IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff

v.

KRISTEN SMITH,

Defendant.

REPORT AND RECOMMENDATION

14-cr-24-jdp

REPORT

On February 7, 2014, defendant Kristen Smith was charged in a criminal complaint with kidnaping infant KP on February 6, 2014, in violation of 18 U.S.C. § 1201(a)(1) (*see* dkt. 1), followed on February 19, 2014 with a one count grand jury indictment charging Smith with the same offense. *See* dkt. 3. Before the court is Smith's motion to suppress statements she made to law enforcement agents on February 6 and 7, 2014 while detained at the Cedar County Jail in Iowa. *See* dkt. 25, supplemented by dkt. 30. Smith alleges that the agents coerced her to make these statements and that they violated her request for counsel and her invocation of her right to remain silent. The government does not oppose one specified portion of the motion but opposes the rest.

For the reasons stated below, I am recommending that this court grant Smith's motion in part and deny it in part. The facts that I find below establish that Smith invoked her right to counsel under *Miranda* at about 1:30 a.m. on February 7, 2014 at the conclusion of the first day of interviews. Because Smith did not initiate her next contact with the questioning agents at about 9:30 a.m. on February 7, 2014, the questioning that followed violated Smith's rights notwithstanding her signing a *Miranda* waiver form. Other than this, there are no valid bases to suppress Smith's statements.

First, the state court's appointment of counsel for Smith during her initial appearance following her arrest on a Texas warrant did not carry over to her questioning about the kidnaping. Second, I have found that, contrary to Smith's contention, she did not invoke her right to counsel while being questioned by the FBI on February 6, 2014. Third, notwithstanding the circumstances attending Smith's interaction with the agents February 6-7, 2014, Smith was not coerced into making any statements or consenting to any searches. Therefore, the government may, if the trial gets to this point, use Smith's February 7, 2014 statements as rebuttal evidence if Smith were to take the stand at trial.

The court held an evidentiary hearing on May 15, 2014. Having heard and seen the witnesses testify, and having made credibility determinations, I find the following facts (which also draw from other documents in the court record, such as the complaint, dkt. 1):

Facts

BM gave birth to KP on February 1 or 2, 2014 (the court record is not clear) after which she, KP and KP's father returned to their home in Beloit, Wisconsin, which they shared with other members of BM's family. BM's half-sister, Kristen Smith, was visiting from Denver and staying at the residence. Smith planned to drive back to Colorado on February 6, 2014, leaving Beloit around 2:00 a.m. that morning. Smith left that morning without waking anyone.

At about 4:30 a.m. on February 6, 2014, BM awoke to discover that KP was missing. The family immediately called 911; Beloit police officers arrived at the residence shortly thereafter. At about 4:54 a.m. Smith called on her cell phone from the interstate to talk to BM's grandmother, who handed the telephone to BPD Officer Dykstra. Officer Dykstra told Smith that KP was missing; Smith reported that she did not have KP, although she had his clothing

which she was transporting in anticipation of BM and her boyfriend's imminent move to Denver. Officer Dykstra directed Smith to pull off the highway at the next exit and report where she was so that local law enforcement officers could meet her and talk to her. At this point, Smith had not been identified as a suspect.

At about 5:21, a.m., Smith called back to report that she was at the Kum & Go gas station off of I-80 Exit 254 in West Branch Iowa. This information was relayed to the West Branch Police Department, which dispatched Officer Alex Koch to the gas station. Officer Koch arrived at about 5:30 a.m.; Smith saw his marked squad car and flagged him down. The temperature was about -11°F, with the wind chill hovering around -20°F.[1] Officer Koch activated his dashboard camera (*see* Exh. 4), got out of his car and approached Smith, who handed him her cell phone; Officer Dykstra was on the line. Officer Dykstra told Officer Koch that Smith's sister's baby was missing and Dykstra wanted Koch to search Smith's car to make sure that Smith didn't have the baby.

Officer Koch asked Smith for permission to search her car; Smith gave it. Throughout her interaction with Officer Koch, Smith was cooperative and seemed concerned (apparently for KP's welfare). Smith's vehicle (a Dodge Durango) was so full of adult and infant clothing (much of it new and still tagged) that Smith assisted Officer Koch by moving stuff around so that he could search. In the Durango, Officer Koch saw a child seat but no formula or other food that would have been necessary for taking care of a child. At some point, Smith told Officer Koch that she was pregnant. Smith also told Officer Koch that she thought maybe BM's brother (KP's

[1] *See* "Hourly Weather History & Observations" at www.wunderground.com/history/airport/KIOW/2014/2/6/DailyHistory, accessed on June 15, 2014.

uncle) had taken KP, and she showed Officer Koch some Facebook comments the uncle had made that led her to suspect this.

Another WBPD officer arrived to assist. Per standard operating procedure, Officer Koch checked with his Dispatch Center to see if Smith was wanted on any active warrants. Dispatch reported that she was: Tarrant County, Texas had filed an active arrest warrant against Smith for tampering with government documents. Officer Koch called the Tarrant County Sheriff's Department to confirm that the warrant was active and that they really wanted Smith arrested on it. They did. Officer Koch and his colleague advised Smith that they were arresting her on the Texas warrant. Officer Koch was not arresting Smith on a kidnaping charge; as far as Officer Koch was concerned, she was not a suspect in KP's disappearance. Officer Koch cuffed Smith's hands in front of her body, which was department protocol for pregnant arrestees. Smith remained cooperative throughout this process. Officer Koch placed Smith in the back seat of his squad car and, per his standard practice, he read Smith her *Miranda* rights[2] off of a pre-printed card, even though he did not intend to question her.

Officer Koch drove Smith to the Cedar County Jail, which was about 20 minutes distant. Although Officer Koch did not question Smith, Smith questioned Koch, asking about the Texas warrant and how she could resolve it. They arrived at the jail at 6:52 a.m., and Smith was placed in a holding cell by herself.

Around 9:30 or 10:00 a.m., Smith was taken to the county courthouse for her initial appearance on the Texas detainer and request for extradition. The court appointed a public defender, Victoria Noel, to represent Smith for the extradition and set another hearing for

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

February 7, 2014 (the next day). *See* Exh. A to gov't brief in opp., dkt. 47-1. Smith was returned to the county jail, where she remained in the general population for about an hour.

Meanwhile, the FBI in Wisconsin had gotten involved in KP's disappearance. Madison agents contacted their colleagues in Moline, Illinois to request that a team drive to Iowa to interview Smith in the Cedar County Jail. FBI Special Agents James McMillan and Carlton Morgan made the trip and met with Smith at the Cedar County Jail. The FBI did not know whether Smith should be considered a suspect in KP's disappearance; Agent McMillan's instructions were to interview her to determine what she knew and what role she might have played.

The agents arrived at the jail at about 12:15 p.m. They met with Smith in a tall, windowless interview room about 8' x 8', furnished with a long table and three lightweight chairs. The room was equipped with an overhead video recorder that captured most of what the agents said but did *not* always capture Smith's words when she spoke softly or mumbled.[3] Smith was clothed in a jail jumpsuit with her hands cuffed in front of her. The agents introduced themselves as FBI agents, then Agent McMillan opened by asking Smith "why do you think we want to talk to you?" Agent McMillan then told Smith that they were there to talk about KP's disappearance. Agent McMillan did not provide Smith with a *Miranda* advisal because he had been told that she had been previously *Mirandized* by a West Branch police officer. This interview lasted about an hour and 48 minutes. Throughout this interview, Smith was alert,

[3] One might question the value of a recording system that doesn't completely record the interviewee's statements, but this is all we've got and it's better than no recording at all. *See* Exhs. 4-6, three discs admitted under dkt. 38. The recordings in the court file speak for themselves; to the extent that I have transcribed below words that I hear Smith saying *sotto voce*, technically these constitute findings of fact but they are not credibility determinations. Most of the facts in this report derive from testimony at the May 15, 2014 evidentiary hearing, and these facts *do* involve credibility determinations.

friendly and cooperative. Smith provided answers that were responsive to the questions posed. The agents did not make any promises or threats to Smith. The thrust of the interview was to obtain a time line from Smith of where she was and when, and also to get her view of the family's dynamics: who was staying where, who met who, and so forth.[4]

During this interview, the agents asked Smith if she would consent to another search of her vehicle and a search of the contents of her iPhone. Smith agreed. The agents presented Smith with the FBI's FD-26 consent form into which they had written a description of her vehicle and her cell phone. Smith signed the consent form, thereby acknowledging that she had been told that she had the right to refuse consent, and that her consent was voluntary. *See* dkt. 38-1. Toward the end of the first interview, Agent McMillan asked Smith if she would consent to taking a lie detector test and if she would pass it; Smith responded that she would be willing to take the test and that she would pass it.

The agents asked Smith for her iPhone's pass code. The code she provided did not work. Neither did the second code she gave them. The agents' attempts to unlock the phone with the wrong pass code caused the phone to impose lockouts of increasing length. The agents confronted Smith about this, expressing their frustration and asking Smith what was on the phone that she didn't want the agents to see? Smith responded:

Smith: Nothing. . . .

McMillan: [*Inaudible*]

Smith: [*inaudible*] like "No you can't look at my phone, no you can't look at my car, get a search warrant!"

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[4] The government has announced that it does not intend to this portion of Smith's interview in its case in chief at trial, explaining that it doesn't advance the government's case.

McMillan: Well, I think you know we could do that.

Smith: Exactly. . . .[*inaudible*] if I was being difficult then why wouldn't I be like, "I don't want to talk to you, I want an attorney"?

McMillan: Right.

In context, it is clear that Smith is *not* telling Agent McMillan that the agents cannot search her phone or her car, and she is *not* telling Agent McMillan that she doesn't want to talk to him and she is *not* telling Agent McMillan that she wants an attorney. It is just the opposite: Smith is explaining to Agent McMillan that she is not intentionally giving him the wrong pass code to her iPhone and she is corroborating this assertion by pointing out that she has not failed to consent to other searches and she has not invoked her right to remain silent or her right an attorney.[5]

Agent McMillan left the room and the agents called Apple's security section to see if there was a way to access Smith's iPhone in the absence of the password. Apple responded that Apple could not unlock Smith's phone remotely, but if she stored information in the cloud, they could access certain content. The agents returned to the interview room with Apple's security people still on the phone and asked Smith if she had an iCloud account. She responded that she did and gave the agents her email address associated with the account. Smith then asked to have her phone back; she worked it for a moment and was able to unlock it herself, having entered the correct code. The agents took Smith's unlocked iPhone with them to search its contents;

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[5] These facts *are* credibility determinations by the court because Smith testified at the May 15, 2014 evidentiary hearing that when she made these statements she *was* invoking her rights. However, it is clear from context, body language, demeanor and from Agent McMillan's hearing testimony that Smith was not invoking her rights at this time. Smith's testimony to the contrary was palpably incredible and I have rejected it.

Smith remained in the room alone. It was about 2:15 p.m. Jail staff brought Smith dinner at about 4:25 p.m.

At some point that afternoon, a polygraph examiner, Special Agent Derek Riessen from the Iowa Department of Criminal Investigation, arrived at the Cedar County Jail. Agent Riessen advised that he could not conduct his examination if Smith was pregnant. At about 5:00 p.m., Agent McMillan told Smith that she needed to take a pregnancy test to confirm what she had told Officer Koch. Smith responded that she was not pregnant and that she had not told Officer Koch that she was. Agent McMillan replied that they still had to check; he also advised Smith that the Cedar County Jail would be performing its own pregnancy test on Smith the next morning as part of its routine booking procedure for female detainees, so she might as well do it now. At first Smith acquiesced, then she changed her mind, complaining of being tired; ultimately, Smith agreed to be tested.

The polygraph examiner arrived and moved everyone out of the interview room while he rearranged the sparse furniture to accommodate his machinery. Agent Riessen brought Smith into the room; she sat next to the table on which he had placed his polygraph. After Agent Riessen set up his machine, he introduced himself and pulled out a polygraph examination consent form and began providing Smith with a synopsis of the form, stating that the form "talks about your rights. It also talks about that no one's forcing you to do this, that no one's making you do this . . ."

Smith interrupted by announcing "Yes they are."

Taken aback, Agent Riessen responded, "Well, I'm telling you no one's — *I'm* not, okay? So I'm going to read this to you, then I'll let you look it over for yourself, and then if you choose

to go forward, fine, we'll go from there, okay?" Agent Riessen then read aloud the polygraph examination consent form. Among other things, this form contained a complete *Miranda* advisal and waiver. Exh. 2, dkt. 38.[6]

After reading the form, Agent Riessen asked Smith if she had any questions for him; she asked "if you haven't slept, [*inaudible*]?" This dialogue ensued:

Riessen: If you haven't slept? When, when have you slept?

Smith: Yesterday.

Resin: Yesterday? Uhm, you know, if, if you–are you awake now, though? I mean, you're hanging in there? I mean, this is about a child, right?

Smith: Yeah.

Riessen: So, I mean–

Smith: It's about a child.

Riessen: Yeah, that's kind of where we're at, we're, you know, you need to . . . what direction are we goin'. . ? Um, you know, sometimes you just got to do the best you can, right? So, is it ideal? I don't know. I mean, sure, you know, I'd love to, if we all just woke up at nine a.m. at the place of our choice–-

Smith: [*inaudible*]

Riessen: —Right, So . . . I've had a long day too, you know, and we're here together, so, what I'm going to do is take this [*inaudible*] okay? I'm not here to trick anybody, I'm not here to throw any curve balls. . . .

[6] At the May 15, 2014 evidentiary hearing, Smith testified that she had told Agent McMillan that she did not want to take the polygraph examination while the two of them were waiting in the hallway for Agent Riessen to set up his machinery. On rebuttal, Agent McMillan categorically denied that any such conversation had occurred. I believe Agent McMillan and credit his testimony on this point. I do not believe Smith and reject her testimony on this point.

Agent Riessen provided additional assurances to Smith and promised her that he would demystify the process and answer any other questions she had. He then he gave Smith the consent form to review. Smith signed the consent form at 5:57 p.m. Agent Riessen engaged Smith in small talk and she visibly perked up. The two chatted about whether Smith had been fed (she had, but demonstrated that she had found it awkward to eat while handcuffed) and about the interview room's warm temperature. Smith was grateful for the heat: "I like it. I've been cold this whole time."[7]

At that point, Agent Riessen engaged Smith in what he characterizes as the "prepolygraph" or pretest interview, which involved about ninety minutes of questioning Smith about her background and giving her a chance to talk about what was happening in her own words. One purpose of this interview was so that Agent Riessen could assess Smith's mental and physical state before administering the actual polygraph examination. Agent Riessen found Smith to be very alert, very congenial, and that they had established a good rapport. Agent Riessen made no promises or threats to Smith in order to make her participate in the polygraph examination. After her initial statement that "they" were making her take the examination, Smith did not tell Agent Riessen that she did not wish to take the polygraph examination.

Agent Riessen then administered the examination; he concluded that Smith had been deceptive. Agent Riessen confronted Smith, telling her that she possessed information that she hadn't yet divulged and she needed to divulge it right now. Smith was unmoved: she denied any involvement in the kidnaping and denied knowing where KP was.

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[7] At this time, the temperature *outside* was about 1°F, with the windchill around -8°F.

Based on Agent Riessen's assessment, Agent McMillan and Agent Riessen resumed questioning Smith, dialing up the intensity to confrontational mode: now they viewed Smith as their subject and they were intent on learning the whereabouts of KP. Smith stuck to her story. The agents interrogated Smith until 1:30 a.m. on February 7, 2014, with time out for several breaks lasting 30 minutes or more while the agents reviewed Smith's Facebook page and similar activities. The agents had reviewed the contents of Smith's iPhone and found emails indicating that Smith was telling friends and family that she was pregnant and due to deliver very soon; in one email, Smith claimed to have given birth herself on February 5, 2014. The agents confronted Smith with the prosthetic pregnancy belly they found in her car. The agents reviewed call logs from Smith's service provider, compared them to the contents of Smith's phone and noted that some of the calls were gone from the phone. The agents accused Smith of deleting these calls from her phone prior to her contact with Officer Koch at the gas station; Smith riposted that the *FBI* must have deleted these calls, and she accused Agent McMillan of manipulating the evidence against her. Throughout the evening and into the next morning, Smith repeatedly and adamantly insisted that she did not know KP's whereabouts.

Finally, at about 1:30 a.m., Smith pretended to fall asleep and would not respond to the agents questions. The agents told her that they were going to terminate the interview and let her be taken to a cell to sleep. That was it, save for one last request by Agent McMillan: he re-entered the interview room to ask Smith's consent for the agents to review her Yahoo email account, to which she claimed to have forgotten her password. (Gov. Exh. 6 is a videorecording of this brief exchange). At this point, Smith appears groggy, her hands are under her shirt (probably for warmth), she does not make eye contact with Agent McMillan and she mumbles

her responses to his questions. (The agents contend that this was a ploy to end the questioning; it is not possible to adduce from the video whether they are correct). When Agent McMillan first asks her to sign the consent to search form, Smith shakes her head no, but cannot be heard to say anything. Agent McMillan asks "You're not willing to sign this?" Smith responds inaudibly; Agent McMillan asks "I'm sorry?" and leans in to catch her words. Smith says something else inaudible. This exchange follows:

McMillan: I'm sorry, I can't understand what you're saying.

Smith: Everything else I want an attorney to advise me.

McMillan: Okay, you want an attorney to advise you on *what*?

Smith: [*inaudible*] . . . sign anything.

McMillan: Okay, like the consent?

Smith: Yeah.

McMillan: Okay.

Agent McMillan interpreted this as Smith's request for an attorney's assistance in reviewing the consent form, so he dropped the subject. This was the end of Smith's interaction with law enforcement at that time. Smith had been in the jail interview room for about 13½ hours, from about noon on February 6, to 1:30 a.m. on February 7. She was fed two meals in the interview room, was allowed to nap there, and she was taken out of the room for restroom breaks as well as for the fifteen minutes or so that it took Agent Riessen to rearrange the room for his polygraph test. Jailers took Smith to a cell to sleep. The temperature outside at 1:30 a.m. was about -6°F and the windchill was -16.9°F.

Around eight hours later on the morning of February 7, 2014, at about 9:30 a.m., Agents McMillan and Riessen returned to the Cedar County Jail to renew their efforts to learn from Smith the location of KP, who had not yet been found. The agents met Smith in the same interview room. Agent McMillan conceded that things had gotten "a little heated" and confrontational the night before, but that was because everybody was concerned about finding KP. He suggested that they start over with no ill will so that KP could be found. Agent McMillan read aloud to Smith from a written *Miranda* advisal/waiver form and asked her to sign it. Smith reviewed the form and asked a number of questions about it; Agent McMillan answered Smith's questions as best he could and tried to assure Smith that they were not trying to trick her, that Smith would not forfeiting her rights by signing the form and that Smith still could invoke her rights at any time. The agents made no promises or threats to Smith. Smith eventually signed the waiver at 9:36 a.m., *see* dkt. 38, Exh. 3, and the agents resumed their questioning.

Meanwhile, law enforcement officers in Wisconsin and Iowa continued to search for KP. West Branch Police Chief Mike Horihan returned to the vicinity of the Kum & Go station off of I-80; behind the BP station up the road, he spotted a plastic tote bin amidst a stack of recycling bins; inside the plastic tote, Chief Horihan found KP, alive and uninjured. It was 10:06 a.m. This news was transmitted to the jail and a deputy sheriff interrupted the FBI interview of Smith to update Agent McMillan. Agent McMillan told Smith that KP had been found alive. Smith then admitted that she had taken KP from BM's house and had placed him behind the BP gas station in West Branch, drawing a map of where she had left him. Smith eventually asked for an attorney, at which point the agents terminated the interview.

On June 3, 2014, the government notified Smith's attorney that its fingerprint expert would be testifying at trial that Smith's fingerprints were located on the tote in which KP was found behind the BP gas station. *See* dkt. 46.

ANALYSIS

In her opening brief in support of her motion to suppress post-arrest statements at the jail (dkt. 45), Smith provides her characterization of the what occurred, then argues that: (1) the FBI agents did not *Mirandize* her before questioning her; (2) after she received a *Miranda* advisal from Agent Riessen, she twice unambiguously asserted her Fifth Amendment right to counsel, neither of which was honored; and (3) her statements were coerced, at the latest from the time she unwillingly submitted to Agent Riessen's polygraph examination.[8]

In response to Smith's first argument, the government has announced that it will not seek to introduce any statements made by Smith to Agents McMillan or Morgan from the beginning of their interview through Agent Riessen's *Miranda* advisal. *See* government's Preliminary Response, dkt. 34, at 2. As a result, this issue is moot for *Miranda* purposes.[9]

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[8] Smith does not contend that the state court's appointment of an attorney to represent Smith on the Texas warrant is relevant to her *Miranda* claims, nor could she. "The Sixth Amendment right to counsel is offense specific." *United States v. Krueger*, 415 F.3d 766, 775 (7th Cir. 2005). The state proceeding on the Texas warrant was factually and legally unrelated to the federal missing child investigation so that no Sixth Amendment right to counsel would have attached to Smith for this questioning. *Id.* Of course, Smith could *invoke* her right to counsel at any time, but that is a *Miranda* issue that is analytically separate.

[9] As a side note, although the parties do not raise this issue, *Miranda* does not govern requests for consent to search because a statement granting consent to search is neither testimonial nor communicative in the Fifth Amendment sense. *United States v. Bustamante*, 493 F.3d 879, 892 (7th Cir. 2007), quoting LaFave, Israel & King, Criminal Procedure § 3.10(b) (2nd ed. 2007). This means that any consents to search that the agents obtained during an interrogation that this court finds to have occurred in violation of *Miranda* are not subject to suppression on that basis, although the court still must determine if the consents were coerced. (More on that below.)

In response to Smith's second argument, the government argues that Smith did not actually invoke her right to counsel during her conversation with Agent McMillan about the contents of her iPhone, and that her invocation of her right to counsel at the end of the evening was limited to seeking a lawyer's assistance parsing the Yahoo consent-to-search form. In response to Smith's third argument, the government argues that Smith's claims of coercion are baseless.

Moving to Smith's *Miranda* claim, although block quotes are tedious to read, the Court of Appeals for the Seventh Circuit has set forth most of the law applicable to this dispute in one passage from a 2011 opinion:

> Law enforcement officers are free to question a suspect who waives his right to counsel after receiving *Miranda* warnings. But a suspect may still invoke his right to counsel after an initial waiver if he does so unambiguously. "An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485-85 (1981). The *Edwards* rule is non-offense specific and prohibits police from interrogating a suspect regarding *any* offense after the suspect invokes his *Miranda* rights. Whether a suspect invokes his right to counsel is an objective inquiry which requires "at a minimum, some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney." *Davis [v. United States*, 512 U.S. 452, 459 1994]. . . . The *Edwards* rule serves as an absolute prohibition on further interrogation only if an accused invokes his right to counsel for all purposes. *See Connecticut v. Barrett*, 479 U.S. 523, 529-30 (1987); *accord, United States v. Spruill*, 296 F.3d 580, 588 (7th Cir. 2002)(suspect's request for an attorney if he took a polygraph exam was a "conditional request."
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> *United States v. Martin*, 664 F.3d 684, 687-88 (7th Cir. 2011).

Equally applicable here are Judge Wood's observations in her dissent from the majority's conclusion that the defendant's statement "I'd rather talk to an attorney first before I do that" is unambiguous and sets clear limitations. As Judge (now Chief Judge) Wood notes, the majority's conclusion loses sight of what the defendant said–and what he did not say. *Martin*, 664 F.3d at 692 (Wood, J., dissenting). The majority's conclusion reverses the presumption reflected in *Barrett* under which a partial waiver of rights exists only if the accused affirmatively spells out what he will discuss and what he will not. "It is the government's burden to prove [defendant] waived his right to counsel. *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2401 (2011). This is important for two reasons. First, it means that ties go to [defendant], not to the prosecution. . . . " *Id.*

Against this gloss of the applicable law, the determination of Smith's *Miranda* claims depends primarily on discerning what Smith actually said, which in turn depends on trying to tease her words out of an unclear recording, interpreting her body language and demeanor in the recording, and making credibility determinations at the May 15, 2014 evidentiary hearing.

Starting with the last point, I have found Smith's testimony in support of her suppression motion to be self-serving and untruthful, I have found Agent McMillan's testimony to be self-serving but truthful (although occasionally mistaken) and I have found Agent Riessen's testimony (as well as Officer Koch's) to be truthful and fairly neutral. These findings are important to my resolution of the factual dispute over how to interpret the partially inaudible exchange between Smith and Agent McMillan when they are trying to open her iPhone. Although I cannot conclude with certainty exactly what words Smith used, her meaning is sufficiently clear to allow me to conclude that Smith is *not* invoking her right to an attorney in

any fashion. Smith's testimony to the contrary at the evidentiary hearing was false. Agent McMillan's testimony was true, and it is corroborated by what can be discerned by watching and listening to the recording. As the government contends, Smith is offering examples *of what she is not doing* in an attempt to allay Agent McMillan's concerns that she is hiding the contents of her iPhone. Smith's diametric gloss at the evidentiary hearing is simply audacious revisionism. The bottom line is that Smith did not invoke her right to an attorney at this time. Therefore, the agents were not required to stop questioning her, which means that this is not a basis to suppress her statements.

Jumping to Smith's second claim that she invoked her right to counsel, this claim has more traction. As with Smith's first claim, the court is left to discern Smith's intent at the time from the parties' conflicting proposals of what Smith actually said and how the court should interpret it. During this exchange, Smith is speaking so softly and so unclearly that no one can discern exactly what she said. As shown on the recording, Agent McMillan cannot understand Smith even though he is sitting within two feet of her and interacting with her live. Although I acknowledge that the recording is unclear, I have found as a fact that Smith said "Everything else I want an attorney to advise me." That is an unequivocal, unconditional request for the assistance of counsel. That, essentially, is the end of the analysis, and it leads to suppression of all custodial statements that Smith made thereafter (since she is not the one who reinitiated contact with the agents the next morning).

To be fair, I also conclude that Agent McMillan genuinely could not hear what Smith said at the time, and unlike the court and the attorneys, he did not have the benefit of endless replays and foreknowledge of what to listen for, and it was the end of a very stressful and

exhausting day for him as well as Smith. Agent McMillan, in good faith, asked Smith to clarify; Smith does say *something* about "sign anything," which would be responsive to the Yahoo consent-to-search form that Agent McMillan had presented. So Agent McMillan asked: "Okay, like the consent?" Smith responds "Yeah." I accept as true Agent McMillan's testimony that he interpreted this as Smith limiting her request for counsel, but I conclude that Agent McMillan's interpretation was incorrect. This exchange does not equate to a clear limitation articulated by Smith, it is only her agreement with an example offered by Agent McMillan; it certainly does not suffice to support a finding by the court that the expression of one is the exclusion of others.

To employ a litotes, it's not impossible that Smith really intended to limit her request for an attorney to contract interpretation; but then to invoke Occam's Razor, in this situation, the simplest answer appears to be the most correct: Smith now wanted the assistance of an attorney on everything, including but not limited to the consent form. To the extent that we simply cannot be sure what Smith meant at the time (and I do not find her hearing testimony helpful in this regard), as Chief Judge Wood noted in *Martin*, it is the government's burden to prove that Smith waived her right to counsel, and ties go to Smith, not to the prosecution. Finally, it is irrelevant whether at that time Smith was pretending to be cold and tired or really was cold and tired, the right to counsel was hers to invoke in either case, and I have found that she invoked it. As a result, I am recommending that the court grant Smith's motion to suppress the custodial statements she made after about 1:30 a.m. on February 7, 2014.

This however, is not the end of the story: Smith contends that all of her statements and consents to search were coerced, which requires the court to examine both the statements she made before 1:30 a.m. on February 7, 2014 *and* to review the statements I have recommended

the court suppress on *Miranda* grounds. The latter analysis is necessary because statements suppressed for a *Miranda* violation that nonetheless were voluntary might still be admissible for impeachment purposes in the event that Smith testifies at trial. *Harris v. New York*, 401 U.S. 222, 224 (1971); *United States v. Handlin*, 366 F.3d 584, 592 (7th Cir. 2004). A coerced statement, however, cannot be used for any purpose.

It is the government's burden to establish that Smith's *Miranda* waiver was voluntary, knowing and intelligent. *United States v. Johnson*, 680 F.3d 966, 974 (7th Cir. 2012). A waiver is voluntary if it was not coerced; it is knowing and intelligent if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Coleman v. Hardy*, 690 F.3d 811, 815 (7th Cir. 2012). A confession is voluntary and admissible if, in the totality of circumstances, it is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation or deceptive interrogation tactics that overcome the defendant's free will. *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012). The same test is used to determine the voluntariness of a consent to search. *United States v. Swanson*, 635 F.3d 995, 1003 (7th Cir. 2011). Factors relevant to a determination of voluntariness include the suspect's age, education, background, intelligence, experience, the length of questioning, the use of repeated requests and any physical coercion. *United State v. Brown*, 664 F.3d 1115, 1118 (7th Cir. 2011).

As a starting point, Smith was old enough, smart enough, articulate enough and sufficiently experienced with the criminal justice system to hold her own in any ordinary Q&A session with a pair of FBI agents. Cutting to the chase, Smith's repeated, vigorous–and false–denials of any knowledge of or involvement in KP's disappearance, coupled with her monstrous indifference to a four-day old baby's safety after essentially abandoning him to die

alone in the bitter cold, demonstrated that throughout every minute of this entire process, Smith would not be–could not be–coerced or intimidated by the agents. The facts found above establish that, after Smith's polygraph examination results revealed deception, the agents leaned on Smith and they leaned on her hard. Undoubtedly they felt morally, as well as legally obliged to find the baby. If KP had been found dead behind that gas station, then the agents likely would have spent sleepless nights wondering why they had not pressed Smith harder. But nothing they did crossed the line, and Smith was absolutely impervious to their efforts.

The only evidence that arguably shows that Smith felt cowed by the agents was when she told Agent Riessen that "they" (the FBI agents) were "making" her take the polygraph exam. Smith *said* this, but it was untrue. I have rejected Smith's testimony at the evidentiary hearing that she told Agent McMillan in the jail hallway that she did not want to take the test, and I have accepted his testimony that Smith never told him this. Further, as the facts found above establish, Agent Riessen did not actually administer the polygraph examination until he had chatted with Smith at length and determined, to his own satisfaction, that she was comfortable with the process and was proceeding of her own free will. The recording in the record shows Smith amicably chit-chatting with Agent Riessen about having been fed and appreciating the warmth of the small interview room.

In sum, Smith's statements and consents were voluntary at every point. Smith was not broken or dispirited at any time in the Cedar County Jail. Rather, Smith was a savvy manipulator who constantly assessed and reassessed her environment for threats, then countered them with manufactured charm, feigned victimization or exaggerated indicators of tiredness. What finally got Smith to admit what she had done to KP on the morning of her second day of

questioning? Not the interrogation techniques of the agents, but rather, the discovery of the baby that morning. At that juncture, what would be the point of continued denial?

Given the almost self-proving nature of the kidnaping charge that Smith is contesting, one might ask what is the point of either side contesting the admissibility of the evidence derived from Smith's interaction with agents while jailed in Cedar County, but Smith has a right to insist that the evidence to be used against her be constitutionally sound. As noted above, I have found a *Miranda* violation (based on a defensible misinterpretation of Smith's statement) that augurs exclusion of Smith's actual confession from the government's case in chief, but the evidence otherwise passes muster in every category. I am recommending that the court deny Smith's motion to suppress evidence on her claim of government coercion.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court:

(1) GRANT defendant Kristen Smith's motion to suppress custodial statements she made after 1:30 a.m. on February 7, 2014, on the basis of a *Miranda* violation;

(2) DENY Smith's motion to suppress any other statements on her claim of a *Miranda* violation; and

(3) DENY in all respects Smith's motion to suppress her statements and consents to search on her claim of coercion.

Entered this 20th day of June, 2014.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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Post Office Box 591
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June 20, 2014

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Re: United States v. Kristen Smith
Case No. 14-cr-24-jdp

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 7, 2014, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 7, 2014, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;
(2) judgment on the pleadings;
(3) summary judgment;
(4) to dismiss or quash an indictment or information;
(5) to suppress evidence in a criminal case;
(6) to dismiss or to permit maintenance of a class action;
(7) to dismiss for failure to state a claim upon which relief can be granted;
(8) to dismiss actions involuntarily; and
(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**