Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **8th day of September, 2023,** are as follows:

BY Crichton, J.:

2022-KK-01827 STATE OF LOUISIANA VS. WILLIAM WAYNE LEE, JR. (Parish of St. Tammany)

REVERSED AND REMANDED. SEE OPINION.

Retired Judge Paul Bonin, appointed Justice ad hoc, sitting for Hughes, J., recused in case number 2022-KK-01827 only.

Weimer, C.J., dissents and assigns reasons.
Genovese, J., dissents for reasons assigned by Weimer, C.J. and Griffin, J.
Griffin, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-KK-01827

STATE OF LOUISIANA

VS.

WILLIAM WAYNE LEE, JR.

On Supervisory Writ to the 22nd Judicial District Court, Parish of St. Tammany

CRICHTON, J.[1]

We granted the writ application in this case to address an issue of constitutionality: whether Article 930.10 of the Code of Criminal Procedure, which governs post-conviction plea agreements, violates the state constitution's separation of powers provision, La. Const. art. II, § 2. More specifically, the question presented is whether Article 930.10 permits the judicial branch to exercise the governor's power under La. Const. art. IV, § 5(E) to pardon a final conviction. We hold that because Article 930.10 permits a court to overturn a final conviction without a finding of legal defect pursuant to La. C.Cr.P. art. 930.3, the article unconstitutionally allows the judicial branch to exercise the governor's exclusive pardon power, and, therefore violates the doctrine of separation of powers as found in La. Const. art. II, § 2.

BACKGROUND

On October 20, 2003, the state charged defendant William Wayne Lee, Jr. with one count of second degree murder, La. R.S. 14:30.1. Following a trial, on February 9, 2007, a unanimous jury found defendant guilty as charged. The trial court sentenced defendant to life imprisonment at hard labor without benefit of

[1] Retired Judge Paul Bonin, Justice *ad hoc*, sitting for Justice Jefferson Hughes, who is recused in this matter.

probation, parole, or suspension of sentence. The conviction and sentence were affirmed on appeal. *State v. Lee*, 2007-1807 (La. App. 1 Cir. 3/26/08), 978 So.2d 1257, *writ denied,* 2008-0861 (La. 11/10/08), 996 So.2d 1066.

On October 5, 2021, defendant and the District Attorney for the 22nd Judicial District filed a "Joint Motion to Amend Conviction and Sentence Pursuant to La. C.Cr.P. art. 930.10." In the motion, the parties stipulated to certain facts relating to the cause of the victim's death. They agreed that new evidence obtained in May 2020 would have bolstered defendant's case at trial by supporting the defense theory that the victim's fatal injuries were caused by her falling on her own accord. Based on this new evidence, the parties agreed that "a fair and just resolution" of the case would be to amend defendant's conviction from second degree murder, La. R.S. 14:30.1, to manslaughter, La. R.S. 14:31, and for the court to vacate the life without parole sentence and impose a sentence of 35 years imprisonment at hard labor.

The motion was heard in the district court on January 19, 2022. At the hearing, the assistant district attorney announced his office was "submitting on what's contained in the joint motion," and then the defendant's lawyer summarized the pleading. The district court granted the joint motion and, without finding any legal defect in the conviction pursuant to La. C.Cr.P. art. 930.3, vacated defendant's second degree murder conviction, La. R.S. 14:30.1, and the previously-imposed life without parole sentence. Thereafter, the court accepted defendant's guilty plea to manslaughter, La. R.S. 14:31, and imposed the agreed-upon 35-year sentence with credit for time served.

On March 9, 2022, the Attorney General filed a pleading entitled, "Motion and Incorporated Memorandum to Vacate Post-Conviction Plea Agreement as Unconstitutional." The Attorney General argued that Article 930.10 unconstitutionally permits courts to grant clemency to criminal defendants, a power that is expressly and exclusively granted to the governor. By signing the pleading,

the District Attorney indicated he did not oppose the filing of the motion. From this, we infer that the District Attorney acquiesced in the Attorney General's entry into the proceedings to allow the district court to consider the issue.

On June 15, 2022, after a hearing on the merits, the district court denied the Attorney General's motion and found that Article 930.10 does not violate Louisiana's Constitution. In its reasons, the court found that the statute does not interfere with the separation of powers and does not infringe upon the governor's right to issue clemency. The court explained that it did not view the procedure as "tossing the jury's finding out." Rather, the court found, it is intended to be used in cases like this, where there is new evidence that could possibly result in a new trial. Importantly, the judge stated, *"I'm not saying it would have*, but [the new evidence] *could* result in a new trial, so the District Attorney has to make the decision, do they want to face a possible new trial or do they want to proceed under Article 930.10[?]" (emphasis added). The district court further found that safeguards were built into Article 930.10 because in order for a defendant to obtain relief, there must be agreement with the district attorney and approval by the court.

The Attorney General sought review in the court of appeal, which, in an unpublished ruling, denied the writ application without comment. *State v. Lee*, 2022-1060 (La. App. 1 Cir. 11/21/22) (unpub'd), *available at* 2022 WL 17091941.[2] This Court thereafter granted the Attorney General's writ application. *State v. Lee*, 2022-1827 (La. 2/24/23), 355 So.3d 1095.

[2] The Attorney General timely filed a writ application in the court of appeal on July 14, 2022, however, that application was not considered as it did not include a notarized affidavit verifying the allegations of the application and certifying that a copy had been delivered to the respondent judge, to opposing counsel, and to the District Attorney. *State v. Lee*, 2022-0741 (La. App. 1 Cir. 9/26/22) (unpub'd). The Attorney General then filed a second writ application on September 27, 2022, which resulted in the writ denial cited above. Since the appellate court denied the second application, rather than refused to consider it, the Attorney General's application to this Court was properly filed.

DISCUSSION

The standard of review in determining the constitutionality of a statute, a question of law, is *de novo*. *See State v. Eberhardt*, 2013-2306, p. 4 (La. 7/1/14), 145 So.3d 377, 380. A *de novo* review means the court will decide the matter after considering the statute at issue, the relevant law, and the record without deference to the legal conclusions of the courts below. This court is the ultimate arbiter of the meaning of the laws of this state. *City of Bossier City v. Vernon*, 2012-0078, p. 3 (La. 10/16/12), 100 So.3d 301, 303.

Louisiana's Constitution divides the state's governmental powers among three distinct branches: legislative, executive, and judicial. La. Const. art. II, § 1. The separation of powers provision in the Constitution declares: "Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." La. Const. art. II, § 2. The Constitution then delineates the powers delegated to each branch. Specifically, "judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article." La. Const. art. V, § 1. District attorneys, members of the judicial branch, "have charge of every criminal prosecution by the state in his district," subject to the supervision of the attorney general. La. Const. art. V, § 26; La. C.Cr.P. art. 61. Relevant to this case, the Constitution provides that the governor, the chief executive officer of the state, has exclusive authority over matters of clemency pursuant to La. Const. art. IV, § 5.[3] The power to grant reprieve, and, upon favorable recommendation of the Board of Pardons, commute sentences, pardon those convicted of offenses against the state,

[3] The Louisiana Constitution does not use the word "clemency" to describe the power granted to the governor in La. Const. art. IV, § 5. Clemency is a term used to describe the different forms of relief that may be granted by the governor to those convicted of crimes. *Bosworth v. Whitley*, 627 So.2d 629, 632 (La. 1993).

and remit fines and forfeitures imposed for such offenses rests exclusively with the governor. La. Const. art. IV, § 5(E)(1). Courts have no authority to pardon a defendant or to commute his sentence. *See State ex rel. Esteen v. State*, 2016-0949, p. 3 (La. 3/13/18), 239 So.3d 266, 267 (Weimer, J., would grant rehearing) (citing *State ex rel. Francis v. Resweber*, 212 La. 143, 151, 31 So.2d 697, 699 (1947)).

A statute is presumed to be constitutional, and the burden of establishing unconstitutionality rests upon the party who attacks the statute. *State v. Guidry*, 247 La. 631, 634, 173 So.2d 192, 193 (1965). In this case, the Attorney General is challenging the statute, arguing that Article 930.10 unconstitutionally "authorizes district courts to effectively pardon an offender by nullifying a final sentence and/or conviction . . . as long as the prosecutor joins the defendant in moving for such relief."[4] In testing the constitutionality of a statute, the statute "shall be given a

[4] The Attorney General has standing in this case pursuant to the powers granted to him under the Constitution to intervene in criminal proceedings. Article IV, §8 of the Louisiana Constitution provides, "As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority . . . for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, [] to . . . intervene in any criminal action or proceeding[.]" In this case, the Attorney General seeks to protect the interest of the state by preventing the application of an unconstitutional statute. In most instances, the constitutionality of a statute is challenged by a party to the matter. *See e.g., Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552, pp. 3–4 (La. 10/10/21), 332 So.3d 606 (defendant filed cross-motion for summary judgment arguing, *inter alia*, the statute relied upon by plaintiff was an unconstitutional violation of separation of powers); *State v. Hair*, 2000-2694, p. 6 (La. 5/15/01), 784 So.2d 1269, 1273 (defendant filed a motion to quash claiming the statute defining the offense alleged was unconstitutionally vague); *State v. Amato*, 343 So.2d 698, 700 (La. 1977) (defendant filed motion to quash indictment on the ground that the statute defining the offense charged was unconstitutionally vague and overbroad). In a typical case, it is in the interest of one of the parties to have a governing statute declared unconstitutional. In this case, however, due to the unique, non-adversarial nature of the code article itself, there was, in effect, no dispute between the parties as to the constitutionality of the law. The parties would not have filed the joint motion pursuant to Article 930.10 if they were of the view that it was unconstitutional. Neither the District Attorney nor the defendant had a reason to challenge the law's constitutionality, making intervention by the Attorney General necessary to test the constitutionality of this unique statute. *Plaquemines Par. Comm'n Council v. Perez*, 379 So.2d 1373, 1377 (La. 1980) ("The 'cause' requirement refers to a showing that the district attorney is not adequately asserting some right or interest of the state."). If the Attorney General was barred from making this challenge, the validity of the code article would be beyond judicial review. Furthermore, in this case, the District Attorney acquiesced in the Attorney General's intervention. Though defendant challenged the Attorney General's standing to file the motion, the district court did not address this argument, and instead, proceeded to rule on the merits of the motion to vacate. Accordingly, we conclude that the district court implicitly denied defendant's challenge on standing and authorized the Attorney General to intervene despite ultimately denying the motion. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 12 (La. 7/1/08), 998 So.2d 16 ("Generally, when a trial court judgment is silent as to a claim or demand, it is presumed the relief sought was denied."). In a case in which the district attorney *opposes*

genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3.

With these principles in mind, we now consider whether Article 930.10 violates the doctrine of separation of powers by permitting the judicial branch to exercise the governor's exclusive power to grant pardons.[5] Code of Criminal Procedure Article 930.10 provides:

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

A pardon is "[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime." Pardon, Black's Law Dictionary (11th ed. 2019). In *State v. Lee,* 132 So. 219, 219–20 (La. 1931), this Court quoted *Ex parte*

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intervention, explicit authorization must be granted by the court before the Attorney General may intervene in a criminal action or proceeding. La. Const. art. IV, §8.

[5] Commutation is a separate and distinct power of the governor.

> The power to commute does not conflict with nor exclude the prerogative of pardon. Commutation is simply the change of punishment to which a person has been condemned, for a less rigorous one; and this change can only be granted by the executive authority, in which the pardoning power resides.

McDowell v. Couch, 6 La.Ann. 365, 366–67 (1851). Commutation is defined as "[t]he executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant." Commutation, Black's Law Dictionary (11th ed. 2019). In this case, the district court did not amend defendant's sentence, but instead vacated the conviction, accepted a guilty plea to a lesser offense, and then imposed a lesser sentence. Because the action in this case involved overturning the conviction, the proper comparison is not to a commutation, but instead to a pardon.

Garland, 71 U.S. 333, 380 (1866), in which the United States Supreme Court explained,

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. * * * If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

A governor need not assert a legal basis to grant a pardon. Rather, "[a] pardon is simply an act of grace from the governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense." *Verneco, Inc. v. Fid. & Cas. Co. of New York*, 219 So.2d 508, 511 (La. 1969). *See also Esteen*, 2016-0949, p. 5 (La. 1/30/18), 239 So.3d 233, 237 ("A pardon is a matter of grace from the state and a function of the executive branch of government[.]") (quotation omitted).

Similarly, Article 930.10 permits a court to set aside a final conviction, without stating a basis in the law. In order to effectuate a "post conviction plea agreement" for the purpose of "amending the petitioner's conviction," Article 930.10 permits courts, first, to overturn the defendant's final conviction, and then, accept their guilty plea and impose the agreed-to sentence. Article 930.10 allows a court to reverse a conviction merely because the defendant and the district attorney jointly requested the court to do so. The parties need not assert, nor is the court required to find, any legal defect requiring relief set forth in La. C.Cr.P. art. 930.3, which provides the exclusive grounds for post-conviction relief. Indeed, Article 930.10(B) expressly provides, "*Notwithstanding the provisions of 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." (emphasis added). The court's ruling on the joint motion

is not governed by what the law requires, but rather left to the prerogative of the judge. As such, the court's action pursuant to Article 930.10 is not an act of law, but instead, like a pardon, an act of "grace." *Esteen*, 2016-0949, p. 5, 239 So.3d at 237.

Moreover, Article 930.10 serves to upend the work of the jury, the prosecutor, and the judge in the trial of the case without identifying a legal defect in those proceedings. Contrary to the observation of the district court, a post-conviction plea agreement pursuant to Article 930.10 *is* "tossing the jury's finding out." The Constitution authorizes only the governor to take such an action. La. Const. art. II, §2; art. IV, §5. For these reasons, we hold that Article 930.10 permits courts to exercise the governor's exclusive power to pardon those convicted of crimes, a violation of the separation of powers provision of the constitution. La. Const. art. II, §2.

In her dissent, Justice Griffin agrees with the majority that a "post-conviction plea agreement" pursuant to Article 930.10 is equivalent to a pardon; however, she contends that Article 930.10 does not violate the separation of powers provision of our constitution because La. Const. art. IV, §5 "does not explicitly forbid the legislature from going beyond the pardon power of the governor." Such a claim is contradicted by this Court's long-held doctrine that clemency power is *exclusively* vested in the governor. *See e.g. Bosworth v. Whitley*, 627 So.2d 629, 632 (La. 1993) (referring to "the governor's exclusive authority over matters of clemency pursuant to Article IV, § 5(E) of the Constitution."); *State v. Lindsey*, 404 So.2d 466, 487 (La. 1981) (describing pardons as an "issue entrusted only to the governor and Board of Pardons."); *State v. LeCompte*, 406 So.2d 1300, 1307 (La. 1981) (noting this Court had previously held that the constitution provided "an exclusive grant to the governor of the power to commute sentences."); *State ex rel. Francis v. Resweber*, 212 La. 143, 150, 31 So.2d 697, 699 (1947) (explaining, "[t]he only authority to grant a pardon or to commute a sentence is vested in the Governor."); *State v. Lee*,

171 La. 744, 747–48, 132 So. 219, 220 (1931) ("[I]t is the accepted rule that the pardoning power is an executive function, which cannot be exercised or limited in its effect, [] by the legislature of a state."). The consistency of this Court's holdings over many decades speaks to the clarity of the relevant constitutional provisions.[6]

Turning back to this case, the District Attorney and defendant filed a joint motion in which they agreed that in light of the new facts discovered, "a fair and just resolution of this matter" would be to amend the final conviction and impose a 35-year sentence. In their joint motion, the parties did not assert that defendant was entitled to relief based on any law other than Article 930.10. Critically, the district court granted the motion and vacated the final conviction without relying on a ground for relief provided in La. C.Cr.P. art. 930.3.[7] Accordingly, we find that the action by the court, pursuant to Article 930.10, was an unconstitutional exercise of the governor's pardon power by the judiciary.

We note that nothing in this decision prevents district attorneys, in their broad discretion, from cooperating in a collateral challenge to a defendant's final

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[6] Due to the clear and unambiguous language of the constitutional provisions providing for separation of powers (La. Const. art. II, §2) and the governor's clemency power (La. Const. art. IV, §5), it is not necessary to inspect the transcripts of the 1973 constitutional convention in order to reveal the intent of the drafters, as Justice Griffin does in her dissent. Nevertheless, doing so demonstrates that while composing La. Const. art. IV, § 5, the delegates did not adopt the proposal upon which the dissent relies. The quotes by Delegate Gravel included in Justice Griffin's dissent are descriptions of this rejected proposal, not the language adopted by the convention. In contrast, when introducing the amendment that *was adopted* by the convention, the author (Delegate Jack) explained that he "did not like [the rejected proposal]. It's replacing the entire power of pardon, commutation, etc. in the governor even though it also stated that the legislature would have a concurrence right. Now, the inherent right of pardon and commutation is, as I said before, it's an executive matter." Records of La. Const. Convention of 1973: Convention Transcripts, Vol. VI, p. 591 (Aug, 4, 1973). Justice Griffin's dissent relies on Delegate Jack's second sentence in the above quote, taken out of context. However, in context, it is clear the intent of the adopted amendment was to maintain the executive branch's exclusive clemency power and forego any sharing of that power with the legislature. This intent is further evidenced by subsequent statements by other delegates emphasizing that clemency power is, as it has been historically, an executive function. *Id*. at 594, 595.

[7] As noted above, at the hearing on the Attorney General's motion to vacate, the district court judge stated "*I'm not saying it would have,* but [the new evidence] *could* result in a new trial." While the district court did not mention this in its reasons, we note that articles 926.2 and 930.3(8) in the Code of Criminal Procedure provide for post-conviction relief when a defendant can show factual innocence based on particularized types of "new, reliable, and noncumulative evidence."

conviction or sentence. Our holding is based on the unconstitutional nature of the district court's action pursuant to Article 930.10, not the joint effort by the parties.

The Code of Criminal Procedure affords defendants numerous grounds for post-conviction relief. Article 930.3 provides,

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

If a defendant seeks post-conviction relief pursuant to one of these grounds, a district attorney is not required by this decision to oppose the application. For example, if a defendant claims his conviction was obtained in violation of the constitution, pursuant to La. C.Cr.P. art. 930.3(1), because he was denied effective assistance of counsel or because the state withheld favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the district attorney may choose not to raise procedural objections even when they apply.[8] Furthermore, a district attorney has absolute discretion under La. Const. art. V, § 26 and La.

[8] La. C.Cr.P. art. 930.4, barring repetitive applications provides, "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." Similarly, La. C.Cr.P. art. 930.8(D), providing time limitations on post-conviction applications, provides, "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."

C.Cr.P. art. 61 to not oppose, or even to join, an application for post-conviction relief that raises a cognizable claim for relief. This broad authority is necessary because a prosecutor's responsibility is as "a minister of justice and not simply that of an advocate." Model Rules of Prof'l Conduct R. 3.8 cmt[1] (Am. Bar. Ass'n 1983); *see also State v. Tate,* 185 La. 1006, 1019, 171 So. 108, 112 (1936) (noting that the district attorney, as representative of the state, "seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes").

After a conviction is overturned on legal grounds, the district attorney likewise retains his or her traditional discretion over any surviving, valid indictment. The district attorney may re-try the defendant, offer a plea agreement, or dismiss the indictment altogether. *See State ex rel. Morgan v. State*, 2015-0100, p. 17 (La. 10/19/16), 217 So.3d 266, 277 (Crichton, J., additionally concurring) ("[T]he district attorney has an awesome amount of power in our justice system, which encompasses the 'entire charge and control of every criminal prosecution instituted or pending in his district,' including the determination of 'whom, when, and how he shall prosecute.'") (quoting La. C.Cr.P. art. 61).

In short, our decision does not mandate that collateral review of criminal convictions be unnecessarily adversarial, nor does it serve as a bar to cooperation between parties in post-conviction proceedings to achieve the ends of justice. Such a mandate would be inconsistent with Article 2 of the Code of Criminal Procedure, which instructs that the Code is "intended to provide for the just determination of criminal proceedings," and the provisions "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable delay." *See also State v. Shallerhorn*, 2022-1385, pp. 6–7 (La. 6/27/23), --- So.3d ---. A court's ruling on a collateral challenge to a final conviction may follow an adversarial

hearing, an unopposed presentation by the defendant, or a joint effort by both parties to convince the court that the law and evidence support vacating the conviction.

Our decision *does* mandate that courts overturn a final conviction only after finding a ground for relief enumerated in La. C.Cr.P. art. 930.3. Were a court to vacate a conviction without such a finding, as is permitted by Article 930.10, it would amount to an unconstitutional exercise of the governor's exclusive pardon power in violation of the doctrine of separation of powers as provided in La. Const. art. II, §2.

CONCLUSION

For the reasons explained above, the ruling of the district court denying the Attorney General's "Motion and Incorporated Memorandum to Vacate Post-Conviction Plea Agreement as Unconstitutional" is reversed. The district court's decision overturning defendant's second degree murder conviction pursuant to La. C.Cr.P. art. 930.10 is vacated. The conviction and original sentence are reinstated. Article 930.10 of the Code of Criminal Procedure is hereby declared unconstitutional. The matter is remanded to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

SUPREME COURT OF LOUISIANA

No. 2022-KK-01827

STATE OF LOUISIANA

VS.

WILLIAM WAYNE LEE, JR.

On Supervisory Writ to the Twenty-Second Judicial District Court, Parish of St. Tammany

WEIMER, C.J., dissenting.

The attorney general's writ application should be dismissed. Although this case presents an important constitutional issue, there are numerous procedural obstacles which prevent this court from considering the merits of that issue in this particular case. First and foremost, the attorney general is seeking review of a district court judgment that had already become final–the attorney general filed a motion on March 9, 2022, to vacate a post-conviction plea agreement which was accepted by the district court on January 19, 2022. No challenge to the January 19, 2022 ruling was filed within the 30-day window for seeking supervisory writs or applying for reconsideration. By ignoring this issue, the majority essentially revives a right to review that no longer exists.

Equally fatal to the attorney general's application is a lack of standing. This court cannot reach a constitutional issue unless the party seeking a declaration of unconstitutionality has standing to raise a constitutional challenge. The attorney general has a duty to uphold the laws as written, and has no interest or right to test the constitutionality of a statute.[1] Having no authority to attack the constitutionality of

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[1] See **State v. Bd. of Sup'rs, La. State Univ. & Agr. & Mech. Coll.**, 84 So.2d 597, 600 (1955), discussed fully *infra*.

a statute, the attorney general also has no standing. An attack on a presumed constitutional statute by the attorney general is inimical.

The numerous procedural issues, discussed more fully below,[2] make any discussion of the constitutionality irrelevant. However, because the majority addresses the issue, I feel compelled to respectfully dissent from the majority opinion on the constitutional issue. Article 930.10 provides a post conviction process that allows the state and defendant to negotiate a settlement regarding a conviction or sentence to prevent an injustice. Any such agreement must be approved by the district court following a hearing. Nothing in this procedure infringes on the governor's exclusive power of pardon or commutation.

The majority fails to share the salient facts of this case and decides this case in the abstract. However, the district attorney carefully and extensively studied the facts and evidence, which demonstrate the district attorney in this matter "seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes." **State v. Lee**, 22-01827 (La. 9/_/23), slip op. p. 11 (quoting **State v. Tate**, 185 La. 1006, 1019, 171 So. 108, 112 (1936)). The district attorney here appropriately discharged his responsibility as "a minister of justice and not simply [as] an advocate." **Lee**, 22-01827, slip op. at 11. I would find La. C.Cr.P. art. 930.10 is constitutional as applied in this case.

FACTS AND PROCEDURAL HISTORY

On September 11, 2003, Audra V. Bland and William Wayne Lee, Jr. (defendant), who were in a relationship, began consuming alcohol with friends at a

[2] The attorney general does not address, respond to, or brief, the procedural issues raised by the defense. Rather, it is the majority opinion which addresses those issues on behalf of the attorney general.

casino. At one point during the night, defendant became upset when Ms. Bland danced with someone else; however, their night of drinking continued. At daybreak the next morning, the group relocated to a large lake house, owned by defendant's mother and stepfather. At approximately 9:00 p.m. that evening, defendant screamed for help because Ms. Bland, who he thought was sleeping off a hangover, was not breathing. During the course of a 911 call, defendant stated that Ms. Bland had fallen down while attempting to get her overnight bag from the trunk of a car and may have hit her head on the concrete. Prior to the incident which prompted the 911 call, defendant reported that he had helped an unconscious Ms. Bland into the lake house, removed her clothes, and put her to bed.[3] Defendant further indicated that Ms. Bland woke up a few times during the day, but was incoherent and that he had tried to wake her at 12:30 p.m. by giving her a bath and again at 3:00 p.m. when he cleaned vomit from her.

According to the forensic pathologist/coroner, Ms. Bland sustained the following injuries:

> a fatal skull fracture and a large area of bleeding and bruising that resulted from an impact or several impacts to the left posterior of her head. She had a separate area of bruising, consistent with a blow, on her right temple. She also had bruising on her nose, bruising and swelling over her right eye, an abrasion or scratch mark on the inside of her right eye, an abrasion or scratch mark on her upper right lip, scratch marks on the right side of her neck, and bruising on the middle of her forehead.

State v. Lee, 07-1807, pp. 8-9 (La.App. 1 Cir. 3/26/08) (unpub'd opinion). The coroner opined that Ms. Bland died of blunt force trauma to the head and identified the manner of her death as a homicide.

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[3] Eyewitnesses reported that defendant on prior occasions had hit Ms. Bland over the head with a large flashlight, forced her to wear a choke collar, and thrown her against a wall.

On October 20, 2003, defendant was indicted by a grand jury for second-degree murder. He pled not guilty, consistently claiming that the injury to the back of Ms. Bland's head was the result of an accidental fall. Based on an independent review of the evidence,[4] defendant's medical expert opined that Ms. Bland died as a result of "an epidural hematoma due to a fracture of the left occipital bone of the skull due to a fall on the back of the head" rather than a struggle and a fatal strike to the back of the head. Defendant's expert explained that the abrasions and lesions on Ms. Bland's face was consistent with resuscitation efforts and that bruising to Ms. Bland's right lateral forehead were consistent with accidental injury occurring while she was being transported to the bedroom when they got to the house and later to the bathtub.

As noted by the majority, a jury found defendant guilty of second-degree murder, and the district court sentenced defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Defendant's conviction and sentence were affirmed on appeal. Defendant's application for a writ of certiorari was denied. **State v. Lee**, 08-0861 (La. 11/10/08), 996 So.2d 1066. His conviction and sentence became final, but subject to post-conviction review as provided by the legislature. See La. C.Cr.P. arts. 924 to 930.10 (Title XXXI-A titled "Post Conviction Relief").

Subsequently, defendant unsuccessfully pursued post conviction relief. See **State v. Lee**, 18-0779 (La. 2/25/19), 264 So.3d 444 (claiming in relevant part that the autopsy was flawed due to the lack of a thorough examination of Ms. Bland's brain and requesting an examination by a new medical expert to support an actual

[4] Defendant's medical expert did not perform an independent examination of Ms. Bland's brain and stated that examination of Ms. Bland's brain tissue would not illuminate whether physical violence or a fall caused the fatal injury. At trial, defendant's expert did not express any concerns about the lack of detailed brain tissue examination, nor did defendant make any contemporaneous objections regarding the coroner's qualifications.

innocence claim); **State v. Lee**, 12-1945 (La. 4/12/13), 111 So.3d 1020; **State v. Lee**, 10-2341 (La. 4/25/11), 62 So.3d 82. He was also denied federal *habeas corpus* relief. See, e.g., **Lee v. Cain**, Civil Action No. 13-2508 (E.D. La. 2014) (unpub'd), 2014 WL 4967128.

Despite his unsuccessful post conviction attempt to have the court authorize an examination of Ms. Bland's brain by a new expert, the district attorney and defendant on December 11, 2019, filed a motion ***jointly*** seeking the court's permission to allow defendant's new expert, Dr. Jonathan L. Arden, to inspect and test Ms. Bland's brain, which was granted by the district court.

Dr. Arden's examination occurred on February 3, 2020, and a "Supplemental Report of Consultation Re: William Lee" was issued on May 15, 2020. In his report, Dr. Arden indicated that his visual inspection of Ms. Bland's brain revealed that she suffered from "chronic multiple sclerosis."[5] Dr. Arden opined that "[t]he pattern of brain contusions that I have now observed directly confirms my previous conclusion that [Ms.] Bland sustained her blunt head trauma by falling and hitting the back of her

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[5] Dr. Arden reported:

> examination revealed that Ms. Bland's brain had plaques in the white matter of her cerebral hemispheres that were largely located in the areas surrounding the ventricles in the more rear portions of the brain. ... White matter plaques of this type are classically associated with multiple sclerosis. The microscopic appearance of these plaques was also consistent with the process of demyelination, which is the destruction of the coating layers on the nerve-cell fibers, which is characteristic of chronic multiple sclerosis.

According to Dr. Arden, "[t]he multiple sclerosis plaques were evident in the brain specimens ... when I examined them, which should have been recognized and diagnosed at autopsy."

Multiple sclerosis is "a chronic, typically progressive disease involving damage to the sheaths of nerve cells in the brain and spinal cord, whose symptoms may included numbness, impairment of speech and of muscular coordination, blurred vision, and severe fatigue." THE NEW OXFORD AMERICAN DICTIONARY 1122 (2001).

head against a firm, stationary surface, such as the ground."[6] According to Dr. Arden, Ms. Bland's "fatal head injuries were not caused by being struck by another person (which mechanism would not result in [the] contre-coup [corital brain] contusions [discovered])." Dr. Arden opined that defendant's account of the "circumstances and timing of the causation of the fatal injuries by an accidental fall of Ms. Bland when they returned home near dawn was highly consistent with the forensic medical evidence."

Dr. Arden's findings were presented to the district attorney for consideration prior to the filing of a petition for post conviction relief based on actual innocence. While negotiations were underway,[7] the legislature enacted La. C.Cr.P. art. 930.10 (quoted *infra*). See 2021 La. Acts 104, relative to claims of factual innocence.[8] Shortly thereafter, on October 5, 2021, the district attorney and counsel for defendant, together, filed a joint motion to amend defendant's conviction and sentence in connection with a plea agreement entered pursuant to La. C.Cr.P. art. 930.10 (quoted *infra)*. In the joint motion, the parties acknowledged that the state's case against defendant was based on the coroner's testimony and circumstantial evidence that the

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[6] On April 20, 2016 (prior to his examination of Ms. Bland's brain), Dr. Arden provided a "Report of Consultation" to counsel for defendant that included this opinion.

[7] At the hearing on a subsequently-filed joint motion to amend defendant's conviction and sentence, counsel for defendant advised the district court that he and the district attorney "had a series of meetings to discuss this case" before the joint motion to amend was filed. Similarly, in the unopposed motion to supplement the appeal record with Dr. Arden's report, defense counsel stated that there had been "months of negotiations between [the district attorney and defendant's] counsel based upon [the] newly discovered evidence" uncovered by Dr. Arden's examination.

In sum, the joint motion filed by a representative of the state and a representative of defendant was a considered determination evaluated over an extensive period of time based on facts and evidence and not a "knee-jerk" reaction to simply reduce a sentence.

[8] Senate Bill No. 186 of 2021, with contained La. C.Cr.P. art. 930.10, **unanimously passed in both the Senate and the House of Representatives**, was then designated as Act 104, was signed into law by the governor on June 4, 2021, and became effective on August 1, 2021. According to an examination of the legislative history, at no time prior to its effective date did the attorney general voice an objection to this legislation.

head injury was caused by defendant, while defendant argued that the "injury to the back of the head was caused by Ms. Bland falling backwards on her own accord and hitting her head on the driveway." The parties further stated in the motion:

> Dr. Arden's [February 3, 2020] examination [of Ms. Bland's brain] calls into question the cause of Ms. Bland's fall. In his report, Dr. Arden noted that the brain revealed plaques visible to the naked eye in the frontal lobes of Ms. Bland's brain, which are consistent with multiple sclerosis. The autopsy report and testimony of Dr. DeFatta did not include this information. Dr. Charles Preston, St. Tammany Parish Coroner, and Dr. DeFatta, were asked to comment on Dr. Arden's report. Neither disagreed with Dr. [Arden's] findings.
>
> In light of the objective evidence, the parties have agreed that the defense at trial could have used that evidence as support for the defense's theory that Ms. Bland fell on her own accord. The parties agree that, had these findings been made at autopsy, the defense theory at trial would have been bolstered. The defense submits that it would have engaged the services of a medical doctor with expertise in multiple sclerosis, and would have focused its investigation on discovering whether Ms. Bland exhibited various symptoms of multiple sclerosis including falling, dizziness, vertigo, numbness, walking difficulties and fatigue. It has since been discovered that there is evidence that Ms. Bland had other falls occurring close to the time of her death.[9]

Based on Dr. Arden's discovery, the parties agreed that "a fair and just resolution of this matter may be to amend [defendant's] conviction of second-degree murder (R.S. 14:30.1) ... to a conviction of manslaughter (R.S. 14:31)" and "for the Court to vacate the life-without-parole sentence and impose a sentence of thirty-five years at hard labor."[10]

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[9] At the hearing on the joint motion to amend, counsel for defendant advised the court that in a deposition in related civil litigation, Ms. Bland's husband stated that Ms. Bland "was prone to fall and prone to be dizzy."

[10] In the joint motion, the parties recognized the right of Ms. Bland's family to be heard in connection with the motion to amend and acknowledged that "some members of [her] family are not in agreement with the filing of this motion" and may wish to address the court at the required hearing on the joint motion to amend. See La. R.S. 46:1844(K) (governing the right of a member of the victim's family to be present and be heard at "[a]ll critical stages of the prosecution.").

During the January 19, 2022 hearing on the joint motion,[11] the district court conducted a **Boykin**[12] colloquy regarding the proposed plea agreement in accordance with La. C.Cr.P. art. 930.10(B)[13] during which defendant was advised that by his post-conviction guilty plea he was waiving his right to a trial. Subsequently, the district court found "there is a factual basis for the defendant's plea and that the plea is freely, intelligently, and voluntarily made." At the conclusion of the hearing, the district court accepted and approved defendant's plea of guilty to an amended charge of manslaughter. Accordingly, defendant's prior conviction and sentence were vacated. In accordance with the post-conviction plea agreement, defendant was resentenced to 35 years of imprisonment at hard labor with credit for time served and benefits.

On March 9, 2022, the attorney general filed a "Motion and Incorporated Memorandum to Vacate Post-conviction Plea Agreement as Unconstitutional." According to the attorney general, La. C.Cr.P. art. 930.10 "is an unconstitutional usurpation of the authority to grant an offender clemency, which is constitutionally granted exclusively to the executive branch." He further asserted that "**reduction of a final sentence is the equivalent of commutation, which is a power constitutionally reserved solely for [the] executive branch of state government**." The attorney general argued that the "pardoning power is an executive function,

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[11] The district court was informed that Ms. Bland's family, who were not present at the hearing, did not respond to the efforts of the district attorney's office to contact them by telephone or email regarding the hearing.

[12] **Boykin v. Alabama**, 395 U.S. 238 (1969).

[13] In pertinent part, La. C.Cr.P. art. 930.10(B) provides:

> 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.

which cannot be exercised or limited in its effect by the legislature" or the judiciary. Clemency is an exclusive power of the governor; by enacting Article 930.10, the legislature granted to the judiciary the authority to grant clemency. The attorney general characterized a resentencing conducted pursuant to a post-conviction plea agreement under Article 930.10 as a commutation of the sentence. Therefore, he argued that Article 930.10 violates the separation of powers. The attorney general prayed for the court to "(1) strike down La. C.Cr.P. Art. 930.10 as an unconstitutional infringement upon the power to grant clemency, which the Louisiana Constitution exclusively and absolutely confers upon the governor; and (2) vacate the January 19, 2022 post conviction plea agreement entered into pursuant to the unconstitutional La. C.Cr.P. Art. 930.10."

In his opposition to the attorney general's motion, defendant urged that the attorney general's motion to vacate should be denied because (1) "the attorney general lacks standing," (2) "the attorney general's motion is time-barred," and (3) "Article 930.10 is constitutional."

At the June 15, 2022 hearing on the motion to vacate, the attorney general argued that Article 930.10 violates the separation of powers since it "allows the courts and the judicial branch, which includes the District Attorney's Office, to usurp [the parole and pardon] power of the governor and release someone or throw out a conviction." The procedural issues related to standing and mootness raised in defendant's opposition were not addressed by the attorney general at the hearing.

Relative to defendant's standing challenge, defendant's counsel pointed out that "[t]here is no evidence that [the district attorney] made a request to [the attorney general to have the attorney general] parachute into this case and make the arguments [he's] making today." According to defense counsel, absent written request by the

district attorney, the attorney generally lacks standing to assert the unconstitutionality of Article 930.10 in this case. Concerning the timeliness of the attorney general's motion to vacate, counsel for defendant noted that review of a judgment/ruling must be sought within 30 days. Here, the attorney general's motion to vacate was filed more than 30 days after the district court's ruling/judgment on the joint motion to amend defendant's conviction and sentence and is, thus, untimely. Furthermore, because of the finality of that judgment, defense counsel urged that an adverse ruling on the constitutionality issue would not affect defendant. Despite these procedural hurdles, counsel for defendant also asked the district court to rule on the constitutional issue since the district attorneys are now reluctant to utilize Article 930.10 in resolving post-conviction relief matters.

Following argument by counsel, the district court upheld the constitutionality of La. C.Cr.P. art. 930.10 and denied the attorney general's motion to vacate its prior ruling that accepted and approved defendant's post-conviction plea agreement. The district court judge provided the following thorough oral reasons:

> To sort of reiterate that the bill in question was drafted by Louisiana District Attorney's Association, I guess with the help of Innocence Project of New Orleans. It was supported by the Louisiana Sheriff's Association as well as the District Attorney's Office for at least Jefferson Parish and others that I'm aware of.
>
> I think significantly, the Article 930.10, and that is the issue here, whether or not it's constitutional or unconstitutional. It was passed unanimously by both houses, and it was signed by the governor recently on June 4, 2021.
>
> Since this is a constitutional issue and something that was drafted and approved by the legislature, I believe that there is a presumption that it is constitutional, so the burden would be on the Attorney General's Office to prove that it's not constitutional.
>
> The Attorney General's Office argues that the statute violates [ ] separation of powers because it interferes with the governor's right of clemency, and I disagree.

> I find that the article does not interfere with [ ] separation of powers and does not infringe upon the governor's right to issue clemency.
>
> I view this more in comparison to the DNA cases where in this case there was at least allegedly some new evidence that was found that could, not necessarily would result in acquittal, but could have affected the jury's decision.
>
> So under the statute, the defense could go to the District Attorney and see if they would present the evidence to them, and then the District Attorney has a decision.
>
> They can either turn them down at that point as far as them asking for a new trial based on the evidence, or they could proceed under Article 930.10, and there are safeguards to this.
>
> **I don't see this as tossing the jury's finding out. I see this being used in a situation like this where there is possibly new evidence that could result in a new trial.** [Emphasis added.]
>
> I'm not saying it would have but could result in a new trial, so the District Attorney has to make the decision do they want to face a possible new trial or do they want to proceed under Article 930.10.
>
> And there are safeguards there in that the District Attorney not only has to agree to it, but then it has to get Court approval.
>
> So in this case, the District Attorney, at least at one point, was impressed enough with the possible new evidence that they proceeded under Article 930.10, and again, I just find that it does not violate the separation of powers and does not infringe upon the governor's right to issue clemency.
>
> That's my ruling, so I find that it's not unconstitutional.

The minutes reflect that the district court "ruled that the Post-Conviction Plea Agreement is not unconstitutional." Having ruled in favor of defendant on the issue of constitutionality, the district court's ruling was silent as to the standing and timeliness issues raised by defendant. Pursuant to the attorney general's request, the district court set the return date for 30 days from ruling.

The attorney general's writ application to the court of appeal was "NOT CONSIDERED" initially because it was missing "a notarized Affidavit verifying the

allegations of the application and certifying that a copy has been delivered" to the district court judge, to opposing counsel, and to the district attorney as required by court rules. See **State v. Lee**, 22-0741 (La.App. 1 Cir. 9/26/22) (unpub'd writ action), (citing Uniform Rules, Louisiana Courts of Appeal, Rule 4-5(A)). The attorney general was advised that supplementation of the writ application with the missing affidavit and/or an application for rehearing would not be considered and that "[a]ny future filing on this issue should include the entire contents of this application, the missing item noted above, and a copy of this ruling." ***Id***. The attorney general's refiled writ application was denied without reasons. **State v. Lee**, 22-1060 (La.App. 1 Cir. 11/21/22) (unpub'd writ action).

From the November 21, 2022 writ denial, the attorney general filed a writ application with this court, urging that the lower courts erred in failing to declare La. C.Cr.P. art. 930.10 unconstitutional. The attorney general's writ application was granted to allow this court to determine whether the legislature impermissibly intruded into the domain of the executive branch when it enacted La. C.Cr.P. art. 930.10. See **State v. Lee**, 22-1827 (La. 2/24/23), 355 So.3d 1095.

DISCUSSION

"Although this court generally possesses the power and authority to decide the constitutionality of [a law], it is required to decide a constitutional issue only 'if the procedural posture of the case and the relief sought by the appellant demand that [it] do so.'" **State v. Mercadel**, 03-3015, p. 7 (La. 5/25/04), 874 So.2d 829, 834 (quoting **Ring v. State, Dept. of Transp. and Development**, 02-1367, pp. 6-7 (La. 1/14/03), 835 So.2d 423, 428). "Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise a constitutional challenge."

Greater New Orleans Expressway Com'n v. Olivier, 04-2147, p. 4 (La. 1/19/05), 892 So.2d 570, 573 (citing **Mercadel**, 03-3015 at 7-8, 874 So.2d at 834). In this context, the requirement of standing is jurisdictional. To determine if the attorney general has standing in the instant matter, courts must resort "to general principles of constitutional law regarding legal standing to challenge the constitutionality of code articles and statutes." See **Mercadel**, 03-3015 at 7, 874 So.2d at 834.

"[C]ourts sit to administer justice in actual cases"; "they do not and will not act on feigned ones, even with consent of the parties." **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, 228 La. at 955, 84 So.2d at 599. "This principle ... in reality, is determinative of the matter of the jurisdiction of [the] courts, original and appellate." ***Id.***, 228 La. at 956, 84 So.2d at 599. The district courts have "original jurisdiction of all civil and criminal matters." See La. Const. art. V, § 16(A)(1). "Thus, in order for the court to become seized of jurisdiction in the first instance, there must be a dispute or controversy over some matter or right in which the opposing parties have an interest." **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, 228 La. at 956, 84 So.2d at 599. Generally, "the person bringing the challenge must have rights in controversy." **Mercadel**, 03-3015 at 8, 874 So.2d at 834 (citing **Ring**, 02-1367 at 7, 835 So.2d at 428). "More specifically, '[a] person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights,'" or he or she is "injuriously affected by the enforcement of a statute." **Mercadel**, 03-3015 at 8, 874 So.2d at 834 (quoting **Latour v. State**, 00-1176, p. 5 (La. 1/29/01), 778 So.2d 557, 560); **Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman**, 235 La. 332, 344, 103 So.2d 464, 468-69 (1958). "[A] party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical

situations." **Kinnett v. Kinnett**, 20-01134, 20-01143, 20-01156, p. 11 (La. 12/10/21), 332 So.3d 1149, 1157 (quoting **In re Melancon**, 05-1702, p. 8 (La. 7/10/06), 935 So.2d 661, 667, and **Greater New Orleans Expressway Com'n**, 04-2147 at 4, 892 So.2d at 574).

A. Standing

By challenging the constitutionality of a provision in the Louisiana Code of Criminal Procedure in connection with his motion to vacate, the attorney general has placed himself in a position that he does not normally occupy. Generally, the attorney general defends the constitutionality of laws. Furthermore, the attorney general fails to cite in his motion to vacate any support for his ability to challenge the constitutionality of La. C.Cr.P. art. 930.10,[14] nor does the record indicate that the attorney general responded to or provided any such support in response to defendant's opposition in which defendant challenged the attorney general's "standing to enter into this case."

"The powers of government of the state are divided into three separate branches: legislative, executive, and judicial." La. Const. art. II, § 1. The concept of separation of powers is provided for in La. Const. art. II, § 2 ("Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."). The legislative branch enacts the law. See La. Const. art. III, § 1, *et seq*. The executive branch, which includes the Department of Justice that is headed by the attorney

[14] Nowhere in his motion and memorandum at the district court level or in his writ application or brief to this court does the attorney general allege facts or law to establish his standing to file a motion to vacate the district court's ruling on the joint motion to amend in this post-conviction proceeding or to attack the constitutionality of this codal provision. Despite the lack of any arguments by the attorney general in this regard, the majority opinion attempts to supply reasons. See **Lee**, 22-01827, slip op. p. 5 n.4. However, that attempt by the majority is unavailing.

general, enforces the law. See La. Const. art. IV, § 1, *et seq*. The judicial branch interprets and construes the law. See La. Const. art. V, § 1, *et seq*. The judicial branch "has the right[,] and it is its duty[,] to determine whether or not the Legislative or the Executive Departments' actions have transcended and exceeded the constitutional authority vested in them"; "each branch operates as a check or balance against the others so that there will not be a usurpation of power or a consolidation of all of the powers in one department." **Graham v. Jones**, 198 La. 507, 608, 3 So.2d 761, 794 (1941).

"The requirement of standing serves to facilitate deference to the legislature in matters within the legislature's purview." **Greater New Orleans Expressway Com'n**, 04-2147 at 4, 892 So.2d at 573. "Because legislators owe the same duty to obey and uphold the constitution as do judges,[15] legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation." ***Id.*** (citing **Bd. of Supervisors, La. State Univ. & Agric. & Mechanical College**, 228 La. at 958-59, 84 So.2d at 600). Stated differently, the legislature is presumed to have acted

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[15] "[C]ourts [are prohibited] from *sua sponte* striking down constitutional and statutory law." **State v. Hodge**, 19-0568, 19-0569, p. 4 (La. 11/19/19), 286 So.3d 1023, 1026. "[T]he prohibition against a court raising a constitutional challenge *sua sponte* is rooted in the fact that 'judges were charged by their judicial oaths to enforce' the laws as written." ***Id.***, 19-0568 at 5, 286 So.3d at 1026-27 (quoting **State v. Bazile**, 11-2201, p. 5 (La. 1/24/12), 85 So.3d 1, 4). In **Greater New Orleans Expressway Com'n**, 04-2147, pp. 3-4 (La. 1/19/05), 892 So.2d 570, 573-74, this court found that the defendants, who were judges, did not have standing to challenge the constitutionality of a statute in a mandamus proceeding seeking to compel compliance with a statute, explaining:

> Although it is uniquely the province of judges to interpret the law, it is essential that they constrain themselves to do so only when an appropriate case is presented to them for adjudication. To condone defendants' refusal to comply with a presumptively constitutional legislative act, when no litigant had challenged the act's validity, would tend to hasten the "inextricable confusion" and "collision in the administration of public affairs as to materially impede the proper and necessary operations of government[.]"

Greater New Orleans Expressway Com'n, 04-2147 at 9, 892 So.2d at 576 (citing **State ex rel. New Orleans Canal & Banking Co. v. Heard**, 18 So. 746 (La. 1895), which involved a mandamus action against certain state executive officers to compel the performance of ministerial duties).

"within its constitutional authority in enacting legislation." **City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund**, 05-2548, p. 12 (La. 10/1/07), 986 So.2d 1, 12. Accordingly, "[a]ll legislative acts are presumed constitutional, until declared otherwise in proceedings brought contradictorily between interested persons.'" **Greater New Orleans Expressway Com'n**, 04-2147 at 4 , 892 So.2d at 573 (quoting **Bd. of Sup'rs, La. State Univ. & Agr. & Mech. Coll.**, 228 La. at 959, 84 So.2d at 600).

The district attorney and attorney general both have power relative to a criminal prosecution. Concerning a district attorney's powers and duties, La. C.Cr.P. art. 61 provides:

> Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.

Relative to the authority of the attorney general, La. C.Cr.P. art. 62 provides:

> A. The attorney general shall exercise supervision over all district attorneys in the state.
>
> B. The attorney general has authority to institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state.
>
> C. In any criminal action or proceeding involving a homicidal death, if deemed necessary for the assertion or protection of the rights and interests of the state, and in accordance with the provisions of Article IV, Section 8 of the Constitution of Louisiana, the attorney general may, with the consent of the district attorney, investigate, prosecute or intervene in the action or proceeding.

The federal court's decision in **White Hat v. Landry**, 475 F.Supp.3d 532, 548 (M.D. La. 2020),[16] which can be regarded as persuasive authority in this case, recognizes

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[16] Although it is the responsibility of Louisiana state courts to interpret Louisiana law, "the holdings of Federal courts [on state law issues] are persuasive and are entitled to much respect." **Hinchee v. Long Bell Petroleum Co.**, 235 La. 185, 193, 103 So.2d 84, 87 (1958); see **Shell Oil Co. v. Secretary, Revenue & Taxation**, 96-0929, pp. 8-9 (La. 11/25/96), 683 So.2d 1204, 1209-10.

that the attorney general's "authority to prosecute criminal cases is limited by the terms of [La. Const. art. IV, § 8 (1974)]." The broad powers previously vested in the attorney general by the Louisiana Constitution of 1921,[17] were restricted, with voter approval, by the adoption of the Louisiana Constitution of 1974. See La. Const. art. IV, § 8 (1974), which provides:

> There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.
>
> As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.
>
> The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

This constitutional provision authorizes action by the attorney general in certain circumstances and in a prescribed manner. See **State v. Neyrey**, 341 So.2d 319, 322 (La. 1976) ("Besides the change in terminology vesting the Attorney General with the authority to institute criminal prosecutions, it is also clear from the proceedings ***that the intent of the Constitutional Convention delegates was definitely to restrict the Attorney General's power to institute criminal proceedings***." (emphasis added)).

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[17] See La. Const. art. VII, § 56 (1921), which provided:

> The Attorney General and the assistants ... or one of them, shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. They shall exercise supervision over the several district attorneys throughout the State, and perform all other duties imposed by law.

Louisiana's system of government is replete with checks and balances, and the provisions of La. Const. art. IV, § 8, serve as a check and balance on the powers of the attorney general relative to the powers of a district attorney.

As recognized by the **White Hat** court and this court in **Neyrey**, the attorney general's broad codal authority "to institute and prosecute, or to intervene in any proceeding"[18] is limited by the constitution.[19] See ***id.***, 475 F.Supp.3d at 549. An analysis of the attorney general's standing begins with a consideration of whether the instant action was "necessary for the assertion or protection of any right or interest of the state." See La. Const. art. IV, § 8.

As previously indicated, the issue of the attorney general's right or interest in instituting litigation to test the constitutionally of a law in the context of an action for declaratory judgment was addressed by this court in **Bd. of Sup'rs, La. State**

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[18] See La. C.Cr.P. art. 62(B), quoted *supra*.

[19] As the **White Hat** court stated:

> [A]lthough the attorney general of Louisiana is responsible for enforcement of the state's laws,
>
> > [u]nlike district attorneys, [the attorney general of Louisiana] does not have original jurisdiction to prosecute criminal cases. He may assist in a criminal prosecution "upon written request of a district attorney." La. Const. Art. 4, § 8. Alternatively, he may institute, prosecute or intervene in a criminal case "for cause, when authorized by the court" having original jurisdiction. ***Id.*** Consequently, any involvement the Attorney General might have in prosecuting cases under the statute is indirect and remote.

Id., 475 F.Supp.3d at 549; see **Entertainment Software Ass'n v. Foti**, 451 F.Supp.2d 823, 828 (M.D. La. 2006).

University & Agr. & Mechanical College,[20] which was written when the powers of the attorney general were governed by La. Const. art. VII, § 56 (1921):[21]

> In the matter at hand, it is perfectly plain that **neither the Attorney General**[22] nor the Commissioner of Agriculture and Immigration[23] **have any interest or right to have a State statute declared constitutional**. Since all Acts of the Legislature are constitutional until declared otherwise in proceedings brought contradictorily between interested persons, it is evident that the object sought in the petition of these officers, **whose duty it is to uphold the laws as written**, is moot and they are without right or interest in instituting litigation to test the constitutionality of Act 230 of 1954, or any other statute. Such a suit carries an affirmative pregnant and invites an attack upon the validity of the statute.

Id., 228 La. at 958-59, 84 So.2d at 600 (emphasis added).[24] As stated by the **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** court, the attorney

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[20] The 1955 **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** case remains good law, as it has not been called into question and has recently been cited and relied on by this court in resolving standing issues in **Kinnett**, 20-01134, 20-01143, 20-01156, at 10-11, 332 So.3d at 1156-57, and **Hodge**, 19-0568 at 4-5, 286 So.3d at 1026-27.

[21] As indicated, the power and authority of the attorney general was limited vis-a-vis the power and authority of the district attorney when comparing the 1921 and 1974 Constitutions.

[22] "Under Section 56 of Article 7 of the Constitution, the Attorney General is given power to institute proceedings for and on behalf of the State for the assertion or protection of the rights of the State. This suit, obviously, is not concordant with that purpose." **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, 228 La. at 958 n.6, 84 So.2d at 600 n.6.

[23] "The Commissioner of Agriculture and Immigration, whose duties and powers are prescribed by the Legislature, R.S. 3:1 to 3:12, under constitutional mandate, Section 13 of Article 6 of the Constitution, is an administrative officer and, insofar as Act 230 of 1954 is concerned, is charged merely with the duty of collecting the fees or assessments which are to be pledged as security for the payment of the bonds to be issued under that statute. Other than this, the statute has no effect whatever on the duties imposed on him by law." **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, 228 La. at 958 n.7, 84 So.2d at 600 n.7.

[24] The court's finding in **Bd. of Sup'rs, La. State University & Agr. & Mechancial College** is consistent with the following pronouncement in **Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman**, 235 La. 332, 344, 103 So.2d 464, 468-69 (1958):

> As a general rule, a public officer or body is without interest or right to question the constitutionality of a statute which he or it is entrusted to administer. See **Dore v. Tugwell**, 228 La. 807, 84 So.2d 199 [(1955)], and the many authorities cited therein. This doctrine is founded, among other reasons, on the basic tenet that, since all legislative acts are entitled to great respect and are presumptively constitutional, it is inimical to public policy to permit a party who is not injuriously affected by the enforcement of a statute to assail its validity.

general has a duty to "uphold the laws [which are presumed to be constitutional] as written."[25] ***Id.*** at 959, at 600. Like its predecessor,[26] La. Const. art. IV, § 8 (1974)[27] authorizes the attorney general to institute proceedings "for the assertion or protection of any right or interest of the state." After considering the attorney general's constitutional authority to institute proceedings under the 1921 Constitution, the **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** court found that the institution of a suit by the attorney general for the purpose of raising the constitutionality of a legislative enactment or law "obviously, is not concordant" with "the assertion or protection of the rights of the state." See ***Id.***, 228 La. at 958 n.6, 84 So.2d at 600 n.6.[28] Indeed, the presumption of constitutionality instructs that it is not in "the interest of the state" to have a law declared unconstitutional. Although the attorney general's constitutional challenge was incidental to his motion to vacate, rather than simply an action for declaratory judgment, his proceeding first and foremost seeks to "strike down La. C.Cr.P. art. 930.10 as an unconstitutional infringement upon the power to grant clemency." As his prayer for relief indicates, the validity of his motion to vacate depends on whether the district court declares the codal provision to be constitutional or not.

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[25] Based on this duty, the attorney general must "be served with a copy of the proceeding and be entitled to be heard" in a civil proceeding when a law "is alleged to be unconstitutional." **State in Interest of A.N.**, 18-01571, pp. 5-6 (La. 10/22/19), 286 So.3d 969, 973 (quoting La. C.C.P. art. 1880).

[26] See La. Const. art. VII, § 56 (1921) (quoted *supra*).

[27] In pertinent part, La. Const. art. IV, § 8 (1974) provides: "**As necessary for the assertion or protection of any right or interest of the state**, the attorney general shall have authority ...." (Emphasis added.)

[28] See **State v. Lee**, 22-01827, slip op. at 5 n.4, in which the majority opinion attempts to justify the attorney general's standing to "protect the interest of the state." This court has already decided that very issue adverse to the majority's opinion. As indicated, the majority opinion does not mention, much less distinguish, the **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** case which has remained good law for decades.

Based on the analysis in **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, this court should find that the attorney general's constitutional challenge in the instant proceeding is not consistent with "the assertion or protection of any right or interest of the state." The attorney general is without a right or interest in instituting litigation to test the constitutionality of a legislative act or law. ***Id.***, 228 La. at 958-59, 84 So.2d at 600-01. ***Id***. Moreover, the attorney general does not have rights in the controversy, if any so exist, under the facts of this case,[29] as he has neither alleged nor shown in the record before this court that La. C.Cr.P. art. 930.10 seriously affects **his** rights or that he **personally** is "injuriously affected by the enforcement of [La. C.Cr.P. art. 930.10]." See **Mercadel**, 03-3015 at 8, 874 So.2d at 834; **Louisiana Motor Vehicle Comm'n**, 235 La. at 344, 103 So.2d at 469.[30] An attack of a law by the attorney general that does not impact the attorney general directly has long been held to be impermissible. This court has said such an attack on a presumed constitutional state law is "inimical," which is defined as "tending to obstruct or harm."[31, 32] See **Louisiana Motor Vehicle Comm'n**, 235 La. at 344, 103 So.2d at 469.

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[29] Whether a justiciable controversy exists is discussed *infra*.

[30] In **Louisiana Motor Vehicle Commission**, 235 La. at 344, 103 So.2d at 469, this court found that the Louisiana Motor Vehicle Commission, a public board charged with administering and enforcing the Motor Vehicle Commission Law, La. R.S. 32:1251-1260, was "not injuriously affected by the enforcement of [one section of] a statute to assail its validity."

[31] THE NEW OXFORD AMERICAN DICTIONARY at 873.

[32] In effect, the attorney general's constitutional argument would limit the authority of the legislature to legislate, limit the discretion of the district attorney locally to address criminal matters, eliminate the judiciary's authority to decide cases, and concentrate authority in the governor, who is not a party to the litigation. If the governor's authority is undermined, it is the governor who should litigate this issue, not the attorney general. Thus, the majority's rationale that *only* the attorney general can bring an action is inaccurate, as it is the governor's authority that is at issue and, thus, the governor has standing.

Other provisions in La. Const. art. IV, § 8 lend further support for a finding that the attorney general lacks standing to "enter this case." Although the attorney general has authority "to institute, prosecute, or intervene in any civil action or proceeding," the instant proceeding for post conviction relief is clearly not a "civil action or proceeding." La. Const. art. IV, § 8(1). "[P]ost conviction relief, which is procedural in nature, and speaks to matters of remedy, is not criminal litigation *per se*; rather, post conviction relief proceedings, which are designed to allow petitioners to challenge the legality of their confinement, are hybrid, unique, and have both criminal and civil legal characteristics." **State v. Harris**, 18-1012, pp. 10-11 (La. 7/9/20), 340 So.3d 845, 853. Nonetheless, the law on post conviction relief is placed in Title XXXI-A of the Louisiana Code of Criminal Procedure,[33] and defendant's confinement resulted from a criminal proceeding against him.[34] The attorney general's authority to file the motion to vacate the prior district court ruling is clearly not derived from La. Const. art. IV, § 8(1) (quoted *supra*).

For the attorney general "to advise and assist in the prosecution of any criminal case," he or she must have received "written request of a district attorney." See La. Const. art. IV, § 8(2) (quoted *supra*). Here, there is no proof in the record that the district attorney sent a written request to the attorney general "to advise and assist" in this post-conviction relief proceeding.[35] In the introductory paragraph of the

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[33] A post-conviction *criminal* proceeding is established by and defined in the Code of Criminal Procedure. **State in Interest of A.N.**, 18-01571 at 6, 286 So.3d at 973-74; see La. C.Cr.P. arts. 924 to 930.10.

[34] The post conviction relief petition is "a *collateral* action to test the detention of a criminal defendant *after* his sentence and conviction have become final." **Harris**, 18-1012 at 11, 340 So.3d at 853.

[35] In addressing the need for notice to the attorney general in a criminal matter, this court in **State in Interest of A.N.**, 18-01571 at 6-7, 286 So.3d at 974 stated:

> In a criminal matter ... the State is always a party to the proceeding through its district attorneys. See C.Cr.P. art. 61 ("Subject to the supervision of the attorney general, as

attorney general's motion to vacate, the attorney general indicated that "[t]he District Attorney does not object to the Attorney General's motion." Additionally, the district attorney signed after counsel for the attorney general to indicate that he had "NO OPPOSITION." The noted benign lack of an opposition by the district attorney is insufficient to satisfy the affirmative constitutional requirement for a "written request" by a district attorney for the attorney general "to advise and assist" in this matter prior to the attorney general's participation. Otherwise, an attorney general could simply insert himself or herself into matters without the constitutionally required prior written request to the attorney general by the district attorney. Expressing a lack of opposition is far removed from a constitutionally-mandated, written request to advise and assist in the matter. For these reasons, I disagree with the majority's finding that the district attorney's "acquiesce[nce] in the Attorney General's entry into the proceeding" can be "infer[red]." **Lee**, 22-01827, slip op. at 3. An equally reasonable inference is that the district attorney who brought the action initially, simply capitulated rather than acquiesced. Alternatively, the district attorney extended a professional courtesy to the attorney general by filing no opposition. He

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> provided in C.Cr.P. art. 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute."); C.Cr.P. art. 927 ("If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections he may have, or an answer on the merits if there are no procedural objections, within a specified period not in excess of thirty days."). Any concern . . . that the Attorney General's interest should be represented in criminal court proceedings related to the constitutionality of a statute is thus quelled by . . . understanding that the State–through its acting district attorney–is on notice of any constitutional argument made in the district court, and the State's interests are thus represented in all criminal matters. **State v. Hatton**, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 721 (recognizing the purpose of procedural requirements for challenging the constitutionality of a statute is "to give the parties an opportunity to brief and argue the constitutional grounds and to prepare an adequate record for review."). Furthermore, nothing prohibits the Attorney General from exercising his statutory authority to participate in such proceedings if he believes the circumstances warrant his intervention. C.Cr.P. art. 62(B). This argument is without merit. [Footnote omitted; emphasis omitted.]

merely stated he had "no opposition" to the attorney general inserting himself in the limitation without a "written request" from the district attorney to "advise and assist." Clearly, the constitution requires more. The district attorney must make a request in writing. An "inference," with no factual support, is a poor substitute for the constitutional requirement that the district attorney request in writing the attorney general enroll "to advise and assist" in the "prosecution of a criminal case." The prosecution of the case was concluded and already final when the attorney general invervened. Further, there is no evidence in the record the district court held a hearing to ascertain the propriety of the district attorney injecting himself into this litigation.[36]

Even more on point is La. Const. art. IV, § 8(3), which authorizes the attorney general "for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action." This provision requires as a prerequisite to the attorney general's participation in a local criminal action or proceeding the filing of a request by the attorney general seeking the court's permission to participate in the underlying proceeding followed by a "cause" determination by the district court after a hearing. The majority bypasses this requirement, concluding that "the Attorney General seeks to protect the interest of the state by preventing the application of an unconstitutional [code article]" and that "intervention by the Attorney General was necessary to test the constitutionality of this unique [code article]" as "[n]either the

[36] Having ruled against the attorney general on the constitutional issue, it was unnecessary for the district court to rule on the propriety of the attorney general entering the suit. Again, the attorney general offers no argument or rational to justify why he is legally authorized to intervene in this litigation or that the intervention was timely.

District Attorney nor the defendant had a reason to challenge the law's constitutionality."[37] **Lee**, 22-01827, slip op. at 5 n. 4. Once again, **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** long ago held that the attorney general simply cannot protect the interest of the state by attacking the constitutionality of a law he swore to support.

"The 'cause' requirement refers to a showing that the district attorney is not adequately asserting some right or interest of the state." **Plaquemines Parish Commission Council v. Perez**, 379 So. 2d 1373, 1377 (La. 1980) (citing Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La.L.Rev. 765, 835 (1977)). The record currently before this court is devoid of evidence that the attorney general sought any such authorization from the court or that he was, in fact, authorized by the court to participate in the instant proceeding. The simple fact that the district attorney did not oppose the attorney general's filing of a motion to vacate does not dispense with the constitutional requirement of court authorization. Accordingly, I disagree with the majority's finding that explicit authorization by the court is only required under La. Const. art. IV, § 8(3) when "the district attorney *opposes* intervention." **Lee**, 22-01827, slip op. at 5 n.4.[38]

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[37] As indicated, there is no "necessity" for the attorney general to intervene to "test the constitutionality" of the code article. If a challenge is to be made, it should be made by the governor. Instead, the intervention by the attorney general is unauthorized and inimical. See **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, which case is not addressed by the attorney general or the majority.

[38] Any fear that this procedure might serve as a work-around of **State v. Reddick**, 21-01893 (10/21/22), 351 So.3d 273, is misplaced. Allowing the attorney general to act here, in an effort to ostensibly preserve gubernatorial authority, affords the attorney general authority denied even when the attorney general's authority was significantly more robust under the 1921 Constitution. This court in **Bd. of Sup'rs, La. State University & Agr. & Mechanical College** limited the attorney general's authority to attack the constitutionality of laws. Twenty years later the delegates who wrote the 1974 Constitution did not see fit to afford the attorney general the authority to attack the constitutionality of legislative enactments, which are presumed constitutional, and chose not to modify the law to change the result in **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**. This court should continue to honor the wisdom of the past as reflected in **Bd. of Sup'rs, La. State University & Agr. & Mechanical College**, which has been cited recently as having

B. Timeliness of the attorney general's filing in the district court

Further support for upholding the district court's ruling on the joint motion lies in the fact that the justiciable controversy presented in the attorney general's motion to vacate, if any ever existed, was not asserted timely by the attorney general.

In his motion to vacate filed on March 9, 2022, the attorney general challenged the district court's January 19, 2022 ruling on the joint motion to amend defendant's conviction and sentence. Clearly, the attorney general's challenge was made outside of the 30-day window[39] for filing a writ application with the court of appeal[40] or applying for reconsideration by the district court[41] relative to the district court's ruling on the joint motion to amend.[42] In summary, the attorney general failed to meet the deadline for challenging the January 19, 2022 ruling in either the district court or the

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continued viability by members of the current court.

[39] The motion to vacate was filed by the attorney general 49 days after the district court's ruling and 19 days after that ruling became final.

[40] See Uniform Rules, Louisiana Courts of Appeal, Rule 4-3, which provides:

> The judge who has been given notice of intention as provided by Rule 4-2 shall immediately set a reasonable return date **within which the application shall be filed in the appellate court**. The return date in civil cases shall not exceed 30 days from the date of notice, as provided in La. C.C.P. art. 1914. In criminal cases, unless the judge orders the ruling to be reduced to writing, the return date shall not exceed 30 days from the date of the ruling at issue. When the judge orders the ruling to be reduced to writing in criminal cases, the return date shall not exceed 30 days from the date the ruling is signed. In all cases, the judge shall set an explicit return date; an appellate court will not infer a return date from the record.
>
> Upon proper showing, the trial court or the appellate court may extend the time for filing the application upon the filing of a motion for extension of return date by the applicant, filed within the original or an extended return date period. **An application not filed in the appellate court within the time so fixed or extended shall not be considered, in the absence of a showing that the delay in filing was not due to the applicant's fault.** The application for writs shall contain documentation of the return date and any extensions thereof; any application that does not contain this documentation may not be considered by the appellate court. [Emphasis added.]

[41] See La. C.Cr.P. art. 881.1 (governing "motions to reconsider sentence").

[42] "[T]he intervenor[, who is a stranger to the underlying post-conviction relief proceeding,] takes the case as he finds it." **Gorman v. Gorman**, 158 La. 274, 278, 103 So. 766, 767 (1925).

court of appeal. The attorney general's argument for the need for finality of defendant's original conviction is undermined by the attorney general's actions in filing after this matter became final on February 18, 2022. The irony is palpable.

While finality is essential in every legal proceeding, the actions of the district attorney in recognizing that the interest of justice demanded further consideration of this defendant's case is supported by legislation, and the attorney general did not timely complain in the district court. Because the ruling on the joint motion to amend became final before the attorney general filed his motion to vacate, a ruling on the attorney general's motion to vacate, even if he had standing to file such motion, would provide no effective relief to the attorney general relative to this defendant.

C. Timeliness of the attorney general writ application to this court

Notwithstanding the procedural hurdles presented by the standing and timeliness issues, the attorney general's writ application to this court should not have been granted, as the untimeliness of the attorney general's filings were repeated in this court.

The attorney general correctly states that he timely filed a writ application in the court of appeal from the district court's denial of his motion to vacate.[43] The court of appeal refused to consider the attorney general's application on September 26, 2022. See **Lee**, 22-0741 (La.App. 1 Cir. 9/26/22) (unpub'd writ action). Absent the filing of an application for rehearing in the court of appeal, the attorney general's 30-day delay for filing a writ application with this court[44] began to run on September

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[43] However, the so-called "timely filing" of a writ application with the court of appeal was of no moment because the underlying case was already final when the attorney general filed his motion to vacate in the district court. The attorney general cannot breathe life into a final matter after missing the deadline in the district court by subsequently filing in the court of appeal.

[44] See Rules of Supreme Court of Louisiana, Rule X, § 5 (A)(1), which provides:

> An application seeking to review a judgment of the court of appeal either after

27, 2022. Thus, the attorney general had until October 26, 2022, to seek review by this court of the district court's ruling on his motion to vacate. The attorney general's application in this court was not filed until December 16, 2022, fifty-one days late. This court routinely finds matters filed minutes, hours, or a day late to be untimely. All litigants should be treated similarly. In the absence of a timely application to this court, the district court's ruling on the attorney general's motion to vacate became final on October 26, 2022. See La. C.Cr.P. art. 922(B).

Instead of following the rules of the court of appeal and the supreme court, the attorney general chose to file a second writ application with the court of appeal on September 27, 2022, in an effort to obtain a "second bite of the apple." The fact that the court of appeal "denied" the attorney general's second writ application, rather than "refused to consider it," as the majority points out, is irrelevant.[45] See **Lee**, 22-01827, slip op. at 3 n.2. The court of appeal lacked authority to breathe new life into the attorney general's efforts to have the district court's ruling on his motion to vacate reviewed or to control the timeliness of the attorney general's filing with this court, by the wording of its September 26, 2022 writ action or by its purported "consideration" of the attorney general's second writ application.

> an appeal to that court, or after that court has granted relief on an application for supervisory writs (but not when the court has merely granted an application for purposes of further consideration), or after a denial of an application, shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal; however, if a timely application for rehearing has been filed in the court of appeal in those instances where a rehearing is allowed, the application shall be made within thirty days of the mailing of the notice of denial of rehearing or the judgment on rehearing. No extension of time therefor will be granted.

[45] It is the judgment, and not the reasons for judgment, which is significant and important. An appeal is taken from the judgment, not the written reasons for judgment. **Greater New Orleans Expressway Com'n v. Olivier**, 02-2795, p. 3 (La. 11/18/03), 860 So.2d 22, 24 (citing La. C.C.P. arts. 2082, 2083 governing appealable judgments). See also **State v. Alexander**, 22-12, p. 5 (La. App. 5 Cir. 6/21/23), __ So.3d __, __ (citing La. C.C.P. art. 1918 governing the form of a final judgment); **State v. Gravois**, 17-341, p. 9 n.12 (La. App. 5 Cir. 12/13/17), 234 So.3d 1151, 1160 n. 12 (citing La. C.C.P. art. 1918). In this case, the court of appeal's judgment was "denied" which has the same effect as a refusal to consider the application.

For these reasons, I respectfully disagree with the majority's finding that "[s]ince the appellate court denied the second application, rather than refused to consider it, the Attorney General's application to this Court was properly filed." **Lee**, 22-01827, slip op. at 3 n.2.

D. Constitutionality of La. C.Cr.P. art 930.10

Although I find it unnecessary to address the constitutionality of La. C.Cr.P. art. 930.10 based on the preceding reasons, the following discussion explains why I believe the majority also errs in declaring that "Article 930.10 of the Code of Criminal Procedure is hereby declared unconstitutional." See **Lee**, 22-01827, slip op. at 11.

Consistent with the presumed constitutionality of all statutory and codal enactments, where a law "is subject to more than one reasonable interpretation," it should be interpreted "in such a way as to uphold its constitutionality." **State v. LeCompte**, 406 So.2d 1300, 1311 (La. 1981) (on reh'g). The presumption of constitutionality is significant; "[b]ecause of the presumption ..., in determining the validity of a constitutional challenge, a Court 'must construe a statute so as to preserve its constitutionality when it is reasonable to do so.'" **Westlawn Cemeteries, L.L.C. v. Louisiana Cemetery Bd.**, 21-01414, p. 13 (La. 3/25/22), 339 So.3d 548, 559 (citing **Carver v. Louisiana Department of Public Safety**, 17-1340, p. 6 (La. 1/30/18), 239 So.3d 226, 230; **M.J. Farms, Ltd. v. Exxon Mobil Corp.**, 07-2371, p. 22 (La. 7/1/08), 998 So. 2d 16, 31).

I agree with the majority and the attorney general that only the governor can grant pardons and commutations because this is an exclusive, constitutional power of the executive branch. See La. Const. art. IV, § 5(E)(1), which provides in relevant part:

> The governor ... upon favorable recommendation of the Board of Pardons, may **commute sentences**, **pardon** those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. [Emphasis added.]

See also **LeCompte**, 406 So.2d at 1307 ("The courts of this state cannot constitutionally reduce or commute a sentence."); **State ex rel. Francis v. Resweber**, 31 So.2d 697, 699 (La. 1947); **State ex rel. Esteen v. State**, 16-0949, p. 2 (La. 1/30/18), 239 So.3d 233, 240 (Weimer, J., dissenting) ("the power to reduce final sentences belongs to the executive branch").

While the power of commutation is bestowed by La. Const. art. IV, § 5(E)(1) on the executive branch, a pardon, as the majority recognizes, is simply an act of grace from the governing power. See **Lee**, 22-01827, slip op. at 7. The governor's power to pardon is unfettered and can be granted without any supporting evidence. As recognized by the majority, "[a] pardon reaches both the punishment prescribed for the offence and the guilt of the offender." **Lee**, 22-01827, slip op. at 7 (quoting **Ex parte Garland**, 71 U.S. 333, 380 (1866)). A full pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." ***Id.***

The majority holds that the district "court's action pursuant to Article 930.10 is ... like a pardon, an act of 'grace.'" **Lee**, 22-01827, slip op. at 8. I disagree. The actions of the parties and the district court here neither released defendant of punishment nor "blot out of existence the guilt." ***Id.***, 22-01827, slip op. at 7 (quoting **Ex parte Garland**, 71 U.S. at 380). A legal basis existed to support the joint motion filed by the district attorney and defendant, and it was presented for consideration by the district court. A closer evaluation of the evidence resulted in a change in the

facts,[46] which called into question the integrity of defendant's conviction, and led to the district attorney, in his role as "a minister of justice,"[47] reviewing the matter and jointly moving with defendant to resolve a case.[48] Clearly, the post-conviction plea agreement at issue in this case is not equivalent to a matter of grace. Such a finding is further supported by the fact that the parties are giving up certain legal rights in connection with the post-conviction plea agreement. This defendant, following a **Boykin** procedure, waived further rights to appeal and pled guilty to a lesser offense for which he was sentenced.

Furthermore, as recognized by this court, "[t]here is some inevitable overlap of the functions and each branch of government must strive to maintain the separation of powers by not encroaching upon the power of the others." **Hoag v. State**, 04-0857, p. 8 (La. 12/1/04), 889 So.2d 1019, 1024; see **Newman Marchive Partnership, Inc. v. City of Shreveport**, 07-1890, p. 3 (La. 4/8/08), 979 So.2d 1262, 1265 ("The separation of powers is not always defined precisely." One branch "may not usurp those powers which are vested in the other two branches."). Nothing in La. C.Cr.P. 930.10 "limits or controls [or encroaches upon] the executive branch's exercise of its prerogatives." See **State ex rel. Esteen**, 16-0949 at 5, 239 So.3d at 237.

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[46] The district attorney was obviously persuaded by the evidence unearthed by defendant's new expert, which could have served as the basis for a request for a new trial by defendant.

[47] See **Lee**, 22-01827, slip op. at 11.

[48] This clearly is not a case where no credible evidentiary basis existed to support the district attorney and defendant's joint motion. Although "the parties did not assert that defendant was entitled to relief based on any law other than Article 930.10," see **Lee**, 22-01827, slip op. at 9, the parties addressed in their joint motion the recent findings of Dr. Arden that call into question the validity of defendant's conviction, thus suggesting factual innocence. In fact, the district court expressly found "a factual basis for the defendant's plea."

Concerning post-conviction plea agreements, Article 930.10 provides:

> 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 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 procedure authorized by Article 930.10 does not diminish or reduce the governor's exclusive authority. It is not a given that the district attorney, who represents the state, and defendant, who are adversaries, will reach an agreement, or that the district court will "accept[] the post conviction plea agreement." Instead, stripping the court and the district attorney of the authority afforded by Article 930.10 diminishes the constitutional authority of the district attorney to serve the interest of justice and the court to decide cases.

I stand by my position in **State ex rel. Esteen** that courts have no authority to pardon a defendant or to commute a sentence, as that authority is vested in the governor.[49] See ***id.*** 16-0949, pp. 3-4 (La. 3/13/18), 239 So.3d 266, 267 (Weimer, J.,

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[49] Curiously, Justice Crichton, the author of the majority opinion in this case, cites my "would grant rehearing" in **State ex rel. Esteen**, see **Lee**, 22-01827 slip op. at 5 (citing **State ex rel. Esteen**, 16-0949, p. 3 (La. 3/13/18), 239 So.3d 266, 267 (Weimer, J., would grant reh'g)), which is distinguishable from this matter as will be discussed. He concurred in the majority opinion in **State ex rel. Esteen**, which stated:

> This court erred in **State v. Dick**[, 06-2223 (La. 1/26/07), 951 So.2d 124,] to the extent we resolved the tension between these provisions by finding that the *only* avenue to gain the benefit of the more lenient penalty provisions retroactively is by application to the Risk Review Panel at that time (subsequently amended to authorize

would grant reh'g). The legislature cannot restrict the pardon or commutation power of the governor; however, nothing in the constitution prohibits the legislature from enacting legislation in the area of post conviction relief to provide a process in which the parties can negotiate a settlement regarding a conviction or sentence to prevent an injustice. The legislation in question, La. C.Cr.P. art. 930.10, does not restrict nor limit the authority of the governor, but does establish criteria in the area of post conviction relief for a joint motion by the district attorney and the defense, which has been approved jurisprudentially, following a hearing. Nor does Article 930.10 authorize the district court to grant a pardon or commute a sentence, which involve "grace" and can wipe away guilt and the related sentence.

The distinction between my dissent and my vote to grant a rehearing in **State ex rel. Esteen** and my dissent in this matter is plain. In **State ex rel. Esteen**, the statute required a "vetting procedure" that involves an evaluation by the committee on parole prior to an offender receiving the benefit of a reduction in sentence. The majority in **State ex rel. Esteen** simply read the role of the committee on parole out of the statutory language, which I found to be problematic. In the current matter, again paying deference to the legislature, once the district attorney, the party representing the "state," agrees with the defense, which is adversarial to the district attorney, the district court judge must then exercise discretion to accept the joint motion. In both **State ex rel. Esteen** and this matter, I simply applied the law as enacted by the legislature and paid deference to the legislature.

> application to the committee on parole). Instead, we find these provisions can be harmonized in a way that avoids the separation of powers problem on which the holding of **Dick** depended.

Id., 16-0949 at 3, 239 So.3d at 236. The majority in **State ex rel. Esteen** further noted that **Dick** court erred in "equat[ing] the judicial amendment of a final sentence in accordance with a retroactive legislative act to 'allow[ing] the judiciary to exercise the power of commutation.'" ***Id.***, 16-0949 at 4, 239 So.3d at 236.

Any concern over the court usurping the pardon power by reducing a sentence is relieved by the codal requirement that the district attorney and the defense jointly agree, and by the fact that the district court judge is given the authority thereafter to determine if the joint motion will be granted. It goes without saying that the discretion afforded to the district court will only be exercised if the facts demonstrate that justice and the interests of the society warrant the court's decision.

The importance of La. C.Cr.P. art. 930.10 cannot be overstated. Louisiana incarcerates more citizens per capita than any state in the Union and any nation in the world. Non-unanimous juries exacerbated the problem and increased these numbers. It is well-documented that the poor and minorities have been disproportionally impacted by the ill-conceived practices of the past. Perhaps as a direct consequence, Louisiana experiences a significant number of exonerations of incarcerated individuals.

The post-conviction legislation at issue here was unanimously enacted by the legislature, the people's representatives, and signed into law by the governor. Its obvious purpose is to insure justice is done and to act as a counter balance or check on the renegade practices and prejudices of the past. It will only afford a post-conviction remedy in those matters in which an individual is proven to be not guilty of the crime charged and is designed to right wrongs in certain specific cases. The legislature was obviously concerned about past practices and the ineffectiveness of the poorly developed post-conviction relief procedures. Carried to its logical conclusion, the attorney general's effort could have the disastrous effect of undermining, and further limiting, the post-conviction relief procedure that has operated to correct the evils of the past. Finality for finality's sake is an important

concept, but our system of justice and our sense of fairness recoil at the thought that an innocent person remains punished for a crime not committed.

The multi-step process established by Article 930.10 is replete with checks and balances, requiring opposing sides to agree. Just as the governor is granted authority to commute sentences, the district attorney is charged with prosecuting cases and the courts are charged with deciding cases properly brought. The attorney general is seeking to strip the district attorney and judiciary of authority to resolve injustice on a case-by-case basis. The decision of the district attorney and defendant to bring this case to the court is not commutation from a constitutional standpoint, which is wholly within the authority of the governor, but the resolution of a case that was carefully reviewed by the district attorney. After that careful review here, the district attorney obviously determined that it was not in society's best interest to spend untold resources in trying this matter. Rather, exercising the prudence and discretion afforded to his office, the district attorney determined the additional facts presented by defendant here dictated the agreed-upon resolution, which the district court evaluated and granted, promoting judicial economy and saving other valuable public resources. That is not a commutation by the governor but the resolution of a case. Such an interpretation of Article 930.10 is reasonable and does not result in a violation of separation of powers. See **LeCompte**, 406 So.2d at 1311 (on reh'g). Accordingly, I respectfully dissent from the majority's reversal of the district court's June 15, 2002 ruling, as I believe that La. C.Cr.P. art. 930.10 is not facially unconstitutional and is, in fact, constitutional, as applied in this case.

SUPREME COURT OF LOUISIANA

No. 2022-KK-01827

STATE OF LOUISIANA

VS.

WILLIAM WAYNE LEE, JR.

On Supervisory Writ to the 22nd Judicial District Court, Parish of St. Tammany

GRIFFIN J., dissents and assigns reasons.

Respectfully, the majority's opinion is contrary to the original intent of the framers of the Louisiana Constitution. The constitutional question presented is whether La. C.Cr.P. art. 930.10 violates the separation of powers by impinging on the governor's pardon, clemency, reprieve, and commutation power ("pardon power"). In Louisiana, the separation of powers between the three branches of government is not absolute. Article IV § 5 does not explicitly forbid the legislature from going beyond the pardon power of the governor.

The framers of the Louisiana Constitution of 1974 explicitly intended to allow the legislature to extend its own version of the pardon power, provided the legislature did not limit the power granted to the governor in Article IV § 5. The framers initially had a specific provision in what is now Article IV that stated:

> Except in cases of conviction of impeachment, the governor may reprieve, may grant commutation of sentence, and may pardon those convicted of offenses against the state and may remit fines and forfeitures imposed for such offenses. *In addition, the legislature may provide additional methods for the foregoing and other postconviction remedies.*

Transcript Records of the Louisiana Constitutional Convention of 1973 at 577 ("Records") (emphasis added). That this language was left out of the final draft does not preclude it from being the rule, especially where a general intent is discoverable. *See Edwards v. Parker*, 332 So. 2d 175, 186 (La. 1976) (Tate and Calogero

concurring in part and dissenting in part). The language was left out because (1) the framers were worried about the length of the article; and (2) the delegates assumed that this legislative pardon power would be included anyway, so any language referencing it would be superfluous. *See* Records at 578-579 (discussing keeping the Executive Article short). Indeed, Delegate Jack, who rose to defend the amendment that would be incorporated into the Constitution of 1973 (that did not include the express last sentence cited above) stated "It's replacing the entire power of pardon, commutation, etc. in the governor even though it also stated that the legislature would have a concurrence right." Records at 591. Here, the word "concurrence" should have been "concurrent," otherwise, it has no real meaning. No delegate disagreed with the notion that the legislature could use its own pardon power over and above that of the governor, as long as it did not limit the governor's power as stated in the constitution.

The framers also expressly said they intended the legislature to have this expansive pardon power.[1] Delegate Gravel, speaking for the committee that drafted the Executive Article, stated:

> The governor retains the ultimate right [to pardon etc.]. Now many people thought that in addition to the governor having that right that some other provision should be authorized whereby the legislature by supplementary provisions could also provide other methods and other means by which a pardon, commutation or reprieve could be granted. The upshot of it all is probably going to be that the legislature will devise and will develop a plan which in practically every instance will be utilized for the purpose of granting this kind of relief but I don't think there's any question but that because of the position he occupies in state government that in the very last analysis that the governor's authority to act in these instances should be retained, so what I think that we should do and hope that we do do, is to stay with the committee proposal which gives the ultimate authority to the governor but also authorizes the legislatures to provide

[1] This reading is further supported by the fact that the framers intended to allow the legislature to expand and direct the duties and powers of the district attorneys as well as help maintain their independence. Records at 915-927 (discussing the duties, powers, and independence of the district attorneys).

> supplemental methods whereby post conviction relief can be granted to persons charged with offenses…

Records at 583. Delegate Gravel then stated in response to a question as to whether the legislature could adopt an expansive version of the governor's pardon:

> As a matter of fact the legislature can and should and I suggest will provide some model method by which this kind of release can be considered and will be granted but it would be supplementary or corollary to the same right that the governor as the chief executive officer of the state would have under this proposal.

Records at 584. Delegate Gravel responded to a statement that he would want a situation where the legislature could limit the powers of the governor to grant pardons etc., by saying:

> Let me dispel the impression because I don't think I said that, if I did I certainly didn't intend to. I wanted to make it clear I thought, that the governor did have total and complete power and that the power of the legislature would be supplementary and corollary to that power…

Records at 584. Delegate Burson stated "well, I'm glad we agree on that point…" Records at 584.

It is also clear that the legislative pardon power is not just some theoretical version of habeas corpus. The framers made absolutely clear that they were discussing this as the legislature's own expansive version of the governor's pardon power. With the pardon board being a limit on the governor's pardon power; but the legislature's only being limited by the voters.[2] *See generally*, Records at 577-600.

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[2] When the framers discussed all of this, they did so in the context of post-conviction and the governor's traditional powers. For example, Delegate Burns noted, during the debate over the executive article, which included the legislature's own pardon power, that there needed to be a check on the governor's traditional power and his suggestion was the pardon board. See Records at 592. He said that the delegates spoke to him and that they all agreed with it. No one objected to his statements. And no one sought to limit the legislature's expansive pardon power.

The framers then again rejected using the legislative pardon power as the limit on the governor's pardon power. *See e.g.* Records at 593-595 (several delegates' discussion). Thus, they kept the original plan of letting the governor have his power and the legislature having their expansive power, so long as they did not restrict what was granted to the governor. Records at 577, 583, 584, 591 (stating that the legislature has this concurrent power with the governor's traditional power). All throughout these debates, they discussed the traditional pardon power of the governor in their discussion of the legislature's expansive pardon power. See e.g., 577 (governor's pardon power

The majority opinion places an extreme burden on the courts to determine what constitutes enough of a pardon to cross the separation of powers line. It risks the very independence of prosecutors that the framers sought to protect. Records at 915-927 (discussing the duties, powers, and independence of the district attorneys).[3]

For these reasons, I respectfully dissent.

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and legislature's in the same column on the same page), 582 (discussing possible limits on the governor's traditional powers), 583 (discussing traditional governor's pardon and the legislature's power to make its own in the same paragraph by the same Delegate who spoke for the committee that drafted the executive article), 584 (reflecting everyone's agreeing on this statement). The list of examples are legion.

[3] Any prosecutor or defendant who otherwise could have sought relief under La. C.Cr.P. art. 930.10 may have standing to seek reversal of the majority's decision.