IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Ellis,* 2005 YKSC 61 Date: 20051125
Docket No.: S.C. No. 04-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

JUSTINA KRISTEN ELLIS

Before: Mr. Justice R.S. Veale

Appearances:

Peter Chisholm and Edith Campbell — Counsel for the Crown
Diane Oleskiw and James Van Wart — Counsel for Justina Ellis

REASONS FOR JUDGMENT
(Sentencing)

INTRODUCTION

[1] On August 15, 2004, Justina Ellis caused the death of her child, Samara, who was born on July 5, 2004. Justina Ellis administered a substantial blunt force blow to the head of Samara causing a complex fracture of her skull. Justina Ellis also struck or squeezed Samara directly on her chest causing eighteen rib fractures. She also caused brain and eyeball injuries to Samara consistent with shaking or blunt force trauma to her head. There was bruising on Samara's face, upper abdomen and lower chest as well as abrasions on her face, all indicative of more than one incident of trauma that evening.

Justina Ellis was convicted in 1998 of assault causing bodily harm on her first child who is now in the care of grandparents.

[2] Justina Ellis has a chronological age of twenty-three years. As of September 12, 2005, she has been diagnosed as having Fetal Alcohol Syndrome, partial (FAS). She also suffers from Borderline Personality Disorder (BPD). She is addicted to alcohol and cocaine. Compounding this tragedy is the fact that the Yukon does not yet have the comprehensive residential treatment program that Justina Ellis requires.

[3] Ms. Ellis was charged with second-degree murder but has pled guilty to manslaughter. The Crown seeks what is effectively a seven-and-one-half-year penitentiary sentence. This would result in a five-year penitentiary sentence after crediting two and one half years of pre-sentence custody. Counsel for Ms. Ellis seeks a two-year penitentiary term with three years probation.

THE FACTS

[4] I would normally summarize the lengthy Agreed Statement of Facts filed by Crown and defence counsel. However, in this case, it must be recited in complete detail as it reveals the “time bomb” that Justina Ellis poses, even for the community of professional care workers and family that cared for the well-being of both Samara and Justina Ellis.

[5] Before reciting the Agreed Statement of Facts, it is important to understand that Justina Ellis and her spouse, Tim Olson, appeared to be on their way to creating a healthy home environment for Justina’s planned pregnancy. She and Tim had successfully completed a five-week addiction program at the St. Paul’s Treatment

Centre in Alberta in July and August, 2003. They formed a “Sobriety Circle” and they both attended Yukon College in Dawson City. Ms. Ellis was enrolled in Developmental Studies at Yukon College. She passed all her G.E.D. exams except writing and math.

AGREED STATEMENT OF FACTS

The Initial Police Investigation

1. On August 16, 2004, at approximately 1:55 a.m., the RCMP in Whitehorse received a 911 call from Justina Ellis (“Ms. Ellis”) in Dawson City. Ms. Ellis reported that her seven-week-old daughter, Samara Olson (“Samara”), was missing. At approximately 2:00 a.m., Cst. Mitchell of the Dawson City RCMP attended Ms. Ellis’ residence at 1313 – 4th Avenue in response to the call. Cst. Mitchell spoke with Ms. Ellis, who was alone in the house. She reported that earlier that evening, she had gone to the Eldorado Hotel with Samara in a stroller. She said that she had left Samara outside the hotel and went inside to buy alcohol. She was inside for approximately 10 minutes and when she came back outside Samara was missing. She said that she last saw Samara around 1:00 a.m. and had been looking for her for about an hour before phoning 911.

2. Cst. Mitchell contacted Cam Sinclair of Family and Children Services who quickly became involved in the investigation. Ms. Ellis agreed to accompany Cam Sinclair and the police officers to the Eldorado Hotel to outline her movements in more detail and to provide the last known location of Samara. At the hotel, it became apparent that Ms. Ellis was not being truthful about how Samara went missing. While Ms. Ellis was being questioned at the Eldorado Hotel, an RCMP officer travelled out to R-22, a work camp

approximately 50 kilometres outside Dawson, in order to locate Ms. Ellis' common-law partner, Tim Olson ("Mr. Olson"). At the hotel, while the police were inquiring about the whereabouts of Samara, Ms. Ellis began to talk about committing suicide. She was placed under arrest and transported to the RCMP detachment where she was questioned further.

3. En route to the detachment, Ms. Ellis agreed to provide a breath sample to assist in determining her degree of intoxication. The breath test was conducted at 4:26 a.m. with a result of 90 milligrams of alcohol in 100 millilitres of blood.

4. At approximately 4:32 a.m. Ms. Ellis was lodged in a police interview cell and kept under police and video surveillance. She admitted to Mr. Olson at approximately 5:15 a.m. that Samara was not breathing, is now in heaven and that she hid her away in a bag in the garbage behind Klondike Kate's. From this point in the investigation onwards, Ms. Ellis cooperated with police by providing them with a number of inculpatory statements, leading them to the body of Samara and conducting a video-reenactment. She admitted that she had hurt Samara on the night of August 15, 2004, by slapping her, shaking her and smothering her.

Events Leading Up to August 15, 2004

5. Mr. Olson and Ms. Ellis were a common-law couple for approximately two years and in August 2004, they lived together in Dawson City. They had attended a residential treatment program together in Alberta for two months in the summer of 2003 and both had been sober for over 12 months before

August 2004. They had been attending Yukon College and were both doing well in school. Samara was a planned pregnancy and Mr. Olson had travelled to Whitehorse to be with Ms. Ellis when she gave birth on July 5, 2004. Just prior to Samara's birth, the couple moved into their own home, a duplex at 1313-4th Avenue in Dawson. Ms. Ellis kept a clean home which was well supplied for Samara. Social Services arranged to hook up a telephone in their new home in late July 2004.

6. Ms. Ellis received pre-natal and post-natal support from Patricia Greer of Healthy Families, Healthy Babies Program; Cam Sinclair of Social Services; the Tr'ondek Hwech'in Counselling Services and Social Department; medical professionals, and Mr. Olson's mother.

7. Cam Sinclair met Ms. Ellis and Mr. Olson when they were attending the campus of Yukon College in Dawson in 2003. He worked with both of them leading up to the birth of Samara and subsequently, from July 8 until August 12, 2004, visited them four times. To him, the couple appeared to be coping well with the pressures of new parenthood. The last time he saw Ms. Ellis was on August 12th when he spoke to her for a few minutes on her porch. He did not observe anything unusual at that time.

8. Doreen Olson, Tim's mother, lived nearby the couple's home. After Samara's birth, she talked to her son and Ms. Ellis by telephone and visited them at their home. In her opinion, the new parents were providing good care of Samara. She had last seen the three of them together at the Moosehide gathering at the end of July 2004.

9. According to Mr. Olson, Ms. Ellis found new mothering to be tiring. In July, he was able to help out by tending to Samara. However, in early August 2004, he went to work and reside at R-22, a Tr'ondek Hwech'in healing/work camp located in the bush approximately 50 kilometres away from Dawson City. Ms. Ellis and Mr. Olson agreed that she and Samara would accompany him to R-22. After a short while at the camp, Ms. Ellis found the conditions there to be difficult to properly care for Samara. Ms. Ellis was becoming a little bit irritable. The couple decided that Ms. Ellis and Samara should move back into town.

10. Brenda Ellis, Ms. Ellis' mother, stated that her daughter indicated Samara was a good baby and she believed Ms. Ellis was doing very well with the baby. Brenda Ellis understood that Ms. Ellis did not like being alone too much with a newborn baby, so she went to R-22. Ms. Ellis was insecure that Mr. Olson was fooling around, although Brenda Ellis believed she dissuaded her of these thoughts.

11. Brenda Ellis, observed her daughter at R-22 in early August, and confirmed that Ms. Ellis had found the week there to be difficult. Ms. Ellis did not want to eat and talked about having more responsibilities on her own because Mr. Olson was working. Brenda Ellis thought that prior to August 15, 2004, Ms. Ellis was stressed in the sense of being a new mother, being depressed and having to be by herself.

12. Patricia Greer worked with Healthy Families, Healthy Babies whose mandate is to support pregnant women, primarily in the area of nutrition and home

support. Ms. Greer's qualifications focused on nutrition. Ms. Greer first met Ms. Ellis in November 2003 and she worked on a birth plan with Ms. Ellis prior to Samara's birth. On her first visit to the Ellis/Olson home after the birth, she noted Ms. Ellis appeared tired. Ms. Greer attended at the residence once or twice a week and assisted the parents by giving them respites, obtaining groceries, providing meals and doing light housework. She accompanied Ms. Ellis on her visits to the public health nurse. Ms. Greer thought that Samara was a good baby.

13. Ms. Greer observed that Ms. Ellis and Mr. Olson seemed to be doing well as parents after the birth of Samara. One day in mid to late July 2004, Ms. Greer received a phone call from Ms. Ellis who was stressed. Ms. Ellis was very upset and said that she felt like having a drink. She expressed frustration to Ms. Greer that she always felt rushed, that she did most of the work around the house and that she was always picking up after Mr. Olson. Ms. Greer talked with Ms. Ellis for some time, and allowed her to vent until she had calmed herself.

14. A few days later, Ms. Greer spent about one hour at the home, during which time she observed Ms. Ellis to be emotional, upset and trying to "pick fights" with Mr. Olson. It seemed to Ms. Greer that Ms. Ellis was irrational. Ms. Greer was concerned about the possibility of depression and tried to set up a doctor's appointment for Ms. Ellis the next day. A subsequent visit with Ms. Ellis in conjunction with advice from Cam Sinclair and the public health nurse allayed Ms. Greer's concerns, although Ms. Ellis was still expressing

concerns about her spousal relationship and the jealousy she felt with respect to Mr. Olson.

15. By the time of the Moosehide gathering at the end of July 2004, Ms. Greer believed everything was fine. On August 10, 2004, after Ms. Ellis returned from R-22, she told Ms. Greer that she was sorry that she had those earlier thoughts of jealousy about Mr. Olson. On Wednesday, August 11, 2004, Ms. Greer had a visit with Ms. Ellis that caused her concern. Ms. Ellis appeared to be tired and there was no adult food in the refrigerator. After bringing some food to Ms. Ellis on August 12, 2004, Ms. Greer was concerned she may be depressed and not be aware of it. The person she spoke to confirmed this could be the case. Ms. Greer spoke to Ms. Ellis later that day about courses she and Mr. Olson wanted to take at Yukon College. As a result of this conversation and a short visit where she observed Ms. Ellis eating some food, Ms. Greer formed the belief that Ms. Ellis was fine and her concerns were again allayed.

16. Ms. Greer last saw Ms. Ellis and Samara on Friday, August 13, 2004, when she dropped off some bread for her. She arranged to see her in a week's time as she understood Mr. Olson was coming home on Monday and she wanted to give them some time together. Ms. Ellis asked Ms. Greer if it was alright if she called her should she need anything and Ms. Greer responded affirmatively.

Events Leading to the Death of Samara Olson

17. On the evening of Sunday, August 15, 2004 at approximately 6:30 – 7:00 p.m., Mr. Olson came into town from camp in order to shower and have a short visit with Ms. Ellis and Samara. At that time he smelled alcohol on Ms. Ellis. He was disappointed, asked her what she had been drinking and asked her to quit. He told her that if she did not quit, it would ruin their relationship. She said that she would try to quit. Mr. Olson spent approximately one hour at the house. Before he left the residence, he saw Samara in her crib located in his and Ms. Ellis' bedroom. Samara smiled at him and went back to sleep.

18. Ms. Ellis reported that she drank six ciders (7% alcohol concentration) between 6:00 p.m. and 10:00 p.m. on August 15, 2004.

19. At approximately 9:30 – 10:00 p.m. Ms. Ellis went to her mother's house which was about five houses away from her own. Ms. Ellis was alone and told her mother that Samara was at home with Mr. Olson. Brenda Ellis believed that her daughter had been drinking alcohol because Ms. Ellis' speech was slow; she repeated herself, she stared at the walls and, generally, was not acting normal. Also, at about 9:30 – 10:00 p.m. Paula and Sylvia Farr, neighbours of Ms. Ellis, talked to her for a few minutes on the street near her house. Ms. Ellis was alone. Sylvia Farr thought that Ms. Ellis may have been drinking alcohol because she had glossy eyes and repeated a question to Sylvia Farr that Ms. Farr had already answered. Ms. Ellis was walking towards her home when Sylvia Farr last saw her.

20. At 10:00 p.m. on August 15, 2004, Ms. Ellis' blood alcohol concentration would have been between 154 to 219 milligrams of alcohol in 100 millilitres of blood. At these levels, the average person would be expected to experience bloodshot, watery eyes and balance and motor skill problems such as swaying or staggering. There would be definite mental deterioration such as poor judgment, poor attention, loss of inhibitions and restraint, emotional instability and possibly mental confusion and disorientation.

21. Ms. Ellis told the police that she believed that sometime around 10:00 p.m. Samara woke up and started crying. She felt frustrated with the crying and slapped Samara across the face. She also shook Samara and eventually covered her mouth and nose with a blanket. Samara was still breathing for awhile. After she was no longer breathing, Ms. Ellis placed her in a garbage bag, walked to Klondike Kate's restaurant and concealed the body in a garbage can between two cabins. After returning home, Ms. Ellis called police at about 1:55 a.m.

22. Doreen Olson visited with Ms. Ellis at the Dawson City RCMP detachment on August 17th. Ms. Ellis advised Ms. Olson that she had smothered Samara. Ms. Olson asked her if she had been jealous of Samara to which she responded affirmatively.

23. An autopsy conducted on the deceased and expert pathological evidence revealed that the cause of death was a blunt force injury to the head. The blunt force injury caused a complex fracture of the skull. The injury was caused by Ms. Ellis either striking the deceased's head against a blunt object

or by her striking an object against the head. The skull fracture would have required substantial force and it resulted in subdural and subarachnoid haemorrhaging (bleeding on the surface and within the brain). A forensic pathologist indicated that this injury would require significantly more force than dropping an infant on the floor from waist level. The injury was recent in relation to the time of death and it was likely that the deceased did not live very long after sustaining the injury. There were also eighteen rib fractures consistent with significant compressive force (i.e. squeezing) or by direct blow applied to the chest. There were also brain and eyeball injuries consistent with shaking or blunt force trauma to the head. There was bruising on the face, upper abdomen and lower chest as well as abrasions on the face. These multiples injuries were indicative of more than one incident of trauma that evening.

24. Ms. Ellis has been held in custody on these charges since her arrest on August 16, 2004.

EXPERT EVIDENCE

Dr. Dua

[6] Dr. Dua was the first psychiatrist to assess Justina Ellis. He provided an eighteen-page report on May 25, 1999, requested as a result of her conviction for criminal negligence causing bodily harm to her first baby daughter.

[7] He described Justina as “quite disturbed” with a history of “early onset and fairly severe alcohol and drug abuse”. She had received limited therapeutic interventions which generally targeted her substance abuse.

[8] In 1999, Justina also showed motivation to change when she had a period of sobriety and support during her first pregnancy. However, Dr. Dua described her as having “emerging personality disorder” meeting the clinical diagnosis of Borderline Personality Disorder. Dr. Dua was cautious in assigning the BPD diagnosis because of her youth. He diagnosed her as having Dysthymic Mood Disorder which means chronic low grade depression. He also diagnosed her with Polysubstance Dependence Disorder.

[9] In 1999, Dr. Dua recommended treatment that sounds very similar to the treatment recommendations in 2005. He said on page 17 of his report:

> “Treatment for Justina will be challenging, and her prognosis remains guarded. The greatest likelihood of benefit will be obtained from a multimodal and multidisciplinary set of interventions. Elements will include, long-term (years) individual psychotherapy, drug and alcohol abuse counselling, academic and vocational rehabilitation, and perhaps psychotropic medication management. It will also be important to pay close attention to Justina’s residential situation and support system. Her likelihood of improvement will be enhanced by placement in a supportive residential setting. Within the context of an abusive personal relationship, Justina’s problems are unlikely to remit. Should Tyra be returned to Justina, the best option would be placement in a home for single mothers.
>
> Justina’s risk of re-offending is directly related to the context she is in. Should Tyra be returned to Justina, her risk of hurting the child again remains high unless substantial changes, outlined above, are implemented. As well, this risk would extend to other children Justina may have. Undoubtedly, these issues will be addressed appropriately by local Social Services.
>
> Justina’s risk of re-offending is unlikely to be altered by a custodial disposition. …”

[10] It is useful at this point to consider the offence that occurred in January 1999. Justina Ellis had an unplanned pregnancy at age fifteen and her first child was born at

age sixteen. There were three incidents when Justina assaulted her baby causing serious injuries, including skull and collarbone fractures, possible brain damage, retinal haemorrhages and a variety of soft-tissue traumas. The baby will likely have deficits of vision and cognitive function.

[11] Justina Ellis was sentenced in Youth Court to six months of open custody, followed by eighteen months of probation with terms that she was to refrain from possession or consumption of alcohol and drugs, participate in assessments, counselling, programming and treatment including substance abuse counselling, mental health counselling, school, work skills counselling, parenting skills counselling, aboriginal healing circles, and sexual abuse treatment.

[12] It appears to me that Justina Ellis has received virtually all of the recommended programs at some time between her sentencing for criminal negligence causing bodily harm in November 1999 and her present manslaughter offence, with the exception of the years of individual psychotherapy recommended by Dr. Dua.

[13] Lilles T.C.J., the sentencing judge, wrote an extensive judgment. He was particularly concerned that the 1999 offence not occur again. He stated at paragraph 9 of his judgment:

> “I am taking the time to tell this story in detail so that all of the professionals in our community can see the "bigger picture" and not just the small part that they as doctors, nurses, public health nurses, counsellors, teachers, lawyers and judges might encounter. Similarly, it is important for family members and members of the Kwanlin Dun community to reflect on the history of this case in an objective and non-defensive manner. I hope everyone will ask what they might do differently should they encounter similar circumstances in the future.”

[14] It is not my intention to assess blame for the catastrophe that has occurred. Suffice it to say that the change in circumstances from an unplanned and probably unwanted pregnancy in 1999, to a planned pregnancy with full community support in 2005, could not prevent the tragedy of Justina Ellis killing her second child.

Dr. Asante

[15] Dr. Asante is an expert in the diagnosis of Fetal Alcohol Syndrome. He prepared a report in conjunction with a speech language pathologist and a psychologist.

[16] Justina's mother used significant alcohol during her pregnancy with Justina. At age three to four, Justina was placed with her maternal grandmother because of parental neglect.

[17] She attended kindergarten in Mayo, Grades One to Four in Whitehorse and Grades Four to Seven in Watson Lake. She became aggressive in Grades Three and Four. She began sniffing "whiteout", then gas and began using marijuana.

[18] By age ten, Justina was reunited with her mother but she left home again because of parental drinking and reported sexual abuse by her mother's boyfriend. She describes herself as being "a full alcoholic at twelve years." She engaged in high risk behaviour which included alcohol, intravenous drug use, sexual activity and episodes of self-mutilation. She has been to Poundmaker's Adolescent Treatment Centre for three months for alcohol and drug abuse treatment. She has been hospitalized for overdosing and suicide attempts.

[19] Justina's cognitive assessment indicates a Verbal IQ of 80 (low average), a Performance IQ of 91 (average) and a Full Scale IQ of 83 (low average). Although Dr. Asante describes these scores as "not overly low", she meets the criteria for brain

dysfunction due to prenatal alcohol exposure. Her memory testing shows evidence of confabulation which means that Justina fills in the gaps in her memory with something that she heard or read, but isn't accurate. Sadly, Dr. Asante states that her IQ is not abnormally low, which coupled with FAS, usually results in more violent behaviour than FAS coupled with abnormally low IQ's.

[20] Her clinical profile is as follows:

1. Fetal alcohol syndrome, partial.

   This means that Justina has central nervous system damage and dysfunction. Partial refers to the fact that she does not have the facial features associated with the syndrome. Dr. Asante was very clear in stating that the word "partial" does not mean Justina has a mild case but rather that she doesn't show the facial effects. She has a short attention span and is unable to link cause and effect.

2. Brain damage, sentinel physical findings, alcohol exposed. However, alcohol is not the only cause of Justina's problems. Other factors include her history of abuse and neglect, rejection by her birth mother, social problems, her early pattern of significant alcohol and substance abuse and her history of sexual abuse and witness to violence. Dr. Asante did not rule out structural brain abnormality.

3. Substance Abuse Disorder.

4. Attachment Disorder.

5. Mood Disorder.

6. Hepatitis C positive.

7. Attention Deficit Hyperactivity Disorder.

[21] When Dr. Asante was apprised of an additional diagnosis of Borderline Personality Disorder, he felt that it might also account for her violent behaviour.

[22] In spite of all the disabilities Justina has, Dr. Asante agrees that she was criminally responsible for killing her child. He agrees that he had no reason to believe she did not know what she was doing when she offended. However, he indicates that for Justina Ellis to safely care for a child, she would require supervision, twenty-four hours a day, seven days a week. She is very immature and unable to relate to a child. She requires a caregiver to tell her that a crying or vomiting child does not mean that the child dislikes her. In other words, she is incapable of interpreting normal child behaviours without supervision and management.

Recommendations

[23] Dr. Asante recommends that Justina have continued long-term psychiatric and mental health intervention and follow-up. His recommendations for justice and community management bear repeating:

1. Because of her lack of impulse control, particularly exacerbated under the influence of alcohol, Justina needs close supervision to ensure she controls her behaviour.
2. When Justina returns to the community, she needs a “case manager” to ensure that services are in place and to monitor changes in her situation. The Whitehorse organization, the *Fetal Alcohol Syndrome Society of the Yukon (FASSY)* is an example of an organization that could be contracted to perform this service.

3. People with prenatal alcohol exposure tend to have lower ability than normal to cope with the normal stresses of day-to-day living. Even such things as the stimulation of people talking around her, causes Justina to become upset and sometimes angry/aggressive. For example, she reports hiding under her bed to get away from her cellmates' talking (too loudly, too much) in prison. She can only function in a calm environment.

4. Justina should not be placed in a position of responsibility for a child because she cannot handle the stress that constant care requires.

5. Given her brain damage, small stature, and history of victimization, Justina is at risk for victimization by others when she is in custody.

6. Prisoners with brain damage need consideration in the prison system so they are not set up for failure (and unfair treatment) because they are incapable of completing programs or following routines, are rigid in their behaviour, are non-compliant when overwhelmed, and have a low frustration tolerance. They may respond inappropriately in ways that alienate or instigate; they may talk too much about their personal situation.

7. In any important communications (e.g., financial, legal), Justina requires a supportive interpreter to rephrase, simplify, and check for genuine comprehension. She may believe she understands and say she understands when in fact she does not. She can be confused by and misunderstand complex language.

8. Justina has genuine memory deficits. She fills in the gaps with information from other sources. This is not deliberate lying and it is believable. This suggests the importance of corroborating information she provides.

9. While people with disabilities including the brain damage of FAS are not excused for their criminal behaviour, harsh punishment as a specific deterrent will not alter the brain damage or future behaviour. Interventions to reduce future problems primarily mean managing the environment she is in.

10. With regard to her continued education, it will help Justina and those teaching her to understand that she has significant difficulty [to] understand connected language (both listening comprehension and reading comprehension). Her tendency to be verbal makes it difficult for those talking with her to realize that she may not be understanding what they are saying.

11. Verbal information should be accompanied with visual supports such as demonstration, diagrams, hands-on experience, role playing, and checklists to help Justina understand what is told to her.

12. Justina talked about how much she enjoyed providing services to people, for example, serving tea to the elders. If supervised, this is an outlet for her.

[24] Dr. Asante points out that Justina will not benefit from “harsh punishment” and could be victimized in custody. However, he has little experience with the prison system and was not aware of the Fraser Valley Institute at Abbotsford, British Columbia, which I will discuss later.

[25] With respect to recommendation # 4., Dr. Asante states that if Ms. Ellis had another baby that she intended to keep, she would require supervision twenty-four hours

a day, seven days a week to protect the baby. The supervision would be required until the child was at least age five or until the child was able to protect itself.

Dr. Lohrasbe

[26] Dr. Lohrasbe is a forensic psychiatrist with expertise in psychiatric diagnosis and risk assessment. He had the benefit of reading the Asante report and broadly adopted its clinical findings and treatment recommendations.

[27] Dr. Lohrasbe's report dated October 1, 2005, makes the crucial psychiatric diagnosis of Borderline Personality Disorder, first identified by Dr. Dua in 1999. Dr. Lohrasbe states that Justina Ellis' history and clinical presentation is a good match for the classic criteria of Borderline Personality Disorder which are as follows:

> "A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:
>
> 1) Frantic efforts to avoid the real or imagined abandonment.
> 2) A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.
> 3) Identity disturbance: markedly and persistently unstable image or sense of self.
> 4) Impulsivity in at least two areas that are potentially self-damaging (example, spending, sex, substance abuse, reckless driving, binge eating).
> 5) Recurrent suicidal behaviour, gestures, or threats, or self mutilating behaviour.
> 6) Affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).
> 7) Chronic feeling of emptiness.
> 8) Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights).

> 9) Transient, stress related paranoid ideation or severe dissociative symptoms."

[28] Dr. Lohrasbe found Justina Ellis to be more like a thirteen-year-old teenager than her stated age of twenty-three years. Her mood was labile, meaning that she shifted from an "up" to a "down" quite rapidly often out of context to the discussion. This was particularly so when discussing her romantic relationships. She has suicidal thoughts and behaviours. Her own self-image fluctuates from "unrealistically positive" to "harshly self-condemnatory and full of self-loathing". She speaks of herself as utterly alone in the world and she has a powerful need to be cared for and loved. Her only term of reference is to make herself sexually attractive. Her relationships with males are volatile both physically and from a jealousy perspective.

[29] Turning to the risk assessment of Justina Ellis, Dr. Lohrasbe uses the HCR-20 clinical guide rather than an actuarial test for risk assessment. His clinical risk assessment took into account the HCR-20 factors, her predisposition to addiction, the cognitive deficits of her FAS, her childhood deprivation and separation, and sexual abuse. He also assumed some worsening of her chronic depression after childbirth although there was no clear information of a post-partum depression.

[30] He concluded that the violence towards her two infant children was "unlikely to be a coincidence" and at page 20:

> "The immediate and crucial contributor to her violence was intoxication, with its well-known distorting and destabilizing impact on all aspects mental functioning including perception, cognition, emotion, conation, and subsequent action. Ms. Ellis has a history of disordered behavior [sic], including violent behavior [sic], when intoxicated and all available information suggests that it was a crucial and necessary factor in this instance.

> The cognitive deficits of FAS will need sensitive intervention and change, if it does occur, will occur over years, not months. Similarly, personality does not change rapidly, and the treatment of personality disorder, if and when successful, occurs over several years. Given the central role of BPD in her violence, I think it would be unrealistic to anticipate dramatic change in her *potential* for violence in the foreseeable future. In that sense, Ms. Ellis will remain at moderate to high risk for future acts of violence in the foreseeable future. Whether that potential is actualized is dependent heavily on whether abstinence from all substances can be ensured through external supervision for a lengthy period in the foreseeable future. The more destructive actions associated with BPD tend to decline with age. Even when personality does not fundamentally change, behavior [sic] usually does, and the frenzied interpersonal lives of patients with BPD tends to be replaced by social withdrawal and overt depression as they enter their 30s. Typically therefore I would anticipate a general decline in risk for future acts of violence as Ms. Ellis ages."

[31] As to risk management, Dr. Lohrasbe states that psychotherapy is the treatment for Borderline Personality Disorder. Unfortunately, a majority of borderline patients drop out because of their instability and impulsive decision-making. If they stay in therapy, they tend to slowly improve over time. Nevertheless they are difficult cases and may be intermittently suicidal for years or decades.

[32] Dr. Lohrasbe also recommends Dialectical Behaviour Therapy, a recent treatment, which is delivered in a group format with individual psychotherapy as needed. He cautions that it is a long-term undertaking, meaning years, that is unlikely to be of any benefit without immediate and sustained abstinence from all intoxicants. He emphasizes that the principal risk management strategy in the immediate future for Ms. Ellis is to ensure abstinence from all drugs and alcohol. He warns that without abstinence, it is highly unlikely that any treatment strategy, including Dr. Asante's, can

be meaningfully implemented. Dr. Lohrasbe was also informed by Justina Ellis that she had consumed alcohol on more than one occasion prior to August 15, 2004.

[33] Dr. Lohrasbe emphasized that the treatment for Borderline Personality Disorder is for decades in order to maintain the benefit of the initial years of treatment. In other words, there is no cure but rather a requirement for treatment for the rest of her life.

[34] Without intensive treatment, Ms. Ellis' potential risk for violence is extremely high. Dr. Lohrasbe described her as a difficult case because not many Borderline Personality Disorder cases kill a helpless child. He would discourage Justina Ellis from having another child.

[35] Dr. Lohrasbe was not familiar with the Fraser Valley Institute in Abbotsford, British Columbia. This is an institution exclusively for women. However, he endorsed the concept of comprehensive Dialectical Behaviour Therapy which he understood to be a one-to-one therapy which would permit a trust relationship to be established with the therapist in a non-confrontational setting.

[36] Counsel for Ms. Ellis raised the concern about the risk to Ms. Ellis in a penitentiary setting if she disclosed the nature of her crime. Dr. Lohrasbe said he would be surprised if Ms. Ellis disclosed to anyone she didn't trust but he also acknowledged that disclosure could put her at some risk. When he met with Ms. Ellis, he said that "she was vulnerable to spontaneous self-disclosure, if allowed to do so."

Fraser Valley Institute

[37] Shawna O'Connor is a parole officer with the Fraser Valley Institute. The Institute opened in March 2004 and is part of the federal penitentiary system exclusively for female offenders with mental health problems and behavioural disorders. Although the

Institute is a prison, the women live in residential style houses and are responsible for the upkeep of the house. It is described as a structured living environment designed for women with mental illness. The women must volunteer for the comprehensive dialectical behaviour therapy program that is provided in the structured living environment. It involves both individual psychotherapy and skills training. There is a psychologist on site and a psychiatric nurse. In a normal day the inmate will learn to address cognitive distortions, making decisions and conflict.

[38] Entry into this special program for women is not automatic and does not necessarily follow the recommendation of a judge. The inmate must first be classified as a minimum or medium security risk. Ms. O'Connor advised that in January 2006, the Institute will have a capacity to take female inmates with a maximum security rating. This initial assessment is prepared by a community parole officer in Whitehorse. The inmate is then brought to the intake house at the Fraser Valley Institute for a team assessment to determine if the person will be a fit for the structured living environment. If accepted she must remain in the intake house until a bed is available.

Probation Officer

[39] Clara Northcott is a probation officer who is very familiar with Justina Ellis. She has been involved with Justina since 2001 when Justina's Youth Order was transferred to adult jurisdiction. In her first Bail Assessment Report dated February 16, 2001, Ms. Northcott stated:

> "…Justina is a self-professed alcoholic and drug addict. Her drug of choice is cocaine. She does admit to engaging in high-risk behaviours to get the money to pay for her drug addiction. The writer and the local police are very concerned about these activities and the risk she is placing herself in."

[40] Justina attended the Nenqayni Treatment Centre at Williams Lake from August to December 2001 to treat her cocaine addiction. She received positive reports from the Treatment Centre. She returned to Whitehorse in December before an appropriate placement was arranged. On the day of her return and after being welcomed at a special luncheon by family members and support people, she was using both alcohol and cocaine.

[41] When asked about what kind of treatment Justina Ellis responds to, Ms. Northcott stated that Justina requires a structured supportive setting without the distraction of males. Ms. Northcott is of the view that Justina Ellis' interaction with males disrupts her concentration on her treatment. Ms. Northcott was familiar with the Fraser Valley Institute from discussions with Ms. O'Connor and reading the program material. Ms. Northcott supported the Dialectical Behaviour Therapy treatment program provided at the Fraser Valley Institute.

[42] Ms. Northcott is the person that conducts the classification of Yukon offenders sentenced to a penitentiary sentence. She believes that Justina Ellis, barring any last minute surprises, will be classified as a medium risk in the federal system thereby being an appropriate candidate for the structured living environment and Dialectical Behaviour Therapy on a long-term basis.

Yukon Treatment

[43] Sandy Bryce is the Acting Director of Community and Correctional Services as well as the Manager of the Victim Services/Family Violence Prevention Unit for the Yukon Department of Justice. She advised that the Government of Yukon has identified the need for a variety of adult residential facilities which can provide a stable supervised

environment for FAS offenders, offenders who require intensive mental health counselling and high risk offenders.

[44] At the time of Ms. Bryce's evidence, no such adult residential treatment facilities exist. In the 2006 – 2007 budget year, the Government of Yukon may hire a coordinator to arrange for partnerships or contracts with community groups to provide such supervised or structured residential facilities. However, no program funding has been proposed or established.

CRIMINAL RECORD

[45] In February 1998, Justina Ellis was convicted of assaulting a female person which involved biting the victim on the cheek.

[46] Since her conviction in November 1999 for criminal negligence causing bodily harm to her first child, Ms. Ellis has been convicted three times for being unlawfully at large in 2000. Her sentences were fifteen days, twenty-one days and sixty days. She has also been convicted of breaking and entering on two occasions, obstructing a peace officer and breaching a conditional sentence order.

[47] In November 2003, she was convicted of assaulting her common-law spouse, Tim Olson, as a result of stabbing him in the leg. She received a conditional discharge and six months probation. Based on her attendance for treatment for youth suicide prevention, her sobriety, her schooling at Yukon College and participation in counselling, the probation order was terminated early.

VICTIM IMPACT AND REMORSE

[48] Doreen Olson, Samara's paternal grandmother, is a spiritual teacher and healer. She said that she and her son Tim Olson have forgiven Justina for killing her child. They

only ask for more help and healing for Justina. She presented a gift of roses to Justina in court.

[49] Justina also expressed her remorse in a statement she read in court. She acknowledged the trauma, anger, confusion, sadness and grieving that she caused for the whole community. She stated that she was sorry for hurting Samara and taking her life.

THE LAW OF SENTENCING

[50] The fundamental purpose of sentencing is to achieve one or more of the objectives of denunciation of the unlawful conduct, deterrence of offenders and others, separation of offenders where necessary, rehabilitation of offenders, making reparation for the harm done to the community and the promotion of a sense of responsibility in offenders.

[51] It is also a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This means that a sentence must be within the range of sentences imposed for similar offences and offenders and that the enormity of the tragic consequences of an offence should not distort the appropriate penalty.

[52] Sentences are increased or decreased within the appropriate range to take into account aggravating and mitigating circumstances. However, Parliament has directed that when an offender abuses a child, or abuses a position of trust, that shall be deemed to be an aggravating circumstance.

[53] Parliament has also directed judges to take into consideration all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

[54] In this case, a conditional sentence to be served in the community was not put forward as a viable option. Given that Ms. Ellis poses a moderate to high risk for future acts of violence, a conditional sentence is not appropriate.

[55] However, the principles set out in *R.* v. *Gladue*, [1999] S.C.J. No. 19 apply. Those principles are well summarized in paragraph 93 of that decision and require a judge to undertake the sentencing of aboriginal offenders differently because the circumstances of aboriginal people are unique. In this case, those circumstances undoubtedly include the abuse that occurred to parents and relatives of Justina Ellis who attended residential schools. Although no evidence was led on that issue, the dysfunction from residential schools may be felt by following generations. Thus, a jail sentence for an aboriginal person may be less than for a non-aboriginal offender.

[56] However, the *Gladue* case also stated at paragraph 93 (13):

> "It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal."

[57] This case falls into a very special category: crimes of substantial violence against helpless children. No one is more vulnerable in our society than a young child. I can do

no better than to repeat the words used in *R.* v. *K.K.L.*, [1995] A.J. No. 434 at paragraphs 28 and 30:

> "Serious crimes of violence against defenceless children warrant a strong and firm response from the courts. Children are amongst the most vulnerable in our society. And in our society, parents occupy a position of trust vis a vis their children. The existence of that fiduciary relationship lies at the heart of both the parent-child relationship and the family unit. Therefore, where a parent or someone who stands in a trust relationship to a child abuses a child, that will be an aggravating factor in sentencing. [I do not here intend to be taken as commenting on the specific category of infanticide recognized by Parliament in the Criminal Code. Entirely different considerations influence sentencing for that offence.] This trust relationship and children's vulnerability also explain why a parent who kills his or her child as a result of child abuse cannot generally expect to be treated more leniently on sentencing than a stranger entrusted with the care of a child. This is so despite the fact that a parent must live with the knowledge that he or she has killed their child.
>
> …
>
> The imposition of a denunciatory sentence is designed to express society's absolute repudiation of child abuse which has led to death: R. v. Isch (1981) 22 C.R. (3d) 106 (B.C.C.A.). However, a denunciatory sentence also serves another legitimate purpose by affirming and validating two of society's core values: respect for human life and dignity and special protection for those most vulnerable to abuse [,] children. [On this latter point, see R. v. Hagger (1982) 69 C.C.C. (2d) 76 (Alta. C.A.)]. That is why the sentence imposed must bear some proportional relationship to the harm done as a result of the parent's actions. The sentence should not trivialize the fact that a child's life has been ended by the person that child was entitled to look to for love and care. Instead, the sentence imposed should signal to all the value that society places on human life and the need to protect children from abuse whether at the hands of strangers or worse yet, their parents. Otherwise, one rightly risks a loss of public confidence in the administration of justice. This point was made by this Court almost twenty years ago. It is no less valid today than it was then."

[58] The specific facts in *R.* v. *K.K.L.* are that K.K.L. was the father of a nine-month-old baby daughter. He had a low level of frustration tolerance and while changing his child's diaper, he "lost it" when she was wiggling away and put her on the floor with a substantial degree of force causing multiple skull fractures and lethal brain injuries. His act was impulsive and he was genuinely remorseful. He also pled guilty to manslaughter and had no related record. He had no other psychological problems, abnormalities or frailties that would mitigate the sentence. He was sentenced to four and one-half years of imprisonment.

[59] Defence counsel has submitted that principles that apply to infanticide sentencing should apply here. Infanticide requires a finding that the mother is not fully recovered from the effects of giving birth to the child and as a result her mind is disturbed. Justina Ellis was not charged with infanticide nor do the facts support it. I will treat this as a sentencing for the offence of manslaughter to which Justina Ellis pled guilty after a preliminary inquiry and with the advice of counsel.

[60] To show the range of sentences for manslaughter of infant children, the case of *R.* v. *Isch* (1981), 22 C.R. (3d) 106 (B.C.C.A.), previously referred to in *R.* v. *K.K.L.,* must also be considered. This case is clearly in the more severe end of the range. Isch was living with the mother of an eight-month old child. He had previously assaulted the child on two occasions because the child was crying. On this occasion, while the mother was in the shower, he shook the baby to death. He was not drunk and he was sentenced to twelve years in prison.

[61] *R.* v. *Sinclair*, [1997] M.J. No. 455 (Man.C.A.) is a case with some similarity to the case at bar. A twenty-three-year-old aboriginal mother had four children in her care.

Three of them were taken into care by child protection authorities and ultimately returned to her care. The fourth child was a nine-month old baby girl of her common-law husband. Ms. Sinclair was not the birth mother of this child who was allowed to stay in her care. There was no obvious cause for the offender's conduct. She gave in to an impulse to violently shake the nine-month old child causing her death. She had a Grade Eight education and was described as having "a mild form of fetal alcohol syndrome". She was abandoned by her mother and raised by an abusive older couple. She was sexually abused by her grandfather and became a prostitute. A psychiatrist described her as "profoundly dysfunctional" and unable to deal responsibly with others, particularly children. She had no semblance of self-esteem and could not cope with the stresses and frustrations of life. She also had an abusive spouse who also had some responsibility for the death of the child. She had no related offences.

[62] The trial judge sentenced her to seven years. The Manitoba Court of Appeal reduced her sentence to five years considering her dysfunctional state, remorse and nine and one half months of pre-sentence custody.

[63] I acknowledge that there are numerous cases of manslaughter of children that fall within and sometimes less than the range of the cases I have cited. At the end of the day, "the determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community".
See *R.* v. *C.A. M.,* [1996] S.C.J. No. 28 at paragraph 91.

[64] There is a further aspect of sentencing that must be considered. Rehabilitation of an offender is an important objective in sentencing. However, it should not be the driving factor in determining the length of a sentence. In the recent decision in *R.* v. *D.W.H.*, 2005 BCSC 247, Romilly J. provides a useful summary on the subject.

[65] In *R.* v. *Hynes* (1991), 64 C.C.C. (3d) 421 (NfldCA), the accused was convicted of mischief for throwing rocks at his neighbour's house. The accused had a lengthy criminal record and suffered from a mental illness. It was a serious matter because the accused was under a probation order at the time prohibiting him from contact with his terrified neighbours. In reducing his sentence from the maximum of two years to one year of imprisonment, the court noted at page 429 that:

> "The principle, however, seems to be established that the prison system should not be used as a health institution. A psychiatric condition may warrant a shorter term than is usual but does not justify a term that goes beyond an acceptable range."

[66] The court went on to say:

> "Deterrence is not a pertinent factor in a case such as this; rehabilitation is. While deterrence generally indicates a longer prison term and rehabilitation a shorter prison term, rehabilitation in this case seems more readily available to the appellant in custody than out."

[67] In the case of *R.* v. *Patey*, [1999] N.J. No. 191, Mr. Patey was convicted of assault. He had been admitted to psychiatric institutions thirty-four times and had a very lengthy criminal record. In addition, he had a psychiatric history of antisocial personality disorder, alcohol and drug abuse, plus an unconfirmed diagnosis of paranoid schizophrenia. His effective sentence was four years with eighteen months credit for pre-sentence custody. Barry J. summed it up at paragraph 32 as follows:

> "I conclude the protection of society has to be the primary objective of sentencing in this case. Patey presents a continuing danger to the community as long as he continues in his past pattern of behaviour. I am satisfied, however, that society will not be protected merely by imprisoning Charles Patey without treatment and having him released upon the general public when his sentence is completed. If rehabilitation is at all possible, this will be the best way of ensuring the protection of the public. …"

[68] To conclude, rehabilitation is an important factor in any fit and proper sentence but it must be consistent with the objectives of denunciation, deterrence and separation or protection of society. In other words, a sentence must be fit and proper for the offence and the offender and cannot be lengthened merely to ensure that the offender receives adequate psychiatric treatment.

THE POSITION OF THE CROWN

[69] The Crown submits that a fit sentence is a seven-and-one-half year penitentiary term with a credit of two for one for pre-sentence custody, resulting in a sentence of five years. Crown and defence counsel have agreed that the pre-sentence custody should be credited on a two for one basis. While I usually prefer to hear evidence on the issue of credit for pre-sentence custody, I am prepared to accept this recommendation based on the fact that Justina Ellis spent almost half of her pre-sentence custody in some form of segregation. I also take into account the fact that there is no programming available for the intensive psychotherapy and dialectical behaviour therapy that she requires. She has been in pre-sentence custody for fifteen months and should receive thirty months credit.

[70] The Crown submits that this is a brutal beating of a defenceless child and involves a tremendous breach of trust. The Crown acknowledges significant mitigating

factors such as Ms. Ellis' guilty plea, her youth, remorse, tragic background and diagnosis of Fetal Alcohol Syndrome and Borderline Personality Disorder. However, the Crown's view is that the aggravating factors of the brutal beating of her child, her prior criminal history involving her first baby and other assaults, the breach of trust and her moderate to high risk for future violence, dictate a sentence that has significant deterrence, denunciation and separation from society both for the danger she poses and for her rehabilitation.

THE POSITION OF THE DEFENCE

[71] The position of defence counsel is that after the credit for pre-sentence custody, Justina Ellis should receive a penitentiary sentence of two years followed by three years of probation. While acknowledging the aggravating factors of the case, the defence submits that Justina Ellis has a reduced moral culpability because of her Fetal Alcohol Syndrome and Borderline Personality Disorder diagnosis.

[72] Counsel submits that Ms. Ellis is very immature and like a thirteen-year-old. She is unable to grasp the connection between cause and effect, which coupled with her impulsivity and the normal stresses of childbirth overwhelmed her completely. Counsel stresses that Ms. Ellis is not a monster who kills babies but rather a highly disabled and needy young woman who has good prospects for rehabilitation with abstinence and Dialectical Behaviour Therapy. Counsel submits that a rehabilitation and restorative approach should prevail based on Ms. Ellis aboriginal background and the diminished culpability based upon her significant disabilities.

[73] Defence counsel submits that the sentences for infanticide are more appropriate and that the absolute maximum sentence that Justina Ellis should receive is five years less her agreed upon credit for pre-sentence custody.

DECISION

Treatment versus Punishment

[74] My view of the expert evidence is important to understand this sentence decision. Each expert has his own sphere of expertise. Dr. Asante is an expert in the diagnosis of FAS and he made recommendations based on that diagnosis. Dr. Lohrasbe is a forensic psychiatrist with expertise in psychiatric diagnosis and risk assessment.

[75] Dr. Asante diagnosed Justina Ellis as FAS, partial, among other disorders. He was of the opinion that her violence was explained by the fact that she had an I.Q. that was “not overly low” coupled with her FAS. In other words, his opinion was that persons with lower I.Q.s coupled with FAS are not usually so violent. When Dr. Asante was advised of the Borderline Personality Disorder diagnosis of Dr. Lohrasbe, he agreed that the BPD diagnosis might also explain Ms. Ellis’ violence. It is also my understanding from Dr. Asante’s evidence that a diagnosis of FAS means brain damage has occurred from pre-natal alcohol exposure. The brain damage that has occurred is permanent. However, the functioning of the FAS person can be managed by long-term close supervision to empower the FAS person to control their behaviour. The thrust of Dr. Asante’s recommendations is that Justina Ellis will not benefit from harsh punishment. I understand this recommendation to mean that a long period of incarceration with the objective of deterrence has little if any impact on an offender with FAS. However, Dr.

Asante does recommend that Justina Ellis receive continued long-term psychiatry and mental health intervention and follow-up.

[76] I fully agree with his view that offenders with brain damage need special treatment and consideration in the prison system to ensure that they are not set up for failure nor subject to victimization. In my view, the Fraser Valley Institute in the federal penitentiary system provides the only structured living environment that may be able to accomplish these objectives.

[77] Dr. Lohrasbe stated that the violence of Justina Ellis towards her two infant children was “unlikely to be a coincidence”. He concluded that intoxication was “the immediate and crucial contributor to her violence”. Dr. Lohrasbe also stated that her BPD had a “central role in her violence”.

[78] I conclude that Dr. Asante and Dr. Lohrasbe are in complete agreement that Ms. Ellis’ cognitive deficits from FAS will require supervision and management for years. I also accept Dr. Lohrasbe’s opinion that intoxication or substance abuse and BPD play a central role in the violence of Justina Ellis. I am of the view that the facts support this opinion. Dr. Asante does not necessarily disagree with this view although his initial assessment was that her violence was caused by having a “not overly low” I.Q.

[79] Dr. Lohrasbe considers Justina Ellis to be a moderate to high risk for future violence for the foreseeable future. He does not consider her to be a hopeless case but rather amenable to treatment and rehabilitation if she can maintain abstinence from drugs and alcohol. It is significant that without abstinence, it is unlikely that any treatment strategy will be effective. I find Dr. Lohrasbe’s risk assessment very

persuasive, in particular, his opinion that it would be unrealistic to anticipate dramatic change in her potential for violence in the foreseeable future.

[80] Another feature of the proposed treatment strategy is that it must be intensive and because of her FAS and BPD, it must be lifelong. Clearly, Ms. Ellis should never be permitted to have children in her care unless the authorities are prepared to provide her with twenty-four hour supervision, seven days a week. Given her propensity for violence on adults, a child of any age is not safe and secure in her care. She should be discouraged from ever having children again. In the event she does have children, there are only two options; remove the child from her care or provide adult supervision twenty-four hours a day, seven days a week.

Aggravating Circumstances

[81] The killing of a child, not to mention one's own child, is a very aggravating circumstance. Children are helpless and dependent entirely on the care and nurturing of their parents. This offence involves the violent abuse of a child and a most serious breach of trust.

[82] It is also an aggravating factor that there was considerable violence used against Samara causing a complex fracture of her skull, eighteen rib fractures, as well as brain and eyeball injuries. There was no medical assistance sought at any time and when Samara stopped breathing, Ms. Ellis placed her in a garbage bag and concealed her body in a garbage can.

[83] It is also an aggravating feature of this crime that Ms. Ellis has a criminal record that involves a previous incident of serious child abuse against her first daughter which involved a skull fracture. That daughter is now in the care of her paternal grandparents.

[84] Her criminal record is not limited to violence against helpless children. She has been convicted of a vicious assault involving the biting of the cheek of a female person as well as an assault on her spouse, the father of Samara, by stabbing him in the leg with a knife.

Mitigating Circumstances

[85] The mitigating circumstances are extensive. She has pled guilty after the preliminary hearing. Although she was initially untruthful with the police and attempted to avoid detection of her crime, she quickly became cooperative with the police.

[86] A significant mitigating feature of her circumstances is that she suffers from Fetal Alcohol Syndrome and Borderline Personality Disorder. There is no doubt that these disorders reduce but do not eliminate her moral culpability.

[87] Her tragic background is a mitigating circumstance as well. She has suffered from parental neglect in childhood. She became an alcoholic at age twelve and has been involved in high risk behaviour including intravenous drug use and self-mutilation.

[88] She has also expressed remorse and accepted responsibility for her offence.

THE SENTENCE

[89] Denunciation of the killing of a child is certainly an important objective. Children are the most helpless victims in our society and deserve the utmost protection. Nevertheless, the enormity of this tragic killing of a helpless child cannot overwhelm the necessity of imposing a fit and fair sentence for Justina Ellis.

[90] Deterrence to others is important, but deterrence of Ms. Ellis is not a significant factor as it is doubtful that it has any impact because of her memory deficits.

[91] Rehabilitation is an important objective because it not only helps Ms. Ellis in refraining from her high risk activities, it also provides protection to society from her propensity for violence. Despite the fact that she has had a great deal of treatment and professional support, she still presents a danger to society even when appearing to cope with the stresses of child care.

[92] There is no dispute that a penitentiary sentence is appropriate for Ms. Ellis. I place great weight on the evidence of her probation officer who has firsthand knowledge of Justina Ellis since 2001. She strongly recommends a penitentiary sentence in the structured living environment at the Fraser Valley Institute which is exclusively for female offenders.

[93] The defence proposal of two years penitentiary with three years of probation is not appropriate in this case. I acknowledge that probation may be appropriate for lesser offences where there is a low or moderate risk of violence. However, probation, to be effective, must be combined with treatment programs. The Yukon does not have a structured living environment that provides intensive treatment for adult offenders with FAS.

[94] If this was a first offence of child violence, Ms. Ellis did not have a record of violence to others and she was not a moderate to high risk of future violence, I would consider a four- to five-year sentence to be appropriate. However, the risk of violence that she presents and the brutality inflicted on her child requires both denunciation, deterrence to others and separation with intensive specialized treatment for her own protection and the protection of society. I find a term of six years in the penitentiary to be a fit and proper sentence. Applying a credit of thirty months for pre-sentence custody, I

sentence Justina Ellis to three and one-half years imprisonment. I make a strong recommendation that she receive the individual psychotherapy and Dialectical Behaviour Therapy recommended by Dr. Lohrasbe which may be provided in the structured living environment at the Fraser Valley Institute.

[95] As Justina Ellis will in all likelihood return to the Yukon when parole authorities determine it is appropriate, it is incumbent on the Government of Yukon to provide a structured living environment for adult FAS offenders who require long-term supervision and treatment. If such a structured living environment is not provided, the evidence in this case is that the benefit of the initial years of treatment will be lost. That outcome would only compound this tragedy. There is no cure for Ms. Ellis. The protection of society will require long-term treatment and support for Justina Ellis.

[96] The Victim Fine Surcharge is waived. I make an order that Ms. Ellis provide a DNA sample. I make a weapons prohibition order under section 109(2) of the *Criminal Code.*

VEALE J.