An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS GUTIERREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53506

FILED

SEP 19 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Carlos Gutierrez subjected his three-year-old stepdaughter to a pattern of abuse culminating in her death on June 15, 1994. Gutierrez pleaded no contest to first-degree murder, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and a three-judge panel sentenced him to death. This court affirmed his conviction and sentence on direct appeal. Gutierrez v. State, 112 Nev. 788, 920 P.2d 987 (1996). Gutierrez subsequently filed a second post-conviction petition for a writ of habeas corpus with the district court, which was dismissed on procedural grounds. In this appeal from the district court's denial of that post-conviction petition for a writ of habeas corpus, Gutierrez claims that the district court erred by determining his claims were procedurally barred. Gutierrez further complains that he was entitled to an evidentiary hearing.

Having considered the parties' arguments and the submissions before us, we conclude that Gutierrez is entitled to an



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evidentiary hearing regarding his ability to overcome the procedural bars to further consideration of his death sentence. We also note several issues of concern that need further development on remand.

Gutierrez's death sentence has been addressed in two other, independent proceedings: (1) in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena), 2004 I.C.J. 12 (March 31), the International Court of Justice (ICJ) held that the United States violated Article 36(1)(b) of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, by failing to inform Gutierrez of his right to consular assistance in defending his capital murder charge, id. at 51; and (2) in State v. Gonzalez, Case No. CR96-0562 (Nev. Second Jud. Dist. Ct.), the interpreter for the three-judge panel that sentenced Gutierrez to death was convicted of perjury for having falsified his credentials at Gutierrez's death penalty hearing.

Avena addressed the convictions and sentences of 51 Mexican nationals, of whom Gutierrez is one. On its face, "[t]he decision in Avena . . . obligates the United States 'to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals,' 'with a view to ascertaining' whether the failure to provide proper notice to consular officials 'caused actual prejudice to the defendant in the process of administration of criminal justice.'" Medellin v. Texas (Medellin I), 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (third alteration in original) (citation omitted) (quoting Avena, 2004 I.C.J. at ¶153(9); id. at ¶ 121).

Avena does not obligate the states to subordinate their post-conviction review procedures to the ICJ ruling. Thus, the Supreme Court has rejected post-conviction claims similar to Gutierrez's by two other

Avena defendants, Humberto Leal Garcia and Jose Ernesto Medellin, holding that "neither the Avena decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law," Leal Garcia v. Texas, 564 U.S. ___, ___, 131 S. Ct. 2866, 2867 (2011) (5-4 decision), to which state procedural default rules must yield. Medellin I, 552 U.S. at 498-99. Nonetheless, in declining to stay Leal Garcia's and Medellin's executions, the Supreme Court noted that neither had shown actual prejudice to a constitutional right due to lack of timely consular access. Medellin v. Texas (Medellin II), 554 U.S. 759, 760 (2008) ("[t]he beginning premise for any stay [of execution] . . . must be that petitioner's confession was obtained unlawfully," and thus that the petitioner was "prejudiced by his lack of consular access"); Leal Garcia, 564 U.S. at ___, 131 S. Ct. at 2868 (noting that, in supporting Leal Garcia's application for a stay of execution, "the United States studiously refuses to argue that Leal was prejudiced by the Vienna Convention violation," and that "the District Court found that any violation of the Vienna Convention would have been harmless" (citing Leal v. Quarterman, No. SA-07-CA-214-RF, 2007 WL 4521519, at *7 (W.D. Tex. Dec. 17, 2007), vacated in part sub nom. Leal Garcia v. Quarterman, 573 F.3d 214, 224-225 (2009))). And while, without an implementing mandate from Congress, state procedural default rules do not have to yield to Avena, they may yield, if actual prejudice can be shown. See Medellin I, 552 U.S. at 533, 536-37 & n.4 (Stevens, J., concurring) (discussing Torres v. State, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004), where the State of Oklahoma "unhesitatingly assumed" the burden of complying with Avena by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification"; Justice

Stevens rightly described this burden as "minimal" when balanced against the United States' "plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" (internal quotation marks omitted)).

Unlike Medellin and Leal Garcia but like Torres, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance. The Mexican consulate in Sacramento (the closest to Reno, where Gutierrez's death penalty hearing occurred) has provided an affidavit swearing that it would have assisted Gutierrez had it been timely notified. Although the form its assistance would have taken remains unclear—a deficiency an evidentiary hearing may rectify—cases recognize that, "[i]n addition to providing a 'cultural bridge' between the foreign detainee and the American legal system, the consulate may . . . 'conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary.'" Sandoval v. United States, 574 F.3d 847, 850 (7th Cir. 2009) (quoting Osagiede v. United States, 543 F.3d 399, 403 (7th Cir. 2008)).

It is apparent that Gutierrez needed help navigating the American criminal system. At the time of his arrest, Gutierrez was 26 years old, had the Mexican equivalent of a sixth-grade education, and spoke little English. Rather than go to trial, he entered an unusual no-contest plea to first-degree murder. His sentence was determined after an evidentiary hearing by a three-judge panel.[1] Both he and his wife were

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[1]Gutierrez was sentenced to death by a three-judge panel before the decision in Ring v. Arizona, 536 U.S. 584, 609 (2002), which holds that a sentencing judge, sitting without a jury, may not find aggravating

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charged in connection with the death of their three-year-old daughter. There is some suggestion that his wife's role was greater than came out at his penalty hearing.

A number of witnesses testified at Gutierrez's penalty hearing, some Spanish-speaking. Gutierrez and the State each had an interpreter, but the court had its own interpreter as well, Carlos Miguel Gonzalez, who interpreted for 3 of the State's 16 witnesses.[2] A year after Gutierrez was sentenced to death, interpreter Gonzalez pleaded guilty to perjury that he committed during Gutierrez's death penalty hearing, when he swore he was certified and formally educated as an interpreter but was not.[3]

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circumstances necessary for imposition of the death penalty. See also NRS 175.554(2) ("the jury shall determine . . . whether an aggravating circumstance or circumstances are found to exist").

[2]The legal status of court interpreters is unclear. Charles M. Grabau & Llewellyn Joseph Gibbons, Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation, 30 New. Eng. L. Rev. 227, 287-88 (1996). The commentary to Canon 3 of the Model Code of Professional Responsibility for Interpreters in the Judiciary (Nat'l Ctr. State Courts 2002) states that "[t]he interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant."

[3]Gonzalez's presentence investigation report gives this account of his false testimony during Gutierrez's death penalty hearing:

> On August 8, 1995 . . . Gonzalez was called upon to act as an interpreter for the state of Nevada with respect to a death-penalty phase of the capital murder case entitled, "The State of Nevada vs Carlos Gutierrez", #CR94-1795 . . . .
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> . . . .

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> During direct questioning, and after being duly sworn, [Gonzalez] represented to the Court that he was certified as an interpreter in both the state of California and within the federal system. Mr. Gonzalez also, under direct questioning, informed that he had been educated at the University of Madrid for one year studying Spanish Literature. He went on to report receipt of a Bachelor's Degree in Spanish Literature with a minor in Computer Science received at the University of Arizona. Lastly, with respect to his education, Mr. Gonzalez reported his possession of a Master's degree received from the University of San Diego in the field of Linguistics. Additionally, Mr. Gonzalez testified to having served as an interpreter for the Superior Court in California for approximately seven years.
>
> Shortly thereafter, an investigation was initiated by the Washoe County, Nevada, Public Defender's Office so as to ascertain the defendant's true credentials. During that investigation it was learned that Mr. Gonzalez had completely fabricated his educational and employment background. [Among other things], it was learned that Mr. Gonzalez had never been certified within the state of California or by any federal entity as an interpreter and therefore could not have worked as an interpreter within the California Court system. . . . Mr. Gonzalez did not receive any type of certificate or degree from the educational facilities [he named nor] even attended . . . either the University of San Diego . . . or the University of Arizona.

While NRS 176.156(5) generally provides for the confidentiality of presentence reports, the Gonzalez presentence report is part of the record on this appeal and in the docket, neither of which is sealed.

The United States Constitution does not require certified interpreters.[4] United States v. Si, 333 F.3d 1041, 1043 n.3 (9th Cir. 2003) (citing Perovich v. United States, 205 U.S. 86, 91 (1907)). But it does require reliable evidence.[5]

Gutierrez's death penalty hearing was not tape-recorded. However, the certified court reporter's transcript reports exchanges between the defense interpreter and the State's interpreter expressing concern with court-interpreter Gonzalez's accuracy. In addition to a specific dispute over whether a word meant "hit" or "spank," one interpreter noted that Gonzalez relied on Cuban-Spanish, not the Mexican-Spanish the witnesses spoke. Alone, these technical flaws might

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[4]Nevertheless, there is a growing movement that encourages or requires court-appointed certified interpreters. See, e.g., 28 U.S.C. § 1827 (2006); Minn. Gen. R. Pract. § 8.02 (2012); Or. Rev. Stat. § 45.275 (2011); Tenn. S. Ct. R. 42(3) (2012); Tex. Gov't Code. Ann. § 57.002 (2012). See also Maxwell Alan Miller et al., Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions, 14 Harv. Latino L. Rev. 117, 150 (2011) (recommending certified or qualified interpreters in all stages of the proceedings).

[5]In Nevada, criminal defendants who do not understand English have "'a due process right to an interpreter at all crucial stages of the criminal process.'" Ouanbengboune v. State, 125 Nev. 763, 768, 220 P.3d 1122, 1126 (2009) (quoting Ton v. State, 110 Nev. 970, 971, 878 P.2d 986, 987 (1994)). Although an interpreter does not have to perform word-for-word interpretations, errors that fundamentally alter the defendant's statements or the context of his statements may render the interpretation constitutionally inadequate. Baltazar-Monterrosa v. State, 122 Nev. 606, 614-17, 137 P.3d 1137, 1142-44 (2006). Here, Gutierrez's interpreter's skills are not challenged. The challenge is to the accuracy of the interpreter who translated the State's Spanish-speaking witnesses for the court.

not amount to much, but they must be considered in conjunction with the deeper, more disturbing issue as to the integrity of Gonzalez's services as an interpreter. At the sentencing hearing for Gonzalez, in urging a significant sentence for his perjury, the State described interpreter Gonzalez as "a sociopath" who, while "articulate, well groomed, [and] well mannered . . . does not know how to recognize or offer truthful assertions." Perhaps exaggerating things—but perhaps not—the State further described interpreter Gonzalez's role as "integral" to the Gutierrez "death penalty hearing where he was interpreting." The State cannot now dismiss the gravity of Gonzalez's role in the death penalty process nor ignore the potential dishonesty during translation given its own statements at interpreter Gonzalez's sentencing hearing.

The dissent suggests that any mistranslations that occurred were not prejudicial to Gutierrez because they were "resolved on the record" or were "collateral." However, the record indicates that Gutierrez's interpreter repeatedly objected to Gonzalez's interpreting mistakes until she was told to "stop objecting" by the State's interpreter and that Gutierrez's interpreter felt intimidated by Gonzalez. This alone warrants further consideration because of the duty court interpreters have to serve the court and the public. Reasonable minds can differ on whether these errors were prejudicial and that is precisely the reason an evidentiary hearing is necessary.

Additionally, without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided. Would the problems with interpreter Gonzalez have been recognized and addressed earlier? Would the hearing have been tape-recorded, in addition to stenographically reported? What is clear, though, is if a non-Spanish

speaking U.S. citizen were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them. Perhaps timely consular notice would not have changed anything for Gutierrez; perhaps the interpreter's skills, despite his perjury, were sound. These are issues on which an evidentiary hearing needs to be held.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Cherry

_____, J.
Douglas

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Potter Law Offices
Northwestern University School of Law, Bluhm Legal Clinic
Washoe District Court Clerk

PARRAGUIRRE, J., with whom HARDESTY, J., agrees, dissenting:

I would affirm the district court's denial of Gutierrez's post-conviction petition for a writ of habeas corpus on the ground that it is procedurally defaulted. Because his post-conviction petition was untimely and successive, it was procedurally barred absent a showing of good cause and prejudice. NRS 34.726(1); NRS 34.810. To overcome the procedural bars, Gutierrez argued three circumstances provided good cause. First, he argues that post-conviction counsel's ineffectiveness caused the delay in filing his post-conviction petition; however, that claim itself is procedurally barred and cannot satisfy good cause. See State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005) (concluding that claims of ineffective assistance of first post-conviction counsel are not immune to the timeliness bar of NRS 34.726). Second, Gutierrez contends that this court's inconsistent application of procedural bars excuses the delay; however we have repeatedly rejected this argument. Riker, 121 Nev. at 236, 112 P.3d at 1077 (concluding that this court does not arbitrarily "ignore[ ] procedural default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore rules, which are mandatory"). Third, his assertion that any delay in filing his post-conviction petition was not his fault as contemplated by NRS 34.726(1) fails. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (concluding that petitioner must show that "an impediment external to the defense prevented him or her from complying with the state procedural default rules"). Gutierrez's submissions disclose no additional information or argument that demands a different conclusion or justifies an evidentiary hearing. But even if

Gutierrez showed that the delay was not his fault, NRS 34.726(1), and good cause for filing his successive petition, NRS 34.810, he cannot show prejudice.

Gutierrez suggests that his rights under the Vienna Convention on Consular Relations were ignored because the police failed to advise him of his consular rights and to notify the Mexican Consulate of his arrest. Had he been afforded those rights, Gutierrez argues, consular officials would have (1) ensured that he understood the United States legal system and the proceedings against him; (2) attended the proceedings, assisted trial counsel, and endeavored to ensure a fair trial; (3) informed him and counsel of Gutierrez's treaty rights; and (4) monitored counsel's representation and language interpretation. His claims related to his consular rights have been known since at least his first post-conviction proceedings and his bare allegations of harm fall short of establishing prejudice.

As for Gutierrez's interpreter claim, he similarly fails to show prejudice. He argues that Gonzalez mistranslated certain words in the testimony of three prosecution witnesses—Virginia Martinez, Maria Torres, and Alfredo Gutierrez, all of whom testified about Gutierrez's relationship with the victim, whether they observed any injuries on the victim, and/or the day the victim died. Although Gonzalez translated this testimony, two other interpreters were present, with one specifically focused on listening for and correcting any errors.[1] Some of the alleged

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[1]On the prosecution's behalf, Gonzalez interpreted for witnesses who needed assistance. Olivia Ynigez was tasked to notify the prosecutor of any translation problems. Margarita Larkin interpreted for Gutierrez

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mistranslations concerned injuries the witnesses observed on the victim; however, those matters were addressed and resolved on the record. Other alleged mistranslations Gutierrez identifies related to collateral matters that were immaterial to the victim's injuries or Gutierrez's actions or relationship to the victim. See Ouanbengboune v. State, 125 Nev. 763, 768-69, 220 P.3d. 1122, 1126 (2009) (stating that translating errors that fundamentally alter the substance of trial testimony will render the interpretation inadequate). And other witnesses provided substantially more compelling testimony about Gutierrez's treatment of the victim and her injuries, in addition to testimony about autopsy findings revealing that the victim had sustained significant bruising on her body and internal injuries from blunt force trauma, including lacerations and bruising to tissues and organs and fractures. Moreover, the translation issues have been known since the penalty hearing, and Gutierrez still has not identified any errors other than those raised and resolved at the penalty hearing.

The majority concludes that Gutierrez was entitled to an evidentiary hearing on his claims of good cause. I must disagree. He is entitled to an evidentiary hearing only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008). None of Gutierrez's three good-cause arguments

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when a witness spoke English and listened to Gonzalez's translation to advise the district court of any problems with the interpretation.

satisfy that requirement, as they are purely legal in nature and therefore will not benefit from an evidentiary hearing. His consular assistance claim is supported by bare allegations of error. There is no basis for an evidentiary hearing.

_____, J.
Parraguirre

I concur:

_____, J.
Hardesty