

No. 18-8301

IN THE SUPREME COURT OF THE UNITED STATES

---

---

MICHAEL DANIEL CUERO,

Petitioner,

-v-

SCOTT KERNAN,

Respondent.

---

---

REPLY TO THE BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

---

DEVIN BURSTEIN  
Warren & Burstein  
501 W. Broadway, Suite 240  
San Diego, California 92101  
Telephone: (619) 234-4433  
Facsimile: (619) 234-4433

Attorney for Petitioner

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
PETITIONER’S REPLY TO THE BRIEF IN OPPOSITION .....	1
CONCLUSION .....	5

## **TABLE OF AUTHORITIES**

### **Federal Cases**

<i>Degen v. United States</i> , 517 U.S. 820 (1996) .....	4, 5
<i>Dunn v. Collieran</i> , 247 F.3d 450 (3d Cir. 2001) .....	3
<i>Kernan v. Cuero</i> , 138 S. Ct. 4 (2017) .....	2, 5
<i>Molinaro v. New Jersey</i> , 396 U.S. 365 (1970) (per curiam) .....	4
<i>Ortega–Rodriguez v. United States</i> , 507 U.S. 234, 239-242 (1993) .....	5
<i>Pierre v. Thompson</i> , 666 F.2d 424 (9th Cir. 1982) .....	2, 3
<i>Santobello v. New York</i> , 404 U.S. 257 (1971) .....	1, 2, 3, 6
<i>Sexton v. Beaudreaux</i> , 138 S. Ct. 2555 (2018) .....	2

### **State Cases**

<i>People v. Walker</i> , 54 Cal. 3d 1013 (1991) .....	1
---	---

### **Federal Statutes**

28 U.S.C. § 2254(d)(1) .....	2
------------------------------	---

## **PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION**

1. The question remains whether the court of appeals' breach determination remains intact. The parties and the court of appeals' judges disagree on the answer, but it will dictate Mr. Cuero's fate.

If yes, this case will return to state court with a binding determination that the state breached Mr. Cuero's plea agreement in violation of *Santobello v. New York*, 404 U.S. 257 (1971). The state court will then be left to determine the remedy: specific performance or plea withdrawal. And it will almost certainly grant Mr. Cuero specific performance, because that is the remedy required by California law. *See, e.g., People v. Walker*, 54 Cal. 3d 1013, 1029 (1991) (ordering specific performance and explaining "[b]ecause [the defendant has] completed a substantial portion of his prison term, permitting him to withdraw his guilty plea cannot restore the status he enjoyed before sentencing.") (internal quotation and citation omitted).

On the other hand, if the answer is no – such that this Court *sub silentio* reversed the court of appeals not just on remedy but also as to the violation – the case will return to state court in a far different posture. There will be no breach to remedy. And the State will tell the state court there is nothing to do but reimpose the life sentence.

Thus, the uncertainty created by this Court’s prior decision is untenable. But “[t]here is a better path forward here.” State Brief at 7. This Court need only explain that, as Judge Wardlaw found, its prior decision “left intact [the] panel holding that the ‘State violated the Constitution when it moved to amend the complaint.’” APP:D. In other words, the decision did not intend to reverse the court of appeals’ finding on the *Santobello* violation, just on remedy. *Kernan v. Cuero*, 138 S. Ct. 4, 6, 8 (2017).<sup>1</sup>

2. The State, however, asks this Court not to clarify its prior ruling. It says there is “no basis for a federal writ to dictate to the state court how to approach resentencing Cuero” and “no need for any writ to ensure that Cuero will have an opportunity to make whatever arguments he wants to the state courts in connection with a resentencing proceeding.” State Brief at 4-5. But yes, there is.

a. *Santobello* itself remanded to the state court for a remedy determination. 404 U.S. at 363. Plainly, therefore, a writ can issue to send the

---

<sup>1</sup> The Court seems to have confirmed this interpretation in *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 n.3 (2018). There, the Court cited *Cuero* for the proposition that “[b]ecause our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and *does not decide any other issue.*” *Id.* (citing *Cuero*, 138 S. Ct. at 8-9, emphasis added). This strongly suggests that *Cuero* did not address the merits of the *Santobello* violation.

case back to state court to cure the breach. *See, e.g., Pierre v. Thompson*, 666 F.2d 424, 427 (9th Cir. 1982) (“the relief to be afforded in the federal court to the state prisoner for the broken plea agreement upon petition for habeas corpus rests within the sound discretion of the state court as indicated by the opinion of the court in Santobello.”); *Dunn v. Collieran*, 247 F.3d 450, 462 (3d Cir. 2001) (“when we find that a state prosecutor has breached a plea agreement [we] refer the issue of remedy to the state court.”). Were it otherwise, there would be no point in finding a breach to begin with. To be clear, such a remand is not “dictating” how the state court should proceed with resentencing, but rather setting the constitutional parameters for its decision.

b. The State is also misguided in suggesting further action by this Court is unnecessary to ensure that Mr. Cuero will have an opportunity to seek specific performance. That remedy is available only if there has been a breach. And the State claims there was none. It is thus disingenuous for the State to now argue Mr. Cuero “will have an opportunity to raise any argument he wishes” and that a writ would “serve no practical purpose.” State Brief at 7. Only the writ, or similar clarification by this Court, preserves the breach finding. Without it, there is no question of specific performance because there is no extant breach to be fixed.

In short, for Mr. Cuero to argue for specific performance, the case must be returned to state court to determine the remedy for the *Santobello* violation. To do that, however, the court of appeals must grant the writ. But it cannot do so unless this Court clarifies its earlier decision.

3. Nor is there any impediment to granting Mr. Cuero's petition. The state raises the fugitive disentitlement doctrine. State Brief at 2. But it does not apply.

a. On June 18, 2019, counsel spoke to Mr. Cuero. Mr. Cuero resides openly in the community and was unaware of any warrant or allegation of violation. He indicated he would address the matter immediately. Thus, Mr. Cuero cannot be considered a fugitive.

b. The State, moreover, has not filed any documents substantiating its claim. There is no affidavit from a parole officer, and nothing showing the circumstances under which any warrant was issued or whether the State made any efforts to contact Mr. Cuero. As such, the State cannot show he voluntarily absented himself from these proceedings.

c. Additionally, the precedent upon which the State relies does not support the proposition that the mere existence of a parole warrant disentitles Mr. Cuero to this Court's review. In *Molinaro v. New Jersey*, 396 U.S. 365, 365

(1970) (per curiam), the state court revoked the defendant's bail after he failed to surrender and there was no dispute about his fugitive status. In *Degen v. United States*, 517 U.S. 820, 825-26 (1996), the Court declined to extend the fugitive disentitlement doctrine to forfeiture proceedings. And in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-242 (1993), the defendant absconded before his sentencing but then returned. The Court held the doctrine did not apply. *See id.*

In each of these cases, the defendant knew he was wanted and refused to comply. Here, the State has made no such showing. Thus, the Court should decide this case on the merits.<sup>2</sup>

---

---

<sup>2</sup> In the alternative, it should remand for fact finding as to whether Mr. Cuero is in fact a fugitive.



## **CONCLUSION**

Mr. Cuero respectfully requests the Court grant this petition and make clear that, “remand[ing] the case for further proceedings consistent with [its] opinion,” requires a remedy determination by the state court for the *Santobello* violation. *Cuero*, 138 S. Ct. at 9.

Respectfully submitted,

Dated: June 19, 2019

s/ Devin Burstein  
DEVIN BURSTEIN  
Warren & Burstein  
501 West Broadway, Suite 240  
San Diego, CA 92101  
(619) 234-4433  
Attorney for Petitioner