

# “I don’t remember”: police accountability and due process in Mexico City criminal courts

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## *Introduction*

Between October 2007 and February 2008, five cameras were put into courtroom 26 in Mexico City to document Antonio Zuniga’s retrial. The 20 hours of footage collected during the case hearings has been a source of information to analyze legal practices and trial dynamics in a Mexico City courtroom. In addition, and despite the case’s own particular features, we are using this case to study structural violations of human rights that arise in court proceedings in Mexico. According to our previous collection of statistical data and in light of studies about the criminal justice system in Mexico, Antonio’s case represents fairly the cases routinely investigated, prosecuted and tried in the City.

The existing empirical information about Mexico City’s investigative, prosecutorial and judicial practices is scarce. The design of corrective policies for any of the problems hinted in this narrative depends on a full understanding of the context under which cases are litigated. There is reason to be concerned with everything in the process; from the way suspects are identified by police, to the quality of verdicts. Under those conditions, a case study allows the sort of in depth look that is necessary to understand the implications for policy design. By following Antonio’s path through Mexico City penal system, we will acquire a better idea of the patterns at play.

The main purpose of this paper is to provide a description of a Mexico City courtroom through the case study of Antonio’s retrial. We are including as well an analysis of 40 minute of footage from Antonio’s trial a description that will be used to support the argument that procedural rules and informally driven practices in Mexican trials fail to provide systems of police accountability and judicial oversight. For purpose of fluency, we have the description of Antonio’s case towards the last section of this paper. The reader may jump to this section if she needs more context to understand the discussion.

***Is Antonio's story just one bad apple, or is it representative of systemic patterns in the workings of Mexico City penal justice?***

Antonio's story is in many ways a routine case. Among common violations we found the lack of access to appropriate defense at early stages of the process, lack of public access to court proceedings, a court environment that curtails presumption of innocence and, more importantly, coercion of the key witness used by the prosecutor. These features were readily apparent upon reviewing the written file of Antonio's case and through interviews with him. The characteristics of this case match some of the available statistics.

Mexico's constitution stipulates a 48-hour period for prosecutors to interrogate defendants, after which they must be released or formally indicted. Current practice severely limits the opportunity for defense counsel to participate in the questioning of defendants. According to CIDE's survey, during the 48-hour period most defendants are incommunicado and about 33% are mistreated by police detectives.

As in Antonio's trial Mexico City judges do not preside over the trial hearings. In two CIDE inmate surveys (2002, 2005) consistently 80% of respondents report never seeing the judge who sentenced them (In Mexico there is no jury, so judges decide the verdict).

A National Center for State Courts (NCSC) study published that about 90% of the verdicts find the defendant guilty however evidence against the defendant in these cases is almost non-existent. This pattern of high rate of convictions and the low quality of evidence that litigators submit to Mexico City criminal courts are structural to the way penal litigations are constructed in Mexico. The NCSC study, survey the evidence introduced in 400 cases that were completed in 2001. This survey tallied up the types of evidence submitted to penal courts, and concluded that the vast majority of cases are sustained on witness testimony, rather than on scientific or expert testimony.

For his part, Luis Pasara, who read 86 verdicts (a sample drawn from the above cited NCSC study) presents a picture of the Mexican judge as a selectively deaf, unpersuasive and biased decision maker: "...What motivated the judges' decisions was unclear; what was clear is that judges made insufficient use of available evidence. Prosecutors had a decisive role in the process; judges were passively uncritical to the accusation, *and the defense attorney was marginalized*. The idea of presumption of innocence was hardly visible and, therefore the number of convictions was unduly high. As a result, it is fair to say that criminal tribunals work like conviction factories: whomever the prosecutor brings "to justice" has a thin chance of being found "not guilty"...

***Video-ethnography of Antonio's Trial: a 40-minute sample***

Footage of Antonio's trial may help illuminate trial practices of Mexico City's criminal court. It also provides visual knowledge to external observers interested in the way a court looks, and how trial hearings in Mexico City evolve. For this paper we analyzed two filmed

testimonies of the leading detectives in the case. The camera ran nonstop for forty minutes. Our underlying question was: Is the trial an instrument of police accountability. We are accompanying this analysis with an eight-minute edition of the forty minutes analyzed. This footage will be shown at the conference.

### **General features of Mexico City Courts**

At the outset, we must say that from our observations the trial seems completely absurd, it is a sequence that lacks any rationality that departs and violates any Western intuitions of a real courtroom. The court facilities are hardly recognizable as courtrooms. All of Mexico City's first instance courts are composed of a rectangular room divided in half by a small chamber surrounded by glass. The judge will sit in this office while two secretaries normally called 'secretary A' and 'secretary B', conducts hearings to his (or her) left and to his (her) right. Defendants stand behind bars, from inside the prison, looking into the courtrooms. To quell the smell, noise and rushes of wind that the prison structures generate, many courtrooms cover the bars with glass windows, and will open them occasionally to show documents to defendants.

A prosecutor and a defense attorney who reside, like the judge, in the same office, compose the court staff. That is, rather than coming to litigate a case to a courtroom, prosecutors and defenders will litigate any case that reaches a given courtroom, without any prior knowledge on the case. There are two prosecutors in every courtroom, and one public defender. Thus, defenders often complain about having to conduct two separate hearings at the same time. Actors ignore any role for the public or the defendant. Throughout the 40 minutes of film, the judge turn his back to Antonio stood with his inmate uniform behind bars, trying to hear to the ongoing litigation.

### **The dynamics of the questioning**

We observed that when the defense poses a question, the judge thinks for a moment, and if he accepts the question, he will repeat it to the witness. Only then can the witness respond, and the judge will repeat this response back to the secretary. What is on record is thus only what the judge says. What is asked is only what the judge asks. The *expediente*, symbolically and literally is the judge's voice.

The implications are further disastrous to the fluency of the trial. The judge would frequently stop the witnesses in the middle of the phrase. One example, picked at random, was: who told you that Antonio's nickname was "El Toño". The question was not objected or debated. A natural response to this question would normally come 5 or 10 seconds after the question was proffered. With the dictation and repetitions involved, this exchange lasted one minute. If this estimate were to hold, the trial is lasting at least 6 times longer than it should, full of unnecessary bureaucratic routines that not only slow the unveiling of information but distort it.

These observations were made on 40 minutes of trial. In this lapse, 23 questions were proffered, and sketchy answers obtained. Thus, every question consumed on average 1.07 minutes of trial time. We are left to wonder how much time would be saved and fluency obtained if the dictation and repetitions were eliminated altogether.

For the specific depositions of detectives in the trial, the judge offered two reasons to object to questions posed to detectives: 1) the response is already in the prosecutors' record *averiguación previa* in the *expediente* or file and 2) the response is unrelated to the prosecutions record. Thus, the center of gravity of the trial is the record that is crafted before the trial. All the actors seem to be running in circles around the *expediente* as if it was a talisman. But for all their efforts they cannot clarify what it means for the trial, or ignore. The *expediente* stands as a ghost reality, it cannot be revealed and fully come to life in the trial, but it cannot be ignored.

The *expediente* can also be seen as an oracle. The judge, and every participant, constantly consults the oracle to decide whether a litigant can ask a question, and to design the question so that it fits the prescriptions of the oracle. The public stands in bewilderment distant, by a *barandilla*—a wooden structure that sits 20 steps away from the place where the trial takes place unable to understand or hear the court interactions.

Because the portion of film we analyzed corresponded to testimonies of two policemen” Ortega Saavedra and Arrona Salmeron, we coded the data to reveal whether there was a pattern of non-responses that told us something about police accountability. We found that detectives responded with “I do not remember to 40% of the questions” These responses were accepted as natural by the judge. The entire therefore presupposes that it is not necessary for policemen to remember anything. Again, the real trial, it seems, already took place before the trial: we as observers are left to hope that the trial is captured in the *expediente*. The prosecutors are therefore allowed to craft their version of reality beforehand and policemen come to court feeling no pressure to remember anything about their investigations. The outcome of the trial does not depend on the trial. It depends on what is written. In such circumstances it becomes impossible to battle an accusation in court. The defense attorney's efforts are hopeless.

The defense lawyer proffered the vast majority of questions, 95% of them. The judge submitted the remaining 5%. Although the witnesses were key to the prosecution, the prosecutor in the court did not ask any questions. The reason being simple, everything that she thought it was needed was already in the *expediente*.

### **The objected questions**

Of the 23 questions, 4 questions were objected. The judge, not the prosecutor, objected all questions. As said before, the questions were objected under the offered rationale that 1) the questions were already responded in the *averiguación previa* or that 2) they were unrelated to anything in the *averiguación previa*.

Knowing the details of the case, it causes consternation to see which questions were objected.

Antonio asserts that three unidentified men detained him, forced him into a car and that he thought he was being kidnapped. The *Ministerio Público* (in the expediente, not in trial) asserted that they two detectives who self identified to the defendant as policemen kindly asked him to get into a car. The troubling part is that the trial offers no possibility of presenting Antonio's story. There are no opening statements in which his story could be proffered. The policemen's interrogatory offer no window to this reality because the questions related to the story proposed by Antonio are not allowed:

***Did you participate in the arrest of Antonio?*** This question was asked to both detectives and objected twice. It is illustrative to see that in the case of Ortega Saavedra it was objected because the prosecutors' record *averiguación previa* in the *expediente* never suggests that the detectives participated in the arrest. In the case of Arrona Salmeron, it was objected because the response to that was clear in the *expediente*. Thus, the *averiguación previa* or *expediente* is unquestionable. Whatever the prosecutor asserts as a fact in the *averiguación previa* cannot be disputed. The trial is not a place to uncover the past, or to contradict the prosecution's truth.

***Where did you see Antonio for the first time?*** This question was objected because the judge considered this to be "*indicativa*" a 'leading' question, that is, a question that suggests an answer. The judge then translated the question to the following one: ***Did you ever see Jose Antonio?*** The response to this was "I must have"

***What vehicle were you on when you detained Antonio?*** The judge or the prosecutor did not object this question, which already borders irrelevance. The judge's secretary objected it, as at the time the judge was on the phone. The rationale offered for the objection was that the response was already on the *averiguación previa*. The *averiguación previa* in fact stated only the plate numbers of the car. The nauseated attorney followed up with "what was the model of the car? And then by "what did I just ask?"

***Did you investigate the addresses of the suspects mentioned by Victor, Crucito, Ojitos and Luis?*** If we cannot ask a detective what did he investigate, why have a trial? The judge rephrased this question to ask the detective, did you investigate anything related to this homicide? The response was 'I do not remember'.

It is salient that the prosecutor did not have to lift a finger so that the judge would object questions. This incarnates an inquisitorial system. The judge stands as an expert bureaucrat that at the same time can be the goalkeeper and arbiter of a soccer game. The prosecutor seems more like a spectator of the game than one of the adversaries playing in it. Seemingly powerless to affect the outcome she was sure that it would favor her because the arbiter is on her side.

### **“I do not remember” answers**

In addition to analyzing objections, we tallied up the amount of “I do not remember” responses. We believe that this kind of responses eludes judicial oversight and permits police and prosecution practices at the investigation level to remain without scrutiny. Equally important, this common practice supports the idea that evidence develops outside and before trials in Mexico.

For the two depositions under analysis we counted 9/23 “do not remember responses”, totaling 40% of such responses. The following questions, key many of them, were met with an *I do not remember* response:

- Do you know who participated in the arrest?
- Do you remember this case?
- When did you interview Victor Daniel Reyes (the prosecution’s single witness in this case)
- How many of you intervened in the detention of Antonio?
- What was the model of the vehicle in which Antonio was detained?
- Why was the prosecution’s witness (a minor) with you in that car, without his father’s consent?
- Did you investigate the addresses of the suspects mentioned by Victor, Crucito, Ojitos and Luis? (This question was translated by the judge and rephrased as: did you investigate anything?)
- Did you request permission to extract the minor from police headquarters and take him to the crime scene to see if he could recognize one of the assailants?

### ***The reliability of the court’s expediente***

The court stenographer did not capture any of the heated discussions around whether the question should be admitted or not.

This blatantly contradicts the hopes of most Mexican legal professionals, many of whom often believe that the *expediente* offers a safe record, an anchor through which the trial can be revisited by the appellate judges. However, to our cameras the *expediente* and the process of dictating of questions and answers revealed itself as the arena in which reality is crafted. The record is not objective because it refuses to record the conflicts about which questions should be heard and responded to. Thus, the possibility of having a camera turns out to be the medium through which the trial was most faithfully recorded reconstructed. To

whoever wants to do qualitative research in a Mexican courtroom a camera is almost indispensable.

### *The story of Antonio Zúñiga*

Antonio Zúñiga used to have a computer repair service at a public market in Iztapalapa, an impoverished part of Mexico City. On a Monday morning of December 2005, as Antonio left a breakfast place, three men forced him into a car and subdued him next to a youth in the rear seat. The youth remained silent as they drove them away.

Antonio thought they were both being kidnapped. However, as he came realize in the hours to follow, the youth sitting next to him had been a witness to a gang shooting that took place the day before. He had identified Antonio as the probable shooter, and they were now driving them to the *Ministerio Público*, one of the prosecutor's offices in Mexico City that has a similar function to a police station in the US.

During the 48 hours that ensued Antonio was tested for residues of gunpowder; the test came out negative. He was repeatedly questioned by detectives, but given no specific information about why he was detained. "You are the one who shot him—said the *comandante*—now, tell us where did you put the gun!" But he wasn't told shot who, when, or where. No gun, no gunpowder and no fingerprints were found that could link Antonio to the homicide. Most importantly, none of the merchants and friends who could testify that Antonio had spent the entire Sunday with them at the marketplace where he works every week were allowed to depose on his behalf.

Our own analysis of the case supported the theory that Antonio might have been picked at random as a suspect. For instance the prosecutors' record, *averiguación previa*, suggested that the youth in the patrol car that picked up Antonio, sole witness in the case, could have been coerced and led to a weak identification. This witness, Victor was only 16 years old the day of the murder and was arrested at the crime scene; he then was held *incomunicado* and interrogated for nearly 20 hours without a lawyer. During his arrest Victor stated that he had been a member of the gang that attacked both him and the victim; he offered names and addresses of three attackers but he also stated that he had fled the scene before the victim was killed and thus was unable to identify the actual shooter. Despite the information provided by Victor, a day after his detention detectives had made little progress in the case: they had a body, a bike worth \$200 pesos (about \$20 dollars) recovered at the crime scene, two bullets retrieved from the body but not one single suspect. Victor was then put into a police car, without his father's permission. The record has no description of how long the detectives took Victor into his promenade or where exactly was he taken, but at the end of this drive, the detectives had finally found a suspect. After his arrest, Antonio description was included in the record, in the form of a third witness deposition and in sheer contradiction to the witness's previous narratives.

Antonio was charged of being the shooter in the homicide. During the months that ensued, he witnessed his trial from inside the prison, standing behind a barred window that looked into the courtroom. On April 2006 a judge who, according to the defendant, did not preside a single hearing in the case, swiftly handed down a conviction, sentencing Antonio to serve 20 years in prison.

### *How we came to film the retrial of Antonio*

We started filming documenting Antonio's case on the spring of 2006. An appellate court ordered Antonio's unexpected retrial after Roberto Hernandez found out that his original defender had forged his papers to practice law. Having followed the experience of Antonio since the spring of 2006, the retrial offered both an unexpected possibility for his release, or, in the worse case scenario, a possibility for documenting the routine violations that would surely take place anew. It also offered an opportunity for expanding the documentary and thus extending our knowledge of Antonio's experience beyond what he had told us in interview. Rafael Heredia, a top attorney who led the criminal chapter of the Mexican Bar Association, offered to litigate the retrial pro bono.

Because in Mexico retrials are conducted before the same judge that has already decided the case (in itself, this is already a questionable practice), Hector Palomares would have to hear the case of Antonio at court 26, all over again. Judge Palomares agreed to film the hearings. The process of filming this retrial cost over 60,000 dollars.

### *Effect of Camera Presence on the retrial*

We attempted to describe in this paper aspects of Mexico City's criminal trials with the help of footage from the trial of Antonio Zuñiga. The five cameras in the courtroom enabled views of the site and a degree of persistence and resistance to boredom that are not possible for an in site observer. In addition, it offers the possibility of analyzing this case with a high degree of detail.

The most surprising thing that happened through the recording of this trial was the judge presiding nearly every minute of the 20 hours of hearings, a practice that is uncommon in Mexico City's courts. Judge Palomares sat or stood, dressed in a black cloak (normally not worn by judges), and presided over it 99% time. But, more surprising yet, was the outcome of the case when the trial judge, Hector Palomares, handed down a conviction for the second time.

Second, the procedures were followed more formally than typically is the case in Mexico. For example, court staff wore suits and ties as opposed to jeans and sweatshirts as they normally do (In previous work I documented their normal attires by surprising them with a camera at unscheduled times).



Thirdly, the defendant reports that court employees were kinder to him, and took steps to ensure that he felt more comfortable during the proceedings. For example, no other defendants were allowed inside the *reja de prácticas* during his hearing.

In both occasions the defendant was tried within the same facilities. He appeared in court wearing clothes that identify him as an inmate, and in all six hearings stood behind a window covered by a thick one inch glass, and a cemented iron gate.

For their part, the public stood several feet away from the place where the hearings took place, and no seats were provided to them. Other than the equipment brought by the cameramen who recorded the hearing, the court counted with no equipment of its own to ensure that the depositions were audible to the public. Lavalier microphones were attached to the judge, the attorneys and the court stenographer for the purposes of the recording.

As to the content of the hearings, the court generally confined to read to the witnesses the statements that they had previously made while in police headquarters, and to decide whether they confirmed or disconfirmed their statements. Most witnesses by the prosecution confirmed their statements and refused to respond most questions by the defense attorney on the basis that they did not remember what happened. On the first hearing, police detectives strongly opposed the recording, but his objections were dismissed.

### ***Note on the prosecutor's record or averiguación previa***

In cases where suspects are caught red-handed Ministerios Públicos—prosecutors—use a constitutional 48-hour period to assemble the indictment or ‘consignación’. During this lapse, the prosecutors—agentes de Ministerio Público—begin to craft the expediente with the aide of police detectives—policías judiciales and secretaries. Because of its reliance on secretaries, the 48-hour process is similar to the judicial process that will ensue. The work centers on producing a document named “averiguación previa”. A secretary will act under the orders of an agente del ministerio público, and proceed to certify the truth of any testimony or document brought in by police or experts.

Prosecutors and secretaries arrange their work around three eight-hour shifts. In contrast, the work of police detectives is arranged around 24 hour shifts (check). Once a consignación is completed, it is very unlikely that any of the participants in the process of constructing this averiguación previa will be cited to testify in trial. Indeed, the prosecutor resident in the courtroom will litigate the case. This prosecutor may freely rely on whatever documents or depositions were taken during the 48 hour period. Thus, the 48-hour period is really the defining moment of the penal process in Mexico. According to the scholastic consensus in the matter, the process vests enormous amounts of power in police detectives and prosecutors. According to Miguel Sarre, a scholar from ITAM, police detectives can more easily pin a crime on anyone than Supreme Court justices. In Mexico's hierarchical political culture, this is a lot to say.

Arguably, the prosecutors' record or *averiguación previa* contains the full depositions of witnesses and all details about the investigation conducted by detectives following prosecutors' orders. The prosecutor's record in Antonio's case consists of 150 pages. A copy of this record was sent to the court at the moment Antonio was indicted and constitutes the evidentiary grounds for the prosecution. Common court practice is that the prosecution rarely brings a witness to the trial, relying, almost solely in the investigation record.

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