



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-094

For business meeting on September 20, 2022

Title

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence

Agenda Item Type

Action Required

Effective Date

September 21, 2022

Rules, Forms, Standards, or Statutes Affected

Revise forms CR-187 and CR-188

Date of Report

July 22, 2022

Recommended by

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Contact

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Executive Summary

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). Additionally, the revisions implement case law to (1) clarify the out-of-custody requirement; (2) include a request for appointment of counsel; and (3) add and clarify provisions around timeliness in filing the motion. The revisions also include nonsubstantive, technical amendments to simplify the language in the motion to aid self-represented petitioners and conform to the statutory language.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective September 21, 2022, revise *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to:

1. Reflect statutory changes to Penal Code section 1473.7, which became effective January 1, 2022;
2. Incorporate case law clarifying the custody requirement, appointment of counsel, and timeliness in filing the motion;

3. Simplify language to aid self-represented petitioners; and
4. Conform to statutory language.

The revised forms are attached at pages 8–13.

Relevant Previous Council Action

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 (Link A). 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.

Analysis/Rationale

The recommended revisions to the two forms reflect statutory changes to and case law interpreting section 1473.7.

Changes to Penal Code section 1473.7(a)(1)

Assembly Bill 1259 (Stats. 2021, ch. 420) (Link B) amended section 1473.7 to allow a moving party to seek relief based on 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 conviction or sentence.” (Pen. Code, § 1473.7(a)(1).) The amendment broadens relief to convictions that occurred at trial; previously, relief was limited to convictions resulting from a guilty or no contest plea. To implement these statutory changes, the committee recommends revising references to guilty or no contest pleas in items 3a and 3b on *Motion to Vacate Conviction or Sentence* (form CR-187) to refer to a conviction or sentence; and renumbering item 7 to item 8 and clarifying that if a guilty or no contest plea was entered, the moving party may request the court to allow withdrawal of the plea.

Case law regarding persons in custody for an unrelated conviction

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* (2021) 68 Cal.App.5th 301, 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. To reflect this holding, the committee recommends revising item 3 on form CR-187 to clarify that the moving party is not in custody in the particular case at hand.

Case law regarding the right to appointed counsel

In *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 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.) To reflect this holding, the committee recommends new item 5 on form CR-187 for requesting appointment of counsel upon a finding by the court that there is a prima facie case for relief and requiring proof of indigency.

Statutes and case law regarding reasonable diligence in filing the motion

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).)

In *People v. Perez* (2021) 67 Cal.App.5th 1008, 1015, 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. In *People v. Alatorre* (2021) 70 Cal.App.5th 747, 753, the court held that relief under section 1473.7(a)(1) extends to persons who seek vacatur of convictions that predate section 1473.7.

Additionally, motions brought under section 1473.7(a)(2) on the basis of 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 regarding the party’s timeliness in filing the motion. This proposal adds item 3c with questions on reasonable diligence to form CR-187 and also revises the order to clearly delineate the court’s options on how to rule on the motion’s timeliness, both under statute and under the court’s discretionary authority to deem a motion timely or untimely as described in *People v. Perez*.

To reflect *People v. Alatorre*, the proposal also allows the moving party to explain, if both notices were received before the law went into effect on January 1, 2017, when the party became aware of the law and whether something happened to give the party a reason to look for conviction relief.

Policy implications

There was not controversy or intense debate within the committee about the proposal or recommendations. The recommended revisions to forms CR-187 and CR-188 will assist courts by providing court users—both self-represented petitioners and attorneys—with accurate guidance when applying for postconviction relief under section 1473.7.

Comments

The proposal circulated for public comment two separate times in 2022. The committee’s specific responses to each comment are available in the attached comment charts at pages 12–26.

***First circulation (SP22-04)*¹**

In the first circulation, 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 the proposal was modified. The committee incorporated several substantive changes from the comments and recirculated the forms for further comment.

Change heading from “Legal Invalidity With Immigration Consequences” to “Legal Invalidity With Actual or Potential Immigration Consequences” (form CR-187, item 3)

The committee revised the heading of item 3 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:

[t]he 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 incorporated the change, minus the word “adverse,” for brevity and because the adverseness of the consequences is implied.

¹ See Judicial Council of Cal., Invitation to Comment, *Criminal Procedure: Motion and Order to Vacate Conviction or Sentence* (SP22-04), www.courts.ca.gov/documents/sp22-04.pdf.

Modify questions regarding filing of a motion under Penal Code section 1473.7(a)(1) with reasonable diligence (form CR-187, item 3c)

In response to comments, the committee revised item 3c regarding filing a motion under Penal Code section 1473.7(a)(1) with reasonable diligence to:

- state that the reasonable diligence questions may be skipped if the person is requesting appointment of counsel;
- restructure and rephrase the questions for clarity;
- clarify that the notices described in both subparagraphs A and B of section 1473.7(b)(2) must be received before the reasonable diligence element applies; and
- incorporate elements of the holding of *People v. Alatorre* 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.

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 added a statement preceding item 3c3 that if the party is requesting appointment of counsel, the party may skip the item explaining 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 appointed counsel may then 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 recommended 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 (form CR-187, item 6)

Item 6 of form CR-187 addresses a request for the court to hold the hearing without the party's personal presence and includes several check boxes for the party to indicate the basis of the request:

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):

A commenter stated that a common reason for the inability to attend in person is that the moving party is outside of the United States and lacks permission to enter. The commenter requested adding a box reflecting this circumstance. The committee agreed and incorporated an additional check box into item 6.

Request to hold hearing without the personal presence of the moving party (CR-188)

The committee asked about the necessity of item 2 on CR-188, which is 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. Although two commenters from courts stated that the item was unnecessary because the determination is made before a hearing, upon further review, the committee decided to retain and move item 2 of form CR-188 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 (form CR-188, items 4b and 5b)

The committee requested comments about dismissals based on untimeliness:

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, but another commenter opposed it because, “[g]iven that ‘[a]ll motions shall be entitled to a hearing’ (Pen. Code, § 1473.7 subd. (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 because of a lack of understanding of court procedures by self-represented petitioners.

The committee incorporated 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*, 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 replaced the cite to *Perez* with a cite to *Alatorre*, because it draws on *Perez*.

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

Second circulation (SPR22-29)²

Two comments were received from the Superior Court of San Diego County and the Orange County Bar Association, both agreeing with the proposal if modified. The court noted an inadvertent check box on form CR-187, item 3c3. The committee removed this box in response to this comment. The bar association suggested simplifying the language in item 4 of form CR-188, regarding a motion for relief under section 1473.7(a)(2). The committee declined the suggestion because the proposed language reflects the statutory language of section 1473.7(c).

Alternatives considered

The committee did not consider the alternative of taking no action, determining that it is important for the forms to 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.

Attachments and Links

1. Forms CR-187 and CR-188, at pages 8–13
2. Chart of comments, at pages 14–27
3. Link A: Pen. Code, § 1473.7,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7&lawCode=PEN
4. Link B: Assem. Bill 1259 (Stats. 2021, ch. 420),
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1259

² See Judicial Council of Cal., Invitation to Comment, *Criminal Procedure: Motion and Order to Vacate Conviction or Sentence* (SPR22-29), www.courts.ca.gov/documents/spr22-29.pdf.

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

- 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.

[illegible]

Form Approved for Optional Use
Judicial Council of California
CR-187 [Rev. September 21, 2022]

Penal Code, §§ 1016.5, 1473.7
www.courts.ca.gov

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 or 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) (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:

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.

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)

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY <h1 style="margin: 0;">DRAFT</h1> <h2 style="margin: 0;">Not approved by the Judicial Council</h2>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	CASE NUMBER:
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)	FOR COURT USE ONLY DATE: TIME: DEPARTMENT:

1. The court

- a. ☐ grants the request for appointment of counsel.
- b. ☐ denies the request for appointment of counsel because the Moving Party has not shown (choose all that apply)
- ☐ a prima facie case ☐ indigency.

2. 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.

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

- a. ☐ finds good cause to grant ☐ denies the request that the court hold the hearing without the personal presence of the Moving Party.
- b. ☐ deems the motion timely because the Moving Party did not receive, or acted with reasonable diligence after receiving, notice from immigration authorities.
- ☐ exercises its discretion to deem the motion timely.
- ☐ deems the motion untimely and dismisses the motion after a hearing (*People v. Alatorre* (2021) 70 Cal.App.5th 747).
- 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 conviction or sentence.
- d. ☐ permits the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

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

- a. ☐ finds good cause to grant ☐ denies the request that the court hold the hearing without the personal presence of the Moving Party.
- b. ☐ finds that the Moving Party filed 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.
- c. ☐ finds that the Moving Party 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 dismisses the motion after a hearing.

DEFENDANT:	CASE NUMBER:
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4. d. ☐ grants ☐ denies the Moving Party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence. The court's basis for this ruling is specified below:

e. ☐ permits the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

Date: _____
(JUDICIAL OFFICER)

SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)**

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
1.	Caitlin Peters Downieville, CA	AM	<p>1.) Does the proposal appropriately address the stated purpose?</p> <p>* Yes and no</p> <p>See comments on specific provisions below.</p> <p>Would the proposal provide cost savings? If so, please quantify.</p> <p>* The proposal may not initially be cost saving but will become cost saving. First, the courts will become flooded with people bringing relief requests to the courts. Then, after the lower courts are aware of the new processes one can hope they will conduct business ethically. As of now, lower court judges are conducting unethical business practices.</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?</p> <p>* I feel that the local courts, if having kept up with recording and technology for transparency reasons should have no problem making any transitions.</p>	<p>The committee believes that the updated forms will result in an absorbable increase in the number of filed petitions.</p> <p>No response required.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence** (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			How well would this proposal work in courts of different sizes? * It shouldn't matter the size. The courts responsible for reviewing the new forms and deciding which ones are worthy of dismissal and request of relief will have a hard task initially, but will inevitably mellow out in time.	No response required.
2.	Michael Maurer Lead Appellate Court Attorney Fifth Appellate District, Court of Appeal	AM	See comments on specific provisions below.	
3.	Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	AM	Although we support many of the suggested revisions—specifically, the inclusion of a request for appointment of counsel, the clarification of the out-of-custody requirement, and the simplification of language in the motion—and believe that many of the proposed changes meet their stated purpose, we believe that the changes outlined below are needed to assist pro per petitioners seeking PCR with the forms, and to conform the forms to the most recent caselaw. See comments on specific provisions below.	
4.	Orange County Bar Association by Daniel S. Robinson, President	AM	See comments on specific provisions below.	
5.	Superior Court of Los Angeles County by Bryan Borys	A	See comments on specific provisions below.	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)**

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
6.	Superior Court of Orange County Elizabeth Flores, Operations Analyst	AM	<p>Does the proposal appropriately address the stated purpose? Response: Yes.</p> <p>Would the proposal provide cost savings? If so, please quantify. Response: No, they do not.</p> <p>What would the implementation requirements be for the 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> <p>Response: The existing process would support the modifications that are proposed. If it is judicial preference, docket codes may need to be created to capture the Court's ruling as to reasonable diligence. As a result, minor modifications would need to be made to the procedures possible training 1 hour training for all Clerk staff.</p> <p>How well would this proposal work in courts of different sizes?</p> <p>Response: This question is not applicable because it is a rewording of forms and not a process.</p>	No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence** (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			See comments on specific provisions below.	

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	Comment	Committee Response
Michael Maurer Lead Appellate Court Attorney, Fifth Appellate District, Court of Appeal Fresno, CA	<p>Comment to Items 3.c. of CR-187.</p> <p>The reasonable diligence element does not come into play until both the notices described in § 1473.7(b)(2)(A) & (B) have been received. (<i>People v. Perez</i> (2021) 67 Cal.App.5th 1008, 1016.) Also, “the superior court must determine whether the motion ‘was filed with reasonable diligence after the later of’ ” the notices. (Ibid., quoting §1473.7, subd. (b)(2).) The following proposed revisions to Item 3.c. reflect these principles and corrects the statement in (4) that “the law requires that this motion be brought without delay.” (Italics added.) Reasonable diligence is no longer a requirement. Its absence does not automatically result in the motion being denied; instead, its absence gives the trial court the discretion, after considering the totality of the circumstances, to deem the motion untimely. (<i>Perez</i>, at p. 1012.)</p> <p>Proposed language for Item 3.c.(3) & (4):</p> <p>(3) ____ The Moving Party has not received both notices described above from immigration authorities.</p> <p>(4) ____ If the Moving Party has not received both notices described above from immigration authorities, this motion might be denied because of a delay in filing it. If you received both notices, explain why you did not bring and could not bring this motion earlier.</p>	The committee agrees with the comment and restructured and rephrased item 3c to clarify that both notices in section 1473.7(b)(2) must be received before the reasonable diligence element applies.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	Comment	Committee Response
Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	<p>Item 3 Heading “Legal Invalidity With Immigration Consequences”</p> <p>Penal Code section 1473.7, subdivisions (a)(1) and (e)(4), provide for relief for “actual or potential adverse immigration consequences.” (Emphasis added.) The sufficiency of “potential” adverse immigration consequences also is stated in subdivisions (e)(1) and (e)(2). The proposed change to the section heading on item 3 to “Legal Invalidity With Immigration Consequences,” however, omits this category of eligibility for relief under section 1473.7. The absence of the word “potential” within the proposed heading could mislead prospective petitioners into incorrectly inferring that an actual adverse consequence must be shown. Instead of the draft’s proposed heading, we suggest this heading: “Legal Invalidity With Actual or Potential Immigration Consequences.” The addition of “actual or potential” would conform the form to the statutory text.</p> <p>Reasonable diligence under Item 3. c.</p> <p>Item 3 section “c” adds a new “reasonable diligence” section for the moving party to indicate whether they received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier. Self-represented petitioners may not know what to include or not include in this section. Although any petitioners may have meritorious reasons for not bringing a motion sooner, they may not know what reasons are meritorious. One way to alleviate this concern would be to make the reasonable diligence section inapplicable to moving parties who have applied for and are granted PCR counsel, so that their attorneys can assist them in identifying and articulating the circumstances showing reasonable</p>	<p>The committee agrees with the change, and modified the heading accordingly, minus the word “adverse” in order to keep the title brief and because adverse consequences are implied.</p> <p>The committee agrees with the comment and revised item 3c regarding timeliness of the motion to state that the reasonable diligence questions may be skipped if the moving party is requesting appointment of counsel.</p>

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SP22-04

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Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	Comment	Committee Response
	<p>diligence. Another way would be to add checkboxes for additional circumstances that constitute “reasonable diligence.”</p> <p>Section 1473.7 states that a motion may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following: (1) The date 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; or (2) Notice that a final removal order has been issued against the moving party, based on the existence of the challenged conviction or sentence. Courts have construed this language to deem motions under section 1473.7 to be timely when the petitioner has yet to receive a final order of removal. (See <i>People v. Alatorre</i> (2021) 70 Cal.App.5th 747, 758-759.) To more clearly implement the legislative intent, and to align with <i>Alatorre</i>, we suggest splitting checkbox (3) into a checkbox (3)(a), “The Moving Party has not received a notice to appear in immigration court,” and a checkbox (3)(b), “The moving Party has not received a final notice of removal.” This would ensure that courts recognize that a motion is not untimely for want of a final notice of removal.</p> <p>In addition, adjudication of reasonable diligence should factor the life events of the moving party that would give them a reason to look for a ground of post-conviction relief, or put them on notice of a need to investigate. (<i>People v. Alatorre</i> (2021) 70 Cal.App.5th 747, 762.) As proposed, the reasonable diligence section does not ask whether such events occurred, nor, if so, when. Further, <i>Alatorre</i> instructs that for petitioners whose adverse immigration events predate section 1473.7, courts should ask when petitioner had reason to become aware</p>	<p>The committee agrees with the comment and restructured and rephrased item 3c to clarify that both notices in section 1473.7(b)(2) must be received before the reasonable diligence element applies and to incorporate <i>People v. Alatorre</i> (2021) 70 Cal.App.5th 747.</p>

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SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	Comment	Committee Response
	<p>of the statutory remedy. As proposed the revision to CR-187 does not elicit such information.</p> <p>Item 6 As drafted, the checkbox list of reasons for requesting that the court hold the motion hearing without the personal presence of the moving party includes two checkboxes for forms of custody, and a catch-all box “other.” A common reason for inability to attend in person is that the moving party is located outside the United States and lacks legal permission to enter. As drafted, the proposal does not include a checkbox for this reason. One should be added, such as, “outside of the United States and without legal permission to enter.”</p>	<p>The committee agrees with this comment and added a checkbox to item 6 stating that the petitioner is outside of the United States and lacks permission to enter.</p>
Orange County Bar Association by Daniel S. Robinson, President	<p>Item 3(c)(4) should be deleted. 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.</p> <p>Item 4(b) should be deleted. An unrepresented and indigent person should have the opportunity to consult with counsel before making a statement regarding how new evidence proves actual innocence.</p>	<p>The committee agrees with the comment in part and revised item 3c regarding timeliness of the motion to state that the reasonable diligence questions may be skipped if the moving party is requesting appointment of counsel.</p> <p>The committee believes it is appropriate to keep the part of item 4b about newly discovered evidence and how it proves the petitioner’s actual innocence, as an unrepresented and indigent petitioner must set forth factual allegations stating a prima facie case for entitlement to relief under the statute for appointment of counsel. The <i>Petition for Writ of Habeas Corpus</i> (form HC-001), which is mandatory for self-represented petitioners, includes a similarly worded section, and these petitioners are also appointed counsel if they state a prima facie case for relief.</p>

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SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence** (Revise forms CR-187 and CR-188)

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

Form CR-187 – Is the declaration sufficient for a motion by either a self-represented person or counsel?		
Commenter	Comment	Committee Response
Caitlin Peters Downieville, CA	* Yes a self represented defendant is ignorant to the law “lingo” and refusing their rights to be heard is unethical. A self represented defendant is not self represented by choice but forced to be their own attorney. For a multitude of reason but mainly because California public defenders are partnered with the local justices and destroying the judicial integrity at a unfathomable rate. Attorneys are well educated to have restrictions against the motions and rules of court when filing certain motions. Attorney should be held at a higher expectation than self represented persons. The courts should lower the expectations when a self represented person comes to court fighting for their lives.	The committee believes the language is sufficient for a motion filed by a self-represented petitioner or counsel.
Superior Court of Los Angeles County by Bryan Borys	This language is sufficient for either scenario.	The committee agrees with the comment.

Order on Motion to Vacate Conviction or Sentence (form CR-188) (general comments and suggested edits)		
Commenter	Comment	Committee Response
Michael Maurer Lead Appellate Court Attorney Fifth Appellate District, Court of Appeal	Comment to Item 4 on CR-188. The current proposal does not address motions that are premature because the moving party is still in custody. The general rule created by § 1473.7(b) is that the motion is deemed timely so long as the moving party is not in custody. The proposed revisions reflect this general rule, the discretionary exception allowing a motion to be deemed untimely, and the statute’s use of the phrase “deemed timely.”	The committee declined to modify item 4 to include an option to dismiss as premature.

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SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence** (Revise forms CR-187 and CR-188)

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

Order on Motion to Vacate Conviction or Sentence (form CR-188) (general comments and suggested edits)		
Commenter	Comment	Committee Response
	<p>Proposed language:</p> <p>4. FOR PURPOSE OF PENAL CODE SECTION 1473.7(a)(1) RELIEF, THE COURT</p> <p>a. deems the motion timely unless ___ the court finds the Moving Party is in custody and, therefore, dismisses the motion as premature; or ___ the court finds the Moving Party received both notices from immigration authorities and did not act with reasonable diligence after receiving the later notice, and then, after considering the totality of the circumstances, exercises its discretion to deem the motion untimely.</p>	
<p>Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender</p>	<p>Finally, while the draft proposed revision of CR-188, at section 4.a., cites <i>People v. Perez</i> (2021) 67 Cal.App.5th 1008, the order fails to cite <i>People v. Alatorre</i>, supra, 70 Cal.App.5th 747, although <i>Alatorre</i> applies <i>Perez</i>, and clarifies that it extends to persons who seek vacatur of convictions that predate section 1473.7. Petitions seeking relief from such older convictions are likely to be meritorious because when they occurred, immigration consequences of convictions were less likely to have been considered, understood, or mitigated. With convictions that predate 1473.7, the moving parties include persons such as appellant <i>Alatorre</i> who were deported years before the passage of Penal Code section 1473.7 and who would have no reason to know about it. <i>Alatorre</i> should be added to the form's citations to ensure that older convictions and sentences can be adjudicated for vacatur on the merits.</p>	<p>The committee agrees and replaced the cite to <i>People v. Perez</i> with a cite to <i>People v. Alatorre</i>.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-188, item 2 – Is it necessary/helpful to include this provision?		
Commenter	Comment	Committee Response
Caitlin Peters Downieville, CA	Yes, It seems necessary and essential for a moving party to have the ability to have a remote hearing. No, they shouldn't be able to dismiss prior to hearing the merits of the motion. Where my concern lies is within the Superior Courts and the negligence of Administration during “remote hearings” The lack of rules governing judicial conduct and ethics while conducting remote hearing are being neglected. Judges are “muting” either party and disallowing them from speaking. The first amendment of “Right to freedom of speech” it protects by giving access to the public, this not happening. Rights to be treated as though you were present in the courthouse is not happening as it should. So, what should a person with court dealing do when this happens? Who do they call? How can they make sure their civil rights aren’t being violated by discriminatory judges in superior court system?	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.
Superior Court of Los Angeles County By Bryan Borys	The provision regarding personal presence is unnecessary. It is simply a preliminary issue decided prior to a hearing on the merits.	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Item 2 is unnecessary because the determination is made before the motion is heard. Also, the moving party may confuse it as they are making the request.	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.

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SP22-04**Criminal Procedure: Motion and Order to Vacate Conviction or Sentence** (Revise forms CR-187 and CR-188)

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

Form CR-188, item 4 – Should this be revised to allow dismissal on the basis that the motion is untimely?		
Commenter	Comment	Committee Response
Caitlin Peters Downieville, CA	* No, the court should not be able to immediately dismiss on grounds for “untimely”. Many inmates or inmates already released have no clue to the rules and specific time limits. Many times the public defender has an agenda and that agenda is not the defendant. Public defenders are not filing motions to dismissed when statute of limitations are being violated by the courts. An example is a speedy trial taking 5 years and needed to fire 3 public defenders on grounds of discrimination and intent to cause harm by defender. Judges grant the request and acknowledge the abuse but then become abusive themselves.	The committee modified item 4 to allow a court to dismiss after a hearing.
Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	Another question posed was whether form CR-188—which is being revised to allow the court to designate whether it finds the motion timely as a matter of right, exercises its discretion to find the motion timely, or finds the motion untimely—should also be revised to allow the court to also dismiss the motion on that basis. Given that “[a]ll motions shall be entitled to a hearing” (Pen. Code, § 1473.7 subd. (d)), courts may not summarily dismiss a motion under Penal Code section 1473.7 without a hearing. Summary dismissal also would compound our concerns that self-represented petitioners cannot identify and will overlook meritorious factual circumstances that could establish reasonable diligence.	The committee modified item 4 to allow a court to dismiss after a hearing.
Superior Court of Los Angeles County By Bryan Borys	Yes. Without the option to dismiss it leaves uncertainty after a finding of untimeliness.	The committee modified item 4 to allow a court to dismiss after a hearing.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Inserting language of dismissal due to untimeliness will clarify the court's action for the moving party. It may also assist them in understanding that they may file another motion.	The committee modified item 4 to allow a court to dismiss after a hearing.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-188, item 5 – Should this be revised to allow the court to dismiss a motion that was not timely filed?		
Commenter	Comment	Committee Response
Caitlin Peters Downieville, CA	-No, the court should not be able to immediately dismiss on grounds for “untimely”. Many inmates or inmates already released have no clue to the rules and specific time limits. Many times the public defender has an agenda and that agenda is not the defendant. Public defenders are not filing motions to dismissed when statute of limitations are being violated by the courts. An example is a speedy trial taking 5 years and needed to fire 3 public defenders on grounds of discrimination and intent to cause harm by defender. Judges grant the request and acknowledge the abuse but then become abusive themselves.	The committee modified item 5 to allow a court to dismiss after a hearing.
Superior Court of Los Angeles County By Bryan Borys	Yes. Same as above.	The committee modified item 5 to allow a court to dismiss after a hearing.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Inserting language of dismissal due to untimeliness will clarify the court's action for the moving party. It may also assist them in understanding that they may file another motion.	The committee modified item 5 to allow a court to dismiss after a hearing.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SP 22-29

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Forms CR-187 and CR-188)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Daniel S. Robinson, President	AM	CR-188 Item 4(b) and (c) are confusing. 4(b) is a double negative. 4(c) is a triple negative. How about – Court finds the delay in filing is [] reasonable or [] undue (unreasonable). And Court finds evidence is [] new or [] not new, or could have been discovered before with reasonable diligence	The committee declined to make these suggested changes, as items 4b and 4c reflect the statutory language of section 1473.7(c) (“A motion pursuant to paragraph (2) or (3) of subdivision (a) 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 under this section or Section 745.”)
2.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	Does the proposal appropriately address the stated purpose? Yes. Would the proposal provide cost savings? If so, please quantify. No. 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? Staff will need to be trained to recognize these forms and route them accordingly.	

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SP 22-29

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Forms CR-187 and CR-188)

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

	Commenter	Position	Comment	Committee Response
			<p>How well would this proposal work in courts of different sizes?</p> <p>Courts could see an increase in these motions, since these forms make it easier for litigants to file such motions. Any increase in filings affects courts of different sizes differently; but, it should not be too much of an impact disparity.</p> <p>Other Comments: CR-187. There may be an inadvertent checkbox in item 3c(3). It seems like it should be formatted like 3b without a checkbox. On both forms, when there is a check box, sometimes the left justification lines up under the left side of the checkbox, and sometimes it lines up with just the wording of the paragraph.</p>	<p>The committee agrees with the suggestion and has deleted the extra checkbox.</p>

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