NO.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*,

v.

BRIAN A. BUCKLEY, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Finding as a fact that the prisoner "well knew" his plea bargain called for a sentence of fifteen years to life imprisonment, the state court rejected his claim that the bargain called only for a maximum sentence of fifteen years instead. Without disturbing the state court's factual finding, the Ninth Circuit Court of Appeals ordered habeas corpus relief on grounds that California contract law required the state court to ignore the prisoner's actual understanding of the bargain.

The Questions Presented are:

1. Did "clearly established federal law" require the California court to apply state contract law to the plea bargain claim?

2. If so, may the federal court order habeas corpus relief based on its own view that state contract law required the state court to ignore the prisoner's understanding of the bargain?

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BRIAN A. BUCKLEY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

James E. Tilton, Acting Secretary of the California Department of Corrections and Rehabilitation (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINIONS BELOW

The en banc opinion of the Ninth Circuit affirming the district court's judgment is reported as *Buckley* v. *Terhune*, 441 F.3d 688 (9th Cir. 2006). (App. A1-A21.) The Ninth Circuit's order granting respondent's petition for rehearing en banc is reported at 418 F.3d 1003 (9th Cir. 2005). (App. B1.) The original three-judge panel opinion of the Ninth Circuit reversing the district court's judgment is reported as *Buckley* v. *Terhune*,

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1. In the proceedings below, C.A. Terhune was named as respondent's custodian. James E. Tilton is now the Acting Secretary of the California Department of Corrections and Rehabilitation, and is the appropriate custodian for the purposes of these proceedings.

397 F.3d 1149 (9th Cir. 2005), reversed and superseded on rehearing en banc, 441 F.3d 668 (9th Cir. 2006). (App. C1-C34.) The order and opinion of the United States District Court for the Central District of California granting respondent habeas corpus relief is reported as *Buckley* v. *Terhune*, 266 F.Supp.2d 1124, 1141 (C.D. Cal. 2002), superseded on rehearing en banc, 441 F.3d 668 (9th Cir. 2006). (App. D1-D38.)

The California Supreme Court's order summarily denying habeas corpus relief is unreported. (App. F1.) The California Court of Appeal's order summarily denying habeas corpus relief is unreported. (App. G1.) The Ventura County Superior Court's opinion denying habeas corpus relief and finding that respondent "well knew" that the terms of his plea agreement called for an indeterminate sentence of fifteen years to life is unreported. (App. H1-H3.)

All of these opinions and orders are reproduced in the Appendix to this Petition.

JURISDICTION

The published en banc opinion of the Ninth Circuit affirming the judgment of the district court was filed and entered on March 17, 2006. (App. A1-A21.) This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (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.

(e)(1) 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. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The Crime

In 1986, respondent Brian Buckley and Curtis Fauber armed themselves with guns and entered the residence of Thomas Urell during the night. Fauber bound Urell with duct tape while respondent held him at gunpoint. Fauber then bludgeoned Urell to death with the blunt end of an axe he found in Urell's residence. Fauber and respondent took various items from Urell's residence, including a safe and Urell's vehicle.

The State Court Proceedings

Respondent and Fauber were arrested and separately charged for Urell's murder in Ventura County, California. Deputy District Attorney Donald Glynn was assigned to prosecute both cases. Mr. Glynn offered respondent a plea agreement via letter, providing that respondent would plead guilty to second-degree murder in exchange for his truthful testimony against Fauber at trial and for his testimony against Christopher Caldwell, who had committed an unrelated prior murder with Fauber.[2/] The letter was silent with respect to respondent's sentence, but California law provided for nothing other than an indeterminate term of fifteen years to life for second-degree murder at the time. (App. O1-O4, P1-P3.)

Mr. Glynn provided respondent's trial counsel, Willard Wiksell, with a Felony Disposition Statement for respondent to sign and initial. At one place the document provided, in preprinted type, "I could be sentenced to the state prison for a maximum possible term of ___ years." Mr. Glynn wrote "15" into the blank space, and respondent initialed this paragraph. In another place on the document, under a preprinted heading entitled "The District Attorney's Position on Sentence," Mr. Glynn wrote, "[a]t the time of sentencing, the People will move the Court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life." Respondent did not initial this paragraph. Respondent signed the People's offer letter and the Felony Disposition Statement on December 17, 1987. Mr. Wiksell also signed the People's offer letter and the Felony Disposition Statement, which included a paragraph

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2. The en banc opinion of the Ninth Circuit erroneously states that "[t]he charges arose from allegations that Buckley and two others, Curtis Fauber and Christopher Caldwell, robbed and killed Thomas Urell in his home in July of 1986," and later refers to "Caldwell's participation in the Urell murder." (App. A3.) It is undisputed that Caldwell was not a party to the Urell murder, but was involved in a separate murder with Fauber that predated the Urell offense.

indicating that he had "explained the direct and indirect consequences of this plea to the defendant and am satisfied he understands them." (App. N1-N9.)

At a January 4, 1988, change of plea hearing, Mr. Glynn asked respondent during the plea colloquy, "Do you understand that for second degree murder you could be sentenced to state prison for a maximum possible term of 15 years?" Respondent answered, "Yes." Mr. Glynn subsequently asked respondent during the plea colloquy, "at the time of sentencing the People will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life . . . Do you understand that to be the situation?" Respondent answered, "Yes." After accepting the plea, the trial court asked defense counsel whether respondent wished to be sentenced by the same judge who took the plea. Defense counsel responded that it did not matter, "because it's second degree murder and you can only sentence him to 15 to life." (App. M1-M10.)

Three days later, on January 7, 1988, respondent testified in the guilt phase of the Fauber case, and stated that his plea agreement called for a sentence of "15 years to life." (App. J4-J6.) Respondent subsequently testified at Caldwell's preliminary hearing, and at the penalty phase of the Fauber trial. During the penalty phase of the Fauber trial, respondent was asked on cross-examination when he expected to be released or paroled from prison. Respondent stated that he expected to be released on parole from prison in seven and a half years. (App. L1-L2.)

Thereafter, the trial court sentenced respondent under his plea agreement to an indeterminate term of fifteen years to life. Respondent did not object to the sentence imposed by the trial court. (App. K1-K6.)

On May 13, 1996, respondent filed a habeas petition in the Ventura County Superior Court, through counsel, alleging that his plea agreement required that he serve no more than a determinate term of fifteen years. Respondent presented the superior court with his own declaration, the written plea agreement, and the reporter's transcript from his plea and

sentencing hearings. The superior court ordered the district attorney to file a return. The district attorney filed a return that included a declaration of Mr. Glynn denying that the People had ever offered respondent anything other than an indeterminate term of fifteen years to life under the plea agreement. The superior court then directed respondent to file a traverse, and told respondent that it was specifically concerned with his testimony during the guilt phase of the Fauber trial in which he stated that he was to receive a term of fifteen years to life. Respondent filed a traverse, but presented no additional evidence in superior court and did not address the superior court's concerns regarding respondent's testimony during the Fauber hearing. The superior court denied habeas relief in a written opinion, finding that "the advisement was that the sentence would be 15 years to life as provided by law, and that the [respondent] well knew this." (App. H1-H3, I1, J1-J6.)

Respondent subsequently filed a habeas petition in the California Court of Appeal raising the same claim he raised in the superior court, which was denied without comment. Respondent then filed a habeas petition in the California Supreme Court raising the same claim he raised in the superior court, which was denied without comment. (App. F1, G1.)

The Federal Habeas Corpus Proceedings

Respondent filed a federal habeas corpus petition in United States District Court. After the State filed its return and respondent filed his traverse, the district court issued an order requiring an evidentiary hearing regarding "what [respondent] was told" about the sentence he was to receive. The district court directed the parties to present the testimony of respondent's trial counsel, Mr. Wiksell, during the hearing.

During the federal evidentiary hearing, respondent testified in his own behalf, and presented the testimony of his mother and Larry Troxel, a Ventura County District Attorney's Office Investigator, who worked with Mr. Glynn on the prosecutions related to the Urell murder. Mr. Troxel testified that it was his

recollection that respondent was to receive a determinate fifteen year term. The State called Mr. Wiksell and Mr. Glynn, who each testified that respondent was never promised anything other than an indeterminate term of fifteen years to life. Mr. Wiksell testified that he had informed respondent that the plea agreement called for an indeterminate term of fifteen years to life. (App. E1.)

The federal magistrate recommended habeas relief, and the district court adopted the recommendation over the State's written objections. (App. D1-D38.) The Magistrate Judge's report asserted: "the Superior Court's findings and conclusion rest on a flawed foundation. It lacked the benefit of an evidentiary hearing during which it could have developed the record regarding any discussions or advice which occurred off the record." (App. D32-D33.) The district court's order granting habeas relief directed the State to release respondent from custody at the expiration of a fifteen year term. (App. D1.) The district court subsequently denied the State's motion to stay the judgement pending appeal, as did the Ninth Circuit. Respondent was released from state prison in January 2003 and has been on parole since that time.

The Ninth Circuit Court of Appeals reversed the district court in a 2-1 decision. In an opinion by Judge Trott, joined by Judge Rawlinson, the panel held that the district court erred in holding an evidentiary hearing and in basing its determination on evidence presented for the first time in federal court rather than on the evidence presented to the state courts. The panel concluded that the Ventura County Superior Court reasonably rejected respondent's claim, and that the evidence presented in federal court did not establish, by clear and convincing evidence, that the state court's factual findings were incorrect or that its corresponding factual determinations were objectively unreasonable. (App. C1-C22.) The panel majority concluded that the construction of a plea agreement is a matter of state law, not to be reinterpreted by federal courts, citing this Court's opinion in *Ricketts* v. *Adamson*, 483 U.S. 1, 5 n.3. (1987). (App. C22-C23.) Judge Bea dissented from the

majority opinion, stating that the state court had failed to apply the law of contracts in ruling on respondent's claim. (App. C23-C34.)

Respondent filed a petition for rehearing and request for rehearing en banc, adopting the rationale of Judge Bea in dissent. The Ninth Circuit granted rehearing en banc.[3/] (App. B1.)

On March 17, 2006, the en banc court issued an opinion written by Judge Reinhardt. The majority read *Ricketts* to mean just the opposite of what the panel had found it to mean. According to the en banc court, *Ricketts* held as a matter of clearly established federal law under 28 U.S.C. § 2254(d)(1) that plea agreements must be construed according to state law. (App. A9-A10.) California plea agreements, in the en banc court's view, must be construed according to state contract law principles. Finding that California courts had not explicitly applied state contract law principles to respondent's claim, the en banc court concluded that the state courts' resolution of respondent's claim was contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1). (App. A12.) The federal court then set forth its own version of state contract law principles and applied that interpretation to respondent's plea agreement with no regard for the state court's factual finding that respondent "well knew" the plea agreement required an indeterminate term of fifteen years to life. The majority concluded that under state law respondent's plea agreement must be deemed a bargain for a determinate term of fifteen years, and that it had been breached by the imposition of an indeterminate term of fifteen years to life, and that respondent was entitled to specific performance of that agreement. (App.

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3. Following oral argument on rehearing en banc, the Ninth Circuit issued an order directing the parties to "attempt to settle this matter through the court's mediation unit." The State filed a motion for reconsideration of the order directing the parties to meditation. The Ninth Circuit subsequently rescinded its order directing the parties to mediation and deemed the matter submitted.

A12-A17.)

Judge Callahan issued a dissenting opinion, joined by Judge Tallman, arguing that, although the majority claimed it was granting relief under 28 U.S.C. § 2254(d)(1), it was actually granting it under § 2254(d)(2) without deference to the state court's factual findings, and that the majority had improperly substituted its own factual determinations for the reasonable determinations of the state court. (App. A17-A22.)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because, in granting habeas corpus relief, the Ninth Circuit opinion conflicts with this Court's decisions in *Ricketts v. Adamson*, 483 U.S. 1, and *Estelle* v. *McGuire*, 502 U.S. 62 (1991), and fails to adhere to the deferential review standard of 28 U.S.C. § 2254(d). First, the Ninth Circuit determined that the California state courts were required by clearly established Federal law to apply commercial contract law principles to resolve respondent's claim that his plea agreement had been violated. The proper application of that state law, according to the en banc court, meant that the state court was required by the federal Constitution to blind itself to the basic reality of what respondent himself believed his bargain to be, and to confine its review to an abstract consideration of the paper record, as if it were construing a commercial contract. There is no such clearly established federal law. Indeed, this Court previously warned the Ninth Circuit in another case involving the same issue that federal courts have no "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts*, 483 U.S. at 5 n.3. The Ninth Circuit en banc court paid no heed to this warning, and did just that.

Second, the en banc court used its mistaken view of clearly established law to nullify one of the most basic of all limitations on federal habeas courts, the principle that a federal court sitting in habeas jurisdiction may not grant a prisoner relief on the basis of a perceived state law error. *Estelle* v. *McGuire*, 502

U.S. at 68. These two errors show that the Ninth Circuit has once again lost sight of the most elementary constraints on federal habeas corpus power. This Court should grant certiorari to rectify both errors.

I. "CLEARLY ESTABLISHED FEDERAL LAW" DID NOT REQUIRE THE CALIFORNIA COURTS TO APPLY STATE CONTRACT LAW PRINCIPLES TO CONSTRUE THE TERMS OF THE PLEA AGREEMENT WITHOUT REGARD TO WHETHER RESPONDENT'S PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT

Respondent first raised his claim that his plea agreement required a determinate term of fifteen years, rather than an indeterminate term of fifteen years to life, in the Ventura County Superior Court in a state habeas corpus proceeding. The superior court conducted an extensive hearing on a written record and concluded that respondent "well knew" that the plea agreement required him to serve an indeterminate term of fifteen years to life at the time he entered his plea. (App. H1-H3, I1.) The Ventura County Superior Court's factual findings are entitled to the deference mandated by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The Ninth Circuit Court of Appeals, however, ignored the state court's factual determinations, and instead held that the California courts, as a matter of "clearly established federal law" under § 2254(d)(1), had a duty to construe respondent's plea agreement according to state contract law principles. Concluding that the state court had failed to do so, the Ninth Circuit reinterpreted the plea agreement under its own flawed version of state law, without regard to the state court's factual findings about respondent's actual understandings of the plea. Having eliminated the state courts' essential finding that respondent "well knew" that he had entered into an agreement for fifteen years to life, not just for fifteen years, the en banc court concluded that respondent was entitled to habeas relief. In so doing, the Ninth Circuit overstepped its authority.

The Ninth Circuit located the source of the "clearly established Federal law" requiring California to employ its own contract law in a single phrase wrenched out of context from a passage in *Ricketts.* (App. A2-A3, A9-A10.) But *Ricketts* says no such thing, and this Court has never held that a state must apply contract law principles to interpret plea agreements. The leading case on the issue of a breach of a plea agreement is *Santobello* v. *New York*, 404 U.S 257, 261 (1971). *Santobello* discusses the consequences of a broken plea agreement, but it does not prescribe the mode of analysis a state must follow to determine whether the agreement was broken. Neither does *Ricketts*. The Ninth Circuit has substituted a review of the process used by the state court for a review of the result reached in the state court. This is a fundamental error.

The question for a federal habeas court reviewing a claim of a breach of a plea agreement is not whether or how well a state court applied its own law in determining what the agreement was and whether the agreement was broken. The question is whether the result reached in the state court was an objectively unreasonable application of controlling federal law. The controlling constitutional law on this issue is that a defendant has a due process right to enter a plea in a "knowing," "voluntary and intelligent" manner. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984); *Santobello* v. *New York*, 404 U.S. at 261. The first step in answering that question is to ascertain what the bargain entailed, and answering that question frequently disposes of the claim. That is precisely the question the state court considered and answered when it found as a matter of fact that respondent "well knew" that the bargain he had made was his plea of guilty in exchange for a sentence of fifteen years to life. But that factor was deemed irrelevant in the Ninth Circuit's opinion. The correct constitutional standard is not mentioned, or referred to, or relied upon in the opinion. Instead, the majority concluded, based on *Santobello* and *Ricketts*, that state courts must determine the components of plea agreements according to a particular set of state law rules, and that federal courts

sitting in habeas jurisdiction may reinterpret and reapply those state law rules to determine whether a breach of a plea agreement has occurred. (App. A9-A17.)

The majority opinion does not hold that respondent's plea was not knowingly and voluntarily entered, or that the California courts erred in reaching such a conclusion, and does not dispute the Ventura County Superior Court's conclusion that respondent "well knew" the terms of his plea agreement required an indeterminate term of fifteen years to life. (App. H1-H3, I1.) As demonstrated in both the original panel opinion and dissent, and in the en banc dissent, the state court's factual finding that respondent "well knew" that he had bargained for a sentence of fifteen years to life is virtually invulnerable. Instead, the majority opinion found constitutional error predicated on nothing more than its own view of how state "contract law" should apply to an analysis of respondent's claim.

The state court determination that respondent subjectively understood his plea agreement to require an indeterminate term of fifteen years to life was consistent with this Court's articulation of what due process requires of a plea agreement, namely, that the agreement be entered into in a knowing, voluntary, and intelligent manner. See *Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S. at 261. The Ninth Circuit majority simply subtracted the component of respondent's subjective understanding from its analysis, noting off-handedly that "whether or not the state court's determination of [respondent's] state of mind was reasonable is wholly irrelevant." (App. A12.) The state courts understood that in resolving respondent's constitutional claim, his own understanding of the terms of his bargain was not irrelevant. It was essential. Even more important, this Court has never suggested that a prisoner's understanding of his plea bargain is "wholly irrelevant."

In place of a review with a properly limited focus, the en banc court misconstrued *Santobello* and *Ricketts* to the point of distortion, substituting instead a discourse on the proper

elements of California state contract law followed by a lecture explaining to the California courts how they had misunderstood and misapplied their own law. In so doing, the Ninth Circuit majority simply ignored this Court's unambiguous command in *Ricketts*, an earlier Ninth Circuit case, that federal courts have no "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts*, 483 U.S. at 5 n.3. At the same time, the Ninth Circuit majority flouted the requirements of § 2254(d)(1).

In *Ricketts*, the defendant pled guilty to second-degree murder in a plea agreement that called for him to testify against two codefendants involved in the murder. The defendant testified against his codefendants and was sentenced to twenty years in state prison pursuant to the agreement. The Arizona Supreme Court subsequently reversed the codefendants' convictions on appeal. The state sought the defendant's testimony at the retrial of his codefendants and he refused. The state then informed the defendant that he was in breach of the plea agreement and filed an information charging him with first degree murder. The Arizona Supreme Court denied the defendant's claim of a double jeopardy violation and concluded that the defendant had violated the terms of his plea agreement by refusing to testify at the retrial. The Ninth Circuit, however, granted defendant habeas corpus relief. *Ricketts* v. *Adamson*, 483 U.S. at 4-6.

This Court reversed the Ninth Circuit, and held:

> 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 [his codefendants] and, if so, whether respondent breached this duty are matters appropriately left to the state courts. The dissent acknowledges that "deference to the Arizona Supreme Court's construction is appropriate," [citation], but proceeds to engage in plenary review of that court's holding that the respondent breached the agreement. The dissent does not explain the nature of the deference it purports to afford the state courts, and one is unable to detect any such deference in the approach the dissent advocates. And, the dissent misconstrues the interrelationship between the construction of the terms of the plea agreement and the respondent's assertion of a double jeopardy defense. As noted previously, once a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.

Ricketts v. *Adamson*, 483 U.S. at 5 n.3.

This Court's comments in *Ricketts* regarding the interpretation of plea agreements were based, in part, on a portion of the dissent authored by Justice Brennan, in which he argued that the defendant's actions under the plea agreements needed to be construed prior to determining whether his double jeopardy rights were violated. *Ricketts*, 483 U.S. at 13-14. Justice Brennan opined:

> This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate.

> [Citations.] It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the state.

Id. at 16.

Nothing in this Court's opinion in *Ricketts*, or the dissent of Justice Brennan for that matter, substantiates the Ninth Circuit's conclusion in the instant case that as a matter of "clearly established federal law" under section 2254(d)(1), a state court must construe a plea agreement according to a particular set of state-law principles identified by the federal court, nor may a federal court reinterpret a state court's reasonable construction of a plea agreement to determine whether a breach has occurred, rather than confining itself to the relevant constitutional determination of whether a plea was entered in a knowing, voluntary, or intelligent manner. Similarly, nothing in *Santobello* purports to require any particular method for a state court to utilize in determining whether a plea agreement was entered knowingly and voluntarily. *Santobello* v. *New York*, 404 U.S. at 259-67; see *Smith* v. *Stegall*, 385 F.3d 993, 999 (6th Cir. 2004).

At least two circuits have rejected the notion that this Court has ever clearly articulated a procedure by which state courts must determine the existence of a breach in a state case. *Smith* v. *Stegall*, 385 F.3d at 999; *Innes* v. *Dalsheim*, 864 F.2d 974, 978 (2nd Cir. 1988). In *Smith*, the Sixth Circuit concluded that, "Although *Santobello* discusses the consequences of a broken plea agreement, the case does not amplify the parameters of what constitutes a breach." *Smith*, 385 F. 3d at 999. In *Innes*, the Second Circuit stated that *Santobello* requires a state court to determine "precisely what was provided" in a plea

agreement, but does not suggest a particular method for this determination other than demanding that a defendant enter his plea in a knowing, voluntary, and intelligent manner. *Innes*, 864 F. 2d at 978-79.

In the instant case, unlike *Santobello*, the state court was concerned with determining the elements of the plea agreement, rather then the consequences of an undisputed breach. *Santobello* v. *New York*, 404 U.S. at 259-67. The Ventura County Superior Court was charged with construing the plea agreement to determine what prison term respondent had agreed to as part of his plea. The superior court construed the terms of the agreement to require an indeterminate term of fifteen years to life, and found that respondent "well knew" that this prison term was required of him when he entered the agreement. (App. H1-H3.) The California courts' undisturbed determination that respondent "well knew" that his plea agreement required an indeterminate term of fifteen years to life at the time he entered his plea satisfies the clearly established precedent of this Court requiring that a plea agreement be entered in a knowing, voluntary, and intelligent manner. The denial of respondent's claim was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. *See Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S at 261.

II. IN REVIEWING A DUE PROCESS CLAIM RELATING TO A STATE PLEA PROCEEDING, A FEDERAL HABEAS COURT HAS NO POWER TO REINTERPRET STATE LAW TO REQUIRE THE STATE COURT TO IGNORE THE PRISONER'S OWN UNDERSTANDING OF THE TERM REQUIRED BY THE PLEA BARGAIN

Even if the Constitution required California courts to employ

state contract-law principles to evaluate negotiated pleas, the Ninth Circuit had no power to tell California courts what those principles are, let alone to conduct an analysis of respondent's claim using its own mistaken version of those principles. A state's decision to construe its plea agreements in a particular method under state law does not provide a federal court sitting in habeas jurisdiction with the authority to reinterpret that agreement under state law to grant a prisoner relief, because a federal court sitting in habeas jurisdiction may not grant relief on the basis of a perceived state law error. *Estelle* v. *McGuire*, 502 U.S. at 68. By granting itself permission to give California courts a brief tutorial on California law, disguised as a review for constitutional error, the Ninth Circuit has contravened the most basic principles of comity and federalism so clearly expressed in *Estelle* v. *McGuire*.

These principles are reiterated in *Ricketts*, but they were simply ignored by the en banc court by means of its highly selective quotation from footnote 3 of that opinion. (App. A9.) The effect of the en banc court's ellipsis is best demonstrated by quoting the *Ricketts* passage more completely, highlighting the single phrase the court of appeals plucked out of context:

> 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. . . . As noted previously, once a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second guessing the finding of a breach and is not a license to substitute a federal

> interpretation of the terms of a plea agreement for a reasonable state interpretation.

Ricketts v. *Adamson*, 483 U.S. at 5 n.3. Thus, this Court's opinion in *Ricketts* echoes the *Estelle v. Maguire* restriction on federal habeas power, making clear that a state court's reasonable interpretation of its own plea agreements may not be disturbed by a federal court on habeas corpus. *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3.

But even if it were assumed further that 28 U.S.C. § 2254(d)(1), by way of *Ricketts*, allows a federal court on habeas corpus to reassess the reasonableness of a state court's determination of a plea agreement under state law, respondent still would not be entitled to habeas relief because the Ventura County Superior Court's interpretation of this plea agreement was eminently reasonable. Indeed, nothing in the en banc court's opinion even suggests otherwise.

Here, the superior court carefully reviewed an abundance of evidence in the extensive written evidentiary record and argument submitted by both sides, including the written plea agreement, the reporter's transcript of the plea and sentencing hearings, and declarations of the parties, including the prosecutor, who averred that he never offered respondent anything other than an indeterminate term of fifteen years to life. The court also considered respondent's own testimony during the guilt phase of the Fauber trial, given three days after his plea, that he understood his plea agreement to require a sentence of fifteen years to life, and took into account the crucial factor that at the time of the plea, fifteen years to life was the only lawful sentence. Based on its scrupulous review of this evidence, the superior court reasonably concluded that respondent "well knew" that the terms of his plea agreement required an indeterminate term of fifteen years to life. (App. H1-H3, I1.)

In any event, the superior court's act of looking to "extrinsic evidence" to resolve an ambiguity in the agreement was entirely proper and reasonable under California state law, as respondent's subsequent conduct in testifying that he

understood his plea agreement to require a prison term of fifteen years to life helped resolve any ambiguity attending to the agreement.[4/] See *People* v. *Shelton*, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354 (2006) (subsequent conduct of the parties is relevant to construing ambiguous terms of a plea agreement); *Morey* v. *Vannucci*, 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 573 (1998). At the most basic level, nothing in California contract law requires a court construing a plea agreement to ignore a defendant's understanding of the bargain, as the Ninth Circuit opinion would require. The Ninth Circuit's contrary conclusion was both improper on federal habeas corpus under *Estelle* v. *McGuire*, 502 U.S. at 68, and erroneous under state law under *People* v. *Shelton*, 37 Cal. 4th at 767.

Where, as in the instant case, a term of a plea agreement is rendered ambiguous by competing provisions, a court under California contract law objectively looks to extrinsic evidence to determine the parties' reasonable understanding of the term's meaning. The examination of extrinsic evidence under California law includes looking to the subsequent conduct of the parties. It is only if the extrinsic evidence regarding the parties' intent fails to resolve the term's ambiguity must the court apply the rule construing ambiguous terms against the drafting party. See *People* v. *Shelton*, 37 Cal.4th at 767; *People* v. *Toscano*, 124 Cal. App. 4th 340, 345, 20 Cal. Rptr. 3d 923 (2004); *Vine* v. *Bear Valley Ski Company*, 118 Cal. App. 4th 577, 590 n.2, 13 Cal. Rptr. 3d 370 (2004).

A plethora of errors in the Ninth Circuit's majority opinion, both factual and legal, demonstrate that court's "readiness to attribute error" which is "inconsistent with the presumption that

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4. Respondent's subsequent testimony during the penalty phase of the Fauber trial that he expected to be released from state prison in seven and a half years was wholly consistent with a reasonable expectation of parole eligibility for a defendant convicted of second-degree murder serving an indeterminate term of fifteen years to life under California law at the time of respondent's testimony. See *In re Oluwa*, 207 Cal. App. 3d 439, 255 Cal. Rptr. 35 (1989).

state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002). The Ninth Circuit's majority opinion in the instant case is contrary to the requirements of 2254(d)(1), and is directly at odds with this Court's prior opinion in *Ricketts*. It undermines the right and the duty of individual states to construe their own plea agreements in a manner consistent with the federal constitutional requirement that pleas must be entered in a knowing and intelligent manner. In so doing, the Ninth Circuit's opinion in this matter contravenes the principles of comity, federalism, and the primacy of state court determinations which the AEDPA was intended to promote. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003).

CONCLUSION

For the stated reasons, petitioner respectfully asks this Court to grant the petition for writ of certiorari.

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Respectfully submitted,

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