No. 18-8301

In the Supreme Court of the United States

MICHAEL DANIEL CUERO,

Petitioner,

v.

RALPH DIAZ, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
DONALD DE NICOLA
Deputy Solicitor General
DANIEL ROGERS
Supervising Deputy Attorney General
ANTHONY DA SILVA
Deputy Attorney General
Counsel of Record
600 West Broadway, Suite 1800
San Diego, CA 92101
(619) 738-9143
Anthony.DaSilva@doj.ca.gov
Counsel for Respondent

QUESTION PRESENTED

Whether the court of appeals' order, on remand from this Court, affirming the district court's judgment denying Cuero federal habeas relief is consistent with this Court's decision in *Kernan v. Cuero*, 138 S.Ct. 4 (2017) (*per curiam*).

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STATEMENT

1. In 2005, petitioner Cuero pleaded guilty to two state felony charges (causing bodily injury while driving under the influence of a drug and unlawfully possessing a firearm) and admitted that he had previously been convicted of felony residential burglary. Pet. App. B 2.[1] Under that plea, Cuero's maximum sentence would have been 14.33 years in prison. *Id.* at B 2-3.

Before the sentencing hearing, however, the prosecutor discovered that Cuero had a second prior felony conviction, for assault with a deadly weapon. Pet. App. B 3. With two prior felonies rather than one, under California's Three Strikes Law Cuero faced a minimum punishment of 25 years in prison. *Id.* Over Cuero's objection, the trial judge granted the State's motion to amend the charges to reflect the second prior felony. *Id.* At the same time, the judge allowed Cuero an opportunity to withdraw his guilty plea. *Id.*

Facing a maximum term of 64 years to life under the amended charges, Cuero withdrew his original plea. Pet. App. A 3-4, 12, B 3. In the end, he entered a new guilty plea to the amended charges and received a stipulated prison sentence of 25 years to life. *Id.* at A 12, B 3. His conviction and sentence

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[1] The documents in the lettered sections of the petition appendix are not paginated. We refer to them by letter and then as if they were paginated starting with page 1 for each attachment.

were affirmed on direct appeal, and the California Supreme Court denied a state habeas petition. *Id.* at B 3.

Cuero sought federal habeas relief. Pet. App. B 3. The district court denied his petition, but a divided panel of the court of appeals reversed. *Id.* at A; *see id.* at B 3-4. The panel held that the state court had acted "contrary to clearly established Supreme Court law" by "refusing to enforce the original plea agreement," and that "specific performance" of the plea agreement was "necessary" to provide relief. *Id.* at A 8, 11 n.14. The court of appeals denied rehearing en banc over a seven-judge dissent, and the State then sought review in this Court. *Id.* at 4. In the meantime the court of appeals' mandate issued, the district court issued a federal writ in accordance with that mandate, and the state trial court re-sentenced Cuero to a term of 13.33 years. *See id.*; Pet. 6.

This Court granted the State's petition and summarily reversed the court of appeals' judgment ordering habeas relief. Pet. App. B. It stated the issue it held dispositive as follows: "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?" Pet. App. B 2. The Court "assum[ed] purely for argument's sake" that the prosecutor had breached the original plea agreement and violated the Constitution by moving to amend the charges to accurately reflect Cuero's criminal history. *Id.* at B 5. But it explained that,

even on that assumption, none of its prior holdings "require[d] the remedy of specific performance under the circumstances" of this case. *Id.* at B 2, 5-6. In the absence of such a holding, the Court ruled, federal habeas relief was precluded by 28 U.S.C. § 2254(d). *Id.* at B 2, 6. In November 2017 the Court remanded the case "for further proceedings consistent with this opinion." *Id.* at B 6.

2. On remand, the court of appeals entertained supplemental briefing on, among other things, "the procedural status of the case and what effect the Supreme Court opinion has on this Court's consideration of the case." C.A. Dkt. 83, 88, 98, 101. On September 19, 2018, it issued an order stating: "In light of *Kernan v. Cuero*, 138 S. Ct. 4 (2017), we affirm the judgment of the district court." Pet. App. C 1.

On January 28, 2019, the court denied a petition for panel rehearing. Pet. App. D 1. Judge Wardlaw dissented. *Id.* at D 1-2. Observing that this Court "did not disturb" the conclusion of the original panel majority that the State breached its initial plea agreement with Cuero, she would have directed the district court to "remand" to the state court "for any further consideration it deems necessary to remediate the violation of Cuero's due process rights." *Id.* at D 2.

3. After this Court issued its opinion but before the remand proceedings in the court of appeals, Cuero was released on parole from the 13.33-year prison sentence imposed by the state trial court in compliance with

the federal writ issued after the original panel opinion. *See* Pet. 6 & n.5. The Attorney General's office is informed by the state Division of Adult Parole Operations that Cuero has failed to report to his parole officer, that he is the subject of an active arrest warrant for violating his parole, and that his whereabouts are unknown.[2]

ARGUMENT

Cuero argues that denial of federal habeas relief in this case is inconsistent with this Court's mandate in *Kernan v. Cuero,* 138 S.Ct. 4 (2017) (*per curiam*), leaving him without a remedy for what the court of appeals considered a violation of his federal due process rights. While he now concedes that any remedy determination must be made by the state courts, he argues that this Court should grant review and order the issuance of a federal writ so that he may have "the opportunity ... to litigate the question of remedy in the state court." Pet. 13. To begin with, however, Cuero is in no position to seek relief from this Court so long as he remains a fugitive, refusing to submit himself to the lawful jurisdiction of state authorities. There is, moreover, no basis for a federal writ to dictate to the state court how to approach resentencing Cuero (as he seems to recognize); and no need for any writ to

[2] Counsel for Respondent has reached out to Cuero's counsel to inform him of the existence of the arrest warrant and of Cuero's fugitive status and to give counsel the opportunity to attempt to contact Cuero and resolve the issue of Cuero's fugitivity. Thus far, counsel for Respondent is informed that the efforts of Cuero's counsel have been unsuccessful and Cuero remains a fugitive.

ensure that Cuero will have an opportunity to make whatever arguments he wants to the state courts in connection with a resentencing proceeding, if and when he can be found an returned to state court. There is no reason for further review.

1. Cuero's petition indicates that he "remains out of custody on parole." Pet. 6 n.5. As noted above, however, the Attorney General's office is informed by the state Division of Adult Parole Operations that Cuero has failed to report to his parole officer, a warrant has been issued for his arrest on charges of violating his parole, and local authorities are unaware of his whereabouts. In other words, he is a fugitive from justice. That status—which both shows disrespect for the courts and would prevent the State from enforcing any judgment rendered in its favor—"disentitles [Cuero] to call upon the resources of the Court for determination of his claims." *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (*per curiam*); *see also Degen v. United States*, 517 U.S. 820, 824-825 (1996) (discussing fugitive disentitlement doctrine); *Ortega–Rodriguez v. United States*, 507 U.S. 234, 239-242 (1993) (same). It is reason enough for the Court to reject a petition for discretionary review.

2. In any event, there is no reason for review. The practical benefit Cuero ultimately seeks is an order from some court limiting his sentence to a maximum of 14.33 years, in accordance with his original plea agreement. This Court held in *Kernan v. Cuero* that the court of appeals had erred in directing the issuance of a federal writ ordering that relief (or, more precisely, ordering

Cuero released unless the state court agreed to limit his sentence), because no opinion of this Court clearly establishes any federal right to "specific performance" of a plea agreement, even if one assumes a breach by the State. Pet. App. B 2, 5-6. Rather, "'permitting Santobello to replead'"—as the state court did in this case—"'was within the range of constitutionally appropriate remedies.'" *Id*. at 6 (quoting *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984)). The court of appeal's new judgment on remand, affirming the district court's denial of federal habeas relief, is consistent with that decision by this Court.

Moreover, over the course of these proceedings circumstances have changed in a way that would render any new federal writ at best pointless. As this Court noted when this case was previously before it, while the State's petition was pending the Ninth Circuit's mandate issued and the state trial court resentenced Cuero in obediance to that court's original decision. That state sentence remains the one under which Cuero is currently in constructive state custody (although he has absconded rather than complying with the terms of his parole). Accordingly, at the moment it would not even be possible for the district court to issue a federal writ directing the state trial court to, for example, either release Cuero or resentence him under his original plea, because the state court has already undertaken just that resentencing. *Cf., e.g.*, *Dunn v. Colleran*, 247 F.3d 450, 464 (3d Cir. 2001) (directing entry of such

an alternative writ) (cited at Pet. 11).[3] And even if it were possible for the district court to frame an appropriate order under the circumstances here, it would serve no practical purpose for this Court to order the court of appeals to order the district court to propose to the state trial court that it either confirm the sentence Cuero is currently serving (or, rather, avoiding serving) or reimpose the sentence called for by his second, valid state plea.

There is a better path forward here. Because the state court previously resentenced Cuero in accordance with the court of appeals' original erroneous decision, it is the State that must return to state court to seek reimposition of Cuero's original sentence—assuming, of course, that Cuero can be found and returned to proper custody at all. When it does so, Cuero will be entitled to personal presence and counsel. *See People v. Sanchez*, 245 Cal. App. 4th 1409, 1417 (Cal. Ct. App. 2016). At that time, Cuero will have an opportunity to raise any argument he wishes about why his current sentence should be retained. The prosecution and defense may disagree about what arguments are procedurally available or their merits, but the state courts are of course perfectly capable of resolving any such disagreements. Many potential points of technical conflict might also be rendered immaterial if, for example, the court were to indicate that, even if there were a constitutional violation here

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[3] There is no mechanism for a federal habeas court to "remand" a matter to state court, as Cuero and Judge Wardlaw seem to suggest. *See* Pet. 10; Pet. App. D 2.

and the court had discretion in remedying that violation, it would choose the remedy that Cuero was already provided under state law—the opportunity to withdraw his original plea. Based on the record to date in this case, that would seem to be by far the most likely result. *See, e.g.*, Pet. App. B 3 (describing how state court originally determined that allowing prosecution to amend charges was both consistent with state law and fair, so long as Cuero was allowed to withdraw his initial guilty plea). But whatever the course of new proceedings in the state courts, there is certainly no need for still further proceedings in this federal habeas matter, or for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
DONALD DE NICOLA
Deputy Solicitor General
DANIEL ROGERS
Supervising Deputy Attorney General

/s/ Anthony Da Silva
ANTHONY DA SILVA
Deputy Attorney General
Counsel for Respondent

Dated: June 17, 2019