

Capital Punishment and the Judicial Process

Third Edition

Letter Update to 2010-2011 Supplement

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CHAPTER 9 THE SENTENCING PHASE OF CAPITAL CASES

E. Closing Arguments and Fundamental Fairness

Casebook page 551. Add to end of Notes and Questions on Prosecutorial Misconduct:

14. Should there be a civil remedy for prosecutorial misconduct? John Thompson was wrongfully convicted and sentenced to death in Louisiana. Thompson's wrongful conviction and death sentence were due, at least in part, to the actions of multiple prosecutors in the Orleans Parish District Attorney's office who withheld exculpatory evidence from Thompson for more than 14 years. After his exoneration, Thompson brought an action pursuant to 42 U.S.C. § 1983 against District Attorney Harry Connick alleging that the district attorney and his employees violated his constitutional rights by not turning over to the defense exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). A federal jury found in Thompson's favor and awarded him \$14 million. In *Connick v. Thompson*, 131 S.Ct. 1350 (2011), the Court reversed the jury award. Thompson's theory of liability was premised on the district attorney's failure to adequately train his employees with regard to a prosecutor's constitutional obligations under *Brady*. The Court concluded that Thompson had not established this constitutional claim "because Thompson did not prove a pattern of similar violations that would 'establish that the "policy of inaction" [was] the functional equivalent of a decision by the city itself to violate the Constitution.'"

CHAPTER 13 INTRODUCTION TO FEDERAL HABEAS CORPUS REVIEW

C. The Anti-terrorism and Effective Death Penalty Act of 1996

Casebook page 782. Insert before Notes on Standard of Review Under § 2254(d) of the AEDPA:

Note on Harrington v. Richter, 131 S.Ct. 770 (2011)

In *Harrington v. Richter*, 131 S.Ct. 770 (2011), the Court considered the standard of review as set out in § 2254, and how that standard would apply to an ineffective assistance of counsel claim where trial counsel had failed to consult blood experts in preparation for trial. What follows is the Court's discussion of § 2254 and the standard of review federal courts must apply to state court findings.

III

Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court; or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the

record before the state court, § 2254(d)(2).

The Court of Appeals relied on the second of these exceptions to § 2254(d)'s relitigation bar, the exception in § 2254(d)(1) permitting relitigation where the earlier state decision resulted from an "unreasonable application of" clearly established federal law. In the view of the Court of Appeals, the California Supreme Court's decision on Richter's ineffective-assistance claim unreasonably applied the holding in *Strickland*. The Court of Appeals' lengthy opinion, however, discloses an improper understanding of § 2254(d)'s unreasonableness standard and of its operation in the context of a *Strickland* claim.

The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. And as this Court has explained, "[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." "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court."

Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." AEDPA demands more. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, 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. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)."

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d),

including its requirement that the state court's decision be evaluated according to the precedents of this Court. It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."

Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.

Here, however, the Court of Appeals gave § 2254(d) no operation or function in its reasoning. Its analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.

CHAPTER 14 STATE BARRIERS TO FEDERAL HABEAS REVIEW

G. Adequate and Independent State Grounds

Casebook page 856. Add to the end of Notes and Questions:

6. In *Wilson v. Corcoran*, 131 S.Ct. 13 (2010) (per curiam), the Court made clear that federal habeas relief is only available for violations of federal law. As the Court stated:

But it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). And we have repeatedly held that "federal habeas corpus relief does not lie for errors of state law." "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." But here, the panel's opinion contained no hint that it thought the violation of Indiana law it had unearthed also entailed the infringement of any federal right. Not only did the court frame respondent's claim as whether "the Indiana trial court considered non-statutory aggravating circumstances . . . in contravention of state law," it also explicitly acknowledged that "[n]othing in [its] opinion prevents Indiana from adopting a rule permitting the use of non-statutory aggravators in the death sentence selection process." See *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (permitting their use under federal law), *id.*, at 551-552 (citations omitted).

Nor did it suffice for the Court of Appeals to find an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). That provision allows habeas petitioners to avoid the bar to habeas relief imposed with respect to federal claims adjudicated on the merits in state court by showing that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." It does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner "only on the ground" that his custody violates federal law.

. . . It is not enough to note that a habeas petitioner asserts the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief. The Seventh Circuit's opinion reflects no such agreement, nor does it even articulate what federal right was allegedly infringed. In fact, as to one possible federal claim, the court maintains that it would not violate federal

law for Indiana to adopt a rule authorizing what the trial court did.

In lieu of finding or even describing a constitutional error, the amended opinion says only that the State had not “advanced any contrary argument based on *Wainwright v. Goode* . . . or any similar decision.” It is not clear what this language was meant to convey. It cannot have meant that the State forfeited the position that respondent’s allegations do not state a constitutional violation, since (as we observed) the State explicitly disputed that point before the District Court—the last forum in which the subject had been raised, leading the Court of Appeals to conclude that respondent had waived the claim entirely. And there is no suggestion that the State has ever conceded the existence of a federal right to be sentenced in accordance with Indiana law. Under those circumstances, it was improper for the Court of Appeals to issue the writ without first concluding that a violation of federal law had been established.

I. Evidentiary Hearings Under the AEDPA - Section 2254(e)

Casebook page 867. Add following Michael Williams v. Taylor:

Cullen v. Pinholster
131 S.Ct. 1388 (2011)

Justice THOMAS delivered the opinion of the Court. FN*

FN* Justice GINSBURG and Justice KAGAN join only Part II.

Scott Lynn Pinholster and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted Pinholster of first-degree murder, and he was sentenced to death.

After the California Supreme Court twice unanimously denied Pinholster habeas relief, a Federal District Court held an evidentiary hearing and granted Pinholster habeas relief under 28 U.S.C. § 2254. The District Court concluded that Pinholster’s trial counsel had been constitutionally ineffective at the penalty phase of trial. Sitting en banc, the Court of Appeals for the Ninth Circuit affirmed. Considering the new evidence adduced in the District Court hearing, the Court of Appeals held that the California Supreme Court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law.” § 2254(d)(1).

We granted certiorari and now reverse.

...

We first consider the scope of the record for a § 2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State.

As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody “in violation of the Constitution or laws or treaties of the United States.” Sections 2254(b) and (c) provide that a federal court may not grant such applications unless, with certain exceptions, the applicant has exhausted state remedies.

If an application includes a claim that has been “adjudicated on the merits in State court proceedings,” § 2254(d), an additional restriction applies. Under § 2254(d), that application “shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim”:

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

This is a “difficult to meet,” and “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” The petitioner carries the burden of proof.

We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that “resulted in” a decision that was contrary to, or “involved” an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

This understanding of the text is compelled by “the broader context of the statute as a whole,” which demonstrates Congress’ intent to channel prisoners’ claims first to the state courts. “The federal habeas scheme leaves primary responsibility with the state courts. . . .” Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.

Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents

interpreting that statutory provision. Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 405, 406, (2000). If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.

Our recent decision in *Schriro v. Landrigan*, 550 U.S. 465 (2007), is consistent as well with our holding here. We explained that "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." In practical effect, we went on to note, this means that when the state-court record "precludes habeas relief" under the limitations of § 2254(d), a district court is "not required to hold an evidentiary hearing."

The Court of Appeals wrongly interpreted (*Michael*) *Williams v. Taylor*, 529 U.S. 420 (2000) as supporting the contrary view. The question there was whether the lower court had correctly determined that § 2254(e)(2) barred the petitioner's request for a federal evidentiary hearing. *Michael Williams* did not concern whether evidence introduced in such a hearing could be considered under § 2254(d)(1). In fact, only one claim at issue in that case was even subject to § 2254(d); the rest had not been adjudicated on the merits in state-court proceedings.

If anything, the decision in *Michael Williams* supports our holding. The lower court in that case had determined that the one claim subject to § 2254(d)(1) did not satisfy that statutory requirement. In light of that ruling, this Court concluded that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a [federal] hearing on th[at] claim." That conclusion is fully consistent with our holding that evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.

The Court of Appeals' reliance on *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), was also mistaken. In *Holland*, we initially stated that "whether a state court's decision was unreasonable [under § 2254(d)(1)] must be assessed in light of the record the court had before it." We then went on to assume for the sake of argument what some Courts of Appeals had held that § 2254(d)(1), despite its mandatory language, simply does not apply when a federal habeas court has admitted new evidence that supports a claim previously adjudicated in state court. There was no reason to decide that question because regardless, the hearing should have been barred by § 2254(e)(2). Today, we reject that assumption and hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the

limitation of § 2254(d)(1) on the record that was before that state court.

Justice SOTOMAYOR, with whom Justice Ginsburg and Justice Kagan join as to Part II, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances. *See* 28 U.S.C. § 2254(e)(2). Under the Court’s novel interpretation of § 2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1)’s threshold obstacle to federal habeas relief - even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute to “compe[re]” this harsh result, ante, at 1398 - 1399, the Court ignores a key textual difference between §§ 2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the § 2254(d)(1) inquiry. I therefore dissent from the Court’s first holding. . . .

I

The Court first holds that, in determining whether a state-court decision is an unreasonable application of Supreme Court precedent under § 2254(d)(1), “review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.” New evidence adduced at a federal evidentiary hearing is now irrelevant to determining whether a petitioner has satisfied § 2254(d)(1). This holding is unnecessary to promote AEDPA’s purposes, and it is inconsistent with the provision’s text, the structure of the statute, and our precedents.

A

To the limited extent that federal evidentiary hearings are available under AEDPA, they ensure that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state-court proceeding, and cannot return to state court retain the ability to access the Great Writ. “When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the ‘writ of habeas corpus plays a vital role in protecting constitutional rights.’” Allowing a petitioner to introduce new evidence at a hearing in the limited circumstance permitted by § 2254(e)(2) does not upset the balance that Congress struck in AEDPA between the state and federal courts. By construing § 2254(d)(1) to do the work of other provisions in AEDPA, the majority has subverted Congress’ careful balance of responsibilities. It has also created unnecessarily a brand-new set of procedural complexities that lower courts will have to confront.

B

2

. . . We have long recognized that some diligent habeas petitioners are unable to develop

all of the facts supporting their claims in state court. As discussed above, in enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not “exercise diligence in pursuing their claims” in state court. Importantly, it did not impose any express limit on evidentiary hearings for petitioners who had been diligent in state court. For those petitioners, Congress left the decision to hold a hearing “to the sound discretion of district courts.”

Faced with situations in which a diligent petitioner offers additional evidence in federal court, the courts of appeals have taken two approaches to applying § 2254(d)(1). Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, § 2254(d)(1) does not apply at all and the federal court may review the claim *de novo*. I agree with the majority’s rejection of this approach. It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.

Other courts of appeals, including the court below, have struck a more considered balance. These courts have held that § 2254(d)(1) continues to apply but that new evidence properly presented in a federal hearing is relevant to the reasonableness of the state-court decision. This approach accommodates the competing goals, reflected in §§ 2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioners to present evidence to the federal court when they were unable to do so in state court.

The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted: § 2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied § 2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State’s public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain

federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. Because the state court adjudicated the petitioner's *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence. That the majority's interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong.

. . . The majority's reading of § 2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners' claims. Justice Breyer takes the same position. I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance, as does Justice Alito. Where I disagree with the majority is in my understanding that § 2254(e)(2) already accomplishes this result. By reading § 2254(d)(1) to do the work of § 2254(e)(2), the majority gives § 2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

Note

1. Justice Sotomayor noted in her dissent in *Pinholtzer* that "evidentiary hearings under AEDPA occur in 0.4 percent of noncapital cases and 9.5 percent of capital cases." See N. King, F. Cheesman, & B. Ostrom, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 35-36 (2007).

CHAPTER 19 INTERNATIONAL LAW AND THE DEATH PENALTY

2010-2011 Supplement page 220. Add following Note:

Garcia v. Texas
131 S.Ct. 2866 (2011)

PER CURIAM.

Petitioner Humberto Leal Garcia (Leal) is a Mexican national who has lived in the United

States since before the age of two. In 1994, he kidnapped 16-year-old Adria Saucedo, raped her with a large stick, and bludgeoned her to death with a piece of asphalt. He was convicted of murder and sentenced to death by a Texas court. He now seeks a stay of execution on the ground that his conviction was obtained in violation of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. He relies on *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U. S.), 2004 I.C.J. 12 (Judgment of Mar. 31), in which the International Court of Justice (ICJ) held that the United States had violated the Vienna Convention by failing to notify him of his right to consular assistance. His argument is foreclosed by *Medellín v. Texas*, 552 U.S. 491 (2008) (*Medellín I*), in which we held that neither the *Avena* decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law.

Leal and the United States ask us to stay the execution so that Congress may consider whether to enact legislation implementing the *Avena* decision. Leal contends that the Due Process Clause prohibits Texas from executing him while such legislation is under consideration. This argument is meritless. The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.

The United States does not endorse Leal's due process claim. Instead, it asks us to stay the execution until January 2012 in support of our "future jurisdiction to review the judgment in a proceeding" under this yet-to-be enacted legislation. It relies on the fact that on June 14, 2011, Senator Patrick Leahy introduced implementing legislation in the Senate with the Executive Branch's support. No implementing legislation has been introduced in the House.

We reject this suggestion. First, we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation. Our task is to rule on what the law is, not what it might eventually be. In light of *Medellín I*, it is clear that there is no "fair prospect that a majority of the Court will conclude that the decision below was erroneous," and our task should be at an end. Neither the United States nor Justice Breyer cites a single instance in this Court's history in which a stay issued under analogous circumstances.

Even if there were circumstances under which a stay could issue in light of proposed legislation, this case would not present them. *Medellín* himself sought a stay of execution on the ground that Congress might enact implementing legislation. We denied his stay application, explaining that "Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in [*Medellín I*]." *Medellín v. Texas*, 554 U.S. 759, 760 (2008) (per curiam) (*Medellín II*). It has now been seven years since the ICJ ruling and three years since our decision in *Medellín I*, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.

The United States and Justice Breyer complain of the grave international consequences that will follow from Leal's execution. Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation, and we will follow the law as written by Congress. We have no authority to stay an execution in light of an "appeal of the President," presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim.

Finally, we noted in *Medellín II* that "[t]he beginning premise for any stay . . . must be that petitioner's confession was obtained unlawfully," and that "[t]he United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access." Here, the United States studiously refuses to argue that Leal was prejudiced by the Vienna Convention violation, contending instead that the Court should issue a stay simply in light of the possibility that Leal might be able to bring a Vienna Convention claim in federal court, regardless of whether his conviction will be found to be invalid. We decline to follow the United States' suggestion of granting a stay to allow Leal to bring a claim based on hypothetical legislation when it cannot even bring itself to say that his attempt to overturn his conviction has any prospect of success. . . .

Justice BREYER, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

The petitioner, Humberto Leal Garcia (Leal), convicted 16 years ago of capital murder, is scheduled to be executed this evening. He asks this Court to stay his execution pending resolution of his petitions for writs of certiorari and habeas corpus. I would grant the applications and stay the execution.

As the Solicitor General points out, Leal's execution at this time "would place the United States in irreparable breach" of its "obligation[s]" under international law. The United States has signed and ratified the Vienna Convention, a treaty under which the United States has promised, among other things, to inform an arrested foreign national, such as Leal, that he has a right to request the assistance of his country's consulate. The United States has also signed and ratified an optional protocol, a treaty in which the United States agrees that "[d]isputes arising out of the interpretation of application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Although the United States has since given notice of withdrawal from the Optional Protocol, that withdrawal does not alter the binding status of its prewithdrawal obligations.

When officials of the State of Texas arrested Leal, they failed to inform him of his Vienna Convention rights, thereby placing the United States in violation of its obligations under that Convention. And so far neither Texas nor any other judicial authority has implemented what the International Court of Justice found (in a related case brought by the Government of Mexico) to be the proper remedy for that Convention violation, namely a hearing to determine whether that violation amounted in effect to harmless error. In other words, the international court made

clear that Leal is entitled to a certain procedure, namely a hearing. That being so, a domestic court's guesses as to the results of that procedure are, as far as our treaty obligations are concerned, irrelevant.

This Court subsequently held that, because Congress had not embodied our international legal obligations in a statute, the Court lacked the power to enforce those obligations as a matter of domestic law. And the Court later refused to grant a stay of execution in a similar case in significant part because "the President . . . has [not] represented to us that there is any likelihood of congressional . . . action."

But these applications for stay do not suffer from this last mentioned legal defect. The Solicitor General has filed an amicus brief in which he states that "after extensive consultation with the Department of State and the Department of Justice," Senator Patrick Leahy, the chairman of the Senate Committee on the Judiciary, has introduced (and expressed an intention to hold speedy hearings on) a bill that would permit Leal and other similarly situated individuals to obtain the hearing that international law requires. The amicus brief indicates that "congressional . . . action" is a reasonable possibility. And the Solicitor General urges this Court to grant a stay, providing Congress with adequate time to carry out the legal responsibility that this Court has held belongs to the Legislative Branch, namely the enactment of a law that will bring the United States into compliance with its treaty obligations and provide Leal with the hearing that those obligations legally demand.

At the same time, the Solicitor General sets forth strong reasons, related to the conduct of foreign affairs, for granting a stay. Representing the Executive Branch (hence the President), the Solicitor General tells us that "[p]etitioner's execution would cause irreparable harm" to "foreign-policy interests of the highest order." The Solicitor General says that failing to halt Leal's execution would place "the United States in irremediable breach of its international-law obligation," with

"serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention."

These statements are supported by the fact that the Government of Mexico has also filed a brief in which it states that declining to stay Leal's imminent execution "would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."

This Court has described interests of the kind set forth by the Solicitor General as "plainly compelling." The Court has long recognized the President's special constitutionally based authority in matters of foreign relations. And it has ordinarily given his views significant weight in such matters. It should do so here.

Finally, this Court has adequate legal authority to grant the requested stay. Should Senator Leahy's bill become law by the end of September (when we would consider the petition in the ordinary course), this Court would almost certainly grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings consistent with that law. Indeed, were the Solicitor General to indicate at that time that the bill was about to become law, I believe it likely that we would hold the petition for at least several weeks until the bill was enacted and then do the same. And this Court, under the All Writs Act, 28 U.S.C. §1651, can take appropriate action to preserve its "potential jurisdiction."

Thus, on the one hand, international legal obligations, related foreign policy considerations, the prospect of legislation, and the consequent injustice involved should that legislation, coming too late for Leal, help others in identical circumstances all favor granting a stay. And issuing a brief stay until the end of September, when the Court could consider this matter in the ordinary course, would put Congress on clear notice that it must act quickly. On the other hand, the State has an interest in proceeding with an immediate execution. But it is difficult to see how the State's interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer.

Consequently I would grant the stay that the petitioner requests. In reaching its contrary conclusion, the Court ignores the appeal of the President in a matter related to foreign affairs, it substitutes its own views about the likelihood of congressional action for the views of Executive Branch officials who have consulted with Members of Congress, and it denies the request by four Members of the Court to delay the execution until the Court can discuss the matter at Conference in September. In my view, the Court is wrong in each respect.