

SUPREME COURT OF LOUISIANA

No. 97-KA-0499

STATE OF LOUISIANA

VERSUS

DEREK LANDRY

**ON APPEAL FROM THE CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS
HONORABLE JAMES F. MCKAY, III, JUDGE**

Calogero, C.J. concurring

I agree entirely with the majority opinion in this case but concur in order to give my views on an issue not addressed by the majority so that upon retrial the same error in the sentencing phase of the trial is not repeated. This involves the trial court's instruction to the jury on the governor's power to commute death sentences.

Louisiana Code of Criminal Procedure article 905.2(B), which authorizes a jury instruction on the governor's power to commute both a life and death sentence, did not become effective until December, 1995, following the amendment of Article I, Section 16 (the right to a fair trial) of the Constitution of Louisiana. Before that time, this Court's decision in *State v. Jones*, 94-0459 (La. 7/5/94), 639 So.2d 1144, prohibited such instruction. The murder in this case occurred on September 1, 1994, and the case went to trial on April 11, 1995, almost eight months *before* the constitutional amendment became effective.

In *State v. Cousan*, 94-2503 (La. 11/25/96), 684 So.2d 382, this Court held that Louisiana constitutional amendments are deemed prospective only, unless a contrary intention is clearly expressed in the amendment. In *Cousan*, we noted that neither the express language of the 1995 amendment of Article I, Section 16 nor the official ballot used in the election to pass the amendment gave any indication of an intent to resurrect or validate retroactively 1993 La. Acts 436. We therefore held that application of the constitutional amendment and its accompanying statutory (re)enactment of article 905.2(B) in 1995 and La. Acts 1322 were prospective only, and as such, we vacated Cousan's sentence and remanded to the trial court for a new sentencing hearing.

Similarly, in the instant case, the trial court gave the jury an instruction which was invalid

at the time under this Court's rule in *Jones, supra*. I therefore believe that the court erred in instructing the jury on this issue and assume the same error will not be repeated upon retrial.