

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
RACHELANN RODRIGUEZ,)
)
 Defendant.)

Criminal Action No. 04-71-KAJ

MEMORANDUM ORDER

The defendant, Rachelann Rodriguez, has filed a motion seeking an order requiring the Government to call its case agent first, thereby achieving in effect the sequestration of the case agent. (Docket Item [“D.I.”] 38; the “Motion”.) A simple sequestration order is not available to the defendant because case agents are explicitly excluded from the sequestration provisions of the Federal Rules of Evidence. See Fed.R.Ev. 615(2) (noting exclusion from sequestration of “an officer or employee of a party which is not a natural person designated as its representative by its attorney”). The defendant therefore contends that I should exercise my discretion under Federal Rule of Evidence 611, which requires the court to “exercise reasonable control over the mode and order of interrogating witnesses[,]” and order the Government to call the case agent as its first witness.

This very argument has recently been rejected by the Third Circuit in a non-precedential opinion stemming from a decision from this district. In *United States v. Drummond*, 69 Fed.Appx. 580, 2003 WL 21710778 (3rd Cir. 2003), the Court held that “[t]he Government has an interest in the order of its presentation” of evidence, *id.* at

582-83, 2003 WL 21710778 at *2, and that, because the Government had a logical reason for its order of proof, it was proper for the district court to deny the defendant's order-of-witnesses motion. *Id.* The Court went on to note that in its earlier decision in *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1991), it had held "there was no prejudice in declining to sequester a case agent, because '[the defendant's] argument that [two Government] agents could coordinate their testimony does not pose a likelihood of prejudice since they had ample time before trial to do that, were they so inclined.'" *Drummond*, 2003 WL 21710778 at *2 (quoting *Gonzalez*, 918 F.2d at 1138 n.8). Finally, the Court observed, "Rule 611 only calls for an ordering of witnesses to maximize the 'ascertainment of the truth'. While there may be instances where the defense is hamstrung by its inability to sequester a case agent, and where it may be justified in requesting that the case agent to testify first, such a measure is not warranted here and would not further the trial's truth-seeking function." *Id.* at *3.

All of the reasons set forth by the Third Circuit in *Drummond* are applicable here. As stated in *United States v. Machor*, 879 F.2d 945 (1st Cir. 1989), a case expressly relied on in *Drummond*, 2003 WL 21710778 at *2, "discretion [under Federal Rule of Evidence 611(c) to order the government to call its witnesses in a specific order] should be used sparingly and good reason should exist before the court intervenes in what is essentially a matter of trial strategy." 879 F.2d at 954. Here the defendant has given no good reason for its motion, except the unsubstantiated assertion that the witnesses will change their testimony based on what is heard in the courtroom. Assuming the concern were well-founded, however, that problem is not obviated by the defendant's Motion because, as both *Gonzalez* and *Drummond* instruct, the opportunity for coordinated

testimony has inevitably already occurred. In short, the defendant has given no good basis for overriding the logical reason expressed by the Government for the order of proof it has chosen for this case. I therefore decline to exercise my discretion under Federal Rule of Evidence 611(c) to require the Government to call its case agent first.

Accordingly, the defendant's Motion (D.I. 38) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

January 13, 2005
Wilmington, Delaware