In the Supreme Court of Louisiana

No. 05-KA-1981

State of Louisiana,

Plaintiff-Appellee

v.

Patrick Kennedy,

Defendant-Appellant.

Appeal from Conviction and Death Sentence Imposed
In the 24th Judicial District Court for the Parish of Jefferson
Hon. Ross LaDart, Judge, Presiding.

THIS IS A DEATH PENALTY CASE

Supplemental Brief of Appellant Patrick Kennedy

Martin A. Stern, # 17154
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Robert N. Markle, # 22111
7817 Bles Ave., Apt. 2B
Baton Rouge, LA 70810
(225) 766-5737

Jelpi P. Picou, Jr., # 18746
G. Ben Cohen, La. Bar No. 25370
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Counsel for Defendant-Appellant
Patrick Kennedy

TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

Statement of the Case 1

Specification of Errors 1

Introduction 1

Argument 2

I. The portion of La. R.S. 14:42 that permits a death sentence for rape violates both the Eighth Amendment to the U.S. Constitution and Article I, § 20, of the Louisiana Constitution 2

A. *Coker* and *Watson* provide the backdrop to this Court's analysis. 2

B. Execution for a non-homicide offense has been deemed unjust by contemporary society. 5

C. The death penalty is a disproportionate punishment for the rape of a child when death does not result. 7

D. Imposing the death penalty for the rape of a child serves no legitimate state interest. 8

1. The death penalty for child-rape does not support the goal of deterrence. 8

2. The death penalty for child-rape encourages worse crimes. 9

3. The death penalty for child-rape increases the hardship on the victim. 9

4. The death sentence for child-rape increases the likelihood of wrongful convictions. 11

E. The Louisiana Excessive Punishment Clause provides greater protection than the Eighth Amendment and independently requires that the death penalty for child-rape be held unconstitutional. 12

II. Reversal is also required because there was no required finding of aggravating factors. 14

A. Louisiana's death penalty for child-rape is unconstitutional because it does not ensure that it will not be imposed arbitrarily or capriciously. 15

B. This case proves the absence of any meaningful aggravating factors. 16

Conclusion 17

INDEX OF AUTHORITIES

U.S. CONSTITUTION

Article VI, § 2 5
Eighth Amendment 1,2,7,12,13,14,17,18
Fourteenth Amendment 1,2,14

LOUISIANA CONSTITUTION

Article I, § 20 1,2,13,14,18

STATUTES AND CODAL ARTICLES

La. R.S. 14:42 1,2,3,6,7,8,12,16,17
La. C.Cr.P. art. 905 15,16
Mont. Code Ann. §45-5-503 5

CASES

Arave v. Creech, 507 U.S. 463, 113 S. Ct 1534, 123 L. Ed. 2d 188 (1993) 17
Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) 6,11
Bethley v. Louisiana, 520 U.S. 1259, 117 S. Ct. 2425, 138 L. Ed. 2d 188 (1997) 2,4
Brennan v. State, 754 So. 2d 1 (Fla. 1999) 14
Buford v. State, 403 So. 2d 943 (Fla. 1981) 5,7
City of Baton Rouge v. Ross, 94-0695 (La. 4/28/95), 654 So. 2d 1311 13
Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) 2,3,3,4,5,7,8,12,15,18
Copeland v. Slidell Memorial Hospital, 94-2011 (La. 6/30/95); 657 So. 2d 1292 13
Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) 7
Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) 2,3,7,15,17
Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) 16
Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) 2,15
Guidry v. Roberts, 335 So. 2d 438 (La. 1976) 13
Lajoie v. Thompson, 217 F.3d 663 (9th Cir. 2000) 10
Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988) 16
Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) 8
Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) 1
Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) 5,6
State v. Coleman, 605 P.2d 1000 (Mont. 1979) 7
State v. Gardner, 947 P.2d 630 (Utah 1997) 1

State v. Hattaway, 621 So. 2d 796 (La. 1993) 13
State v. Middleton, 657 P.2d 1215 (Or. 1983) 10
State v. Perry, 610 So. 2d 746 (La. 1992) 13,14
State v. Wilson, 96-1392 (La. 12/13/96), 685 So. 2d 1063 2,3,4,5,6,7,8,9,16,18
State v. Wright, 598 So. 2d 561 (La. App. 4th Cir. 1992) 11
Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) 15

OTHER AUTHORITIES

ACHR: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) 5

American Convention on Human Rights (ACHR), Article 4(2) 5

Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156 (2002) 9

Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: the Death Penalty for Child Rape*, 89 J. Crim. L. & Criminology 717 (1999) 8,9

BERLINER & STEVENS, ADVOCATING FOR SEXUALLY ABUSED CHILDREN IN THE CRIMINAL JUSTICE SYSTEM 13 (Nov. 1976) 11

BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf 6,12

Child Protection: Balancing Diverging Interests: Hearing Before the Senate Comm. on Labor and Human Resources and the Subcomm. on Children and Families, 104th Cong. (1995) 12

Corey Rayburn, *Better Dead Than R(Ap)Ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004) 9

David W. Schaaf, *What if the Victim is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 U. Ill. L. Rev. 347 (2000) 8

Death Penalty Information Center, State by State Information: Louisiana, http://www.deathpenaltyinfo.org/state/ (last visited Mar. 6, 2006) 12

Donald C. Massey and Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 La. L. Rev. 743 (1996) 14

Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 75 (John Doris ed. 1991) 12

Emily Marie Moeller, *Developing Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 Dick. L. Rev. 621 (1998) 8

Friedrich, Urquiza & Beilke, *Behavioral Problems in Sexually Abused Young Children*, 11 J. PEDIATRIC PSYCHOLOGY 47-58 (1986) 10

Gothard, *The Admissibility of Evidence In Child Sexual Abuse Cases*, 66 CHILD WELFARE 13 (1987) 10

Gross, *Innocence In Capital Sentencing: Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005) 11

http://web.amnesty.org/pages/deathpenalty-countries-eng. 5

http://www.charlotte.com/mld/charlotte/news/breaking_news/14621923.htm 6

J. Chandler Bailey, *Death is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 Wash. & Lee. L. Rev. 1335 (1998) 8

James O'Brien Jr., *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141 (1986) 11

Jason DeParle, *Early Sex Abuse Hinders Many Women on Welfare*, N.Y. TIMES, Nov. 28, 1999, at A1 10

Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. Legis. 249 (1998) 8

John Johnson, *"Kids Don't Lie": Faith in this Assumption Led to Dozens of Unjust Molestation Convictions in Bakersfield; Today One Man Remains in Prison Even After Four of his Original Accusers Said he Never Touched Them*, L.A. TIMES, Aug. 10, 2003, § 9 at 16 12

Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51 (1984) 11

Meryl Diamond, *Assessing The Constitutionality Of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159 (1999) 9

Perpetrators Against Juveniles, http://www.ncjrs.gov/html/ojjdp/2000_6_4/page4.html (2000) 10

Prevent Child Abuse Louisiana, *Current Issues: Valid Abuse and Neglect Cases by Parish*, http://www.pcal.org/New%20Pages/isstats.html (data obtained from the Louisiana Office of Community Services) 1

Richard P. Bullock, Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 788 (1991) 14

ROB HALL, RAPE IN AMERICA 105 (1995) 11

Russell Nuce, *Child Sexual Abuse: A New Decade for the Protection of our Children?*, 39 EMORY L.J. 581 (1990) 10

U.S. Dep't of Justice Office of Justice Programs, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000, http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf (2002) .. 10

Statement of the Case

Defendant-Appellant Patrick Kennedy adopts the Statement of the Case from his primary brief filed this date.

Specification of Errors

Defendant-Appellant Patrick Kennedy adopts the Specification of Errors from his primary brief filed this date and, in addition, sets forth the following two:

I. The portion of La. R.S. 14:42 that permits a death sentence for rape violates both the Eighth Amendment to the U.S. Constitution and Article I, § 20, of the Louisiana Constitution.

II. Reversal is also required because there was no required finding of aggravating factors.

Introduction

Defendant-Appellant Patrick Kennedy was indicted for "aggravated rape upon a female juvenile under the age of 12 years," under La. R.S. 14:42(A)(4). Under La. R.S. 14:42(D)(2)(a), the state treated the case as a capital prosecution.

Kennedy moved to quash the indictment on the grounds that in permitting capital punishment for a non-homicide crime, the statute violates the Eighth Amendment to the U.S. Constitution,[1] applicable against the states through the Fourteenth, *see Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), as well as Article I, § 20 of the Louisiana Constitution.[2] The trial court denied the motion as it did on two later occasions when Kennedy renewed the motion.

To date, Kennedy is the only person in the United States since 1977 who has been sentenced to death for a non-homicide crime. *See State v. Gardner*, 947 P.2d 630, 650 (Utah 1997). He is the only person, of hundreds of offenders, who has been sentenced to death in Louisiana since the Legislature amended the rape statute in 1995 to allow capital punishment for the rape of a person under the age of twelve.[3]

Kennedy files separately his primary brief in which he shows that the conviction should be reversed or, alternatively, that this case should be remanded for errors in the penalty phase to be corrected. The purpose of this supplemental brief, as permitted by this Court's order of May 12, 2006, is to address only whether the death penalty for a non-homicide crime, particularly the rape of

[1] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[2] Article I, § 20 provides that "[n]o law shall subject any person to . . . cruel, excessive, or unusual punishment. . . ."
[3] In the one-year period July 1, 2001, to June 30, 2002, there were 824 reported cases of child sexual abuse in Louisiana. *See* Prevent Child Abuse Louisiana, *Current Issues: Valid Abuse and Neglect Cases by Parish*, http://www.pcal.org/New%20Pages/isstats.html (data obtained from the Louisiana Office of Community Services).

a person under age twelve set forth in La. R.S. 14:42(A)(4), passes constitutional muster, including whether the statutory scheme sets forth sufficiently meaningful aggravating factors to facilitate the non-arbitrary application of the statute.

As shown below, to impose a death sentence for rape of a person under age twelve violates both the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, § 20 of the Louisiana Constitution. Alternatively, even if the death sentence for such a crime can ever pass constitutional muster, the statute at issue here does not because it provides no guidance to the jury in determining which child-rapes should result in the death penalty and which should not.

For either of these independent reasons, set forth in Parts I and II, respectively, the death penalty entered against Kennedy should be vacated.

Argument

I. The portion of La. R.S. 14:42 that permits a death sentence for rape violates both the Eighth Amendment to the U.S. Constitution and Article I, § 20, of the Louisiana Constitution.

A. *Coker* and *Wilson* provide the backdrop to this Court's analysis.

Two opinions are central to the question of whether the death penalty passes constitutional muster for the crime of rape: *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality opinion) and *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So. 2d 1063, *cert. denied sub nom., Bethley v. Louisiana*, 520 U.S. 1259, 117 S. Ct. 2425, 138 L. Ed. 2d 188 (1997).

In *Coker*, the Supreme Court held that a death sentence imposed upon a defendant for the crime of rape violates the Eighth Amendment. The Court applied the test set forth in a line of cases "that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Id.* at 592 (citing *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and *Robinson*). The Court applied the two-prong test from *Gregg* that provides that a punishment is "excessive" if it (1) serves no legitimate purpose or (2) is out of proportion to the severity of the crime, and the Court added a third prong, (3) that the punishment must not be so severe as to be unacceptable to contemporary society. *Id.* If any one of these tests is met, then the punishment is prohibited by the Eighth Amendment.

Beginning by focusing on the third prong, whether the punishment is acceptable in contemporary society, the Court looked to "objective evidence of the country's present judgment"

as to whether the death sentence is justified for rape. *Id.* at 593. After the Court's 1972 decision in *Furman* striking down most of the capital punishment statutes across the nation, a majority of states had reinstituted the death penalty for murder, but of the 16 states in which rape had been a capital offense, only three reinstituted the death penalty for rape of an adult woman. *Id.* at 594. The Court also noted that out of 60 major nations in the world surveyed in 1965, only three permitted the death penalty for rape where death did not ensue. *Id.* at 596 n.10. Thus, the Court concluded that the death sentence for rape had become unacceptable in contemporary society, thereby failing the third prong.

Moreover, the Court held that this "legislative rejection of capital punishment for rape strongly confirms [its] own judgment" that death is a disproportionate penalty for rape, thereby also failing the second prong. *Id.* at 597. While it is true that the plurality holding specifically disallows capital punishment for the rape of an adult woman only, its underlying rationale is not so limited, but rather applies with equal force to any crime of rape. The Court explained, "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." *Id.* at 598. The court continued, "We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life." *Id.* (citation omitted). Thus, while the Court did not specifically prohibit capital punishment for all crimes of rape, its rationale supports such a result. Indeed, the victim in *Coker* was herself only sixteen years old.[4]

More than twenty years later, this Court, in *Wilson*, considered the issue nominally left open in *Coker*, i.e., whether capital punishment for the crime of rape of a person under age twelve can pass constitutional muster. Unlike *Coker*, the defendant in *Wilson* had not been sentenced to death. Instead, the Louisiana trial court had declared La. R.S. 14:42(A)(4), the statute at issue on this appeal, unconstitutional. On the State's appeal, this Court reversed, holding that the statute is not unconstitutional on its face. *Wilson*, 96-1392 at 1, 685 So. 2d at 1064.

Writing for the Court, Justice Bleich actually agreed with the *Coker* Court that "[o]ne of the

[4] Despite the Court referring to the victim sometimes as an "adult woman," Chief Justice Burger's dissent makes clear that the victim was in fact a sixteen-year-old girl. *See Coker*, 433 U.S. at 587, 605 (Burger, C.J., dissenting). Moreover, the Court struck down the death sentence even though the rape before it involved many aggravating factors. In particular, the defendant had escaped from prison where he was serving sentences for a previous murder, rape, kidnapping and aggravated assault, and then, while a fugitive, perpetrated a home invasion that involved another kidnapping and rape, this time at knife-point, as well as armed robbery and theft of an automobile. *Id.* at 587.

most conservative and acceptable methods of determining the excessiveness of a penalty is to examine the statutes of the other states." *Id.* at 1067. And Justice Bleich correctly noted that Louisiana was the only state in the nation that has a law providing for the death penalty for the rape of a person under age twelve. *Id.* at 1068. He even noted that the only three other states that had ever had such a statute had, since *Coker*, declared them unconstitutional. *Id.* But having agreed that the question of excessiveness should be guided by objective evidence of the approach taken by other states throughout the nation, and having found that Louisiana stood alone in allowing capital punishment in this circumstance, he nevertheless did not find the death penalty excessive. *Id.*

Instead, he predicted that Louisiana would be the first of many states to adopt the death penalty for such a crime: "While Louisiana remains the sole jurisdiction with such a statute in effect, it does not do so without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime." *Id.* at 1069. On the basis of this prediction, the Court concluded that the statute should not be declared unconstitutional, and it reversed the trial court's contrary holding. *Id.*

The United States Supreme Court denied certiorari, but not without several Justices taking the unusual step of explaining that not only did the denial not constitute a decision on the merits, but that it was questionable whether the Court even had jurisdiction to grant certiorari where, unlike in *Coker*, there was no final judgment of a death sentence. In their words, "It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' 28 U.S.C. § 1257(a)." *Bethley* (denying certiorari in both *Bethley* and in *Wilson*). Recognizing that "Petitioner has been neither convicted of nor sentenced for any crime[,]" they noted that the fact that the "judgment of the lower court may not be final" had been reason enough to deny certiorari in previous cases. *Id.*

Thus, *Wilson* escaped review not because its decision was deemed sound, but rather, apparently, because the defendant had not been sentenced to death in a final judgment. In any event, the basis for the opinion – the prediction that Louisiana would be in the vanguard of states adopting the death penalty for rape of a person under age twelve – has not withstood the test of time. A decade has passed and Louisiana is still isolated in permitting the death penalty for rape of

a person under age twelve.[5]

It is against this backdrop that the present case must be considered. And unlike the defendant in *Wilson*, Kennedy has been sentenced to death in a final judgment. Thus, if the judgment is not reversed or the case remanded to correct errors in sentencing on some other ground, then there is a possibility – indeed, a likelihood – that the United States Supreme Court will grant certiorari.

B. Execution for a non-homicide offense has been deemed unjust by contemporary society.

Kennedy begins his analysis, as the Supreme Court did in *Coker*, by addressing the third prong. As discussed above, both that Court and this Court have recognized an overwhelming consensus to reject the death penalty as a punishment for rape, including rape of a person under age twelve. Indeed, of all fifty states and the District of Columbia, Louisiana stands alone in permitting the death penalty for such a crime.[6] This Court itself noted in *Wilson*, 685 So. 2d at 1068, that "Louisiana is the only state that presently has a law in effect that provides for the death penalty for the rape of a child less than twelve."

Furthermore, Louisiana stands alone not only in the nation, but practically in the entire world. As noted above, the Supreme Court found in *Coker*, 433 U.S. at 596 n.10, that out of 60 major nations in the world surveyed in 1965, only three provided for the death penalty for rape where death did not ensue.[7] Moreover, since then the United States has become a signatory to the American Convention on Human Rights (ACHR), Article 4(2) of which provides that the death penalty "shall not be extended to crimes to which it does not presently apply." ACHR: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (*cited in Roper v. Simmons*, 543 U.S. 551, 576, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). Thus, Louisiana's death penalty for child-rape not only isolates it on the national and world stages, but there is also a strong argument that it violates an international treaty ratified by the United States and, on this basis, Kennedy asserts that it must be stricken under the Supremacy Clause. U.S. Const. Art. VI, § 2.

---

[5] Florida has a similar statute on its books, but it has been declared unconstitutional by the Florida Supreme Court. *Buford v. State*, 403 So. 2d 9438 (1981), *cert. den.* 454 U.S. 1163 (1981). Montana has a law permitting the death sentence for child-rape, but it is only for a second conviction and, more importantly, has never been applied and its constitutionality, therefore, never tested. Mont. Code Ann. § 45-5-503.

[6] *But see* n.5, *supra*.

[7] Moreover, in permitting the death penalty for non-homicide crimes, Louisiana is not in the company of democracies such as France or the United Kingdom, but rather totalitarian regimes such as North Korea, Iran, and Uzbekistan. *See* http://web.amnesty.org/pages/deathpenalty-countries-eng.

In any event, Louisiana's isolation on the national and world stages would be the end of the inquiry on the third prong, one that would overwhelmingly favor finding the death penalty unconstitutional, if not for the fact that Justice Bleich in *Wilson* had sought to explain this away with the prediction that while Louisiana was then alone, it would be the first among many to adopt such an approach. *Id.*, 96-1392 at 10, 685 So. 2d at 1069. Despite the Court's prediction, however, this has not occurred.[8] In light of this history, this can no longer serve as the basis for ignoring Louisiana's isolation as the lone state permitting the death penalty for this crime.

That this is sufficient to reflect a consensus is amply demonstrated by reference to other capital cases. In *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and *Roper*, the Supreme Court invalidated, respectively, the death penalty for juvenile offenders and for mentally retarded offenders, based upon a national consensus that the death penalty was inappropriate for this type of offender. Notably, twenty out of fifty states authorized the death penalty under the circumstances under review:

> The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Roper, 543 U.S. at 564-65, 125 S. Ct. at 1192 (internal citations omitted). The numbers establishing a national consensus against the death penalty for child-rape are far stronger than those deemed sufficient to establish such a consensus in *Roper* and *Atkins*.

Examination of current trends reveals that, despite *Wilson*, state legislatures and courts remain unwilling to apply the death penalty to perpetrators of rape, no matter what the victim's age. There have been no other cases of individuals sentenced to death for juvenile rape. *See* BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf. This ten-year period of inactivity after the decision in *Wilson* can no longer be attributed to other states taking a wait-and-see approach. Enough time has passed for states to have analyzed the effects of La. R.S. 14:42(A)(4) and, had they intended to do so, to have enacted their own versions.

[8] Just days before the filing of this brief, a South Carolina legislative committee rejected a proposal to permit the death penalty for child-rape. *See* http://www.charlotte.com/mld/charlotte/news/breaking_news/14621923.htm

This is especially true considering that the Court in *Coker* deemed the five-year period following the decision in *Furman* sufficient to measure legislative attitude. *See Coker*, 433 U.S. at 584. This lack of activity by other states after *Wilson* reflects a lack of legislative support nationwide for capital child-rape statutes. This reflects a consensus against imposing the death penalty for rape, regardless of the victim's age, and La. R.S. 14:42(A)(4) therefore does not survive the third prong.

C. The death penalty is a disproportionate punishment for the rape of a child when death does not result.

That La. R.S. 14:42(A)(4) does not survive the third prong is, under *Coker*, alone a sufficient basis to declare it unconstitutional, but also as in *Coker*, 433 U.S. at 597, it confirms a separate basis to declare the statute unconstitutional; the death penalty is disproportionate to the crime of rape, no matter what the victim's age.

In *Coker*, the Court noted, "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." *Id.* at 599-600 (citations omitted). While this Court in *Wilson* suggested that the language in *Coker* was limited to adult women, and the *Coker* court did state its holding in those terms, its underlying rationale applies to all classes of rape: "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592.

Other authorities have recognized that *Coker* held the death penalty for rape unconstitutional not because of the victim's age, but rather because the victim's life was not taken. *See, e.g., Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); *see also State v. Coleman*, 605 P.2d 1000, 1017 (Mont. 1979) (finding *Coker* instructive with respect to all crimes for which the death penalty is permitted where there is no loss of life).

Indeed, that capital punishment is appropriate only for homicide has been confirmed in a string of recent opinions. In *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court reversed a death sentence, holding that the Eighth Amendment does not allow the death penalty for a defendant who does not himself kill, attempt to kill, or intend that killing take

place. *Id.* at 795, 102 S. Ct. at 3375-76. And in *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the Court observed:

> The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed.

Id. at 819, 111 S. Ct. at 2605. Thus, it is the actual and irrevocable loss of life that distinguishes those cases in which the death penalty can be constitutionally imposed from those in which it cannot. This same conclusion has been overwhelmingly reached by the scholars who have considered the issue, many specifically opining that La. R.S. 14:42(A)(4) is, on these very grounds, unconstitutional.[9]

None of this should come as any surprise. The requirement of proportionality is among the most fundamental to our society, its roots traced to the Bible. There it is written, "an eye for an eye, a tooth for a tooth." Exodus 21:24. This is the source for the Judeo-Christian principle that any punishment must be proportionate to the crime. When a person takes a life, a death sentence is, by definition, proportionate. When a person does not take a life, a death sentence is, by definition, disproportionate. In this case, no life was taken, and therefore the death penalty is not warranted. Accordingly, La. R.S. 14:42(A)(4) also does not survive the second prong, another independent basis for vacating the death penalty.

D. Imposing the death penalty for the rape of a child serves no legitimate state interest.

Reversal is also demanded by the first prong of the *Coker* analysis; imposing the death penalty for child-rape serves no legitimate state interest. This is true for multiple reasons.

1. The death penalty for child-rape does not support the goal of deterrence.

In *Wilson*, this Court indicated that it would uphold the death penalty based upon the possibility that the death penalty would deter the commission of additional aggravated rapes. *Wilson*, 96-1392 at 18 , 685 So. 2d at 1073 ("The death penalty for rape of a child less than twelve

[9] *See., e.g.*, Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: the Death Penalty for Child Rape*, 89 J. Crim. L. & Criminology 717, 748, (1999); Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. Legis. 249, 261, (1998); Emily Marie Moeller, *Developing Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 Dick. L. Rev. 621, 648, (1998); David W. Schaaf, *What if the Victim is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 U. Ill. L. Rev. 347, 377, (2000), and J. Chandler Bailey, *Death is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 Wash. & Lee. L. Rev. 1335, 1366, (1998).

years old would be a deterrence to the commission of that crime."). The Court suggested that other states might ratify similar statutes if the future were to reveal a drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the people. But it has not.

A recent study analyzed a sample of pre-*Wilson* and post-*Wilson* child rape cases; it found no additional deterrence. Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156, 159 (2002).[10] The study established that the only realizable effect from the statute's enactment was that both the number of trials and the number of acquittals decreased, while the number of allegations remained the same. *Id.* It suggested that the statute had no deterrent effect. Rather, it was being used as a prosecutorial tool to coax defendants into plea bargaining. *Id.*[11] That is not the deterrent effect that this Court hoped for and, in the proven absence of this effect, the statute serves no legitimate interest.

2. The death penalty for child-rape encourages worse crimes.

Many legal scholars warn that applying the death penalty to a child rapist would encourage worse conduct by raising the risk that a rapist would kill his victim to prevent incriminating testimony. *See* Meryl Diamond, *Assessing The Constitutionality Of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159, 1186 (1999) ("[a] child rapist may kill the victim knowing that once he rapes a child the penalty is just as severe as if he had murdered the child."); Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 742 (1999); Corey Rayburn, *Better Dead Than R(Ap)Ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1160 (2004) ("Given that the rapist of a child does not incur an extra penalty when he is already eligible for execution, the incentive to kill the sole witness to the crime is . . . high . . . ."). Because authorizing the death penalty for incidents of child rape will have the perverse effect of enhancing the threat to the victim, a capital child-rape statute cannot be said to be in the best interests of the child.

3. The death penalty for child-rape increases the hardship on the victim.

The victim in any child-rape case is the subject of a heinous crime, one that causes

[10] The study noted that empirical support existed for the lack of deterrent effect, observing that "when strong physical or emotional feelings are involved (like sexual arousal), rational thought becomes less likely." *Id.* at 157.

[11] Admittedly, the sample used in the study was addressed to specific judicial districts, including Orleans, East Baton Rouge, Claiborne, Bienville, and Jackson Parishes. But they were large districts and the studies were conducted with the assistance of the various law enforcement personnel in those districts.

emotional trauma. But exposing the child to the pressures of confronting his attacker in court and subjecting his attacker to a death sentence only increases the hardship, and possibly serves to discourage victims from reporting incidents of child-rape.

Child-rape victims are already subject to intense psychological trauma. *See* Russell Nuce, *Child Sexual Abuse: A New Decade for the Protection of our Children?*, 39 EMORY L.J. 581, 583-84 (1990) (citing Gothard, *The Admissibility of Evidence In Child Sexual Abuse Cases,* 66 CHILD WELFARE 13, 13 (1987)). Victims report "sleep disturbance, obsessions and compulsions, anxiety and agitation, somatization (e.g., fatigue, bedwetting, eating disturbances, unexplained aches and pains)." *Id.* at 618 n.140; *see also* Jason DeParle, *Early Sex Abuse Hinders Many Women on Welfare,* N.Y. TIMES, Nov. 28, 1999, at A1 (noting that women who have suffered sexual abuse as children remain ashamed, traumatized, and silent about these experiences well into adulthood).

Another study showed that 36% of males, and 39% of females, who were victims of sexual abuse "displayed clinically elevated rates of externalizing behavioral problems." *Id.* (citing Friedrich, Urquiza & Beilke, *Behavioral Problems in Sexually Abused Young Children,* 11 J. PEDIATRIC PSYCHOLOGY 47-58 (1986)). This psychological trauma is exacerbated by the pressures of testifying in a trial. *Lajoie v. Thompson*, 217 F.3d 663, 681 (9th Cir. 2000). The nature of a trial, with many dates set and reset, cases tried, appealed, and remanded, requires the child to prepare for a trial numerous times and subjects him to a drawn out, emotionally draining courtroom experience.

Additionally, if the accused is someone trusted by the victim of sexual abuse, the victim is often hesitant to report abuse or to testify against the accused because of increased feelings of guilt. *State v. Middleton*, 657 P.2d 1215, 1219 (Or. 1983). With cases involving trusted adults, it is common, because of these feelings, for victims of sexual abuse to hesitate in reporting it, and, in some situations, to deny that the episode occurred. *Id.* Studies show that the closer the relationship between offender and victim, the greater the likelihood that the victim will not report the rape. *See U.S. Dep't of Justice Office of Justice Programs,* Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000, http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf (2002). Considering that a large number of juvenile victims of sexual abuse know their attackers, it is easier to understand the high levels of underreporting. *See* Perpetrators Against Juveniles, http://www.ncjrs.gov/html/ojjdp/2000_6_4/page4.html (2000). This will only be more true if the

victim knows that his testimony may lead directly to the execution of the accused, especially if, as is often the case, he is a relative.

4. The death sentence for child-rape increases the likelihood of wrongful convictions.

Another reason not to extend the death penalty to child-rape is the increased likelihood of convictions of innocent defendants. In *Atkins*, one of the grounds on which the Court based its decision to invalidate the death penalty was its observation that mentally retarded defendants face a special risk of wrongful conviction. *See Atkins*, 536 U.S. at 321.

Defendants charged with aggravated rape of a child similarly face a special risk of wrongful execution. The rate of wrongful convictions for rape exceeds that for any other crime. ROB HALL, RAPE IN AMERICA 105 (1995). A study of exonerations during 1989-2003 revealed that 90% of non-homicidal exonerations involved rape cases. Gross, *Innocence In Capital Sentencing: Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005). This high level of unfounded allegations among rape cases can likely be attributed to the prosecution's heavy reliance on testimony from the rape victim. *State v. Wright*, 598 So. 2d 561, 564-65 (La. App. 4th Cir. 1992) (well-settled that testimony of victim in rape case, without more, is sufficient to prove elements of the offense). Because courts afford great deference to a rape victim's testimony, many of these exonerations occur only because of DNA evidence. *Innocence In Capital Sentencing: Article*, 95 J. CRIM. L. & CRIMINOLOGY 531 (finding that 87% of rape exonerations occurred because of DNA evidence).

The risk of wrongful conviction is especially great when the conviction, as in this case, results primarily from a child-witness's testimony. Studies suggest that child-witness testimony is more likely to be inaccurate than is adult testimony. *See* James O'Brien Jr., *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141, 150 (1986) (citing BERLINER & STEVENS, ADVOCATING FOR SEXUALLY ABUSED CHILDREN IN THE CRIMINAL JUSTICE SYSTEM 13 (Nov. 1976)). Children have inaccurate memories, an inability to communicate effectively the events they recall, and a subjective sense of time. *Id.* They are also subject to "memory-fade," meaning adults have better capacity to "remember" retained information. Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51, 54 (1984) (in general, children have greater difficulty than adults in retrieving information from long-term memory). Other studies indicate that child-witnesses can be subject to an increased level of

suggestibility by opposing counsel. Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 75 (John Doris ed. 1991).

The reliance on a child-witness, combined with above problems, indicates a higher rate of false child-rape allegations and convictions. *See* John Johnson, *"Kids Don't Lie": Faith in this Assumption Led to Dozens of Unjust Molestation Convictions in Bakersfield; Today One Man Remains in Prison Even After Four of his Original Accusers Said he Never Touched Them*, L.A. TIMES, Aug. 10, 2003, § 9 at 16; *see also Child Protection: Balancing Diverging Interests: Hearing Before the Senate Comm. on Labor and Human Resources and the Subcomm. on Children and Families,* 104th Cong. (1995) (statement of father wrongly convicted of raping daughter, based primarily on daughter's testimony coerced by therapist). Consequently, allowing child-rape to be punished by death increases the likelihood of wrongful executions.

Louisiana's death row is currently the twelfth largest in the country, with eighty-five inmates immured there. *See* BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf. Since 1976, Louisiana has executed twenty-seven people, ranking it tenth among the states that authorize imposing the death penalty. *Id.* at 9. But Louisiana ranks third (behind only Florida and Illinois) in the number of exonerations during that same period, with eight. Death Penalty Information Center, State by State Information: Louisiana, http://www.deathpenaltyinfo.org/state/ (last visited Mar. 6, 2006). That is, for every four executions in Louisiana there has been at least one wrongfully convicted inmate on death row. Given its population, per capita, Louisiana leads the nation in wrongful convictions. Because of the high level of wrongful convictions in rape cases, and the inability to rely fully on a child-victim's testimony, it is not appropriate that capital punishment be permitted for child-rape.

Based upon all of the above, and as is reflected by the nationwide consensus against allowing the death penalty for child-rape, no legitimate purpose is served by La. R.S. 14:42(A)(4). Thus, the statute fails all three prongs of the *Coker* analysis, any one of which requires that the statute be declared unconstitutional.

E. The Louisiana Excessive Punishment Clause provides greater protection than the Eighth Amendment and independently requires that the death penalty for child-rape be held unconstitutional.

The failure to pass even one prong of the *Coker* analysis means that Kennedy's death penalty must be vacated under the Eighth Amendment. There is, however, an even more basic

reason that the sentence must be vacated – it violates Article I, § 20 of the Louisiana Constitution.

Article I, § 20 sets forth Louisiana's Excessive Punishment Clause, which is similar to the Cruel and Unusual Punishment Clause of the Eighth Amendment. But while similar, Article I, § 20 actually provides broader protection than does its federal counterpart. This was presaged in *Guidry v. Roberts*, 335 So. 2d 438, 448 (La. 1976), where this Court explained that "the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution's Bill of Rights, and they present broader protection of the individual." Then, in *State v. Perry*, 610 So. 2d 746 (La. 1992), this Court held that this is specifically true in comparing Article I, § 20 to the Eighth Amendment. There the Court confronted another death penalty issue – whether the State could execute a prisoner who was insane, but who was susceptible of understanding the link between his crime and punishment by taking anti-psychotic drugs. The trial court had ruled that the state could carry out the death sentence by forcing the prisoner to take the drugs, thereby rendering him competent for execution. This Court reversed the order, finding that this practice violated Article I, § 20. *Id.*

This Court recognized that the issue before it raised both federal and Louisiana constitutional issues but found that the case should be decided on the basis of Article I, § 20. The Court explained, "Both the United States Supreme Court and this Court adhere to the rule that the Court will not pass upon a federal constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed." *Id.* at 750 (cites omitted). The Court found that such an approach is also rooted in the basic concept of federalism, explaining that the "very nature of our federal system and the vast differences between the federal and state constitutions and courts indicate that state law should be applied first." *Id.* at 751 (citations omitted). Thus, the *Perry* court concluded that, if possible, the case should be decided under Article I, § 20.[12]

The Court did not stop there, however. It went on to hold that Article I, § 20 provides broader protection than the Eighth Amendment. The Court explained, "The framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in

[12] This approach has been consistently followed since *Perry*. *See, e.g., City of Baton Rouge v. Ross*, 94-0695 at 16 (La. 4/28/95), 654 So. 2d 1311 n.13 (Calogero, C.J., concurring); *Copeland v. Slidell Memorial Hospital*, 94-2011 at 17 (La. 6/30/95); 657 So. 2d 1292, 1303 (Dennis, J., concurring); *State v. Hattaway*, 621 So. 2d 796, 800 (La. 1993).

some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment and all others." *Id.* at 750 (cites omitted). Accordingly, *Perry* holds that Article I, § 20 provides greater protection, and that if the case can be decided under Article I, § 20, then it must be.[13]

It would be incorrect to go from here to saying that the analysis under Article I, § 20 is radically different from the Eighth Amendment. But it does differ in two key respects. First, unlike the Eighth Amendment, Article I, § 20, by its own terms, prohibits "excessive" punishments, thereby making *explicit* a requirement of proportionality that is only *implicit* in the Eighth Amendment. As shown above, to impose a death penalty upon a person who has not himself taken a life does not satisfy this requirement. Second, unlike the Eighth Amendment, Article I, § 20 is written in the disjunctive; according to its plain language, a punishment does not pass muster if it is either cruel *or* unusual, not merely cruel *and* unusual.[14] The death penalty for child-rape is nothing if not unusual; the death penalty has not been imposed for such a crime in the United States for over thirty years.[15] Accordingly, the death penalty for child-rape does not satisfy Article I, § 20.

This should come as no surprise. When the death penalty does not pass muster under the Eighth Amendment, it cannot possibly pass muster under Article 1, § 20, which this Court has held to "go beyond" the Eighth Amendment. *Perry*, 610 So. 2d at 750. And if a case can be decided under Article 1, § 20, which is as true here as it was in *Perry*, then it must be. *Id.* at 751. Finally, while, as shown above, a decision allowing the death sentence for child-rape would almost certainly be reviewed by the United States Supreme Court, it is equally clear that a decision to vacate the death sentence on state, as opposed to federal, grounds would not be. *See id.*("Because this court is the final arbiter of the meaning of the state constitution and laws, our disposition of a case on state grounds usually will terminate the litigation without the necessity of federal review.")

II. Reversal is also required because there was no required finding of aggravating factors.

As the above argument demonstrates, the death penalty for child-rape is unconstitutional. But assuming for the sake of argument that some death penalty statute may pass constitutional

---

[13] Scholarly articles have embraced the approach set forth in *Perry* and other cases. *See, e.g.*, Donald C. Massey and Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 La. L. Rev. 743 (1996); Richard P. Bullock, Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 788, 790 (1991.)

[14] *See* n.2, *supra*.

[15] The Florida Supreme Court analyzed its own disjunctive "cruel or unusual" clause to find that one death sentence imposed every twenty years on a juvenile was sufficiently unusual to find the punishment unconstitutional. *See Brennan v. State*, 754 So. 2d 1 (Fla. 1999).

muster, the Louisiana version does not because it fails to provide any guidance to the jury as to how to differentiate which child-rapes should result in the death penalty and which should not. For this separate and independent reason, the death sentence in this case should be vacated.

A. Louisiana's death penalty for child-rape is unconstitutional because it does not ensure that it will not be imposed arbitrarily or capriciously.

Louisiana's procedure for determining when child-rape should result in a death sentence offers no guidance to the jury in making this decision. This is because the existing sentencing statute, set forth in La. C.Cr.P. art. 905.4, is designed solely for the crime of murder; it provides no basis by which juries can determine which child-rapists deserve the death penalty and which do not.

In *Coker*, six members of the Court held, without reservation, that the death penalty is a constitutionally disproportionate punishment for raping an adult woman.[16] As the Court observed, the penalty is excessive regardless of whether there are additional factors aggravating the rape. *Id.*, 433 U.S. at 598-99; 97 S. Ct. at 2869-70. "It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." *Id.* at 600, 97 S. Ct. at 2870. Accordingly, if the death penalty may conceivably be a permissible punishment for child-rape, it cannot be because child-rape is an "aggravated" form of rape. Rather, it must be because child-rape is a different species of crime from the rape of an adult woman.

Thus, to come within constitutional limitations, the procedures a jury employs to determine whether the death penalty is appropriate must channel the jury's discretion in a way that prevents imposing the death penalty arbitrarily or capriciously. *See, e.g., Gregg* (Georgia's procedure for capital jury sentencing appropriately channeled jury's discretion in deciding whether death sentence should be imposed); *Furman* (striking death penalty statutes on ground that lack of procedural safeguards failed to ensure that capital punishment was not applied in arbitrary and capricious fashion). As the Supreme Court has held in the context of applying the death penalty in murder cases, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733,

[16] This view was endorsed by the plurality (White, Stewart, Blackmun and Stevens, JJ.) and Justices Brennan and Marshall in their concurring opinions. Justice Powell wrote separately to note his view that the death penalty is ordinarily a disproportionate punishment for the rape of an adult woman. *See id.* at 601-04, 97 S. Ct. at 2870-72 (Powell, J., concurring in part and dissenting in part).

2742, 77 L. Ed. 2d 235 (1983). The same is true for child-rape.

Louisiana's capital sentencing procedures fail to "genuinely narrow" the class of child-rapists eligible for the death penalty. This is true because Article 905.4's aggravating circumstances are intended to guide the jury's discretion in deciding which offenders, found guilty of *intentionally killing*, deserve the death penalty. The statute under which Kennedy was convicted, however, has nothing to do with killing—intentionally or otherwise. Jiggering a statute devised for murder to try to make it fit rape is no more than smashing the proverbial square peg into the round hole.[17]

To date, this Court has not addressed this issue. *See Wilson*, 96-1392 at 15, 685 So. 2d at 1071 (decision limited to constitutionality of La. R.S. 14:42 and not to sufficiency of aggravating circumstances in La. C.Cr.P. art. 905.4). Indeed, Justice Victory, concurring in *Wilson*, said "I write separately to express my view that the Legislature should immediately amend Articles 905 *et seq.* of the Code of Criminal Procedure (especially article 905.2) to clarify the sentencing procedure for an aggravated rape case in which the death sentence may be imposed." *Id.*, 96-1392 at 15, 685 So. 2d at 1074 (Victory, J., concurring). Here, the sentencing statute fails to guide the jury's discretion in determining whether to impose the death penalty. Thus, even if the death penalty for child-rape is not held unconstitutional per se, the Louisiana statutory scheme fails to provide the jury the required guidance as to when to impose the ultimate punishment, and Kennedy's death sentence, imposed under this flawed scheme, must therefore be vacated.

B. This case proves the absence of any meaningful aggravating factors.

In the penalty phase of Kennedy's trial, the jury found two aggravating circumstances: (1) that the offense occurred during the commission of an aggravated or forcible rape; and (2) that the victim was a child under twelve years of age. These circumstances did nothing to guide the jury's discretion in determining that the death penalty was the appropriate punishment for Kennedy.

"Part of a State's responsibility [for constitutionally tailoring its death penalty statutes] is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed. 2d 398 (1980). Thus, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally

[17] In *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 554, 98 L. Ed. 2d 568 (1988), the Supreme Court found that this statute accomplished the required narrowing of which murderers should be executed by limiting the death penalty to first-degree murderers. In contrast, the statute does not accomplish this narrowing relative to child-rapists because while it limits the death penalty to aggravated rapes, every child-rape is, by definition, "aggravated."

infirm." *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct 1534, 1542, 123 L. Ed. 2d 188 (1993). That is precisely what happened here: The aggravating circumstances the jury found apply to *every* defendant eligible for the death penalty under La. R.S. 14:42.

Even assuming *arguendo* that the death penalty for child-rape is constitutional, the sentencing procedure nonetheless must afford jurors standards by which to determine that the child rapist *in the case before them* deserves the death penalty. As the Court recognized in *Arave*, aggravating circumstances that apply to *every* child-rape case fail to accomplish this task.

The Article 905.4(A)(1) circumstance, i.e., that the crime of aggravated rape occurred during the commission of an aggravated rape—to the extent that it can even be interpreted in a manner that makes sense—applies to everyone who has been found guilty under La. R.S. 14:42(A)(4) of the aggravated rape of a child under twelve. This circumstance does nothing to narrow the class of child rapists on whom the death penalty may legitimately be imposed. Likewise, the Article 905.4(A)(10) circumstance, that the victim was under the age of twelve, does nothing to narrow the class of rapists of children under the age of twelve on whom the death penalty may be imposed. If the victim were not under twelve, the crime would not fall under La. R.S. 14:42(D)(2)(a) in the first place.

Because the jury's finding of aggravating circumstances fails to reflect any rational basis on which the sentence here may be imposed, Kennedy's death sentence was imposed arbitrarily and capriciously. It is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309-10, 92 S. Ct. at 2762 (Stewart, J., concurring). For, of all the people convicted of child-rape, Kennedy "is the capriciously selected [individual] upon whom the sentence of death has in fact been imposed." *Id.*

As this Court will recall, it was the arbitrariness by which defendants had been selected for execution, and by which executions were carried out, that convinced the Supreme Court to strike death-penalty statutes nationwide in *Furman*. Given the flawed nature of the statutory aggravating circumstances under which the jury sentenced Kennedy, his death sentence was similarly imposed. On this separate and independent basis, it must be vacated.

Conclusion

The death penalty for child-rape does not satisfy any of the three prongs required for a punishment to pass muster under the Eighth Amendment. As to the third prong, this Court in

Wilson has already correctly noted that it is not accepted by contemporary society, declining to invalidate the statute based only on the prediction that this would change as other states follow Louisiana in permitting the death penalty for child-rape. But a decade has proven this incorrect, with Louisiana being just as isolated now in allowing such a punishment as it was ten years ago. As to the second prong, the Supreme Court explained in *Coker* that the death penalty is proportionate to homicide, but disproportionate to a non-homicide crime such as rape. Finally, as to the first prong, the death penalty for child-rape serves no legitimate purpose, considering that it does not advance the goal of deterrence, creates an incentive for the criminal to kill his victim, increases the hardship on the victim, and increases the likelihood that innocent defendants will be executed.

Furthermore, the statute not only fails the Eighth Amendment analysis, but also that of the Louisiana Constitution's Article I, § 20. This Court has noted in the same setting, a challenge to a death sentence, that this clause provides even greater protection than does the Eighth Amendment, and that if the case can be decided under Article I, § 20, it must be.

Alternatively, even if some statute permitting the death sentence for child-rape could be constitutional, the particular statutory scheme at issue here is not. This is true because it provides no guidance to the jury in determining which child-rapes should result in the death sentence and which should not. On the contrary, it provides "aggravating" factors that are not aggravating at all; they are present, by definition, in every child-rape.

Whether it is because the death sentence for child-rape is unconstitutional, or because the particular statutory scheme at issue here is unconstitutional, the death sentence imposed in this case should be vacated. Accordingly, if the underlying conviction is not reversed or this case remanded for other errors in the penalty phase to be corrected, then, for the reasons set forth herein, Defendant-Appellant Patrick Kennedy prays that his death sentence be vacated.

Respectfully submitted,

Martin A. Stern, # 17154
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Robert N. Markle, # 22111
7817 Bles Ave., Apt. 2B
Baton Rouge, LA 70810
(225) 766-5737

Jelpi P. Picou, Jr., # 18746
G. Ben Cohen, La. Bar No. 25370
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Counsel for Defendant-Appellant
Patrick Kennedy

CERTIFICATE OF SERVICE

I certify that I have served a copy of this paper by facsimile and mail on the persons listed below on this date, May 22, 2006:

Juliette Clark and Terry Boudreaux
Assistant District Attorneys
Jefferson Parish District Attorney's Office
5th Floor, Courthouse Annex
200 Derbigny Street
Gretna, LA, 70053

MARTIN A. STERN