No. AP-75,207

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSÉ ERNESTO MEDELLÍN,

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE NO. 765430 IN THE 339TH DISTRICT COURT OF HARRIS COUNTY

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

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

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit 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 protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Applicant Medellín claims a right under international law to a new determination of whether he was prejudiced by the arresting authorities' failure to notify the Mexican Consulate of his arrest. He has already had a determination, on his first application, that he failed to show any prejudice. Nothing in international law entitles him to a second determination of the same question.

Delaying the already long overdue execution of this well-deserved sentence for a second determination of that issue would be contrary to the rights of victims of crime and the law-abiding public that CJLF was formed to protect.

SOURCE OF FEES

No fee has been paid or will be paid for the writing of this brief. The Criminal Justice Legal Foundation has paid all printing and related expenses from its general operating funds.

SUMMARY OF FACTS AND CASE

Applicant's summary of the case makes no mention of the facts of the unspeakably brutal crimes committed by José Medellín and his pack of predators. *See* Subsequent Application for Post-Conviction Writ of Habeas Corpus 7-8 (cited below as "Subsequent Application"). 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, at 1-2 (Tex. Crim. App. May 16, 1997), Exhibit B to Application for Writ of Habeas Corpus (cited below as "First Application"). "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." *Id*. at 2. The group then proceeded to have "fun" by brutally gang raping both girls, and they bragged about it afterward. *See id*.

> "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." *Id*. at 2-3.

The gang murdered the girls to prevent them from identifying their attackers and divided up their possessions. *See id*. at 3. Medellín personally "took off one of his shoelaces and strangled at least one of the girls with it." *Id*.

The evidence against Medellín included his written statement after arrest, in which he admitted substantial participation in the crimes, *see id*. at 3-4, including his personal participation in strangling Elizabeth. Exhibit C to First Application. This statement was made between 5:54 a.m. and 7:23 a.m. on the day of his arrest, June 29, 1993. *See id*. The statement also says he was born in Mexico. 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 this Court affirmed on direct appeal. After the affirmance, Mexican consular authorities learned of the case and actively assisted in the preparation of Medellín's state habeas application. Subsequent Application at 7. That application was filed 11 months after the consulate began providing assistance. *See id*. 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. *See* Exhibit J to First Application. 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 district court judge also rejected Medellín's Vienna Convention claim on the merits. Appendix to Petition for Writ of Certiorari at 56a-57a, *Medellín v. Dretke*, U.S. Supreme Court No. 04-5928. This Court 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 (S.D. Tex. June 25, 2003), App. to Pet. for Cert. at 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 (5th Cir. 2004). On the procedural default point, the Court of Appeals held it was bound by *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam), until such time as the Supreme Court overrules it. *See* 371 F.3d at 280. On the question of standing, the panel followed circuit precedent. *See id*.

The Supreme Court granted certiorari. Later, on February 28, 2005, President Bush issued a memorandum stating that the United States would comply with the decision of the International Court of Justice "by having state courts give effect to the decision in accordance with general principles of comity . . . ." *See* Exhibit B to Subsequent Application. On March 24, Medellín filed the present application.

On May 23, the Supreme Court dismissed the writ of certiorari as improvidently granted, noting the numerous impediments in federal habeas to this claim. *Medellín v. Dretke*, 544 U.S. __, 161 L. Ed. 2d 982, 987-989, 125 S. Ct. 2088, 2090-2092 (2005) (per curiam). The high court noted that review of this Court's decision in the present case would remain available. *See id*., 161 L. Ed. 2d at 989, 125 S. Ct. at 2092.

SUMMARY OF ARGUMENT

The question of whether the courts of Texas are required to comply with the *Avena* decision is moot in this case if Medellín has already received the adjudication to which *Avena* says he is entitled. A comparison of *Avena* with the history of this case shows that he has.

To obtain relief on habeas corpus in Texas, an applicant must show harm from the violation, under the standard set forth in *Ex parte Dutchover*, *Ex parte Barber*, and *Ex parte Fierro*. The *Avena* decision requires relief only if the Vienna Convention violation "ultimately led" to the conviction or sentence. These are substantially the same inquiries.

On Medellín's first state habeas application, the trial court found, as an alternative holding, that Medellín had not shown any harm from the Vienna Convention violation. This holding is manifestly correct on the evidence and

argument submitted with that application. The only prejudice claimed was from failure to notify the consulate before interrogation. However, *Avena* makes clear that notification of the consulate does not become overdue until a considerable time after arrest, at least several days. The confession was not a fruit of the violation, and no other prejudice was shown on the first application. Medellín had the full assistance of the consulate in preparing his first application. Absent a realistic claim of actual innocence, there is no reason to reopen the case to allow him to claim new forms of prejudice that he and the consulate could have claimed, but did not, on the first application.

The International Court of Justice did not consider or decide whether the required review had already been done in this case. The paragraphs of the *Avena* decision cited by applicant for that proposition make only general statements and say nothing about Medellín's specific case. The ICJ appears to be unaware that procedurally defaulted claims are often decided on the merits in alternative holdings, and its decision does not address that situation.

Petitioner cites *Avena* and the President's memorandum as a new legal basis for his claim, but neither is sufficient to entitle him to a *second* determination of prejudice. The application should be denied.

ARGUMENT

Applicant Medellín claims that the decision of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. 1 (Mar. 31),[1] constitutes a new legal basis for his claim within the meaning of the subsequent petition statute, Texas Code of Criminal

1. Cited below as "*Avena*." The International Court of Justice is referred to as the ICJ.

Procedure, Article 11.071, section 5(a)(1). Other amici are briefing the questions of whether this decision is binding on this Court and whether the President's memorandum of February 28, 2005, makes it so. This brief will examine what the *Avena* decision actually requires and whether any further action would be needed to comply with it. If the answer to the latter question is no, then the international and separation of powers questions are moot.

I. The *Dutchover* standard for habeas relief in Texas is substantially the same as the prejudice determination required by *Avena*.

In its "fifth submission" in *Avena*, ¶116(5), Mexico asked the ICJ to declare that any violation of the Vienna Convention operate to annul the criminal judgment. In American parlance, Mexico asked that it be considered structural error. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The ICJ rejected this argument. *See Avena* ¶125. The ICJ found that this position was not supported by the text, the object and purpose, or the *travaux préparatoires* (equivalent of legislative history) of the Vienna Convention. *See id.* ¶124. Instead, the duty of reparation is to review the cases "with a view to ascertaining whether *in each case* the violation . . . caused *actual prejudice* to the defendant in the process of administration of criminal justice." *See id.* ¶121 (emphasis added).

The convictions and sentences of Medellín and the others are not violations of international law. The violation was in certain omissions that preceded the trial. *Id.* ¶123. Quoting a decision of its predecessor court, ICJ further defined reparation as " 'reestablish[ing] the situation which would, *in all probability*, have existed if that act had not been committed.' " *Id.* ¶119 (emphasis added).

A Vienna Convention violation is in this sense analogous to Fourth Amendment and some Sixth Amendment violations. It is completed long before

the trial, not at the trial. *See Withrow v. Williams*, 507 U.S. 680, 691 (1993). If the evidence illegally seized would have been obtained before trial anyway, then there is no need to suppress it at trial and no need to vacate a judgment after trial. *See Nix v. Williams*, 467 U.S. 431, 443 (1984). "Invoking the exclusionary rule [in such a case] would put the police (and society) not in the *same* position they would have occupied if no violation had occurred, but in a *worse* one." *Murray v. United States*, 487 U.S. 533, 541 (1988) (emphasis in original).

In the absence of a causal link, there is no need to disturb the judgment in the criminal case. *Avena* is consistent with this principle. "The question [is] whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, *ultimately led* to convictions and severe penalties . . . ." *Avena* ¶ 122 (emphasis added).

The claimed causal link between the Vienna Convention violation and the subsequent criminal judgment needs to be examined in its pure form and not as an element of some other claim. Thus, it is not sufficient to reject a Vienna Convention claim to hold that the counsel provided met the minimum requirements of the Sixth Amendment or that the trial met the requirements of the Due Process Clause. *See id.* ¶ 139.

Fortunately, the State of Texas already has a pure form of causal link analysis, routinely used in state habeas proceedings. Once a violation has been found, Texas habeas courts regularly examine whether that violation has caused actual harm under the standard of *Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989) and *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994).

In *Barber*, at 891, this Court found that evidence had been admitted in violation of the rule of *Estelle v. Smith*, 451 U.S. 454 (1981). The finding of error was not sufficient for relief from a final judgment on habeas corpus, however.

Unlike an appellant on direct review, *cf.* Tex. R. App. P. 44.2(a), a habeas "applicant must plead and prove that the error complained of did in fact contribute to his conviction or punishment." *Barber*, 879 S.W.2d at 891-892; *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996).

For some claims, the defendant's claim contains a materiality or prejudice element that is greater than or equal to the showing needed to refute a harmless error argument by the state, and in such cases there is no need for a separate harmless error determination. *See Kyles v. Whitley*, 514 U.S. 419, 435-436 (1995). Where the *Dutchover/Barber* standard applies, though, it is a "separate inquiry." *Fierro*, 934 S.W.2d at 377, n.15.

The ICJ noted that the means of review of cases is left to the United States, *Avena* ¶ 141, and required only that the review be by judicial rather than executive action, *id.* ¶ 143, consider the Vienna Convention violation independently of any constitutional claim, *see id.* ¶ 139, and determine prejudice on the facts of the individual case. *See id.* ¶ 121. *Avena* says nothing about burden of proof, so that is one of the issues the United States may determine for itself.

It would be anomalous for a habeas applicant to have a lower burden for a mere treaty claim than he has for a constitutional right. *Cf. Breard v. Greene*, 523 U.S. 371, 376-377 (1998) (per curiam). *Avena*, the Optional Protocol, the President's memorandum, or some combination of them may or may not require such a result as to the procedural default rule (a point we leave to others), but there is no apparent justification for a lowering of the burden of proof. The Texas standard of "did in fact contribute" is no less favorable to the defendant than the phrase "ultimately led" in *Avena*. If *Avena* claims are to be considered in Texas state habeas, the applicant should carry the same burden as for constitutional claims:

"to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Fierro*, 934 S.W.2d at 375.

II. By its alternative holding of "no harm" in the first habeas proceeding, the trial court has already made the determination *Avena* requires.

In its findings of fact and conclusions of law on the first habeas petition, the trial court rejected the Vienna Convention claim on several alternative grounds, any one of which would be sufficient. Conclusions 13 through 15 are procedural, citizenship, and standing grounds inconsistent with the *Avena* decision. Conclusion 16 is the kind of holding that the *Avena* decision rejected in paragraph 139—rejecting a Vienna Convention claim on the grounds that the constitutional standards were observed.

Most important for the present case is conclusion 17:

> "17. The applicant fails to show that his rights, pursuant to U.S. CONST. amends. V, VI, and XIV, were violated *and 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)." (Emphasis added.)

This is actually two holdings, as the conjunctive "and" indicates. No constitutional rights were violated, *and* the treaty violation had no impact. The citation to *Barber* and the parenthetical that follows it specify that the latter holding is an independent finding of no causation, not based on any conflation with the elements of a constitutional claim. This decision was entered four years after *Fierro* had clarified that the determination under *Dutchover* and *Barber* was a separate inquiry. *See supra* at 9. The trial court understood, as indicated by the

parenthetical, that the *Barber* inquiry is whether "the complained-of error," the Vienna Convention violation, "did, in fact, contribute to his conviction or punishment."

In conclusion 17, the trial court found that the Vienna Convention violation did not, in fact, contribute to Medellín's conviction or punishment. A judicial determination of that fact is all that the *Avena* decision and the President's memorandum require. There is nothing more to do.

III. The trial court's no-contribution finding was clearly correct in light of the evidence before it and the subsequent *Avena* decision.

A. The 1998 First Application.

Although Medellín did not have the assistance of the Mexican consular authorities for his trial and direct appeal, he did have their assistance for his first application for habeas corpus. *See* Subsequent Application at 7-8. Applicant and the consulate had 11 months to prepare their showing of prejudice before the application was filed. *See id*. at 7. Applicant's counsel notes that "[i]n support of [the Vienna Convention] claim, Mr. Medellin submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention." *Id*. at 8. The *type* of assistance the consul said in 1998 that he would have provided is revealing.

The affidavit states that the consulate would have advised Medellín to assert his *Miranda* rights and not make a statement without counsel present. *See* Exhibit J to First Application. None of the mitigation claimed in the voluminous exhibits attached to the present application is mentioned. There is only a passing reference to arranging for counsel. There is no mention of "mitigation specialists." If

notification of the consulate would have brought this cornucopia of benefits to Medellín at trial in 1993, it is more than a little strange that the same consulate made no mention of such assistance in 1998.

The Vienna Convention argument contained in the first application similarly makes no other claim of prejudice. There is a passing reference to obtaining representation and an incorporation of the consul general's affidavit. *See* First Application at 28. However, nothing in the argument relates a lack of consul-arranged representation to any deficiency at trial. Instead, the entire thrust of the argument is on the confession. *See id*. at 29. The argument concludes with the claim "that the state, by securing a conviction and death sentence with *evidence obtained* in violation of the Vienna Convention on Consular Relations, rendered the proceedings herein 'fundamentally unfair.' " *Id*. at 31 (emphasis added).

From the argument and the supporting affidavit, we see that the entire claim of prejudice in the first habeas proceeding hinged on the contention that the confession was the fruit of the Vienna Convention violation. If it was not, then applicant made *no* showing of prejudice, and the court's finding of no harm was unquestionably correct on the evidence before it.

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. 630, 159 L. Ed. 2d 667, 674, 124 S. Ct. 2620, 2625 (2004) (plurality opinion).

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. *Id*. ¶ 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. *Id*. ¶ 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. *Id*. ¶ 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 id*. ¶ 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." *Id*. ¶ 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* Exhibit J to First Application, 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 v. Greene*, 523 U.S. 371, 377 (1998).

Applicant asks, in essence, to reopen the proceedings to introduce evidence of a type of prejudice he did not even allege, much less prove, on his first application. Whatever mitigation evidence the consulate could have provided at trial it could have produced for the first habeas petition five years later. There is no reason to reopen the habeas case for a second attempt in the absence of a credible claim of actual innocence.

By finding no harm in the first habeas, the trial court found that if the Vienna Convention had been complied with, Medellín would, in all probability, be right where he is—on death row. That is the finding *Avena* requires. *See supra*, at 7. The finding was manifestly correct on the evidence before the court. The confession was obtained before the State was required to notify the consulate, and no other claim of prejudice was supported by any evidence.

IV. The ICJ in *Avena* did not decide whether the required review had already been done in Medellín's case.

Applicant contends that "the International Court of Justice stated that in the case of Mr. Medellin, invocation of procedural default rules have precluded, and continue to preclude, the required judicial review and reconsideration of his sentence. *Avena*, paras. 112-13." Subsequent Application at 16. The cited paragraphs, in fact, say nothing about Medellín's individual case.

In paragraph 112, the ICJ recaps what it said about the procedural default rule in its previous opinion in *LaGrand* (*Germany v. United States*), 2001 I.C.J. 466 (June 27). After noting that LaGrand had been prevented from effectively challenging his judgment by the procedural default rule, the ICJ states, "This statement of the Court *seems* equally valid in relation to the present case, where *a number* of the Mexican nationals have been placed exactly in such a situation." *Avena* ¶ 112 (emphasis added). This equivocal statement does not even specify how many cases it refers to, much less which cases, and cannot be considered a holding in this specific case.

In paragraph 113, the court notes that the procedural default rule has not been revised since *LaGrand*, and "the procedural default rule *may* continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the [Vienna Convention] violation . . . prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence." *Avena* ¶ 113 (emphasis added). The actual holding in paragraph 113 is that the ICJ will not consider whether there is a violation of the duty to provide a remedy until all judicial proceedings have concluded. The ICJ therefore did not examine the individual circumstances of any of the cases that had not yet reached that point, including Medellín's case.

In particular, the ICJ did not discuss, and does not appear to have considered, the impact of an alternative holding on the merits. Indeed, the ICJ does not seem to be aware that alternative holdings on the merits are permissible and common in American cases involving defaulted claims. This omission and apparent lack of awareness is particularly curious in light of the fact that the United States Supreme Court case on this issue contains precisely such a holding. *See Breard v. Greene*, 523 U.S. 371, 377 (1998).

It is elementary jurisprudence that a case is only precedent for the points actually considered and decided, and not for " '[q]uestions which merely lurk in the record . . . .' " *Cooper Industries, Inc. v. Availl Services, Inc.*, 543 U.S. __, 160 L. Ed. 2d 548, 561-562, 125 S. Ct. 577, 585-586 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Regardless of whether this Court is or is not obligated to follow *Avena* on the points it actually decided, it is certainly not bound on a point the ICJ did not rule on and apparently was not aware of.

V. Applicant has no legal basis for a claim that he is entitled to a second determination of prejudice.

As stated in this Court's order of June 22, 2005, the threshold question is "whether [applicant] meets the requirements for a consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Criminal Procedure."

There can be no doubt that Medellín does not qualify for paragraphs (a)(2) or (a)(3) of section 5. He is clearly guilty of a set of crimes so horrific, so brutal, and so despicable that it is difficult to imagine any jury answering the special issues in his favor. Instead, applicant claims that the factual and legal basis of his claim was unavailable. Subsequent Application at 25. The legal basis, he claims, is not

just the Vienna Convention, but also the *Avena* decision and the President's memorandum.

However, the new legal basis he claims, even if binding, would not be sufficient to entitle him to a subsequent petition. Nothing in the new authorities he cites entitles anyone to a *second* determination of prejudice from a violation of the Vienna Convention.

Applicant Medellín, with the active assistance of the Government of Mexico, submitted to the trial court the prejudice he believed the violation had caused. The trial court held that showing was insufficient in an alternative holding. Even when viewed in the rear view mirror of *Avena*, that decision was correct on the evidence submitted. No new authority entitles him to a second attempt.

Justice is already long overdue. The thoroughly deserved sentence for this unspeakable crime should be carried out as soon as possible.

CONCLUSION

The subsequent application for a post-conviction writ of habeas corpus should be denied.

August 31, 2005

Respectfully submitted,

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Criminal Justice Legal Foundation
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CERTIFICATE OF SERVICE

Pursuant to Texas Rule of Appellate Procedure 9.5, I certify that on August 31, 2005, the foregoing Brief Amicus Curiae of the Criminal Justice Legal Foundation was served by U.S. mail on the counsel for the parties, as follows:

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