No. 25 -

IN THE SUPREME COURT OF THE

UNITED STATES

KYLE SHIRAKAWA HANDLEY,

Petitioner,

vs.

CHRISTOPHER PIERCE,

Respondent.

APPENDIX

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Published Opinion of the United States Court of Appeals for the Ninth Circuit in Handley v. Moore (July 29, 2025)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYLE HANDLEY, *Petitioner - Appellant*, v. SEAN MOORE, *Respondent - Appellee*.	No. 24-499 D.C. No. 8:22-cv-01423-MCS-GJS OPINION

Appeal from the United States District Court
for the Central District of California
Mark C. Scarsi, District Judge, Presiding

Argued and Submitted March 7, 2025
Pasadena, California

Filed July 29, 2025

Before: Gabriel P. Sanchez and Holly A. Thomas, Circuit Judges, and James Donato, District Judge.[*]

Opinion by Judge H.A. Thomas;
Dissent by Judge Donato

[*] The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

SUMMARY**

Habeas Corpus

The panel affirmed the district court's denial of Kyle Handley's federal habeas petition challenging his conviction and sentence on two counts of kidnapping for ransom in violation of California Penal Code section 209(a).

Section 209(a) provides for a sentence of life without possibility of parole if a victim of the kidnapping "suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death." The statute otherwise provides for a sentence of life with the possibility of parole. The information filed in Handley's case did not specifically allege that his victims suffered bodily harm or were confined in a manner that exposed them to a substantial likelihood of death. But during trial, Handley consented to jury instructions and a verdict form requiring special findings on those allegations and, following conviction, the state trial court sentenced him to life without parole.

On direct appeal, the California Court of Appeal rejected Handley's claim that the jury's findings on those special allegations, as well as his sentence, must be reversed because he was never formally charged with those allegations. The state court held that the Constitution does not require an information to charge punishment-enhancing facts—facts that serve only to increase the prescribed punishment to which a defendant is exposed. In the alternative, the state

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

court held that Handley was afforded constitutionally sufficient notice of the special allegations through informal amendment of the information because he received notice of and consented to those allegations during a jury instruction conference at trial.

Handley's federal habeas petition alleged the denial of his Sixth Amendment right to be informed of the nature and cause of the accusation. He argued that he lacked adequate notice of the special allegations because they were omitted from the written information. The district court denied the petition.

The panel held that at the time of the California Court of Appeal's decision, it was not clearly established that the Sixth Amendment requires state charging documents to allege punishment-enhancing facts such as the special allegations at issue here. Nor was it clearly established that the notice required by the Sixth Amendment must be provided by the written information itself and that it cannot be provided through informal amendment of the information. The record accordingly does not support Handley's contention that the state court's decision was "contrary to" clearly established federal law as required for relief under 28 U.S.C. § 2254(d)(1).

The panel rejected Handley's contention that the state court's factual findings regarding informal amendment of the information were objectively unreasonable under 28 U.S.C. § 2254(d)(2). The state court reasonably found that Handley received notice of and consented to the special allegations during the jury instruction conference.

The panel also rejected Handley's contention that the state court's decision was "contrary to" clearly established federal law because he was never expressly informed that the

special allegations exposed him to a sentence of life without parole. Handley was informed of the special allegations, and section 209(a) itself states that the punishment triggered by a jury's true findings on those allegations is life without the possibility of parole.

District Judge Donato dissented. He wrote that § 2254(d)(1) is satisfied because the California Court of Appeal's core conclusion—that section 209(a) may properly be understood to state a single offense for purposes of the Sixth Amendment—was the fruit of an objectively unreasonable application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013). He wrote that the California Court of Appeal also unreasonably applied Supreme Court precedent when it determined that Handley was given constitutionally adequate notice of the aggravated kidnapping for ransom charge in a whirlwind of jury instruction conferences at the tail end of his prosecution. Judge Donato would reverse and remand with instructions to issue a conditional writ of habeas corpus directing vacatur unless Handley is retried within 60 days.

COUNSEL

Cliff Gardner (argued) and Daniel J. Buffington, Law Offices of Cliff Gardner, Berkeley, California, for Petitioner-Appellant.

Warren J. Williams (argued), Deputy Assistant Attorney General, Division of Medi-Cal Fraud and Elder Abuse; Christopher P. Beesley, Supervising Deputy Attorney General; Charles C. Ragland, Senior Assistant Attorney

General; Lance E. Winters, Chief Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

H.A. THOMAS, Circuit Judge:

Kyle Handley was charged with two counts of kidnapping for ransom in violation of California Penal Code section 209(a). Section 209(a) provides for a sentence of life without possibility of parole if a victim of the kidnapping "suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death." Cal. Penal Code § 209(a) (2012).[1] The statute otherwise provides for a sentence of life with the possibility of parole. *Id.* The information filed in Handley's case did not specifically allege that his victims suffered bodily harm or were confined in a manner that exposed them to a substantial likelihood of death. But during trial, Handley consented to jury instructions and a verdict form requiring special findings on those allegations and, following conviction, the state trial court sentenced him to life without parole.

On direct appeal, the California Court of Appeal rejected Handley's claim that the jury's findings on those special allegations, as well as his sentence, must be reversed because he was never formally charged with those allegations.

[1] We rely on the version of the California Penal Code in effect when the crimes were committed.

People v. Handley (*Handley II*), No. G056608, 2021 WL 1138353, at *4–12 (Cal. Ct. App. Mar. 25, 2021). The state court held that the Constitution does not require an information to charge punishment-enhancing facts—facts that serve only to increase the prescribed punishment to which a defendant is exposed. *Id.* at *5–9. In the alternative, the state court held that Handley was afforded constitutionally sufficient notice of the special allegations through informal amendment of the information because he received notice of and consented to those allegations during a jury instruction conference that took place at trial. *Id.* at *9–12.

Handley subsequently filed a federal habeas petition alleging the denial of his Sixth Amendment right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. He argues that he lacked adequate notice of the special allegations because they were omitted from the written information. The district court denied Handley's habeas petition. We now affirm.

At the time of the California Court of Appeal's decision, it was not clearly established that the Sixth Amendment requires state charging documents to allege punishment-enhancing facts such as the special allegations at issue here. Nor was it clearly established that the notice required by the Sixth Amendment must be provided by the written information itself and that it cannot be provided through informal amendment of the information. The record accordingly does not support Handley's contention that the state court's decision was "contrary to" clearly established federal law under 28 U.S.C. § 2254(d)(1). We also reject Handley's contention that the state court's factual findings regarding informal amendment of the information were objectively unreasonable under § 2254(d)(2). The state court

reasonably found that Handley received notice of and consented to the special allegations during the jury instruction conference. Finally, we reject Handley's contention that the state court's decision was "contrary to" clearly established federal law because he was never expressly informed that the special allegations exposed him to a sentence of life without parole. Handley was informed of the special allegations, and section 209(a) itself states that the punishment triggered by a jury's true findings on those allegations is life without the possibility of parole. Handley does not point to any Supreme Court decision requiring more explicit notice of the prescribed punishment.

I

In 2012, Michael S. and Mary B. were asleep in their Newport Beach, California, home when they were awakened at gunpoint, tied up, gagged, and blindfolded by three intruders. *Handley II*, 2021 WL 1138353, at *1–2. The men demanded $1 million from Michael, and when he told them he did not have that kind of money, they carried him and Mary to a van outside and drove to the Mojave Desert, where the men believed Michael had buried cash. *Id.* at *2. Along the way, one man drove the van while the other two stomped Michael with their boots, beat him with a rubber hose, shocked him with a taser, and burned him with a blowtorch. *Id.* "All told, the tasering, burning and beating went on for about two and a half hours before the van finally pulled over on a deserted road out near Rosamond." *Id.* "Michael and Mary were still tied up and blindfolded when the men carried them out of the van and put them down on the desert sand." *Id.* Eventually, the men gave up on finding the money, cut off Michael's penis, doused him with bleach, and drove off in the van, leaving Michael and Mary behind. *Id.* Michael

and Mary survived, and the police ultimately identified Handley as one of the kidnappers. *Id.* at *2–3.

The Orange County District Attorney filed a five-count criminal complaint against Handley in October 2012. The complaint charged Handley with two counts of kidnapping for ransom, a form of aggravated kidnapping, in violation of California Penal Code section 209(a); one count of aggravated mayhem, in violation of Penal Code section 205; one count of torture, in violation of Penal Code section 206; and one count of first-degree residential burglary, in violation of Penal Code sections 459 and 460(a). In connection with the torture count, the complaint also charged an enhancement under Penal Code section 12022.7(a), alleging that Handley "personally inflicted great bodily injury" on Michael.[2]

In October 2014, the prosecution filed a motion to consolidate Handley's case with the case against another defendant. The prosecution noted in its moving papers that "[t]he penalty if convicted is life without parole."

In March 2015, the prosecution filed an information against Handley and a codefendant.[3] The information, which

[2] Under section 12022.7(a), "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." Cal. Penal Code § 12022.7(a) (2012).

[3] The California Constitution "authorizes prosecution of a felony by information 'after examination and commitment by a magistrate.'" 4 B.E. Witkin, *Cal. Crim. Law*, *Pretrial* § 171 (5th ed. 2024) (quoting Cal. Const. art. I, § 14). "Before an information is filed there must be a preliminary examination of the case against the defendant and an order

superseded the October 2012 complaint, included the same charges as the complaint, including two counts of kidnapping for ransom under Penal Code section 209(a).[4] At the time, section 209(a) stated as follows:

> Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that 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

holding the defendant to answer. The proceeding (commonly called a 'preliminary hearing') must be commenced by a written complaint." *Id.* "In contrast, a charge of a felony by indictment may only be made after an inquiry and determination by a grand jury." *Id.* "[A] preliminary hearing is not required where the defendant has been indicted." *People v. Superior Ct. (Persons)*, 128 Cal. Rptr. 314, 315 (Ct. App. 1976). "[A] district attorney is free to use either of the two vehicles"—indictment or information—"to bring a defendant to trial." *People v. Schlosser*, 144 Cal. Rptr. 57, 58 (Ct. App. 1978).

[4] Only the first four counts ultimately went to the jury. The prosecution dropped the burglary count during voir dire and the section 12022.7(a) enhancement during trial.

> 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) (2012).

The penalties under this provision depend on the circumstances of the offense. The baseline penalty for violating section 209(a) is "imprisonment in the state prison for life with the possibility of parole." *Id.* But a penalty of "life without possibility of parole" applies when a victim of the kidnapping "suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death." *Id.* In Handley's case, neither the complaint nor the information specifically alleged that either victim suffered bodily harm or was intentionally confined in a manner exposing that person to a substantial likelihood of death. Nor did the complaint or information indicate whether the prosecution was seeking a sentence of life without possibility of parole.[5]

[5] The information alleged:

> COUNT 1: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain JOHN DOE for ransom, reward, extortion, and to exact from another person money and other valuable things.
>
> COUNT 2: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA

Handley's separate trial began in December 2017. At trial, Handley "did not present any evidence in his defense, nor did he dispute the prosecution's portrayal of Michael and Mary as the victims of a brutal kidnapping scheme. Rather, he claimed there was insufficient evidence tying him to that scheme." *Handley II*, 2021 WL 1138353, at *4.

At the time of Handley's trial, California's pattern jury instruction for Penal Code section 209(a), CALCRIM No. 1202, required the following instruction to be given "[i]f the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death":

> If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), 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).

Jud. Council of Cal., Crim. Jury Instructions (CALCRIM), No. 1202, at 953–54 (2017) (brackets in original).

During a jury instruction conference held on December 21, 2017, the state trial court asked defense counsel whether he had any objection to the court instructing the jury on

> HANDLEY and HOSSEIN NAYERI, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain JANE DOE for ransom, reward, extortion, and to exact from another person money and other valuable things.

California's pattern jury instruction for Penal Code section 209(a). Defense counsel stated that he had no objection. Counsel "also informed the court he was not requesting instructions on any lesser included offenses to aggravated kidnapping. Since his theory of the case was that [Handley] was not actually involved in the alleged kidnappings, he felt there was no need for any such instructions, and [Handley] said he agreed with that decision." *Handley II*, 2021 WL 1138353, at *5.

At a second conference held on January 3, 2018, the trial court informed the parties that it had prepared jury instructions on the section 209(a) counts—Counts 1 and 2—"asking the jury to make findings on both the substantive crime and then whether or not that crime, if committed, great bodily injury was inflicted." The court stated that, "[t]he way that the CALCRIMS read, it should be a special finding, but it's not technically a sentencing enhancement and the like."[6]

[6] The court misspoke by referring to "great bodily injury" rather than "bodily harm." While enhancement under section 12022.7(a) requires "great bodily injury," special allegations under section 209(a) require either "bodily harm" or intentional confinement in a manner which exposes the victim to a substantial likelihood of death. Cal. Penal Code § 209(a) (2012).

By contrast, the court did not misspeak by pointing out that special allegations under section 209(a) are not sentencing enhancements. *See People v. Jones*, 213 P.3d 997, 1004 (Cal. 2009) ("Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself*, when the jury has determined that the defendant has satisfied the conditions specified in the statute." (alteration in original) (quoting *People v. Jefferson*, 980 P.2d 441, 451 (Cal. 1999))); 3 B.E. Witkin, *Cal. Crim. L., Punishment* § 393 (5th ed. 2024) ("An enhancement is an additional term of imprisonment added to the base

After informing the parties that it was "preparing to instruct consistent with what I have just said," the court asked, "Is there any objection by the defense? There was not when we went over jury instructions." Defense counsel responded that there was no objection.

One of the prosecutors then clarified that the prosecution was seeking different special findings with respect to the two victims—bodily harm with respect to Michael and confinement exposing the victim to a substantial likelihood of death with respect to Mary. The court asked defense counsel whether he had any objection to the prosecution proceeding under that theory, and defense counsel stated that he had no objection.

"During closing arguments, the prosecutor argued there was ample evidence to support those allegations, and defense counsel did not disagree. Defense counsel instead took the position that [Handley] had nothing to do with the kidnapping plan that led to Michael suffering bodily harm and Mary being exposed to a substantial likelihood of death." *Id.* at *6. Defense counsel "voiced no objection when the prosecutor argued those allegations." *Id.* at *11.

On January 4, 2018, the jury returned verdicts of guilty on all four counts, including the two kidnapping counts under section 209(a). On Count 1, the jury also made a special finding that Michael "suffered bodily harm" during the course of the kidnapping. On Count 2, the jury made a special finding that Mary "was intentionally confined in a manner that exposed her to a substantial likelihood of death."

term. . . . An aggravating circumstance that is relied on to impose the upper term is not an enhancement. Rather, it is a factor that is used in determining the base term to which enhancements are added.").

Defense counsel voiced no objection to these special findings. *Id.*

As noted by the state court, in his sentencing brief,

> defense counsel fully acknowledged . . . that [Handley] was facing a potential sentence of LWOP based on those findings. Defense counsel made the argument that imposition of an LWOP sentence would be cruel and unusual under the Eighth Amendment, but—to his credit—he never so much as suggested that an LWOP sentence was improper on due process grounds for lack of notice. Nor did he ever suggest that [Handley's] plea decisions or trial strategy were impacted by the manner in which the case was charged. There would have been no support for either argument.

Id.[7] The trial court rejected Handley's cruel-and-unusual-punishment argument and sentenced Handley to life imprisonment without the possibility of parole on each of the kidnapping counts.

On direct appeal, Handley argued for the first time that the jury's findings on the special allegations and his life-without-parole sentence violated his constitutional right to notice of the charges against him because the special allegations were not charged in the written information. In January 2020, the California Court of Appeal rejected that claim. *See People v. Handley* (*Handley I*), No. G056608,

[7] Handley actually claimed cruel and unusual punishment under the California Constitution, not the Eighth Amendment. The distinction has no bearing on the issues presented in this appeal.

2020 WL 58048 (Cal. Ct. App. Jan. 6, 2020). The California Supreme Court subsequently granted review of that decision and returned the case to the court of appeal with directions to vacate *Handley I* and reconsider Handley's notice claim in light of *People v. Anderson*, 470 P.3d 2 (Cal. 2020). In March 2021, the court of appeal issued a superseding decision rejecting Handley's notice claim on two independent grounds. *Handley II*, 2021 WL 1138353, at *4–12.

First, the state court concluded that Handley received constitutionally sufficient notice of the special allegations and his exposure to a sentence of life without possibility of parole because the March 2015 information cited Penal Code section 209(a). *Id.* at *8. The court concluded that this citation alone was sufficient to place Handley on notice of the charges because section 209(a) "plainly states that if the victim of an aggravated kidnapping dies, suffers bodily harm or is exposed to a substantial likelihood of death, the defendant must be sentenced to LWOP." *Id.*

In reaching this conclusion, the court relied on the California Supreme Court's decision in *People v. Britton*, 56 P.2d 494 (Cal. 1936). *Id.* at *8–9. In that case, which involved an earlier version of section 209, the defendant argued that the trial court was "without authority to sentence him 'without possibility of parole' because the indictment contains no allegation that in the course of the commission of the crime of kidnaping for the purpose of robbery to which he entered his plea, the victim thereof suffered 'bodily harm.'" *People v. Britton*, 56 P.2d at 495. The state supreme court disagreed:

> Section 209 of the Penal Code, as amended, for the purpose of this case, defines but one

criminal act or offense, viz., kidnaping for purpose of robbery, for which any one of several punishments may be imposed, depending entirely upon the circumstances surrounding its commission. A charge in the language of the statute that the accused had kidnaped his victim for the purpose of robbery in violation of the statute apprises the accused of what he will be expected to meet and of the several punishments prescribed therefor, any one of which, upon conviction, may be imposed upon him. The indictment here involved charged the offense in the language of the statute and referred thereto.

It is well settled in this state that an indictment or information need not allege the particular mode or means employed in the commission of an offense, except when of the essence thereof. In other words, particulars as to manner, means, place, or circumstances need not in general be added to the statutory definition. The indictment or information need only charge the essential elements of the statutory offense. It then fairly apprises the defendant of what he is to meet at the trial.

So far as the present case is concerned, the essence of the offense denounced in section 209, as amended, as a felony is the seizing, confining, kidnaping, etc., of the victim for the purpose of robbery. If upon the trial of such offense, or upon plea of guilty, it develops that the victim suffered bodily harm, the jury or the court, as the case may

> be, may in its discretion fix the punishment at death or life imprisonment without possibility of parole or, should the victim not have suffered bodily harm, life imprisonment with possibility of parole is prescribed as punishment.

Id. at 496 (citations omitted).

After noting that *People v. Britton* was controlling in Handley's case, the court of appeal rejected Handley's contention that *People v. Britton* had been "overruled sub silentio by the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny." *Handley II*, 2021 WL 1138353, at *8. Relying on post-*Apprendi* California Supreme Court decisions, the court reasoned that "*Apprendi* was not a notice case" but instead "considered whether the rights to trial by jury and proof beyond a reasonable doubt extend to facts that can be used to enhance a defendant's punishment above the statutory maximum." *Id.* at *8–9 (citing *People v. Contreras*, 314 P.3d 450, 470 (Cal. 2013); *People v. Houston*, 281 P.3d 799, 829 (Cal. 2012); *People v. Famalaro*, 253 P.3d 1185, 1211 (Cal. 2011)).

Second, even assuming *People v. Britton* were not controlling, the court of appeal concluded that reversal was unwarranted because Handley received constitutionally sufficient notice of the special allegations—and his potential sentence of life without parole—through informal amendment of the information. *Id.* at *9. The court explained that under California's informal amendment doctrine, "due process will be deemed satisfied if the record, *considered as whole*, shows the defendant received adequate notice of the prosecution's intent to charge him with a particular crime or

enhancement, and the defendant, by word or conduct, acquiesced to the charge." *Id.* at *10. The court concluded that Handley received adequate notice of the special allegations at the January 3 jury instruction conference and that Handley consented to those charges when the trial court asked defense counsel whether he objected to the allegations and defense counsel stated repeatedly that he did not. *Id.* at *11. The court of appeal therefore concluded that "the conditions for an informal amendment of the charges have been met" and that Handley "was afforded sufficient notice of the charges." *Id.*

The court of appeal acknowledged that Handley "was never expressly informed he could be sentenced to LWOP if the jury found the special allegations true." *Id.* at *12. But the court concluded that Handley received adequate notice because "once the aggravated kidnapping charges were informally amended to include allegations of bodily harm and substantial likelihood of death, [Handley] was sufficiently apprised of this possibility." *Id.* The court affirmed the judgment, *id.* at *17, and the California Supreme Court denied review without comment.

Handley subsequently filed a federal habeas petition under 28 U.S.C. § 2254, arguing that his kidnapping convictions and sentences violated his Sixth Amendment right to notice of the charges against him. The district court denied the petition. The court concluded that habeas relief was barred under § 2254(d) because clearly established federal law did not require the special allegations to be charged in the information. In the alternative, assuming arguendo that § 2254(d) was satisfied and that Handley's Sixth Amendment rights were violated, the court concluded that Handley failed to "demonstrate[] that any constitutional error was structural or resulted in any prejudice to his

defense" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The district court dismissed Handley's petition with prejudice. Handley timely appealed.

II

"We review de novo a district court's decision to grant or deny a writ of habeas corpus." *Kipp v. Davis*, 971 F.3d 939, 948 (9th Cir. 2020). Because Handley's petition was filed after April 24, 1996, our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Marks v. Davis*, 106 F.4th 941, 948 (9th Cir. 2024). Under AEDPA, federal habeas relief may not be granted unless the state court's adjudication of a claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "A petitioner who satisfies § 2254(d)(1) or (d)(2) is entitled to de novo review of the merits of the claim." *Marks*, 106 F.4th at 950.

"Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions as of the time of the relevant state-court decision.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Id.* at 71–72. "When th[e Supreme] Court relies on a legal rule or principle to decide a case, that principle is

a 'holding' of the Court for purposes of AEDPA." *Andrew v. White*, 604 U.S.___, 145 S. Ct. 75, 81 (2025) (per curiam).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law or if the state court decides a case differently than th[e Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412–13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

Under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "[E]ven if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (first alteration added) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). "This is a daunting standard—one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other*

grounds as stated in Murray v. Schriro, 745 F.3d 984, 999–1000 (9th Cir. 2014).

When the last state court decision adjudicating a claim is unreasoned, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). "It should then presume that the unexplained decision adopted the same reasoning," although "the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds." *Id.*

III

We now address whether the California Court of Appeal's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

A

We begin with Handley's contention that the California Court of Appeal's decision, and the California Supreme Court's decision in *People v. Britton* upon which the California Court of Appeal relied, were "contrary to" a series of nineteenth-century Supreme Court cases requiring criminal pleadings to allege the essential elements of the offense charged.

Handley relies on the Supreme Court's decisions in *Blitz v. United States*, 153 U.S. 308 (1894), *United States v. Britton*, 107 U.S. 655 (1883), *United States v. Carll*, 105 U.S. 611 (1881), and *United States v. Simmons*, 96 U.S. 360

(1877), contending that these decisions clearly established the principle that the Sixth Amendment requires state charging documents to allege facts that increase the prescribed range of penalties to which a defendant is exposed (which we refer to as "punishment-enhancing facts"). He argues that:

> (1) these cases adopted a common law rule that "where a factual element of a criminal charge exposes a defendant to punishment not available in the absence of that fact, the fact must be pled in the charging document in order to give proper notice";
>
> (2) "the notice provisions of the Sixth Amendment codified th[is] common law [rule]"; and
>
> (3) "the Sixth Amendment applies to the states."

It is true that the decisions Handley cites, along with others from the same era, require the essential elements of an offense to be charged in a federal indictment. *See Blitz*, 153 U.S. at 315 (holding that an indictment must "set forth all the elements necessary to constitute the offense intended to be punished" (quoting *Carll*, 105 U.S. at 612)); *United States v. Britton*, 107 U.S. at 669 ("The intent to injure and defraud is an essential ingredient to every offense specified in the section, and the failure to aver the intent is a fatal defect in the counts in which it occurs."); *Simmons*, 96 U.S. at 362–63 (deeming defective an indictment that failed to allege the elements of the offense with sufficient certainty); *see also United States v. Hess*, 124 U.S. 483, 486 (1888) ("The general, and with few exceptions, of which the present

case is not one, the universal, rule, on this subject, is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading.").[8]

We also agree with Handley that the Supreme Court traced these pleading requirements to the common law. *See, e.g.*, *Simmons*, 96 U.S. at 362 (citing the principle, "fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence"); *see also* 5 Wayne R. LaFave, *Criminal Procedure* § 19.3(b) (4th ed. 2024) (characterizing the requirement that a pleading allege each essential element of the offense charged as "a cornerstone of common law pleading").

Third, we will assume without deciding that the Sixth Amendment codified this common law principle. In *United States v. Cruikshank*, 92 U.S. 542 (1875), the Supreme Court held that the Sixth Amendment requires an indictment to set forth "every ingredient of which the offence is composed."

[8] "[T]hese basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure." *Russell v. United States*, 369 U.S. 749, 765–66 (1962); *see* Fed. R. Crim. P. 7(c)(1) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.").

Id. at 558 (quoting *United States v. Cook*, 84 U.S. (17 Wall.) 168, 174 (1872)). The Court stated:

> In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.'

Id. at 557–58.[9]

[9] The parties have not cited *Cruikshank*, and some have questioned its reasoning. *See* LaFave, *supra*, § 19.3(b) ("[V]arious courts have suggested that the pleading of all essential elements is mandated by the notice requirement of the Sixth Amendment, although that is a dubious proposition." (footnote omitted)). But *Cruikshank* relies explicitly on the Sixth Amendment, and the Supreme Court's more recent decision in *Russell*—which the parties also do not cite—supports the proposition that the Sixth Amendment incorporates these common law principles. In *Russell*, a federal indictment charged the defendants with violating 2 U.S.C. § 192, which made it unlawful for a congressional witness to "refuse[] to answer any question pertinent to the question under inquiry." 369 U.S. at 752 n.2. The Court held that the indictment was insufficiently specific because it "failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated." *Id.* at 752. In reaching this conclusion, the Court relied on both the grand jury requirements of the Fifth Amendment and "the guaranty of the Sixth

Finally, we agree with Handley that the notice requirement of the Sixth Amendment applies to the states. *See Gray v. Raines*, 662 F.2d 569, 571 (9th Cir. 1981) ("The notice provision of the Sixth Amendment is incorporated within the Due Process Clause of the Fourteenth Amendment and is therefore fully applicable to the states." (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.")).

We are not persuaded, however, by Handley's contention that these nineteenth-century decisions clearly established that punishment-enhancing facts—facts serving solely to increase the prescribed range of penalties to which a defendant is exposed—must be alleged in a charging document. In *Blitz*, *Hess*, *United States v. Britton*, *Carll*, *Simmons*, and *Cruikshank*, the indictment omitted—or failed to allege with sufficient certainty—a basic element required for the commission of the offense. None of these cases involved the omission of a fact going solely to punishment. These decisions, therefore, cannot have clearly established the principle that punishment-enhancing facts must be charged in an indictment or information.

Amendment that 'In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.'" *Id.* at 751 (alteration in original) (quoting U.S. Const. amend. VI). Given *Cruikshank* and *Russell*, we assume for purposes of our analysis that the Sixth Amendment incorporates the common law principle that an indictment must charge the essential elements of the crime.

Handley argues otherwise, relying on *United States v. Britton*, but that decision does not bear the weight Handley places on it. In *United States v. Britton*, the defendant was charged in a federal indictment with violating section 5209 of the Revised Statutes of the United States, which made it a crime for the president of a national banking association to willfully misapply funds of the association. 107 U.S. at 655–56. "[T]he indictment charged that the defendant being president of the association, paid to a certain person unknown the sum of $2,400 of the moneys of the association in the purchase of 40 shares of its capital stock, which stock, so purchased, was held by the defendant in trust for the use of the association." *Id.* at 666. The Court held that, "to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged." *Id.* at 666–67. "This essential element of the offense" was not only "not averred in the counts under consideration" but also

> negatived by the averment that the shares purchased by the defendant w[ere] held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds.

Id. at 667.

Handley argues that this decision stands for the proposition that punishment-enhancing facts must be alleged in a charging document because the fact omitted from the indictment in the case "went only to the punishment which could be imposed." Handley's premise is incorrect. The fact omitted from the indictment in *United States v. Britton*—willful misapplication through conversion—was a basic element required for the commission of the offense. Without conversion, there was no violation of the statute at all. Here, by contrast, Handley could be convicted under section 209(a) regardless of whether the prosecution could prove that his victims suffered bodily harm or were confined in a manner exposing them to a substantial likelihood of death. *United States v. Britton*, therefore, does not speak to the issue presented in this case—whether punishment-enhancing facts must be alleged in a charging instrument.[10]

To summarize, we assume without deciding that *Blitz*, *United States v. Britton*, *Carll*, *Simmons*, and similar cases, read in light of *Cruikshank* and *Russell*, clearly established that the Sixth Amendment requires the essential elements of a crime to be alleged in a charging document. These cases do not clearly establish, however, that punishment-enhancing facts are among the essential elements that must be charged. Accordingly, we reject Handley's contention that *People v. Britton*, and the California Court of Appeal decision in Handley's case relying on *People v. Britton*, were

[10] It is true that, as Handley emphasizes, conversion was relevant to the punishment in *United States v. Britton*, as in the absence of proving conversion the government would only have been able to charge the defendant with violating section 5239, maladministration of the affairs of a bank, which carried a lesser penalty than section 5209. But this does not make conversion a punishment-enhancing fact, which is a fact relevant only to punishment.

"contrary to" clearly established federal law under these nineteenth-century decisions.[11]

B

We next address Handley's contention that the California Court of Appeal's decision was "contrary to" more recent Supreme Court decisions stating that any fact (other than a prior conviction) that increases the prescribed range of penalties to which a criminal defendant is exposed must be charged in an indictment.

In *Jones v. United States*, 526 U.S. 227 (1999), a federal indictment charged the defendant with carjacking, in violation of 18 U.S.C. § 2119. *Id.* at 230. Section 2119(1) prescribes a maximum sentence of 15 years; § 2119(2), which applies when serious bodily injury results from the offense, prescribes a maximum sentence of 25 years; and § 2119(3), which applies when death results from the offense, imposes a maximum sentence of life. *Id.* The indictment and the jury instructions made no mention of the statute's numbered subsections or serious bodily injury, but the district court imposed a 25-year sentence under subsection (2) after finding by a preponderance of the evidence that serious bodily injury resulted from the offense. *Id.* at 230–31. After noting that a different construction would raise serious constitutional questions under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, the Supreme

[11] We agree with our dissenting colleague that punishment-enhancing facts are "elements" under *Apprendi* and *Alleyne*. But nothing in the nineteenth-century cases upon which Handley relies establishes that the Sixth Amendment requires these *Apprendi*-type elements to be alleged in state charging documents. Nor, as we explain below, do the *Apprendi* line of decisions squarely address this question.

Court "construe[d] § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Id.* at 252. A footnote in *Jones* stated 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." *Id.* at 243 n.6.

In *Apprendi*, a New Jersey indictment charged the defendant with several state criminal offenses but made no mention of the state's hate crimes statute or the defendant's allegedly racially-motivated purpose in committing the crimes. 530 U.S. at 469. After the defendant pleaded guilty, the state trial court applied the hate crimes statute, found by a preponderance of the evidence that the defendant acted with a racially-motivated purpose, and sentenced the defendant accordingly. *Id.* at 469–71. On review, the Supreme Court quoted *Jones*'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'" and stated that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." *Id.* at 476 (quoting *Jones*, 526 U.S. at 243 n.6). The Court noted, however, that the petitioner "has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . We thus do not address the indictment question separately today." *Id.* at 477 n.3. The Court ultimately held only that

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The holding made no reference to pleading requirements.

In *United States v. Cotton*, 535 U.S. 625 (2002), the Court quoted *Apprendi*'s holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 627 (quoting *Apprendi*, 530 U.S. at 490), before adding that "[i]n federal prosecutions, such facts must also be charged in the indictment," *id.* (citing *Apprendi*, 530 U.S. at 476).[12]

In *Blakely v. Washington*, 542 U.S. 296 (2004), which involved a state prosecution, the defendant pleaded guilty to kidnapping. *Id.* at 298–99. At sentencing, the trial court imposed an exceptional sentence, beyond the standard maximum, based on a judicial finding that the defendant acted with deliberate cruelty—"a statutorily enumerated ground for departure in domestic-violence cases." *Id.* at 300. Applying *Apprendi*, the Court reversed the defendant's sentence on the ground that the fact of deliberate cruelty

[12] "While the Supreme Court has not been entirely consistent in explaining the exact grounding for requiring that such *Apprendi*-elements be alleged in federal indictments, that requirement generally is assumed to rest on the grand jury clause of the Fifth Amendment." LaFave, *supra*, § 19.3(b) (footnote omitted). The grand jury clause does not apply to state prosecutions. *See Hurtado v. California*, 110 U.S. 516, 538 (1884); *Gautt v. Lewis*, 489 F.3d 993, 1003 n.10 (9th Cir. 2007) ("[O]ne's Fifth Amendment right to presentment or indictment by a grand jury . . . has not been incorporated into the Fourteenth Amendment so as to apply against the states.").

should have been submitted to a jury. *Id.* at 313–14. In reaching this conclusion, the Court cited the "longstanding tenet[] of common-law criminal jurisprudence" that "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'" *Id.* at 301–02 (quoting 1 J. Bishop, *Criminal Procedure* § 87 (2d ed. 1872)).

In *Southern Union Co. v. United States*, 567 U.S. 343 (2012), the Court held that the "rule of *Apprendi* applies to the imposition of criminal fines." *Id.* at 360. The federal indictment in the case charged the defendant with violations of the Resource Conservation and Recovery Act of 1976, which authorizes a criminal fine for each day of violation. *Id.* at 346–47. After the jury convicted the defendant, "the District Court made factual findings that increased both the 'potential and actual' fine the court imposed." *Id.* at 352. Applying *Apprendi*, the Court held that the Sixth Amendment right of jury trial requires that "juries . . . determine facts that set a fine's maximum amount." *Id.* at 356. In reaching this conclusion, the Court cited the common law principle that "the indictment must, in order to inform the court what punishment to inflict, contain an averment of every particular thing which enters into the punishment." *Id.* (quoting 1 J. Bishop, *Criminal Procedure* § 540 (2d ed. 1872)).

In *Alleyne v. United States*, 570 U.S. 99 (2013), a federal indictment charged the defendant with using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). *Id.* at 103. Neither the indictment nor the verdict form mentioned § 924(c)(1)(A)(ii), which increases the statute's minimum sentence to seven years' imprisonment if the firearm is brandished, and the jury,

which convicted the defendant, made no finding that the defendant brandished a weapon. *Id.* at 103–04. The district court, however, found that the defendant brandished a weapon and applied the seven-year statutory minimum. *Id.* at 104. Applying *Apprendi* and the Sixth Amendment right to jury trial, the Court reversed, holding that "facts that increase mandatory minimum sentences must be submitted to the jury." *Id.* at 116. In reaching this conclusion, the Court cited the common law principle that "if 'a statute prescribes a *particular punishment* to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggravations,' then those special circumstances must be specified in the indictment." *Id.* at 112 (quoting 1 J. Bishop, *Criminal Procedure* § 598 (2d ed. 1872)).

The question presented here is whether the foregoing decisions clearly established that the Sixth Amendment requires punishment-enhancing facts to be alleged in a state charging instrument. As a threshold matter, Handley concedes that these decisions did not hold that such facts must be charged in a state criminal pleading; he states that "these consistent descriptions of the notice and pleading requirements of the Sixth Amendment were not holdings of the Supreme Court but were, instead, dicta." Quoting *Frye v. Broomfield*, 115 F.4th 1155, 1163 (9th Cir. 2024), however, he contends that "habeas relief can be granted based on 'ancient' and 'deeply embedded' legal principles recognized by the Supreme Court even in the absence of a specific holding."

The issue we confronted in *Frye* was whether it was clearly established in 2001 that the Constitution forbids the unjustified use of visible shackles during the guilt phase of a criminal trial. *Id.* at 1158. It was not until 2005 that the Supreme Court squarely held that "the Fifth and Fourteenth

Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). We nevertheless held in *Frye* that "[t]he prohibition on routine guilt-phase shackling was . . . 'clearly established Federal law' within the meaning of § 2254(d)(1) well before the state court's decision in 2001." *Frye*, 115 F.4th at 1163. In arriving at this conclusion, we relied on pre-2001 Supreme Court decisions plainly stating that unjustified shackling was prohibited. *See Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986) ("[S]hackling[] should be permitted only where justified by an essential state interest specific to each trial."); *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("[N]o person should be tried while shackled and gagged except as a last resort."). We also looked at *Deck*'s characterization of previous Supreme Court cases as clearly establishing the right in question. *See Deck*, 544 U.S. at 626 ("We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase . . . ."). Finally, we relied on the fact that "[f]ollowing *Allen* and *Holbrook*, the courts of appeals, including ours, widely applied 'these statements as setting forth a constitutional standard' barring unjustified shackling." *Frye*, 115 F.4th at 1164 (quoting *Deck*, 544 U.S. at 628).

We are not persuaded that similar reasoning applies here. First, in *Frye* there was a Supreme Court decision—*Deck*—that looked back at earlier precedents and characterized them as being "clear" that it was "forbidden" to use visible shackles absent special need. *Deck*, 544 U.S. at 626. Here,

by contrast, there is no Supreme Court decision looking back at the *Apprendi* line of cases and characterizing them as clearly requiring state charging documents to allege punishment-enhancing facts.

Second, the *Apprendi*-era decisions upon which Handley relies do not clearly state that the notice requirement of the Sixth Amendment requires state charging documents to allege punishment-enhancing facts. *Jones* involved a federal prosecution rather than a state prosecution. *Apprendi* expressly declined to "address the indictment question." 530 U.S. at 477 n.3. *Blakely*, *Southern Union*, and *Alleyne* discussed common law principles requiring charging documents to allege each element of an offense, including punishment-enhancing facts, but none of those cases specifically stated that the Sixth Amendment notice requirement incorporates those common law principles.[13] *Cotton*, moreover, appears to have drawn a distinction between federal and state prosecutions and to have read

[13] The Court made clear in these cases that the Sixth Amendment right to jury trial incorporates certain common law principles. *See Southern Union*, 567 U.S. at 353 ("[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009))); *Blakely*, 542 U.S. at 313 ("Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."). But the Court has not squarely addressed whether, or to what extent, the Sixth Amendment notice requirement incorporates common law pleading requirements. *See Gautt*, 489 F.3d at 1004 n.11 (noting that "the Supreme Court has written relatively sparingly on a defendant's right to notice in the Sixth and Fourteenth Amendment contexts").

Jones's discussion of pleading requirements as applying only to the former:

> In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), we held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490. In federal prosecutions, such facts must also be charged in the indictment. *Id.*, at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999)).

535 U.S. at 627.

Third, the federal circuits have not, to our knowledge, widely applied *Jones*, *Apprendi*, *Blakely*, *Southern Union*, and *Alleyne* as setting forth a Sixth Amendment standard requiring state charging documents to allege punishment-enhancing facts.[14]

[14] Nor have *state* courts construed the *Apprendi* line of authorities as establishing that the Sixth Amendment requires punishment-enhancing facts to be alleged in a state charging document:

> More than dozen state courts so far have addressed the question of whether the federal constitution requires a state pleading to allege an *Apprendi*-type element. Only a few appear to have concluded that there is such a requirement. The vast majority have directly held that there is no such requirement. Some have focused primarily on the Fifth Amendment's grand jury clause not being applicable to the states. Others have cited the need to take account of a possible Sixth [Amendment]

In sum, we reject Handley's contention that the *Apprendi* line of decisions clearly established that the Sixth Amendment requires punishment-enhancing facts to be alleged in state charging documents. The California Court of Appeal's decision was not "contrary to" clearly established federal law on this theory.[15]

In so holding, we emphasize that we have no occasion here to address the question whether Handley's understanding of the Sixth Amendment's notice requirement is correct. The question presented—and the one we answer—is whether, at the time of the state court's decision, Handley's proposed rule constituted "clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In footnote 3 of *Apprendi* and in *Cotton*, the Court reserved the question whether the Constitution requires *Apprendi*-type elements to be alleged in state charging documents. AEDPA does not permit us to dispense habeas relief as if those reservations had not occurred. *Cf. Mitchell v. Esparza*, 540 U.S. 12, 17

> requirement of notice, but concluded that adequate notice can be provided without alleging the *Apprendi*-type element in the charging instrument.

LaFave, *supra*, § 19.3(b) (footnotes omitted).

[15] At oral argument, Handley invoked a recent Supreme Court decision holding that "[w]hen th[e Supreme] Court relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA." *Andrew*, 145 S. Ct. at 81. Handley, however, does not identify a Supreme Court decision relying on the principle that the Sixth Amendment requires punishment-enhancing facts to be alleged in charging documents. The closest case is *Jones*, but *Apprendi* declined to extend *Jones*'s pleading requirement to state prosecutions, 530 U.S. at 477 n.3, and *Cotton* appears to have limited *Jones*'s pleading requirement to federal prosecutions, 535 U.S. at 627.

(2003) (per curiam) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.").

C

We consider Handley's alternative contention that the California Court of Appeal's decision was "contrary to" clearly established federal law because the state court—relying on California law allowing informal amendment of an information—looked beyond the written information to conclude that he received adequate notice of the special allegations.

Handley's argument is without merit. The Supreme Court has never held that a Sixth Amendment notice inquiry is limited to the written charging document. Handley points to our statement in *Gautt* that "for purposes of AEDPA's 'clearly established Federal law' requirement, it is 'clearly established' that a criminal defendant has a right, guaranteed by the Sixth Amendment and applied against the states through the Fourteenth Amendment, to be informed of any charges against him, and that a charging document, such as an information, is the means by which such notice is provided." 489 F.3d at 1004. But *Gautt* did not hold that the inquiry is limited to the information, let alone that clearly established federal law embodies such a limitation. On the contrary, *Gautt* recognized that "[o]ur circuit has held that in certain circumstances—for example, when a defendant has argued that he received insufficient notice of a particular theory of the case—a court can examine sources other than the information for evidence that the defendant did receive adequate notice," *id.* at 1009, and *Gautt* "assume[d]—without deciding—that such sources can be parsed for evidence of notice to the defendant," *id.* at 1010.

Handley not only overreads *Gautt* but also disregards circuit authority expressly stating that the Sixth Amendment inquiry reaches beyond the written charging document. In *Sheppard v. Rees*, 909 F.2d 1234 (9th Cir. 1989), for example, we stated:

> This case does not involve a claim that adequate notice was provided by a source other than the primary charging document. An accused could be adequately notified of the nature and cause of the accusation by other means—for example, a complaint, an arrest warrant, or a bill of particulars. Similarly, it is possible that an accused could become apprised of the particular charges during the course of a preliminary hearing. Any or all of these sources—or perhaps others—might provide notice sufficient to meet the requirements of due process, although precise formal notice is certainly the most reliable way to comply with the Sixth Amendment. The Constitution itself speaks not of form, but of substance.

Id. at 1236 n.2 (citation omitted); *accord Calderon v. Prunty*, 59 F.3d 1005, 1009 (9th Cir. 1995) ("[A] defendant can be adequately notified of the nature and cause of the accusation against him by means other than the charging document."). The existence of these decisions undermines Handley's contention that clearly established federal law proscribes consideration of sources other than the written information.

Even if it were clearly established as a general proposition that the Sixth Amendment notice inquiry is

limited to the written information, the Supreme Court has never addressed whether a defendant may be afforded notice through informal amendment of the information, as the California Court of Appeal concluded occurred here. The state court found that Handley "was apprised of the prosecutor's intent to prove the special allegations required to impose a sentence of LWOP" and "consented to the inclusion of those allegations in the jury instructions and verdict form." *Handley II*, 2021 WL 1138353, at *11; *see Anderson*, 470 P.3d at 11–12 (describing the notice and consent requirements applicable where, as here, informal amendment authorizes increased punishment). The court therefore concluded that "the conditions for an informal amendment of the charges have been met" and, accordingly, that Handley "was afforded sufficient notice of the charges." *Handley II*, 2021 WL 1138353, at *11. Handley cites no Supreme Court decision precluding this form of notice.

Handley argues that notice through informal amendment of the information is insufficient because "[t]he Sixth Amendment notice requirement is designed to permit defendants to prepare a defense *prior to trial*." We agree generally with the proposition that notice afforded at the end of trial is insufficient. *See Gautt*, 489 F.3d at 1002 ("The Sixth Amendment guarantees a criminal defendant the fundamental right to be informed of the nature and cause of the charges made against him so as to permit adequate preparation of a defense."); *id.* at 1010 ("[J]ury instructions or closing arguments—sure signs that the *end* of a trial is drawing near—. . . cannot . . . serve as the requisite notice of the charged conduct, coming as [they do] *after* the defendant has settled on a defense strategy and put on his evidence."); *cf. In re Gault*, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in

advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded . . . ."). But where, as here, the defendant agrees to the amendment, these concerns do not appear to be present. Again, Handley points to no Supreme Court precedent holding that notice provided through informal amendment of the information—with the defendant's consent—cannot satisfy the Sixth Amendment's notice requirement.[16]

To conclude, the California Court of Appeal's decision was not "contrary to" clearly established federal law because the state court looked beyond the written information to conclude that Handley received adequate notice of the special allegations. The Supreme Court has not held that the notice inquiry is limited to the information, and even if the inquiry were so limited, the Court has not held that notice may not be provided through consensual amendment of the information.

D

Handley also argues that the California Court of Appeal's application of the state's informal amendment

[16] For this reason, our dissenting colleague's reliance on *Gault* is misplaced. It is true that the parents of the minor child subject to juvenile court proceedings in *Gault* did not object to late notice of the charges. *Gault*, 387 U.S. at 34 n.54. But those parents, unlike Handley, were not represented by counsel; indeed, they were not even informed of their right to such counsel. *See id.* It was under those circumstances that the Court held that it could not consider the parents' "failure to object to the lack of constitutionally adequate notice as a waiver of their rights." *Id.* Accordingly, *Gault* does not address the circumstances of this case, where Handley was represented by counsel and—rather than merely failing to object to late notice—affirmatively consented to amendment of the information during trial.

doctrine "was based on an unreasonable determination of the facts" under § 2254(d)(2).

Applying California law, the court of appeal concluded that "the conditions for an informal amendment of the charges have been met" because Handley "was apprised of the prosecutor's intent to prove the special allegations required to impose a sentence of LWOP" at the second jury instruction conference and "consented to the inclusion of those allegations." *Handley II*, 2021 WL 1138353, at *11. Handley maintains that the second jury instruction conference was too riddled with errors to provide him proper notice of the special allegations or his life-without-parole sentence. We quote the relevant portion of the transcript in full:

> THE COURT: Counts 1 and 2, the 209 contains a special, additional factor if great bodily injury was inflicted. The people also allege a 12022.7, great bodily injury, sentencing enhancement, as to Count 4, which I understand they have a pending motion regarding.
>
> The court prepared jury instructions asking the jury to make findings on both the substantive crime and then whether or not that crime, if committed, great bodily injury was inflicted.
>
> The way that the CALCRIMS read, it should be a special finding, but it's not technically a sentencing enhancement and the like.

On behalf of the defense, have you had an opportunity to see the verdict forms, sir?

DEFENSE COUNSEL: I have not finished reviewing them, Your Honor.

THE COURT: I am preparing to instruct consistent with what I have just said.

Is there any objection by the defense? There was not when we went over jury instructions.

DEFENSE COUNSEL: No, there is not.

THE COURT: Next there is a People's motion as to that sentencing enhancement.

PROSECUTOR MURPHY: Yes, Your Honor. We would—we moved to strike that.

THE COURT: Any objection, sir?

DEFENSE COUNSEL: No.

THE COURT: That request is granted and the court will then remove the great bodily injury jury instruction from that making sure that it's still contained in Counts 1 and 2 when—which I believe it is, but I'll just be double-checking on that.

PROSECUTOR BROWN: Your Honor, in regards to the second count involving Mary . . . , if the court could take a look at the actual verdict form that the people drafted in regards to Count 2, there is kind of an "or" within the Penal Code. "There is GBI

inflicted on the person or" and our theory of liability is the "or" part.

So I know the court just drafted a special instruction regarding that finding. It's a little different with regards to our theory on Mary . . . .

PROSECUTOR MURPHY: We apologize for the lateness, Your Honor. We were actually dealing with this up until last night.

THE COURT: Noted.

So your theory is intent to confine, a manner in which exposes that person to a substantial likelihood of death?

PROSECUTOR MURPHY: Yes.

THE COURT: Any objection to the people proceeding under that theory?

DEFENSE COUNSEL: As to [Michael]?[17]

PROSECUTOR MURPHY: No. To [Mary].

THE COURT: [Mary].

DEFENSE COUNSEL: I have no objection to proceeding on that theory.

[17] The brackets here and below in this colloquy replace the victims' last names, as recited by the district court, with their first names.

> THE COURT: Thank you. Then the court will be modifying the instruction as to Count 2.

Handley argues that this discussion denied him notice of the special allegations for two reasons. First, he emphasizes that both the trial court and the prosecution confused the standard applicable to special allegations under section 209(a) ("death," "bodily harm," or "intentionally confined in a manner which exposes that person to a substantial likelihood of death") with the standard applicable to a sentencing enhancement under section 12022.7(a) ("great bodily injury").[18] While discussing the special allegations under section 209(a), both the trial court and the prosecution mistakenly referred to "great bodily injury" or "GBI" instead of "bodily harm." Handley argues that this muddling of the elements denied him notice of the special allegations because "telling petitioner that jurors would be asked to 'make findings' on whether 'great bodily injury' had been inflicted did not necessarily give notice that anything new was going to the jury."

Second, Handley highlights the trial court's statement that a special finding under section 209(a) is "not technically a sentencing enhancement." Handley argues that this

[18] As noted, the information charged an enhancement under section 12022.7(a) on Count 4, the torture count, alleging that Handley "*personally inflicted* great bodily injury" on Michael. The prosecution dropped the enhancement charge at the January 3, 2018 hearing. We do not know why the prosecution dropped the enhancement charge. The theory the prosecution chose to present to the jury during closing argument was that Handley drove the van while the other two kidnappers tortured Michael in the back of the vehicle. *See Handley II*, 2021 WL 1138353, at *4 (noting that "the prosecution maintained" that Handley "played an integral role as the driver of the van").

statement denied him notice of the special allegations because it suggested that those allegations would not increase his sentence. He says that "he would have had no idea he was now facing an aggravated kidnapping charge and a life without parole term."[19]

The state court of appeal's finding that Handley received notice that the prosecution was alleging special allegations under section 209(a) was not objectively unreasonable. To be sure, the trial court confused "great bodily injury" with "bodily harm." But the court also referred to Counts 1 and 2 and to section 209. And the court and counsel discussed the two prongs of section 209(a)'s special allegation—bodily harm and confinement exposing a person to a substantial likelihood of death—and clarified that the prosecution was alleging the latter theory with respect to Count 2 (Mary). There was therefore a reasonable basis for the state court to find that Handley was on notice that the prosecution was alleging special allegations under section 209(a) rather than pursuing an enhancement under section 12022.7(a). Handley suggests that the trial court's statement that special allegations under section 209(a) are not technically enhancements was misleading. The court, however,

[19] Handley and our dissenting colleague also cite the California Court of Appeal's discussion of this issue in *Handley I*. But the court of appeal vacated *Handley I* at the California Supreme Court's direction, *see Handley II*, 2021 WL 1138353, at *1, rendering *Handley I* "a nullity." *See People v. Hamilton*, 753 P.2d 1109, 1117 (Cal. 1988); *City of Santa Clarita v. NTS Tech. Sys.*, 40 Cal. Rptr. 3d 244, 247 n.5 (Ct. App. 2006); *Venegas v. County of Los Angeles*, No. B218948, 2011 WL 3672932, at *8 (Cal. Ct. App. Aug. 23, 2011).

accurately stated California law. *See Jones*, 213 P.3d at 1004.[20]

The state court of appeal's finding that Handley affirmatively consented to the new charges was also objectively reasonable. The trial court asked defense counsel if he had any objection to instructing the jury on the special allegations and counsel responded that he had no objection. After the prosecution made clear that it was alleging a confinement theory on Count 2, as to Mary, the trial court asked defense counsel whether he had any objection to the People proceeding under that theory, and defense counsel stated that he had "no objection to proceeding on that theory."

Handley's suggestion that he lacked notice of, or failed to consent to, the special allegations is also difficult to reconcile with his subsequent conduct. As the court of appeal pointed out, defense counsel

> voiced no objection when the prosecutor argued those allegations in closing argument

[20] As our dissenting colleague observes, Handley, as a layperson, may not have understood the distinction California law draws between sentencing factors and sentencing enhancements. But Handley's attorney understood that the prosecution was seeking life without possibility of parole under section 209(a), and courts have long presumed that defense attorneys explain the nature of the charges to their clients. *See, e.g.*, *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) ("[I]t may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit."); *Panuccio v. Kelly*, 927 F.2d 106, 111 (2d Cir. 1991) ("The trial court could also appropriately assume that Panuccio understood the charges against him since he was represented by counsel who had presumably explained the charges to him.").

> or when the jury returned true findings thereon. . . .
>
> And later on, defense counsel fully acknowledged in his sentencing brief that [Handley] was facing a potential sentence of LWOP based on those findings. Defense counsel made the argument that imposition of an LWOP sentence would be cruel and unusual under the Eighth Amendment, but—to his credit—he never so much as suggested that an LWOP sentence was improper on due process grounds for lack of notice. Nor did he ever suggest that [Handley]'s plea decisions or trial strategy were impacted by the manner in which the case was charged.

Handley II, 2021 WL 1138353, at *11.[21]

In sum, the record does not show that the state court's decision was based on an unreasonable determination of the facts under § 2254(d)(2).

E

Handley argues that informal amendment of the information failed to afford him adequate notice under the Sixth Amendment because he "was never expressly

[21] Although Handley argues in this court that he might have chosen to plead guilty if the written information had included the special allegations, he does not appear to have made that argument, or to have presented any evidence in support of it, in the state court. *See Handley II*, 2021 WL 1138353, at *11 (noting that Handley never suggested that his plea decisions were impacted by the manner in which the case was charged and that "[t]here would have been no support for [that] argument" if it had been presented).

informed he could be sentenced to LWOP if the jury found the special allegations true." *Id.* at *12. The court of appeal rejected this argument, reasoning that "once the aggravated kidnapping charges were informally amended to include allegations of bodily harm and substantial likelihood of death, [Handley] was sufficiently apprised of this possibility." *Id.*

We reject Handley's suggestion that the state court's decision was "contrary to" or "involved an unreasonable application of" clearly established Supreme Court precedent. The state court concluded that Handley had sufficient notice that he was exposed to a sentence of life without possibility of parole because he had explicit notice that the prosecution was charging special allegations under section 209(a), and section 209(a) itself plainly states that a sentence of life without possibility of parole applies when such allegations are proven. The Sixth Amendment guarantees a defendant the right "to be informed of any *charges* against him." *Gautt*, 489 F.3d at 1004 (emphasis added). Handley cites no Supreme Court decision clearly establishing that the Sixth Amendment affords the defendant the additional right to have the applicable sentence spelled out in the charging document.

IV

For the foregoing reasons, we hold that the California Court of Appeal's decision denying Handley's Sixth Amendment notice claim was not "contrary to," or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because AEDPA is not

satisfied, Handley is not entitled to de novo review of his Sixth Amendment claim and we do not address his arguments pertaining to the merits of that claim. The district court's judgment is **AFFIRMED**.

DONATO, District Judge, dissenting:

Petitioner Kyle Handley was convicted of a crime he was never charged with, and sentenced to life in prison without the possibility of parole. The California Court of Appeal upheld this injustice on the basis of an unreasonable application of clearly established precedent from the Supreme Court of the United States. *See People v. Handley* (*Handley I*), No. G056608, 2020 WL 58048 (Cal. Ct. App. Jan. 6, 2020); *People v. Handley* (*Handley II*), No. G056608, 2021 WL 1138353 (Cal. Ct. App. Mar. 25, 2021). The majority leaves Handley behind bars without a lawful prosecution under Penal Code Section 209(a) and gives the imprimatur of the federal courts for California to make the same grave error in future kidnapping cases. I dissent.

I

A

A deeper dive into the state court proceedings is useful to fully capture the fundamental unfairness of Handley's prosecution. On October 12, 2012, the Orange County District Attorney filed a felony complaint against Handley, charging two counts of kidnapping for ransom, in violation of California Penal Code Section 209(a); one count of aggravated mayhem, in violation of Penal Code Section 205; one count of torture, in violation of Penal Code Section 206;

and one count of first-degree residential burglary, in violation of Penal Code Sections 459 and 460(a).

As Section 209(a) stated at that time:

> Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that 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. Pen. Code § 209(a) (2012).[1] The plain language of the statute makes clear that a defendant charged with kidnapping for ransom faced two very different sentences, depending on the facts of the kidnapping. For a conviction of "simple" kidnapping for ransom, a defendant would be sentenced to

[1] Unless otherwise noted, all citations are to the 2012 version of the California Penal Code, which was in effect when the crimes were committed.

life in prison with the possibility of parole (LWP). For "aggravated" kidnapping for ransom, which involved bodily harm or a substantial likelihood of death, the penalty was a life sentence without the possibility of parole (LWOP). For Handley, this meant the difference between spending the rest of his natural life in custody versus the possibility of being eligible for parole after seven years of custody. *See* Cal. Pen. Code § 3046(a)(1).

For the kidnapping counts, the complaint alleged that Handley "had the intent to hold and detain, [and] did unlawfully seize, confine, . . . detain [Michael and Mary] for ransom, reward, extortion, and to exact from another person money and other valuable things." For the torture count, the complaint "alleged pursuant to Penal Code section 12022.7(a) (GREAT BODILY INJURY) . . . that [Handley] personally inflicted great bodily injury on [Michael], who was not an accomplice during the commission and attempted commission of the above offense." This allegation exposed Handley to an "additional and consecutive term of imprisonment in the state prison for three years." Cal. Pen. Code § 12022.7(a).

Two years later, the prosecution moved to consolidate Handley's case with the case against Hossein Nayeri, who was said to have been the mastermind behind the scheme. *See Handley II*, 2021 WL 1138353, at *3-4. In the consolidation motion, the prosecution said that Handley was "accused of Two counts of PC 209(a) Kidnap for Ransom, Once [sic] Count of Aggravated Mayhem, Once [sic] Count of Torture, and one count of First Degree Residential Burglary. There 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, Extortion. The penalty if convicted is life without parole."

Even so, on October 23, 2014, the prosecution filed a consolidated criminal complaint, which alleged the same counts against Handley, with identical language as in the original 2012 complaint. To be clear, the amended complaint again charged Handley only with kidnapping for ransom under Penal Code Section 209(a), and not with aggravated circumstances of bodily harm or death. The motion to consolidate had included language about "great bodily injury" in connection with the kidnapping for ransom count, but the consolidated complaint itself alleged only that Handley 'had the intent to hold and detain, [and] did unlawfully seize, confine, . . . and detain [Michael and Mary] for ransom, reward, extortion, and to exact from another person money and other valuable things." The consolidated complaint repeated the allegation of "great bodily injury" solely "[a]s to Count(s) 4," the torture count.

In March 2015, Handley appeared for a preliminary examination. The prosecution sought "to hold both Mr. Hossein Nayeri and Kyle Handley to answer to all the crimes that are charged in the amended complaint." For Handley, that meant the kidnapping charge without aggravating circumstances. After the state's presentation of the facts it believed supported the charges, the state court said "it does appear to the court that there is sufficient and probable cause to believe that defendant Handley . . . committed the felonies charged in counts 1 through 5, and the related enhancements as charged in the complaint. Therefore, [Handley is] . . . hereby ordered held to answer as to those counts and enhancements."

Six days later, the final and operative criminal information was filed against Handley. It alleged two counts of kidnapping for ransom with language identical to the 2012 and 2014 charging documents, as well as "great bodily

injury" "[a]s to Count(s) 4" for torture. Aggravating circumstances of bodily harm or death were not charged with respect to Penal Code Section 209(a).

In sum, the record establishes that for several years, across multiple charging documents and a preliminary examination, Handley was never charged with the circumstances of bodily harm or substantial likelihood of death in connection with the kidnapping counts. All the charging documents alleged only simple kidnapping for ransom under Penal Code Section 209(a), with a sentence of life with the possibility of parole.

B

How then did Handley's prosecution end in a conviction of aggravated kidnapping for ransom and a sentence of life in prison without the possibility of parole? It happened on the fly as the trial court drafted jury instructions during the final days of trial.

Handley was tried on December 18-21, 2017, and January 3-4, 2018. The prosecution's theory was that Handley "played an integral role [in the kidnapping scheme] as the driver of the van." *Handley II*, 2021 WL 1138353, at *4. Handley elected not to present evidence in his defense or contest the prosecution's portrayal of the scheme. Instead, he argued that there was not enough evidence to tie him to the crime. *See id.*

On December 21, 2017, the trial court held a conference on jury instructions. With respect to the kidnapping counts, the court said it would give instruction "1202" for "Kidnapping for Extortion." Defense counsel said he had "no objection." The record does not contain a copy of the precise instructions referenced in this conference, but the

model instruction states that the jury must find the defendant (1) kidnapped, detained, or intended to detain; (2) for ransom or reward or extortion; and (3) the person did not consent to the detainment or kidnapping. *See* Jud. Council of Cal., Crim. Jury Instructions (CALCRIM), No. 1202, at 952 (2017). Under a heading called "Sentencing Factor," the model instruction notes the different sentences in Section 209(a) and states that:

> If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), 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).

Id. at 953 (brackets in original). This "Sentencing Factor" instruction appears in the model instruction after separate instructions about the elements of the crime and various possible defenses. *See id.* at 952-53. It is unclear if this "Sentencing Factor" instruction was in the trial court's proposed instruction being discussed with the parties on December 21, 2017.

On January 3, 2018, the day on which the presentation of evidence closed, the trial court held a second conference to "briefly formalize" some matters. "Counts 1 and 2," the trial judge said, "the 209 contains a special, additional factor if great bodily injury was inflicted. The people also allege a 12022.7, great bodily injury, sentencing enhancement, as to count 4, which I understand they have a pending motion regarding. The Court prepared jury instructions asking the

jury to make findings on both the substantive crime and then whether or not that crime, if committed, great bodily injury was inflicted. The way that the CALCRIMS read, it should be a special finding, but *it's not technically a sentencing enhancement and the like*" (emphasis added).

The trial court got the law wrong in these remarks, as Respondent forthrightly agrees, and the California Court of Appeal concluded. *See Handley II*, 2021 WL 1138353, at *6. The trial judge repeatedly referred to "great bodily injury" in connection with the kidnapping charge, but Section 209(a) states that "bodily harm" is the factual circumstance required for an LWOP sentence. The prosecution, too, repeatedly made the same mistake. "Great bodily injury" is a separate sentencing enhancement that was alleged for the torture count, and if successful would have resulted in an "additional and consecutive term of imprisonment in the state prison for three years." Cal. Pen. Code § 12022.7(a).

The majority says the trial judge "did not misspeak by pointing out that special allegations under Section 209(a) are not sentencing enhancements." But the Court of Appeal itself called the allegations "enhancement factors" and "sentencing factors." *Handley II*, 2021 WL 1138353, at *8. If the majority means to suggest that the trial judge did not misspeak because Handley should have understood in the moment that "great bodily injury" meant "bodily harm" and a sentence of life without parole under Section 209(a), they ask too much. Perhaps "a person trained in the arcana of California sentencing law would understand the judge was attempting to draw" a legal distinction, but "a layperson such as [Handley] might well construe the judge's comment simply to mean that a true finding on the bodily harm allegation would not result in [his] sentence being enhanced

or increased." *Handley I*, 2020 WL 58048, at *7.[2] As the California Court of Appeal stated, Handley "was never expressly informed he could be sentenced to LWOP if the jury found the special allegations true." *Handley II*, 2021 WL 1138353, at *12.

After telling Handley that the new instruction language regarding "great bodily injury" was "not technically a sentencing enhancement and the like," the trial judge asked if defense counsel had reviewed the verdict forms. Counsel answered, "I have not finished reviewing them, your Honor." The trial judge said, "I am preparing to instruct consistent with what I have just said. Is there any objection by the defense? There was not when we went over jury instructions." Counsel answered, "No, there is not."

After that, the prosecution moved to strike the "great bodily injury" allegation made in connection with the torture count. The request was granted. The prosecution then asked to modify the new language the trial judge had just added to the kidnapping count as to the victim Mary to say that she was exposed to a "substantial likelihood of death" rather than "GBI" (great bodily injury). It is unclear if Handley or his counsel had a copy of the modified instructions at the end of the conference, as the trial judge told the parties, "I'll do my best to get those instructions to you as quickly as possible."

Approximately two hours after these discussions, the prosecution began closing arguments. The next day, on January 4th, the trial court instructed the jury, and the jury

[2] As the majority notes, *Handley I* was vacated by the California Supreme Court on other grounds, but this commonsense point still stands in the Court of Appeal's well-phrased formulation. I do not cite it here as precedent.

completed its deliberations. The jury found Handley "GUILTY as to count 1 as charged in the Original Information" and "GUILTY as to count 2 as charged in the Original Information." The jury further found "IT TO BE TRUE that during the course of the above kidnapping for Ransom/Robbery/Extortion/or to Exact Money or a valuable thing that Michael . . . suffered bodily harm" and that "Mary . . . was intentionally confined in a manner that exposed her to a substantial likelihood of death."

At sentencing, defense counsel "fully acknowledged . . . that [Handley] was facing a potential sentence of LWOP based on" the jury's findings but "made the argument that imposition of [such a] sentence would be [unconstitutionally] cruel and unusual." *Handley II*, 2021 WL 1138353, at *11. The trial court rejected the argument and sentenced Handley to LWOP on each of the kidnapping counts. For the mayhem and torture counts, on which Handley was also found guilty, the trial court sentenced him to "two consecutive terms of life with the possibility of parole after a minimum of 7 years."

Overall, the record establishes that Handley was convicted of "aggravated" kidnapping for ransom and sentenced to LWOP based on circumstances of bodily harm and substantial likelihood of death that were never alleged in any charging documents against him, and were injected into his case at a jury instruction conference held two hours before the close of evidence.

II

A

Handley raises a straightforward proposition in his habeas petition: If a fact exposes a defendant to additional

punishment, it is an element of the crime that the state must allege so that the defendant has fair notice of the charge against him. The clearly established precedents of the Supreme Court command no less.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court concluded that facts which increase the maximum punishment an accused faces, other than the fact of prior conviction, must be proven to a jury beyond a reasonable doubt. This holding was "foreshadowed" by a prior decision in which the Court had said 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." *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). "The Fourteenth Amendment command[ed] the same answer in th[at] case involving a state statute." *Id.*

Apprendi was based on an application of two principles in *Jones*: (1) the Due Process Clause guarantees to every criminal defendant "a jury determination that [he or she] is guilty of every element of the crime with which [he or she] is charged, beyond a reasonable doubt," *id.* at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); and (2) any fact which increases the punishment a defendant may suffer is, for purposes of the Sixth Amendment's notice and jury trial guarantees, an element of the crime for which the defendant is being held to account, *id.* at 483 n.10, 491, 494. The Due Process principle was well established. *See id.* at 476-77; *id.* at 499 (Scalia, J., concurring); *id.* at 499-500 (Thomas, J., concurring); *id.* at 524 (O'Connor, J., dissenting). The Court devoted much of its discussion to the second principle, namely why a fact that increases the

maximum punishment is an "element" of the charged offense.

To that point, the Court detailed the long-standing and "invariable linkage of punishment with crime" in the common law. *Apprendi*, 530 U.S. at 478. "As a general rule," the distinction between "an 'element' of a felony offense and a 'sentencing factor'" was nonexistent because "criminal proceedings were submitted to a jury after being initiated by an indictment." *Id.* at 478. The accusation was to contain "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision," in order that "[the defendant] may prepare his defence accordingly" and so "*that there may be no doubt as to the judgment which should be given*, if the defendant be convicted."[3] *Id.* at 478 (omission and emphasis in original) (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)).

"This practice at common law held true" for offenses defined by statute as well. *Apprendi*, 530 U.S. at 480. The Court stated that "the circumstances mandating a particular punishment" were like "the circumstances of the crime and the intent of the defendant at the time of commission," and were "often essential elements to be alleged in the indictment." *Id.* This example illustrated the point:

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring

[3] "Judgment" here means "the stage approximating in modern terms the imposition of sentence." *Apprendi*, 530 U.S. at 478 n.4 (citing 4 W. Blackstone, Commentaries on the Laws of England 368 (1769)).

> the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. If, then, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only.

Id. at 480-81 (cleaned up) (quoting Archbold at 51, 188).

This and other evidence established the "historic link between verdict and judgment." *Id.* at 482. In effect, the Court concluded that the long tradition in the common law linking pleading, crime, and punishment established that facts which increase punishment are essential to, and so are elements of, an "offense" for purposes of the Sixth Amendment's notice and jury trial guarantees. *Id.* at 483, n.10, 494 n.19.

The Court emphasized its adherence to this traditional linkage. *See id.* at 480-90. It underscored a prior determination that Due Process guarantees are not "limited to those facts that constitute a crime as defined by state law." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975); *see Apprendi*, 530 U.S. at 485-86. This is so because nothing would otherwise stop a state from circumventing the Constitution's procedural guarantees "merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 486 (alteration in original) (quoting *Mullaney*, 421 U.S. at 698); *see also id.* at 486

("[C]onstitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense.").

The Supreme Court extended *Apprendi* and refined the Sixth Amendment framework in *Alleyne v. United States*, 570 U.S. 99 (2013). The Court concluded that facts which increase the minimum punishment an individual is to suffer must be tried to a jury and found beyond a reasonable doubt under the Sixth Amendment and Due Process Clause. *Id.* at 104, 116-18. *Alleyne* was based on the same principles stated in *Apprendi*: Due Process requires proof to a jury beyond a reasonable doubt of all elements of a crime, and any fact which aggravates the punishment to which an individual may be exposed is an "element" of the offense for purposes of the Sixth Amendment's procedural guarantees.

Alleyne applied the determination in *Apprendi* that "'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" to conclude that "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* at 111-12 (quoting *Apprendi*, 530 U.S. at 490). There is no basis for distinguishing between a fact that increases the maximum punishment and a fact that increases the minimum punishment, because both "*aggravate* the punishment." *Id.* at 113 (emphasis in original). *Apprendi* established that any "fact that increases a sentencing floor, thus, forms an essential ingredient of the offense" and "each element . . . must be submitted to the jury." *Id.* at 113.

Alleyne clarified that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Id.* at 114. *Apprendi* compelled the conclusion that any "finding of fact" which "alters the legally prescribed punishment so

as to aggravate it . . . necessarily forms a constituent part of a new offense." *Id.* at 114-15.

These rulings clearly established that a fact which aggravates the legally prescribed punishment is an "element" of the offense for purposes of the Sixth Amendment. This principle was "indispensable" to the conclusions in *Apprendi* and *Alleyne* that the defendants' Sixth Amendment rights were violated and so constitutes a holding of the Supreme Court for purposes of AEDPA. *Andrew v. White*, 604 U.S. ---, 145 S. Ct. 75, 81 (2025) (per curiam); *see also id.* ("When this Court relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA." (citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

B

The Court of Appeal mentioned the right cases but unreasonably applied them to deny Handley relief. It essentially ignored *Apprendi* and its progeny in a wholly unreasonable fashion. It said that a criminal pleading "need only charge the essential elements of the statutory offense" to comply with constitutional requirements, for "then [it] fairly apprises the defendant of what he is to meet at the trial." *Handley II*, 2021 WL 1138353, at *8 (citation omitted). There was no problem with the operative information because Section 209(a) "defines but one crime" and, under California law, bodily harm and substantial likelihood of death "are special factors pertaining to the issue of punishment." *Id.* at *5. Consequently, because "the relevant enhancement factors . . . are embedded in a single statute," the citation to Section 209(a) sufficed to give Handley constitutionally adequate notice of the "one crime" for which he was charged and convicted. *Id.* at *5, 8. The

parties agree the state court's basis for this conclusion was the Supreme Court of California's decision in *People v. Britton*, 6 Cal. 2d 1 (1936).

The state court made little effort to square these conclusions with *Apprendi*, *Alleyne*, and the long tradition of due process on which they were built. Its core conclusion -- that Section 209(a) may properly be understood to state a single offense for purposes of the Sixth Amendment -- was the fruit of an unreasonable application of *Apprendi* and *Alleyne*. Consequently, the denial of relief to Handley was not only wrong but "objectively" so. *White v. Woodall*, 572 U.S. 415, 419 (2014) (citation omitted).

A comparison of Section 209(a) and the statute in *Alleyne* puts a finer point on this error. *Alleyne* concerned Section 924(c) of title 18 of the United States Code, which assigned a penalty of imprisonment of "not less than 5 years" for "us[ing] or carr[ying] a firearm" in relation to a "crime of violence" but "imprisonment of not less than 7 years" if "the firearm is brandished." *Alleyne*, 570 U.S. at 1003-04 (quoting 18 U.S.C. §§ 924(c)(1)(A)(i)-(ii)). *Alleyne* held that "the fact of brandishing" is "an element of a separate aggravated offense." *Id.* at 115.

Section 209(a) is similarly structured. It assigns a penalty of LWP for kidnapping for ransom, and an enhanced penalty of LWOP if it is proved that the victim suffered bodily harm or faced a substantial likelihood of death. For both Section 209(a) and Section 924(c), specific facts about the commission of the prohibited conduct open the door to greater punishments.

Consequently, it is hard to see how the state court's glib treatment of *Apprendi* and *Alleyne* in affirming Handley's conviction under Section 209(a) was anything short of

"objectively unreasonable." *White*, 572 U.S. at 419 (citation omitted). To be sure, state Section 209(a) presents both penalties in a single subsection, whereas federal Section 924(c) splits the penalties across subparts (i), (ii), and (iii), but these differences in formatting are hardly of constitutional magnitude.

The Court of Appeal relied mainly on the 1936 decision of the California Supreme Court in *Britton*. The date bears emphasis because *Britton* was decided before the Sixth Amendment right to notice was held to be incorporated against the states by the Fourteenth Amendment, *see Cole v. Arkansas*, 333 U.S. 196 (1948), and obviously decades before *Apprendi*, *Alleyne*, and related precedent. The Court of Appeal cited *Britton* for the proposition that the facts of bodily harm or likelihood of death in Section 209(a) were "special factors pertaining to the issue of punishment" that "do not affect the singular nature of the underlying offense." *Handley II*, 2021 WL 1138353, at *5 (citing *Britton*, 6 Cal. 2d at 4-5). The Court of Appeal offered no explanation of how that proposition might be squared with the Sixth Amendment precedent from the Supreme Court of the United States. *Apprendi* expressly cautioned against exactly this error. It emphasized that state law could not circumvent the Constitution's procedural guarantees by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Apprendi,* 530 U.S. at 485-86 (alteration in original) (citing *Mullaney*, 421 U.S. at 698); *see also Alleyne*, 570 U.S. at 105 (*Apprendi* "identified a concrete limit on the types of facts that legislatures may designate as sentencing factors").

Consequently, "beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), the Court of Appeal's decision was outside the

"range of reasonable judgment," *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). An aggravating fact that produces a higher range of sentence "*conclusively indicates* that the fact is an element of a distinct and aggravated crime." *Alleyne*, 570 U.S. at 116 (emphasis added). The essential premise of *Britton*, that Section 209 sets forth only one offense, is not consonant with the principles clearly established by *Apprendi* and *Alleyne*. Rather than address this issue head on, the state court said only that "*Apprendi* was not a notice case" and that "[i]t is highly doubtful that *Apprendi* has any effect whatever on *pleading requirements*." *Handley II*, 2021 WL 1138353, at *8-9 (alteration and emphasis in original) (citation omitted). This rather cavalier dismissal was again bereft of a cogent explanation. In effect, the state court punted on Handley's Sixth Amendment claim under the federal law clearly established at the time of its decision.

The state court's error was a "critical oversight," *Gautt v. Lewis*, 489 F.3d 993, 1008 (9th Cir. 2007), going to the heart of Handley's constitutional claim and "the essential Sixth Amendment inquiry," *Alleyne*, 570 U.S. at 114. Because the state court's "adjudication of [Handley's Sixth Amendment] claim [was] dependent on an antecedent unreasonable application of federal law" with respect to the elements of the offenses set forth in Section 209(a), I would conclude "the requirement set forth in § 2254(d)(1) is satisfied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

C

The majority responds to all of this by drawing distinctions that the established precedent does not support and applying the Fifth Amendment to truncate the Sixth

Amendment. These arguments do not do the work the majority asks of them.

1

To start, the majority says there is a distinction between facts that are elements of an offense and "punishment-enhancing facts," which are said to be "facts serving solely to increase the prescribed range of penalties to which a defendant is exposed." But *Apprendi* clearly establishes there is no such difference. *See Apprendi*, 530 U.S. at 494 n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense . . . . Indeed, it fits squarely within the usual definition of an 'element' of the offense.").

This chart illustrates how the majority's definitions are actually the same as those in *Apprendi* and *Alleyne*:

Majority's definition of "punishment-enhancing fact"	***Apprendi* and *Alleyne*'s definition of "element"**
• "[F]acts that serve only to increase the prescribed punishment to which a defendant is exposed." • "[F]acts that increase the prescribed range of penalties to which a defendant is exposed."	• "[P]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." *Apprendi*, 530 U.S. at 483 n.10. • "When a finding of fact alters the legally prescribed punishment so

	as to aggravate it, the fact necessarily forms a constituent part of a new offense." *Alleyne*, 570 U.S. at 114-15. • "The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." *Alleyne*, 570 U.S. at 115-16.

The majority also says that Handley essentially conceded his case. It says Handley agreed that "these decisions did not hold that such facts must be charged in a state criminal pleading" and that any statements in them to the contrary was "dicta" for AEDPA purposes.

Not so. Handley filed his opening brief before the Supreme Court decided *Andrew*, which clarified when legal principles are "holdings" for purposes of AEDPA. After *Andrew* was decided, Handley promptly filed a Rule 28(j) letter with this Court in which he squarely contended that the principles in *Jones, Apprendi* and *Alleyne,* are "a 'holding' of the Court for purposes of AEDPA" (quoting *Andrew*, 145 S. Ct. at 81). At oral argument, Handley's lawyer repeatedly relied on *Andrew* to argue that punishment-enhancing facts are "elements" under *Apprendi* and *Alleyne*. This is not a record of concession or agreement by Handley that plugs the holes in the majority's analysis.

2

The majority asserts more broadly that precedent with respect to the grand jury clause in the Fifth Amendment forecloses the conclusion that the Sixth Amendment requires state charging documents to allege punishment-enhancing facts. The logic is said to go like this. Longstanding precedent holds that the guarantee of an indictment by a grand jury in criminal cases was not incorporated by the Fourteenth Amendment to apply to the states. *See Hurtado v. California*, 110 U.S. 516, 535 (1884); *Branzberg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). *Apprendi* identified the historical linkage of pleading, crime, and punishment with respect to the Sixth Amendment, and did not overturn the holding that the right of indictment by a grand jury does not apply to the states. *See Apprendi*, 530 U.S. at 477 n.3. Any doubt about this was put to rest in *United States v. Cotton*, 535 U.S. 625 (2002), which drew a distinction "between federal and state prosecutions." Consequently, the constitutional requirements of notice and the elements of a criminal charge in an indictment do not apply to the states because the Fifth Amendment right to an indictment is not incorporated by the Fourteenth Amendment.

This reasoning is doubtful in several respects. It is true *Apprendi* reserved "the indictment question" for another day. *Apprendi*, 530 U.S. at 477 n.3.[4] But that is not the end of the matter, as the majority would have it. Unlike the grand

[4] Contrary to the majority's suggestion, footnote 3 in *Apprendi* did not say anything about reserving a Sixth Amendment question. The "indictment question" the Court reserved was "the Fifth Amendment right to 'presentment or indictment of a Grand Jury' that was implicated in our recent decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)." *Apprendi*, 530 U.S. at 477 n.3.

jury clause in the Fifth Amendment, the Sixth Amendment has long been applied to the states by the Fourteenth Amendment. As noted in *McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010), the many rights that originate under the Sixth Amendment have been incorporated in full in state criminal proceedings, including: the right to a trial by jury, *see Duncan v. Louisiana*, 391 U.S. 145 (1968); the right to compulsory process, *see Washington v. Texas*, 388 U.S. 14 (1967); the right to a speedy trial, *see Klopfer v. North Carolina*, 386 U.S. 213 (1967); the right to confront adverse witnesses, *see Pointer v. Texas*, 380 U.S. 400 (1965); the right to assistance of counsel, *see Gideon v. Wainwright*, 372 U.S. 335 (1963); and the right to a public trial, *see In re Oliver*, 333 U.S. 257 (1948).[5]

Even so, the majority suggests that *Cotton*, a case about waiver of a Fifth Amendment objection and plain error review, closes the door on the Sixth Amendment here because it stated that a fact which increases the penalty for a crime must be charged in an indictment "in federal prosecutions." *Cotton*, 535 U.S. at 627. This is a heavy hat to hang on *Cotton*, and it does not bear the weight. The fact that the Fifth Amendment does not require states to use grand juries to return indictments in state criminal cases does not mean that the Sixth Amendment principles identified in *Apprendi* and *Alleyne* do not apply to the states or state charging documents. That would be an odd conclusion

[5] *McDonald* noted one "exception" at the time of publication, namely that "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *McDonald*, 561 U.S. at 766 n.14. But that too has changed, and a unanimous verdict is now required in state criminal cases. *See Ramos v. Louisiana*, 590 U.S. 83, 100 (2020).

given the overall incorporation of the Sixth Amendment to the states. To be sure, *Apprendi* and *Alleyne* specifically addressed the question of what facts must be submitted and proved to a petit jury in state and federal criminal trials, but that in no way indicates that the general principles of punishment, elements, and notice they identified and relied on in the Sixth Amendment do not apply here in full measure. *Cotton* did not, and had no reason to, overrule these general principles any more than *Apprendi* overruled the Fifth Amendment cases.

The more likely reason for the mention of federal prosecutions in *Cotton* is that it was simply speaking to the facts at hand. This case is different. To obtain relief, a habeas petitioner must identify a "controlling legal standard." *Panetti*, 551 U.S. at 953. "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of [the Supreme] Court." *Andrew*, 145 S. Ct. at 82; *see also Panetti*, 551 U.S. at 953 ("[E]ven a general standard may be applied in an unreasonable manner."). A controlling standard or principle for Section 2254(d)(1) need not be neatly packaged in one decision. "For example, the Eighth Amendment principle that a sentence may not be grossly disproportionate to the offense is clearly established under § 2254(d)(1), even though it arises out of a thicket of Eighth Amendment jurisprudence and lacks precise contours." *Andrew*, 145 S. Ct. at 82 (cleaned up) (quoting *Lockyer*, 538 U.S. at 72).

So too here. *Apprendi*, *Alleyne*, and allied cases established the historical linkage of pleading, crime, and punishment as general principles embodied in the Sixth Amendment. These principles are "fundamental enough that when new factual permutations arise, the necessity to apply

the earlier rule will be beyond doubt." *Andrew*, 145 S. Ct. at 82 (quoting *White*, 572 U.S. at 427).

To conclude otherwise, as the majority does, unreasonably dilutes the Sixth Amendment. The Supreme Court has "abandoned 'the notion that the Fourteenth Amendment applies to States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)). Rather, it has "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* (quoting *Malloy*, 378 U.S. at 10); *see also Timbs v. Indiana*, 586 U.S. 146, 150 (2019) ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). The majority reduces the Sixth Amendment to weak tea with its cramped reading of the general principles clearly established in Supreme Court precedent.

D

Handley framed his challenge to the Court of Appeal's decision primarily as "contrary to" established precedent. AEDPA permits habeas relief when the state decision "was contrary to, or involved an unreasonable application of, clearly established" federal law in Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Given the clarification in *Andrew* of what constitutes a holding for purposes of AEDPA, which was decided after Handley filed his petition and brief, it would be unfair to penalize him for focusing more on the "contrary to" versus the "unreasonable application" prong, especially in light of his Rule 28(j) letter and oral arguments.

Moreover, it is not obvious there is a meaningful difference in this case between saying the state court's construction of Section 209(a) was "contrary to" *Apprendi* and *Alleyne*'s application of the principle versus saying that construction involved an "unreasonable application" of that principle.

In any event, we should not turn away a good merits argument on mere formalities. Rather, we must "focus on the substance of the [litigant's] claims, not the [litigant's] labels." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 788 n.4 (9th Cir. 2012); *see also Smith v. Texas*, 550 U.S. 297, 314 (2007) ("Smith's labeling of the claim . . . did not change its substance."). An issue is properly presented on habeas review when a party "provided [the] court with ample opportunity to make a reasoned judgment on the issue." *Goeke v. Branch*, 514 U.S. 115, 118 (1995). Handley has done that. It bears mention that the District Court also understood Handley to contend that the state court's decision was "objectively unreasonable factually or under the clearly established federal law."

III

We come now to the second unreasonable application of precedent by the Court of Appeal. The court held that, "even if *Britton* were not controlling," "[n]o due process violation has been shown" because the charges against Handley were informally amended to provide adequate notice of an aggravated kidnapping charge and sentence of life without parole. *Handley II*, 2021 WL 1138353, at *9, 11. This was based on: (1) the trial judge stating at the December 21 conference that he would give the CALCRIM No. 1202 instruction, and defense counsel's failure to object; (2) the trial judge remarking at the January 3 conference that he would instruct on "great bodily injury" in connection with

the kidnapping-for-ransom counts; (3) the prosecution's statement at the January 3 conference that it would argue substantial likelihood of death as to Mary; (4) defense counsel's failure to object at the January 3 conference; (5) defense counsel's failure to object during closing argument or the return of the guilty verdict; and (6) defense counsel "fully acknowledging" that Handley faced "a potential sentence of LWOP" in his sentencing brief. *Id.* at *11.

These events happened during trial at the very end of Handley's multi-year prosecution, but nevertheless satisfied the state court that Handley was "apprised of the prosecutor's intent to prove the special allegations required to impose a sentence of LWOP," and that Handley "consented to the inclusion of those allegations in the jury instructions and verdict form." *Id.* The state court concluded Handley received all the process he was due because the record showed an informal amendment occurred as a matter of state law. *Id.* at *10-12.

This too was constitutional error. It is clearly established under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment that a state criminal defendant "has a right . . . to be informed of any charges against him." *Gautt*, 487 U.S. at 1004 (discussing *Cole*, 333 U.S. 196); *see Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (circuit courts may "look to circuit precedent" to see if a "particular point in issue is clearly established by Supreme Court precedent"). The parties did not contend otherwise.

Gautt aptly stated that it was "troublesome" to treat jury instructions or closing arguments as a "substitute for sufficient notice to a defendant of the charges that have been leveled against him," but did not decide the issue because it

concluded the state court unreasonably determined the evidence from the late-stage trial events there so sufficed. *Gautt*, 487 U.S. at 1010-11. This case presents the occasion to apply the controlling legal standard that the Sixth Amendment and due process require notice to be given at the beginning of court proceedings, and not at the end of them.

Established precedent in *Application of Gault*, 387 U.S. 1 (1967), commands this result. In *Gault*, the Supreme Court reversed a state court's denial of habeas relief sought by a minor challenging his confinement pursuant to a juvenile court "delinquency" determination because the minor's constitutional right to notice, among others, had been violated. *Id.* at 31-34. Although sensitive to the distinctions between juvenile and adult criminal proceedings, the Court concluded that minors were not stripped of the "substantial rights under the Constitution" they would otherwise be afforded if they were "over 18" and facing charges. *Gault*, 387 U.S. at 29. Juvenile proceedings "must measure up to the essentials of due process and fair treatment." *Id.* at 31 (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)).

The Court squarely stated that "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."[6] *Id.* at 33

[6] *Gault* makes plain that these rights originated in the specific guarantees in the Bill of Rights held to apply to the states by the Fourteenth Amendment's Due Process Clause, such as the right to notice, to counsel, to confrontation, to cross-examination, and against self-incrimination. *Gault,* 387 U.S. at 10, 13. The concurring Justices agreed the rights analyzed by the majority were rooted in the Bill of Rights' textual procedural guarantees. *See id.* at 59-61 (Black, J., concurring); *id.* at 64-65 (White, J., concurring).

(internal quotation omitted). The minor's rights were violated because the Constitution "requires notice of the sort [the Court] described -- that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *Id.* at 33 (citing, *inter alia*, *Cole*, 333 U.S. 196). Delaying notice of the charge until "a hearing on the merits" is patently "not timely," which is true "even if there were a conceivable purpose served by the deferral proposed by the court below." *Id.* *Gault* thus relied upon, and so clearly established for purposes of AEDPA, the principle that, as part of "the essentials of due process and fair treatment," criminal defendants have a right to specific notice of the charges against them "sufficiently in advance" of a merits proceeding. *Id.* at 30, 33 (citation omitted).

The Court of Appeal unreasonably applied this precedent when it determined that Handley was given constitutionally adequate notice of the aggravated kidnapping for ransom charge in a whirlwind of jury instruction conferences at the tail end of his prosecution. *See Handley II*, 2021 WL 1138353, at *10-11. Much of the ostensible "notice" was provided during the conference on January 3 that took place about two hours before the close of evidence and featured a variety of incorrect statements by the trial judge, as we have seen. This cannot be constitutionally sufficient because *Gault* made plain that notice given at the *start* of an initial merits hearing was "not timely." *Gault*, 387 U.S. at 33; *see also Balbuena v. Sullivan*, 980 F.3d 619, 631-32 (9th Cir. 2020) (assessing reasonableness of state court ruling by comparing to prior Supreme Court rulings). Whatever the outer boundary of *Gault* might be for notice being "sufficiently in advance" of a merits proceeding, notice at such a late stage here, when the jury trial of Handley was

effectively at an end, cannot be deemed adequate by any stretch of reasoning.

The state court gave substantial attention to whether Handley's case was similar to *People v. Anderson*, 9 Cal. 5th 946 (2020), but did not stop to consider the salient question of whether the ostensible notice to Handley was constitutionally adequate. It bears mention that none of the California state cases cited for support by the Court of Appeal held that notice, provided after the start of trial, of a different charge with greater penalties is constitutionally adequate. *See, e.g.*, *Anderson*, 9 Cal. 5th at 958-60; *People v. Sawyers*, 15 Cal. App. 5th 713, 722-26 (2017); *People v. Sandoval*, 140 Cal. App. 4th 111, 127-29, 132-34 (2006); *People v. Haskin*, 4 Cal. App. 4th 1434, 1439-40 (1992); *see also People v. Mancebo*, 27 Cal. 4th 735, 740-41, 751-53 (2002); *People v. Robinson*, 122 Cal. App. 4th 275, 282 (2004).

Respondent did not cite a decision of this Court which concluded that events occurring after the start of trial can provide adequate notice under the Sixth Amendment of a different offense carrying more severe penalties than the one formally charged. *See John-Charles v. California*, 646 F.3d 1243, 1250 (9th Cir. 2011) (looking to circuit precedent to see if a "fairminded" jurist could agree with the state court based on whether prior panels came to the same conclusion). As *Gautt* stated, our precedents concern either late-stage notice of a new theory by which the prosecution would seek to prove the previously charged offense, or a record of constitutionally sufficient pre-trial notice. *See Gautt,* 489 F.3d at 1009 (discussing cases); *see also Zanini v. Garrett*, No. 23-15397, 2024 WL 2379017 (9th Cir. May 23, 2024) (unpub.) (mid-trial amendment to add new facts to original allegations for the same offenses with the same elements);

Cain v. Chappell, 870 F.3d 1003, 1014-15 (9th Cir. 2017) (information alleged the factual basis for "the commission of rape" and cited the statute containing the "attempted rape special circumstance," which was a "lesser-included offense" (quoting *Gautt*, 489 F.3d at 1007)); *Cote v. Adams*, 586 F. App'x. 414, 415 (9th Cir. 2014) (unpub.).

Even so, the majority rejects Handley's argument under *Gault* by saying he "points to no Supreme Court precedent holding that notice provided through informal amendment of the information -- with the defendant's consent -- cannot satisfy the Sixth Amendment's notice requirement."

I see it differently. The notice requirement in *Gault* is a "general constitutional rule already identified in the decisional law [that] may apply with obvious clarity to the specific conduct in question." *Andrew*, 145 S. Ct. at 82 (quoting *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam)). We have stated that "a legal principle established by a Supreme Court decision" may not provide a "controlling legal standard" when "there is a 'structural difference' between the prior precedent and the case at issue, or when the prior precedent requires 'tailoring or modification' to apply to the new situation." *Moses v. Payne*, 555 F.3d 742, 754-55 (9th Cir. 2009) (citations omitted).

The majority does not say that the plain holding of *Gault* might entail such "tailoring or modification" to govern here, for good reason. The material question is the same -- did the notice come too late? -- and so the inquiry under AEDPA is "whether the application of that standard was objectively unreasonable, even if the facts . . . are not identical to the Supreme Court precedent." *Id.* (citation omitted). That Handley is said to have been given notice by means of an oral, informal amendment does not necessitate any tailoring

or modification. The notices in *Gault* were given orally and then on paper. *See* 387 U.S. at 5-6.

The majority's mention of consent is of no moment and does not pose a "structural difference" between *Gault* and this case. *Moses*, 555 F.3d at 754 (citation omitted). The petitioner and his family in *Gault* "appeared at the two hearings 'without objection.'" *Gault*, 387 U.S. at 5-7, 32. The Court could not have been clearer in stating that the "asserted failure to object does not excuse the lack of adequate notice." *Id.* at 34 n.54.[7] The fact that the petitioner was proceeding pro se does not pose a structural difference, as the majority suggests. *Gault* certainly did not limit the right of "notice which would be deemed constitutionally adequate in a civil or criminal proceeding" to pro se litigants. *Id.* at 33, n.53 (citing, *inter alia*, *Cole*, 333 U.S. 196, in which the defendants had counsel). It bears mention that the Court of Appeal expressly declined to find that Handley waived or forfeited his constitutional claim. *See Handley II*, 2021 WL 1138353, at *11-12, n.6.

IV

Because Handley has established grounds for relief under Section 2254, and it is clear from the foregoing principles that his Sixth Amendment rights were violated, the remaining question is the proper remedy. In my view, a violation of the Sixth Amendment right to adequate notice

[7] One looks in vain in the trial transcript for affirmative consent by Handley to "amendment of the information," as the majority would have it. At most, the record shows, and the Court of Appeal so found, that Handley did not object to the jury instructions or verdict form after the trial judge told Handley that language would not increase his sentence. Those are facts to which *Gault* "clearly extends." *Moses*, 555 F.3d at 753.

of a criminal charge requires automatic reversal of the conviction without a showing of prejudice, for such an error is "structural."

A "constitutional error is either structural or it is not." *Neder v. United States*, 527 U.S. 1, 14 (1999). Structural errors "affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (cleaned up) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)); *see McKinney v. Ryan*, 813 F.3d 798, 821 (9th Cir. 2015); *see also Puckett v. United States*, 556 U.S. 129, 141 (2009) (constitutional error is structural when it would "necessarily render a criminal trial fundamentally unfair" (citation omitted)). An error may also be structural when its effects are "too hard to measure," *Weaver v. Mass.*, 582 U.S. 286, 295 (2017), such that conducting a harmless-error analysis "would be a speculative inquiry," *Gonzalez-Lopez*, 548 U.S. at 150.

Although many constitutional errors can be harmless, *see Fulminante*, 499 U.S. at 306-07, a deprivation of the Sixth Amendment right to notice of a criminal charge is not. The Supreme Court has characterized the right to notice as "both 'basic in our system of jurisprudence' and as a 'principle of procedural due process' that is unsurpassed in its 'clearly established' nature." *Gautt*, 489 F.3d at 1015 (emphasis omitted) (first quoting *In re Oliver*, 333 U.S. at 273, then *Cole*, 333 U.S. at 201). Adequate notice is one of "the essentials of due process and fair treatment." *Gault*, 387 U.S. at 31 (quoting *Kent*, 383 U.S. at 562). *Apprendi* and *Alleyne* detailed the pivotal role that allegations in a charging document played in criminal prosecutions at common law. *See Apprendi*, 530 U.S. at 478-79; *Alleyne*, 570 U.S. at 109-11.

The "charging instrument *is* 'the framework within which the trial proceeds,' and forms the basis of the Government's proof, the accused's defense, and the trial court's rulings." *United States v. Lewis*, 802 F.3d 449, 462 (3d Cir. 2015) (en banc) (Smith, J., concurring, with whom McKee, Ambro, and Jordan, J.J., join) (emphasis in original) (citations omitted). Inadequate notice puts a defendant in the unfair position of proceeding through investigation, plea negotiations, and trial on an understanding of the offense and potential sentence that is completely different from what the prosecution ultimately demands in a verdict. This error "infect[s] the entire trial process," such that the process "cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Neder*, 527 U.S. at 8-9 (citation omitted); *see Puckett*, 556 U.S. at 141.

Respondent suggests that *Cotton* decided that notice errors are subject to harmless error analysis. But *Cotton* concerned a question not presented in this case, namely whether an arguably waived claim of the right to an indictment by a grand jury is reviewed for plain error. *Cotton,* 353 U.S. at 631-32. It expressly did not resolve the prejudice prong of plain error. *Id*. at 632; *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007). Overall, *Cotton* is not instructive here.

Respondent also says that harmless error review should apply because failures to submit an element to a jury under *Apprendi* and *Alleyne* are so reviewed. But harmless error analysis is appropriate in those circumstances because such an error does not "*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington v. Recuenco*, 548 U.S. 212, 219 (2006) (emphasis in original) (citations omitted). That is not the situation here. Adequate notice of

the crime being charged, and its attendant sentence, materially affects defense strategies from start to end. *See Gonzalez-Lopez*, 548 U.S. at 150; *Lewis*, 802 F.3d at 463 (Smith, J., concurring). Adequate and accurate knowledge of the charged crime and punishment determines "whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial." *Gonzalez-Lopez*, 548 U.S. at 150. Unlike the situation where a judge finds a particular fact instead of the jury, "determining 'what might have been'" when a defendant and her counsel were deprived of adequate notice of the ultimate charge and penalty at stake "is an exercise in rank speculation." *Lewis*, 802 F.3d at 463 (Smith, J., concurring); *see Weaver*, 582 U.S. at 295-96; *Gonzalez-Lopez*, 548 U.S. at 150.

This fits Handley's case to perfection. Handley states, and Respondent does not contest, that individuals sentenced to LWP are eligible for parole in seven years in California. *See* Cal. Pen. Code § 3046(a)(1) (2024). Handley received that sentence for the mayhem and torture counts. If Handley had been found guilty of simple kidnapping for ransom, as alleged in the operative information, there was a possibility he would serve between seven and twenty-eight years in prison for all counts before being paroled. *See id.* §§ 3046(a), (b). The calculus of whether to plea bargain or go to trial is obviously quite different when life in prison without parole is on the table. Consequently, a harmless error approach is not reasonable here. It would necessarily entail a "speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

V

I would reverse the denial of habeas relief in this circumstance and remand with instructions to issue a conditional writ of habeas corpus directing the vacatur of Handley's convictions and sentences on the kidnapping for ransom charges unless he is retried within 120 days. The Sixth Amendment demands no less than that.

APPENDIX B

Order of United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (October 8, 2025)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 8 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KYLE HANDLEY,

Petitioner - Appellant,

v.

SEAN MOORE,

Respondent - Appellee.

No. 24-499

D.C. No.
8:22-cv-01423-MCS-GJS
Central District of California,
Santa Ana

ORDER

Before: SANCHEZ and H.A. THOMAS, Circuit Judges, and DONATO, District Judge.*

Judge Sanchez and Judge H.A. Thomas have voted to deny the petition for rehearing en banc, and Judge Donato recommends granting it. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for rehearing en banc, Dkt. No. 48, is **DENIED**.

* The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

Order of United States District Court for the Central District of California Denying Petition for Write of Habeas Corpus (January 16, 2024)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KYLE HANDLEY,
Petitioner,
v.
SEAN MOORE,
Respondent.

Case No. 8:22-cv-01423-MCS-GJS

ORDER ACCEPTING IN PART AND REJECTING IN PART FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative habeas petition, (Pet., ECF No. 1), all relevant documents filed and lodged in this action, the Report and Recommendation of United States Magistrate Judge, (Report, ECF No. 14), and Petitioner's Objections to the Report, (Objs., ECF No. 17). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

Having completed its review, the Court accepts in part and rejects in part the findings and recommendations set forth in the Report. Specifically, the Court rejects the Magistrate Judge's determination that "Petitioner received fair notice of the charges against him." (Report 16.) The charging document did not allege the distinct elements of a charge of aggravated kidnapping for ransom, and the charging

document was only informally amended at a jury instruction conference held during trial—and even then, the court and the prosecutor misarticulated the elements of the crime. The Court doubts this comported with the notice and pleading requirements of the United States Constitution. U.S. Const. amend. VI; *see Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Gautt v. Lewis*, 489 F.3d 993, 1004 (9th Cir. 2007).

That said, relief under 28 U.S.C. § 2254(d) is available only if the state court's resolution of Petitioner's due process claim on direct appeal "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Court concurs with the Magistrate Judge that the state court's resolution of the claim on direct appeal "was not objectively unreasonable factually or under the clearly established federal law." (Report 17.) In its reasoned decision, the California Court of Appeal rejected Petitioner's argument that a longstanding state precedent that undermines his claim, *People v. Britton*, 6 Cal. 2d 1 (1936), conflicts with Supreme Court precedent. (Pet. Ex. G, at 1986, ECF No. 1-3.) The state court noted that the Supreme Court of the United States had declined to resolve whether punishment-enhancing facts must be included in a charging document, and that the California Supreme Court's interpretation of that precedent bound the state court. (*Id.* at 1986–87 (citing, inter alia, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *People v. Contreras*, 58 Cal. 4th 123 (2013)).) Petitioner does not explicitly challenge the Magistrate Judge's finding that this analysis was not objectively unreasonable; instead, citing *Alleyne v. United States*, 570 U.S. 99, 109–11 (2013), he argues that it was clearly established that the notice provision of the Sixth Amendment applies to state proceedings and that the common law as codified in the Sixth Amendment requires every fact essential to the punishment to be pleaded. (Objs. 2–3.) The principles articulated in *Alleyne* on which Petitioner relies are dicta supporting the Court's conclusion that "facts that increase mandatory minimum sentences must be

submitted to the jury." 570 U.S. at 116. *Alleyne* did not speak directly to criminal pleading requirements. Accordingly, Petitioner has not demonstrated the principles on which his petition relies are clearly established for the purpose of § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

The Court also concurs with the Magistrate Judge that Petitioner has not demonstrated that any constitutional error was structural or resulted in any prejudice to his defense. (Report 17.) Notwithstanding Petitioner's persuasive arguments why the type of error here might require automatic reversal, (Objs. 19–20), this Court takes a cue from the Ninth Circuit and "hesitate[s] to pronounce the constitutional violation in question structural in nature, without an explicit 'green light' from the [Supreme] Court," *Gautt*, 489 F.3d at 1015. And Petitioner still has not demonstrated how the purported "error had a 'substantial and injurious effect or influence' on the outcome of his trial." *Brown v. Davenport*, 596 U.S. 118, 126 (2022) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). He argues that "the state cannot prove that the error" was harmless, (Objs. 21), but he bears the burden on this issue, not Respondent, *Brown*, 596 U.S. at 126.

The Court accepts the Magistrate Judge's conclusion that habeas relief is unwarranted. Accordingly, **IT IS ORDERED** that the Petition is DENIED; and judgment shall be entered dismissing this action with prejudice.

DATE: January 16, 2024

Mark C. Scarsi

MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

APPENDIX D

Report and Recommendation of United States Magistrate Judge (October 4, 2023.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KYLE HANDLEY,

Petitioner

v.

SEAN MOORE, Warden, Centinela State Prison,

Respondent.

Case No. 8:22-cv-01423-MCS (GJS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge Mark C. Scarsi, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On August 1, 2022, Petitioner, a prisoner in state custody, filed a habeas petition pursuant to 28 U.S.C. § 2254 ("Petition") and lodged exhibits in support of the Petition ("Ex."). [Dkt. 1.] On November 16, 2022, Respondent filed an Answer and lodged pertinent portions of the state record ("LD"). [Dkt. 10.] Petitioner filed a Reply on January 13, 2023. [Dkt. 12.]

The matter, thus, is submitted and ready for decision. For the reasons that

follow, the Court recommends that the District Judge deny Petitioner's request for federal habeas relief.

PRIOR STATE COURT PROCEEDINGS

On January 4, 2018, following a jury trial in Orange County Superior Court, Petitioner was convicted of two counts of kidnapping for ransom (Cal. Penal Code § 209(a) ("aggravated kidnapping")), aggravated mayhem (Cal. Penal Code § 205), and torture (Cal. Penal Code § 206). [Ex. A, Reporter's Transcript ("RT") 765-67; Ex. B, Clerk's Transcript ("CT") 582-85.] Petitioner was sentenced to two terms of life without the possibility of parole for the two aggravated kidnapping convictions and two terms of seven years to life for the aggravated mayhem and torture convictions. [CT 653.]

Petitioner appealed his conviction to the California Court of Appeal ("Court of Appeal"). [LD 3.] On January 6, 2020, the Court of Appeal issued an opinion affirming the judgment. [Ex. C.]

Petitioner filed a petition for review with the California Supreme Court. [Ex. D.] On April 22, 2020, the California Supreme Court granted review and ordered that the case be deferred pending consideration and disposition of similar notice issues raised in a then pending case (*People v. Anderson*). [Ex. E.] On September 23, 2020, the California Supreme Court transferred Petitioner's case to the Court of Appeal for reconsideration in light of the decision in *People v. Anderson*, 9 Cal. 5th 946 (2020). [Ex. F.]

On March 25, 2021, the Court of Appeal issued its second opinion affirming the judgment. [Ex. G.]

On June 23, 2021, the California Supreme Court denied Petitioner's second petition for review. [Ex. H, I.]

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court. [LD 15.] Although Respondent initially waived the right to file a

response, Respondent later filed a response at the request of the Supreme Court. [LD 16, 17.] On March 28, 2022, the petition for certiorari was denied. [LD 18.]

SUMMARY OF THE EVIDENCE AND BACKGROUND

The Court has reviewed the record in this case, as well as the Court of Appeal's summary of the evidence in its unpublished opinion. [Ex. G.] The Court of Appeal's summary is consistent with the Court's independent review of the record. Accordingly, the Court quotes portions of the factual summary from the Court of Appeal's opinion affirming the judgment to provide an initial factual overview. [Ex. G.]

FACTS

> [Petitioner] and the targeted victim, Michael S., were not strangers. In 2011, [Petitioner] was a marijuana vendor, and Michael co-owned two medical marijuana dispensaries in Orange County. Michael purchased marijuana from [Petitioner] for his dispensaries, and the two became friends. Their friendship was on full display in May 2012, when [Petitioner] joined Michael and his other friends in Las Vegas for a weekend getaway. During the trip, Michael freely spent thousands of dollars on food, lodging and entertainment. And, as was his wont, he paid for everything with cash.
>
> [Petitioner] appeared to have a good time in Vegas. But after the trip, he suddenly stopped communicating and doing business with Michael. Although Michael tried contacting him on several occasions, [Petitioner] never returned his calls or came by his dispensaries, as he had done in the past. [Petitioner] disappeared from Michael's life, both professionally and personally, for no apparent reason.
>
> At the time, Michael really didn't give that development much thought. His dispensaries were doing well, and he was happily renting a room in a house on the Balboa Peninsula in Newport Beach. He certainly did not foresee the dark events that transpired in his life on October 2, 2012, roughly five months from the last time he had seen or heard from [Petitioner].

That evening, Michael was awakened in the middle of the night by two men who were pointing a flashlight and a shotgun in his face. When Michael reached for the gun, the men beat and choked him, causing him to pass out momentarily. The men bound Michael's feet together and tied his hands behind his back with zip ties. They also blindfolded him and taped his mouth shut. Then they dragged him down the stairs and placed him in a hallway next to his roommate Mary B., who, like Michael, was awakened at gunpoint, tied up, gagged and blindfolded by the intruders. However, unlike Michael, Mary was not harmed in any other way. To the contrary, they assured her, "This isn't about you. Just be quiet. Don't fight ... and you'll be alright."

Mary noticed the men spoke with a fake Spanish accent, as if they were trying to disguise their voices. She also surmised there were three intruders in all because while one of them stood guard over her and Michael in the hallway, she heard two others ransacking the residence upstairs. After about 15 minutes, those two returned downstairs and asked Michael, "Where's the money?" Michael said he had $2,000 hidden in a sock in his room, but the men were not interested in that. They told Michael they wanted a million dollars from him. When Michael said he did not have that much money, they carried him and Mary to a van outside and took them to the Mojave Desert.

Along the way, Michael was subjected to horrific abuse. His captors thought he had buried a million dollars somewhere in the desert, and in order to get him to tell them where it was, they repeatedly stomped him with their boots, beat him with a rubber hose, shocked him with a taser, and burned him with a blowtorch. Michael tried to explain to them that there was no million dollars, but every time he did so, they abused him some more.

Although the men did not harm Mary, she was in the back of the van with Michael during the entire trip. In fact, she was so close to him that when his legs twitched from being tasered, they would sometimes come into contact with her. The men beat and berated Michael whenever that happened. Even though his leg movements were involuntary, they used every excuse they could find to abuse him. All told, the tasering, burning and beating

went on for about two and a half hours before the van finally pulled over on a deserted road out near Rosamond.

Michael and Mary were still tied up and blindfolded when the men carried them out of the van and put them down on the desert sand. Michael continued to insist he knew nothing about any million dollars. Eventually, the men gave up on the money and told Michael that if they couldn't get the million dollars, then they "want[ed] his dick." They proceeded to hold Michael down, lower his shorts and put a zip tie around the base of his penis. Then one of the men took out a knife and began cutting off Michael's penis. As he was doing so, the man chimed out the words "back and forth, back and forth" in a sing-songy manner, as if Michael's suffering was a joke. When he finished the deed, he and his companions doused Michael with bleach. Then he turned to Mary and told her he was going to toss his knife into the nearby bushes. He said if she could find the knife and cut herself free, it would be her "lucky day." He then tossed the knife, told Mary to count to 100, and left with his cohorts in the van.

Mary managed to hitch up her blindfold and retrieve the knife, just as the desert sun was beginning to appear on the horizon. She then walked about a mile to the main road and flagged down a patrol officer from the Kern County Sheriff's Department. Mary directed the officer back to where Michael was located. When they arrived, Michael was lying in the dirt, writhing in pain. Although he survived the ordeal, he suffered burns and bruises all over his body, and despite a thorough search of the area, his severed penis was never found.

During the ensuing investigation, Michael told police he had no known enemies and could not think of anyone who would want to harm him. But when the police canvassed Michael's neighborhood in search of clues, they got a break. It turned out that on the afternoon of the kidnapping, one of Michael's neighbors saw a white pickup truck in the alley near Michael's house. There were three men near the truck, one of whom was wearing a hardhat. They extended a ladder onto Michael's house, as if they were there to do construction work, but they had no equipment and there was no construction going on in the area. Thinking this suspicious, the neighbor jotted down the truck's license number. Upon running the number, investigators learned the truck was registered to [Petitioner].

> At that time, [Petitioner] was living in Fountain Valley. When the police searched his home, they found a bleach-stained shirt and zip ties resembling those used in the kidnapping. They also noticed a very strong smell of bleach emanating from [Petitioner's] truck and found a glove in the passenger compartment of the vehicle. The glove contained DNA from [Petitioner's] friend and business associate Hossein Nayeri, and DNA belonging to [Petitioner's] high school buddy Ryan Kevorkian was found on one of the zip ties.
>
> ***
>
> At trial, [Petitioner] did not present any evidence in his defense, nor did he dispute the prosecution's portrayal of Michael and Mary as the victims of a brutal kidnapping scheme. Rather, he claimed there was insufficient evidence tying him to that scheme.
>
> Shortly before the parties rested, the charges against [Petitioner] were modified in two respects. On the prosecution's motion, the section 12022.7 great bodily injury allegation charged in connection with the torture count was dismissed. In addition, two special allegations were orally added to the aggravated kidnapping charges, namely that Michael suffered bodily harm and that Mary was subjected to a substantial likelihood of death. [Petitioner] did not object to the inclusion of those special allegations, which were explained in the jury instructions, discussed in closing argument, and included in the verdict forms.
>
> In the end, the jury found [Petitioner] guilty of the four substantive charges, and it found the two newly-added special allegations attendant to the aggravated kidnapping charges to be true. In light of those special allegations, the trial court sentenced [Petitioner] to life in prison without parole (LWOP) on the aggravated kidnapping counts. In addition, the court imposed consecutive terms of seven years to life on the aggravated mayhem and torture counts.

[Ex. G at 2-8 (footnotes omitted).]

PETITIONER'S HABEAS CLAIM

Petitioner contends that he did not receive proper notice of the special

aggravated kidnapping sentencing allegations (Cal. Penal Code § 209(a)) in violation of his right to due process. [Petition at 5; Dkt. 1-2, Memorandum in Support of Petition ("Pl. Memo") at 11-20.]

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), when the state court has rendered a decision on the merits, federal habeas relief is barred "unless one of two narrow exceptions set forth in 28 U.S.C. § 2254(d)(1) or (2) applies, which are the state court's decision was (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court, at the time the state court adjudicated the claim, . . . or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Ochoa v. Davis*, 16 F.4th 1314, 1325 (9th Cir. 2021) (quoting Section 2254(d)(1) and (2); internal quotation marks omitted), *cert. denied* 143 S. Ct. 126 (2022); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (characterizing the Section 2254(d) requirements as a "limit" and "restriction" on the power of federal courts to grant habeas relief to state prisoners); *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). The above AEDPA predicates for relief constitute a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

The California Court of Appeal considered the claim alleged in the Petition on direct appeal and rejected it on its merits in a reasoned decision. When Petitioner raised the claim in the California Supreme Court, the state high court denied review without comment. Therefore, to undertake its Section 2254(d) analysis, the Court must look to the last reasoned decision on the merits, namely, the California Court

of Appeal's decision on direct appeal. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (when, on direct appeal, state court of appeal denied claims on their merits in a reasoned decision and the state supreme court then denied discretionary review, the "relevant state-court decision" under Section 2254(d) was the state court of appeal decision); *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1193-96 (2018) (when a state high court issues a summary denial of relief following a reasoned decision by a lower state court denying relief, the federal habeas court looks through the summary denial to the lower court's reasoned decision for purposes of AEDPA review, because it is presumed the state high court's decision rests on the grounds articulated by the lower state court).

For purposes of Section 2254(d)(1), the relevant "clearly established Federal law" consists of Supreme Court holdings (not dicta) applied in the same context that Petitioner seeks to apply it and which existed at the time of the relevant state court decision. *See Lopez v. Smith*, 574 U.S. 1, 2, 4 (2014) (*per curiam*); *see also Greene v. Fisher*, 565 U.S. 34, 40 (2011). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand. Section 2254(d)(1), however, "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 425-27 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 419 (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Landrigan*, 550 U.S. at 473. To meet the Section 2254(d)(1) standard, "a prisoner must show far more than that

the state court's decision was 'merely wrong' or 'clear error.'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (cit. om.).

For purposes of Section 2254(d)(2), a federal court may not characterize a state court's factual determinations as unreasonable simply because it "would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010); *see also Brumfield v. Cain*, 576 U.S. 305, 314 (2015). "Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference." *Id.* If reasonable minds reviewing the record might disagree about the state court's factual finding, that will not suffice to supersede the trial court's factual determination. *Wood*, 558 U.S. at 301; *see also Pizzuto v. Yordy*, 947 F.3d 510, 530 (9th Cir. 2019). To pass the Section 2254(d)(2) threshold, a petitioner must show that the state court's decision was based on factual findings that were not merely incorrect but objectively unreasonable. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Section 2254(d)(2), thus, "imposes a 'daunting standard' to disrupt a state court's factual findings, which precludes relief in all but 'relatively few cases.'" *McGill v. Shinn*, 16 F.4th 666, 685 (9th Cir. 2021) (citation omitted), *cert. denied* 143 S. Ct. 429 (2022).

When claims are governed by the Section 2254(d) standard of review, federal habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 562 U.S. at 102. To obtain habeas relief, a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (*per curiam*); *see also Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (for purposes of Section

2254(d) review, "[a]ll that mattered was whether the [state court] . . . still managed to blunder so badly that every fairminded jurist would disagree"); *Kayer*, 141 S. Ct. at 526 (it is error for a federal habeas court to reject a state court decision "which was not so obviously wrong as to be 'beyond any possibility for fairminded disagreement,'" which under Section 2254(d), "is 'the only question that matters'") (cit. om.). This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id*. at 101 (citation omitted); *see also Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (*per curiam*) ("If such disagreement is possible, then the petitioner's claim must be denied."). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' … and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

DISCUSSION

Petitioner contends that his sentence of life without the possibility of parole ("LWOP") for aggravated kidnapping violated his right to due process, because the charging document did not include special aggravated kidnapping sentencing allegations. [Petition at 5; Pl. Memo at 11-20.]

The Information alleged two counts of aggravated kidnapping in violation of Section 209(a) of the California Penal Code (hereafter "section 209(a)"),[1] which provides that "any person who … kidnaps …. with intent to hold or detain, or who holds or detains… that person for ransom, reward, or to commit extortion or to exact from another person any money or valuable thing … is guilty of a felony, and upon

[1] Section 209(a) was revised in 2022. The references to section 209(a) herein refer to the version in effect at the time of Petitioner's conviction.

conviction thereof, shall be punished by [(1)] imprisonment in the state prison for life without possibility of parole" if the kidnapping victim "suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death" or (2) life in prison with possibility of parole in all other cases. While the Information cited section 209(a) and alleged that Petitioner kidnapped and intentionally held and detained his victims for ransom, reward, or to commit extortion or to exact from another person any money or valuable things in counts 1 and 2, the Information did not mention the special aggravated kidnapping sentencing factors, such as whether the victims suffered bodily harm or were confined in a manner that exposed them to a substantial likelihood of death.[2] [CT 221-22.] However, these special sentencing factors were addressed in open court during discussions about proposed jury instructions and verdict forms and were later included in the aggravated kidnapping jury instruction and verdict forms presented to the jury. [RT 559, 578-80.] The Court of Appeal summarized the proceedings in the trial court, as follows:

> One of the jury instructions proposed by the prosecution was CALCRIM No. 1202, the standard instruction on aggravated kidnapping. CALCRIM No. 1202 sets forth the essential elements of that offense. In addition, the instruction contains a paragraph entitled, "Sentencing Factor," which states: "If you find the defendant guilty of [aggravated kidnapping], you must then decide whether the People have proved the additional allegation that [the victim died/suffered bodily harm or was confined in a way that created a substantial likelihood of death]." (CALCRIM No. 1202.)
>
> During a jury instruction conference that occurred toward the end of the prosecution's case, defense counsel was asked if he had any objection to the court giving CALCRIM No. 1202, and he said no. He also informed

[2] The record contains several felony complaints and an earlier version of the Information, but none of these charging documents include the special aggravated kidnapping sentencing allegations. [CT 134-35, 137-38, 211-12.]

the court he was not requesting instructions on any lesser included offenses to aggravated kidnapping. Since his theory of the case was that [Petitioner] was not actually involved in the alleged kidnappings, he felt there was no need for any such instructions, and [Petitioner] said he agreed with that decision.

The discussion on jury instructions continued the following day when the judge met with counsel and [Petitioner] shortly before the parties rested. At the outset of that meeting, the judge stated, "Counts 1 and 2, the [aggravated kidnapping statute section] 209 contains a special, additional factor if great bodily injury was inflicted. The People also allege a 12022.7, great bodily injury, sentencing enhancement, as to [the torture charge in] count 4, which I understand they have a pending motion regarding."

The court's description of the special additional factor in section 209(a) was not entirely accurate. As explained above, that provision uses the term "bodily harm," not "great bodily injury," which is the gravamen of the sentence enhancement provided in section 12022.7. The court's mistake turned out to be contagious because, as shown below, the prosecutor also conflated those two terms at one point during the meeting.

Continuing, the judge stated he "prepared jury instructions asking the jury to make findings on both the substantive crime [of aggravated kidnapping] and then whether or not that crime, if committed, great bodily injury was inflicted. [¶] The way [CALCRIM No. 1202] reads, it should be a special finding, but it's not technically a sentencing enhancement and the like." Asked if he had any objection to the court instructing the jury in that manner, defense counsel said no.

With that, the prosecution moved to dismiss the section 12022.7 great bodily injury enhancement allegation attached to count 4, the torture count. The judge responded, "That request is granted, and the court will then remove the great bodily injury jury instruction from that [count] making sure that it's still contained in counts 1 and 2[.]" The following discussion then took place:

"[Prosecutor Brown]: ... In regards to the second count involving Mary ..., if the court could take a look at the actual verdict that the People drafted in regards to count 2,

there is kind of an 'or' within [section 209(a), of] the Penal Code. [ ]There is gbi inflicted on the person [']or' and our theory of liability is the 'or' part. [¶] So I know the court just drafted a special instruction regarding that finding. It's a little different with regards to our theory on Mary[.]

"[Prosecutor Murphy]: We apologize for the lateness, Your Honor. We were actually dealing with this up until last night.

"The Court: Noted. [¶] So your theory is intent to confine [in] a manner [ ] that exposes [Mary] to a substantial likelihood of death?

"[Prosecutor Murphy]: Yes."

The judge asked defense counsel if he had any objection to the prosecution pursuing that theory, and his answer was no. The judge then told the parties he would be modifying the jury instruction as to count 2 to comport with that theory.

Alas, the instruction on the aggravated kidnapping charge in count 2 informed the jurors that if they found [Petitioner] guilty of that offense, they must decide whether the prosecution proved the additional allegation that Mary was confined in a manner that subjected her to a substantial likelihood of death. And the instruction on count 1 stated that if the jurors found [Petitioner] guilty of aggravated kidnapping in that count, they must decide whether the prosecution proved the additional allegation that Michael suffered bodily harm.

During closing arguments, the prosecutor argued there was ample evidence to support those allegations, and defense counsel did not disagree. Defense counsel instead took the position that [Petitioner] had nothing to do with the kidnapping plan that led to Michael suffering bodily harm and Mary being exposed to a substantial likelihood of death.

The jury rejected defense counsel's argument. It not only found [Petitioner] guilty of aggravated kidnapping, as alleged in counts 1 and 2, it also found true the special allegations of bodily harm as to Michael and substantial likelihood of death as to Mary.

[Ex. G at 10-12.]

The Court of Appeal found that Petitioner had been sufficiently apprised of the special aggravated kidnapping sentencing factors and the potential LWOP sentence. [Ex. G at 12-22.] Relying on *People v. Britton*, 6 Cal. 2d 1 (1936), the Court of Appeal explained, "'[i]t is well settled'" that an "'information need not allege the particular mode or means employed in the commission of an offense,'" but "'need only charge the essential elements of the statutory offense … [to] fairly apprise[] the defendant of what he is to meet at the trial.'" [Ex. G at 16 (quoting *Britton*, 6 Cal. 2d at 5).] Because "the underlying crime of aggravated kidnapping and the relevant enhancement factors … are embedded in a single statute" and the Information charged Petitioner with the essential elements of aggravated kidnapping under California Penal Code § 209(a), there was no need to allege the special sentencing factors. [Ex. G at 15-16.] The Court of Appeal also rejected Petitioner's claim that *Britton* was overruled by the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). [Ex. G at 16-17.] It explained that "the core reasoning and holding of *Apprendi* focus solely on the *proof requirements* for sentencing factors" and *Apprendi* was "not a notice case." [Ex. G at 16 (emphasis in original).] The Court of Appeal concluded that Petitioner had "no basis to complain that he was unaware of [the] possibility" that he could be sentenced to LWOP "if the evidence established that his victims suffered bodily harm or were subjected to a substantial likelihood of death." [Ex. G at 17.]

The Court of Appeal further found that even if *Britton* was no longer controlling, the Information was "informally" amended so as to adequately apprise Petitioner of the special sentencing factors and potential LWOP sentence. [Ex. G at 18-22.] The Court of Appeal explained that the jury instruction on aggravated kidnapping (CALCRIM No. 1202) and the verdict forms on counts 1 and 2 included the special allegations of bodily harm as to Michael and exposure to a substantial likelihood of death as to Mary and Petitioner consented to each of them following

discussions in open court. [Ex. G. at 20-21.] In addition, the prosecutor specifically stated in open court that the state intended to prove that Mary had been confined in manner that exposed her to a substantial likelihood of death and defense counsel acknowledged in a sentencing brief that Petitioner was facing a potential LWOP sentence. [Ex. G at 20-21.] Thus, while Petitioner was "never expressly informed he could be sentenced to LWOP if the jury found the special allegations true," there was no due process violation, because Petitioner was sufficiently apprised of the potential LWOP sentence when "the aggravated kidnapping charges were informally amended to include allegations of bodily harm and substantial likelihood of death." [Ex. G at 212.]

A "criminal defendant has a right, guaranteed by the Sixth Amendment and applied against the states through the Fourteenth Amendment, to be informed of any charges against him, and ... a charging document, such as an information, is the means by which such notice is provided." *Gautt v. Lewis*, 489 F.3d 993, 1004 (9th Cir. 2007). *See also Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

"When determining whether a defendant has received fair notice of the charges against him, [the Court] begin[s] by analyzing the content of the information." *Gautt*, 489 F.3d at 1003. "The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense." *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994). While the information "need not contain a citation to the specific statute at issue[,] the substance of the information ... must in some appreciable way apprise the defendant of the charges against him so that he may prepare a defense accordingly." *Gautt*, 489 F.3d at 1004.

Here, as determined by the Court of Appeal, Petitioner received fair notice of the charges against him. Although the Information did not allege the special aggravated kidnapping sentencing factors, it contained a citation to section 209(a), which necessarily informed Petitioner that if a victim of an aggravated kidnapping suffers "bodily harm" or was confined in a manner which exposed her "to a substantial likelihood of death," the sentence must be life in prison without the possibility of parole. [CT 571-72.] *See Britton*, 6 Cal. 2d at 5; *see also United States v. James*, 980 F.2d 1314, 1318 (9th Cir. 1992) ("the necessary elements of the crime appear in the indictment by reference to the relevant statutes"). Moreover, as the Court of Appeal found, the Information was informally amended so as to adequately apprise Petitioner that the prosecution intended to prove the special sentencing allegations of bodily harm as to Michael and confinement in a manner that created a substantial risk of death as to Mary. [Ex. G at 18-22.] *See*, *e.g.*, *United States v. Arreola*, 467 F.3d 1153, 1162 (9th Cir. 2006) ("An indictment is constructively amended where the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment.") (internal quotation marks and citations omitted). The aggravated kidnapping jury instruction (CALCRIM No. 1202) and verdict forms, which were discussed at length before the close of evidence and later presented to the jury, contained the special aggravated kidnapping allegations. [RT 559, 578-80; CT 571-72, 582-85.] The prosecution also asserted in closing argument that the evidence presented at trial established the special sentencing allegations that Michael suffered bodily harm and Mary was exposed to a substantial likelihood of death during the course of the aggravated kidnappings. [RT at 599-601, 657-61.]

Considering the citation to section 209(a) in the Information, the aggravated kidnapping jury instructions and verdict forms that were discussed in court and presented to the jury, and the evidence at trial, the Court of Appeal's conclusion that

Petitioner was adequately apprised of the charges against him was not objectively unreasonable factually or under the clearly established federal law.

Petitioner also has not shown how the failure to formally amend the Information to include the special aggravated kidnapping sentencing allegations prejudiced his defense in any way. *See Gautt*, 489 F.3d at 1015-16 (declining to conclude that due process violation was structural error requiring automatic reversal). Petitioner's defense at trial was that he was not involved in the kidnappings. [CT 563.] Petitioner does not identify any evidence that he was unable to present due to the Information's failure to explicitly reference and discuss the aggravated kidnapping special factors above and beyond the reference to section 209(a), nor does he suggest that there was any defense theory that might have been offered had these factors been alleged earlier.

Petitioner contends, as he did in the state courts, that the Court of Appeal's reliance on *Britton* to conclude that the special aggravating kidnapping sentencing factors did not need to be included in the charging document was contrary to *Apprendi* and its progeny. Petitioner points out that in *Apprendi*, the Supreme Court recognized that "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 proved beyond a reasonable doubt." 530 U.S. at 476 (emphasis added; internal quotation marks and citation omitted). Petitioner's reliance on *Apprendi* is misplaced. In *Apprendi*, the Supreme Court explicitly declined to address whether aggravating factors for a sentence enhancement must be included in a *state court* indictment. *Id.* at 477 n.3 ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement ... in the indictment.... We thus do not address the indictment question separately today."). Further, state courts are not required to comply with the Fifth Amendment's provision for indictment by a grand jury. *See Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) ("the Court has never held that federal concepts of a 'grand jury,'

binding on the federal courts under the Fifth Amendment, are obligatory for the States"); *see also Apprendi*, 530 U.S. at 477 n.3 (recognizing that "the Fifth Amendment right to 'presentment or indictment of a Grand Jury'" is not applicable to the states under the Fourteenth Amendment). And finally, Petitioner's sentence did not exceed the maximum penalty for aggravated kidnapping. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis in original); *Apprendi*, 530 U.S. at 483. As the verdicts on counts 1 and 2 included the jury's findings on the special sentencing factors that Michael suffered bodily harm and Mary was exposed to a substantial likelihood of death, Petitioner's LWOP sentence did not violate due process or the rule of *Apprendi*.

Based on the foregoing, the Court finds that the state court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law. In addition, the state court's decision was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, Section 2245(d) forecloses federal habeas relief, and the Petition should be denied.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: October 4, 2023

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.

APPENDIX E

Unpublished Opinion of the California Court of Appeal, Fourth Appellate District, Division Three (January 6, 2020) (Handley I)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.	G056608 (Super. Ct. No. 13CF3394) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Cliff Gardner and Daniel Buffington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kyle Shirakawa Handley was convicted of multiple crimes for participating in a brutal kidnapping scheme that resulted in one of the victims being tortured and sexually mutilated. On appeal, he contends 1) he did not receive adequate notice of the charges, 2) the jury was improperly instructed on how to view accomplice testimony, 3) he was denied due process by virtue of a two-week recess that occurred during the trial, and 4) his sentence violates Penal Code section 654.[1] Finding these contentions unmeritorious, we affirm the judgment.

FACTS

Appellant and the targeted victim, Michael S., were not strangers. In 2011, appellant was a marijuana vendor, and Michael co-owned two medical marijuana dispensaries in Orange County. Michael purchased marijuana from appellant for his dispensaries, and the two became friends. Their friendship was on full display in May 2012, when appellant joined Michael and his other friends in Las Vegas for a weekend getaway. During the trip, Michael freely spent thousands of dollars on food, lodging and entertainment. And, as was his wont, he paid for everything with cash.[2]

Appellant appeared to have a good time in Vegas. But after the trip, he suddenly stopped communicating and doing business with Michael. Although Michael tried contacting him on several occasions, appellant never returned his calls or came by his dispensaries, as he had done in the past. Appellant disappeared from Michael's life, both professionally and personally, for no apparent reason.

At the time, Michael really didn't give that development much thought. His dispensaries were doing well, and he was happily renting a room in a house on the Balboa Peninsula in Newport Beach. He certainly did not foresee the dark events that

[1] All further statutory references are to the Penal Code.

[2] Due to the federal prohibition on marijuana sales, credit card companies and banks were unwilling to do business with Michael's dispensaries. Consequently, Michael took in a lot of cash he had nowhere to deposit.

transpired in his life on October 2, 2012, which was roughly five months from the last time he had seen or heard from appellant.

That evening, Michael was awakened in the middle of the night by two men who were pointing a flashlight and a shotgun in his face. When Michael reached for the gun, the men beat and choked him, causing him to pass out momentarily. The men bound Michael's feet together and tied his hands behind his back with zip ties. They also blindfolded him and taped his mouth shut. Then they dragged him down the stairs and placed him in a hallway next to his roommate Mary B., who, like Michael, was awakened at gunpoint, tied up, gagged and blindfolded by the intruders. However, unlike Michael, Mary was not harmed in any other way. To the contrary, they assured her, "This isn't about you. Just be quiet. Don't fight . . . and you'll be alright."

Mary noticed the men spoke with a fake Spanish accent, as if they were trying to disguise their voices. She also surmised there were three intruders in all because while one of them stood guard over her and Michael in the hallway, she heard two others ransacking the residence upstairs. After about 15 minutes, those two returned downstairs and asked Michael, "Where's the money?" Michael said he had $2,000 hidden in a sock in his room, but the men were not interested in that. They told Michael they wanted a million dollars from him. When Michael said he did not have that much money, they carried him and Mary to a van outside and took them to the Mojave Desert.

Along the way, Michael was subjected to horrific abuse. His captors thought he had buried a million dollars somewhere in the desert, and in order to get him to tell them where it was, they repeatedly stomped him with their boots, beat him with a rubber hose, shocked him with a taser, and burned him with a blowtorch. Michael tried to explain to them that there was no million dollars, but every time he did so, they abused him some more.

Although the men did not harm Mary, she was in the back of the van with Michael during the entire trip. In fact, she was so close to him that when his legs

twitched from being tasered, they would sometimes come into contact with her. The men beat and berated Michael whenever that happened. Even though his leg movements were involuntary, they used every excuse they could find to abuse him. All told, the tasering, burning and beating went on for about two and a half hours before the van finally pulled over on a deserted road out near Rosamond.

Michael and Mary were still tied up and blindfolded when the men carried them out of the van and put them down on the desert sand. Michael continued to insist he knew nothing about any million dollars. Eventually, the men gave up on the money and told Michael that if they couldn't get the million dollars, then they "want[ed] his dick." They proceeded to hold Michael down, lower his shorts and put a zip tie around the base of his penis. Then one of the men took out a knife and began cutting off Michael's penis. As he was doing so, the man chimed out the words "back and forth, back and forth" in a sing-songy manner, as if he thought Michael's suffering was a joke. When he finished the deed, he doused Michael with bleach with the help of his companions. Then he turned to Mary and told her he was going to toss his knife into the nearby bushes. He said if she could find the knife and cut herself free, it would be her "lucky day." He then tossed the knife, told Mary to count to 100, and left with his cohorts in the van.

Mary managed to hitch up her blindfold and retrieve the knife, just as the desert sun was beginning to appear on the horizon. She then walked about a mile to the main road and flagged down a patrol officer from the Kern County Sheriff's Department. Mary directed the officer back to where Michael was located, and when they arrived there, Michael was lying in the dirt, writhing in pain. Although he survived the ordeal, he suffered burns and bruises all over his body. And despite a thorough search of the area, his severed penis was never found.

During the ensuing investigation, Michael told police he had no known enemies and could not think of anyone who would want to harm him. But when the police canvassed Michael's neighborhood in search of clues, they got a break. It turned

out that on the afternoon of the kidnapping, one of Michael's neighbors saw a white pickup truck in the alley near Michael's house. There were three men near the truck, one of whom was wearing a hardhat. They extended a ladder onto Michael's house, as if they were there to do construction work, but they had no equipment and there was no construction going on in the area. Thinking this suspicious, the neighbor jotted down the truck's license number. Upon running the number, investigators learned the truck was registered to appellant.

At that time, appellant was living in Fountain Valley. When the police searched his home, they found a bleach-stained shirt and zip ties resembling those used in the kidnapping. They also noticed a very strong smell of bleach emanating from appellant's truck and found a glove in the passenger compartment of the vehicle. The glove contained DNA from appellant's friend and business associate Hossein Nayeri, and DNA belonging to appellant's high school buddy Ryan Kevorkian was found on one of the zip ties.

Upon investigating Kevorkian, the police learned his wife Naomi had worked with appellant and Nayeri in their marijuana business. In the months leading up to the kidnapping, she enlisted a co-worker to create a phony email account that was used to purchase tracking and surveillance equipment that was sent to appellant's home. In addition, she purchased a shotgun and rented the van that was used in the kidnapping.

After the police arrested appellant, Nayeri fled to Iran, leaving behind his wife Cortney Shegerian. Shegerian was not cooperative when investigators initially contacted her. However, she eventually agreed to tell the truth and testify at appellant's trial in exchange for a grant of immunity. She also worked with law enforcement to lure Nayeri out of Iran to Europe so he could be extradited back to the United States.

Appellant, Nayeri, Naomi and Kevorkian were charged with two counts of kidnapping for ransom, and one count each of aggravated mayhem and torture. (§§ 209,

subd. (a), 205, 206.) It was also alleged they inflicted great bodily injury on Michael while torturing him. (§ 12022.7.)

Appellant was tried separately. At that trial, Shegerian testified about her relationship with Nayeri and the scheme to kidnap Michael. She said Nayeri was very abusive to her and also very cunning.[3] Shegerian also testified that Nayeri and appellant were very close friends. Not only did they grow marijuana together, appellant lived with Nayeri and Shegerian in Newport Beach in the fall of 2011. However, by the spring of 2012, the year the kidnapping occurred, appellant had moved to Fountain Valley, and Nayeri was spending most of his time conducting surveillance activities.

The primary focus of those activities was Michael. Using high-tech cameras and sophisticated GPS equipment, Nayeri monitored Michael's car, home and businesses, as well as his girlfriend and his parents. Nayeri also had Shegerian look up Michael on the internet and talked to her about how they could go about poisoning his dog.

In September 2012, a few weeks before the kidnapping, Nayeri was monitoring Michael on his home computer while Michael was in the desert exploring a potential mining investment. Nayeri asked Shegerian, "Why would someone be circling out in the desert?" He then suggested that would be a great place to bury cash.

Around this same time period, Shegerian saw Nayeri and appellant laughing one day while they were playing around with a blowtorch in Nayeri's garage. In addition to the blowtorch, Nayeri had a hardhat that he was scuffing up on the ground to make it look worn.

At the end of September, as the kidnapping date grew closer, Nayeri had Shegerian purchase four disposable "burner" phones. He gave one of the phones to

[3] Cunning enough to break out of the Orange County Jail while awaiting trial. He was on the lam for about a week before authorities apprehended him.

Shegerian, one to appellant, and he kept one for himself.[4] When appellant had trouble activating his phone, Nayeri had Shegerian explain to him how to do it.

On the night of the kidnapping, Nayeri told Shegerian to use his iPhone in the vicinity of their home, in an apparent attempt to create an alibi. She didn't hear from him again until eight o'clock the following morning. Calling from his burner phone, he instructed Shegerian to put money in a meter where appellant's truck was parked on the Balboa Peninsula. Shegerian did as told. At Nayeri's behest, she also bought four more burner phones and gave them to Nayeri that evening.

According to Shegerian, Nayeri was frantic after appellant was arrested. After destroying his phones, computers and surveillance equipment, he took a one-way flight to his native Iran. During the first few months he was there, he convinced Shegerian to send him money and lie to the police about his involvement in the case. However, as noted above, Shegerian eventually helped authorities capture Nayeri in 2013.

Although Shegerian was an important witness for the prosecution, she was not involved in the actual kidnapping, and thus her testimony did not directly implicate appellant in the alleged offenses. However, based on all the evidence that was presented, the prosecution theorized appellant, Nayeri and Kevorkian all worked together to carry out the kidnapping scheme. In particular, the prosecution maintained Nayeri was the group's leader, Kevorkian provided muscle for the operation, and appellant played an integral role as the driver of the van. Of course, given his prior relationship with Michael, appellant also knew Michael was involved in a lucrative, all-cash business. The prosecution argued this provided defendants with a compelling financial motive to commit the alleged offenses.

[4] Shegerian didn't know what happened to the fourth phone, but the prosecution theorized Nayeri gave it to Kevorkian so they could communicate with one another during the kidnapping.

At trial, appellant did not present any evidence in his defense, nor did he dispute the prosecution's portrayal of Michael and Mary as the victims of a brutal kidnapping scheme. Rather, he claimed there was insufficient evidence tying him to that scheme.

Shortly before the parties rested, the charges against appellant were modified in two respects. On the prosecution's motion, the section 12022.7 great bodily injury allegation charged in connection with the torture count was dismissed. In addition, two special allegations were orally added to the kidnapping for ransom charges, namely that Michael suffered bodily harm and that Mary was exposed to a substantial risk of death. Appellant did not object to the inclusion of those special allegations, which were explained in the jury instructions, discussed in closing argument, and included in the verdict forms.

In the end, the jury found appellant guilty of the four substantive charges, and it found the two newly-added special allegations attendant to the kidnapping for ransom charges to be true. The trial court sentenced appellant to consecutive terms of life in prison without parole (LWOP) on the kidnapping counts, plus consecutive terms of seven years to life on the aggravated mayhem and torture counts. This appeal followed.

Notice of the Kidnapping Charges

Appellant contends the jury's true findings on the special allegations added to the kidnapping for ransom counts, as well as the LWOP sentence he received on each of those counts, must be reversed because he was never formally charged with those allegations. Although appellant was orally informed of the allegations, and his attorney consented to them, he argues their inclusion in the verdict form violated his due process rights because he was never advised they exposed him to a sentence of LWOP. The Attorney General claims appellant forfeited this argument by failing to object to the special allegations in the trial court. He also maintains appellant was afforded sufficient notice of the special allegations to comport with due process. Although we reject the

Attorney General's forfeiture claim, we agree with him that appellant's due process rights were not violated by the manner in which he was charged, convicted or sentenced with respect to the kidnapping for ransom charges.

Appellant's claim requires us to examine the charging documents and the particular offenses at issue in this case. In count 1 of the complaint, appellant was charged with kidnapping Michael for ransom pursuant to section 209, subdivision (a), and in count 2, he was charged with committing the same offense against Mary.

Subdivision (a) of section 209 states that anyone who kidnaps another person for ransom "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."

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. (See *People v. Eid* (2010) 187 Cal.App.4th 859, 868, fn. 6; *People v. Chacon* (1995) 37 Cal.App.4th 52; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1237.) Because neither one of those circumstances was alleged in the complaint here, the parties agree appellant was originally charged with simple kidnapping for ransom.

At the preliminary hearing, the prosecution presented evidence of the harrowing circumstances under which Michael and Mary were kidnapped and the serious injuries Michael suffered at the hands of his captors. The preliminary hearing judge determined there was sufficient evidence to bind appellant over for trial on all of the charges and allegations.

The subsequently-filed information mirrored the complaint in all material respects. Like the complaint, it alleged simple kidnapping for ransom in counts 1 and 2, not the aggravated form of that offense.

. At trial, the only disputed issue was identification. Toward the end of the prosecution's case, the judge met with the parties to discuss jury instructions. The prosecution proposed CALCRIM No. 1202, which sets forth the requirements for aggravated kidnapping for ransom. Defense counsel did not object to that instruction. And since his theory of the case was that appellant was not involved in the subject kidnapping, he did not request instructions on any lesser offenses. When the court asked appellant if he agreed to forego instructions on any lesser offenses, he said, "That's fine."

On the next court date, shortly before the parties rested, the trial judge met with counsel outside the presence of the jury to formalize a few matters. Appellant was also present during this meeting. At the outset, the judge stated, "Counts 1 and 2, the 209 contains a special, additional factor if great bodily injury was inflicted. The People also allege a 12022.7, great bodily injury, sentencing enhancement, as to [the torture charge in] count 4, which I understand they have a pending motion regarding."

The judge's description of the charges was not entirely accurate. As noted above, section 209, subdivision (a) uses the term "bodily harm," not "great bodily injury," which is the gravamen of the sentence enhancement provided in section 12022.7. The court's mistake turned out to be contagious because, as the meeting progressed, the prosecutor also conflated those two terms, as shown below.

Continuing, the judge stated he "prepared jury instructions asking the jury to make findings on both the substantive crime [of kidnapping for ransom] and then whether or not that crime, if committed, great bodily injury was inflicted. [¶] The way that the CALCRIMS read, it should be a special finding, but it's not technically a sentencing enhancement and the like." When the judge asked defense counsel if he had any objection to the court instructing the jury in that manner, he said no.

With that, the prosecution moved to dismiss the section 12022.7 great bodily injury enhancement allegation attached to count 4, the torture count. The judge responded, "That request is granted and the court will then remove the great bodily injury jury instruction from that [count] making sure that it's still contained in counts 1 and 2[.]" The following discussion then took place:

"[Prosecutor Brown]: . . . In regards to the second count involving Mary . . ., if the court could take a look at the actual verdict that the People drafted in regards to count 2, there is kind of an 'or' within [section 209, subdivision (a), of] the Penal Code. []There is gbi inflicted on the person ['or' and our theory of liability is the 'or' part. [¶] So I know the court just drafted a special instruction regarding that finding. It's a little different with regards to our theory on Mary[.]

"[Prosecutor Murphy]: We apologize for the lateness, Your Honor. We were actually dealing with this up until last night.

"The Court: Noted. [¶] So your theory is intent to confine [in] a manner [] that exposes [Mary] to a substantial likelihood of death?

"[Prosecutor Murphy]: Yes."

The judge asked defense counsel if he had any objection to the prosecution pursuing that theory, and he said he did not. The judge then told the parties he would be modifying the jury instruction as to count 2 to comport with that theory.

Alas, the instruction on the kidnapping for ransom charge in count 2 informed the jurors that if they found appellant guilty of that offense, they must decide whether the prosecution proved the additional allegation that Mary was exposed to a substantial likelihood of death. And the instruction on count 1 stated that if the jurors found appellant guilty of kidnapping for ransom as alleged in that count, they must decide whether the prosecution proved the additional allegation that Michael suffered bodily harm.

During closing arguments, the prosecutor argued there was ample evidence to support those allegations, and defense counsel did not disagree. Defense counsel instead took the position that appellant had nothing to do with the kidnapping plan that led to Michael suffering bodily harm and Mary being exposed to a substantial likelihood of death.

The jury rejected defense counsel's argument. It not only found appellant guilty of kidnapping for ransom, as alleged in counts 1 and 2, it also found true the special allegations of bodily harm as to Michael and substantial likelihood of death as to Mary. Appellant did not object to the inclusion of those allegations in the verdict forms, nor did he object to lack of notice when the trial court sentenced him to LWOP on those two counts. However, because neither the complaint nor the information included those allegations, he now contends he was improperly convicted of a greater offense (aggravated kidnapping for ransom) than that with which he was charged (simple kidnapping for ransom) in violation of his due process rights. For reasons we now explain, we disagree.

Due process is an integral component of our criminal justice system. Among other things, it requires that an accused be afforded "'fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.' [Citation.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) This notice requirement extends to any "allegations that will be invoked to increase the punishment for [the defendant's] crimes. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1227 (*Houston*).)

As a corollary of these notice requirements, a defendant generally cannot be convicted of a greater offense than that with which he was charged. (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) But, as respondent points out, and the *Houston* case illustrates, this rule is subject to the forfeiture doctrine that governs criminal appeals, and

there may be instances where the failure to object to the greater offense in the trial court precludes the defendant from challenging his conviction for that offense on appeal. Based on our reading of the *Houston* decision, however, we do not believe this is one of those instances.

In *Houston*, the defendant was convicted of attempted *premeditated* murder, which carries a sentence of life in prison, even though he was only charged with attempted murder, which carries a maximum sentence of nine years. On appeal, he argued his life sentence violated due process because, in contravention of the statutory directive in section 664, the prosecution failed to allege the premeditation element in the accusatory pleading. (*Houston, supra*, 54 Cal.4th at p. 1225.) However, the Supreme Court ruled the defendant forfeited this claim by failing to raise it in the trial court. In so ruling, the court relied on two key facts: 1) the trial judge notified the defendant before the case was submitted to the jury that he could be sentenced to life in prison for attempted premediated murder, and 2) the jury was properly instructed and expressly found appellant acted with premeditation in attempting to murder his victims. (*Id*. at pp. 1227-1229.)

In one respect, our case is similar to *Houston* in that the jury was properly instructed and expressly found true allegations that were not contained in the accusatory pleading, namely, that during the kidnapping crimes alleged in counts 1 and 2, Michael suffered bodily harm and Mary was exposed to a substantial likelihood of death. But, unlike the situation in *Houston*, the trial judge here did not explain to appellant that a true finding on those allegations would increase his punishment from life in prison to LWOP.

In fact, the judge suggested those allegations would not increase his sentence at all when he told appellant the bodily harm allegation was "a special finding, but it's not technically a sentencing enhancement and the like." While a person trained in the arcana of California sentencing law would understand the judge was attempting to draw a distinction between the statutory element of an offense and a separate sentencing

enhancement provision, a layperson such as appellant might well construe the judge's comment simply to mean that a true finding on the bodily harm allegation would not result in appellant's sentence being enhanced or increased. And, at no point did anyone say anything that was likely to disabuse appellant of such a notion.

The judge also misdescribed the bodily harm allegation as requiring great bodily injury. This was not fatal in terms of providing appellant with notice of the charges, but it could not have facilitated his understanding of the proceedings and the complicated legal issues discussed therein. All things considered, we do not believe appellant forfeited his right to challenge the inclusion of the special allegations appurtenant to the kidnapping for ransom charges. (*People v. Perez* (2017) 18 Cal.App.5th 598, 614-618 [rejecting forfeiture claim where, as here, and unlike in *Houston*, the defendant was not apprised of the increased punishment he would receive if convicted of an uncharged greater offense]; *People v. Arias* (2010) 182 Cal.App.4th 1009, 1016-1021 [same].)

Turning to the merits, appellant contends his due process rights were infringed because he was never formally charged with aggravated kidnapping for ransom, nor was he ever advised he could be sentenced to LWOP if he were convicted of that offense. In light of the flexible pleading rules applicable in our state we conclude the contention fails.

It is well established that California's "'Penal Code permits accusatory pleadings to be amended at any stage of the proceedings "for any defect or insufficiency" (§ 1009), and bars reversal of a criminal judgment "by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits" (§ 960).' [Citations.]" (*People v. Sawyers* (2017) 15 Cal.App.5th 713, 720.)

It is equally true that an "[o]ral amendment of an accusatory pleading may suffice for statutory and due process purposes. [Citation.] 'The informal amendment

doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information.' [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 82.) Under that doctrine, "a defendant may, by his conduct, impliedly consent to amendment of a pleading. The '"proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment."' [Citation.]" (*Id*. at pp. 720-721.)

For purposes of these rules, there is no requirement that any specific words or express invocation be employed to effectuate a legally sufficient amendment of the charges. (*People v. Pettie, supra,* 16 Cal.App.5th at p. 84.) Rather, due process will be deemed satisfied if the record, considered as whole, shows the defendant received adequate notice of the prosecution's intent to charge him with a particular crime or enhancement, and the defendant, by word or conduct, acquiesced to the charge. (*Ibid*.; *People v. Haskin, supra,* 4 Cal.App.4th at p. 1438.)

Here, appellant had ample notice the prosecution wanted to charge him with aggravated kidnapping for ransom. It's true the information alleged simple kidnapping for ransom, and that charge was never formally amended. However, during the hearing on jury instructions, defense counsel did not object when the prosecution submitted instructions on aggravated kidnapping for ransom. Instead, defense counsel and appellant both agreed that instructions on lesser offenses were not required because this was an all-or-nothing case; either appellant participated in the kidnapping, in which case he was guilty of aggravated kidnapping for ransom, or he did not participate in the kidnapping, in which case he was not guilty of anything.

Furthermore, on the next court date, the judge explained he was going to instruct the jury on a special allegation pertaining to the kidnapping counts. In particular, he said he was going to ask the jury to consider whether, in committing the alleged kidnapping for ransom offenses, "great bodily injury" was inflicted. We recognize the

circumstance elevating simple kidnapping for ransom to aggravated kidnapping for ransom is "bodily harm," not "great bodily injury." (§ 209, subd. (a).) However, the two concepts are clearly related, and there was no dispute the victim sustained serious, life-threatening injuries in this case. Moreover, on the heels of this discussion, the prosecutor informed the court that, in regard to Mary, the state intended to prove the alternative circumstance needed to establish aggravated kidnapping for ransom, which is that the victim was exposed to a substantial likelihood of death. Given everything that was discussed at the hearing, there can be little doubt the prosecution was alleging both of the circumstances required to transform the charge of simple kidnapping for ransom into the aggravated form of that offense.

When the judge asked defense counsel if he objected to instructions or verdict forms pertaining to those allegations, he said no. He also voiced no objection when the prosecutor argued those allegations in closing argument or when the jury returned true findings thereon. On this record, we are confident the conditions for an informal amendment of the charges have been satisfied. Because appellant was apprised of the prosecutor's intent to prove the allegations required for aggravated kidnapping for ransom, because he acquiesced to those allegations, and because they could have no impact on the conduct of his mistaken identity defense. He was not deprived of his right to due process.[5]

In reaching this conclusion, we are mindful appellant was never expressly informed he could be sentenced to LWOP if the jury found the allegations true. In fact, as discussed above, that is the primary reason we did not apply the forfeiture doctrine to his due process claim. However, once appellant acquiesced to the prosecution's desire to include allegations of bodily harm and substantial likelihood of death with respect to the

[5] In contending appellant had adequate notice he could be sentenced to LWOP for his part in the kidnapping, the Attorney General draws our attention to two online news articles that allegedly mentioned this fact. However, those articles are not included in the record on appeal, and there is no evidence appellant ever saw them, so they have no bearing on our analysis.

kidnapping charges, those charges were effectively amended to allege the crime of aggravated kidnapping for ransom. Therefore, appellant was not convicted of a greater offense than with which he was charged, in derogation of his due process rights. He was instead convicted of an offense that was added by informal amendment to the existing charges. That being the case, there was no need to inform appellant of the punishment for that offense. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 747 [due process is satisfied if the defendant is fairly apprised of the specific factual allegations that will be invoked to increase the punishment for his crimes]; *People v. Robinson* (2004) 122 Cal.App.4th 275, 282 [same].)

Accomplice Instructions

At trial, the parties agreed Shegerian was an accomplice by virtue of her involvement in the case. Although the trial court instructed the jury the statements of an accomplice must be corroborated, the instruction on prior statements did not reiterate that requirement. Appellant fears this omission allowed the jury to convict him based on Shegerian's prior statements, even if they were not corroborated. We do not believe it is reasonably likely the jury construed the court's instructions in this fashion. They are not cause for reversal.

Pursuant to CALCRIM No. 335, the jury was instructed, "If the charged crimes were committed, then [Shegerian was an] accomplice[] to those crimes. You may not convict the defendant of any crime based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] One, the accomplice's statement . . . or testimony is supported by other evidence that you believe; [¶] Two, that supporting evidence is independent of the accomplice's statement or testimony and; [¶] Three, that supporting evidence tends to connect the defendant to the commission of the crime."

The court also gave CALCRIM No. 318, which told the jury, "If you decide that a witness made . . . statements [before trial], you may use those statements in two

ways: [¶] One, to evaluate whether the witness's testimony in court is believable; [¶] And two, as evidence that the information in those earlier statements [is] true."

Appellant does not dispute the correctness of these instructions. His argument is that the latter instruction on prior statements undermined the corroboration requirement set forth in the former instruction. However, appellant did not ask the trial judge to modify or clarify the instructions in order to remedy this purported error. He has thus forfeited his right to challenge the instructions on appeal. (*People v. Lee* (2011) 51 Cal.4th 620, 638 ["A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel . . . and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"].)

Even if the argument had been preserved for appeal, it would not carry the day. In determining whether instructional error has occurred, we presume jurors are intelligent people who are capable of understanding and correlating all of the instructions they are given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) Unless there is a reasonable likelihood the jury construed the challenged instructions in a manner that violated the defendant's rights, we must uphold the court's charge to the jury. (*Ibid.*; *People v. Rogers* (2006) 39 Cal.4th 826, 873.)

There was no such likelihood in this case because the challenged instructions addressed two different issues. CALCRIM No. 318, the instruction on prior statements, spoke to the permissible usage of Shegerian's extrajudicial statements from a general evidentiary standpoint. CALCRIM No. 335, the instruction on accomplice testimony, addressed the specific requirements for using Shegerian's statements to obtain a conviction. So even if the jurors used Shegerian's prior statements for their truth, as they were allowed to do under CALCRIM No. 318, they would have known from

CALCRIM No. 335 that they could not use those statements to convict unless they were corroborated by other evidence. In other words, viewing the instructions in light of one another, the jurors would have realized they could not convict appellant on the basis of uncorroborated pretrial statements that were made by Shegerian. Appellant's instructional claim is without merit.

The Two-Week Trial Recess

During the trial, the judge recessed the proceedings for 14 days over the course of the winter holidays. Appellant would have us believe this delay violated his state and federal due process rights. We think not.

Appellant's trial started in December 2017, roughly five years after he was arrested. At a pretrial hearing on December 5, the prosecutor asked the judge what days the court was going to be in session during the trial. After discussing the matter with counsel off the record, the judge stated, "We discussed the scheduling and it looks as if all parties are in agreement." "We'll be off [Tuesday, December] 26th through the 29th, and that we will be telling the jury that we will be doing evidence [December] 12th through the 22nd, and then we will be doing closing arguments probably like January 3rd." No one objected to this scheduling framework.

Six days later, on December 11, the judge met with counsel to discuss voir dire and the prospect of prescreening prospective jurors who might have time constraints due to work or prepaid vacations. The judge surmised those constraints might not be a problem for some of the prospective jurors because the court was going to be in recess during the week of Christmas. He also stated he would be time-qualifying the jurors through January 5, not including the time required for deliberations. Again, neither side objected to this scheduling proposal.

As it turned out, the trial did not begin until Thursday, December 14. That day, opening statements were given in the afternoon, and at the end of the session, the judge ordered the jurors to return on Monday, December 18 for the start of testimony.

After the jurors left the courtroom, the prosecutor informed the judge he was going to be moving through his witnesses pretty quickly because he and defense had been able to narrow the scope of certain testimony. In fact, throughout the trial, the parties worked hard[6] to streamline the case through the use of stipulations and other time-saving measures.

Consequently, the prosecution's case went faster than initially expected. By Wednesday, December 20, the prosecution was down to its final witness, lead detective Ryan Peters. Peters finished his testimony just before noon that day. At that time, the judge asked the parties if there was any reason he should not excuse the jury until January 3, 2018, and both sides answered no. The court then adjourned the trial until that date. In so doing, the court admonished the jurors not to discuss the case during the break or start forming opinions about the case until they began their deliberations.

When the trial resumed on January 3, the prosecution recalled Peters to the stand for a few brief questions before resting its case. Then the defense rested without presenting any evidence, and the parties made their closing arguments. The next day, the jury was instructed and received the case. After deliberating for less than three hours, it found appellant guilty as charged.

Appellant contends the 14-day recess that occurred from December 20 to January 3 violated his fair trial rights because, having heard the bulk of the prosecution's evidence by the 20th, the jurors would not have been able to keep an open mind over the course of the recess. However, of those 14 days, six were weekends or holidays and four (December 26 thru the 29th) were taken off by agreement of the parties, leaving only three and one-half unplanned recess days: The afternoon of the 20th, the 21st and 22nd, and January 2. And when the court adjourned on the 20th, appellant did not object to the court ordering a recess until January 3. He therefore waived his right to complain about

[6] We're impressed.

the delay attributable to those three and one-half days. (*People v. Ochoa* (2001) 26 Cal.4th 398, 441 [absent an objection, the waiver rule bars claims arising from the granting of a continuance during trial]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 791-792 [by consenting thereto, the defendant waived his right to challenge a 17-day trial recess that occurred over the winter holidays].)

Waiver aside, the two-week delay in appellant's trial did not constitute an abuse of discretion or violate appellant's due process rights. (See generally *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 968 [the decision whether to order a midtrial continuance rests within the sound discretion of the trial court]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042 [to overturn a conviction on due process grounds the defendant bears a heavy burden to show the procedures used at trial were fundamentally unfair].) Had the court not recessed the trial on December 20, there is a good chance the jurors would have received the case before Christmas and felt rushed to deliver a verdict before that holiday arrived, with the prosecution's evidence fresh in their minds.[7] As it was, the jury was given ample time to process and evaluate the state's case before being asked to render a verdict. This prevented a rush to judgment based on temporary feelings of passion, prejudice, or inconvenience. (See *People v. Johnson, supra,* 19 Cal.App.4th at p. 791 [pointing out that forcing a jury to deliberate against a Christmas holiday deadline is often not in the best interest of the defendant].)

And the fact the recess occurred before deliberations commenced distinguishes this case from *People v. Santamaria* (1991) 229 Cal.App.3d 269, upon which appellant relies. When a recess occurs during deliberations, as it did in *Santamaria*, the jury may forget important aspects of the evidence or the court's instructions. (*Id*. at p. 282.) That danger was minimized here because the recess occurred before the jury heard closing arguments, during which the evidence was

[7] Appellant presented no defense.

discussed at length, and before the jury received its instructions from the court, which would clarify the analysis of that evidence. Considering all the pertinent circumstances, we do not believe the recess is cause for reversal.[8]

Sentencing Claims

Lastly, appellant contends his consecutive life sentences for aggravated mayhem and torture must be stayed under section 654 because those crimes were part and parcel of the kidnapping offense for which he was separately punished. Once again, we disagree.

Section 654 states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute "applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 551; *In re Calvin S.* (2016) 5 Cal.App.5th 522, 533.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. If all of his crimes were carried out pursuant to a single objective, multiple punishment is prohibited. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

[8] This case is also distinguishable from *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14, in which a three-week trial continuance was found to be "inherently prejudicial" because it undermined the jury's ability to fairly assess the evidence the defendant introduced at trial. (*Id*. at p. 21.) Since appellant did not present any evidence in his defense, that was not a concern here.

On appeal, we must remember the defendant's intent and objective present factual questions for the trial court, and its findings, whether express or implied, will be upheld if they are supported by substantial evidence. (*People v. Petronella* (2013) 218 Cal.App.4th 945, 964; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Under the substantial evidence test, "our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted; accord, *People v. Petronella, supra*, 218 Cal.App.4th at p. 964; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

The crimes in this case involved a course of conduct that started with the victims being kidnapped from their home in Newport Beach and ended two and a half hours later when they were left out in the Mojave Desert. During that period of time, the kidnappers tortured Michael repeatedly, and once they realized they were not going to get the million dollars they were after, they cut off his penis, which was the basis for the aggravated mayhem count. Appellant contends section 654 applies to the torture count because the only reason he and his cohorts tortured Michael was to get him to tell them where the million dollars was, which is why they kidnapped him in the first place.

At sentencing, the trial judge rejected this contention because, besides torturing Michael in the back of the van to find out where the money was, the kidnappers also poured bleach on Michael after they cut off his penis. The judge found the bleach pouring amounted to a torturous act that was done not to get Michael to reveal the location of the money, but simply to add to the pain and suffering he had already endured. Indeed, the record indicates that one of the effects of pouring bleach on Michael was that the kidnappers' footprints became permanently seared into his skin.

Relying on *People v. Siko* (1988) 45 Cal.3d 820, 825-826 and *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1337-1340, appellant contends the judge's finding regarding the purpose of the bleach pouring was foreclosed by the prosecutor's closing argument, in which he asserted the kidnappers doused Michael with bleach to destroy their DNA. Those cases stand for the proposition that if there is a basis for identifying the specific factual basis for a verdict, such as the charging documents, closing arguments or verdict forms, the trial court may not rely on other acts to avoid application of section 654. (*Ibid*.) By parity of reasoning, appellant contends that because the prosecutor referenced the destruction of DNA as a motive for the bleach pouring, the trial judge was precluded from finding the act was done for any additional reason. However, the prosecutor did not argue the destruction of DNA was the *only* reason the kidnappers poured bleach on Michael and their cavalier disposal of his penis supports the idea they could well have harbored baser motives at that time. Therefore, the judge was free to find the act was done for some other reason as well, such as torture. (*Ibid*.) Suffice it to say, there is substantial evidence in the record to support the judge's finding the bleach pouring had multiple motives and was not done for the sole purpose of destroying evidence.

Still, appellant contends the judge's reliance on the bleach-pouring incident as the basis for not applying section 654 to the torture count was improper because the act of pouring bleach on Michael did not amount to torture. Appellant does not dispute the act caused Michael great bodily injury, the first element of torture. But he does dispute the sufficiency of the evidence to support the second element, namely, that by pouring the bleach, he and his cohorts intended to cause Michael to suffer cruel or extreme pain "for the purpose of revenge, extortion, persuasion, or for any sadistic purpose[.]" (§ 206.)

In challenging this element, appellant again relies on the prosecutor's claim during closing argument that the kidnappers poured bleach on Michael to destroy their DNA. To appellant's way of thinking, this claim proves the destruction of evidence was

the sole reason for the bleach. However, if the kidnappers were so transfixed on destroying their DNA, they would have poured bleach on Mary too. Their failure to do so supports the conclusion they had an additional reason for dousing Michael with bleach, which was either to exact revenge on him for not telling them where the money was and/or to simply make him suffer, which is the hallmark of sadism. Either way, the bleach-pouring act was a sufficient basis for the trial judge's torture theory. The judge was not remiss for relying on that act in considering the applicability of section 654 in connection with the kidnapping for ransom counts and the torture count. We discern no basis for disturbing appellant's life sentence for torturing Michael.

As for the aggravated mayhem count, appellant argues his sentence for that offense should have been stayed pursuant to section 654 because it was based on the same act – the severing of Michael's penis – that supported the bodily harm element of the aggravated kidnapping for ransom charge in count 1. In so arguing, appellant admits there were other acts that could have supported the bodily harm element, such as the blowtorching or the tasering. However, he insists that doesn't matter because the prosecutor "specifically elected" not to rely on those acts in urging the jury to convict him on count 1.

The record does not support appellant's position. While the prosecutor alluded to the kidnappers' act of severing Michael's penis while discussing the bodily harm element of the aggravated kidnapping for ransom charge, he did not tell the jury to ignore all of the other bodily harm Michael suffered in deciding whether appellant was guilty of that offense. To the contrary, the prosecutor urged the jury to consider everything Michael went through and all the injuries he received. Therefore, it cannot be said that the prosecutor elected to base the bodily harm allegation solely on the dismembering of Michael's penis.

Because the prosecutor did not elect to prove the bodily harm allegation on such a limited basis, and because there is nothing else in the record that reveals which act

or acts the jury relied on in finding that allegation to be true, the trial judge was free to consider all of the evidence adduced at trial in determining whether section 654 applied to appellant's sentences for aggravated mayhem and aggravated kidnapping for ransom. (*People v. Siko, supra,* 45 Cal.3d at pp. 825–826; *People v. McCoy, supra,* 208 Cal.App.4th at p. 1340.) Having reviewed the entire record ourselves, we are convinced there is substantial evidence to support the trial court's implied finding those two offenses were based on different acts and committed for different reasons. Therefore, appellant is not entitled to relief under section 654.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

DUNNING, J.*

*Retired judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX F

Order Granting Review (April 22, 2020) and Order Transferring Case back to Court of Appeal (September 23, 2020) by California Supreme Court.

Court of Appeal, Fourth Appellate District, Division Three - No. G056608

S260462

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.

The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of related issues in *People v. Anderson*, S253227 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Cantil-Sakauye
Chief Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

Court of Appeal, Fourth Appellate District, Division Three - No. G056608

S260462

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.

The above-captioned matter is transferred to the Court of Appeal, Fourth Appellate District, Division Three, with directions to vacate its decision and reconsider in light of *People v. Anderson* (2020) 9 Cal.5th 946. (Cal. Rules of Court, rule 8.528(d).)

Cantil-Sakauye
Chief Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

_____
Associate Justice

APPENDIX G

Unpublished Opinion of the California Court of Appeal, Fourth Appellate District, Division Three (March 25, 2021) (Handley II)

Filed 3/25/21 P. v. Handley CA4/3
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.	G056608 (Super. Ct. No. 13CF3394) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Cliff Gardner and Daniel J. Buffington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, David E. Madeo and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kyle Shirakawa Handley was convicted of multiple crimes for participating in a brutal kidnapping scheme that resulted in one of the victims being tortured and sexually mutilated. On appeal, he argues 1) he did not receive adequate notice of the charges, 2) the jury was improperly instructed on how to view accomplice testimony, 3) he was denied due process by virtue of a two-week recess that occurred during the trial, and 4) his sentence violates Penal Code section 654.[1] In an opinion filed early last year, we rejected appellant's arguments and affirmed the judgment against him. (*People v. Handley* (Jan. 6, 2020, G056608) [nonpub. opn.] (*Handley I*).)

The California Supreme Court granted appellant's petition for review on the notice issue and transferred the case back to us with directions to vacate our opinion and reconsider that issue in light of its recent decision in *People v. Anderson* (2020) 9 Cal.5th 946 (*Anderson*). Having examined *Anderson*, and the parties' supplemental briefing about its applicability in this case, we conclude appellant was given sufficient notice of the charges and again affirm the judgment.

FACTS

Appellant and the targeted victim, Michael S., were not strangers. In 2011, appellant was a marijuana vendor, and Michael co-owned two medical marijuana dispensaries in Orange County. Michael purchased marijuana from appellant for his dispensaries, and the two became friends. Their friendship was on full display in May 2012, when appellant joined Michael and his other friends in Las Vegas for a weekend getaway. During the trip, Michael freely spent thousands of dollars on food, lodging and entertainment. And, as was his wont, he paid for everything with cash.[2]

Appellant appeared to have a good time in Vegas. But after the trip, he suddenly stopped communicating and doing business with Michael. Although Michael

[1] All further statutory references are to the Penal Code.

[2] Due to the federal prohibition on marijuana sales, credit card companies and banks were unwilling to do business with Michael's dispensaries. Consequently, Michael took in a lot of cash he had nowhere to deposit.

tried contacting him on several occasions, appellant never returned his calls or came by his dispensaries, as he had done in the past. Appellant disappeared from Michael's life, both professionally and personally, for no apparent reason.

At the time, Michael really didn't give that development much thought. His dispensaries were doing well, and he was happily renting a room in a house on the Balboa Peninsula in Newport Beach. He certainly did not foresee the dark events that transpired in his life on October 2, 2012, roughly five months from the last time he had seen or heard from appellant.

That evening, Michael was awakened in the middle of the night by two men who were pointing a flashlight and a shotgun in his face. When Michael reached for the gun, the men beat and choked him, causing him to pass out momentarily. The men bound Michael's feet together and tied his hands behind his back with zip ties. They also blindfolded him and taped his mouth shut. Then they dragged him down the stairs and placed him in a hallway next to his roommate Mary B., who, like Michael, was awakened at gunpoint, tied up, gagged and blindfolded by the intruders. However, unlike Michael, Mary was not harmed in any other way. To the contrary, they assured her, "This isn't about you. Just be quiet. Don't fight . . . and you'll be alright."

Mary noticed the men spoke with a fake Spanish accent, as if they were trying to disguise their voices. She also surmised there were three intruders in all because while one of them stood guard over her and Michael in the hallway, she heard two others ransacking the residence upstairs. After about 15 minutes, those two returned downstairs and asked Michael, "Where's the money?" Michael said he had $2,000 hidden in a sock in his room, but the men were not interested in that. They told Michael they wanted a million dollars from him. When Michael said he did not have that much money, they carried him and Mary to a van outside and took them to the Mojave Desert.

Along the way, Michael was subjected to horrific abuse. His captors thought he had buried a million dollars somewhere in the desert, and in order to get him

to tell them where it was, they repeatedly stomped him with their boots, beat him with a rubber hose, shocked him with a taser, and burned him with a blowtorch. Michael tried to explain to them that there was no million dollars, but every time he did so, they abused him some more.

Although the men did not harm Mary, she was in the back of the van with Michael during the entire trip. In fact, she was so close to him that when his legs twitched from being tasered, they would sometimes come into contact with her. The men beat and berated Michael whenever that happened. Even though his leg movements were involuntary, they used every excuse they could find to abuse him. All told, the tasering, burning and beating went on for about two and a half hours before the van finally pulled over on a deserted road out near Rosamond.

Michael and Mary were still tied up and blindfolded when the men carried them out of the van and put them down on the desert sand. Michael continued to insist he knew nothing about any million dollars. Eventually, the men gave up on the money and told Michael that if they couldn't get the million dollars, then they "want[ed] his dick." They proceeded to hold Michael down, lower his shorts and put a zip tie around the base of his penis. Then one of the men took out a knife and began cutting off Michael's penis. As he was doing so, the man chimed out the words "back and forth, back and forth" in a sing-songy manner, as if Michael's suffering was a joke. When he finished the deed, he and his companions doused Michael with bleach. Then he turned to Mary and told her he was going to toss his knife into the nearby bushes. He said if she could find the knife and cut herself free, it would be her "lucky day." He then tossed the knife, told Mary to count to 100, and left with his cohorts in the van.

Mary managed to hitch up her blindfold and retrieve the knife, just as the desert sun was beginning to appear on the horizon. She then walked about a mile to the main road and flagged down a patrol officer from the Kern County Sheriff's Department. Mary directed the officer back to where Michael was located. When they arrived,

Michael was lying in the dirt, writhing in pain. Although he survived the ordeal, he suffered burns and bruises all over his body, and despite a thorough search of the area, his severed penis was never found.

During the ensuing investigation, Michael told police he had no known enemies and could not think of anyone who would want to harm him. But when the police canvassed Michael's neighborhood in search of clues, they got a break. It turned out that on the afternoon of the kidnapping, one of Michael's neighbors saw a white pickup truck in the alley near Michael's house. There were three men near the truck, one of whom was wearing a hardhat. They extended a ladder onto Michael's house, as if they were there to do construction work, but they had no equipment and there was no construction going on in the area. Thinking this suspicious, the neighbor jotted down the truck's license number. Upon running the number, investigators learned the truck was registered to appellant.

At that time, appellant was living in Fountain Valley. When the police searched his home, they found a bleach-stained shirt and zip ties resembling those used in the kidnapping. They also noticed a very strong smell of bleach emanating from appellant's truck and found a glove in the passenger compartment of the vehicle. The glove contained DNA from appellant's friend and business associate Hossein Nayeri, and DNA belonging to appellant's high school buddy Ryan Kevorkian was found on one of the zip ties.

Upon investigating Kevorkian, the police learned his wife Naomi had worked with appellant and Nayeri in their marijuana business. In the months leading up to the kidnapping, she enlisted a co-worker to create a phony email account that was used to purchase tracking and surveillance equipment that was sent to appellant's home. In addition, she purchased a shotgun and rented the van that was used in the kidnapping.

After the police arrested appellant, Nayeri fled to Iran, leaving behind his wife Cortney Shegerian. Shegerian was not cooperative when investigators initially

contacted her. However, she eventually agreed to tell the truth and testify at appellant's trial in exchange for a grant of immunity. She also worked with law enforcement to lure Nayeri out of Iran to Europe so he could be extradited back to the United States.

Appellant was charged with two counts of aggravated kidnapping and one count each of aggravated mayhem and torture. (§§ 209, subd. (a), 205 & 206.) It was also alleged that appellant inflicted great bodily injury on Michael during the torture offense. (§ 12022.7.) Nayeri, Kevorkian and Naomi faced similar charges, but the trial court denied the prosecution's motion for consolidation, so appellant was tried separately.

At his trial, Shegerian testified about her relationship with Nayeri and the scheme to kidnap Michael. She said Nayeri was very abusive to her and also very cunning.[3] She also said Nayeri and appellant were very close friends. Not only did they grow marijuana together, appellant lived with Nayeri and Shegerian in Newport Beach in the fall of 2011. However, by the spring of 2012, the year the kidnapping occurred, appellant had moved to Fountain Valley, and Nayeri was spending most of his time conducting surveillance activities.

The primary focus of those activities was Michael. Using high-tech cameras and sophisticated GPS equipment, Nayeri monitored Michael's car, home and businesses, as well as his girlfriend and his parents. Nayeri also had Shegerian look up Michael on the internet and talked to her about how they could go about poisoning his dog.

In September 2012, a few weeks before the kidnapping, Nayeri was monitoring Michael on his home computer while Michael was in the desert exploring a potential mining investment. Nayeri asked Shegerian, "Why would someone be circling out in the desert?" He then suggested that would be a great place to bury cash.

[3] Cunning enough to break out of the Orange County Jail while awaiting trial. He was on the lam for about a week before authorities apprehended him.

Around this same time period, Shegerian saw Nayeri and appellant laughing one day while they were playing around with a blowtorch in Nayeri's garage. In addition to the blowtorch, Nayeri had a hardhat that he was scuffing up on the ground to make it look worn.

At the end of September, as the kidnapping date grew closer, Nayeri had Shegerian purchase four disposable "burner" phones. He gave one of the phones to Shegerian, one to appellant, and he kept one for himself.[4] When appellant had trouble activating his phone, Nayeri had Shegerian explain to him how to do it.

On the night of the kidnapping, Nayeri told Shegerian to use his iPhone in the vicinity of their home, in an apparent attempt to create an alibi. She didn't hear from him again until eight o'clock the following morning. Calling from his burner phone, he instructed Shegerian to put money in a meter where appellant's truck was parked on the Balboa Peninsula. Shegerian did as told. At Nayeri's behest, she also bought four more burner phones and gave them to Nayeri that evening.

According to Shegerian, Nayeri was frantic after appellant was arrested. After destroying his phones, computers and surveillance equipment, he took a one-way flight to his native Iran. During the first few months he was there, he convinced Shegerian to send him money and lie to the police about his involvement in the case. However, as noted above, Shegerian eventually helped authorities capture Nayeri in 2013.

Although Shegerian was an important witness for the prosecution, she was not involved in the actual kidnapping, and thus her testimony did not directly implicate appellant in the alleged offenses. However, based on all the evidence that was presented, the prosecution theorized appellant, Nayeri and Kevorkian all worked together to carry out the kidnapping scheme. In particular, the prosecution maintained Nayeri was the

[4] Shegerian didn't know what happened to the fourth phone, but the prosecution theorized Nayeri gave it to Kevorkian so they could communicate with one another during the kidnapping.

group's leader, Kevorkian provided muscle for the operation, and appellant played an integral role as the driver of the van. Of course, given his prior relationship with Michael, appellant also knew Michael was involved in a lucrative, all-cash business. The prosecution argued this provided defendants with a compelling financial motive to commit the alleged offenses.

At trial, appellant did not present any evidence in his defense, nor did he dispute the prosecution's portrayal of Michael and Mary as the victims of a brutal kidnapping scheme. Rather, he claimed there was insufficient evidence tying him to that scheme.

Shortly before the parties rested, the charges against appellant were modified in two respects. On the prosecution's motion, the section 12022.7 great bodily injury allegation charged in connection with the torture count was dismissed. In addition, two special allegations were orally added to the aggravated kidnapping charges, namely that Michael suffered bodily harm and that Mary was subjected to a substantial likelihood of death. Appellant did not object to the inclusion of those special allegations, which were explained in the jury instructions, discussed in closing argument, and included in the verdict forms.

In the end, the jury found appellant guilty of the four substantive charges, and it found the two newly-added special allegations attendant to the aggravated kidnapping charges to be true. In light of those special allegations, the trial court sentenced appellant to life in prison without parole (LWOP) on the aggravated kidnapping counts. In addition, the court imposed consecutive terms of seven years to life on the aggravated mayhem and torture counts. This appeal followed.

Notice of the Charges

Appellant contends the jury's true findings on the special allegations added to the aggravated kidnapping counts, as well as the LWOP sentence he received on each of those counts, must be reversed on due process grounds because he was never formally

charged with those allegations. The Attorney General disagrees. In his view, appellant received sufficient notice that he could be sentenced to LWOP if he was convicted of aggravated kidnapping. We agree with the Attorney General that appellant's due process rights were adequately protected in this case.

Appellant's claim requires us to examine the crime of aggravated kidnapping and the manner in which it was alleged in this case. As noted above, appellant was charged with two counts of aggravated kidnapping in violation of section 209, subdivision (a) (section 209(a)). That provision states that anyone who kidnaps another person for ransom, reward, extortion or to exact money from another person "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." (§ 209(a).)

In our original opinion, we characterized this statute as containing two distinct criminal offenses: 1) Aggravated kidnapping for ransom, punishable by LWOP, when the victim suffers death or bodily harm or is subjected to a substantial likelihood of death; and 2) simple kidnapping for ransom, punishable by life in prison with the possibility of parole, in all other cases. (*Handley I*, *supra*, at p. 9.) That characterization is accurate when viewed from the standpoint of punishment. However, at its core, section 209(a) actually defines but one crime, aggravated kidnapping.

The reason it is called *aggravated* kidnapping is that, unlike *simple* kidnapping, which is a general intent offense that arises independently of any other criminal objective, aggravated kidnapping is committed for a specific purpose, such as obtaining ransom money. (*People v. Bell* (2009) 179 Cal.App.4th 428, 435, fn. 2.) Whether the victim dies, suffers bodily harm or is subjected to a substantial likelihood of

death are special factors pertaining to the issue of punishment, but they do not affect the singular nature of the underlying offense. (*People v. Britton* (1936) 6 Cal.2d 1, 4-5 (*Britton*).)

In this case, the complaint and information alleged appellant committed aggravated kidnapping in violation section 209(a) by kidnapping Michael (count 1) and Mary (count 2) for ransom, reward, extortion and to exact money from another person. The prosecution did not allege any special sentencing factors related to the issue of punishment. However, those factors were openly discussed in connection with the proposed jury instructions and verdict forms.

One of the jury instructions proposed by the prosecution was CALCRIM No. 1202, the standard instruction on aggravated kidnapping. CALCRIM No. 1202 sets forth the essential elements of that offense. In addition, the instruction contains a paragraph entitled, "Sentencing Factor," which states: "If you find the defendant guilty of [aggravated kidnapping], you must then decide whether the People have proved the additional allegation that [the victim died/suffered bodily harm or was confined in a way that created a substantial likelihood of death]." (CALCRIM No. 1202.)

During a jury instruction conference that occurred toward the end of the prosecution's case, defense counsel was asked if he had any objection to the court giving CALCRIM No. 1202, and he said no. He also informed the court he was not requesting instructions on any lesser included offenses to aggravated kidnapping. Since his theory of the case was that appellant was not actually involved in the alleged kidnappings, he felt there was no need for any such instructions, and appellant said he agreed with that decision.

The discussion on jury instructions continued the following day when the judge met with counsel and appellant shortly before the parties rested. At the outset of that meeting, the judge stated, "Counts 1 and 2, the 209 contains a special, additional factor if great bodily injury was inflicted. The People also allege a 12022.7, great bodily

injury, sentencing enhancement, as to [the torture charge in] count 4, which I understand they have a pending motion regarding."

The court's description of the special additional factor in section 209(a) was not entirely accurate. As explained above, that provision uses the term "bodily harm," not "great bodily injury," which is the gravamen of the sentence enhancement provided in section 12022.7. The court's mistake turned out to be contagious because, as shown below, the prosecutor also conflated those two terms at one point during the meeting.

Continuing, the judge stated he "prepared jury instructions asking the jury to make findings on both the substantive crime [of aggravated kidnapping] and then whether or not that crime, if committed, great bodily injury was inflicted. [¶] The way [CALCRIM No. 1202] reads, it should be a special finding, but it's not technically a sentencing enhancement and the like." Asked if he had any objection to the court instructing the jury in that manner, defense counsel said no.

With that, the prosecution moved to dismiss the section 12022.7 great bodily injury enhancement allegation attached to count 4, the torture count. The judge responded, "That request is granted and the court will then remove the great bodily injury jury instruction from that [count] making sure that it's still contained in counts 1 and 2[.]" The following discussion then took place:

"[Prosecutor Brown]: . . . In regards to the second count involving Mary . . ., if the court could take a look at the actual verdict that the People drafted in regards to count 2, there is kind of an 'or' within [section 209(a), of] the Penal Code. []There is gbi inflicted on the person ['or' and our theory of liability is the 'or' part. [¶] So I know the court just drafted a special instruction regarding that finding. It's a little different with regards to our theory on Mary[.]

"[Prosecutor Murphy]: We apologize for the lateness, Your Honor. We were actually dealing with this up until last night.

"The Court: Noted. [¶] So your theory is intent to confine [in] a manner [] that exposes [Mary] to a substantial likelihood of death?

"[Prosecutor Murphy]: Yes."

The judge asked defense counsel if he had any objection to the prosecution pursuing that theory, and his answer was no. The judge then told the parties he would be modifying the jury instruction as to count 2 to comport with that theory.

Alas, the instruction on the aggravated kidnapping charge in count 2 informed the jurors that if they found appellant guilty of that offense, they must decide whether the prosecution proved the additional allegation that Mary was confined in a manner that subjected her to a substantial likelihood of death. And the instruction on count 1 stated that if the jurors found appellant guilty of aggravated kidnapping in that count, they must decide whether the prosecution proved the additional allegation that Michael suffered bodily harm.

During closing arguments, the prosecutor argued there was ample evidence to support those allegations, and defense counsel did not disagree. Defense counsel instead took the position that appellant had nothing to do with the kidnapping plan that led to Michael suffering bodily harm and Mary being exposed to a substantial likelihood of death.

The jury rejected defense counsel's argument. It not only found appellant guilty of aggravated kidnapping, as alleged in counts 1 and 2, it also found true the special allegations of bodily harm as to Michael and substantial likelihood of death as to Mary. The question we must decide is whether this verdict, and appellant's subsequent sentence for LWOP on those counts, violated due process because appellant was never formally charged with those special allegations. For the reasons explained below, we do not believe appellant's due process rights were violated in this case.

Due process is an integral component of our criminal justice system. Among other things, it requires that an accused be afforded "'fair notice of the charges

against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.' [Citation.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.; see also *Anderson, supra*, 9 Cal.5th at p. 964 [proper notice allows the defendant "to make informed decisions about the case, including whether to plead guilty, how to allocate investigatory resources, and what strategy to deploy at trial."].) This notice requirement extends to both substantive offenses and sentence enhancements alike. As our Supreme Court recently explained in *Anderson*, "A defendant has the 'right to fair notice of the specific enhancement allegations that will be invoked to increase the punishment for his crimes.' [Citation.]" (*Id*. at p. 953.) Appellant was entitled to notice that would allow him to investigate and strategize, and *Anderson* illuminates that entitlement.

In *Anderson*, the defendant was charged with murder and multiple counts of robbery. In connection with the murder charge, the information alleged a sentence enhancement that Anderson was vicariously liable for a codefendant's injurious discharge of a firearm. (§ 12022.53, subds. (d), (e).) That enhancement, which we will refer to as the vicarious discharge enhancement, carried a mandatory sentence of 25 years to life. (*Ibid*.) In contrast, the robbery counts contained less serious allegations that Anderson personally used a firearm. (§§ 12022.53, subd. (b), 12022.5, subd. (a).) Even though the vicarious discharge enhancement was not alleged as to the robbery counts, the jury instructions and verdict forms permitted the jury to return findings that would support the enhancement with respect to each of those counts. And, ultimately, that is what it did. Based on the jury's true findings on the uncharged vicarious discharge allegations, Anderson's sentence was enhanced 125 years above and beyond what the original charges would have otherwise permitted. (*Anderson, supra*, 9 Cal.5th at pp. 950-952.)

In finding this result violated due process, the Supreme Court made two rulings that are relevant to our case. First, the court found the accusatory pleadings failed

to provide Anderson with sufficient notice the vicarious discharge enhancements could be applied to the robbery counts. Second, the court held the accusatory pleadings were not informally amended so as to provide Anderson with adequate notice of this possibility. Therefore, his sentence on the robbery counts could not be increased by virtue of the vicarious discharge enhancements. (*Anderson, supra*, 9 Cal.5th at pp. 954-960.)

The present case is distinguishable from *Anderson* in both of those key respects. The nature of the charges appellant faced, and the way the proceedings unfolded near the end of his trial, both lead us to conclude that, unlike Anderson, appellant received adequate notice of the sentence he received.

The dispute in *Anderson* was whether the punishment for Anderson's robbery offenses could be enhanced by virtue of the fact he vicariously discharged a firearm in connection with that offense. In finding the accusatory pleading failed to provide Anderson with adequate notice of this possibility, the Supreme Court stated, "Fair notice requires that every sentence enhancement be pleaded in connection with every count as to which it is imposed. [Citation.]" (*Anderson, supra*, 9 Cal.5th at pp. 956-957.) Thus, it did not matter that the vicarious discharge enhancement was alleged as to the murder count. Because that enhancement was not alleged with respect to the robbery counts, Anderson had no way of knowing he faced five additional 25-year-to-life enhancements on those counts. (*Ibid*.) In fact, because the vicarious discharge enhancement was alleged only on the murder count, Anderson was "entitled to assume the prosecution made a discretionary choice not to pursue the enhancement on the [robbery counts], and to rely on that choice in making decisions such as whether to plead guilty or proceed to trial. [Citation.]" (*Id*. at p. 956.)

This reasoning clearly does not apply to the present case. The fundamental reason Anderson was blindsided by the vicarious discharge enhancements is that they had no inherent relationship to the underlying crime of robbery. Standing alone, that offense

does not contemplate increased punishment for vicarious discharge of a firearm. (§ 211.) Therefore, from a charging perspective, the only way Anderson could have known he was looking at additional prison time on his robbery counts for vicariously discharging a firearm was if the prosecution alleged a separate and distinct sentencing enhancement with respect to those counts.

Here, in contrast, the underlying crime of aggravated kidnapping and the relevant enhancement factors are not set apart from each other in different provisions of the Penal Code. Rather, they are embedded in a single statute, section 209(a). Indeed, that statute plainly states that if the victim of an aggravated kidnapping dies, suffers bodily harm or is exposed to a substantial likelihood of death, the defendant must be sentenced to LWOP. (§ 209(a).) As our Supreme Court explained long ago in *Britton, supra,* 6 Cal.2d 1, this close relationship between crime and punishment obviates the need to charge the sentencing factors in the accusatory pleading when a violation of section 209 is alleged.

Britton is closely analogous to our case. As here, the defendant in *Britton* argued his LWOP sentence for aggravated kidnapping under section 209 was unlawful because, although the evidence amply proved it, the accusatory pleading did not formally allege the victim suffered bodily harm; instead, it simply alleged the requisite elements of aggravated kidnapping. The Supreme Court found nothing wrong with this charging method. It ruled, "A charge in the language of [section 209] that the accused had kidnapped his victim [for one of the reasons proscribed in the statute] apprises the accused of what he will be expected to meet and of the several punishments prescribed therefor, any one of which, upon conviction, may be imposed upon him." (*Britton, supra,* 6 Cal.2d at p. 5.) Therefore, it was immaterial that the accusatory pleading failed to allege the particular sentencing factor that was used to increase the defendant's punishment from life to LWOP. (*Ibid*.)

In rejecting the defendant's lack-of-notice argument in *Britton*, the Supreme Court stated, "It is well settled in this state that an indictment or information need not allege the particular mode or means employed in the commission of an offense, except when of the essence thereof. [Citation.] In other words, particulars as to manner, means, place or circumstances need not in general be added to the statutory definition. [Citations.] The indictment or information need only charge the essential elements of the statutory offense. It then fairly apprises the defendant of what he is to meet at the trial." (*Britton, supra*, 6 Cal.2d at p. 5.)

Appellant admits *Britton* fatally undermines his due process argument. He also acknowledges *Britton* has never been expressly overruled by any subsequent appellate court decision. However, he contends *Britton* was overruled sub silentio by the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. We are not persuaded.

Apprendi was not a notice case. Instead, it considered whether the rights to trial by jury and proof beyond a reasonable doubt extend to facts that can be used to enhance a defendant's punishment above the statutory maximum. (*Apprendi, supra*, 530 U.S. at p. 469.) In concluding they did, the high court expressly declined to take up the issue of whether such facts must be included in the indictment. (*Id*. at p. 477, fn. 3.) Yet, as appellant correctly points out, the *Apprendi* court did state, "'[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.'" (*Id*. at p. 476, quoting *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6, italics added.)

Despite the italicized wording, however, our own Supreme Court has recognized the core reasoning and holding of *Apprendi* focus solely on the *proof requirements* for sentencing factors. (*People v. Contreras* (2013) 58 Cal.4th 123, 148-149.) As such, "'[i]t is highly doubtful that *Apprendi* has any effect whatever on *pleading requirements*.'" (*Id*. at p. 149, italics added, quoting *People v. Famalaro* (2011)

52 Cal.4th 1, 37 [general allegation of murder provides fair notice of conviction and punishment for first degree murder; *Apprendi* does not require the prosecution to allege the specific facts necessary to elevate a second degree murder to first degree murder]; see also *People v. Houston* (2012) 54 Cal.4th 1186, 1227 [finding *Apprendi* had no bearing on the defendant's due process/fair notice claim].) "Highly doubtful" seems to us a pretty clear signpost.

In urging us not to follow *Britton*, appellant is not only asking us to ignore a time-tested California Supreme Court decision that has never been openly questioned or criticized by *any* court, he is asking us to ignore the California Supreme Court's interpretation of the United States Supreme Court's opinion in *Apprendi*. However, as an intermediate appellate court, we must follow decisions of the California Supreme Court (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455), and we must follow the California Supreme Court's interpretation of United States Supreme Court cases. (*People v. Madrid* (1992) 7 Cal.App.4th 1888, 1895.)

Given the limited applicability the California Supreme Court has accorded *Apprendi*, we are not convinced that decision undermines the strength of *Britton* in any respect. To the contrary, we believe *Britton* is still good law and is controlling in this case. Pursuant to that decision, we conclude the fact appellant was charged with the essential elements of aggravated kidnapping under section 209(a) provided him with sufficient notice he could be sentenced to LWOP if the evidence established his victims suffered bodily harm or were subjected to a substantial likelihood of death. Therefore, he has no basis to complain that he was unaware of this possibility. (*Britton, supra*, 6 Cal.2d at p. 5; *People v. Reeves* (1955) 135 Cal.App.2d 449, 453-454; *People v. Holt* (1949) 93 Cal.App.2d 473, 476; *People v. Haley* (1941) 46 Cal.App.2d 618.)[5]

[5] In addition to the actual written charges, the Attorney General relies on two online newspaper articles to support his claim appellant received sufficient notice he was facing a potential sentence of LWOP on the aggravated kidnapping counts. However, those articles are not included in the record on appeal, and there is no evidence appellant ever saw them, so we do not believe we can allow them to have any bearing on our analysis. The

But even if *Britton* were not controlling, we do not believe reversal would be required in this case. As we now explain, the informal amendment of the information to apprise appellant of his potential punishment would be determinative and his complaint about notice would still be unavailing.

While fair notice of the charges is an essential component of due process, rigid pleading rules are no longer favored in this state. (*Anderson, supra*, 9 Cal.5th at p. 957.) In fact, "'California law does not attach any talismanic significance to the existence of a written information.' [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 82.) That being the case, an informal "[o]ral amendment of an accusatory pleading may suffice for statutory and due process purposes. [Citation.]" (*Ibid*.)

Under this informal amendment body of law, there is no requirement that any specific words or express invocation be employed to effectuate a legally sufficient amendment of the charges. (*People v. Pettie, supra*, 16 Cal.App.5th at p. 84.) Rather, due process will be deemed satisfied if the record, *considered as whole*, shows the defendant received adequate notice of the prosecution's intent to charge him with a particular crime or enhancement, and the defendant, by word or conduct, acquiesced to the charge. (*Ibid*.; *People v. Sawyers* (2017) 15 Cal.App.5th 713, 720-721; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

These principles were not lost on the Supreme Court in *Anderson*. There, the court fully recognized "that not every amendment to a pleading – even one that increases the defendant's potential criminal liability – need be made in writing." (*Anderson, supra*, 9 Cal.5th at p. 960.) However, based on the unique circumstances

Attorney General also draws our attention to verbiage in the prosecution's pretrial motion to consolidate, and a passage in the discovery materials appellant received. 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. And the discovery passage simply reflects mastermind Nayeri's personal understanding that the charges carried a potential sentence of LWOP, it does not prove appellant was aware of this fact. Suffice it to say, none of this peripheral information is convincing in terms of proving appellant knew he could get LWOP.

presented in *Anderson*, the Supreme Court found no informal amendment occurred in that case.

Recall that in *Anderson*, the vicarious discharge enhancement was alleged only as to the murder count, but the jury was permitted to find that enhancement applicable to multiple counts of robbery as well. Importantly, however, the record in *Anderson* did not "reveal precisely how this came to pass." (*Anderson*, *supra*, 9 Cal.5th at p. 958.) "For all the record show[ed], the drafting of the instructions and verdict forms [to include the uncharged vicarious discharge enhancement on the robbery counts] may have simply been a mistake the parties did not manage to catch before it was too late." (*Id*. at p. 960.) As a matter of fact, the prosecutor did not announce his intention to seek a 25-year-to-life enhancement on the robbery counts until after the jury found the vicarious discharge allegation true on those counts, and the parties were "midway through the sentencing hearing." (*Id*. at p. 964.)

Under those circumstances, *Anderson* rejected the state's informal amendment argument. The Supreme Court acknowledged that due process can be satisfied if the defendant consents to an informal, unwritten amendment of the information, even if the amendment alleges an uncharged greater offense or enhancement. (*Anderson*, *supra*, 9 Cal.5th at pp. 958-960.) The Supreme Court also recognized defense counsel failed to object to the subject instructions and verdict forms that contained the uncharged vicarious discharge enhancements. However, the court refused to equate that failure with consent to the enhancements because "there was no hearing in open court where the prosecution asked to make an oral amendment to the information to add the . . . enhancements as to the robbery counts, nor was Anderson asked if he consented to the amendment, nor did the trial court ever grant such a request." (*Id*. at p. 960.) In other words, there simply was not enough attention given to the issue to ensure Anderson received adequate notice of the potential punishment he faced. Therefore, the Supreme Court concluded due process was not satisfied. (*Ibid*.)

The situation here is much different. Unlike in *Anderson*, where the amended instructions and verdict forms flew under the radar and were unnoticed until the time of sentencing, the amended instructions and verdict forms in this case were talked about at length before the close of evidence.

When the judge met with the parties to discuss jury instructions toward the end of the prosecution's case, he specifically brought up CALCRIM No. 1202. As explained above, that instruction not only contains the elements of aggravated kidnapping, it describes the special factors relevant to the issue of sentencing. The inclusion of the special factor language plainly signaled that appellant could be sentenced to LWOP if he was convicted of aggravated kidnapping. Despite this, defense counsel told the court he had no objection to the court giving CALCRIM No. 1202 to the jury.

Furthermore, on the next court date, the judge explained to the attorneys and appellant that he intended to instruct the jury on a special allegation pertaining to the aggravated kidnapping counts. The judge said he was going to ask the jury to consider whether, in committing that offense, "great bodily injury was inflicted." We recognize the circumstance elevating the punishment for aggravated kidnapping from life in prison with parole to LWOP is "bodily harm," not "great bodily injury." (§ 209(a).) However, the two concepts are clearly related, and there was no dispute Michael sustained serious, life-threatening injuries in this case. This circumstance was revealed clear back at the preliminary hearing.

Moreover, on the heels of this discussion, the prosecutor informed the court that, in regard to Mary, the state intended to prove the alternative circumstance needed to impose a sentence of LWOP, which is that the victim was exposed to a substantial likelihood of death. Given everything that was discussed at the hearing, there could have been little doubt the prosecution was alleging both of the circumstances required to sentence appellant to LWOP if he was convicted of aggravated kidnapping.

When the judge asked defense counsel if he objected to instructions or verdict forms containing those special allegations, he said no. He also voiced no objection when the prosecutor argued those allegations in closing argument or when the jury returned true findings thereon. His defense was total non-involvement; those matters made no difference to him.

And later on, defense counsel fully acknowledged in his sentencing brief that appellant was facing a potential sentence of LWOP based on those findings. Defense counsel made the argument that imposition of an LWOP sentence would be cruel and unusual under the Eighth Amendment, but – to his credit – he never so much as suggested that an LWOP sentence was improper on due process grounds for lack of notice. Nor did he ever suggest that appellant's plea decisions or trial strategy were impacted by the manner in which the case was charged. There would have been no support for either argument.

On this record, we are satisfied the conditions for an informal amendment of the charges have been met. Because appellant was apprised of the prosecutor's intent to prove the special allegations required to impose a sentence of LWOP, and because appellant consented to the inclusion of those allegations in the jury instructions and verdict form, he was afforded sufficient notice of the charges. No due process violation has been shown. (See *People v. Sandoval* (2006) 140 Cal.App.4th 111, 128-134 [prosecutor's informal amendment of the pleadings made in open court and agreed to by the defense was sufficient to provide the defendant with adequate notice of the charges against him].)

In reaching this conclusion, we are mindful appellant was never expressly informed he could be sentenced to LWOP if the jury found the special allegations true. However, once the aggravated kidnapping charges were informally amended to include allegations of bodily harm and substantial likelihood of death, appellant was sufficiently apprised of this possibility. Therefore, he was not denied due process. (See *People v.*

Mancebo (2002) 27 Cal.4th 735, 747 [due process is satisfied if the defendant is fairly apprised of the specific factual allegations that will be invoked to increase the punishment for his crimes]; *People v. Robinson* (2004) 122 Cal.App.4th 275, 282 [same].)[6]

Accomplice Instructions

At trial, the parties agreed Shegerian was an accomplice by virtue of her involvement in the case. Although the trial court instructed the jury the statements of an accomplice must be corroborated, the instruction on prior statements did not reiterate that requirement. Appellant fears this omission allowed the jury to convict him based on Shegerian's prior statements, even if they were not corroborated. We do not believe it is reasonably likely the jury construed the court's instructions in this fashion. They are not cause for reversal.

Pursuant to CALCRIM No. 335, the jury was instructed, "If the charged crimes were committed, then [Shegerian was an] accomplice[] to those crimes. You may not convict the defendant of any crime based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] One, the accomplice's statement . . . or testimony is supported by other evidence that you believe; [¶] Two, that supporting evidence is independent of the accomplice's statement or testimony and; [¶] Three, that supporting evidence tends to connect the defendant to the commission of the crime."

The court also gave CALCRIM No. 318, which told the jury, "If you decide that a witness made . . . statements [before trial], you may use those statements in two ways: [¶] One, to evaluate whether the witness's testimony in court is believable; [¶] And two, as evidence that the information in those earlier statements [is] true."

[6] Given our conclusion in this regard, we need not consider the Attorney General's contentions that appellant forfeited his due process argument on appeal by failing to raise it in the trial court and that he was not prejudiced by the alleged lack of notice.

Appellant does not dispute the correctness of these instructions. His argument is that the latter instruction on prior statements undermined the corroboration requirement set forth in the former instruction. However, appellant did not ask the trial judge to modify or clarify the instructions in order to remedy this purported error. He has thus forfeited his right to challenge the instructions on appeal. (*People v. Lee* (2011) 51 Cal.4th 620, 638 ["A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel . . . and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"].)

Even if the argument had been preserved for appeal, it would not carry the day. In determining whether instructional error has occurred, we presume jurors are intelligent people who are capable of understanding and correlating all of the instructions they are given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) Unless there is a reasonable likelihood the jury construed the challenged instructions in a manner that violated the defendant's rights, we must uphold the court's charge to the jury. (*Ibid.*; *People v. Rogers* (2006) 39 Cal.4th 826, 873.)

There was no such likelihood in this case because the challenged instructions addressed two different issues. CALCRIM No. 318, the instruction on prior statements, spoke to the permissible usage of Shegerian's extrajudicial statements from a general evidentiary standpoint. CALCRIM No. 335, the instruction on accomplice testimony, addressed the specific requirements for using Shegerian's statements to obtain a conviction. So even if the jurors used Shegerian's prior statements for their truth, as they were allowed to do under CALCRIM No. 318, they would have known from CALCRIM No. 335 that they could not use those statements to convict unless they were corroborated by other evidence. In other words, viewing the instructions in light of one

another, the jurors would have realized they could not convict appellant on the basis of uncorroborated pretrial statements that were made by Shegerian. Appellant's claim to the contrary is without merit.

The Two-Week Trial Recess

During the trial, the judge recessed the proceedings for 14 days over the course of the winter holidays. Appellant would have us believe this delay violated his state and federal due process rights. We think not.

Appellant's trial started in December 2017, roughly five years after he was arrested. At a pretrial hearing on December 5, the prosecutor asked the judge what days the court was going to be in session during the trial. After discussing the matter with counsel off the record, the judge stated, "We discussed the scheduling and it looks as if all parties are in agreement." "We'll be off [Tuesday, December] 26th through the 29th, and that we will be telling the jury that we will be doing evidence [December] 12th through the 22nd, and then we will be doing closing arguments probably like January 3rd." No one objected to this scheduling framework.

Six days later, on December 11, the judge met with counsel to discuss voir dire and the prospect of prescreening prospective jurors who might have time constraints due to work or prepaid vacations. The judge surmised those constraints might not be a problem for some of the prospective jurors because the court was going to be in recess during the week of Christmas. He also stated he would be time-qualifying the jurors through January 5, not including the time required for deliberations. Again, neither side objected to this scheduling proposal.

As it turned out, the trial did not begin until Thursday, December 14. That day, opening statements were given in the afternoon, and at the end of the session, the judge ordered the jurors to return on Monday, December 18 for the start of testimony. After the jurors left the courtroom, the prosecutor informed the judge he was going to be moving through his witnesses pretty quickly because he and defense had been able to

narrow the scope of certain testimony. In fact, throughout the trial, the parties worked hard[7] to streamline the case through the use of stipulations and other time-saving measures.

Consequently, the prosecution's case went faster than initially expected. By Wednesday, December 20, the prosecution was down to its final witness, lead detective Ryan Peters. Peters finished his testimony just before noon that day. At that time, the judge asked the parties if there was any reason he should not excuse the jury until January 3, 2018, and both sides answered no. The court then adjourned the trial until that date. In so doing, the court admonished the jurors not to discuss the case during the break or start forming opinions about the case until they began their deliberations.

When the trial resumed on January 3, the prosecution recalled Peters to the stand for a few brief questions before resting its case. Then the defense rested without presenting any evidence, and the parties made their closing arguments. The next day, the jury was instructed and received the case. After deliberating for less than three hours, it found appellant guilty as charged.

Appellant contends the 14-day recess that occurred from December 20 to January 3 violated his fair trial rights because, having heard the bulk of the prosecution's evidence by the 20th, the jurors would not have been able to keep an open mind over the course of the recess. However, of those 14 days, six were weekends or holidays and four (December 26 thru the 29th) were taken off by agreement of the parties, leaving only three and one-half unplanned recess days: The afternoon of the 20th, the 21st and 22nd, and January 2. And when the court adjourned on the 20th, appellant did not object to the court ordering a recess until January 3. He therefore waived his right to complain about the delay attributable to those three and one-half days. (*People v. Ochoa* (2001) 26 Cal.4th 398, 441 [absent an objection, the waiver rule bars claims arising from the

[7] We're impressed.

granting of a continuance during trial]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 791-792 [by consenting thereto, the defendant waived his right to challenge a 17-day trial recess that occurred over the winter holidays].)

Waiver aside, the two-week delay in appellant's trial did not constitute an abuse of discretion or violate appellant's due process rights. (See generally *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 968 [the decision whether to order a midtrial continuance rests within the sound discretion of the trial court]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042 [to overturn a conviction on due process grounds the defendant bears a heavy burden to show the procedures used at trial were fundamentally unfair].) Had the court not recessed the trial on December 20, there is a good chance the jurors would have received the case before Christmas and felt rushed to deliver a verdict before that holiday arrived, with the prosecution's evidence fresh in their minds.[8] As it was, the jury was given ample time to process and evaluate the state's case before being asked to render a verdict. This prevented a rush to judgment based on temporary feelings of passion, prejudice, or inconvenience. (See *People v. Johnson, supra,* 19 Cal.App.4th at p. 791 [pointing out that forcing a jury to deliberate against a Christmas holiday deadline is often not in the best interest of the defendant].)

And the fact the recess occurred before deliberations commenced distinguishes this case from *People v. Santamaria* (1991) 229 Cal.App.3d 269, upon which appellant relies. When a recess occurs during deliberations, as it did in *Santamaria*, the jury may forget important aspects of the evidence or the court's instructions. (*Id*. at p. 282.) That danger was minimized here because the recess occurred before the jury heard closing arguments, during which the evidence was discussed at length, and before the jury received its instructions from the court, which

[8] Appellant presented no defense.

would clarify the analysis of that evidence. Considering all the pertinent circumstances, we do not believe the recess is cause for reversal.[9]

Sentencing Claims

Lastly, appellant contends his consecutive life sentences for aggravated mayhem and torture must be stayed under section 654 because those crimes were part and parcel of the kidnapping offense for which he was separately punished. Once again, we disagree.

Section 654 states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute "applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 551; *In re Calvin S.* (2016) 5 Cal.App.5th 522, 533.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. If all of his crimes were carried out pursuant to a single objective, multiple punishment is prohibited. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

[9] This case is also distinguishable from *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14, in which a three-week trial continuance was found to be "inherently prejudicial" because it undermined the jury's ability to fairly assess the evidence the defendant introduced at trial. (*Id.* at p. 21.) Since appellant did not present any evidence in his defense, that was not a concern here.

On appeal, we must remember the defendant's intent and objective present factual questions for the trial court, and its findings, whether express or implied, will be upheld if they are supported by substantial evidence. (*People v. Petronella* (2013) 218 Cal.App.4th 945, 964; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Under the substantial evidence test, "our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted; accord, *People v. Petronella, supra*, 218 Cal.App.4th at p. 964; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

The crimes in this case involved a course of conduct that started with the victims being kidnapped from their home in Newport Beach and ended two and a half hours later when they were left out in the Mojave Desert. During that period of time, the kidnappers tortured Michael repeatedly, and once they realized they were not going to get the million dollars they were after, they cut off his penis, which was the basis for the aggravated mayhem count. Appellant contends section 654 applies to the torture count because the only reason he and his cohorts tortured Michael was to get him to tell them where the million dollars was, which is why they kidnapped him in the first place.

At sentencing, the trial judge rejected this contention because, besides torturing Michael in the back of the van to find out where the money was, the kidnappers also poured bleach on Michael after they cut off his penis. The judge found the bleach pouring amounted to a torturous act that was done not to get Michael to reveal the location of the money, but simply to add to the pain and suffering he had already endured. Indeed, the record indicates that one of the effects of pouring bleach on Michael was that the kidnappers' footprints became permanently seared into his skin.

Relying on *People v. Siko* (1988) 45 Cal.3d 820, 825-826 and *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1337-1340, appellant contends the judge's finding regarding the purpose of the bleach pouring was foreclosed by the prosecutor's closing argument, in which he asserted the kidnappers doused Michael with bleach to destroy their DNA. Those cases stand for the proposition that if there is a basis for identifying the specific factual basis for a verdict, such as the charging documents, closing arguments or verdict forms, the trial court may not rely on other acts to avoid application of section 654. (*Ibid*.) By parity of reasoning, appellant contends that because the prosecutor referenced the destruction of DNA as a motive for the bleach pouring, the trial judge was precluded from finding the act was done for any other reason. However, the prosecutor did not argue the destruction of DNA was the *only* reason the kidnappers poured bleach on Michael, and their cavalier disposal of his penis supports the idea they could well have harbored baser motives at that time. Therefore, the judge was free to find the act was done for some other reason as well, such as torture. (*Ibid*.) Suffice it to say, there is substantial evidence in the record to support the judge's finding the bleach pouring had multiple motives and was not done for the sole purpose of destroying evidence.

Still, appellant contends the judge's reliance on the bleach-pouring incident as the basis for not applying section 654 to the torture count was improper because the act of pouring bleach on Michael did not amount to torture. Appellant does not dispute the act caused Michael great bodily injury, the first element of torture. But he does dispute the sufficiency of the evidence to support the second element, namely, that by pouring the bleach, he and his cohorts intended to cause Michael to suffer cruel or extreme pain "for the purpose of revenge, extortion, persuasion, or for any sadistic purpose[.]" (§ 206.)

In challenging this element, appellant again relies on the prosecutor's claim during closing argument that the kidnappers poured bleach on Michael to destroy their DNA. To appellant's way of thinking, this claim proves the destruction of evidence was the sole reason for the bleach. However, if the kidnappers were so transfixed on

destroying their DNA, they would have poured bleach on Mary too. Their failure to do so supports the conclusion they had an additional reason for dousing Michael with bleach, which was either to exact revenge on him for not telling them where the money was and/or to simply make him suffer, which is the hallmark of sadism. Either way, the bleach-pouring act was a sufficient basis for the trial judge's torture theory. The judge was not remiss for relying on that act in considering the applicability of section 654 in connection with the aggravated kidnapping counts and the torture count. We discern no basis for disturbing appellant's life sentence for torturing Michael.

As for the aggravated mayhem count, appellant argues his sentence for that offense should have been stayed pursuant to section 654 because it was based on the same act – the severing of Michael's penis – that supported the bodily harm element of the aggravated kidnapping charge in count 1. In so arguing, appellant admits there were other acts that could have supported the bodily harm element, such as the blowtorching or the tasering. However, he insists that doesn't matter because the prosecutor "specifically elected" not to rely on those acts in urging the jury to convict him on count 1.

The record does not support appellant's position. While the prosecutor alluded to the kidnappers' act of severing Michael's penis while discussing the bodily harm element of the aggravated kidnapping charge, he did not tell the jury to ignore all of the other bodily harm Michael suffered in deciding whether appellant was guilty of that offense. To the contrary, the prosecutor urged the jury to consider everything Michael went through and all the injuries he received. Therefore, it cannot be said that the prosecutor elected to base the bodily harm allegation solely on the dismembering of Michael's penis.

Because the prosecutor did not elect to prove the bodily harm allegation on such a limited basis, and because there is nothing else in the record that reveals which act or acts the jury relied on in finding that allegation to be true, the trial judge was free to consider all of the evidence adduced at trial in determining whether section 654 applied

to appellant's sentences for aggravated mayhem and aggravated kidnapping. (*People v. Siko*, *supra*, 45 Cal.3d at pp. 825–826; *People v. McCoy*, *supra*, 208 Cal.App.4th at p. 1340.) Having reviewed the entire record ourselves, we are convinced there is substantial evidence to support the trial court's implied finding those two offenses were based on different acts and committed for different reasons. Therefore, appellant is not entitled to relief under section 654.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

APPENDIX H

Order Denying Review by California Supreme Court (June 23, 2021)

Court of Appeal, Fourth Appellate District, Division Three - No. G056608

S268164

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX I

Excerpts from Clerk's Transcript from Direct Appeal, People v. Handley, G056608, California Court of Appeal, Fourth Appellate District, Division Three.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	FELONY COMPLAINT
vs.	No. NBPD 12-008626
KYLE SHIRAKAWA HANDLEY 01/12/79 B5793881 Defendant(s)	

The Orange County District Attorney charges that in Orange County, California, the law was violated as follows:

COUNT 1: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA HANDLEY, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain MICHAEL SIMONIAN for ransom, reward, extortion, and to exact from another person money and other valuable things.

COUNT 2: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA HANDLEY, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain MARY BARNES for ransom, reward, extortion, and to exact from another person money and other valuable things.

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KYLE SHIRAKAWA HANDLEY NBPD 12-008626 PAGE 2

COUNT 3: On or about October 02, 2012, in violation of Section 205 of the Penal Code (AGGRAVATED MAYHEM), a FELONY, KYLE SHIRAKAWA HANDLEY, under circumstances manifesting extreme indifference to the physical and psychological well-being of another person, did intentionally and unlawfully cause permanent disability, disfigurement, and deprivation of a limb, organ, and body member of MICHAEL SIMONIAN.

COUNT 4: On or about October 02, 2012, in violation of Section 206 of the Penal Code (TORTURE), a FELONY, KYLE SHIRAKAWA HANDLEY, with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, and for a sadistic purpose, did unlawfully inflict great bodily injury, as defined in Penal Code section 12022.7, upon MICHAEL SIMONIAN.

COUNT 5: On or about October 02, 2012, in violation of Sections 459-460(a) of the Penal Code (FIRST DEGREE RESIDENTIAL BURGLARY), a FELONY, KYLE SHIRAKAWA HANDLEY did unlawfully enter an inhabited dwelling house, trailer coach, and inhabited portion of a building, inhabited by MICHAEL SIMONIAN and MARY BARNES, with the intent to commit larceny.

It is further alleged the above offense comes within the meaning of Penal Code section 462(a).

ENHANCEMENT(S)

As to Count(s) 4, it is further alleged pursuant to Penal Code section 12022.7(a) (GREAT BODILY INJURY), and within the meaning of Penal Code sections 1192.7 and 667.5, that defendant KYLE SHIRAKAWA HANDLEY personally inflicted great bodily injury on MICHAEL SIMONIAN, who was not an accomplice during the commission and attempted commission of the above offense.

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FELONY COMPLAINT E-FILED (DA CASE# 12F14783)
OC DNA NOT ON FILE: KYLE HANDLEY

KYLE SHIRAKAWA HANDLEY NBPD 12-008626 PAGE 3

I declare under penalty of perjury, on information and belief, that the foregoing is true and correct.

Dated 10-10-2012 at Orange County, California.
MM/TT 12F14783

TONY RACKAUCKAS, DISTRICT ATTORNEY

by: /s/ MATT MURPHY
MATT MURPHY, Deputy District Attorney

RESTITUTION CLAIMED

[ ] None
[ ] $_____
[X] To be determined

BAIL RECOMMENDATION:

KYLE SHIRAKAWA HANDLEY - MANDATORY "NO BAIL"

NOTICES:

The People request that defendant and counsel disclose, within 15 days, all of the materials and information described in Penal Code section 1054.3, and continue to provide any later-acquired materials and information subject to disclosure, and without further request or order.

Pursuant to Penal Code Section 296.1, defendant, KYLE SHIRAKAWA HANDLEY, is required to provide DNA samples and thumb and palm prints.

FELONY COMPLAINT E-FILED (DA CASE# 12F14783)
OC DNA NOT ON FILE: KYLE HANDLEY

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
HEATHER BROWN
Deputy District Attorney
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SANTA ANA, CALIFORNIA 92702
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. KYLE HANDLEY, RYAN KEVORKIAN, NAOMI RHODUS Defendant(s)	Case No.: 13CF3394 PEOPLE'S MOTION TO CONSOLIDATE CASES 13HF1146 TO JOIN DEFENDANTS HANDLEY, KEVORKIAN, AND RHODUS with DEFENDANT HOSSEIN NAYERI Date: OCTOBER 15, 2014 Time: 9:00 a.m. Dept: C-55

PLEASE TAKE NOTICE THAT on October 15, 2014, or as soon thereafter as may be heard in the above-entitled court, the People will move to consolidate defendants' cases in 13CF3394 to join defendant Nayeri, (13HF1146) Kevorkian, Handley and Rhodus for trial. This motion will be based upon Penal Code § 1098, this Notice of Motion, and the attached Points and Authorities.

INTRODUCTION

The Defendants are accused of Two counts of PC 209(a) Kidnap for Ransom, Once Count of Aggravated Mayhem, Once Count of Torture, and one count of First Degree Residential Burglary. There 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, Extortion. The penalty if convicted is life without parole.

The People move this court to consolidate both cases, Defendant Nayeri (13HF1146) with Defendants Handley, Kevorkian and Rhodus.(13CF3394) on the grounds that both cases involve the identical crimes, offer the same evidence and the same witnesses. The crimes charged in both cases are identical and arise from same conduct against victims John and Jane Doe. Additionally, the only reason they are separate cases as of now is that Defendant Nayeri was awaiting extradition from the Czech Republic and he has just been brought here to be tried for these crimes.

PROCEDURAL BACKGROUND

Defendant Handley, was originally the first of four defendants the People were aware of being involved in the kidnapping and torture of the victims in this case. Defendant Handley was filed on October 6, 2012 (12CF2954) and this case had gone through preliminary hearing and was set for Jury trial. Due to subsequent investigation, the People became aware of Ryan Kevorkian, and Naomi Rhodus' involvement in the plot to kidnap and torture the victim. The People then dismissed the original case against Kyle Handley prior to it going forward to trial and re-filed with the impending arrest of defendants Kevorkian, Rhodus and Nayeri. This new case was filed against Defendant Handley on 10/25/13, with an amended complaint adding Defendants Rhodus and Kevorkian on 11/13/13. All three of the defendants have been arraigned and the case has been set for preliminary hearing with numerous time waivers by all parties.

Additionally, the People were aware that Defendant Hossein Nayeri was instrumental in the plotting, planning and execution of this horrific crime, however he had fled to Iran, which is

a non-extraditable country. This information was kept confidential as the People and law enforcement were working diligently to capture Defendant Nayeri and did not want to jeopardize this investigation and/or his arrest. While the People were pursuing the prosecution of defendants Handley, Kevorkian, and Rhodus , law enforcement was actively seeking to arrest Nayeri when he landed on soil where we have an extradition treaty. Defendant Nayeri was captured by the FBI along with NBPD and the assistance of the Czech Republic on November 7th, 2013 and extradition proceedings were put in place. Defendant Nayeri has been awaiting extradition since that date and was brought to the United States by way of extradition on September 15, 2014. Defendant Nayeri is set for arraignment in CJ1 on October 21, 2014.

STATEMENT OF FACTS

On October 2, 2012 Victim John Doe was sleeping in a bedroom of his house that he shared with a roommate. The roommate was out of the country, but the roommates new girlfriend Jane Doe happened to be sleeping there that evening as well. Unbenownst to John or Jane Doe, Defendants Kyle Handley, Ryan Kevorkian, and Hossein Nayeri had snuck into the home earlier in the day and at least two of them were waiting in the closets until Jane and John Doe went to sleep. In the early morning hours, the three defendants dressed in black with ski masks on came out from their hiding spots and pistol whipped John Doe, zipped tied him and gagged his mouth. Jane Doe was also zipped tied and carried downstairs. After hearing the Defendants rummage around the home searching for money and the safe, the two victims; Jane and John Doe were placed into what they believed to be a van. They were then driven out to the dessert all the while the Defendants were demanding John Doe take them to the million dollars.

Subsequently it was discovered that Defendant Hossein Nayeri had ordered surveillance equipment in the form of trackers and he was surveilling John Doe's coming and goings and had tracked his vehicle out to a location in the desert. The Defendants believed the victim was burying money in the desert. The victim John Doe had gone out to a location in the desert of Kern County previously and believes this is why Defendants took him to the same location demanding he tell them where the million dollars was buried.

While in the van being taken to the desert, two of the Defendants tortured John Doe by whipping him, burning him and torturing him demanding money the whole way. Once in the desert, John Doe was dragged out of the van and placed on the ground. One of the Defendant's proceeded to place a zip tie on John Doe's penis and then stood on John Doe's chest while another Defendant proceeded to cut his penis off with a rusty old knife. The victim was then doused with bleach as he lie on the ground bleeding and suffering from being beaten, burned and having his body been mutilated. A knife was dropped at Jane Doe's feet with a warning to count to 100 and then if she could find the knife, she could cut herself free. Jane Doe was ultimately able to free her feet and run quite a distance to try and find assistance. A police officer saw her running with her hands zip tied and stopped to assist, whereby the victim was discovered and transported to the hospital in critical condition. His penis was never recovered.

Subsequent investigation led to the arrest of Kyle Handley, who's truck was witnessed the day prior to the kidnapping at the victims home while three suspects pretended to be working on the home. A blue nitrile glove with Hossein Nayeri's DNA was located in the passenger seat of this truck, and remnants of panda paper was found along with a strong odor of bleach in Kyle Handley's truck. Investigation showed that the trackers placed on victims home by Hossein Nayeri were sent to Kyle Handley's home and a partially cut zip tie with Ryan Kevorkian's DNA was located in a trash bag in the back of Kyle Handley's house.

Further Investigation revealed that Defendant Rhodus (ex-wife of Defendant Kevorkian) was bringing money to Hossein Nayeri when he fled the country to Iran. Additionally, it was discovered that Defendant Rhodus actually rented the van used in the kidnapping and provided two of the guns that were used. During taped recorded conversations between Hossein Nayeri and another participant, Hossein Nayeri spoke of the crime and implicated Defendant Kevorkian as the 3rd person involved other than Kyle Handley. Additionally, Hossein Nayeri discussed the crime in detail with an informant and identified Kyle Handley as the perpetrator who actually cut off victims penis at his direction. These four Defendants (Nayeri, Handley, Kevorkian, and Rhodus) were all intricately involved in the kidnapping and torture that resulted in a man having his penis severed and his body terribly injured. All of the witnesses and facts to be presented to

the Judge at preliminary hearing and to the jury at trial will be the same. The charges are identical to each defendant and the case is based on all the same facts and circumstances. The victims are going to be incredibly traumatized recounting the details of that day and it is in the interest of judicial economy to try all of these cases together.

POINTS AND AUTHORITIES

I. Penal Code Section 1098 Permits Joinder

Penal Code section 1098 provides, in pertinent part, "When two or more defendants are jointly charged with any public offense,..., they must be tried jointly....the fact that separate accusatory pleading were filed shall not prevent their joint trial." (Emphasis added). The Legislature has thus expressed a preference for joint trials.

Indeed, courts have observed that a case in which defendants are charged with common crimes involving common events and victims is a "classic case" for joinder. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1374.) A joint criminal trial is proper where "the underlying charges depend upon mutual action. common facts or common evidence." (*People v. Diaz* (1969) 276 Cal.App.2d 547, 549.) Where two or more defendants are charged with offenses that are connected together through a common element, consolidation of the cases is proper. (*People v. Norris* (1963) 223 Cal.App.2d 5)

In *Norris,* Norris stood watch outside a shop as Walker, his codefendant, robbed and murdered the proprietor of the shop. Norris and Walker were jointly charged with robbery and murder. Norris filed a motion for severance of trial. The trial court denied the motion. On appeal, the Court of Appeal affirmed the trial court's judgment and stated it was permissible for the trial court to deny severance "where there was a common element of substantial importance in the commission of the crimes." (*People v. Norris, supra,* 223 Cal.App.2d. at 10.) The Court held the common elements of substantial importance were that each defendant "was charged with committing the offenses set forth in the information." (*Id.* at 11)

Here, Defendants Handley, Kevorkian, Rhodus and Nayeri are charged with crimes arising out of same conduct and there are common elements of substantial importance that occurred in the commission of the crimes. The charges involve common events and rely on mutual action, common facts, and common evidence. The People intend to call approximately 40 witnesses at trial, most of whom are civilians. Such witnesses are expected to establish defendants worked together and jointly committed the crimes with which they are charged. Additionally, these co-defendants are all very good friends and the nature of their relationship is going to be important in proving the identity of these co-conspirators, as well as the nature of their involvement and the cover up of the charged crimes.

Courts have been instructed by the California Supreme Court that joinder is generally appropriate and nonprejudicial "when the offenses would be cross-admissible in separate trials." (*People v. Arias* (1996) 13 Cal.4th 92, 126.) Here, the offenses are identical, the evidence is the same, and, therefore, cross-admissible.

Even a showing of potentially antagonistic defenses is not enough to defeat joinder. (*Zafiro v. United States* (1993) 506 U.S. 534.) Antagonistic defenses are not prejudicial per se, and a defendant must do more than simply state that conflicting defenses exists. "To obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that the defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. Stated another way, mutual antagonism only exists where the acceptance of one party's defense will preclude the acquittal of the other." (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

Here, the Defendants jointly committed the same crimes against the same people. The offenses, witnesses, and victims are identical, therefore, the evidence introduced at the trials will be the same and cross-admissible. Separate trials would be excessive and a waste of judicial time and resources. These considerations outweigh the remote likelihood of any prejudice through joinder of these four defendants.

CONCLUSION

Given the legislative preference for joint trials, the fact that all of the charges arose out of a course of conduct by these defendants, and virtually all evidence in the case would be cross-admissible in separate trials, the People respectfully request defendants be joined for trial.

Dated: October 14, 2014

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

By: _____
HEATHER BROWN
Senior Deputy District Attorney

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

MINUTES

Case : 13CF3394 F A
Name : Handley, Kyle Shirakawa

Date of Action	Seq Nbr	Code	Text
07/20/18	4	OFBAL	Bailiff: Z. T. Hathaway
	5	OFREP	Court Reporter: Adriana Araneta
	6	APDDA2	People represented by Heather Brown and Matthew Murphy, Deputy District Attorneys, present.
	7	APDWRA	Defendant present in Court with counsel Robert K. Weinberg, Retained Attorney.
	8	CORAC	Court read and considered Media Request from KNBC.
	9	MONOB	No objection by People.
	10	MONOB	No objection by Defense.
	11	TRTXT	Media request is granted.
	12	FIDOC	Order on Media Request to Permit Coverage filed.
	13	TRPDR	Case called. People answer ready. Defense answers ready.
	14	WVAFS	Defendant waives arraignment for sentencing.
	15	CORAC	Court read and considered Probation Report, Supplemental Report, People's Sentencing Brief, Defense Sentencing Brief.
	16	FIDOC	Probation & Sentencing report filed.
	17	FITXT	Supplemental Report filed.
	18	TRTXT	Victim Impact Statement read into the record by Heather Brown, Deputy District Attorney.
	19	TRTXT	Court heard from the People regarding recommended sentence.
	20	TRTXT	Court heard from the Defense regarding sentencing.
	21	FDTXT	Court finds that the defendant is ineligible for probation
	22	TRTXT	Reasons as stated on the record.
	23	MOTBY	Motion by Defense requesting a reduction in sentence due to the prohibition of cruel and unusual punishment.
	24	MOTION	Motion denied.
	25	TRTXT	Reasons as stated on the record.
	26	SPSP5	**No legal cause why judgment should not be pronounced and defendant having been convicted of 209(a) PC as charged in count 1, defendant is sentenced to STATE PRISON for a term of life, the possibility of parole = n.**

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

MINUTES

Case : 13CF3394 F A
Name : Handley, Kyle Shirakawa

Date of Action	Seq Nbr	Code	Text
07/20/18	27	SPAC5	**Defendant has also Found Guilty by Jury to the additional charge of 209(a) PC in count 2 and is sentenced to STATE PRISON for a term of life, the possibility of parole = n. Sentence imposed to be served consecutive to count 1.**
	32	SPAC4	**Defendant has also Found Guilty by Jury to the additional charge of 205 PC in count 3 and is sentenced to STATE PRISON for a term of 7 years to life. Sentence imposed to be served consecutive to count 1.**
	33	SPAC4	**Defendant has also Found Guilty by Jury to the additional charge of 206 PC in count 4 and is sentenced to STATE PRISON for a term of 7 years to life. Sentence imposed to be served consecutive to count 1.**
	34	PRJLT	**Total time to be served in State Prison is: Two consecutive terms of life without the possibility of parole and two consective terms of life with the possibility of parole after a minimum of 7 years.**
	35	SPC15	Credit for time served: 2, 114 actual, 317 conduct, totaling 2, 431 days pursuant to Penal Code 2933.1.
	36	SESRF	Pay mandatory state restitution fine of $300.00 pursuant to Penal Code 1202.4 or Penal Code 1202.4(b).
	37	FDGCT	Court finds good cause not to impose the parole revocation fine.
	38	SESEC	Pay $40.00 Court Operations Fee per convicted count pursuant to Penal Code 1465.8.
	39	SECCA	Pay Criminal Conviction Assessment Fee per convicted count of $30.00 per misdemeanor/felony and $35.00 per infraction pursuant to Government Code 70373(a)(1).
	40	SPFDC	Court orders all fees payable through the Department of Corrections.
	41	FITXT	Restitution request from California Victim Compensation Board filed.
	42	FIDOC	Order for Restitution to Crime Victim filed.
	43	SERST	Pay restitution to the victim(s) in the amount of $2, 493.84 as to count(s) 1, 3, 4..
	44	PRRJR	The Court reserves jurisdiction over the issue of restitution to be paid to victim(s).

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
P.O. BOX 808 SANTA ANA, CALIFORNIA 92702
TELEPHONE: (714) 834-3600

Felony Arraignment set on 03-24-2015

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. KYLE SHIRAKAWA HANDLEY 01/12/79 B5793881 HOSSEIN NAYERI 12/06/78 B6444923 Defendant(s)	No.13CF3394 CONSOLIDATED FROM 12CF2954, 13HF1146 INFORMATION

THE DISTRICT ATTORNEY OF ORANGE COUNTY hereby accuses the aforenamed defendant(s) of violating the law at and within the County of Orange as follows:

COUNT 1: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain JOHN DOE for ransom, reward, extortion, and to exact from another person money and other valuable things.

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/

COUNT 2: On or about October 02, 2012, in violation of Section 209(a) of the Penal Code (KIDNAPPING FOR RANSOM), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI, who had the intent to hold and detain, did unlawfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, carry away, hold, and detain JANE DOE for ransom, reward, extortion, and to exact from another person money and other valuable things.

COUNT 3: On or about October 02, 2012, in violation of Section 205 of the Penal Code (AGGRAVATED MAYHEM), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI, under circumstances manifesting extreme indifference to the physical and psychological well-being of another person, did intentionally and unlawfully cause permanent disability, disfigurement, and deprivation of a limb, organ, and body member of JOHN DOE.

COUNT 4: On or about October 02, 2012, in violation of Section 206 of the Penal Code (TORTURE), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI, with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, and for a sadistic purpose, did unlawfully inflict great bodily injury, as defined in Penal Code section 12022.7, upon JOHN DOE.

COUNT 5: On or about October 02, 2012, in violation of Sections 459-460(a) of the Penal Code (FIRST DEGREE RESIDENTIAL BURGLARY), a FELONY, KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI did unlawfully enter an inhabited dwelling house, trailer coach, and inhabited portion of a building, inhabited by JOHN DOE and JANE DOE, with the intent to commit larceny.

It is further alleged the above offense comes within the meaning of Penal Code section 462(a).

ENHANCEMENT(S)

As to Count(s) 4, it is further alleged pursuant to Penal Code section 12022.7(a) (GREAT BODILY INJURY), and within the meaning of Penal Code sections 1192.7 and 667.5, that defendants KYLE SHIRAKAWA HANDLEY and HOSSEIN NAYERI personally inflicted great bodily injury on JOHN DOE, who was not an accomplice during the commission and attempted commission of the above offense.

/

DATED: 03-18-2015

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: /s/HEATHER BROWN
HEATHER BROWN, Deputy District Attorney

NOTICES:

The People request that defendant and counsel disclose, within 15 days, all of the materials and information described in Penal Code section 1054.3, and continue to provide any later-acquired materials and information subject to disclosure, and without further request or order.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF.	CASE NO. 13CF3394
vs.	VERDICT
KYLE SHIRAKAWA HANDLEY DEFENDANT.	

We the jury in the above-entitled action find the Defendant, KYLE SHIRAKAWA HANDLEY, GUILTY / NOT GUILTY (CIRCLE ONE), of the crime of KIDNAPPING FOR RANSOM/REWARD/EXTORTION/OR TO EXACT MONEY OR A VALUABLE THING , a Felony, in violation of Section 209(a) of the Penal Code of the State of California, as charged in COUNT 1 of the Information.

Victim: Michael Simonian

DATED: January 4th, 2018

Signed by Juror Foreperson # 115, in seat # 2
ORIGINAL DOCUMENT SEALED
PURSUANT TO CCP 237(a)(2)

We the jury find it to be TRUE / NOT TRUE (circle one) that during the course of the above Kidnapping for Ransom/Robbery/Extortion/or to Exact Money or a valuable thing that Michael Simonian suffered bodily harm.

DATED: January 4th, 2018

Signed by Juror Foreperson # 115, in seat # 2
ORIGINAL DOCUMENT SEALED
PURSUANT TO CCP 237(a)(2)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF.	CASE NO. 13CF3394
vs.	VERDICT
KYLE SHIRAKAWA HANDLEY DEFENDANT.	

We the jury in the above-entitled action find the Defendant, KYLE SHIRAKAWA HANDLEY, (GUILTY) / NOT GUILTY (CIRCLE ONE), of the crime of KIDNAPPING FOR RANSOM/REWARD/EXTORTION/OR TO EXACT MONEY OR A VALUABLE THING, a Felony, in violation of Section 209(a) of the Penal Code of the State of California, as charged in COUNT 2 of the Information.

Victim: Mary Barnes

DATED: January 4th, 2018

Signed by Juror Foreperson # 115, in seat # 2
ORIGINAL DOCUMENT SEALED
PURSUANT TO CCP 237(a)(2)

We the jury find it to be (TRUE) / NOT TRUE (circle one) that during the course of the above Kidnapping for Ransom/Robbery/Extortion/or to Exact Money or a valuable thing that Mary Barnes was intentionally confined in a manner that exposed her to a substantial likelihood of death.

DATED: January 4th 2018

Signed by Juror Foreperson # 115, in seat # 2
ORIGINAL DOCUMENT SEALED
PURSUANT TO CCP 237(a)(2)

APPENDIX J

Excerpts from Reporter's Transcript from Direct Appeal, People v. Handley, G056608, California Court of Appeal, Fourth Appellate District, Division Three.

G056608

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION III

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF & RESPONDENT,

VS.

KYLE SHIRAKAWA HANDLEY,

DEFENDANT & APPELLANT.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

HONORABLE RICHARD M. KING, JUDGE PRESIDING
HONORABLE ROBERT R. FITZGERALD, JUDGE PRESIDING
HONORABLE GREGG L. PRICKETT, JUDGE PRESIDING

REPORTERS' SUPPLEMENTAL TRANSCRIPT ON APPEAL

OCTOBER 28, 2015
DECEMBER 11, 2015
FEBRUARY 2, 2016
AUGUST 16, 2016
NOVEMBER 4, 2016
DECEMBER 14, 2017

A P P E A R A N C E S

FOR PLAINTIFF & RESPONDENT:	FOR DEFENDANT & APPELLANT:
ATTORNEY GENERAL 600 WEST BROADWAY, STE. 1800 SAN DIEGO, CA 92101	CLIFF GARDNER 1448 SAN PABLO AVENUE BERKELEY, CA 94702

JACQUELINE F. VIGIL, CSR #5851,
DEBORAH MANZO-VASQUEZ, CSR #7018, SHELLEY HILL, CSR #2379
JENNIFER CHIARAVALLOTI, CSR #9476, LOU KATZMAN, CSR #1544
STEPHANIE HARDESTY, CSR #13088
COURT REPORTERS

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PAGES 1 TO 72, INCLUSIVE

MASTER CHRONOLOGICAL WITNESS INDEX

(NONE)

MASTER ALPHABETICAL WITNESS INDEX

(NONE)

MASTER EXHIBIT INDEX

(NONE)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

DEPARTMENT C5

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
PLAINTIFF,	)	
VS.	)	CASE NO. 13CF3394
KYLE SHIRAKAWA HANDLEY AND HOSSEIN NAYERI,	)	
DEFENDANTS.	)	

HONORABLE RICHARD M. KING, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

WEDNESDAY, OCTOBER 28, 2015

APPEARANCES:

FOR THE PLAINTIFF: TONY RACKAUCKAS
DISTRICT ATTORNEY
BY: HEATHER BROWN, DEPUTY

FOR DEFENDANT NAYERI AND SPECIALLY APPEARING FOR DEFENDANT HANDLEY: SALVATORE CIULLA
ATTORNEY AT LAW

JACQUELINE F. VIGIL, CSR #5851
OFFICIAL COURT REPORTER

SANTA ANA, CALIFORNIA - WEDNESDAY, OCTOBER 28, 2015

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(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: OKAY. NEXT. MR. CIULLA.

MR. CIULLA: GOOD MORNING, YOUR HONOR. NAYERI AND HANDLEY.

THE COURT: RIGHT. AND I KNOW MS. BROWN IS HERE.

DO WE HAVE COCOUNSEL?

MR. CIULLA: HE WON'T BE HERE TODAY. HE'S IN LOS ANGELES. I'LL STAND IN FOR HIM.

THE COURT: RIGHT. LET ME SEE COUNSEL.

(SIDEBAR CONFERENCE)

THE COURT: CAN WE KEEP THE NOISE LEVEL DOWN, PLEASE? WE'RE STILL IN SESSION.

ALL RIGHT. THE COURT ON THIS CASE -- AND IF WE CAN, IF WE CAN GET APPEARANCES AGAIN, PLEASE.

MS. BROWN: HEATHER BROWN ON BEHALF OF THE PEOPLE.

MR. CIULLA: SALVATORE CIULLA ON BEHALF OF MR. NAYERI. HE'S PRESENT IN CUSTODY TO THE COURT'S LEFT.

MR. HANDLEY?

MR. HANDLEY IS PRESENT IN COURT. I'LL STAND IN FOR HIS ATTORNEY, MR. WEINBERG, IF THAT'S OKAY WITH YOU, MR. HANDLEY.

DEFENDANT HANDLEY: YES.

THE COURT: ALL RIGHT. THIS WAS SCHEDULED FOR FRIDAY WHICH WOULD BE -- WAS DAY TEN OF TEN BECAUSE THE MATTER WAS

CONTINUED OVER MR. HANDLEY'S OBJECTION.

MR. CIULLA: RIGHT.

THE COURT: AND TO AVOID BEING -- THIS IS THE COURT'S WORDS -- JAMMED, I ASKED THE PARTIES TO COME IN BECAUSE, AS I RECALL, THE LAST TIME THAT WE WERE IN SESSION, MR. CIULLA, YOU DID GIVE THE COURT GOOD CAUSE BUT SAID THAT THERE WAS GOING TO BE FURTHER INVESTIGATION AND YOU WERE AT THAT POINT IN TIME NOT ACTUALLY SURE OF HOW LONG IT WAS GOING TO TAKE, AND SO THAT'S WHY I WANTED TO BRING IT BACK BECAUSE I JUST WANT TO SEE IS THE CASE GOING TO BE -- ARE THE PARTIES GOING TO BE ANSWERING READY ON FRIDAY, AND THAT'S WHY WE HAD A LITTLE OFF THE RECORD CONVERSATION. IT'S MY UNDERSTANDING THAT THE ANSWER TO THAT IS NO.

MR. CIULLA: CORRECT.

THE COURT: SO ANY OBJECTION ON BEHALF OF EITHER DEFENDANT TO ADVANCE THE CASE TO TODAY FOR PURPOSES OF US DISCUSSING A MOTION TO CONTINUE?

MR. CIULLA: NO.

THE COURT: ANY OBJECTION BY THE PEOPLE?

MS. BROWN: NO.

THE COURT: OKAY. THEN I'LL HEAR: ARE YOU ANSWERING READY OR WILL YOU BE ANSWERING READY ON BEHALF OF YOUR CLIENT THIS FRIDAY?

MR. CIULLA: NO.

THE COURT: OKAY. SO IF YOU COULD INDICATE TO THE COURT THE GOOD CAUSE, AND THEN HOW MUCH TIME DO YOU NEED? NOT

FACTORING IN OTHER CASES THAT YOU HAVE, BUT ON THIS CASE BASED ON THE GOOD CAUSE, HOW MUCH TIME DO YOU NEED TO BE ADEQUATELY PREPARED TO REPRESENT YOUR CLIENT?

MR. CIULLA: SO TWO THINGS, YOUR HONOR, THAT WERE STATED IN MY 1050. THE PEOPLE HAVE DECIDED FAIRLY RECENTLY THAT TWO ACCOMPLICES IN THE CASE ARE GOING TO BE USED IN THEIR CASE-IN-CHIEF, BUT ONE OF THOSE THEY HAVE NOT TAKEN THE PROFFER FROM YET. THEY -- I'VE BEEN INFORMED THAT THEY INTEND TO DO THAT WITHIN THE NEXT COUPLE OF WEEKS. SO -- AND THE INVESTIGATION IS GOING TO BE REQUIRED TO DEAL WITH BOTH OF THOSE ACCOMPLICES. IT'S GOING TO TAKE I ESTIMATE 60 DAYS BEFORE WE'RE COMFORTABLE WITH WHERE THEY'RE AT, WITH INVESTIGATION OF THEIR BACKGROUND AND WHAT THEY HAVE TO SAY.

THE COURT: IF I CAN ASK THIS. LET'S SAY -- AGAIN, I ACCEPT WHAT YOU SAY THAT THERE IS, BUT I HAVE HEARD IN MY CAREER SOMETHING ANTICIPATED AND THEN THIS DOESN'T HAPPEN. BUT LET'S ASSUME THAT THAT SECOND ACCOMPLICE IS NOT GOING TO GIVE A PROFFER AND NOT BEING UTILIZED.

YOU STILL NEED TIME WITH THE OTHER ONE TO BE PREPARED; AM I CORRECT?

MR. CIULLA: CORRECT.

THE COURT: IF WE CAN JUST ANALYZE IT WITH THAT, HOW MUCH TIME DO YOU NEED PLUS THE OTHER THINGS THAT YOU HAD MENTIONED LAST TIME THAT WE WERE IN COURT?

MR. CIULLA: I DO ESTIMATE ABOUT 60 DAYS. THERE ARE A NUMBER OF WITNESSES THAT ARE OUT OF COUNTY THAT NEED TO BE

LOCATED AND INTERVIEWED, AND IT'S GOING TO TAKE SOME TIME. THEY'RE UP IN CENTRAL CALIFORNIA, MOST OF THEM.

THE COURT: IF I CAN HAVE --

OKAY. COUNSEL, I'M SORRY. WE HAVE TO -- I HAVE TO ASK YOU NOT TO TALK IN THE CUSTODY BOX. IN THE CUSTODY BOX, I'M GOING TO ASK EVERYBODY TO KEEP THE NOISE LEVEL DOWN, AND I'LL -- THE DEFENDANTS WHO ARE IN CUSTODY, COURT'S MAKING A REQUEST AT THIS TIME THAT YOU NOT TALK TO EACH OTHER UNLESS YOU'RE TALKING TO YOUR CLIENT -- I'M SORRY -- COUNSEL WHO IS OUTSIDE THE CUSTODY BOX. YOU CAN GO AHEAD AND CONTINUE TO TALK TO YOUR CLIENT. JUST MAKE SURE IT'S IN A LOW VOICE.

THOSE IN THE AUDIENCE, AGAIN, I KNOW YOU HAVE TO TALK, THE ATTORNEYS, TO EACH OTHER, BUT TRY TO KEEP THE NOISE LEVEL DOWN.

OKAY. LET'S GO BACK AND SEE. I'M -- I HEARD 60 DAYS. YOU'VE GOT AT LEAST ONE ACCOMPLICE THAT'S GOING TO REQUIRE THAT KIND OF TIME, AND SO GO AHEAD.

MR. CIULLA: RIGHT. IN ADDITION TO THAT, VERY RECENTLY, CONVERSATIONS BETWEEN MY CLIENT AND HIS FORMER SPOUSE WHICH WERE RECORDED WE DID NOT ANTICIPATE, BECAUSE OF CERTAIN PRIVILEGES THAT EXIST, THOSE COMING INTO PLAY. VERY RECENTLY AN ANNULMENT WAS GRANTED IN THAT MARRIAGE AND IT BRINGS INTO PLAY A LOT OF TAPE-RECORDED CONVERSATIONS. HIS FORMER SPOUSE IS GOING TO BE -- IS A COOPERATING WITNESS FOR THE PEOPLE. SHE IS AN ACCOMPLICE TO A CERTAIN DEGREE AS WELL.

THE COURT: SO I HAVE NEVER --

MR. CIULLA: YES.

THE COURT: JUST SO WE HAVE AN ISSUE OF WHETHER THE --

MR. CIULLA: RIGHT.

THE COURT: -- MARITAL PRIVILEGE BECOMES VACATED BECAUSE --

MR. CIULLA: RIGHT.

THE COURT: -- THE COMMUNICATION DURING THE MARRIAGE, THE MARRIAGE IS NOW ANNULLED?

MR. CIULLA: RIGHT.

THE COURT: HMM. BOY.

MR. CIULLA: THE PEOPLE --

THE COURT: I REALLY NEED TO GET BACK TO A TRIAL COURT. I -- THAT'S -- THAT'S VERY INTERESTING.

MR. CIULLA: IT IS. IT WILL BE THE SUBJECT OF SOME MOTIONS, BUT THE PRELIMINARY WORK THAT WE'VE DONE SO FAR SEEMS TO SUGGEST IT BRINGS INTO PLAY THOSE COMMUNICATIONS.

THOSE TAPE RECORDINGS THAT ARE NUMEROUS RECORDINGS ARE GOING TO NEED TO BE TRANSCRIBED AND REVIEWED NOW AND -- BUT I THINK THAT STILL CAN BE ACCOMPLISHED WITHIN ABOUT THE 60-DAY PERIOD THAT I'M TALKING ABOUT.

THE COURT: ALL RIGHT.

MS. BROWN: I ALSO, FOR THAT REASON, BASED ON THIS NEW INFORMATION REGARDING THE ANNULMENT, I AM GOING TO HAVE THOSE TRANSCRIBED. THEY HAVE BEEN TURNED OVER TO BOTH COUNSEL

IN THIS MATTER, BUT I DON'T KNOW THAT MR. WEINBERG IS ACTUALLY EVEN AWARE ALSO THAT SOME OF THE STATEMENTS THAT ARE MADE WITHIN THOSE COULD IMPLICATE HIS CLIENT AS WELL.

THE COURT: ALL RIGHT. OKAY. I AM GOING TO DO --

THE PEOPLE, DO YOU HAVE ANY OBJECTION TO THE GOOD CAUSE?

MS. BROWN: NO. IN FACT, THE PEOPLE ARE REQUESTING TO CONTINUE IT BASED ON NEEDING TO TRANSCRIBE THOSE AUDIO TAPES.

THE COURT: BUT WITH RESPECT TO MR. CIULLA'S CLIENT, YOU HAVE NO ISSUE OR YOU DON'T -- YOU AGREE THAT THERE IS GOOD CAUSE?

MS. BROWN: I ABSOLUTELY AGREE.

THE COURT: AND THE LENGTH OF TIME, WOULD YOU ALSO AGREE WITH THAT ASSESSMENT?

MS. BROWN: YES.

THE COURT: ALL RIGHT. NOW, THE COURT IS GOING TO FIND GOOD CAUSE TO CONTINUE MR. CIULLA'S CLIENT, OKAY, FOR 60 DAYS.

AND THEN I'M ASSUMING NOTHING HAS CHANGED WITH MR. HANDLEY AS YOU'RE STANDING IN FOR MR. WEINBERG THAT HE'S STILL OBJECTING AND HE IS NOT WAIVING TIME?

MR. CIULLA: THAT'S MY UNDERSTANDING.

IS THAT TRUE?

DEFENDANT HANDLEY: (NODDING HEAD IN THE AFFIRMATIVE)

MR. CIULLA: THAT IS TRUE.

THE COURT: WHAT I'D LIKE TO DO THOUGH, I DO WANT TO TALK SCHEDULING, AND ALTHOUGH, YOU KNOW, WE HAVE THESE NEW RULES NOW, WHEN WE HAVE AN INDIVIDUAL WHO IS NOT WAIVING TIME, THE COURT IS GOING TO GO AHEAD AND SET A JURY TRIAL HERE AND I'M GOING TO SET A TRIAL READINESS CONFERENCE ABOUT TEN DAYS BEFORE THAT, BUT I'M ALSO GOING TO SEND THE CASE TO THE SETTLEMENT JUDGE BECAUSE IF SOMETHING COMES UP AND IT LOOKS LIKE THAT THAT'S NOT A REALISTIC TRIAL DATE, EVEN THOUGH IT'S NOT GOING TO GET SETTLED, THEN IT CAN BE SETTLED -- IT CAN BE HANDLED THERE.

ALL RIGHT?

MR. CIULLA: THAT'S FINE.

THE COURT: OKAY. SO LET'S PICK 60 DAYS FROM TODAY'S DATE.

MR. CIULLA: YOUR HONOR, I WAS GOING TO SUGGEST THAT'S -- THAT PUTS US RIGHT AT CHRISTMAS. WE COULD GO THE FOLLOWING WEEK TO LIKE THE FIRST WEEK OF JANUARY.

THE COURT: HOW ABOUT DECEMBER 1ST? I'M SORRY, JANUARY 4TH?

MS. BROWN: THAT DATE IS ACCEPTABLE WITH THE PEOPLE.

MR. CIULLA: THAT'S FINE.

THE COURT: ALL RIGHT. MR. NAYERI, IT'S BEEN SUGGESTED TO PUT THE JURY TRIAL OVER UNTIL JANUARY 4TH.

DO YOU AGREE TO DO THAT?

DEFENDANT NAYERI: YES, YOUR HONOR.

THE COURT: DOES COUNSEL JOIN?

MR. CIULLA: YES.

THE COURT: ALL RIGHT. ALL RIGHT. AND THEN THE COURT UNDER THE 1050 SECTION BECAUSE THERE IS GOOD CAUSE ON THIS DEFENDANT, THE COURT WILL FIND GOOD CAUSE ON MR. HANDLEY.

HOWEVER, I DO WANT TO INDICATE, AS I THINK HERE, I'M GOING TO SEND IT AND SCHEDULE IT FOR JANUARY 5TH AND NOT JANUARY 4TH FOR THE FOLLOWING REASON. THAT WILL GIVE THE COURT WHEN WE COME BACK AN IDEA OF WHAT JUDGES ARE GOING TO BE AVAILABLE, BUT THERE WILL NOT BE A TEN-DAY GRACE PERIOD AND SO I WANT EVERYBODY TO UNDERSTAND THAT BECAUSE MR. HANDLEY IS NOT WAIVING TIME. SO THERE WILL NOT BE A TEN-DAY GRACE PERIOD. THE COURT HOPEFULLY CAN CONTACT THE PARTIES ON JANUARY 4TH ABOUT, YOU KNOW, WHERE IT CAN BE SENT.

KEEPING THAT IN MIND, I KNOW IT IS THE HOLIDAYS, BUT I DO WANT TO SCHEDULE ON DECEMBER 18TH -- AND I WANT TO MAKE SURE THE PARTIES ARE AVAILABLE -- A TRIAL READINESS CONFERENCE SO THAT THE COURT CAN SEE THAT THE CASE IS ACTUALLY GOING TO GO AND THAT THERE IS NO DISCOVERY ISSUE.

SO ON BEHALF OF THE PEOPLE, IS THAT DATE ACCEPTABLE?

MS. BROWN: YES, YOUR HONOR.

THE COURT: MR. CIULLA?

MR. CIULLA: YES.

THE COURT: AND I'LL ASSUME IT IS FOR MR. WEINBERG AS WELL, BUT IF IT'S NOT, THE PARTIES CAN CONTACT THE COURT AND THEN INFORMALLY I CAN ISSUE A MINUTE ORDER TO PICK A DATE, EITHER THE 17TH OR SOME DAY THAT WEEK WHERE ALL PARTIES ARE

AGREEABLE.

SO NOW I AM GOING TO SEND THIS TO JUDGE MAKINO IN DEPARTMENT C49 AND THE COURT'S INTENT IS TO SET THIS SOME TIME THE FIRST WEEK IN DECEMBER, OR I CAN SET IT FOR THE SETTLEMENT JUDGE SOMETIME IN NOVEMBER. SO THE PARTIES JUST LET ME KNOW WHAT DATE, WHAT MONTH THAT YOU WANT THIS TO BE SET TO.

MR. CIULLA: IT DOESN'T HAVE TO BE ON A FRIDAY?

THE COURT: IT DOESN'T HAVE TO BE ON A FRIDAY.

MR. CIULLA: DECEMBER 11TH?

THE COURT: ALL RIGHT. IS THAT AGREEABLE WITH THE PEOPLE?

MS. BROWN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. ALL RIGHT THE MATTER THEN WILL BE ASSIGNED TO JUDGE FITZGERALD IN DEPARTMENT C57. SO ALL PARTIES ARE ORDERED TO BE IN JUDGE FITZGERALD'S COURT ON DECEMBER 11TH. IF THE MATTER IS NOT RESOLVED, THEN ALL PARTIES ARE ORDERED TO BE HERE ON DECEMBER 18TH FOR A TRIAL READINESS CONFERENCE PURSUANT TO THE RULES OF COURT THAT I'VE INDICATED IN THE RULES THAT THE COURT HAS ISSUED, AND THEN ALL PARTIES ARE ORDERED TO BE HERE ON JANUARY 5TH FOR THE JURY TRIAL.

ALL RIGHT. THEN ON MR. NAYERI, WE HAVE TWO, I BELIEVE, PROBATION VIOLATIONS.

YOU'LL ENTER -- YOU'RE MAKING THE SAME REQUEST FOR THOSE DATES?

MR. CIULLA: YES.

THE COURT: AND IF I CAN, THERE ARE NO OTHER CASES FOR MR. HANDLEY.

ALL RIGHT. ANYTHING FURTHER ON BEHALF OF THE PEOPLE?

MS. BROWN: NO, YOUR HONOR.

THE COURT: MR. CIULLA?

MR. CIULLA: NO THANKS.

THE COURT: ALL RIGHT. GENTLEMEN, THANK YOU.

(PROCEEDINGS ADJOURNED)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE - C57

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
PLAINTIFF,	)	
VS.	)	NO. 13CF3394
HANDLEY, KYLE SHIRAKAWA,	)	
DEFENDANT.	)	

THE HONORABLE ROBERT R. FITZGERALD, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, DECEMBER 11, 2015

FOR PLAINTIFF:	OFFICE OF THE DISTRICT ATTORNEY BY: HEATHER BROWN, ESQ.
FOR DEFENDANT KYLE SHIRAKAWA HANDLEY:	ROBERT K. WEINBERG, ESQ. PRIVATELY RETAINED COUNSEL
FOR DEFENDANT HOSSEIN NAYERI:	SALVATORE CIULLA, ESQ. PRIVATELY RETAINED COUNSEL

DEBORAH MANZO-VASQUEZ CSR NO. 7018
OFFICIAL COURT REPORTER

SANTA ANA, CALIFORNIA; FRIDAY, DECEMBER 11, 2015

MORNING SESSION

* * *

THE COURT: KYLE HANDLEY.

MS. BROWN: HEATHER BROWN ON BEHALF OF THE PEOPLE.

MR. WEINBERG: ROBERT WEINBERG ON BEHALF OF MR. HANDLEY, WHO IS PRESENT IN COURT IN CUSTODY.

MR. CIULLA: SALVATORE CIULLA FOR MR. NAYERI. HE'S PRESENT IN CUSTODY.

YOUR HONOR, AS WE DISCUSSED IN CHAMBERS, I AM MAKING A MOTION PURSUANT TO 1050 TO CONTINUE THE JURY TRIAL DATE. AND THE REASON FOR THE REQUEST, AS I INDICATED, IS THAT THERE ARE STATEMENTS -- ALLEGED STATEMENTS MADE BY MR. NAYERI TO HIS WIFE AFTER THIS INCIDENT WHICH THE PEOPLE INTEND TO INTRODUCE AGAINST HIM. THERE IS A FAMILY LAW MATTER IN LOS ANGELES COUNTY BEING LITIGATED CURRENTLY AS TO WHETHER OR NOT THE MARRIAGE OF MR. NAYERI WILL BE TERMINATED AS A RESULT OF ANNULMENT. IF IT IS TERMINATED, THE PEOPLE WILL BE ABLE TO USE THE STATEMENTS AGAINST HIM THAT WERE MADE TO HIS WIFE. IF THE ANNULMENT IS NOT GRANTED, THOSE STATEMENTS CANNOT BE USED IN OUR TRIAL. THOSE STATEMENTS ARE VERY IMPORTANT TO OUR TRIAL.

BASED ON THAT, I AM MAKING A REQUEST THAT THE HEARING SET FOR JANUARY THE 5TH TO DETERMINE WHETHER

THE COURT IS GOING TO GRANT A TRIAL ON THAT ISSUE, I'M REQUESTING THAT --

THE COURT: HOW SOON AFTER THAT CAN YOU GET READY FOR TRIAL?

MR. CIULLA: FEBRUARY 23RD IS THE SOONEST DATE.

THE COURT: MISS BROWN, CAN YOU SEPARATE THESE PEOPLE?

MS. BROWN: NO, YOUR HONOR.

THE COURT: MR. WEINBERG, IS YOUR CLIENT GOING TO WAIVE TIME?

MR. WEINBERG: HE WILL NOT WAIVE TIME.

THE COURT: OKAY. OVER THE FAILURE OF WAIVING TIME AND DEFENDANT HANDLEY'S OBJECTION, THE MATTER WILL BE SET ON FEBRUARY 23RD FOR --

MR. CIULLA: TRIAL.

THE COURT: -- JURY TRIAL DATE. I NEED --

MR. CIULLA: WE'RE ASKING FOR FEBRUARY 16TH FOR TRC.

THE COURT: 2-16?

MR. CIULLA: YES. AND WE'RE ALSO ASKING FOR FEBRUARY 2ND FOR PRETRIAL IN THIS COURT.

THE COURT: PRETRIAL IN THIS DEPARTMENT ON FEBRUARY 2ND. OKAY. I NEED SOMEBODY TO TAKE A TIME WAIVER OF MR. NAYERI.

MR. CIULLA: MR. NAYERI, YOU HAVE THE RIGHT

TO HAVE YOUR TRIAL CURRENTLY ON JANUARY THE 5TH. I'M ASKING THE COURT TO PUT IT OVER FOR THE REASONS I STATED TO FEBRUARY 23RD WITH THE UNDERSTANDING THAT IT WILL BEGIN ON THAT DATE OR WITHIN A REASONABLE TIME OF THAT DATE.

DO YOU UNDERSTAND AND AGREE TO THAT?

THE DEFENDANT: YES.

THE COURT: AGREEABLE TO THE PEOPLE?

MS. BROWN: YES, YOUR HONOR.

THE COURT: RESPECTIVE DATES, FEBRUARY 2ND BOTH DEFENDANTS FOR PRETRIAL IN THIS DEPARTMENT FOR AN EFFORT TO SETTLE THE CASE. SHOULD THAT FAIL, TRIAL READINESS CONFERENCE FEBRUARY 16TH. JURY TRIAL DATE FOR BOTH DEFENDANTS FEBRUARY 23RD. THERE IS NO TIME WAIVER AS TO HANDLEY OVER THE OBJECTION OF THAT DEFENDANT. THANK YOU, FOLKS.

MR. WEINBERG: THANK YOU.

MR. CIULLA: THANK YOU.

THE COURT: TRIAL DATE WAS VACATED.

(THE PROCEEDINGS WERE ADJOURNED.)

(THE NEXT PAGE NUMBER IS 15.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

DEPARTMENT C-57

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. 13CF3394
	)	
KYLE SHIRAKAWA HANDLEY,	)	
	)	
DEFENDANT.	)	
	)	

THE HONORABLE ROBERT R. FITZGERALD, JUDGE

REPORTER'S TRANSCRIPT

TUESDAY, FEBRUARY 2, 2016

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: TONY RACKAUCKAS
DISTRICT ATTORNEY
BY: MATTHEW MURPHY
DEPUTY

FOR DEFENDANT HANDLEY: ROBERT K. WEINBERG

FOR DEFENDANT NAYERI: SALVATORE CIULLA

SHELLEY HILL, CSR NO. 2379
OFFICIAL COURT REPORTER PRO TEM

SANTA ANA, CALIFORNIA - TUESDAY, FEBRUARY 2, 2016

MORNING SESSION

* * * * *

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: COURT HAS AUTHORIZED MEDIA COVERAGE ON HANDLEY AND NAYERI AFTER A CONFERENCE WITH COUNSEL IN CHAMBERS.

PEOPLE VS. -- IN FACT, I DON'T EVEN KNOW HOW MANY, BUT THERE'S A LOT OF MEDIA HERE THAT WANTS TO FILM. THAT REQUEST IS GRANTED. IT LOOKS LIKE EVERYBODY EXCEPT PERHAPS THE *WASHINGTON POST* WANTS TO TAKE A PICTURE.

COURT CALLS THE MATTER OF KYLE --

THE CLERK: THEY'RE NOT GOING TO BE UP YET, YOUR HONOR.

THE COURT: OKAY. THE MEDIA MAY FILM WHEN THEY'RE HERE.

(**WHEREUPON THE COURT HEARD OTHER MATTERS.**)

THE COURT: DO WE HAVE HANDLEY AND NAYERI UP?

MR. WEINBERG: WE DO.

THE COURT: WHERE ARE THEY?

MR. WEINBERG: MR. HANDLEY IS RIGHT HERE.

DEFENDANT HANDLEY: RIGHT HERE.

THE COURT: PEOPLE VERSUS KYLE HANDLEY.

MR. MURPHY: GOOD MORNING, YOUR HONOR. MATT MURPHY HERE FOR THE PEOPLE ON THAT MATTER.

THE COURT: DO WE NEED TO DO BOTH DEFENDANTS AT THE SAME TIME?

MR. MURPHY: YES.

THE BAILIFF: THEY'RE BOTH OUT.

THE COURT: NEXT DEFENDANT IS HOSSEIN NAYERI. RIGHT HERE? IS THAT CORRECT?

DEFENDANT NAYERI: YES, YOUR HONOR.

MR. CIULLA: PRESENT, YES, YOUR HONOR. SALVATORE CIULLA FOR MR. NAYERI.

MR. WEINBERG: ROBERT K. WEINBERG FOR MR. HANDLEY, PRESENT BEFORE THE COURT IN CUSTODY.

THE COURT: DID YOU GIVE YOUR APPEARANCE?

MR. MURPHY: YES, YOUR HONOR. MATT MURPHY APPEARING FOR THE PEOPLE ON THAT MATTER.

THE COURT: GO AHEAD.

MR. CIULLA: YOUR HONOR, BASED ON OUR DISCUSSIONS IN CHAMBERS, THERE'S A REQUEST -- BY ME ANYWAY -- TO CONTINUE THE MATTER TO MARCH THE 21ST FOR A STATUS CONFERENCE DATE -- TRIAL SETTING DATE.

THE COURT: PRETRIAL, THIS DEPARTMENT?

MR. CIULLA: YES.

THE COURT: MR. WEINBERG?

MR. WEINBERG: YOUR HONOR, AS THE COURT KNOWS, THIS CASE HAS BEEN THROUGH TWO ITERATIONS. MY CLIENT WAS

ARRESTED THE FIRST WEEK OF OCTOBER OF 2012. HE SAT IN CUSTODY WITH NO BAIL UNTIL ABOUT A YEAR AGO. ON THE THIRD DAY THE CASE WAS TRAILING FOR TRIAL, THE D.A. DISMISSED AND REFILED. HE HAS SAT ALL THE WAY TILL NOW ON THE SECOND ROUND OF THIS CASE.

WE'VE OBJECTED REPEATEDLY TO THESE POSTPONEMENTS, AND AS MUCH AS I RESPECT SAL'S LAWYERING AND THE NEED TO BE COMPLETELY PREPARED, WE HAVE A SEPARATE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL. SO I'M GOING TO OBJECT BECAUSE WE'RE READY ON THE DATE THAT WE'VE ALREADY SELECTED AND I'LL SUBMIT.

THE COURT: WHAT IS THAT DATE?

MR. WEINBERG: I BELIEVE IT'S 26TH -- FEBRUARY 23RD.

MR. CIULLA: FEBRUARY 23RD.

THE COURT: MR. MURPHY, YOU NEED TO KEEP THESE PEOPLE TOGETHER IN A SINGLE TRIAL?

MR. MURPHY: YES, YOUR HONOR.

THE COURT: OVER THE OBJECTION OF THE DEFENSE COUNSEL WEINBERG FOR MR. HANDLEY, THE COURT WILL SET THE MATTER ON MARCH 21ST. MATTER MUST BE TRIED TOGETHER.

CAN YOU TAKE A TIME WAIVER, NONETHELESS? YOU WANT TO SPEAK TO YOUR CLIENT, SEE IF HE'LL DO THAT ONE MORE TIME?

MR. WEINBERG: WELL, YOUR HONOR, MY CLIENT OBJECTS, SO IF THE COURT WANTS TO EXPLAIN HIS

CONSTITUTIONAL --

THE COURT: NO, THE COURT HAS ALREADY MADE THE FINDING THAT THEY HAVE TO BE TRIED TOGETHER, AND THE EARLIEST THAT MR. CIULLA CAN GET READY IS MARCH 21ST, AND PERHAPS A REASONABLE TIME THEREAFTER. WE'LL SET IT FOR PRETRIAL WITH AN ENDEAVOR TO SETTLE THIS CASE IF POSSIBLE ON THAT DATE. THANK YOU, FOLKS.

MR. WEINBERG: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: TIME IS WAIVED, MARCH 21.

MR. CIULLA: THANK YOU.

THE COURT: AS TO CIULLA'S CLIENT ONLY. THANK YOU, FOLKS.

MR. CIULLA: OTHER DATES ARE VACATED.

THE COURT: HAVE YOU DONE THAT YET? GO AHEAD.

MR. CIULLA: WE'RE ASKING TO VACATE THE -- I THINK IT'S FEBRUARY 23RD TRIAL DATE.

THE COURT: THAT'S VACATED AS TO BOTH DEFENDANTS.

MR. CIULLA: THANK YOU.

MR. MURPHY: THANK YOU, YOUR HONOR.

THE COURT: DID WE GET A TIME WAIVER ON YOUR CLIENT?

THE CLERK: NO, YOUR HONOR.

MR. CIULLA: WE DIDN'T.

MR. NAYERI --

THE COURT: BE A GOOD IDEA.

MR. CIULLA: -- YOU HAVE A RIGHT TO GO TO TRIAL ON FEBRUARY 23RD. IT'S CURRENTLY SET FOR THAT DATE OR WITHIN A REASONABLE TIME OF THAT DATE. I'M ASKING THE COURT TO PUT YOUR CASE OVER TO MARCH 21ST FOR A PRETRIAL WHICH MEANS YOU'LL HAVE A TRIAL SET WITHIN A REASONABLE TIME OF MARCH 21ST. DO YOU AGREE TO THAT?

DEFENDANT NAYERI: I DO.

MR. CIULLA: JOIN.

THE COURT: TIME IS WAIVED. DEFENDANT -- BOTH DEFENDANTS ARE ORDERED PRESENT, THIS DEPARTMENT, FOR PRE-TRIAL MARCH 21. THANK YOU.

MR. MURPHY: THANK YOU, YOUR HONOR.

MR. CIULLA: THANK YOU.

THE COURT: THANK YOU.

(END OF PROCEEDINGS.)

SANTA ANA, CALIFORNIA - WEDNESDAY, JANUARY 3, 2018

MORNING SESSION

* * *

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: WE ARE BACK ON THE RECORD. GOOD MORNING. I TRUST EVERYONE HAD A GOOD HOLIDAY. ALL COUNSEL ARE PRESENT. THE DEFENDANT IS PRESENT.

THERE ARE JUST A COUPLE OF MATTERS THAT THE COURT WANTED TO BRIEFLY FORMALIZE BEFORE WE PROCEED FURTHER.

COUNTS 1 AND 2, THE 209 CONTAINS A SPECIAL, ADDITIONAL FACTOR IF GREAT BODILY INJURY WAS INFLICTED. THE PEOPLE ALSO ALLEGE A 12022.7, GREAT BODILY INJURY, SENTENCING ENHANCEMENT, AS TO COUNT 4, WHICH I UNDERSTAND THEY HAVE A PENDING MOTION REGARDING.

THE COURT PREPARED JURY INSTRUCTIONS ASKING THE JURY TO MAKE FINDINGS ON BOTH THE SUBSTANTIVE CRIME AND THEN WHETHER OR NOT THAT CRIME, IF COMMITTED, GREAT BODILY INJURY WAS INFLICTED.

THE WAY THAT THE CALCRIMS READ, IT SHOULD BE A SPECIAL FINDING, BUT IT'S NOT TECHNICALLY A SENTENCING ENHANCEMENT AND THE LIKE.

ON BEHALF OF THE DEFENSE, HAVE YOU HAD AN OPPORTUNITY TO SEE THE VERDICT FORMS, SIR?

MR. WEINBERG: I HAVE NOT FINISHED REVIEWING THEM, YOUR HONOR.

THE COURT: I AM PREPARING TO INSTRUCT CONSISTENT WITH WHAT I HAVE JUST SAID.

IS THERE ANY OBJECTION BY THE DEFENSE? THERE WAS NOT WHEN WE WENT OVER JURY INSTRUCTIONS.

MR. WEINBERG: NO, THERE IS NOT.

THE COURT: NEXT THERE IS A PEOPLE'S MOTION AS TO THAT SENTENCING ENHANCEMENT.

MR. MURPHY: YES, YOUR HONOR. WE WOULD -- WE MOVED TO STRIKE THAT.

THE COURT: ANY OBJECTION, SIR?

MR. WEINBERG: NO.

THE COURT: THAT REQUEST IS GRANTED AND THE COURT WILL THEN REMOVE THE GREAT BODILY INJURY JURY INSTRUCTION FROM THAT MAKING SURE THAT IT'S STILL CONTAINED IN COUNTS 1 AND 2 WHEN -- WHICH I BELIEVE IT IS, BUT I'LL JUST BE DOUBLE-CHECKING ON THAT.

MS. BROWN: YOUR HONOR, IN REGARDS TO THE SECOND COUNT INVOLVING MARY BARNES, IF THE COURT COULD TAKE A LOOK AT THE ACTUAL VERDICT FORM THAT THE PEOPLE DRAFTED IN REGARDS TO COUNT 2, THERE IS KIND OF AN "OR" WITHIN THE PENAL CODE. "THERE IS GBI INFLICTED ON THE PERSON OR" AND OUR THEORY OF LIABILITY IS THE "OR" PART.

SO I KNOW THE COURT JUST DRAFTED A SPECIAL INSTRUCTION REGARDING THAT FINDING. IT'S A LITTLE

DIFFERENT WITH REGARDS TO OUR THEORY ON MARY BARNES.

MR. MURPHY: WE APOLOGIZE FOR THE LATENESS, YOUR HONOR. WE WERE ACTUALLY DEALING WITH THIS UP UNTIL LAST NIGHT.

THE COURT: NOTED.

SO YOUR THEORY IS INTENT TO CONFINE, A MANNER IN WHICH EXPOSES THAT PERSON TO A SUBSTANTIAL LIKELIHOOD OF DEATH?

MR. MURPHY: YES.

THE COURT: ANY OBJECTION TO THE PEOPLE PROCEEDING UNDER THAT THEORY?

MR. WEINBERG: AS TO MR. SIMONIAN?

MR. MURPHY: NO. TO MS. BARNES.

THE COURT: MS. BARNES.

MR. WEINBERG: I HAVE NO OBJECTION TO PROCEEDING ON THAT THEORY.

THE COURT: THANK YOU. THEN THE COURT WILL BE MODIFYING THE INSTRUCTION AS TO COUNT 2.

MR. MURPHY: THANK YOU.

THE COURT: I'LL DO MY BEST TO GET THOSE INSTRUCTIONS TO YOU AS QUICKLY AS POSSIBLE. IF AT ANY POINT THAT IMPACTS EITHER PARTY'S ABILITY TO ARGUE AS TO THAT ONE THEORY OF LIABILITY, I WOULD ALLOW YOU TO REOPEN YOUR ARGUMENT TO ADDRESS THAT ONE ISSUE. I DON'T THINK THAT WILL BE NECESSARY, BUT I -- AS YOU -- I'M SURE YOU'RE AWARE, I ERR ON THE SIDE OF GIVING EACH SIDE

THE COMPLETE ABILITY TO BE ABLE TO EFFECTIVELY ARGUE THEIR MOTIONS TO THE JURY.

ARE THERE ANY OTHER ISSUES REGARDING THE JURY INSTRUCTIONS OR THE CHARGING DOCUMENT ON BEHALF OF THE PEOPLE?

MR. MURPHY: NO, YOUR HONOR. WE DO WANT TO LET THE COURT KNOW, SINCE THE COURT WAS KIND ENOUGH NOT TO HAVE EITHER PARTY REST BEFORE THE BREAK, THERE WERE A FEW HOUSEKEEPING MATTERS, THAT WE STARTED PUTTING TOGETHER STIPULATIONS, AND THEN WE WERE THINKING JUDICIAL NOTICE IT, AND THEN WE SETTLED ON THE IDEA THE EASIEST WAY TO DO IT IS BRIEFLY CALL DETECTIVE PETERS AGAIN THIS MORNING REGARDING DISTANCE TO THE SCENE, WHEN THEY START TICKETING IN NEWPORT. VERY SHORT MATTERS. WE ANTICIPATE THE DIRECT WOULD BE LESS THAN TEN MINUTES.

THE COURT: ANY OBJECTION?

MR. WEINBERG: NO.

THE COURT: I WILL GRANT THAT REQUEST.

THERE ARE TWO ADDITIONAL THINGS. THERE IS THE -- THERE HAS BEEN A PREVIOUS GRANTING OF THIS COURT OF MEDIA COVERAGE BY -- I'M OLD SCHOOL, SO I DON'T KNOW ALL THE RIGHT NEW TERMS, BUT BY TELEVISION. I HAVE GRANTED THAT.

THERE IS NOW A STILL PHOTOGRAPHY REQUEST BY THE LOS ANGELES TIMES.

IS THERE ANY OBJECTION ON BEHALF OF THE

PEOPLE?

MR. MURPHY: NO, YOUR HONOR.

THE COURT: ON BEHALF OF THE DEFENSE?

MR. WEINBERG: NONE.

THE COURT: COURT WILL GRANT THAT REQUEST.

THE LAST ISSUE I WANT TO FORMALIZE IS THAT THERE WAS A REQUEST FOR TRAINING PURPOSES THAT THE DISTRICT ATTORNEY'S OFFICE BE ALLOWED TO VIDEOTAPE THIS.

IT WAS REPRESENTED TO THE COURT THAT THERE HAD BEEN NOTICE GIVEN TO THE DEFENSE. AND I HAVE TENTATIVELY GRANTED THAT REQUEST.

IS THERE ANY OBJECTION?

MR. WEINBERG: NONE. I WAS GIVEN NOTICE. THANK YOU.

THE COURT: I WILL GRANT THAT REQUEST AS WELL.

ANYTHING FURTHER BEFORE WE BRING THE JURY IN?

ON BEHALF OF THE PEOPLE?

MR. MURPHY: NO.

THE COURT: ON BEHALF OF THE DEFENSE?

MR. WEINBERG: NOTHING, YOUR HONOR.

THE COURT: WE'RE OFF THE RECORD.

(PAUSE IN PROCEEDINGS.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: WE ARE BACK ON THE RECORD. ALL COUNSEL ARE PRESENT. THE DEFENDANT IS PRESENT. THE JURORS ARE

DEFENDANT WAS THE DRIVER OF THE VAN, THE DEFENDANT HAD THE ABILITY TO CONTROL THE ONGOING NATURE OF MUCH OF THESE OFFENSES AS HE IS DRIVING THROUGH A TOWN AFTER AN HOUR OF THE PAIN AND SUFFERING THAT'S GOING ON IN THE BACK OF THE VAN. HE VERY EASILY COULD HAVE PULLED TO THE SIDE OF THE ROAD, JUMPED OUT OF THE CAR AND RUN AWAY. AT LEAST, EXTRICATING HIMSELF FROM THAT.

THERE IS NO EVIDENCE TO SUPPORT THAT THAT EVER OCCURRED. ON THE CONTRARY, IF THE DEFENDANT WAS IN THE BACK -- BACK IN -- IN A NON-DRIVER POSITION IN THE CAR, THEN FROM THE EVIDENCE THAT WAS RECEIVED, HE WAS ONE OF THE TWO PEOPLE INFLICTING INJURIES UPON THE VICTIM.

EITHER WAY, THE COURT FINDS THAT THAT IS A SIGNIFICANT MIND-SET OF CRUELTY BECAUSE EVEN THOUGH THESE PEOPLE WERE DUCT-TAPED, ONE WOULD HAVE BEEN CLEARLY AWARE OF NOT ONLY THE ACTS, BUT THE IMPACT OF THOSE ACTS BY THE RESPONSES OF BOTH VICTIMS IN THIS CASE.

TO SUMMARIZE, THE DEFENDANT IS SENTENCED IN COUNT 1 TO LIFE WITHOUT THE POSSIBILITY OF PAROLE AS TO COUNT 2, LIFE WITHOUT POSSIBILITY OF PAROLE CONSECUTIVE. COUNT 3, LIFE WITH PAROLE ELIGIBILITY AFTER SEVEN YEARS CONSECUTIVE. COUNT 4, LIFE WITH A PAROLE ELIGIBILITY AFTER SEVEN YEARS CONSECUTIVE. THAT -- THUS, IS A TOTAL SENTENCE OF TWO TERMS OF LIFE WITHOUT POSSIBILITY OF PAROLE PLUS TWO TERMS OF LIFE WITH A MINIMUM PAROLE