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

REPLY BRIEF FOR PETITIONER

Jelpi P. Picou
G. Ben Cohen
THE CAPITAL APPEALS PROJECT
636 Baronne St.
New Orleans, LA 70113

Martin A. Stern
Ravi Sinha
ADAMS AND REESE LLP
4500 One Shell Square
NEW ORLEANS, LA 70139

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

PROPOSED LEGISLATION

OTHER AUTHORITY

REPLY BRIEF FOR PETITIONER

The State does not dispute that Louisiana is the *only* jurisdiction in the United States in which Patrick Kennedy could be executed for the crime at issue here – a first conviction for child rape with no aggravating facts beyond the elements of the crime. Nor does the State offer any legitimate reason to condone such punishment, and thereby to re-introduce the prospect of the death penalty into a realm of prosecutions from which it has absent for almost half a century. Petitioner's sentence should be reversed.

I. The Eighth Amendment Bars Imposing the Death Penalty for Child Rape.

The State contends that neither *Coker v. Georgia*, 433 U.S. 584 (1977), and its progeny nor the two-step analysis required by *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), dictates that petitioner's death sentence is unconstitutional. The State is wrong on both counts.

A. In 1977, despite a handful of recently enacted capital rape statutes, this Court found a national consensus against punishing rape with the death penalty and expressed 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." 433 U.S. at 598 (quotation omitted). This Court reasoned that rape, unlike murder, does not "involve the unjustified taking of a human life." *Id.* Neither the State nor its *amici* respond to these portions of the *Coker* opinion. Instead, they emphasize that this Court described the

sixteen-year-old victim in that case as an "adult woman." Resp. Br. 25-26; Texas Br. 6-7.

This is true enough. But pointing out the age of the victim in *Coker* does not answer petitioner's argument (Petr. Br. 20-21) that the *rationale* of *Coker* applies with equal force to child rape. At the risk of stating the obvious, this Court writes opinions for a reason. Opinions elucidate the principles of law upon which specific holdings are based. They provide stability, predictability, and public respect for the rule of law. When, as here, a litigant offers no justification for why the reasoning of a prior decision is inapplicable, this Court should follow its earlier reasoning.

Following the reasoning of *Coker* here would not, as the State of Texas would have it (Texas Br. 5-6, 10-13), require this Court to adopt any "implicit" view that the death penalty is always impermissible when death does not result. As petitioner *explicitly* stated in his opening brief, *Coker* and its progeny dictate merely that "person-on-person violent crime" cannot justify capital punishment when death does not result. Petr. Br. 26. That principle does not implicate crimes such as treason and terrorism. But that principle does apply here. It also, contrary to the State's suggestion (Resp. Br. 31), is consistent with this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987). A violent crime in which the victim dies, at least in part due to the defendant's reckless disregard for human life, is worse than one in which the victim continues living. *See Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (discussing *Tison*).

B. Nothing in the State's *Atkins/Roper* analysis provides any reason to question the conclusion that

imposing the death penalty here constitutes cruel and unusual punishment.

1. Despite the State's protestations, all three objective indicia reinforce the national consensus against capital punishment in the context of this case.

a. *Number of states.* Petitioner explained in his opening brief that the key question in surveying states is how many besides the one at hand would allow petitioner to be sentenced to death. Petr. Br. 29-31.[1] If a given state allows the death penalty for the basic crime of which the petitioner was convicted but requires the presence of certain aggravating facts that are not present in petitioner's case, then that state should be counted as opposing the death penalty. *See Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Coker*, 433 U.S. at 593-96.

---

[1] Contrary to the State's repeated references to the thirty-seven "death penalty jurisdictions," this Court has made it plain that states that bar the death penalty across the board also count for purposes of assessing whether a national consensus exists against the death penalty in a particular context. *See, e.g.*, *Roper*, 543 U.S. at 564 ("30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it, but . . . exclude juveniles from its reach."); *Atkins*, 536 U.S. at 313-15. And contrary to the Missouri Governor's argument (Br. 11-12), "the *absence*" in a state of legislation "affirmatively authorizing the death penalty" for a particular crime signifies that state's stance against it. *See Enmund*, 458 U.S. at 789-93; *Coker*, 433 U.S. at 593-94. This Court inquired in *Roper* and *Atkins* whether certain jurisdictions had laws expressly exempting juvenile and mentally retarded offenders from the death penalty because those jurisdictions had laws on the books otherwise allowing capital punishment for the crimes at issue. Here, that is not the case.

The State does not dispute that this methodology shows that Louisiana is the *only* state in which petitioner could have received a death sentence. In the four states besides Louisiana that recently have enacted laws allowing the death penalty for child rape, the statutes condition death-eligibility on the defendant's having a prior conviction for sexual battery or rape of a child. *See* Petr. Br. 30 & n.7. Notwithstanding the State of Texas's irresponsible suggestion to the contrary (Texas Br. 2), petitioner has no such prior conviction. Before this case, he had never even been *charged* with child rape or any other violent offense.[2] The punishment at issue here, in short, is not only cruel and unusual; it is cruel and unique.

The State also references capital rape statutes in Florida and Georgia (Resp. Br. 37-39), but petitioner could not have received a death sentence in those states either. Florida law does not allow the death penalty for child rape. Although it has a pre-*Coker* statute on the books calling the crime a "capital offense," another statute – which the State ignores – expressly provides that sentencing courts shall sentence offenders to life imprisonment "[i]n the event the death penalty . . . is held to be unconstitutional by the Florida Supreme Court." Fla. Stat. § 775.082(2).

---

[2] The State of Texas bases its assertion that petitioner is a "recidivist" on an allegation from one witness during the penalty phase of petitioner's trial – an allegation the jury was never required to evaluate. Even if the allegation had been credible, it would not have satisfied Texas's or any of the other states' recidivism requirements, each of which require the defendant to have a prior *conviction* for child rape. In any event, the Jefferson Parish Sheriff's Office had previously determined that the allegation the witness made against petitioner was *not* credible. Tr. 1439.

The Florida Supreme Court has done just that, *see Buford v. State*, 403 So. 2d 943 (Fla. 1981), and has made it clear that "[t]he crime of sexual battery on a child less than twelve set forth in Florida Statutes section 794.011(2)(a) is referred to as 'capital' sexual battery" in the Florida statutory code only as a "historical[]" matter. *Welsh v. State*, 850 So. 2d 467, 468 n.1 (Fla. 2003). The failure of the Florida Legislature to repeal the superseded penalty is thus meaningless.

Nor does the 1999 Georgia legislation to which the State refers authorize capital punishment for child rape. That enactment merely clarified that when a female rape victim is "less than ten years of age," the victim's youth conclusively establishes the use of force. *See* Ga. Code Ann. § 16-6-1(a)(2); *State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002). To be sure, the Georgia Supreme Court stated after petitioner filed his opening brief that "[p]rior to the 1999 enactment, the death penalty was statutorily authorized under" a different Georgia statute, "[Ga. Code] § 16-6-1(b)." *State v. Velazquez*, ___ S.E.2d ___, 2008 WL 480078, at *2 (Ga. Feb. 25, 2008). But the capital punishment reference in Ga. Code § 16-6-1(b) is part of the state's long-standing general rape law, which applies to victims of all ages and has been treated as a dead letter since *Coker.* Even if operative, that statute does not allow capital punishment unless a jury finds an aggravating circumstance beyond the elements of the offense. *See* Ga. Code Ann. §§ 16-6-1(b), 17-10-30. The jury was not asked to – and did not – find any such aggravating fact in this case.

In any event, even if some or all of the six other states with capital rape statutes on the books could be counted in the State's favor, it still would not matter.

In *Enmund*, eight states authorized capital punishment for the offense at issue, and this Court held that a national consensus existed against such punishment. 458 U.S. at 793. The *Enmund* Court also suggested that even if as many as seventeen states were treated as allowing capital punishment for a given crime, that tally would still "weigh[] on the side of rejecting capital punishment for the crime at issue." *Id.* The numbers in this case do not approach that level under any method of counting.[3]

Finally, the State argues that the prevalence of sex offender registration laws somehow indicates "a society more comfortable with the severe punishment and deterrence of child rapists." Resp. Br. 47 (quotation omitted). Yet the very premise of sex Registration requirements – a premise necessary for their

---

[3] The Governor of Missouri (Br. 4) speculates that the current legislative judgment with respect to punishing child rape might be skewed because "*Coker* has distorted any debate on this issue for a generation." Yet the Governor provides not one speck of evidence showing that debate has actually been distorted in Missouri or anywhere else. And in light of "the general popularity of anticrime legislation," *Roper*, 543 U.S. at 566 – including purely symbolic anticrime legislation, *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 531-33 (2001); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda,* 1 Buff. Crim. L. Rev. 67, 103 (1997) – the suggestion that any legislative body has held back with respect to prescribing harsh punishment for sex offenders seems exceedingly dubious. In any event, this Court in *Coker* itself confronted a situation in which sixteen states had allowed rape to be punished by death prior to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), but only six had re-enacted such statutes in the uncertain shadow of that decision. This Court did not adjust, much less abandon, its objective analysis based on any speculation regarding *Furman*'s effect on the country's legislative landscape. *See Coker*, 433 U.S. at 593-96.

constitutionality, *see Smith v. Doe*, 538 U.S. 84 (2002) – is that they are *non-punitive* measures designed to regulate the behavior of offenders who are not even incarcerated. Consequently, such laws reveal nothing about public attitudes toward punishing sex offenders. Even if registration laws were lumped in with related efforts to incapacitate convicted sex offenders, that goal is fully achieved by life imprisonment without the possibility of parole – the sentence petitioner will receive if his sentence is reversed.

b. *Actual sentences.* Despite the fact that La. R.S. 14:42 has been in effect for thirteen years, the State does not dispute that petitioner is one of only two defendants actually sentenced to death under the statute. Nor does the State deny that no one has been sentenced to death during the eleven years that Mont. Code § 45-5-503 has been on the books or in the thirty-one years since *Coker* in which Georgia has had a statute on the books arguably allowing the death penalty for child rape. (Even though some confusion has surrounded the post-*Coker* import of Ga. Code Ann. § 16-6-1(b), it is telling that no prosecutor or elected official has ever sought to clarify the situation, much less to enforce that law.) The State contends, however, that actual sentencing decisions belie a national consensus against the death penalty for child rape because "it appears that Louisiana capital sentencing jurors have returned a death sentence in two out of five cases in which prosecutors sought it." Resp. Br. 42.

The State's statistical argument misses the mark. The Eighth Amendment is concerned with punishment that is "unusual" in absolute terms, without regard to how often prosecutors request it from juries. Accord-

ingly, this Court consistently has assessed the numbers of individuals who were actually executed or residing on death row, without regard to how often prosecutors had actually sought such sentences. *See Roper*, 543 U.S. at 564-65 and *id.* at 614 (Scalia, J., dissenting) (surveying number of states who recently had executed juvenile offenders and noting that 123 such offenders were on death row); *Atkins*, 536 U.S. at 316 (conducting same analysis with respect to mentally retarded offenders and citing source indicating that 35 such offenders had been executed since 1976); *Enmund*, 458 U.S. at 794-95 (surveying number of individuals recently executed and on death row "for crimes such as petitioner's"); *Coker*, 433 U.S. at 596-97 (same with respect to death sentences for rape). Here, the simple reality is that a total of *two* people convicted of child rape – out of hundreds of thousands if not millions of such cases across the country over the past few decades – are on death row. *See* Petr. Br. 45 (estimating 45,000 cases of child sexual abuse per year); Texas Br. 23-24 (estimating 80,000 reported cases of child sexual abuse each year plus numerous unreported cases). No one has been executed for any kind of non-homicidal rape in over forty years.

The State notes that prosecutors' "plea bargaining and charging decisions" depend on "'the likelihood that a jury would impose the death penalty if it convicts.'" Resp. Br. 45 & n.44 (quoting *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring)). To the extent that this is true, it reveals a localized consensus against capital punishment for child rape even in Louisiana. In contrast to murder prosecutions, in which the State commonly insists on seeking the death penalty, the State does not dispute

that it has offered defendants the opportunity to plead guilty to life in prison in *every* child rape prosecution it has commenced under La. R.S. 14:42.

The two cases in which Louisiana juries have returned death sentences do not even suggest that cross-sections of Louisiana citizens are willing to impose capital punishment based on distinctly egregious instances of child rape. *See* Petr. Br. 48-49. Rather, the State in those two cases was simply exceptionally successful in "death-qualifying" juries and was prosecuting defendants who not only refused to plead guilty but were disadvantaged in some respect. Here, the State disqualified forty-four potential jurors from the juror pool and ultimately persuaded a predominantly white jury in Jefferson Parish – based on no "positive evidence" of guilt – to sentence a 300-pound black man who is borderline mentally retarded to death. Petr. Br. 13.

c. *Trends.* Faced with an overwhelming national consensus against the death penalty in these circumstances, the State lastly urges this Court to condone petitioner's sentence based on what it calls "a significant trend toward the capitalization of child rape." Resp. Br. 38. Once again, however, the State can make its argument only by means of ignoring this Court's precedent, which renders any such trend irrelevant here. In any event, no real trend exists that supports imposing the death penalty in this case.

This Court's precedent dictates that evidence of a trend can be decisive only when it acts as something of a tiebreaker. In *Atkins* and *Roper*, this Court considered the "direction of the change" in state laws because fully *twenty* states in each case allowed the death

penalty under the circumstances at issue. *Atkins*, 536 U.S. at 313-16; *see also Roper*, 543 U.S. at 564. By contrast, in the last case in which only a handful of states allowed capital punishment for the crime at issue, this Court did not find it necessary to examine any evidence of trends. *See, e.g.*, *Enmund*, 458 U.S. at 789-93 (eight states). When a clear national consensus exists against the death penalty under the circumstances, at issue, that reality controls.

Even if evidence of trends could be relevant here, it would not aid the State. In *Coker,* six states over a period of five years had enacted statutes making at least some form of non-homicidal rape a capital offense. 433 U.S. at 594-95. And over those five years, thirty individuals convicted of rape had been sentenced to death. *See* Brief of Respondent at 21, *Coker v. Georgia*, 433 U.S. 584 (No. 75-5444), 1977 WL 189754. This Court nevertheless held that imposing the death penalty against Coker constituted cruel and unusual punishment.

The evidence of any current trend toward allowing the death penalty for child rape pales in comparison. None of the states that recently have enacted legislation concerning child rape allow the death penalty for nonrecidivists like petitioner. And even if this Court were to look beyond the punishments that other jurisdictions allow for a first conviction for child rape, the calculus would not change materially. Viewed against the backdrop of forty-four years without a single execution for rape of any kind, the enactments of only four states over thirteen years (in the midst of one other state's repealing its law and six other states' rejecting such proposals, *see* Petr. Br. 35 & n.14) hardly signify a shift in societal attitudes. As

this Court observed in *Roper*, "[i]t would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for [the crime at issue] was broadly recognized sooner . . . were to become a reason to [allow the practice]." 543 U.S. at 567 (quotations and citations omitted). Put another way, even if a small handful of states started enforcing capital rape laws, the support for capital punishment in this context would merely approach the level of support that was present in *Enmund* and *Coker*, where in each case this Court still found a decisive consensus against the death penalty.

The recently proposed legislation in various states does not alter this analysis. There is an enormous difference between proposed legislation and enacted legislation. As proof, the Mississippi bill that the State cites has died in committee. S.B. 2596, Regular Sess. (Miss. 2008), *available at* http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml. The Alabama and Tennessee bills are simply reiterations of bills that already died in committees over the past two years. *Compare* H.B. 456, Regular Sess. (Ala. 2008), *with* H.B. 335, Regular Sess. (Ala. 2007); *compare* S.B. 0157, Regular Sess. (Tenn. 2007), *with* H.B. 2924, Regular Sess. (Tenn. 2006). And the proposed bills in Missouri or Colorado have not cleared any of those states' many legislative hurdles.

But to any extent pending legislation across the country is relevant, it signals a populace that is far more skeptical of the death penalty than supportive of it. Legislation to *abolish* the death penalty has been introduced in no fewer than *eighteen* states since 2007, including Montana (where the proposal passed the state senate), Missouri (where a bipartisan group

of fifty-eight lawmakers also is co-sponsoring legislation to impose a moratorium), Mississippi, Texas, and the State of Louisiana itself. Such legislation was recently enacted into law in New Jersey, *see* Death Penalty Information Center, *Facts About the Death Penalty* 1 (2008), and it remains pending in a total of nine states.[4] Accordingly, any conceivable prospect of an additional state or two enacting capital rape legislation is thus dwarfed by the likelihood – at least if measured by proposed bills – that other states will abandon the death penalty entirely.

2. This Court independently has concluded that the death penalty is disproportionate punishment for rape or other person-on-person crimes that do not result in the death of the victim. *See* Petr. Br. 38. The State does not engage this precedent. Instead, it simply says that rape inflicts serious and often lasting harm upon child victims. Resp. Br. 51-55.

---

[4] Those nine states are Arizona, Illinois, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, and New York. *See* H.B. 2297, Regular Sess. (Ariz. 2008); S.B. 328, Regular Sess. (Ill. 2007); H.B. 2510, Regular Sess. (Kan. 2007); H.B. 260, Regular Sess. (Ky. 2008); H.B. 323, Regular Sess. (La. 2008); H.B. 1328, Regular Sess. (Md. 2008); H.B. 2375, Regular Sess. (Mo. 2008); A.B. 542, Regular Sess. (N.Y. 2007). The other states in which legislation recently was introduced are Connecticut, Mississippi, Montana, New Hampshire, New Mexico, South Dakota, Texas, and Virginia. *See* H.B. 5333, Regular Sess. (Conn. 2007); H.B. 216, Regular Sess. (Miss. 2007); Draft B. 87, Regular Sess. (Mont. 2007); H.B. 607, Regular Sess. (N.H. 2007); H.B. 190, Regular Sess. (N.M. 2007); H.B. 1195, Regular Sess. (S.D. 2007); H.B. 745, Regular Sess. (Tex. 2007); H.B. 1960, Regular Sess. (Va. 2007). For a report on the Missouri moratorium legislation, see Bria Scudder, *Moratorium on the Death Penalty Gathers Bipartisan Support*, Columbia Missourian, Apr. 1, 2008.

This discussion does not advance the State's cause. The issue here is not whether child rape inflicts severe harm. Of course it does, and petitioner does not contend otherwise. The issue is whether an individual who commits child rape is *more culpable than the average deliberate murderer. See Roper*, 543 U.S. at 571; *Coker*, 433 U.S. at 598. The State does not claim this to be the case. And for good reason: this Court held in *Coker* "in terms of moral depravity and of the injury to the person and to the public, [aggravated rape] does not compare with murder, which does involve the unjustified taking of human life." 433 U.S. at 598.

At any rate, when it comes to assessing social science in the context of capital punishment policy, this Court looks to amicus briefs from "professional organizations" with "germane expertise," *Atkins*, 536 U.S. at 316 n.21 (quotation omitted), not to parties' arguments drawn from generalized journal articles. And here, all of the amici that are expert on the sexual abuse of children support *petitioner*. As the National Association of Social Workers, the National Alliance to End Sexual Violence, and related groups explain in their comprehensive filing, introducing the death penalty into this realm of cases would (1) send a devastating message "to child rape victims that they are akin to murder victims – that is, that they are irreparably harmed and that their lives are effectively over"; (2) "increase the trauma suffered by the victims of child rape" by requiring greater involvement and causing heightened stress in the judicial process; and (3) impede victims' healing process by precluding opportunities for structured confrontations between victims and abusers, who often are family members.

Finally, the risk of wrongful convictions in child rape cases provides additional reason for this Court to eschew the death penalty in this context. The State maintains that such a risk is relevant only if the class of defendants at issue have a "lesser ability . . . to assist counsel and to make a persuasive showing of mitigating factors." Resp. Br. 56. But nothing in this Court's cases is so restrictive. To the contrary, this Court specifically noted in *Atkins* that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." 536 U.S. at 320 n.25. Louisiana is a leading locus of this problem; triple the amount of its death row inmates over the past ten years have been exonerated (eight) as have been executed (three).[5] And the problem of wrongful convictions in capital cases would only accelerate in the specific context of child rape prosecutions, in light of the heightened evidentiary and procedural difficulties present in child abuse prosecutions. *See* Petr. Br. 39-40; Amicus Br. of NACDL & Twelve Innocence Projects.

---

[5] Compare Death Penalty Info. Ctr., *Innocence Cases: 1994-2003*, http://www.deathpenaltyinfo.org/article.php?did=2340, *and* Death Penalty Info. Ctr., *Innocence Cases: 2004-Present*, http://www.deathpenaltyinfo.org/article.php?did=2341 (noting exonerations of Curtis Kyles (1998), Shareef Cousin (1999), Michael Graham (2000), Albert Bell (2000), John Thompson (2003), Dan Bright (2004), and Ryan Matthews (2004)), *with* Death Penalty Info. Ctr., *Searchable Database of Executions*, http://www.deathpenaltyinfo.org/executions.php (search "State" for "LA") (noting executions of Dobie Gillis Williams (1999), Feltus Taylor (2000), and Lesile Martin (2002)).

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

The Eighth Amendment requires a state's capital punishment scheme to "genuinely narrow the class of persons eligible for the death penalty and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the same crime]." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The State does not dispute that neither of the aggravating factors that the jury found at the penalty stage of petitioner's trial satisfied this narrowing requirement. Rather, the State contends that Louisiana's aggravated rape statute satisfied the Eighth Amendment's narrowing requirement at the guilt stage, by "defin[ing] the offense to provide that only offenders who committed [vaginal] or anal rapes of children under twelve years of age were eligible for the death penalty." Resp. Br. 59. But nothing in this statutory definition satisfies the narrowing requirement.

The State's reliance on the victim's age fails to respond to petitioner's central argument (Petr. Br. 45-47) that since a victim's youth is the only fact that could conceivably make a perpetrator of rape death-eligible in the first place, that fact that a victim was a child cannot identify the most culpable defendants deserving of the death penalty. What is more, requiring the victim to be less than twelve years old does not do anything at all to guide juries in "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (quotation omitted; alteration in original). There are no doubt hundreds if not thousands of instances of

child rape – defined, as Louisiana does, as any vaginal or anal penetration, regardless of any use of force – across the State of Louisiana every year. Assuming *arguendo* that the Constitution allows the death penalty to be imposed for child rape, Louisiana juries must be given some means of differentiating among the vast sea of such cases.

If the State also means to suggest (Resp. Br. 58) that the 1998 version of its child rape law narrowed the class of death-eligible offenders because it excluded "oral intercourse" from its scope, this suggestion adds nothing. Oral intercourse is not a death-eligible offense. Accordingly, requiring the jury to find that petitioner committed vaginal or anal rape did not oblige it to differentiate petitioner from any other offenders who are supposedly subject to capital punishment by virtue of committing child rape.

CONCLUSION

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

Respectfully submitted.

Jelpi P. Picou
G. Ben Cohen
THE CAPITAL APPEALS PROJECT
636 Baronne St.
New Orleans, LA 70113

Martin A. Stern
Ravi Sinha
ADAMS AND REESE LLP
4500 One Shell Square
NEW ORLEANS, LA 70139

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

April 4, 2008