No. 07-___

IN THE
Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick Kennedy respectfully petitions for a writ of certiorari to the Louisiana Supreme Court in *State v. Kennedy*, No. 05-KA-1981.

OPINIONS BELOW

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

In 2003, the Louisiana Legislature amended subsections (A)(4) and (D)(2) to substitute the phrase "under thirteen years" for the phrase "under twelve years."

STATEMENT

Petitioner Patrick Kennedy is the only person in the United States who is on death row for a non-homicide offense. He has been sentenced to die for the crime of rape – an offense for which no person has been executed in this country for over forty years. A divided Louisiana Supreme Court nonetheless declined to hold that Kennedy's sentence constitutes cruel and unusual punishment, expressly anticipating that after it ruled this Court would "bring its own independent judgment to bear on the Eighth Amendment question" whether capital punishment may be imposed for rape of a child. App. 47a. Petitioner now seeks that review.

1. In 1976, this Court held in a memorandum opinion that the Eighth Amendment prohibited the State of Louisiana from imposing the death penalty for the offense of aggravated rape (there, the rape of two girls, one sixteen and one seventeen) because Louisiana law made such punishment mandatory for the offense. *Selman v. Louisiana*, 428 U.S. 906 (1976), *reversing in part State v. Selman,* 300 So. 2d 467 (La. 1974). The following year, this Court decided *Coker v. Georgia,* 433 U.S. 584 (1977), 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 in the country with similar laws ceased seeking death sentences in rape cases.

In 1995, the Louisiana Legislature re-capitalized the crime of aggravated rape for cases in which the victim is less than twelve years old. *See* La. R.S. 14:42. In a pre-enforcement challenge to that statute, the Louisiana Supreme refused to invalidate it. *State v. Wilson,* 685 So. 2d 1063, 1069 (La. 1996). This Court denied certiorari. But three Justices

took pains to emphasize this Court's lack of jurisdiction and that its decision to deny a petition for writ of certiorari "does not in any sense constitute a ruling on the merits of the case." *Bethley v. Louisiana,* 520 U.S. 1259, 1259 (1997) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari).

2. Petitioner Patrick Kennedy is an African American man who is forty-three 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 issuing five worthless checks between 1987 and 1992.

At 9:18 in the morning on March 2, 1988, 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 had 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 had dragged her into the yard from the garage and forcibly raped her. Petitioner added that he had seen 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. Although L.H.'s injuries were very serious, a pediatric surgeon was able to repair the damage to her genital area, and two weeks later the physical injuries were fully healed.

During this entire ordeal, and for over several months thereafter, L.H. repeatedly told various investigating officers

and doctors, as well as defense investigators, 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 on a bike. 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 that was the same type as the one that petitioner personally identified the day before as resembling the 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, and he never subsequently provided a verifiable alibi. The police nonetheless decided to rule out Oatis as a suspect because they thought his bicycle appeared inoperable and because he appeared "heavy set," whereas L.H. had described her attacker as "muscular." App. 8a-10a.

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 circumstantial evidence at the house to indicate 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, sounding nervous, 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 explanation of the rape 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" from 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 again 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. 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, L.H. relented. 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 raped her. When pressed over 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 and tried him in the judicial district court for Jefferson Parish.[1] During pretrial proceedings, the State offered to take the death penalty off the table in exchange for petitioner pleading guilty. Petitioner steadfastly refused this offer and insisted on his innocence, so the case proceeded to trial.

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." 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 rape was finally selected.

Despite performing 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 police never found any "positive evidence" linking petitioner to the rape. App. 14a. Accordingly, the "most important" evidence the prosecution presented at trial 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. *Id.* L.H. took the stand at trial, but she "evidently . . . lost her composure" and was never required to describe the rape to the jury. App. 15a.

Petitioner suggested to the jury that, consistent with L.H.'s initial and repeated claims, Oatis was the true

[1] This is the same parish in which the trial occurred in *Snyder v. Louisiana*, No. 06-10119 (cert. granted. June 25, 2007), which is currently pending in this Court.

perpetrator. But petitioner was unable to force Oatis to appear in court. Although the trial court, at petitioner's request, issued a subpoena for Oatis, he apparently had fled to California and could not be found. The jury ultimately convicted petitioner of rape.

The case then proceeded to sentencing. Following a lengthy 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." App. 60a (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, and a majority of that court – adhering to its *Wilson* decision that rejected the pre-enforcement challenge to the State's then-newly minted capital rape law – upheld his sentence. Although this Court held in *Coker* that the Eighth Amendment prohibited imposing the death penalty for rape, the majority 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. 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 (App. 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 petitioner is the only person in the United States on death row for a non-homicide offense; that only five states even have statutes on the books theoretically allowing the death penalty to be imposed for child rape; and that no state since *Coker* – indeed, no state for over forty years – has executed a single person for any kind of rape. App. 48a-49a. But instead of drawing from this evidence the inference that sentencing petitioner to death constitutes cruel and unusual punishment, the majority found that objective factors actually support the constitutionality of petitioner's sentence. The majority asserted that the five states that have capital rape statutes actually embody a "compelling" "trend" – *e.g.*, that "even after the Supreme Court decided in *Coker* that the death penalty for rape of an adult woman was unconstitutional, five states nevertheless have capitalized child rape." App. 55a. In addition, the majority noted that nine states besides those five and the federal government have at least one law on the books allowing capital punishment for a non-homicide offense. App. 52a-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." App. 56a.

The Louisiana Supreme Court also rejected petitioner's more limited Eighth Amendment argument that even if some rapes of child victims could 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. App. 58a-62a; *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 because 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)]." 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. App. 134a.

REASONS FOR GRANTING THE WRIT

"Looming over this case is the potential for [petitioner] to be the first person executed for committing an aggravated rape in which the victim survived since [Louisiana law] was amended in 1995 to allow capital punishment for the rape of a person under the age of twelve." App. 38a. Indeed, if the State were allowed to carry out petitioner's sentence, he would be the first person in this country to be executed for a non-homicide offense in forty-three years – a period that began thirteen years before this Court held in *Coker v. Georgia,* 433 U.S. 584 (1977), that imposing the death penalty for aggravated rape of a sixteen-year-old woman violates the Eighth Amendment's Cruel and Unusual Punishment Clause, and that has continued ever since.[2] A majority of the

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[2] The last person executed for rape in this country was Ronald Wolfe, whom the State of Missouri executed on May 8, 1964 by lethal gas. *Executions in the U.S. 1608-2002: The Epsy File Executions by Date* 381

Louisiana Supreme Court nonetheless declined to invalidate petitioner's sentence, noting that the membership of this Court recently changed and forecasting 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." App. 56a; *see also* App. 45a.

This predictive, anti-precedential judgment cries out for this Court's review. It flouts the overwhelming national consensus that capital punishment is an inappropriate penalty for any kind of rape. Forty-five states ban such punishment, and prosecutors and juries in the remaining five states – with the sole exception of this single case – refuse to impose it. The Louisiana Supreme Court's decision also contravenes this Court's holding in *Coker*, as well as other decisions ruling that at least in the context of person-on-person violent crime,[3] the death penalty is constitutionally excessive punishment for crimes that do not result in the victim's death. And if that were not enough, the Louisiana Supreme Court's decision conflicts with decisions from every other state court of last resort to consider this or any similar issue.

This case does not have any vehicle problems; it stands in the ideal procedural posture for this Court's review and actually highlights the distressing realities attendant to extending the death penalty into the realm of child rape. There would be no benefit from further percolation. This Court should grant review to settle this enormously important matter.

(2007). The last execution in the United States for any non-homicide offense occurred on September 4, 1964, when Alabama electrocuted James Coburn for robbery. *Id.*

[3] This phrasing leaves aside "*sui generis*" crimes such as treason and espionage, *see* App. 134a (Calogero, C.J., dissenting), as well as offenses such as air piracy and the federal "drug kingpin" law that inherently involve a reckless disregard for human life on a large scale.

I. This Court Should Grant Review To Make Clear That The Eighth Amendment Bars Imposing the Death Penalty for Child Rape.

A. The Louisiana Supreme Court's Decision Contravenes This Court's Precedent.

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 had raped a sixteen-year-old at knifepoint with her husband tied up and watching in the bathroom, and then abducted her from her home. Seven members of this Court agreed 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 enacted statutes making any form of non-homicidal rape a capital offense *Id.* at 594-95. The plurality then explained that:

> [T]he legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.
>
> . . . .
>
> Rape is without a 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. Although it may be accompanied by another crime, rape by definition does not involve the death of or even the serious injury to another person. 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 597-98 (internal quotations, citations and footnote omitted).

It is readily apparent that the Louisiana Supreme Court's decision allowing the imposition of capital punishment for the crime of child rape cannot be squared with *Coker.* The Louisiana Supreme Court asserted that *Coker* is distinguishable from this case because the victim here was younger and "[c]hildren are a class of people that need special protection." App. 43a, 48a, 57a. But *Coker* leaves no room for such hairsplitting. The *Coker* Court considered all legislative variations of rape and forbade capital punishment for that offense for the simple reason that the crime "does not take [a] human life." 433 U.S. at 598 (plurality opinion); *see also id.* at 599 (emphasizing that even when rape is aggravated the crime does "not involv[e] the taking of life"); *id.* at 621 (Burger, C.J., dissenting) ("The clear implication of today's holding appears to be that the death penalty may properly be imposed only as to crimes resulting in the death of the victim.").

This Court has never wavered from that judgment. To the contrary, it has reinforced *Coker* through other decisions holding that the Eighth Amendment prohibits imposing the death penalty for a person-on-person violent crime in which death does not result. *See Enmund v. Florida,* 458 U.S. 782, 797 (1982) (aggravated robbery, even when connected to felony murder, is not punishable by death when defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); *Eberheart v. Georgia,* 433 U.S. 917 (1977) (aggravated kidnapping alone

not punishable by death). As the dissent below properly recognized, App. 134a, the Louisiana Supreme Court had no warrant to resist this unbroken line of authority.

But even if the Louisiana Supreme Court were correct that *Coker* and its progeny leave open the possibility that a capital child rape statute might be constitutional if reinforced by objective indicia of national support, it would not matter. In assessing whether imposing capital punishment comports with objective indicia of legitimacy, this Court recently made clear that courts should look to (1) the number of states that have statutes allowing the death penalty for the offense at issue; (2) the "[]frequency of its use even where it remains on the books"; and (3) the direction of any change on the issue. *Roper v. Simmons,* 543 U.S. 551, 567 (2005); *Atkins v. Virginia,* 536 U.S. 304, 313-16 (2002). In *Roper* and *Atkins*, this Court held that the Eighth Amendment barred executing juvenile and mentally retarded offenders, respectively, where twenty states allowed such punishment; those laws were rarely enforced; and the number of such laws was decreasing. *Roper,* 543 U.S. at 564-67; *Atkins,* 536 U.S. at 314-17; *see also Enmund,* 458 U.S. 792-93 (fact that eight jurisdictions allowed death penalty under circumstances "weigh[ed] on the side of rejecting capital punishment for the crime at issue").

These guideposts confirm that petitioner's sentence cannot stand. Only five states, including Louisiana, currently have statutes on the books authorizing the death penalty for child rape – and none of the other four states authorizes such punishment when, as here, the defendant does not have any prior convictions for rape.[4] What is more, even though these

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[4] Those four other states are South Carolina, Oklahoma, Montana, and Texas. *See* S.C. Code Ann. § 16-3-655(c)(I) (2006 Supp.) (child rape when defendant previously has been convicted of sexual battery of a child 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);

statutes have been on the books for as many as twelve years, no one besides petitioner in any of these five states – nor any other state over the past forty-three years – has actually received a death sentence for child rape. There are currently over 3300 people on death row in America, and petitioner is the only one who did not commit murder. Death Penalty Information Center, *Facts About the Death Penalty* 2 (2007). Even within Louisiana, petitioner's sentence is an extreme anomaly: the State has initiated over 180 prosecutions for child rape since the 1995 law at issue here went into effect, *see* Dft's La. S. Ct. Sentence Review Mem. at 5-7, and petitioner's case is the only one in which the State has sought and obtained a death sentence. By any objective measure, petitioner's sentence is not only cruel and unusual; it is cruel and unique.

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. App. 50a. But this observation is merely makeweight. Those crimes – treason, espionage, and air piracy, aggravated assault by a prisoner, and kidnapping – are so unrelated to the offense at issue here that this Court in *Coker* had no need even to survey states' punishments for them. *See*

Mont. Code Ann. § 45-5-503 (enacted 1997) (child rape when defendant previously has been convicted of 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. 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. 1978). 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).

Coker, 433 U.S. at 592-96; *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. What is more, none of those jurisdictions has imposed a single death sentence for any of these crimes in over forty years. Consequently, whatever the legal status of these various statutes, they provide no cover for the State here.[5]

The Louisiana Supreme Court also asserted that the direction of change in the realm of child rape is toward allowing the death penalty for this offense. App. 55a. "[E]ven after [this Court's decision] in *Coker,*" the court declared, "five states nevertheless have capitalized child rape" in the thirty years "since then." *Id.* But when there is only one single time over a dozen years that a prosecutor and a jury even attempt to implement one of these statutes, it can hardly be said that any "trend" really exists. 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 (plurality opinion) (quotation omitted). Over that five-year period since 1972, six states had enacted capital rape statutes (three of which made the death penalty *mandatory* for the offense). *Id.* at 594-95. This Court was unmoved.

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[5] 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 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).

B. The Louisiana Supreme Court's Decision Conflicts with Decisions from Every Other State Court of Last Resort To Consider This or Any Similar Issue.

Because the Nation displays so little interest in imposing capital punishment for non-homicide offenses, few courts have had any occasion since *Coker* to consider whether the Eighth Amendment permits a state to punish child rape or any other non-homicide offense with the death penalty. But the few courts that have done so all have reached decisions that conflict with the Louisiana Supreme Court's decision here.

In *Buford v. State,* 403 So. 2d 943 (Fla. 1981), *cert. denied,* 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), the Florida Supreme Court considered whether a death sentence imposed for violently raping a seven-year-old girl could withstand constitutional scrutiny. The court held that it could not, and it precluded such punishment in no uncertain terms: "The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of 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 Florida Supreme Court recently reaffirmed this view, making it clear that *Buford*'s Eighth Amendment holding rendered child rape no longer a capital offense in Florida. *Welsh v. State,* 850 So. 2d 467, 468 n.1 (Fla. 2003).

The Mississippi Supreme Court also has confronted a post-*Coker* case in which a defendant was sentenced to death for raping a child. *See Leatherwood v. State,* 548 So. 2d 389 (Miss. 1989). At that 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. But there was no proof of such an attempt or intent in the case.

Accordingly, the Mississippi Supreme Court vacated the sentence without needing to address the constitutionality of sentencing someone to death for a non-homicide rape of a child. *Id.* at 402-03. But two justices wrote separately to emphasize that they would have preferred simply to "hold forthrightly" that Mississippi's child rape law would violate the Eighth Amendment 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 thereafter amended its law to make clear that it precludes capital punishment for any rape in which a victim does not die. *See* Miss. Code § 97-3-65(3).

Two other state courts of last resort have invoked *Coker* to preclude capital punishment for other violent person-on-person offenses in which the victim survives. In *State v. Gardner,* 947 P.2d 630 (Utah 1997), the Utah Supreme Court considered indictments charging two prisoners with capital felonies for committing aggravated assaults against prison guards. The court held that the Eighth Amendment precluded imposing the death penalty because the crime did not result in death:

> 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. We may or may not think the Supreme Court reached the right result in so concluding, but we do not see the persuasiveness of an argument that any aggravated assault, no matter how vicious, could be legally more reprehensible than any rape, no matter how brutal. And under *Coker*, no rape, "*with or without*

> *aggravating circumstances*," can constitutionally qualify for the death penalty when death has not resulted.

947 P.2d at 653. In *People v. Hernandez,* 69 P.3d 446, 464-67 (Cal. 2003), the California Supreme Court confronted a similar prosecutorial argument that the state's death penalty statute should be read to "make capital punishment available for those engaged in an *unsuccessful* conspiracy to commit murder." *Id.* at 464. The court refused to read its law this way, reasoning that "a construction of [California's] death penalty law as permitting capital punishment for an offense like conspiracy to commit murder that does not require the actual taking of human life would raise a serious constitutional question." *Id.* at 465. "Although 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.'" *Id.* at 464 (quoting *Coker,* 433 U.S. at 598). Other courts in the context of reviewing death sentences for murder have stated that they interpret *Coker* the same way. *See Allen v. Ornoski,* 435 F.3d 946, 951 (9th Cir. 2006) (citing *Coker* for the proposition that "execution for offenses short of murder is unconstitutional"), *cert. denied,* 546 U.S. 1136 (2006); *State v. Black*, 815 S.W.2d 166, 190 (Tenn. 1991) ("While death may be disproportionate *per se* when the offense does not involve the death of the victim, *see, e.g.,* [*Coker*], . . . this is not true when the crime is first-degree murder.").

There is no way to reconcile the Louisiana Supreme Court's decision with the reasoning and holdings in all of these other decisions. This Court is the only institution that can resolve the conflict on this tremendously important issue.

C. This Court Should Resolve This Question Presented Here and Now.

For several reasons, this case provides the ideal opportunity to resolve the constitutionality of imposing capital punishment for the crime of child rape.

1. This case comes to this Court on direct review from a final judgment sentencing a defendant to death. Therefore, in contrast to the only other time in which a case involving Louisiana's current capital rape statute was presented to this Court, this Court unquestionably has jurisdiction. *Compare Bethley v. Louisiana,* 520 U.S. 1259, 1259 (1997) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari) (emphasizing jurisdictional problem present in pre-enforcement challenge to statute and that the denial of certiorari "d[id] not in any sense constitute a ruling on the merits of the case"). This case's procedural posture also means that it is unencumbered by the complexities that typically accompany capital cases on federal habeas review.

2. This case also aptly illustrates two of the primary practical problems that would inevitably plague any extension of the death penalty into the realm of child rape prosecutions. First, this Court noted in *Atkins* that imposing the death penalty is less defensible when the type of prosecution at issue presents "a special risk of wrongful execution." 536 U.S. at 321. The risk of wrongful convictions is especially pronounced in child rape cases, for child testimony is subject to suggestibility in ways that adult testimony is not. *See* Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness,* in The Suggestibility of Children's Recollections 75 (John Doris, ed. 1991). Children also are 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 6-7. Finally,

the prosecution, as here, frequently lacks any "positive evidence" linking the defendant to the charged crime. 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).

Second, petitioner – as historically almost always has been the case in capital rape prosecutions – is black. The notion of executing people for rape has its roots in the southern antebellum practice of hanging slaves believed to have committed the crime. Stuart Banner, The Death Penalty: An American History 139-42 (2002). White offenders, with few exceptions, were executed only for murder, and "[n]o white rapists are known to have been hanged in the antebellum South." *Id.* at 139; *accord* William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 139-40 (1984). This disparity persisted right up until this country's last execution for rape in 1964: While blacks and whites were executed for murder in almost identical numbers during the mid-twentieth century, over 89% of those executed for rape were black. *See* 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 this period were black. Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties,* The Angolite, Sept./Oct. 1996, at 36. This Court should pause before condoning a practice so heavily tinged with the scourge of racism.

3. Finally, this case allows this Court to appreciate – and to bring to an end – the "wanton and freakish" nature, *Zant v. Stephens,* 462 U.S. 862, 876 (1983), of Louisiana's latest rendition of capital rape law. After twelve years of operation,

litigators and scholars have compiled a detailed and mature empirical record documenting the law's products and effects, and that evidence is part of the record here. These studies show that numerous offenders who have committed far more vile rapes than that of which the jury convicted petitioner have received life or lesser sentences. Dft's La. S. Ct. Sentence Review Mem. at 9-13. What is more, dozens of offenders during this period who brutally *killed* children have received life or lesser sentences. *Id.* at 38-50. Indeed, the only discernable pattern that Louisiana's capital rape law has generated is that defendants charged with child rape are more likely to plead guilty than before the law was enacted. *See* 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 (2002). But this reality only serves to highlight the perversity of a system in which only a defendant, such as petitioner, who insists on his innocence and (quite reasonably) demands a trial faces the prospect of "the most severe" of all punishments. *Roper,* 543 U.S. at 568.

II. This Court Should Grant Review To Hold, at the Very Least, That 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, certiorari would be warranted in order to make clear that Louisiana's law nevertheless violates the Eighth Amendment because it does nothing to guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not. In order to prevent states from imposing the death penalty in an arbitrary and capricious manner, it has long been settled that a state's capital punishment law "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 murder." *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 v. Georgia,* 446 U.S. 420, 428-29 (1980) (plurality opinion); *Gregg v. Georgia,* 428 U.S. 153, 189-95 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). States must carry out this mandate by requiring juries in capital cases to find some "aggravating circumstance" that distinguishes the defendant from others who also committed the same death-eligible offense. *Tuilaepa v. California,* 512 U.S. 967, 971-72 (1994). Accordingly, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant subject to the death penalty, the circumstance is constitutionally infirm." *Arave,* 507 U.S. at 474.

That is precisely the situation here. Louisiana law classifies rape of a "victim [who] is under the age of twelve years" as one of its forms of aggravated rape. *See* La. R.S. 14:42(A)(4). The only two aggravating facts that the jury found in this case – the only two that Louisiana law required it to find – 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* App. 60a. The first aggravating factor simply restates the crime of conviction, and the second simply restates one of its elements.

The Louisiana Supreme Court nevertheless upheld petitioner's sentence on the ground that it comported with this Court's holding in *Lowenfeld v. Phelps*, 484 U.S. 231 (1988). *Lowenfeld* makes clear that "the fact that [an] aggravating circumstance duplicate[s] one of the elements of the crime does not make [the] sentence constitutionally infirm." App. 61a (quoting *Lowenfeld,* 484 U.S. at 246). But *Lowenfeld* 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]." 484

U.S. at 244-46; *see also, e.g., United States v. McCullah,* 76 F.3d 1087, 1108 (10th Cir. 1996) ("Under *Lowenfeld*, 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."); *State v. Young,* 853 P.2d 327, 352 (Utah 1993) (duplicative aggravating circumstance is permissible so long as substantive capital offense "narrows the class of offenders eligible for the death penalty at the guilt phase of the trial"). Here, that is not the case. 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 makes perpetrators of rape supposedly eligible for the death penalty in the first place is that the victim is a child. And even then, the age of the victim supposedly makes the defendant only minimally eligible for capital punishment – that is, it makes the defendant the least culpable type of offender eligible for the death penalty. Consequently, the fact that the victim of a rape was a child cannot narrow the class of death-eligible offenders.

The only other two state courts of last resort to confront similar situations have enforced *Lowenfeld*'s explicit limitation. In *McConnell v. State,* 102 P.3d 606 (Nev. 2004), the Nevada Supreme Court considered whether an aggravator that essentially duplicated an element of its capital felony murder statute sufficed to satisfy the Eighth Amendment's narrowing requirement. The court held that it did not because, unlike the capital murder statute at issue in *Lowenfeld,* Nevada's capital felony murder statute was not itself "narrow enough that no further narrowing of death eligibility [was] needed once the defendant is convicted." 102 P.3d at 621-22; *see also McConnell v. State,* 107 P.3d 1287, 1289 (Nev. 2005) (en banc) (reaffiming this holding in the course of denying state's petition for rehearing). The Tennessee Supreme Court has reached the same conclusion for the same reasons. *See State v.*

Middlebrooks, 840 S.W.2d 317, 341-46 (Tenn. 1992); *State v. Stout,* 46 S.W.3d 689, 705-06 (Tenn. 2001).[6]

The Louisiana Supreme Court's decision here conflicts with these two decisions, for there is no plausible argument that Louisiana's capital rape law is narrow enough that any defendant convicted of that crime is already more culpable than some other death-eligible offenders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

[6] This Court granted certiorari in *Middlebrooks* but dismissed the case as improvidently granted, presumably because the Tennessee Supreme Court stated after applying federal law to the narrowing issue in the case that the Tennessee Constitution would require the same result. *See Tennessee v. Middlebrooks,* 507 U.S. 1028 (1993), *cert. dismissed as improvidently granted,* 510 U.S. 124 (1993). In this Court, the State of Tennessee did not challenge the Tennessee Supreme Court's holding that when an aggravating fact duplicates an element of an offense, *Lowenfeld* requires state law to "narrow[] the class . . . of death-eligible defendants . . . at the [guilt] stage." 840 S.W.2d at 344. Instead, it argued that *Lowenfeld* did not apply because Tennessee's felony murder aggravator actually narrowed the class of death-eligible offenders at the sentencing stage. *See* Br. for Petitioner 14, *Tennessee v. Middlebrooks* (No. 92-989).

Respectfully submitted,

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