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IN THE TEXAS COURT OF CRIMINAL APPEALS

AND

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

339TH DISTRICT COURT

EX PARTE **JOSE ERNESTO MEDELLÍN ROJAS** **Applicant**	§ § § § § §	**No. ________** **(Trial Cause Nos. 67,5429 & 67,5430)**

SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

VOLUME 1

Respectfully submitted,

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EX PARTE **JOSE ERNESTO MEDELLÍN ROJAS**	§	
Applicant	§	**No. ______________** **(Trial Cause Nos. 67,5429 & 67,5430)**

SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

Applicant José Ernesto Medellín Rojas, a Mexican national, petitions this Court pursuant to Texas Code of Criminal Procedure Articles 11.071 and 11.59 to issue a writ of habeas corpus ordering his release from confinement, on the grounds that he is being denied his liberty under an illegal and unconstitutional conviction and sentence of death. In this application, Mr. Medellín presents a claim based on the International Court of Justice's recent decision in *Avena and Other Mexican Nationals*. Exhibit A, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.A.)*, 2004 I.C.J. 1 (Mar. 31, 2004) ("*Avena* Judgment").

On December 10, 2004, the United States Supreme Court granted certiorari in Mr. Medellín's case to review questions regarding the enforceability of the *Avena* Judgment. *Medellín v. Dretke*, No. 04-5928. Oral argument on the case has been scheduled for March 28, 2005. During the course of that case, on February 28, 2005, President Bush determined that Texas courts must provide review and reconsideration of Mr. Medellín's claim pursuant to the

criteria set forth by the International Court of Justice in the *Avena* Judgment, notwithstanding any state procedural rules that might otherwise bar merits review of his claim. The President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of American (Avena), 2004 I.C.J. 128 (Mar. 31), 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.

Exhibit B, Presidential Determination of February 28, 2005. In a brief filed with the Supreme Court that very day, the Texas Solicitor General acknowledged the President's authority to ensure compliance with the *Avena* Judgment. Specifically, Texas identified as one of the "methods of seeking enforcement of *Avena*" the issuance of an Executive Order. Exhibit C, Excerpts from Brief filed by Texas Solicitor General in *Medellín v. Dretke*, at 46.[1] Texas also confirmed:

> The President is under a constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As a duly ratified treaty, the Vienna Convention is undoubtedly the "supreme Law of the Land." U.S. Const., art. VI, cl. 2. As the executive of the national government, the President enjoys preeminence in conducting the foreign relations of the United States. See, e.g., Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). Accordingly, working with Mexico and within the Executive Branch to implement *Avena* and enhance compliance with Article 36 is well within the duties and responsibilities of the President.

Id. at 47. Only after the President issued his determination did the State begin equivocating about the scope of President's authority. *See* Exhibit D, Petitioner's Motion to Stay, *Medellin v. Dretke,* 04-5928; Exhibit E, Response to Petitioner's Motion to Stay, *Medellín v. Dretke*, 04-5928, at 4, n. 1. Since the state has already conceded that the authority to enforce the *Avena*

[1] Relevant portions of the brief and all other documents referred to in this petition are attached as exhibits.

decision is well within the domain of the Executive Branch, it should not be heard to advance a contrary argument in these proceedings.

The President's determination and the *Avena* Judgment constitute two separate sources of binding federal law. As discussed below, Texas law expressly permits this Court to give full effect to the President's determination and the *Avena* Judgment. But if Texas law were read to prevent this Court from doing so, it would be preempted pursuant to the Supremacy Clause of the U.S. Constitution. While this Court has previously considered claims raised under the Vienna Convention on Consular Relations, it has never before been presented with a petition based on an executive order issued by the President of the United States and a final judgment of the International Court of Justice. These are truly matters of first impression in the Texas courts.

Because this case involves questions of first impression, including the application of an executive determination, Mr. Medellín respectfully requests that the case be set for submission. As the President recognized, the issues before this Court have far-reaching implications for the nation's foreign policy. The rights of American citizens incarcerated abroad, as well as the rights of foreign nationals arrested within the United States, could be affected. As former Secretary of State Madeleine Albright and other retired senior diplomats observed in a brief filed with the Supreme Court on January 24, 2005:

> [T]he failure of the United States to comply with the ICJ's decision in *Avena* would damage a number of existing treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States' ability to negotiate new diplomatic covenants. Because "international law is founded upon mutuality and reciprocity," *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the creation and operation of international dispute-resolution regimes depends largely upon every signatory's good-faith compliance with decisions by these judicial bodies.

Exhibit F, Excerpts from Brief filed by Former United States Diplomats as Amici Curiae in Support of Petitioner at 22, *Medellín v. Dretke*, ___ U.S. ___ (No. 04-5928).

In a motion to be filed separately, Mr. Medellín will request that his case be consolidated with those of other Mexican nationals seeking to enforce the President's determination and the *Avena* Judgment in this Court. Mr. Medellín is aware that this Court has a prohibition against being in dual forums. This dual forum prohibition was relaxed in *Ex parte Soffar*, 120 S.W.3d 344 (Tex.Crim.App. 2003), a case in which this Court first allowed a habeas petitioner to present a post conviction challenge in state court where the case was pending in a federal court, assuming that the federal court had granted a motion to stay its proceedings and allow the petitioner to return to state court by abating those proceedings. *See Ex parte Soffar*, 143 S.W.3d 804 (Tex.Crim.App. 2004). In light of the President's determination, Mr. Medellín has already filed a motion in the United States Supreme Court seeking to abate his federal habeas corpus petition for the express purpose of seeking the state court remedy provided by the February 28 President's determination and the *Avena* Judgment by its own terms. *See* Exhibit D. Mr. Medellín has filed this subsequent application for a post-conviction writ in order to avoid any possible argument about his compliance with the statute of limitations that might be made if he were to file his state-court petition after the one-year anniversary of the *Avena* Judgment (handed down March 31, 2004). *See* 28 U.S.C. § 2244(d). Mr. Medellín respectfully requests this Court to hold this petition at least until the United States Supreme Court has ruled on the motion to abate or issued an opinion in his case.

INTRODUCTION

On March 31, 2004, the International Court of Justice ("ICJ") handed down its judgment in *Avena and Other Mexican Nationals*. *See* Exhibit A. In the case of Mr. Medellín, the Court found that the United States had violated all of its obligations under Article 36(1) of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 UNTS 261 (hereinafter "Vienna

Convention"), including Mr. Medellín's right to consular notification and access, and Mexico's corresponding right to assist in his defense. The *Avena* Judgment establishes, *first,* that Texas authorities violated Mr. Medellín's Vienna Convention rights, and *second*, that the Texas courts must now provide review and reconsideration of his conviction and sentence in light of that violation, addressing the possible prejudice caused by the Article 36 violation on its own terms, not under the rubric of due process rights. This review must also be conducted without any reference to procedural default.

The Vienna Convention violation in this case was no mere technicality. Police authorities were well aware that Mr. Medellín was a Mexican national. Despite this knowledge, they failed to inform the Mexican consulate of Mr. Medellín's arrest and detention. Consular authorities learned of Mr. Medellín's case some six weeks after the affirmance of his death sentence and nearly four years after he was first arrested, when Mr. Medellín wrote to them from death row. By that time it was too late for Mexico to affect the quality of the defense at trial, which had disastrous consequences for Mr. Medellín.

As detailed below, the Government of Mexico had an active and far-reaching program of consular assistance in 1994, the year Mr. Medellín was convicted and sentenced to death. Oklahoma's highest court has recognized that Mexico was providing crucial assistance to its nationals facing the death penalty since at least 1989. In vacating the death sentence of a Mexican national in that state, the court observed:

> We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing. . . .We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and knew he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate.

Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002).

In another Oklahoma case, *Torres v. Oklahoma*, No. PCD-04-442 (May 13, 2004), the Oklahoma Court of Criminal Appeals recently recognized that domestic law precedent cannot control the analysis of a Vienna Convention violation in the case of a Mexican national subject to the *Avena* Judgment. The *Torres* court stayed the execution of a Mexican national subject to the *Avena* Judgment and, in accord with that Judgment, remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. Though the Torres order did not set forth the Court's reasoning, the concurring and dissenting opinions make it clear that, but for the *Avena* Judgment, the Court would have held the Vienna Convention claim procedurally defaulted. *See* Exhibit G, Order and Concurrence in *Torres v. State of Oklahoma*. As Judge Chapel stated in a concurring opinion, and the majority presumably recognized, "this Court is bound by the Vienna Convention and Optional Protocol" and hence is required to give full effect to the Avena Judgment. *Id.* (Chapel, J., concurring). Thus, although its own precedent would have required otherwise, the Oklahoma Court recognized that it was now bound to follow, as a matter of federal law, the holding in the *Avena* Judgment that Torres's Vienna Convention claim could not be procedurally barred.[2] *Id.*

This Court should arrive at the same conclusion in the case at bar. *First*, the President's determination requires this Court to comply with the *Avena* Judgment and remand Mr. Medellín's case for the mandated review and reconsideration of his Vienna Convention claim. *Second*, the *Avena* Judgment on its own terms provides the rule of decision in Mr. Medellín's case and should be given direct effect by this Court. Both the rule of decision announced by the

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[2] The Oklahoma statutory provisions governing the filing of successive post-conviction applications are virtually identical to those of Texas' Art. 11.071 (5)(a). If anything, Oklahoma imposes an even higher bar on the filing of such applications.

ICJ in *Avena* and the February 28 President's determination constitute new factual or legal developments that were previously unavailable and which entitle Mr. Medellín to review of this petition under Article 11.071, § 5(a). Thus, in accordance with the *Avena* Judgment and the President's determination, this case should be remanded to the trial court in order for Mr. Medellín to have an opportunity to develop his claims and for an evidentiary hearing on his allegations.

PROCEDURAL HISTORY

The Decisions of the Texas Courts.

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with two murders in Houston, Texas. The Texas trial court appointed counsel to represent Mr. Medellín, who was indigent. On September 16, 1994, Mr. Medellín was convicted of capital murder and, upon the jury's recommendation, the trial court sentenced Mr. Medellín to death on October 11, 1994. *State v. Medellín*, Judgment, No. 675430 (Tex. 339th Dist. Ct. Oct. 11, 1994). On March 16, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished opinion. *Ex parte Medellín*, Order, No. 50191-01 (Tex. Crim. App. Mar. 16, 1997).

On April 29, 1997, some six weeks after the affirmance of his death sentence on direct appeal and nearly four years after he was first arrested, Mexican consular authorities first learned of Mr. Medellín's arrest, detention, trial, conviction, and sentence. *See* Exhibit H, Affidavit of Víctor Manuel Uribe. They promptly began rendering assistance. *See id.*

On March 26, 1998, Mr. Medellín filed a state application for habeas corpus, alleging the violation of his rights under Article 36 of the Vienna Convention and requesting, among other relief, an evidentiary hearing and vacatur of his conviction and sentence. Application for Writ of

Habeas Corpus at 25-31, 45, *Ex parte Medellín*, No. 675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998). In support of this claim, Mr. Medellín submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. The State did not contest that Mr. Medellín was a citizen of Mexico or that state officials had failed to advise Mr. Medellín of his right under Article 36 of the Vienna Convention to contact the Mexican consulate. Original Answer at 21-23, *Ex parte Medellín*, No. 675430-A (399th Dist. Ct.).

On January 22, 2001, the state trial court adopted the state's proposed findings and conclusions and recommended denial of relief on all claims, including those predicated on the violation of Mr. Medellín's Vienna Convention rights. *Ex parte Medellín*, Order at *19-20 No. 675430-A (339th Dist. Ct. Jan. 22, 2001). It held that the Texas contemporaneous-objection rule barred the Vienna Convention claim because Mr. Medellín had not raised the claim at trial and that he had no individual right to raise the Article 36 violation.[3] *Id.* The court also denied Mr. Medellín's request for an evidentiary hearing. *Id.* at *22. On October 3, 2001, by an unpublished order, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions. *Ex parte Medellín*, Order, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001).

The Decision of the District Court.

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus, and on July 18, 2002, an amended petition, in the United States District Court for the Southern District

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[3] While not questioning Mr. Medellín's Mexican citizenship, the state's proposed findings adopted by the state court also stated in the alternative that Mr. Medellín "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. *Ex parte Medellín*, Order at *19-20 No. 675430-A (339th Dist. Ct. Jan. 22, 2001).

of Texas. Mr. Medellín raised a claim under Article 36 of the Vienna Convention, again requesting an evidentiary hearing and vacatur of his conviction and sentence. *See* Amended Petition for Writ of Habeas Corpus at 46, *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. July 18, 2002).

In support of his petition, Mr. Medellín relied on *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), a decision issued subsequent to Mr. Medellín's state post conviction proceedings. In *LaGrand*, the ICJ held that Article 36(1) of the Vienna Convention creates individual rights to consular notification and that Article 36(2) of the Convention prevents the application of procedural default rules to bar the challenge to a conviction or sentence on the ground of the Article 36(1) breach. Among other things, Mr. Medellín argued that "*LaGrand* . . . controls the interpretation of the Vienna Convention" and that the District Court was bound by *LaGrand*'s rulings regarding individual rights and procedural default. *See* Petitioner's Response to Respondent's Answer and Motion for Summary Judgment, at 14-17, *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

On June 26, 2003, the District Court denied relief and a certificate of appealability. *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003). The District Court rejected the holdings of *LaGrand* and held that (1) Mr. Medellín had defaulted his Vienna Convention claim under the "adequate and independent state procedural rule" applied by the Texas state courts, and (2) the Vienna Convention did not create individually enforceable rights and, hence, no judicial remedy is available for its violation. *Id.*[4]

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[4] The District Court held in the alternative that, if the Vienna Convention created individual rights, Mr. Medellín was barred from asserting them by the nonretroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989), and that he could not demonstrate that the violation affected the constitutional validity of his conviction and sentence.

The *Avena* Judgment.

On January 9, 2003, while Mr. Medellín's habeas petition was pending before the District Court, the Government of Mexico initiated proceedings in the ICJ against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellín and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings, *Avena* (No. 128). Mexico sought relief on its own behalf and, in the exercise of its right of diplomatic protection, of its nationals. *Avena*, para.12.

During the week of December 15, 2003, the ICJ held a hearing, *Avena*, para. 11, and, on March 31, 2004, issued a final judgment. The *Avena* Judgment built on ICJ's earlier holdings in *LaGrand*. However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed. As a result, in *Avena*, the ICJ expressly adjudicated Mr. Medellín's own rights, as well as those of the other nationals on whose behalf Mexico had sought relief, and entered a final judgment. *Avena*, paras. 40, 106.

Addressing liability, the ICJ held that, in the cases of Mr. Medellín and those of 50 other Mexican nationals, the United States had breached its obligation under Article 36(1)(b) "to inform detained Mexican nationals of their rights under that paragraph" and in 49 of those cases, including that of Mr. Medellín, "to notify the Mexican consular post of the[ir] detention." *Avena*, paras. 106(1)-(2), 153(4)-(5). In the cases of Mr. Medellín and 48 other Mexican nationals, the ICJ also held that the United States had breached its obligation under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." *Avena*, paras. 106(3), 153(6). And, in the cases of Mr. Medellín and 33 other Mexican nationals, the ICJ also held that the United States had breached its obligation

under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Avena*, paras. 106(4), 153(7).

The ICJ then turned to remedies and held that as a remedy for the violations of Article 36(1) the United States must provide "review and reconsideration" of the convictions and sentences of Mr. Medellín and the other Mexican nationals in whose cases it found violations. *Avena*, paras. 14, 121-122, 153(9). The ICJ then specified the nature of the review and reconsideration that the United States would need to provide to Mr. Medellín: *first*, the required review and reconsideration must take place "within the overall judicial proceedings relating to the individual defendant concerned;" *second*, procedural default doctrines could not bar the required review and reconsideration when the competent authorities of the detaining State had themselves failed in their obligation of notification; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurs must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Avena*, paras. 111-113, 120-122, 133-134, 138-141. The ICJ reached each of its holdings on liability by a vote of fourteen to one and its holding on remedies unanimously. *Avena*, paras. 153(4)-(7), (9), (11). Both the United States judge and the Mexican judge voted with the majority on each of these holdings. *Id.*

The Decision of the Court of Appeals.

On October 24, 2003, while *Avena* was pending before the ICJ, Mr. Medellín sought a certificate of appealability from the Court of Appeals on several grounds, including his Vienna Convention claim. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2003). On May 20, 2004, after the

ICJ had rendered its judgment in *Avena*, the Court of Appeals denied Mr. Medellín's application, including his Vienna Convention claim. *Id.* at 281.

On August 18, 2004, Mr. Medellín filed a petition for a writ of certiorari before the United States Supreme Court and, on December 10, 2004, the Court granted certiorari in Mr. Medellín's case to review the enforceability of the *Avena* Judgment. The Supreme Court will review two questions regarding the enforceability of the *Avena* Judgment:

> 1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
>
> 2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

Order of December 10, 2004, U.S. Supreme Court, *Medellín v. Dretke*, No. 04-5928. While Mr. Medellín's case was pending before the U.S. Supreme Court, the President of the United States issued his February 28, 2005 determination that the State courts must give effect to the *Avena* Judgment, without regard to any State procedural default bars. *See* Exhibit B. On March 8, 2005, Mr. Medellín filed a motion in the U.S. Supreme Court, asking it to stay the case in deference to the President and hold it in abeyance while Mr. Medellín proceeds in this Court in accordance with the President's determination. *See Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004). That motion remains pending. Oral argument is scheduled for March 28, 2005.

<u>THIS COURT MUST REMAND MR. MEDELLÍN'S CASE FOR THE REVIEW AND RECONSIDERATION MANDATED BY THE *AVENA* JUDGMENT AND THE PRESIDENT'S DETERMINATION.</u>

A. <u>Under the President's Determination and the *Avena* Judgment, This Court May Not Apply Any Procedural Bar That Would Otherwise Preclude Review of Mr. Medellín's Vienna Convention Claim on the Merits.</u>

President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law. As discussed below, Texas law expressly permits this Court to give full effect to the President's determination and the *Avena* Judgment. But if Texas law were read to prevent this Court from doing so, it would be preempted. The United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all 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, cl. 2 (emphasis added).

1. The President's Determination

In a brief filed on behalf of the United States in the United States Supreme Court on the day the President's determination was issued, the Solicitor General of the United States explained that each Mexican national subject to the *Avena* Judgment, including Mr. Medellín, has a right to receive the full review and reconsideration ordered by the International Court of Justice. *See* Exhibit I, Excerpt from *Brief Amicus Curiae for the United States in Medellín v. Dretke (No. 04-5928), Part IV*. The United States explained that, by the terms of a treaty duly ratified by the President with the advice and consent of the Senate, the ICJ decision places the United States "under an international obligation to choose a means for 51 individuals to receive review and reconsideration of their convictions and sentences to determine whether the denial of

the Article 36 rights identified by the ICJ caused actual prejudice to the defense either at trial or at sentencing." *Id.* at 40. Accordingly, Mr. Medellín and other Mexican nationals may "file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President's determination that the decision should be enforced under general principles of comity." *Id.* at 42. In the event that prejudice is found, "a new trial or a new sentencing would be ordered." *Id.* at 47.

To the extent that state procedural default rules would prevent giving effect to the President's determination, "those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, *see* U.N. Charter Art. 94, constitutes 'the supreme Law of the Land.' U.S. Const., Art. VI, Cl. 2." *Id.* at 43-44.

> [T]he [Supreme] Court has repeatedly held that the President has authority to make executive agreements with other countries to settle claims without ratification by the Senate or approval by Congress. *[American Insurance Association v.] Garamendi*, 539 U.S. [396,] at 415 [(2003)]; *Dames & Moore v. Regan*, 453 U.S. at 679, 682-683; *United States v. Pink*, 315 U.S. 203, 223 (1942); *United States v. Belmont*, 301 U.S. 324, 330-331 (1937). The Court has also held that such agreements preempt conflicting state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331.

Id. at 45.

A determination is a form of presidential directive equivalent to an Executive Order.[5] As such, it has the force of law so long as "[t]he President's power. . .to issue the order. . .stem[s]

[5] "[I]t is the substance of a President's determination or directive that is controlling and not whether the document is styled in a particular manner." Department of Justice, Office of Legal Counsel, Memorandum for the Counsel to the President, January 20, 2000 (www.usdoj.gov/olc/predirective.htm).

either from an act of Congress or from the Constitution itself.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-189 (1999); *see also Armstrong v. United States*, 80 U.S. 154, 156 (1871) (a President's proclamation on a matter entrusted to the executive is "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect").

Because the President is the Head of State, U.S. Const., Art. II, § 2, cl. 2, & § 3, he is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Thus, matters touching on foreign affairs are one of the core areas in which the President can act independently, and the laws of the States must yield to his authority. "[S]tate laws 'must give way if they impair the effective exercise of the Nation's foreign policy.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003), *quoting Zschernig v. Miller*, 389 U.S. 429, 440 (1968). *See also id.*, *quoting United States v. Pink*, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring) ("state law may not be allowed to 'interfere with the conduct of our foreign relations by the Executive'").

President's power in the realm of foreign policy is limited only by "the Constitution's guarantees of individual rights." *Garamendi*, 539 U.S. at 417. Where, as here, the President has acted within the scope of that power in order to manage the Nation's foreign policy, fulfill its treaty obligations, and protect its citizens abroad, there can be no question of the constitutional validity of that action. That action requires contrary state laws to yield - just as the state laws were required to yield in *Garamendi*, *Zschernig* and *Pink*. Although the President's foreign policy actions and directives are not expressly listed as part of the supreme law of the land in Article VI, clause 2, of the United States Constitution, they share much the same status by virtue of the fact "that complete power over international affairs is in the national government and is

not and cannot be subject to any curtailment or interference on the part of the several states." *United States v. Belmont*, 301 U.S. 324, 331 (1937).

This interpretation of executive authority was supported by the State of Texas as Respondent in *Medellín v. Dretke.* Discussing options for the implementation of *Avena*, the State observed that "the President enjoys preeminence in conducting the foreign relations of the United States" and that "working . . . within the Executive Branch to implement *Avena* and enhance compliance with Article 36 is well within the duties and responsibilities of the President." Exhibit C at 47. Only after the President issued his determination did the State begin equivocating about the scope of President's authority. *See* Exhibit E, Response to Petitioner's Motion to Stay, *Medellín v. Dretke*, 04-5928, at 4, n. 1. Since the state has already conceded that the authority to enforce the *Avena* decision is well within the domain of the Executive Branch, it should not be heard to advance a contrary argument in these proceedings.

Because of the President's determination, this Court may not apply the same doctrines of procedural default that have previously operated to bar relief in the cases of foreign nationals seeking review of consular rights claims. *See, e.g.*, *Ibarra v. State*, 11 S.W.2d 189, 197 (Tex. Crim. App. 1999); *Ex parte Humberto Medellín, Jr.*, No. 41,743-01 (Tex. Crim. App. Oct. 20, 1999)(unpublished); *Ex parte Plata*, No. 46,749-01 (Tex. Crim. App. October 4, 2000).

2. The *Avena* Judgment

In *Avena*, the International Court of Justice stated that in the case of Mr. Medellín, invocation of procedural default rules have precluded, and continue to preclude, the required judicial review and reconsideration of his conviction and sentence. *Avena*, paras. 112-13. The ICJ had addressed the application of procedural default rules in its earlier ruling in the *LaGrand Case (Germany v. U.S.)*, 2001 I.C.J. 466, a case brought by Germany regarding two German

nationals on death row. The *LaGrand* court explicitly found that procedural default rules *do* violate Article 36 if, as applied in a particular case, they prevent a foreign national from challenging his conviction and sentence on the grounds of a prior violation of Article 36. *LaGrand*, para. 90. This holding was reaffirmed in *Avena. See Avena*, paras. 111-113.

The ICJ's holding on this point merely restates the plain words of Article 36(2). That provision permits domestic law to be followed in proceedings involving the consular notification and access rights secured by Article 36(1), "*subject to the proviso*, *however*," that any such domestic laws *must* give "full effect" to the purposes for which Article 36(1) rights are intended. *See Avena*, para. 113 (emphasis added). If applying state procedural rules in this case would *preclude* Mr. Medellín from challenging his conviction and sentence based on Article 36 violations, applying those rules in this case would not give effect to, but would rather frustrate, the purposes of Article 36(1) rights. As explained below, the *Avena* Judgment is binding authority with respect to the application of procedural rules in this case. Thus, under *Avena*, Texas is likewise precluded from applying any procedural rule that would prevent a merits review of Mr. Medellín's case.

a. By the Process Set Forth in the Constitution, the United States Voluntarily Agreed to the Vienna Convention and Its Optional Protocol.

"Treaties are contracts between sovereigns." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Nations make treaties when they determine that the exchange of rights and obligations set forth in the treaty serves the best interests of their respective peoples. Because a treaty reflects a promise, the rule that treaties must be obeyed (*pacta sunt servanda*) "lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Restatement (Third) of the Foreign Relations Law of the United States* § 321 cmt. a (1987) (hereinafter *Restatement (Third)); see also Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 433

(2d Cir. 2001). The rule says nothing more than that nations, no less than other contracting parties, must keep their promises.

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Specifically, Article II provides that the President "shall have Power . . . to make Treaties." U.S. Const. art. II, § 2, cl. 2. That clause also provides, however, that the President may do so only "with the Advice and Consent of the Senate," and, for the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* Hence, Congress cannot negotiate or enter into treaties, and the President cannot enter into them without Senate consent on a supermajority vote. This structure ensures that the United States takes on international obligations only with the clear support of the elected representatives of the American people. *See generally* Louis Henkin, *Foreign Affairs and the US Constitution* 36-37 (2d ed. 1996).

The United States followed this constitutionally prescribed process when it entered into the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. United States delegates participated in the 1963 diplomatic conference that produced the Vienna Convention. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria March 4 to April 22, 1963, *reprinted in* S. Exec. Doc. E, 91st Cong., at 41 (1st Sess. 1969). The United States played an active role in drafting Article 36 of the Vienna Convention and the Optional Protocol. *See id.* at 59-61. Indeed, it was the United States that proposed the binding dispute settlement provision that became the Optional Protocol to the Vienna Convention, resisting efforts by other states to eliminate or weaken the dispute settlement provisions. *See id.* at 72-73.

The President signed the Vienna Convention and its Optional Protocol on April 24, 1963, and sent it to the Senate on May 8, 1969. The Senate held hearings on October 7, 1969. It then unanimously consented to both the Vienna Convention and the Optional Protocol on October 22, 1969. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969). Texas Senators Ralph Yarborough (D) and John G. Tower (R) joined in that unanimous vote. *Id.*

The Supreme Court has explained that once a treaty is ratified, it

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined*. And when such rights are 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.

Head Money Cases, 112 U.S. 580, 599 (1884) (emphasis added). The treaty obligations reflected in the Vienna Convention and its accompanying Optional Protocol are entirely self-executing and required no implementing legislation to come into force. *Hearing Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State); *see also Restatement (Third)* § 111 (great weight accorded to Executive Branch statements in determining whether a treaty is self-executing); *see also Standt v. City of New York*, 153 F. Supp. 2d 417, 423 n.3. (S.D.N.Y. 2001); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1124-25 (C.D. Ill. 1999). Article 36 of the Vienna Convention, by its terms, confers rights on individual foreign nationals with respect to the requirements of consular notification and access, as the ICJ held in the *Avena* and *LaGrand* cases. *See* Vienna Convention art. 36(1)(b), 36(2); *Avena*, para. 40; *LaGrand*, para. 77.

As President Richard M. Nixon stated when he announced the entry into force of the treaty, the "[Vienna] Convention and Protocol . . . and every article and clause thereof shall be

observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof." 21 U.S.T. 77, 185. The Vienna Convention and its Optional Protocol are now fully effective as United States law.[6]

b. By Entering into the Vienna Convention and Its Optional Protocol, the United States Agreed to Submit Disputes Arising Under the Convention to the International Court of Justice for Binding Resolution.

The Vienna Convention on Consular Relations was designed to provide a comprehensive framework for the work of consular officials posted from one nation to another. In particular, Article 36 of the Vienna Convention requires that, when the authorities in a foreign state arrest or detain a citizen from one of the parties to the Vienna Convention, those authorities must advise the citizen without delay of his or her right to contact the consulate, notify the consulate without delay at the national's request and allow the consulate to provide various forms of assistance. One need only imagine being detained in a foreign country to appreciate the importance of assuring foreign nationals that they can contact their consul and enlist the aid of their national government in, among other things, communicating with the local authorities, obtaining and assisting legal counsel, and contacting their families.

Not surprisingly, the Vienna Convention is among the most widely ratified multilateral treaties. An American arrested in China, or South Africa, or Colombia, or any of the other 165 nations that are party to the Vienna Convention has the right to be advised of his or her rights under the Convention and to seek and receive help from the U.S. consulate. As Judge Steven

[6] President Bush has now announced that the United States would withdraw from the Vienna Convention's Optional Protocol submitting to the jurisdiction of the International Court of Justice to decide future disputes regarding the Convention. *See* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. Times, Mar. 10, 2005. That withdrawal, however, has no impact on Mr. Medellin's case or the obligations in existence when his case was adjudicated by the ICJ.

Schwebel, the United States Judge on the International Court of Justice who was then serving as President of the Court, said in an earlier case involving the Vienna Convention, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States." *Vienna Convention on Consular Relations (Paraguay v. U.S.)* 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

The Optional Protocol to the Vienna Convention provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. In other words, by agreeing to the Optional Protocol, nations agree that any other nation that is party to the Optional Protocol can require them to submit disputes about the Vienna Convention to the International Court of Justice for binding resolution. As its name expressly states, entry into the Optional Protocol was optional for the United States. While 167 nations have agreed to the Vienna Convention, only 46 states have also agreed to the Optional Protocol. *See Status of Multilateral Treaties Deposited with the Secretary-General*, at http://untreaty.un.org/English/access.asp (last visited Aug. 4, 2004).

The binding character of a judgment of the International Court of Justice in a case within its compulsory jurisdiction is reinforced by the United Nations Charter, which is also a treaty that the United States entered by the standard constitutional process. U.N. Charter, Jun. 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153. The ICJ is the "principal judicial organ of the United Nations," and all Members of the United Nations, including Mexico and the United States, are *ipso facto* parties to the Statute of the Court. U.N. Charter, arts. 92, 93(1).

Article 59 of the ICJ's Statute provides that decisions of the ICJ are binding with respect to the parties to the particular case. Statute of the I.C.J., June 26, 1945, 59 Stat. 1055. The United States has frequently availed itself of the ICJ, initiating ten cases as an applicant or by special agreement with another state. *See* International Court of Justice, *List of Cases brought before the Court since 1946*, *at* www.icj-cij.org (last visited Jan. 26, 2005). Indeed, the United States was the first state to invoke the Optional Protocol, when it brought an application against Iran concerning United States diplomatic and consular personnel who were being held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7; 1980 I.C.J. 3. By subscribing to the United Nations Charter, the United States agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94(1). These provisions say no more than that, when nations are subject to the jurisdiction of a court - here, by virtue of their own consent to that jurisdiction - they, like any other parties before a court, must obey its orders and decisions.

c. If Any Provision of Texas Law Would Prevent Full Compliance with the *Avena* Judgment, The United States' Treaty Obligation to Comply with That Judgment Would Preempt It.

Because the *Avena* Judgment is binding on the United States as a matter of treaty obligation, and hence is binding on this Court as a matter of federal law, the Judgment operates as a binding adjudication. Mr. Medellín was one of the nationals whose rights were adjudicated by the ICJ, so the *Avena* Judgment is a binding adjudication in Mr. Medellín's own case. As the United States Supreme Court has explained, the treaty component of the Supremacy Clause is necessary to the very concept of the United States as a unified, single nation:

> A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand it its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United

> States, shall be superior to the Constitution and laws of any individual state; and their will alone is to decide.

Ware v. Hylton, 3 U.S. 199, 236-37, 1 L. Ed. 568, 584 (1796). The Texas Constitution echoes this principle in equally clear terms: "Texas is a free and independent State, subject only to the Constitution of the United States. . . ." Tex. Const. art. I, § 1.

The United States has agreed to submit disputes under the Vienna Convention to the International Court of Justice. When the President, with the advice and consent of the Senate, made that agreement, they did not compromise this nation's sovereignty; they exercised it. The U.S. Constitution directs this Court to give effect to the judgment of the International Court of Justice in *Avena*, "any Thing in the Constitution or Laws of [the State of Texas] to the Contrary notwithstanding," and the Texas Constitution recognizes the obligation to adhere to the constitutional command reflected in the Supremacy Clause. *See* Tex. Const. art. I, § 1.

The Texas courts have likewise recognized the supremacy of treaties and the duty to give them the same force as any federal law. *See, e.g.*, *Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) ("Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law."); *Cardona v. State*, 973 S.W.2d 412, 416 (Tex. App. 1998) (same); *Arteaga v. Texas Dep't of Protective & Regulatory Services*, 924 S.W.2d 756 (Tex. App. 1996) (axiomatic that the state must adhere to United States treaties as the supreme law of the land).

As a legal matter, therefore, the *Avena* Judgment operates in the same way as the judgment of a federal court on a federal question in a habeas proceeding. Hence, if any provision of the Texas Code of Criminal Procedure or any other Texas law prevented this Court fom giving full effect to the *Avena* Judgment, that provision would be preempted by federal law in the form of the United States' agreement to abide by the Judgment.

Even if the *Avena* Judgment were not a binding adjudication of Mr. Medellín's rights directly applicable in this case, it would stand as an authoritative interpretation of the Vienna Convention as applied to his case that courts in the United States should recognize as a matter of comity. The parties to a treaty should be understood to intend that a common interpretation be given the treaty by all parties. By consenting in the Optional Protocol to the compulsory jurisdiction of the ICJ in cases involving the interpretation or application of the Convention, the United States designated that Court as the judicial authority from which that common interpretation would issue. The ICJ expressly recognized that responsibility when it stated in the Judgment that it had decided the case "from the viewpoint of the general application of the Vienna Convention," so that there could be "no question of making an *a contrario* argument in respect of any of the Court's findings" in other cases involving other states or other nationals. *Avena*, para. 151 (emphasis added). At a minimum, therefore, this Court should give full deference to the *Avena* Judgment as a dispositive interpretation of Mr. Medellín's rights under the Convention.

B. <u>Even if Texas's Procedural Default Rules Could Be Applied, Mr. Medellín's Claim Rests on a New Factual or Legal Development within a Recognized Exception to Art. 11.071, § 5(a).</u>

Article 11.071, section 5(a)(1) of the Texas Code of Criminal Procedure provides, in pertinent part:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article…because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Section 5(d) provides:

> For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

Tex. Crim. Proc. Code Ann. art. 11.071, sec. 5(d).

And finally, Section 5(e) provides:

> For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Tex. Crim. Proc. Code Ann. art. 11.071, sec. 5(e).

In this subsequent application, Mr. Medellín raises a claim that rests upon two very recent developments: the *Avena* Judgment that adjudicated the rights of Mr. Medellín on March 31, 2004, and the President's determination issued by President Bush less than a month ago, on February 28, 2005. Because neither of these developments had occurred when this Court rejected Mr. Medellín's first application for post-conviction relief, Mr. Medellín's claim meets the standard set forth in Section 5 of Article 11.071 of the Texas Code of Criminal Procedure. That is, the claim rests on a legal or factual basis that was not available to Mr. Medellín when he filed his previous application.

The factual and legal basis for this application *is the Avena Judgment and the President's determination*, not simply the underlying Vienna Convention claim, so the claim, by definition, could not have arisen until the Judgment and the President's determination issued. Mr. Medellín's current claim "could not have been presented previously" because its basis in law simply did not exist. *Id.* Tex. Crim. Proc. Code Ann. art. 11.071, sec. 5(a)(1). The International Court of Justice in *Avena* adjudicated his rights under the Vienna Convention, and ordered a specific remedy through its Judgment. President Bush subsequently issued a determination that

the United States would comply with the *Avena* Judgment by giving it effect in state courts. Mr. Medellín seeks to enforce the *Avena* Judgment and the President's determination here.

The Oklahoma Court of Criminal Appeals' recent decision in *Torres v. State of Oklahoma* provides further support for petitioner's arguments. *See* Exhibit G, *Torres v. State of Oklahoma* (granting a stay of execution and remanding case for an evidentiary hearing after defendant petitioned for post-conviction relief premised on *Avena*). As Judge Chapel described in a special concurrence, the application of the *Avena* Judgment was an "issue of first impression for [the] Court" and was not resolved by any prior jurisprudence relating to the Vienna Convention. *Id.* (Chapel, J. concurring), at 1.

The decision of the Seventh Circuit in *Garza* v. *Lappin*, 253 F.3d 918 (7th Cir. 2001), also supports the proposition that a claim may be novel, even where the underlying international legal right has existed for a number of years before the claim was raised by the petitioner. The Seventh Circuit in *Garza* accepted as colorably novel, for purposes of a post-conviction relief statute, a petitioner's claim based on a decision of the Inter-American Commission on Human Rights. *Id.* at 923.

Because the legal or factual basis for his claim was not recognized in 1997, Mr. Medellín is entitled to merits review of his claim under Texas Code of Criminal Procedure Art. 11.071, § 5(d).

B. Review of These Claims Is Not Barred by the Contemporaneous Objection Rule.

Even if trial counsel did not preserve Mr. Medellín's claims by objecting at trial, the Texas waiver doctrine may not be invoked here. The waiver doctrine, like the procedural bars set forth in Art. 11.071, is a state procedural rule whose application to Mr. Medellín's claim is expressly prohibited by the President's determination and the *Avena* Judgment. Moreover, well-

settled Texas law incorporates an exception—the "right not recognized" doctrine—to the otherwise applicable general requirement that a defendant, in order to raise a claim of error in some later proceeding, must make a contemporaneous objection at trial. Under the "right not recognized" doctrine, if a right has not yet been recognized by the Texas courts, a failure to object at trial does not bar raising the claim later for appellate or post-conviction review. *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (permitting review of unpreserved claims of error under *Penry v. Lynaugh*, 492 U.S. 302 (1989)). *See also, e.g.*, *Ex parte Chambers*, 688 S.W.2d 483 (Tex. Crim. App. 1984) (same, respecting claims of Fifth and Sixth Amendment error under *Estelle v. Smith*, 451 U.S. 454 (1981); *Cuevas v. State*, 641 S.W.2d 558 (Tex. Crim. App.1982) (same, respecting claim based on *Adams v. Texas*, 448 U.S. 38 (1980)); *Ex parte Turner*, 542 S.W.2d 187 (Tex. Crim. App.1976) (same, respecting claim based on *Washington v. Texas*, 388 U.S. 14 (1967)). Finally, if the Court were to hold that Mr. Medellín had waived or defaulted his claims before they even came into existence, that would constitute an arbitrary denial of a forum that would violate rights of due process under the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the Texas Constitution. *See Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982).

Because the application of the contemporaneous objection rule is expressly prohibited by the President's determination and the *Avena* Judgment, and because the rights at issue in this application had not been recognized by the Texas courts at the time of Mr. Medellín's trial, he is entitled to have his claims reviewed on the merits in this proceeding.

C. The Post-Conviction Court's Consideration of Mr. Medellín's Vienna Convention Claim Did Not Constitute the Review and Reconsideration Mandated by the ICJ in *Avena.*

Not surprisingly, this Court has never before considered the claim raised by Mr. Medellín in this petition. In state post-conviction proceedings, Mr. Medellín raised the Vienna Convention violation and requested an evidentiary hearing on the issue, but at the time, the *Avena* Judgment and the President's determination had not yet issued. Accordingly, the post-conviction court's analysis failed to apply the specific criteria set forth by the *Avena* court, as described below.

As an initial matter, Mexico supplied the International Court of Justice with the entirety of the post-conviction court's findings of fact and conclusions of law, as well as this Court's unpublished, per curiam order denying post-conviction relief.[8] After reviewing the findings, the International Court of Justice made clear that the limited scope of this Court's review on direct appeal did not constitute the judicial "review and reconsideration" contemplated by its Judgment. The court determined that Mr. Medellín was entitled to *de novo* review and reconsideration, and set forth specific criteria to guide the analysis to be conducted by judicial factfinders in the United States. *Avena*, para. 153(9).

Second, the International Court stressed that the review and reconsideration had to be "effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account." *Avena,* para. 138; *see also id.* at para. 131. Yet the post-conviction court determined that since Mr. Medellín had received the protections to which he was entitled under the United States Constitution, he had failed to show harm. Respondent's Proposed Findings at 20; *Medellín v. Cockrell*, No. H-01-4078, Order at 23. Indeed, this was

[8] *See* Memorial of Mexico, Annexes 59-60, (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. June 20, 2003).

precisely the argument advanced by the United States in the *Avena* proceedings,[9] and it was soundly rejected by the International Court of Justice:

> [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, para. 139 (emphasis added). Indeed, the post-conviction court denied Mr. Medellín an evidentiary hearing on his Article 36 claim.

Third, the post-conviction court held that Mr. Medellín had defaulted the claim by failing to raise the issue at trial. As noted above, the ICJ and the President's determination preclude the application of procedural bars in reviewing the Vienna Convention violation here. The President of the United States has now directed the states to comply with the *Avena* Judgment, applying the criteria set forth by the international court. This federal law was not addressed by the post-conviction court and could not have been reasonably anticipated.

The Oklahoma Court of Criminal Appeals in *Torres v. State of Oklahoma* did not hesitate to order *de novo* review for the petitioner in that case, despite its awareness that the federal courts had previously addressed the petitioner's Vienna Convention claim. In *Torres,* the federal district court had considered a Vienna Convention violation in federal habeas proceedings prior

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[9] *See, e.g.,* Transcript at para. 3.22, *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 124 (Oral Pleadings, Dec. 19, 2003, 3:00 p.m.) ("It is true that a court in the United States generally will not grant relief to an individual for a claim cast merely as a claim for a breach of the Vienna Convention, as such. But. . . . that is not a bar to satisfying the requirements of *LaGrand*. . . the courts can entertain any and all claims alleging that a breach of the Convention has resulted in harm to a specified right that is essential to a fair trial.").

to *Avena*, and had concluded—as did the post-conviction court here—that the claim was procedurally barred and that petitioner was not prejudiced by the violation. *See Torres v. Gibson*, No. CIV-99-155-R, Memorandum Opinion and Order at 73 (W.D. Okla. Aug. 23, 2000), *reprinted in* Mexico's Memorial to the ICJ in *Avena*, Annex 46, at A.949. When the petitioner in *Torres* filed a subsequent writ application after *Avena*, the Oklahoma Court of Criminal Appeals implicitly recognized that the federal court's review had been insufficient by remanding the case for the review and reconsideration mandated by *Avena. See* Exhibit G, *Torres v. State of Oklahoma*. The state post-conviction court subsequently conducted a hearing and determined that petitioner *had* suffered prejudice as a result of the violation. *See Torres v. State of Oklahoma*, Findings of Fact and Conclusions of Law (March 18, 2005), at 7.

C. In The Alternative, This Court Should Consider Mr. Medellín's Application Under the Court's Original Habeas Corpus Jurisdiction.

Should this Court find that Texas procedural default rules do apply and also find that Mr. Medellín has not satisfied the requirements of Article 11.071, § 5(a), Mr. Medellín requests that his application be considered under this Court's original habeas corpus jurisdiction. *See Ex parte Davis*, 947 S.W.2d 216, 232 (Tex. Crim. App. 1996) *(en banc)* (Baird, J., concurring) ("this Court has original habeas corpus jurisdiction *separate and apart* from that provided in art. 11.071") (emphasis in original); *Ex parte Powell*, 558 S.W.2d 480 (Tex. Crim. App. 1977). As this Court observed in *Powell*, regulatory legislative action is not required for the Court to exercise its habeas corpus powers and "*is not capable* of abolishing or restricting the substantive scope of those powers." 558 S.W.2d at 482 (emphasis added).

Because this Court's original habeas corpus jurisdiction derives from the Texas Constitution, the Court's power to entertain original habeas applications remains unaffected by the procedural requirements of Texas Code of Criminal Procedure Art. 11.071. *See* Tex. Const.

art I, § 12; *Ex parte Norvell*, 528 S.W.2d 129, 131 (Tex. Crim. App. 1975) (explaining that a legislative enactment "does not affect the exercise of this Court's constitutional power of original jurisdiction"). Indeed, the argument that the legislature has attempted to abrogate the Court's original habeas corpus jurisdiction by implementing a statutory scheme has been soundly rejected in the past. *See Ex parte Davis*, 947 S.W.2d at 233 (Baird, J., concurring) (citing a similar debate, resolved in favor of the continued vitality of the Court's original habeas corpus jurisdiction, in *Ex parte Renier*, 734 S.W.2d 349 (Tex. Crim. App. 1987)). *See also Thomas v. Stevenson*, 561 S.W.2d 845, 848 (Tex. Crim. App. 1978) *(en banc)* (Onion, J., concurring) (describing the effect of the relevant amendments to the Texas State Constitution and explaining that the only restriction on the Court's original habeas jurisdiction is the constitutional limitation to cases involving criminal matters); *State v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961) (although a district court's jurisdiction over petitions for writ of habeas corpus is limited by statute, the "original jurisdiction of this Court to issue writs of habeas corpus is unlimited"); *Ex parte Waters*, 499 S.W.2d 309, 309 n.1 (Tex. Crim. App. 1973) (while the Texas Constitution limits the Texas Supreme Court's power to entertain habeas corpus petitions, the Texas Court of Criminal Appeals has general original jurisdiction to issue such writs); *Ex parte Young*, 418 S.W.2d 824, 825 (Tex. Crim. App. 1967) (a petition presented originally to the Court of Criminal Appeals is only "one of the means" to invoke the Court's constitutional authority to grant the writ of habeas corpus).

Other Texas appellate courts have provided individuals with a forum in which to enforce rights conferred by treaty, the terms of which may override requirements under state law. *See In re Vernor*, 94 S.W.3d 201 (Tex. App. 2002) (Convention on the Civil Aspects of International Child Abduction confers rights on individual applicants; Convention's provisions for obtaining

relief take precedence over comparable state law requirement in Tex. Fam. Code Ann. § 152.001-.317); *Flores v. Contreras*, 981 S.W.2d 246, 248 (Tex. App. 1998) (same).

The Texas Supreme Court has broadly construed state procedural requirements for litigation by individual foreign nationals, when equivalent rights are afforded by treaty to U.S. citizens abroad. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000) (applying generous reciprocity interpretation to permit foreigner's wrongful death suit to proceed under "equal treaty rights" provision of Section 71.031 of Texas Civil Practice and Remedies Code); *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 675 n.2 (Tex. 1990) (same); *see also Owens-Corning Fiberglas Corp. v. Baker*, 838 S.W.2d 838, 841 (Tex. App. 1992) ("equal treaty rights" exist between the United States and Canada because the two countries are party to several treaties granting court access and substantive rights to each other's citizens). Given that Texas courts have consistently construed original habeas corpus jurisdiction and procedural requirements broadly to allow for recognition of treaty rights, Mr. Medellín's claim that he is entitled to post-conviction relief under the *Avena* Judgment is clearly cognizable in this court.

GROUNDS FOR RELIEF

I. MR. MEDELLÍN IS ENTITLED TO RECEIVE A NEW TRIAL OR, AT A MINIMUM, A NEW SENTENCING HEARING BECAUSE TEXAS AUTHORITIES VIOLATED THEIR OBLIGATIONS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS, AND THAT VIOLATION WAS PREJUDICIAL.

As a remedy for the violation of Mr. Medellín's Vienna Convention rights, the International Court of Justice ordered that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [among others, Mr. Medellín], by taking account . . .of the violation of the rights set forth" in the Vienna Convention. *Avena*, para. 153(9). "[T]his freedom in the choice of means for such review and

reconsideration [, however,] is not without qualification." *Id.* at para. 31. The review and reconsideration of Mr. Medellín's conviction and sentence must be "effective" and "'tak[e] account of the violation of the rights set forth in [the] Convention' and guarantee that the violation and the possible prejudice caused by that violation will be fully examined . . . ." *Id.* at para. 138 (citations omitted).

Further, the Court held, the violation of Mr. Medellín's Article 36 rights must be addressed on its own terms, not under the rubric of other due process rights afforded in the United States criminal justice system. *Id.* at para. 139. As the Court explained, "[t]he 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." *Id.*

These obligations of the *Avena* Judgment may be met under Texas law by granting Mr. Medellín an evidentiary hearing to determine the extent of the prejudice resulting from the Article 36 violation. Regardless of any impediments under Texas law, however, Mr. Medellín must receive the full relief afforded him by the *Avena* Judgment.

A. <u>The Violation of the Vienna Convention Caused Mr. Medellín Substantial Prejudice That Demands a New Trial.</u>

The International Court of Justice has called upon the courts of the United States to assess the consequences of the undisputed violation of the Vienna Convention in Mr. Medellín's case. The United States Supreme Court has suggested that any claim under the Vienna Convention is subject to a prejudice requirement. *Breard v. Greene*, 523 U.S. 371, 377 (1998) (suggesting in dicta that petitioner may only be entitled to relief for Vienna Convention violation where violation had "some effect" on the fairness of the trial). Courts considering Vienna Convention claims have used a three prong test for determining if a prisoner has demonstrated

prejudice: "(1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant." *Torres*, No. PCD-04-442, at 9 (internal citations omitted) (Chapel, J., concurring) (applying *Avena* Judgment); *see also United States v. Rangel Gonzalez*, 617 F.2d 529, 530 (9th Cir. 1980) (assessing whether Vienna Convention violation "harmed [petitioner's] interests in such a way as to affect potentially" his conviction or sentence). Mr. Medellín easily satisfies the burden under any formulation of the prejudice requirement.

1. Mr. Medellín Did Not Know He Had a Right to Contact His Consulate for Assistance.

Mr. Medellín did not know, nor did anyone attempt to inform him of, his right to consular assistance. *See* Exhibit J, Declaration of Jose Ernesto Medellín. The authorities clearly knew that Mr. Medellín was a foreign national; at the time of his arrest, he told police authorities that he was born in Mexico and informed the Harris County Pre-Trail Services Agency that he was not a U.S. citizen. *See* State's Ex. 113 at 000076 (Statement of Jose Ernesto Medellín Rojas); Harris County Pre-Trial Services Agency, Defendant Interview. Throughout all previous forums, in United States courts and in the International Court of Justice, the State does not contest the fact that Mr. Medellín was not informed of his rights under the Vienna Convention, nor has the State suggested that he had independent knowledge of his rights. The Court of Appeals for the Fifth Circuit also has found that Mr. Medellín was not advised of his Article 36 right to contact the Mexican consul. *See Medellín v. Dretke*, 371 F. 3d 270, 279 (5th Cir. 2004). There can be no credible debate as to whether Mr. Medellín has satisfied this first element of the test.

2. Mr. Medellín Would Have Contacted the Mexican Consulate Had He Been Apprised of His Rights.

Had Mr. Medellín been properly informed of his right to consular notification upon arrest – or at any time during his pre-trial detention – he would have sought out the consulate's help. *See* Exhibit J, Declaration of Jose Ernesto Medellin. Indeed, it was Mr. Medellín himself who first contacted the consulate by letter while on death row. *See* Exhibit H, Affidavit of Victor Manuel Uribe.

3. Mexico Would Have Provided Substantial Assistance to Mr. Medellín.

There is no question that Mexico would have provided substantial assistance to Mr. Medellín throughout 1994, when he was detained on capital murder charges, had the consulate been aware of his case. Since at least 1920, the Mexican government has extended legal assistance to its nationals sentenced to death in the United States. *See* Exhibit K, Affidavit of Everard Kidder Meade IV. As early as 1921, upon the motion of Nobel laureate Octavio Paz, who was then a congressman in Mexico, Mexico appropriated special funding for criminal defense attorneys to represent Mexican nationals in United States courts. *Id.*

At least one court has already recognized the "significance and importance" of the assistance provided by Mexican consular officials. *Valdez*, 46 P.3d at 710. In the case of Mr. Valdez, who was arrested in 1989, the Oklahoma Court of Criminal Appeals found that "the Government of Mexico *would have* intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing." *Id.* (emphasis added). Mr. Medellín was arrested some four years after Mr. Valdez. From 1989 to 1993, Mexico's involvement in the defense of its nationals only increased in intensity. Shortly before Mr. Medellín's prosecution, for example, consular officials in Texas were heavily involved in the defense of Ricardo Aldape Guerra, who was convicted and sentenced to death in Houston

without the benefit of consular assistance. *See* Exhibit L, Affidavit of Scott J. Atlas. In the case of Mr. Aldape, the consulate's assistance quite literally made the difference between life and death, just as it would have in the case of Mr. Medellín. *Id.*; *see also* Exhibit M, Declaration of Michael Iaria (describing assistance provided by Mexican government to national facing capital charges in Oregon which resulted, among other things, in the withdrawal of incompetent counsel and the appointment of a qualified capital defense attorney); Exhibit N, Affidavit of Bonnie Goldstein (describing assistance provided by Mexico during the 1992-1997 period to national on Texas's death row in habeas proceedings); Exhibit O, Affidavit of Peter Lopez, III (describing assistance provided by Mexico including obtaining documents in Mexico unavailable to defense counsel under Texas law). As early as 1988, the Mexican Ministry of Foreign Relations had designated a specific point-person charged specifically with monitoring legal cases of Mexican citizens in the United States. *See* Exhibit P, Affidavit of Barbara K. Strickland. The Ministry was particularly interested in the cases of Mexican nationals facing the death penalty. *Id.* This emphasis persisted throughout the 1990s. *Id.*; *see also* Declaration of Roberto Rodriguez Hernandez, attached as Appendix 1 to Exhibit H, Affidavit of Victor Manuel Uribe. The fact that the Mexican government took an active interest in Mr. Medellín's case immediately upon learning of it, and promptly sought to take a vigorous role in his defense from that time forward belies any argument that the consulate would have ignored any pleas for assistance from the client or his attorneys.

B. <u>Even Under a Stricter Prejudice Standard, the Record in This Case Clearly Establishes Overwhelming Prejudice.</u>

According to the test set forth in *Torres*, the above facts are all that must be proven in order to entitle Mr. Medellín to relief. However, even under a more stringent test, Mr. Medellín easily carries his burden. For example, the factual showing made by Mr. Medellín readily meets

the prejudice standard applied in *Ex parte Fierro*, 934 S.W.2d 370, 375 (Tex. Crim. App. 1996) ("[A]pplicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment").

As an initial matter, during the course of the investigation and prosecution of Mr. Medellín's case, lead counsel John Millin was under a six-month suspension from the practice of law for ethics violations in another case. *See* Judgment, *State Bar of Texas v. John A. Millin, III*, September 14, 1993, attached as Appendix H to Exhibit T, Affidavit of Danalynn Recer. He continued to represent Mr. Medellín while suspended, filing numerous motions and making at least five court appearances. *See* Exhibit T, Affidavit of Danalynn Recer. Prior to trial, Mr. Millin was held in contempt of court and arrested for violating his six-month suspension. *See* Appendices E, I, J, K, L attached to Exhibit T, Affidavit of Danalynn Recer. After the Texas State Bar instituted a second disciplinary proceeding against him, Mr. Millin spent much of the time that should have been allotted to representing Mr. Medellín to vigorously defending himself in the District Court and the Court of Appeals. *See* Appendices M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, attached to Exhibit T, Affidavit of Danalynn Recer. In fact, less than three weeks before the beginning of Mr. Medellín's trial, Mr. Millin was forced to file a writ of habeas corpus on his own behalf in order to keep himself out of jail. *See* Petition for Writ of Habeas Corpus, *Ex parte John A. Millin, III*, attached as Appendix M to Exhibit T, Affidavit of Danalynn Recer.

As Danalynn Recer, an attorney retained by the government of Mexico to assist in Mr. Medellín's case, describes:

> On February 28, 1994, after having been found in contempt by the District Court for continuing to practice law during his suspension, Mr. Millin was booked into the Fort Bend County jail for 7 days and released upon issuance of an Appeal bond. On July 22, 1994, Mr. Millin filed a petition for writ of habeas corpus and pursued relief in both the District Court and the Court of Appeals throughout the

> fall of 1994. . . . Meanwhile, the State Bar had filed a second law suit on October 7, 1993, which Mr. Millin defended through 1994 and into 1995.

Exhibit T, Affidavit of Danalynn Recer.

Documents found in Mr. Millin's files also indicate that his personal and professional life were falling apart during the time his attention should have been focused on zealous representation of Mr. Medellín:

> [I]n 1993-1994: Mr. Millin's clients, whose cases encompassed a wide range of legal matters, were not paying him; he was having trouble paying his mortgage, phone bills, parking tickets, and his son's college tuition; the Texas State Bar was suing him based on the fact that seven individuals had filed grievances against him to which he never responded. A second disciplinary proceeding was also taking place (*State Bar of Texas v. John A. Millin,* Cause No. 83, 936 (1994)). It appeared his law firm of Davis & Millin had split up, because the file contained correspondence where the name "Davis" had been scratched off the letterhead. In an undated draft letter to the Texas State Bar, Mr. Millin indicated that he had been suspended for six months and asked the bar committee to probate his suspension so that he could pay his bills and "get [his] life back on track."

Exhibit Q, Affidavit of Marissa Hill. In addition, Mr. Millin suffered from acute health problems that led to his death shortly after the trial. *See* Exhibit T, Affidavit of Danalynn Recer.

Given his failing health, financial problems, suspension from the practice of law and a history of disciplinary problems before the Texas State Bar, counsel was ill-equipped to defend Mr. Medellín. Billing records indicate that the only investigator for the defense spent a total of eight hours on the investigation prior to the commencement of jury selection, including the time he spent with Mr. Medellín. *See* Invoice of James C. Jackson, attached as Appendix 1 to Exhibit Q, Affidavit of Marissa Hill. Commenting on pre-trial investigation after reviewing the invoice submitted by the sole investigator in Mr. Medellín's case, Russell Stetler, Director of investigation and mitigation at the New York Capital Defender Office explained:

> According to the invoice, only eight hours were spent [on investigation] prior to the commencement of jury selection on August 9, 1994: one hour in a case briefing with counsel, three hours visiting Mr. Medellín and attempting to locate a

> character witness at his request, two hours in court and two hours meeting with the family and the attorney. The overwhelming majority of the time was spent in a period of less than two weeks once hearings and trial were under way. . . . It is my professional opinion that this investigation fell far below the prevailing professional norms in a capital case in 1994, particularly in the area of mitigation investigation. . . . The total time spent investigating this case was insufficient, the investigation was conducted too late, and the focus of investigation reflected no understanding of the meaning of mitigation beyond the vague notion of "character" evidence. . . . The failure to conduct a timely and thorough investigation fell grossly below the standard for effective representation at the time of this trial.

Exhibit S, Affidavit of Russell Stetler.

Only boilerplate motions were filed during pre-trial proceedings. During jury selection, defense failed to strike jurors who indicated they would automatically impose the death penalty.[7] During the guilt phase of the trial, the defense called no witnesses. Counsel also failed to object to the State's inflammatory characterization of Mr. Medellín as a gang member.

At the penalty phase, the defense presented only one expert witness, Dr. Wendell Dickerson, a psychologist who had never met Mr. Medellín. In light of the jury's task at the sentencing stage, the damage caused by Dr. Dickerson's testimony far outweighed its benefits. In Texas, the jury must determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. PROC. CODE ANN. art. 37.071 §(2)(b)(1). With regard to this critical question, Dr. Dickerson testified repeatedly that the "single most important" predictor of future behavior is past conduct. S.F. Vol. 35 at 302, 346. Never having met Mr. Medellín, Dr. Dickerson could not accurately testify to his future dangerousness, let alone to the influences that severe depression, violent social environment and early childhood abandonment may have played on his behavior.

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[7] *See, e.g.*, S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.

The defense also failed to challenge the State's showing of Mr. Medellín's propensity for future dangerousness. The State relied heavily on the fact that a search of Mr. Medellín's prison cell turned up a "shank" fashioned from a disposable razor. With the help of investigators hired by the Mexican Consulate, it has now been ascertained that prison records clearly show that numerous threats were made on Mr. Medellín's life during that time. One of the threats was considered sufficiently serious by prison officials to warrant the transfer of Mr. Medellín to a different location. *See* Exhibit R, Affidavit of Naomi E. Terr. Even though a superficial investigation of prison records would have revealed this mitigating evidence, the defense did not present any explanation for Mr. Medellín's behavior that may well have justified the imposition of a lesser sentence.

The defense also utterly failed to explore Mr. Medellín's life history to provide a mitigating explanation for his role in the crime. At trial, Mr. Medellín's parents testified only briefly. S.F. Vol. 35 at 279-92. His mother mentioned his participation in Mexican cultural activities; *id.* at 290-91; his father testified that Mr. Medellín was not a permanent United States resident. *Id. at* 283. A probation report evidencing Mr. Medellín's good behavior was not presented. The entire penalty phase defense lasted less than two hours. Transcript at 343-441 (Trial Docket at 000281).

An exhaustive investigation and preparation of a mitigation case is axiomatic in capital defense strategy. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding that trial counsel has an "obligation to conduct a thorough [mitigation] investigation of the defendant's background."); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure of trial attorney to investigate defendant's background and present mitigating evidence violated Sixth Amendment right to effective assistance of counsel); *see also Lewis v. Dretke*, 355 F.3d 364, at 368 (5th Cir. 2003) ("It is

axiomatic – particularly since *Wiggins* – that [the decision not to present mitigating evidence] cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose."). Many of the steps that the Mexican Consulate has already taken or would have taken if timely advised of Mr. Medellín's case, are precisely the type of investigative acts which have been standard practices for capital defense attorneys since the early 1980s. These include: hiring experts to evaluate the client's mental health; hiring a mitigation specialist to compile a social history of the client through interviews of the client and his/her family, neighbors, friends and acquaintances; and collecting school, medical, employment, and other records. *See* Exhibit H, Affidavit of Víctor Manuel Uribe; *see also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, at 5-6, 31-32.

Through a preliminary investigation funded by the Mexican Consulate, it has now been ascertained that Mr. Medellín grew up in an environment of abject poverty and violence. Mr. Medellín was born in Nuevo Laredo, Mexico, the second of four children of Venancio Medellín, a farm laborer, and Maria Felipa Rojas, a housekeeper. At the age of four, he was abandoned by his parents and left to live in substandard conditions with an elderly relative. *See* Exhibit R, Affidavit of Naomi E. Terr. The defense offered no evidence at trial of the numerous difficulties Mr. Medellín faced growing up in poverty without parental aid and care.

Mr. Medellín became exposed to serious violence shortly after rejoining his parents in Houston five years later. Although Mr. Medellín performed well in elementary school, both academically and behaviorally, things took a turn for the worse when he entered Hamilton Middle School, known for its violent environment and emerging gang problems. By the time Mr. Medellín finished middle school, he was shot at on three separate occasions, suffering a

wound to the leg. *See id.* As his school environment grew more violent, a disconnect quickly developed between Mr. Medellín's experience at school and at home. As recent immigrants, his parents lacked the skills to understand and address the pressures Mr. Medellín faced at school. Mr. Medellín began withdrawing from his family and gravitating towards his peers for support. His behavior started changing dramatically during this time. He grew increasingly depressed, attempting to commit suicide on at least one occasion. *See id.* Lacking intervention programs for youth at risk, the school system addressed Mr. Medellín's developing behavioral and emotional problems through disciplinary means. Mr. Medellín developed an alcohol abuse problem and dropped out of school after completing only eight grades. *See id.;* S.F. Vol. 38, State's Ex. 113 at 000076 (Statement of Jose Ernest Medellín Rojas).

These profound experiences, ascertained though a preliminary investigation funded by the Mexican Consulate, explain much of Mr. Medellín's behavior prior and subsequent to the crime that the State presented at the punishment phase of his trial as evidence of his future dangerousness. Yet, trial counsel failed to explore Mr. Medellín's life history to provide a mitigating explanation for his role in the crime. Prior to the commencement of jury selection, the only investigator for the defense spent a total of eight hours on interviews for Mr. Medellín's case, including the interview he conducted with Mr. Medellín. *See* Invoice of James C. Jackson, attached as Appendix 1 to Exhibit Q, Affidavit of Marissa Hill; Exhibit S, Affidavit of Russell Stetler. Trial counsel was actually and constructively aware of the violent environment Mr. Medellín lived in, his susceptibility to peer pressure, suicidal tendencies and depression. Nevertheless, trial counsel did not further investigate his client's environment or emotional health with a view to presenting mitigating evidence at the punishment phase or exploring the possibility that these factors might in some degree account for his grossly anti-social conduct.

Having declined even to explore this avenue of mitigation, Mr. Medellín's trial counsel was in no position to make a reasoned strategic decision to forgo it. It is all the more puzzling that trial counsel ignored this mitigating evidence when one considers that he presented no evidence at the punishment phase of the trial and failed to object to the State's damaging characterization of his client as a gang member. Given the circumstances of the crime, trial counsel's failure to investigate client's social history or request funds for an expert psychological evaluation cannot be explained away as trial strategy.

Mexico would readily have supplied funds for such investigation, and has in fact done so. *See* Exhibit H, Affidavit of Victor Manuel Uribe. Experts and investigators could have been retained by the Mexican Consulate to present information showing the influence of Mr. Medellín's difficult childhood, exposure to violence, and history of depression on his behavior, thus presenting to the jury a complete and human picture of Mr. Medellín. Testimony of experts familiar with Mr. Medellín could have replaced testimony of Dr. Dickerson, who testified without ever even having met Mr. Medellín. In addition, Mexico's assistance in the investigation could have been invaluable in light of linguistic and cultural differences and the geographic distance of many life-history witnesses.

On the record before this Court, there can be no question that Mexico's involvement in Mr. Medellín's case would have transformed the quality of his defense, and, at minimum, prevented the imposition of a death sentence by (1) ensuring that trial counsel was effective and prepared; and (2) providing critical resources for experts and investigators. To make this assessment, the Court must consider the powerful assistance that Mexico has provided to Mr. Medellín since learning of his case – assistance it would have provided at his trial, were it not for the violation. Had trial counsel possessed the evidence now developed by Mexico, the penalty

phase would have had real meaning and resonance to the jury. On the record before this Court, the result is not fairly in doubt: were it not for the violation of the Vienna Convention, Mr. Medellín would not be on death row. The investigation in Mr. Medellin's case is ongoing and likely to produce additional mitigating evidence.

C. **<u>Mr. Medellín Is Entitled to an Evidentiary Hearing.</u>**

The *Avena* Judgment would require at a minimum that Mr. Medellín receive an evidentiary hearing before a trial court to determine the effect of the Article 36 violation on his conviction and sentence. *Avena*, para. 131. According to the International Court of Justice, "it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at 122. In Texas post-conviction proceedings, trial courts perform the function of determining facts in the first instance. Tex. Code Crim. P. art. 11.071 §9(a). An evidentiary hearing in these circumstances would comport with Tex. Code Crim. P. Ann. art. 11.071, § 9. But even if Texas law would not otherwise permit an evidentiary hearing, the preemptive effect of the *Avena* Judgment and the President's directive implementing it would require that this Court order one.

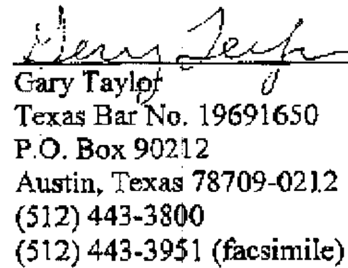
<u>PRAYER FOR RELIEF</u>

In view of the foregoing, Jose Ernesto Medellín respectfully requests that this Honorable Court:

1. Vacate his conviction and death sentence;
2. Remand this case for an evidentiary hearing at which proof may be offered as to the allegations contained in this petition;
3. Order oral argument on the application of the President's determination, the *Avena* Judgment, and Article 11.071, § 5(a) to the facts of this case; and

4. Grant any other relief, both in law and in equity, to which Petitioner may show himself justly entitled.

Respectfully submitted,



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ATTORNEYS FOR APPLICANT

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Gary Taylor, who being by me duly sworn on oath deposed and said that he is authorized to sign and has read the above and foregoing Subsequent Application for Post-Conviction Writ of Habeas Corpus, and that every statement contained therein is true and correct on his personal knowledge.

By: ______________________

SUBSCRIBED AND SWORN TO BEFORE ME on this 25 day of March, 2005, to certify which witness my hand and official seal.

____
NOTARY PUBLIC, STATE OF TEXAS

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS

2005 MAR 24 PM [illegible]

AFTER HOURS
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EXHIBITS

Table of Contents

Case Concerning Avena and Other Mexican Nationals, (Mex. v. U.S.A.), 2004 [illegible] (Mar. 31, 2004) .... A

Presidential Determination of February 28, 2005 .... B

Excerpts from Brief filed by Texas Solicitor General in *Medellin v. Dretke* C

Petitioner's Motion to Stay, *Medellin v. Dretke* .... D

Response to Petitioner's Motion to Stay, *Medellin v. Dretke* .... E

Excerpt from Brief filed by Former United States Diplomats as Amici Curiae in Support of Petitioner in *Medellin v. Dretke* .... F

Torres v. Oklahoma, No. PCD-04-442 (May 13, 2004) .... G

Affidavit of Victor Manuel Uribe, with Appendix 1, Declaration of Roberto Rodriguez Hernandez .... H

Excerpt from Amicus Curiae Brief for the United States in *Medellin v. Dretke* I

Declaration of Jose Ernesto Medellin .... J

Affidavit of Everard Kidder Meade .... K

Affidavit of Scott J. Atlas L

Declaration of Michael Iaria .... M

Affidavit of Bonnie Lee Goldstein .... N

Declaration of Peter Lopez, III .... O

Affidavit of Barbara K. Strickland .... P

Affidavit of Marissa Hill, with Appendix 1, Invoice of James C. Jackson .... Q

Affidavit of Naomi E. Terr .... R

Affidavit of Russell Stetler .... S

Affidavit of Danalynn Recer, with Appendices A-BB .... T