



HOW TO DEFEND IMMIGRANTS CHARGED WITH DRUG OFFENSES

Including pleas under new Penal Code § 372.5

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Federal immigration laws impose extremely severe immigration penalties for even a minor controlled substance offense.

- A California conviction of simple possession, possession of paraphernalia, or being under the influence can subject an immigrant to ICE detention without possibility of bond, ineligibility for lawful status, and permanent deportation to the home country -- regardless of hardship to the person or to the U.S. family they leave behind.
- Offenses such as possession for sale, or misdemeanor growing more cannabis plants than permitted, are classed as “aggravated felonies” that carry the very worst penalties.

This all makes it difficult to defend any immigrant facing a drug charge in a way that avoids disproportionate and life-destroying immigration penalties. Difficult, but not impossible. **Part B** of this advisory discusses four defense strategies to avoid a drug conviction. **Part C** cites statutes and arguments to use in plea negotiations for immigrant defendants.

We will use the term **immigrant** to refer to any defendant who is not a United States citizen. *All* immigrants face great risk in any criminal proceeding, whether they are a long-time lawful permanent resident, an undocumented person, or a student, asylee, DACA recipient, or person with other immigration status. The **Department of Homeland Security (DHS)** is the federal agency that grants immigration applications, enforces laws, and prosecutes removal hearings.

Each case involving an immigrant defendant requires expert “crim/imm” advice.

Unfortunately, your criminal law expertise alone does not enable you to identify a good immigration plea. Immigration penalties are not predictable: a strike such as residential burglary can be an excellent plea, while several misdemeanors are extremely dangerous. Further, each client requires an individual analysis based on their own immigration and criminal record history: what’s good for one permanent resident or undocumented person may be bad for another. Don’t represent an immigrant defendant without expert advice.²

A. Identifying Case Goals

Our immigration goal in a criminal case is to obtain an “immigration neutral” disposition that leaves the person’s immigration situation about the same as it was before the criminal proceeding. (If you also can improve their situation by vacating a prior damaging conviction, that is the gold standard. See **Part C.3**, below.)

Deportable for a conviction. The first goal is to avoid *conviction* of any controlled substance offense (CSO). That will prevent a lawful permanent resident from becoming *deportable*. If they

² If you work in a public defender office, or if you represent indigent clients in small rural counties, you already should have access to case-specific crim/imm advice. Contact kbrady@ilrc.org if you are in either of these categories but believe that you do not have access.

are not deportable for some other reason they can continue living safely within the United States, although they should get expert advice before leaving the country, even for a day.

Inadmissible: Undocumented people, asylees and refugees, deportable permanent residents, and others. Other immigrants will need to apply for lawful immigration status or protection (immigration “relief”) at some time, if they are to live legally in the United States. For many applications the person must not be *inadmissible*. Unfortunately there are multiple ways to be inadmissible for drugs and the immigrant has the burden of proof.

An immigrant is inadmissible if they are convicted of a CSO (which the below strategies prevent), or if they make a *qualifying admission* that they committed a CSO.³ There is precedent that if an immigrant was charged with conduct in criminal court but not convicted of the conduct, they cannot be found inadmissible for admitting the same conduct,⁴ but most immigrants are unrepresented and may not be able to assert that defense.

An immigrant also is inadmissible if immigration authorities gain sufficient evidence from any source for “reason to believe” the person ever participated in drug *trafficking*.⁵ This can be fatal to undocumented people, asylum seekers and asylees and refugees, and even permanent residents who travel outside the United States. Just a criminal charge involving trafficking will alert DHS authorities, but they may or may not actually gather evidence. Keep such facts out of plea statements or a factual basis for the plea; see **Part C.1**.

Asylum applicants, asylees, and refugees need to avoid being inadmissible for “reason to believe” drug trafficking, but they may be able to survive an admission or conviction of a possessory offense. They must avoid conviction of any offense where the underlying facts show significant violence or harm (“particularly serious crime”). An applicant for a T or U visa (victim of trafficking or certain crimes) might be able to survive an admission or conviction of a possessory offense.⁶ See **Part B.6**, below.

What we can do. We can work to prevent a drug conviction. After that, while we cannot control what happens in immigration proceedings, we can help. All strategies in **Part B** avoid a drug conviction, but the first two (pleading to a non-drug offense, pretrial diversion) are likely safer than the next two (pleading to Penal Code §§ 32 or 372.5) for purposes of inadmissibility. Also, see **Part C** for Practice Tips for the factual basis for the plea, advising clients of their rights if approached by ICE, and laws and policies to support your plea negotiation.

³ See INA § 212(a)(2)(A)(i)(II) and see discussion in ILRC, *Immigrants and Marijuana* (2021), www.ilrc.org/crimes.

⁴ The BIA has declined to find inadmissibility if no conviction occurred because the charges for that offense were dismissed or the person completed pretrial diversion, or if there was conviction but it was eliminated by immigration-effective post-conviction relief. See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

⁵ INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C).

⁶ For more information on these forms of relief see, e.g., ILRC, *Relief Toolkit* (2018), www.ilrc.org.

B. Defense Strategies for California Drug Charges

1. Bargain to drop the drug charge and plead to another offense

In many cases, the best immigration resolution other than dropping all charges is to avoid pleading to the drug charge/s. Identify a different, immigration neutral offense as an alternative plea. This often is do-able, especially when multiple charges were brought.

The United States Supreme Court, the American Bar Association, and Penal Code § 1016.3 specifically support the practice of prosecutors dropping some charges in favor of others to avoid excessive immigration or other collateral consequences. See **Part C.4**, below.

Example: Your immigrant client is charged with PC § 243(e) (spousal battery) and H&S C § 11377 (possession of a CS). For most immigration purposes, the 11377 is quite dangerous while the 243(e) is immigration neutral, and the priority is to get the 11377 charge dropped. In exchange, and unless you can get all charges dropped or reduced, the client can offer to plead to § 243(e), and if necessary can accept additional immigration-neutral offense, such as PC §§ 148(a) or 594. They can accept drug-related probation conditions such as counseling or search requirements on the non-drug conviction.

But remember that *each defendant needs their own expert analysis*. An asylum applicant might want drug possession over a violent offense, and a DACA recipient cannot accept a § 243(e).

2. Get Penal Code § 1000 pretrial diversion, if your client can complete it

Effective January 1, 2018, Penal Code § 1000 et seq. provides a pretrial diversion option for charges of certain controlled substance offenses (CSOs). It does not require a guilty plea and thus is not a conviction for immigration purposes.⁷ If completed, it is a very good resolution.

However, many defendants are not able to complete diversion. If they fail, they will face the original CSO charge but without the right to a trial by jury, which they waived as a condition of diversion.⁸ If you think that your immigrant client might not complete diversion, it may be best to decline it and just fight for the best disposition while you have all defense options.

3. Plead to Penal Code § 32, accessory after the fact

Accessory after the fact never is a controlled substance offense (CSO) for immigration purposes, even if the underlying felony was a CSO.⁹ Some prosecutors will permit a plea to misdemeanor or felony Penal Code § 32 instead the drug charge. If pleading to accessory, the sentence (including any additional time imposed on a probation violation) should not exceed

⁷ For immigration purposes, a plea or finding of guilt is required for a conviction. See INA § 101(a)(48)(A) and see ILRC, [What Qualifies as a Conviction for Immigration Purposes](#) (April 2019) at www.ilrc.org/crimes.

⁸ Cal. Penal Code § 1000.1(a)(3).

⁹ See, e.g., [Matter of Batista-Hernandez](#), 21 I&N Dec. 955 (BIA 1997).

364 days on each count, to avoid the risk that the conviction would become an immigration “aggravated felony” if a year or more was imposed.¹⁰

To avoid inadmissibility, it is safer to bargain for some other non-drug offense, per Strategy #1, than to plead to accessory. In particular, if the original charge related to drug trafficking and the plea was to accessory, DHS is more likely to seek evidence to try to find the person trafficked. If possible, identify a specific, immigration neutral offense such as burglary as the underlying felony. See also the discussion of factual basis for the plea, for “Know Your Rights” when encountering DHS officials, and other materials at **Part C**, below.

4. Negotiate a plea to new Penal Code § 372.5 instead of a drug charge – at least for some immigrant defendants

[Penal Code 372.5](#) became a plea option on January 1, 2023.¹¹ It never is a conviction of a CSO, a crime involving moral turpitude, or other removable offense.¹² One can think of it as a kind of “wet reckless” for drug charges.¹³ A defendant charged with any of several drug offenses, from infractions to felonies, can ask for the charge/s to be dismissed and instead to plead to being a public nuisance ([Penal Code § 370](#)) at the same offense level. Section 372.5(a)-(c) provides that in this circumstance, being a public nuisance is punishable as an infraction, an alternative one-year misdemeanor/infraction, or an alternative felony/misdemeanor where the felony is punishable by a sentence of 16 months or two or three years. As with “wet reckless,” the prosecution cannot affirmatively charge defendants under section 372.5. They can decide each defense request for this option on a case-by-case basis.

Which immigrants does this best help? Section 372.5 is an excellent option to address even felony drug charges if other options will not work. It is most useful for lawful permanent residents. As discussed in **Part A**, it likely is less safe for undocumented people and other immigrants without secure status, who may need to prove that they are “admissible.” Where possible, it is better to negotiate for a plea to a non-drug offense or to get pre-trial diversion (Strategies 1 and 2). For undocumented clients who take this plea, see information in **Part C.2** on “Know Your Rights” when encountering DHS officials.

¹⁰ See generally ILRC, [California Sentences and Immigration](#) (Dec. 2020) at www.ilrc.org/crimes. The Ninth Circuit held that Penal Code § 32 is not an aggravated felony as “obstruction of justice” a year or more is imposed (*Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020)), but the issue may go to the Supreme Court.

¹¹ See [AB 2195](#), California 2021-2022 session.

¹² Under the categorical approach used to determine whether a conviction is of a CSO for immigration purposes, a CSO must have conduct relating to a controlled substance (as defined by federal drug schedules) *as an element*. Sections 370 or 372.5 do not have this. Also, the definition of “drug” at section 372.5(d) is broader than the federal definition of a CS. See ILRC, [How to Use the Categorical Approach Now](#) (2021), www.ilrc.org/crimes and see also [People v. Gallardo](#), 5 Cal.5th 120 (2017).

¹³ Under [Cal. Penal Code § 23103.5](#), California law has long permitted a person charged with a DUI to agree to a substitute plea to reckless driving with consumption of alcohol, referred to as “wet reckless.”

Practice Tip: Felony charges, policy arguments: Section 372.5 reaches felony charges, including sale and possession for sale of a CS. These mainly are “drug trafficking aggravated felonies” carrying the worst possible immigration penalties. Many people charged with these felonies have not committed serious crimes that deserve such disproportionate immigration penalties, and should be permitted to plead to § 372.5. See discussion in **Part C.3, C.4.**

Practice Tip: Factual basis for the plea: While conviction of section 372.5 is not a CSO regardless of the criminal record, best practice still is to avoid a record that describes drug conduct. If possible, state as a factual basis defendant’s conduct that was a public nuisance, such as loud noise, urinating in public, obstructing a sidewalk, etc. Or decline to state specific facts under *People v. Palmer*, 58 Cal.4th 110, 118-19 (2013). See **Part C.1**, below.

5. Do NOT rely on creating a vague record of conviction that only refers to “a controlled substance.”

For many years, an immigration defense to a drug charge was to bargain to have the name of the substance, e.g., “heroin,” removed from specified documents in the record of conviction and replaced with the term “a controlled substance.” Because California drug schedules contain some substances not found on federal drug schedules, and because DHS could only use information from the (sanitized) record of conviction, creating a vague record prevented DHS from meeting its burden of proving that the conviction involved a federally defined CS.

This defense is no longer available due to the 2021 Supreme Court decision, *Pereida v. Wilkinson*.¹⁴ Now, a vague record of conviction *never* is a defense for undocumented people, permanent residents who already are deportable, or other immigrants applying for relief. While a vague record of conviction might prevent DHS from proving that a permanent resident is deportable, this is no longer guaranteed. Use any of the preceding strategies instead.

6. Immigration consequences of a drug conviction

If the client can’t avoid conviction of a CSO, be sure to get expert advice. For background, criminal and immigration defense advocates can register for the *California Quick Reference Chart*,¹⁵ which analyzes the immigration impact of over 200 offenses, and see online resources that describe the various types of immigration relief and their criminal record bars.¹⁶

Some CSO offenses are “aggravated felonies” (AFs), which bring fatal penalties.¹⁷ Possession for sale always is an AF. Sections 11352, 11360, 11379 are AFs *unless* the plea is to “offering” to distribute, sell, etc., and immigration proceedings are held in the Ninth Circuit. If there is no

¹⁴ See *Pereida v. Wilkinson*, 141 S.Ct. 754 (March 4, 2021) and see discussion of *Pereida* and California drug offenses in ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at www.ilrc.org/crimes.

¹⁵ Register for this free ILRC resource at <https://calchart.ilrc.org/registration/>.

¹⁶ See ILRC, *Immigration Relief Toolkit* (2018) and/or *Immigration Relief Chart* (2020), both at www.ilrc.org/chart

¹⁷ See INA § 101(a)(43)(B) and ILRC, *Aggravated Felonies* (2013), www.ilrc.org/chart.

other choice, pleading up from possession for sale to “offering to” at least avoids an AF, and it has been held ineffective assistance of counsel to fail to advise the client of this.¹⁸ There are several “surprise” drug trafficking aggravated felonies, so check each offense. In particular, growing marijuana for one’s own use, H&S C § 11358, is an AF even as a misdemeanor or infraction. A person convicted of a drug AF can apply for relief under the Convention Against Torture or (at least theoretically) a T or U visa or in rare cases, withholding of removal.

CSO that are not AFs are only slightly better. A conviction for possession makes any immigrant deportable and inadmissible. It bars all family immigration, Temporary Protected Status, VAWA relief, Special Immigrant Juvenile, and other relief from removal. However, it does not entirely destroy eligibility to apply for asylum, withholding, or Convention Against Torture; for adjustment to permanent resident as an asylee or refugee (only); for a T or U visa; for DACA (although a very bad idea); or for a permanent resident to apply for cancellation of removal, unless they committed the offense within seven years of admission in any status. There are some exceptions for conviction for possessing 30 grams or less of marijuana.

C. Practice Tips, Statutes, and Arguments

1. Practice Tip: Factual basis for the plea

None of the first four strategies in **Part B** result in a conviction of a controlled substance offense (CSO), regardless of underlying facts. But best practice is to avoid a record that describes drug conduct, especially if the person needs to be admissible. If possible, identify as a factual basis specific conduct by the defendant that fits the offense of conviction. Or, decline to state a specific factual basis. Under Penal Code § 1192.5, a factual basis is only required for felonies. In felony cases, the California Supreme Court repeatedly has held that the defense does not need specify the underlying facts. In *People v. Palmer*, the court held that a showing that the defendant “had discussed the elements of the crime with his counsel, and that he was satisfied with counsel's advice” is sufficient to meet § 1192.5 requirements.¹⁹

2. Practice Tip: Inform clients of their right not to talk to ICE

DHS has the burden to prove that a person is not a United States citizen (USC). This is most often done through its enforcement arm, Immigration Customs and Enforcement (ICE). Many people just confess to ICE that they were born outside the United States. This shifts the burden to them and destroys the defense. But immigrants have the right to refuse to talk with ICE or state where they were born, or to open their door unless ICE has a warrant from a judge as opposed to another ICE officer (ICE virtually never has that). Instead they can ask if they are free to go or ask to speak to a lawyer. Asserting this defense with an aggressive ICE

¹⁸ See *People v. Bautista*, 115 Cal.App.4th 229 (2004); *In re Bautista*, H026395 (Ct. App. 6th Dist. Sept. 22, 2005).

¹⁹ *People v. Palmer*, 58 Cal.4th 110, 118-19 (2013); see also *People v. French*, 43 Cal.4th 36, 50-51 (2008).

officer can be scary, but it is an effective defense, especially for undocumented people who have not filed any application or encountered DHS. DHS receives all fingerprints from all bookings, but that alone does not prove citizenship status.

Please explain this to your client. The ILRC (author of this advisory) provides *Know Your Rights* materials for immigrants in several languages, at www.ilrc.org/red-cards. You can print out the text to give to a client, or order laminated “red cards” to give out with this information in the language/s you need. Public defender offices can order cards in bulk for free from this site.

3. Practice Tip: The client may be able to vacate prior drug conviction/s

If your client has a prior drug conviction, you can help them by providing assistance or referral to obtain post-conviction relief (PCR) to vacate the conviction. California law provides several good PCR vehicles, including some especially for immigrants. With a few exceptions, a vacatur must be based on error in the original proceedings to have immigration effect (but the error need not be ineffective assistance of counsel). See ILRC, [Overview of California Post-Conviction Relief for Immigrants](#) (July 2022) at www.ilrc.org/crimes and see forthcoming ILRC manual on California PCR for immigrants, <https://www.ilrc.org/publications>. Note that some public defender offices and immigration non-profits have funding to provide PCR assistance.

4. California and federal law and policy provide that prosecutors should plea bargain to avoid extreme immigration consequences

The United States Supreme Court, the American Bar Association, and California courts and statutes all indicate that prosecutors should plea bargain to avoid destructive and disproportionate immigration consequences.

California codified the law regarding duties of defense and prosecution in cases involving immigrant defendants. Under Penal Code § [1016.3\(b\)](#): “The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”

While some prosecutors will say, “I considered it and decided against it,” there has been real improvement in prosecution’s willingness to negotiate based on this statute. It is worth trying.

Section 1016.3(b) instructs prosecutors to act “in furtherance” of section [1016.2](#). Section 1016.2 describes the harsh penalties imposed on immigrants who become removable based on crimes. It finds that these penalties “have a particularly strong impact in California,” noting that “50,000 parents of California United States citizen children were deported in a little over two years.” Penal Code § 1016.2(g).

Section 1016.2(b) cites *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010), where the Supreme Court affirmed the value of plea negotiation to avoid immigration consequences:

[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, *a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel ... may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.* At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. (emphasis added)

The American Bar Association publication, *Criminal Justice Standards for the Prosecution Function* (2017), states that prosecutors may properly dismiss or decline to file a charge if the “likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender.”²⁰ Immigration penalties such as mandatory ICE detention without bond for weeks or months, and permanent deportation and separation from close family, are disproportionate penalties for minor, or relatively minor, drug offenses.

See also ILRC, [*Immigration-Related Prosecutorial Considerations Do Not Violate the Equal Protection Rights of Citizens*](#) (2020) and other materials at <https://www.ilrc.org/prosecutors>.

5. Defendants who are victims of human trafficking, domestic violence, severe trauma, or addiction merit special consideration under California law

California law recognizes that some defendants either lack criminal responsibility, or merit more lenient treatment, because they are victims. An addict who sells some of their own stash for subsistence, a desperate victim of human trafficking or domestic violence, or a parent using drugs to stay awake for multiple jobs, deserve positive consideration.

If a defendant is described in one of these laws, this should serve as a basis for the prosecutor to negotiate under Penal Code § 1016.3(b). Also, their case may qualify for the benefit.

New California laws protect qualifying defendants who are victims of human trafficking, domestic violence, and (for sentencing purposes) severe trauma. It is a complete defense to a charge if the person was “coerced” to commit the offense due to being a victim of “human trafficking” or (as of 2022) “intimate partner violence or sexual violence.”²¹ A separate law

²⁰ See Fourth Edition (2017) of the *CRIMINAL JUSTICE STANDARDS* for the *PROSECUTION FUNCTION*, Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges, Part (c)(vi), available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

²¹ See Cal. Penal Code §§ [236.23](#), [236.24](#).

provides a vehicle for such persons to vacate a prior conviction for cause on similar grounds.²² These laws apply to any offense except a “violent felony” defined at Penal Code § 667.5(c). “Human trafficking” refers to labor obtained by threat, fraud, etc., or any sex work by a minor.²³ The required “coercion” is not limited to being forced to obey the abuser or trafficker; it also includes coercion arising from the status of being a victim.²⁴

Sentence mitigation provisions apply to the above-described victims as well as people with severe childhood, sexual, or other trauma, or who committed the offense while under the age of 26, if any of those factors “contributed” to commission of the offense.²⁵

Again, consider using these laws *in combination with other factors* to persuade the prosecutor. Even if the client cannot win a complete defense based on their victimization, the situation is a strong factor in favor of at least negotiating an immigration neutral plea under § 1016.3(b). See further discussion of these laws at ILRC, [New Options for Survivors of Trafficking and Domestic Violence](#) (Nov. 2022) at www.ilrc.org/crimes.

Consider potential immigration status for victims of human trafficking, violence.

Defendants who advance the above claims also might be eligible to apply for immigration status. They should be referred to immigration non-profits²⁶ or specialists who work with T visas (victims of trafficking), U visas (victims of certain crimes, including domestic violence), and Violence Against Women Act protections (victim of abuse by a U.S. citizen or permanent resident parent, spouse, or adult child). See online resources such as ILRC, [Immigration Relief Toolkit](#) (2018) and/or [Immigration Relief Chart](#) (2020), both at www.ilrc.org/chart, or resources at www.castla.org.

California’s position is that drug addiction (substance use disorder) should be addressed with treatment rather than criminal penalties. California has adopted the position that having a substance use disorder (SUD) is a medical condition and that criminalization is not an effective response to the current epidemic. Most recently, see the passage of the massive California CARE Act that aims to address mental illness and SUD in this manner.²⁷ This should guide prosecutors’ decision under Penal Code § 1016.3(b) to accept a reasonable, immigration neutral plea for defendants suffering from SUD.

²² See Cal. Penal Code § [236.14](#), [236.15](#).

²³ See definition of human trafficking at Cal. Penal Code § [236.1](#)(a), (b), (c).

²⁴ See [In re D.C. \(App. 4 Dist. 2021\) 275 Cal.Rptr.3d 191](#) (obtaining a knife to defend himself from the trafficker can be the basis of a “coercion” defense to unlawful weapon possession).

²⁵ See sentencing provisions at Cal. Penal Code §§ [1016.7](#), [1170](#)(b)(2)..

²⁶ To locate possible nonprofit referrals, go to this site and scroll down for the county in which your client lives: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/search?state=CA>

²⁷ See, e.g., press release at <https://www.gov.ca.gov/2022/09/14/governor-newsom-signs-care-court-into-law-providing-a-new-path-forward-for-californians-struggling-with-serious-mental-illness/>.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.