

EX PARTE JOSE ERNESTO MEDELLIN

Trial Court Cause no. 675430-B

CCA No. WR-50,191-02

AP-75,207

IN THE COURT OF CRIMINAL APPEALS

AT

AUSTIN, TEXAS

STATE'S BRIEF IN RESPONSE

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Respondent, the State of Texas, by and through the undersigned Harris County Assistant District Attorney, files its brief in response to the Court of Criminal Appeals' filing and setting for submission the issue of whether the applicant meets the requirements for consideration of a subsequent application for writ of habeas corpus, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5, and the Respondent would show the following:

I. PROCDURAL HISTORY OF APPLICANT'S CLAIM

The applicant is confined pursuant to the judgment and sentence of the 339TH District Court of Harris County, Texas, in cause number 675430 (hereinafter "the primary case"), wherein a jury convicted the applicant of the felony offense of capital murder. On September 20, 1994, after the jury affirmatively answered the first two special issues and

negatively answered the third special issue, the trial court assessed punishment at death by lethal injection. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered March 19, 1997. *Medellin v. State*, No. AP-71,997 (Tex. Crim. App. Mar. 19, 1997)(not designated for publication).

Subsequently, the applicant filed an initial state application for writ of habeas corpus, alleging a violation of his rights under Article 36 of the Vienna Convention. On October 3, 2001, the Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law that the applicant's claim was procedurally barred for lack of a contemporaneous objection and, in the alternative, that the applicant had no individually enforceable right to raise the claim. *Ex parte Medellin*, No. 5019-01 (Tex. Crim. App. Oct. 3, 2001)(not designated for publication). Consequently, the Court of Criminal Appeals denied the applicant habeas relief in his initial state application for writ of habeas corpus. *Id.*

On April 17, 2003, the federal district court denied the applicant federal habeas relief, including the applicant's claim of a violation of the Vienna Convention, and denied a certificate of appealability. *Medellin v. Cockrell*, No. H-01-4078 (S.D. Tex. April 17, 2003). The federal district court held that (1) the applicant defaulted on his Vienna Convention claim under the adequate and independent state procedural rule applied by Texas state courts; (2) there was no judicial remedy for enforcement because the Vienna Convention did not create individually enforceable rights; and, in the alternative (3) even if the Vienna Convention created individual rights, the applicant was barred from asserting such rights under the rule in *Teague v. Lane*, 489 U.S. 288 (1989); and, (4) the applicant could not show that the violation of the Vienna Convention affected

the constitutional validity of his conviction and sentence. *Medellin v. Cockrell*, No. H-01-4078 (S.D. Tex. April 17, 2003).

On March 31, 2004, the International Court of Justice (ICJ) held that the Vienna Convention guaranteed individually enforceable rights; that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of the named Mexican nationals in the case before the ICJ; and, that the United States must determine whether the violation of the Vienna Convention “caused actual prejudice” to those named Mexican nationals,” regardless of American procedural default rules. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. No. 128, 122-23, 153 (March 31, 2004). Subsequently, the Fifth Circuit Court of Appeals, while acknowledging the *Avena* decision, denied the applicant’s request for certificate of appealability based on state and federal procedural default rules and based on prior holdings that the Vienna Convention did not create an individually enforceable right. *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5TH Cir. 2004)(citing *Breard v. Greene*, 523 U.S. 371 (1998); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5TH Cir. 2001)).

The United States Supreme Court granted the applicant’s subsequent petition for writ of certiorari to consider whether a federal court is bound by the ICJ’s decision in *Avena* and whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation to the ICJ’s decision. *Medellin v. Dretke*, ___ U.S. ___, 123 S. Ct. 2088 (2005). However, the Supreme Court ultimately dismissed the applicant’s petition for writ of certiorari as improvidently granted after President George Bush issued a memo stating the United States would have state courts give effect to the ICJ’s decision

in *Avena*. Further, prior to oral argument in the Supreme Court, the applicant filed a subsequent state application for writ of habeas that is the basis for the instant briefing.

II. ISSUE BEFORE THIS COURT

Whether the applicant's Vienna Convention claim meets the requirements for consideration of a subsequent application for writ of habeas corpus, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5.

III. BRIEF ANSWER

No. The applicant's Vienna Convention claim is barred from consideration by the Texas contemporaneous objection rule and its progeny, TEX. CODE CRIM. PROC. art. 11.071, § 5, and, in the alternative, the applicant fails to show actual prejudice resulting from a violation of the Vienna Convention.

IV. STATEMENT OF FACTS

Respondent denies the factual allegations made in the instant application, except those supported by official court records, and offers the following additional reply:

State's Evidence at Guilt-Innocence

On June 24, 1993, the sixteen-year old complainant, Elizabeth Pena, and her fourteen-year old friend, Jennifer Ertman, left a friend's apartment around 11:30 p.m. to walk home (XXVIII R.R. at 172-3). However, the complainant and Ertman did not return home, and the girls' friends and families handed out fliers and searched for the missing girls on Saturday and Sunday (XXVIII R.R. at 176-7).

During the applicant's trial, Ramon Sandoval testified that he and his twin brother Frank knew the applicant and his co-defendants Efrain Perez, Derrick Sean O'Brien, and Peter Cantu (XXVIII R.R. at 205-9). Sandoval also knew the applicant's younger brother, Vanancio Medellin, known as Unie (XXVIII R.R at 210). Sandoval met the applicant's co-defendant Raul Villarreal the night of the offense when Sandoval, his twin brother Frank, the applicant, Villarreal, Perez, Cantu, and Jesse Medellin went to the railroad tracks in the park so that Villarreal could be initiated into the White and Black Gang (XXVIII R.R. at 211-18). The men, who were joined by O'Brien, talked, drank beer, and smoked before Villarreal fought with the gang members individually as his initiation rite into the gang (XXVIII R.R. at 219-22).

After the initiation fighting, Sandoval and his brother were walking by the railroad tracks when two young girls, later identified as the complainant and Jennifer Ertman, passed them walking toward the other end of the tracks (XXVIII R.R.at 232-4)(XXIX R.R. at 315). Sandoval heard the applicant ask the girls their names before the applicant grabbed the complainant and threw her on the tracks (XXVIII R.R. at 234-35). Jennifer Ertman, who ran to help the complainant, was grabbed by Cantu (XXVIII R.R. at 236-37)(XXIX R.R. at 317-20). The Sandoval brothers then left because they thought something bad would happen (XXIX R.R. at 259, 322).

Christina Cantu, the wife of Joe Cantu, co-defendant Peter Cantu's brother, testified that the applicant and Efrain Perez and Raul Villarreal arrived at the Cantu's apartment in the early morning hours of June 25, 1993 (XXIX R.R. at 366-70). Villarreal was bleeding from his eyebrow and Perez had blood on his shirt (XXIX R.R. at 373). When Christina asked what happened, they said they had some fun (XXIX R.R. at 383-

4). Peter Cantu arrived at the apartment about forty-five minutes after the applicant, Perez, and Villarreal (XXX R.R. at 516).

After Perez took a bath, the applicant told Joe and Christina Cantu that he and Peter Cantu had met two “hos” in the woods by the railroad tracks off T. C. Jester and had sex with them (XXIX R.R. at 389)(XXX R.R. at 521-2). The applicant said he grabbed one of the girls and she started screaming, so he punched her (XXIX R.R. at 389-90). The applicant told her to stop screaming or he would hit her again (XXIX R.R. at 390). The applicant, who was giggling and laughing while describing what he did, said that he “fucked one of the girls in the pussy;” that he turned her around and “fucked her in the ass;” and, that another guy was having sex with the other girl who tried to run away (XXIX R.R. at 391-2). The applicant said that he made one of the girls give him a “blow job” and that he hit her on the top of her head when she would not close her mouth (XXIX R.R. at 395, 425).

One of the girls told the applicant that she was a virgin, and the applicant could not believe the “bitch” was telling the truth about being a virgin (XXIX R.R. at 393). Later, the applicant showed Christina Cantu his underwear which had blood on it (XXIX R.R. at 394). The applicant, who admitted having sex with both girls, seemed proud that he “opened” the girl who was a virgin, and that he “dirtied” the inside of the girl when he was first entering her (XXIX R.R. at 405, 422).

When Christina Cantu asked what happened to the girls, the applicant said he killed one of the girls by strangling her with his shoelace and that he was involved with strangling the other girl so the girls could not identify them (XXIX R.R. at 424-5). The applicant stomped on one of the girl’s throat because it did not look as if she were dead

(XXIX R.R. at 424)(XXX R.R. at 533). The applicant assumed he killed both girls, because he said that he took turns killing both with his shoelace and then his foot (XXX R.R. at 477-8). The applicant said it would be faster and easier if he had a gun to kill them (XXIX R.R. at 425)(XXX R.R. at 534). The applicant said they had fun and that the Cantus would see it on the news on television (XXIX R.R. at 393).

While at Joe and Christina Cantu's apartment, the applicant, Villarreal, Perez, and Peter Cantu divided the jewelry and money they had taken from the girls (XXIX R.R. at 397). The applicant got state's exhibit 25, a ring with an "E" on it, which the applicant said he was going to give to his girlfriend (XXIX R.R. at 398-401). Perez got state's exhibit 106, another ring (XXIX R.R. at 402). There was a ring with a "V" on it and a couple of necklaces (XXX R.R. at 517). Peter Cantu divided approximately thirty or forty dollars between himself and Perez (XXIX R.R. at 404).

On June 28, 1993, Larry Hoffmaster, Houston Police Department, homicide division, received a phone call from Crime Stoppers (XXX R.R. at 621-4). As a result, Joe and Christina Cantu were interviewed and, afterwards, the police obtained arrest warrants for the applicant, Efrain Perez, Peter Cantu, Derrick Sean O'Brien, and unknown male who later proved to be Raul Villarreal (XXX R.R. at 626-7).

On June 28TH, the bodies of the complainant and Jennifer Ertman were located near the railroad trestle in the woods of the park at 34TH Street and T. C. Jester (XXVIII R.R. at 30, 51). Both bodies were in an advanced state of decomposition, heavily infested with flies and maggots (XXVIII R.R. at 34).¹ Jennifer Ertman was completely nude and the complainant was wearing a black t-shirt pulled over her head and a tennis

¹ The bodies were subsequently identified through dental records (XXX R.R. at 582-609)(XXXI R.R. at 692-711).

shoe and sock on one foot (XXVIII R.R.at 32-33). The girls' clothing was strewn throughout the bushes (XXVIII R.R.at 34). Police recovered clothing from the scene that was later identified as belonging to the complainant and Jennifer Ertman (XXVIII R.R. at 135-52, 183-89). The applicant's girlfriend identified Ertman's heartshaped ring, as the ring that the applicant gave her on June 27, 1993 (XXXI R.R. at 743-50).

At 4:00 a.m. on June 29, 1993, the applicant, Peter Cantu, Efrain Perez, Derrick Sean O'Brien, and Raul Villarreal, along with the applicant's fourteen year old brother, Vanancio Medellin, were arrested by separate teams of police officers (XXVIII R.R.102)(R. XXX - 629). At the time of his arrest, Venancio Medellin had a Disney character watch in his pocket later identified as the watch Jennifer Ertman was wearing on the night of the offense (XXVIII R.R.189)(XXX R.R. at 640-1). After Derrick Sean O'Brien's arrest, police recovered from O'Brien's apartment the red belt used in the commission of the offense (XXXII R.R. at 782-3).

According to the applicant's written statement, on June 23, 1993, the applicant, Peter Cantu, Efrain Perez, Frank Sandoval, Roman Sandoval, Derrick Sean O'Brien, Venancio Medellin, and Raul Villarreal were in the grassy area near the railroad tracks behind the Brook Green Apartments so they could initiate Villarreal into their gang (XXXII R.R. at 946). After the ritual fighting initiation, they returned to the railroad tracks and drank and talked (XXXII R.R. at 946-7). They started walking back and passed two girls who said their names were Jennifer and Elizabeth (XXXII R.R. at 947). According to the applicant, Cantu grabbed Jennifer Ertman and told Villarreal to grab the complainant (XXXII R.R. at 947). The girls were asking them to let them go, and Cantu said "bitch, we're going to fuck your ass" (XXXII R.R. at 947). The complainant asked

him not to hurt her (XXXII R.R. at 947). Cantu had sex with the complainant and then told her to have oral sex with the applicant (XXXII R.R. at 948). The complainant asked Cantu about being let go and Cantu said yes (XXXII R.R. at 948). While Cantu and the applicant were having sex with the complainant, Perez, O'Brien, and Villarreal were taking turns having sex with Ertman (XXXII R.R. at 948). Cantu told Venancio Medellin to get the girls' beepers, watch, rings, and necklaces (XXXII R.R. at 949). They took the girls into the woods and Perez had sex with the complainant and O'Brien had sex with Ertman (XXXII R.R. at 949).

According to the applicant, Cantu told Villarreal to kill Ertman, and O'Brien handed him a belt to use (XXXII R.R. at 949). Villarreal strangled Ertman with the belt which tore, and Villarreal put his foot on her throat (XXXII R.R. at 949). Cantu told Perez to do the same to the complainant but to use his shoelace (XXXII R.R. at 949). Perez could not get a good grip so the applicant held one end of the shoelace (XXXII R.R. at 949). After Perez got a better grip, he took the shoelace back and continued to choke the complainant (XXXII R.R. at 949). When Perez let go of the shoelace, the complainant was still moving so Perez stepped on her throat (XXXII R.R. at 950). When the applicant's brother walked by, Cantu told the applicant to tell his brother to leave so he would not see it (XXXII R.R. at 950). However, they had already starting killing the girls (XXXII R.R. at 950). As they were leaving, Villarreal said that he did not think Ertman was dead, so he starting stomping on her face with his foot then did the same to the complainant (XXXII R.R. at 950).

During the applicant's trial, Marilyn Murr, Assistant Medical Examiner, testified that she performed the autopsies on the sixteen-year old complainant and on fourteen-

year old Jennifer Ertman on June 29, 1993 (XXXII R.R. at 846-9). The complainant had several teeth missing which had very recently come out of her jaws; her head was decomposed to the level of the bone so that the skull was exposed; there was soft tissue present on each side of her head but her eyes and scalp were absent; her neck was markedly decomposed; and, the skin, along with a lot of soft tissue, was absent from her neck (XXXII R.R. at 851, 862). There were maggots over the entire body with a concentration in the head and neck area (XXXII R.R. at 852). The complainant's external sexual organs were markedly decomposed and covered with maggots (XXXII R.R. at 852). Murr testified that maggots and bacteria, which cause decomposition, are attracted to hemorrhage or blood, and that strangulation causes the head to become congested with blood (XXXII R.R. at 852, 857). The complainant's hands and arms had dark coloration as opposed to the intact portions of her body, indicating hemorrhage, such as bruising, on the hands and arms, and the complainant's neck was decomposed to a point indicating that maggots and bacteria were drawn to area (XXXII R.R. at 855).

The complainant's external genitalia were mostly absent and covered with maggots showing trauma to that area (XXXII R.R. at 857). There was a large, open hole filled with maggots in the complainant's anal area (XXXII R.R. at 857). Based on an examination of the complainant's body, Murr concluded that there had been large amount of trauma in the neck area, the arms, shoulder, external sexual organs and anal area (XXXII R.R. at 858). The dark areas on the complainant's fingers were consistent with someone being struck or someone struggling to get something from around the neck (XXXII R.R. at 859). The condition of the complainant's jaw in the area of the missing

teeth was consistent with someone striking the complainant in the mouth with either a closed fist or a foot or some other instrument (XXXII R.R. at 862).

An internal examination of the complainant's body revealed maggots covering the chest organs indicating that the maggots had come from the complainant's decomposed neck (XXXII R.R. at 860). An internal examination of the complainant's head revealed that there was no brain and no soft tissue, indicating that there had been great trauma to the neck and head area for decomposition to be so advanced (XXXII R.R. at 861). Murr testified that the condition of the complainant's head showed that it was very congested with blood, such as from strangulation (XXXII R.R. at 861). The condition of the applicant's neck and head was consistent with someone being strangled by a shoelace, a belt, or a hand or hands (XXXII R.R. at 870). The condition of the applicant's external genitalia was consistent with forced intercourse by multiple assailants (XXXII R.R. at 873). The condition of the complainant's anal area was consistent with forced anal intercourse from multiple assailants (XXXII R.R. at 875). The cause of the complainant's death was trauma to the neck consistent with strangulation (XXXII R.R. at 882).

Fourteen-year old Jennifer Ertman's external sexual organs were markedly decomposed, and there was a great deal of decomposition of the anal area (XXXII R.R. at 883-5). Three of Ertman's ribs were fractured after her death, consistent with the body being stomped or kicked after death (XXXII R.R. at 886-7). Murr testified that dental x-rays were used to identify Ertman (XXXII R.R. at 888). The cause of Jennifer Ertman's death was trauma of the neck consistent with strangulation with hands, a shoe lace, a belt, by standing on her neck, or with unknown object (XXXII R.R. at 903).

State's Evidence at Punishment

James Royster, the principal at Hoffman Middle School, testified that the applicant was suspended from school in the fall of 1990 and placed at Drew Alternative Middle School, a school for repeated misbehavior and misconduct (XXXIV R.R. 76-7). However, the applicant was unable to function at Drew Alternative and was expelled from the school district for the remainder of the school year (XXXIV R.R. 77-8).

Isidra Flores, the applicant's former teacher at Eisenhower High School, testified that the applicant was disrespectful; that he used profanity in class; that he defied the rules; and, that he called Flores a whore (XXXIV R.R. 7-13). Boyd Hemphill, a teacher at Eisenhower, observed the applicant, in January, 1992, having an altercation with two male principals with the angry applicant threatening the principals (XXXIV R.R. 17-23).

Clarence Todd and Greg Colschen, the principals involved in the altercation with the applicant in January, 1992, testified that the applicant became confrontational and aggressive when he was told to go to class; that he physically resisted the principals when they tried to calm him; that he screamed profanities at another student; that he made a threat to Colschen that Colschen took to mean that the applicant would kick him in the groin; that the applicant threatened to kill Colschen; that the applicant threatened to "get" Todd, to "pop," i.e., shoot, Todd; that the applicant said that life did not mean anything to him; that he would be famous and they would see him on television or the front page; that he would be in the newspaper because he killed someone, probably a cop; and, that jail did not scare him (XXXIV R.R. 30-64).

The applicant, who was suspended numerous times from school, was expelled in January, 1992, and suspended pending an expulsion hearing in October, 1992, after being

in a gang-related fight (XXXIV R.R. 64-6). As a result of the expulsion hearing, the applicant was placed at the alternative education program at Drew Middle School and never allowed to return to Eisenhower (XXXIV R.R. 68). According to Colschen, the applicant never altered his behavior while at Eisenhower (XXXIV R.R. 68-9).

On January 4, 1992, a red Firebird belonging to Kathleen and Gregory Beauford was stolen from the parking lot of the bowling alley at Delmar and Mangum (XXXIV R.R. 110-3). Later that afternoon, Kathleen Beauford saw the car in a restaurant parking lot at 34TH and Mangum and called the police and her husband and reported seeing the car (XXXIV R.R. 114, 124). Gregory Beauford, who arrived at the restaurant before the police, entered the restaurant and saw a couple sitting at one table, a family seated at another table, and three Hispanic males sitting at a third table (XXXIV R.R. 125-6). One of the males had an object in his waistband that appeared to be a weapon (XXXIV R.R. 128). Beauford talked to the waitress and manager and again called the police (128). Beauford was in the parking lot with his wife and sisters-in-law when the police arrived as the three Hispanic males were approaching the stolen car (XXXIV R.R. 129). The males, upon seeing the police, ran away (XXXIV R.R. 117).

K.R. Bradshaw, Houston Police department, was unable to find the Hispanic male whom he pursued (XXXIV R.R. 134-8). However, Bradshaw's partner, G.E. Crawford, arrested the other two Hispanic males, identified as the applicant and Efrain Perez (XXXIV R.R. 155). The applicant, a juvenile at the time, had a .38 revolver on his person and he was referred for a weapons charge (XXXIV R.R. 129, 151-4).

On July 18, 1992, P. A. Stavinoha, Houston Police Department, saw two cars stopped in the road with the driver of one of the cars standing in the road yelling at the

driver of the other car (XXXIV R.R. 169-71). When the driver standing in the roadway saw the patrol unit, he jumped in his car and sped away followed by Stavinoha (XXXIV R.R. 172). After Stavinoha stopped the car, Stavinoha saw that there were three people in the car and that the front seat passenger appeared to be hiding something under the seat (XXXIV R.R. 173-5). Subsequently, the applicant was identified as the front seat passenger and Peter Cantu was identified as the driver of the car (XXXIV R.R. 177-8). A .38 weapon was found on the floorboard of the car partially under the front passenger seat (XXXIV R.R. 178). Next to the gun were two live rounds of .38 SP ammunition, a more powerful round than a normal .38 round (XXXIV R.R. 179-81). The applicant was charged with the offense of carrying a weapon (XXXIV R.R. 180).

On June 6, 1993, Joseph Simillen, security guard at Memorial Northwest Hospital, was called to the emergency room where Efrain Perez had been admitted with a gunshot wound to the chest (XXXIV R.R. 197-9). Perez was accompanied by the applicant and Peter Cantu (XXXIV R.R. 198). Simillen escorted the applicant and Cantu outside the emergency room where they said they knew who shot Perez and they were going to get him (XXXIV R.R. 200). When the police arrived, the applicant, Cantu, and Perez were uncooperative with the police (XXXIV R.R. 203, 215). While Mike Knehans, Houston Police Department, was talking with Perez's parents, the applicant and Peter Cantu were belligerent, abusive, sarcastic and vulgar towards Knehans (XXXIV R.R. 216-7). The applicant repeatedly changed his story about the shooting (XXXIV R.R. 218).

While the applicant was incarcerated in the Harris County Jail, a shank was found during a search of his one-man cell on July 1, 1993 (XXXIV R.R. 84-90). The shank,

made from a disposable razor blade, is commonly used as a weapon (XXXIV R.R. 91). During the applicant's trial, Leonard Gonzales, Harris County Sheriff's Deputy, found an L-shaped metal pipe with one sharpened end in the applicant's mattress in his lock-down cell (XXXIV R.R. 225-7). There were scratch marks on the concrete consistent with the L-shaped pipe being rubbed against it in order to sharpen it (XXXIV R.R. 233). The pipe was capable of causing serious bodily injury and death (XXXIV R.R. 239).

Defense Evidence at Punishment

Denise Sota testified that she had known the applicant for four years; that the applicant worked with her father in the construction business and with her mother cleaning houses; and, that the applicant was a good worker and had no problems (XXXV R.R. 230-3). Sebastien Sota, Denise Sota's husband, testified that he had known the applicant about five years; that the applicant worked for him for eight months; and, that the applicant was a good boy who worked from around 5 or 6:00 a.m. with no problems (XXXV R.R. 275-7). Ben Hadad, a former teacher, testified that he worked with the applicant on a science project when the applicant was in the fourth grade, and that the applicant received two awards for his science project (XXXV R.R. 264-6).

Venancio Medellin Armendariz, the applicant's father, testified that he was born in Neuvo Leon, Mexico; that he had lived in the United States for fifteen years and had worked the entire time; that his wife has worked the last five years and she took care of their children prior to working; that he and his wife both had green cards for immigration status; that the applicant was his oldest child; that the applicant helped the family financially when he was working; that the applicant was born in Mexico in Neuvo

Laredo; and, that the applicant began having trouble in school in the sixth grade (XXXV R.R. 279-86).

Maria Felipa Medellin, the applicant's mother, testified that she was born in San Luis Potosi, Mexico; that she had lived in the United States with her husband and children for fifteen years; that the applicant was a good student in elementary school and made A's and B's; that the applicant was very intelligent and liked to play football and baseball; that the applicant participated in school activities; that the applicant was a good son who helped his family financially when he was working; that he helped his sister with her homework; and, that the applicant had a good purpose for his life (XXXV R.R. 288-92).

Windel Dickerson, psychologist, testified that he worked as chief psychologist for the Texas Department of Corrections from 1984 to 1978; that he worked closely with the prison inmates; and, that he began studying the issue of predictability of future dangerousness (XXXV R.R. 294-8). According to Dickerson, the risk factors for future dangerousness included a person's past conduct; the presence or absence of significant mental defect; the type of crime, i.e., a crime of opportunity or the crime of a predator; emotional stability; the use of certain drugs and alcohol; abuse as a child; a poor background; lack of education; and, the parents' example (XXXV R.R. 301-9). Dickerson further testified that violent crimes decreased with a person's age (XXXV R.R. 310). Dickerson stated that a correct prediction for future dangerousness occurred in only one of every three predictions (XXXV R.R. 313). Dickerson acknowledged that he had not examined the applicant or talked with him, but he had read the trial record from Peter Cantu's trial so that he was aware of the basic allegations (XXXV R.R. 321). Dickerson

testified that one of the purposes of incarceration is to limit a person's chances of committing crimes (XXXV R.R. 343).

V.

**THE TEXAS CONTEMPORANEOUS OBJECTION
RULE PROCEDURALLY BARS THE APPLICANT
FROM PRESENTING HIS VIENNA CONVENTION
CLAIM, AND THE APPLICANT FAILS TO MEET
THE REQUIREMENTS OF TEX. CODE. CRIM.
PROC. ART. 11.071, § 5 FOR CONSIDERATION OF
HIS INSTANT, SUBSEQUENT APPLICATION FOR
WRIT OF HABEAS CORPUS.**

In the instant case, the applicant failed to object either pre-trial or during trial that he was not informed of his right as a Mexican national to contact the Mexican consulate, pursuant to Article 36 of the Vienna Convention. *See* Vienna Convention on Consular Relations, art. 36, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The applicant also did not present such claim on direct appeal. *Medellin v. State*, No. AP-71,997 (Tex. Crim. App. Mar. 19, 1997)(not designated for publication). Instead, the applicant first asserted his Vienna Convention claim in his initial state application for writ of habeas corpus, filed in 1998, four years after his conviction. *See Ex parte Medellin*, No. 5019-01 (Tex. Crim. App. Oct. 3, 2001)(not designated for publication). Thus, the applicant's Vienna Convention claim is procedurally barred based on the lack of timely objection. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

To ensure the orderliness of criminal justice proceedings and to promote the finality of conviction, Texas requires that a defendant in a criminal case make a timely objection to the trial court in order to present a complaint on appeal. *See* TEX. R. APP. PRO. 33.1(a). The importance of the contemporaneous objection rule was emphasized

and upheld by the Court of Criminal Appeals' holding that a defendant's lack of timely objection precluded appellate review of his constitutional claim that the State introduced race as an aggravating circumstance during the punishment stage of his capital trial. *See Saldano v. State*, 70 S.W.3d 873, 892 (Tex. Crim. App. 2002)(noting that Texas Attorney General's confession of error in United States Supreme Court important but not conclusive). "All but most fundamental rights are thought to be forfeited" in the absence of a contemporaneous objection. *Id.* at 887 (quoting *Marin v. State*, 851 S.W.2d 275, 279 (Tex Crim. App. 1993)). Further, a federal court distinguished between consideration of a Vienna Convention claim in a civil setting from a Vienna Convention claim in habeas proceedings where a procedural default rule controls, while noting that a treaty or convention does not alter or add to the United States Constitution. *See United States v. \$69,530,000 in United States Currency*, 22 F. Supp.2d 593, 595 (W.D. Tex. 1998)(holding exclusionary rule not invoked by violation of Vienna Convention alone; noting that conventions and treaties are entitled to enforcement but do not alter or add to constitution and "accordingly should not be cloaked with the 'nontextual and unprecedented remedy' that protects those liberties" ensured by constitution).

In the instant case, the applicant erroneously argues that his claim is preserved under the "right not recognized" exception to the contemporaneous objection rule explained by Judge Campbell in his concurring opinion in *Black v. State*, 816 S.W.2d 350, 367-69 (Tex. Crim. App. 1991)(Campbell, J. concurring). In *Black*, Judge Campbell reasoned that the defendant's *Penry* claim was excused under the theory that an exception to the contemporaneous rule results when a claim is so novel that the basis of the claim was not reasonably available at trial or when the law was so well-settled at the time of

trial that an objection would have been futile. *See also Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984)(Campbell, J. concurring)(noting that defendant's failure to object does not forfeit right to present constitutional violation claim if right was not recognized at time of trial). However, the Vienna Convention has been in force since 1969, well before the applicant's arrest and conviction, so that an objection could have been lodged at trial.

Moreover, the "right not recognized" exception to the contemporaneous objection rule was essentially eliminated in the Court of Criminal Appeal's subsequent decision in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). In *Marin*, this Court categorized rights in criminal cases as either (1) rights implemented on request; (2) waivable rights; and, (3) absolute requirements and prohibitions. *Id.* at 279. The majority of rights must be implemented on request, i.e., by objection, and failure to do so results in a forfeiture of those rights. Waivable rights, such as the right to jury trial and right to assistance of counsel, may not be forfeited based on a lack of objection but they may be waived by the defendant's express waiver. Absolute, systemic requirements, such as the jurisdiction of the court, may not be forfeited and may not be waived. *Id.* Therefore, only waivable rights and absolute, systemic requirements may be presented for the first time on appeal. *See also Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)(adopting reasoning of *Matchett v. State*, 941 S.W.2d at 922, 926-30 (Tex. Crim. App. 1996), that appellate courts should not foreclose whole groups of error from harmless error analysis and overruling *Marin* only to extent that *Marin* stated that waivable rights and absolute requirements not subject to harmless error analysis).

However, the Vienna Convention consular notification paragraph does not establish a waivable right that is so fundamental to the proper functioning of the criminal justice system that a defendant has to expressly waive the right, unlike the waivable right of a jury trial and waivable right of assistance of counsel. In the instant case, the applicant fails to show that any violation of the Vienna Convention consists of a violation of any fundamental right that requires express waiver or impacts the due process he was afforded. Also, the Vienna Convention does not establish an absolute, systemic requirement in the criminal justice system, such as that imposed by jurisdictional mandates. *See and cf. See and cf. Saldano*, 70 S.W.3d at 888-89 (noting that *Marin* is a “watershed decision” in law of error-preservation and holding that the State refraining from presenting evidence that violates defendant’s Equal Protection right is neither waivable right or absolute, systemic requirement). Thus, any right under the Vienna Convention is a right forfeited by lack of objection. The trial court in the applicant’s initial state habeas proceeding properly found that the applicant’s Vienna Convention claim was procedurally barred, and the Court of Criminal Appeals properly found that such findings of fact and conclusions of law were supported by the record.

Further, the applicant’s presentation of the same Vienna Convention claim in his subsequent application for writ of habeas corpus does not meet the requirements for consideration of a subsequent writ under TEX. CODE CRIM. PROC. art. 11.071, § 5,² regardless of the International Court of Justice’s dismissal of a firmly rooted principle of state law and regardless of the President’s memo that contains no mandatory language.

See Respondent’s Sections VI and VIII, supra. The applicant fails to show that a legal

² Art. 11.071, § 5 acts as a “postconviction equivalent” of TEX. R. APP. PRO. 33.1(a), by statutorily limiting a death penalty defendant’s state postconviction writs, except in extraordinary circumstances, and, thus, ensuring that a defendant timely present writ claims.

basis for his once-again presented claim was unavailable at the time of his prior writ. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1). Instead, the legal basis for the applicant's claim, the Vienna Convention, was available years before the applicant's trial and the time of the filing of his initial application for writ of habeas corpus. *See Respondent's Section VI, supra.*

VI.

DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (ICJ) ARE NOT BINDING ON THE COURTS OF THE UNITED STATES AND DO NOT OVERRIDE ESTABLISHED PRINCIPLES OF STATE AND FEDERAL LAW.

In 2004, the International Court of Justice (ICJ) issued an opinion stating that the Vienna Convention guaranteed individually enforceable rights; that the United States breached its obligations under Article 36 of the Vienna Convention;³ that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of the named Mexican nationals in the case before the ICJ; and, that the United States must determine whether the breach of the obligations of Article 36, paragraph 1, “caused actual prejudice” to those named Mexican nationals, regardless of American procedural default rules. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. No. 128, 122-23, 153 (March 31, 2004). However, notwithstanding the applicant's forfeiture of any claim arising from the Vienna Convention, the ICJ's *Avena* decision does not constitute a “legal basis” for the

³ Article 36, paragraph (1) of the Vienna Convention provides that a detaining State inform a foreign national of his right to consular notification and access.

applicant's instant claim that was unavailable on the date the applicant filed his initial application for writ of habeas corpus. TEX. CODE CRIM. PROC. art. 11.071, § 5 (a)(1).

A. AVENA IS IN CONFLICT WITH EXPLICIT PURPOSES OF VIENNA CONVENTION.

The ICJ was established under the Charter of the United Nations in 1945 to hear, arbitrate, mediate, and/or decide international disputes between sovereign nations. However, the ICJ's decision in *Avena* is in conflict with the expressed purpose and provisions of the Vienna Convention. The Preamble to the Vienna Convention states:

Believing that an international convention on consular relations, privileges, and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts...

See United States v. Jimenez-Nava, 243 F.3d 192, 198 (5TH Cir. 2001). Moreover, the first sentence of article 36 of the Vienna Convention states that its provisions are adopted "with a view to facilitating the exercise of consular functions." *See Vienna Convention on Consular Relations*, art. 36, paragraph 1, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Allowing the *Avena* decision to act as binding law on the United States so that the federal and state law is set aside would not further the stated purpose of the Convention. *Cf. Jimenez-Nava*, 243 F.3d at 199 (noting that suppressing evidence in criminal case does not further purpose of Vienna Convention and is not required upon showing of violation of Convention): *see also Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App. 2000)(holding that treaties do not constitute "laws" for purpose of TEX. CODE CRIM. PROC. art. 38.23).

B. AVENA DOES NOT OVERRULE UNITED STATES LAW.

In *Breard v. Greene*, the United States Supreme Court held that a Vienna Convention claim was procedurally defaulted under the provisions of the Anti-Terrorism Effective Death Penalty Act of 1996 (AEDPA), a federal “cousin” to TEX. CODE CRIM. PROC. art. 11.071. See *Breard v. Greene*, 523 U.S. 371, 375-76, 118 S. Ct. 1352 (1998)(rejecting defendant’s claim that Vienna Convention trumps procedural default rule). Only the Supreme Court has the authority to overrule its own precedent, and the Supreme Court has not done so concerning the Vienna Convention. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1980); cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995)(holding that Congress’s reopening final judgment unconstitutionally interfered with power of federal courts to decide cases, in violation of Article II and separation of powers).

Instead, the Supreme Court, when dismissing the applicant’s writ of certiorari as improvidently granted, noted the obstacles to federal review, among them that the applicant would have to overcome the deferential standard toward state habeas findings and cited the Court’s prior holding in *Breard*. *Medellin v. Dretke*, ___ U.S. ___, 125 S. Ct. 2088, 2090 (2005). In the applicant’s case, the state habeas court found that the applicant was procedurally barred from presenting his Vienna Convention claim and, in the alternative, that the Convention does not create individually, judicially enforceable rights and that the applicant fails to show harm based on any violation of the Convention. *Id.*; see also *Fisher v. Texas*, 169 F.3d 295, 300 (5TH Cir. 1999)(noting “Texas contemporaneous objection rule has consistently been upheld as an adequate and

independent state ground that procedurally bars federal habeas review of a petitioner's claims.”).

Subsequent to the ICJ's decision in *Avena*, the Fifth Circuit Court of Appeals addressed the claim of whether the federal court was required to review the defendant's procedurally defaulted claim that a violation of his rights under the Vienna Convention prevented him from receiving a fair trial. *See Cardenas v. Dretke*, 405 F.3d 244 (5TH Cir. 2005). Significantly, the defendant in *Cardenas* was one of the 54 named Mexican nationals in *Avena*. The Fifth Circuit Court of Appeals found that the *Avena* decision did not overrule its own precedent and the controlling precedent of the United States Supreme Court and held that the defendant's Vienna Convention claim was defaulted based on his failure to object at trial. *Cardenas*, 405 F.3d at 253 (citing *Breard*, 523 U.S. at 375-76; *Jimenez-Nava*, 243 F.3d at 198).

Also, in the applicant's case, the Fifth Circuit Court of Appeals acknowledged the *Avena* decision but denied the applicant's request for certificate of appealability based on state and federal procedural default rules and based on prior holdings that the Vienna Convention did not create an individually enforceable right. *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5TH Cir. 2004)(citing *Breard*, 523 U.S. at 375-76; *Jimenez-Nava*, 243 F.3d at 195)). Thus, soon after *Avena*, an appellate court of the United States twice held that it cannot disregard United States law based on the ICJ's decision in *Avena*. *See Cardenas*, 405 F.3d at 253 (quoting *Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))(stating “the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decision.”).

Finally, if the *Avena* decision were allowed to override the state rules of procedure and their corresponding habeas statutes, it would invite some counsel to defer making a timely objection to any Vienna Convention claim until habeas proceedings. Otherwise, counsel's timely objection could present an opportunity to address and foreclose the claim prior to appellate review, an action that counsel might consider not in his client's best interests. Also, treating the *Avena* decision as enforceable on United States' courts would likely prompt wholesale, albeit, needless review of hundreds or even thousands of habeas defendants who are foreign nationals convicted of non-death penalty, as well as death penalty, cases.

C. AVENA DOES NOT CREATE INDIVIDUAL RIGHTS ENFORCEABLE IN UNITED STATES COURTS.

Assuming that the Vienna Convention is a self-executing treaty so that it does not require implementing legislation, the Convention does not create individual rights that are enforceable in United States courts. *See Jimenez-Nava*, 243 F.3d at 195-98 (noting that Vienna Convention is standard treaty between nations and holding that it does not create individually judicially enforceable rights). It is a well-established principle that a treaty is a compact between sovereign nation, and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598-99 (1984).

Further, any treaty that creates individual rights does so unambiguously within the treaty's text, such as treaties establishing foreign nationals' inheritance rights or property rights. *See The Head Money Cases*, 112 U.S. at 598; *Kolovrat v. Oregon*, 366 U.S. 871 (1961); *Hauenstein v. Lyndham*, 100 U.S. 483 (1879); *Fairfax's Devisee v. Hunter's Lease*, 11 U.S. (7 Cranch) 603 (1812). The Vienna Convention contains no such explicit

language. Instead, as previously shown, the language and purpose of the Vienna Convention is to “not to benefit individuals but to ensure efficient performance of functions by consular posts on behalf of their respective States.” *Jimenez-Nava*, 243 F.3d at 198 (quoting Vienna Convention on Consular Relations, art. 36, paragraph 1, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261); *see also Hinojosa v. State*, 4 S.W.3d 240 (Tex. Crim. App. 1999)(holding defendant could not rely on United Nations Charter to seek reversal of criminal conviction).

Even where a treaty provides certain benefits for a national of a particular state – such as fishing rights – it is traditionally held that ‘any rights arising from such provisions are, under international law, those of states and ...individual rights are only derivative through the states.

Hinojosa, 4 S.W.3d at 253 (quoting *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7TH Cir. 1990)(quoting Restatement 2d of the Foreign Relations Law of the United States § 115, comment (e) (1965), *cert. denied*, 898 U.S. 978 (1990)).

To allow the ICJ’s interpretation of the Vienna Convention to be enforceable in the domestic courts of the United States would (1) conflict with established construction of treaties as not bestowing individual rights and (2) hinder and/or prevent the United States’ willingness to enter into future treaties and conventions because of fear of the impact on individuals in the courts of the United States.

D. AVENA IS NOT ENFORCEABLE IN THE COURTS OF THE UNITED STATES, AND AVENA'S INTERPRETATION OF THE VIENNA CONVENTION UNDER THE OPTIONAL PROTOCOL DOES NOT CONVERT THE DECISIONS OF THE ICJ INTO SELF-EXECUTING FEDERAL LAW.

The decisions of the ICJ are neither treaties, constitutional provisions, nor United States' laws. Neither the U.N. charter, the ICJ Statute, the Vienna Convention, nor the Optional Protocol converts the ICJ's decisions into self-executing federal law. Instead, the ICJ is limited to hearing disputes between sovereign nations only when those nations have consented to the ICJ's jurisdiction. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, paragraph 1, 59 Stat. 1055 (1945); Vienna Conventions, art. 36. The decisions of the ICJ only have binding force between these sovereign nation parties with respect to the particular dispute heard by the ICJ. *See* ICJ STATUTE art. 59.

Neither the applicant, nor Director Drekte, nor the State of Texas were parties to the *Avena* decision; thus, *Avena* has no binding force in the State or federal courts. *See Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988)(finding that arts. 92 and 94 of U.N. Charter show that purpose of establishing ICJ was to resolve disputes between nations and that such clauses have “no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government.”). The ICJ's decisions are enforceable only by the Security Council, rather than on or by the United States' courts. U.N. CHARTER art. 94 (providing that party to ICJ decision may make resource to Security Council if other party fails to perform obligations and Security Council may take measures to give effect to decision).

Further, the Optional Protocol, which is not self-executing, does not create mandatory jurisdiction enforceable on the courts of the United States. According to Article I of the Optional Protocol,

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a). Thus, the text of the Optional Protocol does not state or indicate that ICJ decisions are enforceable in the domestic courts of member nations to the Convention. Instead, as previously show, the U.N. Charter expressly provides that the Security Council has the discretionary authority to enforce I.C.J. decisions. U.N. CHARTER art. 94.

E. JUDICIAL ENFORCEMENT OF *AVENA* IN THE UNITED STATES' COURTS WOULD IMPROPERLY IMPACT THE CONSTITUTION.

The ICJ's decision in *Avena* does not overrule the law of the United States Supreme Court and federal and state statutes governing criminal proceedings of individuals. To hold otherwise would create the untenable position of instability in the legislative and judicial branches of the United States by lessening the authority of the United States to promulgate, enforce, and interpret its own laws and by diminishing the power of valid rules of law, such as the statutory provisions of TEX. CODE CRIM. PROC. art. 11.071, § 5. In fact, the United States objected to Mexico's application to the ICJ in *Avena* based on the grounds that such application would cause the ICJ to interpret the treaty as if it were intended to govern the criminal justice system and that the ICJ has no jurisdiction in criminal proceedings in United States courts. *Avena*, paragraphs 27, 28.

Treating *Avena* as a “rule of decision,” i.e. law enforceable in United States courts, would overturn rules of criminal procedure and would invoke serious constitutional concerns. At a minimum, *Avena* conflicts with the following: TEX. CODE CRIM. PROC. art. 11.071, § 5; AEDPA’s provision for subsequent federal writs; both state and federal habeas statutes concerning statute of limitations; the state contemporaneous objection rule; the federal default rule; the federal standard for deference to state court habeas findings; and, the rule of law expressing concern for finality of convictions. Further, enforcement of *Avena* in the United States courts would violate the Separation of Powers doctrine of the United States Constitution. U.S. CONST. art. III, § 1 (vesting the judicial power of the United States “in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish.”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)(noting that U.S. CONST. art. III protects judicial department from interference from other departments); *see also The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1870)(finding that a “treaty cannot change the Constitution or be held valid if it is violation of that instrument.”).

F. AVENA IS NOT ENFORCEABLE UNDER THE DOCTRINE OF COMITY.

The doctrine of comity applies to sovereigns, not to international bodies that are the product of international agreements. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895)(stating that comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation.”). Comity is a voluntary observance of the rights of foreign nations to regulate their own affairs. *Id.* at 166. *Avena* does not follow the established doctrine of comity; instead, *Avena* attempts to overrule United States’ binding law and statutory provisions. However, the applicant’s

plea for comity does not obviate the requirements of TEX. CODE CRIM. PROC. art. 11.071, the state statutory provision for habeas review.

CONCLUSION

Based on the foregoing, the applicant fails to show that the ICJ's decision in *Avena* is enforceable on the domestic courts of the United States. However much the applicant attempts to cloak his claim in international law as determined by a non-binding ICJ decision, the applicant's instant, subsequent application for writ of habeas corpus is barred by the principles of criminal law and the valid statutory provisions of TEX. CODE CRIM. PROC. art. 11.071, § 5.

VII.

IN THE ALTERNATIVE, THE APPLICANT FAILS TO SHOW THAT A VIOLATION OF THE VIENNA CONVENTION CAUSED ACTUAL PREJUDICE IN HIS CASE.

According to the ICJ's decision in *Avena*, the United States must provide, by means of its own choosing, "review and reconsideration" of the named Mexican nationals and the United States must determine whether the violation of the Vienna Convention caused actual prejudice to such Mexican nationals, including the applicant. However, notwithstanding that the ICJ's decision is not binding law on the state court, the applicant cannot show actual prejudice.

The applicant was convicted of the brutal murder of the sixteen-year old complainant, Elizabeth Pena, after he participated in a vicious gang rape of her with his four co-defendants Efrain Perez, Derrick Sean O'Brien, and Peter Cantu (XXVIII R.R. at 232-37)(XXIX R.R. at 317-22). The applicant also raped and participated in the murder

of fourteen-year old Jennifer Ertman, Elizabeth Pena's friend (XXVIII R.R. at 272-37)(XXXIX R.R. at 317-22). Afterwards, when bragging about the rapes and murders to co-defendant Cantu's brother and sister-in-law, the applicant referred to the young girls as "hos" he met in the woods (XXIX R.R. at 389)(XXX R.R. at 521-2). The applicant, who was giggling and laughing, described how he punched one of the screaming, young girls and said that that he "fucked one of the girls in the pussy;" that he turned her around and "fucked her in the ass;" and, that another guy was having sex with the other girl who tried to run away (XXIX R.R. at 391-2). The applicant also said that he made one of the girls give him a "blow job" and that he hit her on the top of her head when she would not close her mouth (XXIX R.R. at 395, 425). The applicant, who showed his bloody underwear to co-defendant Cantu's sister-in-law, seemed proud that he "opened" the girl who was a virgin, and that he "dirtied" the inside of the girl when he was first entering her (XXIX R.R. at 405, 422).

The applicant admitted that he killed one of the girls by strangling her with his shoelace and that he was involved with strangling the other girl so the girls could not identify them (XXIX R.R. at 424-25). The applicant stomped on one of the girl's throat because it did not look as if she were dead (XXIX R.R. at 424)(XXX R.R. at 533). The applicant assumed he killed both girls, because he said that he took turns killing both with his shoelace and then his foot (XXX R.R. at 477-8). The applicant lamented the fact that he did not have a gun, saying it would be faster and easier if he had a gun to kill the girls (XXIX R.R. at 425)(XXX R.R. at 534). The applicant said they had fun and that the Cantus would see it on the news on television (XXIX R.R. at 393). Afterwards, the applicant gave Jennifer Ertman's ring to his girlfriend (XXI R.R. at 743-50).

A. THE APPLICANT FAILS TO SHOW THAT THE RESULTS OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT BUT FOR NOTIFICATION OF MEXICAN CONSULATE.

During initial habeas proceeding, the trial court found that the applicant received effective assistance of counsel at both trial on direct appeal. The applicant's case has been examined by the Court of Criminal Appeals on direct appeal, the trial court and the Court of Criminal Appeals in initial state habeas proceedings, the federal district court and the Fifth Circuit Court of Appeals in federal habeas proceedings, and the United States Supreme Court on petition for writ of certiorari. None of these courts found that the applicant was denied effective representation of counsel or due process. Thus, the applicant fails to show actual prejudice. *See Pickney v. Cain*, 337 F.3d 542, 545 (5TH Cir. 2003)(holding showing of actual prejudice met when defendant demonstrates that, but for error, he might not have been convicted).

Further, evidence at the applicant's trial established that the applicant had lived in the United States for most of his life; that he speaks, reads, and writes the English language; that he attended Houston public schools beginning with elementary school; that he initially did well in elementary school; that his family and friends lived in the United States; that his father had been gainfully employed since his arrival in the United States; that his mother was presently employed; and that the applicant had been employed in the United States while going to Houston schools (XXXV R.R. at 279-92).

Also, the applicant was thoroughly familiar with the laws and procedures of the country and state in which he had lived almost his entire life. The applicant was involved in the stealing of a car while still a juvenile and was referred on a weapons charge after a .38 revolver was found on him (XXXIV R.R. at 110-54). Subsequently, the applicant was charged with the offense of carrying a weapon after a gun was found partially under

the applicant seat's in a car that fled from a Houston Police Officer (XXXIV R.R. at 169-80). The applicant also accompanied two of his co-defendants to a hospital emergency room after co-defendant Perez had been shot, and the applicant was uncooperative with police (XXXIV R.R. at 197-203). Based on the applicant's prior criminal history and clashes with authority, it is a reasonable inference that the applicant had more familiarity with Texas' and United States' legal systems than the average law-abiding citizen born in the United States.⁴

Based on the foregoing, the applicant fails to show that he was actually prejudiced by a violation of the Vienna Convention. Further, the applicant fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994)(holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

B. NOTWITHSTANDING THAT AVENA'S "REVIEW AND RECONSIDERATION" HAS BEEN MET IN THE APPLICANT'S CASE BY THE EXTENSIVE APPELLATE REVIEW ACCORDED HIM, A STATE COURT HEARING ON HIS VIENNA CONVENTION CLAIM WOULD CONSIST OF HINDSIGHT SPECULATION.

In the event that a state court is ordered to "hear" the applicant's Vienna Convention claim, it is instructive to consider what such hearing would necessarily encompass. In the applicant's case the issue of whether consular notification was made is not disputed. Without such disputed issue, a hearing could only consist of the applicant presenting testimony that the Mexican consulate could have ensured better legal representation or more adept guidance to the applicant in the state trial proceedings. A prior determination of effective assistance of counsel makes irrelevant an assertion of the

⁴ Indeed, the applicant's familiarity with the criminal justice system likely prompted his self-serving written statement where he attributed most of the heinous acts to his co-defendants (XXXII R.R. at 946-50).

possibility of “better” counsel. Further, guidance of a foreign consulate cannot exceed guidance provided by adequate, effective assistance of domestic legal counsel where reviewing courts have determined no denial of due process. Thus, a hearing to “review and reconsider” the applicant’s case would be meaningless.

VIII.

THE PRESIDENT’S MEMO IS BEST CONSIDERED AS A REQUEST TO STATE COURTS TO GIVE “FULL EFFECT” TO THE ICJ’S DECISION IN AVENA TO THE EXTENT STATE LAW PERMITS, RATHER THAN AN ORDER PRE-EMPTING STATE RULES OF PROCEDURAL DEFAULT AND REQUIRING STATE COURTS TO EXERCISE JURISDICTION OVER SUBSEQUENT WRITS OF HABEAS CORPUS THAT IS NOT PERMITTED BY STATE LAW.⁵

In a “Memorandum for the Attorney General,” President George W. Bush stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of American, 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 America) (Avena)*, 2004 ICJ 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.

The memo, which contains no mandatory language, refers to the discretionary doctrine of comity and was transmitted to the Attorney General of the United States, rather than state courts. Thus, the President’s memo does not create new legal obligations and does not provide the required, previously unavailable legal basis for the applicant’s Vienna

⁵ Section VII of the Respondent’s brief is a summary and adoption of the arguments presented by Ernest A. Young, attorney for *amicus curiae* State of Alabama, et. al, in the Brief of the States of Alabama, Montana, Nevada, and New Mexico as *Amici Curiae* in Support of Respondent.

Convention claim. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5. Instead, the language of the memo suggests that state courts determine the effect that the *Avena* decision can be given, consistent with applicable principles of state and federal law.

A. THE PRESIDENT’S MEMO DOES NOT PROVIDE A REQUIRED LEGAL BASIS NECESSARY FOR CONSIDERATION OF HIS SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS, PURSUANT TO ARTICLE 11.071, § 5.

The President’s memo, that lacks mandatory language, creates no legal obligations or rule that constitutes or creates a legal basis for the applicant’s claim that was unavailable on the date the applicant filed his initial application for writ of habeas corpus. TEX. CODE CRIM. PROC. art. 11.071, § 5 (a)(1). The rights that the applicant attempts to assert are provided by the Vienna Convention to sovereigns, not individuals, and were available through the Convention years before the applicant’s trial and the time of the filing of his initial state writ. The applicant’s claim is based on the Vienna Convention, not the President’s memo. Thus, the President’s memo does not satisfy the requirements of TEX. CODE CRIM. PROC. art. 11.071, § 5 (a)(1).

B. THE PRESIDENT’S MEMO DOES NOT OVERRIDE THE ARTICLE 11.071, § 5 OR THE TEXAS CONTEMPORANEOUS OBJECTION RULE AND DOES NOT CONFER JURISDICTION ON STATE COURTS TO HEAR SUBSEQUENT APPLICATIONS FOR WRITS OF HABEAS CORPUS.

The language of the President’s memo requests that state courts determine what effect *Avena* can be given, consistent with applicable state and federal law. Texas state habeas law does not permit a “wholesale” grant of “review and reconsideration” and does not allow consideration of the applicant’s subsequent application for writ of habeas corpus in violation of state law. However, it is possible that the habeas law of other states might permit granting “review and reconsideration” or that other foreign nationals might still have available appellate recourse.

According to article 36(2) of the Vienna Convention, consular notification rights “shall be exercised in conformity with the laws and regulations of the receiving [nation].” Vienna Convention Art. 36(2). Although article 36(2) also notes that “said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended,” the United States Government has consistently maintained that the proper application of federal and state procedural rules that may limit the presentation of Vienna Convention claims is valid and consistent with the treaty. For example, in its *amicus curiae* brief in *Breard v. Greene*, the United States argued that

[t]he “measures at [the United States’] disposal” under our constitution may in some cases include only persuasion – such as the Secretary of State’s request to the Governor of Virginia to stay Beard’s execution – and not legal compulsion through the judicial system.” That is the situation here.

United State *Breard* Br. at 51. The President’s memo continues the United States’ position that the United States Government has the power to request that the states treat Vienna Convention cases in a particular way, not to order the states to do so.

Comity is a discretionary doctrine that does not allow for a court to override a proper statutory requirement or constraint. The language of the President’s memo that “the United States will discharge its international obligations. . . by having State courts give effect to the [Avena] decision in accordance with general principles of comity . . .,” does not suggest that state courts employ comity to disregard state law. The President’s memo requests that the states exercise available discretion to comply with *Avena*; it does not order that that state courts use the principles of comity to disregard state law.

C. CANONS OF CONSTRUCTION DISFAVOR PRE-EMPTION OF STATE LAW THROUGH A MANDATORY CONSTRUCTION OF THE PRESIDENT’S MEMO.

According to *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)(quoting *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1981)), “[i]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” In the instant case, a mandatory construction of the President’s memo would alter this “usual constitutional balance.” Also, courts “have a duty to accept the reading that disfavors pre-emption...In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention ‘clear and manifest.’” *Bates v. Dow Agrosciences L.L.C.*, 125 S. Ct. 1788, 1801 (2005)(quoting *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). State criminal procedure is an “area of traditional state regulation” and Congress has not made a “clear and manifest” intention, if any, to supplant state criminal procedure with federal law, based on the ICJ’s decision in *Avena* and the President’s memo.

Further, another canon that urges great caution before construing federal law to require a state court to hear a federal claim despite “a neutral state rule regarding the administration of the courts” is applicable. *Howlett v. Rose*, 496 U.S. 356, 372 (1990)(“bottomed deeply in the belief in the importance of state control of state judicial procedure. . . .that federal law takes the state courts as it finds them.”)(quoting Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). Construing the President’s memo as a mandatory order conflicts with

Congressional legislation limiting federal interference with state criminal processes. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

D. THE U.S. DEPARTMENT OF JUSTICE’S INTERPRETATION OF THE PRESIDENT’S MEMO IS NOT ENTITLED TO JUDICIAL DEFERENCE.

In an *amicus* brief before the United States Supreme Court, the Department of Justice (DOJ) interpreted the President’s memo as “binding federal law” before which state procedural rules must “give way.” Brief of United States as *Amicus Curiae*, *Medellin v. Dretke*, ___ U.S. ___, 123 S. Ct. 2088 (2005)(No. 04-5928), 2004 LEXIS U.S. Briefs 5928 at 42-43. However, the President’s memo is not a rule or regulation of the Department of Justice (DOJ), entitling the DOJ’s interpretation to a measure of judicial deference. The DOJ has no delegated authority either to enforce or issue binding interpretations of the President’s memo. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)(suggesting that deference in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1994), inappropriate when agency not delegated authority to issue rules and regulations).

Further, the DOJ, an agency that neither negotiated the Vienna Convention nor was charged with implementing the Convention, is not entitled to deference given to executive interpretations of foreign affairs. *See Smiley v. Citibank (S.D., N.A.)*, 517 U.S. 735, 741 (1996)(stating “Of course we deny deference ‘to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.’”)(quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *cf. Rocha*, 16 S.W.3d at 16 (deferring to State Department letter based on it not being a litigation position and not being a reversal of government’s prior position).

E. ALLOWING THE MEMO TO OVERRULE STATE PROCEDURAL RULES CONSTITUTES AN IMPROPER, UNILATERAL OVERRULING OF STATE RULES OF HABEAS PROCEDURE.

The President's memo does fit within the confines of the principle of Congress obliging state courts to hear cases by creating a federal rule of decision and granting concurrent jurisdiction on state courts to enforce the federal rule. According to Justice Jackson's concurrence in *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), the President's power to act is mainly a function of whether his act coincides with or contradicts the will of Congress. *See also Dames & Moore v. Regan*, cite (adopting Justice Jackson's *Youngstown* analysis). The exercise of Presidential power is at its lowest ebb when the President's action is "incompatible with the expressed or implied will of Congress. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Congress expressly drafted federal statutes to govern the federal habeas proceeding of death-penalty defendants convicted by state criminal judgments, including inclusion of the federal equivalent of a procedural default, in the AEDPA Act of 1996, a "sister" statute to TEX. CODE CRIM. PROC. art. 11.071. *See* 28 U.S.C. § 2254 (b). The Presidential memo, if taken as a mandatory order, would require the Court of Criminal Appeals to disregard Texas procedural rules and statutory provisions and hear the applicant's claim that is barred by the provisions of art. 11.071, § 5, even though the AEDPA, a similar statute, prevents federal courts from hearing the claim.

Further, the Supreme Court has never recognized that the President's "independent authority to act" in foreign affairs allows for a unilateral power to preempt state law, based on a unilateral assertion that the pre-emption serves the United States' foreign-policy interests, rather than on a bilateral executive agreement. Allowing

unilateral “orders” not based on the text of the Constitution or even the Vienna Convention and not subject to any limiting principle would open the door to allowing the unilateral pre-emption of any state law that could be connected to the interests of foreign policy, such as a state’s use of the death penalty.

F. A MANDATORY READING OF THE MEMO WOULD REQUIRE STATE COURTS TO VIOLATE NEUTRAL STATE PROCEDURAL RULES AND HEAR CASES THAT FEDERAL COURTS ARE NOT REQUIRED OR ALLOWED TO HEAR.

The Texas contemporaneous objection rule and the state statutory limitations concerning the consideration of subsequent applications for writ of habeas corpus are neutral rules that apply regardless of whether a defendant is asserting a claim based on state or federal law grounds. However, a mandatory reading of the President’s memo would require state courts to disregard neutral state procedural rules while allowing federal courts to invoke similar neutral procedural rules. *See Medellin v. Dretke*, 371 F.3d 270, 279-80 (5TH Cir. 2004)(holding that Vienna Convention claim could not be enforced in federal courts under federal habeas statute and rule of procedural default); *see also Printz v. United States*, 521 U.S. 898, 935 (1997)(holding “anti-commandeering doctrine” prevents federal government from issuing directives requiring States to address particular problems or to command States’ officer to administer or enforce federal regulatory program; such commands incompatible with constitutional system of dual sovereignty); *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)(stating “[t]his Court has never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.”); *but see Testa v. Katt*, 330 U.S. 386 (1947)(state courts generally require to hear suits under federal law). However, the narrow exception to the anti-

commandeering doctrine set forth in *Testa* is inapplicable to habeas cases where the state courts' obligation to hear federal claims is irrelevant.

CONCLUSION

While the President's memo rightly shows the intent and determination of the United States to enforce the consular provisions of the Vienna Convention, the memo does not order or allow state courts to disregard controlling precedents, state statutory provisions, or state procedural rules. The memo does not provide a legal basis for the applicant's claim asserted in his subsequent application for writ of habeas corpus that was unavailable at the time the applicant filed his initial state writ. The applicant fails to meet the requirements of TEX. CODE CRIM. PROC. art. 11.071, § 5 for consideration of a subsequent application for writ of habeas corpus.

IX. PRAYER FOR RELIEF

Based on the foregoing, the Respondent respectfully requests that this Court dismiss the applicant's subsequent application for writ of habeas corpus as an abuse of the writ, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5. In the alternative, the Respondent respectfully requests that this Court find that the applicant has received "reconsideration and review" of his case and that he fails to show actual prejudice.

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