No. 04-5928

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In light of the decision of the International Court of Justice in the *Avena* case, should this Court overrule its precedent in *Breard* v. *Greene*, to the extent it is inconsistent with *Avena*?

If the answer to Question 1 is yes, the following questions are fairly included and required for resolution of the case:

2. Does *Avena* require suppression of a duly Mirandized confession obtained a few hours after arrest and before any duty to notify the consulate is overdue?

3. When a federal district court has rejected an *Avena* claim on the merits as well as procedural default, does 28 U. S. C. § 2253(c) permit a certificate of appealability to review that nonconstitutional claim on appeal?

4. When a state court has rejected an *Avena* claim on the merits as well as on procedural default, does *Avena* require or federal law permit reexamination of that nonconstitutional claim on federal habeas?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, petitioner seeks further review of an issue decided against him on the merits by the state court, which involves neither jurisdiction nor constitutional rights. He

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

seeks an overruling of this Court's decision in *Breard* v. *Greene*, without resolution of the host of issues such a reversal would raise. Such a decision would create chaos in the lower courts. It would further delay justice in cases such as the present one, where justice is already overdue and where the absence of any prejudice from the Vienna Convention violation is obvious. Such a result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioner's statement of the case makes no mention of the facts of the unspeakably brutal crimes committed by José Medellín and his pack of predators. See Pet. Brief 1-13. However, these facts are essential to understanding just how weak his claim of prejudice is. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984) ("Given the overwhelming aggravating factors . . .").

On the night of June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were taking a shortcut home when they encountered a gang called the Blacks and Whites, including the petitioner, José Medellín. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App., May 16, 1997), App. to Pet. for Cert. 4a. "When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but [two other gang members] grabbed her and threw her down as well." *Ibid.* The group then proceeded to have "fun" by brutally gang raping both girls, and they bragged about it afterward. See *id.*, at 5a.

"Appellant related to [the brother and sister-in-law of one of the gang members] that he sexually assaulted one of the girls and bragged about having 'opened' her since she apparently had been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after another gang member sexually assaulted the

second girl, he 'turned her around' and anally raped her." *Ibid.* The gang murdered the girls to prevent them from identifying their attackers and divided up their possessions. See *id.*, at 5a-6a. Medellín personally "took off one of his shoelaces and strangled at least one of the girls with it." *Id.*, at 6a.

The evidence against Medellín included his written statement after arrest, in which he admitted substantial participation in the crimes, see *id.*, at 6a; J. A. 14-18, including his personal participation in strangling Elizabeth. J. A. 17. This statement was made between 5:54 a.m. and 7:23 a.m. on the day of his arrest, June 29, 1993. J. A. 14-15. Medellín informed the authorities that he was born in Mexico in a pretrial services interview 6½ hours later, at 2:55 p.m. See App. to Pet. for Cert. 165a, 171a. Medellín was not advised that he had a right to have the Mexican Consulate notified, nor was the consulate notified.

Medellín was convicted of capital murder and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. *Id.*, at 3a. After the affirmance, Mexican consular authorities learned of the case and actively assisted in the preparation of Medellín's state habeas petition. Pet. Brief 6-7. The only prejudice from the Vienna Convention violation claimed by the Consul General was that, if they had been notified prior to interrogation, they would have advised him to assert his *Miranda* right to have counsel present during interrogation. App. to Pet. for Cert. 172a-173a. The Consul General's affidavit does not make any claim that the consulate would have arranged for a more effective defense at trial. In addition to procedural default and standing grounds, the state habeas judge also rejected Medellín's Vienna Convention claim on the merits:

> "16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the appli-

> cant's constitutional rights were safeguarded . . . ." *Id*., at 56a.
>
> "17. 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, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Id*., at 57a.

The Court of Criminal Appeals accepted the trial court's findings and conclusions on October 3, 2001. *Id*., at 32a-33a.

Medellín filed a federal habeas petition on November 28, 2001 and amended it the following July. The petition raised Sixth Amendment and Due Process issues, in addition to the Vienna Convention issue. See *Medellín* v. *Cockrell*, No. H-01-4078 (SD Tex., June 25, 2003), App. to Pet. for Cert. 62a. Like the state habeas court, the Federal District Court rejected the Vienna Convention claim on the merits as well as on procedural grounds. "The police officers informed Medellín of his right to legal representation before he confessed to involvement in the murders. Medellín waived his right to advisement by an attorney. Medellín does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellín would not have waived those rights as he did his right to counsel. Medellín fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' (Citation.) Petitioner has failed to show prejudice for the Vienna Convention violation." *Id*., at 84a-85a (footnote omitted).

The Court of Appeals denied a certificate of appealability. *Medellín* v. *Dretke*, 371 F. 3d 270, 281 (CA5 2004). On the procedural default point, the Court of Appeals held it was bound by this Court's decision in *Breard* v. *Greene*, 523 U. S. 371, 375 (1998), until such time as this Court overrules it. See

371 F. 3d, at 280. On the question of standing, the panel followed circuit precedent. See *ibid.*

SUMMARY OF ARGUMENT

In the event that the Court decides to accommodate the *Avena* decision, there are a number of issues that can and should be resolved in the present case.

First, the taking of a properly Mirandized confession promptly upon arrest, the only prejudice asserted in state court in this case, is rarely, if ever, the product of a Vienna Convention violation. *Avena* held that notification of the consulate does not become overdue until long after the typical postarrest interrogation, and informing the arrestee of consular rights on top of the *Miranda* warning is highly unlikely to have any effect, as two courts have already found in the present case.

When no state court has ruled on the merits, a decision to follow *Avena* would render state remedies unexhausted, unless there has been a post-notification default. A decision that a treaty overrides procedural default rules would apply to state rules as well as this Court's *Wainwright* v. *Sykes* rule. However, in a case where a petitioner failed to raise the Vienna Convention in a proceeding after the consulate has actual knowledge of the case, *Avena*'s rationale for overriding the procedural default rule is inapplicable, and such claims would still be defaulted.

When a federal district court has adjudicated a state prisoner's Vienna Convention claim on habeas corpus, the decision cannot be appealed. Under 28 U. S. C. § 2253(c)(2), only constitutional claims can be appealed. Extraordinary remedies may be available, but they should be reserved for truly extraordinary cases.

Where a state court has adjudicated the Vienna Convention claim on the merits, the claim cannot be reexamined in federal habeas. *Avena* does not require it, and the rule of *Reed* v.

Farley prohibits it. The claim is neither fundamental, jurisdictional, nor constitutional.

ARGUMENT

In *Breard* v. *Greene*, 523 U. S. 371 (1998) (*per curiam*),[2] this Court rejected an argument based on the Vienna Convention for three reasons. First, in international law generally and the Vienna Convention particularly, the procedural rules of the forum State govern the assertion of rights under the treaty, and for criminal cases in the United States, that includes the procedural default rule. *Id*., at 375. Second, treaty rights do not stand on any higher plane than federal statutory rights or constitutional rights, and these are subject to the procedural default rule. *Id*., at 376. Third, Breard's claim of prejudice, *i.e.*, that the treaty violation actually affected his case, was at best speculative. *Id*., at 377.

Petitioner and supporting *amici* advance a variety of reasons for not following *Breard*, at least on the procedural default point, based on the decision of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. 1 (Mar. 31), (cited below as "*Avena*"). See, *e.g.*, Brief for Government of the United Mexican States as *Amicus Curiae* 1-4. Respondent will, we understand, submit several weighty arguments as to why *Breard* was correctly decided and should continue to govern these cases.

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2. Petitioner refers to *Breard* as a "per curiam order." See, *e.g.*, Pet. Brief 13. *Breard* is, in fact, a per curiam opinion. It is a precedent, although its force as such in this Court is somewhat less than that of an opinion issued after full briefing and argument. See *Hohn* v. *United States*, 524 U. S. 236, 251 (1998). Nonetheless, it is a binding precedent on all the other courts of the Nation, and the Court of Appeals was therefore entirely correct to follow it unless and until this Court sees fit to overrule it. See *id*., at 252-253.

This brief will address a different question, but one that is fairly included in the question posed by petitioner. *If* this Court does decide to accommodate the decision in *Avena*, what happens next? Petitioner does not address this question in any depth, but his conclusion seems to assume that the case would go back to the Court of Appeals, to proceed directly to the merits. Pet. Brief 50. *Amicus* CJLF submits that is not correct. The *Avena* decision does not require it, and the law of the United States does not permit it. Furthermore, to leave undecided the host of questions raised by an affirmative answer to petitioner's question would create chaos in the lower courts that could only further delay justice in cases where justice is already long overdue.

I. Petitioner's confession was not the result of a Vienna Convention violation.

A. The Avena Decision.

The *Avena* decision involved the claims of 54 Mexican nationals, including the petitioner in the present case, José Medellín. *Avena*, *supra*, ¶ 16 (case number 38). The International Court of Justice (ICJ) rejected many of Mexico's claims regarding the nature of the Vienna Convention notification requirement and the consequences of noncompliance.

Most importantly, the court rejected the claim that the treaty violation alone necessarily required "partial or total annulment of conviction or sentence as the necessary and sole remedy." ¶ 123. Instead, a causal connection must be shown that "the violations . . . ultimately led to convictions and severe penalties . . . ." ¶ 122. In other words, the burden is on the petitioner to show "actual prejudice." ¶ 121. In this aspect, *Avena* is entirely consistent with *Breard*'s alternative holding, that even if a Vienna Convention claim is properly raised and a violation proved, relief from the criminal judgment requires "a showing that the violation had an effect on the trial." 523 U. S., at 377.

B. Exclusion of Confessions.

The *Avena* decision rejected Mexico's claim that in any retrial after the finding of a violation, any statement or confession obtained prior to notification to the arrestee of his consular rights must be suppressed. Instead, the confession issue is to be considered in each case as a part of the review process. *Avena*, *supra*, ¶¶ 126-127. That means a causal connection between the violation and obtaining the confession. In American exclusionary rule parlance, the confession must be the "fruit of the poisonous tree." See, *e.g.*, *United States* v. *Patane*, 542 U. S. __, 124 S. Ct. 2620, 2625, 159 L. Ed. 2d 667, 674 (2004).

Obviously, there is no causal connection when the confession precedes the violation. The ICJ rejected the claim that notice to the arrestee necessarily precede interrogation. *Avena*, *supra*, ¶ 85. During preparation of the Convention, suggested time periods for notification ranged from a minimum of 48 hours up to one month. ¶ 86. Without explanation, though, the ICJ nonetheless finds a duty to inform the arrested person as soon as he is known to be a foreign national or there are grounds to think he probably is. ¶ 88. The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report and who was informed 40 hours later. ¶ 89.

However, there is no comparable requirement of immediacy regarding actually notifying the consulate. The ICJ found no violation of the duty to notify the consulate "without delay" when notice was given five calendar days and three working days after arrest. See *Avena*, *supra*, ¶ 97. Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation." ¶ 87 (emphasis added); cf. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966) (deciding admissibility of statements obtained during custodial interrogation). Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for

consular notification has been fulfilled. Cf. *Miranda*, *supra*, at 473-474. Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation. Cf. *id*., at 479.

Given a proper administration of *Miranda* warnings, a knowing and voluntary waiver of the right to have counsel during interrogation, and interrogation taking place promptly after arrest, there will rarely, *if ever* be a causal connection between failure to give the consular information before interrogation and obtaining the confession. Indeed, if the confession and the information of nationality are obtained in the same interview, or if nationality is learned later, there is no violation at all.

In the present case, Medellín gave his confession within a few hours of arrest. See *supra*, at 3. The Consul General says he would have told Medellín to assert his *Miranda* rights if the *consulate* had been notified prior to interrogation, see App. to Pet. for Cert. 172a, but such swift notification of the consulate (as opposed to the arrestee) is not required by *Avena*. Even in the unlikely event that failure to inform Medellín himself was a violation, a causal connection between that violation and the confession is every bit as speculative as the one rejected in *Breard*. 523 U. S., at 377. The District Court's finding of no prejudice, App. to Pet. for Cert. 84a-85a, and the state habeas court finding to the same effect are both amply supported by the facts.

Petitioner asks this Court to order the Court of Appeals to issue a certificate of appealability (COA). That requires a substantial showing on both his procedural issue and on the merits of his claim. See *infra*, at 16-17. Putting to one side for the moment the statutory requirement that the claim be constitutional, discussed in Part IV-A, *infra*, he has made no showing at all of a debatably meritorious claim. The taking of his confession was not a violation, and his claim of prejudice from the later violation is stated only in the most general and conclusory terms. See Pet. Brief 5-6, 41-42. Although in *Slack* v. *McDaniel*, 529 U. S. 473, 485 (2000), petitioner was

permitted to make his merits showing on remand, that was only because the requirements had been unclear up to that point. In this post-*Slack* proceeding, petitioner has utterly failed to meet a clearly established requirement for a COA, and that alone is sufficient to affirm denial of the COA.

II. Ineffective assistance as "cause" provides the model for accommodating *Avena*'s holding on procedural default.

The only aspect of *Avena* that would require a significant change in American practice to accommodate is its holding on procedural default. Analysis of this aspect must begin with the ICJ's understanding of the procedural default rule. Quoting Mexico's argument, *Avena* defines the procedural default rule this way: " 'a defendant who could have raised, but fails to raise, a legal issue *at trial* will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*'." *Avena*, *supra*, ¶ 111 (first emphasis added);[3] see also ¶ 133. This is the trial default rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Presumably, the word "generally" in this definition recognizes the cause-and-prejudice and actual innocence exceptions. Significantly, *Avena*'s definition excludes defaults at stages of the proceedings later than trial. Statements in the *Avena* opinion referring to the "procedural default rule" therefore do not necessarily refer to later defaults, and they should only be extended to such defaults when the underlying rationale of the opinion so requires.

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3. The opinion continues at that point: "The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts." This is not technically correct. Exhaustion and procedural default are separate, although related, rules. See, *e.g.*., *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *id.*, at 850-851 (Stevens, J., dissenting). The ICJ may have been misled in this respect by the abbreviated description in *Breard*. 523 U. S., at 375.

The underlying rationale of the procedural default holding is that no "provision has been made to prevent [the procedural default rule's] application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, *supra*, ¶ 113. This rationale is flawed. When the state has provided or the defendant has retained competent counsel, the failure to inform does not preclude counsel from raising the Vienna Convention issue. When defense counsel is ineffective, that ineffectiveness is both cause for default and an independent claim for relief. See *Murray* v. *Carrier*, 477 U. S. 478, 488-489 (1986).[4]

If this Court should decide that the Optional Protocol requires the United States to accept this rationale despite its flaw, then *Carrier* provides the guide to accommodate *Avena* within the framework of American habeas corpus jurisprudence:

> "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default." 477 U. S., at 488.

Where the denial of assistance that defendant was entitled to receive is the cause of a default, that denial is sufficient for the cause prong of the *Sykes* test. If the Court accepts *Avena*'s assumption of a causal connection between the failure to notify the consulate and the default of the Vienna Convention claim,

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4. In the present case, Medellín attacked trial counsel's performance on multiple grounds, but failure to raise the Vienna Convention issue and failure to contact the consulate himself were not among them. See App. to Pet. for Cert. 62a.

then the analogy is complete. *Strickler* v. *Greene*, 527 U. S. 263, 288-289 (1999) is similar, where the prosecutor's inadvertent nondisclosure of impeachment evidence was both an element of the petitioner's *Brady*[5] claim and cause for his failure to raise it in state court.

The violation-as-cause rationale only extends to defaults occurring before the violation is corrected. In *Gray* v. *Netherland*, 518 U. S. 152, 162 (1996), unlike *Strickler*, the evidence which had not been disclosed to defense counsel before trial was known to habeas counsel before he filed his state habeas petition. Hence, it was defaulted by failure to raise it in that proceeding. Similarly, failure to notify the consulate, or to inform the defendant of his right to have the consulate notified, has no causal connection whatever to any default occurring after the consulate has actual knowledge, whether through official channels or any other means. *Avena* is concerned with cases where "application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate paragraph 2 of Article 36." *Avena*, *supra*, ¶ 113. Once the consulate has actual notice, it is not prevented from assisting the defendant in presenting his Vienna Convention claim in the next available procedure, as in fact it did in the present case, Pet. Brief 6-7, and any prior lack of notice would not be cause for a default beyond that point. Cf. *Avena*, *supra*, ¶¶ 104, 106(4) (no breach of duty to enable consulate to arrange representation in cases where consulate learned of arrest, by whatever means, before trial). Application of the procedural default rule to default after actual notice would not be a violation of paragraph 2 of Article 36 as construed by *Avena*.

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5. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

III. A decision that *Avena*'s procedural default holding is binding on American courts would apply to state courts as well as federal, and it would render many claims unexhausted.

Unlike most of the countries of the world, the United States of America is a federation. In its *Avena* decision, the International Court of Justice dealt with the United States as a whole and did not purport to resolve the questions of federalism that come with compliance. The court quoted its earlier decision in *LaGrand* (*Germany* v. *United States*) 2001 I. C. J 466, ¶ 128 (June 27), that " 'the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence' . . . ." *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. 1, ¶ 131(Mar. 31). *Avena* modified this holding by specifying "that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned," ¶ 141, as opposed to executive clemency, but otherwise left the choice of means to the United States. Thus, the requirement of review "by the United States courts," ¶ 121, does not necessarily mean by federal courts.

Concerns of federalism permeate this Court's habeas corpus jurisprudence, see, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. 722, 726 (1991), as well as Congress's most recent word on the subject, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §§ 101-107, 110 Stat. 1214. If the judicial system of the United States is going to accommodate the *Avena* decision, then the distinct responsibilities of the state and federal courts need to be addressed.

The first question is whether a decision by this Court to accommodate *Avena* would have any binding effect on state courts. Some aspects of this Court's habeas corpus jurisprudence are binding equally on state and federal courts, while others are only rules of practice for federal courts. To determine the status of a rule in this regard, it is necessary to identify its origin.

The cause and prejudice test for procedural default had its origins in a federal prisoner case under 28 U. S. C. § 2255 and took its cause standard from Federal Rule of Criminal Procedure 12(b)(2). See *Davis* v. *United States*, 411 U. S. 233, 242 (1973). As later developed and applied to state prisoner petitions, it is largely a device to prevent evasion of the exhaustion rule, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999), which is a limitation on federal courts to protect the integrity of state procedures. Since it is based neither on the Constitution nor on a federal statute applicable to state courts, it is not binding on them. State courts can and do adopt different tests for procedural default. See, *e.g.*, *In re Harris*, 5 Cal. 4th 813, 825, n. 3, 829-841, 855 P. 2d 391, 395, n. 3, 398-405 (1993).

Retroactivity analysis, on the other hand, is binding on the states. Although they have no obligation to provide collateral review at all, once a state does provide collateral review it must apply retroactively any decision of this Court that would apply retroactively in a federal collateral review. See *Yates* v. *Aiken*, 484 U. S. 211, 217-218 (1988). Because the decision itself is a constitutional rule, the Court's decision regarding its temporal reach is similarly binding on state courts.

Self-executing treaties are also binding on state courts. A treaty stands in the same place in the federal hierarchy of laws as a federal statute. See 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 6.7, pp. 581-582 (3d ed. 1999). It is subordinate to the Constitution and to later-enacted statutes, but it is superior to contrary state law. In its only express reference to judicial review, the Constitution makes treaties, along with itself and federal statutes, "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, § 2. To the extent that the Optional Protocol overrides the procedural default rule, it overrides state procedural default rules, whether statutory or case law, as well as this Court's *Sykes* rule.

A treaty does not, however, override a later-enacted statute. See Rotunda & Nowak, *supra*, at 582. The pertinent later-enacted statute in this case, 28 U. S. C. § 2254(b), provides:

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> "(A) the applicant has exhausted the remedies available in the courts of the State; or
>
> "(B)(i) there is an absence of available State corrective process; or
>
> "(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> "(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> "(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

In a case where no state court has decided a Vienna Convention claim on the merits and there is no operative default rule preventing its consideration in state court, the later-enacted AEDPA forbids the Federal District Court to grant relief on the merits. The court can deny the claim on the merits under subsection (2), if it is meritless, but otherwise it must deal with the unexhausted claim in the manner this Court decides this Term in *Rhines* v. *Weber*, No. 03-9046, either dismiss or stay.

In the present case, however, the state habeas court rested its decision on both the procedural default rule and the merits. The claim of prejudice by the Consul General dealt solely with Medellín's confession. See App. to Pet. for Cert. 172a-173a. The state habeas court found the showing unconvincing, see *id*.,

at 84a-85a, just as this Court did with the plea bargain claim in *Breard*, 523 U. S., at 377. Since this claim was decided on the merits in state court, the question is what further review, if any, is required.

IV. Once a Vienna Convention claim has been decided on the merits, there is no right to review on federal habeas or on appeal in federal habeas.

In the present case, petitioner has received not one but at least two rulings on the merits of his claim that he was prejudiced by the failure to provide the notifications required by the Vienna Convention. Both the state habeas trial court and the Federal District Court ruled in the alternative that, even if the claim were not procedurally defaulted, petitioner had failed to show any prejudice resulting from the violation. App. to Pet. for Cert. 56a-57a, 84a-85a.[6] By claiming a right to a certificate of appealability (COA), petitioner is claiming a right to federal habeas review of the state court's decision and appellate review of the Federal District Court's decision. He is entitled to neither. *Avena* requires only a judicial review of the prejudice question "whatever may be the actual outcome of such review and reconsideration." *Avena*, *supra*, ¶ 139. Entitlement to any review of the review is solely a question of domestic American law.

A. The AEDPA Appeal Statute.

Whether he was entitled to it or not, a question discussed in Part IV-B, below, petitioner received a review of the state decision in the Federal District Court. He now wishes to appeal that decision to the Court of Appeals. He does not meet the criterion in the governing statute, 28 U. S. C. § 2253(c)(2), "a

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6. The Texas Court of Criminal Appeals' brief order, *id*., at 32a-33a, is presumably a third such ruling. See *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991).

substantial showing of the denial of a *constitutional* right." (Emphasis added). An error on procedural default is not sufficient for a COA unless the substantive criterion of the statute is also met. See *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000).

Petitioner sought a COA on six grounds. Four of them related to his right to effective assistance of counsel under the Sixth Amendment, one was the Vienna Convention claim, and one was a claim under the Due Process Clause of the Fourteenth Amendment. See *Medellín* v. *Dretke*, 371 F. 3d 270, 274 (CA5 2004). The Court of Appeals held that petitioner's Sixth Amendment and Due Process Clause claims did not meet the statutory criterion, see *id*., 275-281, and petitioner chose not to seek this Court's review of those holdings. See Pet. for Cert. i.

All that is left to decide is whether petitioner's Vienna Convention claim makes "a substantial showing of the denial of a constitutional right." To ask the question is to answer it. The Vienna Convention is not in the Constitution.

Surprisingly, petitioner's brief does not mention or cite the statute governing the relief he seeks or give any reason for departing from its plain meaning. Nor do any of the numerous supporting *amici*. We can only anticipate the arguments that might be made in the reply brief.

One argument might be that the use of the word "constitutional" in this statute was merely a drafting error and did not reflect the genuine intent of Congress. Even if we were to accept the premise that such an argument is legitimate, there is no evidence to support the drastic step of ignoring plain meaning. There is no conflict with other sections of the statute. No tortured construction is necessary to avoid unconstitutionality, because there is no constitutional right to an appeal. *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 160 (2000). No contortion is necessary to avoid an absurd result, because the result is not absurd. As explained

in the next section, constitutional claims have long had preferred treatment over statutory ones in habeas, and treaties stand on the same level as statutes.

Prior to AEDPA, the standard for issuance of a certificate of probable cause was supplied by case law: " 'a substantial showing of the denial of a federal right.' " *Slack*, 529 U. S., at 480 (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893 (1983)). As *Slack* explained, AEDPA codified the *Barefoot* standard except that it replaced the word "federal" with "constitutional." See *id*., at 483. When Congress borrows language unchanged from another legal source, it is presumed to intend an unchanged meaning. See *Evans* v. *United States*, 504 U. S. 255, 259-260, and n. 3 (1992); *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000). Conversely, when it makes a change in the language that is substantive and not stylistic, that change must be deemed deliberate. Congress meant what it said. Although the District Court has jurisdiction over statutory and treaty-based claims, see 28 U. S. C. § 2254(a), its decision denying these claims is not appealable by the petitioner. Indeed, there will rarely be anything to review on such claims. Jurisdiction to hear a claim does not mean that habeas corpus is a proper remedy to grant for it. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 201 (1830); Scheidegger, Habeas Corpus and the Legislative Power, 98 Colum. L. Rev. 888, 929-930 (1998). Under *Reed* v. *Farley*, 512 U. S. 339 (1994), discussed in the next section, habeas corpus as a collateral attack on a judgment is rarely, if ever, an available remedy for a claim based on neither the Constitution nor the jurisdiction of the court.

A final possibility would be the "bootstrap" argument. Since the Supremacy Clause requires state judges to enforce federal statutes and treaties, any failure to do so violates the Supremacy Clause of the Constitution and hence is a constitutional claim. Such an interpretation of the word "constitutional" in § 2253(c) would render the change made by Congress to the *Barefoot* standard a nullity, which is sufficient to refute it.

Congress's prohibition of review by the ordinary route does not, of course, foreclose all review of a district court's denial of a claim based on statute or treaty. In *Felker* v. *Turpin*, 518 U. S. 651, 660-661 (1996), this Court addressed a similar limitation on review of the successive petition "gatekeeper" decision and held that it did not repeal this Court's original habeas jurisdiction. See also *id*., at 666 (Stevens, J., concurring); *id*., at 667 (Souter, J., concurring) (other possibilities). These extraordinary measures must, however, remain extraordinary, and not be used routinely to circumvent the intent of Congress. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Thompson*, No. 04-514, pp. 14-18. Whatever other means of review may be employed in another case, petitioner in this case has asked for a COA for a nonconstitutional claim, see Pet. Brief 50, and Congress has unambiguously forbidden it.

B. The Hill/Reed Rule.

The Reconstruction Congress extended the federal writ of habeas corpus to any person restrained of liberty in violation of the Constitution, laws, or treaties of the United States. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. This law, enacted primarily to rescue freedmen illegally held in continuing slavery, was originally understood to permit postconviction relitigation of issues already decided in criminal cases only when those issues went to the jurisdiction of the convicting court. See *ibid*. The concept of "jurisdictional" error was stretched to more and more constitutional claims until all constitutional claims were included, and the pretense of jurisdiction was dropped. See *id*., at 932-933. At no time, however, did the *de novo* relitigation rule stretch to the full limit of the jurisdiction to encompass all statutory and treaty-based claims.

In *Sunal* v. *Large*, 332 U. S. 174, 182 (1947), a federal prisoner was denied the right to relitigate a claim, which subsequent developments indicated was meritorious, on the

ground that his claim involved neither his constitutional rights nor the jurisdiction of the court. *Hill* v. *United States*, 368 U. S. 424 (1962) held that this distinction in claims continued after enactment of 28 U. S. C. § 2255, which was intended as a procedural substitute for habeas without changing the substantive criteria of review. See *id.*, at 427-428. The violation of Federal Rules of Criminal Procedure claimed by Hill "is not itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice . . . ." *Id.*, at 428; see also *United States v. Timmreck*, 441 U. S. 780, 783 (1979).

Not until *Reed* v. *Farley*, 512 U. S. 339 (1994) did this Court address whether the *Hill* rule applied to state prisoners. Such questions rarely arise, because so few federal statutes and even fewer self-executing treaties regulate state criminal procedure. The statute forbidding racial discrimination in jury selection, 18 U. S. C. § 243, is one of the few, but it is difficult to see how one could violate this statute without also violating the Equal Protection Clause as it is presently understood. See generally *Powers* v. *Ohio*, 499 U. S. 400, 408 (1991).

Reed involved the Interstate Agreement on Detainers (IAD), an interstate compact that is both federal and state law. See 512 U. S., at 341, 347. The Indiana Supreme Court considered and rejected Reed's IAD claim. See *id.*, at 345. The Court rejected his argument that the *Hill* rule should be limited to federal prisoners. "[O]ur decisions assume that *Hill* controls collateral review–under both §§ 2254 and 2255–when a federal statute, but not the Constitution, is the basis for the postconviction attack." *Id.*, at 353-354.[7] The IAD claim did not go to a

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7. The dissent relied primarily on the lack of any distinction between constitutional and nonconstitutional claims in the language of the statute. See *id.*, at 365 (opinion of Blackmun, J.). This is no longer entirely true. As explained in Part IV-A, above, Congress expressly

fundamental defect, at least as presented in this case. *Id*., at 349 (plurality).[8] The "fundamental defect" exception to *Hill*'s prohibition of relitigation of nonconstitutional rules may be entirely superfluous. In today's expansive view of constitutional criminal procedure, it is hard to imagine a claim that would meet *Hill*'s test that did not also state a claim under the Due Process Clause. See *id*., at 357 (Scalia, J., concurring in part and concurring in the judgment).

"By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an act of legislation." *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888). *Reed* is therefore on point. Where a state court has duly considered the treaty claim and rendered a decision on it, reconsideration of that decision is not available on federal habeas corpus. A different rule might apply if the state courts simply refuse to abide by the United States's treaty obligations as construed by this Court, see *Reed*, 512 U. S., at 355 (plurality), but that is not what happened in this case. By considering and deciding the merits as well as procedural default, the state court satisfied the obligation of review in advance of the *Avena* decision. No further review in federal court is required by *Avena*, and no such review is permitted under *Reed*.

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distinguished constitutional from nonconstitutional claims in the context of petitioner's appeals, and it probably had the *Reed* rule in mind when it did so.

8. Justice Ginsburg's opinion is the opinion of the Court except for Part II and the last paragraph of Part IV. As to those parts it is a plurality, but it is the opinion concurring on the "narrowest grounds." See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability should be affirmed.

February, 2005

Respectfully submitted,

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