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Courts must enforce the consular rights of foreign nationals.

BY CARLOS M. VÁZQUEZ

Mario Bustillo, a Honduran citizen, is doing time in Virginia for a murder he claims he did not commit. Bustillo contends that his is a case of mistaken identity. He argued at trial that another Honduran living in Virginia, Julio Osorto, nicknamed “Sirena,” had committed the crime and fled back to Honduras. The prosecutor ridiculed this defense, suggesting to the jury that “this so-called Sirena” may not even exist.

But Sirena does exist. He is in Honduras and has been caught on videotape confessing to the crime. The Virginia courts have refused to consider this evidence because, under Virginia law, it should have been presented at trial.

Bustillo’s case is now before the U.S. Supreme Court. The issue is not innocence per se, but whether he should be permitted to present new evidence of innocence because Virginia violated its obligation to notify him when he was arrested that he had a right to communicate with the Honduran consulate. That right is granted by the Vienna Convention on Consular Relations, which the United States ratified in 1969 but has an unfortunate history of violating.

Bustillo claims that he likely would have been able to present a much stronger case at trial if Virginia had complied with its obligation. The Honduran consul could easily have confirmed the existence of Sirena and proved through immigration records that he had returned to Honduras shortly after the crime. The consul might even have helped track Sirena down in Honduras, which might have led to an earlier confession.

PROCEDURAL DEFAULTS

In *Bustillo v. Johnson*, Virginia concedes that it violated its

obligations under the Vienna Convention, but argues that Bustillo has raised the matter too late. Because he did not raise it at trial, he committed procedural default and is thus precluded from raising it now. (A paired consular-rights case also argued before the Court on March 29, *Sanchez-Llamas v. Oregon*, does not present the issue of a procedural default because the defendant did raise his consular right at trial.)

Courts in the United States—both federal and state—have been refusing to remedy violations of consular rights for about a decade now. Before now, the Supreme Court has declined review.

The International Court of Justice, on the other hand, has considered the issue several times. In cases brought against the United States by Germany and Mexico, the ICJ has ruled that detainees convicted after their consular rights were violated are entitled to relief in court if the violation adversely affected their trials. It specifically held that “procedural default” rules should not be applied to deny the detainee a chance to establish such prejudice.

After the ICJ’s decision in Mexico’s favor, President George W. Bush instructed U.S. state courts to provide the necessary hearing to the Mexican nationals whose cases were considered by the ICJ. But in Bustillo’s case, the president has sided with Virginia. The Bush administration has told the Supreme Court that the ICJ’s judgment is binding only with respect to Mexicans and that its interpretation of the Vienna Convention was erroneous. Bustillo and others argue that, even though the ICJ’s judgment is not technically binding with respect to Hondurans, the Supreme Court should follow the ICJ’s interpretation out of comity.

CONSULAR RIGHTS

In my view, the Supreme Court should rule in Bustillo’s favor

not just out of comity but because—purely as a matter of U.S. law—Bustillo should not be deemed to have forfeited his consular rights by failing to raise them at trial.

To those unfamiliar with criminal procedure, Virginia's argument might seem facetious. The treaty obligated Virginia to inform Bustillo that he had a right to communicate with his consulate. A law that entitles one to be notified of a right presupposes that one does not already know about the right. Virginia now argues that Bustillo lost his right because he failed to raise at trial a right that he did not know about *because* Virginia violated its legal obligation to tell him. Such attempts to benefit from one's own violations of law are routinely rebuffed by courts.

In response, Virginia points out that it is not uncommon for notification rights to be forfeited if they are not raised at trial. One example is the "right to remain silent" given by police before interrogations. Even if the police fail to provide *Miranda* warnings, the defendant forfeits his right to exclude the evidence if he does not object at trial. Even if the client did not know about this right to remain silent, we expect his lawyer to bring the matter up. The lawyer's failure to do so binds the client unless the lawyer's performance was constitutionally deficient.

If notification rights under our own Constitution can be forfeited in this way, Virginia argues, why not the notification right under the Vienna Convention?

But Virginia overlooks crucial distinctions between *Miranda* rights and the Vienna Convention. Unlike the Vienna Convention, *Miranda* does not really establish a "right" to be notified of anything. The police may interrogate without giving the warning if they do not intend to use the evidence in court. The legal violation is the admission of the evidence over the defendant's objection.

More important, the state's "obligation" to provide *Miranda* warnings (to the extent one can be said to exist) becomes moot once the interrogation has taken place. The state's obligation to notify foreign nationals of their right to consult with their consul, on the other hand, continues until the notice is given. Thus, if the defendant did not receive the notice before trial, the state is under an obligation to provide the notice *at the time of trial*.

At the trial, the state is represented by two separate yet equally important parties—the prosecutor and the judge. Thus, during the trial, the prosecutor and the judge are perpetuating the state's violation if they do not provide the required notice. In other words, Bustillo was the victim of a "procedural default" by the prosecutor and the judge.

In other contexts where the prosecutor or the judge violates a legal obligation to notify the defendant of something during trial, the Supreme Court permits the defendant, if prejudiced, to obtain relief after trial without establishing that his lawyer's performance was constitutionally deficient. These cases offer a closer analogy than *Miranda*.

For example, a federal judge must inform a convicted defendant that he has a right to appeal. The Court has held that if the judge fails to do so and the defendant is prejudiced by this failure, the defendant may obtain relief even if his lawyer did not bring it up at the time.

Similarly, the prosecutor is obligated under *Brady v. Maryland* (1963) to turn over material exculpatory evidence even without a request from defense counsel. Relying in part on the "well-established" presumption that "prosecutors have discharged their official duties," the Court has held that the defendant's ability to obtain relief on collateral review if his lawyer did not raise the matter at trial does not depend on showing that the lawyer's work was constitutionally deficient.

The Court in *Bustillo* should make it clear that judges and prosecutors are obligated to inquire whether the defendant was given the notification required by the Vienna Convention, as the State Department has "encouraged" them to do. If the defendant was not notified of this right by the police, and the judge and prosecutor both fail to provide the notice at or before trial, then the defendant should be permitted to obtain relief if he was prejudiced by that failure.

LAWYERS AND CLIENTS

In addition, the Court should make clear that the defendant's lawyer also is expected to inquire whether his client has been afforded his consular notification. Analogously, even though the judge is under a duty to notify the defendant of his right to appeal, the Court has held that the defendant's lawyer is virtually always required to consult with his client about whether to take an appeal, and failure to do so will be regarded as ineffective assistance of counsel if prejudice results.

As noted, a defendant is not barred from raising a matter after trial if the failure to raise it at trial resulted from his counsel's ineffective assistance. If the lawyer's failure to raise a Vienna Convention violation resulted from his ignorance of the law, presumably the lawyer's conduct would be deemed constitutionally deficient—at least after the Supreme Court makes it clear (presumably in this case) that detainees prejudiced by the state's violation of their consular rights are entitled to a remedy.

The state may contend, however, that the lawyer knew about the consular rights but made a strategic decision not to raise the matter with his client. Most ineffective-assistance claims fail because the courts defer to the lawyer's actual or imputed strategic calls.

The Court should hold, however, that a lawyer's failure to consult with a client about consular rights is virtually always ineffective assistance of counsel. The detainee's lawyer is not likely to welcome the consul's intrusion into the attorney-client relationship. She may prefer not to have her advice second-guessed by someone likely to be more effective at communicating his views to his compatriot.

Indeed, one of the consul's rights under the Vienna Convention is to "arrange for [the detainee's] legal representation." Because lawyers assigned to indigent foreign defendants are often overworked and underprepared, some consuls have a policy of offering better legal representation to their nationals, particularly in capital cases.

It was surely because of this potential conflict of interest that the Vienna Convention (rightly) placed the decision whether to communicate with the consul in the hands of the detainee himself, not his lawyer. Because a lawyer's self-interested decision can easily be disguised as a strategic one, the Court should hold

that the lawyer's failure to raise the matter with the detainee, if prejudicial, is virtually always ineffective assistance of counsel.

NO SANDBAGGING

Virginia may object that such an approach would encourage the defendant to game the judicial process. A defendant certain to lose might decide to overlook the state's violation of his consular rights, knowing that the state's error would entitle him to a second bite at the apple.

Such sandbagging seems unlikely. If the defendant thought that the consul could help him, he would not delay. If the case against him were indeed hopeless, he presumably would be unable to show prejudice. This scenario improbably assumes that the lawyer would be willing to be labeled incompetent just to give his hopeless client a useless hearing later. And because the defendant's knowledge of his rights would vitiate any claim of prejudice, the scenario also assumes either that the lawyer would make this sacrifice and keep it from his client or that he and his client would conspire to perjure themselves about their knowledge of the Vienna Convention.

In any event, there is an easy way for the prosecutor or pre-

siding judge to pre-empt any such sandbagging: They can inform the defendant of his consular rights, as they are required to do in the first place. The defendant would be forced to mitigate any damage from the violation from that point on, eliminating any advantage the defendant might attain from sandbagging.

It is eminently fair to expect the prosecutor or judge to provide this information about the Vienna Convention. After all, it was the state that was supposed to provide the information to the defendant in the first place—only much earlier.

In short, if the defendant was not informed of his consular rights by the police when he was first detained, the judge, prosecutor, *and* defense counsel should be expected to do so at or before trial. If all three fail to do so, the defendant should be allowed to obtain relief on collateral review if he can make the required showing of prejudice.

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