



Villanova University  
Charles Widger School of Law

*presents the*

**FINAL ARGUMENT**

*of the*

**63<sup>RD</sup> ANNUAL  
HONORABLE THEODORE L.  
REIMEL '24 CLAS  
MOOT COURT COMPETITION**

Thursday, November 17, 2022

5:00 p.m.

The Martin G. McGuinn '67 Ceremonial Courtroom

## **THE HONORABLE THEODORE L. REIMEL '24 CLAS MOOT COURT COMPETITION**

The Reimel Competition is an intra-school tournament dedicated to the late Theodore L. Reimel '24 CLAS, judge for the Pennsylvania Court of Common Pleas from 1953 to 1973. The competition is designed to foster student development in written and oral advocacy through simulated appellate argument.

Judge Theodore L. Reimel graduated from Villanova University in 1924 and then from Temple Law in 1928. Judge Reimel served for 10 years as an assistant district attorney in Philadelphia. Afterward, he practiced for 15 years before becoming a professor at Temple Law, where he published many articles and books on criminal law. In 1953, Judge Reimel ascended to the bench of the Court of Common Pleas of Philadelphia, where he served until his passing in 1973.

In the early years of Villanova Law, former Dean Reuschlein brought the competition to the attention of Judge Reimel, who subsequently played an integral role in the competition's success. Judge Reimel personally funded the awards for the participants and generously assisted with the competition. The Reimel Competition has since become a Villanova Law tradition.

## **THE JOHN J. DUFFY, ESQ. '62 ADVOCACY CUP**

The Moot Court Board would like to extend a heartfelt thank you to Seamus Duffy '84 whose generous gift has created the John J. Duffy, Esq. '62 Endowed Fund for Moot Court. His gift supports students and faculty competing in external advocacy competitions through the Moot Court program.

## **THE LEGACY OF JOHN J. DUFFY, ESQ. '62**

John J. Duffy, a member of the Villanova Law Class of 1962, is a widely recognized and accomplished criminal trial lawyer in Pennsylvania. His experience runs the gamut of state and federal criminal prosecutions, including capital homicide cases, public corruption cases and complex drug and white-collar conspiracy cases.

Mr. Duffy has also been recognized for his philanthropic work, in particular for three decades of service with The Caron Foundation and his efforts to establish and provide leadership for Lawyers Concerned for Lawyers, an assistance program that offers confidential help to distressed and impaired lawyers, judges, law students and their family members to regain their good health and professional competency.

While a student at Villanova Law, Mr. Duffy competed for the winning team of the Second Annual Theodore L. Reimel Moot Court Competition. He was also selected "best oralist" by the members of the final argument bench. Now, more than 50 years later, his legacy lives on in the outstanding teams and individuals who compete in this prestigious and highly competitive annual rite of passage for Villanova Law students.

## THE FINAL BENCH

THE HONORABLE STEPHANOS BIBAS  
*United States Circuit Judge for the U.S. Court of Appeals  
for the Third Circuit*

THE HONORABLE SCOTT W. REID  
*United States Magistrate Judge for the Eastern District of  
Pennsylvania*

THE HONORABLE DAVID R. STRAS  
*United States Circuit Judge for the U.S. Court of Appeals  
for the Eighth Circuit*

## THE SEMIFINAL BENCH

THE HONORABLE ELIZABETH T. HEY '89  
*United States Magistrate Judge for the Eastern District of  
Pennsylvania*

THE HONORABLE KAREN S. MARSTON  
*United States District Court Judge for the Eastern District  
of Pennsylvania*

THE HONORABLE SHELDON K. RENNIE '97  
*Judge for the Superior Court of Delaware*

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## FACTUAL BACKGROUND

On May 24, 2021, defendant Nathaniel Malone was arrested on a complaint charging him under 18 U.S.C. §§ 371, 2332a, and 1113 for plotting a mass shooting and bombing at the Benjamin E. Garrison Federal Building in Wellspring, VA, where he had been employed for eighteen years as an administrative assistant in the tax collector's office. The government alleges that Malone had planned to commit an act of domestic terrorism on the day of his arrest, an aggravating factor that carries an enhanced sentence. The FBI alleges that Malone is a member of an extremist survivalist group called "The Pledge." The Pledge believes that stockpiling ammunition and other weaponry is necessary to protect against social unrest. The government started monitoring The Pledge for domestic terrorism in February 2021 because the group had propagated increasingly radical anti-government and conspiracy-oriented rhetoric on social media during the COVID-19 pandemic. Through its surveillance of The Pledge's message board, the FBI learned that Malone's anger about COVID-19 restrictions drove him to plot the attack at the federal building.

Early in the morning on May 24, 2021, the FBI obtained and executed an arrest warrant at the Defendant's home where they discovered that he had amassed a large stockpile of legally purchased weapons, ammunition, bomb-making material and paramilitary gear. They also seized a single HP 700 desktop computer and an Apple iPhone 12. After being Mirandized, Malone informed the agents that he lived alone and that he was the sole owner and user of the computer and iPhone that were seized. The government sought and received additional search warrants for the electronic devices seized, but agents were unable to search the devices because encryption technology made them inaccessible without the owner/subscriber's password and the phone's biometric features had not been activated. Malone refused to provide the password to the agents, telling them, "No way am I giving that to you. I'll go to hell before I help the government with its case against me or rat out my preppers in arms."

He declined to answer additional questions without a lawyer.

The Wellspring County Regional Computer Forensics Laboratory was able to employ equipment that allowed the agents to search the Defendant's computer but they could not decrypt the iPhone. Through the search of the computer, the agents discovered that Malone had become radicalized during the year before the attack and that "he consumed poison on the internet." Specifically, he watched extremist propaganda and videos of other ideologically motivated mass murders on an almost daily basis from March 2020 until he was arrested on May 24, 2021.

Additionally, on at least 20 separate occasions posts associated with Malone advocated for a violent overthrow of the government on The Pledge's message board, the social media website MeFirst and on the chat application Strife. For example, on February 10, 2021, a post associated with Malone on MeFirst stated, "I pledge allegiance to THE PLEDGE and join all preppers who will anact [sic] anarchy." On April 20, 2021, Malone posted a video of himself on MeFirst in paramilitary gear and holding an AK-47 with the caption "5/24/21. The day of reckoning [sic] is near. Preppers Stand By." On May 22, 2021, a post associated with Malone on The Pledge's message board stated: "Almost ready for Phase 1. 5/24/21 is the day. Ill [sic] text u [sic] about our next steps. Stay vigilant." Three anonymous users replied to this message with a "thumbs up" emoji. At 11:47 p.m. on May 23, 2021, a post associated with Malone on Strife stated: "Hey BZ - when I give the signal you know what you need to do. Lemme [sic] know your [sic] ready." Four minutes later an anonymous user replied, "Yup. Ready. You know how to reach me." This was the last communication sent from the computer and the FBI has been unable to trace the identities of the individuals that Malone communicated with in the days leading up to his arrest May 24, 2021.

## PROCEDURAL BACKGROUND

The District Court granted the government's motion to compel disclosure of the password and ordered Malone to supply the government with any and all passwords used to access his iPhone. In its opinion, the court rejected Malone's claim that compelled disclosure of his password would violate his privilege against self-incrimination. However, the United States Court of Appeals for the Fourth Circuit reversed the District Court's order compelling Malone to produce the password. The Fourth Circuit held that the compelled disclosure of appellant's password is testimonial in nature, and therefore privileged under the Fifth Amendment to the United States Constitution. Furthermore, the court explained that until the United States Supreme Court holds otherwise, it would construe the foregone conclusion rationale to be one of limited application and inapplicable to compel the disclosure of a defendant's password to assist the government in gaining access to a smartphone. On August 24, 2022, the Supreme Court granted the United States' petition for writ of certiorari.

## ISSUES PRESENTED

- I. Does the foregone conclusion exception to the Fifth Amendment privilege against self-incrimination apply to the compelled production of the password to an encrypted iPhone?
- II. If the foregone conclusion exception applies, what is the government's burden of proof to support the exception, i.e., must the government demonstrate knowledge relating solely to the password sought or must it also demonstrate knowledge of the contents of the encrypted device?



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## ACKNOWLEDGMENTS

The Moot Court Board gratefully acknowledges the Law School faculty and staff who have supported the Board in administering the 2022 Reimel Competition. The Board would especially like to thank the attorneys who served as judges during the preliminary round and the round of twelve, the faculty members who judged the quarterfinal round, and the esteemed benches of the semifinal and final rounds. The Reimel Competition continues to be a success due to the generosity of these individuals who donate their time—we appreciate your contribution to this valued Villanova Law tradition.

We express our sincere thanks and appreciation to our Moot Court Board Advisor, Professor Jessica Webb. Professor Webb should be congratulated for her dedication to writing this year's Reimel problem, and for the level of preparation her appellate advocacy students displayed throughout the competition. Her invaluable expertise, unending patience and mentorship is shaping us to be better future litigators. We are grateful for her impact on our law school careers.

We would also like to thank our Reimel Administrators, Riley Cook and Madelyn Phinney. Riley and Madelyn brought a vision of flawless execution to this year's Reimel Competition—there was not one piece of this competition that they did not successfully strategize and execute. Their positive attitudes and purpose of making this competition the best experience for all participants made them an outstanding team. Thank you.

The Board is grateful to those who assisted with planning this event, including Dean Mark Alexander, Associate Dean Bo Connell, Mandy Goins, Kim Madden, Joe Mariani, Nicole Garafano, Samantha Pilhuj, Priscilla Holmes, Victoria Durand, Diane Mozino, Brian Sirak, Michael Hayden and Michael Gallo.

