No. 07-343

In The Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the offense 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.

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OPINIONS BELOW

The May 22, 2007 decision of the Louisiana Supreme Court is reported at 957 So.2d 757 (La. 2007). Pet. App. 1a-65a. An appendix to the opinion of the Louisiana Supreme Court is unreported. Pet. App. 66a-132a. The dissent of Chief Justice Pascal Calogero is reported at 957 So.2d 757, 794 (La. 2007). Pet. App. 133a-134a.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on May 22, 2007. That court denied petitioner's timely petition for rehearing on June 29, 2007. Pet. App. 135a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As relevant to petitioner's case,[1] Section 14:42 of the Louisiana Revised Statutes provided in pertinent part as follows:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> . . .
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> . . .
>
> D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
>
> (2) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:

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[1] La. Rev. Stat. Ann. § 14:42 (1997). In 2001, the introductory paragraph of La. R.S. 14:42(A) was amended to include oral sexual intercourse in the definition of rape. 2001 La. Acts 301, § 1. In 2003, the Louisiana Legislature amended La. R.S. 14:42(A)(4) and (D)(2) to substitute the phrase "under thirteen years" for the phrase "under twelve years." 2003 La. Acts 795, § 1.

> (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. art. 782 relative to cases in which punishment may be capital shall apply.
>
> (b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

At all relevant times,[2] Article 905.4 of the Louisiana Code of Criminal Procedure provided:

> A. The following shall be considered aggravating circumstances:
>
> (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting,

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[2] In 2006, the Louisiana Legislature amended La. C.Cr.P. art. 905.4 A(1) to add "second degree robbery," and "cruelty to juveniles, second degree cruelty to juveniles, or terrorism." 2006 La. Acts 86, § 1.

armed robbery, first degree robbery, or simple robbery.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The offense was committed in an especially heinous, atrocious or cruel manner.

(8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(9) The victim was a correctional officer or any employee of the Department of Public

Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(10) The victim was under the age of twelve years or sixty-five years of age or older.

(11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1).

B. For the purposes of Paragraph A(2) herein, the term "peace officer" is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

STATEMENT OF THE CASE

In 1995, the Louisiana Legislature amended the penalty provision of Section 14:42 of the Louisiana Revised Statutes to provide that the rape of a child under twelve years of age shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the sentencing jury.[3] Patrick Kennedy is the first person to be convicted and sentenced to death pursuant to this provision.[4]

1. On May 7, 1998, a Jefferson Parish grand jury returned an indictment charging Kennedy with one count of aggravated rape of a child under twelve, a capital offense, in violation of La. R.S. 14:42. Petitioner received "a vigorous pre-trial defense, during which defense counsel filed approximately 50 substantive motions and sought six supervisory writs." Pet. App. 2a. A jury was selected on August 8, and 11-15, 2003. Pet. App. 2a. Opening statements commenced immediately after jury selection and trial continued through August 25, 2003, on which date the jury returned a verdict of guilty of aggravated

[3] 1995 La. Acts 397, § 1.

[4] Subsequent to the Louisiana Supreme Court's decision affirming petitioner's conviction and death sentence on appeal, a Louisiana jury convicted Richard Davis of aggravated rape of a child under twelve and returned a death sentence. *State v. Davis*, Case No. 262,971, Caddo Parish, Louisiana. Davis is presently awaiting formal imposition of sentence by the trial court.

rape. Pet. App. 2a. The penalty phase was held on August 26, 2003, and the jury unanimously decided that the defendant should be sentenced to death after finding the following aggravating circumstances: 1) the offender was engaged in the perpetration of an aggravated rape; and 2) the victim was under the age of twelve years.[5]

2. The testimony and evidence presented during the guilt phase of petitioner's trial are recounted in the opinion of the Louisiana Supreme Court (Pet. App. 3a-24a) and summarized below:

At 9:18 in the morning on March 2, 1998, Patrick Kennedy called 911 to report that his eight year-old stepdaughter, L.H. had just been raped. 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.

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[5] La. C.Cr.P. art. 905.4.

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. The deputy also noticed that when he attempted to question the victim, the defendant tried to answer the questions for her. L.H. eventually indicated that she 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 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.[6]

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

L.H. was transported to Children's Hospital, where she underwent emergency surgery to repair a vaginal injury which had resulted in profuse bleeding. A laceration to the left wall of her vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into her vagina. Additionally, L.H.'s perineum was torn all the way from the posterior fourchette, where the vagina normally ends, to the anus.

Detectives assigned to investigate the offense caused the neighborhood to be canvassed for a suspect and a bicycle Kennedy described in statements to 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 Det. 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 relate 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.[7] 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

[7] The Louisiana Supreme Court describes the McDermott interviews in detail in its opinion on direct appeal from conviction. Pet. App. 10a-11a. The first day was devoted primarily to collecting personal and familial history, while the victim was questioned about the rape on the second day. Pet. App. 10a, n.11.

hand over her mouth, and "stuck his thing in [her]." Pet. App. 11a. 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 asked the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asked her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

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."[8]

On March 9, 1998, the police 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 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

[8] Arguello testified that he could not recall whether Kennedy said his niece or his daughter had "become a young lady." Rec. Vol. 19, p. 4738.

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 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 also 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 mother that defendant had raped her.[9] She testified that the victim was in

[9] The victim's mother denied telling people that she was afraid that L.H. would be taken from her if L.H. did not change her story, and denied telling the wife of one of Kennedy's friends that the police wanted the victim to change her story. Rec. Vol. 22, p. 5386. In brief, petitioner references Division of Child Protection Services records pertaining to the victim as "Dft. Ex. K." Pet. Brief at p. 6. These documents were not introduced at trial, nor did petitioner call any employee of the Department of Social Services to the stand to testify regarding the content of these records. In fact, the respondent can find nothing in the record indicating that these documents were introduced as a defense exhibit in any proceeding in the trial court. Instead, it appears that the copy of these documents contained in the third

(Continued on following page)

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

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box of exhibits to the State appellate record is that which the Department of Social Services produced to the trial court under seal and for *in camera* review at the petitioner's request. Rec. Vol. 5, pp. 568-569. Having reviewed the records, the trial court ordered that the state and defendant be provided full and complete copies of the same. Rec. Vol. 3, pp. 576-577. The trial court obtained a written receipt for the copies from counsel for the State and the defendant. Rec. Vol. 3, p. 577. The other documents in the third box of exhibits to the record and labeled "A" through "M" include jury questionnaires, jury polling slips, the Uniform Capital Sentencing Report, and other *subpoena duces tecum* returns to the trial court. *See*, Rec. Vol. 1, Exhibit Index at p. 7.

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. Also, she had to leave her mother and brother and go live with another family for awhile. This was upsetting to her, and she first told her mother that the defendant was the one that raped her right before the interview with Amalee Gordon.

3. In the capital sentencing phase of the trial, the State presented the testimony of S.L. Pet. App. 24a. The defendant was previously married to S.L.'s cousin and godmother, C.S., and S.L. spent the summer with defendant and C.S. when she was eight or nine years-old. S.L. testified that the defendant sexually abused her three times, the first time involved inappropriate touching, and the last time involved sexual intercourse. She did not tell anyone until two years later, and did not pursue legal action because of pressure from her family.

4. Kennedy's conviction and sentence were affirmed by the Louisiana Supreme Court on direct appeal. Of significance, the court held that the death penalty is not a constitutionally disproportionate punishment for the rape of a child under twelve years old, and rejected Kennedy's claim that Louisiana's capital sentencing scheme fails to genuinely narrow the class of death eligible offenders. Pet. App. 37a-61a.

Previously, in *State v. Wilson*, 685 So.2d 1063, *cert. denied, Bethley v. Louisiana,* 520 U.S. 1259 (1997), the Louisiana Supreme Court upheld the constitutional validity of the death penalty for the aggravated rape of a child under twelve in the context of a pretrial appeal by the state from the granting of a motion to quash. The Louisiana Supreme Court interpreted this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977) as clearly precluding the death penalty as punishment for the rape of an adult woman, but as leaving open the question of whether child rape or other non-homicide crimes can be constitutionally

punished by death. Pet. App. 42a-43a. Considering the fact that "children are a class that need special protection," the Louisiana Supreme Court concluded in *Wilson* that "given the appalling nature of the crime, the severity of harm inflicted on the victim, and the harm imposed on society, the death penalty is not an excessive penalty when the victim is a child under the age of twelve years old." Pet. App. 42a (quoting *Wilson*, *supra*, at 1070).

Called upon in *Kennedy* to decide the issue in the context of a case where, for the first time, a defendant (the petitioner) had been convicted and sentenced to death, the Louisiana Supreme Court applied the two-part test recently used by this Court in *Atkins v. Virginia*, 536 U.S. 335 (2002) (Eighth and Fourteenth Amendments prohibit execution of mentally retarded person), and *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth and Fourteenth Amendments prohibit execution of individuals who were under eighteen years of age at the time of their crimes). Pet. App. 44a-45a.

First, the Louisiana Supreme Court reviewed "objective indicia of consensus, as expressed in particular by the enactments of legislatures addressing this question." Pet. App. 44a-45a (quoting *Roper*, 543 U.S. at 564). Whereas Louisiana was the only State with an effective statute authorizing the death penalty as punishment for the rape of a child under twelve years old at the time of this Court's decision in *Wilson, supra*, in the intervening years, four more states (Oklahoma, South Carolina, Montana, and Georgia) had passed laws to authorize the death

penalty as punishment for the rapes of young children. The court acknowledged that these laws were more narrowly drawn than Louisiana's capital rape law, as they required proof of a previous conviction for sexual assault of a child to render the offender death eligible. Pet. App. 49a.

The court also considered objective indicia suggesting that "there may be no consensus one way or the other on whether death is an appropriate punishment for any crime which does not result in the death of the victim." Pet. App. 54a. Citing commentators' conclusions that the number of jurisdictions allowing the death penalty for non-homicide offenses had "at least doubled between 1993 and 1997," the court conducted a review of State death penalty provisions and determined that 38% of capital jurisdictions authorize some form of non-homicide capital punishment. Pet. App. 54a.

The Louisiana Supreme Court found the direction of change toward the death penalty for child rape constituted a compelling trend. The court stated,

> [I]t is likely that 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. These states may just be taking a "wait and see" attitude until the Supreme Court rules on the precise issue.

Pet. App. 55a.

Exercising its independent judgment, the Louisiana Supreme Court affirmed its decision in *Wilson*, *supra* at 1076, that the death penalty was not a disproportionate penalty for the rape of a child under twelve. Pet. App. 57a. Children are a class of people who need special protection as they are immature and not capable of defending themselves. Rape of a child under twelve is a crime like no other, and a "maturing society" 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." Pet. App. 57a (footnote omitted).

The Louisiana Supreme Court also rejected petitioner's claim that Louisiana's capital sentencing procedures failed to genuinely narrow the class of child rapists eligible for the death penalty, citing this Court's determination in *Lowenfield v. Phelps,* 484 U.S. 231 (1988), that "Louisiana's capital scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and exercise of discretion. The Constitution requires no more." Pet. App. 61a, citing *Lowenfield*, *supra*, at 246. The court found this reasoning applies to Louisiana's sentencing scheme for capital rape. Pet. App. 60a.

Chief Justice Pascal Calogero dissented. Citing this Court's decisions in *Coker v. Georgia*, 433 U.S. 584 (1977), and *Eberheart v. Georgia*, 433 U.S. 917 (1977), he reasoned that the Eighth Amendment

precludes capital punishment for any offense that does not involve the death of the victim, with the possible exception of *sui generis* crimes against the state involving espionage or treason. Pet. App. 133a-134a.

SUMMARY OF THE ARGUMENT

The death penalty is not cruel and unusual punishment for the rape of a child. It is evident that societal awareness of the prevalence of child sexual abuse has increased tremendously in the last few decades. Moreover, public outrage over the sexual violation of immature young children by predatory adults is extremely great due to the recognition that these offenders target and harm the most vulnerable members of our society.

While this Court in *Coker* found that the death penalty was excessive for the rape of an adult woman, it has not found the death penalty to be excessive for all non-homicide crimes, or for all rapes. Objective indicia reflect 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. Seven states have legislation providing the death penalty for child rape, and of those States, only Florida's statute has been invalidated by its state supreme court. Three other states are presently considering legislation which would authorize the death penalty as punishment for the rape of a child committed

under certain circumstances. Additionally relevant to a determination of societal consensus with regard to authorizing the death penalty for this non-homicide offense, are the fifteen capital jurisdictions (including the federal government) that authorize the death penalty for a variety of non-homicide offenses, and the recent widespread enactment of "Megan's Laws," which require sex offenders to register and provide notification to the community. Juries have returned death sentences in two of the five cases in Louisiana in which it is known that the issue was submitted to a jury. In other states, the laws are so recently enacted that the fact that no one has yet been capitally convicted in those states does not demonstrate that juries are unwilling to impose the death penalty for the rape of a child. Therefore, objective indicia confirm that a current trend strongly supports imposition of the death penalty for this exceedingly grave offense. The State respectfully submits that legislative consideration of this issue should not be prematurely foreclosed.

Finally, Louisiana's capital child rape statute narrows the class of offenders who are subject to the death penalty. As applicable to Patrick Kennedy, the statute narrowly defined the offense to limit the death penalty to those offenders who anally or vaginally rape children eleven years of age or younger (children under twelve).

ARGUMENT

I. The Death Penalty is Not Cruel and Unusual Punishment for the Rape of a Child Under the Eighth Amendment.

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. It is well established that 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, 173 (1976).

In *Gregg,* this Court held that the death penalty was not a constitutionally excessive punishment for deliberate murder, but reserved the question of the constitutionality of the death penalty when imposed for other crimes. *Id.* at 187 n.35. That question, with respect to child rape, is now before the Court.

A. This Court's Decisions in *Coker v. Georgia* and its Progeny Have Not Established a Categorical Rule Limiting Capital Punishment to those Offenses Resulting in Death.

1. One year after its decision in *Gregg*, this Court held that the death penalty was an excessive and unconstitutional punishment for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584 (1977).[10] The plurality did not discount the seriousness of rape as a crime, finding that "[s]hort of homicide, it is the 'ultimate violation of self.'" *Id.* at 597. Rape was described as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established." *Id.* While rape was described as a violent crime, normally involving force or the threat of force to

[10] *Coker* was decided by this Court in a plurality opinion. Justice White announced the judgment of the Court, joined by Justice Stewart, Justice Blackmun, and Justice 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 *Coker*, 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.

overcome the victim's will or capacity to resist, it was noted that it did not by definition include even serious injury to another person. *Id.* at 597-598. The plurality stated: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* at 598.

However, the plurality was describing the rape of an adult. As noted in the Louisiana Supreme Court's opinion in *State v. Wilson*, 685 So.2d 1063, *cert. denied, Bethley v. Louisiana,* 520 U.S. 1259 (1997), there are fourteen separate references to the rape of an "adult woman" contained in the *Coker* plurality opinion, concurring opinion, or dissenting opinion.[11] In stating the issue before this Court and announcing the plurality's judgment, the *Coker* plurality opinion explicitly referred to the offense in question as the rape of an "adult woman."[12] Although this Court noted that two jurisdictions (Tennessee and Mississippi) provided capital punishment when the victim was a child, it was in the context of emphasizing the fact that Georgia was the only jurisdiction in the United States which, at that time, authorized a sentence of

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[11] *Wilson, supra,* at 1066, n.2.

[12] The plurality stated: "That question [the constitutionality of the death penalty], with respect to the rape of an adult woman is now before us." *Coker*, 433 U.S. at 593. The plurality concluded: "Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman." 433 U.S. at 584.

death when the rape victim was an adult woman. *Coker*, 433 U.S. at 595-596. It is therefore apparent that the plurality in *Coker* refrained from deciding whether the death penalty is grossly disproportionate for the rape of a child.

Louisiana is not the only state supreme court to interpret *Coker* as limited to the constitutionality of the death penalty for the rape of an adult woman. In *Upshaw v. State*, 350 So.2d 1358 (Miss. 1977), the Mississippi Supreme Court held that death is a constitutionally permissible punishment for the rape of a female child under the age of twelve years.[13] Its decision, rendered just four months after this Court's decision in *Coker*, rested in part upon a finding that this Court had taken great pains in *Coker* to limit its decision to the constitutionality of the death penalty for the rape of an adult woman, citing the multiple references to the rape of an "adult woman" in the plurality opinion. *Upshaw*, 350 So.2d at 1360.[14]

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[13] The Mississippi Supreme Court's discussion of the facts in the *Upshaw* opinion reflects that the eight-year-old victim did not die, and does not suggest that the victim was seriously injured apart from the rape. *Upshaw*, 350 So.2d at 1359-1360.

[14] In *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989) the Mississippi Supreme Court subsequently reversed a conviction and sentence of death for the rape of a child under twelve years of age due to the erroneous admission of hearsay evidence. The Mississippi Supreme Court held that on retrial, the maximum sentence available would be life imprisonment because the aggravating factors set forth in Miss. Code Ann. § 99-19-1010 precluded the imposition of the death penalty. Although two justices wrote separately to state that they would have preferred

(Continued on following page)

Upshaw's conviction and death sentence were reversed on procedural grounds. *Upshaw v. State*, 350 So.2d at 1361-1362.

Most recently, in *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08), the Georgia Supreme Court rejected the argument that *Coker* precludes the imposition of the death penalty for the rape of a child. The Georgia Supreme Court held that Velazquez, who pled guilty to the 2005 rape and aggravated sodomy of his seven year-old step-daughter, could not be sentenced to life imprisonment without possibility of parole because the State had not supplied any notice under the Uniform Rules of the Superior Courts that it intended to seek the death penalty.[15]

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to hold that the death penalty may not be imposed for the rape of a child consistent with the Eighth Amendment to the Constitution of the United States, the majority found it unnecessary to address this issue. In 1998, the Mississippi legislature amended Miss. Code Ann. § 97-3-65 to remove the provision authorizing the death penalty for the rape of a child. However, legislation to reinstate the death penalty for the rape of a child under twelve is presently pending in the Mississippi Legislature, where it passed the Senate on February 27, 2008. *See*, S.B. 2596, 2008 Leg., Reg. Sess. (Miss. 2008), *available at* Mississippi State Legislature, Bill Status http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml (last visited March 3, 2008). The votes are reported as 52 yeas, with no nays, and none absent or not voting. *Id.*

[15] In 1999, the Georgia Legislature re-enacted Ga. Code Ann. § 16-6-1(a)(2), providing for the capital rape of a female less than ten years of age. *See*, http://www.legis.state.ga.us/legis/1999_00/leg//fulltext/hb249.htm Georgia General Assembly, 1999-2000 Session (last visited March 5, 2008).

Under the provisions of Ga. Code Ann. § 17-10-32.1 (West 2007) the defendant could only be sentenced to life imprisonment if the notice was not given. The Georgia Supreme Court rejected the State's contention that it could not file the notice because the death penalty was unconstitutional in a case of rape where the death of the victim does not result. Noting that *Coker* concerned the rape of an adult woman, the Georgia Supreme Court stated, "[n]either the United States Supreme Court, nor this Court, has yet addressed whether the death penalty is unconstitutionally disproportionate for the crime of raping a child." *Velazquez,* 2008 WL 480078 at *2 (Ga. 2008).

Likewise, the Florida Supreme Court in *Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), found that this Court had not decided whether death is a constitutional punishment for the rape of a child in *Coker*.[16] Although the Florida Supreme Court held that the reasoning of the justices in *Coker* compelled it to reverse a death sentence imposed for the rape of a seven-year-old girl, its opinion does not reflect any attempt to conduct an independent analysis of

[16] Noting that *Coker* held the death penalty to be unconstitutional under the Eighth Amendment for the rape of an adult woman, the Florida Supreme Court stated: "[t]he Court has yet to decide whether the same holds true for the rape of a child under eleven years of age." *Buford,* 403 So.2d at 950.

whether child rape is more heinous than the rape of an adult for purposes of Eighth Amendment proportionality.[17]

2. Following its decision in *Coker,* this Court considered whether death is a constitutionally excessive penalty when imposed on offenders who neither took life, attempted to take life, or intended to take life, but were convicted of murder under the felony-murder rule and sentenced to death. These cases do not establish a bright-line rule precluding imposition of the death penalty for offenses which do not result in death, but reflect instead the Court's focus upon the culpability of the individual offender.

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court found the death penalty to be a disproportionate sentence for a robber convicted of murder under Florida's felony-murder rule.[18] This Court stated: "We

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[17] The Florida Supreme Court noted that because the defendant's death sentence was sustained under the conviction of premeditated murder, "the constitutionality of the statute imposing the death penalty for sexual battery becomes academic." *Buford*, 403 So.2d at 951.

[18] This Court noted that in assessing the degree of petitioner's guilt, the Florida Supreme Court stated:

> [T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money.

Enmund, 458 U.S. at 786 (quoting *Enmund v. State*, 399 So.2d 1362, 1370 (Fla. 1981)).

have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.' *Enmund*, 458 U.S. at 797 (citing *Gregg v. Georgia,* 428 U.S. 153, 184 (1976) (footnote omitted)). Focusing on Enmund's own conduct and culpability, this Court stated that it had an abiding conviction that the death penalty, which is "unique in its severity and irrevocability," is an excessive penalty for the robber who, as such, does not take human life. *Id.*

Thereafter, in *Tison v. Arizona*, 481 U.S. 137 (1987), the petitioners were convicted of capital murder based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder. Continuing its focus upon the mental state of the particular offender, the Court held:

> [T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-158. Therefore, "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

Contrary to the petitioner's assertion, this Court's decisions in *Coker*, *Enmund*, and *Tison*, do not draw a "bright-line" between offenses resulting in death and offenses which do not result in death for purposes of the constitutionality of the death penalty. In *Coker,* this Court explicitly stated that the issue before it was the constitutionality of the death penalty for the rape of an adult woman. In *Enmund,* the Court did not simply reverse after determining that Enmund did not kill, attempt to kill, or intend to kill, but instead determined that the death penalty was disproportionate to the underlying offense of robbery under the two part test used in *Coker*.[19]

Importantly, the underlying offenses in *Enmund* (robbery) and *Tison* (robbery and kidnaping), are objectively less heinous than the rape of a child. As this Court noted in *Coker* with respect to the rape of an adult woman, rape is the ultimate violation of self, short of homicide. As this Court's decisions in *Coker* and its progeny have not precluded the death penalty for all non-homicide offenses, it is necessary to address

[19] In *Tison*, the Court underscored the limitations of the holding in *Enmund* as follows: "This Court, citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder 'in these circumstances.'" *Tison*, 481 U.S. at 1682 (citing *Enmund*, 458 U.S. at 788).

the issue of whether the death penalty is a constitutionally permissible punishment for the rape of a child in the context of this Court's Eighth Amendment Jurisprudence.

B. Objective Indicia Reflect a Growing Consensus that the Death Penalty is Not a Grossly Disproportionate Punishment for the Rape of a Child, Reinforcing the Conclusion that Death is a Constitutional Punishment for the Rape of a Child.

First, this Court reviews objective indicia of consensus, as expressed in particular by the enactments of state legislators, before determining, in the exercise of its independent judgment, whether the death penalty is grossly disproportionate for an offense. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

1. In determining whether a punishment is "cruel and unusual" under the evolving standards of decency encompassed by the Eighth Amendment, this Court has begun by examining the enactments of state legislators. In a democracy, the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. *Furman v. Georgia*, 408 U.S. 238, 436-437 (1972) (Powell, J., dissenting). Moreover, when assessing a punishment selected by a democratically elected legislature against a constitutional measure, this Court presumes its validity:

> We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "(I)n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

Gregg, 428 U.S. at 175 (quoting *Furman*, 408 U.S. at 383 (Burger, C. J., dissenting)).

The examination of legislative acts involves more than simply a numerical counting of which jurisdictions among the thirty-seven (including the federal government) permitting capital punishment provide for a particular capital prosecution. This Court has also taken into account the direction of any change in that respect. In *Atkins*, this Court noted that with respect to the number of states that had abandoned capital punishment for the mentally retarded following this 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 v. Virginia*, 356 U.S. 304, 315 (2002).

In *Roper v. Simmons*, 543 U.S. 551 (2005), 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 the decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. This Court concluded:

> As 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 *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'

Roper, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 316). In *Roper*, this Court also noted that it had found it to be of particular significance in *Atkins* that "in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty." *Roper*, 543 U.S. at 566 (citing *Atkins*, 536 U.S. at 315-316).

a. In 1995, Louisiana Revised Statute 14:42(C) was amended by 1995 La. Acts 397, § 1 to allow for

the death penalty when the victim of rape is under the age of twelve.[20] In *State v. Wilson*, 685 So.2d 1063 (La. 1996), the Louisiana Supreme Court noted:

> This amendment began as House Bill 55 which passed in the House of Representatives with a vote of 79 yeas to 22 nays. The Bill was then sent to the Senate which passed it with a vote of 34 years to 1 nay. The Bill was then signed into law by Governor Edwards on 6/17/95 to become effective on 8/15/95.

Id. at 1067, n.5. When the first constitutional challenge to the validity of the capital child rape law was presented to the Louisiana Supreme Court in *State v. Wilson*, Louisiana was at that time the only state with a law in effect providing for the death penalty for the rape of a child. *Id.* at 1068. Florida and Mississippi also had statutes which nominally provided for the death penalty in the case of the rape of a child under twelve, but those statutes were invalidated by the Florida and Mississippi Supreme Courts in 1981 and 1989.[21] Upholding the first constitutional challenge

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[20] La. R.S. 14:42(A) defined aggravated rape as anal or vaginal sexual intercourse committed without the lawful consent of the victim. In 2001, the Louisiana Legislature amended La. R.S. 14:42(A) to define aggravated rape as anal, vaginal or oral sexual intercourse.

[21] *See*, discussion of *Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), *supra* pp. 28-29; and *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989), *supra* n.14.

to the State's capital rape law in *Wilson*, the Louisiana Supreme Court noted:

> The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed. To make this the controlling factor leads only to absurd results. Some suggest that it has been over a year since Louisiana has amended its law to permit the death penalty for the rape of a child, and that no other state has followed suit. Since its enactment, the statute has been under constant scrutiny. It is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own.

State v. Wilson, 685 So.2d 1063, 1069 (La. 1996).

Since this Court denied certiorari in *Bethley v. Louisiana,* 520 U.S. 1259 (1997), Montana's child rape law went into effect,[22] and laws have been enacted in

[22] Mont. Code Ann. § 45-5-503 (enacted 1997) (sexual intercourse without consent where victim is less than sixteen years of age and offender more than four years older than the victim punishable by death if offender has prior conviction for an offense under the section and inflicted serious bodily injury on a person in the course of committing each offense), *See also*, Mont. Code Ann. § 45-2-101 (2007) ("Sexual intercourse" defined to include anal, vaginal or oral sexual intercourse. Includes penetration of anus or vulva by foreign object or instrument manipulated by another person under certain circumstances.).

an additional four States: Georgia (1999),[23] Oklahoma (2006),[24] South Carolina (2006),[25] and Texas (2007).[26] Additionally, though its death penalty provision was invalidated by judicial decision in 1981, Florida Stat. Ann. § 794.011 continues to provide that the sexual battery of a child under twelve years old by a person at least eighteen years old is punishable by death.[27]

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[23] *See*, Ga. Code Ann. § 16-6-1 (West 2006) (penile-vaginal rape of a female less than ten years of age punishable by death). *See also, supra* discussion at p. 20, *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08) (Georgia Supreme Court stating that it has never held Ga. Code Ann. § 16-6-1 to be unconstitutional with regard to the death penalty for child rape).

[24] *See*, Okla. Stat. Ann. tit. 10, § 7115(I) (West 2006 Supp.) (forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age parent or any other person, subsequent to a previous conviction for any such offense, punishable by death).

[25] *See*, S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.) (sexual battery of victim less than eleven years of age by offender punishable by death if offender previously convicted of offense constituting first degree criminal sexual conduct with a minor less than eleven years old); *See also*, S.C. Code Ann. § 16-3-651 (2007) (defining sexual battery to include anal, oral or vaginal rape).

[26] *See*, Texas Pen. Code § 12.42 (Vernon 2007 Supp.) (anal, oral or vaginal rape of victim under six years old, or anal, oral, or vaginal rape of victim under fourteen years old under circumstances involving bodily injury, threat of bodily injury, use of a weapon, or administration of certain drugs punishable by death where offender has previous conviction for offense punishable under Texas Pen. Code § 12.42).

[27] *See*, discussion of *Buford v. State*, 403 So.2d 943 (Fla. 1981), *supra* p. 14.

While the number of states with capital child rape laws in effect is admittedly less than half of the death penalty jurisdictions, the number of states enacting such legislation in the past few years represents a significant trend toward the capitalization of child rape. The consistency of this trend is illustrated by the fact that in 2008, legislation to authorize the death penalty as punishment for child rape has been filed in Alabama,[28] Mississippi,[29] and Missouri.[30] As this legislation is currently pending, it is possible that at the end of 2008 there will be nine states with such laws. Additionally, although Florida's capital

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[28] *See*, H.B. 456, 2008 Leg., Reg. Sess. (Ala. 2008) (As proposed, would include rape in the first degree, sodomy in the first degree, and sexual torture as capital offenses, where victim is less than twelve, offender is over eighteen and has a previous conviction for such an offense); Alabama Legislature, Prefiled Bills, http://alisondb.legislature.state.al.us/acas/searchableinstruments/2008rs/bills/hb456.htm (last visited March 5, 2008).

[29] *See,* S.B. 2596, 2008 Leg., Reg. Sess. (Miss. 2008) (Currently, bill would amend Miss. Code §§ 97-3-65, 97-3-71, 97-3-95, and 97-3-101 to impose penalty of death or life imprisonment for rape or sexual battery of child younger than twelve where offender has previous conviction for one of these offenses); Mississippi State Legislature, Bill Status, http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml (last visited March 5, 2008).

[30] *See,* S.B. 1194, 94th Gen. Assem., 2d. Reg. Sess. (Mo. 2008) (Bill provides that offenses of forcible rape or sodomy of a child under twelve would be punishable by death or life imprisonment. Prior offense would be one of several statutory aggravating circumstances); Missouri General Assembly, Joint Bill Tracking, http://www.house.mo.gov/billcentral.aspx?pid=26 (last visited, March 5, 2008).

child rape statute was invalidated by the Florida Supreme Court in 1991, the respondent submits that the fact that the Florida Legislature has not repealed or amended the statute to delete the capital provision should weigh on the side of finding that there is no settled societal consensus that death is disproportionate to the offense of capital child rape.[31]

The ongoing legislative activity concerning this issue provides powerful evidence that this Court should not be quick to infer that there is entrenched opposition to capitalizing child rape in states which do not yet have such laws.

b. It is also relevant that 14 states and the federal government authorize the death penalty for non-homicide offenses. This is further indication that *Coker* and its progeny have not been generally understood to preclude the death penalty for all offenses not resulting in the death of a victim. Additionally, with respect to the rape of an adult woman, this Court has stated, "[s]hort of homicide [rape] is the 'ultimate violation of self.'" *Coker*, 433 U.S. at 597. If the rape of a child is a more heinous offense than the rape of an adult woman, then presumably it is also more heinous than any other offense which does not by definition require the actual death of any person.

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[31] It is respondent's position that in *Buford v. State*, 403 So.2d 943 (Fla. 1981) the Florida Supreme Court erroneously concluded that this Court's reasoning in *Coker* compelled it to hold that child rape was not punishable by death under the Eighth Amendment.

As noted previously, six states now provide capital punishment for the rape of a child: Louisiana, Montana, Georgia, Oklahoma, South Carolina, and Texas. Louisiana also authorizes the death penalty for treason, while Georgia authorizes the death penalty for aircraft piracy, aircraft hijacking and aggravated kidnapping. Montana additionally provides the death penalty where the offender is convicted of committed attempted deliberate homicide, aggravated assault, or aggravated kidnapping while in official detention, if the offender has been previously convicted of deliberate homicide or found to be a persistent felony offender.[32]

Additionally, eight states and the federal government also provide the death penalty for non-homicide offenses. Arkansas, California, Illinois, Mississippi, and Washington authorize the death penalty for treason, while New Mexico provides it for espionage.[33] Mississippi also authorizes the death penalty for aircraft hijacking.[34] Colorado and Idaho provide the death penalty for aggravated kidnapping.[35]

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[32] *See*, La. Rev. Stat. Ann. § 14:113 (2007); Ga. Code Ann. §§ 16-11-1; 16-5-44; 16-5-40 (West Supp. 2007); Mont. Code Ann. §§ 46-18-219; 46-18-303 (2007).

[33] *See,* Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Ill. Comp. Stat. Ann. 38/30-1 (West 2007); Miss. Code Ann. § 97-7-67 (West 2003); Wash. Rev. Code Ann. § 9.82.010 (West 2007); N.M. Stat. Ann. § 20-12-42 (West 2007).

[34] *See*, Miss. Code Ann. § 97-25-55 (West 2003).

[35] *See*, Colo. Rev. Stat. Ann. § 18-3-301 (West 2007); Idaho Code Ann. § 18-4502 (2007).

Although Florida's capital child rape statute has been invalidated by the Florida Supreme Court, Florida provides that importation of 300 kilograms or more of cocaine into the state knowing the probable result of such importation would be the death of any person is a capital offense.[36] At the federal level, excluding treason and espionage, capital punishment is provided for the kingpin of an extremely large continuing criminal drug enterprise.[37]

Significantly, forty percent, or fifteen out of thirty-seven capital jurisdictions provide the death penalty for non-homicide offenses. If pending legislation to capitalize child rape in Alabama, Mississippi, and Missouri is enacted, forty-six percent of capital jurisdictions will so provide.

2. Although the actions of the legislatures are of primary importance as objective indicia of national consensus, this Court has also found the actions of prosecutors and sentencing juries provide a "significant and reliable objective index of contemporary values." *Gregg,* 428 U.S. at 181. However, the fact that petitioner is the first person to be sentenced to death under Louisiana's 1995 law does not establish

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[36] *See*, Fla. Stat. Ann. § 893.135 (West 2007).

[37] *See*, 18 U.S.C. § 3591; 21 U.S.C. § 848.

that jurors or prosecutors believe the death penalty is disproportionate to the offense of child rape.

a. Petitioner's case is one of three tried capitally in Jefferson Parish, Louisiana, and it is the only one of the three in which the jury returned a death sentence. Pet. App. 64a, Jt. App. 139(3), 142(6), 149. On December 17, 2007, a jury in Caddo Parish, Louisiana, determined that Richard Davis should be sentenced to death after finding him guilty of the aggravated rape of a five-year-old girl.[38] Petitioner also contends that he is aware of a fifth aggravated rape case in which prosecutors sought the death penalty at trial.[39] Based upon the available information, it appears that Louisiana capital sentencing jurors have returned a death sentence in two out of five cases in which prosecutors sought it. These numbers do not indicate that Louisiana sentencing juries are unwilling to impose a sentence of death for the rape of a child.[40]

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[38] *State v. Davis*, Case No. 262,971, Caddo Parish, Louisiana.

[39] Pet. Brief at p. 34.

[40] Likewise, the voir dire in this case does not demonstrate that prospective jurors were unwilling to impose the death penalty, or that it was difficult to select a jury. According to the Louisiana Supreme Court's summary of the voir dire process: 24% of prospective jurors were excused due to lack of qualifications, hardship, medical condition, or knowledge of the crime (44 out of 181 prospective jurors); 23% of prospective jurors were excused due to inability to consider a death sentence either generally or with regard to rape (43 out of 181). 43% of the prospective jurors remained to participate in the general voir

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With regard to Louisiana prosecutors' charging and prosecutorial decisions in capital aggravated rape cases, there are no accurate statistics reflecting the total number of death-eligible aggravated rape indictments filed since the effective date of the 1995 amendment. Gathering such statistics would require the examination of every bill of indictment charging the offense of aggravated rape filed in every Parish in the State of Louisiana, from 1995 until the present. Examination of each bill, and sometimes the actual court record, would be necessary to determine the age of the victim of the offense, and to confirm that the date of the offense was not alleged to have occurred prior to the effective date of the amendment.[41] Additionally, it would be necessary to determine which cases involved defendants who were ineligible for the

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dire (78 out of 181). Pet. App. 70a-72a. Out of the 43 prospective jurors excused because they could not consider a death sentence, 17 prospective jurors would not consider a death sentence because the offense was a non-homicide rape, or 9% of the total number of prospective jurors. Pet. App. 71a. Additionally, 16 prospective jurors were excused because they could not consider life (would only consider death) if found petitioner guilty of aggravated rape of child, or 8% of the total number of prospective jurors. *Id.*

[41] The mere fact that a bill of indictment is returned after the effective date of the amendment does not necessarily indicate that the alleged rape occurred after that date as well. Delayed reporting of sexual abuse may result in the arrest and indictment of offenders long after the abuse at issue occurred.

death penalty because they were mentally retarded or juveniles.[42]

Petitioner contends in brief that the various district attorneys of the State of Louisiana have initiated over 180 prosecutions for child rape, since the 1995 amendment to La. R.S. 14:42, citing information provided to the Louisiana Supreme Court in his capital sentencing memorandum. J.A. 12-36. Petitioner contends that to the "best of his knowledge" prosecutors have offered the defendants in each of these cases the opportunity to plead guilty in exchange for a sentence of life imprisonment. Pet. Brief at 34.[43] The information submitted by petitioner

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[42] Although petitioner suggests that he may be mentally retarded, the Louisiana Supreme Court found the pre-trial testimony of Drs. Hannie and Griffin fully supports the determination that he is not. Pet. Brief at p. 7; Pet. App. 102a-107a.

[43] In brief, petitioner appears to suggest that Louisiana's capital rape statute imposes an impermissible burden upon the exercise of petitioner's right to jury trial. Pet. Brief at p. 40 (citing *United States v. Jackson*, 390 U.S. 570 (1968)). There is no merit to this suggestion. In *Jackson*, the death penalty provision of the Federal Kidnapping Act was only authorized where the defendant sought a jury trial. *Id.* at 572. If he entered a plea of guilty or selected a judge trial, the death penalty was not authorized by statute. *Id.* In Louisiana, a defendant may not enter an unqualified plea of guilty in a capital case. La. C.Cr.P. art. 557(A). With the consent of the State and the court, the petitioner may enter a guilty plea with the stipulation that the trial court will sentence him to life imprisonment, or that the trial court will impanel a jury to determine the issue of penalty. *Id.* Moreover, a defendant may not waive trial by jury in a capital case. La. C.Cr.P. art. 780.

does not support a conclusion that prosecutors undertake capital prosecutions merely to obtain pleas to life sentences. It does reflect that in many instances criminal defendants have pled to, or been found guilty of lesser offenses, as they received sentences significantly less than the penalty of life imprisonment without benefit of probation, parole or suspension of sentence mandated by La. R.S. 14:42 on conviction of a non-capital aggravated rape. However, petitioner presents nothing to suggest that the prosecutorial outcomes of particular cases are not the result of the strengths or weaknesses of the individual cases. Additionally, because petitioner provided no disposition for approximately 112 of the 180 cases he provided, it is not evident which of those cases have been resolved, and whether any are presently being prosecuted capitally. *See,* J.A. pp. 12-36.

There is simply no evidence which supports a conclusion that prosecutors in the State of Louisiana consider the death penalty to be an excessive sentence for the rape of a child. Instead, a prosecutor's plea bargaining and charging decisions represent decisions based upon the strengths of particular cases.[44] For example, a prosecutor might determine

[44] Justice White recognized that prosecutorial decision making is concerned with the strengths and weaknesses of individual cases.

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power

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not to pursue a capital verdict for a death-eligible aggravated rape of a particular victim if it allows him to try that offense with non-capital offenses against the same victim, or with non-capital offenses against another victim. A prosecutor may want to join offenses for trial in this manner to present the jury with a stronger, more complete case against a defendant. Additionally concerns regarding the emotional stability, maturity, or communicative abilities of a particular victim may influence charging and plea negotiation decisions. A consideration of the relative strengths and weakness of the case at issue informs every prosecutorial decision.

b. Likewise, there is no reason to conclude that prosecutors and juries in other states believe that the death penalty is disproportionate for the rape of a child. First, it appears that prosecutors in Georgia mistakenly believed that the death penalty provisions of Georgia's capital child rape statute had been invalidated.[45] Petitioner reached a similar conclusion

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> not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring).

[45] *State v. Velazquez*, No. S07G1012, 2008 WL 480078, at *2 (Ga. 2/25/08).

as reflected by his contentions in brief that the rape of a child is not a capital crime under *Presnell v. State*, 252 S.E.2d 625, 626 (Ga. 1979) and that the capital rape amendment merely "clarif[ied] an ambiguity in the law's substantive scope." Pet. Brief at 30, n.7 (citing *State v. Lyons,* 568 S.E.2d 533, 535-36 (Ga. App. 2002). On February 25, 2008, the Georgia Supreme Court resolved any ambiguity in this respect when it stated in *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08), that it had never addressed the constitutionality of the capital child rape law. Moreover experience suggests that the capital child rape statutes of South Carolina (effective July 1, 2006), Oklahoma (effective July 1, 2006), and Texas (effective September 1, 2007) are too recently enacted to have resulted in a capital verdict and sentence.[46]

3. The widespread enactment of "Megan's Laws" has also been posited as an indicator demonstrating "a society more comfortable with the severe punishment and deterrence of child rapists and child molesters."[47] In *Smith v. Doe,* 538 U.S. 84, 89-90 (2002) (Alaska Sex Offender act is a non-punitive,

[46] Trial in the instant capital case was held over five years after the filing of the bill of indictment due in part to extensive pre-trial litigation and scientific testing of evidence. It should be noted that delayed reporting of offenses committed after the effective date of these statutes may delay the indictment and trial of capital offenses.

[47] Melissa Meister*, Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 198 (2003).

Registration Act that does not violate the *Ex Post Facto* Clause of the Constitution) this Court stated:

> Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification.
>
> In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, title 17, 108 Stat. 2038, as amended, 42 U.S.C. §14071, which conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for the state programs. By 1996, every State and the Federal Government had enacted some variation of Megan's Law.

In upholding the Act, the Court found:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.,* at 33, 122 S.Ct. 2017

> ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. Of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. Of Justice, Bureau of Prisoners Released in 1983, p. 6 (1997))).

Smith, 538 U.S. at 103.

The enactment of "Megan's Laws" reflects a widespread public consensus that convicted sexual offenders represent a substantial threat to society, and demonstrate extreme concern regarding the possible perpetration of sexual offenses against children.

4. These objective indicia of contemporary values reinforce the conclusion that the death penalty is not grossly disproportionate punishment for the rape of a child. This Court has held that public perceptions of standards of decency are not conclusive, and that this Court must bring its independent judgment to bear upon whether punishment comports with the Eighth Amendment. This is because "[a] penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg*, 428 U.S. at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). However, this Court has cautioned that,

> [W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Gregg, 428 U.S. at 174-175 (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

The death penalty serves two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. *Gregg*, 428 U.S. at 183. Retribution "serves an important purpose in promoting the stability of a society governed by law." *Id*. Capital punishment's function in expressing "society's moral outrage at particularly offensive moral conduct . . . is essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs." *Id*. The death penalty serves both of these purposes with regard to child rape, as it expresses societies moral outrage at the crime and provides the State with a significant deterrent to child rape.

It is without question that the rape of a child is an offense of the most extreme gravity. In *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography not entitled to First Amendment protection), this Court stated, "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Justice Kennedy has recognized that "[w]hen a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime." *Stogner v. California*, 539 U.S. 607, 651 (2003) (Kennedy, J., dissenting) (citation omitted).

Children are profoundly different from adults. During infancy, toddlerhood, preschool, school-age, and early adolescence, they progress through different stages of cognitive and psychosocial development on the way to adulthood and independence.[48] As a result of their immaturity, children are mentally and physically unprepared for sexual activity, yet because of their youth and frailty are unable to protect themselves from rape and other sexual abuse by adults. Moreover, when that abuse occurs during major developmental periods, it "may have a profound and negative effect on the development of [the child's] adult personality."[49] The harm which rape inflicts

[48] Richard E. Behrman, Nelson Textbook of Pediatrics Ch.7, tbl 7-2 (17th ed., Saunders 2004).

[49] Beth E. Molnar et al., *Child Sexual Abuse and Subsequent Psychopathology: Results From the National Comorbidity Survey*, 91 Am. J. Public Health 753, 757 (2001).

upon a child is therefore one which he or she will suffer throughout life.

Of significance, rape may result in serious physical injury, as it did in the instant case, where the eight-year-old victim required emergency surgery to repair serious tearing of her perineum and vagina.[50] It can also result in infections, and sexually transmitted diseases. One study found data indicating that in females, sexual abuse increases the risk of contracting cervical cancer.[51] Mullen et al., found that there is evidence "that women who report child sexual abuse are at greater risk during adolescence of sexually transmitted diseases, teenage pregnancy, multiple sexual partners, and sexual revictimisation." (citations omitted).[52] A relationship also has been identified between a history of CSA and obesity, which "appears to be particularly strong for those women who

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[50] The victim was an eight-year-old child, and the petitioner was an adult male weighing over three hundred pounds, according to his March 3, 1998 taped statement. Rec. Ex. S-27, S-28.

[51] Karin Bergmark, et al., *Synergy Between Sexual Abuse and Cervical Cancer in Causing Sexual Dysfunctioni,* 31 J. Sex & Med. Therapy 361, 378 (2005).

[52] Paul E. Mullen, et al., *Long Term Effects of Child Sexual Abuse*, Issues in Child Abuse Prevention, Number 9, Autumn 1998, http://www.aifs.gov.au/nch/pubs/issues/issues9/issues9.html. Australia: National Child Protection Clearing House (last visited March 7, 2008).

experienced more severe forms of abuse, such as incidents involving penetration."[53]

> Researchers have also found there is
>
> "an increased risk of psychiatric illness (anxiety disorders, depression, alcohol abuse and/or dependence, drug abuse and/or dependence, eating disorders, conduct disorder, and borderline personality disorder) and other adverse outcomes (suicide attempt, current smoking, sexual revictimization, and relationship problems associated with self-reported CSA".

(footnotes omitted).[54] Moreover, "[t]he greatest risks were associated with CSA involving intercourse." *Id*.[55] The prevalence of psychiatric disorders was higher in persons reporting CSA than the general population. The results for mood, anxiety or substance disorder are particularly striking, in that "78% of the women

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[53] T.B. Gustafson et al., *Childhood sexual abuse and obesity*, 5 Obesity Reviews 129, 133 (2004).

[54] Elliot Nelson et al., *Association Between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes*: *Results from a Twin Study*. 59 Arch. Gen. Psychiatry 139 (2002).

[55] *See also,* Duhe et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*. 28 Am. J. Prev. Med. 430, 434 (2005). (Reporting strong evidence that exposure to CSA acts as an increased risk factor for alcohol problems, illicit drug use, suicide attempts, marrying an alcoholic, and marital and family problems, similarly for adult men and women. Moreover, "intercourse CSA was associated with an elevated risk for the outcomes among both genders.")

and 82% of the men reporting CSA met criteria for at least 1 lifetime disorder. This can be compared with finding that 48.5% of women and 51.2% of men in the NCS met criteria for any lifetime disorder."[56]

The severity of child sexual abuse "has also has been associated with subsequent sexual risk behavior."[57] A consequence of sexual abuse may be "traumatic sexualization in which a child develops maladaptive scripts for sexual behavior, when rewarded for sexual behavior by affection."[58] Additionally, if a child learns his or her needs or requests are ignored, the child may feel powerless, and fail to develop the ability to stop unwanted sexual advances later in life. *Id.* Greater feelings of powerlessness may result from more severe abuse involving force or penetration. *Id.*

The fact that the abuse may be perpetrated by a close relative or acquaintance does not mitigate the severity of the long-term consequences. Molnar, et al. found support for the hypothesis that "chronic CSA perpetrated by a close relative or other trusted acquaintance has more severe long-term consequences than isolated incidents perpetrated by strangers."[59]

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[56] *See,* Molnar, et al., *supra* note 49, at p. 757.

[57] Theresa E. Senn, et al., *Characteristics of Sexual Abuse in Childhood and Adolescence Influence Sexual Risk Behavior in Adulthood*, 36 Arch. Sex Behav. 637 (2007).

[58] Senn, et al., *supra* note 57, at p. 643.

[59] Molnar, et al., *supra* at p. 757.

The rape of a child inflicts surpassing harm, including severe long-term effects which are exacerbated by the victim's youth and immaturity at the time of the offense. The death penalty is a reasoned expression of society's moral outrage at this crime, and will serve the purpose of preventing self-help and vigilantism.[60]

In *McKune v. Lile*, 536 U.S. 24, 32 (2002), this Court recognized that "[s]ex offenders are a serious threat in this Nation." Additionally, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33 (citations omitted). Re-offending declines with age for many groups of offenders, but not for offenders who abuse children.[61] While the death penalty may not deter all

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[60] In 1984, Gary Plauche stepped from a telephone booth in the Baton Rouge airport and shot and killed Jeffrey Doucet, who had been extradited from Los Angeles for allegedly kidnapping and sexually molesting Plauche's young son. Prosecutor Prem Burns stated, "A lot of people have stated that they would have done exactly the same thing as Plauche, if it had been their son." Ed Magnuson, *Up in Arms Over Crime*, Time, Apr. 8, 1985; http://www.time.com/time/magazine/article/0,9171,965498,00.html (last visited March 2008). Plauche pled guilty to manslaughter and received a sentence of five years probation. A.P. *Around the Nation; Informer's Call Reported Before Suspect's Slaying,* The New York Times, March 19, 1984. http://query.nytimes.com/gst/fullpage.html?res=9407E3DC1039F93AA25750C0A962948260&scp=2&sq=Plauche&st=nyt (last visited March 7, 2008).

[61] *See generally*, Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Respondent, *Stogner v. California*, 539 U.S. 607 (2003) (No. 01-1757), 2003 WL 542208 at p. *22-24.

sexual offenders, there will be many for whom it will undoubtedly provide a significant deterrent. Therefore, the State should not be deprived of this significant tool to prevent child rape.

Moreover, the defendant's reliance on *Atkins v. Virginia,* 536 U.S. 304 (2002) is misplaced. In *Atkins,* the Court found that the reduced capacity of mentally retarded offenders provides a second justification for categorically making them ineligible for the death penalty, due to the enhanced risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). The risk was enhanced by the lesser ability of such persons to assist counsel and to make a persuasive showing of mitigating factors. The defendant has neither argued nor alleged that rapists in the aggregate have personal characteristics which cause them to face a special risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

II. Louisiana's Capital Rape Statute Genuinely Narrows the Class of Offenders Eligible for the Death Penalty By Narrowly Defining the Offense.[62]

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 (1976). The 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" than on others. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). This can be accomplished 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

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[62] Petitioner contends in brief that the number of defendants subject to prosecution for child rape is extremely large, citing statistics indicating roughly 45,000 reports of sexual abuse a year. Pet. Brief, at p. 45; citing U.S. Dep't of Health & Human Servs., *Child Maltreatment 2004* tbl.3-11 (2006), http://www.acf.hhs.gov/programs/cb/pubs/cm04/table3_11.htm. In 2005, statistics indicate that Louisiana reported 892 child victims of sexual abuse, with child victims including those children up to seventeen years of age, U.S. Dep't of Health & Human Servs., *Child Maltreatment 2005* tbl. 3-3. 3-6 (2007), http://acfhhs.gov/programs/cb/pubs/cm05/table3_6.htm. The report does not differentiate among different types of sexual abuse, which presumably includes victims who were fondled or subjected to a wide variety of non-capital sexual offenses. *Id.* Moreover, there is no reason to believe that the number of perpetrators, who may abuse more than one child, is equal to the number of victims.

provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *Lowenfield*, 484 U.S. at 246. Louisiana has chosen the first method, in that the legislature has narrowly defined the definition of offenses which are punishable by death during the guilt phase. Jt. App. 60a.

On March 2, 1998, the date on which petitioner committed the instant offense, the capital offense of aggravated rape was narrowly defined to include only rapes committed when the anal or vaginal sexual intercourse was deemed to be without consent of the victim because the victim is a child under twelve. La. R.S. 14:42A(4) (West 1997). As *Coker* held only that the death penalty was disproportionate for the rape of an adult female, the statute under which the defendant was convicted is narrowly drawn.

With regard to non-adult, child victims, the statute essentially defined two categories of the offense: 1) aggravated rapes where the anal or vaginal intercourse was deemed to be without consent of the victim because the victim was less than twelve years old;[63] and 2) aggravated rapes of children twelve and older, where the anal or vaginal intercourse was deemed to be without consent of the victim because it was committed under other enumerated circumstances.[64] The definition of either category of aggravated rape excluded acts of oral sexual intercourse.

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[63] La. R.S. 14:42A(4).

[64] La. R.S. 14:42A(1)-(3), (5), & (6).

The first category was punishable by death or life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The second category was punishable by life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. Therefore, the statute narrowly defined the offense to provide that only offenders who committed oral or anal rapes of children under twelve years of age were eligible for the death penalty. No more is required.[65]

[65] Although the present version of La. R.S. 14:42 is inapplicable to petitioner's case, it should be noted that the definition of aggravated rape has been amended to include acts of oral sexual intercourse and to increase the maximum age of a victim in the first category of aggravated rape from eleven years of age to twelve years of age (victim under the age of thirteen). *See*, 2003 La. Acts 795, § 1. However, La. C.Cr.P. art. 905.4(10) continues to provide that "[t]he victim was under the age of twelve years." Therefore, the provisions of La. C.Cr.P. art. 905.4 do narrow the class of offenders described in La. R.S. 14:42, as presently written.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the conviction and sentence of the petitioner, Patrick Kennedy.

Respectfully submitted,

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