

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2002 TERM

JAVIER SUÁREZ MEDINA

Petitioner

vs.

STATE OF TEXAS

Respondent

On Petition for a Writ of Certiorari to
the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

EXECUTION DATE: AUGUST 14, 2002

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QUESTIONS PRESENTED

- I. In the *LaGrand Case*, the International Court of Justice (ICJ) issued a binding judgment regarding the application of article 36 of the Vienna Convention on Consular Relations. In light of the court's decision:
 - A. Did the Texas court's invocation of a procedural bar violate the United States' obligation to give "full effect" to the rights provided under article 36?
 - B. Is petitioner entitled to a judicial remedy for the violation of his rights to consular notification and access?
- II. When the United States has expressly consented to the jurisdiction of the International Court of Justice to resolve treaty disputes, are the lower courts of the United States bound, under the Supremacy Clause of the United States Constitution, to consider and apply the ICJ's rulings?
- III. The State of Texas gratuitously scheduled fourteen execution dates over a span of thirteen years in Mr. Suárez Medina's case. When all but one of those dates were imposed as a surrogate for filing deadlines and served no penological purpose, did the State of Texas violate Mr. Suárez Medina's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the U.S. Constitution?

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APPENDIX & EXHIBITS

Appendix 1: *Medina v. State*, No. 37,792-02 (Tex. Crim. App., August 12, 2002) (opinion on successor application for writ of habeas corpus)

Exhibits: A volume of separate exhibits was sent by federal express to the Court, c/o Cynthia Rapp, on August 6, 2002, together with the Successive Application Writ of Habeas Corpus filed in the Texas Court of Criminal Appeals. The exhibits referred to herein can be found in that separate exhibits volume.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINION BELOW

The opinion of the highest state court, the Texas Court of Criminal Appeals, to review the successive application for writ of habeas appears in *Javier Suárez Medina v. State of Texas*, No. 37,792-02 (Tex. Crim. App. August 12, 2002) and is attached as Appendix 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Constitution, U.S. Const. art. VI, which provides:

This constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const. amend. VI, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted

U.S. Const. amend. XIV, § 1, which provides

No State shall ... deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Procedural History

On May 24, 1989, Javier Suárez Medina (“Suárez Medina”) was convicted of the murder of Lawrence Cadena. On June 5, 1989, he was sentenced to death by lethal injection. Suárez Medina’s conviction was affirmed on direct appeal in an unpublished opinion, *Medina v. State*, No. 70,892 (Tex. Crim. App., delivered May 5, 1993). Brice Cunningham, who had represented Mr. Suárez Medina at trial, continued to represent him on direct appeal. Although Mr. Cunningham promised to file a petition for writ of certiorari with the Supreme Court, he failed to do so.¹ On September 16, 1998, the Texas Court of Criminal Appeals denied relief following the filing of a Post Conviction Application for Writ of Habeas Corpus.

¹ Although Mr. Cunningham received assistance from *pro bono* attorneys who helped prepare the petition for writ of certiorari, he inexplicably failed to file it.

On May 15, 2001, the federal district court denied habeas relief. *Medina v. Johnson*, No. 3:98-CV-2511-D (N.D. Tx. May 15, 2001). On January 16, 2002, a panel opinion of the Fifth Circuit Court of Appeals denied a Certificate of Appealability. *Medina v. Cockrell*, No. 01-10763 (5th Cir. Jan 16, 2002). On February 26, 2002, the court denied a petition for rehearing and rehearing en banc. *Medina v. Cockrell*, No. 01-10763 (5th Cir. Feb. 26, 2002). The Supreme Court denied certiorari on June 28, 2002. *Medina v. Cockrell*, ___ U.S. ___, 122 S. Ct. 2693 (2002). On August 6, 2002, Medina filed a successor Application for Writ of Habeas Corpus in the Texas Court of Criminal Appeals. This petition for writ of certiorari follows.

Statement of Facts

A. Evidence Produced at Trial

Javier Suárez Medina was convicted of capital murder for the December 13, 1988 shooting death of Lawrence Cadena, an undercover Dallas police officer. According to the trial evidence, the plainclothes officer was shot while on an undercover “buy-bust” operation, in which Mr. Cadena was posing as a drug dealer. After Mr. Suárez Medina threw a bag of white powder into Cadena’s car, he shot at the officer and killed him. A police officer who had observed the drug transaction from his undercover vehicle fired back at Mr. Suárez Medina, hitting him twice.

From his hospital bed, Mr. Suárez Medina admitted to the shooting but insisted that he fired only because he feared for his own life, after hearing two gunshots. Because Mr. Suárez Medina was not aware that Mr. Cadena was a police officer, the state

was unable to seek the death penalty under Texas Penal Code 19.03(a)(1). Instead, prosecutors indicted Mr. Suárez Medina for felony murder, based on his admission that others present at the crime scene had intended to rob Cadena after delivering the narcotics. On May 24, 1989, following a highly publicized trial, the jury found him guilty of capital murder.

Although there was strong evidence that Mr. Suárez Medina had shot and killed Officer Cadena, he could not be sentenced to death unless the jury unanimously concluded that he would be a “future danger” to society. In this case, however, the prosecution’s case for Mr. Suárez Medina’s “future dangerousness” was virtually non-existent, consisting mostly of evidence that he had trespassed on school property and was once found joyriding in a stolen car with three other people. Mr. Suárez Medina had never been charged, let alone convicted, for a crime of violence.

After both sides had already concluded their sentencing phase presentations, the prosecution suddenly produced a surprise witness, Michael Mesley. (S.F. 9: 2246-50). Mr. Mesley came forward after he saw television coverage of jury selection in the trial. (S.F. 10: 2251-55). Over the strenuous objections of the defense, he was allowed to testify that Mr. Suárez Medina had shot him and his wife in 1987. (S.F. 9: 2247). He swore that he recognized the defendant from a televised photo as the same man who fired a shotgun in his face during a robbery, also injuring his wife in the head and leaving her with permanent disfiguring injuries. (S.F. 10: 2251-2280). Mr. Mesley swore that he positively identified Mr. Suárez Medina, even though he also testified the man he saw had no glasses and that Mr. Suárez Medina had “shaved” since the incident. (S.F. 10:

2256-57).

Given only days to confront this crucial testimony, the defense produced Mr. Suárez Medina's employment records from a Burger King restaurant, proving that he was working on the night of the Mesley shooting and did not "punch out" until nearly two hours after the shooting. (S.F. 10: 2324-26). However, the prosecution implied that another employee could have punched out for him – even though there was absolutely no evidence to support this assumption. (S.F. 10: 2331-33). The jury was not instructed to apply or consider any standard of proof when weighing the Mesley testimony, nor did the defense request such an instruction. The defense did not present or seek to present expert rebuttal testimony on the inherent unreliability of the Mesley identification. Despite Mr. Suárez Medina's alibi, the jury returned a death sentence based on Mr. Mesley's testimony.

B. The Violation of the Vienna Convention

Although the arresting authorities were aware from the outset that Javier Suárez Medina is a Mexican national, he was never informed of his right to consular notification and assistance pursuant to article 36 of the Vienna Convention on Consular Relations. The authorities failed to notify Mexican consular officials of Mr. Suárez Medina's detention, and defense counsel likewise neglected to seek consular assistance.

During his statement to the police on the day following his arrest, Mr. Suárez Medina informed the interrogating officer that he was born in Piedras Negras, Mexico. Exhibit LL at 9 (Statement given by Javier Suárez Medina to police on December 14,

1988). Mr. Suárez Medina was also carrying a “green card” in his wallet (the identification card issued to resident aliens by the United States Immigration and Naturalization Service), which was confiscated by the police when he was arrested. Exhibit A (Affidavit of Javier Suárez Medina).²

Shortly after Mr. Suárez Medina’s arrest, Mexican consular officials learned of the case through media reports. Exhibit C (Affidavit of Oliver Albert Farres Martins). Concerned that Mr. Suárez Medina could be a Mexican national, they contacted the Dallas County district attorney’s office and requested verification of Mr. Suárez Medina’s nationality. *Id.* They were informed that he was a Cuban national. *Id.* Relying on this misinformation, consular officials were left with the mistaken belief that Mr. Suárez Medina was not eligible for their assistance. Many months later, during a television broadcast of trial coverage that included a statement by Mr. Suárez Medina, consular officials observed that Mr. Suárez Medina spoke with a Mexican accent. *Id.* Once again, the consulate contacted the local authorities and once again they were rebuffed; this time, they were told that Mr. Suárez Medina’s nationality was “unknown.” *Id.* On June 2, 1989, consular officials contacted defense counsel, who informed the consulate that they were uncertain of Mr. Suárez Medina’s nationality. *Id.*

On Monday, June 5 – the date Mr. Suárez Medina was sentenced to death – consular officials once again contacted the police department and the office of the district

² Mr. Suárez Medina’s death row committal form clearly indicates his “native county” as Piedras Negras, Mexico, *see* Texas Department of Criminal Justice, Death Row Statistics, <http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/medinajs.jpg> (last visited July 30, 2002), and the Texas Department of Criminal Justice lists him as a Mexican national. Texas Department of Criminal Justice, Citizenship of Offenders on Death Row, <http://www.tdcj.state.tx.us/stat/nationalities.htm> (last visited August 6, 2002).

attorney regarding Mr. Suárez Medina. This time, consular officials were told that Mr. Suárez Medina was either Cuban or Colombian. *Id.* Still the consulate persisted, finally verifying his Mexican nationality through records of the Immigration and Naturalization Service. Three days after the death sentence was imposed, consular officials visited Mr. Suárez Medina for the first time. *Id.*

1. Mitigating Evidence Discovered With Mexico’s Assistance

Since Mr. Suárez Medina’s death sentence was imposed, the Government of Mexico has been actively involved in Mr. Suárez Medina’s defense. *See* Exhibit B (Affidavit of Juan Manuel Gomez Robledo). Consular officials have maintained close contact with Mr. Suárez Medina and with defense counsel, regularly informing them of significant legal developments. *Id.* Moreover, Mexico has invested substantial resources in his defense. For example, Mexico has retained counsel to assist Mr. Suárez Medina’s lawyer in developing legal claims. *Id.* In addition, Mexico has retained an investigator and two mental health experts, all of whom have uncovered a substantial amount of mitigating evidence that was never presented at trial. *See* Exhibits E (Affidavit of Dr. Ricardo Weinstein); F (Affidavit of Dr. Gilda Kessner); and MM (Affidavit of Tena Francis).

Tena Francis, an investigator and mitigation specialist, was retained by the Government of Mexico to supervise and conduct a mitigation investigation in this case. In her affidavit, Ms. Francis summarized the results of her investigation. Exhibit MM. She noted that Mr. Suárez Medina grew up in a Spanish-speaking home, and spent his early childhood in Mexico. When his mother left her native country to look for work in

the United States, she left Javier in the care of her abusive, alcoholic father who subjected Javier to repeated whippings. His biological father abandoned him at an early age. When Javier was finally brought to the United States to live with his mother and stepfather, his life was chaotic and disorganized, characterized by frequent moves and several deportations to Mexico. *Id.*

Dr. Ricardo Weinstein, a clinical neuropsychologist, reported that the psychological effects of this environment were devastating:

Not only was the family very poor, but the constant threat of deportation had a profoundly destabilizing impact on Javier's childhood. His life was thrown into chaos several times when one or both of his parents were deported. The INS would raid the restaurant where Guadalupe and Samuel worked. Whoever could not escape out a back door ended up on bus for Mexico. Neighbors would take in the children until the family was able to reorganize. Sometimes, the family would lose their home while the parents tried to return from Mexico. At times they lost their personal property as well. Often, a neighbor or friend could go into the family home and remove some of the family's more prized possessions, like photographs.

On at least two occasions, the children were deported with the parents. Javier's sisters describe staying with their great-aunt for a period of a few months up to a year while the family recovered from one of these deportations. Although the parents were able to return to Dallas, they left several of the children (including Mr. Suárez Medina) with Guadalupe's aunt, while they tried to get their finances in better shape. They sent money to the aunt for the children's care, then eventually were able to move all the children back to Dallas. This aunt is described as abusive and neglectful. She made the children go without food, and would send them to school without lunch. The children were required to walk to school, but she would drive her daughter to the same school. This aunt was easily angered and would beat the Medina children with a belt, leaving welts on their bodies.

Exhibit E (Affidavit of Ricardo Weinstein, Ph.D.)

Dr. Weinstein conducted a two-day neuropsychological evaluation of Mr. Suárez Medina. He discovered that Mr. Suárez Medina had been exposed to dangerous neurotoxins as a child, when he worked on a family farm. He experienced several head injuries. In school, he had difficulty learning, and as a result was enrolled in special education classes. After conducting a series of neuropsychological batteries, Dr. Weinstein concluded that Mr. Suárez Medina suffered from a variety of mental impairments, including mild to moderate brain damage, learning disabilities, and attention deficit disorder. “Mr. Suárez Medina could not process information mentally, could not do simple arithmetic calculations, was unable to spell words backwards or to recall a short paragraph, and could not follow simple sequential instructions.” *Id.*

Dr. Weinstein also concluded that Mr. Suárez Medina suffers symptoms consistent with Post Traumatic Stress Disorder (PTSD):

Throughout his childhood and adolescence, Mr. Suárez Medina experienced several traumatic events. The effect of his family’s frequent deportation cannot be underestimated. In addition, he was the victim of numerous beatings by other teenagers at his school. In his late teens, he witnessed the drive-by shooting of an acquaintance at a party. Mr. Suárez Medina was standing only twenty feet away when unknown assailants drove by and shot the victim, killing him. Following these incidents, Mr. Suárez Medina experienced repeated nightmares and feelings of disassociation.

Id.

The significance of these impairments cannot be overstated, particularly when viewed in light of the facts of the crime. Dr. Weinstein observed:

It is my opinion that Mr. Suárez Medina suffered from mental impairments, including post-traumatic stress disorder, attention

deficit disorder, learning disabilities, and brain dysfunction, that affected his behavior at the time he killed Larry Cadena. Mr. Suárez Medina has consistently maintained that he shot Officer Cadena without premeditation or volition, after hearing a loud noise which he took to be a gunshot. This description of the event is consistent with an exaggerated acoustic startle response, one of the classic symptoms of Post-Traumatic Stress Disorder (PTSD).

The potential significance of sudden loud noises in triggering acute stress disorder has long been recognized. Indeed, PTSD is now the only anxiety disorder in which hyperstartle is listed as a core symptom, according to the DSM-IV.

His organic deficits would also have hampered his judgment. It is noteworthy that Mr. Suárez Medina was only 19 years old at the time of the crime. Research has shown that the brain, particularly in young males, does not finish growing until well into the early 20s. A nineteen year old male's brain is simply not fully developed, compromising impulse control and affecting social behavior and judgment. These deficits provide, at minimum, an explanation for his actions on the night of the crime.

Id.

Ms. Francis elaborated further on the impact this evidence would have had on the jury:

Evidence of Mr. Suárez Medina's mental impairments and deficits is important for several reasons. First, it provides a mitigating explanation for his conduct on the night of the offense. Apart from this incident, Mr. Suárez Medina had absolutely no history of violent behavior. Yet this offense was unquestionably brutal. Without an adequate explanation for the crime, the jury could, mistakenly, believe that Mr. Suárez Medina was simply a brutal killer who was capable of controlling himself – as demonstrated by his otherwise peaceful life – but who deliberately chose to commit an act of great violence.

Exhibit MM (Affidavit of Tena Francis).

Dr. Gilda Kessner, a psychologist retained by the Government of Mexico,

concluded in this evaluation, finding that the defense failed “to clearly identify the deficits and damaging developmental experiences suffered by Mr. Medina, [and failed] to provide a meaningful explanation of the impact of those experiences.” Dr. Kessner listed the following factors that should have been developed and presented at Mr. Suárez Medina’s capital sentencing trial:

- Mr. Medina’s premature birth and birth complications
- Cephalic malformation at the time of his birth
- Mr. Medina’s illness in infancy
- Childhood exposure to neurotoxins
- Born into poverty and dysfunctional family
- Head injuries as a child and adolescent
- Early childhood separation from mother and abandonment by biological father
- Living with maternal grandfather who was violent and alcoholic
- Childhood abuse and trauma exposure
- Absent or inadequate medical care
- Poverty and upheaval through deportation
- Separation when parents were deported
- History of special education
- Negative peer pressure from gangs
- Adolescent exposure to neurotoxins
- Mild to moderate brain impairment
- Learning disabilities
- Attention deficit disorder

Id. The defense explored none of these factors.

Dr. Kessner also conducted a detailed evaluation of the testimony of Dr. Robert Powitsky, the psychologist who testified for the defense at the penalty phase of trial. *Id.* Dr. Kessner found that Dr. Powitsky

failed to make use of readily available data regarding the rates of violence for capital offenders, leaving him vulnerable and unprepared for a highly effective cross examination. As a result, the jury who sentenced Mr. Suárez Medina to death was deprived of critical and highly compelling information that had direct bearing on their answer to one of the Texas “special issues.”

Exhibit F (Affidavit of Dr. Gilda Kessner). In particular, Dr. Powitsky failed to provide the jury with readily available data demonstrating that capital offenders rarely commit crimes in prison. *Id.* Moreover, he failed to describe the context of the structured and intensively supervised prison environment in which Mr. Suárez Medina would be confined if sentenced to life. As Dr. Kessner notes, there was “extensive conceptual and research literature available in 1989 that could have been presented at sentencing” in this regard. *Id.*

Among many other deficiencies, Dr. Powitsky also failed to discuss information on the effects of aging on violence and criminality. As Dr. Kessner points out, “[p]rogressive aging is well established as a significant factor” in reducing the likelihood of criminal violence, and is “one of the most robust and accepted tenets in criminology.” In her opinion, risk estimates that fail to address this data are “fundamentally flawed.” *Id.*

2. New Evidence Relating to the Mesley Shooting

Since Mr. Suárez Medina's death sentence was imposed, there have been hundreds of documented cases of misidentification by eyewitnesses. Scientists who study memory, such as Dr. Geoffrey Loftus (whose affidavit on the Mesley testimony is attached) have established that an identification such as that made by Mr. Mesley is inherently unreliable -- although such testimony may have a persuasive effect on a jury if not vigorously challenged. As noted above, defense counsel made no attempt to retain expert witnesses to assess or testify to the credibility of the Mesley identification.

Mexico, through its counsel, was able to obtain Dr. Loftus' declaration as additional evidence of Mr. Suárez Medina's innocence of the Mesley shooting.

The testimony of a memory expert would have undoubtedly greatly diminished the impact of the Mesley testimony. To quote from Dr. Loftus' declaration:

There are a number of factors present in Mr. Mesley's identification of Mr. Medina as the person who shot him that support the conclusion that Mesley's identification of Medina, no matter how sincerely Mesley believes he is correct, is false. Mr. Mesley viewed the person who shot him for a short period of time, much less than a minute. The event was, to say the least, enormously stressful. Mr. Mesley and Mr. Medina come from different racial backgrounds, increasing the likelihood of a mistaken identification. Shortly after the shooting, when the event was freshest in his mind, Mr. Mesley was able to give only the briefest description of the person who shot him, a description almost devoid of facial features.

Nearly two years passed from the time that Mesley was shot to the time that he identified Medina as the person who shot him. Obviously, Mesley's memory would have dimmed significantly during this time. Contrary to popular opinion, such events are not "stamped" or "branded" into memory. Finally, Mr. Mesley identified Mr. Medina as the person who shot him only after a highly suggestible situation (seeing Medina on television described as a man who shot and killed a police officer) and shortly thereafter being shown a photo montage containing a photograph of the man he saw on television.

Dr. Loftus' conclusion on the effect of the Mesley testimony on the jury is equally noteworthy:

There are also persuasive reasons to conclude that Mr. Medina's jury believed Mr. Mesley's testimony. Studies prove that juries tend to believe that a witness who is confident is also correct. Mr. Mesley repeatedly told Mr. Medina's jury that he was sure that Medina shot him. However, confidence does not necessarily correlate with accuracy.

In summary, the declaration of Dr. Loftus, when viewed in tandem with the uncontroverted proof of Mr. Suárez Medina’s alibi, strongly supports a conclusion in this case that Mr. Medina was sentenced to death by a jury who based its decision on evidence of a crime that he did not commit.

C. Death Row Incarceration and Multiple Execution Dates

From 1995 to 2002, the state fixed fourteen execution dates for Mr. Suárez Medina.

<u>Scheduled Execution Dates</u>	<u>Stays Received</u>
January 18, 1995	January 9, 1995
July 12, 1995	May 11, 1995
August 15, 1995	July 31, 1995
November 2, 1995	October 30, 1995
March 1, 1996	February 22, 1996
May 31, 1996	May 23, 1996
August 29, 1996	August 27, 1996
December 10, 1996	December 4, 1996
May 14, 1997	April 16, 1997
September 16, 1997	September 8, 1997
December 9, 1997	December 1, 1997
March 18, 1998	March 3, 1998
June 15, 1998	June 5, 1998
August 14, 2002.	

In February 1994, while Mr. Suárez Medina was still without legal counsel, the state trial court ordered that his execution be carried out on January 18, 1995.¹ In early January, prison officials gave Mr. Suárez Medina a form to fill out, specifying the means in which they should dispose of his bodily remains. Mr. Suárez Medina requested that his mother receive his remains, and asked that his mother, stepfather, and sister witness his execution. Exhibit R. On January 6th, 1995, he filed a motion for

appointment of counsel in the trial court, and requested that his execution be stayed.¹ The district court issued a stay on January 9, 1995, appointed post-conviction counsel, and ordered that the execution be carried out on July 12, 1995. Exhibit S.

On May 11, 1995, the court modified the execution date to August 15, 1995. Exhibit T. One month later, on June 13, 1995, counsel filed a state habeas corpus petition and requested a stay of execution on Mr. Suárez Medina's behalf. It is unclear whether Mr. Suárez Medina received notice of the court's May 11 order staying his July 12 execution date. On June 27, 1995, prison officials requested that he fill out a form clarifying that he still wished for his remains to be sent to his mother. Exhibit U.

On July 31, 1995, the court rescheduled Mr. Suárez Medina's execution for November 2, 1995. Exhibit V. On October 25, 1995, prison authorities again asked Mr. Suárez Medina how they should dispose of his remains. Again, Mr. Suárez Medina requested that his mother receive them. This time, he requested that no one witness his execution, and told prison officials to spend the three cents remaining in his inmate trust account. Exhibit W. On October 30, the court entered a stay, and rescheduled the execution for March 1, 1996. Exhibit X. On February 16, he requested that Chaplain Lopez witness his execution. Exhibit Y.

On February 22, his execution was once again stayed, and rescheduled for May 31, 1996. Exhibit Z. On May 14, Mr. Suárez Medina asked that his remains be delivered to his mother, and requested no witnesses to his execution. Exhibit AA. On May 23, one week before the execution, the court entered a stay and set a new execution date of August 29, 1996. Exhibit BB. On August 13, Mr. Suárez Medina requested that

his remains be delivered to his mother. Two days before the execution, the court once again rescheduled the execution date for December 10, 1996 – his eighth execution date in two years. Exhibit CC. On December 2, he filled out a three-page form detailing the disposal of his body and meager possessions. On December 4, six days before the execution, the court once again rescheduled the date for May 14, 1997. Exhibit DD.

On December 9, 1997, beginning at 6:15 a.m., the prison placed Mr. Suárez Medina on “death watch,” apparently because prison officials did not receive notice of the stay. Exhibit EE. Death watch is the prison’s countdown to execution. Each time an inmate is placed on death watch, he is moved to a special cell where he is under constant observation. Prison guards remove all of the prisoner’s personal property, with the exception of writing materials, a coffee maker, and a mug. Prison officials finally received confirmation of the stay of execution at 10:30 a.m. on December 9, and ended the death watch. *Id.*

The May 14 date was then rescheduled for September 16, 1997. On September 8, the court rescheduled Mr. Suárez Medina’s execution for December 9, 1997. Exhibit FF. On December 1, 1997, the court once again rescheduled Mr. Suárez Medina’s execution for March 18, 1998. Exhibit GG. The date was then re-set for June 15, 1998. On June 2, the prison once again approached Mr. Suárez Medina regarding his burial plans; this time, Mr. Suárez Medina requested that his remains be released to his stepfather, Samuel. Exhibit HH. Meanwhile, defense counsel appealed the trial court’s decision to the Texas Court of Criminal Appeals, and the execution date was withdrawn on June 5, 1998. Exhibit II. On September 16, 1998, the Texas Court of Criminal

Appeals adopted the trial court's findings in a one-page order.

This reprieve lasted approximately three and a half years, during which time Mr. Suárez Medina unsuccessfully appealed his conviction in federal post-conviction proceedings. Mr. Suárez Medina's fourteenth execution date has been scheduled for August 14, 2002. Exhibit JJ.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflict Between the Decision of the International Court of Justice in the *LaGrand Case* and the Decisions of this Court in *Breard* and *LaGrand*.

This Court has yet to articulate a clear position on the enforceability of individual Article 36 claims. Although the Court addressed Article 36 in *per curiam* opinions in *Breard v. Greene*, 523 U.S. 327, 375-378 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999), both cases arose in the context of a provisional order of the International Court of Justice (ICJ). One year ago, the ICJ issued its decision in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. (Judgment of June 27, 2001) ("*LaGrand*"). Prior to the ICJ's resolution of the issue in *LaGrand* there had been considerable debate over the binding effect of ICJ *provisional* measures, *LaGrand* ¶ 110, although it was accepted that a final judgment of the ICJ was binding even though a provisional order might not be.³ See ICJ Statute art. 65-68 (delineating the jurisdiction and substance of advisory opinions).

³ In addition, neither *Breard* nor the Supreme Court *per curiam* in *LaGrand* was a signed opinion resulting from the Court's normal briefing, argument and deliberations process. The Court itself noted in *Breard* that "[i]t is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier." *Breard*, 523 U.S. at 378. The Court maintained that it was

It is time for this Court to resolve the conflict between the decision of the International Court of Justice and the decisions of the this Court and the lower courts regarding the interpretation of article 36. The case has undeniable importance for the enforcement of the Vienna Convention worldwide. Moreover, should the Court fail to review this case, it will simply encourage sovereign nations to engage in repetitive litigation against the United States in the International Court of Justice.

A. Article 36 of the Vienna Convention on Consular Relations Provides Foreign Nationals Who are Detained by State or Federal Authorities the Rights to Consular Notification and Assistance.

Both the United States and Mexico are parties to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (“Vienna Convention”). Article 36 of the Vienna Convention requires that nationals of one country who are arrested in another country must be advised “without delay” that they have the right to communicate with a consular officer of their government. Upon the request of an arrested national, the arresting authorities must, also without delay, notify the consular officers of the foreign national’s home country and permit them full access to the prisoner.⁴

required to “decide questions presented to it on the basis of law,” *id.*, despite Justice Breyer’s view, expressed in dissent, that “several of the issues raised . . . are of sufficient difficulty to warrant less speedy consideration” and that “the nature of [Breard’s] claim, were we to accept it, [may] create a ‘watershed rule of criminal procedure.’” *Id.* at 380. It is, moreover, well-settled that decisions like *Breard*, denying *certiorari*, lack precedential value. See *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case, as the bar has been told many times.”); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (“[A] denial [of a writ of *certiorari*] carries with it no implication whatever regarding the Court’s view of the merits of a case The Court has said this again and again; again and again the admonition has to be repeated.”); *Teague v. Lane*, 489 U.S. 288, 296 (1989) (“[Even] opinions accompanying the denial of *certiorari* cannot have the same effect as decisions on the merits.”). Finally, the Court was not squarely presented with, and did not issue a holding regarding, either the individual nature of the right secured by Article 36 or whether state procedural default rules may bar consideration of an Article 36 claim not previously raised in the courts.

⁴ Article 36 provides:

In cases where the foreign national is charged with a crime — particularly a serious crime carrying a severe penalty — consular assistance is an indispensable complement to the usual trial rights and protections afforded by U.S. courts to “level the playing field” for defendants who suffer the disadvantages of dealing with a strange legal system, in a strange language, in a strange country. “The consul is in a unique position to offer information to the detainee about the legal system in which he is detained in comparison to his home legal system.” Linda Jane Springrose, Note, *Strangers in a*

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - (b) if [the defendant] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
 - (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention, art. 36, 21 U.S.T. at 100-01 (emphasis added). In the language of the Vienna Convention, the “sending State” refers to the country that establishes a consular post in another country. The “receiving State” refers to the country that receives the sending State’s consular representative. Thus, in Mr. Suárez Medina’s case, Mexico is the sending State and the United States is the receiving State.

Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations, 14 Geo. Immigr. L.J. 185, 195 (1999) (“Springrose”). The State Department “has described the right of access as a ‘cultural bridge,’ which ‘[n]o one needs . . . more than the individual . . . who has been arrested in a foreign country.’” *Id.* (citation omitted).⁵ Indeed, “[c]onsular officials can eliminate false understandings and prevent actions which may result in prejudice to the defendant.” *Ledezma v. Iowa*, 626 N.W. 2d 134, 152 (Iowa 2001) (citing Springrose, 14 Geo. Immigr. L.J. at 195).

The concern about equal footing applies not just to foreign nationals in the United States, but also to Americans traveling, working and living abroad in any country that also is party to the Vienna Convention. Accordingly, the United States has long insisted that other States Parties promptly comply with the Convention’s notification requirement, terming it an obligation “of the highest order.” Lee at 143 (quoting United States Department of State File L/M/SCA; United States Department of State, *Digest*, 1973, p. 161). *See also United States v. Li*, 206 F.3d 56 74-75, 78 (1st Cir. 2000) (State Department insistence that “[i]n all cases, the foreign national must be told of the right of consular access.”) (Torruella, C.J., concurring and dissenting). The International Court of Justice similarly recognized Article 36’s essential role when it held in *LaGrand* that Article

⁵ The federal courts have recognized that foreign defendants pose special problems for our justice system that may implicate due process concerns. *See, e.g., Davis v. United States*, 512 U.S. 452, 460 (1994) (recognizing that “requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present”); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997) (acknowledging that a “language barrier, like . . . mental illness, is a ‘salient fact’ that was known to the district court and put the court on notice that [the defendant’s] waiver ‘might be less than knowing and intelligent’”).

36 rights must be provided *in addition to* the procedural protections that U.S. courts provide to its own nationals. *LaGrand* ¶ 91.

B. The *LaGrand* Decision

1. **The Facts Giving Rise to *LaGrand* Provide No Basis to Distinguish Mr. Suárez Medina’s Case.**

LaGrand arose from Arizona’s having arrested, tried and executed two German nationals, the LaGrand brothers, without giving them notice of their rights under Article 36 of the Vienna Convention to receive assistance from the German Consulate. The LaGrands had moved to the United States with their mother when they were still young children and had taken up permanent residence in the United States. They remained German nationals, although “both had the demeanor and speech of Americans rather than Germans.” *LaGrand* ¶ 13. When the brothers were in their late teens, they were arrested, tried, convicted, and sentenced for capital murder. *Id.* ¶ 14; *LaGrand v. Stewart*, 133 F.3d 1253, 1259 & n.1 (9th Cir. 1998). There was no dispute that they were not informed of their rights under Article 36. *Id.* ¶ 15.

The brothers were represented at trial by court-appointed counsel who neither raised the issue of noncompliance with Article 36 nor contacted the German Consulate; as a consequence, the LaGrands did not receive consular assistance. *Id.* ¶ 17. The LaGrands challenged their convictions and sentences on direct appeal to the Supreme Court of Arizona and in state court habeas corpus actions before they learned, *id.* ¶¶ 19-20, “from other sources, and not from the Arizona authorities,” of their Article 36 rights. *Id.* ¶ 22.

The brothers then contacted the German Consulate, which provided them with consular assistance, including helping their lawyers investigate the brothers' childhood in Germany. *Id.* ¶ 22. Having finally received consular assistance, the brothers for the first time asserted a claim for violation of Article 36 in their federal habeas corpus actions. *Id.* ¶¶ 21, 23. The federal district court rejected this claim because it had not been raised in the earlier state court proceedings, relying on federal rules of procedural default and the court's finding that the Article 36 claim could have been raised earlier. *Id.* ¶ 23. Although it was "undisputed" that the State of Arizona did not notify the LaGrands of their rights under the treaty, the Ninth Circuit nevertheless affirmed, on the ground that the Article 36 claim had been procedurally defaulted and that the LaGrands had not established the prerequisites for addressing the merits of a procedurally defaulted claim. *LaGrand*, 133 F.3d at 1261-62. Nearly a year later, "the LaGrands were formally notified by the United States authorities of their right to consular access." *LaGrand* ¶ 24. Only a few weeks thereafter, Arizona set execution dates, and Germany intervened to prevent the executions, first through letters to Arizona and federal officials and then by seeking "provisional measures" from the ICJ. These efforts were ultimately unsuccessful.

b. The Holdings in *LaGrand*.

In *LaGrand* the ICJ set out five principal holdings regarding the scope of Article 36. First, "Article 36 . . . creates *individual* rights" for a detained foreign national to be informed, following his detention and prior to trial, that he is entitled to receive assistance from his nation's consul if he so chooses. *LaGrand* ¶ 77 (emphasis added). Second, this right is separate and distinct from, and not cumulative of, rights accorded under the laws of a

state or the U.S. Constitution. *Id.* ¶ 91. Third, a showing of prejudice is not necessary to establish a violation of Article 36. *Id.* ¶ 74. Fourth, a state that denies a defendant his Article 36 rights cannot invoke waiver as a defense to a challenge based on that violation. *Id.* ¶ 60. Finally, neither the United States, nor any of its constituent states, including Texas, may apply its procedural default rules to deprive a foreign national of the opportunity to challenge his conviction and death sentence on the ground that he was deprived of his rights under Article 36 to seek and obtain consular assistance from his own government without delay. *Id.* ¶¶ 90–91.

LaGrand's interpretation of Article 36 is binding on the United States. It is, accordingly, binding on this Court through the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI.

2. *LaGrand* Must be Followed by the United States.

LaGrand is fully applicable to Mr. Suárez Medina's case. See Declaration of President Guillaume to the *LaGrand* decision (although Subparagraph (7) of the operative part of the Judgment rules on Germany's submission, "it should be made clear that there can be no question of applying an *a contrario* interpretation" in other cases), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_judgment_declaration_guillaume_20010627.htm.

There are at least six reasons that the United States is bound to follow *LaGrand*. First, when the United States signed and ratified the Optional Protocol to the Vienna Convention, the United States recognized that the ICJ's "interpretation or application of the

Convention” is authoritative. Preamble; art. I.⁶ Under Article 94 of the United Nations Charter, the United States has also “undertaken to comply with the decision of the International Court of Justice in any case to which it is a party.” U.N. Charter art. 94, para. 1.⁷ As a party to the *LaGrand* case, the United States must comply with the ICJ’s interpretation of Article 36 in that case.⁸ Having acceded through the Optional Protocol to the ICJ’s overriding authority to interpret Article 36, the United States must abide by the

⁶ The Optional Protocol makes the ICJ the final arbiter of the Convention’s interpretation. The Optional Protocol provides:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as “the Convention,” adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

⁷ The International Court of Justice issues two types of opinions: binding and non-binding. Non-binding decisions are the result of advisory opinions that are issued upon the request of parties designated by the U.N. Charter. Binding decisions only result from “contentious” cases, which arise when one State brings an action against another State involving a disputed claim arising under international law. Furthermore, ICJ jurisdiction is “compulsory” where the dispute concerns “the interpretation of a treaty.” ICJ Statute, art. 36 para 2. *See also* Optional Protocol, art. I. Since the *LaGrand* decision arose from a contentious case in which the ICJ jurisdiction was compulsory, it is binding on the United States. Indeed, the decision is the most authoritative type of ruling issued under contemporary standards of international law.

⁸ The Statute of the International Court of Justice, which is incorporated by reference in the U.N. Charter, *see* U.N. Charter art. 92, provides that a decision “has no binding force except between the parties and in respect of th[e] particular case,” art. 59. As discussed in this section, this does not affect the force of the decision as applicable law in this case. Furthermore, the Optional Protocol is not so limited.

interpretation in *LaGrand* with respect to nationals of all signatories, not just German nationals.

Second, under principles of *stare decisis* — which form the bedrock of our common law system — where cases raise the same issues on the same, or sufficiently similar, material facts, the prior determination of legal issues prevails. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[W]e recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”) (citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921) and Powell, *Stare Decisis and Judicial Restraint*, 1991 J. Sup. Ct. Hist. 13, 16).

In this case, the material facts, if anything, provide a more compelling case for observance of Article 36 than *LaGrand*. The LaGrands received all of their schooling in the United States, resided here for most of their lives, had “the demeanor of Americans,” spoke English like natives, and were well-schooled in the U.S. legal system from past experience. *LaGrand* ¶¶ 13-14; *LaGrand v. Stewart*, 133 F.3d at 1259 n.1. In contrast, Mr. Suárez Medina was born in Mexico, grew up in a Spanish-speaking home, had learning disabilities, and had no prior criminal record at the time of his arrest. *See* Exhibit MM (Affidavit of Tena Francis); Exhibit B (Affidavit of Juan Manuel Gomez Robledo).

Particularly because the ICJ maintains consistency in its opinions, recognizing that the international community derives guidance from the substance and wording of its judgments, *see* International Court of Justice at <http://www.icj-cij.org>, the ICJ’s decision is

entitled to *stare decisis* effect. As the most recent, thorough, factually relevant and authoritative decision regarding Article 36, it governs the outcome of Mr. Suárez Medina’s case.

Third, the cousin of *stare decisis*, issue preclusion, likewise applies to make *LaGrand* binding on the United States in this case. As a party to *LaGrand*, the United States has had a full and fair opportunity to litigate each of the issues that were decided by the ICJ in *LaGrand* with respect to the interpretation of Article 36 and that Mr. Suárez Medina relies upon here. Under the generally applicable rule of “offensive collateral estoppel,” the United States is not free to disregard the ICJ’s interpretation of Article 36. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979).⁹ Although the courts have sometimes allowed an exception to *Parklane*’s general rule of offensive collateral estoppel in cases to which the United States is a party, *see, e.g., United States v. Mendoza*, 464 U.S. 154 (1984), the basis for the *Mendoza* exception does not apply here. “The major policy interests outlined in *Mendoza* were avoidance of premature estoppel and assurance of an opportunity for the government to consider the administrative concerns that weigh against initiation of the appellate process.” *Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990). In *State v. United Cook Inlet Drift Association*, 895 P.2d 947, 951-52 (Alaska 1995), the Supreme Court of Alaska identified a third *Mendoza* factor — “preserving policy choices.”

⁹ The Court in *Parklane* identified two situations in which offensive collateral estoppel would not be appropriate: (1) where the “plaintiff could easily have joined in the earlier action” and (2) where application of offensive collateral estoppel would be unfair to the defendant because he had “little incentive to defend vigorously” because future suits were not foreseeable or “the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.” 439 U.S. at 330-32. Neither situation obtains here because Mr. Suárez Medina has no ability to participate in a suit before the ICJ. *See* ICJ Statute, art. 34, para. 1 (stating that only states, not international organizations or private individuals may sue another state in the ICJ). The United States has been involved in a number of actions based upon its

None of these policy interests is implicated in this case. Having ratified the Optional Protocol and the U.N. Charter, the United States knew when it defended its position in *LaGrand* that the ICJ's decision would be authoritative and binding. When the United States fully developed and argued its position before the ICJ it was well aware that a large number of cases in U.S. courts (and one prior case in the ICJ) have raised the very same issues regarding the interpretation of Article 36 as *LaGrand*, so that the ICJ's decision would have broad ramifications. Since the *Mendoza* exception does not apply, the United States is collaterally estopped from re-litigating the *LaGrand* decision.

Fourth, the *LaGrand* decision is also binding on the United States by virtue of the paramount international law rule of *pacta sunt servanda* — treaties must be observed — which, under a long line of U.S. Supreme Court decisions, “is a part of the law of the land.” *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Chief Justice Marshall); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[i]nternational law is part of our law”). See also Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 Am. J. Int'l L. 313 (2001) (tracing the development and application of international law theories as a rule of decision for U.S. courts).

Fifth, unless *LaGrand's* authoritative interpretation of Article 36 is applied equally to German and non-German nationals, similarly situated persons would be treated differently, in contrary to the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has made it clear that the right to equal protection under the law applies “to [1] all persons within the territorial jurisdiction, [2] without regard

violations of Article 36 and thus had every incentive to expect other suits and to defend vigorously, and this court offers no “procedural opportunities” not available to the ICJ.

to any differences of race, of color, or of *nationality*.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added). Since *Yick Wo*, the Supreme Court has extended the reach of equal protection so that it “encompasses lawfully admitted resident aliens.” *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *see also Ambach v. Norwick* 441 U.S. 68, 73 (1979). It is undisputed that Mr. Suárez Medina was and remains a legal resident alien. As discussed above, the LaGrand brothers were also lawful resident aliens. Accordingly, for this Court to refuse to follow *LaGrand* in this case because Mr. Suárez Medina is a Mexican national rather than a German would clearly treat two groups of persons possessing the same equal protection rights differently — with the sole criterion for the discrimination being mere “nationality.” *Yick Wo* at 369. Government discrimination “against some, but not all, legal aliens on the basis of some characteristic of alienage is subject to strict scrutiny.” *Doe v. Plyler*, 628 F.2d 448, 458 (5th Cir. 1980). Thus, the United States must follow *LaGrand’s* holding with respect to Mr. Suárez Medina and other nationals no less than with respect to German nationals.

Finally, the rubric that “[t]reaties that lay down rules to be enforced by the parties [to the treaty] through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems,” Restatement (Third) of Foreign Relations Law of the United States Restatement at Section 325 cmt. d (1987) (“Restatement”), also requires that the rule of *LaGrand* apply equally to the nationals of all signatories of the Convention. Denying *LaGrand’s* interpretation of Article 36 rights to Mr. Suárez Medina because he is not German would create a *non*-uniform result contrary to the rule set out in the Restatement.

3. Under *LaGrand*, the Doctrine of Waiver or Procedural Default May Not Bar Merits Review of the Vienna Convention Violation.

Although the *LaGrand* decision recognized that a procedural default rule like Texas Code of Criminal Procedure 11.071, Sec. 5 does not “in itself” violate Article 36, *LaGrand* ¶ 90, the *LaGrand* Court explicitly found that procedural default rules *do* violate Article 36 if, as applied in a particular case, they prevent a foreign national from challenging his conviction and sentence based upon a prior violation of Article 36. *Id.*

The Court’s holding on this point merely restates the plain words of Article 36(2). That provision permits domestic law to be followed in proceedings involving the consular notification and access rights secured by Article 36(1), “*subject to the proviso, however,*” that any such domestic laws *must* give “full effect” to the purposes procured by Article 36(1). *LaGrand* ¶ 91. Because applying Texas’ procedural default rules in this case would *preclude* Mr. Suárez Medina from challenging his conviction and sentence based on the Article 36 violations, applying those rules in this case would not effect, but would rather frustrate, the purposes of Article 36(1) rights. Thus, Article 36(2) plainly precludes Texas from applying its procedural default rules in this case.¹⁰ It is an

¹⁰ Although *Breard v. Greene*, 523 U.S. 327 (1998) indicated that procedural default rules do apply, that decision is based on a total misreading of Article 36, perhaps as a consequence of its procedural posture. *See* n. 24, *infra*. It is, of course, the unambiguous words of a treaty that determine its meaning under United States law as well as international law. *Compare Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1985) with Vienna Convention on the Law of the Treaties, May 23, 1969, 1155 U.N.T.S. 331 (“Treaty Convention”), art. 31. Thus the unmistakable direction of Article 36(2) that the law of the forum applies “*provided that*” it gives “full effect” to the “purposes” of Article 36(1)’s guarantee of consular notification and access was perversely read to approve the very opposite when the Court cited it as allowing Virginia to invoke its procedure bypass rules and deny a hearing on Mr. Breard’s Article 36 claims. *Breard*, 523 U.S. at 375-76. The Court also, erroneously, declared its misreading to be consistent with what it asserts to be an “international law” principle that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the Treaty in that State.” *Id.* at 375. This purported “international law” principle finds no support in the cases cited and is contrary to the paramount international law rule of *pacta sunt servanda* — that treaties are binding and must be observed. While it is ordinarily not a concern of international law how that observance is achieved, it is settled that a state may “not invoke the provisions of its internal law as

axiom of United States law that, in interpreting treaties, the plain language of the text controls. Treaty Convention, art. 31; *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *Lombera-Camorlinga*, 206 F.3d at 893. Thus, *LaGrand* is unassailable on this point.¹¹

C. No Prejudice Is Required for Relief for an Article 36 Violation.

The ICJ's decision in *LaGrand* makes clear that Mr. Suárez Medina does not need to demonstrate that his trial would have had a different outcome if he had been notified of his Article 36 rights. The ICJ dismissed the United States's arguments that the benefits of consular access in hindsight "rest on speculation." *LaGrand* ¶ 72. It found that in cases where "the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay"

justification for its failure to perform a treaty." Treaty Convention, art. 27; see also Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int'l L. 406, 424-26 (1989).

In any event, *Breard* was based entirely on federal law issues, including the federal "last in time" doctrine, which rests on the notion that a treaty and a statute are on a par as sources of federal law so that the later-adopted will control in the case of a conflict. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888), cited by the Court in *Breard*, 523 U.S. at 376. The Court relied on the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), which does not apply in this state court proceeding; it opined that AEDPA took precedence over Article 36 in federal court proceedings. *Breard* thus did not address the issue before this Court: whether Texas can apply its *state* law procedural rules to refuse to hear a challenge to Mr. Suárez Medina's conviction and sentence based on the violation of Article 36. And, of course, it did not address the *LaGrand* decision.

The cases cited in the *Breard per curiam* are also inapposite because, contrary to what the opinion says, they all apply U.S. law, not international law, and none purports to set forth any international law rule. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (under Full Faith and Credit Clause of the U.S. Constitution forum could apply its own statute of limitations, noting in dictum that it was also "the rule in international law at the time the Constitution was adopted" that the forum's statute of limitations applied); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988) (convention preempts inconsistent state law; law of the forum state relevant to interpreting the convention); *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S.D. Iowa*, 482 U.S. 522, 539-40 (1987) where convention contained no "plain statement of pre-emptive intent," it was not exclusive means to obtain discovery in federal court.

¹¹ *LaGrand's* ruling that a state which has violated a defendant's Article 36 rights to notice cannot deny relief on the pretext of a waiver of rights is equally unassailable. *LaGrand* ¶ 60. See p. 60 *infra*

— which is as true in this case as it was in *LaGrand* — “[i]t is immaterial . . . whether the [detained national] would have sought consular assistance,” from his own consul, whether his consul “would have rendered such assistance, or whether a different verdict would have been rendered.” *LaGrand* ¶ 74.

The ICJ’s decision in *LaGrand* that a harmless error standard cannot be applied to Article 36 violations requires that Mr. Suárez Medina’s conviction be reversed, and the case remanded for a new trial in which he will be accorded his full rights under Article 36 to receive the aid and assistance of the Mexican Consulate.

D. Even if this Court Could Properly Require Mr. Suárez Medina to Demonstrate that Texas’ Violation of his Article 36 Rights Caused Him Prejudice, the Record Shows Overwhelming Prejudice.

Even if a prejudice showing could permissibly be required after *LaGrand*, the factual record in this case shows that Texas’ admitted failure to notify Mr. Suárez Medina of his

Even if a prejudice showing could permissibly be required after *LaGrand*, the factual record in this case shows that Texas’ admitted failure to notify Mr. Suárez Medina of his Article 36 rights did alter the outcome of his trial to his detriment. Given the far-reaching assistance offered by the Mexican Consulate to its nationals on trial for their lives and the abysmal performance of counsel in this case, it is indisputable that Mexico’s involvement would have made a substantial difference in the result of the proceedings in Mr. Suárez Medina’s case.

¹² The burden of showing harmless error should rest with the State, since Texas is responsible for denying Mr. Suárez Medina his rights. See *La Grand* ¶¶ 60, 74; cf. *Chapman v. California*, 386 U.S. 18, 24 (1967) (government has burden of proving constitutional violation harmless beyond a reasonable doubt).

If the Mexican Consulate had been notified of Mr. Suárez Medina's arrest for a capital offense, the Government of Mexico would not only have ensured competent counsel, it would have offered assistance at all phases of Mr. Suárez Medina's trial in accordance with its normal procedures. Exhibits B, C. The Mexican Consulate ordinarily provides substantial assistance to its nationals who face capital charges. *Id.* This assistance would, at a minimum, have consisted of assistance in investigating the facts of the case and, in particular, those that required investigation in Mexico or among Mexican nationals in the United States; it would also have extended to providing funds for mitigation investigation and appropriate experts, assisting Mr. Suárez Medina with understanding the American criminal process and monitoring, or even replacing, defense counsel. *Id.* Such assistance was fundamental to the defense, and Mr. Suárez Medina was deprived of it. He therefore could not offer at trial existing, clear, essential evidence that was both exculpatory and mitigating.

1. Prejudice at the Guilt Phase

The policy and invariable practice of Mexican consular authorities in 1989 was to provide effective and far-reaching assistance to their nationals facing capital charges from the earliest stages of the case. Exhibit C (Affidavit of Farres Martins). Had the Mexican Consulate learned of the case at the time of the initial detention—in other words, “without delay”—consular officials would have advised Mr. Suárez Medina “in no uncertain terms that he should not speak to any law enforcement officer without first speaking with an American attorney”. *Id.* Hospitalized and medicated as a result of the two gunshot wounds he received,

there is no question that the guidance and support of Mr. Suárez Medina's consular representative would have ensured that he was fully aware of his Fifth Amendment rights and would have made a knowing, voluntary and intelligent decision to exercise those rights.

Moreover, the role of Mexican consular officials in plea negotiations has often been crucial in resolving cases before trial for a sentence less than death. *Id.*, *See also* Exhibit B (Affidavit of Gomez Robledo). In a case such as this, the timely intervention of consular authorities may have a significant impact on the exercise of prosecutorial discretion. Mexican consular officials would have assisted in the development of mitigating evidence at the earliest possible moment, as relevant information to be presented by them to the prosecutor as grounds for seeking a life sentence. That comprehensive development of mitigation would have revealed that Mr. Suárez Medina was suffering from significant mental impairments, including Post Traumatic Stress Disorder— compelling evidence of reduced culpability. Such evidence of an absence of deliberation was precisely what was required to persuade the prosecutor that Mr. Suárez Medina, while undoubtedly the shooter, did not meet the narrow criteria for a death sentence under Texas law.

Finally, Mexican consular officials work closely with defense counsel and can provide access to expert assistance in trial preparation. Exhibits B, C. Knowledge of Mr. Suárez Medina's diminished mental capacity and reduced culpability developed through timely consular assistance would have provided trial counsel with alternate lines of defense at the guilt phase— an essential attribute of a fair trial and a prerequisite of effective assistance of counsel, since “[i]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed.” *Coleman v. Brown*, 802 F.2d 1227 (11th Cir. 1986).

2. Prejudice at the Penalty Phase

There is nothing speculative about the assertion that Mexican consular assistance can and does avert disproportionate or unfair death sentences. As a starting point, one need only look to the evidence recently gathered by lawyers, investigators, and mental health experts funded by the Government of Mexico. *See* discussion of facts, *supra*, and Exhibits B, C, E, F, G, MM. The Mexican Consulate has rendered substantial assistance to Mr. Suárez Medina by hiring counsel and investigators to develop additional facts relevant to his defense. For example, Mexican consular officials could have provided funds for a bilingual investigator to travel to Mexico to investigate the circumstances of the abuse he suffered when he was temporarily abandoned by his mother. Based on the significant family and personal history information these experts have discovered, we now know that trial counsel failed to unearth a wealth of mitigating evidence that would, in all likelihood, have resulted in a life sentence if presented at his trial. This evidence was the missing link in the evaluation done years ago by the defense psychologist, Dr. Robert Powitsky. Nothing could be more prejudicial than the absence of this evidence from the trial, and nothing could be clearer than that the denial of Mexico's consular aid is the cause of this prejudice.

Given trial counsel's lack of preparation, the willingness and ability of the Mexican Consulate to find other counsel would also have been a turning point for Mr. Suárez Medina. Exhibit C (Affidavit of Farres Martins). If the Consulate had been involved, Mr. Suárez Medina would have had a different defense team – comprised of experienced counsel, either working with appointed counsel or retained by Mexico in their place – who would have investigated and prepared a meaningful mitigation case. With Mexico's assistance, counsel

could have conducted extensive interviews with Mr. Suárez Medina's Spanish-speaking relatives, including his mother. Consular officials would have assisted them in compiling a detailed and complete life history of their client.

Experts, such as Drs. Weinstein and Kessner, could have been retained by the Mexican consulate to present and interpret actual test data showing Mr. Suárez Medina's medical, psychological and neurological impairments, thus "translat[ing] a medical diagnosis into language that [would] assist the trier of fact, and therefore offer[ing] evidence in a form that has meaning for the task at hand." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). As described above, Dr. Ricardo Weinstein concluded that he suffers from a host of mental impairments, including post-traumatic stress disorder, attention deficit disorder, learning disabilities, and organic brain dysfunction. This evidence was undoubtedly material to Mr. Suárez Medina's defense both on the merits and at sentencing. Such evidence has in the past been important in convincing juries to choose life over death. *See* Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" 98 *Columbia Law Review* 1538 (1998) and "The Emotional Economy of Capital Sentencing," 75 *New York University Law Review* 26 (2000) (concluding that mitigation does matter, especially mental retardation and mental illness). Experienced counsel would have also recognized the need for an eyewitness identification expert, such as Dr. Loftus. With a different lawyer, working in cooperation with Mexico, the outcome of the trial would have been different.

II. The Gratuitous Imposition of Fourteen Execution Dates Violated Mr. Suárez Medina's Eighth and Fourteenth Amendment Rights.

On fourteen separate occasions since Mr. Suárez Medina's death sentence was

imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains, and the distribution of his meager death row spending account. Ten times, he has specified the witnesses he wishes to view his death, and in doing so, has imagined himself strapped to a gurney in the death chamber in Huntsville, Texas. Of course, Mr. Suárez Medina has been envisioning his death by lethal injection for the last thirteen years – but each time a date was set, he was forced to participate in a countdown of months, days, and hours in anticipation of his death sentence. Mr. Suárez Medina contends that the combination of his lengthy incarceration on death row, and the repeated setting of execution dates, amount to cruel and unusual punishment in violation of the United States Constitutions.

American jurists have recognized that the infliction of extreme mental anguish can be a form of unconstitutional torture. *See, e.g., Hudson v. McMillan*, 112 U.S. 995, 1004 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); *cf. In re Medley*, 134 U.S. 160, 172 (1890) (recognizing the "immense mental anxiety" that a condemned man experiences when the authorities intentionally refuse to inform him of the precise date of his scheduled execution, and referring to it as "one of the most horrible feelings to which he can be subjected").

The torturous effects of "death row phenomenon" -- that is, the psychologically devastating impact of a lengthy stay on death row, and the setting and re-setting of execution dates -- have been widely noted by jurists during the last three decades. *See, e.g.,*

Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [i.e., the actual execution]"); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); *Suffolk County District Attorney v. Watson*, 411 N.E.2d 1274, 1289-95 (Massachusetts Supreme Judicial Court 1980) (Liacos, J., concurring (vivid and detailed description of the type of psychological pain and torture that a condemned person experiences while awaiting execution)).¹³ Similar views have been expressed by legal commentators and mental health experts.¹⁴

¹³ Justice Liacos' description of a condemned man in Massachusetts who won a commutation on the eve of a pending execution is worthy of extensive quotation:

For over two years, Henry Arsenault "lived on death row feeling as if the Court's sentence were slowly being carried out." Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution.

. . . The raw terror and unabating stress that Henry Arsenault experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.

Mr. Suárez Medina's repeated execution dates and last-minute reprieves have exacted an additional punishment from him -- a punishment to which he was not sentenced, and that is deliberate, barbaric and inhuman. Unquestionably, it is treatment that is condemned by the Eighth Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency" against which forms of punishment must be measured); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (Eighth Amendment "aim[s] . . . to protect

. . . The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement.

N.E.2d at 1290-92.

¹⁴ See, e.g., Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L. FORUM 180 (1994) [available on WESTLAW]; Lambrix, *The Isolation of Death Row*, in *FACING THE DEATH PENALTY* 198 (M. Radelet ed. 1989); Millemann, *Capital Post-Conviction Prisoners' Right to Counsel*, 48 MD. L. REV. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing. . . . This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 513, 552 & n.251 (1988) (same) (citing studies); Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element making the death penalty cruel and unusual punishment.") (citing authorities); Stafer, *Symposium On Death Penalty Issues: Volunteering for Execution*, 74 J. CRIM. L. 860, 861 & n.10 (1983) (citing studies); Holland, *Death Row Conditions: Progression Towards Constitutional Protections*, 19 AKRON L. REV. 293 (1985); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REVIEW 141, 157-60 (1979); Hussain & Tozman, *Psychiatry on Death Row*, 39 J. CLINICAL PSYCHIATRY 183 (1979); West, *Psychiatric Reflections on the Death Penalty*, 45 AMER. J. ORTHOPSYCHIATRY 689, 694-95 (1975); Gallemore & Parton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMER. J. PSYCHIATRY 167 (1972); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 AMER. J. PSYCHIATRY 393 (1962); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972); G. Gottlieb, *Testing The Death Penalty*, 34 S. CAL. L. REV. 268, 272 & n.15 (1961); A. Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION & DEATH* 205 (1966).

the condemned from [unnecessary] fear and pain . . . or to protect the dignity of society itself from the barbarity of exacting mindless vengeance").

CONCLUSION

For these reasons, Javier Suárez Medina respectfully requests that this Court grant his petition for writ of certiorari to answer the questions presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lydia M. Valenti Brandt, certify that on August 12, 2002, I caused a copy of the foregoing to be sent to counsel for the Respondent by overnight delivery and by email to katherine.hayes@oag.state.tx.us.

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APPENDICES

Appendix 1: *Medina v. State*, No. 37,792-02 (Tex. Crim. App., August 12, 2002)
(opinion on Successor Application for Writ of Habeas Corpus)
