

# State v. Jones and the 905.2(B) Clemency Instruction: An Evidentiary Perspective

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# **State v. Jones and the 905.2(B) Clemency Instruction: An Evidentiary Perspective**

## I. INTRODUCTION

Louisiana Code of Criminal Procedure article 905.2(B)<sup>1</sup> required the judge in a criminal prosecution in which the prosecutor seeks the death penalty to instruct the jury of the governor's power to grant a reprieve, pardon, or commutation.<sup>2</sup> Additionally, Article 905.2(B) required the judge to inform the jury that the governor may commute a death sentence to life or time served, commute a life sentence to time served, or include in any life sentence the possibility of parole. The defense may then present evidence of the governor's use of this power.

In *State v. Jones*,<sup>3</sup> the Louisiana Supreme Court struck down Article 905.2(B), finding it violated the defendant's right to due process and humane treatment under the Louisiana Constitution.<sup>4</sup> As a result of the facial challenge, the court held that the clemency instruction was unconstitutional in all situations. The majority, however, did not consider a case-by-case approach in determining if a clemency instruction is relevant.

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1. 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.

La. Code Crim. P. art. 905.2(B).

2. La. Const. art. V, § 5(E); La. R.S. 14:30(C) provides "[w]hoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury." La. R.S. 14:30(C) (Supp. 1995).

La. Code Crim. P. art. 905.6 provides "a sentence of death shall be imposed only upon a unanimous determination of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall render a determination of a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

3. 639 So. 2d 1144 (La. 1994). The *Jones* decision was in response to a motion *in limine* filed by the defendant to restrain the prosecution from mentioning the possibility of executive clemency.

4. La. Const. art. I, § 2 provides "[n]o person shall be deprived of life, liberty, or property, except by due process of law."

La. Const. art. I, § 20 provides "[n]o law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."

This note examines Article 905.2(B) and its rejection by the Louisiana Supreme Court in *Jones*. Also, a case-by-case analysis is proposed to determine whether a clemency instruction might be appropriate in some capital cases.

## II. LOUISIANA CODE OF CRIMINAL PROCEDURE ARTICLE 905.2(B)

The Louisiana Code of Criminal Procedure instructs a capital sentencing jury to focus on the circumstances of the offense and the character and propensities of the offender in determining the propriety of a capital sentence.<sup>5</sup> The Code further instructs the jury to consider any mitigating<sup>6</sup> or aggravating<sup>7</sup> circum-

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5. La. Code Crim. P. art. 905.2(A). See also La. Code Crim. P. art. 905.3 providing "[a] sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."

6. La. Code Crim. P. art. 905.5 lists the following mitigating circumstances:

- (a) The offender has no significant prior history of criminal activity;
- (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
- (c) The offense was committed while the offender was under the influence or under the domination of another person;
- (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
- (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
- (f) The youth of the offender at the time of the offense;
- (g) The offender was a principle whose participation was relatively minor;
- (h) Any other relevant mitigating circumstance.

7. La. Code Crim. P. art. 905.4(A) lists the following aggravating circumstances:

- (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, first degree robbery, or simple robbery.
- (2) The victim was a fireman or peace officer engaged in his lawful duties.
- (3) The offender has previously been convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.
- (4) The offender knowingly created a risk of death or great bodily harm to more than one person.
- (5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.
- (6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.
- (7) The offense was committed in an especially heinous, atrocious or cruel manner.
- (8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.
- (9) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to

stances before choosing the penalty. In addition, Article 905.2(B) requires a jury to consider the possibility of executive clemency when deciding if a particular case warrants the death penalty.

A "propensity" is a natural inclination or tendency, often towards something not considered admirable.<sup>8</sup> The Louisiana Supreme Court has narrowed this definition in capital punishment cases to "the propensity to commit first degree murder."<sup>9</sup> Some of the aggravating and mitigating circumstances will aid the jury in determining the propensities of the offender. Finally, the jury may consider any other *relevant* evidence concerning the propensities of the offender.<sup>10</sup>

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>11</sup> Judges are to employ logic, as opposed to concrete rules, to determine if the proffered evidence is relevant.<sup>12</sup> Even if the evidence will aid the jury in determining whether the defendant's crime merits the death penalty, the evidence will be excluded if its prejudicial effect substantially outweighs its probative value.<sup>13</sup>

A justification for clemency instruction is that it aids the jury in its assessment of the propensities of the offender. Information about how, where, and why a particular defendant exercises his natural tendencies may influence the jury's decision. The jury's focus on the natural tendencies of the offender will cause them to attempt to protect society-at-large. There may be a lesser concern for the safety of the prison staff and other inmates who will be in daily contact with the violent offender. The possibility of early release may cause the jury to

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come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(10) The victim was under the age of twelve years.

(11) The offender was engaged in the distribution, exchange, sale or purchase, or any attempt thereof, of a controlled dangerous substance . . . .

8. Webster's Third New International Dictionary 1817 (1986).

9. *State v. Jackson*, 608 So. 2d 949, 955 n.9 (La. 1992) (stating "[t]he propensity to commit first degree murder is significant not only in identifying the worst murderers for consideration of capital punishment (which is the basic function of the capital sentencing hearing), but also in showing 'moral qualities' or character traits pertinent to the crime with which the accused is charged"). See also *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950 (1976) (stating that evidence as to the future dangerousness of the offender is constitutionally permissible).

10. See *State v. Langley*, 635 So. 2d 784 (La. App. 3d Cir. 1994) (deciding defendant's statement "I'll do it again" is relevant to the propensities of the defendant); *State v. Wilson*, 467 So. 2d 503 (La. 1985) (deciding defendant's showing of a lack of remorse is relevant to the propensities of the defendant).

11. Fed. R. Evid. 402; La. Code Evid. art. 403. See also 1A John Henry Wigmore, *Evidence in Trials at Common Law* (Peter Tillers ed. 1983) and 2 John W. Strong, *McCormick on Evidence* (Practitioner Treatise Series 1992) for a complete discussion on basic evidentiary rules of relevancy.

12. In the penalty phase of a capital trial, aggravating and mitigating circumstances, under La. Code Crim. P. arts. 905.4 and 905.5, are always relevant factors for the jury to consider.

13. Fed. R. Evid. 403; La. Code Evid. art. 403.

see the offender with the propensity to commit murder as a continuing threat to society. Accordingly, the jury is more likely to impose the death penalty when an offender demonstrates the propensity for violent behavior. The United States Supreme Court's decision in *California v. Ramos* supports this view.<sup>14</sup>

Legislative history suggests the purpose of Article 905.2(B) was to "make the jury aware of the truth of the law of Louisiana regarding sentencing."<sup>15</sup> Undoubtedly, jurors wonder about and question the effect of life and death sentences.<sup>16</sup> A clemency instruction forces the judge to explain to the jury the actual ramifications of each sentence. The offender may counter the instruction with evidence that the governor rarely exercises his clemency power.<sup>17</sup> The United States Supreme Court's decision in *California v. Ramos*<sup>18</sup> prompted the passage of Article 905.2(B).<sup>19</sup> *Ramos* concerned a challenge to a California clemency instruction, known as the "Briggs Instruction." The Briggs Instruction, mandated by statute,<sup>20</sup> provided that sentences of life imprisonment without the possibility of parole were subject to commutation or modification by the governor, including the possibility of parole. The Court upheld the Briggs Instruction, noting the connection between the possibility of executive clemency and the offender's future threat to society.<sup>21</sup>

According to *Ramos*, the Briggs Instruction aided in assessing the individual defendant's "propensities." The Court stated, "by bringing the jury's attention to the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose

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14. 463 U.S. 992, 1005, 103 S. Ct. 3446, 3456 (1983) (stating an instruction on the possibility of early release forces the jury to assess whether the defendant's return to society is desirable). See also *id.* at 1003, 103 S. Ct. at 3454 (stating consideration of the possibility of early release is akin to assessing future dangerousness). See also *id.* at 1009, 103 S. Ct. at 3457-58 (stating that informing the jury of the possibility of parole provides the jury with an additional factor to aid in their determination of an appropriate sentence).

15. *Hearings on H.B. 787 Before the Committee on Administration of Criminal Justice*, 19th Leg., Regular Sess. (1993) (statement of Harry Connick, District Attorney of Orleans Parish); see also *State v. Jones*, 639 So. 2d 1144 (La. 1994).

16. *Hearings on H.B. 787 Before the Committee on Administration of Criminal Justice*, 19th Leg., Regular Sess. (1993) (statement of Harry Connick, District Attorney of Orleans Parish); see also *Hearings on H.B. 787 Before the Senate Committee on Judiciary B*, 19th Leg., Regular Sess. (1993) (statement of E. Pete Adams, Louisiana District Attorney's Association); see also *State v. Jones*, 474 So. 2d 919 (La. 1985) (involving jury requests as to the true meaning of life and death sentences); *State v. Kirkpatrick*, 443 So. 2d 546 (La. 1983) (same); *State v. Brown* 414 So. 2d 689 (La. 1982) (same); *State v. Sonnier*, 379 So. 2d 1336 (La. 1979) (same).

17. A compilation by Thomas A. Hollins, Administrative Specialist II, Louisiana Board of Pardons, documented in *Jones*, 639 So. 2d at 1151, indicates between the years of 1974-1993, 170 commutations were given to inmates serving life imprisonment for first degree murder, while only one death sentence was commuted to life imprisonment.

18. 463 U.S. 992, 103 S. Ct. 3446 (1983).

19. *Hearings on H.B. 787 Before the Senate Committee on Judiciary B*, 19th Leg., Regular Sess. (1993) (statement of Representative Windhorst).

20. Cal. Penal Code §§ 190.2 and 190.3 (West 1983).

21. *Ramos*, 463 U.S. at 1012-14, 103 S. Ct. at 3459-60.

probable behavior makes it undesirable that he be permitted to return to society."<sup>22</sup> Therefore, a clemency instruction is not a violation of the United States Constitution, nor is it an arbitrary and capricious consideration.

*Ramos* also demonstrated the Court's clear preference for state-level development of the rules of criminal procedure.<sup>23</sup> Louisiana does not allow the possibility of early release to be a factor in a jury's consideration of the propensities of the offender.<sup>24</sup> Louisiana's focus is on the individual offender, and not on the possibility of early release. The possibility of early release is not relevant to the evaluation of the offender's propensities, since it does not help the jury decide if this offender is likely to engage in future violent behavior. The jury should focus on the offender's history of violence, pre-sentencing reports, the nature and circumstances of the crime, and any statements made by the offender to determine his propensities.<sup>25</sup>

The Court in *Ramos* noted the instruction merely clarifies a jury's understanding of the parole process, as most jurors already know of the possibility of executive clemency.<sup>26</sup> As long as the offender can present evidence on the infrequency of pardons and commutations, he suffers no prejudice. The Court concluded it "cannot be argued that the Constitution prohibits the State from accurately characterizing its sentencing choices."<sup>27</sup>

*Ramos* also addressed the possible effects of a commutation of a death sentence. A jury might be more inclined to impose the death penalty after learning the governor can prevent its effect. The Court stated "advising jurors that a death verdict is theoretically modifiable and thus not final, may incline them to approach their sentencing decision with less appreciation for the gravity of their choice."<sup>28</sup> Information concerning the possibility of commutation of a death sentence may, therefore, interject an element of arbitrariness into the sentencing proceeding. This aspect of *Ramos* is contrary to the Court's core holding. If a jury is aware that the governor may commute a life sentence, then it will be more likely to impose a death sentence to ensure the offender is never

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22. *Id.* at 1003, 103 S. Ct. at 3454.

23. *Id.* at 1012-14, 103 S. Ct. at 3459-60 (stating wisdom of decision to permit juror consideration of possible commutation is best left to the states). *See also* *Herrera v. Collins*, 113 S. Ct. 853, 864 (1993) (stating substantial deference is given to state legislative judgments in area of criminal procedure).

24. *State v. Willie*, 410 So. 2d 1019, 1033 (La. 1982) (stating this court has held that conditions under which a person sentenced to life imprisonment without benefit of parole can be released at some time in the future is not a proper consideration for a capital sentencing jury and shall not be discussed in the jury's presence).

25. La. Code Crim. P. art. 905.5 provides the defendant's prior criminal history, mental state at the time of the offense, the circumstances of the offense and the degree of the defendant's participation in the crime are mitigating circumstances. All of these factors aid in the determination of the propensities of the defendant.

26. *Ramos*, 463 U.S. at 1004-05, 103 S. Ct. at 455-56.

27. *Id.* at 1004, 103 S. Ct. at 3455.

28. *Id.* at 1011, 103 S. Ct. at 3459.

released.<sup>29</sup> The juror may believe the circumstances warrant only a life sentence. Nevertheless, to protect society from the early release of the defendant the jury will vote for the death penalty.

The recent United States Supreme Court decision in *Simmons v. South Carolina* also upheld a clemency instruction.<sup>30</sup> In *Simmons*, the Court considered a trial judge's refusal to inform the jury the defendant was not parole-eligible. Although first degree murderers are generally eligible for parole in South Carolina, the defendant was ineligible because of prior convictions. The prosecution characterized the defendant as a threat to society and urged the jury to sentence the defendant to death as an act of "self defense."<sup>31</sup> The trial judge refused to inform the jury of the defendant's parole ineligibility, even after the jury specifically inquired whether life imprisonment included the possibility of parole.<sup>32</sup>

*Simmons* consisted of a myriad of concurring opinions, but a majority subscribed to the conclusion that the failure of the trial judge to instruct the jury of *Simmons*' parole ineligibility contravened his right to due process under the United States Constitution.<sup>33</sup> The Due Process Clause of the Fourteenth Amendment prohibits an execution based on information that the defendant has no opportunity to rebut. Due process affords the defendant an opportunity to rebut a prosecutor's request for the death penalty based on future dangerousness by informing the jury that parole was unavailable to him.

The prosecutor argued that because the Governor of South Carolina possessed the power to grant *Simmons* clemency, the judge's failure to instruct the jury of the defendant's parole ineligibility was correct. A plurality of justices rejected this argument, based on their observations that clemency in South Carolina is granted only in extraordinary circumstances.<sup>34</sup> The Court, however, did not say a clemency instruction would be unconstitutional.

*Simmons* may be read as supporting the constitutionality of a clemency instruction.<sup>35</sup> Seven justices agreed that while states may conclude information regarding early release should be kept from the jury, nothing in the United States Constitution prohibits the prosecution from presenting any truthful information

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29. *Id.* at 1015-17, 103 S. Ct. at 3460-62 (Marshall, J., dissenting).

30. 114 S. Ct. 2187 (1994); see *State v. Jones*, 639 So. 2d 1144, 1155 (La. 1994) (Marcus, J., dissenting) (stating *Ramos* and *Simmons* allow a judge to comment on any truthful information relating to early release). *But cf. Jones*, 639 So. 2d at 1156 (Kimball, J., concurring) (stating *Simmons* precludes any comment on the possibility of executive clemency).

31. *Simmons*, 114 S. Ct. at 2190-91.

32. *Id.* at 2192.

33. U.S. Const. amend. XIV provides "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

34. *Simmons*, 114 S. Ct. at 2195 n.6.

35. See *State v. Jones*, 639 So. 2d 1144, 1155 (La. 1994) (Marcus, J., dissenting) (stating *Simmons* allows a mandatory clemency instruction). *But cf. Jones*, 639 So. 2d at 1156 (Kimball, J., concurring) (stating *Simmons* prohibits a clemency instruction).

relating to early release.<sup>36</sup> The majority in *Jones* avoided conflict with *Ramos*<sup>37</sup> and *Simmons*,<sup>38</sup> which rely on the Federal Constitution, by holding Article 905.2(B) violates the Louisiana Constitution.

### III. *STATE V. JONES*

#### A. *Majority Opinion*

In *State v. Jones*,<sup>39</sup> the Louisiana Supreme Court held that a clemency instruction is a violation of both an offender's due process rights and humane treatment rights under the Louisiana Constitution.<sup>40</sup> The majority did not reach federal constitutional questions.<sup>41</sup> The court characterized Article 905.2(B) as an irrelevant instruction that created a risk that juries would impose death sentences for arbitrary reasons.<sup>42</sup> The court's use of the terms "relevant" and "irrelevant" suggested that the court was concerned with the instruction's evidentiary value.<sup>43</sup> The court found a *mandatory* instruction to be irrelevant in a capital sentencing hearing.

In reaching this conclusion, the majority relied heavily upon *State v. Lindsey*.<sup>44</sup> *Lindsey* established a strong presumption against the introduction of evidence concerning the possibility of the commutation of a life sentence. In *Lindsey*, the court stated:

Although it is possible for cases to arise in which this Court can conclude that a death penalty imposed after future remedial measures are discussed at the sentencing hearing is not reversible, the magnitude of the potential for the arbitrary decision making and the irrelevance of future remedies to the jury's duty weigh heavily in favor of an almost blanket prohibition of the discussion of such matters.<sup>45</sup>

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36. *Simmons*, 114 S. Ct. at 2196 (plurality); *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring).

37. *California v. Ramos*, 463 U.S. 992, 103 S. Ct. 3446 (1983).

38. 114 S. Ct. at 2187.

39. 639 So. 2d at 1144.

40. La. Const. art. I, §§ 2, 20. According to the *Jones* court, the addition of the word "excessive" in La. Const. art. I, § 20 provides additional protection to the criminal defendant beyond that which U.S. Const. amend. VIII, § 1 which provides "nor cruel and unusual punishments inflicted."

41. See *Jones*, 639 So. 2d at 1156 (Kimball, J., concurring) (addressing the Federal Constitution).

42. *Id.* at 1153-55. See also *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) (holding the death penalty may not be inflicted in an arbitrary and capricious manner).

43. *Jones*, 639 So. 2d at 1152 (stating "[t]he possibility of reprieve, pardon or commutation bears no relevant relationship to the constitutionally required focus of the capital sentencing hearing which is the circumstances of the offense and the character and propensities of the offender."). *Id.* (stating "[t]he factor is arbitrary because it invites the jury to engage in irrelevant speculation of what the present or an unknown future governor will do."). *Id.*

44. 404 So. 2d 466 (La. 1981).

45. *Id.* at 487 (footnote omitted).



In *Lindsey*, the prosecutor told the jury that even if the defendant received a life sentence, a pardon could result in the defendant's early release.<sup>46</sup> No statutory provision mandating a clemency instruction existed at the time of *Lindsey*. The court relied instead on basic evidentiary rules of relevancy in determining the prosecutor's remarks were unrelated to the character and propensities of the offender. The court relied on three factors in reaching this determination: (1) the primary emphasis of the hearing should be on the circumstances of the offense and the character and propensities of the offender—speculation as to the actual length of a life sentence is not related to this goal; (2) the instruction forces the jury to speculate vainly about whether the defendant might be rehabilitated and eligible for early release; and (3) the jury has no authority to decide if a defendant is eligible for early release, as the Louisiana Constitution vests that power in the Governor and Board of Pardons.<sup>47</sup> Other cases employing basic evidentiary standards approve of this aspect of *Lindsey*.<sup>48</sup> Prior decisions held it was impermissible for a judge to instruct the jury on the possibility of early release, even if the jury specifically requested an instruction to clarify the meaning of a life sentence.<sup>49</sup> These decisions support a prohibition on mandatory clemency instructions.

The *Jones* court also deemed the clemency instruction as "irrelevant," because it invited the jury to speculate on the future acts of an executive official. This speculation may render the jury's decision arbitrary by diverting its focus from the individual defendant and his crime. Additionally, the court indicated the instruction might diminish the jury's sense of responsibility for its decision. The jury may recommend death, believing the governor will correct any jury sentencing error.

The instruction, according to *Jones*, places the offender in an unfair defensive position. To overcome the impact of the instruction the offender must persuade the jury that the clemency power is rarely exercised. Additionally, the offender must convince the jury he is not a likely candidate for early release.

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46. The relevant portion of the prosecutor's rebuttal argument reads:

[W]hy must you vote for the imposition of the death penalty? This man could be convicted—he is convicted, could be sentenced to life imprisonment. He's already had one pardon. That statute doesn't say that he cannot be pardoned, and in spite of all the cane fields and the rest that Mr. Richard was telling you about, I think you people have seen the workings of the criminal justice system, but you people have a chance that that cannot happen. . . .

*Id.* at 482.

47. *Id.* at 486.

48. See *State v. Willie*, 410 So. 2d 1019 (La. 1982) (holding it is impermissible for the prosecutor to bring up fact the defendant sentenced to life could be granted early release); *State v. Copeland*, 419 So. 2d 899 (La. 1982) (holding it reversible error for a judge to instruct the jury during voir dire that life does not mean infinity).

49. *State v. Jones*, 474 So. 2d 919 (La. 1985); *State v. Kirkpatrick*, 443 So. 2d 546 (La. 1983); *State v. Brown*, 414 So. 2d 689 (La. 1982).

According to the majority, Article 905.2(B) violated the doctrine of separation of powers because it invited 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.”<sup>50</sup> According to statistics given in *Jones*, only one death sentence was commuted in the last twenty years, while one hundred seventy commutations were granted to offenders sentenced to life for first degree murder.<sup>51</sup> After hearing such statistical evidence, the jury may decide to impose death merely to decrease the likelihood of commutation. According to the court, this illustrated an attempt by the legislature to usurp a power expressly granted to the executive branch by the Louisiana Constitution.<sup>52</sup>

### B. Concurring Opinions

In her concurring opinion, Justice Kimball agreed Article 905.2(B) violated the Due Process Clause of the Louisiana Constitution. In addition, she concluded the article was also a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>53</sup> Because the protections of due process voided Article 905.2(B), Justice Kimball did not address the “cruel and unusual punishment” argument.<sup>54</sup>

Justice Kimball relied on *South Carolina v. Simmons*<sup>55</sup> to conclude that federal due process

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 clemency where to do otherwise would skew the jury toward imposing death.<sup>56</sup>

Although she did not specifically address the constitutionality of a permissive instruction, Justice Kimball indicated there are situations where a clemency instruction might be proper. The use of the phrase “where to do otherwise” suggests situations may arise in which a clemency instruction would not impermissibly skew the jury towards death. In such instances, the instruction would not be unconstitutional. Therefore, each situation should be evaluated to determine if a clemency instruction would lead to an impermissible imposition of the death penalty.

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50. *State v. Jones*, 639 So. 2d 1144, 1153 (1994).

51. *Id.* at 1150-51.

52. *Jones*, 639 So. 2d at 1144; La. Const. art. V, § 5(E).

53. U.S. Const. amend. XIV, § 1 provides “nor shall any State deprive any person of life, liberty or property without due process of law.”

54. La. Const. art. I, § 20; U.S. Const. amend. VIII, § 1.

55. 114 S. Ct. 2187 (1994).

56. *Jones*, 639 So. 2d at 1156 (Kimball, J., concurring).

In a separate concurring opinion, Justice Lemmon agreed that a *mandatory* clemency instruction in a capital sentencing hearing is unconstitutional. However, Justice Lemmon specifically stated some cases may permit such an instruction. Statements made by the defense or prosecution or a request by the jury for clarification of the meaning of a life or death sentence, might permit such an instruction. Justice Lemmon stated "[t]hese questions must be resolved on a case-by-case basis" but cautioned "the trial judge flirts with reversible error when he or she mentions pardon powers and should be very cautious in handling such situations."<sup>57</sup> A case-by-case approach would permit a judge to consider the particular issues in the case when determining whether to give a clemency instruction.

#### IV. SUPPORT FOR CASE-BY-CASE DETERMINATION

Prior decisions support a case-by-case approach to determine the propriety of a clemency instruction. In *Ramos*,<sup>58</sup> the United States Supreme Court stated it was not suggesting "that the Federal Constitution prohibits an instruction regarding the Governor's power to commute a death sentence."<sup>59</sup> Both *Ramos*<sup>60</sup> and *Simmons*<sup>61</sup> articulated a clear preference for allowing state legislatures to develop their own rules of criminal procedure, so long as those rules do not result in the arbitrary infliction of capital punishment. Since, as established by *Jones*, a mandatory instruction may, in fact, result in such an arbitrary infliction, the Louisiana Legislature should (as has been done in the past) leave the decision as to whether to give a clemency instruction to the presiding judge.<sup>62</sup>

The *Lindsey* decision, relied upon by the majority, did not establish a *per se* rule against clemency instructions.<sup>63</sup> Rather, *Lindsey* supported a case-by-case approach as it envisioned situations in which an instruction on executive clemency is proper.<sup>64</sup> Cases following *Lindsey* allowed the prosecution to inform the jury about the possibility of executive clemency when the defendant

57. *Id.* at 1155 (Lemmon, J., concurring).

58. 463 U.S. 992, 103 S. Ct. 3446 (1983).

59. *Id.* at 1012 n.27, 103 S. Ct. at 3459 n.27.

60. *Id.* at 992, 103 S. Ct. at 3446.

61. 114 S. Ct. 2187 (1994).

62. Numerous cases illustrate the practice before the enactment of La. Code Crim. P. art. 905.2(B) of allowing the presiding judge to decide if a clemency instruction is appropriate. These decisions are based on evidentiary principles of relevancy. *State v. Byrne*, 483 So. 2d 564 (La. 1986); *State v. Jones*, 474 So. 2d 919 (La. 1985); *State v. Glass*, 455 So. 2d 659 (La. 1984); *State v. Kirkpatrick*, 443 So. 2d 546 (La. 1983); *State v. Willie*, 410 So. 2d 1019 (La. 1982); *State v. Brown*, 414 So. 2d 689 (La. 1982); *State v. Copeland*, 419 So. 2d 899 (La. 1982); *State v. Sawyer*, 422 So. 2d 95 (La. 1982); *State v. Lindsey*, 404 So. 2d 466 (La. 1981).

63. 404 So. 2d 466 (1981).

64. *Id.* at 487.

himself raised the issue of early release by informing the jury that life in prison means life without the possibility of early release.<sup>65</sup>

In *State v Sawyer*,<sup>66</sup> the defense argued against a death sentence, advocating instead the "living death of life imprisonment."<sup>67</sup> The prosecutor responded that a sentence of life imprisonment does not necessarily preclude a pardon. The court ruled that when taken in context, the prosecutor's brief comment did not suggest the jury should consider the possibility of early release in making its decision.<sup>68</sup> Two additional cases—*State v. Glass*<sup>69</sup> and *State v. Byrne*<sup>70</sup>—support this holding.

In *Glass*, a defense witness testified that in the past no pardons had been granted to any convicted murderers.<sup>71</sup> On cross-examination of the defense witness, the prosecutor asked whether any death row inmates had been executed. *Byrne* involved comments made during *voir dire*. Defense counsel told the jury that "life imprisonment meant life, and that no one (i.e., the judge or the parole board) had authority to release the defendant prior to his death."<sup>72</sup> The prosecutor objected to the comment as an inaccurate statement of the law, and the judge admonished the jury to follow only the law as presented to them.<sup>73</sup> Defense counsel then made a second, similar statement. The trial judge admonished the jury and warned the defense "he might be opening the door for further explanation of what the parole board might do in a first degree murder situation."<sup>74</sup>

In both *Glass* and *Byrne*, the court permitted the mention of executive clemency because the defense "opened the door on the subject."<sup>75</sup> Even though clemency is typically not a relevant issue in a capital sentencing hearing, the defendant made it an issue by raising it in the presence of a jury. The jury may believe the fact that the defendant is not eligible for early release is a relevant mitigating factor against imposition of the death penalty.<sup>76</sup> However, according

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65. See *Byrne*, 483 So. 2d at 564 (involving a statement by defense counsel that neither the judge nor parole board could grant an early release to the defendant); *Glass*, 455 So. 2d at 659 (involving a defense witness' testimony that pardons were not granted in the past to convicted murderers); *Sawyer*, 422 So. 2d at 95 (involving defense counsel's argument to the jury to sentence the defendant to the living death of life imprisonment); *State v. Monroe*, 397 So. 2d 1258 (La. 1981) (involving statement by defense counsel that it was impossible for defendant to obtain early release from life imprisonment).

66. 422 So. 2d at 95.

67. *Id.* at 104.

68. *Id.*

69. 455 So. 2d at 659.

70. 483 So. 2d at 564.

71. 455 So. 2d at 667.

72. *Byrne*, 483 So. 2d at 569.

73. *Id.*

74. *Id.* at 570.

75. *Glass*, 455 So. 2d at 668; see also *Byrne*, 483 So. 2d at 570.

76. La. Code Crim. P. art. 905.5(10) provides the jury may consider any other relevant mitigating circumstance. The jury might interpret the seeming impossibility of early release as a fact mitigating

to *Spivey v. Zant*,<sup>77</sup> relevant mitigating circumstances are "circumstances which do not justify or excuse an offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment."<sup>78</sup> The possibility of early release is not a relevant mitigating circumstance because it does not relate to an assessment of the individual.<sup>79</sup> Mitigating circumstances include the mental state of the offender, the offender's youth, and the extent of the offender's participation in the crime.<sup>80</sup>

The purpose of prohibiting references to executive clemency is to eliminate from the jury's consideration irrelevant factors that might result in the arbitrary infliction of capital punishment. However, the defendant waives this protection if he or his counsel informs the jury that early release is impossible. Thus, a case-by-case approach is the only way to resolve this fact-sensitive issue.

## V. ANALYSIS

*Jones* leaves an important question unanswered—is it ever permissible for the judge or prosecutor to comment on the possibility of executive clemency? *Jones* held that a *mandatory* clemency instruction is unconstitutional. A narrow interpretation of the opinion leads to the conclusion that a permissive instruction may be appropriate in certain circumstances.

Before the enactment of Article 905.2(B), the particular issues raised in the capital sentencing hearing determined the appropriateness of a clemency instruction.<sup>81</sup> This emphasis on circumstances suggests the Louisiana Supreme Court wished to maintain the practice of the judge deciding whether a permissive instruction is appropriate. If the defense specifically states in the presence of a jury that the offender can never obtain early release, then a clemency instruction may be appropriate. Justice Lemmon's concurrence<sup>82</sup> and Justice Marcus' dissent<sup>83</sup> support this conclusion. Justice Kimball's concurrence also supports

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against the death penalty.

77. 661 F.2d 464 (5th Cir. 1981).

78. *Id.* at 471.

79. *State v. Willie*, 410 So. 2d 1019, 1032-33 (La. 1982). See also *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 2964-65 (1978) (defining mitigating circumstances as any aspect of the defendant's character or any circumstances of the offense that support a sentence less than death); *State v. Brogden*, 457 So. 2d 616, 626 (La. 1983) (stating length of co-defendant's life sentence is not a mitigating circumstance); *State v. Welcome*, 458 So. 2d 1235, 1253 (La. 1983) (defining mitigating circumstances as those pertaining to defendant's culpability); *State v. Unger*, 362 So. 2d 1095, 1100 (La. 1978) (defining mitigating circumstances as those relating to the offender and his crime).

80. La. Code Crim. P. art. 905.5.

81. *State v. Byrne*, 483 So. 2d 564 (La. 1986); *State v. Glass*, 455 So. 2d 659 (La. 1984); *State v. Copeland*, 419 So. 2d 899 (La. 1982); *State v. Sawyer*, 422 So. 2d 95 (La. 1982); *State v. Willie*, 410 So. 2d 406 (La. 1982); *State v. Lindsey*, 404 So. 2d 466 (La. 1981).

82. *State v. Jones*, 639 So. 2d 1144, 1155 (1994) (Lemon, J., concurring).

83. *Id.* at 1155 (Marcus, J., dissenting) (stating the mandatory instruction is neither a violation of the United States Constitution nor the Louisiana Constitution).

this conclusion, but only if the instruction does not impermissibly skew the jury towards imposing the death penalty.<sup>84</sup>

A broad interpretation of *Jones* suggests a clemency instruction is *always* irrelevant in a capital sentencing hearing, even if the offender raises the issue of no early release. The majority argues that "[t]he 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 character and propensities of the offender."<sup>85</sup> Under this interpretation, defense counsel is free to misinform a jury about the potential for early release.

The majority's assertion that Article 905.2(B) violates the separation of powers doctrine does not support an absolute prohibition of a clemency instruction. It is the job of the judiciary to conduct trials according to the rules of evidence. The judge's decision to clarify an erroneous statement by the defense does not interfere with the governor's pardoning powers. No one can interfere with the governor's exercise of his clemency power because this power includes the freedom to grant clemency to all offenders regardless of the sentence the jury imposes.

## VI. CONCLUSION

A clemency instruction is not appropriate in every case. Certain circumstances exist, however, when such an instruction is appropriate. Common sense supports this conclusion. The broad reading of *Jones* as prohibiting the clemency instruction in all circumstances is thus contrary to such common sense. The legislature should leave the decision as to whether a particular case warrants such an instruction to the presiding judge.<sup>86</sup> The judge should make this determination based on basic evidentiary rules of relevancy.<sup>87</sup> Louisiana Code of Criminal Procedure article 905.2(A), which states the capital sentencing hearing "shall be conducted according to the rules of evidence," also leads to this conclusion.

A clemency instruction is proper only if the defendant or his counsel makes a direct statement to the jury denying the possibility of the defendant's early release.<sup>88</sup> Otherwise, the law would, in effect, be permitting the defendant to

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84. *Id.* at 1156 (Kimball, J., concurring).

85. *Id.* at 1152 (emphasis added).

86. Other states leave this decision to the presiding judge. *State v. Clark*, 772 P.2d 322 (N.M. 1989); *Commonwealth v. Clayton*, 532 A.2d 385 (Pa. 1987); *Poole v. State*, 453 A.2d 1218 (Ct. App. Md. 1983); *People v. Walker*, 440 N.E.2d 83 (Ill. 1982); *State v. Atkinson*, 172 S.E.2d 111 (S.C. 1970); *State v. Jackson*, 412 P.2d 36 (Ariz. 1966).

87. See *Wigmore*, *supra* note 11, at 945-1071; *Strong*, *supra* note 11, at 772-860.

88. *State v. Byrne*, 483 So. 2d 564 (La. 1986); *State v. Glass*, 455 So. 2d 659 (La. 1984); *State v. Sawyer*, 422 So. 2d 95 (La. 1982); *State v. Monroe*, 397 So. 2d 1258 (La. 1981). See also *State v. Clark*, 772 P.2d 322 (N.M. 1989) (deciding a clemency instruction is proper if defendant interjects the notion of early release and provides the jury with inaccurate information).

misinform the jury. To avoid the mention of executive clemency the defense should refrain from stating the defendant can never be released early. The jury may erroneously believe the defendant's ineligibility for early release is a mitigating factor against imposing the death penalty. The defense is free, however, to argue that life imprisonment is sufficient punishment.

A specific request by a juror for a clarifying instruction on the clemency power does not make the issue of clemency relevant.<sup>89</sup> The judge should instruct the jury to follow the law and not to speculate on the possibility of future action by an executive official. The jury's focus should be on the circumstances of the offense, the character and propensities of offender, and the aggravating or mitigating circumstances that are present.

A prosecutor should never introduce the issue of clemency into a capital sentencing hearing.<sup>90</sup> Speculation about the possibility of the defendant's early release may divert the jury from its proper focus and may cause an unwarranted imposition of the death sentence. The prosecutor is free to argue for the death penalty, but may not mislead the jury by introducing arbitrary and irrelevant considerations. A comment on the possibility of executive clemency by the prosecutor could result in a new penalty phase for the defendant. At the very least it could lead to an admonishment of the prosecutor by the judge and an instruction to the jury to follow only the law provided by the judge. The judge will decide the proper remedy based on the content and length of the prosecutor's comment.

Judges should continue to apply a strong presumption against an instruction on the possibility of executive clemency. This presumption may be overcome only if the defense specifically denies the possibility of clemency. The judge should evaluate the scope and nature of the remarks in determining whether to give the clemency instruction or allow the prosecutor to inform the jury about the possibility of executive clemency.

Allowing judges to decide what evidence is relevant in the penalty phase of a capital trial is the best way to ensure the defendant receives the punishment that the particular circumstances of his crime warrant.<sup>91</sup> A careful balancing of the interests of the defendant against those of the state is the only way to achieve this objective. Only judges are qualified and capable of making this delicate balance.

*Sue Ann Kelly*

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89. See *State v. Jones*, 474 So. 2d 919 (La. 1985) (holding it impermissible to give a clemency instruction even if jury specifically requests it); *State v. Kirkpatrick*, 443 So. 2d 546 (La. 1983) (same); *State v. Brown*, 414 So. 2d 689 (La. 1982) (same).

90. *State v. Lindsey*, 404 So. 2d 466 (La. 1981); *State v. Willie*, 410 So. 2d 1019 (La. 1982). See also *People v. Brisbon*, 478 N.E.2d 402 (Ill. 1985); *People v. Walker*, 440 N.E.2d 83 (Ill. 1982); *Poole v. State*, 453 A.2d 1218 (Ct. App. Md. 1983).

91. La. Code Crim. P. art. 905.8 provides "[t]he Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive."