

MOTION FILED

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IN THE  
**Supreme Court of the United States**

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PATRICK KENNEDY,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent.*

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***On Petition for a Writ of Certiorari to the  
Louisiana Supreme Court***

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***MOTION AND BRIEF AMICI CURIAE  
OF LOUISIANA PUBLIC DEFENDER  
OFFICES IN PARISHES IMPACTED BY  
HURRICANES KATRINA AND RITA***

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**MOTION FOR LEAVE TO  
FILE BRIEF AMICI CURIAE**

Pursuant to Rule 37.2 of the Rules of this Court, the public defenders of Jefferson, Calcesieu, and Orleans Parishes, Louisiana, move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has refused consent.

Under La. R.S. 14:42, Louisiana prosecutors may seek the death penalty for the rape of a child under thirteen years of age. *Amici* are required to expend millions of dollars defending capital rape prosecutions in such cases while the constitutionality of the death penalty for child rape remains in question, and even though in the vast majority of child-rape prosecutions, the State reduces the charge to a non-capital prosecution, but only on the eve of trial. Making such expenditures has been particularly difficult since Hurricanes Katrina and Rita ran roughshod over *Amici's* parishes in August and September of 2005.

*Amici*, therefore, have a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the capital rape statute in Louisiana. Accordingly, *Amici* should be granted leave to file the attached *amici curiae* brief, which demonstrates the financial hardships *Amici* bear in light of the uncertainty of

the constitutionality of Louisiana's capital rape statute.

Respectfully submitted,

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***INTEREST OF THE AMICI CURIAE<sup>1</sup>***

*Amici curiae* are statutorily-created offices charged with the responsibility of representing indigent defendants, including those charged capitally under La. R.S. 14:42. *Amici* have public defender offices covering Jefferson Parish, Calcesieu Parish, and Orleans Parish, locations devastated by Hurricanes Katrina and Rita.

Because of the availability of the death penalty under La. R.S. 14:42, *Amici* are required to expend millions of dollars defending capital prosecutions even though prosecutors in their parishes have never persisted in seeking the death penalty against any defendant charged under La. R.S. 14:42 through a capital penalty phase. *Amici* are particularly hard-pressed to make such expenditures after Hurricanes Katrina and Rita ran roughshod over their parishes in August and September of 2005.

The indigent defense system throughout Louisiana was severely stretched and challenged prior to Hurricane Katrina and Rita. *See State v. Citizen*, 898 So.2d 325, 327, 335 n.11 (La. 2005) (pointing out that state legislature has “failed to provide adequate appropriation to support” indigent defense; citing testimony from director of state

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<sup>1</sup> Pursuant to Rule 37.3, the letter signifying petitioner’s consent to the filing of this brief is on file with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to this brief.

Indigent Defense Assistance Board “that the state reduced his agency’s funding by 25% after its first year of existence, then failed to restore funding to previous levels in the seven subsequent years”); National Legal Aid and Defender Association, *In Defense of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon*, 32-41 (March 2004) (discussing “crushing caseloads” of public defenders in Avoyelles Parish); Greenlee, *The Louisiana Indigent Defense Assistance Board*, La. Bar Journal, Vol. 50, No. 2, 97,101 (August/September 2002) (article by the director of the Louisiana Indigent Defense Assistance Board (LIDAB) noting that “economic problems have exacerbated the state’s already overburdened indigent defense system” and concluding that “the indigent system cannot continue to provide quality service given the current drain on available funds”); *Justice in Louisiana, Indigent Defense in Louisiana*, La. Bar Journal, Vol. 50, No. 2, at 96 (August/September 2002) (noting “lack of adequate funding” for indigent defense).

The hurricanes greatly exacerbated an already dire situation. *See, e.g.*, National Legal Aid & Defender Association, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana’s Criminal Courts* iv (September 2006) (explaining that “it would be disrespectful to those ... individuals trying to keep the system afloat to suggest that Katrina was *solely* responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina.... Pre-Katrina, the public defender system in New Orleans was not obligated to adhere to any national, state or local

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standards of justice resulting in public defenders handling too many cases, with insufficient support staff, practically no training or supervision, experiencing undue interference from the judiciary, all while compromising their practices by working part-time in private practices to augment their inadequate compensation.... In the aftermath of the storm things only got worse.”).

*Amici* have a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the capital rape statute in Louisiana.

### ***SUMMARY OF ARGUMENT***

This Court should grant *certiorari* now to address and resolve the constitutionality of the death penalty for non-homicide child rape.

In Louisiana, La. R.S. 14:42 renders every defendant charged with the rape of a child under the age of thirteen death eligible, including those charged with oral sexual battery of a child under 13.

Under Louisiana law, the prosecution has complete discretion to determine when and how to prosecute. Prosecutors have continued to seek death against defendants charged under La. R.S. 14:42 through a capital penalty phase in only three cases, all from Jefferson Parish.<sup>2</sup> In the vast majority of child-rape prosecutions, the State reduces the charge to a non-capital prosecution, but only on the eve of trial. (This eleventh-hour maneuver allows the State

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<sup>2</sup> Two of these cases resulted in life sentences. Only Patrick Kennedy has received a death sentence.

to obtain convictions by non-unanimous jury verdicts.  
*See* La. C. Cr. P. art. 782(A).)

Louisiana Public Defender Offices are currently obligated to provide capital representation to all indigent defendants facing capital rape prosecutions, regardless of the likelihood that prosecutors will eventually decide not to pursue a death sentence.

The defense of potential death penalty cases under La. R.S. 14:42 requires vast expenditures out of the offices' extremely limited budgets. As a result, Public Defender Offices are forced to make extremely difficult resource allocation decisions that affect all of their clients, both those facing capital prosecutions and those facing non-capital prosecutions.

Delay in deciding this case will force *Amici* to continue to expend a crippling proportion of already scant resources on the defense of defendants charged capitally under La. R.S. 14:42.

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### **ARGUMENT**

***The Court Should Grant Certiorari Now, as Amici – and the Criminal Justice System throughout Louisiana -- Bear the Cost of the Continued Confusion Concerning the Constitutionality of the Death Penalty for the Rape of a Child.***

Although Louisiana prosecutors have decided not to seek the death penalty in all but three child rape cases,<sup>3</sup> they have almost invariably delayed making this decision until the eve of trial.<sup>4</sup> As a result, defender offices are compelled to expend vast amounts of their scarce resources on cases arising under La. R.S. 14:42.

1. In Louisiana, the prosecution has the power to decide whether (and when) to proceed capitally in a case of aggravated rape of a child. *Amici* do not dispute the prosecution's authority to make this determination and, indeed, a recent appellate court upheld that authority. *State v. Mizell*, 938 So. 2d 712, 714 (La. App. 1<sup>st</sup> Cir. 2006).

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<sup>3</sup> See n.2, *supra*, and accompanying text. In the remaining cases, the prosecution's decision to proceed non-capitally permits the prosecution to secure a non-unanimous guilty verdict. La. C. Cr. P. art. 782(A).

<sup>4</sup> The Sentencing Review Memorandum filed by Petitioner in the Louisiana Supreme Court identifies one hundred and eighty (180) aggravated rape prosecutions which resulted in a life sentence. In one hundred and seventy-seven (177) of those instances, the State reduced charges, proceeded non-capitally, or accepted a plea. *Amici* feel safe to say that this number vastly underestimates the true numbers as the Sentence Review Memorandum identifies no cases from Orleans Parish because officials in that parish refused to provide the requested information to petitioner.

Prosecutors have continued to seek death against defendants charged under La. R.S. 14:42 through a capital penalty phase in only three cases, all from Jefferson Parish. *See* n.2, *supra*. In all other child-rape prosecutions, the State has decided not to seek the death penalty, but in general only on the eve of trial.

Because of defendants' exposure to the death penalty until the eve of trial, however, *Amici* are required to defend these cases as capital prosecutions until the prosecution announces its decision to forgo death.

2. The defense of potential death penalty cases under La. R.S. 14:42 requires vast expenditures out of the offices' extremely limited budgets. *Amici* are particularly hard-pressed to make such expenditures after Hurricanes Katrina and Rita ran roughshod over their parishes in August and September of 2005. Public Defender Offices are forced to make extremely difficult resource allocation decisions that affect all of their clients, both those facing capital prosecutions and those facing non-capital prosecutions.

*Amici* bear tremendous additional costs in defending these potentially capital cases. In Louisiana, capital cases require: the appointment of two lawyers (*see* Louisiana Indigent Defender Board Standard ("LIDBS") 7-8.1); the appointment of a senior experienced lawyer (LIDBS 7-2.1); and significantly reduced case loads for the lawyers (LIBDS, 12-2.1). In addition, the defense of capital cases requires an exhaustive mitigation investigation into the defendant's life. *See, e.g., ABA Guidelines for the Appointment and Performance of Counsel in*

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*Death Penalty Cases* §4.1 (rev'd ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913, 959 (2003).

Cases of unusual complexity present additional costs. Such cases typically involve: 1) allegations of child rape in multiple jurisdictions, and/or 2) delayed reporting of the rape, which renders investigation especially lengthy and time-consuming, and/or 3) substantial difficulties in unearthing and deciphering mitigation histories.

To take one example, thus far in 2007, the costs of representing one post-Katrina appointed case in Orleans Parish have been approximately \$140,000, including:

\$50,000 for mitigation investigation; and

\$32,000 for lead counsel; and

\$58,000 for associate counsel.

In 2007, in Orleans Parish alone, there have been at least 32 pending capital aggravated rape cases. *See* Appendix A (collecting case data). Paying qualified defense attorneys for those thirty cases at the bare minimum price of \$77,000 per case per annum<sup>5</sup> would cost nearly 2.5 million dollars

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<sup>5</sup> On average, capital aggravated rape cases take far more than a year to be resolved. For the purpose of this calculation, however, an average of a year is assumed. Because the Orleans Public Defender cannot afford to pay the salary the market demands for qualified capital counsel, it is forced to pay private attorneys \$110 per hour for their representation (a rate low by market standards for the lead counsel and barely adequate for the associate counsel). Under prevailing standards of practice in Louisiana, capital defense attorneys can handle a maximum of five capital cases per year (with a recommended range of 3 to

(precisely \$2,464,000). This is more than ninety percent (90%) of the budget for the entire Orleans Parish Public Defender office.<sup>6</sup> And this figure does not even account for the additional substantial cost of adequate mitigation investigation.

Information concerning the exact number of capital rape prosecutions elsewhere in the State is currently unavailable.<sup>7</sup> However, *Amici* are aware

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5). LIDBS 12-2.1. At least two attorneys must be assigned to each case. LIBDS 7-8.1. A team of two attorneys working full time for an entire year, therefore, could represent a maximum of five capital-charged clients. Assuming they work only 35 hours per week for 50 weeks, the annual cost for those five clients would be \$385,000 (2 \* 35 \* 50 \* 110). The cost per case is \$77,000. This figure is low compared to defense costs in other jurisdictions. *See, e.g., State v. Robert Young & Reis Lopez*, Slip. Op. No. 29,467 (N.M. 2007) (noting testimony of defense attorney that cost of defense in complicated capital case would be one million dollars per defendant) (available at <http://www.supremecourt.nm.org/cgi-bin/downloadit.cgi/slipopinions/SC29,467.html>) (last visited Nov. 10, 2007).

<sup>6</sup> A report prepared after Hurricane Katrina by the Department of Justice, Bureau of Justice Affairs, noted that the budgetary needs of the Orleans public defender system were approximately eight million dollars (\$8,000,000). Nicholas Cbiarkis, D. Alan Henry, & Randolph Stone, *An Assessment of the Immediate and Longer-Term Needs of the New Orleans Public Defender System*, Study of the Bureau of Justice Initiative National Training & Technical Assistance Initiative Project at American University, 26 (2006) (available at <http://www.lajusticecoalition.org/reports+resources/studies/>) (last visited Nov. 10, 2007). The Orleans Public Defender currently receives approximately one-third of that amount.

<sup>7</sup> The Louisiana Indigent Defense Assistance Board has a statistical page indicating the capital cases in Louisiana. It does not appear to differentiate between murder and aggravated rape cases, and appears not to have been updated

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that their own current case loads involving numerous potentially capital aggravated rapes impose crushing financial burdens on them and on defense efforts to improve an indigent defense system already in crisis mode.

3. Delay in deciding this case will force *Amici* to continue to expend a crippling proportion of already scant resources on the defense of defendants charged capitally under La. R.S. 14:42.

Therefore, this Court should grant the petition for writ of certiorari and resolve the constitutionality of La. R.S. 14:42.

### **CONCLUSION**

For the foregoing reasons, Amici respectfully suggests that the petition for a writ of certiorari be granted.

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since 2002. *See* <http://www.lidab.com/Capital%20Trial%20Chart.html> (last visited Nov. 9, 2007)

Respectfully submitted,

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