

1 **ERIC S. FISH**
California State Bar No. 280992
2 **FEDERAL DEFENDERS OF SAN DIEGO, INC.**
225 Broadway, Suite 900
3 San Diego, California 92101-5030
Telephone: (619) 234-8467
4 Facsimile: (619) 687-2666
Eric_Fish@fd.org

5 Attorneys for Morena Mendoza-Romaldo
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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 Morena Mendoza-Romaldo
15 Defendant.

Case No: 18-MJ-2070-RBB-DMS-1

Hon. Dana M. Sabraw
Hearing Date: TBD

16 NOTICE OF MOTIONS AND
17 MOTIONS TO:

- 18 1) Suppress Statement
- 19 2) Request Cross-Examine Declarant

20 To: ADAM BRAVERMAN, UNITED STATES ATTORNEY, AND
21 DAVID D LESHNER, ASSISTANT UNITED STATES ATTORNEY:

22
23 Please take notice that defendant, Morena Mendoza Romaldo, by and through
24 her attorneys, Eric Fish, and Federal Defenders of San Diego, Inc., will ask this Court
25 to enter an order granting the following motions.

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MOTION

Defendant, Morena Mendoza Romaldo, by and through counsel, Roxana Sandoval, and Federal Defenders of San Diego, Inc., asks this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law, and local rules for an order to:

- (1) Suppress Statement
- (2) Request Cross-Examine Declarant

This motions are based upon the instant motion and notice of motions, the attached Memo, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of this motions.

Respectfully submitted,

Dated: May 30, 2018

s/ Eric S. Fish
Federal Defenders of San Diego, Inc.
Attorneys for Morena Mendoza-Romaldo
Email: Eric_Fish@fd.org

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CERTIFICATE OF SERVICE

Counsel for the Defendant certifies that the foregoing pleading has been electronically served on the following parties by virtue of their registration with the CM/ECF system:

- David D Leshner**
Assistant U.S. Attorney
- Davis McEvoy Loop**
Assistant U.S. Attorney
- Michael E Lasater**
Assistant U.S. Attorney

Respectfully submitted,

Dated: May 30, 2018

s/ Eric S. Fish
Federal Defenders of San Diego, Inc.
Attorneys for Morena Mendoza-Romaldo
Email: Eric_Fish@fd.org

1 **Eric S. Fish**
2 California Bar No. 280992
3 **Federal Defenders of San Diego, Inc.**
4 225 Broadway, Suite 900
5 San Diego, California 92101-5008
6 Telephone: (619) 234-8467
7 Eric_Fish@fd.org

8 Attorneys for Morena Mendoza-Romaldo

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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **(HONORABLE RUBEN B. BROOKS)**

13
14 **United States of America,**) Case No: 18mj-2070-RBB
15)
16 Plaintiff,) **Motion to Suppress Statement and**
17 vs.) **Request to Cross-Examine Declarant**
18)
19 **Morena Mendoza-Romaldo,**)
20 Defendant.)

21 **I.**

22 **Motion to Suppress Statement**

23 **A. Ms. Mendoza’s statement.**

24 On April 27, 2018, at 9:18 p.m., Morena Mendoza-Romaldo was interrogated at
25 the Imperial Beach Border Patrol Station. The interrogation was recorded and the
26 recording lasts 53 minutes and 21 seconds. Border Patrol Agent Fabian Lopez
27 questioned Ms. Mendoza in Spanish, and Border Patrol Agent Joshua Morales
28

1 observed. During the interrogation Ms. Mendoza was separated from her 12-year-old
2 son, who was not in the room.

3 Ms. Mendoza was provided the video recording of this statement one week ago,
4 and has not had adequate time to prepare a certified transcript. She is lodging the video
5 of her interrogation with the court, and has ordered a transcript which she will provide
6 the court when it is available.
7

8 **B. Grounds for Suppression.**

9 Ms. Mendoza did not understand her rights.

10 At the four-minute mark of the interrogation video, Agent Lopez finishes
11 reading Ms. Mendoza her *Miranda* rights and asks if she understands them. Ms.
12 Mendoza then shakes her head no. The agent does not attempt to explain the rights
13 again. He simply continues with the questioning, and asks Ms. Mendoza if she wishes
14 to answer his questions without the presence of an attorney. Ms. Mendoza pauses at
15 this question and laughs nervously at the four minute 44 second mark of the video.
16 Agent Lopez then, at the five minute 42 second mark of the video, instructs Ms.
17 Mendoza to sign the page indicating that she understands her rights. At no point did
18 Agent Lopez attempt to explain Ms. Mendoza's *Miranda* rights again, despite her clear
19 indication that she did not understand them. This violates *Miranda's* requirement that a
20 person must understand their rights and knowingly waive them in order to be lawfully
21 interrogated. *See Miranda v. Arizona*, 384 U.S. 436, 469 (1966) ("This warning is needed
22 in order to make [her] aware not only of the privilege, but also of the consequences of
23 forgoing it. It is only through an awareness of these consequences that there can be any
24 assurance of real understanding and intelligent exercise of the privilege."); *Moran v.*
25 *Burbine*, 475 U.S. 412, 424 (1986) (conduct that "deprives a defendant of knowledge
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1 essential to [her] ability to understand the nature of [her] rights and the consequences
2 of abandoning them” renders a waiver unconstitutional).

3
4 **C. Good Cause Exists for Considering the Motion to Suppress.**

5
6 The Court requested briefing on the question of whether it should consider the
7 motion to suppress. Under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, a
8 motion to suppress must be made before trial “if the basis for the motion is then
9 reasonably available.” Under Rule 12(c), it is also within the Court’s discretion to
10 establish deadlines for the filing of pretrial motions. In this case, the Court set a deadline
11 of May 15, 2018 for the filing of motions. Ms. Mendoza did not file a suppression
12 motion on that date, because she had not yet been provided with the recording of her
13 statement. On May 23, 2018, the government provided a video recording of Ms.
14 Mendoza’s statement. On that same date, defense counsel alerted the Court that it
15 intended to file a motion to suppress the statement. There is “good cause” to consider
16 this motion under Rule 12(c)(3), because this motion to suppress could not have been
17 written without first viewing the statement. To reject this motion on timeliness grounds
18 would effectively require the defense to make any suppression arguments before it
19 knows what it is suppressing. That would violate Ms. Mendoza’s Sixth Amendment
20 rights to present a defense and to effective assistance of counsel, as well as her Fifth
21 Amendment right to due process of law.
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23

24 **II.**

25 **Request to Cross-Examine Agent**

26
27 In opposing Ms. Mendoza’s motion to dismiss for selective prosecution, the
28 government filed a declaration from Ryan Yamasaki, an Assistant Chief Patrol Agent.
See Dkt. No. 32-2. In that declaration, Agent Yamasaki makes various factual

1 assertions, including that “individuals’ status as caravan participants, not their
2 nationality,” was the “reason for prosecution.” Dkt. No. 32-2 at 4. He also declares
3 that some caravan members were identified through a “list provided by Mexican
4 immigration officials,” although he otherwise provides little information about the list,
5 including how it was compiled and when it was received. See Dkt. No. 32-2 at 3.
6

7 At the hearing on May 23, 2018, the government contended that it did not need
8 to subject Agent Yamasaki to cross-examination. Ms. Mendoza disagreed. She argued
9 that, if this Court intended to rely on the declaration to deny her motion—and it
10 appeared from this Court’s tentative that it intended to do so—that Agent Yamasaki
11 should be subject to cross-examination about his factual assertions, assertions that Ms.
12 Mendoza disputed. This Court asked the parties to submit supplement briefing on this
13 issue. This is that briefing.
14

15 1. Ms. Mendoza has a right to cross-examine Agent Yamasaki under Local
16 Criminal Rule 47.1. That rule provides: “Each declarant in support of and in
17 opposition to criminal motions must be made available for cross-examination at the
18 hearing of the motion, unless the opposing party does not dispute the facts contained
19 in the declaration.” S.D. CRIM. R. 47.1; *see also United States v. Herrera-Rivera*, 832 F.3d
20 1166, 1173 (9th Cir. 2016) (holding that the district court did not abuse its discretion
21 by enforcing this rule). Here, the government has filed a declaration in opposition to a
22 motion. Ms. Mendoza contests the facts in that declaration. Mr. Yamasaki must
23 therefore be made “available for cross-examination[.]” See *id.* Denying Ms. Mendoza
24 the right to cross-examine Mr. Yamasaki would violate her basic due-process rights.
25

26 2. At the hearing, the government contended that the local rule was an
27 improper “end run” cases like *United States v. Armstrong*, 517 U.S. 456 (1996), which
28 limited a defendant’s right to discovery when seeking to support a selective-prosecution

1 claim. This argument misunderstands *Armstrong*. In *Armstrong*, the defendant claimed
2 that he was entitled to discovery under Rule 16’s low standard. 517 U.S. at 461–62.
3 The Court disagreed. But in doing so, the Court did not hold that the government’s
4 interest in not producing discovery in selective-prosecution cases trumped Rule 16.
5 Instead, the Court held that Rule 16 by its very terms did not apply to defenses like
6 selective prosecution. 517 U.S. at 461–63. Thus, the defendant could not point to any
7 generally applicable rule to support his discovery request and was left relying on general,
8 common-law principles. See *id.* at 463–70. *Armstrong*, then, does not give the
9 government the right to ignore generally applicable rules just because the defendant has
10 raised a selective-prosecution claim. And, in this case, Ms. Mendoza can point to a
11 generally applicable rule that governs her request for cross-examination: Rule 47.1.
12 Nothing about Rule 47.1’s text makes it inapplicable to selective-prosecution motions.
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15 Moreover, cross-examining a witness was not the type of “discovery” at issue in
16 cases like *Armstrong*. While the government filed declarations in *Armstrong*, defense
17 counsel did not apparently ask to cross-examine the declarants. Instead, the defendant
18 wanted the government to “assemble from its own files documents which might
19 corroborate or refute the defendant’s claim,” something the Court refused to order the
20 government to do. 517 U.S. at 468. By contrast, with this request, Ms. Mendoza is not
21 asking for documents. Now that the government has made the choice to rely on a
22 witness’s declaration and put that declaration in the record, Ms. Mendoza wants to
23 challenge that witness’s assertions via cross-examination before this Court relies on the
24 truth of the witness’s assertions. *Armstrong* is silent as to that sort of request.
25

26 In sum, the government is seeking to shield its witness from scrutiny by refusing
27 to make its witness available for “cross-examination.” See S.D. CRIM. R. 47.1. This
28 Court should therefore allow defense counsel the chance to cross-examine Agent

1 Yamasaki—and, if the government does not make him available, this Court should
2 refuse to consider his declaration.
3

4
5 Respectfully submitted,

6 Dated: May 30, 2018

7 */s/ Eric S. Fish*

8 **Eric S. Fish**

9 Federal Defenders of San Diego, Inc.

10 Attorneys for Ms. Mendoza-Romaldo
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Respectfully submitted,

Dated: May 30, 2018

/s/ Eric S. Fish

Eric S. Fish
Federal Defenders of San Diego, Inc.
Attorneys for Ms. Mendoza-Romaldo