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State v. Forbes Appellant's Brief Dckt. 46606

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	**NO. 46606-2018**
	KOOTENAI COUNTY NO. CR-2017-23540
v.	
RYAN ALAN FORBES,	**APPELLANT'S BRIEF**
Defendant-Appellant.	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE LANSING L. HAYNES
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Ryan Alan Forbes asserts the district court erred when it denied his motion to suppress, because he made incriminating statements to a polygraph examiner and a police officer in a "classic penalty" situation, in violation of his Fifth Amendment privilege against compelled self-incrimination. Mr. Forbes also asserts the district court abused its discretion when it denied his motion to dismiss the indictment against him, because the prosecutor committed misconduct so egregious as to require dismissal by presenting illegal evidence to the grand jury.

Statement of the Facts and Course of Proceedings

According to the district court's findings of fact on the motion to suppress, one evening Mr. Forbes and Cathryn Mason were at the home of Mr. Forbes' parents, where Mr. Forbes lived. (*See* R., p.620.) Post Falls Police Department Officers Flood and Browne, along with emergency medical personnel, arrived at the home in response to a request for emergency assistance for Ms. Mason. (R., p.620.) She was unconscious and unresponsive. (R., p.620.)

Mr. Forbes had been performing CPR on Ms. Mason, but the emergency responders took over. (R., pp.620-21.) Per the district court's findings of fact regarding the motion to dismiss the indictment, Officer Flood testified he saw Mr. Forbes performing chest compressions on an unconscious Ms. Mason, and Mr. Forbes stated he had engaged in rescue breathing on her before the officer's arrival. (*See* R., p.635.) Officer Flood testified he took over the chest compressions before the medical personnel took over, and once the medical personnel arrived, Mr. Forbes did not seem very interested in what was happening. (R., pp.636-37.)

The officers searched Mr. Forbes' room after he consented, finding a baggie of methamphetamine and medical supplies. (R., p.621.) He told the officers that Ms. Mason had arrived in his room intoxicated, had fallen asleep, and could not be awakened. (R., p.621.)

The next day, Mr. Forbes was arrested for the methamphetamine found in his room. (R., p.621.) Post Falls Police Detective McDonald asked him if he would take a polygraph examination, and Mr. Forbes said yes, if requested. (R., p.621.) The State later charged him with possession of methamphetamine in Kootenai County CR 2014-9159. (R., p.621.)

Ms. Mason died the day after Mr. Forbes' arrest, from what was determined to be a heroin overdose. (R., p.621.) John Howard, M.D., a forensic pathologist, performed an autopsy on Ms. Mason a few days later. (R., p.637.)

Detective McDonald testified at an evidentiary hearing that he had accessed Ms. Mason's cell phone and saw indications that she had used heroin before she met Mr. Forbes. (R., p.635.) Post Falls Detective Goodwin testified that he had searched Ms. Mason's car, and found syringes and a baggie of heroin. (R., p.635.) He also found drug paraphernalia in the room where Ms. Mason had been staying at her grandmother's house, and the grandmother believed she had seen certain physical changes in Ms. Mason in the few months before her death. (R., p.635.)

Mr. Forbes was charged in a separate Benewah County case with stealing the medical supplies found in his room. (R., p.621.) The possession of methamphetamine charge was dismissed, but the State subsequently refiled the charge in Kootenai County CR 2014-13139. (R., p.621.) The State also charged Mr. Forbes with two counts of burglary, relating to items Mr. Forbes had pawned, in Kootenai County No. CR 2014-21999. (R., p.621.)

Mr. Forbes ultimately pleaded guilty to possession of methamphetamine and one count of burglary. (R., p.621.) At Mr. Forbes' sentencing hearing, Ms. Mason's mother, Cynthia

Carmack, testified about Ms. Mason's death. (R., p.621.) The district court imposed a prison sentence and retained jurisdiction. (R., p.621.)

Several months later, Post Falls Police Detective Dave Beck called Mr. Forbes while he was on his "rider," and asked if Mr. Forbes would speak with him about Ms. Mason's death. (R., p.622.) Mr. Forbes stated he would not do so without his lawyer. (R., p.622.) The district court subsequently placed Mr. Forbes on probation. (R., p.622.)

About five months into Mr. Forbes' probation, the State filed a report of probation violation against him. (*See* R., p.622.) Mr. Forbes admitted the violation and was released from jail, on the condition that he attend the Good Samaritan Rehabilitation program. (R., p.622.) The district court delayed the probation violation disposition, "presumably to see how he performed in the" program. (R., p.622.)

Meanwhile, Post Falls Police investigators took steps to have Mr. Forbes undergo a polygraph examination regarding Ms. Mason's death. (R., p.622.) Detective McDonald emailed Mr. Forbes' probation officer, Clinton Blettner, asking about arranging a polygraph examination. (R., p.622.) Detective McDonald then advised Officer Blettner a polygraph was scheduled at the office of Ted Pulver. (R., p.622.) Officer Blettner responded that someone from the Good Samaritan program would take Mr. Forbes to the appointment. (R., p.622.) Detective McDonald went through Mr. Forbes' probation officer "on the belief that a condition of Defendant's probation was cooperation with law enforcement." (R., p.622.)

Officer Blettner later sent a message to Detective McDonald stating that he had earlier, at a church service, told Mr. Forbes about the polygraph appointment, and Mr. Forbes "had asked if he had to do it." (R., p.622.) The district court found, "Blettner said he told Defendant if he told Defendant to take a polygraph examination that Defendant would have to do so since he was on

felony probation and a condition of that probation included taking polygraph examinations." (R., pp.622-23.) A condition of Mr. Forbes' probation was that he "submit to a polygraph examination at the request of his probation officer." (R., p.623.) Officer Blettner told Detective McDonald that Mr. Forbes did not seem eager to take the polygraph. (R., p.623.)

Officer Blettner's notes indicated that he "instructed" Mr. Forbes to take the polygraph, but the officer later testified that he really meant "informed." (R., p.623.) Officer Blettner testified before a grand jury that he told Mr. Forbes to take the polygraph, but did not tell him it was mandatory. (R., p.623.) According to the officer, he did not order Mr. Forbes to take the polygraph, but told him it was going to happen. (R., p.623.) The district court found that Officer Blettner "has also said he never threatened Defendant with a polygraph violation should Defendant refuse to take the polygraph, and that it was never his intention to seek to have Defendant's probation violated with respect to any polygraph refusal." (R., p.623.)

Steven Hemming, a facilitator with the Good Samaritan program, drove Mr. Forbes to the polygraph appointment at Mr. Pulver's office. (R., p.623.) Mr. Hemming believed Mr. Forbes' probation officer had ordered Mr. Forbes to take the polygraph examination, and told Mr. Forbes of his belief. (R., p.623.) He encouraged Mr. Forbes to be honest. (R., p.623.) Mr. Forbes did not want to take the polygraph, but Mr. Hemming advised him this was an opportunity from God for him to release himself from the burden of Ms. Mason's death. (R., p.623.)

The district court found: "Polygrapher Ted Pulver has testified he conducted a pre-test interview with Defendant during which Defendant allegedly made incriminating statements about Mason's death. Pulver advised Sgt. Beck of those statements." (R., p.623.) Detective Beck then spoke with Mr. Forbes over the phone, and arranged to pick him up from Mr. Pulver's

office for a further interview at the Post Falls Police Department. (R., pp.623-24.) Mr. Pulver testified that Mr. Forbes agreed to speak with Detective Beck. (R., p.624.)

Detective Beck testified that during the drive to the police station, Mr. Forbes was not under arrest, and the detective made no promises or threats to him. (R., p.624.) At the station, Mr. Forbes signed a *Miranda* rights acknowledgement and waiver form. (R., p.624.) The district court found, "Beck has stated that during the interview Defendant had admitted to injecting Mason with heroin, and when Mason became unconscious he used the same syringe to inject Narcan in an effort to revive her." (R., p.624.) Mr. Forbes asked Detective Beck if the interview had been done to prosecute him, and the detective stated it was done to try to get some answers for Ms. Mason's mother. (R., p.624.)

After the interview, Mr. Forbes left the police station with Mr. Hemming. (R., p.624.) Mr. Hemming stated that, when he picked up Mr. Forbes, Mr. Forbes seemed happy and upbeat or light hearted. (R., p.624.) Mr. Forbes told Mr. Hemming he had been honest with the police, he had talked about Ms. Mason's overdose, the heroin was hers and not his, and he had helped her to administer it. (R., p.624.) At a grand jury, Mr. Hemming testified that Mr. Forbes had admitted to administering the heroin to Ms. Mason. (R., p.624.)

Ms. Carmack, now going by the last name Schaffner, stated that she met Mr. Forbes at their church a couple years after Ms. Mason's death. (R., p.624.) After the appointment with Mr. Pulver, Ms. Carmack asked Mr. Forbes to sit with her at church. (*See* R., pp.624-25.) The district court found, "Carmack has denied being an agent of the police, or having been asked by the police to gather information from Defendant." (R., p.625.) Ms. Carmack knew about the plans for the polygraph, but told Mr. Forbes she had not been talking with the police. (R., p.625.) However, the district court found "she had several discussions with the police about

the statute of the investigation, and had told the police about having met Defendant at church and one time outside the courthouse in Coeur d'Alene." (R., p.625.)

Mr. Forbes told Ms. Carmack he had told the polygrapher and police that he had given Ms. Mason the drugs that led to her death. (R., p.625.) He explained he had injected Ms. Mason with heroin and tried to revive her with Narcan. (R., p.625.) They also talked about forgiveness, accountability, and Mr. Forbes' recovery program with Good Samaritan. (R., p.625.) The district court subsequently formally reinstated Mr. Forbes' probation, because of his good performance in his rehabilitation program. (R., p.625.)

About a year later, a Kootenai County grand jury returned an Indictment charging Mr. Forbes with second degree murder and delivery of a controlled substance. (Conf. Exs., pp.1-2; *see* R., p.625.) Ms. Carmack testified before the grand jury, and the district court found that, by that time, she had learned that Ms. Mason had been involved in illegal drug use. (R., p.635.) She testified that, at the time of Ms. Mason's death, she knew nothing about Ms. Mason using drugs. (R., p.635.) Ms. Carmack had learned from Detective McDonald that Mr. Forbes had admitted using the same syringe to administer heroin and then Narcan to Ms. Mason. (*See* R., p.635.) However, the district court found that Ms. Carmack "told the grand jury she did not know Mason to use drugs and had seen no signs of drug use in her." (R., p.637.)

Dr. Howard also testified before the grand jury, stating that Ms. Mason died of heroin toxicity that caused cardiorespiratory arrest and subsequent brain damage and death. (*See* R., p.637.) Dr. Howard testified he did not find any needle track marks indicative of frequent IV use of heroin. (R., p.637.) He stated any evidence of someone injecting heroin for the first time could have been obscured by hospital injections, but he saw no evidence Ms. Mason had been

using drugs over a period of time. (R., p.637.) Dr. Howard agreed that hospital injections could mask an injection site on a new user. (R., p.637.)

In his testimony before the grand jury, Detective Beck stated Mr. Forbes had told him that Ms. Mason had claimed to use heroin intravenously before using with him, and he had used heroin with Ms. Mason one other time prior to the day she died. (R., p.637.) Detective McDonald testified that Mr. Forbes had told him Ms. Mason had used opiates before her death, but not in his presence. (R., p.637.)

Mr. Forbes filed various motions, including a Motion to Suppress. (R., pp.237-39.) Among the issues raised in the motion to suppress, Mr. Forbes asserted the evidence gathered against him after probation officers ordered him to take a polygraph interrogation related to the death of Ms. Mason must be suppressed, because the polygraph interrogation was unlawful and produced involuntary statements in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Idaho Constitution. (R., p.237.)

Mr. Forbes had previously filed a Memorandum in Support of Motion to Suppress. (R., pp.87-117.) On the Fifth Amendment claim, he asserted: "In this case, the police used Ryan's probation to get him to participate in a polygraph and elicit incriminating statements. Mr. Hemming and others verified that Ryan only participated because he believed he was required to as part of his probation. Thus, the police put Ryan in the classic penalty situation." (R., p.106.)

Mr. Forbes also filed a Motion to Dismiss Indictment and Memorandum in Support. (R., pp.181-94.) The motion to dismiss the indictment was brought "pursuant to Idaho Criminal Rule 6.6, on the grounds that the Indictment was not properly found, endorsed and presented as required by these rules or by the statutes of the state of Idaho." (R., p.181.) Mr. Forbes asserted

"the grand jury did not receive legally sufficient evidence to support a finding of probable cause, and even if such legally sufficient evidence was presented, prosecutorial misconduct in submitting illegal evidence and failing to introduce evidence negating Mr. Forbes' guilty was so egregious as to be prejudicial. (R., p.181.)

On the prosecutorial misconduct claim, Mr. Forbes asserted, "In this case, prosecutors abused the indictment procedure by allowing inadmissible evidence to be introduced and by failing to disclose evidence within the State's possession that would substantially negate the guilt of the subject of the investigation." (R., p.186.) Among the claims of prosecutorial misconduct, he asserted his confession should not have been presented to the grand jury, because his statements to Mr. Pulver were in violation of the Fifth Amendment. (R., p.187.)

Mr. Forbes also asserted the testimony of Ms. Carmack was deliberately inflammatory, argumentative, and illegal. (R., p.189.) He asserted that, "From the beginning, Ms. Carmack turned every question into an emotional appeal to the jurors." (R., p.189.) Moreover, "on at least one occasion Ms. Carmack blatantly lied to the jury, a fact easily detected by the state if not known to them as she perjured herself." (R., p.191.) While Ms. Carmack testified that she had spent time with her daughter prior to her death and there were no signs Ms. Mason was using drugs, Ms. Carmack and her daughter were actually estranged at the time. (*See* R., p.191.)

Additionally, Mr. Forbes filed a Motion to Dismiss on Grounds of Corrupted Investigation and Bad Faith. (R., pp.392-401.) The district court subsequently conducted an evidentiary hearing. (*See generally* Tr. 07/12/18; Tr. 07/13/18.)

At a later hearing, with respect to the motion to suppress, Mr. Forbes asserted, "[Y]ou can't have a probationer believe that they have to cooperate, do a polygraph, talk to the police, provide new information on an investigation, or they'll have a probation violation."

(Tr. 08/03/18, p.21, Ls.1-6.) On the motion to dismiss the indictment, Mr. Forbes asserted there was a lot of speculation allowed with respect to Ms. Carmack's testimony. (*See* Tr. 08/03/18, p.59, Ls.5-6.) The State allowed Ms. Carmack to testify before the grand jury that she did not know Ms. Mason to use drugs. (*See* Tr. 08/03/18, p.59, Ls.6-23.) The State, however, had a duty to correct inaccurate testimony. (*See* Tr. 08/03/18, p.61, Ls.1-2.)

The district court issued a Memorandum Decision and Order Re: Defendant's Motion to Suppress. (R., pp.620-33.) On the Fifth Amendment right against compelled self-incrimination issue, the district court determined the State did not compel Mr. Forbes to make any statements to Mr. Pulver or Detective Beck. (R., p.629.) Per the district court, "Notwithstanding some inconsistency in language used by Blettner, this Court finds that he did no more than arrange for the polygraph at the request of law enforcement, arrange for Defendant to get a ride to that appointment, and then accurately answer Defendant's questions about the polygraph." (R., p.629.) The district court determined Officer Blettner "did not order Defendant to submit to the polygraph, nor did he threaten him with a sanction if Defendant refused." (R., p.629.) The district court also determined Mr. Forbes "never invoked his Fifth Amendment right, rather, he appeared to follow Mr. Hemming's moral advice to unburden himself of the story surrounding Mason's death." (R., p.629.) The district court denied the motion to suppress. (R., p.632.)

The district court also issued a Memorandum Decision and Order Re: Defendant's Motion to Dismiss. (R., pp.634-43.) This memorandum decision covered both the motion to dismiss the indictment, and the corrupted investigation and bad faith motion to dismiss. (*See* R., p.637.) The district court denied that latter motion to dismiss. (*See* R., p.638.)

On the motion to dismiss the indictment, the district court determined that Dr. Howard did not conclude that Ms. Mason was a new drug user, but only stated her body lacked evidence

of needle track marks. (*See* R., p.641.) The district court determined: "Carmack's testimony was more problematical. It appears to the Court that her testimony clearly implied her belief that Mason was not a prior drug user, despite the fact that other evidence establishes that Carmack knew otherwise." (R., p.641.) However, the district court determined that evidence was "immaterial." (R., p.641.) According to the district court: "Dr. Howard did not offer testimony that Mason died of an overdose because she was new to drug use[], only that she died of the effects of heroin toxicity. Further, both Flood and McDonald testified that Defendant told them he believed Mason was a heroin user." (R., p.641.) The district court determined: "It is entirely immaterial whether Mason was a prior drug user. The grand jurors heard evidence that she was, and her mother's implied belief that she was not. Neither inference matters." (R., p.641.)

Additionally, the district court determined that, because "the State did not violate Defendant's constitutional right to counsel and right to be free from compelled self incrimination in the manner they obtained" the statements to Mr. Pulver and Detective Beck, "there is no prejudice in the introduction of that evidence to the grand jury." (R., p.641.)

In sum, the district court "conclude[d] that some inadmissible evidence was submitted to the grand jury, but the conclusion, in the exercise of the Court's discretion, is that the prosecution did not engage in misconduct in its presentation to the grand jury." (R., p.642.) The district court determined, "The presenting prosecutors may have been a little more relaxed than what is expected in their vigilance about presenting inaccurate information, but this Court concludes Defendant was not prejudiced by any inaccuracy." (R., p.642.) The district court specifically determined "that even if the grand jury had clearly heard that Mason brought the heroin to the scene of her death, or that she had been using prior to that day, the evidence would still have supported that the prosecution introduced substantial evidence on each element of the

charged offenses, and Defendant would still have been indicted." (R., p.642.) The district court denied the motions to dismiss. (*See* R., p.642.)

Under a conditional plea agreement, Mr. Forbes agreed to plead guilty by way of an *Alford*[1] plea to an amended charge of involuntary manslaughter. (*See* R., pp.645-48.) His conditional plea reserved "the right to appeal this Court's . . . denials of the Defendant's Motions to Suppress and Dismiss; and the . . . denials of Defendant's Motion to Dismiss based on Double Jeopardy and Array of Grand Jurors."[2] (R., p.647.)

The district court imposed a unified sentence of ten years, with five years fixed, to be served concurrently with the sentences imposed in Mr. Forbes' other cases. (R., pp.658-60.)

Mr. Forbes filed a Notice of Appeal timely from the Judgment. (R., pp.661-69.)

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[1] *North Carolina v. Alford,* 400 U.S. 25 (1970).

[2] On appeal, Mr. Forbes has decided to waive any issues related to the double jeopardy motion to dismiss or the biased grand jury motion to dismiss.

ISSUES

I. Did the district court err when it denied Mr. Forbes' motion to suppress?

II. Did the district court abuse its discretion when it denied Mr. Forbes' motion to dismiss the indictment?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Forbes's Motion To Suppress

A. Introduction

Mr. Forbes asserts the district court erred when it denied his motion to suppress. The district court determined the State did not compel Mr. Forbes to make any statements to Mr. Pulver and Detective Beck. (R., p.629.) According to the district court, "The circumstances of those statements did not violate his Fifth Amendment right to be free from compulsory self-incrimination." (R., p.632.) However, Mr. Forbes' incriminating statements to Mr. Pulver and Detective Beck were made in violation of his Fifth Amendment right against compelled self-incrimination. Thus, the district court erred when it denied Mr. Forbes' motion to suppress on the Fifth Amendment privilege issue.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated." *State v. Moore*, 164 Idaho 379, 381 (2018) (internal quotation marks omitted). The Idaho Supreme Court has held, "When we review an order granting or denying a motion to suppress, we accept the trial court's factual findings, unless they are clearly erroneous." *State v. Munoz*, 149 Idaho 121, 128 (2010) (internal quotation marks omitted). "Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence." *State v. Bishop*, 146 Idaho 804, 810 (2009). "Substantial, competent evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore*, 164 Idaho at 381 (internal quotation marks omitted). "Decisions regarding the credibility of witnesses, weight to be given to conflicting evidence, and

factual inferences to be drawn are also within the discretion of the trial court." *Bishop*, 146 Idaho at 810. The appellate court "freely reviews the application of constitutional principles to the facts as found." *Moore*, 164 Idaho at 381 (internal quotation marks omitted).

C. Mr. Forbes' Incriminating Statements To Mr. Pulver And Detective Beck Were Made In Violation Of Mr. Forbes' Fifth Amendment Right Against Compelled Self-Incrimination

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fourteenth Amendment guards this privilege against compulsory self-incrimination from abridgement by the States. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Further, "A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

Here, Mr. Forbes did not affirmatively assert his Fifth Amendment privilege or refuse to answer the questions of Mr. Pulver or Detective Beck. Instead, Mr. Forbes answered the questions given to him during the polygraph interrogation and later interview at the police station. (*See* R., pp.623-24.) The Fifth Amendment "does not preclude a witness from testifying voluntarily in matters which may incriminate him"; generally, if one "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the

meaning of the Amendment." *See United States v. Monia*, 317 U.S. 424, 427 (1943). The United States Supreme Court has also held that, "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States*, 424 U.S. 648, 654 (1976).

However, in some narrowly defined situations, "incriminatory disclosures have been considered compelled despite a failure to claim the privilege," where some factor "was held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.'" *See id.* at 656-57 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)). One such situation is the "classic penalty" situation, "where the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony.'" *See Murphy*, 465 U.S. at 434-35 (quoting *Garner*, 424 U.S. at 661). In such cases, "the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Id.* at 434 (quoting *Lefkowitz*, 431 U.S. at 806).

United States Supreme Court precedent has established "that certain types of penalties are capable of coercing incriminating testimony: termination of employment, the loss of a professional license, ineligibility to receive government contract, and the right to participate in political associations and to hold public office." *McKune v. Lile*, 536 U.S. 24, 49-50 (2002) (O'Connor, J., concurring in the judgment) (citations omitted). In contrast, in *McKune* itself, a plurality of the Court held that a treatment program requiring a prisoner convicted of sex offenses to complete a sexual history form detailing uncharged sexual offenses and all other prior sexual activities did not violate the prisoner's Fifth Amendment privilege against self-

incrimination, even if refusal to participate would result in a move to maximum-security housing and loss of other privileges. *See id.* at 48 (plurality); *id.* (O'Connor, J., concurring).

The plurality in *McKune* held the program "serves a vital penological purpose, and offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment." *Id.* at 29 (plurality). Justice O'Connor, concurring in the judgment, agreed with the dissenting justices on the proper standard, but did not believe that the alterations in the prisoner's prison conditions because of his failure to participate in the program "were so great as to constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination." *See id.* at 48-49 (O'Connor, concurring). The four dissenting justices opined that the State's order for the prisoner to incriminate himself or lose his medium-security status, combined with the threatened revocation of other privileges, violated the prisoner's Fifth Amendment rights. *Id.* at 56 (Stevens, J., dissenting).

The Idaho Supreme Court, after examining *McKune*, noted "the opinions of O'Connor and the four dissenters would hold that any penalty for asserting the right to remain silent that was likely to compel an incriminating statement violates the Fifth Amendment." *State v. Van Komen*, 160 Idaho 534, 539-40 (2016). The *Van Komen* Court held that, where the district court "in its own words relinquished jurisdiction solely because Defendant refused to waive his Fifth Amendment right and answer questions that could incriminate him and result in new felony charges," the court's action "violated Defendant's Fifth Amendment rights." *Id.* at 540.

In the specific context of probation, the United States Supreme Court in *Murphy* has explained:

> The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony. A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not

> give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Murphy, 465 U.S. at 435.

The *Murphy* Court also observed "that a state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Id.* at 435 n.7. "Under such circumstances, a probationer's right to immunity as a result of his compelled testimony would not be at stake." *Id.* Further, "nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as one of a number of factors to be considered by a finder of fact in deciding whether other conditions of probation have been violated." *Id.*

In *Murphy*, the Court inquired into whether the probationer's conditions of probation "merely required him to appear and give testimony about matters relevant to his probationary status or whether they went farther and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id.* at 436. The Court held, "there is no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination." *Id.* at 437. The Court based its holding on the following: "There is no direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent. . . . Murphy was not expressly informed during the crucial meeting with his probation officer that an

assertion of the privilege would result in the imposition of a penalty." *Id.* at 437-38. Further, "the fact that Murphy apparently felt no compunction about adamantly denying the false imprisonment charge on which he had been convicted before admitting to the rape and murder strongly suggests that the 'threat' of revocation did not overwhelm his resistance." *Id.* at 438.

The *Murphy* Court also held that if the probationer "did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable," because the State "could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." *Id.* Additionally, revocation was not automatic under Minnesota's statutes, even if the probation officer desired revocation, because a court would have the final say following a hearing. *See id.* at 438-39. Thus, the *Murphy* Court could not "conclude that Murphy was deterred from claiming the privilege by a reasonably perceived threat of revocation." *Id.* at 439.

Conversely, in this case, Mr. Forbes was deterred from claiming the Fifth Amendment privilege against compelled self-incrimination by a reasonably perceived threat of revocation. The district court determined that Officer Blettner "did no more than arrange for the polygraph at the request of law enforcement, arrange for Defendant to get a ride to that appointment, and then accurately answer Defendant's questions about the polygraph." (R., p.629.) The district court also determined Officer Blettner "did not order Defendant to submit to the polygraph, nor did he threaten him with a sanction if Defendant refused." (R., p.629.)

However, the district court also found that Officer Blettner "said he told Defendant if he told Defendant to take a polygraph examination that Defendant would have to do so since he was on felony probation and a condition of that probation included taking polygraph examinations." (R., pp.622-23.) Thus, unlike the probation officer in *Murphy*, who wanted to discuss the

probationer's information in terms of his continued need for treatment, Officer Blettner did not couch the requirement to take a polygraph in terms of treatment or other matters relevant to Mr. Forbes' probationary status. *See Murphy*, 465 U.S. at 423-24.

Further, the district court here found that Mr. Hemming, a facilitator at the Good Samaritan program, "believed Defendant had been ordered by his probation officer to take the polygraph examination, and told Defendant of his belief." (R., p.623.) Thus, Mr. Forbes submits that there is more direct evidence here, than was the case with the probationer in *Murphy*, that Mr. Forbes made his incriminating statements because he feared his probation would be revoked if he remained silent. *Cf. Murphy*, 465 U.S. at 437-38.

Mr. Forbes was therefore placed in a "classic penalty" situation, where his assertion of the Fifth Amendment privilege was penalized so as to foreclose a free choice to remain silent, and compel incriminating testimony. *See id.* at 434-35; *Garner*, 424 U.S. at 661. Thus, his incriminating statements to Mr. Pulver and Detective Beck were made in violation of his Fifth Amendment right against compelled self-incrimination. The district court erred when it denied Mr. Forbes' motion to suppress on the Fifth Amendment privilege issue.

II.

The District Court Abused Its Discretion When It Denied Mr. Forbes' Motion To Dismiss The Indictment

A. Introduction

Mr. Forbes asserts the district court abused its discretion when it denied his motion to dismiss the indictment. The indictment should have been dismissed because the prosecutorial misconduct in submitting illegal evidence to the grand jury was so egregious as to be prejudicial. The prosecutor should not have presented to the grand jury Mr. Forbes' incriminating statements made to Mr. Pulver and Detective Beck, and Ms. Carmack's testimony on Ms. Mason's prior drug use was false. Thus, the district court did not act consistently with the applicable legal standards when it denied the motion to dismiss the indictment.

B. Standard Of Review

An appellate court reviews a denial of a motion to dismiss a grand jury indictment for an abuse of discretion. *State v. Bujanda-Velazquez*, 129 Idaho 726, 728 (1997). When an appellate court reviews an alleged abuse of discretion by a trial court, the sequence of inquiry requires consider of whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 864 (2018).

C. The Prosecutorial Misconduct In Submitting Illegal Evidence Was So Egregious As To Be Prejudicial, Because The Prosecutor Should Not Have Presented Mr. Forbes' Incriminating Statements To The Grand Jury, And Ms. Carmack's Testimony Was False

Mr. Forbes asserts the indictment must be dismissed because the prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial, because the prosecutor should not have presented to the grand jury Mr. Forbes' incriminating statements made to Mr. Pulver and Detective Beck, and Ms. Carmack's testimony on Ms. Mason's prior drug use was false. The district court therefore did not act consistently with the applicable legal standards.

Idaho Criminal Rule 6.6 outlines the grounds for granting a motion to dismiss the indictment, including when "the indictment was not properly found, endorsed and presented as required by these rules or by the statutes of the state of Idaho." I.C.R. 6.6. A grand jury "ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." I.C. § 19-1107. Idaho Criminal Rule 6.5 provides: "If the grand jury finds, after evidence has been presented to it, that an offense has been committed and that there is probable cause to believe that the accused committed it, the jury ought to find an indictment." I.C.R. 6.5(a). "Probable cause exists when the grand jury has before it evidence that would a reasonable person to believe an offense has been committed and that the accused party has probably committed the offense." *Id.* The grand jury "can receive any evidence that is given by witnesses produced and sworn before them except as hereinafter provided, furnished by legal documentary evidence, the deposition of a witness in the cases provided by this code or legally admissible hearsay." I.C. § 19-1105.

An inquiry into the propriety of a grand jury proceeding is two-fold. *State v. Martinez*, 125 Idaho 445, 448 (1994). As the Idaho Supreme Court has held, "First, we must determine

whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause." *Id.* (citing *State v. Jones*, 125 Idaho 477 (1994); *State v. Edmonson*, 113 Idaho 230 (1987)). "Second, even if such legally sufficient evidence were presented, the indictment must be dismissed if the prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial." *Id.* (citing *Jones*, 125 Idaho 477; *Edmonson*, 113 Idaho at 236-37). "Prejudicial effect" means "the defendant would not have been indicted but for the misconduct." *Edmonson*, 113 Idaho at 237. "Absent a showing a prejudice by the defendant, we will not second guess the grand jury." *Martinez*, 125 Idaho at 448.

The Idaho Supreme Court has also held, "To determine whether misconduct gives rise to a dismissal, an appellate court must balance the gravity and seriousness of the misconduct with the sufficiency of the evidence supporting the indictment." *Id.* at 448-49 (citing *Edmonson*, 113 Idaho at 237). The Court in *Edmonson* further explained this balancing:

> At one extreme, the misconduct can be so outrageous that regardless of the extent of probable cause evidence, dismissal will be required. At the other extreme, the misconduct may be so slight, that it becomes unnecessary to question the independent judgment of the grand jury. In the middle of these extremes, the court must examine the totality of the circumstances to determine whether the indictment should be dismissed. As stated above, the burden rests with the criminal defendant to make an initial showing that the misconduct rises to the level of prejudice. Absent the showing of prejudice, a reviewing court will not second guess the grand jury. However, once the defendant does affirmatively prove prejudice, the court must dismiss.

Edmonson, 113 Idaho at 237. "Generally, prosecutorial misconduct will require dismissal only when it reaches the level of a constitutional due process violation." *Id.*

Here, even assuming the district court correctly determined that legally sufficient evidence supported the grand jury's finding of probable cause, the prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial. Specifically, the prosecutor

should not have presented to the grand jury Mr. Forbes' incriminating statements made to Mr. Pulver and Detective Beck. The district court here determined "that the State did not violate constitutional right to counsel and right to be free from compelled self incrimination in the manner they obtained those statements. Therefore, there is no prejudice in the introduction of that evidence to the grand jury." (R., p.641.) However, those incriminating statements were actually made in violation of Mr. Forbes' Fifth Amendment privilege to be free from compelled self-incrimination, for the reasons explained in Section I of the Argument above and incorporated herein by reference thereto.

This use of the incriminating statements was prejudicial. As Mr. Forbes asserted before the district court, "the prosecutor elicited testimony about those statements and the fruit of those statements from Cynthia Carmack, Steven Hemming, and Detective David Beck of the Post Falls Police." (*See* R., p.187 (citations omitted).) Indeed, Ms. Carmack testified before the grand jury that Mr. Forbes "said he was interviewed with the polygraph person and that he also talked to the detective that he had injected Cathryn." (Grand Jury Tr. 12/27/17, p.69, Ls.1-4 (Conf. Exs., p.33).) Mr. Hemming testified that Mr. Forbes "said that he was honest and truthful with the detectives and in the polygraph. He said that his involvement was that he administered the drugs to her. (Grand Jury Tr. 12/27/17, p.83, Ls.1-5 (Conf. Exs., p.37).) Detective Beck testified that, at the police station, Mr. Forbes "said that he injected her with heroin[], that she overdosed, and he—she shortly died thereafter." (Grand Jury Tr. 12/27/17, p.87, L.5 – p.88, L.13.) Thus, the grand jury heard testimony from multiple witnesses on Mr. Forbes' incriminating statements, where those statements were made in violation of his Fifth Amendment privilege.

Moreover, the testimony of Ms. Carmack on Ms. Mason's prior drug use was false. The district court in this case observed that "Carmack's testimony was more problematical" than that

of Dr. Howard; "It appears to the Court that her testimony clearly implied her belief that Mason was not a prior drug user, despite the fact that other evidence establishes that Carmack knew otherwise." (R., p.641.) However, the district court determined: "It is entirely immaterial whether Mason was a prior drug user. The grand jurors heard evidence that she was, and her mother's implied belief that she was not. Neither inference matters." (R., p.641.)

Contrary to the district court's determination, Ms. Carmack's testimony was prejudicial. As the district court acknowledged, Ms. Carmack before the grand jury testified that she did not know Ms. Mason to do drugs. (*See* Grand Jury Tr. 12/27/17, p.61, L.15 – p.62, L.16 (Conf. Exs., p.31).) But as the district court found, "By the time of her Grand Jury testimony . . . Carmack had learned that Mason had been involved in illegal drug use." (R., p.635.) As Mr. Forbes asserted before the district court, "There was a background, bit of information that was then known, and that wasn't clarified to the grand jury." (*See* Tr. 08/03/18, p.59, Ls.10-12.) Rather, "The State further allowed that picture to be painted of [C]athryn being quite innocent to this lifestyle." (*See* Tr. 08/03/18, p.59, Ls.13-14.)

In sum, the prosecutor should not have presented to the grand jury Mr. Forbes' incriminating statements made to Mr. Pulver and Detective Beck, and the testimony of Ms. Carmack on Ms. Mason's prior drug use was false. Mr. Forbes submits that, balancing the gravity and seriousness of the prosecutor's misconduct with the sufficiency of the evidence supporting the indictment, under the totality of the circumstances here, the misconduct here can only give rise to a dismissal. *See Martinez*, 125 Idaho at 448-49; *Edmonson*, 113 Idaho at 237. Because of the importance of Mr. Forbes' incriminating statements to the State's case, coupled with Ms. Carmack's misleading portrayal of Ms. Mason's prior drug use, Mr. Forbes would not have been indicted but for the prosecutorial misconduct. *See Edmonson*, 113 Idaho at 237.

Thus, the prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial, and the indictment must be dismissed. *See Martinez*, 125 Idaho at 448. The district court therefore abused its discretion when it denied Mr. Forbes' motion to dismiss the indictment, because it did not act consistently with the applicable legal standards. *See Lunneborg*, 163 Idaho at 864.

CONCLUSION

For the above reasons, Mr. Forbes respectfully requests that this Court vacate the district court's order of judgment and commitment, the order denying his motion to suppress, and the order denying his motion to dismiss the indictment.

DATED this 30th day of September, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas