diminished. *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007).

Once the trial court has exercised its sound discretion in denying public access to certain judicial records, the trial court is then responsible for narrowly tailoring its restrictions. *Press-Enter. Co.*, 478 U.S. at 10. Any trial court order must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 9–10. Yet "at times the sensitive nature of the sealed judicial documents may warrant

the court justifying the lack of public access in conclusory terms." *Riker*, 315 F. App'x at 755.[4]

Finally, after a court record is sealed and a motion is made to remove that seal, "the district court should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail." *Miller v. Ind. Hosp.*, 16 F.3d 549, 551–52 (3rd Cir. 1994).

III. ANALYSIS

The Tenth Circuit's Order and Judgment instructs this Court to conduct additional analysis before determining that any witness testimony currently under Level 2 restriction (Doc. ## 1107–1109) should be kept sealed. First, because some time has elapsed since the Court issued its Orders restricting access to the hearing transcripts, the Tenth Circuit indicates that the Court "may need to consider whether circumstances have changed" such

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[4] In *Riker*, when the district court sealed the judiciary records to protect Mr. Riker's safety, it described its reasons for the seal in conclusory terms because of the sensitive nature of the sealed material. In contrast, another Tenth Circuit opinion, *Simpson v. Kansas*, holds that the district court's justification for sealing "confidential medical and personal information" is "too broad and conclusory to overcome the presumption against sealing." *Simpson v. Kansas*, 593 F. App'x 790, 799 (10th Cir. 2014). However, the facts of the instant case are much more like *Riker*, which aims to protect the **safety** of a witness, than *Simpson*, which aims to protect the **privacy** of an individual. Here, like in *Riker*, this Court is concerned for the safety of the witnesses that testified in Mr. Walker's § 2255 hearing. Therefore, this Court may sometimes describe its reasoning for sealing certain testimony in conclusory terms so as not to compromise the safety of the witnesses. *See infra* Section III(B)(2)(a).

that unsealing the transcripts is now appropriate. (Doc. # 1124 at 27.) Second, the Tenth Circuit instructs this Court to analyze the facts of the instant case in light of the "the strong presumption in favor of the public right of access" to judicial records, which is heightened when courts rely on sealed testimony to make decisions, those decisions occur in the absence of a jury, and the information that is sealed has already been revealed in open court. (*Id.* at 24.)

Through the lens of this legal analysis, the Tenth Circuit instructs this Court to determine if "a narrower alternative to restricting access to the full transcript" exists. (*Id.* at 27.) Upon analyzing the relevant factors identified by the Tenth Circuit, it is evident that the safety of many of the witnesses is still at risk, and therefore, some, but not all, of the testimony must remain restricted.

A. CIRCUMSTANCES HAVE NOT CHANGED SIGNIFICANTLY

First, the Court considers the extent to which circumstances have changed since its initial Orders restricting access. (Doc. ## 1085, 1114.) The safety and welfare risk to many of the witnesses remains high. A Just Cause, an organization founded by CSFC to act on behalf of and in coordination with the IRP-6, has engaged in a campaign to harass all involved with this case, and the Court has no reason to conclude that it will halt its pattern of harassment. As recently as October 22, 2019, A Just Cause alleged, without evidence, that the Court is concealing misconduct and "secretly used her court to conduct personal attacks against [IRP-6's] Pastor

(Rose Banks) and Church (Colorado Springs Fellowship Church)." A Just Cause, Colorado Federal Judge and Prosecutor Entangled in Misconduct Cover-Up (Oct. 22, 2019), http://www.digitaljournal.com/pr/4481574 [https://perma.cc/68RS-CNTM]. If all witness testimony from the § 2255 hearing were to be unsealed, the Court is concerned that CSFC would turn its attention away from the Court and begin harassing these witnesses. Therefore, the Court determines that circumstances have not changed significantly, and as such, those witnesses who testified about CSFC must remain protected and their testimony will remain sealed.

B. WEIGHING THE PUBLIC'S RIGHT TO ACCESS JUDICIAL TRANSCRIPTS AGAINST THE RISKS TO THE WITNESSES

In order to weigh the public's right to access the judicial transcripts at issue against the risks to the witnesses, the Court must first apply the relevant legal standards, including the additional factors identified by the Tenth Circuit, to the instant case. Second, the Court has reviewed the testimony of the individual witnesses to ensure that any necessary restrictions are as narrowly tailored as possible.

1. Application of Legal Standards

Public access to judicial documents may be restricted in limited circumstances. *Nixon*, 435 U.S. at 598. In the instant case, the relevant facts and circumstances are such that restricting public access is essential to preserving the safety and security of many of the testifying witnesses. The Court is

particularly concerned that, because CSFC has previously engaged in harassment and intimidation tactics, it may do so again, this time targeting witnesses from the § 2255 hearing. The Court does not come to this conclusion lightly.

CSFC lashes out—unrelentingly—towards those whom Pastor Banks perceives to have wronged her or her church. After the initial trial, where the Court made clear that none of the parties were to contact jurors, CSFC staged a coordinated effort to contact and repeatedly harass members of the jury. This continued even after a court order and a stipulation that neither the parties nor anyone acting on their behalf would contact jurors without the Court's permission.

Later, Ms. Lawson, after representing Mr. Walker at sentencing, formally opposed his resentencing. Ms. Lawson even sought to provide rebuttal testimony to convince the Court not to reduce Mr. Walker's sentence. Additionally, A Just Cause's scathing press releases continue, even years after the verdict was entered. This persistent behavior of CSFC demonstrates the type of harassment that witnesses in the § 2255 hearing may face, if their testimony is unsealed.

Furthermore, Ms. Lawson's intentional swapping of a "dummy binder" for the Court's Exhibit Notebook and CSFC's harassment of the jurors demonstrates that CSFC members will go to great, even possibly illegal, lengths on behalf of CSFC. In its appeal brief requesting the unsealing of the § 2255 hearing transcripts, CSFC claims that it wants to determine the extent to which it has been maligned by the testimony. (Doc. # 1116-2 at 3, 6.) This is a disingenuous claim. Members of CSFC

were present in the courtroom throughout the § 2255 hearing, and they generally know what was said. Instead, the Court believes that CSFC wants transcripts of the testimony so that its members, even those who were not present at the hearing, can threaten and harass witnesses who were critical of CSFC. If the Court were to release the detailed testimony of all the witnesses, the precise language would serve only to enflame CSFC and put the witnesses at risk of harm.

Given the past conduct of members of CSFC—harassment of the jury, disparagement of the Court, opposing Mr. Walker's resentencing, and absconding with an evidence binder—the Court is concerned that Pastor Banks and other CSFC members will continue their pattern of harassing behavior and will use certain witness testimony to "gratify private spite." *Nixon*, 435 U.S. at 598. After carefully examining the facts in the instant case, the Court determines that this is one of those cases in which the right of public access to judicial records is outweighed by the importance of protecting certain witnesses from further harm. *Davis*, 890 F.2d at 1109.

The bar for restricting public access to judicial records is high, and the Court does so only when the risk to the witnesses is significant. *Id.* Some of the testimony in this case does not meet that standard, and therefore, can be released in full. *See infra* Section III(B)(2)(b). On the other hand, even after considering this high legal standard, the Court determines that the testimony of many witnesses must remain sealed. *See infra* Section III(B)(2)(a). In reaching that decision, the Court considers in detail the three particular factors that the Tenth Circuit

highlighted in its Order and Judgment. (Doc. # 1124.) Specifically, the Tenth Circuit emphasized: reliance on sealed records to determine substantive rights; the absence of a jury; and whether sealed information has already been disclosed.

a. Relying on Sealed Judicial Records to Make a Judgment

There is a strong presumption in favor of public access to judicial records, particularly when a district court uses sealed documents to determine litigants' substantive legal rights. *Pickard*, 733 F.3d at 1302. The tradition of open proceedings helps alleviate concerns about judicial bias. *Id.* Here, in determining Mr. Walker's resentencing, the Court considered only testimony given in open court. This public access mitigates concern about using the restricted testimony to determine Mr. Walker's substantive legal rights and undermines any argument that the Court's ruling was made based on testimony unavailable to the public. After considering this factor, the Court determines that, because it allowed public access to the proceedings, restricting access to the testimony of witnesses who are at risk of harassment is the most appropriate way to "carefully balance[]" the public's right of access to the transcripts with safety concerns for the witnesses. *Davis*, 890 F.2d at 1109.

b. Absence of a Jury

Absence of a jury makes the importance of public access to a proceeding even more significant. *Press-Enter. Co.*, 478 U.S. at 12–13. This helps keep the

judge accountable and promotes respect for the judiciary. *Id.* Again, the Court allowed full public access to the proceeding at issue, which was attended by members of the public. A Just Cause even issued multiple press releases about the hearing, which amplified the public's awareness of the Court's decisions. *See, e.g.*, Press Release, A Just Cause, Maligned Denver Federal Judge Shortens IRP6 Defendant's Sentence Based on Fantastic Lies (July 6, 2017), http://www.releasewire.com/press-releases/release-828015.htm [https://perma.cc/64VQ-DFSH]; Press Release, A Just Cause, Colorado Federal Judge Accused of Slandering Colorado Springs Pastor, Church, and Religion from the Bench (July 10, 2017), http://www.releasewire.com/press-releases/release-829509.htm [https://perma.cc/RBQ3-7VVK]. In considering this factor, the Court finds that, although there was no jury present, there was attendance by and engagement from the public, which helps keep this Court accountable.

Furthermore, the presence of a jury helps protect the defendant from unfair treatment during trial. *Davis*, 890 F.2d at 1109 (noting that "[o]ne of the major purposes for the public trial guarantee . . . is to safeguard the defendant from potentially perjurious or abusive testimony."). In the instant case, Mr. Walker, the defendant, is not at risk of unfair treatment regarding the sealing of the transcripts because he was the party who requested the restrictions. Instead, the Court is concerned about unfair treatment and harassment of Mr. Walker, as well as other witnesses, if the records are **not** sealed. Therefore, one of the ultimate goals of having a jury present for court proceedings—protecting the defendant—is actually best

accomplished by upholding the Level 2 restriction on certain witness testimony.

c. Sealed Information Has Already Been Disclosed

When information is disclosed in public court hearings, this undermines privacy concerns about judicial transcripts. *Mann*, 477 F.3d at 1149. As discussed previously, all the witness testimony in the § 2255 hearing was given in an open courtroom. Where, as here, witnesses face a significant risk of harassment, the distinction between merely hearing their testimony audibly as opposed to accessing transcripts of the testimony matters significantly. If the Court were to release the testimony of many of the witnesses, those not present at the hearing could identify, locate, and harass those who gave testimony critical of CSFC. As indicated by CSFC members' prior harassment of Jurors, this concern is not theoretical.

Jury selection, like the witness testimony in this proceeding, was public. But once CSFC members obtained a written list of the names of the jurors, CSFC members began harassing jurors methodically. The Court is concerned that, if certain written witness testimony is released, this could lead to harassment of the witnesses, as it led to harassment of the jurors. Therefore, the testimony of many of the witnesses must remain under Level 2 restriction. However, this analysis is necessarily "exercised in light of the relevant facts and circumstances" of the testimony of each of the witnesses. *Hickey*, 767 F.2d at 708.

2. Narrowly Tailoring Restrictions on Witness Testimony

As the Tenth Circuit instructed in its Order and Judgment (Doc. # 1124), this Court has reexamined the witness transcripts in the instant case to determine whether the restrictions on public access can be more narrowly tailored. *See Press-Enter. Co.*, 478 U.S. at 10. The Court now narrowly tailors its restrictions to the § 2255 hearing transcripts by releasing the statements of the Court and releasing the testimony of some of the witnesses.

First, A Just Cause continues to publish press releases alleging that the Court wants to keep transcripts sealed to hide the Court's misconduct.[5]

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[5] *See* Press Release, A Just Cause, 10th Circuit Judges and Harvey Weinstein Have Much in Common, Says Advocacy Group: Colorado Federal Judges Abuse Power and Cover Misconduct (Dec. 4, 2017), http://www.releasewire.com/press-releases/10th-circuit-judges-harvey-weinstein-have-much-in-common-says-advocacy-group-900336.htm [https://perma.cc/8TVG-63GZ] ("'Why are all documents from Walker's habeas proceeding sealed and Judge Arguello's actions being kept secret and hid (sic) from the public?' questions Stewart. 'In my view, this entire proceeding was not only a fraud but a feeble attempt by Judge Arguello and the government to absolve themselves of wrongdoing,' says Stewart."); Press Release, A Just Cause, Impeachment Sought Against Colorado Federal Judge for Intentionally Violating Federal Laws: Investigation by Office of Attorney Regulation Counsel Exposes Misconduct by Federal Judge Christine Arguello (June 4, 2018), http://www.releasewire.com/press-releases/impeachment-sought-against-colorado-federal-judge-for-intentionally-violating-federal-laws-988851.htm [https://perma.cc/G8MA-X7K3] (alleging that "Judge Arguello sealed these proceedings to conceal misconduct by her and her clerks."); Press Release, A Just Cause, Colorado Federal Judge and Prosecutor Entangled in Misconduct Cover-Up (Oct. 22, 2019), http://www.digital

The Court takes that accusation seriously, but it has nothing to hide. The Court dispels that notion by releasing all statements by the Court during the § 2255 hearing, except any names of witnesses whose identities are sealed. This action is both responsive to CSFC's concerns and attentive to the legal principle that public access to courts helps promote fair trials and a respect for the judiciary. *Press-Enter. Co.*, 478 U.S. at 7; *Globe Newspaper Co.*, 457 U.S. at 606.

Second, the Court takes seriously the concerns of CSFC, which worries that "misinformation and innuendo about . . . CSFC was laced throughout the [§] 2255 hearing," and this could have an "adverse impact on its ministry." (Doc. # 1106 at 1, 3.) As the Tenth Circuit recognizes in its Order and Judgment (Doc. # 1124 at 30), when a party is concerned that its reputation may be diminished because of testimony, "keeping the transcript out of the public eye" may be the best way to protect that party's reputation. The same logic applies here: CSFC's reputation will be best protected by not releasing testimony that criticizes it. As set forth below, the Court has "narrowly tailored" its restrictions to allow for as much public access as possible without providing additional fodder for harassment. *Press-Enter. Co.*, 478 U.S. at 10.

The Court has determined that the testimony of thirteen witnesses will remain under Level 2

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journal.com/pr/4481574 [https://perma.cc/68RS-CNTM] (claiming "Judge Arguello took her concealment of misconduct to another level, this time sealing an entire IRP6 related proceeding from public view where it is alleged she secretly used her court to conduct personal attacks

restriction, while the testimony of two witnesses is released in full.[6]

a. Witness Testimony to Remain Under Level 2 Restriction[7]

The purpose of keeping certain records sealed is twofold: the Court is concerned both with protecting the safety and welfare of the witnesses and with protecting CSFC against any potentially slanderous statements made about it during the § 2255 hearing. The Court deliberately describes its reasoning for maintaining the Level 2 restriction on these witnesses' testimony without revealing specific details, because disclosing the substance of the witnesses' testimony to justify its seal would undermine the very purpose of the seal. *See Riker*, 315 F. App'x at 755 (articulating that the "sensitive nature of the sealed documents" can warrant "conclusory treatment").

Although the Court determines that the entirety of the testimony of the following witnesses must remain sealed, the Court identifies, for ease of the Tenth Circuit's review, certain citations in the transcripts that may either threaten the safety of the witnesses or potentially slander CSFC. See *Press-Enter. Co.*, 478 U.S. at 9–10 (explaining that a

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[6] Although sixteen witnesses originally testified in the § 2255 hearing, the Court has already unrestricted the testimony of one of the witnesses—Gwendolyn Lawson. (Doc. # 1102.) Therefore, this Court limits its analysis to the transcripts of the testimony of the fifteen remaining witnesses.

[7] In an attempt to protect the witnesses, the Court identifies the witnesses by number, as opposed to name, using the order in which they appeared in front of the Court.

trial court order must be "specific enough that a reviewing court can determine whether the closure order was properly entered").

Witness #1[8]

The testimony of Witness #1, Mr. Walker, must remain at Level 2 restriction because he spoke critically about CSFC, and therefore, the public disclosure of his testimony could threaten his personal safety. Maintaining a Level 2 restriction is essential to limit "private spite" and to protect Mr. Walker. *Nixon*, 435 U.S. at 598.

Witnesses #2 and #7[9]

Both Witness #2 and Witness #7 work at the Federal Bureau of Prisons in Florence, Colorado. Because their testimony reflects negatively on some

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[8] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #1: (Doc. # 1107 at 26:25–27:3, 27:11–15, 28:2–12, 30:1–11, 31:9–22, 34:3–6, 35:13–15, 37:19–25, 38:1–14, 39:18–21, 45:19–21, 47:8–16, 49:9–25, 50:1–11, 60:12–13, 62:5–23, 65:3–20, 68:9–14, 69:17–25; 70:1–6, 71:9–11, 74:25, 75:1–10, 83:2–7, 85:6–25, 92:1–15, 97:7–11, 98:11–17, 99:4–25, 100:1–23, 102:3–5, 108:11–21, 119:19–22, 121:7–9, 122:6–19, 139:15–16, 141:2–5, 146:9–12, 149:5–16, 155:13–21, 157:9–21, 162:3–10, 166:1–6, 178:5–15).

[9] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #2: (Doc. # 1107 at 182:1–3, 183:11–22, 184:8–13, 184:23–24, 185:14–25, 187:3–9, 192:4–6); and Witness #7: (Doc. # 1108 at 151:16–20, 152:21–23, 153:19–25, 154:6–12).

CSFC members, both witnesses are at risk of harassment. The Court's concern for the safety of these witness is exacerbated because they may have daily contact with incarcerated CSFC members at the Federal Bureau of Prisons. Redacting their names will not sufficiently protect these witnesses because their identities may easily be determined through the particular details of the testimony. Therefore, the Court determines that maintaining a Level 2 restriction is essential to preserving both Witness #2's and Witness #7's safety, and that this overcomes any legitimate interest the public has in viewing the transcript. *Press-Enter. Co.*, 478 U.S. at 10.

Witness #3[10]

Witness #3 is an expert witness. Because full disclosure of Witness #3's testimony could embarrass one of the CSFC members, Ms. Lawson, the Court is concerned that Witness #3 is at risk of being a target of harassment by CSFC. The Court considered the Tenth Circuit's suggestion of releasing the testimony with narrowly tailored redactions of Witness #3's identity. (Doc. # 1124 at 25.) However, because the witness' identity could be determined through docket

[10] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #3: (Doc. # 1107 at 198:15–23, 199:10–16, 200:11–14, 202:10–25, 203:1–24, 204:4–24, 205:2–6, 206:3–16, 208:3–6, 208:21–25, 209:1–9, 212:10–14, 212:24–25, 213:1–25, 216:4–15, 217:2–8, 219:20–24, 220:20–23, 222:3–14, 223:10–23, 225:20–23, 226:1–15, 227:10–18, 230:1–17, 233:8–12, 238:5–8, 241:17–21, 242:1–6, 244:7–9, 249:10–18, 250:18–21, 256:7–16, 257:21–25, 258:1–2, 258:15–24, 259:3–5).

entries, simply redacting Witness #3's name would not be sufficient, as CSFC could then connect Witness #3's identity with the corresponding testimony. Therefore, this Court keeps the entirety of Witness #3's transcript sealed, as this is the best way to protect this vulnerable witness from "embarrassment and harm." *Davis v. Reynolds*, 890 F.2d at 1109.

Witness #5[11]

Witness #5 has already endured harassment from Pastor Banks, and therefore, the Court is very concerned that Pastor Banks and other CSFC members could use Witness #5's testimony to "gratify private spite" by harassing this witness with additional vigor. *Nixon*, 435 U.S. at 598. Therefore, the Court maintains the Level 2 restriction on Witness #5's testimony.

Witness #6[12]

Witness #6, an expert witness, testified extensively about this witness's examination of, and

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[11] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #5: (Doc. # 1108 at 45:10–15, 46:9–20, 49:4–12, 51:14–24, 52:2–18, 59:14–17, 60:3–25, 61:1–10).

[12] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #6: (Doc. # 1108 at 73:13–25, 74:1–13, 75:7–11, 76:6–25, 77:1–2, 77:16–20, 78:11–17, 80:17–25, 81:2–22, 82:6–25, 83:1–6, 83:19–24, 84:20–23, 89:8–20, 90:8–25, 91:1–17, 96:6–13, 116:2–11, 118:17–24,122:13–24, 134:11–14, 143:15–19, 144:15–25).

conversations with, Mr. Walker. Because this testimony describes what Mr. Walker experienced and how this relates to Witness #6's determination that Mr. Walker was under the undue influence of Pastor Banks, the Court is concerned that both Witness #6 and Mr. Walker could be retaliated against for Witness #6's testimony. Preserving both Witness #6's and Mr. Walker's safety are interests that outweigh the presumption of public access to the testimony. *See Davis*, 890 F.2d at 1109. Therefore, the Court keeps Witness #6's transcript at a Level 2 restriction.

Witnesses #9–#14[13]

Six former members of CSFC—Witnesses #9–#14—testified about their experiences with the church, their treatment by Pastor Banks, and their treatment by members of CSFC who remained in the church after they left. The Court remains extremely concerned for the safety of the former CSFC members who testified, and fears that any of their

[13] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witnesses ##9–14: (Doc. # 1109 at 8:14–25, 9:1–2, 16:8–10; 18:15-19; 21:19–25; 22:1, 22:13–25, 23:1–3, 23:17–23, 24:13–25, 25:1, 27:5–11, 29:6–10, 33:5–25, 36:10–13, 37:5–25, 38:1–20, 41:1–25; 42:1–25; 43:1–16, 46:10–25, 52:24–25, 54:4–13; 61:3–7, 61:18–25, 62:1–15, 66:10–23, 67:2–22, 75:17–21, 77:18–24, 80:8–12, 83:5–25, 88:5–11, 89:14–25, 90:1–23, 91:20–23, 104:3–11, 109:2–10, 111:17–25, 112:1–10, 114:8–25; 115:1–5, 117:12–22, 120:3–5, 121:1–8, 121:21–25, 122:1–22, 128:3–25, 129:1–8, 130:17–21, 131:2–19, 133:1–25, 134:1–25, 135:1–21, 140:14–18, 141:8–15, 145:2–25, 156:1–5).

testimony may be used by CSFC in retaliation against those witnesses.

The former members of CSFC spoke very personally about the circumstances that led to either their expulsions from CSFC or their choices to leave CSFC. Because of this, simply redacting their names would not protect their identities. As a result, the Court finds that the public's general right to access to these records is outweighed by the "higher value[]" of preserving the safety of these witnesses. *Press-Enter. Co.*, 478 U.S. at 10.

Witness #15[14]

Witness #15 testified as an expert witness. Because this witness' testimony contradicts the public image that CSFC seeks to project to the Colorado Springs community, Witness #15 could be at risk of harassment if this witness' testimony is released. Though the Tenth Circuit suggested that it might be possible to release the testimony of expert witnesses with redactions, the Court remains concerned that the identity of Witness #15 can be determined through docket entries. If Witness #15's identity is linked to this witness' testimony, Witness #15 could incur significant harassment. Therefore, "in light of the relevant facts and circumstances" of this case, this Court determines that the testimony

[14] The Tenth Circuit may wish to consult the following citations in the sealed record, which this Court cites as support for its decision to seal the entire testimony of Witness #15: (Doc. # 1109 at 151:10–23, 152:2–25, 153:1–3, 153:15–18, 153:20–24, 154:9–17, 157:3–14, 161:12–25, 162:1–25, 163:1-19, 164:12–23, 165:20–25, 169:4–15, 182:16–23, 193:12–14, 195:14–25, 196:1–7, 197:19–23, 201:8–14, 204:20–25, 205:1–6, 207:2–20).

of Witness #15's testimony must remain sealed. *Nixon*, 435 U.S. at 599.

b. Witness Testimony to be Unsealed

Witness #4

Witness #4, Vernon Lee Gaines, was the second process server who attempted to serve Pastor Banks with a subpoena. (Doc. # 1108 at 9–10.) Mr. Gaines describes the steps he took to locate Pastor Banks and serve process on her. (*Id.* at 10–32.) After carefully considering both Mr. Gaines' testimony and the Tenth Circuit's Order and Judgment (Doc. # 1124 at 25), the Court concludes that Mr. Gaines is not at risk of harassment because he does not speak negatively about CSFC. Therefore, public interest in Mr. Gains' testimony outweighs any risk to Mr. Gains. The Court releases the transcript of Mr. Gaines' testimony without any redactions.

Witness #8

Witness #8, Joshua Lowther, was co-counsel for Mr. Walker and his codefendants during their sentencing and other post-conviction matters. (Doc. # 1108 at 159–61.) After carefully reviewing the transcript of his testimony in light of the Tenth Circuit's analysis in the Order and Judgment, the Court determines that Mr. Lowther's testimony is not likely to be used for "a spiteful or scurrilous purpose." (Doc. # 1124 at 25 n.12.) Therefore, the public's right to access judicial records outweighs other competing concerns, and Mr. Lowther's testimony will be released in full.

IV. CONCLUSION

For the foregoing reasons, the Court UNSEALS the transcripts IN PART:

1. The Court MAINTAINS the Level 2 restriction with respect to the testimony of Witness #1, Witness #2, Witness #3, Witness #5, Witness #6, Witness #7, Witnesses ##9–14, and Witness #15;

2. The Court LIFTS the Level 2 restriction with respect to the testimony of Witness #4 and Witness #8; and

3. The Court LIFTS the Level 2 restriction with respect to any statements by the Court, except those which reveal the identities of protected witnesses.

Any interested parties may submit a request and payment to the Court Reporter for a certified transcript of statements that are no longer under a Level 2 restriction.

DATED: November 21, 2019

BY THE COURT:

/s/ CHRISTINE M. ARGUELLO
United States District Judge

FILED August 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-1246
(D.C. Nos. 1:15-CV-02223-CMA &
1:09-CR-00266-CMA-1)
(D. Colo.)

In re: COLORADO SPRINGS
FELLOWSHIP CHURCH,
Petitioner.

ORDER

Before **MATHESON**, **McHUGH**, and **EID**, Circuit Judges.

This matter is before us on a petition for a writ of mandamus by Colorado Springs Fellowship Church (CSFC). CSFC seeks an order of this court directing the district court to comply with this court's mandate on remand from our decision in *United States v. Walker*, 761 F. App'x 822, 838 (10th Cir. 2019). CSFC also asks us to direct that the underlying district court case be reassigned to a different district court judge. We hold that the extraordinary remedy of mandamus is not warranted at this time.

The underlying case is a proceeding under 28 U.S.C. § 2255 brought by Gary L. Walker, who was a member of CSFC. In *Walker*, we held that the district court had abused its discretion when it denied CSFC's motion to unseal the transcript of an evidentiary hearing. 761 F. App'x at 836-38. In vacating the district court's order and remanding for further proceedings, we directed:

> On remand, the district court should consider the factors that heighten the public right of access to the transcript of Mr. Walker's § 2255 hearing, address how the interests advanced by Mr. Walker connect to the restriction placed on public access to the testimony of each witness, and consider whether there exists a narrower alternative to restricting access to the full transcript. Finally, because a non-insignificant amount of time has elapsed since the district court restricted access to the judicial records, the district court may need to consider whether the circumstances have changed so as to diminish Mr. Walker's interests.

Id. at 838.

Our mandate issued on March 18, 2019. CSFC quickly moved this court to enforce the mandate. We denied that motion without comment. On June 9, 2019, CSFC filed a motion in the district court asking it to direct the clerk to unseal all records in Walker's § 2255 proceeding. To date, the district court has not acted on that motion, nor has it complied with this court's mandate in *Walker*.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). "Three conditions must be met before a writ of mandamus may issue. First, because a writ is not a substitute for an appeal, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." *Id.* at 1187 (internal quotation marks omitted). "Second, the petitioner must demonstrate that his right to the writ is clear and undisputable. Finally, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (citation and internal quotation marks omitted).

CSFC contends that the district court has ignored this court's clear and indisputable mandate and that there is no reason for the district court's delay in complying with the mandate. But to the extent that CSFC contends this court's mandate in *Walker* simply ordered the district court to unseal the hearing transcript, we disagree and point to the clear wording of our decision directing the court to consider the appropriate legal standard in deciding whether, and to what extent, to restrict access to the transcript. 761 F. App'x at 838. CSFC also argues it has no other means to obtain the relief it seeks. As noted, CSFC has already moved in the district court to have all of the case records unsealed, but the district court has not yet acted on that motion.

This court has found a clear and indisputable right to relief in the context of a district court's dispositional delay, but under circumstances substantially more egregious than those presented

here. In *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990), we held that the district court's failure to decide a habeas action that had been at issue for fourteen months, for no reason other than docket congestion, warranted issuance of a writ directing the court to hear and decide the matter within sixty days. In contrast, the district court here has delayed acting on our mandate for a period of over four months.

In addition, the district court's failure to act in *Johnson* delayed the resolution of the prisoner's habeas action. "[W]rits of habeas corpus are intended to afford a swift and imperative remedy in all cases of illegal restraint or confinement." *Id.* at 1284 (internal quotation marks omitted). Indeed, while courts may generally "determine the order in which civil actions are heard and determined," they must "expedite the consideration of any action brought under [the habeas statutes]." 28 U.S.C. § 1657(a). Here, the district court's failure to act on this court's mandate has not similarly delayed the resolution of Walker's § 2255 proceedings. Under the circumstances presented, we cannot say that the district court has violated a "plainly defined and peremptory duty," *Johnson*, 917 F.2d at 1285, to comply with this court's mandate within the relatively short period of time the court has had the case on remand. Thus, CSFC has not demonstrated an entitlement to mandamus relief at this juncture.

That said, we emphasize the importance of timely compliance with our mandate. Moreover, our decision in *Walker* was grounded on the strong presumption in favor of the public's right of access to court records, *see* 761 F. App'x at 836-38, which continues to be restricted in contravention of our

mandate. We therefore make clear that our denial of CSFC's request for mandamus relief is without prejudice to renewal should substantial additional delay occur.

CSFC also asks this court to direct that the underlying case be reassigned to a different district court judge because Judge Arguello has exhibited bias against it and its pastor. CSFC cites comments by Judge Arguello during Walker's resentencing after the district court granted his § 2255 motion—comments that we noted in our decision in *Walker*, *see id.* at 827-28. We have inherent authority to reassign a case to a different district court judge on remand. *United States v. Roberts*, 88 F.3d 872, 885 (10th Cir. 1996). But we exercise that authority "with extreme reluctance." *Id.* And here, CSFC did not ask for, nor did we include, such an order when we remanded to the district court in *Walker*.

Mandamus is an appropriate vehicle to review a district court's denial of a motion for recusal. *Id.* But CSFC has not sought Judge Arguello's recusal in the district court. CSFC therefore fails to show that it has no adequate remedy other than mandamus to obtain such relief.

The petition for a writ of mandamus is denied.

Entered for the Court

/s/ ELISABETH A. SHUMAKER, Clerk

FILED January 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-1415
(D.C. Nos. 1:15-CV-02223-CMA
and 1:09-CR-00266-CMA-3)
(D. Colorado)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

GARY L. WALKER,
Defendant - Appellee.

GWENDOLYN MAURICE LAWSON, DEMETRIUS K. HARPER, CLINTON A. STEWART, DAVID A. ZIRPOLO, and KENDRICK BARNES,*
Movants - Appellants.

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*Collectively, we refer to these five appellants as the "17-1415 Appellants." Section II(A) discusses the proper identity of the Movants-Appellants in Case Number 17-1415. In short, although the notice of appeal also identified David A. Banks as an appellant, Gwendolyn Maurice Lawson's representation of Mr. Banks terminated prior to the motions and notice of appeal she filed on behalf of herself, the other named Appellants in Case Number 17-1415, and Mr. Banks.

No. 18-1273
(D.C. No. 1:15-CV-02223-CMA
and 1:09-CR-00266-CMA-3)
(D. Colorado)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

GARY L. WALKER,
Defendant - Appellee.

COLORADO SPRINGS FELLOWSHIP CHURCH,
Movant - Appellant.

ORDER AND JUDGMENT**

Before **BRISCOE**, **MURPHY**, and **McHUGH**, Circuit Judges.

** After examining the briefs, the appellate appendices, and the restricted records provided by the government, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Gary L. Walker, a former member of the Colorado Springs Fellowship Church ("CSFC"), was convicted of one count of conspiracy to commit mail fraud arising out of a business operated by CSFC members. He filed a 28 U.S.C. § 2255 motion, in part raising a claim of ineffective assistance of sentencing counsel. The district court convened an evidentiary hearing, at which sixteen witnesses testified, including Mr. Walker; former CSFC members; and Gwendolyn Maurice Lawson and Joshua Lowther, counsel for Mr. Walker at sentencing. The district court concluded Ms. Lawson, who is a member of the CSFC, operated under a conflict of interest because Pastor Rose Banks of the CSFC dictated counsel's strategy.

Mr. Walker moved to restrict access to the transcript of his § 2255 hearing, and the district court granted the motion. Ms. Lawson, on behalf of herself and Mr. Walker's codefendants, twice moved to obtain the hearing transcript. The district court predominantly denied the motions but permitted Ms. Lawson access to the portion of the transcript containing her own testimony. Ms. Lawson, again on behalf of herself and Mr. Walker's codefendants, noticed an appeal, commencing Case Number 17-1415. Thereafter, the CSFC moved to unseal the transcript. The district court denied the CSFC's motion, concluding that releasing the transcript was likely to result in CSFC members harassing and threatening Mr. Walker, as well as the former CSFC members who testified at the § 2255 hearing. The CSFC appealed, thereby initiating Case Number 18-1273.

The 17-1415 Appellants and the CSFC argue to this court that the strong presumption in favor of the

public right of access to judicial records exceeded Mr. Walker's interest in restricting access to the transcript. The 17-1415 Appellants raise four additional arguments for vacating or reversing the district court's denial of their motions to receive the transcript. We vacate the district court's order as to the CSFC and remand for further proceedings because the district court did not adequately account for the strong presumption in favor of public right of access to judicial records and did not narrowly tailor its orders restricting access to the transcript. We, however, affirm the district court's rulings on the motions to receive the transcript by the 17-1415 Appellants. Unlike the CSFC, the 17-1415 Appellants did not raise a public right of access argument in their motions to the district court. And the four remaining arguments of the 17-1415 Appellants are either also unpreserved or wholly without merit.

I. BACKGROUND

A. *Mr. Walker's Conviction & Sentence*

Mr. Walker, as well as his codefendants David A. Banks, Demetrius K. Harper, Clinton A. Stewart, David A. Zirpolo, and Kendrick Barnes, were all members of the CSFC. These six individuals helped run IRP Solutions Corporation ("IRP"), a software development company. *United States v. Banks*, 761 F.3d 1163, 1170–71 (10th Cir. 2014). In the course of running IRP, Mr. Walker and his codefendants falsified employee time cards and hired several staffing companies without having any ability to pay for their services. *Id.* at 1171–73. A grand jury

indicted Mr. Walker and his codefendants on various mail fraud and wire fraud charges. *Id.* at 1173. Mr. Walker and his codefendants proceeded pro se for their trial and were convicted on multiple counts. *Id.* at 1173–74.

For purposes of sentencing and appeal, Mr. Walker, Mr. Harper, Mr. Stewart, Mr. Zirpolo, and Mr. Barnes retained Mr. Lowther and Ms. Lawson as counsel.[1] *See id.* at 1169. Meanwhile, after Ms. Lawson withdrew from representing Mr. Banks,[2] the court appointed Charles Henry Torres as counsel for Mr. Banks, *see id.* At sentencing, and over Mr. Walker's objection, the district court concluded Mr. Walker was a leader of IRP and increased his United States Sentencing Guidelines Manual range accordingly. Mr. Walker moved for a downward variance, focusing predominantly on his personal characteristics and the potentially legitimate nature of IRP, but not presenting arguments about how his faith in God, the CSFC, and Pastor Banks influenced his actions when operating IRP. The district court rejected Mr. Walker's request for a downward variance and sentenced him to 135 months' imprisonment. This court affirmed the district court's judgment. *Banks*, 761 F.3d at 1202.

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[1] At that time, Ms. Lawson was married and her legal name was Gwendolyn Maurice Solomon. *See United States v. Banks*, 761 F.3d 1163, 1169 (10th Cir. 2014).

[2] Ms. Lawson's representation of Mr. Banks was limited to a post-trial, presentencing bond hearing.

B. *Mr. Walker's § 2255 Proceeding*

Mr. Walker submitted a § 2255 motion to the district court, accompanied by a motion to restrict access to his § 2255 filing. The § 2255 motion and the memorandum in support of the motion to restrict are marked as "restricted document- Level 2" such that only Mr. Walker, the government, and the court can access the documents. Mr. Walker's § 2255 motion raised three claims, including that Ms. Lawson operated under an actual conflict of interest when representing him at sentencing because Pastor Banks directed Ms. Lawson's mitigation strategy. The Government filed a non-restricted response to Mr. Walker's § 2255 motion. The district court convened a three-day evidentiary hearing, at which sixteen witnesses testified.[3] The witnesses included (1) Mr. Walker; (2) Vernon Lee Gaines, a process server; (3) Ms. Lawson; (4) Mr. Lowther; (5) several former CSFC members; and (6) a witness offered as an expert for the standard of a reasonably competent criminal defense attorney. Each witness testified in open court. The district court granted Mr. Walker's § 2255 motion as to his claim that Ms. Lawson operated under an actual conflict of interest when she represented him at sentencing. At resentencing, the district court reduced Mr. Walker's sentence to seventy months' imprisonment.

After announcing Mr. Walker's new sentence, the district court addressed Mr. Walker's relationship with the CSFC and Pastor Banks, a discussion which sheds some light on the restricted

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[3] The minute entries from the hearing reflect that fifteen witnesses testified. A review of the transcript reveals a sixteenth witness testified.

documents that we have reviewed but do not discuss in our opinion. In short, the district court noted the control the CSFC and Pastor Banks held over Mr. Walker during the commission of his offense, including how Pastor Banks required Mr. Walker to discontinue communication with his parents if he wanted to remain in the CSFC. The district court also praised Mr. Walker for divorcing himself from the beliefs of the CSFC and questioned whether Pastor Banks espoused values consistent with Christianity. Finally, the district court outlined actions taken by Pastor Banks subsequent to Mr. Walker questioning her divine prophecies, actions which the court had deemed harassing. Included in those actions were Pastor Banks (1) excommunicating Mr. Walker from the CSFC, (2) ordering Mr. Walker's wife and son not to have any further contact with Mr. Walker, and (3) writing Mr. Walker a letter in which she attributed his father's cancer and the proliferation of his own muscle disease to his decision to speak against her and the CSFC by filing his § 2255 motion.

C. *Motions to Restrict, to Receive Transcript, & to Unseal*

Following his resentencing hearing, Mr. Walker moved to restrict access to the transcript of his § 2255 hearing, supporting his motion to restrict with a document that, itself, is restricted. Through a text order accompanied by a restricted access written order, the district court granted Mr. Walker's motion to restrict. Thereafter, Ms. Lawson, on behalf of herself and purportedly as counsel for Mr. Walker's codefendants, moved to receive the transcript from

the day on which she testified, June 15, 2017.[4] In advancing the motion, Ms. Lawson relied on 28 U.S.C. § 753 and her need to review the transcript in preparation for defending against the attorney disciplinary proceedings. The district court granted the motion with respect to Ms. Lawson's own testimony but denied the motion with respect to the other witnesses who testified on June 15, 2017. In support of the partial denial, the district court cited its text order granting Mr. Walker's motion to restrict, but it did not provide Ms. Lawson with any of its analysis.

Thereafter, Ms. Lawson, again on behalf of herself and Mr. Walker's codefendants, moved to receive the transcript of all three days of the § 2255 hearing. This motion argued CSFC members never harassed any of the witnesses and challenged the propriety of the district court's decision to grant Mr. Walker § 2255 relief. The district court entered a text order denying the motion to receive a transcript of all three days of testimony "for the same reasons as stated in [its partial denial of Ms. Lawson's motion to receive the transcript of all witnesses on the day she testified]." 17-1415 App'x at 38. Ms. Lawson, again on behalf of herself and Mr. Walker's codefendants, filed an appeal. *See* Notice of Appeal, *United States v. Harper*, No. 1:09-cr-00266-CMA-2, (D. Colo. Nov. 10, 2017) ECF No. 1093. In pertinent part, the notice of appeal reads:

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[4] Sometime after the resentencing hearing but before this motion to receive the transcript, the district court judge initiated attorney disciplinary proceedings against Ms. Lawson in the Colorado Supreme Court and the District of Colorado.

> Gwendolyn M. Lawson Attorney of Record for co-defendants, Demetrius K. Harper, Kendrick Barnes, Clinton A. Stewart, David A. Banks and David Zirpolo in the above named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from Orders 1090 and 1092 denying access to the transcripts for the June 12, 15 and 16, 2017 from Gary Walker Evidentiary Hearing . . . .

Id. And, Ms. Lawson filed the notice of appeal in Mr. Harper's case rather than Mr. Walker's case. *See id.*

Thereafter, the CSFC, through counsel other than Ms. Lawson, moved to unseal the transcript of the § 2255 hearing, arguing (1) it had a private interest in the transcript because statements in the transcript impugned its reputation in the community and (2) a general First Amendment and common law public right of access to judicial records independently countenanced against the sealing of the transcript. In an unrestricted order, the district court denied the CSFC's motion, concluding the CSFC primarily sought the transcript for personal purposes and faulting the CSFC for failing to advance a "less intrusive alternative[]" than sealing the entire record. 18-1273 App'x at 84. The CSFC timely appealed, with Ms. Lawson representing the CSFC on appeal. We consolidated the appeals in cases 17-1415 and 18-1273.

II. DISCUSSION

Before reaching the merits of these appeals, we address three preliminary matters: (1) the identity of

the appellants in case number 17-1415, (2) our jurisdiction over these appeals, and (3) the parties' motions to supplement the record on appeal. **A. *Identity of Appellants in Case No. 17–1415*** Case No. 17-1415 is an appeal from two district court orders: (1) Docket Number 1090, which denied Docket Number 1088—the motion to receive the transcript of the June 15, 2017, portion of the § 2255 hearing; and (2) Docket Number 1092, which denied Docket Number 1091—a motion to receive the full transcript of the § 2255 hearing. The motions identify "Gwendolyn M. Lawson, Attorney at Law and Defendants, Demetrius K. Harper, David A. Banks, Clinton A. Stewart, David A. Zirpolo, and Kendrick Barnes, by and through their attorney" as the movants. 17-1415 App'x at 26, 31. Further, the notice of appeal identifies Ms. Lawson, Mr. Harper, Mr. Barnes, Mr. Stewart, Mr. Banks, and Mr. Zirpolo as parties to the appeal. And, as noted above, the notice of appeal was filed in Mr. Harper's case.

From this, we conclude that, in addition to Ms. Lawson, Mr. Harper, Mr. Barnes, Mr. Stewart, and Mr. Zirpolo were movants below and are appellants in Case Number 17-1415.[5] However, we reach a

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[5] We acknowledge the docketing statement filed by Ms. Lawson in this court identifies only herself as an appellant. However, under Federal Rule of Appellate Procedure 3(b)(1), "[w]hen two or more parties are entitled to appeal from a districtcourt judgment or order, and their interests make joinder practicable, *they may file a joint notice of appeal. They may then proceed on appeal as a single appellant*." (emphasis added). Thus, where the motions identified Ms. Lawson, Mr. Harper, Mr. Barnes, Mr. Stewart, and Mr. Zirpolo as movants and the notice of appeal identified the same as appellants, Ms. Lawson was not required to identify Mr. Harper, Mr. Barnes, Mr.

different conclusion with respect to Mr. Banks. In 2011, prior to the sentencing proceeding, Ms. Lawson moved to withdraw from representing Mr. Banks, and a magistrate judge granted the motion. Thereafter, for purposes of sentencing and appeal, Mr. Torres represented Mr. Banks. And nothing in the record, such as a new entry of appearance by Ms. Lawson on behalf of Mr. Banks, suggests Mr. Banks subsequently sought Ms. Lawson's legal services. We, therefore, conclude Ms. Lawson lacked a basis to file the motions and notice of appeal on behalf of Mr. Banks and we do not include him as an appellant in Case Number 17-1415.

B. *Jurisdiction over Appeal*

We ordered the parties in both appeals to file jurisdictional memoranda addressing whether Appellants need certificates of appealability (COAs) for this court to possess jurisdiction over the appeals. The Government and the Appellants in both appeals argue COAs are not needed because Appellants are not § 2255 movants and are not appealing from the district court's order granting in part and denying in part Mr. Walker's § 2255 motion. Mr. Walker agrees the CSFC does not need a COA but argues the 17-1415 Appellants need a COA to the extent they seek to challenge the district court's ruling on Mr. Walker's § 2255 motion.

Whether a party needs a COA is a threshold jurisdictional question. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on

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Stewart, and Mr. Zirpolo on the post-notice-of-appeal docketing statement.

the merits of appeals from habeas petitioners."). Thus, although the parties are largely in agreement that Appellants do not need COAs, we must assure ourselves that COAs are not required before considering the merits of the appeals. *See Chavez v. City of Albuquerque*, 402 F.3d 1039, 1043 (10th Cir. 2005) ("[W]e have a continuing obligation to assure ourselves that appellate jurisdiction exists."); *see also Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951) (noting that parties cannot consent to the expansion of federal court jurisdiction).

Section 2253 of Title 28 establishes when a COA is required: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . *the final order* in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1) (emphasis added). Meanwhile, Federal Rule of Appellate Procedure 22 also addresses the issuance of a COA, stating:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by . . . a 28 U.S.C. § 2255 proceeding, *the applicant* cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If *an applicant* files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) . . . along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, *the applicant* may request a circuit judge to issue it.

Fed. R. App. P. 22(b)(1) (emphases added). Based on the emphasized language in 28 U.S.C. § 2253(c)(1) and Federal Rule of Appellate Procedure 22(b)(1), we conclude Appellants are not required to obtain a COA relative to their challenge to the district court's decision to restrict access to the § 2255 hearing transcript.[6]

First, by its terms, § 2253(c)(1) applies when an appeal is taken from "*the* final order" in a § 2255 proceeding; but Appellants appeal from orders other than the final order granting Mr. Walker relief. Second, Rule 22(b)(1) focuses on the "applicant" needing to obtain a COA but does not place the same requirement on other individuals, such as Appellants, who might appeal from a collateral order in the course of a § 2255 case. *See United States v. Pearce*, 146 F.3d 771, 773 (10th Cir. 1998) ("[M]ost courts have held that Congress intended to require a

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[6] To the extent the 17-1415 Appellants seek to challenge the district court's decision to grant Mr. Walker § 2255 relief, we need not opine on whether a COA is required because a more apparent jurisdictional defect—a lack of standing— precludes reaching the merits of their potential argument. Parties have standing to challenge an action, if they "suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). Where a party relies on a "threatened injury" the "injury must be 'certainly impending'" to confer standing, and a speculative or attenuated injury will not suffice. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Here, the 17-1415 Appellants do not identify any already-sustained injury resulting from the district court's grant of habeas relief and their suggested prospective injuries are speculative and attenuated. Thus, the 17-1415 Appellants lack standing to challenge the district court's decision to grant Mr. Walker § 2255 relief.

certificate only in an appeal by an *applicant* for a writ.").

Our conclusion is consistent with the primary purposes of the COA requirement: "to protect government officials from the need to respond to large numbers of insignificant appeals." David G. Knibb, Federal Court Appeals Manual § 16.2 (6th ed. 2018); *see* 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3968.1 at 1–2 (4th ed. 2008) ("Courts have noted that the COA requirement serves to protect the government from having to defend against frivolous appeals."). But very few appeals from § 2255 proceedings involve collateral matters, such as the denial of a motion to access a transcript of a proceeding. Thus, the government would not be flooded with appeals if a COA is not required before this court can take jurisdiction over appeals from matters collateral to the § 2255 proceeding. Our conclusion is also consistent with the conclusion we reached in an unpublished order where we held § 2255 applicants appealing from the denial of a motion to unseal did not need a COA. *See United States v. Pickard*, 733 F.3d 1297, 1301 n2. (10th Cir. 2013) ("This court previously determined that Defendants do not need to obtain a certificate of appealability . . . in order to appeal the district court's decision denying their motion to unseal because that motion is separate from any challenge to their convictions and sentences under 28 U.S.C. § 2255." (citing *United States v. Pickard*, Nos. 12–3142, 12–3143, Order (10th Cir. Oct. 2, 2012))). And if § 2255 applicants do not need COAs to appeal the denial of a motion to unseal, it follows non-applicants do not need COAs.

C. *Motions to Supplement*

The 17-1415 Appellants, the CSFC, and Mr. Walker all separately move to supplement the record on appeal. We outline the legal standard for when supplementation is permissible before analyzing the three motions to supplement.

1. Legal Standard

A party may supplement the record pursuant to either Federal Rule of Appellate Procedure 10(e) or the inherent equitable power exception to the constraints placed on supplementation by Rule 10(e).

Although "Rule 10(e) allows a party to supplement the record on appeal," it "does not grant a license to build a new record." *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (internal quotation marks omitted). Under Rule 10(e), a party may modify the record on appeal "only to the extent it is necessary to 'truly disclose what occurred in the district court.'" *Id.* (quoting Fed. R. App. P. 10(e)(1)). To that point, as a general rule, "[t]his court will not consider material outside the record before the district court." *Id.*; *cf. Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1502 n.12 (10th Cir. 1994) ("Although this court may appropriately take judicial notice of developments that are a matter of public record and are relevant to the appeal, our review of a grant of summary judgment is limited to the record before the trial court at the time it made its ruling." (citation omitted)).

Apart from Rule 10(e), "under some circumstances, we have an inherent equitable power

to supplement the record on appeal." *Kennedy*, 225 F.3d at 1192 (citing *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986)).[7] In determining whether proposed supplemental material qualifies for the inherent equitable power exception to Rule 10(e), a court should evaluate factors such as: "1) whether 'acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue;' [and] 2) whether remand for the district court to consider the additional material would be contrary to the interests of justice and a waste of judicial resources."[8] *Id.* at 1191 (quoting *Ross*, 785 F.2d at 1475).

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[7] Although *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000), involved an appeal from the denial of § 2255 relief where the rules governing the development of the record are more exacting, *see* Rules 7 & 8 of the Rules Governing §§ 2254 & 2255 Proceedings, this court has cited *Kennedy* and the inherent equitable power exception in appeals from non-§ 2255 proceedings, *see Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n.11 (10th Cir. 2010); *see also Breen v. Black*, 709 F. App'x 512, 514 (10th Cir. 2017); *Chytka v. Wright Tree Serv., Inc.*, 617 F. App'x 841, 846 (10th Cir. 2015); *Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 817 (10th Cir. 2008).

[8] *Kennedy* identified a third factor specific to an appeal from the denial of § 2255 relief, a factor which is not applicable in this case. *See* 225 F.3d at 1191 (identifying third factor as "whether supplementation is warranted in light of the 'unique powers that federal appellate judges have in the context of habeas corpus actions'" (quoting *Ross v. Kemp*, 785 F.2d 1467, 1475 (11th Cir. 1986))).

2. The 17-1415 Appellants' Motion

The 17-1415 Appellants seek to supplement the record with two e-mails Ms. Lawson received from her ex-husband, Stanley Solomon, a former CSFC member who testified at the § 2255 hearing. These e-mails were not part of the record before the district court. Accordingly, the e-mails cannot be added to the record through Rule 10(e). Furthermore, the e-mails shed little to no light on any matter dispositive to these appeals such that the factors underlying the inherent equitable power exception to Rule 10(e) counsel against supplementation. Therefore, we deny the 17-1415 Appellants' motion to supplement.

3. The CSFC's Motion

The CSFC moves to supplement the record with (1) an undated letter from a CSFC member to Mr. Walker's probation officer detailing Mr. Walker's August 28, 2018, attempted delivery of a birthday card to Kyle Walker—Mr. Walker's son and a member of the CSFC; and (2) an August 28, 2018, letter from Kyle Walker. As both of these letters were drafted subsequent to the district court's last order on June 1, 2018, the letters were not part of the district court record and are not proper materials for supplementation under Rule 10(e). Furthermore, the letters do not prove relevant to the public right of access argument upon which we resolve the CSFC's appeal. Therefore, the factors underlying the inherent equitable power exception to Rule 10(e) counsel against supplementation, and we deny the CSFC's motion to supplement.

4. Mr. Walker's Motion

Mr. Walker moves to supplement the record with (1) a June 14, 2018, e-mail from a CSFC member to Mr. Walker's counsel; (2) a radio advertisement about the district court judge; and (3) a letter from the Colorado Supreme Court Office of Attorney Regulation Counsel indicating that the disciplinary action instituted by the district court judge against Ms. Lawson was resolved in Ms. Lawson's favor. The first two items post-date the district court's June 1, 2018, order such that supplementation is not appropriate under Rule 10(e). Furthermore, the first two items are neither dispositive nor relevant to the issues that dominate this matter. Accordingly, the inherent equitable power exception to Rule 10(e) does not favor supplementation of the first two items, and we deny Mr. Walker's motion as to those two items.

Regarding the letter from the Colorado Supreme Court Office of Attorney Regulation Counsel, matters in state bar disciplinary proceedings are subject to judicial notice. *Rose v. Utah State Bar*, 471 F. App'x 818, 820 (10th Cir. 2012); *see White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (identifying "state bar record reflecting disciplinary proceedings" as documents "appropriate for judicial notice"). And where we may take judicial notice of a matter that occurs subsequent to the district court's ruling, supplementation is permissible. *See Magnum Foods, Inc.*, 36 F.3d at 1502 n.12. Furthermore, the letter is relevant to Ms. Lawson's argument that she has a personal interest in the full transcript because she needs it to properly defend against the state disciplinary proceeding. Accordingly, we grant Mr.

Walker's motion with respect to the letter from the Colorado Supreme Court Office of Attorney Regulation Counsel. However, because Ms. Lawson acknowledges in her reply brief that the state disciplinary proceeding was resolved in her favor, we see no need to delay issuance of our ruling to allow Mr. Walker to formally supplement the record. Rather, we accept as true that the state disciplinary proceeding concluded, but we permit Mr. Walker ten days from the issuance of this opinion to supplement the record.

D. *Analysis of Merits of Appeals*

We state the standard of review and the requirements governing preservation of arguments before outlining the law surrounding the public's right of access to judicial records. Thereafter, we address the public right of access argument in each appeal, concluding the district court abused its discretion when it denied the CSFC's motion to unseal but that the 17-1415 Appellants failed to preserve a public right of access argument. Finally, we consider and reject the 17-1415 Appellants' four additional arguments for vacating or reversing the district court's orders denying their motions to receive the transcript.

1. Standard of Review

The district court's decision to seal or unseal documents is reviewed for an abuse of discretion, but any legal principles the district court applied when making its decision are reviewed de novo. *Pickard*, 733 F.3d at 1302. We apply the overarching abuse of

discretion standard because the decision whether to seal or unseal is "necessarily fact-bound." *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985). A district court abuses its discretion where it "(1) commits legal error, (2) relies on clearly erroneous factual findings, or (3) where no rational basis exists in the evidence to support its ruling." *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1295 (10th Cir. 2018); *see Pickard*, 733 F.3d at 1302 (district court abuses its discretion if it "appl[ies] incorrect legal principles").

2. Preservation Requirement

"An appellant can fail to preserve an appeal point through either forfeiture or waiver." *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 531 (10th Cir. 2016). "A federal appellate court will not consider an issue not passed upon below." *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). "Consequently, when a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review." *Id.* Finally, where a party forfeits an argument by not raising it in district court, we will only overlook the forfeiture if the party advancing the argument on appeal presents the argument through the lens of plain error review. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.").

3. Public Right of Access Argument

On appeal, the Appellants argue the district court, when granting Mr. Walker's motion to restrict the § 2255 hearing transcript and denying the various motions to gain access to said transcripts, failed to accord proper weight to the public right of access to inspect judicial records. We outline the prevailing legal standard before analyzing the issue as to each appellate case.

a. *Legal standard*

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted). Generally, this right is not conditioned "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Id.* Rather, "[t]he interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies." *Id.* at 597–98. Likewise, the common law right to access court records "is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *Hickey*, 767 F.2d at 708.

Based on these principles, "there is a *strong presumption* in favor of public access" as "the interests of the public . . . are presumptively paramount[] [when weighed] against those advanced by the parties." *Pickard*, 733 F.3d at 1302 (emphasis

added) (internal quotation marks omitted). And at least three factors may amplify this strong presumption in favor of public access. First, the purposes behind allowing public access to judicial records are heightened when "the district court used the sealed documents to determine litigants' substantive legal rights." *Id.* (internal quotation marks omitted). Second, where a criminal proceeding does not involve presentation to a jury, the importance of public access to the proceeding is "even more significant." *See Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 12–13 (1986) (applying right to access to preliminary hearings); *cf. In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 179 (5th Cir. 2011) ("[T]he fact that there is no jury at the sentencing proceeding, in contrast to jury trials, heightens the need for public access."). Third, where the information sealed has already been disclosed in a public proceeding, a party's personal interest in sealing the material is diminished.[9] *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007); *see Pickard*, 733 F.3d at 1305 ("The fact that some of the sealed information has already been made public suggests that much of the information . . . could be unsealed.").

The right of public access to judicial records, however, is "not absolute" as "[e]very court has supervisory power over its own records and files," which gives it the authority to seal documents. *Nixon*, 435 U.S. at 598; *see Pickard*, 733 F.3d at

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[9] While we state these three factors as having enhanced the strong presumption in favor of the public interest here, we do not conclude the CSFC necessarily perfected its arguments on each of these factors. Nonetheless, these factors are matters the district court may need to address on remand.

1300. The "strong presumption of openness can be overcome where countervailing interests *heavily outweigh* the public interests in access." *Pickard*, 733 F.3d at 1302 (emphasis added) (internal quotation marks omitted). Put another way, "[t]he party seeking to seal any part of a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)).

Situations where the right to public access is sufficiently subservient to a party's interest include where the records are likely to be used for "improper purposes," including "'to gratify private spite or promote public scandal'" or to "serve as reservoirs of libelous statements for press consumption." *Nixon*, 435 U.S. at 598 (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)). However, any denial of public access to the record must be "*narrowly tailored* to serve th[e] interest" being protected by sealing or restricting access to the records. *Press-Enter. Co.*, 478 U.S. at 13–14 (emphasis added); *see Pickard*, 733 F.3d at 1304 (noting that district court, when sealing record, should consider whether supplying a redacted version of the record would adequately protect the interests of the party seeking the seal); *cf. Waller v. Georgia*, 467 U.S. 39, 48 (1984) ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, *the closure must be no broader than necessary to protect that interest*, [and] the trial court must consider reasonable alternatives to closing the proceeding."

(emphasis added)). And a district court abuses its discretion if it does "not narrowly tailor its order" closing the record to public inspection. *See Davis v. Reynolds*, 890 F.2d 1105, 1110 (10th Cir. 1989).

After "a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents. This is true even if the case in which the documents were sealed has ended." *Pickard*, 733 F.3d at 1300 (citations omitted). If after a court seals its records a motion is made "to remove such a seal, the district court should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail." *Miller*, 16 F.3d at 551–52. And, when reviewing a motion to unseal, the district court must remember that "the party seeking to keep records sealed bears the burden of justifying that secrecy," as the granting of the earlier motion to seal does not shift the burden onto the party seeking to unseal. *Pickard*, 733 F.3d at 1302; *see id.* at 1303– 04 (holding district court abused its discretion where it did not continue to "apply the presumption of public access to judicial records" when confronted with motion to unseal). Finally, in granting a motion to seal, or denying a motion to unseal, "[t]he trial court must articulate [the interest warranting sealing] 'along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Phoenix Newspapers, Inc. v. U.S. Dist. Court for the Dist. of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998) (quoting *Press-Enter. Co.*, 478 U.S. at 9– 10).

b. *Analysis as to the CSFC*

The CSFC presented a public right of access argument to the district court when moving to unseal the transcript.[10] Accordingly, the CSFC's argument is properly before us. And, after a review of the full record, including the transcript of the § 2255 hearing, we conclude the district court abused its discretion by (1) not fully acknowledging the strong presumption in favor of the public right of access, including several factors that heightened the strong presumption in this instance; (2) failing to narrowly tailor its orders restricting access to the record and, relatedly, failing to connect the interests asserted by Mr. Walker to the sealing of the testimony of *each witness* at the § 2255 hearing; and (3) faulting the CSFC for not proposing an alternative to sealing the entire record. We address each abuse of discretion in turn.

When granting Mr. Walker's motion to restrict and denying the CSFC's motion to unseal, the district court failed to acknowledge and account for three facts that heightened the already strong presumption in favor of the public right of access. First, the district court relied on the § 2255 hearing testimony to grant Mr. Walker relief. *See Pickard*, 733 F.3d at 1302. Second, the proceeding, although technically civil, impacted Mr. Walker's criminal

[10] The CSFC moved to unseal the entire record in Mr. Walker's § 2255 proceeding. The district court, however, only addressed the motion relative to the hearing transcript. And, on appeal, the CSFC does not specifically argue that the district court's failure to address its motion relative to sealed documents other than the transcript was error. Thus, we confine our analysis to what the district court did decide—that the transcript of the hearing would not be unsealed.

sentence and occurred in the absence of a jury. *See Press-Enter. Co.*, 478 U.S. at 12–13. Third, not only was the § 2255 hearing not sealed such that the information restricted was already exposed to the public but during Mr. Walker's resentencing hearing, the district court, in open court, discussed aspects of the restricted record.[11] *See Mann*, 477 F.3d at 1149; *see also Pickard*, 733 F.3d at 1305. In not acknowledging and addressing these facts in its orders restricting the transcript and denying the CSFC's motion to unseal, the district court either failed to apply the appropriate legal standard or failed to adequately articulate its analysis in support of restricting the record so as to permit meaningful appellate review.

Next, by restricting access to the entire transcript, the district court failed to narrowly tailor its order to the interest asserted by Mr. Walker—that he and the former CSFC members that testified were likely to face harassment if the CSFC gained access to the transcript. It is not apparent why restricting access to the testimony of Mr. Lowther, who served as counsel for Mr. Walker and four of his codefendants, and of Mr. Gaines, who served process on Ms. Lawson, furthers the personal interest advanced by Mr. Walker.[12] Certainly, the district

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[11] At least one member of the CSFC, Ms. Lawson, was present at the resentencing hearing, and the transcript of the resentencing hearing is not restricted.

[12] We observe that, despite not having access to the transcript, the CSFC was well aware of Mr. Lowther's and Mr. Gaines's identities and roles in the proceedings. Yet the district court did not cite any evidence suggesting CSFC members took steps to harass Mr. Lowther or Mr. Gaines. Nor is it apparent from the record how or why the CSFC would use a transcript of Mr.

court did nothing to tie the private interests raised by Mr. Walker to the need to restrict access to the testimony of these two witnesses. And, the district court also failed to consider whether redacting aspects of the testimony of other witnesses, especially the expert witnesses, would allow for the unsealing of their testimony.[13] Interestingly, the district court, in its order denying the CSFC's motion to unseal, implicitly acknowledged it had not narrowly tailored its order granting Mr. Walker's motion to restrict when it stated: "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 transcript[] in [its] entirety is warranted." 18-1273 App'x at 84 (emphasis added). But if the restriction was necessary to protect only "virtually all of the witnesses," it follows that the restriction was not necessary for the protection of at least one witness. Yet, the district court did not follow our precedent and narrowly tailor its orders restricting access to the transcript. As such, the district court abused its discretion.

Finally, the district court erred when it faulted the CSFC for not proposing alternatives to restricting access to the entire transcript. *See id.* ("CSFC presents this Court with no less intrusive

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Lowther's or Mr. Gaines's testimony for a spiteful or scurrilous purpose.

[13] In particular, we are skeptical of the need to restrict entirely access to the testimony of the expert for the standard of a reasonably competent criminal defense attorney, as redacting the expert's name and place of employment is likely sufficient to mitigate the concerns raised by Mr. Walker.

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.'" (quoting *id.* at 67 (CSFC Mot. to Unseal at 3))). But the duty was on the district court, not the CSFC, to consider alternatives to restricting access to the entire transcript. *See Davis*, 890 F.2d at 1110; *Waller*, 467 U.S. at 48. And placing such a duty on the district court, rather than the party seeking access, is logical because the district court had full access to the transcript while the CSFC had no access to the restricted transcript. Thus, the CSFC could not comb through the transcript and meaningfully advance a narrower alternative than unsealing the entire transcript.

Where access to Mr. Walker's filings was restricted *ab initio*, the issue of restricting access to the record proceeded in a quasi-*ex parte* manner, with the individuals and entity against whom Mr. Walker alleged wrongdoing not before the court. But a court must take extra care when granting an *ex parte* motion. Here, the district court issued a series of text orders that neither stated the requirements for restricting access to judicial records nor critically analyzed whether sealing the *full* transcript was appropriate. And while the record supports the conclusion that the CSFC is far from the most upstanding litigant, the court was still required to carefully consider the public's interest in judicial records and craft a narrowly tailored order.

In summation, we conclude the district court abused its discretion when it denied the CSFC's motion to unseal. Accordingly, we vacate the district court's order and remand for further proceedings. On

remand, the district court should consider the factors that heighten the public right of access to the transcript of Mr. Walker's § 2255 hearing, address how the interests advanced by Mr. Walker connect to the restriction placed on public access to the testimony of each witness, and consider whether there exists a narrower alternative to restricting access to the full transcript. Finally, because a non-insignificant amount of time has elapsed since the district court restricted access to the judicial records, the district court may need to consider whether circumstances have changed so as to diminish Mr. Walker's interests. *See Miller*, 16 F.3d at 551–52 ("Even if the initial sealing was justified, when there is a subsequent motion to remove such a seal, the district court should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail.").

c. *Analysis as to the 17-1415 Appellants*

Unlike the CSFC's motion in the district court, neither of the two motions to the district court filed by the 17-1415 Appellants raised a public right of access argument. As such, the argument is forfeited. And although the 17-1415 Appellants raise the argument on appeal, neither their opening brief nor their reply brief presents the argument through the lens of plain error review. This is true even though Mr. Walker, in his response brief, pointed out the forfeiture of the argument. Accordingly, we do not reach the merits of the 17-1415 Appellants' argument to unseal based on a public right of access. *See Richison*, 634 F.3d at 1131 ("[T]he failure to

argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.").

4. Additional Arguments by the 17-1415 Appellants

The 17-1415 Appellants raise four additional arguments for vacating or reversing the district court's orders denying their motions to receive the transcript. These additional arguments range from unpreserved, to meritless, to illogical, to incomprehensible.

a. *Right to Notice Before Restriction*

The 17-1415 Appellants argue the district court had a duty to provide them notice and an opportunity to be heard before granting Mr. Walker's motions to restrict access to the records in his § 2255 proceeding. The 17-1415 Appellants, however, failed to present this argument to the district court; thus, the argument is forfeited. And where the 17-1415 Appellants do not raise this argument on appeal through the lens of plain error review, we do not reach the merits of the argument. *See id* ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.").

b. *Right of access under 28 U.S.C. § 753*

Ms. Lawson argues 28 U.S.C. § 753 grants her a right to receive the transcript. This argument, although presented to the district court, is without merit. The relevant portion of 28 U.S.C. § 753 states:

> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all . . . proceedings in connection with the imposition of sentence in criminal cases. . . . He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. *Upon the request of any party to any proceeding which has been so recorded* who has agreed to pay the fee therefor, or of a judge of the court, *the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings* and attach to the transcript his official certificate, and *deliver the same to the party or judge making the request.*

28 U.S.C. § 753(b) (emphasis added). By its terms, § 753(b) conveys a right of access only to parties to the proceeding and judges of the court. It does not convey any right of access to witnesses such as Ms. Lawson. Furthermore, while Mr. Harper, Mr. Stewart, Mr. Zirpolo, and Mr. Barnes were parties to the criminal trial, they were not parties to Mr.

Walker's § 2255 proceeding. Accordingly, we reject this argument as without merit.

c. Personal interest in transcript

Next, Ms. Lawson argues she has a personal interest in obtaining the full transcript because the transcript contains (1) false statements against her and she cannot defend her name and reputation as an attorney without access to the transcript; and (2) statements relevant to the disciplinary proceedings instituted against her in the Colorado Supreme Court and the District of Colorado. Both of these personal interest arguments were presented to the district court. Ms. Lawson's first argument, however, is illogical. To the extent the transcript contains statements against Ms. Lawson's name and reputation, maintaining the restriction of access and keeping the transcript out of the public eye will protect Ms. Lawson's name and reputation. Ms. Lawson's second argument is partially moot and partially unsupported by the record before us. As Ms. Lawson acknowledges in her reply brief, the disciplinary proceeding in the Colorado Supreme Court was resolved in her favor. *See* 17-1415 Reply Br. at 5 ("The Attorney Regulation has determined that Attorney Lawson has not violated any Rules of Professional conduct and did not provide Mr. Walker ineffective assistance of counsel."). Thus, any need Ms. Lawson had for the full transcript relative to that proceeding evaporated with the termination of the proceeding. As for the disciplinary proceeding in the District of Colorado, Ms. Lawson fails to enlighten us as to the nature of the charge(s) against her. Thus, Ms. Lawson has not demonstrated the

district court abused its discretion when it determined that providing her with a transcript of her own testimony was sufficient to permit her to defend against the allegations levied by the district court judge.

d. *Violation of Federal Rule of Appellate Procedure 4*

Finally, Ms. Lawson argues the district court, by denying her access to the full transcript, violated her constitutional right to appeal, as provided by Federal Rule of Appellate Procedure 4. The contours of Ms. Lawson's argument on this point are beyond our powers of comprehension given that (1) the district court docketed Ms. Lawson's notice of appeal; (2) Ms. Lawson presented her appellate arguments to this court; and (3) Federal Rule of Appellate Procedure 4 does not, in and of itself, create any constitutional rights. To the extent Ms. Lawson is trying to argue that we cannot effectively consider her arguments on appeal without access to the transcript, we reviewed the full transcript and would have ruled in Ms. Lawson's favor on the public right of access argument had she had the foresight to include such an argument in the motions to the district court or argue for plain error review in this court. She did not.

III. CONCLUSION

We **DENY** the 17-1415 Appellants' motion to supplement and the CSFC's motion to supplement, and **DENY IN PART** and **GRANT IN PART** Mr. Walker's motion to supplement. Mr. Walker shall

have ten days from the issuance of this opinion to submit the letter from the Colorado Supreme Court Office of Attorney Regulation Counsel. Further, we **AFFIRM** the district court's orders denying the 17-1415 Appellants' motions to receive the transcript. However, we **VACATE** the district court's order denying the CSFC's motion to unseal and **REMAND** for further proceedings consistent with this Order and Judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge