

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED BY W D.C.
2006 OCT 10 PM 1:10

CASE NO. 02-20982-CIV-MORENO/SIMONTON

CLARENCE W. ...
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIA.

SANDALIO GONZALEZ

Plaintiff,

vs.

**ALBERTO GONZALES, Attorney
General of the United States of
America, in his official capacity,**

Defendant.

**PLAINTIFF'S MOTION IN LIMINE OR IN THE ALTERNATIVE TO ORDER
THE PRODUCTION OF JOINT ASSESSMENT TEAM REPORT**

COMES NOW Plaintiff, SANDALIO GONZALEZ, by and through undersigned counsel, and moves this Honorable Court to enter an Order disallowing testimony of specific witnesses at trial on the JAT Ciudad Juarez matters, or in the alternative to order Defendant to Produce the government's Joint Assessment Team Report on the Ciudad Juarez matters pursuant to Rule 612 of the Federal Rules of Evidence, and as grounds states as follows:

1. Defendant has included in their witness list several witnesses that intend to testify to a Joint Assessment Team (JAT) assessment of the Ciudad Jaurez matters. (See copy of Defendant's Witness List attached hereto as exhibit "A").

2. The Defendant's witnesses that intend to testify as to the JAT assessment of Ciudad Jaurez matters are: Karen Tandy, Administrator for DEA; Michele Leonhart, Deputy Administrator for DEA; Michael Ferguson; and Rodney Benson.

3. On February 24, 2004, Plaintiff sent a letter to the Bureau of Immigration and Customs Enforcement (ICE) SAC in El Paso, Texas addressing his concerns about the Ciudad Juarez matters under the instructions of Michael Ferguson, DEA's Chief of Operations.

4. When DEA upper management learned of Plaintiff's letter, Plaintiff was accused of using poor judgment and that Plaintiff should have waited for the JAT assessment to be completed before acting as he did.

5. The JAT was assembled to examine or review the procedures utilized by both agencies (DEA and ICE) that led to the problem at hand. After the assessment was completed a report was drafted and issued to the agencies, a copy of which was never given to Plaintiff.

6. Defendant's witnesses can only testify to the JAT Ciudad Juarez matters by having read the JAT report.

7. Plaintiff moves this Honorable Court to disallow testimony of Defendant's witnesses at trial on the JAT Ciudad Juarez matters, or in the alternative to order Defendant to produce the government's JAT Report on the Ciudad Juarez matters pursuant to Rule 612 of the Federal Rules of Evidence.

MEMORANDUM OF LAW

Rule 612, Fed. R. Evid., states:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

The Plaintiff is entitled to have the JAT report produced to inspect it, to use to cross-examine the witnesses, and to introduce into evidence those portions that are relevant to the witnesses' testimony. "Under the Federal Rules of Evidence, unlike the common law, writings used to refresh memory prior to testifying as well as those used on the stand will be admissible, in the court's discretion, on the motion of the opposing party." United States v. Smith, 521 F.2d 957, 968 (D.C. Cir. 1975). Also See Rush v. Ill. Cent. R.R. Co., 395 F.3d 705, 716 (6th Cir. 2005). (Fed. R. Evid. 612 authorizes a party to refresh a witness's memory with a writing so long as the adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.) Also See United States v. Baptista-Rodriguez, 17 F.3d 1354, 1367 (11th Cir. 1994).

Thus, if a witness reviews an official report prior to testifying, whether or not he refers to it on stand, it is admissible. If the Defendant's witnesses are going to testify to

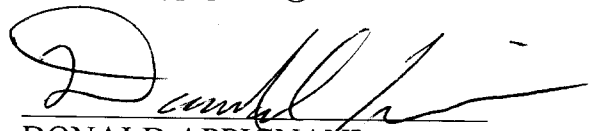
the JAT Ciudad Juarez matter and they reviewed the JAT report, which they must have, then the Plaintiff is entitled to have the report. Furthermore, the Plaintiff is entitled to have the JAT report produced prior to the trial to inspect the report because the Plaintiff has a good faith reasonable belief that the report is too lengthy to inspect on the witness stand or during a recess at trial.

WHEREFORE, Plaintiff, Sandalio Gonzalez, respectfully requests this Honorable Court to grant said Motion and if the Defendant's witnesses plan on testifying to the JAT Ciudad Juarez matter, then the Defendant must produce the report to Plaintiff prior to trial, or in the alternative the witnesses should not be able to testify to this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered on this 10th day of October 2006 to Lawrence Rosen, Assistant U.S. Attorney, 99 N.E. 4th Street, Suite 300, Miami, Florida 33131.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-20982-CIV-MORENO

SANDALIO GONZALEZ

Plaintiff,

vs.

ALBERTO GONZALES, Attorney
General of the United States of
America, in his official capacity,

Defendant.

DEFENDANT'S WITNESS LIST

The undersigned Assistant United States Attorney, on behalf of the defendant, submits the defendant's witness list. Pursuant to Court Order, this list only includes those witnesses that have not been listed by the plaintiff.

Karen Tandy, Administrator for DEA, will testify to personnel decisions she made and the non-discriminatory, non-retaliatory reasons for those selections, including selections contested by the plaintiff and made during her administration. She will also discuss bonus issues with respect to the plaintiff, mobility issues, SAC positions and prestige, the JAT/Ciudad Juarez matters, resource issues relative to various Field Divisions, rebuttal issues and impeachment issues.

Michele Leonhart, Deputy Administrator for DEA, will

testify, if necessary, concerning plaintiff's evaluations, the rationale for SES placement selections, SAC positions and prestige, the mobility agreement, JAT/Ciudad Juarez matters, resource issues relative to various Field Divisions, plaintiff's performance at the El Paso Field Division, retirement issues, rebuttal issues, and impeachment issues.

Donnie Marshall, the former DEA Administrator, will testify to the SES selections and placement positions, promotion of plaintiff to the El Paso Field Division SAC position, SAC positions and prestige, consultation issues, mobility agreement, reassignments, the Southwest Border Initiative, testimony to the Congress, rebuttal issues, and impeachment issues.

Julio Mercado, the Deputy Administrator under Donnie Marshall, will testify to the reassignments under Mr. Marshall, mobility requirement, SAC positions and prestige, discussions with the plaintiff concerning positions available, evaluations, and issues concerning El Paso Field Division, rebuttal issues and impeachment issues.

Vincent Mazzilli, Michael Kane and William Silvestri will be called concerning issues in the Miami Field Division, SAC positions and prestige, reassignment issues under Administrator Marshall, the mobility agreement, OPR matters, consultation issues before transfer, Bovair issues, rebuttal issues and impeachment issues.

Barry Jamison and Pat Warner will testify to OPR issues, the Jamison memo, Tinsley investigation, Bovair matter, and plaintiff's allegations into grand jury/OPR matters.

Michael Ferguson will testify concerning the formation and purpose of the JAT, discussions with DEA personnel and with the plaintiff on that matter. He will testify as to plaintiff's involvement and interference in the Juarez matter and the reaction by Headquarters to that involvement. In addition, he can address the mobility agreement, assignments to and operations of DEA Field Divisions, reassignments within DEA to Headquarters, and to leadership positions in Operations. He will also address the mandatory retirements of DEA agents, rebuttal issues and impeachment issues.

Rogelio Guevarra, William Brown, Felix Jimenez will testify to OPR operations, decision-making procedures, and the Career Board decisions. They can also testify as to the plaintiff's SES position, mobility agreement, claims of discrimination and retaliation against Hispanics, and to serving in various Field Division offices as a SAC, to rebuttal issues and impeachment issues.

Lizette Yrizarry and Max Olalde would testify to Perez and Bovair matters. They would testify to plaintiff's tenure as an ASAC in Miami, credibility, and mobility issues as a DEA agent.


Rodney Benson would testify to JAT and Juarez issues, the

mobility agreement and to the experience of being a SAC of a smaller Field Office, to rebuttal issues and impeachment issues.

Lynn Coffman will testify to plaintiff's OPF and EEO matters.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

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