

**IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA**

GERARDO VALDEZ,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

District Court of Grady County
Case No. CRF 89-139

Direct Appeal Case No. F-90-461

Post-conviction Case No.

MOTION FOR EVIDENTIARY HEARING AND DISCOVERY

Applicant Gerardo Valdez, by and through counsel, hereby moves for an evidentiary hearing and for leave to take the discovery specified herein pursuant to Okla. Crim. App. R. 9.7(D)(2)-(5). In support of his motion, Mr. Valdez relies upon the facts and legal claims in his Second Application for Post-Conviction Relief, filed August 21, 2001, which are incorporated by reference as if fully set forth herein, and on the additional arguments set forth below, all of which demonstrate by clear and convincing evidence that the facts now sought to be

introduced and the discovery related to new additional facts have or are the claim raised in Mr. Valdez's application.¹

BACKGROUND

On August 21, 2001, Mr. Valdez filed his Second Application for Post-Conviction Relief with this Court. That Application shows that Mr. Valdez, a Mexican national, is entitled to a new trial as a result of the violation by the State of Oklahoma of his individual rights under Article 36 of the Vienna Convention of Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, which is the law of Oklahoma pursuant to the Oklahoma Constitution, art. I and the Supremacy Clause of the United States Constitution, U.S. Const. art. VI. As part of that showing, Mr. Valdez has alleged prejudice resulting from the denial of his Article 36 rights.

Mr. Valdez's Second Application for Post-Conviction Relief raises substantial claims regarding the violation of his Vienna Convention rights. Further, although a showing of prejudice from the violation not is required under applicable law (as set forth in the Application) so that Mr. Valdez should be granted a new trial without a showing of prejudice, he has made such a showing. He has alleged facts which prove that, if he had been afforded his rights under Article 36, he would have been found not guilty by reason of insanity on the single offense for which he was charged or, at a minimum, the jury would have chosen a life sentence over death. These facts were not brought forth or resolved at trial as a direct result of the State's violation of

¹ Failure to cite a particular affidavit attached to the application should not be deemed to be a waiver of the facts recited therein; rather, Mr. Valdez seeks only to highlight particular facts for the Court without undue repetition.

Article 36; they are material to Mr. Valdez’s confinement since they bear directly on his culpability and sentence, and controvert the evidence presented by the prosecution at trial.

ARGUMENT

A. This Court Should Order a Hearing Pursuant to Title 22, Section 1089(D)(5)

Title 22, section 1089(D)(5) provides that this Court “shall” order a hearing if it determines that “controverted, previously unresolved factual issues material to the applicant’s confinement” exist, *id.*, and that the applicant is otherwise entitled to relief under Title 22, section 1089. In his application, Mr. Valdez has shown that he is entitled to relief under section 1089 and alleged new evidence that controverts facts presented at trial and that are material to his claim. Specifically, Mr. Valdez alleges that, as a result of the admitted violation of his rights under the Vienna Convention to be notified that he had the right to receive assistance from the Mexican Consulate, and to receive that assistance, both “without delay” following his detention he was prejudiced in four material respects.

First, Mr. Valdez was denied assistance from the Mexican Consulate for nearly 12 years as a direct result of Oklahoma’s failure to inform him of his rights and the Consulate of his arrest. This denial prejudiced his defense because it took Mexico’s involvement — more than 11 years later² — to find crucial evidence of Mr. Valdez's organic brain damage that rendered him legally insane at the time of the crime. After Mexico learned about Mr. Valdez, retained counsel and conducted a preliminary review of the record and an investigation that ought to have been done in 1989, it had Mr. Valdez tested properly by a psychologist and neuropsychologist who

² Oklahoma never has complied with the law. When Mr. Valdez’s execution was set for June, 2001, one of his relatives in Texas contacted the Mexican Consulate in El Paso seeking advice and Mexico finally learned of Mr. Valdez’s plight.

determined the existence of damage to the frontal and temporal lobes of his brain. Mexico has provided this evidence to the psychiatric expert who was named by the State at trial, and he agrees that these test results not only fill the gap in the information available to him at trial, but alter the opinion he gave at trial that Mr. Valdez was sane at the time of the crime. He now concludes that Mr. Valdez was temporarily insane at the time of the crime. *See* Affidavit of Hon. Juan Manuel Gomez Robledo, dated August 10, 2001 (“Gomez Aff.”) ¶¶ 17-19, Exh. 5 of APPENDIX OF EXHIBITS IN SUPPORT OF SECOND APPLICATION FOR POST-CONVICTION RELIEF (“APPENDIX”); Affidavit of Oliver Albert Farres Martins, dated August 10, 2001 (“Farres Aff.”) ¶¶ 4-12, Exh. 6 of APPENDIX; Affidavit of Ricardo Weinstein, Ph.D., dated June 4, 2001 (“Weinstein Aff.”) ¶ 13-14, Exh. 7 of the APPENDIX; Affidavit of Maurice B. Sterman, Ph.D., dated July 6, 2001 (“Sterman Aff.”) ¶ 9, Exh. 9 of APPENDIX; Affidavit of Dr. Cecil F. Mynatt, Jr., dated August 14, 2001 (“Mynatt Aff.”) ¶ 8, Exh. 4 of APPENDIX.

Second, the denial resulted in prejudice to Mr. Valdez because, if the Mexican Consulate had been notified of his case, a complete investigation of the circumstances of his life would have been conducted prior to trial, not more than 11 years later. As a consequence, the facts of his head injuries and the resulting neuropsychological evidence of brain damage and insanity, as well as a complete and thorough mitigation investigation, would have been known prior to trial. Thus, evidence that is crucial to guilt and mitigation would have been developed for presentation at trial. In addition to being determinative of guilt, this evidence was also pertinent to sentencing; even if there had been some evidence contrary to the State’s expert’s opinion based on the new evidence, that evidence would certainly have led the jury to choose life over death for

Mr. Valdez. *See, e.g.*, Affidavit of Craig Haney, Ph.D., J.D., dated Aug. 14, 2001 (“Haney Aff.”) ¶¶ 60-61, Exh. 18 of APPENDIX.

Third, the involvement of the Mexican Consulate would have saved Mr. Valdez from suffering at the hands of his trial counsel, who was both inexperienced — this was his first capital case and one of his very first murder cases — and wholly unprepared. *See* Affidavit of Robert Robles, dated May 29, 2001 (“Robles Aff.”) ¶ 5, Exh. 15 of APPENDIX; Affidavit of Robert Robles, dated August 17, 2001 (“Second Robles Aff.”) ¶ 7, Exh. 25 of APPENDIX; (Gomez Aff. ¶ 32). Following its normal practice, Mexico would have monitored and assessed counsel’s performance and obtained additional or replacement counsel who was experienced and competent. (Farres Aff. ¶ 7; Gomez Aff. ¶¶ 14, 32).

Fourth, the Mexican Consulate would have provided funds and resources both in the United States and in Mexico to uncover relevant evidence, not offered at trial; for example, the fact of Mr. Valdez’s lack of a criminal record in Mexico would have rebutted one witness’s claim that Mr. Valdez told him he had murdered someone in Mexico, testimony obviously material to the penalty phase of the trial. (Farres Aff. ¶¶ 8-9; Gomez Aff. ¶¶ 14, 20). That Mexico would have been prepared to do all this for Mr. Valdez, and more, is well established by the record compiled for the Second Application. (*E.g.*, Farres Aff. ¶¶ 5-13; Gomez Aff. ¶¶ 30-33).

Mr. Valdez’s Second Application also makes clear that he is not precluded from relief as specified in Paragraph 4 of section 1089(D). The facts now available prove that Mr. Valdez should have been found not guilty by reason of insanity, not sentenced to death. Mr. Valdez could not have previously raised this claim because it was only on April 19, 2001 that the Mexican Government learned about Mr. Valdez and thereafter informed him of his rights under

the Vienna Convention. It was only after the International Court of Justice (“ICJ”) decided the *LaGrand Case (F.R.G. v U.S.)*, 2001 I.C.J. ___ (Judgment of June 27, 2001) on June 27, 2001 — less than 60 days ago — see Okla. Crim. App. R. 9.7(G), that new law was established, giving Mr. Valdez a right to a new trial based upon Oklahoma's on violation of his rights under the treaty. Mr. Valdez cannot be deprived of a new trial for not having raised his Article 36 claim earlier because, as a direct result of Oklahoma's failure to comply with the notification requirements of Article 36, he did not know he had such a right. *LaGrand* ¶ 91.

Finally, relief is available under sections 1080 and 1085 of the Post-Conviction Procedures Act because Mr. Valdez was convicted and sentenced to death in violation of Article 36 of the Vienna Convention, made applicable to Oklahoma through the Supremacy Clause of the United States Constitution and Article I Section 1 of the Oklahoma Constitution. Okla. Stat. tit. 22, § 1080. Accordingly, this Court should remand this case for a full evidentiary hearing so that the District Court may develop a full record in this case. *LaGrand* ¶ 125.

B. This Court Should Permit Discovery Pursuant to Title 22, Section 1089(D)(2)-(4)

Under this Court's Rule 9.7(D)(1)(b), the record in a post-conviction case may be supplemented to include evidence that was not and could not have been raised on direct appeal and evidence which supports the conclusion that the outcome of trial would have been different had the evidence been introduced. *Id.* Mr. Valdez seeks discovery relevant to his Vienna Convention claim and the showing of prejudice he has made in connection therewith; such evidence could not have been raised on direct appeal and supports the conclusion that the outcome of the trial would have been different. Okla. Crim. App. R. 9.7(D)(1)(b). As discussed above, Mr. Valdez has lately found new evidence that demonstrates that he is not guilty by reason of insanity or, at a minimum, he would not have been sentenced to death. He seeks

discovery related to that evidence and to material facts adduced at trial that are relevant to the harm caused by the absence of Mexico's assistance prior to and at trial. This evidence could not have been produced on direct appeal because the ICJ's opinion in *LaGrand*, which authoritatively decided for the first time the scope of Mr. Valdez's rights and remedies under the Vienna Convention, was decided only on June 27th of this year.

In order to enable him to defend himself at a new trial that provides him the full benefit of the consular assistance which he was earlier denied, as referenced by *LaGrand*, Mr. Valdez requests that this Court order the following:

1. The production of all "documents," as that term is described by Okla. Stat. tit. 12 § 3234(A)(1), in the possession or control of state or local law enforcement, or other state or local, governmental agency, department or authority, including the executive branch thereof relating directly or indirectly to:
 - A. The testimony of Dr. Mynatt and/or Dr. Romero at Mr. Valdez's trial, including without limitation, the evaluations of Mr. Valdez performed by Dr. Mynatt and/or Dr. Romero and any testing data relating thereto, including any information provided to them by any federal, state or local authority;
 - B. Mr. Valdez's sanity and/or mental health at any time, including any *Brady* material;
 - C. Awareness at any time prior to May 2001 that Mr. Valdez was a foreign national;
 - D. At any time from July 24, 1989 to May 2001, awareness that foreign nationals were to be notified of their rights under Article 36 of the Vienna Convention, including but not limited to any procedures, policies manuals, or other similar materials, whether written or oral;

- E. Contact with the Mexican Government prior to April 19, 2001 concerning Mr. Valdez, his nationality, the facts of his case, and his criminal record;
 - F. Information shared between the Immigration and Naturalization Service and all relevant Oklahoma authorities (state and local) regarding Mr. Valdez, the investigation into the murder of Juan Barron, and the Vienna Convention;
 - G. At any time after June 1989 through the present time, the position or policy of the United States or the State of Oklahoma regarding Article 36 of the Vienna Convention with respect to foreign nationals detained or arrested in the United States or contacts with the Department of Justice or Department of State regarding such position or policy as a general matter or in any specific cases;
 - H. Mr. Valdez's application for executive clemency and the Vienna Convention claim contained therein, including any and all correspondence or other documents written by or addressed to any federal, state or local authority; and
 - I. The testimony, confinement as a material witness, criminal record and nationality of Martin Orduna and Alfonso Borjas, including any investigative notes, interview reports or other materials relating to the crime or their discussions with law enforcement (state and federal) or the District Attorney's office.
2. The taking by deposition of oral testimony from Melvin Singleterry and W.R. Moon, the prosecutors of Mr. Valdez.

The discovery requested above is highly relevant to Mr. Valdez's claims and is appropriate to supplement the record in this case. Accordingly, Mr. Valdez requests that such discovery be ordered without delay.

CONCLUSION

For the foregoing reasons, Mr. Valdez respectfully requests that his motion for an evidentiary hearing and his requests for discovery be granted.

Respectfully submitted,

Robert A. Nance
RIGGS, ABNEY, NEAL, TURBEN, ORBISON &
LEWIS
5801 N. Broadway, Suite 101
Oklahoma City, OK 73118

Counsel for Mr. Valdez

Of Counsel:

Margaret K. Pfeiffer
Lee Ann Anderson McCall
SULLIVAN & CROMWELL
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2001, a true and correct copy of the foregoing Motion for Evidentiary Hearing and Discovery was delivered to the Office of the Clerk of the Court to be delivered to the Office of the Attorney General.

Robert A. Nance
RIGGS, ABNEY, NEAL, TURBEN, ORBISON &
LEWIS
5801 N. Broadway, Suite 101
Oklahoma City, OK 73118

Counsel for Mr. Valdez