ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION Northern California

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION Southern California

January 25, 2023

The Honorable Chief Justice Guerrero
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Submitted via TrueFiling

Subject: Amicus letter in support of Petition for Review in *MacMurray v. Superior Court of Los Angeles County*, Supreme Court Case No. S277823

Dear Chief Justice Guerrero and Honorable Associate Justices of the Supreme Court:

The American Civil Liberties Union Foundations of Northern California and of Southern California respectfully submit this letter in support of the petition for review in *MacMurray v. Superior Court*, Case No. S277823**.** The Petition raises an issue of statewide importance - namely, whether Penal Code section 1170(b)(2) and specific circumstances in aggravation alleged thereto are void for vagueness.

Senate Bill 567, enacted in 2021, changed the maximum sentence for most felony offenses, providing that when "the statute specifies three possible terms," the court may not exceed the middle term except "when there are circumstances in aggravation of the crime that [so] justify...[and] have been stipulated to by the defendant, or found true beyond a reasonable doubt at trial." (Pen. Code, § 1170, subd. (b)(2).) Because neither section 1170(b)(2) nor any other provision of the Penal Code defines "circumstances in aggravation," courts and prosecutors have filled this vacuum with California Rule of Court 4.421, a list of considerations promulgated by the Judicial Council to guide trial courts' discretion that includes many abstract, highly subjective factors. Petitioner's case highlights two such factors: he is now facing an aggravated sentence based on allegations that he "engaged in violent conduct that indicates a serious danger to society" and that his prior convictions "are numerous or of increasing seriousness." The void-

for-vagueness doctrine forbids reliance on these circumstances in aggravation as a matter of due process.

First, the legislature abdicated its duty to define what conduct is subject to enhanced penalties, a threshold requirement of the vagueness doctrine. (*See Smith v. Goguen* (1974) 415 U.S. 566, 574.) Second, the language of many of the existing Rule 4.421 factors, including those alleged against Petitioner, violates the core of the vagueness doctrine, as it fails to either provide notice of how particular conduct will be punished or to create meaningful standards for jurors.

This latter point is of particular concern given the extensive research demonstrating that absent meaningful constraints on discretion, decisionmakers will resort to implicit biases. In other words, the predominant factor in who is convicted of an aggravating circumstance and then receives a higher sentence under section 1170(b)(2) may be the race of the defendant.

Finally, the Court of Appeal's suggestion below, that any vagueness problems may be resolved by appropriate jury instructions, is wholly unsatisfactory. Jury instructions are decided after the evidentiary portion of a trial has concluded, and a system of justice that fails to tell defendants what conduct is prohibited *before* they have engaged in that conduct and presented their defense is no system of justice at all. Moreover, any attempt to provide specific guidance via jury instruction will only result in inconsistent application of the circumstances in aggravation. To ensure constitutional sentencing in this state and safeguard against enhanced sentencing on the basis of racial prejudice, this Court should reverse the decision below and hold 1170(b)(2) void for vagueness. For these reasons, *amici* respectfully request that this Court grant the Petition for Review.

I. Interests of amici curiae

The American Civil Liberties Union Foundations of Northern California and of Southern California are California affiliates of the national American Civil Liberties Union ("ACLU"), a non-profit, non-partisan civil liberties organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the United States and state constitutions. For decades, the ACLU has advocated to advance racial justice for all Californians, as well as to protect the rights of the criminally accused. The ACLU affiliates in California have participated in cases, both as direct counsel and as *amici*, involving the protection of due process

guarantees for the criminally accused and fair treatment for Black and Latine persons in the criminal justice system.

II. Argument

a. Reliance on Rule 4.421 factors as "circumstances in aggravation" to be found by a trier of fact under section 1170(b)(2) violates the Due Process clause.

Petitioner challenges the use of several Rule 4.421 circumstances in aggravation on the grounds that they are unconstitutionally vague, in violation of the Due Process clause. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) A penal statute is void for vagueness if it fails to provide ordinary people with fair notice of the conduct it punishes or is so broad and standardless that it invites arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 457.) "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." (*Johnson v. U.S.* (2015) 576 U.S. 591, 596, *citing U.S. v. Batchelde*r (1979) 442 U.S. 114.) The United States Supreme Court has accordingly applied this doctrine to strike down statutes which impose an enhanced sentencing scheme on the basis of vague and indeterminate criteria, such as whether a defendant committed past crimes which presented "a serious potential risk of physical injury," *Johnson*, *supra*, 576 U.S. at pp. 594, 597, or is currently charged with an offense that "involve[s] a substantial risk that physical force against the person or property of another may be used," *U.S. v. Davis* (2019) 139 S.Ct. 2319, 2323-26.

But the void-for-vagueness doctrine contains a threshold requirement, as well: the legislature, "rather than the executive or judicial branch, [must] define what conduct is sanctionable and what is not." (*Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1212; *see also Davis, supra*, 139 S.Ct. at p. 2323 ["[Vague laws] hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct."].) As the United States Supreme Court held, "the requirement that a legislature establish minimum guidelines to govern law enforcement" is "the more important aspect of the vagueness doctrine," because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (*Kolender, supra,* 461 U.S. at p. 358 [citing *Smith*, *supra*, 415 U.S. at p. 574].)

Penal Code section 1170(b) provides that when a person is convicted of a felony offense formerly punishable by three possible terms of imprisonment, the sentencing court may impose a sentence *not to exceed* the middle term, unless there are "circumstances in aggravation" that have been either stipulated to or found true beyond a reasonable doubt by the trier of fact at trial.[1]

This sentencing scheme, which generally requires a jury determination that an aggravating circumstance has been proven beyond a reasonable doubt, is the product of recent statutory amendments encompassed by Senate Bill 567 (2021). While section 1170 creates procedural rights attendant to the imposition of an aggravated term of imprisonment, it does *not* include any statutory definition of the circumstances in aggravation that may be pled and proven to a jury to justify the aggravated term. Accordingly, whether there are *any* circumstances in which trial courts may impose the aggravated term of imprisonment in a manner consistent with due process is a question that requires this Court's attention. Certainly, any sentence in excess of the middle term imposed pursuant to section 1170(b)(2) is constitutionally suspect under United States Supreme Court precedent because the Legislature did not define "circumstances in aggravation." (*See Dimaya*, *supra*, 138 S.Ct. at p. 1212; *Davis*, *supra*, 139 S.Ct. at p. 2323.)

Even assuming that circumstances in aggravation may be derived from non-statutory sources, there is a due process problem with the source prosecutors and courts have turned to. In the absence of statutory factors, prosecutors are alleging circumstances in aggravation taken from the California Rules of Court, Rule 4.421, as occurred in Petitioner's case. This rule, authored by the Judicial Council rather than a legislative body, was never intended to function as a penal statute; instead, it was drafted to provide "guidance" and "criteria for the consideration of the trial judge" at the time they were called upon to exercise their sentencing discretion—a distinction evident from the fact that many of the Rule 4.421 factors are written with a high level of abstraction that, while perhaps useful to seasoned jurists, offer little guidance to laypersons. (*People v. Thomas* (1979) 87 Cal.App.3d 1014, 1023 [distinguishing the specificity required of penal statutes from then-enumerated Rule of Court 4.421]; *accord People v. Sandoval* (2007) 41

[1] The statute includes an exception for prior convictions, which may be considered based upon a certified record of conviction without being found true by a jury.

Cal.4th 825, 849 ["[T]he rules were drafted for the purpose of guiding judicial discretion and not for the purpose of requiring factual findings by a jury beyond a reasonable doubt"].)

Consider the two circumstances in aggravation challenged by Petitioner. First, Petitioner is alleged to have "engaged in **violent conduct** that **indicates a serious danger to society**" (emphasis added). Not only does the allegation fail to define what constitutes "violent conduct" or a "serious danger to society," but also – as Petitioner notes – existing law requires proof that the purported aggravating factor makes the offense "distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) Yet requiring jurors to compare a defendant's circumstances to a hypothetical "ordinary" crime is precisely the type of "imagined abstraction" repeatedly disapproved by the Supreme Court. (*Johnson*, *supra*, 576 U.S. at p. 598; *see also Dimaya*, *supra*, 138 S.Ct. at pp. 1215-16 ["How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?"].)

The second circumstance in aggravation – an allegation that Petitioner's "prior convictions as an adult or sustained petitions in juvenile delinquency are **numerous** or of **increasing seriousness**" (emphasis added) – suffers from the same deficiencies. The key terms are undefined, and this allegation requires jurors to decide, without any guidance, whether the convictions are "numerous" or "increasingly serious." Plainly, reliance on such abstract notions, as determined by a jury, raises questions as to whether "ordinary people can understand" what conduct is subject to increased penalties without "encourag[ing] arbitrary and discriminatory enforcement." (*Kolender, supra,* 461 U.S. at p. 357.) The Court should accordingly grant review to determine whether enhanced sentencing under section 1170(b)(2) complies with due process, either facially or as-applied in light of the Rule 4.421 aggravating circumstances alleged in the present matter.

b. Requiring jurors to make comparative judgements about a defendant's relative risk to society or whether past offenses are "numerous" or of "increasing seriousness" invites reliance on implicit biases.

This Court's review is particularly urgent because without firm, legislative guideposts to direct their findings, jurors are likely to rely on implicit biases. The due process clause's prohibition of vague criminal statutes is designed to protect against just this outcome, as it

"guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." (*Dimaya*, *supra*, 138 S.Ct. at p. 1212; *accord People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116.) Rules that call upon the trier of fact to engage in abstract assessment of offenses necessarily involve a certain level of indeterminacy that gives free reign to personal preferences and idiosyncrasies. (*Johnson, supra,* 576 U.S. at pp. 597-98.) So do standards that require an "imprecise quantitative or comparative evaluation of the facts." (*Sandoval, supra,* 41 Cal.4th at p. 840.)

This Court has already determined that many of the circumstances listed in Rule 4.421 are indeterminate in precisely this way. (*Sandoval, supra,* 41 Cal.4th at p. 849 [holding Rule 4.421 circumstances "are not readily adaptable to the [] purpose [of jury instruction], because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well-suited to perform."].) And indeed, social science research confirms that the particular aggravating circumstances alleged in the case at bar are ready vehicles for unwitting discrimination.

It is well established that people carry implicit associations or biases corresponding with race, often without any conscious awareness of the sources of these biases or the influence they have on judgement and behavior. (Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1129-31.) These implicit associations have significant implications for how the average person – or juror – perceives the aggressiveness or dangerousness of another.

One recent national study of jury-eligible adults, for example, found that participants strongly and automatically associated both Black and Latino men with future dangerousness, while automatically associating White men with future safety. (Levinson et al., *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations* (2021) 56 Ga. L. Rev. 225, 281-82.) These conclusions echo other studies finding that mock jurors who were asked to evaluate the guilt of hypothetical defendants perceived Latine defendants as "more aggressive, more likely to be aggressive in the future, more likely to be guilty, and more likely to commit criminal assault in the future" compared to racially nondescript defendants; similarly, White jurors in cases involving Black defendants were especially likely to

see Black defendants as dangerous or "lacking remorse." (Bodenhausen & Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity* (1987) 52 Journal of Personality and Social Psychology 871, 875; Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases* (2012) 115 W. Va. L. Rev. 305, 327.)

Another study found that mock jurors recalled facts about aggressive behavior more readily when the actor was Black, compared to when the actor was White, suggesting that a defendant's perceived race impacts how jurors retain and process information about their actions. (Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering* (2007) 57 Duke L. J. 345, 398-99.) And where decision-makers are primed to associate a hypothetical crime with Black characteristics (*e.g.*, by being exposed to words stereotypically associated with Blackness, like "Harlem" or "dreadlocks"), their assessment of the offender's culpability, violence, and the need for punishment increase. (Graham & Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders* (2004) 28 Law & Hum. Behav. 483.) These findings suggest that a defendant's race is likely to play a significant role in the perceived seriousness of past offenses, especially when jurors are asked to consider these convictions in the abstract. In fact, the more abstract the question presented to the jury, the more likely they are to rely on their implicit biases or stereotypes to guide their decision-making. (Wilkins, *supra*, 115 W. Va. L. Rev. at p. 329.) More broadly, what these studies show is that when jurors are asked to assess implicitly comparative, abstract, and subjective concepts like risk of violence, dangerousness to society, or conviction severity, race will *always* be an underlying factor, whether the decisionmaker is conscious of it or not.

In this case, Petitioner is facing an increased maximum sentence on the basis of undefined and abstract concepts of dangerousness to society and offense severity and frequency. These factors open the door to explicit or unconscious racial biases, creating serious constitutional concerns. But of even greater import, to *amici* and this Court, is the systemic impact of section 1170(b)(2)'s vagueness. Absent this Court's intervention, *all* sentences beyond the statutory midrange may reflect little more than racial stereotypes.

c. The constitutionality of the challenged aggravating circumstances will not be resolved by jury instruction.

The Court of Appeal denied the Petition below, reasoning that "the argument concerning vagueness is not yet ripe for review, as jury instructions may clear up any alleged ambiguity." (Order of 2nd App. Dist. Dated Dec. 14, 2022, Case No. B323232.) This reasoning is flawed: *First*, as discussed above, courts may not remedy the deficiencies of a penal statute by using their own judgment to define aggravating circumstances; the void-for-vagueness doctrine ascribes this function to the legislature exclusively. *Second*, due process requires that the law provide ordinary people with *advance* notice of what conduct will be subject to enhanced penalties; requiring defendants to wait until they have been arrested, turned down a plea-bargain, and finished the evidentiary portion of their trial to receive instruction on these factors clearly does not satisfy this requirement. *Third*, trial courts have predictably utilized widely divergent approaches to instructing juries regarding the Rule 4.421 factors: some have provided no additional instruction, leaving trial attorneys and jurors to interpret the language of the aggravating factors as they wish, *see, e.g*., Transcript from Sonoma Superior Court Case No. SCR-747896-1 at pp. 613-32, enclosed as Attachment A; others have tried to provide additional instruction in a manner that explicitly requires jurors to speculate about other hypothetical crimes – for example, by asking them to determine if "the manner of the instant crime's commission presented a serious danger to society distinctly greater than that in other similar cases," *see,* Jury Instruction from Contra Costa Superior Court, Docket 5-201667-2, enclosed as Attachment B.) Such inconsistency only exacerbates the arbitrariness of extended sentences under section 1170(b)(2).

Finally, there is no good reason to think that a jury instruction can do the work hypothesized by the Court of Appeal. The Judicial Council recently issued proposed jury instructions for some of the Rule 4.421 aggravating factors, including the "serious danger to society" allegation challenged by Petitioner in this case. (*See* Judicial Council of California Proposed CALCRIM 3234, enclosed as Attachment C.) Yet even a cursory analysis of the proposed instruction reveals that it suffers from the same shortcomings as the Rule 4.421 factor it seeks to explain. The instruction does not attempt to define what a "serious danger to society" means. Instead, it introduces further uncertainty into the standard by suggesting that jurors should consider any "violent conduct" "in light of all the evidence presented and *the defendant's*

background" to determine if the individual is a "serious danger to society." There is no explanation of what aspects of a defendant's "background" are relevant, or of how jurors should weigh such information in an evaluation of dangerousness.

This is particularly troubling because the literature on implicit bias indicates that jurors can hear the "very same mitigating evidence regarding the defendant's horrifically abusive childhood, psychological difficulties during adult life, and positive traits" and assess that evidence differently based solely on the race of the defendant, tending to treat "mitigating evidence as aggravating more often with [B]lack than with [W]hite defendants." (Wilkins, *supra*, 115 W. Va. L. Rev. at p. 329.) The obvious difficulties in framing clear and specific criteria for this aggravating factor suggest that no amount of instruction will remedy the ambiguities intrinsic to a determination of whether an individual poses a particular danger to society, beyond that inherent to the typical offense. Instead, such speculative and comparative assessments create a particular risk that these factors will be unfairly applied against Black and Latine defendants.

In sum, the Court of Appeal's resolution of the profound due process questions in this case is sorely wanting and will likely worsen racial disparities in criminal sentencing. *Amici* therefore respectfully urge this Court to *grant* the Petition for Review and reverse.

Respectfully submitted,

/s/ Emi Young

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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On January 25, 2023, I served the attached,

Amicus letter in support of Petition for Review in *MacMurray v. Superior Court of Los Angeles County*, Supreme Court Case No. S277823

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

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Respondent

Clerk of the Court of Appeal,
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 25, 2023 in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant

Attachment A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SONOMA

HON. PETER OTTENWELLER COURTROOM 10

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. KATHRYN LEE NICHOLS, Defendant.	Case No. SCR-747896-1

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

THURSDAY, DECEMBER 9, 2021

APPEARANCES:

FOR THE PEOPLE: Jill Ravitch
District Attorney
By: ROBERT BLADE
Deputy District Attorney

FOR THE DEFENDANT: Kathleen Pozzi
Public Defender
By: DANIEL CLYMO
Deputy Public Defender

Reporter: KAREN M. STEWART, CSR NO. 8744

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THURSDAY, DECEMBER 9, 2021

P R O C E E D I N G S

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THE COURT: I am back in the Nichols Jury trial. I have both attorneys present outside the presence of the Jury as well as Ms. Nichols.

Madam Clerk, if you would mark the Jury's question as court exhibit next in order

THE CLERK: No. 5.

(Whereupon, Court Exhibit No. 5, note from Juror 5091, was marked for identification.)

THE COURT: And, Mr. Bailiff, if you would hand the questions to the attorneys.

Question number one, is the golf club considered a deadly weapon in all counts as a whole or can it be considered as such in one count but not another?

It's the Court's understanding of this question, I would answer, yes, that it can be considered as such in one count but not another.

Mr. Blade?

MR. BLADE: I think that the best response would be to just refer the Jury back to the instructions. I'd be reluctant to give any instruction directly specific as to particular count. They've had the instructions regarding the deadly weapon and the elements of the offense.

THE COURT: Mr. Clymo?

MR. CLYMO: I would also ask the Court to refer them back to the CALCRIM on the definition of a deadly weapon.

THE COURT: So the question is -- I don't think they're confused about a deadly weapon, the instruction on what constitutes a deadly weapon, because they're saying in here can the golf club be considered a deadly weapon in all counts? They're wondering -- I think they're wondering, for instance, can we find that she didn't use the golf club as a deadly weapon in the vandalism versus the 422?

MR. BLADE: I don't disagree with the Court. That's how I'm interpreting this as well. I don't know if that's what they mean it as, but that's how I interpret it.

That being the case, I think that the best remedy -- the People's request would be to just advise them to follow the instructions.

THE COURT: All right. So with that said, I am going to -- and, Madam Clerk, if you would mark what I have -- a copy of all of the questions as court exhibit next in order that I'm going to send into the Jury.

THE CLERK: Do you want it as 6 or do you want it as 5A?

THE COURT: I want it as 5A.

THE CLERK: Marking Court Exhibit 5A.

(Whereupon, Court Exhibit No. 5A, response from Judge Ottenweller to the Jury, question one, was marked for identification.)

THE COURT: So what I'm doing is I'm crossing out question two and three, and on the white sheet of paper I am going to underneath it put, yes, you can consider deadly weapon allegation separately for each count. Okay? And that will be 5A.

And then let's go to question number two.

The definition of sustained fear, we understand it is momentary. Is this minutes? Is it less timeframe? This is regarding Count 2, criminal threat.

I can't remember what it says.

MR. BLADE: So the instruction in 1300, your Honor, it provides essentially the victim must be in sustained fear, sustained fear is more than momentary, fleeting or transitory.

And I'm looking at currently People v. Allen which as I understand it is the case that is referred to in the use notes that specifically is where this language comes from. So that's the case I'm looking at right now.

THE COURT: What is the cite of Allen?

MR. BLADE: It is 33 Cal.App.4th 1149.

THE COURT: So my suggestion on this, you three, is to merely say, please refer back to the

definition of sustained fear in CALCRIM 1300.

MR. CLYMO: That was going to be my request.

MR. BLADE: I tend to agree with that. If we get further questions on this point, we can possibly take a look at this case, but I would agree.

THE COURT: Okay. We're going to mark the next answer sheet as 5B to question number two.

(Whereupon, Court Exhibit No. 5B, response from Judge Ottenweller to the Jury, question two, was marked for identification.)

THE COURT: And I am going to cross out question one and question three.

Madam Clerk, I need 5A back. I didn't put my name under the note.

Okay. So I have put please refer to 1300 and definition of sustained fear.

And then question three, regarding Count 5, trespass, refusing to leave, is there a timeframe this must fall into?

So my answer to this is, no, since no timeframe is given in the trespass instruction.

Mr. Blade?

MR. BLADE: I agree.

THE COURT: Mr. Clymo?

MR. CLYMO: I would object to that and ask the Court simply refer them back to the trespassing question.

THE COURT: Okay. So number three, I think Mr. Clymo is correct, I think by -- at least at this point by saying no, that I am adding to the Jury instruction by putting some kind of timeframe on it and the way the trespass instruction is drafted no such timeframe exists.

So I'm going to just refer them back to the instruction. If they have further questions about this or it's a real sticking point, I'll address this again.

I'm crossing out questions one and two on this sheet of paper, please refer to the trespass instruction.

THE CLERK: And this will be 5C?

THE COURT: 5C.

(Whereupon, Court Exhibit No. 5C, response from Judge Ottenweller to the Jury, question three, was marked for identification.)

THE COURT: And, Madam Clerk, if you would make a copy for the attorneys of that if you could and then we will give the original for my bailiff to send into the jury room.

Okay. Folks, we'll see where we go from here.

(Recess taken.)

THE COURT: I am recalling the Nichols Jury trial. I have both attorneys present. Ms. Nichols is present. We're outside the presence of the Jury.

Mr. Bailiff, what's the latest from our Jury?

THE BAILIFF: They have a verdict.

THE COURT: Would you go ahead and bring them in with the verdict forms as well as their personal items? Thank you.

So we have two jurors who don't want to be in the box. They're sitting out in the audience. So if you see them migrating out into the audience, that's why.

THE BAILIFF: Thank you.

(Whereupon, the Jury entered the courtroom.)

THE COURT: All right. Our 12 jurors are back in their seats.

Good morning to all of you.

Who is the foreperson? What's your juror number?

JUROR 5091: 5091.

THE COURT: And, Madam Foreperson, my bailiff handed me this envelope. Is this your completed verdict forms?

JUROR 5091: Yes.

THE COURT: All right.

Ms. Nichols, if you and Mr. Clymo would stand for the reading of the verdicts.

So, Madam Clerk, I have clipped verdicts regarding greater and lesser just so that you know, if you could read them in that order, please.

THE CLERK: Thank you.

Superior Court of the State of California,

County of Sonoma, the People of the State of California, plaintiff, versus Kathryn Lee Nichols, defendant, SCR-747896-1.

Verdict, Count 1, we, the Jury, find the defendant Kathryn Lee Nichols not guilty of a violation of Section 245(a)(1) of the Penal Code, to wit -- excuse me, a felony, to wit, assault with a deadly weapon as charged in Count 1 of the information, dated 12/9/2021, foreperson number 5091.

Same title, came caption, Count 1, lesser included offense, we, the Jury, find the defendant Kathryn Lee Nichols guilty of a violation of Section 240 of the Penal Code, a misdemeanor, to wit, assault, a lesser included offense to a violation of Penal Code Section 245(a)(1) as charged in Count 1 of the information, dated 12/9/2021, foreperson number 5091.

Same title, same caption, Count 2, we, the Jury, find the defendant Kathryn Lee Nichols not guilty of a violation of Section 422(a) of the Penal Code, a felony, to wit, criminal threats as charged in Count 2 of the information, dated 12/9/2021, foreperson number 5091.

Same title, same caption, Count 2, lesser included offense, we, the Jury, find the defendant Kathryn Lee Nichols guilty of a violation of Section 664/422(a) of the Penal Code, a felony, to wit, attempted criminal threats, a lesser included offense

to a violation of Penal Code Section 422(a) as charged in Count 2 of the information.

We, the Jury, further find that in the commission and attempted commission of the above offense, the said defendant Kathryn Lee Nichols personally used a deadly and dangerous weapon within the meaning of Penal Code Section 12022(b)(1) to be true, dated 12/9/2021, foreperson number 5091.

Same title, same caption, Count 3, we, the Jury, find the defendant Kathryn Lee Nichols guilty of a violation of Section 594(a) of the Penal Code, to wit, vandalism as charged in Count 3 of the information.

We, the Jury, further find that the damage caused by the vandalism was $500 or more as charged in Count 3 of the information to be true.

If you found the damage caused by the vandalism to be $400 or more, please answer the following question: We, the Jury, further find that in the commission and attempted commission of the above offense, the said defendant Kathryn Lee Nichols personally used a deadly and dangerous weapon within the meaning of Penal Code Section 12022(b)(1) to be true, foreperson number 5091.

Same title, same caption, Count 4, we, the Jury, find the defendant Kathryn Lee Nichols guilty of a violation of Section 148.9(a) of the Penal Code, a misdemeanor, to wit, giving false information to a

police officer as charged in Count 4 of the information, dated 12/9/2021, foreperson number 5091.

Same title, same caption, Count 5, we, the Jury, find the defendant Kathryn Lee Nichols guilty of a violation of Section 602(o) of the Penal Code, a misdemeanor, to wit, trespass and refusing to leave private property as charged in Count 5 of the information, dated 12/9/2021, foreperson number 5091.

THE COURT: You may have a seat.

Mr. Blade, do you wish the jurors to be polled?

MR. BLADE: No.

THE COURT: Mr. Clymo?

MR. CLYMO: No, thank you.

THE COURT: So, Madam Clerk, if you would go ahead and record the verdicts for me, please.

So, Ladies and Gentlemen, what I would like you to do if I could, would you please go back into the jury deliberation room, there may be another task I need you to accomplish.

So would you pick up your personal items, follow my bailiff into the jury deliberation room, I'll let you know by noontime what I'm planning for you, if anything.

(Whereupon, the Jury exited the courtroom.)

THE COURT: You may have a seat.

We are outside the presence of the Jury.

So there has been a finding on one or more

felonies, I believe it is Counts 2 and 3, the lesser of Count 2, and that would bring into play the factors in aggravation that are contained in the information.

So the question I've got here is I'm looking at this -- and, Mr. Clymo, first of all, is your client willing to stipulate to factors in aggravation number one?

MR. CLYMO: No.

THE COURT: As to number two, I believe the Jury has already made its finding as to Counts 2 and 3.

MR. CLYMO: I believe that it would be res judicata or collateral estoppel to relitigate that issue.

MR. BLADE: I agree. I think that finding -- I think the record of the verdicts would support the aggravating circumstance alleged in two and three.

THE COURT: As to three as well?

MR. BLADE: Yes.

THE COURT: Mr. Clymo, what's your position on three?

MR. CLYMO: The third -- I am not prepared to admit to that number three.

MR. BLADE: Actually --

MR. CLYMO: I think Mr. Blade -- I understand Mr. Blade is saying Count 3?

MR. BLADE: The third aggravating -- actually, reading it now, I think that would require -- the way that it is phrased, I don't think that it's

automatically inherent in the Jury verdict. So that is something that we would likely wish to present to the Jury, but it will be based upon the facts of the case.

THE COURT: All right. And, Mr. Clymo, is your client willing to stipulate to three?

MR. CLYMO: No, your Honor.

THE COURT: Number four?

MR. BLADE: Before the Court addresses four, I've already informed Mr. Clymo I believe that I alleged this in error. I'm not aware of any prior 1170(h) or prison term. I think this was something that I likely inadvertently copied and pasted. We are not proceeding with the fourth aggravating factor.

THE COURT: I will strike that.

Number five, Mr. Clymo, is your client willing to stipulate she was on probation at the time?

MR. CLYMO: Yes.

THE COURT: Ms. Nichols, there is a new law going into effect January 1st, 2022. It states in essence that if a Court is going to utilize aggravating factors at the time of your sentencing, those aggravating factors must either be stipulated to you -- by you, I'm sorry, or found by the Jury in a case such as this.

Do you agree that you were on probation in file SCR-739562 and SCR-739561?

DEFENDANT NICHOLS: Yes, I was.

THE COURT: Okay. So we don't have to

provide that to the Jury.

Mr. Clymo, is your client willing to stipulate that her performance on probation was unsatisfactory?

MR. CLYMO: No.

THE COURT: And, Mr. Blade, are you still wishing to have this as an aggravating factor?

MR. BLADE: Yes.

THE COURT: Okay. Now, Mr. Blade, so we have in this one, three and six. Are you prepared to go forward this afternoon?

MR. BLADE: We will be prepared to go forward this afternoon.

With regard to the first factor alleged, this will be merely argument. I do not have additional witnesses to present or evidence to put on.

With regard to three --

THE COURT: So, Mr. Blade, that's okay, I just need to bring the Jury out since it is noontime here. I'm going to just tell them to return at 1:30 and I'm going to explain what we're going to do at that time to them and then we're going to go into this on your part of it.

It is my request that over the lunch hour that you prepare verdict forms for these aggravated factors, whether it is true or not true.

I need to hear the two of you be ready to argue is the burden of proof here preponderance of the evidence or beyond a reasonable doubt?

MR. CLYMO: It is beyond a reasonable doubt in the statute.

THE COURT: It is beyond a reasonable doubt in the statute?

MR. CLYMO: Yes.

MR. BLADE: I agree.

THE COURT: Okay.

MR. BLADE: So just so the Court is aware, we will have a witness here that we will be prepared to call for this afternoon.

The thing that I wanted to bring up with the Court this morning before we break for lunch is I believe that we will need to do a part of this outside the presence of the Jury, specifically with regard to admitting and proving the prior convictions. That part does not require a finding by the Jury. It's that whether or not the convictions are numerous or increasing seriousness is my understanding, but there is not a requirement of a Jury finding on the fact of the prior conviction.

So that's something I would recommend everybody take a look at. It would be my position that we'd be moving into evidence the prior convictions, themselves, and I would be asking the Court to take judicial notice that the statutes that she was convicted of, what the name of those offenses are.

And the verdict form in question is -- I already have that prepared and I can submit that to

the Court and counsel.

MR. CLYMO: Are you talking about your allegation number three? I'm just not -- or number one?

THE COURT: I don't see it either, Mr. Blade, regarding an increase in violent behavior is not alleged.

Mr. Bailiff, let's bring our Jury out, please, and tell them to bring their personal items with them.

(Whereupon, the Jury entered the courtroom.)

THE COURT: The parties may have a seat.

We have our 12 jurors back.

So you are going to engage in a first time -- certainly for me and I believe in this courthouse and I'll tell you where we're at.

I'm going to be needing you to come back at 1:30. In the past, if you found -- if a Jury found someone guilty of a felony offense and I would go to sentencing some weeks later, I would get a probation report and the probation report would list mitigating and aggravating factors that I could consider in sentencing someone and if I felt it was appropriate I could utilize those mitigating and aggravating factors to come up with a sentence.

The legislature as of January 1st, 2022, and I believe it would be retroactive to now, says that either Ms. Nichols can stipulate to various aggravating factors that are pled in this information or if not

the Jury, you, have to come to a unanimous decision whether those aggravating factors are true in this case.

Now, because we're at lunch, I just wanted you to know where we're at with this. I don't expect this to go longer than this afternoon. I expect this to be very short and to the point, but I am going to need all of you to reach a unanimous verdict on one or more of these aggravating factors that have been alleged.

So I'm going to release you for lunch. I'd like you back here ready to come on in at 1:30 and we will -- Mr. Blade has the burden of proof on this, and I'll tell you more about that when you come on back in, and I just wanted you to know why I need you back.

As I said, this is a first for me and for any Judge in this courthouse. This is the first jury trial to deal with this issue and so we're all kind of feeling our way around it to see how this all fits.

So with that said, we'll see how it fits with the 12 of you. I'll see you all back here at 1:30. Okay? Thank you.

(Whereupon, the Jury exited the courtroom.)

THE COURT: Okay. I will see the attorneys back here at 1:15 if you would. We need to go over some procedural issues.

I'm thinking here that I'm going to have to

pre-instruct them like I did with 220, but instead of guilty or not guilty, I'm going to have to interpose aggravating factors or not, and so that's kind of what I'm thinking of is reading 220 to them and letting them know with that modification and letting them know that the rest of the jury instructions apply to the evidence as it comes in. Okay?

MR. CLYMO: I'll be back at 1:15.

I did just want to put something briefly on the record. As to allegation six, Ms. Nichols' prior performance on probation, I don't -- Mr. Blade I'm sure will correct me if I'm wrong, but I don't have any discovery of any prior VOPs or missed meetings. So if there's going to be some evidence coming forward after lunch that I've not been provided, I would object to that under due process and notice.

MR. BLADE: So I believe all of the prior -- any prior sustained violations would be in the certified records of prior convictions which have been disclosed.

The Public Defender's office has represented Ms. Nichols while she's been on probation. Past performance on probation relate to the two matters that are before this Court that are probation matters that are actually, in fact, being run concurrent with this trial. She's on probation in these two cases.

We have notified the defense of the intent to call the probation officer. I think it's been well

established and mentioned throughout these proceedings and our in limine motions that Ms. Nichols has been in abscondence with active warrants outstanding for the past year essentially and eight months prior to this offense. I'm not sure what other discovery counsel would like.

But there are prior violations of probation, she's been in violation of probation for eight months prior to this case, and the probation officer has been disclosed to the defense and put in our in limines.

THE COURT: So I have the files with me.

What I have in SCR-739562, Mr. Clymo, is a Universal dated 10/27/20 -- I'm sorry, 10/26/20 and a Universal dated 12/9/20.

I imagine that's what you're proceeding on. Is that correct, Mr. Blade?

MR. CLYMO: I have no objection to that.

What I was concerned about is I'm going to hear for the first time that probation officer X met with Ms. Nichols, she was rude to him, used profanity or something of that language.

As far as she was placed on probation this day, I filed a petition for revocation, I'm not going to object to that if that helps the Court and Mr. Blade with my issue.

MR. BLADE: And if there are any specific --

THE COURT: And, again, just to make the record clear, in 739561 I have one Universal that

duplicates the one of two in the other case.

So I will leave it -- Mr. Blade, over the lunch hour, if you'll give an offer of proof to Mr. Clymo to see if there's going to be any other testimony outside of these two Universals?

MR. BLADE: And, your Honor, I'll just put on the record again we've disclosed this witness. Counsel has had the opportunity to contact her this entire time. There have been multiple violations of probation. She was in violation of probation since December when she absconded. I think that we have a right to examine this witness and whatever she testifies is what she testifies to, but counsel has had an opportunity to contact her and I've been --

THE COURT: That's not how it works, Mr. Blade. You have to give up to Mr. Clymo so he has an ability to cross-examine this person. He didn't even know this was going to be relevant until five minutes ago.

MR. BLADE: I disagree, your Honor. We disclosed the intent to proceed with this aggravating factor at the start of trial and we disclosed the name of this witness as well as described in our statement of facts --

THE COURT: Okay. Just stop because we're into the lunch hour. You will give Mr. Clymo over the lunch hour the offer of proof of what the probation officer is going to testify to.

MR. BLADE: Very good.

THE COURT: I'll see you all at 1:15.

(Recess taken.)

THE COURT: All right. We are back on the record in the Nichols Jury trial. This is the post-conviction portion of the trial which we bifurcated. This has to do with the factors in aggravation as alleged in the information.

So what I intend to do when the Jury comes back in, I intend to read to them the factors in aggravation from the information. For instance, what I am going to do is read factor in aggravation number one. I am going to tell them that as to factor in aggravation number two which I'm going to read to them that they have already made that determination in their Jury verdict as to Counts 2 and 3 -- I should say the lesser in 2 and 3. I would read to them three. I would read to them five except to say that defendant has stipulated she was on probation in two felony matters and I'm going to read those case numbers. And then I would read number six without putting in mandatory supervision, blah, blah, blah.

I then would read to them 220, and 220 under reasonable doubt, instead of criminal charge, I would put in factor in aggravation wherever the word charge is used.

And then I would turn it over to Mr. Blade since he has the burden of proof to start up his

evidence.

So, Mr. Blade, what's your position on this?

MR. BLADE: I think that sounds fine, your Honor.

Looking at the -- and one of the reasons I did not respond to one of the Court's last emails, I wanted to avoid getting into a subject matter that might need to be on the record, but looking at the first factor in aggravation alleged, great violence, great bodily harm, threat of great bodily harm, other acts regarding a high degree of cruelty, viciousness or callousness, the only argument I intend to present to the Jury is that there was in this instance a threat of great bodily harm or other acts involving a high degree of cruelty, viciousness or callousness.

I'm not going to ask them to find that there was great bodily harm or great violence as it's listed here.

I'm fine with this verdict form. I will tell them that, that they can mark not true on that. If the Court would like to modify to simplify this so that they're not confused, that might be another solution.

THE COURT: So I am then going to strike in the information with Mr. Blade's statement the words great violence and great bodily harm. So I will not read that to them.

And then I will have my JA take out for both the vandalism -- oh, so that would be for the

attempted criminal threat.

Is there something different, Mr. Blade, for the vandalism? Would you want to strike threat of great bodily harm in the vandalism count and just have other acts or do you want to keep it the way it is?

MR. BLADE: I apologize, your Honor, I'm not quite following the Court.

THE COURT: She has been convicted of a felony vandalism with the use of a deadly weapon. So do you -- in the attempted criminal threats, you're willing to strike great violence and great bodily harm.

MR. BLADE: Correct.

THE COURT: Are you willing to do that in the vandalism --

MR. BLADE: Yes.

THE COURT: -- count?

MR. BLADE: Yes.

THE COURT: Okay.

MR. BLADE: And, your Honor, in looking through --

THE COURT: And just a second, Mr. Blade.

I never asked Mr. Clymo if he has any comments about what I just said?

MR. CLYMO: I do have some comments.

I spent the past week scampering around trying to find what I -- Judge Cousin's memo called -- forwarded to the Public Defender's office so I worked that. I finally got my hands on a copy of it over the

lunch hour. I did have a chance to review it. It was enlightening.

The one thing that clearly hit me with flashing lights that I do need to put on the record is Judge Cousins did have on page 28 a section, Section 8, talking about aggravating factors needing to have been pled and proven at the preliminary hearing.

In Ms. Nichols case, that was not the case.

Judge Cousins did analyze two cases that had a split, and I think it was the Brooks case, 159 Cal.App.4th 1, and Sandoval, People v. Sandoval, S-a-n-d-o-v-a-l, it's a 2007 case at 41 Cal.4th 825.

And what Judge Cousins concluded was that it would be prudent for the People to allege in the felony complaint and the information any factors in aggravation, likely the Court would be prohibited from considering any aggravating factors not pled and proved unless the factors relate to a prior conviction or are admitted by the defendant.

Since what we're left with here are factors one, three and six were not pled and proved -- or not proven at the preliminary hearing, nor did Ms. Nichols admit, I wanted to put that objection on the record.

THE COURT: Done.

Mr. Blade, do you wish to respond to that at all?

MR. BLADE: This is perspective. This law hasn't gone into effect yet. Clearly we can't go back

in time before the prelim to a point when this law was not signed into law.

So that was -- as I read -- I also read that part as well. It's a split of authority. We don't have any direct guidance yet. I think Judge Cousins was recommending as a precautionary measure to plead and prove before preliminary hearing. However, there is no case directly on point that says that this is a plead and prove requirement, and my reading of the statute would show entirely the contrary.

So I don't think that we've waived that issue by not alleging it in the complaint and the statute that didn't exist yet.

THE COURT: So my view about this is it's a sentencing aspect. If this were in a felony complaint at the time of prelim, under our current -- under the current law as I read it for prelims, I would not have to make a finding on the sentencing aspect of those and I would not require the District Attorney to prove them up at the time of the prelim.

It seems to me like it's very similar to a strike that doesn't have to be proved at the time of prelim or other sentencing enhancements that are not part of the underlying charge, and I don't find these to be part of the underlying charge.

MR. CLYMO: I understand.

THE COURT: So with that said, Mr. Blade, how do you intend to proceed this afternoon?

MR. BLADE: Well, a couple of things.

So my intent would be to call the probation officer who is seated behind me, Casey Arbogast, and I did provide counsel an offer of proof as the Court had requested after conversation with Ms. Arbogast, and it will be for the purpose of describing Ms. Nichols' performance on probation as well as any sustained violations that occurred.

I also intended for that purpose to admit the certified records of conviction which show the sustained violations of probation that occurred.

THE COURT: By that you mean the Universals?

MR. BLADE: No. No, I wouldn't be offering the Universals into evidence. We have the certified records of conviction in both SCR-739561 and 562.

THE COURT: So let me just find out, Mr. Clymo, would you stipulate to that? I think we've already put in front of the Jury that she's convicted of two felony convictions. They're just not -- we did not associate them with a probation grant or a case number.

MR. CLYMO: I did get the offer of proof from the People of what -- their evidence they want to put on and what evidence they want Ms. Arbogast -- I apologize if I said that wrong -- to put on. Some, I'm fine with. I do have objections to several.

I don't know if you want to go line by --

THE COURT: So hang on a second. This is what

I just wanted to find out: Would you agree to a stipulation in front of the Jury that Ms. Nichols was on -- at the time of this offense was on probation for a felony offense of 10851 in case number SCR-739562?

MR. CLYMO: Yes, I would stipulate to both the convictions for being on probation.

And what I did learn from Judge Cousins which is what I suspected was under the Apprendi caselaw, the prior conviction is not something that the Jury needs to find. So I don't think that is something that needs to go in front of the Jury. For those reasons, I would object to the certified priors coming in which the People have on their list.

THE COURT: So that's what I'm saying is if we can stipulate -- it sounds like we have a stipulation as to that conviction and she's already stipulated that she was on probation on those two cases. I don't see the need to provide them with a certified copy of the conviction.

MR. BLADE: I don't disagree, but there are a few other reasons that I want to advance these convictions.

THE COURT: Go ahead.

MR. BLADE: So there is also a sustained violation of probation on November 18th, 2020, in both cases. I wonder if we can have a stipulation to that violation of probation on that date and it is part of the Court's record?

MR. CLYMO: Yeah, there's no objection to that. That would be akin to a prior conviction in my analysis.

THE COURT: So how we're going to do this, Mr. Blade, just so that you know, I'm going to allow you to stand up in front of the Jury before you put Ms. Arbogast on the stand and tell them -- voice those stipulations.

MR. BLADE: Okay. Thank you, your Honor.

The other aspect of this as well is one of the factors that we allege that I notice the Court made a few modifications to in the verdict form is a factor under Rule 4.421, the defendant has engaged in violent conduct that indicates a serious danger to society. That is a factor relating to the defendant under subsection B.

I did notice that the Court made a modification to the verdict form. We, the Jury, find in this case the defendant engaged in violent conduct that indicates a serious danger to society.

My read of this factor is it's relating to the defendant and it refers to this person has engaged in violent conduct. I think that does invite prior criminal conduct to be a relevant consideration.

So for that purpose I would also be asking the Court to -- I would be asking the Jury to take into consideration prior convictions for that factor and that includes in the arson case that Ms. Nichols

was also convicted of battery on a peace officer.

So I'm wondering if we can also include that in our stipulation? That is -- that is an aggravating factor that relates to the person and it's that this person has engaged in prior conduct that indicates a danger to society.

THE COURT: I understand that was a misdemeanor. Is that correct?

MR. BLADE: It was.

THE COURT: So she's not on felony probation for that. Right?

MR. BLADE: She's not on felony probation for that. That was -- she is and is not. That was a part of the arson conviction. So she is on felony probation for the arson. The battery on a peace officer was one of the charges in that case.

THE COURT: Mr. Clymo?

MR. CLYMO: I think as far as she had a conviction for a misdemeanor 243(b), battery on a police officer, I do think that probably falls under the prior convictions that's not in front of the Jury.

If the People want to introduce that and the Court thinks it would be admissible to this aggravating factor, I would ask -- we would be prepared to stipulate to that before my client's rap sheets and priors are stuck in front of the Jury which have all kinds of language and verbiage that's not relevant, confusing and would be -- I'd ask to exclude those

under 352.

MR. BLADE: And I'd also be prepared to enter into that stipulation.

THE COURT: Okay. Then what I would do is just strike in this case in that verdict form.

MR. BLADE: Thank you.

THE COURT: Okay. What else, Mr. Blade?

MR. BLADE: I think that's it.

Ms. Arbogast here will be prepared to talk about Ms. Nichols' performance on probation, and, you know, I would just ask her question and answer when was this person placed on probation, what were the terms --

THE COURT: That's okay. I just needed to know. You have given this to Mr. Clymo. Is that right?

MR. BLADE: I did. I provided a summary of my -- what I anticipate the probation officer will testify to along with all of the factual bases and all of the Universals that that's based on.

THE COURT: Mr. Clymo?

MR. CLYMO: Yes, I did receive that. I'd like to go over that briefly.

The first information the People indicated that an offer of proof was that Ms. Nichols was placed on probation on September 24th, 2020. I'm fine with that.

The next offer of proof was that Ms. Nichols

was directed to call probation on September 28th, 2020, and did not. Unless Ms. Arbogast was the person that called and gave this information to Ms. Nichols, I would object this coming through Ms. Arbogast as hearsay.

Also, there are -- People indicated that Ms. Nichols was directed to keep advised of address and she did not do so. I'm fine as long as Ms. Arbogast is the person that conveyed this information to Ms. Nichols. Otherwise, I would have the same hearsay objection to that.

THE COURT: So while you're going down this list, just so we don't lose sight of it -- so, Ms. Arbogast, good afternoon.

MS. ARBOGAST: Good afternoon.

THE COURT: Were you the one who advised Ms. Nichols to give her contact information and call in?

MS. ARBOGAST: I was not.

THE COURT: So, Mr. Blade, it would seem to me that that -- it would be hearsay, not admissible.

What is your position?

MR. BLADE: I believe that would also be part of the record of conviction, but I'll have to...

Normally a person is ordered to contact probation by the Judge and that is a condition of probation and there is a list of conditions of probation that are ordered. So I believe that would

be a part of the Court's file and the record -- part of the record of conviction.

THE COURT: So I'm looking at the minute sheet that I have just to see what she was told because I was the sentencing Judge in both cases.

MR. CLYMO: And this very well may be admissible, just my objection would be through Ms. Arbogast.

THE COURT: I did order her to report to probation within two working days upon her release from custody. That is in file 739562.

MR. CLYMO: Just so I'm clear, was that on September 24th, 2020?

THE COURT: Yes.

MR. CLYMO: So I'm assuming since the records in probation was that someone other than Ms. Arbogast directed her to call on 9/28 is she did do that, at least there is an inference that occurred.

MR. BLADE: I think that a lot of counsel's hearsay objections can be addressed while the witness is testifying. If she does not have the ability to answer -- what this is starting to sound like is a 402 hearing to me.

With that said, I think the record of conviction, if it indicates that she was -- that Ms. Nichols was ordered to contact probation within a certain period of time and did not, whether or not this probation officer can answer that question...

MR. CLYMO: I think this is a trial with proof beyond a reasonable doubt. I have a right -- Ms. Nichols has a right to know what the evidence is and object to it before the Jury hears it.

THE COURT: So again, Mr. Blade, I would allow you in both cases to -- when you're telling the Jury before you start up with Ms. Arbogast that Ms. Nichols was ordered by the Court to report to probation within two business days of her release from custody.

And of course, Mr. Clymo, you are welcome to make your objection if you hear a hearsay from that aspect.

MR. CLYMO: Understood.

THE COURT: And, Mr. Clymo, again, you'd stipulate to that being the record in those two probation cases?

MR. CLYMO: Yes.

THE COURT: Thank you. What else, Mr. Clymo?

MR. CLYMO: There's also -- the People want to introduce that Ms. Nichols was ordered to participate in TASC. I have no objection to that.

There's also information that the People want to introduce that Ms. Nichols left TASC after four hours. Unless Ms. Arbogast has personal information as to that, I would object as to foundation and hearsay.

THE COURT: Mr. Blade?

MR. BLADE: So I do believe that the -- my understanding is that Ms. Nichols leaving TASC within four hours would likely be a hearsay statement.

That said, she was ordered to complete TASC and also was ordered to contact probation within a period of time of completing TASC. Neither of those happened. On July 26th, 2021, Ms. Nichols was very much not in TASC and had not at that time contacted probation. So I think that would be admissible evidence through the testimony of this probation officer.

MR. CLYMO: And I'm fine with that. My issue was left after four hours.

THE COURT: So I was going to say it appears that she admitted a violation of probation for leaving -- for not successfully completing TASC. Is that right?

MR. CLYMO: Yes, she did. Like I said, my only objection is to the four hour component.

THE COURT: Okay.

So, Mr. Blade, again, I have no objection to you again as another item to tell the Jury when you first stand up that she admitted a violation of probation for not completing TASC and you, of course, can have Ms. Arbogast testify what that means.

MR. BLADE: Okay. Thank you.

THE COURT: And the four hours, if she doesn't have personal knowledge of a four hours, we

would stay away from that.

MR. BLADE: I don't disagree. The Court directed me to provide the offer of proof to counsel. That's what I did. I'm not -- I'm not submitting that everything that Ms. Arbogast told me is necessarily admissible evidence. So I don't disagree with that.

If I can have just a moment, your Honor?

So there was a violation of probation that was admitted and I believe that we're stipulating to.

MR. CLYMO: Ms. Nichols is prepared to stipulate she did not complete TASC if that's...

MR. BLADE: That's fine.

So there is an admitted violation of probation on 11/18/2020. There was not an admitted violation of probation to my knowledge for leaving TASC. If Ms. Nichols is prepared to stipulate that she did not complete TASC, I would be prepared to enter that stipulation as well.

MR. CLYMO: So the probation was revoked on 12/9/20 for I think not doing TASC. I'm fine with that also coming in.

There is also People seek to introduce on that same day of December 9th, 2020, a warrant was issued for Ms. Nichols' arrest. I would object to that as irrelevant and 352.

THE COURT: Mr. Blade?

MR. BLADE: Submitted.

THE COURT: You'll not -- Ms. Arbogast,

you'll not go into the warrant aspect of the case.

MS. ARBOGAST: Okay.

THE COURT: All right.

MR. CLYMO: And we are almost done.

The last objection was the People wanted Ms. Arbogast to describe Ms. Nichols' performance on probation as poor. I would object to that. I think that goes to the ultimate question as to what the Jury is here to decide. So I would ask that that not be asked.

THE COURT: So I disagree with that. I think Ms. Arbogast can testify as to that opinion and she is subject to cross-examination by you about how she bases that opinion. Okay?

And again this is -- I'm sure Ms. Arbogast has been -- I know she's been around here, been a probation officer for many years. So that's why I'm saying I would allow her that opinion testimony.

Anything else, Mr. Clymo?

MR. CLYMO: No.

THE COURT: Let's bring our Jury in.

MR. BLADE: I just want to make sure that I'm going to state all of these stipulations correctly. I've been writing these down.

So I will tell the Jury --

THE COURT: If we hear something that you're not stating correctly, we'll let you know.

MR. BLADE: Okay.

THE COURT: Go ahead. Let's bring our Jury in.

(Whereupon, the Jury entered the courtroom.)

THE COURT: Okay. The parties may have a seat.

We have our 12 jurors back in their seats.

Again, Ladies and Gentlemen, thank you so much for your patience in this process.

We're going to start up with what I call the second phase of your responsibilities here in making further decisions regarding the case.

As my clerk did when we started this up, she read the felony information, I'm going to read to you the factors in aggravation that also are alleged in this information.

Oh, you don't have your notebooks. They're in the jury room.

Mr. Bailiff, could you go get their notebooks for me, please. I think they may need them for this.

I actually would like you when the notebook comes to write down these factors in aggravation because you're going to have to decide on them one at a time just so you know.

Okay. The District Attorney's office alleges the following sentencing factors in aggravation relating to the crime of attempted threats while personally using a deadly weapon and the crime of vandalism while personally using a deadly weapon and

relating to the defendant.

This is what they are alleging:

Those two crimes, one or both or either one, involved threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness.

Two, number two was -- and you don't need to write this down -- was armed or used a weapon at the time of those two crimes. You've already found that. So you don't have to deal with that.

And then number four was stricken by the District Attorney.

And number five, Ms. Nichols has already stipulated she was on two grants of felony probation at the time of this event. So you don't have to find that. She's already stipulated to that.

You remember you heard in the case that she suffered two prior felony convictions? That's what the probation relates to. Okay? There are two separate cases. And Mr. Blade is going to give you a stipulation so that you're aware of that.

The last factor in mitigation, that her performance on these two grants of probation was unsatisfactory.

JUROR 5258: I'm sorry, I missed the last two words of that sentence.

THE COURT: Was unsatisfactory.

And that was Juror 5258.

Okay. So those are the things you're going to decide after you've heard some brief evidence here this afternoon.

So you remember I read to you a couple of times the proof beyond a reasonable doubt instruction? So I want to read that to you again and instead of the word charge like the criminal charges you've decided, I'm going to substitute in these allegations of aggravation. Okay? Just so that you understand how I'm modifying this instruction.

The fact that factors in aggravation have been filed against the defendant is not evidence that they are true. You must not be bias against the defendant just because she has been arrested, alleged to have committed these factors in aggravation or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption of innocence applies to each element and each factor in aggravation I have just told you about. This presumption requires that the People prove a defendant has committed these factors in aggravation beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the factor in aggravation which you are deciding is true. The

evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant committed these factors in aggravation beyond a reasonable doubt, she is entitled to your verdict of not true and you must find that these did not occur. Okay?

Now, Mr. Blade is going to get up. He has some stipulations he is going to give you.

Again, I want you -- you can either listen or you can write these down. If he goes too fast, raise your hand if you want to take them down. These stipulations are evidence for you to decide. It is what Mr. Clymo and Ms. Nichols have agreed to with Mr. Blade for your consideration. Okay?

Go ahead, Mr. Blade.

MR. BLADE: Thank you, your Honor.

The parties have stipulated to the following facts: That on August 26th, 2020, in Sonoma County Superior Court, docket SCR-739562, that Ms. Nichols was convicted of unlawful taking of a vehicle.

The parties further stipulate that on August 26th, 2020, in Sonoma County Superior Court, docket number SCR-739561, Ms. Nichols was convicted

of arson and of committing a battery on a police officer.

MR. CLYMO: Objection.

THE COURT: It's unlawfully starting a fire.

MR. CLYMO: Correct. She was not convicted of arson.

THE COURT: There is a distinction here just so you know, we have referred to it you remember during the trial as unlawfully starting a fire was her prior conviction. The stipulation again was to an unlawful starting of a fire rather than the term arson which has a more specific meaning in criminal law.

Go ahead, Mr. Blade.

MR. BLADE: On September 24th, 2020, in the above cases, Ms. Nichols was placed on formal supervised probation.

The parties further stipulate on November 18th, 2020, Ms. Nichols admitted a violation of probation.

The parties further stipulate Ms. Nichols was thereafter ordered to participate in a residential treatment program called TASC or Athena House and thereafter failed to complete the participation in residential treatment program as ordered.

Thank you.

THE COURT: And I also believe, Mr. Blade, we had agreed in the stipulation that on September 24th, 2020, I was the sentencing Judge in

both of these cases. I ordered Ms. Nichols to report to probation within two business days of her release from custody in both of those cases. Okay?

That was a further stipulation by the sides. Is that correct, Mr. Blade?

MR. BLADE: Correct.

THE COURT: Mr. Clymo?

MR. CLYMO: Yes.

THE COURT: All right. With that said, Mr. Blade, your first witness.

MR. BLADE: Thank you, your Honor. The People call Deputy Probation Officer Casey Arbogast.

THE COURT: Come on up, Ms. Arbogast, if you would to our witness seat.

And before you get comfortable, will you raise your right hand so my clerk can swear you in.

CASEY ARBOGAST,

Called as a witness herein, who having been first duly sworn, was examined and interrogated as is hereinafter set forth:

THE CLERK: Thank you. If you could please be seated.

THE WITNESS: Thank you.

THE CLERK: And if could you please state your name, spelling it for the record.

THE WITNESS: Casey Arbogast, C-a-s-e-y, A-r-b, as in boy, o-g-a-s-t.

THE CLERK: Thank you.

THE COURT: And, Mr. Blade, if I could just have a moment?

The other thing I want to tell the 12 of you, you remember the Jury Instruction 226 on how to view the credibility of witnesses, it was just entitled 226, it gave you a list of factors to look at that you could look at if you wish to evaluate the credibility of a witness, that is in play here and I would like you to go ahead and keep that in mind as you listen to Ms. Arbogast's testimony.

Go ahead, Mr. Blade.

MR. BLADE: Thank you.

DIRECT EXAMINATION

BY MR. BLADE:

Q. Good afternoon, ma'am.

A. Good afternoon.

Q. Can you please tell you the jury what you do are a living?

A. I'm a deputy probation officer with Sonoma County.

Q. And how long have you been engaged in that employment?

A. I've been with Sonoma County for just over three years. I was a PO, probation officer, in a different county for two years.

Q. And can you explain specifically what a

probation officer does?

A. A probation officer -- I'm a supervision probation officer and I supervise people that have been placed on grants of probation, make sure they follow their terms and conditions, provide them services that they may need.

Q. And can you explain what probation is and -- how would you characterize what probation or probation is when a person is on probation?

MR. CLYMO: Objection, relevance, 352.

THE COURT: Overruled. You can answer if you can.

THE WITNESS: I'm sorry, do you mind repeating that?

MR. BLADE: That was a confusing question.

Q. Can you just explain generally what is probation?

A. So as a supervision probation officer, I meet with people in the office for office appointments, go over -- provide them services, whatever services, maybe from mental health services, drug treatment services, Epics, which is a behavioral therapy. I make sure -- I go to their houses. I make sure that they're following their terms and conditions that the Court placed.

Q. And when a person is on supervision, when you're supervising somebody, are they required to meet with you?

A. Yes.

Q. And when you're supervising somebody, are they required to keep you informed of their whereabouts?

MR. CLYMO: Objection, relevance, 352.

THE COURT: Overruled. You can answer.

THE WITNESS: Yes.

MR. BLADE: Q. And can you explain what that means, keeping somebody informed -- keeping you informed of their whereabouts?

A. Keeping probation informed of their whereabouts is we need to know where the person is staying every single night so where they're sleeping at.

Q. And how often is a person supposed to remain in contact with probation?

MR. CLYMO: Objection, the general person is not what we're here for.

THE COURT: Agreed. If you can narrow it down, Mr. Blade, please.

MR. BLADE: Q. Are you the supervising probation officer for Ms. Nichols?

A. I was. I am currently not anymore.

Q. Okay. When did you become the supervising probation officer for Ms. Nichols?

A. When she was granted probation.

Q. Okay. And that was when she was placed on probation in September of last year?

A. Correct. It wasn't actually assigned to me until October 7th of 2020.

Q. Understood. And how long were you the assigned supervising probation officer for Ms. Nichols?

A. I moved caseloads in March of 2021. However, I did monitor the case which she was on due to it not having an assigned officer until September of 2021.

Q. Okay. And did you have any contact with Ms. Nichols after you became her supervising probation officer?

A. I did not.

Q. Okay. And can you explain what you mean by that?

A. I did not have any phone or in person contact with her.

Q. Okay. Was she required to keep her probation officer -- was she required to contact her probation officer?

A. Yes.

Q. Okay. And she never contacted you?

A. She never contacted me.

Q. Okay. Did you ever -- were you ever able to meet with Ms. Nichols?

A. I personally did not.

Q. Okay. Ms. Nichols, was she -- after Ms. Nichols was directed to participate in residential treatment, was she required to contact you or her probation officer after she completed treatment?

A. Yes.

Q. Okay. And after she was placed in residential treatment, did Ms. Nichols ever contact probation?

A. No.

MR. CLYMO: Objection, lack of foundation.

THE COURT: Overruled. You can cross-examine, Mr. Clymo. I'll allow the answer to stand.

MR. BLADE: Q. And to this date how would you describe -- as Ms. Nichols' supervising probation officer until March, how would you describe her performance on probation?

MR. CLYMO: I'm going to object. This calls for the legal conclusion of what the jury is tasked with finding.

THE COURT: Overruled. I'll allow it.

Go ahead, Ms. Arbogast.

THE WITNESS: In my opinion, her time on probation was unsatisfactory.

MR. BLADE: Q. And can you just elaborate what makes you say that?

MR. CLYMO: Same objection.

THE COURT: Understood. It's overruled.

THE WITNESS: She was -- after being on probation for one month, she was taken into custody for new law offenses, and then she had failed to contact probation at any point during her probation status or time.

MR. BLADE: Okay. No further questions.

THE COURT: Mr. Clymo.

CROSS-EXAMINATION

BY MR. CLYMO:

Q. So you were assigned Ms. Nichols' case on October 7th of 2020?

A. Correct.

Q. So if Ms. Nichols was ordered on September 24th to go in and meet with probation, if that had not occurred, would the case have been assigned to you?

A. Yes. Yes.

Q. Now, when someone is on probation and they're homeless, are they assigned to contact their supervising probation officer or are they assigned to call the officer of the day?

A. If it is an assigned case, they're directed to contact the supervising probation officer. If it's unassigned, it would be the officer of the day.

Q. So between October 24th and October 7th of 2020, was Ms. Nichols' case assigned to anyone?

THE COURT: You mean September 24th?

MR. CLYMO: Q. Excuse me, I misspoke, September 24th.

A. Not to my knowledge, no, it was not.

Q. So if someone were to come in in that situation, would they be -- would they be told to

call the officer of the day to report their whereabouts?

A. Yes.

MR. CLYMO: I have no further questions.

THE COURT: Anything further for Ms. Arbogast?

MR. BLADE: No.

THE COURT: All right. Thank you, Ms. Arbogast. You're free to go.

THE WITNESS: Thank you.

THE COURT: Any other witnesses, Mr. Blade?

MR. BLADE: No, your Honor. At this time the People rest.

THE COURT: Mr. Clymo, do you wish to present any witnesses or evidence for this bifurcated matter?

MR. CLYMO: No, thank you.

THE COURT: All right.

So, Ladies and Gentlemen, that is the evidence in the case. I am going to allow Mr. Blade to give a brief closing on this for you and to give Mr. Clymo a brief closing just so they can put this into context if they wish to do so.

Mr. Blade, go ahead.

MR. BLADE: Thank you, your Honor.

Good afternoon, everyone. Thank you for your patience.

So there's essentially three factors that we're asking you to consider and these would relate to sentencing.

The first is that the crime or crimes that you have found Ms. Nichols guilty of, specifically the attempted criminal threats as well as the vandalism, that those offenses involved a threat of great bodily violence -- or, sorry, great bodily harm.

The second part of that is that the offenses, specifically the attempted threats and the vandalism, involved a high degree of callousness.

So based on the evidence that you've heard, I'm going to submit this to you to determine whether or not you feel that this aggravating factor is appropriate. It's really just going to be based on the evidence you've already heard and the facts that you've already presided over.

And when I say these terms such as callousness or threat of great bodily harm, it's in the everyday use of the word.

The second factor that we're going to ask you to consider is that Ms. Nichols has engaged in violent conduct that indicates a serious danger to society.

This is going to be based on both the present offense, offenses, as well as her prior convictions that have been described to you through these stipulations, specifically the battery on a peace officer, the unlawful causing of a fire as well as the offenses that you have heard and presided over during the course of this trial.

And I will submit to you that based on the

evidence you've heard and the prior convictions, Ms. Nichols' conduct has demonstrated that she is a serious danger to society. So I would for that reason ask that you find that factor to be true.

Finally, we are asking you to determine whether or not Ms. Nichols' prior performance on probation has been satisfactory.

And this is a determination for you to make. You did hear the opinion of the probation officer that was assigned to supervise Ms. Nichols. She gave her opinion that she believes it's unsatisfactory. However, this is your decision to make. You may consider Ms. Arbogast's opinion. You may consider the stipulations that we entered that there was a prior violation of probation admitted, that there was a prior participation in residential treatment that was ordered that Ms. Nichols did not complete.

You may consider everything that you've heard this afternoon or in this case in determining that factor, and I would ask you to find given the performance of Ms. Nichols while she was on probation, based on the evidence, I would ask that you find that factor is true as well.

You've been a very patient jury. We very much appreciate your time. Thank you very much.

THE COURT: Thank you, Mr. Blade.

Mr. Clymo, any closing remarks?

MR. CLYMO: Yes. Thank you.

THE COURT: Go ahead.

MR. CLYMO: This case has been unique and memorable ever since we showed up at the Jockey Club last week.

I think the Judge talked to you a little bit, throughout the past decades, these aggravating factors are things that the Judge typically finds after we get a probation report, you get a bunch of information.

The fact that the legislation is changing that in January kind of from my position leads me -- I'm not quite exactly sure how it is I'm supposed to explain all this, and I think all sides somewhat feel that.

What I want to point out is when you talk about something as great violence or callous and viciousness, it's not what -- I tend to argue this when I'm arguing this in front of a Judge who has got decades of experience in the criminal justice system and sees cases on a daily basis which luckily everybody in the jurors -- I wouldn't expect you guys to know what this is -- what you see, but this is based on a felony conviction. It's not, oh, just this is bad. This is bad on whatever the felony conviction is. So it's difficult.

I was trying a case about 15 years ago in front of Judge Cousins in Placer County. It was a very vicious, callous thing. My client was convicted eventually of breaking into a random stranger's house

in a senior community, tying them to their bed, turning on the stove of their gas oven, lighting a fire, taking the victim's Rosary beads and driving off in their car and was arrested the next day driving the stolen car wearing the Rosary beads.

That case tried was a lot longer than this one. The jury went out for about three weeks. The law changed while the jury was deliberating. The jury came back and they said we can't reach a verdict, and I was the first person that got to argue a second closing argument. It throws everything off the balance.

But, you know, that's something that is vicious, that is something that is callous, that is something that unfortunately is not super uncommon in the criminal justice.

What we have, the facts of this case, Ms. Nichols who had left her treatment program without completing it, had nowhere to sleep and is sleeping on the side of the road having a run in with the security guard at Korbel and causing damage to the windshield, I would submit to you that this is not a crime of great viciousness, great violence, great callousness, and I would ask you not to find these aggravating factors against Ms. Nichols, and thank you for your time.

THE COURT: And, Mr. Blade, since you have the burden of proof on this, I'll give you a short

rebuttal if you wish.

MR. BLADE: Thank you very much, your Honor. The People will waive rebuttal.

THE COURT: Thank you. So I have developed over the lunch hour some verdict forms for you to consider. We'll use the same foreperson. I'm not going to read all these instructions to you again, but there are two instructions that I think are important.

I know your packets are still in there so you can refer to your packet once you get back in there, but this is 3515 in your packet and it's entitled multiple counts, separate offenses, and I'm going to change it up a little bit here.

Each of the factors in aggravation charged in this case is a separate item for you to decide. You must consider each separately and return a separate verdict for each one. That's the first.

Then I want to go back to 3550. That was the last instruction I gave you before you went into the jury deliberation room.

Keep an open mind -- I'm sorry, it is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can.

And when I say verdict, you're going to see on these forms, and I know it's hard to see back there, it's going to be true or not true. Okay?

You are to decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong, but do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about these factors in aggravation. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

If you need to communicate with me while you are deliberating, send a note through the bailiff signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time.

You already went through this this morning.

You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

It is not my role -- I'm sorry.

Your verdict on each allegation in aggravation

must be unanimous.

So as you go through these lines of true or not true, they must be unanimous. Okay?

This means to return a verdict, all of you must agree to it. Do not reach a decision by a flip of the coin or by any similar act.

And again you must reach your verdict without any consideration of punishment. All right?

I just want to do one other thing just to make sure we have it for you.

Again, remember, as to each of these factors in aggravation, it is the District Attorney's sole burden of proof beyond a reasonable doubt. Remember that. That is the standard for each one of these as you go through them. Okay?

All right. With that said, if you will pick up your personal items and your notebooks and return with my bailiff to the jury deliberation room, we'll send in these verdict forms with you.

(Whereupon, the jury exited the courtroom.)

THE COURT: Okay. Folks, we'll let you know when we hear from our jury.

(Recess taken.)

THE COURT: We are outside the presence of the jury.

Go ahead, Mr. Clymo.

MR. CLYMO: I did object and it was sustained. I just want to note that my recollection is

we had in limine motions where I argued and the Court agreed that the term arsonist was not going to be used.

I think -- I may be wrong, but I think the Court also instructed Mr. Blade not -- to tell his witnesses not to use the term arsonist.

Right before we begin arguing on whether or not Ms. Nichols has serious -- the allegation of serious danger to society, Mr. Blade stood up and told the jury she was convicted of arson which, number one, is not correct, she was not convicted of arson, but, number two, it inflames the jury that thinking she's an arsonist. It's not what we agreed to and I think it violated the in limine motions.

For those reasons, I'm moving for a mistrial.

THE COURT: The mistrial as to the factors in aggravation?

MR. CLYMO: The entire trial.

THE COURT: Mr. Blade, do you wish to be heard?

MR. BLADE: So the in limine as I understand it was with regard to the case-in-chief.

It was the People's intent to demonstrate as an aggravating factor that Ms. Nichols is a serious danger to society.

When we went through this afternoon the stipulations, I wrote them down in shorthand as we agreed to them. This was a very fast-paced entry of stipulations. I was reading shorthand off of a

yellow notepad what our stipulations were and I had written this down as we went and I wrote down in shorthand the word arson.

I'd also point out that the conviction is for Penal Code Section 452, unlawfully causing a fire, which is a charge of reckless causing of a fire, and the title of that chapter that this statute falls under is arson. So this does qualify as an arson offense. I also further -- so this is arson. I didn't misstate the law.

Further, I did actually ask to make sure that I had all of the stipulations right before the jury came in, if we could go over them, and I was informed by both Court and counsel that I would be informed if I had misstated something.

So counsel objected. The Court corrected for the record which I found to be quite undermining to the stipulation that I was attempting to enter and I think certainly had the effect of undermining my credibility with the jury when counsel made that objection. The Court admonished the jury what the stipulation was and what the law was.

I think if there was any error, which I am not agreeing that there was, this is an arson conviction, but if there was any error, whatsoever, one, it was absolutely unintentional and not even neglect because this was a stipulation that was entered very, very quickly and I did not have a lot of time, I had no

time to clarify it, and, second, any harm that may be caused, whatsoever, was immediately corrected by the Court to the jury, specifically that the stipulation that I started to read was not accurate.

So I don't see that there's been any error. I don't see that there's been any harm. This is not a violation of any motion in limine because this is a separate stage of the trial, and I did the very best that I could to be accurate regarding our stipulations.

Finally, as to the motion for mistrial, we already have a verdict in this case. I think that the scope of this motion for mistrial at most would be limited just to the aggravating factors. I would very strongly and adamantly object to it.

And with that, I would submit.

THE COURT: The motion for mistrial is denied.

Mr. Clymo, I corrected in front of the jury very quickly and explained that arson has a different connotation in the law and that this was unlawfully setting a fire.

I don't -- from what -- in listening to Mr. Blade throughout this case and in our very quick pace at trying to get this to -- the second portion to the jury this afternoon, I don't think Mr. Blade has in this case ever exhibited some type of behavior that he was undermining any of my rulings in any way.

So I don't take it as anything more than a negligent slipup even if it was negligent in the sense

that we were trying to get these stipulations while the jury was waiting out in the hallway this afternoon, and I don't find that to be intentional on his part, whatsoever.

So with that said --

MR. BLADE: Your Honor, if I may just state for the record, too, that when this stipulation -- the jury was being brought in. I was still writing down the stipulation on my notepad as the jury was coming in. I would just like to state that for the record. I believe they were brought in almost instantaneous with the completion of our discussions of stipulations. I would just like that on the record.

THE COURT: Anything else we need to discuss before I let you go? Not hearing anything.

We'll let you know what they decide.

MR. BLADE: Your Honor, apologies, I was hoping just for the purpose of the record that I could admit into evidence the two prior certified convictions at this time.

THE COURT: I believe Mr. Clymo objected to those. Is that right?

MR. CLYMO: I did for going to the jury.

I'm not sure what we're --

MR. BLADE: I would like them to be a part of the Court's file and the record of conviction. I'm not asking to submit these to the jury, but I do believe that they need to be part of the Court's record.

THE COURT: So you just want to mark them as exhibits, not admitted exhibits?

Again, Mr. Blade, I believe we in our stipulations -- and I can take judicial notice of the two probation files we've discussed earlier. Don't you think that's sufficient?

MR. BLADE: The exception under 1170 that counsel and I were discussing before the jury came in, it does provide that convictions may be considered by the Court, that certified records of conviction that have been admitted.

So my intent would be to admit these into evidence for the Court, not for the jury.

THE COURT: Mr. Clymo?

MR. CLYMO: I think this would be something that would come up at a probation report. We don't have certified records for probation reports. Ms. Nichols stipulated to the convictions.

My biggest concern is I don't want it to go to the jury. If there wants to be a court exhibit or something of that nature, I don't see how -- any harm.

MR. BLADE: I think we can address it at a later time if that's the concern.

THE COURT: So this is what we'll do, we'll mark them as Plaintiff's next in order and I will not admit them at this time and we'll decide what to do with them later.

MR. CLYMO: I feel they may be spelled out in

more detail in the presentence report, but we'll get there when we get there.

THE CLERK: Plaintiff's Exhibits 1 and 2?

THE COURT: Hang on a second.

So we are going to -- the last Plaintiff's exhibit was 19?

THE CLERK: I don't have Plaintiff. I have People.

THE COURT: I'm sorry, People's Exhibit 19.

THE CLERK: Okay. So we'll go People's 20 and 21?

THE COURT: Correct.

THE CLERK: Okay.

(Whereupon, People's Exhibit No. 20, certified docket SCR-739561-1, was marked for identification.)

(Whereupon, People's Exhibit No. 21, certified docket SCR-739562-1, was marked for identification.)

THE COURT: And we'll show that Mr. Blade is seeking to admit them and the Court is not admitting them over his objection.

Anything else we need to discuss?

MR. BLADE: No.

MR. CLYMO: No, thank you.

THE COURT: We'll let you know.

(Recess taken.)

THE COURT: I am returning to the Nichols

jury trial, the bifurcated portion.

Mr. Bailiff, do we have a verdict?

THE BAILIFF: We do.

THE COURT: Could you bring our jurors in, and would you tell the jurors to bring all their personal items with them, leave their notebooks, jury instructions back in there, and tell the foreperson to hold onto the verdict form and bring that in with her.

THE BAILIFF: Okay.

THE COURT: Thank you.

(Whereupon, the jury entered the courtroom.)

JUROR 5091: I was told to hand these to you.

THE COURT: Just have a seat. I just wanted you to hold onto them.

JUROR 5091: Okay.

THE COURT: The parties may have a seat.

Juror 5091, has the jury reached a verdict?

JUROR 5091: We have.

THE COURT: Would you hand the verdict forms to my bailiff?

JUROR 5091: Yes.

THE COURT: And, Ms. Nichols, would you and Mr. Clymo please stand for the taking of the verdict from the bifurcated hearing.

And, Madam Clerk, if you could read the verdict.

THE CLERK: Superior Court of California,

County of Sonoma, the People of the State of California, plaintiff, versus Kathryn Lee Nichols, defendant, SCR-747896-1.

Verdict, factor one in aggravation, we, the jury, find the crime of attempted criminal threats, Penal Code 664/422, while personally using a deadly weapon involves threat of great bodily harm true.

Other acts involving a high degree of cruelty, viciousness or callousness not true.

Dated 12/9/2021, foreperson number 5091.

Same title, same caption, factor one in aggravation, we, the jury, find the crime of vandalism, Penal Code 594, while personally using a deadly weapon involves threat of great bodily harm true.

Other acts involving a high degree of cruelty, viciousness or callousness not true.

Dated 12/9/2021, foreperson number 5091.

Same title, same caption, factor three in aggravation, we, the jury, find defendant Kathryn Lee Nichols has engaged in -- excuse me, has engaged in violent conduct that indicates a serious danger to society to be true, dated 12/9/2021, foreperson number 5091.

Same title, same caption, factor six in aggravation, we, the jury, find the defendant Kathryn Lee Nichols' prior performance on probation was unsatisfactory true, dated 12/9/21, foreperson number 5091.

THE COURT: Mr. Blade, do you wish the jury to be polled on these findings?

MR. BLADE: No, your Honor. Thank you.

THE COURT: Mr. Clymo?

MR. CLYMO: No, thank you.

THE COURT: Madam Clerk, if you will record the findings, please.

You have now completed your jury service in this case. On behalf of myself, the attorneys and Ms. Nichols, please accept our thanks for your time and effort.

Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone. Let me tell you about some rules the law puts in place for your convenience and protection.

The lawyers in this case, the defendant or their representatives may now talk to you about the case including your deliberations and verdict. Those discussions must occur at a reasonable time and place and with your consent. Please tell me immediately if anyone unreasonably contacts you without your consent. Anyone who violates these rules is violating a court order and may be fined.

I will order that all of your personal identifying information be sealed until further order of this Court. If in the future the Court is asked to decide whether this information will be released, you

will be noticed and you may oppose the release of this information and ask that a hearing on the release be closed to the public. The Court will decide whether and under what conditions any information may be disclosed.

Thank you all. Your jury service is now complete. I know you thought that was the case a little while ago before lunch. Again, thank you for your patience with this.

One last thing, if you have time, I'm going to ask some who can do this to wait out in the hallway. I'm going to release the attorneys here in about two minutes to come out into the hallway to speak with you. When I was in their position as an attorney, it was great feedback to get from the jurors about how I acted in the courtroom, criticism of me or anything that you could give really helped my professional development.

You don't have to do this. You can take off. You've been here all week now. I understand.

If any of you can spare the time, I'll send them right out so that you chat with them and please feel free to let them know what you thought. Okay?

As you walk out, if you'll take off your passes, hand them to my bailiff as you go by him, I hope to see you again in jury service or maybe out on the street, but I thank you very much for all you've done here for the last four days. You're free to go.

(Whereupon, the jury exited the courtroom.)

THE COURT: All right. The parties may have a seat.

Ms. Nichols, you have a right to be sentenced within 20 court days of today's date. Would you like to be sentenced within that time or beyond that time?

DEFENDANT NICHOLS: As soon as possible, your Honor. Thank you.

THE COURT: The 10th day is January 10th.

THE CLERK: 10th or 20th day?

THE COURT: The 10th day -- the 20th day is January 10th. You will be sentenced on that date.

I will come back over here at 11:00 a.m. I'm going to come on over at 8:30 in the morning on that day for sentencing before Judge DeMeo starts his 9:00 calender. Probation report is due January 3rd.

Anything else?

MR. CLYMO: I would just ask that the minutes reflect I would like to be present at the presentence interview.

THE COURT: Will do.

THE CLERK: Judge, does a Prop 63 form need to be filled out?

THE COURT: Yes. And, Mr. Clymo, after your client signs that, you're free to go on out.

All right. So with that said, the attorneys are excused. Thank you, all.

MR. BLADE: Thank you.

THE COURT: Oh, I'm sorry, I need to do one thing. I am finding Ms. Nichols in violation of probation in 561 and 562 as a result of the jury verdict in this case and she will be sentenced on those two violations of probation at the January 10th date.

THE CLERK: Do you want them referred for credits?

THE COURT: Yes, credits.

(Proceedings concluded.)

(Nothing omitted. Go to page 701.)

STATE OF CALIFORNIA)
) ss:
COUNTY OF SONOMA)

CERTIFICATE OF SHORTHAND REPORTER

I, KAREN M. STEWART, CSR No. 8744, a duly appointed, qualified and acting shorthand reporter for the County of Sonoma, do hereby certify:

That on THURSDAY, DECEMBER 9, 2021, I reported in shorthand writing the proceedings had in the case of THE PEOPLE OF THE STATE OF CALIFORNIA versus KATHRYN LEE NICHOLS.

That I thereafter caused my said shorthand writing to be transcribed into longhand typewriting.

That the foregoing pages 576 through 644 constitute and are a full, true, correct and accurate transcription of my said shorthand writing and a correct and verbatim record of the proceedings so had and taken, as aforesaid.

Dated this 21st day of April, 2022.

KAREN M. STEWART, CSR 8744

(Nothing omitted. Go to page 701.)

Attachment B

3250(b). Specific Factual Issue: Violent Conduct

DEFENDANT HAS ENGAGED IN VIOLENT CONDUCT

It is alleged that the defendant, Rocio Vargas, has engaged in violent conduct that indicates she is a serious danger to society.

If you determine that the defendant, Rocio Vargas, has engaged in violent conduct, you must then determine whether that violent conduct, when considered in light of all the evidence presented about the defendant and her background, indicates that the defendant, Rocio Vargas, is a serious danger to society.

To the extent the offense itself necessarily involves violent conduct, you can only find this factor true if the violent conduct is beyond that which is necessary to accomplish the defendant's criminal purpose. In other words, in order to find this factor true, you must be convinced that, when compared to the other ways in which such a crime could be committed, the manner of the instant crime's commission was distinctly worse than other similar cases.

To the extent the offense itself necessarily involves a serious danger to society, you can only find this factor true if the serious danger to society created by the defendant's conduct is beyond that which is necessary to accomplish the defendant's criminal purpose. In other words, in order to find this factor true, you must be convinced that, when compared to the other ways in which such a crime could be committed, the manner of the instant crime's commission presented a serious danger to society distinctly greater than that in other similar cases.

The People have the burden of proving this additional fact beyond a reasonable doubt. If you have a reasonable doubt that it is true, you find it to be not true.

Attachment C

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether the People have proved the additional allegation that _____***<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>* **which indicates (he/she) is a serious danger to society.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>* **which indicates (he/she) is a serious danger to society.]**

To prove this allegation, the People must prove that:

1. **The defendant has engaged in violent conduct;**

   AND

2. **The violent conduct, considered in light of all the evidence presented[and the defendant's background], show[s] that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime[as well as evidence about the defendant's background].]

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. ▸ California Rules of Court, rule 4.421(b)(1).
- Aggravating Fact Defined. ▸ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Danger to Society: Subsequent Conduct Can Be Considered. ▸ *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].