

IN THE  
COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSÉ ERNESTO MEDELLÍN

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE NO. 675430  
IN THE 339<sup>TH</sup> DISTRICT COURT OF HARRIS COUNTY

REPLY BRIEF OF APPLICANT  
JOSÉ ERNESTO MEDELLÍN

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## ARGUMENT

The State's Brief in Response makes it clear that the dispute before this Court is narrow. It is undisputed that:

- The Vienna Convention on Consular Relations, a treaty duly ratified by the President and Senate, requires authorities in the United States, after arresting a Mexican national, to “inform the person concerned without delay of his rights” to contact the Mexican consulate for assistance;
- In violation of this obligation, Texas authorities failed to inform Mr. Medellín, a national of Mexico, of his right to seek consular assistance at any time before he was convicted and sentenced to death;
- By the Optional Protocol to the Vienna Convention, another duly ratified treaty, the United States and Mexico agreed to submit any disputes over the interpretation and application of the Vienna Convention to binding adjudication before the ICJ;
- After considering voluminous evidence and argument from the United States and Mexico, the ICJ rendered a final judgment in the *Avena* case, determining that the Vienna Convention required the United States to provide review and reconsideration of the convictions and sentences of Mr. Medellín and 50 other Mexican nationals on death row;
- By the United Nations Charter, another duly ratified treaty, the United States agreed to comply with the ICJ's judgments in cases to which it is a party;
- As a result of the *Avena* Judgment and the United States's commitment to abide by that Judgment, the United States has an international obligation to provide Mr. Medellín the review and reconsideration ordered by the ICJ; and
- The President of the United States has “determined, pursuant to the authority vested in [the President] by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”

Only one issue remains in dispute: whether this Court should place the United States in breach of its international obligations to Mexico, notwithstanding the binding effect of the *Avena* Judgment and the President's determination that the United States will comply,

by refusing to order that Mr. Medellín be provided with the review and reconsideration to which first the ICJ and now the President has determined he is entitled.

**I. THE UNITED STATES CONSTITUTION REQUIRES THE COURT TO GIVE EFFECT TO THE *AVENA* JUDGMENT.**

The *Avena* Judgment requires that Mr. Medellín receive review and reconsideration of his conviction and sentence without resort to procedural default rules. As Petitioner explained in his opening brief, as a matter of United States federal law, this requirement is an individual right enforceable by Mr. Medellín in this proceeding.

**A. The *Avena* Judgment Is Binding Federal Law.**

The State contends that “*Avena* does not overrule United States law.” State Br. 23. But the *Avena* Judgment *is* United States law. The United States Constitution provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,” just as Acts of Congress are. U.S. CONST. art. VI. It also provides that, just like Acts of Congress, treaties preempt contrary state law: it says that treaties are supreme law, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.* The Vienna Convention is a duly ratified treaty, which requires that “full effect . . . be given to the purposes for which the rights [of consular access and notification] are intended.” Vienna Convention art. 36(2). The Optional Protocol, also a duly ratified treaty, requires that disputes over the interpretation and application of this provision be submitted to binding adjudication by the ICJ. Thus, the ICJ’s binding determination of the interpretation and application of the Vienna Convention in the *Avena* case is a bargained-for treaty obligation, no less than any other

provisions of the treaty. Pet’r Br. 41-43. Accordingly, it provides the rule of decision in this case and preempts any contrary state law. Pet’r Br. 63-71.

Contrary to the State’s argument, State Br. 23-25, the United States Supreme Court’s decision in *Breard v. Greene*, 523 U.S. 371 (1998), does not apply here. Unlike this case, *Breard* did not involve a final judgment of the ICJ. Pet’r Br. 67 n.39. For that fundamental reason, the Supreme Court has already recognized, in Mr. Medellín’s own case, that *Breard* is distinguishable. *Medellín v. Dretke*, 125 S. Ct. 2088, 2091 n.3 (2005) (per curiam) (“At the time of our *Breard* decision . . . , we confronted no final ICJ adjudication.”).<sup>1</sup> Indeed, if the Supreme Court had thought *Breard* controlled this case, it would not have referred the case to this Court, since only the Supreme Court can overrule its own precedents.

The State also contends, in effect, that the ICJ’s interpretation of the Vienna Convention was incorrect. State Br. 22. That is irrelevant, because the United States agreed that the ICJ would determine the meaning and application of the Vienna Convention in cases to which the United States is a party. Just as a party cannot defeat the res judicata effect of a domestic judgment by arguing that the judgment was incorrect,<sup>2</sup> Texas cannot alter the United States’ obligation to comply with the ICJ’s

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<sup>1</sup> See also *id.* at 2106 (Souter, J., dissenting) (“This case is . . . not *Breard*, and the Court of Appeals should be free to take a fresh look.”). The Supreme Court’s opinion in *Medellín* makes clear that the Fifth Circuit’s decisions in *Medellín* and in *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005), were wrongly decided to the extent they held *Breard* to be controlling.

<sup>2</sup> See, e.g., *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (res judicata effect of judgment not “altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”); *Williams v. Robinson*, 63 Tex. 576, 580 (1885) (“[A] judgment is conclusive of the matters . . . acted (footnote continued)

judgment by rearguing the position that the United States unsuccessfully urged before the ICJ. Pet'r Br. 39-41. As with a domestic judgment, "an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself." *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899); see 3 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata").

In any event, though it is not relevant here, the ICJ correctly interpreted the Vienna Convention. Article 36(1) specifically refers to individual "rights" to consular notification and access. See Vienna Convention art. 36(1)(b) ("The said authorities shall inform the person concerned without delay of *his rights* under this sub-paragraph") (emphasis added). Article 36(2) makes clear that a party to the Convention must provide a fully effective remedy for violation of these rights. The ICJ held these provisions to create individual rights, see *Avena* ¶ 40, and numerous courts in the United States reached the same conclusion even before the ICJ's *Avena* judgment.<sup>3</sup> Indeed, the language of the Convention is far clearer than the language of the treaties involved in the cases that the

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on, and whether correct or not is binding . . . "); *Butler v. Cont'l Airlines, Inc.*, 116 S.W.3d 286, 287-88 n.4 (Tex. App. Houston 14th Dist. 2003) ("The principles of res judicata apply even if the first judgment was erroneous.").

<sup>3</sup> *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (Article 36 of Vienna Convention confers individual rights); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (same); *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999) (same); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932-33 (C.D. Ill. 1999) (same); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999) (same); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 989 (S.D. Cal. 1999) (same); see also *Breard v. Greene*, 523 U.S. 371, 376 (1998) (Vienna Convention "arguably confers" an individual right); *Rocha v. State*, 16 S.W.3d 1, 18 (Tex. Crim. App. 2000) (declining to decide whether the Vienna Convention confers individual rights). Cases holding otherwise, e.g., *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998), were wrongly decided, as the ICJ's subsequent decision in *Avena* makes clear.

State attempts to distinguish, which contain no express reference to individual rights but were nonetheless interpreted to create such rights. *See Medellín v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O’Connor, J., dissenting) (Vienna Convention far more explicit on creation of individual rights than treaties in *Kolovrat v. Oregon*, 366 U.S. 187, 192 & n.6 (1961), and *Asakura v. Seattle*, 265 U.S. 332, 340 (1924)).

The plain language of the Vienna Convention conferring these individual rights is fully consistent with the main purpose of the Convention “to ensure the efficient performance of functions by consular posts on behalf of their respective States” (Vienna Convention Preamble), because a nation’s ability to provide effective consular assistance is impaired if its citizens are denied access to their consulates or not informed of the availability of consular assistance, or not given an effective remedy for violation of these rights. Moreover, the reference in the Preamble to “privileges and immunities” not being “intended to benefit individuals,” *id.*, on its face refers to the “privileges and immunities” of consular officials repeatedly mentioned in the Convention—not the “rights” of individual citizens referenced in Article 36. *See* Pet’r Br. 14 n.14 (citing provisions). And even if there were an inconsistency between Article 36 and the Preamble, the specific language of Article 36, an operative provision that expressly recognizes individual rights, would prevail over the general statement of purpose in the Preamble.<sup>4</sup>

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<sup>4</sup> *See, e.g.*, Restatement (Third) of Foreign Relations Law § 325 reporter’s note 4 (in interpreting treaty, “purpose” does not override “intent”; “object and purpose” of the treaty is subordinate to “interpretation in accordance ‘with the ordinary meaning’ of the text of the agreement”); *see also, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989) (specific statutory provision prevails over general provision); *Eastern Airlines v. Floyd*, 499 U.S. 530, 535 (1991) (general rules of construction may aid in interpreting treaties).

The State also argues that it is not bound by *Avena* because neither it nor its official Doug Dretke were named parties to the ICJ decision. State Br. 27. This argument misapprehends the status of the constituent states of the United States when international relations are involved. In foreign relations, the federal Executive Branch speaks for the United States as a whole, including all its constituent states. *See* Pet’r Br. 29-31. As far as relations with foreign nations are concerned, the United States acts as a single nation, and the individual states have no legal personality separate from the United States. *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations . . . , state lines disappear. As to such purposes the State . . . does not exist.”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *see also* Pet’r Br. 31 n.17.

Thus, in the *Avena* case before the ICJ, it was the United States that defended Texas’s position and that of the other affected states—in close consultation with Texas officials<sup>5</sup>—even though all the affected Mexican nationals were in state custody rather than federal custody. Texas, and Mr. Dretke in his official capacity, thus *were* parties to the ICJ proceeding (or, at a minimum, in privity with a party), because their interests were represented by the United States, of which Texas is a constituent part. *See, e.g., Belmont*, 301 U.S. at 331; *The Chinese Exclusion Case*, 130 U.S. at 604-06; *see also*,

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<sup>5</sup> *See, e.g., States Amici Br.*, Appx. B, at 1 (letter from U.S. Attorney General Alberto Gonzalez to Texas Attorney General Greg Abbott, acknowledging that “[t]he State of Texas has . . . provided critical assistance to the U.S. Department of State in preparation of the response of the United States in [the *Avena*] proceeding” before the ICJ).

*e.g., Nevada v. United States*, 463 U.S. 110, 135 (1983) (Indian tribe whose interests United States represented in litigation was bound by judgment).

**B. The *Avena* Judgment Is Enforceable in this Court.**

As Petitioner has shown, rights created by treaty are judicially enforceable by the express language of the United States Constitution. Pet’r Br. 36-43. Texas argues, however, that this Court should breach the treaty obligations of the United States under the treaty because Article 94(2) of the UN Charter allows Mexico to seek redress from the Security Council “if [the] other party fails to perform [its] obligations,” State Br. 27, and because the Vienna Convention’s Optional Protocol is silent on domestic judicial enforcement, *id.* at 28. The United States, by contrast, acknowledges that the UN Charter requires that “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party” without awaiting Security Council action, U.N. Charter art. 94(1), but argues that the reference to compliance in Article 94(1) implicitly refers to the federal “political branches.” U.S. Br. 44.

Each of these arguments fundamentally confuses the question of what the obligations of the United States are on the international plane with the question of how the United States chooses *within its own legal system* to give effect to its international obligations. As the *Avena* Judgment, the Vienna Convention, and the UN Charter all make clear, the means of compliance are matters for each country’s domestic law, subject only to the Vienna Convention’s proviso that those means be sufficient to give full effect

to the rights of consular notification and access.<sup>6</sup> The treaties are indifferent to a nation's internal constitutional structure: whether or not a nation internally has a separation of powers between its "political branches" and its judiciary, each nation has an obligation to ensure compliance by whatever means are provided in its own constitution.<sup>7</sup> A breach of treaty is no less a breach in the event that judges, rather than executive or legislative officials, cause it to occur. Pet'r Br. 30 & n.15.<sup>8</sup>

The question of how the United States implements compliance with international obligations within its own legal system is answered not by any treaty or general international law, but by the United States Constitution:

[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI (emphasis added). This provision, expressly requiring direct enforcement of treaties as federal law by state judges, was added to the Constitution specifically to prevent state courts from putting the United States into breach of its

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<sup>6</sup> See Vienna Convention Art. 36(2) ("The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."); *Avena* Judgment ¶¶ 138-39, 153(9) (United States to provide review and reconsideration by "the means of its own choosing"); UN Charter, art. 94(1) (providing that "[e]ach Member" is obligated to comply with ICJ judgment, but not specifying governmental organ in each nation responsible for complying).

<sup>7</sup> Thus, the argument of the State's Law Professor *Amici*, to the effect that not all foreign countries give direct effect to treaties in their ordinary courts, is irrelevant. Br. of *Amici* Prof. Supporting Resp. 24-29.

<sup>8</sup> See also, e.g., IAN BROWNLIE, STATE RESPONSIBILITY, PART 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. No. 121, paras. 75-76 (Feb. 14) (issuance of arrest warrant by Belgian judge violated rule of customary international law recognizing head-of-state immunity).

international obligations.<sup>9</sup> In other words, it was adopted to avoid precisely the result that the State now urges upon this Court.

The Supreme Court has left no doubt that the Constitution commands that when a treaty confers rights “of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *The Head Money Cases (Edye v. Robinson)*, 112 U.S. 580, 598-99 (1884); Pet’r Br. 63-67. To be sure, Congress has the power to repudiate the United States’s treaty obligations. *E.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (prior treaty provision superceded by legislation). The states, however, have no such authority. *E.g.*, *United States v. Belmont*, 301 U.S. 324, 331 (1937) (states cannot obstruct the effective operation of federal authority in international relations). And as the United States explains, the enforcement of Mr. Medellín’s rights under the *Avena* judgment are clearly of a nature that can be enforced judicially. U.S. Br. 21 (noting the “suitability of judicial review as a means of compliance”). The question of what rights Mexico would have on the international plane

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<sup>9</sup> See, e.g., *The Federalist* No. 22, at 183 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (“The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?”); *id.* at 150 (“The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations.”); *The Records of the Federal Convention of 1787* at 316 (Max Farrand ed., rev. ed. 1966) (James Madison) (“The tendency of the States to . . . violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.”); see also 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 490 (Jonathan Elliot ed., 2d ed. 1881) (John Wilson of Pennsylvania) (Making treaties judicially enforceable “will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.”).

if the United States fails to comply with the *Avena* Judgment is simply irrelevant, because the United States Constitution requires this Court to comply.<sup>10</sup>

The State offers no response to Mr. Medellín’s argument that the *Avena* Judgment should be followed in the interest of uniform treaty interpretation, even if it were not directly binding. Pet’r Br. 43-44.<sup>11</sup>

## **II. THE UNITED STATES CONSTITUTION REQUIRES THE COURT TO GIVE EFFECT TO THE PRESIDENT’S DETERMINATION.**

Even if the *Avena* Judgment standing alone were not binding on this Court, the President’s Determination now makes it so. Thus, as the United States points out, this Court need not decide the direct effect of the *Avena* Judgment if it decides that it must abide by the President’s Determination. U.S. Brief 34.

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<sup>10</sup> This case is fundamentally different from *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). First, in the *Nicaragua* case, Congress had enacted legislation by which the United States determined to take action inconsistent with the ICJ judgment, while here there is no such legislation, and indeed the Executive Branch has expressly decided to comply. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (Congress has power to repudiate treaty by subsequent statute). Second, in the *Nicaragua* case, the ICJ judgment addressed rules of customary international law concerning the use of military force, an area of Executive Branch competence, while here the obligation arises under a self-executing treaty and is “of a nature to be enforced in a court of justice.” *The Head Money Cases*, 112 U.S. at 598-99. Finally, in the *Nicaragua* case, the U.S. nationals who sought to enforce the ICJ judgment had no relationship to the ICJ case, while here, by contrast, the ICJ adjudicated Mr. Medellín’s own rights.

<sup>11</sup> The State’s Law Professor *Amici* suggest (at 24-29) that courts in some other countries might not automatically follow the *Avena* decision as binding domestic law if their country were the defendant, but they do not and cannot cite a single decision from a foreign country that reaches a conclusion contrary to the holding of *Avena*, because there is none. At the very least, *Avena* is strong evidence of how respected and seasoned judges from around the world are likely to view the requirements of the Vienna Convention, and it would receive—at a minimum—respectful consideration as persuasive authority from judges in other countries.

**A. Compliance with the President’s Determination Violates No Requirements of the United States Constitution.**

**1. The President’s Determination Is In Accord With The Express Will Of Congress.**

The State argues that the President did not have authority to order compliance with the *Avena* Judgment. State Br. 39-40. The State does not contest the President’s well established authority under Article II of the Constitution and his foreign affairs power to settle international disputes and act to protect Americans abroad. Pet’r. Br. 44-50. Nor does the State contest Mr. Medellín’s showing that the President and Senate have committed the United States by treaty to comply with ICJ judgments in cases to which it is a party. Pet’r Br. 45-50. Instead, the State and the other States *Amici* suggest that the President’s authority is curtailed by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (“AEDPA”)—a statute that places no restrictions on state habeas corpus proceedings. State Br. 39; States *Amici* Br. 17-20. They ask this Court to read AEDPA’s restrictions on a *federal court’s* habeas authority to limit the President’s authority to require a *state court* to apply federal law. State Br. 39; States *Amici* Br. 19.<sup>12</sup>

Regardless of the State’s characterization of AEDPA as the “cousin” (State Br. 23) or “sister” (State Br. 39) of Tex. Code Crim. Proc. art. 11.071, that statute has no bearing

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<sup>12</sup> Far from contesting the President’s authority to issue the Determination, the State’s Law Professor *Amici* confirm his authority to settle international disputes pursuant to his Article II powers, Br. of *Amici* Prof. Supporting Resp. 17-18, making the rest of their brief pointless. Indeed, one of those *amici* had already disparaged any opposition to the President’s authority as “probably loser arguments” because “Texas would have to get the Supreme Court to reconsider some of its recent precedent.” Julian Ku, *Texas’ Last Stand on Medellin*, *Opinio Juris*, Mar. 8, 2005, at <http://lawofnations.blogspot.com/2005/03/texas-last-stand-on-medellin.html> (last visited Sept. 7, 2005).

here for the simple reason that federal statutory limitations on habeas review by federal courts do not apply to this proceeding in state court. Similarly, the Supreme Court’s discussion in *Breard* of AEDPA in the context of a Vienna Convention claim (States *Amici* Br. 19-20) provides no guidance, because there, too, the Supreme Court was addressing a claim in the posture of *federal* habeas. Indeed, the Supreme Court effectively referred the case to this Court partly in order to avoid the possible limitations on federal court review of the state judgment here. *See Medellin*, 125 S. Ct. at 2090 n.1 (2005) (per curiam) (enforcement of *Avena* judgment on state habeas avoids issues presented by AEDPA); *id.* at 2093 (Ginsburg, J., concurring) (allowing Mr. Medellín to proceed in this Court will allow the Supreme Court “ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ’s *Avena* judgment, shorn of procedural hindrances that pervade[d] the [federal habeas] action.”).<sup>13</sup>

Nor is there any need for Congress to express a “clear and manifest” intention to supplant state criminal procedure with federal law. State Br. 37. The preemptive action here is not a Congressional statute, but the President’s exercise of authority under Article II and his foreign affairs power; no specific *Congressional* intent is required to supplant state law where the *President* has exercised his Constitutional power to determine that the United States will comply with its treaty obligations. *See United States v. Pink*, 315 U.S.

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<sup>13</sup> As it happens, it is clear from the legislative history that the AEDPA Congress never considered the effect of the statute on the United States’s treaty obligations, including those under the Vienna Convention. Hence, in some future case, the Supreme Court will also need to consider the effect on the interpretation of that statute of *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), which holds that absent a clear instruction to do so from Congress, courts should not construe federal statutes in a manner that would place the United States in breach of its treaty obligations. But none of those issues are remotely relevant here.

203, 231 (1942) (power of the state “must give way before the superior Federal policy evidenced by a treaty or international compact or agreement” as determined by the Executive); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (as the treaty-making power is independent of and superior to the legislative power of the states, the construed meaning of treaty provisions “must prevail over inconsistent state enactments”).

**2. The President’s Exercise of his Foreign Affairs Power in Issuing his Determination Is in Accord With the Constitution.**

The State next argues that the President lacks the power to preempt state law based on a “unilateral assertion that the pre-emption serves the United States’ foreign-policy interests, rather than on a bilateral executive agreement.” State Br. 39-40. In similar fashion, though they acknowledge the Supreme Court’s decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the States *Amici* contend that it is inapplicable here because there is no executive agreement to abide by *Avena*. States *Amici* Br. 21-22. In other words, the State and the States *Amici* would condition the President’s constitutional authority in foreign affairs on his ability to secure a foreign power’s acquiescence in his decision.

As the United States explains, U.S. Br. 30, that would be a truly remarkable limitation on the President’s foreign affairs authority. Applied here, for example, the State would have required the President to obtain Mexico’s agreement with his decision on how to implement *Avena* before that decision would be effective. Unsurprisingly,

there is not an iota of support for that proposition either in the Constitution or anywhere else.<sup>14</sup>

In any event, if the President needed an agreement with a foreign state here, he surely has one. Indeed, he has several – the Vienna Convention, its Optional Protocol, the UN Charter, and the ICJ Statute – and they are not simply executive agreements, entered into on the President’s own authority, with a single state, but treaties, entered into with the advice and consent of the Senate, on a multilateral basis with foreign nations representing much of the international community. Pet’r Br. 4-6. And the determination he has made here could not comport more closely with the promises made, by the elected representatives of the American people, in those treaties. The President has determined nothing more than that, because “[c]ompliance serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States’ commitment in the international community to the rule of law,” the United States will keep those promises.<sup>15</sup>

Nor was the President’s exercise of his foreign affairs authority an improper intrusion into state affairs. To the contrary, in determining the means of compliance, the President exhibited great respect for the principles of federal-state comity, “under which

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<sup>14</sup> The States *Amici* simply misunderstand Justice Ginsburg’s preference in *Garamendi* – in a dissenting opinion, of course – for “a considerably more formal and binding executive instrument” as an expression of executive policy sufficient to preempt state law. States *Amici* Br. 22. Justice Ginsburg was objecting to the majority’s reliance on statements of individual members of the Executive Branch as such an expression, but she nowhere suggested that the President’s exercise of his foreign affairs authority depended on the acquiescence of a foreign state.

<sup>15</sup> For that reason, the speculation about “unilateral presidential abolition of state death penalty statutes” (States *Amici* Br. 23; State Br. 39-40) is sheer hysteria, as there is no international instrument by which the United States has undertaken to abolish the death penalty.

the responsibility in state cases for record development and fact-finding . . . is . . . left for the state courts in the first instance.” U.S. Br. 29. Just as the ICJ showed great respect for courts in the United States by entrusting to them the review and reconsideration it held was required by the Vienna Convention, the President has shown great respect for the state courts of this country by directing that that review and reconsideration take place in those courts.

### **3. The President’s Determination Does Not Implicate The Anti-Commandeering Doctrine.**

Despite the clear federal power over foreign affairs, and the clear command of the Supremacy Clause that state judges apply federal law, the State of Texas and the States *Amici* argue that the application of the President’s Determination as the rule of decision in state court violates the “anti-commandeering doctrine” of *Printz v. United States*, 521 U.S. 898, 935 (1997). State Br. 40-41; States *Amici* Br. 24-31. Specifically, they argue that the President’s Determination requires the state courts to hear new types of cases beyond their jurisdiction, and thus is beyond the scope of *Testa v. Katt*, 330 U.S. 386 (1947), which held that a state court could not refuse to hear federal claims. They are mistaken.

*First*, neither the President’s Determination nor the *Avena* Judgment creates any new cause of action that Texas law does not recognize. Mr. Medellín’s cause of action in this case is the writ of habeas corpus, which arises under Texas common law and is recognized by the Texas Constitution, which provides that the Court “shall have the power to issue the writ of habeas corpus,” TEX. CONST., art. 5, § 5, and by Chapter 11 of

the Texas Code of Criminal Procedure, which makes clear that the writ is available to persons under sentence of death. *See* TEX. CODE CRIM. PROC. art. 11.071, § 1. It is undisputed that Texas allows resort to the state-law habeas corpus procedure for the vindication of federal rights. *See, e.g., id.* art. 11.071, § 5(d).

The *Avena* Judgment and the President’s Determination operate to preempt state-law *defenses* that the State of Texas might otherwise assert in response to Mr. Medellín’s habeas corpus claim under Texas law—including, in particular, the state’s defense that Mr. Medellín did not make a contemporaneous objection at trial. *Cf., e.g., Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 266 (5th Cir. 1978) (provision of federal arbitration law does not create new cause of action but merely “remove[s] the previously viable defenses of the party opposing arbitration” in state-law action based on contract). Under the Supremacy Clause, federal law has routinely been held to preempt state-law defenses that are inconsistent with federal law.<sup>16</sup> The States *Amici* cite *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), which held *as a matter of statutory construction* that a state court could apply *forum non conveniens* doctrines that were not inconsistent with federal law. States *Amici* Br. 26-27. Here, however, the Texas contemporaneous-objection rule itself runs directly contrary to Mr. Medellín’s rights

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<sup>16</sup> *See, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (federal law preempts state court’s application of state-law defenses to enforcement of arbitration agreement); *Armstrong v. Accrediting Council for Continuing Educ. & Training Inc.*, 168 F.3d 1362, 1368-69 (D.C. Cir. 1999) (federal law preempts state-law defenses of mistake and illegality as to enforceability of student loan contract); *Gates v. Shell Oil (Shell Offshore, Inc.)*, 812 F.2d 1509, 1513-14 (5th Cir. 1987) (federal law preempts state-law “statutory employer” defense regarding injury claim of offshore oil worker); *Commercial Metals*, 577 F.2d at 266 (federal law preempts state-law defenses to enforcement of arbitration agreements under state-law contract causes of action); *see also Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (Attached at S.A. Ex. G) (*Avena* Judgment preempts Oklahoma criminal statutory provisions).

under the *Avena* Judgment and the President’s Determination, and is therefore preempted. Because Texas procedure provides Mr. Medellín’s underlying cause of action, the analysis of *Printz* and *Testa* does not even come into play.

*Second*, even if the Vienna Convention, the *Avena* Judgment or the President’s Determination created a new cause of action, that new cause of action would be squarely within this Court’s existing competence, and *Testa* would require the Court to entertain it. In *Testa*, the Supreme Court held that Rhode Island courts could not apply their own law to refuse to entertain a federal cause of action under the Emergency Price Control Act that Congress had enacted during World War II. Although Rhode Island law did not authorize such a claim, it was clear that the Rhode Island courts of general jurisdiction could have entertained “this same *type* of claim” if it arose under Rhode Island law. *Testa*, 330 U.S. at 394 (emphasis added). The other cases cited by States *Amici* are all to the same effect; *amici* cite no cases allowing state courts to refuse to entertain a federal claim on grounds that adjudication of the claims would commandeer state resources. *See* States *Amici* Br. 27 & n.11 (acknowledging that all cases cited required state courts to entertain federal claims). As discussed, Texas courts have jurisdiction to hear, and routinely do hear, the present “type” of claim, *Testa*, 330 U.S. at 394, namely a habeas corpus claim for post-conviction relief. *See* TEX. CONST., art. 5, § 5; TEX. CODE CRIM. PROC. art. 11.05; *see also id.* arts. 11.01, 11.07, 11.071. Thus, even if the President’s Determination created a new cause of action, it would be of a “type” that is within the existing jurisdiction of the courts of Texas, and *Testa* and the other cases cited by the state *amici* would require Texas courts to hear it.

*Third*, the anti-commandeering analysis of *Printz* simply does not apply to state courts, nor does anything in the Constitution bar the federal government from imposing requirements on the state courts beyond what *Testa* requires. As the Supreme Court made clear in *Printz*, “*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the Supremacy Clause,” and thus the anti-commandeering analysis of *Printz* necessarily deals only with “whether state *executive* officers must administer federal law.” *Printz*, 521 U.S. at 928-29 (emphasis added). Indeed, *Printz* cites early federal statutes as evidence that “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions,” but to bar the imposition of similar requirements on “legislatures and executives.” *Id.* at 907; *see also, e.g., Levitt v. Fax.com, Inc.*, 857 A.2d 1089, 1094 (Md. 2004) (rejecting argument that *Printz* bars federal imposition of exclusive mandatory jurisdiction on state courts). Moreover, this case is unlike *Printz*, where a federal law assigned a thoroughly new function to local law enforcement officers, *i.e.*, regulation of gun sales. Adjudication of cases, by contrast, is not a function that is alien to the courts of the State of Texas.

*Finally*, unlike the gun-control scheme in *Printz*, the President’s Determination does not require the state to act in a matter in which it otherwise would be passive. Here, the state is holding Mr. Medellín in confinement and intends to execute him. The President’s Determination requires review and reconsideration, in conformity with the *Avena* Judgment, only as a limitation on the State’s authority to carry out Mr. Medellín’s conviction and sentence. *Cf., e.g., Madej v. Briley*, 371 F.3d 898, 900 (7th Cir. 2004)

(federal courts frequently issue habeas corpus writs directing the state to release an individual unless they retry or resentence him or her). Where, as here, the state is affirmatively choosing to exercise its power, it cannot claim that the federal government, by putting limitations on that exercise, is “commandeering” state authority. As the United States Supreme Court made clear in its unanimous decision in *Reno v. Condon*, 528 U.S. 141 (2000), the “commandeering” prohibition of *Printz* applies only where a federal law purports to “require the States in their sovereign capacity to regulate their own citizens”—not where it “regulates the States” in their own activities. 528 U.S. at 151.

**B. The President’s Determination Is Mandatory.**

The State suggests that the President’s Determination should not be read as an exercise of his constitutional authority to determine the means of compliance with this country’s international obligations, but merely “as a request to state courts to give ‘full effect’ to the ICJ’s decision in *Avena* to the extent state law permits.” State Br. 34. Specifically, the State contends that the President’s Determination should be so read because it “contains no mandatory language, refers to the discretionary doctrine of comity and was transmitted to the Attorney General of the United States, rather than state courts.” State Br. 34-36. The State’s argument denies the obvious.

*First*, the President's Determination is written entirely in mandatory, not precatory terms: “pursuant to the *authority* vested in me as President . . . the United States *will discharge* its international obligations . . . by having state courts *give effect*. . . .” S.A. Ex. B (emphasis added). That clear command is confirmed by the brief that the United

States has submitted in this proceeding at the Court’s invitation: “[T]his Court is required to give effect to the *Avena* decision by providing such review and reconsideration, without regard for state procedural bars that might otherwise prevent consideration of Medellín’s Vienna Convention claim on its merits.” U.S. Br. 22.<sup>17</sup>

*Second*, though comity may be discretionary (State Br. 36; States *Amici* Br. 7-9), the President has already exercised that discretion. As the United States advises, the President has determined that “the ICJ decision *is* entitled to comity;” he has not asked the state courts to consider whether the judgment might be so entitled. U.S. Br. 31; *see* S.A. Ex. B (President’s Determination) (ordering state courts to “*give effect* to the decision in accordance with general principles of comity”). As a result, as the United States explains, U.S. Br. 30-31, this Court is not free to examine whether the ICJ correctly determined the facts, interpreted the Vienna Convention, or prescribed the remedy.<sup>18</sup>

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<sup>17</sup> The State and the States *Amici* are misguided in trying to negate the plain language of the Determination by reference to the brief submitted by the United States in *Breard v. Greene*. State Br. 36; States *Amici* Br. 8. In that case, the United States expressed its position on the effect of an ICJ order of provisional measures, which was regarded by the United States as nonbinding, not a final ICJ judgment expressly recognized as binding by treaty. The events surrounding *Breard* simply provide no precedent here. *See, e.g., Medellín*, 125 S.Ct. at 2091 n.3 (per curiam) (“At the time of our *Breard* decision, however, we confronted no final ICJ adjudication.”).

<sup>18</sup> *See Hilton v. Guyot*, 159 U.S. 113, 203 (1895) (under principles of comity, “the merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion . . . that the judgment was erroneous in law or in fact.”); *see also Medellín*, 125 S. Ct. at 2094 (Ginsburg, J., concurring) (“It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a ‘let’s see if we agree’ approach is out of order.”). In addition, the State’s argument that “*Avena* does not follow the established doctrine of comity” because it “attempts to overrule United States’ binding law and statutory provisions,” State Br. 29, is wrong. The ICJ had no need to apply comity; its jurisdiction over the case was firmly grounded in the treaties by which the United States and Mexico voluntarily consented to submit to it disputes over the interpretation and application of the Vienna Convention. And as stated *supra*, it is the President, not the ICJ, that has determined as a matter of comity that the *Avena* Judgment shall be given effect.

*Finally*, it is of no moment that the President’s Determination was issued as a memorandum to the Attorney General rather than to state courts. State Br. 34; States *Amici* Br. 6. The President need not follow any prescribed form in exercising his executive authority. *See* Pet’r Br. 70, n. 42. Indeed, in *Garamendi*, the federal policy that preempted state law was found in oral statements by officials of the federal executive. 539 U.S. at 421-23; Pet’r Br. 69-70. And while the President transmitted his determination to his Attorney General, the chief federal law enforcement officer, the Attorney General in turn transmitted the memorandum to the Attorneys General of the several states, the chief law enforcement officers of those states. States *Amici* Br. Appx. B. Nothing in the form of the Determination or its chain of transmission in any way derogates from its substantive command.

Recognizing that its interpretation of the President’s Determination is squarely contradicted by the brief that the United States submitted to the United States Supreme Court on the very day that the President issued the Determination, the State makes the remarkable assertion that the “interpretation” of the President’s Determination by the Solicitor General of the United States in his brief to that Court – and now reiterated in his brief to this Court – got the President’s intentions all wrong. President’s Determination. State Br. 38. The State and the States *Amici* also argue the Department of Justice’s view is entitled to no weight because it is the Department of State that is charged with overseeing the implementation of the Vienna Convention. State Br. 38; States *Amici* Br. 11-13.

The State and the States *Amici* are confused. When the Solicitor General submitted his brief to the United States Supreme Court, he was speaking as the representative of the United States before that Court and hence speaking on behalf of the President. Nor, for these purposes, is there any difference between the Department of State and the Department of Justice. The Department of Justice represents the federal executive before courts in the United States, and the Department of State is part of the federal executive. As is customary on matters in which the Department of State has an interest, State Department lawyers, too, signed the brief of the United States to the Supreme Court. Though the Determination speaks clearly enough on its own, the briefs of the United States before the Supreme Court and before this Court are definitive as to any “interpretation” of the Determination. The federal executive speaks with one voice before courts in the United States, and that voice, in the end, is the voice of the President.

**III. TEXAS LAW AUTHORIZES MR. MEDELLÍN TO PURSUE HIS CLAIMS UNDER THE *AVENA* JUDGMENT AND THE PRESIDENT’S DETERMINATION, BUT IF IT DID NOT IT WOULD BE PREEMPTED.**

The State does not contest that if either the *Avena* Judgment or the President’s Determination requires this Court to order review and reconsideration of his conviction and sentence in accordance with that Judgment as a matter of federal law, any inconsistent provision of Texas law would have to give way. Pet’r Br. 63-71. Hence, as the United States explains with respect to the President’s Determination, and is equally true with respect to the *Avena* Judgment itself, this Court must order that review and reconsideration regardless its interpretation of Article 11.071, Section 5(a):

If Section 5 should be construed to permit “consideration on the merits” of Medellín’s Vienna Convention claim in light of the previously unavailable presidential determination that the *Avena* decision should be given effect in state courts, the consideration of Medellín’s Vienna Convention claim permitted under Section 5 would coincide with the requirement imposed by the President’s determination that this Court give effect to the ICJ’s *Avena* decision by providing “review and reconsideration” of Medellín’s Vienna Convention claim. By contrast, should this Court interpret Section 5 in such a manner that precludes consideration of Medellín’s Vienna Convention claim, Section 5 would contravene the President’s implementation of treaty obligations, and federal law would preempt its operation in the circumstances of this case. Under either view, Medellín is entitled to review and reconsideration in light of the President’s determination.

U.S. Br. 15.

This Court should hold, however, that Texas law authorizes Mr. Medellín to pursue his claims here under the *Avena* Judgment and the President’s Determination.

**A. Mr. Medellín’s Claims Were Not Available At His 1994 Trial Or At The Time He Filed His First Post-Conviction Application.**

Texas law is fully consistent with the remedy mandated by the *Avena* Judgment and Presidential Determination. As Mr. Medellín has previously argued, both the *Avena* Judgment and the Presidential Determination constitute new factual and legal developments that independently justify merits review of his subsequent application under Article 11.071, Section 5(a). Pet’r Br. 52-58. The State, however, mischaracterizes Mr. Medellín’s claims as arising solely from the Vienna Convention on Consular Relations. Since the Vienna Convention has “been in force since 1969,” the State argues, his claims are not “novel,” and therefore fail to satisfy both the “right not recognized” exception to the contemporaneous objection rule and Texas Code of Criminal Procedure Article 11.071, Section 5(a). State Br. 19-21.

While it is certainly true that the Vienna Convention informed the ICJ’s Judgment in *Avena*, it was that Judgment, and the President’s determination to enforce the Judgment in state courts, that conferred previously unavailable rights on Mr. Medellín to seek relief here. The United States agrees that Mr. Medellín’s claim under the Presidential Determination was “wholly unavailable” before February 28, 2005. U.S. Br. 51. Mr. Medellín could not have anticipated either the *Avena* Judgment or the Presidential Determination, and there can be no doubt that his claims were as unavailable in 1998, when he presented his first post-conviction application, as they were during his capital murder trial in 1994.<sup>19</sup>

The State also takes issue with Mr. Medellín’s reliance on the well-established “right not recognized” exception to the contemporaneous objection rule by contending that the “right not recognized” doctrine was effectively abolished by *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). State Br. 19. Yet *Marin* did not even address the “right not recognized” exception to the contemporaneous objection rule, much less overrule the Court’s elaboration of the doctrine in *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991); *see also id.* at 367-72 (Campbell, J., concurring). Indeed, *Marin* reaffirms the notion that Rule 52(a) of the Texas Rules of Appellate Procedure may not

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<sup>19</sup> Even if Mr. Medellín’s claim were based on the rights conferred by Article 36, however, it was unquestionably “novel” at the time of his 1994 trial. At that time, no court in the state of Texas had ever cited to Article 36 of the Vienna Convention in a published opinion. Likewise, neither the Texas federal district courts, nor the Fifth Circuit Court of Appeals, had ever published a decision addressing such a claim. For that same reason, it would have been futile for Mr. Medellín to object to the violation at the time of trial, since no remedy would have been forthcoming. *See Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991).

“foreclose review of trial defects for which the litigants are not legally responsible.”<sup>20</sup>

851 S.W.2d at 280. Far from serving as a basis to deny review of Mr. Medellín’s claim on the merits, *Marin* actually provides a separate and independent rationale for precluding the application of the contemporaneous objection rule here.<sup>21</sup>

In *Marin*, the Court carefully distinguished “elective” rights from those that cannot be “extinguished by inaction alone.” 851 S.W.2d at 278. Most evidentiary objections fall into the former category, since a trial judge cannot exclude evidence absent a request from a litigant. *See id. at 278; see also Saldaño v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002). Accordingly, a litigant may not complain on appeal that evidence was wrongly admitted when he failed to object to its admission at trial. By contrast, there are certain guarantees that can only be forfeited if they are expressly waived. *Marin*, 851 S.W.2d at 278. The contemporaneous objection requirement has never been applied to these “waivable” rights. *Id. at 280.*

One of the essential attributes of “waivable” rights is the requirement that they be enforced “by the system’s impartial representatives” absent an express waiver. *Id. at 279.* It can scarcely be gainsaid that the rights to consular notification and access fall into this

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<sup>20</sup> This, of course, is fully consistent with the ICJ’s reasoning in rejecting the application of the procedural default doctrine under the circumstances of this case. *See LaGrand Case*, 2001 I.C.J. No. 104, ¶60 (June 27) (rejecting United States’s reliance on the procedural default doctrine since “it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers” of their consular rights).

<sup>21</sup> In *Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999), this Court refused to review the merits of a Vienna Convention claim where trial counsel had failed to preserve the issue for review. *Ibarra*, however, was decided before the ICJ determined in *LaGrand* and *Avena* that the application of procedural default rules in such a case would violate the United States’s obligations under Article 36(2) of the Vienna Convention, *LaGrand Case*, 2001 I.C.J. No. 104, ¶¶90-91; *Avena Judgment*, ¶113, and before the President determined that *Avena* must be given effect by state courts. Moreover, in *Ibarra*, the parties never briefed and this Court never considered the application of the “right not recognized” exception to the contemporaneous objection rule.

category. The text of Article 36(1)(b) is mandatory and unequivocal: the authorities “shall inform the person concerned without delay of his rights” to communicate with consular officials. Vienna Convention, Art. 36(1)(b). While a foreign detainee can opt not to exercise his rights, he cannot waive them unless he is first informed that the rights exist. *Cf. Marin*, 851 S.W.2d at 280. Because the State’s representatives have an “independent duty” to implement the provisions of Article 36, even in the absence of an affirmative request by the detainee, *id.* at 278, the rights conferred by this provision simply do not fit the definition of “elective” rights set forth by this Court in *Marin*. For this reason, as well, the contemporaneous objection rule does not apply.

**B. The Court Should Remand the Case to the Convicting Court for Review and Reconsideration To Resolve Whether Mr. Medellín Was Prejudiced By the Vienna Convention Violation.**

When submitting a post-conviction application under Section 11.071, §5, an applicant need only make a *prima facie* showing that he is entitled to relief. *See Ex parte Williams*, No. 43,907-02, 2003 WL 1787634, at \*2 (Tex. Crim. App. Feb. 26, 2003) (Cochran, J., concurring) (applicant must provide “sufficient evidence to withstand a directed verdict or a ‘no evidence’ summary judgment motion that he has a factual basis for his claim under newly-established law”) (not designated for publication).<sup>22</sup> “[A]n applicant is *not* required to set out within his writ application the detailed facts and record evidence which would prove [his claim] by a preponderance of the evidence.” *Ex parte Rivera*, No. 27,065-02, 2003 WL 21752841, at \*1 (Tex. Crim. App. July 25, 2003)

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<sup>22</sup> All opinions not designated for publication in this brief are attached as Applicant’s Appendix B.

(emphasis added) (not designated for publication). Rather, the applicant must simply demonstrate that his claim has “possible merit to warrant a fuller exploration by the district court.” *Id.* Once this Court determines that the applicant has met the pleading requirements of Art. 11.071, §5(a), the burden falls to the convicting court to conduct further factfinding proceedings. *See* TEX. CODE CRIM. PROC. art. 11.071, §§8-9; *Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004) (reviewing convicting court’s factfindings after remand of subsequent application based upon the applicant’s *prima facie* showing of mental retardation); *Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002) (“[t]rial courts are the traditional finders of fact”).

In his Subsequent Application, Mr. Medellín explained at length how the violation of Article 36(1) undermined the fairness of his capital murder trial. Subsequent Application for Post-Conviction Writ of Habeas Corpus at 33-44. He provided no fewer than twelve affidavits containing detailed factual allegations in support of his argument. *See* Exhibits H, J-T. The State ignores these affidavits entirely. Indeed, the State makes no attempt to address the detailed allegations presented in the Subsequent Application, and instead recites the facts of the crime for which Mr. Medellín was convicted and resuscitates arguments raised in earlier post-conviction proceedings. *Compare* State Br. 32-33 with *Ex parte Medellin*, No. 675430-A, Respondent’s Original Answer at 22, 25 (339<sup>th</sup> Dist. Ct. Feb. 16, 2000). None of the arguments raised by the State refute Mr. Medellín’s prejudice showing, and to the extent the State disagrees with the facts presented in the Subsequent Application, those factual disputes must be resolved by the convicting court in the first instance.

The State also conflates Mr. Medellín’s *Avena* claim with a Sixth Amendment argument raised in earlier proceedings that is neither factually similar nor legally relevant to the Court’s inquiry here. State Br. 32; *Ex parte Medellin*, No. 675430-A, Application for Writ of Habeas Corpus at 19-24 (339<sup>th</sup> Dist. Ct. Jan. 13, 2000). The question for the convicting court to resolve is *not* whether Mr. Medellín received constitutionally sufficient legal representation under the Sixth Amendment.<sup>23</sup> Rather, the court must fully examine “the [Vienna Convention] violation and the possible prejudice caused by that violation.” *Avena* Judgment, ¶ 138. In conducting this inquiry, the convicting court will necessarily look at the services Mexican consular officers provided in Houston in 1994 to nationals facing the death penalty, and evaluate the impact those services would have had in Mr. Medellín’s capital murder prosecution.<sup>24</sup> The State dismisses this factfinding

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<sup>23</sup> As Mr. Medellín has previously explained, the International Court of Justice expressly rejected the argument that prejudice could be sufficiently assessed by evaluating whether the foreign national had received the protections to which he was entitled under the United States Constitution:

[I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of “harm to a particular right essential to a fair trial” – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

*Avena* Judgment, ¶139 (emphasis added).

<sup>24</sup> It is of course relevant to this inquiry that Mexican consular officers would have intervened to obtain new counsel for Mr. Medellín, “given the several and substantial ways in which his trial attorney’s performance, particularly at the sentencing phase of his trial, fell below the high standards of representation that consular officers routinely insist upon.” Brief *Amicus Curiae* of the United Mexican States at 22. The critical question, however, is not whether appointed counsel provided adequate legal representation under the Sixth Amendment, but whether Mexico’s intervention would have made a qualitative difference in the defense of Mr. Medellín. And as the affidavits appended to Mr. Medellín’s Subsequent Application make clear, consular officers would have ensured that Mr. Medellín received legal assistance that far exceeded what is minimally required by the Sixth Amendment. *See, e.g.*, Exh. H at ¶¶8-10, 15; Exh. L; Exh. M at ¶¶5-8; Exh. O at ¶¶4-5, 8.

process as an unnecessary exercise in “hindsight speculation.” State Br. 33. But post-conviction courts assess harm in a number of contexts – whether they are evaluating *Brady*<sup>25</sup> claims, *Napue*<sup>26</sup> violations, or *Strickland*<sup>27</sup> prejudice.

Mr. Medellín’s specific and detailed evidentiary proffer more than adequately supports a *prima facie* case that the authorities’ failure to advise him of his consular rights was prejudicial. Consequently, and consistent with its established procedures, this Court should remand this case to the convicting court for further proceedings. *See, e.g., Ex parte Rodriguez*, 164 S.W. 3d 400, 400 (Tex. Crim. App. 2005) (referring to hearing conducted by convicting court after remand of subsequent application by this Court); *Ex parte Briseno*, 135 S.W.3d at 3 (same); *Ex parte Hood*, No. WR-41,168-03 (Tex. Crim. App. June 27, 2005) (not designated for publication); *Ex parte Robertson*, No. AP-74,720 (Tex. Crim. App. March 16, 2005) (not designated for publication); *Ex parte Blair*, No. 40,719-03 (Tex. Crim. App. May 30, 2001) (not designated for publication); *Ex parte Gibbs*, No. 23,624-03 (Tex. Crim. App. Apr. 5, 1999) (not designated for publication); *Ex parte Nichols*, No. 21,253-02 (Tex. Crim. App. Apr. 16, 1997) (not designated for publication).

### **CONCLUSION AND PRAYER FOR RELIEF**

For the reasons stated in his opening brief and this reply, Mr. Medellín respectfully requests that this Court issue an order pursuant to Article 11.071, § 5(c) of

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<sup>25</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>26</sup> *Napue v. Illinois*, 360 U.S. 264 (1959).

<sup>27</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

the Code of Criminal Procedure, finding that the requirements of § 5(a) of that Article are satisfied (or in the alternative, to the extent not satisfied, are preempted by federal law), and refer the case to the Harris County District Court for further proceedings consistent with the *Avena* Judgment and the President's Determination.

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Respectfully submitted,

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