

An Arrow for the Quiver

By: Monte E. Hester; Dec 2007

If a foreign national from almost any country is arrested and/or charged with a crime by State or Federal authorities, one or both of two treaties may come into play. One is the Vienna Convention on Consular Relations (VCCR) and the other is the Mutual Legal Assistance Treaty.

Both of these treaties are ratified, which establishes them as the supreme law of the land if they should be found to be inconsistent with other laws of either State or Federal origin.

The application of these treaties, when used creatively, have the potential of resulting in government evidence being suppressed in the event of a violation of the treaty.

The VCCR requires that the authorities of the receiving state (Washington or the United States) shall, without delay, inform the consular post of the sending state (Mexico, Canada or any other country that is a party to the treaty) that a national of that state has been arrested or committed to prison or to custody or has been detained in any other manner. (Article 36 (1)(b) of the VCCR).

Article 36 (1)(c) confers upon the consular officers of the sending state the right to visit a national of their country who is being held, to converse and correspond with him or her to arrange for legal representation.

The consequence of a violation of this rule is not yet predictable as it relates to suppression, however, the issue should be raised any time there is a violation. See Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002), Torres v. State, 120 P.3d 1184, 1187 ((Okla. Crim. App. 2005), Deitry v. Money, 391 F.3d 804 (6th Cir. 2004) and State v. Miranda, 622 NW 2d 353 (Minn. App.).

The Mutual Legal Assistance Treaty (MLAT) is generally perceived to be beneficial only to prosecutors and by its terms does not create a right on the part of any private person. These perceptions are not always correct.

The essence of the MLAT is that when a foreign national is charged with a crime in the U.S., the treaty governs how evidence is to be obtained in the country of the foreign national. Article 1(1) of the treaty establishes that “mutual legal assistance in criminal matters” shall be conducted “in accordance with the terms of the treaty.” Article 1(2) forbids U.S. law enforcement from exercising any “functions or authority” within the foreign country that are “exclusively entrusted” to the foreign authorities. Article 1(3) and 3 permit the foreign country to refuse the request for assistance under specific circumstances.

The treaty establishes a controlling authority for processing and approving requests for assistance.

An expert on this treaty, attorney Mark Warren of Canada, reports that there are at least three circumstances in which the MLAT could be said to benefit foreign national defendants:

(1) On due process grounds, some courts have recognized that the prosecution may be required to invoke MLATs to assist the defense in obtaining exculpatory material or witnesses, in the interests of fundamental fairness. See, e.g., *People v. Sandoval*, 87 Cal. Ct. App. 1425, 1438-41 (2001) (holding that, in view of the MLAT between the U.S. and Mexico, the prosecution was required to make a reasonable, good-faith effort to obtain the witness's presence at trial, even though he was a Mexican citizen residing in Mexico); *United States v. Jean Des Marteau*, 162 F.R.D. 364, *aff'd* and modified 162 F.R.D. 372 (M.D. Fla. 1995) (ordering depositions under MLAT of defense witnesses in Canada). In one case where the MLAT was silent on the issue of whether a defendant possessed a right to seek evidence, the trial court directed the U.S. Department of Justice to make a treaty request on behalf of the defendant. See Bruce Zagaris, *Uncle Sam Extends Reach for Evidence Worldwide*, 15-WTR Crim. Just. 4, 8 (2001).

(2) Since the other nation's consent under an MLAT often governs not only access to the foreign evidence but also limits its ultimate use, some courts have recognized a defendant's right to challenge the introduction of evidence so obtained when its use allegedly exceeds the consent provided. See, e.g., *United States v. Garcia*, 37 F.3d 1359, 1366-67 (9th Cir. 1994), *cert. denied*, 514 U.S. 1067 (1995) (permitting defendant to raise use restrictions on evidence provided by Switzerland to the United States under an MLAT).

(3) Where an MLAT provides the sole lawful means by which the prosecution may gather foreign evidence, a violation of MLAT requirements may be raised defensively to preclude the use by the prosecution of unlawfully-obtained foreign evidence. In addition, where the affected nation protests the MLAT violation, the defendant gains derivative standing to raise the violation as a bar to jurisdiction in domestic court proceedings.

Mexico on occasion, because it is against the death penalty, has created international incidences involving our State Department when the MLAT has been violated, resulting in prosecutors removing the death penalty as an option. It is expected that many other countries would be of the same attitude. If you have a defendant who is a foreign national, contact should be made with the embassy of his or her country to discuss assistance available from that country.

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