

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

UNITED STATES OF AMERICA,)
)
v.)
)
PABLO CASELLAS TORO,)
)
Defendant)
)

No. 13-201
The Honorable Joseph R. Goodwin
U.S. District Judge
Southern District of West Virginia
(Sitting by Designation)

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**SEALED UNOPPOSED MOTION OF THE UNITED STATES OF AMERICA
TO MAKE LIMITED DISCLOSURE OF SEALED INDICTMENT
AND REQUEST FOR EXPEDITED CONSIDERATION**

COMES NOW the United States of America and respectfully seeks permission from this Court to make a limited disclosure of the Defendant's sealed indictment. Given the impact of this request on quickly approaching deadlines in a related civil matter (discussed below), we respectfully seek expedited consideration of this request.

1. In April 2013, Defendant Pablo Casellas Toro was indicted by a federal grand jury for violating 18 U.S.C. § 1001, for making false statements to officials from the Federal Bureau of Investigation ("FBI"). The United States and the Defendant jointly moved to seal the federal indictment pending resolution of separate criminal charges brought against the Defendant in the local court system of the Commonwealth of Puerto Rico. This Court granted that motion, and, to date, the indictment remains sealed. Trial on the Defendant's Puerto Rico charges commenced in April 2013, but was continued to July 29, 2013, and then to October 16, 2013. At present, jury selection is underway.

2. Defendant Pablo Casellas Toro's father is the Honorable Salvador E. Casellas, U.S. Senior District Judge, U.S. District Court for the District of Puerto Rico. Judge Casellas is currently presiding over a civil action in the District of Puerto Rico—Ortíz

Lebrón, et al. v. United States, No. 10-1513—which arises from an FBI Special Agent’s fatal shooting of an officer of the Puerto Rico Police Department during a kidnapping-rescue operation led by the FBI in August 2008. The plaintiffs in the civil matter are the mother, father, and brother of the deceased policeman, and they sue the United States for damages on a negligence/wrongful-death theory under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b)(1), 2671-2680. Because the sole defendant in this civil suit is the United States, there is no jury, and, as it now stands, the FTCA case will be tried directly to Judge Casellas. The final pretrial conference in the civil matter is currently set for December 12, 2013, and a bench trial is currently set to commence on January 15, 2014. In the civil matter, the United States is being represented not by undersigned government counsel but, instead, by the U.S. Justice Department’s Civil Division in Washington, D.C. (specifically, Torts Branch Senior Trial Attorney Jeremy Scott Brumbelow).

3. If he presides over the trial in the civil case, Judge Casellas will be required to pass judgment on the alleged actions of the FBI, the same agency to whom the Judge’s son, i.e., Defendant Pablo Casellas Toro, stands accused of making false statements in violation of 18 U.S.C. § 1001. Moreover, there are six FBI personnel whom the parties in the civil case have named as likely trial witnesses and who were also involved in the investigation of Defendant Pablo Casellas Toro preceding his sealed indictment (an investigation that included an interview of Judge Casellas himself). One or more of these six FBI personnel may be among the government witnesses who testify against Defendant Pablo Casellas Toro in any trial in this criminal case. Given the multiple

points of contention in the civil case, Judge Casellas may well be required to make credibility findings as to these and other FBI witnesses during the trial of the civil case.

4. Given the ways in which the instant criminal case overlaps with the aforementioned civil case, the Civil Division advises that the simultaneous pendency of both cases raises a substantial question as to whether Judge Casellas should recuse himself from the civil matter pursuant to 28 U.S.C. § 455(a) (“Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”); see generally In re United States, 441 F.3d 44, 56-57 (1st Cir. 2006) (“While recognizing that the ‘challenged judge enjoys a margin of discretion,’ this court has repeatedly held that ‘doubts ordinarily ought to be resolved in favor of recusal.’ Under § 455(a), this court asks whether an objective, reasonable member of the public, ‘fully informed of all the relevant facts, would fairly question the trial judge’s impartiality.’”) (citations omitted).

5. Based on these considerations, the Assistant Attorney General for the Civil Division has authorized the Justice Department to file, on behalf of the United States, a motion requesting Judge Casellas to recuse himself in the civil matter. See generally 28 C.F.R. § 50.19. The United States cannot, however, consonant with the sealing order in this case, disclose the basis for recusal even to Judge Casellas. There is a separate problem, moreover, with respect to the plaintiffs. It is all but certain that neither the civil plaintiffs nor their counsel are aware of the instant criminal case because the federal indictment is sealed. Nor are they likely aware of the overlap between the potential witnesses and/or investigators in the instant criminal case and the civil case. As a result, the civil plaintiffs and their counsel likely have no reason even to question whether, from

their perspective, seeking recusal of Judge Casellas might be warranted based on these particular circumstances, and they certainly are in no position to make their own, independent judgment in that regard.

6. Although the United States could theoretically proceed ex parte, in camera, if this Court authorized disclosure to Judge Casellas, the civil plaintiffs and their counsel would still be left in the dark. While this is a permissible approach in certain limited circumstances, it is not without risk. See generally Association for Reduction of Violence v. Hall, 734 F.2d 63, 67 (1st Cir. 1984) (“Our system of justice does not encompass ex parte determinations on the merits of cases in civil litigation.”) (quoting Kinoy v. Mitchell, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)); see also Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968) (per curiam). Such an option could be reasonably viewed as unfair to the civil plaintiffs and their counsel, and it could potentially subject the final judgment in the civil case to unnecessary attack on appeal. Without access to the same information as the Civil Division, the civil plaintiffs and/or their counsel would have no opportunity to make their own judgment as to whether recusal is warranted in these particular circumstances. The civil plaintiffs might seek to oppose recusal, particularly if reassignment to another federal judge would result in a delay of trial. On the other hand, if Judge Casellas denied an ex parte, in camera recusal motion by the United States, and the plaintiffs lost at an FBI-related civil trial presided over by Judge Casellas and only thereafter learned that his son was under federal indictment for allegedly lying to the same federal agency, then the civil plaintiffs and their counsel could claim prejudice based on the Judge’s failure to recuse—and on their lack of an opportunity even to know

the relevant facts and seek recusal prior to trial—and they would all but certainly raise these issues on appeal to the First Circuit.¹

7. In order to balance all of the competing interests—including the sanctity of the seal in the instant criminal case, the rights of Defendant Pablo Casellas Toro, and the rights of the civil-case litigants—the United States respectfully seeks permission from this Court to disclose the following limited factual information, first to Judge Casellas (ex parte, in camera) as part of an anticipated recusal motion, and second, upon entry of a protective order by Judge Casellas (which the United States will request in its sealed recusal motion), to counsel only in the civil case:

“(1) that Defendant Pablo Casellas Toro was indicted under 18 U.S.C. § 1001, for allegedly making false statements to the FBI;

(2) that six of the identified FBI witnesses in the civil case were involved in the criminal investigation of Defendant Pablo Casellas Toro; and

(3) that all federal judges in the District of Puerto Rico, and throughout the First Circuit, are recused from the instant criminal matter.”

If authorized by this Court and approved, in turn, by Judge Casellas, this limited disclosure would permit the attorneys for the civil plaintiffs to have essentially the same information possessed by the Civil Division. It would provide the civil plaintiffs’ counsel with the opportunity to make their own judgment, prior to trial, as to whether to oppose

¹ Although one could argue that a “reasonable member of the public,” knowing “all the relevant facts,” might “fairly question” if Judge Casellas could be impartial toward the FBI in the civil case, In re United States, 441 F.3d at 56-57, it is not hard to imagine how the civil plaintiffs and their counsel could flip the argument, after the fact, and suggest that a reasonable person could fairly question whether the Judge might rule for the United States on the FTCA claims in an effort to “curry favor” for the benefit of his indicted son.

or join the United States' recusal motion. And it would protect the final judgment in the civil case—whatever it might be—from unnecessary attack on appeal.

Alternatively, if this Court determines that the fact of Defendant Pablo Casellas Toro's sealed indictment ought not be disclosed to the civil plaintiffs' counsel as proposed above, then we respectfully ask this Court to authorize the United States to file a motion under seal in the civil case (ex parte, in camera), relaying to Judge Casellas the same three points set forth above along with a request that, based on those considerations, Judge Casellas stay all proceedings in the civil case until such time as this Court unseals the indictment in the instant criminal case. Upon the lifting of the seal, all parties and counsel in the civil case would have the same information concerning the federal prosecution of Defendant Pablo Casellas Toro and could proceed, as they saw fit, with respect to the recusal question. We suggest making the stay request to Judge Casellas only secondarily and in the alternative, for if there were a lengthy stay for reasons undisclosed to the civil plaintiffs and their counsel, they still might claim prejudice, uneven treatment, and an appearance of impropriety.²

8. I have conferred with opposing counsel, who has authorized me to file this motion as unopposed.

9. Both parties move this Court to seal this motion and any subsequent order

² In regard to any substantial delay, the Civil Division advises that, during discovery in the civil case, medical records and deposition testimony indicated that one of the civil plaintiffs—the decedent's mother—has had significant health problems in recent years.

for the reasons set forth in previous filings.

Respectfully submitted,

ERIC H. HOLDER, JR.
ATTORNEY GENERAL OF THE UNITED STATES

WIFREDO A. FERRER
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I sent to the Clerk of the Court an electronically transmitted version of this document for filing under seal and have electronically sent a true copy of this document to counsel for the defense this 25th day of October 2013.

s/ Michael E. Gilfarb
Michael E. Gilfarb
Assistant United States Attorney

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

UNITED STATES OF AMERICA)	No. 13-201
)	[Under Seal]
v.)	
)	
PABLO CASELLAS TORO,)	
)	
Defendant)	
)	

SEALED AGREED ORDER

The court is in receipt of a Sealed Unopposed Motion of the United States to Make Limited Disclosure of the Sealed Indictment and Request for Expedited Consideration.

The court **ADOPTS** and incorporates herein the government’s reasons for sealing as set forth in prior sealed filings. The court reserves the right to elaborate upon and supplement those reasons, if later deemed necessary.

The court **GRANTS** the motion filed by the United States and hereby authorizes the United States to disclose to the Honorable Salvador E. Casellas, U.S. Senior District Judge for the District of Puerto Rico—in an ex parte, in camera filing in the civil action styled as Ortíz Lebrón, et al. v. United States, No. 10-1513 (D.P.R.)—the following limited factual information:

“(1) that Defendant Pablo Casellas Toro was indicted under 18 U.S.C. § 1001, for allegedly making false statements to the FBI;

(2) that six of the identified FBI witnesses in the civil case were involved in the criminal investigation of Defendant Pablo Casellas Toro; and

(3) that all federal judges in the District of Puerto Rico, and throughout the First Circuit, are recused from the instant criminal matter.”

Additionally, upon entry of a protective order by Judge Casellas (which the United States will request in its aforementioned ex parte, in camera filing), the United States may disclose this same limited factual information to counsel—and counsel only—who represent the plaintiffs in the Ortíz Lebrón matter.

The entirety of this action shall remain **SEALED** until further order of this court with the following exceptions: (1) as necessary to issue or execute a warrant

or summons, (2) the United States may disclose it to the prosecuting authority for Puerto Rico, the defendant and his counsel, to any judicial official as required, and to the attorneys employed by the Department of Justice, and any United States Attorney's Office as required.

The court **DIRECTS** the Clerk to send a copy of this Sealed Order by secure electronic means to Michael E. Gilfarb, Assistant United States Attorney, who shall then provide it to defendant's counsel.

Entered: _____, 2013.

Joseph R. Goodwin
U.S. District Judge
Southern District of West Virginia
(Sitting by Designation)