NO:

IN THE
SUPREME COURT OF THE UNITED STATES

M.K.B.,
Petitioner,
v.

WARDEN, et al.

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the [ ] Circuit

[REDACTED*] PETITION FOR WRIT OF CERTIORARI

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND, Supervisory
Assistant Federal Public Defender
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone (305) 536-6900

KMW-00.1

* Redactions indicated by brackets [ ]

QUESTION PRESENTED FOR REVIEW

Whether the lower courts failed to comply with the Court's common-law and First Amendment jurisprudence governing public access to court filings and proceedings, where the lower courts sealed all court filings in a federal habeas corpus case, as well as the entire docket of proceedings in the district court and the court of appeals, without articulating any findings to support sealing, and without considering the possibility of merely redacting those portions of the filings for which sealing might be legally justified?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

M[ ] K[ ] B[ ] respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the sealed and unpublished judgment of the United States Court of Appeals for the [ ] Circuit, rendered and entered in [ ], which affirmed the U.S. District Court's refusal to unseal certain pleadings and the record below.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the [ ] Circuit, which affirmed the district court's order refusing to unseal certain pleadings and the record, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES, and the Court's decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-03 (1982) (public access litigation not moot because it is capable of repetition, yet likely to evade considered plenary review). The decision of the court of appeals was entered on March 31, 2003. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. §§ 2253 and 1291, which give the courts of appeals jurisdiction over appeals of habeas corpus proceedings and all final decisions of the district courts of the United States. In addition, the court of appeals had jurisdiction over the First Amendment and common-law public access claims in accordance with the Court's decision in Globe Newspaper Co., 457 U.S. at 602-03. The appeal was timely filed on February 21, 2002, [

], that disposes of all claims between the parties to this cause.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. CONST. AMEND. I

> Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner was the petitioner in the district court, appellant in the court of appeals, and will be referred to by name or as the petitioner. Respondents [ ] and [ ], will be referred to as the respondents or the government. The record is noted by customary reference to record volume and docket numbers.

Petitioner has been released on an agreed $10,000 Immigration Bond. Appendix (A-7).

Course of Proceedings and Disposition in the District Court

Before the smoke had cleared from 9/11, countless innocent Middle Eastern men were secretly detained in the United States. One of the detainees was the petitioner, M[ ] K[ ] B[ ].

Initially, Petitioner was held in the custody of the Immigration and Naturalization Service as an overstay. He is married to a U.S. citizen and sought adjustment of his status as permitted by law, an adjustment that is routinely granted. [.] When his immigration counsel sought to have him released on an Immigration Bond, the Federal Bureau of Investigation interfered, to the extent that the Immigration Judge refused to conduct a pretrial release hearing or grant relief. Id. As Petitioner's counsel stated under oath, [ ], he was told by INS District Counsel that "'the FBI has an interest in Mr. [ ]' and that unless the FBI closes its investigation of Mr. [ ], INS would object to any adjustment of status and to any request for Mr. [ ]'s release. The Immigration Judge stated that, in view of the INS' position he could not do anything," but he did schedule a bond hearing for November 14, 2001. Id., at 3. When Petitioner's counsel sought to raise the issue of an Immigration Bond,

on November 29, 2001, District Counsel again objected, and as Petitioner's counsel attempted to argue for relief, the Immigration Judge "announced he was going off the record and shut off the recording machine that is used to record bond hearings." Id. at 4. Despite objections by his counsel, Petitioner was not released on an Immigration Bond. Id.

While in INS custody, on December 28, 2001, Petitioner was served with [

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] the government agreed to his release on a nominal $10,000 Immigration Bond pending the balance of INS proceedings. He posted the bond on March 4, 2002, and is now at liberty pending completion of his Immigration proceedings. Appendix (A-7).

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A clerk of the court of appeals inadvertently disclosed the existence of the appeal by listing it on a public oral argument calendar and showing its name under PACER, which led to a nationally published newspaper story, Dan Christensen, Secrecy Within, DAILY BUSINESS REVIEW, March 12, 2003, at A1. Appendix (A-4). Although the existence of an appeal became known to the public, the district court case remained fully sealed from public view. The clerical error revealed only the name and case number of the appellate case, but even that much information was quickly returned to complete secrecy. The oral argument below took place in a sealed courtroom. The existence of, issues in, and the decisions of the district court and court of appeals remain

sealed from public view. Based upon the Secrecy Within newspaper story, [

] the district court clerk listed on the public docket the case number of the habeas corpus case. The district court did not list the names of the parties or their counsel, and simply showed each of the 65 docket entries as "SEALED." Appendix (A-6).

This petition for writ of certiorari follows.

Statement of Facts

The district court did not conduct an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

In an extraordinary set of secret cases, the courts below sealed an entire habeas corpus proceeding and appeal – the style of the case, the case numbers, the names of the parties and their counsel, every court filing and every court ruling – without ever entering a sealing order, without articulating a reason for sealing, and without tailoring a sealing order for only those matters that might justifiably be sealed from public view. Despite repeated motions to unseal proceedings, or portions of these proceedings, the entire habeas corpus case and appeal remain sealed from public view. The mere existence of these proceedings was unknown by the public since neither the district court nor court of appeals maintains a public docket of the case, and, but for a brief clerical error, all proceedings would still be completely sealed from public view. And that brief, yet unrevealing, public glimpse was quickly sealed.[1] This habeas corpus case has been heard, appealed, and decided in complete secrecy.

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. Their ignorance of these proceedings is due to an improperly sealed dual-docket in the district court,

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[1] In error, a clerk of the court of appeals inadvertently disclosed the existence of the appeal by listing it on a public oral argument calendar and showing its name under PACER, which led to a nationally published newspaper story, Dan Christensen, Secrecy Within, DAILY BUSINESS REVIEW, March 12, 2003, at A1. Appendix (A-4). Although the existence of an appeal became known to the public, the district court case remained fully sealed from public view. The clerical error revealed only the name and case number of the appellate case, but even that much information was quickly returned to complete secrecy. The oral argument below took place in a sealed courtroom and the existence of, issues in, and the decisions of the district court and court of appeals remain unknown to any member of the public or media. Based upon the Secrecy Within newspaper story, [

] Appendix (A-2).

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. Although the secret court of appeals' decision ordered the district court to docket the case publicly, [ ] (sealed order, unpublished), it affirmed the district court's refusal to unseal any of the filings in the case, and every entry in the case remains sealed. See PACER, [ ].[2] 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, and filed in a case that is not publicly docketed. See Appendix (A-4&5). The public and media are, therefore, still unaware that the courts below have held undocketed federal judicial proceedings in which all court filings are completely sealed from public view. For obvious reasons, then, Petitioner is the only person who knows sufficient information to challenge these proceedings.

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[2] [ ] the district court has now docketed the case as "Sealed Petition v.", listing the plaintiff as "IN RE PETITION FOR WRIT OF HABEAS CORPUS," and listing no other parties. No party is listed by name and no counsel for the parties are named. Two entries are listed as "SEALED PETITION for writ of habeas corpus," and every one of the remaining 63 docket entries is listed as "SEALED": SEALED DOCUMENT, SEALED MOTION, SEALED ORDER, SEALED NOTICE OF SEALED HEARING, SEALED MINUTES OF HEARING, SEALED TRANSCRIPT OF HEARING, or SEALED NOTICE OF APPEAL, without any further description of the substance of the filing. Appendix (A-6).

Petitioner has standing to raise these common-law and First Amendment access issues[3] and the issues are not moot.[4]

The public's right of access to the sealed courts' filings and proceedings derives from two sources, the common-law and the First Amendment.

It is clearly established that court documents are covered by a common-law right of access. Nixon v. Warner Communications, 435 U.S. 589, 599 (1978) (recognizing general right to inspect and copy "judicial records and documents"). Under that doctrine, judicial documents are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring nondisclosure. Nixon, 435 U.S. at 602. Challenges to closure decisions

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[3] Because "it is the rights of the public, an absent third party, that are at stake, any member of the public has standing ... to move the court to unseal the court file in the event the record has been improperly sealed." Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992); Wilson v. American Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985). As a member of the public, Petitioner has standing to assert these interests on behalf of all Americans, the press and its readers alike. Id.; see e.g., Cendent Corp. v. Forbes, 260 F.3d 183 (3rd Cir. 2001) (private attorney successfully challenged sealing order under principles of common-law access); Miller v. Indiana Hospital, 16 F.3d 549 (3rd Cir. 1994) (granting individual's appeal, based upon common-law right of access, overturning sealing order); Union Oil Company v. Leavell, 220 F.3d 562 (7th Cir. 2000) (individual party successfully challenged legally insufficient sealing order); Leucadia, Inc. v. Applied Extrusion Technologies, Inc, 998 F.2d 157, 167 (3rd Cir. 1993) (permitting private party right to raise public access issue in civil litigation).

[4] See Globe Newspaper Co., 457 U.S. at 602-03 (access litigation not moot because it is capable of repetition, yet likely to evade considered plenary review); United States v. Ellis, 90 F.3d 447 (11th Cir. 1996) (public access issues not moot merely because substantive case has been completed); United States v. Valenti, 987 F.2d 708, 712 (11th Cir. 1993) (mootness does not bar claims against motion to unseal closed proceedings, even though proceedings have ended); Newman v. Graddick, 696 F.2d 796, 800 (11th Cir. 1983) (appeal of denial of unsealing not moot, in part, because records not yet released); United States v. Gurney, 558 F.2d 1204, 1207 (5th Cir. 1977) (appeal of denial of access to court records does not become moot even after case has been tried, since the matter is capable of repetition, yet evading review, because the underlying litigation will almost always terminate before appeal is heard).

based on the common-law right of access are reviewed for abuse of discretion, Nixon, 435 U.S. at 599, and the failure of a sealing court to justify secrecy requires unsealing under common-law principles. See e.g., Miller v. Indiana Hospital, 16 F.3d at 551 (sustaining common-law access to court records in civil case, where court did not articulate compelling countervailing interests); Cendent Corp. v. Forbes, 260 F.3d at 187 (overturning confidentiality order where district court failed to articulate the necessary findings to support order); Union Oil Company v. Leavell, 220 F.3d at 567 (reversing procedure in civil case of filing under seal "[a]lmost every document filed in the case, even the district court's opinions, orders, and judgment"); Bank of America National Trust and Savings Assn. v. Hotel Rittenhouse Associates, 800 F.2d 339, 346 (3rd Cir. 1986) (court abused discretion by refusing to unseal documents without particularized showing of need); Wilson v. American Motors Corp., 759 F.2d at 1571 (reversing sealing in civil case, absent articulated findings of a compelling government interest).

The First Amendment protects the right of the public and the press to attend criminal trials. Globe Newspaper Co., 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558-81 (1980) (plurality opinion). The Court has applied a qualified version of this First Amendment right to attend certain pre-trial proceedings in criminal cases which historically have been, and logically should be, open to the public, allowing access except where closure is essential to serve a higher interest and where closure is narrowly tailored. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-9 (1986) (Press-Enterprise II) (recognizing right of access to preliminary

hearings as conducted in California); Press- Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I) (recognizing right of access to voir dire proceedings).[5]

Together, the common-law and First Amendment have provided an historical tradition of public access to both civil and criminal court proceedings and documents. See Richmond Newspapers. 448 US. at 580 n.17 ("... we note that historically both civil and criminal trials have been presumptively open"); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 386 n.15 (1979) (right of access "is equally applicable to civil and criminal cases..."). There is a presumptive right of public access to court records, which requires a strong showing before it can be overcome. Nixon v. Warner Communications, 435 U.S. at 597-98. Civil proceedings involving the incarceration of prisoners are within the orbit of that presumption. Newman v. Graddick, 696 F.2d at 801 (civil prisoner overcrowding proceedings "presumptively open to press and public").

To justify sealing of court proceedings requires a judge to overcome the strong presumption of openness. To accomplish this, the First Amendment requires that a court must articulate "findings that closure is essential to preserve higher values and narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court, 464 U.S. at 510. "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether

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[5] Although Nixon relied upon the common-law, the decision does not hold that there is no First Amendment right to access court documents. Specifically, it did not address whether there was a First Amendment right to access court documents when access to those documents is an important factor in understanding the nature of proceedings themselves and when access to the documents is supported both by experience and logic. The Court has not yet definitively ruled whether there is also a constitutional right of access to court documents. See United States v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997), citing Lanphere v. Urbaniak and Colorado, 21 F.3d 1508, 1512 (10th Cir. 1994) (suggesting the possibility of using the First Amendment standard in those limited circumstances where experience and logic support public access to judicial documents).

the closure order was properly entered." Id. Under standards enunciated by the Court in "Press-Enterprise II," closure of court proceedings and records can be ordered only if (1) closure serves a compelling interest; (2) there is a "substantial probability" that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. 478 U.S. at 13-14. In making this determination, the district court must make on the record specific findings of fact, id., "with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise II, 464 U.S. at 510.

Although the Court has not specifically applied the three-part First Amendment test to denial of common-law access to court documents, a majority of the circuits have concluded that the logic of Press- Enterprise II extends to at least some categories of court documents and records, such that the First Amendment balancing test should be applied before sealing documents and records accessible under the common-law. See, e.g., Cendent Corp. v. Forbes, 260 F.3d 183, 187 (overturning confidentiality order based on common-law, where district court failed to articulate the necessary findings to support order); Union Oil Company v. Leavell, 220 F.3d at 567 (7th Cir. 2001) (reversing procedure in civil case of filing under seal "[a]lmost every document filed in the case, even the district court's opinions, orders, and judgment," without requisite articulation of compelling interests); United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (applying First Amendment test in addition to common-law access claims); Miller v. Indiana Hospital, 16 F.3d 549, 551 (3rd Cir. 1994) (sustaining common-law access to court records in civil case, where court did not articulate compelling countervailing interests); United States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993) (applying First Amendment test to claim

for common-law access to court docket); Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992) (reversing sealing order in civil case since there was no order setting forth compelling reasons for sealing); Washington Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991) (vacating order to seal plea agreement because of inadequate justification and inadequate findings); In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (affirming order to seal search warrant affidavits and revised order to seal docket entries); In re NBC, Inc., 828 F.2d 340, 343-44 (6th Cir. 1987) (remanding for additional findings sealing motions concerning recusal of trial judge and defense counsel conflict of interest); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (remanding order sealing suppression motions and accompanying exhibits for more adequate findings and for consideration of redacting sensitive material); Bank of America National Trust and Savings Assn. v. Hotel Rittenhouse Associates, 800 F.2d 339, 346 (3rd Cir. 1986) (court abused discretion by refusing to unseal documents without particularized showing of need); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (applying First Amendment test to claim for common-law access to court filings in a products liability action); cf. Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (pre-Press-Enterprise II case reversing order sealing lists in civil case claiming prison overcrowding); Associated Press v. United States District Court, 705 F.2d 1143, 1144 (9th Cir. 1983) (pre-Press-Enterprise II case holding First Amendment prohibited blanket order sealing all documents filed in a high-profile criminal prosecution of John DeLorean, and remanding for document-by-document evaluation). We apply the same test, therefore, to the habeas corpus proceeding below. A habeas corpus case is a civil proceeding, governed by statute, 28 U.S.C. § 2241 et. seq., the Federal Rules of Civil Procedure, and Rules Governing Habeas Corpus Cases.

Habeas corpus proceedings are historically, and by court rule, open to the public. See **FED. R. CIV. P. 77 & 79**. Appeals of habeas corpus proceedings are also open to the public, both as a matter of historical practice and rules of court. **FED. R. APP. P. 12 & 45**.

Habeas corpus is sometimes considered a hybrid criminal proceeding because it involves litigation over a prisoner's right to liberty. This overlap makes it unclear whether access to such proceedings is guaranteed by the First Amendment or the common-law, but, since the test for sealing proceedings is the same, see United States v. McVeigh, 119 F.3d at 811-12, there is little practical difference in how the right of public access is denominated. Under the one test applicable to both common-law and First Amendment protections, the entirely secret habeas corpus proceedings below have been improperly sealed.

Our analysis begins with a succinct reiteration of the law: Where a court "attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Globe Newspaper Co., 457 U.S. at 606-07. And, as Richmond Newspapers stressed, "The judge's eventual decision must be 'articulated in findings' which appellate courts can review." 448 U.S. at 581.

Applying these strict principles to the case at bar, the error below is transparent. Despite how the courts and clerks below treat these cases, there is no sealing order below. It is painfully obvious, therefore, that the district court has not met the requisite constitutional requirements for closure of the court file or sealing of court filings. This is equally true of the court of appeals' secrecy, which exists without any articulation of compelling circumstances to justify it.

Without articulated findings on the record of any kind, the record-on-appeal is necessarily devoid of the common-law and First Amendment requisites for sealing. Manifestly, there have been no articulated findings that there is a compelling government interest, or that complete sealing (as opposed to selective redaction) is necessary. One cannot escape the conclusion that the cases and filings were never properly sealed. Treating an entire case as sealed, where there is no sealing order and the lower courts failed to articulate the requisite findings, is an abuse of discretion, requiring reversal of the court of appeals' order affirming the denial of the motion to unseal the case, as well as the more focused motion to unseal select filings. See e.g., Cendent Corp. v. Forbes, 260 F.3d at 187 (overturning confidentiality order where district court failed to articulate the necessary findings to support order); Union Oil Company v. Leavell, 220 F.3d at 567 (reversing procedure in civil case of filing under seal "[a]lmost every document filed in the case, even the district court's opinions, orders, and judgment"); Bank of America National Trust and Savings Assn. v. Hotel Rittenhouse Associates, 800 F.2d 339, 346 (3rd Cir. 1986) (court abused discretion by refusing to unseal documents without particularized showing of need); Wilson v. American Motors Corp., 759 F.2d at 1571 (reversing sealing in civil case, absent articulated findings of a compelling government interest).

The same analysis applies to the district court's denial of the motions to unseal the case or to unseal selected filings, and the court of appeals' order affirming those decisions.[6] After the

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[6] [ ] United States v. United Mine Workers, 330 U.S. 258, 293-94 (1946) ("an order of a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper

petition for writ of habeas corpus was filed, the magistrate judge who issued the sealed material witness warrant then "entered an order that dissolved the material witness complaint against Petitioner and dissolved the resulting material witness warrant." R2:20 at 4. [

]. The only reason for the original secrecy was because the government [

].

See Maryland Cas. Co v. Latham, 41 F.2d 312, 313 (5th Cir. 1930) ("[I]t is the general rule that in the absence of statute, voluntary dismissal of a suit leaves the situation as if the suit had never been filed."); Bryan v. Smith, 174 F.2d 212 (7th Cir. 1949) (a voluntary dismissal leaves the situation as if suit had never been brought); cf., Ambassador Ins. Co v. Stiles, 628 F.2d 373 (5th Cir. 1980) (earlier order of circuit court had no res judicata effect after voluntary dismissal).

In addition, [

], was apparently not sealed. [

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proceedings"), citing Howat v. Kansas, 258 U.S. 181 (1922) and Worden v. Searls, 121 U.S. 14 (1887) (punishing violations as contempt, even if underlying order is later reversed on appeal); United States v. Cutler, 58 F.3d 825, 832 (2d. Cir. 1995) ("A party may not challenge a district court's [gag] order by violating it. Instead, he must move to vacate or modify the order ..."). Petitioner's counsel did not seek, however, to have the docket sealed in either court. Neither did counsel for appellees below. That decision was apparently made by the district court and court of appeals', or the clerks of those courts, without input from the parties, and without the articulated judicial findings required by the Court's jurisprudence.

]. Id.

Petitioner moved to unseal [ ], and, in a more focused motion, to unseal three specific filings, [ ]:

- Petitioner's Motion [ ]: This motion states only that Petitioner [ ]. These facts are not secrets.
- Petitioner's Memorandum of Law in Support of [ ] and sets forth a legal argument founded entirely on publicly available legal authorities. Nothing in this memorandum is a secret.
- The Motion to Unseal itself. [ ].

Unsealing these documents, or, at least the very least, the Motion to Unseal, would have put the public and media on notice that a sealed proceeding exists, permitting appropriate intervention and litigation by interested parties concerning the propriety of the sealed proceeding. See e.g., United States v. Valenti, 987 F.2d 708 (11th Cir. 1993).[7] Yet, the focused unsealing motion was denied by the same perfunctory single-sentence in the half-page general order denying all relief: "Petitioner's motion to unseal certain pleadings and motion to unseal the entire record in the case are DENIED." [ ]. Certainly this order does not articulate that "the denial of access is necessitated by a compelling governmental interest, and is narrowly tailored to that

[7] Although Petitioner has attempted to diligently guard the rights of press access in this Court and below, his interests may or may not be identical to those of the public and media. For this reason, the public, through their proxy, the news media, must participate in motions to seal or unseal court records, if the issues are to receive a complete airing.

interest." Globe Newspaper Co., 457 U.S. at 606-07. The order denying motions to unseal was, consequently, an abuse of discretion.

The sealed decision of the court of appeals is no more enlightening. It affirms the district court's refusal to unseal without identifying reasons articulated by the district court, or articulating any reasons of its own:

[

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Appendix (A-1). The court of appeals decision erroneously assumes the existence of a non-existent district court "sealing order," and ironically, the court of appeals decision is itself part of a secret case without a public docket. As to the former point, since there is no sealing order in the district court, it necessarily lacks the articulated findings necessary to sustain a sealing order; as to the latter point, the court of appeals' decision suffers the same constitutional and common-law deficiencies for which it reverses the district court.

When minimal information about the appeal was discovered by the news media, due to an inadvertent lapse in the clerk's office, [

]. The case comes to the Court, therefore, with no judicial articulation of any reason for its secrecy in both courts below.

Inherent in the right of access is the right of the public to challenge the propriety of sealed records and proceedings, a right that has been recognized repeatedly. See e.g., United States v. Ellis, 90 F.3d 447, 449 (11th Cir. 1996); United States v. Valenti, 987 F.2d at 711; Newman v. Graddick, 696 F.2d at 799-800. Without the kind of information that a public docket provides, however, the public and news media are unable to challenge the propriety of sealed proceedings, effectively neutering the common-law and First Amendment rights of access.

Although the right to access is not absolute, the right of the public to litigate its entitlement to access must be absolute if the public is to have means to effect its right of access. See United States v. Valenti, 987 F.2d at 711. After all, the right of access to judicial records "is important if the public is to appreciate fully the often-significant events at issue in public litigation and the workings of the legal system." Newman v. Graddick, 696 F.2d at 803.

Recognizing that the common-law and the First Amendment rights of access to court records are dependent on a uniform system of docketing, court rules place this duty on court clerks. "Perhaps no other duty of the clerk is more central to the historical role of the office of clerk than docketing." District Court Clerk's Manual, Chapter 11, Docketing § 11.01(a) **The Duty to Maintain a Docket**, (2002),[8] This portion of the District Court Clerk's Manual is promulgated in direct response to **FED. R. CIV. P. 79(a)**, which sets forth the clerk's docketing duties:

> **Rule 79. Books and Records Kept by the Clerk and Entries Therein.**
> **(a) Civil Docket.** The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative

[8] The District Court Clerk's Manual may be accessed on the JNET at <http://156.119.80.10/court operations/dcad/geninfo/chapter11/chap_11.htm>.

> Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

In addition, **FED. R. CIV. P. 79(c) Indices; Calendars**, adds this requirement: "Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) [relating to civil judgments and orders] of this rule shall be kept by the clerk under the direction of the court." Similar docketing responsibilities are imposed on the clerks of the court of appeals, under **FED. R. APP. P. 12(a) Docketing the Appeal** and **45 Clerk's Duties**.

The docket is a "permanent record[], which contain[s] a chronological account of court proceedings and filings and serve[s] as an index to the case files." District Court Clerk's Manual, Chapter 11, Docketing § 11.01(b) **Function of Dockets** (2002). "Dockets are frequently referred to in determining the present status of a case ..." and "can ... [p]rovide a substitute for the public to use to review a case without having to actually examine the case file." Id. "As keeper of the records of the court, the clerk is required to respond to inquiries by the bar and public on the status of specific cases identified by name or docket number (or any other field that is searchable, given the level of automation)." This includes searches and automated access by PACER, "which provide[s] the bar and public with the capability to search the party case indices and dockets for official information through the use of public computer terminals and a dial-in service ...." Id.

Here, the district court and court of appeals maintain sealed dockets, making historically public information unavailable to the public. The entire dockets for this case and appeal, and every entry on them, are maintained privately, under seal, unavailable to the public. 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. Unless already privy to the litigation, no member of the public or news media can know anything about its existence, thus depriving the media of its common-law and First Amendment rights to challenge the propriety of sealed proceedings. To exacerbate matters, the parties and counsel are under a court order that prohibits them from publicly revealing what they know of the proceedings. Appendix (A-2); R1:1 at 2-3 and R1:18. The public dockets are the only information available to the public about this case and they say nothing.

Even if an interested person knows Petitioner's name, or the case number of his case, or the date on which his case was filed, there is no way to identify that any proceeding is pending. Using the advanced search features of PACER[9] – name, case number, or date filed – one can find not a single inkling of the merits of the habeas corpus proceeding below, or that an appeal was pending and decided.

Because common-law and First Amendment rights of access are implicated, the district court and court of appeals were required to follow certain procedures before they could properly order closure of court records, such as the dockets, pleadings, and decisions. Here, the district

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[9] The Public Access to Court Electronic Records system is the accepted method for the public to retrieve electronically the public docket of federal courts. Hollins v. Dept. of Corrections, 191 F.2d 1324 (11th Cir. 1999).

court did not hold a hearing on the sealing or motions for unsealing. The district court did not give the public any notice of the sealed matter or any opportunity to be heard. The sealed docket prevented the public from even knowing the unsealing question was at issue. And, finally, the district court did not make articulated findings on the sealing and unsealing motions. The entirety of the district court's decision is reflected in this terse line from its perfunctory final order, "Petitioner's motion to unseal certain pleadings and motion to unseal the entire record in the case are DENIED." [ ]. 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 world has changed since 9/11. But the common-law and First Amendment rights to discuss and debate those changing events remain alive. One such subject of national debate has involved the propriety of the government's seizure of Middle Eastern men living in the United States, and their custodial transportation to Virginia for questioning as material witnesses.[10] It has

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[10] See generally, Laurie P. Cohen, Campaign Against Terror: Use of Material-Witness Warrants in U.S. Draws Criticism, WALL S. J., Oct. 22, 2001, at A12, available at 201 WL 2879362; Patricia Hurtado, AMERICA'S ORDEAL: Man Held For Months Faces More Charges, Was Material Witness in Attacks, NEWSDAY, Oct. 25, 2001, at A38, available at 2001 WL 9257870; William E. Gibson, Coalition Seeks Data on Federal Detainees; Activists Decry Use of New Law, S. FLA. SUN SENTINEL, Oct. 30, 2001, at 7A, available at 2001 WL 22764992; Jennifer Barret, Morton H. Halperin: 'We're Seeing Actions Every Day That Violate Fundamental Civil Liberties, NEWSWEEK WEB EXCLUSIVE, Nov. 16, 2001, available at 2001 WL 24139127; Alfonso Chardy, Justice Rules Against Freeing Some INS Long-Term Detainees, MIAMI HERALD, Nov. 24, 2001, at A24, available at 2001 WL 30042331; Alfonso Chardy, Justice: It's OK to Hold Aliens, MIAMI HERALD, Nov. 24, 2001, at 1B, available at 2001 WL 30042357; Evan Thomas & Michael Isikoff, et. al., Justice v. Terror, NEWSWEEK, Dec. 10, 2001, at 37, available at 2001 WL 19505623; Amy Bach, Deported...Disappeared? (Immigration Detainees After September 11), THE NATION, Dec. 24, 2001, at 7, available at 2001 WL 2133141; Sydney P. Freeburg, Fighting Terror: Terror Sweep a Battle of Rights and Safety, ST. PETERSBURG TIMES, Jan. 13, 2002, at 1A, available at 2002 WL 3229185; Amy Goldstein, No Evidence in Pilot's

also been the subject of reported federal court decisions.[11] But in all such cases, the public and media knew that some proceeding was pending, the first and essential ingredient to both the public debate and legal determinations on the closure of proceedings. The blanket sealing utilized in this case and appeal, however, hides everything, both the government's actions and Petitioner's claims of unconstitutional government collusion, neutering the news media's opportunity to litigate the propriety of sealing this action, and necessarily removing Petitioner's legal plight from the public debate. These are precisely the harms that gave rise to the Court's public access jurisprudence.

The facts of Petitioner's case would make a significant contribution to the national debate about the detention and treatment of Middle Eastern persons and there is no legitimate government interest permitting court-suppression of his ordeal. [

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Case; West African Still Held as Material Witness in Attack Probe, WASH. POST, Feb. 2, 2002, at A20, available at 2002 WL 10945321; Greg B. Smith, Arab Student Held in Jail on Phone Links to Terrorists, N.Y. DAILY NEWS, Mar. 22, 2002, available at 2002 WL 3170219; Ashley Gauthier, Secret Justice: Access to Terrorism Proceedings, 26 NEWS MEDIA AND THE L. 1, (2002), available at 2002 WL 17579317.

[11] See e.g., United States v. Osama Awadallah, 202 F. Supp.2d 82 (2002) (finding 9/11 suspect illegally detained as a material witness and suppressing fruits of illegal arrest); In re Application of U.S. for Material Witness Warrant, 213 F. Supp.2d 287 (S.D.N.Y. 2002) (permitting detention of material witness); In re Application of U.S. for Material Witness Warrant, 214 F. Supp. 2d 356 (S.D.N.Y. 2002) (considering contempt against government agent in relation to material witness proceeding); cf., Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (prohibiting secret immigration proceedings to deport "special interest" cases, a euphemism for Middle Eastern men).

[ ]. For a government defending its treatment of Middle Eastern immigrants, see Deborah Zabarenko, FBI Chief Defends Post-9/11 Detention Policies,[12] this kind of information makes a compelling rebuttal. Indeed, this information would have added even more substance to the Department of Justice's Inspector General report criticizing mistreatment of post-9/11 detainees, Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, June 2003,[13] even as the government continues to defend its actions. Department of Justice, Statement of Barbara Comstock, Director of Public Affairs[14] ("We detained illegal aliens encountered during the 9/11 terrorist investigation until it was determined that they were not involved in terrorist activity, did not have relevant knowledge of terrorist activity, or it was determined that their removal was appropriate.").

The fuel for needed change in government is information, fuel which is hidden when subject to blanket sealing orders without valid grounds, as in this case. As the Court observed in Grosjean v. American Press Co, 297 U.S. 233, 250 (1936), "An informed public is the most potent of all restraints upon misgovernment."

The events in this litigation highlight why the Court should grant certiorari, not only to preserve and protect the public's common-law and First Amendment rights to know, but also to

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[12] http://story.news.yahoo.com/news?tmpl=story&cid=578&ncid=578&e=3&u=/nm/20030613/ts_nm/rights_mueller_dc, June 13, 2003

[13] http://www.usdoj.gov/oig/special/0603/full.pdf, June 2, 2003; see also, Eric Lichtblau, U.S. Report Faults the Roundup of Illegal Immigrants after 9/11, NEW YORK TIMES, June 3, 2003, http://www.nytimes.com/2003/06/03/politics/03DETA.html

[14] http://www.usdoj.gov/oopa/pr/2003/June/03_opa_324.htm, June 2, 2003

reinforce those rights in a time of increased national suspicion about the free flow of information and debate.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

By: _____

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
Chief of Appeals
Counsel for Petitioner

Miami, Florida
June 27, 2003

APPENDIX

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[REDACTED]

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Daily Business
REVIEW
DELIVERING MONEY AND POWER EVERY BUSINESS DAY
MIAMI • WEDNESDAY, MARCH 19, 2003 — 2003

Coming Thursday

Economic forces force trailer parks to hit the road

NATIONAL SECURITY

Secrecy within

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

by Ian Christensen

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

See Secrecy, Page A10

This Miami federal building was the site of last week's secret hearing by the 11th U.S. Circuit Court of Appeals.

Bad-faith claim fails against U.S. prosecutor

In an attempt to buff the reputation of an acquitted client, criminal defense attorneys Bruce Udolf and Theresa M.B. Van Vliet mounted a post-trial attack on the reputation of a federal prosecutor.

Udolf, who catapulted to local fame defending ex-FBI agent David Farrall from drunk driving and manslaughter charges, and Van Vliet are partners at Broward's largest law firm, Ruden McClosky Smith Schuster & Russell. A few years back, they were prosecutors themselves and colleagues of Fort Lauderdale Assistant U.S. Attorney Robert Powell, whose credibility they attacked.

Udolf and Van Vliet represented Diego Luis Catano last September when a jury found him not guilty of being

See Federal Watch, Page A4

PAY

Pompano industrial center lures Riviera Beach lab firm AmeriPath

by Terry Sheridan

AmeriPath Inc. has inked a 15-year lease for almost 50,000 square feet of space in the Gateway Industrial Center in Pompano Beach.

The deal, valued at $21.5 million, closed Monday. AmeriPath (Nasdaq: PATH), based in Riviera Beach, provides cancer diagnostics and other medical lab services nationwide. In Florida, the company has 11 practices, which include hospital-based and independant labs.

The company was named last

See Pay Dirt, Page A6

Lee Byron of NAI Ranch Weaver Norfleet Kurtz & Co. represented the owner of this building that will be more than half occupied by

SPECIAL REPORT

Business

See Page A11

Taking the bench

Karen Miller is sworn in as a circuit judge in the 15th Judicial Circuit by Palm Beach Circuit Chief Judge Edward H. Fine.

Karen Miller, former general counsel for the Palm Beach clerk of the courts, has been sworn in as a circuit court judge in the 15th Judicial Circuit. She is the last of five new judges invested in the circuit this year.

Though heavily outspent in a run-off election last fall against attorney William McAfee, a partner at West Palm Beach firm Ricci Leopold Farmer & McAfee, Miller won in a landslide with 66 percent of the vote. She was sworn in last week.

Miller, 41, holds a B.A. in European history and psychology from Bard College and is a 1986 graduate of Nova Southeastern University's law school. She has spent most of her career as a government attorney.

Before working in the clerk's office she served as general counsel to the regional office of the Florida Department of Health and Human Services, predecessor to the present Department of Children and Families. She was also an assistant state attorney in Palm Beach County.

Miller, who lives in West Palm Beach, is married to Steven Alexander, a psychologist. They have an 11-year-old son, John.

— *Steven Ellman*

LEGAL EVENTS

March 18

Stearns Weaver Miller Weissler Alhadeff & Sitterson Breakfast seminar, 8:30 a.m., Stearns Weaver Miller, 150 W. Flagler St., No. 2200, Miami. Topic: The developing law on same-sex sexual harassment. Cost: free. Call (305) 789-3580.

Miami Beach Bar Association: Noon, Palms South Beach Hotel, 3025 Collins Ave. Speakers: Miami-Dade Circuit Judges Sandy Karlan and Scott Bernstein of the United Family Court Pilot Project. Cost: $28, $18 for CLU. Call (305) 538-2344.

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.

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.

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.

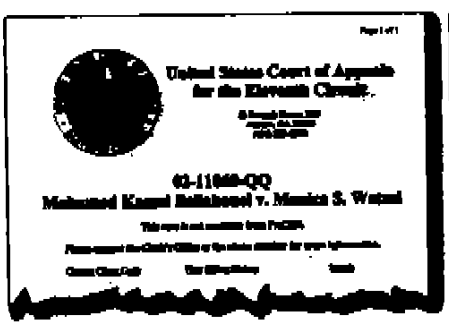
"Have I ever seen that happen in 20 years of practice? No," said Hussain. "Times have changed."

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."

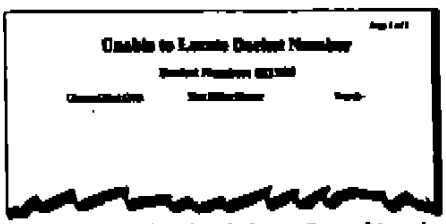
Assistant U.S. Attorney Dexter Lee, who filed the motion, declined comment. Jacqueline Becerra, the spokeswoman for U.S. Attorney Marcos Jimenez, said her office would not comment.



United States Court of Appeals for the Eleventh Circuit

03-11060-QQ

Mohamed Kamel Bellahouel v. Monica S. Wetzel



Unable to Locate Docket Number

The Web site of the 11th U.S. Circuit Court of Appeals removed the style of the appeal of Mohamed Kamel Bellahouel, who lives in Deerfield Beach with his American wife.

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

See Secrecy, Page A17

BILLING

From Page A14

time spent on work. It is even better if each transaction has individual time-in and time-out capability.

• Duplication capability. Many types of law practices consist of the same basic work distributed to several matters. A good system should provide the ability to use a previous transaction, including descriptive text, as a template, thereby eliminating the extra effort of retyping the transaction.

• Audit trails. A time and cost system is only as good as its perceived ability to generate accurate and trusted information. Many firms measure their timekeepers' performance (and compensation) partially on fees and billings generated. To that end, the system should provide a comprehensive trail of the date and time the transaction was entered, and by whom. Deleted transactions should not be allowed, but made available as an audit trail. There should be protections in the system for viewing and/or changing another timekeeper's entries. A good system would set up authorization lists indicating just who is allowed to change certain other staff members' information.

A law firm's timekeeping system should provide a comprehensive trail of the date and time the transaction was entered, and by whom. Deleting transactions should not be allowed.

• Interactive. It is incredible that some software systems still employ the old-fashioned "batch" concept of capturing information. All the transactions for a particular period are accumulated in a batch, which involves staff overhead spent in editing, holding and releasing. It slows down the billing process and inhibits the firm from knowing its exact situation in terms of work in process and billing status. When a system is interactive, all transactions are immediately available for viewing, billing and management reporting.

• Ease of use. This is the most important feature. The best way to get people to utilize a time and cost capture application is to make it easy to use. This is not the same as making it simple. A good system should still have sophisticated capability, yet still be intuitive. The user should know exactly what to do.

• Flexibility. Once a transaction is entered, the user needs the ability to alter any or all of it. There should be utilities in place to globally transfer work dates, adjust billing rates by date range and other such necessary tasks as required.

The future

The time and cost entry system should be an extension of the user's own makeup. Because of the technological advances being made, this should become even more easy to use.

• Voicemail. This is the Holy Grail of efficient time entry. Just speak into a microphone and have the system generate the information automatically. Unfortunately, this ideal still is not ready for prime time. To be sure, there have been advancements in the technology, particularly by companies such as Dragon, IBM and In Cube. However, the best that can be accomplished thus far has been in the area of simple commands, such as "Save This," "Delete This" and "New Item." The ability to actually compose work descriptions by voice has yet to be successful. Moreover, there is a danger in the voice system transposing and misinterpreting crucial information.

• Working from an out-of-office location. Previously, this involved sending the firm a disk copy of those remote time and cost entries transactions, which was then interfaced with the time capture application. Today, this transaction file set can be sent via e-mail to the firm.

The newest methods involve using a combination wireless phone/PDA configurations. Using an application on the PDA (such as the Palm OS or Microsoft Xbox), the out-of-office attorney can track time for the proper matters, set timers on or off and transmit the information seamlessly to the firm's central system. This is the biggest step yet in insuring that time tracking is utilized in real time to the fullest, with virtually zero lost billable hours.

• Application servers. A user, via the Internet or a hosting system (such as Citrix server) can enter time tracking information from any location. All that is required is an Internet connection, which has become increasingly available in hotels, airports, computer specialty shops, kiosks and cellular phones.

There have been many advances in time, cost and billing systems. The more attuned the firm is with making the time capture task easier, the greater the opportunity of maximizing its performance in profit and responsiveness. ◆

Peter Riesberg is the president of AdvantageLaw Inc., a leading provider of legal accounting and management software.

This article first appeared in the New York Law Journal, an affiliate of the Daily Business Review.

THE COURTS

From Page A12

the director of Courtroom 21, approached the Federal Judicial Conference to obtain approval for the project. In the fall of 2001, the FJC authorized the courts to participate if they desired to. The Courtroom Information Project also contacted the chief justices of each of the 50 states. "Delaware said that, since it was the first state, it wanted to be the first state in the project," Herrmann says.

To fund the project, Herrmann contacted leading law firms and technology vendors to become sponsors. The project's Web site currently includes information on six courts, and Herrmann expects to add 10 per month during the first year with what he described as geometric growth in following years.

The project's Web site, www.courtroominformationproject.org, provides in-depth information on the various courthouses. Users can find a list of a particular courthouse's technical equipment as well as technical restrictions. "It's a great advantage for the lawyers to know this information before they get to court," Herrmann says.

Technology spreads

Herrmann's group may soon have many more courts to cover. According to the Administrative Office of U.S. Courts, new technology — including video evidence presentation systems, videoconferencing and electronic transcription systems — was installed in more than 100 federal courthouses across the nation during fiscal 2002.

In addition, chief judges now have authorization to install such equipment and to procure design and installation services to retrofit existing courtrooms, according to Administrative Office Director Leonidas Ralph Mecham's 2002 Annual Report.

With such a rapid pace of technology installation, a pretrial analysis of a courthouse's technology may soon become as common as scouting the courthouse's hours, chambers policies and closest locations for a post-trial beer. ◆

David Horrigan reports for the National Law Journal, and affiliate of the Daily Business Review.

between that kind of procedure and the presentation 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 Hamoui'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 Hamoui 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." ◆

Dan Christensen can be reached at dchristensen@floridabiz.com or at (954) 468-2466.

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