IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. JONATHAN D. LYTLE (DOB: 10-20-78) Defendant.	No. 07-1-00947-8 DEFENDANT'S MEMORANDUM IN RESPONSE TO STATE'S MEMORANDUM REGARDING SENTENCING

BACKGROUND

DEFENDANT Jonathan Lytle was charged with one count of homicide by abuse, in the death of his 4-year old daughter, Summer Phelps, which occurred on March 10, 2007, a jury convicted him of said offense. He was also charged with three aggravating circumstances, and the jury found that all three aggravators were present. He is now before the court for sentencing. The State is seeking an exceptional sentence of 900 months.

There can be no serious discussion but that the offense for which Mr. Lytle was convicted is heinous, and the jury found the aggravating factors of deliberate cruelty, breach of trust, and vulnerability of the victim all apply. Mr. Lytle has no criminal history. The offense itself carries a sentencing range of 240 to 320 months for an offender score of zero. Because the offense is a Class

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

A serious violent felony, with aggravators, the sentencing range available to the court is up to life imprisonment. Because the offense does not carry life imprisonment without possibility of parole, the court must sentence Mr. Lytle to a finite number of months. He is then eligible for good time and earned release time at the statutory rate of 10% of his sentence.

The State is seeking 900 months. That is 75 years. Mr. Lytle is 30 years old at this time. He has been incarcerated since March 11, 2007, so at his sentencing he will have served almost 22 months. If one assumes full credit for good time and earned release time at 10%, he would be entitled to 90 months (7.5 years) off of his sentence. A rough calculation produces 900 minus 90 minus 22 equals 788 months left to serve if he is sentenced to 900 months. At best, Mr. Lytle would be eligible for release when he is 95 and ½ years old. Based upon his current age, according to the Insurance Commissioner's Mortality Tables (see attached copy), Mr. Lytle can (in a "free" environment) expect to live another 46.2 years. In effect, then, 900 months would be a sentence of life without possibility of parole. This is especially so, considering the fact that the Department of Corrections (DOC) considers inmates to be old at age 50, and the median age of death in DOC institutions is 53 years (based upon information received from the DOC).

There are two questions for the court to wrestle with: whether or not this sentence is proportional and therefore valid under the Sentencing Reform Act (SRA), and what would be an appropriate sentence for Mr. Lytle.

There was, as the court will no doubt recall, an enormous amount of pretrial publicity in this case, as well as more than the usual publicity during trial. No doubt sentencing will be attended in the same fashion. The community has been shocked and outraged by this case, and the outpouring of sympathy for Summer Phelps has been almost unprecedented. Certainly, the Spokesman-Review's use of her death as the kick-off for its (previously planned) "Our Kids: Our Business" campaign has added to the exposure this case has had in the public's eye.

Nevertheless, this is not the time for the court to run amuck with retribution, giving society what has been frequently expressed at the most basic, emotional level inherent in us all. It is not the

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

time to sentence on the basis that any amount of time imposed can be justified if only the right words are used and, if certain concepts are avoided there is no limit to the punishment that can be heaped on Mr. Lytle. Instead, this is the time for a reasoned and principled determination of a sentence for Mr. Lytle, which both reflects the needs of society to see justice done and the requirements of the sentencing laws of this state.

THE SENTENCE PROPOSED BY THE STATE FAILS TO MEET THE PROPORTIONALITY REQUIREMENT OF THE SENTENCING REFORM ACT

Effective in 1984, Washington adopted a determinate sentencing scheme by enacting the Sentencing Reform Act of 1981, encoded in RCW Chapter 9.94A. The purposes of the SRA are set out in RCW 9.94A.010:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;
>
> (5) Offer the offender an opportunity to improve him or herself;
>
> (6) Make frugal use of the state's and local government's resources; and
>
> (7) Reduce the risk of reoffending by offenders in the community.

It can readily be seen that the first three of these stated purposes have as their primary charge the requirement that sentences be proportionate. Purpose number one outright states the requirement of proportionality; purpose number two cannot be met unless a sentence is proportionate (a disproportionate sentence would be unjust); and purpose number three clearly references proportionality, as a sentence could not be commensurate with the punishment imposed for similar offenses without being proportionate as well.

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

The case law is clear for the most part. An exceptional sentence, whether above or below the standard sentencing range, must meet with the purposes of the SRA. See, e.g., State v. Allert, 117 Wn.2d 156, 164, 815 P.2d 752 (1991); State v. Estrella, 115 Wn.2d 350, 357, 798 P.2d 289 (1990). Where courts have expanded the number and scope of aggravating circumstances for exceptional sentences or have otherwise gone beyond the purposes of the SRA, sentencing decisions have been reversed. See, e.g., State v. Way, 88 Wn. App. 830, 946 P.2d 1209 (1997). Where defendants are charged under different statutes, even for the same or similar offenses, differences in sentencing law are the province of the Legislature. See, State v. Law, 110 Wn. App. 36, 43, 38 P.3d 374 (2002). Generally, the Washington Supreme Court has bent over backwards to ensure that trial courts have as much leeway as possible in imposing exceptional sentences. Attempts to impose strict proportionality reviews and to require courts to set forth reasons for the lengths of exceptional sentences have been rejected out of hand. State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995). However, one should temper this decision with the dissent by J. Madsen, Id. at 404 (stinging rebuke of rejection of stating reasons for exceptional sentences).

A brief review of other exceptional sentences in homicide by abuse cases reveals the following data:

Calendar Year	County	Cause Number	Std Range	Prosecutor recommended	Sentence Imposed	Aggravators found
1998	Jefferson	98-1-00055-0 (Berube case)	240 - 320	320	640	Particularly Vulnerable, Position of Trust, Deliberate cruelty. Seriousness of offense/more egregious than typical circumstances
1998	Jefferson	98-1-00056-8 (Berube case)	240 – 320	320	640	Particularly Vulnerable, Position of Trust, Deliberate cruelty. Seriousness of offense/more egregious than typical circumstances
1998	Snohomish	98-1-01110-1	240 – 320	320	240	
2000	Cowlitz	99-1-00891-7 (Madarash case)	240 – 320		320	
2000	Kitsap	00-1-00596-1	261 – 347	Indicates that Pros did not indicate similar sentence	360	Domestic violence offense
2003	King	02-1-10353-3	240 – 320		280	
2004	Pierce	02-1-05575-5	240 – 320	Similar to what was	480	Particularly vulnerable. Position of trust. Defendant agreed to prison,

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

				imposed		greater sentence or treatment.
2005	Pierce	04-1-03910-1 (Reyes case)	250 – 333	Similar to what was imposed	600	Defendant agreed to prison, greater sentence or treatment
2005	Spokane	04-1-01724-7	240 – 320		320	
2005	Island	05-1-00023-7	343 – 456	Similar to what was imposed	400	Particularly vulnerable. Domestic violence within sight or sound of children. Position of trust.
2006	Okanogan	05-1-00059-5	338-450		450	

Information in this table compiled from Sentencing Guidelines Commission website.

The State contends that another homicide by abuse case which is "remarkably similar" to Mr. Lytle's case is State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003). This is an assertion the defense can agree with at least to some degree. It does appear that there was a much greater extent of deliberate cruelty in Berube than in the instant case, but many of the other factors are quite similar. It is interesting that the State makes this comparison, because in the process of advocating for 900 months, the State fails to mention the sentences in Berube. Those defendants received 640 months, almost 1/3 less than the State seeks for Mr. Lytle.

A sentence of 900 months fails to meet the proportionality requirement of the SRA. It is understandable that the State, representing the will of the people, seeks a very harsh sentence. It is understandable that the very idea of homicide by abuse generates the sentiment of very harsh sentences. In fact, in State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989), Division One of the Court of Appeals stated: "[w]hen a person causes the death of a child as part of a pattern or practice of assault or torture, we believe the crime is as serious as aggravated first degree murder." Id. at 870. However, the Court noted that homicide by abuse is at the same class as first degree murder, and that the Legislature did not increase the penalties by enacting the homicide by abuse statute. Thus, while the legislation's sponsors intended for the new offense to be "as serious a crime as we can make it," limitations were imposed. Id. at 869. Darren Creekmore's exceptional sentence of 720 months for second degree murder was upheld.

Thus, even the seminal case, the very one which engendered the homicide by abuse statute, resulted in a sentence of only 720 months, which is 180 months less that the State seeks for Jonathan Lytle. In the case of State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993), the defendant was sentenced to 900 months. But Scott was convicted of premeditated first degree murder, and felony

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

murder in the course of first degree robbery and attempted first degree rape. And while the aggravating factors of abuse of trust, victim's particular vulnerability, and deliberate cruelty were present, the jury also found the factor of multiple injuries inflicted in the commission of the crime. Id. at 210. That case is not similar, and does not present a basis for a proportional sentence comparison to the death of Summer Phelps.

The Scott case does bring up an interesting point, however. One of the defendant's arguments in Scott was that the State sought to have him sentenced on the basis of one year of incarceration for each year of the victim's life. The Court in the Scott case dismissed that argument, stating there was no evidence that "the court had improperly used the victim's age to determine the sentence." In the present case, the life expectancy of Summer Phelps, based on the Washington State Insurance Commissioner's Mortality Table for Women, would be about 75 years, which is 900 months (see attached table). Here, the State is coyly asking for 900 months, notwithstanding its assertion that another homicide by abuse is closely related factually, failing to state that in that case the sentence was only 640 months. So, is it merely coincidental, perhaps, that the sentence sought and the victim's life expectancy are the same?

If the State asserted, and could show, that Scott was the most similar case, 900 months and Summer Phelps' life expectancy might be merely coincidental. But that is not the case. The State asserts that another case, Berube, is "remarkably similar" but fails to indicate the sentence received by those defendants (640 months), and instead argues forcefully that 900 months is appropriate, and further argues with extensive citation to case law that the court essentially has unfettered discretion in sentencing—it's okay, no exceptional sentence has ever been overturned in this state. The State here is simply trying to not be blatant in seeking to have Jonathan Lytle sentenced to one year in prison for every year of Summer Phelps' life expectancy—knowing full well that such a sentence would not be countenanced in the law.

A public prosecutor is "a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice." In Re Hinton, 152 Wn.2d 853, 856, 100 P.3d 801 (2004), quoting State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting State v. Case, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). A

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

prosecutor's duty to do justice on behalf of the public transcends mere advocacy of the State's case. See H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 Fordham L. Rev. 1695, 1715 (April, 2000). This requirement has been time honored, and stated over and over, in a great variety of venues. For example, in Bailey v. Commonwealth, 193 Ky. 687, 237 S.W. 415, 417 (1922), the Court said:

> [T]he duty of a prosecuting attorney is not to persecute, but to prosecute, and that he should endeavor to protect the innocent as well as to prosecute the guilty. He should always be interested in seeing that the truth and the right shall prevail....

And, in Lindsey v. State, 725 P.2d 649 (WY 1986), the Court quoted Commentary on Prosecutorial Ethics, 13 Hastings Const. L.Q. 537-539 (1986):

> The difference in our roles as advocates derives from the degree of our authority and the disparity of our obligations. Defense counsel's legitimate and necessary goal is to achieve the best possible result for his client. His loyalty is to the individual client alone. The prosecutor, however, enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.

Our own statutes reflect this requirement to an extent. See, RCW 9.94A.411. While most often referred to for the purpose of determining which crimes are against persons and which are property crimes, the statute does place some duties and limitations on prosecutors.

No homicide by abuse case found in the State of Washington involves a defendant who received an exceptional sentence of 900 months. The range of exceptional sentences in reported cases extends upward to 640 months. The sentence sought by the State is clearly not proportional. It is therefore not just, and it clearly cannot be commensurate with the sentences received by defendants for similar crimes. The court should not sentence Jonathan Lytle to 900 months in prison.

THE DEFENDANT SHOULD BE SENTENCED WITHIN THE RANGE OF OTHER DEFENDANTS FOR HOMICIDE BY ABUSE

The second question, and of course the ultimate question, is what sentence should Jonathan Lytle receive? With three aggravators having been found by the jury, it is not reasonable to expect a sentence at the low end of the standard range of 240-320 months. A sentence of 900 months is also

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

unreasonable, as noted above. Eli Creekmore's killer received 720 months, but he was a felon with an offender score of "9." The defendants in Berube received exceptional sentences of 640 months, which is double the maximum of the standard range.

To read the Berube case, as with the Creekmore case, is to be put through an ordeal. Both cases exhibit gratuitous cruelty beyond all expectations. In State v. Madarash, 116 Wn. App. 500, 66 P.3d 682 (2003), one finds a case far more similar to the Lytle matter, in that the offense of conviction was homicide by abuse and the manner of death was water intoxication in a four-year old girl who weighed a mere 33 pounds. The level of gratuitous violence was sickening. The defendant there, who was the deceased child's stepmother, received the high end of the standard range, 320 months (see chart above, this is the Cowlitz County case from 2000).

Another, much more recent case is State v. Reyes, 2008 Wash. App. LEXIS 2302, Division II case no. 36136-1-II. While an unpublished case, Reyes is noteworthy in that the defendant received an exceptional sentence of 480 months, notwithstanding the facts which included the death of a 2-year old child by vicious kicking and shaking which resulted in a massive subdural hematoma. In fact, the treating physician said he had not seen such severe brain swelling in all the 20 years he had practiced medicine.

The lessons to be learned in these cases, and all of the cases charted above, are two-fold. One lesson is that for all the gruesome photographs and testimony regarding the death of Summer Phelps—and the defense is not attempting to downplay her awful death in any way—her death at the hands of her father and stepmother is not out of the ordinary sway for homicide by abuse cases. While one could never say that a homicide by abuse death of a child is business as usual, it cannot be said that Summer Phelps' death was beyond the pale of the deaths of numerous other unfortunate children in Washington.

The second lesson here is that when defendants have been sentenced for homicide by abuse convictions—and these include several exceptional sentences—the range of those sentences has been 320 to 640 months. If one adds in Darren Creekmore, whose crime generated the legislation that created the homicide by abuse statute, the range goes up to 720 months (but it must be borne in mind that Creekmore had an offender score of "9.") A sentence of 900 months is simply far beyond

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

the range of exceptional sentences which has developed since 1987, in the 21 years the homicide by abuse statute has been in place.

Both Madarash and Berube present fact patterns devoid of any semblance of attempts at meaningful, reasonable discipline, or any real attempts by the defendants to exhibit any love towards their victims. Jonathan Lytle stands alone in the panoply of defendants who have been convicted of homicide by abuse, in that he did exhibit love for his victim, Summer Phelps, and he cared for her. But at the same time he failed her as a father; he failed to protect her, he failed to provide for her, he failed to give her a future. He failed in the promise that all men must make when they beget children--to love, protect, care for and raise their children in the best way possible. But he did love her. He did try to do what fathers should do. It was just far too little, far too late, far too poorly.

Jonathan Lytle does not deserve 900 months. He does not deserve 240 months. The sentencing ranges in the SRA were designed to account for all variations in judicial discretion for a particular charge and offender score. Low end would represent the appropriate sentence for those who accept responsibility for their actions, i.e., those who plead guilty. The high end would represent the appropriate sentence for those who do not, or whose offenses are most egregious within the applicable range for their particular crime. Most sentences should fall midway between the high end and the low end. While a court is given unlimited discretion where aggravating circumstances are found, it is not given unbridled discretion. All of the aggravators found in this case are inherent in the offense itself. Midpoint in Mr. Lytle's standard range is 280 months; that would be the presumptive sentence. The high end (320 months) would represent the added factor of the aggravators. A sentence of 320 months equates to 26 and 1/2 years. With credit for time served and 10% good time, Mr. Lytle would serve an actual 266 months, or slightly over 22 years.

Calculated from the age of 30, Jonathan Lytle would be eligible for release when he is 52 years old. That would not be life without possibility of parole. Given the facts in this case, 320 months is a reasonable exceptional sentence.

Submitted this 31st day of December, 2008.

Dennis Dressler, WSBA #19602

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448

Attorney for Jonathan Lytle

Edward Carroll, WSBA #15615
Attorney for Jonathan Lytle

Cheyenne Kiernan, APR 9 # 9107183
Legal Intern

RICHARD SANGER
SPOKANE COUNTY COUNSEL FOR DEFENSE
1116 W. BROADWAY, 4TH FLOOR ANNEX
SPOKANE, WASHINGTON 99260-0280
(509) 477-3443 FAX: (509) 477-3448