IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Appellee,	)	No. S067678
v.	)	(San Bernardino Superior Court
MARTIN MENDOZA,	)	No. FMB01787)
Defendant and Appellant.	)	

APPELLANT'S SUPPLEMENTAL BRIEF

INTRODUCTION

Appellate counsel was appointed to represent Mr. Mendoza on June 11, 2002. The Appellant's Opening Brief was filed in this case on May 26, 2005. The Appellant's Reply Brief was filed on April 25, 2006. Oral argument is now set for October 2, 2007. The main issue Appellant will address during oral argument involves how this Court should evaluate and rectify the violations of the Vienna Convention for Consular Rights ("VCCR") which occurred in Mr. Mendoza's case. This is an issue of first impression in this Court.

In 2004, the International Court of Justice ("ICJ") issued its ruling in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.*) 2004 I.C.J. 12 (March 31, 2004) (No. 128) (hereafter *Avena*). Since the ICJ issued its decision, several federal and state courts have issued rulings which discuss the *Avena* decision and the effect it should be given in those

courts.

On October 10, 2007, the United States Supreme Court will hear argument in *Medellin v. Texas*, No. 06-984. The questions presented in the *Medellin* case are the following:

1. Did the President of the United States act within his authority when he determined that the states must comply with the United States' treaty obligation to give effect to the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.)* 2004 I.C.J. 12 (March 31, 2004) (No. 128), in the cases of the 51 nationals of Mexico named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by President of the United States with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

The briefing filed in the *Mendoza* case addresses the same issues which will be considered by the Supreme Court in *Medellin.* Appellant previously requested that his oral argument date be vacated until the Supreme Court issued its ruling in *Medellin*. This Court denied that request.

The *Medellin* opinion will likely provide guidance to this Court about what effect state courts must give the *Avena* decision, and how state courts are required to provide the "review and reconsideration" mandated by *Avena*. Pursuant to California Rules of Court, rule 8.524(h), Appellant requests that, after oral argument, this Court defer submission of the decision of this case until the United States Supreme Court issues its opinion in *Medellin.* Appellant requests the opportunity to file additional briefing thirty days after the *Medellin* opinion is issued.

A supplemental brief before oral argument would typically address

authorities which were decided since the last brief was filed. Because this is a case of first impression in California and in the United States Supreme Court, and as a result of litigation which has occurred around the country, Appellant is providing some brief supplemental authorities which expand on some of the factual and legal theories contained in his prior briefing, even though some of these authorities pre-date that briefing.

I

THIS COURT MUST PROVIDE FOR REVIEW AND RECONSIDERATION OF THE VIOLATIONS OF THE VIENNA CONVENTION OF CONSULAR RIGHTS WHICH OCCURRED IN THIS CASE

The *Avena* decision specifically found that the United States had violated the VCCR because law enforcement authorities failed to advise Mexican nationals, including Mr. Mendoza, charged with capital crimes that they were entitled to have Mexican consular officials notified of their detention and likewise failed to notify Mexican consular officials that a Mexican national had been detained by United States authorities. (*Avena, supra,* at pp. 16, 42-43.)

The *Avena* Court held that the remedy for these violations was "review and reconsideration" of each Mexican national's case, with a view to ascertaining whether the violation by the authorities "caused actual prejudice" to the defendant in the administration of criminal justice. In order to discharge this responsibility, the ICJ held that United States courts must examine the facts, and in particular the prejudice and its causes, of the violation of consular notification rights. (*Avena, supra,* at p. 48.)

This Court must therefore decide how to interpret and apply the ICJ's review and reconsideration standard in light of the consular

notification violation found in Mr. Mendoza's case. There are several alternatives.

A. Because Mr. Mendoza's Rights to Consular Notification Were Denied By State Authorities, This Court Must Vacate Mr. Mendoza's Death Sentence

The face of the record in this case establishes that Mr. Mendoza was denied his rights to be advised that the Mexican Consulate could be notified if he so desired, and his right to have law enforcement authorities notify the Consulate of his detention. Mr. Mendoza was arrested on January 25, 1996, the date the offenses in this case took place. The guilt phase of his trial began on June 9, 1997. (2 CT 468-469; 1 RT 40.)

On June 26, 1997, defense counsel filed a Motion to Suppress Evidence, which argued that the violation of Mr. Mendoza's right to consular assistance under the Vienna Convention on Consular Relations required that his post-arrest statements be suppressed. (2 CT 510-522.) The trial court eventually granted the motion, for reasons other than the VCCR violation.

On December 22, 1997, a letter from Enrique Loaeza Tovar, the Coordinator General of Protection and Consular Matters of the Republic of Mexico, was filed with the trial court in advance of the December 23, 1997, hearing on the defense Motion for New Trial or for Modification of Penalty. (4 CT 1117-1120; 11 RT 2589-2613.) Mr. Tovar asked the court to set aside Mr. Mendoza's death sentence because he was not advised at the time of his arrest of his right to contact the Mexican Consulate in compliance with the Vienna Convention. (4 CT 1119-1120.) The letter specifically states:

> 2. The omission made it impossible for Mr. Mendoza to receive the protection and assistance of the Consulate from the

> moment in which he was apprehended. By virtue of his status as an alien, the consular assistance extended from that moment of detention would have guaranteed, among other things, that the arrestee was aware of in his own language and in an accessible fashion, his constitutional and legal rights in the country where he was apprehended, that he would be provided which [sic] prompt appropriate legal assistance, that he know the possible legal consequences (the application of the death penalty) of the crime of which he was accused; that how the legal system of the country where he was detained would be explained to him.

(4 CT 1119.)

Although trial counsel asked Judge Edwards to permit the representative of the Republic of Mexico who attended the sentencing hearing to address the court, this never happened. (11 RT 2594.) Judge Edwards did not refer to the letter he received from the Republic of Mexico during the sentencing hearing.

Thus both the *Avena* decision and the trial record establish that the officers who arrested Mr. Mendoza did not advise him of his consular rights, and that he was harmed by not having the assistance of the consulate in connection with all of the legal matters mentioned in Mr. Tovar's letter. The prejudice Mr. Mendoza suffered from the deprivation of consular assistance provides sufficient evidence for this Court to reverse the death sentence herein.

B. In the Alternative, This Court Must Order An Evidentiary Proceeding In Order to Comply with the Requirement of Review and Reconsideration

If this Court determines that reversal of Mr. Mendoza's death sentence is not required on the basis of the record below, this Court must order an evidentiary hearing on the VCCR violation so that Mr. Mendoza

can provide further factual support for his *Avena* claim. The *Avena* decision contemplated an evidentiary proceeding at which this legal issue would be explored. The ICJ stated:

> The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, 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 rights set forth in the Convention.

(*Avena, supra,* at p. 48, ¶ 122.)

There are two ways this could be accomplished. This Court could remand this case to the trial court for an evidentiary hearing on the VCCR claim, pursuant to California Rules of Court, rule 8.252, subd. ©. This rule permits a reviewing court to take evidence on appeal. This Court could remand this case to the San Bernardino Superior Court and order that further evidence be taken on the VCCR violation, and then review this claim on direct appeal.

Alternatively, this Court could find that the record of the VCCR violation is best further developed in an evidentiary proceeding during habeas corpus proceedings.

It is Mr. Mendoza's position that if an evidentiary hearing is necessary, the issue is most appropriately adjudicated in the context of habeas corpus proceedings. This Court has already issued an Order to Show Cause why relief should not be granted in *In re Omar Martinez*, California Supreme Court No. S141480. Mr. Martinez's habeas corpus petition presented a single issue for consideration. The petition claims that Mr.

Martinez's conviction and death sentence should be set aside because his international and federal constitutional rights to consular notification were violated by law enforcement officials. Mr. Martinez, like Mr. Mendoza, was one of the *Avena* plaintiffs whose rights under the Vienna Convention were found to have been violated. (*Avena, supra,* at p. 16, ¶ 16.)

Mr. Mendoza has proven a violation of his VCCR rights. It is Mr. Mendoza's position that a fuller and more complete factual picture can be developed in the context of habeas corpus proceedings. Further factual development may demonstrate that he is even more plainly entitled to guilt, as well as penalty phase, relief based on this violation. Alternatively, habeas proceedings may demonstrate that the VCCR violation, in combination with other legal and factual claims, entitles him to relief. But it is not in his best interest to have piecemeal litigation of inter-related factual claims in his case.

C. It is Respondent's Burden to Prove That Mr. Mendoza Was Not Harmed by the State's Failure to Comply with the Vienna Convention

The standard by which a court should evaluate the violation of the Vienna Convention was addressed by the Ninth Circuit in *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 532. In that criminal prosecution, the defendant was prosecuted for illegally entering the United States after being deported. The defendant argued that dismissal of his indictment was required because law enforcement agents had failed to advise him of his right to contact the Mexican Consulate for assistance. The trial court denied the dismissal motion. On appeal, the Ninth Circuit reversed, and found that consular assistance in the case "may well have led not merely to

the appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation." (*United States v. Rangel-Gonzales*, *supra,* 617 F.2d at p. 531.)

The court also found that the appellant "carried his initial burden of going forward with evidence that he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation. There was no evidence to rebut that showing and the indictment should have been dismissed." (*United States v. Rangel-Gonzales, supra,* 617 F. 2d at p. 533.) Under this rationale, the burden of proof shifts to the prosecution once the defendant has made an initial presentation of prejudice. Because the government did not present any meaningful evidence in response to that presented by the defendant, the Ninth Circuit ordered the indictment dismissed.

The Oklahoma Court of Criminal Appeals in *Torres v. State* also addressed whether Torres had been prejudiced by the violation of his Vienna Convention rights. This case has instructive value. *(Torres v. State* (Okla.Crim.App. 2005) 120 P.3d 1184, 1186-1188.) The test adopted in *Torres* was:

> (1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant.

(*Torres, supra,* 120 P.3d at p. 1186.)

The court adopted this test to evaluate the proof which was

presented when the case was remanded for an evidentiary hearing on the VCCR claim.

The record before this Court shows Mr. Mendoza has met both the Ninth Circuit and the *Torres* test. He was deprived of his right to consular notification, and would have taken advantage of that right had he known of it. The consulate would have assisted him. These facts appear on the face of the record before this Court.

The penalty phase mitigation presentation in this case was scanty. The defense presented the testimony of three family members and two family friends.[1] The entire testimony of these witnesses took up twenty-three pages. (10 RT 2488-2520.) Three of these witnesses came from Mexico. As Mr. Tovar's letter explained, the consulate could have provided assistance to Mr. Mendoza with respect to his defense. The absence of this assistance at a critical time plainly prejudiced him in the presentation of his mitigation case.

Respondent has failed to rebut this showing of prejudice.

Therefore, this Court must vacate Mr. Mendoza's death sentence.

II

THE STATE OF CALIFORNIA MUST COMPLY WITH THE PRESIDENTIAL DIRECTIVE

Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. It has long been recognized that the "Laws" to which this section refers include

[1] The defense also presented the testimony of a psychologist at the penalty phase. His testimony was also quite short. (10 RT 2426-2487.)

treaties of the United States. (See, e.g., *Fong Yue Ting v. United States* (1893) 149 U.S. 698, 713; *In re Neagle* (1890) 135 U.S. 1, 63-64.) And as this Court has made clear, the President's power and duty under this clause is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but also includes authority to take such steps as he concludes are necessary to carry into effect "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution." (*In re Neagle, supra,* 135 U.S. at p. 64.)

The President may also take steps that he deems appropriate to enforce federal laws without specific Congressional authorization. (See, e.g., *Cooper v. Aaron* (1958) 358 U.S. 1 (dispatch of federal troops); *In re Neagle, supra,* 135 U.S. at pp. 63-68 (dispatch of federal marshal).

Here, the President has directed that "the United States will discharge its international obligations under [Avena] by having state courts give effect to the decision" in the case of Mr. Mendoza, and the other *Avena* plaintiffs.[2] The President's choice of the means by which the United States would discharge its obligations under the Avena judgment falls squarely within his authority to take care that the United States's treaty obligations are faithfully executed.

The Supreme Court recently stated, in *American Insurance Association v. Garamendi* (2003) 539 U.S. 396, 413: "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." As a result, the action taken by the President in the exercise of his foreign affairs

[2] The Presidential Order is attached as Appendix A.

authority in issuing the *Avena* compliance directive preempts any claimed inconsistency with state law.

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III

CONCLUSION

Appellant death sentence should be set aside in light of the VCCR violations shown in this case. Alternatively, this Court should withhold submission of this case until the Supreme Court rules in *Medellin*, or, order appropriate evidentiary proceedings for further factual development of the claim.

DATED: September 17, 2007

Respectfully submitted,

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MARIANNE BACHERS
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DECLARATION OF SERVICE

Re: *People v. MARTIN MENDOZA* No. S067678

I, GLENICE D. FULLER, 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 SUPPLEMENTAL BRIEF

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

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MARTIN MENDOZA
(Appellant)

Each said envelope was then, on September 17, 2007, 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 September 17, 2007, at San Francisco, California.

_____

DECLARANT