No. 25-6654

# In the Supreme Court of the United States

KYLE SHIRAKAWA HANDLEY,

*Petitioner,*

v.

CHRISTOPHER PIERCE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Petitioner was tried for aggravated kidnapping, torture, and aggravated mayhem against one victim, and aggravated kidnapping of a second. Under California Penal Code Section 209, an aggravated kidnapping that causes bodily harm or places a victim at a substantial risk of death subjects the kidnapper to a sentence of life without parole. The prosecution made clear throughout the case that it intended to seek a life-without-parole sentence. And although the written information did not specifically include those allegations as to the Section 209 charge, the parties agreed to have the jury return special verdicts as to whether the kidnapping caused bodily harm to one victim and placed the other at substantial risk of death. The jury unanimously found both circumstances proven beyond a reasonable doubt, and petitioner was sentenced to life without parole. The question presented is:

Whether the state appellate court violated the clearly established holdings of this Court when it determined that, given petitioner's agreement to submit the bodily harm and substantial risk of death questions to the jury, their omission from the written charging document did not violate petitioner's constitutional rights.

## DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

*Handley v. California*, No. 21-6229 (certiorari denied March 28, 2022)

United States Court of Appeals for the Ninth Circuit:

*Handley v. Moore*, No. 24-499 (opinion affirming the denial of habeas relief October 8, 2025; petition for rehearing en banc denied July 29, 2025) (this case below)

United States District Court for the Central District of California:

*Handley v. Moore*, No. 22-CV-1423 (petition for writ of habeas corpus denied January 16, 2024) (this case below)

California Supreme Court:

*People v. Handley*, No. S268164 (review denied June 23, 2021)

*People v. Handley*, No. S260462 (review granted April 22, 2020; remanded for reconsideration September 23, 2020)

California Court of Appeal:

*People v. Handley*, No. G056608 (judgment affirmed on remand March 25, 2021)

*People v. Handley*, No. G056608 (judgment affirmed on direct appeal January 6, 2020)

Orange County Superior Court:

*People v. Handley*, No. 13 CF3394 (judgment entered July 20, 2018)

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## STATEMENT

1. Petitioner Kyle Handley was sentenced to life in prison for kidnapping Michael S., whom petitioner tortured and dismembered. Pet. App. 8a, 15a. He received the same sentence for kidnapping Mary B., whom petitioner kidnapped and left in the desert at risk of death. *Id.*

Petitioner, a marijuana vendor, knew that Michael possessed unbanked cash from owning and operating marijuana dispensaries. Pet. App. 142a-43a & n.2. One night in 2012, two men woke up Michael in his bedroom and pointed a shotgun at his face. *Id.* at 143a. They beat Michael, blindfolded him, and immobilized him with zip ties. *Id.* They also blindfolded and immobilized his housemate Mary. *Id.* They told Michael they wanted a million dollars and accused him of hiding money in the desert. *Id.*

Michael and Mary were forced into a vehicle, whose back windows were covered with light-blocking "panda paper." Pet. App. 143a; C.A. E.R. 1360-1361. The men kept trying to get Michael to tell them where his money was, while a driver took them into the Mojave Desert. Pet. App. 143a. The men beat Michael, shocked him with a Taser, and burned him with a blowtorch. *Id.* at 143a-144a. Finally, after Michael failed to bring them to his money, they took him and Mary out of the vehicle on a deserted road. *Id.* at 144a.

The assailants cut off Michael's penis. Pet. App. 144a. Then they poured bleach on him and drove away, leaving Michael and Mary in the desert, blindfolded and zip-tied. *Id.* Before departing, one of the men tossed a knife into the bushes, telling Mary that if she could find it to cut herself free it would

be her "lucky day." *Id.* Mary managed to shift her blindfold, find the knife, and cut herself free. *Id.* She walked about a mile to a highway and waved down a passing Sheriff's patrol. *Id.* Michael survived but was permanently dismembered. *Id.* at 145a. In addition to burns and bruises, his skin was so damaged from the bleach that there were permanent imprints of his assailants' shoes in it. *Id.* at 144a, 168a.

One of Michael's neighbors had seen a suspicious truck the afternoon of the kidnapping and wrote down the license plate number. Pet. App. 145a. The truck was registered to petitioner. *Id.* A search of petitioner's home and truck revealed zip ties like the ones used to bind Mary and Michael, panda paper like that on the kidnappers' vehicle, and remnants of extensive bleach use. *Id.*; *see also* C.A. E.R. 1678-1679, 1669, 1715. DNA on gloves and zip ties in the truck matched two of petitioners' friends, whose wives admitted to participating in the three men's scheme to kidnap and extort Michael. Pet. App. 144a-48a.

2. a. Petitioner was charged with two counts of aggravated kidnapping under California Penal Code Section 209(a), one count of aggravated mayhem under Section 205, and one count of torture under Section 206. Pet. App. 175a-77a, 187a-89a.

Section 209 is California's "aggravated kidnapping" statute. *See* Pet. App. 9a, 92a, 100a-101a.[1] Section 209(a) lists two possible punishments for a person who kidnaps "for ransom, reward, or to commit extortion." The version in effect at the time of the crime stated that a person convicted of that crime:

> shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

Cal. Penal Code § 209(a) (2012).[2]

With respect to the kidnapping charges, each iteration of the complaint and information cited Section 209(a) and listed the elements of the offense; but they did not specify whether or not "bodily harm" had resulted or whether a victim had been exposed to a "substantial risk of death." Pet. App. 175a, 187a-

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[1] Petitioner asserts that in California the term "aggravated kidnapping" encompasses only those kidnappings under Section 209(a) that include bodily harm or risk of death, and that a kidnapping under Section 209(a) that does not include those facts is "simple kidnapping for ransom." *E.g.*, Pet. i, 3-5. That is incorrect. "Simple kidnapping" is the California term for the abduction of a person without regard to motive, under Penal Code Section 207. "Aggravated kidnapping," as the court of appeal's second opinion explained, refers to kidnapping for a criminal purpose—such as ransom, reward, or extortion (as in the Section 209(a) charge here) or robbery or rape (under Section 209(b)). Pet. App. 149a-150a. Such a crime is "aggravated kidnapping" regardless of injury or risk of death. *See id.*; Witkin, California Criminal Law § 307 (5th ed.).

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

188a. From the beginning, however, the prosecution made clear that it intended at trial to prove crimes for which "the penalty if convicted is life without parole." *Id*. at 179a (pre-trial motion to join defendants for trial). And harms to Michael's body were explicitly alleged in the charging documents' listing of the elements of the torture and mayhem charges. *Id.* at 188a.

b. Petitioner was tried separately from his co-defendants. Pet. App. 146a. Michael's injuries were described in detail and shown in numerous photographs. C.A. E.R. 1237-1245, 1255-1277, 1332-1368. Petitioner did not dispute that the kidnapping of Michael had included brutal abuse culminating in Michael's penis being severed, or that, at the end of the kidnapping, Mary had been left blindfolded and bound in the desert. Pet. App. 148a. Instead, petitioner's defense was that there was insufficient evidence tying him to the kidnapping. *Id*.

On December 5, in a hearing on pretrial motions, the prosecution proposed instructing the jury with California's official pattern jury instruction on aggravated kidnapping, known as CALCRIM No. 1202. Pet. App. 150a; *see also* C.A. E.R. 326, 620-623. That instruction consisted of three parts: the first setting forth the elements of kidnapping; the second listing possible defenses (such as reasonable belief in consent); and the third stating that:

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

Cal. Judicial Council, Crim. Jury Instr. 1202 (2017).

On December 21, after the prosecution's last witness testified, the court held a jury instruction conference. C.A. E.R. 1744-1749. Petitioner's counsel stated he had "no objection" to the kidnapping instruction. Pet. App. 150a, 218a-220a. Petitioner's counsel also informed the court that he had no need for instructions on any lesser included offense because his theory of the case was that appellant simply was not involved in the kidnappings. *Id.* at 150a. Petitioner told the court that he agreed with that strategy. *Id.* On January 3, the defense examined the proposed verdict forms, which included special verdicts as to kidnapping and risk of death. *Id.* at 218a-19a. Petitioner again made no objection. *Id.* The prosecution clarified that, with respect to the kidnapping of Mary, it wanted only an instruction about a substantial risk of death—not bodily harm. *Id.* at 220a. The defense confirmed that it had "no objection," and the court stated that it would modify that instruction accordingly. *Id.*[3]

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[3] At the January 3 hearing, the judge referred to the proposed kidnapping instructions as requiring a special finding as to "great bodily injury." Pet. App. 218a-220a. That language was imprecise: the kidnapping statute (Penal Code Section 209(a)) uses the term "bodily harm"; but the judge instead spoke in the language of an enhancement under a different statute (Penal Code Section 12022.7), that had been alleged with respect to the torture charge and dismissed before the case went to the jury. Pet. App. 151a. However, the verdict forms and the written and oral instructions to the jury on kidnapping used Section 209(a)'s correct "bodily harm" language. *Id.* at 190a-191a (verdict forms); C.A. E.R. 733-734, 1944-1946 (instructions).

The instruction that the jury received followed what the parties had agreed to. The jury was instructed that if it found the elements of kidnapping for ransom, reward, or extortion met as to Michael, it should go on to determine whether petitioner "caused [Michael] to suffer bodily harm." C.A. E.R. 733-734, 1944-1946. And if it found the elements met as to Mary, it should determine whether petitioner "intentionally confined [Mary] in a way that created a substantial risk of death." *Id.* at 734, 1945-1946. The verdict forms also matched the parties' agreement, asking whether the jury found it to be true that Michael "suffered bodily harm" and that Mary was "intentionally confined in a manner that exposed her to a substantial risk of death." Pet. App. 190a-191a. The jury could find those circumstances true only if it unanimously determined that the prosecution had proven them beyond a reasonable doubt. C.A. E.R. 734.

The jury found petitioner guilty of all charges: kidnapping Michael, kidnapping Mary, torturing Michael, and committing aggravated mayhem against Michael. Pet. App. 115a-116a, 118a. The jury entered true findings to the special verdict questions about Michael suffering bodily harm and Mary being placed at substantial risk of death. *Id.* at 190a-191a.

Petitioner's sentencing brief acknowledged that, given the jury's findings, the statutorily provided sentence for the kidnapping charges was life without parole. Pet. App. 15a; C.A. E.R. 758. Petitioner argued that such a sentence would constitute cruel and unusual punishment. Pet. App. 15a; C.A. E.R. 758-

763. But he did not argue that the sentence was precluded because of any defect in the charging document, or any lack of notice. Pet. App. 15a; C.A. E.R. 1985-1988.

The trial court imposed consecutive sentences of life without parole for each count of kidnapping. Pet. App. 15a, 223a. On the torture and mayhem counts, the court imposed consecutive sentences of life with the possibility of parole after seven years. *Id.* at 223a.

3. On direct appeal, petitioner contended for the first time that he should not have been sentenced to life without parole because the written information in his case had not specifically alleged that the kidnapping caused bodily harm or a substantial likelihood of death. Pet. App. 122a. The court of appeal rejected that argument and affirmed petitioner's conviction in an unpublished decision. *Id.* at 111a-136a. Although the court held that the new claim was not forfeited under California law, *id.* at 122a-124a, it determined that petitioner had "ample notice" that, if convicted, he would be subject to the charged statute's increased punishment for those who commit bodily harm or subject a person to risk of death, *id.* at 125a. Additionally, the court reasoned that petitioner "acquiesced" to the inclusion of the bodily harm and risk of death allegations when discussing jury instructions, and the "charges were effectively amended." *Id.* at 126a-127a.

Petitioner filed a petition for review in the California Supreme Court, which transferred the case back to the court of appeal for evaluation in light of an intervening decision. Pet. App. 138a-139a.

4. The court of appeal affirmed again in another unpublished decision. Pet. App. 141a-171a. The court reasoned that for petitioner, the crime (kidnapping) and the enhancement were "embedded in [the] single statute, [S]ection 209(a)," with which petitioner was charged. *Id.* at 155a. That was adequate notice, because the California Supreme Court had previously warned that a charge under what is now Section 209(a) "'apprises the accused'" that upon conviction he may face "'any one'" of the sentences in that statute. *Id.* (quoting *People v. Britton*, 6 Cal. 2d 1, 5 (1936)). The court also disagreed with petitioner's argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required the bodily harm and substantial risk of death factors to be specifically alleged in the written charging document. Pet. App. 156a. Instead, the court noted, *Apprendi* "expressly declined" to consider whether such facts must also be included in an indictment. *Id.* (citing *Apprendi*, 530 U.S. at 477 n.3).

In any event, the court noted, "the amended instructions and verdict forms in this case were talked about at length before the close of evidence, and the prosecution had discussed in open court its intent to prove that Mary had been confined in a way that exposed her to a substantial risk of death and that Michael had suffered bodily harm." Pet. App. 160a. There was "no dispute" that Michael in fact sustained tremendous injuries—evidence of which was

presented as far back as the preliminary hearing. *Id.* Given these circumstances, "there could have been little doubt the prosecution was alleging both of the circumstances required to sentence" petitioner to life without parole under Section 209 "if he was convicted." *Id.* Petitioner, who "consented to the inclusion of those allegations in the jury instructions and verdict form," acquiesced in an informal amendment of the charges. *Id.* at 161a; *see id.* (noting that the defense never "so much as suggested" that it had lacked notice of petitioner's exposure to the life-without-parole sentence, and never suggested that its "plea decisions or trial strategy were impacted by the manner in which the case was charged").

The California Supreme Court denied review. Pet. App. 173a.

5. Petitioner filed a petition for writ of certiorari in this Court. The petition asserted that petitioner's sentence violated the Sixth Amendment's notice principles and the requirements of *Apprendi*. *See* Pet. for Writ of Cert. i-ii, *Handley v. California*, No. 21-6229 (Nov. 4, 2021). This Court denied certiorari. *See* 142 S. Ct. 1421 (2022).

6. Petitioner then filed the federal habeas petition that is the subject of these proceedings. *See* Pet. App. 87a-89a. The magistrate judge recommended that the petition be denied, because the "citation to section 209(a)" in the written information "necessarily informed Petitioner" that he faced a possible sentence of life without parole. *Id.* at 106a. Nor had petitioner shown that his defense was prejudiced. *Id.* at 107a.

The district court denied the petition, explaining that relief was not available under 28 U.S.C. § 2254(d). Pet. App. 87a-89a. Although the court "doubt[ed"] that the charging document provided the degree of notice that the Sixth Amendment required, the Supreme Court in *Apprendi* had "declined to resolve whether punishment enhancing facts must be included in a charging document" in state courts. *Id.* at 88a. In any event, the court continued, petitioner had not shown that the asserted error "had a substantial and injurious effect or influence on the outcome of his trial," as habeas relief requires. Pet. App. 89a (quoting *Brown v. Davenport*, 596 U.S. 118, 126 (2022)) (internal quotation marks omitted).

7. The court of appeals affirmed. Pet. App. 2a-50a. The court explained that no Supreme Court decision clearly established "that the Sixth Amendment requires state charging documents to allege punishment-enhancing facts such as the special allegations at issue here." Pet. App. 7a. Nor did Supreme Court precedent "clearly establish . . . that punishment-enhancing facts are among the essential elements that must be charged." *Id.* at 28a. Instead, *Apprendi* had expressly "reserved the question whether the Constitution requires *Apprendi*-type elements to be alleged in state charging documents." *Id.* at 37a.

The court also rejected petitioner's contention that clearly established federal law barred courts from "look[ing] beyond the written information to conclude that he received adequate notice of the special allegations." Pet. App.

38a. And the court noted that the Supreme Court had never "held that notice may not be provided through consensual amendment of the information." *Id.* at 41a. Finally, the court explained, the state court reasonably concluded that petitioner had, in fact, "received notice of and consented to the special allegations during the jury instruction conference." *Id.* at 8a.

Judge Donato, in dissent, acknowledged that *Apprendi* had "reserved" for "another day" the question of whether punishment-enhancing facts must be alleged in a state charging document. Pet. App. 69a. Nevertheless, he maintained, the general legal principles of cases like *Apprendi* "clearly established that a fact which aggravates the legally prescribed punishment is an 'element' of the offense" that must be included in the information, *id.* at 63a, and the Constitution "require[d] notice to be given at the beginning of court proceedings," not through later amendment, *id.* at 75a. Finally, the dissent stated, "a violation of the Sixth Amendment right to adequate notice of a criminal charge" is structural error, eliminating the need for a harmlessness analysis. *Id.* at 79a-80a.

Petitioner's motion for en banc rehearing was denied, with no judge of the court requesting a vote. Pet. App. 85a.

## ARGUMENT

The court of appeals correctly determined that petitioner's claims did not meet the requirements for habeas relief. The decision creates no conflict among the lower courts. This Court previously denied certiorari when

petitioner raised similar claims on direct appeal, and there is no reason for a different result now under the more stringent standards of federal habeas.

1. The standard for federal habeas relief under 28 U.S.C. § 2254(d) is well settled. A state-court judgment cannot be disturbed unless it "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." 28 U.S.C. § 2254(d)(1). "[C]learly established" law means Supreme Court precedent that "squarely addresses the issue," *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008) (per curiam), and encompasses only "'the holdings, as opposed to the dicta, of this Court's decisions,'" *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). As the court of appeal explained, petitioner does not meet those requirements.

a. Petitioner claims that he had a clearly established right not to receive the highest sentence specified in the charged statute unless the charging document alleged all specific facts that the jury would have to find to make him eligible for that sentence. Pet. 8-16. That is incorrect.

The Sixth Amendment provides criminal defendants the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. And due process entitles a defendant to "reasonable notice of a charge against

him." *In re Oliver*, 333 U.S. 257, 273 (1948). The state court was not unreasonable to conclude that these requirements were met under the circumstances. Among other things, the prosecution explicitly stated its intent to seek a life sentence early in the case. *See supra* p. 4; Pet. App. 179a. Longstanding California precedent put the defendant on notice that, under California law, the information charging a violation of the aggravating kidnapping statute meant that the prosecution could seek to prove facts necessary for the maximum sentence. *See People v. Britton*, 6 Cal. 2d 1, 5 (1936); Witkin, California Criminal Law § 316 (5th ed.). And petitioners' counsel agreed to have the jury decide the factors for increased sentencing, rather than expressing surprise or dismay that those factors were at issue. *See supra* p. 5.

b. The precedents petitioner cites do not establish that he was entitled to more. Petitioner contends that this Court established that punishment-enhancing facts must be alleged in charging documents in *United States v. Britton*, 107 U.S. 655 (1883), *Chandler v. Fretag*, 348 U.S. 3 (1954), *Chewning v. Cunningham*, 368 U.S. 443 (1962), and *Specht v. Patterson*, 386 U.S. 605 (1967). Pet. 10-12. But in *United States v. Britton*, portions of a bank president's indictment were held invalid insofar as they failed to allege "essential element[s]" of charged *crimes*, not punishment-enhancing facts. 107 U.S. at 667-669. The missing element of "conversion" to personal use affected which of two offenses found in separate statutes was committed:

"embezzlement" or "maladministration of funds." Pet. 10; *compare United States v. Britton*, 107 U.S. at 662 (citing Rev. Stat. § 5209 for embezzlement), *with id.* at 668 (citing Rev. Stat. § 5239 for maladministration). Those concerns are not implicated in this case, where the offense and statute pertaining to petitioner's charge were clear from the beginning.[4]

*Fretag*, *Chewning*, and *Specht* are even further afield. Those decisions did not involve the right to notice at all. Instead, they concerned the right to the assistance of counsel and right to confront witnesses. *Fretag*, 348 U.S. at 8-10; *Chewning*, 368 U.S. at 446-447; *Specht*, 386 U.S. at 607, 610. Petitioner cannot receive habeas relief based on precedents that did not "squarely address[]" the right at issue here. *Wright*, 552 U.S. at 125-126.

c. Petitioner's reliance on *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), is also flawed. Pet. 12-14. None of those cases held that the Sixth Amendment requires state charging documents to allege all punishment-enhancing facts. As petitioner notes (Pet. 13), *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

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[4] Beyond that, *United States v. Britton* did not cite the Constitution, and may have been intended as an application of this Court's supervisory power over lower federal courts. Such a decision does not serve as clearly established law for constitutional claims. *See Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam).

increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. But *Jones* was a federal prosecution, and the Court did not say that its statement about federal "indictment[s]" would apply to those charged by criminal informations in state prosecutions. *See generally 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"). That makes habeas relief unavailable, because "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014).

*Apprendi*, in turn, squarely forecloses petitioner's ability to receive federal habeas relief. That case's holdings concerned whether the Fourteenth Amendment "requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 469. But the opinion expressly did "not address the indictment question." *Id.* at 477 n.3. As this Court reasoned in *White*, an opinion does not clearly establish governing law on an issue it expressly states it is *not* deciding. *White*, 572 U.S. at 424. This Court's reservation of the indictment issue in *Apprendi* makes clear that "fairminded jurists could conclude that" this Court's earlier decisions also did

not decide the issue, since this Court is "hardly in the habit of reserving 'separate question[s],' that have already been definitively answered." *White*, 572 U.S. at 424 (citation omitted). And *United States v. Cotton*, 535 U.S. 625 (2002), made the point even more clear, by recounting *Apprendi*'s generally applicable rule requiring jury findings at trial, then adding that "*[i]n federal prosecutions*, such facts must also be charged in the indictment." *Id.* at 627 (emphasis added).[5]

*Alleyne* likewise does not contain the "holding," *Andrew v. White*, 604 U.S. 86, 95 (2025), "squarely address[ing] the issue," *Wright*, 552 U.S. at 125, that would be required for habeas relief here. *See* Pet. 13-14. That case concerned whether facts that increase a mandatory minimum sentence "must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 108 (plurality opinion). The opinion contains no holding about requirements for charging documents. Nor is the gap filled by petitioner's quotation (Pet. 13) about "special circumstances" that should be "specified in [an] indictment." The quoted language is actually only a parenthetical explanation attached to this Court's citation of a treatise. *See Alleyne*, 570 U.S. at 112 (quoting 1 J.

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[5] That distinction rests on a logical basis: where the Constitution allows the government to exercise power against an individual only upon specific findings by a specific body, the absence of that body's required finding prohibits the government from acting. For the federal government to place a defendant at risk of receiving a statute's increased charges, a grand jury's finding of probable cause for the requisite facts is required under the Grand Jury Clause. But no similar requirement applies to state prosecutions. *See Alexander,* 405 U.S. at 633.

Bishop, Criminal Procedure § 598, at 360-361 (2d ed. 1872)). The parenthetical supported the opinion's holdings about requirements for petit jury verdicts, but does not constitute any holding on its own. And *Alleyne*—like *Jones*—was a federal prosecution to which the Grand Jury Clause applied. *Id.* at 103.

d. Finally, petitioner cannot satisfy AEDPA's requirements by pointing to cases from courts other than this one. *See* Pet. 9-10 (discussing *Ritchey v. State*, 7 Blackf. 168, 169 (Ind. 1844); *Hope v. Commonwealth*, 50 Mass. 134 (1845); *United States v. Fisher*, 25 F. Cas. 1086 (CC Ohio 1849); *Lacy v. State*, 15 Wisc. 13, 18 (1862); *Brightwell v. State*, 41 Ga. 482, 483 (1871); and *Garcia v. State*, 19 Tex. App. 389, 393 (1885)). A habeas petitioner must show that the lower court was contrary to, or an unreasonable application of, *this* Court's decisions, not decisions of lower courts. *Cf. Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam) ("clearly established Federal law" must be "determined by this Court, not by the courts of appeals"). Nor can petitioner evade that requirement by claiming, in reliance on a concurring opinion, that the Sixth Amendment codifies a "common law" principle that the lower-court cases demonstrate. Pet. 8 (citing *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring)). General references to the common law cannot substitute for

clearly established precedents of this Court, and statements in a concurring opinion do not constitute "holdings." *Cf. Lockyer*, 538 U.S. at 71-72.[6]

2. Petitioner also claims the state court erred in its "alternative determination" that petitioner received adequate notice of the bodily harm and substantial risk of death allegations through an informal amendment of the written information. Pet. 16-19. But this too was not a violation of clearly established federal law cognizable in federal habeas.

a. This Court has held that due process requires that "[n]otice" of a specific charge to be "given sufficiently in advance of the scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *In re Gault*, 387 U.S. 1, 33 (1967). But that principle was not violated here. From the beginning, the written information provided petitioner with notice that the State could seek to prove his eligibility for the maximum sentence under the charged statute. *See supra* p. 3. And the intent to in fact do so was reiterated in other pretrial pleadings. *See supra* p. 4. In short, the defendant had ample foreknowledge and opportunity to prepare—which is reflected in the lack of

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[6] Petitioner also cites *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004). Pet. 8. That is an opinion of the Court, but still does not meet the AEDPA standard. It described *Apprendi* as reflecting two "longstanding tenets of common-law criminal jurisprudence"—one of which was that "'an accusation which lacks any particular fact which the law makes essential to punishment is . . . no accusation within the requirements of the common law.'" *Id.* (citing 1 Bishop, *supra*, § 87, at 55). But *Blakely* characterized *Apprendi*'s actual "rule" as pertaining only to facts that "'must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301-302.

any objection or expression of surprise when the jury instructions were discussed. *See supra* p. 5.

Nor did the state court's narrow reasoning as to the permissibility of informal amendment here violate the *Gault* principle. The state court limited such amendments to cases where "the defendant *received adequate notice* of the prosecution's intent to charge him with a particular crime or enhancement," and "*acquiesced to the charge*." Pet. App. 125a (emphasis added).[7] Such acquiescence demonstrates that a defendant does not believe he lacked an "opportunity to prepare." *Gault*, 387 U.S. at 33.

b. The lower court opinions cited by petitioner do not conflict with this view. Pet. 18. For the most part, petitioner cites concurring opinions on the quite different proposition that, in federal prosecutions, an indictment cannot be broadened or altered except by the grand jury. Pet. 18; *see United States v. Promise*, 255 F.3d 150, 189 (4th Cir. 2001) (en banc) (Motz, J., concurring in part); *McCoy v. United States*, 266 F.3d 1245, 1269 n.16 (11th Cir. 2001) (Barkett, J., concurring); *United States v. Sanchez*, 269 F.3d 1250, 1315 (11th Cir. 2001) (Tjoflat, J., concurring). It is far from clear that those judges would

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[7] Petitioner implies that he may have been confused by the trial judge's statement that bodily injury "should be a special finding" by the jury "but [is] not technically a sentencing enhancement." Pet. 6, 19. But the judge was referring to a distinction in California terminology, between "enhancements" and "base terms." Pet. App. 13a n.6. Petitioner's attorney would have been perfectly able to explain the distinction to his client.

apply similar rules to a state-court amendment of an information that occurred with a defendant's acquiescence.[8]

Petitioner is also wrong to read the Ninth Circuit's decision in *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007), as requiring that notice must be given in the formal charging document to be adequate. The notice deficiency in *Gautt* was quite different from that alleged here. The "pivotal fact" in *Gautt* was that the charging document alleged a violation of one statutory subsection which specified a 10-year sentence enhancement, but not of another subsection which required proof of additional elements and carried a 25-to-life sentence. *Id.* at 998-999. Under those circumstances, the Ninth Circuit held, the state court was "'objectively unreasonable'" to conclude that the notice provided in the charging document was adequate. *Id.* at 1014; *see also id.* at 1008. That reasoning poses no conflict with the state or federal decisions here. Petitioner

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[8] Petitioner's argument is not aided by his passing citations to *United States v. Watts*, 513 F.2d 5 (10th Cir. 1975), *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974), and *Geboy v. Gray*, 471 F.2d 575 (7th Cir. 1973). Pet. 17. The reasoning in *Watts* illustrates how a defendant's actual knowledge can make up for a lack of formal notice. *See Watts*, 513 F.2d at 8 (failure to notify parents of juvenile's proceeding did not violate due process where parents nonetheless were at the hearing and available to assist their child). The problem in *Cox* was not about the timing or content of a charging instrument—it was that the juvenile was arrested and detained for five days with no charge *ever* lodged. *Cox*, 506 F.2d at 1350-1351. And *Geboy* was not about the timing or content of charges either. Instead, that court held that a juvenile was deprived of his right to counsel at a hearing transferring him to adult court where his attorney was appointed the morning of the hearing and "had no time to either confer with petitioner or his parents, to explore possible alternatives to waiver which might prove more beneficial to petitioner, or to check the accuracy of the juvenile judge's reasons for desiring a waiver of jurisdiction." *Geboy*, 471 F.2d at 579.

was convicted and sentenced under the exact same statutory provision he was charged with—and the conduct of his case indicates that all parties understood his potential sentence and the factual allegations from the beginning. *Compare supra* pp. 4-5 (recounting motion to consolidate and discussions over jury instructions), *with Gautt*, 489 F.3d at 1010-1013 (noting evidence throughout the trial that even the prosecution did not intend to seek a conviction under the elements of the more serious subsection); *see also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. Finally, this case would be an exceptionally poor vehicle in which to explore the metes and bounds of notice requirements. A decision in petitioner's favor would not result in habeas relief, because as the district court noted, *see* Pet. App. 89a, petitioner failed to establish—or even seriously argue—that the alleged lack of notice had a "substantial and injurious effect or influence on the outcome of his trial." *Brown v. Davenport*, 596 U.S. 118, 126 (2022) (internal quotation marks omitted). That bars relief. *See Cotton*, 535 U.S. at 631-633 (affirming sentence although punishment-enhancing fact was not alleged in the indictment); *cf. Washington v. Recuenco*, 548 U.S. 212, 222 (2006) ("Failure to submit a sentencing factor to the [petit] jury . . . is not structural error.").

This Court's ability to shed light on the underlying requirements of the Sixth Amendment would also be circumscribed due to the case's AEDPA posture. The petition neglects to mention that this Court denied certiorari

when petitioner raised his notice claims on direct appeal.[9] For this petition, which arises on habeas, the Court would be limited to reiterating things already clearly established by its prior precedents; it could not consider whether those precedents should be expanded or clarified.

Finally, petitioner did not object to the proposed instructions and verdict forms that submitted the challenged enhancements to his jury—and indeed, affirmatively acquiesced to them. *See supra* p. 5. To be sure, the state appellate court held that petitioner had not forfeited his issue for appeal. *See supra* p. 7. But the lack of objection deprives this Court of a contemporaneous record that would be highly relevant. There was no opportunity for the trial court to ask whether counsel was in fact surprised that the life-sentence factors would be at issue, or whether the charging document in fact affected plea negotiations. Petitioner did not file a state habeas petition to create a record on how his lawyer prepared plea offers and the offers that were actually made. And on federal habeas, instead of presenting facts to establish prejudice, he focused on arguing that any error was "structural" and subject to automatic reversal. *See* Pet. App. 89a, 107a. Even now, though petitioner insinuates that plea negotiations and preparation *might* have been affected, he does not specify how they *were* affected. *See* Pet. 18-19.

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[9] *Compare* Pet. ii (list of related proceedings), *with* Sup. Ct. R. 14.1(b)(iii); *see also* Pet. 2, 7.

This failure to specify—let alone assert—*actual* surprise is far from accidental.[10] The in-court conversations about the jury instructions and verdict form reflect that defense knew all along that the prosecution intended to prove that the victims were subjected to bodily harm and risk of death. *See supra* pp. 5-6; *see also* Pet. App. 188a (aggravated mayhem charge alleging "deprivation of a limb, organ, and body member"). It was the facts of the case—not any failure of notice—that determined the strategies and outcome in the case. Competent defense counsel would see no realistic prospect of success in arguing that Mary was not at risk of death when her kidnappers left her tied and blindfolded in the desert. And any credibility with the jury would be irretrievably harmed by arguing that severing a penis is not bodily injury.

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[10] *See, e.g., 4 Charged in Kidnapping Pot Dispensary Owner, Cutting Off His Penis*, NBC4 Southern California (Nov. 8, 2013), https://tinyurl.com/yp7ed7wx (reporting prosecutors' statement that Handley and his codefendants "were being held without bail and could face up to life in prison without possibility of parole if convicted").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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