

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.

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION IN LIMINE  
OR TO ORDER PRODUCTION OF JOINT ASSESSMENT REPORT**

The undersigned Assistant United States Attorney, on behalf of the defendant, hereby responds to the plaintiff's motion in limine, or in the alternative, to produce the Joint Assessment Team Report, and states:

Plaintiff has filed a motion to restrict testimony on the Joint Assessment Team Report or alternatively to require production. The motion is based on Federal Rule of Evidence 612, entitled "Writing Used to Refresh Memory." The plaintiff's motion is premature and based on an assumption. The assumption is that individuals who will be testifying reviewed the report for purposes of refreshing their recollections.

Plaintiff also assumes in his motion that the merits of the investigation (rather than simply the fact of the investigation) will be the subject of testimony. Defendant's position is that the conclusions reached are not relevant to this matter - merely

the fact that a significant investigation was being conducted at the time plaintiff wrote his letter.

Rule 612, F.R.Evid., addresses where a witnesses uses a writing to "refresh memory for the purposes of testifying." The use of the writing to refresh memory may occur either while the witness is on the stand testifying or prior to the witness testifying. Production of the writing where the witness refreshes memory prior to testifying may be required only if the court in its discretion determines it is necessary in the interest of justice.

The linchpin is that plaintiff first establishes that the document was reviewed to refresh a witnesses' recollection for the purposes of testifying. United States v. Sheffield, 55 F.3d 341, 343 (8<sup>th</sup> Cir. 1995) (Witness acknowledged that he had reviewed the file before testifying but stated that he did not need it to refresh his recollection; the court found that "[i]f the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party.") See, 28 Wright & Gold, Federal Practice and Procedure § 6185, p. 465 (1993). Moreover, even if a writing has been used to refresh memory of a witness before testifying, the court may require furnishing the statement only if in its discretion it determines it is necessary in the interest of justice. Rule 612 is not a vehicle for a plenary search for contradictory or rebutting evidence that may be in a file but rather is a means to reawaken recollection of the witness to the witness's past perception about a writing. Sheffield, 55 F.3d at 446.

Plaintiff has failed at the starting gate. He has failed to show that a witness has used any writings to refresh recollection. Plaintiff has made no showing which of the witnesses may have even seen the final report. Defendant suggests that plaintiff make the motion, if at all, at the time the witness testifies, so that plaintiff may attempt to lay a predicate<sup>1</sup>.

Dated: October 24,  
2006

Respectfully submitted,

R. ALEXANDER ACOSTA  
UNITED STATES ATTORNEY

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<sup>1</sup>In addition, independent of this litigation, the report is being reviewed by DEA to determine whether portions have to be classified as National Security Information.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this \_\_\_\_ day of October, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the attached Service List in the manner specified.

s/ Lawrence N. Rosen  
LAWRENCE N. ROSEN  
Assistant United States Attorney

**SERVICE LIST**

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Case 02-20982-CIV-MORENO/SIMONTON  
United States District Court, Southern District of Florida

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