

**UNITED STATES OF AMERICA,
Petitioner**

v.

**LANA SMITH,
Respondent.**

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?

Parties

This case arises from Defendant-Respondent Lana Smith's motion to suppress evidence obtained during the execution of a search warrant at Smith's apartment, including: (1) evidence relating to her pre-arrest silence during her interactions with Officer Joshua Stillman; and (2) files found on a laptop's encrypted drive.

Statement of Facts

I. 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 Lily 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.

SA Avunjian began her investigation by contacting Gould Department of Child Protective Services (DCPS) Investigator Philip Lamborn. DCPS had received two calls regarding Lily Smith's welfare on September 12, 2017, and November 3, 2017. These calls were placed by a neighbor who suspected Smith was doing something illegal because men were "always" coming in and out of Smith's apartment at "odd hours."

During a November 4, 2017 site visit, Investigator Lamborn observed that the apartment was relatively clean and Lily looked healthy. He questioned Smith about the men visiting the apartment her at odd hours. Smith responded that she was single and often made home-cooked

dinners for dates, but she denied ever allowing inappropriate contact between her “dates” and Lily. During the visit, Investigator Lamborn noticed that Lily was unusually quiet, avoided eye contact, and kept drumming her fingers on everything around her. When he asked how she was feeling, she hesitated but denied that anything was wrong. He was suspicious because abused children often deny there are problems, say only a few words, and show signs of agitation. However, he did not believe that he had sufficient evidence of wrongdoing, so he flagged the file for a follow-up visit.

On January 25, 2018, SA Avunjian conducted surveillance of Smith. At 10:00 a.m., she observed Smith exit her apartment building and go to work at a small boutique. At lunchtime, Smith walked across the street to a coffee shop. SA Avunjian entered the coffee shop and sat about thirty feet away from Smith. SA Avunjian observed 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 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 warrant. During the search, both officers were armed but never drew their weapons. Upon entering the apartment, they ordered Smith to stay in the living room and sit on the couch while the warrant was being executed. Officer Stillman stood between Smith and the front door. At the suppression hearing, Officer Stillman and SA Avunjian both stated that the reasons they kept Smith in the living room were 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 yelling at him to leave. When she tried to stand up, Officer Stillman ordered her to sit down.

During the search, SA Avunjian found four sexually suggestive photos of Smith’s daughter and showed one (depicting the child naked in the bathtub) to Officer Stillman. Officer Stillman was upset and called Smith a “terrible mother.” Smith fell silent and 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. They had no further conversation.

SA Avunjian completed her search and informed Smith that she was under arrest for child pornography. Officer Stillman advised Smith of her Miranda rights. She responded that she understood her rights. He then handcuffed her.

II. Facts Relating to the Password and Computer Search

During her search of the apartment, SA Avunjian found an Acer laptop with a dark sticker in Smith’s bedroom. SA Avunjian identified the laptop as the one she saw Smith using at

a coffee shop. When she performed a brief manual search of the laptop, SA Avunjian noticed that it had two drives. The first appeared to contain only “system” files, and the second was an encrypted drive containing 500 gigabytes of storage, of which over 350 gigabytes had been used.

After Smith was arrested and given her Miranda rights, SA Avunjian noticed that Smith looked unwell, so she gave her a glass of water. SA Avunjian and Officer Stillman then escorted Smith to SA Avunjian’s vehicle. In the vehicle, SA Avunjian removed her handcuffs because she knew that Smith posed no risk to officer safety.

While SA Avunjian was driving to the detention center, she told Smith that the search warrant authorized her to search all computers found in Smith’s apartment, and for her to do that, she needed Smith to give her the password. Smith gave SA Avunjian the password, which was “Expl0!ted33567.”

SA Avunjian gave the laptop and password to an FBI forensics expert for a more thorough search of the encrypted drive. The expert found 1,237 pornographic images and fifty-two pornographic videos on the encrypted drive. Further, metadata contained within some of the pictures detailed the intended recipients. At a preliminary hearing, it was revealed that the laptop was actually purchased by a man named “Lars Fillmore.”