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FILED
STEPHEN THUNBERG
Clerk of the Superior Court
AUG 21 2000
By: C. BONAVOLANT, Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

15 JOHN ALBERT GARDNER,

16 Defendant.

No. SCD 151675
DA AAE320

PEOPLE'S SENTENCING
MEMORANDUM

Date: August 24, 2000
Time: 1:30 PM
Dept: 31 (Hon. Peter Deddeh)

17
18 Comes now the plaintiff, the People of the State of California, by and through its
19 attorneys, PAUL J. PFINGST, District Attorney, and, David Hendren, Deputy District Attorney, and
20 respectfully submits the following People's Sentencing Memorandum related to the above-named
21 defendant.

22 STATEMENT OF THE CASE

23 Defendant John Gardner was arraigned on the complaint on March 20, 2000. On April
24 11, 2000, a preliminary examination was held, and defendant was bound over for trial on all counts and
25 allegations contained in the complaint, and defendant was arraigned immediately on the information.

26 On May 31, 2000, defendant pled guilty to two counts of Penal Code section 288(a)(1) as
27 stipulated lesser included offenses of counts one and two (Penal Code section 288(b)(1)), and one
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1 count four, false imprisonment, a violation of Penal Code sections 236/237(a). The balance of the
2 information was dismissed, and neither the People nor the court made any agreements or representations
3 with regard to the sentencing of defendant.

4 STATEMENT OF THE FACTS

5 On March 16, 2000, 13 year old eighth grade victim [REDACTED] was waiting for the school
6 bus with her friend, 14 year old [REDACTED] Defendant, a former neighbor of victim's who was a month shy
7 of being 21 years of age, drove by and offered the girls a ride to school, and the girls accepted. [REDACTED] said
8 that she decided to remain at school, while [REDACTED] decided to go watch movies with John.

9 Defendant and [REDACTED] were the only ones home at defendant's townhouse, and they
10 began watching the movie "Patch Adams". Defendant started giving the victim a massage, and began
11 kissing her despite her refusals. Defendant then picked victim up, put her on the couch and began
12 rubbing his erect self against her private parts. Defendant persisted despite the victim's protestations.
13 Defendant then picked victim up and brought her upstairs to his bedroom where he got on top of victim.
14 The victim told him "I don't want to do this" and defendant then eventually brought the victim back
15 downstairs to the living room. Once there, defendant put his hand down victim's pants on her buttocks.
16 Defendant put the victim on the couch, began rubbing himself against her and touching her in private
17 places. Defendant would not stop, and was trying to take victim's pants off despite her repeated
18 objections throughout these events. Defendant unzipped [REDACTED] pants, pulled them down, and pulled
19 her underwear halfway down her thigh and forcefully prevented her from pulling her pants back up.
20 Defendant said something to the effect of "you know what, I can't take this anymore" and hit victim
21 repeatedly in the face while rubbing himself and touching victim in her private area under her clothes
22 and sucking her breast over her clothes.

23 [REDACTED] said defendant "was suffocating me. He had his hand on my mouth, and I
24 couldn't breath, and I got pretty fuzzy after he hit me, and I'm not sure if I blacked out." (Preliminary
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26
27
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1 Exam transcript at page 36, lines 21-23) The victim believes defendant put his hands over her mouth to
2 stop her from screaming. Defendant repeatedly hit victim in and about the head. Victim was crying
3 throughout this incident after defendant began hitting her. [REDACTED] thought she was going to be raped,
4 and eventually ran out the door with only one shoe on, holding her pants because she had not yet had a
5 chance to zip them up, and ran to a neighbor's house across the street that had its garage door open. As
6 she did so, she saw defendant get into his vehicle and drive away.
7

8 The neighbor, [REDACTED], testified that [REDACTED] was terrified, and said she'd been raped.
9 [REDACTED] said, "I think it was [REDACTED] left side of her face had all been beaten. It was all swollen, and
10 I barely recognized her this morning [at the preliminary exam], and her pants were unzipped, and she
11 was all kind of raggedy sort of." [REDACTED] said [REDACTED] was "very upset, crying hysterically the whole
12 time...[for] probably two hours, even when the cops were there." [Preliminary Exam Transcript at 56,
13 lines 10-20] [REDACTED] described the injuries to [REDACTED]'s face: "It was all just really, really swollen and
14 enlarged and hadn't gotten black and blue yet, but you could tell she had been hit." [Preliminary Exam
15 Transcript at 57, lines 3-9]
16

17 [REDACTED] suffered a laceration to the inside of her lip, a contusion under her left eye,
18 bruising around the left eyelid area, numerous bruises on the left side of her head and face and another
19 bruise behind her left ear. The area around the inner portion of her left thumb and palm was red and
20 bruised, and there was a red mark on her neck.
21

22 [REDACTED] immediately called 9-1-1 at 9:58 a.m. on March 16, 2000, and the victim got
23 on the phone and immediately stated how the defendant hit her and assaulted her, and identified
24 defendant by first and last name as the perpetrator. [REDACTED] was still so traumatized when the police
25 came, that she threw up in the presence of the police.
26

27 Defendant John Gardner was found at a nearby gas station and taken into custody
28 approximately 19 minutes after the original 9-1-1 call was dispatched to the police. A search warrant
29

1 was executed at his home approximately 12 hours after the incident, and a "Patch Adams" video was
2 found inside the VCR at defendant's home, the identical video the victim said she and defendant had
3 been watching at the time he attacked her.

4
5 Defendant waived his Miranda rights and claimed he picked the victim up, and then
6 dropped the victim off in front of her apartment complex at 8:40 a.m. Defendant claimed he returned
7 home and then decided to watch a movie and put "Patch Adams" in the VCR. [Of course if this were the
8 case, the victim would have had no way of knowing that movie would be in the VCR] Defendant
9 initially said he was with the victim for one to one and one-half hours, but when confronted with other
10 information then claimed he was with the victim for only about 15 minutes. Defendant told the
11 probation officer he was "absolutely innocent" and blamed the victim's "vicious" mother for beating
12 her.

13
14 The preliminary examination also revealed that sometime during the fall of 1999,
15 defendant fondled the breasts of a 14 year old girl, and rubbed her vaginal area over her clothes.
16 [Preliminary Exam Transcript at page 66-67] Although this activity was consensual, defendant had only
17 known that 14 year old victim (who was a friend of [REDACTED]'s) for a week and a half, and the girl was the
18 one who had to tell the defendant to stop.

19
20 **DEFENDANT SHOULD NOT BE GRANTED PROBATION**

21 California Rule of Court 421 sets forth the criteria affecting probation.

22 Rule 421(a)(1), the nature, seriousness, and circumstances of the crime as compared to
23 other instances of the same crime. Usually 288(a) crimes involve no force, but in this case, defendant's
24 crime involved significant force. Defendant beat the victim repeatedly about the head and face for the
25 purpose of forcing her compliance with his sexual wishes. Thus, defendant's actions were much more
26 serious than most 288(a) crimes.

27
28 Rule 421(a)(3), the vulnerability of the victim. [REDACTED] was only 13 years old, is

1 approximately 5'5" tall, and weighs 100 pounds. Defendant is 6'2" tall and weighs over twice as much
2 (210 pounds). Not only was the victim vulnerable because of the significant size disparity, she is a
3 young minor, and was alone and inside defendant's apartment, where nobody else could see her, help
4 her, or hear her when she tried to scream (which defendant apparently tried to prevent by covering her
5 mouth). Thus, the victim's age, size and location inside the defendant's residence all made her
6 particularly vulnerable.
7

8 Rule 421(a)(4) whether the defendant inflicted physical or emotional injury. Defendant
9 inflicted both significant physical and emotional injury. He repeatedly beat victim about the face and
10 head, and inflicted so much injury that the neighbor to whom the victim reported barely recognized the
11 victim a month later at the preliminary examination. The whole left side of victim's face was swollen
12 and beaten, and victim was kept overnight at the hospital for observation. The victim still has lingering
13 pain in one eye where she was struck by the defendant. The physical injuries defendant inflicted show a
14 high degree of callousness.
15

16 Furthermore, the emotional trauma to the victim was even more devastating. Her fear is
17 so great that she had to move, and to change schools. She has lost all of her ability to trust people, and is
18 in need of significant counseling. This ugly incident will undoubtedly affect her for the rest of her life.
19

20 Rule 414(a)(5) the degree of monetary loss to the victim. The victim's family suffered
21 monetary loss because they were forced to break their lease and move due to the victim's fear of living
22 in the area where defendant lives.

23 Rule 414(a)(6) whether the defendant was an active or passive participant. Defendant
24 was clearly the active participant and acted alone.

25 Rule 414(a)(7) whether the crime was committed because of an unusual circumstance,
26 such as great provocation, which is unlikely to recur. There was no unusual circumstance unlikely to
27 occur in this case. On the contrary, defendant set up this situation by offering to give victim a ride,
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1 offering to show her movies at his home when he knew nobody else was at home, and then consistently
2 and forcefully trying to touch or fondle the victim despite her repeated objections and refusals of his
3 advances.

4 Rule 421(a)(9) whether the defendant took advantage of a position of trust or confidence
5 to commit the crime. The victim trusted defendant because she considered him a friend, she had been to
6 his house before, and she believed she could trust him. Defendant took advantage of this trust to lure the
7 victim into his home where he could then force her to let him have his way with her, at least until she
8 ran away.

9 Rule 421(b)(1) prior record of criminal conduct. Defendant has only a 1998 PC 415
10 conviction out of Twin Peaks in case MCF04668. This is the only circumstance which argues in favor
11 of probation. However, the value of this achievement is somewhat diminished when one recognizes that
12 defendant was only 20 years old at the time of the instant offense. Furthermore, it is significantly
13 outweighed by the circumstances warranting a denial of probation.

14 Rule 421(b)(7) whether the defendant is remorseful. Defendant has not expressed one
15 scintilla of remorse to the police, the probation officer, the victim or the victim's family. Rather, he
16 continues to victimize others and has the unmitigated gall to call the further victimize the victim's
17 mother by labeling her "vicious" and claiming she committed the attack upon her own daughter. Since
18 defendant expresses absolutely no remorse, it is even less likely that he will be rehabilitated on
19 probation, since acknowledging wrongdoing is a necessary precursor to making the changes necessary to
20 correct the criminal behavior. Even the interviewing psychologist stated that "the defendant takes no
21 responsibility whatsoever for his actions...." (July 20, 2000 report by staff psychiatrist Dr. Matthew F.
22 Carroll at page 5, last paragraph)

23 Rule 421(b)(8) the likelihood that if not imprisoned the defendant will be a danger to
24 others. Defendant picked a very vulnerable, meek, young victim who trusted him, and lured her to a
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1 location where she would be particularly vulnerable, and then had her way with her. The defendant
2 obviously has an unnatural interest in very young girls, since he also had sexual contact with a different
3 girl who was 14 years old. Thus, defendant's actions are extremely predatory, and this makes him very
4 dangerous despite his minor prior record. When combined with his callous attitude and refusal to admit
5 any wrongdoing, defendant demonstrates that he is an extreme danger to others and needs to be
6 imprisoned to protect society. The staff psychiatrist who interviewed the defendant regarding this crime
7 stated "it is my opinion that [the defendant] would be a continued danger to underage girls in the
8 community." [July 20, 2000 report at page 5, section "3."]
9

10 For all of the above reasons, probation should be denied, and defendant should be
11 sentenced to state prison.
12

13
14 **THE CIRCUMSTANCES IN AGGRAVATION SIGNIFICANTLY OUTWEIGH**
15 **THE CIRCUMSTANCES IN MITIGATION**

16 California Rules of Court set forth the circumstances in aggravation in Rule 421 and
17 circumstances in mitigation in Rule 423. Analysis of the criteria in Rules 421 and 423 demonstrate that
18 the circumstances in aggravation outweigh the circumstances in mitigation.
19

20 Rule 421(a)(1) the crime involved great violence, great bodily harm, threat of great
21 bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. Defendant's
22 punching victim repeatedly in the face and head, ignoring her pleas to stop, and forcing himself on a
23 meek, young, small girl reflects a high degree of cruelty, viciousness and callousness. This is
24 particularly true when combined with defendant's absurd attempts to ignore the overwhelming evidence
25 and blame the victim's mother and thereby further victimize the family. The bottom line is that
26 defendant attacked, beat and forcefully sexually assaulted a small child: this shows his viciousness and
27 callousness.
28

1 Rule 423(a)(3) the victim was particularly vulnerable. As stated above, the victim here
2 was weaker, smaller, and younger than the defendant, and trusted that he was a friend. Furthermore,
3 defendant lured her to a location making her even more vulnerable. Thus, this young child was
4 particularly vulnerable.

5 Rule 423(a)(11) the defendant took advantage of a position of trust or confidence to
6 commit the offense. Defendant took advantage of the fact that he had known the victim, that she used to
7 be a neighbor of his, that she had even been over to his house once before, and that as an older supposed
8 "friend", she trusted him to treat her respectfully. Instead, defendant abused his trust and preyed upon
9 this child.

10
11 California Rule of Court 408(a) provides for the court's consideration of other reasonably
12 related criteria. It provides "The enumeration in these rules of some criteria for the making of
13 discretionary sentencing decisions does not prohibit the application of additional criteria reasonably
14 related to the decision being made. Any such additional criteria shall be stated on the record by the
15 sentencing judge."

16
17 **1) Danger to Society**

18 Based upon his callous and vicious attack on a vulnerable child after luring her to his
19 home, and his refusal to acknowledge any wrongdoing, and his unnatural interest in young girls, the
20 defendant is a danger to society and should be imprisoned. A defendant's "dangerousness" is properly
21 considered by the sentencing court as a circumstance reasonably related to its sentencing choice. People
22 v. Richard (1984) 161 Cal.App.3d 559, 562-563.

23
24 As stated above, the staff psychiatrist who interviewed the defendant about this crime
25 stated that it was his opinion that defendant "would be a continued danger to underage girls in the
26 community" and that same psychiatrist recommended sentencing defendant to the "maximum sentence
27 allowed by law." [July 20, 2000 report at page 6]
28

1 **2) Forcible confining of the victim**

2 Defendant, in the course of his attack on the victim, was on top of her, preventing her
3 from moving anywhere, hitting her in the face and confining her. The victim even said, "he was
4 suffocating me. He had his hand on my mouth, and I couldn't breathe." Thus, the victim was severely
5 pinned down and confined by defendant's placement of his body on top of the victim and covering her
6 mouth preventing her from screaming or moving. Penal Code section 1170.84 declares that the tying,
7 binding or confining of any victim during a serious felony "*shall* be considered a circumstance in
8 aggravation." [Emphasis added] A violation of Penal Code section 288(a) is a serious felony. Penal
9 Code section 1192.7(c)(6).
10

11 **3) Absence of Remorse/Likelihood of Re-offending**

12 Not only has defendant never expressed one scintilla of remorse for his attack upon the
13 victim, he has even gone so far as to blame the victim's mother and claim she somehow attacked her
14 own daughter. Where, as here, the defendant acknowledges guilt (defendant pled guilty and admitted
15 his crimes), but shows no remorse, he may be expected to repeat the criminal conduct under similar
16 circumstances. People v. Key (1984) 153 Cal.App.3d 888, 900-901. The interviewing staff
17 psychiatrist, Dr. Matthew Carroll has stated it "is unlikely that [the defendant] would be amenable to
18 treatment.... There is no known treatment for an individual that sexually assaults girls and does not
19 admit to it in any way. The fact that the defendant takes no responsibility whatsoever for his actions
20 makes him an extremely poor candidate for any sexual offender treatment." [July 20, 2000 report at
21 page 5, last paragraph]
22

23 Defendant has never acknowledged any wrongdoing in connection with this case, either
24 at any early stage or otherwise throughout the proceedings. This is true despite the overwhelming
25 evidence of defendant's guilt, including: (1) the victim was seen in the immediate vicinity of defendant's
26 home in a battered, shocked and emotionally fragile condition, throwing up, wearing only one shoe, with
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1 her zipper still down, scared, and reporting being raped, (2) the victim immediately reported the incident
2 to the neighbor, police, and others (3) the victim immediately and consistently named defendant by full
3 name and age and description during the 9-1-1 call, and thereafter, (4) the defendant was seen by a third
4 party picking the victim up that same morning, and discussing going back to the defendant's place to
5 watch movies, (5) the defendant was found in the area within 19 minutes of the 9-1-1 call in his white
6 vehicle that the victim had stated he had fled in, (6) the defendant lied by changing his story to the
7 police regarding how long he was with the victim, (7) the defendant has shown he has an unnatural
8 interest in very young girls, and (8) the victim identified the exact videotape "Patch Adams" that was in
9 the defendant's VCR player, when defendant claimed he had not even put that in the VCR or decided to
10 play it until after he supposedly dropped the victim off.
11

12 Thus, defendant's lack of remorse in the face of overwhelming evidence of guilt and his
13 prior admissions of committing the crime show that he can be expected to re-offend when he gets the
14 opportunity to do so.
15

16 **DEFENDANT'S LACK OF A SIGNIFICANT PRIOR RECORD**
17 **HAS ALREADY BEEN GIVEN AMPLE CONSIDERATION**

18 The only applicable circumstance in mitigation is 423(b)(1): "The defendant has no prior
19 record, or an insignificant record of criminal conduct, considering the recency and frequency of prior
20 crimes." The People acknowledge this circumstance in mitigation. This is the reason the People are not
21 requested that defendant "be given the maximum sentence allowed by law" as was even recommended
22 by the staff psychiatrist who interviewed the defendant regarding this crime.
23

24 The defendant has already received significant consideration and benefits for that
25 circumstance. It is because of defendant's lack of a prior record that the People are not asking the court
26 to impose a consecutive sentence on count two, and are not asking the court for a consecutive sentence
27 on count four. Furthermore, the People have allowed defendant to plead guilty to violations of Penal
28

1 Code section 288(a) rather than 288(b), and have not alleged the Penal Code section 1203.066(a)(2)
2 allegation which would have absolutely precluded defendant from receiving probation since he caused
3 bodily injury on a child in the course of a violation of Penal Code Section 288(a). (The People's
4 willingness to allow defendant to argue for probation in order to resolve this matter short of a trial and
5 spare the victim the trauma of testifying should not be confused with any belief that probation is even
6 remotely warranted).

7
8 Finally, the People have not required the defendant to plead guilty to molesting the 14
9 year old victim (count five), or to count three, another incident of lewd conduct on a child. Thus, the
10 defendant's minor prior record has already been given ample weight in this case, and should not deprive
11 the victim or the People from being protected and should not further enable defendant to avoid just
12 consequences for his crime.

13
14 **CONCLUSION AND REQUESTED SIX-YEAR SENTENCE**

15 For the reasons stated, it is respectfully requested that defendant be sentenced to six years
16 in state prison, and ordered to pay a restitution fine of \$1200 pursuant to Penal Code section 1202.4(b),
17 as well as an additional stayed restitution fine of \$1200, and to pay restitution to the victim in an amount
18 to be determined pursuant to Penal Code section 1202.4(f). The People do not oppose the time on Count
19 Two and Count Four running concurrent with the time on Count One, since all incidents occurred during
20 substantially the same time period.

21
22 Dated: August 20, 2000

23 Respectfully submitted,

24 PAUL J. PFINGST
25 District Attorney

26 By:

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28 David Hendren
29 Deputy District Attorney

30 Attorneys for Plaintiff