How To Defend Immigrants Charged With Drug Offenses in California Courts

2026 Update

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A. Overview; Identifying Client's Case Goals

Here is some basic information about how to approach the case when a non-U.S. citizen client is charged with a controlled substance ("CS") offense. This Advisory will refer to non-U.S. citizens as "immigrants." See further discussion, and a summary of immigration and criminal topics ("crim/imm") in resources at www.ilrc.org/crimes-summaries, especially *§ N.0 Overview.*

Drug charges can be devastating to immigrants. *But in many cases defenders and/or immigration advocates often can PREVENT these outcomes by using the defense suggestions in Part B of this Advisory and getting expert consultation.* As defense counsel, it is your duty to do what is possible to avoid the catastrophe. *See* Penal Code § 1016.3(a). The hard facts are:

Immigrant defendants face extraordinary penalties beyond the criminal punishment. A California conviction for any drug offense can subject any immigrant to very harsh punishments. Unless a technical defense is available (see **Part B**), the conviction will make the person deportable, inadmissible, subject to mandatory ICE detention and legally ineligible for bond, and in many cases automatically deported regardless of hardship to themselves or to the U.S. family they leave behind. In this Administration, immigrants are being deported to countries where they never have been and have no connections, and where they may be indefinitely imprisoned or dropped into an active war zone.

Possession of a CS is very dangerous for all noncitizens; trafficking and PC § 11395 are worse; and the laws don't make sense. Even a first conviction for simple possession, under the influence, or possession of paraphernalia will doom most immigrants. For example, that conviction would bar your client from getting lawful status through their U.S. citizen spouse, or humanitarian protection under the Violence Against Women Act, Special Immigrant Juvenile, or Temporary Protected Status laws. Generally, the only people who might survive a minor CS possession conviction are certain long-time lawful permanent residents, an asylee, refugee, or applicant for asylum. A CS conviction will subject all immigrants to mandatory ICE detention without possibility of bond. (Note that there are some narrow waivers and exceptions for a first offense involving 30 grams or less of marijuana.[1])

Some CS convictions are immigration "aggravated felonies" that bring the worst possible penalties, including against permanent residents and most asylees and refugees. An aggravated felony (AF), defined at INA 101(a)(43)(B)), need not be aggravated nor a felony. Regardless of the amount of drugs, any conviction for possession for sale, or sale or transport for sale (except in some areas "offering" to sell), or any misdemeanor or felony PC § 11395, including misdemeanor or *infraction* H&S C § 11358, will be charged as an AF. Check the ILRC *California Chart* (see "Resources," below) to see which CS offenses also are AFs.

Sale, possession for sale, cultivation, and other drug trafficking charges carry certain immigration penalties merely based on criminal charges, because DHS may then have "reason to believe" a person has been involved in drug trafficking. Defenders may have limited ability to

[1] See ILRC, *§ N.8B Immigrants and Marijuana* (May 2021) at www.ilrc.org/crimes-summaries.

defend against this when charges are already filed, but should nonetheless be sure to seek expert analysis and advise their clients about the attendant risks.

Each client needs an individual case analysis. Get an expert opinion. Each immigrant defendant's case analysis is based on the individual's current or hoped-for immigration status, all prior convictions, and a basic account of their immigration history. A good criminal court disposition for one permanent resident or undocumented person can be fatal for another.

To gather the information needed to devise case goals, use an Immigrant Defendant Questionnaire. Once you have the information, the best way to identify the defense goals is to get advice from an expert in the field of immigration and crimes ("crim/imm"). This may be an in-house expert in your office or an outside expert who agrees to advise. They can tell you if the client needs to prioritize avoiding a deportable conviction, an inadmissible conviction, or some other disposition. An expert can identify alternative pleas and work with you throughout the case. At this time, every public defender office in California should have access to a crim/imm expert for case consults.[2]

Deportable versus Inadmissible and Admitting Drug Conduct. Many immigration penalties are divided into making the person "deportable" and/or "inadmissible." Some offenses are grounds of deportability, others are grounds of inadmissibility, and some are both. There is a longer discussion on this in the ILRC *Overview of Crim/Imm* for defenders.[3] This section will briefly discuss controlled substances and deportable versus inadmissible.

A lawful permanent resident (LPR, green card-holder) who is in the United States cannot be put in removal proceedings unless they are *deportable* under INA § 237(a). To be deportable under the CS grounds, the LPR must have been convicted[4] of a qualifying CS offense.[5] The defenses at **Part B**, below, can avoid such a conviction.

But any immigrant who must *apply for* some lawful status or defense to stay in the U.S., or for admission into the U.S., is in a tougher situation. This group includes all undocumented people and many others. They often face some version of the grounds of *inadmissibility,* at INA § 212(a). A CS conviction is a ground of inadmissibility to lawful status and a bar to some forms of relief from deportation, although the defenses below in **Part B** may avoid these bars. But additionally, an immigrant is inadmissible if DHS knows or "has reason to believe" the person ever participated in drug trafficking.[6] This can be sustained based on charges alone,

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[2] If you work in a California public defender office and do not have this service, write to calchart@ilrc.org

[3] See ILRC, *§ N.0 Overview of Crim/Imm* (2026) at www.ilrc.org/crimes-summaries.

[4] A conviction for immigration purposes does not include a juvenile disposition but does include almost any proceeding where there was an admission or finding of guilt and the court imposed some restriction. Thus it includes a successfully completed DEJ, even if the state finds no conviction. See *§N.2 Definition of Conviction for Immigration Purposes* (April 2019), www.ilrc.org/crimes-summaries .

[5] See INA 237(a)(2)(B)(i). A qualifying CS offense means a California CS that meets the federal CS definition. See discussion in Part B, sections 4, 5. The person also is deportable if found to have been an "addict or abuser" since admission (237(a)(2)(B)(ii)), but to date that is rarely charged.

[6] See INA § 212(a)(2)(C).

without a conviction. An immigrant is also inadmissible under the CS grounds if they have a qualifying conviction *or* if they formally "admit" to immigration authorities that they committed a qualifying CS offense.[7] (There is a possible defense to this in immigration proceedings,[8] although most immigrants in removal proceedings are unrepresented). If the immigrant applying for relief refuses to answer questions, the immigration judge or officer may simply deny the application. So these defendants are more vulnerable, and a crim/imm expert may recommend steps to give more protection.

What You Need to Know; Resources. There are some points of crim/imm law that you should understand, because even if you are not the expert, you are the messenger. You will explain the goals to your client and perhaps to the prosecutor or judge. You can work on this with your expert, plus there are multiple free ILRC resources created for defenders, ranging from how to approach a case to sentencing issues, details of different offenses, how to obtain post-conviction relief, and more. Go to www.ilrc.org/crimes-summaries. A few basic tools are:

§ N.0 Overview: Immigration and Criminal Law (February 2026) contains short sections on several topics including different types of offenses. It explains basic concepts and reasoning, which may help you explain them to others.

§ N.1 How to Analyze a Crim/Imm Case: Four Questions to Identify Case Goals (March 2023). This takes you from the first client meeting to how to find resources and discusses different goals depending on immigration status.

§ N.16 Client Questionnaire (July 2020), a fillable PDF that you can download to collect the information needed to make the analysis.

§ N.17 Defenders' Immigration Relief Toolkit (December 2024) has two-page summaries of different immigration applications and the criminal-record bars to each.

See also the ***ILRC California Chart*** (updated March 2026), a heavily annotated chart of over 200 California offenses and their immigration effect. Criminal defense attorneys and immigration advocates (but not others) can register for this free resource at https://calchart.ilrc.org/registration/.

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[7] See INA 212(a)(2)(A)(i)(II).

[8] The BIA has found that if an immigrant is charged with conduct in criminal court but the charges are dismissed, then an independent admission of committing that crime is not a basis for inadmissibility. *See Matter of C-Y-C-*, 3 I&N Dec. 623 (BIA 1950) ("[w]here there has been an adjudication of the cause resulting in dismissal of the proceedings, we should not hold the alien bound by an independent admission of the commission of the crime unless the court's action is based on purely technical grounds"). Additionally, if a charge does not receive a final conviction or is pardoned, the person is not inadmissible for having admitted that same conduct in the pleadings during the criminal proceedings. 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).

B. Immigrant Defense Strategies for California Drug Charges

1. Bargain to drop the drug charge and plead to a different offense

For many immigrants the best resolution other than dismissal of all charges is to drop the controlled substance (CS) counts. As needed, identify one or more non-CS, immigration neutral offenses as an alternative plea or pleas. 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.3**, below.

> *Example*: The client is charged with PC § 243(e) (spousal battery) and misdemeanor H&S C § 11377 (possession of a CS). For most immigration purposes, the 11377 is quite dangerous while the 243(e) is not a bar to legal status or ground for deportation, so the priority is to get the 11377 charge dropped. If necessary the client can offer to plead to § 243(e), or even to additional immigration-neutral offenses, such as PC §§ 148(a), 415, or 594. They can accept drug-related probation conditions such as counseling or search requirements on these.

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

2. Pretrial diversion: PC §§ 1000, 1001.20, 1001.36, 1001.80, 1001.95

Pretrial diversion, where the defendant pleads "not guilty", is not a conviction for immigration purposes and can be a great strategy for clients who can complete it. For a misdemeanor charge, consider judicial diversion, PC 1001.95. Some defenders use arguments under the Racial Justice Act to persuade judges to grant it. Also, pretrial drug courts are an option in some counties, but be sure to confirm there is no requirement of a finding, plea, or admission.

Or, carefully consider pretrial diversion under PC 1000 (2018) for the enumerated CS charges. Disadvantages are that (a) if the defendant does not satisfactorily complete the program, they will face the original charges without the right to trial by jury (see PC 1000.1(a)(3)), and (b) H&S C §11395 is not an eligible enumerated offense.

Alternatively, for a felony or misdemeanor charge, including 11395[9], consider CARE Court[10] or mental health diversion (MHD), PC 1001.36, on the grounds that addiction is a mental health issue.[11] See also PC 1001.80 pretrial diversion for veterans or active service personnel dealing with trauma, and see PC 1001.20 for clients with developmental disabilities. Unfortunately, as of 2026, many noncitizens will not be eligible for Medi-Cal and therefore will not be eligible for

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[9] See *Reed v. Superior Court,* 117 Cal.App.5th 697 (2025)

[10] If your client has a schizophrenia or bipolar disorder diagnosis, CARE may be a safer, more flexible, and shorter (1-year versus 2-year) option than MHD. Also, county or other local government failure to comply with court orders related to the CARE process can result in $1000/day sanctions. Welf. & Inst. Code 5979(b)(2)(C).

[11] To support an argument that addiction is a chronic health problem, see Part II of ILRC, *Immigrants and Substance Use Disorder: A Legal and Medical Perspective* (Aug. 2023) at www.ilrc.org/crimes-summaries.

treatment programs that require Medi-Cal. Prior to seeking MHD, counsel should verify whether the treatment plan requires Medi-Cal and/or the individual has Medi-Cal eligibility. Otherwise, the person could face termination of MHD based on non-compliance.[12] The California Department of Health Care Services posts materials on immigrant eligibility as well as links to nonprofits that may be able to assist the individual with the issue.[13]

Warning: DEJ is a conviction and requires a vacatur even if client was successful. Unlike pretrial diversion, the "deferred entry of judgment" (DEJ) offered by H&S C § 11395, PC § 1210.1, and former PC § 1000 (between 1997-2017) requires a guilty plea and thus is a conviction for immigration purposes, even if the person completes it and California finds there is no conviction. For prior DEJ convictions, it may be possible to obtain a vacatur under PC 1437.7(a)(1) per the presumption of legal invalidity found under 1473.7(f)(2). See Part I of ILRC, *Overview of California Post-Conviction Relief for Immigrants* (2022) and see more on post-conviction relief at **Section 7,** below.

3. Plead to PC §§ 32 or 370, 372.5

a. Penal Code §§ 370, 372.5

As of 2023, a California defendant charged with drug offense/s can ask for the charge/s to be dismissed and to plead instead to being a public nuisance (PC 370). Under PC 372.5(a)-(c), a negotiated plea to section 370 in lieu of a drug charge can be punishable as an infraction, a misdemeanor/wobblette, or a 16-2-3 wobbler. Section 372.5 provides that the drug charges are dismissed as a condition of the plea. In this way, the defendant can agree to accept the criminal penalties for a CS conviction while avoiding some of the worst civil penalties such as immigration, housing, employment, etc.

The procedure in criminal court is similar to a "wet reckless" under VC 23103.5. The prosecution cannot affirmatively charge section 370 with 372.5, but if the defense requests it the prosecution will decide whether to agree to it. Section 370, 372.5 can be an alternative to almost any CS charge including to AF offenses such as possession for sale, sale, or H&S C 11395. (Like 11395, section 370, 372.5(c) can punish possession as a wobbler.)

The conviction is for public nuisance, PC 370. For immigration purposes, public nuisance is not a CS offense, CIMT, AF, or other removable conviction. It is not a deportable conviction, so its

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[12] *People v. Riddle*, 115 Cal.App.5th 445, 449 (2025) (MHD termination upheld despite defendant's inability to enroll in specific residential treatment facility because of issues associated with county regulations governing his Medi-Cal coverage and proposal of intensive outpatient care). Counsel may try to distinguish *Riddle*, which involved a *specific* facility not taking individuals with arson charges, with indigent noncitizens who cannot afford treatment due to indigency and state laws that prohibit their coverage, and to argue that this unequal access to criminal diversion programs generally constitutes an equal protection violation.

[13] See discussion of different immigration status and eligibility, and links to immigration nonprofits, at HCS, *Immigration Status and Changes to Eligibility* and see general updates and information at HCS, *Medi-Cal Immigrant Eligibility FAQ's* (both consulted in March 2026). See also National Immigration Law Center, *Major Benefit Programs Available to Immigrants in California* (Feb. 2026) at https://www.nilc.org/resources/.

best use is for an LPR who is not deportable and who needs to avoid becoming deportable. But see Section c, below, about some risks for other immigrants.

b. Penal Code § 32

Felony or misdemeanor section 32, accessory after the fact, has long been used as an informal substitute immigration plea in order to avoid a CS or other harmful conviction. Like public nuisance (PC 370), section 32 is not a CS offense or CIMT. However, *if a year or more jail term is imposed, PC 32 is an aggravated felony.*

The advantage of 370/372.5 over 32 are that (a) PC 370 can take a sentence of a year or more without becoming an AF, while PC 32 cannot, and (b) some prosecutors refuse to accept a PC 32 plea for a CS charge on the grounds that, according to them, it is an inappropriate legal fiction. In contrast, section 372.5 is a legislatively sanctioned option for CS charges. But like section 372.5, section 32 still carries some risks for immigrants who must apply for relief.

c. Risks of Penal Code §§ 32 and 370, 372.5

Convictions of for PC 32 and 372.5 protect people who must avoid becoming "deportable" under the CS grounds. Deportability requires conviction of a CS offense, and sections 32 and 370 are not that. Thus, an LPR who is not deportable will continue not to be deportable with one of these convictions (unless the PC 32 has a sentence imposed of a year or more).

But any immigrant who still must *apply for* some lawful status or defense to stay in the U.S. is in a tougher situation. This group includes all undocumented people, LPRs who already are deportable and seeking relief, and many others. They often face some version of the grounds of inadmissibility, and one can be inadmissible for a CS conviction, *or* if (a) one admits to having committed a qualifying CS offense or (b) immigration authorities have sufficient evidence to support "reason to believe" that the person ever participated in trafficking a controlled substance.

In practice, a conviction for sections 32 or 370/372.5 after a drug charge may spur immigration officials to aggressively question the applicant about the underlying facts in order to obtain an admission to having committed a CS offense. And if the person applying for relief refuses to answer questions, the relief may be denied just on that basis. Additionally, DHS could still say it has "reason to believe" a person has been involved in drug trafficking if they plead to PC 32 or 370 following trafficking charges, whether or not there has been any admission to trafficking conduct. However, sections 32 and 370/372.5 still are far, far better than a qualifying CS conviction. Also, immigration advocates can argue based on BIA precedent that when criminal conduct is brought before a criminal court and the charge is dismissed, immigration authorities cannot use an admission of that same conduct to make the person inadmissible.[14]

[14] See supra note 7.

4. Plead to a CS not on federal drug schedules: *khat, hCG, ioflupane*

For immigration purposes, a controlled substance (CS) refers to a substance found on federal drug schedules; see 21 USC 802. If a California offense involves a CS not found on federal drug schedules, it is not a CS offense for immigration purposes, thus it is not a deportable or inadmissible offense or AF under the CS grounds. California has a few such substances, and in some cases one can negotiate a plea to them. (Do not use the analog defense, described below, with these substances.)

Khat, a plant, appears at H&S C 11055(d)(7) and is criminalized under California law at, e.g., 11377-79. Khat is not a federal CS and thus a California conviction is not a CS offense for immigration purposes.[15] Plead specifically to khat; do *not* plead to the related substance, cathinone, which is a federal CS.

Human chorionic gonadotropin, or hCG, is not on federal drug schedules and for that reason has been a good immigration plea in California. But as of January 1, 2026, California has decriminalized it per AB 1152. Any conviction for hCG from before that date (or after, if there are any) will remain a non-federal CS and thus not a CS for immigration purposes.

Ioflupane **(**or [123]ioflupane) is a derivative of cocaine via ecgonine. This is a developing defense.[16] One could offer a plea to ioflupane in response to a charge under 11350-52 involving cocaine or other substance. In *Brown v. United States*, the Supreme Court found that because ioflupane was federally legalized as of September 11, 2015, a state conviction from after that date is not a federal CS offense.[17] Thus a California conviction specifically for ioflupane is not a federal CS offense.[18]

5. Plead to a CS that California *defines* more broadly than federal law does: Analogs, isomers, cannabis

California and federal statutes often set out technical definitions of the chemical make-up of the listed controlled substances. If a CS appears on both California and federal drug

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[15] Khat is not a CS offense for federal immigration purposes. See *Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014) (section 11377(a) is overbroad as a CS because it includes khat); *Rendon v. Holder,* 782 F.3d 466, 470 (9th Cir. 2015) (same in dicta). For further discussion of khat, see the very helpful *U.S. v. Mire,* 725 F.3d 665, 668–69 (7th Cir. 2013) and see the ILRC *California Chart,* defenses section at H&S C 11377.

[16] *See, e.g., United States v. Holliday*, 853 F. App'x 53, 54 (9th Cir. 2021) ("The Montana schedules are also overbroad when compared with the federal regulatory drug schedules. The federal regulatory schedules were recently amended to specifically exclude 'ioflupane' from the list of cocaine-related substances . . . The Montana schedules, on the other hand, include 'cocaine and ecgonine and their . . . derivatives' without any exception for ioflupane.") (*affirmed in United States v. House*, 31 F.4th 745 (9th Cir. 2021). *See also United States v. Myrick*, No. 2:19-cr-00354, 2023 WL 2351693 (E.D. Penn 2019) (citing cases).

[17] 602 U.S. 101 (2024).

[18] The safest plea is to ioflupane. For technical reasons, ioflupane under California law is best classed as a derivative of ecgonine (see H&S C 11055(b)(7)) or a decocainized coca leaf. (11055(b)(4)), rather than a derivative of cocaine (11055(b)(6)), so another option is to one of those sections, if possible, with mention of ioflupane. See further discussion at the ILRC *California Chart,* in defenses section at H&S C 11377.

schedules, but California law defines the CS more broadly than federal law does, the California conviction is not of a CS offense for immigration purposes: it is not a deportable or inadmissible offense or AF under the CS grounds. At this writing there is no Ninth Circuit precedent directly on point to these defenses (although one is pending), so *defenders also should seek more secure defenses*. But if a client is going to have to plead to a CS, they should plead specifically as below. These defenses might save the day.

a. Arguably, an analog of a California CS is not a federal CS

If it is not possible to avoid a plea to a CS offense, a potentially strong defense is to plead to an analog of the CS, for example, "I possessed **a methamphetamine analog**" rather than "I possessed methamphetamine." This is because the definition of drug analog for federal purposes is different than, and narrower than, California's definition of a drug analog. While the cases discussed below involve meth and meth analogs, this defense should apply to a wide range of substances in Schedules I and II, including but not limited to heroin, cocaine, crack cocaine, LSD, fentanyl, etc. *See* H&S C 11401(a), referencing analogs to substances in 11054, 11055 (CA Schedules I and II) and 11357.5 (synthetic cannabinoid compound).

How this helps in removal proceedings: In short, the argument is that California analogs are overbroad. Under federal law, an analog must be similar to the CS *both* in chemical structure and in effect on the person, while California law only requires an analog to be one or the other.[19] For that reason, two federal district courts have ruled that a California conviction for H&S C § 11378 is not a federal CS conviction: *U.S. v. Morales-Rodriguez* and *U.S. v. Verdugo*.[20] A Ninth Circuit panel is considering the question, along with the question of whether the record must say "analog" explicitly or is indivisible between the listed substances and their analogs.[21] Thus far, the Ninth Circuit stated that "we resolve the relevant predicate legal issues [i.e. CA analog overbreadth and precedential impact of *Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020)] in favor of Defendants."[22] But because the defendants pled to "meth" rather than "a meth analog," the panel has certified to the California Supreme Court the question of whether a listed CS automatically includes its analogs. The California Supreme Court has agreed to weigh in on the question of divisibility as a matter of California law.[23]

While the courts are weighing the question of whether the record must specifically show a conviction for an analog in order to avoid being a federal CS, defenders should include the term "analog" (as in "a cocaine analog") in the plea and record, because that ensures that

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[19] Compare the California definition of a CS analog at H&S C § 11401(b) with the federal definition at 21 U.S.C. § 802(43)(a), and see *U.S. v. Morales-Rodriguez*, 744 F.Supp.3d 1036, 1052-53 (S.D. Cal. 2024).

[20] *U.S. v. Morales-Rodriguez*, 744 F.Supp.3d 1036, 1054-56 (S.D. Cal. 2024); *U.S. v. Verdugo*, 682 F.Supp.3d 869, 873 (S.D. Cal. 2023).

[21] In *U.S. v. Soto, U.S. v. Reid*, 163 F.4th 1249 (9th Cir. 2026).

[22] *Id.* at 1254.

[23] See No. 23-4072, (9th Cir. 2026) DktEntry: 59.1 (Mar. 13, 2026).

immigrants can raise this defense.[24] But immigration advocates will argue that the analog defense is available regardless of whether the plea included "analog." In the federal district court cases cited above, the defendants had pled guilty to methamphetamine without specifying an analog. The federal district courts held that, under the categorical approach, California statutes are not divisible between the CS and its analog, so that a plea to the CS *automatically* includes the analog and is thus overbroad and not a federal CS.

Unrepresented respondents. These arguments are evolving and complicated, and this can be a problem for immigrants fighting their cases. Many immigrants have no representation, and even some immigration attorneys are not familiar with the analog defense. For that reason, a statement of the defense is included as **Appendix A** to this Advisory. Please give a copy of that document to a client convicted of a CS offense and, because ICE likely will confiscate the document if the client is detained, please also give a copy to an ally such as their lawyer, family member, or friend.

b. Isomers

Immigration advocates also can argue that a California CS is overbroad if the state definition includes isomers that the federal definition does not. Isomer overbreadth arguments have a complicated history in California[25] but are continuing to make headway in various circuits nonetheless.[26] As of this writing, the analog argument appears stronger in the Ninth Circuit, so defenders should identify "analog" in the plea. Immigration advocates can consider bringing both isomer and analog arguments in defense. See further discussion of the isomer defense, and litigation delays presented by *Matter of Felix-Figueroa,* 29 I&N Dec.157 (BIA 2025), in the defenses section at H&S C 11377 in the ILRC *California Chart*.

c. Cannabis

Defenders should try to avoid any cannabis conviction, but immigration advocates can argue that a California conviction entered on or after November 9, 2016 does not meet the federal definition of cannabis and is not a ground for removal.[27] See further discussion at H&S C 11357 in the ILRC *California Chart*.

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[24] California law provides, "A controlled substance analog shall …. be treated the same as the controlled substance…." H&S C 11401(a). Given this, along with the directive at PC 1016.3(b) and the RJA, ask the prosecutor to state a reasonable basis for their refusal. (A prosecutor wrongly asserted that "analog" might not qualify for 11395 purposes. Defenders want to avoid 11395, which is an aggravated felony, but of course both 11395 priors, and the 11395 definition of "hard drug," include analogs. H&S C 11395(e).)

[25] *See United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020) (overruling prior Ninth Circuit precedent that had found CA meth to be categorically overbroad because it contained geometric isomers, on the grounds that such isomers do not exist).

[26] *See United States v. Minter,* 80 F.4th 406, 411–13 (2d. Cir. 2023)*; Aguirre-Zuniga v. Garland,* 37 F.4th 446, 451–53 (7th Cir. 2022)*; United States v. Myers,* 56 F.4th 595, 599 (8th Cir. 2022).

[27] See ILRC, *Template Brief on Why California Cannabis Convictions on or after 11/9/2016 are not Grounds for Removal* (Sep. 3, 2024) at www.ilrc.org/crimes-summaries. Note that in November 2025, Congress amended and narrowed the federal definition of legal hemp, changes to be effective Nov. 12, 2026. See the current and amended

6. Is the client a victim of human trafficking or sexual violence?

A person might have an **innocence defense** under California law if they were "coerced" into committing an offense. See PC 236.23, 236.24. Coercion can refer to being forced to do something, e.g., produce or sell drugs,[28] *or* refer to coercion arising from the victimization, e.g., using drugs in response to despair. "Trafficking" refers to forced labor in the U.S. and does not require crossing borders.

San Francisco public defenders have hung juries on behalf of Honduran nationals who were charged with drug dealing but in fact were trafficked and brutally coerced to sell. Sacramento public defenders presented evidence that their marijuana farm laborer clients fit the profile of trafficked Chinese workers, and used that as leverage to negotiate immigration-neutral pleas even though the clients were too afraid to testify about the trafficking. California law also provides special **post-conviction relief** for survivors under PC 236.14, 236.15. Further, survivors might be eligible for lawful immigration status. See ILRC, *New Options for Survivors of Trafficking and Domestic Violence* (Nov. 2022) at www.ilrc.org/crimes-summaries. See also support for defenders offered by CAST at https://www.castla.org/. If your client is also facing federal charges, you should be aware that there is a similar law that provides a defense and post-conviction relief in federal court for survivors of trafficking. See ILRC, *New Federal Post-Conviction Relief for Survivors of Human Trafficking and Potential Benefits for Noncitizen Defendants* (June 2026).

7. Do NOT rely on creating a record that only refers to "a controlled substance" – except for some permanent residents

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 severely limited due to the 2021 Supreme Court decision, *Pereida v. Wilkinson*.[29] Now, a vague record of conviction *never* is a defense for undocumented people, permanent residents who already are deportable, or any other immigrants applying for relief.

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definitions of hemp at 7 USC 1639o. However, hemp is already specifically excluded from both the federal CSA definition of marijuana and from California's definition of marijuana, and so these changes do not affect the overbreadth argument, which relates to California's definition of cannabis as the whole plant including mature stalks, which are excluded from the federal definition.

[28] See, e.g., report from Hope for Justice, *The Nexus Between Drug Trafficking and Human Trafficking* (June 10, 2024), https://hopeforjustice.org/news/the-nexus-between-drug-trafficking-and-human-trafficking/.

[29] *See Pereida v. Wilkinson,* 592 U.S. 224 (2021) and see further discussion of *Pereida* and California drug offenses in ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at www.ilrc.org/crimes.

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.

8. Eliminate a prior CS conviction with Post-Conviction Relief – Perhaps as Part of the Plea Bargain

Vacate a prior conviction using PC 1016.5, 1018, 1473.7, 236.14, 236.15, or other vehicles*.* California has several types of post-conviction relief (PCR), including some specifically for immigrants. Well-prepared criminal and immigration defense counsel frequently succeed in getting PCR that will be given effect in immigration proceedings. But it is critical to have a good case analysis and knowledge of what exactly is required in both criminal and immigration proceedings. For the analysis, see ILRC, *Overview of California Post-Conviction Relief for Immigrants* (July 2022) and complete ILRC, *Worksheet on California Post-Conviction Relief for Immigrants* (May 2024), both found at www.ilrc.org/crimes-summaries. See also ILRC, *Table of California PCR Cases* (April 2026), and the ILRC book available for purchase, *California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (2023). In particular:

- **PC 1018**: Withdraws the plea for good cause within 180 days of imposition of probation
- **PC 1016.5**: Basis for withdrawal if there is no proof that the 1016.5 advisal was given; among other things, this occurs when older court records have been destroyed
- **PC 1473.7(a):** If person is out of custody and not on probation/parole, vacate conviction based on error that prevented the client from understanding and defending against immigration consequences; does not require finding of defender IAC.

Wrap PCR into a Plea Negotiation. In some cases, especially where prior drug conviction/s are older and/or for lesser offenses, defense can negotiate to vacate those convictions and re-plead to an immigration-neutral offense as part of the settlement of new charges.

PCR for DEJ. As stated in **Section 2,** a successfully completed Deferred Entry of Judgment (DEJ) still is a conviction for immigration purposes until it is vacated. This includes DEJ under H&S C 11395, PC 1210.1, and PC 1000 from 1997-2017. It may be possible to obtain a vacatur under PC 1473.7(f)(2) fairly easily and without conflict of interest, based on the DEJ statutory promise that satisfactory completion means there is no conviction. If the client can do so honestly, include their declaration in PCR proceedings, or at least in immigration proceedings, stating that they understood DEJ to mean there would be no conviction including for immigration purposes, and that they relied on that in deciding to plead. See further discussion at Part I of *Overview of California Post-Conviction Relief for Immigrants.*

PCR for minor CS conviction from on or before 7/14/11. For a qualifying client, *a first conviction* for possession of a CS or paraphernalia (but not for use), or for giving away a small amount of marijuana, from on or before 7/14/2011, is eliminated for immigration purposes by withdrawal under "rehabilitative" statutes like PC 1203.4, 1210.1, former 1000.3 (for PC 1000,

1997-2017). The withdrawal can take place at any time including now, and the conviction and rehabilitative treatment can be from any state or country, although it will only eliminate the conviction for immigration proceedings within the Ninth Circuit. See discussion of *Lujan-Armendariz* at *Overview of California Post-Conviction Relief for Immigrants*, cited above, and ILRC, *Lujan and Nunez* (2011).[30]

C. Practice Tips, Statutes, and Arguments

1. Practice Tip: Factual basis for the plea

Some strategies in **Part B** do not result in a conviction of any controlled substance, regardless of underlying facts. Even so, best practice is to avoid a record that describes drug conduct, especially if the person needs to avoid becoming inadmissible. If identifying a factual basis is necessary, best is to specify conduct by the defendant that fits the offense of conviction but does not include any federal controlled substances. Watch out for demands that client stipulate to a police report as a factual basis, because such documents may undermine immigration defenses. In felony cases, the California Supreme Court repeatedly has held that the defense does not need specify the underlying facts. For example, 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.[31]

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, and this gives the government the evidence it needs. Then the burden is on the immigrant to show that they have status or some right to be in the United States. But immigrants have the right to refuse to talk with ICE or state where they were born or how they entered the country. Without their admission, DHS may not be able to meet its initial burden of proof. Asserting this defense with an aggressive ICE officer can be scary, but it is an effective defense, especially for undocumented people who have never been stopped or filed any application with DHS. Note that every time someone is fingerprinted at booking after arrest, those prints are automatically sent to compare against DHS databases, but those fingerprints may or may not be associated with any evidence of citizenship or immigration status.

Please explain this to your client. The ILRC (author of this advisory) provides *Know Your Rights* materials for immigrants in 50 different 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

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[30] The Ninth Circuit found that a prior removal of a person who would have qualified for *Lujan Armendariz* treatment was a gross miscarriage of justice. *Vega-Anguiano v. Barr,* 942 F.3d 945, 946 (9th Cir. 2019).

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

information in the language/s you need. Public defender offices can order cards in bulk for free from this site.

3. 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."[32] 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.

[32] See Fourth Edition (2017) of *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/