

No. _____

In The
Supreme Court of the United States

—————◆—————
ASTATI HALIM, and HENDRA ANWAR,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

—————◆—————
**On Petition For A Writ Of *Certiorari* To The
Court Of Appeal Of California, Second District**

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a federal law enforcement officer on the prosecution team breaches a plea agreement and violates due process when he encourages state authorities to commence a state prosecution because he is personally dissatisfied with the plea bargain reached by federal prosecutors.

TABLE OF CONTENTS

	Page
Table of authorities.....	iii
Opinions below.....	1
Jurisdiction	1
Constitutional provisions	1
Statement of the case	1
Argument.....	6
I. The lower courts are deeply divided on the due process question concerning which governmental agents are bound by a plea agreement	7
II. This case is an excellent vehicle to review the question presented, and the lower court’s analysis was flawed	14
Conclusion.....	18
Appendix	
Opinion, Court of Appeal of California, Second District, Division 4 (Aug. 21, 2017)	App. 1
Transcript (March 30, 2016)	App. 28
Denial of Review, California Supreme Court (Nov. 29, 2017)	App. 43

TABLE OF AUTHORITIES

	Page
CASES	
<i>Allen v. Hadden</i> , 57 F.3d 1529 (10th Cir. 1995)	15
<i>Brown v. Illinois</i> , 422 U.S. 590 (1975)	17
<i>Commonwealth of Puerto Rico v. Sanchez Valle</i> , 136 S. Ct. 1863 (2016)	13
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	9
<i>Kernan v. Cuero</i> , 138 S. Ct. 4 (2017)	6, 16
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	9
<i>Lee v. State</i> , 501 So. 2d 591 (Fla. 1987)	8
<i>Margalli-Olvera v. INS</i> , 43 F.3d 345 (8th Cir. 1994)	12
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012)	6
<i>People v. Halim</i> , 14 Cal. App. 5th 632, 223 Cal. Rptr. 3d 491 (2017)	1
<i>San Pedro v. INS</i> , 79 F.3d 1065 (11th Cir. 1996)	12, 13
<i>Santobello v. New York</i> , 404 U.S. 257 (1971) ...	6, 7, 9, 10, 16
<i>State v. Chetwood</i> , 170 P.3d 436 (Kan. Ct. App. 2007)	8
<i>State v. Matson</i> , 674 N.W. 2d 51 (Wis. Ct. App. 2003)	8
<i>State v. MacDonald</i> , 346 P.3d 748 (Wash. 2015)	8, 9
<i>State v. Rogel</i> , 568 P.2d 421 (Ariz. 1977)	9
<i>State v. Sanchez</i> , 46 P.3d 774 (Wash. 2002)	8
<i>State v. Thurston</i> , 781 P.2d 1296 (Utah Ct. App. 1989)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Thomas v. INS</i> , 35 F.3d 1332 (9th Cir. 1994)	12, 13
<i>United States v. Aleman</i> , 286 F.3d 86 (2d Cir. 2002)	6, 8
<i>United States v. Anderson</i> , 970 F.2d 602 (9th Cir. 1993)	15
<i>United States v. Annabi</i> , 771 F.2d 670 (2d Cir. 1985)	11
<i>United States v. Carter</i> , 454 F.2d 426 (4th Cir. 1972)	9, 10
<i>United States v. Frownfelter</i> , 626 F.3d 549 (10th Cir. 2010)	7
<i>United States v. Gebbie</i> , 294 F.3d 540 (3d Cir. 2002)	6, 11, 15
<i>United States v. Harvey</i> , 791 F.3d 294 (4th Cir. 1986)	10
<i>United States v. Igbonwa</i> , 120 F.3d 437 (3d Cir. 1997)	12, 13
<i>United States v. Monroe</i> , 580 F.3d 552 (7th Cir. 2009)	7
<i>United States v. Palladino</i> , 347 F.3d 29 (2d Cir. 2003)	16
<i>United States v. Randolph</i> , 230 F.3d 243 (6th Cir. 2000)	8, 11, 12, 15, 16
<i>United States v. Russo</i> , 801 F.2d 624 (2d Cir. 1986)	11
<i>United States v. Salameh</i> , 152 F.3d 88 (2d Cir. 1998)	11

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V	1, 5
U.S. Const. amend. XIV	1
STATUTES	
8 U.S.C. § 1324	2
18 U.S.C. § 1546	2
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2254(d)	14
29 U.S.C. § 206(f)	3
29 U.S.C. § 215	3
California Penal Code § 32	3
California Penal Code § 182	4
California Penal Code § 236.1	4

OPINIONS BELOW

The trial court rendered an oral ruling that was not published. The California Court of Appeal, Second Appellate District, Division Four issued a published opinion that can be found at *People v. Halim*, 14 Cal. App. 5th 632, 223 Cal. Rptr. 3d 491 (2017). The Supreme Court of California summarily denied review in an unpublished order.



JURISDICTION

The Supreme Court of California denied review on November 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[,]” and the Fourteenth Amendment provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”



STATEMENT OF THE CASE

Petitioners, Astatu Halim and Hendra Anwar, are married, Indonesian citizens. Petitioner Halim resided in Los Angeles, California, and her husband, petitioner

Anwar, resided in Los Angeles part-time. In February 2013, the Coalition Against Slavery and Trafficking contacted the Federal Bureau of Investigation (“FBI”) and reported that an Indonesian woman was the victim of human trafficking. Special Agent David Lam, of the FBI field office in the Central District of California, and Los Angeles Police Department investigators interviewed the victim, who stated that she had been recruited in Indonesia to work for petitioners in Los Angeles. She also stated that she had a contract where she would earn \$250 per month with a \$50 monthly stipend, and, after working approximately two years, she informed petitioners that she wanted to return to Indonesia, but petitioners retained her passport and stated that she was still under contract. App. 3-5.

On September 9, 2013, the United States Attorney’s Office (“USAO”) for the Central District of California filed a criminal complaint against petitioners alleging harboring aliens in violation of 8 U.S.C. § 1324. Agent Lam swore out the affidavit in support of the complaint and also requested a search warrant for petitioners’ homes. Upon searching the homes, agents found two other Indonesian domestic workers. App. 5.

Petitioners retained counsel and entered into plea negotiations with the USAO. In December 2013, petitioners entered guilty pleas, pursuant to plea agreements, in federal court in the Central District of California. Petitioner Halim pled guilty to a felony violation of misuse of visas under 18 U.S.C. § 1546, and petitioner Anwar pled guilty to a misdemeanor

minimum wage violation under 29 U.S.C. §§ 206(f) and 215. App. 5-6.

Petitioners' plea agreements included a provision stating: "This agreement is limited to the USAO and cannot bind any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authorities." App. 5. Both agreements stated that the USAO would not further criminally prosecute petitioners for their conduct, except with the possible exception of criminal tax violations. The agreements also stated that "the Court and the United States Probation Office are not parties to this agreement. . . ." The Assistant United States Attorney ("AUSA") who signed the agreement stated that "she understood 'the case agent was unhappy with the result' of the plea negotiations, but she did not expect the matter would be taken to the District Attorney after the federal plea disposition and sentencing." Defense counsel stated that the plea agreements were intended to be a "global resolution," and the USAO had rejected the agent's objections to the settlement. App. 7-8.

In February 2014, the district court sentenced both petitioners in accordance with the terms of their plea agreements to probation, community service, and a fine. As mentioned, Agent Lam was "dissatisfied" and "unhappy with the result" of the plea negotiations. He therefore presented the case to the Los Angeles District Attorney's Office ("DA") and encouraged that office to prosecute petitioners. In May 2014, the DA filed a criminal complaint against petitioners alleging three counts of human trafficking in violation of California

Penal Code § 236.1. A subsequent indictment added a conspiracy count under California Penal Code § 182 and an accessory after the fact charge against petitioner Anwar under California Penal Code § 32. App. 5-9.

Petitioners filed a motion to dismiss the charges, contending, among other things, that their Fifth Amendment due process and double jeopardy rights had been violated. The trial court denied petitioners' request for an evidentiary hearing. Instead, the court accepted the prosecutor's concession that Agent Lam went directly to the local DA's office and encouraged that office to prosecute petitioners because he was dissatisfied with the federal plea agreement. The trial court also accepted that Agent Lam is "a federal employee and he's a federal law enforcement agen[t] and to whatever extent he's part of the prosecution team, to whatever extent plea agreements bind them, that's fine. I'll accept that as well." Later in the hearing, however, the trial court reasoned that Agent Lam "is not the prosecutorial agency who makes prosecutorial decisions" and therefore it may only "be an employee matter between him and the Department of Justice" or merely an "employment contract" or "Department of Justice policy" issue with the federal government. The trial court further explained that it "would be a different situation if the U.S. Attorney's Office was unhappy with the resolution of the case" and called the local DA. Here, however, there was only a "rogue agent unhappy with the prosecutors on the federal side going to the local prosecutors." Similarly, the court had a "problem" with "somehow transforming Agent Lam" into the

Fifth Amendment because he is an agent that investigates cases and “is not responsible for the filing or the litigation.”

Ultimately, the trial court denied the motion to dismiss. It accepted that the federal plea agreement was “contemplated by the parties to be global in nature and to finally resolve the case.” The court further accepted that Agent Lam was “extremely disgruntled with the resolution and decided in light of that that he was going to suggest to his local counterparts that the case be presented to the local District Attorney’s office.” However, it concluded that “a disgruntled federal agent . . . although employed by the federal branch of the federal sovereign is not in my opinion a relative of the sovereign’s prosecutorial agency which is the United States Attorney’s Office.” The trial court found that petitioners’ “Fifth Amendment due process” arguments “for plea bargains” were “interesting” and recognized that this Court had “constitutionalized plea bargain discussions,” but it was “a bridge too far” to extend such constitutional protections to this context. The trial court, however, granted a certificate of appealability and accepted petitioner Halim’s guilty plea to one count of human trafficking and petitioner Anwar’s guilty plea to accessory after the fact. The trial court placed both petitioners on probation. App. 28-42.

The California Court of Appeal affirmed. Its opinion mostly addressed double jeopardy and vindictive prosecution concerns. With respect to petitioners’ reliance on their federal plea agreements, the Court of Appeal held: “[D]efendants’ plea agreements were, by

their own terms, ‘limited to the USAO’ and could not ‘bind any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authorities.’ Nothing in the federal plea agreements or judgment barred the District Attorney from prosecuting defendants under state law or required the trial court to dismiss the indictment.” App. 25. The Supreme Court of California summarily denied review. App. 43.

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ARGUMENT

The lower courts have widely recognized that, under *Santobello v. New York*, 404 U.S. 257 (1971), a prosecutorial breach of a plea agreement violates due process. *See, e.g., United States v. Aleman*, 286 F.3d 86, 90 (2d Cir. 2002); *see also Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) (assuming breach of plea agreement violates the Constitution). The lower courts, however, are deeply divided in their interpretations of the due process implications of such agreements, particularly their determinations regarding which governmental agents are bound by such agreements. Although plea agreements are ubiquitous, the Third Circuit observed more than 15 years ago that “[c]ourts of appeals are split on this issue[.]” *United States v. Gebbie*, 294 F.3d 540, 547 (3d Cir. 2002), and the conflict persists.

The issue presented in this petition is important because approximately 95% of criminal convictions are obtained as a result of guilty pleas, *see Missouri v. Frye*, 566 U.S. 134, 143 (2012), which are typically entered

after the prosecution and the defendant have reached a plea agreement. Given that the overwhelming majority of criminal cases are resolved by plea bargains, both parties should be aware of the binding effect of such agreements in order to ensure the efficient and fair administration of the criminal justice system. This case presents an ideal vehicle to resolve the conflict and confusion, and the lower court's assessment of the issue was flawed. For these reasons, the Court should grant this petition.

I. The lower courts are deeply divided on the due process question concerning which governmental agents are bound by a plea agreement.

The California Court of Appeal appeared to resolve the question of whether Agent Lam breached the federal plea agreement as one of pure contract law and simply restated the language in the plea agreement that limited its binding effect to the USAO for the Central District of California. While the lower court's contract analysis, which did not address the many cases cited below, was itself inadequate, it failed to recognize that constitutional principles guide the inquiry. Indeed, although "contract law" may be relevant to the interpretation of plea agreements, the lower courts have generally recognized that, under *Santobello*, the inquiry is ultimately determined by due process principles. *See, e.g., United States v. Frownfelter*, 626 F.3d 549, 553 (10th Cir. 2010) (collecting cases); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009);

Aleman, 286 F.3d at 90; *United States v. Randolph*, 230 F.3d 243, 249 (6th Cir. 2000). Thus, just like *Santobello* itself was a state prosecution, state-court decisions, like the one in this case, are relevant in assessing the extent of the conflict among lower courts.¹

Florida, Wisconsin, and Kansas have held that plea agreements bind law enforcement officers, not just prosecutors. *See Lee v. State*, 501 So. 2d 591, 592-93 (Fla. 1987); *State v. Matson*, 674 N.W. 2d 51, 56-58 (Wis. Ct. App. 2003); *State v. Chetwood*, 170 P.3d 436, 440-41 (Kan. Ct. App. 2007). Despite some earlier confusion in a divided opinion, *see State v. Sanchez*, 46 P.3d 774 (Wash. 2002), the Supreme Court of Washington agrees with this approach. *See State v. MacDonald*, 346 P.3d 748, 752-55 (Wash. 2015).

These courts have explained that “[b]ecause an investigative officer is the investigating arm of the prosecutor’s office, principles of fairness and agency require us to bind the investigative officer to the prosecutor’s bargain.” *Matson*, 674 N.W. 2d at 57. Stated differently, “[i]nvestigating officers are so integral to the prosecutorial effort that to permit one to undercut a plea agreement would, in effect, permit the State to breach its promise.” *Id.* at 58. Furthermore, “[i]n other contexts, [courts] have imputed the actions of law enforcement to the district attorney’s office[,]” *id.* at 58,

¹ Even if the question were purely one of contract law, the plea agreement at issue in this case is a *federal* plea agreement, and the federal authority is divided about the meaning of similar federal plea agreements. Thus, this case presents a federal question even without consideration of the due process inquiry.

such as the due process requirement that exculpatory evidence be produced. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972). The Supreme Court of Washington also explained that an investigating officer is bound by a plea agreement when he is “acting in the role of substantially assisting the prosecution.” *MacDonald*, 346 P.3d at 755. An investigating officer clearly acts in that role when he initiates the investigation, swears out an “affidavit of probable cause result[ing] in charges being filed[,]” is “involved in the plea negotiations[,]” and discusses the proposed plea deal with the prosecutor. *Id.* at 755.

Other states, however, including Arizona and Utah, have taken the contrary position that law enforcement officers are not bound by plea agreements. *See, e.g., State v. Rogel*, 568 P.2d 421, 423 (Ariz. 1977); *State v. Thurston*, 781 P.2d 1296, 1300 (Utah Ct. App. 1989). Federal authority reflects similar disagreement that has existed for decades regarding the interpretation and due process implications of plea agreements.

The same year *Santobello* was decided, an *en banc* panel of the Fourth Circuit held that a plea bargain made by the USAO for the District of Columbia could bind the USAO for the Eastern District of Virginia. *See United States v. Carter*, 454 F.2d 426 (4th Cir. 1972) (*en banc*). In *Carter*, the defendant pled guilty to a misdemeanor in the District of Columbia and cooperated with the FBI; the Secret Service, however, “was annoyed at the manner in which the FBI had handled the

case” and initiated a prosecution through the USAO for the Eastern District of Virginia. *Id.* at 427.

The Fourth Circuit held that the District of Columbia plea agreement could bar the subsequent prosecution in Virginia, reasoning that the “United States government is the United States government throughout all of the states and districts” and that “[s]ound reasons of public policy support[ed]” giving a broad binding effect to the agreement. *Id.* at 428. Given that “[m]any federal crimes have multistate ramifications[,]” a “contrary result would constitute a strong deterrent to the willingness of defendants accused of multistate crimes to cooperate in speedy disposition of their cases and in apprehending and prosecuting defendants.” *Id.* at 428. The Fourth Circuit explained that the “solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another” and added that the then-recent opinion in *Santobello* supported its conclusion. *Id.* at 428-29. Several years later, the Fourth Circuit generally confirmed this approach and held that a plea agreement bound other federal governmental agencies despite language in the agreement that could have been construed as limiting its effect to one particular USAO, although the court left open the possibility that a plea agreement could be drafted more clearly to narrow its binding effect. See *United States v. Harvey*, 791 F.3d 294, 300-03 (4th Cir. 1986).

The Second Circuit has disagreed, holding that the presumption is that a plea agreement only binds

the particular USAO prosecuting a case, “unless it affirmatively appears that the agreement contemplates a broader restriction.” *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985). Thus, the Second Circuit has held that the mere use of the general term “the Government” in a plea agreement “does not create an affirmative appearance that the agreement contemplated barring” other federal agencies. *United States v. Salameh*, 152 F.3d 88, 120 (2d Cir. 1998). The Second Circuit, however, has clarified that “an affirmative appearance need not be an express statement.” *United States v. Russo*, 801 F.2d 624, 626 (2d Cir. 1986). Instead, such an appearance “can be inferred from the negotiations between defendant and prosecutor, as well as from statements at the plea colloquy.” *Id.* (citations omitted).

The Third Circuit has recognized the circuit-split and has followed the Fourth Circuit’s approach. See *Gebbie*, 294 F.3d at 547-49 (“we find the reasoning underlying the Fourth Circuit’s approach more persuasive”). And the Sixth Circuit has adopted an approach that is even more expansive than that of the Fourth Circuit. In *United States v. Randolph*, 230 F.3d 243 (6th Cir. 2000), the defendant entered into a plea agreement with the USAO for the Northern District of Texas in which he pled guilty to a lesser charge in exchange for dismissal of a drug conspiracy indictment. Like the plea agreement in this case, Randolph’s plea agreement included a provision stating: “This agreement is limited to the United States Attorney’s Office for the Northern District of Texas and does not bind

any other federal, state or local prosecuting authorities.” *Id.* at 248. After the plea, the USAO for the Western District of Tennessee sought to prosecute Randolph for the same drug conspiracy that had been dismissed in Texas. The Sixth Circuit held that, under the Due Process Clause, the Tennessee prosecution was barred, even though the plea agreement explicitly limited its binding effect to the USAO for the Northern District of Texas. *Id.* at 249-51. The Sixth Circuit’s decision itself manifests the confusion, as Judge Guy concurred but emphasized that his concurrence was “limited to the facts of this case[,]” *id.* at 253 (Guy, J., concurring), while Judge Boggs dissented, reasoning that Randolph received the benefit of leniency in Texas and that the agreement allowed the Texas authorities to refer the matter to Tennessee when they realized that Randolph had minimized his role. *Id.* at 253-54 (Boggs, J., dissenting).

The circuits have also divided on whether plea agreements by a particular USAO can bind other law enforcement agencies, such as the former Immigration and Naturalization Service (“INS”). The Eighth and Ninth Circuits have held that the USAO can bind the INS in a plea agreement, *see Margalli-Olvera v. INS*, 43 F.3d 345, 354 (8th Cir. 1994); *Thomas v. INS*, 35 F.3d 1332, 1343 (9th Cir. 1994), while the Third and Eleventh Circuits have taken a contrary position. *See United States v. Igbonwa*, 120 F.3d 437, 442-44 (3d Cir. 1997); *San Pedro v. INS*, 79 F.3d 1065, 1072 (11th Cir. 1996). The decisions themselves also reflect the deep disagreement, as three of the four opinions generated

dissents, including by then-Judge Alito and Judge Kozinski. *See Igbonwa*, 120 F.3d at 444-46 (Alito, J., dissenting); *Thomas*, 35 F.3d at 1343-48 (Kozinski, J., dissenting); *San Pedro*, 79 F.3d at 1072-78 (Goettel, J., dissenting).

In sum, federal and state courts are deeply divided regarding which governmental agents are bound by a plea agreement. Even when construing similarly worded agreements, the approaches have diverged significantly. The various disagreements among the lower courts regarding which governmental actors are bound by plea agreements has persisted for decades, and it is time to resolve the conflict. Members of this Court have recently expressed the need for a “fresh examination” of a related issue – whether multiple prosecutions by separate sovereigns for the same misconduct are permissible under the Double Jeopardy Clause. *See Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring, joined by Thomas, J.). The growing sentiment of jurists and commentators calling for restrictions on such multiple prosecutions serves as a timely backdrop to the issue presented. While there is a “resounding” call for the expansion of double jeopardy rights in this context, *id.*, a defendant’s due process rights should afford even more robust protections against multiple prosecutions when the government has explicitly agreed that it is satisfied with the resolution of a case. There would seem to be limited utility in interpreting plea agreements and the related due process questions in a manner that expansively allows members of the prosecution team to

seek multiple prosecutions for the same conduct. The Court should grant this petition to resolve the confusion in this important area of criminal procedure.

II. This case is an excellent vehicle to review the question presented, and the lower court's analysis was flawed.

For several reasons, this case is an excellent vehicle to review the question presented. As an initial matter, this case comes to the Court on a stipulated factual basis. It is stipulated that Agent Lam was disgruntled with the federal plea agreement and therefore urged the local DA to prosecute petitioners, and the AUSA admitted that she did not think he would engage in such conduct. Furthermore, Agent Lam was the case agent, swore out the affidavit supporting the complaint initiating the prosecution, discussed the plea negotiations with the AUSA, and his objections to the resolution were overruled by the prosecutor. Although this case is in the posture of a state prosecution, it involves a *federal* plea agreement. This is also a direct appeal and therefore is not governed by deferential review under the Anti-Terrorism and Effective Death Penalty Act of 1996. *See* 28 U.S.C. § 2254(d).

The lower court's analysis was flawed and should be corrected. The California Court of Appeal simply quoted the language that the plea "agreement is limited to the USAO and cannot bind any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authorities[.]" without

analyzing the relevant cases interpreting similar language and the due process implications. As mentioned, the Sixth Circuit has held that this language does not authorize the prosecution to “silver platter” their investigation to another prosecutorial entity. *Randolph*, 230 F.3d at 249-51.

The California Court of Appeal also did not meaningfully address the language in the plea agreement, which stated that it could not bind “any *other* federal, state, local, or foreign” authorities. Certainly, petitioners could have reasonably understood the agreement to mean that the federal prosecution team in the Central District of California was bound by the plea agreement, including the lead FBI agent on the case. *See Allen v. Hadden*, 57 F.3d 1529, 1535 (10th Cir. 1995) (“In order to determine whether the plea agreement binds the government as a whole or a specific agency, we must examine what the defendant reasonably understood when the plea was entered.”). Indeed, even the AUSA who signed the agreement did not contemplate that Agent Lam would seek further prosecution of petitioners. The Ninth Circuit authority governing the Central District of California suggested that the agents on the prosecution team were bound by the agreement, *see, e.g., United States v. Anderson*, 970 F.2d 602, 605 n.5 (9th Cir. 1993), not to mention the other authority cited earlier holding that investigative agents on the prosecution team are bound by plea agreements. At the very least, the plea agreement was not clear, thereby binding Agent Lam. *See, e.g., Gebbie*, 294 F.3d at 550-52. Given that Agent Lam was bound

by the plea agreement, his conduct breached the agreement, *see Randolph*, 230 F.3d at 249-51, and at least its “spirit,” in violation of due process. *See, e.g., United States v. Palladino*, 347 F.3d 29, 30 (2d Cir. 2003).

The California Court of Appeal also explained that nothing in the plea agreement barred the DA from prosecuting petitioners for state law violations or required the trial court to dismiss the charges. However, the threshold issue, and the one presented by this petition, is whether Agent Lam breached the plea agreement in violation of due process, not whether the plea agreement barred a state prosecution. As explained, the lower court erred in its consideration of whether there was a due process violation as a result of a breach of the plea agreement, and therefore it never conducted an appropriate inquiry into the remedy for such a constitutional violation. While this Court could certainly offer guidance on the remedy question, it need not decide it here, as the appropriate procedure would be for the state courts to decide the question of remedy in the first instance if there were a breach in violation of due process. *See Santobello*, 404 U.S. at 263; *see also Kernan*, 138 S. Ct. at 8.

Nevertheless, it is worth mentioning that dismissal of the state charges could be an appropriate remedy, particularly if the state authorities would not have prosecuted petitioners but for Agent Lam’s conduct breaching the plea agreement. *See Randolph*, 230 F.3d at 251. While such a showing would clearly suffice for dismissal, “but for” causation is not even typically required when determining the remedy for a

constitutional violation. *See Brown v. Illinois*, 422 U.S. 590, 603 (1975). In other words, the state courts could find that dismissal is also an appropriate remedy if Agent Lam's unconstitutional conduct was a significant factor in the DA's decision to prosecute petitioners, or if Agent Lam's misconduct were flagrant. *Id.* at 603-04. In any event, the issue presented by petitioners is whether Agent Lam breached their plea agreements in violation of their due process rights. The question of remedy need not be decided by the Court at this time.

In sum, the due process question presented by this petition is important, and it has generated substantial disagreement among the lower courts. The Court should therefore grant this petition to resolve the confusion and conflict, and it should hold that the FBI agent in this case violated petitioners' plea agreements in violation of their due process rights.



CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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