Hale Moot Court Honors Program

RECORD

2019-2020

UNIVERSITY OF SOUTHERN CALIFORNIA

GOULD SCHOOL OF LAW

HALE MOOT COURT HONORS PROGRAM
PARTICIPANT PACKET
2019-2020

CONTENTS

1. List of Executive Board Members
2. Executive Board Contact Information
3. Program Schedule
4. Competition Case

Appendices

A. Program Rules

B. Appellate Brief Format Rules

Attachment 1: Sample Cover Page
Attachment 2: Sample Argument Headings

C. Appellate Brief Scoring Sheet

D. Oral Argument Participant Guidelines

E. Oral Argument Judging Guidelines

F. Oral Argument Scoring Sheet

HALE MOOT COURT HONORS PROGRAM
EXECUTIVE BOARD
2019-2020

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HALE MOOT COURT HONORS PROGRAM
EXECUTIVE BOARD CONTACT INFORMATION
2019-2020

Eva Schifini	(702) 324-6765	Eva.Schifini.2020@lawmail.usc.edu
Joshua Stillman	(612) 251-0039	Joshua.Stillman.2020@lawmail.usc.edu
Elizabeth Avunjian	(818) 251-6738	Elizabeth.Avunjian.2020@lawmail.usc.edu
Marie Griffith	(949) 573-0233	Marie.Griffith.2020@lawmail.usc.edu
Ryan Montag	(805) 451-4233	Ryan.Montag.2020@lawmail.usc.edu
Madeleine Eldred	(818) 636-9971	Madeleine.Eldred.2020@lawmail.usc.edu
Matt Honig	(619) 985-7409	Matthew.Honig.2020@lawmail.usc.edu
Phil Lamborn	(760) 803-1629	Philip.Lamborn.2020@lawmail.usc.edu
Meghan McBerry	(408) 507-0226	Meghan.McBerry.2020@lawmail.usc.edu
Ella Moberg	(805) 471-7361	Ella.Moberg.2020@lawmail.usc.edu
Allison Skager	(818) 398-0096	Allison.Skager.2020@lawmail.usc.edu

Hale Moot Court Honors Program
Fall 2019 Schedule

Date	Day	Time	Event
August 28	Wednesday	6:00 pm	Opening Dinner, Faculty Lounge
August 30	Friday	1:00 pm	Email preferences to Advocacy Chair
September 6	Friday	8:00 am	Issue Seminars
September 13	Friday	8:00 am	Writing Seminar I
September 18	Wednesday	1:00 pm	**FIRST DRAFT DUE**
September 30**	Monday	1:00 pm	First Draft Returned
October 1-3	Tuesday-Thursday	TBD	First Editor Meeting
October 4	Friday	8:00 am	Writing Seminar II
October 14	Monday	1:00 pm	**SECOND DRAFT DUE**
October 28	Monday	1:00 pm	Second Draft Returned
October 29-31	Tuesday-Thursday	TBD	Second Editor Meeting
November 8	Friday	8:00 am	Writing Seminar III
November 25	Monday	1:00 pm	**FINAL COMPETITION & GRADED BRIEF DUE**

* Tentative dates/times
** An additional pick-up date will be arranged for Rosh Hashanah observers

Hale Moot Court Honors Program
Spring 2020 Schedule

Date	Day	Time	Event
January 17	Friday	8:00 am	Oral Advocacy Seminar I
January 27	Monday	TBD	Mock Rounds: On-Brief
January 28	Tuesday	TBD	Mock Rounds: On-Brief
January 29	Wednesday	TBD	Mock Rounds: Off-Brief
January 30	Thursday	TBD	Mock Rounds: Off-Brief
January 31	Friday	8:00 am	Oral Advocacy Seminar II
February 3	Monday	5:00 – 10:00 pm	Preliminary Round I
February 4	Tuesday	5:00 – 10:00 pm	Preliminary Round I
February 5	Wednesday	5:00 – 10:00 pm	Preliminary Round I
February 6	Thursday	5:00 – 10:00 pm	Preliminary Round I
February 7	Friday	5:00 – 10:00 pm	Preliminary Round I
February 10	Monday	5:00 – 10:00 pm	Preliminary Round II
February 11	Tuesday	5:00 – 10:00 pm	Preliminary Round II
February 12	Wednesday	5:00 – 10:00 pm	Preliminary Round II
February 13	Thursday	5:00 – 10:00 pm	Preliminary Round II
February 14	Friday	5:00 – 10:00 pm	Preliminary Round II
February 18	Tuesday	5:00 – 10:00 pm	Quarterfinalist Round
February 19	Wednesday	5:00 – 10:00 pm	Quarterfinalist Round
February 26	Wednesday	5:00 – 10:00 pm	Semifinalist Round
March 6	Friday	1:00 pm*	Final Round
March 12*	Thursday	12:30 pm	Board Interest Meeting
March 23*	Monday	TBD	Board Applications Due
March 26-27*	Thursday-Friday	TBD	Board Interviews
April 13*	Monday	12:30 pm*	Meeting for 1L Qualifying Rounds
April 14*	Tuesday	TBD	1L Qualifying Rounds
April 15*	Wednesday	TBD	1L Qualifying Rounds
April 16*	Thursday	TBD	1L Qualifying Rounds
April 17*	Friday	TBD	1L Qualifying Rounds

* Tentative dates/times

HALE MOOT COURT HONORS PROGRAM COMPETITION CASE

2019-2020

AFFIDAVIT

I, Elizabeth Avunjian, being duly sworn, hereby depose and state as follows:

INTRODUCTION

1. This affidavit is submitted in support of an application for a warrant to search the premises located at 1234 Wilshire Boulevard, Unit 401, Gould City, Gould ("the Premises") for evidence that Lana Smith knowingly took sexually explicit pictures of her minor child, in violation of 18 U.S.C. §2251(b). The items to be seized are described in Attachment B.

2. I am a Special Agent with the Federal Bureau of Investigation (FBI) and have been so employed since 2013. For the last five years, I have been assigned to a Child Exploitation Task Force. As part of my training and experience, I have become familiar with the ways that persons involved in child pornography use their personal computers and smartphones to engage in the unlawful production, possession, and dissemination of child pornography.

3. This affidavit is intended to show only that there is probable cause for the requested warrant and does not set forth all of my knowledge about this matter.

FACTS

4. On January 19, 2018, the FBI received a call from a teacher named Madeleine Eldred indicating that she suspected Lana Smith was taking inappropriate naked photos of Ms. Smith's

five-year-old daughter, Lily, who is a student in Ms. Eldred's kindergarten class. I contacted Ms. Eldred, and learned the following information:

a. Ms. Eldred was Lily's teacher at West Gould Kindergarten and Primary School. On January 19, 2018, Lily was playing with classmates when Ms. Eldred observed her hit another student. Ms. Eldred immediately intervened, taking Lily back into her classroom to speak with her. Ms. Eldred stated that if students exhibit unusual aggressive behavior, she asks them about their home life to see if anything at home might be upsetting the child.

b. When Ms. Eldred asked Lily if everything was okay at home, Lily responded that it was "okay," and added, "Mommy is nice but I don't like her boyfriends." Ms. Eldred knew that Ms. Smith was single, so she thought it was strange that Lily immediately mentioned her mother's "boyfriends." She asked Lily why she did not like her mother's "boyfriends." Lily responded that she was not allowed to say because her mother said it was a "secret," which worried Ms. Eldred. Ms. Eldred asked Lily what sort of things she did with her mother and the "boyfriends." At first, Lily would not reply, but when Ms. Eldred reassured her that she could be trusted, Lily hesitantly replied, "Well, Mommy likes to take pictures of me in the shower and show them." When Ms. Eldred asked if Lily wore clothes in these pictures, Lily responded "sometimes."

c. Because Ms. Eldred is a mandated reporter of child abuse under Gould State Penal Code § 11165.7, shortly after her discussion with Lily, she called the FBI to report her concern that Ms. Smith might be taking sexually inappropriate pictures of Lily and sharing them with men.

5. On January 20, 2018, I did a check of public records to determine where Ms. Smith resides. According to Gould Department of Motor Vehicle records, Lana Smith listed her home address as 1234 Wilshire Boulevard, Unit 401, Gould City, Gould.

6. On January 21, 2018, I called the Gould Department of Child Protective Services (DCPS) and spoke to DCPS Investigator Philip Lamborn. I asked if DCPS had any record of complaints concerning the Smith family. I learned the following:

a. DCPS had received two calls regarding Lily Smith's welfare on September 12, 2017 and November 3, 2017, respectively. These calls were placed by a neighbor who lived in Unit 409 in the same building as Ms. Smith. The neighbor suspected Ms. Smith was doing something illegal because strange men were "always" coming in and out of Ms. Smith's apartment at "odd hours." He thought the mother was either a prostitute or selling drugs with her small child, Lily, present.

b. Investigator Lamborn conducted a site visit at the Smith residence on the evening of November 4, 2017. During the visit, he observed that the apartment was relatively clean, and that Lily looked well fed and healthy. Investigator Lamborn

spoke with both Ms. Smith and Lily during his visit. First, he questioned Ms. Smith, who assured him that Lily was well taken care of and safe in her care. He told her that a neighbor had reported that "strange men" had been seen regularly visiting the home at odd hours, and he asked her to explain why. Ms. Smith stated that she was single and had dates sometimes. Because she was not able to afford childcare, she would make home-cooked dinners for her dates. Investigator Lamborn asked if she allowed the men to have contact with Lily, and Ms. Smith denied ever allowing inappropriate contact between her "dates" and her child. She said that Lily would sometimes have dinner with them, but after dinner, Lily would go to her room.

c. During the interview, Investigator Lamborn noticed that Lily was unusually quiet, avoided eye contact with him, and kept fidgeting and drumming her fingers on everything around her. When he directly asked her questions about how she was feeling, she hesitated, but then she said she was "okay." When he asked her if there was anything she wanted to tell him, she answered, "No," but would not meet his eyes.

d. Inspector Lamborn suspected that something was wrong in the household because children that are being abused often exhibit this kind of behavior pattern: they deny that there is a problem, do not say more than a few words, and show physical signs of agitation and stress, such as Lily's constant drumming of her fingers. In addition, based on what the

neighbor had said, he suspected that Ms. Smith might be using the apartment for prostitution. However, because the apartment was well-kept and Lily denied that anything was wrong, he did not have sufficient evidence to take any action at that time. He did, however, flag Ms. Smith's file for a follow-up visit in three months, which would have been in February 2018.

7. As part of my investigation, on January 25, 2018, I conducted surveillance of Ms. Smith. At approximately 7:00 a.m., I began my surveillance outside the building where Ms. Smith's apartment is located. At approximately 8:50 a.m., I saw Ms. Smith and her daughter Lily exit the building and enter a white Toyota Corolla (which I later learned is registered in her name). They drove to West Gould Kindergarten and Primary School, where Ms. Smith dropped Lily off at approximately 9:00 a.m. She then returned to her apartment building and entered by the front door. She exited the apartment building again shortly before 10:00 a.m., got into the same white Toyota Corolla and drove to a store called Goulden Boutique. She remained in the store until approximately 12:10 p.m. At that time, she walked out of the store, crossed the street, entered a coffee shop, and sat down at a table near the front window. I followed her into the coffee shop and sat down at a table toward the back of the coffee shop, about thirty feet from her table. She ordered lunch and began working on a laptop. I could see that the laptop was an Acer brand laptop with a dark sticker on the

front, but I could not see any details as to the sticker or the exact model of the computer. She continued typing on the laptop for approximately thirty minutes while she ate lunch. After she finished her lunch, she closed the laptop and exited the coffee shop. She walked back across the street to Goulden Boutique, where she remained until approximately 5:05 p.m. At that time, she exited the store, got into the same white Toyota Corolla vehicle, and drove to the same elementary school, where she picked up her daughter Lily. They then drove back to the same apartment building. At that point, I ended the surveillance.

COMPUTERS AND DIGITAL STORAGE

8. As described in Attachment A, I am seeking permission to search and seize evidence that might be found on the Premises, in whatever form it is found. I submit that if that computer or other electronic devices are found on the Premises, there is probable cause to believe that the records described in Attachment B will be stored on those computers or electronic devices for the reasons listed below.

a. Lily Smith has stated that her mother takes photographs of her in the shower and shares those photos with men. This statement is corroborated by the neighbor's complaint that odd men are constantly visiting the Smith apartment at unusual hours of the day. I therefore believe probable cause exists to believe that Ms. Smith is taking sexually explicit

photographs of her child and engaging in the distribution of child pornography.

b. Based on my observations described above, I believe that Ms. Smith has in her possession and uses an Acer brand laptop computer.

c. Based on my training and experience, I know that photographs from digital cameras or cell phones are frequently stored on suspects' personal computers or other electronic devices as a means of safe-keeping and archiving. I also know that searching for information stored on computers and electronic storage devices often requires agents to seize most or all of those devices and have them searched later by a qualified computer expert in a controlled environment. This is true because of the following:

i. The evidence stored on modern computers and digital devices is often too voluminous to search on-site. Computers and other digital devices frequently have up to one terabyte of storage space, meaning that up to two million photographs could be stored on a device.

ii. Additionally, suspects often try to conceal criminal evidence to avoid detection by law enforcement. For example, criminals often store illicit materials, including child pornography, on encrypted drives, in locations that may be difficult to find, or with deceptive file names. This may require law enforcement agents to conduct a more careful search

of the stored data to determine which particular files are evidence of a crime. This process can take a long time depending on the volume of data stored, and it would be impractical to attempt this kind of data search on-site.

iii. Searching computer systems for criminal evidence sometimes requires a controlled environment. The wide variety of computers and operating systems on the market today often means that an expert is required to properly search a specific device. Further, digital evidence is vulnerable to inadvertent or intentional modification and destruction.

CONCLUSION

9. Based on the foregoing, I believe that probable cause exists that the items listed in Attachment B will provide evidence of the unlawful possession and dissemination of child pornography in violation of 18 U.S.C. § 2251(b), and will be found at the premises described in Attachment A.

Elizabeth Avunjian

ELIZABETH AVUNJIAN
Special Agent
Federal Bureau of Investigation

Sworn before me this 28th day of January 2018 in Gould City, Gould.

Ron Whitney

Ron Whitney
United States Magistrate Judge

ATTACHMENT A

The premises to be searched are located at 1234 Wilshire Boulevard, Apartment 401, Gould City, Gould 90017.

The premises are fully described as an apartment contained within a large complex that has a grey and black rectangular pattern on the street-facing side. The complex faces north. The private balcony of the premises can be seen immediately above the front entrance to the complex, three stories above ground level. The front door of the premises is the first door immediately west of the main elevator on the fourth floor.

ATTACHMENT B

The items to be seized shall include but not be limited to the following items:

1. Any and all items showing ownership and control over the premises to be searched as described in Attachment A, including but not limited to mail and photographs;

2. Any and all evidence depicting or relating to the creation, possession or dissemination of sexually explicit depictions of a minor(s) (otherwise known as child pornography), including the following:

a. any and all photographs, negatives, photographic slides, video tapes, magazines, graphic image files, computer generated images, or other visual depictions of a child, including any such images of the child known as Lily Smith;

b. any and all computer(s) and all related computer equipment, peripherals, related instructions in the form of manuals and notes, as well as the software utilized to operate such a computer;

c. any and all computer storage devices, such as hard disks, CD's, diskettes, tapes, laser disks, and Bernoulli disks;

d. any and all records containing any references to or relating to child pornography or communications with or about minors, including all correspondence (including electronic), notes, papers, ledgers, personal telephone and address books, memoranda, telexes, facsimiles, photographs and other depictions of children;

3. Any and all telephone and toll records and Internet billing and use records.

DECLARATION OF MEGHAN MCBERRY

I, Meghan McBerry, hereby declare and state:

1. I am an attorney licensed to practice law in the State of Gould. I have been appointed by the Court to represent Defendant Lana Smith in the above-entitled matter.

2. This declaration is submitted in support of Defendant Lana Smith's Motion to Suppress Evidence that was obtained in violation of her Fifth Amendment rights, including: (1) all evidence obtained as a result of the illegal search of the Acer laptop computer that was seized from her residence located at 1234 Wilshire Boulevard, Apartment 401, Gould City, Gould, on January 30, 2018; and (2) any evidence or testimony concerning Ms. Smith's alleged silence during a de facto custodial interrogation by Gould City Police Department Officer Joshua Stillman, which took place on January 30, 2018.

3. As part of my representation of Ms. Smith in this matter, I received discovery from the Government, including numerous reports of investigation (FBI Form 302s) which describe the Government's investigation. Those reports detailed the evidence listed below, which I am informed and believe the Government will offer during its case against Ms. Smith.

a. According to the FBI law enforcement databases, Ms. Smith had never been arrested by state or federal authorities before January 30, 2018.

b. On January 30, 2018, at approximately 9:30 a.m., Federal Bureau of Investigation (FBI) Special Agent (SA) Elizabeth Avunjian and Gould Police Department (GCPD) Officer Joshua Stillman barged into her residence located at 1234 Wilshire Boulevard, Apartment 401, Gould City, Gould, announcing that they had a warrant to search for child pornography. During a search that lasted two hours, the following events occurred:

i. Officer Stillman forced Ms. Smith to sit on her couch and instructed her not to move while SA Avunjian searched the entire apartment. Officer Stillman stood guard over Ms. Smith, standing between her and the front door, blocking her from leaving. When she attempted to get up off the couch at one point, he ordered her not to move and to sit back down. Ms. Smith became "very upset," and repeatedly objected to having her home searched. She was so upset that she began yelling at Officer Stillman, telling him repeatedly that she had not done anything wrong, that they would not find anything illegal, and that they should get out.

ii. At one point, SA Avunjian came out of the back bedroom and showed Officer Stillman a photograph of Ms. Smith's child Lily, who was not wearing any clothes because she was in the shower. As soon as SA Avunjian left to continue the search, GCPD Stillman glared at Ms. Smith and said, "That's sick. What a terrible mother." He continued to glare at her.

Her only reaction was to "look away without responding." A few seconds later, Officer Stillman asked her, "How do you live with yourself after doing that?" At that point, Ms. Smith said, "Leave me alone," and then looked back down at her lap. That was the end of their conversation.

iii. During the search, SA Avunjian seized a laptop that was in one of the bedrooms. Using the serial number on that laptop, SA Avunjian later determined that the laptop had been purchased in July 2017 at a Gould City Best Buy store by a man named Lars Fillmore.

iv. After the officers finished searching the apartment, SA Avunjian formally told Ms. Smith that she was under arrest for child pornography. Officer Stillman handcuffed Ms. Smith and read her Miranda rights to her. At that point, Ms. Smith became very pale and looked like she was going to be ill. SA Avunjian then took Ms. Smith in handcuffs down to a law enforcement vehicle to transport her to the local, federal detention facility for booking.

c. While SA Avunjian was driving to the federal detention center, she told Ms. Smith that in the search warrant the judge had authorized her to search all computers that were found in Ms. Smith's apartment, and that for her to do that, Ms. Smith was required to give her the password. Believing that she was doing what the judge had ordered, Ms. Smith complied and

gave SA Avunjian the password to the encrypted drive, which was "Expl0!ted33567."

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 6th day of June, 2018, in Gould City, Gould.

Meghan McBerry

MEGHAN MCBERRY

DECLARATION OF JOSHUA STILLMAN

I, Joshua Stillman, hereby declare and state:

1. This declaration is being submitted in support of the Government's Opposition to Defendant's Motion to Suppress Evidence.

2. I am a police officer with Gould City Police Department (GCPD) and have been so employed for approximately eight years. In that capacity, I have executed a number of search warrants in suspects' homes with both local and federal law enforcement agents.

3. On January 28, 2018, Federal Bureau of Investigation (FBI) Special Agent (SA) Elizabeth Avunjian contacted the GCPD to alert us to a search warrant she had obtained authorizing her to search Defendant Lana Smith's residence, located at 1234 Wilshire Boulevard, Unit Number 401, Gould City, Gould. The GCPD Chief of Police assigned me to accompany SA Avunjian in the execution of the warrant.

4. On January 30, 2018, SA Avunjian and I executed the warrant. When we arrived, SA Avunjian knocked on the door and announced, "FBI. We have a warrant to search the apartment. Open the door." When Ms. Smith came to the door, SA Avunjian repeated that we had a warrant to search the premises and asked her to let us into the front room, which was the living room. Once we were in the living room, I informed Ms. Smith that she

would need to wait in the living room with me while SA Avunjian searched the premises. As part of my training and experience, I know that occupants of premises that are being searched should be confined to a single location during the search to prevent the destruction of evidence and for officer safety.

5. I asked Ms. Smith to sit on the couch while we were waiting for the search to be completed, and I positioned myself next to her, where I could see the front door to make sure no one else entered the premises. As we waited there, Ms. Smith became quite defiant, yelling things like, "Good luck, you aren't going to find anything," and "You aren't going to find anything because I haven't done anything wrong." She was visibly angry and directing continuous comments at me.

6. Approximately ten minutes into her search, SA Avunjian approached me to show me that she had found a naked photograph of Ms. Smith's daughter, Lily. I glanced at it briefly before SA Avunjian returned to searching the apartment. I had not engaged with Ms. Smith before this point, but I could not withhold my disgust, especially as the parent of a young daughter. I made a comment about her being a "terrible mother." In response, Ms. Smith looked at me, opened her mouth as if she was going to speak, looked ashamed, and then then looked away without responding. I was so upset that, a few seconds later, I said, "How do you live with yourself after doing that?" At that

point, she looked up and said, “Leave me alone,” and then looked back down at her lap again, as if she was ashamed. I did not speak any further with her after her statement.

7. Shortly thereafter, SA Avunjian returned to the living room. She placed Ms. Smith under arrest for possession and dissemination of child pornography. I then placed handcuffs on Ms. Smith and read her Miranda warnings to her. Ms. Smith acknowledged that she understood her rights. At this point, Ms. Smith became pale and looked stunned, so SA Avunjian went to the kitchen to get a glass of water for her. We allowed her to take a few sips of water, which seemed to help her recover. We then escorted Ms. Smith downstairs to SA Avunjian’s official vehicle.

8. I helped SA Avunjian place Ms. Smith in the vehicle, and then left the scene in my vehicle. I have had no further contact with Ms. Smith.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 6th day of June, 2018, in Gould City, Gould.

Joshua Stillman
Joshua Stillman

DECLARATION OF ELIZABETH AVUNJIAN

I, Elizabeth Avunjian, hereby declare and state:

1. This declaration is being submitted in support of the Government's Opposition to Defendant's Motion to Suppress Evidence.

2. I am a Special Agent (SA) with the Federal Bureau of Investigation (FBI) and have been so employed since 2013. For the last five years, I have been assigned to a Child Exploitation Task Force. As part of my training and experience, I have become familiar with how personal computers and smartphones can be used in the possession and dissemination of child pornography.

3. On January 19, 2018, the FBI received information from a teacher named Madeleine Eldred indicating that she suspected Lana Smith was taking inappropriate naked photos of Ms. Smith's five-year-old daughter, Lily, who is a student in Ms. Eldred's kindergarten class. After that information was received, I conducted an investigation of Ms. Smith.

4. As part of that investigation, on January 28, 2018, I obtained a search warrant authorizing me to search Defendant Lana Smith's apartment located at 1234 Wilshire Boulevard, Unit 401, Gould City, Gould 90017 for evidence that Lana Smith knowingly took and disseminated sexually explicit pictures of her minor child, in violation of 18 U.S.C. § 2251(b). The items

to be seized included all computer hardware, software, and associated peripherals found at the premises that could be used to electronically or digitally store the items described in the warrant.

5. On January 30, 2018, Gould City Police Department Officer Joshua Stillman and I executed the warrant. When we arrived at the location, I knocked on the door and announced that I was "FBI" and that I had a warrant to search the premises. I told Ms. Smith to open the door. When she came to the door, I told her again that I had a warrant to search the premises and ordered her to let us into the apartment. She complied with my request. We entered the front room, which was the living room. Officer Stillman then informed Ms. Smith that she would need to wait in the living room with him while I searched the apartment. Officer Stillman waited next to Ms. Smith in the living room of the apartment during the execution of the search. During this exchange, Ms. Smith was never told that she was under arrest or that she was not free to leave. In addition, although Officer Stillman and I were armed, we both kept our weapons holstered.

6. I began my search in a back room that appeared to be a home office. In a desk drawer in that room, I found six printed photographs of Lily Smith. She was naked in the shower in four of them in what seemed to be a sexually suggestive pose. In the

other two, she appeared to be wearing a swimsuit, but again, she was posed in what appeared to be a sexually suggestive pose. I walked back through the living room to show Officer Stillman what I had found. I showed him one of the naked photographs of Lily Smith. I then left to finish my search.

7. In a room that appeared to be Ms. Smith's bedroom (based on the clothes in the closet), I found an Acer "Predator" laptop computer, serial number 4567890-098765, that was open and unlocked. It appeared to be the same laptop that I had seen Ms. Smith using on January 25, 2018. In particular, I recognized the dark sticker (which had the words "Warned: Dark and Twisty" in white on it). Because the laptop was open and unlocked when I found it, I was able to quickly check some of the files stored on the laptop. I noticed that the laptop had two hard drives, one being the "C: Drive" and the other being the "Z: Drive." The C: Drive had approximately 120 gigabytes of storage space, of which only 20 gigabytes had been used. I clicked on the C: Drive and saw that it appeared to contain only "system" files, which the computer needs to operate. The Z: Drive had 500 gigabytes of storage space, of which over 350 gigabytes had been used. When I clicked on the Z: Drive, however, the computer prompted me to supply a password, indicating that the drive was encrypted.

8. After I finished my search, I returned to the living room and informed Ms. Smith that she was under arrest for child pornography. Officer Stillman then read Ms. Smith her Miranda rights, and she responded that she understood her rights. At this point, I noticed that she looked a bit pale and shocked, so I got her a glass of water from the kitchen and assisted her in taking a few sips. Officer Stillman then placed Ms. Smith in handcuffs, and I escorted her downstairs to my vehicle. After placing her in the vehicle, I removed her handcuffs because I did not believe she posed a danger to myself or others.

9. I then drove Ms. Smith to the local federal detention center for fingerprinting and processing. While we were driving, I told Ms. Smith that the warrant authorized me to seize and search all computers found in her apartment, which meant that it also required her to give me the password needed to conduct that search. I then asked her to give me the password to the encrypted drive on the laptop. Ms. Smith complied with my request and gave me the password, which was "Expl0!ted33567."

10. After I had completed processing Ms. Smith, I gave the laptop and the password for the encrypted drive to an FBI forensics expert so that she could thoroughly search the computer. Later that same day, the forensic expert informed me that she had found 1,237 pornographic images and 52 pornographic

videos depicting Lily on the encrypted drive of the laptop. Many of the photos and videos were tagged with metadata, indicating numerous intended recipients.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 6th day of June, 2018, in Gould City, Gould.

Elizabeth Avunjian

Elizabeth Avunjian

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA, CASE NO. CR 18-131 MG

PLAINTIFF,

v.

LANA SMITH,

DEFENDANT.

HONORABLE MARIE GRIFFITH, DISTRICT JUDGE, PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO SUPPRESS EVIDENCE

GOULD CITY, GOULD

JUNE 19, 2018

APPEARANCES BY COUNSEL:

FOR THE UNITED STATES:

MATTHEW HONIG

ASSISTANT UNITED STATES ATTORNEY

UNITED STATES COURTHOUSE

1000 THIRD STREET

GOULD CITY, GOULD 90005

FOR THE DEFENDANT:

MEGHAN MCBERRY

ATTORNEY AT LAW

600 SOUTH FIGUEROA STREET

GOULD CITY, GOULD 90017

GOULD CITY, GOULD: JUNE 19, 2018

(COURT IN SESSION AT 9:45 A.M.)

THE CLERK: Calling case number CR 18-131: United States v. Lana Smith.

THE COURT: Counsel please state your appearances.

MR. HONIG: Good afternoon, your Honor. Matthew Honig for the United States of America.

MS. MCBERRY: Good afternoon, your Honor. Meghan McBerry for Defendant Lana Smith, who is present at counsel table with me.

THE COURT: Thank you everyone. I believe we are here today to hear testimony and arguments concerning the Defendant's motion to suppress evidence seized from her laptop and any testimony concerning her pre-arrest silence during her interactions with Officer Stillman during the execution of a search warrant. Ms. McBerry, is that correct?

MS. MCBERRY: Yes, your Honor. That is correct.

THE COURT: Okay. So, Ms. McBerry, since it's your motion, how would you like to proceed?

MS. MCBERRY: Your Honor, I would like to cross-examine Special Agent Elizabeth Avunjian first, then Officer

Joshua Stillman. The Government submitted their declarations in support of its opposition.

THE COURT: Agent Avunjian, please take the stand.

GOVERNMENT'S WITNESS ELIZABETH AVUNJIAN, SWORN

THE CLERK: Please state your full name and spell it for the record.

THE WITNESS: My name is Elizabeth Avunjian, spelled E-L-I-Z-A-B-E-T-H and A-V-U-N-J-I-A-N.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MS. MCBERRY:

Q: Agent Avunjian, you obtained a search warrant to search Defendant Lana Smith's apartment in January of this year, correct?

A: Yes. That is correct.

Q: Did the warrant explicitly authorize you to search and seize any computers that were found in the residence?

A: Yes. The warrant authorized us to seize all computers and electronic devices found in Ms. Smith's residence.

Q: But the warrant did not explicitly authorize you to seize the password to any of those devices, correct?

A: I’m not sure what you mean, the warrant didn’t specify that I could obtain a password, but it did authorize me to search all devices that might have child pornography on them, and based upon my training and experience it seemed very likely that there would be incriminating evidence on the encrypted drive, so I understood the warrant as authorizing me to ask for the password for that encrypted drive.

Q: So when you were driving my client to the federal detention center, you demanded that she give you the password for that computer, correct?

A: It’s true that I asked her for the password, and she gave it to me. Yes.

Q: When you demanded the password, isn’t it true that you told my client that the warrant required her to give you the password?

A: I’m not sure exactly what words I used, but it’s true that I mentioned the warrant because, as I said before, the warrant authorized me to search Ms. Smith’s laptop, and in my mind, that meant the warrant also authorized me to get the password needed to conduct that search.

Q: You have been referring to the laptop as belonging to my client, but isn't it actually true that it was and is owned by someone else?

A: Well, yes. We found out later that the laptop was purchased by someone named "Lars Fillmore."

Q: And isn't it also true that you were able to determine that someone named Lars Fillmore is in fact a real person who resides in Gould City?

A: It is true that a public records check showed that a twenty-nine-year-old male named Lars Fillmore allegedly lives in Gould City, but when I went to the address listed in the DMV records, no such person was living at that address, so I was unable to confirm that a person by that name actually resides in Gould City.

Q: So you were unable to locate him to interview him, but you also have no reason to believe he is not a real person, correct?

A: It is true that someone using that name obtained a driver's license, but I do not know if that it is his real name or an alias, especially since he gave a false address.

Q: Isn't it also true that you have no idea how or why Lars Fillmore's laptop might have been in Ms. Smith's residence?

A: Well, I know it was being used by Ms. Smith to store and distribute child pornography. And I had personally witnessed Ms. Smith using that same laptop a few days before.

Q: Wait one minute Agent Avunjian, isn't it true that when you were doing surveillance of Ms. Smith, you were unable to see any specific markings or the serial number of the laptop?

A: Yes, that is true. All I could see was that it was an Acer laptop with a dark sticker on it.

Q: And you later verified that the laptop was actually owned by Lars Fillmore, correct?

A: Yes. Technically he appears to have purchased the laptop.

Q: Given that the laptop was owned by someone else, isn't it also true that as of January 30, 2018, you had no way of knowing if Ms. Smith would know the password to that laptop?

A: As I said before, I personally saw her working on what I believed to be that same laptop the day before I executed the warrant, so I believed that

she had to know the password to access it. That belief was confirmed when she, in fact, gave me the correct password.

Q: But isn't it also true that while you were watching Ms. Smith use the laptop, you had no way of knowing what drive she was using, or if she might be, for example, just checking emails?

A: Well, it's true that I couldn't see the screen to see exactly what she was doing, but in my experience, if someone is using a laptop, they generally know all of the laptop's passwords. Plus, I knew from my brief examination of the laptop at the scene that the only other non-encrypted drive contained only system files, which are not the kind of files that someone would be using in a coffee shop for thirty minutes. Putting those things together, I was confident that she knew the password for the encrypted drive when I asked her about it.

Q: Agent Avunjian, let's talk about that encrypted drive. Isn't it true that you were unable to access it during your first, brief examination of the laptop?

A: Yes. That is correct.

Q: So, you had no way of knowing what was stored on that drive, correct?

A: Actually, that's not correct. When I first examined the laptop, I could see that encrypted drive had a large amount of data saved on it. That indicated to me that someone had been saving large files on it. Based on my training and experience, I knew that criminals involved in child pornography usually keep pictures and records as files on their computers. Storing pictures takes up a huge amount of data, so the fact that the encrypted drive had a large amount of storage being used was consistent with someone keeping child pornography. In addition, I know based on my training and experience that criminals will commonly encrypt incriminating files, like child porn. Plus, I knew from Lily's teacher that Lily had said that her mother had been taking naked pictures of her. All of those facts gave me ample probable cause to believe that we would find child pornography on that encrypted drive.

Q: But to be clear, you now know that the laptop belonged to someone else, so doesn't that weigh

against the likelihood that my client would be storing any pictures on that particular laptop?

A: I suppose so, but then again, we found the pictures on it, so . . .

Q: Thank you, Special Agent Avunjian.

THE COURT: Mr. Honig, would you like to do any redirect?

MR. HONIG: No thank you, your Honor. I believe the witness has brought forth the relevant facts in her declaration and testimony today.

THE COURT: Fine. The witness will be excused. Can we please have Officer Stillman take the stand now.

GOVERNMENT'S WITNESS JOSHUA STILLMAN, SWORN

THE CLERK: Please state your full name and spell your name for the record.

THE WITNESS: My name is Joshua Stillman, spelled J-O-S-H-U-A and S-T-I-L-L-M-A-N.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MS. MCBERRY:

Q: Why did you accompany Special Agent Avunjian to the search of Ms. Smith's apartment?

A: Local law enforcement is always alerted about search warrants occurring within our district.

Q: Okay, so there was no reason to believe that Ms. Smith was a dangerous criminal or anything like that, correct?

A: No. That's correct. I was just the local contact assisting with the warrant.

Q: Okay, so what role did you play in the execution of the warrant?

A: Agent Avunjian asked me to watch over Ms. Smith to ensure that she did not interfere with the execution of the warrant. It is a standard police procedure to have one officer make sure the occupants of the premises stay in one location during the execution of all search warrants. This is necessary for officer safety and to prevent suspects from destroying evidence or interfering with the execution of the warrant.

Q: Officer Stillman were you carrying a firearm when you executed this warrant?

A: Yes. Per standard procedure for officer safety, SA Avunjian and I were both armed with our standard-issue handguns, but neither of us had our weapons drawn. We kept them holstered the entire time.

Q: But even if you didn't draw your guns, they were visible, correct?

A: Yes. That's true.

Q: Directing your attention again to your claim that you were concerned about officer safety, isn't it true that you knew that my client had no prior arrests, let alone criminal convictions?

A: Yes. That is true.

Q: So, you had no reason to believe that she posed a threat to officer safety did you?

A: It's true that I did not believe she was a particularly dangerous person, which is why my gun was holstered. But it's also true that any suspect can become violent, and Ms. Smith definitely seemed very upset. Plus, in my experience, even non-violent suspects can try to destroy evidence or interfere with searches.

Q: How were you positioned in relation to Ms. Smith while the search was taking place?

A: She was sitting on the living room couch to my left. I was standing between her and the front door.

Q: Why did you pick that location?

A: I didn't want her to be able to bolt out the

door, and it allowed me to make sure no one else entered the scene.

Q: Did you ever explicitly tell Ms. Smith whether she was free to leave or not?

A: Not at that point. I never said anything to her about whether she could leave or not until after the search was completed, when we told her that she was under arrest.

Q: But would it be fair to say that you would not, in fact, have allowed Ms. Smith to leave while the warrant was being executed?

A: I probably would have stopped her from leaving until the search was concluded, but it was only temporary detention at that point. She wasn't under arrest yet.

Q: Officer Stillman isn't it true that at one point my client tried to get up off the couch and you ordered her to sit back down?

A: Yes. At one point, while she was behaving in a very agitated way, she jumped up off the couch, and I told her to sit down because I wasn't sure what she was planning to do. She might have been planning to interfere in the search for all I knew.

Q: While you were forcing Ms. Smith to stay on the couch, did you have any conversation with her?

A: She was yelling a lot at first, saying that she wanted us to get out of her home, et cetera. Pretty typical.

Q: You said "at first." Was she yelling throughout the entire duration of the search?

A: No, she was not.

Q: Did you say anything to her?

A: Well, after Special Agent Avunjian showed me the photo of the naked child, I may have made a couple comments. I'm a parent, and I was disgusted. I think I called her a "terrible mother." She seemed so ashamed that she couldn't even look at me as I said that. She was silent and looked down. Never denied a thing. Then, I asked her how she could live with herself. She told me to leave her alone and then looked down again, like she was too ashamed to meet my eyes.

Q: So, when you asked her a question, she asserted her right to remain silent by telling you to leave her alone?

MR. HONIG: Objection your Honor, Ms. McBerry is drawing a

legal conclusion that is up to the Court to make, not the witness.

THE COURT: Sustained. Counsel rephrase the question please.

Q: I apologize your Honor. Officer Stillman, you admit that you interrogated Ms. Smith while the warrant was being executed and her response was to ask you to leave her alone?

A: No. I never interrogated her. Like I said, when I saw that naked photo, my disgust got the better of me, and I called her a terrible mother. She didn't deny that. Then, I made a comment about not knowing how she could live with herself. She got mad and told me to leave her alone, which I did. That's all that happened.

Q: To be clear, did you expect her to respond to your comments?

A: Well, I wasn't interrogating her, if that's what you're asking. But, on the other hand, honestly, if she was innocent, I would have expected her to deny that she did anything wrong, but she never did.

Q: Did you read her Miranda warnings to Ms. Smith before this exchange took place?

A: No, I did not.

Q: Why not?

A: Because she was not under arrest yet.

Q: Thank you, Officer. Nothing further your Honor.

THE COURT: Thank you counsel. Mr. Honig, any redirect?

MR. HONIG: No, your Honor, but I would like to be heard about the involved law and facts at some point.

THE COURT: You'll be given the opportunity, but because this is the defendant's motion, I'll hear from the defense first. Ms. McBerry?

MS. MCBERRY: Thank you, your Honor. First, the Court should suppress everything that was found on the encrypted drive of the laptop because the agents violated my client's Fifth Amendment right against self-incrimination when they forced her to give them the password. It was clearly an unconstitutional custodial interrogation when Agent Avunjian demanded that my client give her the password, and everything that was later found on that encrypted drive is the fruit of the poisonous tree. Second, the Government should have been precluded from using my client's pre-arrest silence against her because that would also violate my client's Fifth Amendment rights. If the Court looks at the facts here, my client

was in the custody of an armed officer, who was preventing her from leaving. My client was terrified. Then, to make matters worse, Officer Stillman began berating her for being a terrible mother. At first, Ms. Smith was so shocked that she sat mute. But that didn't stop Officer Stillman. No, he continued to berate and interrogate her, asking her how she could live with herself. At that point, she explicitly invoked her Fifth Amendment rights by telling the officer to leave her alone. The Supreme Court held in Salinas that when a defendant has invoked his or her Fifth Amendment rights, the Government cannot use that defendant's pre-arrest silence against her. In summary, my client invoked her Fifth Amendment rights so the Court should preclude Officer Stillman from testifying about my client's pre-arrest silence.

THE COURT: Thank you counsel. Mr. Honig, does the Government wish to be heard?

MR. HONIG: Yes, your honor. The United States urges this Court to deny Ms. Smith's suppression motion. First, when Ms. Smith gave Agent Avunjian the password that act was admittedly compelled, but

it was not a testimonial statement. The legal test for determining when something is "testimonial" relates to whether the statement requires an extensive facility of the mind. Providing a short password does not require any real thought. I'm sure that we all type passwords into our computers every day by muscle memory alone, without any thought. Doing that is not testimonial in the legal sense of the word. Further, even if producing a password is somehow testimonial, that act falls within the "foregone conclusion" doctrine because the Government did not learn any meaningful new information as a result of that act. Agent Avunjian already knew that the Defendant had the password because she had watched the Defendant using that laptop just a few days earlier. Therefore, the password was a foregone conclusion. Second, as to the defendant's pre-arrest silence, the prosecution does intend to offer evidence showing that Ms. Smith was silent when confronted with someone who clearly believed she had forced her child to participate in child pornography. Instead of denying any involvement in child pornography, Ms.

Smith just hung her head in shame. That is solid evidence of a guilty conscience. The defense is arguing that Ms. Smith invoked her Fifth Amendment rights, but that is simply not true. An invocation must be unambiguous. Saying "leave me alone" has nothing to do with the Fifth Amendment, and even if she did invoke her Fifth Amendment rights at the end of their conversation, it was too late. The Government should at least be allowed to use her guilty silence before she said those words. This Court should deny Defendant's suppression motion in its entirety. Thank you.

THE COURT: Does either counsel have anything further you wish to say?

MS. MCBERRY: Yes, your honor. If I may, I'd like to briefly respond to counsel's argument about the foregone conclusion doctrine. The Government misunderstands the foregone conclusion doctrine. The appropriate standard is not whether the Government knew that the defendant had the password. Instead, the Government must be able to identify, with reasonable particularity, first, the files it expects to find on the

encrypted device, and second, that the defendant had access to those files. The Government cannot make that showing here. Agent Avunjian suspected that Ms. Smith had the password, but she could never have described with any particularity the files that she would find on the encrypted drive. Accordingly, the foregone conclusion doctrine is not satisfied in this case, and Ms. Smith's Fifth Amendment privilege against self-incrimination was violated.

THE COURT: Thank you counsel. I will take the motion under consideration. Ms. McBerry, do you expect the matter to go to trial?

MS. MCBERRY: That's unclear, your Honor. If the Court grants the motion, I think we will be going to trial. However, if the Court denies our motion, Ms. Smith will most likely ask to enter a conditional guilty plea, conditioned on her ability to appeal the denial of the suppression motion.

THE COURT: I understand counsel. I will take the motion under consideration.

(Proceedings adjourned.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA, Plaintiff, v. LANA SMITH, Defendant.	)	CR No. 18-131 MG ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter comes before the Court on the Defendant's Motion to Suppress Evidence, including: (1) any and all testimony concerning Defendant Lana Smith's pre-arrest silence as substantive evidence of guilt; and (2) any and all evidence found on the encrypted drive of the laptop computer that was seized from her residence on January 30, 2018.

I. FACTUAL BACKGROUND

On January 19, 2018, Federal Bureau of Investigation Special Agent (SA) Elizabeth Avunjian received information indicating that Defendant Lana Smith might be engaged in taking sexually explicit photographs of her minor child. SA Avunjian then initiated an investigation of Defendant Smith for potential child exploitation in violation of 18 U.S.C. § 2251(b).

As part of her investigation, SA Avunjian learned that according to Gould Department of Motor Vehicle records, Defendant Smith was living at 1234 Wilshire Boulevard, Unit 401, Gould City, Gould. On January 25, 2018, SA Avunjian conducted

surveillance, starting outside of the apartment building where Defendant Smith was believed to be living. At approximately 10:00 a.m., she watched as Defendant Smith exited the building and went to work at a small boutique store. At lunchtime, SA Avunjian watched as Defendant Smith walked across the street to a coffee shop, where she had lunch. SA Avunjian entered the coffee shop and sat about thirty feet away from Defendant Smith. SA Avunjian then observed Defendant Smith open up an Acer laptop and work on it for about thirty minutes. SA Avunjian noticed a dark sticker on the laptop but could not further identify it.

On January 28, 2018, SA Avunjian obtained a warrant to search Defendant Smith's apartment, located at 1234 Wilshire Boulevard, Unit 401, Gould City. On January 30, 2018, she executed that warrant with the assistance of Gould City Police Department (GCPD) Officer Joshua Stillman. Both officers were armed, but neither drew their weapons.

During the execution of the warrant, to prevent Defendant Smith from interfering with the search, Officer Stillman temporarily detained Ms. Smith. He told Ms. Smith to sit on the couch and then stood between her and the front door. Defendant Smith was agitated and was making comments as SA Avunjian was searching her residence.

Midway through the search, SA Avunjian found four photographic prints depicting Lily Smith naked in the shower. SA Avunjian showed Officer Stillman one of those photographs and

then returned to finish searching the apartment. After he had seen the photograph, Officer Stillman became upset and made insulting comments to Defendant Smith, including calling her a "terrible mother." In response to that comment, Defendant Smith stayed silent and looked down. A few moments later, Officer Stillman made another insulting comment, stating, "How can you live with yourself after doing that?" At that point, Defendant Smith responded, "Leave me alone," and then looked back down at her lap again. They did not speak any further at that time.

Meanwhile, SA Avunjian had finished searching the apartment, finding several items of evidence, including an Acer Predator laptop computer with a dark sticker on it. When SA Avunjian located the computer in Defendant Smith's bedroom, it was open and unlocked. SA Avunjian briefly examined it. She was able to determine that it had two drives. One drive was encrypted, but she could still see that much of it storage space was occupied. Based on her training and experience, SA Avunjian knew that suspects involved in child pornography commonly store sexually explicit photographs and videos on encrypted drives and that those files are typically very large, so she believed that the encrypted drive probably contained child pornography. The warrant authorized her to seize all computers found on the premises, so she seized the laptop.

When the search was concluded, SA Avunjian informed Defendant Smith that she was under arrest for the possession and

distribution of child pornography. Officer Stillman placed Defendant Smith in handcuffs and read her the standard Miranda warnings. SA Avunjian then took Defendant Smith to her official vehicle to transport her to the local federal detention center for booking. Once Defendant Smith was in SA Avunjian's vehicle, SA Avunjian removed the handcuffs.

While driving to the detention center, SA Avunjian told Defendant Smith that the search warrant authorized her to search the laptop and that she needed the password to the encrypted drive to do that. She then demanded that Defendant Smith to give her the password, and Defendant Smith did so. The laptop was later analyzed by a forensic expert, who found 1,237 pornographic images and 52 pornographic videos of Lily Smith stored on the encrypted drive. Examination of the files' metadata revealed that some of the stored photos had intended external recipients.

On June 19, 2018, a hearing was held concerning Defendant's suppression motion. During cross-examination, SA Avunjian revealed that the laptop had been purchased by a man named Lars Fillmore, but that SA Avunjian had been unable to locate him.

At the hearing, the Government confirmed that it intended to present evidence at trial concerning (1) the pornographic photos and videos found on the encrypted drive, and (2) Defendant's allegedly incriminating pre-arrest silence after she was confronted by Officer Stillman.

II. **LEGAL ANALYSIS**

Defendant's motion to suppress raises two distinct legal issues. First, will the Government's use of Defendant's pre-arrest silence as substantive evidence of guilt at trial violate her Fifth Amendment right against self-incrimination? Second, was Defendant Smith's statement concerning the password taken in violation of her Fifth Amendment right against self-incrimination?

As explained in greater detail below, this Court answers both of these questions in the negative. First, Defendant's Fifth Amendment rights had not attached yet during her pre-arrest detention, and therefore its protections do not apply to evidence concerning her pre-Miranda, pre-arrest silence. Second, Defendant's act of producing the password was not a testimonial communication afforded protection under the Fifth Amendment protection. Defendant's motion is therefore DENIED.

A. Defendant's Motion to Suppress Her Pre-Arrest Silence Is Denied Because Fifth Amendment Rights Do Not Apply in Non-Custodial Settings

The question whether the prosecution can use evidence concerning a defendant's pre-Miranda, pre-arrest silence during its case in chief is an issue of first impression in the Twelfth Circuit, and one that continues to split other courts, even

after the United States Supreme Court's plurality opinion in Salinas v. Texas, 570 U.S. 178 (2013).

The Fifth, Ninth, and Eleventh Circuit have held that pre-arrest silence can normally be used as evidence of the defendant's guilt. See, e.g., United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1996); United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996); United States v. York, 830 F.2d 885 (8th Cir. 1987). On the other hand, the First, Sixth, Seventh, and Tenth circuits have held that the government's use of a defendant's pre-arrest silence as substantive evidence violates the defendant's privilege against self-incrimination. See United States v. Burson, 952 F.2d 1196 (10th Cir. 1991), Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989), United States ex rel. Savory v. Lane, 832 F.2d 1101 (7th Cir. 1987), Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000). This Court is persuaded by the reasoning of the courts that have held that pre-arrest silence should normally be admissible in the government's case as long as the defendant has not expressly invoked his or her Fifth Amendment rights.

The analysis of this issue must begin with the Supreme Court's recent decision in Salinas, in which the Court held that a defendant who is not yet in custody must expressly invoke his

or her right against self-incrimination to enjoy the Fifth Amendment's protections. 570 U.S. at 183 (plurality opinion). In Salinas, the use of the defendant's pre-arrest silence was allowed because he had simply remained silent, thereby failing to invoke his Fifth Amendment rights. Id. at 181.

The Ninth Circuit explained the rationale behind this rule in Oplinger, reasoning that when deciding whether the Fifth Amendment privilege applies, "the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." 150 F.3d at 1066 (quoting Jenkins v. Anderson, 447 U.S. 231, 241 (Stevens, J., concurring)).

Defendants are excused from affirmatively invoking their Fifth Amendment rights only during trial or if "governmental coercion makes [an individual's] forfeiture of the privilege involuntary." Salinas, 570 U.S. at 184. Such coercion occurs in a custodial interrogation when adequate warnings are not given to the suspect. Id. at 184-85. However, that exception does not apply in this case because defendant Smith was neither in custody nor subjected to interrogation.

A suspect is not "in custody" unless there was a "formal arrest or restraint on freedom of movement" to a degree analogous to a formal arrest. California v. Beheler, 463 U.S.

1121, 1125 (1983). This requires courts to apply a two-step analysis, determining first whether a reasonable person would have felt free to leave under the totality of the circumstances, and second, whether the "relevant environment presents the same inherently coercive pressures as the type of station house questioning in Miranda." Howes v. Fields, 565 U.S. 499, 509 (2012). Temporary detention while a search warrant is being executed is not equivalent to custody. See, e.g., United States v. Williams, 760 F.3d 811, 815 (8th Cir. 2014) (holding that a suspect "who is unrestrained near the front door in the living room of his home, and who is advised there is no arrest" during the execution of a search warrant was not in custody).

Likewise, whether an encounter between an officer and suspect constitutes an "interrogation" also requires a dual inquiry. The definition of "interrogation" can be satisfied by either express questioning or the "functional equivalent" of express questioning. R.I. v. Innis, 446 U.S. 291, 300-01 (1980). The "functional equivalent" of questioning includes "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. An officer blurting out a few insults while standing next to a suspect is not the functional equivalent of an interrogation.

See, e.g., United States v. Blake, 571 F.3d 331, 342 (4th Cir. 2009) (holding that after an officer told a defendant that he had been named as the shooter and was being charged with murder, the officer saying, "I bet you want to talk now, huh?" in a loud, confrontational tone was not the functional equivalent of an interrogation).

Applying these standards to this case, it is clear that Defendant's Fifth Amendment rights were not violated because Defendant Smith was not in custody, not interrogated, and never invoked her right to remain silent. Defendant was merely temporarily detained while her home was being searched pursuant to a valid warrant.[1] When Officer Stillman made a few insulting comments, Defendant remained silent and looked down, as if ashamed of herself. That interaction was not the functional equivalent of an interrogation. And Defendant never invoked her Fifth Amendment rights. Merely saying she wanted to be left alone is not an unambiguous invocation of her Fifth Amendment rights.[2] Accordingly, Defendant Smith's failure to expressly invoke her Fifth Amendment rights at the time of her pre-arrest

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[1] Defendant has not challenged the validity of the search warrant.

[2] The Court does not need to reach this issue, but it notes that, even if Defendant Smith's words were sufficient to invoke her Fifth Amendment rights, she spoke too late. She had already acted in an incriminating manner by hanging her head when the officer called her a "terrible mother." The Government was at very least allowed to use that pre-invocation silence.

silence means she is not now entitled to invoke those rights after the fact. The Government will be allowed to introduce evidence concerning her pre-arrest silence at trial.

B. Defendant's Motion to Suppress the Evidence Found on the Encrypted Hard Drive Is Denied Because Her Statement Regarding the Password Was Non-Testimonial

The Fifth Amendment provides, in relevant part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Thus, the Fifth Amendment's protection against self-incrimination applies only when three conditions are all met: (1) a defendant's statement or act is compelled, Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2005); (2) the compelled statement or act is testimonial, which means that is forces the defendant "to disclose the contents of his own mind" and thereby "convey information to the government," Doe v. United States, 487 U.S. 201, 208 (1988); and (3) the compelled statement or act is incriminating, Hiibel, 542 U.S. at 190.

In this case, the Government has conceded that Defendant Smith's production of the password was compelled because the agent told her that the warrant required her to produce the password. The Government also conceded that the act of producing the password was incriminatory because it led to the discovery of child pornography. Therefore, the analysis in this

case turns on whether Defendant Smith's production of the password was a "testimonial" act.

Neither the United States Supreme Court nor the Twelfth Circuit has directly addressed whether the act of producing a password for an encrypted electronic device is a testimonial act. The analysis of that question must begin with the act-of-production doctrine and the "foregone conclusion" exception to that doctrine.

In Fisher v. United States, 425 U.S. 391, 410 (1976), the Supreme Court established the act-of-production doctrine as a means of determining if a compelled act is testimonial. An act is testimonial if it leads to "tacit averments" that have "communicative" meaning. Id. However, if the act "adds little or nothing to the sum total of the Government's information," it is a "foregone conclusion," meaning that the government has not violated the defendant's Fifth Amendment rights by compelling that act. Id. at 411. Thus, if Defendant Smith's production of the password was a foregone conclusion, it must be treated as non-testimonial and admissible. See id.

Unfortunately, courts disagree as to exactly how the foregone conclusion exception should apply to cases involving the compelled production of passwords for electronic devices. For example, the Eleventh Circuit requires the government to show not only that its agents knew that the defendant had the password, but also that the government agents knew with

"reasonable particularity" what information was stored on the computer. See In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335, 1349 (11th Cir. 2012). Applying a slightly different version of that test, the Third Circuit has held that the foregone conclusion doctrine is satisfied (meaning that Fifth Amendment protections do not apply) as long as the government can show that its agents knew that files existed on the involved computer and that the defendant could access those files. See United States v. Apple MacPro Computer, 851 F.3d 238, 248 (3d Cir. 2017).

On the other hand, numerous other state and federal district courts have held that the government need only show that the defendant knows the password to the device to overcome any Fifth Amendment protections. See, e.g., United States v. Spencer, No. 17-CR-00259-CRB-1, 2018 WL 1964588 (N.D. Cal. Apr. 26, 2018); State v. Stahl, 206 So. 3d 124, 134 (Fla. Dist. Ct. App. 2016). This Court agrees with the courts in that final category. When government agents are acting pursuant to a valid search warrant, the foregone conclusion applies as long as the government can show that its agents knew that the defendant had the ability to decrypt the device. See, e.g., Matter of Search of a Residence in Aptos, California 95003, No. 17-MJ-70656-JSC-1, 2018 WL 1400401 (N.D. Cal. Mar. 20, 2018).

Applying all of those standards to this case, the Court finds that no violation of the Defendant's Fifth Amendment

rights occurred for several reasons. First, this Court is not convinced that Defendant's admission of the password was necessarily even a protected testimonial statement. It is a far cry to say that Defendant truly disclosed meaningful contents of her mind in providing the password to SA Avunjian. As we all know, many people enter their passwords using nothing more than muscle memory.

Further, even if Defendant Smith's act of producing the password was testimonial, the information that the Government learned from that act was a foregone conclusion. Agent Avunjian had already examined the encrypted drive and seen that it had a large amount of storage occupied. Based on her training and experience, she knew that pornographic images take up a large amount of storage space and that defendant's often store pornographic images on encrypted computer drives. Further, based on the statements she had obtained from various witnesses, she believed that Defendant Smith was taking pornographic images of her child. Taken together, those facts led SA Avunjian to believe that the occupied storage space on the encrypted drive probably contained pornographic images of Defendant Smith's child. Therefore, any information that was revealed as a result of Defendant Smith's act of producing the password was a foregone conclusion.

In summary, Defendant's Fifth Amendment privilege against self-incrimination was not violated by Agent Avunjian's request

that the Defendant provide the password, which means that all the evidence found on that laptop is admissible.

III. CONCLUSION

In sum, a defendant must specifically invoke her Fifth Amendment rights in order to be afforded their protection during a lawful search of her home. That did not happen in this case. Additionally, when encrypted evidence has been seized pursuant to a valid search warrant, if the suspect gives the agents the password needed to decrypt that evidence, the production of that password is a non-testimonial act because it does not require the defendant to extensively use the contents of her mind. Further, even if that act was testimonial, the information it revealed was a foregone conclusion because admitting knowledge of a password does not admit knowledge of files on the device.

Based on the foregoing, Defendant's motion to suppress evidence is hereby DENIED.

Dated: June 21, 2018

Marie Griffith

Marie Griffith
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 19-202

Decided Feb. 13, 2019

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

LANA SMITH,

Defendant/Appellant.

APPEAL from a judgment of the United States District Court for the District of Gould. Before Moberg, Skager, and Montag. Opinion by Montag, J.

Defendant-Appellant Lana Smith timely appeals from a guilty plea that she entered, conditioned on her right to appeal the district court's denial of her motion to suppress evidence. Smith argues that the district court violated her Fifth Amendment rights when it wrongly denied her motion to suppress evidence and thereby: (1) failed to forbid the prosecution's use her pre-arrest silence as substantive evidence of her guilt; and

(2) failed to suppress all of the evidence that was found on an encrypted drive of a laptop after the Government compelled her to provide the password to unlock that drive. She further argues that the district court's errors were not harmless because she would not have pled guilty absent the district court's decision to deny her suppression motion.

More specifically, as to the first issue, Smith argues that the prosecution's intended use of her pre-arrest silence during its case-in-chief would violate her Fifth Amendment privilege against self-incrimination because (1) she invoked her Fifth Amendment rights, meaning the Government should have been precluded from using her silence as substantive evidence at trial; and (2) even if she did not invoke her Fifth Amendment rights, her silence was given while she was in custody in response to the functional equivalent of a police interrogation, meaning it violated her Miranda rights.

As to the second issue, Smith asserts that her admission of the password was a compelled, incriminating testimonial communication that violated her Fifth Amendment right against self-incrimination. Following her admission of the password, numerous incriminating photographs and videos were discovered on the drive. Smith further argues that her admission regarding the password did not fall within the "foregone conclusion" doctrine because the Government did not know what files would be

found on that drive. Therefore, the Government learned new, incriminating information from her admission.

This Court agrees with Smith as to both issues. As explained in detail below, evidence relating to Smith's pre-arrest silence should have been suppressed because she was effectively subjected to a custodial interrogation by a police officer, and, even if not, she explicitly invoked her Fifth Amendment rights when she asked Officer Stillman to leave her alone. Therefore, the district court erred when it refused to prevent the Government from using Smith's pre-arrest silence during its case in chief. Likewise, as to the second issue, Smith's admission as to the password for the encrypted computer drive constituted a testimonial communication that was protected by the Fifth Amendment, and that admission did not fall within the "foregone conclusion" doctrine because the Government could not show, with reasonable particularity, that it knew what information it would find on the encrypted drive.

Finally, the district court's error in not suppressing the evidence found on the encrypted drive was not harmless because that evidence was crucial to the Government's case. Therefore, the case must be remanded, and Smith must be given the opportunity to withdraw her guilty plea.

I. FACTUAL AND PROCEDURAL SUMMARY

A. Pre-Arrest Events

On January 19, 2018, the Federal Bureau of Investigation (FBI) received a call from Defendant-Appellant Lana Smith's child's teacher reporting that Smith had been taking naked pictures of her child and sharing them with men. Special Agent (SA) Elizabeth Avunjian, who works for the FBI on a Child Exploitation Task Force, was assigned to the investigation. On January 28, 2018, SA Avunjian obtained a search warrant authorizing her to search Smith's apartment for evidence of child pornography, including any computers and electronic devices found on the premises. Smith did not challenge the validity of that warrant.

On January 30, 2018, at 9:30 a.m., SA Avunjian and Gould City Police Department (GCPD) Officer Joshua Stillman executed the search warrant. They knocked on the door and demanded entry. They were both armed but never drew their weapons. Upon entering the apartment, they ordered Smith to stay in the living room while the warrant was being executed. Officer Stillman directed Smith to sit on a couch in the living room. He then stood guard over her, standing between her and the front door. Officer Stillman and Agent Avunjian both stated that the reason they confined Smith in the living room was to prevent the destruction of evidence and for officer safety, yet they

admitted that they had no reason to believe that Smith was a threat. While she was on the couch, Smith protested the officers' search, telling Officer Stillman repeatedly that she had done nothing wrong and asking him to leave. When she tried to stand up, Officer Stillman ordered her to sit back down.

During the search, SA Avunjian came out of the back bedroom and showed Officer Stillman a photograph Smith's naked daughter. Officer Stillman was upset and began to berate Smith, calling her a "terrible mother." Smith refused to respond to the taunt and simply looked down. Officer Stillman then asked her, "How do you live with yourself after doing that?" At that point, Smith looked up and said, "Leave me alone" and then looked back down. That was the end of their conversation.

Shortly thereafter, SA Avunjian completed her search. She returned to the living room and informed Smith that she was under arrest for child pornography. Officer Stillman advised Smith of her Miranda rights, and she responded that she understood her rights. He then handcuffed her.

B. Facts Relating to the Password and Computer Search

After Smith was arrested and given her Miranda rights, SA Avunjian noticed that Smith looked unwell, so she assisted her in drinking a glass of water. SA Avunjian and Officer Stillman then escorted Smith to SA Avunjian's vehicle. After placing

Smith in the vehicle, SA Avunjian removed her handcuffs, admitting that Smith posed no risk to officer safety.

While SA Avunjian was driving to the federal detention center, she told Ms. Smith that in the search warrant, the judge had authorized her to search all computers that were found in Ms. Smith's apartment, and that for her to do that, she needed Ms. Smith to give her the password. Ms. Smith complied and gave SA Avunjian the password.

SA Avunjian next returned to the FBI office and turned over the laptop and password to an FBI forensics expert for a more thorough search of the encrypted drive. A few hours later, the forensic expert informed SA Avunjian that he had found 1,237 pornographic images and 52 pornographic videos on the drive. Further, metadata contained within some of the pictures detailed their intended recipients.

C. Procedural History

On April 26, 2018, a grand jury issued an indictment charging Smith with fifty-two counts of producing sexually explicit visual depictions of a minor, in violation of 18 U.S.C. § 2251(b). Before trial, Smith moved to suppress the evidence relating to both her pre-arrest silence and all of the evidence found on the encrypted drive. The district court denied that motion, holding that a defendant must specifically invoke her Fifth Amendment rights to be afforded their protection during a

lawful search of her home, and Smith failed to do that, meaning the Government would be allowed to use her pre-arrest silence against her at trial. Additionally, the district court held that when a valid search warrant has been obtained for evidence that is encrypted, the admission of the password needed to access that evidence is non-testimonial. Further, even if that act was testimonial, the information it revealed was a foregone conclusion.

After her suppression motion was denied, Smith entered a guilty plea, conditioned on her right to bring this appeal.

II. DISCUSSION

A. Standard of Review

A district court's denial of a motion to suppress evidence is reviewed de novo, but the trial court's underlying factual findings are reviewed for clear error. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995).

B. The District Court Erred by Denying Smith's Motion to Suppress the Use of Her Pre-Arrest Silence as Substantive Evidence of Guilt

The Fifth Amendment states: "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. const. amend. V. It guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for

such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964). The invocation of the Fifth Amendment privilege does not require a special combination of words. Quinn v. United States, 349 U.S. 155, 163 (1955). The protections are broad in scope and allow an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). This includes judicial, administrative, and investigatory proceedings. Kastigar v. United States, 406 U.S. 441, 444 (1972).

The privilege protects against "any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used." Id. at 445. In other words, it protects against "answers . . . which would furnish a link in the chain of evidence" against the suspect. Ohio v. Reiner, 532 U.S. 17, 20 (2001). It applies not only to explicit police interrogations but also to acts that constitute the functional equivalent of an interrogation, which occurs when the police should know that their conduct is reasonably likely to elicit an incriminating response from the suspect, as viewed from the perspective of the suspect. R.I. v. Innis, 446 U.S. 291, 300-01 (1980).

1. The Government Should Not Have Been Allowed to Use Smith's Pre-Arrest Silence Against Her Because She Invoked Her Fifth Amendment Rights

Relying on Salinas v. Texas, 570 U.S. 178 (2013), the district court held that the government was allowed to use Smith's pre-arrest silence against her because she never invoked her Fifth Amendment rights, and she was never subjected to the compulsion of a custodial interrogation. That holding was wrong for two reasons. First, the facts show that Smith did invoke her Fifth Amendment rights, and second, the facts show that Smith was subjected to a custodial interrogation, so even if she did not invoke her Fifth Amendment protections, her silence still was protected.

We agree with the district court that the analysis of this issue must begin with Salinas v. Texas, but we disagree as to how Salinas applies to the case at hand. In Salinas, the Supreme Court granted certiorari "to decide whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant's pre-custodial silence as evidence of his guilt." Id. at 191 (plurality opinion) (Scalia & Thomas, JJ., concurring). However, the plurality in Salinas found it "unnecessary to reach that question," id. at 183, and instead concluded more narrowly that the defendant's Fifth Amendment claim failed because "he did not

expressly invoke the privilege." Id. at 191. In Salinas, the suspect was cooperating with police officers during a "voluntary interview" until they asked him a particularly incriminating question. Id. at 182. Instead of responding, the suspect stayed mute, looked down, shuffled his feet, bit his bottom lip, tightly grasped his hands in this lap, and tightened up. Id. The plurality found that the defendant's behavior failed to expressly invoke his Fifth Amendment rights, and therefore the government could use that evidence against the defendant. Id.

Meanwhile, in a concurring opinion, Justice Scalia and Thomas stated that, even if the defendant had invoked his Fifth Amendment rights, a suspect's pre-arrest silence is not protected as long as the evidence the government wants to offer is not compelled, self-incriminating testimony. Id. at 192 (Scalia & Thomas, JJ., concurring). On the other hand, the dissent argued that allowing the use of a suspect's pre-arrest silence is inconsistent with the Court's precedent and the Fifth Amendment's protections. Id. at 194 (Breyer, Ginsburg, Sotomayor & Kagan, JJ., dissenting).

Given the different reasoning in Salinas's opinions, Salinas must be read narrowly and only the ultimate holding is binding on lower courts. See Marks v. United States, 430 U.S. 188, 193 (1977). The only thing the plurality and concurring opinions agreed upon was that defendant Salinas had failed to

invoke his Fifth Amendment rights, so his silence was unprotected.

Yet, Salinas is factually distinguishable from the instant case. Unlike the defendant in Salinas, Smith made known her desire not to speak when she told Officer Stillman to leave her alone. The Supreme Court has held "no ritualistic formula is necessary in order to invoke the privilege." Quinn, 349 U.S. at 164. When a defendant unambiguously states that he or she wishes to remain silent or does not want to answer questions, it suffices to invoke that defendant's Fifth Amendment right against self-incrimination. See, Berghuis v. Thompkins, 560 U.S. 370, 382 (2010). Smith did just that when she invoked her Fifth Amendment right to remain silent by asking Officer Stillman to leave her alone.

Which leads us to a question left unanswered by Salinas: should the pre-arrest silence of a defendant who has invoked his or her Fifth Amendment rights be admissible? That is a question that neither this circuit nor the Supreme Court has decided, and which has caused disagreement among other courts.

Before Salinas was decided, the Fifth, Eighth, Ninth, and Eleventh circuits all held that pre-arrest silence may generally be used by the prosecution as substantive evidence of defendant's guilt absent evidence of compulsion. See United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998); United States

v. Rivera, 944 F.2d 1563 (11th Cir. 1996); United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996); United States v. York, 830 F.2d 885 (8th Cir. 1987). On the other hand, the First, Sixth, Seventh, and Tenth circuits have held that a defendant's pre-arrest silence should never be used as substantive evidence of guilt. See Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); United States ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).

Because the Salinas plurality held that if a defendant fails to invoke his Fifth Amendment rights, his pre-arrest silence may be used against him, Salinas at least partially abrogates the cases that had previously held that pre-arrest silence should never be used as substantive evidence of guilt. However, Salinas did not reach the question of whether a defendant's post-invocation, pre-arrest silence may be used against the defendant. See United States v. Okatan, 728 F.3d 111, 118 (2d Cir. 2013).

The answer to that question seems clear. If a defendant invokes his or her right to remain silent during an encounter with law enforcement agents, the government should not be allowed to use that defendant's pre-arrest silence during in its case in chief. See id. at 120-21. This is true because allowing an inference of guilt to be drawn from a pre-arrest

invocation of the privilege would "ignore[] the teaching that the protection of the fifth amendment is not limited to those in custody or charged with a crime." Coppola, 878 F.2d at 1566. Therefore, the Government should not have been allowed to use Smith's silence against her, and the district court erred when it denied her suppression motion.

2. If a Defendant's Pre-Arrest Silence Occurs in Response to a Custodial Interrogation, the Government Should Be Precluded From Using That Silence Even if the Defendant Never Invoked His or Her Fifth Amendment Rights

Further, even if Smith did not invoke her Fifth Amendment rights, we believe that the Government should still be barred from using her silence against her because, although pre-arrest, Officer Stillman's conduct was effectively a custodial interrogation.

Notably, many of the courts that allow the use of a defendant's silence as substantive evidence of guilt rely on the premise that if there is no compulsion, there is no violation of the Fifth Amendment. See, e.g., Oplinger, 150 F.3d at 1067. But when defendants are subjected to custodial interrogations, they are subjected to compulsion.

A suspect is "in custody" whenever there is a "formal arrest or restraint on freedom of movement" to a degree

analogous to a formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983). This requires courts to do a two-step analysis, determining first whether a reasonable person would have felt free to leave under the totality of the circumstances, and second, whether the "relevant environment presents the same inherently coercive pressures as the type of station house questioning in Miranda." Howes v. Fields, 565 U.S. 499, 509 (2012). Temporary detention while a search warrant is being executed may be equivalent to custody when the officers restrict the defendant's freedom of movement and fail to tell the defendant that he or she is not under arrest. See, e.g., United States v. Richardson, 36 F. Supp. 3d 120, 129 (D.D.C. 2014) (holding that a defendant was in custody during the execution of a search warrant after the officers forcibly entered the premises, kept the defendant in the living room under guard the entire time, and never told the defendant that she was not under arrest or that she was free to leave).

Likewise, whether an encounter between an officer and suspect constitutes an "interrogation" also requires a dual inquiry. An "interrogation" occurs if an officer expressly questions a suspect, or if an officer acts in a way that amounts to the "functional equivalent" of express questioning. R.I. v.

Innis, 446 U.S. 291, 300-01 (1980). Additionally, "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect" constitute the functional equivalent of an interrogation. Id. at 301. If an officer asks a rhetorical question, such as asking why a suspect would commit a certain crime, it can constitute interrogation. See United States v. Soto, 953 F.2d 263, 264-65 (6th Cir. 1992) (holding that officer stating, "What are you doing with crap like that when you have these two waiting for you at home?" after the officer found drugs and a photograph of the defendant's family was the functional equivalent of an interrogation).

Therefore, even if Smith did not expressly invoke her Fifth Amendment rights, the facts of the case show that Smith was effectively subjected to a custodial interrogation. It is undisputed that both Officer Stillman and SA Avunjian were armed and that they forced Smith to remain in the living room, sitting on the couch, while they were executing a search warrant. Smith was not free to leave; at one point when she tried to get up off the couch, Officer Stillman ordered her to sit back down. A reasonable person in her circumstances would have believed that she was not free to leave. Then, during her custodial

detention, Officer Stillman effectively interrogated Smith when he called her a terrible mother and then asked her how she could live with herself after "doing that."

In summary, Smith successfully invoked her Fifth Amendment rights, and even if she had not done so, she was illegally subjected to a custodial interrogation, meaning that her silence in response to that interrogation should have been suppressed.

C. The District Court Erred in Holding That Smith's Admission of the Password Was Not Testimonial

As discussed above, the Fifth Amendment provides that defendants have a right against compelled self-incrimination. It is also well-established that the act of producing evidence can have communicative aspects wholly aside from the evidence's contents. Fisher v. United States, 425 U.S. 391, 410 (1976). And when the act of producing documents has a compelled testimonial nature, the Fifth Amendment privilege against self-incrimination may apply. United States v. Hubbell, 530 U.S. 27, 36 (2000). To show that the Fifth Amendment applies to a defendant's act of producing evidence, three things must be shown: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination. Fisher, 425 U.S. at 408.

In this case, it is undisputed that Smith produced the password to the laptop's encrypted drive after being told by SA Avunjian that the warrant required her to produce it. The

Government conceded that sufficed to show compulsion. In addition, that password allowed the Government to access the drive and find incriminating evidence. Therefore, the Government also rightly conceded that the password constituted incriminating information. Therefore, the district court correctly found that the only real issue is whether Smith's act of producing the password was a testimonial act.

The key factor in establishing whether an act is testimonial is whether the government compels the individual to use "the contents of his own mind" to explicitly or implicitly communicate some statement of fact. Curcio v. United States, 354 U.S. 118, 128 (1957). However, that protection will not apply if the information that is conveyed by the defendant's act of producing the evidence is a "foregone conclusion," which essentially means that the government learns nothing new from it. See Fisher, 425 U.S. at 411. For example, in Fisher, when attorneys were holding tax documents for their clients and the IRS served a request for production upon them, the use of the subpoena showed compulsion. Id. at 409. But the Court reasoned that it did not implicate Fifth Amendment protections because the existence and location of the documents was already known to the government, and Fifth Amendment protections are not evoked simply because the papers might be incriminating. Id.

The Court added an additional layer to this analysis when it later decided Hubbell, establishing that some government knowledge of the documents it had obtained was a prerequisite to relying on the foregone conclusion doctrine. Hubbell, 530 U.S. at 44–45. While in Fisher the government "already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity" through the accountants who created them, in Hubbell the government had not established that it had prior knowledge of either the existence or the whereabouts of the documents ultimately produced. Id. Because of this, the Court held that the defendant's production of the documents was testimonial self-incrimination and did not fall under the foregone conclusion doctrine. Id. at 45.

Applying these general principles to the context of passwords to encrypted digital devices is, unfortunately, not an easy task. In fact, the few courts that have applied the foregone conclusion doctrine in the context of digital device passwords have done so in different ways. Compare In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335, 1349 (11th Cir. 2012) (holding that the government must point to specific files on a device and prove that the defendant had access to them for the foregone conclusion doctrine to apply), with State v. Stahl, 206 So. 3d 124, 134 (Fla. Dist. Ct. App.

2016) (holding that the government need only show defendant's knowledge of the password to apply the foregone conclusion doctrine), and United States v. Apple MacPro Computer, 851 F.3d 238, 248 (3d Cir. 2017) (holding that a foregone conclusion analysis requires the government to show that the government knew that files existed on the device and that the defendant knew the password).

The Eleventh Circuit's approach in In re Grand Jury likens the acquisition of digital documents to the government's acquisition of the documents in Hubbell. See 670 F.3d at 1347. The Eleventh Circuit was not persuaded that the government's general knowledge that certain individuals would be likely to have certain kinds of documents (e.g., business people are likely to have tax records on hand) rose to the level of "reasonable particularity" that the foregone conclusion doctrine demands. Id. It held therefore that unless the government can show with reasonable particularity: (1) what encrypted files exist on a hard drive; (2) that an individual has access to those files; and (3) that he is capable of decrypting those files, the foregone conclusion doctrine is inapplicable. Id. at 1349.

Taking a more conservative approach, the Third Circuit more recently held that providing evidence both (1) that files exist on the encrypted portions of the devices, and (2) that the

defendant can access them is enough to satisfy the foregone conclusion doctrine. Apple MacPro Computer, 851 F.3d at 248. In Apple MacPro, the Third Circuit found that the foregone conclusion doctrine was factually met when a defendant admitted owning the electronic devices and his sister told the government that she had seen the defendant unlock the computer to show her images depicting child pornography. Id.

This Court agrees with the reasoning of the Eleventh Circuit and finds that the appropriate standard is to require the Government to describe with reasonable particularity what files it expects to find on the encrypted drive before the defendant's act of producing a password to that drive will be a foregone conclusion. In this case, given that SA Avunjian observed Ms. Smith using the laptop a few days earlier, the Government possibly had sufficient evidence to show that it knew that Ms. Smith knew the password to that laptop. However, the district court erred in concluding that this knowledge alone was sufficient to apply the foregone conclusion exception because the Government could not show with reasonable particularity that it knew what files existed on the encrypted hard drive before the search occurred. The only evidence the Government had that might arguably show that it knew what was on that drive was Smith's daughter's statement that her mother was taking photos of her. But Smith's daughter made no mention of the laptop, and

SA Avunjian only had a hunch that Smith would possibly be keeping those photos on a computer of some kind. And other evidence indicated to the contrary that the photos likely would not be found on that laptop, including that the laptop was owned by someone else, not Smith. In light of these circumstances, the Government did not meet its burden of showing knowledge of the documents it sought, and therefore the foregone conclusion exception does not apply. The district court should have suppressed Smith's admission as to the password and all the fruits of that admission, including all of the photos and videos that were found on the encrypted drive.

D. The District Court's Errors Were Not Harmless

The final question that must be addressed by this Court is whether the district court's errors in denying Smith's suppression motion were harmless.

The harmless error doctrine applies in the context of conditional guilty pleas. United States v. Lustig, 830 F.3d 1075, 1091 (9th Cir. 2016). In that context, an error is not harmless unless the appellate court finds "beyond a reasonable doubt that the error did not contribute to the [defendant's] decision to plead guilty." Id. If the court cannot make that finding, it must remand the matter to provide an opportunity for the defendant to vacate the guilty plea. Id.

Here, the Government conceded that Smith’s pre-arrest silence and the evidence obtained from the hard drive in Smith’s possession provided crucial evidence for its case. Further, the record shows that the denial of Smith’s suppression motion affected her decision to enter a guilty plea. Therefore, the district court’s order must be vacated, and the case remanded to allow Smith the opportunity to withdraw her guilty plea.

III. CONCLUSION

A defendant’s Fifth Amendment rights attach far before any adversarial proceedings begin, and no special combination of words is required to invoke them. Therefore, Smith’s rights were violated when the trial court allowed her pre-arrest silence to be used as substantive evidence of guilt. Further, Smith’s act of producing the password to the laptop was a protected testimonial statement that did not fall within the foregone conclusion doctrine. For the foregoing reasons, the decision of the district court is VACATED and the matter is REMANDED for further proceedings consistent with this opinion.

Dated: February 13, 2019

Ryan Montag

Ryan Montag
United States Circuit Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

No. 19-202

UNITED STATES OF AMERICA,

Petitioner,

v.

LANA SMITH,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented:

1. Is the Fifth Amendment violated if the prosecution presents evidence concerning a defendant's pre-arrest pre-Miranda silence that occurred in response to an officer's insulting comments implying that she was guilty of child pornography, taking into account that these events occurred while the defendant was detained during the execution of a search warrant?

2. Did a law enforcement agent violate a defendant's Fifth Amendment right against self-incrimination by requiring her to produce the password to an encrypted computer drive while she was in custody and after she been read her Miranda rights, or did the foregone conclusion doctrine apply?

APPENDIX A

HALE MOOT COURT HONORS PROGRAM RULES

2019-2020

HALE MOOT COURT HONORS PROGRAM RULES
2019-2020

PREFACE

The Hale Moot Court Honors Program, conducted annually by the Moot Court Honors Executive Board (the "Board"), was inaugurated in 1948 and named in honor of William Hale, former Dean of the Law School. The Program involves researching and writing appellate briefs, and arguing before panels of distinguished judges and attorneys.

RULE 1. PARTICIPANTS

1.1 Participants are second-year law students at the University of Southern California.

1.2 Students are selected based on:
- qualifying oral argument rounds conducted at the end of their first year,
- an appellate brief produced in the first-year writing classes, and
- grade point averages earned during the first year of law school.

1.3 Transfer students may also be selected on the basis of merit, as judged by their performance in a special qualifying round for transfer students.

RULE 2. THE RECORD

2.1 The Record, setting forth the factual, substantive, and procedural components of the competition, is prepared by the Board and distributed at an opening dinner.

2.2 The Record contains two legal issues. Throughout the competition, participants will argue one of the two issues.

2.3 Unless otherwise amended by the Board, the Record constitutes the complete and final parameters for the competition.

RULE 3. BRIEFS

3.1 Assigning Counsel

(a) For purposes of preparing a brief, participants will submit a ranking of their preferred side (Respondent or Petitioner) and legal issue to the Board.

(b) Participants will be divided into two evenly competitive pools, one for each issue, based on their scores for their qualifying oral arguments, appellate briefs, first-year grade point averages, and preferences submitted for issue and side.

(c) Each round, the Board will pair participants arguing a particular side (Respondent or Petitioner) with another participant arguing the same side but a different

issue. These pairings will be made at random. Participants are scored individually, which means that your partner's performance will have no impact on your score.

3.2 Format and Length of Briefs

(a) Briefs shall include the following components in the following order:
Cover Page
Question(s) Presented
Table of Contents
Table of Authorities
Opinions Below
Constitutional and Statutory Provisions Involved
Statement of Facts
Summary of Argument
Argument
Conclusion

(b) Briefs shall be no less than twenty (20) and no more than twenty-five (25) pages in length, excluding the Cover Page, Questions Presented, Table of Contents, and Table of Authorities.

(c) The rules concerning the formatting of the Cover Page, Table of Contents, Table of Authorities, and Argument headings and subheadings are provided in Appendix B.

(d) Citations must be in Bluebook form, using the most recent edition available at the start of the competition.

(e) Briefs must be submitted unbound on 8 1/2 x 11 inch pages.

(f) The type must be double-spaced with one-inch (1") margins on each side of the page. However, footnotes should be single-spaced.

(g) Each page may include a maximum of twenty-five (25) lines of type.

(h) All text must be in Courier New 12-point font.

3.3 Submitting Briefs

(a) Each participant shall submit one (1) copy of the First and Second Drafts of his or her brief to either Blackboard or the Moot Court office by the date and time indicated on the program schedule.

i. Blackboard submissions must be made in Word format.

ii. On Blackboard, participants will be allowed three (3) attempts for submissions. The latest submission will be reviewed.

iii. Participants are responsible for ensuring proper formatting for both Blackboard and hard copy submissions. When using Blackboard, we recommend that you upload your draft, then re-download the file to ensure proper formatting.

(b) Late drafts will incur a one-point penalty on the participant's Final Brief's competition score. An additional one-point penalty will be subtracted for every successive day the draft is late.

(c) Each participant shall submit two (2) copies of their Final Briefs to the Moot Court office by the date and time indicated on the program schedule.

NOTE: Unlike the two drafts, Final Briefs will <u>not</u> be accepted via Blackboard.

(d) Final Briefs that are submitted late to the Moot Court office will incur a one-point penalty for every fifteen (15) minutes which the brief is late.

3.4 Submitting Final Briefs for Grading

(a) <u>In addition</u>, participants shall submit one (1) copy of their Final Briefs to Michael Earnhart by the date and time indicated on the program schedule. This copy must be identical to the copies submitted to the Moot Court office.

(b) Students must submit their Final Briefs in person and present identification to Michael Earnhart at the time of the submission. The faculty advisor will grade each Final Brief, and this grade will constitute the student's two-unit grade for the fall Moot Court class.

(c) If a Final Brief is submitted late to Michael Earnhart, it will be ineligible for the Best Brief award and will incur a grading penalty equal to: 1/10 of a letter grade (1 to 30 minutes late); 3/10 of a letter grade (31 minutes to 7 hours late); or a full letter grade (7 to 24 hours late).

(d) Consistent with the Law School's blind-grading policy, the participant's name must not appear anywhere within the Final Brief. Participants will be assigned numbers to include on the brief's cover page for identification.

3.5 Reviewing Opposing Briefs

(a) The Board shall hold copies of each Final Brief on reserve in the Moot Court office.

(b) The Board shall hold office hours during which participants may review the opposing side's Final Briefs in preparation for the Preliminary Rounds. Students will be required to sign a document certifying that the only briefs they have reviewed are for the opposing side.

(c) Students may not review briefs at any time outside of the Moot Court office. Any participants who share briefs outside the office risk sanctions including, but not limited to, having a penalty assessed against the brief score, receiving no credit for the course, being denied fulfillment of the writing requirement, or expulsion from the program.

3.6 Scoring Briefs

(a) Under the guidance of the faculty advisor, the Board will score the Final Briefs independently of the participant's oral argument scores. These scores shall count up to one-third (1/3) of each participant's total competition score when selecting participants for the Quarterfinal, Semifinal, and Final rounds.

(b) Judges of the oral argument rounds shall not be informed of a participant's brief score or given copies of a participant's brief to review.

3.7 Writing Requirement, Skills Requirement, and Course Credit

(a) A passing grade on the Final Brief fulfills the upper-level division writing requirement for graduation.

(b) Successful participation in the Hale Moot Court Honors Program fulfills the skills requirement for graduation.

(c) In the spring semester, the faculty advisor will submit a grade of CR/D/F for one unit upon successful completion of the program.

(d) Students whose work and participation demonstrate a lack of effort or attention to detail risk not receiving credit for Moot Court and/or not fulfilling the writing requirement.

3.8 Best Brief Awards

(a) Participants earning the highest grades on the Final Brief on each side, for each issue, shall receive Best Brief awards.

(b) The two Participants who earn the next highest grade on their Final Briefs for each issue shall receive Runner-up Best Brief awards.

(c) Late submissions shall be ineligible for award consideration.

RULE 4. ORAL ARGUMENT

4.1 Scheduling of Rounds

(a) The Board shall provide each participant reasonable notice of the date, time, and location of each round of oral argument.

(b) Mock rounds will be held in classrooms, subject to availability.

(c) The Preliminary, Quarterfinal, and Semifinal Rounds will be held in the Ackerman Courtroom, subject to availability.

(d) The Final Round will be held in Norris Theater, subject to availability.

4.2 Time for Oral Argument

(a) Each oral argument shall be limited to fifteen (15) minutes per participant.

(b) Participants arguing as the Petitioner may, upon approval of the judges, reserve up to two minutes of their allotted time for rebuttal.

(c) Judges may allow additional time for participants at their discretion.

4.3 Mock Rounds

(a) Each participant will argue in two mock rounds.

(b) Members of the Board will serve as judges for the mock rounds, and will provide participants with feedback on their performance.

4.4 Scoring

(a) In each round of competition, judges will score participants individually, without regard to the performance of co-counsel.

(b) In addition to giving each participant an absolute score, judges will rank participants relative to their competitors.

(c) The oral argument scoring criteria to be used by the judges will be distributed at the opening dinner.

4.5 Preliminary Rounds

(a) In the First Preliminary Round, participants will argue on the same side and issue for which they prepared their briefs (“on-brief”).

(b) In the Second Preliminary Round, participants will argue the same issue, but opposing side of their briefs ("off-brief").

(c) Oral argument scores from both the on-brief and off-brief Preliminary Rounds will be weighed when selecting participants for the Quarterfinal Round.

4.6 Quarterfinal and Semifinal Rounds

(a) Sixteen (16) participants will advance to the Quarterfinal Round: eight (8) from each issue without regard for which side of the issue the participants wrote their brief on. Selection to the Quarterfinal Round will be based two-thirds (2/3) on oral argument in the Preliminary Rounds and one-third (1/3) on the Final Competition Brief score.

(b) Eight (8) participants will advance to the Semifinal Round: four (4) from each issue without regard for which side of the issue the participants wrote their brief on. Selection to the Semifinal Round will be based four-fifths (4/5) on oral argument in the Quarterfinal Round and (1/5) on the Final Competition Brief.

(c) Upon selection to the Quarterfinal, Semifinal, or Final Round, participants will receive a randomly drawn number, which will determine the order of picking sides for argument in that round.

(d) Participants will argue once in each round to which they advance.

4.7 The Final Round

(a) Four (4) participants will advance to the Final Round: two (2) from each issue. Selection to the Final will be based nine-tenths (9/10) on oral argument in the Semifinal Round and one-tenth (1/10) on the Final Competition Brief.

(b) Judges will rank the performance of each participant in the Final Round relative to the other three competitors in that round.

(c) The Champion of the Hale Moot Court Honors Program will be the participant who the judges have ranked first in the Final Round.

(d) The Runner-Up of the Hale Moot Court Honors Program will be the participant who the judges have ranked second in the Final Round.

4.8 Awards

(a) The Champion of the Hale Moot Court Honors Program will receive the Best Advocate Award, as well as a separate award sponsored by BarBri.

(b) Each of the four finalists will receive the E. Avery Crary Award, which includes a cash prize.

(c) Other participants shall receive certificates indicating the round to which they advanced.

(d) All awards are presented at the conclusion of the Final Round.

RULE 5. PROHIBITION AGAINST EXTERNAL ASSISTANCE

5.1 No participant may receive external assistance preparing a brief or oral argument from outside sources (faculty, attorneys, family members, etc.).

5.2 Participants may not conduct additional practice oral arguments (moots) with Executive Board members, past Hale Moot Court participants, or anyone other than fellow participants. Participants may ONLY moot with fellow participants.

5.3 Participants may not collaborate with fellow participants during the brief-writing process. Once the Final Competition Briefs are turned in, participants are encouraged to confer with fellow participants and board members regarding the legal issues, strategies, arguments, and skills involved in the competition.

5.4 Participants may consult search engines and external publications when preparing their briefs and oral arguments.

5.5 Until they have been eliminated from competition, participants shall not attend any rounds of oral argument except those in which they are a participant, and they must not receive information from any person who has attended other rounds of oral argument.

5.6 Any participant found to receive external assistance in violation of these rules risks sanctions including, but not limited to, penalties assessed against the brief score, denied course credit, denied fulfillment of the writing requirement, or expulsion from the program.

RULE 6. INTERNAL ASSISTANCE

6.1 Every participant will have an Editor (who is a member of the Executive Board) assigned to provide the participant with feedback concerning each Draft of the Brief and to answer the participant's questions. As a general rule, when seeking assistance writing their briefs or formulating their arguments, participants should consult first with their assigned Editor.

6.2 If after consulting with the assigned Editor, a participant believes that he or she needs further clarification concerning a substantive question (e.g. about the legal issues or analysis), the participant may contact the faculty advisor to ask questions.

6.3 If participants have any questions or concerns about the administration of the program, including whether they may receive a time extension or be excused from attending a Moot Court event, they should contact the Moot Court Chair.

6.4 As discussed in Rules 4.3 and 5, participants must participate in two Mock rounds judged by Board members. If participants wish to do additional practice oral arguments (moots), they may moot only with fellow participants, not with Executive Board members, past Moot Court participants, faculty, or anyone else.

6.5 Participants will be required to meet individually with their assigned editors upon receipt of their First Draft and Second Draft. Participants may not meet with their editors beyond this; however, they can ask questions via email (Refer to 6.1).

RULE 7. ETHICAL OBLIGATIONS

7.1 Plagiarism violates academic integrity. Any participant found to plagiarize material will be expelled from the program, given a grade of No Credit, and reported to the Law School Dean, among other University sanctions.

7.2 The Board will not tolerate any actions by participants deliberately intended to impede the preparation of other competitors.

RULE 8. ENFORCEMENT OF THE RULES

8.1 The Board and the Faculty Advisor reserve discretion in enforcing the rules. **Should emergencies arise that interfere with a participant's ability to comply with any rule or fulfill any obligation of the program, he or she should notify the Chair and Faculty Advisor immediately.**

8.2 Penalties for non-compliance with the rules will be assessed on a case-by-case basis and will be appropriate to the seriousness of the violation.

8.3 Requests for formal interpretations of these rules must be submitted to the Board in writing. The Board and the Faculty Advisor are the final arbiters of all rule violations and interpretations.

8.4 The Board may enact amendments to the rules as it deems appropriate, provided that participants are given reasonable notice.

8.5 Participants are expected to check their USC lawmail accounts daily for communication from the Board.

RULE 9. COMPLETION OF THE PROGRAM

9.1 Successful completion of the Hale Moot Court Honors Program requires:

(a) Attending all required seminars and meetings listed on the program schedule;

(b) Submitting satisfactory Drafts, Final Competition and Final Graded Briefs;

(c) Participating in two mock and two preliminary rounds of oral argument;

(d) Participating in all advanced rounds of argument for which the participant qualifies;

(e) Attending the Final Round;

(f) Participating as a judge in the 1L Qualifying Rounds during the spring semester.

9.2 Failure to complete any of the required components of the program may result in an NC (no credit), D, or F grade, as well as denial of the skills and/or writing requirements.

APPENDIX B

HALE MOOT COURT APPELLATE BRIEF FORMAT RULES

2019-2020

HALE MOOT COURT HONORS PROGRAM
2019-2020

APPELLATE BRIEF FORMAT RULES

PREFACE

The following rules are intended to clarify Rule 3.2 of the Hale Moot Court Honors Program Rules. Participants must strictly adhere to these guidelines to insure proper completion of the appellate brief.

RULE 1. CONTENTS OF THE BRIEF

The appellate brief written by participants for the Hale Moot Court Honors Program shall include each of the following:

1.1 Cover Page
1.2 Question(s) Presented
1.3 Table of Contents
1.4 Table of Authorities
1.5 Opinions Below
1.6 Constitutional and Statutory Provisions Involved
1.7 Statement of Facts
1.8 Summary of Argument
1.9 Argument
1.10 Conclusion

RULE 2. COVER PAGE

2.1 Names of participant authors of the appellate brief shall not appear on the cover page or in any other section of the brief.
2.2 The cover page should utilize the format of the sample provided in Attachment A to these Brief Format Rules.

RULE 3. TABLE OF CONTENTS

3.1 The Table of Contents shall list all sections of the brief and shall indicate the page at which each section begins.
3.2 The Table of Contents shall include an index of the Arguments of the brief, as well as all subheadings related to those Arguments. In the Table of Contents, all headings and subheadings for Arguments shall follow the same format guidelines as utilized in the body of the brief, as provided in Rule 5 below.

RULE 4. TABLE OF AUTHORITIES

4.1 The Table of Authorities shall list all authorities cited in the appellate brief.
4.2 Citations in the Table of Authorities shall be divided into the following categories:

a. Cases
b. Constitutional Provisions
c. Statutes
d. Other Authorities

RULE 5. ARGUMENT HEADINGS

5.1 In the Argument section of the brief, participants should use headings to help organize their arguments.

5.2 The headings and subheadings of each argument shall utilize the following format:

I. EACH ARGUMENT POINT HEADING SHALL BE TYPED IN BOLD AND CAPITAL LETTERS.

A. The First Subheading Shall Be Typed in Bold and Capitalization Shall Conform to Bluebook Rule 8(a).

1. The second subheading shall be typed in normal case, without bold typeface and shall be underlined.

a. *The third subheading shall be typed in normal case, in italics, without bold typeface and shall not be underlined.*

i. All subsequent subheadings shall be typed in normal case, without italic or bold typeface and shall not be underlined.

5.3 A sample of these heading formats is provided in Attachment B to these Brief Format Rules.

RULE 6. STYLE

6.1 The entire brief should be in Courier New 12-point font.

APPELLATE BRIEF FORMAT RULES
ATTACHMENT 1
SAMPLE COVER PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

No. 15-8084

MARY MERCER,
SUSAN MERCER and
PARENTS FOR PUBLIC EDUCATION,

Petitioners,

-v.-

ERWIN LEWIS,

Respondent.

ON WRIT OF CERTIORARI

TO THE TWELFTH CIRCUIT UNITED STATES COURT OF APPEALS

BRIEF FOR PETITIONER

Participant [X]
Co-Counsel for Petitioner
University of Southern California
Law Center
Los Angeles, CA 90089-0071
Telephone (213) 740-7331
Email: LStudent@lawmail.usc.edu

APPELLATE BRIEF FORMAT RULES
ATTACHMENT 2

SAMPLE ARGUMENT HEADINGS

I. THE EDUCATIONAL VOUCHER PROGRAM IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Educational Voucher Program Fails to Withstand the Scrutiny of the Tripartite Test Articulated in Lemon v. Kurtzman.

1. The stated secular purpose of the educational voucher program is conceivably legitimate.

2. The voucher program advanced the essential goals of religion by providing direct and unrestricted financial assistance to parochial schools.

a. *The voucher program directly subsidizes religious schools.*

b. *The voucher program alleviates parochial schools of necessary expenses.*

i. The voucher program is distinguishable from Mueller v. Allen.

c. *The voucher program lacks any mechanism to guarantee that state funds will be used exclusively for secular purposes.*

APPENDIX C

HALE MOOT COURT APPELLATE BRIEF SCORING SHEET

2019-2020

HMC 2019-20: APPELLATE BRIEF SCORING SHEET

SCORER________________________ BRIEF #_______________________

SCORING CRITERIA:		**Max Points**	**Points Scored**
Required Elements:			
1.	QUESTION PRESENTED	1	______
2.	TABLE OF CONTENTS (I. bold/all caps; A. bold; 1. underline; a. italics--if order, format, or page number Incorrect, deduct 1 point; if missing deduct 2 points)	2	______
3.	TABLE OF AUTHORITIES	2	______
4.	OPINIONS BELOW	2	______
5.	STATUTORY PROVISONS INVOLVED	2	______
6.	STATEMENT OF FACTS	7	______
7.	SUMMARY OF ARGUMENT	4	______
8.	PENALTY--length of argument (Subtract 1 point for each page over 25)		______
9.	PENALTY—formatting (Subtract 1 point for each page with margins under 1 inch or type smaller than 10cpi)		______
10.	PENALTY—late brief (Late penalties assessed by the Chair and deducted from the subtotal)		______
Subtotal—Required Elements		**20**	______
Main Arguments:			
1.	HEADINGS (formatting & persuasiveness)	4	______
2.	ARGUMENT LEGAL ANALYSIS USE OF AUTHORITY	60	______
3.	EFFECTIVENESS OF WRITING	8	______
4.	BLUEBOOKING AND OVERALL NEATNESS	8	______
Subtotal—Individual Score		**80**	______
TOTAL (add required elements and argument score)		**100**	______

APPENDIX D

HALE MOOT COURT ORAL ARGUMENT PARTICIPANT GUIDELINES

2019-2020

HALE MOOT COURT HONORS PROGRAM
2019-2020 ORAL ARGUMENT GUIDELINES

Although there are universally praised techniques of oral argument, oral advocacy remains a highly individualized skill. Each advocate possesses unique abilities and must make personal decisions regarding the presentation of oral arguments. To this end, the following guidelines merely attempt to provide general suggestions with which advocates should devise their own individual styles of oral argument.

The Importance of Oral Argument

Oral argument may be the first opportunity for judges to openly discuss the case; it allows them to address their doubts about an advocate's position, and it allows the advocate to highlight his or her most important arguments in a way that the formal brief may not.

Preparation for Argument

It is vital to attain mastery of the case, which includes having thorough knowledge of both the factual record and the law. Petitioners must convince the court of errors warranting reversal in an opinion below. Respondents seek affirmance. Mastery of the case is essential to either task.

The effective advocate must point out when an opponent's reasoning is flawed and correct misstatements of the record either from the judges or the opponent. He or she must both distinguish and analogize the case at bar to relevant authorities, requiring a thorough knowledge of the opponent's arguments.

Generally, an advocate should mention minor points only in passing and wait for the judges to show interest in such issues before going into detail.

Questions

Types of questions that may be asked include:

1. Questions clarifying facts

2. Questions about policy considerations

3. Questions about the authorities cited

4. Questions concerning hypotheticals

Be prepared to explain how cases cited in the briefs are relevant to your arguments, and the rationale behind those decisions.

Opening Argument

Petitioner:
"Good evening your honors, may it please the court, my name is John Doe, co-counsel for the Petitioner, Party A. Your honors, at this time, I would like to reserve one minute for rebuttal. [pause] Thank you. This evening, my co-counsel, [Jane Doe] will argue [state argument]. I will argue [state argument]."

As a more practical example, consider this excerpt from a 1990-1991 competition addressing Fetal Alcohol Syndrome and civil commitment, in which Petitioner's argument began:

"The Twelfth Circuit incorrectly held for the Respondent on the issue of civil commitment for two reasons. First, the State of Gould has a compelling interest in protecting fetal life and health from the effects of Fetal Alcohol Syndrome. Second, the temporary civil commitment of a pregnant woman is the least restrictive manner in which the State can effectively accomplish this interest."

Respondent:
"Good evening your honors, may it please the court, my name is John Smith, co-counsel for the Respondent, Party B. This evening, my co-counsel, Jane Smith, will argue [state argument]. I will argue [state argument]."

Continuing with same example above, Respondent might have replied:

"The Twelfth Circuit correctly held for the Respondent on the issue of civil commitment for two reasons. First, the State of Gould does not have a compelling interest in protecting fetal life and health from the effects of Fetal Alcohol Syndrome. Second, the temporary civil commitment of a pregnant woman is not the least restrictive alternative available to the State."

Presenting your Opening Argument

Petitioner: State the question you are addressing concisely and sympathetically to your side. Do not spend too much time on preliminaries, such as the decisions of the courts below; start by directly addressing your major contentions.

Respondent: Recast the facts and the issues in support of your side. As Respondent, it is important to establish your own affirmative case, rather than merely reply to Petitioner, but such reply is necessary. For example, if the Petitioner framed the issue too narrowly, you might restate it more broadly. Point out flaws in the Petitioner's reasoning and distinguish cases which the Petitioner cited as authority.

Avoid excessive detail. When referring to dates, use the year only (unless the month is important). Refer to amounts or quantities using round numbers.

Presenting the Body of Argument

Argue principles, and emphasize the rationale underlying those principles. The court (especially the Supreme Court) will probably not base its opinion on prior decisions without a sound rational basis. Arguing principles means:

- Arguing for a sensible policy
- Connecting arguments to the facts
- Clarifying statutory construction
- Citing case authority and explaining the principles used in those cases

It is important to be flexible in your argument. Pass quickly from the issues on which the court shows clear agreement and concentrate on the areas of doubt. A skilled advocate will not drive a favorable point into the ground, only to leave a major concern unanswered.

Avoid reasoning which the court finds unacceptable, if alternative arguments are available. However, if an argument is crucial to the case, pursue it with deferential vigor even if the court's predisposition remains negative.

Be cautious when arguing in the alternative (adopting your opponent's position) as it may make your position appear noncommittal.

Concede irrelevant or non-crucial points when reasonable, and then proceed to a stronger line of argument.

Questions from the Court

Adopt the attitude that the major reason for your appearance before the court is to answer questions. This means being responsive.

Answer questions as directly as possible, and if you do not know the answer, concede your unreadiness, but never refuse to answer a question you can answer. If the question is tangential to your main argument, answer it briefly and move on.

Never postpone an answer until later in your argument. An effective advocate must be flexible enough to rearrange a planned presentation to answer questions from the bench immediately and then transition to a preferred line of reasoning.

If a question is unclear, state that you did not understand, and politely ask the judge to restate the question. Moreover, take your time. It is better to have a well thought-out response than to answer quickly. A genuine pause will give the impression of serious thought on the answer, which will generally be more persuasive than one that sounds automatic and canned. Answering carefully will also give you time to think about the underlying reasons for a judge's question, improving your answers to questions that follow.

If you are in the middle of answering a question when your time expires, if you can finish your answer very quickly, you may do so, thank the court, and sit down. If, on the other hand, it will take more than a few words to finish your answer, you should stop, tell the court that you noticed that your time has expired, ask the court's permission to briefly finish your answer and conclude. After you get the court's permission finish your answer as quickly as reasonably possible, thank the court, and sit down.

Petitioner's Rebuttal

Maintain an affirmative posture during rebuttal. Rather than a point-by-point refutation, rebut Respondent's arguments within the framework of your own contentions. Avoid minor details. State your best point first, as the judges may use up your remaining rebuttal with additional questions. If your rebuttal time runs out during a question from the bench, answer it briefly, thank the court, and sit down.

Courtroom Etiquette

Dress. The judges will be accustomed to seeing men and women in formal business attire. Outlandish ties, shoes, or hairstyles will distract the judges from your presentation and might annoy them.

Demeanor. Eye contact is vital to maintaining the court's attention. Furthermore, if the judges appear not to pay attention to you, do not stop your argument and wait for attention. This response could appear critical of the judge's behavior.

In general, it is best to remain calm and dignified before the bench. A show of emotion may be effective, but use judgment.

Address the court as "Your Honors" or "Your Honor" and answer questions, "Yes, your Honor" or "No, your Honor." Speak confidently. Avoid weakening your arguments with opening phrases such as "I feel" or "I think." Instead, state your arguments directly.

Refer to the opposition as "Petitioner" or "Respondent" or "Counsel for Petitioner" or "Counsel for Respondent."

Never plan humor into your argument. However, spontaneous wit, conveyed with respectful deference to the court, is fine. Never display sarcasm or bitterness.

Be yourself.

APPENDIX E

HALE MOOT COURT ORAL ARGUMENT JUDGING GUIDELINES

2019-2020

HALE MOOT COURT HONORS PROGRAM
2019-2020 JUDGING GUIDELINES

Being a Judge

As a Hale Moot Court Judge, you are assuming the role of a Justice of the Supreme Court of the United States. Accordingly, your frame of reference should be prevailing Supreme Court doctrine, as it relates to the issues presented. However, you may also be concerned with the relevant social and economic consequences implicated by the issues.

Evaluating Participants

Your primary responsibility is to evaluate each participant both in absolute terms (with a numerical score) and relative terms (by ranking). Note that each participant is scored individually, without regard to the performance of co-counsel. The scoring sheet contains additional instructions to assist you in its completion.

While you may inevitably rely upon your own experience in evaluating each advocate's performance, the Board requests that you consider both substantive and stylistic criteria. Substantively, participants should demonstrate thorough knowledge of the facts in the record, relevant case law, and policy considerations. Participants should organize their arguments persuasively, emphasizing their strongest arguments and minimizing the impact of their opponent's counter-arguments. The advocate should be willing to concede minor points when appropriate without conceding anything crucial to the success of his or her case.

Stylistically, participants should speak clearly, make eye contact with the judges, avoid distracting gestures, and maintain a confident, affirmative posture. Importantly, each participant should remain courteous and deferential to the Court and respectful of opposing counsel. Participants should remain poised under intense questioning and be able to guide the Court's attention to their primary arguments without evading the questions asked.

Managing Time

Participants have fifteen (15) minutes to present their arguments. Petitioners may reserve any portion of their allotted time for rebuttal. The Court may allow additional time at its discretion, if it believes doing so is appropriate under the circumstances and consistent with maintaining a fair competition.

Critiquing Participants

As the primary purpose of the Hale Moot Court Honors Program is to develop the appellate advocacy skills of participants, judges are encouraged to critique students in chambers following each round of argument. However, please do not reveal the score or rank you have assigned participants.

APPENDIX F

HALE MOOT COURT ORAL ARGUMENT SCORING SHEET

2019-2020

ORAL ARGUMENT SCORING SHEET

Scores are based on the following:

KNOWLEDGE: Breadth of information regarding both the record of the instant case and the facts of other relevant cases as well as knowledge of the relevant legal doctrines.

ANALYSIS: Ability to persuasively relate relevant facts to legal issues.

ORGANIZATION: Being able to signpost when necessary, and transition from questions back into the substance of the argument.

RESPONSE TO QUESTIONS: Immediate and explicit answering of questions from the bench. Also consider the advocate's ability to create a smooth transition from responding to a question back to his/her argument.

DELIVERY: Verbal and non-verbal communication. Consider appropriateness of hand gestures, voice inflection, conversational tone, and general demeanor.

Law School Scoring System

92-100 These participants should definitely move on to advanced rounds.

87-91 These are good participants but are not clearly superior to their fellow advocates.

82-86 These participants are average and their appellate brief should tip the scale.

78-81 These scores are rare; only unprepared participants should receive such a score.

PLEASE ALSO RANK EACH OF THE FOUR PARTICIPANTS IN ORDER OF EXCELLENCE ("1" for best, "2" next best, etc.)

First Petitioner

Name:____________________________
Score:_____________
Rank:_____________
COMMENTS:

Second Petitioner

Name:___________________________
Score:_____________
Rank:_____________
COMMENTS:

First Respondent

Name:____________________________
Score:______________
Rank:______________
COMMENTS:

Second Respondent

Name:___________________________
Score:______________
Rank:______________
COMMENTS:

Judge's Signature_______________________________ Date:_______________________

Judge's Name (please print)_____________________________________