

## THE IMPACT OF ARTICLE 36 VIOLATIONS ON MEXICANS IN CAPITAL CASES

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Mexico offers extensive expert assistance to Mexican nationals facing death sentences throughout the United States. American lawyers with the Mexican Capital Legal Assistance Program (hereinafter “MCLAP”) provide wide-ranging support at all stages of these cases, including multi-dimensional litigation efforts, mitigation investigations in Mexico, identification of appropriate, culturally knowledgeable experts, preparation of trial, appellate and international briefs, and coordination of the litigation of issues especially important in cases of Mexican nationals, including language issues, racial discrimination, and international law.<sup>1</sup> MCLAP is extraordinarily successful at both avoiding death sentences being imposed and preventing the carrying out of executions.<sup>2</sup>

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1. *See* *Marquez-Burrola v. State*, 157 P.3d 749, 764, n.13 (Okla. Crim. App. 2007) (“The [MCLAP] was established to provide experienced legal, forensic, and financial support to defense counsel around the country who represent Mexican nationals charged with capital crimes.”). For more on the services MCLAP provides, see Maurice Chammah, *How Mexico Saves Its Citizens from the Death Penalty in the U.S.*, MARSHALL PROJECT (Sept. 22, 2016), <https://www.themarshallproject.org/2016/09/22/how-mexico-saves-its-citizens-from-the-death-penalty-in-the-u-s> [<https://perma.cc/6VRD-W4JE>].

2. According to internal calculations, the death-sentencing rate for Mexican nationals in cases where MCLAP was allowed to provide timely assistance, from March 2008 through November 2017, is just 0.58% (4 death sentences out of 694 cases); when MCLAP is prevented from assisting, the death-sentencing rate is 100%. [Data on file with the authors].

Of course, Mexico cannot help its nationals if it is unaware they have been arrested or are facing capital charges. The law unequivocally requires arresting authorities to tell arrested foreign nationals without delay that they have a right to have their consulate notified of their arrest—and just as unequivocally requires the authorities to then notify the consulate if requested, also without delay. The harm flowing from failing to comply with consular notification requirements is clearly greatest in a capital case, where a governmental authority proposes to take the life of a foreign citizen and the failure to notify his consulate results in lost opportunities. And no one stands to benefit more from the proper exercise of consular notification than Mexican nationals, both because they are uniquely vulnerable to being discriminated against in every stage of capital prosecutions and because the assistance offered them by Mexico is especially far-reaching. However, U.S. authorities routinely violate these notification laws, with predictably disastrous results.

In this article, we explore the vital importance of U.S. authorities complying with their consular notification obligations by demonstrating the glaring difference in capital case outcomes where Mexicans do receive consular assistance versus where they do not receive such assistance.

## I. BACKGROUND ON THE VIENNA CONVENTION ON CONSULAR RELATIONS AND ARTICLE 36

### A. *Overview of the Vienna Convention*

The United Nations adopted the Vienna Convention on Consular Relations (VCCR) in 1963. As of November 28, 2017, 179 countries have signed on to the VCCR,<sup>3</sup> making it among the most widely ratified treaties in the world. The treaty provides the fundamental framework for consular relations between nations, including defining the functions of a consul,<sup>4</sup> dictating rules for recall of consular personnel,<sup>5</sup> protecting consular premises,<sup>6</sup> and protecting confidential communications between consul and home country.<sup>7</sup> One key provision, Article 36(1)(b), requires:

[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall

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3. United Nations Treaty Collection, *Vienna Convention on Consular Relations*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=III-6&chapter=3&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3&lang=en) [https://perma.cc/6YMT-M4LM].

4. Vienna Convention on Consular Relations art. 5, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

5. VCCR, *supra* note 4, art. 23.

6. VCCR, *supra* note 4, art. 31.

7. VCCR, *supra* note 4, art. 35.

inform the person concerned without delay of his rights under this subparagraph.<sup>8</sup>

Simply put, police must inform a foreign national of his right to contact his consulate for assistance, and also inform the arrestee's consulate of the arrest if the arrestee asks them to. Both requirements must be met without delay. Article 36 also gives consular officers a right to visit, converse, and correspond with their detained nationals, and to arrange for their legal representation.<sup>9</sup> It further requires that domestic laws and regulations give "full effect" to these rights.<sup>10</sup>

The treaty also includes a mechanism for signatory nations to resolve disputes between themselves, known as the Optional Protocol concerning the Compulsory Settlement of Disputes.<sup>11</sup> The Optional Protocol creates compulsory jurisdiction over any dispute concerning the treaty in the International Court of Justice ("ICJ").<sup>12</sup> The United States signed and ratified this optional protocol; however, in 2015, the United States notified the Secretary-General of the United Nations that it was withdrawing from that Optional Protocol, though *not* withdrawing from the VCCR.<sup>13</sup>

#### B. A Brief History of Noncompliance/Enforcement Issues

Arresting agencies throughout the United States have historically abysmally failed to notify foreign detainees of their right to consular notification.<sup>14</sup> On several occasions prior to the United States' withdrawal from the Optional Protocol, countries have taken their complaints about the repeated failures to the ICJ. For instance, in 1998, Paraguay instituted proceedings against the United States in the ICJ, complaining of a violation of Article 36 by authorities in the Commonwealth of Virginia, who detained—and ultimately sentenced to death—

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8. VCCR, *supra* note 4, art. 36(1)(b).

9. VCCR, *supra* note 4, art. 36(1)(c).

10. VCCR, *supra* note 4, art. 36(2).

11. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

12. *Id.*

13. Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, Secretary-General of the United Nations (Mar. 7, 2005), <https://www.state.gov/documents/organization/87288.pdf> [<https://perma.cc/6N87-3D3P>].

14. *See, e.g.,* *Medellín v. Dretke (Medellín I)*, 544 U.S. 660, 674 (2005) (O'Connor, J., dissenting) ("[T]he individual States' (often confessed) noncompliance with the treaty has been a vexing problem."); *see also* Mark Warren, *Consular Rights, Foreign Nationals and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us> ("Official records produced by the plaintiff revealed that over 53,000 foreign nationals were arrested in New York City during 1997, but that the NYPD Alien Notification Log registered only 4 cases in which consulates were notified of those arrests—a failure rate well in excess of 99 per cent (even presuming that a majority of the detainees might have declined consular notification).").

Paraguayan national Angel Breard.<sup>15</sup> The ICJ, at Paraguay's request, issued provisional measures—similar to a restraining order—to prevent Breard's execution pending decision by the Court.<sup>16</sup> Virginia executed Mr. Breard anyway, and Paraguay ultimately withdrew its case.<sup>17</sup>

Similarly, in 1999, Germany obtained provisional measures from the ICJ to prevent Arizona's planned executions of German brothers Karl and Walter LaGrand on the basis of a violation of their Article 36 rights.<sup>18</sup> Arizona executed both LaGrands in spite of the ICJ's order. Germany, unlike Paraguay, continued its case in the ICJ, ultimately obtaining a groundbreaking decision in Germany's favor.<sup>19</sup> That decision held that the VCCR grants rights to individuals, and also that domestic laws cannot limit the VCCR rights of foreign nationals.<sup>20</sup> The decision also made explicit that the ICJ's provisional measures create legally binding judicial orders.<sup>21</sup>

### 1. The *Avena* Judgment

Against this backdrop, Mexico, in 2003, brought a case against the United States with respect to fifty-two death-sentenced Mexican nationals. Like Germany, Mexico prevailed; the ICJ found Article 36 violations in fifty-one of the fifty-two cases presented.<sup>22</sup> The ICJ held the "without delay" provision of Article 36 to require authorities to notify foreign nationals of their right to contact the consulate either as soon as they know he is a foreign national or as soon as grounds exist for believing he is probably a foreign national.<sup>23</sup> The ICJ found that in all but one of the fifty-two cases, the United States unambiguously violated this obligation.<sup>24</sup> Significantly and quite distinctly from the ICJ's holdings in the Paraguay and Germany cases, the Court ordered the United States to provide judicial review to each and every one of the fifty-one Mexicans named in the suit whose Article 36 rights had been violated, and to determine whether the failure to timely advise the consulate of their arrests resulted in

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15. Application of the Republic of Paraguay (Para. v. U.S.), Application, ¶ 5, 7, 11 (Apr. 3, 1998), <http://www.icj-cij.org/en/case/99> [<https://perma.cc/33GN-HUJ4>].

16. Cases Concerning Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 ICJ, 248, 258 (Apr. 9 1998).

17. The Agent of Paraguay to the Registrar of the International Court of Justice (Para. v. U.S.), Correspondence (Apr. 28, 1998), <http://www.icj-cij.org/files/case-related/99/13120.pdf> [<https://perma.cc/9EB6-B9U9>].

18. Request for the Indication of Provisional Measures, LaGrand (Ger. v. U.S.), Order, 1999 I.C.J. Rep. 9 (Mar. 3).

19. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶ 3, 4, 5 (June 27).

20. *Id.* ¶ 75, 79.

21. *Id.* ¶ 102.

22. *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 90 (Mar. 31).

23. *Id.* ¶ 63.

24. *Id.* ¶ 106.

“actual prejudice to the defendant.”<sup>25</sup> Importantly, the United States judiciary also had to review and reconsider the convictions and sentences as if procedural default rules did not exist.<sup>26</sup>

## 2. *Sanchez-Llamas and Medellín*

Following *Avena*, the procedurally advanced case of José Ernesto Medellín Rojas, one of the fifty-one nationals in whose case the ICJ found a violation,<sup>27</sup> became the test case for how the United States judiciary would implement the ICJ’s orders. Mr. Medellín unsuccessfully sought to enforce the ICJ ruling that mandated review and reconsideration in United States federal court; the Fifth Circuit denied relief,<sup>28</sup> and the United States Supreme Court granted certiorari.<sup>29</sup> Before the Supreme Court could consider the case, then-president George W. Bush issued an executive memorandum to his Attorney General, asserting federal constitutional authority to order states to review the convictions and sentences of foreign nationals whose Article 36 rights had been violated.<sup>30</sup> Medellín filed a new claim in state court on the basis of President Bush’s memorandum, and the U.S. Supreme Court dismissed his existing case.<sup>31</sup> The

25. *Id.* ¶ 121.

26. *Id.* ¶ 153(11).

27. The especially gruesome facts of Mr. Medellín’s case provided Texas with ample opportunity to focus media and political attention away from the true issue: Texas’ refusal to comply with a binding international obligation to provide review and reconsideration of Mr. Medellín’s conviction and death sentence in light of the Article 36 violation, and the plethora of negative consequences to U.S. international relations and commitments flowing from that refusal. *Mexican Government’s Position on Texas Execution of Mexican Jose Ernesto Medellin Rojas*, BANDERAS NEWS (Aug. 2008), <http://www.banderasnews.com/0808/edat-govtposition.htm> [<https://perma.cc/6BUJ-Y43S>].

28. *Medellín v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

29. *Medellín v. Dretke (Medellín I)*, 544 U.S. 660, 661 (2005) (per curiam).

30. *Medellín v. Texas (Medellín II)*, 552 U.S. 491, 498 (2008); see also OFFICE OF THE PRESS SEC’Y, *Press Release: Memorandum to the Attorney General* (Feb. 28, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html> [<https://perma.cc/4KA5-Z8J8>].

31. *Medellín I*, 544 U.S. at 667. It is no coincidence that President Bush issued his carefully worded executive memorandum, an action which predictably detoured and delayed the progress of the *Medellín* case, while Justice Sandra Day O’Connor still sat on the US Supreme Court. The Bush Administration considered Justice O’Connor a probable vote for upholding the Supremacy Clause and the ICJ’s ruling in *Avena*. See Sandra Day O’Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996) (“Just as state courts are expected to follow the dictates of the Constitution and federal statutes, I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to treaties, and our status as a free nation demands faithful compliance with the law of free nations.”). Derailing Medellín’s first attempt to enforce the *Avena* judgment until Justice O’Connor retired and President Bush had a chance to appoint her replacement made political sense for an

state court dismissed Medellín's second appeal,<sup>32</sup> and again, the U.S. Supreme Court granted certiorari.<sup>33</sup>

While Medellín's case worked its way toward the Supreme Court, the Court decided *Sanchez-Llamas v. Oregon*.<sup>34</sup> In *Sanchez-Llamas*, the Court consolidated two non-capital defendants' cases: a Mexican who was *not* one of the *Avena* litigants and a Honduran national appealed their convictions on the basis of Vienna Convention violations. The Court held that statements taken in violation of Article 36 would not automatically fall within the "exclusionary rule," and that VCCR claims "may be subjected to the same procedural default rules that apply generally to other federal-law claims."<sup>35</sup> This holding regarding procedural default was contrary to the *Avena* judgment's order that review and reconsideration must be undertaken irrespective of procedural default rules.<sup>36</sup>

On March 28, 2008, the Court issued its opinion in *Medellín v. Texas*,<sup>37</sup> ruling that although the ICJ's *Avena* judgment created a binding legal obligation, states could legally continue to refuse to consider procedurally defaulted Vienna Convention claims.<sup>38</sup> The Court held that the ICJ's order that the United States provide review and reconsideration for the fifty-one condemned Mexican nationals was unenforceable absent congressionally promulgated law, and the President's executive memorandum could not substitute for legislation.<sup>39</sup>

### 3. Failed Attempts at Legislation

Given *Medellín*'s holding that, absent federal legislation, the *Avena* judgment cannot be directly enforced as a federal law preempting state laws' limiting the filing of successive habeas petitions, Congress has several times considered so-called *Avena*-implementing legislation.<sup>40</sup> A diverse range of

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administration giving lip service to its international obligations while at the same time playing to its isolationist base.

32. *Ex parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

33. *Medellín I*, 544 U.S. at 661. By this time, Justice O'Connor had retired to care for her husband who was in declining health, as she had made clear was her intention for quite a long time, and Samuel Alito, a stalwart isolationist, had taken her seat on the Court, creating a very different legal landscape for the landmark interpretation of the ICJ's ruling. *See Alito Sworn in as Supreme Court Justice*, NBC NEWS (Jan. 31 2006, 7:48 a.m.), [http://www.nbcnews.com/id/11111624/ns/us-news-the\\_changing\\_court/t/alito-sworn-supreme-court-justice/#.WlpPI62ZPVq](http://www.nbcnews.com/id/11111624/ns/us-news-the_changing_court/t/alito-sworn-supreme-court-justice/#.WlpPI62ZPVq) [<https://perma.cc/AGG3-J2QX>].

34. 548 U.S. 331 (2006).

35. *Ex parte Medellín*, 223 S.W.3d at 331.

36. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 121, 134, 143 (Mar. 31).

37. 552 U.S. 491, 491 (2008).

38. *Id.* at 491–92, 506.

39. *Id.* at 532.

40. *See Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong. (2008); *see also* Senator Patrick Leahy, *Press Release: Leahy Renews Effort to Bring U.S. into Compliance with International Consular Notification Treaty* (June 14, 2011), <https://www.leahy.senate.gov/press/>

business, military, diplomatic, religious, and other American interests that all recognize the critical importance of treaty compliance in general, and of Article 36 compliance specifically, have promoted federal implementation of the *Avena* judgment.<sup>41</sup> In 2008, Rep. Howard Berman of California introduced the Avena Case Implementation Act of 2008, “To create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations.”<sup>42</sup> It did not pass. In 2011, Senator Patrick Leahy of Vermont introduced a similar bill in the Senate;<sup>43</sup> it, too, failed. There have been attempts to attach language on this issue to other bills, but those attempts have yet to succeed.

Thus, as of now, states remain able to disregard Vienna Convention claims not raised at trial, and even to execute *Avena* litigants who never received the ICJ-mandated review and reconsideration of their claims, despite the fact that doing so violates binding international legal obligations.<sup>44</sup> Indeed, Texas has since executed five men whom the ICJ ordered to receive review and reconsideration: José Ernesto Medellín Rojas, on August 5, 2008;<sup>45</sup> Humberto Leal Garcia, on July 7, 2011;<sup>46</sup> Edgar Arias Tamayo, on January 22, 2014;<sup>47</sup> Ramiro Hernandez Llanas, on April 9, 2014;<sup>48</sup> and Ruben Cardenas Ramirez, on November 8, 2017.<sup>49</sup>

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leahy-renews-effort-to-bring-us-into-compliance-with-international-consular-notification-treaty [https://perma.cc/2Y4B-XBHL].

41. See, e.g., Euna Lee, *Consular access: A two-way street on a crucial right*, THE WASH. POST (June 21, 2011), [https://www.washingtonpost.com/opinions/consular-access-a-two-way-street-on-a-crucial-right/2011/06/22/AGYkPdJH\\_print.html](https://www.washingtonpost.com/opinions/consular-access-a-two-way-street-on-a-crucial-right/2011/06/22/AGYkPdJH_print.html) [https://perma.cc/T6JF-HT6T].

42. Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008).

43. Leahy, *supra* note 40.

44. Although states are not compelled by either federal judicial rulings or federal legislation to implement the *Avena* judgment or enforce Article 36, they remain free to recognize the importance of compliance with international law to their constituents, and can both implement the *Avena* judgment and create Article 36 compliance mechanisms through their own judicial and legislative actions. See *infra* Part III.

45. BANDERAS NEWS, *supra* note 27.

46. Chris McGreal, *Humberto Leal Garcia Executed in Texas Despite White House Appeal*, GUARDIAN (July 7 2011, 7:56 p.m.), <https://www.theguardian.com/world/2011/jul/08/humberto-leal-garcia-executed-texas> [https://perma.cc/4KMU-F5X5].

47. Tom Dart, *Mexican Edgar Tamayo Executed in Texas Despite Last-Minute Pleas*, GUARDIAN (Jan. 22 2014, 11:00 p.m.), <https://www.theguardian.com/world/2014/jan/23/mexican-edgar-tamayo-executed-texas> [https://perma.cc/5VL3-LFVN].

48. *Texas Executes Mexican National for 1997 Murder*, CBS NEWS (Apr. 10, 2014, 10:55 a.m.), <https://www.cbsnews.com/news/texas-executes-mexican-national-for-1997-murder/> [https://perma.cc/NVS2-5DKE].

49. *Texas Execution of Ruben Cardenas Ramirez Sparks Row with Mexico*, BBC NEWS (Nov. 9, 2017), <http://www.bbc.com/news/world-us-canada-41928904> [https://perma.cc/5UD3-ERYY].

## II. HOW ARTICLE 36 VIOLATIONS HARM MEXICAN CAPITAL DEFENDANTS

This background establishes not only that the United States has continually failed to comply with its binding treaty obligations under Article 36, but that Mexico and other countries care enough about these violations to continue to fiercely litigate the issue, both domestically and internationally. But why do both Mexico and the international community at large consider strict Article 36 compliance to be such a big deal? This section explores how Article 36 violations dramatically impact Mexican nationals facing capital charges<sup>50</sup> and demonstrates the life and death difference in case outcomes when Mexican consular authorities timely learn of their nationals' arrests.

Although the United States is obliged to comply with Article 36 in relation to the citizens of any of the 178 other countries who have signed the VCCR, the compliance concern is especially great for citizens of Mexico. This is of course partly due to the sheer number of Mexican citizens in the United States. In 2010, fully twenty-nine percent of the foreign-born population residing in the United States was from Mexico,<sup>51</sup> and this does not include large numbers here temporarily or otherwise not recorded by the census. The next closest country, China, had just five percent.<sup>52</sup> But as detailed below, apart from numbers, Mexicans are uniquely vulnerable at every stage of the capital prosecution process due to rampant racial and ethnic bias, significant differences between the Mexican and American legal systems, and complex language issues.

### A. *Mexicans are Subject to Extreme Racial and Ethnic Bias*

Mexican immigrants “come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.”<sup>53</sup> Prejudice specifically against Mexicans has recently been prevalent in the media, in part due to a series of anti-Mexican comments

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50. Article 36 applies any time a foreign national is arrested or detained; it is not limited to capital, or even serious, crimes. Yet the three ICJ cases on Article 36 were all death penalty cases. One reason for this is simply that the stakes are higher; countries—especially those without the death penalty—are more concerned about their citizens being put to death than they are about them serving prison terms. Mexico is particularly opposed to capital punishment, and feels a special duty to protect its citizens from this practice; it is thus especially aggrieved when the United States prevents it from doing so. Moreover, death penalty cases are more complex than other prosecutions, and accordingly provide more opportunities for consular intervention and assistance. Indeed, the presentation of mitigation evidence, a central feature of capital cases, is an especially fruitful area for consular assistance. *See infra* Section II.D. Thus, it is in capital cases that consular notification is the most crucial.

51. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES 6 (2010), [https://www.census.gov/newsroom/pdf/cspan\\_fb\\_slides.pdf](https://www.census.gov/newsroom/pdf/cspan_fb_slides.pdf) [<https://perma.cc/PG4C-7KJA>] (referencing data from the American Community Survey and the Census of Population).

52. *Id.* at 9.

53. JUAN-VINCENTE PALERM, BOBBY R. VINCENT & KATHRYN VINCENT, *Mexican Immigrants in Courts*, in IMMIGRANTS IN COURTS 96 (Joanne Moore ed., 1999).

made by now-President Donald Trump.<sup>54</sup> It is not simply race or foreignness, but specifically *Mexican nationality* targeted by this focused vitriol. Such unfair biases can easily affect discretionary prosecutorial decisions, as well as judges' rulings and juries' willingness to convict and to impose death sentences.<sup>55</sup>

The well-documented phenomena of prejudice and bias exist throughout the justice system,<sup>56</sup> but they are especially problematic in capital cases because of the unparalleled opportunities for multiple decision makers to unfairly exercise unreviewable or virtually unreviewable discretion. Many states have ever-expanding lists of aggravating circumstances that cover nearly every first-degree murder conceivable.<sup>57</sup> Those officials who make the decision about how to charge a case thus exercise significant discretion in choosing which cases will be prosecuted capitally.<sup>58</sup> This discretion leaves room for police and prosecutors, consciously or not, to give effect to any biases they or their constituents may harbor, and to seek the death penalty in a discriminatory manner.

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54. See, e.g., *Transcript of Donald J. Trump Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/U9EP-X3UZ>] (“When Mexico sends its people, they’re not sending their best. . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”).

55. See generally CULTURAL ISSUES IN CRIMINAL DEFENSE (Linda Friedman Ramirez ed., 3d ed. 2007) (discussing selective prosecution, immigration racial profiling, and cultural issues with jury selection and sentencing); see also Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017) (showing general prejudice toward Mexican Americans in non-capital case where juror expressed view that defendant was guilty of sexual assault because he was Mexican).

56. See, e.g., Hernandez v. Texas, 347 U.S. 475, 478 (1954) (“Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws.”); NANCY E. WALKER ET AL., NATIONAL COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 1 (2004) (“[R]esearch and information to date show that, along with other persons of color, Latinos receive more severe treatment at all stages of the criminal justice system, beginning with police stops and ending with longer periods of incarceration, than similarly-situated White Americans.”); Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 558 (2014) (finding that death-qualified jurors held both greater implicit and greater explicit racial bias than non-death-qualified jurors).

57. See, e.g., Petition for Writ of Certiorari at 3, 12, Hidalgo v. Arizona, U.S. No. 17-251 (Aug. 14, 2017) (noting that virtually every first-degree murder in Arizona fits under at least one of the state’s aggravating circumstances); *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report*, ABA, at v (Mar. 2012), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/final\\_missouri\\_assessment\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf) [<https://perma.cc/3L5H-HKTK>] (“Missouri should substantially revise its aggravating circumstances, such that only a ‘narrow category of the most serious’ murder cases are eligible for the death penalty, as required by the U.S. Supreme Court.”).

58. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1260 (2011).

This concern is not hypothetical, nor is it merely a question of political correctness; initial charging decisions seriously impact just outcomes. For example, in its submission to the ICJ in the *Avena* litigation, Mexico highlighted the illustrative case of Jose Trinidad Loza, one of the *Avena* litigants whose Article 36 rights were violated: “The lead police detective in Mr. Loza’s case has admitted that he referred to Mr. Loza as a ‘wetback’—an exceedingly derogatory ethnic slur used to describe recent Mexican immigrants—throughout his investigation. This same officer made the decision to seek the death penalty against Mr. Loza.”<sup>59</sup>

Capital cases afford multiple junctures where law enforcement personnel and prosecutors can purposefully or unconsciously discriminate, starting with initial investigation and arrest, through the decision to bring murder charges, the decision to file a death notice, the decision to take a case to trial rather than offer a plea bargain, and the conduct of the trial itself. Although discriminatory intent by police and prosecutors is exceedingly difficult to prove—any evidence usually remains in the hands of prosecutors and the standards even for obtaining discovery, let alone obtaining relief, are almost insurmountably high<sup>60</sup>—strong circumstantial evidence exists that police and prosecutors use their broad discretion in discriminatory ways at every single stage of a criminal proceeding.<sup>61</sup> Indeed, in some instances, courts have explicitly recognized that law enforcement agencies have discriminatorily stopped, detained, and arrested

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59. Memorial of Mexico, Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), ¶ 43 (June 20, 2003), <http://www.icj-cij.org/files/case-related/128/8272.pdf> [<https://perma.cc/5QWN-DQHE>] [hereinafter Memorial of Mexico].

60. See *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (requiring, in a racial selective prosecution claim, a showing that the government declined to prosecute similarly situated suspects of other races in order to receive entitlement to discovery); *United States v. Bass*, 536 U.S. 862, 863 (2002) (applying the same standard to capital cases); *Wayte v. United States*, 470 U.S. 598, 608 (1984) (“It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.”) (citations omitted).

61. See, e.g., Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65, 73 (1997) (noting that a Hispanic man accused of killing a White man is 4.6 times as likely to be sentenced to death than a White man accused of killing a Hispanic man); see also Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV., 807, 834 (2008) (finding in Harris County, Texas, “the bar appears to have been set lower for pursuing death against black defendants.”); Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites are Far More Likely to be Ruled “Justifiable,”* THE MARSHALL PROJECT (Aug. 14, 2017 5:30 a.m.), [https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20171128-899](https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20171128-899) [<https://perma.cc/RK3X-SJGS>] (reporting that police classified white-on-black killings as “justifiable” at a much higher rate than other killings).

Latinos on the basis of their race.<sup>62</sup> And the Supreme Court has recognized that where broad discretion exists, “there is a unique opportunity for racial prejudice to operate.”<sup>63</sup> But because of the virtually impossibly high evidentiary standards of proof imposed on defendants seeking to establish selective prosecution, prosecutors largely maintain the ability to discriminate with impunity,<sup>64</sup> and they continue to do so.

When consular officials become aware that Mexican nationals are detained and facing serious charges, they can and do intervene and attempt to minimize the effects of these biases. As Mexico explained to the ICJ in the *Avena* litigation, “Mexican consular officers are keenly aware of the overt and subtle ways in which Mexican nationals can be treated differently, based upon their nationality. Through their vigilant presence in courtrooms, jails, and lawyers’ offices, they can detect the presence of unfair bias, and take steps to expose it.”<sup>65</sup> The mere presence of officials from Mexico in court may have the effect of increasing awareness and reducing the impunity with which racist attitudes might be expressed and enacted. But more importantly, consular officials and the MCLAP lawyers employed to bring their expertise to the fore charge into these cases with a wide array of immediate assistance, ranging from short-term advice to the defendant to not discuss the case with anyone besides their lawyers to mitigation investigation to intensive strategy assistance.<sup>66</sup>

#### B. *Differences between the Mexican and U.S. Justice Systems Render Mexicans Uniquely Vulnerable*

Unfamiliarity with the U.S. justice system can be a major problem for any foreign national detained in this country. For instance, most Americans are at least vaguely familiar with the concept of “the right to remain silent” and the rest of the *Miranda* rights from movies and television, if not from a civics class; foreign citizens often are completely unaware of their most basic rights. Beyond this baseline risk, however, particular differences between the Mexican and U.S.

62. See *Ortega Melendres v. Arpaio*, 784 F.3d 1254, 1266 (9th Cir. 2015) (upholding injunction based on law enforcement practices discriminating against Latinos in Maricopa County, Arizona); see also *Press Release: Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff’s Office, and Sheriff Joseph Arpaio*, U.S. DEP’T OF JUSTICE (May 10, 2012), <https://www.justice.gov/opa/pr/departments-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s> [<https://perma.cc/NEY6-Y84Q>]; Troy Carter, *Montana Highway Patrol Settles Racial Profiling Lawsuit*, BOZEMAN DAILY CHRONICLE (Apr. 3, 2015), [https://www.bozemandailychronicle.com/news/crime/montana-highway-patrol-settles-racial-profiling-lawsuit/article\\_bbd0aaa-e8cf-5d5f-839c-607a0131e7c2.html](https://www.bozemandailychronicle.com/news/crime/montana-highway-patrol-settles-racial-profiling-lawsuit/article_bbd0aaa-e8cf-5d5f-839c-607a0131e7c2.html) [<https://perma.cc/G9Y8-TLQ9>].

63. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

64. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHL.-KENT L. REV. 605, 618–24 (1998).

65. Memorial of Mexico, *supra* note 59, ¶ 42.

66. See *infra* Section II.B.

criminal justice systems render Mexicans particularly vulnerable to making unwise decisions after their arrests.

### 1. Confessions

Crucially, until recently,<sup>67</sup> the law in Mexico provided that confessions were not admissible unless taken in front of the Public Prosecutor or judge *and* in the presence of counsel or a “person of confidence” to the defendant.<sup>68</sup> Thus, a Mexican unfamiliar with U.S. pretrial rules would understandably believe any information he told police would not be used against him and indeed, giving an uncounseled statement might actually be useful in avoiding harsh treatment.<sup>69</sup> Mexicans have thus historically been—and many surely remain—uniquely likely to give damaging admissions, especially where police use coercive interrogation tactics. In addition, because of draconian immigration consequences for many arrested Mexican nationals and their families, coercive interrogation techniques abound in cases involving Mexican suspects; they are more deferential to law enforcement because of fear of deportation, and in some cases police may intentionally exploit this vulnerability. A suspect who believes he or a loved one will receive harsher treatment if he does not confess, for instance, or one who believes he will be allowed to go home or contact family if he offers a statement first, is much more likely to do so if he comes from a culture where that statement cannot be used against him.

Consular officials can mitigate this concern; when given access to their nationals without delay, they thoroughly explain this particular aspect of the U.S. justice system, advise the detainee not to speak to the police without an attorney, and put things in familiar terms the detainee can process and understand. Advice from a consular official is much more likely to be both understood and trusted than, say, a *Miranda* warning given by police. Moreover, consular officials, when given prompt notification and access, advise their nationals *before* courts typically would appoint an attorney;<sup>70</sup> appointed attorneys generally do not

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67. In 2008, a set of sweeping reforms to the Mexican criminal justice system was passed, to be implemented over the course of eight years. *See* NANCY G. CORTÉS, OCTAVIO RODRÍGUEZ FERREIRA & DAVID A. SHIRK, 2016 JUSTICIABARÓMETRO—PERSPECTIVES ON MEXICO’S CRIMINAL JUSTICE SYSTEM: WHAT DO ITS OPERATORS THINK? 1, 41 (2016), [https://justiceinmexico.org/wp-content/uploads/2017/03/2016-Justiciabarometro\\_English-Version\\_Online.pdf](https://justiceinmexico.org/wp-content/uploads/2017/03/2016-Justiciabarometro_English-Version_Online.pdf) [<https://perma.cc/XW3D-4APZ>]. The last of these reforms were scheduled to take effect in 2016, but implementation efforts are still underway. *Id.*

68. *See* Memorial of Mexico, *supra* note 59, ¶ 59 (quoting Declaration of Adrián Franco, annex 3).

69. Of course, *Miranda* warnings include an advisement that statements can be used against a defendant, but significant barriers exist to comprehension of *Miranda* warnings, especially for non-English-speaking defendants. *See infra* Part II.C.

70. U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS 24–25 (2016), [https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA\\_Manual\\_4th\\_Edition\\_September\\_2017.pdf](https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_September_2017.pdf) [<https://perma.cc/6U4W-5J86>].

receive formal appointment during early interrogations unless the detainee specifically requests one, something many Mexican nationals do not even realize they can request, or may not know how to request.<sup>71</sup> Consular officials are thus uniquely situated to prevent damaging, often illegal, and sometimes outright false, confessions—if they are notified of the detention and given prompt access to their nationals, as Article 36 requires.

## 2. Plea Bargains

Prior to recent changes, Mexican law did not allow for negotiated resolutions, where reduced penalties are offered in exchange for a guilty plea, in most serious felony cases.<sup>72</sup> Thus, a prosecutor making such an offer in Mexico or a defense attorney proposing such a resolution clearly would have been breaking the law. This is in sharp distinction to U.S. practice where the overwhelming majority of cases get resolved through plea bargains.<sup>73</sup> Because of this difference, Mexicans unfamiliar with the U.S. system are likely to be highly suspicious of, or even outright refuse to consider, plea negotiations. Yet a negotiated plea is very often a defendant's best chance to avoid a death sentence.

Consular officials can assist in this process by explaining the system, the benefits of a plea offer, and the consequences of rejecting it. Consular officials and lawyers provided by the Mexican government through MCLAP can work with the defendants and with their families to explore plea bargain possibilities and convince otherwise recalcitrant defendants that such resolutions are not only perfectly legal in the United States, but often advisable. Consular officials can also meet with prosecutors and present written submissions seeking withdrawal of the death penalty, which can include mitigation evidence gathered by Mexican officials in Mexico.<sup>74</sup> Indeed, Mexico routinely hires mitigation specialists to conduct a preliminary mitigation investigation at the outset of the case, specifically to gather basic evidence that can be used in early attempts to avert the death penalty.<sup>75</sup> This mitigation information can be crucial in securing

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71. Memorial of Mexico, Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), Annex 3, Declaration of Adrián Franco, ¶ 5 (June 20, 2003) (“This is largely due to a history of corruption in the judicial system, and Mexicans’ corresponding lack of faith that lawyers, judges, and others in positions of authority will be sensitive to their concerns.”).

72. *Id.*

73. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE: U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (last visited Jan. 14, 2017) (“[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”).

74. Memorial of Mexico, *supra* note 59, ¶ 63.

75. Many jurisdictions continue to reject their own rules and the guidelines of the American Bar Association by refusing to appoint a full defense team, including a qualified mitigation specialist, until after the prosecution has announced its intention to seek the death penalty. *See, e.g.*, ARIZ. R. CRIM. P. § 6.8(B)(1)(iii) (“Lead counsel. . . shall be familiar with and guided by the

a plea offer, and might never be discovered or presented without the assistance of the Mexican government.

Hundreds of lives have been saved by plea bargains secured in the cases of Mexican nationals who received prompt and ongoing assistance from their government. But when the consulate is not aware of a Mexican national's detention and prosecution, its personnel are unable to offer this critical assistance.<sup>76</sup>

### 3. Public Defenders

Until quite recently, Mexico has had a well-known and longstanding history of corruption in its judicial system.<sup>77</sup> As a consequence and in contrast to much of the U.S. citizenry, many Mexicans have a, "lack of faith that lawyers, judges, and others in positions of authority will be sensitive to their concerns."<sup>78</sup> This mistrust can manifest as an unwillingness to work with public defenders or court-appointed lawyers, who are often perceived as part of "the system."<sup>79</sup> When the defendant does not trust the lawyer, it is almost impossible to conduct the deeply personal mitigation investigation that is necessary for the proper

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performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases . . ."); *see also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 921 (2003) ("Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.") [hereinafter ABA, Guidelines for Defense Counsel].

76. If an incompetently-advised defendant rejects a plea offer, relief is generally not available unless the defendant can prove, by more than just his say-so, that he would have accepted the offer had he been advised accurately, and that the Court would have approved it. *See* Missouri v. Frye, 566 U.S. 134, 147 (2012). Thus, timely intervention when the offer is actually on the table is essential. *Id.*

77. *See, e.g.*, Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico's Judicial Sovereignty*, 16 TEX. HISP. J.L. & POL'Y 37, 39 (2010) (introducing proposal "to combat political and institutional corruption within the judicial branch of the government"); Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 147 (2012) ("Mexico's federal judicial system is similarly plagued by corruption and ineffectiveness."); Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. LAW 715, 751 (2004) ("The perceived subordination of the [Mexican Supreme Court] relative to the executive branch, coupled with widespread skepticism regarding the politicized nature of court appointments and intra-branch corruption, further eroded judicial prestige and citizen confidence in Mexico's legal institutions.")

78. *See* Memorial of Mexico, *supra* note 59, ¶ 57, annex 3 (quoting Declaration of Adrián Franco).

79. *See* PALERM ET AL., *supra* note 53, at 92 ("If there is a high risk involved in the situation, Mexican immigrants may refuse to divulge information to anyone in authority—attorney, judge, or counselor.").

preparation of a capital case, including sensitive topics such as history of abuse, poverty, family violence, drug and alcohol use, mental illness, and intellectual disability.<sup>80</sup> Nor can the advice of an untrusted attorney—paid by the same governmental entity trying to kill the defendant—generally convince him that it may be in his best interests to accept a plea bargain.<sup>81</sup>

Consular officials can effectively explain to defendants that appointed lawyers really are duty bound to act in their best interests, while also acting as a “bridge,” explaining cultural differences to both sides and encouraging meaningful communication between appointed lawyers and their Mexican clients. This assistance is invaluable in building a working relationship yielding successful representation.

### C. Language Issues

Many Mexican nationals in the United States speak little or no English.<sup>82</sup> Thus, from the moment of their arrest, they are often at a distinct disadvantage in their ability to understand what is happening, exercise their rights, and communicate with arresting authorities.

Compounding this phenomenon, the ability to speak “some” English can be misconstrued by authorities as evidence of sufficient linguistic ability to understand rights and make knowing, intelligent decisions about questions phrased in English.<sup>83</sup> In addition, police frequently fail to provide neutral, qualified Spanish interpreters during interrogations: either speaking to Spanish-speaking suspects in English, ignoring their language needs,<sup>84</sup> or using individuals who speak “some” Spanish but are not qualified interpreters, and often have poor speaking skills or speak different varieties of Spanish not easily understood by Mexican defendants.<sup>85</sup> These failures often create serious communication difficulties during interrogations, and cause Mexican nationals

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80. ABA, Guidelines for Defense Counsel, *supra* note 75, at 1005–09.

81. *Id.* at 1009 n.181; *see also supra* Section II.B.1.

82. *See* Memorial of Mexico, *supra* note 59, ¶ 57.

83. *Mendoza v. United States*, 755 F.3d 821, 830–831 (7th Cir. 2014) (holding no due process right to have discovery materials translated into English or to have continual interpretation throughout a trial); *Gonzalez v. United States*, 33 F.3d 1047, 1049–51 (9th Cir. 1994) (holding no error when Judge found language difficulties did not constitute a “major” problem); *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994) (recounting attempt by trial judge to force the Cuban defendant to testify in English because he had some English ability).

84. Memorial of Mexico, *supra* note 59, ¶ 57.

85. *See* Memorial of Mexico, Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), Annex 4, Declaration of Roseann Dueñas González, ¶ 16–18 (June 20, 2003). In addition to different varieties of Spanish, there are approximately eighty indigenous languages spoken in Mexico. Thus, some defendants may not speak or understand Spanish at all. *See Language and Cultures of Present-Day Mexico: Traditional Names*, SIL MEXICO, [http://www.mexico.sil.org/language\\_culture](http://www.mexico.sil.org/language_culture) [<https://perma.cc/DT7V-WD5F>].

to agree to statements they do not fully comprehend.<sup>86</sup> They can also lead to false confessions; uncomprehending Mexicans frequently nod or say “yes” in response to leading questions they do not fully understand, through a well-documented combination of lack of comprehension and a culturally-based tendency to acquiesce to authority figures.<sup>87</sup>

Language barriers can also render *Miranda* warnings ineffectual. For one thing, warnings may be given in English; Spanish-dominant defendants simply may not fully understand the words being spoken and the rather complex and compound alternatives being offered. Even if the warnings are given in appropriate Spanish, they are often spoken extremely rapidly, declaratively as opposed to interrogatively, and without attention to the detainee’s comprehension.<sup>88</sup> The warnings also may not be translated appropriately or pronounced comprehensibly. The *Miranda* advisements are linguistically complex and typically recited in an illogical order.<sup>89</sup> Thus, the chances that a non-English-proficient Mexican national, saddled with a cultural bias toward pleasing authority and avoiding conflict, will fully comprehend and then invoke his rights are infinitesimally small. These linguistic issues are compounded by the differences in legal practice in the two countries discussed supra.

Consular officials can advocate for Mexican nationals by insisting on the presence of a qualified, neutral interpreter, and can explain complicated and unfamiliar concepts, like the full import of the *Miranda* warnings or the legal consequences (or lack thereof) of insisting on a lawyer’s representation, in the appropriate register of the Spanish language. Without consular assistance, non-English-speaking Mexicans are at a distinct disadvantage.

#### D. Other Assistance Mexico Provides

In addition to combatting racial bias, bridging cultural differences, and assisting with language barriers, Mexico provides key assistance to capital defendants in two additional areas: enhancing the quality of legal representation, and assisting in amassing mitigation evidence.

##### 1. Quality of Representation

Although there are of course many skilled and dedicated capital defense practitioners working in this country, it remains the case that it is often

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86. Declaration of Roseann Dueñas González, *supra* note 85, ¶ 23. (“I have observed a tendency on the part of Mexican nationals to acquiesce to all demands by authority figures and answer all questions put to them even if they do not understand the question. . . most often it is because of the cultural conditioning which requires them to speak to authority even if they cannot speak the language.”).

87. *Id.* ¶ 35.

88. *Id.* ¶ 25.

89. *Id.* ¶¶ 26, 27.

[a]bysmally ineffectual lawyers—chronically under-remunerated; often young and inexperienced, patently unqualified and incompetent, unethical, or bar-disciplined; sometimes drug-impaired, drunken, comatose, psychotic, or senile; very often grossly negligent; and nearly always out-gunned—who represent capital defendants in most death penalty states around the country.<sup>90</sup>

Commentators have repeatedly observed that the “death penalty is not reserved for the worst murderers; it is reserved for the murderers with the worst lawyers at trial.”<sup>91</sup>

Consular officers can monitor defense counsel’s performance and intervene if the representation is insufficient. For instance, they can ask courts to appoint new, better-qualified counsel; they can recruit *pro bono* counsel; or they can even retain qualified counsel.<sup>92</sup> They can also visit the defendant in jail, something defense attorneys do not always find sufficient time to frequently do.<sup>93</sup> In its submission to the ICJ, Mexico identified one case where Mexico sent a Spanish-speaking attorney to interview a detained defendant; that attorney determined that the defendant was a juvenile at the time of the crime, a fact defense counsel had not discovered.<sup>94</sup> Mexico then obtained his birth certificate, and the defense used it to secure a waiver of the death penalty.<sup>95</sup> Without Mexico’s involvement, this crucial fact might never have been discovered.

Even where the attorneys are competent capital practitioners, they normally lack experience in representing Mexican nationals. Consular officials can assist such attorneys by referring appropriate experts, assisting in the identification of international law issues, providing cultural guidance, and assisting with mitigation investigation.

## 2. Mitigation Investigation

Mexico often sends a mitigation specialist to conduct a preliminary mitigation investigation aimed at heading off a death notice before an appointed defense team is even getting off the ground.<sup>96</sup> But Mexico also offers significant assistance with the primary, ongoing mitigation work. When a defendant was born and spent any portion of his life in Mexico, both records and witnesses important to the mitigation case likely reside exclusively in Mexico. A U.S.

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90. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102–06 (2000) (footnotes omitted).

91. Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 875–76 (2008).

92. Memorial of Mexico, *supra* note 59, ¶ 4.

93. *Id.* ¶ 75.

94. *Id.* ¶ 77 n.82 (quoting from Declaration of Roberto Rodríguez Hernández).

95. *Id.*

96. *Supra* Part II.B.

subpoena will not obtain materials located in Mexico.<sup>97</sup> Moreover, record-keeping practices are starkly different in Mexico than in the United States. Unlike in the United States, no standardized practices exist for recordkeeping and retention, nor for the privacy of information.<sup>98</sup> Thus, investigation practices familiar to U.S. capital defense attorneys and mitigation specialists will not suffice where the defendant is a Mexican national, and the existence or absence of records cannot be inferred by using the same references as in the United States.

Consular officials can assist in gathering evidence in various ways. For instance, they can easily obtain critical documents such as birth, death, and marriage certificates, basic educational data, and criminal history records. They can sometimes contact government-run schools and medical facilities and obtain directly any records that may exist. They can also provide letters of introduction for mitigation specialists traveling to Mexico, which can be invaluable in securing the cooperation of local officials whose assistance is needed to obtain relevant documents.

The Mexican government can also assist defense teams with interviewing life history witnesses. In some cases, Mexico is able to refer teams to culturally competent mitigation specialists who are thoroughly bilingual and bicultural, and can investigate within Mexico in ways that other mitigation specialists simply cannot. Mexico can also advise counsel on significant cultural differences that routinely impact capital mitigation issues, such as the greater stigma attached to mental illness in Mexico than in the United States. They can also assist counsel in seeking the funding necessary to conduct a life-history investigation in a foreign country.<sup>99</sup> Finally, Mexican government offices can sometimes provide directions, referrals, and other on-the-ground assistance to defense team members traveling to Mexico. It would be nearly impossible for even a highly competent defense team to conduct a truly thorough mitigation investigation without the assistance of the Mexican government.

#### CONCLUSION

Consular notification is anything but a mere formality; it has life and death implications in capital cases, especially for Mexican nationals. As indicated supra, where Mexico is notified and permitted to assist, just 0.58% of death-possible cases end in a death sentence, compared with 100% of the cases where

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97. Federal statute provides for service of a subpoena upon a U.S. citizen or permanent resident in a foreign country. 28 U.S.C. § 1783 (2018). These regulations do not include any method to subpoena non-U.S. nationals or residents. See 22 C.F.R. § 92.86–92.89 (2018).

98. Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1005–06 (2008).

99. *Id.* at 1004.

Mexico is not permitted to assist.<sup>100</sup> Thus, Mexico's involvement quite literally means the difference between life and death in most cases. Yet all over the United States, authorities continue to flout their straightforward obligations under Article 36.<sup>101</sup> In light of the Supreme Court's holding that the *Avena* judgment is not binding on state courts absent congressional implementation, and congress's failure to act, there have been few consequences for this continuing breaking of the law, despite the fact that all nine Justices and even the Texas Solicitor General acknowledge the judgment creates an international law obligation.<sup>102</sup> Thus, Congress and the courts have given police little reason to comply with their obligations.

Although the federal government cannot force states, as of now, to comply with *Avena* and hear procedurally defaulted Article 36 claims, some states recognize their obligation and have implemented it. Oklahoma voluntarily complied with *Avena* by ordering an evidentiary hearing on whether a defendant had been prejudiced by the lack of consular notification, despite the Article 36 claim being procedurally defaulted.<sup>103</sup> Oklahoma Governor Brad Henry then immediately commuted the death sentence to life without parole;<sup>104</sup> the Oklahoma Court of Criminal Appeals subsequently found that he had been prejudiced by the Article 36 violation.<sup>105</sup> Similarly, the Nevada Supreme Court remanded for an evidentiary hearing on prejudice from an Article 36 violation in 2012, again despite the claim not having been raised at trial.<sup>106</sup> Like the Oklahoma Court, the Nevada trial court found prejudice from the violation; the Court then ordered a new penalty hearing.<sup>107</sup> Finally, the California Supreme Court, although it has not yet remanded a procedurally defaulted claim for a hearing on prejudice, has indicated a potential willingness to do so.<sup>108</sup> Thus, state

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100. See *supra* note 2.

101. See *supra* Part II.

102. *Medellín v. Texas*, 552 U.S. 491, 504 (2008) (“No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States.”).

103. *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 at \*1 (Okla. Crim. App. May 13, 2004).

104. See John Greiner, *Henry Commutes Death Sentence*, NEWSOK (May 14, 2004, 12:00 AM), <http://newsok.com/article/1902645> [<https://perma.cc/B2SE-5V5Y>].

105. *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (“Torres clearly showed that the Mexican government would have expended considerable resources on the capital phase of his case. If Torres were still under a capital sentence, this would indeed amount to a showing of prejudice.”).

106. *Gutierrez v. State*, No. 53506, 128 Nev. 900 at \*3 (Nev. Sep. 19, 2012).

107. Order Post Evidentiary Hearing, *Gutierrez v. State*, CR94-1795B (Nev. Second Judicial District Court, County of Washoe, Aug. 21, 2017).

108. See *People v. Mendoza*, 62 Cal. 4th 856, 917 (Cal. 2016) (“We agree with defendant that a claim concerning the asserted prejudicial effect of a violation of article 36 of the Vienna Convention that is based on material outside the record on appeal appropriately should be raised in

courts certainly remain free to comply with our treaty obligations and give effect to the ICJ's judgment.

There has also been some progress toward avoiding these violations in the first instance. Six states now have at least some statutory requirements concerning consular notification.<sup>109</sup> Of particular note, Illinois recently enacted a statute requiring both notification by detaining authorities and notification by the judge at the initial court appearance, and allowing for a continuance if a foreign defendant who did not receive a timely consular rights notification requests it.<sup>110</sup> Similarly, beginning in December 2014, the Federal Rules of Criminal Procedure now provide that at an initial appearance, the judge must inform the defendant “that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant’s country of nationality that the defendant has been arrested—but that even without the defendant’s request, a treaty or other international agreement may require consular notification.”<sup>111</sup> Of course, these provisions do not guarantee compliance, but like the isolated states’ decisions to comply with *Avena* voluntarily, they are a step in the right direction.

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a petition for writ of habeas corpus. Contrary to the People’s claim, we cannot say that the appellate record demonstrates that there is no possibility that evidence outside the record might demonstrate prejudice.” (citation omitted)).

109. CAL. PENAL CODE § 834(c) (West 2004); CAL. PENAL CODE § 5028 (West 2004); OR. REV. STAT. § 181.470 (2015); OR. REV. STAT. § 426.228 (2015); NEV. REV. STAT. § 18.228.135 (2016); N.C. GEN. STAT. § 122C-344 (West 2017); FLA. STAT. § 901.26 (2017); ILL. COMP. STAT. 5/103-1 (2016).

110. ILL. COMP. STAT. 5/103-1 (2016).

111. FED. R. CRIM. P. § 5d1F.