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1 MR. MENDOZA: Your Honor, I don't see any relevance
2 to that testimony. No cross.

3 THE COURT: Thank you.

4 You may step down. Thank you.

5 THE WITNESS: Thank you.

6 THE COURT: Appreciate you being here.

7 THE WITNESS: Am I dismissed?

8 THE COURT: No, ma'am, just from the courtroom.

9 THE WITNESS: Okay. Thank you.

10 THE COURT: Ms. Stewart, your next witness.

11 MS. STEWART: That's all the witnesses for now, Your
12 Honor.

13 THE COURT: Ms. Stewart, do you want to argue the
14 motion?

15 MS. STEWART: My co-counsel can.

16 THE COURT: Ms. Milliron, I'm sorry. That's fine. I
17 was expecting Ms. Stewart.

18 All right. What's your argument, Ms. Milliron?

19 MS. MILLIRON: Your Honor, at the time that we filed
20 the Motion to Dismiss, facts were of such a nature that had
21 merited filing the Motion to Dismiss; but I think the facts
22 have made our motion even stronger since filing the motion.

23 So to give a bit of a factual basis here for the
24 Court, the female passenger who was an adult in the vehicle
25 that was pulled over in this case had a child with her, a

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1 young -- her daughter with her. And all three of the adults in
2 this case were interviewed. So that would be Mr. Campos-Ayala,
3 Mr. Moncada-De La Cruz, and Ms. Castro-Hernandez is what her
4 name is.

5 THE COURT: This is Karina Castro-Hernandez?

6 MS. MILLIRON: Karina Castro-Hernandez, yes, Your
7 Honor.

8 THE COURT: Okay.

9 MS. MILLIRON: And when they were interviewed,
10 according to the reports in discovery from Agent Kettani, who
11 is the case agent in this case, when they were interviewed,
12 Ms. Castro-Hernandez told a story that matched our defendant's
13 stories in substance which was the driver, who was 17 at the
14 time of this offense, picked them up, took them to a park in
15 Van Horn after the three of them had walked across the border
16 illegally and dropped them off at the park, left them there for
17 about 30, 40 minutes.

18 And when he returned is when these bundles of alleged
19 marijuana were crammed inside the vehicle, and that they didn't
20 know what the bundles were. There is some conversation about
21 whether or not the driver told them that there were clothing in
22 the bundles, and they were all instructed to get back in the
23 vehicle. They crammed their way back in as best they could,
24 and they were arrested 19 miles later -- or pulled over
25 19 miles later.

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1 Ms. Castro-Hernandez's testimony is necessary to this
2 case. It is clearly exculpatory of both of our clients, both
3 of the defendants here. It's material and it's not cumulative
4 because she's the only witness now even more so than she was
5 when we filed the motion. Because as the Court is aware, the
6 driver -- the juvenile driver, who is no longer a juvenile,
7 Mr. Ramos-Hernandez, has pleaded the Fifth. So his testimony
8 is completely unavailable in this case. So she is the only
9 witness besides our clients who could possibly testify, and our
10 clients have the right not to take the stand.

11 So the fact of the matter is the government had this
12 interview. They did the interview on the same day of the
13 arrest, on December 24th. Our preliminary and detention
14 hearing was not held until December 30th. Nobody mentioned
15 from the government to either myself or to Ms. Stewart that
16 this favorable interview had occurred or that there was
17 information that was exculpatory to our defendants in this
18 interview.

19 That was not, of course, in the preliminary and
20 detention hearing. It was not something that we found out
21 until the disclosure of additional discovery. And I apologize,
22 I don't remember the exact date of that, but it was sometime
23 later. And it was after Mr. Castro-Mendez had already been
24 deported and removed from the defendants' reach.

25 And since that's happened, the government had other

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1 options to try to obtain Ms. Castro-Hernandez's testimony,
2 including giving her permission to be here, to appear at this
3 trial, including reaching out to us and trying to figure out a
4 way to secure her presence here so that she could be deposed.
5 We had an alternative request for deposition on that basis.
6 We've tried everything we can.

7 Since then, we have actually made contact with
8 Ms. Castro-Hernandez. She sent us a video statement, of
9 course, you know, we have our admissibility issues with that
10 video statement. But she's indicated that she's not going to
11 return to a subpoenaable jurisdiction because she's afraid.
12 She's afraid she may be arrested if she comes here. She's
13 afraid of what might happen to her. She's not going to come
14 back, and she's outside this Court's jurisdiction to be able to
15 make her come back. And the only reason that she's outside the
16 jurisdiction of the Court is because the government deported
17 her before telling defense counsel, giving us the opportunity
18 to interview her.

19 And as Ms. Carrasco clearly demonstrated, the
20 government frequently does and has the opportunity to have kept
21 her in custody at least long enough to inform us that this was
22 happening.

23 So when we talk about dismissal and the consequences
24 of what's happening here, I mean, Ms. Castro-Hernandez is
25 necessary to our defense. She's necessary to our case. And if

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1 the Court rules otherwise, I mean, then we will be forced into
2 a position of advising our clients strategically differently
3 whether or not to take the stand. And I think that's a very
4 dangerous area for us to tread into, Your Honor. So I believe
5 that's my argument.

6 THE COURT: Thank you very much.

7 Mr. Mendoza.

8 MR. MENDOZA: Yes, Your Honor. Your Honor, the Court
9 is well aware of the law that applies to this issue as we have
10 argued this issue in this court before. As the Court knows, in
11 order to prevail on a Motion to Dismiss the indictment, which
12 by the way bears a very heavy burden, according to the Fifth
13 Circuit, there has to be two things.

14 First, defendants have to show that they have been
15 prejudiced. And what that means is they have to show that the
16 testimony that they are basing their motion on is material, is
17 favorable, and is not cumulative. It's not material because
18 everything that is in the motion, you know, that this lady --
19 or that the defendants walked into the country. That there was
20 this ride that went on. They were picked up by a juvenile.
21 And then when they come back, there are the bundles. That's
22 all coming in, in our case of -- it's coming in, in our case in
23 chief because they told DEA agents.

24 And so it makes no difference as to whether this lady
25 is here or not because it's coming in anyway as to whether or

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1 not they testify. So not only is it immaterial because it
2 makes no consequence, but it's also cumulative because we're
3 going to put it in, in our case in chief.

4 Second, if even if they were to satisfy that they
5 have been prejudiced, Your Honor, there is still this second
6 element, which I know has not been required by the Fifth
7 Circuit yet, but lots of circuits require bad faith. There has
8 to be a showing that the government deported this witness in
9 bad faith.

10 I submit to you, Your Honor, that we did not -- and I
11 say "we," being the government, did not deport this witness in
12 bad faith. The reason she was deported, Your Honor, is because
13 she had her 3-year-old daughter with her, and there was no bed
14 space to take care of her daughter individually without her
15 mother. That's a far cry from bad faith.

16 So, again, no prejudice as to the testimony that's
17 been submitted to the Court because it's not material, it's
18 immaterial, and it's cumulative because it's going to be in our
19 case in chief. Even if there is prejudice, Your Honor, there's
20 no showing of bad faith. Thank you.

21 MS. STEWART: Your Honor, I would like to say
22 something.

23 THE COURT: Yes, ma'am.

24 MS. STEWART: What was not presented by the
25 government is that this witness that we desperately need is

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1 going to say and testify that neither she nor these two
2 defendants had anything to do with bringing in the marijuana or
3 possessing the marijuana or had anything to do with that
4 venture at all. They were coming in illegally to get to points
5 where they wanted to be. That's why it's very relevant and
6 very material. Thank you, Your Honor.

7 THE COURT: Thank you.

8 All right. I'll take that motion under advisement as
9 well. We'll look at that one as well as the suppression issue.

10 Let's see, what other motions were filed this
11 weekend. So we have some Daubert challenges which I'll tell
12 you what we'll do. They're the government Daubert challenges
13 of two witnesses, right? I think, right?

14 MR. WEBER: Judge, we're really only challenging one.
15 We're not going to challenge the Spanish speaking witness.

16 THE COURT: Oh, okay.

17 MR. WEBER: That wasn't was put in our motion. That
18 was in error.

19 THE COURT: I think I just assumed. I read your
20 motion, and it was just Wright that you were looking at.

21 MR. WEBER: Yes, Your Honor.

22 THE COURT: So let's do that one -- let's plan to do
23 that one at close of business today once we release the jury.

24 MR. WEBER: Yes, Your Honor.

25 THE COURT: We'll take that up. And I think if I'm

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1 holding the other two in abeyance for the time being, the
2 suppression and the -- this Motion to Dismiss, which even if I
3 deny, of course, I will, of course, be able to revisit that at
4 the Rule 29 hearing as well.

5 Are there other motions -- any other motions pending
6 that I've just missed? Because there's a flurry of them this
7 weekend. I was trying to keep up.

8 MR. MENDOZA: I think that's it, Your Honor.

9 MS. MILLIRON: I agree.

10 THE COURT: Okay. So with that then, let's take
11 30 minutes -- actually 25 because the jury will be back at five
12 till 2:00. We're going to get started. I'll swear them --
13 Ms. Lerma will swear them. I will, of course, read the
14 preliminary instructions. And then you'll each have
15 ten minutes or less to make your opening statements.

16 And then, Mr. Mendoza, you'll have -- assuming I
17 don't grant the Motion to Dismiss, Mr. Mendoza you'll have your
18 witnesses ready to go, right?

19 MR. MENDOZA: Yes, Your Honor, they're ready to go.

20 THE COURT: All right.

21 Anything else we need to take up, Ms. Stewart or
22 Ms. Milliron?

23 MS. STEWART: No, Your Honor.

24 MS. MILLIRON: No, Your Honor.

25 THE COURT: All right. Have a great lunch. Sorry

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1 it's not real long.

2 (Luncheon recess from 1:32 p.m. to 2:05 p.m.)

3 THE COURT: All right. We're back in session, still
4 outside the presence of the jury. The Court -- as to the
5 Motion to Suppress, the Court will deny the motion finding
6 that -- again, noting again in these remote locations, it's
7 difficult. Time is not the same as in, say, a more urban
8 setting whereas this is all very rural and takes some time to
9 get there. The Court does not find that the time that elapsed
10 which looks like it was anywhere from 15 to 30 minutes. It may
11 have been as much as 40. But regardless, I don't find that to
12 be because of any undue delay. It was probably as quick as
13 possible, frankly.

14 I also believe that Agent Ramos -- Border Patrol
15 Agent Ramos, his questioning was more -- was not formal. It
16 was more in a rapid, almost contemporaneous manner which he
17 came up on this vehicle and started -- and sort of asking a few
18 questions.

19 I also note that whichever defendant, the older
20 defendant, that he believes -- Ramos was searching and
21 escorting to the transport vehicle, he was never handcuffed.
22 This was not a formal setting. He was searching this person
23 and walking him over to the transport vehicle where I think
24 more -- sort of a more collective gathering and questioning was
25 made of all of them about immigration status and whatnot.

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1 So I find that the Motion to Suppress is not
2 well-taken. I don't believe this was -- the defendants were at
3 the time that they were questioned by Ramos, I don't find that
4 this was a custodial interrogating that rises to the point --
5 or at least not in custody for Miranda purposes. They were not
6 free to leave, certainly understandable. There was certainly
7 reasonable suspicion at that time that there were issues, and
8 they were being detained much like an ordinary traffic stop
9 would happen.

10 So no formal arrest was made at that time. They were
11 never really arrested until they were taken to the transport
12 vehicle, and all of this happened prior to that. So I don't
13 find the defendants, for the purposes of the statements that
14 were sought to be suppressed and -- by the defense sought to
15 be, I guess, elicited during trial, I don't find that the
16 defendants were under arrest for Miranda purposes. So I don't
17 find this to be a formal custodial interrogation.

18 All right. As to the Motion to Dismiss, I'm going to
19 at least for now deny that, but I'll carry it -- I'm really
20 planning just to carry it and see how the trial goes, how the
21 government's case in chief goes.

22 I can tell you now -- I can already tell you that the
23 Court does not find that the government deported the witness in
24 bad faith. Keep in mind as was elicited in the testimony,
25 there was COVID protocols. In December -- even late

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1 December 2020, certainly the United States had an interest and
2 was trying to remove and deport those who should be deported as
3 quickly as possible because of COVID issues, concerns there.
4 And, of course, because of space and whatnot which now three or
5 four months later we're having issues with already -- I guess
6 only three months later we're having space issues and probably
7 COVID issues as well from at least press reports.

8 And so -- but the Court does not find that there's
9 any bad faith. Now, I reserve the right to revisit this once
10 we get to our Rule 29 issue, and it may play a part in this.
11 I'm taking the government's word for it, that this is merely
12 cumulative and, therefore, is not going to be material.

13 All right. With that, I think we're ready to bring
14 the jury in, and I've got my timer here and ready.

15 Ms. Aida, bring them in.

16 And let's rise for the jury, please.

17 (Jury enters at 2:11 p.m.)

18 THE COURT: So if you'll remain standing. We're
19 going to sit down now. Now, before you sit down, if you'll
20 stay standing, please, raise your right hand and be sworn.

21 Let's all sit.

22 (Jury sworn by the clerk at 2:12 p.m.)

23 THE COURT: Now be seated, please. Thank you.

24 JUROR: Sorry.

25 THE COURT: My apologies. No, it's my communication