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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 45725 & 45726
Plaintiff-Respondent,)	
)	Ada County Case Nos. CR01-2016-27437
v.)	& CR01-2017-796
)	
ANTHONY JAMES IRA BARCLAY,)	RESPONDENT'S BRIEF
)	
<u>Defendant-Appellant.</u>)	

Issue

Has Barclay failed to establish that the district court abused its discretion by imposing an aggregate, unified sentence of 25 years, with 18 years fixed, upon Barclay’s guilty pleas to burglary, felony failure to notify of death, and felony destruction of evidence?

Barclay Has Failed To Establish That The District Court Abused Its Sentencing Discretion

On August 18, 2016, Rinda Mitchell filed a missing person report for her brother, Mark Irwin. (PSI, pp.4, 213.¹) Ms. Mitchell and her family had not heard from Mark for over two

¹ PSI page numbers correspond with the page numbers of the electronic file “Barclay 45725 & 45726 psi.pdf

weeks. (PSI, pp.4, 213.) Ms. Mitchell went to Mark's residence to check on him and found Mark's "mail piled up, his air conditioner running, the microwave door open, [and] bedding missing from his bed." (PSI, pp.4, 213-15) She also noted his 1985 Toyota van was missing. (PSI, pp.4, 213, 215.) Ms. Mitchell told police she knew Mark had been spending time with Francis "Francie" March but, when contacted, Francie told Ms. Mitchell and her family that "she had not seen Mark either." (PSI, pp.4, 213-14; see also PSI, p.215 (Francie called Ms. Mitchell on August 20, 2016, and told her "she had not seen Mark for a while and was concerned" and gave Ms. Mitchell "a lot of detailed information about Mark and the last time she was him."))

Police began an investigation and obtained a warrant to search Mark's house. (PSI, pp.4, 214-18.) While officers were conducting the search, they learned that Francie and Anthony Barclay were at a pawn shop trying to pawn a 22 caliber gun that belonged to Mark. (PSI, pp.4, 218, 220.) When police attempted to conduct a traffic stop on Francie's vehicle, Francie and Barclay attempted to evade them but were eventually apprehended. (PSI, pp.4, 218.) During their police interviews, Francie and Barclay both admitted to having broken into Mark's house "several times" and to having stolen items and pawning them. (PSI, pp.219-20.) Francie and Barclay gave different accounts about the last time they saw Mark and, when questioned about Mark's disappearance, both individuals declined to answer any further questions and requested an attorney. (PSI, pp.219-20.)

On August 26, 2016, a Boise County Deputy reported seeing a van that matched the description of the van owned by Mark. (PSI, pp.5, 221.) Officers responded to the area and, upon approaching the van, "smell[ed] a very strong odor." (PSI, p.222.) Officers opened the sliding door of the van and discovered inside of it a decomposing body that was covered with a tarp. (PSI, pp.222-23.) After obtaining a warrant, officers examined the contents of the van

more closely and discovered the “body and tarp were strapped to [a] yellow kid[']s slide, kind of like a backboard would be used to move a medical patient.” (PSI, p.223.) The body “was in an extensive state of decomposition” and was “face down on the slide and inside the tarp.” (PSI, pp.223-24.) “The head was wrapped in a bed sheet,” over which “were two plastic grocery bags that were tightly taped around the neck area with clear packing style tape.” (PSI, p.224.) “The hands were bound behind the back with a red patterned rope”; “a loose fitting red patterned rope was around the neck area underneath the other layers”; and the “knees were bound together with a belt and the ankles were bound with a bungee cord.” (PSI, p.224.) “Due to the extent of decomposition, the decedent’s identification had to be made by dental records.” (PSI, p.224.) Those records confirmed the decedent was Mark Irwin. (PSI, p.4.) Subsequent investigation resulted in a determination that Francie and/or Barclay were responsible for Mark’s death and that both of them had attempted to dispose of his body. (PSI, pp.4, 224-33.)

The state charged Barclay in case 45725 with three counts of burglary, three counts of grand theft, and one petit theft. (R., pp.48-50.) The state also charged Barclay in case 45726 with felony failure to notify of a death, felony destruction of evidence, and felony conspiracy to commit destruction of evidence. (R., pp.216-18.) Pursuant to a plea agreement, Barclay pled guilty to one count of burglary in case 45725 and to felony failure to notify of a death and felony destruction of evidence in case 45726, and the state dismissed the remaining charges. (R., pp.64-73, 231-40.) The district court imposed consecutive sentences of 10 years, with three years fixed, for burglary, 10 years fixed for felony failure to notify of death, and five years fixed for felony destruction of evidence. (R., pp.79-82, 248-51.) Barclay filed a notice of appeal timely from the judgment of conviction in each case. (R., pp.85-87, 252-54.)

Barclay asserts his aggregate unified sentence of 25 years, with 18 years fixed, is excessive in light of “his young age, minimal criminal record, serious mental health and substance abuse issues, family support, and remorse for the crime.” (Appellant’s brief, pp.3-8.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for burglary is 10 years; the maximum prison sentence for felony failure to notify of death is 10 years; and the maximum prison sentence for felony destruction of evidence is five years. I.C. §§ 18-1403, -2603, 19-4301A(3). The district court imposed consecutive, unified sentences of 10 years, with three years fixed, for burglary, 10 years fixed for felony failure to notify of death, and five years fixed for felony destruction of evidence, all of which fall within the statutory guidelines. (R., pp.79-82, 248-51.) Barclay's age, minimal criminal record, mental health issues, substance abuse issues, family support, and purported remorse do not demonstrate that his sentences are excessive, particularly in light of the serious nature of the offenses and the danger Barclay presents to the community.

Although Barclay was not charged with the murder of Mark Irwin, he ultimately admitted that he knew Francie had killed Mark, and that he and Francie went to great lengths to attempt to dispose of Mark's body. (PSI, pp.7-8.) He also admitted that, after Francie murdered Mark, he and Francie broke into Mark's home on multiple occasions and stole numerous items with the intent of pawing those items. (PSI, p.8.) In fashioning an appropriate sentence, the district court articulated the sentencing factors it must consider, placing paramount importance on the need to protect society. (12/14/17 Tr., p.68, L.14 – p.69, L.22.) The court specifically considered Barclay's young age and his prior criminal record (12/14/17 Tr., p.70, Ls.2-9, p.71, L.22 – p.72, L.1, p.72, L.16 – p.73, L.), which the record shows includes eight juvenile adjudications for drug and theft-related charges and adult misdemeanor convictions for providing false information to an officer, possessing a controlled substance and possessing drug paraphernalia (PSI, pp.9-12). The court also considered Barclay's "very serious substance abuse problem" and prior treatment attempts, ultimately concluding that Barclay "has a substance abuse problem that contributes to the risk he presents to the community." (12/14/17 Tr., p.72, Ls.1-15.) The court specifically

found both Barclay's young age and the nature of his relationship with Francie March mitigating, noting that Francie may "have had some kind of power over him that caused him to behave in certain ways that perhaps he may not have done had he never encountered her." (12/14/17 Tr., p.72, L.16 – p.73, L.22.) What was "very significant" to the court, however, was the "very disturbing, heartless nature" of Barclay's crimes because, by his own admission, "even assuming he had not role in Mr. Irwin's death himself," Barclay "set out on a course of action that was designed to avoid law enforcement, of course, Mr. Irwin's family, from ever knowing what had become of Mr. Irwin," and "he did so in a way that facilitated the desecration of Mr. Irwin's body." (12/14/17 Tr., p.73, L.23 – p.74, L.12.)

Barclay argues on appeal that the district court failed to adequately consider factors he believes are mitigating, but a review of the record and the court's reasoning shows the district court thoroughly considered all of the information before it and reasonably determined that a lengthy sentence was necessary both to protect society and to punish Barclay for the heinous and callous nature of his crimes. (See generally 12/14/17 Tr., p.68, L.14 – p.76, L.8.) Contrary to Barclay's assertions, the district court did not impose "the maximum sentence for each offense." (Appellant's brief, p.4.) In fact, the court rejected the state's recommendation for the maximum fixed sentence and imposed a sentence that would protect society for a substantial period of time but at the same time give Barclay an opportunity to be released on parole supervision after 18 years. (12/14/17 Tr., p.76, Ls.9-25.)

Barclay's sentences are appropriate in light of the seriousness of his offenses, his criminal behavior, and the danger he poses to the community. At the sentencing hearing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Barclay's sentence. (12/14/17 Tr., p.68, L.14 – p.76, L.8.) The state submits that

Barclay has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Barclay's convictions and sentences.

DATED this 16th day of August, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of July, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
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/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 regard for human life, I don't think that that's
 2 true. I think that that's a dim view of
 3 Mr. Barclay. If Anthony had no regard for human
 4 life, he wouldn't have plead guilty and taken
 5 responsibility, which he had the opportunity to do
 6 after he sobered up and started thinking clearly
 7 again.
 8 At the time I think it's fair to say he
 9 wasn't demonstrating much regard. But to say that
 10 Anthony, as he sits here today, has no regard for
 11 human life, I don't think is accurate. He expects
 12 to be punished. He expects to be held accountable
 13 for what he did.
 14 At his young age, I don't think he is a
 15 lost cause, though. Anthony also has some mental
 16 health issues that he needs to deal with. Part of
 17 I think his awakening in the jail is that he began
 18 receiving treatment and taking medication, and so
 19 he is thinking a little clearly.
 20 And when it comes down to it, I know
 21 the factors the court has to consider. 25 years
 22 fixed is just pure retribution. I don't think
 23 that it's a valid argument to say that he is a
 24 threat to society. There is no evidence to
 25 suggest that Anthony is actively engaged when he

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1 excuse for his behavior. He has said over and
 2 over again that he is willing to accept whatever
 3 punishment the court decides to meet out. I would
 4 ask that when the court meets out its punishment,
 5 it considers other factors other than just pure
 6 retribution and vengeance.
 7 I acknowledge that there's a portion of
 8 that that the court needs to consider. But
 9 Anthony is a young man with a future. Bright or
 10 not bright, that's really up to Anthony to decide.
 11 At some point even with 25 years, Anthony is going
 12 to be out on the streets again. And so I would
 13 ask the court to fashion a sentence which gives
 14 Anthony the hope of turning his life around and
 15 gives him some incentive to behave well.
 16 His behavior in the jail has been
 17 largely positive. He is working on trying to make
 18 himself better. I think the presentence materials
 19 sort of suggest that he is working hard to try to
 20 do what he can even though in the jail that is
 21 sort of limited.
 22 I don't have a specific recommendation
 23 for the court, Judge, because frankly this is so
 24 far outside, I wouldn't know what to do.
 25 I just know that Anthony is not a lost

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1 is under the influence of seeking out to hurt
 2 people.
 3 Granted, his choices were disrespectful
 4 to the nth degree. I'm not sure Anthony is
 5 dangerous from that standpoint, but he certainly
 6 makes cataclysmically poor choices when he is
 7 under the influence.
 8 So sort of coming back full circle, I
 9 think the state's characterization of Anthony's
 10 upbringing about what to do with him sort of rings
 11 true in the fact that his behavior here when --
 12 after he got involved with Ms. March, seems to be
 13 a bit of out of character for him, at least based
 14 on his upbringing. And when Anthony and I had
 15 discussed what was likely to happen today, I said
 16 that is going to sort of cut both ways.
 17 Because on one hand, if it is so out of
 18 character, it doesn't speak well for the choices
 19 that he made when he had the advantages that most
 20 of my clients don't have growing up. The flip
 21 side is that he can be rehabilitated. If it is
 22 out of character for Anthony, then there's hope
 23 for rehabilitation, and that's what we would ask
 24 the court to focus on in fashioning a sentence.
 25 Anthony understands that there's no

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1 sole, and I would ask the court to consider that.
 2 Thank you.
 3 THE COURT: Thank you, Mr. Lorello.
 4 Mr. Barclay, would you like to make a
 5 statement today?
 6 THE DEFENDANT: I would, Your Honor.
 7 THE COURT: Go ahead.
 8 THE DEFENDANT: I would like to apologize to
 9 the friends and family of Mark Irwin for the pain
 10 and disrespect that I have caused. There is
 11 nothing that I can say or do, but I pray that God
 12 will use his love to soften the pain and sorrow
 13 that each of us holds in his hearts. Thank you.
 14 THE COURT: All right. Thank you,
 15 Mr. Barclay. I appreciate your comments. I have,
 16 of course, reviewed the presentence investigation
 17 in this case. It's very voluminous as the parties
 18 are aware.
 19 I am also well aware of the four
 20 objectives of criminal sentencing that Idaho law
 21 directs me to consider in every case. The first
 22 and foremost of those factors is protection of the
 23 community. And given all that has gone on in
 24 connection with this case, there is certainly
 25 reason for that to be an important factor for the

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1 court's consideration in this case.
 2 Protection of the community factor is
 3 in some sense another way of saying
 4 incapacitation, providing a period of time where
 5 society is free from the risks that a particular
 6 defendant might present to the community.
 7 And, of course, as I said, the conduct,
 8 the behavior in this case, indicates that there is
 9 risk to the community the defendant presents.
 10 The other three factors: deterrence,
 11 rehabilitation, and punishment. There is an
 12 important role for punishment to play here in
 13 fashioning a sentence as well. These are very
 14 serious wrongs indeed, grave level of disrespect
 15 for human life, not limited to Mr. Irwin but
 16 extending to the members of his family who, of
 17 course, were wondering where he was, not knowing
 18 where he was, and Mr. Barclay sets out on a course
 19 of action that is designed to deprive them of ever
 20 having that knowledge, and that he is doing that
 21 to serve his own ends, perhaps Ms. March's ends,
 22 in some combination.
 23 But there is a punishment to be meted
 24 out for that very wrong, heartless kind of action.
 25 Rehabilitation I think serves, plays some role in

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1 as long as the law allows, the Department of
 2 Correction, and then release him free of any
 3 burden to report to a parole officer;
 4 To be supervised in any fashion despite
 5 that he'll then be a middle-aged man, not someone
 6 who is on his last legs, nearing the grave,
 7 because of advanced old age, but someone who will
 8 be, as I said, in his mid-40s and will have had 25
 9 years of time in prison out of normal society with
 10 no adjustment period and no organized sort of
 11 support system provided by the Department of
 12 Correction.
 13 So it is a weighing, as Mr. Bleazard
 14 suggested, but that's part of what I take into
 15 account in looking at the rehabilitation angle to
 16 this sentence. So those are the factors that seem
 17 to be important here. It's important to consider,
 18 of course, the circumstances of this -- of these
 19 particular crimes; also, what got the defendant to
 20 this point in his life, his prior record, his
 21 circumstances.
 22 Now, the defendant did have a
 23 significant juvenile criminal history leading up
 24 to this, including a history of burglaries, had
 25 some adult criminal history that predates these

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1 the sentence that I have to hand down today as
 2 well. The defendant, as I've noted, is 20 years
 3 old. The three charges considered together, with
 4 consecutive sentences being imposed on each of
 5 them, would allow me to ordered the defendant's
 6 imprisonment for a period of 25 years. That makes
 7 him more or less 45 years old if I were to give
 8 him the absolute maximum, as the state has asked
 9 me to do today.
 10 So the defendant will be released into
 11 society again at some point unless he doesn't --
 12 lives an abnormally short life. So I do think
 13 that there is some need to consider the point I
 14 raised with Mr. Bleazard. The defendant is going
 15 to be released at some point absent an untimely
 16 death while incarcerated.
 17 Is society better off or not better off
 18 if he has, upon release a period of time should
 19 the parole board see fit to parole him, if I
 20 provide an indeterminate portion of his sentence
 21 here where there will be someone with an eye on
 22 him, someone designed to try to help him
 23 re-integrate into the community, and might that
 24 not be a more public safety oriented approach to a
 25 sentence in this case than one which says hold him

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1 offenses as well. The defendant seemed to
 2 struggle in school, didn't finish school; had a
 3 very serious substance abuse problem, a long
 4 history of using methamphetamine and marijuana;
 5 had done inpatient treatment as a juvenile and
 6 indicated in the presentence investigation that he
 7 stayed clean for several years prior to this
 8 incident.
 9 Of course, Mr. Lorello has argued today
 10 that this was a highly substance abuse adult
 11 period of time for the defendant in which he
 12 committed these crimes.
 13 So the defendant certainly has a
 14 substance abuse problem that contributes to the
 15 risk he presents to the community as well.
 16 Now, you can look at certain mitigating
 17 factors in the case, and, of course, I am directed
 18 to consider all mitigating factors that are
 19 presented to me. A couple that seem to have some
 20 significance here and that has been touched on to
 21 varying degrees in argument is the defendant's
 22 age. He is very young, very young at the time of
 23 the alleged crimes.
 24 Social science seems to suggest at this
 25 point that a 19-year-old man is not a fully formed

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1 person with a fully formed brain at this point.
 2 We don't know, I suppose, on some level what kind
 3 of, with additional development of his brain,
 4 where Mr. Barclay will wind up. So that maybe
 5 taken in some mitigation that this is a person who
 6 is still becoming fully formed, and ultimately
 7 when later in life may be better equipped to make
 8 less terrible decisions than he has made so far in
 9 his life.
 10 Additionally, there is the relationship
 11 element between the defendant and Ms. March, who
 12 is I believe a little bit more than twice his age.
 13 There is some reason to think, although the state
 14 has presented arguments as to why that is not the
 15 case, that Ms. March had some, certainly some,
 16 influence on the defendant's behavior and his role
 17 in these offenses.
 18 His decision-making may potentially
 19 have had some kind of power over him that caused
 20 him to behave in certain ways that perhaps he may
 21 not have done had he never encountered her. So
 22 those are items that I can consider in mitigation.
 23 What is very significant to me, of
 24 course, and I've touched on it already, is the
 25 very disturbing, heartless nature of these crimes

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1 the defendant.
 2 Now, I'm not going to engage in any
 3 kind of presumption about whether Mr. Barclay
 4 participated in Mr. Irwin's death himself. As
 5 Mr. Lorello points out, this isn't a murder
 6 sentencing. There isn't a murder charge. The
 7 state could, had it chosen to bring such a charge,
 8 bring one and have it adjudicated. So I'm not
 9 going to assume that Mr. Barclay was, is someone
 10 who has committed murder.
 11 There is, of course, though,
 12 significant indication that the defendant,
 13 Mr. Barclay, knew full well what had happened,
 14 that the defendant -- there is certainly
 15 indications that the defendant was at least
 16 present for some or all of those events, and,
 17 again, did nothing.
 18 And that is a grave matter even
 19 assuming that he had no involvement in the murder
 20 itself or in its planning or even any advance
 21 knowledge of what was going to happen. The state
 22 has argued that he did have that advance
 23 knowledge.
 24 It seems to me a significance sentence
 25 is warranted in this case. It is warranted as a

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1 themselves. The defendant, as I said and counsel
 2 have argued, even assuming he had no role in
 3 Mr. Irwin's death himself, set out on a course of
 4 action that was designed to avoid law enforcement,
 5 of course, Mr. Irwin's family, from ever knowing
 6 what had become of Mr. Irwin.
 7 And he did so in a way that facilitated
 8 the desecration of Mr. Irwin's body. I can only
 9 imagine the level of distress and heartache caused
 10 to Mr. Irwin's family, and the defendant will have
 11 to wrecken over the rest of his life with his role
 12 in that, and that's a terribly hard thing.
 13 A person who could allow himself to
 14 behave in that way is someone who at least at
 15 present does in my mind present as a danger of the
 16 community. There is no way of kind of
 17 rationalizing this behavior this extreme as some
 18 sort of one off, that a person who would do
 19 something like this could be somebody that I could
 20 nevertheless view as completely risk free, and
 21 somebody that could be -- that there is no need
 22 for concern about.
 23 I know that that's not exactly what
 24 Mr. Lorello is suggesting, but there is I think a
 25 significant safety related concern with regard to

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1 punishment. It is warranted as a means of
 2 ensuring that society is safe from the defendant
 3 for a period of time. It is warranted to give the
 4 defendant a substantial period of time to
 5 reconsider how he is going to live his life and to
 6 position himself to make the most of the rest of
 7 it when he is next permitted to be released in the
 8 community.
 9 As I have alluded to before during the
 10 hearing today, I question the wisdom of a flat out
 11 25-year fixed prison term, because it seems to me
 12 that some oversight would be in society's general
 13 best interest when the defendant is released. And
 14 the one way I can ensure that there will be no
 15 oversight is to give the defendant 25 years fixed.
 16 Now, I could give him something less
 17 than 25 years fixed, and the Department of
 18 Correction, the parole board, may choose to hold
 19 him for 25 years if they think that he can't be
 20 safely released and they want to hold him as long
 21 as they possibly can. That's how our system
 22 works. I set the maximum time they can hold him.
 23 I set the minimum time they must hold him. What
 24 they do in between is up to the parole board, and
 25 that seems to me to be the best, safest way to