Secret Court Docket Practice Exposed

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One of the founding principles of the United States judiciary system is the right of access by the public and press. In their infinite wisdom, the authors of the Bill of Rights placed that principle within the First Amendment. That principle, however, has become yet another casualty in the war on crime and terror. Aside from the *Miami Business Daily*, who first broke this story, the corporate and legal media have largely ignored the use of secret court dockets by the judiciary. Most alarmingly, these secret court dockets are being used to hide civil rights lawsuits, criminal drug cases, and even divorce proceedings by wealthy litigants.

Hiding a Counter-Insurgency Scandal

Attorneys representing Colombian drug kingpin Fabio Ochoa, 46, a former member of the Medellin drug cartel, have asked the 11th Circuit Court of Appeals to cease the practice of maintaining dual secret dockets in the Southern District of Florida. Ochoa, represented by Miami attorneys Roy Black and G. Richard Strafer, argues in his brief to the 11th Circuit that Ochoa has been victimized by an improper collaboration between prosecutors and the judiciary, which cut him off from information he needed to defend himself at his criminal drug trial. Black is best known as the high powered attorney who represented William Kennedy Smith on rape charges, leading to an acquittal, and who also secured acquittals for accused drug traffickers Salvador Magluta and Willie Falcon.

Black and Strafer argue the government is trying to hide scandalous evidence of a federal government program that extorted cash from drug dealers to bankroll Colombian right-wing paramilitary death squads in the 1990's in order to combat leftist guerrillas in that country. The fight against leftist guerrillas has been the centerpiece of American foreign policy in Central and South America for the past 30 years. It has relied extensively on mass murder and torture by both the armies and police forces of the region's government's as well as government backed death squads. The scheme allegedly extorted millions from South American drug traffickers in exchange for "sentence reductions" prior to surrendering themselves to American authorities.

The attorneys want information from the secret docket case of Nicholas Bergonzoli. In October 1995, Bergonzoli was indicted by a Connecticut federal grand jury for conspiracy to import cocaine. The case was transferred to the federal district court in Miami, and assigned case number 99cr196. Once in Miami, the case disappeared from public view, as a search of the court's PACER electronic docket system yields a reply of "no matches found". On January 29, 2002, Bergonzoli was sentenced and is now serving a secret sentence of 39 months in a Miami federal prison.

Ochoa's attorneys are interested in Bergonzoli because he has been identified in court papers as an "intermediary" that peddled the government's reduced sentences program to witnesses expected to testify at Ochoa's trial. Ochoa refused to pay a $30 million bribe to Bergonzoli's contact, government informant Baruch Vega of Miami Beach. Federal Magistrate William Turnoff rejected a motion to dismiss because Ochoa "has not offered one iota of evidence in support of his claims" that federal agents and prosecutors knew about the sentence-reduction sales scheme.

Another "intermediary" in the governments' sentence-reduction sales program, Julio Correa, had his case entirely disappear from the Southern District of Florida's court dockets. In March 1995, Correa was indicted for cocaine conspiracy. What happened in his case from that time until he disappeared in Columbia, and was presumably murdered, is unknown. What is known, however, is that from the time of his surrender to the FBI in 1997 until his disappearance in August, 2001, Correa never spent a day in prison. Ochoa will have no such luck. He was convicted by a jury on drug conspiracy charges on May 29, 2003, and in August was sentenced to 30 years in prison.

Yet another case hidden from public view is that of Algerian Mohammad Kamal Bellahouel, who entered the U.S. on a student'visa in 1995. He came to the attention of authorities after an employee of Regal Cinemas in Delray Beach, Florida, said she recalled seeing Bellahouel enter the theater to watch a movie with a suspect in the 9/11 hijackings. Based on this unsubstantiated revelation and the fact Bellahouel worked as a waiter and likely served several of the 9/11 hijackers at the restaurant he worked at, a material witness warrant was issued and Bellahouel was taken into custody.

Anyone held under such a warrant is entitled to a court-appointed lawyer. Once in custody, federal officials began a game of legal hardball. "They issued the warrant, then decided they didn't want him to get representation, so they no longer held him as a material witness," said private lawyer David A. Silk, who is handling Bellahouel's immigration case. "But they held him anyway. The long and short of it is they quashed the warrant to keep him from being represented when the FBI went to talk to him."

For a few days, Bellahouel was held at the Federal Correctional Institution in Miami. He was not criminally charged and is now out on bond awaiting the outcome of immigration proceedings.

Attorney Black said several other criminal cases are being kept off the Southern District's docket: *United States v. Ramon,* docket No. 99CR711; *United States v. Prado,* No. 99CR27; *United States v. Escaf,* No. 99CR433. Black believes information from these cases could help Ochoa's defense, yet they remain sealed to the public and Ochoa's defense team.

Black said evidence of dual docketing comes from Ochoa's case itself. For example, docket entry no. 1166 is listed between docket numbers 222 and 223. All were filed in mid-June 2000. However, "sealed document" number 1166 did not go public until February 25, 2003.

Then there is docket number 1213, which is an order unsealing grand jury proceedings involving many of Ochoa's co-defendants. That order appeared on the public docket on March 28, 2003. The problem is, according to the docket, Judge K. Michael Moore signed that order three years earlier on February 15, 2000.

Disappearances on All Levels

The Southern District of Florida is not the only keeper of secret-dual dockets. Contrary to its own opinion in *United States v. Valenti,* the 11th Circuit has jumped into the fray.

The fact that Bellahouel was held in a Miami federal prison only came to light after a deputy appellate clerk mishandled the appeal of Bellahouel's habeas case and allowed his name to become public. In the Southern District, there exists absolutely no public record of this case. However, the appellate clerk's mistake temporarily revealed the appeal of *Bellahouel v. Wetzel,* Case No. 02-11060.

Monica Wetzel was the warden of the federal prison in Miami at the time of Bellahouel's detention. Of Bellahouel's case, appellate court clerk Robert Phelps said, "We made a mistake. It shouldn't have been put out in the first place." All references to Bellahouel's case have since disappeared from public view in the 11th Circuit.

It also appears that Bellahouel and his lawyers are under a gag order. "I cannot talk about it. I am not allowed" said Bellahouel. The identity of Bellahouel's lawyers was only revealed March 5, 2003 after Federal Public Defender Kathleen Williams was blocked from entering a meeting of a three-judge panel from the 11th circuit sitting in Miami, which was closed to the public and media. Williams was only admitted after explaining she was an attorney in the case. Williams and her appeals chief Paul Rashkind refuse to comment on the case or even acknowledge they represent Bellahouel. None of the federal circuit court judges hearing the case would respond to questions or otherwise acknowledge the case exists.

Until March 5, Bellahouel's involvement in the 9/11 case was a secret. His situation is similar to the 1,200 Arab men rounded up by the U.S. Justice Department in the 9/11 aftermath. Even less is known about these round up in the FBI investigation Code named PENTTBOM, which resulted in the secret detention of material witnesses. There has been no disclosure of their names, numbers, or nationalities; not even their lawyers' identities have been revealed. Assuming they have lawyers.

Since 9/11, more than 750 people have been detained on immigration violations. In June 2002, the U.S. Supreme Court put on hold New Jersey U.S. District Judge John Bissell's order that found it unconstitutional to impose a blanket policy closing all detention or deportation hearings to the "public and media that the government calls "special interest" cases. "More people will be tried in secret, and that's unfortunate," said Lee Gelerant, an American civil Liberties Union attorney specializing in immigrant rights. "They're appearing all by themselves in front of a judge, facing a trained INS prosecutor in secret. There's no public scrutiny of the process," he said. Of the 750 detainees, 611 have had secret hearings so far. They have been "disappeared" just as American advisers instructed their allies and flunkies of the 1970's and 1980's of assorted military dictatorships in South and Central America to do. No public record or acknowledgment exists that these people have been taken into government custody much less any word on their treatment or conditions of confinement in custody.

The secret docket practice has become so commonplace, that when Ochoa's lawyers filed a motion to intervene in Bellahouel's case before the 11th Circuit, it was filed under seal at the request of a deputy appellate clerk. Without acknowledging Bellahouel's case exists or an opinion has been rendered, the 11th Circuit instructed Ochoa's lawyers to raise the issue in their brief before the court in Ochoa's interlocutory appeal of his criminal drug case.

The trend of secret court dockets and proceedings has began to creep into state judiciary systems. In Connecticut, courts can make cases into a "level 1" invisible or "level 2" names-only case. When *The Connecticut Law Review* disclosed in March 2003 that it had learned of the existence of level 1 cases that lack party names and docket numbers to keep their very existence hidden from the public, another newspaper brought suit under § 1983 and 1985 in federal court. The suit styled *The Hartford Courant Co. v. Pelligrino* seeks basic docket information about the 104 level 1 stealth cases. In recent years, the perk of "level 1" has been held out to a millionaire CEO, state lawmaker, judge, and famous lawyer. Recently, University of Connecticut President Phillip G. Austin and his wife had their divorce shrouded in the ultra-secret mode, with top level court approval. Rather than invoking national security or crime fighting rationales, this is a case of using the public courts in total secrecy to shroud the legal travails of the wealthy and politically connected.

"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 Federal Public Defender Kathleen Williams. It is also infecting the civil justice system when it suits the convenience of the wealthy and well connected or, as in Bellahouel's civil rights cases, may shroud human rights violations by government officials.

Connecticut supreme court chief justice William Sullivan has called for a change in Connecticut state court rules to eliminate secret dockets in that state's court system. At the federal level, the silence is deafening, with no government official or judge even acknowledging the practice exists, much less that it should be stopped.

The Disappearing Act

Attorney Black discovered evidence of secret dockets and the human dynamics behind the practice when the once-sealed transcript of a November 2, 1999, bond hearing for one of Ochoa's many drug co-defendants, Orlando Sanchez-Cristancho, was unsealed. Sanchez-Cristancho was under indictment, but he was trying to finalize a deal to cooperate with the government, which the federal prosecutor was trying to keep secret.

The prosecutor, Theresa M.B. Van Vliet, asked Chief Magistrate Ann Vitunac to seal the proceedings and any evidence the bond hearing ever happened. Van Vliet told the judge that 11 days earlier Magistrate Lurana Snow had granted Sanchez-Cristancho a no cash bond, released him to the custody of the Drug Enforcement Administration, and then sealed everything so it would "not be obvious in the record itself."

The problem, according to Van Vliet, is that "apparently when it gets filed, even if it is under seal, the court's computer, the WinDoc system, indicates sealed document." Judge Vitunac then ruled, "We will hold these tapes [of the proceedings], not docket this proceeding, and my order at this moment is oral and to be put in writing at a later date." Seven months passed before that proceeding was placed on the public docket.

In Connecticut, clerks are instructed to go to great lengths to hide secret docket cases. "It is suggested that a photocopy of the original Daybook Page be made and the docket number and name of the case be redacted. In the redacted space, add 'level 1 file,'" the clerk's manual instructs. The public gets the photocopy while the original is maintained in a secure location "such as the safe."

The Law

A decision by the 11th Circuit, *United States v. Valenti,* 987 F.2d 708 (11th Cir. 1993), prohibits the use of dual dockets that keep matters from the public. In 1993, the 11th Circuit held that one public and one secret docket in a corruption case in Florida's Middle District violated 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," the opinion says.

The Southern District of Florida's Local Rule 5.4 says, "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." A form is provided to close filings from public view, "Order Re: Sealed Filing."

There are no provisions of law or rule enacted before or after 9/11 that justifies or allows the sealing of an entire docket of a case or individual entries themselves in any type of litigation.

Keeping a minimal public record of sealed matters allows defendants, the public, or the news media to mount a legal challenge to a prosecutor's motion to seal or a court's sealing order when they know that a sealing has occurred or is being sought. Normally, non-public developments in a case are reflected by a "sealed" docket entry.

No one in South Florida is talking about the secret-dual dockets. Chief Judge William J. Zloch declined to comment on the practice. The court clerk, Clarence 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." While refusing to comment on the irregularities outlined in this article, Maddox said the court "in its discretion is the authority for what is sealed and thus available to the public. This is an established and long-standing practice." Also refusing to comment on the dual-secret dockets was the United States Attorney in Miami, Marcos Jimenez.

Eroding Public Trust

Attorneys contacted by the *Miami Daily Business Review,* who are all 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. "Although on the 50th Anniversary of the House Un-American Activities Committee there's nothing that surprises me."

Miami lawyer Neil Sonnett, termed the Bergonzoli case "an extraordinary circumstance" and called the sealing of dockets "inexcusable" if used to hide relevant matters for the defense of clients from lawyers.

Ochoa's lawyers, however, argue a greater harm. While asking the 11th Circuit to put the issue of *United States v. Valenti* to rest forever, they argue the public credibility is threatened by what has happened in Ochoa's case and several criminal cases associated with it.

"It would be both ironic and tragic if the court were to issue an opinion in this case defining the scope of a criminal defendant's First Amendment right to access the court's through procedures that themselves denied that

defendant the same access afforded his opponent in the litigation," says Ochoa's brief.

Black and Strafe argue that if government officials want to use informants whose identities they want to remain secret, they should not pursue criminal cases against them, which requires the court to provide the public information.

"Once Executive Branch officials take the step of filing a case, thereby invoking the role of the judiciary, they must either live with the consequences of that choice or dismiss the case," the brief says. "When two branches collaborate to perpetuate an undercover operation that is not subject to public scrutiny, the public and the citizens accused will inevitably lose confidence in the independence of the judiciary."

"The 'foundation of the Republic will not crack' if the federal government fails to put Fabio Ochoa in federal prison," the brief concludes. "It will shatter, however, if the American people come to believe that their judicial system cannot be trusted."

In late October, 2003, Bellahouel's secret case made it to the U.S. Supreme Court. No appellate court or district court ruling or docket information exists and the 27 page petition for certiorari filed in the supreme court by Kathleen Williams has been partially censored. Bellahouel's identity is also secret, concealed behind his initials.

The certiorari petition notes: "The entire dockets for this case and appeal, every entry on them, are maintained privately, under seal, unavailable to the public. As we go to press the Supreme Court has asked the solicitor general's office to respond to the brief. In the court of appeals, not just the filed documents and docket sheet are sealed from public view, but also hidden is the essential fact that a legal proceeding exists." The cert petition's existence indicates that the Eleventh Circuit, in a secret ruling, must have upheld the use of secret dockets and ruled against Bellahouel on the merits, presumably reversing its ruling in *Valenti.* Panel rulings can only be reversed by the circuit court sitting en banc. With a secret ruling, no one knows if that happened. The case is docketed in the Supreme Court as *MKB v. Warden,* Supreme Court Case No. 03-6747.

The Supreme Court has previously held that public and media access to judicial proceedings are an integral part of a functioning democracy. In *Press Enterprise Co.v. Superior Court,* 104 S.Ct 819 (1984), the court held "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed. The sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." It remains to be seen what the supreme court will do when those principles conflict with government expediency.

Only after Bellahouel's case was docketed in the Supreme Court did the mainstream media take notice of this issue. However, Ochoa's case, with it's pervasive and proven pattern of hidden dockets, secret deals and sentenced prisoners who never actually go to prison, has languished in obscurity. Arguably, government agents extorting millions from drug lords to bankroll right wing death squads in a counterinsurgency war against leftist rebels, and then covering it up, would be a newsworthy issue. Apparently not. But, the last time it happened, known as the Iran-Contra scandal, the media didn't exactly jump on the story then either.

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