

Secrecy within

Algerian native's federal appeal in Miami has court altering records, closing hearing in name of security

by Dan Christensen

This story was first published on March 12, 2003

With war in Iraq looming, the largely invisible U.S. campaign against terror being waged in the nation's federal courts surfaced in extraordinary ways in Miami last week.

A published court calendar for the 11th U.S. Circuit Court of Appeals was obliterated to omit the names of litigants in a sealed civil case brought by an Algerian man the Daily Business Review has learned was among 1,200 young Arab and Muslim men secretly detained in the post-Sept. 11 nationwide dragnet.

Later, the appellate court's computer records were altered to remove any information about the case, No. 02-11060.

In between, a three-judge panel of the 11th Circuit closed its courtroom last Wednesday to the public and the press to hear arguments in the sealed case.

Court records that were briefly public said the case is styled *Mohamed Kamel Bellahouel v. Monica S. Wetzel*. Wetzel is a former warden at the Federal Correctional Institution in South Miami-Dade County.

"That's very unusual," said one federal judge, referring to the closure of the appeals court.

Also unusual: The public docket for the Southern District of Florida, where the case apparently originated, is devoid of any mention of either Bellahouel or his case.

From its style, the case appears to involve a petition for a writ of habeas corpus. Typically, even sealed cases appear on the public docket.

Persons seeking release from unlawful imprisonment routinely file such writs. Why the appeal is taking place is unclear, however, because Bellahouel is out of federal custody and living in Deerfield Beach with his American-born wife.

Bellahouel declined to be interviewed.

"I cannot talk about it. I am not allowed," said Bellahouel, who has not been charged with any crime.

In another case, the U.S. attorney's office has taken secret steps to remove from the public record any trace of a habeas corpus case brought by a stateless Palestinian man from Sunrise

who's fighting deportation after being labeled a "terrorist" by an immigration judge late last year.

The matter is so sensitive that even the government's motion to seal is sealed.

Adham Amin Hassoun is the first person in the U.S. known to have been ordered out of the country for alleged terrorist activities, according to local and national civil rights attorneys, including the director of the American Civil Liberties Union's Immigrants' Rights Project.

Hassoun, an activist in South Florida's Muslim community, was detained in June by agents from South Florida's Joint Terrorism Task Force who'd learned of his friendship with alleged "dirty bomber" Jose Padilla. The two once attended the same Broward mosque. Hassoun was accused of overstaying his 1990 nonimmigrant student visa.

In December, Hassoun filed a 23-page habeas petition in U.S. District Court now assigned to Judge K. Michael Moore. The filing, first reported in the Review, made public the outline of the government's secret case against him.

The petition says the FBI has accused Hassoun of recruiting terrorists, taking part in an unidentified assassination plot, and being a member of a group whose leader was convicted in connection with the 1993 bombing of the World Trade Center.

U.S. Immigration Judge Neale S. Foster in Miami also said in court that Hassoun "had contact" with Osama bin Laden, the petition says.

Hassoun and his Miami lawyer, Akhtar Hussain, deny he's a terrorist. And they say the government has produced no evidence to back up its accusations.

In a telephone interview from the Department of Homeland Security's Krome Processing Facility in southwestern Miami-Dade last week, Hassoun said the government included its two-page motion to seal his case among a batch of secret evidence it filed recently. Hassoun, who is representing himself in U.S. District Court, said the evidence is precisely what the FBI in the INS court used against him.

The government's filing of secret evidence in the case is a matter of public record. But what the case file doesn't indicate, in either its electronic or paper versions, is that the government is now moving to seal the entire habeas case.

"Have I ever seen that happen in 20 years of practice? No," said Hussain. "Times have changed."

The lack of public notice about the U.S.'s intentions has the practical effect of foreclosing any opportunity to respond by the public or the press.

The government's secret move to seal Hassoun's case is "scary," said Lucas Guttentag, the Oakland, Calif.-based director of the ACLU Immigrants' Rights Project.

"Across-the-board secrecy or closure orders that are themselves secret deny the public the right to judge our government's actions," Guttentag said. The courts, he said, should resist granting blanket secrecy orders and "provide an opportunity for the press and public to oppose the closure."

Assistant U.S. Attorney Dexter Lee, who filed the motion, declined comment. Jacqueline Becerra, the spokeswoman for U.S. Attorney Marcos Jimenez, said her office would not comment.

Government's 'concerted effort'

Defense attorneys across the nation have complained about being hamstrung by the Justice Department's aggressive assertion of secrecy in both criminal and civil court proceedings that have arisen from the investigation of the terrorist attacks on the World Trade Center and the Pentagon.

"There's been a concerted effort to cut defense lawyers out of the process, to make it impossible for people accused of terrorism offenses to mount an effective defense," said Neal R. Sonnett, a Miami attorney who chairs the American Bar Association's Task Force on the Treatment of Enemy Combatants.

"Counsel can be deprived of access to evidence and of access to the client. So if there is a lawyer, the lawyer is basically fighting with both hands and both feet tied behind his back," he said Tuesday.

Sonnett pointed to the government's practice of sidestepping the Classified Information Procedures Act as a particular problem. The act established rules by which lawyers can get access to classified information needed to defend their clients.

"The act effectively weighs national security concerns versus the right to present an effective defense," Sonnett said. "There is a difference between that kind of procedure and the presenta-

tion of secret evidence that even the defense lawyer can't see."

AUSA Lee is also involved in Bellahouel's case, appearing at last week's closed-door appellate court hearing with Assistant U.S. Attorney Anne Schultz, chief of the office's appeals section. Schultz also declined comment.

The appellate panel judges were Ed Carnes, Stanley F. Birch Jr. and Procter Hug Jr. Hug, from Reno, Nev., is a senior U.S. Circuit judge and a former chief judge for the 9th Circuit.

Government-imposed secrecy in the Bellahouel case has also kept under wraps the names of Bellahouel's attorneys.

But their identities became apparent at last Wednesday's hearing when the doors to the courtroom were shut and court deputies briefly blocked Federal Public Defender Kathleen Williams from entering. Williams was admitted after it was explained she was an attorney in the case.

Also in the courtroom was Williams' chief of appeals, Paul Rashkind. Neither Williams nor Rashkind would comment.

Asked about the alteration of published court records to remove Bellahouel's name, the appellate court's chief deputy clerk in Atlanta said office personnel acted after realizing an error had been made. The case is sealed, he said, and access is restricted.

"We made a mistake. It shouldn't have been put out in the first place," said Robert Phelps last Wednesday after the hearing. After being told Bellahouel's name was still accessible in the court's computer system, Phelps replied, "It is? We'll have to fix that, too." Within hours, Bellahouel's name had been removed.

The unusual secrecy that's accompanied the Bellahouel case, and the government's pending motion to seal Hassoun's case, caught the attention of the ACLU in Miami.

"This is very disconcerting," said Florida ACLU legal director Randall Marshall. "There's no public motion in the district court in the Hassoun case, and now you combine that with the post 9-11 case appearing at the 11th Circuit in a secret fashion. I think we'd be interested in taking a look at how it came about." ♦

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Low burden of proof

Coincidence, uncorroborated report enough to get Arab waiter in Delray Beach detained five months

by **Dan Christensen**

This story was first published March 14, 2003.

Mohamed Kamel Bellahouel, an Algerian veterinarian living in Deerfield Beach, was detained by federal authorities for five months because he may possibly have served food to two Sept. 11 terrorists at a Middle Eastern restaurant where he worked as a waiter.

His problems were made worse when an unidentified movie theater ticket agent — in uncorroborated, unchallenged testimony — said she saw Bellahouel go into the theater with one of the terrorists.

The Daily Business Review has obtained the three-page sworn statement of a ranking FBI agent that was the basis for initially denying bond to Bellahouel in late November 2001. It shows how little the government needs to convince a U.S. Immigration Court judge to lock up foreigners accused of terrorism ties.

Bellahouel was the subject of a front-page Review article Wednesday that described how docket calendars and computer records of the 11th U.S. Circuit Court of Appeals were altered to obliterate any reference to a civil case that was brought by Bellahouel and is pending before the court. The story also reported how a three-judge panel of the 11th Circuit sitting in Miami had closed its courtroom to the public and the press last week when it heard arguments in the case.

In a three-page sworn statement, FBI special agent Michael E. Rolince, chief of the International Terrorism Operations Section at the FBI's Washington headquarters, describes Bellahouel and his work waiting tables at the Kef Room on Federal Highway in Delray Beach in 2001.

"It is likely that Bellahouel would have waited on both [Sept. 11 terrorists Mohamed] Atta and [Marwan] al Shehhi since Bellahouel had worked at the restaurant for 10 months, and both Atta and al Shehhi were frequent patrons during shifts that Bellahouel worked," Rolince wrote.

"A third suspected hijacker, Saeed Alghamdi, may also have come to the restaurant with al Shehhi," Rolince wrote. "In interviews conducted by FBI agents on Oct. 15, 2001, and Nov. 12, 2001, Bellahouel indicated that he may have waited on some of the suspected terrorists, but does not recall seeing their faces."

Rolince then noted that the Kef Room is near a Regal Cinemas movie theater and an apartment complex at 755 Dotteral Road, where a number of the suspected hijackers, including Mohand Alshehri and Ahmed Alnami lived.

"An employee of the Regal Cinemas recalled seeing Bellahouel and Alnami come to a movie together during the summer months," Rolince wrote. "This employee specifically remembered Bellahouel requesting a discount for both himself and Alnami. While the employee was not able to give either

individual a discount, they were given a student rate."

On the same day that Rolince signed the sworn statement, Nov. 28, 2001, Bellahouel told the FBI he'd never been to that movie theater. But, Rolince wrote in his report that "Bellahouel has declined to take a polygraph examination."

Rolince closed with this sentence: "In the meantime, the FBI has been unable to rule out the possibility that the respondent is somehow linked to, or possesses knowledge of, the terrorist attacks."

The FBI didn't identify the theater employee. Nor did government lawyers produce her for cross-examination at the bond hearing.

"That's the sum total of what they had against him," said Bellahouel's immigration attorney, David A. Silk of Miami. "They won't call it secret evidence and they won't call it classified, but they won't give it to you, either."

Whatever it was, it was enough to convince Immigration Court Judge Kenneth S. Hurewitz in Miami to deny Bellahouel a bond.

Little is known publicly about the 1,200 young Arab men the U.S. Department of Justice has said were rounded up in the aftermath of the Sept. 11 terrorist attacks. Even less is known about those who've been secretly held as material witnesses in the FBI investigation code-named PENT-TBOM. Justice has released nothing about them — no numbers, no names and no nationalities; not even the identities of their lawyers.

Bellahouel, who married a U.S. citizen in June 2001, is one of those material witnesses, the Review has learned. He is the first such compelled witness known to be from South Florida.

Until last week, Bellahouel's involvement in the Sept. 11 case was a secret. A mistake by a clerk at the 11th U.S. Circuit Court of Appeals in Atlanta made his name public, and allowed the Review to report much of his story.

"The FBI put him through the wringer," Silk said. "It's a sad story. For Kamel, the American dream is really turning sour."

'He fit the criteria'

Bellahouel, born in Blida, Algeria, on the Fourth of July in 1969, arrived in the United States in 1996 to study biology at Florida Atlantic University. In his home country, he had been a veterinarian. He came to South Florida because his aunt lives here, Silk said.

What has happened to Bellahouel since, including his continuing struggle to avoid deportation, was pieced together from interviews and documents filed with the U.S. Immigration Court in Miami.

Court records show that Bellahouel came to the FBI's attention after agents learned that at least two Sept. 11 hijackers — ringleaders Atta and al Shehhi — were customers of Kef, the restaurant where Bellahouel worked as a waiter.

"He fit the criteria," Silk said. "He's a Muslim from an Arab country."

The same records show that an employee at a nearby movie theater put the spotlight on Bellahouel when she

told agents she had seen him go into a movie that summer with another hijacker, Ahmed Alnami. Alnami died when United Airlines Flight 93 crashed in a Pennsylvania field.

Bellahouel denied any connection to the hijackers but was detained by the Immigration and Naturalization Service on Oct. 15, 2001. Government charging documents state that Bellahouel failed to comply with the conditions of the student visa he got when he entered the United States in November 1996.

Bellahouel didn't enroll at FAU after the fall 1997 term. "Basically what happened to him is he ran out of money to pay for his studies," Silk said.

For five months beginning in October 2001, Bellahouel was held in federal detention without bond — even though no criminal charge was ever brought against him. During that time, Silk said, Bellahouel was hauled before a federal grand jury in Alexandria, Va. — apparently the same grand jury that indicted so-called 20th hijacker, Zacharias Massaoui. Bellahouel's testimony, if any, is under seal.

Most of that time was spent behind the razor wire and fences that enclose the Krome Processing Facility in southern Miami-Dade. Bellahouel had committed no crime, but he wore the red jumpsuit of a criminal detainee, Silk said.

For a few days, he also spent time at the Federal Correctional Institution, further south. That's known because the center's former warden, Monica S. Wetzel, is a defendant in a federal civil lawsuit Bellahouel brought regarding his incarceration. That is the case that was mishandled by appellate court clerk's office, allowing Bellahouel's name to become public.

The right to counsel

Along the way, Silk said, Bellahouel became the target of some legal hardball by prosecutors at the U.S. attorney's office in Miami who were looking to strip Bellahouel of the court-appointed lawyer to which he became entitled when the material witness warrant was issued at the end of December 2001.

Any person deemed to have important information that might be needed by a grand jury may be detained under the federal material witness statute if a prosecutor can convince a U.S. district court judge to issue a warrant. The statute also provides for the right to court-appointed counsel for those who can't afford a lawyer.

Silk, a private lawyer who handled only Bellahouel's immigration case, said prosecutors later dismissed the material witness warrant in hopes of nullifying Bellahouel's eligibility for representation by the Federal Public Defender's Office in Miami. Even without the warrant, they continued holding him on the immigration charge.

"They issued the warrant, then decided they really didn't want him to get representation so they no longer held him as a material witness," Silk said. "But they held him anyway. The long and short of it is they quashed the warrant to keep him from being repre-

sented when the FBI talked to him."

Assistant U.S. Attorney Jacqueline Becerra, who is also the spokeswoman for Miami U.S. Attorney Marcos Jimenez, declined to comment on the case.

A similar ploy worked against alleged "dirty bomber" Jose Padilla, said Neal Sonnett, a Miami lawyer who chairs the American Bar Association's Task Force on the Treatment of Enemy Combatants. In the case of Padilla, a U.S. citizen, the government dismissed the material witness warrant, had Padilla declared "an enemy combatant" by President Bush and locked him away indefinitely in a U.S. Navy brig.

But the trick failed to dislodge the federal public defender's office from Bellahouel's case.

Silk said he does not know the names of the assistant U.S. attorneys in Miami involved with Bellahouel's case. Paul Rashkind, the chief of appeals for the federal public defender's office who also represents Bellahouel, said he could not comment.

Bellahouel finally was released about March 1, 2002, Silk said. It only happened after the Department of Justice decided not to oppose Bellahouel's release on a \$10,000 cash bond, Silk said.

"They decided he wasn't a threat," Silk said. "They checked his background and if they'd found something he'd still be in custody." Silk, who recently joined Ferrell Schultz Carter Zumpano & Fertel in Miami as a senior associate, called his client "a sweet guy."

Bellahouel declined comment.

Avoiding blame

Today, Bellahouel is out of custody, but not off the hook. U.S. immigration authorities at the Bureau of Citizenship and Immigration Services, the successor agency to the INS, are seeking to deport him. The case is on hold until at least September while immigration authorities consider a petition on Bellahouel's behalf filed by his wife, Edith, a U.S. citizen, Silk said.

If Bellahouel was not a Muslim from an Arab country, he'd likely now be out of the woods, Silk said. "If you are married and you entered the U.S. lawfully, you are entitled to seek to adjust your status even if you overstayed and worked without authorization," Silk said. "If he were a Catholic coming from Venezuela or Colombia, they would have let him adjust his immigration status."

As Bellahouel's deportation case drags on, he can't legally work to support himself, his wife and his stepchild.

"He likes life in the U.S., but he feels victimized for who he is rather than what he's done," Silk said. "He's tired of living under a microscope."

Silk theorizes that federal authorities realize Bellahouel is not a threat but that, in the midst of all the finger-pointing about who's to blame for allowing the Sept. 11 terrorists into the country, no one wants to take responsibility for letting him stay.

"I guess nobody wants to be the one to put his signature on a piece of paper for someone who might down the road turn out to be somebody," Silk said. ♦

Court secrets

U.S. District Court in South Florida hides civil, criminal cases from public

by **Dan Christensen**

This story was first published May 9, 2003.

With the start this week of the government's high-profile drug trafficking case against accused Colombian drug lord Fabio Ochoa, a fresh spotlight is shining on a little-known practice by the U.S. District Court in South Florida that's hiding civil and criminal cases from the public.

Ochoa's defense team, including Miami super lawyer Roy Black, says it has identified several drug cases in which the existence of events and pleadings were omitted from the public docket. In one case, drug defendant Nicholas Bergonzoli was convicted, sentenced and imprisoned last year in total secrecy.

Drug cases aren't the only ones sometimes kept completely secret. Also obscured from view on the docket kept by Court Clerk Clarence Maddox's office is a civil case brought against a prison warden by a young Algerian man living in Deerfield Beach, Mohamed Kamel Bellahouel, who was once mistakenly suspected of involvement with terrorists.

Neither the courts nor the U.S. attorney's office, however, acknowledges that dockets are being secretly maintained. A 10-year-old decision by the 11th U.S. Circuit Court of Appeals in Atlanta — *U.S. v. Valenti* — forbids the use of so-called dual dockets in which some matters are held back from the public.

"The government has convinced judges in this court to use the same type of dual docketing system prohibited by Valenti," said Black in a recent court filing. Black has sought to document what he alleges was a government-led extortion scheme against his client. Black contends the secrecy is part of the government's effort to keep the lid on a major scandal.

Black cites four other drug cases where he "has reason to believe" that documents and events have been kept off the public docket. Each of those cases involves defendants who, like Bergonzoli, are alleged to have been involved in the extortion scheme. But there's no way of determining how many cases in all are kept off the public docket in South Florida in whole or in part.

The docket is the backbone of a case file, a listing reference for every document and every hearing. If access to it is thwarted, as Black contends in his case, lawyers may find it impossible to obtain information needed to defend clients. The media and the public, unaware, would not know to challenge a questionable order.

In 1993, after learning that a federal judge in Tampa had sealed docket entries in a corruption case, the 11th U.S. Circuit held that the lower court's "dual docketing system," one public and one secret, was an unconstitutional breach of the First Amendment.

"The Middle District's maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings," says the opinion in *U.S. v. Valenti*.

Who is responsible for cases being sealed in South Florida is unclear. No one in authority is talking much.

Chief Judge William J. Zloch of the Southern District of Florida, who sits in Fort Lauderdale, did not return calls seeking comment about his court's docketing practices. In a written response to questions, Court Clerk Maddox said his office "does not employ a 'dual' docketing system. We use a single docketing system — the integrated case management system — for all our docketing work."

Maddox did not respond specifically to questions about the anomalies the Review found in the dockets maintained by his office. He did say, however, that the court "in its discretion is the authority for what is sealed and thus unavailable to the public. This is an established and long-standing practice."

Maddox also did not answer questions about whether his office was withholding the existence of entire cases from the public docket, or whether federal district judges were issuing specific instructions to seal documents and dockets.

Dick Carelli, a spokesman for the Administrative Office of the U.S. Courts in Washington, D.C., declined comment. Assistant U.S. Attorney Matthew Dates, a spokesman for U.S. Attorney Marcos Jimenez in Miami, said his office would not comment.

The law

Under federal law, even matters that are properly sealed by a district court judge aren't supposed to be hidden completely from view. Says Local Rule 5.4: "Unless otherwise provided by law, court rule or court order, proceedings in the U.S. District Court are public and court filings are matters of public record." There's even a form for judges to close individual filings from public view, "Order Re: Sealed Filing." But there are no provisions for sealing the entire docket of a case, or sealing individual docket entries themselves.

Several defense attorneys interviewed for this article said there is no law or rule issued before or after the attacks of Sept. 11 that could justify the sealing of dockets in cases involving terrorism, immigration or anything else in the district court or in higher courts.

That includes the Classified Information Procedures Act, a framework for allowing defense counsel access to sensitive documents. CIPA was invoked in Ochoa's case.

The U.S. government invoked the act in the late 1990s because of the backdrop of intrigue in Colombia linking drug dealers and certain leaders of powerful political factions in the South American nation. U.S. District Judge K. Michael Moore's order about CIPA, recently unsealed, makes no mention of sealing dockets.

The rationale for retaining at least a minimal public record of sealed matters is that defendants, the public or the news media can only mount a legal challenge to a prosecutor's motion to seal or a judge's sealing order if they know that a sealing has occurred or is being sought. Typically, the public docket will record that some nonpublic development has occurred in a case with docket entry saying "sealed."

In a motion filed late last month, Roy

Black asked Moore, who is presiding over the case, "to direct the government and the clerk's office to file on the public docket any remaining sealed pleadings or hearings" in Ochoa's case.

"The secret or dual docketing system being used in this case is unconstitutional under the First Amendment," Black wrote, citing the 1993 Valenti ruling. Moore has not ruled on the request.

'At a loss'

Informed by the Review about the secret cases, three prominent South Florida defense attorneys, all of whom are past presidents of the National Association of Criminal Defense Lawyers, expressed shock and anger.

"I find it offensive," said Miami's Albert Krieger. "While it's possible to conceive of a situation sealing a docket might be required, I'm at a loss to see it at the moment."

"I've never seen this before," said Fort Lauderdale's Bruce Lyons, a former president of the National Association of Defense Lawyers. "Although on the 50th anniversary of the House Un-American Activities Committee there's nothing that surprises me."

Miami lawyer Neal R. Sonnett, a spokesman for the American Bar Association on criminal justice issues, said he'd not encountered secret dockets. He termed the Bergonzoli case "an extraordinary circumstance" and called the sealing of dockets "inexcusable" if used to hide from defense lawyers matters relevant to the defense of clients.

A spokesman for the NACDL in Washington, D.C., Daniel Dodson, said he, too, was unaware of secret dockets being used to hide cases. He sent a broad electronic inquiry to NACDL members about the matter this week. No examples outside South Florida were reported.

"The ever-expanding introduction of secrecy into the criminal justice system is an alarming trend that is contrary to the most basic principles of a democratic government," said Miami Federal Public Defender Kathleen Williams.

Invisible

There are at least two completely invisible cases on the secret docket of the Southern District of Florida.

One is the criminal case in federal district court in Miami against Colombian businessman and imprisoned drug dealer Nicholas Bergonzoli. A federal grand jury in Bridgeport, Conn., indicted Bergonzoli on a conspiracy to import cocaine charge in October 1995. That court's docket shows the case was transferred in March 1999 to Miami, where it was given a case number, 99cr196, and assigned to then-Chief Judge Edward B. Davis, who has since retired.

Once the case landed in Miami, though, it seemed to vanish. Court dockets accessible to the public don't include Bergonzoli's name. And a computerized search for Docket No. 99cr196 on the PACER electronic docket system yields the reply "no matches found."

But the Review has learned that Bergonzoli, now 39, was convicted on the conspiracy charge. On Jan. 29, 2002, U.S. District Judge Patricia A. Seitz in Miami sentenced him to 39 months in prison. Today, Bergonzoli is serving that secret sentence in the Federal

Detention Center in downtown Miami

Information is not publicly available about whether Bergonzoli had a trial or pleaded guilty. But the length of Bergonzoli's sentence suggests there was a plea deal, because a much longer sentence of 20 to 30 years is common for those convicted on such a charge. Such deals typically involve the defendant providing information to help the government nail other offenders. Bergonzoli's projected release date is June 14, 2005, according to the Federal Bureau of Prisons.

A source familiar with the case said the main reason for keeping Bergonzoli's case completely under wraps was Bergonzoli's personal safety. That's because of the murderous reputations of the defendants in cases that overlap Bergonzoli's. One of those defendants is Ochoa.

Ochoa's defense lawyer, Black, has subpoenaed Bergonzoli as a witness in the sprawling cocaine distribution and money laundering case that began with jury selection this week in Miami before Judge Moore. Ochoa was among 43 defendants charged in the case.

Most have pleaded guilty and gotten deals in exchange for their cooperation. Some remain fugitives. Only Ochoa is on trial.

In court papers, Black identifies Bergonzoli as an "intermediary" in an alleged U.S.-backed "program" to induce major Colombian drug traffickers, including Ochoa, to surrender by selling them advance "sentence reductions." Bergonzoli played an "integral role" in peddling cooperation deals to traffickers, including several who are expected to testify against Ochoa, according to defense filings.

Black has claimed Ochoa was indicted because he refused to play this game. According to Black, Ochoa wouldn't pay a \$30 million bribe to Bergonzoli's contact, government informant Baruch Vega of Miami Beach, to arrange a sweetheart deal with the feds.

In February, however, U.S. Magistrate William Turnoff in Miami rejected Black's efforts to get Ochoa's indictment dismissed on this theory. Turnoff held that Ochoa "has not offered one iota of evidence in support of his claims" that federal agents and prosecutors knew about the alleged sentence-reduction sales scheme.

Even so, Black and Miami appellate lawyer G. Richard Strafer have continued to push here and in Atlanta to unseal dozens of documents in the case that their court filings assert would shed light on what they contend is a government scandal that's being covered up by a blanket of secrecy. Late last month, some documents were ordered unsealed, but others remain shielded.

Black, a founding partner at Black Srebnick Kornspan & Stumpf in Miami, did not return calls for comment.

Through an intermediary, Bergonzoli declined to be interviewed. Asked whether Bergonzoli is comfortable with the fact that his case is not a matter of public record, his attorney, Joaquin G. Perez of Miami, was cryptic.

"Obviously Mr. Bergonzoli knows there's a case," Perez said. "There are some times when it is not advisable for matters to be of public record."

He declined to elaborate.

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But from a public policy perspective, Bergonzoli's feelings about the secrecy aren't relevant, said one attorney familiar with the case who asked to remain unidentified. "Why should the parties define what the public knows about a case," the lawyer said.

Traces of case removed

A second case kept completely out of the South Florida sunshine is an apparent habeas corpus petition stemming from an immigration detention case brought by the Algerian, Mohamed Bellahouel. He was detained for five months on skimpy evidence of ties to the Sept. 11 terrorists.

As first reported in the Daily Business Review in March, Bellahouel was a waiter at a Middle Eastern restaurant in Delray Beach, where he apparently served food to some of the Sept. 11 hijackers who dined at the restaurant. A Delray Beach movie theater employee told the FBI she thought she saw Bellahouel go into the theater with one of the hijackers. As a result, in October 2001, he was detained at the Krome Processing Facility in southwest Miami-Dade.

Bellahouel, who lives in Deerfield Beach, later was hauled before a federal grand jury in Alexandria, Va. — apparently the same grand jury that investigated the so-called 20th hijacker, Zacharias Massaoui. Bellahouel has since been released on a \$10,000 bond. But his case has rolled along in secret. Sealed proceedings of an unknown nature took place March 5 before a three-judge panel of the 11th U.S. Circuit Court of Appeals sitting in Miami.

Bellahouel's case surfaced briefly because of a court clerk's mistake. Later, the Review found, a court calendar and the 11th Circuit's computerized docketing system in Atlanta were altered to remove any trace of Bellahouel's case

from the public record.

Information on why the appellate court heard the case and whether it has ruled is not publicly available. Federal Public Defender Williams and her chief of appeals, Paul Rashkind, were present at the sealed appellate hearing in March and represented Bellahouel. They don't acknowledge representing Bellahouel and won't discuss the case at all.

The Review has asked each of the 11th Circuit judges in the case — Stanley F. Birch Jr., Ed Carnes and visiting Judge Procter Hug Jr. of the 9th Circuit — to unseal Bellahouel's case and any opinion. There has been no response.

Missing docket entries

While Bergonzoli's and Bellahouel's cases were entirely disappeared from the public docket, the cases of other federal criminal defendants in South Florida feature public dockets in which certain documents and events were kept out. They include the case of Julio Correa, another alleged "intermediary" in the government's purported sentence-reduction sale scheme involving Ochoa.

Correa was indicted in Miami in 1995 for cocaine conspiracy. He was a fugitive at the time, and a superseding indictment against him was issued in January 1999. Correa disappeared in Colombia in August 2001 and is presumed murdered. In September 2001, the Miami Herald reported that Correa was a "prized government informant" who lived in a plush Aventura condominium and never served a day in prison after he secretly surrendered to the FBI in 1997.

What happened in Correa's criminal case from the time the superseding indictment was unsealed in March 1999 until he vanished nearly 2 1/2 years later isn't known. The public docket contains no entries.

Roy Black and his law partner

Howard M. Srebnick have brought this puzzle to the attention of Judge Moore in the Ochoa case. "Counsel have reason to believe other proceedings occurred in Correa that, as in the Bergonzoli case, are not reflected in the publicly available docket sheets," Black and Srebnick said in court papers.

Black and Srebnick also cite criminal drug prosecutions against other defendants in which they believe docket entries were kept off the public docket and which they think could help with their defense of Ochoa. Those cases include *U.S.A. v. Ramon*, Docket No. 99cr711; *U.S.A. v. Prado*, No. 99-cr27; and *U.S.A. v. Escaf*, No. 99cr433.

Some evidence presented to the court by Black to document the existence of dual docketing came from the Ochoa case itself. Black cited pleadings and events that appeared only recently on the docket after being "withheld and kept secret from public docketing of any kind, sometimes for years." These were entries for documents filed by the government that have now appeared, for no stated reason, on the Ochoa case's extensive docket. The contents remain sealed to the public and Ochoa's defense team alike.

A "startling" example, Black said, was the recent appearance of an entry for a "sealed document" in the Ochoa case that was filed with the court on June 15, 2000. The docket entry, No. 1166, stands out strangely because it's listed between docket numbers 222 and 223, which were also filed in mid-June 2000. Entry 1166 went public on Feb. 25, 2003.

Then there's the even more mysterious docket entry 1213, which first appeared on the public docket on March 28, 2003. The docket describes 1213 as an order unsealing grand jury proceedings involving many defendants. The problem is the docket says Judge Moore

signed that order more than three years earlier on Feb. 15, 2000.

How secret system works

Further evidence of a secret docket and the human dynamics behind it comes from a once-sealed transcript, recently uncovered by Black, of a Nov. 2, 1999, bond hearing for one of Ochoa's many drug co-defendants, Orlando Sanchez-Cristancho. He was under public indictment when he appeared for the bond hearing. But he was finalizing a deal to cooperate with the government which, judging from the transcript, the federal prosecutor wanted to keep secret.

During that hearing, according to the transcript, then-prosecutor Theresa M.B. Van Vliet asked Chief U.S. Magistrate Ann Vitunac in West Palm Beach to seal the proceedings as well as any evidence the hearing ever happened.

Van Vliet told Vitunac that 11 days earlier, U.S. Magistrate Lurana Snow in Fort Lauderdale had granted a no-cash bond releasing Sanchez-Cristancho to the custody of the Drug Enforcement Administration and then sealed everything — including a tape recording of the hearing — so it would "not be obvious in the court record itself."

Van Vliet explained to the chief magistrate that "apparently when it gets filed, even if it's under seal, the court's computer, the WinDOC system, indicates sealed document."

To prevent that from happening, Van Vliet asked Vitunac to follow Magistrate Snow's lead, which Vitunac did. "We will hold those tapes, not docket this proceeding," Vitunac said. "And my order at this moment is oral and to be put in writing at a later date."

Seven months passed before the court disclosed in the public docket that a hearing regarding Sanchez-Cristancho was held that day. ♦

Secrecy appealed

Detained after terror attacks, Algeria-born Broward man asks U.S. Supreme Court to review sealing of his case

by **Dan Christensen**

This story was first published Sept. 25, 2003.

A Delray Beach cafe waiter who was detained in the aftermath of the Sept. 11 terrorist attacks has asked the U.S. Supreme Court to decide whether U.S. District Judge Paul C. Huck and the 11th U.S. Circuit Court of Appeals abused their discretion by sealing his case without explanation.

But, in an unusual move, the public copy of Mohamed Kamel Bellahouel's petition to the Supreme Court for a writ of certiorari is heavily censored, with entire pages blanked out. A complete copy, plus attachments, was filed under seal for the justices' eyes alone. Still, the filing by the federal public defender's office in Miami is the first public acknowledgement by any federal court of Bellahouel's habeas corpus case, which was first reported by the Daily Business Review in March.

According to court papers filed by Paul M. Rashkind, chief of appeals for Federal Public Defender Kathleen M. Williams, the Algerian-born Bellahouel was "obliged" to file both full and redacted versions of his Supreme Court petition to comply with lower court secrecy rulings in his case.

The lower courts, the petition said, have gone to great lengths to hide the "essential fact" that Bellahouel's case even exists — including keeping the existence of the case off the public court dockets. But, it said, "the facts of the petitioner's case would make a significant contribution to the national debate about the detention and treatment of Middle Eastern persons. There is no legitimate government interest [in] permitting court-suppression of his ordeal."

Even at the Supreme Court, however, the public file for Case No. 03M1 does not include the petitioner's name or the names of the lower courts that kept the case secret. The style lists Bellahouel's initials — *M.K.B. v. Warden et al.* The case is identifiable to knowledgeable outsiders only because the petition includes a reference to a March 12 Daily Business Review article about Bellahouel's case.

That article reported how the case only came to light due to the inadvertent disclosure by the 11th Circuit's court clerk's office in Atlanta of Bellahouel's appeal of Judge Huck's decision to seal the case. That disclosure led to the alteration of published federal court calendars and computer records to hide the case again.

The article also reported how the three judges on the 11th Circuit panel — Stanley F. Birch Jr., Ed Carnes and Procter Hug Jr., from Reno, Nev. — closed their courtroom to the public and the news media on March 5 to hear arguments in the case.

The federal government has not accused Bellahouel, 34, of involvement in terrorism. After holding him in custody for five months, the U.S. Department of Justice apparently con-

cluded he was not a danger and authorized his release in March 2002 from Krome Detention Center in southern Miami-Dade on a \$10,000 immigration bond. Bellahouel now is seeking to adjust his legal status and block the government's effort to deport him for overstaying his student visa.

Bellahouel's appeal to the Supreme Court has partly lifted the extraordinary veil of secrecy thrown over the case since he filed his habeas corpus petition in January 2002. At the same time, the high court appeal raises fundamental issues about public access to court records, particularly to basic court docket information, at a time of heightened national security and suspicion.

"At a bare minimum you need to have a public docket that reflects cases," said Thomas R. Julin, a partner at Hunton & Williams in Miami who is not involved in the case. "Without that, there's absolutely no safeguard against abuse." Both Julin and Fort Lauderdale appellate attorney Bruce S. Rogow said that aside from grand jury matters, they hadn't seen secret docketing of cases before.

Bellahouel's petition also highlights the fact that little information is publicly available about the 1,200 young Arab and Muslim men the Department of Justice has said were rounded up in the aftermath of the Sept. 11 terrorist attacks, or about those who've been secretly held as material witnesses in the FBI investigation code-named PENTTBOM.

"This petition raises the common law and First Amendment rights of the public and the news media, who are oblivious to the proceedings below and cannot be heard themselves," Rashkind wrote. "Their ignorance of these proceedings is due to an improperly sealed dual-docket in the district court, which did not even acknowledge the existence of the case; and a refusal of the court of appeals to publicly acknowledge the appeal pending before it, that it decided the case, or the nature of its decision."

U.S. Solicitor General Theodore B. Olson, listed on the docket as now representing the government, had not filed papers in the case as of Wednesday.

Before the Supreme Court can consider Bellahouel's arguments, a majority of the justices must vote to accept his petition, which was filed July 10. A decision could come as early as Monday, when the justices are scheduled to hold a conference to consider whether to hear cases filed during the summer recess.

Rashkind declined to discuss the case in detail, and the U.S. attorney's office in Miami also declined comment. Rashkind's petition said a gag order on all parties is in force.

Rogow said it was "rare" for documents filed in a Supreme Court case to be so heavily censored.

Held without charges

Bellahouel, who lives in Deerfield Beach with his American wife, was a veterinarian in Algeria. He came to the United States in November 1996 to

study biology at Florida Atlantic University. He ran out of money and didn't re-enroll at FAU after the fall term of 1997.

In the summer of 2001 he was waiting tables at the Kef Room, a Middle Eastern restaurant in Delray Beach where several Qaeda hijackers dined in the weeks before the 2001 terrorist attacks. In an affidavit presented to the federal immigration court, an FBI terrorism investigation official said it was "likely" that Bellahouel served Sept. 11 hijack leaders Mohamed Atta and Marwan al Shehhi.

According to the affidavit, an employee at a nearby movie theater fingered Bellahouel as the man she saw go into the theater with hijacker Ahmed Alnami. Bellahouel has denied any connection to the hijackers.

Bellahouel was picked up on Oct. 15, 2001. Government charging documents stated that Bellahouel failed to comply with the conditions of the student visa he received when he entered the United States in November 1996.

A month later, an immigration court judge, relying on the FBI affidavit, denied Bellahouel bond. Before the FBI ultimately agreed to Bellahouel's release the following March, Bellahouel was transported to Alexandria, Va., to testify before a federal grand jury. The substance of Bellahouel's testimony, if any, is not known.

For five months beginning in October 2001, Bellahouel was held in federal detention without bond. While still in custody, Bellahouel asked the courts to release him and open his case to the public.

The release issue became moot in March of last year when Bellahouel bonded out pending the completion of his immigration case. U.S. immigration authorities still seek to deport him.

No requests to seal

Bellahouel's efforts to open the case to the public have continued separate from his immigration case. He filed his habeas suit in January 2002 while he was held at the Federal Correctional Institution in south Miami-Dade. The suit named the former warden there, Monica S. Wetzel, as a defendant. The identity of a second defendant is not known.

The case was assigned to Judge Huck in Miami, though that information did not become public until recently. Little public information is available about what happened before Huck had the case. The case suddenly appeared on the U.S. District Court docket in Miami in mid-June of this year. Other than the case number, 02cv20034, virtually every other detail of the case, including the names of the parties and their lawyers, is still sealed. Bellahouel appealed Huck's decision to seal the entire case in February 2002.

Bellahouel's petition to the U.S. Supreme Court revealed that the 11th Circuit panel issued a "sealed and unpublished judgment" in his case on March 31 of this year.

"Although the secret court of appeals' decision ordered the district court to docket the case publicly [words deleted], it affirmed the district court's refusal to unseal any of the filings in the case, and every entry in the case remains sealed," the petition says. "The court of appeals itself refuses to disclose that it has decided the appeal. Indeed, the final order of the court of appeals is sealed, not publicly docketed."

Bellahouel's petition to the Supreme Court attacks the sealing orders of both the district court and the appeals court, calling them "improper" and noting that "habeas corpus proceedings are historically, and by court rule, open to the public."

The petition says that the district court and the 11th Circuit judges decided on their own to seal the case, because neither the government nor Bellahouel requested it. "That decision was apparently made ... without input from the parties and without the articulated judicial findings required by the court's jurisprudence," Rashkind wrote.

The information blackout in Bellahouel's case kept it off the public docket and unavailable to the news media. Rashkind said the secrecy "effectively neuter[ed]" the news media's ability to file a First Amendment challenge to the secrecy decisions.

No order issued

Rashkind argued that courts aren't supposed to close access to such cases unless a "compelling government interest" is at stake. And judges who deny access must explain themselves in an order.

But Judge Huck never issued such an order, the petition said. "This is equally true of the court of appeals' secrecy, which exists without any articulation of compelling circumstances to justify it."

Rashkind argues that the failure to issue an order justifying the sealing was legally unsupportable. "The district court's failure to give notice, hold a hearing, and to make articulated findings is an abuse of discretion and reversible error. The same is true of the court of appeals' secrecy," the petition says.

Public information about court proceedings is "the first and essential ingredient" to creating public debate and affording the opportunity to challenge government secrecy, Rashkind wrote. In contrast, the "blanket sealing" in Bellahouel's case "hides everything, both the government's actions and petitioner's claims of unconstitutional government collusion."

"The world has changed since 9-11," Rashkind argues. "But the common law and First Amendment rights to discuss and debate those changing events remain alive. The court should grant certiorari, not only to preserve the public's ... rights to know, but also to reinforce those rights in a time of increased national suspicion about the free flow of information and debate." ♦

Plea for openness

National press group asks U.S. Supreme Court to unseal case files of Broward man imprisoned after Sept. 11 attacks

by **Dan Christensen**

This story was first published Nov. 5, 2003.

Calling it the “most egregious recent example of an alarming trend toward excessive secrecy in the federal courts,” a national journalism group has filed a friend-of-the-court brief urging the U.S. Supreme Court to open the sealed records of the habeas corpus case of Deerfield Beach resident Mohamed K. Bellahouel.

“This case has been conducted in extraordinary, and unjustifiable, secrecy,” wrote the attorneys for the Arlington, Va.-based Reporters Committee for Freedom of the Press in their amicus brief, filed Monday. “Even the limited available information demonstrates a cavalier disregard for First Amendment values by the 11th Circuit and district court [in Miami].”

Shortly after the reporters committee filed its brief, the Supreme Court justices signaled their interest in Bellahouel’s case, which is listed on the court’s docket only as *M.K.B. v. Warden, et al.* They instructed Solicitor General Theodore B. Olson — who three weeks ago waived the U.S. Department of Justice’s right to respond to Bellahouel’s arguments seeking review of his case — to reply in writing by Dec. 3 to Bellahouel’s petition for a writ of certiorari.

Bellahouel was detained by federal authorities in 2001 and 2002 in connection with the government’s post-Sept. 11 terrorism investigations. In January 2002, the federal public defender’s office in Miami filed a habeas petition seeking his release. In March 2002, he was released. But Bellahouel and the federal public defender’s office have persisted in seeking to open the records of the case.

The Daily Business Review first reported about Bellahouel’s case in March after a mistake by a docketing clerk at the appeals court briefly revealed its existence. Other facts came to light in July, when the federal public defender’s office in Miami filed Bellahouel’s self-censored petition for Supreme Court review of a sealed March 31 judgment by the 11th U.S. Circuit Court of Appeals. That ruling ordered that Bellahouel’s case be kept secret.

According to Bellahouel’s petition for a writ of certiorari, the 11th Circuit issued “a sealed and unpublished judgment” ordering U.S. District Judge Paul C. Huck to docket the case publicly while upholding Huck’s refusal to unseal any filings in the case. Neither Huck nor the 11th Circuit offered any explanation as to why they sealed the case, the petition said.

In its 12-page amicus brief, the reporters committee asks the justices to declare the 11th Circuit’s sealed judgment unconstitutional. The committee encourages the high court to use the case “to clarify that the public has a constitutional right of access to habeas corpus proceedings and records.”

The brief accuses the 11th Circuit of approving “a drastic departure” from judicial norms by Judge Huck. “The district court’s failure to issue a sealing order, make findings, explore less restrictive alternatives, or give the public an opportunity to be heard constitutes an egregious violation of well-settled law,” the brief said.

The 33-year-old Reporters Committee for Freedom of the Press is a voluntary association of reporters and editors whose purpose is to defend the First Amendment rights and freedom of information interests of the news media. Its brief was prepared and filed by in-house attorneys Lucy A. Dalglish, Gregg P. Leslie and James A. McLaughlin. Dalglish is also the group’s executive director.

The reporters committee has played a role in hundreds of press freedom cases during the past two decades, often in amicus briefs filed with the Supreme Court. Last month for example, in a case styled *Doe v. Chao*, the committee urged the court to recognize a limit on damages under the federal Privacy Act.

Richard J. Ovelman, a prominent South Florida First Amendment lawyer, said the press group’s independent intervention would carry weight with the justices. He said amicus briefs are usually not filed until after the court has agreed to review a case, but an early amicus in an important case can “assist the court” in granting review.

“It can do that for a couple of reasons — one is that it can show the importance of the case — and sometimes it raises points that the party to the case either can’t raise or doesn’t know to raise,” said Ovelman, a partner with Jorden Burt in Miami.

Bellahouel is among a wave of new cases fueled by the Bush administration’s war on terrorism that have landed recently at the Supreme Court. It is also among the least known, and the odds are long that the justices will grant a full review. Still, the facts and issues involved in Bellahouel’s case are compelling.

Secret and uncorroborated

Bellahouel, an Algerian immigrant who lives with his American-born wife in Deerfield Beach, was detained in secret for five months during the post-Sept. 11 dragnet. He was one of approximately 1,200 young Arab and Muslim men detained by the government during that period.

A veterinarian by training, Bellahouel, now 34, came to the FBI’s attention because he worked as a waiter at a Middle Eastern restaurant in Delray Beach that was a pre-Sept. 11 favorite of Mohamed Atta and Marwan al Shehhi, who later were identified as the leaders of the Sept. 11 attacks.

In a sworn statement obtained by the Daily Business Review in March, the chief of the FBI’s International Terrorism Operations Section explained the basis for Bellahouel’s detention to an immigration judge.

Agent Michael E. Rolince said it was “likely” Bellahouel had waited on Atta and al Shehhi, and he cited the uncorroborated testimony of an unidentified movie theater ticket agent who said she saw Bellahouel go into the theater with another Sept. 11 hijacker, Ahmed Alnami.

Bellahouel was picked up on Oct. 15, 2001. He was held on the charge of failing to comply with the conditions of the student visa he received when he entered the United States in November 1996.

In November 2001, U.S. Immigration Judge Neale S. Foster in Miami relied on the FBI statement to deny bond to Bellahouel. Bellahouel was transported to Alexandria, Va., to testify before a federal grand jury investigating the so-called 20th hijacker, Zacharias Massaoui. Bellahouel’s testimony, if any, is under seal.

While in custody in January 2002, attorneys for Bellahouel filed his habeas petition in U.S. District Court in Miami seeking his release. It has yet to see the full light of day.

The petition named the former warden of the Federal Correctional Institution in southern Miami-Dade, Monica S. Wetzal, as a defendant, and was filed by Paul M. Rashkind, chief of appeals for Federal Public Defender Kathleen M. Williams.

The release issue became moot in March 2002 when authorities apparently concluded Bellahouel was not a threat and allowed him to post a standard \$10,000 bond pending the completion of his immigration case. The efforts of Bellahouel and the federal public defender’s office to open the case to the public continued.

For the next year, the case proceeded in absolute secrecy. It wasn’t listed on public dockets in Miami, where it was before U.S. District Judge Huck. Nor was it listed later at the appeals court in Atlanta. Even the case number was kept secret.

In March, the Daily Business Review first reported on the case. The Review found altered court calendars, a rare closing of an appeals court courtroom and a clerk’s computer mistake, which alerted the Review to the existence of the case.

In mid-June, Bellahouel’s case suddenly appeared on the U.S. District Court’s public docket in Miami. But other than the case number, 02cv20034, virtually every other detail of the case, including the names of the parties and their lawyers, remains sealed.

Why that happened was unclear until July, when Rashkind filed Bellahouel’s petition for a writ of certiorari at the Supreme Court. The petition disclosed the existence of the 11th Circuit’s sealed judgment.

First Amendment guarantee

Because of lower court gag orders, the publicly accessible version of Bellahouel’s petition to the Supreme Court is heavily censored. Entire pages are blanked out, including Bellahouel’s name. Only his initials, M.K.B, identify Bellahouel. The justices received an unredacted copy for their eyes only.

The Reporters Committee for Freedom of the Press argued the court-imposed secrecy “has prevented the public and the news media from monitoring the proceedings in any meaningful way, despite the potentially significant news value of the case.”

Indeed, other than several articles published by the Review, only a handful of news stories about Bellahouel’s case have appeared, including one last week in the Christian Science Monitor that referred to Bellahouel only by his initials.

The Reporters Committee cites case law, including *Richmond Newspapers Inc. v. Virginia*, to argue that the court should acknowledge a First Amendment guarantee of access to federal habeas corpus cases. That 1980 case found a public right of access to criminal trials.

Habeas proceedings are civil actions but involve elements of criminal cases. Because of that, the brief says, “the press and the public have a legitimate interest in knowing why M.K.B. has been detained and is now being deported, particularly given the government’s allegations that M.K.B. associated with terrorists.”

The brief said Bellahouel’s case “could spark a healthy public debate about the means by which the government is conducting the war on terrorism.”

The lower courts’ failure to meet “rudimentary obligations” of oversight in a case as important as Bellahouel’s warrants full review by the Supreme Court, the brief argues.

“If the district court closed M.K.B.’s habeas corpus proceeding to protect national security interests, it should be required to say so, and make findings in support; if its reason was something else, it should be required to identify the reason on the record.” ♦

Why did he do it?

South Florida judges, lawyers question Judge Paul Huck's actions in bringing secrecy to extreme level in case linked to terrorism probe

by **Dan Christensen**

This story was first published Dec. 1, 2003.

In the belly of downtown Miami's sprawling federal court complex, there's a large, walk-in vault kept by the court clerk that few people have ever seen. Those who have seen it say it has row upon row of red file folders.

The red folders are embossed with the word "sealed." Inside the folders are the court's secrets, including grand jury records, documents with the names of confidential informants and trade secrets. Those matters have been kept off the public record by judges who ordered them sealed in accordance with either local court rules or specific statutes.

This year, however, the Daily Business Review reported on two cases in the U.S. District Court for the Southern District of Florida that involve a wholly different and — to many judges and lawyers — a more disturbing brand of secrecy. Some have dubbed these cases supersealed. One involves a terrorism-related investigation and a habeas corpus petition; the other is a narcotics case.

The secrecy in these two cases goes well beyond the red file cases in that Miami court vault. Perhaps more importantly, the secrecy in these two cases was put into place without any explicit legal process or criteria established by Congress or the Supreme Court. In one case, the secrecy was imposed over the objections of one of the parties.

In both cases, the public court docket and court record contained no party names, no facts, no judge, no attorneys and no documents that were publicly accessible. Even the case numbers were confidential. And for the one party who objected, he and his attorney were placed under gag orders. While there are established procedures in the federal system for sealing information in a publicly docketed case on an individualized basis, there is no procedure for removing a case from the public docket and placing it in an alternative, deep-cover docket.

It makes it virtually impossible for anyone not involved in such cases to know of their existence. Even parties involved in the cases sometimes could not obtain copies of certain matters or access to the docket to assure themselves as to what documents actually were filed with the court. The terrorism-related case only came to light because of lapses by court clerks in maintaining secrecy; the drug case was revealed by a defense lawyer in a related case.

Last year, U.S. District Judge Paul C. Huck sealed the civil habeas corpus case of Deerfield Beach resident Mohamed Kamel Bellahouel and ordered it kept off the public docket. Unlike in standard sealed cases, Judge Huck never issued any formal order to keep the case secret. Neither did the 11th U.S. Circuit Court of Appeals in Atlanta, which upheld Huck's actions.

But the only way to know even that much is to read Bellahouel's appeal of those secrecy rulings, which is now before the U.S. Supreme Court in a heavily censored filing. The justices

have asked Solicitor General Theodore B. Olson to respond to Bellahouel's appeal by Wednesday, though it's likely the government will seek an extension.

The other case of supersealing is that of Nicholas Bergonzoli, who was convicted last year of drug conspiracy, sentenced to 39 months and ordered to prison by U.S. District Judge Patricia A. Seitz in Miami.

There was no public record or docket entry on Bergonzoli's case or sentencing until two weeks after the Daily Business Review published an article in May about the case. Later that month, U.S. District Judge K. Michael Moore signed an order that put Bergonzoli's case on the public docket and unsealed most of its documents.

Experts say that the extreme secrecy in these two cases — apparently imposed without legally accepted processes and criteria — is dangerous for both those involved in litigation and for the public.

Criminal defendants lose the protection of public knowledge of their case. Without court information, there is no way for the public and the news media to hold the courts, prosecutors and parties accountable for their actions. And the public and the news media are deprived of information that could trigger public discussion of important public policy issues, such as the appropriateness of government national security actions.

Why the federal judges involved in these cases — Judge Huck; Judge Seitz; and the three appellate judges who voted in secret last March to keep Bellahouel's case sealed, Stanley F. Birch Jr., Ed Carnes; and Procter Hug Jr. — were willing to impose such extreme secrecy is unclear. They aren't commenting publicly.

But some South Florida lawyers say federal judges nationally are being overly influenced by U.S. Attorney General John Ashcroft and his national security-oriented Justice Department. "The courts have been much too deferential to the executive branch by simply accepting prosecutors' representations that no information must get out," said Thomas R. Julin, a First Amendment lawyer who is a partner at Hunton & Williams in Miami.

The Bellahouel case in particular has elicited shock and criticism from veteran federal judges and attorneys in South Florida who are not involved in either supersealed case. They say they've never seen cases handled this way before.

"I have signed sealing orders, but I've never signed an order that a case would be kept totally from the public," said Judge James Lawrence King, who joined the U.S. District Court bench in 1970.

"There are any number of reasons, properly established, that I would rely on to seal certain matters, but not forever," said Senior U.S. District Judge Shelby Highsmith of Miami. "Not in a way that hid their existence."

Sanford Bohrer, a First Amendment lawyer and partner at Holland & Knight in Miami, said that in these secret docket cases, "there aren't any standards [for sealing] that I'm aware of. If there are, we don't know if they're being followed."

Neither Chief Southern District Judge William J. Zloch nor Clerk of Courts Clarence Maddox returned calls

seeking comment for this article.

Counter to tradition

These two secret South Florida cases are unusual, but they apparently aren't unique in the federal court system nationally.

In Washington, D.C., the federal court uses a secret docket to hide the existence of cases in which lives of cooperating witnesses who plead guilty to crimes may be in danger, Federal Public Defender A.J. Kramer said in an interview. Pleas are taken and sentences are handed down in secrecy, and there is no adjudication of guilt on the public record, he said.

"There are definitely cases here that don't show up on the docket," Kramer said. "We agree to them because we feel that our clients would be in danger if their cooperation was on a public record."

Still, such cases run against the U.S. judicial system's long tradition of openness. To remove a matter from public view, the courts have consistently said, there has to be a strong justification.

Over the past three decades, access cases regarding court proceedings and records have taken twin tracks. In 1978, in *Nixon v. Warner Communications*, the Supreme Court first articulated a common law right of access to court records. Two years later, in *Richmond Newspapers Inc. v. Virginia*, the high court declared a public right of access to criminal trials based on the First Amendment.

At the 11th Circuit, the main precedent for maintaining open court records is a 1983 decision, *Newman v. Graddick*. The ruling, similar to decisions in other circuits, established a public right to attend civil judicial proceedings relating to the incarceration of prisoners. It also recognized that right is incomplete without access to court records as well.

Even so, federal judges sign sealing orders every day at the request of prosecutors, criminal defendants and civil litigants in cases where someone believes that certain facts need protection. Reasons include national security, personal safety and privacy, and trade secrets. To achieve secrecy, judges impose protective orders that gag litigants and seal court records. And unless it's a case the media are interested in, there's typically little debate and no public notice.

While the Florida Rules of Judicial Administration provide standards for sealing records in state cases based on the state constitution, there is no parallel rule in the federal system.

According to Julin, the generally accepted legal view is that there is no constitutional right of access to federal judicial records. "The general view is that there is a common law right and that that right simply requires courts to balance the interests that are asserted," he said.

The Southern District of Florida, however, has a formal policy on filing matters under seal. Local Rule 5.4 says attorneys who want a sealing order must tell the court, in secret, what they want sealed and spell out a "reasonable basis for departing from the general policy of a public filing."

"It's a matter of [judicial] discretion, bounded by the notion that you can't just do it for any old reason," Julin said.

The reality in federal courts in South Florida and elsewhere is that the rules governing federal judicial decisions to impose secrecy aren't hard and fast. Often, judges' decisions turn on procedural rules that require a balancing of competing interests and a showing of "good cause" to maintain documents under seal. Such decisions vary from case to case and judge to judge, South Florida lawyers say.

Other secret avenues

Sealing orders aren't the only way courts help keep secrets. For example, the U.S. Foreign Intelligence Surveillance Court, created by Congress in 1978, is a special, secret court composed of seven federal district judges from around the country who are appointed by the chief justice.

In closed proceedings, FISA judges review applications by the Justice Department to conduct electronic surveillance to collect foreign intelligence information. The attorney general must personally approve all applications and give the court specific reasons sufficient to establish "probable cause" that the target of the surveillance is a foreign power or foreign agent. All of FISA's records and files are sealed.

Another secrecy procedure is spelled out in the federal Classified Information Procedures Act. It provides a process by which the federal government and the federal courts give criminal defendants access to sensitive evidence from government files or witnesses. Under CIPA, defense attorneys who want such access must agree to be bound by certain rules and obtain security clearance.

Even in national security cases, a judge must be specifically convinced of the existence of an "obvious and imminent" threat to the administration of justice to overcome the presumption of openness that attaches to court proceedings, said Sam Terilli, a former general counsel for the Miami Herald and managing partner at Ford & Harrison in Miami.

"That's the safeguard," Terilli said. "If the government says [secrecy] is required, it's put to the test and the judge evaluates the evidence. You win some, you lose some, but at least you've had your day in court and there's an order on the record and people know that something has been done in secret. When you have a secret docket, that's not been done."

Julin agreed. "If a motion to seal is itself filed under seal, it defeats the purpose of the system and undermines the credibility of the courts," he said.

The cases of Bellahouel and Bergonzoli depart from law and tradition in a fundamental way, several experts said.

Mohamed Kamel Bellahouel, a 34-year-old Algerian-born veterinarian, filed his habeas petition in U.S. District Court in Miami during his five months in federal custody in 2001 and 2002. He was detained without bond after the Sept. 11 terrorist attacks.

Federal investigators say he was arrested because he served meals before the attacks to some of the Sept. 11 hijackers at a Middle Eastern restaurant in Delray Beach, and he allegedly watched a movie with one hijacker.

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Bellahouel was not charged with a crime, but was transported to Virginia while in custody to testify before the grand jury that indicted the so-called 20th hijacker, Zacarias Moussaoui. He was released in March 2002 after FBI agents apparently concluded that he was not a threat. Authorities allowed him to post a \$10,000 immigration bond, related to charges that he overstayed his student visa issued in 1996.

Even after being released, Bellahouel continued his legal challenge to the secret handling of his case. Meanwhile, he faces possible deportation in the immigration proceedings.

His case proceeded in secret until last March when clues to its existence, unintentionally left on the public record by court clerks in Miami and Atlanta, were found and reported by the Daily Business Review. During the summer, Bellahouel appealed to the Supreme Court after his efforts to open up the case were rebuffed by the lower courts.

His petition for certiorari is publicly listed only as *M.K.B. v. Warden, et al.* The heavily redacted filing states that Judge Huck and the 11th Circuit judges must have decided on their own to seal the case, because neither the government nor Bellahouel requested it.

Bellahouel's attorney, Paul Rashkind, chief of appeals for the federal public defender's office in Miami, argued that courts aren't supposed to close access to such cases unless a "compelling government interest" is at stake. And judges who deny access must explain themselves in an order.

But neither Judge Huck nor the 11th Circuit panel ever issued such an order or offered "any articulation of compelling circumstances to justify it," Rashkind wrote. "The failure to give notice, hold a hearing, and to make articulated findings is an abuse of discretion and reversible error," the petition said.

To get a full hearing, at least four justices must agree to take the case.

"We're all supposed to be following the same rules, and the judges are supposed to try to apply them the same way," said Holland & Knight's Bohrer.

"The problem here is that because there are no [explicit] standards, everybody may be using a different standard. We don't know because everything is secret."

A friend of the court brief filed Nov. 3 by the Reporters Committee for Freedom of the Press accused the 11th Circuit of approving "a drastic departure" from judicial norms by Judge Huck. "The district court's failure to issue a sealing order, make findings, explore less restrictive alternatives, or give the public an opportunity to be heard constitutes an egregious violation of well-settled law," the brief said.

The brief by the Reporters Committee cites nearly a dozen prior court cases that, in its view, describe what judges must do before closing a proceeding or sealing a document. Judges must make specific findings about why secrecy is necessary, consider alternatives to secrecy and provide public notice on proposed closings, said the brief.

On the issue of public notice, the brief cites a 1993 decision by the 2nd Circuit, holding that courts must provide notice on public dockets of hearings to close proceedings.

In addition, the Reporters Committee brief asserts a "presumptive right" to inspect and copy court records in Bellahouel's case. To support that claim, the brief cited the 11th Circuit's *Newman v. Graddick*.

But Julin argues that the Supreme Court never established such rights regarding civil judicial proceedings such as Bellahouel's habeas case, and that the proposition that judges must articulate findings or provide public notice before sealing records is not uniformly accepted. "It very much depends on the judge," he said.

Leeway to fight terrorism

While a number of South Florida lawyers and federal judges are dismayed by the two identified cases of supersealing, one commentator argues that law enforcement authorities should be allowed broad leeway to use confidential court proceedings to combat terrorism.

Paul D. Kamenar, senior executive counsel for the conservative Washington Legal Foundation in Washington, D.C., argues that Supreme Court review of the lower-court secrecy orders in the Bellahouel case is unnecessary because Congress can take action if the courts tilt too far in favor of national security over openness and public accountability.

"Our position," Kamenar said, "is that the courts should weigh and balance security interests with a need for openness in judicial proceedings."

A spokesman for the House Judiciary Committee declined to comment on the court secrecy issue.

Kamenar also argues that the government may have come across sensitive national security information in the Bellahouel case that needs to remain secret. "The mere fact that [Bellahouel] has been released doesn't mean there's not significant information that came out during proceedings that we don't know about," he said. "And it doesn't mean the government has a lesser interest in keeping that under wraps."

But prominent First Amendment lawyer Floyd Abrams, a co-counsel to the New York Times in the landmark Pentagon Papers case, said he was unaware of any previous case in which the right of access to court information was litigated in secret, as it has been in the Bellahouel case.

"That tells a story of its own — secrecy breeds more secrecy," said Abrams, a partner at Cahill Gordon & Reindel in New York City. "That is one of the reasons it must be resisted."

"When the government classifies things like that, they're usually trying to cover up their own mistakes," said Abner J. Mikva, who has served as a Democratic congressman, chief judge of the U.S. Circuit Court of Appeals for the District of Columbia and a top aide in the Clinton White House.

Mistakes were made

Indeed, a government coverup for its mistakes is precisely how Miami attorney Roy Black explains the government's sealing of the case of Nicholas Bergonzoli.

In court papers, Black, who represents convicted Colombian drug lord Fabio Ochoa, identified Bergonzoli as an "intermediary" in an alleged U.S.-backed "program" to induce major drug traffickers such as Ochoa to surrender by selling them advance "sentence reductions." The defense alleged that Ochoa was indicted because he refused to pay.

Ochoa has filed an appeal to the 11th Circuit, based in part on the argument that his defense was hampered by the secrecy in the Bergonzoli case. He claims that secrecy blocked effective access to a potentially important defense witness who could testify about the government's corrupt sentence reduction scheme.

But the secrecy in the Bergonzoli case also could stem from concerns about Bergonzoli's personal safety. A source familiar with the case said that the murderous reputations of the defendants in the Ochoa case and related cases were the main reason for keeping Bergonzoli's case under wraps.

If that's true, Bellahouel's petition to the Supreme Court highlights a broader public policy issue than does the Bergonzoli case. It reminds us that there is little information publicly available about the 1,200 young Arab and Muslim men who, like Bellahouel, were rounded up in relative secrecy by the Department of Justice after the Sept. 11 terrorist attacks.

"At this point, it is impossible to judge whether [Bellahouel] was legitimately detained, or whether he was the victim of racial or ethnic profiling," says the amicus brief of the Reporters Committee. "There may, in fact, be legitimate reasons for the government's actions ... but without any ability to observe the proceedings, the public and news media cannot be blamed for being skeptical."

Such skepticism seems unlikely to dissipate anytime soon. "For the public to have confidence that the judiciary is doing the right thing, it has to see what it is doing," Thomas Julin said. "Without open access to files, there's absolutely no safeguard against abuse." ♦