No. 25-6654

IN THE SUPREME COURT OF THE

UNITED STATES

KYLE SHIRAKAWA HANDLEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. CERTIORARI IS APPROPRIATE TO REVIEW THE PANEL MAJORITY'S PUBLISHED CONCLUSION THAT CLEARLY ESTABLISHED FEDERAL LAW DOES NOT REQUIRE NOTICE OF PUNISHMENT-ENHANCING FACTS.

Although charged with simple kidnapping for ransom, petitioner was convicted of aggravated kidnapping for ransom, requiring proof of bodily harm or exposure to a substantial likelihood of death. Neither fact was alleged in the information. The panel majority nevertheless denied petitioner's Sixth Amendment notice claim in a published decision, holding "it was not clearly established that the Sixth Amendment requires state charging documents to allege punishment-enhancing facts . . . ." App. 7a. Petitioner seeks certiorari based on three principles: (1) the common law required the state to plead facts giving rise to increased punishment, (2) the Sixth Amendment's notice requirement codified the common law, and (3) this Court had long recognized that the Sixth Amendment applied to facts which enhance punishment.

The state does not dispute that the common law required the prosecution to plead punishment-enhancing facts. Brief in Opposition ("BIO") 1-23. Instead, it argues certiorari should be denied because the Court has never held the Sixth Amendment right to notice (1) codifies the common law or (2) applies to punishment-enhancing facts.[1]

For the first proposition, the state notes, correctly, that petitioner cannot rely solely on Justice Thomas' concurring opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). BIO 17. This is true; although Justice Thomas concluded the Sixth Amendment codified the common-law rule that facts which expose a defendant to enhanced punishment must

1. The state quibbles with the phrases "simple kidnapping for ransom" and "aggravated kidnapping for ransom" to distinguish between the two offenses. BIO 3, n.1. But the phrases come directly from the state appellate court itself. App. 120a, 149a.

be alleged in the charging document, that was a concurring opinion only. But several years later a majority recognized the same rule, endorsing the common-law principle 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." *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004). Moreover, nearly two centuries ago, Justice Story explained that the Sixth Amendment right "to be informed of the nature and cause of the accusation . . . does but follow out the established course of the common law in all trials for crime." Story, Commentaries on the Constitution of the United States at 664 (1833). Until now, this has not been questioned.

As noted, the state does not dispute that the common law required the prosecution to plead punishment-enhancing facts. BIO 1-23. With good reason. *See Apprendi*, 530 U.S. at 512 (Thomas, J., concurring) (summarizing the common-law rule that "every fact that was by law a basis for imposing or increasing punishment . . . was an element. Each such fact had to be included in the accusation of the crime and proved to the jury."); *Alleyne v. United States*, 570 U.S. 99, 110-111 (2013) ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.").

Instead, the state argues the common law is irrelevant because it does not constitute "clearly established federal law." BIO 17. This observation misses the point -- the Sixth Amendment itself may serve as clearly established federal law. *See White v. Woodall*, 572 U.S. 413, 429 (Breyer, J., dissenting) ("If the Court holds in Case A that the First Amendment prohibits Congress from discriminating based on viewpoint, and then holds in Case B that the Fourteenth Amendment incorporates the First Amendment as to the States, then it is clear that the First Amendment prohibits the States from discriminating based on viewpoint."); *Gibbs v. Frank,* 387 F.3d 268, 277-278 (3rd Cir.

2004) (Nygaard, J., concurring) (28 U.S.C. § 2254(d) does not "disestablish the Constitution itself as clear federal law."). Because the Sixth Amendment codified the common-law rule, it therefore constitutes federal law requiring notice of punishment-enhancing facts. The panel's contrary decision is patently incorrect. Certiorari is proper.

The state's second reason for denying certiorari fares no better. Over the last quarter century this Court has repeatedly stated that under the notice provision of the Sixth Amendment "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment." *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). *Accord Apprendi*, 530 U.S. at 476; *Blakely*, 542 U.S. at 301-302; *Southern Union Co. v. United States*, 567 U.S. 343, 356 (2012); *Alleyne*, 570 U.S. at 112. The state spills considerable ink arguing these clear statements are not traditional holdings which constitute clearly established federal law. BIO 14-17. *But see Andrew v. White*, 604 U.S. 86, 92 (2025) ("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.").

United States v. Britton, 107 U.S. 655 (1883) should resolve the matter. *Britton* held that the government's failure to plead "conversion" in an embezzlement charge meant defendant could be guilty of no more than maladministration (subject to a fine) rather than embezzlement (subject to a 5-10 year sentence). Put simply, the government must plead punishment-enhancing facts to impose a more serious punishment.

The state argues *Britton* does not establish the common-law rule because embezzlement and maladministration are defined in "separate statutes." BIO 13. But the state never explains the constitutional significance of this fact. While the offenses in *Britton* were defined in two statutes rather than one (as here), that is a difference of form only. As this Court has recognized, however, in determining the Sixth Amendment's

scope "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment . . . ." *United States v. Haymond*, 588 U.S. 634, 643 (2019). *Accord Ring v. Arizona*, 536 U.S. 584, 585-586, 604 (2002).

The "separate statutes" distinction urged by the state certainly finds no support in the common law cases. To the contrary, even where (as here) multiple crimes are set forth in a single statute, where the state seeks to impose the longer term, it must plead the facts giving rise to that enhanced punishment. *See*, *e.g., Hope v. Commonwealth*, 50 Mass. 134, 137 (Mass. 1845); *Lacy v. State*, 15 Wis. 13, 17 (Wis. 1862); *Garcia v. State*, 19 Tex.App. 389, 393 (Tex. 1885). Nor does the "separate statutes" distinction of *Britton* find support in this Court's case law. *See Alleyne*, 570 U.S. 103, 115 (a single statute provided terms of "not less than 5 years" for the use or carrying of a firearm during a violent crime and "not less than 7 years" if the firearm was brandished; held "the fact of brandishing" is "an element of a separate aggravated offense" subject to both the Fifth and Sixth Amendments). In short, there is no constitutional significance to whether different crimes are defined in one statute or two.

Britton, *Jones*, *Blakely*, *Alleyne*, *Apprendi* and *Southern Union* establish that federal law requires the pleading of punishment-enhancing facts. Certiorari is proper to review the panel majority's squarely contrary published conclusion.[2]

II. CERTIORARI IS APPROPRIATE TO REVIEW THE PANEL MAJORITY'S PUBLISHED CONCLUSION THAT CONSTITUTIONALLY ADEQUATE NOTICE MAY BE GIVEN AT THE END OF TRIAL.

The panel alternatively held that there was no clearly established federal law

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2. In a footnote, the state suggests the 1883 *Britton* decision may not have been a notice case at all, but "an application of this Court's supervisory power over lower federal courts." BIO 14, n.4. But as Justice Barrett noted two decades ago, "[t]he Court claimed such authority for the first time in 1943." Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 325 (2006).

barring the state from providing notice at an end-of-trial instructional conference. App. 39a-40a. The state recognizes that *Application of Gault*, 387 U.S. 1 (1967) held that notice must be given *before* court proceedings, not after, but argues that certiorari should be denied because "from the beginning [of this case] . . . the prosecution made clear that it intended to prove crimes for which the penalty is life without parole." BIO 4, 13, 18.

This suggestion is irreconcilable with the actual record and the state appellate court's own findings. The language of the kidnapping counts used in the criminal complaint and the information are *word-for-word identical* to the language of California Penal Code section 209 proscribing simple kidnapping for ransom. App. 175a-177a, 187a-188a. The state appellate court concluded (1) "the parties agree [that in the complaint] appellant was originally charged with simple kidnapping for ransom" and (2) the information "alleged simple kidnapping for ransom . . . not the aggravated form of that offense." App. 119a, 120a. After remand, the state court recognized (1) the prosecution "did not allege any special sentencing factors related to the issue of punishment" and (2) petitioner "was never formally charged with special allegations" that would expose him to an aggravated kidnapping for ransom conviction. App. 150a, 152a. So certainly nothing in the actual charging documents "made clear that [the prosecution] intended to prove crimes for which the penalty is life without parole."

California practice confirms the point. When the state seeks to convict of simple kidnapping for ransom prosecutors charge the crime exactly as it was charged in this case -- using the simple kidnapping-for-ransom language from section 209.[3] But when the

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3. *See*, *e.g.*, *People v. Eid*, 59 Cal.4th 650, 657 (2014) ("Defendants were charged with kidnapping for ransom, a serious offense that carries a sentence of life in prison."); *People v. Dowdell*, 227 Cal.App.4th 1388, 1393 (2014) (defendant charged with "kidnapping for ransom" and sentenced to life with parole); *People v. Wiley*, 25 Cal.App.4th 159, 163 (1994) (same).

state seeks to convict of aggravated kidnapping for ransom, and obtain a life-without-parole sentence, prosecutors do not use section 209's simple kidnapping for ransom language. Instead, to give notice, prosecutors specifically charge the defendant with inflicting bodily harm or exposing the victim to a substantial likelihood of death.[4]

In urging the Court to deny certiorari, the state ignores all of this. But in charging petitioner here, the prosecution employed the exact language in section 209 used to define simple kidnapping for ransom. It elected not to plead the additional allegations of either bodily harm or exposure to a substantial likelihood of death. And it did all this in a recognized context where prosecutors (1) plead those facts when seeking a life-without-parole term and (2) omit them when they are seeking a straight life term. The state's suggestion that "from the beginning . . . the prosecution made clear that it intended to prove crimes for which the penalty is life without parole" is made not by relying on the record, but by ignoring it almost entirely.[5]

Alternatively, although the prosecution here elected not to plead either bodily harm or substantial likelihood of death, the state argues "defendant [was put] on notice" by the California Supreme Court's decision in *People v. Britton*, 6 Cal.2d 1 (1936) holding that

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4. *See*, *e.g.*, *People v. Jackson*, 44 Cal.2d 511, 512 (1955) (information alleged kidnapping "for ransom or reward [and] inflicting bodily harm upon the victim"); *People v. Greenberger*, 58 Cal.App.4th 298, 314 (1997) (information alleged "aggravated kidnapping in violation of section 209, subdivision (a)" and "alleged that the victim had suffered bodily harm"); *People v. Castillo*, 233 Cal.App.3d 36, 43 (1991) (information alleged "aggravated kidnapping with bodily harm"); *People v. Juarez*, 158 Cal.App.3d 412, 413 (1984) (information alleged "kidnaping for ransom . . . with bodily harm").

5. In making its contrary argument the state relies on the prosecution's motion to consolidate filed five months before it filed charges against petitioner. BIO 4, 13. Though the state does not mention it, it raised this precise argument on appeal in state court. The appellate court rejected the suggestion that "verbiage in the prosecution's pretrial motion," provided notice concluding that (1) the motion recognized the possibility of a life-without-parole term if the state alleged a bodily harm allegation was pled but (2) no such allegation was made. App. 158a, n.5

notice of punishment-enhancing facts was not required. BIO 13. But *Britton* was decided 12 years before the Sixth Amendment even applied to the states, so it provided no notice as to the requirements of the Sixth Amendment. Equally important, the modern cases cited in footnotes 3 and 4 above show that after 1948 -- when the notice requirement was applied to the states -- California prosecutors seeking convictions for aggravated kidnapping for ransom regularly provided notice to the defense by pleading bodily harm or substantial likelihood of death. Although the state does not cite a single one of the post-1948 cases, these cases establish that "from the beginning" of this case, the state was giving notice it had charged simple kidnapping for ransom -- nothing more.

Here, clarity of the charges "from the beginning" was particularly important. In California, "97 percent of convictions are a result of plea bargain agreements." Disposition of Criminal Cases, 2019 Report to the California Legislature at 7. The trial court referred this case for settlement three times. App. 206a, 211a and 216a.

As to petitioner, this is certainly a case that looked ripe for settlement. The prosecutor's own theory was that petitioner merely drove the van while two other defendants inflicted injuries on the two kidnap victims. 8 ER 1781, 1826-1827, 1849-1850. Indeed, recognizing that no evidence at all established petitioner did anything but drive the van, the prosecutor himself dismissed the allegation that petitioner personally inflicted injury. App. 9a-10a, 188a, 218a-219a; Cal. Pen. Code § 12022.7. The state's current suggestion that it was petitioner who assaulted the victims in this case (BIO 1) finds no support in the record. And as the least culpable of all three defendants in the case, settlement was certainly a possibility (as the judge recognized by referring the case for settlement three times). *See United States v. Mezzanatto*, 513 U.S. 196, 207 (1995) (noting that prosecutors may extend leniency "in order to procure testimony

against other, more dangerous suspects . . . ."); *Roberts v. United States*, 445 U.S. 552, 564, n.1 (1991) (Marshall, J., dissenting) (noting that prosecutor offered deal to least culpable defendant).

But when plea negotiations occurred in this case, given the charging documents and accepted California practice, petitioner was potentially parole eligible in seven years. App. 82a; Cal. Pen. Code § 3046(a)(1). As the dissent below noted with some understatement, "[t]he calculus of whether to plea bargain or go to trial is obviously quite different when life in prison without parole is on the table." App. 82a.

The state notes that at the instructional conference, counsel did not object to aggravated kidnapping instructions. BIO 19, 22. The state concedes an objection was not required to preserve this issue. BIO 7, 22. Instead, from the absence of an objection, the state urges the Court to infer that defendant had notice of the enhanced charge.

For sound practical reasons, this Court has repeatedly rejected this precise inference. *See Lankford v. Idaho*, 500 U.S. 110 (1991); *Gault*, 387 U.S. 1. Given the importance of notice to a fair proceeding, when there is uncertainty as to what a defendant has been charged with, the Court does not infer notice from the absence of an objection. *Lankford*, 500 U.S. at 126, 134; *Gault*, 387 U.S. at 32, n.54.

The same is true here. The state appellate court, the District Court and even the state itself have all recognized the uncertainty:

- The judge and prosecutor both misdescribed the uncharged "bodily harm" element needed for life without parole, confusing it with the charged element needed to prove the three-year enhancement under § 12022.7. App. 123a, 218a; BIO 5, n.3.
- The judge suggested the additional element would not enhance petitioner's sentence. App. 218a.
- Petitioner was never told he could be subject to a life-without-parole term. App. 126a.

At the end of the day, the state is asking the Court to infer that defendant knew he had been charged with a life-without-parole offense because he did not object to factual elements which the judge misdescribed and then said "would not increase [defendant's] sentence at all." App. 123a. The state never explains why the failure to object to instructions that "would not increase [defendant's] sentence" constitutes acquiescence to conviction for an offense which would, in fact, vastly "increase [defendant's] sentence." This is the precise type of uncertainty that precludes the inference the state is seeking. Certiorari is appropriate.[6]

DATED: May 26, 2026

Respectfully submitted,

By Cliff Gardner
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6. Respondent suggests this is a "poor vehicle" to assess the right to notice because, in its view, a harmless error standard applies and petitioner offered no showing of prejudice. BIO 21. But because the panel majority found no error, it did not address prejudice in the first instance. App. 1a-50a. In contrast, the dissent found error, addressed prejudice and concluded habeas relief was proper. App. 79a-82a.

In this situation, a grant of certiorari would not involve the question of prejudice. *See McFadden v. United States*, 576 U.S. 186, 197 (2015) ("Because the Court of Appeals did not address [the harmless-error] issue, we remand for that court to consider it in the first instance."); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (same); *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (same). As these cases suggest, questions as to what standard of prejudice (if any) applies to a notice violation, and the impact of a lack of notice on petitioner's ability to seek a deal prior to trial, are best left to the lower courts and have no bearing on the propriety of certiorari.