UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center,

Respondent.

MEMORANDUM OF LAW REGARDING FEDERAL RULE OF EVIDENCE 611(a)

The best way for the Court to determine the truth is to allow the government to call its witnesses in the order that it chooses. Accordingly, the Court should reject Petitioner's request that Respondent be limited to calling him last as a witness.

As the party with the burden of proof here, the government has primacy in determining the order that it presents its case. *See Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, 262 F.R.D. 293, 297 (S.D.N.Y. Sept. 16, 2009). The government is at liberty to call Petitioner as part of its case in chief in whatever order best suits its trial strategy, including first. *See* Jonathan M. Purver, et al., *The Trial Lawyer's Book* § 16:21, p. 428 (1990) ("One of the most effective trial strategies is to call an opponent's witness as an adverse witness . . . ."); Fred Lane, *Goldstein Trial Technique* § 11:85 (3d ed. 2003) (calling an opponent as a witness prevents the opponent from "tell[ing] his story in his own way" and commits the witness "to a position that he [can]not later modify").

A court decision to rearrange the order that a party presents its proof should be rare. Indeed, a court should only interfere with a party's determination of the order of proof where the opposing party presents "good reason" for doing so. *United States v. Machor*, 879 F.2d 945, 954 (1st Cir. 1989) (holding that under Rule 611, "the court has ample discretion to control the order of interrogating witnesses. However, this discretion should be used sparingly and good reason should exist before the court intervenes in what is essentially a matter of trial strategy."); *United States v. Rodriguez*, No. 04-cr-71, 2005 U.S. Dist. LEXIS 789, at *3 (D. Del. Jan. 13, 2005). That is because "the Government's interests in the orderly presentation of its case [can] far" outweigh "the negligible possibility of prejudice." *United States v. Drummond*, 69 F. App'x 580, 583 (3d Cir. 2003). Petitioner has failed to meet this standard here.[1]

If called first or early in the government's case and Petitioner feels the need to respond to later testimony from the government's witnesses, he is at liberty to retake the stand as part of the defense case. Thus, there is no need to prevent Respondent from calling Petitioner except as its last witness. *See Tesser v. Bd. of Educ.*, 190 F. Supp. 2d 430, 442 (E.D.N.Y. 2002) (rejecting plaintiff's argument that the court should have interfered with the order of witnesses under Rule 611(a) because plaintiff had an opportunity to retake the stand and remedy any prejudice she suffered from being called before other witnesses).

Moreover, Petitioner's explanation for his request—that he be allowed to hear the evidence before testifying—is also completely at odds with the intent of Federal Rule of

[1] Instead, Petitioner's motion only makes reference to his Rule 611(a) argument in a passing footnote. *See* Pet.'r's Br. at 31 n.14 (ECF No. 101) ("If the Court concludes that a blanket privilege is not available to Mr. Hassoun, then the Court should, at a minimum, instruct the government that it must call Mr. Hassoun at the end of its case so that Mr. Hassoun can hear the evidence against him before testifying. *See* Fed. R. Evid. 611(a) ('The court should exercise reasonable control over the mode and order of examining witnesses'); *Green v. McElroy*, 360 474, 496 (1956)."). Petitioner's footnote argument is insufficient to meet the good reason standard and is not even properly before the Court. Order at 12 n.4 (ECF No. 55) ("The relegation of this argument to a footnote relieves the Court of any burden to consider it."). Beyond the insufficiency of Petitioner's solely raising the argument in a one-sentence footnote, the sole case cited has nothing to do with the order of witnesses.

Evidence 611(a). The Rule's purpose in authorizing the Court to control the presentation of evidence is "to maximize the ascertainment of the truth." *Rodriguez*, 2005 U.S. Dist. LEXIS 789 at *3; Fed. R. Evid. 611(a)(1). Allowing Petitioner to listen to the evidence first provides him the improper advantage of tailoring his testimony. It has nothing to do with the ascertainment of truth.

Petitioner's counsel suggested during the March 16, 2020 hearing that Petitioner and his counsel need to hear the evidence against him before testifying, so that they can protect his Fifth Amendment rights. Tr. of Mar. 16, 2020 Hr'g at 29:17-25, 30:2-3 (ECF No. 114). That is incorrect. Whether Petitioner gets to listen to the other witnesses has no bearing on whether the questions that the government asks Petitioner call for him to make an incriminating statement, nor does it indicate whether Petitioner faces a reasonable fear of incrimination. Resp.'s Opp. to Pet.'r's Mot. to Compel 20 (ECF No. 96) (citing, e.g., *Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 794-95 (D.C. Cir. 1997). Instead, allowing Petitioner to hear all of the evidence against him simply affords Petitioner the opportunity to tailor his testimony, and to utilize the Fifth Amendment as both a sword or shield—whichever suits him based on the evidence he has heard. As the Court has noted, if Petitioner has a valid reason for invoking the Fifth Amendment in response to government questioning in this case that he has filed, he may choose to do so. Tr. of Mar. 16, 2020 Hr'g. at 28:21-23; *see Latif v. Obama*, 677 F.3d 1175, 1193 (D.C. Cir. 2011). But as in every similar civil case, short-circuiting the government's attempt to elicit the truth in such way simply raises the possibility that the Court may take an adverse inference where appropriate. Rather than being unfair, that is precisely the way in which Fifth Amendment invocations are designed to work in civil cases, and consistent

with Rule 611's goal "to maximize the ascertainment of the truth." *Rodriguez*, 2005 U.S. Dist. LEXIS 789 at *3.

CONCLUSION

For the reasons above, there is no "good cause" to restrict the government's freedom to call its witnesses in the order that it chooses. Respondent respectfully requests that the Court deny Petitioner's Rule 611(a) request.

Date: April 3, 2020

Respectfully submitted,

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