No. 04-5928

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether the lower courts properly determined that Medellin's Vienna Convention claim was procedurally barred?

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Jose Ernesto Medellin ("Medellin")[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. §§ 2241 and 2254. He now seeks certiorari review of the Fifth Circuit Court of Appeals' decision denying a certificate of appealability ("COA") to review the district court's denial of relief on his consular notification claim. However, as discussed below, the Court of Appeals properly applied established federal law and correctly concluded that Medellin was not entitled to a COA. Because Medellin does not present a compelling reason for this Court to review his claims, his petition for certiorari review should be denied.

## STATEMENT OF THE CASE

### I. Facts of the Crime

The Court of Criminal Appeals of Texas adequately summarized the facts of the offense in its opinion on direct appeal:

> On the night of June 24, 1993, a gang called the "Black and Whites" had come together to initiate a new member, Raul Villareal. The other gang members present were [Medellin], Peter Cantu, Roman Sandoval, Efrain Perez, and Sean O'Brien. Roman's brother Frank, and [Medellin's] fourteen–year-old brother, Venancio, were also tagging along. The initiation involved fighting each member of the gang for a five to ten minute period. After the fighting was over, Raul was

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[1] Respondent Doug Dretke is referred to herein as "the Director."

welcomed into the gang.

Meanwhile, the fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were visiting a girlfriend. Around 11:15 p.m., Jennifer and Elizabeth decided to head for their respective homes by way of a shortcut across the railroad tracks. Jennifer and Elizabeth first encountered Roman and Frank as they made their way home, but managed to pass the brothers without incident. However, as they passed [Medellin], he attempted to engage Elizabeth in conversation. When Elizabeth tried to run from [Medellin], 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 Peter and Sean grabbed her and threw her down as well. At this point, the Sandoval brothers decided that it was time to leave.

Subsequent boastful statements of [Medellin] and other gang members revealed that what ensued was a brutal gang rape of both girls. After the girls were thrown to the ground, the gang members orally, vaginally, and anally raped both of them. After the assault, [Medellin], Raul, Efrain, and Peter regrouped at Peter's house where he lived with his brother and sister-in-law, Joe and Christina Cantu, to brag about their exploits. Christina noticed that Raul was bleeding and that Efrain had blood on his shirt. She asked the group what had occurred and [Medellin] responded that they "had fun" and that their exploits would be seen on the television news. [Medellin] was hyper, giggling, and laughing. He boasted to Joe and Christina that the group had met two "hos" [sic]

and had sex with them. He also told the couple that the two girls had been talking to them and that he punched one of the girls because she had started screaming after he grabbed her.

[Medellin] related to Joe and Christina that he sexually assaulted one of the girls and bragged about having "opened" her since she had apparently been a virgin. As if to accentuate his conquest, [Medellin] showed Christina his blood soaked underwear. [Medellin] related that after another gang member sexually assaulted the second girl, he "turned her around" and anally raped her. [Medellin] also bragged of having forced both girls to engage in oral sex with him. Peter joined the group shortly thereafter and began to divide up the money and jewelry that had been taken from the two girls. Peter gave [Medellin] a ring with an "E" design on it so that he could give it to his girlfriend, Esther.

When Christina asked the group what happened to the girls, [Medellin] told her that they had been killed so that they could not identify their attackers. [Medellin] then elaborated that it would have been easier with a gun, but because they did not have one at the scene of the incident, he took off one of his shoelaces and strangled at least one of the girls with it.[2] Both Joe and Christina noted

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[2] Apparently, all of the gang members were talking about having killed the two girls which resulted in some degree of confusion on the part of the witness. However, Christina testified that she understood [Medellin] to have said that he personally participated in killing *both* of the girls, while Joe testified that he understood [Medellin] to have said that he strangled one of the girls while his

> that [Medellin] complained of the difficulty the group encountered in killing the girls. After [Medellin] related the difficulty he encountered in strangling one of the girls, he said that he put his foot on her throat because she would not die.
>
> Christina subsequently convinced her husband to report the incident to the police. By the time bodies were discovered, they were so badly decomposed that dental records were required to identify them. However, enough tissue remained for the medical examiner to determine that each girl had died of a trauma to the neck consistent with strangulation.
>
> Eventually, all of the individuals who participated in the rapes and murders were apprehended. After [Medellin] was arrested, he gave a written and then oral, tape-recorded statement, the latter of which was never offered into evidence at trial. In the written statement, [Medellin] admitted to having oral sex with Elizabeth, but commented that he only peripherally participated in her murder.

*Medellin v. State*, No. 71, 997, slip op. at 1-4 (Tex. Crim. App. 1997). On September 16, 1994, the jury convicted Medellin of murder during the course of a sexual assault, a capital offense. Tr 294.[3]

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companions killed the other girl.

[3] "Tr" refers to the transcript of pleadings and documents filed with the court during the trial - followed by page numbers. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "SHTr" refers to the

## II. Fact Relating to Punishment

The Court of Criminal Appeals also summarized the evidence introduced during the punishment phase of Medellin's trial:

> At the punishment stage of trial, [Medellin's] parents testified that [Medellin] had been a good student and had made good grades until he entered the sixth grade. After that point, [Medellin's] behavior deteriorated rapidly. [Medellin] was suspended from middle school in the Fall of 1990 for "misconduct and repeated misbehavior." In high school, [Medellin] was well known to administrators due to his repeated disciplinary violations. In January of 1992, [Medellin] was restrained by an assistant principal from attacking another student. Furthermore, [Medellin] repeatedly threatened to kill the assistant principal and to "fix it" so that he could not father any more children. [Medellin] told the assistant principal that life meant nothing to him ([Medellin]) and that someday he would be featured on television or the front page of the newspaper as a result of having killed someone, "probably a cop." In October of 1992, [Medellin] was involved in a gang-related fight at school which resulted in his expulsion from school and subsequent placement at an alternative school.

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state habeas transcript - the transcript of pleading and documents filed with the court during the state habeas proceedings - followed by page numbers. "FF" refers to the numbered findings of fact issued by the state habeas court. "CL" refers to the numbered conclusions of law issued by the state habeas court.

> [Medellin] was also known to the police. In January of 1992, police were called to a restaurant in response to a disturbance call involving a terroristic threat. When initially confronted by police, [Medellin] refused to stop or to remove his hand from his pocket. He was later found to have a .38 caliber pistol concealed in his pocket. In June of 1993, [Medellin] was found at the emergency room of a Houston hospital where Efrain Perez was being treated for a gunshot wound. Testimony from an employee of the hospital regarding a conversation the employee overheard between the [Medellin] and co-defendant Cantu indicated that the two knew who had shot Perez and that they were going to go after that individual themselves. When a police officer arrived to investigate the shooting, [Medellin] was belligerent and uncooperative.
>
> While [Medellin] was in jail awaiting trial on the instant offense, a search of the [Medellin's] cell turned up a "shank" which had been fashioned from a disposable razor. Another search of [Medellin]'s cell a year later, the day before punishment arguments were to be heard in the instant case, turned up another "shank" in the making.

*Medellin*, slip op. at 4-5. At the conclusion of the punishment phase on October 11, 1994, Medellin was sentenced to death. Tr 308.

## III. Direct Appeal & Postconviction Proceedings

The Court of Criminal Appeals affirmed both the

conviction and the sentence in an unpublished opinion issued on March 19, 1997. *Medellin v State*, No. 71,997. Medellin did not petition this Court for certiorari review.

Following the denial of his direct appeal, Medellin filed an application for writ of habeas corpus in the trial court on March 26, 1998. SHTr 002. The trial court entered findings of fact and conclusions of law recommending that relief be denied. SHTr 198-224. Based upon those findings and conclusion, the Court of Criminal Appeals rejected Medellin's application for habeas corpus relief. *Ex Parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

Medellin's federal habeas petition was filed in the United Stated District Court for the Southern District of Texas, Houston Division on November 11, 2001, then later amended on July 18, 2002. The district court denied federal habeas relief and certificate of appealability on all claims. *Medellin v. Cockrell*, H-01-4078 (S.D. Tex. Jun. 26, 2003)[4]. Medellin's subsequent application for certificate of appealability to the Fifth Circuit was denied on May 20, 2004. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). The instant petition for certiorari followed.

## ARGUMENT

### I. The Question Presented for Review Are Unworthy of the Court's Attention.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and

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[4] The district court's opinion is reprinted in its entirety in the appendix to Medellin's petition. For this Court's convenience, the Director will cite the district court's opinion as "Appendix" followed by the appropriate page number.

will be granted only when there are special and important reasons therefor. Medellin advances no special or important reason in this case, and none exists. Thus, the petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

Further Medellin has not shown that he was entitled to a COA. Federal law requires a petitioner seeking COA to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. This standard is satisfied by demonstrating that "jurists of reason could disagree with the district court's resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Notably, the question of whether the district court's resolution is debatable among jurists of reason is a threshold inquiry that does not require the full consideration of the factual or legal grounds offered in support of the claims. *Miller-El*, 537 U.S. at 336.

Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

> of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(b) (West 2003). This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *(Terry) Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

The Court also held that a federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable. *Id.* at 411. In other words, habeas relief is inappropriate when a state court, at a minimum, reaches a "satisfactory conclusion." *Id.* at 410-11 (citing *Wright v. West,* 505 U.S. 277, 287 (1992)). The Fifth Circuit has further explained that it is the state court's "ultimate decision" that is to be tested for reasonableness, "not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir.

2001).[5]

## II. The Court Should Deny Medellin's Petition For Certiorari Review Because the Lower Courts Followed Established Federal Law in Deciding That Medellin's Consular Notification Claim Was Procedurally Barred.

The district court and the court of appeals below both held that Medellin's claim alleging that he was denied consular assistance in violation of his rights under the Vienna Convention on the Law of Treaties, May 22, 1696 art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"), was procedurally barred in federal court. Appendix at 79-82; *Medellin*, 371 F.3d 279-290. The state habeas court, the first court to consider the claim, concluded that in light of Medellin's failure to object to the alleged Vienna Convention violation during trial - and thus, properly preserve the issue for appeal - he had waived his right to assert the claim on post-conviction review. Appendix at 79, 131. Based upon consistent recognition by the Fifth Circuit that Texas' contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review[6], the lower courts held that Medellin was procedurally barred from obtaining federal habeas relief on this claim. Appendix at 80, 131.

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[5] *See also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (holding that a federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"), *cert. denied,* 537 U.S. 1104 (2003).

[6] *E.g. Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n. 48 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995).

This application of the procedural default rule to Medellin's consular notification claim is compelled by precedent established in this Court. First, it is well settled that "[t]his Court will not take up a question of federal law presented in a case 'if the decision of [the state court] rests on a state law ground that is independent and adequate to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 723 (1991)). In the habeas context, the application of this procedural default doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730.

> Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas could offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its law.

*Id.* at 730-31. Thus, because the state court's adjudication of Medellin's Vienna Convention claim was based upon a state procedural ground independent of the merits and adequate to support the judgment, the lower courts were precluded by federal law from granting relief on the merits.

Moreover, as noted by the district court and Fifth Circuit below, the application of the procedural bar in this case is controlled by the Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998). In *Breard*, the Court directly addressed the question of whether a petitioner's consular notification claim is subject to the procedural default doctrine, and concluded that Vienna Convention claims, like constitutional claims, can be procedurally defaulted, even in a death penalty case. 523 U.S. at 375-77. Although, Medellin attempted to convince the lower courts that the decisions by the International Court of Justice in the *LeGrand Case* (*Germany v. United States of America*), 2001 ICJ 104

(Judgment of June 27) ("*Le Grand*"), and *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), 2004 ICJ 128 (Judgment of March 31 ("*Avena*"), precluded the application of any procedural bar to his consular notification claim, neither the district court nor the Fifth Circuit were willing to depart from precedent set by this Court in *Breard*. The district court stated that,

> [t]he concerns of comity, federalism, and finality of the state judgments suggest that this [c]ourt refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw with the ICJ action in the *LaGrand Case*. This [c]ourt is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.

Appendix at 82.

The Fifth Circuit echoed a similar sentiment in its opinion on this issue:

> Though *Avena* and *LeGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims. "If a precedent of the Supreme Court has direct application in a case, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

*Medellin*, 371 F.3d at 280 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

To the extent that Medellin's petition insists that the lower courts should have ignored directly controlling federal law in

adjudicating his Vienna Convention claim, it is unsupportable. As aptly noted by the Fifth Circuit, the court of appeals is bound to follow Supreme Court precedent that bears immediately upon a particular issue. *Rodgriguez de Quijas*, 490 U.S. at 484; *Agostini v. Felton et al.*, 521 U.S. 203, 237-38 (1997). Because the lower courts properly applied the procedural default doctrine in accordance with precedent established in this Court, Medellin's request for further review of his consular notification claim should be denied.

## III. Even if This Court Were to Find it Necessary to Revisit *Breard* in Light of the *LeGrand* and *Avena* Decisions, the Present Case Does Not Present an Appropriate Opportunity to do Such.

Medellin argues that this Court should grant certiorari to in order to bring the United States into compliance with its obligation to abide by the *Avena* judgment. Specifically, he notes that the ruling in *Breard,* allowing the procedural default of consular notification claims, conflicts with *Avena*, wherein the ICJ held that the imposition of the procedural default rule to cases where a criminal defendant was deprived of his consular rights under the Vienna Convention would essentially "prevent[] full effect from being given to the purposes for which the rights according under the article are intended." *Avena*, ¶ 113 (internal citations omitted). However, the application of *Avena* would have no effect on the ultimate disposition of Medellin's Vienna Convention claim.

In deciding *Avena*, the ICJ contemplated what would constitute "an adequate reparation for the violations of Article 36 [consular notification rights]" and concluded:

> It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States

> courts...with a view to ascertain whether in each case the violation of Article 36 committed by competent authorities cause actual prejudice to the defendant in the process of administration of criminal justice.

*Avena* ¶ 121. Thus, assuming that *Avena* were enforceable here, Medellin would be entitled to have the courts of this country review and consider the effect of the Vienna Convention violation on his criminal proceedings. Medellin was already granted this type of merits review in the both his state and federal habeas proceedings.

Although the state habeas and district courts' adjudication of Medellin's consular notification claim rested primarily on the imposition of the procedural bar, the courts nevertheless considered its merits in the alternative. The state habeas court found that this claim did not warrant relief because "[Medellin] fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [he] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." SHTr 217. On federal habeas, the district court reviewed this finding to determine whether it was either contrary to, or an unreasonable application of clearly established federal law. Appendix at 84. The court stated that Medellin would have to "show concrete, non-speculative harm from the denial of his consular rights" in order to obtain relief. *Id* (citing *Breard*, 523 U.S. at 377). Applying this standard, the court concluded,

> Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his

> confession. There is no indication that, if informed of his consular rights, Medellin would not have waived those rights as he did his right to counsel. Medellin fails to establish a "casual connection between the Vienna Convention violation of his statements. [Medellin] has failed to show prejudice for the Vienna Convention violation.

Appendix at 84-85.

Notably, the lower court's analysis is consistent with federal law, as set out in *Breard,* and with the *Avena* decision. When deciding *Breard* in 1998, this Court stated that even if a petitioner had properly raised and proven a violation of the right to consular notification, "it is extremely doubtful that the violation should result in the overturning of a final judgment of the conviction without some showing that the violation had an effect on the trial." 523 U.S. at 377. More importantly, the ICJ recently explained in *Avena* that,

> The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction of sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarding as having, in the casual sequence of events, ultimately led to convictions and severe penalties is an integral part of the criminal proceedings before the court of the United States and is for them to determine in the process of review and reconsideration. In doing so, it is for the court of the United States to examine the fact, and in particular the prejudices and its causes, taking account of the violation of the rights set forth in the Convention.

*Avena*, ¶ 122. The state habeas and district courts' evaluation of the potential harm arising from the alleged violation in this case is clearly consistent with what the international court's decision in *Avena*.[7]

Accordingly, even assuming that *Avena* were enforceable in this case, it would have no effect. Medellin has already been afforded the full merits review mandated by the ICJ. Because Medellin has already received the "benefit" of the *Avena* decision, granting certiorari to review procedural default issue would essentially result in an advisory opinion. As such this case does not present an appropriate opportunity to revisit *Breard*. *See Alabama v. Shelton*, 535 U.S. 654, 676 (2002)(noting this Court longstanding refusal to issue advisory opinions).

## CONCLUSION

For the foregoing reasons, Medellin's petition for writ of certiorari should be denied.

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[7] Notably, Medellin does not seek review of the lower court's adjudication of the merits of his consular notification claim; rather, his petition only requests review of the procedural default issue. Thus to the extent that he would now attempt to challenge the correctness of the merits review, that argument has been waived. *See, Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983) (This Court has long held that it will neither decide issues raised for the first time on petition for certiorari); *see alsoTacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438-39 (1969).

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