No. 21-6229

# In the Supreme Court of the United States

**KYLE SHIRAKAWA HANDLEY,**

Petitioner,

**v.**

**STATE OF CALIFORNIA,**

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION THREE

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner was tried for kidnapping, torturing, and committing aggravated mayhem against one victim, and kidnapping a second victim. As part of the torture and mayhem counts, the charging document specified that the petitioner "inflict[ed] great bodily injury" and "intentionally and unlawfully cause[d] [the first victim's] permanent disability, disfigurement, and deprivation of a limb, organ, and body member." The paragraphs that charged kidnapping under California Penal Code Section 209 did not specify whether petitioner caused "bodily harm" to the first victim or caused the second to be at substantial risk of death—circumstances that Section 209 provides make a kidnapper subject to the increased penalty of life without parole. Throughout the case, however, the prosecution made clear its intent to seek a life-without-parole sentence; the parties agreed to submit the question of bodily harm and substantial risk of death to the jury; and the jury unanimously found those circumstances proven beyond a reasonable doubt. The court of appeal held that the written charge had been informally amended with petitioner's acquiescence. The question presented is:

Whether the absence of explicit allegations of bodily harm and substantial risk of death in the written charging document means that petitioner's constitutional rights were violated when he was sentenced based on the jury's verdict as to those facts.

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## STATEMENT

1. Petitioner Kyle Handley was a marijuana vendor who supplied dispensaries owned by Michael S. Pet. App. C 2. Michael traded in cash, and petitioner saw evidence of Michael's unbanked cash. *Id.* at 2-3 & n.2. One night in 2012, Michael was awakened in his bedroom at midnight by two men pointing a shotgun and flashlight at his face. *Id.* The men beat Michael, gagged him, blindfolded him, and immobilized him with zip ties. *Id.* They also gagged, blindfolded, and immobilized his housemate Mary B., although they assured her that "[t]his isn't about you." *Id.* The men asked Michael where his money was, saying they wanted a million dollars from him. *Id.* Michael said he had just $2,000. *Id.* The men accused Michael of hiding money in the desert, and they put him and Mary into a van whose back windows were obscured with light-blocking "panda paper." *Id.*

The two men in the back kept trying to get Michael to tell them where he had a million dollars, while a third man drove the van into the Mojave Desert. Pet. App. C 3-4. The men stomped and beat Michael, shocked him with a Taser, and burned him with a blowtorch. *Id.* Finally, they took Michael and Mary out of the van on a deserted road. *Id.* at 4. They cut off Michael's penis while taunting him with a song. *Id.* Then they poured bleach on him. *Id.*

The men drove away, leaving Michael and Mary in the desert, blindfolded and zip-tied. Pet. App. C 4. Before departing, one of the men had tossed his knife into the bushes, telling Mary that if she could find it to cut herself free

then it would be her "lucky day." *Id.* Mary managed to shift her blindfold, find the knife, and cut herself free. *Id.* She walked about a mile to a highway and waved down a passing Sheriff's patrol. *Id.* Michael survived but was permanently dismembered. *Id.* In addition to burns and bruises, his skin was so damaged from the bleach that there were permanent imprints of his assailants' shoes in it. *Id.* at 4, 28.

One of Michael's neighbors had happened to see a suspicious truck the afternoon of the kidnapping and had written down the license plate number. Pet. App. C 5. The truck was registered to petitioner. *Id.* A search of petitioner's home and truck revealed zip ties like the ones used to bind Mary and Michael, panda paper like that on the van, and the remnants of extensive bleach use. *Id.* DNA on gloves and zip ties in the truck matched two of petitioners' friends, whose wives admitted to participating in the three men's scheme to kidnap and extort Michael. *Id.* at 4-8. Further evidence came from records of petitioner's truck in the vicinity of Michael's house during the planning of the crime, and from records and communications concerning surveillance and GPS equipment used in the scheme. *Id.* at 5

2. a. Petitioner was charged with two counts of aggravated kidnapping under California Penal Code Section 209(a), one count of aggravated mayhem under Section 205, and one count of torture under Section 206. *See* CT 442-

444 (final information); CT 1-3, 134-136, 137-139, 211-213, 221-223 (prior complaints and informations).[1]

The version of Section 209(a) in effect at the time of the crime defined the crime of aggravated kidnapping and listed two possible punishments:

> Any person who . . . kidnaps . . . another person . . . for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

Cal. Penal Code § 209(a) (2006).[2]

With respect to the kidnapping charges, each iteration of the complaints and information cited Section 209(a) and listed the elements of the offense; but they did not specify whether "bodily harm" had resulted or whether a victim had been exposed to a "substantial risk of death." CT 1, 134, 137, 211, 221, 424. From the beginning, however, the prosecution made clear that it intended at trial to prove crimes for which "the penalty if convicted is life without parole."

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[1] CT and RT refer to the trial court's Clerk's Transcript and Reporter's Transcript prepared for the appeal.

[2] Section 209(a) was subsequently amended, but the current version retains the same two punishments depending on the presence or absence of bodily harm and substantial risk of death. *See* 2021 Cal. Stat., ch. 626, § 16.

*Id.* at 215 (People's motion to consolidate). And harms to Michael's body were explicitly alleged, with various wording, in the charging documents' listing of the elements of the torture and mayhem charges. *See infra* pp. 22-23 & n.13.

b. Petitioner was tried separately from his co-defendants. Pet. App. C 6.[3] Michael, Mary, and other witnesses testified about Michael's injuries, and numerous photographs showed the damage to his body. RT 101-125, 182-217, 76-99. Petitioner did not dispute that the kidnapping of Michael had included brutal abuse culminating in Michael's penis being severed, or that, at the end of the kidnapping, Mary had been left blindfolded and bound in the desert. Pet. App. C 8. Petitioner's defense was that there was insufficient evidence tying him to those acts. *Id.*; *see infra* p. 23 & n.14 (discussing witness examination and closing arguments); RT 563-564 (petitioner's personal approval of counsel's strategy of arguing that petitioner "had nothing to do with this event" rather than seeking instructions on lesser included offenses).

During the prosecution's case in chief, the court held hearings about the jury instructions. The prosecution proposed instructing the jury with California's official pattern jury instruction on aggravated kidnapping, known

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[3] Co-defendant Ryan Kevorkian pleaded guilty. *See People v. Kevorkian*, No. 13CF3394 (Orange Cty. Super. Ct.). Co-defendant Hossein Nayeri—who fled the country but was eventually captured, *see* Pet. App. C 5—was convicted at trial; his pending state-court appeal raises a claim similar to petitioner's claim here. *See People v. Nayeri*, No. G059610 (Cal. Ct. App.).

as "CalCrim No. 1202." CT 460.[4] The instruction consisted of three parts: the first setting forth the elements of kidnapping; the second listing possible defenses (such as reasonable belief in consent); and the third stating that:

> If you find the defendant guilty of kidnapping . . . , you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped person to (die/suffer bodily harm) / [or] intentionally confined the kidnapped person in a way that created a substantial likelihood of death).

Cal. Judicial Council, Crim. Jury Instr. 1202 (2017); *see also id.* (continuing by providing definitions of "bodily harm" and "substantial risk of death").

The court had provided counsel with a packet of the instructions it intended to deliver, RT 548, and asked counsel about each instruction in turn, *id.* at 548-568. Petitioner's counsel stated he had "no objection" to the kidnapping instruction. *Id.* at 559; *see* Pet. App. C 10. Petitioner's counsel also informed the court that he had no need for instructions on any lesser included offense because his theory of the case was that appellant simply was not

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[4] Petitioner asserts that in California the term "aggravated kidnapping" means kidnapping under Section 209(a) that includes bodily harm or risk of death, and that a kidnapping under Section 209(a) that does not include those facts is "simple kidnapping for ransom." *E.g.*, Pet. i-ii, 3-5. That is incorrect. "Simple kidnapping" is the California term for the abduction of a person without regard to motive, under Penal Code Section 207. "Aggravated kidnapping," as the court of appeal's second opinion explained, refers to kidnapping for a criminal purpose—such as ransom, reward or extortion (as in the Section 209(a) charge here) or robbery or rape (under Section 209(b))—and such a crime is "aggravated kidnapping" regardless of injury or risk of death. *See* Pet. App. C 9-10; Witkin, California Criminal Law §§ 281, 292 (4th ed.).

involved in the kidnappings. Pet. App. C 10. Petitioner stated he agreed with that strategy. *Id.*[5] Petitioner's counsel had been provided with the proposed verdict forms too, RT 578-579, and made no objection to them. The prosecution clarified that, with respect to the kidnapping of Mary, it wanted only an instruction about a substantial risk of death—not bodily harm. RT 580. The defense confirmed that it had "no objection," and the court stated that it would modify that instruction accordingly. *Id.*

The instruction that the jury received followed what the parties had agreed to: With respect to the kidnapping of Michael, the jury was instructed that if it found the elements of kidnapping for ransom, reward, or extortion met, it should go on to determine whether petitioner "caused [Michael] to suffer bodily harm." CT 571-572; RT 742-744. With respect to the kidnapping of Mary, the jury was instructed that if it found the elements of kidnapping for ransom, reward, or extortion met, it should determine whether petitioner "intentionally confined [Mary] in a way that created a substantial risk of death." *Id.* On the verdict forms, the jury was asked to "find it to be TRUE/NOT TRUE"

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[5] In a later hearing on the instructions, the judge made reference to its proposed instructions requiring a special finding as to "great bodily injury" in connection with the kidnapping charges. RT 578-579. That language was imprecise: the kidnapping statute (Penal Code Section 209(a)) uses the term "bodily harm"; but the judge instead spoke in the language of a separate enhancement (under a separate statute, Penal Code Section 12022.7), which was alleged with respect to the torture charge and dismissed before the case went to the jury. Pet. App. C 11. The verdict forms and the written and oral instructions to the jury on kidnapping used Section 209(a)'s correct "bodily harm" language. RT 742-743; CT 519-520, 571-572, 582.

that Michael "suffered bodily harm" in count 1 and that Mary was "intentionally confined in a manner that exposed her to a substantial risk of death" in count 2. CT 582-583. The instructions required that the jury could find the circumstance true only if it unanimously determined that the prosecution had proven it beyond a reasonable doubt. CT 572; *see also id.* at 524, 545, 549, 557.

The jury found petitioner guilty of all charges: kidnapping Michael, kidnapping Mary, torturing Michael, and committing aggravated mayhem against Michael. Pet. App. C 12; CT 581-585. The jury also found beyond a reasonable doubt that, in the kidnappings, Michael suffered bodily harm and Mary was intentionally confined in a manner that created a substantial risk of death. CT 582-583.

c. Petitioner filed no post-trial motions. His sentencing brief acknowledged that, given the jury's findings, the statutorily provided sentence for the kidnapping charges was life without parole. CT 596. Petitioner argued against that sentence on the ground that it would constitute cruel and unusual punishment in light of asserted shortcomings in the evidence that petitioner had personally inflicted the injuries on Michael. *Id.* at 596-600. But neither petitioner's brief nor his counsel's argument proposed that the sentence was precluded because of any defect in the charging document, or any lack of notice. *Id.*; RT 783-787.

The court rejected petitioner's Eighth Amendment argument and imposed consecutive sentences of life without parole for each count of kidnapping. CT 208-209; RT 800-801. On the torture and mayhem counts, the court imposed consecutive sentences of life with the possibility of parole after seven years. CT 209; RT 801.

3. On appeal, petitioner contended for the first time that he should not have been sentenced to life without parole because the information in his case had not specifically alleged that the kidnapping caused "bodily harm." The court of appeal rejected that argument and affirmed petitioner's conviction in an unpublished decision. Pet. App. A. Although the court held that the new claim was not forfeited under California law, *id.* at 12-13, it determined that petitioner had had "ample notice" that, if convicted, he would be subject to the charged statute's increased punishment for those who commit bodily harm or subject a person to risk of death, *id.* at 15. The court reasoned that, in discussing the jury instructions, petitioner "acquiesced to the prosecution's desire to include" the bodily harm and risk of death allegations, and the "charges were effectively amended." *Id.* at 16-17.

Petitioner filed a petition for review in the California Supreme Court, which transferred the case back to the court of appeal for evaluation in light of an intervening decision, *People v. Anderson*, 9 Cal. 5th 946 (2020). Pet. App. B.

4. The court of appeal again affirmed, in the unpublished decision that petitioner now asks this Court to review. Pet. App. C. The court of appeal began by analyzing the effect of the *Anderson* decision. In that case, the California Supreme Court concluded that a defendant had received inadequate notice when a free-standing enhancement statute was alleged only in connection with a murder charge, but the statute was applied at sentencing to separate charges for robbery as well. *Anderson*, 9 Cal. 5th at 950-952; *see also* Pet. App. C 14-15 (explaining that the defendant in *Anderson* was "blindsided" by application of enhancements that had "no inherent relationship to the underlying crime of robbery"). The court of appeal in this case noted that "[h]ere, in contrast," the crime (kidnapping) and the enhancement were "embedded in [the] single statute, [S]ection 209(a)," with which petitioner was charged. *Id.* at 15. And the California Supreme Court had previously stated that a charge under what is now Section 209(a) "'apprises the accused'" that upon conviction he may face "'any one'" of the sentences in that statute, depending on what the jury finds. *Id.* (quoting *People v. Britton*, 6 Cal.2d 1, 5 (1936)).

The court also disagreed with petitioner's argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), barred sentencing him on the basis of the jury's bodily harm and substantial risk of death findings because the original charging document did not explicitly state those specific allegations. Pet. App. C 16. The court acknowledged that *Apprendi* had quoted a statement from

*Jones v. United States*, 526 U.S. 227 (1999), that "[a]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Pet. App. C 16; *see Apprendi*, 530 U.S. at 476 (quoting *Jones,* 526 U.S. at 243, n.6). But *Apprendi* focused on "proof requirements" rather than "pleading requirements." *Id.* at 16 (internal quotation marks and emphasis omitted). It held that "the rights to trial by jury and proof beyond a reasonable doubt" extend to "facts that can be used to increase a defendant's punishment above the statutory maximum," but "expressly declined" to consider whether such facts must also be included in an indictment. *Id.* (citing *Apprendi*, 530 U.S. at 477 n.3).

In any event, the court of appeal concluded that the charges in this case were informally amended during the course of the proceedings to add the bodily harm and substantial risk of death allegations. Pet. App. C 18-22. "[T]he amended instructions and verdict forms in this case were talked about at length before the close of evidence." *Id.* at 20. There was "no dispute" that Michael in fact sustained tremendous injuries—evidence of which was presented as far back as the preliminary hearing. *Id.* And the prosecution had discussed in open court its intent to prove that Mary had been confined in a way that exposed her to a substantial risk of death and that Michael had suffered bodily harm. *Id.* Given these circumstances, "there could have been little doubt the prosecution was alleging both of the circumstances required to

sentence" petitioner to life without parole under Section 209 "if he was convicted." *Id.* Petitioner, who "consented to the inclusion of those allegations in the jury instructions and verdict form," acquiesced in the amendment of the charges. *Id.* at 21; *see id.* (noting that the defense never "so much as suggested" that it had lacked notice of petitioner's exposure to the life-without-parole sentence, and never suggested that its "plea decisions or trial strategy were impacted by the manner in which the case was charged").

The California Supreme Court denied review.

## ARGUMENT

The charging documents in this case alleged two violations of California Penal Code Section 209(a), which provides for a punishment of life without parole upon a finding that a victim suffered bodily harm or was placed at substantial risk of death. Petitioner assented to the jury being instructed that it should determine whether the prosecution had proven those circumstances beyond a reasonable doubt, and he received his sentence of life without parole only after the jury made those determinations. That result complies with this Court's precedents and does not create any conflict with decisions of other lower courts. And this case would be a poor vehicle in which to consider petitioners' proposal to expand the *Apprendi* rule, given that (among other things) petitioner's failure to raise his constitutional claim in the trial court has deprived this Court of the kind of developed factual record that would assist in reviewing that claim.

1. a. There is no merit to petitioner's argument that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. i-ii, 8-10. *Apprendi* held, under "the Sixth Amendment's jury-trial guarantee," that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (summarizing *Apprendi*, 530 U.S. at 482-484, 490). Petitioner's sentence complied with that requirement. Section 209(a) prescribes a life-without-parole sentence for defendants who cause a kidnapping victim "bodily harm" or expose the victim to a "substantial risk of death." Here, the jury expressly found—unanimously and beyond a reasonable doubt—that petitioner had caused bodily harm to Michael and had placed Mary at substantial risk of death. *See supra* pp. 6-7. Petitioner's sentence complies with *Apprendi*'s rule.

Petitioner asserts that *Apprendi* also stands for an additional rule: any facts that render a defendant eligible for an increased sentence also must have been specifically stated in the written charging document. Pet. 8-13. Petitioner primarily relies on this Court's statement that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Pet. i, 11 (quoting

*Apprendi*, 530 U.S. at 476). At a literal level, that statement has no application to petitioner's case, which proceeded by way of a criminal information instead of any grand jury indictment. *See supra* pp. 2-3. But there are deeper flaws in petitioner's reasoning as well.

As the court of appeal below recognized, Pet. App. C 16, the words in *Apprendi* on which petitioner relies quote *United States v. Jones*, 526 U.S. 227, 243 n.6 (1999). *Jones* did involve an indictment, which charged the defendant with carjacking under 18 U.S.C. § 2119, a statute that generally prescribes a 15-year maximum prison term. *Jones*, 526 U.S. at 230. The jury found that the defendant had committed carjacking as defined in the statute. *Id.* at 231. At sentencing, however, the judge made an additional finding that the carjacking had caused "serious bodily injury" to the victim, which under a distinct subsection of the statute permitted a sentence of 25 years. *Id.* In rejecting that sentence, this Court construed "serious bodily injury" as an "element" of the offense, and stated that such "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones*, 523 U.S. at 233. The Court's inclusion of the indictment requirement in that list made sense: Jones was being prosecuted by the federal government, so he could not be "held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const., amend. V. In contrast, this Court has held that no indictment is required in state prosecutions. *Hurtado v. California*, 110 U.S. 516, 538 (1884);

*see also Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). And *Jones* did not hold or imply that its statement about the need to include sentencing allegations in an "indictment" would apply in state prosecutions.[6]

Nor did *Apprendi* impose any such requirement. That case concerned the requirements that apply to jury verdicts. *See Apprendi*, 530 U.S. at 469 (stating that the issue was whether the Fourteenth Amendment "requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt"). The defendant did not "assert[] a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment," and the Court did "not address the indictment question." *Id.* at 477 n.3.

Shortly after the *Apprendi* decision, this Court made clear in *United States v. Cotton*, 535 U.S. 625 (2002), that there is a fundamental distinction between jury-trial requirements (which apply to all prosecutions) and charging-document requirements (which apply only to federal indictments). In *Cotton*, the Court recounted *Apprendi*'s general rule about jury findings for guilt, then explained that "*[i]n federal prosecutions*, such facts must also be charged in the indictment." *Id.* at 627 (emphasis added). The distinction rests on a logical basis: where the Constitution allows the government to exercise

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[6] In support of its statement about the need for each element to appear in the indictment, *Jones* cited only cases arising from federal prosecutions. *See Jones,* 533 U.S. at 223 (citing *Hamling v. United States*, 418 U.S. 87 (1974), and *United States v. Gaudin*, 515 U.S. 506 (1995)).

its power against an individual only upon specific findings by a specific body, the absence of a required finding prohibits the government from acting. Although a grand jury's finding of probable cause for the requisite facts is constitutionally required for the federal government to place a defendant at risk of receiving a statute's increased charges, no similar requirement applies to state prosecutions. *See Hurtado*, 110 U.S. at 538. Instead, defendants are entitled more generally to notice of the charges for which they will be tried and for which they could be punished. *See infra* pp. 15-16. That is the principle under which petitioner's claim must be evaluated.[7]

b. A defendant is entitled to "reasonable notice of a charge against him," *In re Oliver*, 333 U.S. 257, 273 (1948), based on his general entitlement to due process and his Sixth Amendment right "to be informed of the nature and cause of the accusation," U.S. Const., amend. vi; *see generally Cole v. Arkansas*, 333 U.S. 196, 201 (right to "notice of the specific charge").

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[7] Petitioner's argument is not advanced by *Alleyne v. United States*, 570 U.S. 99 (2013). *See* Pet. i-ii, 11. *Alleyne* described *Apprendi* not as setting a rule for indictments but as holding that certain facts must be found by the "jury" "beyond a reasonable doubt." *Alleyne*, 570 U.S. at 111. *Alleyne*'s new rule similarly concerned facts that must be "submitted to the jury and found beyond a reasonable doubt." *Id.* at 116; *see id.* at 118. Although petitioner quotes statements in *Alleyne* that discussed indictments, that part of *Alleyne* did not command a majority of the Court. *Compare* Pet. 11 (quoting *Alleyne*, 570 U.S. at 109-111), *and* Pet. i (citing same), *with Alleyne*, 570 U.S. at 102 (Part III-A of opinion was not for the Court). Finally, no part of *Alleyne* (which involved a federal prosecution) suggested that *Cotton*'s recognition of different charging requirements in federal versus state cases should be overruled.

Petitioner had notice from the beginning of his case that the State was charging him with a violation of Section 209(a) and that it intended to prove facts that would result in the life-without-parole sentence specified in the statute. As petitioner acknowledges, *see* Pet. 12-13, California precedent has long made clear that a charge of violating Section 209(a) authorizes the prosecution to prove to the jury the bodily-harm and risk-of-death facts that would result in a sentence of life without parole under that statute. *See People v. Britton*, 6 Cal.2d 1, 5 (1936) (a charge of kidnapping under the predecessor to Section 209(a) "apprises the accused" that "any of" the "several punishments" in that statute may be imposed upon him).[8]

Petitioner does not allege that the prosecution misled the defense by disclaiming intent to prove those factors and obtain the resulting sentence. *Cf. Lankford v. Idaho*, 500 U.S. 110, 114, 119-127 (1991) (reversing death sentence that was imposed after prosecutor's official disclaimer of any intent to seek death sentence led defense counsel not to prepare for such issues in the sentencing hearing). Nor did the prosecution mislead the defense by seeking to apply a sentencing enhancement from a different statutory section, or to a different charge, than what the charging document affirmatively specified. *Cf. Cole v. Arkansas*, 333 U.S. 196, 197-198 (1948) (reversing conviction, where information and jury charge concerned a violation of section 1 of a statute but

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[8] When *Britton* was decided, Section 209 consisted only of one paragraph, defining the offense that is now generally covered by Section 209(a).

state court held defendants convicted and punished under section 2 to avoid constitutional issues with section 1); *supra* p. 9 (discussing *People v. Anderson*, 9 Cal. 5th 946 (2020), where California Supreme Court overturned an enhancement that was alleged as to one count but applied at sentencing to others).

And it is not credible here to suggest that the defense failed to appreciate the meaning and implications of the Section 209(a) charges. The defense expressed no surprise or objection when the trial court proposed and delivered instructions and verdict forms requiring the jury to determine, with respect to the Section 209(a) charges, whether the prosecution had proven beyond a reasonable doubt that the defendant caused bodily harm to Michael and placed Mary at a substantial risk of death. *See supra* pp. 4-7. And it expressed no surprise when the judge sentenced petitioner to life without parole on the basis of those findings. *See supra* pp. 7-8. Even on appeal, petitioner has not argued that petitioner or his trial counsel *actually* lacked knowledge that the prosecution intended to prove that Michael suffered bodily harm and that Mary was exposed to a risk of death. *See* Pet. 1-13; Appellant's Br. (Cal. Ct. App.). Nor would any such argument be persuasive: From early in the case, the prosecution stated that the charges it had brought would lead to a sentence of life without parole. *See supra* pp. 3-4. And the most noteworthy aspects of petitioner's case were the striking and salacious type of bodily harm that Michael had suffered, and the cruelty of leaving Mary, bound and blindfolded,

to die in the desert. Given this background, a claim based on *actual* lack of knowledge that enhanced penalty provisions of Section 209(a) would be in play would be beyond implausible.[9]

2. Petitioner briefly alleges that other lower courts have required that allegations that could lead to a higher sentence must be pleaded in the charging document. Pet. 12. But most of the cited cases address federal prosecutions, which are subject to a different rule than state prosecutions. *See supra* pp. 13-15; *Cotton*, 535 U.S. at 627. And the few state cases petitioner cites are not in conflict with the decision below.

In *B.O. v. Florida*, 25 So.3d 586 (Fla. Ct. App. 2009), after a juvenile pled guilty to stealing a firearm, he received a heightened sentence under a separate statute that enhances penalties for "use or possession of a firearm in the commission of an offense." *Id.* at 587-589. The appellate court's reversal of that sentence was indeed partly based on the fact that no violation of the enhancement statute was alleged in the charging document. *Id.* But the court's federal constitutional analysis required no more than a straightforward application of *Apprendi*'s right to beyond-a-reasonable-doubt findings at the conviction stage: because the defendant pleaded "guilty to the crimes as

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[9] Given the clarity of California precedent, any allegation that the defense did not understand the import of the Section 209 charge could be considered under the standards applying to ineffective assistance of counsel—which would allow a court to consider evidence of what the prosecution in fact communicated to defense counsel and what defense counsel communicated to his client. *See also infra* pp. 22-23.

charged," *id.* at 588, omission of the enhancement from the charging document meant it was not something the juvenile pleaded guilty to and therefore not something as to which he waived his right to a beyond-a-reasonable doubt verdict. To the extent *B.O.* mentioned requirements relating to charging documents on their own, those were apparently requirements of Florida law. *See id.* at 589 ("*State law* now recognizes a broadly applicable Constitutional rule about punishment: the accused must be given notice in the charging document of any fact on which a sentencing enhancement will be based.") (emphasis added).

In *State v. Simuel*, 357 S.C. 378 (S.C. Ct. App. 2004), an inmate convicted of escape was sentenced to an increased term based on the escape statute's provision for those who are apprehended out-of-state. *Id.* at 380. Although the appellate court reversed, it is not clear that the reversal turned on the contents of the indictment. The defendant had been sentenced on an "enhancement element" that "was neither charged in the indictment *nor submitted to the jury*." *Id.* at 379 (emphasis added); *see id.* at 481 (concluding that the sentence violated "the holding of *Apprendi*," after noting that the out-of-state-apprehension enhancement provision "was not submitted to the jury"). The *Simuel* court did not state that it would also have reversed in a case where an enhancement provision that was not expressly stated in the original charging document *had* been submitted to the jury.

And in *Commonwealth v. King*, 234 A.3d 549 (Pa. 2020), the court reversed an enhanced sentence "where the Commonwealth failed to provide formal notice of its intent to seek the enhancement in the charging documents." *Id.* at 552. But that holding was not necessarily one of federal law. The court noted that "*Apprendi* declined to address a constitutional claim regarding what the charging document must say," *id.* at 561, but that specific notice requirements existed under a state rule of criminal procedure and the due process aspects of "the Pennsylvania Constitution." *Id.* at 561. "Whatever the source of the notice guarantee," *id.* at 561, the court held that "when the Commonwealth intends to seek an enhanced sentence for attempted murder resulting in serious bodily injury . . . the Commonwealth must include a citation to the statutory provision as well as its language in the charging documents," *id.* at 563. *King* appears to depend largely on the requirements of Pennsylvania law, and its interpretation of the limits of *Apprendi* agrees with the lower court's in this case. *See supra* pp. 9-10.

3. Finally, this case would be a poor vehicle in which to assess any requirements that the federal constitution might place on state-court charging documents, for three reasons.

First, petitioner did not object to the instructions or verdict forms that submitted the challenged enhancements to his jury. *See supra* pp. 4-7. Nor did he object to being sentenced to life without parole under Section 209(a) based on the jury finding—beyond a reasonable doubt—that he had caused

bodily harm to Michael and had placed Mary at substantial risk of death. *See supra* pp. 7-8. To be sure, the court of appeal held that the lack of an objection did not prohibit petitioner from raising this issue on appeal. *See supra* p. 8. But the lack of an objection still deprives this Court of a record by which to judge petitioner's claim of inadequate notice. Without an objection, the prosecution had no opportunity to submit information about public, official statements or private communications with the defense bearing on the prosecution's intent to prove bodily harm and risk of death under the Section 209(a) charges. *See also supra* pp. 17-18 (noting that even on appeal, petitioner does not contend that his counsel was actually unaware of the prosecution's intent to prove the penalty factors).[10]

Second, petitioner's argument about the need for sentencing allegations to be charged has questionable relevance, given the lower court's reasoning. The court of appeal explained that California law allows a written charging document to be orally amended where "the defendant received adequate notice of the prosecution's intent to charge him with a particular crime or enhancement, and the defendant . . . acquiesced to the charge." Pet. App. C

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[10] The defense's actual knowledge may explain why it made no objection in the first place. In any event, an objection would also have allowed the trial court to ask counsel for concrete explanations of how the language in the charging document affected the preparation and conduct of petitioner's case—which would allow this Court to make a decision based on more than the petition's vague assertion that lack of notice sometimes affects defendants' investigatory and plea decisions. *See* Pet. 13.

18. The court of appeal concluded that such an amendment happened here. *Id.* at 20-21. Although petitioner asserts that the information "was not *formally* amended," Pet. ii (emphasis added), petitioner does not challenge the court of appeal's conclusion that an *informal* amendment occurred under California law, and does not explain why an informal amendment (in a case with no indictment requirement) would not satisfy the requirement that petitioner purports to find in *Apprendi*.

Third, petitioner would be unlikely to obtain meaningful relief regardless of any constitutional rule that could be announced in this case. *Apprendi* errors are subject to harmless-error analysis. *Washington v. Recuenco*, 548 U.S. 212 (2006).[11] As explained above, it is exceedingly implausible that the defense was actually unaware of the prosecution's intent to submit the bodily harm and risk of death factors to the jury and of the resulting effect on his sentence.[12] And the mayhem and torture charges informed the defense that

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[11] *See also Cotton*, 535 U.S. at 631-633 (affirming sentence where, although drug-quantity was not alleged in the indictment, the evidence was "'overwhelming' and 'essentially uncontroverted,'" and omission from the indictment did not "seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings").

[12] *See supra* pp. 15-18 (noting California precedent that charge under Section 209(a) allows prosecution to seek jury determination of those sentencing facts); *id.* at 3-4 (noting that prosecution discussed the life-without-parole sentence in its motion to consolidate petitioner's trial with his co-defendants'); *see also* CT 268-272, 280-283, 316-329 (preliminary hearing evidence of the injuries to Michael's body).

the injuries to Michael's body would be a part of the case regardless of how the defense interpreted the kidnapping charge.[13] Nevertheless, petitioner's defense throughout the trial was "mistaken identity." Pet. App. A 16. Instead of contesting that Michael suffered injury, the defense focused on reasons to doubt petitioner's involvement, and raised the possibility that the other defendants had framed petitioner.[14] There is no reason to believe petitioner would have followed a different approach if "bodily harm" had been specified in the information's kidnapping charges, and he does not suggest otherwise. Trying to persuade a jury that the severing of a penis and the use of enough bleach to permanently disfigure Michael's skin was somehow not "bodily harm" would have damaged the credibility of the defense. Nor is there any indication that such an argument could have succeeded.

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[13] *See* CT 443 (alleging, as part of the elements of mayhem, that petitioner caused Michael's "permanent disability, disfigurement, and deprivation of [his] limb, organ, and body member"); *id.* (alleging, as part of the elements of torture, that petitioner "inflict[ed] great bodily injury" on Michael).

[14] *See, e.g.*, RT 674 (arguing that petitioner did not participate and Nayeri had planted evidence to make him "the fall guy"); *id.* at 679-683 (arguing that there was no evidence of petitioner being at certain key places at key times, and that items found in petitioner's home and truck that matched those in the kidnapping were commonplace in the marijuana trade); *id.* at 687, 693 (arguing that prosecution relied on "circumstantial evidence" rather than direct "evidence my client participated," and emphasizing jury instruction requiring special burdens for facts proven by circumstantial evidence); *see also* RT 99, 126-146, 150, 168-172, 217-232, 238-240, 269-272, 336-342, 412-445, 510-529 (cross-examination of prosecution witnesses).

## CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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