No. 10-9659

IN THE
Supreme Court of the United States

FELIX ROCHA,
Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Felix Rocha was sentenced to death in 1998 but did not raise his ineffective-assistance-of-sentencing-counsel (IAC) claim until he filed his federal habeas corpus petition in 2003, where it was dismissed as unexhausted and procedurally defaulted. An unrelated Vienna Convention claim was also raised and denied on its merits. On appeal, Rocha sought and received a stay of federal proceedings so he could raise his IAC claim for the first time in state court, in his fourth state habeas application. The Court of Criminal Appeals of Texas (CCA) dismissed that application as an abuse of the writ. Rocha then filed a motion for relief from judgment in the district court in which he argued that his IAC claim was no longer procedurally defaulted and the court's previous judgment should be reopened pursuant to Fed. R. Civ. P. 60(b). The district court denied that motion and the court of appeals affirmed. Rocha now poses two questions concerning the lower courts' rulings:

> Did the state court's unambiguous citation to a state procedural rule in its dismissal order constitute an independent and adequate state-law ground barring federal consideration of his defaulted IAC claim?
>
> Is suppression of evidence an appropriate remedy for a Vienna Convention violation?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Rocha defaulted his IAC claim when he failed to comply with reasonable state-court procedures which require such claims to be raised in an initial application for habeas corpus relief. The district court found the claim to be procedurally barred and the United States Court of Appeals for the Fifth Circuit agreed. His unrelated Vienna Convention claim was denied on its merits. In this Court, Rocha fails to demonstrate that the courts below erred or that any compelling reason exists for further review. As a result, a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the evidence demonstrating Rocha's guilt in its opinion on direct appeal.

> On November 26, 1994, Rafael Fuentes, the decedent, was working as a security guard at La Camelia, a nightclub in Harris County. Reynaldo Muñoz, who owned some pool tables at the nightclub, arrived at around 7:00 p.m. Muñoz talked to Fuentes for ten to fifteen minutes while Fuentes stood at the door to the club. Muñoz noticed that Fuentes was wearing a holster containing a gun. Two men, a tall man and a short man, moved quickly toward Fuentes. Muñoz moved out of the way as Fuentes stopped the men to conduct a search. Muñoz saw the tall man raise his arms as if to permit a frisk. Then Muñoz watched the short man pull out a gun, point the gun at Fuentes, demand

> Fuentes'[s] gun,[1] and reach for Fuentes'[s] gun. At that point, Muñoz began to flee the scene and did not see what happened next. As he fled, Muñoz heard two or three gunshots.
>
> A police radio dispatch informed patrol officer Michael Junco of a shooting in progress. Junco arrived at the scene to find Fuentes'[s] body with gunshot wounds. Junco noticed that there was no gun in Fuentes'[s] holster.
>
> The tall man was later identified as Virgilio Maldonado. The short man was believed by law enforcement officials to be [Rocha]. Houston Police Officer X.E. Avila interviewed [Rocha]. In his oral statements, [Rocha] gave the following version of events: [Rocha] and Fuentes had been involved in an altercation at some time prior to the murder. Fuentes had beaten and otherwise embarrassed [Rocha], and [Rocha] had vowed to get revenge. On the night of the killing, [Rocha] and Maldonado confronted Fuentes. [Rocha] intended to take Fuentes's gun to embarrass him and show that Fuentes was not a good security guard. [Rocha] pulled his own gun on Fuentes, and Fuentes grabbed [Rocha]'s gun. Then [Rocha] and Fuentes struggled over [Rocha]'s gun, and [Rocha]'s gun was shot once during the struggle. [Rocha] did not know whether the shot hit Fuentes or simply went into the air. Maldonado shot Fuentes several times to protect [Rocha]. Maldonado then took Fuentes'[s] gun, and [Rocha] and Maldonado fled the scene.

Rocha v. State, 16 S.W.3d 1, 5 (Tex. Crim. App. 2000).

II. Direct Appeal and Postconviction Proceedings

Rocha's conviction and sentence were affirmed on appeal by the CCA. In its opinion, the CCA rejected Rocha's claim that his Vienna

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[1] [Rocha]'s demand for the gun was made in Spanish. Muñoz, who understood Spanish, heard and understood this demand.

Convention rights were violated and that his confession should have been suppressed. *Rocha v. State,* 16 S.W.3d at 13-19; *see also id.* at 23-30 (Holland, J., concurring); *and id.* at 30-31 (Johnson, J., concurring). Rocha did not petition this Court for certiorari review.

Instead, he raised a one-paragraph *Strickland*[2] claim in a state habeas application in which he failed to identify any professionally deficient action of trial counsel. 01-SHCR 92-93.[3] Relief was subsequently denied by the CCA based on the findings and conclusions of the trial court. *Ex parte Rocha,* No. 52,515-01 (2002) (unpublished order); 01-SHCR 106-121; Pet. Appx. G. Rocha filed an additional memorandum containing unrelated claims which was dismissed as an abuse of the writ. *Ex parte Rocha,* No. 52,515-02 (Tex. Crim. App. 2002) (unpublished order); Pet. Appx. G.

Rocha pursued habeas corpus relief in the district court, but was ultimately unsuccessful. *Rocha v. Quarterman,* No. H-03-CV-3639 (S.D. Tex. 2005) (unpublished order); Pet. Appx. F. In particular, the district court found Rocha's *Strickland* claim to be defaulted. Pet.

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2 *Strickland v. Washington,* 466 U.S. 668 (1984).

3 "01-SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court during Rocha's initial state habeas proceeding, "02-SHCR" the Clerk's Record during Rocha's second, "03-SHCR" the third, and so on. All references are preceded by volume number and followed by tab or page numbers when necessary.

Appx. F at 15-18. The court also rejected Rocha's Vienna Convention claim because (1) the Convention does not create an individually enforceable right; and (2) the International Court of Justice (ICJ) already determined that Rocha's substantive rights under the Vienna Convention were not violated. *Id.* at 9-11 (citing *United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir. 2001), and *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12, 42, ¶104) *(Avena)*). The district court denied a certificate of appealability (COA) concerning both claims. *Id.* at 27-29. Rocha then appealed to the Fifth Circuit.

After docketing Rocha's appeal, the court of appeals granted his request for a stay of proceedings on March 26, 2006 so that he could pursue further habeas relief in state court. In a third state habeas filing, Rocha raised his *Avena*-based Vienna Convention claim for the first time. 03-SHCR 2-57. This claim was dismissed as an abuse of the writ pursuant to *Ex parte Medellín,* 223 S.W.3d 315 (Tex. Crim. App. 2006). *Ex parte Rocha,* No. 52,515-03, 2007 WL 678628 (Tex. Crim. App. 2007) (unpublished order). Rocha's petition for writ of certiorari was also denied. *Rocha v. Texas,* 128 S. Ct. 1735 (2008).

The court of appeals renewed the stay on May 14, 2007 and again on July 10, 2008 while Rocha submitted a fourth state habeas

application, this time raising his IAC claim in full. 04-SHCR 2-43. This application was also dismissed as an abuse of the writ. *Ex parte Rocha,* No. 52,515-04, 2008 WL 5245553 (Tex. Crim. App. 2008) (unpublished order); Pet. Appx. A. Rocha then filed a motion in the district court in which he argued that his IAC claim was no longer procedurally defaulted and the court's previous judgment should be reopened pursuant to Fed. R. Civ. P. 60(b). However, the district court denied the motion and also denied a COA. Pet. Appx. B.

On appeal, the Fifth Circuit denied a COA with regard to the *Avena* claim. *Rocha v. Thaler,* 619 F.3d 387, 407-08 (5th Cir. 2010); Pet. Appx. C at 12-13. The court of appeals granted a COA as to Rocha's IAC claim, but ultimately affirmed the district court's denial of habeas relief. Pet. Appx. C at 5-12. On rehearing, the court clarified its opinion denying relief on Rocha's *Strickland* claim. *Rocha v. Thaler,* 626 F.3d 815 (5th Cir. 2010); Pet. Appx. D. Finally, the court of appeals denied rehearing and rehearing en banc on December 17, 2010. *Rocha v. Thaler,* 628 F.3d 218 (5th Cir. 2010); Pet. Appx. E. This petition follows.

REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be

granted only for "compelling reasons." Sup. Ct. R. 10 (West 2011). Rocha advances no compelling reason in this case, and none exists. Importantly, Rocha's first claim arises from an appeal of the district court's denial of a Rule 60(b) motion. Such motions should be reviewed only for abuse of discretion. *Callon Petroleum Co. v. Frontier Ins. Co.,* 351 F.3d 204, 210 (5th Cir. 2003). Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1981). Additionally, any factual determinations underlying the decision are reviewed for clear error. *Jenkens & Gilchrist v. Groia & Co.,* 542 F.3d 114, 118 (5th Cir. 2008). Rocha fails to make such a showing.

I. The CCA's Decision Does Not Fairly Appear to Rest on Federal Law.

As discussed above, Rocha did not raise his current IAC claim in state court until he filed his fourth state habeas application. The CCA stated that Rocha's claim was brought in a "subsequent" application. Pet. Appx. A at 1. Under Texas law, a subsequent application is one "filed after filing an initial application." Tex. Code Crim. Proc. Art. 11.071, § 5(a). The CCA "may not consider the merits" of a subsequent

application unless it meets one of three exceptions contained in the statute. *Id.*

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id.

The CCA explained that Rocha sought to excuse his abuse of the writ pursuant to Tex. Code Crim. Proc. Art. 11.071, § 5(a)(3). Pet. Appx. A at 1. The state court then recounted the procedural history of Rocha's case, noting that his initial habeas application was denied on its merits, but his second and third habeas applications were also subsequent applications. *Id.* at 2. Finally, the court held that Rocha's "allegations do not satisfy the requirements of Article 11.071, [§] 5(a)(3)," and dismissed the application "as an abuse of the writ." *Id.*

Rocha's primary argument in this Court is that the state court provided no explanation for its dismissal of his subsequent habeas application. Pet. at 16-17, 24-25. But the state court clearly held that Rocha's claim failed to meet the exceptions for review of a subsequent habeas application and that the application was therefore barred as an abuse of the writ. Pet. Appx. A at 2. Seemingly aware that his primary argument is baseless, Rocha advances a secondary argument: a federal court must "go behind" a state-court order in order to seek out and generate ambiguity where there is none. Pet. at 5, 16-17, 24-25 (citing *Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007)). Yet even this tactic fails.

In *Michigan v. Long,* the Court made clear that, in determining whether a state-court judgment is independent and adequate on direct review, it would first decide whether a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." 463 U.S. 1032, 1040 (1983). If this predicate was met, the Court would presume that the state court's decision turned on federal law unless the "adequacy and independence of any possible state law ground" was "clear from the face of the opinion." *Id.* at 1040-41. This framework was imported into the habeas context in *Harris v. Reed,* 489 U.S. 255, 260-263 (1989), and it has since been called the "*Harris*

presumption" when it is applied in such matters. *See, e.g., Ylst v. Nunnemaker,* 501 U.S. 797, 802 (1991).

The Court later made clear, in *Coleman,* that a two-part, conjunctive test is required: "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." 501 U.S. at 735. *Coleman* rejected the notion that *Harris* imposed a "clearly and expressly" requirement on all procedural default holdings. *Id.* at 736. Rather, the Court explained that the *Harris* presumption, and hence the "clearly and expressly" requirement, "appl[ies] only in those cases in which it fairly appears that the state court rested its decision primarily on federal law." *Id.* (internal quotation marks omitted); *see also id.* at 735 (describing this "predicate to the application of the *Harris* presumption").

Simply put, Rocha's certiorari petition asks the Court to treat the "clearly and expressly" requirement as if *Coleman* had been decided the other way. Rocha suggests that the CCA may have considered the merits of his IAC claim because the CCA has done so other, dissimilar

cases and, thus, all "boilerplate" dismissals must be considered to rest primarily on federal law, triggering the *Harris* presumption.

But if the most that can be said of boilerplate CCA dismissals after *Blue* is that there is a possibility that any individual order may have been based on federal law, then these perfunctory orders cannot meet the necessary predicate for the *Harris* presumption. Rocha overlooks the predicate requirement, described in *Long* and confirmed in *Coleman,* that the CCA's orders must first appear to rest primarily on federal law or to be interwoven with federal law before the *Harris* presumption can operate to require a clear statement by the CCA that the dismissal was based on state procedural grounds. *Coleman,* 501 U.S. at 735-736.

In *Long,* this Court explained that federal courts should not accept such invitations to "decide issues of state law that go beyond the opinion" under review. 463 U.S. at 1040. Indeed, it is intrusive for a federal court to second-guess a state court's determination of state law, and federal courts should not "undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris,* 489 U.S. at 264-65. Not only is there no need where, as here, the state court clearly explained the state-law basis for its decision; there is no justification for Rocha's search for

ambiguity in *other* state-court decisions involving Art. 11.071, § 5(a)(3). This sort of inquiry is reserved to the state court and not permitted in a federal court under *Harris* and *Long*.

In any event, the lower court accepted Rocha's invitation to explore state law and found, after a lengthy analysis, that there was no substance to Rocha's argument.

> [W]hen the CCA determines that a successive state habeas application does not satisfy § 5(a)(3), it does so because it has concluded that the habeas applicant cannot establish that he is actually innocent of the death penalty. To arrive at that conclusion, the CCA need not, and does not, consider the merits of the underlying federal constitutional claim.[4]

Pet. Appx. D at 2 (footnote renumbered from original, citation omitted).

Rocha counters that *Ex parte Blue* provides the necessary ambiguity. Yet the court below rejected this contention as well. In *Blue,* the CCA held that § 5(a)(3) requires evidence that would be sufficient to show, by clear and convincing evidence, that no rational factfinder would fail to find the applicant is ineligible for—actually innocent of—the death penalty. Pet. Appx. D at 4 (citing *Blue,* 230 S.W.3d at 163. The CCA concluded that the Texas Legislature

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[4] Again, subject to the possible exception of cases in which the applicant's federal constitutional claim is itself a claim that the applicant is ineligible to receive, and therefore actually innocent of, the death penalty. [*See* n.7, *infra.*]

"apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*"[5] within § 5(a)(3). *Id.* (citing *Blue*, 230 S.W.3d at 160).

The lower court noted that, under the federal law of procedural default, a federal court *cannot review the merits* of a state prisoner's habeas claim unless cause and prejudice is shown or actual innocence is demonstrated. Pet. Appx. D at 4. (citing *Schlup v. Delo,* 513 U.S. 298, 327 (1995); *Sawyer,* 505 U.S. at 350; *Murray v. Carrier,* 477 U.S. 478, 495–96 (1986); and *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977)). The Texas legislature incorporated into § 5(a)(3) both *Sawyer*'s definition of actual innocence of the death penalty and *Sawyer*'s clear-and-convincing standard. *Id.* (citing *Blue,* 230 S.W.3d at 159; and § 5(a)(3)). Actual innocence of the death penalty means that, but for constitutional error at an inmate's sentencing hearing, no reasonable juror would have found him eligible for the death penalty under state law. *Id.* at 5 (citing *Sawyer,* 505 U.S. at 350).

The court below then explicitly and correctly rejected the very heart of Rocha's argument.

> Rocha argues that when the CCA concluded that his successive state habeas application did not satisfy the requirements of § 5(a)(3), it necessarily also concluded that

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[5] 505 U.S. 333 (1992).

> his *Wiggins*[6] claim is without merit. Rocha effectively invites us to treat an actual-innocence claim under *Sawyer* as synonymous with an ineffective-assistance claim under *Wiggins*. Our panel opinion declined his invitation, and we decline it again here. The CCA did not have to reach the merits of Rocha's *Wiggins* claim to conclude that he is not actually innocent of the death penalty. A state court does not undermine the independent state-law character of its procedural-default doctrine by using a federal standard to determine whether an otherwise defaulted successive habeas application should be permitted to bypass a procedural bar.
>
> A claim of actual innocence is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" This statement is no mere shibboleth. It teaches that consideration of a petitioner's gateway claim of innocence precedes consideration of his federal constitutional claim not just temporally but analytically. Only if the petitioner can show that he is actually innocent of the death penalty can a federal court proceed to consider the merits of the alleged underlying constitutional violation. If a petitioner cannot establish his actual innocence, a federal court cannot, and does not, consider the merits of his habeas claim.

Pet. Appx. D at 5 (footnotes omitted).

Section 5(a)(3) is a state law exception to a state procedural rule. It involves no federal constitutional issue.[7] The question posed is

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6 *Wiggins v. Smith,* 539 U.S. 510 (2003).

7 The court of appeals noted "[t]here may well be some exceptions to the rule that a decision on the gateway innocence claim does not constitute a decision on the underlying constitutional claim." Pet. Appx. D at 7. But those exceptions are necessarily limited to claims that the petitioner is ineligible for the death penalty because of mental retardation, incompetency or juvenile status. *Id.* (citing *Roper v. Simmons,* 543 U.S. 551 (2005); *Atkins*

whether, assuming for the sake of argument there was constitutional error as claimed, is there clear and convincing evidence that no rational juror would have answered the special issues in such a way that the death penalty would be imposed under state law? In applying this exception, the CCA did not consider or decide whether or not Rocha's right to effective counsel under the Sixth Amendment was violated.

The state court did not consider whether trial counsel conducted a reasonable investigation, or whether he had a strategic reason for not presenting the evidence Rocha now claims should have been presented. Nor did the CCA question whether counsel's omission undermined objective confidence in Rocha's death sentence. The court decided only that Rocha failed to demonstrate he was actually innocent of the death penalty. For these reasons, Rocha's reliance on *Ake v. Oklahoma,* 470 U.S. 68 (1985), Pet. at 19-20, is misplaced.

This type of threshold inquiry is a common "safety valve" employed by state courts and does not deprive a state procedural default rule of its independence of federal law. *See, e.g., Gardner v. Galetka,* 568 F.3d 862, 884 (10th Cir. 2009) (rejecting challenge to independence of Utah "frivolousness" review); *Campbell v. Burris,* 515

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v. Virginia, 536 U.S. 304 (2002); and *Ford v. Wainwright,* 477 U.S. 399 (1986)). Rocha makes none of these arguments.

F.3d 172, 177-79 (3d Cir. 2008) (rejecting challenge to independence of Delaware "plain error" review); *Daniels v. Lee,* 316 F.3d 477, 487 (4th Cir. 2003) (rejecting challenge to independence of North Carolina plain error review); *Gunter v. Maloney,* 291 F.3d 74, 80 (1st Cir. 2002) (rejecting challenge to independence of Massachusetts "miscarriage of justice" exception); *Scott v. Mitchell,* 209 F.3d 854, 865 (6th Cir. 2000) (rejecting challenge to independence of Ohio plain error review); *Neal v. Gramley,* 99 F.3d 841, 844 (7th Cir. 1996) (rejecting challenge to independence of Illinois plain error review); *Julius v. Johnson,* 840 F.2d 1533, 1546 (11th Cir. 1988) (rejecting challenge to independence of Alabama plain error review); *but see Hornbuckle v. Groose,* 106 F.3d 253, 257 (8th Cir. 1997); *Walker v. Endell,* 850 F.2d 470, 474-75 (9th Cir. 1987).

Accepting Rocha's alternative logic that § 5(a)(3) is not independent of federal law and that the CCA considered the merits of his IAC claim, the exception would swallow the procedural rule it serves. *See, e.g., Gardner,* 568 F.3d at 884 ("We do not think that a state's decision to allow exceptions to its procedural bar in the interest of preventing 'fundamental unfairness,' which requires an examination of the merits, makes the underlying bar any less procedural"); *Campbell,* 515 F.3d at 177–78 (Delaware's plain error exception to

defaulted claims, which "may be resolved by assuming arguendo the merit of the federal claim," did not render the procedural bar dependent on federal law).

This Court has also recognized that states should not be punished for creating safety valves like § 5(a)(3) for procedural default rules.

> A contrary holding would pose an unnecessary dilemma for the States: States could preserve flexibility by granting courts discretion to excuse procedural errors, but only at the cost of undermining the finality of state court judgments. Or States could preserve the finality of their judgments by withholding such discretion, but only at the cost of precluding any flexibility in applying the rules.
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> We are told that, if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review. That would be unfortunate in many cases, as discretionary rules are often desirable.

Beard v. Kindler, 130 S. Ct. 612, 618 (2009) (internal citations omitted).

Section 5(a)(3) is desirable for the same reasons. If Rocha's argument is made law, then surely the Texas Legislature will enact a stricter Article 11.071, § 5(a) procedural default rule without any equitable exceptions. *See, e.g.,* Va. Code § 8.01-654(B)(2) ("Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on

the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition") (emphasis added). This would be an ironic outcome to Rocha's efforts indeed.

II. The Courts Below Do Not Require Additional Guidance on the Issue.

Rocha avers that the circuits are split concerning the operation of the *Harris* presumption, and that the Fifth Circuit itself is confused. Pet. at 14-15 & n.14, 29-30 (citing *Balentine v. Thaler,* 626 F.3d 842 (5th Cir. 2010); and *Koerner v. Gregas,* 328 F.3d 1039, 1051 (9th Cir. 2003)). However, this Court recently denied certiorari review in *Balentine,* — S. Ct. —, 2011 WL 1156549 (Jun 13, 2011). And the lower court's decisions in *Balentine* and this case, as well as other circuits, have consistently recognized that a necessary predicate to the application of the *Harris* presumption is that there be a fair indication that the decision of the last state court to which the petitioner presented his federal claims was based on federal law.[8]

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[8] *See, e.g., Johnson v. Pinchak,* 392 F.3d 551, 557 (3d Cir. 2004) ("*Harris*'s plain statement rule was subsequently narrowed by *Coleman,* which established that the first step is to determine whether the decision of the last state court to which the petitioner presented his federal claims 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law'") (quoting *Coleman,* 501 U.S. at 735); *Gulertekin v. Tinnelman-Cooper,* 340 F.3d 415, 422-423 (6th Cir. 2003) (noting that a determination that a state court decision rests on federal grounds is a predicate to any application of the *Harris* presumption); *Aparicio v. Artuz,* 269 F.3d 78, 92 (2d Cir. 2001) ("[I]n *Coleman,* the Supreme Court backed away from the 'clear statement'

III. Notwithstanding the Fact That the CCA's Opinion Does Not Fairly Appear to Rest on Federal Law, the CCA Clearly and Expressly Indicated Its Reliance on State Law.

The Texas abuse-of-the-writ statute has long been considered an independent and adequate bar to federal review. *Hughes v.*

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principle, holding it was an essential predicate to the *Harris* presumption that the state court decision on petitioner's claims be grounded in substantive federal law"); *Thomas v. Davis,* 192 F.3d 445, 453 n.6 (4th Cir. 1999) ("Although the opinion of the [state court] nowhere states that its rejection of [the habeas applicant's] fair-notice claim was based on the application of a procedural bar, we are not entitled to simply presume that the court therefore decided the case on the merits. . . . The *Harris* presumption does not apply in cases such as this one, however, where the state court's decision does not 'fairly appear' to rest primarily on federal law or to be interwoven with such law"); *Brewer v. Marshall,* 119 F.3d 993, 999-1000 (1st Cir. 1997) ("When the state decision fairly appears to rest primarily on federal law or to be interwoven with federal law, the federal court presumes there is no independent and adequate state ground for the decision. However, that presumption does not apply where, as here, there is no clear indication that [the] state court rested its decision on federal law") (internal quotation marks and citations omitted); *Klein v. Neal,* 45 F.3d 1395, 1399 (10th Cir. 1995) ("*Coleman* thus clarifies that the *Harris* presumption is applicable if, and only if, the predicate question of whether the state court decision fairly appears to rest primarily on federal law is first answered in the affirmative"); *Willis v. Aiken,* 8 F.3d 556, 561 (7th Cir. 1993) ("[T]he Court in *Coleman* cautioned that, before the *Long–Harris* presumption is applicable, a federal court must first ascertain that the state court decision fairly appears to rest on federal grounds or is interwoven with federal law. Thus, even when the state court does not make a 'clear and express' statement that it is deciding an issue based on state law, the presumption may not automatically apply: The federal court first must determine whether the state court decision fairly appears to rest on federal grounds."); *Hunter v. Aispuro,* 982 F.2d 344, 347 (9th Cir. 1992) ("The state courts' terse dismissals of the habeas petitions do not disclose whether they were based on state or federal law. Certainly the *pro forma* orders do not fairly appear[ ] to rest primarily on federal law, or to be interwoven with the federal law. Therefore, the necessary federal law predicate is missing and the *Harris* presumption of a reviewable federal issue does not apply.") (internal quotation marks and citation omitted).

Quarterman, 530 F.3d 336, 342 (5th Cir. 2008); *Emery v. Johnson,* 139 F.3d 191, 196 (5th Cir. 1998); *Nobles v. Johnson,* 127 F.3d 409, 423 (5th Cir. 1997). Here, the CCA delivered a plain and unambiguous statement of its actual reliance on the same statute, which is independent of federal law and adequate to support the judgment.[9]

Under the "plain statement" rule of *Long,* a federal court may not review such a decision. 463 U.S. at 1042. Such a plain statement must clearly and expressly indicate, on the face of the opinion, that the judgment is based on distinct, state-law grounds. *Id.* at 1041-42; *see also Harris,* 489 U.S. at 263 (habeas review is barred if the state-court judgment rests on a state procedural bar). Here, the CCA expressly stated that Rocha's claim was brought in a subsequent habeas application, cited the state statute prohibiting such subsequent applications, and held that the claim failed to meet any exception to that prohibition. Pet. Appx. A. No federal law was cited within the order. This is exactly the sort of plain statement that is contemplated under *Long*. *Cf. Sochor v. Florida,* 504 U.S. 527, 534 (1992) (state court's opinion which said that "[n]one of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved

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[9] As the lower court noted, Rocha expressly waives any challenge to the *adequacy* of the state-court judgment dismissing his claim. Pet. App. C at 7 n.36; Pet. Appx. D at 3.

for appeal" indicated with requisite clarity reliance on state law); *Coleman,* 501 U.S. at 740 (perfunctory order of dismissal, which did not mention federal law, "fairly appears" to rely on state law). Thus, Rocha's claim is procedurally defaulted.

IV. Certiorari Review Is Not Warranted with Regard to Rocha's Vienna Convention Claim.

Rocha next suggests that the Court should grant certiorari in order to overrule its earlier opinion in *Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006). Pet. at 30-39. In *Sanchez-Llamas,* the Court held that suppression of evidence was not an available remedy for a Vienna Convention violation. 548 U.S. at 347. Rocha argues that an exception should be made for his case. Pet. at 37-39. However, any such holding would violate the nonretroactivity rule of *Teague v. Lane,* 489 U.S. 288 (1989). Indeed, even a decision that the Vienna Convention creates an individually enforceable right would run afoul of *Teague.* Furthermore, no clearly established law undermines the state court's rejection of Rocha's claim. As a result, certiorari review should be denied.

A. Initially, the lower court correctly denied a COA because Rocha's claim does not meet the required showing under AEDPA.

Because Rocha initiated his federal habeas proceeding after April 24, 1996, his petition and the instant appeal are governed by the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Slack v. McDaniel,* 529 U.S. 473, 478 (2000); *Lindh v. Murphy,* 521 U.S. 320, 326 (1997). However, there is no automatic entitlement to appeal. *Miller-El v. Cockrell,* 537 U.S. 322, 335 (2003). Rather, before an appeal may be entertained, Rocha must first seek and obtain a COA as a jurisdictional prerequisite. *Id.* at 335-36. A COA will only issue if Rocha makes a substantial showing of the denial of a constitutional right, which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that)" the court below should have resolved the claims in a different manner or that this Court should encourage Rocha to further litigate his claims in federal court. *Id.* at 336 (quoting *Slack,* 529 U.S. at 483-84). The COA determination "requires an overview of the claims in the habeas petition and a general assessment of their merits" but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El,* 537 U.S. at 336.

Moreover, a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'"

clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter,* 131 S. Ct. 770, 785 (2011) (quoting *Williams v. Taylor,* 529 U.S. 362, 412 (2000)); 28 U.S.C. § 2254(d).

A "run-of-the-mill" state court decision applying the correct rule to the facts of a particular case is to be reviewed under the "unreasonable application" clause. *Williams,* 529 U.S. at 406. In order to determine if the state court made an unreasonable application, a federal court "must determine what arguments or theories supported or . . . *could have supported,* the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree* that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter,* 131 S. Ct. at 786 (emphasis added). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004).

Fairminded jurists would certainly not disagree that, at the time of the CCA's rejection of Rocha's Vienna Convention claim, no Supreme Court precedent supported the notion that the Vienna Convention

creates individually enforceable rights or that suppression of evidence is an appropriate remedy for a Vienna Convention violation. Therefore, Rocha not only fails to show the unreasonableness of the state court's decision, he fails to show that reasonable jurists would even debate the reasonableness of that decision. For this reason alone, certiorari review should be denied.

B. Rocha was not prejudiced by the State's failure to advise him of his Vienna Convention rights.

The State of Texas promised in *Medellín v. Texas,* 554 U.S. 759 (2008) (*Medellín III*) that, for inmates named in the *Avena* decision who did not receive "review and reconsideration" of their claims for prejudice under the Vienna Convention, the State would seek a review of the merits of that inmate's claim. However, Rocha received review of his claim as mandated by the ICJ. Initially, the ICJ determined that Rocha was not harmed by any Vienna Convention violation with regard to the punishment phase of his trial. In its opinion, the court stated that, in Rocha's case "the Mexican consular authorities learned of their national's detention in time to provide [legal, financial, and investigative] assistance, either through notification by United States authorities (albeit belatedly . . .) or through other channels." *Avena* at

42, ¶104. Reasonable jurists would not debate that no further review and reconsideration of this aspect of Rocha's claim is necessary.

With regard to his confession, the CCA reasonably concluded that any violation was harmless. The CCA rejected Rocha's challenge to his confession on direct appeal and in his first state habeas proceeding, finding that he was warned of his *Miranda*[10] rights in Spanish both orally and in writing. *Rocha v. State,* 16 S.W.3d at 11-12; 01-SHCR 107-08, 110, 114, 116. Rocha understood those warnings, including the fact that he had a right to an attorney who would be present during any questioning. *Rocha v. State,* 16 S.W.3d at 11-12; 01-SHCR 108-10, 114, 116. Rocha voluntarily waived his right to counsel and agreed to provide a statement. *Rocha v. State,* 16 S.W.3d at 11-12; 01-SHCR 109-10, 114, 116.

A concurring judge on the CCA reached the same conclusion when specifically factoring in the Vienna Convention to the question of voluntariness:

> In the instant case, the State admits that the terms of the Vienna Convention were violated. [Rocha] is a citizen of Mexico, the arresting officer knew that [Rocha] was a Mexican citizen, and [Rocha] was never informed of his right to talk to a Mexican consulate. But, while [Rocha] demonstrates how the Mexican consulate would have helped him, he does not state that he would have availed

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10 *Miranda v. Arizona,* 384 U.S. 436 (1966).

> himself of this help had he been informed of that right. Therefore, [Rocha] fails to show a causal connection between the officers' failure to inform him of his Vienna Convention rights and the oral statements he made. [Rocha]'s statements were properly admitted at trial.

Rocha v. State, 16 S.W.3d at 30 (Holland, J., concurring) (footnotes in original).

Rocha implies he would have elected to speak with an attorney if he had been informed of his rights in Spanish by an employee of the Mexican Consulate. Pet. at 32-33, 38. However, he offers no clear and convincing evidence to rebut the state court's fact finding that his confession was voluntary. Further, he offers no evidence that would rebut the state court's implicit fact finding: that Rocha did not desire an attorney, provided to him by the Mexican Consulate or otherwise. Nor does Rocha demonstrate that the state court unreasonably applied federal law in deciding the claim. In other words, Rocha would have confessed whether or not he was informed of his right to contact his consulate.

C. This Court has never held that the Vienna Convention creates any individually enforceable rights.

Moreover, as Rocha recognizes and the district court correctly held, this Court has declined to hold that an inmate—as opposed to Mexico—possesses any individually enforceable rights under the

Vienna Convention. Pet. at 35-37 (citing *Sanchez-Llamas,* 548 U.S. at 343); Pet. Appx. F at 10-11 (citing *United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir. 2001)). Additionally, this Court explicitly held in *Medellín v. Texas* that *Avena* itself is not directly or individually enforceable under United States law. 552 U.S. 491, 522-23 (2008) (*Medellín II*). Thus, for the purposes of either AEDPA review or *Teague,* clearly established law does not support Rocha's argument. Any such holding by this Court now would constitute a "new rule" because it was not dictated by precedent at the time Rocha's conviction became final in 2000. *Goeke v. Branch,* 514 U.S. 115, 118 (1995).

Rocha is not entitled to the retroactive application of any new rule unless he demonstrates that a *Teague* exception applies. Under *Teague,* "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1971)). "Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (quoting *Mackey,* 401 U.S. at 693 (internal quotations omitted)). Rocha makes no attempt to suggest either exception applies. Nor could he. A holding that the Vienna Convention creates individually enforceable

rights would impose a new obligation on the State of Texas and unfairly trample the reasonable, good-faith interpretations of the precedents that the state court relied upon in adjudicating Rocha's claim.

D. Suppression is not an appropriate remedy even if Rocha was harmed.

Finally, Rocha's attempt to carve an exception out of *Sanchez-Llamas* regarding the length of time between arrest and admonishment of his consular rights does not entitle him to relief or certiorari review. This Court was clear in *Sanchez-Llamas* that suppression of evidence is not an available remedy where the Vienna Convention "does not provide a particular remedy, either expressly or implicitly." 548 U.S. at 347. Thus, "it is not for the federal courts to impose one on the States through lawmaking of their own." *Id.* Further,

> The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Id. at 349. Time is not one of the factors mentioned as a concern in the Court's decision. Therefore, reasonable jurists would not debate that habeas relief is precluded under the circumstances. Indeed, this is

exactly what the state court reasonably determined on direct appeal, under state law. *Rocha v. State,* 16 S.W.3d at 13-19.

CONCLUSION

For the foregoing reasons, Rocha's petition for writ of certiorari should be denied.

Respectfully submitted,

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