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FRANK B. WILSON, CLERK
U.S. DISTRICT COURT, FENC
BY: *dl* DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
09-SO-02

IN RE:)
)
PUBLIC ACCESS TO PLEA) AMENDED
AGREEMENTS AND SUBSTANTIAL) STANDING ORDER
ASSISTANCE MOTIONS) OF THE COURT

This standing order supersedes and replaces Standing Order of the Court No. 09-SO-2, filed August 28, 2009.

The Court has received information from the litigation of cases before it, as well as information submitted to the bench as a whole, regarding the misuse of publicly available information regarding assistance to law enforcement by criminal defendants. Prior to August 28, 2009, plea agreements, including language obligating the defendant to cooperate with authorities, and motions regarding substantial assistance were freely available via PACER to any member of the public using remote access. The Court has learned that such information is often posted on internet web sites, such as "Whosarat.com," and on social networking sites such as "Facebook" and "MySpace," for the apparent purpose of encouraging reprisals against defendants who cooperate with authorities. The Court has reviewed a video posted on the internet displaying the cooperation provisions of defendants' plea agreements and discussing substantial assistance motions, apparently aimed at discouraging the cooperators from testifying. Incidents have been reported regarding the assaults, even torture, of defendants by fellow inmates. The Court has seen requests from inmates requesting that references to their cooperation be deleted from their court files so as to spare them from reprisals from fellow inmates.

Acting through an ad hoc committee chaired by one of the judges of this Court, the bench has received information gleaned from surveys conducted by the offices of both the United States

Attorney and the Federal Public Defender regarding the efforts of other federal district courts to address the aforementioned problems. The Court has learned that some districts have a policy that all plea agreements are removed from electronic access and others have a standing order, local rule, or court policy under which all or part of the plea agreement in every case is filed under seal or otherwise made a non-public document. The Court has further learned that some districts, by standing order, local rule, or court policy, provide for the sealing of all or part of substantial assistance motions in every case. The Court has reviewed samples of such orders from at least four districts.

In 2001, the Judicial Conference of the United States decided that the portion of a criminal judgment labeled "Statement of Reasons" would henceforth be a non-public document. Said the Conference:

[I]n order to protect the identity of cooperating defendants, the portion of the forms entitled "Statement of Reasons," **which includes sensitive information about whether a defendant's substantial assistance served as the basis for a sentence departure**, was revised to become an attachment to the judgment forms, and will not be disclosed to the public.

Report of the Proceedings of the Judicial Conference of the United States, March 14, 2001, at 17 (emphasis added).

The Court finds that the concerns about the safety of cooperating defendants that led to the Judicial Conference action regarding Statements of Reasons have been exacerbated by the subsequent development of PACER and the growth of the internet. Therefore, this Court has found it necessary to impose certain additional restrictions on public access to information about the cooperation of defendants, which are set forth below.

As to all plea agreements in criminal cases filed after August 28, 2009, the Clerk of this

Court is directed to file said plea agreements in such a manner that there is no remote electronic public access to plea agreements. Court personnel, including the United States Probation Office, and attorneys of record in the case in which the plea agreement was filed may still have electronic access to filed plea agreements. The public, including members of the news media, may have access to filed plea agreements at the public terminal in the clerk's office, subject to existing rules regarding these access methods.

Motions filed regarding the substantial assistance of a defendant, whether pursuant to United States Sentencing Guidelines §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35(b), shall be filed under seal by the clerk, without necessity of a separate motion and order to seal.¹ Copies may be provided to the Office of the United States Attorney, the defendant whose assistance is the subject of the motion, that defendant's counsel, and the United States Probation Office.

If the Office of the United States Attorney for this district determines that disclosure of a substantial assistance motion sealed by operation of this order is necessary to fulfill case-related disclosure obligations under the U.S. Constitution, or applicable statutes and court rules, that office may provide copies of such motion to counsel for defendants who are deemed entitled to such disclosure, without seeking a court order.

Likewise, if the defendant whose assistance is the subject of the motion, or that defendant's counsel, determines that disclosure of such motion is necessary to protect that defendant's legal interests or safety, then the defendant or the defendant's counsel may disclose copies of the motion to the extent necessary to protect those interests, without seeking a court order.

¹ This provision shall likewise apply to any responses to substantial assistance motions, replies, orders granting or denying such motions, and any pleadings and orders relating to the continuance of a hearing on a pending Rule 35 motion.

If an attorney, who has filed a Notice of Appearance in a criminal case in this Court, files a signed Certification on a form provided by the Clerk stating that there is a case-related need to receive and review a copy of any document sealed by operation of this Standing Order, then the Clerk shall make that document available to the certifying attorney for use in the attorney's criminal case, without necessity of a court order. The Certification shall include the name and number of the case in which the attorney has filed a Notice of Appearance and it shall include a statement that there is a case-related need to receive and review a copy of a document sealed by operation of this Standing Order. The Clerk shall file the Certification in the file of the case from which the document is sought.

Upon the expiration of two years from the date of the filing of the order or other resolution of the substantial assistance motion, documents sealed by operation of this standing order shall be unsealed, unless the presiding judge in the case extends the sealing order.

The Court has considered alternatives to the blanket sealing of substantial assistance motions, such as entertaining motions to seal on a case-by-case basis or merely removing the motions from the electronic window provided by PACER, but has found these inadequate to preserve the "higher value" (see In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986)) of preventing interference with the due administration of justice that results from reprisals against witnesses. Substantial assistance motions contain information that makes cooperating defendants especially vulnerable to reprisals, such as the fact that the cooperator's assistance has led to the indictment or conviction of someone else, and the specific methods of assistance, such as the use of recording devices. Case-by-case review would not work because one of the dangers identified

by the Court is the use of this information to encourage generalized reprisals against all cooperators.² The Court believes that this sealing procedure is “narrowly tailored” (see id.) to address the problem because (1) sentencing hearings will remain open to the public; (2) the sealed documents will ultimately be available for public inspection after the expiration of the two-year period; and (3) the Court has herein provided for immediate access by litigants who have a case-related need for copies of these documents.

SO ORDERED, this 12th day of February, 2010.



LOUISE W. FLANAGAN
Chief United States District Judge

² From the aforementioned surveys, the Court learned that some districts are requiring a separate motion to seal for each substantial assistance motion filed, but are routinely granting them in every case. The Court finds such a procedure to be a waste of judicial resources.