

No. 04-5928

In the
Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

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

RESPONSE TO PETITIONER'S MOTION TO STAY

Petitioner asserts that the Court should stay this case while he pursues additional “review and reconsideration” of his conviction in Texas courts. Petitioner’s Motion to Stay (“Pet’r Mot.”), at 1, 3. Because the ultimate resolution of any such successive state habeas application (if and when it is filed) will not affect the legal issue presently before the Court—whether the court of appeals should have issued a certificate of appealability (“COA”) in Petitioner’s first federal habeas proceeding—the Court should deny Petitioner’s motion to stay.

1. Petitioner's Motion Does Not Provide Any Reason for the Court to Stay its Consideration of the Questions Presented in This Case.

This case concerns the denial of a COA following the denial of a federal habeas corpus petition. On May 20, 2004, the United States Court of Appeals for the Fifth Circuit denied Petitioner's request for a COA on his claim that his rights under the Vienna Convention on Consular Relations were violated. Appendix to the Petition ("P.A."), at 119a-135a. The court of appeals denied Petitioner's request for a COA because his Vienna Convention claim was procedurally defaulted under *Breard v. Greene*, 523 U.S. 371 (1998), and because, under Fifth Circuit precedent, Article 36 of the Vienna Convention conveys no judicially enforceable individual right. P.A., at 131a-133a.

Petitioner filed a petition for writ of certiorari challenging the court of appeals's denial of a COA and framing the questions presented as follows:

"On Petitioner's application for a certificate of appealability of the denial of his petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the LaGrand and Avena Judgments.

"1. In a case brought by a Mexican national whose rights were adjudicated in the Avena Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?"

"2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the LaGrand and Avena Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?" Pet., at i (first emphasis added).

On December 10, 2004, the Court granted certiorari.

Whether the International Court of Justice's ("ICJ") decisions in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 1 (Mar. 31) (No. 128) ("*Avena*"), and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), compel a COA in Petitioner's first federal habeas proceeding is the question squarely presented by this appeal. The parties and eighteen *amici curiae* have filed full merits briefing on that question (save Petitioner's Reply Brief), and it is a question unrelated to the resolution of any potential subsequent state habeas proceedings.

2. The Authority of the Presidential Determination of February 28, 2005, Is Not a Question Presented in This Case.

The Rules of this Court make clear that only those questions included in the petition for writ of certiorari are properly before the Court. Rule 14.1(a) provides, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein. *Only the questions set out in the petition, or fairly included therein, will be considered by the Court.*" SUP. CT. R. 14.1(a) (emphasis added). The Court will "disregard [this rule] 'only in the most exceptional cases,'" *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976)).

Petitioner's petition for certiorari framed the questions, necessarily, in terms of whether the court of appeals erred in denying him a federal COA. Indeed, the sole relief Petitioner requests in his brief on the merits is that this Court "reverse the judgment of the Court of Appeals and remand the case with instructions to issue a certificate of appealability" Pet'r Br., at 50.

In contrast, Petitioner's motion to stay is predicated entirely on a not-yet-filed successive state habeas application that Petitioner intends to file in light of the February 28, 2005, presidential determination concerning *Avena*. That determination states, in pertinent part: "I have determined . . . that the United States will discharge its international obligations under the decision of the [ICJ] in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in [*Avena*]." See Brief of the United States as Amicus Curiae Supporting Respondent ("U.S. Br."), at app. 2. The United States' amicus brief explains further that, in order to obtain "review and reconsideration" under the presidential determination, the 51 referenced Mexican nationals (including Petitioner) "may file a petition *in state court* seeking such review and reconsideration." U.S. Br., at 42 (emphasis added).

Whether the President has authority to issue such a broad "determination" is far from clear.¹ Indeed, the assertion that a two-paragraph memorandum to the Attorney General—which the United States concedes is not required by any federal treaty or statute, U.S. Br., at 10-38—by itself constitutes a "Law[]" of the United States" under the Supremacy

1. Although Respondent agreed that executive action provided a viable means for implementing *Avena*, Resp. Br., at 46-47, he did so only with respect to review efforts "within the Executive Branch," *id.*, at 47. Thus, were an Executive Order to provide an executive "review and reconsideration" panel for the 51 Mexican nationals referenced in *Avena*, and were the Executive then to formally request that any executive determinations of prejudice be given great weight in state clemency proceedings, the outcome would be a straightforward and plainly constitutional mechanism that could provide a remedy for Mexico's grievance (albeit in a different form than requested).

Clause or otherwise is somehow sufficiently authoritative to preempt longstanding state criminal laws of general applicability is utterly unprecedented.²

But, those novel questions of presidential authority are not presently before this Court. They will arise, if at all, in subsequent state habeas proceedings, where Petitioner (and presumably others of the 51 Mexican nationals referenced in *Avena*) can be expected to assert the preemptive force of the presidential determination. See Pet'r Mot., at 1,3. It will then be for the state habeas courts, in the first instance, to decide the determination's preemptive force, if any. Of course, those questions may ultimately return to this Court—through a petition for certiorari from one of those successive state habeas proceedings, or through a second federal habeas proceeding brought after a denial of successive state habeas. See U.S. Br., at 44 (“The state court judgments addressing those individuals’ claims would raise federal

2. None of the cases relied upon by the United States to support the asserted preemptive force of the presidential determination concern state criminal laws of general applicability. Rather, each addressed state legislation expressly designed to impinge on foreign affairs. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (California state law attempted to impose obligations on insurers related to failures to repay Holocaust survivors in conflict with executive agreements signed by the President with Germany and Austria); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (Massachusetts Legislature imposed by state statute more stringent sanctions on trade with Burma than the President, pursuant to express congressional authorization, subsequently chose to impose); *Zschernig v. Miller*, 389 U.S. 429 (1968) (Oregon inheritance statute allowing state courts to avoid recognizing foreign inheritance rights on the basis of a political evaluation of the foreign government was struck down as interfering with the federal government's ability to speak with a unitary voice). The fact that a state statute merely affects foreign nationals or interests, in and of itself, is not sufficient to find preemption by the political branches to facilitate foreign relations. See *Barclay's Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 318 (1994). And, here, the claimed authority is all the more extraordinary in that it commandeers state courts and directs them to set aside state criminal statutes in deference (in the interest of comity) to an ICJ decision that the Executive has simultaneously recognized misinterprets U.S. treaty obligations.

issues that are ultimately reviewable in this Court.”).³ The instant proceeding presents neither vehicle.⁴

3. Resolution of Any Subsequent State Habeas Proceeding Will Not Affect the Federal Question Presented in This Appeal.

Petitioner has cited no authority for the Court to stay its own proceedings while Petitioner pursues a separate, successive state habeas application. Any such stay would merely serve to prolong the time before Petitioner’s sentence—for a crime committed some twelve years ago—may be justly carried out. Petitioner’s rationale for requesting a stay of this appeal is expressed as follows:

“In the event the Texas state courts for any reason fail to give full effect to the *Avena* Judgment, Petitioner would have the right to seek enforcement of [*Avena*] in this Court by virtue of both its direct effect in the United States legal system—the issue raised by the questions on which this Court granted the petition—and the authority of the President’s determination.” Pet’r Mot., at 4.

Petitioner’s conclusion does not flow from his premises. Although future events might merit certiorari review of some not-yet-filed subsequent proceeding, nothing that might happen in such a proceeding will impact the federal issues presented in this appeal.

3. Of course, whether jurisdiction would lie to consider an appeal from a successive federal habeas petition is an entirely separate question, governed by the AEDPA. *See* U.S. Br., at 44 n.15 (“Any claims brought on federal habeas corpus, if the state courts denied relief, would have to satisfy the requirements of the AEDPA.”).

4. The Court has consistently waited until a question was “fully litigated below so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.” *Yee*, 503 U.S., at 538 (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) (“Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion.”)).

In the event that, pursuant to state law, a state court denies Petitioner “review and reconsideration” in some subsequent state habeas proceeding, that occurrence would not impact the validity of the court of appeals’s determination that a COA should not issue from the district court’s denial of first federal habeas. The latter question, presented in this appeal, is separate and distinct from what might occur in subsequent proceedings.

Conversely, should a state habeas court grant Petitioner “review and reconsideration,” although it would presumably moot this appeal, it would not affect the correctness *vel non* of the court of appeals’s original decision to deny COA. And, the prospect that future proceedings in another court might potentially moot an appeal by providing the desired relief does not justify a stay of a pending appeal.

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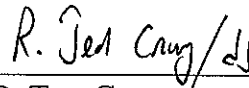
A possible successive state habeas application, which has not even been filed at this time, formed no part of the decision of the court of appeals or the questions presented in the petition for writ of certiorari. Any such state habeas proceeding is unrelated to the federal questions presented by this appeal. Those questions have been fully briefed and are ripe for this Court’s resolution. A holding that the AEDPA bars Petitioner’s COA, and that *Avena* did not overrule this Court’s decision in *Breard*, would remove any uncertainty in the law on these issues and address the questions directly presented by this appeal. Because the outcome of a subsequent state habeas proceeding would not impact those federal questions, Respondent respectfully requests that Petitioner’s Motion to Stay be denied.

Respectfully submitted,

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March 15, 2005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one true and correct copy of this Response to Petitioner's Motion to Stay was served via UPS (Next Day Air Delivery) and/or electronic mail, on March 15, 2005, to:

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