No. 07-434

In The
Supreme Court of the United States

PATRICK KENNEDY

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Writ of Certiorari To The Louisiana Supreme Court

BRIEF FOR RESPONDENT

Please serve:

Scott E. Jones
OFFICE OF THE DISTRICT ATTORNEY
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020

SCOTT E. JONES
Council of Record for Respondent
Attorney General

JONATHON A. DEWEY
Sr. Asst. Attorney General

THEODORE S. CHEATUM
Asst. Attorney General

ARTHUR K. HOWE
Deputy Asst. Attorney General

QUESTION PRESENTED FOR REVIEW

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

CASE BACKGROUND

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

Sometime in the morning hours of March 2, 1998, Kennedy's 8-year-old stepdaughter, L.H., was brutally raped. Kennedy was home at the time, and called 911 at 9:18 A.M. to report the crime. After police and emergency personnel arrived, L.H. was transported to the hospital, where she underwent surgery to repair the significant vaginal injuries inflicted during the rape. While the doctors were able to repair the external injuries, many of the internal damage was found to be unrepairable, which left L.H. to be unable to become pregnant when she became an adult.

According to the state, when Kennedy originally called 911, he claimed that L.H. had been selling Girl Scout cookies from the family garage when she was dragged to a side yard and raped by two neighborhood boys. Kennedy claimed to have seen one of the attackers riding away from the house on a blue ten-speed bicycle with upturned handlebars. However, police soon became suspicious of Kennedy's story for several reasons. The first officer on the scene, who had been patrolling a block away, didn't see anyone leaving the crime scene. This same officer also noticed that the grass in the yard—where the crime was alleged to have occurred—was "undisturbed," and that only a small amount of blood was found in the grass. Kennedy himself also acted suspiciously: according to the state, Kennedy was washing L.H.'s genital area when the police arrived. He claimed that he had originally carried L.H. in from the yard and placed her

in the bathtub to wash her, yet he had no blood on his clothes. Kennedy also "tried to answer questions for" L.H. while police were questioning her.

Later investigation also revealed that Kennedy had called his employer hours before calling 911 and left a message saying that he wouldn't be able to come to work that day. Sometime later, but before calling 911, Kennedy actually spoke with his employer. In that conversation, Kennedy apparently stated that his stepdaughter "had just become a young woman" and asked how to remove bloodstains from carpet. About an hour and a half before calling 911, Kennedy also placed a call to a carpet cleaning company, asking for assistance in removing bloodstains from carpet. From these calls, the state surmised that the rape had occurred several hours before it was reported to the police,which cast additional suspicion on Kennedy.

Police took Kennedy to a local KMart, to see if he could better identify the getaway bicycle. Kennedy picked out a gearless bike with straight handlebars as matching the one he had seen. The day after the rape, a blue bicycle was found behind a nearby apartment building; it had flat tires, was rusty, and was covered in spider webs. When the blue bike was found and shown to Kennedy, he claimed that it was the one he had seen—but the blue bike was gearless (not a ten-speed as Kennedy had originally reported) and had straight handlebars (not upturned ones). Police were able to establish that the blue bikebelonged to Devon Oatis, a teenage neighborhood boy.

Search warrants were executed at Kennedy's house, and a jug of "low foam extraction cleaner," carpet samples, a pail, and two towels were removed from the house. Police also used luminol to test for the presence of blood on the carpeting in the house. Some bloodstains were found; in particular, one stain was found in the carpet at the foot of L.H.'s bed. That carpet was removed, and a bloodstain was found on the subfloor below. Later testing revealed L.H.'s blood

on some of the carpet samples, one of the towels, and a blanket that she had been wrapped in when police first arrived at the house. No grass or soil stains were found on L.H.'s clothing, and no depressions were found in the grass in the yard. Finally, only a small amount of blood was found on the grass, "suggesting that the blood had been planted there."

At the hospital, L.H. continued to tell authorities that she had been dragged into the yard by two neighborhood boys and raped by them. Several days after her surgery, L.H. was interviewed by a psychologist and related the same version of events, explaining in more detail how she had been dragged into the yard. However, the psychologist didn't believe L.H. and "thoroughly and argumentatively" questioned her on "each element" of her story, asking, for example, why she had no abrasions on her legs from being dragged and why she hadn't screamed for help.

After L.H. was raped, she was removed from her mother's custody for about one month. According to C.H., L.H.'s mother, L.H. was removed from the home because she had allowed Kennedy to continue telephone contact with her daughter after his arrest. C.H. also claimed that when L.H. was eventually returned to her custody, L.H. told her that Kennedy had raped her.

On May 7, 1998, a Jefferson Parish grand jury returned an indictment charging Kennedy with one count of aggravated rape of a child under twelve, a capital offense, in violation of La. R.S. 14:42. Petitioner received "a vigorous pre-trial defense, during which defense counsel filed approximately 50 substantive motions and sought six supervisory writs." A jury was selected on August 8, and 11-15, 2003. Opening statements commenced immediately after jury selection and trial continued through August 25, 2003, on which date the jury returned a verdict of guilty of aggravated rape. The penalty phase was held on August 26, 2003, and the jury unanimously decided that the defendant should be sentenced to death after finding the following aggravating

circumstances: 1) the offender was engaged in the perpetration of an aggravated rape; and 2) the victim was under the age of twelve years.

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

RELEVANT LAWS, PRECEDENTS AND ARGUMENT

I. This Court's Decision in *Coker v. Georgia* and Following Cases Have Not Established a Categorical Rule Limiting Capital Punishment to those Offenses Resulting in Death.

1. One year after its decision in *Gregg*, this Court held that the death penalty was an excessive and unconstitutional punishment for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584 (1977). The plurality did not discount the seriousness of rape as a crime, finding that "[s]hort of homicide, it is the 'ultimate violation of self.'" Rape was described as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established." While rape was described as a violent crime, normally involving force or the threat of force to overcome the victim's will or capacity to resist, it was noted that it did not by definition include even serious injury to another person. The plurality stated: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."

However, the plurality was describing the rape of an adult. As noted in the Louisiana Supreme Court's opinion in *State v. Wilson*, 685 So.2d 1063, *cert. denied, Bethley v. Louisiana*,

520 U.S. 1259 (1997), there are fourteen separate references to the rape of an "adult woman" contained in the *Coker* plurality opinion, concurring opinion, or dissenting opinion. In stating the issue before this Court and announcing the plurality's judgment, the *Coker* plurality opinion explicitly referred to the offense in question as the rape of an "adult woman." Although this Court noted that two jurisdictions (Tennessee and Mississippi) provided capital punishment when the victim was a child, it was in the context of emphasizing the fact that Georgia was the only jurisdiction in the United States which, at that time, authorized a sentence of death when the rape victim was an adult woman. *Coker*, 433 U.S. It is therefore apparent that the plurality in *Coker* refrained from deciding whether the death penalty is grossly disproportionate for the rape of a child.

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

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

the culpability of the individual offender.

In *Enmund v. Florida,* 458 U.S. 782 (1982), this Court found the death penalty to be a disproportionate sentence for a robber convicted of murder under Florida's felony-murder rule. This Court stated, "We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.' *Enmund*, 458 U.S. at 797 (citing *Gregg v. Georgia,* 428 U.S. 153, 184 (1976)). Focusing on Enmund's own conduct and culpability, this Court stated that it had an abiding conviction that the death penalty, which is "unique in its severity and irrevocability," is an excessive penalty for the robber who, as such, does not take human life.

Thereafter, in *Tison v. Arizona*, 481 U.S. 137 (1987), the petitioners were convicted of capital murder based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder. Continuing its focus upon the mental state of the particular offender, the Court held that the death penalty was appropriately applied because "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the *Enmund* culpability requirement."

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

II. There is an Objective Growing Consensus that the Death Penalty is not a a Disproportionate Punishment for the Rape of a Child

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

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

The examination of legislative acts involves more than simply a numerical counting of which jurisdictions among the thirty-seven (including the federal government) permitting capital punishment provide for a particular capital prosecution. This Court has also taken into account the direction of any change in that respect. In *Atkins*, this Court noted that with respect to the number of states that had abandoned capital punishment for the mentally retarded following this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 356 U.S. 304, 315 (2002).

In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative

enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to the decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty.

a. In 1995, Louisiana Revised Statute 14:42(C) was amended by 1995 La. Acts 397, § 1 to allow for the death penalty when the victim of rape is under the age of twelve. When the first constitutional challenge to the validity of the capital child rape law was presented to the Louisiana Supreme Court in *State v. Wilson*, Louisiana was at that time the only state with a law in effect providing for the death penalty for the rape of a child. Florida and Mississippi also had statutes which nominally provided for the death penalty in the case of the rape of a child under twelve, but those statutes were invalidated by the Florida and Mississippi Supreme Courts in 1981 and 1989.

Since this Court denied certiorari in *Bethley v. Louisiana*, 520 U.S. 1259 (1997), Montana's child rape law went into effect, and laws have been enacted in an additional four States: Georgia (1999), Oklahoma (2006), South Carolina (2006), and Texas (2007). Additionally, though its death penalty provision was invalidated by judicial decision in 1981, Florida Stat. Ann. § 794.011 continues to provide that the sexual battery of a child under twelve years old by a person at least eighteen years old is punishable by death. While the number of states with capital child rape laws in effect is admittedly less than half of the death penalty jurisdictions, the number of states enacting such legislation in the past few years represents a significant trend toward the capitalization of child rape. The consistency of this trend is illustrated by the fact that in 2008, legislation to authorize the death penalty as punishment for child rape has been filed in Alabama, Mississippi, and Missouri.

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

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

Additionally, eight states and the federal government also provide the death penalty for nonhomicide offenses. Arkansas, California, Illinois, Mississippi, and Washington authorize the death penalty for treason, while New Mexico provides it for espionage. Mississippi also authorizes the death penalty for aircraft hijacking. Colorado and Idaho provide the death penalty for aggravated kidnapping. Although Florida's capital child rape statute has been invalidated by the Florida Supreme Court, Florida provides that importation of 300 kilograms or more of cocaine into the state knowing the probable result of such importation would be the death of any person is a capital offense. At the federal level, excluding treason and espionage, capital punishment is provided for the kingpin of an extremely large continuing criminal drug enterprise.

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

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

In *McKune v. Lile*, 536 U.S. 24, 32 (2002), this Court recognized that "[s]ex offenders are a serious threat in this Nation." Additionally, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." Re-offending declines with age for many groups of offenders, but not for offenders who abuse children. While the death penalty may not deter all sexual offenders, there will be many for whom it will undoubtedly provide a significant deterrent. Therefore, the State should not be deprived of this significant tool to prevent child rape.

CONCLUSION

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

Respectfully Submitted

Scott E. Jones
Council of Record for Respondent
Attorney General