

No. 04-5928

In The
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

Mountain States Legal Foundation (“MSLF”) respectfully submits this *amicus curiae* brief in support of the Respondent, Doug Dretke, Director, Texas Department of Criminal Justice, Institutional Division. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.¹

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF’s members include businesses and individuals who live and work in nearly every state of the country.

MSLF members are engaged often in natural resources activities as well as other business enterprises that are highly regulated by federal and state laws, many of which include criminal sanctions. Moreover, MSLF has represented individuals who have been prosecuted or persecuted pursuant to these laws, which, all too often, are

¹ Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

Draconian in their application and scope. *See, U.S. v. Unser*, 165 F.3d 755 (10th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Shook v. Montana*, 67 P.3d 863 (Mont. 2002), *cert. denied*, 540 U.S. 815 (2003). MSLF members and clients recognize that, under the U.S. Constitution, they are guaranteed certain rights and privileges; however, once they have exhausted their resorts to the courts of the land, including this Court, no other rights exist.

Medellin argues that, because he is a citizen of a foreign country, he has rights and privileges before the courts of this land, including this Court, which are unavailable to the citizens of this country. Moreover, Medellin claims that laws and court decisions in which the citizens of this country did not participate and in which their elected and appointed officials and judges played no part constrain and limit the citizens of this country in the actions that state and federal authorities may take regarding him for crimes he committed against this Nation's citizens. Such a bifurcated legal system, were it to be adopted by this Court, would undermine the confidence of MSLF members and clients as well as that of the Nation's citizenry regarding the legitimacy of the laws and court rulings to which they must be willing to be held accountable.

SUMMARY OF THE ARGUMENT

Both the District Court and the Fifth Circuit found that Medellin waived his Vienna Convention claim when he did not raise that claim in state court. Both decisions should be upheld because they follow established American federal law in holding that Medellin's claim of a

violation of his right to consular notification under the Vienna Convention was barred procedurally. For this Court to hold otherwise would be in direct conflict with its previously decided precedence.

ARGUMENT IN SUPPORT OF PETITION

I. **The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow Established Federal Law Barring Such Claims.**

Both the District Court and the Fifth Circuit Court of Appeals held that Medellin was barred procedurally in federal court from raising a claim that he was denied consular assistance in violation of his rights under the Vienna Convention. *Medellin v. Cockrell*, No. H-01-4078 (S.D. Tex. filed June, 26, 2004); *Medellin v. Dretke*, 371 F.3d 270, 279-290 (5th Cir. 2004). The application of the procedural default rule to Medellin's claim is controlled by this Court's previous holdings and federal law.

A. **The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow This Court's Previous Holdings.**

In *Lee v. Kemna*, 534 U.S. 362, 375 (2002), this Court held that the Court "will not take up a question of federal law presented in a case 'if the decision of [the state court] rests on a state law ground that is independent and adequate to support the judgment.'" In the *habeas corpus*

context, the application of this procedural default doctrine is grounded in concerns of comity and federalism. *Coleman v. Thompson*, 501 U.S. 722, 723 (1991).

Furthermore, in *Breard v. Greene*, 523 U.S. 371, 375-377 (1998), this Court concluded that Vienna Convention claims, like constitutional claims, may be defaulted procedurally, even in a death penalty case. In *Breard*, the Court declined to stay an execution of a Paraguayan national who was convicted in Virginia of murder and attempted rape. Like the current case, Virginia failed to notify the Paraguayan Consulate in violation of the Vienna Convention. Also, like the current case, the International Court of Justice issued a provisional order demanding that the United States “take all measures at its disposal” to stay the execution. *Paraguay v. the United States*, I.C.J. (decided April 9, 1998), reprinted at 37 I.L.M. 810, 819 (1998). This Court held that “while we should give respectful consideration to the interpretation of an international treaty . . . it is recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” *Breard*, 523 U.S. at 375; see also, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). This Court further ruled that the holding of the International Court of Justice was not binding and, even if it were, that the federal government did not have the authority to impose it upon the states because federal authority over the States’ criminal justice system is limited. *Breard*, 523 U.S. at 373.

Thus, the Fifth Circuit held that it may not disregard this Court’s clear holding that ordinary procedural default rules may bar Vienna Convention claims:

If a precedent of the Supreme Court has direct application in a case, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Medellin, 371 F.3d at 280 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

B. The District Court’s And Fifth Circuit’s Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow The 1996 Antiterrorism And Effective Death Penalty Act.

Any enforceable rights that Medellin might have been entitled to under the Vienna Convention are limited by the 1996 Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(a)(e)(2). This Act provides that federal courts should not hold evidentiary hearings on *habeas* claims, including claims based on alleged treaty violations, “[i]f the applicant has failed to develop the factual basis of [the] claim in State court proceedings.” *Id.*

Medellin’s ability to obtain relief based upon violations of the Vienna Convention is subject to this Act, just as any claim arising under the United States Constitution would be. This Act prevents Medellin from establishing that the violation of his Vienna Convention rights caused prejudice because Medellin failed to raise this claim in state court and thereby failed to “develop the factual basis” of his claim in that court. As a result, Medellin is barred procedurally from now raising this claim.

II. The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because The Decisions Of Other Countries Do Not Supercede The Law Of This Country.

Contrary to the Supreme Court's decision in *Breard*, the International Court of Justice held that procedural default doctrines do not bar Vienna Convention claims. See, *Germany v. United States of America* ("LaGrand"), 2001 I.C.J. 104 (Judgment of June 27); *Mexico v. United States of America* ("Avena Judgment"), 2004 I.C.J. 128 (Judgment of March 31). Medellin argues that the *LaGrand* and *Avena* Judgments should apply to his case.

There are numerous reasons why Medellin's argument should be rejected. First, this Nation follows a "dualist" approach to international law. Bradley, Curtis, *Breard, Our Dualist Constitution, and the International Conception*, 51 Stan. L. Rev. 529 (February 1999). Under this dualist view, international and domestic laws are distinct and each nation determines for itself when and to what extent international law is incorporated into its legal system. The status of international law in the domestic system is determined by domestic law, and under dualism a nation's courts look inward to domestic standards and processes. *Id.* Relevant domestic standards pertaining to the issue in Medellin's case have been created by this Court and it is these American standards that apply to this case, not the standards of the international courts. It is this Nation's domestic policy that Vienna Convention claims are barred procedurally in state cases when, as here, the claim was not raised in state court. Therefore, Medellin's claim should be denied because it is inconsistent with the domestic policy of the United States.

Second, foreign decisions are based on an entire set of cultural, political, and societal norms that are separate from those in the United States. These foreign norms may or may not be similar to the norms in this country. There are significant dangers in giving authority over this Nation's courts to a body that does not represent the interests of the United States. These dangers include: strengthening of the precedential value of foreign authorities where there has been no distinction regarding which foreign authorities should and should not be binding; encouraging international actors who do not have the best interests of the United States; system at heart; and reducing the United States' freedom of action regarding civil and criminal matters in the future. Eric D. Hargan, *The Sovereignty Implications of Two Recent Supreme Court Decisions*, <http://www.fed-soc.org/IntlLaw&AmericanSov.htm> (posted July 11, 2004).

Third, the use of foreign law in the United States will result in the creation of an international legal regime that does not answer to American voters and is not based upon our republican form of government or the Constitution's system of checks and balances. A significant body of American jurisprudence could be struck down if it were subject to foreign precedent. For example, the United States is "out of step" with the views of international tribunals because the United States is not a signatory to: the Kyoto Protocol (signed by more than 85 nations), the Rome Statute of the International Criminal Court (signed by 97 nations), the Convention on the Rights of the Child (not ratified by only two nations, the United States and Somalia), and the Mine Ban Treaty Act (signed by more than two-thirds of the nations of the world). These examples are illustrative of the numerous instances in which

the United States' view of international law is inconsistent with the view of the majority of other nations. Adopting foreign law would create many inconsistencies between American values and beliefs and the laws governing this Nation's residents.

Furthermore, requiring the States to transfer their authority over domestic actions to the International Court of Justice violates the U.S. Constitution's Dual Sovereignty and the rights reserved to the States under the Tenth Amendment. *U.S. v. Lopez*, 514 U.S. 549, 561 (1995). Moreover, such a transfer would undermine the state courts' efficiency and the timely presentation of claims, causing harm to an already overburdened system. It is in the interest of fairness and justice, including speedy trials and final resolution of criminal cases, that exclusive domestic authority over domestic criminal activities be retained.

This Court should reject this attempt to subordinate this Nation's Constitution, its well-established judicial principles, and various Acts of Congress. This Court should deny Medellin's Vienna Convention claims.



CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court uphold the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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