No. 08-106

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO A. DE LOS SANTOS MORA,

Petitioner,

-v.-

THE PEOPLE OF THE STATE OF NEW YORK;
RICHARD A. BROWN, DISTRICT ATTORNEY;
FLUSHING QUEENS POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's dismissal of the complaint because the Vienna Convention on Consular Relations does not provide for a private cause of action for damages based on the failure of Respondents to advise Petitioner, a foreign national, of his right to have his consulate notified of his arrest and detention?

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COUNTER-STATEMENT OF THE CASE

In this action brought under the Alien Tort Claims Act, 28 U.S.C. § 1350, Petitioner Ricardo A. De Los Santos Mora, a citizen of the Dominican Republic, alleges that the New York City Police Department and the Queens County District Attorney violated Article 36 of the Vienna Convention on Consular Relations by failing to advise him of his right to have the Dominican consulate notified of his arrest and detention on a charge of attempted first degree robbery.

Background

Article 36 of the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261 (ratified Nov. 24, 1969), provides in relevant part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> . . .
>
> (b) if [the defendant] 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. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

It is the policy of the City of New York to comply with the notification requirement in Article 36 of the Vienna Convention if the Police Department ascertains that a prisoner is not a United States citizen. The Police Department's Patrol Guide contains a procedure, No. 208-56, for the processing of arrests of aliens that includes a list of countries whose consulates or embassies must be

notified.[1] The prisoner's country of nationality is entered on line 12 of the Online Booking System Arrest Worksheet. The arresting officer then must determine if the prisoner's embassy or consulate is on the list of countries that must be notified. If so, the arresting officer then must contact the Inter-City Correspondence Unit and provide a member of the Unit with the pertinent information regarding the prisoner, including the prisoner's name, date and county of arrest, the charges, and the exact location where the prisoner is detained. The Inter-City Correspondence Unit member then must notify the embassy or consulate concerned.

In situations where notification is not mandated because the prisoner's country is not listed, the arresting officer is to inform the prisoner of the right to have his or her embassy or consulate notified. If the prisoner so requests, then the arresting officer is to follow the same procedure with the Inter-City Correspondence Unit.

Also, in either situation, the arresting officer's supervisor is to ensure that the arresting officer has contacted the Inter-City Correspondence Unit.

Finally, the Patrol Guide incorporates by reference Mayoral Executive Orders Nos. 34 and 41 regarding City

[1] There was a scant record in the District Court because the matter was dismissed by the Court *sua sponte*. Respondents provided relevant portions of the New York Police Department Patrol Guide to the Circuit Court in a post-argument filing following a request by the Circuit Court for information on the Police Department's procedures with respect to foreign nationals who are arrested.

policy concerning aliens.[2] In essence, these orders state the City's policy of providing essential services to all residents regardless of immigration status while complying with the federal law that the City may not prohibit its employees from providing information to the U.S. Bureau of Immigration and Customs Enforcement. Under the terms of the Executive Orders, law enforcement officers are not to inquire about a person's immigration status unless they are investigating illegal activity other than one's status as an undocumented alien.

The City's Department of Correction has a similar notification procedure for aliens that the Department has in its custody. Moreover, all New York City Police and Correction officers are trained at the academy level, as well as through refresher courses, on compliance with these procedures. Assistant District Attorneys also are trained on the notification requirement in Article 36 of the Vienna Convention.

The procedures currently employed by law enforcement officers in New York City are not substantially different from what was in effect at the time of Petitioner's arrest in 1992. Because of the long period of time between Petitioner's arrest and the commencement of his action in 2005, there are no records readily available to show what the Police Department did in his particular case to comply with the treaty.

According to his complaint, Petitioner emigrated to the United States from the Dominican Republic in 1991 and retained his Dominican citizenship. Sometime in 1992 he was arrested in Flushing, Queens and charged with

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[2] *See* http://search.citylaw.org/isysquery/873c3005-348e-457c-8b7d-258626c0cae0/4/doc/# and http://home2.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf

attempted first degree robbery. Petitioner claims that when he was arrested, he did not speak English and the police officers did not speak Spanish. He further claims that when he was brought to court, he was assigned counsel who also did not speak Spanish and that he was denied the services of an interpreter. Petitioner was ultimately sentenced to six months imprisonment and five years probation following a guilty plea that he claims was coerced.

Litigation History

On December 23, 2005, Petitioner commenced an action in the United States District Court for the Eastern District of New York. He claimed that the Police Department and Queens County District Attorney's Office violated Article 36 of the Vienna Convention because throughout the criminal proceeding – from arrest through interrogation and court appearances – no one ever advised him of his right to contact the Dominican consulate, nor did the Respondents contact the consulate on his behalf. Petitioner contended that the "outcome of [his] case would have been different if [he] had known of his Vienna Convention rights" and that the Respondents' "serious error" resulted in his incarceration. He sought $1 million in damages and permission to proceed *in forma pauperis*. Before Respondents filed an answer, the District Court dismissed the complaint *sua sponte*.

The District Court's Order

In a memorandum dated December 30, 2005 (Appendix B), the District Court granted Petitioner's request to proceed *in forma pauperis* but dismissed the complaint pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief could be granted. The District Court said that Article 36 of the Vienna Convention did not confer rights to individuals but was intended to protect the rights of states to care for their nationals traveling abroad. Citing the Second Circuit's

decision in *United States v. De La Pava*, 268 F3d 157 (2nd Cir. 2001), and decisions from the Eastern and Southern Districts of New York, the District Court held that violation of the Vienna Convention's consular notice provision was not grounds for vacating Petitioner's sentence.

The Order of the Circuit Court of Appeals

In a unanimous opinion issued on April 24, 2008 (Appendix A), the Second Circuit affirmed the District Court's order. *De Los Santos Mora v. New York*, 524 F3d 183 (2nd Cir. 2008). The Court noted that the Circuits were split on the question of whether Article 36 created judicially enforceable rights; the Fifth, Sixth, and Ninth Circuits had held that it did not, while the Seventh Circuit recently held that it did (Appendix A, pp. 7a-8a). It said that its most recent decision on the subject, *De La Pava*, did not definitively address the issue but only held that the failure of counsel to move for dismissal of an indictment based on an alleged violation of Article 36 was not ineffective assistance of counsel providing grounds to vacate a conviction (*id*., p. 8a).

The Court noted that the U.S. State Department surveyed United States embassies around the world and was unable to identify any party to the Vienna Convention that allowed an individual to sue for damages for a violation of Article 36 (*id*., pp. 8a-9a). The State Department also reported that virtually no other country's domestic courts construed Article 36 to create a private right of action for its violation (*id*.).

Examining the text of the treaty, the Court said that Article 36 did not provide that notice of the rights under it was itself a right, nor was there any mention of whether private individuals could seek redress for the violation of the notice provision in the domestic courts of the States-parties (*id*., p. 23a). Moreover, the Court said, the

preamble clearly stated that the "purpose of such privileges and immunities [under the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States" (*id*., p. 29a)

The Court further said that there was a presumption in its caselaw, as well as the law in other circuits, that unless there is express language, treaties do not create individual rights (*id*., pp. 40a-42a). Also, it accorded "great weight" to the views of the United States Departments of State and Justice, which had submitted a joint *amicus curiae* brief arguing that Article 36 did not grant individual rights that were enforceable in court (*id*., p. 46a).

Finally, the Court said that it was not bound by the holding of the International Court of Justice in *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31) that Article 36 granted foreign nationals an individual right that could be asserted in the domestic courts of the United States (*id*., p. 50a).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S ORDER DISMISSING THE COMPLAINT BECAUSE THE VIENNA CONVENTION ON CONSULAR RELATIONS DOES NOT PROVIDE FOR A PRIVATE CAUSE OF ACTION FOR DAMAGES BASED ON THE FAILURE OF RESPONDENTS TO ADVISE PETITIONER OF HIS RIGHT TO HAVE DOMINICAN OFFICIALS NOTIFIED OF HIS ARREST AND DETENTION.

This Court has left open the question of whether Article 36 of the Vienna Convention creates individually enforceable rights. In *Breard v.* Greene, 523 US 371, 376 (1998) (*per curiam*), the Court held that Article 36 "arguably confers on an individual the right to consular assistance following arrest," and that treaties are on the "same footing" as federal statutes. But the Court also said that there could be no remedy without a showing of prejudice. *Id*. at 377. In *Sanchez-Llamas v. Oregon*, 548 US 331 (2006), the Court assumed without deciding that the Vienna Convention creates judicially enforceable rights, but held that suppression of evidence was not a proper remedy for a violation of Article 36.

Most recently, in *Medellin v. Dretke*, -- US --, 128 SCt 1346 (2008), this Court reiterated that assumption but again left it unresolved. 128 SCt at 1357, n. 4. The main holding in *Medellin* was that decisions from the International Court of Justice, and specifically *Avena*, were not binding on state courts and so did not preempt state limitations on the filing of successive habeas petitions.

The Circuit Courts have mainly left the question unresolved or decided that the Vienna Convention does not

confer individual rights. *See, e.g., Cornejo v. County of San Diego, et al.*, 504 F3d 853 (9th Cir. 2007) (holding that Article 36 does not create a private right of action under 42 U.S.C. § 1983); *United States v. Duarte-Acero*, 296 F3d 1277, 1281-1282 (11th Cir.), *cert. denied*, 537 US 1038 (2002) (dismissal of an indictment is "simply unavailable" because "Vienna Convention itself disclaims any intent to create individual rights," as stated in the Preamble, and the "Convention nowhere suggests that the dismissal of an indictment is an appropriate remedy for a violation."); *United States v. Emuegbunam*, 268 F3d 377, 388-394 (6th Cir. 2001), *cert. denied*, 535 US 977 (2002) (no individual rights under the treaty, so no remedy of dismissal of an indictment or reversal of a conviction for a violation of Article 36); *United States v. Li*, 206 F3d 56, 61 (1st Cir.) (*en banc*), *cert. denied*, 531 US 956 (2000) ("[d]efendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy.")

On the other hand, the Seventh Circuit recently held that there is a private cause of action under section 1983 for the violation of the Vienna Convention. *See Jogi v. Voges*, 480 F3d 822 (7th Cir. 2007).

In *De La Pava*, the Second Circuit explained that there is generally a "strong presumption against inferring individual rights from international treaties," given that "'[a] treaty is primarily a compact between independent nations'" that "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" 268 F3d at 164, quoting *Head Money Cases*, 112 US 580, 598 (1884). Quoting from its earlier decision in *United States ex. rel. Lujan v. Gengler*, 510 F2d 62, 67 (2nd Cir.), *cert. denied*, 421 US 1001 (1975), the Court went on to say that rights arising from treaty provisions "are, under international law, those of the states and…individual rights are only derivative through

the states." 268 F3d at 164. The Court also quoted from Restatement (Third) of the Foreign Relations Law of the United States, § 907 cmt a: "International agreements…generally do not create private rights or provide for a private cause of action in domestic courts". *Id*.

In addition, in *De La Pava*, as in the present case, the Court said that "[t]he preamble to the Vienna Convention supports the view that the Convention created no judicially enforceable individual rights." *Id*. The preamble reads, in pertinent part:

> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
>
> Realizing 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,…

The Court added that "Article 36 itself specifically states that the provisions of that Article are framed 'with a view to facilitating the exercise of *consular functions* relating to nationals of the sending State,'" which indicates that the article was intended "to protect a state's right to care for its nationals." *Id*. at 164-165 (emphasis by the Court).

Furthermore, the Court accorded the required "substantial deference" to the State Department's interpretation that the Vienna Convention "created state-to-state rights and obligations, not judicially enforceable individual rights." *Id*. at 165, n. 6. The Court also noted

that the negotiations over Article 36 emphasized the rights of states, particularly the potential administrative burden that consular notifications would make on a state with a large dispersed immigrant population, and that the Senate Report on the Convention opined that the treaty "does not change or affect present U.S. laws or practice." *Id.* at 165, n. 7.

The Court went on to hold that "[e]ven 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." *Id*. at 165. Noting that dismissal had "been available only in cases implicating the most fundamental of rights," the Court emphasized that, as it previously held in *Waldron v. INS*, 17 F3d 511 (2nd Cir. 1994), the "consular-notification provision of the Vienna Convention and its related regulations do not create any 'fundamental rights' for a foreign national." 268 F3d at 165, citing *Waldron*, 17 F3d at 518.

In *Waldron*, the Second Circuit interpreted 8 C.F.R. § 242.2(g), which reiterates the requirements of Article 36 by requiring the Immigration and Naturalization Service to notify a detained alien of his right to contact consular officials. The Court held that noncompliance with that regulation did not require reversal of a Board of Immigration Appeal's decision to deport an alien because, "although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origin to concepts of due process." *Waldron*, 17 F3d at 518.

In this case, the District Court and the Circuit Court correctly held that Article 36 of the Vienna Convention does not create individual rights or provide for a private

cause of action for damages due to non-compliance. Four of the five other Circuit Courts that have addressed this issue have agreed. The Seventh Circuit's decision in *Jogi* is an outlier that does not significantly undermine the rationale of the Second Circuit in this case and the other Circuits that reached the same conclusion, and should not be considered a sufficient basis for finding that there is a conflict among the Circuits that must be resolved by this Court. Moreover, we respectfully urge this Court to defer to the expertise of the U.S. Departments of State and Justice on this subject.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
September 8, 2008

Respectfully submitted,

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