

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL DANIEL CUERO,

Petitioner,

-v-

SCOTT KERNAN,

Respondent.

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

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## **QUESTION PRESENTED FOR REVIEW**

This Court previously reversed and remanded petitioner's case to the court of appeals. The judges of that court, however, have different interpretations of this Court's decision and how to apply it. Under one interpretation, the court of appeals must send the case back to the state court for it to consider the appropriate remedy for the prosecution's breach of the plea agreement. Under the other interpretation, the court of appeals can do nothing but affirm the district court's denial of petitioner's claim.

These disparate interpretations have real world consequences. Without this Court's further intervention, the petitioner may be subject to a reimposed life sentence with no recourse. Thus, the question presented for review is: what was the import of the Court's prior decision?<sup>1</sup> Otherwise stated, whether the court of appeal's majority-decision is inconsistent with the Court's opinion in this case.

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<sup>1</sup> To the extent this petition should be presented as a motion for clarification under Rule 21, or as a petition for a writ of mandamus under Rule 20.3, the petitioner respectfully requests the Court construe it as such. *See In re Sanford Fork & Took Co.*, 160 U.S. 247, 255 (1895) ("If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court.").

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## **TABLE OF CONTENTS**

QUESTION PRESENTED FOR REVIEW .....	prefix
TABLE OF AUTHORITIES .....	ii
OPINIONS BELOW.....	2
JURISDICTION.....	2
RELEVANT PROVISION .....	2
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THE PETITION.....	8
CONCLUSION.....	14

## **TABLE OF AUTHORITIES**

### **Federal Cases**

<i>Cuero v. Cate,</i> 827 F.3d 879 (9th Cir. 2016) .....	<i>passim</i>
<i>Cuero v. Kernan,</i> 904 F.3d 865 (9th Cir. 2019) .....	2
<i>Kernan v. Cuero,</i> 138 S. Ct. 4 (2017) .....	<i>passim</i>
<i>Dunn v. Colleran,</i> 247 F.3d 450 (3d Cir. 2001) .....	11, 12
<i>In re Sanford Fork &amp; Took Co.,</i> 160 U.S. 247 (1895) .....	prefix
<i>Moore v. Texas,</i> 686 U.S. ___, Slip Op. (2019) .....	8
<i>Pierre v. Thompson,</i> 666 F.2d 424 (9th Cir. 1982) .....	10, 11
<i>Santobello v. New York,</i> 404 U.S. 257 (1971) .....	5, 9, 11, 12, 13
<i>United States v. Rosales-Gonzales,</i> 801 F.3d 1177 (9th Cir. 2015) .....	12

### **Federal Statutes**

28 U.S.C. § 1254(1) .....	2
28 U.S.C. § 2254 .....	2, 4

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Petitioner Michael Cuero respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## **OPINIONS BELOW**

The court of appeals reversed the district court’s denial of Mr. Cuero’s petition under 28 U.S.C. § 2254. The opinion is reported at 827 F.3d 879 (9th Cir. 2016). This Court then reversed the court of appeals, in an opinion reported at 138 S. Ct. 4 (2017). In light of this Court’s reversal, the court of appeals affirmed the district court’s denial of Mr. Cuero’s petition. That order is reported at 904 F.3d 865 (9th Cir. 2018). Thereafter, over Judge Wardlaw’s dissent, the court of appeals denied a petition for panel rehearing. The denial and dissent were reported in a published order, but the official citation is not yet available.<sup>2</sup>

## **JURISDICTION**

On January 28, 2019, a divided panel of the court of appeals denied the timely petition for panel rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **RELEVANT PROVISION**

The Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

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<sup>2</sup> These decisions are attached in Appendix A-D.

## STATEMENT OF THE CASE

A. In 2005, California charged Mr. Cuero with several crimes after he accidentally struck and injured someone while driving under the influence. ER:4-5.<sup>3</sup> Mr. Cuero entered into a written plea agreement, under which he would plead guilty to two felonies and admit certain prior convictions as sentencing enhancements. ER:14. In exchange, and to induce the plea, the state guaranteed a maximum prison sentence of 14 years and 4 months, and agreed to dismiss the misdemeanor charge. ER:15.

During the change of plea hearing, the parties explained the terms of the agreement to the court. ER:118. The court confirmed that, as a result of the agreement, “[h]is maximum exposure is 14 years, 4 months in state prison . . . . That’s the most he could receive by way of this plea[.]” ER:119. The prosecutor agreed. ER:119.

On the basis of that representation, Mr. Cuero waived his trial rights and pleaded guilty. ER:122-23. The court then expressly accepted the guilty plea, and, as agreed, the state dismissed the misdemeanor charge. ER:125 (court accepts

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<sup>3</sup> The Excerpt of Record is on file with the court of appeals.

“the defendant’s plea and admissions”); ER:16 (court concludes, “the defendant is convicted thereby.”). The court then set a sentencing date. ER:125-26.

Prior to sentencing, the state unilaterally violated the plea agreement. ER:29. The prosecutor asserted that, in preparing for the sentencing, she found an additional prior conviction that had not been alleged. ER:30. The state then amended the charging document to include the new conviction, making Mr. Cuero a “third-striker” under California law. ER:30. This drastically increased his sentencing exposure from no more than 14 years and 4 months (as originally promised), to a mandatory sixty-four years to life. ER:30, 74-78, 161.

To avoid a minimum of sixty-four years before parole eligibility, Mr. Cuero entered into a second agreement with the state, under which he would receive a mandatory sentence of twenty-five years to life. ER:84-85; 159-63. In accordance with this new agreement, the superior court sentenced Mr. Cuero to twenty-five years to life in prison. ER:96-97; 184.

B. After being denied relief on direct appeal, Mr. Cuero moved to vacate the sentence under 28 U.S.C. § 2254, arguing the prosecutor violated his due process rights by breaching the original plea agreement. ER:348-60. The federal district court denied the petition. ER:466.

The court of appeals reversed and ordered resentencing by the state court to no more than 14 years and 4 months, as originally promised. *See Cuero*, 827 F.3d at 891. In reaching this result, the court of appeals found the state court unreasonably applied clearly established Supreme Court law in two respects: (1) failing to conclude the prosecutor breached the plea agreement in violation of *Santobello v. New York*, 404 U.S. 257 (1971); and (2) failing to order specific performance as the remedy. *See Cuero*, 827 F.3d at 883, 887 (state prosecutor “breached the plea agreement by moving to amend the complaint” and the state court “unreasonably applied clearly established Supreme Court authority by failing to recognize that the ‘breach [was] undoubtedly a violation of the defendant’s rights.’” (citation omitted); *and id.* at 891 (“Cuero is therefore entitled to the benefit of his original bargain: a maximum sentence of 14 years, 4 months in prison.”)).

C. The state petitioned for a writ of certiorari. While the petition was pending, the case wound its way back to the San Diego superior court. *See Dckt. No. 89* at 1.<sup>4</sup> On May 11, 2017, Mr. Cuero appeared in that court. *See id.* at 2. He reentered his guilty plea under the original plea agreement. *See id.* at 9-13.

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<sup>4</sup> Docket numbers refer to the court of appeals’ docket in this case (9th Cir. No. 12-55911).

Thereafter, the court imposed a sentence of 13 years and 4 months. *See id.* at 33.

Mr. Cuero was then released from state prison.<sup>5</sup>

D. After his release, this Court reversed the court of appeals. It was “unable to find in Supreme Court precedent [] ‘clearly established federal law’ demanding specific performance as a remedy.” *Cuero*, 138 S. Ct. at 6. The Court, however, “decide[d] no other issue in this case.” *Id.* at 8. Instead, it “assume[d]” a breach occurred and remanded “for further proceedings consistent with this opinion.” *Id.* at 8-9.

Post-remand, the parties engaged in additional litigation before the court of appeals regarding the import of this Court’s opinion. *See* Dckt. Nos. 88, 98, 101. Mr. Cuero argued that the court of appeals was required to remand the case to the superior court of California for a determination of the appropriate remedy for the breach of Mr. Cuero’s plea agreement. *See* Dckt. No. 88 at 2. Only that result would accomplish this Court’s directive to “permit the state courts to determine in the first instance the lawfulness of a longer sentence not yet served.” *Cuero*, 138 U.S. at 7 (citation omitted).

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<sup>5</sup> He remains out of custody on parole.

The state disagreed, arguing the court of appeals could only affirm the district court's denial of Mr. Cuero's petition, which would lead to a reinstatement of Mr. Cuero's life sentence. *See* Dckt. No. 98 at 1-2.

After briefing, the court of appeals issued an order stating: "In light of *Kernan v. Cuero*, 138 S. Ct. 4 (2017), we affirm the judgment of the district court." 904 F.3d at 865-66. Mr. Cuero petitioned for panel rehearing. *See* Dckt. No. 107. Judge Wardlaw dissented from the summary denial of that petition:

With respect, I would grant Cuero's petition for panel rehearing. I agree with Cuero's reading of the Supreme Court's opinion in *Kernan v. Cuero*, 138 S. Ct. 4 (2017), reh'g denied, 138 S. Ct. 724 (2018). On remand, I would have entered an order that reversed in part and remanded with instructions to remand to the state court for any further consideration it deems necessary to remediate the violation of Cuero's due process rights. On the assumption that the parties likely will once again find themselves in state court, I write to clarify what the Supreme Court did and didn't hold in *Kernan*.

1. First, the Supreme Court left intact our panel holding that the "State violated the Constitution when it moved to amend the complaint." *Id.* at 8. In *Cuero v. Cate*, 827 F.3d 879 (9th Cir. 2016), we found that Cuero entered a binding, judicially approved plea agreement that contained a charge bargain that resulted in an agreed maximum sentence of 14 years and 4 months. We held that the State breached this agreement in violation of Cuero's clearly established constitutional due process rights by seeking to amend the criminal complaint after the binding plea agreement was signed and judicially approved, resulting in an indeterminate 64 years to life sentence. The Supreme Court did not disturb this holding and it remains the law of the case.

2. The Supreme Court reversed only our holding that specific performance of the plea agreement, i.e. an imposition of a 14 year, 4 month sentence as originally bargained, was the required remedy. It did so because it was “unable to find in Supreme Court precedent that ‘clearly established federal law’ demanding specific performance as a remedy.” *Kernan*, 138 S. Ct. at 8. As the Court wrote, “We decide no other issue in this case.” *Id.* at 9.

3. The Supreme Court rejected Cuero’s mootness argument based on his having been resentenced, stating “[r]everse 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 7 (citation omitted). The Court then “remand[ed] the case for further proceedings consistent with this opinion.” *Id.* at 9.

Consistency with the *Kernan* Supreme Court decision requires that any resentencing that may occur must take into account the State’s breach of Cuero’s plea agreement in violation of Cuero’s due process rights. The state court remains free to remedy this breach by requiring specific performance of the original plea agreement. *Kernan* stands merely for the proposition that the state court is not required to do so by clearly established Supreme Court law.

App:D.

#### **REASON FOR GRANTING THE PETITION**

Mr. Cuero respectfully requests the Court grant this petition to confirm Judge Wardlaw’s interpretation of its prior opinion. *See Moore v. Texas*, 686 U.S. \_\_\_, Slip Op. at 6 (2019) (granting the petition for certiorari and reversing because “the appeals court’s determination is inconsistent with our [prior] opinion in [the case].”). Absent such intervention, Mr. Cuero will likely be subjected to re-imposition of a

life sentence without a proper state-court election of remedy for the prosecution’s *Santobello* violation.

A. The court of appeal’s initial opinion had two components – violation and remedy. As to the violation, it correctly held: “Not only did the prosecution breach the plea agreement by seeking to amend the complaint after the deal was sealed, the Superior Court judge unreasonably applied clearly established Supreme Court authority by failing to recognize that the ‘breach [was] undoubtedly a violation of the defendant’s rights.’” *Cuero*, 827 F.3d at 883 (quoting *Puckett v. United States*, 556 U.S. 129, 136 (2009) (citing *Santobello*, 404 U.S. at 262)).

The court explained: “Although the prosecution initially honored its promise to dismiss the misdemeanor charge, it then breached the plea agreement by moving to amend the complaint to charge Cuero’s prior assault conviction as a second strike. The Superior Court acted contrary to clearly established Supreme Court law by permitting the amendment and refusing to enforce the original plea agreement.” *Id.* at 887-88. To this end, “[t]he terms of Cuero’s plea agreement were ‘clear and explicit’: Cuero promised to plead guilty to two felonies, a prior strike, and four prison priors; in exchange, the state promised to drop the misdemeanor charge. By seeking to amend the charges in the complaint, the prosecution denied Cuero the

benefit of his bargain: a maximum sentence of 14 years and 4 months.” *Id.* at 888-89.

As to the remedy, in a separate section of the opinion, the court of appeals ordered specific performance. *See id.* at 890-91.

Although this Court reversed on the latter point, it expressly left the former undisturbed. *See Cuero*, 138 S. Ct. at 8. Indeed, the only other relevant comment was to “assume” the court of appeal’s breach finding was correct, and “remand . . . for further proceedings consistent with this opinion.” *Id.* at 6, 8. In this procedural posture, there was no cause for the court of appeals to reconsider the breach issue and certainly no grounds for reaching a different result. Instead, it should have reaffirmed the *Santobello* violation, and remanded to the state court for a remedy determination. *See Cuero*, 827 F.3d at 883.

Indeed, this Court’s opinion appeared – at least to Mr. Cuero and Judge Wardlaw – to require that result: “the ultimate relief to which petitioner is entitled must be left to the discretion of the state court[.]” *Cuero*, 138 S. Ct. at 8 (internal quotations omitted). The circuit courts too have remanded to state courts on essentially the same facts. *See e.g., Pierre v. Thompson*, 666 F.2d 424, 427 (9th Cir. 1982) (“The prevailing view is that 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. Colleran*, 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. Thus, this Court will not decide whether [the petitioner] should be resentenced under the plea agreement or given the opportunity to withdraw his plea. Indeed, as the *Santobello* Court long ago observed, it is best left to the state court to decide what remedy is appropriate.”).

B. The state, however, claims there is no issue left to litigate in state court. It takes the position that this Court ordered the court of appeals to affirm the denial of Mr. Cuero’s 2254-petition outright. *See* Dckt. No. 98 at 1-2. In its words, “the United States Supreme Court’s reversal of [the court of appeal’s] decision disposes of Cuero’s *Santobello* claim in its entirety.” *Id.* at 3. Thus, it argues that beyond reentering the life sentence, “there is nothing left for the state court to do here.” *Id.* at 10.

To this end, the state further claims there is no point remanding for a remedy determination because the state court has already made its choice. *Id.* at 6. It contends that when the state court originally allowed Mr. Cuero to enter into a new plea agreement for twenty-five to life (after the prosecution breached the plea

agreement by filing the amended complaint), it determined rescission – not specific performance – was sufficient. *See id.*

This is wrong. Mr. Cuero’s state attorney never raised a breach claim to the state court. Although he generally objected to the sentence, counsel did not argue it was a constitutional violation under *Santobello*. ER:64-70. The superior court, therefore, never ruled on that issue. ER:142. Certainly, it did not exercise its discretion to elect a remedy, as it never found a violation to begin with. *Cf. United States v. Rosales-Gonzales*, 801 F.3d 1177, 1183 (9th Cir. 2015) (“in the context of . . . plea agreements, ‘the existence of discretion requires its exercise’”).

Equally clear, this Court’s opinion did not resolve the issue, as the state now claims. It says, “the Supreme Court determined that the state court’s decision to allow Cuero to withdraw his plea was not unreasonable under the AEDPA.” Dckt. No. 98 at 6. But this is a figment of prosecutorial imagination. No such conclusion appears in this Court’s opinion.

As noted, the Court expressly limited its holding: “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.*” *Cuero*, 138 S. Ct. at 9 (emphasis added). This statement makes clear that specific performance is not required. But it does not say this Court

concluded *sub silentio* that the state court already selected a remedy for a violation it never found. Yet that is precisely the improbable reading advocated by the state and incorrectly accepted by the panel majority.

C. This is untenable. As Judge Wardlaw's dissent confirms, the conflicting interpretations of this Court's decision leave Mr. Cuero's liberty hanging in the balance. And no one should suffer a life sentence due to a lack of clarity.

Nor is Mr. Cuero asking for much. He merely seeks the opportunity he believes this Court intended and *Santobello* requires; to litigate the question of remedy in the state court. Returning him to that posture is the only way to neutralize the taint of the due process violation, while at the same time honoring the state-court's authority to determine the appropriate remedy. Accordingly, the Court should grant this petition, reverse, and make clear that, "remand[ing] the case for further proceedings consistent with [its] opinion," requires a remedy determination by the state court. *Cuero*, 138 S. Ct. at 9.

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## CONCLUSION

The Court should grant the petition for a writ of certiorari to clarify its prior decision.

Respectfully submitted,

Dated: February 26, 2019

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