1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MOISES SANCHEZ-LLAMAS, :

4 Petitioner :

5 v. : No. 04-10566

6 OREGON; :

7 and :

8 MARIO A. BUSTILLO, :

9 Petitioner :

10 v. : No. 05-51

11 GENE M. JOHNSON, DIRECTOR, :

12 VIRGINIA DEPARTMENT OF :

13 CORRECTIONS. :

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15 Washington, D.C.

16 Wednesday, March 29, 2006

17 The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States

19 at 10:03 a.m.

20 APPEARANCES:

21 PETER GARTLAN, ESQ., Salem, Oregon; on behalf of the

22 Petitioner in No. 04-10566.

23 MARK T. STANCIL, ESQ., Washington, D.C.; on behalf of

24 the Petitioner in No. 05-51.

25

1 MARY H. WILLIAMS, ESQ., Oregon Solicitor General,
2 Salem, Oregon; on behalf of the Respondent in No.
3 04-10566.
4 WILLIAM E. THRO, ESQ., State Solicitor General,
5 Richmond, Virginia; on behalf of the Respondent in
6 No. 05-51.
7 GREGORY G. GARRE, ESQ., Deputy Solicitor General,
8 Department of Justice, Washington, D.C.; on behalf
9 of the United States, as amicus curiae, supporting
10 the Respondents.
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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in two cases, Sanchez-Llamas v.

5 Oregon and Bustillo v. Johnson.

6 Mr. Gartlan.

7 ORAL ARGUMENT OF PETER GARTLAN

8 ON BEHALF OF THE PETITIONER IN 04-10566

9 MR. GARTLAN: Mr. Chief Justice, and may it

10 please the Court:

11 This case presents three questions. The

12 first is does article 36 of the Vienna Convention on

13 Consular Relations confer rights to individuals such as

14 Mr. Sanchez-Llamas. The second is can Mr. Sanchez-

15 Llamas enforce the right in a State criminal

16 prosecution. And the third is can the right be

17 enforced by suppression.

18 The first issue is -- is a matter of treaty

19 interpretation, and the language of the article 36 is

20 -- is plain. It confers three rights. Article 36(1)

21 says that the consulate and the individual can have

22 free communication between them. Article 36(1)(b)

23 gives to the detainee, the foreign national detainee,

24 the right to have his consulate notified of his arrest

25 and the right to forward communication to the

1 consulate. And it also imposes a duty on the detaining
2 authorities to inform the foreign national under -- of
3 his rights under that section. And it's critical, or
4 at least important, and telling to -- to notice that
5 the detainee gets to control the communication. The
6 detainee initiates and controls the communication with
7 the consulate. It's not the consulate contacting the
8 detainee initially. It's the detainee authorizes the
9 contact.
10 The secondary sources -- we -- we believe the
11 text is plain, but if the Court resorts to any
12 secondary sources, that too will confirm the plain
13 language of -- of the article.
14 CHIEF JUSTICE ROBERTS: I thought that the
15 argument on the other side is that those references in
16 the secondary sources and in the document itself are
17 meant to make clear that if the individual detainee
18 does not want contact with his consular officials, for
19 example, in a case where he might be seeking asylum or
20 something like that, that it was, as you said earlier,
21 his decision and not necessarily that there was to be a
22 departure from the norm in international -- the
23 international context where treaties are between the
24 sovereigns and don't confer enforceable rights on
25 individuals.

1 MR. GARTLAN: Well, Your Honor, actually the
2 article 36 is -- is unique and different in that the
3 revolutionary part of this is that the detainee did,
4 for the first time, have the authority to have the
5 consulate notified. Typically most of the notification
6 statutes, bilateral treaties, multilateral treaties
7 require mandatory notification, but this is an instance
8 where the detainee gets to control. The detainee
9 decides whether or not the consulate is going to be
10 contacted.
11 CHIEF JUSTICE ROBERTS: Right. So the --
12 that's what the different countries, the signatories,
13 are supposed to provide, and if they don't, that's a
14 matter to be taken up bilaterally between the countries
15 involved and not necessarily an individual enforceable
16 right.
17 MR. GARTLAN: Well, it -- it could work on
18 the international level as well. You know, a state
19 could complain to another state, but the question here
20 is whether or not this article, as domestic law in the
21 United States, confers a personal right to a foreign
22 national detainee because a treaty in the United
23 States, a self-executing treaty -- and everybody agrees
24 this is that -- works in two spheres, on two levels.
25 One level is the international level, but by -- through

1 the Supremacy Clause, the treaty is also domestic law.
2 And the question is whether as domestic law this
3 treaty confers personal rights to individuals because
4 --
5 JUSTICE GINSBURG: And at least you have the
6 authority of the International Court of Justice that
7 says this is a right. This is not just a matter of
8 between states.
9 MR. GARTLAN: Yes, Your Honor. Yes, Your
10 Honor. In two cases, the ICJ has held that this
11 article 36 does confer rights to individuals. There's
12 the LaGrand case --
13 JUSTICE SCALIA: That court is not a common
14 law court, is it?
15 MR. GARTLAN: No, Your Honor.
16 JUSTICE SCALIA: And not being a common law
17 court, it's not bound by its own prior decisions, is
18 it?
19 MR. GARTLAN: I don't believe so, Your Honor.
20 JUSTICE SCALIA: I think its statute says
21 that it -- it decides the particular case and does not
22 set forth propositions of law that are binding in
23 future cases. If it's not bound by its prior cases, I
24 don't know why we should be.
25 JUSTICE GINSBURG: How many times now has the

1 ICJ said that this convention confers rights on the
2 individual?
3 MR. GARTLAN: At least two, Your Honor,
4 LaGrand and Avena, and both involved criminal cases.
5 JUSTICE GINSBURG: And what is the view of
6 our treaty partners on that issue?
7 MR. GARTLAN: Many of the treaty partners
8 view it as conferring a right, at least 11 tell an
9 arrestee of his rights under -- under the treaty and --
10 CHIEF JUSTICE ROBERTS: But do any of our
11 treaty partners apply the exclusionary rule to
12 violations of this?
13 MR. GARTLAN: That's beginning to happen,
14 Your Honor. In Australia and Great Britain, there -- I
15 believe it has been --
16 JUSTICE GINSBURG: Not at the time this
17 treaty came into force.
18 MR. GARTLAN: Excuse me, Your Honor?
19 JUSTICE GINSBURG: Not at the time the Vienna
20 Convention came into force.
21 MR. GARTLAN: No, Your Honor.
22 JUSTICE GINSBURG: We were almost alone in
23 having suppression as the remedy.
24 MR. GARTLAN: Yes, Your Honor, and --
25 CHIEF JUSTICE ROBERTS: We didn't even have

1 it then, did we?

2 MR. GARTLAN: In 1969? Yes, we did, Your

3 Honor.

4 CHIEF JUSTICE ROBERTS: That's when the

5 convention came into effect?

6 MR. GARTLAN: That -- that -- excuse me.

7 That's when the United States ratified the treaty,

8 1969.

9 JUSTICE SCALIA: What -- what remedies have

10 other countries provided for -- for these rights? I

11 mean, it's -- it's easy to say the right exists. What

12 -- what have other countries done by way of vindicating

13 these rights?

14 MR. GARTLAN: Typically I think the --

15 JUSTICE SCALIA: I mean, advising them of

16 them is -- is really not vindicating them, it doesn't

17 seem to me.

18 MR. GARTLAN: Typically it is a matter of

19 state to state complaints or apologies and --

20 JUSTICE SCALIA: Well, that's -- but, you

21 know, that's what the other side said the whole thing

22 should consist of, that it's a matter to be enforced by

23 -- by state-to-state protests, not -- not by the

24 judicial system or the legal system taking it upon

25 itself to provide a remedy.

1 What -- what remedies have been provided in
2 -- in other countries? You -- you mentioned an
3 exclusion in Australia?
4 MR. GARTLAN: Yes, Your Honor.
5 JUSTICE SCALIA: When -- when was that?
6 MR. GARTLAN: Offhand -- I believe it's
7 within the last couple years.
8 JUSTICE KENNEDY: Was there a showing of
9 prejudice in that case or just automatic exclusion?
10 MR. GARTLAN: No, it's not automatic.
11 Typically in the commonwealth countries, a judge has a
12 lot of equitable authority to kind of balance some
13 interests and decide whether or not to exclude the --
14 the evidence. And I'm not saying that it's happened
15 worldwide, that it's pervasive practice, but in -- in
16 some sense, what other countries are doing in their
17 individual systems, it's nice to know that it's not all
18 that controlling because the question, again, is how
19 does this statute work as domestic law.
20 JUSTICE SOUTER: Well, is that -- that -- my
21 question was going to be are -- are you suggesting or
22 arguing that the remedy ought to be exclusion as a
23 matter of domestic law or as a necessary implication of
24 -- of the treaty?
25 MR. GARTLAN: It's a necessary implication or

1 it's an implication of the treaty, of section 2 of
2 article 36. But --
3 JUSTICE SOUTER: Well, what would you do in a
4 country that does not apply an exclusion remedy in --
5 in domestic cases given the provision, which I can't
6 quote correctly, but you'll know what it is, the -- the
7 provision that the treaty will -- will be administered
8 in accordance with or consistently with, I guess it is,
9 domestic law so long as full effect is given to its
10 substantive provisions? I would have thought that that
11 -- that that provision for administration in accordance
12 with domestic law would have a great bearing, if -- if
13 not being dispositive, on the remedy, so that if I were
14 answering the question I -- I had asked you, I -- I
15 would have said, well, it's probably a domestic law
16 basis for -- for exclusion, but not a treaty basis.
17 So why in those countries -- getting back to
18 -- to my -- why -- why in those countries that do not
19 customarily apply an exclusion remedy wouldn't it be
20 consistent with the treaty for them to decline to apply
21 it given the provision for administration consistently
22 with -- with domestic law?
23 MR. GARTLAN: It could be appropriate. The
24 treaty was prepared -- drafted full knowing that there
25 are various and myriad kinds of legal systems

1 throughout the world, and it wasn't intended to say,
2 here's the -- here's the remedy because typically under
3 international law, the remedy is -- is a domestic
4 remedy. And this -- this doesn't -- the treaty does
5 not say, thou shalt suppress.
6 CHIEF JUSTICE ROBERTS: Well, if it doesn't
7 --
8 JUSTICE SOUTER: So if the treaty --
9 CHIEF JUSTICE ROBERTS: Why don't you go
10 ahead?
11 JUSTICE SOUTER: The -- the treaty provision
12 then governs only in the sense that for remedy it
13 refers you to domestic law. Is that it?
14 MR. GARTLAN: Yes, Your Honor.
15 JUSTICE SOUTER: Okay.
16 CHIEF JUSTICE ROBERTS: So -- so if the
17 treaty doesn't say suppress, what authority does a
18 Federal court have to direct a State court to exclude
19 evidence?
20 MR. GARTLAN: Through the Supremacy Clause,
21 Your Honor.
22 CHIEF JUSTICE ROBERTS: The Supremacy Clause
23 gives effect to the treaty. You just told me the
24 treaty doesn't require suppression.
25 MR. GARTLAN: Well, the treaty doesn't in --

1 in its text doesn't say, thou shalt suppress, but is --
2 it is a source of authority because the treaty says
3 thou shalt give full effect to the law.
4 JUSTICE SCALIA: Well, it's just a source of
5 authority but not a source of authority for
6 suppression. And I find it implausible that we signed
7 a treaty which requires us to suppress evidence of this
8 sort, but allows the other treaty partners to do
9 whatever they like, not -- not suppress, let it in,
10 rely upon consular protests. Is -- is that what this
11 provision, you know, in accordance with domestic law,
12 means, that -- you know, each man to himself?
13 MR. GARTLAN: In -- in many cases, yes, Your
14 Honor. Again, the -- the drafters recognized that
15 remedies would be local, and so the question is for our
16 system, for the United States system, how does the
17 United States system -- how does it remedy breaches.
18 And it depends upon the type of the breach. In this
19 instance, the breach here involved statements, and so
20 the breach occurred when the authorities did not inform
21 Mr. Sanchez-Llamas of his right to contact the
22 consulate.
23 JUSTICE KENNEDY: Well, of course, that's
24 assuming a causal link, which is an altogether
25 different problem.

1 But it's still not clear to me. Are you
2 saying that we should require the States to follow and
3 the United States Government to follow an exclusionary
4 rule because that's what the treaty requires or because
5 this is the remedy that we ought to devise in the
6 exercise of our supervisory powers? And if it's the
7 latter, it seems to me surely there must be some causal
8 linkage between the violation and the -- and the
9 statement at -- at a minimum.
10 MR. GARTLAN: Yes, Your Honor. Well, it's
11 kind of a combination of both. The treaty directs give
12 effect to these rights. And we are asking the Court to
13 exercise its authority to remedy the breach because
14 suppression is a creature of this Court's authority,
15 common law authority.
16 JUSTICE GINSBURG: You don't think that the
17 -- that the remedy that the ICJ imposed in the case
18 where the United States was before it as a party, that
19 that would be the appropriate remedy? It was not
20 suppression. It was reconsider this, taking account of
21 the failure to notify and what might have happened if
22 notice had been provided.
23 MR. GARTLAN: Yes, Your Honor, and then
24 supply whatever remedy would be appropriate. And
25 again, that -- that's a call upon the judiciary to

1 remedy treaty violations, and -- and that's been --
2 JUSTICE GINSBURG: But there wasn't any word
3 in either of the ICJ judgments, if I recall them
4 correctly, that said, United States, you have a
5 suppression remedy, so you should suppress.
6 MR. GARTLAN: No, Your Honor, because again,
7 remedies are a question of domestic law, so it's up to
8 the domestic courts to decide what would be the
9 appropriate remedy.
10 JUSTICE ALITO: Well, did you ask for any
11 remedy in this case other than suppression? This arose
12 on the motion to suppress, am I right?
13 MR. GARTLAN: Correct, Your Honor. No other
14 remedy but -- but suppression.
15 JUSTICE KENNEDY: One of the things -- and I
16 -- I really have this question for all counsel. If the
17 Miranda warning is given, it seems to me that that
18 comprehends the relief that you need. If the accused
19 talks with his attorney, his attorney is presumed to
20 know the treaty's -- the provisions of the convention.
21 If he does not, he proceeds at his risk. Attorneys
22 have lots of things they can tell clients, and if you
23 don't have an attorney, you proceed at your risk. I
24 just think this is a very important point here.
25 MR. GARTLAN: Yes, Your Honor, and many

1 courts have held that -- well, the Miranda rights
2 pretty much encompasses these rights, but they're
3 different. These are standalone rights, and what's
4 critical about this, what's really important is that
5 for every United States citizen who's arrested -- and
6 typically interrogation is going to follow quickly on
7 the heels of the arrest -- they're giving the Miranda
8 warnings. And essentially they have three options.
9 They can speak to the police. They can invoke the
10 right to silence, or they can invoke the right to an
11 attorney. However, foreign nationals have a fourth
12 option and that fourth option is they can have the
13 consulate contacted, if they want. And the consulate
14 provides different kinds of information and support for
15 the arrestee.
16 And it's -- what's critical is -- what's hard
17 to see is that because we're in this country, we don't
18 see it, but if you're overseas and you've been arrested
19 -- let's say you're in Damascus and you're given a dime
20 and your options are to call the local attorney
21 provided by your jailers or the American consulate.
22 And I think it's pretty clear that most people are
23 going to call the American consulate. Why? It's
24 because there's a kind of a familiarity. There's an
25 attraction there. There's an appeal. There's

1 security. You're dealing with the known. Whereas, a
2 local attorney, it's the unknown, and it's by the local
3 authorities.
4 JUSTICE SCALIA: That may give you a warmer
5 feeling inside, but do you think that the foreign
6 consulate is -- is more likely to give you good advice
7 about what you should do under American law than an
8 American lawyer that you've been provided?
9 MR. GARTLAN: Well, you know, Your Honor,
10 it's not really the content of the advice. The
11 question is at this point what would people do, and the
12 legal error here, what's wrong, is that the foreign
13 national is given the same three options, but by law,
14 he's supposed to have a fourth option.
15 JUSTICE SCALIA: Yes, but I'm just saying
16 whether it makes any difference. I mean, you're
17 talking about anything that -- that affects substantive
18 rights. He's been provided an attorney who knows
19 American law better, presumably, than -- than a
20 consular official. What -- other than the comfort of
21 -- of speaking to somebody from his own country, what
22 -- what's the substantive harm here?
23 MR. GARTLAN: Well, but really he hasn't been
24 given an attorney yet, Your Honor. We have to remember
25 this is the arrest has been made and he's confronted

1 with options.

2 JUSTICE KENNEDY: Well, but you -- you want

3 us to write an opinion to say that we're holding our

4 attorneys to the same standard of evaluation as the

5 attorneys in Syria --

6 MR. GARTLAN: Oh, no, Your Honor.

7 JUSTICE KENNEDY: -- and -- and our bar is --

8 is not to be trusted to have the expertise that's at

9 least equivalent to that of the foreign counsel?

10 MR. GARTLAN: No. What I'm saying, Your

11 Honor, is that if you're arrested, the next -- you have

12 a choice, and you have one of three if you are a

13 national, but if you're a foreigner, you have one of

14 four. And the question --

15 JUSTICE BREYER: The question --

16 JUSTICE KENNEDY: But the question is who

17 tells you about that choice, and your attorney can tell

18 you about that choice.

19 MR. GARTLAN: But this contemplates that the

20 detaining authorities informed the person of -- of what

21 their rights are to contact the consulate.

22 JUSTICE BREYER: Suppose they don't do it.

23 They don't do it. They violated the treaty.

24 MR. GARTLAN: Yes, Your Honor.

25 JUSTICE BREYER: We assume that. Then the

1 question is what is a proper remedy.

2 MR. GARTLAN: Yes, Your Honor.

3 JUSTICE BREYER: And I'll assume with you,

4 for the moment, that -- that the treaty has to be read

5 as saying you have to have some kind of appropriate

6 remedy, but it doesn't say what kind. So why isn't it

7 an appropriate remedy that he was given a lawyer, if he

8 wanted one, and the lawyer either told him about the

9 right to talk to the consul or he didn't. And if he

10 didn't -- if he did, he found out, and if he didn't and

11 it mattered, maybe that was ineffective assistance of

12 counsel. So if we have ineffective assistance of

13 counsel claims to take care of the tough cases where it

14 really did matter, doesn't that suffice under the

15 treaty, or does it?

16 MR. GARTLAN: Your Honor, I'd -- I'd like to

17 -- to move back the discussion to there's no attorney

18 yet, and the question is what can that person do. And

19 -- and the error --

20 JUSTICE BREYER: Oh, he's stuck without an

21 attorney. I have no doubt about that. I have no doubt

22 that the treaty was violated. I follow you that far,

23 but now you're talking about the domestic court's power

24 to do what there is an international obligation to do,

25 which is to create a remedy. I'm not sure why that

1 remedy need always be suppression.

2 MR. GARTLAN: Your Honor, it needn't --

3 JUSTICE BREYER: I think sometimes it could

4 be something else.

5 MR. GARTLAN: Yes. It depends on the legal

6 injury that flows from the violation. Now, in this

7 instance, we're dealing with statements because again,

8 to illustrate perhaps, even a national, given these

9 three options -- what if the police forgot to tell the

10 -- the person that he has a right to an attorney? Now,

11 he's given these two options, and he -- he waives

12 those. And that waiver is voluntary, but it's still

13 invalid as a matter of law because he wasn't given all

14 the options he's supposed to be given. And that's the

15 difference because we don't know what would have --

16 typically you don't know what would have happened if

17 somebody were given all the options. That's -- that's

18 a problem. So now --

19 JUSTICE GINSBURG: But we do know, don't we,

20 Mr. Gartlan, that if the treaty had been followed, it

21 still would have been permissible for the police,

22 having given Miranda warnings, to commence

23 interrogation? The treaty does not require that the

24 enforcing officials in this country immediately call

25 the foreign consulate. Isn't that so?

1 MR. GARTLAN: Well, actually the language of
2 the article says without delay, Your Honor, so that
3 suggests that there's some kind of promptness that's --
4 that's involved.
5 JUSTICE GINSBURG: Promptness. And I think
6 that the United States has told us it's generally done
7 here somewhere between 24 and 72 hours. A suspect who
8 has been given Miranda warnings as here -- the
9 conversation with the police, the interrogation, could
10 begin before that 24 hours or 72 hours expires.
11 MR. GARTLAN: And our reading of the article
12 is that once the -- the police know or have grounds to
13 believe that the -- that the person is probably a
14 foreign national, then that duty arises on the police
15 to give him his rights.
16 JUSTICE GINSBURG: Yes.
17 JUSTICE SCALIA: That's fine, but --
18 JUSTICE SOUTER: It's a --
19 JUSTICE SCALIA: Go ahead.
20 JUSTICE SOUTER: We keep doing this.
21 JUSTICE SCALIA: Yes, we do.
22 JUSTICE SOUTER: It's -- it's a duty to
23 advise him of -- of his right to have them notify the
24 -- the consulate. It is not a duty to remain silent
25 until the consulate responds. And even if you are

1 correct that the obligation to -- to advise him and to
2 give the notice arises immediately upon the realization
3 that he's a foreign national, I don't see anything in
4 the treaty that requires them to defer interrogation
5 until the -- the consulate has decided whether it wants
6 to do anything or not.
7 MR. GARTLAN: Yes, Your Honor, but in -- in
8 this case, the -- the statements that we're seeking to
9 suppress, the harmful ones, occurred about 8 hours
10 after the initial arrest. However --
11 JUSTICE SOUTER: Well, do you -- do you say,
12 going back to -- to the point Justice Ginsburg made, if
13 the United States follows a 48- to 72-hour rule, is --
14 is that a violation of the treaty?
15 MR. GARTLAN: Yes, Your Honor, because our
16 position is that once somebody says, yes, I -- I want
17 to speak with the consulate, it's like saying I want to
18 speak with my attorney or I want to invoke my right to
19 silence. It's a signal that this person believes that
20 they are being overwhelmed by the situation, that they
21 are no longer in control, and they're trying to
22 exercise some control.
23 Now, this Court doesn't have to make this
24 ruling in this case, but our position would be if
25 somebody invoked --

1 JUSTICE SOUTER: Well, we -- we might have to
2 make it in this case.
3 JUSTICE SCALIA: We'd have to make an 8-hour
4 ruling in this case anyway if -- if we agree with you.
5 MR. GARTLAN: Well, our -- our position is
6 that if there's an indication of a right to have the
7 consulate contacted, that's like a cry for help. It's
8 like -- it's an alternative way of saying I want -- I
9 can't deal with this anymore. I'm -- I'd like my right
10 to silence. And --
11 JUSTICE SCALIA: Gee, what about -- what
12 about countries that don't have an extensive telephone
13 system, you know, where you -- you have to send a
14 runner to notify the consul?
15 MR. GARTLAN: That would be a problem for
16 that country and people in that country. But now we're
17 dealing with --
18 JUSTICE SCALIA: Well, it -- it just makes me
19 think that -- that instant contact is not what was
20 envisioned by the treaty.
21 MR. GARTLAN: The treaty is supposed to be
22 applied in every country, and there are going to be
23 different results. The drafters recognized some --
24 some countries have different systems, different
25 waiting periods before there's interrogation or before

1 there's contact. And all this treaty does is it puts
2 the foreign national on par with an American, with the
3 United States citizen. That all intends to do.
4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Gartlan.
6 MR. GARTLAN: Thank you, Your Honor.
7 CHIEF JUSTICE ROBERTS: Mr. Stancil.
8 ORAL ARGUMENT OF MARK T. STANCIL
9 ON BEHALF OF THE PETITIONER IN NO. 05-51
10 MR. STANCIL: Mr. Chief Justice, and may it
11 please the Court:
12 Mario -- Mario Bustillo was not advised of
13 his rights under article 36 in direct contravention of
14 the treaty. As a result, he went to trial for first-
15 degree murder, having had no contact with a consular
16 officer from his home country and being completely
17 unaware that he was entitled to do so.
18 The Virginia courts improperly relied upon
19 the result of that violation, itself the product of
20 failure to comply with the treaty, to refuse to
21 consider critical exculpatory evidence that was
22 uniquely in the possession and available with the
23 assistance of the consular officers. That evidence
24 would have included official government immigration
25 records, corroborating a key defense witness, and

1 proving that the alternative suspect, a Honduran
2 national, known as Sirena, fled to Honduras the day
3 after the victim died. The Honduran consulate also
4 would have provided Sirena's address and attempted to
5 interview him. Indeed, once Bustillo's habeas counsel
6 located Sirena in Honduras, he obtained a
7 surreptitiously videotaped confession in which Sirena
8 admitted, in chilling detail, to committing the crime
9 and acknowledged that Mario Bustillo had been wrongly
10 convicted.
11 JUSTICE KENNEDY: Has the Honduran Government
12 offered to arrest and extradite that witness from
13 Honduras to bring him back to the United States?
14 MR. STANCIL: Not on this record, Your Honor,
15 but the Honduran consulate has offered -- has said it
16 would have attempted to locate Sirena and interview
17 him. And acting with far fewer resources, before the
18 Honduran consulate was even aware of this case,
19 petitioner's habeas counsel got this confession, the
20 point being it wasn't that hard to get, to trick this
21 person into admitting, yes, he -- he committed the
22 crime. And in the confession, which is on pages 33 to
23 55 of the -- of the joint appendix, there are a number
24 of -- of details in that confession he could have known
25 no other way.

1 Moreover, the Honduran consulate would have
2 provided, and ultimately did provide, a photograph of
3 Sirena.
4 JUSTICE ALITO: Well, that, Mr. -- could your
5 client's attorney have argued in the Virginia habeas
6 proceeding that his procedural default should have been
7 excused because of ineffective assistance of trial
8 counsel at the time of the default?
9 MR. STANCIL: Yes. However, an ineffective
10 assistance claim -- and I should back up. It was
11 raised. The -- the habeas court disposed of it on two
12 grounds, saying it was beyond the statute of
13 limitations because an ineffective assistance claim,
14 based on the Vienna Convention, did not relate back,
15 but also denied it on the merits and said it wouldn't
16 have met the Strickland standard anyway.
17 But the ineffective assistance claim is
18 ineffective to address the treaty violation for two
19 reasons. First, the treaty gives you a right to be
20 notified. It protects the special relationship between
21 a consular officer and the detained foreign national,
22 and channeling these claims to ineffective assistance
23 doesn't vindicate that separate Federal right.
24 CHIEF JUSTICE ROBERTS: Well, Miranda gives
25 you the same, you know, right to -- to reach a counsel,

1 a right to remain silent, and yet, if your lawyer
2 doesn't raise a Miranda violation in trial, it can be
3 waived.
4 MR. STANCIL: Correct.
5 CHIEF JUSTICE ROBERTS: Why should this be
6 elevated to a special status beyond that?
7 MR. STANCIL: It's not elevated, Your Honor.
8 It's actually treated more like the right it
9 resembles, like a Brady right, which is not defaulted
10 if you don't raise it -- raise it at trial, for three
11 reasons.
12 First, like a Brady case, a Vienna Convention
13 violation resulting in the exclusion of exculpatory
14 evidence is, by its nature, not known at the time of
15 trial.
16 JUSTICE SOUTER: No, but isn't -- isn't the
17 problem with your analogy that counsel do not advise
18 their clients about Brady rights because, by definition
19 or in the normal case by definition, counsel doesn't
20 know whether there's a Brady violation. But counsel
21 does know or, it seems to me, can properly be charged
22 with knowing that when he's representing a foreign
23 national, the foreign national has a Vienna Convention
24 right, just as much as the foreign national has a
25 Miranda right, and he can advise him of that. So it

1 seems to me the Brady analogy is -- is not apt.

2 MR. STANCIL: A Brady violation is a closer

3 match than a -- for example, a Miranda violation, for

4 the central reason that the consular officer and the

5 foreign national, working together, know best whether

6 to exercise those rights.

7 JUSTICE GINSBURG: But in this case, wasn't

8 it true that the trial counsel knew about the Vienna

9 Convention right and, for whatever reason, thought his

10 client would not be aided by talking to the Honduran

11 counsel -- consul.

12 MR. STANCIL: As an initial matter, it's --

13 it's not perfectly clear in the record. He submitted

14 an affidavit stating that he never advised clients of

15 Vienna Convention violations, but it does not say on

16 this record that he knew at the time of trial about the

17 Vienna Convention.

18 But even granting that he did, the attorney

19 is not in the position to make that decision. This

20 case illustrates why, and this is my second reason why

21 an ineffective assistance claim, Justice Alito, would

22 be insufficient, which is ineffective assistance trusts

23 strategic decisions about whether to invoke a right to

24 the counsel, but the counsel, the lawyer, is not -- is

25 not in a position to make that decision for his client.

1 As this case illustrates, even assuming that the
2 counsel knew about the Vienna Convention right, he
3 said, well, that's more trouble than it's worth. This
4 case illustrates precisely why we don't leave those
5 decisions with the lawyers. First and foremost --
6 JUSTICE ALITO: That may or may not have been
7 ineffective assistance of counsel. But I don't
8 understand why -- if a jurisdiction in this country has
9 a procedural default rule that can be overcome by a
10 showing of cause and prejudice with ineffective
11 assistance of counsel being cause, why isn't that a
12 remedy that is sufficient to give full effect to the
13 treaty, which is what the treaty requires?
14 MR. STANCIL: Because that cuts out an entire
15 category of treaty violations where it may have been a
16 strategic decision by counsel not to raise it, but
17 where that decision is ultimately mistaken. And as the
18 treaty is structured --
19 CHIEF JUSTICE ROBERTS: Well, it's true about
20 the right to remain silent or any other rights that are
21 very much the rights of the defendant, not the rights
22 of the counsel, but they're exercised in consultation
23 with the counsel, and if they make a determination not
24 to contact the consul, then that's a decision that
25 counsel made, and if it's ineffective, there are

1 remedies for that. I'm not sure how it's different
2 than the right to remain silent.
3 MR. STANCIL: Well, I should back up and --
4 and point to the first reason why a lawyer isn't
5 effective in making this decision and -- and first,
6 state that the lawyer here never told Mario Bustillo
7 about the Vienna Convention. So it isn't that
8 situation where he consulted with his client and
9 elected not to raise it. He didn't even tell his
10 client.
11 But more fundamentally, the lawyer operates
12 under inherent conflict of interest. The first thing
13 the consular officer does, when he makes contact with a
14 foreign national, is decide is the lawyer that he has
15 good enough. In fact, it's the only form of consular
16 assistance that's specified in the text of the treaty.
17 In article 36(1)(c), it says to ensure that he can
18 obtain adequate legal representation. So the lawyer,
19 who's deciding whether to get the consulate involved,
20 has to think in the back of his mind, well, is the
21 first word out of this consular officer's mouth going
22 to be, well, you know, fire this guy and get a new
23 lawyer. That's why we don't trust those rights to the
24 lawyer, and that's why the treaty doesn't trust those
25 rights to the lawyer.

1 JUSTICE SOUTER: But once, at least --
2 JUSTICE BREYER: Why -- the ultimate question
3 I think is the one Justice Alito asked. I think, as I
4 read the ICJ treaty, we're under a legal obligation in
5 this country to provide a reasonable, effective remedy.
6 And why isn't that a reasonably effect remedy? Treat
7 it, you know, like any other problem where the client
8 should have learned something and he didn't. If the
9 lawyer is there, this is obligation. The lawyer tells
10 him, and if the lawyer fails to tell him, then that's
11 ineffective assistance in an appropriate circumstance,
12 or if it isn't, it isn't. But that's a good remedy.
13 What's wrong with that?
14 And the other obligation is, counsel, you
15 have to raise this issue as soon as everybody learns
16 about it, in which case you might be out because I
17 don't -- he's certainly learned about it by the time he
18 was on appeal, and as I read your brief here, he didn't
19 raise it on appeal either.
20 MR. STANCIL: I'd -- I'd like to correct that
21 very clearly. As soon as Mr. Bustillo got new counsel
22 on direct appeal --
23 JUSTICE BREYER: Yes.
24 MR. STANCIL: -- he submitted a motion to
25 remand to -- back to the trial court, saying there's a

1 Vienna Convention violation --

2 JUSTICE BREYER: He said -- when I read that

3 motion, which I'll do -- so it's in the record?

4 MR. STANCIL: Yes, sir.

5 JUSTICE BREYER: Where?

6 MR. STANCIL: It's -- the Virginia courts

7 don't paginate the record --

8 JUSTICE BREYER: Do I have it in front of me

9 somewhere?

10 MR. STANCIL: It's in the record, yes, Your

11 Honor.

12 JUSTICE BREYER: Fine, okay. Now, in other

13 words, he did raise it. Okay. If he did raise it,

14 then maybe he would be entitled to this relief.

15 MR. STANCIL: We would have --

16 JUSTICE BREYER: But is -- my general

17 question is, is that approach sufficient under the law?

18 MR. STANCIL: Getting back -- is ineffective

19 assistance sufficient? Yes.

20 JUSTICE BREYER: Say, in an appropriate case,

21 I can't find a rule for every case -- but that our

22 obligation, as interpreted by the ICJ, is that we have,

23 as the law of the land, a treaty that says you tell the

24 person about his Vienna Convention right, and if you

25 don't, now says the ICJ, there has to be some kind of

1 -- of effective remedy. Now, assuming that's the law
2 of the United States, why isn't this approach an
3 effective remedy?
4 MR. STANCIL: Because relying on the lawyer
5 to do the duty of the State does not effectuate the
6 fundamental interest the treaty serves, which is
7 establishing direct contact between the consular
8 officer and the lawyer.
9 JUSTICE SOUTER: But the -- the only thing in
10 -- in the second part of Justice Breyer's question, the
11 only thing that the lawyer has to be relied upon is to
12 get the issue raised at the appropriate point in the
13 trial process. And -- and so, at the very least, what
14 Virginia is -- is arguing here is that he waived it
15 because no objection was raised based upon a prior
16 Vienna Convention failure. That is a very conventional
17 obligation upon lawyers. It -- it's an obligation that
18 goes to Miranda. It's an obligation that goes to any
19 denial of rights of which counsel could or should be
20 charged with knowing, and I don't see why there should
21 be an exception made to -- to that obligation to raise
22 the issue.
23 MR. STANCIL: Leaving aside the conflict of
24 interest that the lawyer would suffer on two additional
25 reasons why the -- why the lawyer is not --

1 JUSTICE SCALIA: Can I come back to the
2 conflict of interest? Was -- was this lawyer a
3 compensated lawyer, or was he a public defender?
4 MR. STANCIL: He was retained.
5 JUSTICE SCALIA: He was retained.
6 MR. STANCIL: Yes, Your Honor.
7 JUSTICE SCALIA: By whom?
8 MR. STANCIL: By the defendant's family.
9 JUSTICE BREYER: There -- there are rules on
10 conflicts of interest too, you know. So following our
11 normal rules, is there any country, is there any
12 international law, is there anything in American law
13 that would suggest, in respect to any kind of
14 significant procedural failure, that the State has to
15 do more than we're just talking about?
16 MR. STANCIL: I'm not sure I --
17 JUSTICE BREYER: And if so, what is it?
18 MR. STANCIL: Is there international
19 authority required --
20 JUSTICE BREYER: Anywhere. I -- I just think
21 --
22 MR. STANCIL: Well --
23 JUSTICE BREYER: -- think for our most severe
24 violations, we provide an approach that you tell the
25 lawyer. The lawyer brings it up. If the lawyer

1 doesn't bring it up and it's important or there's a
2 conflict of interest or something terrible is going on,
3 normally you'd say that's ineffective assistance. And
4 I just wonder if that approach doesn't work here.
5 MR. STANCIL: It does not. First and
6 foremost, it doesn't vindicate --
7 JUSTICE BREYER: Well, I'm not interested in,
8 now at the moment, whether it does or does not work. I
9 want to know if there's any country or anywhere else in
10 American law or international law where people have
11 gone further than that. And there might be. I'm
12 asking it seriously.
13 MR. STANCIL: Well, the -- well, the ICJ has
14 held that you can't rely -- that these procedural
15 default rules are not adequate to vindicate the treaty
16 interests.
17 JUSTICE BREYER: I'm not talking about a
18 procedural default rule. I'm talking about the system
19 that was suggested.
20 MR. STANCIL: In -- in terms of ineffective
21 assistance?
22 JUSTICE BREYER: Yes, the procedural default
23 rule would mean you get procedurally defaulted if you
24 fail to bring it up, but I think you might say if you
25 failed to bring it up the first time that the lawyer

1 knew about it. And if it's his fault for not bringing
2 it up or he should have known about it, then he's out
3 -- the client. But if it's not, he's not out.
4 MR. STANCIL: I believe that actually would
5 not be the practice in civil law countries, for
6 example, where a judge as the inquisitor has much more
7 flexibility than he does in an adversarial system when
8 and whether to consider evidence that may or may not
9 have come in at a certain time.
10 But I'd like to get back to, Justice Souter,
11 your question, with respect to two additional points
12 why the treaty -- and I'm not saying this is our rule
13 -- the treaty says the State has to notify and -- and
14 it doesn't say the lawyer has to notify.
15 JUSTICE SOUTER: No. And I'm not -- I'm not
16 suggesting anything that -- that affects that. Yes,
17 the State does have to notify him, and if he wants, the
18 State has to make the phone call.
19 What I am suggesting is that the lawyer
20 should be taxed with knowing that that is the
21 individual's right. The lawyer should be taxed with
22 knowing that because it's the law of the land. It's a
23 treaty. And -- and it seems to me the obligation is
24 upon the lawyer to say, well, did they -- did they tell
25 you, did they notify the consul, just as the lawyer

1 would say, did you get the Miranda warnings. And --
2 and if the lawyer does not make that inquiry and does
3 not raise an objection, whatever it may be, if in fact
4 the individual didn't get his rights, then I don't see
5 why there should be -- there should not be a waiver
6 with respect to the Vienna Convention objection, just
7 as there is a waiver with respect to a Miranda
8 objection or a search and seizure objection and -- and
9 other constitutional rights.
10 MR. STANCIL: And again, ineffective -- an
11 ineffective assistance claim doesn't give full effect
12 because under this Court's cases, if it's -- if it's in
13 the rubric of ineffective assistance, you leave
14 strategic decisions to the lawyer, and so if --
15 JUSTICE GINSBURG: Well, the problem at the
16 trial level, I think, is you would be -- you couldn't
17 make it at that stage because it's the very lawyer
18 who's ineffective. Here, it was raised by a new
19 counsel on appeal, and that's really the first
20 opportunity it could come up because the -- the lawyer
21 who didn't give this advice certainly isn't going to
22 say, in -- in the course of the trial, I was
23 ineffective. So -- and that's I think the point that
24 the ICJ was trying to make when it said you couldn't
25 use the procedural default rule.

1 MR. STANCIL: Yes, Justice Ginsburg, and in
2 that sense, it's very much like the rule this Court
3 laid down in Federal cases in Massaro where it -- it
4 explained just the practical difficulties associated
5 with requiring claims that need, for example, a
6 prejudice record, and everybody believes that a
7 prejudice showing would need to be made before you
8 could establish a violation.
9 But here, we'd have to -- we have to go back
10 and we need the tools of post-conviction review to
11 establish prejudice. And here, once we got there --
12 this is -- this is not speculation. This is a lawyer
13 made a strategic decision, he says, not to tell his
14 client. And then we tried to raise an ineffective
15 assistance claim, and the court said -- in addition to
16 saying it was barred for other reasons, said that
17 doesn't meet Strickland. This is that category of
18 treaty violations that, if you push these claims to
19 ineffective assistance, they evaporate, and that does
20 not get --
21 JUSTICE KENNEDY: Well, it's the same point
22 we've been covering, but all seem to concede that the
23 particular characteristics of a national system have to
24 be taken into account. And the distinguishing feature
25 of our system is that it's an adversary system. And

1 you're asking us to make an exception to that system --
2 MR. STANCIL: I --
3 JUSTICE KENNEDY: -- an exception to the
4 usual rules that prevail in that system, and that's not
5 consistent with what the treaty requires.
6 MR. STANCIL: Your Honor, it's no more of an
7 exception than Brady, which is exactly the same
8 situation where you have a right that you don't know
9 either the violation has occurred, because they didn't
10 tell him and his lawyer didn't tell him, and you don't
11 know the evidence that could have been developed.
12 Here, once that -- once that missing piece, that one
13 critical part of article 36, direct notification and
14 contact with the consulate, once that key is removed,
15 everything else follows.
16 JUSTICE KENNEDY: Well, but that's because in
17 Brady, as Justice Souter has already pointed out,
18 there's a factual piece of evidence that the State has
19 withheld. Here, the lawyer is presumed to know the
20 law. It's just not an apt analogy.
21 MR. STANCIL: We believe it is, in part,
22 because this is an affirmative obligation on the State.
23 Miranda is a rule, for example, that requires you to
24 say what the -- the rules of the game are and this is
25 how it works. This is different. This is

1 fundamentally different. This says, you've got to tell
2 him individually to go out -- you've got to tell him
3 that he has a right to go out and ask somebody for
4 help, and it gets him access to resources that are
5 uniquely within the possession and control of a
6 consular officer. The government immigration records.
7 The consular -- the lawyer could not have gotten those
8 records. They were crucial to the defense. More
9 fundamentally, the lawyer didn't even know those
10 existed
11 So even if you would assume that an
12 ineffective assistance claim could remedy violations --
13 and -- and we certainly believe this case and a large
14 category of other cases could never be remedied through
15 ineffective assistance claims as a practical matter.
16 Even then, all it does is breed ineffective assistance
17 claim after ineffective assistance claim because the
18 trial lawyer doesn't know what's in the embassy file.
19 JUSTICE SOUTER: Well, maybe after the first
20 ineffective assistance claim is decided in the client's
21 favor, people are going to wake up. I mean, you have
22 to admit at this stage of the game -- and it's not your
23 client's fault, but the -- this is a fairly rare bird.
24 And -- and if, in fact, it were held to be --
25 let's -- let's assume that -- that on -- on collateral

1 review, someone in your client's position made the
2 following claim. Number one, the State didn't tell me.
3 They -- they failed in their Vienna Convention right.
4 Number two, my lawyer never inquired of me or of
5 anybody else whether the State had given me my -- my
6 Vienna Convention rights. And therefore, my -- my
7 lawyer was ineffective. If on collateral review a
8 claim like that is made, it is accepted and prejudice
9 is found, I would imagine the bar is going to wake up
10 fairly fast to what's going on. Don't you?
11 MR. STANCIL: It doesn't seem to be the case.
12 In fact -- and our research has revealed that about 60
13 ineffective assistance claims based on the Vienna
14 Convention violations -- it's ambiguous as to whether
15 there's one or none where the court has granted relief
16 either on prejudice grounds or performance grounds. So
17 litigants have tried, but that just shows what a poor
18 fit ineffective assistance claims are.
19 JUSTICE SOUTER: May I ask you one factual
20 question? And I -- I should know this. I just -- if
21 -- if I did know it, I can't remember it now.
22 Was any ineffective assistance claim raised
23 -- I -- I take it there's no ineffective assistance
24 claim that was ever raised on collateral review here
25 because you've never gotten to a collateral review

1 stage. Is that correct?

2 MR. STANCIL: We did file an ineffective

3 assistance claim in the State habeas petition.

4 JUSTICE SOUTER: But that -- wasn't -- I'm --

5 I'm sorry?

6 MR. STANCIL: The -- the circuit court -- we

7 then tried to amend -- habeas counsel tried to amend

8 the petition to specify an additional -- that to

9 include within that ineffective assistance claim the

10 failure to notify.

11 JUSTICE SOUTER: But you did that on

12 collateral review as opposed to trying to supplement

13 the direct appeal?

14 MR. STANCIL: Yes, Your Honor.

15 JUSTICE SOUTER: Okay.

16 MR. STANCIL: If I may, I'd like to reserve

17 the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.

19 Stancil.

20 Ms. Williams.

21 ORAL ARGUMENT OF MARY H. WILLIAMS

22 ON BEHALF OF THE RESPONDENT IN NO. 04-10566

23 MS. WILLIAMS: Mr. Chief Justice, and may it

24 please the Court:

25 Counsel describes the rule that he asks this

1 Court to announce under article 36 as revolutionary,
2 and I think that's accurate. It would be revolutionary
3 for this Court to construe the article 36 of the Vienna
4 Convention to grant an individual foreign national a
5 right to obtain a judicially created sanction against
6 the State for its failure to provide the information
7 that it is obliged to -- to provide under article 36.
8 No other signatory's court has construed the treaty to
9 permit an individual in a criminal proceeding to raise
10 the kind of challenge that petitioner seeks to raise
11 here, and certainly no other court has suggested that
12 exclusion of lawfully obtained evidence would be the
13 appropriate remedy for that violation.
14 JUSTICE BREYER: Have there been any courts
15 that have held the contrary? Have there been courts
16 that said when somebody wasn't notified and they sought
17 to obtain some remedy for that, that even though the
18 treaty has been violated, you have no remedy under our
19 system?
20 MS. WILLIAMS: There have been only a handful
21 of courts that have dealt with the issue.
22 JUSTICE BREYER: Which are -- which is the
23 best authority abroad for you that -- where they say,
24 no, we're sorry, we give you no remedy, even though we
25 violated the treaty?

1 MS. WILLIAMS: Yes, Your Honor. The -- a
2 Canadian court has said that the -- that there is no --
3 no remedy for -- in a criminal proceeding for that sort
4 of remedy. And there are, in fact --
5 JUSTICE BREYER: That's a holding? They --
6 they held that?
7 MS. WILLIAMS: It is a holding. It's a lower
8 court opinion. It's not the --
9 JUSTICE BREYER: So we have a lower court
10 opinion in Canada, and you -- and they have a lower
11 court opinion in Australia. Is it fair if I come to
12 the conclusion no one has ever really decided this?
13 MS. WILLIAMS: I think that's absolutely
14 fair, and what's --
15 JUSTICE BREYER: All right. If -- then if
16 that's fair, is it fair also for us to say that -- that
17 we have to take this treaty, since it's self-executing,
18 as if it were written into American law?
19 MS. WILLIAMS: I think, though, it is --
20 JUSTICE BREYER: Is that fair?
21 MS. WILLIAMS: Yes, that is fair, but I think
22 it --
23 JUSTICE BREYER: Okay. If that's fair, then
24 suppose you're coming -- suppose the treaty had said --
25 and it's part of American law.

1 MS. WILLIAMS: Yes.

2 JUSTICE BREYER: It didn't say this, but

3 suppose it had. You have to inform this individual,

4 and if you don't inform the individual, you have to

5 give him a remedy so that he is not prejudiced thereby.

6 Now, if it had said that and the State or the Federal

7 Government refused to give him a remedy and it's part

8 of American law, wouldn't we have to say that American

9 law, Federal law, treaty law requires you to do that

10 rather than what you're doing, if it had said that?

11 MS. WILLIAMS: If it had said that --

12 JUSTICE BREYER: Okay.

13 MS. WILLIAMS: -- I would agree with you.

14 JUSTICE BREYER: And once we're there, it

15 seems to me what we're arguing about is not this

16 metaphysical thing about rights. We're arguing about

17 what the treaty says. Now, if that's so, I -- I think

18 we're back to where we were in the last case and say

19 does this treaty or does it not, as a matter of

20 American law, say that the person is entitled to some

21 kind of remedy. And our problem there is that the ICJ

22 has said, yes, it does, but it doesn't mention it, but

23 it does say that you cannot have procedural rights that

24 do not give full effect to the purpose of -- of this

25 section. So where are we?

1 MS. WILLIAMS: I think the starting point is
2 with the text and context of the treaty, and beginning
3 with the preamble that makes it very clear that this
4 treaty, like other international treaties, is an
5 international agreement concerned with the obligations
6 of the signatories, not with any particular granting of
7 rights for the individuals who may benefit from those
8 obligations.
9 And one thing that the preamble makes very
10 clear is that matters not expressly regulated by the
11 provisions of this treaty are left to the rules of
12 customary international law.
13 The only remedy that is discussed as part of
14 the -- the treaty negotiation is the optional protocol
15 that would permit signatories, not individuals, to take
16 a dispute under the treaty to the International Court
17 of Justice. So there is little evidence in the context
18 of the treaty and there is evidence contrary --
19 JUSTICE BREYER: Well, the -- the thing I
20 found stronger the other way, which you can answer, is
21 that ordinarily, I guess, since they quote in one these
22 amicus briefs, since at least 1927 we consider -- our
23 State Department -- the treaties that have obligations
24 are -- also require appropriate enforcement remedies,
25 et cetera. And we have Avena and we have LaGrand, and

1 there the ICJ, as I read it, has said you have to have
2 some kind of remedy, being pretty vague about what kind
3 it is. All right. So normally we follow the ICJ, if
4 we can. Schooner Betsy and go back forever.
5 All right. So why not? Just follow what
6 they say, say there has to be some kind of remedy. And
7 then we put our minds to figuring out what that kind
8 is.
9 MS. WILLIAMS: Your Honor, even following the
10 ICJ opinion in Avena does not get petitioner the relief
11 that he seeks in this Court or that he sought below.
12 It does not get you to suppression of the statements
13 that were made.
14 It's -- it's -- there are a couple of very
15 important things to consider in the Avena decision from
16 the ICJ. They discuss suppression and the exclusionary
17 rule, and they specifically reject Mexico's assertion
18 that there's a connection somehow between the provision
19 of information and -- under the article 36 and the
20 ongoing criminal interrogation. So -- and they also
21 discuss the -- the concept of without delay and what
22 that meant to -- to those who put together the treaty.
23 And it does not mean immediately. So there -- under
24 the ICJ's reading of the treaty, there would not be a
25 basis to suppress the statements that petitioner seeks

1 to suppress in our court.

2 I think --

3 JUSTICE GINSBURG: Is there any other relief

4 sought by the petitioner? There was the suppression

5 request. Was there any other? Was there a request of

6 the kind that the ICJ thought would be appropriate,

7 which was, court, reconsider this and determine whether

8 the defendant was prejudiced by the absence of Vienna

9 Convention notice?

10 MS. WILLIAMS: There -- there was not, Your

11 Honor. The only remedy that petitioner has sought in

12 this case is suppression of the statements.

13 And it's also important, I think, to make the

14 distinction between the Oregon case and the Virginia

15 case. In the Oregon case, it's clear that counsel for

16 petitioner knew about the obligations under article 36

17 and raised them in the motion to suppress. And so

18 there's no question about the State's obligation to --

19 to inform the consul that the -- that petitioner was

20 being detained or any concern with interference with

21 consular access and communication. The only violation

22 that we have in the case is that the State failed to

23 provide the information that it was obligated to

24 provide under article 36.

25 JUSTICE GINSBURG: There's a question I would

1 like to ask you about the State. Now, if everything
2 worked ideally, it would be the police officer, along
3 with the Miranda warnings, says, would you like to call
4 your consulate. You could do that if you wish. If it
5 -- if the State has an obligation to give this
6 information under the treaty, but many police officers
7 don't know anything about any Vienna Convention, do
8 judges, Federal judges, State judges, have an
9 obligation, when they see that an alien defendant is
10 before them, to, on the judge's own motion, ask the
11 prosecutor has he been told about the Vienna
12 Convention, and if not, the judge would have an
13 obligation to do so?
14 MS. WILLIAMS: I think that would be one way
15 to ensure better compliance with our obligations under
16 the treaty. The treaty requires competent authorities
17 to provide the information and doesn't specify exactly
18 who is included and who is not included in that
19 category.
20 Oregon and other States, along with --
21 CHIEF JUSTICE ROBERTS: So State -- you don't
22 have any problem with State judges being enlisted as
23 officers to execute Federal treaty obligations on
24 behalf of the State Department or someone?
25 MS. WILLIAMS: I -- I was hearing the

1 question, I guess, of whether that would be something
2 that judges could do, and I -- and I was responding to
3 -- to that part of it. I don't think that -- that
4 judges are obligated to provide that as a requirement
5 of the treaty. I think it does fall on the State
6 authorities to provide that information.
7 JUSTICE KENNEDY: Can you tell us what the
8 State of Oregon has done in this regard --
9 MS. WILLIAMS: This --
10 JUSTICE KENNEDY: -- or other States?
11 MS. WILLIAMS: We have done a number of
12 things. In 2000, the Attorney General put together a
13 task force that included consular officials, law
14 enforcement officials, jail managers and, working
15 together, devised some better education tools so that
16 -- that there could be more education in terms of the
17 -- the competent authorities who need to provide this
18 information.
19 JUSTICE KENNEDY: Well, how do you think it
20 should -- you think the police officer should give it
21 as part of the Miranda warnings, or what's -- what's
22 your conclusion as to how it should be implemented?
23 MS. WILLIAMS: The State Department has
24 recommended that as soon as it is known that the
25 individual is a foreign national, that the information

1 be given. I think that it is not --

2 JUSTICE KENNEDY: Does this mean that the --

3 the desk sergeant in the police station or who?

4 MS. WILLIAMS: We've actually worked with our

5 jail managers to develop a form that could be used as

6 part of the booking process to provide the information.

7 And the -- I mean, I think the more we do the

8 education, probably the better the compliance will be.

9 But what's important is that we're attempting to do

10 that not because the treaty obligates that sort of

11 immediate notification at the risk of not being able to

12 use evidence obtained in a later criminal proceeding.

13 JUSTICE STEVENS: Well, it does obligate

14 immediate notification to the defendant, doesn't it?

15 MS. WILLIAMS: It says without delay that the

16 information should be provided, but that phrase,

17 without delay, when you look at the prefatory materials

18 and how the ICJ has construed it, doesn't mean

19 immediately.

20 JUSTICE STEVENS: Well, but there are two

21 different without delay points: one, when you tell the

22 -- the defendant; and secondly, whether or not he wants

23 the consulate notified, and there's the second delay.

24 MS. WILLIAMS: And the way the ICJ has

25 construed that, after reviewing the materials, is that

1 the phrase, without delay, means the same thing in the
2 three places that it's used in the treaty. And so
3 there is -- it's not an immediate requirement. There
4 is some time that can pass, and in some countries,
5 there may be considerable time.
6 JUSTICE KENNEDY: So you think it's -- it's
7 not -- it's not required for police interrogators in
8 the station to include this? They can -- they can
9 wait?
10 MS. WILLIAMS: It is not required under the
11 treaty that the advice be given prior to interrogation.
12 That's correct.
13 JUSTICE KENNEDY: Well, how about during the
14 interrogation?
15 MS. WILLIAMS: At some point in a prolonged
16 interrogation, that right is -- that obligation will
17 arise.
18 JUSTICE KENNEDY: I mean, it seems to me it's
19 not like rocket science. You've had study groups and
20 everything. Well, you just tell the policemen give
21 them -- give them the advice. End of case.
22 MS. WILLIAMS: Well, and part of the
23 difficulty is it's not so easy to give simply a simple
24 advice because it's not always clear that someone is a
25 foreign national, and even if there's a suggestion that

1 someone might be --

2 JUSTICE KENNEDY: Well, that's easy. If you

3 are a foreign national, you -- that's easy too. I

4 don't -- I don't see why this is so complicated.

5 MS. WILLIAMS: The other difficulty is that

6 for some foreign nationals, this is not -- this is not

7 the case where the detainee controls the contact with

8 consular officials. We have mandatory notification

9 obligations. So it's important to establish what

10 country the individual is from, and some individuals

11 would prefer that the officials not know what country

12 they are from.

13 JUSTICE SOUTER: I mean, all you've got to do

14 is --

15 JUSTICE KENNEDY: That's their problem.

16 JUSTICE SOUTER: You ask him what his name

17 is. Why don't you ask him whether he's an American

18 citizen? If he says no, say what country are you a

19 citizen of. I mean, I -- I don't see the difficulty of

20 that.

21 MS. WILLIAMS: And certainly we're hoping to

22 move toward better compliance by moving toward that

23 goal. But the question in this case --

24 JUSTICE SOUTER: But, I mean, why does it

25 have to be a distant goal? I mean, it seems easy.

1 MS. WILLIAMS: And I think it gets easier as
2 more cases like this one certainly get the message out.
3 CHIEF JUSTICE ROBERTS: Of course, he doesn't
4 have to answer that.
5 JUSTICE KENNEDY: Your answer -- your answer
6 doesn't give me confidence that you're implementing the
7 treaty.
8 MS. WILLIAMS: But the question is when there
9 is a violation and -- and if it's from lack of
10 education or lack of effort on the State's part to
11 ensure that people understand the obligation, then does
12 the treaty give the individual the right in a criminal
13 proceeding to have that lawfully obtained evidence kept
14 out of the proceeding. And so certainly we can make
15 better efforts to improve compliance with what is an
16 obligation that we have under the treaty, but that
17 doesn't take this Court to suppressing the evidence in
18 the criminal proceeding, and that's what petitioner has
19 sought from the Court.
20 JUSTICE STEVENS: A little while ago you were
21 asked about the judge asking whether or not to ask the
22 defendant if the advice was given him. And the
23 suggestion was made there's no duty on the State judge
24 to enforce a Federal treaty, but if it's a matter of
25 Federal law, why wouldn't it be a duty to -- on the

1 judge to obey Federal law if -- if it is part of our
2 Federal requirement?
3 MS. WILLIAMS: I think the question would
4 come down to whether the judge falls in the category of
5 competent authorities under the treaty, and I'm not
6 sure how that would be construed, whether it would be
7 construed to include the judge or if it's primarily
8 focused on the -- the State government officials who
9 would be involved in the -- the criminal proceeding.
10 Unless the Court has further questions, thank
11 you.
12 CHIEF JUSTICE ROBERTS: Thank you, Ms.
13 Williams.
14 Mr. Thro.
15 ORAL ARGUMENT OF WILLIAM E. THRO
16 ON BEHALF OF THE RESPONDENT IN NO. 05-51
17 MR. THRO: Mr. Chief Justice, and may it
18 please the Court:
19 The Vienna Convention does not create
20 judicially enforceable individual rights.
21 Nevertheless, if this Court were to hold that it does
22 create individual rights, those treaty claims should
23 not be treated more favorably than constitutional
24 claims.
25 In Virginia, if a criminal defendant has a

1 Miranda claim or a Fourth Amendment claim and fails to
2 raise it at trial, he may not raise it on collateral
3 review. The same reasoning should apply with respect
4 to any violation of the Vienna Convention. There's no
5 reason to elevate a treaty claim above a Miranda claim
6 or a Fourth Amendment claim.
7 JUSTICE SOUTER: Does -- does -- would
8 Virginia allow the -- a claim of ineffective assistance
9 of counsel to be raised on collateral review for
10 failure of counsel to -- to advise the client or take
11 action on the client's behalf under the Virginia
12 Convention -- the Vienna Convention during -- during
13 the -- the direct proceedings?
14 MR. THRO: Yes, Your Honor. If -- if this
15 Court were to announce a new rule that the Vienna
16 Convention confers individual rights, and if counsel
17 failed to raise that at trial, and if that failure
18 constituted ineffective assistance under the standard
19 articulated in Strickland v. Washington, then it would
20 be permissible for that criminal defendant to raise it
21 in his collateral review. Yes.
22 And in fact, Mr. Bustillo attempted to raise
23 an ineffective assistance of counsel claim, did raise
24 an ineffective assistance of counsel claim in the State
25 trial court. That claim was denied, and for whatever

1 reason, he chose not to appeal that to the Virginia
2 Supreme Court.
3 JUSTICE BREYER: I have a couple --
4 CHIEF JUSTICE ROBERTS: There was a State
5 collateral review?
6 MR. THRO: Yes. It was on State collateral
7 review, Your Honor.
8 JUSTICE BREYER: -- thinking of the wrong
9 thing, but it seemed to me I have a couple of opinions
10 here on habeas, State habeas, where they did raise it.
11 Am I thinking of the other case?
12 MR. THRO: It -- it was raised in the -- in
13 the State trial court, Your Honor.
14 JUSTICE BREYER: And -- and not on --
15 MR. THRO: But -- but what was -- and the
16 State trial court chose to deny the ineffective
17 assistance of counsel claim on a variety of reasons,
18 and it was chosen -- he chose not to appeal that to the
19 Supreme Court of Virginia.
20 JUSTICE GINSBURG: I thought the first time
21 it was raised was on direct appeal by appellate
22 counsel.
23 MR. THRO: Appellate counsel on direct appeal
24 attempted to raise it. He filed a motion requesting a
25 -- a remand. That motion was denied as -- as improper.

1 Then in -- once the conviction had been
2 affirmed by the Virginia Court of Appeals, by the
3 Supreme Court of Virginia, and review had been denied
4 by this Court, he went back and filed a collateral
5 review claiming ineffective assistance of counsel for,
6 among other things, failure to raise the Vienna
7 Convention. The trial court denied that ineffective
8 assistance of counsel claim, and then there was no --
9 and then the decision was made not to pursue that --
10 the appeal of the denial of the ineffective assistance
11 of counsel claim to the Supreme Court of Virginia.
12 JUSTICE GINSBURG: And the reason for the
13 denial?
14 MR. THRO: There were several reasons for the
15 denial, one of which was statute of limitations, but
16 the court also noted that even if it had been made
17 within the statute of limitations, there was no merit
18 to it.
19 The record reflects, Your Honor, that Mr.
20 Bustillo's retained trial counsel was fully aware of
21 the Vienna Convention claim. In fact, he was the son
22 of Salvadoran diplomats and was familiar with Vienna
23 Convention issues. He made a strategic decision that
24 it would be better to -- to contain his client and to
25 contain the amount of people talking to his client and,

1 therefore, he should not raise the Vienna Convention
2 issue at trial. And that is set forth in the affidavit
3 of retained counsel, set forth on pages 318 through 319
4 of the habeas record in the Fairfax County Circuit
5 Court.
6 JUSTICE GINSBURG: I think that counsel said
7 that the -- the people at the consulate -- they tend to
8 talk a lot?
9 MR. THRO: Yes, he -- yes, he did, Your
10 Honor, and having grown up as the son of diplomats, he
11 was obviously familiar with diplomats and their
12 behavior in social settings. And it was feeling and
13 his strategic view that his client was better off not
14 raising and not contacting the consulate.
15 But, again, this goes back to the basic point
16 that Justice Kennedy raised earlier. In America, we
17 give all criminal defendants, regardless of
18 nationality, a lawyer to represent them. We charge
19 that lawyer with knowing their rights and with
20 vindicating their rights, with making the objections
21 necessary to vindicate Miranda rights, with making the
22 necessary objections with respect to the Fourth
23 Amendment.
24 The Vienna Convention should be no different.
25 If this treaty does, in fact, create judicially

1 enforceable individual rights, then the attorneys who
2 are appointed or to represent these people will know
3 about that and will be responsible for vindicating.
4 That's how we do things in the American system.
5 JUSTICE BREYER: So then the -- then the only
6 question really is this thing that I find metaphysical,
7 and maybe you can explain it. To start talking about
8 the individual rights that -- enforceable, that sounds
9 to me like a -- you know, a case that arises under 1983
10 or something. But I thought we don't need that
11 concept. We all agree that -- that this -- this is the
12 law of the United States. It's self-executing. And
13 the only question is whether the action here violates a
14 provision of the treaty, which is the law of the land.
15 What else is there?
16 And -- and the only thing I read that the ICJ
17 said, it said, by the way, I'll tell you what kind of
18 procedural rule you can't have. You can't have a
19 procedural rule that says after you failed to inform
20 him of the right and after he's unbelievably
21 prejudiced, you say he can't raise it because he didn't
22 raise it before he could possibly have found out about
23 the right. That would be self-defeating. So you can't
24 have that kind of a rule.
25 Now, do you agree with that?

1 MR. THRO: No. No, Your Honor. We --
2 JUSTICE BREYER: You explain to me where I --
3 where I --
4 MR. THRO: Well, I will certainly attempt to
5 do so.
6 I -- I think the flaw in the ICJ's reasoning
7 is failure to recognize that in the United States all
8 criminal defendants are -- are given an attorney, and
9 that that attorney is charged with providing
10 constitutionally effective assistance of counsel,
11 meaning being aware of all of the constitutional rights
12 and all of the Federal and State statutory, presumably
13 Federal -- Federal treaty rights as well.
14 There's no doubt that no Virginia official
15 informed Mr. Bustillo of his opportunity to contact the
16 consulate, but it is also clear that his retained
17 counsel knew of it and chose not to pursue it. Now,
18 that may or may not be ineffective assistance of
19 counsel, but it does not justify setting aside the
20 State's procedural bars on collateral review, which
21 would apply for a Miranda violation or a Fourth
22 Amendment violation.
23 I would also note, Your Honor, that the
24 United States is unique in the world in having the
25 extensive system of collateral review for criminal

1 convictions. Most of the rest of the world doesn't
2 have a method of collateral attack. So if the rest of
3 the world doesn't have to have a method of collateral
4 attack, it seems rather disingenuous to suggest that
5 the United States has to modify our rules of collateral
6 attack in order to accommodate the treaty.
7 CHIEF JUSTICE ROBERTS: Is -- is a defense
8 counsel a competent authority under the treaty for the
9 purposes of notifying the accused?
10 MR. THRO: I -- I don't think that -- that he
11 is, Your Honor. However, the -- a defense counsel
12 would be, if this Court were to announce a new rule --
13 would be charged with the knowledge and, therefore,
14 could I think correct any error that may have been made
15 by the failure of the local officials or the national
16 officials to inform the criminal defendant of his
17 opportunity to contact the consulate.
18 JUSTICE STEVENS: You know, one thing I find
19 difficulty understanding in this case is I just can't
20 understand how a lawyer thought it would be to his
21 client's advantage not to consul -- not to tell the
22 consul because the facts are quite persuasive that he
23 really was severely prejudiced by the fact he didn't
24 get all the help he could have gotten.
25 MR. THRO: Your -- Your Honor, I would refer

1 -- I -- the only thing in the record is the affidavits
2 of -- of the retained counsel. He made that as a
3 strategic judgment. Obviously --
4 JUSTICE STEVENS: How -- how could he make
5 such a judgment? I just don't understand it. You know
6 --
7 MR. THRO: I --
8 JUSTICE STEVENS: Because the prejudice is
9 just stark in -- in this case. It just stands out and
10 -- and you just wonder what was going on here.
11 MR. THRO: Well, with all due respect, Your
12 Honor, we would disagree as to whether -- as to the
13 extent of the prejudice. I believe that his affidavit
14 in -- both with respect to the Vienna Convention claim
15 and his previous affidavit with respect to just other
16 varieties of ineffective assistance of counsel claims,
17 indicates that he had some concern about the
18 credibility of some these witnesses who were
19 identifying Mr. Sirena.
20 But in any event, he made that strategic
21 judgment. The trial court said that it was not
22 ineffective assistance of counsel, and for whatever
23 reason, that judgment was not appealed to the Virginia
24 Supreme Court.
25 CHIEF JUSTICE ROBERTS: You know, that's kind

1 of a tough position to put the lawyer in. If he's not
2 a competent authority for notification purposes and he
3 makes the judgment that, you know, I don't think it's
4 going to do any good to notify the consulate, wouldn't
5 he be better advised not to tell his client about it?
6 Because if he does, then it's, I guess, harmless error
7 that the State hasn't notified him, and if he doesn't,
8 it's kind of an ace in the hole. You see how the trial
9 goes, and at the end say, by the way, the State never
10 notified my client.
11 MR. THRO: That's perhaps so, Your Honor, and
12 that's one thing -- thing that, whatever rule you
13 craft, you need to be very careful of and that is
14 preventing gamesmanship on -- on the part of attorneys
15 and criminal defendants so that these Vienna Convention
16 claims are not raised after the fact, which is another
17 reason to -- to --
18 CHIEF JUSTICE ROBERTS: It's kind of like a
19 speedy trial claim. Right? I mean, if the lawyer knows
20 he has a right to a trial within a certain number of
21 days, and he doesn't -- it's not his obligation to
22 notify the State. He just kind of watches the clock
23 and lets the clock run out, and then he has a claim
24 based on that. Right?
25 MR. THRO: Yes, Your Honor, he would.

1 JUSTICE STEVENS: Of course, that might be
2 likely if there had been a history of these claims
3 being successful, but none has ever prevailed. So I
4 doubt if that would be very -- very good to figure you
5 can, you know, save your -- your key argument that has
6 no precedent of winning.
7 MR. THRO: Yes, Your Honor, and that would
8 obviously -- if this Court announced a new rule, then
9 that would perhaps change the thing.
10 If there are no further questions, thank you.
11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Thro.
12 Mr. Garre.
13 ORAL ARGUMENT OF GREGORY G. GARRE
14 ON BEHALF OF THE UNITED STATES,
15 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS
16 MR. GARRE: Thank you, Mr. Chief Justice, and
17 may it please the Court:
18 The failure to inform a foreign national that
19 his consulate may be notified in the event of his
20 arrest gives rise to a treaty violation between
21 sovereign sates, but it does not give rise to an
22 individually enforceable right. That follows from the
23 text of the Vienna Convention and its ratification
24 history --
25 JUSTICE BREYER: I wonder what that means.

1 Suppose that the treaty provides that if the individual
2 sends a letter to the counsel, they have to deliver it.
3 Doesn't it?
4 MR. GARRE: It does, Your Honor.
5 JUSTICE BREYER: Well, suppose a sheriff
6 somewhere grabs the letter, keeps it, and the counsel
7 sues him under State property law. And State property
8 law, they say, entitles me, says the counsel, to this
9 letter. It's mine. It was sent to me. Now, if that
10 happens to be the interpretation of the judge in the
11 State of X the sheriff can keep the letter, wouldn't
12 you say that that property law of the State is invalid
13 in light of this provision of the treaty, which is the
14 law of the United States self-executing?
15 MR. GARRE: I think in that situation you
16 would have -- you wouldn't be asserting an individual
17 right under the treaty. You ultimately --
18 JUSTICE BREYER: No. I just would like an
19 answer to my question.
20 MR. GARRE: There could be situations --
21 JUSTICE BREYER: No. I've given you the
22 straight facts. The straight facts are they sue -- I
23 don't have to repeat them. I want to know under --
24 under my straight facts, wouldn't you say that -- you
25 got the question.

1 MR. GARRE: The straight -- I think the
2 answer would be is you would have a treaty violation if
3 you had a State law which prevented our Nation from
4 giving effect to our obligations under the Vienna
5 Convention --
6 JUSTICE BREYER: But I'm not saying a treaty.
7 I'm saying there's a letter and wouldn't it be the
8 case that the judge would have to say, here, Mr.
9 Sheriff, you take the letter and you hand it to the
10 counsel? It's his property.
11 MR. GARRE: If they were asserting a cause of
12 action under State property law and that were the
13 result, then yes.
14 JUSTICE BREYER: That's correct.
15 MR. GARRE: That would be the case, Your
16 Honor.
17 JUSTICE BREYER: Okay, fine.
18 MR. GARRE: But -- but --
19 JUSTICE BREYER: And now what they're doing
20 here is they're saying we have a cause of action. It's
21 called habeas corpus. And we're asking for a rule of
22 decision in that cause of action, and the rule of
23 decision in this cause of action, just like mine, was
24 in property. Is the decision -- the rule of decision
25 is the rule written into the treaty, just like in the

1 property case, and you cannot do anything that
2 contravenes it though, of course, you can argue about
3 the content of that rule of decision.
4 MR. GARRE: In these -- in these two cases --
5 one you have on Federal habeas, one you had on direct
6 appeal -- individuals are seeking to affirmatively
7 invoke rights that they claim that they can enforce
8 under the Vienna Convention, and we don't think that
9 the Vienna Convention confers those individual rights.
10 If -- if I could try to explain the -- the --
11 what you referred to as a metaphysical question
12 earlier. We agree that the Vienna Convention, as a
13 self-executing treaty, is part of our Federal law.
14 JUSTICE ALITO: But is there a difference
15 between the rights that could be asserted by the consul
16 or a consulate official and the rights that could be
17 asserted by a criminal defendant?
18 MR. GARRE: I don't think so, Justice Alito.
19 The -- the treaty has an enforcement mechanism, and
20 that's -- that's an important thing to keep in mind.
21 The -- the signatories to this treaty permitted for a
22 judicial enforcement mechanism.
23 JUSTICE ALITO: And if a consulate official
24 knew that a national of that country was being detained
25 and wanted access to that person and that was being

1 denied by -- by the State officials, there would be no
2 remedy in Federal court? The consulate -- the foreign
3 country could not obtain -- could not get Federal
4 enforcement of that right to get access?
5 MR. GARRE: That's right, Justice Alito. The
6 remedy would be the traditional remedy for enforcement
7 of treaties, diplomatic repercussions, diplomatic
8 protests, and that happens all the time. That happens
9 in this country where a -- where consulates complain to
10 the United States State Department. It happens
11 overseas where the State Department complains about the
12 treatment of American citizens. This -- this --
13 CHIEF JUSTICE ROBERTS: Are there any
14 countries that recognize individually enforceable
15 rights under this convention overseas on behalf of
16 American citizens?
17 MR. GARRE: No, Your Honor, and what -- the
18 petitioners and their amici here are asking this Court
19 to be the first court to recognize an individually
20 enforceable right under this treaty.
21 JUSTICE SCALIA: What about that Australian
22 case that was mentioned, I believe one case where at
23 least --
24 MR. GARRE: Well, Your Honor --
25 JUSTICE SCALIA: -- evidence was excluded?

1 That would have been a --

2 MR. GARRE: There -- there is Australian

3 authority going directly to the contrary. It's -- it's

4 the R. v. Abbrederis case which we cite, which -- which

5 recognizes that the article 36 is individually

6 enforceable.

7 The -- the other cases that are referred to

8 by some of petitioners' amici are -- are addressed at

9 length in the Criminal Justice Legal Foundation amicus

10 brief. And they explain that in those situations,

11 there -- first of all, the cases are a little bit vague

12 as to which provisions they're purporting to enforce.

13 But, second of all, there are domestic statutes which

14 we think that the correct reading of the cases is in

15 those cases they were giving effect to the domestic

16 statutes.

17 There's certainly no -- no unambiguous

18 example that --

19 JUSTICE BREYER: I imagine there's not --

20 there's some little authority both ways. To put it in

21 my perhaps -- I know you disagree with this way of

22 thinking about it. But I'm -- I'm thinking about this

23 article 36 and thinking that you're reading it as if it

24 said, inform the individual, but if you don't, he can't

25 do anything about it. And the other way is to read the

1 silence as if it said, inform the individual, but if
2 you don't, he can do something about it. We're not
3 saying what. Okay.
4 Now, between those two interpretations, we
5 have the ICJ picking interpretation two and rejecting
6 interpretation one in, I grant you, a different case.
7 But I guess since a lot of these amicus briefs tell us
8 throughout history, a long history, we've tried to
9 follow ICJ interpretations of treaties to which we are
10 parties. Why -- it's all up to us, but we've tried to.
11 Why -- why should we not, given the two possible
12 interpretations -- they choose one. Why should we not
13 choose to follow theirs here?
14 MR. GARRE: Because, to be blunt, the ICJ
15 decision is wrong. This Court gives respectful
16 consideration to the decisions of the ICJ and other
17 international tribunals, but it's certainly not bound
18 by those decisions. This Court should look carefully
19 to the text of the treaty itself, to the ratification
20 history, to the consistent interpretation of the
21 executive branch, and to implementing practice in other
22 states.
23 At best, they -- petitioners and their amici
24 have suggested that there's some ambiguity in -- in two
25 states, Australia and Great Britain. There are more

1 than 160 contracting states to this -- to this treaty.
2 JUSTICE BREYER: Well, then you're going back
3 to putting weight on the absence of authority. In
4 those contracting states, most of which I guess are
5 civil system states, and in civil systems, you'll have
6 magistrates who do take this kind of thing into
7 account, but you won't find a case on it. So -- so --
8 MR. GARRE: What you don't --
9 JUSTICE BREYER: -- are there authorities in
10 these other states to the contrary? I'm surprised if
11 there is.
12 MR. GARRE: There are authorities that we've
13 cited where courts have rejected the notion that
14 article 36 creates individually enforceable rights, in
15 Canada and Australia, and there's a case in Germany
16 where they refused to provide for a suppression remedy.
17 So there are authorities going the other way.
18 The manner in which this treaty is
19 implemented by the State Department overseas and by the
20 State Department here is to provide for enforcement
21 through the traditional means. This Court, as long
22 back as the Head Money Cases, said that the traditional
23 -- treaties are compacts between states. The
24 traditional means of enforcing those obligations is
25 through diplomatic repercussions.

1 JUSTICE KENNEDY: In your view, just as a
2 practical matter, what we have here, how -- how should
3 the States enforce this obligation?
4 MR. GARRE: Well, the States should enforce
5 it generally by giving information to the detainee at
6 the point in time when they realize -- determine that
7 he's a foreign national. The State Department is
8 engaged in extensive --
9 JUSTICE KENNEDY: Do they have any obligation
10 to inquire whether he is? And -- and can you be more
11 specific? Should it happen --
12 MR. GARRE: Generally --
13 JUSTICE KENNEDY: -- when you first give him
14 the Miranda warnings, or tell me how you think it
15 should work?
16 MR. GARRE: Generally it happens during the
17 arrest process. If -- if, during the course of
18 questioning, they determine that a detainee or arrestee
19 is a foreign national, then at that point in time,
20 generally they would provide consular notification.
21 The State --
22 JUSTICE KENNEDY: Do you think they have the
23 affirmative obligation to ask him if he is a foreign
24 national?
25 MR. GARRE: The State Department advises law

1 enforcement officers at the Federal and State and local
2 level that ordinarily they should make that
3 determination.
4 CHIEF JUSTICE ROBERTS: If they don't -- if
5 they can't ask him -- I mean, I assume many foreign
6 nationals are detained fairly close to the border, and
7 if you start saying, well, my first question is, are
8 you a citizen or not, you've got to give Miranda
9 warnings first saying you don't have to answer any
10 question that might incriminate you.
11 MR. GARRE: That's right.
12 CHIEF JUSTICE ROBERTS: It's kind of a catch
13 22.
14 MR. GARRE: That's right, Mr. Chief Justice.
15 And many foreign nationals are reluctant to provide
16 information about their citizenship because they fear
17 that that could result in other legal jeopardy.
18 Importantly, Justice Kennedy, article 36 is
19 in no way an interrogation right. It has no connection
20 to interrogation. The International Court of Justice
21 in the Avena decision, at page -- at paragraph 87,
22 specifically made that point, that this was not related
23 to interrogation. In many European countries,
24 detainees who are arrested not only can't have access
25 to consular officials during questioning, they don't

1 even have access to lawyers during questioning. So --
2 so this --
3 JUSTICE KENNEDY: Well, I thought you
4 indicated that you advise the States that they do have
5 to advise him of this right during the booking process
6 or the interrogation.
7 MR. GARRE: Well, when they -- when they
8 learn that the person is a foreign national.
9 Oftentimes, that could happen -- that could happen
10 during questioning, although oftentimes it doesn't. It
11 could happen at booking. It could happen later in the
12 process. That's what the State Department advises law
13 enforcement officials.
14 The State Department has engaged in extensive
15 efforts to ensure compliance with this treaty in order
16 to abide by our international obligations. We -- we
17 have sent information to State and local law
18 enforcement officers how to comply with this treaty.
19 There have been training videos. There have been cards
20 similar to Miranda cards. More than 600,000 of those
21 cards have been sent out to local officials, and -- and
22 the initial indications that we've received is that
23 these efforts are working. In fact, these indicate --
24 these efforts are -- are outlined in the Hardy
25 affidavit, which is in volume II of the Counter

1 Memorial and Avena decision, which we've offered to
2 lodge with the Court.
3 But -- but we -- the feedback we've gotten is
4 that in some offices, they're being overwhelmed by
5 notifications. So the United States is seeking to
6 abide by its treaty obligations. Those efforts are
7 working.
8 This --
9 JUSTICE GINSBURG: Has it worked the other
10 way around when a young American citizen is detained in
11 -- in a jail someplace abroad, and has the United
12 States ever then -- what efforts have been made?
13 MR. GARRE: Your Honor, the efforts that we
14 undertake are diplomatic efforts. We do not go into
15 foreign courts and assert or suggest that American
16 citizens should go into foreign courts and assert a
17 right to individually enforce this treaty either
18 through suppression or any of the other remedies that
19 have been suggested.
20 JUSTICE GINSBURG: Has it worked anyplace?
21 Take Mexico, Turkey, any country you'd like.
22 MR. GARRE: Yes, Your Honor. In fact, during
23 the 1980's the United States complained to Mexico about
24 the fact that American citizens had not received
25 consular notification, and through the result of those

1 diplomatic discourses, they negotiated an -- a
2 agreement whereby American citizens were brought back
3 to the United States for custody. But significantly
4 there, the -- the United States didn't take the
5 position that those convictions were unlawful or could
6 be set aside under the Vienna Convention. They simply,
7 through diplomatic discourse, the traditional means of
8 enforcing a treaty, provided for the -- the transfer of
9 these citizens back to the United States to serve out
10 their custody.
11 The -- the traditional rule in international
12 law is that treaties don't create individually
13 enforceable rights. Many treaties, by their terms, do
14 expressly contemplate private enforcement in domestic
15 courts. Look at article 28 of the Warsaw Convention.
16 Look at article 2, subsection 3 of the International
17 Covenant on Civil and Political Rights. These treaties
18 do expressly contemplate that theirs -- their
19 provisions will be individually enforceable in the
20 domestic courts. It would have been --
21 JUSTICE SOUTER: When you say they -- they
22 contemplate it, how do they express that contemplation?
23 I mean, are -- are there magic words that diplomats
24 understand or -- or what?
25 MR. GARRE: Your Honor, they refer to rights

1 that individuals can assert or should be able to assert
2 in judicial courts, in the domestic courts.
3 JUSTICE SOUTER: But they -- they provide
4 expressly that these are rights that may be asserted
5 individually in national courts?
6 MR. GARRE: There -- Your Honor, there are
7 varying degrees of specificity, but yes, they -- in
8 some cases they do provide for that explicitly.
9 JUSTICE SOUTER: But they -- they go beyond
10 the reference to rights as -- as in article 36.
11 MR. GARRE: Yes. They -- they refer to
12 domestic enforcement.
13 JUSTICE BREYER: Do they, in all those
14 property cases, you know, from like the early part of
15 this republic where property law was determined in
16 accordance with -- you know all those cases that are
17 cited.
18 MR. GARRE: Right.
19 JUSTICE BREYER: In those treaties where the
20 courts then looked to the treaty to help decide who
21 owned what property, they used it as a rule of
22 decision. Do those cases -- treaties all use the word
23 individually enforceable rights?
24 MR. GARRE: They didn't, Your Honor, but
25 those treaties, as we explain in our brief, are dealing

1 with commercial relations, property rights, and -- and
2 are almost entirely dealing with individuals and how
3 they should be treated in foreign states, are much more
4 amenable to a construction that they create
5 individually enforceable rights. And the Vienna
6 Convention, which after all is a convention about the
7 quintessential matter of interstate relations, consular
8 functions between states -- we don't think that that
9 treaty can be interpreted to confer individually
10 enforceable rights.
11 JUSTICE BREYER: Where does this term come
12 from as applied to a rule of decision? I mean, when
13 somebody is arguing that the treaty should apply a rule
14 of decision in a case brought under some other cause of
15 action, what's the best thing I could read? I'm not an
16 expert.
17 MR. GARRE: Your Honor --
18 JUSTICE BREYER: You say the way to think
19 about that --
20 MR. GARRE: -- read --
21 JUSTICE BREYER: -- is the, quote,
22 individually enforceable rights.
23 MR. GARRE: We would suggest read the treaty.
24 It's -- it's -- we agree with you that you get back to
25 the treaty and you have to make the determination that

1 the signatory states to the treaty intended for private
2 enforcement in domestic courts.
3 The signatory states to this treaty provided
4 for a very limited judicial enforcement mechanism, only
5 contracting states that join the optional protocol and
6 only in the ICJ. It would have been an extraordinary
7 thing for those contracting states that so carefully
8 limited that remedy to -- to subject themselves to suit
9 in their own courts to any number of foreign nationals
10 who went abroad into their countries.
11 JUSTICE SOUTER: Well, I -- I would agree
12 there, but we're not -- this -- this isn't a case about
13 subjecting them to suit.
14 MR. GARRE: What you -- what you -- what
15 they're asking you to do, Your Honor, is to say that
16 this treaty is individually enforceable in our courts.
17 JUSTICE SOUTER: Well, yes, but -- but that
18 is -- that's not equivalent to saying that it's -- it
19 is subjecting the United States to suit.
20 MR. GARRE: May I answer the question?
21 CHIEF JUSTICE ROBERTS: Yes.
22 MR. GARRE: It is, Your Honor, insofar as if
23 you think it in waiver of sovereign immunity terms. A
24 state may waive its sovereign immunities from some
25 types of claims, but not other types of claims. And

1 what they're claiming here is that these claims are
2 enforceable, and we think that they are incorrect.
3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Stancil, you have 4 minutes remaining.
5 REBUTTAL ARGUMENT OF MARK T. STANCIL
6 ON BEHALF OF THE PETITIONER IN NO. 05-51
7 MR. STANCIL: Thank you. I'd like to first
8 briefly address two points on behalf of Mr. Sanchez-
9 Llamas.
10 First, with -- with respect to him, the
11 question is how to give full effect to the treaty in
12 the context of custodial interrogation, and his
13 position is that suppression is necessary to give full
14 effect. And we need look no further than the fact that
15 the custodial -- that the remedies that are currently
16 afforded in a context of custodial interrogation are
17 ineffective.
18 And secondly, admitting evidence encourages
19 violations, and that's been the -- the result that's
20 been a constant pattern and practice of violations.
21 If I could switch back to Mr. Bustillo's
22 case, and I'd like to address what Mr. Garre just said,
23 which is that there's a presumption or that -- that
24 treaties don't create individually enforceable rights.
25 Every decision of this Court is unambiguously

1 clear. Where you have a treaty that becomes part of
2 the domestic law -- here it is. Where that treaty
3 creates rights -- here the treaty says his rights. And
4 third and critically, where you have a cause of action
5 to enforce those rights, it is judicially enforceable
6 as a matter of domestic law. Regardless of the
7 international dimension of the treaty, as a matter of
8 domestic law, it is enforceable.
9 CHIEF JUSTICE ROBERTS: But it refers to his
10 rights, to make it clear that the consular office does
11 not have the right to contact him in the situations
12 where he would prefer not to be contacted by his
13 consul.
14 MR. STANCIL: I disagree, Your Honor. If --
15 if you look at the treaty's text, it says, you shall
16 notify the person affected of his rights. It's
17 referring to the foreign national specifically. And
18 twice more, article 36(2) talks about the rights that
19 are created. These all flow directly to the foreign
20 national. He decides whether to exercise them. This
21 is a classic rights-creating piece of -- it's not a --
22 it's not a statute, but it's treated on par.
23 And if you look at the --
24 JUSTICE SCALIA: I -- I thought you said the
25 third condition was creation of a cause of action.

1 MR. STANCIL: Availability of a cause of
2 action. Here --
3 JUSTICE SCALIA: Where -- where is that in
4 this statute?
5 MR. STANCIL: The Virginia habeas statute
6 provides a cause of action if you are held in violation
7 of Federal law, and in Sanchez-Llamas, the cause of
8 action is the criminal prosecution. That's what the
9 Court did in Rauscher where it allowed him to --
10 JUSTICE SCALIA: You meant the statute has to
11 create a cause of action.
12 MR. STANCIL: The cause of action, just like
13 1983, allows --
14 JUSTICE SCALIA: I mean, the -- the treaty
15 has to create a cause of action.
16 MR. STANCIL: That's not correct. Just like
17 1983 has to create a cause of action to vindicate
18 Federal rights, here --
19 CHIEF JUSTICE ROBERTS: Well, 1983 is a good
20 example. If you have a -- a treaty between a State and
21 the Federal Government, a Spending Clause provision,
22 that says you've got to spend the money this way, give
23 certain rights to the individuals, we don't always
24 automatically hold that the individuals have
25 enforceable rights even under 1983.

1 MR. STANCIL: Not automatically, but if you
2 have a statute that said his rights and refers rights
3 and makes it his obligation and his decision whether to
4 invoke them, it would be classic rights-creating.
5 If I --
6 CHIEF JUSTICE ROBERTS: It said his rights in
7 Gonzaga v. Doe, which dealt with the student privacy
8 rights act, and we held -- and the -- we -- the Court
9 held that that was -- did not give rise to individually
10 enforceable rights.
11 MR. STANCIL: I would -- I would compare the
12 language of article 36(2) to any of the rights cases
13 this Court has decided.
14 If I could, in my remaining minute, describe
15 why -- and this goes to the heart of what we were
16 talking about with the procedural bar. If the question
17 is, as Justice Breyer put it, whether pushing these
18 claims to ineffective assistance is self-defeating, we
19 have ample evidence here that it is. The State says,
20 well, it may or may not be ineffective assistance. The
21 State court said it wasn't ineffective assistance.
22 That's because trial counsel doesn't have unique
23 experience and knowledge necessary to make these
24 decisions. That's why the treaty expressly puts it in
25 the hands of the foreign national to make these

1 decisions, not the lawyer.

2 And, with respect, if -- if -- the State has

3 asserted that we haven't raised an ineffective

4 assistance claim. We did -- we did recharacterize in

5 the Virginia Supreme Court, on pages -- page 203, note

6 4 of the joint appendix, that if you wanted to flip all

7 this on its head, you could certainly -- you would

8 certainly have to conclude that he created -- that he

9 committed ineffective assistance of counsel.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.

11 Stancil.

12 MR. STANCIL: Thank you.

13 CHIEF JUSTICE ROBERTS: The case is

14 submitted.

15 (Whereupon, at 11:30 a.m., the case in the

16 above-entitled matter was submitted.)

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