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BREARD v. GREENE

REPUBLIC OF PARAGUAY v. GILMORE

In re BREARD, REPUBLIC OF PARAGUAY v. GILMORE

118 S. Ct. 1352 (1998)

FACTS AND PROCEDURAL HISTORY

Angel Francisco Breard (“Breard”), “a citizen of Paraguay, came to the United States in 1986.”¹ Six years later, the State of Virginia charged the foreign national with attempted rape and capital murder.² Against the advice of his attorneys, Breard took the stand in his own defense and confessed to the crime.³ He maintained his actions were the result of a satanic curse placed on him by his father-in-law.⁴ Subsequently, the trial court convicted Breard and sentenced him to death.⁵ The Virginia Supreme Court affirmed the convictions and sentences, and the Supreme Court of the United States denied certiorari.⁶

In August 1996, Breard filed a motion for habeas corpus relief under 28 U.S.C. § 2254 with the federal district court.⁷ Breard asserted, for the first time, that his rights under the Vienna Convention on Consular Relations (“Vienna Convention”)⁸ had been

violated.⁹ Breard claimed that throughout his arrest and detention, he had not been informed of his rights to contact the consul, nor had Virginia officials apprised the Paraguayan Consul of Breard’s situation.¹⁰ Breard contended that because of Virginia’s failure to comply with the Vienna Convention, his conviction and sentence were invalid.¹¹

The district court rejected his motion and held that the claim had been procedurally defaulted by Breard’s failure to raise it in state court.¹² The United States Court of Appeals for the Fourth Circuit agreed.¹³ The appellate court

when detained in a foreign state. Article 36 of the Vienna Convention provides, in relevant parts: “1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state: (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. . . (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph; . . . 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving state. . . .”, 21 U.S.T. 77, T.I.A.S. 6820.

⁹ *Breard*, 118 S. Ct. at 1354.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹ *Breard v. Greene*, 118 S. Ct. 1352, 1353 (1998).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1353-54.

⁷ *Id.* at 1354.

⁸ The Vienna Convention, an international treaty of which the United States and Paraguay are parties, grants foreign nationals a right to contact and communicate with their consular officials

determined that Breard had not shown cause that might excuse his procedural default, noting that, “[i]n no set of circumstances has Breard made a showing that he is actually innocent of the offense he committed . . . or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty.”¹⁴ In the words of the court, “no miscarriage of justice occurred here Accordingly, Breard is entitled to no relief on his Vienna Convention claim.”¹⁵ Breard petitioned the United States Supreme Court for a writ of certiorari.¹⁶

In September 1996, the Republic of Paraguay, the Ambassador of Paraguay, and the Paraguayan Consul General brought suit in federal district court against certain Virginia officials.¹⁷ Each alleged violations of their rights under the Vienna Convention and also under the Treaty of Friendship, Commerce and Navigation (“Treaty of Friendship”)¹⁸ between the United States

and the Republic of Paraguay.¹⁹

They claimed that Virginia had violated these rights by failing to inform Breard of his personal rights under the agreement, and also by failing to inform the Paraguayan Consulate of Breard’s arrest, conviction, and sentence.²⁰ They sought a declaration that Virginia authorities had violated the Vienna Convention and the Treaty of Friendship, a declaration that Breard’s conviction was void because of those alleged violations, and an injunction vacating Breard’s conviction and directing defendants to abide by the treaties during any future proceedings against Breard.²¹

The Consul General of Paraguay also asserted a cause of action under 42 U.S.C. § 1983.²² He claimed deprivation of the Consul General’s right to have Breard informed of his own personal right to have the consul notified of his arrest (under the Vienna Convention); and also the Consul General’s right to be personally informed of Breard’s arrest

¹⁴ Breard v. Pruett, 134 F.3d 615, 620 (4th Cir. 1998) (citations omitted).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Breard*, 118 S. Ct. at 1354.

¹⁸ U.S.-Para., 12 Stat. 1092 (Feb. 4, 1859). Although the Vienna Convention requires government officials to inform a sending state’s consular office only “[i]f [the arrestee] so requests,” Paraguay argued that under rights extended to them under the Treaty of Friendship, Virginia was required to notify Paraguayan consular officials of Breard’s detention. This is so because Article XII of the Treaty of Friendship provides that “the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are or may be there granted to agents of any other nation whatever.” Since this right of mandatory notice to consular officials had been extended to Britain, among others, *see, e.g.*, Convention Regarding Consular

Officers, June 6, 1951, United States-United Kingdom, art. 16, 3 U.S.T. 3426 (“[a] consular officer [of the sending state] shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or otherwise detained within his district.”), Paraguay claimed the right of mandatory notice was, through the Treaty of Friendship, extended to them as well. *See generally* Republic of Para. v. Allen, 949 F. Supp. 1269, 1271-72 (E.D. Va. 1996).

¹⁹ *Breard*, 118 S. Ct. at 1354.

²⁰ *Id.*

²¹ *Republic of Para.*, 949 F. Supp. at 1272.

²² This statute provides, in relevant part, “[e]very person who . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .”

(under the Treaty of Friendship).²³

The district court concluded that since neither Paraguay, its ambassador, nor its consul general were alleging a “continuing violation of federal law,” the Eleventh Amendment²⁴ prevented the court from exercising subject-matter jurisdiction over the suits.²⁵ “The Fourth Circuit affirmed on Eleventh Amendment grounds.”²⁶

The appellate court held that it did not have subject-matter jurisdiction over the suits because Paraguay could not fulfill either of the two requirements to fit within the narrow exception to Eleventh Amendment immunity carved out by *Ex Parte Young*.²⁷ The violation was not “ongoing,” nor was the relief sought “prospective.”²⁸ Paraguay also petitioned the United States Supreme Court for a writ of certiorari.

On April 3, 1998, Paraguay instituted proceedings against the United States in the International Court of Justice (“ICJ”).²⁹ Paraguay alleged that the United States had violated Article 36(b)(1)

of the Vienna Convention by failing to inform Breard of his right to have the Paraguayan consulate notified of his arrest.³⁰

On April 9, 1998, the ICJ issued an order, recommending that the United States Supreme Court “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”³¹

HOLDING

On April 14, 1998, the United States Supreme Court affirmed the lower courts’ decisions and denied the petitions for certiorari and the applications for stays of execution.³² The court held that: (1) by not asserting his Vienna Convention claim in state court, Breard had procedurally defaulted this claim;³³ (2) the Eleventh Amendment barred Paraguay’s suit against Virginia, because the violation of the consular notification provisions of the Vienna Convention were not continuing;³⁴ and (3) the Paraguayan Consul General was acting only in his official capacity and thus could not bring suit against Virginian authorities.³⁵ Three justices dissented, arguing that the court should grant the stay of execution in order to deliberate more fully on the writs of certiorari.³⁶

ANALYSIS

²³ *Republic of Para.*, 949 F. Supp. at 1272.

²⁴ “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any foreign state.” U.S. CONST. amend. XI.

²⁵ “Now that the defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties.” *Republic of Para.*, 949 F. Supp. at 1273.

²⁶ *Breard*, 118 S. Ct. at 1354.

²⁷ *Id.* See also *Ex Parte Young*, 209 U.S. 123 (1908) (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 an ongoing one, and (2) the relief sought is only prospective.).

²⁸ *Republic of Para. v. Allen*, 134 F.3d at 627.

²⁹ *Breard*, 118 S. Ct. at 1354.

³⁰ *Id.*

³¹ See International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. U.S.*), Request for the Indication of Provisional Measures, Order, Apr. 9, 1998.

³² *Breard v. Greene*, 118 S. Ct. 1352 (1998) (per curiam).

³³ *Id.* at 1354.

³⁴ *Id.* at 1356.

³⁵ *Id.*

³⁶ *Id.* at 1356-57.

The Court concluded that two reasons barred Breard from bringing his claim. First, the Court followed closely the reasoning used by the district court and the appellate court by holding that the rights granted under the Vienna Convention were subject to and must be exercised according to the laws of the forum state.³⁷ “[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”³⁸ The Court stated that “[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted.”³⁹ The Court found that Breard had procedurally defaulted on his claim by failing to “exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.”⁴⁰

The second reason that prevented Breard from raising his claim was the fact that the United States Congress had enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”)⁴¹ in 1996.⁴² This statute provides that a habeas petitioner will not be afforded an evidentiary hearing if he “has failed to develop the factual basis of [a] claim in State court proceedings”⁴³

A subsequent-in-time rule had

been established by the Court in *Reid v. Covert*.⁴⁴ “[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”⁴⁵ Since the AEDPA was passed subsequent to the Vienna Convention, its terms would control. “This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him.”⁴⁶

The court further stated that even if Breard’s claim was “properly raised and proven, it is extremely doubtful that the violation [of the Vienna Convention] should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.”⁴⁷ Moreover, “[i]n this case, no such showing could even arguably be made.”⁴⁸

Turning to Paraguay’s suits, the court held that “neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States’ courts to set aside a criminal conviction and sentence for violation of consular notification provisions.”⁴⁹ Furthermore, since there were no continuing consequences stemming from the failure to notify Paraguayan officials of Breard’s situation,

³⁷ *Id.* at 1354.

³⁸ *Id.*

³⁹ *Id.* at 1355 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

⁴⁰ *Id.*

⁴¹ 28 U.S.C.A. § 2254 (Supp. 1998).

⁴² *Breard*, 118 S. Ct. at 1355.

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

⁴⁴ *Breard v. Greene*, 118 S. Ct. at 1355 (quoting *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion)). *See also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, “the one last in date will control the other”).

⁴⁵ *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

⁴⁶ *Breard*, 118 S. Ct. at 1355.

⁴⁷ *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1356.

the Eleventh Amendment provided a separate basis for dismissal of Paraguay's suits against Virginia.⁵⁰

Neither Paraguay nor its Consul General could sue under 42 U.S.C. § 1983.⁵¹ Paraguay could not bring suit because it is not a "person" as that term is used in the statute, nor is it "within the jurisdiction" of the United States.⁵² These restrictions also barred the Consul General from bringing suit, as he "[was] acting only in his official capacity, he ha[d] no greater ability to proceed under § 1983 than [did] the country he represents."⁵³

With respect to the pending proceedings before the ICJ, the Court stated that it was "unfortunate" that those proceedings were still pending. However, the Court noted that [the proceedings] "might have been brought to that court [the ICJ] earlier."⁵⁴ The Court hinted that they would not interfere with diplomatic relations, rather "this Court must decide questions presented to it on the basis of law."⁵⁵ Nor could the ICJ "enforce" their order of April 9.⁵⁶ The Court implied that foreign relations decisions are the purview of the Executive Branch, who "may, and

⁵⁰ "That Amendment's 'fundamental principle' that 'the states, in the absence of consent, are immune from suits brought against them . . . by a foreign state' was enunciated in *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934)." *Id.*

⁵¹ See *supra* note 22.

⁵² *Breard*, 118 S. Ct. at 1356.

⁵³ "Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual." *Id.*

⁵⁴ *Breard*, 118 S. Ct. at 1356.

⁵⁵ *Id.*

⁵⁶ The ICJ, being a world body, has no enforcement mechanism for their orders. See generally *Breard*, 118 S. Ct. at 1354 ("Breard then filed a petition . . . in this Court in order to 'enforce' the ICJ's order.").

in this case did, utilize diplomatic discussion with Paraguay."⁵⁷ Noting that the Secretary of State had sent a letter to the Governor of Virginia requesting a stay of Breard's execution, the court stated that "[i]f the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make the choice for him."⁵⁸

In separate dissenting opinions, Justices Stevens, Breyer, and Ginsburg focused on the amount of time used to review this case. Justice Stevens pointed out that under an ordinary review, the Court would have had additional time to consider the merits of the petitions.⁵⁹ He stated that the Court had been "deprived" of the chance for "considered deliberation" and saw "no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures."⁶⁰ Justices Breyer and Ginsburg echoed Justice Stevens' concern for the speed of the deliberation.⁶¹

Justice Souter, in a separate statement concurring in the judgment, opined that "the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard's conviction and sentence disentitle him to

⁵⁷ *Breard*, 118 S. Ct. at 1356.

⁵⁸ *Id.*

⁵⁹ *Breard*, 118 S. Ct. at 1357 (Stevens, J., dissenting). Supreme Court Rule 13.1 states that, "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."

⁶⁰ *Id.*

⁶¹ *Id.* (Breyer and Ginsburg, JJ., dissenting).

relief on any theory offered.”⁶²

CONCLUSION

The ruling in this case will surely have an impact on thousands of foreign national felons, including up to sixty individuals on death rows throughout the country.⁶³ Justice Souter’s statement, language from the majority opinion, and several recent court decisions seem to indicate that a foreign national who can prove that his cause suffered because of the failure of the state to notify his consul might have a justiciable claim.⁶⁴

The outcome in *Breard* does not mean that foreign nationals are being treated unfairly.⁶⁵ On the contrary, it implies that the Vienna Convention does

give additional rights to foreign nationals, provided that they first show that there was an ill effect on their trial. Proving prejudice to their cause seems to be a reasonable hurdle for foreign nationals to clear, especially since a defendant already enjoys the full protection of our criminal system of justice.

This case could also impact United States citizens traveling or working abroad. Some three thousand United States citizens are detained overseas every year.⁶⁶ Officials in foreign countries, acting out of revenge, anger, or simply hatred of America, could refrain from notifying the American Consulate in their country when an American citizen is detained. Disregarding an order from the World Court can be viewed by other countries as a violation of international law, and, as one commentator has noted, “[t]hese breaches of international law decrease the likelihood that Americans will have their rights respected abroad.”⁶⁷ Sensing that American credibility could be hampered by Breard’s death, Secretary of State Madeleine Albright, in a letter to Governor Gilmore asking him to stay Breard’s execution, stated that the execution of Breard might hamper “[o]ur ability to ensure that Americans are protected when living or traveling abroad.”⁶⁸

One positive result of this case and the publicity it generated is that the Secretary of State has provided to the

⁶² *Id.* at 1356 (Souter, J., concurring).

⁶³ Frank J. Murray, *Court: U.S. law outweighs older pact. Foreign Countries can't sue states*, THE WASHINGTON TIMES, April 16, 1998, at A1. See also Editorial, *Ensure Access to Consulates*, THE LOS ANGELES TIMES, December 21, 1998, at B4 (“Of the 74 foreigners on death row in the United States, only four were told of their right to contact their consulates after their arrest.”).

⁶⁴ “Even were Breard’s Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.” *Breard*, 118 S. Ct. at 1355 (citing *Arizona v. Fulminante*, 499 U.S. 279 (1992)). See also *United States v. Salas*, 1998 WL 911731 (4th Cir. 1998) (“[petitioners] must establish prejudice to prevail”); *United States v. Esparza-Ponce*, 7 F. Supp.2d at 1096 (S.D. Cal. 1998) (“[D]efendant’s motion fails because he must show prejudice, and has failed to do so.”).

⁶⁵ On December 10, 1998, the Supreme Court granted a stay of execution to consider a petition for certiorari from a Canadian citizen scheduled to die for a 1976 murder in Texas. *Faulder v. Johnson*, 119 S. Ct. 614 (1998). Certiorari was denied without comment on January 25, 1999. *Faulder v. Texas*, 1999 WL 24803 (U.S. Tex. Jan. 25, 1999).

⁶⁶ U.S. Dept. of State Daily Press Briefing (Mr. Rubin), 1998 WL 11307249.

⁶⁷ Jonathan D. Tepperman, *Texas law vs. Treaty Execution of Canadian murderer could be trouble for Americans abroad*, CHRISTIAN SCIENCE MONITOR, Dec. 15, 1998, at 9.

⁶⁸ Letter from Madeleine Albright, United States Secretary of State, to James Gilmore, Governor of Virginia (Apr. 13, 1998) at 2.

Governor of every state pocket-sized reference cards detailing steps to take when arresting foreign nationals. This step, properly implemented, should ensure that every foreign national is apprised of his Vienna Convention rights at the time of his detention.⁶⁹ Perhaps the simplest and best way to prevent violations may be, as some have suggested that the *Miranda* warning should be accompanied by a statement of foreign nationals' rights under the Vienna Convention.⁷⁰

This case also illustrates the "clear recognition that Virginia and other states have consistently violated the Vienna Convention, and that there appears to be no effective remedy for these violations."⁷¹ No remedy was written into the Vienna Convention, however, and it is not for the Court to write one into it. One possible non-judicial remedy is holding

⁶⁹ *But see* Peter J. Spiro, *States that Flout World Opinion May Incur Loss*, NAT'L L.J., May 4, 1998, at A23, col. 1. Professor Spiro notes "[t]hese federal efforts are unlikely to have much effect--Vienna Convention guidelines have been formally transmitted to the states no less than six times since 1990."

⁷⁰ *But see* James A. Deeken, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the wake of Printz v. United States*, 31 VAND. J. TRANSNAT'L L. 997, 1023 ("Even if an individual criminal defendant can raise provisions of the Vienna Convention in his defense as personal rights, this alone is not enough to justify placing an obligation on local police to inform aliens of their rights under a *Miranda* framework.").

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court enumerated warnings which should apprise an arrestee of his rights before he is questioned. *Id.* at 478.

⁷¹ William J. Aceves, *Application of the Vienna Convention on Consular Relations (Paraguay v. U. S.). Provisional Measures Order*, 92 AM. J. INT'L L. 517, 523 (1998).

the state economically responsible for perceived violations.⁷² States faced with economic losses through boycotts would be less willing to breach "international obligations." In this way, foreign countries, corporations, and consumers, rather than "World Courts," could persuade states to respect international agreements.

Finally, the Court's ruling, effectively ignoring the World Court's (ICJ) order, could cause problems for world judicial bodies such as the war crimes tribunals on Rwanda and Bosnia, which the United States government supports.⁷³ The proper forum for change here, however, seems to be the legislature, not the judiciary. It is the job of the legislature to create laws, the role of the judiciary to interpret laws. As the Supreme Court stated, "[i]f the Governor wishes to [stay an execution], that is his prerogative. But nothing in our existing case law allows us to make that choice for him."⁷⁴

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⁷² *See generally* Peter J. Spiro, *States that Flout World Opinion May Incur Loss*, NAT'L L.J., May 4, 1998, at A23, col. 1.

⁷³ *See* Brooke A. Masters, *Albright Urges Va. To Delay Execution*, THE WASHINGTON POST, Apr. 14, 1998, at B1. Yale University law professor, Harold Hongju Koh stating that the Supreme Court's action in this case "will send a message about our respect for international bodies. What goes around comes around." *See also* Margaret A. Jacobs, *World Court Orders U.S. to Stay Va. Execution of Paraguayan*, THE WALL STREET JOURNAL, Apr. 10, 1998, at B2. George Washington University international law professor saying, "Dissing the [World Court] can only hurt our credibility abroad."

⁷⁴ *Breard*, 118 S. Ct. at 1356.