FEDERALISM, HARM, AND THE POLITICS OF *LEAL GARCIA V. TEXAS*

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Humberto Leal Garcia savagely raped and murdered sixteen-year-old Adria Sauceda in San Antonio in the spring of 1994.[1] A Texas jury sentenced him to death.[2] On these facts alone, his case appears indistinguishable from the dozens of Texas capital cases that regularly receive federal court review, capable of spurring the occasional, predictable complaints about Texas justice and compelling the indignation of the capital defense bar and abolitionist community, but otherwise not especially noteworthy legally or politically. Yet, Texas law enforcement officials investigating the murder did not allow Leal, a Mexican national who had resided in the United States since the age of two, access to the Mexican consulate pursuant to the Vienna Convention on Consular Relations.[3] So when Leal sought a stay of his Texas execution from the United States Supreme Court in the summer of 2011, he created more than just a legal question for the Court's resolution. His case ignited a storm of controversy at multiple levels of politics—constitutional, international, and electoral.

What may have appeared as a relatively straightforward question about the application of an international treaty to a foreign national subjected to American criminal punishment was certainly much more, implicating issues not only of international law and human rights, but of the structure of American government and the tensions often created in criminal cases by our scheme of federalism. In so doing, Leal's case pitted multiple strains of conservative legal and political thought against one another. On the one hand, the case presented an opportunity for the Court to defer to the claims of the President on an issue of foreign

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1. Garcia v. Texas, 131 S. Ct. 2866, 2867 (2011) (per curiam). Confusingly, the current Supreme Court Reporter's caption refers to the petitioner as "Garcia." In its opinion, however, the Court refers to him as "Leal," which is the proper reference and the one employed by the lower courts. For accuracy here, I will cite to the Supreme Court's opinion as "Garcia v. Texas," but will refer to the petitioner personally as "Leal."

2. *Id.*

3. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820; *Garcia*, 131 S. Ct. at 2867.

relations, a notion that fits comfortably within the conservative constitutional mindset.[4] Notably, many former officials in the Bush Administration—which itself famously sought to stay Jose Medellin's Texas execution in light of a Vienna Convention violation[5]—actually defended President Obama's position advocating the stay.[6] On the other hand, though, deference to the President would have meant permitting a federal court to interfere with the execution of a lawful sentence imposed by a sovereign state's criminal justice system under circumstances where the legal violation made no difference to the outcome of the criminal case, a notion ordinarily incompatible with the legal right's commitment to a robust system of federalism.[7] Beyond this, even, there remained the problem of institutional roles and relationships—whether, even assuming Leal had an enforceable right, his claim for relief was more properly directed at the Congress than at the courts. And then there remained the political reality that the Texas Governor who defended Leal's death sentence and refused to halt the execution, had become a leading candidate to unseat the President, whose administration so vigorously sought the stay.[8] So the case of this Mexican national who savagely raped and murdered a teenage girl turned out to be more than a run-of-the-mill reflection on Texas's death penalty. Like Medellin's case, it was a lesson in how the tension

4. *See, e.g.*, Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180 (2006); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 499 (2008).

5. *See* Medellin v. Texas, 552 U.S. 491, 491 (2008).

6. *See* Reid J. Epstein, *Court Won't Block Texas Execution*, POLITICO (July 7, 2011, 11:07 PM), http://www.politico.com/news/stories/0711/58528.html; Ed Pilkington, *US Politicians and Lawyers Protest Against Death Penalty for Mexican Man*, THE GUARDIAN (June 7, 2011, 5:42 PM), http://www.guardian.co.uk/world/2011/jun/07/us-texas-humberto-leal-execution.

7. *See* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 874-75 (2006); *see also* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5 (1997) (discussing conservative concerns about pre-reform habeas law and jurisprudence).

8. *See* Nicole Allan, *In Texas, a Death Penalty Showdown With International Law*, THE ATLANTIC (June 6, 2011, 7:01 AM), http://www.theatlantic.com/international/archive/2011/07/in-texas-a-death-penalty-showdown-with-international-law/241480/; Megan Carpentier, *Humberto Leal's Execution, Rick Perry's Ambition*, THE GUARDIAN (July 8, 2011, 1:00 PM), http://www.guardian.co.uk/commentisfree/cifamerica/2011/jul/08/rick-perry-texas-leal; Mary Lu Carnevale, *Another Poll Shows Perry Leading GOP Field, Closing in on Obama*, WASH. WIRE BLOG (Aug. 31, 2011, 2:37 PM), http://blogs.wsj.com/washwire/2011/08/31/another-poll-shows-perry-leading-gop-field-closing-in-on-obama (citing results of Quinnipiac University poll).

between American federalism and international relations functions at the intersection of constitutionalism and politics.

Still, despite the legitimate presidential interest in seeking the stay, the Court's ultimate decision to deny Leal relief was not only correct, but ought to satisfy conservative judicial, constitutional, and political instincts. Of all of the competing harms asserted in the case, the harm that Leal caused to Adria was simply too significant even for a presidential assertion of foreign policy interests. By ultimately recognizing that Leal could show no prejudice arising from the denial of consular access, in addition to its rejection of unenacted legislation as a basis for temporary relief, the Court validated the strength of the case against Leal as well as Texas's interests in carrying out the political community's condemnation of Leal's brutal act.

Before going further, though, a procedural description is appropriate. After Leal exhausted his direct appeals, he sought both state and federal post-conviction collateral relief.[9] The courts all denied relief, including a certificate of appealability (COA) in federal court.[10] Leal, however, was one of fifty-one Mexican nationals named in the *Case Concerning Avena and other Mexican Nationals* (*Avena*), decided by the International Court of Justice on March 31, 2004.[11] That court held that the United States violated its Vienna Convention obligations as to the named inmates.[12] In response, President Bush issued a memorandum ("Bush Memorandum") seeking to implement the *Avena* decision here, and required state courts to give effect to *Avena* "in accordance with general principles of comity."[13] Leal subsequently filed a second round of state and federal habeas petitions, in which he argued that he was entitled to relief for the Vienna Convention violation.[14] The United States District Court for the Western District of Texas denied relief on the ground that the second petition was impermissibly successive under federal habeas law, but allowed Leal a COA to litigate the Vienna Convention question.[15] While his appeal was pending in the Fifth Circuit, the Supreme Court decided *Medellin v.*

9. *See* Leal v. Dretke, 428 F.3d 543, 547 (5th Cir. 2005) (briefly describing procedural history after direct appeal).

10. *See id.* at 543, 553.

11. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

12. *Id.* ¶ 106.

13. Brief for the United States as Amicus Curiae Supporting Respondent at Appendix 2, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5982), 2005 WL 504490.

14. Garcia v. Quarterman, 573 F.3d 214, 216 (5th Cir. 2009) (briefly describing procedural history of Leal's second round of post-conviction petitions).

15. Leal v. Quarterman, No. SA-07-CA-214-RF, 2007 WL 4521519, at *25 (W.D. Tex. Dec. 17, 2007).

Texas.[16]

In *Medellin*, the Court held that neither *Avena* nor the Bush Memorandum was enforceable domestic law, and neither could implement the Vienna Convention and preempt state procedural law.[17] The Court reasoned that because the treaty was not self-executing, only an act of Congress could implement it.[18] The Fifth Circuit subsequently determined that although Leal's petition was not successive, in light of *Medellin*, he was not entitled to relief, and the Court dismissed his petition with prejudice.[19]

Leal returned to the Texas Court of Criminal Appeals with a second subsequent application for state habeas relief, predicated upon the Vienna Convention violation as well as the fact that Senator Patrick Leahy of Vermont had introduced new legislation (S. 1194) to implement the *Avena* decision and the Vienna Convention by requiring a hearing and allowing relief only where there was actual prejudice to the person.[20] That court once again denied his application pursuant to the Texas abuse of the writ doctrine.[21] Meanwhile, Leal also sought relief in the Western District of Texas again, and again that court denied relief, including a stay of Leal's execution.[22] The Fifth Circuit then denied relief in an unpublished opinion.[23]

Leal then sought review from the Supreme Court on the Vienna Convention claim, requesting a stay of execution to allow time for Congress to enact the Leahy Bill, S. 1194.[24] After Justice Scalia (the Circuit Justice for the Fifth Circuit) referred the case to the full Court, on July 7, 2011 the Court rejected the request. In a per curiam opinion, the Court first easily disposed of Leal's claim that due process required

16. Medellin v. Texas, 552 U.S. 491 (2008).

17. *Id.* at 498-99; *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 354-55 (2006) (holding that the Vienna Convention did not preclude application of a state's procedural rules to cases involving violations of the Convention).

18. *Medellin*, 552 U.S. at 525-26.

19. Leal v. Quarterman, 573 F.3d 214, 224 (5th Cir. 2009).

20. *See* S. 1194, 112th Cong. § 4 (2011).

21. *Ex parte* Leal, No. WR–41743–03, 2011 WL 2581917, at *1 (Tex. Crim. App. June 27, 2011). Texas abuse of the writ law is codified at Article 11.071, § 5 of the Texas Code of Criminal Procedure, and sets forth the requirements for obtaining review of a subsequent application for state habeas relief. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (West 2011). The Court of Criminal Appeals had previously held that claims like Leal's would be summarily dismissed as an abuse of the writ. *See ex parte* Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006).

22. Garcia v. Thaler, No. SA-11-CA-482-OG, 2011 WL 2479912, at *21 (W.D. Tex. June 22, 2011).

23. Garcia v. Thaler, No. 11-70022, 2011 WL 2582880, at *5 (5th Cir. June 30, 2011).

24. Garcia v. Texas, 131 S. Ct. 2866, 2867 (2011) (per curiam).

a stay during consideration of S. 1194.[25] The Court next rejected the argument of the government, who, while not endorsing the due process claim, argued that the Court should stay the execution in support of future jurisdiction that would arise once the bill was enacted and Leal had been given a hearing on his Vienna Convention claim.[26] According to the government, harm would be done to American foreign policy interests in the absence of a stay, including relations with Mexico and the ability of Americans to benefit from consular access if detained in a foreign country.[27] Yet, as the Court put it, "we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation. Our task is to rule on what the law is, not what it might eventually be."[28] But even if it were appropriate to impose a stay based on unenacted legislation, Leal's case was not an appropriate vehicle for doing so.[29] At this point—three years after *Medellin* and seven since *Avena*—it is clear that Congress does not believe that implementing the Vienna Convention is a priority.[30] This is apparently true despite the "grave international consequences" identified by the government; "Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation."[31] Finally, Leal's advocates argued that had he been granted timely consular access, additional mitigation evidence could have been uncovered that would have proven helpful to the defense, such as brain damage and physical and sexual abuse as a child.[32] But the Court concluded that Leal could not identify any prejudice arising from the lack of consular access.[33] Indeed, even the government did not claim prejudice here, prompting the Court to remark that it would not grant a stay at the government's suggestion "when it cannot even bring itself to say that his attempt to overturn his conviction has any prospect of success."[34]

25. *Id.*

26. *Id.*; *see also* Brief of the United States as Amicus Curiae in Support of Applications for a Stay, Garcia v. Texas, 131 S. Ct. 2866 (2011) (Nos. 11A1, 11A2, 11A21), 2011 WL 2630156, at *1, *31 n.1.

27. Brief of the United States as Amicus Curiae in Support of Applications for a Stay, Garcia v. Texas, 131 S. Ct. 2866 (2011) (Nos. 11A1, 11A2, 11A21), 2011 WL 2630156, at *11-12.

28. *Garcia*, 131 S. Ct. at 2867.

29. *Id.*

30. *Id.* at 2868.

31. *Id.*

32. *See* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Humberto Leal Garcia, Garcia v. Texas, 131 S. Ct. 2866 (2011) (No.11-5001), 2011 WL 2581860, at *14.

33. *Garcia*, 131 S. Ct. at 2868.

34. *Id.*

Justice Breyer's dissent, joined by Justices Ginsburg, Sotomayor, and Kagan, adopted the government's contention that permitting Texas to carry out its judgment against Leal would amount to a breach of international legal obligations.[35] He also noted that in *Medellin*, the Court refused to grant a stay because President Bush had not represented a likelihood of congressional action to implement the Vienna Convention.[36] That was not the case here, Justice Breyer said, noting the consultation between the Obama Administration and Senator Leahy, who said he intended to hold hearings on S. 1194 quickly.[37] Finally, the dissent noted the significant weight that is traditionally given to presidential assertions of authority in matters of foreign relations, which is particularly significant when the presidential claims are as compelling as the ones before the Court in Leal's case.[38]

It is easy to see why *Leal* is a decision primarily about federalism. It is certainly deserving of that description, particularly when we consider that the state's interests in bringing its criminal judgment against Leal to finality were given greater weight than the President's assertion of the damage that could be done to American foreign policy interests absent a stay of the execution. The Court simply was not willing to compromise the state's interests when S. 1194 was merely introduced and pending but had received no other meaningful action. Indeed, it was a chief weakness in Leal's case that Congress had not acted in the three years since *Medellin*. But one cannot help but wonder whether the insufficient procedural state of S. 1194 would have mattered less had Leal presented a stronger case on the merits of some underlying constitutional claim or if there had been some question about his guilt or his moral desert for the punishment he received.

As it was, though, the harm that Leal undeniably caused his victim was the harm that carried the greatest weight—to put it differently, the strength of the state's guilt and punishment case was too much for Leal's legal claims, and the government's political claims, to overcome. The evidence showed that when police found the nude sixteen-year-old Adria's body, her face was bloody and blood was oozing from a gaping hole that extended from her eye to the center of her head.[39] A bloody stick, about fifteen inches long with a screw at the end, was found

35. *Id.* at 2868-69 (Breyer, J., dissenting).
36. *Id.* at 2869.
37. *Id.*
38. *Garcia*, 131 S. Ct. at 2870 (Breyer, J., dissenting).
39. Leal v. Dretke, 428 F.3d 543, 546 (5th Cir. 2005).

protruding from her vagina.[40] Investigators also found near Adria's body an asphalt rock nearly double the size of Adria's skull (approximately thirty to forty pounds) and another stick about four to five inches long.[41] A police video of the crime scene was admitted into evidence.[42] Leal gave multiple, conflicting statements to police about his involvement in Adria's death.[43] Finally, after police confronted Leal with the statement of his brother, Gualberto, that Gualberto saw Leal return home covered in blood and that Leal confessed to killing a girl, Leal gave a statement in which he described his fatal encounter with Adria.[44] Police also found Adria's bloody blouse during a consent search of Leal's home.[45] Once the jury was faced with these grisly facts, there was every chance that the jury would both convict Leal and sentence him to death.

Texas capital sentencing law is, of course, a relevant further consideration here. Texas's "special issues" required then, as they do now, that the jury find that the defendant is a future danger before it can recommend a death sentence.[46] That a defendant has no prior history of violence is not enough to spare his life, for a jury can find future dangerousness based on the nature of the crime, including the deliberateness of the crime or heinousness sufficient to demonstrate "a wanton and callous disregard for human life."[47] The demonstrably cruel nature of Leal's crime enabled prosecutors to fashion a fairly straightforward case for future dangerousness, even despite his lack of criminal convictions. What was left, then, was for Leal to offer the jury any evidence in mitigation that would have justified a life sentence rather than the death penalty. On the strength of the aggravating evidence here, and given the nature of the crime, it was not reasonably likely that even a stronger mitigation case would have spared his life. The lower courts acknowledged as much when considering the merits of Leal's constitutional claims.[48]

In light of the strength of Texas's case, then, consular access would

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Garcia v. Thaler, Civil. No. SA-11-CA-482-OG, 2011 WL 2479912, at *3 (W.D. Tex. June 22, 2011).

45. *Id.*

46. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2011).

47. *See* Barnes v. State, 876 S.W.2d 316, 322 (Tex. Crim. App. 1994); Wilkerson v. State, 881 S.W.2d 321, 336 (Tex. Crim. App. 1994).

48. *See, e.g.*, Leal v. Dretke, 428 U.S. 543, 549-52 (5th Cir. 2005).

not have altered the outcome here. Not only did the Court acknowledge this,[49] but even the Breyer dissent did not make a case for prejudice to Leal.[50] In fact, the very legislation on which Leal and the government relied, S. 1194, expressly contemplates this very kind of analysis.[51] The bill uses the term "actual prejudice" but does not define that term.[52] In post-conviction litigation, though, actual prejudice is a familiar phrase. Ineffective assistance of counsel jurisprudence, for example, requires a showing of prejudice before an inmate will be entitled to relief on an ineffectiveness claim.[53] This means that the *inmate* bears the burden of showing that, but for counsel's errors, there is a reasonable probability that the outcome would have been different.[54] In addition, an inmate pursuing habeas corpus relief who wishes to overcome his procedural default of a cognizable claim must establish cause for the default, as well as actual prejudice.[55] Distinguish this from traditional harmless error review on direct appeal, which places the burden on the government to prove that the asserted error was harmless beyond a reasonable doubt.[56] That S. 1194 uses the "actual prejudice" language instead of something more suggestive of traditional harmless error review tells us something about the legislature's vision for the standard governing Vienna Convention claims: it sets a high hurdle for the defendant to surmount. One must also remember that traditional harmless error review applies to *constitutional* violations. Though Leal's claim certainly implicated constitutional politics, it did not assert a constitutional violation, merely one involving a treaty. The search for actual prejudice was entirely sensible.

Such a standard will, of course, prove less burdensome for the state. In the world of collateral review, that is precisely the point. A standard that reduces the burden on the state, and increases the burden on the inmate, better serves—and is consistent with existing law that protect—the state's interests in comity, finality, and federalism that are implicated when a state inmate asks a federal court to undo his conviction or sentence.[57] Indeed, this is precisely the premise of

49. Garcia v. Texas, 131 S. Ct. 2866, 2868 (2011) (per curiam).

50. *See generally id.* (Breyer, J., dissenting).

51. *See* S. 1194, 112th Cong. § 2 (2011).

52. *See id.* § 4.

53. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

54. *Id.* at 687.

55. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

56. *See* Chapman v. California, 386 U.S. 18, 21-22 (1967).

57. *See, e.g.*, 28 U.S.C. § 2254(d) (2006) (forbidding federal habeas relief to state prisoners unless the state court decision is unreasonable); Coleman v. Thompson, 501 U.S.

harmless error review—even of constitutional violations—in federal habeas proceedings, where the burden is on the inmate to demonstrate that the underlying error had a substantially injurious effect or influence upon the verdict.[58] Like other habeas doctrines and law, the actual prejudice requirement for defaulted claims and the government-friendly harmless error standard are designed to promote federalism by protecting the state's interests in enforcing and administering its own criminal law.[59] In the end, that is what Texas sought, and the Court preserved, in *Leal*.

The politics of the Leal litigation—constitutional and otherwise — were sufficiently thick to take it out of the universe of typical state capital cases subjected to federal review. Despite the intuitive appeal of federalism, there surely is sympathy in constitutional politics for the presidential assertion of national interests here. Congress should pass legislation to implement the country's obligations pursuant to the Vienna Convention, though no relief should be obtained without a showing that the outcome was affected by the failure to provide consular access. Sympathy for the federal interests, though, must just as surely be mitigated by the confidence that priorities of a different order in constitutional politics assumed primacy here. Those priorities include the structural constitutional interests served by federal court respect for the criminal judgments of a sovereign state and the prudential limit on judicial authority that was implicit in the Court's deference to Texas here, absent any affirmative action on the part of Congress. They also include the primacy given to the lack of prejudice to Leal. Such primacy actually functions not simply as a way of vindicating the state's sovereign criminal law powers, but also as a recognition of the relative strength of the prosecution's case on guilt and punishment in light of the brutality that Leal waged upon his helpless young victim. The Court's decision in *Leal*, like its decision in *Medellin*, thus exists comfortably within a body of modern collateral review jurisprudence that gives primacy to state criminal law interests.

722, 730, 739 (1991) (recognizing that application of the adequate and independent state grounds doctrine to criminal cases on collateral review is "grounded in concerns of comity and federalism" and that "it is primarily respect for the State's interests that underlies the application of the adequate and independent state grounds doctrine in federal habeas"); Teague v. Lane, 489 U.S. 288, 309-10 (1989) (citing the damage to state criminal interests from retroactive application of new rules of criminal procedure to cases on collateral review).

58. *See* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

59. *See* J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J. L. & PUB. POL'Y 109 (2004) (a detailed analysis of how these doctrines protect federalism interests).