IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

3. GARY L. WALKER,

Defendant-Movant.

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

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

DEFENDANT'S CLAIMS

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

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

TIMELINESS

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

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

LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE CLAIMS

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

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

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

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

OFFENSE CONDUCT & TRIAL EVIDENCE

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

A. Legal Standard for Waiver of Counsel

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

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

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

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

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

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

B. Factual Background For Waiver of Counsel Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Proceedings re Joint Representation

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

[9] Ms. Solomon later withdrew as counsel for David Banks, who retained separate counsel.
[10] A portion of the proceedings were placed under seal, involving a colloquy between the court and the defendants, because of concern with privileged communications. *Id*. at 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Mr. Walker's Arguments

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

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

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

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

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

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

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

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

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

3. Alleged Misstatements in the Government's Closing Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully Submitted,

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Certificate of Service

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

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s/ *Ma-Linda La-Follette*
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