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THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. JONATHAN D. LYTLE WM 10/20/78 Defendant(s).	No. 07-1-00947-8 PA# 07-9-27095-0 RPT# 002-07-0066462 RCW 9A.32.055-F (#23771) SENTENCING MEMORANDUM

I. PROCEDURAL HISTORY

The defendant was charged by information with Homicide by Abuse, with the aggravating circumstances of Deliberate Cruelty, Particularly Vulnerable Victim and Abuse of Position of Trust alleged as well, on March 14, 2007. The defendant was convicted as charged by jury on November 14, 2008, including a finding that all three aggravating circumstances were proven beyond a reasonable doubt.

1. Exceptional Sentence Procedure.

In *State v. Clarke*, 156 Wn.2d 880, 895, 134 P.3d 188 (2006), the court commented on exceptional sentence procedure. It stated that "RCW 9.94A.537 lays out the procedure for exceptional sentences. The *Clarke* court further stated that "[a]n exceptional sentence upward may be reversed on appeal if (1) under a clearly erroneous standard, the trial court's reasons for

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imposing the sentence are not supported by the record, (2) those reasons do not justify the exceptional sentence as a matter of law, or (3) under an abuse of discretion standard, the exceptional sentence is clearly too excessive or clearly too lenient. *Clarke*, 124 Wn. App. at 905 (citing RCW 9.94A.585(4); *State v. Branch*, 129 Wn.2d 635, 645-46, 919 P.2d 1228 (1996))."

Our case law on this subject is well-established. In *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2003), the court stated "[w]e have held that the SRA establishes a two-part test to determine if a sentencing departure is justified as a matter of law. In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two-part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Ha'mim*, 132 Wn.2d at 840 (citing *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995))."

RCW 9.94A.537(3) allows a jury to determine whether aggravating circumstances exist. Proof is beyond a reasonable doubt and the verdict must be unanimous. Once this finding is made, a "court may sentence an offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds … that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). In this case, Homicide by Abuse is a Class A felony so the maximum sentence is life in prison.

II. DELIBERATE CRUELTY AGGRAVATOR

The first aggravating factor found by the jury was the defendants' conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a). An exceptional sentence may be supported by a finding that "[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the

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1 victim." RCW 9.94A.535(3)(a); RCW 9.94A.537; *State v. Valentine,* 108 Wn. App. 24, 30, 29
2 P.3d 42 (2001). "Deliberate cruelty" is defined as gratuitous violence beyond that typically
3 associated with the crime charged. *Valentine,* 108 Wn. App. at 30. "The infliction of multiple
4 injuries in the course of a second degree assault is a factor upon which a court may rely to
5 justify an exceptional sentence." *State v. Crane,* 116 Wn.2d 315, 334-35, 804 P.2d 10 (1991).
6 Deliberate cruelty is "'gratuitous violence, or other conduct which inflicts physical, psychological
7 or emotional pain as an end in itself.' "*State v. Talley,* 83 Wn. App. 750, 760, 923 P.2d 721
8 (1996) (quoting *State v. Strauss,* 54 Wn. App. 408, 418, 773 P.2d 898 (1989)), *aff'd,* 134 Wn.2d
9 176, 949 P.2d 358 (1998).
10 In *State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003), a homicide by abuse case
11 remarkably similar to this case, there was testimony showing the child victim was repeatedly
12 beat with the belt. There was evidence the child was beat with a cable cord on at least one
13 occasion because the belt was no longer effective. The day the child died, the child was forced
14 to run in circles around a couch because the defendant thought the child was becoming lazy.
15 There was evidence the child was hit and that both caretakers were responsible for abuse at
16 different times. The child was never taken to a doctor. The trial court's use of deliberate cruelty
17 as an aggravating factor to support the exceptional sentences was not erroneous.

18 III. PARTICULARLY VULNERABLE VICTIM

19 The second aggravating factor found by the jury was the defendant knew and should have
20 known that the victim of the current offense was particularly vulnerable or incapable of resistance,
21 as provided by RCW 9.94A.535(3)(b). Extreme youth is a valid aggravating factor when
22 considering the vulnerability of a victim. *State v. Russell*, 69 Wn. App 237, 251-252, 848 P.2d
23 742 (1993). The *Russell* court noted on page 252 that the homicide by abuse statute
24 incorporates children between the ages of 1 day and sixteen years.
25

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In *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987), a five and a half year old was found to be particularly vulnerable. In *State v. Mehlhaff*, 158 Wn.2d 363, 143 P.3d 824 (2006), a six year old was found to be particularly vulnerable. In *State v. J.S.*, 70 Wn. App 659, 855 P.2d 280 (1993), a four year old was found to be particularly vulnerable because of their extreme youth. In this case, Summer Phelps was four years old at the time of her death.

IV. POSITION OF TRUST

The third aggravating factor found by the jury was the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, as provided by 9.94A.535(3)(n).

A familial or same household relationship is clearly not an element of the homicide by abuse crime. *State v. Russell*, 69 Wn. App 237, 252, 848 P.2d 742 (1993). In *State v. Berube*, 150 Wn.2d 498, 513, 79 P.3d 1144 (2003), a parent and a parent figure, just like in this case, were found to have abused their position of trust by continually abusing the child. "It is the trust between the perpetrator and the victim which renders the victim particularly vulnerable." *State v. Grewe*, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991). *See also State v. Russell*, 69 Wn. App. 237, 252, 848 P.2d 743 (1993) (finding parent's violation of trust relationship with child an aggravating sentencing factor where parent was convicted of homicide of child by abuse); *State v. Creekmore*, 55 Wn. App. 852, 868-69, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990) (finding victim's extreme youth, abuse of trust, and lack of remorse aggravating factors for the crime of homicide by abuse). Jonathan Lytle was Summer Phelp's biological father and was entrusted with her care by her biological mother, Elizabeth Phelps, from August 25, 2006, until her death.

V. LENGTH OF SENTENCE

In determining whether an exceptional sentence is clearly excessive, the standard is whether the trial court abused its discretion by relying on an impermissible reason or

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unsupported facts, or whether the sentence is so long that, in light of the record, it shocks the conscience of the reviewing court. In other words, it must be determined that no reasonable person would adopt the position taken by the trial court. *State v. Ferguson,* 142 Wn.2d 631, 651, 15 P.3d 1271 (2001); *State v. Ross,* 71 Wn. App. 556, 571-72, 861 P.2d 473, 883 P.2d 329 (1993), *review denied,* 123 Wn.2d 1019, 875 P.2d 636 (1994). Reviewing courts have considerable latitude in making this assessment:

> Stated otherwise, the "clearly excessive prong" of appellate review under the sentencing reform act gives courts near plenary discretion to *affirm* the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence. This necessarily follows from the lack of a legislative definition of "clearly excessive" and from the abuse-of-discretion standard of review.

State v. Creekmore, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989), *review denied,* 114 Wn.2d 1020, 792 P.2d 533 (1990).

In *State v. Halsey*, 140 Wn. App. 313, 165 P.3d 409 (2007) the defendant, with a standard range of 120 to 160 months, was sentenced to an exceptional sentence of 720 months, based on several aggravating factors relating to the child victim. While this sentence was several times the standard range, it did not render it presumptively invalid and was found to be not "clearly excessive". Exceptional sentences that have doubled or more than doubled the standard range have been upheld on numerous occasions. *See, e.g., State v. Branch,* 129 Wn.2d 635, 650, 919 P.2d 1228 (1996) (affirming 48 month sentence for first degree theft, which was more than 16 times the standard range sentence of 90 days); *State v. Oxborrow,* 106 Wn.2d 525, 535-36, 723 P.2d 1123 (1986) (upholding a 10 year sentence for first degree theft, 15 times more than the standard range); *State v. Vaughn,* 83 Wn. App. 669, 680-81, 924 P.2d 27 (1996) (upholding sentence that was 2 1/2 times the standard range), *review denied,* 131 Wn.2d 1018, 936 P.2d 417 (1997); *State v. Smith,* 82 Wn. App. 153, 167, 916 P.2d 960 (1996) (upholding sentence that was 3 times the standard range); *State v. Bedker,* 74 Wn. App. 87, 92,

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1 871 P.2d 673 (holding that the sentence of 180 months for child rape, compared to standard
2 range sentence of 72 to 96 months, was not clearly excessive), *review denied,* 125 Wn.2d 1004,
3 886 P.2d 1133 (1994); *Creekmore,* 55 Wn. App. at 864, 783 P.2d 1068 (upholding 720 month
4 sentence for second degree murder despite a standard range of 144-192 months); *State v.*
5 *Harmon,* 50 Wn. App. 755, 761-62, 750 P.2d 664 (upholding a 648 month sentence for first
6 degree murder, which was 315 months longer than standard range sentence), *review denied,*
7 110 Wn.2d 1033 (1988).

8 In *State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003), the trial court found three
9 aggravating factors to justify the exceptional sentences: victim vulnerability, abuse of trust, and
10 deliberate cruelty. The trial court based the aggravating factor of victim vulnerability on the fact
11 the child was only 23 months old when he was killed, and that the abuse he endured had taken
12 place prior to that time. The fact that Berube was Kyle's parent and Nielsen was a parent-figure
13 gave them unmonitored access to Kyle. Both individuals abused their positions by repeatedly
14 assaulting the child until the injuries finally killed him. With regard to the third aggravating
15 factor, the trial court found that although the crime of homicide by abuse encompasses behavior
16 that generally could be described as deliberate cruelty, it remains possible for a defendant to
17 engage in gratuitous violence more egregious than that proscribed. RP at 2429 ("It is possible to
18 engage in conduct that satisfies the mental element of the crime, extreme indifference to human
19 life, by more passive less violent means...."). The trial court found that deliberate cruelty is a
20 proper aggravating factor case because the abuse inflicted on the child resulted in horrendous
21 injuries, far exceeding the prohibited conduct.

22 In *State v. Scott*, 72 Wn. App. 207, 866 P.2d 1258 (1993), a homicide case, an
23 exceptional sentence of 900 months was upheld for a seventeen year old defendant with no
24 prior record. "The rational basis for the length of the sentence can be implicit in the record.
25 Here, that rational basis is the numerous aggravating factors found by the court. As long as the

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1 sentencing court relies solely on valid aggravating factors, that is, does not rely on any
2 inappropriate factors, as the courts did in *Pryor* and *Elsberry*, and so long as the duration of the
3 sentence does not exceed the statutory maximum or otherwise shock the appellate court's
4 conscience in all the circumstances of the case being reviewed, it cannot be said that the
5 sentence, although harsh, is so clearly excessive that no reasonable person would have
6 imposed it. Certainly *Scott* received the SRA's determinate sentencing equivalence of a life
7 sentence for this crime. The aggravating factors are both numerous and individually and
8 collectively egregious, however. All of the factors fall within the Legislature's own non-exclusive
9 list of examples of valid aggravating factors. It cannot be said that the sentence is clearly
10 excessive in light of all the purposes of the SRA." *Scott* at 221-222.

11 VI. CONCLUSION

12 The State of Washington respectfully requests that the court find that all three
13 aggravating circumstances: deliberate cruelty, particularly vulnerable victim, and abuse of a
14 position of trust, have been proven. Clearly, the facts show that Summer Phelps was a four
15 year old girl, entrusted to the care of her father, Jonathan Lytle, and his wife, Adriana Lytle, by
16 Summer's mother. She ended up, over the course of roughly six months, being beaten with a
17 belt, kitchen utensils, and hands. She was bitten. She was shocked with a dog collar. She was
18 burned with cigarettes. She had her head dunked under water. She was made to wash clothes
19 in a tub of her urine soaked water for hours on end, so stiffed legged that bruises were left
20 where she had to bend over the tub. Her hair had been pulled out in clumps. She was made to
21 tear pizza boxes into tiny pieces.

22 The ER physician and charge nurse, both with extensive experience, consider it the
23 worst case of child abuse they ever saw. Dr. Hval thought when he first saw her that she was a
24 cancer patient based upon her condition. She had bruises over her entire body, so many that
25 Dr. Aiken, the medical examiner listed blood loss from having so many bruises as a contributing

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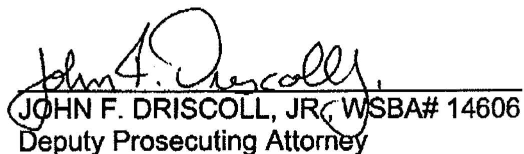
cause of her death. The other cause was bronchial pneumonia, most likely from collapsing in the tub from shear exhaustion after being made to scrub clothes for hours on end,

If ever a case cries out for the most severe punishment, it is this one. As it is often said the punishment must fit the crime. Summer Phelps endured the most severe punishment imaginable over a six month period. A country would endure world wide condemnation if they treated a prisoner in the same fashion Summer Phelps was treated. Jonathan Lytle deserves the most severe punishment as well.

Based on the aggravating factors in this case, the State of Washington respectfully requests that the court impose an exceptional sentence of 900 months. The State also asks the court to find that it would have imposed the same sentence based upon any single one of the aggravating circumstances.

Respectfully submitted this 4 day of December 2008.



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