



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 24, 2019

Title

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence

Agenda Item Type

Action Required

Rules, Forms, Standards, or Statutes Affected

Revise forms CR-187 and CR-188

Effective Date

January 1, 2020

Recommended by

Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Date of Report

September 24, 2019

Contact

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Executive Summary

The Criminal Law Advisory Committee recommends revisions to two optional Judicial Council forms 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.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2020:

1. Revise *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to incorporate clarifications of timing and procedural requirements consistent with amendments to Penal Code section 1473.7; and
2. Further revise the format of *Motion to Vacate Conviction or Sentence* (form CR-187) so that it is appropriate for use by both self-represented litigants and those represented by attorneys.

The revised forms are attached at pages 4–8.

Relevant Previous Council Action

Optional forms CR-187 and 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 section 1473.7.

Analysis/Rationale

Penal Code section 1473.7, adopted effective January 1, 2017 (Assem. Bill 813), 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.

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.) 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.)

Policy implications

The recommended revisions to forms CR-187 and CR-188 will assist courts by providing court users, both self-represented litigants and attorneys, with guidance when applying for postconviction relief under section 1473.7.

Comments

This proposal circulated for comment from April 11 to June 10, 2019. Seven comments were received. The Superior Courts of Los Angeles and San Diego Counties agreed with the proposal, as did the Orange County Bar Association. The Superior Court of Riverside County and the Trial Courts Presiding Judges Advisory Committee and Court Executives Advisory Committee Joint Rules Subcommittee agreed with the proposal if modified. The Superior Court of Orange County and the Los Angeles County Public Defender did not indicate a position.

The committee revised the forms in response to the comments, as described below:

- ***Header check boxes to identify applicable basis for requested relief:*** Both the Superior Court of Riverside County and the Joint Rules Subcommittee recommended modifying the header of forms CR-187 and CR-188 to allow check boxes for the applicable statute, e.g., Motion to Vacate Conviction or Sentence, PC § 1016.5 PC § 1473.7(a)(1) or PC § 1473.7(a)(2). The commenters noted that modifying the forms in this manner would allow courts to keep specific statistics on the number and types of petitions filed, if courts so chose.

In addition, the check boxes would aid self-represented litigants in clarifying the basis for their requests for relief.

- **Notification of counsel:** The Los Angeles County Public Defender noted that section 1473.7 requires that counsel alleged to be ineffective must be given notice of the motion and suggested adding that advisement to form CR-187. The committee agreed and incorporated a check box.
- **Dual-use form:** The committee included a specific request for comments regarding proposed form CR-187 as a dual-use form by self-represented litigants and attorneys. The Superior Court of Orange County and the Orange County Bar Association each responded with suggestions for revisions to the form so that it could be used by both self-represented litigants and attorneys. The committee agreed with the suggestions and revised the format of the form in response to these comments.

Alternatives considered

In addition to the alternatives considered in response to the public comments, the committee considered revising the form so that it was formatted in a manner that would allow use solely by self-represented litigants. The committee recognized, however, that providing a form that is designed for ease of use by self-represented litigants and that can also accommodate use by attorneys representing litigants would be most effective for the courts. For that reason, the committee recommends formatting form CR-187 as a dual-use form.

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.

Attachments and Links

1. Forms CR-187 and CR-188, at pages 4–8
2. Chart of comments, at pages 9–15
3. Link A: Assem. Bill 813; Stats. 2016, ch. 739,
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB813
4. Link B: Assem. Bill 2867; Stats. 2018, ch. 825, § 1,
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2867

ATTORNEY OR PARTY WITHOUT ATTORNEY: NAME: STREET ADDRESS: CITY: TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	STATE BAR NO.: STATE: ZIP CODE: FAX NO.:	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:		FOR COURT USE ONLY DATE: TIME: DEPARTMENT:
DATE OF BIRTH:		

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 you.
- 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 the above 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 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**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**

The Moving Party is not currently in criminal custody (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 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.) 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. 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 claiming ineffective assistance of counsel, you must state facts detailing what the 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 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.)

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 (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 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 the claim.)*

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
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5. The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence for the following reasons:


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

7. 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)

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): _____	<i>FOR COURT USE ONLY</i> 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: _____	<i>FOR COURT USE ONLY</i> DATE: _____ TIME: _____ DEPARTMENT: _____
ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE <input type="checkbox"/> Pen. Code, §§ 1016.5 <input type="checkbox"/> Pen. Code, §§ 1473.7(a)(1) <input type="checkbox"/> Pen. Code, §§ 1473.7(a)(2)	

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. denies the motion on the following basis (specify):

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

d. 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)

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Los Angeles County Public Defender Ricardo D. Garcia, Public Defender Erika Anzoategui, Acting Alternate Public Defender	N/I	For the most part, this proposed form correctly states the requirements of Penal Code section 1473.7, however, it omits the requirement that counsel who is alleged to be ineffective has been given notice of the motion which alleges ineffective assistance of counsel. As such, an additional section, 3-c. should be added stating: c. If you are asserting that your conviction or sentence is legally invalid due to ineffective assistance of counsel, you or the prosecution must give timely notice to the counsel who you are asserting was ineffective in advance of the hearing on this motion.	The committee accepts the comment and will recommend adding the proposed information regarding notification of counsel to section 3-a of the Motion to Vacate Conviction or Sentence, form CR-187.
2.	Orange County Bar Association by Deirdre Kelly, President	A	Does the proposal appropriately address the stated purpose? The changes do appropriately address the stated purpose including use by a self-represented litigant. Are the proposed revisions an effective way to address the legislative changes to section 1473.7? The forms are an effective way to incorporate the legislative changes to 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	<ul style="list-style-type: none">• No response needed. • No response needed.

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>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 form should not be limited for use only by self-represented litigants. While an attorney using the form may hesitate to sign a motion under penalty of perjury which uses averments as “I am” or “I discovered”, counsel can simply strike the “I” leaving the rest of the pleading intact. On the other hand, the form could be modified to the provide alternative check the boxes for the averment of “I” or in the alternative, “Defendant”. As with other Judicial Council forms, the use of the “Defendant” instead of “I” does cause confusion for self-represented individuals. However, designing two sets of forms for attorneys and self-represented litigants is inefficient and potentially adds confusion to what is supposed to be a simple method to move the court per 1473.7.</p>	<ul style="list-style-type: none">• The committee agrees the form should be clearly designed for use by both self-represented litigants and attorneys, and has incorporated various format changes for this purpose.
3.	Superior Court of Los Angeles County (no name provided)	A	Does the proposal appropriately address the stated purpose?	

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

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	Commenter	Position	Comment	Committee Response
			<p>Yes, the proposal addresses the stated purpose. Are the proposed revisions an effective way to address the legislative changes to section 1473.7?</p> <p>Yes, the proposed revisions are an effective way to address this legislative change.</p> <p>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?</p> <p>The proposed form is fine as presently constituted.</p>	<ul style="list-style-type: none"><li data-bbox="1409 302 1703 334">• No response needed.<li data-bbox="1409 472 1703 505">• No response needed.<li data-bbox="1409 1114 1976 1308">• The committee agrees the form should be clearly designed for use by both self-represented litigants and attorneys, and has incorporated various format changes for this purpose.

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

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	Commenter	Position	Comment	Committee Response
			<p>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. We do not anticipate cost savings.</p> <p>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. We do not anticipate significant implementation requirements.</p> <p>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months is sufficient.</p> <p>How well would this proposal work in courts of different sizes? The proposed changes are consistent and provide clarity. Court size should not have any significant impact.</p>	<ul style="list-style-type: none"> • No response needed. • No response needed. • No response needed. • No response needed.
4.	Superior Court of Orange County (no name provided)	N/I	Request for Specific Comments	

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <ul style="list-style-type: none">• Does the proposal appropriately address the stated purpose? Yes, it does.• Are the proposed revisions an effective way to address the legislative changes to section 1473.7? Yes. The revisions are well placed and make sense.• 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? I do believe the verbiage does not quite make sense if an attorney were to submit on behalf of the defendant. The dual use could be confusing. If a statement at the beginning were added “I am	<ul style="list-style-type: none">• No response needed.• No response needed.• The committee agrees the form should be clearly designed for use by both self-represented litigants and attorneys, and has

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Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>the defendant / attorney for the defendant in this matter”, then using third person terminology throughout the rest of the form (e.g. instead of “I am not currently...” could read “The defendant is not currently...”</p> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> <ul style="list-style-type: none"> • Would the proposal provide cost savings? If so, please quantify. <p>No cost savings would be realized.</p> <ul style="list-style-type: none"> • 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. <p>No training necessary, just a staff update. Processes already exist to process these scenarios.</p> <ul style="list-style-type: none"> • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? <p>Yes</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? <p>I think it would work well.</p>	<p>incorporated various format changes for this purpose.</p> <ul style="list-style-type: none"> • No response needed. • No response needed. • No response needed.

SPR19-21**Motion and Order to Vacate Conviction or Sentence (form CR-187, CR-188)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
				<ul style="list-style-type: none"> • No response needed.
5.	Superior Court of San Diego County by Mike Roddy, Executive Officer	A	No specific comment.	No response needed.
6.	Superior Court of Riverside County by Susan Ryan, Chief Deputy – Legal Services	AM	<p>Modify the face of CR-187 and CR-188 to allow check boxes for the applicable statute, e.g.</p> <p>Motion to Vacate Conviction or Sentence • PC §1016.5 • PC §1473.7(a)(1) or • PC §1473.(a)(2)</p> <p>Modifying the forms as noted above would allow a court to keep specific stats on the number and type of petition filed, if court’s are interested in doing so.</p>	The committee appreciates the comment and will recommend adding the proposed check boxes to the header of Motion to Vacate Conviction or Sentence, form CR-187, and Order on Motion to Vacate Conviction or Sentence, form CR-188.
7.	TCPJAC/CEAC Joint Rules Subcommittee	AM	<p>JRS notes the proposal is required to conform to a change of law.</p> <p>Suggested modification(s):</p> <p>Modify the face of CR-187 and CR-188 to allow check boxes for the applicable statute, e.g.</p> <p>Motion to Vacate Conviction or Sentence <input type="checkbox"/> PC §1016.5 <input type="checkbox"/> PC §1473.7(a)(1) or <input type="checkbox"/> PC §1473.(a)(2)</p> <p>Modifying the forms as noted above would allow a court to keep specific stats on the number and type of petition filed, if courts are interested in doing so.</p>	The committee agrees and will recommend adding the proposed check boxes to the header of Motion to Vacate Conviction or Sentence, form CR-187, and Order on Motion to Vacate Conviction or Sentence, form CR-188.