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**Torres v. State No. PCD-04-442 (Okla. Crim. App. May 13, 2004)  
(order granting stay of execution and remanding case for  
evidentiary hearing)**

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**Torres v. State**

**No. PCD-04-442 (Okla. Crim. App. May 13, 2004)**  
**(order granting stay of execution and remanding**  
**case for evidentiary hearing)**

*I. Facts*

In 1996 an Oklahoma jury tried and convicted Osbaldo Torres, a Mexican national, of one count of burglary and two counts of first-degree murder.<sup>1</sup> The Oklahoma County District Court subsequently affirmed the jury's conviction and sentence of death.<sup>2</sup> A state court of criminal appeals then affirmed both the conviction and sentence, and the United States Supreme Court denied certiorari.<sup>3</sup>

In 1998 the state court of criminal appeals denied petitioner's first application for postconviction relief.<sup>4</sup> A year later a federal district court rejected Torres's petition for writ of habeas corpus, the United States Court of Appeals for the Tenth Circuit affirmed the decision, and the Supreme Court denied certiorari.<sup>5</sup> Thereafter, the Oklahoma Court of Criminal Appeals rejected the petitioner's second application for postconviction relief, and his execution was set for May 18, 2004.<sup>6</sup> However, less than three weeks before the scheduled execution, defense counsel filed a third application for postconviction relief

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1. *Torres v. State*, 962 P.2d 3, 7 (Okla. Crim. App. 1998) [hereinafter *Torres I*]. Two perpetrators, one wearing a white and the other a black t-shirt, shot and killed Francisco Morales and Maria Yanez in their Oklahoma City house. *Id.* at 8. Responding to a 911 call, police arrested Torres and George Ochoa walking a short distance from the crime scene. *Id.* Ochoa wore a black t-shirt, and Torres wore a white t-shirt with blood on it. *Id.* A witness identified both Torres and Ochoa as the two men that she saw removing a gun from the trunk of a car shortly before the homicide. *Id.*

2. *Id.* at 7-8.

3. *Id.* at 26; *Torres v. State*, No. PCD-04-442, at 1 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing) [hereinafter *Torres III*].

4. *Torres III*, No. PCD-04-442, at 1 (citing *Torres v. State*, No. PCD-1998-213 (Okla. Crim. App. Aug. 4, 1998) (order not selected for publication)).

5. *Torres v. Mullin*, 124 S. Ct. 562, 563 (2003) (mem.) (Breyer, J., dissenting in the Court's denial of certiorari). Torres argued that the State violated his rights secured by the Vienna Convention on Consular Relations ("Vienna Convention") and failed to contact the Mexican consular following his arrest. *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 a certificate of appealability); see also Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 609 (2004) (analyzing *Torres v. Mullin*, 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting from a denial of certiorari)).

6. *Torres III*, No. PCD-04-442, at 1.

alleging that the violations of Torres's rights under the Vienna Convention on Consular Relations ("Vienna Convention") precluded his execution.<sup>7</sup>

## II. Holding

The Oklahoma Court of Criminal Appeals stayed Torres's execution indefinitely, granted Torres's request for an evidentiary hearing, and remanded the case to the district court of Oklahoma County.<sup>8</sup> The trial court was to decide the following: "(a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel."<sup>9</sup> Lastly, the appellate court set deadlines for the hearing and subsequent filings from both parties.<sup>10</sup>

Judge Chapel filed a concurring opinion to the stay order.<sup>11</sup> Judge Chapel specifically addressed state courts' obligations regarding the Vienna Convention.<sup>12</sup> He concluded that the United States, as a signatory to the multinational treaty and the Optional Protocol, is bound by the resolutions of the International Court of Justice ("I.C.J.").<sup>13</sup>

## III. Analysis

In March of 2004 the I.C.J. decided *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States) ("*Avena*").<sup>14</sup> Torres was among the 52

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7. *Id.*

8. *Id.* at 2.

9. *Id.*

10. *Id.*

11. *Torres III*, No. PCD-04-442, at 1 (Chapel, J., concurring).

12. *Id.* at 3-7 (Chapel, J., concurring); 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 [hereinafter *Vienna Convention*] (requiring notification of consular rights and an opportunity for consular consultation before detaining authorities take any action that may infringe upon the rights of a foreign national).

13. *Torres III*, No. PCD-04-442, at 2 (Chapel, J., concurring). Because the Vienna Convention did not include an enforcement mechanism, the United States helped draft and then accepted the Optional Protocol to provide that mechanism. *Id.* Judge Lumpkin, dissenting, found that the I.C.J. decision was not binding upon the Oklahoma Court of Criminal Appeals. *Torres III*, No. PCD-04-442, at 2 (Lumpkin, J., dissenting). Furthermore, the judge stated that Torres's ineffective assistance of counsel claim was barred by res judicata. *Id.* at 1.

14. *Torres III*, No. PCD-04-442, at 1 (Chapel, J., concurring); see *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), No. 128, ¶ 153(4-11) (I.C.J. Mar. 31, 2004) [hereinafter *Avena*] (holding that the United States failed in securing Vienna Convention rights to the Mexican nationals). Acting as the judicial arm of the United Nations, the I.C.J. made the following judgments in *Avena*: (1) the United States breached its obligations under the Vienna Convention by not notifying 49 Mexican detainees of their Article 36 rights; (2) the United States breached Article 36 of the Vienna Convention by failing to inform the Mexican consular post of the detention of 51 Mexican nationals; (3) the United States breached its obligations under the Vienna Convention by

Mexican citizens who brought suit in *Avena*.<sup>15</sup> The I.C.J. found that the United States had violated Torres's rights guaranteed by the Vienna Convention.<sup>16</sup> By a vote of fourteen to one, the I.C.J. called upon the United States to "provide, by means of its own choosing, review and reconsideration" for the Mexican nationals' convictions and sentences.<sup>17</sup> In his concurrence to *Torres III*, Judge Chapel characterized the duty of the Oklahoma Court of Criminal Appeals as being to "determine how to apply that ruling."<sup>18</sup>

#### A. *The Supremacy Clause and the Vienna Convention*

Judge Chapel pointed out that the United States is party to the Vienna Convention and the Optional Protocol and thereby bound to the provisions of the international treaty.<sup>19</sup> Citing *Nielsen v. Johnson*,<sup>20</sup> Judge Chapel enunciated the principle of constitutional law that the federal government's treaty-making authority supercedes the power of the states.<sup>21</sup> Judge Chapel further noted that a "failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad."<sup>22</sup> Reciprocity is essential to the stability of international law, and, in the opinion of Judge Chapel, ignoring the international rights of foreign nationals may inspire like action towards American citizens in foreign countries.<sup>23</sup>

Because the Constitution vests the treaty-making power in the President and the Senate, the judiciary must defer to the other branches of government when interpreting treaties such as the Vienna Convention and Optional Protocol.<sup>24</sup>

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depriving Mexico access to 49 detainees; (4) the United States breached its obligations under the Vienna Convention by depriving Mexico of the opportunity to arrange for legal representation of 34 Mexican nationals; (5) the United States breached its obligations under the Vienna Convention by refusing review and reconsideration of the convictions and sentences of three Mexican nationals; (6) the United States must provide review and reconsideration of the convictions and sentences of the detained Mexican nationals; (7) the United States must assure Mexico of non-repetition; and (8) the United States shall provide for review and reconsideration in the event that Mexican nationals be sentenced to severe penalties. *Id.*

15. *Torres III*, No. PCD-04-442, at 1 (Chapel, J., concurring).

16. *Id.*

17. *Avena*, No. 128, at ¶ 153(9).

18. *Torres III*, No. PCD-04-442, at 1 (Chapel, J., concurring).

19. *Id.* at 3; see U.S. CONST. art. VI, cl. 2 (stating that all treaties are the supreme law of the land and bind state courts).

20. 279 U.S. 47 (1929).

21. *Torres III*, No. PCD-04-442, at 3-4 (Chapel, J., concurring); see *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (stating in relevant part that "the treaty-making power is independent of and superior to the legislative power of the states").

22. *Torres III*, No. PCD-04-442, at 4 (Chapel, J., concurring).

23. *Id.*

24. *Id.* at 5-6; see U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall have Power,

The Optional Protocol granted the I.C.J. judicial jurisdiction and power to resolve disputes arising under the Vienna Convention, and accordingly, the State Department has looked to the I.C.J. to “enforce United States rights under the Convention.”<sup>25</sup> In *Avena*, Mexico similarly sought the protection of Torres’s rights guaranteed by Article 36 of the Vienna Convention.<sup>26</sup> Judge Chapel asserted that because the United States government ratified the treaty in 1969 and the State Department has subsequently relied upon the I.C.J. authority and jurisdiction in international law, the courts of the United States are not free to decide whether or not they are bound by the Vienna Convention or I.C.J. decisions.<sup>27</sup>

### B. *The Avena Decision*

Given the two undisputed facts that Torres is a Mexican national and that the United States failed to inform him of his rights under the Vienna Convention, the I.C.J. concluded that the United States should “review and reconsider Torres’s conviction and sentence in light of the consequences of the treaty violation.”<sup>28</sup> Although Torres failed to raise his claim of the Vienna Convention violation at the trial level, the *Avena* court reasoned that a procedural bar of the petitioner’s claim would fail to comply with the I.C.J.’s direction to review and reconsider Torres’s conviction and sentence.<sup>29</sup> Consequently, compliance with the Vienna Convention mandated that the Oklahoma Court of Criminal Appeals re-examine the merits of Torres’s claims.<sup>30</sup>

In *Breard v. Greene*,<sup>31</sup> the United States Supreme Court indicated that a Vienna Convention violation must have affected the outcome of the trial before federal habeas relief would be warranted.<sup>32</sup> To meet this requirement of preju-

by and with the Advice and Consent of the Senate, to make Treaties”).

25. *Torres III*, No. PCD-04-442, at 5–6 (Chapel, J., concurring); see Vienna Convention, 21 U.S.T. at 100–01 (affirming foreign nationals’ consular rights).

26. *Torres III*, No. PCD-04-442, at 6–7 (Chapel, J., concurring).

27. *Id.* at 2–7.

28. *Id.* at 7 (citing *Avena*, No. 128, at ¶ 153(11)).

29. *Torres III*, No. PCD-04-442, at 7–8 (Chapel, J., concurring); see *Avena*, No. 128, at ¶ 134 (stating that the application of the procedural default rule would bar Torres “from raising the issue of the violation of his rights under Article 36 of the Vienna Convention”); see also *Case Concerning LaGrand (F.R.G. v. U.S.)* No. 104, ¶¶ 88–91 (I.C.J. June 27, 2001) (holding that the United States could not procedurally default claims of Vienna Convention violations that had not been raised at trial level).

30. *Torres III*, No. PCD-04-442, at 8 (Chapel, J., concurring).

31. 523 U.S. 371 (1998).

32. *Torres III*, No. PCD-04-442, at 9 (Chapel, J., concurring); see *Breard v. Greene*, 523 U.S. 371, 377 (1998) (per curiam) (stating that “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”).

dice, Judge Chapel endorsed a three-prong test that state and federal courts have devised.<sup>33</sup> He described the three prongs to be as follows: “(1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant.”<sup>34</sup> The facts of the case satisfied the first part of the test.<sup>35</sup> On the second prong, Judge Chapel noted an affidavit submitted by Torres in which he explained that he would have availed himself of the services of the Mexican consulate had he been aware of this right.<sup>36</sup> The judge also found that this contention was more plausible because Torres’s family did contact the Mexican consulate in 1997 when he was finally informed of his right.<sup>37</sup>

Relying on the evidence of Mexico’s “active assistance [that] extends back to the 1920’s,” Judge Chapel discussed the third prong in more detail.<sup>38</sup> This “active assistance” supported Torres’s contention that the Mexican consulate would have been willing and able to assist the defendant, a Mexican national facing capital charges within the United States.<sup>39</sup> Furthermore, once Mexico was informed of the charges against Torres, the consular staff conducted interviews

33. *Torres III*, No. PCD-04-442, at 9 (Chapel, J., concurring); *see, e.g.*, *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989) (quoting *United States v. Rangel-Gonzales*, 617 F.2d 529, 533 (9th Cir. 1980) (finding that “[t]o establish prejudice, the defendant must produce evidence that 1) he did not know of his right; 2) he would have availed himself of the right had he known of it; and 3) ‘there was a likelihood that the contact would have resulted in assistance to him in resisting deportation’ ”); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App. 2002) (employing a similar three-prong test); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. Ct. App. 2000) (employing a similar three-prong test).

34. *Torres III*, No. PCD-04-442, at 9 (Chapel, J., concurring).

35. *Id.*

36. *Id.*

37. *Id.* at 9–10.

38. *Id.* at 10. Judge Chapel noted that:

In 1993, the Mexican government monitored and participated in capital cases throughout the United States involving Mexican nationals through consulate, Mexican government departments, and retained counsel in the United States. Mexico has a systematic procedure to offer very specific consular assistance in defending these cases. Consular officials monitor defense counsel’s efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings; officials often assist in gathering evidence in preparation for both stages of capital trials. Mexico provides funds for experts and investigators, particularly regarding discovery and presentation of mitigating evidence, but for DNA testing, jury consultations, and other specialized testimony where appropriate. Mexico obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation. In addition to aiding retained or appointed counsel, the consulate also helps capital defendants obtain qualified capital counsel.

*Id.* at 10–11.

39. *Id.* at 11.

and the government retained multiple professionals to assist the defense and develop evidence.<sup>40</sup>

Upon evaluating the evidence in light of the I.C.J.'s decision and the three-prong prejudice test, Judge Chapel "concluded that there [was] a possibility a significant miscarriage of justice occurred."<sup>41</sup> Because *Avena* had directed the United States to review and to reconsider Torres's conviction and sentence, Judge Chapel concurred with the decision to remand the case for an evidentiary rehearing.<sup>42</sup> In May of 2004 the Governor of Oklahoma commuted Osbaldo Torres's sentence to life imprisonment, ending the necessity of further examination by the Oklahoma courts.<sup>43</sup>

#### IV. Application in Virginia

Judge Chapel's concurrence demonstrates the importance of familiarity with international law in relation to capital defense. He illustrated the government's obligations to inform detained foreign nationals of their Vienna Convention rights and to communicate with their respective consulates.<sup>44</sup> Although Judge Chapel's interpretation of *Avena* suggests that Article 36 violations cannot be completely barred by United States judicial procedure, other courts have applied procedural default doctrine to such treaty-based claims.<sup>45</sup> Attorneys representing foreign nationals in capital cases should continue to assert such claims pretrial to avoid any potential risk of default.

*Torres III* is noteworthy for its recognition that an I.C.J. decision in a capital case has a binding effect upon state and federal courts within the United States.<sup>46</sup> Although the United States judiciary does not relinquish jurisdiction in cases involving foreign nationals, the Optional Protocol designates the I.C.J. as the appropriate forum to adjudicate Vienna Convention claims.<sup>47</sup> Thereafter, by

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40. *Torres III*, No. PCD-04-442, at 11-12 (Chapel, J., concurring). Mexico hired an attorney, two investigators, a social worker, a mitigation specialist, two gang experts, and a bilingual neuropsychologist. *Id.*

41. *Id.* at 12.

42. *Id.*

43. John Greiner, *Henry Commutes Death Sentence*, THE DAILY OKLAHOMAN, May 14, 2004, at 1A.

44. *Torres III*, No. PCD-04-442, at 7-8 (Chapel, J., concurring).

45. See, e.g., *Breard*, 523 U.S. at 375 (holding that petitioner's claim had been procedurally defaulted for failure to raise the claim in state court); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (holding that the petitioner's claim was "procedurally barred because he did not raise it in state court and he cannot show cause and prejudice for his default"); *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (finding that the petitioner's claims were procedurally defaulted because "the legal basis for the claim [was] not new and was available at the time of Petitioner's first Application for Post-conviction Relief").

46. *Torres III*, No. PCD-04-442, at 3-5 (Chapel, J., concurring).

47. *Id.* at 5.

virtue of the Supremacy Clause, such I.C.J. decisions also bind state courts.<sup>48</sup> Attorneys may anticipate I.C.J. instructions for review and reconsideration of capital sentences of foreign nationals in cases involving Vienna Convention violations. However, because the Oklahoma Governor commuted Torres's sentence before the evidentiary rehearing, it remains to be seen how closely United States courts will review and reconsider such cases.

Mark J. Goldsmith

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48. See U.S. CONST. art. VI, cl. 2 (stating that all treaties are the supreme law of the land and bind state courts).



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# **STATUTE NOTES:**

**Code of Virginia**

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