

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1923

IN RE: AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN
CIVIL LIBERTIES UNION OF MINNESOTA,

Petitioners

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO

UNITED STATES' ANSWER TO THE PETITION FOR A WRIT OF
MANDAMUS OR PROHIBITION
Provisionally Under Seal

The United States submits this response to the Court's October 2, 2019, order directing the respondents, including the United States, to answer the petition for a writ of mandamus or prohibition filed by the American Civil Liberties Union Foundation and American Civil Liberties Union of Minnesota (together, the ACLUs). As explained below, the United States takes no position on the petition.

BACKGROUND

The ACLUs' petition seeks relief from an order of the Honorable Chief Judge Gustavo A. Gelpí of the U.S. District Court for the District of Puerto Rico in *United States v. Commonwealth of Puerto Rico*, No. 3:12-cv-2039 (D.P.R.)

(*United States v. Puerto Rico*). In *United States v. Puerto Rico*, Judge Gelpí retained jurisdiction to oversee a settlement agreement between the United States, the Commonwealth of Puerto Rico, and the Puerto Rico Police Department, which addressed allegations of unconstitutional police practices. Doc. 61. A local ACLU entity, the ACLU of Puerto Rico, participated in *United States v. Puerto Rico* as amicus curiae but withdrew in July of 2019. Doc. 1297 (Pet. Ex. 22).

The order that is the subject of the instant petition prohibited Dr. Alejandro del Carmen, a Special Master in *United States v. Puerto Rico*, from “participat[ing]” or “testify[ing] as an expert, witness or any other capacity, in any litigation where the ACLU is a party or counsel.” Aug. 12, 2019 Order (Pet. Ex. 1). The order specified that its prohibition extended to *Jones v. City of Faribault*, No. 18-cv-1643 (D. Minn.), a case in which Dr. del Carmen had been designated as an expert by the City of Faribault.¹ The ACLUs are counsel in *Jones*, but the United States has no role in that case. Judge Gelpí’s order interrupted planned expert discovery in *Jones*, prompting the ACLUs to file the instant petition. Pet. 1-2. The petition asks this Court to direct Judge Gelpí to vacate or narrow the order restricting Dr. del Carmen’s activities so that he can continue in his role as expert in *Jones*. Pet. 2, 31.

¹ According to Judge Gelpí’s answer to the petition, the City of Faribault has identified another expert witness and is no longer relying on Dr. del Carmen. J. Gelpí Answer 8.

After the ACLUs filed the petition, Judge Gelpí granted Dr. del Carmen's request to be relieved of his duties as Special Master in *United States v. Puerto Rico* because Dr. del Carmen had completed his assigned tasks. Doc. 1339 (Ex. 1). The order relieving Dr. del Carmen noted his ongoing obligations to protect confidential information and work product that he had acquired through his participation in the case. Doc. 1339.

DISCUSSION

Neither the order at issue in the petition, nor the relief the petition seeks, implicates the interests of the United States. Therefore, the United States takes no position on the petition.

Whether Dr. del Carmen can participate in any matter in which an ACLU entity is a party or counsel does not presently affect the interests of the United States. The only scenario in which the order might affect the United States is litigation in which the United States, Dr. del Carmen, and an ACLU entity are all involved. Dr. del Carmen is no longer serving as Special Master in *United States v. Puerto Rico*, and the undersigned counsel is unaware of any other pending litigation in which the United States is a party and Dr. del Carmen is testifying or participating as an "expert, witness or any other capacity." Aug. 12, 2019 Order (Pet. Ex. 1).

Moreover, the United States has no interest in the relief the ACLUs seek in the petition. The United States has no role in *Jones* and no stake in Dr. del Carmen's ability to serve as an expert in that case. The government notes, however, that if Dr. del Carmen were allowed to participate, he would be bound by the confidentiality and work-product protections referenced in the order relieving him of Special Master duties in *United States v. Puerto Rico*.²

Accordingly, in the absence of a present federal government interest in the order in question or in the relief the ACLUs seek, the United States declines to take a position on the petition.

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General



TOVAH R. CALDERON
KATHERINE E. LAMM
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

² The ACLUs stipulated in *Jones* that they would not ask Dr. del Carmen questions related to *United States v. Puerto Rico* (Pet. 12; Pet. Ex. 32), which could implicate the United States' interests.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing UNITED STATES' ANSWER TO THE PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION:

(1) complies with Federal Rule of Appellate Procedure 21(d)(1) because it contains 726 words, excluding the parts of the answer exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.



KATHERINE E. LAMM
Attorney

Dated: October 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I filed an original and five copies of the foregoing UNITED STATES' ANSWER TO THE PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION with the Clerk of the Court for the United States Court of Appeals for the First Circuit by Federal Express, standard delivery.

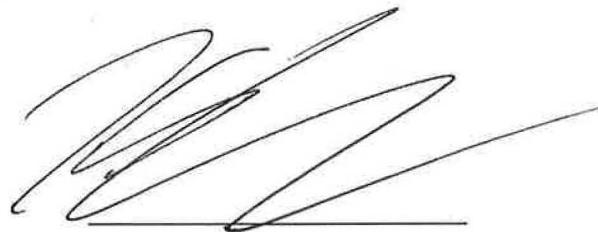
The foregoing answer was served on October 15, 2019, by Federal Express, standard delivery, to the Clerk of the Court for the United States Court of Appeals for the First Circuit and to the following counsel of record:

Alejandro Ortiz
Jenessa Calvo-Friedman
American Civil Liberties Union
Foundation
125 Broad St., 18th Floor
New York, NY 10004-0000

Arturo J. Garcia-Sola
Lizzie M. Portela
McConnell Valdes LLC
270 Muñoz Rivera Ave.
P.O. Box 364225
San Juan, PR 00936-4225

Teresa Nelson
Ian Bratlie
American Civil Liberties Union
of Minnesota
2828 University Avenue SE
Suite 160
Minneapolis, MN 55414

The Honorable Gustavo A. Gelpí
United States District Court
for the District of Puerto Rico
150 Chardón Ave.
San Juan, PR 00918



KATHERINE E. LAMM
Attorney

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

COMMONWEALTH OF PUERTO RICO, et al.,

Defendants.

CASE NO. 12-2039 (GAG)

ORDER

The Court is in receipt of Dr. Alejandro Del Carmen's October 1, 2019 letter asking that he be relieved from his appointment and duties as Special Master (See Attachment).

The parties and Monitor informed last Thursday at the status conference that a final consensus methodology as to all eleven areas of the Reform had finally been achieved, pioneered by Dr. Del Carmen. As such, the Court grants his present petition.

The Court appreciates Dr. Del Carmen's intense work and effort. It furthers notes that he is aware of his ongoing obligations pertaining to confidential and work-product information acquired throughout the scope of his work for the TCA and as Special Master, as per the various orders on the matters.

Dr. Del Carmen shall make himself available at the next status conference, telephonically, via VTC or otherwise, if warranted, since the final methodology will be discussed and approved then.

The parties shall within the next thirty (30) days confer as to possible candidates to substitute Dr. Del Carmen as Special Master.

SO ORDERED.

In San Juan, Puerto Rico this 1st day of October 2019.

s/ Gustavo A. Gelpi
GUSTAVO A. GELPI
United States District Judge

October 1, 2019

The Honorable Gustavo Gelpi
United States District Court, Puerto Rico
Jose V. Toledo U.S. Courthouse
San Juan, Puerto Rico 00901

Dear Judge Gelpi,

It has been one of the greatest honors of my career to have served the people of Puerto Rico as a TCA member and recently, as a Special Master. After having been vetted by the parties (USDOJ and the Commonwealth of Puerto Rico), I assumed the role of TCA member and made contributions in different areas of the reform agreement including, but not exclusive to, use of force, training curriculums, policies and SARP.

In January, the Court, with the approval of the parties (USDOJ and Commonwealth), appointed me to serve in the unique role of Special Master with the overall mission of "extending the capacity period" of the Puerto Rico Police Department. That is, my primary role was to provide assistance in ensuring that the Police Department would have the capability (in terms of data and systems), in order to ensure compliance with the reform agreement. This role was not intended to evaluate the Department or serve as a continuation of my previous position as a TCA member.

Soon after my appointment, the parties submitted a motion to the Court asking that I focus on specific areas related to the agreement. Despite early efforts to comply with these tasks, the Court, with the agreement of the parties, asked that I lead efforts in coordinating and achieving a consensus methodology agreed upon by the parties and the monitor. This meant that I was to put all other tasks aside and simply bring the parties together, along with the monitor and his team, in order to reach consensus in all 11 areas of the police reform.

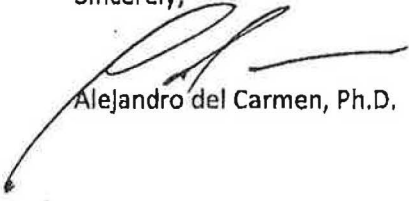
Historical and unprecedented events that affected the Island and the police reform case took place, which led for a greater effort on my part to remain focused on the methodology. The scope and amount of work that I have performed in my role as Special Master since January, have been approved by the parties (USDOJ and Commonwealth) at all times, in the same exact manner invoices of TCA staff have been approved since this case commenced.

I am pleased to inform you that, as of a few days ago, a consensus methodology has been achieved in all 11 areas, and that in a few weeks this will be made part of the Court Record at the upcoming status conference.

Given my completion of the tasks assigned to me as Special Master, related to achieving consensus of the methodology in all 11 areas of the police reform, I am asking the Court to relieve me of my duties as Special Master effective immediately. I acknowledge that all judicial canons and directives applicable to my work in this case continue to remain in effect.

I leave my tenure as Special Master with a sense of accomplishment and gratitude for the years of service to the people of Puerto Rico. I intend to focus entirely, for the foreseeable future, on my other academic, professional and Fulbright commitments which require my full attention. I wish all involved in the police reform case success, as they embark in the journey of completing the monitoring of all 11 areas of the police reform case.

Sincerely,

A handwritten signature in black ink, appearing to be 'Alejandro del Carmen', written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Alejandro del Carmen, Ph.D.