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Practice Advisory on the Vienna Convention

I Overview of the issue & Problem

The Issue: What are a non-citizen's rights under Art. 36(b) of the Vienna Convention on Consular Relations (VCCR), which requires a foreign consulate to be notified when one of its citizens is being detained by government authorities and what are best practices for ensuring compliance with the VCCR?

The Problem: In an effort to comply with obligations under the VCCR, the U.S. State Department, and some prosecutors and courts have implemented practices that require or encourage a non-citizen to disclose information about their citizenship, nationality and/or immigration status. Non-citizens are a particularly vulnerable group within the criminal justice system.¹ While exercising her right to talk to her consulate might be a good thing for some non-citizens, disclosing citizenship information risks exposing her to immigration authorities and possible deportation. The rights embodied in the VCCR are important and useful. However those rights must be administered and exercised in such a manner as to not violate or foreclose other equally important rights and protections.

II Why Is This Issue Coming Up Now?

Increased litigation on this issue and host of recent developments including a 2004 International Court of Justice (ICJ) ruling against the US on this issue, have brought renewed attention to this issue by prosecutors.² Notification of VCCR rights should

¹ See, e.g.: *In the Matter of Hammermaster*, 139 Wn.2d 211, 244; 985 P.2d 924, 941 (1999)

² Although so far no form of post-conviction relief based on a violation of an individual right created by the VCCR has been upheld, (other than through "comity" or voluntary action in cases involving the most severe penalties) the International Court of Justice (ICJ) judgment in *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. 12, P151 (Mar. 31); the subsequent statement by President Bush and withdrawal from ICJ jurisdiction on VCCR issues; the Supreme Court's actions in *Medellin v. Dretke*, 125 S. Ct. 2088 (2005); and the granting of writs of certiorari in November, 2005, by the Supreme Court in *Sanchez-Llamas v. Oregon*, 04-10566; and *Bustillo v. Johnson*, 05-51; have shown that the law is not settled on this question.

be given by law enforcement officers upon arrest of all defendants. However, since this does not appear to be standard practice, numerous prosecutors and courts have taken up the practice by attempting notification at arraignments. While motivated to ensure that a noncitizen defendant has an opportunity to exercise her VCCR rights, these practices also work to foreclose future attacks on convictions due to VCCR claims. However the practice of attempting notification at arraignment is extremely problematic for non-citizens if it requires them to make affirmative disclosures regarding their citizenship, nationality or immigration status.

This practice advisory provides an overview of Art. 36(b)(1) of the VCCR, the current state of the law, ' rights and best practices for defense counsel in addressing the issue.

III What Are The Vienna Convention And The Bilateral Treaties?

-- **The Vienna Convention on Consular Relations (VCCR)** is an international treaty to which the United States adhered in 1969.³ The treaty mainly deals with the establishment and duties of consular relations between states. While its preamble states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," Article 36 of the VCCR guarantees free communication between nationals of a "sending state" and consular officials.

Article 36(1)(b) applies to noncitizen defendants. In particular, Article 36 §(1)(b) requires the "receiving state" (e.g. the United States government) to inform a foreign consulate if one of their nationals is "arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

-- In addition to Article 36 of the VCCR, **there are a series of bilateral treaties on consular relations between the United States and individual nations**, some of which include a mandatory requirement that the two countries notify each other when their nationals are detained. The State Department's (DOS) advisory material emphasizes that the notification in these cases is mandatory, regardless of the desires of the non-citizen.⁴ Moreover, the DOS material starts from the presumption that an arrested person's citizenship status is already known to the detaining agency. These advisory materials do mention privacy concerns and fears of excessive disclosure that may exist, for example in the case of refugees; but do not discuss a situation where a person is afraid, or chooses not to, reveal her citizenship status at all.⁵ So for that reason the DOS materials are problematic in regard to the rights of non-citizens to decline to disclose information about their citizenship, nationality or immigration status.

Although the notification is an obligation of one State to another, neither the bilateral treaties nor the VCCR create an affirmative individual legal obligation by a non-citizen to reveal information that he does not otherwise need or want have to reveal, especially where that would violate legal protections to which he or she has a right.

³ 21 U.S.T. 77 (U.S.T. 1969)

⁴ http://travel.state.gov/law/consular/consular_737.html#notification

⁵ http://travel.state.gov/law/consular/consular_747.html

The starting point for the bilateral treaties is that a foreign national's status has become known, and that once that is known the notification is obligatory. The purpose of the bilateral consular notification treaties is to facilitate consular functions, one of which is protection of foreign nationals; but not to subject them to additional legal penalties or hunt them out against their will.

Like the VCCR's voluntary consular notification requirement, the bilateral treaties' mandatory consular notification requirement is best served by informing all defendants of the treaty obligations, without subjecting them to an unnecessary judicial inquiry into citizenship status, prohibited by RCW 10.40.200(1), and the Fifth Amendment.

IV Who Is Responsible For Ensuring Compliance With The VCCR?

The primary obligation for treaty compliance rests with the Department of State (DOS). The DOS calls on state and federal criminal agencies to assist. The VCCR does *not* make state courts responsible for compliance in the first instance. According to the State Department, "[t]he law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification. . . . Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification."⁶ However, the State department encourages judges and prosecutors to ask whether consular notification has been complied with, to promote compliance. As noted below, however, this suggestion by the State Department runs afoul of a non-citizen's right to not disclose her status and does not take into consideration that in so doing she may be exposing herself to apprehension by immigration authorities. The Ninth Circuit noted that the State Department has historically worked directly with detaining authorities to facilitate compliance with the VCCR.⁷

V. What Happens If The VCCR Is Violated And A Noncitizen Is Not Notified Of His Right To Contact His Consulate?

At present, the remedies available for failure to notify a noncitizen of the VCCR right to contact her consulate are unclear and the law is in a dynamic state of flux. No US Court of Appeals has yet found that the VCCR creates individually enforceable rights, although some trial courts have done so. The 9th circuit has ruled that a motion to

⁶ http://travel.state.gov/law/consular/consular_748.html

⁷ "The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. ... Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct" " *US v Lomberra-Camorlinga* 206 F.3d 882; 887 (CA9 2000)

suppress evidence is not the appropriate remedy for a VCCR violation-- that such a violation does not require the exclusion of evidence.⁸

When the US signed the VCCR it also signed an "Optional Protocol" making the ICJ the forum for resolving disputes about the VCCR.⁹ In *Avena*, the recent case before the ICJ concerning over 50 Mexicans on death row,¹⁰ the ICJ found the US to be in violation of the consular notification requirement and required the US to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention."¹¹ The ICJ finding is specifically put in the context of those individuals sentenced to "severe penalties."

President Bush then issued a memorandum saying that United States would discharge its international obligations under the ICJ's *Avena* judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."¹² (The US then promptly took its marbles and withdrew from the Optional Protocol, on Mar. 7, 2005).

In *Medellin*, after laying out many likely obstacles to relief, the Supreme Court dismissed a writ by an *Avena* petitioner, to allow Texas courts to consider the matter after the ICJ ruling and Bush's statement. The Court had already ruled, prior to *Avena*, that even if a VCCR claim could be brought, it can be procedurally defaulted under state and federal habeas rules.¹³

Although there is as yet no exclusionary rule, whether the VCCR grants *any* individual judicially enforceable rights is still open. In November, 2005, The Supreme Court granted certiorari in the cases of *Sanchez-Llamas* and *Bustillo*; an attempted aggravated murder case from Oregon and a Virginia first-degree murder case,

⁸ "We need not decide whether to accept the government's argument that Article 36 creates no individually enforceable rights, however. We agree with the government's alternative position that assuming that some judicial remedies are available for the violation of Article 36, the exclusion in a criminal prosecution of evidence obtained as the result of post-arrest interrogation is not among them." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000). This was prior to the ICJ ruling in *Avena*, *infra*.

⁹ Optional Protocol; 21 U.S.T. 325, (entered into force for the United States, Dec. 24, 1969; United States withdraws, Mar. 7, 2005).

¹⁰ Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12, P151 (Mar. 31).

¹¹ "[S]hould Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention..." 2004 ICJ LEXIS 11, 135-136 (ICJ 2004)

¹² George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005).

¹³ *Breard v. Greene*, 523 U.S. 371, 375-376 (U.S. 1998) . The subsequent interpretation of Article 36 by the ICJ eliminated one rationale for *Breard*: the absence of a clear ruling by an international court with jurisdiction. *Id.*

respectively. Neither were sentenced to death. Bustillo presents a strong claim of prejudice and factual innocence.¹⁴

V. How Should I Respond If The Court Or The Prosecutor Makes A Citizenship Inquiry On The Record?

- If you know that this is going to be asked you should talk about it with your client before arraignment. The best practice is for your client to let you speak for her, and to decline to answer the question. If your client does want to speak to her consulate then you can help that go forward, outside of court. No defendant should have to answer such a question on the record.
- You should point out that this practice violates Washington state law¹⁵ and that defendants can be informed of the consular notification option and requirements, and the prosecutor can make a record of having done so, without an improper inquiry into legal status in court. The Fifth Amendment's protection against self-incrimination also arguably applies. (See below.)
- You can use the revised King County felony prosecutor's form as an example of a way of making sure defendants are told about consular notification rights without violating other rights, or conducting an unnecessary courtroom inquiry into immigration status. (See attachment)
- The revised form agreed to by the King County prosecutor has one place to sign to request notification, and another that says "I do not wish to provide citizenship information and I waive any consular notification right at this time," but allows the person to request consular notification at a later moment. Ideally, if presented with such a form, all defendants would decline to sign in the place indicating non-citizenship, and either sign the acknowledgment/waiver, or have their attorney simply acknowledge receipt of the form and advisal. Then, if the client is a non-citizen, they should decide whether or not to reveal that fact, and allow either the optional Vienna Convention consular notification, or the mandatory notification for certain countries, to go forward.
- Even if the client desires to have their consul notified, they should not have to go through the judge and the prosecutor to obtain this. The jail authorities who are detaining them should simply fax the consulate in question, as the State Department recommends. Additionally, defense counsel themselves can facilitate contact with consulates on behalf of detained non-citizens. The Washington Defender Association Immigration Project is willing to help you with this if needed.

¹⁴ http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/05-51_Petitioner.pdf

In another Virginia murder case, the State Supreme Court recently overturned a judge's decision to take the death penalty off the table due, to a VCCR violation.
<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/19/AR2006011903029.html?referrer=emailarticle>

¹⁵ RCW § 10.40.200(1) "It is ... 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."

- If you are ever in position to represent a defendant *before* booking or an interview with Court services, they should be encouraged to politely decline to answer all questions about citizenship, legal status, or “place of birth,” even if they need to request an interpreter for court. They can be told to refer such questions to you.

VI Rights of non-citizens to not disclose citizenship or legal status

Washington State Law Prohibits Requiring A Person To Identify His Immigration Status

Washington State’s advisal statute on potential immigration consequences, requires both that defendants be told that a guilty plea have potential immigration consequences, but also unambiguously prohibits requiring that *any* defendant “at the time of the plea.... be required to disclose his or her legal status to the court.”¹⁶

Article 36(2) of the VCCR requires that the consular notification rights be exercised in accordance with US law. The two requirements can be harmonized by making all defendants aware of the VCCR and other treaty notification requirements, without conducting an inquisition into citizenship status in open Court. As a practical matter— and given current trends towards greater criminalization of undocumented immigrants-- a public interrogation by the Court or a prosecutor may also cast a chill on any desire to actually seek consular consultation, to avoid exposure.

Immigrant Defendants Have A Fifth Amendment Right Not To Disclose Their Legal Status¹⁷

The Fifth Amendment applies to even undocumented non-citizens.¹⁸ The privilege against self-incrimination applies at all times, not just after arrest.¹⁹ It applies in any proceeding: civil or criminal, administrative or judicial, investigatory or adjudicatory.²⁰ Its protections continue even through sentencing.²¹ The privilege

¹⁶ RCW § 10.40.200(1)

¹⁷ Art. 1, § 9, the "Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution." *State v. Moore*, 79 Wash.2d 51, 57, 483 P.2d 630 (1971).

¹⁸ “There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. (citations omitted) Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. (citations omitted).” *Mathews v. Diaz*, 426 U.S. 67, 77 (U.S. 1976)

¹⁹ [T]he Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also *privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.*" *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). *Baxter v. Palmigiano*, 425 U.S. 308, 316 (U.S. 1976) (emphasis added)

extends to disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt can be established.²² Moreover, that link may be provided not simply by use of the response itself as evidence, but also by its use as an investigatory lead to other evidence that could lend support to a prosecution.²³

Numerous federal crimes contain either nationality or current immigration status as elements of the offense, or implicate people who may ever have used a false name or document in order to work.²⁴ Just to give some examples: every non-citizen over 18 is required to "have in his personal possession" and to carry his or her 'green-card' "at all times." Violation of this subsection is a federal misdemeanor.²⁵ Every non-citizen over 14, including long-term legal residents, are required to be registered and fingerprinted, with the exception of specified non-immigrants.²⁶ Every non-citizen required to register is also required to notify the Attorney General, in writing, of address change, within 10 days.²⁷ Failure to register, or to make a written notification of every address change, is a federal crime.²⁸ Most permanent residents are not aware of these provisions, nor of the criminal penalties. Washington State itself has a criminal offense where alienage— non-citizen status-- is an element.²⁹

Given all these and other possibilities of criminal exposure, the threat that the privilege protects against is "real and appreciable," and not "imaginary and unsubstantial" nor "trifling."³⁰ A non-citizen has an arguable right to invoke the 5th

²⁰ *Kastigar v. United States*, 406 U.S. 441, 444 (U.S. 1972)

²¹ *Estelle v. Smith*, 451 U.S. 454, 467 (U.S. 1981)

²² *Kastigar v. U. S.*, 92 S.Ct. 1653, 406 U.S. 441, 32 L.Ed.2d 212, rehearing denied 92 S.Ct. 2478, 408 U.S. 931, 33 L.Ed.2d 345

²³ On investigatory leads being sufficient, see *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 78, 86 S.Ct. 194, 198, 15 L.Ed.2d 165 (1965); *Kastigar* at 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972).

²⁴ 8 U.S.C. 1282(c) – Alien crewman overstays; 8 U.S.C. 1306(a) – If overstay after 30 days and no fingerprints/registration; 8 U.S.C. 1304(e) – 18 or over not carrying INS documentation; 8 U.S.C. 1306(b) – Failing to comply with change of address within 10 days; 8 U.S.C. 1324c(e) – Failure to disclose role as document preparer; 8 U.S.C. 1324(a) – Alien smuggling; 8 U.S.C. 1325 – Entry Into United States without inspection or admission; 8 U.S.C. 1326 – Illegal Reentry after deportation; 18 U.S.C. 1546 – False statement/fraudulent documents; 18 U.S.C. 1028(b) – False documents; 18 U.S.C. 911, 1015 – False claim to U.S. citizenship.

²⁵ INA § 264(e); 8 USC 1304(e)

²⁶ INA §262; 8 USC 1302

²⁷ INA §265(a); 8 USC 1305(a)

²⁸ INA §266(a), (b); 8 USC 1306(a),(b). The fact that the failure must be willful provides a defense; however many legal residents are often technically in breach of these requirements, and are exposed to the consequences if a violation were found, which also include deportation as well as criminal prosecution.

²⁹ RCW 9.41.170 Alien's license to carry firearms.

³⁰ *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Marchetti v. United States*, 390 U.S. 39, 53 (1968)

Amendment and refuse to answer any questions about his alienage, nationality or citizenship, posed by prosecutors or judges in open court.