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Update on Vienna Convention Violations and the Exclusionary Rule
November 2006

On June 28, 2006, in *Sanchez-Llamas v. Oregon*, [1]the Supreme Court held that suppression of evidence via the exclusionary rule is not an appropriate remedy for a violation of the Vienna Convention on Consular Relations (VCCR).[2] Article 36(1) (b) of the VCCR provides that if a foreign national is detained he or she shall be informed of the right to have her Consulate notified and to communicate with her. The obligation is not specifically upon the courts.

The WDA Immigration Project addressed this issue previously in a practice advisory.[3] Some King County prosecutors tried to remedy the failure of jail authorities to give the notification advisal, by questioning defendants about citizenship in open court. This seemed to go against the clear intent of RCW § 10.40.200,[4] but a method was worked out of putting defendants on notice about the VCCR, that does not require an inquisition into status by the criminal court.[5] After *Sanchez-Llamas*, prosecutors' concerns about future post-conviction challenges based on Vienna Convention failures, should be greatly assuaged.

Sanchez-Llamas covers two related cases. The Court ruled in *Sanchez-Llamas* that there is no exclusionary rule as a remedy for a violation of the notification obligation. In *Bustillo* it also upheld a state habeas court that had dismissed a Vienna Convention claim as procedurally barred, because he had failed to raise the issue at trial or on appeal. The majority held that it was not necessary to rule on whether or not the VCCR requires any other individually enforceable rights, in order to affirm both state court rulings. The Court discounted several related earlier International Court of Justice (ICJ) decisions, that the United States should provide a meaningful remedy in such situations.[6] The Court also ruled that an ineffective assistance claim could not be based on the VCCR *alone*: "an attorney's

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1 *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 165 L. Ed. 2d 557, 2006 WL 1749688, at *7 (2006)

2 Apr. 24, 1963, [1970] 21 U.S. T. 77, 100-101, T. I. A. S. No. 6820

3 www.defensenet.org-- go to Immigration Practice Advisories. The advisory also discusses why the 5th Amendment may apply in cases where Courts or prosecutors conduct an inquisition into immigration status.

4 "It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court." RCW § 10.40.200(1)

5 www.defensenet.org-- go to Immigration Practice Advisories: see Vienna Convention Notification Form for example of a form that is given to defendants which does not require a "confession" of immigration status. Many defense lawyers simply don't have their clients sign at all, on either spot.

6 "Today's decision interprets an international treaty in a manner that conflicts not only with the treaty's language and history, but also with the ICJ's interpretation of the same treaty provision. In creating this last-mentioned conflict, as far as I can tell, the Court's decision is unprecedented." *Breyer, dissenting*, 126 S. Ct. 2702.

lack of knowledge does not excuse the defendant's default, unless the attorney's overall representation falls below what is required by the Sixth Amendment."[7]

The Court did rule, however, that, although suppression is not available, '[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police"[8]

[7] 126 S. Ct. 2686.

[8] 126 S. Ct. 2682; see *United States v. Garcia-Perez*, 2006 U.S. App. LEXIS 18972 (6th Cir. 2006). Immigration practitioners should know that there is a *specific* regulatory requirement for notification. See 8 CFR §§ 236.1(e), 235.3(f). The 9th Circuit has found that a violation of this regulation can be used to challenge a federal criminal charge of unlawful entry after removal, if prejudicial. *United States v. Calderon-Medina*, 591 F.2d 519 (9th Cir. 1979); *United States v. Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980).