

27742-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN D. LYTTLE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
3030 S. Grand Blvd. #132
Spokane, WA 99203
(509) 838-8585

27742-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN D. LYTTLE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
3030 S. Grand Blvd. #132
Spokane, WA 99203
(509) 838-8585

INDEX

A.	ASSIGNMENTS OF ERROR.....	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE	3
	1. The Attorneys’ Experience	8
	2. The Expert’s Testimony	12
	3. The Court’s Ruling on Competency	16
	4. The Trial Evidence	17
D.	ARGUMENT.....	19
	1. MR. LYTLER WAS NOT COMPETENT TO STAND TRIAL	19
	a. Mental illness is not a prerequisite to a finding of incompetence	20
	b. Defense counsel are best qualified to assess whether the defendant is able to rationally assist counsel and understand the legal proceedings	23
	c. The testimony of mental health experts was inadequate to support the conclusion Mr. Lytle was competent	25
	(i) Expert Testimony Respecting Whether Mr. Lytle Was Mentally Ill Was Neither Relevant Nor Within The Witnesses’ Expertise	25

	(ii)	Expert Testimony Did Not Adequately Address Mr. Lytle’s Ability To Rationally Understand And Assist In The Legal Proceedings	27
	(iii)	Expert Testimony Respecting Whether Mr. Lytle’s Behavior Was The Product Of Choice Is Not Supported By Any Evidence In The Record	28
	d.	Finding Mr. Lytle Competent to Stand Trial Was an Abuse of Discretion	29
2.		DENIAL OF THE MOTION TO CLOSE THE COMPETENCY HEARING WAS AN ABUSE OF DISCRETION	31
3.		ADMISSION OF PREJUDICIAL EXHIBITS WAS ERROR	33
E.		CONCLUSION.....	36

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERATED PUBLICATIONS, INC. V. KURTZ, 94 Wn.2d 51, 615 P.2d 440 (1980)	31, 32
FEDERATED PUBLICATIONS, INC. V. SWEDBERG, 96 Wn.2d 13, 633 P.2d 74 (1981).....	32
IN RE PERS. RESTRAINT OF FLEMING, 142 Wn.2d 853, 16 P.3d 610 (2001)	19
JENKINS V. SNOHOMISH COUNTY PUB. UTIL. DIST. NO. 1., 105 Wn.2d 99, 713 P.2d 79 (1986).....	35
STATE V. ATSBEHA, 142 Wn.2d 904, 16 P.3d 626 (2001)	20
STATE V. BONE-CLUB, 128 Wn.2d 254, 906 P.2d 325 (1995)	32
STATE V. BROWN, 132 Wn.2d 529, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).....	29
STATE V. CRENSHAW, 27 Wn. App. 326, 617 P.2d 1041 (1980)	24
STATE V. ELLIS, 136 Wn.2d 498, 963 P.2d 843 (1998)	20
STATE V. FINCH, 137 Wn.2d 792, 975 P.2d 967, <i>cert. denied</i> , 528 U.S. 922 (1999).....	35
STATE V. HAHN, 106 Wn.2d 885, 726 P.2d 25 (1986)	22
STATE V. HARRIS, 122 Wn. App. 498, 94 P.3d 379 (2004)	20, 23

STATE V. ISRAEL, 19 Wn. App. 773, 577 P.2d 631 (1978) <i>affirmed</i> 98 Wn. 2d 789, 659 P. 2d 488 (1983).....	24
STATE V. MARSHALL, 144 Wn.2d 266, 27 P.3d 192 (2001)	20
STATE V. NEWMAN, 63 Wn. App. 841 822 P.2d 308, <i>review denied</i> , 119 Wn.2d 1002 (1992).....	35
STATE V. REECE, 79 Wn.2d 453, 486 P.2d 1088 (1971)	21
STATE V. STOCKMYER, 83 Wn. App. 77, 920 P.2d 1201 (1996)	35
STATE V. SWAIN, 93 Wn. App. 1, 968 P.2d 412 (1998)	29

SUPREME COURT CASES

ADDINGTON V. U.S., 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).....	22
DROPE V. MISSOURI, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).....	24
DUSKY V. U.S., 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).....	21, 25, 27
GANNETT CO. V. DePASQUALE, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).....	31
KANSAS V. HENDRICKS, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	22
MEDINA V. CALIFORNIA, 505 U.S. 437, 112 S. Ct. 2572, 2580 (1992).....	22, 24

FEDERAL CASES

U.S. V. DAVID, 511 F.2d 355,
167 U.S.App.D.C. 117 (C.A.D.C. 1975).....23

UNITED STATES EX REL. ROTH V. ZELKER,
455 F.2d 1105 (CA2), *cert. denied*, 408 U.S. 927,
92 S. Ct. 2512, 33 L. Ed. 2d 340 (1972).....24

CONSTITUTIONAL PROVISIONS

ARTICLE I § 1031

ARTICLE I, § 2231

FOURTEENTH AMENDMENT19

STATUTES

RCW 5.60.06023

RCW 10.77.010(15).....21

RCW 10.77.05020

COURT RULES

RPC 1.6.....23

OTHER AUTHORITIES

AM. PSYCHIATRIC ASSN, Diagnostic And Statistical Manual Of
Mental Disorders (4th ed. 1994).....26

CALDWELL, et. al., The Art and Architecture of Closing Argument,
76 Tul. L. Rev. 961 (2002)34, 36

CHATTERJEE, Admitting Computer Animations: More Caution
and a New Approach Are Needed, 62 Def. Couns. J. 34 (1995)...35

RETHINKING LEGALLY RELEVANT MENTAL DISORDER,
29 Ohio N.U. L. Rev. 497 (2003).....26

THE ATTORNEY CLIENT PRIVILEGE, ETHICAL RULES,
AND THE IMPAIRED CRIMINAL DEFENDANT,
52 U. Miami L. Rev. 529 (1998)23

A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in finding Mr. Lytle competent to stand trial based on the irrelevant testimony of mental health experts and total disregard of the evidence of defense counsel.
2. The court abused its discretion in denying a defense motion to close the hearing for determining Mr. Lytle's competency to stand trial.
3. The court abused its discretion in admitting prejudicial demonstrative evidence that did not accurately represent the physical attributes of the individuals portrayed by the evidence.

B. ISSUES

1. Under the due process clause, the test for determining whether a person is competent to stand trial is whether the person has sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding, and whether he has a *rational* as well as factual understanding of the proceedings against him. In determining whether a defendant is competent to stand

trial, is evidence that the defendant suffers from a mental disease necessary?

2. Absent evidence as to an expert's understanding of the term "mental illness" in the context of the DSM, is the expert's opinion as to whether a defendant's personality disorder, as defined in the DSM, constitutes mental illness reasonably reliable?
3. Do the opinions of mental health experts that address the defendant's factual understanding, but fail to address his rational understanding, of legal proceedings or the concept of rationally assisting counsel provide sufficient basis for finding the defendant competent to stand trial?
4. Defense counsel presented substantial factual evidence that the defendant was insisting on the pursuit of defense theories for which there was no factual or rational basis and that the defendant refused to participate in any discussions designed to explore the factual basis for any rational defense. A mental health expert opined that the defendant's conduct was the product of rational choice. Did the court abuse its discretion in finding the defendant was competent to stand trial?

5. Pleadings filed before the competency hearing showed that the testimony would consist of highly prejudicial character evidence, none of which would be admissible at trial. Although the record contains voluminous evidence of media coverage of the child's death, there is no coverage relating to the defendant's mental health or personality disorders. Did the court abuse its discretion in denying a defense motion to close the hearing speculating that nothing would come out in the hearing that had not already been made public in the extensive media reporting?
6. Does the court abuse its discretion in admitting into evidence white Styrofoam cutouts purporting to demonstrate the height and weight of the defendant and his wife absent any showing that the cutouts accurately represent the width, girth, or weight of the individuals?

C. STATEMENT OF THE CASE

Carrying the lifeless body of his daughter, Summer Phelps, Jonathan Lytle walked into Deaconess Hospital Emergency check-in and asked if he could go straight back to the ER. (RP 441, 453) It was after 11:00 o'clock on the night of March 10, 2007. (RP 445)

Mr. Lytle initially appeared to be in shock. (RP 462) He told the charge nurse that his child had fallen asleep in the bathtub. (RP 477) As he said this, the nurse observed his lack of emotion, his monotone voice and “very flat aspect.” (RP 477, 483)

Finding that the child was not breathing and had no pulse, the ER staff began attempting to resuscitate her. (RP 456-57) The attending physician eventually determined that the child was dead, and had likely died before arriving at the hospital. (RP 458-59) During the time the ER staff was attempting to resuscitate his child Mr. Lytle was unemotional, and when he was told that she was dead he simply threw up an arm and turned away. (RP 462)

Corporal Rob Dashiell was at the hospital dealing with a DUI suspect when hospital staff told him that the child in the room next door had bruises on her. (RP 500-502) After the doctor had told Mr. Lytle that his daughter was dead, Mr. Lytle went to the family waiting room. (RP 462, 502) Corporal Dashiell went to the room and asked Mr. Lytle what had happened. (RP 503) Mr. Lytle said that his wife had found the child in the bathtub, asked him for help, and upon finding the child under water he pulled her out and attempted to revive her. (RP 503) When that failed he brought her to the hospital. (RP 503)

Mr. Lytle went on to describe his daughter's recent hair loss, and noted that his wife's explanation, that it was ringworm, was not credible. (RP 504) He described what he believed was the child's self-destructive behavior. (RP 504, 513) He explained that his wife was not his daughter's mother, and that her real mother had abandoned her. (RP 506, 512)

Throughout this conversation, Mr. Lytle remained calm, until the doctor came to the family room and told Mr. Lytle his daughter was dead. (RP 507) Mr. Lytle responded for a few minutes by doing something that looked like crying, but did not produce any tears. (RP 508) He then returned to sitting calmly and answering more questions. (RP 508)

During their conversation he twice asked Corporal Dashiell whether the child was really dead. (RP 505) The officer assured him that she was dead, and each time Mr. Lytle appeared to be unsuccessfully trying to cry. (RP 516) Mr. Lytle also approached Sergeant Charles Reynolds, who was standing outside the door, asked if his daughter was really dead, and commented that there were machines they could hook up to her, so there was always hope. (RP 526)

As he was walking to the patrol car to be transported to the public safety building, Mr. Lytle began to cry softly, then stopped after a minute. (RP 527)

Detective Brian Hammond recorded an interview with Mr. Lytle shortly after he arrived at the public safety building. (Exh. 199) Mr. Lytle told the detective that when he first noticed the bruises on his daughter, both she and her stepmother had attributed them to her falling down or running into things. (Exh. 199 at 9-10) He said Mrs. Lytle did the majority of discipline, which included spanking the child with a belt and forcing her to do chores. (Exh. 199 at 10) He admitted that he, too, had spanked the child with a belt. (Exh. 199 at 10) He said his wife had disciplined her by using an electric dog collar; he admitted having bought the collar for their dog and that he had used it on his daughter once. (Exh. 199 at 10-12) He said his wife had used the collar because he had told her to stop hitting his daughter. (Exh. 199 at 13) He explained that Mrs. Lytle had struck the child on her head, back and buttock, mainly with an open hand but also once with a spoon. (Exh. 199 at 13)

Mr. Lytle described his daughter's bruises as "the kind you don't repair" and said they were caused by his wife's spanking her over a period of two or three months. (Exh. 199 at 14) On the day of his daughter's death, Mrs. Lytle had ordered her to pick up garbage from the floor, and had then beaten her with a belt for doing it too slowly. (Exh 199 at 18-19).

Mr. Lytle then took his daughter for a ride in his car because the nurse was coming. (Exh 199 at 19-20) He explained that a nurse visited

the family regularly because an agency from which the family had sought assistance at an earlier time had reported to CPS that Mrs. Lytle had admitted to some mental health issues. (Exh. 199 at 17) As a result, when his son was born CPS had become involved and he had agreed to these visits. (Exh. 199 at 17) He took the child away so the nurse would not see her injuries. (Exh 199 at 20)

Mr. Lytle told the detective that the night before the nurse's visit his daughter had wet her bedding and after the nurse had left, his wife had required her to spend much of the day washing her bedding by dipping it repeatedly in a bathtub filled with soapy water. (Exh. 199 at 15-17, 23) Mr. Lytle spent the rest of the day manipulating drawings with a computer. (Exh 199 at 24) About ten o'clock that night Mrs. Lytle told Mr. Lytle to come and save his daughter's life. (Exh 199 at 30) Believing that he was being toyed with, he went outside for a cigarette. (Exh 199 at 31) When he returned, he saw Mrs. Lytle attempting CPR and he then tried to revive his daughter. (Exh 199 at 32) When he could no longer find a heartbeat, he took his daughter to the hospital. (Exh 199 at 33-34)

Near the end of the interview Mr. Lytle admitted having struck his daughter with a mop handle and a belt. (Exh 199 at 41, 43)

Four days later, the State charged Mr. Lytle with one count of homicide by abuse. (CP 1) The court appointed Dennis Dressler and Edward Carroll to represent Mr. Lytle. (CP 3)

1. The Attorneys' Experience.

From the outset, defense counsel had difficulty communicating with Mr. Lytle because of the rigidity of his approach to perceiving and processing information. (CP 1331)

In the ensuing months, Mr. Lytle produced hundreds of pages of written materials setting forth his understanding of the events leading up to and surrounding his daughter's death, his analysis of police reports, his legal theories, and his theories of the case. (CP 1331, 1344)

Mr. Lytle's explanation for the bruising on his daughter's body was that it was caused by emergency room staff and police officers in the emergency room after her death. (CP 1334, 1347) He believed the bruising mechanism in human beings was the same as the bruising of picked fruit. (RP 1334) Even after the defense team provided him with written materials showing that bruising could not occur after death, Mr. Lytle continued to assert that the bruising was not present when he brought his daughter to the emergency room. (CP 1334, 1347)

Mr. Lytle insisted that his daughter was killed by being injected with iodine while she was in the emergency room. (CP 1346) The basis for this theory appeared to be a notation in one of the doctors' reports using the abbreviation "IO", which his attorneys understand to refer to an intraosseous injection. (CP 1346) Relying on his dictionary, Mr. Lytle insisted that IO was an abbreviation for iodine. (CP 1346)

Mr. Lytle also told his attorneys, however, that Mrs. Lytle had indeed killed his daughter in order to ensure that his attention would be devoted to her and their baby. (CP 1347)

The defense team included a legal intern, Cheyenne Kiernan, who reviewed the written materials Mr. Lytle had provided and met with on several occasions. (CP 1340) Mr. Lytle told her he believed that various aspects of his daughter's death were analogous to the crucifixion of Christ, and that this "explained everything." (CP 1340) He frequently relied on this analogy as his only response to questions posed by his attorneys. (CP 1340)

Eventually Mr. Lytle abandoned his crucifixion theory in favor of a theory that relied on his complicated manipulation of numbers to arrive at such things as the birth dates of his wife and daughter, which he considered relevant proof. (CP 1340) Even when shown that his results were actually the product of arithmetic errors, Mr. Lytle persisted in

maintaining this theory of his case. (CP 1340-41) As Mr. Carroll explained to the court:

“It appears that he has taken various dates of events (mostly related to the case, but not always), and set forth formulas, such as ‘10=10=20-2=18-12=1 ½.’ Usually these formulas are contained in three short paragraphs, which provide the basis for the numbers. For example, ‘PG. 000313 C.P.S. Received DAT JUN09 PG.8 Adriana Lytle admitted that over a period of time in the late morning of Friday 3/9/07 Summer was beaten with a belt. 9+9=18-12= 1 ½ yR. 9 DAYS.’”

(CP 1345)

Mr. Lytle informed his attorneys that that he believed that jail personnel and detectives were able to listen in on conversations between him and his attorneys conducted in the attorney booth. (CP 1332) He also believed his telephone calls were similarly monitored. (CP 1332-33) As a result, Mr. Lytle refused to discuss the case with his attorneys. (CP 1332) At one time he told Mr. Carroll that the detectives and the media were able to hear everything he was thinking and saying, and that he was being watched through a video camera in the hallway next to his cell. (CP 1348)

At Mr. Lytle’s request, his attorneys provided him with a dictionary. (RP 1333) Thereafter he relied on the dictionary definitions of various words to support his views of reality and the law and to refute information the defense team attempted to provide. (RP 1333) He often responded to his attorneys’ questions by demanding the definition of a

word relating to the question rather than responding to the question.
(RP 1335)

Provided with redacted copies of police reports, he looked up words from the reports in his dictionary and relied on the definitions he found as proof of his innocence. (CP 1341) He provided his attorneys with written documents explaining these proofs, complete with citations to the pages of the dictionary. (CP 1341)

He created his own “reports” based on language from the police reports, which he had meticulously copied and rearranged. (CP 1344) After several months he informed his attorneys that his defense was complete and he would not be providing any more reports. (CP 1344) According to Mr. Carroll, the “reports” did not include any analysis, had no ascertainable meaning, and provided nothing that could be used in Mr. Lytle’s defense. (CP 1244-45)

When his attorneys asked Mr. Lytle to view or respond to various items of evidence, such as the recorded statements of himself and potential witnesses, he refused to watch or responded angrily and inappropriately, refusing to provide counsel with any useful information. (CP 1336-37)

Mr. Dressler concluded Mr. Lytle lacked the necessary skills to communicate with his lawyers. (CP 1337) Mr. Carroll determined that Mr. Lytle was unable to provide any assistance in formulating a defense or

to advise counsel of his views as to any proposed defense. (CP 1349)
And Mr. Dressler believed that as a result of Mr. Lytle's abrasive and inappropriate response to questioning, it would be impossible for him to testify in his own behalf. (CP 1335-36)

Believing that Mr. Lytle's mental status was deteriorating, the attorneys sought the opinion of psychologist Mark Mays on the issue of whether Mr. Lytle was competent to stand trial. (RP 73) Dr. Mays met with Mr. Lytle in January 2008. (RP 74) He found that although Mr. Lytle was oriented as to time and place, and aware that he was charged with a crime, he was distracted and confused, suspicious, and unable to take in or process information. (RP 74-75) Mr. Lytle had extremely bizarre thoughts and distorted thinking. (RP 74) His responses were irrational. (RP 76)

In March 2008, the court granted defense counsel's request to have Mr. Lytle examined for competency to stand trial. (CP 1319)

2. The Expert's Testimony.

Randall Strandquist, a psychologist at Eastern State Hospital (ESH) testified at the competency hearing. (RP 13) Dr. Strandquist received his doctorate in clinical psychology from Biola University. (RP 14, 52) He saw Mr. Lytle during a 15-day evaluation at ESH.

(RP 16) Dr. Strandquist explained that a forensic interview is “the point where we talk about competency issues and state of mind at the time of the alleged incident” (RP 19)

He emphasized the distinction between ability and desire, and told the court that in his opinion Mr. Lytle was choosing to be difficult and to refuse to participate. (RP 17, 32) He tentatively diagnosed Mr. Lytle with an unspecified personality disorder “with traits of antisocial and narcissism,” but said that he did not believe he had all the data. (RP 21-23)

Dr. Strandquist explained antisocial personality disorder as being manipulative and cunning with a pattern of violating the law and rights of others without remorse. (RP 22-23) He explained narcissism as being haughty and demanding, with a pervasive sense of superiority and infallibility. (RP 23) He said he did not observe anything that showed these disorders affected Mr. Lytle’s ability to function in any way. (RP 23) He opined that a personality disorder is not a mental disease or defect because it is not subject to physiological intervention. (RP 24)

Dr. Imelda Borromeo, a psychiatrist who also saw Mr. Lytle at ESH, concurred with Dr. Strandquist’s view that Mr. Lytle did not suffer from a mental condition other than a personality disorder. (RP 111) She agreed that the disorder affected his ability to assist his counsel because

“he won’t be able to see what is right for himself, although he thinks that what, in his idea and in his mind, that he’s come up with are correct, but that’s his own idea of himself.” (RP 113)

Both Dr. Strandquist and Dr. Borromeo were struck by the fact that, at least some of the time, Mr. Lytle gave rational answers and could remember incidents that had happened earlier, was aware of the charge against him and understood the basic functions of the court and attorneys. (RP 28-32, 114-116) Dr. Borromeo found significance in the fact that Mr. Lytle’s theory that his daughter was killed by an iodine injection was plausible, and she noted that the child’s death was analogous to the crucifixion of Christ because both involved the death of innocent persons. (RP 117)

Having met with Mr. Lytle a second time, a few months after the evaluation at ESH, Dr. Mays testified that in his opinion Mr. Lytle “continued to be impaired and unable to assist” counsel. (RP 77) As an example of Mr. Lytle’s bizarre behavior, Dr. Mays described asking him a question that could not be answered “yes” or “no” and Mr. Lytle nevertheless answered “no” and then “started to cackle.” (RP 78)

Dr. Mays found Mr. Lytle’s belief that the police or physicians had caused his child’s death represented a misunderstanding of the facts. (RP 78-79) When Dr. Mays confronted him about this, Mr. Lytle

responded “Do you know what time it was?” and Dr. Mays said “Well, approximately.” Mr. Lytle’s response was “Well, you don’t know precisely, so there.” (RP 79) Mr. Lytle went on to provide irrelevant information without ever addressing the factual issue. (RP 79)

Dr. Mays disagreed with Dr. Strandquist’s finding that Mr. Lytle had the capacity to change his uncooperative behavior. (RP 83) In his view, Mr. Lytle had had a long-standing personality disorder, but following the death of his daughter he had developed an adjustment disorder of psychotic proportions that rendered him incapable of processing and communicating information and controlling his behavior. (RP 84, 87-88) He noted that Mr. Lytle’s response to questions was often not “reality based.” (RP 85)

As an example, Dr. Mays told the court that when he went to visit Mr. Lytle, who had met him before and knew he was coming, Mr. Lytle demanded evidence that he was a doctor. (RP 85-86) “I showed him correspondence and he said, ‘Anyone can write that.’ I mean, this is not a person who can cooperate. This is a person whose suspiciousness, wariness and exaggerated faith in his own skills and abilities causes him to distort his situation and his context.” (RP 86)

3. The Court's Ruling on Competency.

Judge Price reviewed the evidence and found that Mr. Lytle was unwilling to participate in the Rorschach test but was able to complete the MMPI which isn't always the norm. (RP 153) He noted that Dr. Mays had found Mr. Lytle was evasive, challenging, difficult, abusive, aggressive, disagreeable, unpleasant and sometimes bizarre, defensive and somewhat paranoid. (RP 154-55) He acknowledged that in Dr. Mays's opinion Mr. Lytle is mentally ill and unable to assist his counsel. (RP 154)

The judge noted the opinions of Drs. Strandquist and Borromeo that Mr. Lytle does not have a mental disease or defect, but is immature, angry, embittered, manipulative and controlling. (RP 155) He found Mr. Lytle is not developmentally disabled, has an above average vocabulary and is able to communicate in a bizarre, albeit sophisticated manner. (RP 155)

Judge Price recognized that Mr. Lytle was able to hold a full-time job and maintain a driver's license, and that according to Dr. Strandquist "he has the capacity to understand court proceedings; that he understands who all the players are; that he has the ability to assist his counsel in preparing for trial; and that he clearly understands the nature of the charges that are before him." (RP 155-56)

Ultimately, the judge's primary factual determination was that Mr. Lytle merely had a disagreeable personality:

From the Court's perspective, what this boils down to is the fact that an individual is aggressive, that he's disagreeable, that he's uncooperative, that he's perhaps narcissistic, as Dr. Borromeo indicated, is not a basis to find Mr. Lytle incompetent.

(RP 156)

The judge concluded that Mr. Lytle is an aggressive, disagreeable and uncooperative individual who is competent to stand trial. (RP 156)

4. The Trial Evidence.

The State presented overwhelming evidence of the injuries Mr. Lytle's daughter sustained in the weeks before her death. (RP 455-60, 478, 524, 560-75, 985-89, 1069-1122) The medical examiner testified that the cause of her death was "broncopneumonia due to near drowning in bathtub and cumulative blood loss resulting from multiple nonaccidental blunt force injuries" (RP 1122)

Sandra Gorman-Brown, a social worker, told the jury that when she first met with the Lytles she learned that they had had some involvement with Child Protective Services and that Mrs. Lytle had untreated mental health issues. (RP 610, 614) She noted that the Lytles had no friends or family in Spokane and were socially isolated.

(RP 612, 616) She learned that Mrs. Lytle had sought services from the Women, Infants, and Children program, during which the providers became concerned about Mrs. Lytle's mental health problems and made a referral to Child Protective Services. (RP 615) As a result of that experience, the Lytles were unwilling to accept further services. (RP 615) Ms. Gorman-Brown noted that Mrs. Lytle had some rigid tendencies and spoke to the child more harshly than necessary. (RP 612)

Visiting nurse Sharon Miller also noted that Mrs. Lytle sometimes spoke too harshly to her stepdaughter. (RP 657-58) She made a note that Mrs. Lytle would benefit from some education on how to correct a child. (RP 658, 661) At her last visit, in September 2006, she saw the girl and did not notice any unusual bruising. (RP 659, 663)

Nurse Susan Harms visited the Lytle family in December 2006 and January 2007 and did not see any injuries, though she is trained to look for them. (RP 674, 677-78, 83). Summer appeared needy. (RP 676) At the next visit, at the end of February, Ms. Harms did not see Summer; Mrs. Lytle said she was asleep in the bathroom. (RP 679) Nor did she see Summer when she visited on the morning of March 10. (RP 680-81) She noted, however, that Mrs. Lytle appeared "guarded." (RP 682)

Neighbor Glenda Davis heard both an infant and a child crying in the Lytles' apartment, during the daytime, on a daily basis. (RP 712) The

crying was almost constant. (RP 712) She would not typically hear it after Mr. Lytle got home in the evening. (RP 712)

Neighbor Karen Quinley visited Mrs. Lytle and whenever she did, the child was always in the bathroom with the door closed. (RP 724)

Next door neighbor John Rogers heard Mrs. Lytle yelling, but not Mr. Lytle. (RP 747)

Mr. Lytle did not testify at his trial and the defense did not present any witnesses. The jury returned a guilty verdict on the charge of homicide by abuse and found three aggravating factors: deliberate cruelty, abuse of trust and victim vulnerability. (CP 1517-18) The court imposed an exceptional sentence of 75 years, 580 months more than the high end of the standard range. (CP 1577, 1581)

D. ARGUMENT

1. MR. LYTLE WAS NOT COMPETENT TO STAND TRIAL.

The Fourteenth Amendment's due process clause prohibits the conviction of a person who is not competent to stand trial. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 861, 16 P.3d 610 (2001). Whether a person is competent is a mixed question of law and fact. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

- a. Mental illness is not a prerequisite to a finding of incompetence.

Courts sometimes fail to recognize the important distinction between incompetence and mental illness as an affirmative defense, whether asserted as an insanity defense or as a claim of diminished capacity. *See State v. Harris*, 122 Wn. App. 498, 504, 94 P.3d 379 (2004). This is an important distinction: “Mental incompetence at the time of trial is a bar to trial. RCW 10.77.050. Insanity at the time of the alleged offense is an affirmative defense. RCW 10.77.030(2).” *Id.* at 504.

Establishing mental illness as an affirmative defense usually requires expert medical testimony. To prove a diminished capacity defense, “a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant’s ability to form the specific intent to commit the crime charged.” *State v. Atsbeha*, 142 Wn.2d 904, 925, 16 P.3d 626 (2001) (*quoting State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998)). The test for the insanity defense is well-settled:

Is the mind of the accused so diseased or affected at the time of the commission of the act charged that he is unable to perceive the moral qualities of the act with which he is charged and is unable to tell right from wrong with reference to the particular acts charged.

State v. Reece, 79 Wn.2d 453, 454, 486 P.2d 1088 (1971) Both tests require the trier of fact to determine whether the accused has a mental disorder or disease.

The statutory definition of competency to stand trial in Washington likewise implicates mental disease: “‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15). But this requirement is not consistent with the constitutional standard required by due process.

The constitutional standard for competency to stand trial, as formulated by the Supreme Court in *Dusky v. United States*, is the defendant’s ability to function *rationally*; the test is whether a defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding – and whether he has a *rational* as well as factual understanding of the proceedings against him.” *Dusky v. U.S.*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (emphasis added).

While medical experts may provide assistance in understanding mental conditions that affect a defendant’s competency, the *Dusky* standard does not require any medical diagnosis. “Legal definitions . . . which must ‘take into account such issues as individual responsibility . . . and competency,’ need not mirror those advanced by the medical

profession.” *Kansas v. Hendricks*, 521 U.S. 346, 359, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Accordingly, the test applied in the courts makes no reference to mental disease or defect. *See State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986).

Nevertheless, the trial courts continue to rely heavily on the opinions of mental health experts in making competency determinations. This may be because the opinions of such experts are seen to be clothed in an objective reality based on scientific standards that offer an illusion of certainty in an area that appears elusive to the lay attorney or judge. But the sense of certainty is indeed illusory:

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations, because [p]sychiatric diagnosis . . . is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician.

Medina v. California, 505 U.S. 437, 451, 112 S. Ct. 2572, 2580 (1992) quoting *Addington v. Texas*, 441 U.S. 418, 430, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The courts’ reliance on mental health experts to assist in determining whether a defendant is competent to stand trial may also be the result of ethical and legal constraints on defense counsel’s ability to provide the court with evidence of the client’s incapacity. *See* RPC 1.6;

RCW 5.60.060. An attorney seeking to disclose sufficient information to enable the court to recognize the extent of the client's incompetence walks a minefield of uncertain constraints. *See* The Attorney Client Privilege, Ethical Rules, and the Impaired Criminal Defendant, 52 U. Miami L. Rev. 529, 563 -572 (1998).

- b. Defense counsel are best qualified to assess whether the defendant is able to rationally assist counsel and understand the legal proceedings.

This court has recognized that “defense counsel’s opinion as to the defendant’s competence is a factor that carries considerable weight with the court.” *State v. Harris*, 122 Wn. App. at 505. Indeed, “counsel’s first-hand evaluation of a defendant’s ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency. This is particularly so when – as in the instant case – trial counsel has independently expressed ‘misgivings’ about the defendant’s competency.” *U.S. v. David*, 511 F.2d 355, 359-360, 167 U.S.App.D.C. 117, 121-122 (C.A.D.C. 1975).

The Supreme Court has gone further:

Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant’s inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense

counsel will often have the best-informed view of the defendant's ability to participate in his defense.

Medina v. California, 505 U.S. 450.

Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see *United States ex rel. Rizzi v. Follette*, 367 F.2d 559, 561 (CA2 1966), an expressed doubt in that regard by one with 'the closest contact with the defendant,' *Pate v. Robinson*, 383 U.S. 375, 391, 86 S. Ct. at 845 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered.

Drope v. Missouri, 420 U.S. 162, 178 n.13, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); see *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (CA2), *cert. denied*, 408 U.S. 927, 92 S. Ct. 2512, 33 L. Ed. 2d 340 (1972).

While defense counsel's opinion is not dispositive, "A lawyer's opinion as to his client's competency and ability to assist in his own defense is a factor which should be considered and to which the court must give considerable weight." *State v. Crenshaw*, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980) (citing *State v. Israel*, 19 Wn. App. 773, 577 P.2d 631 (1978) *affirmed* at 98 Wn. 2d 789, 659 P. 2d 488 (1983)). In *Crenshaw*, defense counsel told the court he had not spent sufficient time with the defendant to form any opinion as to his competency. *Id.* Here, the record demonstrates that counsel had spent a substantial amount of

time with Mr. Lytle and had arrived at strongly held, factually based views as to his incompetence.

- c. The testimony of mental health experts was inadequate to support the conclusion Mr. Lytle was competent.
 - (i) Expert Testimony Respecting Whether Mr. Lytle Was Mentally Ill Was Neither Relevant Nor Within The Witnesses' Expertise.

The due process standard announced in *Dusky* does not implicate forensic psychiatry or psychology. The touchstone is whether the defendant can consult with his lawyer with a rational understanding, and whether he has a rational as well as a factual understanding of the proceedings. When the issue to be decided does not involve medical diagnoses or impressions, the testimony of the experts assumes marginal significance at best.

In forming their opinions as to Mr. Lytle's competence to stand trial, the mental health experts relied on the Diagnostic And Statistical Manual Of Mental Disorders (DSM) for their terminology and classification of disorders. (RP 22, 24, 46, 127) The DSM defines mental disorder to mean "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in

one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” AM. PSYCHIATRIC ASS’N, Diagnostic And Statistical Manual Of Mental Disorders at xxi (4th ed. 1994).

The DSM recognizes numerous categories of mental disorders, including psychosis; dementia; mental retardation; dissociative disorders; and mood, anxiety, personality, sexual, eating, sleeping, and substance abuse disorders. Rethinking Legally Relevant Mental Disorder, 29 Ohio N.U. L. Rev. 497, 500-01 (2003). Opinion within the mental health community varies as to which of these categories should be classified as “mental illness.” Some, but not all, experts equate mental illness with irrational thought content. *Id.* at 501. “Advocates of this approach contend that irrationality is most likely to be a feature of the first few symptom complexes listed, although it could occasionally occur in connection with some of the other symptom patterns as well.” *Id.* at 501-02. Other classifications emphasize the relationship between the mental disorders and either their biological causes or their biological effects. *Id.* at 501-02.

Dr. Strandquist’s testimony implies that legal incompetence to stand trial requires the presence of a mental illness as opposed to a mental disorder. It is unclear, however, how he determined which disorders are

classified as mental illnesses and thus decided that Mr. Lytle's disorders did not constitute mental illness. Since due process requires no finding of mental illness order, and there is no legal standard for distinguishing between those categories, Dr. Strandquist's opinions or conclusion are derived from a misunderstanding as to the relevant standards to be applied.

(ii) Expert Testimony Did Not Adequately Address Mr. Lytle's Ability To Rationally Understand And Assist In The Legal Proceedings.

It is not enough for the judge to find that "the defendant (is) oriented to time and place and (has) some recollection of events." *Dusky v. United States, supra*. The test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Id.*

Dr. Strandquist presented substantial testimony as to Mr. Lytle's factual understanding of the proceedings, which is but one factor in the *Dusky* test.

Dr. Borromeo testified that Mr. Lytle was capable of rational thought, noting that his beliefs regarding the fatal effects of iodine overdose and an analogy between the crucifixion of Christ and the death of Mr. Lytle's daughter were rational. As exercises of knowledge and

abstract reasoning, they may indeed have been rational, but as evidence of a rational understanding of legal proceedings, they are laughable . . . or pathetic.

A psychiatrist may see a rational analogy between the crucifixion of Christ and the death of a small child in that both involved the death of innocents. But this does not make the analogy a rational explanation of the child's death for purposes for preparing a defense to a homicide charge. A psychiatrist may see that injection with iodine provides a rational explanation for the death of a child in the abstract, but this is not information that a rational person would provide to counsel in preparing a defense to a homicide, the recognized mechanism of which was drowning.

Despite his capacity for some rational thought, Dr. Borromeo agreed with Dr. Mays that Mr. Lytle's disorders affected his ability to assist counsel.

(iii) Expert Testimony Respecting Whether Mr. Lytle's Behavior Was The Product Of Choice Is Not Supported By Any Evidence In The Record.

The gist of Dr. Strandquist's testimony appears to be that Mr. Lytle's competency to stand trial hinged on whether his irrational behavior was volitional; he concluded that Mr. Lytle's inability to rationally assist his attorneys was a choice and therefore not indicative of the mental

illness necessary to render a defendant incompetent to stand trial. His testimony provides no factual basis, however, for this conclusion.

It is possible that a rational person in peril whose behavior appears designed to alienate anyone who might be able to assist him, who persists in providing demonstrably inaccurate and irrelevant information to his attorneys, who postulates fantastical explanations for a death in which he is implicated, and who obsessively relies on a dictionary as the sole source of authority, reality and truth, has made a deliberate choice to behave in such a manner. It is, however, so improbable that, without substantial corroborating evidence, it should not form the basis for determining that the person is competent to stand trial.

d. Finding Mr. Lytle Competent to Stand Trial
Was an Abuse of Discretion.

The trial court's finding as to the defendant's competency to stand trial is reviewed for abuse of discretion. *State v. Swain*, 93 Wn. App. 1, 9, 968 P.2d 412 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

The trial court's oral ruling largely consists of the court's assurance that it has read or heard all of the evidence and a partial

summary of that evidence. The summary emphasizes all of the testimony relating to Mr. Lytle's disagreeable personality traits, the evidence that he has a factual understanding of the proceedings against him, and the expert opinions as to whether he has a mental illness. The court did not mention any of the evidence relating to Mr. Lytle's rational functioning, either in terms of assisting his counsel or in understanding the legal proceedings.

A person who is disagreeable, evasive, arrogant, controlling, aggressive and unpleasant may or may not be irrational with respect to assisting counsel and understanding legal proceedings. The two states are not mutually exclusive. The entire thrust of the affidavits provided by defense counsel of this case was that however disagreeable, controlling or unpleasant their client may have been, their central concern was that he was utterly unable to provide them with any meaningful information or to address any of the questions that arose in the course of attempting to prepare a defense.

The court's finding of competency was based on opinion evidence that had marginal relevance to the legal issue and ignored entirely the most relevant, factual evidence provided to the court. In short, the court's decision was based on untenable grounds and constituted an abuse of discretion.

2. DENIAL OF THE MOTION TO CLOSE THE
COMPETENCY HEARING WAS AN ABUSE OF
DISCRETION.

The public right of access to judicial proceedings, including pretrial hearings, must be balanced against the defendant's right to trial by an impartial jury. Const. Art 1. § 10; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980), Const. Art. I, § 22 requires the trial judge to take protective measures against the reasonable possibility of prejudicial publicity. *Id.* at 62.

(A) trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard v. Maxwell, supra*. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary

Id. quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979). Closing the hearing is often the most reasonable measure in view of the difficulty in predicting the prejudicial effects of pretrial publicity:

The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial. . . . Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized(.)

Id..

In the context of a pretrial proceeding, the alternatives to a closed hearing generally implicate other rights and interests of the defendant. *Federated Publications, Inc. v. Swedberg*, 96 Wn.2d 13, 17, 633 P.2d 74, 75 (1981). Accordingly, the availability of a change of venue is insufficient justification for denying a defense motion for closure. *See Kurtz*, 94 Wn. 2d at 63-64.

In ruling on the motion to close the competency hearing, the judge recognized the factors recognized in *State v. Bone-Club*, 128 Wn.2d 254, 258, 906 P.2d 325 (1995). The court found the first factor dispositive: “The proponent of closure or sealing must make some showing [of a compelling interest] . . .” *Id.* But the court’s resolution of the first factor was factually and legally flawed.

The court remarked that the information that would be disclosed during the hearing was information that would be difficult for the court and jurors to “look at.” (RP 10) The court went on to note that this evidence was already “out there,” referring to the extensive media coverage of the factual allegations relating to the child’s death. The court concluded that what occurred during the competency hearing would not add to the body of information that had already been made public. (RP 10)

Having reviewed the written reports of the experts, as well as the affidavits provided by counsel, the court must have been aware that

virtually none of the evidence relevant to Mr. Lytle's competence to stand trial had been made public, and there was little reason to believe any of it would be presented to a jury. The substance of the hearing was highly prejudicial, amounting to virtual character assassination. The evidence, as summarized by the court at the close of the competency hearing, consisted in large part of a catalog of unpleasant personality and character traits, as to which the State had no admissible evidence to put before a jury. Thus the court's initial reasoning was flawed.

As the Supreme Court observed in *DePasquale*, measuring the prejudicial effect of publicity concerning pretrial hearings is difficult if not impossible. Nevertheless the trial court rejected an opportunity to minimize the circulation of especially prejudicial and irrelevant evidence as to Mr. Lytle's character.

Denial of the defense motion for a closed hearing was an abuse of discretion that casts doubt on the impartiality of the jury and hence the fairness of the trial.

3. ADMISSION OF PREJUDICIAL EXHIBITS WAS
 ERROR.

Detective Hamond told the jury that he had had an opportunity to observe Mr. And Mrs. Lytle. (RP 1050) He testified that Mr. Lytle was 5'9" tall and weighed 200 pounds; Mrs. Lytle was 5'6" tall and weighed

236 pounds. (RP 1050) He testified that he had also observed Summer Phelps some time after her death. (RP 1050-51) He said he later learned that she was 42 ½ inches tall and weighed 45 pounds. (RP 5011)

The prosecutor presented the detective with Styrofoam cutouts intended to represent these three individuals and asked the detective whether they were substantially similar to the weight, size and height of the individuals they represented. (RP 1051-53) Detective Hamond testified that they were. (RP 1051-53).

Detective Hamond acknowledged that he did not have any measurements for the depth or girth of the individuals, that he had not prepared the cutouts and did not know how the width was determined. (RP 1054) The prosecutor offered the exhibits for demonstrative purposes, to show the “height, width, and two dimensional form” of the individuals represented. (RP 1054)

Finding they were accurate reflections of the individuals’ height and weight, the court admitted the exhibits, over defense counsel’s objection that they were not accurate representations. (RP 1054-57)

The use of “demonstrative aids” ensures heightened retention of the concepts demonstrated to the jurors. *See* Caldwell, et. al., *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 1042-44 (2002). Indeed, studies have revealed just how effective, noting that “juries

remember 85 percent of what they see as opposed to only 15 percent of what they hear.” Chatterjee, Admitting Computer Animations: More Caution and a New Approach Are Needed, 62 Def. Couns. J. 34, 36 (1995).

Demonstrative evidence is encouraged only when it accurately illustrates facts sought to be proved. *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Substantial similarity to the actual events is required. *Jenkins v. Snohomish County Pub. Util. Dist. No. 1.*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986). A trial court’s determination that the demonstration is sufficiently similar should be reversed where the court abuses its discretion. *Id*; *see also State v. Stockmyer*, 83 Wn. App. 77, 85, 920 P.2d 1201 (1996).

As with any piece of evidence that has some probative value, if the evidence is more prejudicial than probative, the court should refuse its admission. *Finch*, 137 Wn.2d at 816. When inaccuracies in the demonstrative evidence are significant, any probative value is outweighed by the unfair prejudicial effect. *Stockmyer*, 83 Wn. App. at 85; *State v. Newman*, 63 Wn. App. 841, 853-54, 822 P.2d 308, *review denied*, 119 Wn.2d 1002 (1992).

The only thing about the Styrofoam cutouts that was based on fact was the height of the figures. Yet they were offered to demonstrate the

width and “two-dimensional form” of the individuals. The detective’s testimony showed that there was no factual basis for the representation of these forms. He did not prepare them, he did not testify that he advised the person who prepared them, or even knew who had done so. He could not explain any basis for the shape or width of each figure. And despite the judge’s comment, they most certainly did not demonstrate the weight of these individuals, each of whom weighed more than two pounds.

“Information that jurors are merely told, they will likely forget; information they are told and shown, they will likely remember. It is that simple.” *Caldwell, supra* at 1043. Such images are more easily recalled during deliberations and are more memorable for jurors, thus lending more weight to whatever they portray. *Caldwell, supra* at 1045.

During their deliberations, the jurors had implanted in their minds imaginary representations of Mr. and Mrs. Lytle as dehumanized blank, white, flat people. The prejudicial effect of those images far outweighed their possible value in assisting the jury in understanding what a height of 5’6” or 5’9” looks like.

E. CONCLUSION

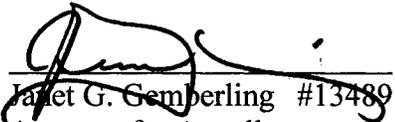
Mr. Lytle admitted to a small number of specific incidents in which he had struck his daughter and one occasion on which he put the

electric dog collar on her. In light of the horrific nature of his daughter's injuries and his admitted, if limited, involvement in the abusive situation, his conviction was likely inevitable. But if there was any mitigating evidence, the defense attorneys' affidavits make it clear that he was unable to discuss it with them. The result of his inability to assist his lawyers was that they had nothing to present to a jury that could create a possibility of leniency with respect to the aggravating factors, or to provide to the court at sentencing to avoid the imposition of an extraordinarily harsh sentence.

Mr. Lytle was not competent to stand trial and his conviction should be reversed.

Dated this 30th day of August, 2010.

GEMBERLING & DOORIS, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 27742-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JONATHAN D. LYTLE,)	
)	
Appellant.)	

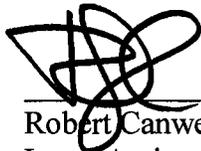
I certify under penalty of perjury under the laws of the State of Washington that on August 30, 2010, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on August 30, 2010, I mailed a copy of the Appellant's Brief in this matter to:

Jonathan D. Lytle
#326758
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

Signed at Spokane, Washington on August 30, 2010.



Robert Canwell
Legal Assistant