IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. EDUARDO D. 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 REPLY BRIEF

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Under the California Appellate Project, Inc.
Assisted Case Program

DEATH PENALTY

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INTRODUCTION

Since the government violated appellant's right to consular notification under the Vienna Convention on Consular Relations (Vienna Convention on Consular Relations, April 24, 1963, 21U.S.T. 77, T.I.A.S. No. 6820 (Vienna Convention)), this Court must reverse appellant's conviction and remand the case for a new trial. Appellant maintains that no showing of prejudice need be made, but even if this

Court requires a showing of prejudice (see *People v. Mendoza* (2007) 42 Cal.3th 686 (*Mendoza*), appellant has demonstrated it, both at his hearing on a motion for a new trial (13 RT 3276-3363) and in his supplemental opening brief. Respondent's claim that intervention by the Mexican consulate would not have affected the outcome of appellant's case (RSB 1, 5)[1] misapprehends both the resources of a sovereign nation and the Mexican government's success at helping its nationals avoid the death penalty. The Mexican government's advocacy program for its nationals facing the death penalty in the United States has a 95 percent success rate in avoiding or reversing a death sentence. (Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client* (2008) 36 Hofstra L.Rev. 989, 1000.) The California government's violation of appellant's right to consular notification therefore deprived him of an invaluable advocate on his behalf.

In this brief, appellant addresses specific contentions made in respondent's supplemental brief where it is necessary to present the

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"SB" refers to Appellant's Supplemental Opening Brief, and "RSB" refers to Respondent's Supplemental Brief.

issues more fully to the Court. Appellant does not reply to respondent's contentions that are adequately addressed in appellant's opening brief and supplemental opening brief. The absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in appellant's opening or supplemental briefs, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully briefed.

ARGUMENT

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

In his supplemental brief, appellant explained how the Mexican government declared that it would have visited him in jail as soon as possible after being notified of his detention. (SB 30-31.) A Mexican consular official would have advised appellant not to speak to police without first consulting a criminal defense attorney. (SB 9.) Had the government not violated his rights under the Vienna Convention, appellant would not have waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. (SB 31.) By waiving his *Miranda* rights and talking to the police, appellant foreclosed the possibility of testifying in his own defense. (SB 6-7).

Not only would timely consular notification have resulted in timely consular intervention, but timely consular intervention would have prevented appellant's statements to the police. Respondent's complaint that appellant has "failed to establish any link between the consular notification violation and waiver of his *Miranda* rights" (RSB

3), disregards appellant's argument. Though the police's violation of appellant's Vienna Convention rights did not cause him to waive his *Miranda* rights, the violation prevented appellant from receiving help in understanding his rights, help that would have enabled him to understand and exercise those rights.

In a declaration lodged with the trial court, Miguel Angel Isidro-Rodriguez – chief of the Mexican Consulate in Santa Ana – explained how consular officials would have promptly visited appellant. (SB 8-9.) Respondent, on the other hand, maintains that appellant was required "to show that [the Mexican consulate's intervention] necessarily would have occurred prior to the point in time at which he waived his *Miranda* rights." (RSB 3.) Respondent appears to derive this requirement from this Court's ruling in *People v. Enraca* (2012) 53 Cal.4th 735, a case in which the "[d]efendant made his confession while he was being booked, within a few hours of his arrest and several weeks after the murders." (*Id.* at p. 758.) Under those circumstances, this Court concluded that there had been "no showing that [the Philippine consulate's intervention] would have occurred before the defendant was booked." (*Ibid.*) Since the defendant in *Enraca* had

been booked immediately after his arrest, this Court implied that it would have been practically impossible for the Philippine consulate to have intervened before his confession. No similar impossibility applies here. On the contrary, given the Mexican consulate's capital defense program, timely intervention before appellant's *Miranda* waiver was highly likely.

Likewise, respondent's extrapolations from appellant's encounter with Diane Booker – the Immigration and Nationalization Services (INS) agent who visited him in jail – do not withstand scrutiny. Respondent believes that appellant's "lack of interest in consular assistance following the INS admonition supports the reasonable inference that [appellant] would not have contacted the Mexican consulate if only he had been advised by arresting officers of his consular rights." (RSB 4.) To begin with, Booker reported that she did not "recall" whether appellant asked her to contact the consulate on his behalf, acknowledged that such a "conversation may have taken place," admitted she would not have made a record of appellant's request, and explained that Mexico is not one of the consulates that she was "mandatorily required to contact," even if requested by a detainee.

(13 RT 3339-3340.) Booker never told appellant about his right to contact the Mexican consulate for immigration advice; instead, she only handed appellant a written notice. (13 RT 3347.) Nothing in the record attests to appellant's "lack of interest" in consular assistance.

Moreover, respondent offers no reason why it would be reasonable to infer that appellant knew that the Mexican consulate could help him with any criminal proceedings. (RSB 4.) Booker herself had determined that appellant was a lawful permanent resident. (13 RT 3345.) According to her, appellant faced no imminent immigration consequences from his arrest; his status as a permanent legal resident would be threatened only once he was convicted. (13 RT 3346.) Even if one were to charitably assume for the sake of argument that appellant had been uninterested in help with immigration matters, that says nothing about appellant's interest in help with his criminal proceedings. Under respondent's logic, if a New Jersey resident whose home had been flooded by Hurricane Sandy showed no interest in contacting her insurance company about her life insurance policy, she likewise would have no interest in contacting that same company about her homeowner's insurance policy.

In his supplemental brief, appellant also showed that he suffered additional prejudice from the violation of his rights under the Vienna Convention by being deprived of the resources and expertise of the Mexican consulate. (SB 27-33.) The consulate would have provided him with mitigation specialists, funding, intervention by Mexican consular officials to dissuade prosecutors from seeking the death penalty, and the expertise acquired by capital defense attorney Sandra Babcock and others. (SB 28.) Appellant did not obtain similar help from other sources. (*Ibid.*)

Respondent counters by putting forward a misreading of this Court's decision in *People v. Mendoza* (2007) 42 Cal.4th 686 (*Mendoza*). In *Mendoza*, the defendant did not allege a violation of the Vienna Convention. (*Id.* at p. 710.) Instead, on the day of his hearing for a new trial, he filed a letter from the Mexican consulate "at the consul's behest." (*Ibid.*) After denying the defendant's motion for a new trial, the court considered his automatic motion to modify his death sentence under Penal Code section 190.4, subdivision (e). (*Id.* at p. 711.) At this hearing, the court invited a Mexican consular representative to address the court. "Neither the [representative] nor

defense counsel argued that the alleged violation denied defendant any benefit he would have otherwise received had the consulate been properly notified." (*Ibid.*) Though the trial court denied the defendant's automatic motion, it never addressed the Vienna Convention issue.

After recounting this series of events, this Court concluded,

> Even if we assume defendant's consular rights were violated, defendant has 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 that assistance from other sources. Nor does the record reveal any prejudice. Whether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition. [Citation.]

(*Mendoza, supra,* 42 Cal.4th at p. 711.) As its topic sentence explains, the quoted paragraph discusses prejudice. And the *Mendoza* court concluded that neither the consulate's letter nor the record showed any prejudice: namely, that appellant did not obtain similar assistance from other sources.

Yet, respondent misreads the quoted paragraph. For respondent

states that if the *Mendoza* court considered a showing of the failure to obtain services elsewhere to be a showing of prejudice, it "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." (RSB 6, emphasis added.) But that is not what the court "observed." After noting in the second sentence that the letter had failed to claim that the defendant did not obtain the assistance in question from other sources – implying that the letter had thus failed to show prejudice – the court in the next sentence, notes, "Nor does the record" – not "letter," as respondent asserts – "reveal any prejudice." (*Mendoza, supra,* 42 Cal.4th at p. 711.) Instead of distinguishing the defendant's failure to obtain services elsewhere from any prejudice he may have suffered, the court distinguished prejudice evidenced by the consulate's letter from prejudice evidenced by the record.

At the hearing on appellant's motion for a new trial, defense counsel admitted that he had been ignorant of the "full range of services" that the Mexican consulate could have provided. (13 RT 3355.) These services were not – and could not have been –

replicated by defense counsel on his own or obtained from another source. Of particular importance was Dr. Weinstein's expert opinion that the Minnesota Multiphasic Personality Inventory (MMPI) was biased against Hispanics. (SB 14-15.) As defense counsel noted, "I was unaware of the fact that this [MMPI] that the prosecution was turning into a sword against us, [that] it was culturally biased." (13 RT 3356.)

Contrary to respondent's insistence otherwise, appellant does not "merely . . . demonstrate that a particular expert might have been recommended by the Mexican consulate that [*sic*] would have contradicted or rejected" defense experts whom defense counsel retained and relied upon (RSB 6-7), but rather shows how the defense's ignorance of biases in the MMPI caused it to present mitigation evidence that undermined its own strategy at the penalty phase. Dr. Greenzang, for instance, testified that the MMPI indicated that appellant had aggressive traits and "tend[ed] to be impulsive." (12 RT 3138.) He also testified that appellant rationalized his difficulties, denied responsibility, and had anti-social attitudes. (*Ibid.*) According to Greenzang, appellant "may [have] a personality disorder such as an

antisocial or paranoid personality." (12 RT 3139.) Dr. Weinstein's testimony therefore showed that appellant's penalty phase had been misconceived. Whether appellant was thereby prejudiced does not turn on whether "Dr. Weinstein's opinions would be more convincing to a jury than the mitigation defense actually presented at [appellant's] trial" (RSB 8), but on how the government's violation of appellant's Vienna Convention rights deprived him of a mitigation expert who was sensitive to the cultural differences of Mexican nationals.

Respondent also misunderstands the role that a sovereign government can play in the defense of one of its nationals in a capital case. Although respondent believes "[t]here is nothing to suggest" that the services offered by the Mexican consulate "are 'unique'" (RSB 6), Mexico's unequaled track record in defending its nationals shows otherwise. Indeed, the Mexican Capital Legal Assistance Program (MCLAP) has been described as an "unprecedented program" designed to increase the quality of capital defense by coordinating all aspects of a Mexican national's defense. (Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases* (2003) 20

Az. J. of Int'l and Comp. L. 359, 393.) Though only established in September 2000, by 2002 MCLAP had helped 45 defendants and filed *amicus* briefs in 13 cases. (Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty* (2002) 35 U.C. Davis L.Rev. 1085, 1117.) By January 2003, MCLAP had helped Mexican nationals avoid the death penalty in 30 cases. (*Reciprocity Unmasked*, at p. 394.) Between September 2000 and January 2003 – the period covering appellant's trial – only five nationals had been executed and MCLAP had only been involved in one of those cases before trial. (*Ibid.*)

MCLAP offers unparalleled financial and cultural resources for mitigation arguments on behalf of Mexican nationals. Though respondent believes that appellant "cannot show that the outcome of his trial would have been different" (RSB 7), MCLAP's success rate shows that it is highly likely the outcome of appellant's trial would have been different. Gregory Kuykendall – the current director of MCLAP – has detailed the astonishing success of his organization's efforts:

> Active MCLAP involvement has proven instrumental in averting death sentences, particularly in cases involving plea agreements, the exclusion of the death penalty by

> trial judges, and life sentences following death penalty trials. In the 298 cases it has completed to date (i.e., where a final disposition has occurred), MCLAP has a ninety-five percent success rate in avoiding or reversing death sentences. Early intervention is essential – when MCLAP is involved from the outset, our research indicates that the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general.

Mitigation Abroad, at p. 1000.) As of October 16, 2007, death sentences had not been imposed in 272 death-eligible cases, while in 12 other cases, existing death sentences had been set aside by judicial or executive commutation. (*Mitigation Abroad* at p. 1000, fn. 53.) By contrast, death sentences had been imposed in only 11 cases and there had only been three executions. (*Ibid.*) Thus, death sentences had been averted or reversed in a total of 284 out of 298 completed MCLAP cases, for a success rate of 95.3%. (*Ibid.*)

The importance of consular help in capital cases has been recognized by the American Bar Association (ABA). In its guidelines for capital defense counsel, the ABA stated that securing consular help "should . . . be viewed by counsel as an important element in defending a foreign national at any stage of a death penalty case." (ABA

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), Guideline 10.6, commentary, in (2003) 31 Hofstra L.Rev. 913, 1013 & fn. 194, citing *Valdez v. State* (Okla. 2002) 46 P.3d 703, 710 [granting post-conviction relief for trial counsel's failure to inform the defendant that "he could have obtained financial, legal and investigative assistance from his consulate"].)

Respondent also argues that since defense counsel had been aware of the Vienna Convention before trial, it "precludes the causal connection that is a prerequisite for any relief." (RSB 7.) In a footnote, respondent elaborates on this point by arguing that defense counsel's knowledge "refutes any finding of prejudice." (RSB 7, fn. 3.) Yet if one accepts as true the trial court's observation that the Vienna Convention was "not new stuff to Orange County" and "has been kicked around this court and other trial courts for a long time now" (13 RT 3352), then respondent's argument becomes reduced to an absurdity. For if all defense lawyers know of the Vienna Convention and that knowledge alone bars a claim of prejudice as a result of a defendant's Vienna Convention rights, then a criminal defendant can never be prejudiced by a violation of the Vienna

Convention.

In any case, respondent cites no authority to show that defense counsel's knowledge of the Vienna Convention defeats a claim of prejudice. Indeed, as respondent itself remarks, the Vienna Convention protects "the right of foreign nationals to have their consulate *informed* of their arrest or detention . . . ." (RSB 3, quoting *People v. Enraca, supra,* 53 Cal.4th at p. 758, quoting *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 349, original emphasis.) Appellant, in other words, was prejudiced by not having his consulate informed that he had been detained.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and grant him a new trial. Alternatively, this Court should modify his death sentence to life without parole.

Dated: June 11, 2013

Respectfully submitted,

RUSSELL S. BABCOCK
Attorney for Appellant Eduardo D. Vargas

CERTIFICATE OF WORD COUNT

I certify that the APPELLANT'S SUPPLEMENTAL REPLY BRIEF does not exceed the 2,800 word limit for supplemental briefs under rules 8.520(d) and 8.630(d) of California Rules of Court and that the actual word count is 2,800 words.

Dated: June 11, 2013

Russell S. Babcock

CERTIFICATE OF MAILING

Re: *People v. Vargas* (S101247)

I, the undersigned, certify and declare that:

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