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Breard v. Greene 118 S. Ct. 1352 (1998)

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I. Facts

On April 14, 1998, the United States Supreme Court denied the petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, the petitions for certiorari, and the corresponding stay applications filed by Angel Francisco Breard ("Breard") and his native country of Paraguay.[1] That same evening, at approximately 9:00 p.m., the Commonwealth of Virginia executed Breard by lethal injection.

In 1993, a jury convicted Breard of the 1992 attempted rape and capital murder of a woman in Arlington, Virginia.[2] After exhausting all of his state habeas options with no success, Breard filed a petition for federal habeas relief on August 20, 1996. For the first time, Breard claimed that the Commonwealth's alleged violations of the Vienna Convention on Consular Relations ("Vienna Convention")[3] warranted a reversal of his conviction and sentence.[4] 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 consul is allowed to visit the detainee and provide assistance.[5] The district court found this claim to be procedurally defaulted with an insufficient showing of cause and prejudice for the default.[6] After the Fourth Circuit affirmed this ruling,[7] Breard filed the petition which prompted this opinion by the United States Supreme Court.

As a result of Breard's conviction and sentence and his subsequent Vienna Convention claim, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States brought

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1. Breard v. Greene, 118 S.Ct. 1352 (1998).

2. *Breard*, 118 S.Ct. at 1353. The Commonwealth proffered strong evidence regarding Breard's guilt, specifically a match between semen found on the victim's body and that of Breard's DNA profile and a match between hairs discovered on the victim's body and those taken from Breard. Also, the jury heard Breard testify that he killed the victim, but only because he was acting under a Satanic curse put on him by his father-in-law. *Id.* See Case Summary of *Breard v. Pruett*, CAP. DEF. J., vol. 10, no. 2, p. 15 (1998), for a more detailed account of the facts surrounding Breard's case.

3. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261.

4. *Breard*, 118 S.Ct. at 1354.

5. Vienna Convention on Consular Relations, *supra* note 3, 21 U.S.T. at 100-101, 596 U.N.T.S. at 292-94.

6. Breard v. Netherland, 949 F.Supp. 1255, 1266 (E.D. Va. 1996).

7. Breard v. Pruett, 134 F.3d 615, 620 (1998).

an action in federal court against certain Virginia officials, claiming that the Commonwealth violated each of their rights under the Vienna Convention by failing to notify Breard of his rights under the treaty and failing to notify the Paraguayan consulate of Breard's arrest, conviction and sentence.[8] The Consul General brought an additional claim under 42 U.S.C. § 1983, asserting a denial of his Vienna Convention rights. The district court found that Paraguay was not claiming a "continuing violation of federal law" as required by the *Ex parte Young* exception to Eleventh Amendment immunity.[9] Therefore, the district court held that it did not have subject matter jurisdiction over the various actions.[10] Thereafter, the Fourth Circuit affirmed the lower court's ruling,[11] and Paraguay petitioned for a writ of certiorari in the United States Supreme Court.

On April 3, 1996, the Breard case became the focus of an international inquiry when the Republic of Paraguay commenced an action against the United States in the International Court of Justice ("ICJ").[12] Paraguay asserted that the United States violated the Vienna Convention with its treatment of Breard upon arrest. Six days later, the ICJ issued an order asking the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings. . . ."[13] Additionally, the ICJ established a briefing schedule for this action, making a November date for oral arguments most likely. Consequently, Breard and Paraguay filed the various petitions and motions which are herein addressed.[14]

II. Holding

The United States Supreme Court denied the petitions for certiorari filed by both Breard and Paraguay and held that (1) Breard procedurally defaulted his Vienna Convention claim by not raising it in state court;[15] (2) Paraguay could not

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8. Breard v. Greene, 118 S.Ct. 1352, 1354 (1998) (citing Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D. Va. 1996)).

9. *Breard*, 118 S.Ct. at 1354 (citing *Ex parte* Young, 209 U.S. 123 (1908)).

10. *Id.* (citing Republic of Paraguay v. Allen, 949 F.Supp. 1269, 1272-73 (E.D. Va. 1996)).

11. *Id.* (citing Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998)). See Case Summary of *Breard v. Netherland*, CAP. DEF. J., vol. 10, no. 2, p. 15, 17 n.39 (1998), for an analysis of *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998).

12. *See* Application of Paraguay, Case Concerning the Vienna Convention on Consular Relations (Par. v. U.S.), <http://www.icj-cij.org/idocket/ipaus/ipausorder/ipausapplication 980403.html> (Apr. 3, 1998).

13. *Breard*, 118 S.Ct. at 1354 (quoting Case Concerning the Vienna Convention on Consular Relations (Par. v. U.S.), <http://www.icj-cij.org/idocket/ipaus/ipausorder/ipausorder090498.htm> (Interim Protection Order of Apr. 9, 1998)).

14. *Id.* Breard filed a petition for an original writ of habeas corpus and a stay application as a means of ensuring compliance with the ICJ's order. Paraguay filed a motion for leave to file a bill of complaint, referencing the Supreme Court's original jurisdiction over actions "affecting Ambassadors . . . and Consuls." *Id.* (quoting U.S. CONST. art. III, § 2).

15. *Id.* at 1354-55.

bring suit against the Commonwealth of Virginia under an exception to the Eleventh Amendment because the Commonwealth's violation of the notification provisions of the Vienna Convention had no continuing effect;[16] and (3) the Paraguayan Consul General had no greater ability to proceed under § 1983 than his representative country because he was operating only in his official capacity.[17]

III. Analysis / Application in Virginia

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

In attempting to protect his Vienna Convention claim from a swift demise under the procedural default doctrine, Breard argued that he had a viable claim because as an international treaty, the Vienna Convention constituted "the supreme law of the land" and therefore trumped the procedural default doctrine. The Court rejected this argument for two reasons. First, the Court cited the proposition that in international law, unless there is a definitive statement contradicting such, a treaty is applied in a certain State according to the procedural rules of that State.[18] According to the Court, the Vienna Convention itself supports this premise given the following language: "'[the treaty] shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'"[19] By not making a Vienna Convention claim in state court, Breard did not exert his rights under the treaty "in conformity with" either the laws of the United States[20] or those of the Commonwealth of Virginia.[21] Therefore, the Court found that Breard could not now raise such a claim at the federal habeas level.

The Court also rejected Breard's "supreme law of the land" argument based on the holding of *Reid v. Covert*,[22] which stated "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."[23] The Court reasoned that the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[24] passed nearly thirty years after the Vienna Convention,

16. *Id.* at 1356.

17. *Breard*, 118 S.Ct. at 1356. This issue will not be discussed further in this case analysis.

18. *Id.* (citing Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 539 (1987)).

19. *Breard*, 118 S.Ct. at 1355 (quoting Vienna Convention on Consular Relations, *supra* note 3, 21 U.S.T. at 101, 596 U.N.T.S. at 294).

20. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (finding that assertions of error in criminal actions must be raised first in state court in order to establish a foundation for habeas relief).

21. *Breard*, 118 S.Ct. at 1355.

22. 354 U.S. 1 (1957) (plurality opinion).

23. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

24. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132,

constituted such a "subsequently-enacted rule" under *Reid.* Specifically, AEDPA states that a habeas petitioner will not be granted an evidentiary hearing on a claim of a treaty violation if he "failed to develop the factual basis of [the] claim in State court proceedings."[25] Under *Reid*, this subsequently-enacted rule of AEDPA governs any violations of the Vienna Convention. Consequently, the Court concluded that without such a hearing, Breard could not prove that the denial of his rights under the Vienna Convention prejudiced him. Breard challenged this limitation, arguing that his Vienna Convention claims were so novel as to prevent him from learning of them early enough to raise them in state court. Even if such novelty existed, the Court opined that the claims would be barred under *Teague v. Lane.*[26]

In spite of the ultimate outcome on this issue, the opinion contains some valuable and potentially helpful information for capital defense counsel concerning the procedural default of Vienna Convention claims. First, it is absolutely imperative that capital defense counsel assert any Vienna Convention claims at the trial court level in order to avoid the pitfalls of procedural default. Violations of the Vienna Convention have recently become much more recognized both by the judicial system and the general public. Whenever counsel takes on a death penalty case, the nationality of his or her client should be one of the first things to be determined. If the client is of a foreign nationality, then Vienna Convention rights may have been violated, providing the basis for pretrial motions and objections at trial.

Second, in determining that Breard, without the help of an evidentiary hearing, could not establish that the violation of his Vienna Convention rights prejudiced him, the Court offered capital defense counsel an argument as to what is required to show prejudice in a Vienna Convention claim. The Court stated that without a hearing, "Breard . . . [could not] establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Counsel could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him."[27] Counsel should first use this list of requirements as a guide to making his or her Vienna Convention claim in both written and oral form. The factors enumerated by the Court can provide guidance for the showing of prejudice. One or all may be present on the facts of an individual case. For example, in *Breard*, though the client's consul may not be better at explaining the Virginia legal system, the knowledge of the client's culture and the personal interaction between countrymen may well affect the subjective

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110 Stat. 1214. Note that Breard filed his habeas petition after the enactment of AEDPA. *Breard*, 118 S.Ct. at 1355.

25. 28 U.S.C.A. § 2254(e)(2) (Supp. 1998).

26. 489 U.S. 288 (1989). *Reid* offers an exception to default if the claim is novel. Nonetheless, if the claim is so novel that it would not be dictated by existing precedent, then under *Teague* it would not fall under the exception. *See, e.g.*, O'Dell v. Netherland, 117 S.Ct. 1969 (1997).

27. *Breard*, 118 S.Ct. at 1355.

decision to accept a plea agreement. Similarly, for example, we will never know whether Paraguay could have assisted Breard's counsel in communicating to his sentencing jury cultural information about the existence and force of a belief that one was compelled by a Satanic curse.

B. The Application of the Eleventh Amendment to Paraguay's Suit

In rejecting the actions brought by Paraguay, the Court concluded that neither the text nor the history of the Vienna Convention afforded a foreign country a private right of action in the United States' judicial system as a means of seeking the reversal of a criminal conviction based on a violation of this treaty.[28] Furthermore, the Court found that the Eleventh Amendment offered an additional reason why Paraguay's suit would certainly fail. In *Principality of Monaco v. Mississippi*,[29] the Court, in determining the basic principle of the Eleventh Amendment, stated that "'the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State.'"[30] In challenging this immunity, Paraguay argued that its action survived this principle under an exemption to the Eleventh Amendment enunciated in *Milliken v. Bradley*.[31] In *Milliken*, a case involving remedial issues surrounding school desegregation, the Court crafted an exception to the Eleventh Amendment for situations involving "continuing consequences of past violations of federal rights."[32] Paraguay asserted that this exception applied to its suit, but the Court disagreed and instead found that the Commonwealth's disregard of the consular notification requirement happened well in the past and had no continuing effect.[33] The Court reasoned that, unlike *Milliken* in which discrimination and inequality continued to pervade classrooms because of past acts of de jure segregation, Paraguay's suit lacked a causal link between the violation and any continuing effect.

Should defense counsel be working in concert with a nation offended by Virginia's violation of the Vienna Convention, three arguments responding to the Court's Eleventh Amendment concerns may be crafted. First, counsel, using the Court's own language, should argue that a causal link does indeed exist between the Commonwealth's past violations of the Vienna Convention and the convictions and death sentences of foreign nationals. By denying an accused foreign national the assistance of his or her consul at the time of arrest and thereafter, the Commonwealth prevents the defendant from receiving effective assistance

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28. *Id.* at 1356.

29. 292 U.S. 313 (1934) (finding that a suit to recuperate principal and interest from bonds issued by a state should be left to international measures instead of being pursued by a foreign nation in a federal court).

30. *Breard*, 118 S.Ct. at 1356 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934)).

31. 433 U.S. 267 (1977).

32. *Breard*, 118 S.Ct. at 1356 (citing Milliken v. Bradley, 433 U.S. 267 (1977)).

33. *Id.*

of counsel and a fair trial. This is but the first of the unjust consequences stemming from the treaty violation as the defendant is continually denied the benefits of consular assistance at every stage of the proceedings. Each day the defendant sits on death row is a continuing consequence of the Commonwealth's past violation of the Vienna Convention with the ultimate consequence manifesting itself upon the defendant's execution. Second, now that cases such as *Breard* and *Murphy* have been decided, counsel should argue that Virginia has certainly been put on notice of its obligations under the Vienna Convention, and any future violations will be willful and controlling.

Finally, there is an argument to be made against Eleventh Amendment immunity based on the intersection of foreign policy and state action. It has been suggested that the Court find the necessity of such an exception when a state irreversibly interferes with federal foreign policy.[34] In not adhering to the provisions of the Vienna Convention, the Commonwealth encroaches upon the duties of the Executive Branch and the State Department by intruding into federal foreign relations. Such encroachment jeopardizes United States' relations with not only the defendant's native country, but also with all other signatory countries of the treaty. Counsel can use the importance of amicable relations between the United States and these countries to argue the overwhelming necessity for this exemption to the Eleventh Amendment.

C. The Collision Between the Procedural Rules of the Supreme Court and Virginia

Each of the three justices who dissented in this case expressed great apprehension about the lack of time afforded the Court for deliberation on Breard's petitions. According to the dissenting justices, this lack of time resulted directly from the execution schedule set by the Commonwealth.[35] Under the rules of the Supreme Court, "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."[36] The Fourth Circuit affirmed the denial of Breard's habeas petition on February 18, 1998. Therefore, under the Supreme Court's rules, Breard could have properly filed a petition for a writ of certiorari to review the denial up until May 18, 1998. Nonetheless, under the schedule currently utilized by the Commonwealth, the Commonwealth must seek an execution date from the circuit court within 10 days of the Fourth Circuit's denial of a petitioner's writ applica-

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34. *See* Kirgis, Zshernig v. Miller *and the* Breard *Matter*, 92 AM. J. INT'L L. 704, 707 (1998). *See also* Zschernig v. Miller, 389 U.S. 429 (1968) (invalidating state probate laws permitting nonresident aliens to inherit American decedents' property only if aliens' countries recognize certain property rights upon finding that state judges were interfering with federal foreign relations by improperly administering these probate laws).

35. *Breard*, 118 S.Ct. at 1356-57 (Stevens, J., dissenting); *Id.* at 1357 (Breyer, J., dissenting); *Id.* (Ginsburg, J., dissenting).

36. *Id.* (Stevens, J., dissenting).

tion, and within 60 days the circuit court must set an execution date.[37] If the Commonwealth faxes the request for an execution date to the circuit court, the day after the Fourth Circuit's denial, which it is permitted to do and often does, the circuit court could conceivably set the execution date prior to the date in which the petitioner can file a timely petition to the United States Supreme Court. Not only is the petitioner's right to appeal severely hampered, but the Supreme Court itself is denied the full amount of time for consideration of the petitioner's application as provided for by its own rules. Breard suffered from this overlap because even though he had until May 19, 1998, to file a petition with the Supreme Court and the Court had until that same date to review such a petition, the Commonwealth set his execution date for April 14, 1998. For Breard, those thirty-five days could have made the difference between a denial and a granting of certiorari by the Court.

Breard also suggests the need to push an issue not limited to foreign nationals. The collision between the rules of the Supreme Court and the practices of the Commonwealth in Breard's case is not a new phenomenon. Justices Ginsburg and Stevens have been consistently dissenting in all Virginia capital cases on this basis since Virginia began pursuing a speedier execution schedule nearly two years ago.[38] The addition of Justice Breyer's dissenting opinion is hopeful and encouraging, particularly since the granting of certiorari only requires four justices' votes.[39]

Counsel should give thoughtful consideration to the *Breard* dissents and seek way to secure that fourth vote. For example, if counsel is confronted with a situation similar to that of Breard, he or she could file a motion for leave of the Court to file under the normal rules of the United States Supreme Court as opposed to having to file a petition simply to beat the execution date set by the Commonwealth.

The fundamental lesson of *Breard* is that capital counsel representing foreign nationals must make any potential Vienna Convention claims as early as possible. Procedural default should be avoided at all costs. Also, capital counsel should keep in mind that the Vienna Convention places an affirmative duty upon states to uphold the consular notification provisions. Using this affirmative duty, counsel should argue that the state or Commonwealth has the burden of showing

37. *See* VA. CODE ANN. § 53.1-232.1 (Michie 1998).

38. *See, e.g.*, Watkins v. Angelone, 118 S.Ct. 1351 (U.S. 1998); DuBois v. Greene, 119 S.Ct. 25 (U.S. 1998).

39. Beyond the timing issue, Breyer also addressed the possibility of Breard successfully arguing the existence of "cause" given the novelty of his claim and the existence of "prejudice" because of the treaty violation's effect of "isolating him at a critical moment from Consular Officials who might have advised him to try to avoid the death penalty by pleading guilty." *Breard*, 118 S.Ct. at 1357 (Breyer, J., dissenting). Moreover, Breyer hypothesized success for Breard with regard to a *Teague* claim. Specifically, Breyer suggested that Breard, if victorious in arguing the novelty of his Vienna Convention claim, should assert that the nature of his claim constitutes a "'watershed rule of criminal procedure,'" and therefore prevail over any *Teague* obstacles. *Id.* at 1357 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

that it did in fact satisfy all of the requirements of the treaty with regard to the arresting of foreign nationals. The onus should not be placed upon the defendant to have to prove that the state or Commonwealth afforded him all of the rights provided by the Vienna Convention, or to prove in advance how he is prejudiced by the denial of those requirements.

The controversy surrounding the execution of foreign nationals in the United States has intensified in recent years.[40] Defense counsel should use this controversy and the resulting publicity to its tactical advantage in negotiating with prosecutors. For it is no longer simply capital defense counsel opposing the Commonwealth's continuous violations of the Vienna Convention, but also the International Court of Justice, foreign countries and at least three United States Supreme Court justices.

Mary K. Martin

40. *See* Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).