3-8-2018

State v. Akins Respondent's Brief Dckt. 45347

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 45347**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NO. CR 2016-4001**
LAURA LOUISE AKINS,	)	
	)	**RESPONDENT'S BRIEF**
Defendant-Respondent.	)	
	)	

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

HONORABLE RICH CHRISTENSEN
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

The State appeals from the district court's order granting Ms. Akins's motion to dismiss one of the felony charges against her: failure to notify of a death with the intent to prevent discovery of the manner of death. The district court granted the motion because it reasoned that compliance with this statute impermissibly infringed on Ms. Akins's Fifth Amendment privilege against self-incrimination. Due to her valid claim of the privilege, the district court dismissed the charge. The district court was correct, and this Court should affirm the district court's order.

Statement of Facts and Course of Proceedings

In November of 2015, law enforcement began investigating the death of a young woman whose body had been found in Lake Coeur d'Alene. (*See generally* R., pp.10–52 (probable cause affidavit).) Law enforcement identified the woman as twenty-seven-year-old Kimberly Vezina. (R., p.19.) Her last known contact was when she was released from Spokane County Jail about one month prior. (R., pp.19, 21.)

After further investigation, law enforcement determined Ms. Vezina went with a friend (Darren Smith) to a "flophouse" in Spokane after her release. (R., p.44.) Ms. Vezina died of a drug overdose on her second night there. (R., p.44.) There were four other people at the house that night (Darren, Lacy Drake, Charles "Rowdy" Rogers, and Ms. Akins). (R., p.44.) In addition, two other people (Jennifer Gilpatrick and Victor Matt) were in and out of the house that evening. (R., p.44.) They were using methamphetamine, heroin, and alcohol. (R., p.44.) Ms. Vezina's body was discovered the next morning by Rowdy, who was in a relationship with Jennifer. (R., p.44.) Darren, Lacy, and Ms. Akins all suspected Jennifer intentionally caused Ms. Vezina's overdose. (R., p.45.) Rowdy, who had seniority in the group due to his drug dealer

status, decided Lacy and Ms. Akins would dispose of the body. (R., p.44.) Rowdy and Jennifer provided Lacy and Ms. Akins with a "burner" car, and Rowdy told them to dispose of the body near Ms. Akins's family's lake house in Coeur d'Alene. (R., p.44.) Lacy and Ms. Akins went to her family's house, unlawfully entered the home, and stole several items. (R., p.44.) Then, they drove to the public boat dock, unloaded Ms. Vezina's body, and dropped her in the lake. (R., p.44.) Her body had been wrapped in a tarp and a shower curtain. (R., p.44.) Several weeks later, two fishermen found her body and called the police. (R., pp.14, 17–19.)

The State charged Ms. Akins with one count of failure to notify of a death (Count 1), in violation of I.C. § 19-4301A(3), and one count of destruction of evidence (Count 2), in violation of I.C. § 18-2603. (R., pp.86–87.) Specifically, for Count 1, the State alleged Ms. Akins failed to notify or delayed notification to law enforcement of Ms. Vezina's death, where the death would be subject to the coroner's investigation, with the intent to prevent discovery of the manner of death. (R., p.86–87.) For Count 2, the State alleged Ms. Akins willfully concealed a body knowing that the body was about to be produced, used or discovered as evidence in a felony criminal investigation and with the intent to prevent it from being so produced, used or discovered. (R., p.87.)

Ms. Akins moved to dismiss Count 1. (R., pp.103–08.) She argued the district court should dismiss this charge as unconstitutional because the statute violated her Fifth Amendment rights. (R., pp.103–08.) Ms. Akins later submitted additional materials in support of her motion, including the legislative history for I.C. § 19-4301A(3), (R., pp.126–33), and a written decision from the Honorable Cynthia K.C. Meyer granting a motion to dismiss for the same offense on

the same constitutional grounds, but in a different case, (R., pp.152, 181–89).[1] The State opposed the motion. (R., pp.137–42.) Ms. Akins replied. (R., pp.200–02.) The district court held a hearing on the motion and took the matter under advisement. (R., pp.203–05; *see generally* Tr.)

About three weeks later, the district court issued a memorandum decision dismissing Count 1 due to its infringement on Ms. Akins's Fifth Amendment privilege. (R., pp.236–52.) The district court then issued an order to dismiss Count 1, and the State timely appealed. (R., pp.257, 258–60.)

[1] The State did not appeal Judge Meyer's memorandum decision and order dismissing this charge (I.C. § 19-4301A(3)). *See* Idaho Supreme Court Data Repository, *State v. McGhee*, Kootenai County No. CR-2015-9852.

ISSUE

The State frames the issue on appeal as:

> Did the district court err by concluding that I.C. § 19-4301A(3) violates the Fifth Amendment right against compelled self-incrimination because it includes a motive element of intent to prevent the discovery of the manner of death that elevates the crime to a felony?

Ms. Akins rephrases the issue as:

> Did the district court properly grant Ms. Akins's motion to dismiss because compliance with the felony reporting statute violates Ms. Akins's Fifth Amendment privilege against self-incrimination?

ARGUMENT

The District Court Properly Granted Ms. Akins's Motion To Dismiss Because Compliance With The Felony Reporting Statute Violates Ms. Akins's Fifth Amendment Privilege Against Self-Incrimination

A. Introduction

The single issue in this case, as correctly identified by the district court, is whether compliance with I.C. § 19-4301A(3) compels an individual to face a substantial hazard of self-incrimination. It does. Compliance with this statute therefore violates Ms. Akins's Fifth Amendment privilege against compulsory self-incrimination, and the Fifth Amendment provides a complete defense to the charge. The district court properly granted Ms. Akins's motion to dismiss due to her claim of the privilege.

B. Standard Of Review

"This Court freely reviews questions of law. Constitutional issues are purely questions of law over which this Court exercises free review." *State v. Baeza*, 161 Idaho 38, 4 (2016) (citations and quotation marks omitted).

C. Compliance With Felony Reporting Statute For Deaths Subject To A Coroner's Investigation Violates The Fifth Amendment Because It Confronts The Individual—Who Intends To Prevent The Discovery Of The Manner Of Death—With A Substantial Hazard Of Self-Incrimination

"The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting U.S. CONST. amend. V). The privilege against self-incrimination is "always broadly construed . . . to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." *Baxter v. Palmigiano*, 425 U.S. 308, 326–27 (1976) (quoting

Maness v. Meyers, 419 U.S. 449, 461 (1975)). "Thus, the Fifth Amendment not only excludes from use in criminal proceedings any evidence obtained from the defendant in violation of the privilege, but also is operative before criminal proceedings are instituted: *it bars the government from using compulsion to obtain incriminating information from any person*." *Id.* at 327 (emphasis added). The Fifth Amendment provides "a complete defense" to the prosecution of an offense if the individual's compliance with the statute compels self-incrimination. *See Marchetti v. United States*, 390 U.S. 39, 60–61 (1968).

Consistent with the "liberal construction" of the privilege, *Hoffman v. United States*, 341 U.S. 479, 486 (1951), the U.S. Supreme Court broadly interprets the type of information and the scope of individuals protected by the Fifth Amendment. "[T]he protected information 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution,'" *Baxter*, 425 U.S. at 327 (quoting *Maness*, 419 U.S. at 461), "as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Maness*, 419 U.S. at 461 (citing *Hoffman*, 341 U.S. at 486). "And it is not necessary that a person be guilty of criminal misconduct to invoke the privilege; an innocent person, perhaps fearing that revelation of information would tend to connect him with a crime he did not commit, also has its protection." *Baxter*, 425 U.S. at 327. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (quoting *Slochower v. Bd. of Higher Ed. of New York*, 350 U.S. 551, 557–58 (1956)).

"[T]o invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with substantial hazards of self-incrimination." *California v. Byers*, 402 U.S. 424, 429 (1971) (plurality opinion). "[J]udicial scrutiny is invariably a close

one" when the courts are "confronted with the question of compelled disclosure that has an incriminating potential." *Id.* at 427.

> Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. Here, as correctly determined by the district court, Ms. Akins has demonstrated the substantial hazards of self-incrimination by her compliance with the reporting statute. Ms. Akins's claim to her constitutional protections outweighs the State's demand for information.

The reporting statute here pertains to a person's duty to notify the coroner or law enforcement of certain deaths. The statute reads in full:

> (1) *Where any death occurs which would be subject to investigation by the coroner under section 19-4301(1), Idaho Code*, the person who finds or has custody of the body shall promptly notify either the coroner, who shall notify the appropriate law enforcement agency, or a law enforcement officer or agency, which shall notify the coroner. Pending arrival of a law enforcement officer, the person finding or having custody of the body shall take reasonable precautions to preserve the body and body fluids and the scene of the event shall not be disturbed by anyone until authorization is given by the law enforcement officer conducting the investigation.
>
> (2) Except as otherwise provided in subsection (3) of this section, any person who fails to notify the coroner or law enforcement pursuant to subsection (1) of this section shall be guilty of a misdemeanor and shall be punished by up to one (1) year in the county jail or by a fine not to exceed one thousand dollars ($1,000), or by both such imprisonment and fine.
>
> (3) Any person who, *with the intent to prevent discovery of the manner of death*, fails to notify or delays notification to the coroner or law enforcement pursuant to subsection (1) of this section, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a term not to exceed ten (10) years or by a fine not to exceed fifty thousand dollars ($50,000) or by both such fine and imprisonment.

I.C. § 19-4301A (emphasis added). As delineated in Subsection (1), a person does not have to notify authorities for all deaths, but only those "subject to investigation by the coroner" under I.C. § 19-4301(1). The deaths subject to a coroner's investigation are:

> (a) The death occurred as a result of violence, whether apparently by homicide, suicide or by accident;
>
> (b) The death occurred under suspicious or unknown circumstances; or
>
> (c) The death is of a stillborn child or any child if there is a reasonable articulable suspicion to believe that the death occurred without a known medical disease to account for the stillbirth or child's death.

I.C. § 19-4301. Here, Ms. Akins was charged with the felony offense in Subsection (3), which includes the additional element of "the intent to prevent discovery of the manner of death," unlike the misdemeanor offense in Subsection (2), which contains no intent element. (R., pp.86–87.)

There are two factors to determine whether a reporting or disclosure statute confronts an individual with a substantial hazard of self-incrimination. *Byers*, 402 U.S. at 429 (plurality opinion). The first is whether the statute is directed at the public at large or a highly selective group inherently suspect of criminal activities. *Id.* The second is whether the statute is regulatory or criminal. *Id.* In its memorandum decision, the district court thoroughly addressed each factor and held that both weighed towards infringing on Ms. Akins's Fifth Amendment privilege. (R., pp.240–46.) The district court appropriately considered and weighed these factors.

1. The Felony Reporting Statute Is Directed At A Highly Selective Group Inherently Suspect Of Criminal Activities

As recognized by the district court, Idaho Code § 19-4301A has multiple components. Subsection (1) imposes a duty to notify the authorities, and Subsection (2) penalizes those who fail to do so with a misdemeanor offense. I.C. § 19-4301A. (*See* R., pp.240–42.) Subsection (3),

however, takes the duty to notify and attendant penalty a step further. It states that individuals who, in failing or delaying to notify the authorities of a death, possess the intent to prevent the discovery of the manner of death have committed a felony offense. I.C. § 19-4301A(3). The district court correctly held that this subsection of the statute, unlike the misdemeanor subsection, targets a highly selective group inherently suspect of criminal activities.

To resolve this factor, the district court examined two leading United States Supreme Court cases that have designated statutes as targeting either the general public or a suspected criminal group. (R., pp.240–42.) In *United States v. Sullivan*, 274 U.S. 259 (1927), the United States Supreme Court rejected the defendant's claim that "the privilege against compulsory self-incrimination afforded him a complete defense because filing a [tax] return would have tended to incriminate him by revealing the unlawful source of his income." *Byers*, 402 U.S. at 428 (plurality opinion). The Court recognized that the defendant could claim the privilege to particular incriminating questions, but he could not refuse to file a tax return altogether "by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Sullivan*, 274 U.S. at 263–64. Then, in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the United States Supreme Court distinguished *Sullivan* and held that the statute in question targeted a suspected criminal group. *Id.* at 78–79. The statutory scheme in *Albertson* required individuals to register as members of the Communist Party, which could be used to prosecute them under at least two federal statutes. *Id.* at 77–78. Unlike *Sullivan*, where "the questions in the income tax return were neutral on their face and directed at the public at large," response to any of the Communist Party registration questions "in context might involve the [defendants'] admission to a crucial element of a crime." *Albertson*, 382 U.S. at 79. The "pervasive effect of the information called for by" the registration form was incriminatory. *Id.*

Thus, in *Albertson*, the statute was "directed at a highly selective group inherently suspect of criminal activities." *Id.*

Weighing the refusal to file a tax return on one hand with the Communist Party registration in the other, the district court appropriately concluded I.C. § 19-4301A(3) contained more similarities to *Albertson* than *Sullivan* and, as such, targeted a suspected criminal group. The district court was quick to distinguish I.C. § 19-4301A(3) from the misdemeanor offense in Subsection (2). That provision targets the public at large. (R., p.241.) And Ms. Akins agrees. The misdemeanor provision in Subsection (2) is "akin to *Sullivan*," (R., p.241), because it requires *all* individuals report *any* death subject to the coroner's investigation. These reportable deaths—as a result of violence (whether homicide, suicide, or accident), under suspicious or unknown circumstances, or of a stillborn child or any child without a known medical disease—are directed at both the general public and suspected criminal groups. For example, deaths by suicide or accident are not inherently criminal; death by homicide is. (R., p.241.) But, because *any* person that finds or has custody of the body must report the death, the misdemeanor provision is directed at the public at large. It does not infringe upon the Fifth Amendment privilege.

In contrast, Subsection (3) is directed at a highly selective group inherently suspect of criminal activities because it contains an additional element to deliberately pare down the group from the general public to suspected criminals. Subsection (3) elevates the offense to a felony for failing or delaying notification of the death "with the intent to prevent discovery of the manner of death." I.C. § 19-4301A(3). Like *Albertson*, Subsection (3) targets individuals who, in reporting the death, "might involve" their "admission to the crucial element of a crime." 382 U.S. at 79. An individual who delays or fails to notify of a death with the intent to prevent the coroner or law enforcement from discovering how that person died is trying to hide something. In short,

Subsection (3) compels individuals to report the death they want to hide. Although the person may not be hiding something criminal, "a great majority of those who intend to prevent the discovery of the manner of death presumably have something to gain from preventing it: avoiding criminal culpability." (R., p.242.) This additional element in Subsection (3) "is overwhelmingly directed at those inherently suspected of criminal activity." (R., p.242.)

The State appears to take a narrow view and downplay the compelled disclosures in I.C. § 19-4301A(3). It argues that Subsection (3) does not target individuals suspected of criminal activity because the statute only requires the person to report "disclosure of death and location of the body." (App. Br., p.6.) These innocent disclosures, according to the State, do not target a suspected criminal group. (App. Br., p.6.) The State's position not only misrepresents the statute, but also ignores United States Supreme Court precedent.

First, the statute's plain language contains no limitation on the information required to be submitted by the individual who found or has custody of the body. I.C. § 19-4301A(1). The determination of compliance with the statute rests solely in the hands of the prosecutor. Without any limiting language, the prosecutor has unfettered discretion to decide whether an individual provided enough information to comply with the statute. To obtain more information than just a death and the body's location, law enforcement could easily, and in good faith, threaten prosecution under I.C. § 19-4301A(3) to persuade the person to talk. Moreover, the statute imposes an affirmative duty on the individual to preserve the body until law enforcement arrives:

> Pending arrival of a law enforcement officer, the person finding or having custody of the body shall take reasonable precautions to preserve the body and body fluids and the scene of the event shall not be disturbed by anyone until authorization is given by the law enforcement officer conducting the investigation.

I.C. § 19-4301A(1). The State omits this portion of the statute in its brief. This provision, however, all but prohibits the conduct the State suggests: that an individual can simply call the

police, give an anonymous tip informing them of a dead body, the manner of death, and the body's location, and wash his hands of the matter. The statute plainly requires more cooperation than that. The State's effort to downplay the reporting statute is belied by the statute itself.

Second, the United States Supreme Court has rejected the State's narrow view of the compelled disclosures and those implicated by them. *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968), are instructive. In *Marchetti* and *Grosso*, the United States Supreme Court held that the Fifth Amendment "afforded a complete defense to prosecutions for noncompliance with federal gambling tax and registration requirements." *Byers*, 402 U.S. at 429–30 (plurality opinion). In *Marchetti*, the Court acknowledged that a gambling registration and tax necessarily "increases the likelihood" of discovery and prosecution of gambling offenses, but the Court also recognized that "[t]hese offenses need not include actual gambling" to create a substantial hazard of incrimination. 390 U.S. at 52. Offenses related to gambling could also be implicated by the required disclosures. *Id.* This concern is present here. An individual who is compelled to report a death he intends to prevent the discovery of obviously increases the likelihood of the death's discovery and his prosecution for that death. But the compelled disclosures could easily incriminate the individual in *other* criminal activity. It takes little imagination to picture a scenario where an individual may intend to prevent the discovery of the death due to related criminal conduct (*i.e.*, drug use, unlawful possession of a firearm, assisting suicide, or destruction of evidence) and not necessarily the death itself. Contrary to the State's reasoning, a purported innocent disclosure of a death and the body's location does not insulate an individual from the risk of self-incrimination.

Likewise, in *Grosso*, the Court cautioned, "The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers; but we cannot ignore either the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made." 390 U.S. at 68. This concern also rings true here. It is assumed that the State has a legitimate interest in recovering dead bodies and investigating deaths, but the "characteristics of activities" that surround a violent, suspicious, or unknown death and "the composition of the group to which inquiries are made" surrounding that death, especially those that intended to prevent the death's discovery, cannot be ignored. *Id.* The State's assertion that reporting a death by an individual who desires to prevent that death's discovery contains no risk of incrimination is patently false.

Further, in *Haynes*, the U.S. Supreme Court held the Fifth Amendment privilege protected an individual "prosecuted for failure to register a firearm as required by federal statute." *Byers*, 402 U.S. at 429 (plurality opinion). The Court was not persuaded by the government's assertion that registration was "not invariably indicative of" a violation of the registration laws. *Haynes* 390 U.S. at 96. The government noted the "uncommon" situations "which a possessor who has not violated the Act's other provisions is obliged to register." *Id.* at 96–97. "Nonetheless," the Court emphasized, "the correlation between obligations to register violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution . . . . " *Id.* at 97. Just like in *Haynes*, the correlation between an individual's disclosure of a death he intends to hide and the prosecution for an offense related to that death "can only be regarded as exceedingly high." *Id.* "Moreover," that individual can "reasonably

fear" that reporting a death he intends to hide will facilitate his prosecution for an offense related to that death. *Id.* Despite the State's claims that not all individuals will self-incriminate, these "uncommon" situations do not negate the risk of self-incrimination for individuals who intend to prevent the death's discovery.

As explored in *Marchetti*, *Grosso*, and *Haynes*, the State's attempt to gloss over the Subsection (3) as not directed at a highly selective group inherently suspect of criminal activities fails. While the State is correct that the statutory mandate to disclose a death remains the same regardless of the individual's intent, it is undisputable that Subsection (3) targets a different group than the general public. Subsection (3) targets individuals who intend to prevent the coroner's and police's investigation of a violent, suspicious, or otherwise unknown death. It targets suspected criminals by design. Therefore, the "motive" element is entirely relevant to this Court's analysis of the constitutionality of Subsection (3), and the district court properly held that this factor was in Ms. Akins's favor.

Lastly, the State seems to analogize this case to a court order to produce a child, but this analogy falls flat. In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), a mother tried to claim the privilege to avoid physically producing her child as directed by a court order. *Id.* at 552, 553. The child was in the "oversight" of the city's social services agency pursuant to a court order, but the order gave physical custody to the mother. *Id.* at 552. Once the agency learned the mother was violating the order, it petitioned to remove the child from the mother's care, and the mother refused to produce the child despite the court's order. *Id.* at 552–53. She claimed the Fifth Amendment protection. *Id.* at 553. The United States Supreme Court rejected her claim. First, the Court held that the mother could not claim any privilege over "the contents or nature of the thing demanded," her child. *Id.* at 554–55. Next, to the extent that

the mother's production of the child would implicitly communicate her control over the child, the United States Supreme Court held that the mother could not invoke the privilege because she "assumed custodial duties related to production" and "production is requires as part of a noncriminal regulatory regime." *Id.* at 555–56. The Court held, "Persons who care for children pursuant to a custody order, and who may be subject to a request for access to the child, are hardly a 'selective group inherently suspect of criminal activities.'" *Id.* at 559 (quoting *Marchetti*, 390 U.S. at 57). The Court also reasoned that orders to produce children are "for reasons related entirely to the child's wellbeing and through measures unrelated to criminal law enforcement or investigation." *Id.* at 561.

In stark contrast to *Bouknight*, Subsection (3) does not impose or even authorize a court order to produce a body. I.C. § 19-4301A is not concerned with persons who already may be subject to requests for access to a body. Even so, any requirement to produce a body to authorities, which would not trigger the privilege per *Bouknight*, is beside the point. The Fifth Amendment intrusion here is the requirement that an individual disclose information about the body to the coroner or law enforcement. Unlike a child under government supervision and subject to a court order, the body is unknown to the authorities, hence the requirement that an individual report it once he discovers it. Subsection (3) imposes an affirmative duty on individuals, on their own accord and without a judicial mandate, to contact law enforcement or the coroner and provide details of a death that they want to hide from law enforcement and the coroner. *Bouknight* is inapposite to the Fifth Amendment issue at hand.

In summary, Subsection (3) is "directed at a highly selective group inherently suspect of criminal activities." *Albertson*, 382 U.S. at 69. It is beyond cavil that individuals who desire to prevent a body from being discovered and investigated by the authorities would be suspected of

criminal activity. In fact, Subsection (3) intentionally targets this suspected criminal group. The district court correctly reasoned, "[T]his factor tips the balance in favor of holding the Fifth Amendment prohibits the duty to report." (R., p.242.)

2. The Felony Reporting Statute Is In An Area Permeated With Criminal Statutes

The district court held that this second factor weighed strongly in favor of establishing the substantial hazard of self-incrimination if one complies with Subsection (3). (R., pp.242–46.) This factor considers whether the defendant's claim of privilege is asserted "in an essentially noncriminal and regulatory area of inquiry" or "against an inquiry in an area permeated with criminal statutes." *Albertson*, 382 U.S. at 79. For example, the income tax laws in *Sullivan* and a law requiring any driver to stop and identify himself after an accident, as examined in *Byers*, were regulatory and noncriminal. *Byers*, 402 U.S. at 429–30 (plurality opinion). On the other hand, the gambling tax and registration requirements in *Marchetti* and *Grosso*, the Communist Party registration in *Albertson*, and the firearm registration in *Hayes* were part of a criminal statutory scheme. *Albertson*, 382 U.S. at 78–79; *Marchetti*, 390 U.S. at 44–47; *Grosso*, 390 U.S. at 64–65; *Haynes*, 390 U.S. at 98–99. Here, as properly identified by the district court, "the area of inquiry is overwhelmingly concerned with investigating deaths where criminal liability is likely to be found." (R., p.245.)

To demonstrate the criminal nature of Subsection (3), the district court examined the legislative history of I.C. § 19-4301A. The State, in a footnote, disputes "the district court's conclusion that this statute addresses primarily homicides or other criminal investigations" because, the State alleges, neither the plain language nor the record "show that a significant percentage of" deaths investigated by the coroner "are related to criminal activities." (App. Br., p.6 n.1.) For one, the State miscomprehends that number of deaths-turned-criminal

investigations would be somehow be indicative of the statute's purpose. Whether there are more or less deaths-turned-criminal investigations has no bearing on the criminal nature of the statute—just like whether more or less people fail to register their gambling income or illegal firearms does not change the nature of those criminal statutory schemes. Second, the plain language of the statute and the legislative history, which the State fails to discuss in its brief, fully support the district court's conclusion.

The legislature added Subsections (2) and (3) to I.C. § 19-4301A in 2006. 2006 Idaho Sess. Laws 724 (ch. 239, § 1). (R., p.242.) The statement of purpose for these new provisions read: "Current Idaho law requires the reporting of deaths to appropriate officials, however, there is no penalty given for failure to do so. *The purpose of this legislation is to provide penalties that may be used for punishment of individuals who fail to report deaths as prescribed by law.*" (R., p.243.) Prior to the enactment of these compliance penalty statutes, three committees discussed the bill and its purpose. First, in the House State Affairs Committee, a representative spoke in support of the bill:

> [L]egislation that will provide penalties that may be used for punishment of individuals who fail to report deaths as prescribed by law. . . . An unfortunate situation was described that had occurred in Madison County where bodies of a mother and daughter were found dead in a home. It was determined they had been dead for about three years and the father was still living in the home and had failed to report the deaths as required by law. There are currently no penalties provided in the current law.

*RS 16085, H. State Affairs Comm. Minute*s, at 4 (Feb. 20, 2006). The bill initially charged the failure to notify of a death as a misdemeanor; however, a second violation increased the offense to a felony. *RS 16085, H. State Affairs Comm. Minutes,* at 4. The bill was referred to the House Judiciary and Rules Committee. *RS 16085, H. State Affairs Comm. Minutes,* at 4. In this House committee, the representative explained:

> This legislation requires a person to report deaths to law enforcement officials. This bill was brought forward because of a case found in Rexburg, Idaho, in 2004, where the badly decomposed bodies of a mother and a grown daughter were found. The mother had been dead for approximately three years and the daughter for approximately a year.

H 709, H. Judiciary, Rules, and Admin. Comm. Minutes, at 1 (March 1, 2006). A retired FBI agent and a relative of the deceased mother and daughter spoke in support of the bill:

> Both of their bodies were decayed, mummified, and beyond recognition when they were found . . . . Autopsies were conducted and the doctor said the two women could have been suffocated or poisoned, but due to the advanced decomposition, he could not determine the exact time or cause of death. To date, the husband and father who lived in the home with the bodies, David [ ], has not said one word about their deaths and has not cooperated with Law Enforcement. Currently, David has not been charged with any crime and is a free man.

H 709, H. Judiciary, Rules, and Admin. Comm. Minutes, at 1–2. The FBI agent asked for the legislature to create a felony offense "with a mandatory sentence" for "a person knows or has any type of relationship with the deceased and does not report the dead body." *H 709, H. Judiciary, Rules, and Admin. Comm. Minutes*, at 2. After this meeting, the felony provision in Subsection (3) was added because "the main testifier to the bill expressed concern that the misdemeanor language in the bill was not strong enough and asked that amendments be added making the crime a felony." *H 709, H. Judiciary, Rules, and Admin. Comm. Minutes*, at 1 (March 7, 2006). Finally, in the Senate Health and Welfare Committee, a representative explained,

> [O]ne of the reasons behind the bill was a disturbing situation in Madison county which has highlighted the need to add a penalty clause to the law against failing to report a death. The current statute contains no penalty for failing to report a death even if it is intentionally concealed.

H 709a, S. Health & Welfare Comm. Minutes, at 1 (March 15, 2006). A senator added, "Because there is no penalty for individuals who ignore this law, [this bill] is necessary to aid law enforcement in upholding this law." *H 709a, S. Health & Welfare Comm. Minutes*, at 1.

It is evident from this legislative history that Subsection (3) is in an area permeated with criminal statutes.[2] The legislature's purpose of the bill was not to regulate the coroner's investigation of bodies or a neutral process for notification of bodies. The dual purposes were to ensure law enforcement or the coroner would be "promptly" notified to investigate violent, suspicious, or unknown deaths and to allow the prosecutor to charge individuals with a felony offense for failing to disclose the necessary information. This statute was not regulatory and administrative. It was "intended to facilitate criminal convictions." *Byers*, 402 U.S. at 430 (plurality opinion).

Beyond the legislature's intent, the plain language of the statute and the statutory scheme as a whole prove Subsection (3) is far from a "noncriminal and regulatory area of inquiry." *Albertson*, 382 U.S. at 79. Subsection (3) compels individuals to report a violent, suspicious, or unknown death that they want to hide to the very authorities that must, by statutory mandate, investigate that death. As noted by the district court, the duty to report and the penalty for noncompliance "are found back-to-back in the same statute." (R., p.246.) The statute is predominantly criminal. In addition, Chapter 43, which contains I.C. § 19-4301A, has numerous statutory provisions focused exclusively on criminal investigations and prosecution, not to

[2] The district court also discussed the legislative history of I.C. § 19-4301 (the coroner's duty to investigate) in considerable detail. (R., p.244–45.) Part of the legislative purpose was

> relating to when a coroner must investigate a suspicious death. The new provision is found at 19-4301(1)c [sic] and provides that a coroner will investigate stillbirths and child deaths when it can reasonably be shown that there is no known medical disease causing the stillbirth or death. *With regard to stillbirths, the intent is to capture those circumstances where illegal drug use by the mother may have caused or contributed to the cause of the stillbirth. Under existing law, there is no legal authority to investigate under those circumstances.*

(R., p.244 (emphasis added).) Similar to the discussion of I.C. § 19-4301A, the legislature's focus was plainly criminal, rather than regulatory or administrative. (R., pp.244–45.)

mention the fact that Title 43 is part of Chapter 19, Criminal Procedure. One statute mandates that the coroner, after completing the investigation of the death, "shall make and file a written report of the material facts concerning the cause and manner of death" to the district court's clerk's office. I.C. § 19-4301D. This statute also provides, "the coroner shall promptly deliver to *the prosecuting attorney* of each county having criminal jurisdiction over the case copies of all records relating to every death as to which further investigation may be advisable." I.C. § 19-4301D (emphasis added). The next three provisions allow the coroner to subpoena witnesses and empanel a jury to determine "who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death." I.C. §§ 19-4302 to -4304. Then, the jury "must render their verdict" and set forth "who the person killed is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof." I.C. § 19-4305. A subsequent section reads:

> If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant . . . for the arrest of the person charged.

I.C. § 19-4308. In light of these statutes, the overwhelming purpose of Title 43 is to facilitate a criminal investigation and prosecution for a death subject to the coroner's investigation.

In summary, an assertion of the Fifth Amendment privilege when faced with noncompliance of I.C. § 19-4301A(3) is to protect "against an inquiry in an area permeated with criminal statutes." *Albertson*, 382 U.S. at 79. The district court properly determined that "this factor weighs heavily in favor of holding that I.C. § 19-4301A(3)'s duty to report—especially for someone with the intent to prevent the discovery of the manner of death[—]is incompatible with the Fifth Amendment's prohibition against self-incrimination." (R., p.246.)

3. Ms. Akins's Compliance With The Felony Reporting Statute Would Provide A Link In The Chain For Prosecution Of Homicide Or Other Crimes

After thoroughly discussing these factors, the district court held,

> I.C. § 19-4301A(3) is incompatible with the Fifth Amendment. First, the felony provision of the statue is directed at those who intend to prevent the discovery of the manner of death - a group inherently suspected of criminal activity. Second, the area of inquiry is overwhelmingly concerned with investigating deaths where criminal liability is likely to be found.

(R., p.246.) The district court then addressed one final matter: the highly incriminating nature of the information disclosed by compliance with I.C. § 19-4301A(3) in general and in Ms. Akins's case. (R., pp.246–48.)

Looking generally at the issue, the district court carefully distinguished the failure to comply with the act of compliance. (R., pp.246–47.) Although the failure to comply is a crime in and of itself, it does not trigger the Fifth Amendment protection. The Fifth Amendment protection arises because, under a Subsection (3), "to those who intend to prevent the discovery of manner of death, notifying the authorities would establish a crucial element in the (assumed) crime: evidence of the manner of death." (R., p.246.) The district court explained,

> One who intends to prolong—perhaps indefinitely—the discovery of the manner of someone else's death, is perhaps one who is engaged in inherently unlawful activity. . . . It is not the criminality of the failure to report that I.C. § 19-4301A(3) is concerned; it is the criminal purpose furthered by preventing the "discovery of the manner of death."

(R., p.247.) A person compelled to disclose a death under Subsection (3) "would furnish a link in the chain of evidence needed to prosecute" him for that death or a related offense. *Hoffman*, 341 U.S. at 486. As such, these compelled disclosures are protected by the Fifth Amendment privilege.

For Ms. Akins specifically, even though she has not been charged with homicide yet, she still retains her Fifth Amendment protection. Ms. Akins does not have to prove beyond a

reasonable doubt the precise crime should she would have confessed to if she had complied with Subsection (3). She must show only "substantial hazards of self-incrimination," not a guarantee or certainty of self-incrimination. *Byers*, 402 U.S. 428–29 (plurality opinion). The compelled disclosures here would create those risks. As recognized by the district court, "[I]t is not the choice of law enforcement to pursue charges that creates a substantial hazard of self-incrimination, but the law. Without engaging in speculation, the Court acknowledges that [Ms. Akins's] conduct *could be criminally culpable if the factual allegations are true*, notwithstanding the jurisdiction's choice (at this point) to decline charging [Ms. Akins.]" (R., p.248 (emphasis added).) Thus, contrary to the State's assertion that the district court did not identify any risks of incrimination,[3] (App. Br., p.7), the district court plainly identified that Ms. Akins could be charged with an offense related to Ms. Vezina's death. Further, the compelled disclosures would have put Ms. Akins at risk of self-incrimination for other related crimes, such as illegal drug use. If Ms. Akins had immediately reported the body, and then remained at the scene as required by the statute, it absurd to believe that law enforcement, upon arriving at a flophouse with a dead body, would turn a blind eye to the other criminal activities taking place and decline to investigate Ms. Akins for other crimes. In that situation, there is "a very real" "possibility of prosecution . . . for criminal offenses disclosed by or deriving from the

[3] The State's claim is also curious because Ms. Akins was charged with another felony offense: destruction of evidence for concealing the body. (R., p.87.) This charged offense is so broadly described in the Information that it does not identify how Ms. Akins committed this offense. (R., p.87.) Presumably, Ms. Akins could have committed this offense in at least two ways: by transporting the body from Spokane to Coeur d'Alene or by disposing of the body in the lake. But, even if Ms. Akins had complied with I.C. § 19-4301A(3) by "promptly" notifying the authorities, she could have been charged with this offense. Through her compelled disclosure, she might have provided a link in the chain of a destruction of evidence charge if she had already moved the body or removed other evidence at the flophouse. In addition, if the prosecutor decided Ms. Akins disclosed the body too late (a delayed notification), then she would have incriminated herself in the same offense she was trying to comply with—I.C. § 19-4301A(3).

information that the law compels [Ms. Akins] to supply." *Byers*, 402 U.S. at 428 (plurality opinion). Ms. Akins's disclosures could have provided "a link in the chain of evidence that could lead to prosecution." *Baxter*, 425 U.S. at 327 (quoting *Maness*, 419 U.S. at 461).

More importantly, speculation as to whether the State would actually pursue criminal charges after the disclosures and whether Ms. Akins's admission would secure a conviction are both "immaterial" to invoke the privilege. *Blau v. United States*, 340 U.S. 159, 161 (1950). "The judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties." *Albertson*, 382 U.S. at 81. In other words, the State does not get to claim the benefit of hindsight to defeat the privilege. The fear that criminal charges "might be brought against her" if she complied with the statute is reasonable, and therefore Ms. Akins can assert her Fifth Amendment privilege. *Id.*

As acknowledged by the district court, "if the facts presented at the preliminary hearing are true, this is certainly a disturbing set of actions on many levels." (R., p.252.) But the issue before the Court is not to pass judgment on "the particular reprehensible and odious act of dumping a human body into Lake Coeur d'Alene." (R., p.252.) The question is whether Subsection (3) of I.C. § 19-4301A "can withstand constitutional and legal scrutiny given the set of facts as presented." (R., p.252.) As shown here, Subsection (3) targets a highly selective group inherently suspect of criminal activities and is in an area permeated with criminal statutes, such that Subsection (3)'s compelled disclosures confronted Ms. Akins with a substantial hazard of self-incrimination. Her claim of the Fifth Amendment privilege therefore provides a complete defense to the charge in Count 1, and the district court properly granted her motion to dismiss.

CONCLUSION

Ms. Akins respectfully requests this Court affirm the district court's order granting her motion to dismiss.

DATED this 8th day of March, 2018.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of March, 2018, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RICH CHRISTENSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAY LOGSDON
KOOTENAI COUNTY PUBLIC DEFENDER
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CRIMINAL DIVISION
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_____/s/_____
EVAN A. SMITH
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JCS/eas