

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

F I L E D

August 4, 2008

No. 08-20495

Charles R. Fulbruge III
Clerk

JOSE ERNESTO MEDELLIN

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division

Respondent-Appellee

On Motion for Authorization to File
Successive Petition for Writ of Habeas
Corpus in the United States District Court
Before the Southern District of Texas, Houston

Before JONES, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:*

Petitioner Jose Ernesto Medellin, convicted of capital murder and sentenced to death, is scheduled to be executed August 5, 2008. Through counsel, on August 1, 2008, Petitioner filed a motion for authorization to file a

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

successive petition pursuant to 28 U.S.C. § 2244(b) and a motion for stay of execution.¹

Pursuant to 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” Additionally, pursuant to section 2244(b)(2):

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

During Petitioner’s initial federal habeas proceedings, he filed a motion for a Certificate of Appealability (COA) in this Court, arguing, among other things, that the State violated the Vienna Convention by failing to notify him of his right to contact the Mexican consul. While his motion for COA was pending in this Court, the International Court of Justice issued its decision in the *Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.)*, 2004 I.C.J. 12

¹ We note that, consistent with our local rules, counsel filed a statement providing a detailed explanation under oath detailing the reason for the late filing. See Fifth Circuit Local Rule 8.10 (requiring such an explanation if permission to file a successive petition is filed within 5 days of the scheduled execution).

(Judgment of Mar. 31) (*Avena*). In *Avena*, the ICJ held that because of the violations of the Vienna Convention, the named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. *Id.*; see *Medellin v. Texas*, 128 U.S. 1346, 1352 (2008). The ICJ also decreed that this right was not subject to any forfeiture under state rules with respect to challenges to criminal convictions. *Id.*; see *Medellin*, 128 U.S. at 1352.

Subsequently, this Court denied a COA, holding that the Vienna Convention claim was procedurally defaulted and that our prior precedent constrained us to hold that the Vienna Convention did not confer an individually enforceable right. *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004) (per curiam).

As set forth above, § 2244(b)(1) provides that “[a] claim presented in a second or successive habeas corpus application under section 2254 that *was presented in a prior application shall be dismissed.*” (emphasis added). Because Petitioner previously raised the instant Vienna Convention violation in his initial habeas proceedings, § 2244(b)(1) requires that it be dismissed.

Nonetheless, in his motion for authorization to file a successive petition, Petitioner attempts to fall under the requirements of § 2244(b)(2)(A). Specifically, Petitioner contends that the Supreme Court’s decision in *Medellin* constituted a new rule, “namely the requirement that implementation of the treaty obligation to comply with the *Avena* judgment is a task for Congress.” Motion at 26 (citing *Medellin v. Texas*, 128 S.Ct. at 1368-69).

In *Medellin*, the Supreme Court determined that the ICJ’s decision in *Avena* was not binding domestic law unless Congress enacted implementing statutes. 128 S.Ct. at 1357. The Supreme Court further rejected the claim that President Bush’s determination independently required states to provide review of the claims in *Avena* despite any state procedural default rules. *Medellin*, 128

S.Ct. at 1267-71. Petitioner now contends that because legislative officials have begun the process of implementing the decision in *Avena*, he has satisfied the requirements for a successive petition. We have recently rejected this particular claim.

In *In re Fierro*, the movant argued that, despite the adverse decision in *Medellin*, there was “substantial reason to continue to stay consideration of his request for authorization to file a successive habeas petition, because . . . work is underway to introduce a bill in Congress that would make the *Avena* judgment enforceable in the domestic courts.” 2008 WL 2330965 *1 (5th Cir. June 2, 2008) (internal citation marks omitted). We found that Fierro had not made a prima facie showing that his claim relied on a new rule of constitutional law as required by § 2244(b)(2)(A). Likewise, here, we are unpersuaded that Petitioner has made a prima facie showing that his claim constitutes a new rule of constitutional law as required under § 2244(b)(2)(A).

In conclusion, after considering the arguments of Petitioner, the response of the Respondent, and the Supreme Court’s decision in *Medellin v. Texas*, 128 S.Ct. 1346 (2008), we deny leave to file the successive petition. Because habeas relief is not available, we must deny the motion for stay of execution. *See Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir. 1995) (explaining that a court may stay an execution based on a second or successive federal habeas petition only when substantial grounds exist upon which relief may be granted).

DENIED.