

California Health & Safety Code § 11395: The Treatment-Mandated Felony Act (Prop 36 of 2024)

A. Short Title and Legislative Purpose

- a. **Short Title:** Health & Safety Code § 11395 was added by California’s Proposition 36 (2024) and is officially named the **“Treatment-Mandated Felony Act”**. This short title reflects the law’s focus on mandating treatment as part of the felony process for certain drug offenses.
- b. **Legislative Purpose:** The statute is part of **The Homelessness, Drug Addiction, and Theft Reduction Act** (Prop 36, 2024). Its purpose is to address California’s drug addiction and homelessness crisis by encouraging treatment over incarceration for repeat drug offenders. In the findings of Proposition 36, voters declared that prior reforms (like Proposition 47 in 2014) unintentionally contributed to increased drug abuse and homelessness by reducing penalties for hard drug possession. Section 11395 creates a new category of offense – a “treatment-mandated felony” – to **provide drug and mental health treatment for people addicted to “hard drugs”** while still holding repeat offenders accountable. In plain terms, the law aims to break the cycle of addiction by giving eligible offenders a chance to enter treatment instead of jail, and to ultimately avoid a conviction if they succeed in rehabilitation.

B. Eligibility Criteria for Individuals Under § 11395

- a. **Repeat Drug Offenders:** Section 11395 applies only to individuals who have a history of drug convictions. Specifically, a person **must have at least two prior convictions** (misdemeanor or felony) for certain drug-related offenses to be charged under this law. These qualifying prior offenses include *simple possession* (e.g. Health & Safety Code §§ 11350 or 11377), *possession for sale, drug sales or transportation, possessing drugs while armed, inducing minors in drug offenses*, and other serious drug crimes involving “hard drugs”. Even a prior conviction under the new §11395 itself counts toward this two-conviction threshold. There is ***no time limit or “washout” period*** on these prior convictions – **any prior qualifying drug conviction, no matter how old**, can trigger eligibility. Prior convictions must be formally alleged by the prosecutor in the new case and either admitted by the defendant or proven true in court.
- b. In summary, **only a repeat offender – someone caught possessing a “hard drug” after two or more prior drug convictions – can be charged with the treatment-mandated felony under §11395**. First- or second-time drug possession offenders remain subject to the usual misdemeanor procedures or other diversion programs; this law targets the *third offense (and beyond)* for hard drug possession.

C. Sentencing Guidelines: First vs. Subsequent Convictions

Section 11395 establishes a “*wobbler*” offense, meaning it can be punished either as a misdemeanor or a felony. The statute differentiates between a defendant’s **first conviction under**

this section and any **subsequent conviction under this section** (i.e. if the person re-offends under §11395 in the future):

- a. **First Conviction (Third Drug Possession Offense Overall):** A first conviction under §11395 is punishable by **imprisonment in a county jail for up to one year (misdemeanor)** or by a **felony jail term under Penal Code § 1170(h)**. In practice, this means the court can treat the offense as a misdemeanor (max one year in county jail) or as a low-level felony (with a jail sentence served in county jail per California’s realignment law). This first offense is not state-prison eligible; any felony term is served locally.
- b. **Second or Subsequent Conviction under §11395:** If the same individual is convicted again under this section (which would typically mean a fourth drug possession offense or more overall), the offense is still a wobbler (it can be a misdemeanor or felony), but a felony in this case is punishable by **imprisonment in state prison** (as opposed to county jail). The law states that a second or subsequent conviction *“is punishable by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison.”* In other words, on a repeat §11395 conviction, the court has the option to impose a state prison sentence for the felony form of the crime.

Both first and subsequent violations of §11395 are **eligible for probation** at the court’s discretion (unless some other law forbids probation due to the defendant’s record). They are also “wobblers” in both instances, meaning the judge or prosecutor could reduce the charge to a misdemeanor in appropriate cases. Importantly, however, **the law prefers treatment over incarceration** – as explained below, the defendant typically will not be sentenced to jail or prison at all if they choose to enter treatment, and the court finds them suitable for it.

No Sentence without Treatment Consideration: Section 11395 explicitly provides that **a person shall not be sentenced to jail or prison under this section unless the court first determines whether the person is not eligible or suitable for treatment, or certain other exceptions apply**. This means if someone qualifies for this treatment-mandated felony, the default expectation is that they will be given the opportunity to pursue treatment instead of immediate incarceration. Only if the court finds the defendant ineligible for the treatment option (or if one of the failure conditions discussed below has occurred) can the judge proceed to impose a jail or prison term. This provision ensures the statute’s primary goal – rehabilitation – is prioritized over punishment when possible.

D. Conditions for Electing Treatment Instead of Incarceration

Under §11395, an eligible defendant can **choose to enter a treatment program in lieu of serving a jail or prison sentence**. The law lays out specific conditions and procedures for this election:

- a. **Timing and Plea Requirement:** The defendant may elect treatment at the time of arraignment or later, **in lieu of a jail/prison sentence or even instead of a probation term with jail**. To do so, the defendant must **plead guilty or no contest**

to the §11395 charge and admit the prior convictions that make them eligible. This plea is entered upfront, effectively acknowledging responsibility, but **the court does not immediately enter judgment (conviction).**

- b. **Waiver of Sentencing and Judgment:** By electing treatment, the defendant **waives the right to a speedy sentencing and the pronouncement of judgment is delayed.** The case is essentially put on hold while the defendant undergoes treatment. Importantly, the law states that the defendant's guilty/no contest plea **"shall not constitute a conviction for any purpose unless judgment is entered"** under the failure conditions. This means that while the defendant is in the treatment program, they are not yet formally convicted – the conviction only becomes final if they fail the program and the court enters judgment.
- c. **Agreement to Complete a Treatment Program:** The defendant must **agree to participate in and complete a detailed treatment program** as approved by the court. The program plan is typically **developed by a drug addiction expert** and tailored to the defendant's needs, subject to court approval. By making this election, the defendant commits to complying with all treatment requirements set by the court.

In summary, the conditions for choosing treatment instead of jail are the defendant pleads guilty or PNC to the charge, admits their priors, waives immediate sentence, and agrees to complete a court-approved treatment plan. This process is somewhat akin to a deferred entry of judgment or drug court model – the defendant's case is paused while they attempt rehabilitation, and if they succeed, they avoid incarceration and even avoid a conviction on their record.

E. Court-Ordered Evaluations and Benefit Eligibility Assessment

Once a defendant indicates an interest in the treatment option (either at arraignment or soon after), the law involves the court in assessing the defendant's needs and resources:

- a. **Substance Abuse and Mental Health Evaluation:** On the request or with consent of the defendant (or their attorney), the court **must order an evaluation by a drug addiction expert.** This expert will conduct a **substance use and mental health assessment** of the defendant and provide a written report to the court and the parties. The evaluation may include an interview with the defendant (and possibly input from others who know the defendant) and a review of relevant records such as medical history, prior treatment records, criminal history, and details of the current offense. The purpose is to identify the defendant's underlying substance abuse or mental health issues (if any) so that the court can determine the most appropriate way to handle the case
 - i. *Use Immunity for the Evaluation:* If the defendant agrees to be interviewed by the treatment evaluator, the law protects the defendant from that information being used against them at trial for the current offense. The defendant's statements to the evaluator (and

any evidence derived from those statements) **cannot be used by the prosecution at a later trial** on the drug charge, except if the defendant takes the stand and says something contradictory (then the statements could be used for impeachment). This encourages candid participation in the evaluation without fear of self-incrimination.

- b. **Benefit Eligibility Check:** At the same time as the court orders the evaluation (and with the defendant's consent), the court will also order a **case worker or qualified person to assess the defendant's eligibility for public benefits** that could cover treatment costs. Specifically, they will see if the defendant can receive Medi-Cal, Medicare, or other relevant assistance to pay for treatment programs or evaluations under this section. If the defendant did not agree to this benefits check at arraignment, the court must order it once the defendant agrees to enter a treatment program, and it becomes a condition of participating in treatment. This provision ensures that lack of insurance or funds is not a barrier – it helps connect the defendant with funding for rehab or related services they may be entitled to.
- c. **Judicial Oversight:** Throughout the treatment process, the court maintains active oversight. Section 11395 requires that the court hold **regular status hearings** to review the defendant's progress in the program. The judge essentially takes on a supervisory role (much like a drug court judge), receiving progress reports and ensuring the defendant is complying with treatment. The court also facilitates referrals to appropriate programs, with a directive to refer defendants to **no-cost services whenever possible** (programs that are free to the participant and deemed credible by the court and experts). The defendant can choose a different program (including private/pay programs) if they prefer, as long as it's approved by the court

In plain terms, after a qualifying offender opts for treatment, the court doesn't just send them off — it actively evaluates their needs (through an expert assessment), helps line up financial support for treatment, and keeps tabs on their progress with periodic check-ins. This comprehensive judicial review process is designed to set the defendant up for success in addressing addiction and to monitor that success over time.

F. Treatment Program Requirements and Successful Completion

Permissible Treatment Programs: The law broadly defines what the treatment program can entail. It is not limited strictly to drug treatment; the program may include a combination of services tailored to help the defendant overcome addiction and stabilize their life. For example, programs can involve **substance abuse treatment, mental health counseling, medical or psychiatric care, housing or shelter (if the person is homeless), job training, education, and other rehabilitative services**. The key is that any conditions or services in the program should be related to treating the defendant's drug problem or otherwise contributing to a successful outcome for the defendant. The court, in consultation with the addiction expert and the parties, will approve the specific plan and ensure the program is credible and effective. Often, this looks like enrollment in a certified drug rehabilitation program (inpatient or outpatient as appropriate) possibly

combined with therapy, support group attendance, vocational training, and regular court monitoring.

Successful Completion: A defendant is deemed to have successfully completed the program when they **fulfill all the requirements of the court-approved treatment plan**, and the treatment providers give a **positive recommendation** indicating the defendant's satisfactory participation and progress. In practice, this means the defendant has attended and finished the prescribed treatment (for example, completed a residential rehab program or maintained sobriety in outpatient treatment for the duration ordered, complied with counseling, etc.), and the program reports to the court that the defendant met the goals. Upon such successful completion, a very favorable outcome occurs:

- a. **Dismissal of the Charge:** The court is required to **dismiss the §11395 charge** if the defendant completes treatment successfully. The law provides that, on the motion of any party (the defendant, prosecutor, probation, or the court itself), and with proof of completion and a positive report, the judge “*shall dismiss*” the charge. This dismissal means the defendant is not convicted of the offense.
- b. **Record Clearance:** Once the charge is dismissed due to successful treatment, the statute invokes the same benefits as California's deferred entry of judgment provision (Penal Code §1000.4). Under those provisions, the arrest and charge **are deemed to have never occurred** for most purposes. In other words, the offender's record is cleared of this incident – they can lawfully state they have not been arrested or convicted for the offense, with certain exceptions (e.g., for law enforcement job applications). The law explicitly states that a dismissal after treatment **does not count as a conviction for any purpose, including calculating future penalties** under §11395. This protects the person from the “second conviction” enhanced punishment if they were to relapse later – the successfully completed episode won't be held against them as a prior.

In summary, **successful completion of treatment results in no conviction and an effective expungement of the case**. The carrot offered by the law is very strong: the individual not only avoids jail or prison, but also gets a clean slate for that offense, encouraging them to stick with the program.

G. Consequences of Failing or Refusing Treatment; Reinstatement of Sentencing

The law also spells out what happens if the treatment path does not work out – whether because the defendant isn't cooperating, or other issues arise. Key points regarding failure or termination of the treatment option include:

- a. **Grounds for Termination:** If at any point during the program the defendant **is not succeeding in treatment**, various parties can ask the court to end the diversion and impose the sentence. Specifically, if the defendant **appears to be performing unsatisfactorily, not benefiting from the program, no longer amenable to**

treatment, or if the defendant outright refuses to participate or continue, then a motion can be made to terminate the treatment option. Additionally, if the defendant commits and is **convicted of a new crime while in the program**, that is also a ground to end the diversion. Such motions to terminate can be made by the prosecutor, by the probation department, or by the court on its own initiative.

- b. **Hearing and Entry of Judgment:** Once a motion is made alleging one of the above failures, the court must give notice to the defendant and hold a **hearing to determine whether to enter judgment and proceed to sentencing**. At the hearing, the court will consider evidence of the defendant's performance or new offense. If the court finds any of the failure conditions to be true – e.g. the defendant isn't complying with treatment or picked up a new conviction – then the judge will formally enter the previously deferred **judgment of conviction and sentence the defendant** on the §11395 charge. In other words, the leniency ends, and the defendant now faces the normal sentencing (jail or prison) for the offense because the opportunity for treatment was not successfully utilized. The conviction, once entered, counts as a regular felony conviction going forward.
- c. **Second Chances (Rereferral):** The law does allow a bit of flexibility in cases of non-criminal program failure. If the defendant has not committed a new crime but was, say, struggling in treatment or temporarily uncooperative, the court has discretion **to give the defendant another chance instead of immediately imposing sentence**. The statute provides that, except when the failure is a new crime conviction, the judge *may* decide it's in the interest of justice to **re-refer the defendant to treatment** rather than finalize the conviction. The court would need to find that the defendant is currently amenable to continuing treatment (perhaps in a revised or more intensive program), and the defendant must agree to continue treatment under those terms. This essentially is a safety valve to avoid punishing someone who might still succeed with a bit more help or time, as long as public safety isn't at risk. However, if the problem was that the defendant committed a new offense during treatment, the statute does *not* allow this second chance – in that scenario, the conviction must be entered.
- d. **Refusal of Treatment:** If a defendant initially **refuses the offer of treatment entirely**, then the case would simply proceed to sentencing on the §11395 conviction (since the defendant either stands trial or pleads guilty without the diversion agreement). In effect, refusing treatment would be treated the same as failing out of treatment – the court would impose a sentence as it would for any felony conviction. (The Proposition 36 findings noted that an offender who *refuses* drug treatment under this law would “serve jail time for hard drug possession.”)

Practical effect: Failing or quitting the program means the defendant will face the jail or prison time that was deferred. For example, if a defendant stops attending the required counseling and the court revokes their placement in treatment, the judge will impose sentence – up to one year (or longer if a felony) depending on the case. The law tries to save true incarceration as a last resort, after giving the defendant ample opportunity to comply with treatment.

H. Rules for Awarding Credits While in Treatment

Section 11395 addresses how time spent in a treatment program counts (or doesn't count) toward any eventual custody time. This is important if a defendant fails the program and is sentenced, or perhaps if a program involves residential custody-like settings.

- a. **Credit for Residential Treatment:** If the defendant spends time in a **residential treatment facility** (meaning a live-in program, akin to a rehab center where the person stays on site 24/7), that time is treated similarly to custody for credit purposes. The defendant can earn **actual time credits** against any later jail/prison sentence for each day spent in the residential program. This is governed by Penal Code §2900.5, which generally gives credit for time spent in custody or custody-equivalent programs. For example, if a defendant lived in a residential rehab for 90 days, and later the court imposes a jail term, those 90 days would be deducted from the jail sentence as credit for time served.
- b. **No Conduct Credit in Treatment:** However, while the defendant gets credit for the actual days in residential treatment, they **cannot earn “good behavior” or conduct credits** (under Penal Code §4019 or similar provisions) for that treatment time. In custody, inmates often earn additional days off their sentence for good conduct or participation. Here, the law disallows that for treatment time – likely because treatment is an alternative to incarceration, not incarceration itself, so the only credit given is day-for-day for the time they actually were in the facility.
- c. **No Credit for Non-Residential Programs:** If the defendant's program is **outpatient or non-residential** (for example, attending counseling sessions while living at home), **no credits are earned at all**. Time spent in therapy sessions or in community programs isn't credited against a later jail sentence. Credit is limited to residential/in-custody treatment time, recognizing that residential rehab can be a restrictive environment similar to jail.

These rules ensure that defendants don't misuse the system to accrue extra credit, while still being fair in recognizing intensive inpatient treatment as time they were incapacitated from freedom. Essentially, a day in rehab counts as a day in jail would, but you don't get any extra credit beyond the actual days, and if you're not in a live-in program, you don't build up custody credit.

I. Definition of “Hard Drug” (Included and Excluded Substances)

The statute uses the term “hard drug” repeatedly – both to define who can be charged and what substances trigger the offense. Section 11395 provides a specific definition:

- a. **Included Substances:** “Hard drug” means **any controlled substance listed in Schedule I or II of California's controlled substance schedules (Health & Safety Code §§ 11054 or 11055)**, *including* any substance containing *fentanyl*, *heroin*, *cocaine* (or cocaine base), *methamphetamine*, or *phencyclidine (PCP)*, as well as analogs of those substances. These examples illustrate the primary drugs

targeted – fentanyl, for instance, is singled out due to its lethality. The mention of analogs means chemically similar substances or designer drugs intended to mimic those drugs are also covered (using the definitions in HSC §§11400-11401 for analogs).

- b. **Excluded Substances:** The law carves out several substances that are *not* considered “hard drugs” for purposes of this section, even if they appear in the schedules. Specifically, **cannabis (marijuana) and cannabis products are excluded**, as are *peyote*, **lysergic acid diethylamide (LSD)**, and **other psychedelic drugs such as mescaline or psilocybin (“magic mushrooms”)**. In addition, any other substance listed in Schedule I, *subdivisions (d) or (e)* of §11054, is excluded (those subdivisions of Schedule I cover many hallucinogens and other non-narcotic drugs), and – with the exception of methamphetamine – any substance in Schedule II subdivision (d) is also excluded. This effectively means that most hallucinogens and psychedelics are not treated as “hard drugs” under this law, nor are marijuana or its derivatives. The focus is on addictive narcotics, stimulants, and other serious controlled substances that are commonly linked to addiction and overdose (heroin, fentanyl, cocaine, meth, etc.).

In plain language, *hard drugs* under §11395 are essentially the heavy illicit drugs (heroin, fentanyl, cocaine, meth, PCP, and similar), and **do not include** marijuana or psychedelics. A person with two prior LSD or cannabis offenses, for example, would not fall under this law if their third offense is again LSD or cannabis-related, because those aren’t “hard drugs” here. But a person with two prior cocaine or heroin possession convictions caught with cocaine again would be subject to §11395.

J. Pretrial Release and Risk Review Requirements

Section 11395 contains a special rule to ensure that offenders who are charged under this law are not immediately released back into the community without a court’s oversight. Upon arrest for a violation of §11395, **the arrestee must go before a judge for a “judicial review” of their custody status before any release**. In effect, this means no cite-and-release or automatic bail release happens without a judge’s evaluation. The statute says the court shall require judicial review “*prior to release to make an individualized determination of risk to public safety and likelihood to return to court.*”

Practical implications: Normally, many low-level offenders might be released on their “own recognizance” or through a pretrial program shortly after booking, or bail could be posted according to a schedule. For §11395 charges, however, the arrest triggers a requirement that a magistrate or judge assess the person’s danger to the public and flight risk first. The judge will consider factors like the offender’s history (which includes at least two prior drug convictions in these cases) and the circumstances of the offense. Only after this review can the person be released pretrial, and the judge can set conditions or bail as appropriate. This means a §11395 defendant will usually spend at least some time in custody until they see a judge, and **cannot be released by**

a standard pretrial release program without a judge’s approval. The law is aiming to prevent repeat hard-drug offenders from cycling immediately back to the streets without intervention, given the public safety concerns (for example, if someone has multiple hard drug offenses, there may be a risk of overdose, dealing, or other crime while on release).

It’s also noted that an arrest under this section will typically involve **DNA sample collection**, as with any felony arrest (California law requires DNA collection from persons arrested for or convicted of felonies). And because §11395 is a felony charge, the arrest will be taken seriously in terms of pretrial handling. Law enforcement is advised to check criminal history when arresting for drug possession; if the person has two priors, booking under §11395 (instead of a simple possession misdemeanor) will invoke this judicial review and prevent a quick release by citation.

K. Additional Legal/Procedural Points and Cross-References

Finally, §11395 includes some additional provisions and interacts with other laws:

- a. **Prosecutorial Discretion (Other Charges Not Precluded):** Subdivision (g) explicitly states that **nothing in §11395 precludes prosecution or punishment under any other law**. This means prosecutors are not forced to charge someone under §11395 even if technically eligible – they have the discretion to charge a different offense if appropriate. For instance, if a repeat drug offender is also caught committing another crime (like burglary or drug sales), the prosecutor might focus on those charges instead of or in addition to §11395. Even for drug possession itself, the prosecutor could choose to charge the misdemeanor possession (HSC §11350 or §11377) rather than the felony, depending on the case. The new law does not override things like the Three Strikes law or other sentencing schemes for additional crimes – those can still apply in conjunction. In short, §11395 is an *option* for dealing with repeat drug possessors, not a mandatory path in every scenario
- b. **Relation to Prop 36 (2000) and Drug Diversion Laws:** Before this law, California had drug diversion programs (such as Penal Code §1000 pretrial diversion, and Penal Code §1210.1 – the earlier “Proposition 36” from 2000 – mandating probation and treatment for first- and second-time drug possession offenders). Section 11395 was written “*notwithstanding any other law*”, which means it overrides those general diversion provisions for the individuals it covers. Even if a defendant would normally qualify for a treatment program under those older laws, once they have two prior convictions and are charged under §11395, this new framework applies. For example, ordinarily a non-violent drug possession felony might be subject to mandatory probation under PC §1210.1, but under §11395 it can be charged as a felony with the special treatment option and potential jail if they refuse. The statute’s “notwithstanding” clause ensures that a qualifying repeat offender cannot insist on the lighter misdemeanor or automatic diversion when the state chooses to charge them with this new felony. That said, because of

subdivision (g) (not precluding other prosecution), a prosecutor could still opt to use the standard misdemeanor charge and diversion if they felt it appropriate – the law just empowers them to pursue the harsher route to force treatment if needed.

- c. **Penal Code Cross-References:** Several Penal Code sections are referenced within §11395:
 - i. **Penal Code §1170(h):** This is referenced in defining the sentencing for a felony under this section. PC 1170(h) generally allows certain felonies to be punished by county jail time. For the first §11395 conviction, any felony sentence is served in county jail per 1170(h). On a subsequent conviction, state prison is allowed (which implicates PC 1170(h)(3) if the defendant has disqualifying priors)
 - ii. **Penal Code §1000.4:** Incorporated in subdivision (d)(3), this provides that upon dismissal after successful treatment, the arrest is deemed never to have occurred. PC 1000.4 is the standard for deferred entry of judgment cases (drug diversion), and §11395 directly uses it to give the defendant the same clean record benefit.
 - iii. **Penal Code §2900.5 and §4019:** These govern custody credits. Subdivision (d)(5) of §11395 uses §2900.5 (credit for time in custody) to grant actual time credit for residential treatment, and disallows §4019 conduct credits for that time
 - iv. **Three Strikes Law:** While not explicitly cited in the text, the interaction is worth noting. If a defendant has prior serious/violent felonies (“strikes”) and is charged under §11395, those priors don’t exclude them from opting for treatment because the plea isn’t a conviction until later. However, if they fail and judgment is entered, a judge could impose a stricter sentence under Three Strikes (for instance, a 3rd strike would normally mean 25-life in prison). The statute (g) makes clear it doesn’t stop punishment under other laws, so Three Strikes rules would kick in at sentencing if applicable
 - v. **DNA Collection and Government Code:** Proposition 36 also added a requirement (Gov. Code §76104.9) relating to funding programs and possibly reinforced DNA collection on these new offenses, but the main point is that as a felony charge, §11395 triggers DNA sampling under existing law.
- d. **No Change to Other Crimes:** The creation of §11395 is not intended to change how *other* offenses are handled. If someone commits a drug possession alongside another crime (say theft or violence), the prosecutor can focus on those crimes separately. The treatment option only applies to the §11395 charge itself; other charges aren’t eligible for this deferred treatment process. The law is narrowly about repeated drug possession.

In conclusion, Health & Safety Code §11395 (Prop 36, 2024) introduces a focused approach for repeat hard-drug users: it escalates the offense to a felony (to get the court’s attention and leverage) but then offers a path to treatment instead of jail. Eligible individuals are steered into rehab and

closely monitored by a judge. If they embrace treatment and succeed, they avoid punishment entirely and even clear the offense from their record. If they fail or reject help, the law ensures accountability through traditional sentencing. The statute also carefully defines its scope (via “hard drugs” and prior convictions) and preserves flexibility for law enforcement and prosecutors to use other laws as needed. By combining these elements, the Treatment-Mandated Felony Act seeks to reduce addiction-fueled crime and aid offenders in breaking their drug habit, thereby addressing broader public safety and health goals.