

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR17-11

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<b>Title</b>	<b>Action Requested</b>
Criminal Procedure: Motion and Order to Vacate Conviction or Sentence	Review and submit comments by April 28, 2017
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Approve forms MC-245 and MC-246	January 1, 2018
<b>Proposed by</b>	<b>Contact</b>
Criminal Law Advisory Committee Hon. Tricia Ann Bigelow, Chair	Eve Hershkopf, Attorney 415-865-7961 <a href="mailto:eve.hershkopf@jud.ca.gov">eve.hershkopf@jud.ca.gov</a>

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### Executive Summary and Origin

The Criminal Law Advisory Committee proposes new optional forms to assist self-represented individuals and the courts in implementing the recent legislation that permit criminally convicted individuals no longer in custody to file a motion to vacate a conviction or sentence and withdraw the plea of guilty or nolo contendere based on prejudicial errors related to immigration consequences or newly discovered evidence of actual innocence as well as an existing statute provides similar relief for a comparable judicial error related to immigration consequences.

### Background

New Penal Code section 1473.7 was adopted effective January 1, 2017 (Assem. Bill 813, Stats. 2016, Ch. 739, Sec. 1.)<sup>1</sup> This new section permits individuals convicted of criminal offenses and no longer in custody to file a motion to vacate a conviction or sentence based on either of two claims: (1) a prejudicial error damaging the defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere; or (2) newly discovered evidence of actual innocence. Section 1473.7(b)–(f) provides specific procedures for the motion and hearing process.

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<sup>1</sup> All future references are to the Penal Code.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

In preparing this invitation to comment, the committee recognized that section 1016.5, originally enacted in 1977,<sup>2</sup> provides similar relief for a comparable judicial error related to immigration consequences. This section permits individuals to file a motion to vacate a conviction and withdraw the plea of guilty or nolo contendere based on the court's failure to advise the defendant of the potential immigration consequences of a conviction and the defendant's showing that the conviction may have immigration consequences. The committee concluded that including this related basis for relief from a conviction in the proposed forms would be efficient.

## The Proposal

Proposed *Motion to Vacate Conviction or Sentence* (form MC-245) and *Order on Motion to Vacate Conviction or Sentence* (form MC-246) would assist self-represented individuals and the courts in following the procedural requirements established by sections 1016.5 and 1473.7, as follows:

- Proposed form MC-245 provides for a motion to vacate a conviction under either section 1016.5 or section 1473.7. The form identifies the statutory bases for these motions and includes space for the moving party to provide facts regarding each of the required elements for the requested relief:
  - A motion under section 1016.5 must be based on a claim that the court failed to admonish the defendant on the record, before acceptance of a plea of guilty or nolo contendere; that conviction of the offense may have various immigration consequences for the defendant; and that the defendant was prejudiced by the court's failure to admonish the defendant regarding the immigration consequences or to provide a complete advisement.<sup>3</sup> Prejudice is shown if the defendant establishes that it was reasonably probable that he or she would not have pleaded guilty or nolo contendere if properly advised.<sup>4</sup>
  - A motion under section 1473.7, available to a person no longer in custody, must be based on either of two claims: (1) a prejudicial error damaging the defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere; or (2) newly discovered evidence of actual innocence.
- Proposed form MC-246 is designed to assist courts in making the requisite findings to order or deny appropriate relief.
- Sections 1016.5(b) and 1473.7(b)–(f) establish specific procedures for the motion and hearing process, as follows:
  - Section 1473.7(d) provides in part that, on request, the court may hold the hearing without the personal presence of the moving party if counsel is present and the court finds good cause as to why the moving party cannot be present.

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<sup>2</sup> Sen. Bill 276; Stats. 1977, ch. 1088.

<sup>3</sup> *People v. Superior Court (Zamudio)* (2000), 23 Cal.4th 183, 200.

<sup>4</sup> *People v. Martinez* (2013), 57 Cal.4th 555, 559; *People v. Arriaga* (2014) 58 Cal.4th 950, 957–58.

- Section 1473.7(e) provides in part that, in granting or denying the motion, the court shall specify the basis for its conclusion.
- Sections 1016.5(b) and 1473.7(e) provide in part that if the court grants the motion, the court shall allow the moving party to withdraw the plea.

Proposed forms MC-245 and MC-246 include provisions designed to guide the moving party and the court in implementing these procedures.

### **Alternatives Considered**

The committee considered postponing or declining to propose new forms to implement the provisions of section 1473.7. The committee also considered proposing new forms that solely address section 1473.7 relief. The committee decided, however, to recommend two new optional forms that address both section 1016.5 and section 1473.7 because of the Legislature’s emphasis on providing relief for eligible defendants,<sup>5</sup> and in the interest of reducing confusion for self-represented petitioners and assisting courts to meet statutory requirements.

### **Implementation Requirements, Costs, and Operational Impacts**

Because the forms are optional, expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

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<sup>5</sup> Subdivision (d) of section 1016.5 states:

The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea....

(Pen. Code, § 1016.5(d).)

Similarly, the author of Assembly Bill 813 noted the following:

California lags far behind the rest of the country in its failure to provide its residents with a means of challenging unlawful convictions after their criminal sentences have been served. Forty-four states and the federal government all provide individuals with a way of challenging unjust convictions after criminal custody has ended. In California, however, individuals who gain access to evidence of actual innocence—or to proof of a defect in the underlying criminal proceeding—have no way to present this evidence before the court after criminal custody has expired. [¶] This omission has a particularly devastating impact on California’s immigrant community. Since 1987, California law has required defense counsel to inform non-citizen defendants about the immigration consequences of convictions. However, many defense attorneys still fail to do so. Many immigrants suffer convictions without having any idea that their criminal record will, at some point in the future, result in mandatory immigration imprisonment and deportation, permanently separating families.

(Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess) p. 4, [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB813](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB813).)

## Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Are the forms easy to understand and follow for a self-represented litigant? If not, please identify specific recommendations for improving their readability, format, and design.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts, for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### Attachments

1. Proposed forms MC-245 and MC-246, at pages 5–8

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	<i>FOR COURT USE ONLY</i>
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	CASE NUMBER:
<b>MOTION TO VACATE CONVICTION OR SENTENCE</b> <b>(Pen. Code, §§ 1016.5, 1473.7)</b>	<i>FOR COURT USE ONLY</i> DATE: TIME: DEPARTMENT:

**Instructions — Read Carefully**

If you are requesting that the court vacate a sentence or criminal conviction, you should file this motion in the superior court in the county where the conviction or sentence was imposed.

- Read the entire form *before* answering any questions.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. Because the motion is made under penalty of perjury, if you make a statement that you know is false it could result in a conviction for perjury.
- Fill in the requested information. If you need additional space, add an extra page and note that your answer is "continued on additional page." You may use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.
- Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filling your motion.

This motion concerns a conviction or sentence. (Note: You must file a separate motion for each conviction or sentence.)

1. On (date): \_\_\_\_\_, I was convicted of a violation of the following offenses (*List all offenses included in the conviction.*):

Code	Section	Type of offense ( <i>felony, misdemeanor, or infraction</i> ):

If additional space is needed for listing offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

2.  **Motion under Penal Code Section 1016.5**

**GROUND FOR RELIEF: I am requesting relief based on the following:**

- a. Before my acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise me, as required under Penal Code Section 1016.5(a), that the conviction might have immigration consequences.
- b. The conviction that was based on my plea of guilty or nolo contendere may result in immigration consequences for me, including possible deportation, exclusion from admission to the United States, or denial of naturalization.
- c. I likely would not have pleaded guilty or nolo contendere if the court had advised me of the immigration consequences of my plea. (*People v. Arriaga* (2014) 58 Cal.4th 950.)

- Supporting facts:

*Tell your story briefly. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences (2) the possible immigration consequences and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. If necessary, attach additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.):*

3.  **Motion under Penal Code Section 1473.7**

I am not currently imprisoned or restrained.

**GROUND FOR RELIEF: I am requesting relief based on the following:**

- a.  The conviction or sentence is legally invalid due to a prejudicial error damaging my ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.

- Supporting facts:

*Tell your story briefly. Describe the facts you allege to be prejudicial error. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifying what your attorney did or failed to do and how that affected your plea. (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.):*

- b.  Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

I discovered the new evidence of actual innocence on: *(date)*

- Supporting facts:

Tell your story briefly. Describe the facts you allege to constitute newly discovered evidence of actual innocence. *If necessary, attach additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.*

4.  I request that the court hold the hearing on this motion without my personal presence for the following reasons:

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5. I request that the court vacate the conviction or sentence in the above-captioned matter.

6. I request that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(TYPE OR PRINT NAME OF DECLARANT)



\_\_\_\_\_  
(SIGNATURE OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY: _____ STATE BAR NO.: _____ NAME: FIRM NAME: STREET ADDRESS: CITY: _____ STATE: _____ ZIP CODE: _____ TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: ATTORNEY FOR (name): _____	<b>FOR COURT USE ONLY</b>
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: _____ DATE OF BIRTH: _____	CASE NUMBER: _____
<b>ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE</b> <b>(Pen. Code, §§ 1016.5, 1473.7 )</b>	<b>FOR COURT USE ONLY</b> DATE: TIME: DEPARTMENT:

1. For purposes of Penal Code Section 1016.5 relief, the court:

grants  denies the moving party's request to vacate the judgment and withdraw the plea of guilty or nolo contendere.

2. For purposes of Penal Code Section 1473.7 relief:

a. The court  finds good cause  does not find good cause as to why the moving party cannot be personally present for the hearing and

grants  
 denies

the request that the court hold the hearing without the personal presence of the moving party.

b. The moving party  has established  has not established the existence of grounds for relief, as specified below:

c. The court  grants  denies the moving party's request to vacate the conviction or sentence on the basis that the conviction or sentence is legally invalid due to a prejudicial error.

d. The court  grants  denies the moving party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence.

e. The court  grants  denies the moving party's request to withdraw the plea of guilty or nolo contendere.

(date): \_\_\_\_\_  
\_\_\_\_\_  
(JUDICIAL OFFICER)