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FACTS

On February 17, 1992, at approximately 10:30 p.m., Ann Isch heard her upstairs neighbor, Ruth Dickie, and a man arguing loudly in the hall.[1] Dickie, a thirty-nine year old unmarried woman, lived alone in an Arlington County apartment. As the arguing continued, Isch heard the man enter Dickie's apartment. She subsequently called Joseph King, the apartment complex maintenance person. When King went to check on Dickie, he knocked on the door and heard what he thought was someone being dragged across the floor. After no one answered his knocking, King called the police.[2]

The police arrived, and using King's master key, entered Dickie's apartment. They found her naked from the waist down, lying on the floor on her back.[3] Dickie was bleeding, and according to the police, did not seem to be breathing.[4] According to the autopsy report, Dickie had been stabbed in the neck five times with two of the wounds being fatal.[5] Based on other findings in the autopsy report, the police were able to place Angel Francisco Breard in Dickie's apartment.[6]

Despite the forensic evidence, the police suspected Breard only after he came to their attention as a result of another crime.[7] Breard was subsequently indicted on charges of the attempted rape and capital murder of Dickie.[8] In testifying at his jury trial, Breard offered the following account of the events that took place on February 17, 1992. He testified that, on the night in question, he left his apartment, armed with a knife, with the intent of "'try[ing] to do someone,'" meaning that he "'wanted to use the knife to force a woman to have sex with [him].'"[9] Breard confessed that he talked to Dickie on the street, followed her to her apartment, argued with her, and then forced himself into her apartment. In testifying, Breard also detailed how he stabbed Dickie, took off her pants, and got "'on top of her.'"[10] Upon hearing a knock at the door, Breard became frightened, and escaped through a kitchen window.[11]

The jury convicted Breard of both the attempted rape and capital murder charges.[12] For the rape conviction, the jury gave Breard ten years' imprisonment and a $100,000 fine. After hearing evidence in aggravation and mitigation of the capital murder charge during the sentencing phase, the jury fixed Breard's sentence at death based upon findings of both future dangerousness and vileness of the crime.[13] The trial

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[1] *Breard v. Pruett,* 134 F.3d 615, 617 (4th Cir. 1998).

[2] *Breard,* 134 F.3d at 617.

[3] *Id.*

[4] The police made the following observations at the crime scene: (1) there was body fluid on Dickie's pubic hair and on her inner thigh; (2) there were hairs clutched in her hands and on one of her legs; (3) her underpants had been ripped from her body; (4) there was a blood-stained telephone receiver near her head; (5) a missing lens from Dickie's eyeglasses was found under her body; (6) Dickie's pants were missing some buttons; (7) her purse was on the floor just inside the front door; and (8) her keys were on the floor between her legs. *Breard v. Commonwealth,* 248 Va. 68, 72-73, 445 S.E.2d 670, 674 (1994).

[5] *Breard,* 134 F.3d at 617.

[6] The autopsy report on Dickie contained the following findings. First, hairs found on Dickie's body were found to be identical in all microscopic characteristics to hair samples taken from Breard. Id. Second, the semen found on Dickie's pubic hair matched Breard's enzyme typing in every respect, and Breard's DNA profile matched the DNA profile of the semen found on Dickie's body. *Id.* Additionally, Breard's Argentinean nationality strengthened this physical evidence, in that his DNA profile occurs in only one in seventeen million members of the Hispanic population. Breard, 248 Va. at 73, 445 S.E.2d at 674. Moreover, only 1.7 percent of the general population possesses the same enzyme type as Breard. *Id.* at 73, 445 S.E.2d at 674.

[7] On August 17, 1992, police answered a call reporting screams from Breard's Arlington apartment. Upon arrival, the police found Jeanine Yvonna Price, naked and hysterical, and Breard wearing only his undershorts. Breard and Price had met in Washington, D.C., and then traveled together to Breard's apartment. Breard had then attempted to sexually assault Price, removing her clothing, striking her, and telling her that he intended to have anal intercourse with her. The police arrested Breard, and, at that time, made him a suspect in Dickie's murder. *Id.* at 85, 445 S.E.2d at 680.

[8] *Breard,* 134 F.3d at 617.

[9] *Breard,* 248 Va. at 73, 445 S.E.2d at 674 (quoting trial record).

[10] *Id.* at 73, 445 S.E.2d at 674 (quoting trial record).

[11] *Id.* at 73, 445 S.E.2d at 674. Breard also testified that, at the time of the attack, he believed that he was under a curse placed upon him by his ex-wife's father.

[12] *Breard,* 134 F.3d at 617.

[13] *Id.* During the sentencing phase, the Commonwealth presented evidence that in addition to Dickie and Price, Breard had attacked another woman. *Breard v. Commonwealth,* 248 Va. 68, 85, 445 S.E.2d 670, 680 (1994). Three weeks prior to Dickie's murder, Breard assaulted Celia Gonzales on a street in Arlington County. He grabbed Gonzales from behind and forced her to go with him, telling her he had a gun. After someone noticed what was going on, Breard released Gonzales, but not before telling her he knew where she lived and he was going to have someone get her later. *Id.* at 85, 445 S.E. at 680. In response, the defense presented the following mitigating evidence. First, Breard testified that he had become very religious since his arrest, praying often, including prayers for Dickie and her mother. *Id.* at 85, 445 S.E.2d at 680. Second, a volunteer for Good News Mission, a Bible-teaching organization, testified that Breard goes to his Bible study class twice a week, and has had a genuine conversion to Christianity. *Id.* at 85-86, 445 S.E.2d at 680. Finally, Breard's mother testified that when he was five years old, her son had been in a traumatic car accident, and that some years later, he had been seriously injured in another car accident. Additionally, Breard's father died when Breard was eighteen years old. More recently, according to his mother, Breard's failed marriage had lead to many problems, including excessive drinking. *Id.* at 86, 445 S.E.2d at 680-81.

court sentenced Breard accordingly. The Supreme Court of Virginia affirmed Breard's convictions and sentences,[14] and the United States Supreme Court then denied Breard's petition for a writ of certiorari.[15]

Breard filed a petition for writ of habeas corpus in the Circuit Court for Arlington County, seeking state collateral relief.[16] Two months later the circuit court dismissed Breard's petition, and the Supreme Court of Virginia subsequently refused the petition for appeal. On August 30, 1996, Breard filed another petition for writ of habeas corpus, this time in the United States District Court for the Eastern District of Virginia, seeking federal collateral relief. After the district court denied relief,[17] Breard filed a timely notice of appeal. Consequently, the district court granted Breard's application for a certificate of appealability concerning all of the issues Breard raised in his application.[18]

Breard now appeals the district court's denial of his petition for writ of habeas corpus, raising the following issues: (1) whether The Antiterrorism and Effective Death Penalty Act ("AEDPA"), specifically the amended Chapter 153 provisions and the newly created Chapter 154 provisions, applies to Breard's appeal;[19] (2) whether his convictions and sentences should be vacated because, at the time of his arrest, Virginia authorities failed to notify him that, as a foreign national, he had the right to contact his consulate under the Vienna Convention on Consular Relations;[20] and (3) whether the aggravating circumstances instructions given by the trial court were unconstitutionally vague.[21]

HOLDING

The Court of Appeals affirmed the district court's denial of Breard's petition for writ of habeas corpus, holding that: (1) the amended Chapter 153 provisions under the AEDPA apply, but the new Chapter 154 provisions do not apply;[22] (2) Breard is entitled to no relief on his Vienna Convention claim;[23] and (3) Breard's claim of an unconstitutional aggravating circumstances instructions is denied.[24]

ANALYSIS/APPLICATION IN VIRGINIA

I. The Antiterrorism and Effective Death Penalty Act ("AEDPA")

The AEDPA, which became effective on April 24, 1996, amended parts of Chapter 153 which provides procedures for federal habeas review.[25] In *Lindh v. Murphy*,[26] the United States Supreme Court held that § 107(c) of the AEDPA, which provided that Chapter 154 applied to cases pending on the effective date of the AEDPA, produced a "'negative implication ... that the new provisions of Chapter 153 generally apply only to cases filed after the Act became effective.'"[27] Therefore, under Lindh, a habeas petition filed before April 24, 1996, is subject to the pre-AEDPA habeas standards, and a petition filed after April 24, 1996, falls under the provisions of Chapter 153.[28] In addition, the AEDPA created a new Chapter 154 which governs habeas proceedings against a state in capital cases.[29] Application of Chapter 154 depends on whether a state "opts in" by instituting certain mechanisms for the appointment and compensation of competent counsel.[30]

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[14] *Breard v. Commonwealth*, 248 Va. 68, 445 S.E. 2d 670 (Va. 1994).

[15] *Breard v. Virginia*, 513 U.S. 971 (1994).

[16] *Breard*, 134 F.3d at 618.

[17] *Breard v. Netherland*, 949 F.Supp. 1255 (E.D.Va. 1996).

[18] *Breard*, 134 F.3d at 618.

[19] *Id.* at 618.

[20] *Id.* at 618-19.

[21] *Id.* at 621.

[22] *Breard*, 134 F.3d at 618.

[23] *Id.* at 620.

[24] *Id.* at 621. On appeal, Breard raised the issue of whether his death sentence violated *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that under then-existing state capital sentencing schemes, death penalty was being imposed arbitrarily, discriminatorily, and wantonly, and therefore imposition of death penalty violated Eighth Amendment prohibition against cruel and unusual punishment). Although this issue will not be discussed in this case summary, it is important to note the court's ruling on it. Breard made three arguments under his Furman claim: (1) given the prosecutor's alleged offer to forego the death penalty if Breard would plead guilty, the prosecutor violated his constitutional rights by seeking and obtaining a death sentence once Breard insisted upon pleading not guilty; (2) the Commonwealth of Virginia imposes the death penalty arbitrarily in capital murder cases; and (3) his death sentence is unconstitutionally disproportionate. *Breard*, 134 F.3d at 621. The first two claims were not raised in state court, and the third claim had been procedurally barred by the Supreme Court of Virginia on appeal from the denial of state habeas relief. *Id.* Therefore, the court of appeals found that it could not address the merits of any of these claims because Breard had neither established "cause" for the procedural default of these claims, nor proven that a miscarriage of justice would result if the court failed to consider any of the claims. *Id.*

[25] *Id.* at 618. *See* Raymond, *The Incredible Shrinking Writ*, Cap. Def. J., Vol. 9, No. 1, p. 52 and Eade, *The Incredible Shrinking Writ, Part II*, Cap. Def. J., Vol. 9, No. 2, p. 55 (summaries of habeas corpus before AEDPA and APEDA's major provisions, including amendments to Chapter 153).

[26] 117 S.Ct. 2059 (1997).

[27] *Breard*, 134 F.3d at 618 (quoting *Lindh v. Murphy*, 117 S.Ct. 2059, 2068 (1997)).

[28] *Id.* at 618.

[29] *See* Raymond, *The Incredible Shrinking Writ*, Cap. Def. J., Vol. 9, No. 1, p. 52 and Eade, *The Incredible Shrinking Writ, Part II*, Cap. Def. J., Vol. 9, No. 2, p. 55 (discussing habeas corpus before AEDPA and AEDPA's major provisions, including Chapter 154).

[30] *Breard*, 134 F.3d at 618. To qualify as an "opt-in" state, a state must satisfy the following requirements:

> (1) The State must establish by statute, rule of its court of last resort, or other agency authorized by state law a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants.
>
> (2) Such mechanism must provide standards of competency for the appointment of such counsel.
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> (3) Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence.
>
> (4) Such mechanism must provide for the entry of a court order either appointing counsel to each indigent capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences.

In applying these principles of the AEDPA, the court of appeals first decided that the Chapter 153 provisions apply to Breard's case because he filed his federal habeas petition on August 30, 1996, nearly four months after the effective date of the AEDPA.[31] The court of appeals then analyzed whether the Chapter 154 provisions applied to Breard's case, and found that they did not.[32] In *Breard v. Netherland*,[33] the district court held that the Chapter 154 provisions did not apply because the Commonwealth of Virginia has not satisfied the "opt-in" provisions of the AEDPA.[34] Specifically, Virginia has not met the first "opt-in" requirement, in that it has not created an appropriate mechanism for the appointment and payment of counsel. The court of appeals reasoned that because the Commonwealth of Virginia did not appeal this ruling, it would not consider the issue of whether Virginia satisfies the "opt-in" provisions of the AEDPA.[35] Nonetheless, the court of appeals noted, with confidence, that the "opt-in" provisions would be of no help to Breard anyway.

Capital defense counsel should be aware of the filing date of the federal habeas petition. The filing date will determine whether capital cases will be subject to the pre-AEDPA habeas standards or the amended provisions of Chapter 153. Also, it is important to note that the court of appeals here reaffirms Virginia's ongoing failure to satisfy the requirements of the "opt-in" provisions of the AEDPA. As of the decision date of this case, Virginia has still not met all four of the criteria necessary to be considered an "opt-in" state. Consequently, the provisions of Chapter 154, under the AEDPA, cannot be applied to capital cases in Virginia.

II. The Vienna Convention on Consular Relations[36]

A. The Procedural Default of Breard's Vienna Convention Claim

The Vienna Convention on Consular Relations was unanimously adopted by the more than 100 participating countries, including the United States, on April 24, 1963.[37] Under the Vienna Convention, a citizen of one country who is arrested in another country is given the right to contact the country's consul, and, consequently, the counsel is allowed to visit the detainee and provide assistance.[38]

Breard possesses dual citizenship in both Argentina and Paraguay.[39] Therefore, using the Vienna Convention, Breard argued that his convictions and sentences should be vacated because when he was arrested the Arlington County authorities did not tell him that, as a foreign national, he had the right to contact either the Consulate

Breard v. Netherland, 949 FSupp. 1255, 1261 (E.D.Va. 1996) (citing *Satcher v. Netherland*, 944 FSupp. 1222, 1238 (E.D.Va. 1996)).

[31]*Breard*, 134 F.3d at 618.

[32]*Id.*

[33]949 FSupp. 1255 (E.D.Va. 1996).

[34]*Id.* at 1262.

[35]*Breard*, 134 F.3d at 618.

[36]Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (hereinafter Vienna Convention). *See also* Case Summary of *Murphy*, Cap. Def. J., Vol. 10, No. 1, p. 17.

[37]Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 384 (1997).

[38]Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94.

[39]*Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998), is a case which stemmed from the arrest and conviction of Angel Francisco Breard. The Republic of Paraguay (hereinafter "Paraguay") and its Ambassador and Consul General to the United States sought declaratory and injunctive relief against the Governor and other officials of the Commonwealth of Virginia. *Republic of Paraguay v. Allen*, 949 FSupp. 1269, 1271-72 (E.D.Va. 1996). Specifically, Paraguay sought the following: (1) a declaration of violation by the Commonwealth of treaties between Paraguay and the United States; (2) the vacatur of a capital conviction and death sentence imposed by the Commonwealth on a Paraguayan national in alleged violation of the treaties; and (3) an injunction against further violations. *Id.* at 1271-72. The district court determined that it did not have subject matter jurisdiction over the case and dismissed it pursuant to Federal Rules of Civil Procedure 12(b)(1), and Paraguay appealed. *Republic of Paraguay v. Allen*, 134 F.3d at 624.

The events leading up to this case began with the arrest of Breard on August 17, 1992, by the Arlington, Virginia police on suspicion of the murder of Ruth Dickie. *Id.* At the time of his arrest, the Arlington authorities did not inform Breard of any right to contact the Paraguayan consulate to confer with it throughout his detention and trial. The Circuit Court of Arlington County appointed two attorneys to represent Breard. After a jury trial, Breard was convicted of attempted rape and murder, and subsequently sentenced to death. At no point in his direct appeal did Breard claim that the Commonwealth had violated any treaty provision while he was detained or on trial. *Id.* at 624-25. After being appointed new counsel for his state habeas corpus proceedings, Breard again failed to assert violations of any treaty. At some time after January 1996, Paraguay's ambassador and general counsel became aware of Breard's conviction and sentence, and consequently sought to consult with Breard as provided for by certain international treaties. *Id.* at 625. The Commonwealth complied, and "Paraguay's officers have been given free access to Breard since that time." *Id.*

Paraguay and its officials alleged that Paraguay's separate rights under the Vienna Convention and the Treaty of Friendship, Commerce, and Navigation (an 1859 treaty signed by the United States and Paraguay) had been violated by the Commonwealth's failure to advise Breard of his rights under the treaties and to notify the Paraguayan consulate of Breard's arrest, conviction and sentence. *Id.* at 625-26. Paraguay's suit included a joint claim based directly upon Paraguay's treaty rights, and a parallel claim, on behalf of Jose Antonio Dos Santos, Paraguay's Consul General to the United States. Under 42 U.S.C. section 1983, Dos Santos alleged a denial of his rights under federal treaty law by the actions of Commonwealth officials taken under color of state law. *Id.* at 626. The district court found that Paraguay and its officials had standing to bring their claims, stressing that Paraguay was asserting its own rights, and not those of Breard. Similarly, the district court determined that Dos Santos had standing to bring his section 1983 claim. The district court ultimately dismissed the action, however, holding that it did not have subject matter jurisdiction. *Id.* The petitioners were not claiming a "'continued violation of federal law,'" and consequently could not bring an Ex parte Young action in order to qualify for immunity under the Eleventh Amendment.

of Argentina or the Consulate of Paraguay.[40] The district court rejected this argument, finding that Breard never raised this claim in state court, that the claim was procedurally defaulted, and that Breard failed to establish cause to excuse the default.[41]

A habeas claim is procedurally defaulted when: (1) the petitioner does not exhaust all available state remedies; and (2) the court to which the petitioner would have had to present the claim to satisfy the exhaustion requirement, would now find the claim procedurally barred.[42] Virginia law stipulates that "'a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition.'"[43] Breard asserted that he could not have made his Vienna Convention claim until April 1996, when the United States Court of Appeals, Fifth Circuit decided *Faulder v. Johnson,*[44] because until that time, the claim was virtually unknown. In *Faulder*, the court of appeals held that an arrestee's rights under the Vienna Convention were violated when Texas authorities did not inform him of his right to contact the Canadian consulate, but the omission was found to be harmless error.[45] Furthermore, Breard argued that he could not have raised his Vienna Convention claim during state habeas because Virginia failed to notify him of his rights under the Vienna Convention.[46]

The court of appeals found that these assertions were insufficient to show that the facts which Breard needed to make his Vienna Convention claim were unavailable to him when he filed his state habeas petition.[47] Citing *Murphy v. Netherland,*[48] the court of appeals renewed its rejection of a state habeas petitioner's argument that the novelty of a Vienna Convention claim and the state's failure to inform the petitioner of his rights under the Vienna Convention was sufficient cause for the failure to raise the claim in state court.[49] As it did in *Murphy*, the court found that "a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention have been raised."[50] Therefore, the court concluded that Breard's Vienna Convention claim would be procedurally defaulted if he tried to raise it in state court at this time.

Based upon this conclusion, the court of appeals could only consider the Vienna Convention claim if Breard "'c[ould] demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim w[ould] result in a fundamental miscarriage of

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On appeal, the court of appeals considered only the Eleventh Amendment ground of the district court's dismissal of the action for lack of subject matter jurisdiction. *Id.* at 626. The Eleventh Amendment provides for sovereign immunity, "'a constitutional limitation on the federal judicial power'" over certain actions against States and state officials. *Id.* at 627. (quoting *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 98 (1984)). However, *Ex parte Young,* 209 U.S. 123 (1908), establishes an exception to this immunity, providing that federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is ongoing and (2) the relief sought is only prospective. *Id.* at 149-50. Therefore, the issues on appeal were whether the violations alleged by Paraguay are "ongoing" and whether the relief sought is only "prospective." On the first issue, the court of appeals held that the violation alleged by Paraguay was not ongoing under *Ex parte Young*, finding that the actual violation alleged, Paraguay's denial of its rights under the treaties cited, was a past event that was not itself continuing. *Republic of Paraguay*, 134 F.3d at 627. With regard to the second issue, the court held that the essential relief sought was not prospective, in that the only relief sought, the voiding of Breard's final state conviction and sentence, was quintessentially retrospective. *Id.* at 626. Moreover, the only possible effect of the relief sought would be to undo a completed state action, and not to provide prospective relief against the continuation of the past violation. *Id.* Despite the judicial fate of Paraguay's action, the court of appeals did include a paragraph in its opinion which specifically addressed the Commonwealth's compliance, or lack of, with the Vienna Convention. The court of appeals stated, "We share the district court's expressed 'disenchantment' with the Commonwealth's conceded past violation of Paraguay's treaty rights. There are disturbing implications in that conduct for larger interests of the United States and its citizens." *Id.* at 629 (quoting *Republic of Paraguay v. Allen,* 949 F.Supp. 1269, 1273 (E.D.Va. 1996)). The court also noted that what it found even more disturbing was that this was not the only disclosed violation. *Id.* at 629, n. 7 (citing *Murphy v. Netherland,* 116 F.3d 97 (4th Cir. 1997)). Defense counsel can and should use this expressed disapproval of the actions of the Commonwealth in light of the rights provided for by international treaties when representing foreign nationals. Even more importantly, capital defense counsel must preserve these Vienna Convention claims for appeal, beginning at the trial court level. There is a strong implication in this opinion that, if properly preserved, the Vienna Convention issue could be a winning issue for a capital defendant.

[40] *Breard,* 134 F.3d at 618-19.

[41] *Breard v. Netherland,* 949 F.Supp. 1255, 1263 (E.D.Va. 1996).

[42] *Coleman v. Thompson,* 501 U.S. 722, 735 (1991). A federal habeas claim can also be procedurally defaulted if a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule that provides an independent and adequate ground for the dismissal. *Id.* at 731-32.

[43] *Breard,* 134 F.3d at 619 (quoting *Hoke v. Netherland,* 92 F.3d 1350, 1354 n. 1 (4th Cir. 1996). See also Va. Code Ann. § 8.01-654(B)(2) (Michie 1950 & Supp. 1997).

[44] 81 F.3d 515 (5th Cir. 1996), *cert. denied,* 117 S.Ct. 487 (1996).

[45] *Id.* at 520.

[46] *Breard,* 134 F.3d at 619.

[47] *Id.*

[48] 116 F.3d 97 (4th Cir. 1997). See Case Summary of *Murphy,* Cap. Def. J., Vol. 10, No. 1, p. 17.

[49] *Breard,* 134 F.3d at 619.

[50] *Id.* at 619-20.

justice.'"[51] To show "cause," Breard had to establish "that some objective factor external to the defense impeded counsel's efforts" to make a timely claim in state court.[52] The court found that Breard failed to make such a showing, in that the factual basis for which Breard needed to make his Vienna Convention claim was available to him at the time he filed his state habeas petition.[53] Once the court found that Breard failed to show "cause," it stated that it was unnecessary to consider the issue of "prejudice."[54] Therefore, the court found that Breard was foreclosed from obtaining any relief under his Vienna Convention claim.

B. A Rare, but Hopeful Concurring Opinion

The concurring opinion in *Breard v. Pruett* agreed that Breard should be denied all requested relief, but its underlying emphasis seemed to be the importance of the Vienna Convention. The opinion began with a quote from the Vienna Convention, stating that the treaty facilitates "'friendly relations among nations, irrespective of their differing constitutional and social systems.'"[55] It recognized that the Vienna Convention is a "self-executing treaty," in that it provides rights to individuals, namely the right of consular notice and assistance, and does not merely list the responsibilities of the signing countries. The concurrence impressed that the Vienna Convention deserves the same respect as an act of Congress. Furthermore, the Vienna Convention is binding upon the states because the Supremacy Clause demands that states uphold rights granted by a treaty.[56] The opinion unequivocally stated that the Vienna Convention provisions should be applied prior to trial when they can be properly considered because collateral review is too limited to provide a suitable remedy.[57]

According to the concurrence, the Vienna Convention protections are not limited to foreign nationals, as in this case. These protective measures also extend to United States citizens. As the opinion stated, "United States citizens are scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example."[58] The concurring justice reminded public officials that "'international law is founded upon mutuality and reciprocity.'"[59] This reminder extended to the states, including Virginia, along with a warning that the State Department had in fact advised the states of their obligations under the Vienna Convention. The implication is that states will not be able to use the excuse of ignorance in any future claims of violations of the Vienna Convention. Furthermore, the opinion named prosecutors and defense attorneys as judicial actors who should be aware of the rights and responsibilities stemming from the Vienna Convention. The concurrence concluded with the following mandate: "[t]he importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation."[60]

C. A New Light on the Vienna Convention

The decisions of *Breard v. Pruett* and *Republic of Paraguay v. Allen*[61] each offer some exciting new "ammunition" for capital defense counsel representing foreign nationals. It is clear from the ideas expressed in these opinions that the judiciary is not pleased with the increasing number of claims that the Commonwealth of Virginia and its public officials have violated the Vienna Convention. There is a growing recognition that the rights and obligations under the Vienna Convention are intended to be reciprocal, and if the United States is not satisfying its end of the bargain, there is no incentive for other countries to do so. The Vienna Convention is not some far removed international treaty that has little effect on the individual United States citizen. Quite the contrary, this treaty is something that should be very important to any U.S. citizen who is thinking about traveling abroad, is currently in a foreign country, or has loved ones in foreign places. One can only imagine how terrifying it must be to be detained, arrested, tried, and convicted in a foreign country with no contact from a fellow countryperson. The court of appeals, in *Breard* and *Republic of Paraguay*, seems to have imagined

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[51] *Id.* at 620 (quoting Coleman, 501 U.S. at 750). The court of appeals found it unnecessary to consider the issue of whether the AEDPA revoked the "miscarriage of justice" exception to the procedural default doctrine. Under *Murray v. Carrier,* 477 U.S. 478, 495-96 (1986), the "miscarriage of justice" exception is available to those petitioners who are actually innocent of the offense charged. Furthermore, under *Sawyer v. Whitley,* 505 U.S. 333, 350 (1992), the "miscarriage of justice" exception can be used by petitioners who are actually ineligible for the death penalty. For instance, the exception can be applied by those petitioners who prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. The *Breard* court noted that even if the AEDPA does not abolish the "miscarriage of justice" exception, no miscarriage of justice occurred here. Moreover, the court stated that Breard did not make a showing that he was actually innocent of the offense committed, under *Murphy*, or ineligible for the death penalty, under *Sawyer*. *Id.* at 620.

[52] *Id.* at 620 (quoting *Murray v. Carrier,* 477 U.S. 478, 488 (1986)).

[53] *Breard,* 134 F.3d at 620.

[54] *Id.* (citing *Kornahrens v. Evatt,* 66 F.3d 1350, 1359 (4th Cir. 1995)).

[55] *Id.* at 621 (Butzner, J., concurring) (quoting Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, 79).

[56] *Id.* at 622 (citing Head Money Cases, 112 U.S. 580, 598-99 (1884); U.S. Const. art. VI, cl. 2).

[57] *Breard,* 134 F.3d at 622.

[58] *Id.*

[59] *Id.* (quoting *Hilton v. Guyot,* 159 U.S. 113, 228 (1985)).

[60] *Id.*

[61] See *supra* note 36 and accompanying text.

a similar scenario, and as a result, has issued some stern warnings to the Commonwealth of Virginia.

Defense counsel should use this stern language in support of its Vienna Convention claims, particularly for tactical purposes in negotiating with prosecutors. Furthermore, these opinions only supplement the already strong implication that if capital defense counsel, representing foreign nationals, can make these Vienna Convention claims early, the judiciary would support foreign national defendants whose international rights had been violated.

III. The Aggravating Circumstances Jury Instructions

Breard also argued that the trial court's aggravating circumstances instructions, both for the vileness aggravator and the future dangerousness aggravator, were unconstitutionally vague.[62] The court noted that the claim was not procedurally barred because the Supreme Court of Virginia had rejected it on direct appeal.[63] However, the court of appeals ultimately rejected Breard's constitutional attack of the aggravating circumstances instructions, finding that precedent demanded such a conclusion.

The court relied upon two cases, *Bennett v. Angelone*[64] and *Spencer v. Murray*,[65] and it emphasized that Breard, in his brief, acquiesced that the instructions upheld in these cases were "similar" to those given at his trial.[66] In *Bennett*, the court rejected a vagueness challenge to the Commonwealth of Virginia's vileness aggravating circumstance.[67] The *Bennett* court stated that it had recently upheld the constitutionality of "the precise instruction given in this case" in *Tuggle v. Thompson*,[68] and therefore, Bennett's attack failed.[69] Similarly, in *Spencer*, the court rejected a vagueness attack on the future dangerousness aggravator.[70] Spencer argued that the provision concerning the future dangerousness aggravating factor[71] had not been meaningfully interpreted by the Supreme Court of Virginia, and that the provision failed to "channel the jury's discretion in sentencing."[72] The court repudiated these arguments, stating that it had rejected "an almost identical challenge" in a previous case, and would not now depart from its precedent.

In using these precedents concerning aggravating circumstances jury instructions to reject challenges such as Breard's, the court of appeals did not clearly state that the precedent jury instructions are in fact identical to the instructions used in current challenges. Rather, the instructions are "similar" and "almost identical." Capital defense counsel can craft an argument that when reviewing jury instructions, particularly under challenges of vagueness, the court should only apply precedent if the instructions used in the previous cases contain the exact wording as the challenged instructions. The diction, punctuation, and structuring of a jury instruction are all crucial points when challenging an instruction because one word choice or one comma could affect the way a juror interprets an instruction. Therefore, arguably one jury instruction should only be judged against another if the two are identical.

Summary and analysis by:
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[62] *Breard*, 134 F.3d at 621.

[63] *Id.*

[64] 92 F.3d 1336 (4th Cir. 1996).

[65] 5 F.3d 758 (4th Cir. 1993).

[66] *Breard*, 134 F.3d at 621.

[67] *Bennett*, 92 F.3d at 1345. The following instruction was given at Bennett's trial:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt ... 2) That [the defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

Id. at 1345 n.8.

[68] 57 F.3d 1356, 1371-74 (4th Cir. 1995).

[69] *Bennett*, 92 F.3d at 1345.70

[70] *Spencer*, 5 F.3d at 764-65.

[71] Va. Code Ann. § 19.2-264.2 (Michie 1990). The statute reads:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall ... find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society ....

[72] *Spencer*, 5 F.3d at 764.