No. 05-51

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF FOR PETITIONER MARIO A. BUSTILLO

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QUESTION PRESENTED

Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or on the ground that the treaty does not create individually enforceable rights.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the Supreme Court of Virginia are named in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR PETITIONER MARIO A. BUSTILLO

OPINIONS BELOW

The decision of the Supreme Court of Virginia (J.A. 241-242) is unreported. The May 4, 2004, decision of the Fairfax County Circuit Court (J.A. 155-169) is unreported; the September 16, 2003, decision of the Fairfax County Circuit Court (J.A. 138-154) is reported at 63 Va. Cir. 125; the February 21, 2003, decision of the Fairfax County Circuit Court (J.A. 136-137) is unreported; and the August 8, 2002, decision of the Fairfax County Circuit Court (J.A. 120-131) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 7, 2005. On May 25, 2005, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 5, 2005, and the petition was filed that day. The petition was granted, limited to Question 1, on November 7, 2005. 126 S. Ct. 621. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Relevant portions of the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101; and the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1953, 21 U.S.T. 325, are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. App. 51a-55a) and the Appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case concerns whether a foreign national may seek judicial relief from a conviction obtained in violation of the Vienna Convention on Consular Relations ("Vienna Conven-

tion" or "Convention"), April 24, 1963, 21 U.S.T. 77, where the violation prevented him from presenting critical evidence supporting his claim of innocence at trial. The sole issue in petitioner Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat on the evening of December 10, 1997. Three witnesses testified that Bustillo, a Honduran national, committed the crime. Two testified that Bustillo was not the killer, and one of them identified a Honduran national nicknamed "Sirena"—now known to be Julio Osorto—as the man who killed Merry. The day after Merry died, Sirena fled the country for Honduras. Since then, Sirena has admitted to friends, in surreptitiously videotaped conversations, that he was the one who killed Merry.

At the time of trial, however, defense counsel had difficulty proving that Sirena existed. As a result, the Commonwealth mocked the defense's theory that this "so-called Sirena" committed the crime; called Sirena's absence "convenient"; and questioned the credibility of a witness who swore she saw Sirena fleeing the country, on a flight to Honduras, the day after the victim's death. It now turns out that the Commonwealth failed to turn over to the defense police reports showing that the police stopped "Julio C. Osorto"—Sirena—near the crime scene shortly after the crime occurred; that Sirena had what appeared to be red "ketchup" stains on his shirt and pants; that Sirena gave three conflicting stories about where he was coming from; and that another witness reported seeing Sirena cock a baseball bat as he approached Merry.

More important, no one advised Bustillo of his right, under Article 36 of the Vienna Convention, to communicate with his consulate. The United States has conceded that Bustillo's Vienna Convention rights were violated and has apologized to Honduras. The Honduran Consulate has averred that, had it been advised of Bustillo's defense—that another Honduran national (Sirena) had committed the crime—at the very least it would have: (a) provided a photo-

graph of Sirena to prove his existence; (b) supplied immigration records showing that Sirena had entered Honduras the day after Merry died; and (c) attempted to contact and interview Sirena in Honduras.

The issues presented are whether, given the treaty violation and the evidence corroborating Bustillo's claim of innocence: (1) a foreign national may invoke the Vienna Convention as a basis for judicial relief from his conviction; and (2) the courts of this Nation must consider the impact of such a violation despite a failure to raise it at trial.

I. Treaty Background

The United States and more than 160 other countries (including Honduras) are signatories to the Vienna Convention. Article 36 of the Convention, entitled "Communication and contact with nationals of the sending State," obliges signatory Nations (a) to advise detained foreign nationals of their right to communicate with their consulate, and (b) to advise the consulate of the arrest promptly if the detainee so requests. It provides, among other things, that:

> [I]f [the detainee] 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 subparagraph.

Vienna Convention art. 36(1)(b). Article 36 further specifies that the "laws and regulations of the receiving State," although generally applicable, "*must* enable *full effect* to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.* (emphasis added).

The United States also ratified the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325. The Optional Protocol provides, in relevant part, that "[d]isputes arising out of

the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice" ("ICJ"). *Ibid.* The United States first invoked the Optional Protocol in 1979, claiming that Iran had violated Article 36 of the Vienna Convention in connection with the seizure of the United States Embassy in Tehran. See *United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)*, 1979 I.C.J. 23 (Dec. 15).

Since then, the ICJ has twice been called upon to address the meaning and effect of Article 36 in cases involving the United States. See *LaGrand Case (F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 12 (Mar. 31). In both cases, the ICJ held that Article 36 provides foreign nationals with individual rights of consular notification and contact that can be asserted in the courts of the detaining country. *LaGrand*, 2001 I.C.J. at 497, ¶ 89; *Avena*, 2004 I.C.J. at 66, ¶ 140. The ICJ also held that procedural bars against assertion of Vienna Convention rights are inconsistent with the Convention if they preclude meaningful consideration of otherwise valid claims. *LaGrand*, 2001 I.C.J. at 497, ¶ 90; *Avena* 2004 I.C.J. at 57, ¶ 113.

II. Proceedings In This Case

A. The Murder Of James Merry

James Merry was murdered on the night of December 10, 1997, as he smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia. Someone approached Merry and struck him in the head with a baseball bat; Merry eventually died of his wound. Immediately after the attack, the 15 to 20 youths in and around the Popeye's restaurant scattered. 3/17/98 Tr. at 128, 219, 238. When police arrived on the scene at about 8:30 p.m., they found Merry lying "down on the ground outside" the Popeye's, "bleeding." *Id.* at 116 (Officer Milam); see *id.* at 133, 139 (Michelle Gutierrez); *id.* at 223 (Jesse Konstanty). "[T]he evidence also showed that there was blood at the scene,

including photographic evidence of what appeared to be" drops of "blood spatter." J.A. 147 (footnote omitted). When interviewed on the scene, a witness who had been sitting inside the Popeye's restaurant asserted that Bustillo had been the killer; others agreed.

Bustillo and other witnesses maintain that another Honduran national—"Sirena," now known to be "Julio Osorto" —committed the murder. It turns out that, shortly after the murder, the police actually encountered Sirena while canvassing the area around the crime scene. The Report of Officer Christopher Mahoney indicates that he stopped Sirena, who "had what appeared to be ketchup" on his shirt and pants. J.A. 134. Sirena gave conflicting statements about where he was coming from:

> [Mr. Osorto] claimed he had come from McDonald's * * * . Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. * * * . He stated he lived at Chelsea Square Apts. but was confused on the address.

J.A. 134-135. Sirena denied that he had been at Popeye's that evening. J.A. 135. According to the report, Sirena's breath smelled of alcohol. J.A. 135. Officer Mahoney did not detain Sirena for further questioning; Sirena's picture was not shown to witnesses; and the report of the encounter was not disclosed to the defense until four years after trial.

Several hours after encountering Sirena near the crime scene, officers gathered several witnesses at the police station. 3/18/98 Tr. at 39. Between 3:00 a.m. and 4:00 a.m., Detective Richard Cline showed six photographs to witnesses Michelle Gutierrez and Jesse Konstanty. *Id.* at 39-41, 165-168. The array included Bustillo's photograph, but it did not include Sirena or any other person present when the attack occurred. *Id.* at 54-56. Gutierrez and Konstanty, who knew Bustillo, identified Bustillo as the assailant. *Id.* at 41. Bustillo was arrested that morning at his high school. *Id.* at 68. Although Bustillo told officers that he is a Hon-

duran national, he was not notified of his right under the Vienna Convention to consult with the Honduran Consulate; nor were Honduran officials advised of his arrest.

Around January 7, 1998, Detective Cline interviewed eyewitness Jose Armando Amaya. According to Cline's notes, Jose Amaya saw both Sirena and Bustillo at the Popeye's restaurant that evening. Although he "[c]ouldn't tell who actually hit the guy," Jose Amaya said he "[s]aw Sirena take [a] bat from [his] shirt" and "cock it." Notes of Det. Richard Cline, Jan. 7, 1998, at 1 ("Det. Cline Notes"); J.A. 140 n.6 ("Amaya observed 'Sirena' at the scene with a 'bat cocked.'"). Amaya said that Sirena had lived in the Chelsea Square Apartments, the same complex identified by Sirena when Officer Mahoney stopped him the night of the murder. Det. Cline Notes at 4. Amaya also stated that Sirena left the Northern Virginia area by December 31, 1997. *Ibid.* Like the Mahoney Report, the Cline notes were not disclosed until years after the trial.[1]

B. The Trial And Direct Review

Bustillo's first-degree murder trial began on March 17, 1998. The sole issue at trial was *who*—Bustillo or Sirena—swung the bat that killed James Merry. There was no physical evidence connecting Bustillo to the crime. The prosecution therefore relied on the testimony of three eyewitnesses (Michelle Gutierrez, Jesse Konstanty, and Valeria Landaeta) who claimed that they saw the attack from inside the Popeye's restaurant. They admitted that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were

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[1] Although Bustillo's trial counsel reminded the prosecution of its obligation to disclose exculpatory material, 12/29/97 Tr. at 5, the prosecution did not disclose Officer Mahoney's report. The Commonwealth did disclose that Jose Amaya had "told law enforcement that he saw [Bustillo] and Sirena at the scene and both had bats," J.A. 25, but it did not include Detective Cline's notes; nor did it mention that Amaya reported seeing Sirena with his "bat cocked." J.A. 140 n.6, 146.

made from within the well-lighted restaurant, through a glass window that was partially obstructed by an advertising poster. 3/17/98 Tr. at 127-128, 131, 142, 157, 161, 222, 241-242, 249, 251; 3/18/98 Tr. at 20, 25, 27-28, 30. They also admitted that, before talking to the police, they had discussed with each other who they thought the attacker had been. 3/17/98 Tr. at 252-253; 3/18/98 Tr. at 31-32. They ultimately identified Bustillo as the assailant, relying in part on their belief that he was wearing a red shirt. 3/17/98 Tr. at 132-133, 222; 3/18/98 Tr. at 30. Detective Cline testified that no one he interviewed identified anyone other than Bustillo as the attacker. 3/18/98 Tr. at 69.

Bustillo presented the testimony of two eyewitnesses who were standing outside the restaurant, only steps away from Merry, when the attack occurred. Amilcar Amaya testified that he was just leaving the Popeye's when he saw Sirena approach Merry, take out a baseball bat, and strike Merry in the head. 3/18/98 Tr. at 100-101. Christina Hondoy testified that, shortly before the attack on Merry, she had stepped out of the Popeye's with a friend to smoke a cigarette. *Id.* at 141-142. She had turned to speak with Merry when she saw someone strike him in the head with a baseball bat. *Id.* at 142. She stated that, although she did not recognize the assailant, she knew that it was not Bustillo. *Ibid.* Hondoy further testified that, a few weeks after the attack (after a preliminary hearing), she told Detective Cline that the person she saw at the hearing, Mario Bustillo, was not the person who struck Merry. *Id.* at 143, 191. According to Hondoy, Cline told her "[not to] worry" and that she would not be needed at trial. *Ibid.*

Ulma Martinez testified that, the day after Merry died, she saw Sirena on a flight to Honduras. 3/18/98 Tr. at 167-168. On cross-examination, Martinez admitted that she did not know Sirena's last name. *Id.* at 171. Two of Bustillo's high school teachers testified that Bustillo's demeanor the day after the assault was inconsistent with his having committed murder the night before. *Id.* at 115-118, 132-135.

In closing argument, the prosecution disparaged Bustillo's defense that Sirena committed the murder. J.A. 21-22. The prosecutor dismissed Amilcar Amaya as a "gang member," 3/19/98 Tr. at 19-20; Christina Hondoy, the prosecutor also argued, had been given loans by the Bustillo family, *id.* at 21-23. "This whole Sirena thing," the prosecutor mocked, was very "convenient" because "Sirena apparently isn't available." J.A. 21. Referring to "this so-called Sirena," the prosecution pointed out that neither Amilcar Amaya (who testified that he saw Sirena strike James Merry), nor Ulma Martinez (whom the prosecutor characterized as having supposedly seen Sirena flee to Honduras the day after Merry's death) "kn[e]w his full name." J.A. 22. And the prosecutor pointed out that no one produced "plane tickets * * * for this Sirena." J.A. 22.

The jury was never informed that Officer Mahoney had stopped Sirena while canvassing the area around the crime scene; that Sirena had red stains on his shirt and pants; that Sirena gave inconsistent statements about where he had been; and that Sirena lied about being at the Popeye's that evening. Neither the jury (nor any of the witnesses) saw a picture of Sirena, possessed by Honduran officials, that proved his existence and could have been used when examining witnesses about the assailant. And the jury never heard that Honduras's immigration records demonstrated that Sirena in fact had fled to Honduras the day after Merry died—precisely as Ulma Martinez had testified.

The jury convicted Bustillo of first-degree murder and sentenced him to 30 years' imprisonment. 3/20/98 Tr. at 24.

With new counsel, Bustillo filed an appeal. While the appeal was pending, Bustillo's counsel learned that Bustillo had never been advised of his right to consult with consular officers. He also obtained a declaration from the Honduran Consulate stating that, had it been informed of the charges against Bustillo, it would have provided him with assistance. J.A. 32, 73-74. Bustillo moved to remand the case to the trial court to, among other things, further develop the

record, but the motion was denied. *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 & 2422-98-4, slip op. at 13-14 (Va. Ct. App. June 1, 1999). The court of appeals then affirmed the conviction. *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 and 2422-98-4, 2000 WL 365930 at *3, (Va. Ct. App. Apr. 11, 2000). The Supreme Court of Virginia denied Bustillo's petition for appeal, *Bustillo* v. *Commonwealth*, No. 001110, slip op. at 1 (Va. Jan. 17, 2001), and this Court denied his petition for a writ of certiorari, *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

C. State Habeas Proceedings

Bustillo then sought a writ of habeas corpus in the Circuit Court for Fairfax County. The petition sought a new trial based on the violation of Bustillo's rights under Article 36 of the Vienna Convention, newly discovered evidence, and violations of the duty to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

1. A key component of the petition was a surreptitiously recorded videotape in which Sirena admitted killing Merry. See J.A. 33-55. On the tape—recorded by another Honduran national in Honduras—Sirena brags about the killing in terms that are nothing short of chilling: "When I smashed [Merry] with that blow * * * I heard that son of a bitch sound like a big box." J.A. 40. Consistent with the witness testimony, Sirena specified that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. J.A. 38. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been "wearing a red sweater." J.A. 41. Sirena also stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. J.A. 40-41.

Sirena also acknowledged that Bustillo had been wrongly convicted. Upon entering the home of the "friend" who recorded his admissions, Sirena warned that his "friend" better not try to help Bustillo:

> [Sirena]: But you know that guy's family, *man*. And I hope you're not snitching, son of a bitch.
>
> [Friend]: No, *man*. I just know them, but you're my friend. [Bustillo] was just an acquaintance, *man*.
>
> [Sirena]: But I don't fucking care, *man*. *That guy must be paying for something he did before.*
>
> [Friend]: No, but I still feel bad about it. You know well that he didn't do it. That's why I feel bad, homes.
>
> [Sirena]: I don't know. I don't think those guys burned me. *Because, if they had burned me they would have let that guy go.*

J.A. 54 (some emphasis added). The habeas petition included the videotape, together with the affidavits of four eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. J.A. 56-59.

Bustillo also asserted that, had he been apprised of his rights under Article 36 of the Vienna Convention, he would have sought assistance from the Honduran Consulate. J.A. 60. The Honduran Consulate in turn averred that, had it been apprised of the case, it would have (at a minimum) confirmed Julio Osorto/Sirena's existence and nationality; provided official records of his arrival in Honduras just after Merry's death; provided a picture of him; and attempted to locate and interview him. J.A. 32, 73-74.

Using the picture of Sirena provided by the Honduran Consulate, Bustillo's counsel interviewed a number of witnesses to the crime. No fewer than five witnesses executed affidavits stating that, upon seeing the photograph of Sirena provided by Honduras, they recognized Sirena as the individual who attacked Merry. J.A. 61, 65, 98, 100, 106. Some explained that witnesses had not come forward earlier because they feared being deported. J.A. 61, 65.

Finally, Bustillo asserted that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*

v. *Maryland*. In response to a motion to compel, the Commonwealth for the first time disclosed the police report of Officer Christopher Mahoney and the investigation notes of Detective Richard Cline. The Mahoney Report revealed that Officer Mahoney stopped "Julio C. Osorto" (Sirena) while canvassing the crime scene hours after the fatal assault; that Sirena "had what appeared to be ketchup" on his shirt and pants; and that Sirena gave conflicting statements about where he was coming from. J.A. 134-135. Detective Cline's investigation notes recorded that eyewitness Jose Amaya "[s]aw Sirena take [a] bat from [his] shirt" and "cock it" as he approached Merry. Det. Cline Notes at 3.

2. On August 8, 2002, the Circuit Court denied Bustillo's new evidence and Vienna Convention claims. The court held that new evidence is not a ground for habeas relief, J.A. 123, and that the Vienna Convention claim was procedurally barred for failure to raise it earlier, J.A. 129.

The Circuit Court did hold that the Mahoney Report and Detective Cline's notes were exculpatory and should have been turned over to the defense. Those documents "unquestionably implicate 'Sirena' * * * as a possible suspect," and thus "must be deemed exculpatory" within the meaning of *Brady*. J.A. 146, 147. The notes "not only make[] clear that Sirena was present at the scene, but also implicate[] Sirena as the actual assailant." J.A. 146. The fact that Sirena "was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing" was also clearly relevant given that "photographs of the crime scene depict[] what appears to be blood spatter." J.A. 146-147; see J.A. 144 ("Merry's blood was found at the scene.").

Following a hearing on "materiality," however, the Circuit Court ruled that the withheld police reports were not material. J.A. 167. The court downplayed the red stains on Sirena's clothing, and it did not address the fact that Sirena, when stopped by the police near the crime scene, had lied about where he was coming from. J.A. 165-166.

3. On March 7, 2005, the Virginia Supreme Court denied Bustillo's petition for appeal. In a two-paragraph order, the court stated that it found "no reversible error" with respect to the circuit court's rejection of Bustillo's Vienna Convention claim. J.A. 241. The court dismissed Bustillo's *Brady* on procedural grounds. J.A. 241; Pet. 13.

4. On November 7, 2005, this Court granted the petition for a writ of certiorari, limited to the Vienna Convention issues. J.A. 243.

SUMMARY OF ARGUMENT

I. A. The Supremacy Clause of the Constitution makes treaties—no less than the Constitution and Acts of Congress—the "supreme Law of the Land." The Framers' decision to make treaties binding federal law was born of experience. The Articles of Confederation had proved unworkable in part because they did not obligate the States and their courts to obey treaty obligations, denying the central government of means to secure compliance. Because the Vienna Convention is self-executing, individual parties may invoke its protections in judicial proceedings to the extent the Convention creates individual rights.

B. The text, structure, and origins of Article 36 make it clear that the Convention's notification and consular access provisions accord individual rights to detained foreign nationals. By its terms, Article 36 creates "rights" and "freedoms" that "shall" be respected, words that are customarily associated with the creation of individual rights. The text of Article 36 shows that the treaty's drafters understood the difference between the rights of signatory nations and the rights of individual foreign nationals, and that they intended to create both. Subsection 1(a), for example, first grants nations (acting through consular officers) the rights "to communicate with" and "to have access to" their nationals; it then provides that those "[n]ationals * * * shall have the same freedom with respect to communication with and access to consular officials." Furthermore, Subsection

1(b) requires the receiving State to notify the foreign national of "*his* rights."

The Vienna Convention's drafting history confirms that the delegates to the Vienna Convention expressly considered whether Article 36 should create individual rights—as opposed to nation-to-nation rights—and decided that it should. That conclusion is bolstered by the United States' post-ratification conduct. Other signatories agree that the Convention creates individual rights, and the International Court of Justice—which has jurisdiction to interpret the Vienna Convention—has twice so held. The preamble to the Convention is not to the contrary. It cannot create ambiguity that does not exist. Moreover, it merely clarifies that the "privileges and immunities" the Convention grants consular officers are intended to facilitate their official duties. The preamble does not speak to the "rights" and "freedoms" Article 36 grants to detained foreign nationals.

II. A. The Vienna Convention permits signatories to effectuate the Convention through domestic law, but provides that "said laws and regulations *must enable full effect to be given* to the purposes for which the rights accorded under this Article are intended." Virginia's invocation of a procedural bar to preclude Bustillo from challenging his conviction on collateral review, because he did not raise the Vienna Convention violation at trial, fails to give those rights "full effect." First, the reason Bustillo did not consult and obtain the assistance of the Honduran Consulate—which had access to evidence supporting Bustillo's claim that another Honduran national committed the crime—was the Commonwealth's breach of its treaty obligation to advise Bustillo that he had the right to communicate with his consulate. The Commonwealth should not be permitted to parlay a consequence of its treaty violation into a reason for ignoring the violation. Second, procedural default rests on the presumption that the individual and counsel are aware of his rights and are best positioned to decide which arguments to raise. The Vienna Convention, however,

presumes that the individual is unaware of his treaty rights; for that very reason, it requires the State to inform foreign detainees of their rights to consular notification and assistance. The fact that the individual has a lawyer is immaterial under the Convention—Article 36 does not permit the State to transfer its responsibility to notify the detained national to defense counsel, and then penalize the national if his counsel fails to do so.

B. The imposition of procedural bars is particularly problematic in cases where, as here, the consulate would have provided evidence of the accused's innocence. This Court has recognized that traditional procedural default rules do not apply where the defendant has not had a meaningful opportunity to develop the factual predicate of his claim. For that reason, ineffective assistance of counsel and *Brady* claims generally can be brought on collateral review. In those contexts, the defendant does not have a sufficient opportunity to assert the violation in the trial court because he is ignorant of the violation, or because proceedings on direct review do not permit the development of a sufficient record of the violation and its impact.

For the same reasons, foreign nationals must be permitted to raise Vienna Convention claims after trial. Often, the State's violation will keep them ignorant of their treaty rights until after trial. Moreover, foreign nationals cannot develop a record of the assistance their consulate could have provided until they receive notice of their rights and have an opportunity to discuss their cases with consular officials. Requiring foreign nationals to raise Vienna Convention claims before they can develop that record forces foreign nationals to raise the claims prematurely, before they can determine whether the claims have merit. More important, those premature claims often will be denied because the record is inadequate to establish an entitlement to relief, including claims that would ultimately have proved meritorious on a full record. The ICJ has twice concluded that precluding Vienna Convention claims on collateral

review because of procedural bars fails to give "full effect" to Vienna Convention rights. That view is entitled to this Court's "respectful consideration."

C. Barring the claim here, moreover, is inconsistent with the criminal justice system's central goal—convicting the guilty and acquitting the innocent. In this case, the jury never heard critical evidence showing that Bustillo did not commit the offense. The trial turned on closely divided eyewitness testimony as to which of two Honduran nationals—Bustillo or Sirena—swung the fatal blow, but the defense could not even prove Sirena's existence. Absent the Vienna Convention violation, the Honduran Consulate would have provided Bustillo with Sirena's photograph and immigration records. Those materials would not merely have established Sirena's existence. They also would have allowed the defense to test the vulnerable recollections of the prosecution's witnesses. When shown Sirena's photograph or a videotape of him, nine eyewitnesses said they recognized him as the person who struck Merry. The immigration records, moreover, would have conclusively established that Sirena fled to Honduras the day after the victim died. They also would have provided his full name, enabling counsel to seek specific evidence about "Julio C. Osorto" (Sirena), including evidence of his suspicious conduct when stopped by police, with red stains on his clothes, near the crime scene on the night of the murder. Finally, the Honduran government has averred that it would have attempted to locate and interview Sirena. After Bustillo's habeas counsel tracked Sirena down in Honduras, he obtained a surreptitiously recorded videotape on which Sirena, while discussing the incident with his "friends," bragged about committing the murder in chilling (and self-authenticating) detail.

ARGUMENT

I. Article 36 Of The Vienna Convention Creates Individual Rights That Are Judicially Enforceable

A. The Supremacy Clause Makes Treaties, Including The Vienna Convention, Binding And Enforceable Federal Law

The Supremacy Clause of the Constitution makes treaties—no less than the Constitution and Acts of Congress—the supreme Law of the Land, binding on the States and their courts alike:

> The Constitution, and the Laws of the United States * * * and *all Treaties made* * * * under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

The Framer's decision to make treaties "supreme Law," along with the Constitution and Acts of Congress, was born of practical experience. Although the Articles of Confederation had given Congress exclusive authority to "enter[] into treaties and alliances," they did not expressly bind the States and their courts to obey those accords. See Articles of Confederation arts. 6, 9. As a result, when a State violated treaty obligations, the national government could not "punish that State, or compel its obedience to the treaty." 1 The Records of the Federal Convention of 1787, at 24-25 (Max Farrand ed., rev. ed. 1966) ("Farrand") (statement of Edmund Randolph). That created serious problems. As James Madison lamented, experience revealed "a constant tendency in the States * * * to violate national Treaties," *id.* at 164, destroying the Nation's credibility abroad and with it the ability to negotiate new international accords. 3 Farrand, *supra*, at 548 (statement of James Madison) ("[T]he Fed[eral] auth[orit]y had ceased to be respected abroad" due to the States' treaty violations); The Federalist No. 64,

at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.").

The central government's inability to compel State compliance became one of "the principal animating causes of the Framers' decision to establish a new government under the Constitution." Carlos M. Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1102 (1992). By expressly making treaties part of our domestic law—and the "supreme Law of the Land"—the Framers ensured that *individuals* could obtain judicial enforcement of treaty rights. As Alexander Hamilton explained:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, *as far as respects individuals*, must, like all other laws, be ascertained by judicial determinations.

The Federalist No. 22, at 150 (Clinton Rossiter ed., 1961) (emphasis added).[2]

Thus, by the Framers' design, treaties have a dual character. As a matter of *international law*, treaties are "a compact between independent nations," enforceable by the Executive Branch in the international arena through "international negotiations and reclamations." *Edye* v. *Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884); see *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1779 (2005);

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[2] James Wilson similarly observed that the provision for judicial power in Article III over cases arising under treaties "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 490 (Jonathan Elliott ed., 2d ed. 1881).

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In addition, as a matter of *constitutional law*, the Supremacy Clause makes each treaty as much "the law of the land as an act of congress is." *Head Money Cases*, 112 U.S. at 598. Consequently, "whenever [a treaty's] provisions prescribe a rule by which the rights of the private citizen or subject may be determined[, and] when such rights are of a nature to be enforced in a court of justice, [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.* at 598-599.

For more than two centuries, this Court has consistently provided for judicial enforcement of treaties creating individual rights.[3] The Court even has refused to close the court-

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[3] See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslavian citizens' treaty rights to inherit personal property in the United States, despite contrary Oregon law); *Warren* v. *United States*, 340 U.S. 523 (1951) (allowing seaman to sue for injuries under terms of treaty); *Clark* v. *Allen*, 331 U.S. 503 (1947) (enforcing treaty rights of German citizens to inherit United States realty); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (enforcing treaty right of Danish citizen to be free from discriminatory state tax); *Jordan* v. *Tashiro*, 278 U.S. 123 (1928) (affirming mandamus to enforce treaty rights of Japanese citizens to organize corporation); *Cheung Sum Shee* v. *Nagle*, 268 U.S. 336 (1925) (holding that treaty prevented mandatory exclusion of wives and children of Chinese merchants); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (invoking treaty to enjoin law prohibiting foreign citizens from serving as pawnbrokers where treaty protected Japanese citizen's right to carry on a trade); *Johnson* v. *Browne*, 205 U.S. 309 (1907) (affirming grant of habeas corpus where Canadian defendant had been convicted in violation of extradition treaty); *de Geofroy* v. *Riggs*, 133 U.S. 258 (1890) (enforcing treaty right of French citizen to hold real estate in the United States); *United States* v. *Rauscher*, 119 U.S. 407 (1886) (prosecution of British citizen barred where he was extradited in violation of treaty); *Chew Heong* v. *United States*, 112 U.S. 536 (1884) (reversing denial of habeas petition of Chinese laborer detained in violation of immigration treaty with China); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1879) (enforcing property rights of Swiss citizens under treaty against Virginia "inquisition of escheat"); *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaty that "enabled the subjects of France to hold lands in

house doors to individuals when the treaty in question explicitly provides a mechanism for diplomatic resolution of violations. See *United States* v. *Jung Ah Lung*, 124 U.S. 621, 632-633 (1888).[4] The Supremacy Clause thus provides "a complete answer to the proposition that the rights of persons [under a treaty] cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress." *United States* v. *Rauscher*, 119 U.S. 407, 431 (1886).

There is a category of treaties—treaties that are not "self-executing"—that do *not* form part of our domestic law, absent implementing legislation. See *Foster* v. *Neilson*, 27

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the United States" in inheritance dispute); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) (enforcing treaty rights of British citizens to defeat Virginia forfeiture); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia). Other cases in which this Court has enforced treaties on behalf of private interests include *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940) (enjoining Puerto Rico from enforcing statute against United States corporation in violation of treaty); *Cook* v. *United States*, 288 U.S. 102 (1933) (disallowing forfeiture of British merchant vessel seized in violation of treaty); and *Soc'y for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 21 U.S. (8 Wheat.) 464 (1823) (enforcing treaty rights of British corporation to defeat action in ejectment).

[4] In *Jung Ah Lung*, a Chinese citizen who had been detained and denied re-entry into the United States sought a writ of habeas corpus, claiming rights under an Act of Congress that implemented the terms of a treaty between the United States and China. 124 U.S. at 623, 626-627. The government argued that the petitioner was prohibited from raising his claim on habeas because "the treaty itself contemplates only executive action," citing a provision under which the "Chinese minister at Washington may bring the matter to the notice of the secretary of state of the United States, who will consider the subject with him." *Id.* at 632-633. This Court held that the petitioner could raise his claim on habeas nonetheless, finding that "there is nothing in this provision which excludes judicial cognizance, or which confines the remedy of a subject of China * * * to diplomatic action." *Id.* at 633.

U.S. (2 Pet.) 253, 314 (1829).[5] There is no dispute, however, that the Vienna Convention is self-executing and therefore "the supreme Law of the Land."[6] Consequently, to the extent the Convention "affects the rights of parties litigating in court," it "as much binds those rights and is as much to be regarded by the court as an act of congress." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); see also *United States* v. *Alvarez-Machain*, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if * * * it is self-executing, it would appear that a court must enforce it on behalf of an individual.").

B. Article 36 Of The Vienna Convention Creates Individual Rights

Because the Vienna Convention is self-executing, it "stands on the same footing of supremacy as do the provi-

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[5] In *Foster*, this Court recognized that a treaty is judicially enforceable only if it "operates of itself without the aid of any legislative provision," *i.e.*, only if it is self-executing. Treaties that merely obligate the United States to *enact legislation* (addressing themselves "to the political * * * department") are not self-executing. *Id.* at 314-315. By contrast, if "the treaty contains stipulations which are self-executing, *that is, require no legislation to make them operative*, to that extent they have the force and effect of legislative enactment." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) (emphasis added). A non-self-executing treaty does "not itself create obligations enforceable in the federal courts," though it "bind[s] the United States as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004).

[6] During the Senate hearings, a State Department official testified that the Vienna Convention was "entirely self-executive and does not require any implementing or complementing legislation." S. Exec. Rep. No. 91-9, App. p. 5 (1969). The United States has acceded to "the accepted understanding that the Vienna Convention is self-executing." U.S. Br. as *Amicus Curiae* at 26, *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005). And the State Department has long adhered to that position. United States Dep't Of State, Consular Notification And Access 44 (avail. at http://travel.state.gov/pdf/CNA_book.pdf) ("Implementing legislation is not necessary (and the VCCR [is] * * * 'self-executing') because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.").

sions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura* v. *Seattle*, 265 U.S. 332, 341 (1924). The question therefore becomes whether the Convention may be invoked by individual foreign nationals detained in the United States—or whether instead it may be invoked only by the signatory nations. That question is strictly a matter of interpreting the Vienna Convention. The inquiry "must begin * * * with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 396-397 (1985). The Court has also "traditionally considered as aids to interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties." *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

In *Breard* v. *Greene*, 523 U.S. 371, 376 (1998), this Court observed that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest." In view of Article 36's text, its *travaux préparatoires*, the parties' post-ratification conduct, and the intervening decisions of the international judicial body responsible for the Convention's construction, it is no longer merely "arguable" that Article 36 creates individual rights. It is now clear that Article 36 creates such rights.

1. *The Text Of Article 36 Unambiguously Defines The Rights Of Individuals*

In determining whether Article 36 creates individual rights, "the clear import of [the] treaty language controls." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). Article 36 by its terms imposes mandatory—not hortatory—obligations on signatories. It imposes obligations with respect to identified individuals (detained foreign nationals). And it expressly denominates many of those obligations as the "rights" and "freedoms" *of the detained individuals*. A clearer basis for concluding that the treaty creates individual rights could scarcely be imagined.

Subsection (1)(a) of Article 36 begins by establishing a right of communication and access *for the signatory nations*: "*[C]onsular officers* shall be free to communicate with [detained] nationals * * * and to have access to them." Vienna Convention art. 36(1)(a) (emphasis added). The second clause of subsection (1)(a), however, establishes that the *detained individual* has a corresponding right: Detained foreign "[n]ationals," it declares, "shall have the same freedom." *Ibid.* Indeed, the *sole purpose* of the second clause is to designate the individual national as an additional beneficiary of the "same freedom" given to signatory nations in the first clause. A contrary interpretation—under which Article 36 would *not* create individual rights—would render the second clause superfluous, violating the "cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000).

The text of subsection (1)(b) likewise bestows rights on both individual detainees and signatory nations. First, that subsection commands that, if the detained person so "requests," "competent authorities of the [detaining] State shall, without delay, inform the [foreign national's] consular post." Vienna Convention art. 36(1)(b). Second, subsection (1)(b) mandates that "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded to the said authorities without delay." *Ibid.* Third (and most critically), subsection (1)(b) requires authorities in the detaining State to "inform the person concerned without delay of *his rights under this sub-paragraph*." *Ibid.* (emphasis added). The Convention's use of the phrase "his rights" makes it clear that the subparagraph creates *rights*—and that the rights belong to the detained individual. See *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("[I]f a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be

required before a defendant could invoke that statute to complain in court if he had not been so informed."); *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting) ("I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national.").

The mechanics of subsection (1)(b) also compel the conclusion that it creates rights in the individual and not merely the signatory nation. Consular notification is not automatic—the detaining authority must contact the foreign national's consulate only "if [the detainee] so requests." Vienna Convention art. 36(1)(b). By giving the detained individual the decision to have his consulate notified or not, the Convention makes it clear that the right to notification resides with him, not his country of origin.

Finally, section (2) expressly forecloses any argument that the Vienna Convention creates only nation-to-nation rights that may be enforced only through international diplomacy. That section clearly contemplates domestic judicial consideration of an individual national's claim that his rights were violated, declaring that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention art. 36(2).

In sum, the plain "text [of Article 36] emphasizes that the right of consular notice and assistance is the citizen's." *Breard* v. *Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); see also *Jogi* v. *Voges*, 425 F.3d 367, 382 (7th Cir. 2005) ("[W]e conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals."). "This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect." *Kolovrat* v. *Oregon*, 366 U.S. 187, 193 (1961). It should do likewise here.

2. *The* Travaux Préparatoires *Confirm That Article 36 Creates Individual Rights*

The Vienna Convention's negotiating history—its *travaux préparatoires*—confirm what Article 36's text makes clear: that the signatories unmistakably understood Article 36 to create rights in individual, detained foreign nationals. Indeed, the issue was specifically debated; the United States delegation strongly advocated the protection of *individual rights* in Article 36; and the final version of the Convention, as a result, included such protections.

The original draft of Article 36, prepared by the International Law Commission ("ILC") for Conference delegates, provided in relevant part:

> (a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;
>
> (b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay[.]

2 U.N. Conference on Consular Relations: Official Records ("U.N. Official Records"), at 24, U.N. Doc. A/Conf.25/16, U.N. Sales No. 63.X.2 (1963).

Specifically raising the issue of individual rights, Venezuela objected to that language on the ground that "[t]he opening statement of sub-paragraph (1)(a), concerning *the right of the nationals* of the sending State to communicate with and have access to the competent consulate, was inappropriate in a convention on consular relations." 1 U.N. Official Records, *supra*, at 331, ¶ 32 (emphasis added). The

Venezuelan delegate proposed an amendment that would have eliminated all reference to the rights of individual nationals. *Ibid.*; 2 U.N. Official Records, *supra*, at 84. The Kuwaiti delegate shared Venezuela's objection, claiming that the ILC's "text introduced a novelty to the convention by *defining the rights of the nationals* of the sending States and *not* * * * *the rights of consular officials*." 1 U.N. Official Records, *supra*, at 332, ¶ 37 (emphasis added).

Other delegates, however, argued that the text of (1)(a) did not go far enough in protecting the rights of individuals. The Australian delegate proposed that the signatory nation's "right [of communication and access] must be qualified with regard to the wishes of the individual. * * * There was no need to stress the extreme importance of not disregarding, in the present or any other international document, *the rights of the individual*." 1 U.N. Official Records, *supra*, at 331, ¶ 34 (emphasis added). Venezuela ultimately withdrew its amendment and submitted a new one that retained the reference to the rights of individuals, but changed the order of the original text. *Id.* at 334, ¶ 2. The amendment was adopted. *Id.* at 336, ¶ 22.

The debate over individual rights continued in the discussion of subsection (1)(b). The ILC's original draft of that subsection provided for mandatory notification to the consulate of the sending nation whenever one of its nationals was detained; it made no mention of the rights of the individual. 2 U.N. Official Records, *supra*, at 24. The United States delegate proposed an amendment to (1)(b) that would make notification of the consulate contingent on "the request of a national of the sending State." 1 U.N. Official Records, *supra*, at 337, ¶ 39. The United States delegate explained that the "object of the amendment was *to protect the rights of the national concerned*." *Ibid.* (emphasis added). The Korean delegate agreed, explaining that "paragraph (1)(b) was extremely important, because it related to one of the fundamental and indispensable *rights of the individual*." *Id.* at 338, ¶ 11 (emphasis added). Delegates

from other countries objected to qualifying the nation's right to receive notification, see, *e.g.*, *id.* at 341, ¶ 33, and the amendment was temporarily defeated, *id.* at 342, ¶ 47.

Debate continued in the plenary meetings, and the question of individual rights remained a central focus.[7] The United States adhered to its view that Article 36(1)(b) should "recognize the *freedom of action of the detained persons* who might not wish their consulate to be informed" of their detention. 1 U.N. Official Records, *supra*, at 38, ¶ 21 (emphasis added). Consistent with the United States' position, the United Kingdom eventually proposed amending Article 36(1)(b) to provide that a detained foreign national be informed "without delay of *his rights* under subparagraph (b)," and that the detaining authority should notify the detained foreign national's consulate only "if he so requests." *Id.* at 83-84, ¶¶ 73, 74 (emphasis added). The amendment was adopted, *id.* at 86-87, ¶ 108, and remains unchanged in Article 36 today.

Thus, "[o]nly after much debate"—much of it focused on the issue of individual rights—"was the Conference able to agree on a text for Article 36." Report of the United States Delegation to the Conference on Consular Relations ("U.S. Delegation Report"), S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 59. But, as the U.S. Delegation Report observed, the resulting text of Article 36 was clear in

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[7] See, *e.g.*, 1 U.N. Official Records, *supra*, at 37, ¶ 13 (statement of Soviet delegate) ("What guarantee was there that the person concerned had been informed of *his right* [to consular notification] * * * ?") (emphasis added); *id.* at 37, ¶ 16 (statement of Vietnamese delegate) ("[I]t was a matter of reconciling the interests of two equal sovereign States * * * with respect for the *rights of the detained person*.") (emphasis added); *id.* at 81, ¶ 46 (statement of Indian delegate) (espousing the view that Article 36 "dealt with *the right of nationals of the sending State* to communicate with and to have access to their consulate") (emphasis added); *id.* at 85, ¶ 84 (statement of Tunisian delegate) (objecting to amendment to Article 36 on the ground that it would "frustrate the *national's right* to protection from his consulate") (emphasis added).

requiring "authorities of the receiving State to inform the person detained of *his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with the consular post." *Id.* at 60 (emphasis added).

3. *The United States' Post-Ratification Conduct Shows That Article 36 Creates Individual Rights*

"While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat*, 366 U.S. at 194. While the United States recently has taken the position in litigation that Article 36 does not create individual rights, this Court generally gives more weight to the government's application of the treaty in practice than the interpretation it has adopted for litigation purposes. See *Alaska* v. *United States*, 125 S. Ct. 2137, 2150 (2005); cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied the principle of [*Chevron* deference] to agency litigating positions that are wholly unsupported by * * * practice."). Here, the United States' litigating position is belied by the "practical construction" that the Executive Branch has given to Article 36 since ratification. See *Saks*, 470 U.S. at 396 (looking to the "practical construction adopted by the parties").

To the extent that any single department of government (other than the courts) can be said to be "charged" with "enforcement" of the Vienna Convention, it is the State Department. And the State Department's "practical construction" of Article 36 makes clear that the Vienna Convention creates individual rights. The State Department's Foreign Affairs Manual "outlines the Department of State's policies, guidance and procedures in the important area of [United States consular] assistance to arrested U.S. citizens or nationals." U.S. Dep't of State Foreign Affairs Manual, 7 FAM 410, 411 (2004) (avail. at http://foia.state.gov/masterdocs/07fam/07m0410.pdf). In the section titled "Notification

Under the Vienna Convention on Consular Relations (VCCR)," the State Department declares:

> Article 36 of the VCCR * * * provides that the host government must notify a foreign national arrestee without delay of *the arrestee's right* to communicate with his or her consular officials, and must notify the consular officials without delay if the arrestee so requests.

7 FAM 420, 421.1-1 (2004) (avail. at http://foia.state.gov/masterdocs/07fam/07m0420.pdf) (emphasis added). The State Department could not be any clearer in declaring that the Convention creates a "right" and that it belongs to "the arrestee." Nor could there be confusion over the meaning of the word "right." The State Department defines the term "rights" as follows: "Civil rights under local or international law that are *possessed by a U.S. citizen who has been detained or arrested abroad*." 7 FAM 410, *supra*, at 414 (emphasis added).

The State Department repeats that interpretation of Article 36 with equal clarity in its instructions to domestic law enforcement officials. The State Department's instructions emphatically and repeatedly describe consular notification as a "right": "In all cases, the foreign national must be told of the *right* of consular notification and access." United States Dep't of State, Consular Notification and Access 13 (avail. at http://travel.state.gov/pdf/CNA_ book.pdf) (emphasis added); see also *id.* at 3, 14, 19 (referring to consular notification and access as a "right"). The instructions are also abundantly clear that this "right" of notification and access resides with the individual national, since the "foreign national * * * has the option to decide whether he/she wants consular representatives notified of the arrest or detention." *Id.* at 14; see *id.* at 4, 13, 20-21.

The Nation's highest law enforcement official, the Attorney General, likewise has taken the view that Article 36 creates individually enforceable rights. In a June 3, 2004, letter to the Ambassador of Mexico regarding a Mexican

national facing trial here, then-Attorney General Ashcroft addressed the Ambassador's "concern that [the Mexican national] was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations." Letter From Attorney General John Ashcroft to Ambassador Carlos de Icaza, at 2 (June 3, 2004). The Attorney General wrote:

> Consistent with the opinion of the International Court of Justice * * * [the defendant] is free to argue in the trial court that *his rights under Article 36 of the Vienna Convention were violated* by a failure to inform him of *his right* to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national.

Ibid. (emphasis added). The statement that the *detained foreign national* may raise the violation in trial court—and the specific references to *his* rights under the Convention—would make no sense if the rights belonged to and could be asserted solely by foreign governments. Whatever the United States' litigating position in this case, its nonlitigation position—its practical construction of the Convention—has consistently been to recognize that it creates judicially enforceable individual rights. See *Li*, 206 F.3d at 75 n.4 (Torruella, J., concurring in part and dissenting in part).

4. *Post-Ratification Conduct Of Other Signatories And International Judicial Bodies Confirms That Article 36 Confers Individual Rights*

Other signatories to the Convention agree that the Convention creates individual, judicially enforceable rights. In this case and in *Medellín*, no fewer than 63 other Nations—including the members of the European Union and some of our closest allies—have submitted briefs urging that the Convention creates individual rights. In interpreting a multilateral treaty, "the subsequent interpretations of the signatories help clarify [its] meaning." *Saks*, 470 U.S. at 403.

The International Court of Justice ("ICJ") has reached the same conclusion. In *Breard*, this Court acknowledged that, although this Court is the final authority on matters of treaty interpretation within the United States, the Court "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. Because the Optional Protocol Concerning the Compulsory Settlement of Disputes accords the ICJ precisely that jurisdiction—to resolve "[d]isputes arising out of the interpretation or application of the Convention," Optional Protocol art. I—the ICJ's decisions are entitled to that respect.

Since this Court decided *Breard*, the ICJ has twice held that Article 36 does create individual rights. The first case, *LaGrand*, 2001 I.C.J. 466, concerned two brothers, both German citizens, who were arrested, tried, convicted, and executed in Arizona for committing capital murder. There was no dispute that the Arizona authorities had failed to inform the LaGrand brothers that they could request that the German Consulate be notified of their arrest. *Id.* at 481-482, ¶ 39. Germany brought suit in the ICJ, claiming that the United States had "violated the *individual rights* conferred on the detainees by Article 36." *Id.* at 481, ¶ 38 (emphasis added). Agreeing with Germany's construction of the Convention, the ICJ rejected the United States' assertion "that rights of consular notification and access under the Vienna Convention are rights of States, and not individuals." *Id.* at 493, ¶ 76. Looking to the text of Article 36, the ICJ found it significant that the last sentence of subsection (1)(b) states that "'said authorities shall inform the person concerned without delay of *his rights* under this subparagraph.'" *Id.* at 494, ¶ 77 (quoting Article 36(1)(b)). The ICJ also remarked that, under Article 36(1)(c), "the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposes such action.'" *Ibid.* (quoting Article 36(1)(c)). The ICJ concluded that the "clarity of these provisions, viewed

in their context, admits of no doubt" that Article 36 "creates individual rights." *Ibid.*

The ICJ reiterated and expanded on that construction more recently in *Avena*, 2004 I.C.J. 12. In *Avena*, Mexico argued that the United States had denied 54 Mexican nationals their individual rights under the Vienna Convention. *Id.* at 19-20, ¶ 12. Citing *LaGrand*, the ICJ again held that Article 36 creates individual rights in detained foreign nationals. *Id.* at 35-36, ¶ 40. The ICJ confirmed that an individual's rights under Article 36 "are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Id.* at 35, ¶ 40.

Those rulings are significant. When the Convention was ratified, and when *LaGrand* and *Avena* were decided, the United States had expressly agreed to submit all international "[d]isputes arising out of the interpretation or application of the Convention" to the compulsory jurisdiction of the ICJ. Optional Protocol art. I.[8] In signing and ratifying the Optional Protocol, the Executive and the Senate made an affirmative decision to vest the ICJ with authority to interpret the Vienna Convention.

5. *The Preamble To The Vienna Convention Does Not Contradict Article 36's Clear Text*

Notwithstanding Article 36's clear text, some courts have relied on its preamble to hold that it does not create individually enforceable rights. See, *e.g.*, *United States* v. *Emuegbunam*, 268 F.3d 377, 392 (6th Cir 2001). But a pre-

[8] The United States was the Optional Protocol's original proponent. Its delegation urged that "the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand," and that a nation's response to the Optional Protocol was a measure of its "support for international law." 1 U.N. Official Records, *supra*, at 249, ¶ 37. On March 7, 2005, however, the President stated that the United States is withdrawing from the Optional Protocol. *Medellín*, 125 S. Ct. at 2101 (O'Connor, J., dissenting) (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

amble cannot override the plain text of the Convention itself, and the Convention's preamble in any event does not by its terms address the Article 36 rights at issue here.

Courts, of course, may look to preambles, titles, and headings as aids to interpretation when the section at issue is ambiguous *in and of itself*. See *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 483 (2001); *Bhd. of R.R. Trainmen* v. *Baltimore & O.R. Co.*, 331 U.S. 519, 528-529 (1947); *Price* v. *Forrest*, 173 U.S. 410, 427 (1899). But where the treaty or statutory text is clear, a court may not look to the preamble to create ambiguity, much less to override clarity. *Whitman*, 531 U.S. at 483 ("This eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself.") (internal quotation omitted); *Trainmen*, 331 U.S. at 528-529 (repeating the "wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text"); *Price*, 173 U.S. at 427 ("[W]e must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute."). Here, because the language of Article 36 is not ambiguous *in and of itself*, the preamble is irrelevant.

Even considered on its own terms, however, the preamble does not preclude Article 36 from creating individual rights. The preamble provides, in relevant part:

> *The States Parties to the present Convention,* * * * *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, * * * *Have agreed* as follows[.]

As the Seventh Circuit has explained, "[t]he most reasonable understanding of this language is as a way of emphasizing that the Convention is not designed to benefit diplomats in their individual capacity, but rather to protect them

in their official capacity." *Jogi*, 425 F.3d at 381. The preamble, after all, by its terms is addressing the purpose of "privileges and immunities"—things traditionally enjoyed by diplomats and consular authorities under international law. Nowhere does the preamble purport to circumscribe the nature of the "*freedoms*" and "*rights*" the Convention accords to individual foreign nationals.

The report of the United States delegation to the Vienna Convention confirms that construction. As the report observes, the preamble to the Vienna Convention "follows closely" the preamble to the 1961 Vienna Convention on Diplomatic Relations. U.S. Delegation Report, *supra*, at 46 (citing Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227). The report clarifies that the preamble language merely acknowledges that "[b]oth conventions rest upon the premise that privileges and immunities are granted for governmental reasons, rather than for the benefit of *officers, members of families, and employees, as individuals*." *Ibid.* (emphasis added).[9]

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[9] If the preamble were controlling, it would control *every* provision of the Vienna Convention—not just Article 36. Given that, it is not plausible to read the preamble's statement that "the purpose of such privileges and immunities is not to benefit individuals" as declaring that the rights created by the Vienna Convention can only be enforced between nations in the diplomatic arena. Article 43 of the Vienna Convention, for example, provides that "Consular officials and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." To date, courts have allowed consular officials to raise Article 43 as a defense to suit, and in proper cases they have dismissed the suit for lack of jurisdiction. See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397-398 (9th Cir. 1991); *Gerritsen* v. *Escobar Y Cordova*, 721 F. Supp. 253, 258-259 (C.D. Cal. 1988). If the individual consular official being sued did not have a right to enforce Article 43 in court, but must submit to judicial proceedings until his country can negotiate a diplomatic solution on his behalf, the treaty's provision that he is "not to be amenable to the jurisdiction" of the domestic courts would be meaningless. The similar preamble to the Vienna Convention on Diplomatic

Finally, this Court has itself indicated that Article 36 "arguably confers on an individual the right to consular assistance following arrest." *Breard*, 523 U.S. at 376. Thus, even if the preamble were interpreted to raise a question as to whether Article 36 creates individual rights, that at most would establish that the "'treaty fairly admits of two constructions.'" *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 163 (1940)). As explained above, however, all the traditional aids to treaty interpretation, including drafting history, show that Article 36 clearly was intended to create individual rights. Numerous other signatories have reached that conclusion. And the international judicial body with jurisdiction to construe the Convention has reached that conclusion as well. If any doubt remained—and none does—the most venerable of principles of treaty interpretation would resolve it: "'[W]here * * * a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *Ibid.* Here, that preferred construction is compelled by text and history alike.

II. The Asserted State Procedural Bar Cannot Preclude Consideration Of Bustillo's Otherwise Valid Claim For Enforcement Of Article 36

A. Where The Violation Prevents Presentation Of Exculpatory Evidence, Procedural Bars Contravene Article 36's Requirement That Local Law Give "Full Effect" To Treaty Rights

The Vienna Convention expressly addresses the interaction between the "rights accorded under" Article 36 and the procedural rules of a particular legal system:

Relations, *supra*, would similarly render the diplomatic immunity provisions of that treaty meaningless. See *Tabion* v. *Mufti*, 73 F.3d 535, 538-539 (4th Cir. 1996) (affirming motion to quash service of process on grounds of diplomatic immunity despite language in preamble to the Vienna Convention on Diplomatic Relations).

> 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.

Vienna Convention art. 36(2) (emphasis added). The treaty thus recognizes the potential for domestic procedural rules to frustrate full exercise of Article 36 rights, and it unambiguously forecloses application of such rules.

There can be little doubt that, as applied here, the Commonwealth's procedural bar prevented any effect (much less "full effect") from being given to Bustillo's Article 36 rights. Article 36 requires the States to *notify* detained foreign nationals of their right to consular access and to grant such access. It is undisputed that the Commonwealth failed to comply with those obligations. Neither law enforcement officials, nor prosecutors, nor the courts at any point advised Bustillo of his consular access rights. It is also undisputed that, as a result of that failure, Bustillo was not aware he even *had* such rights until well after his trial had concluded. To require Bustillo to assert the violation of those rights before trial—before he was aware of them, when his ignorance was itself a product of the violation—makes a direct result of the violation a reason for ignoring the violation. It is difficult to see how bootstrapping a consequence of the violation (Bustillo's ignorance and resulting failure to assert his rights) to preclude judicial cognizance gives "full effect" to the notification rights at issue.

Indeed, the Convention's express requirement that the foreign national be informed of his right to consular assistance necessarily *presumes* that the foreign national will not otherwise be aware of that right. It is precisely because foreign nationals generally will not know about Article 36's requirements that the Convention requires notification. See *Torres* v. *Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting denial of certiorari) ("It surely is reasonable to

presume that most foreign nationals were unaware of the provisions of the Vienna Convention (as are, it seems, many local prosecutors)."). It is difficult to fathom how a rule requiring foreign nationals to raise a violation of which they are unaware—and of which the State has, in violation of Article 36, kept them ignorant—gives "full effect" to the rights and purposes of Article 36. Such a result, for all practical purposes, would make Article 36's facially mandatory notification requirement enforceable only when it matters least: Detainees could seek redress for the State's failure to provide notice of their rights only in those cases when they receive notice of their rights before trial by other means. Cf. *Williams*, 529 U.S. at 404 (construction "must give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).[10]

Such a result, moreover, is wholly inconsistent with the function of consular assistance under international law and the principles that animate the rules of forfeiture and

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[10] Imposing procedural bars for notification requirements would also "condone[] and encourage[] future violations" of Article 36. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 150 (2002). Charging a defendant with constructive knowledge of the very treaty rights for which the State fails to provide required notice—and then subjecting those rights to forfeiture when the defendant, ignorant of the rights, fails to assert them—effectively relieves the State of *any* practical consequences of the violation. Under such a rule, the State generally would have nothing to lose and everything to gain by failing to give (or to correct a failure to give) Article 36 notifications. If the defendant does not raise a Vienna Convention violation before trial, he might permanently lose the benefit of any exculpatory evidence the consulate might find; if the defendant does discover and raise the violation, he presumably will receive consular access before proceeding to trial, and the prosecution is no worse off than it would have been had it initially complied. This Court has often recognized that police officers respond to the incentives the law creates. See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (requiring *de novo* review of probable cause and reasonable suspicion determinations for warrantless searches because deferential review "would eliminate the incentive" to seek warrants).

waiver. Our adversary system of justice generally requires parties to assert their rights at trial on the assumption that the parties "know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). But that principle has no application where, as here, a treaty—the "supreme Law" on the issue—presumes that the party is *unaware* of his rights and for that very reason affirmatively obligates the State to advise him of the rights.

For the same reason, it is no answer to suggest that the defendant's *lawyer* should be charged with discovering and raising the violation before trial. As a matter of plain text, Article 36 requires *the State* to inform *the foreign national* of his right to consular notification and access. It nowhere gives the State the option of ignoring Article 36 so long as it provides the defendant with a lawyer who may (or may not) provide that notice. Requiring *defense counsel* to establish compliance with Article 36 before trial effectively transfers the notification duty from the State, where the Convention places it, to the lawyer.

Requiring foreign nationals who are not advised of their rights and do not learn of them until after trial to assert their violation in the trial court also conflicts with the basic purpose of consular access. Foreign nationals arrested here may come from nations with entirely different legal systems; they may have little or no understanding of our practices, the critical role of defense counsel, and their own role in planning a defense. Likewise, Americans detained abroad may confront wholly unfamiliar legal regimes. The State Department's Foreign Affairs Manual, 7 FAM 410, 412, admonishes consular employees that "[o]ur most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." By guaranteeing nationals arrested

in foreign countries a right to—and requiring that they be told of their right to—consular access, Article 36 helps those individuals understand the basic parameters of a foreign legal system before they are required to navigate it. A lawyer may not, consistent with the purposes of Article 36, unilaterally forfeit a foreign national's opportunity to communicate with his consulate and thereby develop a rudimentary understanding of our legal system—including an appreciation of the lawyer's role in it.[11]

Americans detained abroad may also confront unfamiliar legal systems, some in potentially oppressive regimes, where there is uncertainty about the role of their lawyers. In those circumstances, the fact that an American detainee was given a "lawyer" (of potentially questionable quality or loyalty) who never objected to the violation, and who himself kept the detainee ignorant of his treaty rights, would never be thought to excuse a violation of the Vienna Convention (especially given the consulate's role in helping the detainee understand the legal system he confronts). The same rule must apply here as well. The Vienna Convention establishes rules designed to operate in a multiplicity of legal systems, some very different from our own. It is for that reason that the Convention places the

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[11] That is consistent with the rule that "[w]hat suffices for waiver depends on the nature of the right at issue." *New York* v. *Hill*, 528 U.S. 110, 114 (2000). "For certain fundamental rights, the defendant must personally make an informed waiver," and courts may not impute a lawyer's silence to the defendant. *Ibid.* For example, although a defendant's lawyer typically has "full authority to manage the conduct of the trial," *id.* at 115, the defendant must be personally involved in deciding whether to exercise certain core rights, such as the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938), and the right to plead not guilty, *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966). The same must be true with respect to a right—like the right of consular notification—that may be critical to the foreign national's understanding of our legal system and the role of his lawyer. While the issue in this case is one of forfeiture rather than waiver, see *United States* v. *Olano*, 507 U.S. 725, 733 (1993), the distinction makes no difference here.

burden of notification on the authorities of the detaining State, not on other individuals with potentially varying and debatable legal roles.

B. The Asserted Procedural Bar Makes It Impossible To Give "Full Effect" To Article 36 Claims Where, Absent The Violation, The Consulate Could Have Provided Exculpatory Evidence

Notwithstanding a general preference for contemporaneous objections, courts and Congress have repeatedly recognized that certain categories of claims are most appropriately raised post-trial or on collateral review. For example, claims arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), are, by their nature, virtually always first raised on collateral review, as in *Brady* itself. See *id.* at 85; see, *e.g.*, *Lovitt* v. *Warden*, 585 S.E.2d 801 (Va. 2003); *Syvertson* v. *State*, 699 N.W.2d 855 (N.D. 2005); *Pederson* v. *State*, 692 N.W.2d 452 (Minn. 2005); *Head* v. *Stripling*, 590 S.E. 2d 122 (Ga. 2003). Likewise, claims alleging ineffective assistance of counsel are generally "best suited" for collateral review. *Massaro* v. *United States*, 538 U.S. 500, 505 (2003). In those circumstances, courts generally do not require the defendant to raise the violation within the time for direct review because, during that time, the defendant often lacks notice of the violation or a meaningful opportunity to develop the necessary factual basis.

In *Massaro*, for example, the petitioner first raised his ineffective-assistance-of-counsel claim in his motion for postconviction relief under 28 U.S.C. § 2255. The Second Circuit found the claim procedurally defaulted, holding that "when the defendant is represented by new counsel on appeal and [an] ineffective-assistance claim is based solely on the record made at trial, the claim must be raised on direct appeal." 538 U.S. at 503. This Court unanimously reversed. Noting that "'[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time,'" *id.* at 504 (quoting *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J.,

concurring)), the Court announced an across-the-board rule that such claims may be raised on collateral review. *Id.* at 507. The Court explained that, if such claims had to be pressed on direct review, "appellate counsel and the court [would have to] proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-505. Even if the defendant correctly claims that his representation was constitutionally deficient, "without additional factual development, an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id.* at 505. That would present the untenable risk that "[e]ven meritorious claims would fail * * * [because] the trial record [would be] inadequate to support them." *Id.* at 506. Further, an appellant facing possible forfeiture of the claim (but unable on the existing record to determine its viability) would have the "perverse incentive[]" "to bring claims * * * regardless of merit." *Ibid.* The resulting deluge of claims would require courts "'to search for needles in haystacks'" to identify the "'rare claim'" that is capable of resolution, wasting judicial resources on issues more efficiently resolved on collateral review. *Id.* at 507 (quoting *Guinan*, 6 F.3d at 475 (Easterbrook, J., concurring)).

The assertion of procedural bars to preclude post-conviction review of Article 36 claims suffers from the same defects. As an initial matter, of course, a defendant who has not been notified of his rights under Article 36 often will not be aware of the most basic predicate of the violation—*i.e.*, the existence of the rights themselves. But even assuming awareness, the defendant generally will lack the full factual predicate necessary to obtain relief. It is generally agreed that a Vienna Convention "violation should result in the overturning of a final judgment of conviction [only upon] some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona* v. *Fulminante*, 499 U.S. 279 (1991)); see also *Avena*, 2004 I.C.J. at 59-60,

¶ 121.[12] But proof (or disproof) of prejudice generally requires a record. The foreign national at the very least must have the consular contact he was previously denied and determine what, if any, assistance the consulate would have rendered. Until the contact occurs, he will not be in a position to know whether he could successfully meet the prejudice requirement. Requiring defendants to raise violations before they have that opportunity would, just like the rule rejected in *Massaro*, create a "perverse incentive[]" to raise claims before it is possible to determine their merit. 538 U.S. at 506-507.

Here, for example, Bustillo could not have presented his Article 36 claim until he learned of his rights; figured out what assistance the Honduran Consulate could have provided; identified the additional evidence that might have been gathered as a result; and determined whether any such help would have made a difference at trial. It was for that very reason that, upon learning of the violation, Bustillo's counsel on direct appeal (unsuccessfully) sought a *remand* to the trial court "for consideration of a renewed motion to set aside the verdict" based on "the substantive measures the Honduran Government could have taken to assist [Bustillo's] defense had the consulate been timely apprised" of the charges. Aplt.'s Motion to Remand, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 & 2422-98-4 (Va. Ct. App. Mar. 5, 1999). Simply put, most foreign nationals subjected to a violation will not learn that they had a right to consular notification and assistance until after trial. When they do learn of the violation, they do not and cannot know whether they can state a valid claim under Article 36 until they have

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[12] It does not appear that courts have clearly articulated which of the several prejudice standards would apply to the type of Vienna Convention violation at issue here. Cf. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 86-87 (2004) (Scalia, J., concurring) (outlining various prejudice formulae). It is not necessary to decide that question here, and Bustillo would meet *any* reasonable standard.

the contact with the consulate they were initially denied and identify the assistance that could have been rendered. A rule that forfeits rights under Article 36 before the foreign national and his consulate can develop the necessary factual predicate does not give "full effect" to the purposes underlying Article 36.

Equally troubling, defendants with potential Article 36 claims "would feel compelled to raise the issue" on direct review, *Massaro*, 538 U.S. at 504, when the record "often [will be] incomplete or inadequate" to support their claims, *id.* at 506. The resulting risk that "[e]ven meritorious claims would fail," *id.* at 506, increases if Article 36 claims are deemed to require a detailed showing of prejudice. Cf. *id.* at 505 ("Without additional factual development, * * * an appellate court may not be able to ascertain whether the alleged error was prejudicial."). Absent remands to the trial court of the sort the Virginia courts refused to provide here, only collateral review provides a mechanism through which evidence supporting prejudice can be developed and placed in the record. See also *Breard*, 523 U.S. at 376.

Any remaining doubt that the bar prevents "full effect" from being given to Bustillo's Article 36 rights disappears in light of the ICJ's repeated pronouncements that such bars are often inconsistent with the treaty's text and purpose. As this Court has noted, "the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" is entitled to "respectful consideration." *Breard*, 523 U.S. at 375. Twice within the past four years, the ICJ has held that the Convention does not permit a receiving State to invoke a procedural bar rule where the foreign national was not aware of his rights because the State "failed to carry out its [notification] obligation under the Convention." *LaGrand*, 2001 I.C.J. at 488, ¶ 60; see *Avena*, 2004 I.C.J. at 56-57, ¶¶ 112-114.

In *LaGrand*, the United States argued that the asserted violation of Article 36 was not cognizable because the foreign nationals had not raised the issue on direct appeal of

their state convictions or on state habeas. 2001 I.C.J. at 487-488, ¶ 58. The ICJ rejected that argument because the bar left insufficient time or required the claim to be raised before the detainee knew of his right. Such rules do "not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the sending state." *Id.* at 497, ¶ 90. Accordingly, the ICJ ruled that the asserted procedural bar "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under [Article 36] are intended,' and thus violated paragraph 2 of Article 36." *Id.* at 498, ¶ 91 (quoting Vienna Convention, art. 36(2)).

The ICJ reaffirmed and expanded that holding last year in *Avena*. That case concerned Mexico's claim that 54 Mexican nationals facing capital punishment in the United States had been denied their rights under Article 36 of the Vienna Convention. The United States contended that any rights foreign nationals enjoyed under the Convention were subject to a panoply of procedural default rules, and that the potential availability of executive clemency allowed "full effect" to be given to Article 36 even if judicial review was otherwise barred. *Avena*, 2004 I.C.J. at 55-56, ¶ 110. The ICJ rejected that argument, noting that *LaGrand* had prohibited the use of procedural bars where the foreign national's failure to raise the claim stemmed from the State's failure to comply with its notification obligations. *Id.* at 56-57, ¶ 112. *Avena* further directed "the United States to permit review and reconsideration of these nationals' cases by the United States courts," *id.* at 59-60, ¶ 121, and held that "the clemency process, as currently practiced within the United States criminal justice system, * * * [is] not sufficient in itself" to satisfy Article 36, *id.* at 66, ¶ 143.

Notably, the President has since confirmed that pursuit of treaty interests may require States to set aside procedural bars in specific cases. See *Medellín*, 125 S. Ct. at 2090 (noting President's February 28, 2005, Memorandum directing Texas courts to reconsider the claims of certain Mexican nationals). Although the United States has asserted that the President's authority to issue an order directing state courts to consider particular claims derives at least in part from "his constitutionally based foreign affairs power," U.S. Br. at 9, in *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005), it is highly questionable whether anything but the Convention itself could provide a legitimate basis for that intrusion into state judicial proceedings. Construing the Vienna Convention to require the state court action presumably would make the President's order, seeking to enforce the treaty, well within his power. A contrary construction of the Convention raises serious constitutional questions about the Executive's authority to order state courts to set aside procedural rules and consider claims absent a treaty or other federal law obligating them to do so. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." See *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (internal quotation marks omitted).

The ICJ's guidance (like the President's implementing memorandum) did not exist when this Court issued its *per curiam* opinion in *Breard* stating (without full briefing or argument) that the Vienna Convention does not displace procedural bars on federal habeas corpus. See 532 U.S. at 375-376. For that reason alone, *Breard* is not controlling here. *Breard* anticipated the possibility that "an international court with jurisdiction to interpret" the Convention (*i.e.*, the ICJ) might reach a contrary interpretation, *id.* at 375, 379, and that the ICJ's interpretation would be entitled to "respectful consideration" by this Court, *id.* at 375. "In the past the Court has revisited its interpretation of a

treaty when new international law has come to light." *Medellín*, 125 S. Ct. at 2105 (O'Connor, J., dissenting) (citing *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833)).

Moreover, *Breard*'s statements regarding the meaning of the Convention were unnecessary to the result in that case, for two reasons. First, the Court found that the necessary showing of prejudice was lacking in any event. 523 U.S. at 377. As explained below, such is not the case here. Second, in *Breard*, the *federal habeas statute*—as amended by AEDPA in 1996—foreclosed the *federal habeas* relief sought because the petitioners had not adequately developed the record in state court proceedings. 523 U.S. at 376-377. The Court stated that, even if the Vienna Convention otherwise required review, the bar imposed by the later-enacted provision of the federal habeas statute would control. When "a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Ibid.* The federal habeas statute that controlled the outcome in *Breard*, of course, has no application to this case, which arises on state habeas. Moreover, state laws (unlike federal laws) cannot displace federal treaty obligations. In any event, the fact that the federal habeas statute generally requires anyone with a claim based on "treaties of the United States" to "develop the factual basis of [that] claim in State court proceedings," *id.* at 376, further supports the conclusion that States cannot refuse foreign nationals an opportunity to develop the record relating to Vienna Convention violations like the one Bustillo asserts here.

C. The Procedural Bar Also Prejudices The Truth-Finding Capacity Of The Criminal Justice System

Requiring Vienna Convention claims to be raised before trial or on direct review also defeats one of the fundamental purposes of Article 36—to ensure that foreign nationals are on a level playing field when navigating a potentially unfa-

miliar legal system far from home. Properly observed, Article 36 aids the truth-finding function of the American criminal justice system by giving foreign nationals the tools necessary to mount a full and fair defense. Among other things, Article 36 ensures that detained foreign nationals have notice of their right to communicate with consular officials, who may have unique access to critical information relating to guilt or sentencing. See, *e.g.*, *LaGrand*, 2001 I.C.J. at 477, ¶ 22. Depriving foreign nationals of those rights—and upholding potentially erroneous convictions where the jury never saw critical exculpatory evidence that the consulate could have provided—is not merely inconsistent with the purposes of Article 36. It is also irreconcilable with the central purpose of our criminal justice system: to convict only the guilty while acquitting the innocent.

This case illustrates that point all too well. Here, the Vienna Convention violation deprived Bustillo of crucial evidence showing that Sirena—not Bustillo—killed James Merry. After all, it was Sirena whom the police found near the crime scene shortly after the crime, with red stains on his clothes, J.A. 134; it was Sirena who, after being stopped, gave the police false and inconsistent statements about where he was coming from, J.A. 134-135; it was Sirena who fled to Honduras the day after Merry died, J.A. 32; and it was Sirena who later bragged to friends about having committed the murder—describing it in graphic detail—in a secretly videotaped conversation. J.A. 35-42.

In fact, it is hard to imagine a case where consular assistance could be more critical. Bustillo's defense was not merely that he, a Honduran national, did not commit the crime. It was that *another Honduran national*, Sirena, committed the crime and that Sirena had *fled to Honduras* the day after the victim died. Because Sirena is a Honduran and had returned to Honduras, the Honduran Consulate was uniquely positioned to provide critical evidence relating to him, his whereabouts, and his involvement in the

crime. In a trial like this one, which turned entirely on closely divided eyewitness testimony, the evidence the Honduran Consulate could have provided would likely have proved pivotal.

Bustillo's trial counsel had great "difficulty finding evidence to corroborate the existence of" a Honduran national "named 'Sirena,'" J.A. 164 n.38, and even the police claimed they had no probative evidence of his existence, J.A. 118-119. Further, the only evidence available at trial of Sirena's flight from this country—shortly after the victim died—was the testimony of Ulma Martinez, who claimed she saw Sirena on a Continental Airlines flight to Honduras the day after Merry's death. 3/18/98 Tr. at 168-169.

Exploiting that dearth of evidence, the prosecution suggested to the jury that Sirena was a convenient defense fabrication. J.A. 21-22. The Commonwealth's closing referred to "this so-called Sirena"; pointed out that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." J.A. 21-22. The prosecution likewise attacked Ulma Martinez's testimony that she saw Sirena on a flight to Honduras the day after Merry died, asserting that "[s]he still doesn't know [Sirena's] full name"; that "[t]he plane tickets you have are for that witness, not for this Sirena"; and casting doubt on whether the "so-called Sirena" "was on the plane" at all. J.A. 21-22.

Had the Commonwealth apprised Bustillo of his Vienna Convention rights, those arguments—virtually the entirety of the Commonwealth's response to the Sirena defense—would have been unavailable. The Government of Honduras has represented that, had it been advised of the case, it at least would have been able to provide biographical data and a picture of Sirena. J.A. 32, 73-74.[13] That would have

[13] The Commonwealth has never disputed Bustillo's sworn statement that, had he been informed of his rights, he would have requested to speak with consular officials. See J.A. 60. Nor has the Commonwealth

precluded any suggestion that Sirena was a convenient defense invention, for he would be a real person with a picture and history. It is one thing to point to a real person as the alternative suspect; it is quite another to point to a phantom. More important, the photograph itself could have proved invaluable when questioning witnesses and addressing their recollections. When the police interviewed witnesses, none was shown Sirena's photo (or a photo of anyone else at the crime scene); only Bustillo's was included in the array. But when confronted with the photo of Sirena provided by the Honduran government, numerous eyewitnesses identified Sirena as the individual who struck Merry. J.A. 61, 65, 98, 100, 106. An actual photograph thus would have made Sirena a real person in the eyes of the jury, and it could have been used to confront witnesses at trial.

The Honduran Consulate, moreover, has averred that it would have produced official, indeed, irrefutable immigration records showing that Sirena *in fact* fled the United States for Honduras the day after James Merry died. J.A. 32, 73-74. Sirena's flight, once proven, is powerful evidence of Sirena's guilt and thus petitioner's innocence. See *California* v. *Hodari D.*, 499 U.S. 621, 624 n.1 (1991) (The guilty "flee when no man pursueth.") (quoting Proverbs 28:1); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight * * * is the consummate act of evasion" that is "suggestive" of "wrongdoing"). The prosecution and Sirena himself understood as much. See J.A. 239 (prosecutor's acknowledgment that flight shows consciousness of guilt); J.A. 37-38 (surreptitious video of Sirena conceding that he fled because he feared he would get "burned"). The Commonwealth was sufficiently concerned by the evidence of Sirena's flight at trial—even when it was supported solely by Martinez's testimony—that it directly attacked Martinez's credibility, pointing out the lack of documentary evi-

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disputed the statements of Honduran officials that they could have provided significant assistance. J.A. 32, 73-74.

dence, mentioning her inability to provide Sirena's surname (she only knew him to go by "Sirena" and "Julio"), and questioning whether he was on the flight at all. J.A. 21-22. Those arguments would have been foreclosed absent the Vienna Convention violation.

Moreover, it is likely that, had the Honduran Consulate been advised of Martinez's testimony that a "Julio" was on the plane to Honduras, it could have provided the defense with Sirena's full name, now known to be Julio Osorto. J.A. 73 ("The records of the [Honduran government] reflect that a young man named 'Julio' arrived in Tegucigalpa, Honduras on Continental Flight 769 on December 17, 1997 and that * * * his full name is JULIO CESAR OSORTO HERRERA."). That information would, in turn, have allowed the defense to issue a more specific *Brady* request to prosecutors, identifying Sirena's proper surname. Such a demand would have either increased the likelihood that the Commonwealth would have timely produced the Mahoney Report detailing the suspicious stop of "Julio C. Osorto" on the night of the attack, J.A 134-135, or, alternatively, heightened the scrutiny the Commonwealth would have faced for failing to do so. See *United States* v. *Agurs*, 427 U.S. 97, 106 (1976) ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.").

Finally, Honduras has also represented that it would have attempted to locate Sirena and interview him. J.A. 32. The potential impact of such an effort should not be underestimated. Acting with fewer resources, petitioner's habeas counsel ultimately was able to locate Sirena in Honduras and convince an associate of Sirena's to surreptitiously videotape two conversations with him. In those conversations, Sirena both acknowledged that Bustillo was wrongly accused and confessed to Merry's killing with self-authenticating detail. J.A. 33-55. Consistent with the witness testimony, Sirena stated that he attacked Merry with a baseball bat while Merry was outside the Popeye's

smoking a cigarette. J.A. 38. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been "wearing a red sweater." J.A. 41. And, consistent with the Mahoney Report's statement that Sirena had alcohol on his breath when stopped by police, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. J.A. 40-41. That lattermost assertion is particularly striking because, at the time of Sirena's confession, the Mahoney Report—and its statement that Sirena's breath smelled of alcohol, J.A. 135—had not yet been disclosed. Better self-authenticating detail is difficult to imagine.

In sum, Virginia's failure to observe Bustillo's Vienna Convention rights deprived him of evidence that not only raises a reasonable doubt about his guilt, but also strongly supports his innocence. The evidence would have cut to the core of the prosecution's case—and supported the defense's consistent claim that Sirena was the real killer—in a case marked by divided witness testimony. Yet the asserted bar, coupled with the Commonwealth's violation of the treaty's notification requirement, has precluded any court from considering that. It is one thing for the courts to resist, on collateral review, complaints about the admission of probative physical evidence. See *Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976). But it is quite another to refuse to address treaty violations that prevent the jury from learning the whole truth and impair the truth-finding function that lies at the core of our judicial process.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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APPENDIX A

CONSTITUTIONAL AND TREATY PROVISIONS

1. The Supremacy Clause of The Constitution of the United States of America, art. VI, cl. 2, provides in relevant part:

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, provides in relevant part:

Article 36

Communication and contact with nationals of the sending State

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

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers 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. 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;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. 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.

2. 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.

3. The Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, art. I, 21 U.S.T. 325, provides in relevant part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

APPENDIX B

Convention on Consular Relations.

Convention on consular relations. Done at Vienna April 24, 1963; entered into force March 19, 1967; for the United States December 24, 1969.

21 UST 77; TIAS 6820; 596 UNTS 261.

States which are parties:

Albania
Algeria
Andorra
Angola
Antigua & Barbuda
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas, The
Bahrain [1]
Bangladesh
Barbados [1]
Belarus
Belgium
Belize
Benin
Bhutan
Bolivia
Bosnia-Herzegovina
Brazil
Bulgaria [1]
Burkina Faso
Burma [1, 2]
Cameroon
Canada
Cape Verde
Chile
China [3]
Colombia
Congo, Dem. Rep.
Costa Rica
Cuba [2]
Cyprus
Czech Rep.
Denmark [1, 2]
Djibouti
Dominica
Dominican Rep.
East Timor
Ecuador
Egypt [2]
El Salvador
Equatorial Guinea
Eritrea
Estonia
Fiji [2]
Finland [1, 2]
France [1]
Gabon
Georgia
German Dem. Rep. [1, 4]
Germany, Fed. Rep. [1, 4]

Ghana
Greece
Grenada
Guatemala
Guinea
Guyana
Haiti
Holy See
Honduras
Hungary
Iceland [1]
India
Indonesia
Iran
Iraq [2]
Ireland
Italy [2]
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kiribati
Korea, Dem. People's Rep.
Korea, Rep.
Kuwait [1]
Kyrgyz Rep.
Laos
Latvia
Lebanon
Lesotho [1]
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg
Macedonia
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta [2]
Marshall Is.
Mauritania
Mauritius
Mexico [2]
Micronesia
Moldova
Mongolia
Morocco [1, 2]
Mozambique [1]
Namibia
Nepal
Netherlands [1, 5]
New Zealand
Nicaragua
Niger
Nigeria
Norway [1]
Oman [1]
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar [2]
Romania [1]

Russian Fed.
Rwanda
St. Kitts & Nevis [6]
St. Lucia
St. Vincent & the Grenadines [6]
Sao Tome & Principe
Saudi Arabia [2]
Senegal
Serbia and Montenegro
Seychelles
Slovak Rep.
Slovenia
Solomon Is. [6]
Somalia
South Africa
Spain
Sudan
Suriname
Sweden [2]
Switzerland
Syrian Arab Rep. [2]
Tajikistan
Tanzania
Thailand
Togo
Tonga
Trinidad & Tobago
Tunisia
Turkey
Turkmenistan
Tuvalu
Ukraine
United Arab Emirates [1]
United Kingdom [1, 7]
United States
Uruguay
Uzbekistan
Vanuatu
Venezuela
Vietnam, Socialist Rep. [2]
Viet-Nam, Rep. [8]
Western Samoa
Yemen (Sanaa) [2, 9]
Yugoslavia [10]
Zimbabwe

NOTES

[1] With a statement.

[2] With reservation(s).

[3] Applicable to Hong Kong and Macao. See note under CHINA in bilateral section.

[4] See note under GERMANY, FEDERAL REPUBLIC OF in bilateral section.

[5] Applicable to Aruba and Netherlands Antilles.

[6] See under country heading in the bilateral section for information concerning acceptance of treaty obligations.

[7] Extended to Anguilla and territories under the sovereignty of the United Kingdom.

[8] See Vietnam footnote under AUTOMOTIVE TRAFFIC: convention of September 19, 1949 (3 UST 3008; TIAS 2487; 125 UNTS 22).

[9] See note under YEMEN in bilateral section.

[10] See note under YUGOSLAVIA in bilateral section.