Nos. 08-5573, 08A98

In the Supreme Court of the United States

JOSÉ ERNESTO MEDELLÌN
Petitioner,
v.
STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari and Application for Stay of Execution to the Court of Criminal Appeals of Texas, and On Motion to Recall and Stay the Court's Mandate in *Medellìn v. Texas*

BRIEF IN OPPOSITION

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This is a capital case

QUESTIONS PRESENTED

In *Medellìn v. Texas*, 128 S. Ct. 1346 (2008), the Court held that neither the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), nor the Presidential Memorandum instructing state courts to give effect to the *Avena* decision, constitute "binding federal law." Accordingly, the Court ruled that the State of Texas may proceed with the execution of Petitioner José Ernesto Medellìn, which has been scheduled for Tuesday August 5, 2008, after 6:00 PM (CST).

1. Should the Court set aside its earlier ruling in *Medellìn*—and do so for some as yet undetermined period of time—based on the introduction of legislation by a member of the House of Representatives, when (1) Congress has taken no action in the more than four years following *Avena*, and (2) there is not a remote, much less reasonable, expectation that both Houses of Congress will approve the legislation?

2. Should the Court grant relief when Medellìn has already received the "review and reconsideration" required by *Avena*?

STATEMENT

Nothing of legal relevance has changed since this Court ruled less than five months ago that the State of Texas may proceed with the execution of José Ernesto Medellìn for his part in the gang rape and brutal murders of two Houston teenage girls in 1993. Medellìn seeks relief based not on a change in law, but on the introduction of legislation. Nothing in the Constitution, statute, or case law authorizes relief based on legislation that has been introduced but not enacted—especially not where Congress has taken no action in the over four years since *Avena*, and where there is no remote, let alone reasonable, expectation that both Houses of Congress will approve the legislation. Nor does any rule of law exist to determine how much (more) delay is needed to further confirm that no action is indeed forthcoming.

To hold otherwise would be to license a single member of the House of Representatives to enjoin the administration of criminal justice by a sovereign State. The Court has already held that the President of the United States, alone, cannot give domestic legal effect to *Avena* and override Texas law. *A fortiori*, one member of the House of Representatives cannot do so.

What's more, enactment of legislation giving domestic legal effect to *Avena* would have no impact on Medellìn's case in any event. The ICJ denied Mexico's request to nullify the convictions and sentences at issue in *Avena*. Instead, the

ICJ ordered the United States only to provide "review and reconsideration," "by means of its own choosing," to determine whether the Vienna Convention violation "actually prejudiced" anyone. As Texas has consistently represented to this Court since 2004, Medellìn has already received "review and reconsideration" of his Vienna Convention claim. In his first state habeas proceedings, both the trial court and the Court of Criminal Appeals found that Medellìn "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." App. Tab A, at 84a-85a; Tab B, at 33a. Similarly, a federal district court recognized that a Vienna Convention violation requires a showing of actual harm, Tab C, at 84A, and denied *Medellìn* habeas relief accordingly. This Court likewise observed that "Medellìn confessed within three hours of his arrest—before there could be a violation of his Vienna Convention right to consulate notification." *Medellìn v. Texas*, 128 S.Ct., at 1355 n.1. And just two weeks ago, a federal district court again noted that "no prejudice flowed from the alleged Vienna Convention violation." Pet. App., at 7a-14a. The relief sought by Medellìn is thus not only legally baseless but also futile in any event.

BACKGROUND

I. The Crime and Arrest.

This Court recited the relevant facts and procedural history in *Medellìn*. 128 S. Ct., at 1354-55. On June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were walking home when they encountered Medellìn and other members of the "Black and Whites" gang. Medellìn attempted to engage Elizabeth in conversation. When she tried to run, Medellìn threw her to the ground. Jennifer attempted to run back and help her friend, but was grabbed by other members of the gang. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, Medellìn and his fellow gang members murdered the girls and discarded their bodies in a wooded area. Medellìn was personally responsible for strangling at least one of the girls with her own shoelace.

Five days later, Medellìn was arrested. Within three hours of his arrest, and after receiving *Miranda* warnings, he signed a written waiver and gave a detailed written confession. Local law enforcement officers did not inform Medellìn that, as a Mexican national, he was entitled to notify the Mexican consulate of his detention within three days of his arrest, under the Vienna Convention on Consular Relations.

II. Criminal Proceedings and Habeas.

The relevant procedural history is likewise detailed in *Medellìn*. *Id.* at 1355-56. After his conviction for capital murder was affirmed on direct review, Medellìn invoked the Vienna Convention for the first time in his first application for state habeas relief. The trial court rejected the claim on two grounds. First, the claim was procedurally defaulted because Medellìn failed to invoke it at trial. Tab A, at 55a. Second, Medellìn was not entitled to relief in any event, because he "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." Tab A, at 57a. The Court of Criminal Appeals affirmed.

Medellìn then sought federal habeas relief. The district court held that the state court reasonably found that the Vienna Convention did not prejudice Medellìn's conviction and sentence. Tab C, at 82a-83a. While the case was pending at the U.S. Court of Appeals for the Fifth Circuit, the ICJ in *Avena* directed that the United States "provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the [affected Mexican] nationals," to determine whether the violation of the Vienna Convention "actually prejudiced" any of the nationals. *Avena*, ¶¶14, 121. The Fifth Circuit then denied a certificate of appealability. *Medellìn v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

This Court granted certiorari, but soon thereafter, the President issued a Memorandum to the United States Attorney General ordering state courts to give effect to the *Avena* ruling, based on the President's own authority. The Court subsequently dismissed the petition as improvidently granted. *Medellìn v. Dretke*, 544 U.S. 660, 672 (2005).

Medellìn sought habeas relief in state court pursuant to the President's Memorandum. The trial court denied relief, and both the Court of Criminal Appeals and this Court affirmed, holding that the President could not give domestic legal effect to *Avena* absent an act of Congress. Accordingly, the Court affirmed the judgment of the Court of Criminal Appeals allowing Medellìn's execution to proceed. *Medellìn*, 128 S. Ct. at 1372.

Medellìn subsequently filed habeas petitions in both federal and state courts, arguing that he should be given the opportunity to avail himself of any remedy that Congress might potentially provide in future legislation. The district court denied habeas relief, while noting that "no prejudice" flowed from any Vienna Convention violation. Pet. App., at 7a-14a . The Texas Court of Criminal Appeals held that Medellìn's claims were barred. Tab D, at 4.

REASONS TO DENY THE RELIEF REQUESTED

Medellìn seeks to delay the effect of this Court's decision in *Medellìn* by filing a petition for certiorari, a request that the Court withdraw its mandate,

an original petition for a writ of habeas corpus, and an application for stay of execution. The State of Texas opposes all of these requests for the reasons stated herein. (The State will respond to the procedural issues uniquely presented by the original petition for a writ of habeas corpus separately.)

I. THE COURT HAS ALREADY HELD THAT THE STATE OF TEXAS MAY PROCEED WITH THIS EXECUTION—A RULING THAT CANNOT BE UNDONE BY THE PRESIDENT, LET ALONE BY A SINGLE MEMBER OF CONGRESS.

In *Medellìn*, the Court held that neither the *Avena* decision nor the President's Memorandum prevents the State of Texas from proceeding with Medellìn's execution. Medellìn now contends that the Court should delay his execution because a member of the House of Representatives has introduced a bill that, if enacted, would enable him to obtain judicial review of his conviction and sentence for prejudice, in accordance with *Avena*. He further notes that a Texas senator has informed the press that he intends to introduce a bill providing a similar procedural option in state court. He does not contend, however, that any member of the U.S. Senate plans to introduce such legislation. Nor does he argue that either House of Congress is expected to approve it.

The substance of Medellìn's request for relief from this Court flows from the following extreme and unprecedented premise: that a single member of the House of Representatives can effectuate a stay of his execution by doing nothing more than introducing a bill—one that *might* someday impact his conviction and

sentence, but only *if* he can obtain the support of at least 217 other Representatives, a sufficient number of Senators to bring the bill to a vote and pass it, and the President, and even then, only *if* he can then convince a court (as he has repeatedly failed to do to date) that his denial of consular notification actually prejudiced him.

Medellìn makes this argument in the face of this Court's holding less than five months ago that the President alone cannot give legal effect to the *Avena* ruling. There is *a fortiori* no legal authority for the proposition that a single member of the House of Representatives may interfere with a sovereign State's implementation of its criminal laws, when even the President of the United States lacks the same power. *Cf. United States v. Ballin*, 144 U.S. 1, 7 (1892) ("Power is not vested in any one individual, but in [a majority of each House of Congress]"); *see also Raines v. Byrd*, 521 U.S. 811, 829 & n.10 (1997); *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring). The Court has already ruled, in effect, that nothing in the *laws* of the United States prevents the State of Texas from proceeding with Medellìn's execution. But if that is so, then surely Texas cannot be prevented from acting based on the mere possibility that legislation may someday ripen into valid law.

If the Due Process Clause did not prevent Texas from proceeding with Medellìn's execution the day after this Court decided *Medellìn v. Texas*, then

surely nothing has changed simply because a single legislator has introduced a bill a few months later. That is especially so given that Congress has taken no action in the over four years since the ICJ announced its decision in *Avena*, and given that there is no prospect of Congress taking any such action in the future.

What's more, Medellìn's theory of relief would inject profound instabilities into the judicial system. There is no reason to believe that either House of Congress will approve the legislation in *any* amount of time. No rule of law exists to determine how much time courts must give Congress, beyond the over four years that have already passed since *Avena*, before allowing Texas to proceed. No rule of law permits, let alone requires, courts to leave the State of Texas (not to mention the families and friends of the victims) in a state of limbo, based on nothing more than speculation about the future of the political process. Nor does any rule of law imposes any limits on Medellìn's theory of relief. Should this Court endorse Medellìn's theory of relief, nothing will stop future litigants from seeking similar redress based on any number of other proposals that have been introduced in Congress.

* * *

Medellìn falls far short of satisfying the legal standard for granting a stay of execution. He does not demonstrate the denial of a constitutional right that would become moot if he were executed. *See Barefoot v. Estelle,* 463 U.S. 880,

893-94 (1983). Indeed, Medellìn does not assert a constitutional right. Nor is there any support for granting Medellìn's extraordinary request to stay or withdraw the Court's mandate. *See Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("The sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforseen contingencies."). When a valid state-court judgment is involved, a federal court may not recall or withdraw its mandate absent a showing of actual innocence or fraud on the court. *Id.* at 558; *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944). Medellìn demonstrates neither. The Court has on occasion withdrawn its mandate in order to permit Congress to cure an unconstitutional enactment, without impairing the administration of the government in the interim. *See, e.g., N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 & n.40 (1982) (staying the mandate in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (adopting the same approach to allow the Federal Election Commission to continue operations). But it has never placed a criminal punishment on hold, in the absence of any unconstitutional enactment, in order to allow Congress to affirmatively enact entirely new legislation.

II. EVEN IF ENACTED, THE PROPOSED LEGISLATION WOULD NOT ALTER THE RESULT IN THIS CASE, BECAUSE MEDELLÌN HAS ALREADY RECEIVED THE REQUIRED "REVIEW AND RECONSIDERATION" AND HAS CONSISTENTLY BEEN FOUND TO HAVE SUFFERED NO PREJUDICE.

Medellìn's request for relief suffers from yet another defect—the legislation would not alter the result in his case, because he has already received the "review and reconsideration" required under the ICJ's ruling in *Avena*. Federal and state courts have repeatedly concluded that Medellìn was not "actually prejudiced" by the denial of timely consular notification. Medellìn first received review and reconsideration of his Vienna Convention claim in his first state habeas proceeding, when the trial court concluded that the violation did not impact the validity of his conviction or sentence. Tab A, at 57a. No court has ever disagreed with that determination. And the State of Texas has explained the implications of that holding at every stage of the proceedings involving Medellìn, including in this Court.[1]

In *Avena*, the ICJ specifically rejected Mexico's request to nullify all convictions and sentences arising from a violation of the Vienna Convention and instead ordered a more modest procedural remedy: that the United States

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1. In the first case heard by the Court, *Medellín v. Dretke*, the State addressed this issue both in its brief in opposition to certiorari, at 14-16, and in its merits briefing, at 15-17. In the second appeal, *Medellín v. Texas*, the State likewise addressed the issue both in its brief in opposition to certiorari, at 4-5, 12-14, and in its merits briefing, at 49-50.

provide, "by means of its own choosing," judicial "review and reconsideration" of the sentences and convictions of the named Mexican nationals. *See Avena*, at ¶¶14, 121-23, 153(9). The "review and reconsideration" would simply determine whether the denial of timely consular notification "caused actual prejudice to the defendant in the process of the administration of criminal justice." *Id.*, ¶121.

Medellìn has already received such "review and reconsideration," on multiple occasions, from multiple state and federal courts. In his First State Habeas Application, the trial court rejected his Vienna Convention claim on several grounds. The court addressed the merits of his claim, and concluded that the violation did not prejudice either his conviction or sentence:

> "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)." Tab A, at 57a.

Accordingly, the court concluded that Medellìn "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellìn] was provided with effective legal representation upon [his] request; and [his] constitutional rights were safeguarded." *Id.*, at 56a.

The Court of Criminal Appeals affirmed the trial court's order and likewise held that, even if there were a Vienna Convention violation, Medellìn was not prejudiced by it. Tab B, at 33a.

The federal district court reviewing Medellìn's first petition for federal habeas relief similarly considered, and rejected, his claim of prejudice:

> "Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, [Medellìn] would have to show concrete, non-speculative harm for the denial of his consular rights. . . . Medellìn contends that the Mexican Consul would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.
>
> . . . [Medellìn] has not shown that [the state court's] determination [concerning prejudice] was contrary to, or an unreasonable application of, federal law . . . . Medellìn's allegations of prejudice are speculative. The police officers informed Medellìn of his right to legal representation before he confessed to involvement in the murders. Medellìn waived his right to advisement by an attorney. Medellìn does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellìn would not have waived those rights as he did his right to counsel. Medellìn fails to establish a causal connection between the [Vienna Convention] violation and [his] statements." Tab C, at 84a-85a.

And just a few months ago, this Court likewise observed:

> "The requirement of Article 36(1)(b) of the Vienna Convention that the detaining state notify the detainee's consulate "without delay" is satisfied, according to the ICJ, where notice is provided within three working days. *Avena,* 2004 I.C.J. 12, 52, ¶ 97 (Judgment of Mar. 31). *See Sanchez-Llamas v. Oregon,* 548 U.S. 331, 362 [] (2006) (Ginsburg, J., concurring in judgment). Here, Medellìn

> confessed within three hours of his arrest—before there could be a violation of his Vienna Convention right to consulate notification." *Medellìn,* 128 S. Ct. at 1355 n.1.

See also id. at 1373 (Stevens, J., concurring) (noting "remote likelihood" that Medellìn suffered any prejudice).

In subsequent federal habeas proceedings, just two weeks ago, the district court remarked, again, that the issue of prejudice had been addressed by the trial court on first state habeas. Pet. App. at 7a-14a.

And just last week, the Court of Criminal Appeals again rejected Medellìn's claim for relief. Tab D, at 4. In a concurring opinion, Judge Cochran rejected Medellìn's claim of prejudice in rather pointed terms:

> "[T]here is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellin. This was a truly despicable crime committed by five truly brutal young men who were deadly dangerous to anyone who might find themselves near them. All five were sentenced to death by separate juries after hearing all of the evidence in each of their individual trials. No matter how long the courts of this state, this nation, or any other nation review, re-review, and re-review once again the disgusting facts of this crime and these perpetrators, the result should be the same: These juries reached a reasonable verdict, beyond a reasonable doubt, that a sentence of death was the only appropriate punishment under Texas law." Tab D, at 23-24 (Cochran, J., concurring).

In addition, Judge Cochran specifically addressed Medellìn's contention that a different, better lawyer, paid for by the Mexican consulate, could have introduced sufficient background, character, and "life history" evidence to

convince the jury that a life sentence, rather than the death penalty, was appropriate:

> "This argument might have some plausible intellectual appeal had just one, any one, of [Medellìn's] [four] cohorts not been sentenced to death despite the best efforts of their respective attorneys during their individual trials. [Medellìn] may or may not have been the ringleader of this gang, but he was, at minimum, fully and gleefully involved in the brutal rapes and murders of these two young girls. The evidence at trial showed that he bragged about his gory and sadistic exploits to his friends. The State also put on considerable evidence showing his prior violence and post-offense violence in jail. The jurors heard a great deal of evidence about [Medellìn's] extensive gang-related illegal activities before this crime and how he was expelled from school because of gang activities. No Officer Krupke would ever concluded that [Medellìn's] crimes and those of his cohorts were just the unfortunate product of a sad and sorry upbringing." Tab D, at 20-22 (Cochran, J., concurring).

In all of the numerous federal and state legal proceedings following the denial of Medellìn's first application for habeas relief, no court has ever disagreed with these conclusions. Medellìn has had the benefit of multiple habeas proceedings, and two proceedings before this Court—yet has never impeached the trial court's conclusions during first state habeas that he suffered no actual prejudice as a result of the Vienna Convention violation, either in conviction or in sentencing. There is no reason to believe that a specially-created procedure for raising the same arguments, based on the same evidence, seven years later would change the results of Medellìn's conviction and sentence.

Accordingly, nothing in the *Avena* ruling, as a matter of either U.S. or international law, stands in the way of the legal authority of the State of Texas to proceed with the execution of Medellìn.

* * *

As explained, proceeding with Medellìn's execution fully complies with international law. Moreover, this Court has already ruled that ICJ decisions are not U.S. law and therefore not binding in U.S. courts. Nevertheless, the State of Texas acknowledges the international sensitivities presented by the *Avena* ruling, as well as the observation of Justice Stevens in his concurring opinion that "[t]he cost to Texas of complying with *Avena* would be minimal." *Medellìn*, 128 S. Ct., at 1374-75 (Stevens, J., concurring).

For this reason, the State of Texas will take certain measures in future proceedings. Medellìn has already received review and reconsideration of his claims under the Vienna Convention. However, some defendants currently incarcerated in Texas and subject to *Avena* may not have received "review and reconsideration" of their claims of prejudice under the Vienna Convention on the merits. Accordingly, and as an act of comity, if any such individual should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing

court to address the claim of prejudice on the merits, as courts have done for Medellìn.

CONCLUSION

Medellìn's petition for writ of certiorari, motion to recall and stay the mandate, and application for stay of execution should be denied.

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