No. 21-6229

IN THE SUPREME COURT OF THE

UNITED STATES

KYLE SHIRAKAWA HANDLEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Under California law, simple kidnapping for ransom is punishable by a life term in prison. Cal. Penal Code § 209(a). But aggravated kidnapping for ransom -- that is, where the victim suffers "bodily harm" or is exposed to a "substantial risk of death" -- is punishable by a sentence of life without parole. In *People v. Britton*, 6 Cal.2d 1 (1936), a divided California Supreme Court held that because the bodily harm and substantial risk of death allegations only went to punishment, the state could obtain a conviction for aggravated kidnapping for ransom, and impose a life-without-parole term, even if neither allegation was set forth in the charging document. 6 Cal.2d at 5-6.

The state appellate court here followed *Britton* as a "time-tested California Supreme Court decision." *People v. Handley (Handley II)*, 2021 WL 1138353, at *9 (2021). In his Petition for Certiorari, petitioner contended certiorari was proper because the 1936 decision in *Britton* is inconsistent with the common law notice requirement codified in the Sixth Amendment and this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny.

Respondent urges the Court to deny certiorari for two general reasons. First, respondent argues the state court's reliance on *Britton* was of no moment because, in fact, the charging document here *did* give petitioner notice he could be subject to a life without parole term. Respondent's thesis is simple: although respondent concedes the information alleged neither bodily harm nor substantial risk of death in connection with the kidnap charges at issue, other charges alleged a different bodily injury enhancement. Brief in Opposition ("BIO") i, 4, 22-23. Second, turning to the merits of whether *Britton* is inconsistent with the Sixth Amendment's notice provision, respondent cites footnote

three of *Apprendi* and argues that *Apprendi* (and its progeny) have nothing at all to do with notice. BIO 12-15.

As discussed below, the enhancement allegations which the state relies upon as having provided notice in connection with the kidnap charges were actually made in connection with the non-kidnapping charges. In this situation, as both state and federal cases have recognized for decades, not only was petitioner *not* given notice but -- to the contrary -- he was entitled to assume the prosecution made a discretionary choice not to pursue the enhancement on the kidnapping counts.

Nor does respondent's reliance on footnote three of *Apprendi* justify permitting *Britton* to stand. That footnote establishes that *Apprendi* did not involve any question of notice under the indictments clause of the Fifth Amendment. *Apprendi*, 530 U.S. at 477, n.3. But the question here is not whether *Britton* is inconsistent with the indictments clause of the Fifth Amendment. It is whether it is inconsistent with the notice provisions of the Sixth Amendment. As to that question, footnote three says very little.

Britton cannot be reconciled either with the Sixth Amendment's notice provision or this Court's precedents. Certiorari is appropriate.

ARGUMENT

I. BECAUSE THE 1936 DECISION OF THE CALIFORNIA SUPREME COURT IN *PEOPLE V. BRITTON* VIOLATES THE NOTICE GUARANTEE OF THE SIXTH AMENDMENT, CERTIORARI IS APPROPRIATE.

The state appellate court here followed *Britton* as a "time-tested California Supreme Court decision." *Handley II*, 2021 WL 1138353, at *9. Indeed, in the 85 years since *Britton* was decided and -- as the appellate court's opinion here shows -- to this day, California appellate courts dutifully follow *Britton*. *See*, *e.g.*, *People v. Song*, 2013 WL 2635087 at *4 (2013); *People v. Wafford*, 2010 WL 2599319 at *4 (2010); *People v.*

Reeves, 135 Cal.App.2d 449, 454 (1955); *People v. Holt*, 93 Cal.App.2d 473, 476 (1949); *People v. Haley*, 46 Cal.App.2d 618, 624 (1941).

Respondent concedes that the facts which exposed petitioner to a life without parole term were *not* pled in the information filed against petitioner:

> 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.

BIO i. Notwithstanding this concession, however, respondent argues that certiorari is inappropriate to assess *Britton*. According to respondent, petitioner in fact had notice of the bodily harm allegation because -- in connection with charges *other* than the kidnapping -- the state added a "bodily injury" enhancement allegation. BIO i, 4, 22-23. Although respondent raised this precise argument in state court, the state appellate court did not adopt it; instead, the state court relied on *Britton* as "controlling in this case." *Handley II*, 2021 WL 1138353 at * 9.

To be sure, respondent's factual predicate is accurate. Other charges did indeed contain a bodily injury allegation. But as the state court's decision to rely on *Britton* shows, the inference the state seeks to draw from this is wrong by a full 180 degrees. The fact that the prosecutor elected to add similar enhancement allegations as to some charges -- *but not the kidnapping charges* -- actually *undercuts* any suggestion that petitioner had notice that an enhancement would also apply to the kidnapping charge.

The facts are these. The state charged petitioner with five counts. Counts one and two charged simple kidnapping for ransom. As noted above, the state concedes these counts made no allegation of bodily harm or substantial risk of death. Counts three and four charged mayhem and torture; the state correctly notes that these charges *did* contain

separate enhancement allegations referencing bodily injury. The state urges this Court to infer that petitioner would therefore have been on notice that the bodily injury allegations also applied to the simple kidnapping for ransom charges in counts one and two, even though no bodily injury allegations were included as to those counts.[1]

In fact, however, California law has not only rejected this precise inference, but it draws precisely the opposite inference. As the California Supreme Court has recently reaffirmed, the state's decision to charge petitioner in this fashion affirmatively entitled petitioner to assume the state had elected *not* to charge him with aggravated kidnapping for ransom:

> [A] pleading that alleges an enhancement as to one count does not provide fair notice that the same enhancement might be imposed as to a different count. When a pleading alleges an enhancement in connection with one count but not another, the defendant is ordinarily entitled to assume the prosecution made a discretionary choice not to pursue the enhancement on the second count, and to rely on that choice in making decisions such as whether to plead guilty or proceed to trial.

People v. Anderson, 9 Cal.5th 946, 956 (2020). "Fair notice requires that every sentence enhancement be pleaded in connection with every count as to which it is imposed." *Id*. at 957. This has long been the rule in California. *See People v. Ramirez*, 189 Cal.App.3d 603, 623 (1987) (fact that charging documents alleged an in-concert enhancement for

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[1] The state expresses concern with petitioner's use of the terms "simple kidnapping for ransom" and "aggravated kidnapping for ransom." BIO 5 at n.4. The concern is curious given that the terms come directly from the California Court of Appeal describing California law:

> When the victim suffers bodily harm or is exposed to a substantial likelihood of death, thus triggering the greater sentence of LWOP, the offense is elevated from simple kidnapping for ransom to aggravated kidnapping for ransom. . . . Because neither one of those circumstances was alleged in the complaint here, the parties agree appellant was originally charged with simple kidnapping for ransom.

People v. Handley (Handley I), 2020 WL 58048, at *5 (2020).

some charges but not others "would tend to suggest" the in-concert allegation did not apply to those counts). It has long been the rule in federal courts as well. *See United States v. Lang,* 732 F.3d 1246, 1249 (11th Cir. 2013) ("We cannot combine the allegations from separate counts to allege what the indictment itself does not."); *United States v. Schmitz*, 634 F.3d 1247, 1262-63 (11th Cir. 2011); *United States v. Redcorn*, 528 F.3d 727, 734 -735 (10th Cir. 2008); *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994); *United States v. Miller*, 774 F.2d 883, 885 (8th Cir. 1985); *United States v. Fulcher*, 626 F.2d 985, 988, 200 (D.C. Cir. 1980); *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975). The state's contrary suggestion not only ignores these cases, but also the common sense principles on which these cases are based.

The state buttresses its argument by referencing language in a pretrial motion to consolidate. According to the state, in that motion, "the prosecution made clear that it intended at trial to prove crimes for which 'the penalty if convicted is life without parole.'" BIO 3-4, 22, n.12 citing 2 CT 215.

As the state appellate court recognized in rejecting this argument as well, the motion to consolidate did nothing of the sort. Indeed, in light of the actual language in the motion to consolidate, the inference the state seeks is once again off by a full 180 degrees.

The facts are these. In an October 2014 motion to consolidate petitioner's case with that of a co-defendant, the state prosecutor wrote as follows: "[t]here is additionally an allegation that Great Bodily injury was inflicted during the course of Torture as well as during the course of the Kidnap for Ransom . . . . The penalty if convicted is life without parole." 2 CT 214-215. But as the state appellate court properly concluded, this language

shows that the predicate for an aggravated kidnapping sentence of life without parole was an express charge of bodily injury in connection with the kidnapping for ransom charges:

> The Attorney General also draws our attention to verbiage in the prosecution's pretrial motion to consolidate . . . . The motion to consolidate does mention appellant could get LWOP if convicted of aggravated kidnapping, *but it appears to premise that possibility on the assumption appellant was expressly charged with inflicting bodily injury during that offense, which was not the case*.

Handley II, 2021 WL 1138353, at *9, n.5 (emphasis supplied).

The state appellate court's conclusion applies with special force here. The state filed its information against petitioner in March of 2015, five months *after* it filed the motion to consolidate which explicitly tied a life without parole term to an "express charge" of bodily injury in connection with the kidnap charges. 2 CT 214-215, 442. Yet the state still elected not to include bodily injury (or substantial risk of death) allegations in connection with either of the kidnap charges. 2 CT 442-443. In other words, just like the state's reliance on enhancement allegations from other charges, the fact that the motion to consolidate hinged a life without parole term on an "express[] charge [of] inflicting bodily injury" in connection with the kidnapping charges -- and the subsequently filed information contained no such charge -- once again suggested that a life without parole term would *not* be sought.

To its credit, respondent goes on to discuss whether *Britton* is contrary to the Sixth Amendment and this Court's decision in *Apprendi*. Respondent argues that *Apprendi* did not itself involve a question of notice, but only the question of whether facts which enhance punishment were elements for purposes of the Fifth Amendment right to proof beyond a reasonable doubt and the Sixth Amendment right to a jury trial. BIO 12-15. In respondent's view (and as applied here) *Apprendi* stands for the proposition that the fact of bodily harm *is* an element of the offense for purposes of the Fifth Amendment right to

proof beyond a reasonable doubt and the Sixth Amendment right to a jury trial, but is *not* an element for purposes of the Sixth Amendment right to notice. This was the precise rationale which the state court here used to distinguish *Apprendi* and justify continued fealty to the 1936 decision in *Britton*. *Handley II*, 2021 WL 1138353 at *8.

There are two fundamental problems with this position. First, there is nothing in the language of the Fifth or Sixth Amendments which even remotely supports such a wildly disparate approach to the very same fact. Neither the state court (when it adopted this rationale) or the state in its BIO cite any language in either the Fifth or Sixth Amendments themselves, or in any case, to justify such starkly varying treatment of the very same fact. As petitioner pointed out in his Petition, there is simply no "support for th[e] proposition" that a fact that increases a defendant maximum penalty is an element for "some rights . . . but not others." *United States v. Promise*, 255 F.3d 150, 157, n.6 (4th Cir. 2001) (*en banc*).

Second, it is clear from *Apprendi* and its progeny that (1) the Sixth Amendment's notice provision was intended to codify the common law, (2) the common law rule was that "the basis for imposing or increasing punishment" was an element which must be alleged in the charging document and (3) the common law notice requirement "reflected the original meaning of the Fifth and Sixth Amendment." *See Apprendi*, 530 U.S. at 500-501, 518 (conc. opn. of Thomas, J.); *Alleyne v. United States*, 570 U.S. 99, 109-111 (2013); *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004). Regardless of how respondent now characterizes *Apprendi*'s explicit discussion of the common law and "the notice . . . guarantee[] of the Sixth Amendment," the fact of the matter is that the common law discussed in both *Apprendi* and *Alleyne* directly answers whether *Britton* remains good law. Both *Apprendi* and *Alleyne* recognize that under the common law codified by

the Sixth Amendment, there was "a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment[.]" *Alleyne*, 570 U.S. at 109-110. *Accord Apprendi*, 530 U.S. at 478, 480. Moreover, both *Apprendi* and *Alleyne* note that under common law, the charging document "must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *Alleyne*, 570 U.S. at 111. *Accord Apprendi*, 530 U.S. at 478, 480. *Britton* simply cannot stand consistent with the common law as described in *Apprendi* and *Alleyne*.

In arguing that *Apprendi* did not involve the notice provision of the Sixth Amendment, the state cites footnote three of *Apprendi*. BIO 14, citing *Apprendi*, 530 U.S. at 477 n. 3. In that footnote the Court made clear it was not addressing the question of whether the failure to plead facts in that case violated the indictment clause of the Fifth Amendment. *Ibid*. The state adds a citation to *Hurtado v. California*, 110 U.S. 516 (1884) for the proposition that the Fifth Amendment indictment clause does not apply to the states. BIO 13.

The state's discussion of the Fifth Amendment indictment clause is puzzling. Petitioner here does not suggest that the indictment clause applies to the states, nor does he contend that the failure to plead either bodily harm or substantial risk of death in this case violates the indictments clause. Instead, his position is that it violates the notice provisions of the common law, codified by the Sixth Amendment. In short, the question here is not whether *Britton* may stand consistent with the indictment clause of the Fifth Amendment, but whether it may stand consistent with the notice provisions of the Sixth Amendment.

Respondent accurately observes that in holding that *Britton* remained good law, and that petitioner received adequate notice, the state appellate court relied on the fact that at the conclusion of the case -- when the trial court was deciding what instructions to give the jury -- petitioner's counsel did not object to instructions on bodily harm. BIO 8, 10, 21-22. The state court characterized this failure to object as an "informal amendment" to the information. BIO 22.

But contrary to the argument at least implicit in respondent's observations, and as numerous federal judges have observed, this observation misses the essential dynamics of a criminal case. The purpose of providing notice as to the potential punishment which can be imposed is not simply to ensure defendants know their potential punishment at the end of a case or on the day they are sentenced. Instead, such notice is designed to ensure defendants have notice of the potential punishment as they make decisions from the very beginning of the case, including perhaps the most critical decision of all -- whether to go to trial or accept (or seek out) a deal with the government, often in exchange for testimony against a more culpable co-defendant. *See*, *e.g.*, *Gautt v. Lewis*, 489 F.3d 993, 1010 (9th Cir. 2007); *Promise*, 255 F.3d at 189 (conc. opn. of Motz, J.); *McCoy v. United States*, 266 F.3d 1245, 1269 n.16 (11th Cir. 2001) (conc. opn. of Barkett, J.); *United States v. Sanchez*, 269 F.3d 1250, 1315 (11th Cir. 2001) (conc. opn. of Tjoflat, J.). As these jurists recognize, even in the situation where adequate notice would not change *how* a case was tried, it might change *whether* a case was tried in the first place or whether a favorable deal would be sought. A defense lawyer's failure to object to certain instructions at the very end of trial hardly fulfills the Sixth Amendment's guarantee that defendants "be informed of the nature and cause of the accusation . . . ."

This is especially true here. As the state appellate court itself recognized, the mid-trial conference where the trial court discussed these issues -- and where the "informal amendment" occurred -- was hardly a model of clarity. *Handley I*, 2020 WL 58048, at *5 (noting that trial court's comments were "not entirely accurate."); *Handley II*, 2021 WL 1138353, at *6 (same). The trial court first mixed up the term "great bodily injury" alleged in connection with a count four enhancement and the term "bodily harm" required for a charge of aggravated kidnapping in count one. *Ibid*. *See* Pet. 4-5; 3 RT 578. Then the trial court told both defense counsel and petitioner that the bodily harm allegation "should be a special finding, but it's not technically a sentencing enhancement and the like." 3 RT 578. As the state appellate court properly recognized, the trial court's comments actually "suggested those allegations would not increase [petitioner's] sentence at all . . . " *Handley I*, 2020 WL 58048, at *7. Respondent never explains how trial counsel's failure to object to instructions on bodily harm -- instructions which petitioner and counsel were both told would *not* increase petitioner's sentence -- constituted an informal amendment which affirmatively put defendant on notice that contrary to what he had been told, his sentence *could* be increased to life without parole.

Petitioner will end where he began. The 1936 decision in *Britton* held that facts which increase a defendant's punishment from life to life without parole did not have to be pled in the charging document. This was so, the court explained, because those facts only went to punishment.

Britton is inconsistent with the common law on which the Sixth Amendment is based. It is inconsistent with *Apprendi*. It is inconsistent with *Alleyne*. And because the

state appellate court here rejected petitioner's notice claim by citing *Britton* and relying on it as a "time-tested California Supreme Court decision," certiorari is appropriate.[2]

DATED: March 4, 2022

Respectfully submitted,

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[2] Respondent suggests this case is a "poor vehicle in which to assess" *Britton,* arguing that because state law required no objection to raise this issue, respondent was prevented from offering "information about public, official statements or private communications" which would have provided constitutionally adequate notice. BIO 20-21. But "information about public, official statements or private communications" cannot serve as notice in a criminal case. *See Gautt v. Lewis*, 489 F.3d 993, 1009 (9th Cir. 2007) ("the Supreme Court . . . has never held that non-charging-document sources can be used to satisfy the Constitution's notice requirement . . . .) As the state appellate court noted in rejecting respondent's attempt to cobble together notice based on similar materials, "[s]uffice it to say, none of this peripheral information is convincing in terms of proving appellant knew he could get LWOP." *Handley II*, 2021 WL 1138353 at * 9, n.5.

Nor does respondent's brief reference to harmless error change the certiorari calculus. BIO 22-23. Precisely because the state court relied on *Britton* it found no error and did not address prejudice in the first instance. In this situation, a grant of certiorari would not involve the question of prejudice. *See McFadden v. United States*, 576 U.S. 186, 197, (2015) ("Because the Court of Appeals did not address [the harmless-error] issue, we remand for that court to consider it in the first instance."); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (same); *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (same). Questions as to what standard of prejudice (if any) applies to a notice violation, and the impact of a lack of notice on the defendant's ability to seek or accept a deal prior to trial, are not presented on this record.