FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 20, 2012

HOW TO ATTACK AGGRAVATED SENTENCES

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January 2012

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I. Introduction

Few areas of criminal appellate practice are more deserving of consideration than sentences in which aggravated terms are meted out. While such sentences can be extremely harsh (such as 16 years for a single violation of Penal Code section 288.5), often they are not challenged. It may be that we have become inured to increasingly extreme sentences over the years. It may be due to a misconception that such issues are too hard to win; so why try? Whatever the reason, we need to rededicate ourselves to briefing these issues. The goal of this article is to (re)acquaint criminal appellate practitioners with the art of challenging aggravated terms.

II. Know the Sentencing Facts of Your Case and Know Your Client

Sentencing arguments are inherently fact intensive. Read all material presented at the sentencing hearing carefully: probation report, sentencing memoranda, client letters, letters in support of client from others (family, friends, employers, etc.) Become familiar with the facts of the offense (trial; if plea, preliminary hearing or probation report). Read psychiatric reports, if any, and any other material bearing on sentencing. Know your client: read your client's letters.

III. Know the Statutory and Decisional Framework

A. Penal Code Section 1170, subdivision (b), provides in part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.... The court shall select the term which, in the court's discretion, best serves the interests of justice."

B. A sentencing court's discretion to impose an aggravated term "must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "[A] trial court

will abuse its discretion ... if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid*.)

C. "The court shall set forth on the record the reasons for imposing the term selected...."[1] (Pen. Code, § 1170, subd. (b); see also Cal. Rules of Court, rules 4.406(b)(4) , 4.420(e).)

D. "[T]he sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b), see also Pen. Code, § 1170, subd. (b).)

E. "[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; id., rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].)" (*People v. Sandoval, supra,* 41 Cal.4th at p. 848.) (See Dual Use, *post*.)

F. Trial courts are not restricted to the aggravating factors listed in the California Rules of Court, but it remains true that an aggravating circumstance must be one that makes the offense "'distinctively worse than the ordinary'" and "makes [the defendant] deserving of punishment more severe than that merited for other offenders in the same category." (*People v. Black* (2007) 41 Cal.4th 799, 817.)

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[1] "The reasons, however, no longer must 'include a concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation.' [Citation.]" (*People v. Sandoval, supra,* 41 Cal.4th at p. 847.) Further, a trial court is no longer required "to weigh aggravating or mitigating circumstances." (*Ibid*.)

G. Aggravating factors (Cal. Rules of Court)

1. Rule 4.421: "Circumstances in aggravation include factors relating to the crime and factors relating to the defendant

(a) Factors relating to the crime

Factors relating to the crime, whether or not charged or chargeable as enhancements include that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;

(2) The defendant was armed with or used a weapon at the time of the commission of the crime;

(3) The victim was particularly vulnerable;

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;

(5) The defendant induced a minor to commit or assist in the commission of the crime;

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(12) The crime constitutes a hate crime under section 422.55 and:

(A) No hate crime enhancements under section 422.75 are imposed; and

(B) The crime is not subject to sentencing under section 1170.8."

(Cal. Rules of Court, rule 4.421(a).)

"(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior prison term;

(4) The defendant was on probation or parole when the crime was committed; and

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Other factors

Any other factors statutorily declared to be circumstances in aggravation."

(Cal. Rules of Court, rule 4.421(b).)

H. Mitigating Factors

1. "Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime include that:

(1) The defendant was a passive participant or played a minor role in the crime;

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;

(3) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;

(8) The defendant was motivated by a desire to provide necessities for his or her family or self; and

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense."

(Cal. Rules of Court, rule 4.423(a).)

"(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;

(3) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;

(5) The defendant made restitution to the victim; and

(6) The defendant's prior performance on probation or parole was satisfactory."

(Cal. Rules of Court, rule 4.423(b).)

IV. Consider "Target Rich" Areas for Analysis

A. Dual Use: A trial court "is prohibited to some extent'" from using the same factor to support more than one sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 350 & fn. 12.)

1. A fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).) Examples:

a. A trial court may not use the same prior conviction to impose an aggravated sentence and a section 667.5, subdivision (b) enhancement. (*People v. McFearson* (2008) 168 Cal.App.4th 388, 395.)

b. "Great violence/threat of great bodily harm" aggravating factor was impermissible dual use of a fact for a firearm use enhancement and an upper term because the evidence conclusively showed that it was only the presence of firearms that justified the finding of a threat of great bodily harm. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1010-1012.)

2. A fact that is an element of the crime may not be used to impose the upper term. (Cal. Rules of Court, rule 4.420(d).) However, "where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. [Citation.]" (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.)

a. Common "problem" elements:

(1) Where minority is an element of the charged offense, minority of victim alone may not be used as a factor in aggravation (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680), unless the victim is extremely young (*People v. Ginese* (1981) 121 Cal.App.3d 468, 477.)

(2) "armed with or used a weapon" where weapon use, possession, or arming is an element of the offense or enhancement. (*People v. Garfield* (1979) 92 Cal.App.3d 475, 479-480.)

(3) Force/Violence: "Some violence is an element of the forcible sex crimes involved, i.e., forcible rape and forcible oral copulation. To the extent that violence does not exceed the force necessary to consummate the crime(s), it may not be used to aggravate the base term." (*People v. Key* (1984) 153 Cal.App.3d 888, 901.) "Force" cannot be used as an aggravating factor for a violation of lewd act by force or violence (Pen. Code, § 288, subd. (b)). (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 679.)

(4) Great bodily injury where a great bodily injury enhancement is imposed. (§ 12022.7, subd. (e); *Scott, supra,* 9 Cal.4th at p. 350.)

3. The same factor cannot support both imposition of the upper term and the choice to impose consecutive sentences for separate offenses. (*Scott, supra,* 9 Cal.4th at p. 350 & fn. 12.)

B. *Harvey*: Court may not rely on the facts underlying a dismissed count as an aggravating factor absent defendant's waiver. (*People v. Harvey* (1979) 25 Cal.3d 754, 758.) This rule does not apply when the dismissed counts are "transactionally related" to the count for which sentence is being imposed. (*Ibid*.)

C. Court erroneously considers facts as aggravating:

1. "The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) "In imposing the upper term, the trial court certainly has the obligation to go beyond a casual reading of terms which define the factors in aggravation." (*People v. Harvey* (1984) 163 Cal.App.3d 90, 116–117.) Be on the lookout for reasons that describe and apply to all persons convicted of violations of the same offense, regardless of

the particular facts, and do not indicate why defendant's conduct deserves harsher punishment than that of any other. Such reasons ("behavior is beyond all acceptable norms of society that we live in today" describing defendant's violation of lewd act) have been held improper. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

2. Improper aggravating factors:

   a. Bereavement of victims. (*People v. Levitt* (1984) 156 Cal.App.3d 500, 516–517.)

   b. Alienage. (*People v. Johnson* (1988) 205 Cal.App.3d 755, 758.)

   c. Any factor involving a circumstance over which defendant has no control. "[A] defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control." (*People v. Levitt*, supra, 156 Cal.App.3d at pp. 516–517.)

   d. Lack of remorse is not a valid reason to aggravate a sentence where defendant denies committing the crimes. (*People v. Key* (1984) 153 Cal.App.3d 888, 900.)

   e. "Reasons ... too vague and editorial to constitute meaningful, fact-based reasons for making more punitive sentencing choices" (e.g., "overwhelming and pathetic" nature of defendant's testimony; his "repeated deviant behavior" showing an inability or refusal to "conform to the mores of society"; and defendant's "behavior is beyond all acceptable norms of society that we live in today") (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

   f. Reasons based on defendant's conduct while on probation, rather than the circumstances existing at the time probation was granted, is error. (Cal. Rules of Court, rule 4.435, subd. (b)(1); *People v. Colley* (1980) 113 Cal.App.3d 870, 872–873.)

3. Some aggravating factors rife for attack:

a. Victim vulnerability. "'Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.'" (*People v. Huber* (1986) 181 Cal.App.3d 601, 629.) To support a finding of vulnerability, facts must indicate that the victim is vulnerable "'in a special or unusual degree.'" (*People v. Clark* (1990) 50 Cal.3d 583, 638.) Victims of some offenses, such as drunk driving, are not particularly vulnerable. (*People v. Bloom* (1983) 142 Cal.App.3d 310, 320.) Victim vulnerability finding is inconsistent with verdict of voluntary manslaughter based on imperfect self-defense. (*People v. Spencer* (1996) 51 Cal.App.4th 1208, 1222.)

b. Great bodily harm. Mere bodily harm alone is not enough. (*People v. McNiece* (1986) 181 Cal.App.3d 1048, 1061.)

c. "Induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission" where evidence shows mostly that defendant was a willing participant. (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1097.)

D. Court overlooks significant mitigating factors.

1. A remand for resentencing is required when the court fails to consider relevant mitigating factors. (*People v. Strunk* (1995) 31 Cal.App.4th 265, 273-275.)

2. Some neglected mitigating factors:

a. "The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime." (Cal. Rules of Court, rule 4.423(a).)

(1) Narcotics addiction may be a mitigating factor at sentencing. (*In re Spears* (1984) 157 Cal.App.3d 1203, 1214.)

(2) Alcoholism. "The trial court must consider the possibility that his alcoholism is a circumstance in mitigation within the meaning of rule [4.]423, and must then weigh this factor along with other relevant circumstances." (*People v. Simpson* (1979) 90 Cal.App.3d 919, 928; but see *People v. Reyes* (1987) 195 Cal.App.3d 957, 963-964 [substance abuse not mitigating where defendant has failed to deal with the problem despite repeated opportunities and continues in criminal conduct to support his pattern of substance abuse].)

(3) Mental Illness

V. Weaving it All Together and Making the Case for Prejudice

A. In determining whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing, "the reviewing court must determine if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Avalos* (1984) 37 Cal.3d 216, 233 quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. It is absolutely essential to address all aggravating factors. (*People v. Osband* (1996) 13 Cal.4th 622, 732 [A single aggravating factor supported by substantial evidence suffices to impose the upper term].) In your argument, set them up and knock them down.

C. The failure to properly consider a significant mitigating factor "creates a reasonable probability that [it] will affect the sentencing calculus favorably." (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274 .) When you argue that the court overlooked a substantial mitigating factor, demonstrate, whenever possible, how the mitigating factor explains, diminishes, or tends to undermine otherwise apparently "valid" aggravating factors.

VI. Forfeiture

A. In general, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott, supra,* 9 Cal.4th at p. 356.)

B. Exception: defense had no opportunity to object: "This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices" (*Scott,* at p. 356.)

C. Note: the reviewing court has discretionary authority to review an inadequately preserved claim anyway. (See e.g., *People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6; *In re Sheena K.* (2007) 40 Cal.4th 875, 887 fn. 7.")

D. If your claim was not adequately preserved, you will have to raise the claim by alternative means.

VII. Alternative Means for Raising Your Claim When it Is Forfeited

A. Claim ineffective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668, 687-688: counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.

1. If your claim is supported by the record, and there is no satisfactory tactical reason for counsel's failure to object or otherwise preserve the claim, make your ineffective assistance of counsel claim on appeal. (*People v. Gray* (2005) 37 Cal.4th 168, 207 [reviewing court gives deference to trial counsel's tactical choices and will not find ineffective assistance where the record is devoid of counsel's reasoning unless there can be no satisfactory explanation for counsel's choice].) Where the record is not clear, make the claim in a writ of habeas corpus. Note: often an ineffective assistance of

counsel claim is raised both on appeal and by writ. Either way, your claim will be addressed.

2. Sometimes counsel utterly fails to investigate or present favorable sentencing evidence to the court. Remember: your client has a due process right to have the court exercise informed sentencing discretion. (*United States v. Tucker* (1972) 404 U.S. 443, 447.) Accordingly, do not hesitate to embark on investigation yourself, when necessary (if extensive, talk to your FDAP buddy first).

B. Recall Sentence: Penal Code section 1170, subdivision (d), "permits a court to recall a sentence 'on its *own* motion'" within 120 days of sentencing. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193-194, Pen. Code, § 1170, subd. (d).) The court can hold a hearing and retains jurisdiction to decide whether to resentence a defendant anytime after timely recall of sentence. (*People v. Chlad* (1992) 6 Cal.App.4th 1719, 1724.) This method of obtaining relief is particularly suitable for obvious errors (e.g., improper dual use in an otherwise close case).

SAMPLE ARGUMENT

III. THE COURT IMPOSED AN UPPER TERM BASED ON AN ELEMENT OF THE OFFENSE AND OTHERWISE FAILED TO GIVE A SOUND REASON FOR SUCH TERM.

Penal Code section 1170, subdivision (c), provides that "The court shall state the reasons for its sentence choice on the record at the time of sentencing."

The Rules of Court, rule 4.406(a), also provides that a statement of reasons "must be delivered orally on the record" and 4.406(b)(4) provides that a statement of reasons is required for "Selecting one of the three authorized prison terms referred to in section 1170(b) ...."

Rule 4.420(d) provides that "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term."

The basic consideration in deciding to impose an aggravated term is whether the offense is distinctively worse than the ordinary instance of its kind. (People v. Young (1983) 146 Cal.App.3d 729, 734; People v. Moreno (1982) 128 Cal.App.3d 103, 110.)

The court sought to comply with section 1170 and rule 4.406 when it stated why it was imposing an upper, 16-year term for the violation of section 288.5:

> [W]hen I look at determining the appropriate term of imprisonment in this matter, certainly [1] the number of times that [appellant] abused his stepdaughter is significant. He went over, greatly over a period of three months.* One, for three years, over three years. And it's significantly more than three times.* Close to 100. No one really knows. That's an estimate.
>
> The victim indicated that at times the intercourse was happening every other day, every two days. [Sppellant] stated [2] it was an addiction, that he knew it wasn't right but he couldn't stop himself. That sounds like a dangerous person to me. [Appellant] does not have a prior record. And he does, he did enter a plea, in this case, relatively early in this proceeding. And those are two factors that the Court can take into consideration in selecting the term.
>
> When I look at everything, the reports from all of the doctors, in this case, and I'm not giving a lot of weight to the [report], from Department of Corrections, when [appellant] was not, did not have an interpreter present, but [3] this seems to me to be an aggravated case and so I am going to impose the aggravated term of 16 years.
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> (11 RT 688-689)

Thus, the court gave three reasons (indicated by the bracketed numbers above) for its choice of the upper term:

(1) the number of times appellant had sex with "Jane"

and the period of times during which he did so – i.e.,

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* The significance of "three months" and "three times" is that elements of "continuous sexual abuse of a child" under section 288.5 are that the defendant must engage in "three or more" acts of lewd conduct with a child under 14 over a period "not less than three months in duration."

"significantly more than three times" and for "over three years";

(2) appellant was unable to control himself and was, therefore, a dangerous person; and

(3) this seems to be an aggravated case.

(1)

There are two things wrong with the court's first reason. One is that the violation of section 288.5 necessarily occurred when "Jane" was under the age the 14 – i.e., before her 14th birthday on January 7, 2008 – and was based on the acts that appellant committed before that date. The only information that the court had about those acts was what was stated in the Probation Report and District Attorney's Sentencing Statement.[2] Conceding that such information was sufficient to show three or more acts over a period of at least three months, it was not sufficient to show what the

[2] The Probation Report stated that "Jane" said that the first time she had sexual contact with appellant was when she was 13 and he put her hand on his penis and moved it until he ejaculated, that he did this about ten more times, during which he would rub her breasts and vagina, insert his finger in her vagina, and have her orally copulate him. "[Appellant] then progressed into having sexual intercourse with the victim." In a paragraph which begins "When the victim turned 14 years old", the Probation Officer stated that he started having intercourse with her every two days and that "Her first sexual intercourse incident with [appellant] occurred inside his truck", implying that sexual intercourse did not take place before she was 14. (CT 55) On the District Attorney's account, the intercourse began when "Jane" was 14. (CT 109)

court found – that there were "close to 100" acts occurring "over three years." There may have been that many acts over that period, but they were not violations of section 288.5 but of other statutes which were the subject of other counts. The decision whether to impose an upper term for the 288.5 violation was a question of whether the acts constituting *it* were an aggravated example of continuous sexual abuse of a child under 14. *They* were not.

The very nature of violations of section 288.5 is that they involve multiple acts over an extended period of time. "In essence, the statute punishes repetitive activity as a course of conduct ...." (People v. Cortes (1999) 71 Cal.App.4th 62, 75.) That is why violation of section 288.5 is a more serious offense, carrying a range of sentences from 6 to 16 years, than violation of section 288, which is punishable by terms of 2 to 8 years. "'The legislative purpose was to make obtaining significant penalties against a resident child molester easier'" (People v. Alvarez (2002) 100 Cal.App.4th 1170, 1177; People v. Johnson (1995) 40 Cal.App.4th 24, 26), by eliminating "difficulties in pleading and proving with sufficient precision the dates, times, and particular nature of each molestation." (People v. Rodriguez (2002) 28 Cal.4th 543, 549; People v. Avina (1993)

14 Cal.App.4th 1303, 1308.)[3] A typical instance of violation of section 288.5 does not involve *only* the minimum three molestations over the minimum three months (ibid. ["The three-act requirement merely sets a 'baseline' for measuring the course of conduct"]), but involves many more molestations over a longer period. (Ibid. [section 288.5 is "aimed ... at the molester, often a relative, family friend or lodger, who subjects a child to an extended course of repetitious abuse"]; non-codified Section 1 of Stats. 1989, chap. 1402, which created section 288.5 [Legislature declares that purpose of section 288.5 is to protect children from "molesters (who) reside with, or have recurring access to, a child and repeatedly molest the child over a prolonged period of time"]; see, e.g., People v. DeSimone (1998) 62 Cal.App.4th 693, 695 [defendant estimated he had molested his stepdaughter more than a hundred times].) Thus, there was nothing unusual about *this* instance of violation of section 288.5. Like most other such

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[3] The "trade-off" for this dilution of ordinary due process/notice standards and increased punishment is, as Justice Werdegar explained in Avina, at p. 1311, that "when a criminal statute punishes a course of conduct, the prosecution may not divide that course up into multiple counts of the offense; the entire continuous course constitutes only a single violation of the statute. The Legislature expressly incorporated this attribute of the course-of-conduct crime in section 288.5, subdivision (c): '... A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.'"

violations, it involved a number of acts of molestation over an extended period when "Jane" was 13 years old. To impose an upper term based on the number of acts and the length of the period which constituted the 288.5 violation offended the rule against using "A fact that is an element of the crime upon which punishment is being imposed ... to impose a greater term." (Rules of Court, rule 4.420(d).)

(2)

The second reason given by the court for imposing an upper term, that appellant was unable to control himself and was, therefore, a dangerous person, came very close to violating the rule against using an element of the offense to impose a greater term. All violations of section 288.5 involve defendants who committed a number of acts of molestation over an extended period of time and who, *if they could have controlled themselves*, would not have "subject[ed] a child to an extended course of repetitious abuse." (People v. Avina, supra, 14 Cal.App.4th at p. 1311.) The repetition of the acts over a period during which the defendants should have been able to reflect upon their impropriety necessarily implies a lack of self-control. All such persons are "dangerous." Thus, the court's finding that appellant lacked control and was dangerous does not serve to distinguish this violation of section 288.5 from the ordinary such violation.

Moreover, appellant was probably better able to control himself than the typical violator of section 288.5. He was generally a very well-controlled or "self-regulated" person, as the psychologist found. (CT 79-80) He had no criminal record, had no substance-abuse problem, and was a steady worker and dedicated father. Unlike the typical child-molester, he readily owned up to his crimes, expressed shame for them, and was willing to undergo treatment. On all the scientific measures of the likelihood of recidivism, he scored at the very bottom.

(3)

The third "reason" for imposing an upper term – that the case seemed to the judge to be an aggravated case – was not a reason but a truism, like "The sky is blue because it looks blue." A reason should explain *why* the case is aggravated.

Against the foregoing supposed reasons for an aggravated term, the court found two mitigating factors, that appellant did not have a prior record and pleaded "relatively early" (before the preliminary hearing). (11 RT 688-689). Of course, he did not merely plead early but he admitted responsibility immediately upon being contacted by the Sheriff,[4] and there

[4] In fact, appellant admitted more, sooner, than "Jane" did. When first contacted by the Sheriff, she said that she last had sex with appellant three years earlier. He said that they had sex 16 to 17 times over the last two

were a significant number of other mitigating circumstances, briefly summarized on page 33 above.

It is "reasonably probable"– i.e., there is a "reasonable chance, more than an abstract possibility" – that, if the court had not mistakenly believed that the 288.5 violation was based on close to 100 instances of molestation over a 3-year period, had focused on the acts which occurred when the child was 13 which were the factual basis for the plea, had not relied on facts which are characteristic of most or all violations of section 288.5, had attempted to articulate non-truistic reasons for imposing an upper term, and had given full consideration to the many mitigating factors, it would have imposed a sentence of less than 16 years.

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years, most recently the day before. (CT 54) In later interviews, both parties admitted the greater number and longer time-span of the relationship. (CT 55, 56)

IV. IF THERE WAS A MEANINGFUL OPPORTUNITY TO OBJECT TO THE FOREGOING SENTENCING ERRORS, APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO DO SO.

Appellant's attorney did not object to the errors of the court which are set forth in Parts II and III above, but it is not clear that he had a "meaningful opportunity" to do so, at least so far as the court's failure to state proper reasons for the upper term is concerned. (People v. Scott (1994) 9 Cal.4th 331, 353, 356 ["This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices"].) The attorney's failure to object to the court's misunderstanding of the difference between the bests interests of the child in appellant's being granted probation and having contact with her (Part II) is understandable because the attorney was unaware of the limitations place on the court's power to grant probation by subdivision (d)(1) of section 1203.066 (Part I). As for the court's failure to state proper reasons for imposition of the upper term (Part III), it made no "tentative ruling" or any kind of indication that it intended to impose an upper term, that it was confused about the number and time frame of the

acts which constituted the 288.5 violation, that it would rely on facts that are elements of or true of almost all 288.5 violations, or any other of the "reasons" it would give for the upper term; it just stated them and did not pause to give the attorney a chance to object. (11 RT 688-689) Thus, the attorney may be excused from failing to object to the errors in imposing an upper term.

However, if an objection was required to preserve the issue for appeal, then appellant was denied his right to the effective assistance of counsel by his attorney's failure to object. A reasonably competent attorney should be aware of basic sentencing law (People v. Cropper, supra, 89 Cal.App.3d 716, 719-720) and should make "potentially meritorious" objections. (See People v. Nation (1980) 26 Cal.3d 169, 179, 181.) Appellant's attorney's failure to "obtain an adjudication" of the sentencing errors was a denial of his right to the effective assistance of counsel. (Ibid.; see authorities cited above at page 30-32.)

For the reasons stated at the conclusion of Parts I and III above, pages 33 and 47, it is "reasonably probable" that, if counsel had made proper objections, the trial court would have corrected the errors and granted probation or imposed a lower term.