IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. EDUARDO VARGAS, Defendant and Appellant.	)	Case No. S101247 (Superior Court No. 99CF0831)

AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JOHN RYAN, JUDGE

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Under the California Appellate Project, Inc.
Assisted Case Program

DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL BRIEF

INTRODUCTION[1]

Appellant is a Mexican citizen, but not a United States citizen. (13

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In Appellant's Opening Brief, appellant maintained that his rights under Article 36 of the Vienna Convention on Consular Relations, as well as other state and federal rights, had been violated by the failure of state authorities to notify him of his right to speak with the Mexican Consulate. (AOB 192-204.) Appellant also urged this Court to defer any findings on his Vienna Convention claim until he had been afforded an opportunity to investigate and present the claim in a petition for writ of habeas corpus. (*Ibid.*) In Respondent's Brief, respondent argued that appellant's claims under the Vienna Convention should be decided adversely to appellant in this appeal. (RB 96.) Although appellant rebutted respondent's claims in Appellant's Reply Brief, appellant has submitted this Supplemental Brief to allow respondent an opportunity to respond to appellant's arguments.

RT 3331.) Both Article 36 of the Vienna Convention on Consular Relations (Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (Vienna Convention), which has been ratified by the United States Senate, and Penal Code section 834c[2] require that a foreign national detained by the government be informed of his right to consular notification. When appellant was arrested on April 2, 1999, he was not notified of his right to speak with the Mexican Consulate. (13 RT 3363.) As a result, he did not speak with any Mexican consular official before either the guilt or penalty phases of his trial. The Mexican Consulate did not learn of his arrest until after the jury had returned a death verdict. (3 CT 1145.)

Appellant moved for a new trial or, in the alternative, modification of his death sentence to life without parole, as a remedy for the violation of his rights under the Vienna Convention and section 834c. (3 CT 1093.) The trial court properly ruled that the government violated Article 36 of the Vienna Convention, but found that the Vienna Convention itself did not specify a remedy and the defense's requested remedy was unreasonable. (13 RT 3358-3359.) The trial court also erroneously concluded that

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2 All code sections refer to the California Penal Code, unless otherwise noted.

appellant had not shown he was prejudiced by the violation. (13 RT 3360-3363.)

As argued below, the trial court rightly found that appellant was deprived of his right to consular notification under the Vienna Convention, but erroneously denied his motion. The government's failure to advise appellant of his right to consular notification violated the Vienna Convention, section 834c, and the Fourteenth Amendment's due process clause. Appellant maintains that once a violation has been established — and without a showing of prejudice — he must be restored to the position he was in before the government violated his right to consular notification. Accordingly, this Court should reverse appellant's conviction and death sentence and remand his case for a new trial.

Appellant acknowledges that this Court has required a showing of prejudice to succeed on a claim under the Vienna Convention (*People v. Mendoza* (2007) 42 Cal.4th 686, 711), and asks this Court to reconsider that decision. Appellant maintains, however, that the record demonstrates prejudice and a new trial is required.

ARGUMENT

APPELLANT SUFFERED ACTUAL PREJUDICE AS A RESULT OF THE GOVERNMENT'S VIOLATION OF HIS RIGHT TO CONSULAR NOTIFICATION AND ASSISTANCE UNDER THE VIENNA CONVENTION

A. The Vienna Convention on Consular Relations

On April 24, 1963, 172 countries, including the United States, signed the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (Vienna Convention). (Robledo, *Vienna Convention on Consular Relations*, Audio Visual Library of International Law <http://untreaty.un.org/cod/avl/ha/vccr/vccr.html> [as of March 5, 2013].) In 1969, with the advice and consent of the Senate, the United States ratified the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820 (Optional Protocol). (*Medillín v. Texas* (2008) 552 U.S. 491, 500 (*Medillín*).) Article 36 of the Vienna Convention was created to "facilitat[e] the exercise of consular functions." (Vienna Convention, Art. 369(1).) It provides that if a person detained by a foreign country "so requests, the competent authorities of the [foreign country] shall, without delay, inform the consular post [of the person's country of citizenship] of the person's detention and "inform the [detainee] of his righ[t]" to request assistance

from his own state's consulate. (*Id.* at Art. 36(1)(b).) Article 36 also grants consular officers the right to visit a detainee, to converse and correspond with him, and to arrange for his legal representation. (*Id.* at Art. 36 (1)(c).) Though the Vienna Convention allows for the rights created by Article 36 to be "exercised in conformity with the laws and regulations of the [detaining] State," these laws and regulations "must enable full effect to be given to the purposes for which the rights . . . are intended." (*Id.* at Art. 36 (2).)

The Optional Protocol grants the International Court of Justice jurisdiction over disputes arising out of the Vienna Convention. (Optional Protocol, Art. 1.) On May 7, 2005, the United States withdrew from the Optional Protocol to the Vienna Convention. (*Medillín, supra,* 552 U.S. at p. 500.)

In recognition of the consular notification requirements of the Vienna Convention, in 1999 the Legislature codified the rights afforded to foreign nationals under Article 36. (§ 834c [noting Vienna Convention's requirement for consular notification "without delay"].) Section 834c, subdivision (a)(1), provides that "every peace officer, upon arrest and booking or detention for more than two hours of a known suspected foreign national, shall advise the foreign national that he or she has a right

to communicate with an official from the consulate."

B. Procedural and Factual Background

1. The government did not inform appellant of his Vienna Convention rights to consular notification and assistance

Appellant is a Mexican citizen, but not a United States citizen. (13 RT 3331.) He was arrested at 8:30 a.m. on April 2, 1999. (13 RT 3348-3349.) No government officer informed appellant of his right to speak with the Mexican Consulate under Article 36 of the Vienna Convention or section 834C, subdivision (a)(1). (13 RT 3331.) As a result, appellant did not speak with anyone from the Mexican Consulate. On February 23, 2001, the jury sentenced appellant to death. (13 RT 3253-3254.)

2. Appellant's motion for a new trial and supporting documents lodged with the trial court show prejudice

On June 7, 2001, appellant moved for a new trial or for a reduction of his death sentence to life without parole because the government violated his right to consular notification under both Article 36 of the Vienna Convention and section 834C, subdivision (a)(1). (3 CT 1093-1100.) Appellant explained that he would have consulted the Mexican Consulate if he had been informed of his right to do so. (3 CT 1094, 1097.) In turn, appellant argued, a Mexican consular official would

have

advised him to exercise his Fifth Amendment rights to remain silent in accordance with *Miranda v. Arizona* (1966) 384 U.S. 436. (3 CT 1097.) Instead, appellant — who was unfamiliar with the *Miranda* warning and the rights it protected — waived his right against self-incrimination and spoke to police. (3 CT 1097.) Although appellant's statement to police did not incriminate him, it contained several misstatements that turned out to be inconsistent with the facts later developed at trial. (*Ibid.*) If appellant had testified at his trial, appellant argued, the prosecution would have impeached him with "his uncounseled statement." (*Ibid.*) Consequently, appellant did not testify. (*Ibid.*)

In support of his motion, appellant lodged a letter and a declaration from Miguel Angel Isidro-Rodriguez, chief of the Mexican Consulate in Santa Ana (who testified at the hearing on the motion as discussed in section three, below). (3 CT 1144-1156.) Isidro-Rodriguez confirmed that "[l]ocal law enforcement authorities failed to notify [appellant] of his article 36 rights, and as a result, Mexico was barred from providing consular assistance at the most critical phase of his capital murder prosecution." (3 CT 1148.) He warned that "[m]any courts have mistakenly presumed that the assistance provided by the consulate would

have been no different from that provided by trial counsel. This uninformed assumption both minimizes and disparages the quality of consular assistance." (3 CT 1149.) In other cases, Isidro-Rodriguez pointed out, Mexican consular

officials helped trial counsel to locate witnesses, communicate with Spanish-speaking family members, and persuade prosecutors to dismiss capital charges. (3 CT 1149, citing Lafay, *Virginia Ignores Outcry*, The Roanoke Times (July 6, 1997) [reporting Mexican consulate's negotiated plea bargains on behalf of two Mexican citizens facing the death penalty] and Cooper, *Foes of Death Penalty Have a Friend: Mexico*, Sac. Bee (June 26, 1994) p. A1 [death penalty avoided in Kentucky and California cases in which Mexico intervened].)

According to Isidro-Rodriguez, at the time of appellant's trial, the "Mexican Foreign Ministry had implemented a far-reaching program of legal assistance to Mexican nationals facing the death penalty in the United States." (3 CT 1149.) As part of this commitment, Mexico retained an experienced capital defense attorney, Sandra Babcock, to direct the program. (3 CT 1155.)

As of September 2001, program attorneys were working on cases in California, Arizona, Oregon, Washington, Texas, Georgia, Illinois, Florida,

Oklahoma, Tennessee, and Kentucky. (3 CT 1155.) Through this program, Mexican representatives monitored and supported defense counsel, conferred regularly with the defendant and his family, and often helped to gather evidence for both the guilt and penalty phases of capital trials. (3 CT 1149, 1155.) When required, Mexico also paid for bilingual mitigation specialists, neuropsychologists, investigators, and other experts to help defense counsel in capital cases. (3 CT 1155.)

Most important, Isidro-Rodriguez explained that "[i]n Mexico's experience, early intervention by consular officers can often prevent the imposition of the death sentence." (3 CT 1155-1156.) Between December 1, 1994 and August 15, 2000, Mexican consular officials assisted 261 Mexican nationals in death penalty cases. Of those cases, 119 avoided capital prosecution, 19 were acquitted, and two death sentences were commuted. (3 CT 1149, fn. 3, citing Mexican Ministry of External Relations, Annual Report (2000).)

Once the Santa Ana Consulate had been informed of appellant's detention, wrote Isidro-Rodriguez, a consular official would have visited him in jail as soon as possible to explain the American adversarial system of criminal justice. (3 CT 1156.) Specifically, the Consulate "would have advised him in no uncertain terms that he should not speak to any law

enforcement officer without first speaking with an American attorney." (*Ibid.*) The Santa Ana Consulate would then have notified the Mexican Foreign Ministry and asked that appellant be included in the legal assistance program directed by Babcock. (3 CT 1149, 1156.) "Consular representatives would have worked in tandem with Ms. Bacock to ensure [appellant] received the resources and expertise available to him." (3 CT 1156.) The Santa Ana Consulate would have "played as active a role as necessary to help ensure [appellant] avoided the death penalty." (*Ibid.*) Because of Mexico's committed advocacy on behalf of its citizens who face the death penalty in the United States, Isidro-Rodriguez believed that Mexico's involvement in appellant's case, "would have made the difference between life and death." (*Ibid.*)

As a remedy for the violation of appellant's Vienna Convention rights, Isidro-Rodriguez asked that appellant's conviction and death sentence be vacated and that he be restored to the position he was in before the violation occurred. (3 RT 1150.) Returning appellant to the position he was in after his arrest but before his violation, reasoned Isidro-Rodriguez, would be consistent with the international law remedy of *restitutio in integrum*, which provides for the "restoration of the prior situation, the reparation of the consequences of the violation, and

indemnification." (3 CT 1150, citing *Valasquez Rodriguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989).

3. Testimony at the hearing on appellant's motion for a new trial established prejudice

On October 3, 2001, the trial court heard appellant's motion for a new trial. (13 RT 3275-3363.) At the hearing, the parties stipulated that appellant was a Mexican national and that the arresting police officer did not advise him of his right to consular notification. (13 RT 3277.)

Sandra Babcock, a lawyer and the director of the legal assistance program for Mexican citizens facing the death penalty in the United States, testified. (13 RT 3302.) Babcock's ten years' experience as a capital defense lawyer and her involvement with the defense of Mexican nationals enabled her to serve as a bridge between defense attorneys and the Mexican government. (13 RT 3303.) Babcock had developed an extensive list of bilingual experts, including gang experts, neuropsychologists, psychiatrists, mitigation specialists, and investigators. (13 RT 3304.) She assisted attorneys representing capital defendants with Mexican citizenship by recommending certain experts. (13 RT 3305.) In the previous year, she had written amicus briefs in approximately a dozen capital cases involving Mexican nationals. (13 RT 3310.)

The Mexican government enlisted her to help appellant. (13 RT

3305.) She testified that neither she nor — to her knowledge — the Mexican government had been informed of appellant's situation until after his conviction. (*Ibid.*) After learning of the conviction, Babcock contacted appellant's defense counsel, reviewed the penalty phase testimony, and conferred with consular officials about the Vienna Convention violations. (13 RT 3306-3307.) She advised defense counsel to retain a bilingual mental health expert. (13 RT 3307.)

Ms. Babcock recommended Dr. Ricardo Weinstein, a psychologist, because he was fluent in the Mexican-Spanish dialect and was trained in neuropsychology, which Babcock had learned was "very important" to developing "persuasive and compelling" mitigating evidence for capital juries. (13 RT 3308.) Babcock explained that the remedy for a treaty violation under international law is to restore the parties to the status quo before the violation. (13 RT 3329.) In this case, she testified, that would require a new trial for appellant. (Ibid.)

Weinstein, who worked on death penalty cases in over half a dozen states, also testified for the defense. (13 RT 3278-3301.) Weinstein qualified his remarks as "very limited in scope" because he was given insufficient time and resources to formulate comprehensive findings. (13 RT 3284, 3297.) Still, "just through brief interviews," including a clinical

interview of appellant, together with psychological testing of appellant and a review of testimony by Dr. Greenzang, the defense's expert witness, Weinstein identified prejudicial deficiencies in appellant's penalty phase defense. (13 RT 3280-3281, 3289.) Most notably, the defense did not present an accurate account of appellant's psycho-social development or explain how cultural factors hindered his assimilation into mainstream American society.

Weinstein criticized Greenzang's testimony for presenting appellant as the anomalous, antisocial "bad apple" in an otherwise stable, supportive family. (13 RT 3288.) In reality, Weinstein testified, appellant's family life "was fraught with issues of dysfunction," dysfunction that included sexual abuse "in the family" by the father. (13 RT 3288-3289.) But no one interviewed appellant's father or compiled an extensive social history of appellant's early development. (13 RT 3289.) Weinstein described appellant's first three years of life – years that are critical to long-term brain development – as disrupted by strife between his parents. (13 RT 3290.)

According to Weinstein, appellant also suffered several blows when he was young and a significant head injury about two years before the incidents that resulted in his capital case. (13 RT 3290.) From his limited

investigation, Weinstein concluded that appellant suffered from brain injuries, learning disabilities, and severe depression. (*Ibid.*) Appellant self-medicated for his depression by drinking alcohol and taking drugs, which led to addiction by an early age. (*Ibid.*)

In Weinstein's opinion, appellant never assimilated into mainstream American society. After spending his formative years in Mexico, appellant was "transported suddenly from one country to the next without sufficient support to make that transition." (13 RT 3289.) As a result, appellant lacked "the level of acculturation to function adequately." (*Ibid.*)

Weinstein condemned Greenzang's decision to give appellant the Minnesota Multiphasic Personality Inventory (M.M.P.I.) as a "big error." (13 RT 3292.) First, appellant's learning disability prevented him from understanding the M.M.P.I.'s questions. Though appellant appeared to speak English fluently, Weinstein testified, he did not understand English fluently. (*Ibid.*) According to Weinstein, there was a "significant difference" between appellant's verbal I.Q. and performance I.Q. (*Ibid.*) Because of his learning disabilities, appellant's ability to understand certain words and phrases was "very compromised." (*Ibid.*) For example, appellant could not understand the concept of "seldom" or how a "double negative" functions. (*Ibid.*) Weinstein pointed out that "during the penalty

phase, [appellant] was presented as a heartless sociopathic individual mostly based on the results of the M.M.P.I." (*Ibid.*) Yet Greenzang had no experience in administering or interpreting the M.M.P.I. (*Ibid.*)

Moreover, Weinstein testified that an extensive scholarly literature explains that the M.M.P.I. is not valid for the Hispanic population. (13 RT 3292.) In support of his claim, Weinstein presented an affidavit from Dr. Richard Cervantes attesting to the invalidity of the M.M.P.I. for the Hispanic population. (13 RT 3294.) Cervantes is a bilingual psychologist who works with the defense in capital cases as a mitigation specialist and expert on the cultural and psychological issues that confront Mexican immigrants to the United States. (13 RT 3309.) The affidavit was introduced as an exhibit. (13 RT 3295.)

Though Weinstein explained he had been given "insufficient resources to conduct the necessary investigation," he outlined what he and other experts would have done if they had been enlisted to help before appellant's trial. (13 RT 3295.) Weinstein would have conducted a complete neuropsychological evaluation to assess appellant's cognitive condition. (13 RT 3296.) An addiction specialist would have investigated the effect of appellant's drug and alcohol abuse. (*Ibid.*) A mitigation specialist with knowledge of Mexican culture would have determined

appellant's "levels of acculturation" that would be relevant to the jury's consideration of the death penalty. (13 RT 3295-3296.) Typically, a mitigation specialist travels to a capital defendant's hometown and conducts extensive interviews with family members, friends, teachers, and others to draw a complete picture of the person's development. (13 RT 3295- 3296.)

Isidro-Rodriguez also testified for appellant. (13 RT 3330-3334.) He confirmed he was authorized to sign the letter and declaration that were lodged with the trial court on behalf of the Mexican government (the contents of which are set forth in section B.2, above) and verified the declaration's accuracy. (13 RT 3331-3332.) Isidro-Rodriguez authenticated appellant's Mexican passport and informed the trial court that appellant had no criminal record in Mexico. (13 RT 3333-3334.)

Diane Booker, an immigration agent with the Immigration and Naturalization Service,[3] testified for the prosecution. (13 RT 3335-3348.) Booker interviewed appellant at 8:55 p.m. on April 2, 1999 to establish his immigration status. (13 RT 3336.) After concluding appellant was a lawful permanent resident, Booker handed him an immigration rights form

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The former Immigration and Naturalization Services is now known as Immigration and Customs Enforcement.

to read. (13 RT 3337.) Typically, Booker testified, she would summarize the form's contents, including the person's right to speak with an attorney or consular official for advice about his immigration status. (13 RT 3339, 3346-3347.) The form addressed appellant's immigration rights in the event he was convicted of a crime. (13 RT 3346.) A notation by Booker on the form indicated appellant had read its contents. (13 RT 3345.)

4. Defense counsel and prosecution arguments

Defense counsel argued that the Vienna Convention requires a peace officer to inform a foreign national of his right to consult a consular official from his country of origin. (13 RT 3349.) Even assuming Booker's immigration advisements were proper for immigration purposes, defense counsel reasoned, they were irrelevant for the purposes of complying with the Vienna Convention, which required a peace officer to notify appellant of his right to seek the Mexican Consulate's help with his criminal charges. (13 RT 3350.) Thus, the government violated appellant's Vienna Convention rights. (13 RT 3550.)

Defense counsel argued that Weinstein's testimony, Babcock's testimony, and Cervantes' affidavit, all of which highlighted the services the Mexican government would have provided appellant, established prejudice. (13 RT 3350-3351.) If appellant had been properly notified

under the Vienna Convention and contacted the Mexican Consulate, he would have benefitted from Weinstein's testimony at the penalty phase of his trial. (13 RT 3550.) Defense counsel confirmed that if he had been aware of Weinstein's and Cervantes' expertise in multi-cultural neuropsychological forensic analyses, he would have asked the court to allow them to testify. (13 RT 3356.) Moreover, defense counsel had been unaware that the M.M.P.I. was culturally biased. (*Ibid.*)

Even assuming a violation of the Vienna Convention, the prosecution countered, the defense's prejudice argument was based upon speculation that appellant would have availed himself of the Mexican Consulate's services, the Consulate would have recommended Weinstein and Cervantes, and counsel would have used them. (13 RT 3551-3552.)

The prosecution noted that appellant had not contacted the Consulate in connection with Booker's advisement about immigration states, and that defense counsel had not testified that he would have used Weinstein or Cervantes. (13 RT 3551-3552.) Finally, there would have to be a "reasonable possibility" that the experts' testimony would have made a difference to the jury. (13 RT 3553.)

The prosecution also argued that appellant had not been prejudiced

by his *Miranda* waiver. (13 RT 3353.) He maintained that appellant's claim he was precluded from testifying because of the waiver was based on the fact appellant had given misinformation to the police. (13 RT 3353.) The prosecution pointed out that there had been no indication of what appellant would have testified to or how his testimony would have made a difference in either the guilt or penalty phase of his trail. (13 RT 3354.)

5. The trial court correctly found there was a violation, but incorrectly found no prejudice

After ruling that the government violated appellant's rights under the Vienna Convention, the trial court found that appellant failed to show how he was prejudiced by the violation. (13 RT 3363.) The trial court concluded that Booker's immigration advisement did not satisfy the requirements of the Vienna Convention. (13 RT 3558.)

Once there is a violation of the treaty, the trial court explained, "due process requires prejudice before any remedy should be imposed." (13 RT 3359.) The trial court rejected Babcock's suggested remedy that appellant should be restored to the position he was in immediately after his arrest as "unreasonable" and "not based upon law." (13 RT 3558.)

In the trial court's opinion, defense counsel's argument required an "assumption" that appellant would have notified the Mexican Consulate. (13 RT 3360.)

> This is speculation: Let's assume that Tustin P.D. told [appellant] that he had a right to talk to the Consulate or they would call the Consulate for him, what would have happened? Would they have said, "Don't talk to the police?" Would [appellant] have followed that advise [sic]? We don't know because he certainly hasn't told us.
>
> But he did, in essence, not talk to the police. He gave them a story, and that was it. Not very helpful to anybody. So we're right back where we were. Nothing happened, in essence, that would prejudice [appellant's] right to a fair trial.

(13 RT 3360.)

The trial court then inferred that Weinstein's testimony carried the implicit charge that defense counsel and Greenzang had performed incompetently. (13 RT 3361.) It believed that "those assumptions are just not supported by the evidence that was before this jury and certainly not noted by this court's observations of the trial." (*Ibid.*) The trial court characterized this implied incompetence of defense counsel as a "rational choice" about "trial tactics." (*Ibid.*) Based on its past experience with defense counsel, the trial court concluded he had done what was best for appellant. (*Ibid.*)

Further, defense counsel had been "aware of the Vienna Convention well before trial." (13 RT 3361-3362.) Thus defense counsel could have spoken to the Mexican Consulate if he had wanted. (13 RT 3362.) But the trial court stated it did not think it was incompetent not to speak with the

Mexican Consulate because the Vienna Convention was not "designed to help defendants like [appellant]." (*Ibid.*) The trial court described appellant as someone who immigrated to the United States at nine years old, whose family were all American citizens, who went to school in the United States, and who, "[f]or all practical purposes," was "an American citizen as well as a Mexican citizen." (13 RT 3362-3363.) The trial court also questioned Weinstein's conclusions by remarking that appellant did not appear to be "mentally slow in any way." (13 RT 3362.)

C. The Vienna Convention is Enforceable in State Courts

Appellant did not learn of his Vienna Convention rights "until after he was tried, convicted, and sentenced to death." (3 CT 1145.) "Likewise, Mexican consular officials, were unaware [appellant] had been detained, and were therefore prevented from assisting [appellant] before and during his trial." (*Ibid.*, Letter from Mexican Consulate in Santa Ana to the Honorable John Ryan, dated September 17, 2001.) The Mexican government later sued the United States on behalf of appellant and other similarly situated Mexican citizens in the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States) (Mar. 31, 2008) 2004 I.C.J. 128 (*Avena*) for its failure to notify appellant and the others of their rights to consular notification in accordance with

Article 36 of the Vienna Convention.

The ICJ held that the United States violated appellant's Article 36 Vienna Convention rights. (*Avena, supra* 2004 I.C.J. at ¶ 153(9).) As a remedy for the violation of his Vienna Convention rights, the ICJ ordered that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [appellant and the other Mexican nationals], by taking into account . . . the violation of the rights set forth" in the Vienna Convention. (*Ibid.*) The review and reconsideration of appellant's conviction and sentence must be "effective" and "guarantee that the violation and the possible prejudice caused by that violation will be fully examined. . . ." (*Id.* at ¶ 138, citations omitted.)

Moreover, as this Court has noted, "the ICJ required that the violation of article 36 be reviewed *independently of due process provisions* of the United States Constitution." (*In re Martinez* (2009) 46 Cal.4th 945, 960, emphasis added (*Martinez*).) Indeed, *Avena* stresses that "review and reconsideration" should not be limited to considering a treaty violation as just another fair trial concern addressed in appellate or post-conviction review. The right under Article 36 operates under a different rationale:

> [T]he defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — the concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the

> infringement of his rights under article 36, paragraph 1. The rights guaranteed under the Vienna convention are treaty rights which the United States is undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law

(*Avena, supra* 2004 I.C.J. at ¶ 139.)

Accordingly, article 36 does not recast federal constitutional rights in different language, but creates a separate right for criminal defendants who are foreign nationals, a right grounded in international law.

The United States Supreme Court has recognized the *Avena* judgment "constitutes an international law obligation on the part of the United States." (*Medillín v. Texas, supra,* 552 U.S. at p. 504.)

> The decision in Avena merely obligates the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [appellant and certain other] Mexican nationals" [(*Avena*, 2004 I.C.J. at p. 72, ¶ 153(9)], "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" [(*Id.* at p. 60, ¶ 121.)].

(*Medillín, supra,* 552 U.S. at p. 536, conc. opn. Stevens, J.)

Nevertheless, since the relevant treaties do not create "binding law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, . . . the *Avena* judgment is not automatically binding domestic law." (*Medillín, supra,* 552 U.S. at p. 506.) The United States Supreme Court has accordingly denied petitions for writs of habeas

corpus by two of the *Avena* defendants, Huberto Leal Garcia and Jose Ernesto Medillín, because "neither the Avena decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law" (*Leal Garcia v. Texas* (2011) 564 U.S. , ,131 S. Ct. 2866, 2867) that preempts post-conviction state procedural limitations (*Medillín, supra,* 552 U.S. at p. 498-499.).

Both the United States Supreme Court and this Court "continue to adhere" to the approach of "assuming, without deciding, that article 36 confers individual rights on foreign nationals." (*In re Martinez, supra,* 46 Cal.4th at p. 957, fn. 3; *People v. Cook* (2006) 29 Cal.4th 566, 600; *Medillín, supra,* 552 U.S. at p. 506 fn.4 [assuming article 36 grants foreign nationals an enforceable right]; *Breard v. Greene* (1998) 523 U.S. 371, 376 [Vienna Convention "arguably confers on an individual the right to consular assistance following arrest"].))

Even though state procedural rules do not have to give way to the ICJ's ruling in *Avena*, these rules may give way, if an aggrieved appellant can show actual prejudice. (See *Medillín, supra,* 552 U.S. at 536-537 & n. 4, conc. opn. of Stevens, J.) As Justice Stevens noted in his concurring opinion in *Medillín,*, "[o]ne consequence of our form of government is that sometimes the States must shoulder the primary responsibility for

protecting the honor and integrity of the Nation." (*Id.* at p. 536.) To illustrate this general principle, Justice Stevens cited *Torres v. State* (Ok. 2004) 43 I.L.M. 1227, in which "the State of Oklahoma unhesitatingly assumed" the costs of complying with Avena by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification." (*Id.* at p. 537 n. 4.) Justice Stevens observed that the costs to Oklahoma were "minimal" compared to the United States' "plainly compelling interest in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. [Citation.]" (*Id.* at p. 537, internal quotations omitted.)

D. Standard of Review

A reviewing court employs a mixed standard of review when an issue raises questions of both fact and law. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1264, fn. 8.) When considering mixed questions, a reviewing court applies (1) the deferential substantial evidence standard to determine what "historical facts"have been established, (2) independent review to determine the applicable legal principles, and (3) independent review to apply these legal principles to the historical facts. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 608-609 [suggestiveness of pre-

trial lineup]; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [reasonableness of detention].) Since appellant Vienna Convention claim presents both factual and legal issues, this Court should adopt a mixed standard of review by giving substantial deference to the trial court's factual findings and by conducting an independent review of the trial court's Vienna Convention analysis and its applicability to appellant's case.

E. A Violation of Appellant's Vienna Convention Rights Also Constitutes a Violation of His Federal Constitutional Rights to Due Process of Law and to Be Free From Cruel and Unusual Punishment

The denial of appellant's rights under this section also violates the due process clause of the Fourteenth Amendment, the Eighth Amendment's prohibition on cruel and unusual punishment prohibition on cruel, and the Eighth Amendment's requirement of heightened reliability in capital cases. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [liberty interests protected by the federal Constitution's due process clause arise from both the due process clause itself and the laws of the states]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 295-300 [Eighth Amendment requires individualized sentencing determination in a capital case]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 ["Under the Eighth Amendment, the death penalty has been treated differently from other punishments"].)

In *Hicks v. Oklahoma*, the United States Supreme Court considered whether depriving a criminal defendant his right under an Oklahoma law to have his punishment imposed in the discretion of the trial jury merely violated a matter of state procedural law. (*Hicks v. Oklahoma, supra* 447 U.S. at p. 346.) The higher court noted that the defendant had a "substantial and legitimate expectation that he [would] be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion" and concluded that his liberty interest was protected by the Fourteenth Amendment against "arbitrary deprivation by the State." (*Ibid.*) By denying appellant his right to consular notification and assistance, the government arbitrarily deprived appellant of his rights to due process of law under the Fourteenth Amendment.

F. The Government Violated Appellant's Vienna Convention Rights

The trial court properly concluded that appellant's rights under the Vienna Convention had been violated because he was not notified of his right to consular notification before he was tried, convicted, and sentenced to death. Although Booker informed appellant of his right to consular consultation about his immigration status, her advisement did not extend to appellant's right to consular consultation about his criminal defense. As Babcock testified, appellant would have no reason to infer from Booker's

advisement that he also had a right to consular assistance in his criminal proceedings. (13 RT 3321-3322.)[4]

Appellant contends that he need not establish prejudice to succeed on his claim of a violation of the Vienna Convention.

G. Appellant Was Prejudiced by the Government's Violation of His Vienna Convention Right to Consular Notification and Assistance

This Court has indicated that its standard of prejudice for violations of article 36 of the Vienna Convention is whether "the alleged violation denied [appellant] any benefit he would have otherwise received had the consulate been properly notified" so long as "he did not obtain assistance from other sources." (*People v. Mendoza, supra,* 42 Cal.4th at p. 711.) Here, appellant was denied the benefit of any resources the Mexican Consulate would have provided — including a bilingual mitigation

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The trial court stated that defense counsel was "aware of the Vienna Convention well before the trial" and opined that counsel "could have talked to the consulate if you liked to, and I don't think it was incompetent not to." (13 RT 3361-3362.) Article 36 grants rights to foreign nationals who are criminal defendants. Therefore defense counsel's knowledge about the Vienna Convention should not be imputed to appellant. Furthermore, whether defense counsel's failure to contact the Mexican Consulate and request its assistance constituted ineffective assistance of counsel presents a question appropriately raised for habeas review. (See, e.g., *Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399 [finding trial counsel ineffective for failing to raise Article 36 violation and remanding non-capital habeas case for prejudice determination].)

specialist familiar with Mexican culture, an addiction specialist, a bilingual psychologist familiar with biases in standardized psychological testing, and a neuropsychologist. He was also denied the benefit of the financial assistance of the Mexican Consulate in preparing and presenting his defense, any intervention by Mexican consular officials to persuade prosecuting authorities not to seek the death penalty, and the wealth of knowledge acquired by Babcock and other representatives of the Mexican Consulate through the defense of Mexican nationals in criminal cases. Appellant did not obtain these kinds of assistance from other sources.

The assistance and resources of the Mexican Consulate are unique. It is widely recognized that "[c]riminal defense attorneys are not equipped to provide the same services as the local consulate" and that prompt consular access "may very well make a difference to a foreign national, in a way that trial counsel is unable to provide." *(Ledezma v. State* (Iowa 2001) 626 NW.2d 134, 152, citations omitted.) Many cases note 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* (7th Cir. 2009) 574 F.3d 847, 850, quoting *Osagiede v. United States* (7th Cir.

2008) 543 F.3d 399, 403.)

Indeed, the Mexican Consulate has a long history of uniquely successful interventions in persuading California prosecutors not to seek the death penalty. (See, e.g., Cooper, *Foes of Death Penalty Have a Friend: Mexico*, Sacramento Bee (June 26, 1994) p. A1 [reporting that after this Court reversed a Mexican national's death sentence in 1992, the Mexican consul general successfully wrote to the district attorney "urging that death penalty charges not be re-filed" and quoting the prosecutor as stating: "You don't ignore a document like that"].) Even in far more aggravated circumstances than appellant's, timely Mexican consular interventions have been instrumental in securing plea agreements. (See, e.g., Moran, *Arellano Félix Case Ends Quietly With Guilty Pleas*, San Diego Union-Tribune (Sept. 18, 2007) [interventions by Mexico helped persuade federal prosecutors in San Diego not to seek the death penalty against a drug cartel leader linked to at least 20 murders].)

The Mexican Consulate's letter and declaration lodged with the trial court, together with Weinstein's and Babcock's testimony, establish that appellant suffered prejudice as a result of the violation of his Vienna Convention rights. Had appellant been notified of his consular rights regarding his criminal charges at the time of his arrest, he would have

exercised his right to speak with the Mexican Consulate. The Mexican consulate would then have been informed of appellant's case from the beginning. Babcock, the director of the Mexican Consulate legal program that assists Mexican capital defendants, would have been notified and been able to assist appellant before his trial. In his letter, Isidro-Rodriguez specified that the Consulate would have advised appellant not to waive his *Miranda* rights and speak with police.

Appellant recognizes that the United States Supreme Court has held that suppression of a criminal defendant's statement to police should not be an available remedy for an Article 36 violation. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.) Nevertheless, the higher court allowed that a criminal defendant can raise an article 36 claim "as part of a broader challenge to the voluntariness of his statements to police." (*Ibid.*) Similarly, this Court has held upheld a trial court's ruling that "under the totality of the circumstances, defendant's confession was not linked to the consular convention violation." (*People v. Enraca* (2012) 53 Cal.4th 735, 757 (*Enraca*).) In *Enraca*, this Court noted that even if it assumed that the Philippines Consulate would have provided the defendant with a lawyer and advised him to remain silent, "there was no showing that this would have occurred before defendant was booked," which was the time of his

confession. (*Id.* at p. 758.) Here, the declaration of Isidro-Rodriguez states that Mexican consular officials would have visited appellant in jail as soon as possible after being notified of his detention. (3 CT 1156.) Without having a right to exercise his right to consular consultation, appellant could not voluntarily, knowingly, and intelligently waive his right against self-incrimination under the Fifth and Fourteenth Amendments.

Further, Babcock would have been able to provide appellant with experts at both the guilt and the penalty phases, including experts such as Weinstein and Cervantes. At the penalty phase, Weinstein would have advised counsel that the M.M.P.I. is an invalid test for Hispanics. (13 RT 3285-3286.) He could also have testified during the penalty phase about appellant's dysfunctional family history, self-medication, and diminished cognitive abilities as mitigating factors. (13 RT 3290.) Weinstein would have explained to the jury that, in spite of appellant's long-term residence in the United States, he had not assimilated into mainstream American society. (13 RT 3289.)

All of these mitigating factors could have been brought into appellant's penalty phase had he been fully apprised of his rights. Certainly, the call between a life without parole or death recommendation in appellant's case was a close one. Appellant had strong mitigating factors

in favor of life without parole, such as his youth, lack of any prior felony record, his kindness to elders and children, his drug use, and his low socioeconomic status. (13 RT 3430-3441.)

The prosecution, on the other hand, arguably presented two aggravating factors, the fact that two bullets were used to commit the crime and the problematic victim impact evidence. (13 RT 3431-3432.) If Weinstein had been able to testify during the penalty phase, the additional information supplied by him regarding the cultural assimilation problems with Mexican citizens and appellant's history of problems quite probably could have tipped the jury to recommended life without parole instead of death. These factors could have been considered by the trial judge in appellant's automatic motion to modify the death sentence pursuant to section 190.4, subdivision (e). Finally, the trial court's disparaging remarks that the Vienna Convention was not meant to protect appellant undermines its incorrect prejudice ruling. (13 RT 3361-2263.)

In summary, there was an admitted violation of appellant's consular rights as enumerated in the Vienna Convention and section 834c as well as a violation of appellant's right to due process under the Fourteenth Amendment and right against cruel and unusual punishment, including the heightened reliability required in capital cases, under the Eighth

Amendment. (U.S. Const., 8th & 14th Amend.; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Hewitt v. Helms, supra,* 459 U.S. at p. 466; *Woodson v. North Carolina, supra* 428 U.S. at pp. 295-300; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 856.) And a new trial should be ordered. If these rights had not been violated, appellant, at a minimum, would have benefitted from the testimony of Weinstein during the penalty phase. Appellant did not obtain similar assistance from another source. Thus, appellant, contrary to the holding of the trial court, meets the standard of prejudice set forth in *Mendoza, supra,* 42 Cal. 4th at p. 711.

CONCLUSION

The government violated appellant's rights to consular notification and assistance under article 36 of the Vienna Convention. The government's violation deprived appellant the benefit of services he would otherwise have received if the Mexican Consulate had been properly notified and he did not receive comparable help from other sources.

The Mexican Consulate would have advised appellant not to waive his *Miranda* rights. The Consulate's intervention at this critical stage would have altered how appellant conducted the guilt phase of his trial.

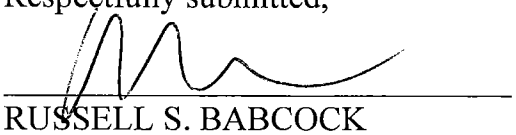
Appellant also was prejudiced by not benefitting from the bilingual experts the Mexican Consulate would have provided him at the penalty phase of his trial. Evidence offered by appellant at his motion for a new trial shows that the defense did not present an accurate account of appellant's psycho-social development or explain how cultural factors hindered his assimilation into mainstream American society. Moreover, the defense relied on a psychological test that was biased against people from appellant's country of origin. In addition, the Mexican Consulate would have provided appellant with financial and other assistance in preparing his defense, including the retention of experts.

This court should accordingly reverse appellant's conviction and

grant him a new trial. At the very least, this Court should modify appellant's death sentence to life without parole.

Dated: March 7, 2013

Respectfully submitted,



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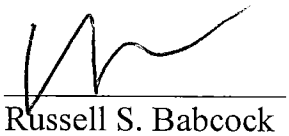
CERTIFICATE OF WORD COUNT

I certify that the APPELLANT'S SUPPLEMENTAL BRIEF has an actual word count of 7,201 words. This brief therefore exceeds the 2,800 word limit set forth in California Rules of Court 8.630, subdivision (d), for supplemental briefs. I am filing with this Supplemental Brief a Request for Permission to File an Oversized Brief.

Dated: March 7, 2013



Russell S. Babcock

CERTIFICATE OF MAILING

Case Name: ***People v. Vargas*** **(S101247)**

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