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

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| **STATE OF IDAHO,** | ) | |
| | ) | **No. 47137-2019** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **Teton County Case No.** |
| **v.** | ) | **CR-2016-327** |
| | ) | |
| **ERIK M. OHLSON,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

# BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON**

**HONORABLE BRUCE L. PICKETT**
**District Judge**

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## STATEMENT OF THE CASE

### Nature Of The Case

Erik M. Ohlson appeals from his judgment of conviction for one count of first degree murder and one count of voluntary manslaughter.

### Statement Of The Facts And Course Of The Proceedings

Ohlson met Jennifer Nalley "in January or February of 2016." (PSI, p.4.) The two began dating; Jennifer got pregnant; and around that same time, Ohlson later told police, "problems in their relationship escalated." (Id.) He recalled there was "'mean behavior' and 'hurtful' exchanges between the two of them." (Id.)

As the months went on, Ohlson sent some text messages to a friend of his, Erin Landry, regarding Jennifer and their relationship. (PSI, p.5.) From May 20, 2016, to July 4, 2016, these "included threats to kill Jennifer," discussions of "miscarriage and abortion for her baby," expressions of "frustration" and "anger about Jennifer" and their relationship, and mentions of "potential prison time." (Id.) Among other things, Ohlson texted Ms. Landry that:

- "I am praying for a miscarriage or an abortion. If not one of us will wind up dead…."
- "It is taking everything in my power not to go kill that crazy bitch right now. I am at my wits end and life in prison seems reasonable."
- "I really will spend the rest of my life in jail before I let a woman screw me over like this. Three hots and a cot beats being imprisoned by a crazy woman any day."
- "I'm praying for a miscarriage… short of that I need a lawyer. She is dead set on having this child and it seems as though my only obligation is financial in her eyes. I'm deadly serious, I will kill her before she sticks me with child support."

- "Prison seems viable at this point. Sure the food sucks but the rent is way cheaper than Jackson."
- "Pushing for an abortion. We fucking hate each other so it makes sense. I want to forget that I met her, not be forced to deal with her sociopathic ass for 18 years. If she got hit by a truck I would be happy."

(Plaintiff's Prelim. Ex.1, pp.1-2, 4-7.)

On July 4, 2016, Ohlson texted Ms. Landry that he "want[ed] to strangle" Jennifer "and witness her last mortal moment"; that he "want[ed] to see her beg for life and then take it away by slashing her throat"; and that, "[i]n the words of the Ramones, I'm gonna kill that girl." (PSI, p.5.) He followed up with these texts:

- "She threatened that. Been in tears since I talked with her. I'm just going to kill her."
- "Nope. Gonna kill that girl."
- "I was literally tying my shoelaces when you texted. Was headed to Driggs to commit a murder. Glock loaded with hollow points, plans of killing her and killing myself. I'm not being dramatic."
- "My shoes are untied and I'm not going anywhere tonight. You caught me before anything stupid happened. You have that knack with me. Thank you thank you thank you. I can't thank you enough."

(PSI, pp.5-6.)

On that same night, July 4, Ohlson drove from Jackson Hole, Wyoming, to Driggs, Idaho, where Jennifer was staying. (PSI, p.30.) He shot her eight times—six times in the back—killing her, and killing their unborn child. (PSI, p.30.) Jennifer's body was found the following morning by her grandfather, and her uncle, who called 911. (PSI, pp.122-23.)

After killing Jennifer, Ohlson drove away and crashed his truck into a power pole, which he subsequently described as "an attempted suicide." (PSI, p.30.) He was "staggering, and very unsteady" and arrested for suspected driving under the influence. (PSI, p.85.) Shortly thereafter, he "agreed to a breath test," the results of which "were .276, .241, and .243." (Id.) While Ohlson was incarcerated at Madison County Jail on the DUI charge, the Teton County Sheriff's Office and Idaho State Police were investigating Jennifer's death, which eventually led them to Ohlson. (PSI, pp.3-4.)

The state charged Ohlson with two counts of first degree murder, both with firearm enhancements; one count of burglary; and one count of DUI with a blood alcohol concentration over .20. (R., pp.755-58.) Thereafter, the parties entered into a plea agreement. (R., pp.1227-31.) Pursuant to that agreement, Ohlson pleaded guilty to one count of first degree murder, to a reduced charge of voluntary manslaughter, and the state agreed to dismiss the remaining charges. (R., pp.1228-29; 2/14/19 Tr., p.23, L.21 – p.27, L.8.)

The district court sentenced Ohlson to a life sentence, with 25 years fixed, for the first degree murder conviction, and to a concurrent 15-year sentence, with 10 years fixed, for the manslaughter conviction. (R., p.1407.) Ohlson timely appealed. (R., pp.1414-16.)

## ISSUES

Ohlson states the issues on appeal as:

I. Did the district court abuse its discretion by failing to redline portions of the Presentence Investigation Report that it found should be excised?

II. Did the district court abuse its discretion by imposing an excessive sentence upon Mr. Ohlson, in light of the mitigating factors that exist in this case?

(Appellant's brief, p.4.)

The state rephrases the issues as:

I. Did the district court err by concluding the letters from friends and the PSI author's comment should have been stricken from the PSI, and has Ohlson failed to show a limited remand would be proper?

II. Has Ohlson failed to show the district court imposed an excessive sentence?

## ARGUMENT

### I.
### The District Court Erred By Determining The Friends' Letters And The PSI Author's Comment Should Be Stricken From The PSI; Moreover, Their Inclusion In The PSI Is Harmless, And Ohlson Fails To Show A Limited Remand To Remove These Items Would Be Proper

### A. Introduction

Ohlson claims the district court "abused its discretion by failing to carry out its decision to excise" three categories of documents from the PSI: letters written by friends of the victim, a purportedly "gratuitous" statement from the PSI author, and a Section 19-2524 addendum. (Appellant's brief, p.5.) Per Ohlson, the court correctly found these items "should have been excised," but "these items were not actually removed" from the PSI. (Id.)

Ohlson fails to show error. First, with respect to the friends' letters (PSI, pp.43-56), and the PSI author's comment (PSI, p.30), these items were properly included in the PSI in the first place.[1] The district court erred by concluding they should have been stricken at all.

In any event, any failure to remove the items was harmless. While the state acknowledges that under State v. Golden, a limited remand would be appropriate to remove "unreliable or erroneous information" that the court itself does not redline, State v. Golden, No. 46751, 2020 WL 4814181, at *3 (Idaho Ct. App. Aug. 19, 2020), that remedy is unavailable here. The court never determined that the friends' letters or the PSI author's comment were unreliable or erroneous. As such, Ohlson fails to show any harm from leaving these items in the PSI, and fails to show a limited remand to remove them is warranted. Finally, even assuming this Court concludes a limited remand would be proper, because Ohlson limits his argument on appeal to

[1] On the other hand, the state had no objection to the removal of the Section 19-2524 addendum below (see 5/9/19 Tr., p.182, L.1 – p.182, L.12), and thus does not contend the district court erred in determining it should have been removed.

the friends' letters, the PSI author's comment, and the Section 19-2524 addendum, no other things should be removed from the PSI on remand.

B. Standard Of Review

"A district court's denial of a motion to strike or delete portions of a PSI is reviewed on appeal for an abuse of discretion." State v. Molen, 148 Idaho 950, 961, 231 P.3d 1047, 1058 (Ct. App. 2010); State v. Rodriguez, 132 Idaho 261, 263, 971 P.2d 327, 329 (Ct. App. 1998).

C. The Friends' Letters And The PSI Author's Comment Are Unobjectionable And Were Properly Attached To The PSI

Under Idaho Criminal Rule 32, there are certain elements a PSI "*must* contain," including a "description of the situation surrounding the criminal activity," "any prior criminal record of the defendant," and "the defendant's social history," among other things. I.C.R. 32(b)(emphasis added). However, a presentence report *may* contain a wide range of other information. In fact, the only limitations placed on the other information a PSI "*may* contain" are foundational in nature; the PSI "may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider that information." I.C.R. 32(e) (emphasis added). Likewise, "[t]he judge may consider material contained in the presentence report that would have been inadmissible under the rules of evidence applicable at a trial." (Id.) And "[w]hile not all information in a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report." (Id.) Beyond these foundational requirements, there is no substantive limitation on what a PSI may contain. See Rule 32(e).

Thus, a district court is free to consider the results and contents of a PSI if the reliability of the information is ensured by the defendant's opportunity to review the report, present favorable evidence, and explain or rebut adverse information. Molen, 148 Idaho at 961, 231 P.3d at 1058. Where a district court rejects information in the PSI as inaccurate, unfounded, or unreliable, it should also redline that information from the PSI. State v. Carey, 152 Idaho 720, 722, 274 P.3d 21, 23 (Ct. App. 2012).

1. The Letters From Jennifer's Friends

Applying those standards here, the district court erroneously concluded that the victim's friends' letters should have been stricken from the PSI. Letters may be attached to a PSI because Rule 32 does not categorically prohibit letters—those penned by victims, friends, or anyone else. See I.C.R. 32. Moreover, the district court never found that the friends' letters here were unreliable, that they contained "conjecture or speculation," nor did it identify any other foundational reason, under Rule 32, why the letters should not have been attached to the PSI. (See generally 5/9/19 Tr.)

In fact, the district court appeared to think the opposite: while it found the letters "should not be attached to the PSI," it nevertheless held "they can be included in the sentencing," and would go "to the broad information that the Court can use at sentencing." (5/9/19 Tr., p.164, Ls.3-12.) The district court found the letters, along with the other objected-to information, would be "considered as argument" at sentencing, and that it would "determine relevancy and weight to be used at the time of sentencing." (5/9/19 Tr., p.171, Ls.3-8.) As it turned out, the court indicated it had considered the letters at sentencing, at least to some extent—on the day of sentencing, it told the parties that "I have reviewed the letters that were submitted with the PSI." (5/10/19 Tr., p.367, Ls.19-20.) To the extent the court found the letters were admissible at

sentencing, they necessarily met the foundational requirements of Rule 32(e). And because the district court never articulated that the letters were unreliable, contained conjecture or speculation, or had some other foundational defect relevant in a Rule 32 analysis, they should not have been removed from the PSI.

It appears that the district court only concluded the letters were improperly included in the PSI because Ohlson asked they be removed. The court found, "[a]s to the specific letters of the individuals that are not defined as victims," it did not "believe that they should be attached, *based upon the request of the defense*." (5/9/19 Tr., p.164, Ls.3-11 (emphasis added).)

However, a party is not entitled, on demand, to have whatever information it objects to stricken from a PSI. State v. Carey, 152 Idaho 720, 722, 274 P.3d 21, 23 (Ct. App. 2012). In Carey, the Idaho Court of Appeals reviewed a claim that the district court abused its discretion by failing to rule on Carey's objections to the PSI and failing to strike those portions. Id. at 721, 274 P.3d at 22. Carey argued that "because he rebutted or disputed these statements, they should have been stricken from the PSI," relying on Mauro, Rodriguez, and Molen to support his position. Id. at 722, 274 P.3d at 23 (citing State v. Mauro, 121 Idaho 178, 824 P.2d 109 (1991); State v. Rodriguez, 132 Idaho 261, 971 P.2d 327 (Ct. App. 1998); Molen, 148 Idaho 950, 231 P.3d 1047).

The Court determined that Carey "misunderst[ood] the holdings" of these cases. Id. "Not one of these authorities holds that a sentencing court must strike from a PSI any statement that the defendant disputes." Id. Rather, a district court should redline the PSI when it finds the disputed portions to be speculative, inaccurate, or unreliable. Id. The Court of Appeals determined that Carey failed to show "that any of the information to which he objected or which he rebutted was found to be unreliable or inaccurate by the trial court." Id. Not only was the

information "not facially unreliable," it "came from presumably reliable sources—a parole officer and the presentence investigator who were reporting on their own observations of and conversations with Carey." Id. at 722-23, 274 P.3d at 23-24. Thus, the Court of Appeals held that Carey failed to show that the district court abused its discretion. Id. at 723, 274 P.3d at 24. Likewise, it was an abuse of discretion here to grant Ohlson's request to remove the letters, simply because he asked.

Even if we assume the district court implicitly adopted Ohlson's stated reasoning for excluding the letters, the court still erred. Below, Ohlson argued the letters could not be attached to the PSI because the letters were not written by "victims" as defined by statute, but, instead, by Jennifer's friends. Per Ohlson, "only Victim Impact Statements from the victim's family may be included in the PSI," and that, "[t]here is no provision in either I.C.R. 32(b) or (e) that allows for letters or other information from non-Victims to be attached to the PSI report." (R., pp.1352-53.)

This fundamentally misapprehends Rule 32. It is true that there is no provision in Rule 32(e) that explicitly "allows for letters or other information from non-Victims," but that is only because Rule 32(e) doesn't "allow for" any specific category of information at all. In other words, the rule does not provide a limited, itemized list of things that a court may consider, as Ohlson seemed to think below. I.C.R 32(e). Instead, Rule 32(e) allows in *any* information, so long as it is reliable. (See id.)

Similarly, Ohlson's claim that "only Victim Impact Statements from the victim's family may be included in the PSI" (R., pp.1352-53), is meritless, and mixes up the relevant standards. While victims certainly have the right to have their "statement of impact included" in a PSI (see I.C. § 19-5306(1)(h)), that does not mean we deny the antecedent, and conclude that non-victims may *not* supply information for a PSI. To the contrary, it is settled that a non-victim may present

information at sentencing. State v. Hansen, 156 Idaho 169, 174, 321 P.3d 719, 724 (2014) (holding that "the fact that" a sentencing hearing witness was "not a 'victim'" under I.C. § 19-5306 "does not preclude him from presenting relevant information at sentencing," but that he simply may "not a matter of *right*") (emphasis added)). More importantly, Rule 32 makes no distinction whatsoever between victim and non-victim statements—in fact, it does not mention "victims" at all. See Rule 32. Thus, under Rule 32(e) it simply does not matter whether the letters were written by victims or not. So long as the letters were reliable, and met the other foundational requirements of Rule 32(e), they were appropriately attached to the PSI. See id.

On appeal, Ohlson has no merits argument on this issue. He simply states, with no elaboration, that "[t]he district court correctly found that the non-victim impact letters … should have been excised from the PSI." (Appellant's brief, p.5.) This conclusory argument fails to show the district court or Ohlson correctly applied Rule 32 below, and this Court should reject it. Because the district court never found the friends' letters were unreliable, or otherwise made a ruling applying the standards of Rule 32, the letters were properly included in the PSI.

2. The PSI Author's Statement

Likewise, the district court erred in concluding that the PSI author's written comment—that "anything less than continued incarceration would be unconscionable" (PSI, p.30)—should be stricken from the record. The district court concluded it should be removed for the following reasons:

> As to the specific comments of [the PSI author] in paragraph 9, "Anything less than continued incarceration would be unconscionable." Frankly, this is just an example of how the process works. I read through that comment in the Presentence Investigation Report prior, frankly, to the objection. I thought that's kind of an irrelevant statement.

> The Court would have disregarded that, had planned on disregarding that, because, as argued, incarceration is going to continue. The sentencing options here are ten years as a minimum, up to life. So incarceration is going to continue. However, the exact term, "Anything less than continued incarceration would be unconscionable," the Court's going to grant that motion to strike that from the Presentence Investigation Report.
>
> But as an example, the Court wouldn't have considered that anyway. Because, like I said, it has nothing to do with the reality of where we are; that it's going to be a ten-year-to-life range. That's what we're talking about.
>
> So continued incarceration is the only option; however, the "unconscionable" I'm not quite sure where that word comes from, but the Court would have disregarded that anyway even without the defense's objection to that. I will grant that and strike that from the Presentence Investigation Report.

(5/9/19 Tr., p.166, L.8 – p.167, L.9.)

This was an error, because the district court again did not articulate any reason based on Rule 32 for striking the PSI author's comment. Rule 32 expressly provides that a PSI author "may recommend incarceration," but cautions "it should not contain *specific* recommendations concerning the length of incarceration." I.C.R. 32(c) (emphasis added). Under this standard, the PSI author's comment—which was a non-specific recommendation of incarceration—was proper. Moreover, the district court indicated it would remove the comment because it would have "disregarded" it as "irrelevant," insofar as "incarceration is going to continue," or because it was "not quite sure where" the "word [unconscionable] comes from." (5/9/19 Tr., p.166, L.13 - p.167, L.6.) None of these concerns implicate Rule 32(c); as such, the court erred by ruling it would strike the comment.

Below, Ohlson likewise failed to show the comment should have been removed. Ohlson first claimed that, "it is unclear what" the PSI author "meant by 'continued incarceration.'" (R., p.1353.) "Therefore," he argued, "to the extent" the PSI author "intended to recommend anything other than incarceration (versus probation) to the Court, this statement is improper."

(R., p.1354.) He additionally claimed that the "use of the phrase 'unconscionable' was inappropriate and demonstrative of bias," because "[i]t is exclusively within the province of the Court to determine what a fair, just, and reasonable sentence is in this case." (Id.)

None of these concerns justify striking the PSI author's comment. Even if the phrase "continued incarceration" is "unclear," as Ohlson thought, it does not run afoul of Rule 32. Rule 32(c) bars a *specific* sentence recommendation, not an ambiguous statement like "continued incarceration." Ohlson's own argument at the motion hearing demonstrates this. He wondered: "what does she mean by her statement, 'Anything less than continued incarceration would be unconscionable'? *I have no idea what that means, but it's improper.*" (5/9/19 Tr., p.147, Ls.1-4 (emphasis added).) If Ohlson himself had no idea what the PSI author meant by her comment, then, by definition, it was not a specific sentencing recommendation. And conclusory argument that the comment was "inappropriate and demonstrative of bias," (R., p.1356), does not address the legal standard set forth in the rules, much less show a violation of them.

Here again, Ohlson does not provide any merits argument on appeal. He only claims that "[t]he district court correctly found that the … gratuitous statement from the PSI writer … should have been excised from the PSI." (Appellant's brief, p.5.) This fails to show the district court or Ohlson correctly applied Rule 32 below. Because the PSI author's statement was appropriate under Rule 32(c), it was properly included in the PSI.

D. Any Failure To Remove The Friends' Letters And The PSI Author's Statement Was Harmless, And Ohlson Fails To Show A Limited Remand To Remove These Items Would Be Proper

The state acknowledges the recent Idaho Court of Appeals opinion in State v. Golden, where the court found that because "the PSI in the appellate record does not reflect the changes

the district court suggested it was making in response to Golden's proffered additions and corrections," it could not "determine whether the court complied with the requirement in [State v. Molen, 148 Idaho 950, 231 P.3d 1047 (Ct. App. 2010)] to cross out or redline unreliable or erroneous information." No. 46751, 2020 WL 4814181, at *3. The Golden Court accordingly found that, "[b]ecause a corrected PSI is not in the appellate record in this case, we remand to the district court to ensure that the court's additions or corrections are reflected on Golden's PSI and that the corrected PSI is the one distributed per I.C.R. 32(h)." Id. (footnote omitted).

But even in light of Golden, Ohlson fails to show he is entitled to the remedy of a limited remand. In Golden, the concern going forward was the Court of Appeals could not "determine whether the court complied with the requirement in [Molen, 148 Idaho 950, 231 P.3d 1047] to cross out or redline *unreliable or erroneous information*." (Id. (emphasis added).) Here, as shown above, the district court never determined that the objected-to items actually contained "unreliable or erroneous information." (Id.) Because the limited-remand remedy in Golden was intended to remove such information going forward, Ohlson fails to demonstrate that he is entitled to such a remedy here. Any failure to remove the friends' letters and PSI author's statement would be harmless.

Even if this Court determines a limited remand would be appropriate, Ohlson has only argued that the court "correctly found that the non-victim impact letters, the gratuitous statement from the PSI writer, and the I.C. § 19-2524 evaluation all should have been excised from the PSI," and only argued that "the district court abused its discretion by failing to carry out its decision to excise *these documents* from the PSI" (Appellant's brief, p.5 (emphasis added)). Because Ohlson limits his argument on appeal to these three items, any remand should be limited

in scope for the removal of these items, and not any others. See Estes v. Barry, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998) (issues not raised in the opening briefing are waived).

## II.
## Ohlson Fails To Show The District Court Abused Its Sentencing Discretion

Where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden, Ohlson must show that his sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). The Court reviews the whole sentence on appeal and presumes 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 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Ohlson fails to show his concurrent life sentences, with a total of 25 years fixed, are unreasonable. Ohlson gunned down his pregnant girlfriend, shooting her six times in the back, killing her and his own unborn son. (PSI, p.30.) He left her body on the front porch to be found by family members. (Id.) While Ohlson later claimed to have little memory of the killings, and "the prior week" (5/10/19 Tr., p.366, Ls.11-15), the texts he sent showed that, for many weeks before then, he contemplated killing Jennifer, the death of the child, and going to prison. (State's Prelim. Hearing Ex. 1; PSI, pp.5-6.) Ohlson made it crystal clear: he "want[ed] to strangle"

Jennifer, "witness her last mortal moment," "see her beg for life and then take it away by slashing her throat." (PSI, p.5.) Ohlson openly discussed his "plans of killing her," which he did, in brutal fashion. (PSI, p.6.) The district court thus correctly found that Ohlson had a "plan … to take three lives," which ultimately "ruined … the victim's life, the life of [his] unborn child, [Ohlson's] life, the victim's family," and Ohlson's own family. (5/10/19 Tr., p.369, Ls.4-9; 377, Ls.19-20.)

Despite these aggravating factors, Ohlson claims on appeal that the district court gave insufficient weight to the mitigating factors. (Appellant's brief, pp.7-11.) But the district court delved into mitigation at length, discussing Ohlson's "lack of criminal history," his prior work history, and his alcohol abuse problems, among other things. (5/10/19 Tr., p.371, L.8 – p.373, L.4.) The court understood and accepted that "there are a lot of mitigating circumstances"; but, of course, there were "aggravating circumstances" too. (5/10/19 Tr., p.373, Ls.5-7.) The court was therefore well aware of the mitigating evidence. Just because the court apparently found the aggravating circumstances outweighed the mitigating circumstances, does not show an abuse of discretion.

With regard to community protection, the most important sentencing factor (see Toohill, 103 Idaho at 568, 650 P.2d at 710), Ohlson essentially claims that this was a one-time, freak occurrence. He argues he "is a good person who did a terrible thing"; points to his purported good character and life history; and cites friends and family members who conclude this situation is "not likely to repeat." (Appellant's brief, pp.7-11 (quoting PSI, p.64).) Ohlson grants that "[t]he deaths of Ms. Nalley and her unborn child are tragic and devastating," but explains that "the people who know Mr. Ohlson best, know that these crimes are completely out of character." (Appellant's brief, pp.7, 9.) Thus, Ohlson argues, "[t]he thought that those deaths occurred at the

hands of Erik Ohlson is almost unfathomable to the people who know him best." (Appellant's brief, p.7.)

Perhaps it is "almost unfathomable" because the people who "know [Ohlson] best" did not know him intimately, like A.S. did. A.S. previously dated Ohlson and recounted that, "[a]bout three months into the relationship … she accidentally got pregnant." (PSI, p.22.) She and Ohlson "subsequently decided to marry." (Id.)

According to Ohlson, A.S. "chose to terminate the pregnancy, which led to the couple's separation." (Id.) But, according to her, she noticed "'red flags,' after she began living with" Ohlson. (Id.) She further recalled Ohlson "became controlling and told her what she could and could not do," and that she "began feeling unsafe with Ohlson's harsh and controlling demeanor." (Id.) Although A.S. clarified that Ohlson was "never violent and she never felt any fear for her safety" physically, she still "did not trust that the relationship would turn out well," and thus broke up with Ohlson. (Id.) After that, Ohlson—who she thought "did not have much empathy for other people"—left her "extremely hurtful" messages calling her "horrible names." (PSI, p.81.) She was "shocked by how disparaging and terrible they were." (Id.) When told of the current case, A.S. indicated she "feels lucky that it didn't happen to her." (PSI, p.82.)

Or maybe the people who "know [Ohlson] best" did not have the insight that Dr. Landers did. Dr. Landers evaluated Ohlson for the Section 19-2522 psychological assessment before sentencing. (PSI, pp.32-36.) While Ohlson "acknowledge[d] that his actions in killing Jennifer Nalley were unjustified," and "express[ed] empathy for the pain" he caused, Dr. Landers found it nevertheless "clear that [Ohlson] does not fully comprehend the impact of his actions nor truly recognize his full responsibility that is unmitigated by external factors." (PSI, p.34.) Dr. Landers found Ohlson's insight was "limited," and "his judgment in choosing appropriate future

behaviors is equally limited, resulting from a history of immaturity, hedonism, and self-centeredness." (PSI, pp.34-35.) That "generally hedonistic lifestyle," Landers noted, was combined with "a history of alcohol use" and "immaturity, egocentricity, irresponsibility," and "relationship instability." (PSI, p.36.) Thus, while Ohlson appeared to have "a hint of insight regarding the need for internalization and motivation for change," with some "possibility for rehabilitation in the future," Dr. Landers concluded Ohlson's "current risk to the public would be judged as high, should he be released immediately or in the near future." (PSI, pp.35-36.)

Or perhaps the people who "know [Ohlson] best" simply made the same mistake Erin Landry did. Ms. Landry—Ohlson's close friend for over a decade—thought Ohlson's talk of killing Jennifer was not who he truly was. (See PSI, pp.67, 72.) She "never thought he was serious." (PSI, p.72.) As Ohlson's attorney later downplayed it, Ohlson was "a little bit quirky," and discussions of killing Jennifer were "just part of his dark humor." (5/10/19 Tr., p.353, L.10 – p.354, L.17.) Of course, we now know these sanguine assessments had it all wrong. Ohlson was not kidding when he said, "I'm deadly serious, I will kill her before she sticks me with child support." (State's Prelim. Hearing Ex. 1, p.5.) He was not joking when he said, "I really will spend the rest of my life in jail before I let a woman screw me over like this." (State's Prelim. Hearing Ex. 1, p.4.) And it was not "quirky," "dark humor" when Ohlson said, "[i]n the words of The Ramones, I'm gonna kill that girl." (PSI, p.5.) He meant it. So for a full measure of Ohlson's character, and risks to the community going forward, we should not just ask what Ohlson's friends and family, giving every benefit of the doubt, would say about him. We should take Ohlson at his own word, in light of what he actually did.

Ohlson has since reconsidered at least one of those text messages. Back in June of 2016, Ohlson figured "life in prison seems reasonable" in exchange for ending two lives. (State's

Prelim. Hearing Ex.1, p.2.) He has now changed his tune, and claims that 25 years in prison is "excessively harsh." (Appellant's brief, p.11.) In Ohlson's updated view, "the district court should have instead sentenced him to a term of life, with ten years fixed." (Id.) But the district court's sentence was perfectly reasonable. For killing Jennifer and their unborn child, Ohlson's 25-year fixed sentence is well within the court's wide range of sentencing discretion. Given all the aggravating and mitigating circumstances of this case, and all of the Toohill factors, Ohlson fails to show the district court abused its discretion.[2]

## CONCLUSION

The state respectfully requests this Court decline to remand this case for removal of the friends' letters and the PSI author's comment; alternatively, any remand for the purposes of removing items from the PSI should be limited to the friends' letters, the PSI author's comment, and the Section 19-2524 addendum. In any event, the state respectfully requests this Court affirm Ohlson's judgment of conviction and sentence.

DATED this 3rd day of November, 2020.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

[2] Ohlson also fails to argue "the district court improperly considered unreliable or erroneous information in the PSI when imposing his sentences." Golden, No. 46751, 2020 WL 4814181, at *3, n.1. This Court should accordingly "review [Ohlson's] assertion that his sentences are excessive based on the appellate record as it exists." Id.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of November, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kale D. Gans
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KDG/dd