

STATE OF MINNESOTA

COPY

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

State of Minnesota,

SENTENCE

Plaintiff,

-vs-

File No. 96-05000

BRIAN PATRICK MERKT

FILED

Defendant.

JUL 02 1997

SCOTT COUNTY COURTS.

The above-entitled matter came duly on for  
Hearing before the Honorable Thomas R. Howe, one of the  
Judges of the above-named Court, on the 13th day of June  
1997, at the Scott County Courthouse, Shakopee,  
Minnesota.

## A P P E A R A N C E S

THOMAS HARBINSON and NEIL NELSON, Office of the  
County Attorney, County of Scott, appeared on behalf of  
the Plaintiff.

EARL GRAY, Attorney at Law, 386 North Wabasha,  
Suite 654, St. Paul, Minnesota appeared on behalf of the  
Defendant.

BRIAN PATRICK MERKT, the Defendant, also  
appeared.

\* \* \* \*

STATE OF MINNESOTA, COUNTY OF SCOTT  
Certified to be a true and correct copy of the  
original on file and of record in my office.  
GREGORY M. ESS  
Court Administrator

July 30 1997 By: Darlene Munk  
Deputy

1 THE COURT: Good morning, everyone. We are  
2 here this morning for the sentencing in the case of state  
3 of Minnesota versus Brian Patrick Merkt, and before we  
4 begin, I want to just say to all of you, many of whom are  
5 now familiar looking faces who have been here throughout  
6 the course of the trial on and off, that I want to  
7 commend you and compliment you for your demeanor and your  
8 behavior at and during the time of the trial. It was a  
9 difficult time for all of you, as it was for all of us  
10 involved in this proceeding, and you conducted yourselves  
11 in a very proper manner and in an appropriate manner.

12 I'm going to ask again today -- we have come  
13 here today. It's an emotional moment for many people,  
14 and it's going to be a difficult moment for many people  
15 who are here. I'm going to ask again that you do as what  
16 you did before; that is, that you maintain the dignity  
17 and the decorum of the courtroom and your own demeanor,  
18 and again I want to thank you for the way you have done  
19 that in the past. I know again that having only stated  
20 that to you now that shall continue as we go through this  
21 proceeding this morning.

22 Many of you have written letters. I've got  
23 this stack of letters, all of which I have read. This is  
24 a group of letters from the Herdahl, Bussiere family and  
25 friends and relatives, and I have read them all. Then we

1 also have this stack of letters, and these are people who  
2 are friends, relatives, family members of Brian Merkt. I  
3 have read all those letters, as well. You express  
4 yourselves well in those letters, and I understand this  
5 morning that there will be some oral statements made also  
6 here at this point.

7 The purpose of the sentencing is to give both  
8 the state and the defense an opportunity to set forth  
9 their respective positions as to what would be an  
10 appropriate sentence given the specific conviction that's  
11 involved. And so we are going to be focusing then this  
12 morning on the conviction which that jury handed down --  
13 the second-degree murder -- and after all those  
14 statements have been completed, oral statements by those  
15 who wish to make one and statements by the attorneys,  
16 then I'll proceed with the sentencing.

17 So, if we are ready to begin we will start  
18 first with the state's presentation, and we will turn it  
19 over to Mr. Harbinson.

20 MR. HARBINSON: Thank you, Your Honor.

21 Your Honor, I would ask at this time that the  
22 record reflect I'm going to read off some names of family  
23 members that are present, and I'd like the record to  
24 reflect these family members are present, Your Honor.

25 Tina Herdahl, who's the mother of MacKenzie;



1 Katherine Herdahl, the maternal grandmother; Phillip and  
2 Doris Herdahl, the maternal great grandparents; Andrea  
3 Mendez, the aunt; Amanda Herdahl, another aunt, Your  
4 Honor; Janelle Shoder, a cousin; Sharon Johnson, a great  
5 aunt; Jessica Nylo, a cousin; Anne Raehsler, the paternal  
6 grandmother; Sean Bussiere, MacKenzie's father; Shane  
7 Bussiere, an aunt of MacKenzie; Doug Herdahl, the  
8 maternal grandfather; and Linda Hendrickson, who's a  
9 friend of the family.

10 Your Honor, at this time I would ask pursuant  
11 to Minnesota Statute 611A, that Tina Herdahl give her  
12 Victim Impact Statement to the court, Your Honor.

13 THE COURT: All right. Ms. Herdahl?

14 MS. HERDAHL: I have two letters to read  
15 today. One is from Nicole and one is from myself.  
16 Nicole writes, "Dear Judge: Brian should say in jail  
17 forever until he dies. I miss my Mommy and MacKenzie very  
18 much and judge, please keep Brian in jail so he won't  
19 hurt any other people because I like everybody. From  
20 Nicole."

21 And then this is mine. I'm going to start out  
22 by saying nothing I write or say will ever bring back  
23 MacKenzie. There will never be someone who can put  
24 themselves in my shoes and even imagine what kind of hell  
25 I have been through.



1           This past year has been a living nightmare, and  
2           I wish it would just end. I am a so-called victim but I  
3           don't think of myself as one. My daughter, MacKenzie,  
4           was a victim. She is the one who suffered the most from  
5           Brian's cruel acts. Because of Brian, I can only imagine  
6           what MacKenzie would look like today. I can only imagine  
7           what she would have been as an adult. Because of Brian,  
8           I will never know.

9           I went from being a happy, healthy person to  
10          unhappy and very lonely. I can't concentrate on one  
11          thing at a time. I can't be by myself for long periods  
12          because I get scared. I start thinking about MacKenzie  
13          and what Brian did to her. I think about how much I  
14          really do miss my little 'Kenzie. There's just too many  
15          emotional things I have had to live with every single day  
16          so I only mention some of them that come to mind as I sit  
17          and write.

18          I have to make myself get up every morning. I  
19          used to like getting up every day. I had two smiling  
20          little faces to see. Little MacKenzie used to come in  
21          and open my eyes with her little fingers and say, "Mommy,  
22          are you sleeping?" We had lots of hugs and puppy kisses  
23          from each other.

24          I used to make breakfast every morning. Nicole  
25          had cereal; 'Kenzie, eggs and toast. They argued over

1        which chair they were going to sit in or which Tippy Cup  
2        they would get to drink from, but things eventually  
3        worked out. We always enjoyed our time together.

4                Today I don't see a point in getting out of  
5        bed. I remember playing the quiet game while riding in  
6        the car together. 'Kenzie always wanted to play. Of  
7        course, I always lost because the girls then always got a  
8        treat. Today when I ride in the car, I would make quiet  
9        games because there are no giggly little girls in the  
10       back seat. MacKenzie always used to make me laugh by  
11       doing something silly. Today I don't laugh much.  
12       MacKenzie had a cute little laugh, a special little smile  
13       and a bubbly little voice. Her personality was one of a  
14       kind.

15               Today I can't remember all those things because  
16       my mind has completely blocked it out. It would be too  
17       painful for me to remember. I have pictures and videos  
18       but that's it. I hope that some day I can regain the  
19       memory of my precious little 'Kenzie.

20               I have been a burden on my family and friends.  
21       They have all put me first in their lives. They have  
22       given me hope, strength and courage. I just wish that I  
23       was able to give them the same back, but I don't have  
24       much to give anymore. I don't like meeting people or  
25       telling things to people. My trust for people is

1 completely gone. I loved and trusted Brian at one time.  
2 I trusted him with my child's life and now she is not  
3 here. I trusted Brian and I was betrayed. I don't know  
4 when I'll ever be able to trust again. Brian took that  
5 all away.

6 I'm becoming rundown and out of energy. I'm  
7 kind of tired of sticking up for myself. I'm sick of  
8 trying to prove to everybody that I didn't know Brian was  
9 so mean. I have been ripped apart from head to toe by  
10 attorneys, social workers, family, friends and  
11 psychologists. If I knew Brian was so mean, I would  
12 never have been with him. I'm tired of being screamed  
13 at, lied to, and really sick of people not believing me.  
14 I have been forced to remember every last detail of my  
15 entire life when it's hard enough for me to remember what  
16 I did yesterday. If I couldn't remember something or got  
17 something mixed up, I was called a liar. Does anyone  
18 know how degrading it is to be yelled at and called a  
19 liar? I have been made to look like a horrible parent  
20 because I let Brian do this to my girls. I'm not the  
21 horrible parent. Brian is the horrible child murderer,  
22 and I couldn't have known he was going to do this. I know  
23 I wasn't a horrible parent, and you know that, too. You  
24 can't tell me you are a perfect parent because there's no  
25 such thing. I'm still trying to prove to this day that



1 I'm not the criminal. Brian is.

2 I'm tired of receiving bills from hospitals,  
3 clinics and transportation. I have bill collectors  
4 calling my house, sending me nasty letters. I received a  
5 letter once saying, "On March 9, 1996, Life Link Three  
6 provided transportation and hope you are satisfied with  
7 their services. From all of us at Life Link Three, we  
8 hope MacKenzie enjoyed a speedy recovery and is now  
9 feeling much better." Next paragraph it says that I owe  
10 them \$2800, and it's past due.

11 I watched my best friend drink herself to death  
12 after MacKenzie died. She couldn't live with the things  
13 she heard that Brian did to MacKenzie and couldn't handle  
14 all the details. She felt guilty for not being there for  
15 me and the girls. She was angry at herself for not being  
16 able to save MacKenzie. My best friend died in an  
17 alcohol-related car accident last May.

18 I have horrifying nightmares and horrible  
19 flashbacks of MacKenzie lying there on the hospital bed  
20 with hundreds of different tubes running in and out,  
21 lying there with no smiles, no laughs, not even tears.  
22 Helpless. I had to make the decision to really end her  
23 life, and I always say I don't wish that feeling upon my  
24 worst enemy, but I do. I wish that Brian only knew what  
25 love was and how horrible a feeling it is to watch your

1 child lay there brain dead and helpless.

2 I guess what kills me the most is I do have  
3 Nicole left, and I'm still fighting to get her back. I  
4 have spent every penny I have on lawyers. Nicole has  
5 been through a hell of a lot for her age and she is  
6 suffering bad and she wants -- all she wants to do is be  
7 with Mommy. Just ask her.

8 Nicole not only lost one sister. She lost two  
9 out of this whole thing. I have lost two children. I  
10 had Brian's baby last September, and I placed her for  
11 adoption. It would have been selfish for me to keep  
12 her. She needs a fair chance at life. And I worry about  
13 Brian coming to find Nicole and even the baby. Brian is  
14 a horrible person, and you can't trust what he'll do when  
15 he gets out of prison. Nicole is already worried about  
16 him getting out. Nicole is deathly scared of Brian.  
17 This is only some of the suffering I have been through as  
18 a result of Brian. I couldn't possibly tell you it all.

19 The court asked me what I thought was a fair  
20 sentence for Brian and his crime. I really don't know  
21 what to tell you because no matter how much time he gets,  
22 it's not enough. He should sit in that prison and  
23 everything many years for every year that my MacKenzie  
24 cannot get to live her life. Brian is a horrible person  
25 and a slap on the hand isn't going change him. You know

1 he'll do it again. They all do. Whatever you end up  
2 giving him, whether it's 12 years or 25 years, it's not  
3 enough for taking away a life that is so priceless,  
4 precious, and so dear to me.

5 This kind of behavior is not acceptable in this  
6 world. Why show you can actually get away with it?  
7 Nicole and I have to suffer for the rest of our lives.  
8 Why shouldn't Brian?

9 I'm going to close with this. I hope that  
10 Brian thinks of what he did to my sweet little 'Kenzie  
11 every day and his guilt eats him alive. I have enclosed  
12 a picture of myself and what I do. Quite often, pictures  
13 tell a thousand words. Sincerely, Justina Beth Herdahl,  
14 MacKenzie's mother.

15 THE COURT: All right. Thank you.

16 MR. HARBINSON: Your Honor, we have two other  
17 persons that are going to give Victim Impact Statements.  
18 The next individual will be Katherine Herdahl, the  
19 maternal grandmother of MacKenzie.

20 KATHERINE HERDAHL: On March 9, 1996, around  
21 4:15, the phone rang. It's a call that any grandparents,  
22 parents or anyone can never forget happened. It's Tina.  
23 I have to get to Minneapolis Children's Hospital right  
24 away. It's MacKenzie. She has been air-lifted there and  
25 we don't know if she is going to make it.



1           One minute you're on your way home from work  
2           thinking about what you want to do that evening. The  
3           next, at the hospital pacing for hours, watching, praying  
4           as a lifeless child just lays there not moving, crying.  
5           There is nothing. She just lies there with no smiles,  
6           tears, laughs, movement. Just a lifeless little body  
7           hooked up to a lot of machines.

8           On Sunday, March 10, it's time to make a  
9           decision. The doctors have told us MacKenzie's brain  
10          dead and she is not going to come around. We gather  
11          around her bed, say our last good-byes, tell her how much  
12          we love her and then it's time, and she is gone. She  
13          will never laugh, smile, give hugs and kisses, tell her  
14          Mommy how much she loves her, play with her sister, talk  
15          to grandma. We'll never be able to hold her ever again.

16          Next week is like a bad dram. There's funeral  
17          arrangements, flowers, food, people to call, no sleep for  
18          anyone. Finally we are over the funeral. We have also  
19          had news people coming to our house. Tina and Nicole  
20          come to live with us. They need a place to go so they  
21          come to our home. We all try to adapt. Losing  
22          MacKenzie, having our lives turned upside down. Work is  
23          missed, schedules are changed. I need to adjust.  
24          Amanda, Tina's sister, needs to adjust, and it still has  
25          affected her today.

1           Things start going a little better, then we get  
2 the call that Brian is out on bail. Now, what can happen  
3 next? Next few weeks, Nicole's paternal grandparents  
4 file a custody suit to take Nicole away from Tina. After  
5 several days in court, it happens. Nicole is placed  
6 there. We have no visits unless they are supervised.  
7 Don't talk to Nicole about MacKenzie. We have lost  
8 another child from this. No more overnight visits.  
9 Fourth of July, MacKenzie's birthday. We visit her at  
10 the cemetery. We miss Nicole's first day of school, her  
11 birthday, Halloween, Thanksgiving, Christmas, New Year's,  
12 Valentine's Day and Easter and visits to great grandma's  
13 house to see all the cousins they loved to play with.

14           It's fall now. Tina has a baby. She puts that  
15 baby up for adoption. She needs to get her life back  
16 together. All -- now we have a third loss. All these  
17 losses due to one person, Brian Merkt, and what he did on  
18 March 9.

19           It has been over a year now, but it seems like  
20 just yesterday. Going through the defendant's testimony  
21 at the trial, attorneys questioning doctors, watching  
22 Brian free to come and go as he pleases. The hours  
23 waiting for the verdict from the jury. Are we prepared  
24 for what we are about to hear? I don't think anyone  
25 could be. Did that jury come up with the right verdict?

1       Only MacKenzie and God can answer that. She will never  
2       be able to tell us. We can visit her and talk to her in  
3       a peaceful country cemetery and wonder what would she be  
4       like today?

5               So many lives have been affected by this one  
6       senseless act. Ours will never be the same. Brian not  
7       only took the life of our little MacKenzie, but he also  
8       took everyone who knew and loved her. There's not a long  
9       enough sentence that Brian could get for what he has done  
10      and all we have now are memories. We will never have  
11      MacKenzie back. Brian doesn't deserve his freedom back.

12             Think about MacKenzie, Brian, as you have a lot  
13      of time on your hands. Think about the baby you could  
14      have had with Tina. Think about how much you miss your  
15      family, only some day you can see yours again. MacKenzie  
16      can never come to see us again. We just have memories.

17             THE COURT: Thank you.

18             MR. HARBINSON: Your Honor, at this time the  
19      last person who will give a Victim Impact Statement is  
20      Anne Raehsler, the paternal grandmother of MacKenzie.

21             MS. RAEHSLER: Your Honor, before I give my  
22      impact statement, I have a picture of MacKenzie that I  
23      would like to give to you, and I don't know whether you  
24      would think it proper or not, but I would like it given  
25      to Mr. Merkt. I would like him to be reminded of what he



1 destroyed. This is a beautiful child.

2 THE COURT: You can hand it to Mr. Harbinson at  
3 this point, and he'll take care of it later.

4 Go ahead with your statement.

5 MS. RAEHSLER: On March 9, 1996, Brian Merkt  
6 violently took MacKenzie's life. He took her away from  
7 us forever. In her three and a half years, she brought  
8 so much joy to us with her smiles and her laughter, her  
9 playfulness and her love. Now we will forever be without  
10 that joy. Brian Merkt did that. He took more than just  
11 MacKenzie's life. He took a part of our lives, also.

12 We will never be able to see her grow into the  
13 person she could have been. We will never see her go to  
14 school. What would she have been like on a first day of  
15 kindergarten? She was bright and loving and full of  
16 life. I don't think she would have been timid about  
17 going. She probably would have been very excited.  
18 That's something we will never know because Brian Merkt  
19 took that away from us, too. We will never get to  
20 experience any of the special days in MacKenzie's life  
21 with her, her years in school, the special parties for  
22 her birthday, the holidays, watching her grow into the  
23 beautiful young woman that she could have been. We won't  
24 have any of that because of Brian Merkt.

25 I feel her loss every minute of every day. But

1 more than that, I see what Brian Merkt has done to Nicole  
2 more than anyone else. Until the day Brian Merkt  
3 murdered her sister, Nicole had never been separated from  
4 MacKenzie. They had not only been sisters; they were  
5 best friends. They were constant companions. They were  
6 together always. Now, Nicole is alone. She lives with  
7 us, so I see what Brian Merkt has done to Nicole, also.  
8 I see and I hear her nightmares. I see the loneliness  
9 when she says to me, "Grandma, I wish Brian didn't kill  
10 MacKenzie. I wish she was alive again." I see how she  
11 plays pretending MacKenzie is still there. I also see  
12 her cry because she knows that MacKenzie is gone  
13 forever. I can't explain forever to Nicole I can't take  
14 away the fear that Brian Merkt has caused in her. I can  
15 try to help her understand that Brian can't hurt her  
16 anymore because he is in jail. But I can't tell her that  
17 Brian Merkt will be in jail forever. I wish that I  
18 could. Brian Merkt's sentence should be the same  
19 sentence that he has forced on all of us. Forever.

20 THE COURT: Thank you, Ms. Raehsler.

21 Mr. Harbinson?

22 MR. HARBINSON: Your Honor, that concludes the  
23 Victim Impact Statements under Minnesota statutes the  
24 state is obligated to present to the court.

25 Your Honor, we have presented to you a

1 memorandum on the state's request for a sentence, and I'm  
2 not going to repeat everything that's contained in that  
3 memorandum because I don't believe it's necessary to do  
4 so.

5 I would note, Your Honor, that as the court  
6 full well knows, the standard of review for an upward  
7 departure is whether or not it's an abuse of discretion  
8 on the part of the trial court, and that's a very high  
9 standard for someone challenging an upward departure  
10 indeed if someone is to. Abuse of discretion is very  
11 high. The appellate court will normally give a great  
12 deal of latitude to this court if this court chooses to  
13 do an upward departure.

14 Your Honor, the state is requesting a sentence  
15 of 40 years' imprisonment to the Commissioner of  
16 Corrections with two-third's of that sentence as an  
17 executed sentence and a maximum supervised release term  
18 for the remaining third of that sentence. That would be  
19 a 480-month sentence to the Commissioner of Corrections,  
20 Your Honor.

21 Your Honor, because a portion of the sentence  
22 is supervised release, we are also asking as part of the  
23 sentence that the defendant be directed during the time  
24 he's on supervised release to have no unsupervised  
25 contact with children under the age of 16. We would also



1 request -- and this would include the time the defendant  
2 is incarcerated, Your Honor -- that he have no contact  
3 with Nicole Bussiere or members of the Bussiere or  
4 Herdahl families.

5 In addition, we would ask the court to adopt as  
6 part of the sentence the recommendation of the probation  
7 agent and that is restitution in an amount of \$4,582.50  
8 to the Minnesota Crime Victim Reparation Board. We have  
9 addressed that in the memorandum. I'm not going to go  
10 into the reasons that support that, but there's also been  
11 an affidavit submitted on that, and we'll stand on the  
12 memorandum we submitted to the court.

13 In addition, Your Honor, we are asking that the  
14 defendant pay the out-of-pocket costs for Nicole  
15 Bussiere's continued therapy as it specifically relates  
16 to the current offense. And just briefly on that, Your  
17 Honor, again we have submitted an affidavit from Dr.  
18 Sandra Hewitt. Defense counsel and the court received as  
19 part of the discovery process extensive therapy notes  
20 from Dr. Hewitt on the therapy she gave Nicole. The  
21 defense has argued that some of Nicole's therapy is for  
22 reasons unrelated to the murder and thus it's  
23 inappropriate for the state to request that the  
24 out-of-pocket costs for Nicole's therapy be included as  
25 part of the sentence. Your Honor, I don't think that's

1 reasonable. I think the principle that really applies is  
2 the same principle that would apply in tort law, what in  
3 law school we called the thin skull rule: If a victim or  
4 an eyewitness to a murder is particularly vulnerable  
5 because of past life events. But for being an earwitness  
6 to her sister's murder, she would not have needed therapy  
7 or would not have needed therapy as extensive as this. It  
8 seems to me that it's appropriate for the defendant to  
9 take the victim or the eyewitness -- in this case,  
10 Nicky -- as he finds her, and he should be required to  
11 pay the full out-of-pocket expenses. The reason Nicky  
12 was sent to therapy was because she was present in the  
13 house when her sister was murdered, and the fact that she  
14 has other problems doesn't take away from the fact that  
15 but for her being an earwitness to that incident, she  
16 wouldn't have needed therapy.

17 We are also asking you to require that the  
18 defendant provide a DNA sample as required by Minnesota  
19 statute. We have addressed that in our memo, so I'm not  
20 going to go into our reasons for that, Your Honor, and  
21 also that the defendant pay the required assessment and  
22 surcharge fees as required by statute.

23 Just briefly, Your Honor to address some points  
24 made by counsel for defendant. Counsel has stated that  
25 Womack, Lubitz and Larkins cases stand for the

1 proposition that you can't use the facts underlying the  
2 offense that the jury did not convict the defendant on to  
3 aggravate sentence in this case for the counts the  
4 defendant was convicted on, citing the proposition that  
5 things like the hymenal tear, past pattern injuries or  
6 the other items that are included in the facts of Counts  
7 I and II cannot be used by this court as aggravating  
8 factors in this case.

9 Your Honor, we don't believe that those cases  
10 stand for that proposition. Womack, Lubitz and Larkins  
11 are all plea bargain cases. They are cases where the  
12 state agreed as part of the plea bargain to a  
13 lesser-included offense and as part of the plea bargain,  
14 the facts that underlie the counts that were dismissed  
15 weren't included as part of the plea bargain. So, it was  
16 not appropriate to include those facts as underlying  
17 facts for an upward departure.

18 In this case, the jury may have found the  
19 defendant not guilty on Count I not because they rejected  
20 that MacKenzie had hymenal tears, but they may have had  
21 other reasons that had nothing to do with the hymenal  
22 tears for their finding the defendant not guilty on Count  
23 I.

24 Likewise, on Count II, the jury may have  
25 rejected that count not because they didn't accept the



1 facts that underlaid the past pattern of injuries, but  
2 for other reasons that had nothing to do with the facts  
3 that constitute the past pattern of injuries.

4 Your Honor, there's a case that I want to cite  
5 to the court, State v. Winchell, at 363 N.W.2d 747 -- and  
6 I'll provide counsel with a copy -- where the  
7 appellate -- and maybe he has one already, Your Honor,  
8 just to make sure -- where the state Supreme Court stated  
9 that the fact the defendant pled not guilty to a lesser  
10 offense doesn't bind the court to his version of the  
11 facts. The fact that Mr. Merkt denies causing the hymenal  
12 tears to MacKenzie Bussiere, denies the past pattern  
13 injuries to MacKenzie Bussiere, does not bind this court  
14 as the court said in State v. Winchell to his version of  
15 the facts.

16 For instance, just to cite one of the items we  
17 are asking for an upward departure, and I'm not going to  
18 go through them all, Your Honor. They are in our  
19 memorandum, but failure to obtain medical treatment. We  
20 have cited that as a basis for an upward departure. The  
21 defendant says it was an accident. She fell down the  
22 stairs and when he became aware she needed medical  
23 treatment, he got it. Well, Your Honor, the jury  
24 convicted him of murder. They rejected the accident  
25 scenario that the defendant gave. You are not now at the

1 time of sentencing obligated to only take the defendant's  
2 scenario that this was an accident. The jury has found  
3 him guilty of second-degree murder and since the jury has  
4 found him guilty of second-degree murder, it is only  
5 reasonable to conclude that the defendant failed to  
6 obtain medical treatment promptly for MacKenzie after he  
7 inflicted the injuries that constitute the counts for  
8 which he was convicted. And the same thing applies, Your  
9 Honor, for abuse of position of authority and trust, and  
10 the behavior that constitutes particular cruelty.

11 In addition, Your Honor, one other thing with  
12 reference to the bases for the upward departure that we  
13 have cited, and that is impact on family and members of  
14 the family of the victim. The defense has stated that  
15 that is an improper factor; that that's something that  
16 happens in every murder. However, Your Honor, in State  
17 v. Choklos, a criminal vehicular homicide case that Your  
18 Honor sentenced an individual on several years ago after  
19 a jury trial. There the appellate court upheld an upward  
20 durational departure on grounds that the conduct of the  
21 defendant significantly affected the victim's daughter by  
22 depriving her of a mother. So, that is valid. And again  
23 I'll provide counsel with a copy. I don't know if he has  
24 it. That is a valid basis for an upward departure under  
25 our case law, Your Honor.

1           Your Honor, in addition, defense counsel has  
2       stated that vulnerability of the victim does not apply  
3       here because it was a part of the elements of the  
4       underlying charge for which defendant was convicted. The  
5       vulnerability doesn't have to be due solely to age.  
6       Vulnerability can be due to taking advantage of a  
7       position of trust, which defendant clearly had. He  
8       himself testified that the mother left him that day with  
9       the children as the caretaker. That's the testimony  
10      before this court. The defendant himself testified that  
11      the children called him dad. He was clearly in a  
12      position of trust, clearly in a caretaker role, and that  
13      made the three-year-old victim particularly vulnerable,  
14      especially since this murder occurred in her own home.

15           In addition, Your Honor, I'd note in State v.  
16      Stumm, there the jury found the defendant guilty on what  
17      could be called a lesser-included count, and there the  
18      appellate court upheld the trial judge using factors or  
19      facts that were part of the record, that were part of the  
20      counts that the jury found the defendant not guilty on.

21           Just briefly, Your Honor, defendant has also  
22      argued that MacKenzie -- that we are not aware if  
23      MacKenzie was conscious or not during the time the  
24      third-degree assault occurred and so the victim's terror  
25      is not a valid basis for an upward departure. Your



1 Honor, clearly the multiple injuries inflicted on  
2 MacKenzie, the abrasions -- and I'm not going to go into  
3 all those injuries; you have heard the testimony -- but  
4 the multiple injuries inflicted on her show she was  
5 conscious at the beginning of this incident. The  
6 injuries to her eyelid and to her right face and the rug  
7 burn injuries about her face and on her arms clearly show  
8 to the extent that a three-year-old can struggle, she did  
9 struggle. She was conscious, and victim terror, which  
10 she clearly had to have felt, is a proper basis for an  
11 upward departure, Your Honor.

12 Your Honor, the defense has also argued that  
13 because the defendant has maintained his innocence  
14 throughout these proceedings, the state should not be  
15 permitted to, in effect, trump the jury's acquittal of  
16 the defendant on Counts I and II. That, in fact, is what  
17 the state's request for an upward departure is. Your  
18 Honor, I would cite State v. Stumm again to rebut that.

19 In that case -- and it was also a child abuse  
20 case, Your Honor -- the jury convicted on a lesser  
21 included, and the appellate court upheld an upward  
22 departure. When the jury makes a determination about  
23 whether the defendant is guilty or not, they are not to  
24 allow their sympathy to affect their judgment and so what  
25 the possible sentence should be or should not be is not