No.

In the Supreme Court of the United States

SCOTT KERNAN, *Petitioner,*

v.

MICHAEL DANIEL CUERO, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals exceeded the proper scope of federal habeas review by setting aside a state criminal sentence based on a putative federal due process right to specific performance of a plea agreement that was superseded and withdrawn, in accordance with state law, before the entry of judgment.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Scott Kernan, Secretary of the California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals (App. 1a-97a) is reported at 827 F.3d 879 (9th Cir. 2016). The order denying rehearing and rehearing en banc and accompanying opinions (App. 98a-139a) are reported at 850 F.3d 1019 (9th Cir. 2017). The judgment of the district court (App. 140a-143a) and the magistrate judge's report and recommendation (App. 144a-166a) are unpublished. The state superior court's oral ruling (App. 167a-184a) and the state court of appeal's affirmance on direct appeal (App. 185a-188a) are unpublished. The state habeas corpus denials by the state superior court (App. 189a-193a), the state court of appeal (App. 194a-199a), and the state supreme court (App. 200a) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. App. 1a. The court of appeals denied the State's petition for rehearing and rehearing en banc on March 8, 2017. App. 98a. The

[1] Scott Kernan has succeeded Matthew Cate as Secretary of the California Department of Corrections and Rehabilitation. Secretary Kernan is substituted as the named petitioner in this case in compliance with this Court's Rule 35.3.

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> …
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was not adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

2. Section 969.5 of the California Penal Code provides in pertinent part:

> (a) 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.

3. Section 1192.5 of the California Penal Code provides in pertinent part:

> If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.

STATEMENT

1. Under California law, if state prosecutors discover that a pending criminal complaint does not accurately reflect all of a defendant's relevant criminal history, a trial court may authorize amendment of the charging document to add allegations of the missing prior offenses. Cal. Penal Code §§ 969a, 969.5; *see generally People v. Valladoli*, 13 Cal. 4th 590, 602 (1996). Penal Code section 969.5, adopted by the state Legislature in 1935, provides that such an amendment may be made even after a defendant pleads guilty, but before sentence is rendered and judgment entered.[2] If the court allows such an amendment, the defendant is entitled to withdraw the plea previously made to the original charges. Cal. Penal Code § 1192.5; *see also People v. Kim*, 193 Cal. App. 4th 1355, 1361-1362 (2011) (where court departs from original plea agreement, defendant must be given opportunity to withdraw); *In re Falco*, 176 Cal. App. 3d 1161, 1166-1167 (1986) (similar).

The California Legislature vested trial courts with authority to amend a charging document after entry of a guilty plea in part "to prevent one accused of a crime from quickly pleading guilty before a magistrate and thereby limiting the amount of time the prosecutor has to investigate, discover, and charge the accused's prior felony convictions." *Valladoli*, 13 Cal. 4th at 602. More generally, the authority allows prosecutors to honor the policy decision made by the Legislature that a criminal complaint should generally reflect all prior felonies that qualify as "strikes"

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[2] The predecessor to section 969.5 was section 969½. *See Valladoli*, 13 Cal. 4th at 602. In 1998, the Legislature renumbered the provision to section 969.5 and made changes that are not pertinent here. *See* Stats. 1998, ch. 235, § 1.

under California's Three Strikes Law. Cal. Penal Code § 667(f)(1) (requiring prosecutors to allege all strikes); *cf. People v. Superior Court* (*Romero*), 13 Cal. 4th 497, 504 (1996) (recognizing California trial courts' authority to dismiss a prior strike in furtherance of justice).

Penal Code section 969.5 is one part of a broader statutory structure that permits the withdrawal of, or changes to, pleas until the time the trial court imposes sentence and enters the judgment of conviction. *See People v. Karaman*, 4 Cal. 4th 335, 344 n.9 (1992) (judgment rendered when sentence is orally pronounced); Cal. Penal Code § 1191 ("in a felony case, after a plea . . . the court shall appoint a time for pronouncing judgment"). For example, before sentencing and the entry of judgment, a defendant may move to withdraw his guilty plea, Cal. Penal Code § 1018, or the trial court may decide to withdraw approval of such a plea, even over the defendant's objection, *id.* § 1192.5. This flexibility ensures that trial courts are able to address changes in circumstance that are material to the fairness, to all of the parties involved, of the underlying plea proceedings.

2. a. On October 14, 2005, respondent Michael Cuero crashed his car into Jeffery Feldman while driving under the influence of methamphetamine, severely injuring Feldman. App. 115a. Cuero had no valid driver's license, was on parole for prior drug violations, and was unlawfully carrying a loaded 9 mm semiautomatic pistol, which he disposed of at the scene. *Id.*

Shortly after the crash, the State filed an initial criminal complaint and then an amended criminal complaint charging Cuero with two felonies and a misdemeanor: (1) inflicting serious bodily injury while driving under the influence of alcohol or drugs

and doing so within ten years of a prior driving-under-the-influence conviction; (2) possessing a firearm as a felon; and (3) being under the influence of a controlled substance. App. 115a. The amended complaint also alleged that Cuero had served four prior prison terms and that Cuero's prior conviction for residential burglary qualified as a "strike" under California's Three Strikes law. *Id.* at 115a-116a.

Cuero pleaded guilty to the two felony charges on December 8, 2005, and admitted the prior prison terms and the residential burglary strike. App. 116a. The court then dismissed the remaining misdemeanor count, at the State's request. *Id.* Based on this plea, Cuero faced a maximum sentence of 14 years and 4 months in state prison. *Id.* At the end of the hearing, the court ordered a probation report to be prepared and scheduled a later hearing for sentencing and the entry of judgment. App. 35a, 96a-97a, 116a; *see* Cal. Penal Code §§ 859a, 1191.

b. Before sentencing, the prosecutor learned that Cuero had two additional prior serious felony convictions, and that the facts underlying his prior conviction for assault with a deadly weapon meant that it qualified as a second strike. App. 116a-117a, 170a-171a. On January 5, 2006, the prosecutor moved under Penal Code section 969.5 to amend the operative complaint to allege these new prior offenses. *Id.* at 169a.

At the February 2, 2006, hearing on the State's motion, the prosecutor explained that a conviction for assault with a deadly weapon qualifies as a strike only under prescribed circumstances, and that the file the prosecution originally had in this case contained only the initial assault complaint, which did not include the qualifying allegations. App. 170a-172a. In preparing for sentencing, the prosecutor learned that Cuero had ultimately pleaded guilty to an amended

assault complaint, including allegations that qualified the conviction as a strike. *See id.* at 170a-174a.[3] The State requested that the court allow it to amend the complaint, with the consequence that Cuero would be permitted to withdraw his guilty plea and re-plead. *Id.* at 174a.

The trial court granted the prosecution's motion. App. 178a-181a. The court first noted that disposition of the prosecution's motion turned on state statutory law, including Penal Code section 969.5. App. 178a-180a. ("What I looked at first was the statute. I think that's what guides my decision."). The court explained that section 969.5 was adopted by the state Legislature to enable the accurate charging of all prior convictions, and that such amendments ordinarily should be allowed unless a defendant's substantial rights would be prejudiced. *See id.*

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[3] For assault with a deadly weapon to qualify as a strike under California law, the State must allege and prove that the defendant either personally inflicted serious bodily injury or personally used a firearm, Cal. Penal Code § 1192.7(c)(8), or that he personally used a dangerous or deadly weapon, *id.* § 1192.7(c)(23). In the complaint to which he initially pled guilty in this case, Cuero's 1992 assault conviction was identified only as a "prison prior" under California Penal Code sections 667.5(b) and 668. App. 29a-30a. A prison prior subjects a defendant to a one-year sentence enhancement, while a second strike subjects a defendant to a minimum indeterminate term of 25 years to life in prison, Cal. Penal Code § 667(e)(2)(A)(ii). *See* App. 116a n.2.

at 179a-180a.[4] Here, the trial court found, "there [was] no showing that [Cuero's] substantial rights [would] be prejudiced in any way" by the prosecution's proposed amendment. *Id.* at 179a-181a. Cuero's "plea was entered December 8th, and the amendment was attempted to be filed on January 5th. And nothing changed during that period of time to prejudice [Cuero]." *Id.* at 181a.

The trial court suggested that unfair prejudice could arise if, for example, there were "a material change in the evidence that was available or something dramatic had happened in between times." App. 180a. But the court found no such circumstances present in this case. *Id.* ("I don't see that there's any detriment to him in that regard."). The court explained that a defendant's substantial rights are not prejudiced simply because a proposed amendment would deprive him "of what he viewed as the benefit of the bargain," where he is allowed to withdraw his plea and "will be in the same situation as he would have been prior to entry of the plea." *Id.*; *see also id.* (substantial rights not prejudiced by mere fact that potential punishment might be increased by amendment). The court accordingly granted the prosecution's motion to amend the complaint and provided Cuero the opportunity to withdraw his plea. *Id.* at 181a.

Cuero deferred decision on whether to withdraw his plea and entered into negotiations with the State to resolve the amended charges. App. 181a, 184a. The parties ultimately agreed to a plea deal under

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[4] The reporter's transcript shows the court's statement as, "the purpose of those statutes goes to effectually the lecture's view that all those prior felony convictions should be pleaded." App. 179a. "Lecture" appears to be a mistranscription for "Legislature."

which Cuero would plead guilty to inflicting great bodily injury while driving under the influence and admit the two prior strikes in exchange for the State's agreement to dismiss the remaining charges and allegations, which would reduce Cuero's potential sentence from 64 years to life to 25 years to life. *Id.* at 118a. At a change-of-plea hearing on March 27, 2006, Cuero withdrew his prior guilty plea and pleaded according to the terms of the parties' new agreement. *Id.* At the sentencing hearing on April 20, 2006, the trial court sentenced him to 25 years to life in state prison and entered judgment. *Id.* at 119a

c. On direct appeal, Cuero's counsel filed a brief under *People v. Wende*, 25 Cal. 3d 436 (1979), California's equivalent of an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967). Counsel's brief directed the state appellate court's attention to the "possible but not arguable issues" of "whether the trial court abused its discretion in permitting the People to amend the complaint after Cuero entered guilty pleas" and "whether the amendment violated the terms of the earlier plea agreement in violation of due process." App. 187a-188a. The state court of appeal granted Cuero permission to file a brief on his own behalf, but he did not do so. *Id.* at 188a.

After "review[ing] the entire record," including the possible issues identified by counsel, the court of appeal unanimously held that there was "no reasonably arguable appellate issue" and affirmed the judgment. App. 188a; *see also id.* (concluding that Cuero was represented by competent counsel on appeal). Cuero did not seek discretionary review in the state supreme court. *Id.* at 37a, 119a.

Cuero filed two habeas petitions in the state trial court, alleging among other things ineffective assistance of counsel. App. 189a-193a, 195a. The trial court denied both petitions. *Id.* at 192a, 195a.

Cuero next filed a habeas petition in the state court of appeal alleging, among other things, ineffective assistance of counsel. App. 195a-196a. He argued in part that his appellate lawyer performed deficiently by filing a *Wende* brief on direct review, and that his due process rights were violated when the trial court allowed the prosecution to amend the complaint after entry of his initial guilty plea. *Id.* at 196a-197a. The court of appeal denied the petition, concluding that there was no arguable issue that his appellate counsel failed to raise on appeal and that his ineffective-assistance-of-counsel claim was "merely a laundry list of counsel's alleged shortcomings, wholly unsupported by facts or any explanation for the basis of the allegations." *Id.* at 196a, 199a. The court declined to consider Cuero's due process claim because it had already been raised on direct appeal and held not to be reasonably arguable. *Id.* at 197a.

Cuero also filed a habeas petition in the state supreme court, raising the same claims he raised in his petition to the court of appeal. App. 153a-165a. The supreme court summarily denied the petition. *Id.* at 200a.

3. a. Cuero filed a federal habeas petition asserting the same claims that he had raised in the state court of appeal and supreme court. App. 144a-145a. The district court denied the petition on the merits, holding as to each of Cuero's claims that he failed to demonstrate that the state courts' determinations were contrary to, or an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d)(1). App. 142a-143a, 153a-165a. The district court issued a certificate of appealability as to all issues raised in the petition. *Id.* at 143a.

b. A divided panel of the court of appeals reversed. App. 1a-97a. Treating the state trial court's decision to grant the prosecution's motion to amend

the complaint as the "last reasoned decision of the state courts" subject to federal habeas review (*id.* at 8a), the court held that the state decision was contrary to, and reflected an unreasonable application of, clearly established federal law. *Id.* at 23a-24a.

The panel majority first concluded that Cuero's initial plea was entered pursuant to an agreement with the State, and that the trial court's acceptance of that agreement "seal[ed] the deal," giving Cuero a vested federal due process right to enforce the agreement's terms. App. 10a; *see also id.* at 9a ("plea agreement became binding the moment the first Superior Court judge accepted his guilty plea"). Relying primarily on this Court's decisions in *Santobello v. New York*, 404 U.S. 257 (1971), and *Mabry v. Johnson*, 467 U.S. 504 (1984), *overruled in part on other grounds by Puckett v. United States*, 556 U.S. 129 (2009), in addition to circuit precedent, the court concluded that a defendant's entry, and the trial court's acceptance, of a guilty plea "'implicates the Constitution,'" and "transform[s]" a plea bargain from "a 'mere executory agreement' into a binding contract." App. 9a (quoting *Mabry*, 467 U.S. at 507-508); *see also* App. 14a ("prosecution was bound by the agreement's terms" when trial judge made the requisite factual findings and accepted the plea).

The court next held that by amending the complaint to add new prior-conviction allegations, the prosecution breached the plea agreement. App. 15a-16a. Citing this Court's decision in *Ricketts v. Adamson*, 483 U.S. 1 (1987), the panel reasoned that construction of a plea agreement is, within broad bounds of reasonableness, a matter of state law. App. 16a. Relying on Ninth Circuit precedent, the court perceived its task on federal habeas review as evaluating whether the state trial court's decision granting the prosecution's motion to amend was

"consistent with a proper application of state contract law in interpreting the plea agreement." *Id.* "[I]f not, the [state court's] decision was an unreasonable application of federal law." *Id.* (ellipses, alterations, and internal quotation marks omitted); *see also id.* (reasoning that clearly established federal law imposes on federal habeas courts an "obligation to construe plea agreements according to state contract law"); *id.* at 20a (state courts "constitutionally obligated to construe [plea] agreement in accordance with state contract law").

After reviewing California contract principles, the court of appeals held that the state court had not properly applied state law. App. 17a-21a. Rather, in the federal appellate court's view, California contract law entitled Cuero to "the benefit of his bargain" from the moment that the trial court accepted his initial guilty plea. *Id.* at 9a, 18a. The state trial court erred, the panel majority concluded, by relying on state appellate decisions permitting amendments to complaints under Penal Code section 969.5. *Id.* at 18a n.11, 19a-20a. In the federal court's view that state statutory provision was "irrelevant," because "[o]nce a defendant enters a guilty plea pursuant to a plea agreement, the state is bound by the agreement and any attempt by the state to withdraw—through a motion to amend the complaint pursuant to § 969.5 or otherwise—constitutes a breach." *Id.* at 19a n.12. The federal court concluded that the state trial court "fail[ed] to interpret Cuero's plea agreement consistently with California contract law," and thus "unreasonably applied" clearly established federal law. *Id.* at 21a.

Finally, the court of appeals held that, under California law, Cuero was entitled to specific performance of the terms of his original plea. App. 21a-23a. The court reasoned that a "state court must

supply a remedy for a breached plea agreement that comports with state contract law," and that California contract principles provide that "the remedy for breach must repair the harm caused by the breach." *Id.* at 21a. The trial court's decision to permit Cuero to withdraw his plea, the court concluded, did not "'repair the harm.'" *Id.* at 21a. Moreover, under circuit precedent, "specific performance is the best remedy," unless the defendant himself elects to rescind the agreement instead. *Id.* at 22a.

Based on these conclusions, the court of appeals ordered the district court to issue a conditional writ requiring the State to resentence Cuero in accordance with his original plea. App. 24a.

c. Judge O'Scannlain dissented. App. 34a-75a. He explained in part that this Court has never held that the Constitution requires specific performance of a plea agreement that is breached or withdrawn after the defendant pleads guilty but before the court has entered judgment. *Id.* at 58a-59a.[5] Although *Santobello* requires the prosecution to fulfill any promises that induce a plea upon which a judgment of conviction is based, that holding does not extend to the different situation present here, where the state trial court's ultimate judgment of conviction "was not entered on the basis of the initial plea, purportedly induced by unfulfilled promises," but where "judgment was entered on the basis of the subse-

[5] At the threshold, Judge O'Scannlain disagreed with the panel majority that Cuero entered his guilty plea pursuant to a mutual agreement with the State. App. 43a-47a; *id.* at 46a n.10 ("the record contains no promise or agreement by *the State* to drop any charges or to refrain from amending the complaint"). For purposes of this petition, the State assumes that Cuero's initial guilty plea, coupled with dismissal of one charge on the prosecution's motion, reflected or constituted an agreement between him and the State.

quent plea, which was induced by promises that have been fulfilled." *Id.* at 58a. Moreover, *Santobello* itself expressly declined to hold that specific performance is required to redress a prosecutor's breach of a plea agreement. *Id.* at 54a; *see also id.* at 67a (idea that specific performance is required is an "invention[] of our circuit").

The dissent further concluded that the panel had overstepped its bounds in granting habeas relief based on perceived errors of state law. App. 61a (federal court can set aside state conviction only for violations of federal law). In any event, the panel misinterpreted California law. *Id.* at 62a (noting California statutes that "expressly permit a prosecutor to amend an information or complaint"). The dissent explained that, rather than "engag[ing] freely in a de novo determination of what California contract law requires, both for the construction of the agreement and the remedy for a breach," *id.* at 73a, the federal court of appeals was required to defer to the state courts' conclusion that state law authorized amendment of the complaint, *id.* at 65a. The majority's decision to countermand that interpretation of state law "severely undermines the California Legislature's determination … that prosecutors should have the ability, with the approval of the court, to amend a complaint after a plea to allege all prior felonies." *Id.* at 65a.

d. The court of appeals denied rehearing and rehearing en banc, with the two judges in the panel majority issuing an opinion concurring in the denial. App. 98a-114a. Seven judges dissented from the denial of rehearing en banc, explaining that this Court "has never held that the Due Process Clause precludes post-plea, pre-judgment amendments to a complaint" or "ordered the reinstatement of an alleged plea agreement that was not in effect at the

time the judgment was entered." *Id.* at 114a. They reasoned that the panel majority's contrary conclusion improperly "strip[s] California of a tool used to ensure that criminal defendants receive sentences that are commensurate with all of the offenses they have committed." *Id.* at 139a.[6]

REASONS FOR GRANTING CERTIORARI

Under longstanding California law and practice, a trial court may permit the prosecution to amend a criminal complaint to accurately reflect all of the defendant's prior felony convictions at any time before judgment is entered. This is true even if the defendant has already entered a guilty plea pursuant to a plea agreement, provided that the defendant is then permitted to withdraw that original plea. Disagreeing with the state courts' interpretation of California law and applying Ninth Circuit precedent, the decision below holds that this state procedure so clearly violates the federal Constitution that it justifies issuance of a federal writ of habeas corpus—requiring the State to resentence Cuero in accordance with the terms of an original plea that reflects neither an accurate account of his prior criminal history nor the terms of his final plea agreement with the State.

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[6] On March 16, 2017, the court of appeals issued the mandate, which required Cuero to be resentenced within 60 days. Cuero was resentenced in the trial court on May 11, 2017. According to the California Department of Corrections and Rehabilitation, his anticipated release date is April 18, 2018. However, were Cuero released during the pendency of this case, it would not moot the case, as Cuero will remain on parole following his release and in any event would be reincarcerated if the decision below were reversed.

That decision exceeds the proper bounds of federal habeas review. Under 28 U.S.C. § 2254(d), a federal court may set aside a final state judgment only if it is contrary to, or reflects an unreasonable application of, clearly established federal law. No holding of this Court clearly establishes any federal due process right to specific performance of a plea agreement that is withdrawn or superseded before the entry of an actual judgment of conviction. In addition, this Court has repeatedly confirmed that perceived errors of state law cannot form the basis for federal habeas relief. This Court should grant certiorari to correct the court of appeals' improper use of federal habeas review to upend perfectly fair state plea procedures that have been part of California law for over eighty years.

1. Under the familiar standards of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, a federal habeas court may not grant relief unless the state court's adjudication of a prisoner's claim "was 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).[7] For these

[7] Applying a "look through" principle, the panel majority held that the relevant state-court decision subject to federal habeas review was the state trial court's ruling on the prosecution's motion to amend. App. 8a. As Judge O'Scannlain's dissent explains, the state trial court was not presented with a federal due process claim; by contrast, the state court of appeal on direct review expressly adjudicated the merits of such a due process claim. *Id.* at 39a-41a. But which state-court decision is properly evaluated for federal habeas purposes does not affect the analysis in this case. The State need not rely here on any actual or potential rationale for the state appellate court's judgment different from the reasons expressed in the trial court's ruling. There is therefore no need for the Court to con-

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purposes, federal law is "clearly established" only by holdings of this Court. *Williams v. Taylor*, 529 U.S. 362, 381 (2000). The Court has "repeatedly emphasized [that] circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) (quoting § 2254(d)(1)). Only a "specific legal rule" articulated by this Court may provide a basis for relief. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (AEDPA bars consideration of claim when Court's "case law does not clearly establish the legal proposition needed to grant [a state prisoner] habeas relief"). Moreover, before a federal court may set aside a state conviction, "a state prisoner must show that the state court's ruling on the claim being presented in federal court 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 court below seriously erred in concluding that Cuero's claim satisfied these standards. Contrary to the court of appeals' conclusion, neither *Santobello v. New York*, 404 U.S. 257, nor *Mabry v. Johnson*, 467 U.S. 504, held that the Due Process Clause prohibits a State from amending a criminal complaint after a defendant enters a guilty plea pursuant to an initial agreement with the State but before judgment is entered, where the defendant is entitled to withdraw his original plea. Nor does either case hold that a breach of a plea agreement must be rem-

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sider the disagreement below over the proper application of the "look through" doctrine. For the same reason, this case will not be affected by the Court's consideration of look-through issues in *Wilson v. Sellers*, No. 16-6855.

edied by specific performance of the terms of the initial plea. Indeed, fairminded jurists could conclude that this Court's decisions have reached precisely the opposite conclusion.

In *Santobello*, the defendant agreed to plead guilty to a lesser-included offense in exchange for the government's promise to refrain from making a sentencing recommendation. 404 U.S. at 258. At sentencing, several months after Santobello pleaded guilty, the government breached the agreement by asking for the maximum available sentence, which the trial court imposed. *Id.* at 259-260. The Court held that due process required vacatur of Santobello's conviction. *Id.* at 262-263. The Court explained that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* Due process did not permit holding Santobello to his obligations under the plea agreement, while the prosecution freely breached its own. *See id.*

Notably, having identified a due process violation, this Court expressly left it to the state courts to determine appropriate relief. *Santobello*, 404 U.S. at 262-263. The Court explained that a state court was "in a better position to decide" which remedy—either specific performance of the plea agreement or withdrawal of the guilty plea with the opportunity to replead—was warranted under the circumstances of the case. *Id.* at 263 & 263 n.2.

In *Mabry*, the Court held that a defendant was not entitled to enforce a plea offer made by the prosecution. 467 U.S. at 510. There, the prosecution proposed a favorable plea deal to Johnson's counsel. *Id.* at 505-506. When defense counsel told the prosecutor that Johnson had accepted, the prosecutor withdrew the offer. *Id.* at 506. Johnson later pleaded

guilty, but on less-lenient terms. *Id.* In federal habeas proceedings, he claimed that he was entitled to the more favorable terms of the withdrawn offer. *Id.*

This Court rejected Johnson's claim. The Court explained that a "plea bargain standing alone is without constitutional significance[.]" *Mabry*, 467 U.S. at 507. "[I]n itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* (footnote omitted). "It is the ensuing guilty plea that implicates the Constitution. Only after [Johnson] pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of [his] liberty at issue here." *Id.* at 507-508 (footnote omitted). Because Johnson's ultimate plea, pursuant to which he was convicted and sentenced, was voluntary and "in no sense induced by the prosecution's [earlier] withdrawn offer," he suffered no due process violation. *Id.* at 510-511.

The Court further concluded that, even if the prosecution had breached a promise by withdrawing its initial offer, Johnson would still not be entitled to enforce the offer's terms. *Mabry*, 467 U.S. at 510 n.11. The Court explained that *Santobello* had "expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Id.* Rather, *Santobello* "made it clear that permitting [a defendant] to replead was within the range of constitutionally appropriate remedies." *Id.* Because Johnson pleaded "after the prosecution breached its 'promise' to him," his "constitutional rights could not have been violated." *See id.*

Neither *Santobello* nor *Mabry* even came close to holding that due process forbids a State from amending a criminal complaint after a guilty plea

pursuant to an initial agreement, while of course also allowing the defendant to withdraw the initial plea. In *Santobello*, the Court held that a defendant cannot be held to a plea agreement while the prosecution is allowed to breach it. 404 U.S. at 262. But *Santobello* did not address a situation like that here, where the defendant is permitted to withdraw his original plea just as the prosecution is allowed to amend the original complaint. In such circumstances, the final judgment of conviction is not entered based on "the initial plea, purportedly induced by unfulfilled promises." App. 58a (dissenting opinion). Rather, if, as here, the defendant ultimately comes to a new agreement with the State, the final judgment rests "on the basis of the subsequent plea, which was induced by promises that have been fulfilled." *Id*. Accordingly, the state court's decision permitting the prosecution to amend the complaint was not contrary to, or an unreasonable application of, *Santobello*.

The court below also erred in concluding that, under *Mabry*, the entry of Cuero's guilty plea "sealed the deal" between him and the State and vested him with a due process right to enforce the terms of his original plea. *See* App. 9a-10a. *Mabry* held that a defendant was not entitled to enforce the terms of a plea offer that was revoked before entry of a plea, even though the defendant had tried to accept the offer before it was withdrawn. 467 U.S. at 506-507, 509-510. Although the Court observed that a guilty plea "implicates the Constitution," it also made clear that a plea agreement is a "mere executory agreement" until it is "embodied in the judgment of a court." *Id*. at 507-508. Here, Cuero's initial plea, although accepted by the state trial court, was never embodied in a judgment. App. at 111a. The state court's ruling—that the prosecution could amend the

complaint with the result that Cuero could withdraw his plea—is not inconsistent with anything in *Mabry*.

In extending the holdings in *Santobello* and *Mabry* to address the different situation here, the Ninth Circuit exceeded AEDPA's limits. As this Court has observed, "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (citation omitted). Consequently, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *Id*. (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). And while "'[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt[,]'" this will only be the case where there can "be no 'fairminded disagreement' on the question." *White*, 134 S. Ct. at 1706-1707 (quoting *Yarborough*, 541 U.S. at 666, and *Richter*, 562 U.S. at 103). As the dissenting opinions below reflect, fairminded jurists can (at a minimum) disagree about whether *Santobello* and *Mabry* apply to this case. App. 48a-54a, 123a-125a.

Even beyond its improper extension of *Santobello* and *Mabry* to conclude that the State breached a binding plea agreement with Cuero, the court of appeals entirely misapplied those cases in holding that the state court was required to order specific performance of the terms of Cuero's original plea. As explained above, both *Santobello* and *Mabry* expressly concluded that, in cases where the prosecution breaches the terms of a plea agreement, due process concerns are satisfied if the defendant is given the

opportunity to withdraw his plea and enter a new one. *See Mabry*, 467 U.S. at 510 n.10; *Santobello*, 404 U.S. at 262-263. Accordingly, even if the prosecution's motion to amend the complaint in this case constituted a breach of a plea agreement, Cuero was not entitled to anything more than the state trial court ordered—the opportunity to withdraw his original plea and enter a new one to the new charges.

The court of appeals' decision to itself determine the proper remedy in this case is also inconsistent with decisions of this and other Courts that have instead deferred to state courts to fashion appropriate remedies in cases of breach. As explained above, in *Santobello*, after concluding that the prosecution violated the parties' agreement, this Court vacated the defendant's conviction and remanded, explaining that the state court was "in a better position" to determine the proper remedy under the particular circumstances of the case. 404 U.S. at 263.

Consistent with this approach, courts of appeals have likewise refused to dictate to state courts how to redress a prosecutorial breach. For example, in *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001), the Third Circuit referred the issue of remedy to the state court after holding on federal habeas review that the prosecutor had violated the terms of a plea agreement. *Id.* at 462 (declining to decide whether defendant "should be resentenced under the plea agreement or given the opportunity to withdraw his plea"). The court explained that, "as the *Santobello* Court long ago observed, it is best left to the state court to decide what remedy is appropriate." *Id.*

Similarly, in *McPherson v. Barksdale*, 640 F.2d 780 (6th Cir. 1981), the Sixth Circuit court explained that "[f]ederal courts may not ordinarily choose the appropriate remedy for violations of plea bargains during state criminal proceedings." *Id.* at 781. Re-

jecting a habeas petitioner's request for specific performance, the court reasoned that nothing in *Santobello* provides any "basis for granting specific performance of … an alleged plea bargain in a federal forum." *Id.* at 782. These cases confirm that, even if the court of appeals here properly held that the prosecution breached a plea agreement with Cuero, the federal appellate court had no proper basis on which to order the State to resentence Cuero according to the terms of his original plea.

2. The court of appeals also overstepped AEDPA's bounds in setting aside Cuero's conviction based on perceived errors of state law. Under AEDPA, a federal habeas court may act "only on the ground that [a state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As this Court has repeatedly stressed, federal habeas relief "does not lie for [purported] errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Rather, "a state court's interpretation of state law … binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam).

Here, in contrast, the court of appeals held that AEDPA required it to "consider whether the state court decision [was] consistent with a proper application of state contract law…." App. 16a. Then, based on its own view of California law, the court held that the state trial court improperly applied state appellate precedent and "fail[ed] to interpret Cuero's plea agreement consistently with California contract law." *Id.* at 21a. Further still, the court ordered the State to resentence Cuero in accordance with the terms of his original plea based on its conclusion that California law required specific performance of the initial plea agreement. *Id.* at 23a-24a; *see also id.* at 110a-112a (Wardlaw, J., concurring in the denial of re-

hearing) (describing California law as "providing the requisite remedy" and asserting that "California law calls for specific performance" when it will implement the parties' reasonable expectations). This plenary review of a state court's interpretation of California law—and a requirement that the State take action to comply with the habeas court's interpretation of state law—cannot be squared with the established principle that "only noncompliance with *federal* law [may] render[] a State's criminal judgment susceptible to collateral attack in the federal courts." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam); *see also Estelle*, 502 U.S. at 67-68 ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

The court of appeals discerned authority to construe California contract law for itself on federal habeas review from its own precedents and from this Court's statement in *Ricketts v. Adamson*, 483 U.S. at 6 n.3), that the "construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *See* App. 16a. That seriously misconstrues *Ricketts*. As an initial matter, *Ricketts* did not say that construction of a plea agreement turns exclusively on principles of state *contract* law. *See* 483 U.S. at 6 n.3 (construction of plea agreement is a matter "of state law").[8] But more fundamentally, the

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[8] Nor did this Court's decision in *Puckett v. United States*, 556 U.S. 129, 137 (2009), as the court of appeals also suggested. App. 16a. *Puckett* held that a forfeited claim that the government breached the terms of a plea agreement is subject to plain-error review. 556 U.S. at 143. In explaining that conclusion the Court observed that "plea bargains are essentially contracts," although "the analogy may not hold in all respects." *Id.* at 137. The Court did not say, or even suggest, that a state court must (continued…)

Court in *Ricketts* expressly directed federal courts to defer to state courts on matters of state law—not to decide such matters for themselves.

The question in *Ricketts* was whether the Double Jeopardy Clause barred retrial of a defendant who had breached his obligations under a plea agreement. 483 U.S. at 3. In holding that it did not, the Court expressly declined to independently determine whether the defendant had violated the terms of the plea deal. *Id.* at 6 n.3. The Court explained: "While we assess independently [in this pre-AEDPA case] the plea agreement's effect on [defendant's] double jeopardy rights, the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law, and we will not disturb the [state court's] reasonable disposition of those issues." *Id.* (scope of parties' obligations under plea agreement and whether party breached agreement's terms "are matters appropriately left to the state courts"). The Court made clear that in a habeas case a federal court's task is to review the effect of the state court's construction of a plea agreement on a defendant's federal rights, and to do so "without second-guessing" the state court's interpretation of the plea agreement. *Id.* (criticizing dissent's "discourse

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(…continued)
rely exclusively on state contract law to determine whether a prosecutor violated the terms of a plea agreement—let alone in assessing whether a well-established state criminal plea procedure violates due process.

Moreover, as Judge O'Scannlain noted, *Puckett* was decided after the state court of appeal decided Cuero's claim. App. 70a. Consequently, *Puckett* did not exist and was not "clearly established Federal law" at the time of the state court's decision. *Id.*

on the law of contracts" as "illuminating but irrelevant"). A federal court's review of a prisoner's federal claim, the Court concluded, is "not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Id.* But in rejecting the California trial court's conclusion that the prosecution could properly amend the complaint, that is precisely what the Ninth Circuit did here.

The court of appeals' own precedents, on which it relied here, cannot support its conclusion that a state court unreasonably applies clearly established federal law if it misinterprets state contract law. *See* App. 16a (citing *Davis v. Woodford*, 446 F.3d 957 (9th Cir. 2006), and *Buckley v. Terhune*, 441 F.3d 688 (9th Cir. 2006) (en banc).) As this Court has "emphasized, time and again, … [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" *Lopez*, 135 S. Ct. at 2 (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450-51 (2013) (per curiam)). This Court should grant certiorari to correct the court of appeals' improper intervention in matters of state law.

3. In accepting Cuero's claim in this case, the Ninth Circuit effectively invalidated a state criminal procedure that has been part of California law for more than eighty years. Its decision upends settled practice and displaces the considered judgment of the state Legislature that allowing amendment of a criminal complaint to include allegations of prior convictions at any time before a judgment is entered, even if the defendant has already entered a guilty plea pursuant to a plea agreement, is a fair and sensible way to ensure that criminal dispositions accurately reflect a defendant's criminal history, so long as the defendant is likewise allowed to withdraw any initial

plea and enter a new one to the amended charges. The court of appeals' rejection of this system, on federal habeas review and without any footing in this Court's decisions, improperly interferes with the State's administration of its criminal justice system, and warrants review and correction by this Court. In light of the clarity of the error, the Court may wish to consider summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 6, 2017

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL DANIEL CUERO,
Petitioner-Appellant,
v.
MATTHEW CATE,
Respondent-Appellee.

No. 12-55911
D.C. No. 3:08-cv-02008-BTM-WMC

OPINION

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted August 5, 2015
Pasadena, California

Filed June 30, 2016

Before: Diarmuid F. O'Scannlain,
Barry G. Silverman, and Kim McLane Wardlaw,
Circuit Judges.

Opinion by Judge Wardlaw;
Dissent by Judge O'Scannlain

SUMMARY*

Habeas Corpus

The panel reversed the district court's judgment denying California state prisoner Michael Daniel Cuero's 28 U.S.C. § 2254 habeas corpus petition and remanded.

The panel held that after Cuero entered a binding, judicially-approved plea agreement guaranteeing a maximum sentence of 14 years and 4 months in prison, and stood convicted, the prosecution breached the plea agreement by moving to amend the complaint to charge Cuero's prior assault conviction as a second strike, and the Superior Court acted contrary to federal law, clearly established by the Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971), when it permitted the amendment and refused to order specific performance of the original plea agreement. The panel wrote that by failing to interpret Cuero's plea agreement consistently with California contract law, the Superior Court unreasonably applied federal law clearly established by the Supreme Court in *Ricketts v. Adamson*, 483 U.S. 1 (1987). The panel explained that allowing Cuero to withdraw his guilty plea, exposing Cuero to the risk of trial and receiving an indeterminate sentence of 64 years to life, was no remedy. The panel remanded with instructions to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

issue a conditional writ requiring the state to resentence Cuero in accordance with the original plea agreement within 60 days of the issuance of the mandate.

Dissenting, Judge O'Scannlain wrote that the majority erroneously orders federal habeas relief to a state prisoner on the basis of a non-existent plea agreement and irrelevant state contract law.

COUNSEL

Devin Burstein (argued), Warren & Burstein, San Diego, California, for Petitioner-Appellant.

Anthony Da Silva (argued) and Matthew Mulford, Deputy Attorneys General; Julie L. Garland, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Kamala Harris, Attorney General of California; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

WARDLAW, Circuit Judge:

On December 8, 2005, Michael Daniel Cuero stood in open court before the Honorable Charles W. Ervin, Judge of the Superior Court in and for the County of San Diego, and pursuant to a written plea agreement, he freely and voluntarily pleaded guilty

to one felony count of causing bodily injury while driving under the influence and one felony count of unlawful possession of a firearm. Cuero also admitted a single prior strike conviction[1] and four prison priors.[2] In exchange for Cuero's waiver of his constitutional and numerous other rights, the prosecution dismissed a misdemeanor count, thereby guaranteeing Cuero a maximum sentence of 14 years, 4 months in prison and 4 years of parole, as explained both in the written plea agreement, Appendix A, ¶ 7a, and by Judge Ervin during the plea colloquy. Judge Ervin then accepted Cuero's plea and admissions, and set sentencing for January 11, 2006. That same day, Judge Ervin signed the Finding and Order, Appendix A at 3, stating that "the defendant is convicted thereby."

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[1] "California's current three strikes law consists of two virtually identical statutory schemes 'designed to increase the prison terms of repeat felons.'" *Ewing v. California*, 538 U.S. 11, 15 (2003) (quoting *People v. Superior Court of San Diego Cty. ex rel. Romero*, 917 P.2d 628, 630 (Cal. 1996)). When Cuero was charged in 2005, the three strikes law required that a defendant with a single qualifying conviction, i.e., a single strike, "be sentenced to 'twice the term otherwise provided as punishment for the current felony conviction.'" *Id.* at 16 (quoting Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1)). If the defendant had two or more qualifying convictions, the law mandated "an indeterminate term of life imprisonment." *Id.* (quoting Cal. Penal Code §§ 667(e)(2)(A), 1170.12(c)(2)(A)). *See generally* 3 B.E. Witkin et al., California Criminal Law §§ 428–429 (4th ed. 2012).

[2] California Penal Code § 667.5(b) requires a court to "impose a one-year term for each prior separate prison term or county jail term" served by a defendant. California courts refer to these prior terms of incarceration as "prison priors." Cuero admitted serving four prison priors, resulting in the addition of four consecutive years to his sentence.

Cuero stood convicted; "nothing remain[ed] but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Under clearly established Supreme Court law, the plea agreement bound the government. *See Mabry v. Johnson*, 467 U.S. 504, 507–08 (1984) (a defendant's guilty plea "implicates the Constitution," not the "plea bargain standing alone"); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *Boykin*, 395 U.S. at 242, 244 ("[A] plea of guilty is more than an admission of conduct; it is a conviction."). In Cuero's case, the government was bound by its agreement in open court that punishment could be no greater than 14 years, 4 months in prison. *See Ricketts v. Adamson*, 483 U.S. 1, 5 n.3 (1987) ("[T]he construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law."); *see also Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) ("Under *Santobello v. New York*, 404 U.S. 257, 261–62 (1971), a criminal defendant has a due process right to enforce the terms of his plea agreement.").

Improbably, the day before the scheduled sentencing, the state prosecutor moved to amend the criminal complaint to allege an additional prior strike conviction, which, if allowed, would result in an indeterminate 64 years to life sentence under

California's three strikes law.[3] Even more improbably, a different Superior Court judge than Judge Ervin permitted the amendment. 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." *Puckett v. United States*, 556 U.S. 129, 136 (2009) (citing *Santobello*, 404 U.S. at 262). That the Superior Court allowed Cuero to withdraw his guilty plea and enter a new plea agreement calling for an indeterminate 25 years to life sentence was no remedy here; Cuero lost the benefit of his original bargain.

Because the state court neither recognized nor applied clearly established Supreme Court authority, and acted in contravention of that authority, we reverse the judgment of the district court denying Cuero's habeas petition, and we remand with instructions to issue the writ of habeas corpus.

I. Jurisdiction and Standard of Review[4]

We have jurisdiction pursuant to 28 U.S.C. §§

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[3] Although the state also alleged two additional "serious felony" priors, it was the addition of the second strike that exposed Cuero to an indeterminate life sentence.

[4] Cuero properly exhausted on direct and collateral review his claims that the prosecutor breached the plea agreement in violation of his due process rights and that he received ineffective assistance of counsel. We do not reach the latter claim.

1291 and 2253. We review de novo a district court's denial of a habeas petition. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014). Because Cuero filed his federal habeas petition after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") governs our review. *Id.*

AEDPA bars relitigation of any claim adjudicated on the merits in state court, unless the state court's decision satisfies the exceptions contained in 28 U.S.C. §§ 2254(d)(1) or (2). *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Those exceptions authorize a grant of habeas relief where the relevant state-court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (2).

"[A] state-court decision is contrary to Federal law 'if the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law,' or 'the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court].'" *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014) (alterations in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). "A state-court decision is an 'unreasonable application' of Supreme Court precedent if 'the state court identifies the correct governing legal rule from th[e Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case,' or 'the state court

either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Id.* (alterations in original) (quoting *Williams*, 529 U.S. at 407).

We review the last reasoned decision of the state courts. "When a state court does not explain the reason for its decision, we 'look through' to the last state-court decision that provides a reasoned explanation capable of review." *Id.* at 996 (quoting *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)). Where a reasoned state-court decision exists, we do not "evaluate all the hypothetical reasons that could have supported the high court's decision." *Cannedy v. Adams*, 706 F.3d 1148, 1157 (9th Cir.), *amended on denial of reh'g by* 733 F.3d 794 (9th Cir. 2013); *see also id.* at 1159 ("*Richter* does not change our practice of 'looking through' summary denials to the last reasoned decision—whether those denials are on the merits or denials of discretionary review." (footnote omitted)); *Medley v. Runnels*, 506 F.3d 857, 862–63 (9th Cir. 2007) (en banc) (Judge Callahan writing for the majority). Here, we evaluate the San Diego Superior Court's decision to grant the prosecution's motion to amend the complaint following Cuero's entry of his original guilty plea and his conviction based on that plea.[5]

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[5] On direct appeal, Cuero's appointed counsel filed a brief pursuant to *People v. Wende*, 600 P.2d 1071 (Cal. 1979) (en banc), and *Anders v. California*, 386 U.S. 738 (1967). The California Court of Appeal affirmed Cuero's conviction and sentence in an unpublished, unreasoned opinion, finding "no reasonably arguable appellate issue."

II. Discussion

A. Cuero entered a binding, judicially approved plea agreement and stood convicted.

Under clearly established Supreme Court law, Cuero stood convicted and his plea agreement became binding the moment the first Superior Court judge accepted his guilty plea. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin*, 395 U.S. at 242. And "[w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled*." *Santobello*, 404 U.S. at 262 (emphasis added)*; see also* Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 60 Calif. L. Rev. 471, 474 (1978) (citing the language quoted above as the "undisputed holding" of *Santobello*). A defendant's guilty plea thus "implicates the Constitution," transforming the plea bargain from a "mere executory agreement" into a binding contract. *Mabry*, 467 U.S. at 507–08.[6] In

[6] Although *Mabry* clarified the constitutional significance of a consummated plea agreement, insofar as Cuero's case is concerned, it did nothing more. As the dissent points out, *Mabry* involved a "prosecutor's *withdrawn offer*." 467 U.S. at 510 (emphasis added). In *Mabry*, the prosecution had offered the defendant more lenient sentencing terms in exchange for his guilty plea and, when the defendant attempted to accept the offer, the government withdrew it. *Id*. at 505–06. The defendant then opted to stand trial and, following a mistrial, pleaded guilty on entirely different terms. *Id*. at 506. Unsurprisingly, the *Mabry* court refused to enforce the prosecutor's original, withdrawn offer—the defendant's guilty

(continued…)

other words, a guilty plea seals the deal between the state and the defendant, and vests the defendant with "a due process right to enforce the terms of his plea agreement." *Buckley*, 441 F.3d at 694 (citing *Santobello*, 404 U.S. at 261–62); *see also Doe v Harris*, 640 F.3d 972, 975 (9th Cir. 2011); *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003).

In *Buckley v. Terhune*, our court, sitting en banc, affirmed a grant of habeas relief pursuant to 28 U.S.C. § 2254(d)(1) that ordered specific enforcement of the terms of a plea agreement. 441 F.3d at 691. There, the state prosecutor offered a plea bargain: Buckley would provide cooperating testimony against his codefendants in return for which the prosecutor would dismiss his robbery and burglary charges and reduce the first degree murder charge against him to second degree. *Id.* Attached to the offer was a felony disposition statement that stated, under "Consequences of the Plea," that Buckley could be sentenced to a "*maximum possible term of 15 years*." *Id.* Buckley signed the plea agreement, initialing the maximum sentence line on December 17, 1987. *Id.* At some point before the change of plea hearing on January 4, 1988, the state prosecutor, on his own and without Buckley's knowledge, added a handwritten paragraph to the disposition statement stating that the sentence would be a "*maximum term of 15 years to life*." *Id.* at 691–92. Just as in Cuero's case, during the guilty plea colloquy pursuant to the plea bargain,

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(…continued)
plea "was in no sense induced by the prosecutor's withdrawn offer," *id.* at 510, and that "executory agreement" was not made binding through an "ensuing guilty plea," *id.* at 507.

the state court told Buckley that he could be sentenced to state prison for a "*maximum possible term of fifteen years*." *Id.* at 692. Following the trial of his codefendants in which Buckley "complied with the terms of the negotiated disposition," according to the state prosecutor, the court sentenced Buckley to a prison term of 15 years to life. *Id.* at 693. And, again, just as in Cuero's case, the last reasoned state court decision failed to "interpret Buckley's plea agreement according to California contract law." *Id.* at 691. We affirmed the district court's grant of habeas relief because the state court's failure was "contrary to clearly established Supreme Court law as set forth in *Santobello v. New York* . . . and *Ricketts v. Adamson*," satisfying § 2254(d)(1)'s "contrary to" exception. *Id.*

While the state prosecutor here did not act so underhandedly as Buckley's, the same result obtained—Cuero performed his part of the bargain only to have the state renege on its. The state originally charged Cuero with two felonies and a misdemeanor. It later amended the complaint to add a single prior strike conviction and four prison priors. Next, the parties entered into a written plea agreement through which the state induced Cuero to cede his constitutional and other rights and plead guilty in exchange for the state's promise to drop the misdemeanor charge, thereby guaranteeing Cuero a "maximum [sentencing] exposure of 14 years, 4 months in state prison, 4 years on parole and a $10,000 fine." On December 8, 2005, the parties signed the plea agreement, which is on page three of the dissent's Appendix A, and which, as in *Buckley*, under "Consequences of the Plea" set forth Cuero's state-guaranteed maximum sentencing exposure. That same day, Judge Ervin held a change of plea

hearing. The state prosecutor, Kristian Trocha, Cuero, and Cuero's counsel, Alberto Tamayo, stood before Judge Ervin and expressed their mutual intent to "settle this case today." The court received the charge sheet—i.e., the amended complaint, Appendix A.1, attached to the majority opinion—and asked counsel to what Cuero would be pleading. Cuero's counsel, referring to the charge sheet, stated that Cuero would be pleading to "the sheet without the Count 3 misdemeanor." Judge Ervin reiterated, "He's going to plead guilty to everything on the charging document with the exception of Count 3." The judge next indicated that "It is a sentence for the Court, no deals with the people," meaning that the plea agreement was as to the charge and not to the specific sentence.[7] Both the prosecutor and defense

[7] Two types of plea bargains exist: charge bargains and sentence bargains. Charge bargains "consist[] of an arrangement whereby the defendant and prosecutor agree that the defendant should be permitted to plead guilty to a charge less serious than is supported by the evidence." 5 Wayne R. LaFave et al., Criminal Procedure § 21.1(a) (4th ed. 2015). Sentence bargains "involve[] an agreement whereby the defendant pleads 'on the nose,' that is, to the original charge, in exchange for some kind of promise from the prosecutor concerning the sentence to be imposed." *Id.*; *see also United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983) (explaining that charge bargains are "predicated upon the dropping of counts," whereas sentence bargains are "predicated either upon the [prosecutor's] recommendation of or agreement not to oppose a particular sentence . . . , or upon a guarantee of a particular sentence"). "Sentence bargaining carries with it a somewhat greater risk than charge bargaining. When a defendant bargains for a plea to a lesser offense, he receives his bargain the instant he enters his guilty plea, but when he pleads guilty in exchange for the prosecutor's promise to seek a certain sentence there remains some possibility that . . . the trial judge will not follow the prosecutor's recommendations." (continued…)

counsel assented.[8] Cuero was then placed under oath

(…continued)
LaFave, *supra*, at § 21.1(a). This case involves only charge bargaining.

Federal Rule of Criminal Procedure 11(c)(1) also reflects the distinction between a charge bargain and a sentence bargain, and prescribes procedures for each:

> [T]he plea agreement may specify that an attorney for the government will:
>
> (A) not bring, or will move to dismiss, other charges;
>
> (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1)(A)–(C).

Thus, there were no agreements about Cuero's sentence, as indicated by Appendix A to the dissent; rather, because the state agreed to drop the misdemeanor charge, Cuero's sentence was limited to 14 years and 4 months.

[8] The dissent misleadingly mistakes the "no deals with the people" language to mean that there was no plea agreement, and, ironically, holds up the document setting forth the plea agreement, Appendix A, to support its view.

and asked by Judge Ervin "Did you hear the plea agreement that I described?" Following Cuero's affirmative response, the court asked, "Is it your full and complete understanding to settle this case today?" The court went on to review the forms, the dissent's Appendix A, with Cuero, asking Cuero again to inform him that he "wish[ed] to accept the agreement to this case, written on the blue form," and to confirm Cuero "sign[ed] his name," "place[d] his initials in these boxes," and "put his thumb print on it." Again, following Cuero's affirmative responses, the court stated, "In addition to the plea agreement, the document [Appendix A to the dissent] sets forth and describes constitutional rights that you enjoy." *See* Appendix A at 1. The court next informed Cuero that 14 years, 4 months in prison was the "maximum punishment [he] could receive," and Cuero pleaded guilty to the two felonies and admitted his single strike and four prison priors. The court accepted the plea. The court then turned to the prosecutor, Mr. Trocha, and asked, "People's motion as to the misdemeanor count, which is Count 3?" Mr. Trocha stated, "Dismiss in light of the plea." The court then granted the state's motion "in light of the plea," accepted "the defendant's plea and admissions," and concluded that "the defendant is convicted thereby." Nothing more was required to consummate Cuero's plea agreement; it "was accepted and final . . . at the moment that the judge made the requisite factual findings and accepted the plea." *Brown*, 337 F.3d at 1159. And the prosecution was bound by the agreement's terms, which it acknowledged by

immediately moving to dismiss the misdemeanor charge.[9]

B. The prosecution breached the court-approved plea agreement by attempting to amend the complaint.

Although the prosecution initially honored its promise to dismiss the misdemeanor charge, it then breached the plea agreement by moving to amend the

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[9] Absurdly, the dissent attaches the very document that the court and both state and defense counsel identified as the written plea agreement as purported proof that there was no agreement. The dissent's analysis reads like the caption "This is not a pipe" below Magritte's famous painting of a pipe. Even more mystifying, the dissent disregards the entire plea colloquy, transcript of proceedings, and the written plea agreement itself to reach this convenient conclusion. The dissent stands alone in its erroneous conclusion—not even the state disputed the existence of the plea agreement, until oral argument, and it waived that argument by failing to raise it in the answering brief. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (holding that an argument not addressed in an answering brief is waived (citing *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007)). Throughout its briefing, the state insists that California law allowed it to amend the complaint, even after the plea agreement was entered and Cuero was convicted. By contrast, Cuero argued throughout his opening brief that the state breached his original plea agreement—and the state did not dispute the original plea agreement's existence anywhere in its answering brief. To the contrary, the state acknowledged the agreement's existence and framed the issue to be resolved as "[w]hether amendment of the complaint after Cuero pleaded guilty *violated the plea agreement* and Cuero's right to due process." Indeed, the state's brief contrasted Cuero's "initial plea agreement" with his "second" or "new plea agreement." It was therefore no wonder that members of our panel greeted the state's argument that there was no plea agreement, made for the first time at oral argument, with incredulity.

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.

"[T]he construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *Adamson*, 483 U.S. at 5 n.3; *see also Buckley*, 397 F.3d at 1161–62 (Bea, J., dissenting) ("At the time of the state habeas proceeding, clearly established Federal law, as determined by the Supreme Court, made the interpretation and construction of a plea agreement a matter of state law." (citing *Adamson*, 483 U.S. at 5 n.3)), *majority rev'd en banc*, 441 F.3d 688 (9th Cir. 2006); *see also Puckett*, 556 U.S. at 137 ("[P]lea bargains are essentially contracts."). "Under AEDPA, we . . . must consider whether the [state court] decision is consistent with a proper application of state contract law in interpreting the plea agreement; if not, the decision was an 'unreasonable application of' clearly established federal law." *Davis v. Woodford*, 446 F.3d 957, 962 (9th Cir. 2006) (citing, *inter alia*, *Adamson*, 483 U.S. at 5 n.3). In *Buckley*, we noted that as of 1999, when the state court summarily denied Buckley's habeas petition, the obligation to construe plea agreements according to state contract law "had been clearly established federal law for more than a decade." 441 F.3d at 694–95 (quoting *Adamson*, 483 U.S. at 6 n.3)[10]

[10] The dissent argues that *Buckley*'s reasoning was undermined to the point of irreconcilability by the Supreme Court's intervening opinions in *Wilson v. Concorran*, 562 U.S. 1 (continued…)

Under California law, "[a] plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." *People v. Segura*, 188 P.3d 649, 656 (Cal. 2008) (quoting *People v. Ames*, 261 Cal. Rptr. 911, 913 (Ct. App. 1989)). Thus, "[a] negotiated plea agreement . . . is interpreted according to general contract principles." *People v. Shelton*, 125 P.3d 290, 294 (Cal. 2006). Under California law, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636. A contract's "clear and explicit" language governs its interpretation. *Id.* § 1638. Moreover, "[a]lthough a plea agreement does not divest the court of its inherent sentencing discretion, 'a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain.'" *Segura*, 188 P.3d at 656 (quoting *Ames*, 261 Cal. Rptr. at 913).

The 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

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(...continued)
(2010) (per curiam), and *Swarthout v. Cooke*, 562 U.S. 216 (2011) (per curiam), freeing our three-judge panel to entirely disregard the en banc *Buckley* decision. The dissent is incorrect. *Wilson* and *Swarthout* each reversed an intermediate appellate decision based on perceived errors of state, rather than federal, law in the areas of statutory aggravation and parole, respectively. They do not speak to the situation where, as here, the Supreme Court has clearly held that the federal constitutional due process right is itself defined by reference to principles of state law. *Buckley*, 441 F.3d at 695 (citing *Adamson*, 483 U.S. at 6 n.3).

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. And, as a result of the amendment, the Superior Court ultimately imposed an indeterminate life sentence well beyond the limits of the plea agreement.[11]

Moreover, the agreement said nothing about altering the foundational assumption on which the bargain was struck—namely, the set of charges alleged in the criminal complaint. *See People v. Walker*, 819 P.2d 861, 867 (Cal. 1991) *overruled on other grounds by People v. Villalobos*, 277 P.3d 179 (Cal. 2012) ("When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement."). Such an implied term would render the agreement illusory by providing the state unfettered license to terminate it. *See Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 791 (9th Cir. 2012) ("[A]n enforceable termination clause that gives a promisor an unrestricted power to terminate

[11] The state argues that its conduct was appropriate because California Penal Code § 1192.5 allows a state court to, among other things, "withdraw its approval [of a plea] in the light of further consideration of the matter." But that is not what happened here. Rather, the *prosecution* sought to renege on its court-approved promise to Cuero. The result: Cuero received a sentence far greater than that specified in the court-approved plea agreement. Section 1192.5 actually prohibits what took place here. That section disallows the imposition of "a punishment more severe than that specified in the plea."

a contract at any time, without notice, renders the promise illusory and unenforceable, at least so long as the purported contract remains wholly executory."). This outcome is inconsistent with California contract law, which prefers an "interpretation which gives effect" to a contract over one that would render it void. Cal. Civ. Code § 3541.[12]

As in *Buckley*, where we noted that the state court's decision denying habeas neither mentioned state contract law nor referred to the terms of the plea agreement, nothing in the second Superior Court judge's decision permitting the state

[12] The state argues that our construction of the plea agreement is foreclosed by California Penal Code § 969.5, which permits amendment of a complaint after a defendant pleads guilty if the complaint "does not charge all prior felonies of which the defendant has been convicted." But § 969.5 is irrelevant to the interpretation of a court-approved plea agreement under state contract principles. Under California law, "a prosecutor may withdraw from a plea bargain at any time *before the defendant pleads guilty* or otherwise detrimentally relies on that bargain." Witkin, *supra* at § 382 (emphasis added); *see also People v. Rhoden*, 89 Cal. Rptr. 2d 819, 824–25 (Ct. App. 1999), *as modified on denial of reh'g* (Nov. 23, 1999). Once a defendant enters a guilty plea pursuant to a plea agreement, the state is bound by the agreement and any attempt by the state to withdraw—through a motion to amend the complaint pursuant to § 969.5 or otherwise—constitutes a breach. Simply put, that § 969.5 provides a discretionary vehicle for post-plea amendment of a complaint does not mean that the prosecutor can amend the complaint after the court has approved a plea agreement and signed an order of conviction. In any event, the state *did* charge "all prior felonies of which [Cuero] ha[d] been convicted" in the original complaint—it simply did not charge Cuero's felony assault conviction *as a strike*.

prosecutor's amendment here suggests that it understood it was dealing with a binding plea agreement, let alone that it was constitutionally obligated to construe the agreement in accordance with state contract law. *See Buckley*, 441 F.3d at 696. Tellingly, the Superior Court permitted the amendment in reliance on two state cases: *People v. Superior Court (Alvarado)*, 255 Cal. Rptr. 46 (Ct. App. 1989), and *People v. Jackson*, 48 Cal. Rptr. 2d 838 (Ct. App.), *review granted and opinion superseded*, 914 P.2d 831 (Cal. 1996). Although both cases address the propriety of permitting amendment of a complaint after a defendant enters a guilty plea, neither addresses the propriety of such amendment after a defendant enters a guilty plea *induced by a prosecutorial promise*—i.e., pursuant to a plea bargain—and it has been approved by the court.[13] *See Jackson*, 48 Cal. Rptr. 2d at 840 ("[T]he court took Jackson's plea to the face of the complaint."); *Alvarado*, 207 Cal. App. 3d at 471 (noting that the transcript of the plea colloquy "does *not* indicate any plea bargain"). In other words, neither *Alvarado* nor *Jackson* discusses the scenario present here, where the court-approved guilty plea was entered pursuant to a written plea agreement. Indeed, neither case contains so much as a hint that the court was applying California contract law. Thus, by failing to

[13] In granting the state's motion to amend, the Superior Court reasoned that Cuero's "substantial rights [would not be] prejudiced by the mere fact that [his] potential punishment may have been increased due to the amendment," and that Cuero would "be in the same situation as he would have been prior to entry of the plea." The court borrowed this (inapposite) language almost verbatim from *Jackson* and *Alvarado*. *See Jackson*, 48 Cal. Rptr. 2d at 844 (relying on *Alvarado*).

interpret Cuero's plea agreement consistently with California contract law, the Superior Court unreasonably applied federal law clearly established by the Supreme Court in *Adamson* nearly thirty years ago.

C. Allowing Cuero to withdraw his guilty plea was no remedy at all.

The Superior Court also unreasonably applied clearly established federal law by failing to order specific performance of Cuero's plea agreement. A state court must supply a remedy for a breached plea agreement that comports with state contract law. *See Puckett*, 556 U.S. at 137; *Adamson*, 483 U.S. at 5 n.3; *Davis*, 446 F.3d at 962. Under California law, the remedy for breach must "repair the harm caused by the breach." *People v. Toscano*, 20 Cal. Rptr. 3d 923, 927 (Ct. App. 2004). "'When the breach [alleged] is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the prosecutor to fulfill the bargain' and will be granted where there is a substantial possibility that specific performance will completely repair the harm caused by the prosecutor's breach." *In re Timothy N.*, 157 Cal. Rptr. 3d 78, 88 (Ct. App. 2013) (alteration in original) (quoting *People v. Kaanehe*, 19 Cal. 3d 1, 13 (1977)). Under *Buckley*, which we are bound to follow, in a situation like that here, where the state has already received the benefit it bargained for—a plea of guilty and a conviction—specific performance is the best remedy, unless the defendant, whose choice it becomes, "elect[s] instead

to rescind the agreement and take his chances from there."[14] *Buckley*, 441 F.3d at 699 n.11.

Moreover, that the state court permitted Cuero to withdraw his plea did not "repair the harm" caused by the prosecutor's breach. To the contrary: It exposed Cuero to the risk of going to trial and receiving an indeterminate 64 years to life sentence.

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[14] In this context, specific performance is necessary to maintain the integrity and fairness of the criminal justice system. *See, e.g.*, LaFave, *supra*, at § 21.2(e) ("When the breach was a failure by the prosecutor to carry out a promise which was fulfillable, then certainly the defendant's request for specific performance should be honored. . . . [T]here is no reason why a prosecutor who has failed to keep his fulfillable plea bargain promise should be allowed to force the defendant into a withdrawal of the plea and thus, presumably, a permanent breach of the bargain.") (footnotes omitted); *State v. Tourtellotte*, 564 P.2d 799, 802 (1977) (Wash. 1977) (en banc) ("If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain[.]"). Although not dispositive, when *Santobello* was decided, "a majority of the court's members . . . [were] on record as favoring looking to defendant's wishes [as to choice of remedy]." Dennis A. Fischer, *Beyond Santobello—Remedies for Reneged Plea Bargains*, 2 U. San Fernando Valley L. Rev. 121, 125 (1973); *see also Santobello*, 404 U.S. at 267 (Douglas, J., concurring) ("[A] court ought to accord a defendant's 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."); *id*. at 268 (Marshall, J., dissenting) (explaining that Justice Douglas's concurrence, coupled with the dissenting votes, appeared to create a majority in favor of honoring the defendant's preferred remedy).

This is hardly the "remedy" Cuero would have elected had he properly been given a choice. That Cuero was ultimately able to "bargain" for an indeterminate 25 years to life sentence does not alter the analysis; the state could not have lawfully pursued an indeterminate life sentence in the first place if it had not been allowed to breach the plea agreement. Again, Cuero had performed his part of the agreement by pleading guilty to the two felony charges, admitting a single prior strike, and conceding his four prison priors, giving the government the bargain it sought. Because Cuero had already performed, "fundamental fairness demands that the state be compelled to adhere to the agreement as well." *Brown*, 337 F.3d at 1162 (citation omitted). Cuero is therefore entitled to the benefit of his original bargain: a maximum sentence of 14 years, 4 months in prison.

III. Conclusion

The San Diego Superior Court failed to recognize that Cuero's entry and Judge Ervin's acceptance of Cuero's guilty plea pursuant to the written plea agreement was binding on both sides. By allowing the prosecution to breach the agreement, reneging on the promise that induced Cuero's plea, the state court violated federal law clearly established by the Supreme Court in *Santobello*. It further violated clearly established federal law requiring construction of the plea agreement under state contract law. *See Adamson*, 483 U.S. at 5 n.3; *Buckley*, 441 F.3d at 697. Even worse, the last reasoned decision of the state courts relied on two inapposite state law cases and failed to even acknowledge, much less apply, the well-established

Supreme Court authority that dictated the contrary result. This error had a "substantial and injurious effect" on Cuero, who is serving an indeterminate life sentence, the minimum term of which, 25 years, is well in excess of the 14 year, 4 month maximum promised by the government. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). Cuero is entitled to habeas relief.

Accordingly, the district court's judgment denying Cuero's petition for a writ of habeas corpus is reversed with instructions to issue a conditional writ requiring the state to resentence Petitioner in accordance with the original plea agreement within sixty days of the issuance of the mandate.

REVERSED and **REMANDED**.

APPENDIX A.1

FILED October 23, 2005

IN CUSTODY

SUPERIOR COURT, COUNTY OF SAN DIEGO
EAST COUNTY DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
MICHAEL DANIEL CUERO,
dob 03/14/72, Booking No. 05145189A,
Defendant.

CT No. CE255082
DA No. MAM704
AMENDED COMPLAINT-FELONY

INFORMATION
Date: _____

PC296 DNA TEST STATUS SUMMARY

Defendant CUERO, MICHAEL DANIEL
DNA Testing Requirements DNA sample has been previously provided

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range
1	VC23153(a)	Felony	16-2-3/$5,000

CUERO, MICHAEL DANIEL

Special Allegations	Allegation Effect
VC23560	
PC12022.7(a)	+ 3 Yrs

Count	Charge	Issue Type	Sentence Range
2	PC12021(a)(1)	Felony	16-2-3

CUERO, MICHAEL DANIEL

Count	Charge	Issue Type	Sentence Range
3	HS11550(a)	Misdemeanor	90 Days-1 Yr

CUERO, MICHAEL DANIEL

PC1054.3 INFORMAL REQUEST FOR DISCOVERY

PC667(b) thru (i) and PC1170.12 "THREE STRIKES LAW"

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

CHARGES

COUNT 1 -DRIVING UNDER INFLUENCE OF ALCOHOL OR DRUGS CAUSING INJURY, PRIOR DUI WITHIN 10 YEARS OF VIOLATION OF VC23153

On or about October 14, 2005, MICHAEL DANIEL CUERO did unlawfully, while under the influence of an alcoholic beverage and a drug and under their combined influence, drive a vehicle and in so driving did an act forbidden by law, to wit: VC 21658, VC 22107, and neglected a duty imposed by law which proximately caused bodily injury to another, in violation of VEHICLE CODE SECTION 23153(a).

And it is further alleged that within ten years of the commission of the above offense, said defendant MICHAEL DANIEL CUERO was convicted of the

following separate violations committed in California or elsewhere,

a violation of VC23152(A), to wit: (Date of Offense) 05-05-1997, (Date of Conviction) 12-18-1998, (Docket No.) C181561, in the Superior Court, County of San Diego, State of California, within the meaning of VEHICLE CODE SECTIONS 23626 and 23560.

And it is further alleged that in the commission and attempted commission of the above offense the defendant, MICHAEL DANIEL CUERO, personally inflicted great bodily injury upon Jeffrey Feldman, not an accomplice to the above offense, within the meaning of PENAL CODE SECTION 12022.7(a).

COUNT 2 -POSSESSION OF FIREARM BY A FELON

On or about October 14, 2005, MICHAEL DANIEL CUERO did unlawfully own, purchase, receive, and have in his/her possession and under his/her custody and control a firearm, the said defendant having theretofore been duly and legally convicted of a felony, in violation of PENAL CODE SECTION 12021(a)(1).

COUNT 3 -UNDER INFLUENCE OF A CONTROLLED SUBSTANCE

On or about October 14, 2005, MICHAEL DANIEL CUERO did unlawfully use and become under the influence of a controlled substance, to wit: methamphetamine, in violation of HEALTH AND SAFETY CODE SECTION 11550(a).

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PRIORS

MICHAEL DANIEL CUERO:

FIRST PRISON PRIOR

And it is further alleged that said defendant, MICHAEL DANIEL CUERO served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge: PC459-T **Date of Conviction:** 05/22/1991
Court Number: ECR4096 **Court:** Superior Court
County: San Diego **State:** CA

Charge: PC460 **Date of Conviction:** 05/22/1991
Court Number: ECR4096 **Court:** Superior Court
County: San Diego **State:** CA

Charge: PC487.3 **Date of Conviction:** 05/22/1991
Court Number: ECR4096 **Court:** Superior Court
County: San Diego **State:** CA

Charge: VC10851 **Date of Conviction:** 03/06/1992
Court Number: ECR5408 **Court:** Superior Court
County: San Diego **State:** CA

Charge: PC245(A)(1)
Date of Conviction: 03/06/1992
Court Number: ECR5409 **Court:** Superior Court
County: San Diego **State:** CA

SECOND PRISON PRIOR

And it is further alleged that said defendant, MICHAEL DANIEL CUERO served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge: VC664-10851(A
Date of Conviction: 11/15/1994
Court Number: ECR10125 **Court:** Superior Court
County: San Diego **State:** CA

THIRD PRISON PRIOR

And it is further alleged that said defendant, MICHAEL DANIEL CUERO served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within

the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge: VC10851(A)
Date of Conviction: 12/18/1998
Court Number: SCE193890 **Court:** Superior Court
County: San Diego **State:** CA

MICHAEL DANIEL CUERO

FOURTH PRISON PRIOR

And it is further alleged that said defendant, MICHAEL DANIEL CUERO served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge: HS11377(A)
Date of Conviction: 07/31/2003
Court Number: CE232093 **Court:** Superior Court
County: San Diego **State:** CA

STRIKE PRIOR(S)

And it is further alleged pursuant to Penal Code sections 667(b) through (i), 1170.12, and 668 that the defendant, MICHAEL DANIEL CUERO, has suffered the following prior conviction(s) and juvenile adjudication(s), which are now serious or violent

felonies under California law whether committed in California or elsewhere.

Charge: PC459-T
Date of Conviction: 05/22/1991
Court Number: ECR4096 **Court:** Superior Court
County: San Diego **State:** CA

Charge: PC460
Date of Conviction: 05/22/1991
Court Number: ECR4096 **Court:** Superior Court
County: San Diego **State:** CA

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NOTICE: Any defendant named on this complaint who is on criminal probation in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's probation, on any and all such probation grants, utilizing the same evidence, at the preliminary hearing. Defenses to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

Pursuant to PENAL CODE SECTION 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by PENAL CODE SECTION 1054.3.

The People reserve the right to amend the accusatory pleading to further allege any and all facts in

aggravation in light of Blakely v. Washington (6/24/2004) __U.S.__ [124 S.Ct. 2531, 2004 WL 1402697].

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER CE255082, CONSISTS OF 3 COUNTS.

Executed at El Cajon, County of San Diego, State of California, on October 27, 2005.

/s/ Ronald Mendes
COMPLAINANT

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INFORMATION

Date _____

BONNIE M. DUMANIS
District Attorney
County of San Diego
State of California
by: _____
Deputy District Attorney

O'SCANNLAIN, Circuit Judge, dissenting:

Today, the Court erroneously orders federal habeas relief to a state prisoner on the basis of a non-existent plea agreement and irrelevant state contract law. Because the decision of the California Court of Appeal affirming Cuero's conviction was neither contrary to, nor an unreasonable application of, Supreme Court precedent, the district court's denial of the writ of habeas corpus should have been affirmed.

I respectfully dissent.

I

A

It is appropriate to recapitulate the relevant facts. While driving under the influence of methamphetamine, Michael Daniel Cuero veered off the road and crashed his car into Jeffrey Feldman, another driver who was standing outside his pickup truck on the side of the road. Feldman sustained severe injuries including a ruptured spleen, brain damage, and facial disfigurement. Cuero, a convicted felon prohibited from possessing a firearm, had a loaded firearm with him.

Over the next two weeks, the State filed a complaint and then an amended complaint against Cuero. The amended complaint charged two felonies (driving under the influence and possession of a firearm by a felon) and one misdemeanor (being under the influence of a controlled substance). The State alleged that Cuero had served four prior prison

terms and that one of Cuero's prior convictions constituted a "strike" under California's "three strikes law." *See* Cal. Penal Code § 667(b)–(i).[1] Cuero initially pleaded "not guilty" to the charges in the amended complaint.

On December 8, 2005, Cuero appeared before the superior court to change his plea to guilty. He signed a change of plea form, which stated that he had not been induced to enter the plea by any promises of any kind and that he had no deals with the State.[2] After the court had accepted Cuero's plea on both felonies and his admissions to the "prison priors" and prior strike, the State moved to dismiss the misdemeanor count, and the court granted the motion. A sentencing hearing was then scheduled.

B

According to the State, during the preparation of the sentencing memorandum for the superior court, the probation officer discovered that one of Cuero's prior convictions constituted a strike in addition to the single strike alleged in the first amended complaint.[3] Prior to the scheduled

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[1] Cuero actually had two prior strikes, but the State initially did not realize that fact.

[2] This form, which is the same form that the mistakenly majority calls a written plea agreement, is reproduced in Appendix A to this dissent.

[3] Cuero had been convicted of violating California Penal Code § 245(a)(1), which prohibits assault with a deadly weapon other than a firearm. "Not all section 245(a)(1) violations constitute strikes under California law." *Gill v. Ayers*, 342 F.3d 911, 914 (9th Cir. 2003). "[T]o qualify a section 245(a)(1) conviction as a strike, the prosecution must establish that the (continued…)

sentencing hearing, the State moved under California Penal Code § 969.5(a) further to amend its complaint again to add the allegation of the second strike. Cuero opposed the motion. On February 2, 2006, the superior court granted the motion with the condition that Cuero would be permitted to withdraw his guilty plea, thus restoring all of his constitutional rights. The court then accepted for filing the second amended complaint alleging the additional strike.

On March 27, 2006, Cuero moved to withdraw his guilty plea entered on December 8, 2005. The court granted the motion and set aside that plea. As part of a "negotiated guilty plea," the State filed a third amended complaint omitting the felon-in-possession charge, and Cuero pleaded guilty to the charge of driving under the influence and admitted the two prior strikes. On April 20, 2006, the court sentenced Cuero to a term of 25 years to life pursuant to the plea agreement and pronounced judgment.

C

Cuero appealed to the California Court of Appeal. Pursuant to *People v. Wende*, 600 P.2d 1071

(…continued)
defendant 'personally inflicted great bodily injury on any person, other than an accomplice, or personally used a firearm' under section 1192.7(c)(8) or that he 'personally used a dangerous or deadly weapon' under section 1192.7(c)(23)" of the California Penal Code. *Id.* (internal alterations omitted). According to the State, Cuero's admission of a "personal use of a deadly weapon" allegation did not appear in the files it originally compiled in preparation for charging Cuero after the car crash.

(Cal. 1979), and *Anders v. California*, 386 U.S. 738 (1967), Cuero's appointed appellate counsel filed a brief setting forth the evidence in the superior court, *presented no argument for reversal*, but asked the court of appeal to review the record for error. The brief directed the court's attention to two potential, but not arguable, issues: (1) "whether the trial court abused its discretion by permitting the prosecutor to amend the complaint to allege additional priors after [Cuero's] initial guilty plea" (citing *People v. Sipe*, 42 Cal. Rptr. 2d 266 (Ct. App. 1995); *People v. Superior Court* (*Alvarado*), 255 Cal. Rptr. 46 (Ct. App. 1989)); and (2) "whether the amendment constituted a breach of a plea agreement in violation of due process, entitling [Cuero] to specific performance of the original agreement" (citing *People v. Walker*, 819 P.2d 861 (Cal. 1991), *overruled in part by People v. Villalobos*, 277 P.3d 179 (Cal. 2012); *People v. Mancheno*, 654 P.2d 211 (Cal. 1982)). The California Court of Appeal granted Cuero permission to file a brief on his own behalf, but he did not respond. The court reviewed the entire record and the possible issues raised by counsel's *Wende*/*Anders* brief. It concluded that they "disclosed no reasonably arguable appellate issue" and affirmed, noting that "[c]ompetent counsel has represented Cuero on this appeal."

In due course, Cuero brought this petition for habeas corpus in federal district court, where it was properly denied and he timely appealed.

II

A

As a reminder, it must be observed that a state prisoner's federal habeas petition "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d). "This is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Contrary to the majority's suggestion that the § 2254(d) "exceptions authorize a grant of habeas relief," Maj. Op. at 7, these clauses prescribe conditions that are necessary, but not sufficient, for

habeas relief under AEDPA. Other requirements exist. Most importantly for this case, § 2254(d) "does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law." *Wilson v. Corcoran*, 562 U.S. 1, 5–6 (2010) (per curiam).

For purposes of § 2254(d)(1), "clearly established Federal law" is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (citations omitted). It "includes only the holdings, as opposed to the dicta, of [the Supreme Court's] decisions." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

B

A threshold problem with the opinion's analysis is its failure to identify the appropriate state-court decision before us. The majority concludes that we should "look through" the opinion of the California Court of Appeal on direct review to the earlier reasoned decision of the San Diego Superior Court. Maj. Op. at 8. However, the look-through doctrine only applies "[w]here there has been one reasoned state judgment rejecting a federal claim," *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), and we cannot "look through" when the federal claim at issue was not "adjudicated on the merits" in the prior reasoned decision, *see* 28 U.S.C. § 2254(d); *Casey v. Moore*, 386 F.3d 896, 918 n.23 (9th Cir. 2004); *Medley v. Runnels*, 506 F.3d 857, 870–71 (9th Cir. 2007) (en banc) (Ikuta, J., concurring in part, dissenting in

part) ("[W]e do not 'look through' to a state decision which does not address the constitutional claim."); *see also Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014)[4] ("[W]e 'look through' to the last state-court decision that provides a reasoned explanation *capable of review*." (emphasis added)); *Ortiz v. Yates*, 704 F.3d 1026, 1034 (9th Cir. 2012) ("[W]e look through state-court summary denials to the last reasoned state-court opinion *on the claim at issue*." (emphasis added)).

Here, the superior court never did adjudicate the merits of Cuero's claim that the second amendment of the complaint constituted a breach of his plea agreement in violation of due process, entitling him to specific performance. In Cuero's brief in opposition to the motion to amend and in oral argument on the motion, he exclusively argued that the superior court should exercise its discretion under state law to deny leave to amend.[5] Cuero did

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[4] I note that the majority relies on one of *Murray*'s statements of law that has been undermined by a subsequent Supreme Court decision. *See Woodall*, 134 S. Ct. at 1706; *contra* Maj. Op. at 7–8.

[5] Cuero cited only California Penal Code § 969.5(a), *Alvarado*, and *People v. Jackson*, 48 Cal. Rptr. 2d 838 (Ct. App.), *review granted and opinion superseded*, 914 P.2d 831 (Cal. 1996). I do not understand why the majority criticizes the superior court for then addressing these sources of law in its decision. Maj. Op. at 18–19 & n.13, 22. The majority also suggests that it grants relief because the superior court did not "recognize[]" or "acknowledge" (unspecified) Supreme Court precedents in its decision. Maj. Op. at 6, 22. But a "state court need not cite or even be aware of [the Supreme Court's] cases under § 2254(d)." *Richter*, 56 U.S. at 98 (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) ("Avoiding these pitfalls does not require citation of our cases—indeed, it does not even

(continued…)

not argue that the second amendment of the complaint would violate due process. He did not argue that any plea agreement prohibited the second amendment of the complaint, nor that he was entitled to specific performance, nor that the state court was required to construe plea agreements in accordance with state contract law. Indeed, Cuero argues to us that his trial counsel was ineffective for failing to raise Cuero's due process claim before the superior court.

Thus, Cuero never raised a due process claim, and the superior court did not decide one. As a result, Cuero's claim that the second amendment of the complaint breached a pre-existing plea agreement and thereby violated due process was not adjudicated on the merits by the superior court. Such claim was indeed adjudicated on the merits by a single state court decision: the opinion of the California Court of Appeal on direct review, the only dispositive "decision" with respect to which the petition for habeas corpus has been brought.[6]

(…continued)
require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.")).

[6] This statement requires a slight caveat. With respect to Cuero's ineffective assistance of counsel claims, the relevant state-court decision is that of the California Court of Appeal on collateral review. While the majority does not reach the issue, I would affirm the denial of the writ with respect to such claims.

C

Of course, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. In such a situation, we must ask "what arguments or theories. . . could have supported[] the state court's decision" and then determine "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court. *Id.* at 102. "Thus, when the state court does not supply reasoning for its decision, we are instructed to engage in an independent review of the record and ascertain whether the state court's decision was objectively unreasonable. Crucially, this is not a de novo review of the constitutional question, as even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Murray*, 745 F.3d at 996–97 (internal quotation marks and citations omitted).

"Adherence to these principles serves important interests of federalism and comity. AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Donald*, 135 S. Ct. at 1376 (quoting *Visciotti*, 537 U.S. at 24). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong. Federal habeas review thus exists as 'a guard against extreme malfunctions in the state criminal justice systems, not a substitute

for ordinary error correction through appeal.'" *Id.* (quoting *Richter*, 562 U.S. at 102–03.).

III

In order to prevail in his petition for habeas corpus, Cuero must demonstrate (among other things) that: (1) on December 8, 2005, he had a plea agreement with terms that prohibited amendment of the complaint; (2) such plea agreement had constitutional significance before the entry of judgment, so that breaching it would violate due process; and (3) rescission of such plea agreement (withdrawal of the plea) was not a constitutionally acceptable remedy for the breach of the plea agreement. Contrary to the majority's analysis, under the Supreme Court's holdings in existence at the time of the California Court of Appeal's decision, he cannot.

A

The majority erroneously concludes that, when Cuero initially pleaded guilty on December 8, 2005, he had a "written plea agreement" in which the government guaranteed that punishment would be no greater than 14 years, 4 months in prison. Maj. Op. at 4–5, 5, 6, 11–15 & nn. 8–9, 19, 21–22. To the contrary, fairminded jurists could readily conclude that Cuero's initial guilty plea was not induced by any agreement with the State, let alone an agreement that the State would never amend its complaint.

On December 8, 2005, Cuero signed a standard change of plea form. As completed, that document states:

> I, the defendant in the above-entitled case, in support of my plea of Guilty/No Contest, personally declare as follows: . . .
>
> 2. I have not been induced to enter this plea by any promise or representation of any kind, except: (*State any agreement with the District Attorney*.)
>
> STC[7] – NO DEALS W/ PEOPLE.

Appendix A at 1 ¶ 2. Cuero's initials appear next to the line indicating "STC – NO DEALS W/ PEOPLE." *Id*. Cuero declared that he has "read, understood, and initialed each item above . . . and everything on the form . . . is true and correct." *Id*. at 3 ¶ 13. In his plea colloquy that same day, Cuero confirmed that he had read, understood, and thoroughly reviewed with his attorney the plea form submitted, that he had signed and initialed the document, and that he had no questions about it.[8]

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[7] Based on the judge's statements at the plea hearing, it appears that "STC" stands for "sentence for the court."

[8] Because the majority and I cannot seem to agree on the basic facts of what was said at the plea hearing on December 8, 2005, I attach the transcript of that hearing as Appendix B to my dissent.

What about the "14 year, 4 month maximum promised by the government," Maj. Op. at 22, relied upon so heavily by the majority? Such a promise is a figment of the majority's imagination. The only statement signed by the prosecutor on the change of plea form was the following: "The People of the State of California, plaintiff, by its attorney, the District Attorney for the County of San Diego, concurs with the defendant's plea of Guilty/No Contest as set forth above." Appendix A at 3. And at the hearing prosecutor Kristian Trocha said three words before Cuero entered his plea. Those words were "Kristian Trocha" to identify himself in his initial appearance, and "Yes" in the context of the following exchange:

> THE COURT: It is a sentence for the court, *no deals with the People*. His maximum exposure is 14 years, 4 months in state prison, 4 years on parole and a $10,000 fine. That's the most he could receive by way of this plea; true, Mr. Tamayo?
>
> MR. TAMAYO: It is.
>
> THE COURT: Mr. Trocha?
>
> [MR. TROCHA[9]]: Yes.

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[9] The transcript actually says that someone named Dan Rodriguez said "Yes." Appendix B at 2. The record does not indicate who Dan Rodriguez is, so the court of appeal could easily have concluded that the prosecutor only said his name before Cuero entered his plea. Because it does not matter for purposes of this dissent, I assume that this was a transcription error and that Mr. Trocha was the person who responded to the court.

See Appendix B at 1, 2 (emphasis added). Thus, the court confirmed that there were "no deals with the People." And the prosecutor did not promise to refrain from ever doing anything, such as amending the complaint, that would result in a longer sentence. He simply agreed, as a descriptive matter, that 14 years, 4 months, was the maximum prison term Cuero was facing at the time.[10]

Both Cuero's appellate counsel's brief and the California Court of Appeal's decision imply that the initial plea was not induced by a plea agreement. In

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[10] The majority suggests that, in the plea hearing, the State (1) "identified [the document in Appendix A] as the written plea agreement," Maj. Op. at 14–15 n.9; (2) "stood before Judge Ervin and expressed [its] intent to 'settle this case today,'" Maj. Op. at 11; and (3) "assented" "that the plea agreement was as to the charge and not to the specific sentence," Maj. Op. at 11–12. It simply did not. *See* Appendix B. Nowhere in the attached transcript will the reader find the statements that the majority ascribes to the State. One will search in vain for any reference by the Deputy District Attorney, or by the Deputy Public Defender, for that matter, to a "plea agreement."

The majority reasonably notes that the *superior court* referred to a "plea agreement," and it reasonably speculates that a "charge bargain" existed and that *Cuero* believed he would never face more than 14 years, 4 months in prison. But the record contains no promise or agreement by *the State* to drop any charges or to refrain from amending the complaint. In that regard, the majority confuses actions taken after the plea was accepted with promises to take such actions. Trocha moved to "[d]ismiss in light of the plea." Appendix B at 8. But the State never indicated, in either the change of plea form or the plea hearing, that such dismissal was required by the terms of any agreement.

his brief on appeal, Cuero's counsel stated that Cuero initially "pled guilty," with no mention of a plea agreement. In contrast, the brief states that the second guilty plea was made "pursuant to a plea agreement" and sets forth the terms of the charge bargain. Similarly, the Court of Appeal refers to the initial "guilty pleas" and the subsequent "negotiated guilty plea," which strongly implies that the court of appeal determined that no plea agreement existed for the initial plea. Such determination would not constitute an unreasonable determination of the facts.

Given Cuero's express declaration that he was not "induced to enter this plea by any promise or representation of any kind" and that there were no deals with the People, a fairminded jurist could readily conclude that the government did not promise Cuero anything, let alone that it would never amend its complaint.

B

Even if there were a plea agreement with terms that prohibited the State from amending its complaint, Cuero would still need to show that, under the Supreme Court's holdings at the time of the California Court of Appeal's decision, a fairminded jurist could not possibly conclude either that the plea agreement lacked constitutional significance before the entry of judgment or that rescission was a constitutionally acceptable remedy for a breach of the plea agreement.

In his briefing before our Court, Cuero contends that the California Court of Appeal's decision was an objectively unreasonable application of *Santobello v. New York*, 404 U.S. 257 (1971). Apparently unsatisfied with the arguments that Cuero made on his own behalf, the majority regrettably adds some selective quotation of *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Ricketts v. Adamson*, 483 U.S. 1 (1987), to support its grant of the writ.[11] I respectfully suggest that the Court of Appeal's decision was neither contrary to, nor an unreasonable application of, *Santobello*, *Johnson*, or *Adamson*.

1

In *Santobello*, the Supreme Court addressed "whether the State's failure to keep a commitment concerning the sentence recommendation on a guilty plea required a new trial." 404 U.S. at 257–58. There, as part of a plea bargain, the prosecution had agreed to make no recommendation as to the sentence, and Santobello had agreed to plead guilty to a lesser-included offense. *Id.* at 258. At sentencing, the prosecutor instead recommended the maximum sentence, which the judge imposed. *Id.* at 259–60.

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[11] The majority's opinion, like much of our circuit precedent, vacillates between conclusions under the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1). Maj. Op. at 10, 15 ("contrary to"); Maj. Op. at 15, 19 ("unreasonable application of"). We should be more precise. The "'contrary to' and 'unreasonable application of' clauses in § 2254(d)(1) are distinct and have separate meanings." *Moses v. Payne*, 555 F.3d 742, 751 (9th Cir. 2009) (citing *Andrade*, 538 U.S. at 73–75).

Upon certiorari, the Court vacated and remanded for the state court to consider the appropriate remedy for breach of the agreement. *Id.* at 262–63.

As part of its reasoning, the Court indeed made the broad statement upon which the majority relies: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

However, this general, isolated statement does not, by itself, constitute the entire holding of *Santobello*.[12] With respect to the proper remedy for the government's breach, the Court remanded to the state court and held:

> The ultimate relief to which petitioner is entitled we leave 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, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner,

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[12] Accurate identification of the Supreme Court's holdings is a critical step in our analysis under 28 U.S.C. § 2254(d)(1) because "clearly established Federal law" includes only the holdings, as opposed to the dicta, of the Supreme Court's decisions. *See Donald*, 135 S. Ct. at 1376.

> i.e., the opportunity to withdraw his plea of guilty.

Id. at 262–63. The Court noted that if "the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts." *Id.* at 263 n.2.

Thus, contrary to the majority's analysis, the Court in *Santobello* did not hold that literally every plea agreement offered by the prosecution and accepted by the defendant is enforceable by specific performance. Rather, the Court held that, when a trial court's judgment of conviction is based on a plea induced by a promise later broken by the state, the judgment must be vacated. The Court further held that the ultimate relief would be left "to the discretion of the state court, which [was] in a better position to decide whether the circumstances of [the] case" required specific performance or withdrawal of the guilty plea. *Id.* at 263.

2

The majority's grant of the petition rests entirely on the premise that "[u]nder clearly established Supreme Court law, Cuero stood convicted and his plea agreement became binding the moment the first Superior Court judge accepted his guilty plea." Maj. Op. at 8–9. *Johnson* undercuts such premise.

In *Johnson*, the Supreme Court addressed "whether a defendant's acceptance of a prosecutor's proposed plea bargain creates a constitutional right to have the bargain specifically enforced." 467 U.S. at

505. There, the prosecutor proposed that, in exchange for a plea of guilty, the prosecutor would recommend a 21-year sentence served concurrently with other sentences. *Id.* at 505–06. When the defendant's counsel called the prosecutor and communicated acceptance of the offer, the prosecutor told defense counsel "that a mistake had been made and withdrew the offer." *Id.* at 506. The prosecutor then made a second offer to recommend a 21-year sentence to be served consecutively to the other sentences, which the defendant ultimately accepted. *Id.* "In accordance with the plea bargain, the state trial judge imposed a 21-year sentence to be served consecutively to the previous sentences." *Id.*

In its analysis, the Court reasoned:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

Id. at 507–08 (footnote omitted). The majority completely ignores the reasonable conclusion that a fairminded jurist could draw from the first sentence of this passage: a "plea bargain . . . is without constitutional significance . . . until embodied in the

judgment of a court." *Id.*[13] In other words, it is the judgment, not the acceptance of a guilty plea, that "seals the deal between the state and the defendant." *Contra* Maj. Op. at 9.[14]

The *Johnson* Court further explained that "only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause." 467 U.S. at 509. The Court then applied that rule:

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[13] The majority distorts this passage by selectively pairing three words from the second sentence with three words from the first sentence: "A defendant's guilty plea thus 'implicates the Constitution,' transforming the plea bargain from a 'mere executory agreement' into a binding contract." Maj. Op. at 9. However, such tortured paraphrasing does not remotely reflect the passage above or the holding of *Johnson*.

[14] Some confusion could arise from the Court's use of "convicted" and "conviction" in this passage and in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), upon which the majority relies. I note that the word "conviction" has multiple meanings about which fairminded jurists can disagree. "It is certainly correct that the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding." *Deal v. United States*, 508 U.S. 129, 131 (1993); *see also id.* at 143–46 (Stevens, J., dissenting). Here, the Supreme Court used "conviction" in the latter sense, *i.e.* the entry of a final judgment on a finding of guilt. Having just stated that a plea bargain "does not deprive an accused of liberty or any other constitutionally protected interest" "until embodied in the judgment of a court," the Court did not state two sentences later that a guilty plea gives rise to the deprivation of a defendant's liberty *before the entry of judgment*. And, even if this understanding of the Court's use of "conviction" in *Johnson* is wrong, it is not objectively unreasonable.

> [Johnson's] plea was in no sense induced by the prosecutor's withdrawn offer; unlike Santobello, who pleaded guilty thinking he had bargained for a specific prosecutorial sentencing recommendation which was not ultimately made, at the time respondent pleaded guilty he knew the prosecution would recommend a 21-year consecutive sentence. [Johnson] does not challenge the District Court's finding that he pleaded guilty with the advice of competent counsel and with full awareness of the consequences—he knew that the prosecutor would recommend and that the judge could impose the sentence now under attack.

Id. at 510.

The Court concluded that Johnson's "inability to enforce the prosecutor's offer is without constitutional significance." *Id.* Johnson "was not deprived of his liberty in any fundamentally unfair way. [He] was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Id.* at 511.

Thus, the Court in *Johnson* held that a defendant's inability to enforce a plea offer withdrawn before the entry of judgment is without constitutional significance, not that every breach of a plea agreement after a guilty plea violates the Constitution. Consequently, there is no due process violation so long as the prosecution fulfills the promises that induced the plea upon which the judgment of conviction is based.

More importantly, *Johnson* clarified the holding in *Santobello*. The Court noted that "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea" and that "permitting Santobello to replead was within the range of constitutionally appropriate remedies." *Id.* at 510–11 n.11 (citing *Santobello*, 404 U.S. at 262–63; *id.* at 268–69 (Marshall, J., concurring in part and dissenting in part)). "It follows that [Johnson's] constitutional rights could not have been violated. Because he pleaded after the prosecution had breached its 'promise' to him, he was in no worse position than Santobello would have been had he been permitted to replead." *Id.*

3

The majority also concludes, erroneously, that the state court was "constitutionally obligated to construe the agreement in accordance with state contract law" and that a "state court must supply a remedy for a breached plea agreement that comports with state contract law." Maj. Op. at 18, 20. Although the majority relies heavily on *Adamson* for these propositions, I respectfully suggest that case does not support, let alone require, such conclusions.

In *Adamson*, the Supreme Court addressed "whether the Double Jeopardy Clause bars the prosecution of [a defendant] for first-degree murder following his breach of a plea agreement under which he had pleaded guilty to a lesser offense, had been sentenced, and had begun serving a term of

imprisonment." *Adamson*, 483 U.S. at 3.[15] There, the Arizona Supreme Court held that a written plea agreement[16] required Adamson to testify at the retrial of the other two individuals, that he violated the terms of the plea agreement by refusing to testify at the retrials, and that the terms of the plea agreement required the original first-degree murder charge to be reinstated automatically. *Id.* at 5. The Supreme Court held that the subsequent prosecution did not violate the Double Jeopardy Clause. It reasoned that "terms of the agreement could not be clearer: in the event of [Adamson's] breach occasioned by a refusal to testify, the parties would be returned to the *status quo ante*, in which case [Adamson] would have *no* double jeopardy defense to waive." *Id.* at 10. Thus, the Court held in *Adamson* that the Double Jeopardy Clause does not bar a state from vacating a judgment of conviction and reinstating criminal charges pursuant to the express terms of a plea agreement.

The majority does not rely on the holding of *Adamson* for its erroneous propositions, but rather on part of a sentence in dictum contained in a footnote of the Court's opinion. In footnote 3, the Court addressed Adamson's contention that the Arizona

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[15] Given this description, one might get the sense that the *holding* of *Adamson* is unlikely to bear on the instant case.

[16] Our Court published the entirety of the eighteen-paragraph plea agreement in an appendix. *See Adamson v. Ricketts*, 789 F.2d 722, 731–33 (9th Cir. 1986), *rev'd*, 483 U.S. 1. Contrast that plea agreement with the change of plea form in this case, which expressly states that there was no plea agreement. *See* Appendix A at 1 ¶ 2.

Supreme Court had misconstrued the terms of the plea agreement:

> We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently the plea agreement's effect on respondent's double jeopardy rights, *the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law,* and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues. The dissent's discourse on the law of contracts is thus illuminating but irrelevant. The questions whether the plea agreement obligated the respondent to testify at the retrial of Dunlap and Robison and, if so, whether the respondent breached this duty are matters appropriately left to the state courts. . . .

Adamson, 483 U.S. at 6 n.3 (emphasis added to the clause upon which the majority relies). As the Supreme Court eloquently once stated in an unrelated context: "Most importantly, the statement is pure dictum. It is dictum contained in a rebuttal to a counterargument. And it is *unnecessary* dictum even in that respect." *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013).

Even if not dictum, the footnote has been misinterpreted by the majority. The majority, consistent with precedent of our circuit,[17] focuses solely on the statement that "the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." Maj. Op. at 15. However, in context it is clear that the Supreme Court was not stating that state courts are "constitutionally obligated to construe the agreement in accordance with state contract law" and that they violate the Constitution by failing to do so. Maj. Op. at 18. And the footnote does not remotely support the contention that a state court violates the Constitution if it does not "supply a remedy for a breached plea agreement that comports with state contract law." Maj. Op. at 20. Quite the opposite. Respecting important interests of federalism and comity, the Court explained that the construction of plea agreements and whether a breach has occurred are matters of state law which are "appropriately left to the state courts." *Adamson*, 483 U.S. at 6–7 n.3. Federal courts must not "second-guess[] the finding of a breach" and they have no "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Id.* Thus, the *Adamson* footnote, upon which the majority relies, is about deference to state courts, not

[17] *Buckley v. Terhune*, 441 F.3d 688, 694–95 (9th Cir. 2006) (en banc); *Davis v. Woodford*, 446 F.3d 957, 962 (9th Cir. 2006). As discussed below, we should not follow these decisions because they are irreconcilable with intervening decisions of the Supreme Court. *See infra* note 20.

about imposing new constitutional requirements on state courts.

C

The California Court of Appeal's decision was not "contrary to" *Santobello*, *Johnson*, or *Adamson*. "Because none of [the Supreme Court's] cases confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from" the Supreme Court. *Donald*, 135 S. Ct. at 1377 (quoting *Lopez v. Smith*, 135 U.S. 1, 4 (2014) (per curiam)).

In *Santobello*, the defendant pleaded guilty in reliance upon the promises in the prosecution's original offer, the prosecution broke a promise contained in its original offer, and the court entered judgment on the basis of the plea induced by the unfulfilled promise. Unlike *Santobello*, here the superior court's judgment was not entered on the basis of the initial plea, purportedly induced by unfulfilled promises. Rather, judgment was entered on the basis of the subsequent plea, which was induced by promises that have been fulfilled. In *Johnson*, the prosecution withdrew its original offer before the defendant pleaded guilty. Unlike *Johnson*, here the prosecutor purportedly breached a plea agreement after the defendant pleaded guilty. Finally, *Adamson* does not remotely resemble this case. There, the defendant breached his plea bargain, and the question was whether or not the Double Jeopardy Clause prohibited the state from vacating the conviction and reinstating criminal charges.

Therefore, *Santobello*, *Johnson*, and *Adamson* do not address the specific question presented by this case: whether the Constitution requires specific performance of a plea bargain after a defendant has pleaded guilty but before the court has entered judgment. As a result, the state court's decision could not be "contrary to" any holding from the Supreme Court. *See Donald*, 135 S. Ct. at 1377.

D

Nor was the California Court of Appeal's decision an "unreasonable application of" the Court's holdings in *Santobello*, *Johnson*, and *Adamson*. As discussed above, fairminded jurists could easily conclude that Cuero's initial plea did not rest "on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration." *Santobello*, 404 U.S. at 262; *see* Appendix A at 1 ¶ 2 ("I have not been induced to enter this plea by any promise or representation of any kind, except: . . . NO DEALS W/ PEOPLE.").[18]

Even assuming that the State did make a promise not to amend its complaint, fairminded jurists could readily conclude that, under *Johnson*, Cuero's inability to enforce the original plea agreement, which was withdrawn before the entry of judgment, is "without constitutional significance." *Johnson*, 467 U.S. at 507–08, 510. Moreover, fairminded jurists could conclude that, if the

[18] Without any plea agreement to construe, *Adamson*'s purported requirement to construe the plea agreement in accordance with state contract law has no application here.

prosecution did breach some binding agreement with Cuero, "permitting [Cuero] to replead was within the range of constitutionally appropriate remedies." *Johnson*, 467 U.S. at 510–11 n.11 (explaining *Santobello*); *Santobello*, 404 U.S. at 263 & n.2.[19]

Therefore, the state court's ruling on the claim presented here was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. As a result, the state court's ruling was not an unreasonable application of *Santobello*, *Johnson*, or *Adamson*.

IV

Perhaps the majority's faulty analysis can best be explained by its erroneous reliance on (1) perceived errors of state law; (2) circuit precedent (to bridge the gap between the Supreme Court's holdings and this case); (3) a Supreme Court decision that post-dates the California Court of Appeal's decision; and (4) issues of law framed at the highest levels of generality. Making matters worse, the majority misconstrues many of the sources of law upon which it improperly relies.

[19] *Adamson* indirectly reinforces this conclusion with its repeated emphasis that returning the defendant to the *status quo ante—i.e.*, restoring his trial rights fully—resulted in no double jeopardy violation. *See Adamson*, 483 U.S. at 10–11.

A

1

The majority erroneously relies on perceived errors of state law. Maj. Op. at 15–22 & n.10; *see Swarthout v. Cooke*, 562 U.S. 216, 219–22 (2011) (per curiam); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Rose v. Hodges*, 423 U.S. 19, 21–22 (1975) (per curiam).

Specifically, it holds that the writ must issue because the state court failed "to interpret Cuero's plea agreement consistently with California contract law" and failed to "supply a remedy for a breached plea agreement that comports with state contract law." Maj. Op. at 20. "But it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Corcoran*, 562 U.S. at 5 (quoting 28 U.S.C. § 2254(a)). The Supreme Court has "repeatedly held that 'federal habeas corpus relief does not lie for errors of state law.'" *Id.* (quoting *McGuire*, 502 U.S. at 67). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* (quoting *McGuire*, 502 U.S. at 67–68) (alteration omitted).

The majority protests that these cases "do not speak to the situation where, as here, the Supreme

Court has clearly held that the federal constitutional due process right is itself defined by reference to principles of state law." Maj. Op. at 16 n.10. One would expect a citation to Supreme Court precedent to follow such a strong statement, but none exists. The majority cites our *Buckley* case, which cites *Adamson*. Maj. Op. at 16 n.10. But *Adamson* held no such thing. In fact, *Adamson* does not contain the words "due process" *anywhere* in the Court's opinion. "No opinion of [the Supreme Court] supports converting California's [contract law] into a substantive federal requirement." *Cooke*, 562 U.S. at 220–21.[20]

2

Even if the court could grant habeas relief on the basis of state law, the majority misconstrues California state law.

California state law did not prohibit the second amendment of the complaint. Several provisions of the California Penal Code expressly permit a prosecutor to amend an information or complaint. *See* Cal. Penal Code §§ 969a, 969.5(a), 1009. "Under

[20] Just as we did in *Cooke*, our Court in *Brown v. Poole*, 337 F.3d 1155 (2003), *Buckley*, and *Davis* relied upon a perceived error of state law to conclude that the federal Due Process Clause was violated. Accordingly, with respect to its analysis regarding the required remedy, the reasoning of these cases has been undermined to the point that it is clearly irreconcilable with *Corcoran* and *Cooke*. *See Lair v. Bullock*, 798 F.3d 736, 745 (9th Cir. 2015) (citing *Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc)). *Brown*, *Buckley*, and *Davis* are of no help to the majority's analysis.

section 1009, the People may amend an information without leave of court prior to entry of a defendant's plea, and the trial court may permit an amendment of an information at any stage of the proceedings." *People v. Lettice*, 163 Cal. Rptr. 3d 862, 868 (Ct. App. 2013). Sections 969a and 969.5(a) specifically deal with amendment of the complaint to add allegations of prior felonies, and § 969.5(a), upon which the State relied, addresses amendment of a complaint after a guilty plea:

> 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.

Cal. Penal Code § 969.5(a). None of these statutes indicate that a prosecutor's ability to amend the information is limited to situations in which a plea agreement has been entered.

In *People v. Valladoli*, the California Supreme Court interpreted both § 969a and former § 969 ½ in determining whether an information could be amended to allege prior felonies *after* a defendant was found guilty at trial. 918 P.2d 999 (Cal. 1996). Discussing former § 969 ½, the predecessor to § 969.5(a), the court said that if the defendant had "pleaded guilty before the magistrate under section

859a, . . . the express terms of section 969 ½ would have permitted the People to amend the information to charge his prior convictions after the guilty plea." *Id.* at 1005; *see also People v. Tindall*, 14 P.3d 207, 212 (Cal. 2000) (citing *Valladoli* for this proposition). The court continued, "An obvious motivating force underlying section 969 ½ is to prevent one accused of a crime from quickly pleading guilty before a magistrate and thereby limiting the amount of time the prosecutor has to investigate, discover, and charge the accused's prior felony convictions." *Valladoli*, 918 P.2d at 1005.

Thus, the state statutory scheme and *Valladoli* permit a prosecutor to request to file an amended complaint to allege prior convictions after entering a plea agreement. The majority fails to cite any California case which has definitively held that a prosecutor may not amend a complaint after the court accepts a plea agreement.[21]

Ultimately, the Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546

[21] In *Lettice*, the California Court of Appeal was presented with a case similar to this one, but did not decide this issue. On appeal, because the defendant did not argue that the prosecutor was precluded from filing an amended information after entering the plea agreement, the court of appeal expressly did not decide that issue. *Lettice*, 163 Cal. Rptr. 3d at 871 n.12. The court of appeal remanded to the superior court with instructions to exercise its discretion to determine whether to permit the amendment of the complaint. *Id.* at 873.

U.S. 74, 76 (2005) (per curiam). Here, both the superior court and the appellate court determined that amendment of the complaint was permissible under state law. We must defer to those interpretations and conclude that there was no error of state law. Rather than deferring, the majority's decision severely undermines the California Legislature's determination, in enacting sections 969.5(a) and 1009, that prosecutors should have the ability, with the approval of the court, to amend a complaint after a plea to allege all prior felonies.

B

1

The majority erroneously relies (heavily) on circuit precedent to bridge the gap between the Supreme Court's cases and this one. *See Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450–51 (2013) (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148, 2155–56 (2012) (per curiam); *Renico v. Lett*, 559 U.S. 766, 778–79 (2010).

Specifically, the majority relies on circuit precedent for the following propositions, which are not supported by the Supreme Court's decisions:

(1) The "federal constitutional due process right is itself defined by reference to principles of state law," Maj. Op. at 16 n.10 (citing *Buckley*, 441 F.3d at 695); a state court is "constitutionally obligated to

> construe the [plea] agreement in accordance with state contract law." Maj. Op. at 18 (citing *Buckley*, 441 F.3d at 696); "[u]nder AEDPA, we . . . must consider whether the [state court] decision is consistent with a proper application of state contract law in interpreting the plea agreement . . . ." Maj. Op. at 15 (quoting *Davis*, 446 F.3d at 962).
>
> (2) "[W]here the state has already received the benefit it bargained for—a plea of guilty and a conviction—specific performance is the best remedy, unless the defendant, whose choice it becomes, 'elect[s] instead to rescind the agreement and take his chances from there.'" Maj. Op. at 20 (quoting *Buckley*, 441 F.3d at 699 n.11).
>
> (3) "Because Cuero had already performed, 'fundamental fairness demands that the state be compelled to adhere to the agreement as well.'" Maj. Op. at 21 (quoting *Brown*, 337 F.3d at 1162).

Take the first proposition. As discussed above, *Adamson* does not even contain the words "due process," so the notion that the "federal constitutional due process right is itself defined by reference to principles of state law" comes solely from *Buckley*. Similarly, footnote 3 of *Adamson* says

nothing about state *contract* law. *See Adamson*, 483 U.S. at 6 n.3 (construction and breach determinations are "matters of state law"). So the majority's restriction of the relevant state law to contract law comes solely from circuit precedent in *Buckley* and *Davis*. *See, e.g.*, Maj. Op. at 18 n.12 (rejecting argument under § 969.5(a) because that section "is irrelevant to the interpretation of a court-approved plea agreement under state contract principles"). Finally, no Supreme Court decisions remotely support the notion that specific performance is required when a defendant has pleaded guilty and the court has accepted that plea. Such notions are inventions of our circuit.

The Supreme Court has "repeatedly emphasized [that] circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Frost*, 135 S. Ct. at 431 (quoting 28 U.S.C. § 2254(d)(1)). "It therefore cannot form the basis for habeas relief under AEDPA." *Matthews*, 132 S. Ct. at 2155. And "Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced.'" *Smith*, 135 S. Ct. at 4 (quoting *Rodgers*, 133 S. Ct. at 1450). In the past three years, the Supreme Court has caught us three times trying to evade this rule. *See Frost*, 135 S. Ct. at 431 ("The Ninth Circuit acknowledged this rule, but tried to get past it . . . ."); *Smith*, 135 S. Ct. at 4 ("The Ninth Circuit attempted to evade this barrier . . . ."); *Rodgers*, 133 S. Ct. at 1450–51. It is unwise to think that we will slip through this time around.

Even if the majority could properly rely on our decisions in *Brown*, *Buckley*, and *Davis*, those cases not compel the conclusion that the majority reaches.

For instance, *Brown* and *Buckley* acknowledged that there are "two available remedies at law for the breach of [a] plea agreement: withdrawal of [the] plea (i.e., rescission of the contract) and specific performance." *Buckley*, 441 F.3d at 699; *Brown*, 337 F.3d at 1161. In choosing between those remedies in *Buckley*, the en banc court "express[ed] no view on what the proper remedy would be in a case with other facts." *Id*. at 699 n.11.

Cuero's circumstances are readily distinguishable from those in *Brown* and *Buckley*. In both cases, we ordered specific performance because rescission of the contract was "impossible" under the circumstances and the petitioners could not "conceivably be returned to the status quo ante." *Brown*, 337 F.3d at 1161; *Buckley*, 441 F.3d at 699. The petitioners had "paid in a coin that the state cannot refund" by testifying and/or serving their bargained-for sentences. *Buckley*, 441 F.3d at 699 (quoting *Brown*, 337 F.3d at 1161). Here, when the superior court granted permission to amend the complaint, Cuero had not performed in a way that could not be undone. Instead, to the extent Cuero had performed, the "coin" he paid was fully refunded when his relinquished trial rights were fully restored. Thus, specific performance was not required by our precedents because rescission was still possible for Cuero.

In addition, Cuero's case differs from *Davis*, *Buckley*, and *Brown* because the petitioners were incarcerated on the basis of pleas induced by plea agreements that the state breached. *See Davis*, 446 F.3d at 959–63; *Buckley*, 441 F.3d at 691–93; *Brown*, 337 F.3d at 1157–58. Thus, those cases were much closer to *Santobello*. Here, the initial plea, purportedly induced by a plea agreement which the state breached, was withdrawn and does not form the basis of Cuero's incarceration. Cuero's case is much closer to *Johnson*. He "was not deprived of his liberty in any fundamentally unfair way. [He] was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Johnson*, 467 U.S. at 511.

C

1

The majority erroneously relies upon a Supreme Court opinion—and numerous other authorities—issued *after* all of the state court decisions that related to Cuero. *See Greene v Fisher*, 132 S. Ct. 38, 44–45 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *Andrade*, 538 U.S. at 71–72; *see also Woodall*, 134 S. Ct. at 1706.

Specifically, the panel relies on *Puckett v. United States*, 556 U.S. 129 (2009), for the following propositions:

(1) "A state court must supply a remedy for a breached plea agreement that comports with state contract law." Maj. Op. at 20 (citing *Puckett*, 556 U.S. at 137).[22]

(2) The purported breach of Cuero's plea agreement was "undoubtedly a violation of the defendant's rights." Maj. Op. at 6 (quoting *Puckett,* 556 U.S. at 136).

(3) "[P]lea bargains are essentially contracts." Maj. Op. at 15 (quoting *Puckett*, 556 U.S. at 137).

Section 2254(d)(1) "requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against [the Supreme Court's] precedents *as of the time the state court renders its decision*." *Greene*, 132 S. Ct. at 44 (internal alteration and quotation marks omitted) (emphasis in original). "Obviously, a state-court decision cannot be contrary to clearly established Federal law that was not yet in existence." *Murray*, 745 F.3d at 997. Thus, because *Puckett* was issued after the California Court of Appeal's decision, it was not "clearly established Federal law" at the time the state court rendered its decision. Consequently, the majority cannot rely on *Puckett*.

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[22] The majority also cites *Adamson*, 483 U.S. at 5 n.3, and *Davis*, 446 F.3d at 962, for this proposition. Maj. Op. at 20. None of the authorities cited support the majority's contention, let alone clearly establish such contention.

The majority also relies on a number of other authorities issued after the state court's decision to state the principles of law that the state court should have applied. *See* Maj. Op. at 9 (relying on *Doe v. Harris*, 640 F.3d 972, 975 (9th Cir. 2011)); *id.* at 16 (relying on *People v. Segura*, 188 P.3d 649, 656 (Cal. 2008)); *id.* at 17 (relying on *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 791 (9th Cir. 2012)); *id.* at 20 (relying on *In re Timothy N.*, 157 Cal. Rptr. 3d 78, 88 (Ct. App. 2013)); *id.* at 20–21 n.14 (relying on 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.2(e) (4th ed. 2015)). This reliance, too, was impermissible, for the state court cannot be expected to apply rules of law stated in authorities not yet in existence.

2

Even if the majority could rely on *Puckett*, that case cannot support the weight of the majority's argument.

The Supreme Court in *Puckett* stated that "[w]hen a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, i.e., to withdraw his plea." 556 U.S. at 137. Clearly, withdrawal of the plea is a constitutionally permissible remedy, and Cuero received that remedy. The *Puckett* Court did not remotely suggest that the determination of which remedy to afford is a matter of state contract law. Also, the *Puckett* Court acknowledged that, although "plea bargains are essentially contracts," "the analogy may not hold in

all respects." *Id.* This undermines the majority's proposition that only state contract law can be used to determine whether amendment of the complaint was permitted.

D

Finally, the majority erroneously frames legal issues at the highest levels of generality. *See Donald*, 135 S. Ct. at 1377; *Smith*, 135 S. Ct. at 4; *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam); *cf. City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))). "By framing [the Supreme Court's] precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Jackson*, 133 S. Ct. at 1994 (quoting 28 U.S.C. § 2254(d)(1)). Such an "approach would defeat the substantial deference that AEDPA requires." *Id.*

The majority can only grant habeas relief if the Supreme Court's cases clearly establish that a defendant has a due process right to specific performance of a plea agreement before the entry of judgment. But none of the Supreme Court's cases addresses that specific issue. *See Smith*, 135 S. Ct. at 4.

Instead, the best the majority can do is to point to *Adamson* for the general proposition that "the construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." 483 U.S. at 6 n.3. "This proposition is far too abstract to establish clearly the specific rule [Cuero] needs." *Smith*, 135 S. Ct. at 4.

The majority treats the door supposedly opened by *Adamson*'s general proposition as license to engage freely in de novo determination of what California contract law requires, both for the construction of the agreement and the remedy for a breach. Maj. Op. at 15–22. Again, however, no California cases establish that specific performance is required when the State amends its complaint after entry of a plea but before judgment. As a result, the majority is forced to frame principles of California law at the highest level of generality in order to conclude that specific performance is required. The majority rests its decision on the very general principle that "the remedy for breach must 'repair the harm caused by the breach.'" Maj. Op. at 20 (quoting *People v. Toscano*, 20 Cal. Rptr. 3d 923, 927 (Ct. App. 2004)). Such a general proposition obviously does not establish, under California law, that specific performance was the only remedy in this situation that could repair the harm caused by the breach.

To supply that final conclusion, the majority relies purely on its own de novo, *ipse dixit* analysis. Note that the key last paragraph before its conclusion section contains only a single citation to a source of law, and that citation does not establish that specific performance is required here.

Ultimately, the court's decision rests on its own determinations that it would be unfair not to require specific performance, Maj. Op. at 21, and that "specific performance is necessary to maintain the integrity and fairness of the criminal justice system," Maj. Op. at 20–21 n.14.[23] These conclusions are not dictated by state or federal law.

V

For the foregoing reasons, I respectfully conclude that the majority erroneously orders reversal of the district court and grant of the writ. In accordance with Supreme Court law, a fairminded jurist could conclude that Cuero's plea was not induced by any promise by the prosecutor. *See* Appendix A. Even assuming there was such a promise, a fairminded jurist could conclude that the plea agreement was without constitutional significance before the entry of judgment. And, even if there were a breach of a constitutionally binding plea agreement, nothing in *any* Supreme Court decision clearly establishes that the state court was required to order specific performance. Thus, the state court's decision was neither contrary to, nor an unreasonable application of "clearly established Federal law." 28 U.S.C. § 2254(d)(1).

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[23] The majority determines that "specific performance is necessary to maintain the integrity and fairness of the criminal justice system" on the basis of a treatise, a 1977 Washington Supreme Court decision, and an article in the second volume of the now-defunct *University of San Fernando Valley Law Review*. Maj. Op. at 20–21 n.14. These hardly constitute "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

For the foregoing reasons, I respectfully dissent.

APPENDIX A

Plea of Guilty/No Contest – Felony
Signed December 8, 2005

FILED December 8, 2005

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

PEOPLE vs MICHAEL CUERO Defendant

**Court Number: CE255082
DA Number: MAM704**

PLEA OF GUILTY/NO CONTEST — FELONY

I, **the defendant in the above-entitled case, in support of my plea of Guilty/No Contest, personally declare as follows:**

1. Of those charges now filed against me in this case, I plead GUILTY to the following offenses and admit the enhancements, allegations and prior convictions as follows: /M.D.C./

Count: CT 1
Charge: § 23153(a)
Enhancement: VC § 23560/**Allegation:** -#C181561

Count: CT 2
Charge: § 12021(a)(1)
Enhancement/Allegation: PC § 12022.7(a)
5/5/97 23152

PRIORS: (LIST ALLEGATION SECTION, CONVICTION DATE, COUNTY, CASE NUMBER, AND CHARGE)

Priors: 667.5(b)
Priors: 667(b-i)
(1) Allegation Section: ECR 4076
Conviction Date: 5-22-91
County: SDSC
Case No.: § 459/460
Charge: PC—STRIKE

(2) Allegation Section: ECR 10125
Conviction Date: 11-15-94
County: SDSC
Charge: § 10851 VC

(3) Allegation Section: SCE 193890
Conviction Date: 12-18-98
County: SDSC
Charge: § 10851 VC

(4) Allegation Section: SCE 232093
Conviction Date: 7-31-03
County: SDSC
Charge: § 11377 H & S

2. I have not been induced to enter this plea by any promise or representation of any kind, except: (*State any agreement with the District Attorney*.)
STC—NO DEALS W/PEOPLE /M.D.C./

3. I am entering my plea freely and voluntarily, without fear or threat to me or anyone closely related to me. /M.D.C./

4. I understand that a plea of No Contest is the same as a plea of Guilty for all purposes. /X/

5. I am sober and my judgment is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours. /M.D.C./

CONSTITUTIONAL RIGHTS

6a. I understand that I have the right to be represented by a lawyer at all stages of the proceedings. I can hire my own lawyer or the Court will appoint a lawyer for me if I cannot afford one.
/M.D.C./

I understand that as to all charges, allegations and prior convictions filed against me I **also have the following constitutional rights, which I now give up to enter my plea of guilty/no contest:**

6b. I have the right to a **speedy and public trial by jury.** I **now give up this right.** /M.D.C./

6c. I have the right to **confront and cross-examine all the witnesses** against me. **I now give up this right.** /M.D.C./

6d. I have the right to **remain silent** (unless I choose to testify on my own behalf). **I now give up this right.**
/M.D.C./

6e. I have the right to **present evidence in my behalf** and to have the court

subpoena my witnesses at no cost to me.
I **now give up this right** /M.D.C./

CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST

7a. I understand that I may receive this maximum punishment as a result of my plea: 14 years, 4 mon in State Prison, $10,000 fine and 4 years parole (4, 7, 14, life) with return to prison for every parole violation. If I am not sentenced to prison I may receive probation for a period up to 5 years or the maximum prison term, whichever is greater. As conditions of probation I may be given up to a year in jail custody, plus the fine, and any other conditions deemed reasonable by the Court. I understand that if I violate any condition of probation I can be sent to State Prison for the maximum term as stated above. /M.D.C./

7b. I understand that I must pay a restitution fine ($200 - $10,000), that I will also be subject to a suspended fine in the same amount, and that I must pay full restitution to all victims. /M.D.C./

7c. I understand that my conviction in this case will be a serious/violent felony ("strike") resulting in mandatory denial of probation and substantially increased penalties in any future felony case. /M.D.C./

7d. I understand that if I am not a U.S. citizen, this plea of Guilty/No Contest may result in my removal/deportation, exclusion from admission to the U.S. and denial of naturalization. Additionally, if this plea is to an "Aggravated Felony" listed on the back

of this form, then I will be deported, excluded from admission to the U.S., and denied naturalization.
/M.D.C./

7e. I understand that my plea of Guilty or No Contest in this case could result in revocation of my probation or parole in other cases, and consecutive sentences.
/M.D.C./

7f. My attorney has explained to me that other possible consequences of this plea may be: (Circle applicable consequences.) /M.D.C./

(1) Consecutive sentences
(2) Loss of driving privileges
3 Commitment to Youth Authority
4 Registration as an arson / sex / narcotic / gang offender
(5) Cannot possess firearms or ammunition
(6) Blood test and saliva sample
(7) Priorable (increased punishment for future offenses)
(8) Prison prior
(9) Mandatory prison
10 Presumptive prison
11 Sexually Violent Predator Law
12 Possible/Mandatory hormone suppression treatment
(13) Reduced conduct credits
a Violent Felony (No credit or max. 15%)
(b) Prior Strike(s) (No credit to max. 20%)
c Murder on/after 6/3/98 (No credit)
14 Loss of public assistance
15 AIDS education program
16 Other: _____ /M.D.C./

OTHER WAIVERS

8. **(Appeal Rights)** I give up my right to appeal the following: 1) denial of my 1538.5 motion, 2) issues related to strikes priors (under PC sections 667(b)-(i) and 1170.12), and 3) any sentence stipulated herein. /M.D.C./

9. **(Harvey Waiver)** The sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence. /M.D.C./

10. **(Arbuckle Waiver)** I give up my right to be sentenced by the judge who accepts this plea.* /M.D.C./

11. **(Probation Report)** I give up my right to a full probation report before sentencing. /X/

PLEA

12. I now plead Guilty/No Contest and admit the charges, convictions and allegations described in paragraph #1,above. I admit that on the dates charged, I: *(Describe facts as to each charge and allegation)*

-was driving under the influence and ran off the road hitting a vehicle and person causing serious bodily injuries; and had possession of a gun after conviction of a felony. /M.D.C./

13. I declare under penalty of perjury that I have read, understood, and initialed each item above and any attached addendum, and everything on the form and any attached addendum is true and correct.

/M.D.C./

Dated: 12-8-05
Defendant's Signature /s/ Michael Daniel Cuero
Defendant's Address:
Street
City State Zip
Telephone Number: ( ) _____
/Defendant's Right Thumb Print/

ATTORNEY'S STATEMENT

I, the attorney for the defendant in the above-entitled case, personally read and explained to the defendant the entire contents of this plea form and any addendum thereto. I discussed all charges and possible defenses with the defendant, and the consequences of this plea, including any immigration consequences. I personally observed the defendant fill in and initial each item, or read and initial each item to acknowledge his/her understanding and waivers. I observed the defendant date and sign this form and any addendum. I concur in the defendant's plea and waiver of constitutional rights.

Dated: 12-8-05
(Print Name) Albert M. Tamayo
Attorney for Defendant (/s/ signature)
(Circle one: PD/APD/PCC/RETAINED)

INTERPRETER'S STATEMENT (If Applicable)

I, the sworn _____language interpreter in this proceeding, truly translated for the defendant the entire contents of this form and any attached addendum. The defendant indicated understanding of the contents of this form and any addendum and then initialed and signed the form and any addendum.

Dated: ____
(Print Name)
Court Interpreter
(Signature)

PROSECUTOR'S STATEMENT

The People of the State of California, plaintiff, by its attorney, the District Attorney for the County of San Diego, concurs with the defendant's plea of Guilty/No Contest as forth above.

Dated: 12-8-05
(Print Name) Mendes, Ronald
Deputy District Attorney (/s/ Signature)

COURT'S FINDING AND ORDER

This Court, having questioned the defendant and defendant's attorney concerning the defendant's plea of Guilty/No Contest and admissions of the prior convictions and allegations. If any, finds that: The defendant understands and voluntarily and intelligently waives his/her constitutional rights; the defendant's plea and admissions are freely and voluntarily made; the defendant understands the

nature of the charges and the consequences of the plea and admissions; and there is a actual basis for same. The Court accepts the defendants plea and admissions, and the defendant is convicted thereby.

Dated: 12-8-05

/s/ Charles W. Ervin
Judge of the Superior Court

APPENDIX B

Transcript of Plea Hearing
December 8, 2005

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO
EAST COUNTY DIVISION

DEPARTMENT 2
HON. CHARLES W. ERVIN, JUDGE

THE PEOPLE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL DANIEL CUERO

Defendant.

Case No. SCE255082

Reporter's Transcript
December 8, 2005
Pages 1 through 9

Appearances:

For the Plaintiff: Kristian Trocha,
Deputy District Attorney

For the Defendant: Alberto Tamayo
Deputy Public Defender

Toni Christy, RPR, CRR, CSR,
CSR Certificate No. 12159, Official Reporter,
El Cajon, California

El Cajon, California, December 8, 2005

THE BALIFF: Cuero.

THE COURT: Michael Cuero, change of plea.

MR. TAMAYO: That matter is ready. Albert Tamayo with Mr. Cuero.

MR. TROCHA: Kristian Trocha.

THE COURT: SCE 255082. In this case Mr. Cuero will be pleading guilty to?

MR. TAMAYO: Essentially it's the sheet without the Count 3 misdemeanor.

THE COURT: He's going to plead guilty to everything on the charging document with the exception of Count 3, the 11550 under the influence of a controlled substance, misdemeanor charge? So he's pleading guilty to Count 1, DUI, felony DUI, 23153(a); 12022(a)(1), possession of a firearm by a felony. He is admitting prior DUI conviction from 1997. He is admitting the 12022.7(a), great bodily injury on Mr. Jeffrey Feldman as a result of his collision in the felony DUI. He is admitting prison priors?

MR. TAMAYO: There's four.

THE COURT: Prison priors, '91, '94, '98 and '03 in cases 076, 125, 890 and 093 for burglary, auto theft, auto theft and possession of a controlled substance.

MR. TAMAYO: Strike prior for the first.

THE COURT: That's what I was looking at. He is also admitting a strike prior which is that res burg from 1991. He's admitting prison priors times four, a strike prior times one. He is pleading guilty to two felonies, the UI with a prior conviction for DUI and the GBI allegation, which is attendant to Count 1. Is that correct?

MR. TAMAYO: Yes.

THE COURT: It is a sentence for the Court, no deals with the People. His maximum exposure is 14 years, 4 months in state prison, 4 years on parole and a $10,000 fine. That's the most he could receive by way of this plea; true, Mr. Tamayo?

MR. TAMAYO: It is.

THE COURT: Mr. Trocha?

DAN RODRIGUEZ: Yes.

THE COURT: Mr. Cuero, raise your right hand to be sworn.

(Defendant is sworn.)

THE COURT: Thank you. Keep your voice up so I can hear your answers to my questions. If I say anything today that you don't understand, if I say something you're confused by, it's your obligation to stop me so I know that, and your attorney will explain it to you further. Do you understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Sir, what is your true, full and correct name?

THE DEFENDANT: Michael Daniel Cuero.

THE COURT: What is your date of birth?

THE DEFENDANT: 3/14/72.

THE COURT: Did you hear the plea agreement that I described?

THE DEFENDANT: Yes, I did.

THE COURT: Is it your full and complete understanding of the agreement to settle this case today?

THE DEFENDANT: Yes.

THE COURT: Is it what you wish to do?

THE DEFENDANT: Yes, I do.

THE COURT: Do you read write and understand the English language well?

THE DEFENDANT: I do.

THE COURT: Have you had any alcohol or drugs in the last 24 hours?

THE DEFENDANT: No.

THE COURT: You submitted two forms for me to review. The first is a three-page blue felony change of plea form, the other a Blakely Waiver. Did you read them?

THE DEFENDANT: Yes, I did.

THE COURT: Did you understand everything on them?

THE DEFENDANT: Yes.

THE COURT: Did your attorney thoroughly review them with you?

THE DEFENDANT: Yes, he did.

THE COURT: Did he answer any questions you might have had concerning them?

THE DEFENDANT: Yes.

THE COURT: To tell me he's done so, you read them and you understood them, lastly to tell me you wish to accept the agreement to this case, written on the blue form, and I read it to you a moment ago, assisted the by your attorney in this situation, did you sign your name to it?

THE DEFENDANT: Yes.

THE COURT: Place your initials in these boxes?

THE DEFENDANT: I did.

THE COURT: Did you put your thumb print on it?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about anything on it now?

THE DEFENDANT: No.

THE COURT: You need more time to talk to your lawyer or anyone else about your decision to plead guilty to these charges?

THE DEFENDANT: No.

THE COURT: In addition to the plea agreement, the document sets forth and describes constitutional rights that you enjoy. Rights that you must freely and voluntarily waive and give up so I can accept your guilty plea. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: Do you freely and voluntarily waive and give up those rights?

THE DEFENDANT: I do.

THE COURT: You have a right to a trial by jury to determine facts which could be considered by a sentencing judge as aggravating factors, increasing your sentence to the maximum term which is allowed by law. Do you waive and give up your right to a jury trial in that regard and agree to allow a judge to make that determination?

THE DEFENDANT: I do.

THE COURT: If law enforcement seized any property from you, if you want the property back do you acknowledge at this time that you must notify that agency in writing within sixty days that you do want it back or your ability to receive it will expire?

THE DEFENDANT: Yes.

THE COURT: Do you join in your client's waivers and acknowledgments?

MR. TAMAYO: I do.

THE COURT: Do you understand the maximum punishment you could receive for this conviction is 14 years, 4 months in prison, 4 years on parole and a $10,000 fine?

THE DEFENDANT: I do.

THE COURT: Are you satisfied, based on your discussions with your client, that he read and understood the forms submitted and the nature and consequences of his plea?

MR. TAMAYO: I do.

THE COURT: Before I accept your guilty plea, Mr. Cuero, do you have any questions about anything you're doing here today?

THE DEFENDANT: No.

THE COURT: Michael Daniel Cuero, in case CE255082, you're charged in Count 1 with a felony, offense driving while under the influence of alcohol or drugs, causing injury, with a prior conviction within the past ten years. To that charge, 23153(a) how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: In Count 2 you're charged with 12021(a)(1) possession of a firearm by a person previously convicted a felony. To that charge how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty because you were driving a motor vehicle at a time that you were under the influence of alcohol or drugs, and you ran off the road, hitting a vehicle and a person, causing serious bodily injury to that person. At the time you were also unlawfully in possession of a firearm having previously suffered a conviction for a felony offense?

THE DEFENDANT: Yes,·Your Honor.

THE COURT: And do you admit that previous conviction for driving while under the influence in case 561 occurring on or about May 5th, 1997?

THE DEFENDANT: Yes.

THE COURT: Do you admit you suffered previous convictions for which you served time in state prison in case ending in 076, 125, 890, 093, the first of which was a residential burglary occurring May 22nd, 1991?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The next for auto theft 10851, 11/15/1994?

THE DEFENDANT: Yes.

THE COURT: The next auto theft on or about December 18th, 1998?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The last for a possession of a controlled substance on or about July 31st, '03?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you admit that your first conviction in that regard, the residential burglary 459/460 of the California Penal Code Section is that which would commonly be referred to as a strike prior?

THE DEFENDANT: Yes, sir.

THE COURT: The Court finds the defendant to be in full possession of his faculties. There is a knowing and intent waiver of his rights, a sufficient

factual basis for his plea established. His not guilty plea is withdrawn. Guilty plea is received. Count 1, 23153(a); Count 2, 12021(a)(1), both felonies. The Court finds the defendant to have admitted the prior conviction for DUI in case ending in 561. The 12022.7(a) allegation of great bodily injury attendant to Count 1 is deemed admitted.

The Court further finds that each of the four prison priors in cases 076, 125, 890, 093 have all been admitted. The Court lastly finds that the first prison prior, case 096, that is a 459/460 allegation to have been admitted by way of it being a strike prior. People's motion as to the misdemeanor count, which is Count 3?

MR. TROCHA: Dismiss in light of the plea.

THE COURT: It is dismissed in light of the plea on the motion of the People. Sir, you have a right to be sentenced by me because I'm the judge that took your plea. Do you give up that right so that your sentencing may occur by any other judge of this court?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Arbuckle Waiver for the record. You have a right to be sentenced by me January 9th. Do you give up that right so your sentencing may occur January 11th, Wednesday?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Time waived personally, January 11th, two o'clock in this department.

Defendant to be held without bail, pending sentencing. DNA sample collection at the direction of the sheriff. Full probation report ordered.

(The proceedings were concluded.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL DANIEL CUERO,
Petitioner-Appellant,
v.
MATTHEW CATE,
Respondent-Appellee.

No. 12-55911
D.C. No. 3:08-cv-02008-BTM-WMC

ORDER

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted August 5, 2015
Pasadena, California

Filed March 8, 2017

Before: Diarmuid F. O'Scannlain,
Barry G. Silverman, and Kim McLane Wardlaw,
Circuit Judges.

Order;
Concurrence by Judge Wardlaw;
Dissent by Judge Callahan

SUMMARY*

Habeas Corpus

The panel denied a petition for panel rehearing and, on behalf of the court, a petition for rehearing en banc, in a case in which the panel reversed the district court's judgment denying California state prisoner Michael Daniel Cuero's 28 U.S.C. § 2254 habeas corpus petition and remanded with instructions to issue a conditional writ requiring the state to resentence Cuero in accordance with the original plea agreement within 60 days of the issuance of the mandate.

Concurring in the denial of rehearing en banc, Judge Wardlaw, joined by Judge Silverman, wrote that there is no need for the dissent's "sky is falling" rhetoric, as this is the rare case where the state court's decision was contrary to then-clearly established Supreme Court law governing guilty pleas induced by agreements with the prosecutor.

Judge Callahan, joined by Judges O'Scannlain, Tallman, Bybee, Bea, M. Smith, and Ikuta, dissented from the denial of rehearing en banc. She wrote that the three-judge panel decision is not based on clearly established federal law, as the Supreme Court has never held that the Due Process Clause precludes post-plea, pre-judgment amendments to a complaint; that the Supreme Court has never ordered the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

reinstatement of an alleged plea agreement that was not in effect at the time judgment was entered; and that such an exercise of raw federal judiciary power is exactly what the Antiterrorism and Effective Death Penalty Act prohibits.

COUNSEL

Devin Burstein (argued), Warren & Burstein, San Diego, California, for Petitioner-Appellant.

Anthony Da Silva (argued) and Matthew Mulford, Deputy Attorneys General; Julie L. Garland, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Kamala Harris, Attorney General of California; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

ORDER

Judges Silverman[1] and Wardlaw have voted to deny the petition for panel rehearing and rehearing en banc. Judge O'Scannlain has voted to grant the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the

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[1] Judge O'Scannlain and Judge Silverman both voted on the petition for rehearing en banc while they were in active status.

nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED.**

IT IS SO ORDERED.

WARDLAW, Circuit Judge, with whom SILVERMAN, Circuit Judge, joins, concurring in the denial of rehearing *en banc*:

The panel majority opinion speaks for itself. I respectfully suggest that there is no need for the dissent's "the sky is falling" rhetoric. This is the rare case where the state court's decision was contrary to then-clearly established Supreme Court law governing guilty pleas induced by agreements with the prosecutor. It is no wonder that a majority of our active judges declined to rehear this simple appeal en banc.

I.

On October 18, 2005, the San Diego County District Attorney's Office filed a criminal complaint against Cuero. The complaint, as amended, charged Cuero with two felonies, causing great bodily injury to another while driving under the influence and being a felon in possession of a firearm, as well as with a misdemeanor charge of being under the influence of a controlled substance. The state alleged, based on its review of Cuero's criminal history, that Cuero had a single strike for first-degree burglary and three additional prior convictions resulting in prison terms that did not constitute strikes.

Cuero and the prosecution reached a plea agreement, which they reduced to writing. Cuero would plead guilty to the two substantive felony counts listed in the first amended complaint and admit his four prior convictions. In exchange, the state would drop the misdemeanor charge from the complaint. This agreement represented a charge bargain only, not a sentence bargain.[1] As indicated on the plea agreement, the parties did not agree to a particular sentence, leaving sentencing to the court within the maximum statutory sentence of 14 years, 4 months of incarceration.

On December 8, 2005, Cuero pleaded guilty pursuant to the terms of the plea deal. During the change-of-plea proceeding, the court reviewed the plea agreement, signed by both defense counsel and the state prosecutor, and noted that the parties had left the "sentence for the Court" and that Cuero had made no sentencing deals "with the People." The court confirmed that Cuero had heard "the plea agreement that [the court] described," that it was his "full and complete understanding of the agreement to

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[1] Charge bargains "consist[] of an arrangement whereby the defendant and prosecutor agree that the defendant should be permitted to plead guilty to a charge less serious than is supported by the evidence." 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.1(a) (4th ed. 2016). Sentence bargains "involve[] an agreement whereby the defendant pleads . . . to the original charge[] in exchange for some kind of promise from the prosecutor concerning the sentence to be imposed." *Id.* In short, in a charge bargain the deal relates to the charges the prosecution will bring and to which the defendant will plead, while in a sentence bargain the parties reach an agreement over the prosecution's sentencing recommendation. This distinction is also reflected in Federal Rule of Criminal Procedure 11.

settle this case" and that he "wish[ed] to accept the agreement to this case." The judge also explained that "[i]n addition to the plea agreement," the document set forth the constitutional rights Cuero relinquished by pleading guilty.

Cuero fully performed his obligations under the plea bargain, pleading guilty and waiving his constitutional and other rights. The government then moved to dismiss the misdemeanor count "in light of the plea," carrying out its own obligation under the agreement. Once Cuero pleaded guilty to the relevant charges and the prosecution moved to drop the misdemeanor charge, the trial judge signed the court's "Finding and Order" accepting Cuero's plea and admissions and concluding that Cuero was "convicted thereby." The court scheduled sentencing for January 11, 2006.

While preparing for sentencing, the prosecution apparently concluded that another of Cuero's prior convictions constituted a strike. Though the prosecutor was previously aware of this conviction (as evidenced by the fact she charged it in the complaint to which Cuero had pleaded guilty pursuant to the plea deal), she did not initially notice that the prior conviction could be counted as a strike. Notwithstanding the written agreement "to settle this case" and Cuero's preexisting guilty plea and conviction, the prosecution moved to amend the complaint to add a second strike and two additional felony priors, drastically increasing Cuero's sentencing exposure from a maximum of 14 years, 4 months to a minimum of 25 years and a maximum of 64 years to life. A different Superior Court judge than the one who accepted the plea agreement and signed the conviction papers permitted, over defense

counsel's objection, the prosecutor to "amend" the charging document. Cuero, deprived of the benefit of his original bargain and having no other choice, entered into a new plea agreement exposing him to a maximum sentence of 25 years to life. On April 20, 2006, the new trial judge sentenced Cuero to 25 years to life.

II.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas petition may not be granted unless the state court's adjudication of the claim under review "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "[C]learly established Federal law under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (internal quotation marks omitted). At the time of the state court's decision, Supreme Court precedent clearly established that it was a violation of Michael Cuero's due process rights for the prosecution to seek to amend its complaint after Cuero entered a guilty plea induced by a plea agreement with the State. The trial judge's decision to allow the prosecution to amend the complaint after Cuero pleaded guilty and was convicted pursuant to the agreement thus violated clearly established Supreme Court law, satisfying AEDPA's requirements.

First, *Santobello v. New York* holds that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. 257, 262 (1971); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) ("[A] prosecutor's plea-bargaining promise must be kept."). *Santobello* stands for the proposition that "a criminal defendant has a due process right to enforce the terms of his plea agreement." *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc).[2]

Second, the Court in *Mabry v. Johnson* instructed us that a guilty plea entered pursuant to a plea agreement "implicates the Constitution." 467 U.S. 504, 507–08 (1984) ("A plea bargain standing alone is without constitutional significance . . . . It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here."); *see also Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. . . . [T]he court has nothing to do but give judgment and sentence."). My dissenting colleagues incorrectly claim that *Mabry* did not determine the point at which a defendant's due process right to enforce his plea agreement attaches. Yet the central issue in

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[2] This language from *Buckley* and other citations to circuit precedent in the panel majority opinion guided our analysis only "for the limited purpose of assessing what constitutes 'clearly established' Supreme Court law and whether the state court applied that law unreasonably." *Woods v. Sinclair*, 764 F.3d 1109, 1121 (9th Cir. 2014).

Mabry was whether due process concerns are implicated when a defendant accepts the prosecution's offer of a plea deal or only when the defendant pleads guilty in detrimental reliance on the plea agreement. *See Mabry*, 467 U.S. at 507–10. The core holding of *Mabry* is thus that a plea of guilty induced by a plea agreement triggers due process protection.

Together, these Supreme Court cases clearly establish that a defendant whose guilty plea was induced by a prosecutorial promise is constitutionally entitled to fulfillment of that promise and that a subsequent prosecutorial breach of the plea agreement violates the defendant's due process rights. Once Cuero fully performed his promise to plead guilty and the government moved to dismiss his misdemeanor charge, Cuero stood "convicted" pursuant to a "Finding and Order" signed by the judge. According to *Mabry*, at that point Cuero's plea agreement transformed from an "executory agreement" that did not "implicate[] the Constitution" to one that bore "constitutional significance" because Cuero's guilty plea and conviction were induced by the prosecutor's agreement to the reduced charges. 467 U.S. at 507–08. Cuero's plea rested on a promise of the prosecutor, requiring that promise to be "fulfilled." *Santobello*, 404 U.S. at 262. The plea bargain became a constitutionally enforceable agreement, and Cuero was entitled to have the prosecution carry out its end of the deal.

There is absolutely no support for the dissent's supposition that whether the Due Process Clause is implicated turns on whether the defendant has been sentenced and final judgment rendered. In fact, the

Supreme Court has held distinctly contrary to the dissent's view. In *Santobello*, the Supreme Court addressed the Due Process Clause's application to circumstances strikingly similar to Cuero's. At the point when the prosecution breached Santobello's plea agreement, a judgment setting forth the sentence had not been entered. The prosecution had promised in the pre-judgment plea agreement that it would not make a sentencing recommendation, and Santobello pleaded guilty in accordance with that agreement. 404 U.S. at 258–59. At sentencing, the government broke its promise by urging the court to adopt the maximum available sentence, one year. *Id.* at 259. The Supreme Court held that Santobello had a due process right to enforce the terms of his plea agreement, finding that the prosecutor breached the agreement and that "the adjudicative element inherent in *accepting a plea of guilty*" must contain safeguards to protect the rights of defendants, including the right to have a prosecutorial promise fulfilled when such promise was used to induce a guilty plea. *Id.* at 262 (emphasis added).

Defendants routinely promise pursuant to plea agreements both to plead guilty and to cooperate by testifying at a codefendant's trial. The defendant enters his plea, the plea is accepted by the court, but he is not sentenced until after he fully cooperates, and therefore a final judgment is not immediately entered. According to the dissent's analysis, because the defendant has not been convicted and final judgment has not been entered, an amendment of the charging document at that point would be constitutionally permissible. Yet it would be a clear violation of a defendant's due process rights to allow the prosecution to breach the agreement by seeking to amend the complaint or indictment at that stage,

once the defendant had already fully performed his end of the bargain by testifying against his codefendant. It therefore cannot be the case that due process rights do not attach until the defendant has already been sentenced and "final judgment" entered. The dissent's discussion of the distinction between a guilty plea and the entry of judgment (which carefully omits the fact of conviction following entry of a plea) is thus a distinction without a difference to our analysis.

Similarly, the dissent's argument that the original plea agreement "was not in effect at the time judgment was entered" and therefore lacks constitutional significance begs the question. The original plea deal was "in effect" when Cuero first pleaded guilty and was convicted pursuant to his plea. To the extent the agreement ceased to be "in effect," this was solely because in the interim the government was allowed to breach the agreement, leaving Cuero no choice but to plead a second time to a different complaint and be convicted once more. The dissent's argument reduces to the proposition that because the government breached the first plea agreement, Cuero's guilty plea and resulting conviction induced by that plea agreement did not implicate due process, creating a catch-22 for Cuero and like defendants. According to my dissenting colleagues, the due process right to enforce a plea agreement would apply only where the prosecutor had not previously breached it.

III.

The dissent similarly holds an alternative view of state law untethered to reality. California state law treats guilty pleas entered without the

inducement of a plea agreement with the State differently from those that are entered pursuant to a plea deal. Under California law, the rights of both parties to back out of the plea agreement terminated once Cuero entered his plea pursuant to the parties' agreement and was convicted. Cuero did not simply enter a plea that he could withdraw. The trial court "made the requisite factual findings and accepted the plea," *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003), and concluded that Cuero was "convicted thereby." Once the plea was accepted and Cuero was convicted, he could no longer withdraw his guilty plea absent good cause and an exercise of discretion by the court. Cal. Penal Code § 1018. Similarly, California Penal Code § 969.5, while allowing the prosecution to amend a complaint after the entry of guilty pleas without plea agreements, does not allow the prosecution to amend its complaint following a guilty plea that was induced by prosecutorial promises embedded in a plea agreement. Instead, under California law, "a prosecutor may withdraw from a plea bargain at any time *before* the defendant pleads guilty or otherwise detrimentally relies on that bargain." 3 B.E. Witkin et al., California Criminal Law § 382 (4th ed. 2012) (emphasis added); *see also People v. Superior Court (Alvarado)*, 255 Cal. Rptr. 46, 50–51 (Ct. App. 1989). California law does not permit amendment to the complaint when the guilty plea is entered in reliance on a plea agreement precisely because such an interpretation would run afoul of the due process protections that attach under those circumstances. The dissent is therefore wrong as a matter of state as well as constitutional law.

IV.

The dissent further misstates California law providing the requisite remedy for the prosecution's breach. As the dissent acknowledges, the Supreme Court has clearly established that "the construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *Ricketts v. Adamson*, 483 U.S. 1, 5 n.3 (1987). Moreover, both Supreme Court and California precedent provide that plea agreements are to be interpreted in accordance with state contract law. *See Puckett v. United States*, 556 U.S. 129, 137 (2009) ("[P]lea bargains are essentially contracts."); *People v. Segura*, 188 P.3d 649, 656 (Cal. 2008) ("A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." (quoting *People v. Ames*, 261 Cal. Rptr. 911, 913 (Ct. App. 1989))). "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." *People v. Shelton*, 125 P.3d 290, 294 (Cal. 2006).

By seeking to amend the complaint after Cuero waived all his rights, pleaded guilty and was convicted, the prosecution breached the fundamental promise it made to Cuero: The State agreed to drop a charge and thereby limit Cuero's maximum exposure to 14 years, 4 months incarceration. The foundation of a charge bargain is that the parties reach an agreement as to what the prosecution will and will not charge and to what the defendant will plead. *See* LaFave, *supra*, at § 21.1(a). By definition, a charge bargain means that the prosecution will not later add charges or strikes, just as the defendant will not plead to less than the agreed-upon charges and

strikes. The government's attempt to amend the complaint unequivocally breached its central promise to Cuero.[3]

"Where a plea agreement is breached, the purpose of the remedy is, to the extent possible, to repair the harm caused by the breach." *Buckley*, 441 F.3d at 699 (internal quotation marks omitted) (quoting *People v. Toscano*, 20 Cal. Rptr. 3d 923, 927 (Ct. App. 2004) (citing *People v. Kaanehe*, 559 P.2d 1028, 1036–37 (Cal. 1977))). California law calls for specific performance "when it will implement the

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[3] The dissent also argues that the state prosecutor made a mistake in the original plea agreement, which could entitle the prosecution to rescission. First, the state has never raised the issue of rescission based on mistake in the many years of briefing in this case, so the argument is waived. Second, there is no evidence that the state prosecutor's original promises under the first plea agreement arose from a "mistake." It is equally likely that the prosecution forewent additional legal research and investigation in order to secure a quick, favorable resolution of this case. Third, the government's putative "mistake" regarding whether Cuero's prior conviction constituted a strike under California law would have been a mistake of law, not a mistake of fact, and California law does not permit rescission of a contract based on a party's unilateral mistaken interpretation or application of the law. *See* Cal. Civ. Code §§ 1578, 1689(b)(1). Finally, even if the standard permitting rescission for certain unilateral mistakes of fact applied here, rescission is not available to a party whose mistake of fact was the result of its own negligence, *see* Cal. Civ. Code § 1577, as was the government's late "discovery" of Cuero's strike here: The government had access to all the information necessary to conclude that Cuero's second prior conviction constituted a strike, and its failure to do so before entering the plea agreement was exclusively the result of its own negligence at best or a calculated, though incorrect, decision at worst.

reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." *People v. Mancheno*, 654 P.2d 211, 215 (Cal. 1982). "When the breach [alleged] is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the prosecutor to fulfill the bargain and will be granted where there is a substantial possibility that specific performance will completely repair the harm caused by the prosecutor's breach." *People v. Timothy N.* (*In re Timothy N.*), 157 Cal. Rptr. 3d 78, 88 (Ct. App. 2013) (alteration in original) (internal quotation marks omitted) (quoting *Kaanehe*, 559 P.2d at 1036).

Here, the sole remedy available to implement Cuero's reasonable expectations was specific performance. "Permitting" Cuero to withdraw his guilty plea and plead guilty to the constitutionally defective amended complaint, the alternative remedy proposed, did not repair the harm caused by the breach; instead, it allowed the *prosecution* to achieve the precise outcome it sought in breaching the plea agreement. Protection of Cuero's due process rights therefore "leaves specific performance as the only viable remedy." *Brown*, 337 F.3d at 1161.

V.

Finally, the panel majority opinion has none of the broader implications my dissenting colleagues would ascribe to it. The opinion does not alter the existing dynamic between the prosecutor and the defendant. Prosecutors are already constitutionally required to uphold their end of plea agreements following the entry of a guilty plea and conviction, *see Santobello*, 404 U.S. at 262—a proposition that no

one can fairly find surprising. Neither party to a binding plea agreement is permitted to renege on that agreement because he may have entered it on the wrong assumptions. If the prosecution is troubled by its inability to breach a binding plea agreement if further information about a defendant's criminal history comes to light, contractual provisions can and do minimize that risk. Here, for example, the original plea agreement could have provided that if the state later learned that one of the charged priors qualified as a strike, the court could treat it as such for sentencing purposes. And contrary to my dissenting colleagues' contention, the panel majority opinion does not apply where the defendant misrepresents his identity or prior convictions and thereby fraudulently induces the government to enter a plea agreement that does not reflect his full criminal history. In this case, the government had access to accurate and adequate information about Cuero's prior convictions at the time of the original plea agreement and merely neglected to reflect his full criminal history in the original amended complaint.

It is only by abstracting to the highest level—noting that "plea agreements play an instrumental part in our criminal justice system"—that my dissenting colleagues can claim that this case impedes the administration of criminal justice in California. No one disputes that plea agreements are an "essential component of the administration of justice." *Santobello*, 404 U.S. at 260. Yet the majority opinion in no way interferes with the ability of the state to conduct plea negotiations and enter plea agreements. Indeed, it is the dissent's interpretation of the Due Process Clause and California Penal Code § 969.5—as enabling the prosecution to back out of charge bargains already accepted by the court and

fully performed by the defendant—that would undermine the stability of the plea bargaining system by rendering such bargains illusory and untrustworthy. If a prosecutor could unilaterally renege on a plea bargain that had been accepted by the court and fully performed by a defendant, defendants would likely lose faith in the plea bargaining system and would rationally require more substantial promises from the prosecution to secure their participation.

CALLAHAN, Circuit Judge, with whom O'SCANNLAIN, TALLMAN, BYBEE, BEA, M. SMITH, and IKUTA, Circuit Judges, join, dissenting from the denial of rehearing *en banc*:

For the second time in roughly as many weeks, we invite summary reversal by the Supreme Court in a state court habeas case.[1] The three-judge panel decision here is not based on clearly established federal law, as the Supreme Court has never held that the Due Process Clause precludes post-plea, pre-judgment amendments to a complaint. Nor has the Supreme Court ever ordered the reinstatement of an alleged plea agreement that was not in effect at the time judgment was entered. Such an exercise of raw federal judiciary power, though, is exactly what the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, prohibits. I respectfully dissent from our refusal to rehear this case *en banc*.

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[1] The other case we refused to rehear *en banc* was *Hardy v. Chappell*, 832 F.3d 1128 (9th Cir. 2016), *reh'g en banc denied*, — F.3d — (9th Cir. 2017).

I. BACKGROUND

On October 14, 2005, Michael Cuero ("Cuero") crashed his vehicle into Jeffrey Feldman, who was standing on the side of the road next to his parked pickup truck. At the time, Cuero did not have a valid driver's license, was under the influence of methamphetamine, and was on active parole for prior drug violations. Although the record is silent as to the injuries Cuero sustained from the crash, he maintained the wherewithal and physical ability to dispose of the 9mm semiautomatic pistol that he, as a felon, was unlawfully possessing. Feldman, on the other hand, was not so fortunate. He had to be airlifted to the nearest trauma center, where he immediately underwent emergency surgery and was put on life support. Among other things, Feldman suffered a severe brain injury, fractures to all the bones in his face, and a ruptured spleen. Feldman's prognosis was grim and his treating physicians believed he would never be able to work again.

A few days after the crash, the People filed its initial criminal complaint against Cuero. On October 28, 2005, the People filed an amended criminal complaint, alleging that Cuero: (1) inflicted serious bodily injury to Feldman while driving under the influence of alcohol or drugs and that he did so within ten years of a driving under the influence conviction, a felony; (2) possessed a firearm as a felon, a felony; and (3) was under the influence of a controlled substance, a misdemeanor. The People also alleged that Cuero had served four prior prison

terms[2] and that one of his prior convictions—for residential burglary—constituted a strike.

On December 8, 2005, Cuero pleaded guilty to inflicting serious bodily injury while driving under the influence and to unlawful possession of a firearm. Additionally, Cuero admitted that he had served four prior prison terms and that his residential burglary conviction was a strike. Following Cuero's plea, the Superior Court granted the People's motion to dismiss the remaining misdemeanor count. In light of his pleas and admissions, Cuero's maximum punitive exposure was 14 years, 4 months. It is not clear whether Cuero's plea was based on an agreement with the People; there is evidence that it was not.[3] There is no evidence, though, that the People agreed to recommend a particular sentence or to waive its ability to later amend the complaint to add a charge or strike.

In preparing the sentencing memorandum and upon further investigation, the prosecuting attorney discovered that Cuero had two additional serious felony convictions and an assault-with-a-deadly-weapon conviction that constituted yet another

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[2] For each prior prison term, an additional one-year, consecutive prison term is added. *See* Cal. Penal Code § 667.5(b).

[3] For instance, in response to the plea form's question of whether he had "been induced to enter [his] plea by any promise or representation of any kind," Cuero wrote: "STC–NO DEALS W/ THE PEOPLE." *See Cuero v. Cate*, 827 F.3d 879, 915 (9th Cir. 2016) (O'Scannlain, J., dissenting). Based on the judge's statements at the plea hearing, "STC" appears to stand for "sentence for the court." *Id.* at 901 n.7 (O'Scannlain, J., dissenting).

strike.[4] On January 11, 2006, pursuant to California Penal Code section 969.5,[5] the People filed a motion to amend the criminal complaint to add the two serious felony convictions and allege that Cuero's assault-with-a-deadly weapon conviction was an additional strike.[6] Cuero challenged the amendment, arguing that the Superior Court, exercising the discretion afforded to it by California Penal Code section 969.5, should deny the request because it was untimely and would prejudice him. However, Cuero did not contend that the requested amendment

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[4] Under California law, whether an assault-with-a-deadly-weapon conviction constitutes a strike is based on the conviction's underlying facts. *See, e.g.*, *People v. Winters*, 93 Cal. App. 4th 273, 280 (2001) (noting that not all assault-with-a-deadly-weapon convictions constitute a strike).

[5] California Penal Code section 969.5(a) 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. The defendant shall thereupon be arraigned before the court to which the complaint has been certified and shall be asked whether he or she has suffered the prior conviction. If the defendant enters a denial, his or her answer shall be entered in the minutes of the court. The refusal of the defendant to answer is equivalent to a denial that he or she has suffered the prior conviction.

[6] Each prior "serious felony" conviction adds a five-year enhancement to a defendant's sentence. Cal. Penal Code § 667(a)(1).

violated the Due Process Clause or California contract law.

Following a hearing on February 2, the Superior Court granted the People's request. The Superior Court based its decision on section 969.5's language and its belief that existing case law demonstrated that an increase in exposure due to an amendment does not impact a defendant's substantial rights. After announcing its decision, the Superior Court asked Cuero if he wished to withdraw his plea. Cuero responded by requesting time to make his determination, which the Superior Court afforded him. Thereafter, the People filed a second amended complaint, which raised Cuero's possible exposure to a sentence of 64 years to life.

Sometime during the next month and a half, Cuero reached an agreement with the People. In exchange for Cuero pleading guilty to inflicting great bodily injury to Feldman while driving under the influence of a drug and admitting the alleged two prior strikes, the People agreed to withdraw the second amended complaint and charge Cuero with only inflicting great bodily injury to Feldman while driving under the influence of a drug and having two prior strikes, which had the effect of dramatically reducing Cuero's exposure.

At the change-of-plea hearing held on March 27, 2006, the People filed a third amended complaint ("TAC") reflecting these changes. Cuero withdrew his previous guilty plea and pleaded guilty to the TAC's single charge. Cuero also admitted to the two prior strikes contained in the TAC and stipulated to a 25-years-to-life sentence.

The sentencing hearing was held on April 20, 2006. At no point leading up to it did Cuero attempt to withdraw from his plea or ask the Superior Court to exercise its discretion and sentence him to less than 25 years to life, which he could have done.[7] The Superior Court sentenced Cuero to what it had said it would—25 years to life.

On direct appeal, Cuero's counsel filed a *Wende* brief[8] and asked the California Court of Appeal to review the record for error. Specifically, counsel directed the appellate court's attention to the "possible but not arguable issue[]" of "whether the [People's] amendment violated the terms of the earlier plea agreement in violation of due process." The appellate court afforded Cuero the opportunity to file a separate brief, but Cuero chose not to do so. After "review[ing] the entire record," on March 21, 2007, the Court of Appeal found that there was "no reasonably arguable appellate issue" and affirmed the Superior Court.

Thereafter, Cuero petitioned for habeas relief in the Superior Court, California Court of Appeal, and California Supreme Court, all of which denied Cuero's request for relief. Cuero then filed a federal habeas petition in the District Court, which was also denied and serves as the basis for this appeal.

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[7] As noted in *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 504, 529–30 (1996), pursuant to California Penal Code section 1385(a), a trial court may dismiss a strike if it is in furtherance of justice.

[8] A *Wende* brief, named after *People v. Wende*, 25 Cal. 3d 436 (1979), is similar to a brief filed in federal court pursuant to *Anders v. California*, 386 U.S. 738 (1967).

II. DISCUSSION

A federal habeas petition challenging state custody shall be denied "unless the [state court's] adjudication of the claim[] resulted in a decision that was 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) (emphasis added). "A decision is 'contrary to' Supreme Court precedent where 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Jones v. Harrington*, 829 F.3d 1128, 1135 (9th Cir. 2016) (alterations in original omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). "A state court unreasonably applies clearly established federal law if it 'identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case.'" *Id.* (alterations in original omitted) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014)). State court decisions are to be measured "against [the Supreme Court's] precedents *as of 'the time the state court renders its decision*.'" *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (emphasis in original) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)).

The majority finds that the Superior Court's approval of the People's request to amend was both contrary to and an unreasonable application of

clearly established law.[9] *Cuero v. Cate*, 827 F.3d 879, 883 (9th Cir. 2016). In reaching this erroneous conclusion, the majority goes beyond the scope of what Supreme Court precedent instructs. Rather than interpret "clearly established Federal law, as determined by the Supreme Court of the United States," the majority gives the Due Process Clause an overbroad and unprecedented interpretation that intrudes upon the just and orderly administration of justice in California and other states within the Ninth Circuit.

A. The Superior Court's approval of the People's requested amendment was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

First, the Supreme Court has never held that the Due Process Clause prevents a state prosecutor from amending a criminal complaint post-plea, pre-judgment. Second, California Penal Code sections 969.5, 1009, and 1192.5 specifically allow for post-plea amendments of complaints, and no California court has limited any of the section's application to instances where a defendant pleaded without an agreement. Third, the Supreme Court has never held that specific performance is the only remedy for alleged violations of the Due Process Clause during the plea bargaining process or that federal appellate courts, as opposed to state courts, should fashion the

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[9] In light of its finding that habeas relief was warranted based on the People's court-approved amendment, the majority did not address Cuero's ineffective assistance of counsel claim. *See Cuero*, 827 F.3d at 883 n.4.

remedy for any such violation. In fact, it has held the opposite.

1. Supreme Court precedent does not clearly establish that the People's post-plea, prejudgment amendment implicates the Due Process Clause.

The majority claims that "a guilty plea seals the deal between the state and the defendant, and vests the defendant with a due process right to enforce the terms of his plea agreement." *Cuero*, 827 F.3d at 885 (internal quotation marks omitted). But—as the majority's citation of only three Ninth Circuit cases reveals—the Supreme Court has never applied the Due Process Clause to a plea agreement that was not in effect at the time judgment was entered.[10] Thus, even assuming that Cuero's initial guilty plea was pursuant to a plea agreement, there is no basis to conclude that the Superior Court acted contrary to or unreasonably applied clearly established Supreme Court precedent by exercising its statutorily-based authority and approving the People's request to amend the complaint. *See, e.g.*, *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (stating that precedent

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[10] While the language in some of our opinions may support the majority's conclusion, it is the Supreme Court's precedent, not ours, that matters here. *See, e.g.*, *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) (noting that the Supreme Court has "repeatedly emphasized [that] circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court" (internal quotation marks omitted)).

must address "the specific question presented by th[e] case").

In its conclusion, the majority states that, "[b]y allowing the prosecution to breach the agreement, reneging on the promise that induced Cuero's plea, the state court violated federal law clearly established by the Supreme Court in *Santobello* [*v. New York*, 404 U.S. 257 (1971)]." *Cuero*, 827 F.3d at 891. However, *Santobello* is clearly distinguishable. There, the defendant agreed to plead guilty in exchange for the government's explicit promise not to make a sentence recommendation. 404 U.S. at 258. Following the *Santobello* defendant's guilty plea, though, the government violated the parties' agreement by asking for the maximum possible sentence. *Id.* at 259. Significantly, unlike Cuero, the defendant in *Santobello* was never afforded the opportunity to back out of the parties' agreement and withdraw his plea. *Id.* at 263. Therefore, at the time judgment was entered, the defendant in *Santobello* remained bound by the agreement he had reached with the government, despite the government's breach. *Santobello* thus does not address the specific question in this case—does the Due Process Clause apply to an alleged plea agreement that is withdrawn before judgment is entered—and therefore cannot serve as a basis for habeas relief. *See Lopez*, 135 S. Ct. at 4.

Mabry v. Johnson, 467 U.S. 504 (1984), *overruled in part by Puckett v. United States*, 556 U.S. 129 (2009), also cannot serve as a basis for habeas relief. There, the Supreme Court stated:

> A plea bargain standing alone is without constitutional significance; in itself it is

> a mere executory agreement which, *until embodied in the judgment of a court*, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

467 U.S. at 507–08 (emphasis added) (footnote omitted). *Mabry* thus identifies two points at which due process rights may possibly attach in this context: (1) the entry of a plea, or (2) the entry of judgment. Notably, though, *Mabry* did not actually decide the issue because the government had withdrawn the plea agreement the defendant sought to enforce before the defendant entered a plea pursuant to it. *Id.* at 506.

In the thirty-plus years since *Mabry*, the Supreme Court has not addressed the Due Process Clause's application to a pre-judgment plea agreement. As a result, the "precise contours" of a defendant's due process rights in the plea agreement context "remain unclear." *White*, 134 S. Ct. at 1705 (quoting *Lockyer*, 538 U.S. at 75–76). Therefore, at an absolute minimum, reasonable minds could disagree about whether the Due Process Clause covers pre-judgment plea agreements, particularly those that have been withdrawn or are not in effect at the time of judgment. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("A state court's determination that a claim lacks merit precludes habeas relief so long as 'fairminded jurists could disagree' on the correctness

of the state court's decision." (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).

Contrary to the majority's indication, there is a significant difference between the entry of a guilty plea and the entry of judgment. Far from a perfunctory step, the entry of judgment constitutes a significant milestone in a prosecution. Among other possible things, the entry of judgment dramatically reduces a defendant's ability to withdraw his guilty plea and exercise his constitutional right to trial. *See* Cal. Penal Code § 1018.[11] In short, the entry of judgment provides a finality that does not exist when a defendant simply offers to plead. Until judgment is entered, the defendant may withdraw his plea or the trial judge may withdraw approval. This distinction further confirms the reasonableness of the belief that the Due Process Clause attaches only after judgment is entered.

Under California law, "[i]n a criminal case, judgment is rendered when the trial court orally pronounces sentence." *People v. Karaman*, 4 Cal. 4th 335, 344 n.9 (1992); *accord People v. Mendoza*, 171 Cal. App. 4th 1142, 1150 (2009). Therefore, while a guilty plea is certainly a stop along the path to a judgment, it is not the final destination, as it does not include a sentence pronouncement. *See, e.g.*, Cal. Penal Code § 1191 (stating that, "in a felony case,

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[11] The imposition of a sentence or entry of judgment has a similar effect in other states within the Ninth Circuit. *See, e.g.*, Alaska R. Crim. P. 11(e); Haw. R. Penal P. 32(d); Idaho Crim. R. 33(c); Nev. Rev. Stat. Ann. § 176.165; Or. Rev. Stat. Ann. § 135.365.

after a plea, . . . the court shall appoint a time for pronouncing judgment"). Here, it is undisputed that, at the time the People sought and received permission to amend its complaint, no sentence had been announced, and, thus, no judgment had been entered. As a result, even if there was an initial plea agreement and the People's amendment violated it, a reasonable judge could find that the state courts here did not act contrary to, or unreasonably apply, clearly established federal law by allowing the amendment because no Supreme Court case has applied the Due Process Clause to a situation like the one presented here.

The fact that the Superior Court or California Court of Appeal might have extended the Due Process Clause to cover Cuero's alleged initial plea agreement does not mean that their failure to do so amounts to an unreasonable application of federal law. *See, e.g.*, *White*, 134 S. Ct. at 1706 (stating that AEDPA "does not require state courts to *extend* [the Supreme Court's] precedent or license federal courts to treat the failure to do so as error"). Simply put, Supreme Court precedent does not "squarely establish[]" that the Due Process Clause applies to pre-judgment plea agreements. *Id.* Therefore, it is not "so obvious that a clearly established rule applies to [this case] that there could be no fairminded disagreement on the question," as is needed for relief under AEDPA. *Id.* at 1706–07 (internal quotation marks omitted).

2. The People's post-plea, pre-judgment amendment to the criminal complaint did not violate the Due Process Clause.

Assuming, arguendo, that there was an initial plea agreement and that the Due Process Clause applied to it, there is no due process violation. "[T]he construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *Ricketts v. Adamson*, 483 U.S. 1, 5 n.3 (1987). To reiterate, California Penal Code section 969.5(a) states, in relevant part:

> 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.[12]

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[12] In the last sentence of footnote 12, the majority states that, "[i]n any event, the state *did* charge 'all prior felonies of which [Cuero] ha[d] been convicted' in the original complaint—it simply did not charge Cuero's felony assault conviction as a *strike*." *Cuero*, 827 F.3d at 889 n.12 (alterations in original). Presumably, this statement was intended to imply that section 969.5 is not applicable in this case. There is a good reason the majority buried this statement in a footnote—it has no support. Nothing in existing case law suggests that section 969.5 does not apply to a strike, which is, after all, a felony. Further, the (continued…)

Additionally, California Penal Code section 1009 declares that the trial court "may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings." Also, California Penal Code section 1192.5 provides that, following a defendant's guilty plea, a trial court retains the ability to "withdraw its approval [of the plea] in light of further consideration of the matter." Prior to pleading, a defendant is made aware of this ability. *See* Cal. Penal Code § 1192.5.

No California state court has held that sections 969.5, 1009, and 1192.5 are inapplicable in cases where a defendant pleads pursuant to a plea agreement reached with the People. *See People v. Lettice*, 221 Cal. App. 4th 139, 150 n.12 (2013) ("Neither the [*People v. Valladoli*, 13 Cal. 4th 590 (1996),] court, nor any other court of which we are aware, has considered whether the People may file an amended information after having entered into a plea agreement to resolve the case."). Therefore, based on the sections' plain language, a complaint may be amended post plea if the People seek and receive approval from the trial court to do so. *Cf. People v. Superior Court (Alvarado)*, 207 Cal. App. 3d 464, 478 (1989) (noting that trial courts have the discretion to amend a complaint to "allege a prior

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California Court of Appeal has affirmed amendments to add strikes under California Penal Code section 969a, which employs the same "does not charge all prior felonies of which the defendant has been convicted" language. *See, e.g.*, *People v. Sandoval*, 140 Cal. App. 4th 111, 132–34 (2006). Thus, section 969.5 clearly applies here.

felony conviction after a guilty plea has been entered by the accused [under section 969.5]").

Here, California's amendment process was followed: the People filed a motion to amend, the Superior Court held a hearing on the motion, and, after determining that the requested amendment would not unfairly prejudice Cuero's substantial rights, the Superior Court granted the People's request and an amended complaint was filed. Furthermore, the Superior Court allowed Cuero to withdraw his initial plea, which was purportedly based on an earlier plea agreement. As a result, the People's amendment is consistent with state law and did not violate the Due Process Clause.

Recognizing that California criminal procedure law cannot get them to where they want to go, the majority shifts its focus to California contract law. *See Cuero*, 827 F.3d at 885–91. However, the majority's reliance on this body of law is misplaced for two reasons: first, the Supreme Court has never construed the phrase "matters of state law" to mean just "matters of state contract law"; and second, even if it had, in this case, the Superior Court's approval of the People's request to amend is not clearly inconsistent with that body of law.[13]

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[13] In addition, federal habeas corpus jurisdiction does not extend to alleged violations of state law. *See, e.g.*, *Guzman v. Morris*, 644 F.2d 1295, 1297 (9th Cir. 1981); 28 U.S.C. § 2254(a).

i. The Supreme Court has never said that "matters of state law" means "matters of state contract law," thus, the Superior Court was not bound to apply woodenly California contract law.

The majority takes the Superior Court to task for not explicitly discussing the interplay between the California Penal Code and California contract law. *Id.* at 889–90. But why would it? Cuero did not raise any arguments under California contract law and neither the Supreme Court nor the California appellate courts have required its consideration. It is true that a number of cases have stated that California contract law generally applies to plea agreements. *See id. a*t 888 (collecting cases). "Generally speaking," though, has no place in the AEDPA lexicon. *See, e.g.*, *Lopez*, 135 S. Ct. at 4 ("We have before cautioned the lower courts—and the Ninth Circuit in particular—against 'framing our precedents at such a high level of generality.'" (quoting *Neveda v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam))). The precedent relied upon under AEDPA must address "the specific question presented by this case," *id.*, which here is: does state contract law eliminate a prosecutor's statutory ability to amend a criminal complaint after a defendant has allegedly pleaded pursuant to a plea agreement, but before judgment has been entered. No Supreme Court or California appellate court precedent answers this question.

Undeterred, the majority turns to our own precedent, specifically, *Davis v. Woodford*, 446 F.3d 957 (9th Cir. 2006), and *Buckley v. Terhune*, 441 F.3d 688 (9th Cir. 2006) (en banc). *See Cuero*, 827 F.3d at 888–89. But *Davis* and *Buckley* were decided after

the Superior Court approved the People's amendment and are not Supreme Court opinions. As the Supreme Court has made clear, "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.'" *Lopez*, 135 S. Ct. at 4 (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam)). Thus, the Superior Court was not bound to apply woodenly state contract law, but rather, as *Ricketts* instructs, could consider any relevant state law. *Ricketts*, 483 U.S. at 5 n.3.

The Superior Court's approval of the People's request to amend is consistent with state law. First, the language in sections 969.5, 1009, and 1192.5 is broad and neither the California Supreme Court nor the California Court of Appeal has narrowed it. Second, existing California law evinces a strong desire that repeat felony offenders receive "longer prison sentences and greater punishment." Cal. Penal Code § 667(b). Third, California law strongly disfavors prosecutors dismissing or not charging all of a defendant's strikes, allowing for such action to occur only when it is "in the furtherance of justice" or when there is insufficient evidence to prove the strike. *See* Cal. Penal Code § 667(f)(1).[14]

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[14] Section 667(f) specifically refers to "serious and/or violent felony convictions." However, as subsequent case law makes clear, a "serious and/or violent felony conviction" under section 667(f) constitutes a strike. *See, e.g.*, *People v. Acosta*, 29 Cal. 4th 105, 111 (2002) ("Each of these crimes is either a 'serious felony' . . . or a 'violent felony' . . . and therefore is a strike under the Three Strikes law."). Because the terms are interchangeable, and for the sake of clarity, this dissental uses

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In light of sections 969.5, 1009, and 1192.5, California contract law is not controlling. Again, no California case has ever held that state contract law limits the application of sections 969.5, 1009, and 1192.5. Furthermore, to the extent sections 969.5, 1009, and 1192.5 are inconsistent with state contract law in allowing the People to amend the complaint, those statutory provisions should govern because they speak more directly to the situation faced by the Superior Court. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the specific governs the general." (alteration in original omitted) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992))); *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

ii. Even if state contract law had a role to play in the analysis, a reasonable judge could conclude that the People's amendment was permissible.

Although not stated, it is clear that the majority essentially viewed the People's amendment as a rescission of the alleged initial plea agreement. Under California law, a party to a contract may rescind a contract if the party's consent was given by

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(…continued)
the word "strike," as opposed to the phrase "serious and/or violent felony conviction," when discussing section 667(f).

mistake.[15] *See* Cal. Civ. Code § 1689(b)(1). To claim rescission, the mistaken party must show that:

> (1) [he] made a mistake regarding a basic assumption upon which [he] made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to [him]; (3) [he] does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable.

Donovan v. RRL Corp., 26 Cal. 4th 261, 282 (2001). Here, there is no doubt that the People would not have entered into the alleged initial plea agreement with Cuero had it known that a second prior conviction constituted a strike. Further, if the People's mistake remained uncorrected, Cuero would have received a windfall—14 years rather than facing a maximum of 64 years to life. Therefore, factors one and two are clearly satisfied.

A reasonable judge could also conclude factors three and four were satisfied. As recently noted by the California Court of Appeal in *Amin v. Superior Court*, 237 Cal. App. 4th 1392, 1405 (2015), "there is

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[15] The People's briefing did not address how its amendment is consistent with state contract law. Nonetheless, we have an independent duty to ask "what arguments or theories . . . could have supported[] the state court's decision; and then [] ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e] [Supreme] Court." *Harrington*, 562 U.S. at 102.

a dearth of cases in California" regarding whether a plea agreement is rescindable due to a prosecutor's unilateral mistake. While the majority in *Amin* concluded that the People failed to establish that factors three and four were satisfied, *see* 237 Cal. App. 4th at 1400–07, the dissent disagreed, *id.* at 1411–15. For purposes of Cuero's appeal, *Amin* is significant for two reasons. First, it shows that, even as of 2015, California courts had not conclusively decided how mistake-of-fact rescission applied in the plea agreement context. Second, the disagreement between the majority and dissent demonstrates that reasonable judges could disagree about the issue, even years after the conclusion of Cuero's state court proceedings. Thus, the state courts here could have reasonably found that the alleged initial plea agreement could be rescinded.

Despite the majority's intimation to the contrary, the alleged rescission in this case did not occur past the point of no return. The People could still be disgorged of the benefit received—Cuero's waiver of his right to trial—and the proverbial "coin" Cuero had paid could be refunded to him in full. Stated differently, the initial plea could be unwound and the parties returned to the exact same position they occupied prior to the plea being entered, as the prosecutor had argued at the hearing on the motion to amend. Thus, this case is unlike those where a defendant, pursuant to a plea agreement, testifies against another at trial or cooperates with law enforcement in some meaningful way. As a result, a reasonable judge could conclude that the alleged rescission here was permissible. *See, e.g.*, *NMSBPCSLDHB v. County of Fresno*, 152 Cal. App. 4th 954, 959–60 (2007) (stating that rescission "requir[es] each [party] to return whatever

consideration has been received" (quoting *Imperial Cas. & Indem. Co. v. Sogomonian*, 198 Cal. App. 3d 169, 184 (1988))).

3. Even if Cuero's due process rights were violated, Supreme Court precedent does not require specific performance.

The majority concludes that the "Superior Court also unreasonably applied clearly established federal law by failing to order specific performance of Cuero's [initial] plea agreement." *Cuero*, 827 F.3d at 890. Again, this conclusion finds no support in existing Supreme Court precedent. In fact, it is clearly inconsistent with the Supreme Court's declaration that the decision of whether to grant a defendant specific performance or to allow him to withdraw from his plea is a decision best left to the "discretion of the state court, which is in a better position to decide [what relief is warranted]." *Santobello*, 404 U.S. at 263.

In addition to being wrong on the law, the majority ignores the fact that allowing Cuero to withdraw his plea placed him in the exact same position he was in prior to entering into the alleged initial plea agreement, which distinguishes this case from those cited by the majority. *See Cuero*, 827 F.3d at 890–91.[16] California contract law merely requires

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[16] The three cases cited by the majority in which specific performance was ordered involved defendants who, in reliance on their plea agreements, took actions that could not be undone. *See Buckley*, 441 F.3d 688 (testifying against codefendants); *Brown v. Poole*, 337 F.3d 1155 (9th Cir. 2003) (serving as a (continued…)

that the non-breaching party be made whole. Here, pursuant to the alleged initial plea agreement, Cuero gave up his right to trial, but he received that right back when the Superior Court approved the People's request to amend.

It is true that Cuero was deprived of receiving an unlawfully generous sentence, but this is of no moment. California law did not clearly establish that, under these circumstances, a defendant is entitled to re-acquire something he should have never gotten in the first place; instead, it indicated just the opposite. *See Alvarado*, 207 Cal. App. 3d at 477 ("Although probation ineligibility is prejudicial in the sense that Alvarado would rather it not be alleged, the allegation here does not cause prejudice to Alvarado's substantial rights. In fact, the amendment merely places Alvarado in the position he should have been in at the time of his arraignment in municipal court had he not used an alias and entered an immediate guilty plea under section 859a."). A reasonable judge might well conclude that the appropriate remedy in this case was to allow Cuero to withdraw from his initial plea rather than order the People to perform specifically the alleged initial plea agreement.

In sum, following the People's motion to amend the complaint, the Superior Court held a hearing, considered Cuero's opposition to the motion, and, exercising its statutorily given authority, determined that the People's motion should be granted. Further,

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(…continued)
model inmate during her first few years in confinement); *In re Timothy N.*, 216 Cal. App. 4th 725 (2013) (successfully completing probation).

after making this determination, the Superior Court afforded Cuero the opportunity to withdraw from his plea, of which he took advantage. Nothing in this sequence of events is inconsistent with state law or established Supreme Court precedent. As a result, there is no due process violation, the Superior Court did not err, and Cuero is not entitled to habeas relief.

B. The majority's opinion intrudes upon the just and orderly administration of justice in California and possibly other states within the Ninth Circuit.

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that [federal courts] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina v. California*, 505 U.S. 437, 445 (1992) (citation omitted) (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). Accordingly, federal courts may use the Due Process Clause to override a state's prescribed criminal procedure only when the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (quoting *Patterson*, 432 U.S. at 202).

Today, plea agreements play an instrumental part in our criminal justice system. *See Santobello*, 404 U.S. at 261; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). The majority appears blind to the practical implications of its ruling. Due to speedy trial concerns, as well as

others, plea negotiations often begin immediately and a prosecutor may have less-than-complete or unclear information. In hopes of covering his sordid record, a defendant may use an alias or be less than forthcoming about his criminal history. Further, reports from the FBI, state and local law enforcement authorities, and presentence investigators may not be available. *Cf. Thompson v. Superior Court*, 91 Cal. App. 4th 144, 156 (2001) ("At the time of the preliminary hearing, the defendant's prior convictions may not be fully known to the People, especially if the defendant has used one or more aliases, or has suffered convictions in other states."). As a result, mistakes are bound to occur. Though we undoubtedly want state prosecutors to follow through with agreements they enter into, we should not impede their need to revive those agreements upon the discovery of additional information unless and until the Supreme Court clearly establishes that we may do so in the specific circumstances here. *See Medina*, 505 U.S. at 445; *see also Mabry*, 467 U.S. at 511 ("The Due Process Clause is not a code of ethics for prosecutors[.]").

The majority's ruling substantially interferes with California's criminal justice system. California law requires prosecutors to charge a defendant's prior serious and violent felonies, i.e., strikes. Without the safety valve created by California Penal Code sections 969.5, 1009, and 1192.5, prosecutors will be forced to choose between (a) pressing ahead with imperfect information and risk potentially violating California law and (b) refusing to negotiate until complete information is received, potentially freeing dangerous individuals and taking to trial cases they otherwise would not. While Supreme Court precedent sometimes creates Hobson-like

choices for law enforcement personnel, it has not done so in this particular context and one should not be foisted onto prosecutors within the Ninth Circuit.

III. CONCLUSION

If past behavior is any indication of future behavior, Michael Cuero is well on his way to serving a life sentence on an installment plan. Unfortunately, each new installment likely means that Cuero has victimized yet another person whose life, like Jeffrey Feldman's, will never be the same. The true injustice here is that Cuero will not have to serve the sentence that the Superior Court legally imposed. In failing to follow the Supreme Court's direction to defer to the state court's reasonable determination, the majority has not only deprived Jeffrey Feldman and his family of the justice to which they are entitled, but has also stripped California of a tool used to ensure that criminal defendants receive sentences that are commensurate with all of the offenses they have committed. Such meddling by a federal court in a state's criminal justice process should only occur when required by clearly established Supreme Court precedent. Because no such precedent exists here, I respectfully dissent from our refusal to rehear this case *en banc*.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL DANIEL CUERO,
Petitioner,
vs.
MATTHEW CATE, Secretary,
Respondent.

Civil No. 08cv2008-BTM (WMc)

ORDER:

(1) ADOPTING THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE;

(2) DENYING PETITION FOR WRIT OF HABEAS CORPUS; and

(3) ISSUING A CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Petitioner entered a negotiated guilty plea in the San Diego County Superior Court which resulted in his conviction for causing great bodily injury while operating a motor vehicle under the influence of alcohol or drugs. (Pet. at 1-2.) Petitioner was sentenced to twenty-five years-to-life in state prison under California's Three Strikes law as a result of a prior conviction for residential burglary and a prior conviction for assault with a deadly weapon. People v. Cuero, 2007 WL

841757 at *1 (Cal.App.Ct. Mar. 21, 2007) (unpublished memorandum). Petitioner alleges here that he received ineffective assistance of trial and appellate counsel, that his plea agreement was violated, and that his sentence was unlawfully enhanced by the prior felony convictions. (Pet. at 6-8.)

Respondent filed an Answer to the Petition contending that Petitioner failed to state a colorable claim of ineffective assistance of counsel, that his plea agreement has not been violated, and that his sentence was properly enhanced. (EFC No. 35.) Petitioner responded with a Traverse in which he apparently attempts to present new claims based on the same facts which support the claims raised in the Petition, relating to allegations of ineffective assistance of counsel, use of his prior convictions to enhance his sentence, and the prosecutor's actions in connection to the plea agreement. (EFC No. 41.) In particular, he contends that there was insufficient evidence to support using the prior convictions to enhance his sentence, and that their use violated ex post facto principles, constituted prosecutorial misconduct, and violated the principles discussed in Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham v. California, 549 U.S. 270 (2007). (Traverse at 5-11.)

Presently before the Court is a Report and Recommendation ("R&R") submitted by United States Magistrate Judge William McCurine, Jr. (ECF No. 42.) The Magistrate Judge found that the claims raised in the Petition are insufficiently meritorious to warrant federal habeas relief, and recommended denying the Petition and declining to exercise the

Court's discretion to address any new claims raised in the Traverse. (R&R at 2 n.1, 4-14.) Petitioner has filed Objections to the R&R in which he again attempts to present new claims arising from the same facts supporting his Petition claims. (EFC No. 45.) Specifically, he contends that he was improperly charged and prosecuted, his prior convictions were improperly used to enhance his sentence, and that his trial attorney was deficient in failing to object to improper procedures and failing to utilize proper procedures. (Obj. at 2-14.)

The Court has reviewed the R&R and Petitioner's Objections pursuant to 28 U.S.C. § 636(b)(1), which provides that: "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

The Court has reviewed those portions of the R&R to which Petitioner has objected and, based on a de novo review, **ADOPTS** the findings and conclusions of the Magistrate Judge. The Court **DENIES** the Petition for a Writ of Habeas Corpus for the reasons set forth in the R&R. To the extent there are new claims raised in the Traverse or in Petitioner's Objections to the R&R, they merely rely on the factual predicate of the claims presented in the Petition which the Magistrate Judge correctly found to be without merit, and the Court exercises its discretion and declines to address such claims. See Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002) (holding that district court has discretion whether to

consider evidence presented for the first time in objections to an R&R); see also Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (stating that court may ignore issue raised for first time in traverse when scope of traverse has been specifically limited by court order and petitioner ignores order to file a separate pleading indicating intent to raise claim). The Court issues a Certificate of Appealability as to all claims raised in the petition.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

DATED: April 25, 2012

/s/ BARRY TED MOSKOWITZ
BARRY TED MOSKOWITZ, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL DANIEL CUERO,
Petitioner,
vs.
MATTHEW CATE,
Respondent.

CASE NO. 08cv2008 BTM (WMc)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS AND ORDER DENYING EVIDENTIARY HEARING

I.
INTRODUCTION

Michael Daniel Cuero (hereinafter "Cuero" or "Petitioner"), a California state prisoner proceeding *pro se* and *in forma pauperis*, filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 29, 2008. (Doc. No. 1.) In his petition, Cuero claims he is entitled to federal habeas relief because: (1) he was provided ineffective assistance of counsel by his trial and appellate attorneys; (2) his negotiated plea agreement was violated by the trial court; and (3) his sentence was

unlawfully enhanced by prior convictions. Petitioner also requests an evidentiary hearing. (*Id*.)

Respondent Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, has filed an answer. (Doc. No. 35.) Respondent contends the petition should be denied because: (1) Cuero has failed to state a colorable claim of ineffective assistance of counsel; (2) Cuero's plea agreement was not violated; and (3) Cuero's sentence was correctly enhanced by his prior convictions. (*Id*.)

Cuero subsequently filed a traverse to Respondent's answer, where he recites the allegations contained in the petition.[1] (Doc. No. 41.)

This Report and Recommendation is submitted to United States District Judge Barry Ted Moskowitz pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule H.C.2 of the United States District Court for the Southern District of California. After reviewing the Petition, Respondent's Answer and Memorandum of Points and Authorities in support thereof (hereinafter "Answer"), and all the supporting

[1] Petitioner's traverse also contains claims not set forth in the petition. This court, however, does not reach the merits of those claims, which were improperly raised for the first time in the traverse. *See, e.g. Cacoperdo v. Demosthenes*, 37 F.3d 504 (9th Cir. 1994) ("A traverse is not a proper pleading to raise additional grounds for relief."); *Breverman v. Terhune*, 153 Fed.Appx. 413 (9th Cir. 2005) ("Habeas court had discretion to consider claim raised for the first time in petitioner's traverse."). Even assuming this court reviewed Petitioner's new claims on the merits, they would be barred for lack of exhaustion pursuant to 28 U.S.C.A. § 2254(b)(1)(A).

documents submitted by the parties, the Court recommends the Petition be **DENIED** for the reasons stated below.

II.
PROCEDURAL BACKGROUND

A. State court proceedings

On October 18, 2005, the San Diego County District Attorney's Office filed a felony complaint against Petitioner for: (1) causing bodily injury to another while driving under the influence of alcohol or drugs when Petitioner already had a prior DUI within 10 years (CAL. VEH. CODE § 23153(a), § 23560); (2) possessing a firearm (CAL. PENAL CODE § 12021(a)(1)); and (3) being under the influence of a controlled substance, a misdemeanor (CAL. HEALTH & SAFETY CODE § 11550(a). (Lodgment No. 1 at 1.)

On October 23, 2005, the District Attorney amended the complaint to include a special allegation: Cal. Penal Code § 12022.7(a), a sentencing enhancement for causing great bodily injury during the commission of a felony. (*Id.* at 6.)

On December 8, 2005, Cuero entered guilty pleas with respect to the first two charges of the District Attorney's amended complaint, and also admitted one prior strike. (*Id.* at 11.)

On January 11, 2006, the District Attorney moved the trial court to allow an additional amendment of a prior strike and two prior felonies.

The trial court granted this request on February 2, 2006. (Lodgment No. 3 at 13.)

On March 27, 2006, the trial court allowed the District Attorney to file a third amended complaint, charging Cuero with causing great bodily injury while operating a motor vehicle under the influence of alcohol or drugs, and also alleging Cuero's two prior strikes. The same day, Cuero withdrew his previous guilty plea, and entered into a negotiated plea to the charges contained in the District Attorney's third amended complaint, admitted two prior felonies contained therein, and stipulated to a 25-years-to-life sentence. (Lodgment No. 5 at 62, 67-71.)

On April 20, 2006, the trial court sentenced Cuero to 25-years-to-life pursuant to the negotiated plea agreement. (Lodgment No. 6.)

On January 23, 2007, Cuero's appellate counsel filed a *Wende* brief with the California Court of Appeal, Fourth Appellate District. (Lodgment No. 7.) Cuero was also granted permission to file a supplemental brief on his own behalf, but failed to respond. (*Id.*)

On March 21, 2007, after concluding that no reasonably arguable appellate issue existed, the California Court of Appeal affirmed the trial court's judgment. (Lodgment No. 8 at 3-4.)

On August 29, 2007, Cuero filed for habeas relief in the San Diego County Superior Court, alleging he was provided ineffective assistance of counsel. (Lodgment No. 10 at 3.)

On October 2, 2007, the San Diego County Superior Court denied Cuero's petition for habeas relief on the merits. (Lodgment No. 11.)

On November 14, 2007, Cuero filed his habeas petition with the California Court of Appeal, Fourth Appellate District, where he claimed: (1) he was provided ineffective assistance of counsel; (2) the trial court violated his negotiated plea agreement; and (3) his sentence was unlawfully enhanced by prior convictions. (Lodgment No. 12 at 5-8.)

On March 6, 2008, the California Court of Appeal, Fourth Appellate District, denied Cuero's petition for habeas relief on the merits. (Lodgment No. 13.)

On April 28, 2008, Cuero filed for habeas relief with the Supreme Court of California, which was summarily denied on October 1, 2008. (Lodgment No. 15.)

B. Federal Court Proceedings

Cuero filed for federal habeas relief on October 29, 2008. (Doc. No. 1.) Respondent filed an answer on February 9, 2009. (Doc. No. 35.) Cuero filed a traverse to Respondent's answer on March 18, 2010. (Doc. No. 41.)

III.
STATEMENT OF FACTS

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State

court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *See also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) ("Principles of comity and federalism counsel against substituting our judgment for that of the state courts, a deference that is embodied in the requirements of the federal habeas statute, as amended by AEDPA."). Accordingly, the following facts are taken from the California Court of Appeal's opinion in Cuero's direct appeal. (Lodgment No. 8.)

On October 14, 2005, Petitioner veered his car off a roadway and struck the driver of a pickup truck, who was standing beside his parked trailer. The driver sustained severe injuries, including a ruptured spleen, brain damage, and facial disfigurement. Petitioner subsequently tested positive for methamphetamine. A loaded firearm was also found at the scene. (*Id*.)

Prior to this incident, Petitioner served four prison terms for numerous felonies, including two strikes.

IV.
STANDARD OF REVIEW

Title 28, United States Code section 2254 and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at Title 28, United States Code section 2254, subpart(d)(1), sets forth the following scope of review for federal habeas corpus claims:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. [. . .]
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(a), (d)(1)-(2).

When determining what constitutes "clearly established federal law" under section 2254(d)(1), federal courts look to United States Supreme Court holdings at the time of the state court's decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)

(quoting *Williams v. Taylor*, 529 U.S. 362, 412) (2000)); *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (citing *Andrade* to explain clearly established federal law is the governing legal principle or principles set forth by the U.S. Supreme Court at the time the state court renders its decision). In addition, Ninth Circuit law may be considered for its "persuasive authority in applying Supreme Court law." *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004) (quoting *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000)), overruled in part on other grounds by *Andrade*, 538 U.S. 63 (2003)); *see also, Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (noting while circuit law may be persuasive authority, "only the [United States] Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied").

The "contrary to" and "unreasonable application" clauses contained in section 2254(d)(1) have independent meaning. *Williams*, 529 U.S. at 404-05; *Lambert*, 393 F.3d at 974; *Van Lynn v Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). A state court decision is "contrary to" clearly established federal law as determined by the United States Supreme Court if (1) the state court applies a rule different from the governing law set forth in Supreme Court cases, or (2) the state court confronts a set of facts that are materially indistinguishable from a Supreme Court case, but reaches a different result. *Williams*, 529 U.S. at 405-06, 412; *Bell v. Cone*, 535 U.S. 685, 694 (2002); *Andrade*, 538 U.S. at 73; *Lambert*, 393 F.3d at 974; *Clark*, 331 F.3d at 1067. A state court is not required to be aware of clearly established applicable Supreme Court cases, so long

as "neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

A state court decision involves an unreasonable application of Supreme Court law if (1) the state court identifies the correct governing rule, but unreasonably applies the rule to a new set of facts, or (2) "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Andrade*, 538 U.S. at 76; *Lambert*, 393 F.3d at 974; *Clark*, 331 F.3d at 1067. For a state court decision to be an unreasonable application of clearly established federal law, the state court decision must be more than simply incorrect or erroneous; instead, the state court's decision must be "objectively unreasonable." *Rompilla v. Beard*, 545 U.S. 374, 380 (2009) (citing *Wiggins*, 539 U.S. at 520-21); *Williams*, 529 U.S. at 409; *Vasquez*, 572 F.3d 1029, 1035 (citing *Andrade*, 538 U.S. at 75); *see also, Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002) (federal habeas courts determine the reasonableness of the state court's decision, not its reasoning). Thus, this Court will not disturb the decisions of the California state courts with respect to Petitioner's claims unless the state courts' resolutions of those claims were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d); *see also, Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004).

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the last reasoned state court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991); *Plascencia v. Alameida*, 467 F.3d 1190, 1198 (9th Cir. 2006); *Vasquez*, 572 F.3d at 1035; *Van Lynn*, 347 F.3d at 738. However, if the relevant state court decision does not provide an adequate explanation or a discernable basis for its reasoning on a particular claim, the federal court must conduct "an independent review of the record to determine whether the state court's decision was objectively unreasonable." *Richter v. Hickman*, 578 F.3d 944, 951 (9th Cir. 2009) (quoting *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006)); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

V.
DISCUSSION

A. Ineffective Assistance of Counsel

Petitioner claims he was provided ineffective assistance of counsel by both his trial and appellate attorneys. (Doc. No. 1 at 6.) In support of this contention, Petitioner claims his attorneys: (1) failed to investigate; (2) failed to file for full discovery; (3) failed to prepare for trial; (4) failed to interview potential witnesses; (5) failed to request a continuance; (6) failed to object to the District Attorney's filing an amended complaint; (7) failed to provide counsel at sentencing; (8) failed to preserve appeal rights; (9) had a conflict of interest; (10) and denied him choice of counsel. (*Id.*)

Respondent observes both the trial court and state appellate court denied Petitioner's ineffective assistance of counsel claim because it failed to state a *prima facie* case for relief; and Petitioner has failed to allege any new facts supporting his claim. (Doc. No. 35 at 7.)

The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), set forth a two-pronged standard for establishing a claim for ineffective assistance of counsel. First, a defendant must show "counsel's performance was deficient." *Id.* at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In other words, counsel's performance must fall below an "objective standard of reasonableness." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). In reviewing counsel's performance for deficiency, courts must be "highly deferential, and avoid the temptation to conclude that a particular act or omission of counsel was unreasonable simply because in hindsight the defense has proven to be unsuccessful." *Strickland*, 466 U.S. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 687. Further, the defendant bears the burden of overcoming the strong presumption counsel performed adequately. *Id.*

Second, Petitioner must show counsel's deficient performance "prejudiced the defense." *Id.* This requires showing counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To satisfy this prong, Petitioner must demonstrate a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v. Spisak*, 130 S. Ct. 676, 685 (2010) (quoting *Strickland*, 466 U.S. at 694). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. The prejudice inquiry "must be considered in light of the strength of the [prosecution]'s case." *Rhoades v. Henry*, 596 F.3d 1170, 1193 (9th Cir. 2010) (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002) (internal quotation marks omitted).

When a "habeas petitioner asks a federal court to review a state court's application of the *Strickland* standard for evaluating ineffective assistance of counsel claims, under AEDPA, the federal court must give state courts even more latitude than is typical under AEDPA to reasonably determine that a defendant has not satisfied the *Strickland* standard." *Cheney v. Washington*, 614 F.3d 987 (9th Cir. 2010). When a "federal court reviews a state court's *Strickland* determination under AEDPA, both AEDPA and *Strickland's* deferential standards apply; hence, the standard is described as doubly deferential." *Id.*, citing *Yarborough*, 540 U.S. at 6.

When raised on collateral review, the California Court of Appeal denied Petitioner's ineffective assistance of counsel claim because it "failed to state a prima facie case for relief" and was "wholly unsupported by facts or any explanation for the basis of the allegations." (Lodgment No. 13 at 3.) In his federal habeas petition, Petitioner merely recites the same laundry list of counsel's alleged shortcomings without any explanation as to why they

were "deficient" or deprived Petitioner of a fair trial as required by *Strickland*. The Ninth Circuit has repeatedly held that vague and conclusory ineffective assistance of counsel allegations do not warrant federal habeas relief. *See, e.g., Jackson v. Calderon*, 211 F.3d 1148, 1155 (9th Cir. 2000) ("unsupported speculation and conclusory allegations regarding an attorney's substandard performance are not sufficient to show either deficient performance or prejudice."); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) ("factually unfounded claim alleging ineffective assistance of counsel presents no basis for federal habeas relief."); *James v. Borg*, 24 F.3d 20 (9th Cir. 1995) ("conclusory allegations which are not supported by statement of specific facts do no warrant habeas relief.").

Hence, the California Court of Appeal's denial is not "contrary to" or the result of an "unreasonable application of" clearly established federal law. § 2254(d). In accordance with the "doubly deferential" standard set forth by *Strickland* and AEDPA, we affirm the state appellate court's denial of Petitioner's claim for ineffective assistance of counsel. Therefore, it is recommended federal habeas relief be **DENIED** on this claim.

B. Violation of Plea Agreement

Petitioner claims his plea agreement was violated by the trial court's "failure to keep a commitment concerning a sentencing recommendation on a guilty plea." (Doc. 1 at 13.). In support, Petitioner cites the report of a probation officer who recommended a total prison term of 14 years and 4 months. (Doc. No. 1 - Appendix D at 46.)

Petitioner further claims his consent to the plea agreement was "made on involuntariness", and that any constitutional waivers made in accordance with the plea are invalid. (Doc. 1 at 14.)

Respondent argues Petitioner was counseled extensively at his plea hearing, and therefore entered into the plea agreement knowingly and voluntarily (Doc. No. 35 at 11.) Further, Respondent observes Petitioner has misrepresented to the court the probation officer's report, which was subsequently revised to include a recommended prison term of 25-years-to-life after the District Attorney filed its third amended complaint. *Id*.

Petitioner failed to raise this claim on habeas review in the trial court. When Petitioner raised this claim for the first time in the California Court of Appeal, the Court held:

> "Petitioner's contention that he should have been able to withdraw his plea fails because it was not properly presented to the trial court in the first instance. Petitioner filed a pro se motion to withdraw his guilty plea on September 6, 2007, well after the judgment in his case had been affirmed on appeal. However, petitioner did not raise the issue in either of the two consecutive habeas petitions he filed in the trial court. We decline to address it here for the first time." (Lodgment No. 13 at 4.)

Summary denials of habeas claims are considered decisions "on the merits". *See Gaston v.*

Palmer, 417 F.3d 1030 (9th Cir. 2005). When a state court reaches a decision on the merits but provides no reasoning to support its conclusion, the federal court conducts an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law. *See Pirtle v. Morgan*, 313 F.3d 1160, 1170 (9th Cir. 2002) (citing *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

California state law requires "an application for state habeas relief [to] be filed as promptly as the circumstances of the case allow." *In re Stankewitz*, 40 Cal.3d 391, 397 (1986). "Any significant delay must be explained and justified with particularity by the petitioner." *In re Clark*, 5 Cal.4th 750, 786 (1993). A prisoner whose habeas petition was denied by the Superior Court can obtain review of his claims only by filing a new petition in the Court of Appeal. *Id.* The new petition, however, must be confined to claims raised in the initial petition. *See In re Martinez*, 46 Cal.4th 945, 956 (2009). If the claims have not first been brought in the lower court, the Court of Appeal has discretion to deny the petition. *In re Hillery*, 202 Cal.App.2d 293, 294 (1962).

Both the Ninth Circuit Court of Appeals and, most recently, the United States Supreme Court, have upheld California state court discretion to deny habeas corpus petitions for untimeliness. "A Court of Appeal has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court (*i.e.* in a Superior Court), but the Court of Appeal need not do so." *Gaston*, 417 F.3d at 1035, (quoting *In re Steele*, 32 Cal.4th 682 (2004)) (citing, inter alia, *In re Ramirez*, 89 Cal.App.4th 1312 (2001)) ("Court of Appeal has discretion to refuse to

issue the writ as an exercise of original jurisdiction on the ground that application has not been made...in a lower court in the first instance.") (quoting *In re Hillery*, 202 Cal.App. at 294). "California courts have discretion to bypass a timeliness issue and instead, summarily reject the petition for want of merit." *Walker v. Martin*, - - - S. Ct. - - -, No. 09-996, 2011 WL 611627 at *6 (Feb. 23, 2011). "Absent a showing of cause and prejudice, federal habeas relief will be unavailable when (1) a state court has declined to address a prisoner's federal claims because the petitioner has failed to meet a state procedural requirement"; and (2) the state judgment rests on independent and adequate state procedural grounds." *Id*., quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (internal quotation marks omitted). A state procedural rule rests on independent and adequate grounds if it is "firmly established and regularly followed". *Id. at *7*, quoting *Beard v. Kindler*, 130 S. Ct. 612 (2009). In *Walker, supra*, the Supreme Court held California's procedural rule was firmly established and regularly followed, satisfying the "independent and adequate grounds" standard. *Id*.

When "a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *See also, Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir. 1985) ("As a general rule, fundamental fairness requires that promises made during a plea bargaining...must be respected."). "[In] deciding whether a plea agreement has been breached, the court considers what the defendant reasonably understood when he pled guilty." *U.S. v. Packwood*,

848 F.2d 1009 (9th Cir. 1988). "Guilty pleas are valid if made voluntarily and intelligently." *Brady v. U.S.*, 397 U.S. 742 (1970). In determining whether Petitioner's consent to the plea agreement was valid, the test is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Doe v. Woodford*, 508 F.3d 563, 568 (9th Cir. 2007). The "record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Id*.

First, as Respondent observes, Petitioner misrepresented the probation officer's report cited. After the District Attorney filed its third amended complaint, which included Petitioner's two prior strikes, the probation officer released a subsequent report on April 20, 2006, which indicates Petitioner stipulated to a 25-years-to-life prison term with the possibility of parole. (Lodgment No. 6 at 100.) Hence, the plea agreement entered into by Petitioner contained no promise that he would be sentenced to a 14 years and 4 months prison term. Moreover, at the March 27, 2006 plea proceedings, Petitioner repeatedly acknowledged that the plea agreement stipulated a 25-years-to-life prison term:

> THE COURT: Okay. So, Mr. Cuero, do you understand that if you plead guilty to this felony offense and admit those two prison priors, you face a mandatory prison sentence of 25 years to life in prison, no more and no less?
>
> CUERO: And I will be eligible after 25 years for parole?

> THE COURT: Eligible, but there are no guarantees that you will get it.
>
> CUERO: Right. (Lodgment No. 5 at 66, paras. 19-28.)
>
> - - -
>
> THE COURT: And then by admitting the second strike prior, it then mandates a sentence of 25 years to life with no credits for those 25 years but you become eligible for probation after 25 years. Do you understand that?
>
> CUERO: Yes. (*Id.* at 66, paras. 3-8.)

Second, Petitioner's contention his consent to the plea agreement was "involuntary" is baseless. A review of the state court record shows Petitioner was counseled by his attorney, and indicates on multiple occasions his consent to the negotiated plea agreement was made "knowingly and voluntarily". Further, Petitioner initialed the plea flea form to indicate: "I have not been induced to enter this plea by any promise or representation of any kind, except 'Stipulate to 25 yrs. to life with parole eligibility in 25 yrs.'." (Lodgment No. 1 at 81.)

Third, as discussed above, California's procedural mandates pertaining to habeas claims are consistent with controlling federal law. Petitioner failed to raise this claim in his first two habeas petitions in Superior Court, and provided no justification for waiting until filing for habeas relief in the state appellate court before raising this claim for the first time. Hence, this court finds the state

court's ruling was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, it is recommended that federal habeas relief be **DENIED** on this claim.

C. Use of Prior Strikes to Enhance Sentence

Finally, Cuero contends his due process rights were violated by the trial court's use of two prior felony convictions to enhance his sentence pursuant to California's Three Strikes Law. (Doc. No. 1 at 8.) In support, Cuero argues: (1) the two prior felony convictions were improperly considered by the trial court at sentencing pursuant to *People v. Trujillo*, 40 Cal.4th 165, 175 (2006), which held a "defendant's statement in a probation officer's report, made after a plea of guilty [has] been accepted, is not part of the record of conviction and therefore may not be considered in determining whether the prior conviction is a "strike" within the meaning of the Three Strikes Law"; (2) that any statements or admissions contained in the plea agreements or probation reports do not describe the nature of the prior convictions and cannot be used to prove the prior convictions are serious or violent felonies; and (3) that the prior offenses are not serious felonies under California Penal Code section 667, and therefore are not "strikes" for sentencing purposes. *Id.*

Respondent argues (1) Petitioner is precluded from raising such a challenge under *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 403 (2001), which held "a state conviction is regarded as conclusively valid when it is no longer open to direct or collateral attack because the defendant failed to

pursue state remedies while they were available or because the defendant did so unsuccessfully"; (2) Petitioner's sentence was correctly enhanced because the trial court relied on Petitioner's admission and stipulation to the sentence, not post-plea statements found in a probation report; and (3) interpreting state sentencing laws is not within the purview of a federal habeas court. (Doc. 35 at 15.)

Federal habeas corpus jurisdiction does not extend to alleged violations of state law. *Guzman v. Morris*, 644 F.2d 1295 (9th Cir. 1981). The Ninth Circuit has refused to consider claims of erroneous application of state sentencing law by state courts in habeas corpus review. *See, e.g., Miller v. Vasquez*, 868 F.2d 1116, 1118 (9th Cir. 1989) ("whether assault with a deadly weapon qualifies as a "serious felony" under California's sentencing enhancement provisions is a question of state sentencing law and does not state a constitutional claim."), *Estelle v. McGuire*, 502 U.S. 62, 68 (1991), ("It is not the province of a federal habeas court to reexamine state court determinations on state law questions."). The question to be decided by a federal court on petition for habeas corpus is not whether the state committed state law error but whether the state court's action was so "arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *See Richmond v. Lewis*, 506 U.S. 40, 50 (1992). "A petitioner's due process rights have been violated only if the trial court's error rendered the state proceeding fundamentally unfair." *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

Here, Cuero fails to demonstrate the state court's consideration of his two prior strikes violates the Constitution or laws of the United States. The state court's consideration of Petitioner's prior strikes is a question of state law not subject to federal habeas review. Even if it were within the scope of this court's authority to review questions of state law on habeas review, the state court's enhancement of Cuero's sentence was proper. The California Court of Appeal, in denying Petitioner's claim, held:

> "[t]he trial court relied on petitioner's admission and stipulation to the sentence, not post-plea statements found in a probation report, to support the determination that his priors were strikes. Because petitioner admitted his prior convictions and did not otherwise contest them, *Trujillo* does not apply, and petitioner's claim fails." (Lodgment No. 13 at 5.) As the California Court of Appeal found, the trial court relied on Petitioner's admission to two prior felonies: first degree burglary (CAL. PENAL CODE § 459, 460); and assault with a deadly weapon (CAL. PENAL CODE 245(a)(1)):
>
> THE COURT: Were you convicted of first degree burglary in May of 1991, in the County of San Diego?
>
> CUERO: Yes, I was.
>
> THE COURT: Were you convicted of assault with a dangerous or deadly weapon in violation of [Penal Code

> section] 245(A)(1) in March of 1992, in the Superior Court of this county?
>
> Cuero: Yes, I was. (Lodgment No. 5 at 70, paras. 16-23.)

Both of these convictions are "serious felonies" under California Penal Code section 1192.7. *See* CAL. PENAL CODE § 1192.7(c)(18) ("Any burglary of the first degree."); CAL. PENAL CODE § 1192.7(c)(23) ("Any felony in which the defendant personally used a dangerous or deadly weapon.") "Serious felonies" are considered "strikes" for sentencing purposes pursuant to California Penal Code section 1170.12(b)(1). Therefore, the state court's use of Petitioner's prior convictions for sentencing purposes was not contrary to or an unreasonable application of clearly established federal law.

For the reasons stated above, it is recommended that federal habeas relief be **DENIED** on this claim.

VI.
CONCLUSION AND RECOMMENDATION

For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing Judgment be entered denying the Petition, evidentiary hearing, and dismissing this action.

IT IS ORDERED that no later than **April 25, 2011** any party to this action may file written objections with the Court and serve a copy on all

parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **May 11, 2011**. The parties are advised failure to file objections within the specified time may result in a waiver of the right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *see also Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: March 25, 2011

/s/ William McCurine, Jr.
Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

DEPARTMENT
BEFORE HON., JUDGE HALGREN

THE PEOPLE OF THE STATE OF THE
STATE OF CALIFORNIA,

PLAINTIFF,

VS.

MICHAEL DANIEL CUERO,

DEFENDANTS.

NO. SCE255082

MOTION TO AMEND COMPLAINT

REPORTER'S TRANSCRIPT
FEBRUARY 2, 2006

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REPORTED BY:
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OFFICIAL COURT REPORTER

EL CAJON, CALIFORNIA, FEBRUARY 2, 2006, 3:00 P.M.

THE COURT: All right. Ready to proceed on Michael Cuero, SCE255082. Before me today is the People's motion to amend the information. Actually, it's amending the complaint.

MS. SHAMOON: Complaint, your Honor.

THE COURT: And I have the People's motion. I have the opposition filed by the defense. I have reviewed those, and I'm prepared to hear any argument from either side.

I think I should clarify or make sure the record reflects the sequence of events because there's one aspect that isn't on the record. The original complaint was filed October 18th, '05. There was an amended complaint filed October 28th, '05. And that was on the date of readiness. He was arraigned on that complaint. And then there was a change of plea on December 8th.

On January 5th, the People -- D.A. presented to, I believe, the business office for filing an amended complaint. And originally, as I understand it, Judge Ervin had directed that it be filed. However, he did not realize at that time that there had been a plea entered already. And so then he just directed the business office staff to place the proposed amended complaint in the file, and the People's request for filing would be addressed on January 11th, the time set for sentencing. And then that hearing is continued to today.

So that is my understanding as to how things transpired and, I thought, the timely issue to be indicated for the record. Does anybody know anything to the contrary?

MS. SHAMOON: No. That's my understanding.

THE COURT: All right. Then this is your motion, Ms. Shamoon, if you wish to address. I have read the papers. You don't need to repeat them.

MS. SHAMOON: Yes, your Honor. There are two issues that I'd like to address from the defense's response to my motion.

The two biggest areas that are the Court's concern, that number one, did the People do due diligence in filing either the complaint or amended complaint originally in this case and just drop the ball, or was this some other circumstance that's unusual in this case? And then number two, what's the prejudice to the defendant by filing an amended complaint as opposed to putting on these strikes at the initial complaint?

First of all, what happened in the original file is the People's file had the 1991 case that pled in 1992 of 245 and 243 without the allegation. The reason for that is when that case originally took place, no 1192 allegation was made until we found out the victim's injuries were more serious than initially thought. There was an amended complaint in that case, and that was then alleged and changed.

The Court had an amended complaint. However, what the People got was a copy of the original complaint, along with the packet of the

change of plea form. So all that showed on our packet for change of plea in that case. What the dispo deputy had in that case was the original complaint in case ECR05409, which did not have an 1192 allegation on it.

The only way that was discovered is when the probation officer was reviewing her file, and she believed that there was a strike in this case. Upon further investigation, actually physically ordering that case that was onsite -- Both the Court's file was off-site and the People's file was off-site. And looking at the change of plea, the 1192 allegation was on there. It was also on the minute order. That is how we came to learn that that was actually a strike and not just a naked 245 --

THE COURT: Can I interrupt?

MS. SHAMOON: Yes.

THE COURT: When you say all we had procedurally, you have actually the blue packet, prior packet?

MS. SHAMOON: Right.

THE COURT: Where do those come from? Those come from the court?

MS. SHAMOON: We get those from the court file. So I'm not sure if they ordered it off-site and then made copies of it, or if there was an original that was originally made. And we went to our file and got the copy.

But normally what happens is our court clerks will go to the court's file, get a copy of the change of plea, the complaint, and a prison packet that's available, if they had gone to prison on it, and make the packet available to us and in a blue packet so we can visit for future purposes if we needed it.

THE COURT: All right.

MS. SHAMOON: Secondly, with regard to the prejudice, there would be prejudice to the defendant in this case if we were coming in and saying, "Listen, we have now found the strike, serious felony priors. We want to allege them. We want to amend the complaint to do so. But we don't want to give the defendant an opportunity to withdraw his plea."

That would be unfair, that would be prejudicial, and that would put the defendant in a place he would never have been in had we caught this in the beginning. What we're willing to do, and what we suggested to the defense, is to withdraw the plea and give us the opportunity to amend the complaint. That puts everybody at Step 1 in this case.

The complaint would have read from the beginning had we known that there was not only this charge but a strike and two serious felony priors along with the alleged prison priors, the defendant, knowing that, may or may not have pled guilty as he did. And we're giving him the opportunity to be put in that situation. Again, it would only be prejudicial to the defendant if we were not willing to do that for him.

And with regard to this case and comparison with the case that's talked about in the -- both briefs

-- I think it's the Alvarado case. In the Alvarado case, what happens is the defendant is arrested for a sales of drugs case. He gives one name. He pleads being guilty. Later on, he's picked up again, another sales case. Gives a different name to the prosecutor.

In this case, he had a prior record nobody knew. They had let him plead. And afterwards when it was discovered, we wanted to allege -- Or the prosecution wanted to allege the prior. And what the Court found in that case is there was some fraud on the part of the defendant because he knew he had the prior, and he knew he had used a different name. He didn't give that to the prosecution. Now, although the prosecution could have done a cross-reference on the names through the sheriff's sometimes, and we normally do, the Court didn't blame the prosecution for that; it blamed the defendant for that.

In this case, it's very similar. The defendant knew he had a strike. He has known all along he had a strike, but he didn't divulge that information to the Court. In fact, he himself didn't divulge to the prosecution or this Court that seven days before this accident, he was picked on a violation of using methamphetamine and was directed to go to detox. That would have made a difference to us in how we pled the case. Instead of letting him plead on, we perhaps would have made a stipulated sentence. He kept crucial information from us and then got us partially in this situation.

I'm telling the Court that because it's very similar to the Alvarado case, where the Court indicated that fraud on the part of the defendant does factor into this. However, most of the argument in Alvarado was the prejudice to the defendant. Again,

they indicated that if the People had known initially that it was the same defendant in both cases that the People would have been able to allege the prior. Therefore, there was no prejudice to the defense in this case.

Also, had we known the strike existed when we first issued the case, and we issued them with the strikes on there, there would have been no prejudice to the defendant. He would just be in the situation of being a three-striker, as all three strikes customers are. We are willing to put him back at that stage. We are willing to let him withdraw his plea if we are allowed to amend the complaint at this time to allege the two serious felony priors and also allege the additional strike.

THE COURT: Mr. Tamayo?

MR. TAMAYO: Thank you. Let me just amend a couple of things that I have here in my own moving papers. At page 10 of my moving papers at line 16, the sentence should read, “Appellate court reversed their decision. This is part because the trial departments should not” -- The word “not” should be inserted at this point. “Should not,” on the previous page.

Page 9, line 18. The line should read, “Where the prosecutor in Jackson have exercised the due diligence required to avoid prejudice to,” and strike the word “those.” It should read, “to avoid prejudice to the defendant in that case.” And I apologize for that.

THE COURT: No problem. I did understand what you meant on page 10.

MR. TAMAYO: Thank you. That was clearly material in that case.

Let me just respond to Counsel's argument. This case is one of due diligence. When we talk about the three strikes law, there are two crimes that can and cannot be strikes. And when you look at them, red flags are thrown up. The first one is a 459 burglary. A burglary can be second-degree or first-degree. If it's residential, it's first-degree. It's a strike if it's second-degree nonresidence such as a second degree.

Whenever Counsel -- Whenever it's the prosecution, the defense get the 459 research to determine whether it constitutes a strike or not to see whether it's a first-degree. The other crime that we look at, the other one where the red flag flies up, is a 245. The 245 -- It can be either called "naked," where it's not a strike. A naked 245 is one where there is no allegation of either great bodily injury or weapon use. If those two are absent, it's a naked. It's not a strike. But if those two are present, it is.

So whenever we get these cases of either a 459 or 245, flags come up. And in this case, Counsel has argued to the Court that, you know, we just relied on this information that we initially got, and we stopped right there, and we had no idea it was a strike. I asked the Court to enter this. I find a lack of due diligence. This isn't a case where Mr. Cuero -- 245 or assault someplace else. This was right here in San Diego. And not only was it here in San Diego, it was right here in El Cajon.

So Counsel had access to the Court's files. I don't think anybody can argue that Counsel did not

have access to its own files here in El Cajon on a case that happened in 1992. That was only about 12 years ago, 13 years ago, 13 years before. So Counsel -- I don't think anyone can argue that Counsel did not have access to its own files to do the research to find out the 245 was, in fact, a strike now that the strikes had gone up, or even looked at the court files here in its own department.

And I think the Court would concur for the record that the District Attorney's Office and the court offices are in the same building. It's not that difficult to do the research, to find out whether a person has a strike or not. To have Mr. Cuero tell the Court that he has a strike -- There's two problems with that. First of all --

THE COURT: You know what? I don't think they deferred to anyone.

MR. TAMAYO: Incrimination is the issue here. So, again, Counsel had the flag up. Counsel should have done their research. Now, there are two cases that's come forward for the Court's consideration. One is Alvarado, and the other one is Jackson. Jackson was a bit different because it didn't involve a situation where a person already had not entered a plea. They tried to enter a plea at the time of the preliminary hearing, but the Court took a look at the diligence of the prosecutor.

In the Jackson case here, the Court noted that the District Attorney only had 14 days from the time that it filed the complaint to the time though discovery. So it wasn't a very long period of time; only four, five days. On top of that, the Court found that they were dealing with a 1976 prior. And 1976 priors

-- I don't believe the case was here in San Diego, had peen placed on computers at that time. I don't know the actual facts, so I'm only submitting my argument with the Court, which is to take judicial notice of the fact that perhaps the -- Not all cases or the use of computers is much greater now than it was before.

And I'm just saying that in the Jackson case, the Court said the prosecutor only had 14 days. And it was a 1976 case. It's excusable that they didn't find it because he probably wasn't on a computer. In this case, we're talking about a 1992 case where computers are used in a jurisdiction in El Cajon where the prosecutor had access to.

So what I'm asking the Court to do is take a look at these two cases, Jackson and Alvarado cases, and find it different from the distinction where the prosecutor could have looked at the court file very easily to find the notion. Whereas in Jackson, it was -- The Court gave an extension to the prosecutor because it was a very short period of time and because it was a 1976 case. Now, in the other case, the Alvarado case, that's completely different. Alvarado says, you know, we're not going to allow this. That clearly is -- clearly distinguishable from Mr. Cuero's case. Mr. Cuero did nothing, did absolutely nothing to defraud the Court.

His true name is there. He had this prior here. The prosecutor could have looked it up and done the research on it. I think the cases are clearly distinguishable. Going on the issue of -- Counsel says Mr. Cuero could simply withdraw his plea. I ask the Court to look at the practicality of this. If the client cannot rely on his plea bargain, not only does the system fail, but I think it's prejudiced clearly to Mr.

Cuero as a practical matter. What happens is that Mr. Cuero talks about it; and pretty soon, we have situations where clients will refuse to enter into pleas simply because they have a feeling that the opposing party can withdraw them at any time.

That is a practical matter. It's not a consideration for the Court. But it does go to the prejudice that will happen to Mr. Cuero, who tries to enter a plea and have the situation, knowing that -- or believes that it could be withdrawn at any time. The prosecution decides to do some research and discover some information. There's prejudice to Mr. Cuero. And I'm asking the Court to find that and find there was no due diligence in finding something.

That has clearly been flagged in the prosecution's own pleadings. And there's another distinction, too, in many of the cases. I think that -- Like in the Jackson case, where the Court excuses this type of research. This is a case where, clearly, the prosecution had notice of its own priors. As I've indicated, they had everything flagged. Everything was here in court. Had this case been a situation where the prior was maybe in another state or county, I think there might have been a finding that the prosecutor did not lack due diligence. But the situation is different here. So I'm just asking the Court to consider that.

THE COURT: All right. Thank you.

All right. Well, let me just address a few of the comments that you both raised and explain my reasoning. What I looked at first was the statute. I think that's what guides my decision. And there are two statutes that are related and have the same

purpose. Penal Code 969A, regarding an indictment; and 969.5, regarding amending complaints. And the purpose of those statutes goes to effectually the lecture's view that all those prior felony convictions should be pleaded.

And I think that distinguishes it in a situation where the People might, after a guilty plea, seek to amend, to add new charges, new crimes, or other types of factual scenarios. The analysis might be different. Here, we're talking simply about limiting the focus to amending to alleged prior convictions. And we have the lecture's purpose that is nicely stated in case law. Cases have allowed amendments to be filed as late as after a guilty plea is taken up to the day of trial and even after the verdict, before the jury is discharged.

The cases I looked at -- Alvarado and Jackson -- are also cases that upheld the amendment. In Jackson and Alvarado, the Court was found to have abused its discretion by denying the amendment. I don't think any cases were cited to me, and I didn't really find, where the Court abused its discretion by allowing them. And I think that's because the purpose of the expectation is that it will be allowed unless certain circumstances exist.

The key issue is whether or not the defendant's substantial rights would be prejudiced. The case law doesn't address as a factor whether the People have proven due diligence. Now, it comes into the analysis. It came into the analysis in Jackson, I think, in order to show whether there was any abuse. But it's never been used, that I saw, in the cases to show that the Court erred in allowing an amendment because the People hadn't proven due diligence.

In this particular case, I don't think the question is could the People have found it sooner. There isn't any showing of egregious default on the People's part. Maybe they could have found it sooner. But it was found relatively quickly in the whole process. But that's not the statutory criteria, and that's not what the case law criteria is. The statute says whenever it shall be discovered, then this may occur. Here, it was discovered within a few months. And so that, I think, falls within the statute.

And so we turn, then, to the issue of substantial rights of the defendant. Substantial rights are not prejudiced by the mere fact that potential punishment may have been increased due to the amendment. And if that were the case, Alvarado would have been decided differently. Substantial rights are not impacted because the defendant now can be deprived of what he viewed as the benefit of the bargain, is going to be allowed to withdraw his plea, and he will be in the same situation as he would have been prior to entry of the plea.

There has been a substantial right. It may -- It theoretically might be affected if you had a material change in the evidence that was available or something dramatic had happened in between times. That would affect the case. But none of that has been presented to me. And so I don't see that there's any detriment to him in that regard. I'm not considering his potential punishment one way or the other because that isn't a factor to consider. I'm not placing any burden on the defendant. I don't think he has a duty to divulge the presence after the strike. It's not like a fraud found in a case where the defendant used a different name. I don't think that's the situation.

But that still does not lead me to conclude there is any prejudice to substantial rights. The plea was entered December 8th, and the amendment was attempted to be filed on January 5th. And nothing changed during that period of time to prejudice the defendant. So I find there is no showing that defendant's substantial rights will be prejudiced in any way by permitting the filing of the amended complained and by allowing the filing of all those felony convictions. It will be before the Court, which is what the lecture intended.

Accordingly, the amended complaint will be filed. I think, technically, it would be the second amended complaint.

MS. SHAMOON: That's correct, your Honor.

THE COURT: And I have that document before me. And I just should interlineate sections. And it will be filed with regard to -- Let me make sure I have the spelling proper. I do.

Does defendant wish to withdraw his plea at this time?

MR. TAMAYO: No. What we'd like to do is just set this for sentencing at the 15th. Excuse me. And at that time, we'd like to determine whether we're going to withdraw the plea at that time.

MS. SHAMOON: My only concern with that, your Honor, is as you recall the last time we were before the Court, there's several victims that wanted -- victim and family members that wanted to be present for the probation hearing and sentencing.

As long as Counsel can let me know before the actual date of the sentencing whether or not there's going to be a motion to withdraw the plea, I don't mind setting both for the same date -- or setting the probation hearing and sentencing hearing, knowing that there might be a motion to withdraw. But I don't want the victim and the family to have to come in again and again have the probation hearing and sentencing postponed.

THE COURT: What I think needs to happen first procedurally is either he's going to plead to the amended allegation of the additional strike because at this point, it has been admitted. Or he's not; and if he's not, then there has to be a trial on the second prior.

So we can't really set it for sentencing until that issue is resolved. I could set it for readiness, at which time then he could make a decision on what he wants to do. But I think it would be premature to set it for sentencing without the second strike.

MR. TAMAYO: Okay. Could we trail the sentencing, then, until after the readiness?

THE COURT: I have -- Any of the sentencings, I would just take off calendar. I can't set a sentencing until this other, you know, adjudicated allegation is resolved. And would you like me to simply set this for a readiness at whatever time you want with a time waiver?

MR. TAMAYO: We can do that.

THE COURT: Readiness -- That's true although if it needs to be especially set for some, we wouldn't

be doing a sentencing at that time regardless. So it would only be a hearing to decide if he's going to either move to withdraw or admit the strike.

MR. TAMAYO: We could do that. Could we set this on the afternoon? I was thinking about the 15th of February.

THE COURT: Is there a problem with doing it that way, Ms. Shamoon, just from the D.A.'s standpoint and having proper coverage on the case?

MS. SHAMOON: No, your Honor, because I probably could handle it vertically.

THE COURT: Okay. The 15th is open on my calendar. So we can do that. Just --

MR. TAMAYO: Just put it on the afternoon for further proceedings at 3:00, 2:00.

THE COURT: That's fine. We have a few OR sentencings. So if you want to set it for 3:00 o'clock, we can do that. The 16th is really heavy.

MS. SHAMOON: The 15th is fine, your Honor.

MR. TAMAYO: The reason is because I know that your calendars are real clouded on --

THE COURT: Thursdays and Fridays.

MR. TAMAYO: -- Thursdays and Fridays. And I'm going to be gone for about three weeks. I would rather just get an idea on where we're headed with that before I leave.

THE COURT: Is that going to work for you, Ms. Shamoon, your schedule?

MS. SHAMOON: Yes, your Honor. I will make it work.

MR. TAMAYO: So at 3:00 o'clock?

THE COURT: Make it 3:00 o'clock. That will get me through the other sentencing first. And what I think I need at this point would be a general time waiver because we originally had a sentencing. But now I think that really goes off calendar because really -- I think at this point, he's entitled to the speedy trial on at least the allegation of a prior. Is he willing to waive time on all of that to set this for further proceedings?

MR. TAMAYO: Yes, if we could set this for further proceedings and a readiness conference.

THE COURT: All right. Sir, are you willing to waive time to have a chance to talk to with your attorney and have a chance to decide what to do in this matter?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. February 15th, 3:00 p.m. for further proceedings. And probation will be notified because they are wanting to know what to add on this when and if we go forward with the sentencing. It would be once all the other issues that are pending are resolved. Thank you.

MR. TAMAYO: All right. Thank you.

(END OF PROCEEDINGS.)

FILED March 21, 2007

COURT OF APPEAL, FOURTH
APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
MICHAEL DANIEL CUERO,
Defendant and Appellant.

D048691
(Super. Ct. No. SCE255082)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

On October 28, 2005, the People filed an information charging Michael Daniel Cuero with: causing great bodily injury to Jeffrey Feldman while driving under the influence of alcohol and a drug and that he had a driving under the influence conviction within the prior 10 years (count one) (Veh. Code, §§ 23153, subd. (a), 23626, 23560; Pen. Code, § 12022.7,

subd. (a));[1] possessing a firearm (count two) (§ 12021, subd. (a)(1)); and being under the influence of a controlled substance (count three) (Health & Saf. Code, § 11550, subd. (a)). The People alleged Cuero had served four prior prison terms (§§ 667.5, subd. (b), 668) and had a strike prior (§§ 667, subds. (b)-(i), 668, 1170.12). On December 8 Cuero entered guilty pleas and admissions to the crimes charged in counts one and two. Cuero admitted a prior driving under the influence conviction, serving four prior prison terms and one prior strike. On January 10, 2006, pursuant to section 969.5, the People filed a motion to amend the information to add an allegation that Cuero had a second prior strike. On February 2 the court granted the motion and the People filed an amended complaint. On March 21, after the court denied a motion to substitute counsel (*People v. Marsden* (1970) 2 Cal.3d 118), Cuero withdrew his previous guilty plea and the People filed an amended complaint charging Cuero with causing great bodily injury to Feldman while driving under the influence of alcohol and a drug and alleged he had two prior strikes. The same day Cuero entered a negotiated guilty plea to the charges and stipulated to a 25-years-to-life sentence. The court imposed the stipulated sentence and issued a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b).)

[1] All statutory references are to the Penal Code unless otherwise indicated.

FACTS

Viewing the record in the light most favorable to the judgment below (*People v. Johnson* (1980) 26 Cal.3d 557, 576), the following occurred. On October 14, 2005, Cuero was driving on Potrero Valley Road when he hit a trailer attached to a pickup truck parked on the side of the road. Cuero also hit the driver of the pickup truck who was outside the truck. The pickup truck driver sustained severe injuries including a ruptured spleen, brain damage and facial disfigurement. Cuero appeared to be under the influence when a highway patrol officer arrived at the scene. When Cuero's blood was tested for alcohol or drugs, his blood was positive for methamphetamine. A loaded firearm was found nearby.

Among Cuero's numerous prior felony convictions and four prior prison terms are two prior strikes, residential burglary (§§ 459/460) and assault with a deadly weapon while personally using a deadly weapon (§§ 245, subd. (a)(1), 1192.7, subd. (c)(23)). Because Cuero entered a guilty plea, he cannot challenge the facts underlying the conviction. (§ 1237.5; *People v. Martin* (1973) 9 Cal.3d 687, 693.) We need not recite the facts in greater detail.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel

refers to as possible but not arguable issues: (1) whether the trial court abused its discretion in permitting the People to amend the complaint after Cuero entered guilty pleas; and (2) whether the amendment violated the terms of the earlier plea agreement in violation of due process.

We granted Cuero permission to file a brief on his own behalf. He has not responded. A review of the entire record pursuant to *People v. Wende, supra,* 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra,* 386 U.S. 738, has disclosed no reasonably arguable appellate issue. Competent counsel has represented Cuero on this appeal.

DISPOSITION

The judgment is affirmed:

/s/ HALLER
HALLER, J.

WE CONCUR:

/s/ NARES
NARES, Acting P.J.

/s/ IRION
IRION, J.

FILED October 2, 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO,
EAST COUNTY DIVISION

IN THE MATTER OF THE APPLICATION OF:
MICHAEL DANIEL CUERO, PETITIONER.

EHC 606
SCE 255082

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

THIS COURT HAVING READ THE PETITION FOR WRIT OF HABEAS CORPUS AND THE FILE IN THE ABOVE CAPTIONED MATTER FINDS AS FOLLOWS:

On March 27, 2006, Petitioner entered a guilty plea to driving under the influence of a drug causing injury in violation of Vehicle Code § 23153(a) and admitted that he personally inflicted great bodily injury within the meaning of Penal Code § 1192.7(c)(8). Petitioner further admitted that he had suffered two prior serious felony convictions. On April 20, 2006, Petitioner was sentenced to the stipulated term of 25 years to life in state prison.

On May 22, 2006, Petitioner filed a notice of appeal. Petitioner's counsel filed a *Wende* brief. On May 22, 2007, the remittitur was received affirming the judgment. The appellate court found that there were no reasonably arguable appellate issues.

On August 29, 2007, Petitioner filed the present petition for a writ of habeas corpus. Petitioner contends that he received ineffective assistance of counsel in that counsel failed to obtain a better disposition for the case.

A petitioner in habeas corpus bears the burden of proving the facts upon which he or she bases his or her claim for relief. (*In re Riddle* (1962) 57 Cal.2d 848, 852.) Every petitioner, even one filing in pro per, must set forth a prima facie statement of facts which would entitle him or her to habeas corpus relief under existing law. (*In re Bower* (1985) 38 Cal.3d 865, 872; *In re Hochberg* (1970) 2 Cal.3d 870, 875 fn. 4.)

"A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus. The petition 'must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful.' (*In re Lawler* (1979) 23 Cal.3d 190, 194; see Pen. Code, § 1474.) When presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief--that is, whether it states facts that, if true, entitle the petitioner to relief--and also whether the stated claims are for any reason procedurally

barred. (*In re Clark* (1993) 5 Cal.4th 750, 769, fn. 9.)" *People v. Romero* (1994) 8 Cal.4th 728, 737.

As to the issue of ineffective assistance of counsel, the court in *People v. Frye* (1998) 18 Cal.4th 894, 979, held, "[t]o establish a claim of inadequate assistance, a defendant must show counsel's representation was "deficient" in that it 'fell below an objective standard of reasonableness...[P]...under prevailing professional norms.' (*Strickland, supra,* 466 U.S. at p. 688; *In re Jones* (1996) 13 Cal.4th 552, 561.) In-addition, a defendant is required to show he or she was prejudiced by counsel's deficient representation. (*Strickland, supra,* 466 U.S. at p. 688; *Ledesma, supra,* 43 Cal.3d at p. 217.) In determining prejudice, we inquire whether there is a reasonable probability that, but for counsel's deficiencies, the result would have been more favorable to the defendant. (*Strickland, supra,* 466 U.S. at p. 687; *In re Sixto* (1989) 48 Cal.3d 1247, 1257.)"

As to the prejudice component, the court in *People v. Cox* (1991) 53 Cal.3d 618, 656, held, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Id.,* at p. 694.) Moreover, 'prejudice must be affirmatively proved. [Citations.] "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . ." [Citations.]' (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)"

In the present petition, Petitioner claims that trial counsel was ineffective for failing to conduct a reasonable pre-trial investigation. However, Petitioner has not articulated how counsel's investigation was ineffective and what evidence was not discovered by counsel. Thus, Petitioner has failed to set forth grounds for relief based on ineffective assistance of counsel. In addition, Petitioner has not shown any prejudice, which would warrant a reversal of the conviction. There are not sufficient facts presented showing counsel's performance rendered the proceedings fundamentally unfair.

Petitioner has cited to the case of *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*) claiming that appellate counsel failed to rely on this case or present it during his appeal. However, Petitioner fails to show how the holding in *Trujillo* is applicable to his case. Unlike the defendant in *Trujillo,* Petitioner admitted that his prior convictions were serious felonies within the meaning of the Three Strikes law. Thus, there is no showing that the trial court in Petitioner's case improperly relied on hearsay to find that Petitioner has suffered a serious felony prior conviction. Petitioner personally admitted that his prior conviction for Penal Code § 245(a)(1) was a serious felony prior. Thus, the trial court properly relied upon Petitioner's admissions in order to impose the sentence pursuant to the Three Strikes law.

Based on the foregoing, Petitioner has failed to show grounds for habeas corpus relief. Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

The clerk's office is directed to serve a copy of this Order on: (1) Petitioner; and (2) the Office of the San Diego County District Attorney – Appellate Division.

IT **IS SO ORDERED.**

DATED: Oct. 01, 2007

/s/ HERBERT J. EXARHOS
HERBERT J. EXARHOS
JUDGE OF THE SUPERIOR COURT

FILED March 6, 2008

COURT OF APPEAL - FOURTH APPELLATE
DISTRICT DIVISION ONE
STATE OF CALIFORNIA

In re MICHAEL DANIEL CUERO
on Habeas Corpus.

D052010
(San Diego County Super. Ct. No. SCD255082)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices Benke and Aaron. We take judicial notice of petitioner's direct appeal No. D048691.

Petitioner pleaded guilty to causing great bodily injury while driving under the influence of alcohol and a drug, and admitted that he had suffered two prior serious felony convictions. Petitioner stipulated to a term of 25 years to life, and the court sentenced him to the stipulated term.

The trial court granted petitioner a certificate of probable cause to appeal, and counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal. 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738. Counsel referred this court to the following possible, but not arguable issues: (1) whether the trial court abused its discretion in permitting the People to amend the complaint after petitioner

entered guilty pleas; and (2) whether the amendment violated the terms of the earlier plea agreement, in violation of petitioner's due process rights. We granted petitioner permission to file a brief on his own behalf, but he did not respond. We affirmed the judgment in No. D048691.

Petitioner then filed a habeas petition in the trial court, contending: (1) trial counsel was ineffective for failing to conduct a reasonable pre-trial investigation; and (2) appellate counsel should have relied on *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*). On October 2, 2007, the trial court denied the petition because petitioner did not articulate how counsel's investigation was ineffective and what evidence counsel failed to discover, petitioner failed to establish prejudice, and *Trujillo* was inapplicable.

Thereafter, petitioner filed a second habeas petition in the trial court claiming: (1) ineffective assistance of counsel; (2) the court did not abide by the sentencing agreement set forth in the plea agreement; and (3) the plea agreement was in violation of Penal Code section 1192.7. On December 6, 2007, the trial court denied the petition because the ineffective assistance of counsel claim had been raised and rejected on direct appeal, and the plea agreement issues could have been, but were not raised on direct appeal.

Petitioner filed the instant petition claiming: (1) ineffective assistance of appellate counsel for filing a *Wende* brief and failing to raise any issues; (2) trial counsel was ineffective for numerous shortcomings, including preparation for trial, investigation and failing to preserve appeal rights, among other

inadequacies; (3) petitioner's plea agreement was violated during sentencing; (4) petitioner should have been able to withdraw his plea; (5) petitioner's sentence was illegally enhanced because of his prior convictions, in violation of *People v. Trujillo, supra,* 40 Cal.4th 165.

To raise a valid claim of ineffective assistance of trial and appellate counsel, the petition must state facts and cite evidence to show: (1) the attorney's performance was deficient, and (2) the deficiencies prejudiced the trial or appellate result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *Smith v. Robbins* (2000) 528 U.S. 259, 285; *In re Smith* (1970) 3 Cal.3d 192, 202.)

Petitioner's contention that appellate counsel was ineffective for failing to raise issues is denied because petitioner has not shown that counsel's decision to file a *Wende* brief was deficient. (*Smith v. Robbins, supra,* 528 U.S. at p. 285.) As examined below, petitioner has not pointed to any arguable issue that counsel could have raised. Moreover, we note that petitioner was afforded an opportunity to raise issues he believed were meritorious on direct appeal, but he declined to do so, and this court concluded "[c]ompetent counsel has represented [petitioner] on this appeal." (*People v. Cuero* (Mar. 21, 2007, D048691) [nonpub. opn.].) Because there is no showing of counsel deficient performance, petitioner's claim lacks merit. (*Smith v. Robbins, supra,* 528 U.S. at p. 285.)

Petitioner's claim that trial counsel was ineffective is merely a laundry list of counsel's alleged shortcomings, wholly unsupported by facts or any explanation for the basis of the allegations. We

therefore deny petitioner's claim for failing to state a prima facie case for relief. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Regarding petitioner's contention that his plea agreement was violated, counsel raised as a possible but not arguable issue "whether the amendment violated the terms of the earlier plea agreement in violation of due process." (*People v. Cuero, supra,* (D048691).) We reviewed this issue on petitioner's direct appeal and concluded that it was not reasonably arguable. We will not permit a repetitive, piecemeal attack on the same issue. (*In re Harris* (1993) 5 Cal.4th 813, 828-829.) This is especially true here, where the supporting documents petitioner attaches are portions of the record on appeal, and a part of petitioner's habeas petition is merely a photocopy of the brief counsel filed on direct appeal. Habeas corpus does not serve as a substitute for an appeal, or a subsequent attempt at appeal. (*Id.* at p. 829.)

Petitioner's contention that he should have been able to withdraw his plea fails because it was not properly presented to the trial court in the first instance. Petitioner filed a pro se motion to withdraw his guilty plea on September 6, 2007, well after the judgment in his case had been affirmed on appeal, and the trial court denied the motion. However, petitioner did not raise the issue in either of the two consecutive habeas petitions he filed in the trial court. We decline to address it here for the first time. (See *In re Steele.* (2004) 32 Cal.4th 682, 692; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)

Finally, although petitioner's contention that his sentence was illegally enhanced under *People v.*

Trujillo, supra, 40 Cal.4th 165, was presented to the trial court only as an issue of ineffective assistance of appellate counsel, the trial court addressed the merits of the claim in concluding that counsel was not ineffective. We therefore exercise our discretion to address the merits of this claim here.

The Supreme Court in *Trujillo* held that a defendant's statement in a probation officer's report, made after a plea of guilty has been accepted, is not part of the record of a prior conviction and therefore may not be considered in determining whether the prior conviction is a "strike" within the meaning of Three Strikes Law. (*Id.* at pp. 175, 179-180.) Petitioner's claim fails because *Trujillo* is inapplicable. *Trujillo* involved a contested determination of whether a prior conviction was a strike. (*Id.* at pp. 169-171.) As the trial court in petitioner's case concluded, unlike *Trujillo,* petitioner admitted his prior convictions for residential burglary (Pen. Code, §§ 459, 460) and assault with a deadly weapon while personally using a deadly weapon (Pen. Code, §§ 245, subd. (a)(1), 1192.7, subd. (c)(23)) when he pleaded guilty. Petitioner also stipulated to a sentence of 25 years to life, and was sentenced accordingly. The trial court relied on petitioner's admission and stipulation to the sentence, not post-plea statements found in a probation report, to support the determination that his priors were strikes. Because petitioner admitted. his prior convictions and did not otherwise contest them, *Trujillo* does not apply, and petitioner's claim fails.

The petition is denied.

/s/ AARON
AARON, Acting P. J.

Copies to: All parties

FILED October 1, 2008

No. S163101

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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In re MICHAEL DANIEL CUERO
on Habeas Corpus

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The petition for writ of habeas corpus is denied.

Kennard, J., was absent and did not participate

/s/ GEORGE
Chief Justice