U.S. Department of Justice

Criminal Division

10-CR-A

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 25, 2010

The Honorable Richard C. Tallman
Chair, Advisory Committee
on the Criminal Rules
United States Court of Appeals
902 William K. Nakamura Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1195

Dear Judge Tallman:

The Department of Justice recommends two amendments to Rule 5 of the Federal Rules of Criminal Procedure. We view the proposed amendments to be necessary in order to better equip the federal courts to deal with unique aspects of the international extradition process and to ensure that the treaty obligations of the United States are satisfied.

First, we recommend that Rule 5 be amended to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. Second, we recommend that Rule 5 (as well as the corresponding Rule 58) also be amended to require federal courts to inform a defendant in custody, at the initial court appearance, that if he is not a citizen of the United States, an attorney for the government or federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest.[1] The proposed amendments are important to assist federal courts in dealing with unique aspects of the international extradition process and to ensure that foreign defendants arrested pursuant to U.S. charges receive the notifications to which they are entitled pursuant to the obligations of the United States under the multilateral Vienna Convention on Consular Relations ("the Vienna Convention"), or other bilateral agreements.

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[1] In some cases, pursuant to a bilateral agreement between the United States and a foreign country, consular officials must be notified of the arrest or detention regardless of the national's wishes. Those "mandatory notification" countries are designated in the State Department public website at http://travel.state.gov_notify.html.

1. According to longstanding practice, persons who are charged with criminal offenses in United States federal or state jurisdictions and who are surrendered to the United States following extradition proceedings in a foreign country make their initial appearance in the jurisdiction that sought the person's extradition. Although these individuals are taken into U.S. custody outside the territory of the United States, the onward transportation of such persons to the jurisdiction that sought the extradition is appropriate and authorized by statute. Specifically, Title 18, United States Code, Section 3193 provides that,

> "[a] duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping."

Contrary to the usual practice, recent experience indicates that, occasionally, the extradited person has his Rule 5 initial appearance hearing in the first federal district in which he arrives rather than in the district that sought his extradition. For example, in one federal district bordering Mexico, one judge ordered that the Rule 5 hearing be held in that district for a number of persons extradited and surrendered to the United States simultaneously by Mexico, despite the fact that many of the defendants were sought for prosecution in various other federal jurisdictions. Although the judge may have reacted to a brief delay in the onward transportation of those defendants to their final destinations as a result of delays in connecting flights or other logistical difficulties, requiring the Rule 5 hearing in the district of first arrival only caused additional delay and extended detentions for those defendants whose alleged crimes occurred in different jurisdictions.

We are concerned that interruptions in the transportation of such extradited persons, which occasionally occur due to unforeseen transit delays, not be deemed justification to require that the person's initial appearance occur in the district of first arrival. Such a requirement would build additional delay in the delivery of the person to the jurisdiction where he or she is sought for trial and would not serve well the purposes of Rule 5 – to inform the person of the reason for his arrest. In cases of international extradition, the extradited person is fully informed about the criminal charges and the reason for his arrest. In such cases, the foreign country affords the person various opportunities to contest his or her arrest, extradition, and surrender to the United States. During the foreign extradition proceedings, the person, who is assisted by counsel, is afforded the opportunity to review the United States charging document, the United States arrest warrant, and evidence supporting the criminal charges that the United States presents in support of the extradition request. The person also has the opportunity to contest identity and to challenge the sufficiency of the evidence presented by the United States in support of the extradition request. Consequently, given the nature of the foreign extradition proceeding

(which may have taken many months, or even years, to complete) there is nothing to gain by conducting an initial appearance in the district of first arrival in the United States. Such an approach hinders the defendant in reaching the jurisdiction where the charges are pending and, as a result, impairs his ability to obtain trial counsel and to begin to prepare his or her defense.

While the practice of conducting the Rule 5 initial appearance hearing in the district of first arrival is not widespread, we believe that it occurs often enough, and there exists sufficient doubt about the Rule's proper application to internationally extradited persons, to warrant amendment to the Rule. We propose the following addition:

Rule 5. Initial Appearance

(C) Place of Initial Appearance; Transfer to Another District.

. . .

(4) **Procedure for Persons Extradited to the United States.** If the defendant is surrendered to the United States pursuant to a request by the United States for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

2. The second proposed amendment to Rule 5 corresponds to certain obligations of the United States, with respect to foreign nationals arrested in the United States, which arise pursuant to the Vienna Convention on Consular Relations ("the Vienna Convention"), a multilateral treaty. The Vienna Convention sets forth basic obligations that a country has towards foreign nationals who are arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 of the Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Over the past years, there has been much litigation over the manner by which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution.

In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was the appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The Court, however, did not rule on the preliminary question of whether or not the Vienna Convention creates an individual right, holding that regardless of the answer to that

question, suppression of evidence obtained following a violation of the Vienna Convention is not an appropriate remedy.

Notwithstanding the position of the United States in *Sanchez-Llamas v. Oregon* that the Vienna Convention does not create an enforceable, individual right, the government has created policies and taken substantial measures to ensure that the United States fulfills its international obligation to other signatory states with regard to Article 36 consular provisions. For example, the Justice Department has issued regulations that establish a uniform procedure for consular notification when non-United States citizens are arrested and detained by officers of the Department. *See* 28 CFR 50.5. Additionally, the Department of State has published and placed on a public website, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers law enforcement personnel can use to obtain advice and assistance. The Department of State also has published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages[2] that police can post in their facilities. The State Department regularly provides training and communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention. Moreover, the United States is committed to ensuring that when a law enforcement authority fails to give notice to the consulate of a detained foreign national, measures will be taken to immediately inform the consulate, address the situation to the extent possible, and prevent a reoccurrence.

We believe in addition to these measures, Rules 5 and 58 of the Federal Rules of Criminal Procedure should be amended to provide an additional assurance that the Vienna Convention obligations are satisfied. The proposed amendments would require federal courts to inform a defendant in custody, at his initial court appearance, that if he is not a citizen of the United States, an attorney for the government will, upon request, notify a consular officer from the defendant's country of nationality of his arrest. We recommend the following amendments to Rules 5 and 58:

Rule 5. Initial Appearance

"(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

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[2] The languages are Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese.

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; ~~and~~

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a citizen of the United States, an attorney for the government or federal law enforcement officer will notify a consular officer from the defendant's country of nationality of his arrest if he so requests, or make such other consular notification as may be required by treaty.

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Rule 58. Petty Offenses and Other Misdemeanors

"(b) Pretrial Procedure.

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(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

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(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

> (H) if the defendant is held in custody and is not a citizen of the United States, an attorney for the government or federal law enforcement officer will notify a consular officer from the defendant's country of nationality of his arrest if he so requests, or make such other consular notifications as may be required by treaty.

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The proposed amendments would require federal courts to inform a non-citizen defendant in custody that the government will, upon request, notify a consular officer from his country of nationality of his arrest, or that it will make any other consular notification that may be required by certain bilateral agreements. We believe these amendments are a further step in fully meeting the United States' international obligation under Article 36 of the Vienna Convention. We think the amendments are an appropriate step, notwithstanding the Supreme Court's reservation of important questions surrounding the existence of any individual rights stemming from the Vienna Convention and any possible domestic remedies for a violation of the Convention. The amendments mandate a procedure that is uniformly supported without getting into unresolved questions of the extent of substantive rights or remedies. We believe it is important that should the Committee adopt these amendments, it make clear the questions that remain unanswered and that it is not addressing substantive rights. We further believe that the Committee should make clear that nothing in the proposed amendment is intended to modify in any respect extant Supreme Court case law construing Article 36 of the Vienna Convention. We suggest the following Committee Note to accompany the amendments:

ADVISORY COMMITTEE NOTES

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201_ Amendments

These amendments are part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of The Vienna Convention on Consular Relations, and other bilateral treaties. Article 36 of the Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S.331 (2006). Nothing in these amendments shall be construed as creating any individual justiciable right, authorizing any delay in the investigation or

prosecution because of a request for consular assistance, or any basis for the suppression of evidence, dismissal of charges, reversal of judgment, or any other remedy.

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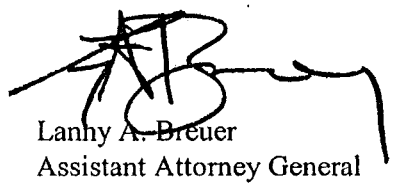
We believe these amendments are responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day.

We appreciate your assistance with this proposal and look forward to working with the Committee on this proposal.

Sincerely,



Lanny A. Breuer
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej