

CHAPTER 2: APPEALING YOUR CONVICTION

A. INTRODUCTION

This Chapter explains your legal rights regarding your conviction or sentence. It also explains how you can get your conviction undone or your sentence reduced if something was done incorrectly at your trial or hearing. Specifically, this Chapter focuses on the procedures for appealing your conviction or sentence in the state of Louisiana. Chapter 9 of the main *JLM* deals with New York law, so it will not be helpful for you to read that Chapter if you have been convicted in a Louisiana state court. However, you may want to read Chapter 9 of the main *JLM* for background information about appeals in general.¹ If you are currently in prison and you are already serving your sentence, you may have already passed the timeframe to file a notice of appeal. If those timelines have passed, Chapter 5 of the Louisiana State Supplement on state habeas corpus should be helpful to you.

Part B provides you with general background information about the courts that can hear your appeal and what you generally can appeal from. Part C discusses how you can go about making your motion to appeal. Part D discusses the various actions that take place after making your motion to appeal. Part E discusses how you preserve your right to appeal at trial. Part F discusses when you should bring an appeal, or in other words, reasons to bring an appeal. Part G discusses how your appeal is determined and when a judgment becomes final. Finally, Part H discusses your post-conviction relief rights.

B. APPEALS IN GENERAL

In the state of Louisiana, you have the right to appeal. In an appeal, you exercise your right to have the judgment of the trial court revised, changed, set aside, or reversed by an appellate court.² If you have been convicted of and sentenced for a crime in a Louisiana state court, you can exercise this right to appeal by first submitting your appeal motion to the trial court in which you were originally sentenced.³ If the motion is granted, your order of appeal will be entered, at which point, the Court of Appeal in the district where you were convicted will take over.⁴ But in a Nineteenth Judicial District's city court's triable-by-jury criminal case, an appeal from a judgment will be taken to the Nineteenth Judicial District in the East Baton Rouge parish.⁵ Ultimately, you may then appeal your case to the Supreme Court of Louisiana, the highest court in Louisiana.⁶

If you have been sentenced to the death penalty, Louisiana law allows you to appeal directly to the Supreme Court of Louisiana.⁷ While you may appeal to the Supreme Court of Louisiana from a judgment in a capital case, in which a sentence of death has actually been imposed, the law does not require you to do so.⁸ If you are eligible for the death penalty but instead receive a life sentence, your appeal will follow the normal path and will begin at the Court of Appeal.

Lastly, you may only appeal from a *final* judgment—which in most cases means a conviction and sentence.⁹

¹ See the main *JLM*, Chapter 9 (direct appeals).

² LA. CODE CRIM. PROC. ANN. art. 911 (2017).

³ LA. CODE CRIM. PROC. ANN. art. 914 (2017).

⁴ LA. CODE CRIM. PROC. ANN. art. 916 (2017).

⁵ LA. CODE CRIM. PROC. ANN. art. 912.1(B)(2) (2017).

⁶ LA. CODE CRIM. PROC. ANN. art. 922(A) (2017).

⁷ LA. CODE CRIM. PROC. ANN. art. 912.1(A)(1) (2017).

⁸ See *State v. Bordelon*, 2007-0525 p. 9 (La. 10/16/09); 33 So. 3d 842, 849 (holding that a defendant who had been sentenced to death had the right to make an informed decision to waive his right to appeal, but that his waiving the right to appeal did not change the Supreme Court's duty to review the capital sentence under LA CODE CRIM. PROC. ANN. art. 905.9 (2017); LA CODE CRIM. PROC. ANN. art. 912.1(A)(2) (2017)).

⁹ LA. CODE CRIM. PROC. ANN. art. 912(C)(1) (2017).

C. MAKING YOUR MOTION TO APPEAL

If you have been convicted in a capital case and have been sentenced to the death penalty, you do not need to make a motion to appeal your sentence. The Supreme Court of Louisiana will automatically review every death sentence to determine if it is excessive.¹⁰ In all other cases, you must make a motion for an appeal.¹¹ Your motion for an appeal can be made either in an open court oral testimony or through a written notice filed with the trial court clerk.¹² Either way, this motion will then be entered in the minutes (a summarized record of the proceedings) of the court.¹³

Two separate paths exist for 1) appealing your judgment or ruling or 2) appealing your sentence. If you are appealing your judgment or ruling, you must move for an appeal within thirty days of that judgment or ruling's passage.¹⁴ If you are appealing your sentence, you must move for an appeal within thirty days after the ruling on a motion to reconsider your sentence.¹⁵ Therefore, you do *not* have to make a motion to reconsider your sentence in order to appeal. That said, you can move to reconsider your sentence. Doing so would still allow you the option to move for an appeal within thirty days after the ruling on your motion to reconsider that sentence. If you file a motion to reconsider your sentence, please refer to Article 881.1 of the Louisiana Code of Criminal Procedure.¹⁶

With the exception of certain legal holidays, every day counts towards this thirty-day time limit.¹⁷ This limit is important to obey when bringing your appeal. Your conviction and sentence will become final if you fail to move for an appeal within the thirty days. Again, you have thirty days to move for an appeal after the judgment or ruling from which you are making your appeal. But if you make a motion to reconsider your sentence, then you will have thirty days to move for an appeal after a ruling on your motion to reconsider is made.

If you have failed to move for an appeal within the thirty-day time period, you can only obtain appellate review by seeking a reinstatement of your right to appeal through an application for post-conviction relief.¹⁸ This is not the best route. Post-conviction relief is discussed in Part H of this chapter.

When you make your motion for appeal, you must also request the part of your original trial proceeding's transcript that will be necessary for your appeal.¹⁹ Only portions of the transcript that relate to the reasons you are bringing your appeal may be requested.²⁰ You or your attorney can request this transcript from the trial court that convicted you through a mailed notice of your appeal. The trial court or appellate court may also designate additional portions of the transcript if it decides that more is needed for a full and fair review.²¹ Still, the ultimate burden is on you. As the appealing party, you have to make sure that the record is complete so that the appellate court can review the merits of your claim.²²

¹⁰ LA. CODE CRIM. PROC. ANN. art. 905.9 (2017).

¹¹ LA. CODE CRIM. PROC. ANN. art. 914 (2017).

¹² LA. CODE CRIM. PROC. ANN. art. 914(A) (2017).

¹³ LA. CODE CRIM. PROC. ANN. art. 914(A) (2017).

¹⁴ LA. CODE CRIM. PROC. ANN. art. 914(B)(1) (2017).

¹⁵ LA. CODE CRIM. PROC. ANN. art. 914(B)(2) (2017).

¹⁶ LA. CODE CRIM. PROC. ANN. art. 881.1 (2017).

¹⁷ LA. CODE CRIM. PROC. ANN. art. 13 (2017).

¹⁸ *See State v. Mims*, 2006-1219, p. 2 (La. App. 3 Cir. 11/2/06) 942 So. 2d 70, 72 (La. App. 3 Cir. 2006) (holding that "A defendant's conviction and sentence becomes final when a motion for appeal is not filed within 30 days after judgment, and he can no longer obtain an appeal by simply filing a motion for appeal; rather, he must first obtain reinstatement of his right to appeal by way of a properly filed application for post-conviction relief" in a case in which the defendant, convicted of second degree murder, failed to appeal in thirty days); *State v. Counterman*, 475 So. 2d 336, 339 (La. 1985) (describing the procedure by which "the defendant who has failed to appeal timely should seek reinstatement of his right to appeal in the district court in which the conviction was obtained").

¹⁹ LA. CODE CRIM. PROC. ANN. art. 914.1(A) (2017).

²⁰ LA. CODE CRIM. PROC. ANN. art. 914.1(B) (2017).

²¹ LA. CODE CRIM. PROC. ANN. art. 914.1(D) (2017).

²² *See State v. Bernard*, 98-994, p. 10 (La. App. 3 Cir. 2/3/99); 734 So. 2d 687, 692 (finding that "LA. CODE CRIM. PROC. art. 914.1 puts the burden on the party requesting the appeal to make sure the record is complete so that the appellate court is able to review the merits of appellant's claim" when a defendant argued that evidence of a prosecutor's

The *record* on appeal consists of all the pleadings, evidence, exhibits, orders, judgments, and necessary portions of the transcript regarding the appeal. Any portion of the transcript that you request but that the court finds unrelated to the appeal will not be prepared.²³ Within five days of making your motion for appeal and your request for the transcript, the State may also write to request portions of the transcript it finds necessary to oppose your appeal.²⁴

Preparing these transcripts costs money. Be aware. Unless you have indigent circumstances and cannot afford the costs, you must pay the court reporter or the appropriate agency for the trial court's preparation of the transcript.²⁵ Filing the appeal also costs money, which must be paid in the appellate court.²⁶ Please consult with the courts to determine these non-fixed costs. Otherwise, both payments must be made within twenty days of the mailing of notice.²⁷ Failure to pay these costs can result in a monetary fine under five hundred dollars or even in a dismissal of your appeal.²⁸

D. ACTIONS ON YOUR MOTION TO APPEAL

After you make your motion to appeal, you must forward notice to the appropriate appellate court that a motion for appeal has been made within seven days of the date you make your motion.²⁹ This is so that all parties interested in your appeal receive proper notification about your appeal.

Also, after you make your motion to appeal, the trial court has seventy-two hours to either grant or deny your motion.³⁰ This time limit does not include legal holidays. If your motion for appeal is granted, the court will assign you a return date. The return date is the date on which your court appearance is scheduled. The return date in Louisiana courts will be seventy-five days, unless the trial judge fixes a lesser period.³¹ On this date, either you or your attorney will need to appear before the court, unless the court has indicated that the matter will be dealt with on submission, or in writing. You may request one extension of the return date of not more than thirty days.³² The trial court would have to grant that request. It cannot do so if the return date has passed.³³ Additionally, an extension for the return date can only be granted if the moving party can prove that additional time is necessary due to certain circumstances that would create an unusual and undue hardship.³⁴ The appellate court can grant any other extensions for your return date for sufficient cause or at the request of the court reporter.³⁵

Once the order of the appeal is entered, the trial court's jurisdiction "divests" (transfers) to the appellate court assigned to the district in which you were convicted.³⁶ In other words, the trial court loses its authority over your case and will no longer have the jurisdiction to take any action on it, except in limited situations laid out in the law.

improper remarks existed in the record, but did not provide the transcripts to support that claim on appeal); *State v. Ronquille*, 09-81, pp. 9–10 (La. App. 5 Cir. 5/26/09); 16 So. 3d 411, 416 (holding that "the party making the motion for appeal bears the burden of furnishing the appellate court with a record of the trial proceedings needed for review; and therefore, any inadequacy of the record is imputable to the appellant" when the defendant claimed that the appellate court's review of his appeal should be reversed because the court did not have the full transcript from his first trial).

²³ LA. CODE CRIM. PROC. ANN. art. 914.1(B) (2017).

²⁴ LA. CODE CRIM. PROC. ANN. art. 914.1(A) (2017).

²⁵ LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017); LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

²⁶ LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

²⁷ LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

²⁸ LA. CODE CRIM. PROC. ANN. art. 914.1(C)(3) (2017).

²⁹ LA. CODE CRIM. PROC. ANN. art. 915(B) (2017).

³⁰ LA. CODE CRIM. PROC. ANN. art. 915(A) (2017).

³¹ LA. CODE CRIM. PROC. ANN. art. 915(A) (2017).

³² LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

³³ LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

³⁴ LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

³⁵ LA. CODE CRIM. PROC. ANN. art. 915.1(B) (2017).

³⁶ LA. CODE CRIM. PROC. ANN. art. 916 (2017).

E. PRESERVING YOUR RIGHT TO APPEAL

1. Preservation

To have an issue reviewed by an appellate court, the issue must be preserved at trial.³⁷ In the state of Louisiana, it is enough that your attorney objects to any irregularity or error when it occurs.³⁸ A “bill of exceptions” is unnecessary. If your attorney made timely objections, then, on your appeal, you only need to file a written designation of the errors which you want to raise in appeal with the appellate court.³⁹ The appellate court will only consider issues and objections raised at trial.

Other issues and objections will only be considered if an error can be found from a mere inspection of the pleadings and proceedings, without having to inspect the evidence (in other words, “patent errors”).⁴⁰ This is not a preferred route for your appeal. Taking this path will make it very difficult for your appeal to be successful. You or your attorney must be careful to bring your complaint to the attention of the trial court at the time of your trial, so that the trial court has a chance to address your complaint.⁴¹

The courts will find the failure to timely object during trial inexcusable and will prevent that issue from being reviewable on appeal. Merely submitting an “assignment of error” for the court’s consideration will not be enough.⁴² The assignment of error must be argued either orally or in writing. Otherwise, it will be disregarded and therefore unavailable for appeal.⁴³ It is also important that you object to any errors at the time that they happen during your trial.⁴⁴ A timely objection is required to call the trial judge’s attention to an error at a time when the error can be corrected.⁴⁵ This requirement of a timely objection (otherwise known as the “contemporaneous objection rule”) also prevents defendants from “sitting out” an error, gambling unsuccessfully on the verdict, and then later trying to appeal based on an error which could have been corrected at trial.⁴⁶ In some states, in capital cases, the only exception is if the record shows that injustice was done to the defendant and he did not receive a fair trial.⁴⁷

Regardless, “patent” errors (or errors that can be found looking only at the pleadings and proceedings, and without having to inspect the evidence) do happen.⁴⁸ Some examples of patent errors include imposing an illegal sentence,⁴⁹ a trial by an incorrect number of jurors,⁵⁰ a failure to rule on a motion for a new trial before imposing a sentence,⁵¹ an erroneous indictment,⁵² a failure to properly advise a defendant of his constitutional rights when entering a plea of guilty,⁵³ and a failure to determine if the defendant knowingly and voluntarily waived any of his or her waivable rights (rights you can waive, or give up).⁵⁴ A guilty plea waives three federal constitutional rights: the privilege against self-incrimination, the

³⁷ See *State v. Richards*, 426 So. 2d 1314, 1318 (La. 1982).

³⁸ LA. CODE CRIM. PROC. ANN. art. 841(A) (2017).

³⁹ LA. CODE CRIM. PROC. ANN. art. 844(A) (2017).

⁴⁰ See *State v. Richards*, 426 So. 2d 1314, 1318 (La. 1982).

⁴¹ See *e.g.*, *State v. Morrison*, 582 So. 2d 295, 304 (La. App. 1 Cir. 1991) (holding that by failing to enter any objection to testimony repeating victim’s statement, defendant failed to preserve alleged error on appeal).

⁴² See *State v. Morgan*, 333 So. 2d 642, 643 n.1 (La. 1976).

⁴³ See *State v. Morgan*, 333 So. 2d 642, 643 n.1 (La. 1976).

⁴⁴ LA. CODE CRIM. PROC. ANN. art. 841(A) (2017).

⁴⁵ *State v. Arvie*, 505 So. 2d 44, 47 (La. 1987).

⁴⁶ See *State v. Mart*, 419 So. 2d 1216, 1219 (La. 1982).

⁴⁷ *State v. White*, 192 So. 345, 349 (La. 1939).

⁴⁸ LA. CODE CRIM. PROC. ANN. art. 920 (2017).

⁴⁹ LA. CODE CRIM. PROC. ANN. art. 882(A) (2017) (“An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.”); see also *State v. Delaney*, 359 So. 2d 976, 977 (La. 1978).

⁵⁰ *State v. Kibodeaux*, 524 So. 2d 891, 892 (La. App. 3 Cir. 1988) (finding a procedural defect in trial by a jury of 11 instead of 12).

⁵¹ LA. CODE CRIM. PROC. ANN. art. 853 (2017) (“A motion for a new trial must be filed and disposed of before sentence.”); see also *State v. Stevenson*, 525 So. 2d 281, 282 (La. App. 1 Cir. 1988).

⁵² See *State ex rel. Jackson v. Henderson*, 283 So. 2d 210, 211 (La. 1973).

⁵³ See *State v. Pittman*, 585 So. 2d 591, 596 (La. App. 5 Cir. 1991).

⁵⁴ See *State v. Studivant*, 531 So. 2d 539, 542 (La. App. 5 Cir. 1988).

right to a trial by jury, and the right to confront your accusers.⁵⁵ The right to be assisted by counsel is another waivable right.⁵⁶

If you find a “patent” error on the face of the record, the appellate court will be able to consider it any time.⁵⁷ Therefore, you do not need to worry about preserving patent errors for the appellate court to review. In fact, Courts of Appeals routinely review the record for patent errors regardless of whether you make a request to do so.⁵⁸ Still, if you request that your record be reviewed for patent errors, a Court of Appeal will perform an independent and thorough review of the following: all the pleadings filed in district court, all the minute entries of district court proceedings, the bill of information, and all the transcripts contained in the appeal record.⁵⁹ So, requesting a patent error review may make sense.

2. Plea Agreements

If you plead guilty or *nolo contendere* (no contest), the court, within its discretion, may allow you to withdraw your plea of guilty any time before sentencing.⁶⁰ Otherwise, you generally cannot appeal. If you do decide to plead guilty or *nolo contendere* in a misdemeanor case and if you are not represented by counsel, the court will follow a series of steps. First, the court will personally determine in open court that your plea is voluntary and that it is made with an understanding of the nature of your charge, as well as with an understanding of your right to be represented by counsel.⁶¹ Only after this determination will the court accept your guilty plea. If the court, however, determines either that a sentence of imprisonment will actually be imposed on you or that your conviction can be used to enhance the grade (severity) of a later offense, then the court will first address you personally in open court and determine that you understand all of the following:

- 1) The nature of the charge to which your plea is offered, as well as the mandatory minimum and maximum penalty provided by law;
- 2) Your right to be represented by an attorney;
- 3) Your right to have a trial;
- 4) Your right to confront and cross-examine witnesses and your right not to be forced to incriminate yourself; and
- 5) That your plea of guilty or *nolo contendere* will result in no further trial of any kind, so that by pleading guilty or *nolo contendere* you are waiving your right to trial⁶²

In a felony case, the court will also address you personally in an open court. There, the court will inform you of the above-listed rights that you waive and the consequences you face when you plead guilty or *nolo contendere*. Before accepting your plea of guilty or *nolo contendere*, the court will also make sure personally in an open court that your plea is voluntary and not the result of force, threats, or promises apart from a plea agreement. The court will also ask if your willingness to plead guilty or *nolo contendere* is a result of discussions you had among yourself, your attorney, and the district attorney. If these discussions occurred, then the court will require a disclosure of that discussion and agreement in open court or *in camera* (privately) when the plea was offered.

If you plead guilty without having been made aware of these above-mentioned rights or consequences at the time of your plea, then your guilty plea may not be valid. For example, the failure of a trial court to advise a defendant of the mandatory minimum sentence before accepting a guilty plea may be raised by the defendant as an error on appeal. However, this may be subject to analysis under the harmless

⁵⁵ See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969).

⁵⁶ See *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d. 955 (2009).

⁵⁷ See *State v. Buttner*, 411 So. 2d 35, 37 (La. 1982).

⁵⁸ See *State v. Jackson*, 2007-0985, p. 12 (La. App. 5 Cir. 4/15/08); 985 So. 2d 246, 253.

⁵⁹ See *State v. Broussard*, 581 So. 2d 763, 765 (La. App. 4 Cir. 1991).

⁶⁰ LA. CODE CRIM. PROC. ANN. art. 559(A) (2017).

⁶¹ LA. CODE CRIM. PROC. ANN. art. 556(A) (2017).

⁶² LA. CODE CRIM. PROC. ANN. art. 556.1(A) (2017); LA. CODE CRIM. PROC. ANN. art. 556(B) (2017).

error rule.⁶³ The rule states that your guilty plea will *not* be invalidated if the difference between the procedures the court followed and the procedures that they should have followed did *not* affect your *substantial* rights.⁶⁴ What the courts consider a substantial right is discussed more in Part F of this Chapter. To sum up, if you plead guilty in the state of Louisiana, you cannot appeal your sentence unless you find a patent error that affects your substantial right.

F. WHEN YOU SHOULD BRING AN APPEAL

In an appeal, you ask the appellate court to correct the trial court's error in its judgment or sentence. The appellate court will then decide to revise, modify, set aside, reverse, or affirm the judgment or sentence against you.⁶⁵ However, you cannot bring an appeal on just any issue. It must be from a final judgment. Part B of this chapter covers this topic.⁶⁶ Know that a final judgment is one which puts an end to the proceedings.⁶⁷ In other words, your appeal may only be brought to challenge a judgment that ultimately disposes of, or finishes, the case.⁶⁸ For example, an order granting a new trial does not finally dispose of a case and will therefore not be appealable.⁶⁹ You can appeal from a final judgment of a conviction only when you have been given a sentence.⁷⁰

Secondly, only two types of errors will be considered on appeal: (1) an error designated in the assignment of errors (*see below*) and (2) an error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.⁷¹ An "assignment of errors" is a written report of the errors which are to be argued on appeal. This written report is to be filed with the appellate court, and filed in accordance with the uniform rules of the appropriate appellate court. It is important that you have preserved these issues for appeal, as discussed in Part E of this chapter. Errors that are discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence are called "patent" errors. This is discussed in detail in the latter half of Part E of this chapter.

Finally, the judgment or ruling you are appealing must affect a substantial right of yours. In other words, the judgment or ruling must amount to more than a harmless error.⁷² So not every violation of your rights by the trial court will automatically lead the appellate court to grant a reversal of that judgment. To put it in another way, the trial court having denied you a statutory right does not automatically lead to a reversal.⁷³ Rather, courts have held that when statutory rights are denied, a reversal is required only if the substantial rights of the accused are affected.⁷⁴

The same is true for constitutional rights as well.⁷⁵ The error in your case must be found to be both substantial and prejudicial in order for you to appeal it.⁷⁶ To show that your substantial rights were affected,

⁶³ State v. Snow, 36,826, p. 2 (La. App. 2 Cir. 3/5/03); 839 So. 2d 988, 990 (holding that a failure of a trial court to advise a defendant of the mandatory minimum sentence, if raised as an assignment of error on appeal, is subject to analysis under the harmless error rule).

⁶⁴ See LA. CODE CRIM. PROC. ANN. art. 556(D) (2017); *see also* LA. CODE CRIM. PROC. ANN. art. 556.1(E) (2017).

⁶⁵ LA. CODE CIV. PROC. art. 2082 (2017).

⁶⁶ LA. CODE CRIM. PROC. ANN. art. 912(C)(1) (2017).

⁶⁷ State v. Quinones, 94-0436 p. 3 (La. App. 5 Cir. 11/29/94); 646 So. 2d 1216, 1217 (holding that the conviction was not final and thus not appealable because the defendant had not yet been sentenced).

⁶⁸ State v. Carter, 44 So. 997, 997, 120 La. 96, 96-97 (La. 1907) (denying an appeal from an order refusing the defendant bail upon an indictment for murder).

⁶⁹ See State v. White, 21 So. 2d 877, 877 (La. 1945).

⁷⁰ See State v. London, 316 So. 2d 743, 743 (La. 1975).

⁷¹ LA. CODE CRIM. PROC. ANN. art. 920 (2017).

⁷² LA. CODE CRIM. PROC. ANN. art. 921 (2017).

⁷³ State v. Ardoin, No. 58318, p. 8 (La. 12/13/76); 340 So. 2d 1362, 1365 ("Not every violation of a statutory right therefore must result in reversal of a conviction.")

⁷⁴ See State v. Williams, 2000-0011, p. 23 (La. App. 4 Cir. 5/09/01); 788 So. 2d 515, 527.

⁷⁵ See State v. McLeod, 6 So. 2d 146, 148 (La. 1942); 199 La. 372, 378.

⁷⁶ State v. McLeod, 6 So. 2d 146, 148 (La. 1942); 199 La. 372, 378 ("Error in a criminal case must be substantial and prejudicial in order to afford ground for a reversal and, while the accused is entitled to be protected against an invasion of the rights guaranteed to him by the Constitution, these rights may not be employed, on a pretext, as a shield to thwart the process of justice.").

you must show that you were prejudiced in your case.⁷⁷ Prejudice will not be presumed from just the fact that the error had been committed. You must affirmatively show that you were prejudiced due to the error.⁷⁸ When an error has been found to not affect your substantial right, courts call such an error a harmless error. Courts have found errors to be harmless when they conclude that the trial record still establishes guilt beyond a reasonable doubt.⁷⁹ Courts have also found an error to be harmless if there is little likelihood that the error would have changed the result.⁸⁰ For example, in one case, there was an error by the court because the court admitted a hearsay statement. The appellate court, however, found the error to be harmless because the defendant who was accused of murder had admitted to firing the shot that went into the victim's back and killed the victim.⁸¹

You can also bring an appeal if you believe that your right to effective assistance of counsel was not met. In Louisiana, you can challenge the effectiveness of your trial counsel or your appeals counsel. It is your burden to prove by a "preponderance of the evidence" that your counsel was constitutionally deficient, or lacking, in your representation. The details on how to prove such a burden are listed in Section H(1)(e) of this chapter. Detailed discussion of ineffective assistance of counsel claims have been reserved for Section H, which centers on post-conviction relief. In Louisiana, courts have often recommended that a claim of ineffective assistance of counsel be brought as an application for post-conviction relief.⁸² This is so that your claim can be heard in a full evidentiary hearing, where you will be able to present evidence.⁸³

G. DETERMINATION OF THE APPEAL

Your motion for appeal will not suspend the execution of your sentence.⁸⁴ In other words, you will generally have to begin serving your sentence while waiting for your appeal to be decided. Still, you will earn credit for the time you serve while you wait for the court to make a decision on your appeal.⁸⁵ This does not apply to you, however, if you are admitted to post-conviction bail.⁸⁶ Therefore, you should not be discouraged from appealing in fear that you will not receive credit for your time spent in jail pending your appeal.

If your first appeal is in the Court of Appeal and it is not successful, you may be able to pursue your claim in a higher court.⁸⁷ Both you and the State can apply to the same Court of Appeal for a rehearing within fourteen days of mailing the notice of the judgment and opinion on your appeal.⁸⁸ Also, both you and the State can apply to the Supreme Court of Louisiana for permission to appeal through a "writ of certiorari" (an order by a higher court directing a lower court to send the record of a case for review) within thirty days

⁷⁷ *State v. Jarrell*, 2007-1720 p. 15 (La. App. 1 Cir. 09/12/08); 994 So. 2d 620, 632 (holding that the prejudicial effect on defendant did not rise to the level of undue prejudice to establish that the defendant's trial of two or more crimes in a single proceeding affected his substantial rights).

⁷⁸ *See State v. Pierfax*, 105 So. 16, 18, 158 La. 927, 932 (La. 1925).

⁷⁹ *See State v. Hall*, 606 So. 2d 972, 980 (La. App. 3 Cir. 1992).

⁸⁰ *State v. Ferdinand*, 441 So. 2d 1272, 1274 (La. App. 1 Cir. 1983).

⁸¹ *See State v. Taylor*, 2001-1638, p. 21-22 (La. 1/14/03); 838 So. 2d 729, 748.

⁸² *See* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) ("If a person's claim is that he was represented by incompetent or ineffective assistance of counsel at trial, he can usually only raise it by post-conviction petition since that provides for an evidentiary hearing to air the complaint. Likewise, a claim of incompetent counsel raised on appeal is likely to be deferred to post-conviction proceedings since the appellate record usually is inadequate to review the complaint.").

⁸³ *See* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) ("If a person's claim is that he was represented by incompetent or ineffective assistance of counsel at trial, he can usually only raise it by post-conviction petition since that provides for an evidentiary hearing to air the complaint. Likewise, a claim of incompetent counsel raised on appeal is likely to be deferred to post-conviction proceedings since the appellate record usually is inadequate to review the complaint.").

⁸⁴ LA. CODE CRIM. PROC. ANN. art. 913(B) (2017).

⁸⁵ *See Hart v. Henderson*, 449 F.2d 183, 185 (5th Cir. 1971).

⁸⁶ LA. CODE CRIM. PROC. ANN. art. 913(B) (2017).

⁸⁷ LA. CODE CRIM. PROC. ANN. art. 922(A) (2017).

⁸⁸ LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

of the mailing of the notice of judgment and opinion of the Court of Appeal.⁸⁹ However, you *cannot* apply for a writ of certiorari without first applying for a rehearing in the Court of Appeal.⁹⁰

If you do file a timely application to the Court of Appeal for a rehearing, then the time limit for you and the State to apply to the Supreme Court of Louisiana for a writ of certiorari is extended until thirty days after the mailing of the denial of rehearing notice.⁹¹ If neither the application to the Court of Appeal nor the application to the Supreme Court of Louisiana is filed in a timely manner, then the judgment of the Court of Appeal becomes final.⁹² These time limits are *extremely* important.

If your timely application for a rehearing in the Court of Appeal is denied, then the judgment will become final and definitive unless you file an application for a writ of certiorari to the Supreme Court of Louisiana within the thirty days as described above.⁹³ If an application for certiorari to the Supreme Court of Louisiana is timely filed, then the judgment becomes final and definitive five days after the Supreme Court's denial of certiorari.⁹⁴ Please note that you must be mindful to preserve issues also in your appellate hearings, as discussed in Part E of this chapter, which deals with the "assignment of errors." This is because the Court of Appeal will not give you a new hearing to consider a point that was not raised at your first hearing.⁹⁵

If your appeal is in the Supreme Court of Louisiana and it is not successful, you may apply to the court and ask for a rehearing. You must apply within fourteen days from the day when the notice of judgment is mailed.⁹⁶ No higher court in Louisiana exists. Thus, your claim stops there. If you do not apply for a rehearing on time, the judgment of the Supreme Court of Louisiana becomes final.⁹⁷ If you do apply on time, the judgment becomes final when the application is denied.⁹⁸

If the Supreme Court of Louisiana decides not to hear your appeal, you may still have other chances for relief. First, if your case involves issues of federal law, you can apply for a writ of certiorari to the United States Supreme Court.⁹⁹ In a writ of certiorari, you are asking the United States Supreme Court to review a lower court's decision. However, the United States Supreme Court rarely grants such cases. Second, in some circumstances, you may be able to challenge your conviction or sentence through post-conviction relief proceedings. These are discussed further in Section H of this chapter.

H. POST-CONVICTION RELIEF

If you are seeking to have a conviction and offense set aside, you will most likely be applying for post-conviction relief.¹⁰⁰ The post-conviction relief process in Louisiana occurs post-appeal.¹⁰¹ In other words, you cannot apply for post-conviction relief if you are still able to appeal the conviction or sentence. You also cannot apply for post-conviction relief if an appeal is pending on your case.¹⁰²

⁸⁹ LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

⁹⁰ *State v. Moore*, 143 So. 707, 708, 175 La. 607, 609 (La. 1932) (holding that the Supreme Court of Louisiana's right to issue certiorari to the Court of Appeal will not be exercised unless applied for within 30 days after a rehearing was refused by the Court of Appeal).

⁹¹ LA. CODE CIV. PROC. ANN. art. 2166(B) (2017).

⁹² LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

⁹³ LA. CODE CIV. PROC. ANN. art. 2166(C) (2017).

⁹⁴ LA. CODE CIV. PROC. ANN. art. 2166(E) (2017).

⁹⁵ *See Stephens v. Duckett*, 36 So. 89, 91, 111 La. 979, 982–983 (La. 1904).

⁹⁶ LA. CODE CIV. PROC. ANN. art. 2167(A) (2017).

⁹⁷ LA. CODE CIV. PROC. ANN. art. 2167(B) (2017).

⁹⁸ LA. CODE CIV. PROC. ANN. art. 2167(C) (2017).

⁹⁹ Violations of the U.S. Constitution present issues of federal law. *See* 28 U.S.C. § 1331 (2012).

¹⁰⁰ LA. CODE CRIM. PROC. ANN. art. 924 (2017).

¹⁰¹ LA. CODE CRIM. PROC. ANN. art. 924.1 (2017).

¹⁰² LA. CODE CRIM. PROC. ANN. art. 924.1 (2017). *See State v. Rolland*, 96-11, p. 3 (La. App. 5 Cir. 4/30/96); 673 So. 2d 1229, 1230 (holding that post-conviction relief was the appropriate procedural vehicle for defendant to seek to exercise his right to appeal after the time for appealing has elapsed).

1. Time Limits for Post-Conviction Relief

You may file a petition for post-conviction relief with the District Court where your conviction took place. There are strict time limits for when courts will consider an application for post-conviction relief. If it has been more than two years since the judgment of conviction and sentence has become final, the court will not consider a post-conviction relief application.¹⁰³ However, there are two exceptions to this rule:

- 1) Your application shows that at the time of your criminal case, you or your attorney did not know the facts which your case was based upon. You must be able to prove or the state must admit that you were not aware of those facts.¹⁰⁴ One example of this could happen if there was evidence that the state suppressed material evidence at trial and you and your attorney did not become aware of that evidence until after the time limit for appeal expired; or¹⁰⁵
- 2) Your conviction carries a death sentence.¹⁰⁶

Unless one of these provisions applies to you, make sure to bring your application for post-conviction relief within two years after your conviction and sentence became final.

Furthermore, the court may dismiss your post-conviction relief application even if it is filed on time (or allowed under one of the above listed exceptions). Your application will be dismissed if the court finds that the state's ability to respond to your claims has been materially prejudiced by events not under the control of the state since the date of your original conviction.¹⁰⁷

a. Proving Your Claim for Post-Conviction Relief

Attempting to attain post-conviction relief is an uphill battle. You should not consider it as an alternative route to your appeal rights. Indeed, post-conviction relief is your **last resort!** You must make sure to take your appeal rights very seriously. Be extremely thorough in exhausting your appeal rights before you bring any application for post-conviction relief.

The burden of proving the post-conviction relief that you seek is on you as the petitioner.¹⁰⁸ First, in order to prevent your application from being dismissed, your application must bring a claim, which if established, would entitle you to relief.¹⁰⁹ Secondly, your relief will only be granted on the following grounds:

- 1) Your conviction was obtained in violation of the Constitution of the United States or the state of Louisiana;
- 2) The court exceeded its jurisdiction (the case never should have been before that particular court);
- 3) The conviction or sentence subjected you to double jeopardy (you were tried more than once for the same crime);
- 4) The limitations on the institution of prosecution had expired;
- 5) The statute creating the offense for which you were convicted and sentenced is unconstitutional;
- 6) The conviction or sentence constitutes the *ex post facto* (retroactive; after the fact) application of law in violation of the constitution of the United States or the state of Louisiana; or

¹⁰³ LA. CODE CRIM. PROC. ANN. art. 930.8(A) (2017).

¹⁰⁴ *State v. Parker*, 98-0256, p. 1 (La. 05/08/98); 711 So. 2d 694, 695 (holding that a late realization that an error may have occurred at trial does not qualify as discovery of a new fact).

¹⁰⁵ *State ex rel. Winn v. State*, 95-0898, p. 1 (La. 10/02/96); 685 So. 2d 104, 104 (finding that claim fell under the statute providing exception to the three-year time limit for filing applications for post-conviction relief, where defendant alleged that the state suppressed material, exculpatory evidence at trial in violation of *Brady* and that defendant and his attorney did not know until defendant obtained documents pursuant to the Public Records Act).

¹⁰⁶ LA. CODE CRIM. PROC. ANN. art. 930.8(A) (2017)

¹⁰⁷ LA. CODE CRIM. PROC. ANN. art. 930.8(B) (2017).

¹⁰⁸ LA. CODE CRIM. PROC. ANN. art. 930.2 (2017).

¹⁰⁹ LA. CODE CRIM. PROC. ANN. art. 928 (2017).

- 7) The results of DNA testing (performed pursuant to an application granted under Article 926.1 of the Louisiana Code of Criminal Procedure) prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which he or she was convicted.¹¹⁰

The seventh ground upon which post-conviction relief can be granted is further discussed in Section H(1)(d) of this chapter.

Finally, a claim for relief that has already been fully litigated in your appeal from your judgment of conviction and sentence will not be considered again in your post-conviction application.¹¹¹ The courts do not want to allow the re-litigation or reconsideration of issues that have already been fully litigated. That said, in the interests of justice, the court may find that re-litigation, in certain situations, is required.¹¹² This, however, should not give you any reason to wait for your post-conviction relief procedure to bring certain claims. Therefore, the courts will also deny your application for post-conviction relief if your application brings a claim which you could have raised, but inexcusably failed (didn't have a reason for not bringing earlier) to raise in the proceedings leading to your original conviction.¹¹³ This also applies for any claim you inexcusably failed to bring on your appeal.¹¹⁴

For any application for post-conviction relief that follows after a previous application (“successive applications”), such an application will be dismissed if it fails to raise a new or different claim.¹¹⁵ Also, a successive application will be dismissed if it raises a new or different claim that the prior application inexcusably omitted.¹¹⁶ So, when you first apply for post-conviction relief, you want to state *all* your known claims for which you intend to seek relief. Also, if you plan to submit a successive application, make sure that you have a new claim (for which you have an excuse for not having included in your first application) instead of attempting to merely reargue previous matters.

If the court does consider dismissing your application because you failed to raise the claim in (a) the proceedings leading to your original conviction and sentence, (b) your appeal from that conviction or sentence, or (c) a prior application for post-conviction relief, then the court will order you to state your reasons for such a failure.¹¹⁷ If the court then finds that your failure is excusable, it will consider the merits of your claim.¹¹⁸

b. Procedural Process for Post-Conviction Relief

This section contains further information on how to handle the procedures for your post-conviction challenges for relief. As stated earlier, you may apply for post-conviction relief in the parish in which you were convicted.¹¹⁹ Be sure to remember, however, that you can only do this after exhausting all your appeal rights related to the conviction at hand. In Louisiana, a “parish” is a territorial division similar to a county in other states.

¹¹⁰ LA. CODE CRIM. PROC. ANN. art. 930.3 (2017).

¹¹¹ LA. CODE CRIM. PROC. ANN. art. 930.4(A) (2017).

¹¹² LA. CODE CRIM. PROC. ANN. art. 930.4(A) (2017); *see* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) (“In *State ex rel. Ferrand v. Blackburn*, the petitioner applied for post-conviction relief alleging the evidence was insufficient to prove an essential element of the offense. The petitioner had failed to raise the issue on appeal. However, the state supreme court did not hesitate to review the claim (and in fact grant relief) since a conviction based on insufficiency of evidence is a violation of constitutionally guaranteed due process. Post-conviction relief has also been granted to persons challenging the validity of multiple offender proceedings based on prior convictions by five-member juries, regardless of whether the issue was raised in earlier proceedings.”).

¹¹³ LA. CODE CRIM. PROC. ANN. art. 930.4(B) (2017).

¹¹⁴ LA. CODE CRIM. PROC. ANN. art. 930.4(C) (2017).

¹¹⁵ LA. CODE CRIM. PROC. ANN. art. 930.4(D) (2017).

¹¹⁶ LA. CODE CRIM. PROC. ANN. art. 930.4(E) (2017).

¹¹⁷ LA. CODE CRIM. PROC. ANN. art. 930.4(F) (2017).

¹¹⁸ LA. CODE CRIM. PROC. ANN. art. 930.4(F) (2017).

¹¹⁹ LA. CODE CRIM. PROC. ANN. art. 925 (2017).

The application itself must be a written petition addressed to the proper district court for the parish in which you were convicted.¹²⁰ You must also attach a copy of the judgment of conviction and sentence.¹²¹ If you have requested but have been unable to receive such a copy, you may allege that a copy has been demanded and refused. You must state the following on the petition: name of person in custody, name of custodian, the grounds upon which relief is sought, statement of all prior applications for writs of habeas corpus or for post-conviction relief filed by or on behalf of yourself, and all errors known or discoverable by the exercise of due diligence.¹²²

Please be sure to use the uniform application for post-conviction relief approved by the Supreme Court of Louisiana because the court may require its use. This uniform application can be found in Appendix A of the Louisiana Supreme Court Rules. Make sure to be thorough. Any inexcusable failure, on your part, to comply with these provisions can potentially be a reason for dismissal of your application.¹²³ Finally and most importantly, if your application fails to bring a claim that if proven would entitle you to relief, then the court will dismiss your application.¹²⁴

A court may appoint you counsel for one of a few reasons. As a petitioner, if you are found to have shown a legitimate claim that can entitle you to relief and if you need counsel, the court may then appoint you counsel.¹²⁵ The court may also appoint counsel when it orders an evidentiary hearing, authorizes a deposition, or authorizes requests for admissions of fact or genuineness of a document.¹²⁶ The trial court has the discretion to appoint counsel based upon the statements contained in the petitioner's pleadings alone.¹²⁷

More importantly, if you allege a valid claim that can potentially entitle you to relief, the court will order the district attorney in the parish in which you were convicted to file any procedural objections he has to your claim. The court will order that this be done within a specified period of time—no longer than thirty days.¹²⁸ If there are no procedural objections, the district attorney will be asked to answer on the fundamental facts and issues with the case within thirty days.¹²⁹ However, if procedural objections are filed on time, then no answer on the merits of the claim can be ordered until the procedural objections have been considered and ruled upon.¹³⁰ After the state has been given its opportunity to answer, the court may order an evidentiary hearing. You are entitled to be present at the evidentiary hearing if one is ordered.¹³¹

An evidentiary hearing may take place if one of your claims, if true, would entitle you to relief. An evidentiary hearing is only required and ordered whenever there are contested questions of fact that cannot be properly resolved on the record.¹³² Your record in this case will usually consist of your application, the answer to your application, and any other related supporting documents.

If a hearing is required, you are permitted to be present. You can expressly waive your right to be present, unless the *only* evidence to be received is of the following: duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of fact.¹³³ If you are incarcerated, you can be “present” at such proceedings by teleconference, video link, or other visual remote technology.¹³⁴ Additionally, in such a case, you will be provided with copies of the evidence and an opportunity to respond in writing.¹³⁵

¹²⁰ LA. CODE CRIM. PROC. ANN. art. 926(A) (2017).

¹²¹ LA. CODE CRIM. PROC. ANN. art. 926(A) (2017).

¹²² LA. CODE CRIM. PROC. ANN. arts. 926(B)(1)–(5) (2017).

¹²³ LA. CODE CRIM. PROC. ANN. art. 926(E) (2017).

¹²⁴ LA. CODE CRIM. PROC. ANN. art. 928 (2017).

¹²⁵ LA. CODE CRIM. PROC. ANN. art. 930.7(A) (2017).

¹²⁶ LA. CODE CRIM. PROC. ANN. art. 930.7(B) (2017).

¹²⁷ State *ex rel.* Cherry v. Cormier, 281 So. 2d 99, 102 (La. 1973).

¹²⁸ LA. CODE CRIM. PROC. ANN. art. 927(A) (2017); *see also* State v. Felton, 522 So. 2d 626, 627 (La. App. 4 Cir. 1988).

¹²⁹ LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

¹³⁰ LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

¹³¹ *See* LA. CODE CRIM. PROC. ANN. art. 927(C) (2017); LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

¹³² LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

¹³³ LA. CODE CRIM. PROC. ANN. art. 930(A) (2017); LA. CODE CRIM. PROC. ANN. art. 930(B) (2017).

¹³⁴ LA. CODE CRIM. PROC. ANN. art. 930.9 (2017).

¹³⁵ LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

Still, the court may find that it can grant or deny relief through a summary disposition.¹³⁶ This means that the court can determine that the factual and legal issues can be decided from just your application, the answer, and supporting documents (for example, relevant transcripts, depositions, and other reliable documents you and your opposing party have submitted).¹³⁷ When there is no evidentiary hearing, the court may take oral depositions (out-of-court testimonies) under conditions specified by the court simply for good cause.¹³⁸ This might include taking a statement from you at the prison. The court may also authorize requests for admissions of fact (written requests for facts you and your opposing party agree upon).¹³⁹

If the court grants relief under your application for post-conviction relief, the process is not over, but you will have overcome the most difficult part of the process. Unless the court dismisses the charges against you and acquits you, the State may be permitted to retry you. If so, the court may order that you be held in custody pending a new trial if it appears that there are legally sufficient grounds upon which to re-prosecute you.¹⁴⁰ However, the court may also grant you bail and order that you be released during the new trial. If the court does find the grounds upon which to re-prosecute you, you will then be entitled to a new trial (in other words, as if you had never been convicted of the offense).¹⁴¹ If the State decides not to retry you, the charges will be dismissed, and you will be released.

Once the court makes a judgment granting or denying relief, a copy of the judgment along with reasons for the judgment will be given to you (the petitioner), the district attorney, and anybody the court appoints as a custodian (like a court officer or sheriff).¹⁴² There is no right of appeal from judgment denying post-conviction relief. However, if the statute or ordinance is declared unconstitutional, the state may appeal to the Supreme Court of Louisiana.¹⁴³

c. Writ of Habeas Corpus

Habeas corpus is a process that you can use to argue that the reasons for your imprisonment are not legal. If you do not have the option of appealing your conviction or sentence or you want to challenge your incarceration or the procedures used in convicting and sentencing you, you may turn to the writ of habeas corpus.¹⁴⁴ Be clear, however: habeas corpus is not the proper process for you if you are still able to file applications for post-conviction relief. An application for a writ of habeas corpus will be considered early (and improper) if you do not first exhaust all your appeal rights.¹⁴⁵ Challenging your imprisonment with the writ of habeas corpus is *not the same* as appealing your conviction or sentence. Louisiana state habeas corpus is discussed in Chapter 5 of this Supplement.

The federal courts also have jurisdiction to hear your complaint, by way of a writ of habeas corpus, if you claim that you are being held in violation of the United States Constitution or the laws or treaties of the United States.¹⁴⁶ As with a state habeas corpus claim, you must have exhausted all your available state remedies to be heard on a federal writ of habeas corpus.¹⁴⁷ For more detailed information on habeas corpus, refer to Chapter 13 of the main *JLM*.

¹³⁶ LA. CODE CRIM. PROC. ANN. art. 929 (2017).

¹³⁷ LA. CODE CRIM. PROC. ANN. art. 929(A) (2017).

¹³⁸ LA. CODE CRIM. PROC. ANN. art. 929(B) (2017).

¹³⁹ LA. CODE CRIM. PROC. ANN. art. 929(B) (2017).

¹⁴⁰ LA. CODE CRIM. PROC. ANN. art. 930.5 (2017).

¹⁴¹ LA. CODE CRIM. PROC. ANN. art. 930.5 (2017).

¹⁴² LA. CODE CRIM. PROC. ANN. art. 930.1 (2017).

¹⁴³ LA. CODE CRIM. PROC. ANN. art. 930.6 (2017).

¹⁴⁴ *State v. Lewis*, 350 So. 2d 1197, 1198 (La. 1977) (holding that since the defendant's conviction was affirmed and the defendant did not take any action on the judgment for 14 days, the defendant must bring any additional issues to the attention of the court by application for writ of habeas corpus).

¹⁴⁵ *See State v. Carter*, 463 So. 2d 785, 787 (La. App. 2 Cir. 1985).

¹⁴⁶ 28 U.S.C. § 2254 (2012).

¹⁴⁷ 28 U.S.C. § 2254 (2012).

d. DNA Testing

Prisoners in the state of Louisiana have the right to post-conviction DNA testing. “DNA testing” means any method of testing and comparing deoxyribonucleic acid that would be admissible under the Louisiana Code of Evidence.¹⁴⁸

If currently the date is BEFORE August 31, 2019, or if you have been sentenced to death prior to August 15, 2001, then your application for DNA testing will be filed under the provision of Louisiana Code of Criminal Procedure Article 926.1.¹⁴⁹

If, however, the current date IS or IS AFTER August 31, 2019, then you may request DNA testing under the rules for filing an application for post-conviction relief as provided in Louisiana Code of Criminal Procedure Article 930.4 or 930.8.¹⁵⁰ Articles 930.4 and 930.8 deal with the validity of your application based on the prior appeal procedures you have taken as the petitioner and the appropriate time limitations. Both sections of the code are discussed in Section H(1) and H(1)(a) of this chapter. Since both Articles 930.4 and 930.8 have been discussed in detail earlier in this chapter, this section will take a close look at Article 926.1 and its provisions. Lastly, an application for post-conviction DNA testing is brought in as part of your application for post-conviction relief. For more information on DNA testing, see Chapter 4 of the *Louisiana State Supplement* and Chapter 11 of the main *JLM*.

i. Article 926.1 Provisions (BEFORE August 31, 2019)

Under Article 926.1, your application must show the following:

- 1) A factual explanation that demonstrates why there may be an “articulable doubt” as to your guilt, based on clear evidence—whether or not introduced at trial—that DNA testing will resolve the doubt and show your innocence;
- 2) Factual circumstances showing that the timing of application is appropriate;
- 3) Identification of the particular evidence for which you want DNA testing done on; and
- 4) An affidavit stating factual innocence of the crime by the applicant.¹⁵¹

To demonstrate why there may be an “articulable doubt,” you must be able to demonstrate with a factual explanation that the doubt is clearly present. You must also be able to show with competent evidence that DNA testing can resolve this doubt. This is a very high standard. Therefore, the court will only allow DNA testing applications under *very* narrow circumstances. For example, courts have held that a claim of an “alternative and inconsistent” theory of defense will not be entertained. This is not considered a claim of actual innocence.¹⁵² In other words, you cannot use DNA testing to just present other possible theories and alternatives to your guilty conviction. DNA testing is not directed towards reweighing the evidence that was used to convict.¹⁵³ Further, the mere fact that DNA testing for a particular piece of evidence is available now, but not in the past, does not warrant you relief under Article 926.1.¹⁵⁴ There have been cases where the courts have found DNA testing not permissible because prior evidence in the case was found to be overwhelmingly clear of the defendant’s guilt. So, even a favorable DNA test may not be able to establish your innocence.¹⁵⁵

¹⁴⁸ LA. CODE CRIM. PROC. ANN. art. 924 (2017).

¹⁴⁹ LA. CODE CRIM. PROC. ANN. art. 926.1(A) (2017).

¹⁵⁰ LA. CODE CRIM. PROC. ANN. art. 926.1(A) (2017).

¹⁵¹ LA. CODE CRIM. PROC. ANN. art. 926.1(B) (2017).

¹⁵² See *State v. Conway*, 2001-2808, p. 1 (La. 4/12/02); 816 So. 2d 290, 291.

¹⁵³ See *State v. Robertson*, 42,247, p. 1 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 788.

¹⁵⁴ LA. CODE CRIM. PROC. ANN. art. 926.1(E) (2017).

¹⁵⁵ *State v. Robertson*, 42,247, p. 1 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 788 (holding that DNA testing was not permissible because evidence in the case was sufficient to support defendant’s conviction for rape and so results of DNA testing would not prove by clear and convincing evidence that defendant was factually innocent of the crime for which he was convicted. Victim in this case was able to see her attacker and later identify him in both photographic and physical lineups; matching fingerprints were also found at the scene).

In addition to showing this “articulable doubt”, you will also need to show that your application was made in a timely manner, what particular evidence you want DNA testing performed on, and lastly, an affidavit (sworn personal statement) stating your factual innocence of your crime.

The court will dismiss any application filed under Article 926.1, unless it finds *all* the following:

- 1) An articulable doubt based on competent evidence as to your guilt;
- 2) A reasonable likelihood that the requested DNA testing will resolve the doubt and establish your innocence as the petitioner;
- 3) That the application has been timely filed; and
- 4) That the evidence to be tested is available and in a condition that would permit DNA testing.¹⁵⁶

These requirements have been discussed above, but please take note that the court will dismiss your application unless it finds *all* the above-listed requirements. Satisfying a majority of the requirements will not be enough! Furthermore, Article 926.1 expressly states that relief will not be granted if it finds a substantial question as to the integrity of the evidence to be tested.¹⁵⁷ In other words, if the court finds that the evidence has been tampered, altered, or substituted substantially enough to affect its reliability—or even a strong possibility or question of such—then relief will not be granted to you under Article 926.1.

ii. *Article 926.1 Procedure*

After your application is filed and the court determines where the evidence will be tested, the court will serve a copy of your application to the district attorney and the law enforcement agency that has possession of the evidence you want tested.¹⁵⁸ This agency could be, but is not exclusively, the sheriff, the office of state police, a local police agency, or a crime laboratory.¹⁵⁹ A laboratory mutually agreed upon both by the district attorney and yourself will do the testing.¹⁶⁰ However, if you cannot agree with the district attorney on a testing site, the court will designate a laboratory to perform the tests. That laboratory must be accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic DNA analysis.¹⁶¹

The results of the DNA testing will then be filed by the laboratory with the court and served to you and the district attorney.¹⁶² No evidence that is relevant to your case will be destroyed until the case is finally resolved by the court.¹⁶³ No state official or agency will be held civilly or criminally liable if any evidence becomes unavailable or has deteriorated so much that testing cannot be performed. The only exception to this is in the case of willful or wanton misconduct or gross negligence.¹⁶⁴ It is also important for you to know that your DNA profile obtained under Article 926.1 will be sent by the district attorney to the state police to be included in the state DNA database.¹⁶⁵ However, you may seek removal of your DNA record.¹⁶⁶

e. Ineffective Assistance of Counsel

Even though Louisiana has the same standards for effective assistance of counsel as federal law, you should always raise your ineffective assistance of counsel claim as both a state claim and a federal

¹⁵⁶ LA. CODE CRIM. PROC. ANN. art. 926.1(C) (2017).

¹⁵⁷ LA. CODE CRIM. PROC. ANN. art. 926.1(D) (2017).

¹⁵⁸ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

¹⁵⁹ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

¹⁶⁰ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

¹⁶¹ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

¹⁶² LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

¹⁶³ LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

¹⁶⁴ LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

¹⁶⁵ LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

¹⁶⁶ LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

claim. Indeed, the Louisiana constitution gives you a right to effective assistance from a lawyer.¹⁶⁷ The Sixth and Fourteenth Amendments of the U.S. Constitution also give you a right to effective assistance from a lawyer.¹⁶⁸ Louisiana courts have held that your right to effective assistance of counsel under Louisiana law is the same as your right under federal law.¹⁶⁹ Chapter 12 of the main *JLM* explains this federal law in more detail.

It is important to always raise both state and federal claims because, if you do not, you may not be able to raise them in later proceedings. For example, if you do not present the claim as a federal constitutional violation at the same time when you make your claim that state right to effective counsel was violated, then you may not be able to present the claim in a later federal habeas corpus petition.¹⁷⁰

Other than the preference of Louisiana courts to hear claims of incompetent counsel in post-conviction proceedings, all the standards for effective assistance of counsel are the same as federal standards. A successful claim of ineffective assistance requires two things. First, your lawyer must have failed to follow professional standards while representing you. Second, there must be a “reasonable probability” that your lawyer’s poor representation negatively affected the outcome of your case.¹⁷¹ This standard is the same as the federal standard and is often referred to as the *Strickland* test.¹⁷² When considering ineffective assistance of counsel claims, this is the standard that courts often discuss.¹⁷³ The negative effect must so serious as to deprive you of a fair trial.¹⁷⁴ You must demonstrate that, but for your counsel’s deficiency or mistakes, the outcome of the trial would have been different.¹⁷⁵ Please look to Chapter 12 of the main *JLM* for a full discussion of the standards for ineffective assistance of counsel.

I. CONCLUSION

In the state of Louisiana, you have the right to appeal. In an appeal, you ask the appellate court to revise, change, set aside, or reverse a decision of your trial court. There are time limits on when you can appeal. Also, to have an issue reviewed by an appellate court, the issue usually must be made at trial. You can appeal issues that affected your substantial rights and that prejudiced you. You have to appeal to a Court of Appeal before you can try to appeal to the Louisiana Supreme Court. You can try to have your conviction set aside through post-conviction relief. You can apply for post-conviction relief after your appeal is done.

¹⁶⁷ LA. CONST. art. I, § 13 (“When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of . . . his right to the assistance of counsel and, if indigent, his right to court-appointed counsel . . . At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”). In addition to the Louisiana constitution, the Louisiana Code of Criminal Procedure also gives you the right to effective help from a lawyer. LA. CODE CRIM. PROC. ANN. art 511 (2017).

¹⁶⁸ The 6th Amendment of the Constitution gives you a federal right “to have the Assistance of Counsel.” U.S. CONST. amend. VI. The 14th Amendment requires all fifty states, including Louisiana, to make sure that you have a lawyer in a criminal trial, unless you do not want one. U.S. CONST. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963). Those two amendments also require that your lawyer is effective in representing you. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

¹⁶⁹ *State v. Morrison*, 45,620, p. 18 (La. App. 2 Cir. 11/24/10); 55 So. 3d 856, 867. So, although you have several sources for your right to effective help from a lawyer—including the Louisiana constitution, Louisiana statutes, and the federal Constitution—all of these rights mean the same thing.

¹⁷⁰ For more information on filing a federal habeas corpus claim, see Chapter 13 of the main *JLM*, “Federal Habeas Corpus.”

¹⁷¹ See *State v. Jenkins*, 2009-1551, pp. 4–5 (La. App. 4 Cir. 6/30/10); 45 So. 3d 173, 176; see also *State v. Sparrow*, 612 So. 2d 191, 199 (La. App. 4 Cir. 1992).

¹⁷² See *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695–696 (1984).

¹⁷³ See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) *writ denied*, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082; see also *State v. Jenkins*, 2009-1551, pp. 4–5 (La. App. 4 Cir. 6/30/10); 45 So. 3d 173, 176; *State v. Morrison*, 45,620, p. 18 (La. App. 2 Cir. 11/24/10); 55 So. 3d 856, 867.

¹⁷⁴ See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) *writ denied*, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082.

¹⁷⁵ See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) *writ denied*, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082.