

**CASE NOTE: CRIMINAL LAW—LIMITING USE OF POST-HOMICIDE CONCEALMENT OF A BODY AS AN AGGRAVATING FACTOR IN CRIMINAL SENTENCING—*STATE V. LEJA***

Stephen W. Trask<sup>†</sup>

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I. INTRODUCTION

Since the establishment of the Minnesota Sentencing Guidelines in the late 1970s,<sup>1</sup> one of the most important legal issues has been identifying what situations justify departure from the Guidelines. In particular, a line of cases since the early 1980s has

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<sup>†</sup> J.D. Candidate, 2006, William Mitchell College of Law; B.S., Government, 2003, Liberty University.

1. 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE SERIES—CRIMINAL LAW AND PROCEDURE § 36.24 (3d ed. 2001).

considered the circumstances under which concealment of a body after a homicide can be an aggravating factor that justifies departure from the Guidelines.<sup>2</sup> The Minnesota Supreme Court recently clarified this area of the law in *State v. Leja*.<sup>3</sup> The court held that concealing a body could be an aggravating factor if the defendant either commits additional aggravating factors or uses personal knowledge about the location of the body to bargain for a more favorable sentence.<sup>4</sup>

This Case Note examines an unexplored issue in the academic literature, which is whether the aggravating factor for concealment under the sentencing guidelines of many jurisdictions violates the right against self-incrimination. This Case Note makes an initial contribution to this discussion by applying the current self-incrimination precedents of the U.S. Supreme Court to the aggravating factor, as developed by the Minnesota courts in a line of cases leading up to *Leja*.<sup>5</sup> This Case Note argues that Minnesota's aggravating factor violates the constitutional right against self-incrimination.<sup>6</sup> Part II of this Case Note explores the history of the Guidelines and legal precedents in Minnesota that deal with departure for concealment of a body.<sup>7</sup> Part III examines the facts and the analysis provided by the Minnesota Supreme Court in *State v. Leja*.<sup>8</sup> Part IV applies the law of self-incrimination to Minnesota's concealment aggravating factor and concludes that the aggravating factor violates the right against self-incrimination.<sup>9</sup>

## II. BACKGROUND

### A. *The History, Purpose, and Operation of the Guidelines*

Until the mid-1970s, all U.S. jurisdictions, including Minnesota, used sentencing systems that provided little detail about the specific sentences that judges should impose for felonies.<sup>10</sup> Due

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2. See *infra* Part II.B.

3. 684 N.W.2d 442 (Minn. 2004).

4. *Id.* at 449.

5. See *infra* Part II.

6. See *infra* Part IV.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 141-42 (2005) (citing DALE G. PARENT, STRUCTURING CRIMINAL

to this substantial flexibility, judges had almost unfettered discretion to impose sentences up to the statutory maximums.<sup>11</sup> The goal of this sentencing system was for judges to address each offender individually.<sup>12</sup> In the mid-1970s, commentators criticized the flexibility of this sentencing system because they believed it produced unjust disparities in sentencing<sup>13</sup> and often unduly lenient sentences.<sup>14</sup>

In the late 1970s and early 1980s, many jurisdictions implemented laws to reduce judicial discretion by creating greater uniformity in sentencing.<sup>15</sup> In 1978, the Minnesota Legislature established the Sentencing Guidelines Commission.<sup>16</sup> Minnesota was the first jurisdiction in the United States to create mandatory sentencing guidelines administered by an independent commission, and many jurisdictions have since modeled their sentencing guidelines on the Minnesota Guidelines.<sup>17</sup>

The Legislature created the Commission and the Guidelines to achieve consistency and proportionality in sentencing.<sup>18</sup> The Sentencing Guidelines Grid is a matrix that judges use to calculate presumptive sentences for defendants.<sup>19</sup> The grid assigns the presumptive duration of a sentence based on two factors: “criminal history”<sup>20</sup> and “offense severity level.”<sup>21</sup> The grid also assigns the

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SENTENCES: THE EVOLUTION OF MINNESOTA’S SENTENCING GUIDELINES 15-21 (1988) (discussing the judicial system prior to sentencing guidelines)).

11. *Id.* at 141.

12. *See id.* at 141-42.

13. *Id.* at 142 (“Some critics argued that the broad discretion exercised by judges and parole boards permitted substantial disparities in the sentencing of offenders convicted of similar crimes . . .”).

14. *Id.*

15. *Id.* (citing 1 ALFRED BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 132-35 (1983)).

16. MCCARR & NORDBY, *supra* note 1, § 36.24.

17. Frase, *supra* note 10, at 131 (“Minnesota was the first jurisdiction to implement legally binding sentencing guidelines developed by an independent sentencing commission. Minnesota’s guidelines have served as a model for other state guidelines reforms, and for revised American Bar Association and Model Penal Code sentencing standards . . .”); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.3(e) (2d ed. 1999) (“Since Minnesota first adopted presumptive sentencing guidelines in 1980, they have proved more popular . . . . By the mid-1990’s, well over a dozen states and the federal government had adopted sentencing guidelines and nearly as many were in the process of creating or studying them.”).

18. MINN. SENTENCING GUIDELINES COMM’N, MINN. SENTENCING GUIDELINES AND COMMENTARY § I (2004) [hereinafter GUIDELINES].

19. *See generally id.* § IV (Sentencing Guidelines Grid).

20. *See generally id.* § II.B (the criminal history index).

presumptive disposition of a sentence, which determines whether a judge must presumptively execute or stay a sentence.<sup>22</sup>

A judge may depart from the Guidelines in two ways. A durational departure occurs when a judge alters the presumptive duration of a sentence.<sup>23</sup> The presumptive duration of a sentence is the range of months specified in the Guidelines within which a judge must sentence a felon.<sup>24</sup> When a judge issues a sentence that is outside this range, the judge has made a durational departure from the Guidelines.<sup>25</sup>

A dispositional departure occurs when a judge alters the presumptive disposition of a sentence.<sup>26</sup> The departure occurs when a judge decides to impose intermediate sanctions, such as “probation, local incarceration, community work, treatment, [or] financial sanctions.”<sup>27</sup> When a judge issues a disposition other than what the Guidelines specify, the judge has made a dispositional departure from the Guidelines.<sup>28</sup>

The Commission and the Minnesota courts have established standards for judicial departure from the Guidelines. To depart from the Guidelines, there must be “substantial and compelling circumstances” that justify the departure.<sup>29</sup> A crime must be

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21. See generally *id.* § II.A (the offense severity level).

22. *Id.* § II.C. A presumptively executed sentence involves “commitment to state prisonment.” *Id.* § IV. A presumptively stayed sentence involves “up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.” *Id.*

23. MCCARR & NORDBY, *supra* note 1, § 36.30.

24. MINN. SENTENCING GUIDELINES COMM’N, BACKGROUND INFORMATION AND SUMMARY STATISTICS 1, 5 (2001) [hereinafter GUIDELINES BACKGROUND], available at <http://www.msgc.state.mn.us/Data%20Reports/background.pdf>.

25. *Id.* “In 1999, 11.6% of offenders sentenced to executed prison sentenced [sic] received aggravated (upward) durational departures; 25.5% received mitigated (downward) durational departures.” *Id.*

26. *Id.*

27. *Id.*

28. See *id.* “In 1999, 4.7% of all felony offenders received an aggravated (upward) dispositional departure (10.4% of those recommended probation).” *Id.* “In 1999, 12.9% of all cases (30.8% of those recommended prison), received a mitigated dispositional departure.” *Id.*

29. E.g., *State v. Griller*, 583 N.W.2d 736, 744 (Minn. 1998) (“[T]here must be ‘substantial and compelling circumstances’ in the record to justify a departure.” (quoting *Rairdon v. State*, 577 N.W.2d 318, 326 (Minn. 1996))); see also GUIDELINES, *supra* note 18, § II.D (“The judge shall utilize the presumptive sentence provided in the sentencing guidelines unless the individual case involves substantial and compelling circumstances. When such circumstances are present, the judge may depart from the presumptive sentence and stay or impose any sentence authorized by law.”).

unusual in severity compared to the normal type of crime at issue to depart from the Guideline's presumptive sentences.<sup>30</sup> A crime is unusual in severity if it involves aggravating or mitigating factors.<sup>31</sup> If a judge departs from the Guidelines, the sentence must still be proportional to the severity of the crime at issue.<sup>32</sup> Departure from the Guidelines must be infrequent<sup>33</sup> because too many departures will undermine the purpose of the Guidelines.<sup>34</sup>

*B. Concealment of a Victim's Body and Durational Departure*

Minnesota courts have considered whether concealment of a victim's body after a homicide justifies upward departure from the Guidelines since the early 1980s. The first case that the Minnesota Supreme Court decided on this issue was *State v. Shiu*.<sup>35</sup> In that case, the defendant kidnapped three people, including a six-year-old boy.<sup>36</sup> The defendant killed the young boy shortly after

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30. See *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999) (requiring consideration of whether the conduct was "significantly more or less serious than that typically involved in the commission of the crime in question" (quoting *State v. Back*, 341 N.W.2d 273, 276 (Minn. 1983))); see also *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984) ("The general issue . . . is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question.").

31. E.g., *Spain*, 590 N.W.2d at 88 ("[A] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present."). The list of factors that will justify departure from the Guidelines is not exclusive. *Id.* at 89. "In most cases, where upward departures have been sustained, more than one factor is present." MCCARR & NORDBY, *supra* note 1, § 36.30.

32. GUIDELINES, *supra* note 18, § II.D (When departing from the presumptive sentence, "the court should pronounce a sentence which is proportional to the severity of the offense of conviction"); *Spain*, 590 N.W.2d at 89 ("When a sentencing court departs from the presumptive sentence, it must still strive to determine a sentence that is proportional to the severity of the offense.").

33. See *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981) (stating that reasons for departure exist in only "a small number of cases"); see also GUIDELINES, *supra* note 18, § II.D cmt. II.D.01 ("The guideline sentences are presumed to be appropriate for every case. However, there will be a small number of cases where substantial and compelling aggravating or mitigating factors are present.").

34. GUIDELINES, *supra* note 18, § II.D cmt. II.D.03 ("The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity."); *Spain*, 590 N.W.2d at 88 ("The purposes of the sentencing guidelines will not be served if the trial courts generally fail to apply the presumptive sentences found in the guidelines."); *Schantzen*, 308 N.W.2d at 487 ("[T]he purposes of the law will not be served if judges fail to follow the guidelines in the 'general' case.").

35. 326 N.W.2d 648 (Minn. 1982).

36. *Id.* at 649.

kidnapping him, and he concealed the body.<sup>37</sup> The other two victims later escaped and reported the defendant to the police, who arrested him soon after.<sup>38</sup> The defendant revealed the location of the victim's body only after the County Attorney agreed not to charge him with first-degree murder.<sup>39</sup> A jury found the defendant guilty of kidnapping and second-degree murder.<sup>40</sup> The district court departed from the Guidelines, citing six aggravating factors, including concealment of the victim's body.<sup>41</sup>

On appeal, the Minnesota Supreme Court held that concealment of a body is an aggravating factor that justifies an upward durational departure from the Guidelines for three reasons.<sup>42</sup> First, concealment of the victim's body causes severe emotional harm to the victim's family members because they are unaware of the victim's location and well-being.<sup>43</sup> Second, an increased sentence is necessary to deter defendants from using their personal knowledge about the location of the body to bargain for a reduced sentence.<sup>44</sup> The court believed the risk of a higher sentence would compel the defendant's attorney or the authorities to inform the defendant about the risks of not revealing the location of the body.<sup>45</sup> Third, concealment of a body is an aggravating factor in other jurisdictions.<sup>46</sup> Thus, the court found that concealment of a body should be an aggravating factor in Minnesota.<sup>47</sup>

In *State v. Schmit*, the Minnesota Supreme Court carved out a potential exception to its prior holding in *Shiue*.<sup>48</sup> In *Schmit*, the

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37. *See id.* at 650-51.

38. *Id.* at 650.

39. *Id.*

40. *Id.* at 652.

41. *Id.* at 654. The trial court cited six grounds for upward durational departure: (1) vulnerability of the victim, (2) no provocation by the victim, (3) the victim being treated with particular cruelty, (4) a prior felony offense involving the victim, (5) planning and concealment, and (6) prior break ins, which negated the defendant's lack of felony record. *Id.*

42. *Id.* at 655.

43. *See id.* ("For five months, [the victim's] family suffered a great deal of trauma, not knowing whether their son was dead or alive.")

44. *See id.*

45. *See id.*

46. *Id.* (citing *People v. Saiken*, 275 N.E.2d 381 (Ill. 1971); *Gardner v. State*, 388 N.E.2d 513, 518 (Ind. 1979)).

47. *Id.*

48. 329 N.W.2d 56, 58 (Minn. 1983).

defendant murdered his wife in her sleep.<sup>49</sup> He then concealed her body in an area near some train tracks.<sup>50</sup> After his arrest, he did not use the hidden body to bargain for a lower sentence.<sup>51</sup> A jury found him guilty of “first-degree heat-of-passion manslaughter.”<sup>52</sup> The district court departed based on a few factors, including concealment, and the supreme court affirmed two of the factors for departure.<sup>53</sup> In a footnote, the court stated “[b]ecause defendant made no effort to bargain with information concerning the location of the body, his concealment of the body does not operate as an aggravating factor in sentencing.”<sup>54</sup> Therefore, the *Schmit* court limited *Shiue* to situations where a defendant bargains for a lower sentence.<sup>55</sup>

Following *Schmit*, the Minnesota Court of Appeals applied *Shiue* and *Schmit* to a series of homicide cases.<sup>56</sup> In *State v. Shoebottom*, the defendant shot his wife after she handed him a gun and dared him to shoot her.<sup>57</sup> He then burned her body and concealed the remains.<sup>58</sup> He only revealed the location of the remains after the County Attorney agreed not to charge him with first-degree murder.<sup>59</sup> The district court departed from the sentencing guidelines exclusively because of the concealment of the body.<sup>60</sup> The court of appeals affirmed the departure and held that the facts were similar to *Shiue*, because the defendant had bargained and concealed the body, which remained hidden for a long period.<sup>61</sup>

In *State v. Jackson*, the defendant hired a prostitute and

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49. *Id.* at 56.

50. *Id.*

51. *Id.* at 58 n.1.

52. *Id.* at 56.

53. *Id.* at 58. The supreme court affirmed because (1) there was more time separating the events than in a normal crime of this type, and (2) there was an abuse of a relationship of trust. *Id.*

54. *Id.* at 58 n.1 (citing *State v. Shiue*, 326 N.W.2d 648 (Minn. 1982)).

55. *See id.*

56. *See, e.g.*, *State v. Murr*, 443 N.W.2d 833 (Minn. Ct. App. 1989); *State v. Johnston*, 390 N.W.2d 451 (Minn. Ct. App. 1986); *State v. Jackson*, 370 N.W.2d 72 (Minn. Ct. App. 1985); *State v. Shoebottom*, 355 N.W.2d 773 (Minn. Ct. App. 1984).

57. 355 N.W.2d at 773-74.

58. *Id.* at 774.

59. *Id.*

60. *Id.*

61. *Id.*

strangled her.<sup>62</sup> He then concealed the body and destroyed the prostitute's identifying information.<sup>63</sup> The district court departed from the Guidelines and the court of appeals affirmed the departure based on three aggravating factors, including concealment.<sup>64</sup> The court of appeals held that departure was justified even without bargaining, because the defendant attempted to hinder identification of the body in addition to concealing the body.<sup>65</sup>

In *State v. Johnston*, the defendant beat the victim to death and then attempted to dispose of the body in a nearby dumpster.<sup>66</sup> A jury convicted him of second-degree felony murder,<sup>67</sup> and the district court departed from sentencing guidelines based on five aggravating factors, including concealment of the body.<sup>68</sup> The court of appeals held that under *Schmit*, departure for concealment could not be justified, because the defendant did not bargain.<sup>69</sup> The court held that *Jackson* did not apply, because the defendant did not attempt to conceal the identity of the victim.<sup>70</sup> However, the court concluded that concealment still justified departure based on the "particular cruelty" of the crime.<sup>71</sup>

In *State v. Murr*, the defendant killed his father after he was told to move out.<sup>72</sup> The defendant then concealed the body in a shallow grave at Death Valley National Park where coyotes mutilated it.<sup>73</sup> Concealment of the body was the only factor cited

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62. 370 N.W.2d 72, 74 (Minn. Ct. App. 1985).

63. *Id.*

64. *Id.* The court of appeals affirmed based on three aggravating factors: (1) the vulnerability of the victim, (2) the particular cruelty of the crime, and (3) the concealment of the victim's body. *Id.*

65. *Id.* ("The fact that Jackson did not attempt to negotiate a deal through his knowledge of the location of the victim's body does not prevent the use of concealment in this case as an aggravating factor because, here, concealment was coupled with other attempts at concealing the victim's identification.")

66. 390 N.W.2d 451, 453 (Minn. Ct. App. 1986).

67. *Id.* at 452.

68. *Id.* at 456. The district court cited five aggravating factors: (1) prior convictions for personal injury, (2) particular vulnerability of victim, (3) particular cruelty of crime, (4) crime happened in victim's zone of privacy, and (5) concealment of victim's body. *Id.* The court of appeals affirmed all aggravating factors cited by the trial court except numbers two and four. *Id.* at 457.

69. *Id.* at 456 (citing *State v. Schmit*, 329 N.W.2d 56, 58 n.1 (Minn. 1983)). The court explicitly noted that "appellant did not attempt such a bargain." *Id.*

70. *Id.*

71. *Id.* at 456-57.

72. 443 N.W.2d 833, 834 (Minn. Ct. App. 1989).

73. *Id.*

for an upward departure.<sup>74</sup> The court of appeals held that *Schmit* prohibited departure for concealment alone without bargaining.<sup>75</sup> The court cited *Jackson* because mutilation of the body hindered its identification.<sup>76</sup> The court also cited *Johnston* to justify departure for concealment because it demonstrated the “particular cruelty” of the crime.<sup>77</sup>

In the late 1990s, the Minnesota Supreme Court ruled on two more concealment cases. In both cases, the court affirmed a departure where concealment of a body was one of a few aggravating factors. In *State v. Folkers*, the defendant killed his girlfriend in his garage, put her body in her van, and abandoned the van in a parking lot.<sup>78</sup> The court affirmed the departure based on three factors, including the “particular cruelty” of concealing the body.<sup>79</sup> In *State v. Griller*, the defendant killed the victim and buried the body in his backyard.<sup>80</sup> The court affirmed the departure based on four factors, including concealment of the body.<sup>81</sup> In both cases, the court affirmed concealment as one of a few factors and cited *Shiue* but provided no analysis justifying a departure without bargaining.<sup>82</sup>

Other jurisdictions have also considered whether concealment of a body justifies departure from their respective sentencing guidelines. No consensus exists on the issue among the various jurisdictions. Indiana,<sup>83</sup> Louisiana,<sup>84</sup> Tennessee,<sup>85</sup> and the Ninth

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74. *Id.* at 836.

75. *See id.* at 836-37 (“There is some merit to Murr’s position that concealment alone may not support an aggravated sentence.”).

76. *Id.* at 837 (“[T]he method of concealment . . . may still be considered. . . . Identification of the body could be accomplished only through dental records; no other items of identification were present.”).

77. *Id.* (“Murr’s transportation of his father’s body in the trunk of his car, combined with the manner of concealment of the body that lead to its mutilation by coyotes, relate to the ‘particular cruelty’ with which the murder was committed.”).

78. 581 N.W.2d 321, 323 (Minn. 1998).

79. *Id.* at 327. The supreme court affirmed three factors supporting departure: (1) concealment of the body, (2) lack of remorse, and (3) blaming the murder on another person. *Id.*

80. 583 N.W.2d 736, 738-39 (Minn. 1998).

81. *Id.* at 744. The supreme court affirmed four factors supporting departure: (1) concealment of the body, (2) particular cruelty, (3) lack of remorse, and (4) shifting the blame. *Id.*

82. *Compare Griller*, 583 N.W.2d at 744 n.29 (citing *Shiue* with no reasoning), with *Folkers*, 581 N.W.2d at 327 (citing *Shiue* with no reasoning).

83. *Gardner v. State*, 388 N.E.2d 513, 518-19 (Ind. 1979) (holding that it was not unreasonable for the trial court to depart based in part on the defendant’s

Circuit<sup>86</sup> have held that concealment can be an aggravating factor. Other jurisdictions such as Florida<sup>87</sup> and Washington<sup>88</sup> have prohibited or restricted use of concealment as an aggravating factor.

### III. *STATE V. LEJA*

#### A. *The Facts*

Tina DeAnn Leja was involved in an abusive relationship with Darnell Smith.<sup>89</sup> When Leja received a phone call from Bobby Dee Holder, Darnell ordered Leja to tell Holder that Darnell was not at home and that Holder could come over.<sup>90</sup> Darnell wanted Holder to come over because he believed that Holder wanted to have sex with Leja.<sup>91</sup> When Holder came over, Darnell and his younger brother Chaka beat and shot Holder, killing him.<sup>92</sup> Darnell and

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concealment of a body and destruction of evidence).

84. *State v. Williams*, 633 So. 2d 309, 310 (La. Ct. App. 1993) (holding that the trial court did not abuse its discretion when it departed in part for concealment of a body).

85. *State v. Gordon*, No. 03C01-9207-CR-234, 1993 Tenn. Crim. App. LEXIS 162, at \*3-4 (Tenn. Crim. App. Mar. 11, 1993) (holding that concealment of a body amounts to an aggravating factor).

86. *United States v. Quintero*, 21 F.3d 885, 893-94 (9th Cir. 1994) (holding that destroying and concealing a body after a voluntary manslaughter is an aggravating factor).

87. *State v. McCall*, 524 So. 2d 663, 665 n.1 (Fla. 1988) (“[M]utilation of a body subsequent to death does not indicate the killing itself was excessively brutal and therefore cannot be a valid basis for departure.”); *Jackson v. State*, 451 So. 2d 458, 463 (Fla. 1984) (“Actions after the death of the victim are irrelevant in determining this aggravating circumstance.”) (citation omitted); *Herzog v. State*, 439 So. 2d 1372, 1380 (Fla. 1983) (“As to the trial court’s finding that the disposal of the body is a factor that can be considered in determining heinousness, we have held that this evidence is irrelevant on this issue.”) (citations omitted); *Simmons v. State*, 419 So. 2d 316, 319 (Fla. 1982) (holding that concealing a body through burning provides no support for an aggravating factor); *Blair v. State*, 406 So. 2d 1103, 1109 (Fla. 1981) (“[O]nce the victim dies, the crime of murder was completed . . . .”); *Halliwell v. State*, 323 So. 2d 557, 561 (Fla. 1975) (“[W]hen Arnold Tresch died, the crime of murder was completed and . . . the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the Legislature in providing for the consideration of aggravating circumstances.”).

88. *See infra* notes 146-52 and accompanying text.

89. *State v. Leja*, 684 N.W.2d 442, 444 (Minn. 2004).

90. *Id.*

91. *Id.*

92. *Id.* at 445.

Chaka then cut up the body and placed the parts in a cooler.<sup>93</sup> The next day, Darnell ordered Leja to dispose of the body and told her that Andre Parker would monitor her.<sup>94</sup> Leja and Parker then proceeded to dispose of Holder's car and body in Wisconsin and northern Minnesota.<sup>95</sup> About a month later, police arrested and charged all of the people involved in the murder and disposal of Holder's remains.<sup>96</sup>

*B. Procedural History*

A jury found Leja guilty of second-degree felony murder.<sup>97</sup> In sentencing Leja, the trial court departed from the Guidelines citing "concealment" and "abuse of a position of trust" as aggravating factors.<sup>98</sup> The court imposed a sentence of 210 months, which was an upward departure of 60 months from the presumptive sentence.<sup>99</sup>

The court of appeals considered whether departure from the Guidelines for concealment requires bargaining by the defendant with the authorities.<sup>100</sup> The court cited two reasons for affirming the district court on this issue.<sup>101</sup> First, the Minnesota Supreme Court affirmed departures in *Folkers* and *Griller*, even though neither of the defendants in those cases used concealment to bargain for a more favorable sentence.<sup>102</sup> Second, the court cited its own precedent in *Murr* where it held that concealment could justify departure for particular cruelty even in the absence of bargaining.<sup>103</sup>

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93. *Id.*

94. *Id.*

95. *Id.* at 445-46.

96. *Id.* at 443, 446-47. Darnell Smith was convicted of first-degree premeditated murder. *Id.* at 443. Chaka Smith pled guilty to second-degree felony murder. *Id.* Andre Parker pled guilty to aiding an offender after the fact. *Id.*

97. *Id.* at 447. Leja was convicted of accomplice-after-the-fact, but the court of appeals vacated that conviction. *Id.* She was also convicted of aiding assault in the second degree, but that conviction was never addressed on appeal. *Id.* at 447 n.1.

98. *Id.* at 447.

99. *Id.*

100. State v. Leja, 660 N.W.2d 459, 467 (Minn. Ct. App. 2003), *modified*, 684 N.W.2d 442 (Minn. 2004).

101. *Id.*

102. *Id.*

103. *Id.*

C. *The Findings of the Minnesota Supreme Court*

The Minnesota Supreme Court only considered whether Leja's concealment of the body presented "substantial and compelling circumstances" that justified upward departure from the Guidelines.<sup>104</sup> The court held that the facts in this case did not meet this standard.<sup>105</sup> The *Schmit* case led the court to conclude that the policy rationales from *Shiue* did not apply, because Leja never bargained for a favorable sentence.<sup>106</sup> The court distinguished *Folkers* and *Griller*, where it held that concealment of a body was an aggravating factor without bargaining,<sup>107</sup> by explaining that many factors justified departure in those cases, and concealment was not the exclusive factor justifying departure.<sup>108</sup> The court concluded that Leja's conduct was not "substantial and compelling," and modified the sentence to the presumptive duration level.<sup>109</sup>

#### IV. ANALYSIS

A. *Minnesota's Concealment Aggravating Factor*

Under Minnesota law, concealment is an aggravating factor in certain situations. In *Shiue*, it seemed like concealment might always be an aggravating factor.<sup>110</sup> In *Schmit*, the supreme court limited the aggravating factor to situations where a defendant bargains.<sup>111</sup> The court of appeals technically followed *Schmit* in the

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104. *Leja*, 684 N.W.2d at 447-48. The State argued that "abuse of position of trust" was an aggravating factor before the district court, but did not advance this argument on appeal. *Id.* at 447.

105. *Id.* at 450.

106. *See id.* at 449 ("These independent policy concerns are not present here.").

107. *Id.* ("In *State v. Folkers* and *State v. Griller* . . . there had been no effort to use the body's location to negotiate a more favorable charge." (citing *State v. Griller*, 583 N.W.2d 736, 744 n.9 (Minn. 1998); *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998))).

108. *Id.* ("We have not decided a case where concealment, standing alone, was cited approvingly as a sufficient aggravating factor supporting an upward departure.").

109. *Id.* at 450 ("Leja's participation in the concealment of Holder's remains, without more such as her bargaining with the authorities, does not support an upward durational departure.").

110. *See supra* notes 42-47 and accompanying text.

111. *See supra* notes 54-55 and accompanying text.

cases that followed.<sup>112</sup> In practice, the court of appeals may have circumvented *Schmit* by justifying departure for concealment in the absence of bargaining based on particular cruelty.<sup>113</sup> In the late 1990s, the supreme court moved away from *Schmit* in *Folkers* and *Griller* when it held, without explanation, that concealment justified departure in the absence of bargaining.<sup>114</sup> The supreme court may have been following the “particular cruelty” rationale for departure that the court of appeals had previously adopted.<sup>115</sup>

The supreme court attempted to reconcile these conflicting precedents in *Leja* when it held that two situations justify departure for concealment. First, departure can be justified if the defendant uses the location of the victim’s body to bargain for a favorable sentence.<sup>116</sup> Second, departure can be justified if the defendant commits other aggravating factors in addition to concealment.<sup>117</sup>

#### B. *The Historical Origin and Purpose of the Privilege*

The privilege against self-incrimination originated in the English common law.<sup>118</sup> In the early eighteenth-century, common law courts established a general right against self-incrimination, which gave defendants the right not to testify about incriminating information in civil or criminal cases.<sup>119</sup> Some American colonies modeled the common law right against self-incrimination.<sup>120</sup> Eight states had a right against self-incrimination in their constitutions prior to the ratification of the Fifth Amendment.<sup>121</sup> Because there is little “helpful legislative history” relating to the Fifth Amendment,<sup>122</sup> the Supreme Court has operated on the

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112. See *supra* notes 69, 75 and accompanying text.

113. See *supra* notes 65, 71, 77 and accompanying text.

114. See *supra* notes 78-82 and accompanying text.

115. See *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998) (“Folkers treated the victim with particular cruelty in that he attempted to conceal her body . . .”).

116. See *State v. Leja*, 684 N.W.2d 442, 449 (Minn. 2004) (“[I]f concealment was not considered an aggravating factor, the accused would be able to use the concern of the victim’s family to negotiate a favorable plea agreement in return for disclosing the location of the victim’s body.”).

117. See *id.* at 449 (“We note, however, that the upward durational departures in both *Folkers* and *Griller* were based on *multiple* aggravating factors, of which concealment of the body was but a single factor.”).

118. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.14(b) (3d ed. 2000).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

assumption that the framers adopted the privilege as it existed at common law.<sup>123</sup>

The United States and Minnesota Constitutions contain identically worded provisions that protect against self-incrimination.<sup>124</sup> The Supreme Court has cited many purposes for the right against self-incrimination.<sup>125</sup> Protection of the adversarial system is one of the primary functions of the privilege.<sup>126</sup> The American legal system assumes that a contested process, where the State must prove the guilt of the defendant before a neutral judge, is the best means to determine whether a defendant is guilty.<sup>127</sup> The use of independent evidence instead of coercion is important to the effectiveness of this process.<sup>128</sup>

### C. *The Elements of Self-Incrimination*

The Supreme Court has held that a state action violates the

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123. *United States v. Balsys*, 524 U.S. 666, 674 n.5 (1998) (“What we know of the circumstances surrounding the adoption of the Fifth Amendment, however, gives no indication that the Framers had any sense of a privilege more comprehensive than common law practice then revealed.”).

124. *Compare* U.S. CONST. amend. V, *with* MINN. CONST. art. I, § 7. The U.S. Supreme Court has held that Fifth Amendment protections against self-incrimination apply to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

125. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). The Supreme Court has offered the following rationales for the privilege:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;” our respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life;” our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”

*Id.* (citations omitted).

126. *See* *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (“[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.”).

127. *See id.*

128. *See id.*

right against self-incrimination when three elements are present.<sup>129</sup> “There must be (1) compulsion of a (2) testimonial communication that is (3) incriminating.”<sup>130</sup> The following discussion will examine whether Minnesota’s use of concealment as an aggravating factor satisfies these elements.

### 1. *The Compulsion Element*

The Supreme Court has held that any state-created penalty that punishes a person for remaining silent about incriminating information is compulsion.<sup>131</sup> The term “penalty” has a broad meaning that includes the imposition of any sanction that makes silence “costly.”<sup>132</sup> A person may be compelled to provide incriminating testimony only if that person is offered complete immunity from any future criminal penalty that might result from revealing the information.<sup>133</sup>

Any state-imposed penalty for exercising the right against self-incrimination is *prima facie* unconstitutional.<sup>134</sup> A person normally must assert the right against self-incrimination if the State requests testimony that is reasonably incriminating.<sup>135</sup> The Supreme Court has held that this principle does not apply if a person will suffer a

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129. *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979); *see also* *Fisher v. United States*, 425 U.S. 391, 408 (1976) (“[T]he Fifth Amendment . . . applies only when the accused is compelled to make a Testimonial Communication that is incriminating.”).

130. *Authement*, 607 F.2d at 1131 (citation omitted).

131. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (“[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.”); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”).

132. *Spevack v. Klein*, 385 U.S. 511, 515 (1967). The privilege prohibits any form of “compulsion,” and it is not limited to “economic sanctions” or “imprisonment.” *Lefkowitz*, 431 U.S. at 806.

133. *Lefkowitz v. Turley*, 414 U.S. 70, 81-82 (1973) (“Immunity is required if there is to be ‘rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.’”) (quoting *Kastigar v. United States*, 406 U.S. 441, 446 (1972)); *United States v. Lawson*, 255 F. Supp. 261, 265 (D. Minn. 1966) (“Where a statute forces the individual to choose between answering or being punished for invoking the privilege, without at the same time granting a complete immunity, then it becomes unconstitutional.”).

134. *See Lefkowitz*, 431 U.S. at 805-07.

135. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).

state-imposed penalty for exercising the privilege because a penalty forecloses the possibility of free assertion of the privilege.<sup>136</sup> If a person reveals incriminating information under either an express or implied threat of a State-imposed penalty, the person has not waived the privilege, and the State would be unable to use any incriminating testimony in future criminal proceedings.<sup>137</sup>

An upward departure for concealment of a body is a penalty that compels testimony. Many jurisdictions have correctly held that imposition of a higher sentence for exercising the privilege is an unconstitutional penalty.<sup>138</sup> Making something an aggravating factor empowers judges to issue stronger penalties. Thus, the aggravating factor for concealment is a penalty for the act of concealment. Assuming that the other elements are satisfied, the aggravating factor for concealment would be *prima facie* unconstitutional, because the accused has not waived the privilege if there is a penalty for silence.<sup>139</sup> The State would not be able to use any incriminating evidence obtained through this aggravating factor in a future criminal proceeding.<sup>140</sup>

## 2. *The Testimonial Communication Element*

The testimonial communication element includes any information that a person communicates to the State.<sup>141</sup> The

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136. *Id.* at 434; *see also Turley*, 414 U.S. at 82-83 (holding that “[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary”).

137. *Murphy*, 465 U.S. at 435.

138. *See, e.g., United States v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989) (“[A] defendant does not have ‘a free choice to admit, to deny, or to refuse to answer’ if he knows he will be incarcerated for a longer period of time if he does not make the incriminating statements. The touchstone of the fifth amendment is compulsion, and the Supreme Court has recognized that imprisonment is one of a wide variety of penalties which can serve to trigger a constitutional violation.”); *United States v. Heubel*, 864 F.2d 1104, 1111 (3d Cir. 1989) (“[W]here a defendant invokes his or her Fifth Amendment privilege against self-incrimination in a timely manner, a sentencing court may not use his or her failure to waive that right as negative evidence to penalize him or her in deciding upon the appropriate sentence.”); *State v. Shreves*, 60 P.3d 991, 996 (Mont. 2002) (“[W]e cannot uphold a sentence that is based on a refusal to admit guilt . . . . Therefore, we hold that the District Court improperly penalized Shreves for maintaining his innocence pursuant to his constitutional right to remain silent.”).

139. *See supra* notes 131-36 and accompanying text.

140. *See supra* note 137 and accompanying text.

141. *See Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966) (“A nod or headshake is as much a ‘testimonial’ or ‘communicative’ act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts

method of communication is irrelevant, because all forms of communication are included.<sup>142</sup> This element primarily excludes any evidence the State does not obtain through communication by the defendant. For example, the Supreme Court has held that collecting physical evidence from a person's body is not a testimonial communication.<sup>143</sup>

Punishing a defendant for failure to reveal the location of a concealed body is a testimonial communication. Two questions will help to clarify why revealing the location of the body is a testimonial communication. First, under what circumstances does an aggravating factor for concealment compel a testimonial communication? Second, is the act of producing a body a testimonial communication even though the body is physical evidence?

*a. Conditional Versus Unconditional Penalties*

Determining when an aggravating factor for concealment compels a testimonial communication requires one to examine what the State is punishing. There are two possibilities. The State may be unconditionally punishing a defendant exclusively for the act of concealing a body. A punishment is unconditional if the State does not link the punishment to the defendant's willingness to reveal the location of the body.<sup>144</sup> On the other hand, the State may be conditionally punishing the defendant for the act of concealing the body. A punishment is conditional if the State links the defendant's punishment to the willingness of the defendant to reveal the location of the body.<sup>145</sup>

An unconditional aggravating factor for concealment would not fall within the testimonial communication element. With this aggravating factor, the State would be punishing the defendant but would not be directing the punishment at a failure to communicate. The right against self-incrimination is passive, meaning simply that there should be no penalty for silence. The

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noncommunicative in nature . . .”).

142. *Id.* at 763-64.

143. *See id.* at 764. For example, the Supreme Court held in *Schmerber* that “blood test evidence, although an incriminating product of compulsion, was neither petitioner’s testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.” *Id.* at 765.

144. *See infra* note 149 and accompanying text.

145. *See infra* notes 147-48 and accompanying text.

privilege by definition cannot protect the act of concealing a body, because concealment is an affirmative step. Actions like concealing evidence or driving at illegal speeds to evade arrest are both affirmative actions that the privilege does not protect even though the inability to do both might create a higher risk of incrimination. Unconditionally punishing the action of concealing a body is a legitimate means of punishing socially undesirable conduct.

In contrast, a conditional aggravating factor for failure to reveal the location of a body would fall within the testimonial communication element. With this aggravating factor, the State would be telling the defendant that failure to testify about the location of the body would result in a higher sentence. The State would be punishing the defendant for passively remaining silent. The conditional aggravating factor for concealment thus creates a penalty for failure to testify.

Precedent from the Washington state courts supports the distinction between conditional and unconditional aggravating factors for concealment.<sup>146</sup> The Washington cases are particularly persuasive because Washington, like Minnesota, requires “substantial and compelling circumstances” to justify departure from its sentencing guidelines.<sup>147</sup> In *State v. Crutchfield*, the Washington Court of Appeals held that “by ruling that concealment can be an aggravating factor, we would be holding that the defendant who exercises his constitutional right not to incriminate himself by refusing to reveal the location of the victim’s body, has thereby operated to increase his own punishment.”<sup>148</sup> The Washington Court of Appeals clarified *Crutchfield* in *State v. Rich*, holding that “[b]ecause a person has a constitutional right not to incriminate himself, the court cannot rely on the defendant’s failure to reveal the location of a victim’s body as an aggravating factor. But a defendant’s affirmative steps to conceal a crime can support an exceptional sentence.”<sup>149</sup>

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146. *State v. Crutchfield*, 771 P.2d 746 (Wash. Ct. App. 1989).

147. *Compare Crutchfield*, 771 P.2d at 750 (“[T]he reviewing court must independently determine whether, as a matter of law, the trial court’s reasons justify an exceptional sentence. There must be ‘substantial and compelling’ reasons for imposing such a sentence.” (citations omitted)), *with State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004) (“[T]here must be ‘substantial and compelling circumstances’ in the record to justify a departure.” (citations omitted)).

148. 771 P.2d at 752.

149. No. 28342-5-II, 2003 Wash. Ct. App. LEXIS 1387, at \*11-12 (Wash. Ct. App. July 8, 2003) (citations omitted). *State v. Vaughn* provides more authority for the distinction between conditional and unconditional departures for

A Ninth Circuit case, *Dallas v. Arave*, provides further support for the distinction between a conditional and unconditional aggravating factor.<sup>150</sup> In *Dallas*, the State accused the defendant of killing two Idaho game wardens and concealing their bodies.<sup>151</sup> The jury found the defendant guilty of two manslaughters and concealment.<sup>152</sup> On appeal, the Ninth Circuit had to determine whether the concealment conviction violated the defendant's right against self-incrimination.<sup>153</sup> The court noted that although the district court relied on the defendant's refusal to reveal the location of the body, it cited sufficient other reasons related directly to the act of concealment to justify the conviction independent of the failure to disclose the location afterward.<sup>154</sup> The Ninth Circuit held that the district court did not primarily base the conviction on the defendant's refusal to testify against his own interests.<sup>155</sup>

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concealment. See 924 P.2d 27, 32-33 (Wash. Ct. App. 1996). In *Vaughn*, the court of appeals affirmed a district court departure for a crime where the defendant took "affirmative steps" to conceal the crime, including hiding evidence and creating an alibi. *Id.* at 33. The court held that the departure did not violate the defendant's right against self-incrimination. *Id.* It found that *Vaughn* was distinct from *Crutchfield* because the defendant's failure to reveal the location of the body was the reason for departure in *Crutchfield*, but the defendant's affirmative steps to conceal the crime were the justification for departure in *Vaughn*. *Id.*

150. 984 F.2d 292 (9th Cir. 1993).

151. *Id.* at 294.

152. *Id.* at 294-95. The conviction for concealment was an independent crime and not an aggravating factor for the manslaughter convictions. See *id.* The case does not cite the specific statute that the defendant violated, but it was probably the following statute:

Every person who, knowing that any . . . object, matter or thing, is about to be produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, wilfully destroys, alters or conceals the same, with intent thereby to prevent it from being produced, used or discovered, is guilty of a misdemeanor

. . . .

IDAHO CODE § 18-2603 (2005).

153. *Dallas*, 984 F.2d at 297. The court seemed to treat the defendant's appeal with skepticism because "[t]he privilege must be invoked in a timely fashion . . . [and the defendant] did not invoke the Fifth Amendment privilege until he raised it on appeal." *Id.* The court may have relied on an incorrect understanding of the law when making this point, because this was probably a penalty situation where assertion of the privilege was unnecessary. See *supra* notes 135-36 and accompanying text.

154. *Dallas*, 984 F.2d at 297.

155. *Id.* The court affirmed part of the reasoning of the district court when it held that the defendant "could have let someone know the location of the grave once he was 'free or had been removed from the scene and had not been discovered.'" *Id.* This part of the court's reasoning is problematic. Although it is

These cases support the distinction between conditional and unconditional punishments. In *Crutchfield*, the aggravating factor violated the right against self-incrimination because it conditionally punished the defendant for not revealing the location of the body.<sup>156</sup> In *Rich*, the aggravating factor did not violate the right against self-incrimination because it was an unconditional penalty only for affirmative steps taken by the defendant to conceal the body.<sup>157</sup> In *Dallas*, the Ninth Circuit concluded, at least implicitly, that requiring a defendant to tell the State about the location of a body would be a testimonial communication, but punishing the defendant directly for the act of concealing the body would not.<sup>158</sup> The aggravating factor does not penalize a testimonial communication if the State directs the punishment at the affirmative action of concealment, but if the State directs the punishment at a failure to reveal the location of a body it is compelling a testimonial communication.

The current law in Minnesota coerces defendants into testimonial communication by punishing defendants conditionally under the aggravating factor of concealment. The *Shiue* case offered two rationales for making concealment an aggravating factor under Minnesota law.<sup>159</sup> First, families suffer emotional harm from the concealment of a body.<sup>160</sup> The court pointed out that “[f]or five months, Jason Wilkman’s family suffered a great deal of trauma, not knowing whether their son was dead or alive.”<sup>161</sup> Similarly, in *Murr*, the court concluded that concealment of the body “caused Theodore Murr’s family great anguish to be without knowledge of his whereabouts for more than seven weeks.”<sup>162</sup>

The status of the emotional harm rationale under Minnesota law is unclear. The *Leja* majority opinion mentioned both rationales but only discussed the deterring bargain rationale.<sup>163</sup> The dissent complained about the failure of the majority to address

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theoretically possible for a defendant to reveal the location of the body without incrimination, the State would still be coercing a testimonial communication and any method that the defendant could use to reveal the information would probably carry an unreasonable risk of self-incrimination.

156. See *supra* note 148 and accompanying text.

157. See *supra* note 149 and accompanying text.

158. See *supra* notes 154-55 and accompanying text.

159. See *supra* notes 43-44 and accompanying text.

160. See *supra* note 43 and accompanying text.

161. *State v. Shiue*, 326 N.W.2d 648, 655 (Minn. 1982).

162. *State v. Murr*, 443 N.W.2d 833, 837 (Minn. Ct. App. 1989).

163. *State v. Leja*, 684 N.W.2d 442, 449 (Minn. 2004).

the emotional harm rationale.<sup>164</sup> There is, however, reason to believe that this rationale is still valid under Minnesota law. The Minnesota Supreme Court did not explicitly reverse this rationale, and it may be the justification for departure in situations where there is no bargaining.

The emotional harm rationale suggests that the courts are punishing defendants conditionally based on their willingness to reveal the location of a body. Imagine if a court issued a higher sentence to a defendant because he inflicted emotional harm on the victim's family throughout the trial by refusing to plead guilty at the beginning of the trial. There is little difference between this seemingly extreme example and the emotional harm rationale. The courts in both *Murr* and *Shiue* mentioned the specific length of time that the families suffered emotional harm because of the defendants' failure to reveal the location of the bodies.<sup>165</sup> It would be acceptable to punish a defendant for concealing a body. However, punishing a defendant for the ongoing emotional harm that families suffer is a conditional punishment for failure to reveal the location of a body because confessing would be the only way that the defendant could stop the clock from running.

The second reason offered by the court in *Shiue* was the deterring bargaining rationale.<sup>166</sup> The court noted that the defendant "negotiated an agreement to disclose the whereabouts of the body in exchange for an agreement to forego prosecution for first-degree murder. Other accused persons could view this as an appropriate tool in negotiating a plea."<sup>167</sup> Similarly, in *Shoebottom*, the court cited the defendant's bargaining with the authorities about the location of the victim's body as a rationale for departure.<sup>168</sup> This rationale for departure is legitimate post-*Leja*, because the court in *Leja* specifically applied the bargaining rationale.<sup>169</sup>

The deterring-bargaining rationale also suggests that the

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164. *Id.* at 457 (Blatz, C.J., dissenting) ("After recognizing that this was a 'gruesome crime' involving 'particular cruelty' and that *Leja*'s actions were 'reprehensible,' it is inconceivable that the majority could find that her conduct fails to reach the threshold of substantial and compelling circumstances needed to justify an upward durational departure.").

165. *See supra* notes 161-62 and accompanying text.

166. *See supra* note 44 and accompanying text.

167. *State v. Shiue*, 326 N.W.2d 648, 655 (Minn. 1982).

168. *See supra* notes 59-61 and accompanying text.

169. *See supra* note 116 and accompanying text.

courts are punishing defendants conditionally. As has already been discussed, defendants have the right to remain silent about incriminating information. Therefore, the State has two options. Its first option is to allow the defendant to remain silent. Its second option is to create incentives for the defendant to waive the privilege freely like plea-bargaining. The defendant has a right to any promise that the State offers in exchange for waiving the privilege because the defendant only waives the privilege on condition that the defendant will receive the benefit of the bargain.

The deterring-bargaining rationale operates as a penalty for silence because it has the effect of neutralizing the strategic benefit of the privilege to a defendant. Prosecutors do not like the strategic benefit that the privilege offers defendants during plea-bargaining. The deterring-bargaining rationale is simply a means of subverting and neutralizing the strategic benefit that comes from the right against self-incrimination by allowing the courts to impose a greater penalty to offset any benefit that comes to the defendant from revealing the incriminating information. The effect is to coerce the defendant into waiving the privilege while not allowing the defendant to enjoy the benefit of the waiver. The State can choose not to bargain with a defendant if it wishes, but it cannot ask the court to punish the defendant for enjoying the strategic benefit that flows from waiver of the privilege.

One last factor, as indicated by the court in *Shiue*, suggests that Minnesota law punishes defendants conditionally for concealment.<sup>170</sup> The court stated that “by including concealment as an aggravating factor, the authorities or counsel for an accused are in a position to advise that such refusal may lead to an increased sentence.”<sup>171</sup> Unfortunately, it is difficult to determine what the court is referring to with the words “such refusal.” The most likely interpretation is that the authorities can warn a defendant that there will be an increased sentence for refusal to reveal the location of the body. Assuming that this is the case, Minnesota law punishes defendants conditionally for their failure to reveal the location of the body. Both the rationales of the court and the language of the court in *Shiue* suggest that Minnesota’s aggravating factor for concealment is a conditional penalty for failure to reveal the location of a body.

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170. *Shiue*, 326 N.W.2d at 655.

171. *Id.*

b. *The Testimonial Aspects of Producing a Body*

Some courts have discussed the extent to which providing physical evidence to the State constitutes a testimonial communication. Physical evidence is not a testimonial communication by itself.<sup>172</sup> However, the U.S. Supreme Court has held that the act of producing evidence for the authorities could itself be an incriminating testimonial communication even if the privilege does not protect the evidence that the authorities request.<sup>173</sup>

Some cases have applied this principle to determine whether a court-ordered motion to compel a defendant to produce a weapon is a testimonial communication. In *Commonwealth v. Hughes*, a grand jury indicted the defendant on two counts of assault with a deadly weapon.<sup>174</sup> The district court ordered the defendant to produce a weapon that the State believed was in his possession.<sup>175</sup> On appeal, the Massachusetts Supreme Court held that compelling production of the weapon was an incriminating testimonial communication.<sup>176</sup> Compelling the defendant to produce the revolver would implicitly communicate information about the “existence, location, and control” of the weapon to the State.<sup>177</sup> Producing the weapon would also be an implicit authentication of the weapon.<sup>178</sup> The court concluded that even if the prosecution never referenced the defendant’s production of the gun, it might have other potentially incriminating effects because the police would conduct tests on the weapon.<sup>179</sup>

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172. See *supra* note 143 and accompanying text.

173. See *United States v. Doe*, 465 U.S. 605, 612-14 (1984). The Supreme Court held that the act of producing a document could be a testimonial communication even if the document itself is not. *Id.* Compliance with a subpoena could be a testimonial communication under some circumstances because the accused could tacitly concede that the papers were in the defendant’s possession and that the papers are the ones that the State requested. *Id.* The Court held that a case-by-case analysis of the facts is necessary to determine whether producing evidence is itself a testimonial communication. *Id.*

174. 404 N.E.2d 1239, 1240 (Mass. 1980).

175. *Id.*

176. See *id.* at 1244.

177. *Id.*

178. *Id.*

179. *Id.* at 1246 (“The Commonwealth could use such [implicit statements as to existence, location, and control] . . . to secure other incriminating evidence to put before the jury, and it can be assumed that the testimonial statement as to the location of the gun would be used, mediately, to lead to ballistics tests and ballistics evidence and an opinion thereon.”).

In *Goldsmith v. Superior Court*, the California Court of Appeals considered a similar a case.<sup>180</sup> The State charged the defendant with three crimes involving the use of a gun.<sup>181</sup> The district court ordered the defendant to produce the weapon.<sup>182</sup> On appeal, the court had to determine whether compelled production of the gun was an incriminating testimonial communication.<sup>183</sup> The court followed *Hughes* and held that “compelled production of a weapon, allegedly used to commit the crimes charged, is a testimonial communication within the meaning of the privilege against self-incrimination.”<sup>184</sup>

Although the privilege does not protect the victim’s body itself, it does protect the defendant against having to make incriminating testimonial statements to authorities about the location of the body. *Hughes* and *Goldsmith* demonstrate that the act of providing information about physical evidence to authorities can be a testimonial communication.<sup>185</sup> There is no distinction between producing a gun and producing a victim’s body, except that producing the body would be more incriminating. Requiring the defendant to produce the body provides testimony about the location of the body, the identity of the body, the defendant’s prior contact with the body, and physical evidence that the authorities can use to find additional incriminating evidence.<sup>186</sup>

### 3. *The Incriminating Element*

The incriminating element includes any testimonial communication that a person “reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”<sup>187</sup> The Minnesota Supreme Court has held that the privilege:

protects a person from being compelled to disclose the circumstances of his offense, the sources from which or the means by which evidence of its commission or of his

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180. 199 Cal. Rptr. 366 (Ct. App. 1984).

181. *Id.* at 368.

182. *Id.*

183. *Id.* at 369.

184. *Id.* at 373.

185. *See supra* notes 174-84 and accompanying text.

186. *See supra* notes 177-79 and accompanying text.

187. *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also* *Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.<sup>188</sup>

It would be incriminating for a defendant to reveal the location of a concealed body to the State.<sup>189</sup> When a defendant reveals information about the location of a concealed body, the defendant also reveals that he has had direct contact with the body. Furthermore, the location of the body is a link in the chain of evidence that could lead the police to more incriminating evidence.<sup>190</sup> They may uncover additional evidence through testing, autopsy, and expert testimony once the body is in their possession.<sup>191</sup> Revealing the location of a body is an incriminating testimonial communication under the right against self-incrimination.

## V. CONCLUSION

In *Leja*, the Minnesota Supreme Court clarified conflicting precedents dealing with the aggravating factor for concealment and held that departure for concealment is justified when a defendant either (1) bargains or (2) commits aggravating factors beyond concealment.<sup>192</sup> The U.S. Supreme Court has held that a State violates a defendant's right against self-incrimination when it compels an incriminating testimonial communication.<sup>193</sup> The Minnesota aggravating factor for concealment is compulsion because it imposes higher prison sentences; it is a testimonial communication because it requires the defendant to communicate

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188. *State v. Gardiner*, 88 Minn. 130, 139-40, 92 N.W. 529, 533 (1902).

189. *State v. Crutchfield*, 771 P.2d 746, 752 (Wash. Ct. App. 1989) (“[T]he net effect of allowing concealment to be an aggravating factor in the ordinary case is to punish the defendant for not disclosing the location of the victim’s body. If [the defendant] had disclosed it, it would surely have incriminated him.”); *cf. Goldsmith*, 199 Cal. Rptr. at 373 (“[P]roduction of a yet unlocated weapon is incriminating: ‘The revolver is the supposed instrumentality of the crime, and control or possession after the event, taken together with the earlier ownership attested by the registration, would tend to establish possession at the critical time.’”).

190. *Cf. Goldsmith*, 199 Cal. Rptr. at 373 (holding that producing a gun is an important link in the chain of evidence that would allow the authorities to find additional incriminating evidence through testing and expert testimony).

191. *Cf. id.* (explaining that when the Commonwealth has the gun, it “will run ballistics tests, and these may lead to expert testimony”).

192. *See supra* notes 116-17 and accompanying text.

193. *See supra* notes 129-31 and accompanying text.

the location of the body; and it is incriminating because the perpetrator of the crime is usually the only person who knows where the body is concealed.

Minnesota's aggravating factor unconstitutionally imposes a penalty, which is prima facie unconstitutional.<sup>194</sup> *Leja* was a step in the right direction, but it did not go far enough because the aggravating factor, as it exists under *Leja*, still produces violations of the right against self-incrimination. The Minnesota Supreme Court should address the specific issue of self-incrimination and should rule that the aggravating factor is an unconditional punishment directed at the action of concealing a body. The court should make it clear that the aggravating factor is not linked to whether a defendant reveals the location of the body. This would be an important step toward assuring the fair and just operation of the right against self-incrimination in protecting the adversarial process.

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194. See *supra* notes 135-37 and accompanying text.