

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

**SP22-04**

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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 March 18, 2022
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Revise forms CR-187 and CR-188	May 16, 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 in response to recent amendments to Penal Code section 1473.7(a)(1) that became effective January 1, 2022. These revisions would 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 accept the actual or potential adverse immigration consequences of a conviction or sentence. Additionally, the forms revisions to implement recent case law and clarify the forms would (1) clarify the out-of-custody requirement (see *People v. Rodriguez* (2021) 68 Cal.App.5th 301); (2) include a request for appointment of counsel (see *People v. Fryhaat* (2019) 35 Cal.App.5th 969); (3) add provisions around timeliness of the motion; and (4) simplify the language in the motion to aid self-represented petitioners.

### 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.

Assembly Bill 1259 (Stats. 2021, ch. 420) amended section 1473.7(a)(1) to allow a moving party to seek relief based on a prejudicial error damaging the party's ability to meaningfully

*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.*

understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. The amendment broadens relief to convictions that occurred at trial; previously, relief was limited to convictions resulting from a guilty or no contest plea.

Section 1473.7(a) states that “[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence” under subdivisions (a)(1) and (a)(2). In *People v. Rodriguez, supra*, 68 Cal.App.5th at p. 315, the court held that a person is not barred from moving to vacate a conviction under section 1473.7(a)(1) if that person is in custody for another, unrelated conviction.

In *People v. Fryhaat, supra*, 35 Cal.App.5th at p. 981, the court construed section 1473.7 to “provide the right to appointed counsel where an indigent moving party has set forth factual allegations stating a prima facie case for entitlement to relief under the statute” and added that “to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality.” The opinion also notes that the same requirements exist for a court to appoint counsel in a petition for writ of *coram nobis*, and that “[w]e are not aware of any reason the rules for writs of *coram nobis* applicable to a section 1016.5 motion would not include the constitutionally grounded rules for appointing counsel for an indigent moving party.” (Id. at p. 982.)

Motions brought under section 1473.7(a)(1) “shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody” (Pen. Code, § 1473.7(b)(1)), unless the motion was not filed with reasonable diligence after the later of the following:

(A) The moving party receives 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) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate. (Pen. Code, § 1473.7(b)(2)(A)(B).)

In *People v. Perez* (2021) 67 Cal.App.5th 1008, the court held that even if a judge finds that a petitioner did not act with reasonable diligence in filing a motion to vacate under section 1473.7(a)(1), the court must exercise its discretionary authority and decide whether to deem the motion untimely.

Additionally, motions brought under section 1473.7(a)(2), newly discovered evidence of innocence, “shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief.” (Pen. Code, § 1473.7(c)).

The current version of *Order on Motion to Vacate Conviction or Sentence* (form CR-188) allows a court to deny a motion under section 1473.7(a)(1) because it was not filed with reasonable diligence, or to deny a motion under section 1473.7(a)(2) because the moving party failed to exercise due diligence in discovering the relevant evidence or failed to file without undue delay from the date the party discovered or could have discovered the evidence. However, the motion form (form CR-187) does not include corresponding questions about the timing for filing. The committee recommends adding items to the motion form to allow the moving party to indicate whether the party received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier. The committee also recommends revising the order to clearly delineate the court's options regarding the motion's timeliness.

## The Proposal

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

- On item 1, delete “the above,” before “case number.”
- On item 3, for motions under section 1473.7(a)(1):
  - Change the section heading to “Legal Invalidity With Immigration Consequences”;
  - Clarify that the out-of-custody requirement applies to the case at hand (“The Moving Party is not currently in criminal custody in the case referred to in item #1”), in light of *People v. Rodriguez, supra*, 68 Cal.App.5th 301;
  - Replace references to the “actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (no contest)” with the “actual or potential adverse immigration consequences of a conviction or sentence,” to reflect statutory changes made by AB 1259;
  - Simplify language; and
  - Add a new “reasonable diligence” provision for the moving party to indicate whether the party received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier.
- On item 4, for motions under section 1473.7(a)(2):
  - Clarify that the out-of-custody requirement applies to the case at hand (“The Moving Party is not currently in criminal custody in the case referred to in item 1”), in light of *People v. Rodriguez, supra*, 68 Cal.App.5th 301; and
  - Simplify language.
- Add new item 5, to request appointment of counsel on a finding by the court that there is a prima facie case for relief, and direct the moving party to file a financial statement to show indigency, in light of *People v. Fryhaat, supra*, 35 Cal.App.5th at p. 981.

- On renumbered item 6, revise the request to excuse the moving party’s personal presence by including check boxes indicating the party’s custody status.
- On renumbered item 8, revise the request for withdrawal of a plea to apply if the moving party entered a plea.

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

- On new item 1, add a provision for the court to grant or deny a request for appointment of counsel.
- On new item 2, consolidate and move two provisions allowing the court to grant or deny a request to have a hearing without the personal presence of the moving party.
- On renumbered item 4, for orders related to section 1473.7(a)(1):
  - Revise the item on reasonable diligence to allow the court to find the motion timely, exercise its discretion to find the motion timely, or find the motion untimely;
  - Replace references to the “actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (no contest)” with the “actual or potential adverse immigration consequences of a conviction or sentence,” to reflect statutory changes made by AB 1259; and
  - Separate the provision for the court to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of guilty from the general grant or denial of relief.
- On renumbered item 5, for orders related to section 1473.7(a)(2):
  - Revise the item on timeliness to allow the court to find that the moving party filed or failed to file the motion without undue delay from the date the moving party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence; and
  - Separate the provision for the court to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of guilty from the general grant or denial of relief.

### **Alternatives Considered**

The committee did not consider alternatives, determining that it was important to be responsive 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?
- Item 2 on CR-188 reflects an existing provision on the order to allow the court to grant or deny a request to have the hearing without the personal presence of the moving party. Is this provision necessary or helpful? It appears likely that most courts would decide this prior to the hearing on the merits of the motion.
- 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?
- Form CR-187 may be used by either a self-represented person or counsel. The motion states that “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.” Is this declaration sufficient for a motion filed by either, or should there be different declarations to distinguish between a motion filed by a self-represented person and counsel?

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

2. Link A: Pen. Code, § 1473.7,  
[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=1473.7&lawCode=PEN](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7&lawCode=PEN)
3. Link B: Assem. Bill 1259 (Stats. 2021, ch. 420),  
[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=20210220AB1259](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=20210220AB1259)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY <b>DRAFT</b> Not approved by the Judicial Council
<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:	FOR COURT USE ONLY 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 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.



PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

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)  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.
- (2)  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.
- (3)  The Moving Party has not received notice from immigration authorities as described above.
- (4)  If the Moving Party has received notice from immigration authorities as described above, the law requires that this motion be brought without delay. If you received notice, explain why you did not bring and could not bring this motion earlier:

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 and Notice to Defendant* (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.  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:

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

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

