SUPREME COURT OF THE UNITED STATES

OSBALDO TORRES *v.* MIKE MULLIN, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03–5781. Decided November 17, 2003

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS respecting the denial of the petition for certiorari.

My dissent from the hastily crafted opinion in *Breard* v. *Greene,* 523 U. S. 371 (1998) *(per curiam),* rested on procedural grounds: The Court's departure from its normal rules governing the processing of certiorari petitions deprived us of the briefing and argument necessary for the careful consideration of important issues. *Id.*, at 379–380. I am now persuaded that my dissent should have been directed at the merits of the Court's holding.

In *Breard* the Court refused to stay the imminent execution of a citizen of Paraguay. Breard's federal habeas corpus application alleged that the Virginia authorities failed to advise Breard of his right under Article 36 of the Vienna Convention on Consular Relations to have the Paraguayan Consulate notified of his arrest and trial. This Court held that Breard procedurally defaulted his claim by failing to raise it in the Virginia state courts. *Id.,* at 375–376. The opinion did not discuss the possibility that Breard may have failed to assert the treaty claim because he knew nothing about the treaty until after the state proceedings were concluded. It surely is reasonable to presume that most foreign nationals are unaware of the provisions of the Vienna Convention (as are, it seems,

many local prosecutors). That is precisely why the Convention places the notice obligation on the governmental authorities.

There is obvious tension between the holding in *Breard* and the purpose of Article 36 of the Vienna Convention. In its authoritative interpretation of Article 36 in the *LaGrand Case* (*F. R. G.* v. *U. S.*), 2001 I. C. J. No. 104, ¶¶90–91 (Judgment of June 27), http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (as visited Oct. 24, 2003, and available in Clerk of Court's case file),* the International Court of Justice (ICJ) explained:

> "The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the sending State.
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> ". . . Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36."

Applying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair. The ICJ's decision in *LaGrand* underscores that a foreign national who is presumptively ignorant of his right to notification should not

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*The United States has consented to the compulsory jurisdiction of the International Court of Justice over Convention-related disputes. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, Art. I, [1970] 21 U. S. T. 326, T. I. A. S. No. 6820.

be deemed to have waived the Article 36 protections simply because he failed to assert that right in a state criminal proceeding.

Article VI, cl. 2, of our Constitution provides that the "Laws of the United States," expressly including "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." The Court was unfaithful to that command when it held that Congress may not require county employees to check the background of prospective handgun purchasers, *Printz* v. *United States,* 521 U. S. 898 (1997), that Congress may not exercise its Article I powers to abrogate a State's common-law immunity from suit, *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44 (1996), and that a State may not be required to provide its citizens with a remedy for its violation of their federal rights, *Alden* v. *Maine,* 527 U. S. 706 (1999). The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations.