SLS 21RS-333 **REENGROSSED**

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)

AN ACT

To amend and reenact Code of Criminal Procedure Article 930.3 and 930.8(A)(1) 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 and 930.8(A)(1) are 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, may seek post conviction relief on the grounds that he is factually innocent of the offense for which he was convicted. A petitioner's first claim of factual innocence pursuant

to this Article that would otherwise be barred from review on the merits by the time limitation provided in Article 930.8 or the procedural objections provided in Article 930.4 shall not be barred if the claim is contained in an application for post conviction relief filed on or before December 31, 2022, and if the petitioner was convicted after a trial completed to verdict. This exception to Articles 930.4 and 930.8 shall apply only to the claim of factual innocence brought under this Article and shall not apply to any other claims raised by the petitioner. An application for post conviction relief filed pursuant to this Article by a petitioner who pled guilty or nolo contendere to the offense of conviction or filed by any petitioner after December 31, 2022, shall be subject to Articles 930.4 and 930.8.

B.(1)(a) To assert a claim of factual innocence under this Article, a petitioner shall present new, reliable, and noncumulative evidence that would be legally admissible at trial and that was not known or discoverable at or prior to trial and that is either:

(i) Scientific, forensic, physical, or nontestimonial documentary evidence.

(ii) Testimonial evidence that is corroborated by evidence of the type described in Item (i) of this Subsubparagraph.

(b) To prove entitlement to relief under this Article, the petitioner shall present evidence that satisfies all of the criteria in Subsubparagraph (a) of this Subparagraph and that, when viewed in light of all of the relevant evidence, including the evidence that was admitted at trial and any evidence that may be introduced by the state in any response that it files or at any evidentiary hearing, 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 to the offense of conviction at the time of the conviction.

(2) A recantation of prior sworn testimony may be considered if

corroborated by the evidence required by Subsubparagraph (1)(a) of this Paragraph. However, a recantation of prior sworn testimony cannot form the sole basis for relief pursuant to this Article.

(3) If the petitioner pled guilty or nolo contendere to the offense of conviction, in addition to satisfying all of the criteria in this Paragraph and in any other applicable provision of law, the petitioner shall show both of the following to prove entitlement to relief:

(a) That, by reliable evidence, he consistently maintained his innocence until his plea of guilty or nolo contendere.

(b) That he could not have known of or discovered his evidence of factual innocence prior to pleading guilty or nolo contendere.

C.(1) A grant of post conviction relief pursuant to this Article shall not prevent the petitioner from being retried for the offense of conviction, for a lesser offense based on the same facts, or for any other offense.

(2) If the petitioner waives his right to a jury trial and elects to be tried by a judge, the district judge who granted post conviction relief pursuant to this Article shall be recused and the case shall be allotted to a different judge in accordance with applicable law and rules of court.

(3) If the district judge denied post conviction relief pursuant to this Article and an appellate court later reversed the ruling of the district judge and granted post conviction relief pursuant to this Article, and if the petitioner waives his right to a jury trial and elects to be tried by a judge, upon the petitioner's motion the district judge who denied post conviction relief shall be recused and the case shall be allotted to a different judge in accordance with applicable law and rules of court.

Art. 926.3. Motion for testing of evidence

A. Upon motion of the state or the petitioner, the district court may 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.

B. If the motion is made by the petitioner and the state does not expressly consent to the testing or examination, a motion made under this Article shall be granted only following a contradictory hearing at which the petitioner shall establish that good cause exists for the testing or examination. If the state does not expressly consent to the testing or examination and the motion made under this Article is granted following the contradictory hearing, the district attorney and investigating law enforcement agency shall not be ordered to bear any of the costs associated with the testing or examination.

* * *

Art. 930.3. Grounds

If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on 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~~; or~~**.**

(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 Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.

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

Art. 930.4. Repetitive applications

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

* * *

Art. 930.8. Time limitations; exceptions; prejudicial delay

A. No application for post conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, 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 shall prove that he exercised diligence in attempting to discover any post-conviction claims that may exist. "Diligence" for the purposes of this Article is a subjective inquiry that ~~must~~ **shall** take into account the circumstances of the petitioner. Those circumstances shall include but are not limited to the educational background of the petitioner, the petitioner's access to formally trained inmate counsel, the financial resources of the petitioner, the age of the petitioner, the mental abilities of the petitioner, or whether the interests of justice will be served by the consideration of new evidence. New facts discovered pursuant to this exception shall be submitted to the court within two years of discovery. **If the petitioner pled guilty or nolo contendere to the offense of conviction and is seeking relief pursuant to Code of Criminal Procedure Article 926.2 and five years or more have elapsed since the petitioner pled guilty or nolo contendere to the offense of conviction, he shall not be eligible for the exception provided for by this Subparagraph.**

* * *

(5) The petitioner qualifies for the exception to timeliness in Article 926.1.

(6) The petitioner qualifies for the exception to timeliness in Article 926.2.

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

* * *

Art. 930.10. Departure from this Title; post conviction plea agreements

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

B. Notwithstanding the provisions of Code of Criminal Procedure Article 930.3 or any provision of law to the contrary, the district attorney and the petitioner may, with the approval of the district court, jointly enter into any post conviction plea agreement for the purpose of amending the petitioner's conviction, sentence, or habitual offender status. The terms of any post conviction plea agreement pursuant to this Paragraph shall be in writing, shall be filed into the district court record, and shall be agreed to by the district attorney and the petitioner in open court. The court shall, prior to accepting the post conviction plea agreement, 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.

The original instrument was prepared by Alan Miller. The following digest, which does not constitute a part of the legislative instrument, was prepared by Ann S. Brown.

DIGEST

SB 186 Reengrossed 2021 Regular Session Smith

Proposed law authorizes a petitioner convicted of an offense 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 12/31/22, and if the petitioner was convicted after a trial completed to verdict. Proposed law further provides that an application for post conviction relief filed pursuant to proposed law by a petitioner who pled guilty or nolo contendere after 12/31/22 is subject to present law and proposed law relative to repetitive applications and time limitations.

Proposed law provides that to assert a claim of factual innocence under proposed law, a petitioner shall present new, reliable, and noncumulative evidence that would be legally admissible at trial and that was not known or discoverable at or prior to trial and that is either:

(1) Scientific, forensic, physical, or nontestimonial documentary evidence.

(2) Testimonial evidence that is corroborated by evidence of a scientific, forensic, or physical nature.

Proposed law provides that to prove entitlement to relief under proposed law, the petitioner shall present evidence that satisfies all of the criteria provided for in proposed law and that, when viewed in light of all of the relevant evidence, including the evidence that was admitted at trial and any evidence that may be introduced by the state in any response that it files or at any evidentiary hearing, 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 to the offense of conviction at the time of the conviction.

Proposed law provides that a recantation of prior sworn testimony may be considered if corroborated by the evidence required by proposed law, but a recantation of prior sworn testimony cannot form the sole basis for relief pursuant to proposed law.

Proposed law provides that if the petitioner pled guilty or nolo contendere to the offense of conviction, in addition to satisfying all of the criteria in proposed law and in any other applicable provision of present law, the petitioner must show both of the following to prove entitlement to relief:

(1) That, by reliable evidence, he consistently maintained his innocence until his plea of guilty or nolo contendere.

(2) That he could not have known of or discovered his evidence of factual innocence prior to pleading guilty or nolo contendere.

Proposed law provides that a grant of post conviction relief pursuant to proposed law does not prevent 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 provides that if the petitioner waives his right to a jury trial and elects to be tried by a judge, the district judge who granted post conviction relief pursuant to proposed

law will be recused and the case will be allotted to a different judge in accordance with applicable present law and rules of court.

Proposed law provides that if the district judge denied post conviction relief pursuant to proposed law and an appellate court later reversed the ruling of the district judge and granted post conviction relief pursuant to proposed law, and if the petitioner waives his right to a jury trial and elects to be tried by a judge, upon the petitioner's motion the district judge who denied post conviction relief will be recused and the case will be allotted to a different judge in accordance with applicable present law and rules of court.

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 further provides that if the motion is made by the petitioner, it can be granted only after a contradictory hearing at which the petitioner shall establish that good cause exists for the testing or examination. Proposed law further provides that if the state does not expressly consent to the testing or examination and the motion made pursuant to proposed law is granted, the district attorney and investigation law enforcement agency cannot be ordered to bear any costs of 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.

Present law provides that, unless required in the interest of justice, any claim for relief that was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence will not be considered.

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

Present law provides that no application for post conviction relief will be considered if filed more than two years after the judgment of conviction and sentence have become final under present law, unless 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.

Proposed law retains present law and adds that, if the petitioner pled guilty or nolo contendere to the offense of conviction and is seeking relief pursuant to proposed law relative to claims of factual innocence and five years or more have elapsed since the petitioner pled guilty or nolo contendere to the offense of conviction, he is not eligible for

the exception to timeliness provided for by present law.

Present law provides that 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, including the educational background of the petitioner, the petitioner's access to formally trained inmate counsel, the financial resources of the petitioner, the age of the petitioner, the mental abilities of the petitioner, and whether the interests of justice will be served by the consideration of new evidence.

Proposed law retains present law relative to the petitioner exercise of diligence in attempting to discover any post-conviction claims.

Proposed law makes it mandatory that the subjective inquiry of "diligence" take into account the circumstances of the petitioner.

Present law provides that no application for post conviction relief will be considered if filed more than two years after the judgment of conviction and sentence have become final under present law, unless:

(1) 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.

(2) The application would already be barred by the provisions of present law, but the application is filed on or before 10/1/01, and the date on which the application was filed is within three years after the judgment of conviction and sentence has become final.

(3) 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 or proposed law relative to post conviction relief.

Proposed law provides that, notwithstanding any provision of present law or proposed law, the district attorney and the petitioner may, with the approval of the district court, jointly enter into any post conviction plea agreement for the purpose of amending the petitioner's conviction, sentence, or habitual offender status, which agreement must be in writing, filed into the district court record, and agreed to by the district attorney and the petitioner in open court. Proposed law further provides that the court, prior to accepting the post conviction plea agreement, must 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 itself.

Effective August 1, 2021.

(Amends C.Cr.P. Art. 930.3 and 930.8(A)(1); adds C.Cr.P. Art. 926.2, 926.3, 930.4(G), 930.8(A)(5) and (6) and (D), and 930.10)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Judiciary C to the original bill

1. Adds proposed law relative to post conviction relief that are specific to a petitioner who pleaded guilty or nolo contendere.

2. Provides relative to scientific, forensic, physical, and certain testimonial evidence in support of a factual innocence claim under proposed law.

3. Provides that a recantation of prior sworn testimony of the petitioner can be considered under certain circumstances.

4. Provides relative to costs of testing or examination of evidence pursuant to proposed law.

5. Deletes provisions of proposed law relative to joint post conviction plea agreements.

6. Adds proposed law relative to post conviction plea agreements.

7. Makes technical changes to proposed law.

Senate Floor Amendments to engrossed bill

1. Makes technical changes.