

RESPONSE TO DEFENDANT'S MOTION TO STRIKE THE DEATH NOTICE FOR VIOLATION OF RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION

I. MATERIAL FACTS

On December 4, 1999, defendant was arrested for stabbing his wife. Shortly after the arrest, Detective Miller interviewed defendant's brother Nelson regarding defendant's citizenship. Nelson said he believed that defendant had become a citizen approximately six months before, and Nelson provided Miller with defendant's passport. Miller spoke to an employee of the United States Immigration and Naturalization Service, who verified that defendant had become a United States citizen on January 18, 1999.

II. REASONS WHY THE MOTION TO STRIKE THE DEATH NOTICE SHOULD BE DENIED

Article 36 of the Vienna Convention on Consular Relations states in part:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: . . . (b) 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.

Vienna Convention, April 24, 1963, 21 U.S.T. 77.

A. Defendant was a citizen of the United States and therefore had no right to consular notification under the Vienna Convention.

Defendant alleges that he was prejudiced because the government deprived him of his right to assistance from the Nicaraguan Consulate upon his

arrest. However, defendant was a United States citizen on the date he was arrested. The United States Department of State has interpreted the Vienna Convention as not requiring consular notification in the case of a naturalized citizen:

A person who is a citizen of the United States and another country may be treated exclusively as a U.S. citizen when in the United States. In other words, consular notification is not required if the detainee is a U.S. citizen. This is true even if the detainee's other country of citizenship is a mandatory notification country.

Consular Notification and Access, Part 3: FAQs, Questions About Foreign Nationals, <http://travel.state.gov/law>. The State Department's interpretation of a treaty such as the Vienna Convention is accorded "substantial deference." *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000); see also *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty").

In *State v. Ahmed*, 103 Ohio St.3d 27, 813 N.E.2d 637 (2004), the court rejected defendant's argument that as a "dual national" he was entitled to consular notification under the Vienna Convention:

Appellant contends that he is a citizen of both Pakistan and the United States. Under Section 1448, Title 8, U.S.Code, however, the United States does not recognize the "other citizenship" of a person claiming dual citizenship once the person takes the oath to become a United States citizen. See *United States v. Shahani-Jahromi* (E.D.Va.2003), 286 F.Supp.2d 723, 726, fn. 1.

Moreover, as the court noted in *United States v. Matheson* (D.C.N.Y.1975), 400 F.Supp. 1241, 1245: "[I]t is a recognized fact of international law that a dual national is never

entitled to invoke the protection or assistance of one of the two countries while within the other country. See *Nishikawa v. Dulles*, 356 U.S. 129, 132, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958); *Kawakita v. United States*, 343 U.S. 717, 733, 72 S.Ct. 950, 96 L.Ed. 1249 (1952).”

Id. at 36, 813 N.E.2d at 651.

Therefore, as a naturalized United States citizen, defendant had no right to consular assistance from Nicaragua.

B. Even if defendant was not a United States citizen, he has no individually enforceable rights under the Vienna Convention.

“Courts have split on whether the VCCR confers individually enforceable rights.” *State v. Prasertphong*, 206 Ariz. 70, 83, 75 P.3d 675, 688 (2003), *vacated on other grounds*. “Because the exclusionary rule does not apply to violations of Article 36,” the *Prasertphong* court found it unnecessary to decide whether the treaty created individually enforceable rights. *Id.*

Likewise in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006), the court concluded that because defendant was not entitled to suppression of evidence, “we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.” In *Medellin v. Texas*, — U.S. —, 128 S.Ct. 1346 (2008), the court also did not resolve the issue because it was unnecessary for reaching the decision. The court did note that “a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.” 128 S.Ct. at 1357, n.3.

In *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000), the court consulted the State Department regarding this issue after defendants sought suppression of evidence or dismissal of the indictment:

In the State Department's view, the treaties do not create individual rights at all, much less rights susceptible to the remedies proposed by appellants. After "devot[ing] considerable time to the issue," . . . the State Department has concluded that

[t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations. . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned. . . .

"The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law."

. . .

Other federal courts have agreed. "The Supreme Court has left open the question of whether the consular notification provision creates judicial enforceable individual rights. See *Breard v. Greene*, 523 U.S. 371, 376 . . . (1998). As a general matter, however, there is a strong presumption against inferring individual rights from international treaties." *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001). "As a general rule . . . international treaties do not create rights that are privately enforceable in the federal courts." *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001). "The sum of Jimenez-Nava's arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and

his consular office. Thus, the presumption against such rights ought to be conclusive.” *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001).

In *State v. Martinez-Rodriguez*, 131 N.M. 47, 54, 33 P.3d 267, 274 (2001), the court relied in part on *Li* and concluded that “the State Department has consistently taken the position that although implementation of the treaty may benefit foreign nationals, it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states.” The court held that defendant did not have standing to enforce the provisions of the Vienna Convention. “[T]his court should not depart from the general principles of international law and the expressed position of the State Department to find that Defendant has a private right of action to enforce the VCCR in our courts.” *Id.*

Defendant has provided no justification for this Court to depart from the findings of other jurisdictions that the Vienna Convention confers no individually enforceable rights on criminal defendants.

C. Dismissal of the State’s notice of intent to seek the death penalty is not a remedy for violation of the Vienna Convention.

Even if defendant has an individual right of action, courts have held that remedies such as dismissal of charges and suppression of evidence are not available under the Vienna Convention. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), defendant sought suppression of his statements to police because he was not told of his rights under Article 36. The court stated that it would be “startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation.” *Id.* at 343. In addition, the reasons that suppression is often required, such as to exclude unreliable

confessions and discourage unreasonable searches, are absent from the consular notification context. “Suppression would be a vastly disproportionate remedy for an Article 36 violation.” *Id.* at 349. “[N]either the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of Sanchez-Llamas’ statements to police.” *Id.* at 350.

In *United States v. Bin Laden*, 126 F.Supp.2d 290 (S.D.N.Y. 2001), defendant K.K. Mohamed moved to dismiss the government’s death penalty notice, because he was allegedly denied the right to consular notification when arrested in South Africa. The court first assumed without deciding that the Vienna Convention conferred individual rights and that defendant was denied those rights. However, the court refused to dismiss the death penalty notice:

K.K. Mohamed has not provided us with any relevant authority which supports imposing the extraordinary remedy of dismissing the Government’s death penalty notice, thereby rendering K.K. Mohamed effectively immune to capital punishment. The treaty itself provides for no such relief. Significantly, all courts that have considered the issue have already found evidentiary suppression — a far less drastic remedy — to be outside proper judicial authority with respect to consular notification claims. . . . And given that any defendant rights at issue here are non-fundamental and that the Government has its own valid interest to vindicate by pursuing the death penalty against K.K. Mohamed, we have no alternative but to conclude that dismissal of the Government’s death penalty notice is not a remedy that may be imposed by the Court for violation of the Vienna Convention.

Id. at 295-296. “Even if we were to hold that the Vienna Convention confers individual enforceable rights, the remedies that Sharifi seeks — setting aside his conviction, ordering a new trial, or prohibiting the death penalty — are not reme-

dies available for a violation of the Vienna Convention.” *Sharifi v. State*, 993 So.2d 907, 919 (Ala.Crim.App. 2008).

Likewise, other courts have held that defendants are not entitled to dismissal of an indictment or suppression of evidence if the Vienna Convention is violated. “Even if we assume *arguendo* that De La Pava had judicially enforceable rights under the Vienna Convention — a position we do not adopt — the Government’s failure to comply with the consular notification provision is not grounds for dismissal of the indictment.” *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001). “The remedy Duarte seeks, dismissal of the indictment, is simply unavailable under the Vienna Convention. . . . [T]he Convention nowhere suggests that the dismissal of an indictment is an appropriate remedy for a violation.” *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002).

“[I]rrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.” *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000). “[A]lthough some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36.” *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000). “The State Department has rejected the proposition that Vienna Convention violations warrant evidence suppression or case dismissal, and instead has concluded that the only remedies are diplomatic or political or exist between

states under international law.” *Garcia v. State*, 117 Nev. 124, 128, 17 P.3d 994, 997 (2001).

Defendant has not specified any prejudice he suffered as a result of not receiving consular notification. He also has not provided any applicable authority to support his requested remedy. Dismissal of the State’s notice of intent to seek the death penalty is not a remedy available to defendant for a violation of the Vienna Convention.

III. CONCLUSION

Defendant was a United States citizen when he was arrested and therefore had no right to consular notification under the Vienna Convention. In addition, the treaty is between nations and does not provide individually enforceable rights. Even if such individual rights exist under the treaty, dismissal of the death notice is not a remedy recognized by the courts for violation of the Convention. Therefore, the State respectfully requests that this Court deny defendant’s motion to strike the State’s notice of intent to seek the death penalty.

(Revised 7/09)