

2021 Regular Session

SENATE BILL NO. 186

BY SENATOR SMITH

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

CRIMINAL JUSTICE. Provides for post conviction relief with regard to successful "actual innocence" claims. (8/1/21)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

AN ACT

To amend and reenact Code of Criminal Procedure Article 930.3 and to enact Code of Criminal Procedure Articles 926.2, 926.3, 930.4(G), 930.8(A)(5) and (6) and (D), and 930.10, relative to post conviction relief; to provide for a petitioner's claim of factual innocence; to provide for exceptions; to provide for evidence; to provide for appointment of judges; to provide for motions of testing evidence; to provide for grounds for relief; to provide for burden of proof; to provide for joint motions; to provide for waiver; to provide for time limitations; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Code of Criminal Procedure Article 930.3 is hereby amended and reenacted and Code of Criminal Procedure Articles 926.2, 926.3, 930.4(G), 930.8(A)(5) and (6) and (D), and 930.10 are hereby enacted to read as follows:

Art. 926.2. Factual innocence

A. A petitioner, who has been convicted of an offense after a trial completed to verdict and who claimed factual innocence at trial of the offense charged and of any lesser included offense, may seek post conviction relief on the grounds that he is factually innocent of the offense for which he was

1 convicted. A petitioner's first claim of factual innocence pursuant to this Article
2 that would otherwise be barred from review on the merits by the time limitation
3 provided in Article 930.8(A) or the procedural objections provided in Article
4 930.4 shall not be barred if the claim is contained in an application for post
5 conviction relief filed on or before December 31, 2022. This exception to Articles
6 930.4 and 930.8(A) shall only apply to the claim of factual innocence brought
7 under this Article and shall not apply to any other claims raised by the
8 petitioner. The denial of a claim of factual innocence made under this Article
9 shall thereafter serve as a bar to further applications for post conviction relief
10 in accordance with Articles 930.4 and 930.8(A). After December 31, 2022,
11 applications for post conviction relief filed pursuant to this Article shall be
12 subject to Articles 930.4 and 930.8(A).

13 B.(1) To prove factual innocence under this Article, a petitioner must
14 present new, reliable, material, relevant, noncumulative, and exculpatory
15 scientific, physical, or nontestimonial documentary evidence that would be
16 legally admissible at trial, that is not inconsistent with any defense that was
17 offered or advanced by the petitioner at trial, that was not known or
18 discoverable at or prior to trial, and that, when viewed in light of all of the
19 relevant evidence, including the evidence that was admitted at trial, proves by
20 clear and convincing evidence that had the new evidence been presented at trial
21 no rational juror would have found the petitioner guilty beyond a reasonable
22 doubt of either the offense of conviction or of any felony offense that was a
23 responsive verdict at the time of the conviction.

24 (2) A recantation of prior sworn testimony shall not form the basis of
25 relief pursuant to this Article.

26 C. Notwithstanding any provision of law to the contrary, the provisions
27 of Article 930.8(B) shall apply to any application for post conviction relief
28 brought under this Article.

29 D.(1) A grant of post conviction relief under this Article shall not prevent

1 the petitioner from being retried for the offense of conviction, for a lesser
2 offense based on the same facts, or for any other offense. Any retrial or any
3 proceedings in the case subsequent to the granting of post conviction relief shall
4 be heard by a judge other than the judge who granted post conviction relief, to
5 be appointed in the following manner:

6 (a) In a court having one judge, the Louisiana Supreme Court shall
7 appoint a district judge of an adjoining district, or shall appoint a judge ad hoc.

8 (b) In a court having two judges, the other judge of that court shall be
9 appointed.

10 (c) In a court having more than two judges, another judge of that court
11 shall be appointed through a random process as provided by the local rules of
12 court.

13 (2) Nothing in this Paragraph shall be construed to limit the right of the
14 state or of the petitioner to seek recusal of any appointed judge pursuant to the
15 provisions of Chapter 1 of Title XXII of this Code or pursuant to any other
16 applicable provision of law.

17 Art. 926.3. Motion for testing of evidence

18 A. Upon motion of the state or the petitioner, the district court may
19 order the testing or examination of any evidence relevant to the offense of
20 conviction in the custody and control of the clerk of court, the state, or the
21 investigating law enforcement agency.

22 B. If the motion is made by the petitioner and the state does not expressly
23 consent to the testing or examination, a motion made under this Article shall
24 only be granted following a contradictory hearing at which the petitioner must
25 establish that good cause exists for the testing or examination. If the state does
26 not expressly consent to the testing or examination and the motion made under
27 this Article is granted following the contradictory hearing, the state shall not be
28 ordered to bear any of the costs associated with the testing or examination.

29 * * *

1 Art. 930.3. Grounds

2 A. If the petitioner is in custody after sentence for conviction for an offense,
3 relief shall be granted only on the following grounds:

4 (1) The conviction was obtained in violation of the constitution of the United
5 States or the state of Louisiana;

6 (2) The court exceeded its jurisdiction;

7 (3) The conviction or sentence subjected him to double jeopardy;

8 (4) The limitations on the institution of prosecution had expired;

9 (5) The statute creating the offense for which he was convicted and sentenced
10 is unconstitutional;

11 (6) The conviction or sentence constitute the ex post facto application of law
12 in violation of the constitution of the United States or the state of Louisiana.

13 (7) The results of DNA testing performed pursuant to an application granted
14 under Article 926.1 proves by clear and convincing evidence that the petitioner is
15 factually innocent of the crime for which he was convicted.

16 **(8) The petitioner is determined by clear and convincing evidence to be**
17 **factually innocent under Article 926.2.**

18 **B. Notwithstanding the provisions of Paragraph A of this Article or any**
19 **provision of law to the contrary, the district attorney and the petitioner may,**
20 **with the approval of the district court, jointly enter into any post conviction plea**
21 **agreement for the purpose of amending the petitioner's conviction, sentence, or**
22 **habitual offender status. The terms of any post conviction plea agreement under**
23 **this Paragraph shall be in writing, shall be filed into the district court record,**
24 **and shall be agreed to by the district attorney and the petitioner in open court.**
25 **The court shall prior to accepting the post conviction plea agreement address**
26 **the petitioner personally in open court, inform him of and determine that he**
27 **understands the rights that he is waiving by entering into the post conviction**
28 **plea agreement, and determine that the plea is voluntary and is not the result**
29 **of force or threats or of promises apart from the post conviction plea**

1 **agreement.**

2 Art. 930.4. Repetitive applications

3 * * *

4 **G. Notwithstanding any provision of this Title to the contrary, the state**
5 **may affirmatively waive any procedural objection pursuant to this Article. Such**
6 **waiver shall be express and in writing and filed by the state into the district**
7 **court record.**

8 * * *

9 Art. 930.8. Time limitations; exceptions; prejudicial delay

10 A. No application for post conviction relief, including applications which
11 seek an out-of-time appeal, shall be considered if it is filed more than two years after
12 the judgment of conviction and sentence has become final under the provisions of
13 Article 914 or 922, unless any of the following apply:

14 (1) * * *

15 **(5) The petitioner qualifies for the exception to timeliness in Article**
16 **926.1(A).**

17 **(6) The petitioner qualifies for the exception to timeliness in Article**
18 **926.2(A).**

19 * * *

20 **D. Notwithstanding any provision of this Title to the contrary, the state**
21 **may affirmatively waive any objection to the timeliness under Paragraph A of**
22 **this Article of the application for post conviction relief filed by the petitioner.**
23 **Such waiver shall be express and in writing and filed by the state into the**
24 **district court record.**

25 * * *

26 **Art. 930.10. Departure from this Title.**

27 **Upon joint motion of the petitioner and the district attorney, the district**
28 **court may deviate from any of the provisions of this Title.**

The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Alan Miller.

DIGEST

SB 186 Original 2021 Regular Session Smith

Proposed law authorizes a petitioner convicted of an offense and who claimed factual innocence at trial to seek post conviction relief on the grounds that he is factually innocent.

Proposed law does not prohibit a petitioner's first claim of factual innocence that would otherwise be barred from review on the merits by the time limitation or the procedural objections provided in present law if the claim is contained in an application for post conviction relief filed on or before December 31, 2022.

Proposed law requires that for a claim of factual innocence to succeed, a petitioner must present new, reliable, material, relevant, noncumulative, and exculpatory scientific, physical, or nontestimonial documentary evidence:

- (1) That would be legally admissible at trial;
- (2) That is not inconsistent with any defense that was offered or advanced by the petitioner at trial;
- (3) That was not known or discoverable at or prior to trial; and
- (4) That, when viewed in light of all of the relevant evidence, including the evidence that was admitted at trial, proves by clear and convincing evidence that had the new evidence been presented at trial no rational juror would have found the petitioner guilty beyond a reasonable doubt of either the offense of conviction or of any felony offense that was a responsive verdict at the time of the conviction.

Proposed law prohibits a recantation of prior sworn testimony from forming the basis of a petitioner's claim of factual innocence.

Proposed law would not prevent, after a granting of post conviction relief on the basis of factual innocence, the petitioner from being retried for the offense of conviction, for a lesser offense based on the same facts, or for any other offense.

Proposed law requires that any retrial or any proceedings in the case subsequent to the granting of post conviction relief be heard by a judge other than the judge who granted post conviction relief, with the new judge being appointed in the following manner:

- (1) In a court having one judge, the La. Supreme Court shall appoint a district judge of an adjoining district, or shall appoint a judge ad hoc.
- (2) In a court having two judges, the other judge of that court shall be appointed.
- (3) In a court having more than two judges, another judge of that court shall be appointed through a random process as provided by the local rules of court.

Proposed law prohibits any limit to the right of the state or of the petitioner to seek recusal of any appointed judge pursuant to the provisions of present law.

Proposed law authorizes the district court, upon motion of the state or the petitioner, to order the testing or examination of any evidence relevant to the offense of conviction in the custody and control of the clerk of court, the state, or the investigating law enforcement agency.

Proposed law requires that a motion made only by the petitioner, may only be granted following a contradictory hearing at which the petitioner is required to establish that good cause exists for the testing or examination.

Present law requires that if the petitioner is in custody after sentence for conviction for an offense, relief be granted only on any of the following grounds:

- (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana.
- (2) The court exceeded its jurisdiction.
- (3) The conviction or sentence subjected him to double jeopardy.
- (4) The limitations on the institution of prosecution had expired.
- (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional.
- (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.
- (7) The results of DNA testing performed pursuant to an application granted under present law proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.

Proposed law retains present law and adds another ground for relief if the petitioner is determined by clear and convincing evidence to be factually innocent under proposed law.

Proposed law authorizes the district attorney and the petitioner, with the approval of the district court, to jointly enter into any post conviction plea agreement for the purpose of amending the petitioner's conviction, sentence, or habitual offender status. Proposed law provides that the terms of any post conviction plea agreement be in writing, be filed into the district court record, and be agreed to by the district attorney and the petitioner in open court. Proposed law requires the court, prior to accepting the post conviction plea agreement, to address the petitioner personally in open court, inform him of and determine that he understands the rights that he is waiving by entering into the post conviction plea agreement, and determine that the plea is voluntary and is not the result of force or threats or of promises apart from the post conviction plea agreement.

Proposed law allows the state the option to affirmatively waive any procedural objection, if the waiver is express, in writing, and filed into the district court record.

Present law prohibits any application for post conviction relief, including applications which seek an out-of-time appeal, from being considered if it is filed more than two years after the judgment of conviction, but within two years of discovery, and sentence has become final under the provisions of present law, unless any of the following apply:

- (1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his prior attorneys. Further, the petitioner is required to prove that he exercised diligence in attempting to discover any post-conviction claims that may exist. "Diligence" for the purposes of present law is a subjective inquiry that must take into account the circumstances of the petitioner. Those circumstances include but are not limited to:
 - (a) The educational background of the petitioner.
 - (b) The petitioner's access to formally trained inmate counsel.

- (c) The financial resources of the petitioner.
 - (d) The age of the petitioner.
 - (e) The mental abilities of the petitioner.
 - (f) Whether the interests of justice will be served by the consideration of new evidence.
- (2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.
- (3) The application would already be barred by the provisions of present law, but the application is filed on or before October 1, 2001, and the date on which the application was filed is within three years after the judgment of conviction and sentence has become final.
- (4) The person asserting the claim has been sentenced to death.

Proposed law retains present law and adds the following circumstances:

- (1) The petitioner qualifies for the exception to timeliness in present law relative to DNA testing.
- (2) The petitioner qualifies for the exception to timeliness in proposed law relative to factual innocence.

Proposed law allows the state to affirmatively waive any objection to the timeliness of the application for post conviction relief filed by the petitioner, if the waiver is express and in writing and filed by the state into the district court record.

Proposed law provides that upon joint motion of the petitioner and the district attorney, the district court may deviate from any provision of present law post-conviction relief.

Effective August 1, 2021.

(Amends C.Cr.P. Art. 930.3; adds C.Cr.P. Art. 926.2, 926.3, 930.4(G), 930.8(A)(5) and (6) and (D), and 930.10)