IMMIGRATION CONSEQUENCES OF PROP 36 AND OTHER NEW CALIFORNIA OFFENSES

Part One: Controlled Substance Offenses

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I. Overview: Prop 36 and Other New Offenses

In November 2024, California voters approved a ballot measure labeled Proposition 36 (Prop 36).[2] Among other things, Prop 36 permits certain misdemeanor drug offenses and property crimes (e.g., simple possession of a drug, shoplifting) to be charged as felonies. In addition, in 2024 the California legislature created its own new felony property offenses.

Immigration advocates and criminal defense lawyers need to understand the basics of the new laws and how to defend immigrant clients, because some of the new offenses carry extremely severe immigration penalties.

Most of the new laws work by changing what usually would be a misdemeanor offense into a felony or wobbler (alternate felony/misdemeanor) offense, *if the person had certain prior convictions for similar offenses*. Note the timing. For Prop 36 to apply, the person must have committed the new possession offense on or after December 18, 2024, the effective date of Prop 36. But the prior convictions that trigger the new recidivist penalties can have occurred at any time, including before December 2024. Under Prop 36, certain old misdemeanor convictions from any time in the person's adult life can be used to prosecute certain new misdemeanors as felonies or wobblers.

This two-part Practice Advisory discusses the new California criminal laws that have adverse immigration consequences, as well as defense strategies in immigration and criminal court. **Part One**, this document, discusses controlled substance offenses. **Part Two**, the companion document, is forthcoming and discusses new California property crimes and parts of the federal Laken Riley Act (LRA).

This Advisory is focused on selected Prop 36 offenses that carry new immigration consequences. See other resources for a more comprehensive criminal law analysis of all Prop 36 offenses and related new laws.[3]

II. Cal. Health & Safety Code § 11395: Recidivist Possession

New Cal. Health & Safety Code[4] § 11395 is quite dangerous for noncitizens.[5] The statute provides that any person who unlawfully possesses a "hard drug" on or after December 18, 2024, who either admits or is shown to have 2 or more prior controlled substance offenses can be prosecuted under this statute (entered at any time). It appears to be a minor offense: possession of a controlled substance for personal use, with an option to take deferred entry of judgment (DEJ) and avoid a conviction. But for noncitizen defendants, once they plead guilty, and regardless of whether they satisfactorily complete DEJ, or whether the offense is a felony

[2] See California Proposition 36, the "Homelessness, Drug Addiction, and Theft Reduction Act," effective December 18, 2024, https://vig.cdn.sos.ca.gov/2024/general/pdf/prop36-text-proposed-laws.pdf.
[3] *See e.g.* J. Richard Couzens, *Proposition 36: Homelessness, Drug Addiction, and Theft Reduction Act and Related Legislation* (Nov. 2024) https://capcentral.org/wp-content/uploads/2024/11/PROPOSITION-36-HOMELESSNESS-DRUG-ADDICTION-AND-THEFT-REDUCTION-ACT-AND-RELATED-LEGISLATION.pdf
[4] All criminal code sections in this advisory, such as Penal Code or Health & Safety Code, will refer to California law unless noted.
[5] H&S § 11395, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=11395.&lawCode=HSC.

or misdemeanor, the conviction is a "drug trafficking aggravated felony" for immigration purposes. Only a vacatur based on error can eliminate the conviction.

This section will discuss how 11395 works and how to defend immigrants who have been charged with or convicted of the offense.

NOTE: Why care about an aggravated felony? *Any* conviction relating to a federally defined controlled substance is dangerous for non-U.S. citizens. It triggers mandatory detention[6] and is an automatic bar to several forms of relief, such as family immigration, waiver under INA § 212(h), VAWA, cancellation of removal for non-permanent residents, and TPS. (Some of these forms of relief have an exception for a single possession of marijuana.)[7]

But a controlled substance aggravated felony (AF) is even worse. It bars eligibility to more forms of relief, including cancellation of removal for LPRs and asylum, and where it is not a bar it is a very strong negative factor in discretion. Any immigrant who is *not* an LPR and is convicted of an AF can be ordered deported just by a DHS officer, with no judge. However, a drug trafficking AF based on possession rather than trafficking, like 11395, may leave open more options for applying for immigration relief. See **Subsection B**.

A. How does § 11395 work, and why is it an aggravated felony conviction?

New California Health & Safety Code § 11395 punishes possession of a "hard drug" where the defendant has two or more specified prior controlled substance convictions. The conviction for § 11395 must be for conduct committed on or after December 18, 2024, but the prior convictions can have happened at any time. Section 11395 is an alternative felony/misdemeanor, or "wobbler," offense.[8]

> **Example:** Ana was convicted in 2010 and again in 2012, of possessing a controlled substance. She was sober for several years but then relapsed in 2025. On March 1, 2025, she is charged with possession of a controlled substance. While normally possession is a misdemeanor, under Prop 36 Ana can be charged with 11395(a), a wobbler, because she has two prior drug convictions.

1. How does Health & Safety Code § 11395 work? Q&A

What are the elements of § 11395? The elements of an offense are the facts that always must be proved or admitted to find guilt. The elements of 11395 are:

- The defendant unlawfully possessed a "hard" drug on or after December 18, 2024, and
- The defendant admitted or judge or jury found that the defendant had two or more prior convictions for specified California controlled substance offenses, including convictions from before December 18, 2024.

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[6] See INA § 236(c)(1)(B).
[7] See ILRC, *Immigration Relief Toolkit* (2024) at § N.14, www.ilrc.org/crimes-summaries
[8] For more information about "wobbler" offenses, see Appendix to ILRC, *California Sentences and Immigration* (2020), www.ilrc.org/crimes-summaries.

What is a "hard drug"? Section 11395(e)(1) defines a hard drug to include "a substance containing fentanyl, heroin, cocaine, cocaine base, methamphetamine, phencyclidine [angel dust], and the analogs of these substances" as well as other substances, with some exceptions, listed in Health & Safe Code §§ 11054 or 11055. Prop 36 provides that the State Legislature may make additions to this list.

Section 11395(e)(2) provides that the definition of hard drug *does not* include cannabis, cannabis products, peyote, mescaline, psilocybin (mushrooms), lysergic acid diethylamide (LSD), hallucinogens, or depressants. It does not include stimulants such as amphetamines or khat, except for methamphetamine.[9]

If your case involves a substance not mentioned above, check the drug schedules and exceptions that appear at 11395(e) and/or talk with an expert.

Are all of these hard drugs listed on federal drug schedules? The Immigration and Nationality Act always defines a "controlled substance" according to federal drug schedules. Conviction relating to a substance that is not described in the federal schedules is not a controlled substance (CS) conviction for immigration purposes. Each of the "hard drugs" at 11395(e) *does* appear on federal drug schedules. Based on this, ICE will assert that every conviction under 11395 is an immigration controlled substance conviction. (In short, in some cases, the immigration defense of trying to keep the record of conviction vague as to which substance was involved will *not* work for a 11395 conviction.[10])

But there is a strong potential defense in removal proceedings, based on the fact that the California statutory *definition* of certain substances, e.g., methamphetamine and its analogs, is broader than the corresponding federal statutory definition of each substance. Removal defense advocates should consider asserting this defense, and use that time to investigate post-conviction relief. See discussion at **Subsection C**.

Conviction of which types of conduct involving drugs will count as priors for § 11395, under state law? Section 11395(c) sets out a wide range California offenses that serve as priors, including simple possession, sale, possession for sale, possessing drugs while armed with a firearm, and others. It provides that conviction for possession of paraphernalia or for being under the influence do *not* serve as priors.

Which California court dispositions count as prior "convictions" for § 11395? Section 11395 requires the person to have two prior California convictions for certain drug offenses. This question reviews what is and is not a "conviction," and what is required to erase a prior conviction, under California law. (See the next question for information on the definition of conviction under immigration law and see **Subsection C** for more on post-conviction relief.)

- ***Vacatur for cause eliminates a conviction for state purposes.*** If a criminal court vacates a conviction by finding that it is invalid based on legal or procedural error, the conviction no longer exists. This includes a vacatur under Penal Code §§ 236.14, 236.15, 1016.5, 1018, 1203.43, 1473.7, habeas corpus, or other vehicles based on error. See **Subsection D**.

[9] See H&S §§ 11054(d), 11054(e), and 11055(d).
[10] The 'vague record' defense has been weakened generally. See discussion of *Pereida v Wilkinson,* 592 U.S. 294 (2021) at ILRC, *Pereida v. Wilkinson and California Offenses* (2021).

- ***Dismissal or "expungement" does not eliminate a conviction.*** If the conviction merely has been dismissed (or "expunged") under a statute like Penal Code § 1203.4, it will count as a prior conviction if the person is charged with committing a new offense,[11] as in a 11395 prosecution.
- ***Pre-trial diversion is not a conviction.*** Treatment under a pretrial diversion statute, where the defendant pled "not guilty" before being diverted, is not a conviction for state purposes. See, e.g., Penal Code §§ 1001.20, 1001.36, 1001.95, and, after Jan. 1, 2018 and before Jan. 1, 1997, Penal Code § 1000.
- ***For California purposes, a successfully completed "deferred entry of judgment" or similar program is not a conviction (but it is a conviction for federal purposes).*** For state purposes, there is no conviction if the defendant pleads guilty but is found to have satisfactorily completed requirements for the former Deferred Entry of Judgment (DEJ) at Penal Code § 1000 et seq. (1997 through 2017) or for probation and treatment under Penal Code § 1210.1. Both statutes advise the defendant that upon a finding of satisfactory completion, the charges will be dropped and the defendant will have "no conviction." The dispositions will not serve as prior convictions even if the person commits a new offense. It appears that the same would be true of completing a 11395 DEJ. (Immigration law does treat even a successfully completed DEJ as a conviction. See next question.)

Is 11395 a "conviction" <u>for immigration purposes</u> even if the person successfully completes deferred entry of judgment (DEJ)?

Yes. Section 11395(d)(1) states that successful completion of DEJ will mean that the defendant's guilty plea "shall not constitute a conviction for any purpose." But this statement is incorrect: the defendant will have a conviction for federal immigration purposes.

For immigration purposes, a conviction occurs when (i) the defendant enters a plea of guilty or no contest, or there is a finding or admission of facts required for guilt, and (ii) the judge imposes some form of "punishment, penalty, or restrain on the [person's] liberty." See INA § 101(a)(48)(A)(i), (ii).

A successfully completed DEJ pursuant to 11395(d) meets this definition. It meets prong (i) because the defendant must plead guilty or no contest to the drug charge (and admit the two prior convictions). It meets prong (ii) because the judge will order a mandatory treatment program and such programs have been found to meet the requirement at INA 101(a)(48)(A)(ii) of "punishment, penalty, or restraint."[12]

Section 11395 creates a conviction for immigration purposes. The only way to *eliminate* the conviction is for the court to vacate it based on legal error. The fact that 11395(d) provides that there is no conviction if the person behaves satisfactorily does not eliminate it for federal purposes. (However, the confusion caused by the misstatement might form a state court basis to vacate the conviction based on error. See **Subsection C**.)

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[11] See Penal Code § 1203.4(a)(1), providing that "in any subsequent prosecution of the defendant" the conviction will be treated as if it had not been dismissed.

[12] *Matter of Mohammed*, 27 I&N Dec. 92, 98 (2017) (the obligations the noncitizen incurred in a pretrial intervention program individually and cumulatively constituted a form of "punishment, penalty, or restraint.").

Regarding other dispositions: Like California law, federal immigration law holds that there is no conviction in the case of pre-trial diversion (with a 'not guilty' plea) or when a court has vacated a conviction based on error. Unlike California law, immigration law gives no effect at all to "rehabilitative relief" such as an expungement or dismissal under Penal Code § 1203.4, but with two exceptions: it eliminates a conviction as a bar to DACA, and it eliminates a conviction for all federal purposes in the case of certain minor drug convictions from on or before July 14, 2011, under the *Lujan-Armendariz* rule. See discussion in Subsection **B.2**

2. Why is § 11395 an immigration aggravated felony?

The definition of a controlled substance aggravated felony (AF) is set out at INA § 101(a)(43)(B). It sets out two definitions, either of which is an AF. Conviction of federal or state offenses that meet this description will be held an AF.

First, any offense that is "illicit trafficking in a controlled substance" is an AF if the substance is defined at 21 USC § 802 (federal drug schedules). This section refers to offenses that meet the general definition of trafficking, such as sale or possession for sale of a federally-defined substance. (In the Ninth Circuit only, it does not include "offering" to sell. See **Section III**.)

Second, an AF includes "a drug trafficking crime (as defined in [18 USC § 924(c)])." This section is the definition under which 11395 falls. Section 924(c)(2) includes offenses punished as *felonies* in major federal drug statutes. State offenses that match the elements of these federal felonies also are aggravated felonies. (It does not matter if the state offense is a felony or misdemeanor, as long as it matches a federal felony.) While a simple possession generally is a federal misdemeanor and thus is not an AF, it will become a federal felony, and thus an AF, if it carries an enhanced penalty based on proof that the defendant had a prior controlled substance conviction.[13] Because 11395 meets this description—it carries an enhanced penalty based on prior drug convictions—ICE will charge it as an AF. (But as discussed in **Subsection B**, removal defense advocates can argue that the particular 11395 conviction does not match the federal felony definition, and thus is not an AF.)

B. Immigration Defense Strategies for § 11395 and Other Controlled Substance Convictions

This section discusses three defense strategies in removal proceedings on behalf of someone convicted of 11395, and some other drug convictions. The first two strategies are to argue that the California conviction/s are not federally defined controlled substance offenses, or at least are not an aggravated felony. The third is to argue eligibility for immigration relief.

Removal defense advocates can employ these strategies because (a) the arguments have a real chance of winning in immigration proceedings, and (b) while we pursue them, we can use the time to pursue another defense strategy, discussed in **Subsection C**: vacating the convictions.

[13] See 21 USC § 844(a) and discussion in *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567 (2010).

1. Argue that § 11395—and other California drug offenses—do not involve a federally-defined "controlled substance"

Advocates can make a strong argument that a California conviction involving "hard drugs" such as methamphetamine ("meth"), heroin, or cocaine is not a controlled substance (CS) offense for immigration purposes, because California defines these substances more broadly than federal law does. A conviction of a non-federally defined substance is not a CS conviction for immigration purposes: it is not a deportable or inadmissible drug conviction or a drug aggravated felony.[14] This defense potentially applies to any California drug conviction if it involves certain substances and analogs.

As always, while advocates litigate this argument in immigration court, they also should investigate *obtaining post-conviction relief in state criminal court* to eliminate the state conviction. See **Subsection C**.

The argument is based on the federal "categorical approach," which compares definitions of offenses under federal and state law. [15] In this case, state and federal criminal statutes often set out a detailed chemical definition of each controlled substance (CS). If the state statutory definition of a CS—for example, of meth, cocaine, heroin, or marijuana—*includes* some material (for example, a particular isomer in a cocaine analog) that the corresponding CS definition in federal drug schedules does *not* include, the state conviction is not a controlled substance conviction for any immigration purpose. In categorical approach terminology, the state statutory definition is "overbroad," and the state statutory definition is not "divisible" into different offenses. Because the California statute is overbroad and indivisible, no California conviction involving that substance is a CS offense for any immigration purpose.

While the BIA rejects aspects of this argument,[16] most federal circuit courts of appeals, including the Ninth Circuit and in practice the Supreme Court, accept it.[17] Here are examples of arguments that some Prop 36 "hard drugs" are not federally-defined substances. See a sample brief on this topic at www.ilrc.org/crimes-summaries and see discussion of particular substances in the *California Quick Reference Chart*.

Analogs. Analogs are designer drugs, meaning drugs that people create. They are called analogs because they imitate other substances. There are analogs for common controlled substances such as methamphetamine, cocaine, and heroin. For example, note that the definition of "hard drug" at 11395(e) explicitly includes "analogs" of the substances, as defined at Health & Safe Code §§ 11400, 11401.

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[14] The term "controlled substance" is defined at INA §§ 212(a)(2), 237(a)(2), and 101(a)(43)(B) as substances at 21 USC § 802, the federal drug schedules.
[15] See ILRC, *How to Use the Categorical Approach Now* (Oct. 2021).
[16] *Matter of Guadarrama*, 27 I&N Dec. 560, 567 (BIA 2019).
[17] See further discussion and citations at NIPNLG, *Practice Advisory: Realistic Probability in Immigration Categorical Approach Cases* (June 2021), at https://nipnlg.org/work/resources, and see *Brown v. U.S.,* 602 U.S. 101, 107–08 (2024), where without discussion the Supreme Court agreed that if a state's definitions of a CS is broader than under federal law, the state conviction is not a CS offense for federal purposes.

Both the federal government and California specifically define "analogs" in their controlled substance statutes. These definitions are different, and the California definition of an analog is far broader than the federal definition.

California Analog Definition, Health & Safety Code § 11401(b)	Federal Analog Definition, 21 USC § 802(43)(A)
The government must prove that *either* the analog is similar in chemical structure; *or* it is similar in pharmacological effect on the body	The government must prove that the analog is *both* similar in chemical structure *and* in the pharmacological effect on the body.
No requirement that analogs be intended for human consumption	A "controlled substance analog, shall to the extent intended for human consumption, be treated, for the purposes of any federal law, as a controlled substance." 21 USC § 813(a)

Methamphetamine. Federal district courts in California have held that a California conviction involving methamphetamine ("meth") is not a controlled substance offense for federal purposes, because California defines meth more broadly than federal law does. Among other differences, the California definition includes meth analogs that are not intended for human consumption, whereas the federal definition does not. (See above chart.) The courts held that because the California statute is overbroad and indivisible, a prior state conviction involving meth does not qualify as a prior controlled substance conviction under federal criminal law.[18]

Cocaine. Noting that "the statute's scope is plain," the Second Circuit found that New York's definition of cocaine, which had no textual limitation on types of isomers it reached, was categorically broader than federal definition, which expressly limited itself to optical and geometric isomers.[19] Similarly, the Seventh Circuit held that Illinois's definition of cocaine includes optical, positional and geometric isomers, while the federal definition of cocaine only includes optical and geometric isomers.[20] Additionally, the Eighth Circuit has held that Iowa's definition of cocaine is broader than the federal definition because it includes ioflupane while the federal definition specifically excludes it.[21] California's definition of coca leaves, similar to Iowa, does not specifically exclude ioflupane so this argument should also work for any California conviction for cocaine.[22] California practitioners can also argue that the definition of cocaine includes analogs and is overbroad on that basis.

Heroin. The definition of heroin in some states includes a wide range of "salts, isomers, and salts of isomers," whereas the federal definition is quite limited. There are unpublished

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[18] See *U.S. v. Morales-Rodriguez*, 744 F.Supp.3d 1036 (S.D. Cal. 2024); *U.S. v. Verdugo*, 682 F.Supp.3d 869, 872-73 (S.D. Cal. 2023).Note that the basis for *Verdugo* is different from that of prior decisions that held that California statutory definition of meth was overbroad because it included of geometric isomers, but were overruled when it was found that meth does not have that particular isomer. *See Lorenzo v. Session*, 902 F.3d 930 (9th Cir. 2018) *overruled by U.S. v. Rodriguez-Gamboa*, 972 F.3d 1148, 1152 (9th Cir. 2020).

[19] *See United States v. Minter,* 80 F.4th 406, 413 (2d Cir. 2023).

[20] *United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020).

[21] *U.S. v. Perez,* 46 F.4th 691, 698–99 (8th Cir. 2022) (cocaine under Iowa law is outside the federal definition) abrogated on other grounds by *U.S. v. Gordon*, 111 F.4th 899 (8th Cir. 2024) (must look at whether the substance underlying a prior conviction was a controlled substance under state law at the time of the sentencing.)

[22] H&S § 11019.

decisions holding that heroin, like cocaine, has broader definitions of isomers.[23] This issue is being litigated in Maryland, California, and other states.

2. To avoid an AF, argue that under federal law, the client's priors that support the § 11395 are not a "conviction" or are not a conviction for a "controlled substance"

A simple possession conviction is an aggravated felony (AF) only if it carries an enhanced penalty based on *at least one prior "conviction" relating to a "controlled substance."* The terms "conviction" and "controlled substance" arguably must meet federal law definitions to have immigration effect. If the prior California convictions did not involve a federally defined controlled substance, or were not a "conviction" as defined under federal law, arguably the 11395 conviction is not a federal aggravated felony.

> **Example:** The immigration judge agrees to find that a California conviction involving meth is not an immigration controlled substance (CS) conviction, based on the published district court opinions on meth. But she will not make that finding for other California substances like heroin or fentanyl. In the following cases, she will consider whether the 11395 conviction is an aggravated felony.
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> *Case 1:* Avi has two prior convictions for possession of meth, and a 2025 conviction under 11395 for possession of fentanyl. The 11395 conviction is valid under California law because of the two prior drug convictions. Arguably, the 11395 conviction does not meet the federal definition of a recidivist possession aggravated felony, because that requires at least one prior conviction involving a *federally-defined* controlled substance. Avi's prior convictions involved meth as defined under California law, which is not a federally defined substance.
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> *Case 2*: Aarna was convicted of possession of *heroin* in 2010, of *meth* in 2015, and of fentanyl in 2025, under 11395. The immigration judge states that she will hold that California heroin and fentanyl are federally defined substances, and that one qualifying prior is enough to create a recidivist possession aggravated felony. You can appeal the rulings on heroin and fentanyl. However, you also know (because you checked online resources[24]) that in the Ninth Circuit only, a possession conviction from on before July 14, 2011, can be eliminated for all federal purposes by a "dismissal" or "expungement" under Penal Code § 1203.4.[25] Aarna recently obtained § 1203.4 relief for the 2010 conviction. You argue that because Aarna does not have a 2010 drug "conviction" for immigration purposes, and her 2015 conviction did not involve a federally defined

[23] *U.S. v. Myrick*, No. CR 19-354, 2023 WL 2351693 (E.D. Pa. Mar. 2, 2023); *U.S. v. Espy*, No. 18-332, 2022 WL 247833, at *3 (W.D. Pa. Jan. 27, 2022); *U.S. v. Ward*, No. 18-148, 2021 WL 5604997, at *1 (W.D. Pa. Nov. 30, 2021).

[24] See, e.g., ILRC, *Overview of California Post-Conviction Relief for Immigrants* (Jul. 12, 2022), https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf and other materials at §§ N.8 and 14, at www.ilrc.org/crimes-summaries.

[25] See discussion of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) in Section II of *Overview of California Post-Conviction Relief*, cited above.

"controlled substance," her 11395 conviction for possession is not an aggravated felony because under federal law there is no qualifying prior conviction.

While arguing these cases, advocates also should investigate the possibility of post-conviction relief, in case the argument fails or takes a long time to resolve.

3. What immigration relief is available despite an aggravated felony conviction for recidivist possession?

See ILRC, *Immigration Relief Toolkit* (2024) and *Immigration Relief Chart* (2021)[26] for more information about the requirements and criminal record bars for different types of relief.

As we discussed above, *any* conviction relating to a federally-defined controlled substance is dangerous for any non-U.S. citizen even if it is not an aggravated felony. It is a deportable and inadmissible offense and serves as a bar to most forms of immigration relief, including family immigration, INA § 212(h) relief, VAWA, cancellation of removal for non-LPRs, and TPS. [27] It triggers mandatory detention for all non-U.S. citizens.[28]

But a controlled substance aggravated felony (AF) brings even more penalties. Among other things, it is a bar to asylum and LPR cancellation of removal, a permanent bar to naturalization, and a terrible factor for discretion. A non-LPR convicted of an AF can be ordered "administratively" removed just by a DHS officer, with no right to see a judge.

Still, if the controlled substance AF is based on recidivist possession instead of trafficking, the person may be more options, especially with humanitarian relief. See discussion below. And when it comes to discretion, advocates can show that repeated use of a controlled substance is a sign of addiction, which is a medical condition. Research shows that the most common cause of addiction is surviving traumatic experiences. If possible, show how the person's addiction is tied to their claim of persecution or abuse. Obtain a psychologist's report, proof that the person is progressing in a treatment program, and other equities. See ILRC, *Immigrants and Subject Use Disorder: A Legal and Medical Perspective* (2023). [29]

For further discussion and citations, see the relevant section of the *Relief Toolkit*, cited above.

Withholding of removal. An aggravated felony conviction is an automatic bar to asylum as a "particularly serious crime" (PSC), but it is not an automatic PSC and bar to withholding of removal (absent a sentence of 5 years or more). Almost all drug trafficking aggravated felonies are held to be PSCs for withholding purposes, because trafficking is considered to be dangerous. This should not be true for a possession-based aggravated felony. As discussed above, try to show that the person's addiction is tied to their trauma and persecution.

Adjustment of status as an asylee or refugee. If an asylee or refugee is convicted of a drug aggravated felony, they can be placed in proceedings to strip them of their status and remove

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[26] See ILRC, *Immigration Relief Toolkit* and *Relief Chart* at §§ N.17, N.17A at www.ilrc.org/crimes-summaries.
[27] Some but not all of these carry a waiver or exception for a single possession of 30 grams or less of marijuana. See forms of relief described at ILRC, *Immigration Relief Toolkit*, cited above.
[28] See INA § 236(c)(1)(B).
[29] See § N.8.C at www.ilrc.org/crimes-summaries. In particular, see Part Two regarding trauma and addiction.

them. As a defense, they can apply for adjustment of status as an asylee or refugee. Asylee and refugee adjustment has a generous humanitarian waiver at INA § 209(c), which can waive any ground of inadmissibility *except* where the government has "reason to believe" that the person participated in drug *trafficking* under INA § 212(a)(2)(C). A conviction that involves trafficking cannot be waived under § 209(c), but one that involves simple possession can.

T and U visas. For some time, almost any criminal conviction has been held a basis for discretionary denial of a U visa, despite the fact that the visa has a generous waiver. While T visa applicants have not fared as badly, under the current Trump Administration no immigrant with an aggravated felony conviction, or perhaps any conviction, should affirmatively apply for relief without discussing risks with an expert provider. But if the U or T visa application already has been filed or must be filed as a defense, consider the same arguments discussed above: that addiction is a medical condition most commonly caused by extreme trauma.

Post-conviction relief for survivors of domestic violence or human trafficking. The next section discusses using California post-conviction relief to eliminate a prior conviction for immigration purposes. Note that one form of post-conviction relief specifically applies to victims of domestic or sexual violence, or of human trafficking, who committed certain offenses due to their circumstances. This should include turning to drugs in an attempt to cope with the experience of being trafficked or subject to human trafficking or intimate partner violence.[30]

C. Vacate the conviction

Thousands of noncitizens in California are at risk of removal or cannot qualify for immigration relief because they have unlawfully imposed criminal convictions. The good news is that there are several forms post-conviction relief (PCR) under California law that permit immigrants to return to criminal court to vacate these convictions.

Covering how to do PCR is beyond the scope of this advisory, but this section will review resources and suggest possible collaboration between nonprofit immigration advocates and public defenders, as well as private offices.

See free online resources on California PCR, including the new *Worksheet: California Post-Conviction Relief for Immigrants* (2024)[31] that helps advocates to make the crim/imm analysis of the case, identify which convictions must be vacated and what PCR vehicles are available, and create the PCR argument.

See *Checklist for Eligibility for California Post-Conviction Relief for Immigrants* (2025), to help identify possible PCR, and *Overview of California Post-Conviction Relief for Immigrants* (2022) for basic information about PCR.[32] For more in-depth information and sample documents, purchase the ILRC manual, *California Post-Conviction Relief for Immigrants* (2023).[33]

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[30] See discussion of Penal Code §§ 236.23, 236.24 at post-conviction relief materials and at *New Options for Survivors of Human Trafficking and Domestic Violence* (2022), https://www.ilrc.org/resources/new-options-survivors-trafficking-and-domestic-violence.
[31] These free resources are available at §N.14, https://www.ilrc.org/resources/california-crimes-summaries.
[32] See above link.
[33] Available for purchase at https://store.ilrc.org/publications.

Collaboration between immigration and criminal law experts can help. In some cases, immigration advocates are completing the Worksheet, drafting a client declaration, and collecting documents. Then criminal defense counsel working in the county where the case will be brought take over the case in criminal court negotiate a stipulated vacatur and re-plea, or do a contested hearing. Or, they can guide immigration advocates through the local process.

D. Criminal court defense strategies

As we discussed, even a minor controlled substance offense like simple possession is extremely dangerous for immigrants. But 11395 is worse because it is an immigration "aggravated felony" that carries the worst possible consequences. This is true even if the 11395 is a misdemeanor, and *even if the person successfully completes DEJ*. If immigration consequences are important to the defendant, consider the following to avoid 11395:

- Always litigate the stop. File a motion to suppress in every case. In possession cases, the officer's decision to search the person often is based on a hunch, not reasonable suspicion.
- Remind the prosecutor that if the client re-offends, 11395 will still be an option.
- Plead to a felony or misdemeanor safe, non-drug alternative. Consult a crim/imm expert. Depending on your client's situation, they may recommend, e.g., misdemeanor or felony PC § 32 (sentence must be 364 days or less), trespass, vandalism, public nuisance, the special wobbler PC § 372.5 (can take a year or more sentence), or other. You can argue that these non-controlled substance offenses are priorable for purposes of 11395. You can add treatment for addiction or similar requirements as a condition of probation for any offense.
- Get PC § 1000 pre-trial diversion, *except* that if the client might not succeed in completing diversion, it may be best to bargain hard for a good result now rather than accept diversion.
- Challenge the priors, consider post-conviction relief (PCR). See **Subsection C**.

  For example, if the prior conviction occurred within the last six months, consider filing a PC 1018 motion. If the prior conviction is very old, the records may have been destroyed so that a PC §1016.5 motion will work. If the client did not meaningfully understand the immigration consequences or the attorney failed to negotiate for an immigration neutral offense, consider filing a PC 1473.7(a)(1) motion (which does not require ineffective assistance of counsel).

- If the person completed DEJ under the former PC 1000 (1997-2017) or PC §1210.1, and plea was withdrawn, these are not priors that support a charge under 11395.

  But do try to vacate them because they are CS "convictions" for immigration purposes. See 1203.43 (former PC 1000) or PC 1473.7(e)(2) (PC 1210.1 and former PC 1000).

- If nothing else is possible, a Hail Mary approach is to plead specifically to meth.

  A removal defense advocate can argue that a California conviction for meth (or heroin or cocaine) does not meet the federal definition of a controlled substance. See **Subsection B**. But try to avoid this because (a) *most immigrants have no representation* in removal proceedings, so no one will make this argument, and (b) if there is argument, it might lose or take years to resolve, while the client is in ICE detention.

- If the prosecutor refuses to offer anything less than HS 11395, take the case to trial.

III. Other Prop 36 Drug Offenses That Carry New Immigration Consequences

Offering to sell. In the Ninth Circuit only, "offering to sell" a controlled substance is not an aggravated felony.[34] Some Prop 36 offenses penalize sale but not "offering to sell." See Penal Code 12022.7. A better plea is to 'offering' under Health & Safety Code 11352 or 11379.

Prison. Some Prop 36 enhancements require prison, where transfer to ICE is very likely. See, e.g., 11395 (second felony is state prison offense), or Health & Safety Code 11300.4 and Penal Code 12022.7 (always prison).

All substances are in federal drug schedules. A few Prop 36 offenses, such as 11395 and 11370.5, only list substances that also appear on the federal drug schedules. They do not include substances such as chorionic gonadotropin (or arguably khat), which do not appear on federal drug schedules and thus are not controlled substance convictions for immigration purposes.

[34] See *U.S. v Martinez-Lopez,* 864 F.3d 1034, 1037–38, n. 3 (9th Cir. 2017) (en banc), citing *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001).

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