No. 03-14400-D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FABIO OCHOA-VASQUEZ,

Appellant.

On Appeal From the United States District Court
For the Southern District of Florida

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF FIRST AMENDMENT ARGUMENT OF THE APPELLANT, FABIO OCHOA-VASQUEZ

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CERTIFICATE OF INTERESTED PERSONS

United States v. Fabio Ochoa-Vasquez, No. 03-14400-D

The undersigned, counsel for *amicus curiae* The Reporters Committee for Freedom of the Press, hereby certifies that the following is a complete list, to the best of *amicus*'s knowledge,[1] of persons and entities having an interest in the outcome of this case:

Persons

Roy Black, Esq.

Lucy A. Dalglish, Esq.

Gregg P. Leslie, Esq.

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K. Michael Moore, U.S. District Judge

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Fabio Ochoa-Vasquez

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[1]The Reporters Committee is an *amicus curiae* rather than a party to this action, and therefore does not purport to have a comprehensive knowledge of all persons or entities with an interest in the outcome.

Organizations

The American Civil Liberties Union of Florida, Inc.

The Reporters Committee for Freedom of the Press

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Lucy A. Dalglish

Dated: December 23, 2003

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press ("The Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has no parent corporations of any kind.

CERTIFIED:

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Lucy A. Dalglish

Dated: December 23, 2003

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INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Protection of the public's right of access to judicial proceedings is an issue of critical importance for The Reporters Committee. In the present case, the media and the public have been denied access to highly newsworthy events – namely, the prosecution of alleged Colombian drug traffickers in U.S. District Court in Miami – on the basis of findings that were demonstrably deficient or nonexistent. These prosecutions have been carried out in extraordinary secrecy, with closed hearings, sealed docket entries, and even the removal of entire cases from the public docketing system. This level of secrecy strikes at the heart of the public's First Amendment right of access to criminal judicial proceedings. Accordingly, The Reporters Committee respectfully submits this brief as a representative of the news media's interest in asserting a public right of access to the instant proceedings.[1]

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[1]The Reporters Committee has received the consent of G. Richard Strafer, counsel for the appellant, and Assistant U.S. Attorney Emily M. Smachetti, counsel for the government, to the filing of this *amicus* brief.

STATEMENT OF ISSUE

This brief addresses one issue: Whether, in the criminal proceedings against Fabio Ochoa-Vasquez and his alleged co-conspirators, the secretive tactics of the courts below – which included conducting certain proceedings on a nonpublic docket, holding closed hearings without public notice and docketing their occurrence months later, and routinely sealing docket entries without findings or analysis – violated the First Amendment.

SUMMARY OF ARGUMENT

In recent months, it has become evident that the U.S. District Court for the Southern District of Florida maintains a dual, separate docket of public and non-public cases. The existence of the second, "secret" docket has been revealed by a variety of developments in cases related to the present appeal, as well as by recent public disclosures concerning the Southern District's handling of an unrelated habeas corpus proceeding, *M.K.B. v. Warden*, which is now before the U.S. Supreme Court on a petition for writ of certiorari.

In Ochoa's case, the existence of secret proceedings emerges from clues in the publicly available information and from documents that were later unsealed after being kept secret for months or years. Collectively, the repeated pattern of secrecy in the proceedings below paints a picture of a court that conducts its

business with a casual disregard for the public's First Amendment right of access to criminal judicial proceedings. The maintenance of a nonpublic docket, in particular, directly violates this Court's holding of a decade ago in *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993). The Court should reiterate the principle that secret dockets are unconstitutional, order the public docketing of all cases in the proceedings below, and vacate the sealing of the docket entries subject to findings that the secrecy is justified in each instance.

STATEMENT OF FACTS

I. Court secrecy in "Operation Millennium" and related prosecutions

In addition to the Statement of Facts contained in Ochoa's brief, which are hereby adopted and incorporated by reference, The Reporters Committee directs the Court's attention to the following facts relating specifically to the First Amendment issues addressed by this brief.

Ochoa was one of 33 co-defendants indicted in August 1999 as a result of the government's "Operation Millennium" investigation of drug trafficking between the United States and Colombia. Ochoa was extradited to the United States in September 2001, convicted of various drug charges in May 2003, and sentenced to 365 months in prison in August 2003. (Appellant's Br. at 2-3.) On

appeal, Ochoa contends, *inter alia*, that he was the victim of a corrupt scheme involving the sale of plea bargains by a government informant, Baruch Vega, with the alleged cooperation of DEA agents and other government figures.[2]

From day one, secrecy has pervaded the court proceedings against Ochoa and defendants in related cases in the Southern District. Although the full scope of the secrecy is, by its nature, unknown to the public, even the limited clues in the public record suggest a disturbing disregard for the public's First Amendment right to an open criminal justice system.

A. Fabio Vasquez-Ochoa

Ochoa's own case has been litigated largely in secret, despite his objections. According to Ochoa's brief to this Court of May 12, 2003,[3] as of Nov. 20, 2002, the following docket entries were sealed: 152-55, 157, 165, 166, 186, 187, 190, 191, 200, 201, 217, 218, 228-30, 233, 234, 240, 244-46, 248, 250-58, 262-65, 267-

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[2] *Amicus* The Reporters Committee has no first-hand knowledge of the facts surrounding Ochoa's contentions, and takes no position on their validity. The truth of these matters is irrelevant to the legal issue addressed by this brief, namely, the unconstitutional degree of secrecy with which the proceedings have been handled.

[3] Ochoa filed his May 12, 2003, brief in support of an interlocutory appeal from the denial of his motion to dismiss the indictment. This Court dismissed the appeal as moot after he was convicted, reasoning that Ochoa could raise the access issues on direct appeal. *See United States v. Ochoa*, 11th Cir. No. 03-11590-DD. Ochoa's brief in that matter is hereinafter cited as "Appellant's Interlocutory Br."

72, 278, 280, 287, 289, 292-97, 301, 313-18, 31, 363, 364, 374, 380, 381, 507-09, 415, 416, 420-22, 429, 441-43, 451, 453, 460, 465, 466, 474, 482, 487, 493-96, 501, 502, 523-25, 528-30, 539, 542, 543, 545, 547, 549, 563-67, 647, 721, 743-46, 813, 848, 849, 868, 880, and 881.

As Ochoa's brief describes, many of these docket entries were sealed in violation of accepted First Amendment standards and Local Rule 5.4 of the Rules of the Southern District. According to Ochoa, no temporal limitations were placed on the sealings, no public explanation for secrecy was given, and no less restrictive alternatives, such as redaction, were explored.

B. Nicholas Bergonzoli

According to Ochoa, an alleged "land-swap" transaction between Ochoa and Colombian drug dealer Nicholas Bergonzoli formed the heart of the prosecution's case against Ochoa, making Bergonzoli a potentially critical defense witness. But in the course of trying to investigate Bergonzoli's background to prepare for trial, Ochoa discovered that the criminal case against Bergonzoli was maintained on a secret docket. Although a federal indictment against Bergonzoli had been transferred to the Southern District of Florida from the District of Connecticut in February 1999, no record of the case existed in the Southern District until Ochoa succeeded in unsealing a portion of the file on May 23, 2003

– after the government had already rested its case against Ochoa in his criminal trial.

Until then, the existence of proceedings against Bergonzoli in the Southern District could only be inferred from various clues. For instance, the U.S. District Court in Connecticut held public records of Bergonzoli's 1995 indictment and the subsequent transfer of the case to the Southern District of Florida. (DE 988-89, Ex. 18.) Likewise, a March 18, 1999, letter from a clerk in the District of Connecticut to the clerk of the Southern District of Florida was stamped with a Miami case number, "99-00196-CR-Davis." (*Id*., Ex. 18, at 8.)

Until the district court unsealed part of Bergonzoli's case file in May 2003, however, entering the case number "99-00196" in the Southern District of Florida's PACER system yielded a blank, and court personnel said there was no record of a proceeding involving Bergonzoli, according to Ochoa. The discrepancy was underscored by the fact that the immediately surrounding numbers – 99-00195 and 99-00197 – produced ordinary public dockets for other criminal defendants.

In short, Bergonzoli's case had been removed from the public docket altogether. But proceedings were, in fact, taking place. A December 7, 2000, *Wall Street Journal* article referred to an appearance by Bergonzoli in a closed

Miami federal courtroom, and said he was in the process of "working out a plea agreement with U.S. officials." (DE 988-89, Ex. 10.) The subsequently unsealed records confirm that Bergonzoli cooperated with the government, entered into a plea agreement, and, on Jan. 30, 2002, was sentenced to 39 months in prison by a Southern District of Florida court.

But until May 23, 2003, the pleadings reflecting these developments were entirely secret – not just listed as "sealed," but kept off the public docket system entirely. Moreover, a number of the key docket entries in Bergonzoli's case, including those related to his sentencing and cooperation with authorities, remain sealed to this day. (DE 1473, Ex. 4.) The District Court's May 23, 2003, order cites only "higher values" for denying Ochoa access to these materials. (*Id.*)

C. Julio Correa

Julio Correa was indicted in the Southern District of Florida in October 1995, along with numerous co-defendants. The case (*United States v. Correa*, S.D. Fla. No. 95-CR-813-ALL) eventually generated nearly 400 docket entries, and active proceedings were still taking place in early 2003. But other than the original indictment, the issuance of an arrest warrant, and a few administrative pleadings, Correa's name is conspicuously absent from the docket as it appears on PACER. Indeed, as of December 22, 2003, the PACER docket on Correa still lists

all counts as "pending." Essentially, the public docket implies that Correa has been a fugitive from the day he was indicted.

According to news accounts, however, Correa entered into a plea agreement with the government, became an informant, and even served time in federal prison. Any record of such developments is missing from the docket – despite the fact that Correa reportedly was murdered in August 2001, eliminating any need to conceal his cooperation.

On August 29, 2001, the *Miami Herald* reported that Correa had "surrendered to U.S. authorities in Miami in 1997" and had "served three years in prison for drug trafficking and money laundering, a shortened sentence because of his cooperation with U.S. authorities." (DE 988-89, Ex. 13.) According to PACER, there is no docket activity reflecting these events. Previously, the *Herald* had reported, on May 21, 2000, that federal prosecutors allowed Correa and two other alleged drug traffickers to "go free on bond in South Florida after their capture" in "a sign that deals for cooperation are being struck." (DE 988-89, Ex. 17.) No record of a bond decision or a plea agreement regarding Correa appears on his publicly available docket, as of December 22, 2003.

According to the August 29, 2001, *Herald* story and other news accounts, Correa was assassinated in August 2001 while attending a soccer tournament in

Colombia. Consequently, if there once was a justification for maintaining a secret docket in Correa's case – and we do not concede that there was – that justification has long since become moot.

D. Orlando Sanchez-Cristancho

Cristancho was one of Ochoa's co-defendants. It became evident that secret proceedings had taken place with respect to Cristancho after he fired his original defense counsel and began asserting that the government had breached an immunity agreement with him. Regardless of the truth of that claim, the dispute triggered the unsealing of previously secret proceedings in Cristancho's case and shed light on how the secret docket operates.

On Nov. 2, 1999, Cristancho and his then-attorney, Daniel Forman, appeared before Magistrate Judge Ann Vitunac for a status hearing. There, the Assistant U.S. Attorney, Teresa Van Vliet, made reference to a prior hearing that had been conducted in secret and kept off the public docket:

> THE COURT: Is there a written release order by Judge Snow?
>
> MS. VAN VLIET: No. It was all done *in camera* in the hearing. The Court ordered that the minutes that the courtroom deputy took, as well as the tape itself of the proceedings, not actually be filed in the court file because, and this is according to the Court clerk's folks down there, Ms. Butler, apparently when it gets filed, even if it is under seal, the Court's computer on the Windock [*i.e.*, WinDOC] system indicates a sealed document as to Orlando Sanchez Cristancho Sanchez.

> So Judge Snow ordered that it not be filed so that the flag that there were any court proceedings about him not being obvious in the court record itself, and we would ask for the same for this proceeding.
>
> THE COURT: Who is holding the tape of that proceeding?
>
> MS. VAN VLIET: Ms. Butler.
>
> THE COURT: Do you have Ms. Butler's tape? *We are going to need to do the same with this tape and not log this anywhere that it will reflect on Windock [sic] that this hearing was even held.*

(D.E. 243, at 11-12 (emphasis added).) Obviously, the transcript reflects a collaborative effort by the court and the prosecutor to conceal the fact that a hearing had even taken place. At the conclusion of the hearing, Magistrate Judge Vitunac said, "We will hold those tapes and not docket this proceeding, and my order at this moment is oral and to be put in writing at a later date." (*Id.* at 20.) According to Ochoa's brief, the fact that the hearing occurred was withheld from the public docket until June 20, 2000, more than eight months later. (Appellant's Interlocutory Br. at 15-16.)

II. Secret administration of *M.K.B. v. Warden*

Although not directly related to Ochoa's case, the Southern District's handling of a case now on petition for review by the Supreme Court, *M.K.B. v. Warden* (S. Ct. No. 03-1647), is instructive. It is appropriate for this Court's

judicial notice because, among other reasons, Ochoa tried unsuccessfully to intervene in *M.K.B.* in order to gain access to any Eleventh Circuit decision that might affect the present appeal. (*See* Appellant's Interlocutory Br., at 21-22.)

M.K.B. involves a habeas corpus proceeding by Mohammed K. Bellahouel, an Algerian-born veterinarian in Florida who was detained for undisclosed reasons after the Sept. 11, 2001 attacks. Bellahouel's habeas petition was assigned to U.S. District Judge Paul C. Huck of the Southern District of Florida, who for more than a year conducted proceedings with an extraordinary degree of secrecy. For reasons never disclosed, every trace of the case's existence was hidden from the public docket. The case might never have come to light at all, but for a clerical error that caused it to appear, briefly, on the PACER system while on appeal to the Eleventh Circuit.

In March 2003, this Court reportedly ordered the District Court to place Bellahouel's case on a public docket – but even now, virtually all of the entries are listed as "SEALED." The secretive administration of Bellahouel's case is the issue on appeal to the U.S. Supreme Court, which on Nov. 26, 2003 ordered the Solicitor General to respond to the petition for writ of certiorari.[4] It appears the

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[4]The Reporters Committee has filed a brief *amicus curiae* in support of granting Bellahouel's petition.

Supreme Court wants to hear the government's explanation for the extraordinary degree of secrecy with which the Southern District has handled Bellahouel's case.

ARGUMENT

I. Employing a secret docket violates the First Amendment.

It cannot seriously be disputed that, for four years, the *Bergonzoli* case was maintained on a secret docket – that is, its very existence was kept off the public record. Not even a case name with a list of "sealed" entries was available, despite the initial assignment of a case number upon its transfer from the District of Connecticut in February 1999.

Not until May 23, 2003, in response to Ochoa's motion, did the District Court move the case to a public docket and unseal some, though by no means all, of the file. (DE 1473, Ex. 4.) That an organized, secret docket was systematically maintained is clear: otherwise, the file would not have been in any shape for selective unsealing years later. The existence of a secret docket was also discussed explicitly in the Cristancho hearing excerpted above, and is evident by inference from the developments in the Correa case.

Such a practice violates the First Amendment. In *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), this Court squarely held that a secret docket

maintained by the U.S. District Court for the Middle District of Florida violated the First Amendment's guarantee of public access to criminal proceedings. In doing so, this Court recognized the common-sense truth that a constitutionally guaranteed right of public access is meaningless if the very existence of a proceeding is concealed.

The dual docket in *Valenti* was maintained in a public corruption case involving bribery charges against an assistant state's attorney. Although the case itself was publicly docketed, the District Court closed a number of hearings, regularly permitted motions and exhibits to be filed under seal, and, most egregiously, annotated such events only on a sealed docket, not on the usual public docket. This Court correctly declared the secret docket unconstitutional:

> In this case, the sealed docket completely hid from public view the occurrence of closed pretrial bench conferences and the filing of *in camera* pretrial motions. These events remained hidden until a *Times* reporter happened to be present to observe a closed bench conference. The Middle District's dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences.

Id. at 715 (emphasis added). Thus, the *Valenti* Court concluded, "we hold that the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings." *Id.*

Notably, the dual docket was found unconstitutional even though the Court found that closure of the proceedings was justified. *See id.* Thus, *Valenti* indicates that, even in the rare case where the public's presumptive right of access is outweighed by some other interest, it is unconstitutional to withhold the *existence* of a proceeding from the public. Doing so prevents the public and the news media from even "seeking to exercise" their First Amendment rights. *Id.* at 715. Secret dockets are therefore "inconsistent with affording the various interests of the public and the press *meaningful* access to criminal proceedings." *Id.* (emphasis added).

The holding in *Valenti* is consistent with that of other courts to address the permissibility of nonpublic dockets. *See Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (holding that motions to seal plea agreements must be publicly docketed); *In re State-Record Co.*, 917 F.2d 124, 128-29 (4th Cir. 1990) (requiring public docketing of criminal proceeding because of public's First Amendment right of access); *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (ordering district court to produce redacted public docket of a sealed case); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-76 (6th Cir. 1983) (ordering district court to maintain a public docket of litigation against the FDIC to protect the public's "right to be heard"); *Stone v.*

University of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1981) (requiring district court to produce "reasonable" public docket to allow public access to civil rights suit).

In short, courts have repeatedly affirmed that a public docket is the basic precondition for the public's exercise of its right of access to the courts. In the proceedings below, however, the notion of a public docket has been abused and ignored. This Court should declare again, as it did in *Valenti*, that the practice of withholding proceedings from the public docket is unconstitutional, and it should order the District Court to move to the public docket any cases that remain secret.

II. The District Court ignored its obligation to make findings to support the sealing of docket entries.

In addition to improperly withholding events from the public docket, the District Court routinely sealed docket entries for no stated reason, in violation of the First Amendment, Eleventh Circuit case law, and its own local rules.

As noted, dozens of pleadings in Ochoa's case were listed as "SEALED," with no indication of what the docket entry is, or to which defendant(s) it relates. Likewise, numerous entries in Bergonzoli's case remain sealed, even after the District Court's order granting Ochoa access to portions of the file.

The sealing of proceedings is not always impermissible; there are justifications for secrecy in some circumstances. But a court may not simply seal matters as a matter of course. Rather, a court must first articulate "findings . . . which appellate courts can review" to justify the denial of access. *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986) (vacating sealing order in civil case and remanding to district court for findings); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion of Burger, C.J.) (closure of criminal trial requires "overriding interest articulated in findings"); *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983). The court also must provide the press and the public with an opportunity to be heard on the issue of closure, if there is "any reason to believe that the public or press has an interest in attending," *Newman*, 696 F.2d at 802, which surely applies to this prosecution of major figures in the Colombian drug trade. Finally, the court must seek to ensure that the closure order is "narrowly tailored" to address the compelling interest justifying the secrecy. *Id.*

To our knowledge, the judges and magistrate judges of the Southern District, in *Ochoa* and related cases and in the *M.K.B.* case, have made no effort to follow these precautions. Instead, they have routinely sealed docket entries without making any findings at all, or on the basis of conclusory orders that fall

woefully short of the standard of enabling meaningful appellate review. *See Kooistra*, 796 F.2d at 1391.

For instance, Judge Moore's one-page order of May 23, 2003, which denies Ochoa access to numerous pleadings in a case of potentially critical importance to his then-ongoing criminal defense, summarily invokes "higher values" as the only reason for withholding documents. (DE 1473, Ex. 4.) "Higher values" is not a "finding," and it is no more useful to an appellate court, or anyone else, than an order with no explanation at all. Indeed, the use of that phrase is nothing more than a perfunctory recitation of the Supreme Court's language in *Press-Enterprise I*, which said criminal proceedings may be closed only upon a finding that "closure is essential to preserve higher values." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1986).

The May 23 order, and all others of which we are aware, falls short of the requirement that the trial judge articulate findings that are "sufficient for a reviewing court to determine, in conjunction with a review of the documents themselves, what important interest or interests the district court found sufficiently compelling to justify the denial of public access." *Kooistra*, 796 F.2d at 1391. It also violates the Southern District's own Local Rule 5.4, which establishes a presumption that all filings in the court "are matters of public record" and

establishes specific procedures that are to be followed before matters are sealed.

Because these requirements were ignored, this Court should vacate the sealing of all docket entries in the case of Ochoa and his co-defendants, as well as in the *Bergonzoli* case, and remand to the District Court for the required articulation of reasons to justify sealing. (*See* Appellant's Br., App. 6 (listing improperly sealed docket entries).)

III. The Southern District's secretive administration of justice undermines the public policy underlying the right of access to judicial proceedings.

The manner in which these cases have been handled underscores, once again, the importance of preserving an open system of criminal justice. The benefits of openness figure prominently in the line of Supreme Court decisions establishing the public's qualified right of access to criminal judicial proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (public has a First Amendment right of access to criminal trials); *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984) (right to attend *voir dire* proceedings); *Walker v. Georgia*, 467 U.S. 39 (1984) (right to attend hearing on motion to suppress evidence); *Press-Enterprise Co. v. Superior Ct. (Press-Enterprise II)*, 478 U.S. 1 (1986) (right to attend pretrial hearings); *El Vocero de*

Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (right to attend preliminary hearing).

The public's right of access is based on an "unbroken, uncontradicted history" of public criminal proceedings in Anglo-American law, as well as the positive contribution of openness toward the historical function of the proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Public access serves as a check against abuse and enhances the public's confidence in the fairness and integrity of the judicial system. As the Supreme Court has observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572; *see also Press-Enterprise II*, 478 U.S. at 7 ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.").

The Southern District's casual willingness to keep criminal proceedings secret – whether by concealing the existence of a case entirely, or by liberally sealing docket entries in a public case – has far-reaching practical consequences. For one thing, a policy of secrecy creates conditions under which corruption, or the appearance of corruption, can flourish. In this case, the appellant alleges that a DEA informant, Baruch Vega, was in the business of "selling" phony plea

bargains to Colombian drug traffickers with the tacit assistance of the U.S. government. Without expressing an opinion as to the truth of these charges, The Reporters Committee submits that an open system of criminal justice would be far less vulnerable to such an accusation. But as it stands, the mystery enveloping the proceedings against Bergonzoli, Correa, and other figures related to Ochoa's prosecution only adds fuel to such claims.

As this Court has recognized, "Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992). During the criminal investigatory phase, the executive branch of the government may aggressively employ secret tactics, within the boundaries of the law, to build a case and make arrests. Once it has filed charges and moved its case to the arena of the public courts, however, the public has a constitutionally guaranteed right of access that must be respected.

In the present appeal and in *M.K.B. v. Warden*, a disturbing pattern of government abuse and secrecy has emerged. Entire cases are litigated off the public docket, pleadings are filed under seal for no articulated reason, hearings are closed to the public, plea bargains are struck in secret. This Court should act promptly to curb what appears to be a growing disregard for the First Amendment

right of public access to judicial proceedings in the Southern District of Florida.

CONCLUSION

This Court should reaffirm the holding of *Valenti* and declare that the practice of maintaining a secret docket violates the First Amendment. With respect to publicly docketed but sealed entries in the cases of Ochoa, Bergonzoli, Correa, and Cristancho, the Court should vacate all applicable sealing orders and remand to the appropriate District Court for a determination, on the record and with an opportunity for public comment, of whether the secrecy is justified in each instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,360 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

_____

Lucy A. Dalglish

Dated: December 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2003, I caused two (2) true and correct copies of the foregoing brief to be mailed to:

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