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“REVIEW AND RECONSIDERATION:” IN SEARCH OF A JUST
STANDARD OF REVIEW FOR VIOLATIONS OF ARTICLE 36 OF THE
VIENNA CONVENTION ON CONSULAR RELATIONS

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I. INTRODUCTION

“The United States admits it has violated Article 36 but refuses to provide a remedy to those aggrieved.”¹ This statement succinctly captures the problem that has landed the United States before the International Court of Justice (ICJ) for full trials twice in the last four years for violation of Article 36 of the Vienna Convention on Consular Relations (VCCR).² Briefly stated, Article 36 gives a detained foreign national the right to contact and meet with his or her consulate.³

¹ Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 566 (1997).

² See *Avena (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>; *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27). Paraguay also filed a case with the ICJ against the United States in 1998 for a violation of the VCCR, but did not pursue its claims after the execution of its national. Anthony N. Bishop, *The Unenforceable Rights To Consular Notification and Access In the United States: What’s Changed Since the LaGrand Case?*, 25 HOUS. J. INT’L L. 1, 23 (2002).

³ Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

Article 36 reads, in pertinent part, as follows:

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

Consular officers 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;

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

consular officers shall have the right to visit a national of the sending State

Further, the right to this access "implicates a corollary obligation: the arresting state has the affirmative duty to inform the detainee of his consular rights."⁴ It is this obligation of notification that United States law enforcement officials consistently fail to fulfill.⁵

Compounding the problem of the continuing violation of the right is that "[m]ost courts in the United States have refused to supply a remedy for an Article 36 violation."⁶ On direct appeal, state supreme courts have rejected remedies such as dismissal of the indictment, suppression of evidence, reversal of conviction, and new trials.⁷ These state courts generally assume that Article 36 creates primary rights for individuals, without explicitly deciding the issue.⁸ However, state courts deny a remedy either because the defendant failed to raise the

who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.

2. 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.

⁴ Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 151 (1999).

⁵ See Bishop, *supra* note 2, at 7 (noting that "many" denials of consular access are a result of the failure to timely inform the defendant that such a right exists).

⁶ Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N. 41, 45 (2001).

⁷ See Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 198-203 (2002).

⁸ This approach, however, is by no means universal, and the question of whether the VCCR creates primary rights for individuals is still vigorously debated. For a thorough state court explanation of the view that the treaty *does not* create such a right, see *State v. Martinez-Rodriguez*, 33 P.3d 267, 272-74 (N.M. 2001). For a similar argument at the federal level, see *United States v. Jimenez-Nava*, 243 F.3d 192, 195-98 (5th Cir. 2001). By contrast, see Kadish, *supra* note 1, at 599-602 (arguing that a private "right to consul" was intended to be conveyed by Article 36) and *Breard v. Greene*, 523 U.S. 371 (1998) (in dicta noting that the Article arguably confers an individual right). Very recently, the Seventh Circuit concluded after thorough analysis that Article 36 confers individual rights on detained nationals and identified a civil damages claim as an available remedy. The court held, "a country may not reject every single path for vindicating the individual's treaty rights. In the absence of any administrative remedy or other alternative to measures we have already rejected (such as suppression of evidence), a damages remedy is the only avenue left." See *Jogi v. Voges*, 425 F.3d 367, 382-85 (7th Cir. 2005). In November 2005, the Supreme Court granted *certiorari* in *Bustillo v. Johnson*, seemingly with the intent to resolve this issue. See *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) and accompanying briefs. Interesting as this debate is, the question is outside the scope of this paper, and the arguments advanced herein assume that the Treaty does create a primary individual right.

issue at trial and cannot show that the error was “plain error”⁹ or because the defendant fails to show that he was prejudiced by the error even if he did raise it at trial (i.e. the error was “harmless error”).¹⁰ In either case, and often without explanation, courts place the burden on the defendant to show that the error was prejudicial. This paper contends that the Article 36 right to consul as currently adjudicated in state courts, primarily on direct appeal, is a right without a remedy as a direct result of the questionable standards of review used to determine whether the violation was prejudicial to the defendant. This paper also argues that these standards are not justifiable under the ICJ’s rulings in *LaGrand* and *Avena* or U.S. criminal procedure jurisprudence. Furthermore, the current standards will give little or no meaningful effect to the recent Supreme Court case of *Medellin v. Dretke* or President Bush’s February 2005 Memorandum on Compliance with the Decision of the International Court of Justice in *Avena*, both of which placed the job of “review and reconsideration” of Article 36 violations squarely in state court hands.¹¹

For a defendant who has not been notified of his right to consular assistance upon arrest to bear the burden of proving that the outcome of his trial would have been different had he received notification is “not insurmountable in theory, but it is fatal in fact.”¹² As such, a shift in analytical framework is required to provide defendants with a realistic opportunity to obtain a remedy.¹³ The ICJ has twice admonished the United States to “permit review and reconsideration of these nationals’ cases by the United States...with a view to

⁹ See, e.g., *State v. Issa*, 752 N.E.2d 904 (Ohio 2001). “Because appellant failed to raise this issue in the trial court, he has waived all but plain error. Plain error exists when it can be said that but for the error, the outcome of the trial would clearly have been otherwise.” *Id.* at 915.

¹⁰ See, e.g., *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001). “The defendant has the burden of establishing that ‘(1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) there was a likelihood that the contact [with the consulate] would have resulted in assistance to him.’ . . . We adopt this test but further recognize that ‘it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial’” (quoting *Breard*, 523 U.S. at 377).

¹¹ See *Medellin v. Dretke*, 2005 WL 1200824 and George W. Bush, Memorandum for the Attorney General on Compliance with the Decision of the ICJ in *Avena* (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. [hereinafter President’s Memorandum]. The President’s Memorandum raises obvious interesting and important questions regarding its constitutionality that are beyond the scope of this paper.

¹² Luna & Sylvester, *supra* note 4, at 162.

¹³ *Id.*

ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant."¹⁴ *Medellin* and the President's Memorandum made it incumbent upon the states to review Article 36 cases with a prejudice standard that takes the violation and its potential impact on the entire trial process seriously. If the cases affected by the *Avena* judgment and the President's Memorandum are reviewed by the state courts in the same manner they have heretofore been reviewed on appeal, the defendants will again possess a remedy merely in theory. Fortunately, the current U.S. failure to correct this problem is not insurmountable, and can be solved by rethinking the harmless-error standards currently applied to the problem of Article 36 violations.

Section II of the paper briefly reviews *LaGrand*, *Avena*, *Medellin* and the President's Memorandum. Section III provides an overview and critique of the current standards of review used in Article 36 appeals. Section IV continues that critique specifically with regard to harmless-error standards that place the burden of proving prejudice on the defendant, and offers specific arguments as to why such standards are inappropriate in Article 36 cases. Section V argues for the importance of the Article 36 right, in contrast to those who would call it a superfluous procedural protection. Section V then offers an alternative standard of review for Article 36 violations that has the potential to provide Article 36 defendants with meaningful review and reconsideration of their convictions and sentences, while at the same time maintaining respect for the finality of proper judgments.

II. *LAGRAND AND AVENA, MEDELLIN AND THE PRESIDENT'S MEMORANDUM*

A. *LaGrand and Avena*

For the purposes of this paper, recounting the specific details and extensive procedural histories of *LaGrand* and *Avena* is unnecessary.¹⁵ Instead, a brief review of the central holdings of the cases as they pertain to direct review of Article 36 violations will lay the groundwork for the analysis.¹⁶ *LaGrand* involved two German

¹⁴ *Avena*, *supra* note 2, at 48, ¶ 121.

¹⁵ For an extensive description of each (prior to the final judgment in *Avena*), see Alan Macina, Comment, *Avena & Other Mexican Nationals: The Litmus for LaGrand & the Future of Consular Relations in the United States*, 34 CAL. W. INT'L L.J. 115 (2003).

¹⁶ The United States has formally accepted the jurisdiction of the ICJ to adjudicate disputes as to the meaning of the VCCR. Optional Protocol to the Vienna Convention

nationals who did not learn of their right to consular assistance until ten years after they were sentenced to death for murder.¹⁷ The ICJ held that when a defendant does not receive timely notification of his right to consular assistance and where “the individuals concerned have been subject to prolonged detention or convicted and sentenced to severe penalties...it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the rights set forth in the Convention.”¹⁸ The ICJ stopped short of dictating a specific method for review and reconsideration, explaining that the obligation “can be carried out in various ways. The choice of means must be left to the United States.”¹⁹ Of additional significance is the ICJ’s determination that refusal to consider an Article 36 violation because the claim has been procedurally defaulted by not being timely raised “had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended.’”²⁰ Thus, courts may not avoid consideration of an Article 36 violation by claiming it was procedurally barred.

In *Avena*, the ICJ considered Mexico’s claim that the U.S. denied fifty-two Mexican nationals on death row both access to consular assistance and a remedy for the violation.²¹ The ICJ retained the central holding of *LaGrand* with slightly different language, stating that “the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases...with a view to ascertaining whether in each case the violation of Article 36...caused *actual prejudice* to the defendant.”²² As in *LaGrand*, the ICJ left the U.S. courts to “examine the facts, and in particular the prejudice and its causes.”²³ The ICJ also

on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

¹⁷ *LaGrand*, *supra* note 2; Bishop, *supra* note 2, at 36

¹⁸ *LaGrand*, *supra* note 2, ¶ 125.

¹⁹ *Id.*

²⁰ *Id.* ¶ 91.

²¹ *Avena*, *supra* note 2, at 3.

²² *Avena*, *supra* note 2, ¶ 121 (emphasis added).

²³ *Id.* ¶ 122. It is important to note that the *Avena* court seemed to recommend an “outcome-based” prejudice analysis that would allow a finding of prejudice only when the outcome of the case would have been different but for the Article 36 violation (i.e. the defendant would have been acquitted or obtained a different sentence if he had received notice of his Article 36 right). The court said, “The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to

reiterated *LaGrand*'s holding on the use of the procedural default rule, noting that “by operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36.”²⁴ In connection with this point, the ICJ pointed out that the freedom of choice as to the means by which to conduct the “review and reconsideration” is not without qualification: the review and reconsideration must be performed by actually “taking account of the violation of the rights set forth in the Convention” which is not the case when a challenge is denied pursuant to procedural default.²⁵

With regard to remedy, the *Avena* court rejected Mexico's request for *restitutio in integrum* as the required reparation for the violation.²⁶ This would have “take[n] the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations” and required exclusion of evidence obtained in breach of Article 36 in any future proceedings.²⁷ The ICJ responded that adequate reparation “clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury.”²⁸ “[I]t is not to be presumed...that partial or total annulment of conviction or sentence provides the necessary and sole remedy,”²⁹ nor is it to be presumed that a *per se* exclusionary rule ought to result from violation of Article 36.³⁰ While *LaGrand* and *Avena* provide the backdrop for the international reaction to U.S. violation of Article 36, *Medellin* and the President's Memorandum provide the current national impetus for states to rethink their Article 36 analysis.

B. Medellin and the President's Memorandum

On February 28, 2005, President Bush issued a memorandum stating that the United States would discharge its international

determine in the process of review and reconsideration.” *Id.* To the extent that *Avena* is recommending a strictly outcome-based prejudice review, I urge a standard that goes further insofar as it encourages consideration of the entire trial process rather than simply the outcome of the trial in determining whether the defendant has been prejudiced.

²⁴ *Id.* ¶ 134.

²⁵ *Id.* ¶ 131.

²⁶ *Id.* ¶ 117.

²⁷ *Id.* ¶ 117.

²⁸ *Avena*, *supra* note 2, ¶ 119.

²⁹ *Id.* ¶ 123.

³⁰ *Id.* ¶ 127.

obligations under the *Avena* judgment by “having State courts give effect to the ICJ decision in accordance with general principles of comity in cases filed by the fifty-one...nationals addressed in that decision.”³¹ Following closely on the heels of this memorandum, the U.S. Supreme Court dismissed the writ of certiorari in the case of Jose Medellin as “improvidently granted” in order to allow Medellin to seek appropriate “review and reconsideration” of his Vienna Convention claim in state court.³² The Court noted that Medellin filed a second state habeas corpus action just four days before oral argument before the Supreme Court, arguing that the *Avena* judgment and the President’s memorandum provided new bases for relief in state court.³³ The Court reviewed a number of bars to federal habeas corpus relief faced by Medellin, which mitigated in favor of dismissing the writ and allowing the state court to consider his state habeas claim.³⁴ Ultimately, the Court deemed it “unwise to reach and resolve the multiple hindrances to dispositive answers” on these issues given the possibility that the Texas state courts could “provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum.”³⁵ Thus, the Supreme Court left open the “possibility” that Texas and other states considering Article 36 violations will give effect to the requirements of *Avena* and the President’s Memorandum.³⁶ It is now up to those courts to fulfill their duty of meaningful review and reconsideration.

III. THE DEFENDANT’S BURDEN AND THE NATURE OF THE VCCR ARTICLE 36 RIGHT

Against this backdrop of *LaGrand*, *Avena*, *Medellin* and the President’s Memorandum, the paper now turns to an examination of why the current state court treatment of Article 36 violations fails to provide the meaningful “review and reconsideration” envisioned by these decisions and directives, and is not justifiable under U.S. criminal procedure precedent. The type of review given to an Article 36 violation on direct appeal generally fall into one of three categories: 1) a refusal to review for prejudice because the requested remedy is *per se* inappropriate for an Article 36 violation; 2) review under a plain-error

³¹ President’s Memorandum, *supra* note 11.

³² *Medellin v. Dretke*, 125 S. Ct. 2088, 2090 (2005).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2092.

³⁶ *Id.* at 2092

standard; or 3) review under a harmless-error standard requiring the defendant to bear the burden of proof.

A. Per Se Inappropriate Remedy

In cases of the first type, the requested remedy at trial is usually suppression of evidence or exclusion of a confession. When the trial court rejects the motion, the defendant argues for a new trial on appeal on the grounds that the trial court erred in refusing to suppress the evidence or exclude the confession. This argument not only fails to win a new trial, but also forecloses review of the prejudicial effects of the Article 36 violation, since the issue preserved for review is a request for a remedy that appellate courts presume inappropriate for Article 36 violations. For example, in *Lopez v. State* the Georgia Supreme Court rejected the request for a new trial because the VCCR itself does not require application of the exclusionary rule and because “such a judicially-created remedy cannot be imposed absent a violation of a constitutional right.”³⁷

On its face, such a conclusion may seem to comport with the ICJ requirement of “review and reconsideration” since the ICJ rejected a *per se* exclusionary rule and the state appellate court may consider only issues that the defendant preserves for appeal. However, a *per se* rule against remedies that necessarily accompany the trial court motion concerning the Article 36 violation effectively renders the defendant unable to address the issue, since at present *no* remedy exists for which the defendant may move at trial. On the one hand, he is required to make a motion at trial in objection to the Article 36 violation in order to preserve it on appeal, but on the other hand, he has no substantive remedy to request in that motion.³⁸ Part of the

³⁷ *Lopez v. State*, 558 S.E.2d 698, 700 (Ga. 2002). State-court refusal to remedy a VCCR violation is in fact more commonly based upon a rejection of suppression of evidence or exclusion of confession as an appropriate remedy for the violation than on a defendant’s failure under either plain-error or harmless-error analysis. See *Conde v. State*, 860 S.2d 930, 953 (Fla. 2003) (concluding that suppression of a post-arrest statement is not an appropriate remedy for an alleged violation of Article 36); *State v. Prasertphong*, 75 P.3d 675, 688 (Ariz. 2003) (holding that the trial court did not abuse discretion in denying a motion to suppress since “suppression of evidence is not a remedy for [an Article 36] violation”); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003) (“Application of the exclusionary rule is only appropriate when the Constitution or a statute requires it. There is no exclusionary rule generally applicable to international law violations.”); *Bell v. Commonwealth*, 563 S.E.2d 695, 707 (Va. 2002) (“Such a remedy is generally not available when a fundamental right is not implicated.”).

³⁸ It is worth noting that a mere objection to the VCCR violation without attaching

difficulty for the defendant lies in the pre-trial point at which the violation occurs. An objection “based on defects in the institution of the prosecution” such as defects in the indictment, outrageous government conduct and suppression of evidence are generally not considered timely unless made by pretrial motion.³⁹ Because failure to notify a defendant of his right to consular assistance ordinarily means the defendant will not have the knowledge necessary to make a timely pre-trial objection, if the defendant becomes aware of the right during the course of the trial, he is left with only contemporaneous objections for “trial errors,” one of which is exclusion of evidence.⁴⁰

In addition, review of a trial error such as improper admission of evidence is actually not a review of the prejudicial effect of the Article 36 violation on the defendant, but instead is a review of whether a trial court judge abused discretion in denying the particular trial motion. Thus, if the motion is for exclusion of evidence or a statement, and that remedy is *per se* inappropriate for VCCR violations, the trial court could never be found to have abused discretion in denying the motion. The counter to this argument is that the defense should better choose its motions. However, no motion regarding the Article 36 violation that includes a request for a remedy will succeed because currently no such remedy exists. This puts the defendant in the impossible position of having no way to challenge effectively the violation at trial and as a result no way to show error on appeal. Therefore, as a preliminary matter, courts should be precluded from refusing to review an Article 36 violation by adopting a *per se* rule against the requested remedy. Even if exclusion and suppression are inappropriate remedies for an Article 36 violation, that conclusion must be accompanied by a determination of whether the error was prejudicial, and if so, what the appropriate remedy is.⁴¹

that objection to a motion for remedial measures, such as suppression, exclusion, or a new trial would make no sense given the nature of the VCCR right, which does not itself occur during the course of the trial. Thus, to preserve the issue on appeal, the defendant must choose a remedial trial motion as the means for his VCCR objection.

³⁹ *Thirty-Second Annual Review of Criminal Procedure*, 32 GEO. L.J. ANN. REV. CRIM. PROC. 763, 782 (2003).

⁴⁰ *Id.* at 779.

⁴¹ Luna & Sylvester note that “there is a near unanimous opinion among scholars that . . . [r]ights under the Convention should be treated as analogous to the individual guarantees announced in *Miranda* . . . In other words, a denial of consular rights should be irrefutably prejudicial to a detained foreigner, requiring ‘reversal of a conviction and a new trial, or, at least, exclusion of tainted evidence.’” Luna & Sylvester, *supra* note 4, at 176-77. While courts have rejected this view thusfar, the possibility that a VCCR violation could in a particular case implicate a fundamental constitutional right, such as a right to a fair trial, is not theoretically impossible.

B. Plain Error

In cases of the second type, states apply “plain error” review to assess prejudice when the defendant failed to assert the Article 36 violation at trial. Plain-error review does not forgo a prejudice analysis as in the category discussed in Section A above, but under plain-error review the defendant may obtain a new trial or reversal only if “the outcome of the trial would clearly have been otherwise”⁴² or the error of law is “obvious, not reasonably in dispute.”⁴³ In *State v. Reyes-Camarena*, a capital murder case, the Oregon Supreme Court concluded that the error was not plain error because the legal point on which the defendant relied was “not obvious and reasonably is in dispute.”⁴⁴ In response to the defendant’s contention that the court should carefully consider the claim on its merits because of the unsettled state of the law and because his “life depends on Oregon’s treatment of this issue,” the court said that the lack of precedent and significant disputes about the VCCR “militates against considering the unpreserved VCCR issue as plain error.”⁴⁵ Thus, the plain-error standard effectively precluded consideration of the *actual* prejudicial effect of the violation because the law was unclear on the point.

In *State v. Issa*, the Ohio Supreme Court held that the violation was not plain error because the other evidence against the defendant was so strong that “we cannot say without this testimony the outcome of the trial would clearly have been otherwise.”⁴⁶ While the outcome prong of the standard as such provides an “actual prejudice” analysis insofar as it reconsiders the outcome of the trial, the plain-error standard does not consider the question of prejudice in the trial process notwithstanding the ultimate outcome. In addition, the plain-error standard does not consider the impossibility in most cases of determining the impact an Article 36 violation might have had on the outcome of a trial. Thus, failure of the defendant to raise the issue at trial in effect “defaults” him into a higher proof requirement for showing prejudice.⁴⁷ While not technically procedural default, a

⁴² *State v. Issa*, 752 N.E.2d 904, 915 (Ohio 2001).

⁴³ *State v. Reyes-Camarena*, 7 P.3d 522, 525 (Or. 2000).

⁴⁴ *Id.*

⁴⁵ *Id.* at 526. In concluding that the legal point was unsettled, the court noted that no Oregon appellate court had considered the issue and the U.S. Supreme Court had not decided the issue. *Id.* at 525.

⁴⁶ *State v. Issa*, 752 N.E.2d at 916.

⁴⁷ “Higher” in comparison to the harmless-error standard discussed below, which theoretically allows a remedy if the defendant shows prejudice with respect to receiving a fair trial even if the ultimate outcome may not have been different.

procedural rule that significantly increases the burden of proof for the defendant is not meaningful review and reconsideration, particularly since the failure to raise the issue at trial is often not the defendant's fault.⁴⁸ In addition, because of the currently unsettled state of law regarding the VCCR and the plain error requirement that the error of law be "clear" or "obvious," the defendant presently has no chance to hurdle that prong of the plain error barrier. There is no indication that this area of law will "settle" anytime in the near future, which means that applying the near impossible plain-error standard is a far cry from a good faith effort to use our criminal procedure to give full effect to our duties under the VCCR.⁴⁹

C. Harmless Error

Cases in the third category apply a harmless-error standard to Article 36 violations to determine the appropriateness of a remedy. Though not all states have adopted the same harmless-error standard, a universally accepted element of harmless error as applied to Article 36 violations is that the defendant bears the burden of proving that the violation was prejudicial.⁵⁰ Some courts reject the claim of prejudice

⁴⁸ "An obvious "catch-22" results: foreign nationals cannot raise timely Article 36 claims if they are not notified of their Article 36 rights until after trial." Jeffrey L. Green, Comment, *International Law: Valdez v. State of Oklahoma and the Application of International Law in Oklahoma*, 56 OKLA. L. REV. 499, 500 (2003).

⁴⁹ I am mindful that the Supreme Court has spoken definitively on the requirement that *federal* appellate courts apply plain-error review when the defendant did not raise the error in the district court. See *United States v. Olano*, 507 U.S. 725, 731 (1993) (to satisfy the standard, there must be a plain error that affects substantial rights). The Court has also said that under plain-error review "it is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 735. The thrust of my argument in Section IV, *infra*, is that placing the burden on the defendant to show that his substantial rights have been affected in Article 36 cases is an insurmountable burden, though I consider the question with respect to the harmless-error standard. I suggest, however, that *Olano* does not foreclose applying the "modified" harmless-error review that I advocate in state court cases (or a similarly modified plain-error review that recognizes that the error is now "plain" under *Avena*) for two reasons. First, *Olano* considered the application of Fed. R. Crim. P. 52 in federal courts, and second, the nature of the error considered in *Olano* was of the "trial" type, the prejudicial effect of which is more realistically quantifiable than the prejudicial effect of an Article 36 violation. *Id.* at 727-28 (considering whether allowing alternate jurors to attend deliberations was plain error); see also Section IVB, *infra*. I suggest that even if a state court is limited to plain-error review, my burden-shifting proposal better allows state courts to give meaningful effect to U.S. obligations under the Vienna Convention and to the clear intent of the *Avena* mandate of meaningful "review and reconsideration" than does placing the burden on the defendant to show that his substantial rights were affected.

⁵⁰ See *Luna & Sylvester*, *supra* note 4, at 159. ("Courts appear to have settled on a

with little, if any, analysis.⁵¹ Others are less conclusory. In *State v. Lopez* the Iowa Supreme Court considered the defendant’s two claims.⁵² First, that a consular official would have arranged for alternate legal counsel better able to communicate with Lopez who would have properly obtained separate trials for separate charges.⁵³ Second, that Lopez would have accepted a plea bargain had he been able to consult with his consulate.⁵⁴ The court responded that these claims “are all speculative...Lopez points to no evidence in the record to support these claims either by way of affidavit of the Mexican consulate or by his own testimony.”⁵⁵ Thus, Lopez could not persuade the court that contacting the consulate would have resulted in assistance to him.

Similarly, in *State v. Martinez-Rodriguez* the New Mexico Supreme Court held that the defendant failed to demonstrate how the violation affected the outcome of his case.⁵⁶ The court noted that the defendant had waived his rights knowingly, was represented by experienced counsel throughout the trial, and did not allege that the Mexican consul would have been more familiar with the American legal system.⁵⁷ The defendant’s “speculative” assertion that he might not have waived his rights had he been advised that neither he nor his family would suffer reprisals for exercising those rights, and the Mexican Consulate’s affidavit identifying the specific help it would have provided had it known of Martinez-Rodriguez’ detention were not sufficient for the court to find prejudice.⁵⁸ The Court based its conclusion on the duplicative nature of the Consul’s actions, citing with approval cases that held “prejudice has never been — nor could reasonably be — found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights.”⁵⁹

three-prong test . . . [and] the burden is on the defendant rather than the government to affirmatively establish prejudice.”)

⁵¹ See *Darling v. State*, 808 So. 2d 145, 166 (Fla. 2002) (Noting that the extent of the court’s consideration of the prejudice issue was “Darling has failed to show that he was prejudiced by the claimed violation.”)

⁵² *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *State v. Martinez-Rodriguez*, 33 P.3d 267, 275 (N.M. 2001).

⁵⁷ *Id.* at 275-76.

⁵⁸ *Id.* at 275-76.

⁵⁹ *Id.* at 276 (quoting *United States v. Rodrigues*, 68 F.Supp.2d 178, 184 (E.D.N.Y. 1999). *But see* *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980) for an example of a federal case accepting similar assertions from the defendant and Consul as to the assistance defendant would have received had he been notified of his right as

As evidenced by the foregoing examples, “[d]espite many compelling cases involving deprivations of consular rights that substantially injure an alien’s defense, the courts have uniformly found no prejudice from violations of the Vienna Convention.”⁶⁰ Though the harmless-error standard provides “actual prejudice” review, the next section of the paper will explore why placing the burden of proof on the defendant is inappropriate from the standpoint of precedent and given the nature of the Article 36 right. The remainder of the paper will then explore alternative versions of harmless-error review that would give defendants a realistic chance at a remedy while maintaining the integrity of judicial proceedings and the finality of proper judgments.

IV. PROBLEMS WITH THE DEFENDANT’S BURDEN HARMLESS-ERROR STANDARD

A. *The Problem of Origin*

The first problem with the harmless-error standard currently applied to Article 36 violations is its origin. In short, there is no evidence that the cases from which the “defendant’s burden” harmless-error standard derives intended their holdings to apply to all VCCR violations. Further, the fact patterns of these cases are not at all similar to the criminal situations in which the standard is now applied, and thus cannot fairly be extended to them by analogy. The right to consular access was first considered in 1979 in reviews of deportation hearings conducted by the Immigration and Naturalization Service (INS), either on direct appeal or through collateral attacks in criminal cases.⁶¹ These early cases considered implementing INS regulations that had been promulgated to ensure compliance with Article 36.⁶² In *United States v. Calderon-Medina*, the Ninth Circuit held that violation of an INS regulation renders a deportation unlawful “only if the violation prejudiced interests of the alien which were protected by the regulation.”⁶³ According to Professor Kadish, *Calderon-Medina* “implicitly concluded that, without proof of prejudice, deprivation of the right to consul was not so fundamental as to render the proceeding

sufficient to support a finding of prejudice.

⁶⁰ Luna & Sylvester, *supra* note 4, at 163. The authors go on to say: “It is, in fact, difficult to imagine factual circumstances that could spur a judicial finding of prejudice, given the precedents that have denied relief.” *Id.*

⁶¹ Kadish, *supra* note 1, at 571-72.

⁶² *Id.* at 572.

⁶³ *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

unfair.”⁶⁴ Then in *United States v. Rangel-Gonzales*, the Ninth Circuit specified that the burden of proof was on the defendant to show prejudice as a result of violation of the INS regulations if the deportation was to be deemed unlawful.⁶⁵ As Kadish also notes, these and subsequent cases did not examine whether violation of Article 36 itself required a remedy.⁶⁶

This approach to prejudice analysis in the context of deportation proceedings is the precedent that has controlled state courts’ Article 36 prejudice analysis. Some cases specifically reference *Calderon-Medina* and its progeny as authority for placing the burden to show prejudice on the defendant.⁶⁷ For example, *State v. Lopez* cites a 1989 Ninth Circuit case, which itself cites *Rangel-Gonzales*, as authority for its harmless-error test.⁶⁸ Many other cases place the burden on the defendant, but do not reference a statute or case law to support the choice.⁶⁹ In either case, there is no discussion as to whether the standard ought to be used in an analysis of an Article 36 violation.

There are at least two reasons from a precedential standpoint why adoption of this standard is questionable for analyzing Article 36 violations on appeal in state court. First, there is no indication in either *Calderon-Medina* or *Rangel-Gonzales* that the prejudice standard elucidated there was intended to extend outside the bounds of INS deportation regulations. In fact, the language of the regulation at issue in those cases states that consular notification is required “whenever nationals...are detained *in exclusion or expulsion*

⁶⁴ Kadish, *supra* note 1, at 573.

⁶⁵ *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980).

⁶⁶ Kadish, *supra* note 1, at 574.

⁶⁷ Luna & Sylvester note that aside from “suggestions” about the possibility of shifting the burden in two federal cases, “all other decisions have assumed without question that the defendant must bear the burden of establishing prejudice.” Luna & Sylvester, *supra* note 4, at 192 n.254. The Ninth Circuit has applied the test in the context of criminal trials, but those cases have not given a rationale for applying the standard to a criminal trial. *See U.S. v. Villa-Fabela*, 882 F.2d 434 (9th Cir. 1989).

⁶⁸ *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001).

⁶⁹ *See, e.g.*, *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (“Finally, as noted by the trial court, Gordon has failed to demonstrate prejudice” was the only statement in the case as to prejudice.); *Darling v. State*, 808 So. 2d 145, 165 (Fla. 2002) (“Darling has failed to show that he was prejudiced by the claimed violation” was the only statement in the case as to prejudice.); *Lopez v. State*, 558 S.E. 698, 700 (Ga. 2002) (“Lopez cannot show that any alleged violation of the Vienna Convention had a prejudicial effect on his trial” was the only statement in the case as to prejudice.); *Martinez v. State*, 984 P.2d 813, 819 (Okla. 1999) (That appellant “failed to show any prejudice resulting from the alleged [VCCR] violations” was the only statement in the case as to prejudice.).

*proceedings.*⁷⁰ Thus, the holdings in *Calderon-Medina* and *Rangel-Gonzales* requiring the defendant to show prejudice were limited to prejudice with respect to exclusion or expulsion proceedings. Second, the extension of the standard outside this context is unwarranted because deportation proceedings are not analogous to the types of Article 36 criminal cases being considered on appeal in state court. Deportation proceedings involve a significantly lower level of criminality than the murder, rape, or armed criminal action cases in which Article 36 violations most often occur. As a practical matter, much more is riding on the outcome of a murder trial (in terms of loss of liberty or life) than is riding on an administrative deportation proceeding.⁷¹ In addition, the Supreme Court has noted, “the procedures required in an administrative proceeding are less stringent than those demanded in a criminal trial.”⁷² What is not procedurally “unfair” in a deportation proceeding may come closer to that mark in a full-fledged criminal proceeding where long prison terms or death may result. Thus, the use of a harmless-error standard that places the burden of proof of prejudice on the defendant is grounded in precedent that does not apply to most cases involving Article 36 violations.

B. *The Problem of “Fit”*

In addition to the problem of origin, the current standard is ill-suited for the nature of the Article 36 violation. Under the current harmless-error standard, the defendant must show that the violation caused a particularized effect on the outcome of the trial itself. Because the Article 36 violation precludes consular assistance from the beginning of the trial process, putting on proof of the specific ways in which consular assistance might have altered the outcome of the trial is inherently speculative. The defendant must show the specific ways in which a non-participant, about whose non-existence the jury will have no knowledge, would have changed the way the jury decided the case. The defendant, while ostensibly required to prove the presence of prejudice, must actually prove a negative insofar as proving that

⁷⁰ 8 C.F.R. § 242.2(e) (1978) (emphasis added).

⁷¹ For example, in 1987 the Supreme Court considered a violation of 8 U.S.C. § 1326 which required imprisonment of not more than two years or a fine of not more than \$1,000, or both, for “Any alien who (1) has been arrested and deported or excluded and deported, and thereafter (2) enters or attempts to enter, or is at any time found in the United States.” See *United States v. Mendoza-Lopez*, 481 U.S. 828, 830-31 (1987).

⁷² *Mendoza-Lopez*, 481 U.S. at 839 n.17.

prejudice depends upon proving the effect of the absence of consular assistance on the jury. Not surprisingly, when a defendant attempts to provide the requisite speculation, the Article 36 claim is rejected *because* the proffered proof is "speculative." Thus, by placing the burden on the defendant, and rejecting "speculative" arguments, the courts have erected a hurdle that is virtually impossible for defendants to overcome.

In the context of constitutional errors, the Supreme Court has examined this tension of requiring evidence of harm when the harm is difficult to quantify by distinguishing between "structural" errors and "trial" errors. Structural errors are "structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards."⁷³ By contrast, trial errors are those which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt."⁷⁴ While the Article 36 right is not a constitutional right, part of the rationale for the structural/trial distinction is that there are certain types of errors whose impact on the trial is "inherently indeterminate" [because] they do not relate to the introduction or evaluation of particular items of evidence."⁷⁵ Indeed, according to one commentator, "the use of a harmless error analysis is premised on an ability to determine the effect of the error on the decision rendered."⁷⁶

Without reaching the question of whether the right to consul should be viewed as a "fundamental" right, the failure of notification and concomitant lack of consular aid has striking similarities to a structural error in its lack of quantifiability and in the way its prejudicial effect impacts the structure of the trial process itself. The difficulty of putting on proof of such an error should, at the very least, remove the burden of proof from the defendant who suffers the effects, if any, of the prejudice resulting from the violation.⁷⁷ The fact

⁷³ *Arizona v. Fulminante*, 499 U.S. 279, 309 (1986).

⁷⁴ *Id.* at 307-08.

⁷⁵ WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 1170 (2d ed., 1992).

⁷⁶ Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 126 (1993). Carter goes on to say that some state courts may find, in particular penalty phase determinations, that harmless-error analysis is "extremely speculative or impossible." *Id.* at 133 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)).

⁷⁷ In arguing for placing the VCCR right on equal footing with constitutional rights, Professor Kadish argues that denial of Article 36 rights "deprives the foreign national

that defendants are virtually never able to show prejudice resulting from the Article 36 violation is *de facto* evidence that the error eludes a defendant's ability to meet the prejudice hurdle even when significant evidence of prejudice exists.⁷⁸ This is not to say the Article 36 violation should be immune from harmless-error analysis, but that the defendant who has suffered the violation is particularly incapable of quantifying the prejudice, and as such, the error will rarely, if ever, be found prejudicial.⁷⁹

Further support for removal of the defendant's burden is found in the Supreme Court's seminal articulation of harmless error as applied to *non-constitutional* violations. In *Kotteakos v. United States*, the Supreme Court rejected placing the burden on one side or the other in harmless-error review, and instead held that the burden should "aris[e] from the nature of the error and its 'natural effect' for or against prejudice in the particular setting."⁸⁰ The Court noted that Congressional statutes designed to curtail reversal for "technical" errors had the purpose of placing "upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights."⁸¹ However, "[i]f the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining the verdict will, notwithstanding this legislation, rest upon the one who claims under it."⁸² Thus, review of non-constitutional errors, for all but merely the "formalities and minutiae of procedure," requires the government to

of equality of legal process and the ability to mount a proper defense," hardly the type of error that a defendant can readily quantify. *Kadish*, *supra* note 1, at 608.

⁷⁸ "[D]espite many compelling cases involving deprivations of consular rights that substantially injure an alien's defense, the court have uniformly found no prejudice from violations of the Vienna Convention." *Luna & Sylvester*, *supra* note 4, at 163.

⁷⁹ Stephen Goldberg argues that the Court has changed the constitutional harmless-error standard found in *Chapman v. California*, 386 U.S. 18 (1967) from one that "forced the prosecution to show beyond a reasonable doubt that the error did not contribute to the verdict, into a test which forced the defendant to show that the error was of such significance that without it the defendant would be entitled to a directed verdict of acquittal." Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIM. 421, 428 (1980). Goldberg says that applying the test in this way will render almost all errors harmless. *Id.*

⁸⁰ *Kotteakos v. United States*, 328 U.S. 750, 765-66 (1946). As commentators have noted, treaty violations are typically treated as "the substantial equivalent of a federal statute." *Luna & Sylvester*, *supra* note 4, at 158.

⁸¹ *Id.* at 760.

⁸² *Id.* at 760. As LaFave and Israel explain, some courts hold that "once an error is established, the burden lies with the beneficiary of the error, the prosecution, to establish the requisite probability that it did not influence the jury's decision." LAFAVE & ISRAEL, *supra* note 75, at 1164.

show that the error was not harmless in order to uphold the conviction.⁸³

This section has focused on the impropriety of placing the burden on the defendant to show that an Article 36 violation was prejudicial and thus requires a new trial. The next section argues that there are harmless-error standards, including the *Kotteakos* standard, more appropriate to the nature of an Article 36 violation. These standards also apply to the VCCR without the necessity of “bootstrapping” the right to consul up to the level of a constitutional right.

V. HARMLESS-ERROR ANALYSIS AND THE ARTICLE 36 VIOLATION

A. *What can Article 36 Notification and Assistance Accomplish?*

While part of the challenge of the Article 36 right is the difficulty in quantifying specific harm, there is substantial evidence that this right can benefit a defendant. Some argue that the benefits of the right are so significant that its violation is inherently prejudicial to a detained foreign national in a foreign criminal justice system.⁸⁴ This prejudice results from unfamiliarity with the criminal justice system of the receiving nation; a lack of understanding of custom, police policies, or criminal proceedings; an inability to defend himself due to ignorance, lack of resources, and discrimination; a language barrier that will inhibit understanding of the proceedings; and an inability to obtain evidence or witnesses from his home nation.⁸⁵ In addition, a foreign national’s cultural background may play a large role in the defense of the case.⁸⁶ For example, a Texas case involved a foreign national from Canada who did not realize his right to consular assistance until several years after trial.⁸⁷ The defendant made no contact with family in

⁸³ *O’Neal v. McAninch*, 513 U.S. 432, 440 (1995) (“[T]echnical” errors as those concerned with the “mere etiquette of trials and with the formalities and minutiae of procedure” (quoting *Bruno v. United States*, 308 U.S. 287, 294 (1939))).

⁸⁴ See Kadish, *supra* note 1, at 606.

⁸⁵ *Id.* at 605-06. “The Consul General can also aid an attorney, or the attorney’s investigator, to . . . overcome bureaucratic obstacles that might ordinarily arise when investigating an individual abroad.” Margaret Mendenhall, Note & Comment, 8 SW. J.L. & TRADE AM. 335, 348 (2001-2002).

⁸⁶ Kadish, *supra* note 1, at 605 (citing Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1113 (1994) (“Cultural factors can be relevant to the defendant’s motivations, premeditation or deliberation, provocation or heat of passion, and to the defendant’s understanding and perception of the circumstances leading up to and immediately following the charged crime.”))

⁸⁷ *Faulder v. State*, 745 S.W.2d 327, 328 (Tex. Crim. App. 1987). See also Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular*

Canada in preparation for his trial, presented no mitigating evidence in the penalty phase of the trial, and offered no medical and mental history that may have been material to his defense during trial.⁸⁸ According to Kadish, denial of the Article 36 right to a “cultural bridge” “deprives the foreign national of equality of legal process and the ability to mount a proper defense.”⁸⁹

Evidence of this potential for assistance is crucial in countering the assumption expressed by many courts that the Article 36 right is simply duplicative of U.S. procedural rights.⁹⁰ If this is the case, an Article 36 violation will never be found to prejudice the defendant, no matter which side bears the burden of proof, so long as the defendant received the protections of, say, a Miranda warning.⁹¹ To counter this argument, it is necessary to show that a defendant may not completely understand U.S. procedural safeguards and that the consul actually can provide assistance additional to that of appointed counsel. For example, the active participation by the Argentine Consul General in a 1995 Texas case included arranging for an observer to watch the trial, pressuring for an appeal of the defendant’s death sentence because of defense counsel’s lack of objection to questionable trial testimony, and arranging for a replacement of lead defense counsel.⁹² The result was a confession of error by the Solicitor General of Texas and a remand by the United States Supreme Court for reconsideration of the sentence.⁹³ At least one state supreme court has recognized that the right is not duplicative. In *Ledezma v. State*, the Iowa Supreme Court stated,

...criminal defense attorneys are not equipped to provide the same services as the local consulate. Consular officials can eliminate false understandings and prevent actions

Protection in the Context of Criminal Justice, 19 HOUS. J. INT’L L. 375, 411 (1997).

⁸⁸ Uribe, *supra* note 87, at 411-412. (When the Canadian Consulate found out about Faulder’s situations, it filed an amicus brief on appeal to the Fifth Circuit, claiming that the breach “deprived Mr. Faulder of a right under international law that may have prejudiced his ability to receive a fair trial and sentencing hearing.”)

⁸⁹ Kadish, *supra* note 1, at 608.

⁹⁰ See Cara Drinan, Note, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303, 1308 (2002) (“[C]ourts continually err by collapsing the distinct issues of consular access and effective counsel.”).

⁹¹ See *State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001) (“[P]rejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights.”).

⁹² *Saldaño v. Texas*, 530 U.S. 1212 (2000). See also, *Mendenhall*, *supra* note 85, at 350.

⁹³ *Mendenhall*, *supra* note 85, at 350.

which may result in prejudice to the defendant. Thus, consular access may well make a difference to a foreign national, in a way that trial counsel is unable to provide.⁹⁴

This additional assistance is particularly necessary in death penalty cases. Increasing attention is being focused on the near pervasive ineffectiveness of death-eligible defendants’ counsel. Justice Ruth Bader Ginsburg has gone so far as to say, “I have yet to see a death case among the dozens coming to the Supreme Court... in which the defendant was well represented at trial.”⁹⁵ Justice Sandra Day O’Connor has expressed similar concerns about disparities in representation of death-eligible defendants.⁹⁶ In addition, Linda Carter notes the particular difficulties in assessing errors in death sentencing that involve weighing mitigating and aggravating factors.⁹⁷ The Supreme Court has also noted that in death penalty cases the “factfinder must have all possible relevant information about the individual defendant whose fate it must determine.”⁹⁸ Such “relevant information” is at the core of the assistance a consul can provide. Consideration of the particular problems in death penalty litigation is the subject of another paper. The brief point here is that the additional concerns attending death penalty cases (even when U.S. procedural safeguards are followed perfectly) weigh even more strongly in favor of viewing the Article 36 right as a substantive right of its own that provides the additional protection necessary to ensure a fair trial for a foreign national whose life is in the balance. Whether the consulate can provide assistance that is not duplicative is a fact-driven determination that should be considered in any harmless-error analysis.

B. The Article 36 Right and Harmless-Error Review

Against this backdrop of the nature of the Article 36 right to consul, an initial question regarding potential standards of prejudice review is whether the violation should be treated as analogous to a constitutional “structural” error since, as some would argue, it is

⁹⁴ Ledezma v. State, 626 N.W.2d 134, 152 (Iowa 2001). For several other examples of such cases, see Uribe, *supra* note 78, at 410-20.

⁹⁵ Quoted in Kelly Reissmann, Comment, “Our System is Broken”: A Study of the Crisis Facing the Death-Eligible Defendant, 23 N. ILL. U. L. REV. 43, 51 (2002).

⁹⁶ Reissmann, *supra* note 95, at 52.

⁹⁷ Carter, *supra* note 76, at 125.

⁹⁸ Ford v. Wainwright, 477 U.S. 399, 413 (1986).

“irrefutably prejudicial to the detained foreigner,”⁹⁹ and as such reversible *per se*.¹⁰⁰ Such a classification would put the violation out of the reach of harmless-error analysis. While the arguments advanced in favor of equating the Article 36 right with a “fundamental” right are persuasive in some ways, there are three reasons to reject that classification and a corresponding *per se* reversal rule. First, the approach “has been decisively rejected.”¹⁰¹ This pragmatic answer, of course, begs the question as to whether the argument *should* have been decisively rejected. However, this mere fact of rejection makes worthwhile the effort to find a satisfactory approach that may not face the same rejection. Second, *per se* reversal is a remedy designed to function in those limited circumstances in which a violation may always be presumed to prejudice a defendant, and thus is not suitable for harmless-error review.¹⁰² While Article 36 violations do prejudice a significant number of defendants, in some cases egregiously so,¹⁰³ there

⁹⁹ Luna & Sylvester, *supra* note 4, at 176 (describing prevailing scholarly opinion).

¹⁰⁰ This argument has been made by Professor Kadish and Victor Uribe, the Consul in charge of the Protection Department at the Consulate General of Mexico in New Orleans. Uribe argues that violation of the convention in a Fifth Circuit case was structural error because it was:

not isolated to some discrete moment in the proceedings . . . [but] was pervasive and affected Murphy’s right and treatment from the time of his arrest in 1991 through his prosecution to, at the earliest, May 1997, when the consul was finally informed Virginia’s disregard of the Convention infected the entire process that concluded with Murphy’s death sentence.

Uribe, *supra* note 78, at 419. Professor Kadish makes a more direct comparison to fundamental constitutional rights. “[T]here are some constitutional rights for which violations will carry a presumption of harm. Article 36 access to consul is such a right.” Kadish, *supra* note 1, at 607. Kadish specifically compares the VCCR violation to the right to effective counsel and the right to a Miranda warning designed to ensure awareness of certain fundamental constitutional rights, noting that Article 36 “encompasses similar fundamental issues.” *Id.* at 604.

¹⁰¹ Luna & Sylvester, *supra* note 4, at 157. “The source-based hierarchy [of rights] ensures that only those rights directly traceable to the Constitution receive heightened scrutiny.” *Id.* at 158.

¹⁰² So far, those rights recognized as structural errors are the right to counsel, the right to an impartial judge, the right to a public trial, and the right to self-representation at trial. In addition, the Court has said that harmless-error analysis may not be applied to cases involving erroneous jury instructions regarding reasonable doubt, racial discrimination in grand jury selection, the improper removal of potential jurors for cause in capital trials, and certain discovery violations that may have altered the outcome of the trial. Joshua C. Jungman, *Thirty-First Annual Review of Criminal Procedure*, 90 GEO. L.J. 1879 (2002).

¹⁰³ Kadish, *supra* note 1, at 584 (recounting a Mexican national confessing to murder

are cases in which the length of time the foreign national has been in the U.S., combined with mastery of the language and familiarity with the U.S. legal system, make prejudice because of the Article 36 violation highly unlikely. Because the right is uniquely tailored to provide “cultural bridge” assistance to the defendant, the absence of any need on the part of the defendant for a cultural bridge can in some cases make the right duplicative of U.S. procedural rights, and therefore non-prejudicial. Third, in *Avena* the ICJ specifically rejected Mexico’s request for a *per se* reversal rule.¹⁰⁴ In its place, the Court called for a review for actual prejudice, thus recognizing the possibility that the violation could occur and not harm the substantial rights of the defendant.¹⁰⁵ This holding does not squarely address the merits of the arguments that advocate automatic reversal, but is persuasive evidence that such a drastic move is not necessary in the eyes of the international community to give effect to the purposes of the VCCR and fulfill U.S. obligations under the treaty.

If Article 36 violations should not require automatic reversal, and if the current practice of placing the burden of proof on the defendant is in fact an impossible burden even when the prejudicial impact of the violation is significant, how should Article 36 violations be analyzed? Some scholars have recommended shifting the burden of proof from the defendant to the government, with the Article 36 violation carrying a presumption of harm that the government can then rebut.¹⁰⁶ However, this conclusion is often reached by analogizing the Article 36 right to a constitutional right,¹⁰⁷ which in my view is analytically problematic. The remainder of this paper contends that current non-constitutional harmless error jurisprudence directly applies to and

after it was suggested to him by police that his girlfriend and unborn child might be electrocuted if he did not confess).

¹⁰⁴ *Avena*, *supra* note 2, ¶123 (“It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy.”).

¹⁰⁵ *Avena*, *supra* note 2, ¶121. The court also noted that “[w]hat constitutes ‘reparation in an adequate form’ clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the ‘reparation in an adequate form’ that corresponds to the injury.” *Id.* ¶119.

¹⁰⁶ For example, Luna & Sylvester offer a “modest proposal” in which a violation of the Vienna Convention should be “presumptively prejudicial to the defendant . . . [and] the burden should be placed on the government to demonstrate that no prejudice has accrued to the defendant’s case.” Luna & Sylvester, *supra* note 4, at 189. In support of the proposal the authors note only “outlier” suggestions toward that standard and the fact that it has been used in some warrantless search cases. *Id.*

¹⁰⁷ *See supra* notes 99 & 100.

should be used for review of violations of the Article 36 right to consul. This jurisprudence does not require “bootstrapping” the violation up to the level of a constitutional violation and gives defendants a realistic chance at a remedy for the violation while maintaining the integrity of judicial proceedings and the finality of proper judgments.

1. *Kotteakos v. United States*

The starting point of the inquiry is the Supreme Court’s decision in *Kotteakos v. United States*, which delineated the harmless-error standard for non-constitutional errors.¹⁰⁸ In *Kotteakos*, the Court rejected a “correct result” harmless-error standard under which an error is harmless if the defendant “clearly should have been convicted in any event.”¹⁰⁹ Instead the Court adopted a test that analyzes “what effect the error had or reasonably may be taken to have had upon the jury’s decision.”¹¹⁰ Though the error is to be considered in conjunction with “all else that happened... the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.”¹¹¹ The Court noted that the improper joinder of parties “permeated the entire charge, indeed the entire trial”¹¹² and as such affected “the substantial rights of the parties.”¹¹³ An error is not harmless if “it is of such a character that its natural effect is to prejudice a litigant’s substantial rights.”¹¹⁴

In *Brecht v. Abrahamson*, a later case applying the *Kotteakos* standard, Justice Stevens in concurrence explained, “*Kotteakos* plainly stated that unless an error is merely “technical,” the burden of sustaining the verdict by demonstrating that the error was harmless rests on the prosecution.”¹¹⁵ Justice Stevens placed particular emphasis on the *Kotteakos* requirement of *de novo* review “to consider all the ways that error can infect the course of a trial” and its emphasis on avoiding a “single-minded focus on how the error may (or may not)

¹⁰⁸ *Kotteakos*, 328 U.S. at 750.

¹⁰⁹ LaFave, *supra* note 75, at 1162.

¹¹⁰ *Kotteakos*, 328 U.S. at 764.

¹¹¹ *Id.* at 764-65.

¹¹² *Id.* at 769.

¹¹³ *Id.* at 775.

¹¹⁴ *Id.* at 760. “The requirement that an error ‘affect substantial rights’ generally means that the error must have been prejudicial in that it must have affected the outcome of the district court proceedings.” *United States v. Harbin*, 250 F.3d 532, 542 (2001) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

¹¹⁵ *Brecht v. Abrahamson*, 507 U.S. 619, 641 (1993) (Stevens, J., concurring).

have affected the jury’s verdict.”¹¹⁶ Rather, *Kotteakos* requires a reviewing court to decide that “the error did not influence the jury” and that “the judgment was not substantially swayed by the error.”¹¹⁷

Several factors commend using the *Kotteakos* standard to evaluate Article 36 violations. As evidenced by the language from *Kotteakos* and *Brecht*, the standard takes into account the difficulty a defendant has in showing prejudice if the error is of a sort that permeates a trial (and even an entire charge), and is therefore unquantifiable.¹¹⁸ The standard also avoids *per se* findings of harm and allows the flexibility of analyzing a violation as to its impact on particular defendants and particular trials, thus foreclosing unjust reversal when the defendant’s substantial rights were not affected. Further, the *Kotteakos* standard does not require additional justification as to its applicability to the Article 36 violation. Because the treaty requirement is the equivalent of a federal statute and as such is a non-constitutional violation,¹¹⁹ *Kotteakos* applies directly to an Article 36 violation. Perhaps the most significant positive element of the *Kotteakos* standard is that it does not foreclose a prejudice finding simply because the defendant would likely have been found guilty anyway had the error not occurred (though it does consider overwhelming evidence as an element in determining the impact of the error).

In discussing the *constitutional* harmless-error standard articulated in *Chapman v. California*, Professor Carter points out that the Court has faced an interpretational problem in its harmless error jurisprudence about whether to focus on the nature of the constitutional error or on the error in relation to properly admitted evidence. She states:

When the Court has focused on the erroneously admitted or excluded evidence, emphasizing the significance of that evidence and analyzing whether that evidence “contributed” to the verdict, the Court has found that the error was *not* harmless. In contrast, when the Court has focused on the properly admitted evidence and analyzed whether that evidence created an overwhelming case against the defendant, the Court has found the error harmless.¹²⁰

¹¹⁶ *Id.* at 642 (Stevens J., concurring).

¹¹⁷ *Id.* (citations omitted).

¹¹⁸ *See supra* Section IV(B) for a detailed discussion of the problem with the defendant carrying the burden with respect to quantifiability.

¹¹⁹ *See* Luna & Sylvester, *supra* note 4.

¹²⁰ Carter, *supra* note 76, at 137-38.

Carter further explains that this difference in emphasis appears connected to differing philosophical justifications for the harmless-error standard.¹²¹ By equating a “fair” trial with one that correctly determines guilt or innocence, the Court has justified its emphasis on the overwhelming evidence of guilt.¹²² In contrast, dissenting Justices have viewed a “fair” trial as incorporating a value in the process or a particular right.¹²³ Carter concludes that the interpretation of the Chapman “contributes to the verdict” standard “appears to be moving in the direction of analyzing how overwhelming the case is against the defendant.”¹²⁴ Carter’s point about this interpretational inconsistency aptly describes non-constitutional harmless-error analysis as well. However, the language of *Kotteakos* and Justice Stevens’ discussion of the case in *Brecht* make clear that the standard mandates a focus on whether the error affected the jury rather than on whether the error would have changed the outcome of the case. The focus is not simply on guilt or innocence but also on the “value in the process or a particular right.”¹²⁵

The one drawback of the *Kotteakos* standard — and indeed one that would appear to conflict with my earlier rationale for rejecting a defendant’s burden — is that quantifying the effect of an Article 36 error on the jury is problematic due to the nature and timing of the violation. Admittedly, the *Kotteakos* standard still faces this problem to a degree.¹²⁶ Much of the language of the case seems designed to deal with evidentiary and other issues specific to the presentation of the case to the jury rather than with the fairness of the entire trial and pre-trial process of which Justice Stevens and Professor Carter speak. However, *Kotteakos* itself dealt with a pre-trial issue (joinder of

¹²¹ *Id.*

¹²² *Id.* at 139.

¹²³ *Id.* at 139. Carter adds:

If the goal is a correct determination of guilt or innocence, then many errors can be found harmless as long as there is sufficient justification for the verdict. If the goal includes honoring an inherent value in the right denied, then harmless error cannot be found as often. Otherwise the right denied will be slighted. The same language from *Chapman*, thus, is interpreted differently based upon the underlying assumptions about a ‘fair’ trial.

Id.

¹²⁴ *Id.* at 143.

¹²⁵ *Id.* at 139.

¹²⁶ The reviewing court must “take account of what the error meant to *them* [the jury].” *Kotteakos*, 328 U.S. at 764 (emphasis added).

parties), and the case emphasized responsiveness to errors that may permeate the charge and the whole process. This focus indicates that the standard does apply to errors that impact the fairness of the process directly and the jury more indirectly. Even more important, the difficulty of putting on proof of jury impact is in some ways particular to the defendant, especially so in cases in which the violation has permeated the process. The more a defendant would have been assisted but-for the violation, the more difficult for the defendant to show prejudice, since the unfairness from the beginning necessarily weakens his defense and strengthens the prosecution’s case. The great strength of the *Kotteakos* standard is that in such cases it removes from the defendant the burden to prove that the error was not prejudicial and places it on the government. This will be a difficult task for the prosecution if in fact the error did permeate the trial process, but will not be difficult in cases in which the error truly was harmless. *Kotteakos* provides a hopeful, albeit not perfect, fit for relieving the defendant of his impossible burden and alleviating much of the problem of quantifying the error. This standard assesses actual prejudice in a way that gives the defendant a meaningful chance for a remedy and constitutes meaningful review and reconsideration.

2. *Harbin, McCord* and the Middle Ground

An alternative possibility that may solve the *Kotteakos* “trial focus” problem is a recently recognized “middle ground” of constitutional error. A middle ground error falls short of structural error, but has a high presumption of prejudice regardless of the effect of the error on the jury. According to some commentators, this middle ground has been spawned by deficiencies in the Supreme Court’s *Fulminante* structural/trial error dichotomy, and by the Court’s own language in subsequent cases.¹²⁷ While most of the analysis has been in the realm of constitutional error, some circuits have analyzed statutory errors that very likely implicate constitutional rights.¹²⁸ According to

¹²⁷ See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 629 (speaking of a “spectrum” of constitutional error). According to David McCord, the dichotomy “presents a meat-axe approach to what necessarily must be a highly nuanced, case-by-case inquiry into whether a particular error requires reversal.” David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1454 (1997).

¹²⁸ See, e.g., *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001) (finding that violation of statutory right to peremptory jury strikes implicates fair trial rights). The *Harbin* court noted the need to “provide a fair process for adjudicating the defendants’ guilt or innocence, but also to ensure that society perceives the process to be fair, thus promoting respect for the rule of law.” *Id.* at 543.

one treatise, the Court recently “seems to have divided the universe of constitutional errors into three, rather than two, categories for the purposes of harmless analysis.”¹²⁹ This third category, which falls between trial errors and structural errors, involves errors that “should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.”¹³⁰ Reversal of such errors “occurs not so much because of the fundamentality of the right that was violated, but instead because prejudice is simultaneously so likely to occur and so difficult to prove.”¹³¹ Thus, such an error is deemed “presumptively, although not conclusively, prejudicial, and the government bears the heavy burden of establishing” that the error was harmless.¹³²

In *United States v. Harbin*, the Ninth Circuit considered a case involving a jury selection error and the specific question of the “symmetry” of rights between the prosecution and the defense.¹³³ The trial court allowed the government to exercise mid-trial one of its peremptory jury challenges “left over” from jury selection.¹³⁴ The court of appeals held that the error was prejudicial and required reversal.¹³⁵ First, the court held that errors involving rights granted by statute deserve an analysis of the impact of the violation on the overall fairness of the trial (not just of the effect of the error on the jury).¹³⁶ Our legal system is one that depends on “an overall balance designed to achieve the goal of a fair trial” and a “shift at just one stage might so alter the total balance of advantages in favor of the prosecution as to deprive the defendant of the right to a fair trial.”¹³⁷ Thus, “although peremptory challenges are not constitutionally required, due process may be violated by a system of challenges that is skewed towards the prosecution if it destroys the balance needed for a fair trial.”¹³⁸

The court then turned to the question of whether the error “affected the defendants’ substantial rights...[which] generally means that the error must have been prejudicial in that it must have affected the outcome of the district court proceedings.”¹³⁹ However, the court

¹²⁹ RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1380 (2001).

¹³⁰ *United States v. Olano*, 507 U.S. 725, 735 (1993).

¹³¹ HERTZ & LIEBMAN, *supra* note 129, at 1380.

¹³² *Harbin*, 250 F.3d at 544.

¹³³ *Id.*

¹³⁴ *Id.* at 538.

¹³⁵ *Id.* at 548-549.

¹³⁶ *Id.* at 540.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 542.

cited *Brecht* for the proposition that some errors of the trial type “might so infect the integrity of the proceedings as to warrant the grant of habeas relief, *even if it did not substantially influence the jury’s verdict.*”¹⁴⁰ The court went on to conclude, on the facts of this particular case, that “it is impossible to determine what impact, if any, the substitution had on the jury’s ultimate decision”¹⁴¹ and “[h]ere, the error was serious enough to effect a shift in the total balance of advantages in favor of the prosecution, which...could deprive defendants of a fair trial.”¹⁴² Finally, the court noted that neither a *Kotteakos* nor a *Chapman* harmless-error standard could properly assess the impact of such an error on the jury.¹⁴³

In this spirit of rejecting the strict categorical approach of *Fulminante*, Professor McCord argues for an even less categorical approach, and instead advocates considering factors that “bear on the ‘matters of degree’ and ‘multiple concerns’ that are implicated in analyzing whether any error should be reversible.”¹⁴⁴ McCord notes, among other factors, the importance of the right to the defendant,¹⁴⁵ the importance of the right to the public,¹⁴⁶ the degree of infringement, the degree to which the defendant is at fault for the error,¹⁴⁷ the likelihood that the result would have been different absent the error,¹⁴⁸ and basic fairness.¹⁴⁹ McCord insists that such a multi-factored

¹⁴⁰ *Id.* at 544-45 (emphasis added).

¹⁴¹ *Id.* at 545. The court noted that the circuit had previously refused to declare a *per se* reversal rule for peremptory challenge violations, but had held out the possibility that reversal might be warranted on specific facts. *Id.* at 546.

¹⁴² *Id.* at 547.

¹⁴³ *Id.* at 548.

¹⁴⁴ McCord, *supra* note 127, at 1454.

¹⁴⁵ *Id.* at 1455 (“Common sense indicates that there exists a spectrum of importance . . . the more important the right, the less likely the violation is to be harmless.”).

¹⁴⁶ *Id.* (“There are certain rights . . . the enforcement of which benefits the public as much or more than it does the defendant . . . Errors that have a societal effect beyond the effect they have on the particular defendant should tend more toward reversibility.”).

¹⁴⁷ *Id.* at 1456-57 (stating that

In reality, there is a range of behavior by defendants and their lawyers that falls short of waiver, but also short of establishing that the defendant has clean hands with respect to the error. The less culpable the defendant is with respect to the existence of the error, the less likely the error should be found to be harmless.).

¹⁴⁸ *Id.* at 1457 (“The greater the likelihood that the result could have been more favorable, . . . the more a court should lean towards reversal.”).

¹⁴⁹ *Id.* at 1457 (stating that

balancing takes into account the variety of errors and the difficulty of assessing all types of error according to categorical standards.¹⁵⁰ Ultimately, McCord insists that the traditional harmless-error review, which decides whether an error is *per se* reversible and then, if not, conducts a harmless-error review, should be abandoned.¹⁵¹

While the *Harbin* court speaks as though it is categorizing a peremptory challenge violation as a new type of structural error requiring *per se* reversal, its analysis reveals a factor-based approach very similar to that set forth by McCord. The court concluded that neither the *Kotteakos* nor the *Chapman* harmless-error standard applied because “it is simply impossible as a practical matter to assess the impact on the jury of such an error” and thus “automatic reversal is required.”¹⁵² However, to reach this conclusion the court did not conclude that all violations of peremptory jury challenge statutes are *per se* reversible. Instead the court reasoned that “[i]n this case...the error was serious enough to effect a shift in the total balance of advantages in favor of the prosecution, which...could deprive a defendant of a fair trial.”¹⁵³ Thus, the court analyzed whether the defendant suffered “harm” but conducted that analysis not in terms of jury impact but in terms of “process” impact and “balance of advantages” impact. In other words, this is not a rejection of an actual prejudice analysis, but instead represents a shift in the focus of the harm analysis from jury impact to trial process impact. According to *Harbin*, this shift is necessitated by the difficulty in determining the impact on the jury.¹⁵⁴

While this shift in focus is in some ways different from the *Kotteakos* standard, the two are not antithetical. The language of *Kotteakos* indicates an overriding concern with ensuring the fairness of the process from charge to sentencing, even as it dictates an assessment

One of the goals of the criminal justice system should be to provide a process permeated by basic fairness, both to do justice for a particular defendant and to assure the community of the legitimacy of the system. Thus, to the extent that an error evokes the common sense populist response, ‘that’s just not fair!,’ the more a court should lean towards reversal. This would likely be the reaction, for example, if the prosecution utilizes expert testimony against an indigent defendant without the court providing funds for the defendant to hire a corresponding expert.).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1457-58.

¹⁵² *Harbin*, 250 F.3d at 548.

¹⁵³ *Id.* at 547 (emphasis added).

¹⁵⁴ *Harbin*, 250 F.3d at 539.

of how that fairness or lack thereof impacts the jury’s decision when such a determination is possible.¹⁵⁵ *Harbin* simply extends this principle to situations in which jury impact cannot effectively resolve the overarching concern of the extent to which a defendant has been prejudiced by an imbalanced trial procedure.¹⁵⁶ Either choice of standard provides the critical shift of the burden of proof for an Article 36 prejudice analysis. If the error is of the type that lends itself to assessment as to impact on the jury, the government will have little problem showing that the defendant was not harmed if in fact he was not. If the error is difficult or impossible to assess as to jury impact, the government can then put on proof that the trial was basically fair. Thus, the determination of which standard to apply to Article 36 violations should be factually driven given that the result of the violation may sometimes be assessable in terms of jury impact but in some, and maybe most, cases should be analyzed in terms of the affect on the trial process. This will depend in large part upon the extent to which the defendant is in need of a “cultural bridge” to help safeguard the trial process and ensure that the balance is not tipped away from a fair trial.

VI. CONCLUSION

The current standard of review applied to analysis of the prejudice resulting from Article 36 violations clearly leaves defendants with no chance of a remedy. The ICJ has twice mandated effective and meaningful review and reconsideration of sentences handed down when Article 36 was violated, and now the U.S. Supreme Court in *Medellin* and the President of the United States have given state courts the opportunity to give meaningful effect to these rulings. U.S. courts have applied standards that do not give effect to this mandate and are not justified under U.S. criminal procedure jurisprudence. In order to fulfill its international obligations under the VCCR, U.S. states courts can and should adopt standards that better fit the nature of the Article 36 and can be applied fairly to defendants without needlessly requiring reversal in all cases. Shifting the burden of showing prejudice from the defendant and replacing it with a *Kotteakos* or “middle ground” standard that relies on a fact-based analysis of prejudice provides an appropriate new standard for accomplishing this goal.

¹⁵⁵ *Kotteakos*, 328 U.S. at 764.

¹⁵⁶ *Harbin*, 250 F.3d at 539.