

No. S067678

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
Plaintiff and Respondent, )  
 ) San Bernardino County  
v. ) Superior Court No.  
 ) FMB 01787  
MARTIN MENDOZA, )  
 )  
Defendant and Appellant. )

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**APPELLANT'S REPLY BRIEF**

Automatic Appeal from the Judgment of the Superior Court  
of the State of California for the County of San Bernardino

HONORABLE JAMES A. EDWARDS, JUDGE

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MICHAEL J. HERSEK  
State Public Defender

MARIANNE D. BACHERS  
State Bar No. 94743  
Senior Deputy State Public Defender

221 Main Street, 10th Floor  
San Francisco, CA 94105  
Telephone: (415) 904-5600

Attorneys for Appellant

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v.	)	(San Bernardino
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MARTIN MENDOZA,	)	FMB 01787)
	)	
Defendant and Appellant.	)	
_____	)	

**APPELLANT’S REPLY BRIEF**

Appellant Martin Mendoza hereby submits the Appellant’s Reply Brief in this case. Appellant continues to assert all arguments made in his Opening Brief, and does not abandon any argument made therein. To the extent that Appellant does not respond an any argument advanced by Respondent, Appellant relies on arguments made in the Opening Brief with respect to such issues.

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## ARGUMENT

### I

#### ACCUSATORY STATEMENTS MADE BY APPELLANT'S STEP-DAUGHTER WERE IMPROPERLY ADMITTED AT TRIAL

##### INTRODUCTION

In his Opening Brief, Appellant argued that out of court accusations of sexual misconduct made by Sandra Resendes, Appellant's step-daughter, should not have been admitted at Appellant's trial. Appellant argued that the admission of this testimony violated the Confrontation Clause of the Sixth Amendment; that it constituted inadmissible hearsay; and that the admission of this testimony was more prejudicial than probative. (AOB<sup>1</sup>, at pages 26-45).

Respondent argued that Sandra's accusations were properly admitted pursuant to *Crawford v. Washington* (2004) 541 U.S. 36. Respondent also argued that Appellant waived any right to object to the admissibility of Sandra's accusations because he killed her. Respondent argued the accusations were not hearsay and that they were more probative than prejudicial. (Respondent's Brief<sup>2</sup>, at pages 16-34).

#### **A. Sandra's Statements Were Testimonial Evidence and Were Therefore Inadmissible Under *Crawford***

##### **1. Sandra's written statements for the police were testimonial**

Appellant moved in pre-trial proceedings to exclude any evidence about sexual misconduct concerning his step-daughter, Sandra Resendes, in

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<sup>1</sup> AOB = Appellant's Opening Brief

<sup>2</sup> RB = Respondent's Brief

this case. (CT 2:493-509.) The prosecution proposed to introduce at trial evidence that Appellant's step-daughter told her mother - Appellant's wife, Rocio - that Appellant had sexually molested her<sup>3</sup>.

The manner in which the molestation allegations arose is significant. The homicides in this case occurred on January 25, 1996. On the evening of January 5, 1996, Appellant hit Sandra with a belt after she refused to do some chores. Rocio observed this incident, and saw and heard Appellant and Sandra arguing. Rocio became concerned about what had happened and called the Carson City police. (RT 2016-2020.)

The police came and arrested Appellant for hitting Sandra with the belt. Appellant was arrested and incarcerated for three days. (RT 2020.) He was given a thirty day sentence for battery, with three days actual custody. The remainder was stayed, on the condition that Appellant do community service and get alcohol counseling. (RT 1572-74.)

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<sup>3</sup> In connection with his campaign to ensure that the molestation allegations were mentioned whenever possible, the prosecutor asked the coroner whether he found evidence of molestation during the autopsy. (RT 1431-1432.) Respondent mentioned that no objection was made to this evidence by Appellant. (RB, at p. 18, fn.10.) If Respondent's point is that there was some sort of waiver by failure to object, Respondent is wrong. Appellant plainly moved pre-trial to object to testimony about the molestation, a fact Respondent does not dispute. (*People v. Morris* (1991) 53 Cal.3d 152, 189 [defendant does not need to renew objection during trial in order to preserve issue which was the subject of a motion *in limine* upon which trial court ruled].) Additionally, Appellant cannot be faulted for not having made an oral objection at the exact moment this unexpected testimony arose. (*People v. Partida* (2005) 37 Cal.4th 428, 425-436) [court will reach issue where nature of objection and evidence it sought to challenge reasonably clear to trial court]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn.2 [no waiver of confrontation or Sixth Amendment violation objection where governing law at time of proceeding offered scant grounds for such objection].)

When the police officers spoke to Sandra that night, she verbally denied having been molested by Appellant. But in a written statement she gave them at the same time, she wrote that, "...at one time he [Appellant] told me he was going to touch me and he did." She also wrote in the report that Appellant had hit her brother Eric before. (RT 2077-2078; EX 104 - police report.)<sup>4</sup>

Sandra told her mother that night that Appellant had been molesting her. Sandra told Rocio that she told the police about how Appellant had been bothering her. (RT 2075-2078.) Additionally, the police report stated: "The victim was very adamant about pressing charges and signed a complaint against Mendoza-Garcia." (RT 2074; EX 104; 3rd Supp. CT, at page 70-71.)

Rocio testified that when she got to her brother's house in Landers, Sandra gave more details about the alleged molestation. She said that Sandra told her Appellant had been kissing her and fondling her breasts, and had been doing so for about eight months. Sandra also allegedly told Rocio that Appellant had threatened to kill them if she told anyone (RT 2022-2024.)<sup>5</sup>

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<sup>4</sup> In fact, the police report, which was admitted into evidence, contains a litany of abuses Sandra alleged Appellant committed. Sandra states: "Martin Mendoza whatted to hit me and my mom Maria Mendoza told him not to and He hit me with the belt, like seven times. I at one time he told me that was going to touch me and he did. He hit my brother Erick Resendez with the belt like 3 times and he too hit Sergio Mendoza with the belt like 1 (number scratched out here) times. Martin Mendoza hit me in my led and I I had red in my leg." This statement appears on Carson City Sheriff's Department letterhead. (3rd Supplemental CT, page 72.) The misspellings in this footnote appear as they did in the police report.

<sup>5</sup> At this point, Judge Edwards stopped Rocio's testimony before the  
(continued...)

In his arguments in favor of admitting Sandra's accusations, the prosecutor admitted he had no evidence of the molestation other than Sandra's statements. (RT 145-147, 556-564.) In order to bolster his arguments in favor of admissibility, the prosecutor stated that Rocio had told Appellant's brother, Hector, about the allegations after they occurred. The prosecutor also said that Appellant's nephew, Jose Soria Delgado, would also testify about the allegations having been made, and Appellant's anger about these false accusations. (RT 3:556-564.) Hector did not testify at trial. Soria Delgado did not testify in a manner consistent with the prosecution offer of proof. He denied having been told that Appellant sexually abused Sandra. (RT 7:1601.) Soria Delgado testified that Appellant was angry at having been sent to jail, and because his life with his wife seemed to be disintegrating, not about any abuse allegations. (RT 7:1581, 1598.) Soria Delgado only knew that Appellant had been accused of hitting Sandra and Eric, nothing more. (RT 7:1572-1573.) Thus, Rocio's testimony provided the only legal and factual support for the admissibility of the molestation allegations.

Further undermining the admissibility of these allegations was the prosecutor's candid admission that there was no evidence that Appellant had sexually abused Sandra. The prosecutor theorized, however, that the false accusation of sexual misconduct was what had precipitated the homicides at issue here, and that the evidence was therefore admissible as proof of motive, intent, premeditation, and other mental states. (RT 3:556-

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<sup>5</sup>(...continued)

jury because he was concerned that the details of the molestation were unnecessary and irrelevant. He required an in camera showing that Rocio had conveyed these details to Appellant. She testified she had. (RT 2025-2030.)

564).

At the time this case was decided, *Crawford v. Washington* had not yet been decided. Subsequently, *Crawford* and state and federal court rulings have provided some insight into the *Crawford*-related issues presented by this case.

First of all, Respondent admits that the statement Sandra wrote down for the Carson City police accusing Appellant of having threatened to touch her and then in fact having touched her is testimonial. Respondent's Brief states: "The statements contained in the police report which originated when Rocio told the officers of the allegation may be considered testimonial in nature. . . ." (RB, at page 24.) This admission provides a starting point for assessing the testimonial quality of Sandra's other statements.

The Court in *Crawford* recognized that statements made to police officers which were likely to provide the basis for prosecution were testimonial. The Court stated:

"Various formulations of this core class of "testimonial" statements exist: 'ex parte' in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."

(124 S.Ct. at p. 1364.)

Testimonial statements generally include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later date." (124 S.Ct. at p. 1364.)

Sandra's statements to the Carson City police fit these definitions. Sandra complained to her mother that Appellant had struck her with a belt.

In response, Rocio contacted the police in order to make a formal complaint. The police arrived, took a statement, arrested Appellant for battery, and then took him into custody, where he remained for several days. Sandra observed that the allegations she made had a definite and immediate criminal consequence: Appellant was arrested and taken to jail right in front of her. Sandra signed an official statement for the police that initiated the criminal justice process against Appellant. Further legal proceedings were likely, and her testimony may well have been required at a preliminary hearing or trial.<sup>6</sup>

But Sandra's statement to the police contained several distinct complaints: she alleged in writing that Appellant had struck both her brother Eric and herself, and that Appellant had threatened to touch her and had touched her. (EX 104.)

Since Respondent has admitted that the written statements made by Sandra are testimonial<sup>7</sup>, and because *Crawford* itself appears to encompass such statements<sup>8</sup>, we can assume that these statements were

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<sup>6</sup> Sandra was 13 years old when these events occurred. A thirteen year old is assumed to be a competent witness. (Evid. Code, § 700.)

<sup>7</sup> Two state cases have reached the same conclusion: that statements given to police officers when crime reports are made are testimonial evidence, which cannot be admitted in the absence of confrontation. (*People v. Sisivath* (2004) 118 Cal.App. 4th 1396, 1400-1403) and (*In re Fernando R.* (2006) 137 Cal.App.4th 148, 172-173.) These cases provide further support for Appellant's argument that Sandra's written accusation was testimonial, even in light of Respondent's concession.

<sup>8</sup> Two cases are pending in the U.S. Supreme Court which concern the meaning of "testimonial": *Hammon v. Indiana*, No. 05-5705, and *Davis v. Washington*, No. 05-5224. The question presented in *Hammon* is: "Whether an oral accusation made to an investigating officer at the scene of  
(continued...)

unconstitutionally admitted.

**2. Sandra's accusatory statements to her mother were testimonial**

But these were not the only statements Sandra made. According to Rocio, Sandra provided more details about the supposed molestation when they were in Landers, and these statements were admitted at trial in the absence of cross-examination. (RT 2022-2024.)

There is no reason to treat Sandra's verbal accusations to her mother any differently than the written statements made to the police though. There were competing explanations for the problems between Appellant and Sandra. Appellant's nephew, Jose Soria Delgado, testified that Sandra would not obey Appellant's parental instructions, and that was the reason why they were at odds. (RT 7:1599-1600.) Rocio also had problems with Eric, who had been picked up for shoplifting. A social worker had visited Rocio after Eric reported that his mother had struck him with a belt. She was told not to do that anymore by the social workers. (RT 8:2011-2014). All of these facts demonstrate that there was a real reason to question the reliability of Sandra's allegations. This is particularly true in Appellant's case, because the trial prosecutor agreed that there was no evidence that Appellant had sexually abused Sandra.

This is where Appellant's confrontation rights were prejudicially

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<sup>8</sup>(...continued)

an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*?" The question presented in *Davis* is: "Whether an alleged victim's statements to a 911 operator naming her assailant - admitted as excited utterances under the jurisdiction's hearsay law - constitute 'testimonial' statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*?" These cases have been argued and are pending decision.

violated. When Rocio struggled over whether to return to live with Appellant, Sandra filled in the details of her supposed interactions with Appellant. It is equally plausible that Sandra wanted to drive a wedge between her mother and step-father because she bristled under his strict parental guidance. Appellant could not effectively rebut Sandra's accusations, both spoken and unspoken, without the opportunity for cross examination.

The rift between Appellant and Sandra - whatever its genesis - provided a basis for fabrication. Both Sandra and Eric had been in trouble with each parent. The sexual abuse allegations provided a way for one of the children to eliminate a particularly demanding step-parent.<sup>9</sup>

Sandra knew her mother had contacted the police when she complained about being struck with the belt. The mother was the conduit to law enforcement authorities. Rocio initiated contact with the police on Sandra's behalf. Sandra later provided details to her mother about these events in an apparent attempt to persuade her to stay away from Appellant and to increase his criminal liability.

An Illinois case held that the testimony of a grandparent under similar circumstances violated the confrontation clause. In *In re E.H.* (Ill.App. 2005) 823 N.E.2d 1029, EH, a juvenile, was charged with having forced two children - who were five and two years old - into engaging in sexual activity with her. One of the girls testified against her at trial. The other did not, but the grandmother of the second victim testified about the

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<sup>9</sup> Indeed, because the prosecutor disavowed the molestation, Sandra's statements did not bear any indicia of reliability. (*Ohio v. Roberts* (1980) 448 U.S. 56.) Of course, this test is no longer applicable in the face of *Crawford*, but it did provide a legal basis upon which to exclude Sandra's out of court statements.

incidents described to her by the second victim. The court found the admission of the grandmother's testimony violated *Crawford*, and reversal was required. (823 N.E.2d at p. 1035.)

The court stated:

“We believe it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the confrontation clause.”

(823 N.E.2d at p. 1037.)

A Washington state case also provides some support for Appellant's position. In *State v. Garrison* (Wash.App. 2005) 118 P.3d 935, Garrison was prosecuted for sexually abusing his grand-daughter. The appellate court held that it was proper for the trial judge to admit statements made by the grand-daughter to her mother about the sexual abuse because there was no indication law enforcement involvement was anticipated. The mother testified she did not contact the police immediately because she hoped to treat the incident as a family matter. The court stated:

“Nor does the record indicate that C.M. asked her mother to take any action against Garrison. And nothing in the record supports the conclusion that C.M., an eleven year old, reasonably believed the statements to her mother could or would be available for use in a trial. The record indicates that the exchange between Bobbi and C.M. was that of a conversation between a concerned parent and an upset child, nothing more. Therefore, we find that C.M.'s statements to her mother were not testimonial and are admissible.”

The same applies here. Under these circumstances, her oral statements to her mother should be deemed testimonial, and inadmissible without cross-examination.

(118 P.3d at p. 942.)

The conversation between Rocio and Sandra was rooted in the events which led directly to Appellant's arrest. As the Carson City officers

recognized, Sandra was well aware that these allegations would lead to Appellant's arrest. Sandra's continued disclosures to her mother were designed to add fuel to the criminal accusations facing Appellant, and to convince her mother of his criminal misconduct. It is fair to say that she knew these accusations could be used in criminal proceedings against Appellant. These were anything but offhand remarks, in contrast to the non-testimonial statements found admissible in *State v. Garrison*.

The cases cited by Respondent are of no value to this discussion. (RB, at pp. 23-24.) *Demons v. State* (GA 2005) 595 S.E.2d 76, involved excited utterances, which are not an issue in this case. *Horton v. Allen* (1st Cir. 2004) 370 F.3d 75, involved the admissibility of accomplice statements, which is also irrelevant to the issues in this case.

**B. Appellant Did Not Forfeit His Confrontation Rights**

Respondent argues, in reliance on *Reynolds v. United States* (1879) 98 U.S. 145, 158-159, that Appellant has forfeited his confrontation rights with respect to Sandra's statements because he was responsible for her death.<sup>10</sup> Respondent is wrong.

Respondent relies on two cases (aside from *Reynolds* - the applicability of which is under active consideration by this Court) in support of this theory. Respondent's cases actually establish that Appellant did not forfeit his confrontation rights.

Respondent first relies upon *United States v. Cherry* (10th Cir. 2000) 217 F.3d 8111, in support of his forfeiture argument. In fact, *Cherry* holds that defendants in a drug case who specifically conspired to get rid of a cooperating witness could not object to the hearsay statements of that

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<sup>10</sup> A case is pending before this Court concerning issues of forfeiture as related to *Crawford v. Washington*. (*People v. Giles*, No. S129852.)

witness being admitted.

In *State v. Fields* (MN 2004) 679 N.W.2d 341, the Minnesota Supreme Court found that grand jury testimony could be admitted against Fields because he had threatened the witness.

This state has reached a similar conclusion. In *People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, fn.2, the court recognized that the doctrine of forfeiture applies where the defendant (1) causes a potential witness's unavailability, (2) by a wrongful act, (3) undertakes the act with the intention of preventing a potential witness from testifying at a future trial. In *Pantoja*, the court found Respondent's assertion of the rule of forfeiture inapplicable.

All of these cases stand for the proposition that there must be evidence that Appellant intended to prevent a witness from testifying in order to apply the rule of forfeiture by wrongdoing against him. There is no such evidence. In fact, there could be none because, as the trial prosecutor admitted, there was no evidence of sexual assault in this case. Therefore, Respondent's forfeiture argument fails.

### **C. Sandra's Statements Were Inadmissible Hearsay**

Respondent argues that the trial court properly admitted Sandra's statements for a non-hearsay purpose: to prove Appellant's reaction to the statements. (RB, at pp.27-28.)

Appellant disputes that the prosecution introduced the statements for this purpose. The prosecutor's repeated references to the molestation evidence proves this assertion. The prosecutor presented testimony from Rocio about the details of the molestation: that Appellant hugged and kissed Sandra, and fondled her breasts. If the prosecutor did not believe that this actually occurred, there was no need to delve into these details,

other than to stir up the prejudice naturally attached to such an allegation. (See *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365-1366) [admission of non-testifying child victim's statements regarding sexual abuse improper and prejudicial under Confrontation Clause even though prosecutor sought admission for non-hearsay purpose].

**D. Admission of the Molestation Testimony Was Prejudicial**

Respondent argues that the trial court properly admitted the molestation evidence because it was more probative than prejudicial. (RB, at pp. 28-34.)

Several cases have found *Crawford* and *Crawford*-related violations to be prejudicial and reversible. Appellant's case qualifies as such a proceeding.

In *People v. Song* (2005) 124 Cal.App.4th 973, 124-125, the court found that admission of statements admitted in violation of *Aranda/Bruton* also violated *Crawford*.<sup>11</sup>

In *Pantoja*, 122 Cal.App.4th at pp. 13-16, the court rejected Respondent's arguments that the admission of a murder victim's statements were admissible under Evidence Code section 1370.<sup>12</sup> Trial counsel argued that Sandra's statements were inadmissible under this rule as well. (RT 558-559.) *Pantoja* held that admission of the murder victim's statements was prejudicial because the statements were used by the prosecution for a

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<sup>11</sup> The court in *Song* also held that a limiting instruction is not always an adequate substitute for a defendant's right of cross-examination. (124 Cal.App.4th at p. 984.) The trial judge gave a limiting instruction here but it was insufficient to vindicate Appellant's confrontation rights.

<sup>12</sup> The court of appeal declined to reach the *Crawford* issue because it could dispose of the argument based on the statutory argument. (122 Cal.App.4th at p. 10.)

purpose other than that for which they were originally admitted. This is exactly what Appellant contends occurred in his case.

Like *Song* and *Pantoja*, Appellant was prejudiced at guilt phase by the admission of the false allegations of sexual misconduct because the jury could very well have used this evidence in an improper manner. During his offer of proof, the trial prosecutor stated that he had evidence that three different people had discussed the abuse allegations with Appellant, and that he became angry as a result. The only witness who so testified was Rocio. Rocio had an understandable motive to exaggerate and embellish her recollections of what Sandra had said to her about the abuse when she discussed it with the police after Sandra had been killed. The prosecutor had no need to go into the details of Sandra's allegations if all he wanted to do was prove that they had been communicated to Appellant. Instead, the molestation evidence was a major prosecution theme, and the prosecutor's disavowals of the truth of the allegations had little evidentiary audibility.

As Appellant explained in his Opening Brief,<sup>13</sup> the prejudice to Appellant was even greater at the penalty phase, because it was there that the jurors could use the decision-making process in order to increase the punishment imposed upon Appellant for the sexual abuse about which Sandra had complained. The jury was much more likely to impose death, and to ignore the mitigating evidence presented on Appellant's behalf, where they believed him to be a child molester too.

For all of these reasons, this Court should find that the admission of evidence related to the molestation allegations was improper and constituted reversible error.

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<sup>13</sup> AOB, at pp. 43-45.

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## II.

### **PERVASIVE INCIDENTS OF PROSECUTORIAL MISCONDUCT REQUIRE REVERSAL.**

Appellant argued in his Opening Brief that multiple incidents of cumulative, prejudicial prosecutorial misconduct which happened throughout his trial require this Court to set aside his guilt and penalty judgments. (AOB, at pp. 46-68.)

Respondent argued that any claim of error was not prejudicial and that objections to the misconduct were not preserved because Appellant failed to object or request an admonition. (RB, at pp. 34-52.)

Respondent argues that the failure to request an admonition waived the issue for appellate review. (RB, at p. 39.) This is incorrect. Where, as occurred here, the trial judge overruled defense counsel's objection to prosecutorial misconduct, the issue is preserved for review. (*People v. Hill* (1998) 17 Cal.4th 800, at p. 821.)

During the guilt phase closing argument, defense counsel objected to the prosecutor's argument. Defense counsel stated: "He's constantly going beyond the bounds into prosecutorial misconduct." (RT 2229-2231.) Respondent argues that trial counsel failed to object or move for admonitions with respect to prosecutorial misconduct during the guilt phase closing arguments. (RB, at pp. 44-50.)

Trial counsel made plain that he was objecting to on-going misconduct in the argument. For that reason, his objection is preserved for review. (*People v. Hill* 17 Cal.4th at p. 821[holding that defense counsel need not object to each instance of prosecutorial misconduct where prosecutor's misbehavior - including sarcastic, demeaning and critical aside to defense counsel - was on-going during trial].)

For these reasons, and all of those contained in the Opening Brief,

the cumulative instances of prosecutorial misconduct in this case require that Appellant's guilt and penalty judgments be set aside.

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### III.

#### **THE VIOLATION OF THE VIENNA CONVENTION REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND DEATH SENTENCE**

Respondent argues that Appellant is not entitled to reversal of his convictions or vacation of his death sentence under the Vienna Convention on Consular Rights because (1) Appellant has not proven that he is entitled to the benefits of the *Avena* decision, (2) the issues in the direct appeal are neither the same as those raised in the *Avena*<sup>14</sup> decision, (3) the State of California was not in privity with the United States for purposes of the litigation, and (4) Appellant has not shown prejudice.

##### **A. Appellant Is Entitled to the Protections of *Avena***

Respondent argues that the state was not on notice that Appellant was a Mexican national, and therefore it did not have a duty to comply with the Vienna Convention on Consular Rights. (RB, at pp. 52-53, 58.) The Opening Brief discusses the facts which put the state on notice of Appellant's status. (AOB, at p. 75-77.)

As support for its contention, Respondent mentions that Appellant's probation report identified him as an American citizen. The report also listed his place of birth as Mexico.

This fact, and those contained in the Opening Brief, establish that the state was on notice that Appellant was likely a Mexican National and had to comply with the Vienna Convention at the earliest junctures of this case.<sup>15</sup>

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<sup>14</sup> Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States*), 2004 I.C.J. No. 128 (hereafter *Avena*.)

<sup>15</sup> There are two cases pending in the U.S. Supreme Court concerning the effects of the decision of the International Court of Justice in (continued...)

**B. Appellant’s Claims are Factually and Legally Indistinguishable From the *Avena* Proceedings**

Contrary to Respondent’s claims (RB, at p. 55), the claims raised by Appellant in these proceedings and those brought on his behalf before the ICJ in *Avena* are factually and legally identical. Appellant has consistently argued that state authorities violated his individual rights under Article 36 (1)(b) of the Vienna Convention and that the prejudicial breach of those rights entitles him to a domestic judicial remedy. Mexico raised an identical claim on his behalf in the *Avena* proceedings, as the ICJ later found Mexico was fully entitled to do. *Avena*, para. 40 (holding that “Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b).”).

This finding by the ICJ is entirely consistent with the longstanding holdings of the U.S. Supreme Court regarding the procedural status of

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<sup>15</sup>(...continued)

the *Avena* matter. *Sanchez Llamas v. Oregon*, No. 04-10566, presents the questions: (1) Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national? (2) Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?

The other case is *Bustillo v. Johnson*, No. 05-51. *Bustillo* presents the question: Whether, contrary to the International Court of Justice’s interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-01, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or on the ground that the treaty does not create individually enforceable rights? These cases have been argued and are awaiting decision.

individual claimants in cases of international arbitration between two nations:

No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it. . . . By the terms of the compact the individual claimants could not themselves submit their claims and proofs to the commission to be passed upon. Only such claims as were presented to the governments respectively could be “referred” to the commission. . . .

*(Frelinghuysen v. United States ex rel. Key* (1884) 110 U.S. 63, 71); *accord La Abra Silver Mining Co. v. United States* (1889) 175 U.S. 423, 433.)

Just as Mexico represented the interests of Appellant, the United States government, whose views were articulated by the Department of Justice and the Department of State, represented the interests of California.

These arguments were based on the United States’ review of the published decisions in this case, as well as materials provided by the California Attorney General. *See* Declaration of Peter W. Mason Concerning the Fifty-Four Cases, Annex 2, Counter-Memorial of the United States of America (*Mex. v. U.S.*), 2003 I.C.J. Pleadings (*Avena and Other Mexican Nationals*) (Nov. 3, 2003) at A73, para. 4 (“The facts as set forth in Appendices 1-54 have been compiled from materials we have received to date from the Offices of the Attorneys General in the relevant states as well as other state and local officials.”); *see also* Remarks of the Honorable William Howard Taft, IV, Legal Adviser, U.S. Department of State before the National Association of Attorneys General, Thursday, March 20, 2003 (“Those of you who are Attorney Generals of these states should have received a letter from me advising you of [the *Avena* litigation], and of the fact that we will need your help in defending the United

States.”).<sup>16</sup>

Additionally, the United States included a document entitled “Declaration of Ward A. Campbell”, dated October 13, 2003, as part of its evidence in before the ICJ in *Avena*.<sup>17</sup> Mr. Campbell’s declaration contains facts concerning the governor’s ability to review and consider information about Vienna Convention violations in order to comply with requirements imposed by the terms of the Vienna Convention.

Thus, the state’s contention that California was not “in privity in the *Avena* matter” is legally and factually incorrect. Under the Constitution, a state may not enter into international treaties or agreements. (U.S. Const. Art. I, cl. 10(3).) Accordingly, the United States alone represents the interests of the individual states in cases before international courts arising under treaty provisions, and California is by definition never a direct party in those actions. However, it would be inaccurate to maintain that California was not “in privity” in the *Avena* litigation, given that state authorities were both consulted and relied upon by the United States as the source of information in the *Avena* proceedings with respect to the impact of this litigation on the state of California and how California might comply with any decision.

Thus, to the maximum extent possible under the Constitution and under the requirements of international law, California was indeed in privity to the *Avena* litigation and may not now argue to the contrary. (*See also*

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<sup>16</sup> The full text is available at <<http://usinfo.org/wfarchive/2003/030321/epf516.htm>>. See Appellant’s Second Request for Judicial Notice, filed April 25, 2006. The Mason declaration and Taft remarks are included in this motion.

<sup>17</sup> This document is included as part of Appellant’s Second Request for Judicial Notice.

Black's Law Dictionary, Second Pocket Edition (2001) at 556 [defining "privity" as "the connection or relationship between two parties, each having a legally recognized interest in the same subject matter . . . mutuality of interest"].)

While the ICJ litigation necessarily involved only Mexico and the United States as parties, it is beyond doubt that Appellant's claim was fully and fairly considered by the *Avena* Court on its own terms. The claim raised and decided by the ICJ is thus in every sense identical to the one raised here.

**C. Both the Dictates of the Supremacy Clause and the Requirements of International Comity Compel Compliance with the *Avena* Judgment**

The state's response does not contest that the *Avena* Judgment is binding on this Court under the Supremacy Clause, arguing instead a demonstrably untenable interpretation of international comity. (RB, at pp. 56-57.) First, it is beyond dispute that the VCCR is a self-executing treaty ratified without reservations by the United States in 1969. As a result, it became binding on the states under the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, cl. 2). (*See Hines v. Davidowitz* (1941) 312 U.S. 52, 62-63) ["[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land"].)

Neither does the state's response contest that Article 36 confers individual rights on detained foreign nationals, nor could it validly do so following the final and legally binding interpretation of the treaty provided by the International Court of Justice under the terms of the VCCR Optional Protocol. On March 31, 2004, the ICJ issued its *Avena* Judgment,

clarifying, *inter alia*, that the Vienna Convention does in fact confer justiciable rights on individuals that they may invoke in the domestic courts. *See Avena*, para. 40 (“the individual rights of Mexican nationals under subparagraph 1 (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States.”).

The Supremacy Clause places ratified treaties on the same footing as federal statutes; where a self-executing treaty confers rights on individuals, a court “resorts to the treaty for a rule of decision for the case before it as it would to a statute.” (*Edye v. Robertson* (1884) 112 U.S. 580, 590; see also *Hopkirk v. Bell* (1806) 7 U.S. 454, 457 (under the Supremacy Clause, state statute of limitations “must yield” before a conflicting treaty obligation). Accordingly, California courts have long recognized the binding force of justiciable treaty provisions. (See, e.g., *Pierburg GmbH & Co. KG. v. Superior Court* (1982) 137 Cal.App.3d 238, 246 [Hague Evidence Convention provisions supersede state discovery rules due to Supremacy Clause and “California’s interest in avoiding violations of international treaties”]; *Dr. Ing. H.C.F. Porsche A.G. v. Superior Court* (1981) 123 Cal.App.3d 755, 760 [California court “may not exercise jurisdiction in violation of an international treaty”].) Appellant therefore reasserts that the *Avena* Judgment operating by itself requires *de novo* judicial review and reconsideration of the Vienna Convention violation in this case.

Second, the state’s interpretation of the requirements of international comity are plainly incorrect. Under the terms of the Presidential determination and well-settled principles of judicial comity, this Court is not at liberty to “reconsider the ICJ findings.” (RB, at pp. 55-56, fn. 16.) Rather, it is “the long-recognized general rule that, when a judgment binds

or is respected as a matter of comity, a ‘let’s see if we agree’ approach is out of order.” (*Medellin v. Dretke*, 544 U.S. 660, 125 S.Ct. 2088, at p. 2094 (Ginsburg, J., concurring, joined by Scalia, J.).) To hold otherwise would be “in conspicuous conflict with the law of judgments,” (*Id.*, citing Restatement (Second) of Conflict of Laws § 98 (1988); Restatement (Third) of Foreign Relations Law of the United States § 481 (1986); Restatement (Second) of Judgments § 17 (1980).) (*See also Hilton v. Guyot* (1895) 159 U.S. 113, 202-203, 40 L. Ed. 95, 16 S. Ct. 139 [where “comity of this nation” calls for recognition of a judgment rendered abroad, “the merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact”]; Restatement (Second) of Conflict of Laws § 106 (1969) [“A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment . . . .”]; *id.*, § 106, Comment a [“This rule is . . . applicable to judgments rendered in foreign nations . . . .”]; Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 789 (1950) [“[Foreign] judgments will not be denied effect merely because the original court made an error either of fact or of law.”].)

Not surprisingly, the state’s interpretation of the term “comity” was rejected by the United States in pleadings submitted to the Supreme Court in *Medellin v. Dretke*:

[T]he President’s determination is that the Avena decision is to be enforced in accordance with principles of comity. Accordingly, a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention [on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261].

Brief for the United States as *Amicus Curiae*, *Medellin v. Dretke* (2005) 544 U.S. 660.

Moreover, it is beyond dispute that the results of binding international arbitration entered into by the United States must be fully respected by the domestic courts at all levels. Where a treaty invests a body with the authority to adjudicate claims arising under its terms, the decision of that body is “conclusive and final. . .[t]he parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. . .”. (*Comegys v. Vasse* (1828) 26 U.S. 193, 212.) The judgments of international arbitral tribunals determining the rights and duties of nations “are final and conclusive until set aside by agreement between the two governments.” (*Frelinghuysen v. United States ex rel. Key*, 110 U.S. at p. 67.)

An award by a tribunal acting under the joint authority of two countries “is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.” (*La Abra Silver Mining Co. v. United States* (1899) 175 U.S. 423, 463.) Nothing in the state’s response undermines the integrity or fairness of the ICJ proceedings; the *Avena* Judgment must therefore be given full weight and effect by all domestic courts.

**D. Appellant Is Entitled to An Evidentiary Hearing on His Vienna Convention Claim**

As a remedy for the violation of Appellant's Vienna Convention rights, the International Court of Justice ordered that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [among others, Appellant], by taking account . . . of the violation of the rights set forth" in the Vienna Convention. *Avena* at 153(9). "[T]his freedom in the choice of means for such review and reconsideration [, however,] is not without qualification." *Id.* at 31. The review and reconsideration of Appellant's conviction and sentence must be "effective" and "tak[e] account of the violation of the rights set forth in [the] Convention' and guarantee that the violation and the possible prejudice caused by that violation will be fully examined . . ." *Id.* at 138 (citations omitted).

The ICJ held that the violation of Appellant's Article 36 rights must be addressed on its own terms, not under the rubric of other due process rights afforded in the United States criminal justice system. As the Court explained, "[t]he rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law." *Id.* at 139.

On February 28, 2005, the President of the United States issued a directive stating as follows:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of American, that the United States will discharge its international obligations under the decision of the International Court of Justice [*Avena*], by having state courts give effect to that decision in accordance with general principles of comity in cases filed by the 51 Mexican

nationals addressed in that decision.

George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae*, *Medellin v. Dretke* (No. 04-5928). As the United States explained in a brief filed with the United States Supreme Court that same day, “the President has determined that the foreign policy interests of the United States justify compliance with the ICJ’s decision.” Brief of the United States as *Amicus Curiae* at 41, *Medellin v. Dretke*, *supra*. The President expressly acknowledged that the *Avena* Judgment imposes “international obligations” on the United States. *Id.* Indeed, the President has determined “prompt compliance” is in “the paramount interest of the United States.” *Id.*

The President’s determination establishes a “binding federal rule” and hence constitutes the supreme law of the Land. *Id.* at 42. The determination gives Petitioner the right to enforce the *Avena* Judgment in a proceeding filed in the California state courts, and requires the state courts to adhere to the *Avena* Judgment in any such proceeding. The United States explained:

Under that [Presidential] determination, in order to obtain “review and reconsideration” of their convictions and sentences in light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President’s determination that the decision should be enforced under general principles of comity.

*Id.*

The *Avena* Judgment thus requires at a minimum that Appellant receive an evidentiary hearing before a trial court to determine the effect of

the Article 36 violation on his conviction and sentence. *Id.* at 131. According to the ICJ, “it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.” *Id.* at 122. In California post-conviction proceedings, trial courts perform the function in the first instance of determining controverted facts and any prejudice arising. This case should therefore be remanded for an evidentiary hearing at which proof may be offered as to the allegations contained in this appeal.

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## **CONCLUSION**

For all of the reasons stated in the Opening Brief, and in this brief, Appellant's guilt and penalty judgments must be set aside.

DATED: April 25, 2006

Respectfully submitted,

**MICHAEL J. HERSEK**  
State Public Defender

**MARIANNE D. BACHERS**  
Senior Deputy State Public Defender

Attorneys for Appellant

**CERTIFICATE OF COUNSEL**  
**(Cal. Rules of Court, rule 36(b)(2))**

I, MARIANNE D. BACHERS, am the Senior Deputy State Public Defender assigned to represent appellant, Martin Mendoza, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 7,039 words in length.

Dated: April 25, 2006

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MARIANNE D. BACHERS

**DECLARATION OF SERVICE**

Re: *People v. MARTIN MENDOZA*

No. S067678

I, VICTORIA MORGAN, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served true copies of the attached:

**APPELLANT'S REPLY BRIEF**

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

DAVID DELGADO  
Deputy Attorney General  
Office of the Attorney General  
110 West A Street, Suite 1100  
San Diego, CA 92101

San Bernardino County Superior  
Court Clerk, Central District  
351 North Arrowhead  
San Bernardino, CA 92415-0240  
**(Deliver to Hon. James E.  
Edwards)**

ARTHUR KATZ  
Trial Counsel  
45-915 Oasis Street  
Indio, CA 92201

District Attorney's Office  
316 N. Mtn. View Avenue  
San Bernardino, CA 92415

EILEEN STUTSON  
Appeals and Appellate Division  
San Bernardino Superior Court  
401 North Arrowhead Avenue  
San Bernardino, CA 92415-0063

MARTIN MENDOZA  
(Appellant)

Each said envelope was then, on April 25, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2006, at San Francisco, California.

\_\_\_\_\_  
DECLARANT