(ORDER LIST: 583 U.S.)

MONDAY, NOVEMBER 6, 2017

CERTIORARI -- SUMMARY DISPOSITION

17-5460 ROSS, DONIELLE R. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Dean* v. *United States*, 581 U. S. ___ (2017).

ORDERS IN PENDING CASES

17M52 COTA, ROBERT V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

17M53 PIRELA, JOSEPH V. FLORIDA

17M54 DILLARD, C. GORDAN V. OREGON, ET AL.

17M55 STANFORD, ROBERT B. V. RYAN, DIR., AZ DOC, ET AL.

17M56 BANKS, PHYLLIS E. V. MSPB

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

142, ORIG. FLORIDA V. GEORGIA

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

15-1439 CYAN, INC., ET AL. V. BEAVER CTY. EMPLOYEES, ET AL.

The motion of the Solicitor General for leave to participate

in oral argument as *amicus curiae* and for divided argument is granted in part, and the time is to be divided as follows: 30 minutes for petitioners, 25 minutes for respondents, and 10 minutes for the Solicitor General.

16-1276 DIGITAL REALTY TRUST, INC. V. SOMERS, PAUL

The motion of the Solicitor General to argue *pro hac vice* is granted. The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

16-1495 HAYS, KS V. VOGT, MATTHEW JACK D.

The motion of petitioner to dispense with printing the joint appendix is granted. Justice Gorsuch took no part in the consideration or decision of this motion.

CERTIORARI DENIED

16-1102 SAMSUNG ELECTRONICS CO., ET AL. V. APPLE INC.

16-1395 ALEXANDER, TINA, ET AL. V. AMERIPRO FUNDING, INC., ET AL.

16-9415 RIOS-VIZCARRA, ROBERTO V. WIGEN, WARDEN

17-38 JOHNSON, CARMEN V. UNITED STATES

17-169 2 CROOKED CREEK, LLC, ET AL. V. TREASURER OF CASS COUNTY, MI

17-191 COOK, VICKIE, ET AL. V. T-MOBILE USA, INC., ET AL.

17-304 GOLDMAN, SYLVIA V. GREENFOREST CHURCH, ET AL.

17-324 KHAN, MAHMOOD V. MINNEAPOLIS, MN

17-331 MINA, ANTHONY S. V. CHESTER COUNTY, PA, ET AL.

17-337 BENT, MICHAEL S. V. LASHWAY, PATRICIA, ET AL.

17-341 O'NEAL, DAVID A. V. CRAWFORD COUNTY

17-356 FISHER, EDWARD V. NEW YORK

17-360 BEENICK, MICHAEL V. LeFEBVRE, MICHAEL, ET AL.

17-364 SOLOMON, AJIYOSOLA A. V. SESSIONS, ATT'Y GEN.

17-402 LOGLIA, ALEXANDER C. V. UNITED STATES

17-421 MANN, ANTHONY L. V. JOYNER, WARDEN

17-430 SPRINT SPECTRUM V. PRISM TECHNOLOGIES

17-433 KREIT, CAMIL V. QUINN, CHRISTOPHER L.

17-434 PROJECT EXECUTION, LLC, ET AL. V. PAPANICOLAS, MICHELLE

17-437 SINGH, PREET M. V. USPS

17-439 ASTORIA LANDING, INC. V. NYC ENVIRONMENTAL CONTROL BD.

17-474 FAN, HAIYING V. UNITED STATES

17-480 MALNES, BRIAN E. V. ARIZONA, ET AL.

17-484 GOSSAGE, HENRY E. V. MERIT SYSTEMS PROTECTION BOARD

17-495 DONNELL, LAMON S. V. UNITED STATES

17-506 FUSCO, JOSEPH V. NEW YORK

17-5051 GILBERT, CHELSEA M. V. TEXAS

17-5164 MESQUITI, EDWARD V. UNITED STATES

17-5204 RIVERS, WALLACE V. ALABAMA

17-5215 UPSHAW, LAFAYETTE D. V. MICHIGAN

17-5479 SEIBERT, MICHAEL V. JONES, SEC., FL DOC

17-5783 ORAM, GARY V. DILLON, MT, ET AL.

17-5797 MARSHALL, DARRELL L. V. DETROIT, MI, ET AL.

17-5811 CAMPBELL, MICHAEL V. JONES, SEC., FL DOC

17-5813 RUMPH, THOMAS V. CALIFORNIA

17-5817 COHEN, ANDRE V. LANE, SUPT., FAYETTE, ET AL.

17-5819 ERVIN, GARY V. CHEATHAM, WARDEN, ET AL.

17-5820 BRANSON, CARL B. V. WRIGLEY, WARDEN

17-5832 ROGERS, WILLIE E. V. MISSISSIPPI

17-5834 JONES, SHAWN D. V. DAVIS, DIR., TX DCJ

17-5836 VAN AUKEN, FREDERICK J. V. FLORIDA

17-5837 BRATTON, GEORGE A. V. NORTH CAROLINA, ET AL.

17-5839 JEANS, DAVID V. ILLINOIS

17-5852 JOHNSON, LORENZO V. HARRY, WARDEN

17-5853 LEWIS, WILBERT J. V. TEXAS

17-5856 JONES, JONATHAN K. V. DAVIS, DIR., TX DCJ

17-5857 SIMON, MARK J. V. GASTELO, WARDEN

17-5860 TUCKER, TERRANCE V. LINK, SUPT., GRATERFORD

17-5880 NDIBALEMA, FUAD V. KANKOLONGO, FATU

17-5912 GARRETT, LUNDES V. CHASE HOME FINANCE

17-5957 NISKEY, LAWRENCE V. DUKE, SEC. OF HOMELAND

17-5977 JACKSON, CLIFTON V. OHIO

17-6029 HARROD, JESSE V. SCRIBNER, WARDEN

17-6037 LOWE, ASHLEY V. ESPINOZA, ACTING WARDEN

17-6052 NAVARRETTE, ANDRES V. V. LONG, WARDEN

17-6053 MOSLEY, EDDIE M. V. MINNESOTA

17-6091 CILWA, ANTHONY J. V. FORT, JOHN K.

17-6113 KIRKSEY, RONNIE L. V. ALABAMA

17-6158 McDERMOTT, JASON R. V. CARLIN, WARDEN

17-6163 MUHTOROV, JAMSHID V. UNITED STATES

17-6166 JACKSON, GERALD D. V. UNITED STATES

17-6168 SPELLER, TERRY L. V. UNITED STATES

17-6174 JAIMES-JURADO, MIGUEL A. V. UNITED STATES

17-6183 GU, FAN V. INVISTA S.A.R.L.

17-6187 DELEON GARZA, AGUSTIN S. V. UNITED STATES

17-6191 FLUKER, FELECIA V. BRENNAN, POSTMASTER GEN.

17-6192 HAWKINS, KEVIN V. UNITED STATES

17-6193 GATSON, CHARLIE M. V. UNITED STATES

17-6194 GUMBS, AKEEM R. V. UNITED STATES

17-6196 HAIRSTON, MARIO V. UNITED STATES

17-6209 LEON, SUMMER L. V. ARIZONA

17-6211 EDGERTON, CHESTER V. UNITED STATES

17-6216 ANDERSON, KIRK L. V. UNITED STATES

17-6218 THOMPSON, JON K. V. UNITED STATES

17-6220 CASTEEL, TIRAN V. UNITED STATES

17-6223 GORDON, KENNETH S. V. UNITED STATES

17-6227 COVINGTON, DEMARIO V. UNITED STATES

17-6229 FAURE, MIGUEL E. V. UNITED STATES

17-6230 HERNANDEZ-MUJICA, JESUS V. UNITED STATES

17-6233 MARTINEZ-RODRIQUEZ, JULIAN V. UNITED STATES

17-6234 HARRIS, KEELAN V. UNITED STATES

17-6235 HUMPHREY, LAWRENCE V. UNITED STATES

17-6238 CAMARENA, MIGUEL V. UNITED STATES

17-6240 DECOSTE, HARLAN V. UNITED STATES

17-6248 ESTEEN, KELVIN V. UNITED STATES

17-6249 WILLIAMSON, ARTHUR E. V. UNITED STATES

17-6258 HOTT, SHAWN K. V. UNITED STATES

17-6259 GARCIA, ALEXANDER V. UNITED STATES

17-6263 HARRIS, MARCUS L. V. UNITED STATES

17-6267 RUSSELL, DALE V. UNITED STATES

17-6268 SCHNEIDER, DARRELL M. V. UNITED STATES

17-6270 HOBDY, LEE C. V. UNITED STATES

17-6272 MAGGIO, MICHAEL A. V. UNITED STATES

17-6279 URENA, CARLOS V. UNITED STATES

17-6283 BERNAL-RIVAS, DAVID E. V. UNITED STATES

17-6291 BOYKIN, STUART J. V. UNITED STATES

17-6298 HOUSTON, ALVIN V. UNITED STATES

17-6299 GRIMM, STEVEN V. UNITED STATES

17-6301 BANET, HAUSMANN-ALAIN V. UNITED STATES

17-6305 THORNTON, JIMMY L. V. UNITED STATES

17-6311 KEY, ROGER V. UNITED STATES

The petitions for writs of certiorari are denied.

17-168 ANTONICK, ROBIN V. ELECTRONIC ARTS, INC.

The petition for a writ of certiorari is denied. Justice Breyer took no part in the consideration or decision of this petition.

17-5854 DAKER, WASEEM V. FERRERO, JOE, ET AL.

17-6059 WELLS, KELVIN V. BERRYHILL, ACTING COMM'R OF SSA

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

17-6197 FULTON, DARRELL G. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

17-6253 WILLISTON, DAKOTA L. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

17-6348 IN RE KEITH J. ANDERSON

17-6356 IN RE JERRY M. BREWER

17-6369 IN RE CALVIN J. WILLIAMS

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

17-6032 IN RE COREY B. EIB

17-6203 IN RE JOSEPH DICKEY

17-6274 IN RE ABDULLAH JOHNSON

The petitions for writs of mandamus are denied.

17-6304 IN RE MASOUD BAMDAD

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus is dismissed. See Rule 39.8.

17-5827 IN RE TOMMY PHILLIPS

17-6251 IN RE BENJAMIN TILLMAN

The petitions for writs of mandamus and/or prohibition are denied.

17-5810 IN RE DAVID PANNELL

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus and/or prohibition is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

REHEARINGS DENIED

16-1417 RODRIGUES, JOSE V. WELLS FARGO BANK, ET AL.

16-8272 GREENE, JEFFERY V. FLORIDA

16-9474 GRAY, ISAAC V. STOUFFER, J. MICHAEL, ET AL.

16-9552 STEWART, CARL W. V. LOUISIANA, ET AL.

17-103 GRIFFIN, W. A. V. COCA-COLA

17-5759 IN RE STEPHEN HARMON

The petitions for rehearing are denied.

16-1321 WONG, CHRISTINA V. ANDERSON, ELLEN, ET AL.

The petition for rehearing is denied. Justice Breyer took no part in the consideration or decision of this petition.

Per Curiam

SUPREME COURT OF THE UNITED STATES

SCOTT KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* MICHAEL DANIEL CUERO

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

No. 16–1468. Decided November 6, 2017

PER CURIAM.

The Antiterrorism and Effective Death Penalty Act of 1996 provides that a federal court may grant habeas relief to a state prisoner based on a claim adjudicated by a state court on the merits if the resulting decision is "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). In this case, a California court permitted the State to amend a criminal complaint to which the respondent, Michael Cuero, had pleaded guilty. That guilty plea would have led to a maximum sentence of 14 years and 4 months. The court acknowledged that permitting the amendment would lead to a higher sentence, and it consequently permitted Cuero to withdraw his guilty plea. Cuero then pleaded guilty to the amended complaint and was sentenced to a term with a minimum of 25 years.

A panel of the Court of Appeals for the Ninth Circuit subsequently held that the California court had made a mistake of federal law. In its view, the law entitled Cuero to specific performance of the lower 14-year, 4-month sentence that he would have received had the complaint not been amended.

The question here is whether the state-court decision "involved an unreasonable application o[f] clearly established Federal law, as determined by the Supreme Court of the United States." *Ibid.* Did our prior decisions (1)

clearly *require* the state court to impose the lower sentence that the parties originally expected; or (2) instead permit the State's sentence-raising amendment where the defendant was allowed to withdraw his guilty plea? Because no decision from this Court clearly establishes that a state court must choose the first alternative, we reverse the Ninth Circuit's decision.

I

On October 27, 2005, the State of California charged Michael Cuero with two felonies and a misdemeanor. App. to Pet. for Cert. 26a–33a. Its complaint alleged that on October 14, 2005, Cuero drove his car into, and seriously injured, Jeffrey Feldman, who was standing outside of his parked pickup truck. *Id.,* at 27a–28a. The complaint further alleged that Cuero was then on parole, that he was driving without a license, that he was driving under the influence of methamphetamine, and that he had in his possession a loaded 9-millimeter semiautomatic pistol. *Ibid.*

Cuero initially pleaded "not guilty." But on December 8, he changed his plea. A form entitled "PLEA OF GUILTY/NO CONTEST—FELONY" signed by Cuero, the prosecutor, and the trial court memorialized the terms of Cuero's guilty plea. See *id.*, at 77a–85a. On that form, Cuero pleaded guilty to the two felony counts. *Ibid.*; see Cal. Veh. Code Ann. §23153(a) (West 2017) (causing bodily injury while driving under the influence of a drug); Cal. Penal Code Ann. §12021(a)(1) (West 2005) (unlawful possession of a firearm). He also admitted that he had previously served four separate prison terms, including a term for residential burglary, which qualifies as a predicate offense under California's "three strikes" law. Cal. Penal Code Ann. §667(a)(1) (West 2017); see *Ewing* v. *California*, 538 U. S. 11, 15–17 (2003). Finally, Cuero acknowledged on this guilty-plea form that he understood

that he "may receive this maximum punishment as a result of my plea: 14 years, 4 months in State Prison, $10,000 fine and 4 years parole." App. to Pet. for Cert. 80a.

Following a hearing, the state trial court accepted the plea and granted California's motion to dismiss the remaining misdemeanor charge. The court then scheduled the sentencing hearing for January 11, 2006.

Before the hearing took place, however, the prosecution determined that another of Cuero's four prior convictions qualified as a "strike" and that the signed guilty-plea form had erroneously listed only one strike. See Cal. Penal Code Ann. §245(a)(1) (assault with a deadly weapon). This second strike meant that Cuero faced not a maximum punishment of just over 14 years (172 months), but a *minimum* punishment of 25 years. §§667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii).

The State asked the trial court for permission to amend the criminal complaint accordingly. It pointed to Cal. Penal Code §969.5(a), which provides:

> "Whenever it shall be discovered that a pending complaint to which a plea of guilty has been made under Section 859a does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, the complaint may be forthwith amended to charge the prior conviction or convictions and the amendments may and shall be made upon order of the court."

Cuero argued that the State's motion was untimely and prejudicial. But the trial court granted the motion. At the same time, the court permitted Cuero to withdraw his guilty plea in light of the change. It concluded that §969.5(a) "guide[d]" its inquiry and was best read to reflect a legislative determination that criminal complaints should charge all prior felony convictions. App. to Pet. for

Cert. 178a. The court added that the case was distinguishable from "a situation where the [State] might, after a guilty plea, seek to amend" a criminal complaint by adding "new charges" or facts that fundamentally alter the substance of the complaint. *Id.,* at 179a. But here, where only "alleged prior convictions" were at issue, the court could eliminate any prejudice to Cuero by allowing him to withdraw his initial guilty plea, thereby restoring both parties to the status quo prior to its entry. *Ibid.*

Soon thereafter, California amended the complaint. The complaint as amended charged Cuero with one felony, (causing bodily injury while driving under the influence of a drug under Cal. Veh. Code Ann. §23153(a)), and it alleged two prior strikes. Cuero then withdrew his initial guilty plea and entered a new guilty plea to the amended complaint. On April 20, 2006, the trial court sentenced Cuero to the stipulated term of 25 years to life. His conviction and sentence were affirmed on direct appeal, and the California Supreme Court denied a state habeas petition.

Cuero then filed a petition for federal habeas relief in the United States District Court for the Southern District of California. The Federal District Court denied Cuero's petition, but the Court of Appeals for the Ninth Circuit reversed. *Cuero* v. *Cate*, 827 F. 3d 879 (2016).

The Ninth Circuit panel hearing the appeal held that the state trial court had "acted contrary to clearly established Supreme Court law" by "refusing to enforce the original plea agreement" with its 172-month maximum sentence. *Id.*, at 888. It wrote that "[i]n this context, specific performance" of that plea agreement—*i.e.,* sentencing Cuero to no more than the roughly 14-year sentence reflected in the 2005 guilty-plea form—was "necessary to maintain the integrity and fairness of the criminal justice system." *Id.*, at 890, n. 14. The Ninth Circuit denied rehearing en banc over the dissent of seven judges.

Cuero v. *Cate*, 850 F. 3d 1019 (2017). The State then filed a petition for certiorari here.

II

The Ninth Circuit has already issued its mandate in this case. And the state trial court, in light of that mandate, has resentenced Cuero. Cuero argues that this fact renders this controversy moot. The State and Cuero, however, continue to disagree about the proper length of Cuero's sentence, a portion of which he has not yet served. Thus, neither the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing nor the trial court's action in light of that mandate makes the case moot. *Mancusi* v. *Stubbs*, 408 U. S. 204, 206–207, and n. 1 (1972); *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, 306–308 (1946). Reversal would simply "und[o] what the *habeas corpus* court did," namely, permit the state courts to determine in the first instance the lawfulness of a longer sentence not yet served. *Id.*, at 308.

III

The Ninth Circuit, in ordering specific performance of the 172-month sentence set forth on Cuero's original guilty-plea form, reasoned as follows. First, the court concluded that Cuero's guilty-plea form amounts to an enforceable plea agreement. 827 F. 3d, at 884–885. Second, that plea agreement amounts to, and should be interpreted as, a contract under state contract law. *Id.,* at 883 (citing *Ricketts* v. *Adamson*, 483 U. S. 1, 5, n. 3 (1987)). Third, California contract law would consider the State's motion to amend the complaint as a breach of contract. 827 F. 3d, at 887–890. Fourth, "the remedy for breach must 'repair the harm caused by the breach.'" *Id.*, at 890 (quoting *People* v. *Toscano*, 124 Cal. App. 4th 340, 20 Cal. Rptr. 3d 923, 927 (2004)). Fifth, rescission failed to "'re-

pair the harm.'" 827 F. 3d, at 891. Sixth, consequently Cuero was entitled to specific performance, namely, a maximum prison term of 172 months (14 years and 4 months). *Ibid.* And, seventh, the state court's contrary decision was itself "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); see 827 F. 3d, at 888.

We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that "clearly established federal law" demanding specific performance as a remedy. To the contrary, no "holdin[g] of this Court" requires the remedy of specific performance under the circumstances present here. *Harrington* v. *Richter*, 562 U. S. 86, 100 (2011).

Two of our prior decisions address these issues. The first, *Santobello* v. *New York*, 404 U. S. 257 (1971), held that a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement. *Id.*, at 262. As relevant here, however, Chief Justice Burger wrote in the opinion for the Court that the "ultimate relief to which petitioner is entitled" must be left "to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea" or, alternatively, that "the circumstances require granting the relief sought by petitioner, *i.e.,* the opportunity to withdraw his plea of guilty." *Id.*, at 262–263.

The Ninth Circuit cited a concurrence in *Santobello* by Justice Douglas, which added that "a court ought to accord a defendant's [remedial] preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." 827 F. 3d, at 891, n. 14

(quoting *Santobello*, *supra*, at 267). Three other Justices agreed with Justice Douglas on this point, and because only seven Justices participated in the case, the Ninth Circuit suggested that a four-Justice majority in *Santobello* seemed to favor looking to the defendant's preferred remedy. 827 F. 3d, at 891, n. 14 (citing *Santobello*, *supra*, at 268, and n. (Marshall, J., concurring in part and dissenting in part)). The Ninth Circuit also pointed in support to its own Circuit precedent, a criminal procedure treatise, a decision of the Washington Supreme Court, and a law review article. See 827 F. 3d, at 890–891, n. 14 (citing *Buckley* v. *Terhune*, 441 F. 3d 688, 699, n. 11 (CA9 2006); 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §21.2(e) (4th ed. 2015); *State* v. *Tourtellotte*, 88 Wash. 2d 579, 564 P. 2d 799, 802 (1977); and Fischer, Beyond Santobello—Remedies for Reneged Plea Bargains, 2 U. San Fernando Valley L. Rev. 121, 125 (1973)).

There are several problems with the Ninth Circuit's reasoning below. First, "'fairminded jurists could disagree'" with the Ninth Circuit's reading of *Santobello*. *Richter*, *supra*, at 101 (quoting *Yarborough* v. *Alvarado,* 541 U. S. 652, 664 (2004)). Moreover, in *Mabry* v. *Johnson*, 467 U. S. 504 (1984), the Court wrote that "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Id.,* at 510–511, n. 11 (citing *Santobello*, 404 U. S., at 262–263; *id.*, at 268–269 (Marshall, J., concurring in part and dissenting in part)). The Court added that "permitting Santobello to replead was within the range of constitutionally appropriate remedies." 467 U. S., at 510, n. 11. Where, as here, none of our prior decisions clearly entitles Cuero to the relief he seeks, the "state court's decision could not be 'contrary to' any holding from this Court." *Woods* v. *Donald*, 575 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 6) (quoting *Lopez* v. *Smith*, 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 5)).

Finally, as we have repeatedly pointed out, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe* v. *Frost*, 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 3) (quoting 28 U. S. C. §2254(d)(1)). Nor, of course, do state-court decisions, treatises, or law review articles.

For all these reasons, we conclude that the Ninth Circuit erred when it held that "federal law" as interpreted by this Court "clearly" establishes that specific performance is constitutionally required here. We decide no other issue in this case.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SUPREME COURT OF THE UNITED STATES

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* VERNON MADISON

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

No. 17–193. Decided November 6, 2017

PER CURIAM.

More than 30 years ago, Vernon Madison crept up behind police officer Julius Schulte and shot him twice in the head at close range. An Alabama jury found Madison guilty of capital murder. The trial court sentenced him to death. See *Ex parte Madison*, 718 So. 2d 104, 105–106 (1998).

In 2016, as Madison's execution neared, he petitioned the trial court for a suspension of his death sentence. He argued that, due to several recent strokes, he has become incompetent to be executed. The court held a hearing to receive testimony from two psychologists who had examined Madison and prepared reports concerning his competence. The court's appointed psychologist, Dr. Karl Kirkland, reported that, although Madison may have "suffered a significant decline post-stroke, . . . [he] understands the exact posture of his case at this point," and appears to have a "rational understanding of . . . the results or effects" of his death sentence. App. to Pet. for Cert. 75a (internal quotation marks omitted); *Madison* v. *Commissioner, Ala. Dept. of Corrections*, 851 F. 3d 1173, 1193 (CA11 2017) (internal quotation marks omitted). Asked at the hearing whether Madison understands that Alabama is seeking retribution against him for his criminal act, Dr. Kirkland answered, "Certainly." *Id.*, at 1180 (internal quotation marks omitted).

Dr. John Goff, a psychologist hired by Madison's coun-

sel, reported that Madison's strokes have rendered him unable to remember "numerous events that have occurred over the past thirty years or more." App. to Pet. for Cert. 77a. Nevertheless, Dr. Goff found that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for"; that he knows he is "in prison . . . because of 'murder' "; that he "understands that . . . [Alabama is] seeking retribution" for that crime; and that he "understands the sentence, specifically the meaning of a death sentence." *Id.,* at 76a–78a (some internal quotation marks omitted). In Dr. Goff's opinion, however, Madison does not "understan[d] the act that . . . he is being punished for" because he cannot recall "the sequence of events from the offense to his arrest to the trial or any of those details" and believes that he "never went around killing folks." *Ibid.* (internal quotation marks omitted).

The trial court denied Madison's petition. It held that, under this Court's decisions in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), and *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), Madison was entitled to relief if he could show that he "suffers from a mental illness which deprives [him] of the mental capacity to rationally understand that he is being executed as a punishment for a crime." App. to Pet. for Cert. 74a. The court concluded that Madison had failed to make that showing. Specifically, it found that Madison understands "that he is going to be executed because of the murder he committed[,] . . . that the State is seeking retribution[,] and that he will die when he is executed." *Id.,* at 82a.

Madison then filed a petition for a writ of habeas corpus in Federal District Court. As a state prisoner, Madison is entitled to federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) only if the state trial court's adjudication of his incompetence claim "was contrary to, or involved an unreasonable appli-

cation of, clearly established Federal law, as determined by" this Court, or else was "based on an unreasonable determination of the facts in light of the evidence presented" in state court. 28 U. S. C. § 2254(d). A habeas petitioner meets this demanding standard only when he shows that the state court's decision was "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). The District Court denied Madison's petition after concluding that the state court "correctly applied *Ford* and *Panetti*" and did not make an "unreasonable determination of the facts in light of the evidence." App. to Pet. for Cert. 67a.

The Eleventh Circuit granted a certificate of appealability and, on appeal, reversed over Judge Jordan's dissent. In the majority's view, given the undisputed fact that Madison "has no memory of his capital offense," it inescapably follows that he "does not rationally understand the connection between his crime and his execution." 851 F. 3d, at 1185–1186. On that basis, the Eleventh Circuit held that the trial court's conclusion that Madison is competent to be executed was "plainly unreasonable" and "cannot be reconciled with any reasonable application of *Panetti*." *Id.,* at 1187–1188 (internal quotation marks omitted).

We disagree. In *Panetti*, this Court addressed the question whether the Eighth Amendment forbids the execution of a prisoner who lacks "the mental capacity to understand that [he] is being executed as a punishment for a crime." 551 U. S., at 954 (internal quotation marks omitted). We noted that the retributive purpose of capital punishment is not well served where "the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.,* at 958–959. Similarly, in *Ford*, we ques-

tioned the "retributive value of executing a person who has no comprehension of why he has been singled out." 477 U. S., at 409. Neither *Panetti* nor *Ford* "clearly established" that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case. The state court did not unreasonably apply *Panetti* and *Ford* when it determined that Madison is competent to be executed because—notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder he was found to have committed.

Nor was the state court's decision founded on an unreasonable assessment of the evidence before it. Testimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime.

In short, the state court's determinations of law and fact were not "so lacking in justification" as to give rise to error "beyond any possibility for fairminded disagreement." *Richter*, *supra*, at 103. Under that deferential standard, Madison's claim to federal habeas relief must fail. We express no view on the merits of the underlying question outside of the AEDPA context.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* VERNON MADISON

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

No. 17–193. Decided November 6, 2017

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, concurring.

The issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is a substantial question not yet addressed by the Court. Appropriately presented, the issue would warrant full airing. But in this case, the restraints imposed by the Antiterrorism and Effective Death Penalty Act of 1996, I agree, preclude consideration of the question. With that understanding, I join the Court's *per curiam* disposition of this case.

SUPREME COURT OF THE UNITED STATES

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No. 17–193. Decided November 6, 2017

JUSTICE BREYER, concurring.

I join the Court's *per curiam* disposition of this case for the reason set forth in JUSTICE GINSBURG's concurrence (which I also join). I write separately to underline the fact that this case illustrates one of the basic problems with the administration of the death penalty itself. That problem concerns the unconscionably long periods of time that prisoners often spend on death row awaiting execution. See *Glossip* v. *Gross*, 576 U. S. ___, ___–___ (2015) (BREYER, J., dissenting) (slip op., at 2, 17–33).

As I have previously noted, this Court once said that delays in execution can produce uncertainty amounting to "'one of the most horrible feelings to which'" a prisoner "'can be subjected.'" *Id.,* at ___ (slip op., at 20) (quoting *In re Medley*, 134 U. S. 160, 172 (1890)). Justice Stevens later observed that the delay in *Medley* was a delay of four *weeks*. *Lackey* v. *Texas*, 514 U. S. 1045, 1046 (1995) (memorandum respecting denial of certiorari). And he wrote that the *Medley* description "should apply with even greater force in the case of delays that last for many years." 514 U. S., at 1046.

In light of those statements, consider the present case. The respondent, Vernon Madison, was convicted of a murder that took place in April 1985. He was sentenced to death and transferred to Alabama's William C. Holman Correctional Facility in September 1985. Mr. Madison is now 67 years old. He has lived nearly half of his life on

death row. During that time, he has suffered severe strokes, which caused vascular dementia and numerous other significant physical and mental problems. He is legally blind. His speech is slurred. He cannot walk independently. He is incontinent. His disability leaves him without a memory of his commission of a capital offense.

Moreover, Mr. Madison is one among a growing number of aging prisoners who remain on death row in this country for ever longer periods of time. In 1987, the average period of imprisonment between death sentence and execution was just over seven years. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables 14 (rev. Dec. 19, 2014) (Table 10). A decade later, in 1997, the average delay was about 11 years. *Ibid.* In 2007, the average delay rose to a little less than 13 years. *Ibid.* In 2017, the 21 individuals who have been executed were on death row on average for more than 19 years. See Death Penalty Information Center, Execution List 2017, online at https://deathpenaltyinfo.org/execution-list-2017 (as last visited Nov. 3, 2017). Alabama has executed three individuals this year, including Thomas Arthur, who spent 34 years on death row before his execution on May 26, 2017, at the age of 75; Robert Melson, who spent 21 years on death row before his execution on June 8, 2017; and Torrey McNabb, who spent nearly two decades on death row before his execution on October 19, 2017.

Given this trend, we may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age. And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale. *Glossip*, *supra,* at ___–___ (BREYER, J., dissenting) (slip op., at 17–18) (rec-

ognizing the inevitability of delays in light of constitutional requirements needed to ensure procedural and substantive validity of death sentences); see *ante,* at 1 (GINSBURG, J., concurring).

Rather than develop a constitutional jurisprudence that focuses upon the special circumstances of the aged, however, I believe it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself. *Glossip*, *supra,* at ___ (BREYER, J., dissenting) (slip op., at 1).