

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff)
) Cause No: 1:12-cr-00013 SEB-KPF
 v.)
)
 DANIEL A. KRUK,)
)
 Defendant)

UNITED STATES OF AMERICA,)
)
 Plaintiff)
) Cause No: 1:10-cr-00061 SEB-KPF
 v.)
)
 DANIEL A. KRUK,)
)
 Defendant)

**DEFENDANT’S OBJECTIONS TO THE GOVERNMENT’S EX PARTE SUBMISSION,
MOTION FOR A PROTECTIVE ORDER, AND MOTION TO SEAL DEFENDANT’S
MOTION TO COMPEL PRODUCTION OF BRADY MATERIAL**

On March 27, 2012, the government filed an *ex parte, in camera*, submission with this Court in Defendant’s cases along with a motion for protective order preventing the Defendant from having access to the *ex parte* submission. In its motion, the government cited no case law or provided any factual justification for its *ex parte* submission or need for a protective order.

The government’s motion and *ex parte* submission was filed in anticipation of the Defendant’s Motion to Compel Production of *Brady* Material (“Defendant’s Brady Motion or Memorandum”) which was also filed later that day on March 27, 2012.

On March 28, 2012, the government filed an “Emergency Motion to Seal the Defendant’s Motion to Compel Production of *Brady* Materials” claiming that information contained in the defendant’s motion and memorandum (the overwhelming bulk of which is in the public domain) should be sealed because they contain “law enforcement sensitive materials, pleadings that were filed and remain under seal, and other materials for which there is a law enforcement need to remain confidential.” Other than making these conclusory statements, the government again cited no case law and did not proffer any factual support whatsoever establishing why the Court should issue such an unusual order. Further, the government made the overbroad request that the Defendant’s Motion and Memorandum be sealed in their entirety – rather than appropriately identifying and narrowly redacting the so-called “sensitive” materials, if any, which the government could reasonably assert should be sealed for “law enforcement needs.” Defendant is completely unable to ascertain what information in his motion and brief constitutes sensitive material. For example, the documents related to Agranoff attached as exhibits can now be located on the internet. See <http://waronsociety.noblogs.org/?p=3657>. The U.S. Bureau of Prisons website advises that Agranoff is a federal inmate residing at a low security facility in Arkansas. Agranoff even maintains a blog site. <http://davidagranoff.blogspot.com/>.

Criminal proceedings are presumptively open. *Press-Enterprise Company v. California*, 464 U.S. 501, 598-509 (1984); *United States v. Foster*, 564 F.3d. 852 (7th Cir. 2009); *In re Specht*, 622 F.3d 697 (7th Cir. 2010). It is also “beyond dispute that most documents filed in court are presumptively open to the public.” *Bond v. Ultreras*, 585 F.3d 1061 (7th Cir. 2009). Documents filed with Court for *in camera* review are

judicial records. *United States v. Wecht*, 484 F.3d 194, 209 (3rd Cir. 2007); *Goldstein v. Forbes*, 260 F.3d 183, 192 (3rd Cir. 1981); *United States v. Martin*, 746 F.2d 964, 968 (3rd Cir. 1984). The common-law principle that any restrictions on access to court records are subject to the First Amendment was initially recognized in the need to ensure access to criminal proceedings. *Bond*, 585 F.3d at 1073-1074.

Any party seeking a protective order and to seal court files has the burden to overcome the presumption they are public and establish why such protection is required. *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010). “Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.” *In re Cendant Corp.*, 260 F.3d 183, 194 (3rd Cir. 2001). Here, the government not only failed to meet its burden – it did not provide any evidence at all establishing a need for protection. As the Seventh Circuit has cautioned, if a party wants documents to remain secret, it should never proffer them to the court. *Specht*, 622 F.3d at 701.

Ex parte submissions to a court are also in violation of defendant’s constitutional rights to due process, confrontation, and effective assistance of counsel. Such a submission constitutes a direct attack upon the adversarial system which is the foundation of the criminal justice system. *Id.* See also *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C.Cir. 1986) (“It is a hallmark of our adversary system that we safeguard party access to evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.”). See also, Defendant’s *Brady* Memorandum at 21 – 24

which sets forth the government's due process violations based upon its failure to disclose *Brady* material to the defendant relating to guilt, innocence, and punishment and a defendant's right to enter into a plea agreement or be sentenced on the basis of accurate information.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy ...the right to be confronted with the witnesses against him." U.S. Const. amend. VI. The "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). A criminal defendant's right to confront witnesses necessarily encompasses his right to see any documentary evidence that such witnesses could offer at trial. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

As detailed in Defendant's *Brady* Memorandum, throughout the pendency of this case, the government appears to have been filing information under seal in order to avoid its *Brady* obligations. It is time to produce all *Brady* information to the Defendant.

Respectfully submitted,

/s/ Linda L. Pence

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Certificate of Service

I hereby certify that on this 29th day of March, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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