

[La. Const. Art. IV, § 5](#)

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[LexisNexis® Louisiana Annotated Statutes](#) > [Constitution of the State of Louisiana of 1974](#)
> [Article IV. Executive branch](#)

§ 5. Governor; powers and duties

- A. Executive Authority.** — The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.
- B. Legislative Reports and Recommendations.** — The governor shall, at the beginning of each regular session, and may, at other times, make reports and recommendations and give information to the legislature concerning the affairs of state, including its complete financial condition.
- C. Departmental Reports and Information.** — When requested by the governor, a department head shall provide him with reports and information, in writing or otherwise, on any subject relating to the department, except matters concerning investigations of the governor's office.
- D. Operating and Capital Budget.** — The governor shall submit to the legislature an operating budget and a capital budget, as provided by Article VII, Section 11 of this constitution.
- E. Pardon, Commutation, Reprieve, and Remission; Board of Pardons.** —
- (1) The governor may grant reprieves to persons convicted of offenses against the state and, 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. However, a first offender convicted of a nonviolent crime, or convicted of aggravated battery, second degree battery, aggravated assault, mingling harmful substances, aggravated criminal damage to property, purse snatching, extortion, or illegal use of weapons or dangerous instrumentalities never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.
 - (2) The Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him.
- F. Receipt of Bills from the Legislature.** — The date and hour when a bill finally passed by the legislature is delivered to the governor shall be endorsed thereon.
- G. Item Veto.** —
- (1) Except as otherwise provided by this constitution, the governor may veto any line item in an appropriation bill. Any item vetoed shall be void unless the veto is overridden as prescribed for the passage of a bill over a veto.
 - (2) The governor shall veto line items or use means provided in the bill so that total appropriations for the year shall not exceed anticipated revenues for that year.
- H. Appointments.** —
- (1) The governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.

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- (2) Should the legislature be in regular session, the governor shall submit for confirmation by the Senate the name of an appointee within forty-eight hours after the appointment is made. Failure of the Senate to confirm the appointment, prior to the end of the session, shall constitute rejection.
 - (3) If the legislature is not in regular session, the governor may make interim appointments, which shall expire at the end of the next regular session, unless submitted to and confirmed by the Senate during that session.
 - (4) A person not confirmed by the Senate shall not be appointed to the same office during any recess of the legislature.
- I. Removal Power. — The governor may remove from office a person he appoints, except a person appointed for a term fixed by this constitution or by law.
- J. Commander-in-Chief. — The governor shall be commander-in-chief of the armed forces of the state, except when they are called into service of the federal government. He may call out these forces to preserve law and order, to suppress insurrection, to repel invasion, or in other times of emergency.
- K. Other Powers and Duties. — The governor shall have other powers and perform other duties authorized by this constitution or provided by law.

History

Amended by [Acts 1999, No. 1398](#), § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999; [Acts 1999, No. 1401](#), § 1, approved Nov. 20, 1999, eff. Dec. 27, 1999.

Annotations

Case Notes

1. Trial court's grant of a preliminary injunction enjoining the State Defendants from interfering with implementation of educational standards was affirmed because the State Defendants' accusations against the Board of Elementary and Secondary Education (BESE) regarding State procurement law were a mere pretext to cloak their true intent to influence education policy in Louisiana, over which the Louisiana Constitution granted exclusive authority to the Louisiana Legislature and the BESE. [Hill v. Jindal](#), 175 So. 3d 988, 2015 La. App. LEXIS 1199 (La.App. 1 Cir. 2015), writ denied, 2015 La. LEXIS 2499 (La. Oct. 23, 2015).
2. An automatic or first offender pardon under La. Const. art. IV, § 5(E)(1), did not prevent a state nursing licensing board from denying a licensing applicant's advanced practice registered nurse license due to the applicant's past conviction of a crime involving drug distribution as authorized by [La. Rev. Stat. § 37:921\(2\)](#); however, where the applicant had received a gubernatorial or full executive pardon pursuant to La. Const. art. IV, § 5(E)(1), the pardon completely abrogated the conviction so that it could not be considered by the board as a reason for denial of the application under [La. Rev. Stat. § 37:921\(2\)](#). [Gordon v. State Bd. of Nursing](#), La. App. 2000-0164, 804 So. 2d 34, 2001 La. App. LEXIS 1640 (La.App. 1 Cir. June 22, 2001), writ denied, La. 2001-2130, 802 So. 2d 607, 2001 La. LEXIS 3171 (La. Nov. 16, 2001).
3. Although, under [La. Rev. Stat. Ann. § 42:1132](#), the Legislature actually appoints four of the five members of the Board of Ethics for Elected Officials, a board in the executive branch, this method of appointing these inferior officers does not violate the provision in La. Const. art. IV, § 5(H) which expressly allows the appointment of members of boards and commissioners in the executive branch to be provided for by legislative act. [State ex rel. Board of Ethics for Elected Officials v. Green](#), 566 So. 2d 623, 1990 La. LEXIS 3105 (La. 1990).
4. In a suit to enjoin enforcement of [La. Rev. Stat. Ann. § 9:2800.12](#), a statute that would make an abortion provider liable in tort to the woman obtaining an abortion for any damage occasioned by the abortion, naming the attorney general and the governor of Louisiana as defendants did not violate [USCS Const. Amend. 11](#), because

LAC 22:V.213

Last amended December 2015, compiled December 2015

Louisiana Administrative Code > TITLE 22 CORRECTIONS, CRIMINAL JUSTICE AND LAW ENFORCEMENT > PART V BOARD OF PARDONS > CHAPTER 2 CLEMENCY

§ 213. Capital Cases

- A. The board will consider recommending to the governor a stay of execution of death sentence upon receipt of a written application in behalf of a condemned felon. Any such application shall contain the following information:
 1. the name of the applicant, together with any other pertinent identifying information;
 2. identification of the applicant's agents, if any, who are presenting the application;
 3. certified copies of the indictment, judgment, verdict of the jury, and sentence in the case, including official documentation verifying the scheduled execution date;
 4. a brief statement of the offense for which the prisoner has been sentenced to death;
 5. a brief statement of the appellate history of the case, including its current status;
 6. a brief statement of the legal issues which have been raised during the judicial progress of the case;
 7. the requested length of duration of the stay, which shall be in increments of 30 days, unless a different duration is requested on the basis of the grounds for the application set forth pursuant to § 213.A.8;
 8. all grounds upon the basis of which the stay is requested; provided that such grounds shall not call upon the board to decide technical questions of law which are properly presented via the judicial process; and
 9. a brief statement of the effect of the offender's crime upon the family of the victim.
- B. The written application must be delivered to the board office, Post Office Box 94304, Baton Rouge, LA 70804 not later than the twenty-first calendar day before the execution is scheduled. If the twenty-first calendar day before the execution is scheduled falls on a weekend or state observed holiday, the application shall be delivered not later than the next business day. The chairman may extend this timeframe for acceptance of the written application at his or her discretion, based on good and adequate cause. Otherwise, the applicant's recourse will be directly to the governor.
- C. All supplemental information, including but not limited to amendments, addenda, supplements, or exhibits, must be submitted in writing and delivered to the board office, Post Office Box 94304, Baton Rouge, LA 70804 not later than the fifteenth calendar day before the execution is scheduled. If the fifteenth calendar day before the execution is scheduled falls on a weekend or state observed holiday, all additional information including but not limited to amendments, addenda, supplements, or exhibits shall be delivered not later than the next business day. The chairman may extend this timeframe for acceptance of supplemental information at his or her discretion, based on good and adequate cause.
- D. Any information filed with the application, including but not limited to amendments, addenda, supplements, or exhibits, which require reproduction facilities, equipment, or technology not operated by the board, must be provided by the applicant in an amount sufficient to allow review by all members of the board. An amount sufficient shall mean not less than ten and not more than twenty copies of the duplicate item.
- E. A convicted person seeking a board recommendation to the governor of a reprieve or stay of execution may request an interview with a member of the board. Such request shall be included in the written application or any supplement filed therewith.
- F. Upon receipt of a request for interview, the chairman shall designate at least one member of the board to conduct the requested interview. Such interview shall occur at the confining unit of the Department of Public

Safety and Corrections. Attendance at such interviews shall be limited to the convicted person and their counsel of record, the designated board member(s), and institutional staff. The board may consider statements by the offender made at such interviews when considering the offender's application for reprieve or stay of execution.

- G.** The board shall consider and decide applications for stay or reprieve from execution. Upon review, a majority of the board, in written and signed form may:
1. recommend to the governor a reprieve from execution (which may include a recommendation to commute the sentence to life imprisonment);
 2. not recommend a reprieve from execution; or
 3. set the matter for a hearing as soon as practicable and at a location convenient to the board and the parties to appear before it.
- H.** When the board sets a hearing pursuant to Subsection G.3 of this Section, it shall notify the trial officials of the parish of conviction and the attorney general of the state of Louisiana and allow any such official(s), or the designated representatives thereof, the opportunity to attend the hearing and/or to present any relevant information. Prior to the hearing date, the chairman may convene a conference meeting with attorneys for the state and the convicted person to discuss and resolve any hearing preparation issues (i.e., the issues to be heard and considered by the board, list witnesses and exhibits from both sides and any other pertinent details). No testimony from witnesses will be taken. The purpose of the conference is to improve the quality of the hearing with thorough preparation.
- I.** At the time of notifying the trial officials, the board shall also notify any representative of the family of the victim (who has previously requested to be notified) of the receipt of the application, the setting of a hearing, and of said representative or family member's rights to provide any written comments or to attend the hearing.
- J.** All hearings conducted by the board under this section shall be in open session pursuant to requirements of the Louisiana Open Meetings Act. For the purpose of discussing matters which are deemed confidential by statute, or where otherwise authorized by the provisions of the Louisiana Open Meetings Act, the proceedings may be conducted in executive session closed to members of the general public, for that limited purpose. Only those persons whose privacy interests and right to confidentiality may be abridged by discussion involving disclosure of confidential information may be allowed to meet with members of the board in their executive session to discuss that information. No decision, vote, or final action by the board shall be made during a closed meeting; the board's decision, vote, or final action shall be made and announced in an open meeting. The hearing may be recessed prior to its completion and reconvened pursuant to the directions of the board.
- K.** Advocates for and against the death penalty, generally, and members of the general public may present written information for the board's consideration at its central office headquarters at any reasonable time.
- L.** After the conclusion of the hearing, the board shall render its decision, reached by majority vote, within a reasonable time, which decision shall be either to:
1. recommend to the governor a reprieve from execution (which may include a recommendation for a commutation of sentence to life imprisonment);
 2. not recommend a reprieve from execution; or
 3. recess the proceedings without rendering a decision on the merits, if a reprieve has been granted by the governor or if a court of competent jurisdiction has granted a stay of execution.
- M.** Each of the provisions of this policy are subject to waiver by the board when it finds that there exists good and adequate cause to suspend said provisions and adopt a different procedure which it finds to be better suited to the exigencies of the individual case before it.

- N. Successive or repetitious reprieve applications submitted in behalf of the same condemned felon may be summarily denied by the board without meeting.
- O. Time Limits. At the clemency hearing for capital punishment cases, the offender's clemency counsel and the attorneys for the state may make an oral presentation, each not to exceed 15 minutes collectively. Representatives of the victim's family may make oral statements not to exceed an additional five minutes collectively. The chairman may extend these time frames at his or her discretion.

Statutory Authority

AUTHORITY NOTE:

Promulgated in accordance with [R.S. 15:572.4](#), [15:574.12](#) and [44:1](#) et seq.

History

HISTORICAL NOTE:

Promulgated by the Office of the Governor, Board of Pardons, [LR 39:2257](#) (August 2013).

LOUISIANA ADMINISTRATIVE CODE



**LOUISIANA
BOARD OF PARDONS**

Number: 02.203-POL
Date: September 30, 2015
Page: 1 of 3

BOARD POLICY

SUBJECT: ELIGIBILITY FOR CLEMENCY CONSIDERATION

PURPOSE: To describe the eligibility requirements for clemency consideration

AUTHORITY: LAC Title 22, Part 5, Chapter 1; La. R.S. 15:572

REFERENCE: ACA Standard 2-1011

POLICY:

It is the policy of the Louisiana Board of Pardons (Board) may consider individuals for a recommendation of clemency to the Governor based on the eligibility requirements set forth in this policy.

PROCEDURES:

A. Eligibility

1. **Pardons** - A person may not apply for a pardon if the applicant has any outstanding detainers, or any pecuniary penalties or liabilities which total more than \$1,000 and result from any criminal conviction or traffic infraction. In addition, no person is eligible to apply for pardon unless the applicant has paid all court costs which were imposed in connection with the conviction of the crime for which pardon is requested.
2. **Commutation of Sentence** - A person may not be considered for a commutation of sentence unless he or she has been granted a hearing by the Pardon Board and has had his or her case placed upon a Pardon Board agenda.
3. **Remission of Fines and Forfeitures** - A person may not apply for a remission of fines and forfeitures unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including, but not limited to, parole, and/or probation.
4. **Specific Authority to Own, Possess, or Use Firearms** - A person may not apply for the specific authority to own, possess, or use firearms unless he or she has completed

all sentences imposed for the applicant's most recent felony conviction and all conditions of supervision imposed for the applicant's most recent felony conviction have expired or been completed, including, but not limited to, parole, probation, and conditional release, for a period of five years. The applicant may not have any outstanding detainers, or any pecuniary penalties or liabilities which total more than \$1,000 and result from any criminal conviction or traffic infraction. In addition, the applicant may not have had any outstanding victim restitution, including, but not limited to, restitution pursuant to a court or civil judgment or by order of the Committee on Parole.

7. **First Offender Pardon - Automatic -** On the day that an individual completes his sentence, the Division of Probation and Parole, after verifying that the individual is a first offender and has completed his sentence shall issue a certificate recognizing and proclaiming that the petitioner granted, the individual shall not be entitled to receive another automatic pardon.

B. Applications

All applications must be submitted in accordance with Board Policy 02.203, "Application Filing Procedures".

C. Incarcerated Applicants or Applicants Supervision of the Louisiana Department of Public Safety and Corrections

1. A executive pardon shall not be considered for an offender while in prison, except when exceptional circumstances exist.
2. An incarcerated offender may request a commutation of sentence:
 - (a) After having served a minimum of ten years; and
 - (b) Must have been disciplinary report free for a period of at least twenty-four months prior to the date of the application; and
 - (c) Must not be classified to a maximum custody status at the time of the application or at the time of the hearing (if a hearing is granted); and

- (d) Must possess a marketable job skill, either through previous employment history or through successful completion of vocational training while incarcerated; OR
- (e) Upon the written recommendation of the trial official(s) that includes:
 - 1. a statement that the penalty now appears to be excessive;
 - 2. a recommendation of a definite term now consider by the official as just and proper;
 - 3. a statement of the reasons for the recommendation based upon facts directly related to the facts of the case and in existence, but not available to, the court or jury at the time of trial, or a statutory change in penalty for the crime which would appear to make the original penalty excessive

D. Life Sentences

An offender sentenced to life may not apply until he has served 15 years from the date of sentence, unless he has sufficient evidence which would have caused him to have been found not guilty. The offender must also meet the criteria listed in Section C.2. above.

C. Capital Cases

Any offender sentenced to death may submit an application within one year from the date of the direct appeal denial. See also board policy 02.207 "Capital Cases."

SHERYL M. RANATZA, CHAIRMAN

**Signature on file*

Replaces and supersedes Board Policy 02-203 dated December 19, 2012



**LOUISIANA
BOARD OF PARDONS**

Number: 02-205-POL
Date: September 30, 2015
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BOARD POLICY

SUBJECT: APPLICATION FILING PROCEDURES

PURPOSE: To establish procedures for filing an application for clemency

AUTHORITY: LAC Title 22, Part 5, Chapter 1; La. R.S. 15:572

REFERENCES: ACA Standard 2-1011, Board Policy 08-801, "Ameliorative Penalty Consideration"

POLICY:

It is the policy of the Board of Pardons to consider only those applications for clemency which conform to the procedures outlined in this board policy. An Application for Clemency form shall be made available on the Board's website at doc.la.gov. Applications must be received in the Board of Pardons office by the fifteenth of the month to be placed on the docket for consideration the following month. No application shall be considered by the Board until it deems the application to be complete in accordance with this policy.

PROCEDURES:

A. All Applicants

1. Every application must be submitted on the form approved by the Board of Pardons and must contain the following information:
 - a. name of applicant;
 - b. prison number [Department of Corrections (DOC) number];
 - c. date of birth;
 - d. race/sex;
 - e. education (highest grade completed);
 - f. age at time of offense;
 - g. present age;
 - h. offender class;
 - i. place of incarceration (incarcerated applicant only);
 - j. parish of conviction/judicial district/court docket number;
 - k. offense(s) charged, convicted of or pled to;
 - l. parish where offense(s) committed;

- m. date of sentence;
- n. length of sentence;
- o. time served;
- p. prior parole and/or probation;
- q. when and how parole or probation completed;
- r. prior clemency hearing/recommendation/ approval;
- s. reason for requesting clemency;
- t. relief requested and narrative detailing the events surrounding the offense;
- u. institutional disciplinary reports (incarcerated applicants only); total disciplinary reports, number within the last 24 months; nature and date of last violation; and custody status.

- 2. The application shall be signed and dated by applicant and shall contain a prison or mailing address and home address.
- 3. An application must be completed in its entirety. If any required information does not apply, the response should be "NA."

B. In addition to the information submitted by application, the following required documents must be attached as they apply to each applicant.

- 1. **Incarcerated Applicants:** Any applicant presently confined in any institution must attach a current master prison record and time computation/jail credit worksheet and have the signature of a classification officer verifying the conduct of the applicant as set out in A.1.u above, and a copy of conduct summary report. Applicants sentenced to death must attach proof of direct appeal denial (see also Board Policy 02.207, "Capital Cases").
- 2. **Parolees:** Applicants presently under parole supervision or who have completed parole supervision must attach a copy of their master prison record or parole certificate (see also Board Policy 02.201, "Types of Clemency").
- 3. **Probationers:** Applicants presently under probation supervision or who have completed probationary period must attach a certified copy of sentencing minutes or copy of automatic first offender pardon.
- 4. **First Offender Pardons** [R.S. 15:572 (B)]: Applicants who have received an Automatic First Offender Pardon must attach a copy of the Automatic First Offender Pardon.

C. No additional information or documents may be submitted until applicant has been notified that he/she will be given a hearing. The Board of Pardons will not be responsible for items submitted prior to notification that a hearing will be granted.

- D. Reapplication Upon Denial** - Any applicant denied by the Board shall be notified, in writing, of the reason(s) for the denial and thereafter may file a new application as indicated below.
1. **Applicants Sentenced to Life Imprisonment** - Any applicant with a life sentence may reapply five years after the initial denial; five years after the subsequent denial; and every five years thereafter.
 2. **Other** - Applicants without a life sentence may file a new application two years from date of the letter of denial.
 3. **Fraudulent Documents or Information** - Any fraudulent documents or information submitted by applicant will result in an automatic denial by the Board and no new application will be accepted until four years have elapsed from the date of letter of denial. Any lifer denied because of fraudulent documents may reapply 10 years from the date of letter of initial denial; seven years if subsequent denial; and six years for denials thereafter.
 4. **Governor Granted Clemency** - The Office of the Governor will notify an applicant if any clemency is granted. Any otherwise eligible person who has been granted any form of executive clemency by the Governor may not reapply for further executive clemency for at least four (4) years from the date that such action became final.
 5. **Denial/No Action Taken by Governor after Favorable Recommendation** - The board shall notify an applicant after its receipt of notification from the Governor that the Board's favorable recommendation was denied or no action was taken. The applicant may submit a new application within one (1) year from the date of the letter or denial or notice of no action. If the applicant does not re-apply within the one year period, the application filing procedures in D.1. or D.2. shall apply.
 6. **Ameliorative Penalty Consideration** - If an offender is notified by the Board of Pardons that their request for ameliorative penalty consideration has been denied, the offender may re-apply to the Board twelve months from the date of the letter of denial.
- E. Notice of Action Taken on Application** - After review of the application for clemency by the Board, applicants shall be notified, in writing, of action taken by the Board. Action can include granting a hearing before the Board or denial of a hearing.
- F. Hearing Granted/Advertisement in Local Journal** - After notice to an applicant that a hearing has been granted, the applicant shall provide the Board office with proof of advertisement within 90 days from the date of notice to grant a hearing. Advertisement

must be published in the official journal of the parish where the offense occurred. This ad must state:

**"I (applicant's name), (DOC number), have applied for clemency for my conviction of (crime).
If you have any comments, contact the Board of Pardons (225) 342-5421."**

Along with proof of advertisement published in the local journal, the applicant may submit additional information (e.g., letters of recommendation and copies of certificates of achievement and employment/residence agreement).

SHERYL M. RANATZA, CHAIRMAN

**Signature on file*

Replaces and supersedes Board Policy 02.205 dated August 1, 2014



**LOUISIANA
BOARD OF PARDONS**

Number: 02.207-POL
Date: December 19, 2012
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BOARD POLICY

SUBJECT: CAPITAL CASES

PURPOSE: To establish procedures for applications for clemency from offenders sentenced to Death.

AUTHORITY: LAC Title 22, Part V, Chapter 1; La. R.S. 15:572

POLICY:

The Board will consider recommending to the Governor a reprieve of execution of death sentence upon receipt of a written application in behalf of a condemned felon. Notwithstanding any provision to the contrary by Board policy, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Board.

PROCEDURES:

A. Request for Board Recommendation of Stay of Execution

The individual filing such application to the Board for a Stay of Execution, if other than the condemned felon, may be required to demonstrate that he is authorized by the condemned felon to file such application. Any such application shall contain the following information:

- (1) the name of the applicant, together with any other pertinent identifying information;
- (2) identification of the applicant's agents, if any, who are presenting the application;
- (3) certified copies of the indictment, judgment, verdict of the jury, and sentence in the case, including official documentation verifying the scheduled execution date;
- (4) a brief statement of the offense for which the prisoner has been sentenced to death;

- (5) a brief statement of the appellate history of the case, including its current status;
- (6) a brief statement of the legal issues which have been raised during the judicial progress of the case;
- (7) the requested length of duration of the stay, which shall be in increments of 30 days that is, 30, 60, 90, etc., unless a different duration is requested upon the basis of the grounds for the application set forth pursuant to paragraph (8) of this section;
- (8) all grounds upon the basis of which the stay is requested; provided that such grounds shall not call upon the Board to decide technical questions of law which are properly presented via the judicial process; and,
- (9) a brief statement of the effect of the offender's crime upon the family of the victim.

B. Request for Board Recommendation of Reprieve of Execution

- (1) The written application in behalf of a convicted person seeking a Board recommendation to the Governor of a reprieve from execution must be delivered to the Louisiana Board of Pardons, Post Office Box 94304, Baton Rouge, LA 70804 not later than the twenty-first calendar day before the execution is scheduled. If the twenty-first calendar day before the execution is scheduled falls on a weekend or state observed holiday, the application shall be delivered not later than the next business day. Otherwise, the applicant's recourse will be directly to the governor.
- (2) All supplemental information, including but not limited to amendments, addenda, supplements, or exhibits, must be submitted in writing and delivered to the Louisiana Board of Pardons, Post Office Box 94304, Baton Rouge, LA 70804, not later than the fifteenth calendar day before the execution is scheduled. If the fifteenth calendar day before the execution is scheduled falls on a weekend or state observed holiday, all additional information including but not limited to amendments, addenda, supplements, or exhibits shall be delivered not later than the next business day.
- (3) Any information filed with the application, including but not limited to amendments, addenda, supplements, or exhibits, which require reproduction facilities, equipment, or technology not operated by the Board, must be provided by the applicant in an amount sufficient to allow review by all members of the

Board. An amount sufficient shall mean not less than 10 and not more than 20 copies of the duplicate item.

- (4) A convicted person seeking a Board recommendation to the governor of a reprieve from execution may request an interview with a member of the Board. Such request shall be included in the written application or any supplement filed therewith in accordance with this section.
- (5) Upon receipt of a request for an interview, the presiding officer (chair) shall designate at least one member of the Board to conduct the requested interview. Such interview shall occur at the confining unit of DPS&C. Attendance at such interviews shall be limited to the convicted person, the designated Board member(s), and institutional staff. The Board may consider statements by the offender made at such interviews when considering the offender's application for reprieve.
- (6) The Board shall consider and decide applications for reprieve from execution. Upon review, a majority of the Board, or a majority thereof, in written and signed form, may:
 - (a) recommend to the Governor a reprieve from execution (which may include a recommendation to commute the sentence to life imprisonment);
 - (b) not recommend a reprieve from execution; or
 - (c) set the matter for a hearing as soon as practicable and at a location convenient to the Board and the parties to appear before it.
- (7) When the Board sets a hearing pursuant to B.6.3. of this section, it shall notify the trial officials of the parish of conviction and the attorney general of the State of Louisiana and allow any such official(s), or the designated representatives thereof, the opportunity to attend the hearing and/or to present any relevant information. At the time of notifying the trial officials, the Board shall also notify any representative of the family of the victim (who has previously requested to be notified) of the receipt of the application, the setting of a hearing, and of said representative or family member's rights to provide any written comments or to attend the hearing.
- (8) All hearings conducted by the Board under this section shall be in open session pursuant to requirements of the Louisiana Open Meetings Act. For the purpose of discussing matters which are deemed confidential by statute, or where otherwise authorized by the provisions of the Louisiana Open Meetings Act, the proceedings

may be conducted in executive session closed to members of the general public, for that limited purpose. Only those persons whose privacy interests and right to confidentiality may be abridged by discussion involving disclosure of confidential information may be allowed to meet with members of the Board in their executive session to discuss that information. No decision, vote, or final action by the Board shall be made during a closed meeting; the Board's decision, vote, or final action shall be made and announced in an open meeting. The hearing may be recessed prior to its completion and reconvened pursuant to the directions of the Board.

- (9) Advocates for and against the death penalty, generally, and members of the general public may present written information for the Board's consideration at its central office headquarters at any reasonable time.
- (10) After the conclusion of the hearing, the Board shall render its decision, reached by majority vote, within a reasonable time, which decision shall be either to:
 - (a) recommend to the Governor a reprieve from execution (which may include a recommendation for a commutation of sentence to life imprisonment);
 - (b) not recommend a reprieve from execution; or
 - (c) recess the proceedings without rendering a decision on the merits, if a reprieve has been granted by the governor or if a court of competent jurisdiction has granted a stay of execution.
- (11) Each of the provisions of this policy are subject to waiver by the Board when it finds that there exists good and adequate cause to suspend said provisions and adopt a different procedure which it finds to be better suited to the exigencies of the individual case before it.
- (12) Successive or repetitious reprieve applications submitted in behalf of the same condemned felon may be summarily denied by the Board without meeting.

C. Time Limits

At the clemency hearing for capital punishment cases, the offender's clemency counsel and the attorneys for the State may make an oral presentation, each not to exceed 15 minutes collectively. Representatives of the victim's family may make oral statements not to exceed an

additional five minutes collectively. The Chairman may extend these time frames at his or her discretion.

SHERYL M. RANATZA, CHAIRMAN

**Signature on file*



**LOUISIANA
BOARD OF PARDONS**

Number: 02-208-DIR
Date: January 31, 2013
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BOARD DIRECTIVE

SUBJECT: CLEMENCY FOR CAPITAL CASES

PURPOSE: To provide guidance for the voting members and staff of the Board of Pardons and Paroles (Board) to process a clemency application for offenders who received a sentence of death.

AUTHORITY: LAC Title 22, Part 5, Chapter 1; La. R.S. 15:572

POLICY:
In accordance with the Louisiana Constitution, an offender who is convicted and sentenced to death may request clemency from the Governor. The Board of Pardons shall review all such requests in accordance with this directive. Any request for which a hearing is granted shall be handled in accordance with Board policy A-02-007, "Capital Cases".

PROCEDURES:

The Board of Pardons staff shall request a "pen packet" from the Department of Public Safety & Corrections (DPS&C) staff, Classification and Records sometime after the offender is received on death row at Louisiana State Penitentiary or Louisiana Correctional Institute for Women. Once the pen packet is received, a clemency file is created and maintained by the Board.

I. Board of Pardons Clemency File

The Board's Assistant is responsible for creating a file that contains all appropriate documents and will contact the Division of Probation & Paroles to request an executive clemency case report.

II. Application, Interview and Hearing

The Board's Assistant shall receive clemency applications or requests for capital cases. All capital case applications requesting clemency must be in writing and signed by the offender or his attorney, or in cases where the offender is unable to sign due to a mental or physical impairment, by a person acting on his behalf, in accordance with Board Policy, 02.205, "Application Filing Procedures" and 02.207, "Capital Cases".

- A. Application: An offender, or his attorney, is required to submit an application no later than the 21st calendar day before the scheduled execution date. The offender or his attorney may submit supplemental information no later than the 15th calendar day before the execution is scheduled. The offender may request a Reprieve (Stay of Execution) or Commutation of Sentence.
- B. Interview - If the clemency application includes a request for a Board interview, the Board's Assistant shall contact the Chairman who shall designate at least one member of the Board to conduct the requested interview.
 - 1. The assigned Board Member(s) shall conduct the interview and make arrangements for the interview date and time with the Chairman.
 - 2. The interview shall occur at the confining DPS&C Unit. Attendance shall be limited to the convicted person, designated Board Member(s), and unit staff.
 - 3. The Board's Assistant shall also contact the institutional for staff assignment of interview and accommodations for the Board Member(s).
- C. Hearing – If the clemency application includes a request for a hearing, the Board may grant the request and follow the procedures outlined in Board Policy 02-207, "Capital Cases".
- D. Notice - The Board's Assistant shall send a letter to the trial officials and victims notifying them that the offender has requested clemency and soliciting their input.

III. Board Members Vote

Unless notified otherwise by the Chairman, Board Members shall vote not later than seven (7) days before the execution date at 1 p.m. If a Board Member is on leave and out of the country, the member shall not be required to vote.

- A. The Board Members shall submit their votes by facsimile or hand delivery to the Board's Assistant at the Board Office, 504 Mayflower, Baton Rouge, LA 70802. Upon receipt of all votes, the Board's Assistant shall notify the Chairman who will cast final vote.
- B. The Chairman shall notify the Secretary of DPS&C and the Governor's office of the final vote.
- C. The Board's Assistant shall notify Board Members, trial officials who submitted a response to the notice, and DPS&C Victim Services of the final vote. If the vote is to grant a hearing before the Board, the Board's Assistant shall notify all parties as required by law.

02-208-DIR

January 31, 2013

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IV. Clemency File Return

Each Board Member shall return their clemency file to the Board Office after the Board's Assistant notifies them of the Board's final decision.

SHERYL M. RANATZA, CHAIRMAN

**Signature on File*

State v. Jones

Supreme Court of Louisiana

July 5, 1994, Decided

No. 94-KK-0459

Reporter

639 So. 2d 1144; 1994 La. LEXIS 1863; 94-0459 (La. 7/5/94);

STATE OF LOUISIANA v. LESTER JONES

Subsequent History: **[**1]** Released for Publication July 19, 1994. As Corrected.

Writ denied by State v. Jones, 642 So. 2d 1272, 1994 La. LEXIS 1973 (La., Aug. 26, 1994)

Prior History: ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS STATE OF LOUISIANA

State v. Jones, 634 So. 2d 845, 1994 La. LEXIS 700 (La., Mar. 18, 1994)

Disposition: REVERSED AND REMANDED

Core Terms

pardon, commutation, sentence, ***clemency***, jury instructions, death sentence, offender, recommendation, capital sentencing, jury's, death penalty, circumstances, requires, parole, life imprisonment, trial court, reprieve, reliability, severe, federal constitution, due process, speculation, lesser sentence, propensities, provisions, injection, provides, possibility of parole, sentencing hearing, humane treatment

Case Summary

Procedural Posture

Defendant applied for a writ from the decision of the Court of Appeal, Fourth Circuit, Parish of Orleans (Louisiana), which denied defendant's challenge to the constitutionality of La. Code Crim. Proc. Ann. art. 905.2(B), the ***clemency*** instruction added to the state's capital sentencing provisions, under La. Const. art. 1, § 2, the state's due process clause, and La. Const. art. 1, § 20, the state's right to humane treatment clause.

Overview

Defendant was indicted for the first-degree murder of a British tourist during the perpetration or attempted perpetration of an armed robbery. Defendant challenged the constitutionality of La. Code Crim. Proc. Ann. art. 905.2(B) through a motion in limine, which the trial court denied. The intermediate appellate court denied defendant's request for a writ. On further application, the court granted the writ and ruled art. 905.2(B) unconstitutional. The court held that the ***clemency*** instruction during the sentencing phase of a death penalty prosecution violated La. Const. art. 1, § 2 and La. Const. art. 1, § 20 because it invited the jury to engage in irrelevant speculation of what the present or an unknown future governor will do at an unknown point in the future in response to a request by an unknown person to pardon defendant based upon unknown reasons.

Outcome

The court granted defendant's application for a writ from the decision of the intermediate appellate court, which had denied defendant's application for a writ to have the state's death penalty phase ***clemency*** instruction declared

unconstitutional, and reversed the decision of the district court, which denied defendant's motion in limine on the same issue.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN2 [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) states that notwithstanding any provisions to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN1 [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) requires the trial court, during the sentencing phase of a capital trial, to instruct the jurors regarding the governor's power to grant a reprieve, pardon or commutation of sentence following conviction of a crime.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN3 Because of the uniqueness of the death penalty, it cannot be imposed under sentencing procedures which created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. To minimize the risk that the death penalty will be imposed on a capriciously selected group of offenders, the decision to impose death has to be guided by standards so that the sentencing authority will focus on the particularized circumstances of the crime and the defendant.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN4 In 1976, Louisiana amended its capital sentencing scheme in [La. Code Crim. Proc. Ann. arts. 905-905.9](#) and La. Sup. Ct. R. 28, § 1. The adopted scheme specifies that a sentence of death may only be imposed after the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and after consideration of any mitigating circumstances as stated in [La. Code Crim. Proc. Ann. art. 905.3](#). The sentencing hearing is required to focus on the circumstances of the offense and the character and propensities of the offender as stated in [La. Code Crim. Proc. Ann. art. 905.2](#). Every sentence of death is then reviewed by this court to determine if it is excessive pursuant to [La. Code Crim. Proc. Ann. art. 905.9](#) and La. Sup. Ct. R. 28, § 1.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Suspension

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN5 Conditions under which a person sentenced to life imprisonment without benefit of parole, probation or suspension of sentence can be released at some point in the future is not a proper consideration for a capital sentencing jury and shall not be discussed in its presence. Should a jury request information concerning the possibility of an offender's release, it must be informed that it is duty bound to disregard how other governmental bodies may, in their wisdom and subject to other constraints, act but, instead, must concentrate upon whether it presently feels, in light of the offender and the nature of the offense, the offender should be sentenced to death or to spend the remainder of his life in prison.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN6 [La. Code Crim. Proc. Ann. art. 905.2\(A\)](#) states that the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN7 [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) states that notwithstanding any provisions to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the

offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN8 A pardon is a matter of grace.

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN9 Louisiana's gubernatorial **clemency** power, which encompasses reprieves, pardons, commutations of sentences and the restoration of full rights of citizenship, is bestowed by the constitution. It is purely a function of the executive branch of government, not subject to limitation or control from the other branches. [La. Const. art. 5, § 4\(E\)\(1\)](#) (1974) provides that the governor may grant reprieves to persons convicted of offenses against the state and, upon 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. Except for requests for reprieve, the governor can only act on requests for **clemency** upon recommendation made by the pardon board as set forth in [La. Const. art. 5, § 5\(E\)\(1\)](#). The governor's decision is dispositive. There is no right of appeal from his or her decision.

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Concurrent Sentences

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN10 [La. Const. art. 4, § 5\(E\)\(2\)](#) states that Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him.

Governments > Legislation > General Overview

HN11 Principles of jurisprudence, efficiency and federalism dictate that the appropriate procedure for deciding the constitutionality of the state statute is by analyzing the provisions of our constitution before those of the federal constitution.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN12 Death as a punishment is in a class by itself. It is unique in its severity and its irrevocability. Death remains the only punishment that may involve the conscious infliction of physical pain. Hence, the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of capital sentencing determinations and procedures.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

HN13 [La. Const. art. 1, § 2](#) declares that no person shall be deprived of life, liberty, or property, except by due process of law. The broad safeguards of this provision encompass the guarantee of fundamental fairness in the

sentencing phase of a capital trial and in the decision making process from which the penalty results. A sentencing hearing procedure which influences or predisposes a jury to sentence a defendant to death, when it otherwise would not, is fundamentally unfair in violation of due process guarantees. The possibility of reprieve, pardon or commutation bears no relevant relationship to the constitutionally required focus of the capital sentencing hearing which properly is the circumstances of the offense and the character and propensities of the offender.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

HN14 When a jury's attention is diverted from its primary responsibility of weighing the circumstances of the crime and the character and propensities of the offender and thrust into speculation about the future actions of yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation process, thereby rendering the decision arbitrary.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN15 Under the required **clemency** instruction, one capital defendant may be sentenced to death and another to life imprisonment merely because one jury perceived the system provided a greater likelihood of commutation (with the consequence of parole) than did the other jury, an arbitrary factor unconnected to the offense or offender. A recommendation of death based on a jury prediction of the likelihood defendant will eventually be released if not sentenced to death, is an arbitrary and capricious decision lacking in fundamental fairness. The gubernatorial pardoning power is plainly not a meaningful, principled basis for distinguishing a case in which the death penalty should be imposed from one in which it should not. Rather than purposely diverting the jury's focus to arbitrary factors, the trial court should channel its discretion to focus on the defendant's character and the nature of the crime, factors which minimize the risk of capricious imposition of the death penalty. By deterring the capital jury from this goal and marring its focus, [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) impermissibly increases the risk of an arbitrary factor affecting the jury's sentencing recommendation and, therefore, it compromises the reliability of the jury's decision making process.

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

HN16 The **clemency** instruction of [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) also tends to diminish the jury's sense of responsibility for its action. When the jury is informed of the possibility of commutation, reprieve and pardon, the information may cause the jury to avoid its responsibility under the notion that, if it mistakenly fails to recommend mercy, the error may be corrected by the governor. The instruction then obscures the lines separating the judicial and executive powers by inducing the jury to fail to make the proper constitutionally ordained determination in the first instance, upon a belief that it will subsequently be handled by others. The risk of improperly diminishing the jury's sense of responsibility by injecting thoughts of **clemency** is too great a hazard to chance since, through it, the punishment of death may be inflicted in error.

Constitutional Law > Separation of Powers

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN17 Purposeful injection of the ***clemency*** issue under [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) blurs the constitutional separation of powers in yet another manner, by inviting the jury to pre-empt the governor's commutation power by opting for the death sentence to minimize or to thwart the governor's use of the power. Such a jury action would defeat the constitutional design of both the ***clemency*** power and the right of due process of law. The constitution grants the ***clemency*** power to the governor, while the function of the capital jury is solely to sentence defendant based on the circumstances of the offense and the character and propensities of the offender. The jury should not be induced to foreclose the executive branch from subsequently deciding the commutation and parole issues.

Criminal Law & Procedure > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Postconviction Proceedings > ***Clemency***

HN18 A risk created by pre-emption of the gubernatorial ***clemency*** power under [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) is the jury's apprehension of misuse of the power could inspire it to frustrate the constitution's ***clemency*** scheme by recommending defendant be sentenced to death when it would have otherwise recommended a sentence of life-imprisonment. The sentence of death, then, is not the punishment defendant deserves but is a reactive punishment to stymie the ***clemency*** power. Due process is violated by a capital sentencing instruction which invites the jury to speculate if the executive branch will misuse its ***Clemency*** power. Violation of due process is compounded when, as a result of such speculation, the jury recommends the punishment of death. The jury's duty is to decide its recommendation based upon present facts, what happens after the recommended sentence is imposed is simply not its concern.

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

Criminal Law & Procedure > Postconviction Proceedings > ***Clemency***

HN19 [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) is not one with a neutral effect. Defendant's due process right to a fundamentally fair capital sentencing hearing requires that he should not be placed in the defensive position of having to overcome any negative impact of the ***clemency*** power jury instruction. Defendant should not be forced to defensively respond to the irrelevant instruction in order to persuade or reassure the jury that he has little hope of obtaining a commutation, i.e., he is without political clout, his history would not make him a likely candidate for commutation, or he is unlikely to be rehabilitated, educated or to become terminally ill.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

Criminal Law & Procedure > Postconviction Proceedings > ***Clemency***

HN20 [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#), which requires a capital jury to be instructed on the governor's ***clemency*** power, unconstitutionally violates the due process guarantee of a fundamentally fair trial required by [La. Const. art. 1, § 2](#). The possible prejudicial effect of the instruction perniciously undermines the reliability of the capital sentencing hearing and the soundness of the process by which a jury arrives at the recommendation of

death. It purposefully injects an irrelevant, arbitrary factor into the sentencing hearing risking speculation and chancing the recommendation of the death from a capital jury lacking confidence in governor's ability to wisely use the ***clemency*** power. Injecting this arbitrary factor into the capital sentencing process undermines the fundamental fairness requisite for the capital hearing, a hearing which requires a greater degree of scrutiny due to the qualitative difference between the death penalty from other statutory punishments.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN21 Louisiana's constitutional right to humane treatment is embodied in [La. Const. art. 1, § 20](#), which declares that no law shall subject any person to cruel, excessive or unusual punishment. A source of this right is the *Cruel and Unusual Punishments Clause of the Eighth Amendment of the federal constitution*. The Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. It exacts that capital sentencing procedure must facilitate the responsible and reliable exercise of sentencing discretion. The more significant function of the Clause, however, is to protect against the danger of arbitrary infliction of an unusually severe punishment. It forbids the judicial imposition of a cruel and unusual punishment. It entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

HN22 [La. Const. art. 1, § 20](#)'s right to humane treatment embodies Eighth Amendment principles. Moreover, the inclusion in the Louisiana constitution of the prohibition against "excessive" punishment adds a protection which surpasses those provided by the federal constitution. The "cruel and unusual" punishment prohibition condemns the arbitrary infliction of severe punishment. The prohibition against "excessiveness" proscribes punishment which does not make any measurable contribution to the goals the punishment is intended to achieve, or is grossly out of proportion to the severity of the crime. A punishment that is disproportionate to the offense and the offender is unnecessarily severe and, therefore, excessive per se. Thus, under art. 1, § 20, in addition to entitlement to heightened reliability of the capital sentencing process, the provision protects all defendants not only from punishments that are cruel, excessive or unusual per se or as applied to particular categories of crimes or classes of offenders, but also from any excessive feature of a particular sentence produced by an abuse of the sentencer's discretion, even though the sentence is otherwise within constitutional limits.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

HN23 A sentence of death imposed for any reason other than the penalty is particularized to the circumstances of the crime and the character and propensities of the defendant, is arbitrarily severe, unnecessarily cruel, and disproportionate to the offense. Hence, if a jury instruction creates speculation and fear sufficient to overcome the jury's feelings of compassion or mercy, or predisposes it to recommend an unnecessarily severe punishment and, as a consequence, the jury recommends the sentence of death when it otherwise would not, the punishment of death is disproportionate to the severity of the crime and unconstitutionally excessive. The punishment of death would then violate the defendant's right to humane treatment as it is not the punishment defendant deserves.

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN24 Like the Cruel and Unusual Punishments Clause, [La. Const. art. 1, § 20](#) imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case and it invalidates procedural rules which tend to diminish reliability of the sentencing determination. [La. Code Crim. Proc. Ann. art. 905.2\(B\)](#) is unconstitutional in violation of the right to humane treatment provision of [La. Const. art. 1, § 20](#).

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Postconviction Proceedings > **Clemency**

HN25 [La. Const. art. 1, § 20](#) is a constitutional check on the legislature's latitude to pass capital sentencing guidelines.

Counsel: Numa V Bertel, Esq., Dwight M. Doskey, Esq., ORLEANS INDIGENT DEFENDER PROGRAM, Counsel for Applicant.

Hon. Richard Ieyoub, Attorney General, Hon. Harry F. Connick, District Attorney, Mark D. Pethke, Assistant District Attorney, Counsel for Respondent.

Ellis Paul Adams, Jr., Esq., Counsel for Louisiana District Attorney Association. (Amicus Curiae)

Denise LeBoeuf, Esq., Clive Adrian Stafford Smith, Esq., Counsel for Louisiana Crisis Asst. Center and Louisiana Death Penalty Res. Center. (Amicus Curiae)

John Michael Lawrence, Esq., Alan Jeffrey Golden, Esq., Counsel for Raymond Anthony Rawlins. (Amicus Curiae)

John Michael Lawrence, Esq., Kurt Joseph Goins, Esq., Alan Jeffrey Golden, Esq., Counsel for Brandon Haynes. (Amicus Curiae)

Judges: ORTIQUE, Justice * LEMMON, J. - subscribes to the opinion and assigns additional reason. MARCUS, J. - dissents and assigns reasons. KIMBALL, J. - concurs in the result and will assign reasons. **[**2]**

Opinion by: ORTIQUE

Opinion

Pg 1

[*1146] ORTIQUE, Justice. ¹

* Judge Melvin A. Shortess, Court of Appeal, First Circuit, sitting in place of Justice James L. Dennis. Pursuant to Rule IV, Part 2, § 3, Watson, J., is not on the panel which heard and decided this case.

¹ Judge Melvin A. Shortess, Court of Appeal, First Circuit, sitting in place of Justice James L. Dennis. Pursuant to Rule IV, Part 2, § 3, Watson, J., is not on the panel which heard and decided this case.

The issue in the pretrial phase of this death penalty case is the constitutionality of [LSA-C.Cr.P. art. 905.2\(B\)](#), added to Louisiana's capital sentencing provisions by Act 436 of 1993.² **HN1** The provision requires the trial court, during the sentencing phase of a capital trial, to instruct the jurors regarding the governor's power to grant a reprieve, pardon or commutation of sentence following conviction of a crime. Finding [LSA-C.Cr.P. art. 905.2\(B\)](#) in direct contravention to defendant's due process right to a fundamentally fair trial and to defendant's right to humane treatment, we declare it is unconstitutional.

[3] I.**

Defendant, Lester Jones, was indicted by an Orleans Parish Grand Jury on June 18, 1992 for the first degree murder of a British tourist, Julie Stott. The murder allegedly occurred in [Pg 2] the French Quarter on the 1100 block of Rue Chartres during the perpetration or attempted perpetration of an armed robbery on April 14, 1992.³

Defendant filed a motion in limine on December 7, 1993. The motion moved to restrain the prosecution from mentioning in voir dire, opening statement or argument that the governor retains the power to pardon or commute a life sentence, and to have the trial court declare in advance of trial that it will not charge the jury **[**4]** regarding to the power of the governor or executive branch to pardon or commute a life sentence. Defendant's motion was denied.

Defendant applied directly to this court for supervisory relief from the denial of his motion. We stayed trial and transferred defendant's application to the Fourth Circuit Court of Appeal. *State v. Jones*, No. 94-KK-0459 (La. February 24, 1994). The appellate court granted defendant's application for review, but denied him relief. *In Re: Lester Jones*, No. 94-K-0310 (La. App. 4th Cir. February 18, 1994). Noting that defendant's pre-trial motion attacked the constitutionality of [LSA-C.Cr.P. art. 905.2\(B\)](#), as enacted by Act 436 of 1993, the appellate court **[*1147]** declined to exercise its supervisory jurisdiction to provide an advisory opinion as to the conduct of the prosecutor during the guilt phase of trial and as to the jury instructions of the trial court during sentencing. *Id.*

Thereafter, this court vacated its previously issued stay order and remanded the case to the district court. *State v. Jones*, No. 94-KK-0459 (La. March 11, 1994). The order indicated the case could proceed to trial upon the district attorney's stipulation **[**5]** that he would forego use of [LSA-C.Cr.P. art. 905.2\(B\)](#). *Id.* The order further indicated that if the district attorney chose not to forego use of [LSA-C.Cr.P. art. 905.2\(B\)](#), he should notify this court of his decision, in which case this court would stay trial, grant defendant's application and assign the case for oral argument. *Id.* When the district attorney decided not to forego use of [LSA-C.Cr.P. art. 905.2\(B\)](#), we granted defendant's writ application. *State v. Jones*, No. 94-KK-0459 (La. March 17, 1994). [Pg 3]

² The portion of [LSA-C.Cr.P. art. 905.2](#) added by Act 436 of 1993 provides as follows:

Art. 905.2. Sentencing hearing; procedure and evidence; jury instructions

* * *

B. **HN2** Notwithstanding any provisions to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

³ Defendant has two prior convictions for armed robbery which presently are on appeal to the Fourth Circuit Court of Appeal, in *State v. Lester Jones*, No. 94-KA-0071. Defendant also has two charges of armed robbery presently pending against him in the Criminal District Court, Parish of Orleans, in *State v. Lester Jones*, No. 358-749(B).

II.

Defendant's writ application does not seek an advisory opinion on the constitutionality of [LSA-C.Cr.P. art. 905.2\(B\)](#). See generally [America Waste & Pollution Control Co. v. St. Martin Parish Police Jury](#), 627 So. 2d 158 (La. 1993). Instead, it provokes employment of our supervisory jurisdiction and plenary authority to consider the constitutionality of a capital sentencing provision which the law requires the trial court to implement in all capital sentencing hearings, and which the state declined to forego commenting on in the guilt and/or sentencing phases of trial. [LSA-Const. Art. 5, § 5](#). See [State v. Peart](#), 621 So. 2d 780, 790-791 (La. 1993). **[**6]** Cf. [State v. Jackson](#), 608 So. 2d 949 (La. 1992); [State v. Bernard](#), 608 So. 2d 966 (La. 1992). Thus, since a death sentence is qualitatively different from any other sentence and we have a duty to ensure against arbitrary imposition of the death penalty, we invoke our plenary authority to evaluate the constitutionality of [LSA-C.Cr.P. art. 905.2\(B\)](#) at this stage, rather than unnecessarily chancing retrial of a capital case. See [LSA-Const. Art. 5, § 5](#); Supreme Court Rule 28, § 1; [LSA-C.Cr.P. art. 905.9](#).

III.

In [Furman v. Georgia](#), 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the United States Supreme Court recognized that the penalty of death is different in kind from any other punishment imposed under the American criminal justice system. [Gregg v. Georgia](#), 428 U.S. 153, 188, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976). **HN3** Because of the uniqueness of the death penalty, *Furman* holds that it could not be imposed under sentencing procedures which created a substantial risk that it would be inflicted in an arbitrary and capricious manner. *Id.* Where discretion is afforded a sentencing body on **[**7]** a matter so grave as the determination of whether a human life should be taken or spared, *Furman* mandates that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 428 U.S. at 188-189, 96 S. Ct. at 2932. To minimize the risk that the death penalty will be imposed on a capriciously selected group of offenders, the decision to impose death has to be guided by standards so that the sentencing authority will focus on the particularized circumstances of the crime and the defendant. 428 U.S. at 199, 96 S. Ct. at 2937. [Pg 4]

In 1974, in the case of [Roberts v. Louisiana](#), 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1974), the United States Supreme Court held Louisiana's death penalty scheme then in effect failed to provide a constitutionally adequate response to *Furman*. [State v. Sonnier](#), 379 So. 2d 1336, 1370 (La. 1979), *on re'hrg*. However, on the same day *Roberts* was rendered, the United States Supreme Court approved the bifurcated capital sentencing procedure it reviewed in [Gregg v. Georgia](#), *supra*, which divided capital **[**8]** trials into a guilt phase and a sentencing phase. *Id.* Among other procedures, Georgia's bifurcated scheme required the jury in the sentencing phase to consider the circumstances of the crime and the criminal before recommending a sentence of death. In *Gregg*, the United States Supreme Court expressly commented that such a procedure directed the jury's attention to the specific circumstances of the crime and focussed its attention on the characteristics of the person **[*1148]** who committed the crime. It found, as a result, "while jury discretion still exists, 'the discretion to be exercised is controlled by clear objective standards so as to produce non-discriminatory application.'" 428 U.S. at 197-198, 96 S. Ct. at 2936, citing [Coley v. State](#), 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

HN4 In 1976, Louisiana amended its capital sentencing scheme, modeling it after the Georgia scheme approved in *Gregg*. [State v. Sonnier](#), 379 So. 2d at 1370. See [LSA-C.Cr.P. arts. 905-905.9](#); Supreme Court Rule 28, § 1. The adopted scheme specifies that a sentence of death may only be imposed after the jury finds beyond a reasonable doubt **[**9]** that at least one statutory aggravating circumstance exists and after consideration of any mitigating circumstances. [LSA-C.Cr.P. art. 905.3](#). The sentencing hearing is required to focus on the circumstances of the offense and the character and propensities of the offender. [LSA-C.Cr.P. art. 905.2](#). Every sentence of death is then reviewed by this court to determine if it is excessive. [LSA-C.Cr.P. art. 905.9](#); Supreme Court Rule 28, § 1.

After these sentencing procedures were in place, this court noted that the possibility of pardon or commutation was quickly becoming a major issue in Louisiana's capital sentencing hearings. [State v. Lindsey](#), 404 So. 2d 466, 485 (La. 1981), *cert. den.*, 464 U.S. 908, 104 S. Ct. 261, 78 L. Ed. 2d 246, *re'hg den.*, 464 U.S. 1004, 104 S. Ct. 515, 78 L. Ed. 2d 702 (1983). This generated concern because the injection of such factors into the sentencing phase

of a capital trial diverts the jurors from their primary responsibility, charges them to make decisions [Pg 5] not proper within their duty as jurors (by speculating what a present or future governor may do) and creates a substantial likelihood [**10] that the death penalty will be imposed as a product of arbitrary factors. *Id.*

Since the sentencing scheme then in effect did not expressly provide for the jury's consideration of a pardon and commutation and, *more importantly*, because the purposeful injection of comments on pardon and commutation provokes the jury to speculate about future actions of governors, induces the jury to consider whether the present or a future governor would improperly pardon or commute a sentence (thereby pre-empting the governor's power and unconstitutionally invoking the death penalty to defeat the constitutional design of the pardon power), and motivates the jury to act out of fear of the unknown possibility that the defendant may be returned to society, we implemented an almost blanket prohibition of discussion of such matters. See [404 So. 2d at 486-487](#). Consequently, based upon the magnitude of the potential for arbitrary jury decision making and the irrelevance of ***clemency*** to the jury's duty in a capital sentencing hearing, we held that,

HN5 conditions under which a person sentenced to life imprisonment without benefit of parole, probation or suspension of sentence can [**11] be released at some point in the future *is not a proper consideration for a capital sentencing jury and shall not be discussed in its presence*. Should a jury request information concerning the possibility of an offender's release, it must be informed that it is duty bound to disregard how other governmental bodies may, in their wisdom and subject to other constraints, act but, instead, must concentrate upon whether it presently feels, in light of the offender and the nature of the offense, the offender should be sentenced to death or to spend the remainder of his life in prison. [404 So. 2d at 482](#). (emphasis added)

See also [State v. Willie, 410 So. 2d 1019, 1033 \(La. 1982\)](#) [an argument based on the law governing pardon and commutation or its administration by the governor and other executive officers is entirely inappropriate to a capital sentencing proceeding]; [State v. Copeland, 419 So. 2d 899 \(La. 1982\)](#); [State v. Jordan, 420 So. 2d 420 \(La. 1982\)](#); [State v. Sawyer, 422 So. 2d 95, n. 20 \(La. 1982\)](#) ["Prosecutors tread on dangerous ground by mentioning the availability of pardon. Even [**12] though such a remark is accurate, it has little relevance to the penalty determination, except to give the jury a complete picture of the overall scheme for punishing first degree murderers . . ."], *cert. granted, judgment vacated and case remanded*, 463 U.S. 1223, 103 S. Ct. 3567, 77 L. Ed. 2d 1407 (1983), *aff'd on [**149] remand*, [422 So. 2d 1136 \(La. 1983\)](#); [State v. Kirkpatrick, 443 So. 2d 546 \(La. 1983\)](#), *cert. den.*, 466 U.S. 993, 104 S. Ct. 2374, 80 L. Ed. 2d 847 [Pg 6] L. Ed. 2d 847 (1984); [State v. Glass, 455 So. 2d 659 \(La. 1984\)](#), *cert. den.*, 471 U.S. 1080, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985), *re'hrq den.*, 472 U.S. 1037, 105 S. Ct. 3516, 87 L. Ed. 2d 645 (1985); [State v. Williams, 490 So. 2d 255 \(La. 1986\)](#), *cert. den.*, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 780 (1987), *re'hrq den.*, 483 U.S. 1056, 108 S. Ct. 32, 97 L. Ed. 2d 820 (1987).

Against this backdrop, the legislature enacted Act 436 of 1993, adding section (B) to [LSA-C.Cr.P. art. 905.2](#) and its requirement for the trial court to [**13] instruct the jury regarding the gubernatorial ***clemency*** power. As amended, [LSA-C.Cr.P. art. 905.2](#) provides as follows:

Art. 905.2. Sentencing hearing; procedure and evidence; jury instructions

A. **HN6** The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

B. **HN7** Notwithstanding any provisions to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, [**14] commute or modify

a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

As previously indicated, prior to the enactment of Act 436 of 1993 and the addition of section (B) to [LSA-Cr.P. art. 905.2](#), the constant focus of the sentencing phase of a capital trial was on the circumstances of the offense or on the character and propensities of the offender. See [State v. Bernard, supra](#). The constitutionally challenged statute must, therefore, be examined to ascertain whether it impermissibly shifts the focus of the sentencing hearing, skewing the decision making process and, thereby, denying defendant a fundamentally fair trial in **[**15]** violation of due process of law, and/or whether it creates a risk that the jury will abuse its discretion by recommending death for an arbitrary reason, when it otherwise would have recommended a lesser sentence, in violation of the guarantee of humane treatment. [Pg 7]

HN8 A pardon is a matter of grace. [Bryant v. Louisiana State Pardon Board, 378 So. 2d 180 \(La. App. 1st Cir. 1979\)](#); Bedau, Hugo Adam, *A Retributive Theory of the Pardoning Power?*, 27 U.Rich.L.Rev. 185, 191 (1993) ["executive **clemency** is a power of mercy and the sentence reduction it provides are merciful acts"]; Vandirer, Margret, *The Quality of Mercy: Race and Clemency* in Florida Death Penalty Cases, 1924-1966, 27 U.Rich. L.Rev. 315,316,318 (1993). It is reminiscent of the king's prerogative to decide whether a condemned person lived or died. Kobil, Daniel T., *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U.Rich.L.Rev. 201, 202 (1993). The power of **clemency** is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process **[**16]** has been exhausted. [Herrera v. Collins, U.S. , 113 S. Ct. 853, 121 L. Ed. 2d 203 \[*1150\] \(1993\)](#). Nonetheless, like the monarchical power from which it derives, **clemency** is shrouded in mystery and often fraught with arbitrariness. Kobil, 27 U.Rich.L.Rev. at 202.

The executive **clemency** power can be and, admittedly, has been misused by the granting or denying of pardons, commutations and reprieves based on political motivations or favoritism. See Wardlaw, Jack and Lynch, Bill, "Edwards: Turned Down Offers to Buy Pardons for Prisoners," *Times-Picayune* (September 24, 1986); Wardlaw, Jack, "Two Indicted in Pardon Bribe Case," *Times-Picayune* (September 7, 1986) [Rep. Joseph A. Delpit, speaker pro tem of the House, and Pardon Board Chairman Howard A. Marsellus, Jr., indicted on bribery charges for allegedly attempting to sell a pardon for a convicted murderer for \$ 130,000]; Hargroder, Charles M. "Sudden Twist in Marsellus Case," *Times-Picayune* (October 6, 1987) [former chairman of the Louisiana Pardon Board, Marsellus, plead guilty to charges that he sold **clemency** to state prison inmates]; Associated Press, "Pardons **[**17]** Rise as Edwards Term Ends," *Times-Picayune* (February 14, 1988); Scheinfeld, David, "Second Chances," 201 New York Law Journal p. 2, col. 3 (January 31, 1989) [ex-president Ford pardoned an attorney jailed for obstruction of justice; the forgiven attorney's brother was a major Republican political contributor]; Lichfield, John, "No Deliverance in Virginia," *The Independent* p.16 (May 10, 1992) [a Virginia death row inmate whose proof of innocence was discovered 21 days after his conviction and whose execution was scheduled for the following week, replied as follows when [Pg 8] questioned regarding his hope of receiving a gubernatorial pardon: "That's the one question I never answer because the death penalty is political and he's a politician."] However, that power is also validly exercised in cases where newly-discovered evidence establishes innocence, where changes in the prisoner demonstrate the justice of commutation (such as the prisoner is terminally ill or has been rehabilitated), where the prisoner had moral justification for the criminal act (such as battered women's syndrome), where the prisoner was not wholly at fault in committing the criminal act (such as it **[**18]** was committed under circumstances of insanity, mental retardation, or youth), where the imposed penalty is considered unduly harsh, and/or where a pardon will heal political wounds. See generally Bedau, 27 U.Rich.L.Rev. 185; Ledewitz, Bruce and Staples, Scott, *The Role of Executive Clemency* in Modern Death Penalty Cases, 27 U.Rich. L.Rev. 227 (1993); "A Matter of Life and Death: Due Process Protection in Capital **Clemency** Proceedings, 90 Yale L.J. 889 (1981); Schimmel, Joseph B., *Commutations of the Death Sentence: Florida Steps Back From Justice and Mercy*, 20 Fla.S.U.L.Rev. 253

(1992); Adams, Edward A., "Cuomo Faces Annual Ritual of Deciding on **Clemency**," 208 *New York Law Journal* p. 1, col. 3 (December 28, 1992).

HN9 Louisiana's gubernatorial **clemency** power, which encompasses reprieves, pardons, commutations of sentences and the restoration of full rights of citizenship, is bestowed by the constitution. It is purely a function of the executive branch of government, not subject to limitation or control from the other branches. [Bryant v. Louisiana State Pardon Board, supra.](#); [State v. Mehojovich, 119 La. 791, 44 So. 481 \(1907\)](#). [****19**] [Article 5, § 4\(E\)\(1\) of the Louisiana Constitution of 1974](#) provides that the governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, ⁴ may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. See also [LSA-R.S. 15:572 et. seq.](#) Except for requests for reprieve, the governor can only act on requests for **clemency** upon recommendation made by the pardon board. [LSA-Const. Art. 5, § 5\(E\)\(1\)](#). The governor's decision is dispositive. There is no right of appeal from his or her decision.

[Pg 9]

In the last twenty years, a Louisiana governor has commuted only one death sentence [****20**] to life imprisonment. On August 17, [****1151**] 1989, Governor Buddy Roemer, following the recommendation of the Board of Pardons, commuted the sentence of Ronald S. Monroe stating: "While there is guilt for Ronald Monroe, in an execution in this country, the test ought not be reasonable doubt, the test ought to be is there any doubt." Radelet, Michael L. and Zsembik, Barbara A., *Executive Clemency in Post-Furman Capital Cases*, 27 U.Rich.L.Rev. 289, 312-313 (1993). In contrast, during this same time period, 170 ⁵ commutations have been granted to inmates sentenced to life imprisonment for first degree murder.

[****21**] V.

The constitutionality of [LSA-C.Cr.P art. 905.2\(13\)](#) raises issues pertaining to the fundamental provisions of both the Louisiana and federal constitutions. **HN11** Principles of jurisprudence, efficiency and federalism dictate that the appropriate procedure for deciding the constitutionality of the state statute is by analyzing the provisions of our constitution before those of the federal constitution. ⁶ [State v. Perry, 610 So. 2d 746, 750 \(La. 1992\)](#). Cf. [California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 \(1983\)](#); [Simmons v. South Carolina, 428 U.S. 903, 49 L. Ed. 2d 1208, 96 S. Ct. 3207, S. Ct. __, 1994 WL 263483, slip op. at 8 \(June 17, 1994\)](#)["It is true that *Ramos*

⁴ **HN10** The Constitution directs that the "Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him." [LSA-Const. Art. 4, § 5\(E\)\(2\)](#).

⁵ A compilation by Thomas A. Hollins, Administrative Specialist II, Louisiana Board of Pardons, indicates that the following number of commutations for first degree murder were signed: 1974 - 2, 1975 - 1, 1976 - 26, 1977 - 26, 1978 - 11, 1979 - 26, 1980 - 8, 1981 - 0, 1982 - 1, 1983 - 1, 1984 - 9, 1985 - 4, 1986 - 14, 1987 - 9, 1988 - 18, 1989 - 7, 1990 - 7, 1991 - 5, 1992 - 4, 1993 - 0, 1994 - 0 (as of January 27, 1994), totalling 179. Hollins indicated these figures included one death sentence commutation and eight commutations for persons re-sentenced by the courts from death to life, thereby reducing the total to 170. He additionally noted that only eleven commutations specifically stated first degree murder; all others only stated murder.

Accord: A memorandum from the Louisiana Department of Public Safety & Corrections, dated August 17, 1993, indicates that in 1991 the sentences of 5 inmates convicted of first degree murder were commuted from life sentences (average time served on life prior to commutation 16.9 years) and in 1992 the sentences of 4 inmates convicted of first degree murder were commuted from life sentences (average time served on life prior to commutation 16.5 years).

⁶ [California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 \(1983\)](#), held that California's "Briggs instruction" did not violate the **Eighth** and **Fourteenth Amendments to the United States Constitution**. By California law, the Briggs instruction required the trial court to inform the capital jury during the penalty phase of trial that a sentence of life imprisonment without the possibility of parole may be commuted by the governor to a sentence that includes the possibility of parole. Unlike [LSA-C.Cr.P. art. 905.2\(B\)](#), the Briggs instruction did not inform the jury that the governor possesses the power to commute a death sentence. On remand from the United States Supreme Court, the California Supreme Court in [People v. Ramos, 689 P.2d 430,441 \(Cal. 1984\)](#)(*Ramos II*), held the Briggs instruction violated California's constitutional guarantee of due process

stands for the broad proposition that we generally defer to a State's determination as to what a jury should and should not be told about sentencing . . . States reasonably may conclude that [Pg 10] truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide 'greater protections in [the States'] criminal justice system than the Federal [**22] Constitution requires." Citing [California v. Ramos, 463 U.S. at 1014.](#)]

[**23] VI.

HN12 Death as a punishment is in a class by itself. *Furman v. Georgia*, 408 U.S. at 289, 96 S. Ct. at 2752 (Brennan, J., concurring). It is unique in its severity and its irrevocability. [Gregg v. Georgia, 96 S. Ct. at 2931](#); *Furman v. Georgia*, 408 U.S. at 286-291, 96 S. Ct. at 2750-2753 (Brennan, J., concurring); [408 U.S. at 306, 92 S. Ct. at 2760](#) (Stewart, J., concurring). Death remains the only punishment that may involve the conscious infliction of physical pain. *Furman v. Georgia*, 408 U.S. at 288, 96 S. Ct. at 2751 (Brennan, J., concurring). Hence, we fully subscribe to the United States Supreme Court's observation that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of capital sentencing [*1152] determinations (and procedures). [California v. Ramos, 463 U.S. 992, 998, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 \(1983\)](#). Therefore, because it involves the constitutionally guaranteed rights of a capital defendant, the evaluation of the constitutionality of [LSA-C.Cr.P. art. 905.2\(B\)](#) requires a heightened degree [**24] of scrutiny.

A. Due Process Right to a Fundamentally Fair Trial

[LSA-Const. Art. 1, § 2](#) **HN13** declares that no person shall be deprived of life, liberty, or property, except by due process of law. The broad safeguards of this provision encompass the guarantee of fundamental fairness in the sentencing phase of a capital trial and in the decision making process from which the penalty results. A sentencing hearing procedure which influences or predisposes a jury to sentence a defendant to death, when it otherwise would not, is fundamentally unfair in violation of due process guarantees.

The possibility of reprieve, pardon or commutation bears no relevant relationship to the constitutionally required focus of the capital sentencing hearing which properly is the circumstances of the offense and the character and propensities of the offender. The irrelevant instruction required by [LSA-C.Cr.P. art. 905.2\(B\)](#), injects a factor into the jury's decision making process which is arbitrary. The factor is arbitrary because it invites the jury to engage [Pg 11] in irrelevant speculation of what the present or an unknown future governor will do at an unknown point in the future in response [**25] to a request by an unknown person to pardon defendant based upon unknown reasons. In short, it asks for a present answer to uncertain future events, provoking questions which no human mind can answer. [State v. Lindsey, 404 So. 2d at 486](#). In doing so, it diverts the jury from its proper purpose and it invites the jury to impose a death sentence on the basis of its *ad hoc* speculation about the likelihood of defendant's eventual release. [California v. Ramos, 463 U.S. at 1019, 103 S. Ct. at 3463](#) (Marshall, J., dissenting). As we stated in *State v. Lindsey*,

HN14 when a jury's attention is diverted from its primary responsibility of weighing the circumstances of the crime and the character and propensities of the offender and thrust into speculation about the future actions of yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation process, thereby rendering the decision arbitrary . . . [404 So. 2d at 487](#).

HN15 Under the required **clemency** instruction, one capital defendant may be sentenced to death [**26] and another to life imprisonment merely because one jury perceived the system provided a greater likelihood of commutation (with the consequence of parole) than did the other jury -- an arbitrary factor unconnected to the offense or offender. A recommendation of death based on a jury prediction of the likelihood defendant will eventually be released if not sentenced to death, is an arbitrary and capricious decision lacking in fundamental

and held that even if the instruction was amended to inform the jury that the governor possesses the power to commute a death sentence, it would violate California's constitutional guarantee of due process.

fairness. [California v. Ramos, 463 U.S. at 1020, 103 S. Ct. at 3463](#) (Marshall, J., dissenting). The gubernatorial pardoning power is plainly not a meaningful, principled basis for distinguishing a case in which the death penalty should be imposed from one in which it should not. See [Id.](#); [463 U.S. at 1020-1021, 103 S. Ct. at 3463-3464](#). Rather than purposely diverting the jury's focus to arbitrary factors, the trial court should channel its discretion to focus on the defendant's character and the nature of the crime, factors which minimize the risk of capricious imposition of the death penalty. By deterring the capital jury from this goal and marring its focus, [LSA-C.Cr.P. art. 905.2\(B\)](#) impermissibly increases the **[**27]** risk of an arbitrary factor affecting the jury's sentencing recommendation and, therefore, it compromises the reliability of the jury's decision making process.

HN16 The **clemency** instruction also tends to diminish the jury's sense of responsibility for its action. *Ramos II*, 689 P. 2d at 443. When the jury is informed of the possibility of [Pg 12] commutation, reprieve and pardon, the information may cause the jury to avoid its responsibility under the notion that, if it mistakenly fails to recommend mercy, the error may be corrected by the governor. See *Id.* citing [Smith v. State, \[*1153\] 317 A.2d 20, 25 \(Del. 1974\)](#). The instruction then obscures the lines separating the judicial and executive powers by inducing the jury to fail to make the proper constitutionally ordained determination in the first instance, upon a belief that it will subsequently be handled by others. See [People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 932, 180 Cal. Rptr. 266 \(Cal. 1982\)](#) (*Ramos I*), *cert. granted and rev'd*, [California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 \(1983\)](#). The risk of improperly diminishing the **[**28]** jury's sense of responsibility by injecting thoughts of **clemency** is too great a hazard to chance since, through it, the punishment of death may be inflicted in error.

HN17 Purposeful injection of the **clemency** issue blurs the constitutional separation of powers in yet another manner, by inviting the jury to pre-empt the governor's commutation power by opting for the death sentence to minimize or to thwart the governor's use of the power. Such a jury action would defeat the constitutional design of both the **clemency** power and the right of due process of law. See [State v. Lindsey, 404 So. 2d at 487](#); *Ramos II*, 689 P. 2d at 443. The constitution grants the **clemency** power to the governor, while the function of the capital jury is solely to sentence defendant based on the circumstances of the offense and the character and propensities of the offender. The jury should not be induced to foreclose the executive branch from subsequently deciding the commutation (and parole) issue(s). [People v. Morse, 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 41 \(1964\)](#).

HN18 A risk created by pre-emption of the gubernatorial **clemency** power of even greater **[**29]** constitutional dimension, is the jury's apprehension of misuse of the power could inspire it to frustrate the constitution's **clemency** scheme by recommending defendant be sentenced to death when it would have otherwise recommended a sentence of life-imprisonment. See [State v. Lindsey, 404 So. 2d at 487](#); *Ramos II*, 689 P. 2d at 443. The sentence of death, then, is not the punishment defendant deserves but is a reactive punishment to stymie the **clemency** power. Due process is violated by a capital sentencing instruction which invites the jury to speculate if the executive branch will misuse its **Clemency** power. [People v. Morse, 388 P.2d at 40-41](#). Violation of due process is compounded when, as a result of such speculation, the jury recommends the punishment of death. The jury's duty is to decide its recommendation based [Pg 13] upon present facts, what happens after the recommended sentence is imposed is simply not its concern. *Id.*

Finally, **HN19** the instruction is not one with a neutral effect. Defendant's due process right to a fundamentally fair capital sentencing hearing requires that he should not be placed in the defensive **[**30]** position of having to overcome any negative impact of the **clemency** power jury instruction. Defendant should not be forced to defensively respond to the irrelevant instruction in order to persuade or reassure the jury that he has little hope of obtaining a commutation (i.e., he is without political clout, his history would not make him a likely candidate for commutation, or he is unlikely to be rehabilitated, educated or to become terminally ill).

Based on the foregoing reasons, we hold [LSA-C.Cr.P. art. 905.2\(B\)](#), **HN20** which requires a capital jury to be instructed on the governor's **clemency** power, unconstitutionally violates the due process guarantee of a fundamentally fair trial. [LSA-Const. Art. 1, § 2](#). The possible prejudicial effect of the instruction perniciously undermines the reliability of the capital sentencing hearing and the soundness of the process by which a jury arrives at the recommendation of death. It purposefully injects an irrelevant, arbitrary factor into the sentencing hearing risking speculation and chancing the recommendation of the death from a capital jury lacking confidence

in governor's ability to wisely use the **clemency** power. See *Ramos II*, 689 P. 2d at 443. **[**31]** Injecting this arbitrary factor into the capital sentencing process undermines the fundamental fairness requisite for the capital hearing, a hearing which requires a greater degree of scrutiny due to the qualitative difference between the death penalty from other statutory punishments.

B. Right to Humane Treatment

HN21 Louisiana's constitutional right to humane treatment is embodied in [LSA-Const. Art. 1, **\[*1154\]** § 20](#), which declares that no law shall subject any person to cruel, excessive or unusual punishment. A source of this right is the *Cruel and Unusual Punishments Clause of the Eighth Amendment of the federal constitution*. The Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. *Herrera v. Collins*, *supra*, -- U.S. at ___, 113 S. Ct. at 863. It exacts that capital sentencing procedure must facilitate the responsible and reliable exercise of sentencing discretion. [Caldwell v. Mississippi, 472 U.S. 320, \[Pg 14\] 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231 \(1985\)](#). The more significant function of the Clause, however, is to protect against the danger **[**32]** of arbitrary infliction of an unusually severe punishment. *Furman v. Georgia*, 408 U.S. at 277, 96 S. Ct. at 2746 (Brennan, J., concurring). It forbids the *judicial* imposition of a cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. at 241, 96 S. Ct. at 2728 (Douglas, J., concurring). It entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. *Simmons v. South Carolina*, slip op. at 14 (Souter, J., concurring).

HN22 Our state constitutional right to humane treatment embodies these Eighth Amendment principles. Moreover, the inclusion in our constitution of the prohibition against "excessive" punishment adds a protection which surpasses those provided by the federal constitution. See [State v. Perry, 610 So. 2d at 762](#). The "cruel and unusual" punishment prohibition condemns the arbitrary infliction of severe punishment. [State v. Perry, 610 So. 2d at 763](#). The prohibition against "excessiveness" proscribes punishment which does not make any measurable contribution to the goals the punishment is intended to achieve, or **[**33]** is grossly out of proportion to the severity of the crime. [State v. Perry, 610 So. 2d at 764](#); [State v. Lobato, 603 So. 2d 739, 751 \(La. 1992\)](#); [State v. Bonanno, 384 So. 2d 355 \(La. 1980\)](#). A punishment that is disproportionate to the offense and the offender is unnecessarily severe and, therefore, excessive *per se*. Thus, under [LSA-Const. Art. 1, § 20](#), in addition to entitlement to heightened reliability of the capital sentencing process, the provision protects all defendants not only from punishments that are cruel, excessive or unusual *per se* or as applied to particular categories of crimes or classes of offenders, but also *from any excessive feature of a particular sentence produced by an abuse of the sentencer's discretion*, even though the sentence is otherwise within constitutional limits. [State v. Perry, 610 So. 2d at 764](#); [State v. Telsee, 425 So. 2d 1251 \(La. 1983\)](#).

HN23 A sentence of death imposed for any reason other than the penalty is particularized to the circumstances of the crime and the character and propensities of the defendant, is arbitrarily severe, unnecessarily cruel, **[**34]** and disproportionate to the offense. Hence, if a jury instruction creates speculation and fear sufficient to overcome the jury's feelings of compassion or mercy, or predisposes it to recommend an unnecessarily severe punishment and, as a consequence, the jury recommends the sentence of death when it otherwise would not, the punishment of death is disproportionate to the severity of the crime and unconstitutionally excessive. The punishment [Pg 15] of death would then violate the defendant's right to humane treatment as it is not the punishment defendant deserves.

HN24 Like the Cruel and Unusual Punishments Clause, [LSA-Const. Art. 1, § 20](#) imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case and it invalidates procedural rules which tend to diminish reliability of the sentencing determination. *Simmons v. South Carolina*, slip op. at 14 (Souter, J., concurring), citing [Woodson v. North Carolina, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 \(1976\)](#) (opinion of Stewart, Powell, and Stevens, JJ.) and [Beck v. Alabama, 447 U.S. 625, 638, 65 L. Ed. 2d 392, 100 S. Ct. 2382 \(1980\)](#). **[**35]** Without belaboring the reasons made in the previous section supporting the conclusion that the **clemency** power instruction misguides the jury's deliberations by deterring its focus from the circumstances of the offense and the character and propensities of the offender through the injection of an arbitrary factor thereby creating a substantial risk that the penalty of **[*1155]** death will be inflicted for an arbitrary and capricious reason, we hold [LSA-C.Cr.P. art. 905.2\(B\)](#) is unconstitutional in violation of the right to humane treatment.

[LSA-Const. Art. 1, § 20](#) **HN25** is a constitutional check on the legislatures's latitude to pass capital sentencing guidelines. See *Furman v. Georgia*, 408 U.S. at 257-306, 96 S. Ct. at 2736-2760 (Brennan, J., concurring). The **clemency** power jury instruction creates the impermissible risk that the death penalty will be recommended when the penalty is not the one defendant deserves and when it is disproportionate to the severity of the crime. Because the instruction undercuts the soundness of the capital jury's decision making process and undermines the reliability of any resultant recommendation of death, [LSA-C.Cr.P. art. 905.2\(B\)](#) **[**36]** cannot stand.

VII.

The heightened constitutional protections afforded capital defendants combined with the mandates of [LSA-Cont. Art. 1, § 2](#) and § 20, restrain the freedom of the legislature from enacting legislation which undermines the fundamental fairness of a capital sentencing hearing and/or promotes the infliction of cruel, excessive and unusual punishment. Based on the overpowering need for reliability in the determination of a death sentence, a punishment unique in its severity and irrevocability, the invalidation of [LSA-C.Cr.P. art. 905.2\(B\)](#) is necessary. Therefore, the statute, as amended by Act 436 of 1993, is unconstitutional and unenforceable. [Pg 16]

Based on the foregoing, the ruling of the district court on defendant's motion in limine is reversed, the motion is granted and the case is remanded to the district court for further proceedings.

REVERSED AND REMANDED. [Pg 17]

Lemmon, J., subscribes to the opinion and assigns additional reasons Marcus, J. dissents and assigns reasons. Kimball, J., concurs in the result and will assign census.

Concur by: LEMMON; KIMBALL

Concur

LEMMON, J., Subscribing to the Opinion and Assigning Additional Reasons

I agree that **[**37]** [La. Code Crim. Proc. art. 905.2B](#), which requires that the trial judge instruct the jury in every capital case on the governor's pardon and commutation powers, must be declared unconstitutional. This court has consistently held that such an instruction generally will introduce an arbitrary factor into the jury's sentencing decision. See [State v. Lindsey](#), 404 So. 2d 466 (La. 1981).

This is not to say that such an instruction should never be given. Perhaps the defense attorney or the prosecutor will make a statement during closing argument that necessitates clarification by a jury instruction, compare *Simmons v. South Carolina*, U.S. , 49 L. Ed. 2d 1208, 96 S. Ct. 3207 (1994), or perhaps a request by the jury will give rise to such a need. These questions must be decided on a case-by-case basis and are beyond the scope of the narrow issue presently before the court. Nevertheless, the trial judge flirts with reversible error when he or she mentions pardon powers and should be very cautious in handling such situations. [Pg 18] **[*1156] KIMBALL, J., concurring in result.**

I write separately because although I agree with the **[**38]** result achieved by the majority's opinion, I respectfully disagree in part with the analysis employed by the majority in reaching that result.

I disagree with the majority's implication that the due process clause of the Louisiana Constitution provides broader protection than the virtually identical Due Process Clause of the United States Constitution. ¹ In my view,

¹ U.S. Const. Art. XIV, § 1 provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

[La. Const. art. 1, § 2](#) provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

the jury instruction required by [La. C.Cr.P. art. 905.2\(B\)](#)² violates the defendant's due process rights under both constitutions.

[**39] In [Simmons v. South Carolina, 129 L. Ed. 2d 133, 1994 U.S. LEXIS 4640, 114 S. Ct. 2187 \(1/18/94\)](#), the United States Supreme Court held the State of South Carolina denied the defendant due process under the federal constitution when the trial court refused the defendant's request to instruct the jury that "life imprisonment" did not carry with it the possibility of parole. The Supreme Court found the refusal to so instruct the jury "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 6. Under *Simmons*, therefore, federal due process requires trial courts to instruct juries regarding parole ineligibility because to do otherwise would skew the jury toward imposing death.

In the instant case, the requirement that the jury be instructed to consider the possibility of a reprieve, pardon, or commutation of defendant's sentence presents a situation which is analogous to that in *Simmons*. Like the trial court's refusal to instruct the jury that "life imprisonment" did not carry with it the possibility of parole in *Simmons*, the jury instruction required by La. C.Cr. [**40] P. art. 905.2(B) would serve only to raise in the minds of jurors the possibility of defendant's early release and to create "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Simmons, supra* at 6. Therefore, because federal due process under *Simmons* requires trial courts to instruct juries regarding parole ineligibility where to do otherwise would skew the jury toward imposing death, federal as well as state due process likewise requires trial courts to refrain from instructing juries regarding executive **clémency** where to do otherwise would skew the jury toward imposing death. In other words, in my view the rule of *Simmons* broadens the due process protection afforded by the federal Constitution beyond that previously recognized in [California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 \(1983\)](#).³

[**41] Thus, while I agree with the majority's observation that "the possible prejudicial effect of the instruction perniciously undermines the reliability of the capital sentencing hearing and the soundness of the process by which a jury arrives at the recommendation of death," I would emphasize that the instruction [**1157] violates the due process guarantee of a fundamentally fair trial under *both* the United States and Louisiana Constitutions.

Additionally, I disagree with the inclusion of what I consider unnecessary analysis of [La. C.Cr.P. art. 905.2\(B\)](#) under the cruel and unusual punishment clauses of the state and federal constitutions.⁴ Having declared [La. C.Cr.P. art. 905.2\(B\)](#) unconstitutional as a violation of defendant's due process right to a fair trial, I believe the majority should have adhered to the longstanding rule that a court will not consider constitutional challenges unless essential to the decision of the case or controversy. [White v. West Carroll Hosp., Inc., 613 So. 2d 150, 157 \(La. 1993\)](#); [Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm'n, 403 So. 2d 13, 23 \(La. 1981\)](#); [State v. Stripling, 354 So. 2d 1297, 1300 \(La. 1978\)](#); [**42] [State v. Cryer, 262 La. 575, 263 So. 2d 895, 898 \(La. 1972\)](#); [Tafaro's Investment](#)

² [La. C.Cr.P. art. 905.2\(B\)](#) provides:

B. Notwithstanding any provision to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

³ Justice Scalia recognized the broadening of due process protection implied by the majority opinion in *Simmons* when he stated in dissent: "Preventing the defense from introducing evidence regarding parolability is only half of the rule that prevents the prosecution from introducing it as well. If the rule is changed for defendants, many will think that evenhandedness demands a change for prosecutors as well." *Simmons, supra* at 15 (Scalia, J., dissenting).

⁴ [U.S. Const. Amend. VIII](#) prohibits "cruel and unusual punishments," while [La. Const. Art. I, § 20](#) prohibits "cruel, excessive, or unusual punishment."

[Co. v. Division of Housing Improvement, 261 La. 183, 259 So. 2d 57, 59 \(1972\)](#); [Aucoin v. Dunn, 255 La. 823, 233 So. 2d 530, 531 \(1970\)](#).

For the foregoing reasons, I respectfully concur.

Dissent by: MARCUS

Dissent

MARCUS, Justice (dissenting)

In [California v. Ramos, 463 U.S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 \(1983\)](#), the Supreme Court made it clear that an instruction regarding the governor's power to commute was not prohibited by the *Eighth* and *Fourteenth Amendments to the U.S. Constitution*. Recently, in [Simmons v. South Carolina, 428 U.S. 903, 49 L. Ed. 2d 1208, 96 S. Ct. 3207 \(1994\)](#), the Court again stated that "nothing in the Constitution prohibits the prosecution from arguing any truthful [****43**] information relating to parole or other forms of early release."

I see no significant difference between the articles of our constitution and the federal constitution in the area of cruel and unusual punishments. Since this instruction would pass muster under the U.S. Constitution, it should not be prohibited under our state constitution. Accordingly, I respectfully dissent.