No. 07-343

In The Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PAUL D. CONNICK, JR.
District Attorney
Jefferson Parish
STATE OF LOUISIANA

TERRY M. BOUDREAUX*
Assistant District Attorney
LSBA No. 3306
**Counsel of Record*
JULIET L. CLARK
Assistant District Attorney
LSBA No. 23451
OFFICE OF THE
DISTRICT ATTORNEY
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute genuinely narrows the class of such offenders eligible for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISION

STATUTORY AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ of Certiorari through the authority of 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Eighth Amendment to the Constitution of the United States, and the pertinent provisions of La. R.S. 14:42 set forth in petitioner's Petition for a Writ of Certiorari, the State of Louisiana supplies the Court with the following statutory provision:

> **La. C.Cr.P. art. 905.3. Sentence of death; jury findings** provides:
>
> 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. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and

aggravating circumstances upon which the jury was instructed.

La. C.Cr.P. art. 905.4. Aggravating circumstances provides in pertinent part:

A. The following shall be considered aggravating circumstances:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape . . .

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

———♦———

STATEMENT OF THE CASE[1]

Petitioner was indicted by a Jefferson Parish grand jury for one count of capital aggravated rape of a child under twelve, a violation of La. R.S. 14:42. Petitioner was tried, convicted and sentenced to death. His conviction and sentence were affirmed by the Louisiana Supreme Court. *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, reh. denied (La. 6/29/07).

At 9:18 in the morning on March 2, 1998, Patrick Kennedy called 911 to report that his eight-year-old

[1] The testimony and evidence presented at the trial in this matter are recounted in greater detail in the Louisiana Supreme Court's opinion in *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, 761-773.

step-daughter, L.H. had just been raped.[2] Kennedy advised the 911 operator that L.H. said she had been dragged from her garage to the side yard by two neighborhood boys who then raped her. Kennedy claimed to have seen one of the boys riding away from the house on a bicycle. However, a sheriff's deputy who immediately responded to the complaint from a location only a block away from the defendant's residence, did not see anyone fleeing on a bicycle. The deputy, who arrived on the scene while the defendant was still talking to the 911 operator, noticed that the crime scene in the yard was inconsistent with a rape having occurred there: a dog was sleeping undisturbed nearby and only a small patch of coagulated blood was found in otherwise undisturbed long grass.

The defendant led the deputy to the victim's bedroom, where she was lying on the bed in her room, wearing a t-shirt, and wrapped in a bloody cargo blanket. The defendant, who was wiping his hands with a bloody towel, advised the deputy that he had previously placed the victim in the bathtub in order to clean her, after carrying her like an infant from the side-yard to the residence. The deputy noticed that the defendant had no blood on his clothes. He also noticed that when he attempted to question the victim, the defendant kept trying to answer the questions for her. L.H. eventually indicated that she

[2] Kennedy later told detectives that he had kept the victim home from school that morning because she vomited after eating breakfast, and that his wife left for work at 5:30 that morning.

was selling Girl Scout cookies in the garage with her younger brother when two boys dragged her from the garage and one raped her.

When Emergency Medical Services ("EMS") arrived at the residence, Kennedy was found with a basin filled with water which he was using to wipe off L.H.'s genital area. When EMS field supervisor Stephen Brown told him to stop, Kennedy removed the basin, but returned to the room when Brown attempted to question the victim about what happened in order to determine what medical procedures were necessary. Kennedy intervened and provided an account of the incident in the victim's presence.[3] L.H. was transported to Children's Hospital, where she underwent surgery to repair a vaginal injury which had resulted in profuse bleeding.[4] No seminal fluid or spermatozoa was found on any of the swabs taken from the victim at the hospital.

Detectives assigned to investigate the offense caused the neighborhood to be canvassed for a suspect and a bicycle Kennedy described in statements to

[3] Later, when the lead investigator interviewed the victim at the hospital, the defendant was present, and prompted her to include that the attacker had an earring, and noted that they had seen the attacker cutting grass in the neighborhood previously.

[4] Dr. Scott Benton testified that L.H.'s perineal body was torn all the way from the posterior fourchette, where the vagina normally ends, to the anus. Additionally, a laceration to the left wall of L.H.'s vagina separated her cervix from the back of her vagina, causing her rectum to protrude into her vagina.

detectives. A detective took Kennedy to a local K-Mart in an attempt to locate a bicycle similar to the one he described. However, Kennedy picked out a regular bike with straight handlebars as a similar bicycle, when he had originally described a ten-speed bicycle with the handle bars turned up. On March 3, 1998, Detective Florida Bradstreet interviewed the defendant in connection with her discovery of a bike belonging to sixteen year-old Devon Oatis. The blue, gearless bicycle was found in tall grass behind the apartment where Oatis resided. It was described by Detective Bradstreet as covered with spider webs, rusted, with flat tires, and inoperable. It appeared to have been there for some time as the grass underneath it was indented and dead. The defendant positively identified this bicycle as the one on which he saw the subject ride away. Contrary to his earlier description of the bicycle, before he identified a similar bicycle at K-Mart, this bicycle was not a ten-speed with handle bars turned up, but was a regular bicycle with straight handlebars. Oatis was later ruled out as a subject because his physical description did not match those given by the victim and defendant and because his bicycle was inoperable.

In the meantime, the victim continued to claim that two boys on a bicycle pulled her from the garage and one of them raped her in the yard. Dr. Benton testified that medical records showed that the victim told all hospital personnel this same version of the rape while she was at the hospital, but that she told one family member that the defendant raped her. In addition, several days after the rape, the victim was

interviewed by psychologist Barbara McDermott, and the videotaped interview was introduced by the defense at trial. This interview lasted for three hours over two days.[5] During the interview, the victim said she was playing in the garage with her brother when she was approached by a boy who asked her about Girl Scout cookies. After a long delay, she said she fell off a ledge at the end of the garage and the boy pulled her by the legs across the concrete into the neighbor's yard with the other boy following them. She was trying to grab the grass while he was dragging her. The boy then pulled down his pants and her shorts, placed his hand over her mouth, and "stuck his thing in [her]." She forgot what both boys looked like and did not remember what either boy had on, though she thought one had on a black shirt and blue jeans. She did not remember anything after that until the ambulance arrived. Dr. McDermott questioned the victim thoroughly and argumentatively on each element of the victim's story, telling the victim her story did not make sense. For example, Dr. McDermott asks the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asks her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

[5] The Louisiana Supreme Court described the McDermott interviews in detail its opinion in *Kennedy*, 957 So.2d at 765. The first day was devoted primarily to collecting personal and familial history, while the victim was questioned about the rape on the second day.

Despite the victim's version of events, the focus of the investigation began to shift toward the defendant. On March 4, 1998, the police learned about calls the defendant made to his employer on March 2, 1998, hours before he called 911. Alvin Arguello, chief dispatcher for the A. Arpet Moving Co., Patrick Kennedy's employer, testified that when he arrived for work on the morning of March 2, 1998, which was generally around 6:15 a.m., there was a message from Kennedy indicating he would not be available to work that day. Kennedy called Arguello again between 6:30 and 7:30 a.m., sounding nervous, to ask him how to get blood out of a white carpet. Kennedy told Arguello that his step-daughter "had just become a young lady."[6]

On March 9, 1998, the police also found out that Kennedy called B&B Carpet Cleaning at 7:37 a.m. on March 2, 1998 to request urgent carpet cleaning to remove blood stains, almost two hours before he called 911 to complain that the victim had just been raped. Rodney Madere, owner of B&B Carpet Cleaning, testified at trial that the defendant, whom he identified by caller ID, called him at 7:37 a.m. on March 2, to schedule an urgent carpet cleaning job to remove bloodstains. A photograph of the caller ID box from B&B Carpet Cleaners was introduced at trial. Lester Theriot, an employee of B&B testified that Madere called him before 8:00 on the morning of

[6] Arguello could not recall whether Kennedy said his niece or his daughter had "just become a young lady."

March 2, 1998, and told him to report immediately to the defendant's home, but he did not get there until after he dropped his son off at school. When he arrived, he could not get into the home because the police and an ambulance were present.

These calls indicated that the rape occurred much earlier in the morning than reported by the defendant, that he had waited several hours before calling 911, and that he was attempting to clean up evidence of the crime in the meantime. The police also became aware of physical evidence that the crime scene had actually been cleaned. Pursuant to search warrants issued on March 4, 5, 7, and 8, 1998, luminol testing presumptively established the presence of blood on carpeting in areas of the home as reflected in photographs and sketches introduced at trial. A large area of carpet at the foot of the victim's bed was identified in this manner, and a stain was observed on the subfloor following the removal of the carpet and padding. Police also found a one gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" in the garage, and a pail and two towels were recovered from the bathroom sink.

Samples of several of these items from these locations were subsequently tested by Drs. Henry Lee and Michael Adamowicz of the Connecticut State Police Forensic Science Lab in 1998. Dr. Lee testified that liquid dilution demonstrated that someone had attempted to clean some bloodstains from some of the carpet samples. Dr. Adamowicz found the victim's

DNA on some carpet samples, the cargo blanket, and a towel.

Dr. Lee testified regarding the absence of evidence confirming the defense's theory that the victim was raped in the yard as she initially stated. He examined the shirt and shorts the victim was wearing for any grass or soil stains but could not find any, indicating that the victim was not dragged through the grass as she initially claimed. He also did not find any abrasion marks consistent with being dragged. He opined that blood staining on the back of the victim's shorts was consistent with the shorts being placed on the victim after she was raped. He also examined the victim's underwear and found a blood transfer stain on the back of them and did not find any grass or soil stains on them. He examined photographs of the crime scene outside and found nothing to indicate that a struggle had taken place, as there were no depressions in the grass and only a small blood stain sitting on top of the grass, indicating a low velocity dripping, suggesting that the blood had been planted there.

The victim's mother, C.H., testified at trial that she married the defendant in 1998. After the rape, the victim was removed from her custody for approximately one month because she had permitted the defendant, who was in jail, to maintain phone contact with the victim. C.H. testified that soon after the victim was returned to her custody, the victim for the first time reported to her that defendant had raped her. She testified that the victim was in the

room she shared with her younger brother, crying as her mother had never seen her cry before. After she allowed the victim to come sleep in her room, the victim told her that she could not hold it in anymore, and that that the defendant was the one who raped her.

The victim, who was eight when raped and nearly fourteen years old at the time of trial, testified that she woke up to find Kennedy on top of her. The victim testified that she was interviewed by Amalee Gordon on December 16, 1999. The defense stipulated to the admissibility of the videotape of this interview, which was played for the jury. On the videotape, the victim states that she woke up one morning and Kennedy was on top of her. He raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up. The victim could not recall what the story was. She stated that it happened in her room, on her bed, with the defendant's hand covering her eyes, while her shorts were off and the defendant was naked. After she was raped, the victim said she fainted and did not remember anything until the ambulance arrived to take her to the hospital.

After this videotape was played, the victim remained on the stand and testified on direct and cross-examination. The victim testified that she originally said two black boys raped her, but that this wasn't true. She said Kennedy told her to say this. She was not downstairs, in the garage, or outside of the house when the rape occurred. After Kennedy

raped her, he left the room and returned carrying orange juice with pills chopped up in it. He gave it to her. She recalled hearing him on the phone telling his boss that his daughter had become a young lady and he couldn't come to work. She also recalled the defendant carrying her into the hall bathroom, where she threw up in the tub. The police came to the house, and she was taken to the hospital where she was given medicine that put her to sleep.

On cross-examination, the victim testified that she remembered telling police and people at the hospital that someone else did this to her, that after the rape the defendant did not live with them anymore, that she had to leave her mother and brother and go live with another family for awhile and this was upsetting to her, and that she first told her mother that the defendant was the one that raped her right before the interview with Amalee Gordon.

LAW AND ARGUMENT

I. The Eighth Amendment's Cruel and Unusual Punishment Clause Permits a State To Punish the Crime of Rape of a Child With the Death Penalty.

In his petition for writ of certiorari, petitioner argues that the Louisiana Supreme Court erred in determining that a sentence of death is not disproportionate or excessive punishment for the rape of a child. He argues that the Louisiana Supreme Court's

decision in the instant case cannot be reconciled with this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977). He further contends that objective indicia of national consensus supporting this penalty do not exist. Certiorari should be denied on this issue as the Louisiana Supreme Court correctly determined that the death penalty is not excessive punishment for the rape of a child, and that it is supported by objective indicia of national consensus.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment's prohibition of cruel and unusual punishments is "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 366-67 (1910). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). A punishment is excessive and unconstitutional under the Eighth Amendment if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (affirming the death sentence for first-degree murder).

In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), this Court found death to be a disproportionate penalty for the rape of an adult woman.[7] The plurality opinion stated: "Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not take a human life." *Coker*, *supra* at 585. However, as the Louisiana Supreme Court noted in the instant case, the plurality was referring to the rape of an adult woman, and not the rape of a child, as evidenced by the fourteen references to the rape of an "adult woman" found either in the plurality opinion, concurring opinion, or dissenting opinion. *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, 781; citing *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So.2d 1063, cert. denied sub. nom. *Bethley v. Louisiana*, 520 U.S. 1259 (1997).

---

[7] *Coker* was decided by this Court in a plurality opinion. Justice White announced the judgment of the Court, joined by Justices Stewart, Blackmun, and Stevens. Justice Brennan and Justice Marshall filed separate concurring opinions finding the death penalty to be cruel and unusual punishment in all circumstances. Justice Powell concurred in the judgment in part and dissented in part, finding that death is disproportionate punishment for the crime of raping an adult woman where, as in this case, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. Chief Justice Burger dissented, joined by Justice Rehnquist, concluding that he would leave to the States the task of legislating in this area of the law.

The Louisiana Supreme Court addressed the question in the context of this Court's Eighth Amendment jurisprudence, as most recently expressed in the decisions of *Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting mentally retarded persons from capital punishment) and *Roper v. Simmons,* 543 U.S. 551 (2005) (exempting from capital punishment all defendants under the age of 18 years at the time of commission of a capital crime). The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, which data provides essential instruction. The second part of the analysis involves the exercise of this Court's independent judgment in determining whether the death penalty is a disproportionate punishment for the rape of a child under twelve years of age.[8]

The Louisiana Supreme Court correctly recognized that the first part of this test involves more than simply a numerical counting of which states among the thirty-eight jurisdictions permitting

[8] The Louisiana Supreme Court noted that in *Stanford v. Kentucky*, 492 U.S. 361 (1989), this Court held that the Court's independent judgment had no bearing on the acceptability of a particular punishment under the Eighth Amendment. However, *Atkins* and *Roper* reaffirmed the Court's view prior to *Stanford v. Kentucky*, *supra*, that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 563, 125 S.Ct. at 1191-92 (quoting *Atkins*, 536 U.S. at 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (quoting *Coker*, 433 U.S. at 597, 97 S.Ct. at 2868)).

capital punishment stand for or against a particular capital prosecution. This Court has also taken into account the direction of any change in this respect. In *Atkins*, this Court noted with respect to the number of states that had abandoned capital punishment for the mentally retarded following the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 356 U.S. at 315. In *Roper*, this Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to *Stanford* now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. The *Roper* Court concluded that,

> [a]s in *Atkins*, the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice, provide sufficient evidence that today our society views juveniles, in the words of *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

Roper, 543 U.S. at 567.

In the second part of the test, this Court considers whether capital punishment for a particular class

of offenders serves the twin social goals of deterrence and retribution, limiting capital punishment to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

Considering the first part of this test, five states, Montana, Georgia, Oklahoma, South Carolina and Texas have enacted legislation prescribing capital punishment for child rape since this Court denied certiorari in *Bethley v. Louisiana*, 520 U.S. 1259 (1997). Montana enacted its child rape capital punishment statute in 1997. Oklahoma and South Carolina adopted their laws in 2006. Texas adopted its law in 2007. The capital child rape statutes of Montana, Oklahoma, South Carolina, and Texas all require proof that the defendant previously had been convicted of sexual assault of a child before he becomes death eligible. See 10 Okl. St. Ann. § 7115(I) (2006 Supp.); Mont. Code Ann. § 45-5-503; S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.).

With respect to Georgia, the Louisiana Supreme Court noted that it has persistently reenacted its capital rape provision, Ga. Code Ann. § 16-6-1(a)(1), although some forty years have passed since the decision in *Coker*, and despite the fact that the courts of the state readily acknowledge that while the offense remains classified as a capital crime for procedural purposes, the death penalty is not available when the victim is an adult woman. *Kennedy*, 957 So.2d at 784-85; citing *Merrow v. State*, 268 Ga. App.

47, 601 S.E.2d 428 (2004). In 1999, the Georgia legislature added subsection (1)(a)(2), which proscribes the carnal knowledge of a female less than 10 years old as a capital offense.

The Louisiana Supreme Court determined that it was also appropriate to consider the number of jurisdictions which provide capital punishments for non-homicide crimes which are far less heinous than child rape.[9] This determination correctly recognizes the fact that the legislative enactments of these additional jurisdictions demonstrate that there is not a national consensus that the death penalty is disproportionate for non-homicide crimes. The Louisiana Supreme Court noted:

> most [commentators] agree that the number of jurisdictions allowing the death penalty for non-homicide crimes at least doubled between 1993 and 1997. Kearns, 58 S.C. L. Rev. at 520, 521, and n. 110 (citing Meister, *supra* note 108, at 210-21 and Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship,* 4 Wm. & Mary J. Women & L., 129, 160-61 (1997) (noting that in 1993, at least six states authorized death for non-homicide crimes, and by 1997, that number had grown to fourteen)).

[9] Relying upon this Court's characterization of rape as the ultimate violation of self, short of homicide, the Louisiana Supreme Court found child rape to be the most heinous of all non-homicide crimes. *Kennedy*, 957 So.2d at 785; citing *Coker*, *supra*, 433 U.S. at 597.

Kennedy, 957 So.2d at 785-86. Conducting its own survey, the Louisiana Supreme Court found that approximately 38% of capital jurisdictions (15 out of 39, including federal) authorize some form of non-homicide capital punishment:

> Five provide capital punishment for child rape, as discussed above. Five more provide the death penalty for sui generis extraordinary crimes against the government, *i.e.,* treason, espionage, aircraft piracy. *See* Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp.) [footnote omitted] Four states provide capital punishment for aggravated kidnapping offenses similar to Louisiana's (non-capital) crime of aggravated kidnapping in R.S.14:42. *See* Colo. Rev. Stat. Ann. § 18-3-301; Idaho Code, §§ 18-4502, 18-4504 (Michie 2000); Mont. Code Ann. 45-5-503 (West 2005); S.D. Codified Laws § 22-19-1 (Michie 1998).
>
> . . .
>
> Florida remains among the ranks of non-homicide capital jurisdiction because of its sweeping drug laws which provide for capital punishment in extreme cases even when the offense does not result in the actual death of anyone. *See, e.g.* Fla. Stat. Ann. § 893.135(3) (West 2007 Supp.) (importation of 300 or more kilograms of cocaine into the state when the offender "knows that the probable

> result of such importation would be the death of any person"); *see also* Fla. Stat. Ann. § 921.142(1) ("The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life."). Thus, 14 of the 38 states permitting capital punishment provide the death penalty for non-homicide crimes: Louisiana, Oklahoma, South Carolina, Georgia, Arkansas, California, Mississippi, New Mexico, Washington, Colorado, Idaho, Montana, South Dakota, and Florida.
>
> At the federal level, of the 39 crimes carrying the death penalty, excluding the extraordinary crimes of treason and espionage, the overwhelming majority require the death of a person. However, 18 U.S.C. 3591(b)(1) and 21 U.S.C. 848(e) combine to provide capital punishment for the kingpin of an extraordinarily large continuing criminal drug enterprise.

State v. Kennedy, 957 So.2d at 786-787. The Louisiana Supreme Court did not include Texas, which enacted its capital child rape statute in 2007, in the list of jurisdictions authorizing the death penalty for non-homicide offenses. *See,* Tex. Pen. Code § 12.42 (2007 Supp.). Therefore, it now appears that approximately

41% of capital jurisdictions (15 out of 39, including federal) authorize the death penalty for non-homicide offenses.

The trend toward capitalization of non-homicide crimes, child rape in particular, is significant. The Louisiana Supreme Court noted that this trend is more compelling than in *Roper*, wherein this court relied on five states abolishing the death penalty for juveniles after *Stanford* held that the death penalty for juveniles was constitutional. *Kennedy*, 957 So.2d at 788. In the instant case, six states have now enacted the death penalty for child rape after this Court held that the death penalty for rape of an adult woman was unconstitutional. Additionally, "it is likely that the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional." *Kennedy,* 957 So.2d at 788.

Of significance, the respondent contends that the fact that the petitioner is the first to be sentenced to death under the existing child rape statutes does not indicate that juries are unwilling to return death sentences for convicted child rapists. Three of the jurisdictions at issue, South Carolina, Oklahoma, and Texas, have only enacted their legislation within the past two years. When one considers the fact that extensive pre-trial litigation in the instant case resulted in a delay of more than five years from petitioner's indictment on May 7, 1998, to his conviction in August of 2003, it is not surprising that death

sentences have not yet been returned in these jurisdictions.

Considering the second prong of the test, the Louisiana Supreme Court concluded that the death penalty was not a disproportionate penalty for the rape of a child under twelve:

> Rape of a child under the age of twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves. A "maturing society," through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community.

Kennedy, 957 So.2d at 789. The Louisiana Supreme Court further noted that the harm inflicted upon a child when raped is tremendous, that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come, and that aggravated rape inflicts mental and psychological damage to its victims and undermines the community sense of security. *Kennedy*, 957 So.2d at 789, fn. 39.

Moreover, child rapists as a class of offenders, share no common characteristics tending to mitigate

the moral culpability of their crimes. Execution of child rapists will serve the goals of deterrence and retribution as well as the execution of first-degree murderers. *Kennedy*, 957 So.2d at 789.

Respondent submits that the Louisiana Supreme Court correctly found that the death penalty is not excessive punishment for the rape of a child, and that certiorari should be denied on this basis.

II. Louisiana's Capital Rape Statute Genuinely Narrows the Class of Offenders Eligible for the Death Penalty.

Petitioner argues that even if this Court determines that death is a permissible punishment for the rape of a child under certain circumstances, Louisiana's capital rape statute fails to genuinely narrow the class of offenders eligible for the death penalty. This claim has no merit.

In order to avoid arbitrary and capricious imposition of the death penalty, the sentencing jury's discretion must be suitably directed and limited. *Gregg v. Georgia*, 428 U.S. 153, 189, 92 S.Ct. 2909, 2932-2933, 49 L.Ed.2d 859 (1976). The capital sentencing scheme must narrow the class of persons eligible for the death penalty. The narrowing can be done in one of two ways: (1) the legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *State v. Wilson,* 96-1392 (La.

12/13/96), 685 So.2d 1063, 1070-71, citing *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Louisiana has chosen the first method. The legislature has narrowly defined the offenses which are punished by death, therefore the "narrowing function" is performed by the jury at the guilt phase when it finds the defendant guilty of the aggravated rape of a child under the age of twelve.

Accordingly, this Court found in *Lowenfield* that a sentence of death may validly rest upon a single aggravating circumstance under La. C.Cr.P. art. 905.4 that is a necessary element of the underlying offense of first degree murder under La. R.S. 14:30. *Lowenfield*, 484 U.S. at 246. While the scheme narrowed the class of eligible offenders at the guilt phase, the sentencing phase allowed for the consideration of mitigating circumstances and discretion. *Id.* This Court stated that "[t]he Constitution requires no more." *Id.*

La. R.S. 14:42, as it read at the time of trial, defined aggravated rape as "a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed . . . [w]hen the victim is under the age of twelve. . . . "[10] When the victim is under the age of twelve, La. R.S. 14:42(D)(2) authorizes the death penalty. All other cases of aggravated rape are punishable by "life imprisonment at hard labor without

[10] La. R.S. 14:42(A)(4) was amended in 2003 to substitute thirteen years for twelve years.

benefit of parole, probation, or suspension of sentence." La. R.S. 14:42(D)(1).

La. C.Cr.P. art. 905.3 provides:

> 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. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The Court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Included as aggravating circumstances are that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape," and the "victim was under the age of twelve years . . . " La. C.Cr.P. art. 905.4(A)(1) and (10).

Thus, certiorari should be denied because the Louisiana scheme genuinely narrows the class of death eligible rapists to those who rape young children under twelve, and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion.

CONCLUSION

The petitioner has failed to show that any of the issues raised herein necessitate the granting of certiorari. The State of Louisiana requests that, for the foregoing reasons, the petition for writ of certiorari be denied.

Respectfully submitted,

PAUL D. CONNICK, JR.
District Attorney

TERRY M. BOUDREAUX*
JULIET CLARK
Assistant District Attorneys
Twenty-fourth Judicial District
Parish of Jefferson
STATE OF LOUISIANA
OFFICE OF THE DISTRICT ATTORNEY
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020

**Counsel of Record*