No. 07-343

IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BARBARA E. BERGMAN
Of Counsel
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
School of Law, MSC11-6070
1 University of New Mexico
Albuquerque, NM 87131
(505) 277-3304

JONATHAN G. CEDARBAUM
Counsel of Record
MICHAEL J. GOTTLIEB
JOSHUA M. SALZMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with a direct national membership of over 12,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on various issues in this Court and other courts and has filed amicus curiae briefs in previous cases involving Eighth Amendment limitations on capital sentences. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551 (2005).

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

INTRODUCTION

Amicus agrees with Petitioner that this Court should grant a writ of certiorari on the questions presented in the petition. Amicus submits this brief to highlight an additional reason that review of this case is appropriate and important.

This Court has consistently sought to ensure that the death penalty is applied cautiously and fairly, only to the worst of the worst offenders. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002))). In addition, this Court has repeatedly stressed the need for heightened reliability in capital cases. *See, e.g.*, *Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988).

There can be no such assurance where death is a permissible punishment for child rape. Convictions for child rape often rest principally on the testimony of children. Such testimony is often unreliable because many children are susceptible to suggestion; they may confuse the suggestions of others with authentic memories; their stories may change dramatically depending upon when and by whom they are interviewed; and they recant their allegations—whether those stories inculpate or exculpate the defendant—at alarmingly high rates. The unreliability of such testimony is confirmed by over three centuries of experience with child testimony and the recantations that frequently follow. Given the reliability problems inherent in child testimony, it is far too likely that death sentences for child rape will be meted out on the innocent. The heightened risk of erroneous convictions in cases resting on juvenile testimony provides a compelling reason to grant certiorari and clarify that the Constitution does not permit the imposition of the death penalty for child rape which does not result in the death of the victim.

ARGUMENT

This Court has consistently held that the Eighth Amendment demands heightened reliability in capital cases in part to guard against the risk that an innocent defendant might be put to death. *See Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988) ("[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case" (quoting *Gardner* v. *Florida*, 430 U.S. 349, 363-364 (1977) (White, J., concurring in judgment))); *see also Herrera* v. *Collins*, 506 U.S. 390, 407 n.5 (1993) (acknowledging "the importance of ensuring the reliability of the guilt determination in capital cases in the first instance"). This Court has therefore sought "measured, consistent application and fairness to the accused." *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982). Against this backdrop, cases involving child rape too often lack the reliability needed for the irremediable penalty of death. That contention is not intended to diminish in any way the utter repugnance and reprehensibility of sexual violence against children. Rather, it rests simply on a recognition that the most common evidence relied upon in child rape cases—child testimony—produces unacceptably high risks of erroneous convictions for a death-eligible crime, particularly when combined with the special methods of proof that courts have approved to govern such cases.

Child sexual abuse convictions are often "based primarily, if not solely, on the word of the victims involved." Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996). Cases like Petitioner's are frequently "'she said, he said' cases that ultimately rely upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring). Mistakes are inevitable in such cases, for as "[a]ny parent who has ever attempted to resolve a sibling quarrel based upon 'he said, she said' versions

of a single event knows…[,] even a parent can, from time to time, make a credibility mistake and believe a child's inaccurate version of the event." *Id.*

The dangers generally presented by "he said, she said" cases are greater when the crucial witness is a child. History is replete with examples of damning false accusations made by children, from the Salem witch trials to the McMartin preschool case in Manhattan Beach, California in the late 1980s, to "the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota." *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting); *see* Ceci & Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol. Bull. 403, 405 (1993) (Salem); Anderson, 69 S. Cal. L. Rev. at 2117 (Manhattan Beach).[2] These historical examples reflect the heightened reliability problems inherent in child testimony—young children may be particularly susceptible to suggestion; they may confuse the suggestions of others with authentic memories; and their stories may change dramatically from interview to interview. Courts and judges have long recognized these problems. *See Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988) (acknowledging the risks of child "false accuser[s]" and "coach[ing] by a malevolent adult"); *Arizona* v. *Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (noting "'special' reasons" to be suspicious of child testimony, for "studies show that children are substantially more vulnerable to suggestion

[2] It is unsurprising in this regard that more than half of the heralded sexual abuse convictions obtained against daycare professionals in the 1980s were later overturned on appeal. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; *cf.* Goldberg, *Youths' 'Tainted' Testimony is Barred in Day Care Retrial*, N.Y. Times, June 13, 1998, at A6 (noting several reversals of convictions in sexual abuse trials).

than adults, and often unable to separate recollected fantasy (or suggestion) from reality" (citing studies[3]).

The academic literature confirms the dangers courts have perceived. To be sure, children are capable of accurately recalling events and honestly testifying to those recollections. But young children are particularly susceptible to suggestion in circumstances that are common to cases involving allegations of child sexual abuse, such as repeated questioning or other forms of pressure by parents or other authority figures. *See, e.g.*, Ceci, Bruck, & Rosenthal, *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol., Pub. Pol'y & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with … [suggestive] enjoinders"). Indeed, "[e]ven strong prosecution advocates acknowledge that false sexual abuse claims are more likely in some situations than others, particularly in situations where the dominant motives tilt children in that direction (e.g., in acrimonious custody cases in which a custodial parent has relentlessly 'lobbied' a child)." *Id.* at 505. It is thus hardly surprising that there is a "*consensus* in the social-science literature" that children may offer testimony that is so substantially shaped by the suggestions of adults as to be unreliable. Anderson, 69 S. Cal. L. Rev. at 2146 (emphasis added).[4]

---

[3] The studies cited in Justice Scalia's dissent include Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory* 92 (Ceci, Toglia & Ross eds. 1987); Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution; Should Children Really Be Seen and Not Heard?*, 14 Am. J. Crim. L. 227, 230-233 (1987); Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 708-711 (1987).

[4] *See also id.* ("Although widespread disagreement abounds about just how suggestible children are, several studies demonstrate that children may lie if they are motivated to do so, that they are susceptible to

The susceptibility problem is amplified when children are interviewed under suggestive circumstances, a not infrequent occurrence. Thus, child testimony is only reliable when it is elicited by "unbiased, neutral interviewers, when the number of interviews [and] leading questions are kept to a minimum, and when there is an absence of threats, bribes, and peer pressure." Myers, Cordon, Ghetti & Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & Contemp. Probs. 3, 30 (2002). Unfortunately, the use of reliability-enhancing safeguards is far from universal—research shows that "some particularly troublesome techniques, though usually constituting a small part of the interaction in any given interview, are extremely common." Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 66 n.168 (2000). The result is a disturbingly high rate of erroneous accusations—without adequate procedures to prevent improper suggestion, children commit errors more often than not. *See id.* at 54 (noting that "numerous studies show that when children are exposed to these forms of suggestion the error rates can be very high, sometimes exceeding 50%").

The unreliability of child testimony is reflected in the alarming rate at which children recant sexual abuse accusations. While studies have yielded divergent levels of recantation,[5] a number have found that more than 20% of children recant their allegations of sexual abuse. *See* Malloy, Lyon, & Quas, *Filial Dependency & Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. Child & Adolesc. Psychiatry 162, 165 (Feb. 2007) (finding a recantation rate of

---

adapting their reports to fulfill the perceived expectation of the adult interviewer, and that inappropriate postevent inquiries can actually alter a child's memory for an event.").

[5] *See, e.g., United States* v. *Rouse*, 329 F. Supp. 2d 1077, 1080 (D.S.D. 2004) (summarizing expert witness testimony that "published studies show the rate of recantation varies from 3% to 27% of children who have reported sexual abuse").

23.1%); London, Bruck, Ceci, & Shuman, *Disclosure of Child Sexual Abuse—What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psych., Pub. Pol'y. & L. 194, 216 (2005) (citing studies that yielded recantation rates of 27% and 22%). Some studies suggest that "high recantation rates reflect the number of children who attempt to discredit their own previous false allegations by setting the record straight." London et al., 11 Psych., Pub. Pol'y. & L. at 216; *see also Ex parte Thompson*, 153 S.W.3d 416, 423 n.9 (Tex. Crim. App. 2005) (Cochran, J., concurring) (citing cases). Other studies suggest that recantation frequently occurs when a parent pressures a child to withdraw a truthful allegation. *See* Malloy et al., 46 J. Am. Acad. Child & Adolesc. Psychiatry at 167. Children's susceptibility to pressure—both to bring false allegations and to recant truthful ones—adds a degree of unreliability that is at war with the level of certainty this Court has demanded in the capital punishment context.

The reliability problems described above are compounded by the evidentiary procedures employed in many child rape cases. The Sixth Amendment's Confrontation Clause generally prohibits the introduction of testimonial out-of-court statements against the accused if the declarant is unavailable for cross-examination. *Crawford* v. *Washington*, 541 U.S. 36, 65 (2004). This rule ordinarily provides defendants the right to cross-examine their accusers face-to-face. *See Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). The right to confront one's accuser, however, is limited as applied to child witnesses. In *Maryland* v. *Craig*, 497 U.S. 836 (1990), this Court validated the use of procedures designed to protect child witnesses from the trauma that may be caused by testifying in open court. Where the potential for such trauma exists, this Court held, states may use procedures that satisfy the Confrontation Clause by methods of "rigorous adversarial testing" other than "face-to-face confronta-

tion," such as the use of testimony via closed circuit television. *Id.* at 857.[6]

In addition to convictions based on the admission of child testimony that is not subject to traditional face-to-face cross-examination, convictions based on certain forms of hearsay also remain all-too common in child rape and sexual abuse cases. *See* Raeder, *Symposium, Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007) ("In practice, hearsay is a dominant feature of child abuse litigation, primarily introduced in the context of excited utterances, statements for medical diagnosis or treatment, forensic interviews, or via *ad hoc* exceptions."). Courts admit hearsay by finding that the statement in question—such as an accusatory declaration made by a child to a family member or medical examiner—constitutes admissible nontestimonial hearsay under *Crawford*. *See, e.g.*, *People* v. *Geno*, 261 Mich. App. 624, 631 (2004) (admitting a child's out-of-court statement to the director of a children's sexual assault center on the grounds that it was nontestimonial under *Crawford*); *State* v. *Vaught*, 682 N.W.2d 284, 291 (Neb. 2004) (alleged victim's statement to a doctor nontestimonial and therefore admissible under *Crawford*). They also admit hearsay statements that are plainly testimonial—such as those made during an *ex parte* interview conducted by a state official—when the declarant child is "available" for cross-examination, despite the fact that many young children lack the memory, communication skills, or composure

[6] *Crawford* did not explicitly overrule *Craig*. *See* Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4, 8 (2004) (arguing that "the rule of *Maryland* v. *Craig* is presumably preserved" following *Crawford*) (internal citation omitted). Accordingly, courts continue to apply the *Craig* rule. *See, e.g.*, *United States* v. *Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006) (testimony that is not face-to-face may be offered in cases "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.'" (quoting *Craig*, 497 U.S. at 850)).

to answer even basic cross-examination questions and therefore are functionally *unavailable*. *See, e.g.*, *People* v. *Sharp*, 355 Ill. App. 3d 786, 788 (2005) (admitting a child's out-of-court statement to a county child advocacy center even though the child was unable to respond to five consecutive direct examination questions about the events in question).[7] Whatever the merits of these decisions may be, their cumulative effect is that child rape convictions too often turn on hearsay statements not subjected to meaningful cross-examination.

Petitioner's case may contain some of the reliability problems that can arise in child rape cases. Shortly after she was raped, Petitioner's stepdaughter, L.H., told police officers, doctors, investigators, a psychologist, and a social worker that two teenage boys from the neighborhood had dragged her from her garage and forcibly raped her. Pet. App. 8a, 10a-11a. L.H.'s mother, Mrs. Kennedy, originally backed up L.H.'s story. *See id.* at 23a-24a. Mrs. Kennedy changed her story only after the State Division of Child Protective Services placed L.H. in state custody and suggested that the Division's willingness to return her to her mother would depend on Mrs. Kennedy's willingness to implicate Petitioner. Mrs. Kennedy then began to suggest to L.H. that Petitioner had committed the rape, after which L.H. was returned to her mother's custody. *See id.* at 14a-15a, 23a-24a. It was not until December 16, 1999, twenty months

[7] This Court has held that the Confrontation Clause does not preclude the admission of an out-of-court testimonial statement of a witness who takes the stand but says that he or she cannot recall any details about the event in question; so long as the witness is made available for cross-examination, the Sixth Amendment does not bar the admission of the prior statement. *See United States* v. *Owens*, 484 U.S. 554, 560 (1988) (citing *California* v. *Green*, 399 U.S. 149 (1970)). Notwithstanding *Crawford*, courts continue to apply *Owens* to admit testimonial hearsay statements of child witnesses so long as those children take the stand at trial. *See Sharp*, 355 Ill. App. 3d at 788. It is questionable whether the ability to challenge a young (and often emotionally distraught) child's failure of memory constitutes a "realistic weapon[ ]" of the sort this Court envisioned in *Owens*. 484 U.S. at 560.

after the crime, that L.H. told the State for the first time that Petitioner was the one who had raped her. *Id.* at 15a. When the case went to trial, the critical evidence inculpating Petitioner was a videotaped interview L.H. gave to officials at the Child Advocacy Center and Mrs. Kennedy's testimony that L.H. told her that Petitioner had committed the rape. But while L.H. took the stand at trial, she quickly "lost her composure" (*id.*), and was unable to describe the rape to the jury.

This case also contains some of the evidentiary limitations that often arise in child rape cases: a child whose first accounts of the rape exonerated the defendant, yet were transformed following repeated interactions with state officials;[8] a situation in which the complaining spouse is concerned with losing custody of the victim;[9] and, finally, the defendant's inability effectively to cross-examine his accuser. The risk of erroneous conviction in child rape cases, which often involve these elements, is too great to permit application of the death penalty. It is thus hardly surprising that no state has attempted to execute a defendant for child rape in more than forty years.

One of the perverse effects of the Louisiana sentencing regime, if allowed to stand, will be that admittedly guilty offenders will quickly plead guilty to avoid the death penalty, while defendants who steadfastly maintain their innocence will risk death to defend themselves at trial.[10] Al-

---

[8] *Compare* Anderson, 69 S. Cal. L. Rev. at 2144-2145 (noting that a child witness "is most likely to give an accurate and detailed report during the first interview and that after several interviews there is a greater likelihood that a child's memory of actual events is distorted by 'events' suggested by the interviewer").

[9] *Compare* Ceci et al., 1 Psychol., Pub. Pol'y. & L. at 505 (dangers of false claims more likely "in acrimonious custody cases in which a custodial parent has relentlessly 'lobbied' a child").

[10] *See* Hoffman, Kahn, & Fisher, *Plea Bargaining in the Shadow of Death*, 69 Fordham L. Rev. 2313, 2359 (2001) ("Available empirical evidence strongly suggests that … the possibility of the death penalty provides defendants in potentially capital cases with a substantial incentive to

though this criticism may be lodged against the death penalty in general, it is particularly troubling when, as has occurred in Louisiana, the *only* defendants who face the death penalty are those who refuse to accept a plea bargain to life imprisonment. As a result, there is an intolerably high risk that Louisiana's sentencing regime will result in the execution of innocent defendants.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

BARBARA E. BERGMAN
Of Counsel
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
School of Law, MSC11-6070
1 University of New Mexico
Albuquerque, NM 87131
(505) 277-3304

JONATHAN G. CEDARBAUM
Counsel of Record
MICHAEL J. GOTTLIEB
JOSHUA M. SALZMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

NOVEMBER 2007

---

enter into plea bargains that result in the imposition of life without parole."); O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 Mich. L. Rev. 1067, 1083 (2007) (noting that "[p]lea-bargaining contributes to the arbitrary imposition of the death penalty by allowing the guilty to escape death but exposing the innocent to the risks of trial by jury" and that "documented instances in which innocent persons have pled guilty to avoid the death penalty"); Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097 (2000) (arguing that the death penalty "provides the best plea-bargaining leverage imaginable—leverage sufficient, indeed, to induce even innocent defendants to confess or plead guilty to murder to avoid the death penalty, though innocent defendants almost never confess or plead guilty to other serious offenses").