§ N.8 Controlled Substances

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 3, www.ilrc.org/criminal.php)

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WARNING: Even a first conviction for simple possession can be fatal for many immigrants. There are few easy answers, and the law changes frequently. Please carefully consider the information in this chapter, and get advice if needed, before pleading a noncitizen to any offense relating to illegal drugs.

I. Overview of Penalties for Drug Offenses

For further discussion of how deportability, inadmissibility, and aggravated felony status work, see §N.1: Overview at www.ilrc.org/crimes.

A. "Drug Trafficking" Aggravated Felony

This is the most damaging type of conviction. All noncitizens want to avoid conviction of a drug trafficking aggravated felony. It is a ground of deportability as well as a bar to almost all forms of relief. See *§ N.6 Aggravated Felonies.* For example, an aggravated felony is an absolute bar to relief such as asylum and cancellation for lawful permanent residents, while a drug conviction that is not an aggravated felony (e.g., almost any simple possession) is not.

An offense can be a "drug trafficking" aggravated felony[1] in either of two ways:

1) If it meets the general definition of trafficking, such as sale or possession for sale.

2) If it is a state offense that is analogous to certain *federal drug felonies*, even those that do not involve trafficking, such as cultivation, distribution for free, or obtaining a prescription by fraud. A possession offense never is an aggravated felony, with two exceptions: possession of flunitrazepam (a date-rape drug), and a possession conviction where a prior drug offense was pled or proved for recidivist purposes. In the Ninth Circuit only, *offering* to sell a controlled substance is not an aggravated felony under either test. *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).

Offenses that are deportable and inadmissible offenses but not aggravated felonies include most possession offenses, being under the influence, possession of paraphernalia, transportation for personal use, being in a place where drugs are used, and in the Ninth Circuit only, "offering" to commit any drug offense. See Part III below.

B. Controlled Substance Deportability Grounds

A lawful permanent resident (LPR, green card-holder) who is deportable can be stripped of his or her lawful status and permanently removed (deported) from the United States. As long as the person was not convicted of an aggravated felony, however, it is possible that some discretionary waiver or relief is available.

Conviction of any offense "relating to" a federally defined controlled substance causes deportability. There is an automatic exception for a first conviction for simple possession of 30 grams or less of marijuana.[2] See Part III.

A noncitizen who has been a drug addict or abuser at any time since admission to the United States is deportable, even without a conviction.[3] See Part V, below.

[1] See 8 USC § 1101(a)(43)(B), INA § 101(a)(43)(B).
[2] 8 USC § 1227(a)(2)(B)(i).
[3] 8 USC § 1227(a)(2)(B)(ii).

Note: *Some* Noncitizens Can Accept A Relatively Minor Drug Conviction. This is an individual determination, but you or a non-attorney staff person can check the possibilities quickly by using the Client Questionnaire at *SN.17 Relief Toolkit*.

C. Controlled Substance Inadmissibility Grounds

An undocumented person who is inadmissible because of a drug conviction or the drug conduct grounds is barred from applying for many types of relief or lawful status. Significantly, the person will not be permitted to immigrate through a family member (unless, in some cases, the offense involved 30 grams or less of marijuana), or apply for non-LPR cancellation (even if the offense did involve just 30 grams or less of marijuana).

A lawful permanent resident who is inadmissible but not deportable because of a drug conviction or drug conduct grounds can keep her lawful status, *unless* she travels outside the U.S. After some years she may apply for naturalization to U.S. citizenship.

A noncitizen is inadmissible based on a ***conviction*** of any offense "relating to" a federally defined controlled substance, or attempt or conspiracy to commit it.[4] A discretionary waiver of inadmissibility is available to some persons, but only for a first conviction for simple possession of 30 grams or less of marijuana – and the waiver often is not granted.[5]

A noncitizen is inadmissible under the "***conduct grounds***" even absent a conviction, if:

- The noncitizen is a current drug addict or abuser,[6]
- The noncitizen formally admits all of the elements of a controlled substance conviction, when that offense was not charged in criminal court,[7] or
- Immigration authorities have probative and substantial "reason to believe" that the person has ever participated in drug trafficking, or if she is the spouse or child of a trafficker who benefited from the trafficking within the last five years[8]

While the first two grounds are rarely charged, the "reason to believe" trafficking ground is a serious problem, which bars eligibility for nearly all types of relief. See further discussion of conduct grounds in Part V, below.

[4] 8 USC § 1182(a)(2)(A)(i)(II).
[5] 8 USC § 1182(h). See also Brady, "Update on Waiver under INA § 212(h)" at www.ilrc.org/crimes.
[6] 8 USC § 1182(a)(1)(A)(iv).
[7] 8 USC § 1182(a)(2)(A)(i) provides that admission of a drug offense creates inadmissibility. This does not apply, however, if a charge in criminal court resulted in something less than a conviction. See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges) and discussion in § 4.4 of *Defending Immigrants in the Ninth Circuit.*
[8] 8 USC § 1182(a)(2)(C).

REASON TO BELIEVE. It's not a pop song, it is the worst inadmissibility ground in immigration. A noncitizen is inadmissible as of the moment that immigration authorities gain substantial and probative "reason to believe" she has ever participated in drug trafficking.[9] A conviction is not necessary, and ICE can use evidence from outside the record of conviction. Typically ICE gets "reason to believe" from either a trafficking conviction (even if it is later vacated), an admission by the immigrant to an immigration judge or official, a credible report of an incident that did not result in a conviction but where there was strong evidence (e.g. drugs in the trunk of the car at the border), and potentially a plea to trafficking in delinquency proceedings.

This Note provides strategies for how to try to avoid this. You can't block ICE's ability to locate factual evidence, but you can avoid pleading a defendant -- especially a non-permanent resident -- to any offense that would give ICE automatic "reason to believe." For example, a plea to possession, or if nothing else is available to "offer to give away" rather than sale will provide some protection.

"Reason to believe" destroys eligibility to get almost any relief or status,[10] In particular, it is a very damaging plea for a non-permanent resident.

"Reason to believe" is not ground of deportability, so an LPR who stays within the U.S. cannot be put in removal proceedings based solely on this. But if the LPR leaves the U.S., she can be refused admission back in and permanently lose her green card -- unless she qualifies for one of the forms of relief that "reason to believe" does not block.

D. Conviction for trafficking is a crime involving moral turpitude (CIMT)

Trafficking in, but not simple possession of, a controlled substance, is a CIMT. Assume this includes sale, offer to sell, possession for sale, manufacture and the like, as long as there is a commercial element. The substance need not be a federally defined one for this purpose, so the unspecified "controlled substance" defense may not work.

E. Conviction for trafficking is a particularly serious crime (PSC)

Similarly, conviction for trafficking in any controlled substance, including a non-federally defined substance, will be a PSC. This is a bar to a grant of asylum and withholding, and can cause an asylee or refugee to lose their status. There is a narrow exception for peripheral

[9] 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).
[10] Being inadmissible for "reason to believe" trafficking is a bar, with no possible waiver, to family immigration, VAWA relief for domestic abuse survivors, or an asylee or refugee's ability to become a permanent resident. It might not destroy eligibility for LPR cancellation (as long as there is no aggravated felony conviction, just the "reason to believe"), a T or U visa for victims of crime or alien trafficking, the Convention Against Torture, and possibly, asylum and withholding (if no trafficking conviction) – but all of these but LPR cancellation will be very difficult.

involvement in trafficking a very small amount of drugs where no juveniles were involved; see *§N.17 Relief Toolkit* on representing asylees and refugees.

II. DEFENSE STRATEGIES

Parts A and B describe when a conviction comes into being for immigration purposes (Part A), and when post-conviction relief can eliminate the conviction (Part B). Generally a conviction occurs if in adult criminal court there is an admission or a judicial finding of guilt and some form of penalty or restraint is imposed, including court costs or probation.[11] A disposition that lacks these elements is not a drug "conviction" for any noncitizen, or any immigration purposes. For further information see *§N.2 Definition of Conviction.*

Avoiding a conviction is a great result, but note that a few key immigration penalties do not require a drug "conviction." The person is inadmissible if immigration authorities have "reason to believe" she participated in or benefitted from drug trafficking, and inadmissible or deportable based on abuse or addiction. See Part V, below.

A. Obtain a Disposition That is not a "Conviction" for Immigration Purposes

1. Juvenile Delinquency Disposition

A juvenile delinquency disposition is not a conviction for immigration purposes because it is a civil finding, so it is not a deportable or inadmissible conviction or aggravated felony.[12] This is good. The only concerns are the conduct grounds, which do not require a conviction.

Warning: juvenile trafficking pleas. A noncitizen is inadmissible if immigration authorities have "reason to believe" the person is or helped a drug trafficker. A plea to a trafficking offense in juvenile proceedings may provide this evidence. Especially if the juvenile is undocumented, but in any case, make every effort to plead to possession rather than a trafficking offense such as possession for sale or sale. That may prevent an undocumented juvenile from ever immigrating through family member or through the Special Immigrant Juvenile application. If you must plead to a trafficking statute, help avoid the "reason to believe" ground by pleading to distribution of drugs for no remuneration. While distribution is an aggravated felony in adult court (except for giving away a small amount of marijuana; see Part IV), it is not one in juvenile proceedings, since there is no conviction.

2. Formal or Informal Pretrial Diversion, Drug Court

Pretrial diversion: P.C. § 1001. A conviction for immigration purposes requires that the criminal court accept a plea or make a finding of guilt. If the defendant enters no plea or a not-guilty plea before being diverted, this is not a conviction and it is an excellent disposition (as long as the person successfully completes the diversion). California has a misdemeanor pretrial diversion law at P.C. § 1001, although it never or rarely has been used for drug charges. Now

[11] 8 USC § 1101(a)(48)(A), INA § 101(a)(48)(A).
[12] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

that possessory offenses are misdemeanors under Prop 47, counsel may ask prosecutors to consider using § 1001 for this purpose for first-time minor offenders, perhaps coupled with waivers of right to jury trial, etc. Considering this option is in keeping with the prosecutor's duty to consider immigration consequences in order to reach a just solution. See new P.C. § 1016.3, effective January 1, 2016, and see Box, "Making the Case" at Part C, below.

Note that until 1997 California had a successful pretrial drug diversion program instead of DEJ. In 2015 the California legislature passed AB 1351, which would have amended Penal Code 1000 et seq. to bring back pretrial diversion. Unfortunately, Gov. Brown vetoed AB 1351. Thus the main option for a statutory pretrial program is P.C. § 1001.

Pretrial diversion: Drug court. For the few California counties that use drug court with no guilty plea required, this potentially is a good result. The only complication is if the defendant is required to admit to being in danger of becoming an addict in a drug court setting. Being an addict or abuser at any time since admission makes a permanent resident deportable. Being a current addict or abuser makes a noncitizen inadmissible.[13] While in many cases ICE does not charge people under the addiction/abuse grounds, a notation of direction to drug court may alert them to the possibility. Whether a conviction versus addiction/abuse is more dangerous may depend upon the individual's circumstances; check with an immigration lawyer if that decision must be made, and see Part V for more on abuse/addiction.

Informal pre-plea diversion. Some counsel have obtained informal pre-plea diversion, especially in light of the terrible immigration consequences that can flow from a minor drug offense. With the client out of custody, ask the prosecution to defer the plea hearing so that the defendant can meet set goals such as community service, drug counseling, restitution, etc. – including goals beyond what normally might be required. Waive speedy trial, and consider waiving trial by jury. In exchange, ask the prosecution to agree to an alternate plea (e.g. to a non-drug offense) or to no plea if the defendant is successful. (To see a sample written agreement, see Washington state "Stipulations of Continuance."[14])

3. DEJ with Unconditionally Suspended Fine

Persons who successfully completed DEJ can apply for a special withdrawal of plea that should eliminate DEJ as a "conviction" for immigration purposes. See Part B regarding Penal Code 1203.43, below.

Under an independent basis, the Ninth Circuit held that California DEJ is not a conviction in the first place, when the only consequence was an unconditionally suspended fine. *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010). If counsel can succeed in getting an unconditionally suspended fine, this may work to avoid a conviction, although a plea to a non-drug offense is more secure. Give the defendant a summary of the disposition and citation, found at **Practice Aid 8-II** following this Note.

[13] 8 USC § 1227(a)(2)(B)(ii).
[14] See, e.g., Seattle Municipal Court agreement at www.defensenet.org/immigration-project/immigration-resources/deferred-adjudication-agreements-e.g.-socs-and-other-deferred-dispositions

4. California Infraction?

While the law is not settled, there is a strong argument that a California infraction is not a "conviction" for immigration purposes.[15] Therefore if there are no drug priors, Calif. H&S Code § 11357(b) has two potential benefits. First, it might be held not to be a conviction at all. Second, even if it is held a conviction, important immigration benefits apply to a *first* drug incident involving simple possession of 30 grams or less of marijuana: it does not make a permanent resident deportable, and while it is an inadmissible conviction, in some cases a discretionary waiver may be available. See Part III, below.

B. Obtain a Post-Plea Disposition that Eliminates the Conviction

1. With some exceptions, Dismissal of Charges under DEJ, Prop 36, or P.C. § 1203.4 Does Not Eliminate a Conviction for Immigration Purposes

Immigration law considers a conviction to have occurred if there is a plea or finding of guilt, plus any form of punishment or restraint. To eliminate a conviction, immigration will only recognize a court order if it was based on ***legal defect*** (a problem in the underlying proceeding), as opposed to ***rehabilitative or humanitarian*** factors (e.g., the person completed probation or a drug program).

For that reason, dismissing charges pursuant to DEJ, Prop 36, or Calif. P.C. § 1203.4 generally will not eliminate a conviction, because the basis for the order is that the defendant successfully completed some requirement. But it does help in a few specific circumstances:

- ✓ Rehabilitative relief can eliminate a single conviction of possession or possession of paraphernalia received on or before July 14, 2011. See B.5, below. [16]

- ✓ Withdrawal of plea under new PC § 1203.43 will eliminate a successfully completed DEJ as a conviction for immigration purposes. See B.3, below.

- ✓ Rehabilitative relief has some effect in a few discretionary contexts. It will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), and other deferred action and prosecutorial discretion contexts. It may enable the person to avoid being a special target for ICE arrest and detention as an "enforcement priority." See materials at www.ilrc.org/daca and www.ilrc.org/enforcement.

2. Vacation of Judgment for Cause Eliminates the Conviction

Vacation of judgment based on legal defect will eliminate the conviction for immigration purposes. This includes vacation of judgment based on ineffective assistance of counsel for any reason, including failure to warn of immigration consequences (writ of habeas corpus), failure to

[15] See Yi, "Arguing that a California Infraction is Not a Conviction" at http://www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses.
[16] *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (*en banc)*, overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) as applied to convictions after July 14, 2012.

give the immigration warning required by P.C. § 1016.5, withdrawal of plea for good cause under P.C. § 1018, or other order in which the court states that the conviction is vacated for cause. Vacation of judgment based *solely* on sympathetic factors or completion of probation or counseling requirements does not eliminate the conviction for immigration purposes.[17]

3. Withdrawal of DEJ Plea Pursuant to New P.C. § 1203.43 Should Eliminate the "Conviction"

Warning re current pleas. As discussed below, new P.C. § 1203.43 helps people who already have completed DEJ to eliminate the "conviction" for immigration purposes. While this is useful, please note that DEJ still is *not* a recommended plea. The best alternative for a noncitizen charged with a first-time minor drug charge is to try hard to plead to a non-drug offense. See Part C below regarding a non-drug offense, and see other options at below. For a more complete discussion on this topic, see Practice Advisory on new P.C. § 1203.43 at www.ilrc.org/crimes.

Discussion. A criminal court judge may offer deferred entry of judgment (DEJ) to qualifying defendants charged with a first, minor drug offense. See P.C. § 1000 et seq. Under DEJ the defendant agrees to enter a guilty plea and is given from 18 to 36 months to complete a drug program. If the defendant successfully completes the requirements, the court will dismiss the charges, there is no conviction "for any purpose," and no denial of any license, employment, or benefit may flow from the incident. See P.C. §§ 1000.1(d), 1000.3, 1000.4.

Unfortunately, this statutory promise is completely untrue for noncitizens. DEJ is a conviction for immigration purposes, in that there was a plea and some form of punishment and restraint. (But see Part A above, regarding DEJ where the only result is an unconditionally suspended fine.) Although California considers there to be no conviction if the court dismisses the charges based on the defendant completing the DEJ requirements, immigration law does not. To eliminate a conviction for immigration purposes, the plea must be withdrawn for cause, due to a legal defect in the underlying case.

The new law permits people who successfully completed DEJ to withdraw the guilty plea for cause. The legal error is the fact that the DEJ statute misinformed defendants as to the real consequences of the guilty plea. New P.C. § 1203.43(a) provides:

> (a) (1) The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences,

[17] See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (vacation of judgment for cause, but not for rehabilitative or humanitarian purposes, is given effect); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction on the merits); see also *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure to give legislatively required advisal of immigration consequences is eliminated for immigration purposes).

> including adverse immigration consequences. (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

The application can be granted without a hearing. Section 1203.43(b) provides that the court "shall, upon request of the defendant" withdraw the plea in any DEJ case in which the charges were dropped after completion of the DEJ requirements. If the court records showing the resolution of the DEJ case no longer are available, the applicant will submit a sworn declaration that charges were dropped based on successful completion of DEJ. The declaration will be presumed to be true if the person also submits a California DOJ record that either shows successful completion of DEJ, or fails to show a final resolution of the DEJ case.

Compare withdrawal of plea under § 1203.43 to withdrawal of plea under § 1203.4(a) and similar provisions, which immigration authorities refer to as an "expungement." Generally[18] expungement under § 1203.4 will not eliminate a conviction for immigration purposes because it is mere "rehabilitative" relief that the person earns by completing probation. Section 1203.43 eliminates the conviction for immigration purposes, because the plea is invalid due to the fact that the DEJ statute provided "misinformation about the actual consequences of making a plea."

New P.C. § 1203.43 takes effect as of January 1, 2016. Pending creation of a government application form, advocates will provide a model form. See www.ilrc.org/crimes.

4. Reversal of the Conviction on Appeal Eliminates the Conviction

The Ninth Circuit held that just *filing* an appeal will not prevent a disposition from being a conviction for immigration purposes. If the conviction actually is *reversed* on appeal, however, there is no conviction.[19] It still is worthwhile to file regular appeals or "slow pleas" in appropriate cases, because of the chance that (a) the appeal will be sustained or (b) the Ninth Circuit will reverse its rule someday, so that a conviction pending on appeal is treated as not having sufficient finality to constitute a conviction for immigration purposes.

5. First, Minor Drug Offense from On or Before July 14, 2011

Usually a withdrawal of plea pursuant to "rehabilitative relief" – e.g., because the person completed probation – is not given immigration effect. See Part 1, above.

However, a first conviction for simple possession of any controlled substance, or a few related offenses, that was entered on or before July 14, 2011 can be eliminated for immigration purposes by withdrawal of plea pursuant to DEJ, Prop 36, PC § 1203.4, or other vehicle, if the

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[18] If certain conditions are met, immigration effect will be given to a § 1203.4 expungement of a single conviction for possession of a drug or possession of paraphernalia that occurred before July 15, 2011. *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). A § 1203.4 expungement also can be useful in applications for prosecutorial discretion and deferred action, including Deferred Action for Childhood Arrivals (DACA), and in avoiding treatment as an "enforcement priority." See www.ilrc.org/crimes.

[19] *Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011).

client meets the requirements set out below. This may be called the *Lujan-Armendariz* or *Nunez-Reyes* benefit.

The reason the benefit exists is that the Ninth Circuit held that state rehabilitative relief must be given the same effect as a federal expungement under the Federal First Offender Act, in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The reason the benefit has a cut-off date is that the Ninth Circuit overruled the longstanding *Lujan-Armendariz* decision, but applied this ruling prospectively only, to pleas entered after the July 14, 2011 publication of the opinion, in *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011). A plea to possessing a controlled substance entered on July 15, 2011 or after will make a noncitizen deportable or inadmissible. Note that this benefit only applies to immigration proceedings held ***within the Ninth Circuit.***

> **Example:** In March 2010, Marta was convicted in New York of simple possession of cocaine, her first drug offense. In March 2013, after completing probation with no violations, Marta was permitted to withdraw the plea pursuant to rehabilitative relief.
>
> If Marta is placed in removal proceedings in California (which is within the Ninth Circuit), she will not have a conviction. But if the removal proceedings take place in New York (outside the Ninth Circuit), she will have a deportable and inadmissible drug conviction.

The *Lujan-Armendariz* benefit, eliminating a minor immigration plea with state rehabilitative relief, is available to pre-July 15, 2011 pleas if the following requirements are met:

- **Plea was to a First Possession, Possession of Paraphernalia, Giving Away Marijuana, but *not* Use or Under the Influence.** The *Lujan-Armendariz* benefit works on possession of any controlled substance, possession of paraphernalia,[20] and arguably on a first conviction for giving away a small amount of marijuana for free.[21] (That should include Cal H&S C §11360(a) and (b); see below.) However, the benefit does not apply to a plea to being under the influence.[22] See "Practice Advisory: Immigrant Defendants with a First Minor Drug Offense" at www.ilrc.org/crimes.

- **Plea must be withdrawn and/or charges dismissed,** pursuant to DEJ, Prop 36, Calif. P.C. § 1203.4, or similar vehicle in other states. While the plea must have been taken on or before July 14, 2011, the withdrawal of plea may occur either before or after that date.

- **No violation of probation.** The benefit is not available if the criminal court found that the defendant violated probation, before ultimately withdrawing the plea.[23]

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[20] *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Calif. H&S C § 11364(a)).
[21] This is because under federal law, giving away a small amount of marijuana under 21 USC § 841(b)(4), like simple possession, can be treated by federal expungement under 18 USC § 3607. See also Part I, below.
[22] *Nunez-Reyes, supra. See* "Practice Advisory: Immigrant Defendants with a First Minor Drug Offense" at www.ilrc.org/crimes.
[23] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (expungement under P.C. § 1203.4 has no immigration effect where criminal court found two probation violations before ultimately granting the expungement.)

- **No prior pretrial diversion.** The Ninth Circuit held that the existence of a prior pretrial diversion prevents a first possession conviction from qualifying for this benefit.[24]

  - ✓ The pretrial diversion and probation violation disqualifiers might not apply if the **defendant was under 21** when he committed the offense for which he violated probation, or for which he received pre-plea diversion.[25]

- **The benefit only applies in immigration proceedings held within the Ninth Circuit.**[26] f your client is arrested within the Ninth Circuit, he or she might be detained elsewhere, likely in the Fifth Circuit, and immigration proceedings might be held there under that law.

Note that the client may be vulnerable to **removal proceedings before the plea actually is withdrawn.** While immigration counsel have strong arguments that this should not be the case with California relief,[27] this is a risk.

C. Plead to a Non-Drug Offense, Including P.C. §§ 32, 136.1(b)(1)

A plea to a non-drug offense will avoid inadmissibility and deportability based on a drug conviction. Of course, you must analyze the consequences of a non-drug conviction, but these may be far less severe or automatic than the immigration penalties for a drug conviction. This is an individual analysis: for example, one defendant may be able to take a substitute plea to a crime involving moral turpitude, while another cannot. Offenses with little or no immigration effect include loitering, trespass, driving under the influence of alcohol or "drugs," driving under the influence of non-controlled substance (e.g. an over-the-counter sleeping pill), public fighting, resisting arrest, and others. See the *California Quick Reference Chart* for suggestions.

Accessory under the fact, P.C. § 32, is a good alternative to a drug offense. Being an accessory to a drug offense is not considered an offense "relating to controlled substances" even if the principal committed a drug offense.[28] Two caveats: First, avoid a sentence imposed of a year or more on any single count of § 32, or it will be held an aggravated felony as obstruction of justice. Second, it is possible that authorities would charge P.C. § 32 as a crime involving moral turpitude (CIMT) if the principal's offense is, although this is error. Even if § 32 were treated as a CIMT, however, a CIMT is likely to be far less harmful than a drug conviction.

A plea to P.C. § 136.1(b)(1), non-violent attempt to persuade a victim or witness not to call the police, is not a drug offense. Because a felony is a strike, a prosecutor might be willing to consider it in a more serious case. Try very hard to get a sentence of less than a year on any single count, because of the danger that it will be charged as an aggravated felony as "obstruction of justice" aggravated felony.

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[24] *Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).
[25] See discussion of 18 USC § 3607(c) versus (a), in the *Nunez-Reyes* Practice Advisory, *supra*.
[26] *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (en banc),
[27] See *Defending Immigrants in the Ninth Circuit*, § 3.6 discussing *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004).
[28] *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

Making the Case: Explain to Judge and Prosecutor What a First, Minor Drug Conviction Does to an Immigrant. This box is about how to argue for a sympathetic client with no drug priors. Consider the situation: A permanent resident, undocumented person with close family here, person from a country with terrible conditions, or other sympathetic noncitizen is charged with a first drug offense. She might be offered little or no jail time, or DEJ (not recommended, but see Part B, above). The truth is, this minor conviction can destroy her life and the life of her family.

- She will become ***automatically deportable and inadmissible***.[29]
- The conviction will subject her to ***mandatory immigration detention***[30] ***(incarceration) for several months, usually hundreds of miles from home.*** Even if she is eligible to apply for some kind of discretionary relief from removal, waiting for the hearing in detention will take months, and she will remain detained during any appeals. Losing the job or house is just the beginning. Children may be put in foster care, and many parents have permanently lost parental rights due to immigration detention. California residents often are detained in isolated areas in Arizona or Texas, far from family or counsel.
- Many persons will not be eligible for relief. For example, the undocumented spouse or parent of a U.S. citizen never can get lawful status through family if she has a drug conviction. She will be ***deported to the home country***. With this conviction, she ***never will be permitted to enter the U.S. again***.

Your goal is simply to get a plea to a non-drug offense or some other safer option set out in these materials. This may require aggressive or unusual advocacy, but if you win you can save a family. In immigration court, it is common to bring church members or relatives to a hearing, present petitions from neighbors, bring in the children's small school awards (or the U.S. citizen children themselves), and any other steps to illustrate the stakes. Would that help in persuading a D.A. or judge? Tell the defendant that if there ever is a second drug charge, she won't get this consideration again.

D. The "Unspecified" and "Non-Federal" Controlled Substance Defenses

Immigration law defines a controlled substance as one listed in *federal* drug schedules. This gives us some advantages in state court. The grounds of deportability and inadmissibility based on a conviction "relating to a controlled substance," and the definition of a "drug trafficking" aggravated felony, define controlled substance pursuant to 21 USC § 802.[31] If a state offense involves a substance not listed there, conviction will not trigger these penalties. The test is whether the substance was on the federal list at the time of the person's conviction. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015).

[29] 8 USC § 1227(a)(2)(B)(ii); 8 USC 8 USC §§ 1182(a)(2)(A)(i)(II).
[30] See 8 USC § 1226(c)(1), proving that a drug conviction requires mandatory detention without bond.
[31] See 8 USC §§ 1227(a)(2)(B)(i) (deportability for controlled substance conviction), 1182(a)(2)(A)(i)(II) (inadmissibility for same), 1101(a)(43)(B) (drug trafficking aggravated felony).

California statutes such as H&S Code §§ 11377-79 include some substances that are not on the federal schedules.[32] This disparity gives rise to the unspecified and the non-federal substance defenses discussed in Parts 1 and 2. Note that there are a few immigration consequences that the defenses do not prevent, especially if the offense involves intent to sell. See Part 3.

1. Unspecified Controlled Substance Defense

Benefits. The unspecified substance defense works if the issue is deportability. Thus it will prevent a permanent resident who is not already deportable from becoming deportable for a drug conviction or drug trafficking aggravated felony.[33] It many cases it also will help protect a permanent resident who travels abroad,[34] although any non-citizen with a conviction should consult with a crim/imm expert before leaving the U.S. even for a day.

But the defense does not work for a defendant who is undocumented, or a permanent resident who already is deportable for a prior conviction. These people need to apply for some immigration status or relief to remain in the U.S., and at least under current law, a vague record will not work..[35] Under current law, to be eligible for relief or new lawful status a noncitizen must prove that a conviction under a divisible statute is not a bar to eligibility. If the record does not specify the substance, the immigrant cannot prove that it was a non-federal substance. He will need a record showing a specific, non-federal substance, or a non-drug offense.

How to do it. To set up this defense, counsel must sanitize the entire record of conviction so that it contains no mention of a specific controlled substance (e.g., methamphetamines), but refers only to "a controlled substance." The record that must be sanitized includes the charge pled to; the plea colloquy or any plea agreement or form signed by the defendant; the judgment; or the factual basis for the plea. Thus counsel may need to bargain for a new or amended charge, and must take care with any factual basis for the plea (see below). Beware of written notations on documents, including ***abstracts of judgment***, that refer to the charge. The best plea is to §§ 11377-79, rather than §§ 11350-52 or 11550.

How does one sanitize the record? Say that your client is charged in Count 1 with possession of meth, and the police report states that she admitted the meth was hers. Count 1

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[32] See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), and for Calif. H&S C §§ 11377-79 see, e.g., *Quijada-Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014), *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007). The Ninth Circuit also has upheld the defense for H&S C §§ 11350-52 (*Esquivel-Garcia v. Holder*, 593 F.3d 1025 (2010) (11350); *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) but §§ 11377-79 is the better choice.

[33] This is because ICE (immigration prosecution) has the burden of proving that an immigrant with lawful status is deportable based on a conviction. If the substance is not specified, ICE cannot meet its burden of proving a deportable controlled substance conviction.

[34] A lawful permanent resident who returns from a trip abroad is not considered to be seeking a new admission unless he or she comes within an exceptions at 8 USC §1101(a)(13)(C). One of these exceptions is if the person is inadmissible for crimes. The government has the burden of proving that the resident is inadmissible, and cannot meet the burden. (However, if the person is inadmissible for some other reason that the government can prove, or comes within some other categories at (13)(C), the defense will not work.)

[35] The Ninth Circuit held that an applicant for relief must show that a conviction under a divisible statute is not a bar, by producing a record showing a plea to a specific good offense (which here would be a specific, non-federally listed substance). *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*). It is possible but by no means guaranteed that the court will abandon the *Young* rule in the pending en banc case, *Almanza-Arenas v. Holder.*

must be amended by thoroughly blacking out "methamphetamines" and writing in "controlled substance," or Count 1 should be dropped and a new count added. Or, the defendant might plead to the statute rather than the count, and make an oral or written statement at the hearing. The plea still can provide detail, e.g., "On June 3, 2015 at 8 p.m., at 940 A Street in Fresno, I knowingly possessed a controlled substance."

Make sure no other document in the record of conviction identifies the drug, such as the plea agreement, plea colloquy transcript, minute order, abstract, and any documents stipulated to as a ***factual basis for the plea***. To avoid stipulating to any factual basis, see *People v. Palmer* (2013) 58 Cal.4th 110. If you must stipulate, choose documents that you have identified or created that do not include damaging information, for example a written plea agreement or sanitized complaint. See *People v. Holmes* (2004) 32 Cal.4th 432. Make sure that the court clerk records that the count was amended to "controlled substance," does not write the specific substance on the minute order, and does not do anything else inconsistent with the plea. Give a copy to the defendant and if possible defendant's family or attorney.

2. Specific Non-Federal Controlled Substance Defense

This plea may be difficult to obtain, but it will protect all noncitizen defendants from having a drug conviction, including those who need to apply for relief or lawful status. The person must plead to conduct relating to a specific California substance that is not on the federal list, such as § 11377-79 involving either chorioinic gonadotropin or khat.[36] In that case the conviction is not an inadmissible or deportable controlled substance conviction, or a drug trafficking aggravated felony, for any immigration purpose. The defense will continue even if the substance later is added to the federal list. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015).

3. Limits of These Defenses

Conviction of trafficking in any controlled substance is a crime involving moral turpitude (CIMT). Do not assume that this must be a federally-defined substance. Assume that the unspecified and specific non-federal substance defenses will not prevent this.

For persons fearing persecution in the home country, conviction of trafficking in any controlled substance is a fatal "particularly serious crime" (PSC). Conviction of a PSC is a basis for denial of asylee status and for revocation of asylee or refugee status. This may not require a federally-defined substance, so these defenses should not be assumed to work here. Giving a substance away for free might not be a PSC, whereas anything relating to sale is.[37]

To adjust status to permanent residence, an asylee or refugee must be admissible or get a waiver under 8 USC § 1159(c). The one ground that cannot be waived is if the government has "reason to believe" that the asylee or refugee trafficked in a federally-defined substance. See

[36] See *Quijada-Coronado v. Holder*, 759 F.3d 977, 983 and n.1 (9th Cir. 2014).

[37] Any sale is a PSC, with a possible exception if the person had only peripheral involvement, a small amount of substance was involved, and no juveniles were involved. *Matter of Y-L-, A-G-, and R-S-R*, 23 I&N Dec. 270 (A.G. 2002),

next paragraph. For further discussion of applying for asylum or withholding, or representing persons who are asylees or refugees, see *§N.17 Relief Toolkit.*

Immigration authorities may seek evidence to support inadmissibility based on "reason to believe" the person trafficked in a federally-defined substance. This is a factual question, not limited to the record of conviction. This certainly possible with the unspecified substance defense. The government needs probative and substantial evidence. You cannot prevent this from happening, but you can warn the defendant.

III. Drug Conviction, But Lesser Immigration Penalties

A. Conviction/s "Relating To A Single Offense Involving Possession For One's Own Use Of Thirty Grams Or Less Of Marijuana" (And Similar Offenses)

Certain convictions relating to a small amount of marijuana or hashish have immigration benefits. The person ***automatically is not deportable*** for conviction of a controlled substance, with no need to apply for a waiver.[38] Thus a permanent resident, refugee, or other person with secure status who is not otherwise deportable will not become deportable based on the conviction/s. The person is inadmissible due to a controlled substance conviction, but a ***waiver of inadmissibility*** may be available for this type of marijuana offense. Persons immigrating through family can apply for a "section 212(h)" discretionary waiver, which is difficult to win. (A refugee or asylee applying for asylum can apply for an easier-to-win discretionary waiver for any drug possession offense.)[39] In addition, the conviction is not a bar to establishing ***good moral character***.[40] For more information see *§ N.17 Relief Toolkit*.

The conviction must meet several requirements, set out below. Based on that, it appears that a conviction of the following offenses qualify if it is the person's first controlled substance conviction, and multiple convictions qualify if they arose from the same incident: §§ 11357(a) where the record shows 30 grams or less (or, far better, a few grams); 11357(b); 11357(c) where the record shows 30 grams or less; 11364 where the record shows the paraphernalia was for use with a small amount of marijuana or hashish; or 11550 where the record shows that the person was under the influence of marijuana or hashish.

The requirements are:

- ✓ It is the person's first controlled substance conviction.[41]

- ✓ It is for simple possession of marijuana or hashish or certain similar offenses.

[38] INA § 237(a)(2)(B)(i), 8 USC § 1227(a)(2)(B)(i). Note also that asylees are not subject to deportation grounds.
[39] See the regular "section 212(h)" waiver for possession of 30 grams or less or marijuana at 8 USC § 1182(h), INA § 212(h). See the broad waiver for refugees and asylees applying for adjustment, which can waive any possession conviction, at 8 USC § 1159(c), INA § 209(c).
[40] INA § 101(f)(3), 8 USC § 1101(f)(3).
[41] *Rodriguez v. Holder*, 619 F.3d 1077 (9th Cir. 2010).

These include possession of paraphernalia relating to the 30 grams[42] or being under the influence of marijuana or hashish.[43] The Board of Immigration Appeals has stated that an offense that contains more serious elements, such as possession in a jail or near a school, does not qualify for the exception.[44]

- ✓ The amount (30 grams or less) should be in the record.[45]

  The amount and type of drug is a fact-based ("circumstance specific") inquiry, where the government and the immigrant each may present any probative evidence. While there is no precedent, a plea to § 11357(c) (possession of more than 28.5 grams), where the plea statement itself provides that the amount was, e.g., 29 grams, ought to control even if evidence shows the arrest involved a greater amount.

  If the issue is whether a permanent resident is deportable (as opposed to whether a person is eligible for relief), the government must prove that the amount was over 30 grams,[46] so the immigrant could win if no amount was on the record. But best practice by far is to put 30 grams or less on the record.

  The benefit for § 11357(b) should be automatic since the amount is an element of the offense (and arguably an infraction is not a conviction; see Part II.A, above).

- ✓ The substance can be any form of marijuana, including hashish.

  However, for the § 212(h) waiver, the policy is that the amount of hashish should be equivalent to 30 grams of marijuana (i.e., only a few grams of hashish).[47]

- ✓ The exception can cover more than one conviction, as long as each conviction qualifies and all convictions arose from the same incident.[48]

  For example, a person should qualify based on conviction of §§ 11357(b) and 11364, where the record of conviction on 11364 showed that it was for use with a small amount of hashish, if it arose from the same event.

B. Prop 47 and Drug Possession

Proposition 47 makes possession of a controlled substance a misdemeanor. The conviction still will cause deportability and inadmissibility under the controlled substance grounds. But the fact that it is a misdemeanor does help in a few specific immigration contexts,

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[42] *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).
[43] See *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (extends to under the influence). See also *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (extends to attempt to be under the influence of THC).
[44] See *Matter of Martinez-Espinoza*, 25 I&N at 125.
[45] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).
[46] *Matter of Dominquez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014).
[47] It extends to hashish, although for the § 1182(h) waiver purposes it may only be as much hashish as is equivalent to 30 grams or less marijuana. See INS General Counsel Legal Opinion 96-3 (April 23, 1996). See also 21 USC § 802(16), defining marijuana to include all parts of the Cannabis plant, including hashish.
[48] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).

where a misdemeanor possessory controlled substance offense does not cause a penalty, but any felony offense does. These are:

- ✓ Eligibility for Deferred Action for Childhood Arrivals (DACA) and, if the program ever goes forward, Deferred Action for Parents of Americans (DAPA)

- ✓ Eligibility to request other types of deferred action and prosecutorial discretion (requesting ICE not to put the person in removal proceedings as a matter of discretion)

- ✓ Avoiding classification as an "enforcement priority." However, while a misdemeanor possession conviction is not a listed enforcement priority, there are reports that it is being treated as one.[49] Some noncitizens with only a misdemeanor possession conviction are being sought out by ICE and other authorities, who are going to homes, probation officer meetings, and court hearings to get these people.

- ✓ In the three above contexts, obtaining rehabilitative relief such as withdrawal under PC § 1203.4 may be useful. This is unusual in immigration law; see Part I.B.1, above.

C. Drug Paraphernalia

Because the law relating to a paraphernalia conviction has undergone some changes, this section will clarify the immigration effect.

The Supreme Court overruled Ninth Circuit and Board of Immigration Appeals precedent and held that possession of paraphernalia is a deportable and inadmissible drug conviction only if the offense involved a federally-defined substance. Thus the "unspecified controlled substance" and "specific non-federal substance" technically are available.[50] However, ***H&S C § 11377 is the better vehicle*** for using these defenses. See Part II.D, above.

Sale, possession for sale, or offer to sell drug paraphernalia might be charged as an aggravated felony, while simple possession of paraphernalia cannot be.[51]

A conviction for possession of paraphernalia will receive the same benefits as conviction for possession of 30 grams or less of marijuana, if the immigrant can prove that the paraphernlia was intended for use with 30 grams or less of marijuana or hashish.[52] See Part A, above. A single conviction for possession of paraphernalia from on or before July 14, 2011 can be eliminated for immigration purposes by rehabilitative relief. See Part I.B, above.

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[49] See DHS memo, Nov. 14, 2014, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. Although a misdemeanor possession offense is not by itself a listed enforcement priority (see Part A of the memo), officers may be pursing such persons as matters of 'federal interest" (see Part B of the memo).

[50] *Mellouli v. Lynch*, *supra* (Kansas possession of paraphernalia is not a deportable controlled substance offense unless it involves a federally-defined substance).

[51] The test is whether a state offense is analogous to a federal drug felony. See 21 USC § 863(a) (sale, offer to sale, use of mails or interstate commerce to transport, or import or export drug paraphernalia – but not possession).

[52] *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

IV. Trafficking Offenses and Aggravated Felonies

A. How to Plead to Cal. H&S C § 11360

The bad news is that because marijuana is a federally-defined controlled substance, *every* conviction under § 11360 is a deportable and inadmissible controlled substance conviction.

> **Practice Tip:** If the person does not have drug priors, consider whether a plea to a non-drug offense, to a non-conviction disposition, or simple possession of 30 grams of marijuana is possible.

The good news is that this plea can avoid other immigration consequences, including an aggravated felony.

Transportation for personal use under §11360(a) or (b) is a deportable and inadmissible drug conviction, but not an aggravated felony. But as of January 1, 2016, transportation under §11360 reaches only transportation for sale, not personal use, and that is an aggravated felony.

Section 11360 has gone through different iterations over time; in analyzing priors, be sure to identify the correct version. Unless the statute or subsection provides that transportation involves intent to sell, the minimum conduct includes transportation for personal use – and every conviction under that section is for transportation for personal use, even if the particular defendant in the case intended more.

Giving away a small amount of marijuana is not an aggravated felony because that offense is treated as a misdemeanor under federal law. Although "small amount" does not have a statutory definition, defense counsel should assume this means 30 grams or less.[53] A conviction for "giving away" marijuana under §11360(b) is never an aggravated felony, because the statute has as an element a maximum 28.5 grams. A "giving away" plea to § 11360(a) also should not be held an aggravated felony, because the minimum conduct to commit §11360(a) includes 29 or 30 grams. This was the specific issue that the Supreme Court addressed in *Moncrieffe v. Holder*, where the person was convicted of a Georgia statute that prohibited distributing any amount of marijuana, with or without remuneration. Therefore, as long as §11360(a) ever has been used to prosecute giving away 29 or 30 grams of marijuana, no conviction is an aggravated felony. (Wherever possible, however, counsel should indicate in the record of a plea to §11360(a) that the amount given away was 30 grams or less, because this will make it less likely that an immigration judge would misinterpret the rule.) Plead to giving away (or pre-1/1/16 transporting), and not to § 11360 as a whole.

Offering to commit any of the § 11360 offenses. "Offering to" commit an offense in §§ 11360, 11352, or 11379 is not an aggravated felony, in cases arising in the Ninth Circuit only.[54]

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[53] See discussion of 21 USC §841(b)(4) in *Moncrieffe v Holder* (2013) 569 US __, 133 SCt 1678, 1685.
[54] *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc).

Inadmissible for "reason to believe" trafficking; Asylees, refuges, and "particularly serious crimes." While not an aggravated felony, a plea to offering to sell marijuana will provide the government with automatic "reason to believe" the person is a trafficker, one of the most pernicious inadmissible grounds. Offering to sell will be held a "particularly serious crime" for asylees and refugees (unless, perhaps, it is a very small amount of marijuana). Transportation for personal use or giving away a small amount of marijuana (or offering to give away any amount) is better.

B. How to Plead to H&S C §§ 11352(a), 11379(a)

Fortunately for immigrant defendants, California trafficking statutes contain some reasonable options. It is important to plead to a specific good offense: avoid a plea to "sale *or* transport," or the whole statute in the disjunctive ("or"), if there is a federally-defined controlled substance. These following plea suggestions are listed in order of benefit to immigrants.

Transportation, pre-January 1, 2014 statute (i.e., where the offense was committed before January 1, 2014). This is the best possible plea. Because the minimum conduct to commit the offense is transportation for personal use, all convictions are evaluated as that. This is not an aggravated felony conviction, including outside the Ninth Circuit. Without a defense relating to the identity of the controlled substance, it is a deportable and inadmissible drug conviction but not an aggravated felony. Where possible, state on the record that the plea is to the pre-January 1, 2014 version of the statute.

If the record of conviction indicates an "unspecified" controlled substance, then under current law it is not a controlled substance conviction or aggravated felony for purposes of deportability. It is an inadmissible conviction and an aggravated felony as a bar to relief.

If the record shows a specific substance that is on the California but not the federal drug schedules (e.g., transporting chorionic gonadoptrin or khat under § 11379), it is not a controlled substance conviction or aggravated felony for any purpose. See discussion in Part II, above.

Offer to Give Away. Distribution (including giving away for free) of a controlled substance is a felony under federal law, and thus a state conviction is an aggravated felony. The exception is giving away a small amount of marijuana, discussed at Part A. However, "offering to" commit a drug offense is not an aggravated felony in proceedings arising within the Ninth Circuit.[55] It will be held an aggravated felony in immigration proceedings held outside of the Ninth Circuit, however. This is the main disadvantage of offer to distribute, as compared to pre-1/1/2104 transportation.

The unspecified controlled substance and non-federal substance defenses apply here. See discussion at transportation, above. Without these defenses relating to the identity of the controlled substance, the offense is a deportable and inadmissible drug offense, but in the Ninth Circuit not an aggravated felony.

[55] *Rivera-Sanchez, supra*.

The reason that offer to distribute is better than offer to sell is that, because it does not have an element of commercial gain, distribution is not *automatically* a particularly serious crime (bad for persons who fear persecution in the home country) or a basis for inadmissibility as "reason to believe" the person trafficked. See discussion at Part II.D.3, above.

Offer to Sell, or Offer to Transport, post-1/1/2014 version. These offenses involve trafficking, but in the Ninth Circuit only they are not aggravated felonies due to the element of solicitation ("offering"). The unspecified controlled substance and non-federal substance defenses apply here. See discussion at pre-1/1/14 transportation, above. Without these defenses relating to the identity of the controlled substance, the offense is a deportable and inadmissible drug offense, but not an aggravated felony in the Ninth Circuit.

Because these offenses have an element of trafficking, they have extra penalties that may not apply to distribution. Conviction is automatically of a "particularly serious crime," which is bad for refugees, asylees, and applicants for asylum. See discussion in *§N.17 Relief Toolkit.* Conviction also automatically makes the defendant inadmissible by giving ICE "reason to believe" that the person is a trafficker. See Part V. (A plea to offer to distribute may well alert ICE so that it locates evidence to support "reason to believe," but at least it is not automatic.)

Give away, furnish. Distributing a federally-defined controlled substance, even without remuneration, is an aggravated felony. (The exception is giving away a small amount of marijuana; see Part A.) In contrast, "offering to distribute" is not an aggravatd felony in proceedings in the Ninth Circuit, and counsel should try hard to plead to that instead.

The unspecified controlled substance and non-federal substance defenses apply here. See discussion at pre-1/1/14 transportation, above. Without these defenses, conviction is of a deportable and inadmissible drug conviction, and an aggravated felony.

Sale, or Transportation as of January 1, 2014 (i.e., where the offense was committed on or after January 1, 2014). As of January 1, 2014, transportation was amended to mean transportation for sale. This and sale are the worst offenses under these statutes.

The unspecified controlled substance and non-federal substance defenses apply here. See discussion at pre-1/1/14 transportation, above. Without these defenses relating to the identity of the controlled substance, the offense also is a deportable and inadmissible drug conviction, and an aggravated felony.

Even with those defenses, this conviction will be a "particularly serious crime, which is bad for asylees, refugees, and applicants for asylum. It will make the person inadmissible by giving ICE "reason to believe" that he or she trafficked in a federally-defined controlled substance, although a plea to a specific offense not on the federal list may prevent this.

C. Possession for Sale is an Aggravated Felony

Possession for sale of a federally-listed controlled substance is a bad plea. See H&S Code §§ 11351, 11359, 11378. It is a deportable and inadmissible conviction and an aggravated felony. It lacks the crucial option present in §§ 11352, 11360, 11379, of avoiding an aggravated

felony by pleading to "offering to" commit an offense, and in older offenses transportation for personal use.

For this reason, a California court of appeals held that it is ineffective assistance of counsel to fail to advise a noncitizen defendant that for immigration purposes, if there is no other option it is better to "plead up" to a non-aggravated felony under these sections, rather than plead to possession for sale.[56]

The unspecified substance and specific non-substance defenses do apply to possession for sale, and that is a reasonable alternative. See discussion at Part II.D. Still, for immigration purposes usually it is worth it to plead up to pre-1/1/2014 transportation, or to "offer to give away" or "furnish" under § 11379 for purposes of this defense. Unlike possession for sale, these offenses do not automatically give ICE "reason to believe" the person is a trafficker.

D. Other Aggravated Felonies

A state offense that is analogous to a federal drug felony will be an aggravated felony, even if the state offense does not involve trafficking. See 8 USC § 1101(a)(43)(B). The below offenses may be classed as aggravated felonies as federal drug analogues.

1. Possession as an Aggravated Felony

Generally simple possession is treated as a misdemeanor under federal law, and so is not an aggravated felony.[57] There are two exceptions. First, a single conviction for possession of ***flunitrazepam*** (a date-rape drug) is an aggravated felony, because it is a felony under federal law. Second, if a ***prior drug offense is pleaded or proved*** in a possession case for recidivist sentencing purposes, this may be an aggravated felony.[58] If the prosecution wants a drug recidivist plea, find a different way to accept the desired jail time, or get assistance in negotiating a different plea.

Some minor offenses are not federal felonies, or not punished under federal law at all. These include being under the influence, possessing paraphernalia, transporting for personal use.

2. Other Aggravated Felonies, Including Non-Trafficking Offenses

Giving away a specified controlled substance for free is an aggravated felony as a federal analogue (unless it involves giving away a small amount of marijuana; see Part A above).

Forged or fraudulent prescriptions. Obtaining a controlled substance by a forged or fraudulent prescription may be an aggravated felony to the extent it matches the elements of the federal felony 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by

[56] See *People v. Bautista*, (2004) 115 Cal.App.4th 229, 8 Cal.Rptr. 3d 862).
[57] *Lopez v. Gonzales*, 549 U.S. 47 (2006).
[58] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007). For further discussion, see Vargas, "Practice Advisory: Multiple Drug Possession Cases after *Carachuri-Rosendo v. Holder*" (June 21, 2010) at www.immigrantdefenseproject.org/webPages/practiceTips.htm.

misrepresentation, fraud, forgery, deception, or subterfuge). Instead, plead to simple possession, or a straight fraud or forgery offense. Avoid a sentence of a year or more on any single count of forgery, in order to avoid a forgery aggravated felony under 8 USC § 1101(a)(43)(R).

Cultivation. Cal. Health & Safety Code § 11358, cultivation of marijuana, is categorically an aggravated felony as an analogue to 21 USC § 841(a)(1), (b)(1)(D).[59]

Sale of paraphernalia is a federal drug felony under 21 USC § 863(a), which also prohibits offering to sell or transporting (in interstate commerce) paraphernalia. ICE may charge that a similar conviction under Calif. H&S Code § 11364.7 is an aggravated felony as a federal analogue. Section 11364.7 penalizes one who with guilty knowledge delivers, furnishes, or transfers paraphernalia, or who possesses or manufactures paraphernalia with intent to deliver, furnish or transfer it. In contrast, mere possession of paraphernalia is a deportable offense, but not an aggravated felony.

Maintaining a place where drugs are sold under H&S § 11366.5 may be charged as an aggravated felony as an analogue to 21 USC § 856. In contrast, presence in a place where drugs are used, H&S § 11365, is a deportable offense but not an aggravated felony.

Possession of listed chemical having reason to believe it will be used to manufacture a controlled substance is a federal felony under 21 USC § 841(c)(2).[60]

V. Conduct-Based Grounds: Government has "Reason to Believe" Involvement in Trafficking; Drug Abuser/Addict; Admits Committing a Drug Trafficking Offense That Was Not Charged

In a few cases, a noncitizen will become inadmissible or deportable based on conduct, with no requirement of a conviction. As a criminal defense attorney you cannot control whether there is evidence of conduct, but you can avoid structuring pleas that admit to the conduct, and try to define the offense by pleading to something else (e.g., possession, or a non-drug offense). Note that an aggravated felony is not a "conduct-based" ground; a conviction always is required.

A. Inadmissible for "Reason to Believe" One Engaged in Drug Trafficking

A noncitizen is inadmissible if immigration authorities have "reason to believe" that she has been or assisted a drug trafficker. 8 USC § 1182(a)(2)(C). A conviction is not necessary, but a plea to sale, offer to sell, transport with intent to sell, possession for sale, and similar offenses involving a federally-defined controlled substance will prove the person is inadmissible. Because "reason to believe" does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports or use defendant's own statements.

[59] *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008).
[60] *Daas v. Holder*, 198 F.3d 1167 (9th Cir. 2010).

Immigration harm depends on status. For undocumented persons this inadmissibility ground is extremely severe: it is almost impossible ever to obtain permanent residency or any lawful status once inadmissible under this ground, even if the person has strong equities such as being married to a U.S. citizen or a strong asylum case.

A permanent resident who becomes inadmissible faces less severe penalties: the person cannot travel outside the United States, and will have to delay applying to become a U.S. citizen for three to five years, but will not lose the green card based solely on being inadmissible (as opposed to being deportable, which does cause loss of the green card).

Defense strategies*:* To avoid being inadmissible under this ground, follow instructions above for pleading to a non-drug related offense or a disposition that is not a conviction. Any drug conviction will severely cut down a deportable person's potential to get relief, but for at least some purposes a conviction for possession is far better than for sale or offer to sell. A plea to giving away a small amount of marijuana is not an aggravated felony. The person also should know that when applying for immigration status she will be questioned by authorities about whether she has been a participant in drug trafficking. She can remain silent but this may be used as a factor to deny the application.

B. Inadmissible or Deportable for Being a Drug Addict or Abuser

A noncitizen is inadmissible if he or she currently is a drug addict or abuser, and is deportable if he or she has been an addict or abuser at any time after admission into the U.S.[61]

Criminal defenders should consider this ground where a defendant might have to admit, or be subject to a finding, about addiction or abuse in order to participate in a "drug court" or therapeutic placement like CRC. This might alert immigration authorities and provide a basis for a finding of addition or abuse. Otherwise, in practice immigrants rarely are charged under this ground. The abuser/addict ground is not very commonly charged; if the choice is between a conviction for possessing a federally defined controlled substance versus admitting abuse or addiction, it is better to do the latter.

The statute provides that the abuse or addiction must relate to a federally defined controlled substance. In drug court, one option is for a person to admit he or she is in danger of becoming addicted to a substance that appears on the California schedule but not the federal. See Part II, *supra.* This ground is not triggered by an acceptance of drug counseling, e.g. as a condition of probation, where there is no admission or finding of addiction or abuse.

C. Formally Admitting Commission of a Controlled Substance Offense that was Not Charged in Criminal Proceedings

A noncitizen "who admits having committed, or who admits committing acts which constitute the essential elements" of any offense relating to a federally defined controlled substance is inadmissible, even if there is no conviction.[62] This requires a formal admission of

[61] INA § 212(a)(1)(A)(iv), 8 USC § 1182(a)(1)(A)(iv) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).
[62] INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II).

all of the elements of a crime under the jurisdiction where the act was committed. However, the Ninth Circuit held that an admission at a visa medical appointment qualifies as an admission.[63]

Where a conviction by plea was eliminated for immigration purposes by any means, such as under *Lujan-Armendariz* or the new P.C. § 1203.43, the old guilty plea may not serve as an "admission" for this purpose. Neither can a later admission, for example to an immigration judge. This is also true if drug charges were brought but dismissed. The Board of Immigration Appeals has held that if a criminal court judge has heard charges relating to an incident and the result was less than a conviction, immigration authorities will defer to the criminal court resolution and will not charge inadmissibility based on a formal admission of the underlying facts.[64] However, counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in criminal court.

[63] *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1214-15 (9th Cir. 2002).

[64] See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (PC § 1203.4 expungement); *Matter of G*, 1 I&N Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute);

Practice Aid 8-I Checklist: Controlled Substance Strategies For

Lawful Permanent Resident Defendants **(and some Asylees, Refugees)**

A. No or Minor Consequences for LPR or Refugee Who is Not Already Deportable, or Asylee

☑ Plead to a non-drug offense (check to see if this has other consequences)
☑ Possession of, e.g., chorionic gonadopotrin or khat under § 11377 (not deportable or inadmissible)
☑ Possession of an unspecified "controlled substance" under § 11377 (not deportable but is inadmissible; 212(h) waiver not available but LPR cancellation might be)
☑ Delinquency disposition for non-trafficking offense
☑ Formal or informal pretrial diversion for non-trafficking offense
☑ Non-trafficking conviction reversed on appeal, or vacated for legal defect
☑ Withdrawal of plea in a completed DEJ per new PC § 1203.43
☑ Single simple possession or poss of paraphernalia plea from before July 15, 2011 is eliminated by any rehabilitative relief such as DEJ, Prop 36, P.C. 1203.4; but see additional *Lujan/Nunez* requirements

B. First Simple Possession of 30 grams or less marijuana or paraphernalia for use with mj

- Not a deportable offense, but is inadmissible and a § 212(h) waiver is hard to obtain.

C. Not Deportable – But Inadmissible for "Reason to Believe" Trafficking

- *Can bar a deportable LPR from getting some relief, or cause an LPR who travels outside the U.S. to be refused admission upon return*
- *Will prevent an asylee or refugee from getting a green card*

☑ Trafficking conviction with unspecified controlled substance (e.g. possession for sale of "a controlled substance") where strong evidence of the substance exists
☑ Delinquency disposition for sale, possession for sale
☑ Trafficking conviction that is reversed or vacated, where ICE still gets strong evidence of trafficking

D. Deportable & Inadmissible – But Not an Aggravated Felony or "Reason to Believe"

- *LPR, Refugee can be put in removal proceedings, but <u>might</u> be eligible for relief*

☑ Conviction of any non-trafficking offense, e.g. possession of specified controlled substance under H&S C §§ 11350, 11357, 11377 (except, see Hidden Aggravated Felonies below)
☑ Conviction of transportation for personal use (pre-1/1/2014) under H&S C §§ 11352(a), 11379(a) or (pre-1/1/16) 11360(a) or (b)
☑ Conviction of "offering" to commit any offense (only good in Ninth Circuit; and other than offer to give away or furnish, very bad for asylees, refugees) under §§ 11352, 11360, 11379
☑ Being in a place where drugs are used
☑ Giving away a small amount of marijuana, any 11360(b) and even (a) conviction

E. Aggravated Felonies – Avoid them!

☑ Sale, possession for sale, cultivation, manufacture, giving away (except small amount of mj), post-1/1/14 (or for § 11360, 1/1/16) transportation; and outside the Ninth Circuit, offer to give away, sell
☑ Sale of paraphernalia
☑ Possession of flunitrazepam (date-rape drug)
☑ Possession where a prior drug offense is pleaded and proved for recidivist sentence
☑ "Sale *or* offer to sell" "Sale *or* transportation for personal use" "We plead to the language of § 11379(a) in the disjunctive" where record indicates specific substance
☑ Obtain prescription controlled substance by fraud
☑ Maintain place where drugs are sold

Checklist: Strategies For

***Undocumented Persons, Deportable Permanent Residents*, and Others Who Need Status**

A. No Controlled Substance Consequences for This Group

- ☑ Plead to a non-drug offense (check to see if this has other consequences)
- ☑ Plea to non-specified "controlled substance" is ***not a good option***; does not benefit this group
- ☑ Possess a specific California controlled substance that is not on federal drug schedules, § 11377 for chorionic gonadopotrin or khat. Not deportable, inadmissible, or bar to relief.
- ☑ Non-trafficking offense, no "conviction" for immigration purposes: Delinquency disposition; formal or informal pretrial diversion; DEJ with only consequence an unconditionally suspended fine
- ☑ Non-trafficking offense, no longer a "conviction": Plea withdrawn by new PC § 1203.43 after completion of DEJ; conviction reversed on appeal or vacated for legal defect; a single simple possession, or poss of paraphernalia, plea from before July 15, 2011 eliminated by DEJ, Prop 36, PC § 1203.4; but see additional *Lujan* requirements and limitations

B. First Simple Possession, Use, Paraphernalia for use with, 30 Grams or Less *Marijuana, Hashish*

- Inadmissible: might qualify to apply for § 212(h) waiver, but a grant it is hard to obtain.

C. Inadmissible/Deportable Drug Conviction, But Not an Agg Felony or "Reason to Believe"

- ➢ *LPR might get cancellation; Asylee, Refugee still might be able to adjust status*
- ➢ *Undocumented person might qualify for T or U visa, DAPA (if misd w/ 89 days or less), asylum*

- ☑ Almost any non-trafficking offense, e.g. H&S C §§ 11350, 11357, 11364, 11377, 11550 (but see Hidden Aggravated Felonies below)
- ☑ Transportation for personal use, §§ 11352 & 11379 if pre-1/1/14; 11360 if pre-1/1/16
- ☑ Being in a place where drugs are used
- ☑ Giving away a small amount of marijuana, § 11360
- ☑ Conviction of "offering" under §§ 11352, 11360, 11379 (This is the worst option: only works in Ninth Circuit; offer to sell provides "reason to believe," and offer to give away may raise suspicions)

D. Inadmissible for "Reason to Believe" Trafficking – Bar to Getting Almost Any New Status

- ➢ *LPR-Cancellation, U or T visas, Convention Against Torture, and possibly Asylum and Withholding are only possible forms of relief*
- ➢ *Will prevent an asylee or refugee from getting a green card*

- ☑ Trafficking Conviction, including "offer to sell," even with unspecified controlled substance, if ICE can get strong evidence that it was in fact a federally-listed substance
- ☑ Delinquency disposition for sale, possession for sale
- ☑ Trafficking conviction that is reversed or vacated, where ICE has strong evidence of trafficking

E. Other Aggravated Felonies – Avoid them!

- ☑ Sale, possession for sale, cultivation, manufacture, giving away (except small amount of mj), post-1/1/14 or 1/1/16 transportation, and, outside Ninth Circuit, offer to give away, sell
- ☑ Sale of paraphernalia
- ☑ Possession of flunitrazepam (date-rape drug)
- ☑ Possession where a prior drug offense is pleaded and proved for recidivist sentence
- ☑ "Sale *or* offer to sell" "Sale *or* transportation for personal use" "We plead to the language of § 11379(a) in the disjunctive" where record identifies a specific controlled substance
- ☑ Obtain prescription controlled substance by fraud
- ☑ Maintain place where drugs are sold

Practice Aid 8-II:

LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

Please give a copy of the applicable paragraph/s to the Defendant, *with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any* ***official documents*** *(e.g. plea form) that will support the defendant's argument.*

Please give or mail a second copy to the defendant's friend or relative, or mail it to the defendant's home address*. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.*

* * * * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

If the reviewable record of a California drug conviction does not specify a controlled substance, the conviction is not a deportable controlled substance offense or a deportable drug trafficking aggravated felony. Information from a dropped charge or any other information outside of the reviewable record of conviction cannot be used to identify the substance. See, e.g., *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014), *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (Calif. H&S §11377-79); *U.S. v. De La Torre-Jimenez*, 771 F.3d 1163 (9th Cir. 2014), *U.S. v. Leal-Vega, 680 F.3d 1160* (9th Cir. 2012*), Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9th Cir. 2010) (H&S §11350-52). This applies to all offenses, including possession of paraphernalia, and the substance must have been on the federal list at the time of the person's conviction. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015). (“At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not on the federal lists.”)

Where the statute lists the substances, case evidence of prosecution is not required to prove a “reasonable probability of prosecution.” See *Mellouli, supra* (case evidence was not required to establish reasonable probability of prosecution); *U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (where statute sets out element, case evidence is not required to establish reasonable probability of prosecution). Thus *Matter of Ferreira*, 26 I&N Dec. 415 (BIA) does not apply.

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

California deferred entry of judgment is not a "conviction" for immigration when the only consequence to the person is an ***unconditionally suspended fine.*** The immigration definition of conviction at INA § 101(a)(48)(A) requires some form of penalty or restraint to be imposed in order for a disposition to be a "conviction." The Ninth Circuit held that an unconditionally suspended fine is not penalty or restraint. *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Withdrawal of plea under California Penal Code § 1203.43 (Jan 1, 2016) eliminates a deferred entry of judgment (DEJ) as a "conviction" for immigration purposes. A criminal court judge may offer DEJ to defendants charged with a first, minor drug offense. See C.P.C. § 1000 et seq. Under DEJ the defendant agrees to enter a guilty plea and is diverted to a program. If the defendant successfully completes the requirements, the court will dismiss the charges, there is no conviction "for any purpose," and no denial of any license, employment, or benefit may flow from the incident. See C.P.C. §§ 1000.1(d), 1000.3, 1000.4. In some immigration proceedings, however, DEJ has been held to be a conviction because a guilty plea was imposed. Thus the statutory advice regarding the effect of the plea in C.P.C. § 1000 is incorrect.

New § 1203.43 permits people who completed DEJ to withdraw the guilty plea based on the fact that the DEJ statute misinformed defendants as to the real consequences of the guilty plea. Section 1203.43(a) provides:

> (a) (1) The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences. (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

This withdraws the plea for immigration purposes because it is based on legal error, and not rehabilitative or humanitarian reasons. See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (vacation of judgment for cause, but not for rehabilitative or humanitarian purposes, is given effect). The state's determination of legal error is entitled to full faith and credit. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Section 1203.43 contains no deadline for applying, and no bar based on violating the program before successfully completing it.

* * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A first conviction for certain minor drug offenses from on or before July 14, 2011 is eliminated for immigration purposes by rehabilitative relief, such as, in California, withdrawal of plea or dismissal of charges pursuant to DEJ, Prop 36, or Calif. P.C. § 1203.4. This applies to possession, possession of paraphernalia, and other "less serious" offenses that do not have a federal analogue, as well as giving away a small amount of marijuana under Cal. Heath & Safety C § 11360(a) or (b). *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011), overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) prospectively only. Regarding giving away marijuana, 21 USC 841(b)(4) makes this offense a misdemeanor and subject to the FFOA (the test for *Lujan-Armendariz*). Because the minimum conduct to violate giving away marijuana under H&S § 11360(a) or (b) is less than 30 grams, any conviction under the statute qualifies for this relief. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Under 21 years old when first drug offense was committed; pled guilty before July 15, 2011. A first conviction for certain minor offenses from before July 15, 2011 is eliminated for immigration purposes by rehabilitative relief, such as DEJ, Prop 36, or Calif. P.C. § 1203.4. This applies to possession, possession of paraphernalia, giving away a small amount of marijuana, and other "less serious" offense that does not have a federal analogue. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011), overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). If the person was under the age of 21 when the offense was committed, he or she should be eligible for this benefit even if probation was violated before it was successfully completed, or if he or she received a prior grant of pre-plea diversion. *Lujan-Armendariz* extends protections of the Federal First Offender Act, 18 USC § 3607, to state convictions that could have qualified for relief under that Act. Section 3607(c), not 3607(a), applies to cases in which the defendant was under the age of 21 at the time of committing the offense.

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Solicitation to possess a controlled substance under P.C. § 653f(d) is not a conviction of an aggravated felony and, as a generic solicitation offense, should not be a deportable or inadmissible drug crime. See discussion at *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

* * * * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Transportation for personal use of a controlled substance is not an aggravated felony. See, e.g. *U.S. v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999).

* * * * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Offering to commit a trafficking offense or any other drug offense is not a drug trafficking aggravated felony. See, e.g., *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*) (offering to sell under H&S § 11379 is not an aggravated felony).

* * * * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement

Giving away marijuana under Cal. Heath & Safety C § 11360(a), (b) is not an aggravated felony. The Supreme Court held that because 21 USC § 841(b)(4) makes the offense of distributing a small amount of marijuana without remuneration a misdemeanor under federal law, the offense is not an aggravated felony. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Because the minimum conduct to violate giving away marijuana under H&S § 11360(a) or (b) is less than 30 grams, *no* conviction under the statute qualifies for this relief, regardless of the facts of the case. See *Moncrieffe, supra* at 1784, regarding similar Georgia statute. The offense is not an aggravated felony for purposes of deportability or eligibility for relief. *Ibid.*

* * * * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Being an ***accessory after the fact*** is not an offense "relating to controlled substances" and so does not make the noncitizen deportable or inadmissible for having a drug conviction. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

Practice Aid 8-III: DRUG CHART[1]

Effect of Selected Controlled Substance Convictions In Immigration Proceedings Arising in the Ninth Circuit

OFFENSE	DEPORTABLE & INADMISSIBLE	AGG FELONY	ELIMINATE BY REHABILITATIVE RELIEF, *only in 9th Circuit, and* ***only convictions from before 7/15/2011***[2]
Plea to a specific non-federally listed controlled substance (E.g., §§ 11377-79 involving khat or chorionic gonadopotrin)	Not deportable or inadmissible for controlled substance conviction. (Test is whether substance was on federal list at the time of conviction.[3])	Not an aggravated felony	YES, if otherwise qualifies (e.g., § 11377).
Plea to an unspecified "controlled substance" §§ 11377-79, not, e.g., methamphetamine	Can prevent a deportable, but not inadmissible, conviction[4]	Not an agg fel for deportability, but is agg fel as bar to relief	Same as above
First possession (of a specified controlled substance ("CS"))	YES, *except* see note for 30 gm or less marijuana or hash[5]	NO[6]	YES if no probation violation, and no prior pre-plea diversion (better rule if under age 21)[7]
First poss. flunitrazepam	YES	YES flunitrazepam; see note on past crack convictions[8]	YES, see above
Possession (specified CS) with drug prior	YES	NO, *unless* prior pled or proved in the record.[9]	NO
Transportation for personal use, e.g. pre-1/1/14 § 11377, 11352; pre-1/1/16 § 11360 (specified CS)	YES	NO. But transport is an AF under §§11352, 11377 as of 1/1/14, and §11360 as of 1/1/16	NO
Possess paraphernalia, be under influence (specified CS)[10] Note: § 11377 is better plea for the unspecified CS defense	YES, *but see* note if use or paraph relates only to small amount marijuana or hash[11]	NO	YES for poss paraphernalia, NO for use/under the influence[12]

Second such offense	YES	NO	NO
Sale of a specified CS; Sale of paraphernalia to use a specified CS (check statute)	YES	YES	NO
Offer to sell or to commit other drug offense (specified CS)	YES unless "generic solicitation"[13]	NO[14] *but only in imm proceedings held in the Ninth Circuit*	NO
Give away small amount of marijuana	YES	NO, as long as minimum conduct ever prosecuted includes giving away 30 gms or less[15]	SHOULD BE[16]
Possession for Sale (of a specified CS)	YES	YES	NO

ENDNOTES -- Effect of Selected Drug Convictions in Ninth Circuit

[1] Prepared by Kathy Brady of the Immigrant Legal Resource Center. See further discussion in Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit* (2013) (www.ilrc.org), Ch. 3 and *California Quick Reference Chart and Notes*, and *Note: Controlled Substances*, at www.ilrc.org/crimes, and Tooby, Brady, *California Criminal Defense of Immigrants* (www.ceb.org).

[2] *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. July 14, 2011) (en banc) reversed *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), prospectively only. See *Nunez-Reyes* Advisory at www.ilrc.org/crimes.

[3] *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015).

[4] This plea will help a permanent resident or refugee who is not already deportable (e.g., no prior deportable conviction) to avoid becoming deportable, because ICE cannot prove that the substance is one from the federal schedules. Seek a record of conviction that refers only to "a controlled substance" rather than "cocaine." *See Ruiz-Vidal*, 473 F.3d 1072 (9th Cir. 2007) (where Cal. H&S C §11377 conviction record does not ID specific substance, offense is not a deportable drug conviction); *Esquivel-Garcia*, 594 F.3d 1025 (2010) (same for § 11350); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). A plea to an unspecified controlled substance will not prevent the conviction from being a bar to status or relief, however. See *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). The Ninth Circuit might change the *Young* rule in is en banc review of *Almanza-Arenas v. Holder*, pending at this writing.

[5] A single conviction for simple possession 30 grams or less, or use, of marijuana, is not a deportable conviction under 8 USC §1227(a)(2)(B), and might be subject to inadmissibility waiver under 8 USC §1182(h). The same is true for an equivalent quantity of hashish (for inadmissibility waiver purposes, i.e. a few grams) and 30 grams or less of hashish (for deportability purposes; but by far the best plea is to possessing a few grams). See *Note: Controlled Substances*, Part III, above.

[6] *Lopez v. Gonzales*, 549 U.S. 47 (2006) (first state possession offense is not an aggravated felony because it would not be punishable as a felony under federal law). *But see* note 8.

[7] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (probation violation); *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007) (prior pretrial diversion). This might not apply if under age 21 at commission of offense, per 18 USC 3607(c); see *Nunez-Reyes* Advisory at www.ilrc.org/crimes.

[8] Conviction for possession of flunitrazepam (date-rape drug) is an aggravated felony because it is a felony under federal law. Possessing 5 grams or more of crack is no longer an aggravated felony because it is a federal misdemeanor per the Fair Sentencing Act (August 3, 2010); pleas before 8/3/10 should not be held an aggravatd felony. See FSA Advisory at www.nationalimmigrationproject.org.

[9] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). But if there is a finding of a drug prior, possession can be an aggravated felony. See Advisories at www.immigrantdefenseproject.org.

[10] Proof of the specific controlled substance is required for paraphernlia. See *Mellouli v. Lynch, supra*, abrogating *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000); *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009); *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009). It also is required for use. *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005).

[11] Use of marijuana/hash, or possession of paraphernalia for use of 30 gm or less marijuana or hash, can come within 30 gm marijuana rule discussed at n. 5, above*;* see also *Martinez-Espinoza, supra*.

[12] *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000) (paraphernalia comes within *Lujan*); *Nunez-Reyes, supra* (under the influence doesn't come within *Lujan*).

[13] Ariz. Rev. Stat. §13-1002, a "generic" solicitation offense not linked to a specific crime, is not a deportable drug offense. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997). In contrast, "specific" solicitation to commit a drug offense such as under Calif. H&S § 11352(a) will be held a deportable drug offense. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). The court opined that Calif. P.C. § 653f(d) is "generic solicitation" and therefore should not be treated as a deportable controlled substance offense. *Ibid.*

[14] *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(*en banc*) (Calif. H&S Code § 11352, 11360, 11379); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (ARS §13-1002).

[15] 21 USC §841(b)(4) makes this offense a misdemeanor under federal law; therefore it is not an aggravated felony. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Giving away marijuana under Cal. Heath & Safety C § 11360(a), (b) is not an aggravated felony under this test. Because the minimum conduct to violate giving away marijuana under § 11360(a) or (b) is less than 30 grams, *no* conviction under the statute qualifies for this relief, regardless of the facts of the case. See *Moncrieffe, supra* at 1784, regarding similar Georgia statute. The offense is not an aggravated felony for purposes of deportability or eligibility for relief. *Ibid.*(Mr. Moncrieffe is eligible to apply for LPR cancellation).

[16] 21 USC §841(b)(4) makes this offense a misdemeanor and subject to the FFOA (the test for *Lujan-Armendariz*). Because the minimum conduct to violate giving away marijuana under H&S § 11360(a) or (b) is less than 30 grams, any conviction for giving away marijuana under the statute qualifies for this relief. See discussion of *Moncrieffe, supra.*