

# MITIGATION ABROAD: PREPARING A SUCCESSFUL CASE FOR LIFE FOR THE FOREIGN NATIONAL CLIENT

*Gregory J. Kuykendall\**  
*Alicia Amezcua-Rodriguez\*\**  
*Mark Warren\*\*\**

## I. INTRODUCTION

Although defending any capitally charged client always presents enormous challenges, representing a foreign national can be particularly difficult for the entire defense team. Linguistic and cultural barriers that adversely affect building a productive attorney-client relationship and the problem of finding appropriate expert assistance often hamper efforts to conduct a thorough life-history investigation and develop mitigation themes. Moreover, the physical hurdles of traveling to the country of origin and conducting an adequate investigation can be daunting.

That said, recurring mitigation evidence and themes arise in these cases that can almost always be utilized by diligent defense teams. Taking advantage of the assistance offered by consular offices and properly investigating with a culturally and linguistically sensitive mitigation team can create extraordinarily persuasive mitigation that simply does not exist in the lives of most U.S. citizens facing the death penalty.

This Article explores the special duties imposed on defense counsel when representing a foreign national in a capital case. In particular, it focuses on complying with standards set forth in the *ABA Guidelines for*

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\* Gregory J. Kuykendall has been the director of the Mexican Capital Legal Assistance Program ("MCLAP") since 2006 and worked with MCLAP as a staff attorney for five years during the tenure of Sandra Babcock, MCLAP's founder. He is a sole practitioner in Tucson, Arizona, Learned Counsel in federal death penalty cases, a specialist in criminal law certified by the State Bar of Arizona, and speaks Spanish fluently.

\*\* Alicia Amezcua-Rodriguez has been a program attorney for MCLAP since 2004. She is a sole practitioner in North Bergen, New Jersey, and, as a native Spanish-speaker, specializes in developing mitigation evidence in capital cases involving Mexican nationals.

\*\*\* Mark Warren is a legal researcher based in Ottawa, Canada, who specializes in the application of treaty law and international human rights standards to U.S. death penalty cases. He was a member of Mexico's legal team in its successful lawsuit against the United States at the International Court of Justice, which addressed consular rights violations in the cases of over fifty death-sentenced Mexican nationals. Since 2000, he has served as the researcher for MCLAP.

The authors gratefully acknowledge the valuable writing assistance of Judith McDaniel, Ph.D., J.D. (Rutgers, 2007) in the revision of early drafts of this Article.

*the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines”)<sup>1</sup> and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”)<sup>2</sup> when defending a foreign client. It also examines the important role that consular assistance—and, when available, formal programs that countries such as Mexico and El Salvador have developed to assist their nationals facing the death penalty in the United States—may play in supporting adherence to the standards set forth in the guidelines.

While each mitigation investigation must obviously be tailored to the particular facts and the unique cultural issues of the individual client’s case, this Article is intended to provide guiding principles relevant to virtually any investigation of a foreign national. Working with consular authorities from a foreign client’s country of origin can lead to a culturally and linguistically competent life-history investigation that would otherwise be difficult or even impossible to achieve. The Article focuses on cases of Mexican nationals for two reasons. First, the largest groups of foreigners in the United States are from Mexico and Central America,<sup>3</sup> and Mexican nationals comprise the largest population of foreign nationals currently on death row.<sup>4</sup> Second, due to the authors’ experience working with the Mexican Capital Legal Assistance Program (“MCLAP”), we are familiar with strategies that have proven successful in assisting Mexican nationals facing the death penalty. Many of the challenges that we have learned to address when assisting Mexican defendants are just as likely to arise in cases involving other nationalities.

The Article is divided into six parts: Part II briefly looks at the special obligations imposed on defense counsel representing a foreign national under the ABA Guidelines; Parts III and IV discuss relevant developments in international and domestic law regarding the

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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

2. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

3. ANNE JAMES, INT’L JUSTICE PROJECT, BRIDGING THE GAP: EFFECTIVE REPRESENTATION OF FOREIGN NATIONALS IN U.S. CRIMINAL CASES 6 (3d ed. 2007), *available at* [http://www.internationaljusticeproject.org/pdfs/BtG\\_combined\\_print\\_April\\_16.pdf](http://www.internationaljusticeproject.org/pdfs/BtG_combined_print_April_16.pdf).

4. According to the Death Penalty Information Center, of the 122 foreign nationals currently on death row in the United States, 54 are Mexican nationals. Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., <http://deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited Mar. 18, 2008).

importance of consular rights of foreign nationals; Part V examines the role of MCLAP in promoting competent mitigation investigations and its documented beneficial effects; Part VI explores the fundamental issues involved in building a case for life when representing a foreign client; and Part VII provides a case study that dramatically illustrates the critical importance of obtaining the timely cooperation and assistance of the client's country of origin.

## II. ADDITIONAL OBLIGATIONS UNDER THE ABA GUIDELINES OF COUNSEL REPRESENTING A FOREIGN NATIONAL

Guideline 10.6 of the ABA Guidelines addresses the additional obligations of defense counsel in death penalty cases involving foreign nationals. It states:

- A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- B. Unless predecessor counsel has already done so, counsel representing a foreign national should:
  - 1. immediately advise the client of his or her right to communicate with the relevant consular office; and
  - 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.<sup>5</sup>
    - a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.<sup>6</sup>

Consular assistance can be an indispensable tool in preparing a defense whenever a foreign national encounters criminal prosecution. Foreigners facing the death penalty in the United States may be especially vulnerable and often suffer from a range of inherent disadvantages, such as ignorance of important cultural and legal norms, lack of trust in the attorney-client relationship, inability to consult with familial confidants, and significant physical and cultural barriers to a

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5. ABA GUIDELINES, *supra* note 1, at Guideline 10.6.

6. *Id.* As the commentary concerning ABA Guideline 10.6 subsection B(2)(a) recognizes, a foreign national may have legitimate reasons for not wanting his or her home country notified, such as in the case of a political refugee. However, in certain cases, the client's reluctance to notify the consulate may stem from less serious considerations such as wanting to shield relatives in his or her home country from learning of the criminal charges he or she is facing. In such cases, counsel should strive to gain the client's consent by explaining the purpose and potential benefits of consular involvement. Where counsel is unable to obtain consent, subsection B(2)(a) allows counsel to exercise his or her professional judgment of how best to proceed given the circumstance of the particular case. *Id.* at Guideline 10.6, commentary.

competent mitigation investigation. ABA Guideline 10.6 acknowledges the important role that consular assistance can play in overcoming the unique challenges presented when representing a foreign national in a capital case.<sup>7</sup>

Some countries have well-developed consular legal assistance programs that are experienced in providing support to their nationals confronting the death penalty, and most nations' consulates strive to provide enhanced assistance in those circumstances. Mexico and El Salvador have also instituted government-funded initiatives—the MCLAP and the El Salvador Capital Assistance Project, respectively—specifically aimed at providing assistance to attorneys representing their nationals facing the death penalty in the United States.<sup>8</sup> But as ABA Guideline 10.6 emphasizes, alerting a capital defendant's consulate is generally the first step in accessing any assistance that a foreign government may feel compelled to provide.<sup>9</sup>

### III. CONSULAR ASSISTANCE AND THE U.S. DEATH PENALTY

The sovereign right of consulates to protect and defend their nationals' interests abroad is well established under international and domestic law. However, it was the widespread failure of U.S. authorities to permit consular assistance to function in its intended manner that influenced the formulation of ABA Guideline 10.6 and the creation of special legal assistance programs such as MCLAP.<sup>10</sup>

Under international law, consular assistance rights and procedures are codified in Article 36 of the Vienna Convention on Consular Relations (“VCCR”), a multilateral treaty ratified by the United States in 1969.<sup>11</sup> Providing assistance to its nationals in distress is one of the primary functions of any nation's consular service and Article 36 “enshrines the time-honored right of consular officers to communicate with and assist their detained nationals.”<sup>12</sup> The Commentary to ABA Guideline 10.6 observes that under Article 36:

[A]n obligation rests on local authorities to promptly inform detained or arrested foreign nationals of their right to communicate with their consulate. At the request of the foreign national, local authorities must

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7. *Id.* at Guideline 10.6.

8. *See* Int'l Justice Project, Foreign Nationals, Resources, <http://www.internationaljusticeproject.org/nationalsResources.cfm> (last visited Mar. 18, 2008).

9. ABA GUIDELINES, *supra* note 1, at Guideline 10.6(B).

10. *See id.* at Guideline 10.6, commentary.

11. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

12. JAMES, *supra* note 3, at 16.

contact the consulate and permit consular communication and access.<sup>13</sup>

Although the onus under the VCCR is clearly on the detaining authorities to advise foreigners of their consular rights and to notify consulates, the ABA Guidelines recognize that defense counsel may instead need to provide the required consular information to clients and to notify consulates on their behalf.<sup>14</sup> Noting that there is “considerable evidence that American local authorities routinely fail to comply” with Article 36 requirements,<sup>15</sup> the Commentary to ABA Guideline 10.6 states:

Any such failure is likely to have both practical and legal implications. As a practical matter, consuls are empowered to arrange for their nationals’ legal representation and to provide a wide range of other services. These include . . . assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals.<sup>16</sup>

Where consular assistance is delayed or prevented, the impact on the effectiveness of the mitigation investigation can thus be profound.

The State Department has described the requirements set forth in Article 36 as “of the highest order,” largely because the obligations apply with equal force to United States consular officers seeking to assist U.S. citizens detained abroad.<sup>17</sup> Despite the high importance that the United States attaches to Article 36 obligations abroad, its own compliance record has been tragically inadequate. According to Amnesty International, “[t]wenty-two foreign nationals have been executed in the United States since 1988,” virtually none of whom were informed in a timely manner of their right to seek consular assistance;<sup>18</sup> in sixteen of those cases “the consular notification issue was raised on appeal and dismissed, allowing the execution to proceed.”<sup>19</sup>

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13. ABA GUIDELINES, *supra* note 1, at Guideline 10.6, commentary.

14. *See id.* at Guideline 10.6(B).

15. *Id.* at Guideline 10.6, commentary.

16. *Id.*

17. Arthur W. Rovine, *Contemporary Practice of the United States Relations to International Law*, 68 AM. J. INT’L L. 309, 314 (1974). As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed: “[T]he citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States.” Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 259 (Apr. 9) (declaration of President Schwebel).

18. Amnesty International USA, *The Death Penalty and the Rights of Foreign Nationals*, [http://www.amnestyusa.org/Facts\\_and\\_Figures/The\\_Death\\_Penalty\\_and\\_the\\_Rights\\_of\\_Foreign\\_Nationals/page.do?id=1101087&n1=3&n2=28&n3=99](http://www.amnestyusa.org/Facts_and_Figures/The_Death_Penalty_and_the_Rights_of_Foreign_Nationals/page.do?id=1101087&n1=3&n2=28&n3=99) (last visited Mar. 19, 2008).

19. *Id.*

Given the unwillingness of the domestic courts to rectify the lethal failure of the United States to honor its consular treaty commitments, it is not surprising that affected foreign governments would turn instead to the international courts for vindication. When the United States ratified the VCCR in 1969, it also agreed to be bound by the treaty's optional enforcement mechanism.<sup>20</sup> Under those provisions, any dispute over the "interpretation or application" of the treaty "shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court" by any party to the dispute that has ratified the enforcement protocol.<sup>21</sup> In cases that lie within its compulsory jurisdiction, the Court's judgment is "binding between the parties" and is "final and without appeal."<sup>22</sup>

Over the past ten years the International Court of Justice ("ICJ") has heard three Vienna Convention cases brought against the United States, all presenting the same basic issue—violating their treaty obligations, U.S. authorities had failed to advise foreign detainees facing capital charges of their right to seek consular help.<sup>23</sup> As a result, consular officers were unable to assist in the defense of their fellow-nationals on trial for their lives—with disastrous and ultimately fatal consequences.<sup>24</sup>

The ICJ decisions in these landmark cases focus on Article 36 rights and remedies, but they also recognize the central role that consular assistance may play in capital trials. Ruling in favor of Germany and two of its executed nationals, the ICJ held that Article 36 confers individual rights on foreign detainees, the violation of which is subject to "review and reconsideration" by domestic authorities notwithstanding any procedural default that would otherwise prevent consideration of the treaty claim.<sup>25</sup> In the case of the two German defendants, the VCCR violations "prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention."<sup>26</sup> Responding to the claims brought by Mexico, the ICJ found that the United States had breached its Article 36

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20. Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487.

21. *Id.* art. 1.

22. Statute of the International Court of Justice arts. 59-60, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031.

23. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 24-28 (Mar. 31); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 474-80 (June 27); Vienna Convention on Consular Relations (*Para. v. U.S.*), 1998 I.C.J. 248, 249-51, 257 (Oct. 9).

24. *Avena*, 2004 I.C.J. at 26-28; *LaGrand*, 2001 I.C.J. at 478; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249.

25. *LaGrand*, 2001 I.C.J. at 513-14.

26. *Id.* at 497-98.

obligations in fifty-one cases of death-sentenced Mexican nationals.<sup>27</sup> It also clarified that the review necessary in all such cases was to be provided by the domestic courts, and in a manner that would “guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account.”<sup>28</sup> Discussing the right of consular officers to arrange for the detainee’s legal representation, the ICJ affirmed Mexico’s emphasis on “the importance of any financial or other assistance that consular officers may provide to defence counsel . . . for investigation of the defendant’s family background and mental condition, when such information is relevant to the case.”<sup>29</sup>

In its capacity as the judicial arm of the United Nations, the ICJ has, through these rulings, confirmed that prompt and unfettered access to consular assistance can be pivotal to the fairness of death penalty trials. For all counsel representing foreigners facing capital charges in the United States, the obligation to enlist consular support and to provide an exhaustive mitigation investigation are closely intertwined components of competent legal representation. Notably, these parallel requirements under the ABA Guidelines “are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.”<sup>30</sup>

#### IV. DOMESTIC DECISIONS RECOGNIZING THE IMPACT OF CONSULAR ASSISTANCE

Most U.S. courts to address the issue have been resistant to the idea that the ICJ’s decisions on consular rights are directly enforceable by foreign defendants.<sup>31</sup> Nonetheless, the barrage of domestic and international litigation brought on behalf of foreigners deprived of consular assistance is altering the legal landscape. In particular, there can be little doubt that Mexico’s vigorous efforts to assist its death-sentenced nationals and to vindicate their consular rights are transforming the definition of what constitutes ineffective assistance of counsel.

For example, in the case of Gerardo Valdez,<sup>32</sup> the Mexican consulate did not learn that he was on death row in Oklahoma until two

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27. *Avena*, 2004 I.C.J. at 71.

28. *Id.* at 65.

29. *Id.* at 53.

30. ABA GUIDELINES, *supra* note 1, at Guideline 1.1, history.

31. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2673 (2006) (“Nothing in the ICJ’s structure or purpose suggests that its interpretations were intended to be binding on U.S. courts.”); *Breard v. Greene*, 523 U.S. 371, 378-79 (1998) (finding no legal basis for staying an execution in response to an ICJ interim order).

32. *Valdez v. State*, 46 P.3d 703, 705 (Okla. Crim. App. 2002).

months before his scheduled execution. Mexico immediately provided a team of MCLAP lawyers and investigators to assist in preparing a clemency petition and in litigating the undeniable violation of Article 36 obligations committed by the Oklahoma authorities. Armed with compelling new mitigating evidence provided through Mexico's emergency intervention, the defense secured two executive reprieves, followed by a stay of execution.<sup>33</sup> Rejecting the defense argument that the recent ICJ decision in *LaGrand* required the consideration of Valdez's procedurally-defaulted Article 36 claim, the Oklahoma Court of Criminal Appeals nonetheless set aside his death sentence.<sup>34</sup> Although the court had addressed Valdez's ineffective assistance claims in his earlier appeals, it had not previously been presented with a claim that "trial counsel did not inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate."<sup>35</sup> Unable to ignore "the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate," the court held that it "[could not] have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime."<sup>36</sup> Gerardo Valdez was later re-sentenced to life imprisonment. Only Mexico's last-minute consular intervention averted his execution.

After the ICJ ruled in favor of Mexico and its fifty-one death row nationals in March of 2004, Mexican national Osbaldo Torres faced an imminent execution date in Oklahoma. MCLAP attorneys assisted in the submission of a successive habeas corpus petition to the Oklahoma Court of Criminal Appeals based on the ICJ ruling and participated in a successful clemency hearing before the Pardon and Parole Board.<sup>37</sup> In commuting the death sentence to life imprisonment, Governor Brad Henry indicated that the ICJ had recently held that "Torres' rights were violated because he had not been told about his rights guaranteed by the 1963 Vienna Convention"; as a result, Governor Henry stated that "the U.S. State Department contacted my office and urged us to give 'careful

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33. *Id.* at 704-06.

34. *Id.* at 707-11.

35. *Id.* at 710. Through the new investigation sponsored by Mexico, it was learned Valdez suffers from severe organic brain damage; was born into extreme poverty; received limited education, and grew up in a family plagued by alcohol abuse and instability. Most significant of these findings . . . is that he experienced head injuries in his youth which greatly contributed to and altered his behavior.

*Id.* at 706 (footnote omitted).

36. *Id.* at 710.

37. *See Torres v. State*, 120 P.3d 1184, 1186 (Okla. Crim. App. 2005).



consideration' to that fact."<sup>38</sup> Moreover, in deciding Torres's habeas petition, the Oklahoma Court of Criminal Appeals became the first U.S. court to adopt a test "consistent" with that promulgated by the ICJ in *Avena and other Mexican Nationals* for a violation of Vienna Convention rights.<sup>39</sup> The court also observed:

Among [Mexican] consular officials' most important duties are the gathering of mitigation evidence and locating mitigating witnesses in Mexico and the United States. After belatedly entering into Torres's case, Mexico hired two bilingual investigators, two gang experts, a mitigation expert and a neuropsychiatrist, to assist in developing mitigating evidence for the appellate process. All the evidence presented supports the conclusion that consular assistance, in Torres's particular circumstances, would have focused on obtaining a sentence of less than death.<sup>40</sup>

Accordingly, Torres "was actually prejudiced by the failure to inform him of his rights under the Vienna Convention, and by counsel's acts or omissions which might have affected his sentencing."<sup>41</sup>

The potentially momentous impact of the ICJ's judgment on the cases of death-sentenced Mexican nationals was not confined to Oklahoma. On February 28, 2005, President Bush sent a memorandum to the Attorney General (and as transmitted by him to the state attorneys general) declaring that the United States would "discharge its international obligations under the decision of the International Court of Justice [in *Avena*] . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."<sup>42</sup> The White House later explained to the Supreme Court that the decision to comply with the ICJ judgment "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law."<sup>43</sup>

The U.S. Supreme Court later concluded that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal

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38. Press Release, Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1).

39. See *Torres*, 120 P.3d at 1187, 1190 (applying the ICJ-mandated remedy of "review and reconsideration" and finding prejudice arising from the Article 36 violation).

40. *Id.* at 1188.

41. *Id.* at 1190.

42. Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928).

43. *Id.* at 9.

law that pre-empts state limitations on the filing of successive habeas petitions.”<sup>44</sup> According to the majority in *Medellin v. Texas*, the treaties addressing the ICJ’s jurisdiction over Vienna Convention disputes and the enforcement of ICJ decisions do not have automatic domestic effect and “responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”<sup>45</sup>

Significantly, the *Medellin* Court emphasized that it was ruling only on the direct enforcement of the ICJ decision and not on the justiciability of the Vienna Convention itself, assuming without deciding that Article 36 of the VCCR confers on arrested foreigners “an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.”<sup>46</sup> Any violation of those rights, however, must be challenged in the domestic courts in a manner that comports with state rules of procedural default. After *Medellin*, no doubt remains that practitioners must in every circumstance raise Article 36 claims at the trial court level, and each level thereafter, in order to preserve the issue for review by appellate and post-conviction courts.

These holdings in no way undermine the importance of seeking consular assistance in capital cases, nor do they diminish the international legal obligation of the United States to comply with the ICJ decision—an obligation that the Court squarely recognized.<sup>47</sup> Furthermore, the fact that some sixty nations were signatories to *amicus curiae* briefs urging the Supreme Court to order judicial enforcement of the controversial ICJ decision underscores the importance that the international community attaches to consular assistance rights in capital cases.<sup>48</sup>

## V. THE MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM

Responding to a flood of death sentences in which Mexican nationals had been deprived of their international legal rights, the Mexican government established MCLAP primarily to provide litigation

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44. *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008).

45. *Id.* at 1368.

46. *Id.* at 1357 n.4.

47. The Court found it undisputed that the Avena decision “constitutes an international law obligation on the part of the United States,” *id.* at 1356, describing as “plainly compelling” the interests of the United States that the President sought to vindicate through his memorandum. *Id.* at 1367.

48. See, e.g., Press Release, Debevoise & Plimpton LLP, Debevoise Represents Mexican National in Supreme Court (Apr. 30, 2007), available at <http://www.debevoise.com/vccr> (collecting *amici* briefs in support of *Medellin*).

support to counsel representing Mexican nationals facing execution in the United States.<sup>49</sup> MCLAP's work builds on Mexico's historic policy of providing extensive and ongoing consular assistance to its nationals abroad who face serious criminal charges. Since its creation in 2000, Mexico has expanded the scope of MCLAP; its mandate now encompasses all Mexican nationals on death row and all pre-trial cases in which there is a substantial risk that the death penalty will be sought.<sup>50</sup> Currently, twenty-one attorneys, all experienced capital litigators, work with MCLAP across the United States. MCLAP attorneys routinely refer defense counsel to competent experts and mitigation specialists, advise defense teams regarding potential mitigation themes, help conduct mitigation investigations in Mexico, provide sample briefs on a variety of legal issues relevant to Mexican nationals, and assist in various court proceedings. MCLAP has also held training sessions throughout the country for defense teams, mitigation specialists, and consular officers, promoting adherence to the mitigation guidelines and the appointment of culturally and linguistically competent investigators and experts. Depending on the case circumstances, MCLAP counsel may also file *amicus curiae* briefs on issues of international law, or provide other legal assistance necessary to ensure that Mexican nationals receive vigorous and effective representation.<sup>51</sup>

Working in union with defense teams, the Mexican Foreign Ministry and its consular officials, MCLAP has assisted in preserving critical issues for appeal, maximized the opportunity for effective pre-trial negotiations—including convincing prosecutors not to seek death from the outset—and provided crucial resources when they were inappropriately withheld by courts or financially overburdened public defender offices.<sup>52</sup>

Active MCLAP involvement has proven instrumental in averting death sentences, particularly in cases involving plea agreements, the exclusion of the death penalty by trial judges, and life sentences following death penalty trials. In the 298 cases it has completed to date (i.e., where a final disposition has occurred), MCLAP has a ninety-five

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49. See *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 48 n.13, 157 P.3d 749, 764 n.13. See generally Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 812-14, 817-18 (2006) (describing Mexico's large interest in providing legal aid to Mexican defendants facing capital sentences outside the country).

50. See McGuinness, *supra* note 49, at 818-19 & n.357.

51. See Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1116-17 & n.134 (2002).

52. See *id.* at 1116-17 nn.133-34.

percent success rate in avoiding or reversing death sentences.<sup>53</sup> Early intervention is essential—when MCLAP is involved from the outset, our research indicates that the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general.

Other foreign governments may not always be in a position to offer the extraordinary level of assistance that Mexico has committed to its citizens facing the death penalty in the United States. Nonetheless, the potential impact of even the most basic forms of consular support can be enormously significant for any defendant facing capital charges.<sup>54</sup> That is why it is so important for counsel to comply with ABA Guideline 10.6(A) and investigate fully the possibility that some country might be willing to assist the defendant: “A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g., one grandparent of that nationality) that would not be apparent at first glance.”<sup>55</sup>

In short, promptly enlisting any available consular support “should be viewed by counsel as an important element in defending a foreign

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53. For MCLAP cases completed as of October 16, 2007, death sentences were not imposed in 272 death-eligible cases; in twelve other cases, existing death sentences were set aside by judicial or executive commutation. Death sentences were imposed in eleven cases, and three executions have taken place. Death sentences were thus averted or reversed in a total of 284 out of 298 completed MCLAP cases, for a success rate of 95.3%. (All figures on file with authors.)

54. One especially telling example of the potential impact of timely consular assistance is the case of Mario Bustillo, a Honduran national convicted of first-degree murder in Virginia and sentenced to thirty years imprisonment. The U.S. Supreme Court later found his Vienna Convention claim to be procedurally defaulted and that he was thus not entitled to relief. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006). However, it is clear that Bustillo was never advised of his right to consular notification and that the treaty violation prevented him from presenting crucial evidence of his innocence at trial. The sole issue in the case was who among a group of individuals fatally struck the victim with a baseball bat. Three witnesses testified that it was Bustillo; two other witnesses testified that Bustillo was not the killer and one of them identified the actual assailant as another Honduran national known by the nickname of “Sirena,” who had fled to Honduras the day after the crime. The defense was unable to produce Sirena or prove that he existed, and Bustillo was found guilty. With the belated assistance of the Honduran Consulate, post-conviction counsel was able to obtain a photograph of Sirena, establish from immigration records that he had entered Honduras as alleged, and tracked him down in his homeland—whereupon Sirena confessed to the crime. Had the Honduran consulate been aware of the case prior to trial, it would have assisted the defense in locating Sirena and it is highly probable that Bustillo would have been acquitted. *See* Brief for Petitioner Mario A. Bustillo at 7-10, *Bustillo v. Johnson*, 548 U.S. 331 (2006) (No. 05-51), available at <http://www.debevoise.com/vccr> (last visited Apr. 16, 2008).

55. *See* ABA GUIDELINES, *supra* note 1, at Guideline 10.6, commentary; *see also* *Cauthern v. State*, 145 S.W.3d 571, 591-92 (Tenn. Crim. App. 2004), *appeal denied*, (Aug. 30, 2004) (describing testimony of a German consular officer who explained that the consular assistance offered to German nationals in death penalty cases could include “allocating funds for attorney fees and necessary investigative services,” that this assistance “would be offered to dual citizens provided the individual had German citizenship,” and that “German law examines dependency” for citizenship purposes).

national at any stage of a death penalty case.”<sup>56</sup>

## VI. PREPARING THE CASE FOR LIFE WHEN REPRESENTING FOREIGN NATIONALS

As every capital defense attorney knows, gathering and presenting comprehensive mitigating evidence is an indispensable element of capital case preparation, from arrest through clemency. Mitigation experts have written extensively about the important role of developing mitigation evidence in a capital case, as well as the appropriate protocols for investigating and preparing that evidence.<sup>57</sup> As the ABA Guidelines make clear, the use of a mitigation specialist is now a well-recognized component of the “existing ‘standard of care’ in capital cases.”<sup>58</sup> The recently promulgated Supplementary Guidelines further elaborate on the role of mitigation in capital cases.<sup>59</sup>

This Part is not intended to substitute for the excellent materials already available on mitigation in capital cases. Rather, it addresses some of the specific issues confronted in cases involving foreign nationals and how those issues may affect adherence to the standards set forth in the ABA and Supplementary Guidelines. While in many respects the process for conducting a life-history investigation is the same for foreign nationals as it is for other clients, cases involving foreign defendants present not only special challenges but also unique opportunities for developing mitigation evidence. This Part also explores the function that consular assistance and programs such as MCLAP can play in addressing those issues. In particular, it examines three areas in which assistance from foreign governments can play an important role: (1) early intervention and plea negotiations; (2) conducting life-history investigations in a foreign country; and (3) obtaining appropriate expert assistance.

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56. ABA GUIDELINES, *supra* note 1, at Guideline 10.6, commentary.

57. *See, e.g.*, SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE COMM. ON DEFENDER SERV., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION Part I.B.7 (1998), *available at* <http://www.uscourts.gov/dpenalty/4REPORT.htm>; CAL. ATTORNEYS FOR CRIMINAL JUSTICE, CALIFORNIA DEATH PENALTY DEFENSE MANUAL, *available at* <http://www.cacj.org/publications.htm>; John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, CHAMPION, Nov. 2000, at 63, 63-65; Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 43, 43-45.

58. ABA GUIDELINES, *supra* note 1, at Guideline 4.1, commentary (footnote omitted).

59. SUPPLEMENTARY GUIDELINES, *supra* note 2.

### A. *Early Intervention and Plea Negotiations*

As the commentary to ABA Guideline 1.1 makes clear, early pre-trial investigation is required not only to prepare for trial but also as a “necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.”<sup>60</sup>

MCLAP has enjoyed some of its greatest success in helping counsel avoid death sentences before cases ever reach trial; in fact, the vast majority of cases in which MCLAP becomes involved are resolved prior to trial. One vitally important form of MCLAP assistance is facilitating life-history investigations at the earliest stages of the case to uncover compelling facts that may either persuade a prosecutor not to seek death or demonstrate that the client is constitutionally ineligible to receive the death penalty.<sup>61</sup> MCLAP regularly assists counsel in identifying culturally and linguistically competent mitigation specialists and other experts to assist with the development of mitigation evidence. Under appropriate circumstances, consular officials will also make a presentation to the prosecutor, representing Mexico’s interests in avoiding the death penalty for its national and providing reasons why a death sentence is not appropriate in that particular case.

As recognized by ABA Guideline 10.9(1), conducting outreach to the victim’s family can be another critical component in achieving a pre-trial resolution.<sup>62</sup> Accordingly, another area in which MCLAP has provided assistance is in conducting victim outreach.<sup>63</sup> In the many cases where the victim’s family members are of the same foreign nationality as the defendant, consular officers can be particularly helpful in finding culturally-sensitive ways to address their needs and concerns.

Pressure to resolve a case can also be created through aggressive pre-trial litigation, and foreign nationals’ cases often present

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60. ABA GUIDELINES, *supra* note 1, at Guideline 1.1, commentary (footnotes omitted).

61. See Lilita Ibarra, *Interview: La Abogada de Mexico*, TEX. OBSERVER, Oct. 25, 2002, available at <http://www.texasobserver.org/article.php?aid=1123> (interview with former MCLAP director Sandra Babcock); see also Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT’L & COMP. LAW 359, 393-94 (2003).

62. ABA GUIDELINES, *supra* note 1, at Guideline 10.9.1, commentary.

63. For instance, in a recent death penalty case in Nevada, MCLAP counsel consulted with the defense team and then made contact with the victim’s sister in Mexico, explaining to her that the victim’s young daughter would be required to testify if the case went to trial. Wishing to spare the daughter from the added stress and trauma of testifying at a death penalty trial, the victim’s family contacted the prosecutor. After the family expressed its concerns, the prosecution offered a life sentence in exchange for a guilty plea.

opportunities for raising creative legal claims not available in the cases of other clients. In cases where violations of international treaties have been discovered, MCLAP assists defense counsel in drafting motions raising the violations.<sup>64</sup> Where appropriate, Mexico may also decide to file a supporting diplomatic protest. Avoiding complex litigation and diplomatic conflict over international law violations can be a factor the prosecution considers in determining whether to agree to a non-death resolution of the case. In one recent pre-trial case of a Mexican national, for example, defense counsel discovered that the prosecution had engaged in various activities in violation of the bilateral Mutual Legal Assistance Treaty, which regulates and restricts the gathering of evidence in Mexico.<sup>65</sup> In response, consular officials filed complaints directly with the trial court and with the prosecution, while MCLAP assisted by drafting motions alleging prosecutorial misconduct and seeking appropriate sanctions.<sup>66</sup> The diplomatic and legal conflict generated by the treaty violation was instrumental in convincing the prosecution not to seek death against the client.

Yet another area in which MCLAP regularly assists counsel with vigorous pretrial litigation is in seeking adequate funding for the life-history investigation from the court.<sup>67</sup> Demonstrating the high but constitutionally necessary costs involved in conducting an exhaustive investigation in the client's country of origin and of obtaining culturally and linguistically appropriate expert assistance may help apply pressure to reach a pre-trial resolution in a jurisdiction with limited resources. To this end, MCLAP attorneys often provide sample funding motions and affidavits from mitigation specialists and other experts that detail the necessarily laborious and resource-consuming nature of investigations in cases of foreign nationals.<sup>68</sup>

Of course, even if counsel is successful in persuading the prosecution to negotiate a resolution to the case, a positive result can only be achieved when the client is also convinced that a plea is in his or

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64. See McGuinness, *supra* note 49, at 817-19.

65. Mutual Legal Assistance Cooperation Treaty with Mexico, U.S.-Mex., art. 6, Dec. 9, 1987, S. TREATY DOC. NO. 100-13 (1988).

66. See generally McGuinness, *supra* note 49, at 817-19 (discussing the Mexican government's practice of intervening as a party or as *amicus curiae*).

67. See *id.* at 819 n.357; Ibarra, *supra* note 61.

68. See McGuinness, *supra* note 49, at 819 n.357. While courts bear the responsibility for adequately funding representation that complies with constitutional standards and the ABA Guidelines, some courts, of course, may still refuse to grant requests for adequate funding. Similarly, certain institutional defender offices may not have sufficient resources to conduct the extensive investigation that is required in cases of foreign nationals. In such cases, MCLAP may provide additional resources to ensure that a thorough life-history is completed and that culturally and linguistically appropriate expert assistance is obtained. See Ibarra, *supra* note 61.

her best interests. In any capital case, “a relationship of trust with the client is essential to accomplishing this.”<sup>69</sup> In cases of foreign nationals, many factors severely complicate this process. First, misconceptions or ignorance about the legal system in the United States can be a barrier to trust between the client and counsel. For example, the client may doubt that appointed counsel—as opposed to retained counsel—could truly represent his or her interests. Moreover, the concept of a plea agreement may be completely unheard of or even illegal in the client’s country of origin.<sup>70</sup> The defendant may thus react with suspicion or even hostility to a plea offer. Consular officers and MCLAP often provide invaluable assistance by helping the client understand the proceedings and, by acting as a trusted representative from “home,” assuage the client’s fears and suspicions of negotiated pleas.<sup>71</sup>

An additional obstacle can arise due to the fact that, in certain cultures, “important decisions affecting family cohesion are made collectively.”<sup>72</sup> Accordingly, a foreign national may feel unable to agree to accept a plea offer without first discussing it with his or her family. Consular officials can help facilitate communication with family members in the client’s country of origin. In certain circumstances, MCLAP has assisted in bringing family members to the United States to meet with clients to help persuade them to accept a negotiated resolution.<sup>73</sup>

### *B. Life-History Investigations*

Key components of any mitigation investigation are interviews with life-history witnesses and records collection. In many cases of foreign nationals, a survey of the physical environment in which the client developed is also essential. We discuss each of these components below, along with some of the special mitigation themes that may arise in cases of foreigners.

#### 1. Records Collection

##### Both the ABA Guidelines and the Supplementary Guidelines

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69. ABA GUIDELINES, *supra* note 1, at Guideline 10.9.1, commentary.

70. JAMES, *supra* note 3, at 10.

71. Beth Hawkins, *Blows Against the Death Penalty*, CITY PAGES, June 9, 2004, available at [www.citypages.com/databank/25/1227/article12185.asp](http://www.citypages.com/databank/25/1227/article12185.asp).

72. JAMES, *supra* note 3, at 9.

73. See generally ABA GUIDELINES, *supra* note 1, at Guideline 10.6, commentary (describing how consuls may assist in investigations by “arranging for contact with families and other supportive individuals”); JAMES, *supra* note 3, at 19 (including arranging family visits as one of many consular functions in serious criminal cases).



discuss the critical role of records collection in a mitigation investigation.<sup>74</sup> One major difference between the United States and many other countries is the extent to which developmental and other records exist. In the United States, a wealth of information about a client's functioning can be found in a wide array of documents, such as school, medical, employment, government assistance, and social service records. By contrast, equivalent written records may be largely unavailable in foreign countries, particularly in the developing world.

The unavailability of records in certain foreign countries can be attributed to numerous factors. In the first place, United States subpoena power will not assist in obtaining records. In addition, extensive medical records, for example, simply may not exist given high rates of poverty and inadequate access to healthcare. Likewise, school records may not be available due to limited access to education and an inability to pursue an education for economic reasons. In cases of Mexican nationals, for example, it is not uncommon to find that the client did not receive any post-primary school education. Differences also exist between record-keeping practices in the United States and other countries. For example, record-keeping and retention practices are not standardized in Mexico, and it is far less common to find computerized records databases. Standards governing the privacy of information are also different; for instance, a private health care institution may refuse to disclose records even with a written authorization from the patient, whereas other institutions will provide records with or without authorization.

The purpose of the foregoing discussion is not to suggest that defense counsel abandon all efforts to obtain pertinent records abroad, but rather to emphasize that it is important to plan ahead and think creatively in developing strategies to obtain records. For example, while a formal records request to a school might yield nothing, a personal visit to the school may produce surprising results. In one case involving a Mexican national, the mitigation specialist was told by school staff that the client's records no longer existed. When the mitigation specialist pressed further, she was told that there was an old box containing some records in a separate room. After obtaining permission to look through the box, she found school records that provided crucial evidence supporting her client's mental retardation. In another case, the school that the client had attended as a child had closed, but upon visiting the school's location, the mitigation specialist found an abandoned building with several boxes of relevant records.

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74. See SUPPLEMENTARY GUIDELINES, *supra* note 2, at Guideline 10.11(F); ABA GUIDELINES, *supra* note 1, at Guideline 10.7, commentary.

Consulates can provide valuable assistance in obtaining records.<sup>75</sup> Mexican consular officials, for example, routinely provide a letter of introduction for the defense team member traveling in Mexico. A consular letter of introduction can be indispensable in obtaining the cooperation of local officials in the country of origin and gaining access to relevant documents. Consular officials also may be able to obtain certain records directly. Mexican consulates routinely assist defense counsel in obtaining vital documents such as birth, death, and marriage certificates, basic educational data maintained by the Secretary of Education<sup>76</sup> and criminal history records, including an official verification of the absence of any criminal history. Consulates can sometimes secure the cooperation of other agencies in the country of origin in locating and obtaining copies of other relevant records. Where necessary, consular assistance can also be helpful in obtaining authenticated translations of foreign documents that may then be presented to the trial court in an accessible and accepted form.

When seeking consular assistance in obtaining records, defense counsel should remain mindful that the response time may not be immediate. The resources and capacities of individual consular posts vary greatly, and locating and retrieving historical records can be a time-consuming process even for well-resourced consulates. Moreover, defense counsel must provide consular officials with sufficient background information to be able to locate the pertinent records. This, of course, requires the defense team to have done enough preliminary investigation to know what records may exist and where. It is also important to keep in mind that consular officials are not trained in conducting mitigation investigations. Accordingly, while consular officials can sometimes provide indispensable assistance with various bureaucratic tasks, they should not be expected to engage in any investigative activity that requires the skills and sensitivity of a trained mitigation specialist.

Finally, while persistence, patience, and creativity must be exercised when seeking records from a foreign country, the mitigation team must be willing to search for alternative sources of information since many records ultimately may not exist. For example, when investigating a client's medical history where no formal records exist, the mitigation specialist should seek out pharmacists, folk healers, and other local people who may have information about the use of folk

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75. See ABA GUIDELINES, *supra* note 1, at Guideline 10.6, commentary.

76. These files typically show the highest grade completed by the individual and a grade point average, but are not detailed educational records.

cures, home remedies, and other potentially beneficial facts.

## 2. Life-History Witness Interviews

Information obtained from life-history witnesses provides the cornerstone of the mitigation case. As discussed in the ABA Guidelines, information gathered from life-history witnesses both lays the foundation for expert opinions and provides vivid first-person accounts of the client's life experiences which build compelling narratives that humanize the client.<sup>77</sup>

In any capital case, developing mitigation evidence through witness interviews is a laborious process. The Supplementary Guidelines discuss many of the important protocols that render the process time-intensive:

Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.<sup>78</sup>

Logistical factors and cultural barriers can further complicate this process when dealing with witnesses in a foreign country. The logistical difficulties may include having to travel to remote, impoverished areas to locate and interview witnesses. Determining the whereabouts of witnesses can also be more problematic in foreign countries, since the computerized investigative databases typically used to locate witnesses in the United States may not exist. Consular officials may be able to provide assistance in overcoming logistical challenges; for example, they may be able to coordinate with government offices in the foreign country to obtain information for locating witnesses, assist with the transportation needs of an investigator, or help secure the assistance of a local guide when necessary.<sup>79</sup>

Cultural barriers may also add difficulty to the interview process. In any capital case, the social history inquiry necessarily requires delving into the most sensitive and intimate areas of a client's life; when interviewing individuals from a foreign culture, this process becomes even more delicate. For example, mental health issues may be even more

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77. See ABA GUIDELINES, *supra* note 1, at Guideline 10.11, commentary.

78. SUPPLEMENTARY GUIDELINES, *supra* note 2, at Guideline 10.11(C).

79. JAMES, *supra* note 3, at 15, 19.

stigmatizing than in the United States and witnesses' understanding of these issues may be affected by religious and folk beliefs. Similarly, misunderstandings about the nature of the legal process and the purpose of the investigation may hinder the process of obtaining beneficial information. While capital defense lawyers understand that domestic violence and trauma can provide the most compelling kinds of mitigating evidence, a foreigner might perceive such evidence as "bad" for the client, and withhold it from counsel. Consequently, the investigation team requires additional time and sensitivity to explain the need for accurate, albeit uncomfortable, memories of the defendant.

It is essential to retain a mitigation specialist with the skills necessary to break through these barriers to disclosure. Ideally, the mitigation investigator should speak the local language fluently.<sup>80</sup> Merely being able to speak the native language, however, does not necessarily render someone competent to conduct a mitigation investigation in a foreign country. The person must also have extensive knowledge of the foreign culture and must be able to relate to others in a culturally sensitive way. Establishing trust and gaining the confidence of foreign witnesses takes extra time, patience, and skill.

In light of the many challenges that arise when conducting investigations in a foreign country, it is essential that adequate time and resources be allotted to this critical component of the life-history investigation. Because of the logistical difficulties in finding witnesses and the numerous barriers to disclosure that may exist, completing a competent life-history in a foreign country will likely require multiple visits to that country. As noted previously, one important form of MCLAP assistance is helping counsel litigate requests for the additional funding necessary to complete a competent and culturally sensitive life-history investigation abroad.<sup>81</sup>

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80. The use of interpreters can badly hamper multiple aspects of the investigative process; accordingly, interpreters should only be used as a last resort. If the services of an interpreter are required, careful consideration must be given to the selection process. Guidelines established for the selection of interpreters in the context of psychological evaluations provide valuable insight into the use of interpreters to conduct mitigation investigations. *See, e.g.*, Robert L. Rhodes, *Legal and Professional Issues in the Use of Interpreters: Guidelines for School Psychologists*, 29 NAT'L ASS'N OF SCH. PSYCHOLOGISTS COMMUNIQUÉ (Sept. 2000). The following two criteria are particularly relevant to mitigation investigations: (1) the interpreter must have the ability to stay emotionally uninvolved with the discussions and have the ability to maintain confidentiality and neutrality; (2) individuals with familial or social ties to the client and/or the interviewees should not be used as interpreters as it creates the likelihood that information will be manipulated to save the client, family and/or interviewee from embarrassment or bad news. *Id.*

81. *See supra* note 68 and accompanying text.

### 3. Survey of the Physical Environment

The level of poverty that some foreign clients have endured is unlike any most Americans have ever seen. In Mexico, for example, nearly forty-five percent of the population is poor, while at least eighteen percent live in extreme poverty without a reliable source of food or clean water.<sup>82</sup> Many homes in rural areas have dirt floors and cramped living quarters (such as a single room in which every family member sleeps), no indoor plumbing, and no running water. One MCLAP attorney conducting a mitigation investigation in Mexico discovered that the client literally had grown up on a toxic waste dump. The client and his family had made a living by scavenging through landfill trash, and the family's home was built from cardboard and wooden fruit boxes. A case such as this clearly illustrates the importance of surveying the physical environment to which the client was exposed. That survey can be beneficial for developing mitigation themes, as well as providing experts with information crucial to conducting mental health assessments.

When assessing the physical environment in which a client was born, it is important to be mindful of the fact that circumstances may have changed dramatically in the years since the client's childhood. Accordingly, it is essential to gather information regarding the conditions that were present during the client's developmental period. In one Mexican national's case, the childhood home had undergone substantial improvements over the years largely due to the money that the client and his siblings were able to send home from the United States. The investigator, however, located a report that detailed many of the extreme conditions present in the client's village during his childhood. The report indicated, among other things, that the village had no potable water and no plumbing. The common practice was for individuals to relieve themselves outside and then use pigs to eat the human waste. Those pigs, in turn, were eaten by the village residents, resulting in many intestinal illnesses and parasitic infections. None of this was evident from surveying the relatively modernized conditions of the village at the time of the investigation.

Supplementary Guideline 10.11(G) discusses the importance of collecting demonstrative evidence—such as photographs and videotapes—in order to humanize the client.<sup>83</sup> Visual images can also be critically important for graphically documenting the physical conditions in which the client grew up, which can be compelling and powerful

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82. The World Bank, Mexico Country Brief, <http://go.worldbank.org/SP2M3X2FN0> (last visited Mar. 29, 2008).

83. SUPPLEMENTARY GUIDELINES, *supra* note 2, at Guideline 10.11(G).

mitigating evidence. Where those physical conditions have changed over time, old family photographs that show the prior conditions can provide powerful corroboration. As with other information obtained during the investigation, objective data about living conditions can also be critically important for the client's mental health assessments.

#### 4. Mitigation Themes

Given the individualized nature of life-history investigations, it is impossible to provide a comprehensive list of the mitigation themes that may arise in cases of foreign nationals. However, some mitigation issues are commonly found in the cases of foreign defendants, particularly those from developing countries.

Poverty is, of course, a frequent mitigation theme in capital cases, and not just those involving foreign clients. The level of poverty that exists in many foreign countries, however, is something rarely seen in the United States. A host of problems flow from this extreme poverty: malnutrition, exposure to contaminated water and other environmental toxins, lack of access to educational opportunities, inhalation of glue or gasoline from an early age, and abandonment by parents in search of better economic opportunities, to name just a few. Foreign clients who were exposed to such savage poverty are at far greater risk of having mitigating factors such as organic brain damage, intellectual impairments, and trauma.<sup>84</sup>

In general, capital defendants who were born in developing countries are more likely to have suffered neurological damage due to environmental contaminants than someone reared in the United States. In Mexico, for example, paints and candy frequently contain lead, there are no vehicle emission standards, and highly toxic pesticides are often applied without adequate safety gear or precautions against ground water contamination. In addition, in some communities it is common to brew liquor at home that may contain harmful impurities.

Finally, issues related to the process of immigration itself are a source of mitigation evidence unique to foreign clients. Stories of being uprooted from the country of origin and the subsequent struggles in the United States provide compelling and personalized mitigation. Leaving behind one's native country, home, way of life, and family is often extremely traumatic. In some instances, immigrants make a desperate journey to the United States to escape war, abject poverty, or extreme

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84. See, e.g., MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORT 127 tbl.8.1 (10th ed. 2002). Many foreign clients will have virtually all of the risk factors for mental retardation.

violence. In addition, many are exposed to severe trauma—both physical and mental—while crossing the border. Once in the United States, cultural displacement may lead to any number of problems, including mental illnesses. First-generation adolescent immigrants are often caught between two worlds: the world of their parents who have not fully assimilated and the new peer environment in which violence and group loyalty are the norm.<sup>85</sup> Moreover, the preoccupation of undocumented immigrants with avoiding authority figures often leads to horrific unintended consequences for their children, such as inadequate health care, very little formal education, and being witness to routine domestic violence.

Once the mitigation themes have been identified through a life-history investigation, it is possible to determine the various types of experts that will be required for a case.

### C. *Obtaining Expert Assistance*

Guideline 10.11(E)(1) of the Supplementary Guidelines lists the various types of experts that typically may be needed to assist in the development of mitigation evidence. Such experts include, but are not limited to:

- a) Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.
- b) Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.
- c) Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.
- d) Persons with specialized knowledge of institutional life, either generally or within a specific institution.<sup>86</sup>

Where the client is a foreigner, additional criteria must be considered in selecting appropriate experts. The previous Part discussed the importance of retaining a mitigation specialist with the linguistic and

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85. See *Mak v. Blodgett*, 970 F.2d 614, 617 & n.5 (9th Cir. 1992) (positive testimony from defendant's family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of thirteen murders); PEDRO MATEU-GELABERT, *DREAMS, GANGS, AND GUNS: THE INTERPLAY BETWEEN ADOLESCENT VIOLENCE AND IMMIGRATION IN A NEW YORK CITY NEIGHBORHOOD* 10-11, 15 (2002).

86. SUPPLEMENTARY GUIDELINES, *supra* note 2, at Guideline 10.11(E)(1).

cultural expertise necessary to address the special issues involved in conducting a life-history investigation for a foreign client.<sup>87</sup> Developing mitigation evidence in these cases will also likely require obtaining bilingual and bicultural experts in fields such as psychology, cross-cultural issues, and immigration.

Mental health assessments provide an important example of the additional considerations that may arise with foreign clients. For example, many standard psychological testing instruments are written in English and are designed from an American cultural perspective; such tests may yield highly inaccurate results when administered to a foreigner.<sup>88</sup> Linguistic and cultural barriers may also hinder communication and rapport between the tester and subject, further undermining the reliability of the results.<sup>89</sup> In general, “mental health assessments that fail to take into account cultural attitudes and values can produce highly distorted findings.”<sup>90</sup> It is important to note that this phenomenon should be considered not only when retaining experts for evaluations but also when challenging the findings of any testing conducted by the state.

When selecting experts to conduct mental retardation testing, for example, it is imperative to choose personnel who will recognize the unique background of the foreign national and select the appropriate testing instruments and norms. Likewise, the expert must be cognizant of the need to communicate with the foreign defendant without the presence of an interpreter, as that additional presence can skew the results by creating a climate wholly unlike that enjoyed by the normative population during its testing. Similar considerations apply to experts in other fields, all of whom must be aware of and familiar with the specific foreign environment that influenced the client’s development and conduct.

#### VII. CASE STUDY—*MARQUEZ-BURROLA V. OKLAHOMA*

One recent case in particular illustrates the powerful difference that the assistance of a foreign national’s home government can make to the quality of the penalty phase defense. MCLAP became aware of this case a few months before the trial date, but defense counsel steadfastly refused our assistance and proceeded to trial despite MCLAP’s grave

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87. See *supra* notes 80-81 and accompanying text.

88. JAMES, *supra* note 3, at 27.

89. *Id.*

90. *Id.* (citing Antonio Puente & Miguel Perez Garcia, *Psychological Assessment of Minority Groups*, in HANDBOOK OF PSYCHOLOGICAL ASSESSMENT (Gerald Goldstein & Michael Hersen eds., 3d ed. 1999).



concerns over their readiness to proceed. As the appellate opinion later noted, counsel for Mexico even appeared *pro hac vice* at a hearing “just days before trial . . . and expressed concern about the course of the second-stage preparation.”<sup>91</sup>

On February 6, 2003, an Oklahoma jury found Isidro Marquez-Burrola guilty of first degree murder after a three day trial.<sup>92</sup> The State had accused Marquez of killing his wife and “alleged two aggravating circumstances in support of the death penalty: (1) that the murder was especially heinous, atrocious, or cruel; and (2) that there existed a reasonable probability that [he] would constitute a continuing threat to society.”<sup>93</sup> In mitigation, the defense presented three witnesses: the client’s father, mother, and sister: “Each testified generally that the client had been a good man in the past and asked the jury to spare his life.”<sup>94</sup> During the sentencing phase, counsel presented no evidence about Marquez’s mental health. After an exceptionally brief penalty trial,<sup>95</sup> the jury found the existence of both aggravating circumstances and recommended a sentence of death, which the trial judge formally imposed.<sup>96</sup>

On direct appeal, new counsel raised ineffective assistance of counsel at sentencing—ultimately, the Oklahoma Court of Criminal Appeals (“CCA”) remanded the case to the trial court for an evidentiary hearing to develop extra-record evidence.<sup>97</sup> Appellate counsel, in stark contrast to trial counsel, actively worked with MCLAP and consular authorities to investigate the appellant’s life-history and develop a culturally sensitive mitigation defense.

Trial counsel never retained the services of a mitigation specialist and did not commence any penalty phase preparation until about a week before trial. The “mitigation investigation” consisted of speaking for an hour or two with a handful of family members about testifying during the penalty phase. No member of the defense team spoke Spanish fluently; the client’s twelve-year-old nephew served as an interpreter during many of the interactions with client’s family. Defense counsel made no attempt to conduct any investigation in Mexico where Marquez, who was in his early 40s and had recently immigrated to the United States, had spent the majority of his life.

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91. Marquez-Burrola v. State, 2007 OK CR 14, ¶ 49, 157 P.3d 749, 764.

92. *Id.* ¶ 1, 157 P.3d at 752-53.

93. *Id.* ¶ 1, 157 P.3d at 752.

94. *Id.* ¶ 9, 157 P.3d at 754.

95. *Id.* The entire mitigation case numbered a mere fifteen pages. *Id.*

96. *Id.* ¶ 1, 157 P.3d at 752-53.

97. *Id.* ¶¶ 37, 42, 157 P.3d at 762-63.

With the assistance of MCLAP, appellate counsel retained the services of bilingual and bicultural mental health and mitigation experts, and conducted extensive mitigation investigations in Mexico and Oklahoma. Counsel presented evidence of the client's impoverished upbringing, his good character, his mental health problems, immigration-related issues, and the fact that his mental health appeared to deteriorate after immigrating to the United States.<sup>98</sup> MCLAP attorneys assisted counsel in developing mitigation themes and marshalling the evidence into pleadings which ultimately resulted in the granting of an evidentiary hearing. Appellate counsel worked closely with MCLAP attorneys and experts to conduct an effective presentation of the evidence at the evidentiary hearing and in the post-hearing briefing. MCLAP additionally filed an amicus brief with the CCA on behalf of the Mexican government.

MCLAP further assisted by bringing multiple witnesses to Oklahoma from Mexico to testify at the evidentiary hearing. Program attorneys testified to their observations of the defendant and his counsel before trial, assisted in the witness preparation and questioning of witnesses, and even objected to the adequacy of translation at the hearing. Trial counsel gave multiple and contradictory explanations for their actions and inactions with respect to developing and presenting mitigation evidence, including the notion that counsel did not want to remind the rural (and presumably xenophobic) jury about Marquez's Mexican roots. The trial court adopted verbatim the state's proposed findings of fact and conclusions of law.

Relying on the new information developed during the evidentiary hearing, the CCA found the mitigating evidence "clearly outweighed the evidence supporting the aggravating circumstances."<sup>99</sup> The court concluded that trial counsel had been ineffective and that the sentencing result would have been different had Mexico been involved in helping counsel prepare for the penalty phase of trial.<sup>100</sup>

In evaluating whether trial counsel had provided effective assistance at trial, the CCA acknowledged that many logistical challenges bore directly on investigating and presenting a proper mitigation case. It noted:

Practically anyone who could offer insight into Appellant's past lived in Mexico. Proficiency in Spanish was essential, not just for interviewing potential witnesses, but for reviewing school, medical,

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98. *Id.* ¶¶ 52, 58, 157 P.3d at 765, 767.

99. *Id.* ¶ 62, 157 P.3d at 768.

100. *Id.* ¶ 36, 157 P.3d at 761.

and other records. Indeed, these challenges were apparent at the evidentiary hearing. Immigration paperwork caused the hearing to be delayed. There were some translation difficulties at the hearing itself.<sup>101</sup>

The CCA added, however, that despite these difficulties “[d]efense counsel has a duty to take all necessary steps to ensure that available mitigating evidence is presented.”<sup>102</sup>

In evaluating the mitigation evidence presented at the evidentiary hearing, the CCA recognized that “[a]n aggressive mitigation effort, initiated early in the case, would not only have humanized Appellant in the eyes of the jurors, but might also have helped explain his conduct.”<sup>103</sup> The court rejected the trial court’s suggestion “that it was the responsibility of [the client] and his family to understand the nature of mitigation on their own, and to bring relevant evidence to defense counsel’s doorstep.”<sup>104</sup> It concluded that “[i]n this case, counsel simply did not devote the efforts which have been recognized, by the Supreme Court and this Court, as likely to make a difference between life and death.”<sup>105</sup>

Finally, in finding that there had been prejudicial error at the punishment stage of Mr. Marquez-Burrola’s trial, the court noted that such error would generally “warrant vacating the death sentence and remanding to the district court for re-sentencing.”<sup>106</sup> However, in this case, it found a modification of the sentence to life imprisonment without the possibility of parole more appropriate.<sup>107</sup> In so finding, the court relied on the fact that “the evidence supporting one of the two aggravating circumstances (continuing threat to society) was weak,” given that the client had no known criminal record and the considerable evidence of the client’s mental illness developed at the evidentiary hearing “tended to explain what few instances of violent conduct the State was able to muster.”<sup>108</sup> The CCA ultimately concluded that all of the mitigating evidence “clearly outweighed the evidence supporting the aggravating circumstances,” justifying an outright modification of the sentence.<sup>109</sup>

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101. *Id.* ¶ 51, 157 P.3d at 765.

102. *Id.*

103. *Id.* ¶ 58, 157 P.3d at 767.

104. *Id.* ¶ 60, 157 P.3d at 768.

105. *Id.*

106. *Id.* ¶ 62, 157 P.3d at 768.

107. *Id.*

108. *Id.*

109. *Id.*

Perhaps most notably, the court emphasized that the errors requiring the death sentence to be vacated would have been avoided had trial counsel simply accepted MCLAP's involvement in developing the "substantial mitigating evidence" presented on appeal:

This was accomplished with invaluable help from attorneys and mitigation specialists working on behalf of the government of Mexico—the same professionals who had repeatedly offered assistance to trial counsel, and who testified that a thorough mitigation investigation might have been available before trial, had trial counsel first sought funds from the district court to conduct it.<sup>110</sup>

The same reasoning should apply to any case in which a consulate can demonstrate that it would have provided the assistance necessary to develop important mitigating evidence that was never presented at trial. Finally, the *Marquez-Burrola* case illustrates that the failure of trial counsel to accept relevant consular assistance in a capital case constitutes ineffective assistance.

### VIII. CONCLUSION

The challenges inherent in defending a foreign national defendant can be overcome, but only with conscientious and experienced capital defense team members. These members must take special care to be linguistically and culturally sensitive to their client in all their dealings with him or her, their family, and their community. The only way to level the playing field, and provide foreign capital defendants the vigorous and thorough defense mandated for all capital defendants, is to spend *a great deal more time* with the client as well as with those persons, places, and institutions that can provide mitigating evidence. Consequently, counsel should inform the appropriate funding agencies early and often that a capital defense of a foreign client that complies with the ABA Guidelines and the Supplementary Guidelines will cost significantly more than other complex capital litigation. Whether or not consular resources are available does not change the ineluctable responsibility of the charging jurisdiction to provide the resources necessary for a full defense.

Once that responsibility has been met, working in conjunction with consular officials and legal assistance programs can be a satisfying and enlightening project for all members of defense teams. This collaborative effort may lead to the discovery of powerful mitigating evidence from the foreign client's roots and immigration experience.

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110. *Id.* ¶ 52 n.20, 157 P.3d at 766 n.20.

Profoundly compelling evidence is available to defense teams that take advantage of consular assistance and work creatively and compassionately in compliance with the ABA Guidelines.