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 PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

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

2. If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CONSTITUTIONAL PROVISION

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

STATE CODES & STATUTES

OTHER AUTHORITY

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is bifurcated. The first part (Pet. App. 1a-65a) and the dissent (Pet. App. 133a-134a) are reported at 957 So. 2d 757 (La. 2007). The second part (Pet. App. 66a-132a) is unreported.

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 U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

At all times relevant to this case, Section 14:42 of the Louisiana Revised Statutes provided in relevant part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent 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 the benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under twelve years, as provided by Paragraph (a)(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. 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 imprisonment at hard labor without the 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.

Article 905.3 of the Louisiana Code of Criminal Procedure provides: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed."

At all relevant times, 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, 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 agent, federal law 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

Petitioner Patrick Kennedy is one of only two people in the United States on death row for a non-homicide offense, and the only one whose state court proceedings are final. He has been sentenced to die for the crime of rape – an offense for which no one in this country has been executed in almost half a century and for which this Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that capital punishment constitutes cruel and unusual punishment. A divided Louisiana Supreme Court nonetheless upheld petitioner's sentence – the majority asserting that there is a difference of constitutional magnitude between the rape of the sixteen-year-old at issue in *Coker* and that of a younger child.

1. In 1976, this Court invalidated a Louisiana death sentence for the offense of aggravated rape (there, the rape of two girls, one sixteen and one seventeen) on the ground that Louisiana law made such punishment mandatory for the offense. *Selman v. Louisiana*, 428 U.S. 906 (1976) (per curiam), *reversing in part State v. Selman*, 300 So. 2d 467 (La. 1974). The following year, this Court decided *Coker*, 433 U.S. 584, another case involving the rape of a sixteen-year-old. There, this Court held that regardless of whether state law makes capital punishment mandatory or discretionary, it constitutes cruel and unusual punishment for a state to impose the death penalty for the crime of aggravated rape not resulting in death. In response to these decisions, Louisiana and the handful of other states

with similar laws stopped pursuing death sentences in rape cases.

In 1995, the Louisiana Legislature recapitalized the crime of rape for cases in which the victim is less than twelve years old. *See* La. R.S. 14:42 (1995).[1] The law defines "rape" as "anal, oral, or vaginal sexual intercourse," *id.*, and "any penetration, however slight . . . is sufficient" to satisfy the statute. *State v. Self*, 719 So. 2d 100, 101 (La. Ct. App. 1998) (quotation omitted). The statute does not require proof of any use of force; the victim's age automatically establishes a lack of "lawful consent," and a "[l]ack of knowledge of the victim's age shall not be a defense." La. R.S. 14:42(A) & (A)(4). Finally, although the statute requires proof of an "aggravating circumstance" in order to trigger the death penalty, two such potential circumstances are (1) that the defendant raped a child and (2) that the victim was a child. La. C.Cr.P. arts. 905.3 & 905.4(1), (10).

2. Petitioner Patrick Kennedy is an African American man who is now forty-four years old. Although he has never been pronounced mentally retarded, his IQ has been measured at 70, which resides in the mentally retarded range, and he has only an eighth-grade education. Prior to the events at issue here, his only criminal convictions were for

[1] In 2003, after the crime at issue here, the Louisiana Legislature amended this law to substitute the phrase "under thirteen years" for "under twelve years." La. R.S. 14:42(A)(4) (2003) & (D)(2) (2006).

issuing five worthless checks between 1987 and 1992.

At 9:18 in the morning on March 2, 1998, petitioner called 911 to report that his eight-year-old stepdaughter, L.H., had just been raped. Petitioner told the 911 operator that after letting L.H. go play in the garage, he heard loud screaming and ran to discover her in the house's side yard. He told the operator that L.H. said that two teenage boys from the neighborhood dragged her into the yard from the garage and forcibly raped her. Petitioner added that he saw one of the boys and described him as being about eighteen years old and riding a blue ten-speed bike.

The police arrived shortly thereafter. Petitioner took the officers straight to L.H.'s bedroom, where he explained he had carried her after finding her in the yard. L.H. was bleeding from her vaginal area. She was taken to the hospital and underwent surgery. L.H.'s injuries to her genital area were severe, but a pediatric surgeon was able to repair the damage. Two weeks later, her physical injuries were healed. J.A. 48-49.

During this entire ordeal, and well afterwards, L.H. consistently told various investigating officers and doctors the same thing that petitioner had told the 911 operator – that two neighborhood boys had raped her. She also gave a highly detailed account of the incident in a three-hour interview with a psychologist and a social worker, describing exactly

how the boys had assaulted her and then fled by bicycle. Pet. App. 10a-11a.

The police quickly uncovered evidence that supported L.H.'s allegations. Within two days of the rape, they found a blue bicycle in tall grass behind a nearby apartment. The bike was the same style as one that petitioner identified the day before as resembling one ridden by the perpetrators. The bike did not have any gears, the tires were flat, and it was covered in spider webs. The police also found a black shirt matching the one that L.H. had said one perpetrator wore. Investigators linked both of these items to Devon Oatis – a large, tall black teenager who lived in the neighborhood and matched L.H.'s general physical description of the lead rapist. When officers interviewed Oatis, he lied to them about his whereabouts on March 2. In fact, he never provided a verifiable alibi. The police nonetheless decided to rule out Oatis as a suspect because they thought his bicycle was inoperable and because he appeared "heavy set," whereas L.H. had described her attacker as "muscular." Pet. App. 8a-10a.

Instead, the police increasingly turned their sights toward petitioner. As is often the case in child abuse investigations, the police had no direct evidence to substantiate their suspicions. But they interpreted blood on the underside of L.H.'s mattress as indicating that the rape had occurred in L.H.'s bedroom and that petitioner might have attempted to cover this up by turning over the mattress pad. A dispatcher at petitioner's employer also told the

police that on the morning of the rape, petitioner had called to say that he would not be coming to work that day because his daughter had "become a lady." And the owner of a carpet cleaning service said that petitioner had called that morning to schedule an urgent cleaning to remove bloodstains. L.H.'s mother, however, accepted L.H.'s account and denied to state authorities that petitioner could have abused L.H.

In mid-March, the State arrested petitioner and placed him in jail. Shortly thereafter, on April 7, 1998, the State Division of Child Protection Services removed L.H. from her mother's home. According to the investigating officer, the reason for the removal was that "Mrs. Kennedy believes the story that her daughter tells her about two strangers dragging her from the garage and raping her on the side of their house." Dft. Ex. K, Referral Form, at 4. Social workers explained that the State needed to "protect[] [L.H.] from these negative influences" by her mother and described "treatment" as being necessary because: "allegations of sexual abuse by step-father; mother is denying abuse; child has alleged other perpetrators, however evidence points to step-father." *Id.*, Quarterly Report, June 18, 1998, at 1. The State told Mrs. Kennedy that she could regain custody of her daughter when she learned to "be objective concerning evidence" of the rape – that is, when she told her daughter and the State that she believed petitioner committed the rape. *Id.* at 2.

Soon thereafter, Mrs. Kennedy began telling L.H. that she thought petitioner was the one who had raped her. She also told L.H. that it would be "okay" to tell people that petitioner had done this. Pet. App. 23a. On June 22, 1998, the State returned L.H. to her mother.

Police and social workers continued to monitor L.H.'s home environment. They also required Mrs. Kennedy and L.H. to attend state-sponsored "counseling sessions" overseen by one of the assistant district attorneys assigned to the case. Eventually, in a December 16, 1999 interview that the Sheriff's Office and the District Attorney's Office coordinated with the Child Advocacy Center – fully twenty months after the rape – L.H. told the State for the first time that petitioner was the one who had raped her. While being pressed for about fifteen minutes for details, L.H. was able to furnish only a few, claiming that petitioner had raped her early in the morning in her bed and that she then had fainted.

3. The State charged petitioner with capital rape in the judicial district court for Jefferson Parish.[2] Petitioner moved to quash the request for capital punishment on the ground that the Eighth Amendment prohibits such punishment for child rape. But the trial court denied that motion.

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[2] This is the same parish in which the trial occurred in *Snyder v. Louisiana*, No. 06-10119, which is currently pending in this Court.

As the parties conducted discovery and prepared for trial, petitioner repeatedly demanded that the State turn over any physical evidence directly linking him to the crime. The State claimed to have such evidence. But instead of providing it, the State offered to take the death penalty off the table in exchange for petitioner's pleading guilty. Petitioner, however, refused this offer and steadfastly insisted on his innocence.

Shortly before trial was set to begin, petitioner obtained access to the victim's mattress for the first time. He submitted it for forensic testing, which revealed that the blood stains on the mattress did not match the blood type of either the victim or petitioner. When petitioner brought this to the attention of the trial court, the State asked for a continuance, explaining that it needed to change its theory of the crime:

> Mr. Rowan and I basically had a – not so much a theory, but we had a Trial strategy mapped out. This significantly changes that Trial strategy and the witnesses that we intended to call and the evidence that we had intended to present, and the focus that we had, that we intended to take as far as our case. This significantly alters that.

Tr. 2044 (1/14/02). The trial court granted the continuance.

When trial began in August of 2003, it was not easy to seat a jury. The trial court dismissed forty-four potential jurors because "they would not consider capital punishment either generally or for an offense of aggravated rape." Pet. App. 71a-72a & n.14; *see Witherspoon v. Illinois*, 391 U.S. 510 (1968). But after several days of voir dire, a twelve-person jury willing to sentence someone to death for child rape was finally selected.

Despite having performed its own exacting forensic analyses of the blood stains on L.H.'s mattress and elsewhere in her house, as well as investigatory medical tests on L.H. herself, the State did not introduce at trial any "positive evidence" linking petitioner to the rape. Pet. App. 14a. Instead, the State characterized its testing of the mattress as "inconclusive," and it sought to prove its case through circumstantial evidence and oral testimony. Pet. App. 93a. The "most important" such evidence was L.H.'s videotaped *ex parte* dialogue at the Child Advocacy Center, supported by her mother's testimony that L.H. also had told her that petitioner committed the rape. Pet. App. 14a. L.H. took the stand at trial, but she "evidently . . . lost her composure" and was never required to describe the rape to the jury. Pet. App. 15a.

Petitioner suggested to the jury that, consistent with L.H.'s initial and repeated claims, Oatis was the true perpetrator. But petitioner was unable to obtain Oatis' presence for questioning in court. Although the trial court, at petitioner's urging,

issued a subpoena for Oatis, he apparently had fled the state and could not be found.

The jury ultimately convicted petitioner of rape, and the case proceeded to sentencing. Following a short evidentiary hearing, the jury determined that petitioner should be sentenced to death on the basis of two of Louisiana's statutory aggravating factors: (1) "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) "the victim was under the age of twelve years." Pet. App. 58a-61a (quoting La. C.Cr.P. art. 905.4(A)(1) & (10)). Summarily rejecting petitioner's arguments that imposing the jury's recommended sentence would violate the Eighth Amendment, the trial court sentenced petitioner to death.

4. The Louisiana Supreme Court affirmed petitioner's conviction. A majority of that court also upheld his sentence, adhering to its prior decision in *State v. Wilson,* 685 So. 2d 1063 (La. 1996), *cert. denied* 520 U.S. 1259 (1997), which had rejected a pre-enforcement challenge to the State's then-newly enacted capital rape law. Although this Court held in *Coker* that the Eighth Amendment prohibited imposing the death penalty for rape, the majority of the Louisiana Supreme Court distinguished *Coker* on the ground that the sixteen-year-old victim there was an "adult woman" and, therefore, that this Court "has not yet analyzed whether the rape of a child under twelve" is punishable by death. Pet. App. 43a & n.28, 48a. Freed from the compass of *Coker*, the majority turned to the two-part test that – in the

words of the Louisiana Supreme Court (Pet. App. 44a-45a) – a "bare majority" of "the prior Court" (that is, this Court before the appointments of its two "new members") formalized in *Roper v. Simmons*, 543 U.S. 551 (2005). That test requires a court: (1) to consider objective criteria indicating whether imposing the death penalty is cruel and unusual, and then (2) to exercise "independent judgment" concerning "whether the death penalty is a disproportionate punishment" under the circumstances at issue. *Id.* at 564.

In objective terms, the Louisiana Supreme Court acknowledged that only five states have statutes on the books that could even theoretically allow the death penalty to be imposed for child rape, and that the other four states' laws "are more narrowly drawn than Louisiana['s]," in that they all apply only to repeat offenders. Pet. App. 48-49. The court further acknowledged that no state in years (in fact, in over forty-three years) has executed anyone for any kind of rape. Pet. App. 37a. But instead of drawing from this evidence the inference that executing petitioner would constitute cruel and unusual punishment, the majority found that objective factors actually indicate that petitioner's sentence is constitutional. The majority asserted that the five states that have capital rape statutes embody a "compelling" "trend" toward allowing capital punishment for child rape. Pet. App. 55a. The majority also noted that nine additional states and the federal government have at least one law on the books allowing capital punishment for a non-homicide offense. Pet. App. 51a-55a.

Turning to the second prong of *Roper*'s test, the majority predicted, in light of *Coker*'s characterization of rape as "second only to homicide in the harm that it causes," that if this Court "is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape." Pet. App. 55a.

The Louisiana Supreme Court also rejected petitioner's narrower Eighth Amendment argument that even if some rapes of child victims may be punished with the death penalty, Louisiana's capital rape law does nothing to guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not. The court reasoned that even though two of the applicable aggravating facts that allow a jury to impose a death sentence simply duplicate elements of the child rape statute, the "underlying [child rape] statute itself" performs the constitutionally required narrowing function because only those who rape victims less than twelve years of age are subject to the death penalty. Pet. App. 57a-61a; *see also Wilson*, 685 So. 2d at 1072.

Chief Justice Calogero dissented. He reasoned that *Coker*'s holding – namely, that imposing the death penalty for rape violates the Eighth Amendment when the victim "d[oes] not die" – "retains its force undiminished today not only because the decision set out a bright-line and easily administered rule, but also because the 'abiding conviction' expressed in that decision . . . has served as the

wellspring of the Supreme Court's capital jurisprudence over the past thirty years since *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)]." Pet. App. 133a-134a (quoting *Coker*, 433 U.S. at 598). Nothing in the "recent legislative enactments" in a handful of states, the dissent continued, warrants a departure from *Coker* and this Court's other rulings prohibiting the death penalty for person-on-person offenses not resulting in the death of the victim. Pet. App. 134a.

SUMMARY OF ARGUMENT

The death sentence imposed on petitioner constitutes cruel and unusual punishment in violation of the Eighth Amendment.

I. Punishing the crime of child rape with the death penalty cannot be squared with this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977). There, six Justices agreed "that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life." *Id.* at 598 (plurality opinion) (quotation omitted). Subsequent decisions have made clear that capital punishment is categorically impermissible for person-on-person violence that does not result in death, and in which the offender does not attempt or intend to kill or display reckless indifference toward human life. The Louisiana Supreme Court had no warrant in this case to retreat from that well-settled rule.

Even if *Coker* and its progeny did not foreclose capital punishment here, the two-part test this Court

has articulated in recent Eighth Amendment cases would do so. First, objective indicia overwhelmingly show that society views capital punishment as excessive punishment for child rape. There are only two people on death row in this country for this offense, both in Louisiana. Forty-five 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. Furthermore, no one in America has been executed for any kind of rape in over forty-three years, and relevant international norms reinforce the democratic consensus against such punishment. Second, this Court's jurisprudence demonstrates that although rape is a very serious crime, no rapist should be punished more severely than the average deliberate murderer, who by definition is not subject to capital punishment. This is especially so in the context of *child* rape, which, both as a theoretical matter and as actually prosecuted in Louisiana, presents a particularly acute risk of wrongful conviction.

II. Even if it were permissible under some circumstances to impose the death penalty for child rape, petitioner's sentence would still violate the Eighth Amendment. This Court's jurisprudence requires capital sentencing statutes genuinely to narrow the class of death-eligible defendants in order to separate the most culpable offenders from others who have committed the same crime. But Louisiana's capital rape law contains no narrowing mechanism that can serve to differentiate

petitioner's case in any rational way from the many child rape prosecutions in the State in which the death penalty is neither sought nor imposed. Both of the aggravating factors the jury found here simply confirmed that the victim was a child and was raped. Yet those facts are true in the case of every defendant convicted of this crime. They cannot meaningfully differentiate petitioner from any other defendant convicted of capital rape.

ARGUMENT

I. The Eighth Amendment Bars Imposing the Death Penalty for Rape, Regardless of the Victim's Age.

A. This Court's Decision in *Coker v. Georgia* Precludes Capital Punishment for Any Rape in Which Death Does Not Result.

1. In *Coker v. Georgia*, 433 U.S. 584 (1977), this Court considered whether imposing the death penalty upon a thrice-convicted rapist violated the Eighth Amendment. The defendant, who had prior convictions for rape, murder, and kidnapping, broke into the home of Allen and Elnita Carver shortly after escaping from prison. Once in the home, he tied up Allen in the bathroom and proceeded to rape Elnita at knifepoint. Elnita was only sixteen at the time.

This Court held that the defendant's death sentence constituted cruel and unusual punishment. Justice White's plurality opinion began by noting that, in response to this Court's decision in *Furman*

v. Georgia, 408 U.S. 238 (1972), which required states to revamp their death penalty laws, only six had made any form of non-homicidal rape a capital offense. 433 U.S. at 594-95. The plurality then explained that:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . The murderer kills; the rapist, if no more than that, does not. 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 all repair. *We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.*

Id. at 598 (internal quotations, citations, and footnote omitted; emphasis added).[3]

The majority of the Louisiana Supreme Court asserted that *Coker* does not apply where the victim is under twelve because "children are a class of people that need special protection." Pet. App. 42a-43a, 48a, 57a (quotation omitted). It is true that even though the victim in *Coker* was sixteen, this Court referred to her as an "adult woman." But the

[3] Citations to *Coker* from this point forward are to the plurality opinion unless otherwise indicated.

reasoning of *Coker* leaves no room for the Louisiana Supreme Court's hairsplitting. The *Coker* Court emphasized that no matter how aggravated, rape simply "does not compare with murder." 433 U.S. at 598. This basis for this distinction – that rape, unlike murder, "does not take [a] human life," *id.* – operates independent of the age of the victim. *See also id.* at 599 (emphasizing that even when rape is aggravated the crime does "not involv[e] the taking of life"). Accordingly, the four-Justice plurality, supported by two other Justices, flatly concluded that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." *Id.* at 592; *see also id.* at 600-01 (opinions concurring in the judgment).

The other three Justices echoed the categorical nature of the Court's holding. Concurring in the judgment, Justice Powell explained that the lead opinion "holds that capital punishment *always* – regardless of the circumstances – is a disproportionate penalty for the crime of rape." *Id.* at 601 (opinion concurring in part and dissenting in part) (emphasis in the original). He further underscored that "the plurality draws a bright line between murder and all rapes – regardless of the degree of brutality of the rape or the effect upon the victim." *Id.* at 603.[4] The two dissenters observed that "[t]he

[4] Justice Powell agreed that Coker's sentence constituted cruel and unusual punishment but would have reserved the question whether the Eighth Amendment permitted capital punishment for "an outrageous rape resulting in serious, lasting harm to the victim." *Id.* at 604. Louisiana's statute does not require any such

clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim." *Id.* at 621 (Burger, C.J., dissenting).

Commentators and other authorities likewise understood *Coker* to preclude imposition of the death penalty for any rape in which the victim does not die. A report for Congress noted that "[a]lthough [*Coker*] states the issue in the context of the rape of an adult woman, the opinion at no point seeks to distinguish between adults and children." Congressional Research Serv., Library of Congress, The Constitution of the United States of America: Analysis and Interpretation 1402 n.18 (Johnny H. Killian & Leland E. Beck eds., 1987) (citation omitted). Law review articles echoed this assessment. *See, e.g.*, David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1, 4 (1980) (*Coker* "concluded that the death penalty is excessive per se in cases of rape.").

Prior to the decision in this case, both of the other state supreme courts to consider the constitutionality of post-*Coker* death sentences imposed for child rape agreed with this assessment as well. In *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), the Florida

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findings, and the State did not present any evidence of lasting harm to the victim. Accordingly, even under Justice Powell's view of the law, petitioner's sentence would violate the Eighth Amendment.

Supreme Court considered a death sentence imposed for the violent rape of a seven-year-old girl. The court explained: "The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence to death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Buford*, 403 So. 2d at 951.

The Mississippi Supreme Court invalidated the only other post-*Coker* sentence imposed for child rape before Louisiana enacted its law at issue here. *See Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989). At the relevant time, Mississippi's child rape law, read in tandem with its subsequently enacted aggravating circumstances statute, allowed rape to be punished by death when the offender also attempted or intended to kill the victim. Because there was no proof of such an attempt or intent in the case, the Mississippi Supreme Court vacated the sentence without addressing the constitutionality of a death sentence for child rape. *Id.* at 402-03. But two justices wrote separately to emphasize that they would have preferred to invalidate the child rape law insofar as it allowed the death penalty in the absence of the victim's death. *Id.* at 403 (Robertson, J., concurring). The concurring opinion reasoned that "[t]here is as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions." *Id.* at 406 (emphasis in original). The Mississippi Legislature subsequently amended its

law to forbid capital punishment for non-homicide rape. *See* Miss. Code § 97-3-65(3).

2. In the thirty years since *Coker*, this Court has reinforced *Coker*'s reasoning that person-on-person violence that does not involve killing or at least reckless disregard for human life does not warrant capital punishment. In *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam), decided on the same day as *Coker*, the Court held that imposing a death sentence for aggravated kidnapping violates the Eighth Amendment. Despite the fact that aggravated kidnapping is an entirely different crime than rape, the Court issued its ruling without any discussion, relying solely on its decision in *Coker*.

This Court relied again on the *Coker* rationale in *Enmund v. Florida*, 458 U.S. 782 (1982), invalidating the death penalty in a felony murder case. The defendant there had been sentenced to death for his participation in a robbery that ended in murder, even though the defendant "[did] not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 797. This Court held that even though "robbery is a serious crime deserving serious punishment," the death penalty "is an excessive penalty for the robber who, as such, does not take human life." *Id.*; *see also Tison v. Arizona,* 481 U.S. 137, 157-58 (1987) (reaffirming *Enmund* and allowing the death penalty in felony murder cases when the defendant plays a major role

and displays "reckless indifference toward human life").[5]

3. This Court should not deviate from the dictates of *Coker* and its progeny. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court is] bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Accordingly, when a "well-established rationale upon which the Court based the results of its earlier decisions" dictates a particular outcome, this Court should follow that rationale. *Id.* at 66-67; *see also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and

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[5] State supreme courts, in the couple of instances in which the issue has arisen outside of the context of rape, have relied on the rule established in *Coker* and its progeny that capital punishment is excessive for non-homicidal person-on-person violence. *See People v. Hernandez*, 69 P.3d 446, 464-67 (Cal. 2003) (prosecution for conspiracy to commit murder: imposing the death penalty for a crime that "does not require the actual taking of human life would raise a serious constitutional question" because "[a]lthough the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality stressed that the crucial difference between rape and murder is that a rapist 'does not take a human life'" (quoting *Coker*, 433 U.S. at 598)); *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) (prosecution for aggravated assault against prison guard: "The *Coker* holding leaves no room for the conclusion that any rape, even an 'inhuman' one involving torture and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty.").

dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of prior cases, but also to their explications of the governing rules of law.").

That principle applies here. *Coker* and its progeny rest on the principle that person-on-person violent crime cannot justify capital punishment when death did not result and the perpetrator did not even intend or attempt to kill, or display reckless indifference toward human life. This rule does not necessarily mean that the death penalty can never be imposed for a non-homicide offense. The legislative history of federal laws that allow capital punishment for treason, espionage, air piracy, and mass drug importation explains that the death penalty is available in such cases because these crimes implicate national security or present grave risks to multiple human lives in ways that a single act of non-homicidal person-on-person violence does not.[6]

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[6] Legislators made clear when Congress reinstated the death penalty for espionage and instituted the death penalty for drug "kingpins" as part of the Federal Death Penalty Act of 1994 that they viewed those crimes as causing entirely different harms than rape. Senator Orrin Hatch noted that "the *Coker* plurality opinion stated that 'the rapist, as such, does not take human life.' In a real sense, a drug kingpin does take human life and causes untold violence, and the American people know it." 139 Cong. Rec. S15745-01, S15753 (Nov. 16, 1993). Referring to espionage, Senator Hatch explained: "I cannot think of a better instance where [the death penalty] should be enforceable than in those cases where a person sells out his or her country, and does so for a cheap profit by putting lives in jeopardy and causing the death of other people." 140 Cong. Rec. S1820-01

But the established rationale of *Coker* and its progeny clearly applies here and precludes the imposition of the death penalty for child rape.

It is true enough, as the Louisiana Supreme Court went out of its way to note, that this Court's substantive death penalty jurisprudence "has never been reconsidered or applied by the current Court and its new members." Pet. App. 45a. But this is not a sufficient reason for deviating from precedent. "Th[e] doctrine [of *stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). For over thirty years, courts, prosecutors, and lawmakers have relied on the "bright-line and easily administered" rationale of *Coker* and its progeny. Pet. App. 134a (Calogero, C.J., dissenting). This Court should not repudiate that rationale, inject uncertainty into the law, and extend the death penalty to an entirely new category of cases.

(Feb. 24, 1994). Indeed, in the last case in which a death sentence was imposed for espionage, the court observed that the offense was "worse than murder" because the defendants "turned over information to Russia concerning the most deadly weapon known to man [the nuclear bomb] thereby exposing millions of their countrymen to danger or death." *United States v. Rosenberg,* 109 F. Supp. 108, 110 (S.D.N.Y.), *aff'd*, 204 F.2d 688 (2d Cir. 1953).

B. The National Consensus Against Punishing Child Rape by Death Reinforces the Conclusion That Execution for This Offense Would Constitute Cruel and Unusual Punishment.

To any extent that *Coker* and its progeny do not already control here, this Court's recent Eighth Amendment jurisprudence confirms that petitioner's sentence constitutes cruel and unusual punishment. That jurisprudence requires a two-part analysis: (1) "a review of the objective indicia of consensus"; and (2) "exercise of [this Court's] own independent judgment." *Roper v. Simmons*, 543 U.S. 551, 564 (2005). Each of these inquiries reinforces the conclusion that petitioner's sentence cannot stand.

1. In assessing whether imposing capital punishment comports with objective indicia of legitimacy, this Court looks to (a) the number of states that prohibit the death penalty for the offense at issue; (b) the "[]frequency of its use even where it remains on the books"; and (c) the direction of any change with respect to punishing the crime at issue. *Roper*, 543 U.S. at 567; *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). This Court also has "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion); *accord Roper*, 543 U.S. at 575-78. Each of these factors militates against permitting capital punishment here.

a. The critical question for purposes of surveying states is to what extent jurisdictions beyond the one at hand would allow a defendant such as petitioner to be put to death. In *Enmund*, for example, this Court found that "only eight jurisdictions authorize[d] the imposition of the death penalty" for the crime at issue (vicarious felony murder) under the circumstances of Enmund's case. 458 U.S. at 789. This Court noted that nine other states provided that "a vicarious felony murderer may be sentenced to death . . . absent an intent to kill." *Id.* at 791. But this Court did not count those additional states because – unlike the state in which Enmund was convicted – each precluded capital punishment "absent aggravating circumstances above and beyond the felony murder itself." *Id.* at 792. This Court concluded that the existence of only eight states in which the death penalty was available "weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Id.* at 793.

Subsequent decisions have refused to find a sufficient consensus in favor of capital punishment when even more states would have allowed the death penalty in the case at hand. In *Roper* and *Atkins*, this Court held that the Eighth Amendment barred executing juvenile and mentally retarded offenders, respectively, even though twenty states allowed each practice. *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 314-17.

The situation here is far more stark: Louisiana is the *only* state in which petitioner could be executed

for the crime for which he was convicted. Only four other states even have statutes on the books authorizing the death penalty for child rape: South Carolina, Oklahoma, Montana, and Texas. Each of these statutes restricts the availability of capital punishment to situations when a defendant has a prior conviction for sexual battery or rape of a child; two of them also require a defendant to have served at least a twenty-five year sentence for such an offense, further limiting the availability of the death penalty as a possible punishment.[7] Louisiana's law

[7] *See* S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.) (child rape when defendant previously has been convicted of sexual battery of a child, which carries a minimum twenty-five-year sentence, and jury finds aggravating circumstance beyond defendant's record and age of child); 10 Ok. St. Ann. § 7115(I) (2006 Supp.) (child rape or lewd molestation when defendant previously has been convicted of such an offense); Mont. Code Ann. § 45-5-503 (enacted 1997) (child rape when defendant previously has been convicted of the same crime); Texas Pen. Code § 12.42 (2007 Supp.) (child rape when defendant has previously served at least a 25-year sentence for the same crime). Because none of these statutes has been invoked to sentence a person to death, no court has considered whether any of them is constitutional. The Louisiana Supreme Court claimed that a Georgia statute, enacted in 1999, also allows child rape to be punished by death. Pet. App. 49a. But the Supreme Court of Georgia explained years ago that "[s]tatutory rape" – its term for any kind of rape of a child – "is not a capital crime in Georgia." *Presnell v. State*, 252 S.E.2d 625, 626 (Ga. 1979). The Georgia Legislature's 1999 redrafting of its statutory rape provision did nothing more than clarify an ambiguity in the law's substantive scope. *See State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002).

requires no record of recidivism, and petitioner has no such prior conviction.

The Louisiana Supreme Court insisted that the situation is actually "more complex" because nine other states and the federal government have statutes allowing capital punishment "for other non-homicide crimes which are far less heinous" than child rape. Pet. App. 49a-54a.[8] It is puzzling to assert that crimes for which various jurisdictions authorize *more severe* punishment than child rape are actually "far less heinous" offenses.

In any event, the Louisiana Supreme Court's observation is merely makeweight. Five of the laws the court referenced relate to offenses posing grave threats to national security (treason, espionage, and air piracy);[9] two relate to kidnapping when the

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[8] In fact, only seven of the nine states the Louisiana Supreme Court referenced have laws authorizing capital punishment for non-homicide offenses The court cited South Dakota's kidnapping and Florida's drug kingpin statutes. But the maximum sentence for kidnapping in South Dakota is life imprisonment. *See* S.D. Codified Laws § 22-19-1 (aggravated kidnapping is class B felony) & § 22-6-1 (maximum sentence for class B felony is "life imprisonment"). The Florida drug kingpin statute allows extensive drug importation to be punished by death, but only when the offender "knows that the probable result of such importation would be the death of any person." Fla. Stat. Ann. § 893.135(1)(b)(3).

[9] *See* Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West Supp. 2006). Several other states

victim has not been released alive;[10] and one relates to the mass importation of drugs.[11] Those crimes are so vastly different than the offense at issue here that this Court in *Coker* had no need even to survey states' punishments for them. *See Coker*, 433 U.S. at 593-96; *see also Enmund*, 458 U.S. at 793 & n.15 (rejecting dissent's attempt to enlarge survey beyond the particular "crime at issue"). Nothing has changed in that respect. *See supra* at 20-21 n.6. Furthermore, none of those jurisdictions has imposed a single death sentence for any of these crimes in over forty-three years. Consequently, whatever the legal status of those various capital punishment statutes, they provide no cover for the State here.[12]

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not mentioned by the Louisiana Supreme Court have similar laws. *See, e.g.*, Ga. Code Ann. §§ 16-5-44, 16-11-1 (West Supp. 2007); 720 Ill. Comp. Stat. 5/30-1 (West Supp. 2007).

[10] Colo. Rev. Stat. § 18-3-301 (capital punishment permissible "if the person kidnapped was [not] liberated alive prior to the conviction of the kidnapper"); Idaho Code § 18-4502, 4504 (capital punishment permissible if "the kidnapped person has [not] been liberated unharmed" at time of imposition of sentence). Montana has a similar statute, Mont. Code Ann. § 45-5-303, but is already included in the Louisiana Supreme Court's count by virtue of its child rape statute.

[11] 18 U.S.C. § 3591(b)(1).

[12] To the extent there is any utility in surveying statutes outside of those establishing punishment for child rape, the national trend of treating sex offenders as mentally ill and civilly committing them for mandatory medical treatment would be far more informative than reviewing how states

b. The exceptionally infrequent use of the death penalty to punish child rape further illustrates the national consensus against such punishment. This Court stated in *Enmund* that "[s]ociety's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made." 458 U.S. at 794. In particular, the Court observed that only 3 of 739 inmates on death row for whom sufficient data were available were sentenced to die for conduct like the defendant's. *Id.* at 795. In *Atkins*, this Court concluded that the practice of executing mentally retarded offenders "ha[d] become truly unusual, and it [was] fair to say that a national consensus ha[d] developed against it" because only five states over seventeen years had executed offenders with an IQ less than 70. 536 U.S. at 316. In *Roper*, this Court emphasized that "even in the 20 states without formal prohibition on executing juveniles, the practice [was] infrequent. . . . In the past 10 years, only three ha[d] done so . . . ." 543 U.S. at 564-65 (2005).

No one in America has been executed in over forty-three years for any kind of rape, a period stretching back more than a dozen years before *Coker*. Furthermore, even though Louisiana's child rape statute has been on the books for twelve years, and four other states currently have capital rape statutes, petitioner

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punish crimes like treason and air piracy. *See generally Kansas v. Crane*, 534 U.S. 407, 414 (2002); *Seling v. Young*, 531 U.S. 250, 264 (2001) (upholding potentially permanent civil commitment).

is one of only two people in the United States actually to receive a death sentence under one of these statutes. There are currently over 3300 people on death row in America, and petitioner is one of only two who did not commit murder. Death Penalty Information Center, *Facts About the Death Penalty* 2 (2008). The other offender is Richard Davis, whom the State of Louisiana convicted in late 2007 of child rape. *See State v. Davis*, Case No. 00262971.

Prosecutorial practices confirm that society views the death penalty as disproportionate to the offense of child rape. This Court noted in *Enmund* that a lack of prosecutorial vigor in pursuing the death penalty "would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive." 458 U.S. at 796. The State of Louisiana has initiated over 180 prosecutions for child rape since the 1995 law at issue here went into effect. *See* J.A. 12-13. To the best of petitioner's knowledge, the State, in *every one* of these cases, has offered the defendant the opportunity to plead guilty in exchange for a sentence of life imprisonment. As far as petitioner is aware, prosecutors have sought the death penalty at trial only five times.

c. Contrary to the Louisiana Supreme Court's suggestion, Pet. App. 55a, there exists no discernible trend away from this longstanding national consensus. Juries have returned death sentences in child rape prosecutions in only two cases over the past dozen years. Such punishment remains a freak-

ish exception to the typical sentence of imprisonment imposed in the thousands of similar cases across the country each year.

It is true, as the Louisiana Supreme Court noted, that "even after [this Court's decision] in *Coker*, five states nevertheless have capitalized child rape." Pet. App. 54a.[13] Yet over the same thirty-one year period, the two states that had capital child rape statutes prior to *Coker* have disallowed the death penalty for the crime. *See* Miss. Code § 97-3-65(3); *Welsh v. State*, 850 So. 2d 467, 468 n.1 (Fla. 2003). Furthermore, since *Coker*, at least six other state legislatures have rejected such proposed legislation out of hand.[14] The willingness of state legislatures to

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[13] As noted above, the four state laws besides Louisiana's all reserve the possibility of capital punishment for cases in which the defendant has a prior conviction for sexual assault or rape of a child. *See supra* at 23-24 & n.7. These statutes may evince a greater concern with recidivism than the crime of child rape itself. *See, e.g., Ewing v. California*, 538 U.S. 11, 24 (2003) (noting that recent three strikes legislation "responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals").

[14] Those six states are Alabama, California, Pennsylvania, Tennessee, Virginia, and Utah. Bills in five states failed to get out of committee. *See* H.B. 335, Regular Sess. (Al. 2007); AB 35, Regular Sess. (Cal. 1999); H.B. 2779, Regular Sess. (Pa. 2005); H.B. 2924, Regular Sess. (Tenn. 2006); S.B. 271, Regular Sess. (Va. 1998). A provision capitalizing child rape in a bill proposed in Utah similarly failed to make it out of committee, *see* H.B. 86, Regular Sess. (Ut. 2007), even though the

vote down death penalty legislation represents a substantial condemnation of the proposals, "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime." *Atkins*, 536 U.S. at 315; *see also California Department of Corrections v. Morales*, 514 U.S. 499, 521 (1995) (noting the "national trend toward 'get-tough-on-crime' legislation") (Stevens, J., dissenting).

In any event, whatever movement might be said to exist here is not nearly as forceful as the one this Court found inconsequential in *Coker*. There, this Court noted that "the most marked indication" of society's view of capital punishment for a certain offense at that time was "the legislative response to [its 1972 *Furman* decision]." *Coker*, 433 U.S. at 594 (quotation omitted). During the five year period after *Furman*, six states enacted capital rape statutes (three of which made the death penalty *mandatory* for the offense). *Id.* at 594-95. This Court was unmoved.

d. International norms reinforce the unacceptability of imposing capital punishment for child rape. This Court noted in *Coker* that only three out of 60 "major nations in the world" allowed the death penalty for any kind of rape in which death did not result. 433 U.S. at 596 n.10. Today, no Western nation authorizes the death penalty for any kind of

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remainder of the bill eventually became law. *See* H.B. 86 (3rd substitute), Regular Sess. (Ut. 2007).

rape. Only a sliver of the countries admitted to the United Nations does so, the most prominent being China, a country that also allows capital punishment for tax evasion and other economic and nonviolent offenses. *See* Br. *Amici Curiae* of Leading British Law Associations et al.; Peter D. Nestor, *When the Price Is Too High: Rethinking China's Deterrence Strategy for Robbery,* 16 Pac. Rim L. & Pol'y J. 525, 538 (2007). The handful of other countries that Louisiana seeks to have the United States join in authorizing the death penalty for non-homicide rape include Saudi Arabia and Egypt, which authorize such punishment for reasons rooted at least partly in the subjugation of women.[15]

Since *Coker*, the United States also has become a signatory to the American Convention on Human Rights (ACHR), Article 4(2) of which provides that the death penalty "shall not be extended to crimes to which it does not presently apply." ACHR: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144

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[15] Saudi Arabia, Egypt, United Arab Emirates, Nigeria, and Jordan, all of which allow the death penalty for rape, appear to derive their criminal codes from Shari'a, which also subjects individuals to the death penalty for blasphemy, apostasy, adultery, prostitution and homosexuality. *See, e.g.*, *Gay Nigerians Face Sharia Death*, BBC News, Aug. 10, 2007, *http://news.bbc.co.uk/2/hi/africa/6940061.stm*. In some countries, under Shari'a, survivors of rape are themselves subjected to significant corporal punishment. *See, e.g.*, *Rape Case Calls Saudi Legal System Into Question*, MSNBC, Nov. 21, 2006, http://www.msnbc.msn.com/id /15836746; Dan Isaacs, *Court in Nigeria Spares Woman from Stoning*, Daily Telegraph, Mar. 26, 2002, at 4.

U. N. T. S. 146 (entered into force July 19, 1978) (cited in *Roper*, 543 U.S. at 576). Thus, not only does Louisiana's death penalty for child rape isolate it on both the national and world stages, but it is at odds with an international treaty.

2. This Court's jurisprudence demonstrates that it independently views the death penalty as excessive punishment for the crime of child rape. This Court has "identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." *Atkins*, 536 U.S. at 319 (quoting *Gregg*, 428 U.S. at 183).

"With respect to retribution . . . the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. The Court already has expressed in *Coker* its own "abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *Coker*, 433 U.S. at 598 (quoting *Gregg*, 428 U.S. at 187). In so holding, *Coker* refused to accept "the notion . . . that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer" in the average murder case, who by definition is not subject to the death penalty. *Coker*, 433 U.S. at 600; *see also Roper*, 543 U.S. at 571 (independently concluding that the death penalty is excessive when a defendant's culpability is less than that of "the average murderer").

With respect to deterrence, the only empirical study of Louisiana's capital child rape statute concluded that it has "little impact on variables associated with deterrence." Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 Crim. Just. Pol'y Rev. 156, 184 (2002). Because capital cases require more time to prosecute than non-capital cases, "passing the [capital rape statute] has increased the burden of prosecuting a defendant," thereby encouraging prosecutors to reduce charges in serious rape cases. *Id.* at 185. The result is that "prosecutors now work harder for defendants to be punished less harshly than before the amendment." *Id.* Several child advocacy and victim support groups also assert that whatever additional deterrence might theoretically result from equalizing the prescribed punishment for child rape and murder is more than offset by removing the disincentive for sex offenders to kill their victims. *See* Br. of the Nat'l Assoc. of Social Workers et al.

Finally, this Court noted in *Atkins* that imposing the death penalty is inappropriate when the type of prosecution at issue presents "a special risk of wrongful execution." 536 U.S. at 321. In child rape cases, the risk of wrongful conviction is especially pronounced. Child testimony is subject to suggest-ibility in ways that adult testimony is not. *See*, Charles Brainerd & Peter A. Ornstein, *Children's Memory for Witnessed Events*, in The Suggestibility of Children's Recollections 14-19 (John Doris, ed. 1991). Children are also uniquely subject to

pressures from state social services agencies. As this case vividly demonstrates, such agencies have the power to encourage a child to tell a certain story – indeed, to name a certain perpetrator – on pain of being placed in foster care. *See supra* at 8. Moreover, the prosecution, as here, frequently lacks any "positive evidence" linking the defendant to the charged crime. Pet. App. 14a. The upshot of these and other evidentiary hydraulics is that child rape prosecutions "are 'he said, she said' cases that ultimately rely on the jury's assessment of the relative credibility of opposing witnesses" and "it is virtually impossible for the jury not to make an occasional credibility mistake." *Ex Parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. 2005) (Cochran, J., concurring).

This risk of wrongful execution is exacerbated by the practices of Louisiana prosecutors in child rape cases. That Louisiana prosecutors invariably offer child rape defendants the opportunity to plead out to life imprisonment means that the death penalty is a genuine possibility only for those defendants who maintain their innocence and insist upon a trial. Thus, those defendants most likely to be innocent of child rape are also the ones most likely to be subject to the death penalty. *Cf. United States v. Jackson*, 390 U.S. 570, 583 (1968) (eliminating capital punishment from the Federal Kidnapping Act, which could be applied only if the defendant demanded a jury trial, because the statute "tend[ed] to discourage defendants from insisting upon their innocence and demanding trial by jury"). The Eighth Amendment

should not sanction the expansion of the death penalty to this new category of cases.

II. Louisiana's Capital Rape Law Does Not Genuinely Narrow the Class of Offenders Eligible for the Death Penalty.

Even if it were permissible under some circumstances to punish child rape by death, Louisiana's law would still violate the Eighth Amendment because it fails to differentiate between child rapes that are deserving of capital punishment and those that are not.

At the heart of every death penalty case is the question of how a jury will exercise its "discretion . . . on a matter so grave as the determination of whether a human life should be taken or spared." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (quotation omitted). Accordingly, this Court has long made clear that:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be imposed in a way that obviates standardless [sentencing] discretion.

Id. at 428 (quotation omitted and second alteration in original). A capital punishment scheme, in other

words, "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the crime at issue]." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *accord Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988); *Godfrey*, 446 U.S. at 428-29; *Gregg*, 428 U.S. at 189-95 (joint opinion of Stewart, Powell, and Stevens, JJ.).

When capital punishment statutes lack clear and effective narrowing mechanisms, not only do such statutes fail to separate the truly worst offenders from others but they open the door to the pernicious influence of race discrimination and other invidious considerations. *Furman*, 408 U.S. at 249-51 (Douglas, J., concurring); *see also Graham v. Collins*, 506 U.S. 461, 496-97 (1993) (Thomas, J., concurring) ("For 20 years, we have acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing – a danger we have held to be inconsistent with the Eighth Amendment."). Racial prejudice is "the paradigmatic capricious and irrational sentencing factor," *id.* at 484, and standardless capital statutes pose "an unacceptable risk that a sentencer will succumb to either overt or subtle racial impulses or appeals."

Tuilaepa v. California, 512 U.S. 967, 992 (1994) (Blackmun, J., dissenting).[16]

States generally fulfill their constitutional obligation to guard against this and other types of "bias or caprice," *Tuilaepa*, 512 U.S. at 973 (majority opinion), by requiring juries in capital cases to find some "aggravating circumstance" intended to distinguish the defendant from others convicted of the same death-eligible offense. *Id.* at 971-72. An aggravating circumstance must "provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Godfrey,* 446 U.S. at 427 (alteration in original and quotation omitted). "If the sentencer fairly could conclude that an aggravating circum-

[16] To appreciate the possibility that race discrimination will metastasize in any vagaries of Louisiana's law, one only has to look at the nation's history of capital rape prosecutions. The practice originated in the antebellum South, where blacks were hanged (and often lynched) for raping white women; "[n]o white rapists are known to have been hanged." Stuart Banner, The Death Penalty: An American History, 139 (2002). Even during the mid-twentieth century period ending with the last execution in this country for rape in 1964, over 89% of those executed for rape were black, while blacks and whites were executed for murder in almost identical numbers. United States Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment 1930-1967, at 7 (Aug. 1969). All fourteen rapists Louisiana executed during the 1940's and 1950's were black. *See* Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties*, The Angolite, Sept./Oct. 1996, at 36. *See generally* Br. of the American Civil Liberties Union and NAACP Legal Defense Fund.

stance applies to *every* defendant subject to the death penalty, the circumstance is constitutionally infirm." *Arave*, 507 U.S. at 474; *see also Zant*, 462 U.S. at 873-80 (state law invalid if it fails to delineate a "subclass" of death-eligible offenders); *Godfrey,* 446 U.S. at 428-29 (aggravating circumstance invalid because sentencer "could fairly characterize almost every murder" as satisfying it).

That is precisely the situation here. Louisiana law at the time of this crime classified rape of a "victim [who] is under the age of twelve years" as capital rape, La. R.S. 14:42(A)(4) & (D)(2)(a) (it now says under thirteen years), and provides that a death sentence may be imposed if the jury finds that "at least one statutory aggravating circumstance exists." La. C.Cr.P. art. 905.3; *see also* Pet. App. 59a. Yet the only two aggravating facts that the jury found in this case were (1) that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) that "the victim was under the age of twelve years." La. C.Cr.P. art. 905.4(A)(1) & (10); *see* Pet. App. 59a. The first aggravating factor simply restates the crime of conviction, and the second simply restates one of its elements. The jury's discretion regarding whether to sentence petitioner to death thus was not limited in any way.

The Louisiana Supreme Court nevertheless held in a pre-enforcement challenge that the State's capital rape sentencing scheme could legitimately operate in this manner. The court reasoned that because "[t]he class of offenders is limited to those who rape a child

under the age of twelve[,] . . . not every rapist will be subject to the death penalty." *State v. Wilson,* 685 So. 2d 1063, 1072 (La. 1996), *cert. denied* 520 U.S. 1259 (1997). But this analysis misses the point entirely. Given that the death penalty is not a constitutionally available punishment for raping an adult, *see Coker*, 433 U.S. at 598-600, the only fact that could conceivably make a perpetrator of rape death-eligible in the first place is that the victim was a child.

What is more, the class of defendants subject to prosecution for child rape is extremely large. There are roughly 45,000 reports per year of sexual abuse of children under twelve, triple the amount of reported murders.[17] And Louisiana law defines child "rape" in terms that sweep in almost all variations of such abuse. The law captures all "anal, oral, or vaginal sexual intercourse," La. R.S. 14:42(A), and "[a]ny penetration, however slight . . . is sufficient" to satisfy the statute. *State v. Self,* 719 So. 2d 100, 101 (La. Ct. App. 1999) (quotation omitted). The statute does not require proof of any use of force. The

[17] In 2004, the most recent year for which statistics are available, 45 states reported more than 40,000 cases of sexual abuse of victims under 12. *See* 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. The 50 states reported 17,357 murders during that same period. Hsiang-Ching Kung et al., Nat'l Center for Health Statistics, *Deaths: Preliminary Data for 2005* tbl.2 (2005), http://www.cdc.gov/nchs/data/hestat/prelimnarydeaths05_tables.pdf#1 (reporting data from both 2004 and 2005).

victim's age automatically establishes a lack of "lawful consent," and a "[l]ack of knowledge of the victim's age shall not be a defense." La. R.S. 14:42(A) & (A)(4).

The predictable result of this situation is that prosecutors will refuse to seek, and juries will refuse to impose, the death penalty in the vast majority of child rape prosecutions. And since the statutory scheme does not provide any "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not," *Godfrey,* 446 U.S. at 427 (alteration in original and quotation omitted), the death sentences meted out once every several years are bound to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman,* 408 U.S. at 309 (Stewart, J., concurring).

The Louisiana Supreme Court also suggested that petitioner's sentence was valid because it comported with this Court's holding in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *See* Pet. App. 60a-61a. In *Lowenfield,* the defendant was convicted of murder with the intent "to kill or inflict great bodily harm upon more than one person," 484 U.S. at 233 (quoting La. R.S. 14:30(A)(3)), and the jury sentenced him to death based on the aggravating circumstance that the crime "risk[ed] death or great bodily harm to more than one person," *id.* at 235 (quoting La. C.Cr.P. art. 905.4(d)). This Court held that "the fact that the aggravating circumstance duplicated one of

the elements of the crime d[id] not make this sentence constitutionally infirm." *Id.* at 246.

As numerous courts have recognized, however, *Lowenfield* is limited to situations in which the element or elements of the crime that are duplicated themselves perform the constitutionally required act of "narrowing the class of death-eligible [offenders]." *Id.* at 244-46; *see also United States v. McCullah*, 76 F.3d 1087, 1108 (10th Cir. 1996), *cert. denied* 520 U.S. 1213 (1997) ("Under *Lowenfield*, an aggravating factor that does not add anything above and beyond the offense is constitutionally permissible" only if "the statute itself narrows the class of death-eligible defendants."); *McConnell v. State*, 102 P.3d 606, 621 (Nev. 2004) (aggravating factor that duplicates element of offense is permissible only when offense itself is "narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted"); *State v. Young*, 853 P.2d 327, 352 (Utah 1993) (duplicative aggravating circumstance is permissible only when substantive capital offense "narrows the class of offenders subject to the death penalty during the guilt phase of the trial"). That is not the case here. Assuming rape can ever be punished by death, the fact that the victim was a child makes petitioner only minimally death eligible – the least culpable type of offender subject to capital punishment. Consequently, the age of the victim does not appropriately narrow the large class of death-eligible defendants convicted of rape.

The infirmity of Louisiana's law is borne out by the very fact that petitioner and Richard Davis are the only two people out of over 180 prosecuted in the State who have received death sentences for child rape. Petitioner is a black man whose only criminal history prior to this case was passing some bad checks. He was convicted of committing a single act of rape. Although the rape, as is "very often" the case, was "accompanied by physical injury," *Coker,* 433 U.S. at 597-98, the victim's physical injuries fully healed in two weeks. J.A. 48-49. Richard Davis was convicted of repeated sexual interactions with his victim, but those interactions apparently lacked any physical force or trauma. Loresha Wilson, *Death for Rapist: Jury Says Man Should Die for Assaulting 5-Year-Old,* Shreveport Times, Dec. 13, 2007, http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20071213/NEWS03/712130320/1062/ NEWS03.

There is no reason why these two cases should be separated so profoundly from the scores of others across the State over the last several years – let alone from the thousands per year across the country. The State of Louisiana recently has prosecuted dozens of capital rape cases in which defendants raped younger victims; committed multiple offenses (both in terms of assaulting several victims and the same victim multiple times); and inflicted more severe injuries. J.A. 13-27.[18] Yet not

[18] For example, one defendant "was convicted of raping and attempting to kill his fellow church congregant's eleven-year-old daughter. As she screamed during the rape he stabbed her

one of these offenders received a death sentence. Indeed, in at least forty cases since the enactment of Louisiana's capital rape law, the State has convicted people of *killing* children; none of these offenders received a death sentence either. J.A. 13, 35-45.

As the Louisiana Supreme Court itself has acknowledged, an "inference of arbitrariness [arises] if a jury's recommendation of death [is] inconsistent with sentences imposed in similar cases from the same jurisdiction." *State v. Sonnier*, 380 So. 2d 1, 7 (La. 1979). Here, where juries in child rape cases in Louisiana are not required to find a single aggravating circumstance beyond the elements of the crime of child rape itself, and where the elements themselves do not perform the required narrowing, the arbitrariness in the sentencing system is palpable. It is too much for the Eighth Amendment to tolerate.

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multiple times. . . . When the girl regained consciousness, [the defendant] slashed her throat." J.A. 14. He was sentenced to fifty years for attempted murder and twenty-five for rape. *Id.* Another defendant "repeatedly rap[ed] three girls, one of whom was his daughter. The ages of the little girls at the time of the rape were five, seven, and nine." J.A. 15. Even though the defendant knew that he was HIV positive when he committed the rapes, he was not sentenced to death. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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