SUPREME COURT OF THE UNITED STATES

No. 04–5928

JOSE ERNESTO MEDELLIN, PETITIONER *v.* DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 23, 2005]

JUSTICE GINSBURG, with whom JUSTICE SCALIA joins as to Part II, concurring.

Petitioner José Medellín, a Mexican national, was arrested, detained, tried, convicted, and sentenced to death in Texas without being informed of rights accorded him under the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820. The Convention called for prompt notice of Medellín's arrest to the Mexican consul. Medellín could then seek consular advice and assistance.

After unsuccessful challenges to his conviction and sentence, first in state court, later in federal court, Medellín sought this Court's review. His petition for certiorari, which this Court granted, rests primarily on a judgment rendered by the International Court of Justice (ICJ) on March 31, 2004: *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 *(Avena)*. Medellín's petition also draws support from an ICJ judgment of the same order earlier rendered against the United States: *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*. The ICJ held in *Avena* that the failure to accord Vienna Convention rights to Medellín and other similarly situated

Mexican nationals necessitated review and reconsideration of their convictions and sentences by United States courts. Further, the ICJ specified, procedural default doctrines could not be invoked to bar the required review and reconsideration. Medellín sought certiorari on two questions: (1) Are courts in the United States bound by the *Avena* judgment; (2) Should courts in the United States give effect to the *Avena* and *LaGrand* judgments "in the interest of judicial comity and uniform treaty interpretation." Brief for Petitioner i.

On February 28, 2005, President Bush announced:

> "[T]he United States will discharge its international obligations under the decision of the International Court of Justice in *[Avena]*, by having State courts give effect to the decision in accordance with general principles of comity." Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a (hereinafter President's Memorandum).

Medellín thereupon moved to stay further proceedings in this Court pending his pursuit of remedies in Texas court, as contemplated by the President's Memorandum. I would grant Medellín's stay motion as the most conservative among courses the Court might take. That "least change" measure, however, has not garnered majority support.

I

The Court is divided between two responses to Medellín's petition in light of the President's Memorandum: (1) remand to the Court of Appeals for the Fifth Circuit for initial rulings on a host of difficult issues, *post*, at 13, 19 (O'CONNOR, J., dissenting), recognizing that court's prerogative to hold the case in abeyance pending Medellín's pursuit of relief in state court, *post*, at 20; or (2) dismiss the writ, recognizing that "in all likelihood" this

Court would be positioned "to review the Texas courts' treatment of the President's [M]emorandum and [the *Avena* judgment] unencumbered by the [threshold] issues that arise from the procedural posture of this action," *ante*, at 3–4, n. 1. The former course would invite the Fifth Circuit to conduct proceedings rival to those recently launched in state court, or to put the case on hold, a cautionary measure this Court itself is unwilling take. The latter would leave nothing pending here, but would enable this Court ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ's *Avena* judgment, shorn of procedural hindrances that pervade the instant action.

II

For the reasons stated below, I join the Court's election to dismiss the writ as improvidently granted in light of the President's Memorandum and the state-court proceeding instituted in accordance with that Memorandum. I do so recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings, and at that time, to rule definitively on "the Nation's obligation under the judgment of the ICJ if that should prove necessary." *Post,* at 2 (SOUTER, J., dissenting).

The principal dissent would return the case to the Fifth Circuit leaving unresolved a bewildering array of questions. See *post*, at 13 (opinion of O'CONNOR, J.) (describing issues not touched by this Court as "difficult"). Among inquiries left open "for further proceedings": Is a certificate of appealability (COA) available when the applicant is not complaining of "the denial of a constitutional right"? *Post*, at 6–7 (O'CONNOR, J., dissenting) (internal quotation marks omitted); cf. *ante*, at 5–6. What directions must a lower court take from *Teague* v. *Lane,* 489 U. S. 288 (1989), and perhaps from *Reed* v. *Farley*, 512 U. S. 339 (1994), and *Hill* v. *United States*, 368 U. S. 424 (1962)? *Post*, at 10–11 (O'CONNOR, J., dissenting); cf. *ante*, at 4. Is it open to a

lower court to resolve the "conflict between *Avena* and [this Court's] decision in *Breard* v. *Greene,* 523 U. S. 371, 376 (1998) *(per curiam)*"? *Post*, at 13 (O'CONNOR, J., dissenting).[1] Has Medellín exhausted state avenues for relief, see *ante*, at 6; *Rhines* v. *Weber*, *ante*, p. ___; *Rose* v. *Lundy,* 455 U. S. 509, 518–520 (1982); cf. *post*, at 11–12, n. 1 (O'CONNOR, J., dissenting), given that the *Avena* judgment and the President's response to it postdate the rejection of Medellín's pleas in Texas proceedings? While contentious preliminary issues clog final determination of Medellín's claim for federal habeas relief based on the ICJ's judgments, action by the Texas courts could render the entire array of questions moot. See *post*, at 3 (SOUTER, J., dissenting) ("[A]ction in the Texas courts might remove any occasion to proceed under the federal habeas petition.").

Further, at odds with the President's determination to "give effect to the *[Avena]* decision in accordance with general principles of comity," President's Memorandum, and in conspicuous conflict with the law of judgments, see Restatement (Second) of Conflict of Laws §98 (1988); Restatement (Third) of Foreign Relations Law of the United States §481 (1986); Restatement (Second) of Judgments §17 (1980), the principal dissent would instruct the Court of Appeals to "hol[d] up the *Avena* interpretation of the [Vienna Convention] against the domestic court's own conclusions." *Post*, at 13 (opinion of O'CONNOR, J.). But cf. ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute §2, Comment *d,* p. 38 (2005) ("[A] judgment entitled to recognition will not be reexamined on the merits by a second court."). It is the long-recognized general

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[1] See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.,* 490 U. S. 477, 484 (1989) (cautioning lower courts against disturbing this Court's decisions). But cf. *post*, at 2 (SOUTER, J., dissenting).

rule that, when a judgment binds or is respected as a matter of comity, a "let's see if we agree" approach is out of order. See *Hilton* v. *Guyot,* 159 U. S. 113, 202–203 (1895) (where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact"); see also Restatement (Second) of Conflict of Laws §106 (1969) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment . . . ."); *id.*, §106, Comment *a* ("Th[is] rule is . . . applicable to judgments rendered in foreign nations . . . ."); Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 789 (1950) ("[Foreign] judgments will not be denied effect merely because the original court made an error either of fact or of law.").[2]

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[2]The principal dissent maintains that the second question on which we granted certiorari asks "whether and what weight [short of binding effect] American courts should give to *Avena*," in the course of independently interpreting the treaty, "perhaps for sake of uniform treaty interpretation." *Post*, at 13 (opinion of O'CONNOR, J.); see *post*, at 13–14, and n. 2 (same). Significantly, Medellín chose not to break out for discrete review in this Court questions underlying and subsumed in the ICJ's judgments in *Avena*, 2004 I. C. J. No. 128 (Judgment of Mar. 31), and *LaGrand*, 2001 I. C. J. 466 (Judgment of June 27), *i.e.*, whether the Vienna Convention "creates a judicially enforceable individual right" and whether it "sometimes requires state procedural default rules to be set aside so that the treaty can be given 'full effect,'" *post*, at 1 (O'CONNOR, J., dissenting). Nor does Medellín's invocation of "international comity," Brief for Petitioner 45, or his plea for "uniform treaty interpretation," *id.*, at 48, seek this Court's independent interpretation of the Convention. Instead, he urges that comity is accorded, and uniformity achieved, by recognizing as authoritative the ICJ's interpretation as elaborated in successive judgments against the United States. See *id.*, at 49 ("Given its consent to the ICJ's jurisdiction, the United States should treat as authoritative *any* interpretation or application of the Convention by that court."); see also Reply Brief 16 (observing that the United States "agreed that the ICJ would have *final* authority to

Troubling as well, the principal dissent provides no clear instructions to the Court of Appeals on which of the several questions the dissenters would remit to that court comes first, which others "should be part of" the COA determination, *post*, at 11 (opinion of O'CONNOR, J.), and which are meet for adjudication only if, as, or when a COA is granted. The participation of a federal court in the fray at this point, moreover, risks disturbance of, or collision with, the proceeding Medellín has commenced in Texas. The principal dissent appears ultimately to acknowledge that concern by observing that the Fifth Circuit might "hold the case on its docket until Medellín's successive petition was resolved in state court." *Post*, at 20 (opinion of O'CONNOR, J.); see also *post*, at 3 (SOUTER, J., dissenting); *post*, at 3 (BREYER, J., dissenting). But given this Court's unwillingness to put the case on hold here, one might ask what justifies parking the case, instead, in the Court of Appeals.

The *per curiam* opinion which I join rests on two complementary grounds. First, the Texas proceeding "may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding." *Ante*, at 1. Second, the instant proceeding comes to us freighted with formidable threshold issues, *ante*, at 4–6, that deter definitive answers to the questions presented in the petition for certiorari.

Petitioner's recent filing in the Texas Court of Criminal Appeals raises two discrete bases for relief that were not previously available for presentation to a state forum: the ICJ's *Avena* judgment and the President's Memorandum. See Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex Parte Medellín,* Trial Cause Nos. 67,5429 and 67,5430 (Tex. Crim. App.), p. 13 (filed Mar.

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resolve disputes over the treaty's interpretation and application" (emphasis added)).

24, 2005). ("President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law."). The Texas courts are now positioned immediately to adjudicate these cleanly presented issues in the first instance. In turn, it will be this Court's responsibility, at the proper time and if need be, to provide the ultimate answers.