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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

STRAFFORD COUNTY

SEPTEMBER 17, 2004

STATE OF NEW HAMPSHIRE

v.

CHAD EVANS

00-S-888, 891, 893, 895, 896, 934, 935

SENTENCE REVIEW HEARING

BEFORE:

Honorable Patricia C. Coffey, Acting Chair
Honorable Robert E.K. Morrill
Honorable Gary E. Hicks

Friday, September 17, 2004

New Hampshire State Prison
281 North State Street
Concord, New Hampshire

APPEARANCES:

FOR THE STATE:

David Ruoff, Assistant Attorney General
Department of Justice
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Concord, New Hampshire

FOR THE DEFENDANT:

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Appellate Defender Program
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Let me talk about the aggravating sentencing factors in this case, and why the court did not give appropriate weight to the aggravating factors in this case. When assessing what is a just sentence in a case under our law, the State is obligated, I mean the court is obligated to look at all the factors and apportion the weight to each one. In this case we had a very young victim. A special class of victims that are protected by statute. She was only 20-22 months old at the time. A very young little girl who could barely speak at the time. He was an authority over her. That is a very significant factor here. This is not a bar room fight as some of those cases that the trial court cited to; or a robbery out on the side of a dark road in a park in Portsmouth, as the court cited to. It was the death of a very young, innocent little girl. It was severe intimidation and abuse. He threw her into walls. He threw her into a closet. Would jerk her arms around, according to the mother of the victim, maybe about three times a week when she would cry. He held her head under a faucet to keep her from crying. He would pick her up the the head, by the face when she would cry or he would get mad. He would put his hand around her throat and cause her

to cough because she couldn't breathe. He would call her an idiot, a retard, bitch. When people would ask about the injuries that they saw to Cassidy in the months before her death, the defendant lied. And he got others to buy into the lie. There was one point in the months before her death one witness said it looked like this little girl had a handprint on her face from the bruises. There is another witness who said it looked like her face was dirty. In response to similar claims like that, the defendant and her mother made up a story where the victim was playing on a trampoline and went to fall off and the defendant reached over and grabbed her by the face. He said that she was clumsy; that she would walk around and fall unexpectedly and not put her hands up and would hit her head on the coffee table causing these mysterious bruises to her face. When Cassidy Bortner, her autopsy was conducted, they found fractures to her left arm and to her right arm, her right hand, her left leg. Her left leg had an older fracture with a newer fracture over it. So with those injuries in mind, and the evidence that those injuries were inflicted within months, a month or two of the death, a time when the defendant was living with the victim

and the victim's mother, it is no wonder that she would appear clumsy and would fall without putting her arms out and that she had trouble walking because of the pain associated with this. Now, the defendant was convicted of endangering the welfare of a child in which the State alleged that he had caused the broken bones to the victim and those injuries to her face.

When she died, more recent injuries included several bruises to the face and head. Bruises all over the abdomen, bruises on the lower extremities as well. As the State pointed out in their argument this little girl was bruised from head to toe. And there is no doubt that in the last months of her life, she lived every day in pain. There was also evidence that due to the defendant's ongoing intimidation and abuse of Cassidy that she lived in fear of him. One witness related that when she was over at their apartment one time the defendant walked into a room and she cowered. She looked like a feral cat, afraid of him.

The sentencing court said that no child deserves to die, no child deserves to live the silent life of pain that Cassidy suffered, if we, adults, are doing our best to protect them. The State agrees with that

sentiment, but disagrees with the sentence in this case. Not only did the defendant lie about the conduct in this case, not only has he never admitted or shown any remorse with connection of the death or the murder that he caused in this case, he was on probation at the time for abusing his ex-wife, Tristan. He had already gone through batterer's counseling. So he had been through the criminal justice system at least once as a result of his violence and it did not work. He was also convicted of assaulting Amanda Bortner, the mother of the victim in this case, by putting his hands around her throat and he was convicted of multiple counts, along with the second degree murder. There is no evidence that Mr. Kamaridis, the case that the court cited, was convicted of anything other than the second degree murder. One thing that you will not find in the court's discussion of what an appropriate sentence here is, although it is fully appropriate for a court to consider, especially in this case, is deterrence. It is no understatement that this case shocked the consciousness of that community in which that little girl was killed. Shocked the conscience. Because as the case unfolded and the facts came to light and the

evidence and testimonies testified, it told a story of a worst case scenario for the end of the life of a 22 month old little girl. A little girl that lived in fear and pain with no one to turn to. It is difficult to imagine a worse fate for a 22 month old girl who was otherwise healthy. Shocked the conscience on those facts because so many people failed Kassidy Bortner. Her mother failed her, the people around her failed her and the defendant did everything he could to keep her conditions from being disclosed. He convinced the mother not to take her to the doctor until the bruises went away. He convinced her not to put her into daycare and to delay it, and instead hid Kassidy from her grandparents, from his own parents and tried to hide her from Jeff Marshall and Jennifer Connelly. So in cases like that when you have such egregious facts stemming from months of abuse and a brutal assault, citizens look to the court for protection. We all know that citizens look to the court for protection from the likes of me, from the State in protecting their individual rights, but the other function that the court has is to protect the public from people who are very dangerous; those that have a demonstrated history of violence. People that have done something so bad,

make the difficult decision in a sentencing under these circumstances. She also did an extensive analysis of prior sentences. That is in the record, but it is the case that over 80 percent of the sentences for second degree murder were a 30 year minimum or less. So given that the standards that this body uses in changing a sentence under Rule 22(a), it is not a like sentence in comparison to others. It is our position that the State has not provided to you anything of significance that is new and different from the information that the trial judge used and had available. I accept that the emotions that Mr. Ruoff raises here, they were raised extraordinarily effectively at the sentencing hearing in April when that occurred. But the facts are the same, the emotions are the same. Nothing has been changed. The State references cases but the judge was aware of each of those cases and as a matter of her use of her discretion chose to balance issues that are to be addressed in sentencing. Not only did the judge have the facts, the judge used the law in making a determination as to her sentence, referencing Part 1, Article 18 of the Constitution which talks about proportionate sentencing and not treating cases that

are different in name in a similar way. The State is functionally proposing a first degree murder sentence. What Part 1, Article 18 of our State Constitution says is that that's not proper. The judge addressed that, was aware of that, and balanced things there.

I think that it is also a circumstance that we have, and I know that the Board's reviewed the sentence report, but we have someone who has been involved, and now I'm talking about Chad, in a horrific event but has some extraordinary strengths and I think the judge was able to see that, whether it be the Union Leader award that he got for saving three people, whether it be his charitable work, whether it be his public service on the School Board, whether it be the community work that he did, that is something that is absent in any other case in which I've been a part of for a serious felony offense.

I want to reference, because the State referenced some cases, and under your rules 20 (h) I believe it is, you can do comparisons, statistical comparisons to other cases. The case of Barry Lindy which is a 2004 case – he was convicted of second degree murder for the death of a child. It was a negotiated plea with Simon Brown, the same person

who made that extraordinary closing argument for Judge Nadeau for the sentencing. It was the death of a child who was two years old. The sentence was 30 years to life. What was extraordinary about that case? Mr. Lindy was on parole at that time for prior felony convictions for shaking a two month old baby causing permanent brain injury. He served six years on that prison sentence. He also was convicted of a 1991 assault and an unrelated kidnapping and attempted sexual assault of a ten year old girl in 1992. Mr. Lindy who roughly got a similar sentence had a prior felony record, a prior record of abuse and a prior record of sexual assault. I don't see how the State can agree to a 30 year sentence in that case and then call a 28 year sentence light. It is our position that that 30 year sentence was in the ball park of what second degree murder sentences carried at the time. And that is compelling evidence to support Judge Nadeau's sentence in this case.

I would also point out that this case has been the subject of comment by the Attorney General, Attorney General McLaughlin, who was the Attorney General at the time of the case. On October 24, 2002 at the Child Abuse and Neglect Conference, he

referenced the sentence in this case. Referenced the fact that the State had requested a greater sentence. Acknowledged that the State did not "win" in terms of getting the sentence it chose, but said that the sentence was a fair sentence balancing the factors that the sentencing judge must review. So we've got a circumstance of where other sentences are similar, the Attorney General himself has said it is fair. The State has a burden to meet, which they cannot meet, in the circumstances of this case. The State in some fashion says, I think that they said that this was a victory, a defense victory. There is no victory in this case. Chad Evans will miss raising his son, he will miss being with his family, he will probably see as I indicated at sentencing, probably not be with his parents when they pass away. To call a 28 year sentence either a defense victory or a sentence that doesn't include deterrence I think doesn't acknowledge the severity of what 28 years is all about. Take your 30s and your 40s and your 50s and erase those and you would know, too, I believe, as anyone would know, that that is a severe, significant sentence. Judge Nadeau created the balance that was appropriate here, considered the facts of the

case, considered the comments the family members made at the sentencing, considered who Chad was, what his prior record was and what he had accomplished. And gave a sentence that in truth was higher than what we wanted obviously less than what the State wanted and I believe served the ends of justice by creating a sentence that stands the test of time and stands the test of the legal standards that you must address.

JUDGE COFFEY: Thank you, Mr. Cronheim. Does your client wish to address the court?

ATTORNEY RUOFF: I'm sorry, Your Honor. May I, not respond, but you said I could address the court, you said I could do that after the attorneys did.

JUDGE COFFEY: Sure. I thought we had reversed the order so I was going to let Mr. Evans address the court first and your witness go last, but –

ATTORNEY RUOFF: Whatever you would like to do, Your Honor.

JUDGE COFFEY: That's fine.

MS. JACKSON: My name is Kathy Jackson. I'm Amanda Bortner's aunt. On behalf of Cassidy, her grandparents, great grandparents, aunts, uncles and all the individuals whose lives were enriched by her short tenure on this earth. I've come to petition the

daycare provider, by her grandmother, Jackie or even by his own parents. And fourth, the fact that to this date, he has not accepted any measure of responsibility for his actions or shown any degree of remorse for the pain and suffering that he inflicted on that poor baby. Your Honors, we were at the sentencing hearing in which Mr. Evans' friends and family addressed the court. We listened as they spoke of what a kind, loving person he is. How he'd do anything for anyone. How he'd give you the shirt off his back. We heard of what a fine brother, son, co-worker and friend he is and what a gentle, loving father he is to his own biological son. And all of those statements only added to our sense of disbelief as we found ourselves wondering how such a man could be so cruel and display such callous disregard towards a child that was not his own flesh and blood. Please consider those facts, and the others presented by the District Attorney's Office, and return a decision that insures that he can never again do this to any other child like he did to Cassidy Bortner. Thank you.

JUDGE COFFEY:

Thank you.

JENNIFER CONNELLY:

Hi, I'm Jennifer Connelly. I'm Cassidy's aunt. I just want to say that every day that I live I have to

think about how I'm not going to spend any time with my niece. And the fact that Cassidy was only alive less than 22 months and he is going to be out in 28 years. She's not going to see her 28th birthday or any time. I just feel that for the safety of anybody, I just feel that he shouldn't have any time off. That's about it.

JUDGE COFFEY: Thank you.

ATTORNEY RUOFF: Just in response to Attorney Cronheim's – may I just have one minute to respond.

JUDGE COFFEY: One minute.

ATTORNEY RUOFF: I would just caution the court, Your Honors, to compare this case and the sentence in this case to any case in which a plea bargain is involved. As you all know, a plea involves an admission of guilt, which the State places a high premium on because that's the first indicator of rehabilitation and we don't have that in this case. The second is that the sentencing recommendations made by the State in cases is often a result of thorough analysis of the trial risks and other issues in the case, so the sentences in those cases often have a different skew factor because of that analysis, and that's not present in this case. To the extent that the defense suggests that the Lindy

case involving a plea sentence there is appropriate with all other second degree murder cases, that just is not something that should be compared to a case that does not result in a guilty plea. They're apples and oranges.

JUDGE COFFEY: Does your client wish to address the Board?

ATTORNEY CRONHEIM: Your Honor, I think that you may have read his remarks in the sentencing transcript itself, and we would rely on that. Each of the individuals who testified today also testified at the sentencing, so there's nothing new about that. I do want to make a point since the State just referenced the Lindy case. That is also a case where the grandmother said I was hoping he would stay in prison forever. So it's again a circumstance where there was strong family input. I find it troubling, and I'll be brief, but I find it troubling that the State is saying that if someone goes to trial they necessarily are to get a greater sentence. This is not a situation where Chad testified and denied. It is different that he asserted his trial right. The deliberations were five days. I think it was a fair decision to choose to go to trial. It is a case, contrary to what was stated, where the judge found that there was remorse and I can tell you both from his

comments at the sentencing hearing itself and from my time with him that there is no question that there is remorse and it's just not factually accurate or true to say that Chad has not been traumatically effected by this and does not have remorse for his behavior at that time.

JUDGE COFFEY:

Thank you, counsel. We will, as I said, take the matter under advisement and we will stay our decision pending the outcome of the motions hearings in Strafford Superior Court.

I'm sorry, were there questions? Hold on a second, counsel. Any questions here? I'm sorry, my error.

ATTORNEY CRONHEIM:

Your Honors, it just dawned on me with respect to the stay. I'm aware of the pleadings filed in the Strafford Superior. I've read through them. I think if this court stays the decision, we're going to be at the trial court level and the trial court is going to be in a position to say the sentencing court, the Sentence Review court hasn't done anything yet so I don't know if there's any due process claim, I don't know if there's been any resentencing, I don't know if there's any double jeopardy or ex post facto claim in the case

because there's nothing that the sentencing court, the Sentence Review Division has done

JUDGE COFFEY: Well the Motion to Dismiss, as I read it, indicated that you're requesting that the petition itself, the State's petition be dismissed. It had nothing to do with whatever decision we might make.

ATTORNEY CRONHEIM: That's correct.

JUDGE COFFEY: That's another issue.

ATTORNEY CRONHEIM: But the basis for the dismissal, I believe, was ex post facto and double jeopardy. Neither of which may be right unless this court does something about it. I'm just pointing that out.

ATTORNEY RUOFF: I'll respectfully disagree and think that the Board has made the correct procedural judgment.

JUDGE COFFEY: I think we're going to wait until the conclusion of the hearings on the Motion to Dismiss before we issue a decision.

ATTORNEY CRONHEIM: I apologize. Amanda Bortner is here. I did not, ah, I was unaware that she wanted to make a statement.

JUDGE COFFEY: Okay, fine. There's still time left on your presentation of the case if you wish to have her make a statement.

ATTORNEY CRONHEIM: That's her choice. We didn't call her at the sentencing hearing. She is the mother of Kassidy.

JUDGE COFFEY: She can certainly make a statement. She's Kassidy's mother.

AMANDA BORTNER: I just wanted to say, on behalf of Kassidy. This has been a huge injustice. I did 16 months at Strafford County and I just got out five months ago. I'm trying to fix things that I said in discovery of over an 11 hour interrogation. I haven't had much say in any of this. People don't understand because you really can't understand unless you've been through it. All I have to say is that he's already convicted, and it might not even matter what I'm saying right now, but he doesn't even deserve 28 to life. One day, justice will be served. I just don't know when. That's all I have to say.

JUDGE COFFEY: Thank you. Anything further, counsel?

ATTORNEY CRONHEIM: Nothing, thank you.

ATTORNEY RUOFF: No, Your Honor, thank you.

JUDGE COFFEY: You're excused.

END OF PROCEEDINGS