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

STATE OF IDAHO,	)	
	)	**No. 46606-2018**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2017-23540**
	)	
RYAN ALAN FORBES,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Ryan Alan Forbes appeals from the judgment of conviction entered upon his conditional guilty plea to involuntary manslaughter.

Statement Of The Facts And Course Of The Proceedings

The state adopts the following facts from the district court's orders denying Forbes' motion to suppress and motion to dismiss the indictment. Forbes has not challenged any of the district court's factual findings on appeal. (See generally Appellant's brief.)

In May 2014, emergency assistance was requested at Forbes' residence in Post Falls. (R., p.620.) Responders found Cathryn Mason unresponsive in Forbes' room. (Id.) A consensual search of the room revealed methamphetamine and stolen medical supplies. (R., pp.621.) Mason died a few days later of what was determined to be a heroin overdose. (Id.)

The state charged Forbes in Kootenai County with possession of methamphetamine; and two counts of burglary pertaining to items Forbes pawned. (Id.) The state also charged Forbes in Benewah County with stealing the medical supplies found in his room. (Id.) Forbes ultimately pled guilty to possession of methamphetamine and one count of burglary. (Id.) The district court retained jurisdiction. (Id.)

At the conclusion of the period of retained jurisdiction, the district court placed Forbes on probation. (R., p.622.) Five months after that, the state filed a report of probation violation. (Id.)

Forbes admitted the violation. (R., p.621.) The court deferred disposition on the violation pending Forbes' attendance in the Good Samaritan Rehabilitation program. (Id.)

Previously, during the period of retained jurisdiction, Det. Dave Beck called Forbes and asked if he would be willing to speak with him about Mason's death. (R., p.622.) Forbes declined. (Id.) Later, while Forbes was on probation, Sgt. Bob McDonald contacted Forbes' probation officer, Officer Clinton Blettner, about arranging a polygraph examination for Forbes. (Id.) Forbes' terms of probation included a condition that he participate in polygraph examinations requested by his probation officer. (R., p.623.) In email communications between Officer Blettner and Sgt. McDonald, Officer Blettner stated that he told Forbes that he was required to take the examination if requested due to this term of his probation. (R., p.622.) However, Officer Blettner never threatened Forbes with a probation violation or other sanction should Forbes refuse the polygraph. (R., p.623.) Good Samaritan Program facilitator Steven Hemming drove Forbes to the scheduled polygraph exam. (Id.) Hemming encouraged Forbes to be honest and told him that the polygraph was an opportunity for Forbes to release himself from the burden of Mason's death. (Id.)

Polygrapher Ted Pulver conducted a pre-test interview with Forbes. (Id.) During the interview, Forbes made incriminating statements about Mason's death. (Id.) Pulver contacted Sgt. Beck about the statements. (Id.) Sgt. Beck asked Forbes if he would be willing to come to the police station and discuss the statements. (R., p.624.) Forbes agreed. (Id.)

Sgt. Beck drove Forbes to the police station. (Id.) Along the way, Sgt. Beck specifically informed Forbes that he was not under arrest. (Id.) At the station, Forbes signed a *Miranda* rights

acknowledgement and waiver form. (Id.) During the subsequent interview, Forbes told Sgt. Beck that he injected Mason with heroin, and then used the same syringe to inject Mason with Narcan in an effort to revive her after she became non-responsive. (Id.) After the interview, Forbes was allowed to leave. (Id.) Hemming picked Forbes up at the police station. (Id.) Forbes made additional incriminating statements to Hemming – including that he had administered the heroin to Mason. (Id.)

A few weeks later, Forbes talked with Mason's mother, Cynthia Carmack, at church. (Id.) Carmack had been in contact with law enforcement about the plans for the polygraph and the general status of the investigation, but later testified that she had not been asked by the police to gather information about Forbes. (R., pp.624-625.) Forbes told Carmack, as he had told the others, that he injected Mason with the heroin that led to her death. (R., p.625.)

After a subsequent grand jury proceeding, at which Det. McDonald, Officer Blettner, Sgt. Beck, and Carmack (among others) testified, Forbes was indicted for second-degree murder. (See generally G.J. Tr.) Forbes filed numerous pre-trial motions (See generally R.) Relevant to this appeal, Forbes filed a motion to suppress all confessions he made after the polygraph was initiated (R., pp.87-117; 237-239); and a motion to dismiss the indictment on grounds including that the prosecutor committed misconduct by introducing illegal evidence and by failing to correct false testimony (R., pp.181-194). After a two-day evidentiary hearing (7/12/18 Tr.; 7/13/18 Tr.), and additional briefing from the parties (R., pp.337-345, 348-366, 544-561; 566-571), the district court denied both motions (R., pp.634-643).

Pursuant to an agreement with the state, Forbes entered a conditional *Alford* plea to involuntary manslaughter, preserving his right to appeal the district court's denials of his motion to suppress and motion to dismiss the indictment. (R., pp.647-648.) The district court imposed a unified 10-year sentence with five years fixed, to run concurrent with sentences imposed in other cases. (R., pp.658-660.) Forbes timely appealed. (R., pp.661-669.)

ISSUES

Forbes states the issues on appeal as:

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?

(Appellant's brief, p.12.)

The state rephrases the issues as:

1. Has Forbes failed to show that the district court erred by denying his motion to suppress?

2. Has Forbes failed to show that the district court abused its discretion by denying his motion to dismiss the indictment?

ARGUMENT

I.
Forbes Has Failed To Show That The District Court Erred By Denying His Motion To Suppress

A. Introduction

Forbes contends that the district court erred by denying his motion to suppress. (Appellant's brief, pp.13-19.) However, a review of the record and applicable law reveals that the district court correctly concluded that Forbes failed to demonstrate that the state imposed a "classic penalty" scenario that would excuse his failure to exercise his Fifth Amendment privilege against self-incrimination.[1]

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but exercises free review of the application of constitutional principles to the facts as found. State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

[1] It does not appear that Forbes challenges the district court's determinations regarding his Sixth Amendment right to counsel (R., pp.626-628), and whether his confessions were involuntary (R., pp.630-631). (See Appellant's brief, pp.13-19.)

C. The District Court Correctly Denied Forbes' Motion To Suppress

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, 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).

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); (citing Baxter v. Palmigiano, 425 U.S. 308, 316 (1976)).

However, the Fifth Amendment does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, an individual desires the protection of the privilege, he generally must claim it, or he will not be considered to have been "compelled" within the meaning of the Amendment. United States v. Monia, 317 U.S. 424, 427 (1943); see also Garner v. United States, 424 U.S. 648, 653-654 (1976) (noting that the relevant Supreme Court cases, taken together, "stand for the proposition 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.") Further, the incriminating nature of a question, by itself, does not

excuse a timely assertion of the privilege. See United States v. Mandujano, 425 U.S. 564, 574-575 (1976) (plurality opinion).

In McKune v. Lile, 536 U.S. 24, 29-30 (2002), a prisoner was ordered to participate in a prison treatment program a few years before his scheduled release. The program required inmates to complete a sexual history form, and a polygraph examination to verify the accuracy of the answers given. Lile, 536 U.S. at 30. The prisoner was informed that if he did not participate, his status would be changed, resulting in fewer inmate privileges and a transfer to a higher-security facility. Id. at 30-31. Lile asserted his Fifth Amendment rights and refused to participate. Id. at 31. The United States Supreme Court held that Lile's Fifth Amendment rights weren't violated, but the majority disagreed on the appropriate standard to apply. Id. at 29-53. Justice O'Connor, concurring in the result, concluded that the consequences facing the prisoner if he refused to participate were not serious enough to compel him to be a witness against himself. Id. at 48-51.

In State v. Van Komen, 160 Idaho 534, 376 P.3d 738 (2016), the Idaho Supreme Court applied these principles and held that the district court violated a defendant's privilege against self-incrimination. In that case, during Van Komen's arraignment on a probation violation, the district court ordered Van Komen to take a polygraph exam and told him that if he answered deceptively, the court would likely impose Van Komen's prison sentence. Van Komen, 160 Idaho at 537, 376 P.3d at 741. After Van Komen told the court that he would assert his Fifth Amendment rights rather than take a polygraph, the court revoked Van Komen's probation and imposed his prison sentence. Id. at 537-538, 376 P.3d at 741-742. The Idaho Supreme Court held that the district court violated Van Komen's Fifth Amendment rights because it imposed a penalty upon Van

Komen for exercising those rights. Id. at 540, 376 P.3d at 744. However, the Court also noted that had Van Komen not asserted his Fifth Amendment rights, and instead submitted to the polygraph and made incriminating statements, those statements may *not* have been held to have been compelled in light of the United States Supreme Court's decision in Murphy. Id. at 539, 376 P.3d at 743 (citing Murphy, 465 U.S. at 440 ("since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations.")).

The Idaho Court of Appeals later came to the same conclusion as the Court in Van Komen when a district court required a defendant to take a polygraph exam in order to have the opportunity for probation following a period of retained jurisdiction, even where the district court stated that it was making its disposition decision based on *two* factors, with only one of them related to the polygraph requirement. State v. Reed, 163 Idaho 681, 685-687, 417 P.3d 1007, 1011-1013 (Ct. App. 2018); See also State v. Powell, 161 Idaho 774, 777-781, 391 P.3d 659, 662-666 (Ct. App. 2017) (finding the "classic penalty" situation where a parole hearing officer told Powell that if he did not truthfully answer questions regarding his social and criminal history, he would be denied parole.)

Unlike both Van Komen and Reed, but like Forbes in the present case, Murphy, the defendant in Minnesota v. Murphy, never asserted his Fifth Amendment privilege. Murphy, 465 U.S. at 422-425. In that case, the United States Supreme Court held that the Fifth Amendment did not prohibit the introduction into evidence, in a subsequent murder prosecution, of Murphy's admissions to a probation officer. Id. at 426-440. This was because Murphy did not assert his

Fifth Amendment privilege, and because Minnesota did not attempt to take the "impermissible step" of *requiring* Murphy to chose between making incriminating statements and jeopardizing his conditional liberty by remaining silent ("the classic penalty situation"). Id. at 435-436.

The terms of Murphy's probation required him to, among other things, participate in a treatment program and be truthful with his probation officer "in all matters." Id. at 422. Murphy made statements to his treatment counselor implicating himself in a rape and murder. Id. at 423. The counselor contacted Murphy's probation officer. Id. When confronted by his probation officer, Murphy made incriminating statements to her as well. Id. at 424. The information was relayed to authorities, and a grand jury returned an indictment charging Murphy with first-degree murder. Id. The United States Supreme Court granted certiorari to resolve a then-conflict among state and federal courts concerning whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding. Id. at 425.

The United States Supreme Court recognized that the general rule noted above that the privilege against self-crimination requires an assertion of the right has several exceptions. Id. at 429-434. Among these is the "classic penalty" situation, in which a state seeks to induce an individual to forgo the Fifth Amendment privilege by threatening, expressly or by implication, to impose sanctions capable of forcing the self-incrimination which the Amendment forbids. Id. at 434-435 (citing Turley, 414 U.S. at 79-84); see also Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that an individual threatened with discharge from public employment if he did not answer investigative questions did not forfeit the Fifth Amendment privilege when he failed to assert it and instead responded to questions).

The Court first opined that while Murphy's probationary terms required him to meet his probation officer and be truthful in all matters discussed, this was no different from any trial witness who is required to appear and give testimony. Id. at 437. The mere existence of these requirements is insufficient to excuse the failure to exercise the privilege in a timely matter. Id. Murphy's probation terms contained no suggestion that his probation was conditional upon his waving of the Fifth Amendment privilege with respect to further criminal prosecution. Id. The Court also noted that unlike in Garrity, Murphy was not expressly informed that an assertion of the privilege would result in the imposition of a penalty. Id. at 437-438.

The Court also concluded that even if Murphy held some belief that his probation might be revoked for exercising his Fifth Amendment privilege, that belief would not have been reasonable for several reasons. Id. at 438. First, the Supreme Court's decisions have made clear that the state could not constitutionally carry out such a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. Id. Further, Minnesota law did not provide for automatic revocation of probation upon the allegation of a probation violation, and therefore, the probation officer was not even in a position to make such a threat since it was ultimately the court's decision whether Murphy remained on probation. Id. at 438-439.

Therefore, the Supreme Court could not conclude that Murphy was deterred from claiming the Fifth Amendment privilege by a reasonably perceived threat of revocation. Id. For the same reasons, in this case, as the district court correctly recognized (R., pp.628-629), the record demonstrates that Forbes was not deterred from claiming the Fifth Amendment privilege by a

reasonably perceived threat of revocation. Forbes therefore waived the privilege by failing to assert it.

At the probation violation evidentiary hearing, Officer Blettner testified at length about his communications with Forbes in arranging for the requested polygraph examination. (7/13/18 Tr., p.306, L.22 – p.339, L.22.) Officer Blettner acknowledged that according to an email admitted into evidence at the hearing, he told Forbes that if he told him to take a polygraph, "that he has to do it since he is on felony probation, we have a polygraph condition." (7/13/18 Tr., p.312, Ls.1-13.) However, Officer Blettner further testified that he never told Forbes that failure to participate in the polygraph examination would result in a probation violation, and that it was not his intention to attempt to initiate a probation violation proceeding should Forbes choose not to participate. (7/13/18 Tr., p.319, Ls.10-16; p.320, Ls.4-9.) Officer Blettner also quoted from his previous grand jury testimony indicating that his conversation with Forbes about the polygraph was "nonchalant" and that he did not "order" Forbes to participate. (7/13/18 Tr., p.318, Ls.4-15.)

Likewise, there is no indication in Pulver's evidentiary hearing testimony (or transcript of his interview with Forbes that was admitted into evidence), that he ordered Forbes to participate in the polygraph when Forbes arrived, or told Forbes he would face consequences if he refused. (See 7/12/18 Tr., p.207, L.19 – p.228, L.22; Defendant's Exhibit G.) In fact, Forbes left with Sgt. Beck before even taking the polygraph exam. (7/12/18 Tr., p.221, L.15 – p.222, L.11.) Not only did Sgt. Beck also not threaten Forbes, or tell him that there would be consequences to not speaking with him after Sgt. Beck and Forbes left the polygraph examination (7/13/18 Tr., p.346, Ls.15-23; *see* also Plaintiff's Exhibit 5), Sgt. Beck instead advised Forbes of his *Miranda* rights and told

him, more than once, that Forbes did not have to speak with him (7/13/18 Tr., p.346, L.24 – p.348, L.22).

In its order denying Forbes' motion to suppress, the district court made the following relevant factual findings:

> This [c]ourt, after observing the witnesses who have testified, and making determinations about credibility, especially with respect to Probation Officer Blettner, finds that the State did not compel Defendant to make any statements to Pulver/Beck. Notwithstanding some inconsistencies in language used by Blettner, this [c]ourt 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. He did not order Defendant to submit to the polygraph, or did he threaten him with a sanction if Defendant refused.

(R., p.629.)

These uncontested findings support the district court's conclusion that the state did not impose a "classic penalty" scenario upon Forbes, because the state actors did not threaten, expressly or by implication, to impose sanctions should Forbes exercise his Fifth Amendment right against self-incrimination. Forbes was therefore required to assert the privilege to obtain its protections. A comparison of the circumstances of this case with those of Murphy further supports the district court's determination.

While complying with the polygraph examination was required pursuant to the terms of his probation, Forbes, like Murphy, was in a position no different than someone who was required to answer questions at a court proceeding. This is why the mere existence of such probation conditions or the requirement to testify when subpoenaed are not themselves violative of the Fifth

Amendment. Though such requirements may exist, they are subservient to the Fifth Amendment right against self-incrimination – if the right is asserted.

Further, as in Minnesota, it is ultimately the state district court who determines whether an individual's probation is revoked in Idaho. See Idaho Code §§ 19-2602; 19-2603. Van Komen, Reed, and Powell were all directly threatened with sanctions by members of the entity whom actually imposes those sanctions – the district court and parole board, respectively. While Officer Blettner had the authority to initiate a probation violation proceeding, the state submits such a sanction alone, without a resulting probation revocation, is a consequence not serious enough to have compelled Forbes to be a witness against himself. See Lile, 536 U.S. at 48-51 (J. O'Connor, concurring).

Also like Murphy, Forbes could have no reasonable belief that probation could be revoked if he exercised his Fifth Amendment rights. The record demonstrates that Forbes understood he was not required to speak with law enforcement officers, even while he was incarcerated during his period of retained jurisdiction. Sgt. Beck contacted Forbes at that time to talk about the May 2014 incident, but Forbes responded that he was not willing to speak to Sgt. Beck without an attorney present. (7/13/18 Tr., p.350, L.2 – p.351, L.1.) In addition, as the Supreme Court noted in Murphy (in the context of concluding that any belief possessed by Murphy that his probation might be revoked for exercising his Fifth Amendment privilege was not reasonable), the law was well-established that the "state could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." Murphy, 465 U.S. at 438.

Ultimately, as in Murphy, the district court in this case reasonably concluded, based upon its uncontested factual findings, that there was no reasonable basis for concluding that the state attempted to attach an impermissible penalty to Forbes' exercise of his privilege against self-incrimination. This Court should therefore affirm the district court's denial of Forbes' motion to suppress.

II.
Forbes Has Failed To Show That The District Court Abused Its Discretion In Denying His Motion To Dismiss The Indictment

A. Introduction

Forbes contends that the district court abused its discretion by denying his motion to dismiss the indictment. (Appellant's brief, pp.20-25.) Specifically, Forbes contends that the district court erred by rejecting his arguments that the prosecutor committed misconduct in the course of the grand jury proceeding by: (1) admitting inadmissible evidence; and (2) failing to correct false testimony. (Id.) A review of the applicable law, grand jury transcript, and district court order denying the motion reveals that the court understood its discretion and exercised it reasonably in denying Forbes' motion.

B. Standard Of Review

The decision to grant or deny a motion to dismiss an indictment is left within the sound discretion of the trial court. State v. Bujanda-Velazquez, 129 Idaho 726, 728, 932 P.2d 354, 356 (1997).

In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks "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." State v. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. The District Court Acted Well Within Its Discretion To Deny Forbes' Motion To Dismiss The Indictment

Idaho Criminal Rule 6.1 sets forth the duties of a prosecutor during a grand jury proceeding, including that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of the subject of the investigation the prosecutor must present or otherwise disclose that evidence to the grand jury." I.C.R. 6.1(b)(1).

When conducting a review of the propriety of a grand jury proceeding that results in an indictment, the appellate court's inquiry is two-fold. State v. Martinez, 125 Idaho 445, 448, 872 P.2d 708, 711 (1994). First, the court must determine whether, independent of any admissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause.[2] Id.; State v. Jones, 125 Idaho 477, 483, 873 P.2d 122, 128 (1994) (overruled on other grounds); State v. Edmonson, 113 Idaho 230, 236, 743 P.2d 459, 465 (1987). In making this determination, every legitimate inference that may be drawn from the evidence must be drawn in

[2] It does not appear that Forbes has raised this portion of the inquiry on appeal. (See Appellant's brief, pp.20-25).

favor of the indictment. State v. Brandstetter, 127 Idaho 885, 887, 908 P.2d 578, 580 (Ct. App. 1995).

Second, even if such legally sufficient evidence was presented, the indictment must be dismissed if prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial. Martinez, 125 Idaho at 448, 872 P.2d at 711; Jones, 125 Idaho at 483, 873 P.2d at 128; Edmonson, 113 Idaho at 236-237, 743 P.2d at 465-466. Prejudice in this context means "the defendant would not have been indicted but for the misconduct." Martinez, 125 Idaho at 448, 872 P.2d at 711. To determine whether misconduct is so grievous as to be prejudicial and thus to require dismissal, an appellate court must also balance the gravity and seriousness of the misconduct against the extent of the evidence supporting the indictment. Id. at 449, 872 P.2d at 712; Edmonson, 113 Idaho at 237, 743 P.2d at 466. In Edmonson, 113 Idaho at 237, 743 P.2d at 466, the Idaho Supreme Court discussed this balancing test as follows:

> To determine whether misconduct gives rise to a dismissal, a reviewing court will have to balance the gravity and the seriousness of this misconduct with the sufficiency of the evidence supporting the probable cause finding. 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.

Generally, prosecutorial misconduct before a grand jury will require dismissal only if it reaches the level of a constitutional due process violation. Edmonson, 113 Idaho at 237, 743 P.2d

at 466. Dismissal of an indictment is a "drastic remedy and should be exercised only in extreme and outrageous situations, and therefore, the defendant has a heavy burden." Id.

In this case, Forbes moved for the dismissal of his indictment on grounds including, relevant to this appeal, that the prosecutor allegedly committed misconduct by introducing Forbes' confessions that Forbes alleges were obtained in violation of his Fifth Amendment rights; and by failing to correct false statements allegedly made by Carmack at the grand jury proceeding about her knowledge of Mason's prior drug use. (R., pp.181-194.) The district court recognized its discretionary authority and the relevant law discussed above (R., p.639), and correctly rejected Forbes' arguments (R., pp.634-643). Forbes has failed to show that the district court abused its discretion.

1. Forbes' Confessions

For the reasons discussed above, the utilization of Forbes' confessions in the grand jury proceeding did not violate Forbes's Fifth Amendment right against self-crimination because Forbes never asserted the Fifth Amendment privilege and was not faced with a "classic penalty" situation. Therefore, as the district court properly concluded (R., p.641), the prosecutor did not commit misconduct by introducing this admissible evidence.

In the alternative, even assuming that this Court concludes that the district court erred in denying Forbes' motion to suppress his confessions, this is still not fatal to the indictment. As the state noted below (R., p.283), at the time Forbes filed his motion to dismiss the indictment, the district court had not yet ruled on Forbes' motion to suppress his confessions. Neither Murphy nor any of the relevant authorities cited above clearly rendered Forbes' confessions inadmissible.

Therefore, Forbes cannot show that the prosecutor's introduction of them into evidence warrants the "drastic remedy" of dismissal of the indictment.

2. Carmack's Testimony

In the course of her grand jury testimony, Carmack testified, among other things, about her asserted lack of prior knowledge about Mason's drug use. In the testimony Forbes asserts constituted prosecutorial misconduct to elicit and/or not to correct, Carmack testified:

> Q: All right. And at some point did you attempt to get information from Mr. Forbes about as to what might have caused your daughter's condition?
>
> A: We – alls [sic] I knew was that we were told she overdosed on drugs, but we never knew [Mason] to use drugs, and I was talking to [Forbes] and alls [sic] I knew is that he tried to do CPR to save her life, and that he was a nurse. That's all I knew at the time.
>
> Q: All right. So he didn't give you any other information?
>
> A: No.
>
> Q: All right. So you just indicated you did not know your daughter to do drugs?
>
> A: No.
>
> Q: And would you – did you spend enough time with her to know whether or not she did use drugs?
>
> A: Yeah. She – the type of friends that she had, none of them did anything like that. She had pretty good savings in her savings account.
>
> Q: Yeah. No, you're just fine. Let me just kind of bring this up. So did you spend enough time with her in the months preceding her passing that you would know whether or not based – as her mother, whether or not you saw any signs or changes in her that would indicate she was using drugs?
>
> A: Yeah, there was no signs. She was normal Cathryn, outgoing and happy, and –

…

Q: Okay. So what else did he tell you about what occurred?

A: Well, we were talking that [sic] how confusing it is because I never knew [Mason] to use drugs, and that the detective thought that it had to have been smoked because she found no track marks[3] on her wrists. And I said, "Cathryn would never use a needle. I know she wouldn't."

…

Q: Did you ever have any indication from anything that you knew prior to this event that your daughter was using drugs?

A: No.

(G.J. Tr., p.61, L.15 – p.62, L.16; p.65, Ls.11-18; p.77, Ls.3-6.)

From this testimony, it is not clear whether Carmack was asserting that she was unaware of Mason's drug use at the time of the underlying incident, or by the time of the grand jury proceeding. Thus, while the district court found that "[b]y the time of her Grand Jury testimony in December of 2017, Carmack had learned that Mason had been involved in illegal drug use," (R., p.635), this is not necessarily inconsistent with Carmack's grand jury testimony, which can be construed as asserting that Carmack was not aware of Mason's drug use at the time of the incident.

In any event, as the district court correctly reasoned (R., p.641), Carmack's testimony about her knowledge of Mason's prior drug use would have been of little or no importance to the grand jury's determination. Notably, the prosecutor did not reference this testimony in its concluding

[3] Dr. John Howard testified that while he did not find evidence of needle puncture sites on Mason independent of those that would have occurred during her hospitalization, such sites can sometimes heal and be obscured. (G.J. Tr., p.53, L.12 – p.55, L.2.)

remarks summarizing the evidence of Forbes' guilt. (G.J. Tr., p.110, L.8 – p.113, L.6.) The information was not exculpatory. Further, as the court noted (R., p.641), the grand jury heard other testimony indicating that Forbes had previously used drugs (G.J. Tr., p.16, Ls.13-15; p.39, L.7-13; p.90, L.24 – p.92, L.7). It would not have been surprising, or particularly pertinent, to a grand juror analyzing Forbes' culpability, that the mother of a [redacted] woman may have been unaware of her daughter's drug use. As illustrated above, Carmack's testimony was simply not significant in the context of the grand jury proceeding.

Finally, while the district court described Carmack's testimony as "problematical," it did not find that the prosecutor committed misconduct in declining to correct or clarify it. (See R., p.641.) Any difference between Carmack's testimony and the prosecutor's knowledge of the information possessed by Carmack, was not so stark as to constitute a constitutional due process violation when the prosecutor declined to intervene.

The district court cited and applied the relevant law, recognized its discretionary authority, and reasonably determined that Forbes failed to demonstrate that the drastic remedy of dismissal of the indictment was warranted. Forbes has therefore failed to demonstrate that the district court abused its discretion.

CONCLUSION

The state respectfully requests this Court to affirm the district court's determinations and Forbes' judgment of conviction.

DATED this 21st day of January, 2020.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of January, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Mark W. Olson
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MWO/dd