

No 04-5928

**In The
Supreme Court of the United States**

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF FOR THE NATIONAL DISTRICT
ATTORNEYS' ASSOCIATION AS
AMICUS CURIAE, IN SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in *Avena* that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines?
2. In the alternative, in a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the judgments in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?

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INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) respectfully submits this brief as *amicus curiae* in support of the Respondent in accordance with Supreme Court Rule 39.1.¹ The NDAA is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and *amicus curiae* activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People." Local prosecutors are responsible for an overwhelming majority of the criminal prosecution in this country. The NDAA, and its members, have a compelling interest in the outcome of this appeal because of the impact it will have on criminal prosecutions across this nation.

While the petitioner and many of the amici focus on foreign nationals who have been sentenced to death, Article 36 of the Vienna Convention is not restricted to cases in which the death penalty has been imposed. If the Court adopts the petitioner's arguments, it will have a profound impact on the criminal justice system at every level.

¹ In accordance with Supreme Court Rule 37.6, *amici* represents that no other party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no party other than amici and counsel have made a monetary contribution to the preparation or submission of this brief. Global letters of consent from both parties for all *amicus curiae* briefs are on file with the Clerk of this Court.

II. SUMMARY OF ARGUMENT

The requirements which Article 36 of the Vienna Convention on Consular Relations impose on law enforcement authorities who arrest and detain foreign nationals for violation of criminal laws are not issues which are in dispute. While those requirements may not have been widely known at the time of the petitioner's trial, that is no longer the case. As a result of this Court's decision in *Breard v. Greene*, most state and federal courts have been addressing claims of violations of Article 36 in a manner consistent with the holdings of the International Court of Justice in *LaGrande* and *Avena* that Article 36 creates individual rights. Requiring defendants to show prior to trial that a violation of Article 36 has harmed them in some way that affected the outcome of their trial fulfills important policy considerations recognized by this Court. It is likewise consistent with the holding in *Avena*. The decisions of the majority of appellate courts which have interpreted Article 36 are consistent with decisions of the courts from other countries, thus achieving reciprocity, comity and uniformity of interpretation of the Treaty. In deciding this case, this Court should continue to require that defendants assert claims of violations of Article 36 at trial as well as show that the violation had a material adverse effect on the outcome of their case.

III. ARGUMENT

A. What Article 36 Requires Is Not an Issue

The NDAA agrees with the petitioner that the provisions of the Vienna Convention on Consular Relations (VCCR), 21 U.S.T. 77, 596 U.N.T.S. 261, are binding on the states. We also agree that it is incumbent on law enforcement at all levels to insure that foreign nationals² are arrested or detained are advised that (1) they have a right to have their consulate informed that they have been detained and (2) that they have the right to communicate with consular officials. We recognize that the failure on the part of state and local officials to comply with the provisions of Article 36 of the VCCR has a direct relationship on the treatment of Americans who are arrested in other countries that are signatories to the VCCR and that it is in the best interest of the United States to comply with the provisions of Article 36. We also agree that a foreign national who is charged with a crime has the right to raise the issue of a violation of Article 36 of the VCCR during the pendency of the criminal proceedings against him or her. Those are issues that are not disputed and are not before this Court in this case.

Rather the issue upon which this Court should focus is the proper scope of "review and reconsideration" to which the

² The United States has bilateral treaties with fifty-nine nations that mandate consular notification in all cases where one of their nationals are arrested. See U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS, 47 (2003). The provisions of those treaties are not an issue in this case.

petitioner, and other foreign nationals who are similarly situated,³ may be entitled.

C. Article 36 Issues Are Best Addressed by Trial Courts

Although the United States ratified the VCCR in 1969, it received little attention outside of diplomatic channels during the first ten years following ratification.⁴ What little attention it received in either academic or judicial circles focused on those portions of the treaty that dealt with consular immunity. See e.g. *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1977); *Silva v. Superior Court*, 52 Cal. App. 3d 269; 125 Cal. Rptr. 78 (1975).

[T]he question of providing individual remedies for failures of consular notification in the context of criminal proceedings first received significant attention within the Department of State in the early 1990s, when a small number of foreign governments began raising with the Department concerns about cases in which one of their foreign nationals on death row had not received consular notification.

³ We suggest that the class of foreign nationals who may be entitled to “review and reconsideration” should be limited to those individuals who were convicted prior to this Court’s decision in *Breard*.

⁴ President Nixon signed proclamation of ratification on December 24, 1969. 21 U.S.T. 77, 185.

U.S. Dept. of State, Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* at A-1.⁵

As late as 1993, the only guidance that the Department of State provided to state and local governments about Article 36 was a two page memorandum mailed occasionally to state attorneys general. This memorandum “remind[ed] . . . law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there **may** be a legal obligation to notify diplomatic or consular representatives of that person’s government in this country.”⁶ Considering that the Department of State had advised state governors in 1970 that “[w]e do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States,”⁷ it is little wonder that there was widespread ignorance of the requirements of Article 36 at the state and local level prior to 1998.

⁵ Available at U.S. Dept. of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, Ch. 2, doc. 1, <http://www.state.gov/s/l/6151.htm> (hereafter “DoS Answers”).

⁶ U.S. Dept. of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals*, (unpublished, April 20, 1993) (hereafter “1993 Notice”) (Emphasis added). Nowhere in the 1993 Notice is there any indication that the VCCR is a treaty which imposes legal obligations on law enforcement. The text of the 1993 Memorandum covers two typewritten pages and an Annex containing phone numbers for embassies and consulates. See also Molera Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 U.C.L.A. L. Rev. 307, 332 (1999).

⁷ DoS Answers at A-9, quoting an April 1970 letter from John R. Stevenson, State Department Legal Advisor to the governors of the states.

Article 36 was not addressed in a published decision by a court in the context of a criminal case against a foreign national until 1996,⁸ two years after the petitioner was tried and convicted of murder.

As a result of this Court's decisions in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), law enforcement throughout the United States has become aware of the consular notification requirements of the VCCR. The Department of State has initiated an extensive outreach program "to insure that . . . law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national." *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1, 56. In addition state and local governments have enacted statutes⁹ or adopted policies¹⁰ implementing the requirements of Article 36 of the VCCR.

⁸ Angel Breard and the Republic of Paraguay brought separate actions in the Eastern District of Virginia in 1996 attacking Breard's conviction and death sentence based on violation of Article 36. *Republic of Para. v. Allen*, 949 F. Supp. 1269 (D. Va. 1996). Prior to that, in 1979, the 9th Circuit Court of Appeals made a passing reference to the Treaty while addressing the violation of an I.N.S. regulation that implemented the notice requirements of Article 36. Article 36 was not specifically cited by the court. See, *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

⁹ See, e.g. Cal. Pen. Code § 834c; Fla. Stat. Ann. § 288.816(f).

¹⁰ See, e.g. State of Georgia, Department of Community Affairs, MODEL LAW ENFORCEMENT OPERATIONS MANUAL, Ch. 8, SOP 8-1 (6th Ed. 1996) available at <http://www.dca.state.ga.us/research/law/cover.html>.

Although many courts doubted that Article 36 created individual rights which a foreign national could enforce through the courts,¹¹ most federal and state appellate courts accepted the possibility that it did.¹² As a result, since 1998, state and federal courts have entertained claims of Article 36 violations from foreign nationals. At the same time these courts "generally have held that the defendant must show prejudice." *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App.,

¹¹ See e.g., *United States v. Al-Hamdi*, 256 F.3d 564, 575 n. 13 (4th Cir. 2004); *Bell v. Commonwealth*, 264 Va. 172, 187, 563 S.E.2d 695, 706 (2002), *cert. denied*, 537 U.S. 1123 (2003); *Cauthern v. State*, 145 S.W.3d 571, 626 (Tenn. Crim. App., 2004).

¹² See *United States v. Ademaj*, 170 F.3d 58, 66 - 68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999); *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000); *United States v. Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 - 622 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lawal*, 231 F.3d 1045 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Santos*, 235 F.3d 1105 (8th Cir. 2000); *United States v. Lombero-Camorlinga*, 206 F.3d 882 (9th Cir. 2000), *cert. denied* 531 U.S. 991 (2000); *United States v. Cordoba-Masquera*, 212 F.3d 1194, 1195 - 1196 (11th Cir. 2000), *cert. denied* 531 U.S. 1131 (2001); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App. 2002); *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003), *cert. denied*, ___ U.S. ___, 158 L. Ed. 2d 475 (2004); *Villegas v. State*, 273 Ga. 824, 826, 546 S.E.2d 504, 507 (2001); *People v. Hernandez*, 319 Ill.App.3d 520, 745 N.E.2d 673 (2001); *Zavala v. State*, 739 N.E.2d 135 (Ind. App. 2000); *State v. Rosas*, 28 Kan.App.2d 382, 17 P.3d 379 (2000); *Ademodi v. State*, 616 N.W.2d 716 (Minn. 2000); *Cardona-Rivera v. State*, 33 S.W.3d 625 (Mo. App. 2000), *cert. denied*, 534 U.S. 826 (2001); *Flores v. State*, 994 P.2d 782, 785 - 786 (Ok. Crim. App. 1999); *State v. Reyes-Camarena*, 330 Or. 431, 434 - 435, 7 P.3d 522, 524 - 525 (2000); *Rocha v. State*, 16 S.W.3d 1, 25 - 46 (Tex. Crim. App. 2000); *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (1988), *cert. denied*, 527 U.S. 1038 (1989); *State v. Martinez-Lazo*, 100 Wash.App. 869, 873 - 876, 999 P.2d 1275, 1278 - 1279 (2000).

2002), a standard that the I.C.J. expressly adopted. *Avena*, 2004 I.C.J. at 51.¹³ Thus, this Court can give effect to the *LaGrande* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 and *Avena* judgments in so far as the issue of the treaty imposing individual rights without addressing the procedural default doctrine.

Requiring a defendant to raise claims of a violation of Article 36 in the trial court serves several important policy purposes expressed by this Court in *Wainwright v. Sykes*, 433 U.S. 72, 88 - 89 (1977). In the context of a claim of a violation of Article 36, the reasoning of *Wainwright v. Sykes* is equally applicable.

As the Department of State has pointed out, it is difficult to ascertain with any certainty, what, if any, harm occurs to a foreign national defendant if he or she is not notified of his or her rights under Article 36.¹⁴ Even if an arrested individual is advised of his or her rights under Article 36, the individual must request that the consulate be notified. VCCR, Art. 36, 1(b). If the individual asks that his or her consulate be notified, the detaining authorities do not have to do so immediately. “[N]either the terms of the Convention as normally understood, nor its object and purpose, suggest that ‘without delay, is to be

¹³ Significantly, the I.C.J. rejected Mexico’s position that every violation of Article 36 required “partial or total annulment of conviction or sentence,” *Avena*, 2004 I.C.J. at 49, or exclusion of evidence, *Id.* at 50.

¹⁴ DoS Answers at A-4.

understood as ‘immediately upon arrest and before interrogation.’” *Avena*, at p. 38.¹⁵

If a foreign national requests that the consulate be notified and even initiates communication with the consulate, there is no corresponding guarantee that the consulate will do anything. While Mexico offers a wide array of services and support to their nationals who are incarcerated in the United States,¹⁶ there is considerable disparity between the services which are available from the various consulates and embassies of the 180 countries that have missions in the United States due to their own internal policies and resources.¹⁷

The VCCR does not “require a consular officer to respond to notification, or respond in any particular time period, or to offer any particular service.”¹⁸ Unlike the right to counsel which is enshrined in the Constitution and which may be enforced by the courts, even by requiring attorneys to represent indigent defendants without compensation, *Powell v. Alabama*, 287 U.S. 45, 72-73 (1932), our courts are powerless to compel a foreign government to do anything to help their nationals who may be arrested or detained in this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983);

¹⁵ Significantly, the I.C.J. held that notification of the right to have the consulate informed of an arrest and detention does not have to “proceed any interrogation.” *Id.* at 39.

¹⁶ See Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, p. 15 - 19.

¹⁷ DoS Answers, A-4, A-5.

¹⁸ DoS Answers, A-4.

Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987).

Compounding the problem of ascribing harm to every failure on the part of law enforcement to notify foreign nationals of their rights under Article 36, is the fact that a only a limited percentage of the foreign nationals who are arrested and detained in the United States request consular notification, even after being advised of their right to consular notification under Article 36 of the VCCR.¹⁹ Despite “Mexico’s commitment to the protection of nationals,” Brief of *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner, José Ernesto Medellín, p. 13, and the considerable array of services their consulates offer to their citizens who are arrested and detained in the United States, an overwhelming majority of their citizens do not request consular notification.²⁰

These are all factors which trial courts are uniquely positioned to deal with and for which the contemporaneous objection rule exists.

¹⁹ In 2003, at the request of the Department of State, the State of Georgia conducted a survey of jail admissions in 37 counties during the period from August 31, 2003 through September 14, 2003. During that period 6,920 individuals were detained, 552 of whom were identified as foreign nationals (7.9%). Almost three-fourths (72%) of the foreign nationals were eligible for consular notification under Article 36 of the VCCR (the remainder were from mandatory notification countries). Only 77 (13%) requested that their consulate be notified of their arrest and detention after being advised of their rights under Article 36 of the VCCR.

²⁰ Only 47 of the 355 Mexican nationals arrested and detained (13%) in Georgia during the survey period requested consular notification.

C. Reciprocity, Comity & Uniformity

Petitioner argues that this Court should, at a minimum revisit this Court’s decision in *Breard*, while at the same time urging this Court reverse the decision of the court below in the interest of reciprocity, comity and uniformity of interpretation. *Brief of Petitioner*, p. 45-50.

An examination of the holdings of courts of other nations which have considered violations of Article 36 shows that the courts of this country are interpreting the treaty in a way which is in harmony with the courts of other countries. See *R. v. Abbrederis*, 36 A.L.R 190, [1981] 1 NSWLR 530 (New South Wales, Australia); *Re Yater*, 77 Int’l L. Rep. 541 (Italy; Ct. of Cassation, 1973); *R. v. Partak*, 2001 160 C.C.C. (3d) 533, 570 (Ontario, Canada S.Ct. of Justice); *Canada v. Van Bergen*, 161 A.R. 387, 390 (Alberta, Ct. of App. 2000); BGH 5 StR 116/0 (German Fed. S. Ct. 2001); *Public Prosecutor v. Nguyen Tuong Van*, [2004] SGHC 54, 2 S.L.R. 328 (Singapore, High Ct. 2004). We are aware of no appellate court anywhere in the world, and petitioner does not cite any decision of any court outside the United States, that interprets the treaty as expansively as does the petitioner. If this Court interprets the Treaty in the manner suggested by the petitioner and many of his *amici*, it will be the United States that is out of step with the rest of the world.

CONCLUSION

This Court can give effect to the *LaGrande* and *Avena* judgments to the extent that they confirm that Article 36 confers individual rights on foreign nationals who are arrested in the United States while at the same time affirming the judgment of the court of appeals.

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