

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]

IN THE MATTER OF PUBLIC
ACCESS TO CRIMINAL CASE
DOCUMENTS

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ALL CRIMINAL CASES

**THIRD AMENDED ORDER REGARDING PUBLIC ACCESS TO PLEA AGREEMENTS AND
SENTENCING DOCUMENTS FILED IN THE EL PASO DIVISION¹**

It has come to the attention of this court that the risks to cooperating witnesses, defendants and informants have been the subject of a careful study by the Federal Judicial Center.² The study revealed that harm to cooperators is a severe problem. The purpose of this order is to strike a balance between the legal presumption of openness in criminal case proceedings and the safety and welfare of the affected individuals.

This order becomes effective immediately, and shall apply to all Plea Agreements and Sentencing Documents filed in the El Paso Division beginning on that date, irrespective of the date of the return of the Indictment or the filing of the Information. Nothing in this order shall be construed as contravening or diminishing the application of a local rule or federal statute. Furthermore, Plea Agreements will remain unavailable on CM/ECF, but will continue to be available at the District Clerk's office, absent any order to the contrary.

Except for the documents identified in paragraphs (3), (4) and (7) below, decisions as to whether to seal a particular pleading will be made on a case-by-case basis with findings specific enough that a reviewing court can determine whether the sealing was appropriate. Absent an order to the contrary, all documents, other than those identified in paragraphs (3), (4) and (7), and those submitted with a motion to seal, will be accessible to the public.

It is therefore **ORDERED**:

¹ The court issues this amended order as it has come to the court's attention that there is a misunderstanding regarding the Government's obligation to produce its sealed sentencing memorandum to counsel for a defendant being sentenced.

² Margaret S. Williams, et al., Federal Judicial Center, Survey of Harm to Cooperators: Final Report (2016), available at <https://www.fjc.gov/sites/default/files/2016/Survey%20of%20Harm%20to%20Cooperators%20-%20Final%20Report.pdf>.

- (1) Plea Agreements shall include a factual basis and any matters not closely related to the defendant's cooperation. The Plea Agreement shall not make reference to the defendant's past, current or future cooperation.
- (2) All Plea Agreements shall be accompanied by a document captioned "Sealed Addendum to Plea Agreement." The provisions contained in the Sealed Addendum to Plea Agreement are part of the defendant's agreement with the Government. Stipulations and agreements related to base offense level, safety valve statement, any applicable specific offense characteristics, role adjustments and substantial assistance³ which may reveal the defendant's cooperation shall be included in this separate Sealed Addendum to Plea Agreement. If no substantial assistance agreement has been made, this Sealed Addendum to Plea Agreement should state that "The parties have not entered into a cooperation agreement." Any portion of a factual basis that reveals a Defendant's cooperation should also be included in this Sealed Addendum to Plea Agreement.
- (3) Objections to the PSR, if any, **shall not be electronically filed**. Objections and its responses will be submitted through letter addressed to the Probation Officer assigned to prepare the PSR, with a copy to opposing counsel. The Probation Officer will forward the objection letters and its responses to the court separate from the Addendum ordinarily prepared to address them. The objection letters and its responses will be made part of the record.
- (4) Part one of the Confidential Sentencing Recommendation will inform the court of the provisions of the Sealed Addendum to the Plea Agreement and the impact they may have on the sentencing guidelines. Defense and Government counsel will be provided with copy of it. This document will **NOT** be filed and will be provided only to the attorneys of record under penalty of sanctions should they a) disseminate its contents to anyone other than the defendant; and, b) provide copy of it to anyone, including the defendant.
- (5) In all cases, no later than **10 days** prior to the sentencing hearing, the Government shall file "Government's Sealed Sentencing Memorandum" to inform the court about the Government's decision regarding filing a § 5K1.1 or § 3553(e) motion. In response the defense shall file "Defendant's Sealed Sentencing Memorandum" no later than **5 days** prior to sentencing. Through the Government's Sealed Sentencing Memorandum, the Government will make known if it will ask the Court for a sentence reduction. If the Government asks for a reduction of sentence, the Government's Sealed Sentencing Memorandum shall include either the § 5K1.1 or § 3553(e) motion, where applicable. When necessary, the Government's Sealed Sentencing Memorandum shall include a statement that a Rule 35(b) motion may be filed in the future. When there is no substantial assistance provided, the Government's Sealed Sentencing Memorandum shall state "There is no additional information for the Court." Through the Defendant's Sealed Sentencing Memorandum, the defense will address any of the issues presented in the Government's Sealed Sentencing Memorandum and request any variance or departure the defendant may seek. The Government shall serve its Sealed Sentencing Memorandum only on counsel of the defendant who is being sentenced and therefore is the subject of the Sealed Sentencing Memorandum.
- (6) The Clerk of Court is instructed to make part of the record for appeal or 28 U.S.C. § 2255 proceedings, the documents identified in paragraphs (3), (4) and (7).

³ Substantial assistance agreements refer to the provisions governing a defendant's cooperation with the United States in exchange for consideration for binding and non-binding sentencing recommendations, and motions pursuant to U.S.S.G. § 5K1.1, 18 USC § 3553(e), and Fed. R. Crim. P. 35(b).

- (7) The following documents shall be filed under seal without need of a motion to seal or a certification by counsel:
- i) Sealed Addendum to Plea Agreement;
 - ii) Government's Sealed Sentencing Memorandum;
 - iii) Defendant's Sealed Sentencing Memorandum; and
 - iv) Motions for reduction of sentence under Fed. R. Crim. P. 35(b) and pertinent orders.

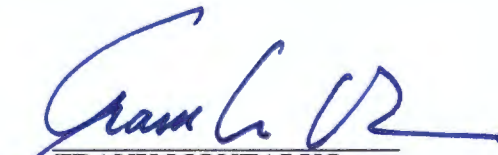
In all such documents, the word SEALED shall appear above the case number. The case number shall include a hyphen showing the defendant number in multidefendant cases.


- (8) The documents identified in paragraphs (3), (4) and (7) above shall remain sealed until further order of this court. In every case in which there is a Plea Agreement, the Sealed Addendum to Plea Agreement, the Government's Sealed Sentencing Memorandum, and the Defendant's Sealed Sentencing Memorandum shall be filed. However, the Sealed Addendum to Plea Agreement and the Government's Sealed Sentencing Memorandum shall be provided to defense counsel of a defendant on trial for the limited purpose of cross-examination of a defendant who entered a plea of guilty and is testifying for the Government.⁴


SO ORDERED.

SIGNED this 30th day of March, 2022.


KATHLEEN CARDONE
U.S. DISTRICT JUDGE


FRANK MONTALVO
U.S. DISTRICT JUDGE


DAVID GUADERRAMA
U.S. DISTRICT JUDGE


DAVID BRIONES
SENIOR U.S. DISTRICT JUDGE

⁴ The defendant mentioned on paragraph 5 above, is the defendant herein “who entered a plea of guilty and is testifying for the Government.”