

Spring 3-1-2004

## Torres v. Mullin 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting from a denial of certiorari)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>

 Part of the [International Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

*Torres v. Mullin* 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting from a denial of certiorari), 16 Cap. DEF J. 609 (2004).  
Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol16/iss2/18>

This Special content is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [lawref@wlu.edu](mailto:lawref@wlu.edu).

**Torres v. Mullin**  
**124 S. Ct. 562 (2003) (mem.)**  
**(Breyer, J., dissenting from a denial of certiorari)**

*I. Facts*

In July of 1993, Oklahoma authorities arrested a Mexican national, Osbaldo Torres (“Torres”), and charged him with murder.<sup>1</sup> Torres was tried in Oklahoma, convicted, and sentenced to death.<sup>2</sup> The Oklahoma Court of Criminal Appeals affirmed his conviction and sentence.<sup>3</sup>

In 1999, Torres filed a habeas petition in federal district court.<sup>4</sup> Torres argued, in part, that authorities failed to advise him of rights guaranteed to him by the Vienna Convention on Consular Relations (“Vienna Convention”) and failed to notify the Mexican consular of his arrest.<sup>5</sup> The federal district court rejected Torres’s assertions and concluded that: (1) Torres procedurally defaulted this claim by failing to raise it in his initial state court proceeding; and (2) Torres failed to establish that the violation of his Vienna Convention rights prejudiced his defense.<sup>6</sup> Both the federal district court and the United States Court of Appeals for the Tenth Circuit declined to issue Torres a certificate of appealability (“COA”).<sup>7</sup> Seeking review of the Tenth Circuit’s decision, Torres petitioned the United States Supreme Court for certiorari.<sup>8</sup>

Torres argued that the Court should review the existing conflict between International Court of Justice (“I.C.J.”) decisions and the Tenth Circuit’s determination.<sup>9</sup> Supporting Torres’s petition for certiorari, Mexico filed an amicus curiae brief.<sup>10</sup> In its brief to the Court, Mexico stated that it brought a case

---

1. Torres v. Mullin, 124 S. Ct. 562, 563 (2003) (mem.) (Breyer, J., dissenting from a denial of certiorari).

2. *Id.*

3. *Id.*; see Torres v. State, 962 P.2d 3, 26 (Okla. Crim. App. 1998) (affirming Torres’s conviction and sentence); Torres v. State, 58 P.3d 214, 216 (Okla. Crim. App. 2002) (denying Torres’s subsequent application for post-conviction relief).

4. Torres, 124 S. Ct. at 563 (Breyer, J., dissenting).

5. *Id.*; see Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, ¶ 1, 21 U.S.T. 77, 100–01, 596 U.N.T.S. 261, 293, 294 (delineating the consular rights of foreign nationals).

6. Torres, 124 S. Ct. at 563 (Breyer, J., dissenting).

7. *Id.*; see Torres v. Mullin, 317 F.3d 1145, 1148 n.1 (10th Cir. 2003) (denying Torres the opportunity to expand his Supplemental Request for an Expanded Certificate of Appealability).

8. Torres, 124 S. Ct. at 563 (Breyer, J., dissenting).

9. *Id.*

10. *Id.*

involving Torres before the I.C.J. and took the position that by convicting and sentencing Torres, the United States violated the Vienna Convention, which the United States is bound to follow as part of its domestic law.<sup>11</sup> Mexico urged the Court to delay deciding Torres's case until the I.C.J. rendered a final decision resolving the dispute.<sup>12</sup>

## II. Holding

The United States Supreme Court denied Torres's petition for a writ of certiorari.<sup>13</sup> Justice Breyer wrote a dissenting opinion from this denial.<sup>14</sup> Justice Breyer stated that a deferred consideration of this petition should have been granted in light of the pending resolution of the related case before the I.C.J. between Mexico and the United States.<sup>15</sup>

## III. Analysis

In *Breard v Greene*,<sup>16</sup> the Supreme Court held that, under the Vienna Convention, state and federal courts can apply ordinary procedural default rules to effectively prohibit defendants who fail to raise Vienna Convention violations in state court from raising these issues in the federal forum.<sup>17</sup> Additionally, the Court noted that defendants making claims under the Vienna Convention were

11. *Id.*; see Case Concerning Avena and Other Mexican Nationals (*Mex. v. U.S.*), No. 128, ¶ 59(a) (I.C.J. Feb. 5, 2003), [http://212.153.43.18/icjwww/idocket/imus/imusorder/imus\\_iorder\\_20030205.PDF](http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF) [hereinafter *Avena*] (holding that the United States "shall take all measures necessary to ensure that . . . [defendants including Torres] are not executed pending final judgment"); Priya Nath, Case Note, 15 CAP. DEF. J. 553 (2003) (analyzing Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*), No. 128 (I.C.J. Feb. 5, 2003), [http://www/icj-cij.org/icjwww/docket/imus/imusorder/imus\\_iorder\\_20030205.PDF](http://www/icj-cij.org/icjwww/docket/imus/imusorder/imus_iorder_20030205.PDF)); see also Amanda E. Burks, *Consular Assistance of Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29, 35 (2001) (discussing international, state, and federal court decisions implicating the Vienna Convention).

12. *Torres*, 124 S. Ct. at 563 (Breyer, J., dissenting). The I.C.J.'s order to the United States in *Avena* on February 5, 2003 was a provisional order pending final judgment of the case.

13. *Id.*

14. *Id.* at 562. Justice Stevens also wrote an opinion not labeled as a dissent but appearing to be in disagreement with the denial of certiorari. *Torres v. Mullin*, 124 S. Ct. 919 (2003) (mem.) (respecting the denial of the petition for certiorari).

15. *Torres*, 124 S. Ct. at 565 (Breyer, J., dissenting).

16. 523 U.S. 371 (1998) (per curiam).

17. *Torres*, 124 S. Ct. at 563 (Breyer, J., dissenting); see 28 U.S.C. § 2254(e)(2) (2000) (stating that generally an evidentiary hearing will not be permitted "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings"; part of AEDPA); *Breard v. Green*, 523 U.S. 371, 376 (1998) (per curiam) (stating that "Breard's ability to obtain relief based on violations of the Vienna Convention is subject to [28 U.S.C. § 2254(e)(2)], just as any claim arising under the United States Constitution would be").

not likely to prevail unless they could prove trial prejudice.<sup>18</sup> However, both Torres and Mexico asserted that in the *LaGrand* Case<sup>19</sup> the I.C.J. authoritatively interpreted the Vienna Convention differently.<sup>20</sup> Torres and Mexico argued that because the I.C.J.'s decision was authoritative, it bound the Supreme Court and, therefore, has been incorporated into American domestic law.<sup>21</sup>

In his dissent, Justice Breyer noted that Article VI of the United States Constitution states that treaties made under the authority of the United States " 'shall be the supreme Law of the Land.' " <sup>22</sup> Additionally, lower courts have held that the Vienna Convention is self-executing in so far as no additional congressional legislation is needed for the provisions to become part of the law of the United States.<sup>23</sup> Moreover, the I.C.J. has stated that the Vienna Convention created individual rights for arrested foreign nationals and that laws of the United States must allow full effect to be given to the purpose behind which those rights were intended.<sup>24</sup>

Second, the Vienna Convention prohibits an implementation of the procedural default rule that would prevent a detained foreign national "from challenging 'a conviction and sentence by claiming . . . that the competent national authorities failed to comply with their obligation to provide the requisite consular information without delay.' " <sup>25</sup> In *LaGrand*, the I.C.J. stated that regard-

18. *Torres*, 124 S. Ct. at 563 (Breyer, J., dissenting); see *Brendt*, 523 U.S. at 377 (stating that "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" (citing *Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991))).

19. *LaGrand* Case (F.R.G. v. U.S.), No. 104 (I.C.J. June 27, 2001), [http://212.153.43.18/icjwww/idoctet/igus/igusjudgment/igus\\_ijudgment\\_20010625.htm](http://212.153.43.18/icjwww/idoctet/igus/igusjudgment/igus_ijudgment_20010625.htm).

20. *Torres*, 124 S. Ct. at 563 (Breyer, J., dissenting); see *LaGrand*, No. 104, at ¶¶ 88-91 (holding that the United States cannot use the procedural default doctrine to avoid enforcing the rights conferred to foreign defendants under the Vienna Convention).

21. *Torres*, 124 S. Ct. at 563 (Breyer, J., dissenting).

22. *Id.* 563-64 (quoting U.S. CONST. art. VI); see U.S. CONST. art. VI (stating "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

23. *Torres*, 124 S. Ct. at 564 (Breyer, J., dissenting); see, e.g., *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932 (C. D. Ill. 1999) (stating that "the treaty is 'self-executing' in the sense that there is no need for enabling legislation for the Convention to have the force of law"); S. Exec. Rep. No. 91-9, App. 1, 5 (1969) (statement of State Department Deputy Legal Advisor J. Edward Lyerly) (testifying, prior to ratification of the Vienna Convention, in front of the Senate).

24. *Torres*, 124 S. Ct. at 564 (Breyer, J., dissenting); see Vienna Convention, 21 U.S.T. at 100-01, 596 U.N.T.S. at 293-94 (stating consular rights of foreign nationals); *LaGrand*, No. 104, at ¶¶ 77, 86-89 (holding that the United States must give full effect to Vienna Convention rights).

25. *Torres*, 124 S. Ct. at 564 (Breyer, J., dissenting) (quoting *LaGrand*, No. 104, at ¶ 90) (internal quotation marks omitted). The United States, by relying on such an assertion, violated the Vienna Convention. *Id.* The United States cannot rely on a defendant's failure to raise a Convention claim in a habeas proceeding when the initial mistake was caused by the United States's failure to carry out its Vienna Convention obligation to inform foreign nationals of their rights. *Id.* (citing

less of whether the accused was informed of his Vienna Convention rights or the right to consular assistance, a nation and its nationals “ ‘were in effect prevented by the breach of the United States from exercising [these rights], had they so chosen.’ ”<sup>26</sup> “Finally, Article I of the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes” states that disputes arising from an interpretation or application of the Convention will “ ‘lie within the compulsory jurisdiction of the International Court of Justice.’ ”<sup>27</sup> Torres and Mexico asserted that they could enforce Vienna Convention rights to obtain an appropriate remedy in spite of the “state-law procedural bars or lack of prejudice” based on the Protocol, the I.C.J.’s authoritative interpretation of the Vienna Convention, the fact that the Vienna Convention is self-executing, the I.C.J.’s determination that its decision is a part of the law of the United States, and the I.C.J.’s holding in *LaGrand*.<sup>28</sup>

Torres and Mexico also pointed to the preliminary order issued by the I.C.J. in response to a petition by Mexico asking the I.C.J. to determine whether the United States violated the Vienna Convention with respect to the treatment it provided to Torres and other similarly situated defendants.<sup>29</sup> The preliminary order issued by the I.C.J. in Mexico’s case stated that the I.C.J. “indicate[d]” that the United States must take measures necessary to ensure that Torres is not executed before the final judgment is issued.<sup>30</sup> Both Torres and Mexico asserted that in *LaGrand* the I.C.J. held that such a preliminary order “has [a] ‘binding effect’ and ‘create[s] a legal obligation for the United States.’ ”<sup>31</sup> Before a final decision is rendered by the I.C.J., Oklahoma can set an execution date within sixty days of the Supreme Court’s denial of certiorari.<sup>32</sup> Therefore, Torres and Mexico asked the Court to defer consideration of this issue.<sup>33</sup>

Based on the briefs submitted, Justice Breyer stated that “Torres [s] and Mexico’s arguments seem substantial.”<sup>34</sup> Due to the strength of the arguments raised by Torres and Mexico and the absence of a brief directly addressing these

*LaGrand*, No. 104, at ¶¶ 60, 90–91).

26. *Id.* (quoting *LaGrand*, No. 104, at ¶ 74). In *LaGrand*, the I.C.J. stated that when foreign nationals are not advised of their Vienna Convention rights without delay and are sentenced to severe penalties, an apology by the offending government is not sufficient. *LaGrand*, No. 104, at ¶ 123.

27. *Torres*, 124 S. Ct. at 564 (Breyer, J., dissenting) (quoting Vienna Convention, 21 U.S.T. at 326, 596 U.N.T.S. at 488).

28. *Id.* at 564.

29. *Id.* at 505; *Avena*, No. 128, at ¶ 8. See generally Nath, *supra* note 11 (discussing international, state, and federal court decisions implicating the Vienna Convention).

30. *Torres*, 124 S. Ct. at 565 (Breyer, J., dissenting) (citing *Avena*, No. 128, at ¶ 59).

31. *Id.* (quoting *LaGrand*, No. 104, at ¶¶ 109–10).

32. *Id.*

33. *Id.*

34. *Id.*

arguments by either the United States or international law experts, Justice Breyer stated that "there is a realistic possibility" that the court should hear this case.<sup>35</sup> Because of the international implications and the need for more information upon which to make a decision, Justice Breyer deferred consideration of the petition for certiorari until the pending I.C.J. case is resolved and further briefing could occur in light of that opinion.<sup>36</sup>

#### *IV. Application in Virginia*

This opinion serves to remind practitioners defending foreign nationals of the requirement that the government inform detained individuals of their Vienna Convention rights and contact appropriate consulates. Neglecting pre-trial to assert the failure of the state to inform the accused of these rights can result in procedural default. Additionally, Justice Breyer is apparently apprehensive of the Supreme Court's summary dismissal of Torres's petition for certiorari. Recognizing the conflict between United States precedent and the decisions rendered by the I.C.J., Justice Breyer would have delayed consideration of the grant or denial of certiorari until the I.C.J. made a final ruling and more information was made available to the Court.

Meghan H. Morgan

---

35. *Id.* Justice Breyer noted that the United States had filed briefs in opposition to the related case arguing, in part, that the I.C.J. does not have judicial power in the United States as that power is clearly vested by the Constitution to the federal courts. *Id.* While noting that this statement is true in general terms, it is unclear whether the I.C.J. has authority, by virtue of treaties to which the United States is a party, to authoritatively interpret the rights of the Vienna Convention. *Id.*

36. *Torres*, 124 S. Ct. at 565 (Breyer, J., dissenting).

