

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR22-29

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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 May 13, 2022
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Revise forms CR-187 and CR-188	September 21, 2022
<b>Proposed by</b>	<b>Contact</b>
Criminal Law Advisory Committee Hon. Brian M. Hoffstadt, Chair	Sarah Fleischer-Ihn, 415-865-7702 <a href="mailto:sarah.fleischer-ihn@jud.ca.gov">sarah.fleischer-ihn@jud.ca.gov</a>

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### Executive Summary and Origin

The Criminal Law Advisory Committee recommends revisions to two optional Judicial Council forms relating to vacating a conviction or sentence to implement recent amendments to Penal Code section 1473.7(a)(1) that became effective January 1, 2022, and to reflect case law interpreting that statute. The committee circulated proposed revisions from February to March 2022 and is proposing further revisions in light of the comments received.

### Background

Optional forms *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) were adopted by the Judicial Council, effective January 1, 2018, to implement the provisions of Assembly Bill 813 (Stats. 2016, ch. 739) and help individuals and the courts adhere to the procedural requirements of Penal Code sections 1016.5 and 1473.7. The forms were last amended effective January 1, 2020, in response to Assembly Bill 2867 (Stats. 2018, ch. 825), which clarified the timing and procedural requirements of Penal Code section 1473.7.

### Prior Circulation

In February 2022, a proposal to amend the forms circulated for public comment.<sup>1</sup> Those proposed revisions were to allow a moving party to seek relief based on a prejudicial error that interfered with the party's ability to meaningfully understand, defend against, or knowingly

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<sup>1</sup> See Invitation to Comment, SP22-04, *Criminal Procedure: Motion and Order to Vacate Conviction or Sentence*, available online at <https://www.courts.ca.gov/documents/sp22-04.pdf>.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

accept the actual or potential adverse immigration consequences of a conviction or sentence. Additionally, that proposal included forms revisions to implement recent case law and clarify the forms by (1) clarifying the out-of-custody requirement (see *People v. Rodriguez* (2021) 68 Cal.App.5th 301); (2) including a request for appointment of counsel (see *People v. Fryhaat* (2019) 35 Cal.App.5th 969); (3) adding provisions around timeliness of the motion; and (4) simplifying the language in the motion to aid self-represented petitioners.

Six comments were received—from the Superior Courts of Los Angeles and Orange Counties, the Los Angeles County Public Defender’s Office, the Orange County Bar Association, a staff attorney for an appellate court, and a member of the public. One commenter agreed with the proposal and five commenters agreed if modified. The committee incorporated several substantive changes from the comments and is now circulating the further revised forms for comment.

## **Proposal**

The proposal would further revise the originally proposed *Motion to Vacate Conviction or Sentence* (form CR-187) to incorporate the following:

- On item 3, for motions under section 1473.7(a)(1):
  - Change the section heading to “Legal Invalidity With Actual or Potential Immigration Consequences”;
  - Restructure and rephrase the reasonable diligence questions for clarity;
  - Add language that the reasonable diligence questions may be skipped if the moving party is requesting appointment of counsel;
  - Clarify that both notices in section 1473.7(b)(2)(A) and (B) must be received before the reasonable diligence element applies; and
  - Incorporate elements of the holding of *People v. Alatorre* (2021) 70 Cal.App.5th 747 by adding questions about when a moving party who received both notices before section 1473.7(a)(1) went into effect heard of the law and to explain what happened to give the moving party a reason to seek conviction relief.
- On item 6, add an option stating that the person is out of the United States and lacks permission to enter as a reason for a request to proceed without the party’s personal presence.

The proposal would further revise *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to incorporate the following:

- Move the provision in item 2 to renumbered items 3 and 4, with additional language stating that the court finds good cause to grant a request to have a hearing without the personal presence of the moving party.
- On renumbered item 3, for orders related to section 1473.7(a)(1):

- Replace all references to “find” to “deem”;
  - Revise the item on reasonable diligence to allow the court to deem the motion untimely after a hearing; and
  - Replace the cite to *People v. Perez* with a cite to *People v. Alatorre*.
- On renumbered item 4, for orders related to section 1473.7(a)(2):
    - Separate the provisions for filing or failing to file a motion without undue delay; and
    - Add an option for the court to dismiss after a hearing if the moving party failed to file a motion without undue delay.

These revisions are proposed for the reasons summarized below.

### **Changes to form CR-187**

#### ***Change heading from “Legal Invalidity With Immigration Consequences” to “Legal Invalidity With Actual or Potential Immigration Consequences” (item 3)***

The committee recommends revising the heading of item 3 to “Legal Invalidity With Actual or Potential Immigration Consequences” in response to a comment suggesting revising the heading to “Legal Invalidity With Actual or Potential Adverse Immigration Consequences” to conform to the statutory text, which states that “the conviction or sentence is legally invalid due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.” (Pen. Code, § 1473.7(a)(1).) The commenter’s concern was that “[t]he absence of the word ‘potential’ ... could mislead petitioners into incorrectly inferring that an actual adverse consequence must be shown.”

The committee recommends adopting the change minus the word adverse, for brevity and because the adverseness of the consequences is implied.

#### ***Modify questions regarding filing of a motion under Penal Code section 1473.7(a)(1) with reasonable diligence (item 3c)***

In response to comments, the committee recommends revising item 3c regarding filing a motion under Penal Code section 1473.7(a)(1) with reasonable diligence to (1) state that the reasonable diligence questions may be skipped if the person is requesting appointment of counsel; (2) restructure and rephrase the questions for clarity; (3) clarify that both notices described in section 1473.7(b)(2)(A) and (B) must be received before the reasonable diligence element applies; and (4) incorporate elements of the holding of *People v. Alatorre*, a recent case from the Fourth Appellate District of the Court of Appeal addressing reasonable diligence. The revised version of item 3(c) is below, with the committee’s previously circulated changes highlighted in yellow and the recommended changes highlighted in green:

**c. Reasonable diligence (check all that apply):**

(1) (a)  On (date): \_\_\_\_\_, the Moving Party received a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(b)  The Moving Party has not received a notice to appear in immigration court or other notice from immigration authorities as described above.

(2) (a)  On (date): \_\_\_\_\_, the Moving Party received notice that a final removal order was issued against the Moving Party, based on the conviction or sentence that the Moving Party seeks to vacate.

(b)  The Moving Party has not received a final notice of removal as described above.

*(If you are requesting appointment of counsel, you may skip the following item 3(c)(3).)*

(3)  This motion may be denied because of a delay in filing it. If you received *both* notices mentioned above, explain why you did not bring and could not bring this motion earlier. If you received both notices before this law went into effect on January 1, 2017, when did you become aware of the law? Did something happen to give you a reason to look for conviction relief?

Two commenters expressed concern that an unrepresented and indigent person should have the opportunity to consult with counsel before making a statement regarding why the petition could not have been brought earlier. The committee agreed in part and recommends adding a statement that if the party is requesting appointment of counsel, the party may skip the item about reasonable diligence. This way, the court may assess whether the person has made a prima facie case for appointment of counsel based on the party's response to item 3b, Supporting Facts, and then appointed counsel may respond to the reasonable diligence questions, because the questions may be complex and reasonable diligence does not appear to be required to make a prima facie case for relief. Because the form is designed for use by self-represented parties requesting appointment of counsel, other self-represented parties, and counsel, the committee recommends this approach as a workable option to address how all three types of parties should approach the question.

***Add options to the request to proceed without the party's personal presence (item 6)***

In response to a comment, the committee recommends adding a checkbox stating that the person is outside of the United States and lacks permission to enter as a reason for a request to proceed without the party's personal presence.

**Changes to form CR-188**

***Request to hold hearing without the personal presence of the moving party***

The committee recommends moving item 2 from its original proposal, the order on the request to hold the hearing without the personal presence of the moving party, to renumbered items 3 and 4, motions under Penal Code section 1473.7(a)(1) and (a)(2), respectively, because this provision relates to motions brought under Penal Code section 1473.7. The committee also recommends adding language that the court "finds good cause to grant" a request to have the hearing without the personal presence of the moving party to conform to Penal Code section 1473.7(d).

### ***Dismissal based on untimeliness (item 4b and 5b)***

The invitation to comment requested specific comments, asking the following questions:

Item 4 on CR-188 allows the court to find a motion filed under Penal Code section 1473.7(a)(1) as untimely. Should it be revised to allow the court to also dismiss the motion on that basis?

Item 5 on CR-188 allows the court to find that the Moving Party failed to timely file a motion filed under Penal Code section 1473.7(a)(2). Should it be revised to allow the court to dismiss the motion on that basis?

Two courts recommended adding dismissal language for clarity, while another commenter opposed it because given that “[a]ll motions shall be entitled to a hearing” (Pen. Code, § 1473.7(d)), courts may not summarily dismiss a motion under Penal Code section 1473.7 without a hearing. Additionally, a member of the public commented that courts should not be able to immediately dismiss due to untimeliness due to the lack of understanding of court procedures by self-represented petitioners.

The committee recommends incorporating all comments by adding an option to dismiss after a hearing to renumbered items 3 and 4.

On the option to find the motion untimely, a commenter recommended adding, after the cite to *People v. Perez* (2021) 67 Cal.App.5th 1008, a cite to *People v. Alatorre*, stating that the *Alatorre* opinion clarified that relief “extends to persons who seek vacatur of convictions that predate section 1473.7.” The committee recommends replacing the cite to *Perez* with a cite to *Alatorre*, because it draws on *Perez*.

The committee also recommends replacing references to the court finding the motion timely or untimely to deeming the motion timely or untimely, to conform to the statutory language.

### **Alternatives Considered**

The committee did not consider the alternative of taking no action, determining that it was important for the forms conform to the legislative change and case law.

### **Fiscal and Operational Impacts**

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

### **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?

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?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Forms CR-187 and CR-188, at pages 7–11 (original revisions highlighted in yellow, with new proposed revisions in green)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	<b>FOR COURT USE ONLY</b>  <h2 style="margin: 0;">DRAFT</h2> <h3 style="margin: 0;">Not approved by the Judicial Council</h3>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	<b>FOR COURT USE ONLY</b>  DATE: TIME: DEPARTMENT:

**MOTION TO VACATE CONVICTION OR SENTENCE**

Pen. Code, § 1016.5     
 Pen. Code, § 1473.7(a)(1)     
 Pen. Code, § 1473.7(a)(2)

**Instructions—Read carefully if you are filing this motion for yourself**

- The term "Moving Party" as used in this form refers to **the person asking for relief.**
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- You must file a separate motion for each separate case number.
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** 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 filing your motion.

1. This motion concerns a conviction or sentence in case number \_\_\_\_\_ . On (date): \_\_\_\_\_ , the Moving Party was convicted of a violation of the following offenses (list all offenses included in the conviction):

CODE	SECTION	TYPE OF OFFENSE (felony, misdemeanor, or infraction)

If you need more space to list offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

CASE NUMBER:

2.  **MOTION UNDER PENAL CODE SECTION 1016.5**a. **GROUND FOR RELIEF: The Moving Party requests relief based on the following:**

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

b. **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. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.*)

3.  **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity With Actual or Potential Immigration Consequences**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison; on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUND FOR RELIEF: Moving Party requests relief based on the following:**

The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.) If you are claiming that your conviction or sentence is invalid due to ineffective assistance of counsel, before the hearing is held on this motion you (or the prosecutor) must give timely notice to the attorney who you are claiming was ineffective in representing you.



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CASE NUMBER:

3. b. **Supporting Facts**

Tell your story briefly. **What facts show prejudicial error?** Include information that shows that the conviction **or sentence** you are challenging is currently causing or has the possibility of causing your removal from the United States, or the denial of your application for an immigration benefit, lawful status, or naturalization.

**CAUTION:** You must *state facts, not conclusions*. For example, if claiming ineffective assistance of counsel, you must state facts detailing what the attorney did or failed to do and how that affected your **conviction or sentence**.

Note: **The court presumes** your conviction or sentence is not legally **valid** if

- (1) you pleaded guilty or nolo contendere based on a law that provided that the arrest and conviction would be deemed never to have occurred if specific requirements were completed;
- (2) you completed those specific requirements; and
- (3) despite completing those requirements, your guilty or nolo contendere plea has been, or possibly could be, used as a basis for adverse immigration consequences.

*(If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

c. **Reasonable Diligence (check all that apply):**

- (1) (a)  On (date): \_\_\_\_\_, the Moving Party received a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.
- (b)  The Moving Party has not received a notice to appear in immigration court or other notice from immigration authorities as described above.
- (2) (a)  On (date): \_\_\_\_\_, the Moving Party received notice that a final removal order was issued against the Moving Party, based on the conviction or sentence that the Moving Party seeks to vacate.
- (b)  The Moving Party has not received a final notice of removal as described above.

*(If you are requesting appointment of counsel, you may skip the following item, 3c(3).)*

- (3)  This motion may be denied because of a delay in filing it. If you received *both* notices mentioned above, explain why you did not bring and could not bring this motion earlier. If you received both notices before this law went into effect on January 1, 2017, when did you become aware of the law? Did something happen to give you a reason to look for conviction relief?

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
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4.  **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

The Moving Party is not currently in criminal custody **in the case referred to in item 1** (criminal custody includes in jail or prison; or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUND FOR RELIEF: Moving Party requests relief based on the following:**

- (1) Newly discovered evidence of actual innocence exists that requires vacating the conviction or sentence as a matter of law or in the interests of justice.
- (2) The Moving Party discovered the new evidence of actual innocence on *(date)*:

b. **Supporting Facts**

Tell your story briefly. Describe the newly discovered evidence and how it proves your actual innocence. Explain why you could not discover this evidence at the time of your trial. Explain why you did not bring and could not bring this motion earlier. *(If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

5.  **REQUEST FOR COUNSEL (People v. Fryhaat (2019) 35 Cal.App.5th 969, 981.)**

- a. The Moving Party requests appointment of counsel upon a finding by the court that there is a prima facie case for relief.
- b. The Moving Party is indigent and has completed and attached *Defendant's Financial Statement* (form CR-105) showing that the Moving Party cannot afford to hire a lawyer. Form CR-105 is available online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

6.  The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence because the Moving Party is *(check one)*

- a.  in federal custody awaiting deportation.
- b.  otherwise in custody at *(facility)*:
- c.  outside of the United States and lacks permission to enter.
- d.  other *(specify)*:

7. The Moving Party requests that the court vacate the conviction or sentence in the above-captioned matter.

8. If the Moving Party entered a plea of guilty or nolo contendere, the Moving Party requests 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 statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

\_\_\_\_\_  
(NAME OF MOVING PARTY OR ATTORNEY FOR MOVING PARTY)

\_\_\_\_\_  
(SIGNATURE OF MOVING PARTY OR ATTORNEY)

