

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR19-21

Title	Action Requested
Criminal Procedure: Motion and Order to Vacate Conviction or Sentence	Review and submit comments by June 10, 2019
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise forms CR-187 and CR-188	January 1, 2020
Proposed by	Contact
Criminal Law Advisory Committee Hon. Tricia A. Bigelow, Chair	Eve Hershcopf, 415-865-7961 Eve.Hershcopf@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes revision of two optional forms, *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188), in response to recent legislation ([Assembly Bill 2867](#)) that clarifies the timing and procedural requirements of Penal Code section 1473.7 for vacating a conviction or a sentence based on prejudicial error related to immigration consequences or newly discovered evidence of actual innocence.

Background

Penal Code section 1473.7, adopted effective January 1, 2017 ([Assem. Bill 813](#); Stats. 2016, ch. 739), 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.

Prior to passage of AB 813, California law did not provide persons no longer in custody with a procedure for challenging a conviction based on a mistake of law regarding immigration consequences, or on ineffective assistance of counsel in properly advising of these consequences when the person learned of the error post-custody. (Assem. Com. on Public Safety, analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 5,

http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB813.)

Optional forms CR-187 and CR-188 were adopted by the Judicial Council effective January 1,

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 These proposals are circulated for comment purposes only.

2018, to implement the provisions of AB 813 and assist self-represented individuals and the courts to adhere to the procedural requirements of section 1473.7.

In *People v. Morales* (2018) 25 Cal.App.5th 502, the court interpreted the application of section 1473.7 and held that a person did not have to be in immigration removal proceedings in order to seek relief under the statute.

In 2018, the Legislature passed Assembly Bill 2867 to ensure greater efficiency and uniformity in the implementation of section 1473.7 by further clarifying the timing and procedural requirements for motions under the statute. ([Assem. Bill 2867](#); Stats. 2018, ch. 825, § 1.) The amendments to the statute replace a requirement that the individual not be currently “imprisoned or restrained” with a requirement that the individual no longer be “in criminal custody.” Forms CR-187 and CR-188 also may be used for motions and orders under Penal Code section 1016.5, but those proceedings are not affected by this proposal.

The Proposal

The proposal would revise *Motion to Vacate Conviction or Sentence* (form CR-187) to incorporate the following, consistent with amendments to section 1473.7:

- Separate requests for relief under sections 1473.7(a)(1) (relief based on prejudicial error regarding immigration consequences) and (a)(2) (relief based on newly discovered evidence of actual innocence);
- For motions under either sections 1473.7(a)(1) or (a)(2), replace “I am not currently imprisoned or restrained” with “I am not currently in criminal custody,” consistent with the language of the amended statute, and include examples of actual and constructive custody to assist self-represented petitioners;
- For requests for relief under section 1473.7(a)(1), note that a finding of legal invalidity may, but is not required to, include a finding of ineffective assistance of counsel;
- For requests for relief under section 1473.7(a)(1), direct the petitioner to describe how the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization, and explain the statute’s presumption of legal invalidity;
- Replace a reference to “incompetence of counsel” with “ineffective assistance of counsel,” consistent with the language of the amended statute;
- In the request to waive a petitioner’s personal presence, delete “I am represented by counsel who will appear at the hearing,” consistent with the amended statute; and
- Other nonsubstantive technical changes to format.

The proposal would revise *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to incorporate the following, consistent with amendments to section 1473.7:

- Separate orders under section 1473.7(a)(1) and (a)(2);
- Provide an option for the court to dismiss a motion under section 1473.7(a)(1) because it was not filed with reasonable diligence, and under section 1473.7(a)(2) because the moving party either failed to exercise due diligence in discovering the evidence that provides a basis for relief or failed to file without undue delay;
- In granting or denying a request to waive a petitioner’s personal presence, delete the reference requiring the presence of counsel, consistent with the amended statute;
- Add the following language (in italics) to the court’s grant or denial of a request to vacate the conviction or sentence under section 1473.7(a)(1): 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 plea of guilty or nolo contendere*;
- Combine the grant or denial of the request to vacate the conviction or sentence with the grant or denial of the request to permit the moving party to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty; and
- Other nonsubstantive technical changes to format.

Alternatives Considered

The committee did not consider alternatives, determining that it was important to be responsive to the legislative intent “to provide clarification to the courts regarding section 1473.7 of the Penal Code to ensure uniformity throughout the state and efficiency in the statute’s implementation” by incorporating the Legislature’s clarifications regarding the timing and procedural requirements of Penal Code section 1473.7 into forms CR-187 and CR-188.

Fiscal and Operational Impacts

Expected costs include 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?
- Are the proposed revisions an effective way to address the legislative changes to section 1473.7?
- It is anticipated that the proposed form will primarily be used by self-represented litigants, though it may also be used by attorneys representing litigants. As proposed, the form is drafted to reflect a self-represented litigant's perspective (e.g., item #1, "I am currently serving a sentence for the conviction listed below"), though it allows for an attorney to sign the form. Is this dual use confusing? Should the form be limited to use only by self-represented litigants? Are there other ways this form could be drafted so that both attorneys and self-represented litigants could use the same form?

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 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 and Links

1. Forms CR-187 and CR-188, at pages 5–9
2. Link A: [Assem. Bill 813](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB813), (Stats. 2016, ch. 739) at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB813
3. Link B: [Assem. Bill 2867](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2867), (Stats. 2018, ch. 825) at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2867

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): _____	<p><i>FOR COURT USE ONLY</i></p> <p>DRAFT Not approved by the Judicial Council</p>
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: _____ DATE OF BIRTH: _____	CASE NUMBER: _____
MOTION TO VACATE CONVICTION OR SENTENCE (Pen. Code, §§ 1016.5, 1473.7)	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p> DATE: _____ TIME: _____ DEPARTMENT: _____

Instructions — Read Carefully

- You must file a separate motion for each separate case number.
- 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).
- 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 the above case number. On (date) _____, I 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 for listing 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****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 that the conviction might have immigration consequences as required under Penal Code section 1016.5(a).
- 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. 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 your claim.*)

3. **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity**

I am not currently in criminal custody (criminal custody includes in jail or prison; on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

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

- a. The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged 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 (no contest). (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.)

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

CASE NUMBER:

b. Supporting facts

Tell your story briefly. Describe the facts you allege to be prejudicial error. Include information that shows that the conviction 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 you are claiming ineffective assistance of counsel, you must state facts detailing what your attorney did or failed to do and how that affected your plea.

Note: There is a presumption of legal invalidity (it will be assumed that your conviction or sentence is not legally correct) 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 you completed specific requirements;
- (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 your claim.)

4. **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

I am not currently in criminal custody (criminal custody includes in jail or prison; or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

- a. 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.
- b. I discovered the new evidence of actual innocence on (date):

c. Supporting facts

Tell your story briefly. Describe the facts you allege to constitute newly discovered evidence of actual innocence. *(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 your claim.)*

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
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5. I request that the court hold the hearing on this motion without my personal presence for the following reasons:

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

7. 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)


(SIGNATURE OF MOVING PARTY OR ATTORNEY)

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):	FOR COURT USE ONLY DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	FOR COURT USE ONLY DATE: TIME: DEPARTMENT:
ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE (Pen. Code, §§ 1016.5, 1473.7)	

1. FOR PURPOSES OF PENAL CODE SECTION 1016.5 RELIEF, THE COURT

grants denies the moving party's request to vacate the judgment and to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

2. FOR PURPOSES OF PENAL CODE SECTION 1473.7(a)(1) RELIEF, THE COURT

a. denies the motion because it was not filed with reasonable diligence under Penal Code section 1473.7(b)(2), as specified below:

b. grants denies the request that the court hold the hearing *without* the personal presence of the moving party.

c. 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 damaging the moving party'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, and to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

3. FOR PURPOSES OF PENAL CODE SECTION 1473.7(a)(2) RELIEF, THE COURT

a. denies the motion because the moving party failed to exercise due diligence in discovering the evidence that provides a basis for relief, or failed to file without undue delay from the date the moving party discovered or could have discovered the evidence, as required by Penal Code section 1473.7(c) and as specified below:

b. grants denies the request that the court hold the hearing *without* the personal presence of the moving party.

c. grants denies the moving party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence and to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. The court's basis for this ruling is specified below:

Date: _____ (JUDICIAL OFFICER)