

No. 18-1273
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. WALKER,

Defendant-Appellee.

COLORADO SPRINGS FELLOWSHIP CHURCH,

Movant-Appellant.

UNITED STATES' ANSWER BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

The Honorable Christine M. Arguello, District Judge
D.C. No. 09-cr-00266-CMA/15-cv-02223-CMA

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ORAL ARGUMENT NOT REQUESTED

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PRIOR OR RELATED APPEALS

The issue presented by this appeal is also before this court in *United States v. Walker*, case no. 17-1415, where the appellant Gwendolyn Maurice Lawson appeals an order of the district court denying her motions to unseal transcripts of the evidentiary hearing on Mr. Walker's § 2255 motion. After the briefs were filed in no. 17-1415, this court *sua sponte* consolidated that case and the instant case as to oral argument and disposition. The government notes that the convictions of all defendants, including Mr. Walker, were affirmed in *United States v. Banks, et al.*, 761 F.3d 1163 (10th Cir.2014), *cert. denied*, 135 S.Ct. 308 (Oct. 6, 2014).

JURISDICTIONAL STATEMENT

Jurisdiction in the district court arose under 18 U.S.C. § 3231, where the defendants were charged with mail and wire fraud. On June 1, 2018, the district court entered an order denying a motion filed by the Colorado Springs Fellowship Church [CSFC] to un-restrict certain court records. The CSFC filed a notice of appeal on June 29, 2018. App. 24.¹ This court's jurisdiction arises under 28 U.S.C § 1291.

¹ Citations are to Appellant's "Appendix A Volume 1."

ISSUE

Whether the district court abused its discretion in denying Colorado Springs Fellowship Church's motion to un-restrict transcripts and other documents pertaining to Mr. Walker's motion under 28 U.S.C. § 2255.

STATEMENT OF THE CASE AND FACTS

Following an evidentiary hearing in June of 2017, the district court granted in part defendant Gary Walker's motion under 28 U.S.C. § 2255 and vacated his prior sentence. App. 19 (#1069). He was re-sentenced on June 28, 2017. App. 20 (#1079). Upon motion of Mr. Walker's counsel under D.C.COLO.LCrR 47.1, *id.* (# 1080/1081), the district court ordered that transcripts of the evidentiary hearing were subject to level 2 restriction, *i.e.*, they are available only to Mr. Walker's counsel, the government, and the court. *See* Sealed Attachments (# 1085/1086).²

² Docket entries 1081 (motion) and 1085 (order) are also filed under Level 2 restriction. The government believes that these documents are necessary for this court to review the district court's order restricting the evidentiary hearing transcripts and other documents. This court issued an Order on April 25, 2018, granting the government's motion to file the documents as sealed attachments to its answer brief, in case no. 17-1415.

Attorney Gwendolyn M. Lawson, who was co-counsel for Mr. Walker at his original sentencing hearing, testified at the evidentiary hearing. The district court would later find that Ms. Lawson suffered under an actual conflict of interest while representing Mr. Walker at his original sentencing hearing. The court found that the conflict arose from Ms. Lawson's allegiance to her co-defendants and to her pastor, Rose Banks, who was also the mother of co-defendant David Banks.³ The court also found that these allegiances precluded Ms. Lawson from arguing against a 4-level aggravating role enhancement that was assessed against Mr. Walker and Mr. Banks. Mr. Banks had separate, independent counsel. These findings were made at Mr. Walker's re-sentencing hearing. *See* United States' Answer Brief, case no. 17-1415, Attachment 2 at 3-5. The court then re-sentenced Mr. Walker to 70 months' imprisonment. *Id.* at 24. The court had originally sentenced Mr. Walker to 135 months' imprisonment. *Id.*, Attachment 1 at 57 (#782).

Following Mr. Walker's re-sentencing hearing, the co-defendants and Ms. Lawson filed motions in district court requesting that the district court order the reporter to make available to Ms. Lawson the restricted transcripts of the evidentiary hearing. Counsel for Mr. Walker objected, arguing that Mr. Walker and other witnesses were being subjected to retaliatory harassment

³ Rose Banks, David Banks, and Ms. Lawson are all members of the Colorado Springs Fellowship Church.

by the prior co-defendants, who were also members of the CSFC. On October 31, 2017, the court issued an order granting Ms. Lawson access to a certified copy of her own testimony, but denying her access to the remainder of the transcripts. These matters are before this court in *United States v. Walker*, No. 17-1415.

On February 1, 2018, the Colorado Springs Fellowship Church filed its own motion to unseal the court evidentiary hearing transcripts and certain other documents pertaining to Mr. Walker's § 2255 motion, arguing that the CSFC and the public had a First Amendment right of access to these court records. App. 65.⁴ On June 1, 2018, the district court issued an order denying the motion and finding that the public's right of access to the court records was "far outweighed by the overwhelming need to prevent Mr. Walker and other witnesses from being harmed." App. 79, 83. The Colorado Springs Fellowship Church then noticed this appeal. App. 24 (#1115).

ARGUMENT SUMMARY

In district court, the government neither joined in nor opposed the motion by Mr. Walker's counsel to restrict the transcripts of his evidentiary hearing. Nor did the government take a position, or file a response, to the

⁴ On April 25, 2018, the CSFC also filed a motion requesting a "forthwith ruling" on its motion to unseal the court documents, which the court forthwith denied on April 27th. App. 23-24 (# 1112, 1113).

CSFC's motion to unseal the court documents. The government files this answer brief in order to assist the court in understanding the record and the issues. Consistent with its position below, however, the government does not join in or oppose the position of Mr. Walker's counsel that the transcripts and other documents should remain restricted.

ARGUMENT

THIS COURT WILL NEED TO DECIDE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CSFC'S MOTION TO UNSEAL CERTAIN RECORDS PERTAINING TO MR. WALKER'S § 2255 MOTION

The motion filed below by CSFC asked the district court to unseal transcripts of Mr. Walker's § 2255 hearing, exhibits, and "all documents" associated with the hearing. App. 73. The court denied the motion. App. 79. This court reviews "for abuse of discretion the district court's decisions regarding whether to seal or unseal documents." *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013). A district court ordinarily abuses its discretion only when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Frias*, 893 F.3d 1268, 1275 (10th Cir. 2018), citing *United States v. Munoz-Nava*, 524 F.3d 1137, 1146 (10th Cir. 2008). In *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. 2007), this court stated it would not disturb the district court's decision regarding whether case related information should be sealed unless it had a "definite and firm conviction that [it] made a clear error of judgment or exceeded the bounds of

permissible choice in the circumstances.” *Id.* at 1149 (quoting *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir.1994)).

A. The Hearing Transcripts and Other Documents Were Restricted On Mr. Walker’s Motion⁵

“The party seeking to overcome the presumption of public access to the documents bears the burden of showing some significant interest that outweighs the presumption.” *Pickard*, 733 F.3d at 1302 (citations omitted).

“Consistent with this presumption that judicial records should be open to the public, the party seeking to keep records sealed bears the burden of justifying that secrecy” *Id.* (numerous citations omitted).

In *Pickard*, the burden was on the government “as the party opposing disclosure of the DEA records, to articulate a sufficiently significant interest that will justify continuing to override the presumption of public access” *Id.* at 1303. In this case, however, the government did not seek to have the hearing transcripts or other documents sealed, counsel for Mr. Walker did. At the request of Mr. Walker’s counsel, the district court restricted his § 2255 motion. Shortly after the re-sentencing hearing, Mr. Walker’s counsel moved to restrict transcripts of the evidentiary hearing. The government did not join in Mr. Walker’s motions to restrict, nor did it oppose the motions.

⁵ These proceedings are discussed in the Statement of the Case and Facts, *supra*, and in United States’ Answer Brief, case no. 17-1415.

In support of its motion to restrict the hearing transcripts, Mr. Walker's counsel relied in part upon their previous filings under Level 2 restriction. *See* Sealed Attachments in case no. 17-1415 (#1080/1081), citing (#898/899/899-1). Mr. Walker's counsel also cited generally to the (restricted) testimony of witnesses at the evidentiary hearing. It is counsel for Mr. Walker who have sought to shoulder the burden of showing a sufficiently significant interest to justify continued restriction of the hearing transcripts and other documents. Mr. Walker's counsel insist that disclosure of these materials would expose Mr. Walker and other hearing witnesses to harassment by members of the CSFC. Only Walker's counsel have access to Mr. Walker, his family, and friends. As explained herein and in its earlier answer brief, the government neither joins in nor opposes Mr. Walker's opposition to unsealing the court documents at issue.

B. CSFC's Motion To Unseal and The District Court's Order

CSFC's motion below sought the transcripts, all exhibits at the hearing, and "all documents associated with the hearing" App. 65, 73. CSFC argued that continued sealing of these materials "denies the public an understanding of the basis of the Court's reduction in Defendant's sentence and denies the CSFC and the public the right to access information regarding the misstatements made about the CSFC." App. 65. The motion argues that

access to these materials is necessary because CSFC is “deeply concerned” about disparaging comments made at the hearing, the “adverse impact” of those comments, and its own “credibility in the community.” CSFC also claims that the public had a right to know the facts underlying the court’s decision to resentence Mr. Walker, “especially if the decision was even partially based on misleading and/or untrue statements.” App. 67. The CSFC argues that as members of the public they have standing and a right to access the documents. App. 68-69.

In deciding whether to seal or unseal judicial records, “the district court, in exercising its discretion, must ‘weigh the interests of the public, which are presumptively paramount, against those advanced by the parties.’” *Pickard*, 733 F.3d at 1302 (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir.2011)). In *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) this court acknowledged “the axiom that a common law right exists to inspect and copy judicial records.” But the court also acknowledged some concerns that may overcome the presumption of public access:

[A]ccess has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not ‘used to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case.’ Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant’s competitive standing.

Hickey, 767 F.2d at 708 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)) (citations omitted by the court).

The district court’s order denying CSFC’s motion to unseal acknowledged a general right of public access to judicial records, but noted that the right was not absolute. App. 81. The court found that it was required to balance the right of access against “the need to protect vulnerable witnesses” App. 81, citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984) and *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989). In balancing these competing interests, the court first cited the reasoning in its previous order (#1086) denying Ms. Lawson’s motion to unseal the hearing transcripts. App. 82. As discussed in the government’s opening brief in case no. 17-1415, this order is a text only docket entry. The court’s findings are actually set forth in docket no. 1085, which is filed under restriction.⁶ The government included docket no.1085 in the sealed attachments to its earlier answer brief.

As to CSFC’s argument that their reputation in the community was imperiled, the court found that limiting access to the hearing transcripts served, rather than undermined, this purpose.⁷ The court was dismissive of

⁶ The existence of this Order cannot be discerned from the docket sheet, which says only “RESTRICTED DOCUMENT – Level 2 as to Gary L. Walker.”

⁷ The government suggested the same in its earlier answer brief.

CFSC's concern with Mr. Walker's sentence being reduced, holding that this was in essence an objection to the reduction (which the other defendant members of CSFC did not receive), and that CSFC, did not have standing to object. App. 82.

The court correctly noted that CSFC's motion to unseal did not address the court's previous conclusion that restricting access was necessary to protect witnesses at Mr. Walker's § 2255 hearing. App. 83. The court again relied upon its previous order (#1086) in holding that "the public's right of access is far outweighed by the overwhelming need to prevent Mr. Walker and other witnesses from being harmed." App. 83, citing *United States v. McVeigh*, 918 F.Supp. 1452, 1466 (W.D. Okla. 1996). The court also found that, in light of CSFC's insistence upon obtaining all documents and transcripts pertaining to the § 2255 hearing, no practical alternative existed to sealing the entirety of the evidentiary hearing transcripts. App. 83-84.

C. CSFC's Arguments On Appeal

The CSFC argues that the district court abused its discretion "by denying public access to all judicial records in the [Mr. Walker's] habeas proceeding" Appellant's Opening Brief [AOB] at 16-17. The government notes that this assertion is inaccurate. Not all records pertaining to Mr. Walker's § 2255 proceeding were restricted, although a great many were. The opening brief specifically identifies five documents: docket nos. 899, 900, 902,

922, and 1114. *Id.* at 17. Of these documents, only two are restricted: nos. 899 (a motion to restrict) and 902/904 (Walker’s § 2255 motion). CSFC claims that the government’s answer to Walker’s § 2255 motion is restricted. *See* AOB at 16-17, 23, 44. That is also incorrect. And the claim is puzzling, because CSFC attached a copy of the government’s answer (#922) to its opening brief.⁸

CSFC’s opening brief, filed by Ms. Lawson, first argues at some length that court proceedings historically have been open to the public and that a presumption exists that members of the public have a First Amendment right of access. AOB at 17-22. This is largely accurate, but as the district court found, that right of access is not unqualified. The legal standard is fairly straightforward to state. In *United States v. Pickard*, this court held that “[a] court has authority to seal documents before it, based upon the court’s inherent supervisory authority over its own files and records.” 733 F.3d at 1300 (citations omitted). “A court can order documents sealed if the party moving for sealing is able to show ‘some significant interest that outweighs the presumption’ in favor of open access to judicial records.” *Id.* (quoting *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir.2012)). Applying this

⁸ CSFC claims the government’s answer (#922) was originally “filed in the open,” but then sealed. No citation to the record is supplied for this claim. *See* AOB at 22. In any event, this claim is moot because CSFC has the government’s answer.

standard may be less straightforward. The question then becomes what is a significant interest. This is a heavily fact-dependent inquiry.

In its opening brief, CSFC correctly states that the district court denied their motion to unseal the evidentiary hearing transcripts and other documents in the interests of protecting Mr. Walker and other hearing witnesses from harassment. CSFC acknowledges that the district court is required to balance these interests against the public right of access, but alleges the court below did not conduct a “rigorous analysis” and that its decision to seal “both Mr. Walker’s 2255 habeas motion and the government’s answer brief was an exceptionally egregious abuse of discretion.” AOB at 22-23.⁹

This argument is directed at the district court’s original decision to seal certain documents, rather than at the court’s order denying CSFC’s motion to unseal. The distinction may be significant, because CSFC’s motion below contained little to no analysis addressing why their right of public access was not outweighed by the interests of protecting Mr. Walker and other hearing witnesses. The district court noted this in its order denying the motion to unseal. App. 83 (“CSFC’s motion does nothing to counter or assuage this Court’s concerns about its need to protect the witnesses at Mr. Walker’s 2255

⁹ As noted above, the government’s answer (#922) does not appear to be sealed (on the CM/ECF docket) and is in the possession of the CSFC.

hearing. If anything, it heightens this Court’s concerns”). Having not engaged in “rigorous analysis” – or any analysis – of the competing interests at stake in its motion below, perhaps CSFC is not on solid ground in faulting the district court for this. However, the court largely premised its ruling on its earlier order denying Ms. Lawson’s motion for access to the hearing transcripts. App. 82, 84. This puts CSFC at a disadvantage, because they do not have access to that restricted order. As explained above, most of the evidence of alleged harassment is set forth in a restricted brief filed by counsel for Mr. Walker (#1081) and the court’s restricted order granting the motion to restrict the transcripts (#1085). Mr. Walker’s restricted § 2255 motion also contains attachments that bear upon this issue. CSFC can hardly be faulted for failing to counter arguments and evidence they have not seen.

CSFC’s opening brief is at times repetitive and difficult to follow, but their primary arguments seem to be: (1) they and the public have a right to review the hearing evidence in order to understand why the court reduced Mr. Walker’s sentence; and (2) evidence known to them does not show harassment of Mr. Walker.

1. The reduction in Mr. Walker’s sentence

CSFC claims to be concerned over:

- “possible unfair sentencing disparity to the other 5 co-defendants” AOB at 24.

- the government attorney consenting to a closed sentencing proceeding. AOB at 26.
- the government’s “180-degree reversal” at the hearing regarding positions taken in its answer to Mr. Walker’s § 2255 motion. AOB 37.
- a likely “nefarious” reason for hiding sentencing information from the public. AOB at 40.

The CSFC does not accurately represent the proceedings. The re-sentencing proceeding was not closed. Indeed, Ms. Lawson attended the re-sentencing.¹⁰ For that matter, the evidentiary hearing on Mr. Walker’s § 2255 hearing was not closed. As to the government’s position, most of the passages quoted by CSFC from the government’s answer to Mr. Walker’s § 2255 motion pertain to Mr. Walker’s collateral attack on his conviction, specifically his claim that he was under undue influence (from Pastor Banks) when he chose to proceed *pro se* at trial. *See* AOB at 35-36. The government did not change its position on this issue. As part of the settlement, Mr. Walker abandoned that argument and abandoned his collateral attack on his

¹⁰ That was when the district judge accused her of recording the proceeding on her cell phone. *See* United States’ Answer Brief, No. 17-1415, Attachment 2 at 9-10.

conviction. During his testimony at the hearing, Mr. Walker admitted his involvement in the fraud scheme and expressed genuine remorse.

The disposition of his § 2255 motion was on a very narrow ground: his then-attorney Ms. Lawson had a conflict of interest in representing him and his co-defendants at sentencing, and that conflict adversely affected her representation of Mr. Walker. The government initially opposed this argument, in part on the ground that the sentencing hearing was handled by other counsel, not Ms. Lawson. However, testimony emerged at the evidentiary hearing that placed things in a different light and supported the district court's concerns about a conflict of interest. One critical question was whether Mr. Walker properly received the 4-level enhancement for being a leader or organizer of the fraud scheme. The district court concluded that Ms. Lawson's allegiance to her other clients, as well to her pastor, prevented her from arguing against the 4-level leader/organizer enhancement for Mr. Walker.¹¹ To do so might have implicated, among others, David Banks, the son of Pastor Rose Banks.

CSFC's opening brief makes clear that they strenuously object to the court's finding that an actual conflict of interest occurred. But the district

¹¹ As noted, the court's findings were made at the re-sentencing hearing and are a matter of public record. *See* United States' Answer Brief, No. 17-1415, Attachment 2 at 3-4.

court's reasoning is neither "nefarious" nor hidden. The court's reasoning was logically based upon the evidence and clearly stated on the public record. And as the district court correctly observed in its order denying CSFC's motion to unseal, they have no standing to challenge the court's finding. In *Pickard*, this court held that standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." 733 F.3d at 1301 (quoting *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2661 (2013)). In that case, the petitioners were parties to the proceeding and this court concluded that as former defendants they had standing to request that the court records be unsealed. *Id.* at 1301. Here, these former co-defendants were not parties to Mr. Walker's § 2255 proceeding and may not be able to meet the standard set out in *Pickard*.

CSFC's concern with sentencing disparities among co-defendants is not well-grounded. The basis for the settlement of Walker's § 2255 motion was unique to Mr. Walker. Only two of the defendants received the 4-level leader/organizer enhancement, Mr. Walker and co-defendant David Banks, the son of Pastor Rose Banks. Banks was represented by separate, independent counsel (not the co-counsel for the other defendants). Hence, the other co-defendants have no plausible claim that they were affected by the conflict of interest and no basis for asserting a disparity in their sentences.

2. Alleged harassment of Mr. Walker

CSFC's opening brief vigorously denies that any harassment took place. But as noted above, their motion to unseal below contained little to no argument or evidence on this issue. A number of the arguments in the opening brief appear to be based upon factual allegations made for the first time on appeal, which this court does not normally consider. This court may of course review factual findings in the district court's orders. And as noted earlier, CSFC cannot be faulted for not rebutting factual arguments below that they were restricted from seeing. To the extent CSFC challenges the district court's fact-finding, review is under a very deferential standard. This court reviews factual findings for clear error, and will not disturb such findings unless they have no basis in the record. *See, e.g., United States v. Martin*, 163 F.3d 1212, 1217 (10th Cir.1998).

The critical issue here, however, appears to be the adequacy of the district court's findings in restricted docket entry no. 1085, which is the primary basis for the court's denial of CSFC's motion to unseal and the court's denial of Ms. Lawson's motions to un-restrict the hearing transcripts. As the government noted in its earlier answer brief, discussion of those sealed findings would be tantamount to disclosure of the contents, which the appellees in these appeals are not authorized to do. Had the appellees filed sealed answer briefs, this could have been discussed, but this would have

been unfair to CSFC and Ms. Lawson. They are entitled to know the government's position on these issues. For this reason, and because the government does not support or oppose Mr. Walker's efforts to maintain restriction of the court records in question, the government leaves to this court the task of determining whether the district court's findings are sufficient to outweigh the public interest in open court records.

CONCLUSION

The motion to unseal the evidentiary hearing transcripts was filed below by counsel for CSFC. The United States did not respond to the motion and took no position as to its merits. The United States also takes no position here. Although the government understands Mr. Walker's concerns, it neither joins in nor opposes efforts by Mr. Walker's counsel to maintain the restricted status of the transcripts and other documents.

ORAL ARGUMENT STATEMENT

The United States does not seek argument.

Respectfully Submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

- (1) all required privacy redactions have been made;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee Agent, Version 5.0.6.220, dated 8/28/18, and according to the program are free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Ma-Linda La-Follette
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Ma-Linda La-Follette
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 28.1(e)(2) & 32(a)(7)(C), I certify that the **UNITED STATES' ANSWER BRIEF** is proportionally spaced and contains 4,064 words, according to the Microsoft Word software used in preparing the brief.

s/ Ma-Linda La-Follette
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U.S. Attorney's Office