

Convicted of A Crime? How It May Ruin Your Overseas Vacation and Moreⁱ

By: David Wemhoff ©2018

This talk is a summary of some key issues pertaining to part of what is known as the collateral consequences of being charged with or convicted of a criminal offense. It is prompted by having represented clients who are students at a university near where I practice law and realizing that many of these students often travel as part of the various programs offered during their respective courses of study. Criminal convictions and even in some cases arrests or pending charges may block a person from entering a country. That can ruin a trip, a vacation, or severely hinder one's participation in a scholastic or academic program. Worse yet, one could find oneself stranded in a foreign country.

The matters presented here are based on my own experience and draw heavily from a variety of other sources, perhaps most notably an organization that has done some great work in analyzing the issue of collateral consequences, The Collateral Consequences Resource Center (CCRC).ⁱⁱ The matters presented here are meant as an overview and summary of key concerns that one should have if one is a student traveling overseas, and none of it is meant to constitute legal advice. Should anyone find themselves in a situation in which they are to travel and may be concerned about the effect of a criminal charge or a criminal conviction, I strongly recommend that you consult with the appropriate legal professional.

First, one must distinguish between a conviction and a charge. A conviction is a far more serious matter than just a pending charge, however, some countries – such as Canada – are concerned about and make decisions for entry into their country based on pending charges also. In Canada's case, that is largely because the Canadian authorities have immediate access to the

NCIC or the National Crime Information Center database which is used by law enforcement authorities in the United States.

Certain offenses committed in the US can result in a US citizen's passport being pulled. Drug trafficking, especially with an international component, is one of them. Additionally, if one is under a criminal justice sentence – whether State or Federal – one's ability to travel is likely to be restricted by the Court. Indeed, one may be restricted to either the county, the state or the district once charges are filed and certainly if one is serving a period of supervised release or probation.

Second, the classification of the charge or of the conviction is of importance. In the US, we have generally three categories of offenses: infractions, misdemeanors, and felonies. There are varying grades of severity in each of those categories. Other countries do not have the same classifications as does the US. Furthermore, other countries may assign greater severity to some offenses than does the American system, and lesser severity to some offenses than does the American system.

For instance, in Canada, there are two types of offenses: summary offenses (which are not used to bar one's entry into the country) and indictable offenses (which can bar one's entry into that country). The CCRC states that Canadian law treats the following as summary offenses: trespassing at night, and taking a motor vehicle without consent. In the US, either one of these could be viewed as a serious offense, as a felony. Indictable offenses include driving under the influence. Clearance to travel with an indictable offense on one's record can be denied. That is most likely for those indictable offenses carrying a sentence of imprisonment of ten years or more. However, one can still travel if one has what Canadian law considers to be an

indictable offense if approved by the authorities. There are four factors (again pursuant to the CCRC) that these authorities consider: 1) how long ago the conviction occurred, 2) the nature of the offense, 3) the number of offenses the individual has been convicted of, and 4) whether the person can demonstrate rehabilitation or likelihood of not reoffending.

Also for purposes of illustration, the United Kingdom has a classification of criminal offenses that is different from the American classification. According to the CCRC, travel clearance into the UK under UK law “will ordinarily be denied for `conviction in any country including the United Kingdom of an offense which, if committed in the United Kingdom, is punishable with imprisonment for a term of twelve months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offense had occurred in the United Kingdom.”

The European Union presents an interesting scenario. (I recommend Professor Dr. Frank Emmert’s class on Doing Business in the EU as he deals with this issue in greater detail.) There is something called the Schengen Agreement which essentially means that one is allowed to travel to all 28 member states of the EU once allowed to travel to one of the member states. A form or application has to be filled out and there are questions about one’s criminal history. Various directives and regulations of the EU are relevant and bear a brief mention here, again deferring to Professor Emmert and case authority on the matters. Article 27 of EU Directive 2004/38 states: “Measures taken on grounds of public policy and public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves, constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently threat affecting one of the fundamental interests of

society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.”

So, it is very important that you understand that of which you are charged or convicted and know the laws of the country to which you are traveling.

Third, before traveling, or even thinking of traveling, check the requirements for entry into the country or countries that you intend to visit or even to transit. This information is perhaps most readily available from one of two sources: that country’s website which sets forth the requirements for a visa or for entry into that country, or you may contact that country’s embassy in the United States and make the same inquiry.

Some countries require visas, and others just need that you travel with your passport. If you have to obtain a visa, or otherwise answer questions concerning any possible criminal offenses or arrests, you should be truthful. False statements on government applications or in response to official questioning is often cause for denial of the requested benefit.

Generally, those countries that ask for a passport only do not “screen for a criminal record” according to the CCRC (Collateral Consequences Resource Center). (Again, Canada is an exception to this as it has access to the NCIC and so even with the presentation of a passport the border agents will review one’s criminal history as a matter of course.)

For extended stays in some countries, one must present proof of a clean record in the United States. This is best done by contacting the Federal Bureau of Investigation and obtaining a records check through their Criminal Justice Information Services (CJIS) office. The FBI, using the NCIC system mentioned earlier, checks all state and federal records concerning criminal history to include arrests and convictions and pending charges. The process takes

several weeks (it can be up to 8 in some instances), requires completion of a form and payment of a small fee, fingerprint card, and an attorney's services may be used for all of this. In addition, the US Department of State often issues an Apostile which certifies the authenticity of the FBI records and does so in the language of the country to which one is traveling. Procedures for obtaining the Apostile, as well as the background check by the FBI, are contained on the websites of those two organizations. Apostile's may have to be translated.

Fourth, stay out of trouble before traveling. Underage alcohol consumption is a big issue that I see as is also illegal drug use or possession. If you are over the age of majority for the purposes of consuming alcoholic beverages (21 in Indiana), procuring alcoholic beverages for minors is also a big deal with law enforcement. These offenses are taken seriously by local law enforcement and can threaten to harm one's travel plans if not also academic career, and more.

Fifth, conviction of certain offenses – whether committed abroad or in the United States - may also negatively affect one's ability to remain in or travel to the United States. Some offenses render one ineligible for visas or permanent residency or even citizenship in the United States. I just briefly want to touch on these concepts because there is an entire body of law that deals with immigration issues when it comes to visiting or residing in the United States. What I am talking about here are crimes termed under US laws as crimes of moral turpitude.

Finally, Indiana, and many other jurisdictions, have something called expungement of criminal records and also criminal convictions. Coming into effect in 2014, Indiana Code 35-38-9-1 et seq. pertains to the procedures for expunging records to include the time periods involved before one can file a petition for expungement. These code sections also set forth which convictions can be expunged as some of the more serious cannot be expunged. Expungement is

up to the discretion of the court, and the prosecution can oppose the effort to do so. If the petition for expungement is granted, then reference to the case is “wiped off the books” as they say or removed from the Court’s records, and every law enforcement agency is required to seal or destroy their records pertaining to the arrest, investigation, and conviction. Furthermore, IC 35-38-9-9 and -10 gives to the person certain protections and rights, to include the right to not answer questions about expunged convictions. Also, employers cannot question about expunged convictions and that is a very big deal, or a great benefit, considering that even felonies may be expunged or wiped from one’s record.

There are similar procedures in other countries. As an example, Canada has a procedure for what is called “criminal rehabilitation” which essentially allows a person to wipe clean or do away with any stigma concerning the offense so as to allow one to travel to Canada. The procedure, according to the CCRC, may be found on the website for Canada.

In summary, be careful. Know the laws and obey the laws. Law enforcement in the United States is very good, very well funded, very professional, and oftentimes very successful. Again, if you run into a situation where you have to travel and are not certain as to whether or not events in your past may hinder your ability to transit countries, then check with that country’s embassy or look on that country’s website.

ⁱ This is a text of a talk given by David Wemhoff on November 2, 2017 at the IU McKinney School of Law, Indianapolis, Indiana.

ⁱⁱ All are encouraged to check out the website of the CCRC found at <http://ccresourcecenter.org/>.