SUPREME COURT OF THE UNITED STATES

Nos. 04–10566 and 05–51

MOISES SANCHEZ-LLAMAS, PETITIONER
04–10566 *v.*
OREGON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

MARIO A. BUSTILLO, PETITIONER
05–51 *v.*
GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 28, 2006]

JUSTICE GINSBURG, concurring in the judgment.

I agree that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding, and therefore join Part II of JUSTICE BREYER's dissenting opinion. As to the suppression and procedural default issues, I join the Court's judgment. The dissenting opinion veers away from the two cases here for review, imagining other situations unlike those at hand. In neither of the cases before us would I remand for further proceedings.

I turn first to the question whether a violation of Article 36 requires suppression of statements to police officers in Sanchez-Llamas' case and others like it. Shortly after his arrest and in advance of any police interrogation, Sanchez-Llamas received the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966), in both English and Spanish. Tr. 122 (Nov. 16, 2000). He indicated that he understood

those warnings, *id.*, at 123, telling the police that he had lived in the United States for approximately 11 years, *id.*, at 124, 143, 177. After a break in questioning, Sanchez-Llamas again received *Miranda* warnings in Spanish, and again indicated that he understood them. *Id.*, at 129, 176. Sanchez-Llamas, with his life experience in the United States, scarcely resembles the uncomprehending detainee imagined by JUSTICE BREYER, *post*, at 30. Such a detainee would have little need to invoke the Vienna Convention, for *Miranda* warnings a defendant is unable to comprehend give the police no green light for interrogation. *Moran* v. *Burbine,* 475 U. S. 412, 421 (1986) (a defendant's waiver of *Miranda* rights must be voluntary, knowing, and intelligent, *i.e.*, "the product of a free and deliberate choice . . . made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"); *United States* v. *Garibay*, 143 F. 3d 534, 537–540 (CA9 1998) (defendant, who had difficulty understanding English, did not knowingly and intelligently waive his *Miranda* rights where the police recited the *Miranda* warnings only in English); *United States* v. *Short*, 790 F. 2d 464, 469 (CA6 1986) (defendant's limited comprehension of English cast substantial doubt on the validity of her *Miranda* waiver).[1]

In contrast to *Miranda* warnings, which must be given on the spot before the police interrogate, Article 36 of the Vienna Convention does not require the arresting authority to contact the consular post instantly. See *Case Concerning Avena and other Mexican Nationals (Mex.* v.

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[1] Before trial, Sanchez-Llamas moved to suppress his statements to police on voluntariness grounds. The trial court denied the motion, finding that clear and convincing evidence established Sanchez-Llamas' knowing, voluntary, and intelligent waiver of his *Miranda* rights. Tr. 232 (Nov. 16, 2000); App. to Pet. for Cert. in No. 04–10566, pp. 10–11. Neither the Oregon Court of Appeals nor the Oregon Supreme Court addressed Sanchez-Llamas' voluntariness challenge, and this Court declined to review the question.

U. S.), 2004 I. C. J. No. 128, ¶97 (Judgment of Mar. 31) *(Avena)* (United States's notification of Mexican consulate within three working days of detainee's arrest satisfied Article 36(1)(b)'s "without delay" requirement); U. S. Dept. of State, Consular Notification and Access 20, http://travel.state.gov/pdf/CNA_book.pdf (as visited June 26, 2006, and available in Clerk of Court's case file) (directing federal, state, and local law enforcement officials to notify the appropriate consular post "within 24 hours, and certainly within 72 hours" of a foreign national's request that such notification be made). Nor does that Article demand that questioning await notice to, and a response from, consular officials.[2] It is unsurprising, therefore, that the well researched dissenting opinion has not found even a single case in which any court, any place has *in fact* found suppression an appropriate remedy based on no provision of domestic law, but solely on an arresting officer's failure to comply with Article 36 of the Vienna Convention. See *post*, at 32; *ante*, at 9, n. 3.

The Court points out, and I agree, that in fitting circumstances, a defendant might successfully "raise an Article 36 claim as part of a broader challenge to the voluntariness of [a detainee's] statements to police." *Ante*, at 15. In that way, "full effect" could be given to Article 36 in a

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[2] See Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, pp. A385–A386, ¶¶34–38 (Oct. 25, 2003) (observing that some Convention signatories do not permit consular access until after the detainee has been questioned, and that, even in countries that permit immediate consular access, access often does not occur until after interrogation); cf. *Avena*, 2004 I. C. J., ¶87 (recognizing that Article 36(1)(b)'s requirement that authorities " 'inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36").

manner consistent with U. S. rules and regulations. But the question presented here is whether suppression is warranted simply because the State's authorities failed to comply with Article 36 of the Vienna Convention. Neither the Convention itself nor the practice of our treaty partners establishes Sanchez-Llamas' entitlement to such a remedy. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng,* 525 U. S. 155, 175–176 (1999) (construing the Warsaw Convention in accord with the views of the United States's treaty partners).

As to the procedural default issue, I note first two anomalies. The Court explains, and I agree, that it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State's procedural default rules, but defendants not told of Article 36 rights would face no such hindrance. See *ante*, at 24. Furthermore, as the dissent apparently recognizes, in the federal court system, a later-in-time statute, codifying a federal procedural default rule, would "supersed[e] any inconsistent provision in the Convention." *Post*, at 25–26 (citing *Breard* v. *Greene,* 523 U. S. 371 (1998) *(per curiam)*). In my view, it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard. *Post*, at 26. That state of affairs, surely productive of friction in our federal system, should be resisted if there is a plausible choice, *i.e.*, if a reasonable interpretation of the federal statute and international accord would avoid the conflict.

Critical for me, Bustillo has conceded that his "attorney at trial was aware of his client's rights under the Vienna Convention." App. in No. 05–51, p. 203, n. 5. Given the knowledge of the Vienna Convention that Bustillo's lawyer possessed, this case fails to meet the dissent's (and the International Court of Justice's) first condition for overrid-

ing a State's ordinary procedural default rules: "[T]he [Vienna] Convention forbids American States to apply a procedural default rule to bar assertion of a Convention violation claim 'where it has been the failure of the United States [or of a State] itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.'" *Post*, at 18 (emphasis deleted) (quoting *Avena*, 2004 I. C. J., ¶113); accord *post*, at 6, 16, 18, 23. Nothing the State did or omitted to do here "precluded counsel from . . . rais[ing] the question of a violation of the Vienna Convention in the initial trial." *Ibid*. Had counsel done so, the trial court could have made "appropriate accommodations to ensure that the defendant secure[d], to the extent possible, the benefits of consular assistance." *Ante*, at 15.[3]

In short, if there are some times when a Convention violation, standing alone, might warrant suppression, or the displacement of a State's ordinarily applicable procedural default rules, neither Sanchez-Llamas' case nor Bustillo's belongs in that category.

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[3] Furthermore, once Bustillo became aware of his Vienna Convention rights, nothing prevented him from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of those rights. Through such a claim, as the dissent acknowledges, see *post*, at 16, 19, 25, 29, "full effect" could have been given to Article 36, without dishonoring state procedural rules that are compatible with due process. Bustillo did not include a Vienna-Convention-based, ineffective-assistance-of-counsel claim along with his direct Vienna Convention claim in his initial habeas petition. He later sought to amend his petition to add an ineffective-assistance-of-counsel claim, but the court held that the amendment did not relate back to the initial pleading. Tr. of Oral Arg. 26, 42. The state court therefore rejected Bustillo's ineffectiveness claim as barred by the applicable state statute of limitations. App. 132. Bustillo did not seek review of that decision in this Court.

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For the reasons stated, I would not disturb the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia.