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Amanda E. Burks

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# Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense

Amanda E. Burks\*

## I. Introduction

The international community has expressed extreme displeasure with the United States's use of capital punishment. Increasingly, foreign governments, which have been notified of their citizen's arrest or conviction, have wanted to become involved, especially in capital cases in which the death penalty is sought or has been imposed. Foreign national involvement has been largely unsuccessful, as it usually comes in the form of pleading for post-conviction relief. Often, foreign governments participate as *amicus curiae* or via informal letters to the President of the United States or the state's governor; but, recently, several governments have brought suit in the United States Supreme Court or in the International Courts of Justice to assert the United States's violation of Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention" or "Convention").<sup>1</sup>

State and federal courts have had numerous opportunities to address claims from foreign nationals alleging that their rights to consular notification and assistance, as provided by the Vienna Convention, were violated. No court in the United States has granted relief on the basis of such a violation. The hope of inconsistency in decisions is slight, but recent developments in both international and American courts are somewhat encouraging.<sup>2</sup>

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\* J.D. Candidate, May 2002, Washington and Lee University School of Law; B.A., James Madison University, 1997; M.A., University of South Carolina, 1999. The author wishes to express her gratitude to her family and friends for their faithful support. The author would also like to thank her fellow clinicians in the Virginia Capital Case Clearinghouse and Professor Roger Groot.

1. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (declining to exercise jurisdiction and enforce injunction against the Governor of Arizona to stay execution); *Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998) (holding that the district court lacked subject matter jurisdiction). See generally *Vienna Convention on Consular Relations*, Dec. 24, 1969, art. 36(1), 596 U.S.T. 77, 262-512 (outlining consular rights for foreign nationals) (hereinafter "Vienna Convention").

2. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶¶ 77, 127 (June 27) (holding that the Vienna Convention affords individual rights to foreign defendants, and a violation of the Convention rights should be appropriately remedied); John Greiner, *Mexican National Granted Indefinite Stay of Execution*, THE DAILY OKLAHOMAN, Sept. 11, 2001, at 1A (reporting Oklahoma court's grant of

This article tracks the claims and decisions of state, federal, and international courts with respect to Vienna Convention violations, using as its primary illustration the cases of Karl and Walter LaGrand.<sup>3</sup> It also seeks to inform attorneys of typical arguments and judicial responses to them, so that they might better avoid the pitfalls that have befallen others who have forged the field. Truly, the best defense is an effective offense, at least with regard to this issue. The author hopes that, in pointing out the obstacles facing a foreign national capital defendant and her counsel, attorneys may better navigate their cases and effect just results for their clients.

## II. *The LaGrand Case*

Karl LaGrand ("Karl") and his half-brother Walter ("Walter"),<sup>4</sup> German nationals,<sup>5</sup> were convicted on February 17, 1984, in the Superior Court of Pima County, Arizona, for first-degree murder, first-degree attempted murder, attempted armed robbery, and two counts of kidnaping.<sup>6</sup> Each received death sentences for the murder of bank manager Ken Harstock in a failed bank robbery.<sup>7</sup> Both death sentences were affirmed on appeal.<sup>8</sup> In a jointly-filed habeas

a stay of execution for Gerardo Valdez).

3. See generally *State v. (Karl) LaGrand*, 733 P.2d 1066 (Ariz. 1987); *State v. (Walter) LaGrand*, 734 P.2d 563 (Ariz. 1987); *(Walter) LaGrand v. Arizona*, 484 U.S. 872 (1987), *cert. denied*; *(Karl) LaGrand v. Arizona*, 501 U.S. 1259 (1991), *cert. denied*; *(Karl) LaGrand v. Arizona*, 501 U.S. 1277 (1991), *reh'g denied*; *(Walter) LaGrand v. Arizona*, 501 U.S. 1259 (1991), *cert. denied*; *(Karl and Walter) LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995); *(Karl and Walter) LaGrand v. Lewis*, 883 F. Supp. 469 (D. Ariz. 1995); *(Karl and Walter) LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 13 (June 27).

4. The cases of Karl and Walter LaGrand illustrate each of the issues discussed in this article. Their cases are archetypal of those involving foreign national defendants. The narrative provides an example of how courts respond to and resolve such cases.

5. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 13 (June 27). The International Courts of Justice (I.C.J.) found in its June 27, 2001 decision:

Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanor and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.

*Id.*

6. *State v. (Karl) LaGrand*, 733 P.2d 1066, 1067 (Ariz. 1987); *State v. (Walter) LaGrand*, 734 P.2d 563, 565 (Ariz. 1987).

7. *(Walter) LaGrand*, 734 P.2d at 565-67. Karl and Walter entered Valley National Bank sometime after 8:00 a.m. on January 7, 1982, pointed a toy gun, and demanded that Ken Harstock ("Harstock") open the bank vault. *Id.* at 565-66. When Harstock was unable to comply, Karl and

petition to the United States Court of Appeals for the Ninth Circuit, the LaGrands argued that their constitutional rights had been violated, as they were not advised of their rights under the Vienna Convention<sup>9</sup> at the time of their arrest or during their trial.<sup>10</sup> They contended that they were denied access to possible mitigation evidence that they could have obtained from Germany.<sup>11</sup> The State of Arizona did not dispute the fact that it did not notify the LaGrands of their rights.<sup>12</sup> Neither defendant raised this issue at trial or in any subsequent state appeal.<sup>13</sup> The Ninth Circuit, therefore, concluded that the issue was procedurally defaulted and the defendants' claims of actual innocence were unsubstantiated.<sup>14</sup> Karl filed a second habeas petition in the Ninth Circuit, again raising the Vienna Convention claim.<sup>15</sup> In the interim, Karl presented the Vienna Conven-

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Walter bound and gagged Harstock and bank employee Dawn Lopez ("Lopez"). *Id.* at 566. Walter and Karl cooperatively stabbed Harstock twenty-four times. *Id.* Walter also stabbed Lopez multiple times. *Id.* When medical personnel arrived, Harstock was dead. *Id.* The LaGrands were arrested later the same day. *Id.* Karl later confessed to the crimes and claimed that he alone had stabbed Harstock and Lopez while Walter was out of the room. *Id.* at 566-67. He stated that he stabbed them both with a letter opener because he panicked when Harstock kicked him. *Id.* at 567. At his trial, Walter testified that, while he did intend to rob the bank, he did not have any role in the killings and was not present when Karl stabbed Harstock and Lopez. *Id.* Walter stated that when he returned to the bank for the car keys, Karl appeared distressed and said, "I killed him. I didn't mean to do it. I panicked. He kicked me." *Id.* Walter called an expert psychologist to testify as to the effects of stress on memory, specifically suggesting that Lopez did not accurately recall Walter's being present during the stabbing, because she was in fear for her life. *Id.* Karl did not testify in his trial and his admissions were not admitted into evidence. *Id.*

8. (Karl) *LaGrand v. Arizona*, 501 U.S. 1259 (1991), *cert. denied*; (Karl) *LaGrand v. Arizona*, 501 U.S. 1277 (1991), *reh'g denied*; (Walter) *LaGrand v. Arizona*, 484 U.S. 872 (1987), *cert. denied*; (Walter) *LaGrand v. Arizona*, 501 U.S. 1259 (1991), *cert. denied*.

9. Vienna Convention, *supra* note 1, art. 36(1), 596 U.S.T. at 262-512. The Convention provides, under Article 36(1)(b), that, upon arrest, incarceration, or other custodial situation, a foreign national must be advised of his right to communicate with his consulate. *Id.*

10. (Karl and Walter) *LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1996). Neither Karl nor Walter raised the Vienna Convention claim in their federal habeas petition to the United States District Court for the District of Arizona. *See generally* (Karl and Walter) *LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995); (Karl and Walter) *LaGrand v. Lewis*, 883 F. Supp. 469 (D. Ariz. 1995).

11. (Karl and Walter) *LaGrand*, 133 F.3d at 1262. The LaGrands argued that, had they been able to contact their consulate, they could have obtained evidence of their abusive childhoods and information on the difficulties German children of mixed marriages encounter. *Id.* The Ninth Circuit stated that this possible mitigation evidence had no bearing on eligibility for the death penalty. *Id.*

12. *Id.* at 1261.

13. *Id.*

14. *Id.* at 1261-62. The Ninth Circuit also concluded that the LaGrands failed to show "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule," evidence of which would allow the appellate court to reach the merits of the procedurally defaulted claim. *Id.* at 1261 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The court also determined that the LaGrands did not meet the "miscarriage of justice" standard. *Id.* at 1262.

15. (Karl) *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999).

tion issue in state court; relief was denied on the basis of procedural default by waiver.<sup>16</sup> Because the state court denied habeas relief and the Ninth Circuit had previously refused to grant relief, the Ninth Circuit declined to apply federal habeas review on this issue.<sup>17</sup> The Ninth Circuit did grant a stay of execution, however, on the basis that the method of execution chosen, lethal gas, was unconstitutional.<sup>18</sup> The United States Supreme Court granted the state's application to vacate the stay of Karl's execution and subsequently dismissed the petition for writ of certiorari.<sup>19</sup> Karl LaGrand was executed on February 24, 1999.<sup>20</sup>

On March 3, 1999, Germany brought an action in the United States Supreme Court, moving for a preliminary injunction to halt the scheduled execution of Walter LaGrand.<sup>21</sup> Germany claimed as its authority an order entered by the International Courts of Justice ("I.C.J.") directing the United States to prevent Walter's execution, pending a final decision of the LaGrand case filed with the I.C.J.<sup>22</sup> The Supreme Court declined to exercise its original jurisdiction, citing "tardiness of action" on the part of Germany and "jurisdictional barriers implicated by pleas."<sup>23</sup> The Court explained that the United States had not waived its sovereign immunity and questioned whether Article III, Section 2, clause 2 of the United States Constitution provided a basis for preventing a German citizen who was not a consul or ambassador from being executed.<sup>24</sup> Furthermore, the Court stated that, with regard to the action against the state of Arizona, "a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh

16. *Id.* The Arizona Rules of Criminal Procedure provide that "[a] defendant shall be precluded from [post-conviction] relief . . . based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." ARIZ. R. CRIM. P. 32.2(a)(3) (West 2001).

17. *(Karl) LaGrand*, 170 F.3d at 1161.

18. *(Karl) LaGrand v. Stewart*, 173 F.3d 1144, 1149-50 (9th Cir. 1999) (deciding the case without discussion of Vienna Convention claim).

19. *Stewart v. (Karl) LaGrand*, No. A-706, 1999 WL 92538, at \*1 (U.S. Feb. 24, 1999); *Stewart v. (Karl) LaGrand*, 526 U.S. 1061 (1999).

20. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 29 (June 27).

21. *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (declining to exercise jurisdiction and enforce injunction against the Governor of Arizona to stay execution).

22. *Id.*; see also Order: Request for the Indication of Provisional Measures (*F.R.G. v. U.S.*), 1999 I.C.J. ¶ 1 (March 3).

23. *Germany*, 526 U.S. at 112. The court noted that Germany's motion for leave to file a bill of complaint and for a preliminary injunction was filed only two hours before the scheduled execution. *Id.*

24. *Id.*; see U.S. CONST. art. III, § 2, cl. 2 (stating, in part, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction").

Amendment principles."<sup>25</sup> Without further explanation, the Court submitted its decision.<sup>26</sup>

The International Courts of Justice reached its final decision on June 27, 2001, in the case of *Federal Republic of Germany v United States*.<sup>27</sup> The court's opinion contemplated four issues: (1) whether the United States had violated Article 36(b)(1) of the Vienna Convention in failing to advise the LaGrand brothers of their consular rights; (2) whether the United States's doctrine of procedural default as applied in the LaGrand case violated the obligation to conform to the Convention; (3) whether the United States failed to comply with the I.C.J.'s March 3, 1999, order, requiring that it employ "all measures at its disposal" to prevent the execution of Walter LaGrand, pending the final decision of the I.C.J.;<sup>28</sup> and (4) whether the United States appropriately remedied the Convention violation.<sup>29</sup> As to the first issue, whether the United States violated the Convention, the I.C.J. determined that both Karl and Walter LaGrand were German nationals and that the United States violated Article 36(1)(b) by failing to notify the LaGrands of their consular rights.<sup>30</sup> The I.C.J. recognized the undisputed fact that neither LaGrand brother received notification of his rights under the Convention at the time of his arrest, conviction, or sentencing.<sup>31</sup> Arizona authorities claimed not to have known of the LaGrands' national status until late-1984, "and possibly by mid-1983 or earlier, but in any event not at the time of their arrest in 1982."<sup>32</sup> The United States also argued that anyone who knew of their German citizenship prior to or at the time of their arrest was not a "competent authority," as dictated in the Vienna Convention.<sup>33</sup> Furthermore, the United States argued, the LaGrands likely did not themselves know of their German citizenship, as neither LaGrand identified himself as a German

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25. *Germany*, 526 U.S. at 112; see U.S. CONST. amend. XI (stating, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

26. *Germany*, 526 U.S. at 112.

27. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1 (June 27).

28. See Order: Request for the Indication of Provisional Measures (*F.R.G. v. U.S.*), 1999 I.C.J. ¶ 1 (March 3).

29. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 11 (June 27).

30. *Id.* ¶¶ 13, 78.

31. *Id.* ¶ 15.

32. *Id.* ¶ 16.

33. *Id.*; see Vienna Convention, *supra* note 1, art. 36(1)(b) (stating, "[If the foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner").

national.<sup>34</sup> Regardless, the United States stipulated in its Counter-Memorial submitted to the I.C.J. that the United States breached its obligation to Germany under Article 36(1)(b) of the Convention.<sup>35</sup> The I.C.J. agreed.<sup>36</sup> It further decided that the Convention creates *individual* rights due to foreign nationals and does not merely provide for the rights of the sending State<sup>37</sup> and its consuls.<sup>38</sup>

As to the second issue, the I.C.J. concluded that, although the procedural default rule is not a per se violation of Convention rights, its application in the LaGrand case violated Convention Article 36(2), which requires that participating states give “full effect” to the rights conferred under the Convention.<sup>39</sup> The I.C.J. recognized that United States federal courts reviewed the LaGrands’ counsels’ professional competence, but the procedural default rule “prevented [United States courts] from attaching any legal significance” to the fact that the Convention violation prevented Germany from providing legal assistance.<sup>40</sup>

Because the United States “failed to take all the steps they could have taken to give effect to the [I.C.J.’s Order of March 3, 1999],” the I.C.J. found the United States in violation of its order to prevent the execution of Walter LaGrand.<sup>41</sup> The I.C.J. directed the United States to adhere to two provisions: (1) to take “all measures at its disposal to ensure that Walter LaGrand is not executed;” and (2) to transmit the order to the Governor of Arizona.<sup>42</sup> According to a letter dated March 8, 1999, from the Legal Counsellor [sic] of the United States Embassy at The Hague, the State Department forwarded the I.C.J. order to the Arizona Governor.<sup>43</sup> The State Department explained, however, that “[i]n view of the extremely late hour of the receipt of the Court’s Order, no further steps were feasible.”<sup>44</sup> The I.C.J. held that, while the United States did comply with the second provisional measure, the “mere transmission of its [the I.C.J.’s] Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay . . . was certainly less than could have

34. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 1, ¶ 16 (June 27). Walter affirmatively stated his United States citizenship. *Id.*

35. *Id.* ¶ 11.

36. *Id.* ¶ 123.

37. A “sending State” refers to the foreign national’s country of citizenship, i.e., Germany; a “receiving State” is the country in which the national is visiting or residing, i.e., the United States.

38. *Id.* ¶ 77.

39. *Id.* ¶¶ 90-91; see Vienna Convention, *supra* note 1, art. 36(2) (stating, “The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended”).

40. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 1, ¶ 91 (June 27).

41. *Id.* ¶ 115.

42. *Id.* ¶ 111.

43. *Id.*

44. *Id.*

been done even in the short time available."<sup>45</sup> The United States, therefore, failed to comply with the I.C.J.'s Order of March 3, 1999.<sup>46</sup>

Finally, Germany asked the I.C.J. to determine a remedial course of action.<sup>47</sup> Specifically, Germany requested that the United States make assurances that it will take steps to prevent further breaches of the Convention and that it will "provide effective review of and remedies for criminal convictions impaired by violation of the rights under Article 36."<sup>48</sup> The I.C.J. recognized the apology from the United States<sup>49</sup> and acknowledged its efforts to educate law enforcement of the rights provided by the Convention.<sup>50</sup> The Court took note of the United States's assurances, but stated that the United States had an obligation under certain circumstances to review convictions and sentences.<sup>51</sup> It left the manner of implementing the process of review to the United States.<sup>52</sup>

### III. *The Vienna Convention Versus the Constitution*

The LaGrand brothers based their appeals on the violation of their consular rights under the Vienna Convention.<sup>53</sup> The Convention is binding between its signatories and confers reciprocal rights to its participating states and, arguably, to their citizens.<sup>54</sup> The United States ratified the Vienna Convention on December 24, 1969, thereby incorporating its substantive and procedural requirements into American jurisprudence.<sup>55</sup> Theoretically, its status as a binding international treaty requires that American courts give it the same force and effect as the

45. *Id.* ¶ 112.

46. *Id.* ¶ 115.

47. *Id.* ¶¶ 117, 118, 120.

48. *Id.* ¶ 117.

49. *Id.* ¶¶ 121-23. The United States's Counter-Memorial contained an apology to Germany and an assurance that the United States would take "substantial measures aimed at preventing any recurrence." *Id.*

50. *Id.* ¶ 121. The United States pointed out that the State Department had published a booklet entitled, "Consular Notification and Access: Instruction for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them." *Id.* It also prepared a small reference card designed to be carried by law enforcement officers with information on rights under the Convention. *Id.*

51. *Id.* ¶ 125.

52. *Id.*

53. *See generally* (Karl and Walter) *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1996); (Karl and Walter) *LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995); (Karl and Walter) *LaGrand v. Lewis*, 883 F. Supp. 469 (D. Ariz. 1995).

54. Vienna Convention on the Law of Treaties, March 21, 1986, art. 26 (stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

55. Vienna Convention, *supra* note 1, art. 36 (1)(a).



“supreme [l]aw of the [l]and.”<sup>56</sup> American courts, however, have construed its authority to be somewhat limited.<sup>57</sup>

Despite the United States judiciary’s difficulty defining the Vienna Convention’s authority in relation to its own, the Convention’s language claims ultimate authority in Article 36, while allowing signatory States to decide the manner of implementation.<sup>58</sup> The Convention states in Article 36(2):

The rights referred to in paragraph 1<sup>59</sup> of this Article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso*, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.<sup>60</sup>

In the *LaGrand* case, the United States argued before the I.C.J. that this Article section referred to the rights of the sending State, rather than to the individual.<sup>61</sup> Additionally, the United States argued that “[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default . . . cannot violate the Convention.”<sup>62</sup> The I.C.J. made note of the Solicitor-General of the United States’s position with regard to the I.C.J.’s order for provisional measures: “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.”<sup>63</sup> Through its arguments and executive decisions, the United States evidenced disregard for not only the Vienna Convention’s protections, but also the authority of the International Courts of Justice.

56. U.S. CONST. art. VI, cl. 2 (mandating that “all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Any thing in the Constitution or Laws of any State to the Contrary notwithstanding”); *see also* U.S. CONST. art. II, § 2, cl. 2 (giving the President of the United States power, with advice and consent of the Senate, to make treaties).

57. *See generally* *Breard v. Greene*, 523 U.S. 371 (1998) (deciding that forum state’s rules determine implementation of international treaty and a conflicting statute in the forum state renders treaty null); *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (holding that violation of Vienna Convention claim does not involve the denial of a constitutional right).

58. Vienna Convention, *supra* note 1, art. 36(2).

59. Paragraph 1 describes the right of consular assistance and notification afforded foreign nationals and consular rights of access and communication. Vienna Convention, *supra* note 1, art. 36(1). *See infra* Part IV for a reproduction of Article 36(1).

60. Vienna Convention, *supra* note 1, art. 36(2) (emphasis added).

61. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶¶ 85-87 (June 27). The United States argued that Article 36(2) provided rights to the sending State, such as “those addressing the timing of communications, visiting hours, and security in a detention facility.” *Id.* ¶ 86. In other words, because Article 36(1) conferred rights to the sending State and its consulate, not individual rights, the United States would be giving “full effect” to the Convention by allowing the foreign consulate access to the foreign defendant. *Id.* The I.C.J. rejected this argument as proceeding on a misreading of the Article. *Id.* ¶ 89.

62. *Id.* ¶ 85.

63. *Id.* ¶ 33.

The case of Angel Breard ("Breard") forecast the arguments and obstacles of the *LaGrand* case.<sup>64</sup> Originating in Virginia courts, Breard's federal habeas applications failed to provide relief for the violation of his Vienna Convention rights, in part, because of courts' interpretation of the authority (or lack thereof) of the Convention.<sup>65</sup> Although the majority in *Breard v Pruett* did not discuss the relationship between the Vienna Convention and the Constitution, Judge Butzner wrote in his concurrence:

The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. The Supremacy Clause mandates that rights conferred by a treaty be honored by the states . . . . The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.<sup>66</sup>

In denying Breard's petition for habeas corpus, the United States Supreme Court rejected Breard's contention that the Convention "trumps" the United States's procedural laws. It further stated that the Vienna Convention explicitly provides that the rights expressed in the Convention shall be enforced by the receiving State's laws.<sup>67</sup> The Court determined that, since Breard "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia," he could receive no relief under the auspices of the Convention.<sup>68</sup> The Court acknowledged its obligation to give "full effect" to the provisions of the Convention and its "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such," but made no finding as to whether its decision fulfilled that duty.<sup>69</sup> The Court also justified its decision by stating that "although treaties are recognized by our Constitution as the supreme law of the

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64. See generally *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998) (refusing to hear petitioner's Vienna Convention claim, because it was not raised in state proceedings); *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (holding that Paraguay failed to prove two prongs of *Ex parte Young* exception to Eleventh Amendment immunity); *Breard*, 523 U.S. at 371 (deciding that forum state's rules determine implementation of international treaty and a conflicting statute in the forum state renders treaty null).

65. Breard failed to raise the Vienna Convention claim in state proceedings. See *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994) (deciding on other issues); *Breard v. Virginia*, 513 U.S. 971 (1994), cert. denied, *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (dismissing petition for habeas relief on ground of procedural default); *Breard*, 134 F.3d at 617 (affirming district court's dismissal of federal habeas petition); *Paraguay*, 134 F.3d at 625 (stating, "At no point in his direct appeal did Breard allege that the Commonwealth had violated any treaty provision during the period of his detention and trial . . . . In his state court petition [for habeas corpus] Breard again failed to allege violations of any treaty").

66. *Breard*, 134 F.3d at 622 (Butzner, J., concurring) (internal citations omitted).

67. *Breard*, 523 U.S. at 375-76.

68. *Id.*

69. *Id.* at 375.

land, that status is no less true of provisions of the Constitution itself.<sup>70</sup> Furthermore, the Court rested its decision on the principle "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."<sup>71</sup> In this case, Breard could only seek relief for Convention violations subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA").<sup>72</sup> AEDPA barred him from such relief.<sup>73</sup> Breard was executed, on schedule, on April 14, 1998.<sup>74</sup>

The United States Court of Appeals for the Fourth Circuit also refused to give equal consideration to the Constitution and Convention in its decision in *Murphy v. Netherland*.<sup>75</sup> The court nominally acknowledged that "[a]lthough states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions . . . into violations of constitutional rights."<sup>76</sup> Because Murphy could not demonstrate a "substantial showing of the denial of a constitutional right,"<sup>77</sup> specifically, the Fourth Circuit determined that the Convention issue was not appealable.<sup>78</sup>

#### IV. Individual Rights Versus Rights of the Sending State and Its Consul

One of the major issues in cases addressing Vienna Convention violations is whether the Convention establishes individual rights or rights for the sending State and its consul. The language of the Convention creates some ambiguity. The Preamble states that the "purpose of such [consular] privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States."<sup>79</sup> The Preamble seems to

70. *Id.* at 376.

71. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

72. *Id.*; see Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254(a), (e)(2) (Supp. V. 1999)).

73. *Breard*, 523 U.S. at 376-77.

74. Governor Gilmore refused to delay the execution, despite an order from the I.C.J. to stay Breard's execution. See Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas: World Tribunal, State Department Had Urged Delay*, WASH. POST, April 15, 1998, at B01. Paraguay filed suit in the I.C.J. on April 3, 1998, and the Court ordered the United States to take "all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, [sic] and should inform the Court of all the measures which it has taken in implementation of this Order." *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. ¶ 1, ¶ 41 (April 9).

75. *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997) (holding that defendant's Vienna Convention claim was procedurally defaulted).

76. *Id.* at 100.

77. *Id.* at 99 n.2 (emphasis added) (quoting 28 U.S.C. § 2253(c)(2) (1996)).

78. *Id.* at 100.

79. Vienna Convention, *supra* note 1, Preamble (emphasis added).

indicate that the Convention does not create an individual right for an alien or foreign national. Article 36(1) of the Convention, however, states, in part:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- a. [C]onsular officials shall be free to communicate with nationals of the sending State and to have access to them. *Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State,*
- b. *[I]f he so requests,* the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this subparagraph,*
- c. [C]onsular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.<sup>80</sup>

The language of this article, especially in (1)(a) and (b), suggests that, distinct from the consulate representative's rights of visitation and communication, the foreign national has the right to communicate with his consulate.<sup>81</sup> In fact, the receiving State has an obligation to inform the individual of that right "without delay."<sup>82</sup> Furthermore, if a defendant or suspect exercises her right and requests consular contact and assistance, the request must be forwarded to the designated consulate.<sup>83</sup> The plain language seems to make the individual right evident, but American decisions have concluded otherwise.

American courts have typically construed Article 36 as creating a consular right. The I.C.J. explicitly decided that the Convention bestows individual rights.<sup>84</sup> Again, the United States and the I.C.J. conflict. In *LaGrand*, the United States took the position that

the rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. [The United States] maintains that the treatment due to individuals under the Convention is inextricably linked to and

80. *Id.* at art. 36(1) (emphasis added).

81. *Id.* at art. 36(1)(a).

82. *Id.* at art. 36(1)(b).

83. *Id.*

84. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 77 (June 27).

derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right.<sup>85</sup>

The I.C.J., however, concluded that the plain text of the Convention creates individual rights that may be invoked by the national's sending State or the I.C.J. itself.<sup>86</sup> The I.C.J.'s decision is a very recent one, and its impact has yet to be seen reflected in American decisions. Given the United States's pattern of international isolation and self-insulation on the issues surrounding the capital penalty, however, the effect may prove minimal.

In a recent non-capital Virginia case, *Shackleford v Commonwealth*,<sup>87</sup> the defendant argued on appeal that his statement should be excluded, in part, on the basis of violations of the Vienna Convention and the Due Process Clause of the Fourteenth Amendment.<sup>88</sup> The Supreme Court of Virginia cited *Kasi v Commonwealth*,<sup>89</sup> which held that the Vienna Convention does not create legally enforceable individual rights.<sup>90</sup> On that basis, the court concluded that "[Shackleford's] purported right to speak with an official of the Jamaican Embassy did not violate the Vienna Convention or any rights secured to him by the Constitution of the United States."<sup>91</sup> Because no violation occurred, the court did not further discuss remedies. The court also did not address the alleged due process violation.

The *Shackleford* decision is typical of how American courts traditionally view the effect of international treaties. Although it did not decide whether the Convention provided individual rights, the court in *Rocha v State*<sup>92</sup> characterized the treaty's significance as an acknowledgment between sovereigns.<sup>93</sup> The *Rocha* court cited the Federalist Papers, which state that "[treaties] are not rules pre-

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85. *Id.* ¶ 76.

86. *Id.* ¶ 77.

87. 547 S.E.2d 899 (Va. 2001).

88. *Shackleford v. Commonwealth*, 547 S.E.2d 899, 905 (Va. 2001). *Shackleford* also argued that he was improperly advised of his Miranda rights and that he was illegally detained because the officers lacked reasonable suspicion on which to hold him. *Id.*

89. 508 S.E.2d 57 (Va. 1998).

90. *Shackleford*, 547 S.E.2d at 905; see *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 2001) (holding that the Convention does not create individual rights; suppression of defendant's confession was not appropriate).

91. *Shackleford*, 547 S.E.2d at 906.

92. 16 S.W.3d 1 (Tex. Crim. App. 2000).

93. See *Rocha v. State*, 16 S.W.3d 1, 15 (Tex. Crim. App. 2000) (holding that Vienna Convention does not create individual rights; remedies are political in nature). In discussing *United States v Li*, however, the *Rocha* court did include a statement issued by the State Department in *Li* stating that the Vienna Convention and U.S.-China bilateral consular convention "establish state-to-state rights and obligations . . . [however], [t]hey are not treaties establishing rights of individuals." *Id.* at 18 (quoting *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000)).

scribed by the sovereign to the subject, but agreements between sovereign and sovereign."<sup>94</sup> The timbre of the *Rocha* court's opinion follows this principle.

Lately, however, the Southern District Court of New York determined in *Standt v. City of New York*<sup>95</sup> that, because the Convention confers an individual right, a German national had standing to bring a 42 U.S.C. § 1983 action for violation of Vienna Convention rights.<sup>96</sup> The district court first determined that the Vienna Convention is a self-executing treaty, which suggests that "it provides rights to individuals rather than merely setting out the obligations of signatories."<sup>97</sup> The court next examined the plain language of the Convention.<sup>98</sup> It cited case law that stated that the "language of Article 36 clearly refers to the existence of an individual right,"<sup>99</sup> and the language in the Preamble<sup>100</sup> refers to individuals in their consular capacity, "rather than civilian foreign nationals."<sup>101</sup> The court then looked to the treaty equivalent of legislative history and found that it evidenced concern for the protection of individual rights.<sup>102</sup> The fact that other countries have recognized the individual protections in the Convention and have argued the point in their amicus briefs, filed on behalf of foreign criminal defendants in the United States, also factored into the court's decision.<sup>103</sup> Finally, the district court noted that the United States invokes the Convention on behalf of

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94. *Rocha*, 16 S.W.3d at 15 (quoting THE FEDERALIST NO. 75 (Alexander Hamilton)) (emphasis omitted).

95. 153 F. Supp. 2d 417 (S.D.N.Y. 2001).

96. *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (finding that the Vienna Convention creates a personal right and defendant, therefore, had standing to bring a § 1983 action).

97. *Standt*, 153 F. Supp. 2d at 423 n.3 (quoting *Breard*, 134 F.3d at 622 (Butzner, J. concurring)).

98. *Id.* at 424 (citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 26); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (stating, "Interpretation of [the Treaty] must, of course, begin with the language of the Treaty itself [, and] [t]he clear import of Treaty language controls"); see also *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000).

99. *Standt*, 153 F. Supp. 2d at 425 (quoting *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77 (D. Mass. 1999)).

100. "The purpose of such privileges and immunities [set forth herein] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.*; see also Vienna Convention, *supra* note 1, Preamble.

101. *Standt*, 153 F. Supp. 2d at 425; see also *United States v. Rodrigues*, 68 F. Supp. 2d 178, 182 (S.D.N.Y. 1999) (stating, "[I]t appears that the purpose of [the Preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention's purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials").

102. *Standt*, 153 F. Supp. 2d at 425-26. The court particularly noted the position of the United States in the committee meetings, in which representatives of the United States proposed language to "protect the rights of the national concerned." *Id.* at 426 (quoting *United Nations Conference on Consular Relations: Official Records*, No. 63.X.2 at 337, U.N. Doc. A/Conf. 2 (1963)).

103. *Standt*, 153 F. Supp. 2d at 426 (citing *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999)).

American citizens detained abroad who have been denied their consular rights, and reciprocity demands that the United States recognize the Convention's protection of foreign nationals within its borders.<sup>104</sup> The court's conclusion was that the "Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials."<sup>105</sup>

#### V. *The Eleventh Amendment and the Young Exception*

In its short opinion in *Federal Republic of Germany v United States*,<sup>106</sup> the Supreme Court made reference to possible Eleventh Amendment issues that would call into question a foreign government's ability to bring suit against a State.<sup>107</sup> The Court did not elaborate. Both the Supreme Court and the Fourth Circuit, however, discussed the Eleventh Amendment implications in their opinions in *Angel Breard's* case.<sup>108</sup>

In *Paraguay v Allen*,<sup>109</sup> the Fourth Circuit based its holding that it lacked subject matter jurisdiction to consider the case solely on Eleventh Amendment principles.<sup>110</sup> That court referenced the sovereign immunity states enjoy because of the Amendment's limitation on federal judicial power over particular actions "against unconsenting states of the Union."<sup>111</sup> Although the immunity literally covers actions brought by "Citizens of another state or by Citizens or Subjects of any foreign State," case law has interpreted the Eleventh Amendment to restrict actions by foreign states.<sup>112</sup> Sovereign immunity also extends to actions against state officials, particularly named in a suit, when those actions are, in actuality, against the state as the real party in interest.<sup>113</sup> A party bringing an action may come under proper jurisdiction, however, only if it proves the two

104. *Id.* at 427.

105. *Id.*

106. 526 U.S. 111 (1999).

107. *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (holding that the Court could not entertain the suit, because the State of Arizona had not waived its sovereign immunity and because of "the probable contravention of Eleventh Amendment principles").

108. *See* *Breard v. Greene*, 523 U.S. 371, 377-78 (1998) (deciding that failure to alert Paraguayan consulate did not constitute "continuing consequences of past violation of federal rights" in the absence of an exception, the state is immune from foreign suits (citing *Miliken v. Bradley*, 433 U.S. 267 (1977)); *Paraguay v. Allen*, 134 F.3d 622, 626-29 (4th Cir. 1998) (holding that Vienna Convention violation did not meet *Ex parte Young* exception to overcome Eleventh Amendment); *see also* U.S. CONST. amend XI (stating that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

109. 134 F.3d 622 (4th Cir. 1998).

110. *See* *Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir. 1998).

111. *Id.* at 627 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)).

112. *Id.* (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)).

113. *Id.*

prongs stated in *Ex parte Young*<sup>114</sup> (1) the violation about which the party complains is ongoing; and (2) the relief sought is prospective only.<sup>115</sup> Paraguay failed under both prongs. The Fourth Circuit agreed with the federal district court that the violation of Paraguay's treaty rights was not ongoing, because it was notified of Breard's situation, as of the time of the district court opinion, and was not prevented from providing aid.<sup>116</sup> Furthermore, any action the Fourth Circuit could theoretically take at that point would not remedy the violation against Breard. The fact that Paraguay was seeking injunctive relief – vacation of the conviction and death sentence – did not alter the essence of the request, which is “quintessentially retrospective.”<sup>117</sup>

### VI. Procedural Default

Procedural default often proves problematic for appellate attorneys. The Convention requires that state authorities advise foreign defendants of their consular rights, but in the wake of rampant failure on the part of police, prosecutors, and other state officials to comply, prudent defense attorneys would be wise to “conventionalize” every client. Defense attorneys should ask every defendant they represent if he is a citizen of the United States. If the defendant is a foreign national, he has consular assistance rights that American defendants, obviously, do not. If he did not receive those rights at the time of arrest or while in custody, his Vienna Convention rights have been violated. Defense attorneys must raise this issue at trial or face the rigors of raising it on appellate review or in a habeas petition. If the issue is defaulted, the defendant must show both cause and prejudice to permit the habeas court to entertain the issue.

Neither Karl nor Walter LaGrand raised the Convention issue in state proceedings, and, as a result, the Ninth Circuit twice rejected their claims on the basis of procedural default.<sup>118</sup> The I.C.J. addressed the adverse effect of the procedural default rule and concluded that its application in the *LaGrand* case prevented adequate review of issues in those cases.<sup>119</sup>

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114. 209 U.S. 123 (1908).

115. *Ex parte Young*, 209 U.S. 123, 149-50 (1908) (holding that federal courts may exercise jurisdiction over state officials in cases brought by parties suffering from violations of federally protected rights if the violation is ongoing and the relief sought is prospective); *see also* *Green v. Mansour*, 474 U.S. 64, 68 (1985) (holding that the Eleventh Amendment does not allow federal courts to order “notice relief” against states, because it is not the appropriate remedy for ongoing violations of federal law).

116. *Allen*, 134 F.3d at 627.

117. *Id.* at 628.

118. (*Karl*) *LaGrand and (Walter) LaGrand v. Stewart*, 133 F.3d 1253, 1261-62 (9th Cir. 1998) (stating that defendant must show cause and actual prejudice to overcome procedural default); (*Karl*) *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999) (finding federal habeas review not available on this claim unless the defendant can show cause for his default and actual prejudice).

119. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶ 1, ¶ 91 (June 27).



The United States Supreme Court followed both the federal district and circuit courts in refusing to hear Angel Breard's Convention violation argument, because he, too, failed to raise the issue in state court.<sup>120</sup> Breard, and Paraguay in its own suit, argued that the Convention was the "supreme law of the land" and, as such, superceded the procedural default doctrine.<sup>121</sup> The Supreme Court rejected Breard's argument for two reasons: (1) the principle that the State's procedural rules are the manner in which the treaty is implemented and, therefore, prevail in conflict with a treaty; and (2) the pertinent procedural default rule was enacted in 1994 as part of AEDPA,<sup>122</sup> and, as the act of Congress most recently enacted, it controls.<sup>123</sup> Without an evidentiary hearing, which is prohibited by AEDPA in cases where a defendant failed to raise the issue in state court, Breard would be unable to present evidence of the Paraguayan consulate's potential contribution to his defense or demonstrate the novelty of his claim.<sup>124</sup>

In *Murphy v Netherland*,<sup>125</sup> the Fourth Circuit precluded review of Murphy's Vienna Convention violation claim, as it was procedurally defaulted in state court.<sup>126</sup> Because of his default, he was precluded from making the argument on appeal.<sup>127</sup> Furthermore, Murphy could not establish cause or prejudice for failing to argue the issue in state proceedings.<sup>128</sup> Regarding the "cause" prong, the Fourth Circuit stated that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention.<sup>129</sup> In fact, the court listed other cases in which attorneys had made such arguments in state court.<sup>130</sup> The court could

120. *Breard v. Greene*, 523 U.S. 371, 375 (1998).

121. *Id.*

122. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254(a), (e)(2) (Supp. V. 1999)) (stating that, in general, a federal court will not afford a federal habeas petitioner an evidentiary hearing for an issue he "has failed to develop the factual basis of . . . in State court proceedings"). *See also Breard*, 523 U.S. at 376.

123. *Breard*, 523 U.S. at 375-76.

124. *Id.* at 376; *see generally* *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a defendant is barred from raising a factual claim not previously made in state court, unless the claim relies on a new, retroactive constitutional rule of law, or the "new" facts could not have been previously found by exercise of due diligence, and but for the evidence the defendant would not have been convicted).

125. 116 F.3d 97 (4th Cir. 1997).

126. *See* *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (holding that violation of Vienna Convention rights did not involve constitutional rights; claim procedurally barred). Defendant was convicted in the Circuit Court of the City of Virginia Beach for capital murder for hire and conspiracy to commit capital murder. *Id.* at 99. He received a death sentence. *Id.* *Murphy* was executed on September 17, 1997. Ellen Nakashima, *Mexican Citizen Execution in Va. Despite Pleas from Government*, WASH. POST, Sept. 18, 1997, at D4.

127. *Murphy*, 116 F.3d at 99-100. The federal district court had previously also rejected consideration of the Convention issue on procedural default grounds. *Id.* at 99.

128. *Id.* at 100.

129. *Id.*

130. *Id.*; *see* *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron v. I.N.S.*, 17 F.3d

reason no other impediment to making the claim appropriately.<sup>131</sup> The court also would not recognize prejudice from the fact that the Mexican consulate was not contacted in time.<sup>132</sup> Specifically, the court did not agree with Murphy that the consulate representative's involvement would have caused him to change his plea to guilty or resulted in Murphy's presenting mitigation evidence not otherwise available.<sup>133</sup>

The courts in *Brazd* and *Murphy* perhaps underestimated the value of consular assistance to a defense. The Supreme Court in *Brazd* suggested that American attorneys were better suited to handle matters in United States courts than a consular attorney, in that they knew the system and the laws of the jurisdiction better.<sup>134</sup> The Court ignored potential problems inherent with an American attorney that would not be the case when a consular attorney represented or, at least, participated in the defense; these include: (1) language barriers; (2) the American attorney's failure to understand cultural customs; (3) her failure to gain access to mitigation evidence without assistance from the consulate investigators; and (4) her failure to recognize information as mitigating given the cultural or regional practices of a particular nation.

### VII. *The Problem of Remedy*

The remedy for a Convention violation, as argued by the United States in *LaGrand*, is an apology and an assurance that it will make efforts to prevent further violations.<sup>135</sup> The I.C.J. has proved helpless to enforce its orders in decisions like that of the *LaGrand* case. As discussed above, the I.C.J. found the United States in violation of its express order to exercise every possible means within its authority to halt Walter LaGrand's execution, pending the I.C.J.'s final decision. Its recourse was to "take note" of the United States's apology to Germany and promise to take preventive action, so that any further Convention violations would receive effective review in the appellate process.<sup>136</sup> The inherent problem with remedy for the I.C.J. in that case, as of the date of its final opinion, was the fact that both LaGrand brothers had been executed. United States state and federal court opinions have not dictated a clear remedy to Convention

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511, 518 (2nd Cir. 1993); *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979).

131. *Murphy*, 166 F.3d at 100.

132. *Id.* at 100-01.

133. *Id.*

134. *Brazd*, 523 U.S. at 377.

135. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. ¶ 1, ¶¶ 119, 123 (June 27).

136. *Id.* ¶ 127. The I.C.J. stated, "the Court will therefore limit itself to taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), of the Vienna Convention." *Id.*

violations or have simply refused to grant any. The United States Supreme Court decided in *Breard v. Greene*<sup>137</sup> that, in response to Paraguay's petition to vacate the conviction and sentence against Breard, "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions."<sup>138</sup> The court in *Paraguay v. Allen*<sup>139</sup> similarly stated that it could not grant an injunction to vacate Breard's death sentence.<sup>140</sup>

In *Rocha v. State*,<sup>141</sup> the Texas Court of Criminal Appeals addressed the appropriateness of excluding evidence obtained before advising Rocha of his consular rights.<sup>142</sup> Rocha was interviewed by a homicide detective in connection with the case, and Rocha's oral statements were admitted as evidence against him at trial.<sup>143</sup> Rocha contended in his appeal that he was not notified of his Convention rights to consular assistance.<sup>144</sup> The state did not dispute that it had not so advised Rocha.<sup>145</sup> The court referenced Article 38.23 of the Texas Code of Criminal Procedure, which states:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.<sup>146</sup>

The appellate court distinguished the "laws" of Article 38.23 and the "law," which includes constitutions and treaties, such as the Vienna Convention.<sup>147</sup> Article 38.23, then, lists only "laws," statutes promulgated by the legislature, and the Texas and United States constitutions as bases for applying the exclusionary rule.<sup>148</sup> Article 38.23 does not, therefore, include violation of a treaty as the basis

137. 523 U.S. 371 (1998).

138. *Breard v. Greene*, 523 U.S. 371, 377 (1998).

139. 134 F.3d 622 (1998).

140. *Paraguay v. Allen*, 134 F.3d 622, 629 (1998).

141. 16 S.W.3d 1 (Tex. Crim. App. 2000).

142. *Rocha v. State*, 16 S.W.3d 1, 13-19 (Tex. Crim. App. 2000). Felix Rocha was convicted of capital murder in the commission of a robbery in November 1998. *Id.* at 4. *See also* *Maldonado v. State*, 998 S.W.2d 239 (Tex. Crim. App. 1999) (codefendant's case; holding that, because the defendant failed to show affirmatively that he was a citizen of Mexico, he was not entitled to notification of his consular rights).

143. *Rocha*, 16 S.W.3d at 11, 13. In a pretrial motion to suppress his statements, Rocha testified that he was a Mexican citizen. *Id.* The detective who interviewed him also testified that Rocha told him before taking his statement that he was Mexican. *Id.* The detective further testified that Rocha's primary language is Spanish; he cannot speak English. *Id.*

144. *Id.* at 13.

145. *Id.*

146. *Id.*; *see also* TEX. CODE CRIM. P. art. 38.23 (Vernon 1999).

147. *Rocha*, 16 S.W.3d at 14.

148. *Id.*

for excluding illegally obtained evidence.<sup>149</sup> As authority for its decision, the Texas Court of Criminal Appeals also relied on two cases – *United States v Li*<sup>150</sup> and *United States v Lombera-Camorlinga*<sup>151</sup> – that held that exclusion of evidence is inappropriate for a Vienna Convention violation.<sup>152</sup> *United States v Li* stated that treaty violations are remedied by political negotiation: “It is obvious that with all this the judicial courts have nothing to do and can give no redress.”<sup>153</sup> The *Lombera-Camorlinga* and *Li* decisions also considered a State Department statement – “no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and . . . two (Italy and Australia) have specifically rejected it” – before ruling against exclusion of the evidence.<sup>154</sup> In *Rocha*, the Texas Court of Criminal Appeals ultimately concluded that Article 38.23, as a state statute, was not an appropriate authority for enforcing international agreements.<sup>155</sup> The court did, however, acknowledge that, if the United States Supreme Court decided to require states to adhere to a federal exclusionary rule, it must comply.<sup>156</sup>

The decision in *Standt v City of New York*,<sup>157</sup> however, indicates that American courts may be more responsive to requests for remedy. The court, deciding that a plaintiff could recover damages for violation of a Vienna Convention right in a § 1983 action, denied the defendant’s motion for summary judgment.<sup>158</sup> The court specifically distinguished civil damages from remedies in a criminal case and stated that damages for unlawful detention are “much less ‘drastic’ than suppressing incriminatory evidence or dismissing an indictment against a properly charged criminal defendant.”<sup>159</sup> The court seemed to consider itself on safe ground in a civil context, and, while it differentiated between civil and criminal

149. *Id.* at 14-17.

150. 206 F.3d 56 (1st Cir. 2000).

151. 206 F.3d 882 (9th Cir. 2000) (en banc).

152. *Rocha*, 16 S.W.3d at 16-18. See *United States v. Li*, 206 F.3d 56 (1st Cir. 2000) (holding that suppressing evidence is not the appropriate remedy for a Vienna Convention violation); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (same).

153. *Li*, 206 F.3d at 60-61 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)); see also *Lombera-Camorlinga*, 206 F.3d at 887 (stating that “[t]he State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary”).

154. *Lombera-Camorlinga*, 206 F.3d at 888; see also *Li*, 206 F.3d at 64-66.

155. *Rocha*, 16 S.W.3d at 19; see also *Zapata v. State*, 15 S.W.3d 661 (Tex. Ct. App. 2000) (following *Rocha* in refusing to exclude evidence obtained in violation of the Vienna Convention); *Trujillo v. State*, 25 S.W.3d 270 (Tex. Ct. App. 2000) (same).

156. *Rocha*, 16 S.W.3d at 19.

157. 153 F. Supp. 2d 417 (2001).

158. *Standt v. City of New York*, 153 F. Supp. 2d 417, 431 (2001).

159. *Id.* at 429.

remedies, it did not suggest that a remedy in a criminal case would be inconceivable.

### VIII. *Using the Consulate in a Defense*

The German consulate assisted the LaGrand attorneys on a diplomatic level, once they were notified of Karl's and Walter's cases.<sup>160</sup> They conducted interviews and collected information on the LaGrands' background and childhood community.<sup>161</sup> Germany became litigiously involved, however, after the execution of Karl LaGrand.<sup>162</sup> The consulate representatives continued to visit Walter in prison and monitored his case.<sup>163</sup> The German ambassador to the United States made a presentation to the clemency board, at which he argued the importance of consular assistance and provided information about Walter's background. He also asked for a reprieve or, at the least, an opportunity to litigate the I.C.J. order to halt Walter's execution, pending its final decision.<sup>164</sup> Germany then brought suit in the United States Supreme Court to enforce the I.C.J. order in state court.<sup>165</sup> Although the suit brought in the Supreme Court was unfruitful, Germany's officials were so involved in the case of Walter LaGrand that Germany filed a Memorial with the I.C.J. and, eventually, received a favorable ruling.<sup>166</sup>

Despite the apparently adverse case law for a foreign national claiming a violation of her Vienna Convention rights, there does seem to be a glimmer of hope. Geraldo Valdez, a convicted murderer,<sup>167</sup> may benefit from the I.C.J. decision in *LaGrand*.<sup>168</sup> On September 10, 2001, the Oklahoma Court of Criminal Appeals granted an indefinite stay of execution and ordered the Attorney General to respond to Valdez's application for post-conviction relief.<sup>169</sup> The appeals court order came after Governor Frank Keating's 30-day stay granted in August.<sup>170</sup> The court also granted permission to the Mexican government to file a brief in the latest appeal.<sup>171</sup> Mexico has claimed that Oklahoma violated the

160. Telephone interview with Dale Baich, Attorney, Federal Public Defender for the District of Arizona (Oct. 26, 2001).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); see *supra* Part II.

166. See *generally* *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. ¶ 1 (June 27); see *supra* Part II.

167. See *Valdez v. State*, 900 P.2d 363 (Okla. Crim. App. 1995); *Valdez v. Oklahoma*, 516 U.S. 967 (1995), *cert. denied*; *Valdez v. State*, 933 P.2d 931 (Okla. Crim. App. 1997), *relief denied*; *Valdez v. Ward*, 219 F.3d 1222 (10th Cir. 2000), *habeas denied*; *Valdez v. Gibson*, 121 S. Ct. 1618 (2001), *cert. denied*.

168. See *generally* *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. ¶ 1 (June 27); see *supra* Part II.

169. John Greiner, *Mexican National Granted Indefinite Stay of Execution*, THE DAILY OKLAHOMAN, September 11, 2001, at 1A.

170. *Id.*

171. *Id.*

Vienna Convention by failing to notify Valdez of his right to consular assistance.<sup>172</sup> Valdez's counsel is requesting a new trial based on the I.C.J.'s decision in *LaGrand*.<sup>173</sup>

The basis of the stay and subsequent appeal is an affidavit from psychiatrist Cecil Mynatt, who previously testified that Valdez was competent to stand trial.<sup>174</sup> Dr. Mynatt has recanted his prior statements.<sup>175</sup> After Valdez's counsel made neuropsychological information available to him, Dr. Mynatt now concludes that Valdez suffered from brain damage, paranoia, and "homosexual panic" at the time of the murder and was, therefore, temporarily insane.<sup>176</sup> The task for the next appeal is establishing the prejudice that resulted from Dr. Mynatt's previously uninformed opinion.

Mexican officials, including President Vicente Fox, have been involved in the later stages of this case.<sup>177</sup> The medical and neurological information gathered by the Mexican government revealed that Valdez's brain damage was the result of injuries he suffered as a youth in Mexico.<sup>178</sup> The most serious injury involved a four-wheel-drive vehicle accident that required Valdez to be hospitalized.<sup>179</sup> Valdez's family indicated that, after the accident, his behavior was "forever altered."<sup>180</sup> The appeal stated that,

[H]ad Mexico been involved at the outset, the jury would have heard from the state's own expert, [Mynatt] that Valdez suffered from a number of serious head injuries that had left him with severe damage to that portion of the brain that allows a normal adult to foresee and consider the consequences of his actions.<sup>181</sup>

As the petition alleges, consular assistance to Valdez could have resulted in a vastly different verdict.

An alien prisoner currently in the process of petitioning for habeas relief is also receiving assistance from the foreign citizen's native country. Mario Bustillo, a Honduran, was convicted of first-degree murder in Fairfax County, Virginia.<sup>182</sup>

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172. *Id.*

173. John Greiner, *Doctor Recants, Questioning Inmate's Sanity*, THE DAILY OKLAHOMAN, Aug. 23, 2001, at 1A.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (quoting Valdez's petition for appeal).

182. See *Bustillo v. Commonwealth*, 2000 WL 365930, No. 2321-98-4, at \*1 (Va. App. Apr. 11, 2000).

Bustillo was never informed of his Vienna Convention rights.<sup>183</sup> Bustillo's motion to set aside the verdict was denied,<sup>184</sup> and he was sentenced to thirty years in prison.<sup>185</sup> Following the notice of appeal, the Honduran Consulate confirmed it had not timely learned of the charges against its citizen.<sup>186</sup> At his appeal, Bustillo argued that the verdict was based upon insufficient evidence and illegally obtained evidence.<sup>187</sup> Additionally, he appealed the denial of the motion to set aside the verdict on the grounds of newly discovered evidence. The newly discovered evidence included three eyewitnesses who observed a third party commit the murder, admitted perjury by two Commonwealth witnesses, two witnesses' impermissible contact with a juror, five separate Brady violations, and a hearsay rendition of a confession by Julio "Sirena,"<sup>188</sup> the third party accused by the new eyewitness.<sup>189</sup>

The Court of Appeals of Virginia limited its review to whether the trial court erred in failing to set aside the verdict based on newly discovered evidence.<sup>190</sup> Applying the standard new-trial rules,<sup>191</sup> the Court of Appeals affirmed Bustillo's conviction.<sup>192</sup>

The defense continued to amass evidence.<sup>193</sup> Another potential witness told police that Sirena was the killer, and, shortly thereafter, the witness was deported.<sup>194</sup> Sirena was surreptitiously captured on videotape in Honduras boasting of the murder.<sup>195</sup>

Perhaps most important, the defense learned that Sirena had fled to Honduras shortly after the murder.<sup>196</sup> Once it learned of Bustillo's case after trial, the Honduran consulate was able to locate Sirena's application for a national identification card, which included a full facial photograph. The Honduran consulate

183. Telephone interview with John Kiyonaga, Partner, Kiyonaga & Kiyonaga (Sept. 25, 2001).

184. *Bustillo*, 2000 WL 365930, at \*1.

185. Telephone interview with John Kiyonaga, Partner, Kiyonaga & Kiyonaga (Sept. 25, 2001).

186. *Id.*

187. *Bustillo*, 2000 WL 365930, at \*1.

188. Telephone interview with John Kiyonaga, Partner, Kiyonaga & Kiyonaga (Sept. 25, 2001). "Sirena" is an alias. *Id.*

189. *Bustillo*, 2000 WL 365930, at \*1.

190. *Id.*

191. *Sae Odum v. Commonwealth*, 301 S.E.2d 145, 149 (Va. 1983). To obtain a new trial, a defendant must show that "the evidence (1) was discovered after trial, (2) could not have been secured for trial with the exercise of due diligence, (3) is not merely cumulative, corroborative or collateral, and (4) is material and likely to produce a different result at another trial." *Id.*

192. *Bustillo*, 2000 WL 365930, at \*3.

193. Telephone interview with John Kiyonaga, Partner, Kiyonaga & Kiyonaga (Sept. 25, 2001). Only some of the newly-discovered evidence is discussed here.

194. *Id.*

195. *Id.*

196. *Id.*

provided the photograph to Bustillo's post-trial defense counsel.<sup>197</sup> Given the inconsistencies in identifying Bustillo as the killer, the photograph could have made a dramatic difference in confronting witnesses at trial.

The *Rudi Apelt*<sup>198</sup> case is particularly unfortunate, because, although the German consulate was aware of the case and had contact with Apelt's attorney at the time of trial in 1991, Apelt's trial counsel did not ask for assistance.<sup>199</sup> Rudi and his brother Michael were arrested for the murder of Michael's new wife.<sup>200</sup> The Apelt brothers had been in the United States for approximately three to four months.<sup>201</sup> The German consulate was notified within days of their arrest, but neither Rudi nor Michael was immediately told of his consular rights.<sup>202</sup> Later, the German consul visited both brothers in jail and inquired into their cases.<sup>203</sup> Trial defense counsel did not seek assistance but, instead, filed a motion with the court to authorize travel expenditures for a trip to Germany to investigate possible mitigation.<sup>204</sup> The prosecution opposed the motion, arguing that less costly alternatives could produce the same information.<sup>205</sup> The court denied the motion.<sup>206</sup> Both Rudi and Michael were convicted of premeditated first-degree murder and conspiracy to commit first-degree murder and received death

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197. *Id.* According to Kiyonaga, the consulate stated that, had she known of Bustillo's arrest and trial and of Sirena's apparent guilt, she would have done anything to help, including finding and questioning Sirena in Honduras. *Id.*

198. 861 P.2d 654 (Ariz. 1993) (en banc).

199. Telephone interview with Dale Baich, Attorney, Federal Public Defender for the District of Arizona (Oct. 26, 2001). See *State v. (Rudi) Apelt*, 861 P.2d 654 (Ariz. 1993).

200. (*Rudi) Apelt*, 861 P.2d at 656 (referencing the facts in *State v. (Michael) Apelt*, 861 P.2d 634 (Ariz. 1993)). Michael and his wife Cindy were married on October 28, 1988, and he purchased two life insurance policies on her behalf, with a total coverage of \$400,000. (*Michael) Apelt*, 861 P.2d at 639. Cindy was murdered on December 23, 1988. *Id.* at 639-40.

201. Telephone interview with Dale Baich, Attorney, Federal Public Defender for the District of Arizona (Oct. 26, 2001).

202. *Id.*

203. *Id.*

204. (*Rudi) Apelt*, 861 P.2d at 659-60. The motion did not include a description of specific mitigation evidence for which they were looking, but simply stated, "Rudi Apelt was born and raised in Germany and came to this country in September, 1988. His mother and other immediate family currently reside in Dusseldorf, Germany. Furthermore, other acquaintances, employers, and personal friends reside in Germany." *Id.* The trial court denied the motion, and defense counsel filed a motion for reconsideration, which did detail possible evidence of psychiatric records, family background, and mitigating witnesses available in Germany. *Id.* at 660. The trial court, again, denied the motion. *Id.*

205. *Id.* at 660.

206. *Id.* On direct appeal, the Supreme Court of Arizona found no abuse of discretion in denying the motion, because defense counsel failed to explain why they needed to travel to Germany to obtain the necessary evidence. *Id.* They, therefore, failed to show "need," as required by due process and statute. *Id.*



sentences.<sup>207</sup> The Supreme Court of Arizona affirmed Rudi's and Michael's convictions.<sup>208</sup>

The German consulate is actively assisting Rudi and closely monitoring his habeas petition.<sup>209</sup> Representatives from the consulate visit both Rudi and Michael four to six times a year.<sup>210</sup> The consul has provided psychiatric and medical records from Germany, which indicate that Rudi is mentally retarded and show evidence of organic brain damage.<sup>211</sup> The consulate's aid in uncovering the medical records was especially helpful, because records systems in foreign states are often difficult to navigate, especially when the information is in another language.<sup>212</sup>

Bustillo's and Apelt's cases, like *Valdez*, are perfect examples of prejudice resulting from a lack of consular assistance. But for Dr. Mynatt's determination at trial that Valdez was both competent and sane, which was based on incomplete information, Valdez would not likely have been sentenced to death. The evidence of brain damage and profound psychological problems stemming from Valdez's childhood in Mexico, which were provided only after the Mexican government became involved, show that his trial was substantially lacking in pertinent information. But for the evidentiary problems and inability to locate and identify Sirena pre-trial, Bustillo may have been acquitted. With the Honduran consulate's assistance, Bustillo now has information about Sirena that will support his claim of actual innocence. But for the lack of mitigating evidence relating to his previous psychological problems and suggested mental retardation, Rudi Apelt might have been spared from the death penalty. The psychiatric and psychological records and evaluations collected by the German consulate illuminate Rudi's history and psychological make-up, especially with regard to his relationship with Michael. Because Rudi's defense was, in part, that he participated in the murder because of his brother's control over him, and because the court found the evidence sufficient to prove that Rudi and Michael formed an agreement to kill Michael's wife,<sup>213</sup> the relationship between Rudi and Michael was pivotal to the jury's understanding of Rudi's culpability and the judge's consideration of mitigation.<sup>214</sup> But for the lack of mitigation evidence, later

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207. *Id.* at 656; see also *(Michael) Apelt*, 861 P.2d at 642.

208. *(Rudi) Apelt*, 861 P.2d at 663; see also *(Michael) Apelt*, 861 P.2d at 654.

209. Telephone interview with Dale Baich, Attorney, Federal Public Defender for the District of Arizona (Oct. 26, 2001).

210. *Id.*

211. *Id.* Medical records indicate that Rudi's father hit his mother in the stomach with a steel bar when Rudi was in the womb. *Id.*

212. *Id.*

213. *(Rudi) Apelt*, 861 P.2d at 659.

214. Judges, rather than juries, decide the existence of aggravating and mitigating factors in Arizona. See generally ARIZ. REV. STAT. ANN. § 13-703 (West 2000); see also *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (holding that the Arizona capital punishment scheme is not unconstitutional because judges make findings as to aggravation and mitigation).

provided by Germany, Karl and Walter LaGrand may not have received a death sentence. Again, evidence of childhood abuse would have served as mitigation.

Each trial suffered from a lack of evidence that may have been revealed before trial had each defendant been advised of his rights pursuant to the Vienna Convention. The states' violation of those rights jeopardized the reliability of the verdicts in Valdez's, Bustillo's, Apelt's, and the LaGrands' trials. If the appellate and habeas counsel in the *Valdez*, *Bustillo*, and *Apelt* cases can prove that failure to advise the defendants of their consular assistance rights led to their inability to access important information and that the lack of that information prejudiced their trials, they will overcome the procedural default obstacle that has been, to this point, impossible to scale.

### IX. Conclusion

For myriad reasons, unrelated to competency, a defense attorney representing a foreign national may be ill-equipped to try the case without assistance. For myriad reasons, a foreign national defendant may be ill-equipped to assist in her own defense. Consular participation is crucial in these cases, as the *Valdez*, *Bustillo*, and *Apelt* cases illustrate. Consulates can provide assistance with language and communication problems, information about the native culture, medical and psychological evidence from when the defendant resided in her home country, political pressure, a "familiar face" with whom the defendant feels more at ease than with her American attorney, and extra legal resources. It is for such basic reasons as these that the Vienna Convention provides for a defendant's individual right to contact with her consulate. Failing to have such access could, and apparently has, doomed some foreign national defendants.

The cases decided in the Supreme Court provide little, if any, room for reversible error. The June 2001 opinion of the I.C.J. in *LaGrand* may, however, prove somewhat effective. American courts traditionally resist international pressure, but the appeals court decision in *Valdez* evidences a possible change in how courts in the United States treat foreign nationals. I urge the defense bar – don't hold your breath. The key to handling these cases is ask early, ask every defendant. If defense counsel finds out in her initial interview with the client that he is a foreign national, and he has not been informed of his Convention rights, she should raise the issue immediately in a pre-trial motion to the court to preserve the issue and guard against procedural default. She should also contact the consulate and request assistance with investigation; translation; cultural information; documentation in the form of medical, educational, psychological, and other records; contact information for potential witnesses; and any possible mitigation evidence available in the foreign national's home country. She should also encourage consulate representatives to monitor the case and visit with the foreign defendant, so that she will foster a relationship between the consulate and the defendant, thereby providing him with a "friendly face" who can speak his language and explain the American legal system in terms he can understand. A

“friendly face” may also promote a more amiable relationship between herself and the defendant. A good relationship between the attorney and her client will increase the likelihood of his full disclosure and meaningful assistance in his own defense and, therefore, improve her ability to represent him.

Remedy is still a problem. American courts have decided that the exclusionary rule does not apply, and granting new trials is not only discretionary but also not prescribed in the Convention. The I.C.J. has, however meekly, suggested that American appellate courts review Convention violation cases for fairness and consider a new trial as a remedy. The Oklahoma Court of Appeals is considering that remedy, which is encouraging but not conclusive. While the court in *Standt* did provide for the possibility of awarding civil damages for a Convention violation and did not absolutely foreclose the possibility of criminal remedy, its language does suggest that obtaining a criminal remedy would be difficult. A defense counsel's best option is to make use of the consulate at the trial level for both legal and practical reasons.