IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE J. LAWSON, JR., Defendant.	Case No. 3:16-cr-00121-TMB-DMS **FINAL REPORT & RECOMMENDATION REGARDING GOVERNMENT'S NOTICE OF FILING OBJECTIONS TO MAGISTRATE JUDGE'S ORDER [Doc. 494]**

I. INTRODUCTION

On May 29, 2019, the government filed objections (Doc. 494) to this Court's public notice of filing (Doc. 489). The notice announced the Court had found serious government misconduct in this case by certain employees of the Internal Revenue Service and the Department of Justice. These findings were further detailed in a sealed order filed on the same date, referring those employees for investigation by the Internal Revenue Service and Department of Justice (Doc. 488).

The government filed a notice of objections, requesting (1) the notice be removed from the public docket or, in the alternative, sealed pending the results of the government's internal investigations; (2) any reference to the public order as authority in all proceedings be prohibited while so removed or sealed; and (3) upon

completion of the Department of Justice's internal process, a status conference be held to address the appropriate action to be taken regarding the notice (Doc. 494).

The defense filed a response in opposition, arguing the government's Due Process concerns were hollow and noting that the government had not objected to any specific findings of fact or law in either the notice or the sealed order (Doc. 497). The defense further argued that "in light of the strong presumption in favor of public access, parts of the Detailed Order that do not refer to personnel records properly shielded from public view should be released" (Doc. 497 at 4 n.3).

On June 4, 2019, District Judge Timothy Burgess referred the government's notice of objections and the defense response to this Court for consideration (Doc. 498). On December 6, 2019, the Court issued its Initial Report and Recommendation, recommending (1) the public notice of filing at docket 489 remain on the public docket, and (2) the District Court unseal the order finding governmental misconduct at docket 488 (Doc. 512).

The Court subsequently granted the government's motion for an additional thirty days to file objections to the Initial Report and Recommendation (Doc. 514). The motion sought this additional time "to engage other members of the respective management teams [at the U.S. Attorney's Office for the District of Alaska and the Tax Division of the Department of Justice] who were and are not available due to the holiday season, and to more fully examine with those individuals the complex, professionally important and serious issues raised in the court's Initial Report and Recommendation at Docket 512" (Doc. 513 at 2). The government eventually filed

objections (Doc. 515) and the defense did not.

Having considered the objections, the Court now issues this Final Report and Recommendation. For the reasons below, this Court recommends the notice of filing at Docket 489 should remain on the public docket. In light of the public's right of access to court documents, it further recommends the District Court unseal the Order Finding Governmental Misconduct at docket 488, subject to the redactions identified in the Court's sealed proposed redacted order at docket 511.

II. PROCEDURAL HISTORY

On October 18, 2016, the federal Grand Jury returned an indictment charging Dr. Lawrence J. Lawson, Jr. with evasion of individual income taxes for the year 2009 (Doc. 2).[1] Pursuant to Rule 3 of the Local Magistrate Judge Rules, Judge Burgess referred the case to this Court for disposition of pretrial matters. Under the District of Alaska's internal operating procedures, a referral of pretrial matters to a magistrate judge remains in place until explicitly revoked by the District Judge. The referral of pretrial matters remains in place and has never been revoked to date.

On March 9, 2018, the defense filed a motion to suppress arguing the IRS had obtained statements from Dr. Lawson through misleading and deceptive conduct (Doc. 185). On March 16, 2018, the Court granted the government's motion for an

[1] A superseding indictment was filed November 15, 2016, charging additional counts for the same offense for the years 2010, 2011, and 2012, and an additional count of obstruction of due administration of internal revenue laws (Doc. 7); and a second superseding was filed June 19, 2018, charging the same offenses (Doc. 252).

extension of time to respond to the motion to suppress (Doc. 195). After the government filed its response (Doc. 204), this Court held evidentiary hearings on May 17 (Doc. 219) and May 18 (Doc. 220), 2018.

On June 20, 2018, relying in part upon evidence presented during the May hearings, the defense filed a motion to dismiss the indictment, arguing the IRS's investigation into Dr. Lawson's tax practices had been marred by employee misconduct and the prosecution had failed to discharge its discovery obligations (Doc. 254). On August 6 (Doc. 389), August 7 (Doc. 390), and August 8 (Doc. 394), 2018, this Court held additional hearings on the motion to suppress and motion to dismiss. Following the hearing, the Court accepted over-length supplemental briefing from the defense (Doc. 409, 416) and the government (Doc. 406, 423).

On December 26, 2018, this Court issued an order concluding that serious discovery violations had occurred, constituting flagrant government misconduct (Doc. 435). The order stated that a more detailed order would follow and requested further briefing from the parties on the appropriate remedies and sanctions. On January 7, 2019, the government (Doc. 436) and the defense (Doc. 437) filed their supplemental briefing.

On February 19, 2019, before the Court had announced any remedies or sanctions, the parties entered into a plea agreement (Doc. 470). The defendant agreed to plead guilty to the misdemeanor offense of Willful Failure to Pay a Tax in 2009. All other charges were dismissed. The defendant was required to pay a $25.00 special assessment. Pursuant to the plea agreement with prosecutors, no fine was

imposed and no term of imprisonment or probation was imposed (Doc. 501). In light of the plea agreement, this Court recommended the defendant's motion to suppress and motion to dismiss be dismissed without prejudice (Doc. 477, 478). The District Judge adopted the Court's recommendations (Doc. 485).

On May 15, 2019, this Court issued its sealed Order Finding Governmental Misconduct (Doc. 488), further detailing the misconduct announced in its December order. The Court also filed the public notice of filing (Doc. 489). The government did not move before this Court for reconsideration of the order or notice. Nor did it file any objections to the sealed order with the District Court.[2]

It did, however, file objections to the public notice of filing (Doc. 494). As noted, the defense filed a response, requesting the sealed order be unsealed (Doc. 497). A member of the press also sent a letter to the Court, asking for the sealed order to be unsealed. On June 3, 2019, Judge Burgess issued an order formally clarifying that the government's objections and the defense response should first be considered by this Court (Doc. 498).

III. APPLICABLE LAW

A. The Public's Presumptive Right of Access to Court Documents

American courts begin with a strong presumption in favor of public access to court records. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir.

[2] A footnote to the government's objections to the notice of filing makes a gesture toward such an objection. "The United States also objects to the findings of the magistrate judge in the sealed 'Order Finding Government Misconduct.' However . . . such objections are now moot" (Doc. 494 at 2 n.1). No grounds for the objection were described.

2016); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This presumption has historical roots which predate the Constitution. *Warner Communications*, 435 U.S. at 612 (Marshall, J., dissenting).

The presumptive right of access advances important public interests. It is "based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice," *Center for Auto Safety*, 809 F.3d at 1096 (quoting *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1047 (2d Cir. 1995)), and permits citizens to "keep a watchful eye on the workings of public agencies," *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion).

Public access to court records is particularly important where a case has the potential to bring to light failures of the justice system. For example, the Ninth Circuit has observed, "[t]he penal structure is the least visible, least understood, least effective part of the justice system; and each such failure is consequent from the others. Public examination, study, and comment is essential if the corrections process is to improve." *CBS, Inc. v. U.S. Dist. Ct. for the C.D. of Cal.*, 765 F.2d 823, 826 (9th Cir. 1985).

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B. Sources of the Presumptive Right: The Common Law and the First Amendment

The presumptive right of public access finds its authority in two sources: the common law and the First Amendment. *Compare Warner Communications Inc.*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"), *with Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982) (recognizing a First Amendment right of access to criminal trials held by the press and the public); *see also United States v. Schlette*, 842 F.2d 1574, 1581-82 n.4 (9th Cir. 1988) (recognizing both constitutional and common-law grounds for a newspaper's request for disclosure and deciding the request on the common-law ground).

Each source of authority presents different hurdles that must be cleared before the strong presumption in favor of public access is overcome. "The First Amendment is generally understood to provide a stronger right of access than the common law." *United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017).

C. Overcoming the Common-Law Presumptive Right of Access

1. A Trial Court Has Discretion to Withhold Records Where Access is for Improper Purpose

The Supreme Court explained in *Nixon v. Warner Communications, Inc.* that the public's right of access to judicial documents is not absolute. Instead, "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become vehicles for improper purposes." 435 U.S. at 598. Trial courts have discretion, the Court said, to deny access to their files

where access is a vehicle for improper purposes, such as to gratify private spite or promote public scandal, to serve as reservoirs of libelous statements for press consumption, or as sources of trade secrets. *Id.* at 598-99.

2. The Ninth Circuit's Compelling Reasons Test

Since *Warner Communications*, the Ninth Circuit has held that trial courts ought to seal judicial documents only where "compelling reasons" exist. *Kamakana*, 447 F.3d at 1179. It has explained,

> Under this stringent standard, a court may seal records only when it finds 'a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.' The court must then 'conscientiously balance[ ] the competing interest of the public and the party who seeks to keep certain judicial records secret.' What constitutes a 'compelling reason' is 'best left to the sound discretion of the trial court.'

Center for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1096-97 (9th Cir. 2016) (quoting *Kamakana*, 447 F.3d at 1178-79; *Warner Commc'ns Inc.*, 435 U.S. at 598-99).

A party seeking to seal a judicial record bears the burden of showing compelling reasons exist to rebut the common law's strong presumption of public access. *Center for Auto Safety*, 809 F.3d at 1096.

The compelling reasons standard applies so long as the records at issue are more than tangentially related to the merits of a case.[3] *Center for Auto Safety*, 908 F.3d at 1101. It does not matter, for instance, if the motion to be sealed is

[3] One recognized exception is "for sealed materials attached to a discovery motion unrelated to the merits of a case. Under this exception, a party need only satisfy the less exacting 'good cause' standard." *Center for Auto Safety*, 809 F.3d at 1097.

dispositive or not. *Id.* at 109 ("To only apply the compelling reasons test to the narrow category of 'dispositive motions' goes against the long-held interest 'in ensuring the public's understanding of the judicial process and of significant public events.' Such a reading also contradicts our precedent, which presumes that the 'compelling reasons' standard applies to *most* judicial records."). Nor does it matter if the motion to be sealed succeeded or failed. *Id.* at 1102 ("Nothing in our precedent suggests that the right of access turns on any particular result. In fact, in *Kamakana*, our circuit applied the presumption of public access to a summary judgment motion that was 'denied, in large part.'").

3. Records and Proceedings Traditionally Kept Secret

The common law presumes no right of public access, however, to the narrow range of documents that have "traditionally been kept secret for important policy reasons." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). The Ninth Circuit has recognized only two categories of documents as "traditionally kept secret": grand jury transcripts and warrant materials in the midst of a pre-indictment investigation. *Kamakana*, 447 F.3d at 1178.

D. Overcoming the First Amendment's Presumptive Right of Access

"Under the First Amendment, the press and the public have a presumed right of access to court documents." *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990) (referring to *Press—Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985) (*Press—Enterprise I*)). This presumed right can be overcome only by an overriding right or interest based on findings that

closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Id.*

The Supreme Court has established a two-part test for determining whether a First Amendment right of access extends to a particular kind of record or proceeding. *Id.* (citing *Press—Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) (*Press—Enterprise II*)). First, a court must decide whether the type of record or proceeding at issue has traditionally been conducted in an open fashion. *Oregonian Pub. Co.*, 920 F.2d at 1465. Second, the court must determine whether public access to the record or proceeding would "serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the criminal justice system." *Id.*

Under the First Amendment, it is the burden of a party seeking closure of records to present facts supporting closure and to demonstrate that available alternatives will not protect his rights. *Id.* at 1466-67.

E. Redaction Can Sufficiently Safeguard Sensitive Personnel Records

Several courts have allowed information contained in personnel records to be disclosed to the public after sensitive information has been redacted. In many cases, the files under consideration were disciplinary reports.

In *Cobell v. Norton*, for instance, a trial court in the D.C. Circuit[4] concluded

[4] Pursuant to *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980), trial courts in the D.C. Circuit must determine whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs the strong presumption in favor of public access by weighing six factors: (1) the need for public access to the documents; (2) public use of the documents; (3) fact of objection and identity of those objecting to disclosure; (4) strength of the generalized

that the U.S. Treasury's interest in keeping sealed an internal disciplinary report were "easily outweighed by the strong presumption in favor of public access." 157 F.Supp.2d 82, 92 (D.C. 2001). Similarly, in *Robinson v. Bowser*, the trial court determined that certain non-party personnel information should remain sealed, but ultimately concluded that North Carolina laws which protected an employee's personnel file, including any disciplinary action, did not outweigh the public's First Amendment right of access to plaintiff's personnel records, especially where the employee made that information a public matter by bringing the action. No. 1:12CV301, 2013 WL 3791770 at *9-11 (M.D. N.C. July 19, 2013).

The trial judge in *United States v. Stevens* likewise denied the government's request to publicly seal the special investigator's final report, concluding the report would play a significant positive role in informing the public regarding criminal trials in general and the *Stevens* case in particular. 842 F.Supp.2d 232, 242 (D.D.C. 2012); *see also United States v. Stevens*, No. 08-231, 2008 WL 8743218, at *9 (D.D.C. Dec. 19, 2008) (rejecting government's request to seal the redacted complaint, stating, "[t]o say that misconduct by law enforcement officers would not affect the integrity or result of a trial simply because the officers did not testify at trial is baseless; if that were the case, the government would be free to engage in rampant misconduct without risk or ramification, provided the prosecution took care not to call any of the violators as witnesses. Moreover, misconduct by law enforcement officers during the *investigation*, such as that alleged in the complaint . . . could

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property and privacy interests asserted; (5) possibility of prejudice; (6) the purposes for which the documents were introduced.

have an impact regardless of whether the officers testified." (emphasis in original)).

The *Stevens* court did, however, rule it would publish the full results of the special investigator's report only after the Department of Justice had been given an opportunity to review the report and make objections to disclosure. *In re Special Proceedings*, 825 F.Supp.2d 203, 207-09 (D.D.C. 2011).

Finally, in the context of the Freedom of Information Act (FOIA), the United States Supreme Court has concluded that summaries of disciplinary proceedings involving cadets at the Air Force academy constituted "files similar to personnel files" under Exemption 6 of FOIA and authorized the district court to release the files pursuant to a FOIA request so long as the redaction of identifying references was sufficient to protect the cadets from any "clearly unwarranted invasions of privacy." *Department of Air Force v. Rose*, 425 U.S. 352, 381 (1976).[5]

Although FOIA requests may not be directly analogous to the judicial sealing of court records, with the Act, Congress sought to serve interests similar to those underlying the presumptive public right of access: "the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from

[5] Several circuits have followed *Rose* in concluding that personnel records may be disclosed so long as redaction can adequately balance the public's interest in oversight with the government's interest in privacy. *See Chamberlain v. Kurt*, 589 F.2d 827, 841-42 (5th Cir. 1979) (affirming an order under FOIA for partial disclosure of three memoranda on disciplinary proceedings of IRS employees, with names and other identifying information excised); *Painting Industry of Hawaii Market Recovery Fund v. U.S. Dept. of Air Force*, 26 F.3d 1479, 1485-86 (9th Cir. 1994) (holding that payroll records with names, addresses, and social security numbers redacted adequately balanced public's interest in disclosure with employees' privacy interest); *but see also Hunt v. F.B.I.*, 972 F.2d 286, 289-90 (9th Cir. 1992) (rejecting request to disclose redacted FBI file where the file indicated no evidence of wrongdoing on the part of the agent, there was little or no public interest served by disclosure, and "the file cannot be redacted and disclosed without the risk of subjecting that agent to undeserved embarrassment and attention").

public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.* at 361. In other words, the Congressional objective was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Id.* This is substantially the same public oversight function that the presumptive right of access exists to serve.

F. Magistrate Jurisdiction

A District Court may designate a magistrate judge to hear and determine any **non-dispositive** pretrial matter pending before the Court. 28 U.S.C. § 636(b)(1)(A). If a party disagrees with the magistrate judge's determination, the party may, within seven days of the order, file a motion for reconsideration. Dist. Ak. L. Civ. R. 7.3(h).[6]

A party may also file objections[7] to a non-dispositive order with the District Court judge within 14 days of a magistrate judge's order or final recommendation. Fed. R. Crim. P. 59; Local Magistrate Judge Rule 6. After *de novo* review of the objections, a District Court judge may accept, reject, or modify, in whole or in part, the magistrate judge's order or recommendation. Fed. R. Crim. P. 59. The judge may also resubmit the matter to the magistrate judge with further instructions. Fed. R. Crim. P. 59; 28 U.S.C. § 636(b)(1).

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[6] The Local Civil Rules apply in criminal proceedings to the degree their application is not inconsistent with the criminal rules. Dist. Ak. L. Civ. R. 81.1.

[7] The Initial Report and Recommendation stated, "A party may also appeal a non-dispositive order" (Doc. 512 at 12). The government objected that the word "appeal" does not appear in Criminal Rule 59 (Doc. 515 at 4). This objection is well-taken and the language has been revised to better reflect the rule.

IV. DISCUSSION

A. This Court had Jurisdiction to Issue the Sealed Order and Public Notice of Filing

The government's objection states, "given the current procedural posture of this case, the subject employees [referred for disciplinary review by the Court's order] are deprived of a forum to litigate the magistrate judge's findings about their conduct" (Doc. 494 at 2). The District Court dismissed the defendant's outstanding dispositive motions following the defendant's plea of guilty on March 11, 2019 (Doc. 485). Because of this, the government argues, "the magistrate judge's Order (Docket 488) [was] not directed at resolving any issues between plaintiff United States and defendant Lawrence J. Lawson, Jr." (Doc. 494 at 3).

To the extent this objection implies the Court lacked jurisdiction to enter the sealed order or the public notice of filing, it is mistaken.

The Court's Order Finding Governmental Misconduct arose out of litigation over the defendant's motion to suppress and motion to dismiss. Its findings were based largely on facts uncovered during the Court's evidentiary hearings on those motions. But the Order itself was not directed toward the motions' disposition.[8] Instead, it was directed towards the misconduct of government agents in their investigation of Dr. Lawson and the prosecution of their case-in-chief. Making such a finding is appropriate to the extent it is based on the prosecutors' repeated misconduct before the Court over the course of the extensive litigation.

[8] As the government correctly notes (Doc. 494 at 3), the District Court denied the motions as moot following the parties' decision to enter into a plea agreement.

There is no necessity that a particular motion or proceeding be currently underway for a magistrate judge to issue an order finding prosecutorial misconduct during that proceeding. Magistrate judges have authority to control the conduct of litigants appearing before them at all stages of a proceeding. For example, if a prosecutor committed misconduct during an arraignment in a case referred to the magistrate judge, the fact that the arraignment was concluded would not prohibit issuance of an order finding misconduct. Nor would the magistrate judge be required to submit that finding to a District Judge in a report and recommendation. The magistrate judge could, for example, punish the prosecutor summarily by fine or imprisonment, or both, by issuing an order of summary criminal contempt. 28 U.S.C. § 636(e)(2).[9]

The District Court referred all pretrial matters to the Magistrate Judge at the opening of the United States' case against Dr. Lawson. Per the local rules and the court's internal operating procedures, this referral was in place at the time this Court issued its Order in May 2019 and remains in place now.

The Court concluded in December 2018, while the motion to suppress and motion to dismiss were pending before the Magistrate Judge, that serious discovery violations had occurred constituting flagrant government misconduct (Doc. 435). At that time, the Court indicated more detailed findings would follow (Doc. 435). The sealed order and public notice of filing provide the detailed findings. Given the government misconduct announced by the December Order, the detailed findings

[9] Indeed, criminal contempt proceedings were a possible alternative remedy to the Order Finding Government Misconduct.

were necessary to serve the public's interest in "keep[ing] a watchful eye," *Kamakana*, 447 F.3d at 1178, to "serve as a curb on prosecutorial or judicial misconduct [and] further the public's interest in understanding the criminal justice system," *Oregonian Pub. Co.*, 920 F.2d at 1465.

The government protests, "it is undisputed that [even if the relief sought by the defendant were still viable] the magistrate judge could not issue a final order on the defendant's motion to dismiss or suppress" (Doc. 494 at 3). This is irrelevant. As explained, the order was not aimed at resolving the defendant's motions. Moreover, the Court's findings of misconduct were non-dispositive and appropriately issued as an order rather than as a report and recommendation.[10]

B. The Government's Due Process Concerns are Hollow

1. The issues identified by the Court's sealed order were thoroughly litigated by the parties

The government objects, "the United States is effectively foreclosed from having a forum to litigate the issues identified by the magistrate judge in her [sealed] Order at docket 488" (Doc. 494 at 3). Setting to one side for the moment that the government has formally objected only to the public notice of filing and not to the sealed order,[11] this claim is meritless.

The Court's sealed Order Finding Government Misconduct had its genesis in the defendant's motion to dismiss at docket 254. As detailed by

[10] If the finding of misconduct caused the Magistrate Judge to recommend dismissal of a case in response to a pending motion to dismiss, that would be filed as a report and recommendation.
[11] The government's decision to file neither a motion for reconsideration nor objections to the sealed order is discussed further, *infra*, at 17-18.

procedural history, this motion was thoroughly litigated by the parties. The motion requested dismissal of the indictment "based on egregious government misconduct" (Doc. 254 at 2) by "either the IRS agents themselves, or the prosecutors, or both" (Doc. 254 at 19). The Court not only granted the government ten additional days to respond (Doc. 281), it allowed the response to be longer than the local rules permit (Doc. 314). The Court then held evidentiary hearings on August 6 (Doc. 388, 389), August 7 (Doc. 390), and August 8 (Doc. 394), 2018, allowing the parties to present evidence on the issues in Dr. Lawson's motion to dismiss and his earlier motion to suppress.[12] Following the hearings, the defense filed an over-length closing brief (Doc. 409, 416) and the government filed an over-length response (Doc. 406, 423).

So, knowing the allegations of misconduct being leveled at both IRS agents and prosecutors, the government had an opportunity at a t**hree-day hearing** to present evidence and argument. The parties submitted briefing after the conclusion of the hearings, and additional briefing at the Court's request after it announced in December 2018 it had found serious government misconduct. In all, the government filed three different briefs on the topic of misconduct and whether dismissal of the charges was the appropriate remedy for the irregularities. Only in the wake of this extensive

[12] As noted *supra,* additional evidentiary hearings on the motion to suppress had previously been held on May 17 (Doc. 219) and May 18 (Doc. 220), 2018. The prosecution's conduct at these hearings and the evidence presented heavily influenced the Court's findings in the sealed order. The parties also thoroughly briefed the Court on the issues pertaining to the motion to suppress.

litigation did the Court conclude that serious government misconduct had occurred (Doc. 435).

2. Once the sealed order was filed, the government ignored the multiple avenues of relief available to it

The government's objection also states, "the magistrate judge's public ruling at docket 489 is problematic from a due process standpoint (Doc. 494 at 3), the reason being that, "[b]ecause the motions at issue are now moot, the United States cannot lodge objections to the magistrate judge's findings of fact and conclusions of law" (Doc. 494 at 3)." This claim is meritless and ignores the rules of the court.

As explained above, the federal and local rules of court provide parties with multiple avenues for objecting to the order and findings of a magistrate judge. The government did not move this Court to reconsider its findings in the sealed order. *See* Dist. Ak. L. Civ. R. 7.3(h). Nor did it file objections to the sealed order with the District Court. *See* Fed. R. Crim. P. 59. Instead, it objected only to the public notice of filing. A footnote to the government's objection states it "also objects to the findings of the magistrate judge in the sealed 'Order Finding Government Misconduct.' However . . . such objections are now moot" (Doc. 494 at 2 n.1). Notwithstanding this gesture, the government's notice fails to object to a single finding of fact or law in the sealed order. To the extent the government held valid objections, they were "mooted" only by the government's decision to ignore the available avenues of procedural relief.

These avenues were not hidden to the government. Although it failed to move this Court for reconsideration of its public notice of filing, it did register objections. The District Court's referral of these objections, precipitating this Court's present discussion, makes clear that the government did indeed retain "a forum to litigate the issues." In the case of the sealed order, the government chose not to challenge the findings of fact and conclusions of law contained in the order.

3. The persons named in the public order have not been denied Due Process

The government also claims the persons named in the public order "have been found liable for misconduct before they have been afforded due process" (Doc. 494 at 4).

The public notice of filing is not a charging document, nor does it create any liability. It announced findings which resulted directly from the fact-finding mission referred to this Court.[13] These facts and the reasoning that underlie the Court's

[13] This point alone demonstrates why the government's reliance upon *Frost v. Gilbert*, 818 F.3d 46 (Tallman, J., partially concurring and partially dissenting), *withdrawn and replaced by Frost v. Gilbert*, 835 F.3d 883 (9th Cir. 2016) is misplaced.

Judge Tallman dissented, "Section II C of Judge Kozinski's opinion launches a groundless, personal attack against named employees of the King County Prosecutor's Office. . . . Incredibly, no discovery has been conducted on these issues; nor has an evidentiary hearing taken place. . . . Judge Kozinski engages in sheer speculation without any factual basis to support raw supposition. . . . Sadly Judge Kozinski elects himself finder of fact in order to hold the individuals to account for their conduct" and then exhorts these individuals to 'seek to clear their names' with the state bar." *Frost v. Gilbert*, 818 F.3d at 485 (Tallman, dissenting).

The Order Finding Governmental Misconduct, however, was not the work of an appellate judge, inventing "ad hominem attacks" from a meager record. It was the result of this Court's exhaustive fact-finding, during five days of hearings, and issued by the magistrate judge who presided over development of the factual record.

conclusions, were explained in painstaking detail in the sealed order. The sealed order is not a charging document. Instead, it refers the persons named in the public notice to their respective agencies for internal investigation.

Finally, the Court notes that the named prosecutors were afforded due process in the form of their participation in the proceedings before this Court, which served as a basis for the findings announced in the public notice of filing. These findings were based on the testimony of witnesses that the prosecutors had the opportunity to question. They also had the ability to present witnesses to rebut the defense allegations. Significant evidence came from statements by IRS agents under oath questioned by prosecutors and from unsworn statements of prosecutors in open court, in court documents, and in emails entered into evidence.

C. The Notice of Filing at Docket 489 Should Remain Public and the Order Finding Governmental Misconduct at Docket 488 Should be Unsealed

1. Public Notice of Filing

As explained above, the courts of this country begin with a strong presumption favoring a public right of access to court documents. *See Warner Communications, Inc.*, 435 U.S. at 597; *Center for Auto Safety*, 809 F.3d at 1096; *Foltz*, 331 F.3d at 1135. For the reasons discussed, the Court concludes the government has not articulated a compelling reason based in fact, showing that the notice of filing at docket 489 should be sealed. *See Center for Auto Safety*, 809 F.3d at 1096-97. Nor has the government shown that sealing the notice of filing is narrowly tailored to serve any compelling government interest. *See Oregonian Pub.*

Co., 920 F.2d at 1465. As a result, the Court recommends the notice of filing remain on the public docket.

2. Order Finding Governmental Misconduct

The Court chose to seal the Order because it referenced victims of the government agents' misconduct, as well as sensitive information in agents' employee personnel records. The defense response to the government's objections to the public notice of filing asked the Court to unseal the Order Finding Governmental Misconduct. The defense argued, "in light of the strong presumption in favor of public access, parts of the Detailed Order that do not refer to personnel records properly shielded from public view should be released" (Doc. 497 at 4 n.3). The Court also received a letter from a member of the press stating that the public had a right of access to the details of the order and asking the Court to unseal. After significant reflection, the Court now concludes the order should be unsealed.

The Order contained a great deal of information which is in the public record already and in which there is a right of public access. For example, the defense sought to seal the affidavit of Stephen Walsh (Doc. 418), and also a document detailing its position regarding the May 17, 2018 testimony of Kris Kalanges (Doc. 413). The Court rejected both of these requests, stating the public's right of access to court records outweighed concerns about the confidentiality of personnel records in those matters (Doc. 459, 460). The Court likewise rejected the government's request to file an affidavit under seal in support of its motion to continue its post-hearing brief in opposition, stating, "[t]he government has failed to provide any reason for

the affidavit to be sealed sufficient to overcome the public's right of access to Court records" (Doc. 422).

Additionally, the hearings and the transcript of the hearings on the motion to suppress and motion to dismiss, which unearthed the key nondisclosures underlying this Court's finding of misconduct, were and are open to the public.

The Order at docket 488 relies in some measure on information from sensitive employee personnel records. The Court previously issued a protective order requiring the parties to seal portions of Dockets 236, 242, 243, 246, and 261 (Doc. 307). Notably, the Court there concluded, "[t]he public's right to immediate access of all Court records is outweighed by the need to protect personnel records and the sensitive information they contain, as well as the need to protect the victims of alleged misconduct by two government agents." However, the Order at docket 488 did not disclose this sensitive information.

The documents subject to the Court's protective order included redactions when they were submitted for *in camera* review. The Court concludes that redacting the names of third-parties and government agents unrelated to the findings of misconduct can adequately protect their privacy while also protecting the public's right to access court records. *See Cobell*, 157 F.Supp.2d at 92; *Stevens*, No. 08-231, 2008 WL 8743218 at *9. Indeed, the Court concludes the Order Finding Government Misconduct could play a significant positive role in informing the public regarding the prosecution of criminal trials in general and the *Lawson* case in particular. *See Stevens*, 842 F.Supp.2d at 242.

The public's right of access is "based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *See Center for Auto Safety*, 809 F.3d at 1096. It permits citizens to "keep a watchful eye on the workings of public agencies." *See Kamakana*, 447 F.3d at 1178, and is of particular importance where, as here, a case has the potential to bring to light failures of the justice system. *See CBS, Inc.*, 765 F.2d at 826 ("Public examination, study, and comment is essential if the corrections process is to improve."). For these reasons, and because the government has not articulated a factual basis sufficient to overcome this presumption, the Court recommends the Order at docket 488 should be unsealed.

However, the government should have an opportunity to make objections to disclosure. *See In re Special Proceedings*, 825 F.Supp.2d at 207-09. A redacted version of the Order Finding Government Misconduct will be issued under seal separately from this Report and Recommendation. The parties must file any objections to this Initial Report and Recommendation and the proposed redactions with this Court, no later than January 3, 2020. The objections may be filed under seal.

The parties are also permitted to comment publicly on the order and the case. The government asks that this Court rescind its gag order at docket 292, which restricted pretrial publicity by the parties (Doc. 494 at 6 n.5). That order states "Until the Court's final written order is filed, the attorneys and anyone working in

concert with the attorneys should refrain from making any statement to the media which is not in strict accord [with Alaska rules of professional conduct]" (Doc. 292 at 2). Because this case has been concluded, the Court now formally rescinds this order.

V. OBJECTIONS TO INITIAL REPORT & RECOMMENDATION

A. Jurisdiction

In the government's objections to the public notice of filing, the government appeared to argue the Magistrate Judge did not have jurisdiction to issue the Order Finding Governmental Misconduct (Doc. 494 at 3). The government's current objections to the Initial Report and Recommendation at Docket 512 abandon this argument, clearly stating the Magistrate Judge had jurisdiction to enter the order: "Nor does the United States dispute the Magistrate Judge's authority to enter the orders finding misconduct at dockets 488 and 489, as both are orders based on the Court's supervisory powers, and, as the Magistrate Judge notes, are 'non-dispositive' orders of the type envisioned by Fed. R. Crim. P. 59(a) and 28 U.S.C. 636(b)(1)(A)" (Doc. 515 at 3).

B. Procedural Concerns Regarding Referral

1. The District Court's referral of the government's objections to this Court was proper

The government claims the District Court acted "inconsistent with the federal rules" when it referred the government's objections to the public notice of filing and the defendant's response to this Court for consideration (Doc. 515 at 3). The government is correct that Federal Rule of Criminal Procedure 59(a) provides,

with reference to non-dispositive matters, "the district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous" (Doc. 515 at 3 (emphasis added by the government)).

But the District Court's current referral does not mean the government's objections will not be considered by the District Court. Title 28 of the United States Code section 636 subsection (b)(1) provides that upon receiving objections to the findings of a magistrate judge, a District Court judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge **may also receive further evidence or recommit the matter to the magistrate judge with instructions**." *See also* Fed. R. Crim. P. 59(b) (providing, with reference to dispositive matters, that upon *de novo* review of objections to a magistrate judge's findings a district judge may "**resubmit the matter to the magistrate judge with instructions**" (emphasis added)).

Therefore, so long as the District Court reviews the government's objections *de novo* upon receipt of the Final Report and Recommendation, its referral of the government's objections is consistent with federal law.

2. Mootness

The government believes, "[the Initial Report and Recommendation at docket 512] suggests that the United States should have substantively objected to the Court's 68-page Order finding misconduct" (Doc. 515 at 4). It claims that its objections to the sealed order were mooted, however, because, "[o]nce the United States settled its case against defendant Lawson, it lacked a legally cognizable

interest in the outcome of the matter" (Doc. 515 at 5). The government is mistaken.

To be clear, the Initial Report and Recommendation did not suggest the government should do anything. The Court does not provide legal advice. The Report and Recommendation merely listed the avenues of relief the government **could** have taken to "lodge objections to the magistrate judge's findings of fact and conclusions of law" (Doc. 494 at 3), which the government chose not to employ (Doc. 512 at 17).

The government represents the United States. Its attorneys have a duty to "win fairly," *see United States v. Alcantara-Castillo*, 788 F.3d 1186, 1191 (9th Cir. 2015), as they seek justice. This gives the government a clear continuing interest in this Court's finding of misconduct. Although the parties' settlement may have mooted the government's prosecution of Dr. Lawson, the settlement had limited relevance to the finding of misconduct and as the Office of Professional Responsibility's ongoing investigation and the current objections demonstrate, the issue of attorney misconduct remains very much alive.

3. Rules of Professional Responsibility

In its objections filed at Docket 515, the government argues that "continuing extensive substantive litigation arguably would have violated the rules of professional conduct" (Doc. 515 at 5). In particular, the government points to Alaska Rule of Professional Conduct 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to offer or accept a settlement") and Model Rule

of Professional Conduct 1.7, Conflict of Interest, comment 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client").

As noted previously, the finding of prosecutorial misconduct occurred while the motion to dismiss was pending, with a notation that a more detailed ruling explaining the court's reasoning would follow. The government cites no case law for its position that the rules of professional conduct prohibited it from objecting to or moving for reconsideration of the finding of prosecutorial misconduct—either in December of 2018, when the finding was first announced, or following the release of the detailed order in May of 2019. In fact, prosecutorial teams **have** filed motions for reconsideration of rulings of prosecutorial misconduct. *See United States v. Goldfarb*, No. CR-07-260, 2009 WL 856326 (D. Ariz. March 27, 2009) (not reported) (granting motion to reconsider brought by the United States and withdrawing previous order finding governmental misconduct because "[t]he Court did not intend to trigger an obligation for the government to notify DOJ OPR").

The government's client is the United States of America. It is not clear how moving for reconsideration of the finding of government misconduct would have been adverse to the nation's interests. It could be argued the government's duty requires a vigorous defense of the conduct of its attorneys, when appropriate. As the Ninth Circuit has explained,

> A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it

> shall win a case, but that justice shall be done." A "prosecutor's job isn't just to win, but to win fairly, staying well within the rules."

Alcantara-Castillo, 788 F.3d at 1191 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. Maloney*, 755 F.3d 1044, 1046 (9th Cir. 2014)). This objection is without merit.

C. Continuing Objection to Due Process

The government continues to argue that the three prosecutors named in the public notice of filing were denied due process (Doc. 515 at 6-7 ("the United States disputes that this issue [of governmental misconduct] was fully litigated")).

As stated, these prosecutors were given the opportunity over t**hree days** of hearings in August of 2018 (Doc. 388-90, 394) to present evidence and argument regarding the defense allegations of misconduct. The parties submitted briefing after the conclusion of the hearings, and additional briefing at the Court's request after it announced in December 2018 it had found serious government misconduct. Only in the wake of this extensive litigation did the Court conclude that serious government misconduct had occurred.

This Court has been unable to locate any case where a judicial finding of prosecutorial misconduct was delayed in order to permit the individual prosecutors to respond. In *United States v. Roberts*, the trial court found the cumulative effect of the prosecutor's actions deprived defendants of due process and operated to bias the grand jury, and ordered dismissal of the indictment. 481 F.Supp. 1385 (C.D. Cal. 1980). It does not appear that the government appealed the order, and there is no

indication the prosecutor found to have committed prosecutorial misconduct was given any opportunity to respond personally before the order was made public. *See also United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) (instructing trial court, which had found that prosecutorial conduct during grand jury proceeding was "generally improper, reprehensible and unacceptable," to furnish DOJ with copies of transcripts reflecting prosecutorial misconduct, and noting "even in the event that prosecutorial misconduct did not in any way taint the proceedings . . . its occurrence may not simply be disregarded").[14]

D. Objections to Findings of Fact and Conclusions of Law in the Order Finding Governmental Misconduct

No timely objections were made to the Order Finding Governmental Misconduct, nor was a motion to reconsider filed. However, in its continued objections to the Initial Report and Recommendation (Doc. 515), the government raised several substantive objections for the first time, almost nine months after the detailed order was filed. In case the District Court disagrees with this Court's view that no timely substantive objections were made, the Court briefly addresses these two new substantive objections.

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[14] The government appears to object that the Court's filing of the public notice and the sealed order did not follow a process utilized in the Ted Stevens case. *See In re Special Proceedings*, 825 F. Supp. 2d 203, 206-09 (D.D.C. 2011). In that case, a special prosecutor was tasked with determining whether the government counsel should be personally charged with contempt of court, and the individual prosecutors or their counsel were given an opportunity to object to the special prosecutor's Report on Prosecutorial Misconduct before it was unsealed. But the issue here is not whether the individual prosecutors should be charged with contempt of court. If it were, it would be appropriate for the prosecutors or their attorneys to have an opportunity to personally respond. Instead, as stated *supra*, the Court here made its finding of prosecutorial misconduct during the motion to dismiss litigation and, in the context of that motion, requested additional briefing on the appropriate remedy for the misconduct. The more detailed findings supporting the judicial finding of prosecutorial misconduct were filed after the parties filed this additional briefing.

The standard of review for a finding of prosecutorial misconduct is clear error. *See Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018); *United States v. Vavages*, 151 F.3d 1185, 1188 (9th Cir. 1998); *United States v. Brown*, --- Fed.Appx. ----, 2020 WL 238762 at *4 (9th Cir. 2020) (unpublished).

1. The defendant suffered no prejudice from the misconduct

The government states that, "[i]n opposing the defendant's motion to dismiss, the United States' primary position was (and still is) that the alleged bias of the IRS employee at issue was immaterial, and thus the defendant suffered no prejudice in the failure to produce the TIGTA report . . . . " (Doc. 515 at 6).

But this response conflates a finding of prosecutorial misconduct with a potential dismissal of the indictment. Whether the defense suffered substantial prejudice is not a defense to a charge of prosecutorial misconduct; it is relevant to determining the remedy. In numerous cases, courts have announced findings of misconduct and gone on to deny dismissal. *See, e.g.*, *Serubo*, 604 F.2d at 818-19 (requiring government to report prosecutorial misconduct to Department of Justice but explaining that if evidence on remand showed that second grand jury was insulated from the effects of the misconduct, "the motion to dismiss may properly be denied").

The government continues,

> . . . [T]he Order finding Misconduct appears to struggle to find "substantial prejudice," ultimately relying on only two substantive bases for this finding: The "loss or unavailability of evidence" based on inferences drawn from hearsay offered by one witness that the subject IRS employee "pretty much" knew about the Lawson criminal matter; and "diminishment of witness memory" because

> one witness was unclear about when he learned the entry into the defendant's trailer occurred, which a subsequent hearing fully explored.

(Doc. 515 at 6 n.3). But this footnote ignores the Court's findings that the defense lost the opportunity to fully investigate the break-in of the taxpayer's airplane hangar and attached apartment; that the delayed notice of the break-in, years after the fact, diminished witness memories relating to the break-in, the IRS manager's possible bias against the taxpayer, and the impact of the IRS manager's relationship upon the civil and criminal investigation; that trial and resolution of the case were delayed a full year while the discovery dispute and litigation were conducted; and that the discovery litigation which led to evidence related to the break-in and bias cost the defendant $77,943 as of August 31, 2018.

2. The government disputes that the matter was fully litigated

The government disputes that the issue of prosecutorial misconduct was fully litigated, despite five days of hearings and multiple rounds of supplemental briefing. The government points to two findings regarding the earliest moment when Prosecutors Randall and Russo first learned about the IRS agent's entry into the taxpayer's property without authorization. The government ignores earlier findings of fact that both prosecutors learned of the break-in by at least February 26, 2018, based upon emails exchanged between prosecutors and the IRS criminal agent (Doc. 488 at 31).

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E. Objections to Redactions or Suggestion of Additional Redactions

None were made.

As stated, the Order Finding Governmental Misconduct contained a great deal of information that is in the public record already and in which there is a right of public access. The hearings and the transcript of the hearings on the motion to suppress and motion to dismiss likewise were and are open to the public. Redacting the names of third-parties and government agents unrelated to the findings of misconduct can adequately protect the privacy of those individuals while also protecting the public's right to access court records.

VI. CONCLUSION

Crucial to the decision of whether to make records public under the First Amendment is a court's determination of whether public access would "serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the criminal justice system." *Oregonian Pub. Co.*, 920 F.2d. at 1465. For all of the reasons discussed in the Report and Recommendation, the Court concludes publication of the Order Finding Government Misconduct serves these functions; and the government has presented no "compelling reason" to rebut the common law's strong presumption of public access. *Center for Auto Safety*, 809 F.3d at 1096. Its objections are without merit.

For the foregoing reasons, this Court recommends the objections to the Magistrate Judge's Public Notice be DENIED and the notice of filing at Docket 489 remain on the public docket. It further recommends the District Court unseal the

Order Finding Governmental Misconduct at docket 488, subject to the redactions identified in the Court's sealed proposed redacted order at docket 511.

DATED this 24th day of February, 2020 at Anchorage, Alaska.

S/DEBORAH M. SMITH
CHIEF U.S. MAGISTRATE JUDGE