Death Penalty Information Center

Kennedy versus Louisiana

Overview

In 1977, the United States Supreme Court held in *Coker v. Georgia* that the death penalty was a disproportionate penalty for the offense of rape. Coker was convicted and sentenced to death for kidnapping and raping a sixteen-year-old girl at knifepoint. He had prior convictions for rape, murder, kidnapping and assault. In determining whether the death penalty was constitutional for rape, the Court looked to the actions of state legislatures, the actions of juries, and its own moral assessment of the penalty.

In terms of legislatures, the Court noted that in 1972, sixteen states had the death penalty for rape. In the following five years, after *Furman v. Georgia* required states across the country to revamp their capital punishment laws, six states re-promulgated capital rape statutes (three states provided for the death penalty for the rape of an adult woman and three permitted it solely for the child rape). In terms of juries, the *Coker* Court observed that in the four years between the adoption of the 1973 Georgia death penalty statute and *Coker*, six defendants in Georgia had been sentenced to death for rape, with thirty defendants sentenced to death across the deep South. With this handful of defendants sentenced to death, and only a handful of states providing the death penalty for rape, the Court held that the national consensus "with respect to the death penalty for rape," while "not wholly unanimous," confirmed the Court's view that the death penalty was a disproportionate punishment for rape "no matter how aggravated."

Today, Mr. Kennedy is one of only two defendants – both from the State of Louisiana – sentenced to death for rape in over thirty years. Currently, forty-four states prohibit the death penalty for rape of a child. Four other states have capital child rape statutes: Texas, South Carolina, Oklahoma, and Montana. Each are "recidivist" statutes, requiring a prior conviction for child rape before a defendant is eligible for the death penalty. No one has been sentenced to death under those statutes. Mr. Kennedy—whose only prior conviction was for issuing worthless checks—would not be eligible for the death penalty in those states. Whatever the status of Georgia and Florida, which have unused capital rape statutes on the books for all rape, pre-dating *Coker*, this handful of states is de minimis, juxtaposed to the more than 80% of states that prohibit the death penalty under these circumstances. In two recent death penalty cases, *Roper* and *Atkins*, the United States Supreme Court found a national consensus against capital punishment for juveniles and the mentally retarded, where thirty states (60%) prohibited the death penalty under those circumstances, and where juries had returned death sentences against one hundred and twenty three (123) juvenile defendants and thirty-five defendants with mental retardation.

The Louisiana Supreme Court upheld Kennedy's death sentence, distinguishing *Coker* based upon the age difference between the victim in *Coker*, whom the *Coker* Court identified as an "adult woman," and the child victim here. The Louisiana Supreme Court found that it was "freed from the compass of *Coker*," and hypothesized that the United States Supreme Court would depart from *stare decisis* based upon the "bare majority" that existed in *Roper*, and the "appointment of two new members" to the United States Supreme Court. The question currently before the United States Supreme Court is whether it will follow the Louisiana Supreme Court's view.

Briefs in Support of Petitioner

Brief of Petitioner: Kennedy's Brief identifies the principle enounced in *Coker*, "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." The brief discusses the national consensus – as established by legislatures, prosecutors, and juries – against capital punishment for rape: forty-four states bar such punishment outright and Louisiana is the *only state* that allows it when, as here, the defendant has no prior convictions for child sexual assault or rape. While legislation has been introduced in a few states to allow the death penalty for rape, it has been rejected more times than accepted. As a Justice from the Mississippi Supreme Court observed addressing this same issue–"[t]here is as much chance of" this type of death sentence being upheld as constitutional "as the proverbial snowball enjoys in the nether regions."

Brief of NASW and Victims of Sexual Violence Organizations: This brief observes that the death penalty for rape harms, rather than protects, children. It indicates that the vast majority of child rape cases involve intra-family assault; and the possibility of capital punishment in these situations discourages reporting. Moreover – as appears in the *Kennedy* case where the child-witness sat on the witness stand and cried for lengthy periods – the very trial of a capital case is a re-traumatizing event. These experts note that the multiple trials and extended appeals process that follows a death sentence will draw out the trauma, further disrupting the child's healing process. In non-intra-family cases, the Brief notes the anomalous result that the existence of the death penalty for rape (instead of deterring) may encourage the sex-offender to kill the lone witness.

Brief of NACDL and Innocence Projects: This brief observes that the heightened risk of wrongful conviction in these cases renders the death penalty unconstitutional. Children are susceptible to suggestive questioning, and once memory is ingrained in a child it is impossible for juries or experts to determine which memory is true or false. In the *Kennedy* case there is no DNA evidence and the victim told authorities for the first 18 months after the rape that two teenage boys – and not Kennedy – raped her. In many of these cases, there is also no physical evidence establishing that a sexual assault occurred. Because "these prosecutions are frequently 'she said, he said' cases that ultimately rely upon the jury's assessment of the relative credibility of opposing witnesses," it is impossible to avoid the occasional wrongful conviction and death sentence. *Amici* note that more than a dozen DNA exonerations involved individuals wrongly convicted of non-homicide rape of a child. Since 1977, Louisiana leads the nation *per capita* in both incarceration rates and wrongful convictions, and the parish from which this case arose is responsible for at least two of the recent wrongful convictions.

Brief of LACDL and Louisiana Public Defenders: This Brief notes that Louisiana has vastly under-funded its obligation to provide counsel to capital defendants charged with murder, sought help from the federal government for such funding, and has no funding source to cover the cost of defending capital rape prosecutions. Both defendants sentenced to death in Louisiana for rape were represented by over-worked public defenders. The brief observes that because each capital rape defendant cannot

receive the defense resources necessary, the imposition of the death penalty is haphazard and arbitrary.

Brief of ACLU: This Brief recounts the sordid history of racism associated with the capital prosecution of rape, detailing the proceeding fifty years of executions in Louisiana in which each defendant executed was black and all but one victim white. Nationally, since 1930, the vast majority of capital rape cases have occurred in the former Confederate states; 89.1% of the 455 people executed for rape since then were black. The Brief observes that the Kennedy case arises from Jefferson Parish, the same jurisdiction as *Snyder v. Louisiana* (involving race discrimination in the selection of jurors) and the jurisdiction in which prosecutors wore "hanging noose and grim reaper ties" into court in capital cases.

Brief of British Scholars: This Brief observes that every other Western nation, along with the vast majority of all nations, have abandoned the practice of punishing child-molestation and rape with the death penalty, and that the countries that continue to have the death penalty for rape generally follow Sharia law – which also provides for the death penalty for adultery, homosexuality, and blasphemy.

Briefs in Support of Respondent

Brief of Louisiana: Louisiana's Brief acknowledges that the large majority of states prohibits the death penalty for child rape, but asserts that there is "currently a significant trend to provide the death penalty as punishment for at least some rapes where the victim is a child." The brief asserts that seven states have legislation authorizing the death penalty for child-rape, while acknowledging that Florida's statute has been held unconstitutional, and that Georgia left its capital rape law on the books, authorizing the death penalty for rape regardless of the age of the victim. The brief also observes, in support of the constitutionality of the Louisiana statute, that three states are considering legislation pending authorizing the death penalty and that a number of states have passed "Megan's Laws" which provide civil consequences for sexual predators. In response to the second question presented to the United States Supreme Court, concerning whether the Louisiana statute narrows the class of death eligible defendants properly, the brief asserts that the Louisiana statute does so.

Brief from Missouri Gov. Matt Blunt, and Members of the Missouri General Assembly: *Governor Blunt et al* notes that legislation providing for the death penalty for child rape has been introduced, and suggests that the legislators deserve a full and fair debate on that bill. The brief suggests that the Supreme Court's decision in *Coker* foreclosed a national debate on the punishment for child-rape, and that the current apparent consensus may "reflect nothing more than an erroneous interpretation of [the] decision in *Coker*." *Gov. Blunt et al* suggests that legislatures in "States (like Missouri) that have not affirmatively authorized the death penalty for child rape have been focused on other issues, and have not been galvanized by shocking crimes."

Brief from Texas, Alabama, Colorado, Indiana, Mississippi, Missouri, Oklahoma, South Carolina and Washington: *Texas et al*'s Brief does not contest that Mr. Kennedy would be the first person executed for a non-homicide offense in over forty years. *Texas et al* suggests that the 'dynamic and flexible approach to the evolving standards of decency' is not a "one-way street that may lead only towards the elimination of the death penalty." Rather, *Texas et al* brings forth the suggestion, that the "evolving standards may also support the expansion of the death penalty," and citing Chief Justice Burger's dissent in *Coker*, that "Each State's legislature should be allowed the flexibility to adopt capital-sentencing laws that reflect its citizens current moral judgment regarding the just deserts for certain capital crimes."