In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

EDUARDO DAVID VARGAS,

Defendant & Appellant.

CAPITAL CASE

Case No. S101247

Orange County Superior Court Case No. 99CF0831
The Honorable FRANCISCO P. BRISENO, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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VARGAS WAS NOT PREJUDICED BY THE TECHNICAL VIOLATION OF HIS CONSULAR NOTIFICATION RIGHTS

In his Supplemental Opening Brief, Vargas contends he was prejudiced by the failure of authorities to advise him of his consular notification rights at the time of his arrest.[1] (Supp. AOB at 1-34.) Vargas is not entitled to any relief notwithstanding the trial court finding a technical violation of his consular notification rights, because he fails to demonstrate any prejudice.

The parties stipulated below that Vargas was a Mexican national and that he was not advised of his right to speak with the Mexican consulate at the time of his arrest on the morning of April 2, 1999. (13 RT 3277.) In the hearing on Vargas' motion for a new trial based on the denial of his consular notification rights, the People presented the testimony of an agent with the United States Immigration and Naturalization Service (INS) who saw Vargas on the same day he was arrested, and provided him with a copy of an immigration rights form that advised him he had the right to speak

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[1] Vargas included a discussion of the consular notification violation found by the trial court in his Opening Brief. He asserted an entitlement to "comprehensive review" and asked the Court to defer ruling on his claim pending his pursuing habeas relief and an evidentiary hearing to develop facts as to whether there was any actual prejudice as a result of violating his consular notification rights. (AOB 192-204.) It was not until his Reply Brief that Vargas asserted he was prejudiced as a result of the violation. (Reply at pp. 79, 93-95.) In order to assure that his assertion of prejudice is properly before the Court in his pending appeal, and to permit the People an opportunity to respond to his claim of prejudice, Vargas filed a Supplemental Opening Brief. (Reply at p. 79, fn. 7; Supp. AOB at p. 1, fn. 1.) This Supplemental Respondent's Brief is limited to responding to Vargas' Supplemental Opening Brief and does not reiterate all of the authority and argument contained in the Respondent's Brief relating to his consular notification claim. (See RB at pp. 96-101.) Moreover, consistent with the identified purpose and parameters of his Supplemental Opening Brief, argument and authority in the Reply Brief that is not raised or included in the Supplemental Opening Brief is not addressed herein.

with an attorney as well as an official from the consulate or embassy of his country of citizenship. (13 RT 3337-3339.) Vargas argued that the INS agent had only advised him that he could contact an attorney with regard to his immigration status, and not that he had a right to seek assistance from his consulate regarding his criminal case. (13 RT 3350.)

The trial court found a technical violation of Vargas' consular notification rights. (13 RT 3358-3360.) Vargas argued below that the remedy for the technical violation of his consular notification rights under the Vienna Convention and non-compliance with Penal Code section 834c would be that he receive a new trial, or his sentence be modified to life without the possibility of parole. (3 CT 1093.) The trial court rejected Vargas' proposed remedy, finding it would be unreasonable to restore him to his post-arrest status without a showing of prejudice.[2] (13 RT 3358-3360.)

A. Vargas Fails to Demonstrate Prejudice Based on the Waiver of His *Miranda* Rights Following his Arrest

Vargas contends he was prejudiced because he waived his *Miranda* right to remain silent and spoke to police as a result of his unfamiliarity with the *Miranda* warning and the right it protected. (Supp. AOB at p. 7.) Vargas argues that had he been notified of his consular notification rights at the time of his arrest, he would have exercised his right to remain silent.

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[2] Vargas continues to argue on appeal, notwithstanding this Court's decision to the contrary in *People v. Mendoza* (2007) 42 Cal.4th 686, 711, that once he has established a violation of his rights he is entitled to be restored to the position he was in before his rights were violated without being required to make any showing of prejudice. (Supp. AOB at p. 3.) Vargas does not provide any persuasive reason for this Court to revisit its rejection of windfalls for criminal defendants from violation of consular notification rights. (See Supp AOB at pp. 10-12.)

(Supp. AOB at pp. 30-31.) Vargas' contention fails because he cannot even link his decision to waive his *Miranda* rights with a consular notification violation, let alone demonstrate actual prejudice.

Vargas observes that the services that could have been available to him included a consular official visiting him "as soon as possible" to explain the American adversarial system of criminal justice. (Supp. AOB at pp. 9-10, 32, citing 3 CT 1156 [letter of Isidro-Rodriguez].) Vargas contends he would have been advised "in no uncertain terms that he should not speak to any law enforcement officer without first speaking with an American attorney." (*Ibid.*) But Vargas fails to show that the response from the Mexican consulate upon notification of a Mexican national requesting assistance following arrest would have been so expeditious that it would have resulted in a conversation between a consular official and Vargas before the point in time he waived his *Miranda* rights and agreed to talk to authorities. As the United States Supreme Court and this Court have made plain, the Vienna Convention "'secures only the right of foreign nationals to have their consulate *informed* of their arrest or detention – not to have ... law enforcement authorities cease their investigation pending any such notice or intervention.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 758, quoting *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 349 [126 S.Ct. 2669, 165 L.Ed.2d 557], original emphasis.) Even if it is assumed that the Mexican consulate's response would have been exactly what was conveyed during the new trial motion, Vargas failed to show that this response necessarily would have occurred prior to the point in time at which he waived his *Miranda* rights. Accordingly, Vargas has failed to establish any link between the consular notification violation and waiver of his *Miranda* rights. (*Ibid.*)

Moreover, while Vargas argues that he would have exercised his right to remain silent if he had been made aware of his consular notification

rights at the time of his arrest (Supp. AOB at pp. 30-32), as the trial court aptly pointed out, nothing in the record substantiates that assertion. (13 RT 3360.) Additionally, Vargas' speculation that he would have contacted the Mexican consulate is refuted by the fact that Vargas did not reach out to the consulate in response to the admonition by the INS within hours of his arrest. His lack of interest in consular assistance following the INS admonition supports the reasonable inference that Vargas would not have contacted the Mexican consulate if only he had been advised by arresting officers of his consular rights. Nothing in the record refutes this inference.

Further, as Vargas acknowledges, the trial court correctly concluded that none of his statements to police incriminated him. (Supp. AOB at p. 7; see 13 RT 3360-3362.) He argues, however, that his statements contained misstatements that turned out to be inconsistent with facts later developed at trial, causing him not to testify in his own behalf. (*Ibid.* citing 3 CT 1097.) But Vargas does not identify those statements nor does he explain what he would have testified to absent having provided those statements to police and how that testimony would have altered the outcome in either the guilt or penalty phase of his trial. For all these reasons, Vargas fails to demonstrate actual prejudice from his decision to waive his *Miranda* rights following a violation of his consular notification rights.

B. Vargas Was Not Prejudiced by the Absence of Assistance from the Mexican Consulate

Vargas also contends he was prejudiced by the technical violation of his consular notification rights because otherwise the Mexican consulate would have provided him with: (1) access to a bilingual mitigation specialist familiar with Mexican culture, an addiction specialist, a bilingual psychologist familiar with biases in standardized testing, and a neuro-psychologist; (2) financial assistance in preparing and presenting his

defense; (3) intervention by Mexican authorities in an effort to persuade prosecuting authorities not to seek the death penalty; and (4) the experience and knowledge acquired by representatives of the consulate through defending other Mexican nationals in criminal cases. (Supp. AOB at p. 29.) Vargas asserts that he did not receive any similar assistance from other sources and that assistance of the Mexican consulate is "unique." (*Ibid.*) Even if it is assumed that Vargas would have contacted the Mexican consulate, and the consulate would have provided him with experts, funding, pleas to the prosecution not to pursue the death penalty, and experience and knowledge gained by the consulate from assisting other Mexican nationals, Vargas has not shown that such assistance was not otherwise available to him through the funding and resources available to his defense trial counsel. Further, even assuming such assistance was indeed unique and otherwise unavailable, Vargas fails to demonstrate how such early intervention and assistance would have affected the outcome in his case.

Vargas argues that a condemned inmate is prejudiced from the denial of his consular notification rights whenever he is denied "'any benefit he would have otherwise received had the consulate been properly notified' so long as 'he did not obtain assistance from other sources.'" (Supp. AOB at p. 28, quoting *People v. Mendoza*, *supra*, 42 Cal.4th at p. 711.) Vargas' reliance on *People v. Mendoza* for this proposition is misplaced. In *Mendoza*, this Court observed:

> Even if we assume defendant's consular notification rights were violated, defendant failed to demonstrate that he suffered any prejudice as a result. [Citation.] While the letter from the Mexican consulate discusses the assistance it asserts it would have provided had it been notified, the letter did not claim that defendant did not obtain the assistance from other sources. *Nor does the record reveal any prejudice.*

(*People v. Mendoza*, *supra*, 42 Cal.4th at p. 711 [emphasis added].)

If, as Vargas argues, prejudice and failure to obtain the same assistance offered by the Mexican consulate from other sources is one and the same, then clearly this Court would not have observed that in addition to failing to show the services were not obtained elsewhere, the letter from the Mexican consulate did not reveal any prejudice. Notwithstanding Vargas' insistence to the contrary, before he can be entitled to any relief, he must demonstrate actual prejudice, *i.e.*, that the outcome in either the guilt or penalty phase would have been different but for the failure to advise him at the time of his arrest of his consular rights.

Vargas contends that he was prejudiced because the assistance available from the Mexican consulate is not the same as can be provided by a criminal defense attorney. (Supp AOB at pp. 7-8.) He fails to explain how the various types of experts the Mexican consulate indicates it would have provided him could not have been located and retained independent of the Mexican consulate should counsel have elected to do so. There is nothing to suggest that the services of experts, funding, pleas not to pursue the death penalty, or the type of experience gained by the Mexican consulate assisting Mexican nationals facing criminal charges are "unique" such that Vargas' defense counsel did not and/or could not have effectively replicated such resources.

Vargas notes that the Mexican consulate retained Sandra Babcock, a defense attorney with ten years of experience defending against capital charges, to direct its "far-reaching program of legal assistance to Mexican nationals facing the death penalty in the United States" and had developed an extensive list of experts and investigators. (Supp. AOB at pp. 8, 11.) After Vargas' conviction, Babcock recommended hiring Ricardo Weinstein, a bilingual mental health expert. (13 RT 3307.) In terms of assessing prejudice, it is not sufficient merely to demonstrate that a particular expert might have been recommended by the Mexican consulate

that would have contradicted or rejected experts that defense counsel independently retained and relied upon in developing and presenting a defense to capital charges. Defense counsel no doubt can find an expert to say practically anything and it does not require the assistance of the Mexican consulate to do so.

In terms of Vargas' insistence that he would have had the benefit of the expert opinion of Dr. Weinstein except for the failure of authorities to inform him upon his arrest of his consular notification rights (Supp. AOB at p. 18), the trial court's finding that defense trial counsel was aware of Vargas' rights under the Vienna Convention well before trial and could have contacted the consulate if he wished (13 RT 3360-3362) precludes the causal connection that is a prerequisite for any relief.[3] Accordingly, Vargas fails to establish the necessary nexus between a violation of his consular notification rights and the absence of consular assistance.

Even assuming that Vargas would have sought consular assistance if only authorities had advised him of his consular notification rights at the time of his arrest, and further assuming that Vargas' defense trial counsel would have been referred specifically to Dr. Weinstein and retained him, Vargas cannot show that the outcome of his trial would have been different.

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[3] Vargas complains that the trial court's observation that defense trial counsel knew about the Vienna Convention well before trial constitutes improperly imputing defense counsel's knowledge of his rights to Vargas. (Supp. AOB at p. 28, fn. 4.) The complaint misses the trial court's point. In the context of prejudice, the fact that counsel for Vargas was aware that the Mexican consulate could be a source of assistance for his defense of Vargas is relevant to the question of actual prejudice and refutes any finding of prejudice. Vargas also argues that whether his defense trial counsel was ineffective for failing to seek assistance from the consulate is a matter appropriately raised in a petition for writ of habeas corpus. (*Ibid.*) Whether Vargas chooses to pursue a claim of ineffective assistance of counsel on habeas does not obviate the fact that for purposes of his claim on appeal, he has failed to demonstrate any actual prejudice.

Vargas cites Dr. Weinstein as being able to present additional mitigating evidence based on his opinion that Vargas' family was dysfunctional, Vargas self-medicated, had diminished cognitive abilities and, despite residing in the United States since the age of 8, had not assimilated into mainstream American society. (Supp. AOB at p. 32, citing 13 RT 3289-3290.) Vargas' reliance on Dr. Weinstein's opinions and criticism of the mitigation defense ignores the trial strategy and defense that was presented to the jury. (See RB at pp. 32-39.)

Vargas ignores the true weight of the evidence in aggravation and assigns weight to Dr. Weinstein's opinions that assume their credibility and persuasiveness. Vargas complains the trial court did not credit Dr. Weinstein's opinions because it found that "for all practical purposes" Vargas was "an American as well as a Mexican citizen." (Supp. AOB at pp. 21, citing 13 RT 3362-3363.) As the trial court aptly observed, Vargas immigrated to the United States at age 9, and he and his family were all American citizens who attended school in the United States. (13 RT 3362-3363.) None of Vargas' siblings experienced the inability to assimilate into mainstream American society that Dr. Weinstein ascribes to Vargas. The mitigation defense that was prepared and presented at trial included testimony by a forensic psychiatrist opining that Vargas was an at-risk youth unusually susceptible to the gang lifestyle. (12 RT 2993.) He accounted for the differences between Vargas and his siblings by explaining that Vargas was subject to negative peer influences his older siblings did not experience. (12 RT 2989.) Vargas fails to explain how Dr. Weinstein's opinions would be more convincing to a jury than the mitigation defense actually presented at his trial, or in a motion to modify a death judgment. The record does not show that he would have enjoyed a more favorable outcome if only the defense strategy embraced the opinions of Dr. Weinstein.

The anecdotal value prosecutors would place on a plea from the Mexican consulate not to pursue the death penalty (Supp. AOB at p. 30) does not remotely show that involvement of the consulate would have resulted in Vargas avoiding being tried for capital murder. Vargas does not explain why in *his* case prosecutors would have made a different charging decision if only the consulate had made a plea on Vargas' behalf.

CONCLUSION

For the reasons detailed herein and in Respondent's Brief, this Court should deny any relief based on a violation of Vargas' consular notification rights.

Dated: May 10, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 2,783 words.

Dated: May 10, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 10, 2013, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 10, 2013, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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