IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	
— *versus* —	:	1:09-cr-00266 (CMA)
	:	1:15-cv-02223 (CMA)
DAVID BANKS, *et al*.,	:	
Defendants,	:	
COLORADO SPRINGS FELLOWSHIP CHURCH,	:	28 U.S.C. § 455 28 U.S.C. § 144
Intervenor,	:	
Movants.	:	Hon. Christine Arguello
	:	U.S. District Judge

MOTION FOR RE-CONSIDERATION TO THE HON. CHRISTINE ARGUELLO, U.S. DISTRICT JUDGE, TO RECUSE HERSELF FROM ALL PROCEEDINGS GOING FORWARD AND RE-ASSIGN THE CASE [Rule 60(b)(6) F.R.Civ.P.]

Comes now the Movants, Intervenor COLORADO SPRINGS FELLOWSHIP CHURCH, and Defendants DAVID BANKS, DEMETRIUS HARPER, DAVID ZIRPOLO, and CLINTON STEWART, by and through their counsel of record, Bernard V. Kleinman, Esq., an attorney duly admitted to practice law before the Bar of this Court,

Seeking an Order from this Court:

1. Vacating the Dismissal as Moot Movants' prior motion to recuse and re-assign;
2. Recusing the Hon. Christine Arguello from all proceedings going forward in this case, pursuant to 28 U.S.C. § 455(a);
3. Re-assigning this matter to another U.S. District Judge for the District of Colorado, pursuant to 28 U.S.C. § 144, and
4. For such other and further relief as this Court shall deem just and proper.

Background

Incorporated herein are the pleadings and prior exhibits and Declarations as set forth in Docket Entry No. 1145.

Following the filing of the Movants' Motion for Recusal and Re-Assignment, on November 21, 2019, within a matter of hours, the Court issued its ruling.

The ruling consisted of two parts:

A. A "Text Only Entry", (Dkt. Entry No. 1147), denying the aforementioned Motion for Recusal and Re-Assignment as "MOOT" as follows:

> ORDER re: [1145] Motion for Recusal. In light of this Court's [1146] Order Unsealing, in Part, Hearing Transcripts, Colorado Springs Fellowship Church's Motion is DENIED AS MOOT. SO ORDERED by Judge Christine M. Arguello on 11/21/2019. Text Only Entry (cmalc2).

B. A decision referenced in the "Text Only Entry", *United States v. Walker*, 2019 WL 6215641 (D. Colo. Nov. 21, 2019). See Exhibit 1.

From the language used in the Text Only Order, it is clear that the Court was of the mistaken opinion that the decision in *United States v. Walker, supra*, addressed and disposed of the arguments and factual assertions made in the Motion for Recusal and Re-Assignment. It clearly did not.

Argument

The District Court, in ruling that its decision regarding the unsealing of portions of the transcript resolved the issues raised in the recusal motion, clearly misapprehended the argument. The continued sealing of the record in the Walker habeas proceeding was merely the symptom of the Court's bias and prejudice — not the actual bias manifested on the record. This is made clear in Movants' motion.

What was, and is, the basis for the District Court's behavior which mandates recusal, is the clear bias, as expressed by the bench, as to both the intervenor, Colorado Springs Fellowship Church, and Pastor Rose Banks.

The November 21 decision at no time or place discusses the specific instances of bias and prejudice raised in the Motion to Recuse. See legal argument as set forth in Motion for Recusal, "Recusal of the Court and Re-Assignment is Merited Under the Circumstances", Dkt. Entry No. 1145, at pp. 7 – 16, relying upon the specific following language from the Tenth Circuit, *viz.*,

> 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 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.

United States v. Walker, 761 Fed. App'x 822, 825 (10th Cir. 2019).

See also Declaration of Rose Banks, at ¶ 9, Dkt. Entry No. 1145-1.

Indeed, the November 21, 2019 opinion that the District Court has issued in *United States v. Walker, supra*, is further evidence of the Court's bias and prejudice as against both Pastor Banks, and the Colorado Springs Fellowship Church that merit both recusal and re-assignment. In this opinion, the Court states, in multiple locations the following:

> Court is concerned about unfair treatment and harassment of Mr. Walker, as well as other witnesses, if the records are **not** sealed.
>
> witnesses who are at risk of harassment
>
> 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."
>
> CSFC's harassment of the jurors
>
> CSFC has previously engaged in harassment and intimidation tactics,
>
> 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.
> [footnote omitted]
>
> witnesses face a significant risk of harassment
>
> CSFC members' prior harassment of Jurors
>
> this could lead to harassment of the witnesses, as it led to harassment of the jurors
>
> Witness #2 and Witness #7 work at the Federal Bureau of Prisons in Florence, Colorado. Because their testimony reflects negatively on some CSFC members, both witnesses are at risk of harassment
>
> 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.
>
> 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.
>
> Witness #15 could be at risk of harassment if this witness' testimony is released

United States v. Walker, supra, passim.

As support for these claims of "harassment" the Court relies upon, and cites to, six separate Press Releases of the organization, A Just Cause. These are the Press Releases that the Court cited to as alleged evidence of the continued or potential harassment of both witnesses and jurors, *viz*.,

> 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].
>
> 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].
>
> 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]
>
> 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]
>
> Press Release, 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]

United States v. Walker, 2019 WL 6215641 at *2 n. 3, *4, *6, *7 n. 5.

Attached hereto are the full texts of all of these Press Releases. See Exhibit 2.

First of all, at no time is there any reference, discussion, analysis, or any mention of the issue of the allegation of the Court's bias and prejudice in its November 21 opinion.[1] The Court's November 21 decision clearly and unequivocally only and exclusively deals with the prior motion to unseal the record, not the motion for recusal.

Secondly, a thorough and close review of the alleged harassing and potentially threatening Press Releases reveals that that they contain no such language. There are no threats against any of the witnesses. There are no threats against any of the jurors.

While the subject Press Release contain criticism of the Court (and even, arguably, what may be termed severe criticism), and its actions, and the actions of the U.S. Attorney, these criticisms are clearly protected by the First Amendment, and can serve as no basis for the allegations of harassment. While the Court might find the 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 generally *Brink v. Muscente*, 2013 WL 236671 at *9 (S.D.N.Y. 2013) (analogizing criticism of members of the bench as "political speech" protected under the First Amendment).

[1] Oddly enough the only time that the Court speaks of "bias" in its decision is when it states: "The tradition of open proceedings helps alleviate concerns about judicial bias." *Id*. at *6. Unfortunately, the Court's paean to "open proceedings" is belied by the fact that of the three days of testimony in which the Court chose to unseal the record (June 12, 15 and 16, 2017)), there were approximately 16,000 lines of record of which only about 2,600 were unsealed, leaving fully 85% remaining under seal!

Whether this is the compliance with the rule of open records or not is a matter more appropriately to be determined by the Court of Appeals.

Compare *Feiger v. Michigan Supreme Court*, 535 F.3d 955 (6th Cir. 2009), in which the Court of Appeals ruled on the sanction imposed upon a member of the bar who engaged in "vulgar and personally abusive comments" about members of the Bench. *Id*. at 964-65. In the case at Bar a reading of the subject Press Releases would hardly lead one to conclude that they were "vulgar" or contained "abusive comments".

And, needless to say, none of these critical remarks can be reasonably construed as a threat or of a harassing nature as to any of the witnesses or jurors.

Indeed, the citation of the Court to these Press Release, and the above quoted language from the November 21 decision, are clearly further evidence of the Court's bias and prejudice against the Movants that is covered under a Section 455 motion.

As to the allegations made by the District Court as contained in the Circuit's opinion of January 2019, and the November 21, 2019 District Court opinion, as the accompanying Declaration from Pastor Banks makes crystal clear,

> Under penalty of perjury, I state without equivocation that I have never engaged in any acts of harassment, intimidation, coercion or any other conduct as against any of the witnesses at the Walker habeas proceeding, or any of the jurors; nor have I ever encouraged any other members of the Church to engage in such conduct.

Rose Banks' Declaration at ¶ 14.

Furthermore, as Pastor Banks states,

> 16. At no time have I ever been contacted by any member of law enforcement — federal, state or local — in which a claim of harassment, punishable by federal or state law, has been alleged.
>
> 17. At no time have I or the Church ever been named as a defendant in any civil lawsuit —federal or state — alleging harassment, intimidation or coercive behavior, by any of the witnesses or jurors in the Walker habeas proceeding.

Id. at ¶¶ 16, 17.

If the actions of Pastor Banks were, as the District court characterized them, there would have been plenty of recourse both under federal and state law. See18 U.S.C. §§ 1503, 1504,[2] 1512(a)(2), 1513(b); Colorado state law making such actions both criminally and civilly subject to penalty: Colo. Rev. Stat. §§ 18-8-704, 18-8, 705, 18-8-706. See also Colo. Rev. Stat. § 18-8-702, providing for a civil action in the event a witness has been found to have been the subject of a threat or intimidation. Indeed, 18 U.S.C. § 1514 provides for the Government to seek a "restraining order prohibiting harassment of a victim or a witness in a federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists . . ." To no great surprise no such action has been taken as against either the Church or Pastor Banks, notwithstanding the Court's language to the contrary. This is for the simple reason that, in actuality, no "harassment" or other offensive behavior ever took place.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Supreme Court defined a moot case as follows:

> "'[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" . . .. The underlying concern is that, when the challenged conduct ceases such that "'there is no reasonable expectation that the wrong will be repeated,'" . . ., then it becomes impossible for the court to grant " 'any effectual relief whatever' to [the] prevailing party,"

Id. at 287.

This definition of a "moot case" has been repeatedly endorsed and utilized by the Courts, both of this Circuit, and of this District Court. *See, e.g., United States v. De*

[2] It ought be noted that Section 1504, which criminalizes "Influencing juror by writing", is strictly confined to direct private communications with a juror, or jury (either grand or petit). See *In re New Haven Grand Jury*, 604 F. Supp. 453, 457 (D. Conn. 1985); *United States v. Smyth*, 104 F. Supp. 283, 299 (C.D. Cal. 1983).

Vaughn, 694 F.3d 1141, 1157 (10th Cir. 2012); *Wyoming v. U.S. Dep't of Agriculture*, 414 F.3d 1207, 1211-12 (10th Cir. 2005); *Olson v. City of Golden*, 814 F.Supp.2d 1123, 1130-31 (D. Colo. 2011).

Or, "[p]ut another way, a case becomes moot `when a plaintiff no longer suffers "actual injury that can be redressed by a favorable judicial decision."'" *Ind v. Colorado Dep't of Corrections,* 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Rhodes v. Judiscak,* 676 F.3d 931, 933 (10th Cir. 2012).

Indeed, in *Baca v. Colorado Dep't of State*, 935 F.3d 887 (10th Cir. 2019), the Court of Appeals, recognizing that there were undecided issues that remained "alive", found that the subject matter at hand was not moot, and required judicial intervention. *Id*. at 927-28.

In *Riley v. I.N.S.*, 310 F.3d 1253 (10th Circuit 2002), this Circuit adopted the language from the Third Circuit in *Chong v. District Director, I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001), where the Court set forth a four part test to determine if a case is, in fact, moot, *viz*.,

> We will not dismiss a petition as moot if "(1) secondary or 'collateral' injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit."

Riley, supra, 310 F.3d at 1257.

See also *Moongate Water v. Dona Ana Mutual Domestic*, 420 F.3d 1082, 1089-90 (10th Cir. 2005); *Halliburton v. United States Dep't of Labor Div. of Energy Employees Occupational Illness Compensation*, 2018 WL 1256509 at *3 (D. Colo. 2018) (Watanabe, U.S.M.J.); *Olson, supra*, 814 F. Supp.2d at 1132 n. 8.

In the case at Bar it is clear that "collateral" injuries continue both in the public perception of the both the Church and Pastor Banks as a result of the Court's characterizations of both, and that the challenged "wrong" perpetrated by the Court will be repeated as evidenced by the November 21 decision.

If the decision of November 21 is reviewed and analyzed, under the rubric of *City of Erie* and its progeny, it is clear that the issue remains entirely undecided as to the recusal of Judge Arguello. Indeed, as is pointed out *infra*, it is Movants' position that the Court used the opportunity to attempt to comply with the Circuit's decision of January 2019, and the Movants' Motion of June 9, 2019, to further demonstrate its actionable, under Section 455, bias and prejudice as against Pastor Banks and the Church.

As the District Court has failed to rule upon the Motion for Recusal and Re-Assignment, it is respectfully requested that the Court do so with all deliberate speed.

Conclusion

For the all of the foregoing reason, this Court should grant the relief sought herein.

Dated: 06 Dec. 2019
Somers, NY

Respectfully submitted,
Law Office of Bernard V. Kleinman, PLLC

/s/ *Bernard V. Kleinman*

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CERTIFICATE OF SERVICE

I do hereby Certify, under penalty of perjury, that on the 6th day of December, 2019, I did serve the within Motion, Declaration and Exhibits, upon all counsel of record by electronic filing with this Court's ECF system.

Dated: 06 Dec. 2019
Somers, NY

Respectfully submitted,
Law Office of Bernard V. Kleinman, PLLC

/s/ Bernard V. Kleinman