APPLICATION OF CONSULAR RIGHTS TO FOREIGN NATIONALS: STANDARD FOR REVERSAL OF A CRIMINAL CONVICTION

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I. INTRODUCTION

In nineteenth century criminal procedure in the United States, extradition treaties impacted the treatment of a person surrendered by a foreign state. In a series of cases in state supreme courts, and one in the United States Supreme Court, persons surrendered invoked extradition treaties to annul criminal indictments. The cases involved persons who were surrendered pursuant to a request based on a particular criminal charge, but then were charged with additional offenses after being surrendered.

That additional charging violated a concept of extradition law called the Rule of Specialty. A state that gains surrender on an extradition request is deemed to violate the rights of the surrendering state if it prefers charges additional to that on which the extradition request was based. For the United States courts, the issue was whether this was an obligation that ran only between the two states, or whether it could be invoked by the individual.

In an Ohio case, a county prosecutor added an additional charge to a man's previous charge, although he was already surrendered and extradited for that charge by England.[1] The Ohio Supreme Court annulled the additional charge

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1. *See* State v. Vanderpool, 39 Ohio St. 3d 273 (Ohio 1883).

as a violation of the Rule of Specialty.[2] Citing the Supremacy Clause of the United States Constitution, the court said the individual could invoke the treaty:

> This treaty is ... the law of the land, and the judges of every state are as bound thereby as they are by the constitution and laws of the Federal or State governments. It is ... the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself.[3]

The court reached this conclusion even though the extradition treaty was silent on the question of whether the individual could benefit from the Rule of Specialty.

Three years later, the United States Supreme Court relied on the Ohio decision when a similar issue came before it. The Court found that allowing an additional charge following extradition would violate the treaty.[4] Like the Ohio Supreme Court, the United States Supreme Court inferred the right of an individual to invoke the treaty and fashioned a remedy.

The Vienna Convention on Consular Relations (VCCR), a multilateral treaty regulating the activity of consuls of a sending state in a receiving state, similarly affects the treatment of persons charged with a criminal offense. One of a consul's functions is to assist nationals charged with crimes. The VCCR creates a triggering mechanism for such assistance by giving a detained foreign national a right of access to a home state consul and by requiring the detaining authorities to advise the foreign national of the right of access.[5]

Additionally, the VCCR requires a receiving state to provide a remedy if the obligation is violated:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[6]

Thus, unlike the extradition treaty at issue in Vanderpool and Rauscher, the VCCR prescribes rights for the individual and requires a remedy if those rights are violated. Despite this greater specificity on these two key issues, courts of

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2. *Id.*
3. *Id.*
4. United States v. Rauscher, 119 U.S. 407 (1886).
5. Convention on Consular Relations, Apr. 24, 1969, art. 36, 596 U.N.T.S. 261.
6. *Id.*

the United States have been hesitant to accord rights to a detained foreign national who is not provided information about consular access and even more reluctant to give a remedy for violation of that right. That reluctance has resulted in three cases filed against the United States in the International Court of Justice (ICJ) by sending states whose nationals were not informed of the right of consular access, but who were, nonetheless, convicted of a crime. In all three cases, the foreign nationals were sentenced to death.

In the second of the two cases, brought by Germany, the ICJ said that in the event of a violation the receiving state must provide "review and reconsideration" of the conviction and sentence.[7] The court stated:

> if the United States ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[8]

In the third case, brought by Mexico, the ICJ elaborated on the requirement to review and reconsider. The ICJ reiterated that "review and reconsideration" must be undertaken to "take account" of the violation.[9] The court said:

> The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.[10]

In the United States, most courts entertaining VCCR claims have not reached this question because, as indicated, they have found either that no right exists invocable by the foreign national or that no remedy is required. Those United States courts that have found in favor of the foreign national on these two points have then faced the question of whether, and to what extent,

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7. LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, 514 (June 27).

8. *Id.* at 513-14.

9. Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, ¶ 131 (Mar. 31).

10. *Id.* ¶ 122.

prejudice must have flowed from the violation before relief is granted. A spectrum of possibilities presents itself. At one end would be no requirement of prejudice, i.e., if there has been a violation of the right of consular access, reversal follows. At the other end, one could construct a substantial barrier to relief by requiring the foreign national to sustain a burden of persuasion that the case would have ended in an acquittal had the information about consular access been given at the time of arrest. Between these two possibilities lie potential rules that would impose only a burden of production on the foreign national. This would not require a finding that there would have been a different outcome, but rather only a finding that consular assistance might have been provided, and that it might have had an impact.

A. Standards as Found by Agencies of the Inter-American System

The ICJ did not further explain how a court is to determine whether a violation requires reversal. Additional learning on that question, however, comes from the inter-American human rights system that operates under the Organization of American States (OAS). The Inter-American Court of Human Rights issued an advisory opinion in 1999 on the question of whether, specifically in the context of capital cases, a failure to comply with consular access rights violates Due Process.

The Inter-American Court of Human Rights, after finding that a judicial remedy is required for a consular access violation, stated that "non-observance of a detained foreign national's right to information, recognized in Article 36(a)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law."[11] The court's view was that the opportunity for consular assistance is critical and may impact criminal proceedings in a variety of ways and, therefore, is an important safeguard.

The court said that "notification to a detained foreign national of the right to communicate with a consular official of his country will materially improve the possibilities of a defense," and "procedural measures, including those taken by the police will be done with greater concern for legality and greater respect for the dignity of the person."[12] The court said that the right to be informed about consular access is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights.[13]

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11. Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (ser. A) ¶137 (Oct. 1, 1999).

12. *Id.* ¶ 121.

13. *Id.* ¶ 123.

B. Burden of Proof

Two cases were subsequently decided by the Inter-American Commission on Human Rights (IACHR), also a part of the OAS, and which is a body subsidiary to the Inter-American Court of Human Rights. The IACHR took its task as one of implementing, in regard to specific cases, the standard set by the Inter-American Court of Human Rights.

Each case concerned a Mexican national convicted of murder and sentenced to death: Ramon Martinez Villareal in Arizona,[14] and Cesar Fierro in Texas.[15] In each case the commission found that the foreign national had not been informed about consular access and that this failure required a reversal of the conviction.[16]

The IACHR did not state that it needed to find that the failure to inform had led to an identifiable negative result for the foreign national, or that consular assistance would have benefited the foreign national in a particular way. Since it did not find a need for such a finding the IACHR did not impose any proof burden, either of production or of persuasion, on the petitioners to demonstrate a prejudicial impact.[17]

To evaluate the effect of a violation of an ensuing conviction, the IACHR used a presumption. In the *Fierro* case, it stated:

> As the Commission has previously held, fundamental due process protections, such as the right to prior notification in detail of the charges against a defendant and the right to effective counsel, are of such a nature that, in the absence of access to consular assistance, a foreign national could be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. Each case must be evaluated on its individual circumstances. Once a failure to inform a foreign national of his right to consular notification and assistance has been proven, however, a formidable presumption of unfairness will arise unless it is established that the proceedings were fair notwithstanding the failure of notification.[18]

The IACHR thus requires an affirmative showing of fairness in the face of the consular access violation. By this standard, it would appear that if a consul

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14. Case 11.753, Inter-Am. C.H.R. 821, OEA/ser. L./V./II.117, doc. 5, rev. 1 (2002).

15. Case 11.331, Inter-Am. C.H.R. 771, OEA/ser. L./V./II.118, doc. 5, rev. 2 (2003).

16. Case 11.753, Inter-Am. C.H.R. 821, ¶ 21; Case 11.331, Inter-Am. C.H.R. 771, ¶ 42.

17. Under the commission's procedures, the foreign national detainee is not a party to the proceedings. A petition may be filed by any person, to inform the commission of a violation of rights. That petitioner, whoever it may be, argues the case.

18. Case 11.331, Inter-Am. C.H.R. 771, ¶ 66.

might have played a constructive role in the defense, the "formidable presumption of fairness" would remain unrebutted.

Applying this presumption to the facts of the *Fierro* case, the IACHR said, "it is also not apparent, from the state's observations or otherwise, that Mr. Fierro's proceedings were fair notwithstanding the state's failure to comply with the consular notification requirements."[19]

C. Standard for Rebutting the Presumption of Unfairness

The *Fierro* case does not provide guidance on the limits of what an affirmative showing of fairness must reveal, because the harm to Fierro from lack of consular access was quite obvious. Shortly after arrest, a murder confession was taken that likely could not have been obtained had a consul been involved.[20] The El Paso, Texas, police who detained Fierro had pre-arranged with police in Ciudad Juarez, Mexico, for Fierro's mother and step-father to be arrested in Ciudad Juarez.[21] The El Paso police used Fierro's fear of what would befall his mother and step-father to convince him to confess.[22] A Texas court found the confession inadmissible but upheld the murder conviction on other evidence.[23] The commission noted the Texas court's conclusion that the El Paso officer who testified to not having coerced Fierro had perjured himself.[24]

The IACHR thought that a consul's participation might have averted the coerced confession:

> Mr. Fierro's confession was taken at a time when consular notification and assistance may have been highly significant in the circumstances. The consulate could, for example, have verified the status of Mr. Fierro's mother and step-father, who were being held in Mexico by the Mexican police, and thereby mitigated any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of the resulting confession.[25]

The IACHR thus engaged in analysis of how a consul might have impacted the proceedings, but only by way of determining whether the presumption of unfairness might be overcome on the facts of the case. The commission did not

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19. *Id.*
20. *See* Ex parte Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996).
21. *Id.*
22. *Id.*
23. Case 11.331, Inter-Am. C.H.R. 771, ¶ 18.
24. *Id.*
25. *Id.*¶ 39.

require that there would have been a different outcome had a consul participated.

Similarly in Martinez Villareal, the commission considered that the proceedings had failed to satisfy Due Process, but again the deficiency was so significant as to provide little indication of the outer limit. Martinez Villareal apparently had little idea of what was occurring during this trial. In the commission's finding:

> the absence of notification under Article 36(1)(b) of the Vienna Convention on Consular Relations could on the information available have had a significant effect on the fairness of Mr. Martinez Villareal's criminal proceedings. According to the record, Mr. Martinez Villareal was a Mexican national who was arrested and tried in the United States, but who did not speak English and was represented by an attorney who did not speak Spanish. The record also indicates that Mr. Martinez Villareal was not familiar with the U.S. legal system and that this, together with his linguistic limitations, affected his understanding of and participation in the criminal proceedings against him despite the presence of a translator. The Petitioners claim, for example, that Mr. [Martinez] Villareal did not understand which people in the courtroom comprised the jury or what the purpose of the jury was, and that the voir dire proceedings were not translated into a language that he could understand. The record also indicates Mr. Martinez Villareal's attorney failed to contact his family in Mexico and, moreover, personally attested through an affidavit as to his overall inexperience and ineffectiveness in handling Mr. Martinez Villareal's case. Further, there is evidence suggesting that Mr. Martinez Villareal suffered from some degree of mental deficiency during at least certain stages of the criminal proceedings against him.[26]

D. Standard Applied by United States Courts

United States courts have not definitively addressed the issue of how to assess a violation of the obligation to inform a foreign national about consular access. In the only Article 36 case to reach the United States Supreme Court, the matter was heard only on a last-minute request for a stay of execution and without full briefing. The court rejected the request for a stay on grounds that the applicant had not raised the Article 36 issue in a timely manner.[27]

The court, nonetheless, speculated on the impact of an Article 36 violation. It said by way of *dictum*, "it is extremely doubtful that the violation should

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26. Case 11.753, Inter-Am. C.H.R. 821, ¶ 82.

27. Breard v. Greene, 523 U.S. 371, 376 (1998).

result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[28] The court did not specify whether by "effect" it meant a decisive effect, namely that the accused would have been acquitted, or whether it meant that a consul might have played some role. Neither did it specify who would carry proof burdens on the issue.

In a case from Illinois involving a Polish national convicted of murder and sentenced to death, a United States district court, purporting to follow the United States Supreme Court's *dictum*, said, "[t]o gain relief on a Vienna Convention violation, then, a Petitioner must show: that his Vienna Convention rights were violated; and that the violation had a material effect on the outcome of the trial or sentencing proceeding."[29] Applying this standard to the facts before it, the court found little reason to believe that a consul could have had an effect on the trial, because "evidence of Madej's guilt was substantial."[30] Continuing, the court said:

> It is possible, though, that the Consulate's participation would have had an effect on the sentencing hearing ... Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference.[31]

That formulation suggested that a proof burden rested on the foreign national, but only to raise a possibility that consular assistance might have had an effect on the outcome.

In an earlier case, *U.S. v. Rangel-Gonzales*, the United States Court of Appeals for the Ninth Circuit addressed more precisely the proof burden.[32] This case was decided in 1980, at a time when that circuit found a remedy to be required for an Article 36 violation.[33] The court of appeals said that while it is incumbent on a foreign national to raise the issue, the government must disprove that the failure of notification did not prejudice the foreign national. Applying the test to the case at bar, the court of appeals said:

> the appellant in this case carried his initial burden of going forward with evidence that he did not know of his right to consult with

28. *Id.* at 377.

29. United States *ex rel.* Madej v. Schomig, 223 F.Supp.2d 968, 980 (N.Dist.Ill. 2002).

30. *Id.*

31. *Id.*

32. United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980).

33. The circuit's position changed with the decision quoted above, *see* United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000).

> consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation.[34]

The court of appeals, moreover, did not require a decisive effect on the outcome of the proceedings. Rather, prejudice would be present if the foreign national's contact with a consul, had it occurred, "would have resulted in assistance to him," and if it appears that the foreign national was unaware of the right of consular access and would have requested it if informed about it.[35] That approach is consistent with that of the Inter-American Court of Human Rights, which as indicated, considered a denial of the possibility of consular assistance through non-notification as affecting multiple aspects of the proceedings.

The standard employed by United States courts in more recent cases comes from the United States court of appeals in *Rangel-Gonzales*.[36] Those courts that have addressed the distinction between burden of production and burden of persuasion have, as in *Rangel-Gonzales*, made clear that the evidentiary burden on the foreign national is one of production only.[37]

These courts have not construed "prejudice" to mean that the case would have ended in an acquittal instead of a conviction. The Department of State has made clear that such an approach would be unworkable and inconsistent with the VCCR. In oral argument in *Paraguay's* case against the United States, the Department said that it would be:

> problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference.[38]

In a case decided in light of the ICJ rulings, the Oklahoma Court of Criminal Appeals indicated deference to the ICJs decisions and a standard of review similar to that of the United States court of appeals in *Rangel-Gonzales*.

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34. *Rangel-Gonzales*, 617 F.2d at 533.

35. *Id.*

36. United States v. Esparza-Ponce, 7 F.Supp.2d 1084, 1097 (S.D.Cal. 1998); United States v. Chaparro-Alcantara, 37 F.Supp.2d 1122, 1126 (C.D.Ill. 1999).

37. *Esparza-Ponce*, 7 F.Supp.2d at 1097 (citing *Rangel-Gonzales*, 617 F.2d at 530-31, for the proposition that the defendant must "produce evidence"); State v. Cevallos Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000) (stating that defendant "must produce evidence . . .").

38. Request for the indication of provisional measures, verbatim record, public sitting of 7 April 1998, para. 2.18 (statement of Catherine Brown, Assistant Legal Advisor for Consular Affairs), Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

Hearing the case of Osvaldo Torres, a Mexican national facing imminent execution in Texas, the court stayed the execution and ordered a trial court to hold a hearing to determine "whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate."[39] The court issued its order without an explanatory opinion, but in a concurring opinion, Judge Chapel said that by virtue of the United States' ratification of the Optional Protocol, his court was obligated to comport with the ICJ judgment in the *Avena* case.[40] Prejudice would be present, Chapel, J., wrote, if Torres was unaware of his right to consular access, if he would have availed himself of it had he been informed about it, and if a Mexican consul would have provided consular assistance.[41]

II. ANALYSIS

A requirement is unrealistic if it would involve a court finding that a consul might have acted in a way that would have averted the conviction. The United States' position in oral argument in the *Paraguay* case is sound. When a detainee has not received consular assistance for not having been informed of the right, one can never know what a consul might have done that would have affected the proceedings in the foreign national's favor.

The approach taken in the inter-American system, and that taken in the cited United States cases, is more realistic. A violation of the obligation to inform a foreign national of the right of consular access gives rise to a "formidable presumption of unfairness," in the words of the IACHR, because of the myriad ways in which a consul may affect proceedings.[42] Where the foreign national was not informed, and where a consul did not participate, one is left only to speculate on what a consul might have done. One can, as the IACHR did in its two cases, cite unfair aspects of a particular proceeding as an indication of problems a consul might have averted. Any decision-maker seeking to make its decision as solid as possible would do so. However, once the presumption of unfairness arises, the presumption should remain unless it can affirmatively be shown that a consul would not have participated in the case. So long as it appears that a consul might have participated had the obligation to inform been met, the presumption of unfairness stands.

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39. Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, Torres v. Oklahoma, No. PCD-04-442, slip op. at 2 (Okla. Crim. App. May 13, 2004).

40. *Id.* at 5.

41. *Id.* at 9.

42. Case 11.331, Inter-Am. C.H.R. 771, ¶ 66.

The *Rangel-Gonzales* approach is more consistent with international practice than is the *Madej* approach. An international law violation must be remedied by putting the situation in which it would have been if no violation occurred. If information was not given to a foreign national at the time of arrest about consular access, there should not need to be a finding that a consul might have impacted the case in a particular respect. As the United States argued in the *Paraguay* case, that approach requires too much speculation. In a case in which no information was given to the foreign national and in which no consul participated, one cannot surmise what role a consul might have played, or how a consul's participation might have altered the course of the proceedings.

Criminal trials can result in a variety of outcomes, not limited to simply acquittal or guilt on the charges filed. Charges can be reduced before or during trial, plea bargains can be reached, and prosecutors can agree to recommend a particular sentence. One can never know how a consul might have taken action that could have affected these determinations. The presumption of unfairness, as the IACHR put the matter, is "formidable."[43]

43. *Id.*