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Capital Punishment: Constitutionality for Non-Homicide Crimes Such as Child Rape

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Summary

The United States has not executed any individual for committing a non-homicide crime since the United States reinstated the death penalty in 1976. However, this may change as several federal and state statutes authorize capital punishment for certain non-homicide offenses such as treason, espionage, aircraft piracy, aggravated kidnapping, and drug trafficking in large quantities. More recently, some states have authorized the death penalty for some instances of child rape. The constitutionality of these statutes has been called into question in light of the U.S. Supreme Court's capital penalty jurisprudence. Earlier Supreme Court cases appear to stand for the proposition that the death penalty in the United States is largely restricted to crimes in which the defendant caused the death of another human being. During the present term, the Court may determine whether states may constitutionally impose the death penalty for any crime other than murder — in particular, whether a death sentence is a disproportionate penalty, under the Eighth Amendment, for raping a child. The Court will address these issues in its review of a Louisiana Supreme Court decision in *Kennedy v. Louisiana*.

Legal Background. The Eighth Amendment, applicable to the federal government and to the states through the Fourteenth Amendment, bars the use of "excessive sanctions" in the criminal justice system. It states specifically that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] Underlying this provision is the fundamental "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense."[2] The U.S. Supreme Court has stated that only "the worst of the worst" may be executed for their crimes.[3] However, the Court has provided minimal guidance for the "worst of

[1] U.S. Const. Amend. VIII.

[2] *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that the Eighth Amendment's Cruel and Unusual Clause requires that punishment for a crime be proportional to its severity).

[3] *See, Kansas v. March*, 126 S. Ct. 2516, 2542 (2006) (Souter, J., dissenting) (stating that "within
(continued...)

the worst" category of offenders and/or offenses. The Court has held in a couple of cases that the death penalty is a disproportionate, and therefore unconstitutional, punishment for some non-homicide crimes.[4] In more recent cases, the Court reinforced and refined its proportionality analysis utilizing an "evolving standards of decency" standard. Using this standard, the Court found that the imposition of the death penalty on juvenile offenders and the mentally retarded is unconstitutional.[5]

Despite the Court's narrowing of crimes and offenders who are capital punishment-eligible, some states and the federal government have sought to expand the scope of capital offenses. For example, federal law authorizes capital punishment for crimes such as espionage,[6] treason,[7] and trafficking of large quantities of drugs.[8] In addition, states such as Florida, Georgia, Louisiana, Montana, Oklahoma, Texas, and South Carolina authorize the death penalty for child rape.[9] The question of whether such non-homicide statutes, including the capital child rape statutes, are constitutional remains unanswered.

In *Coker v. Georgia*,[10] the Court held that the state may not impose a death sentence upon a rapist who does not take a human life.[11] The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it: (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[12] According to the Court, to ensure that applying these standards not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence — history and precedent, legislative

[3] (...continued)
the category of capital crimes, the death penalty must be reserved for "the worst of the worst" (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005)); *Roper*, 543 U.S. at 568 (stating that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crime' and whose extreme culpability makes them 'the most deserving of execution'") (*quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

[4] *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977).

[5] *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)

[6] 18 U.S.C. § 794.

[7] 18 U.S.C. § 2381.

[8] 18 U.S.C. § 3591(b).

[9] Fla. Stat. Ann. § 794.011; Ga. Code. Ann. §§ 16-6-1(a)(2) and 16-6-1(b); La. Rev. Stat. § 14:42; Mont. Code Ann. § 45-5-503;10 Ok. Stat. Ann. § 7115(I); TX Penal Code § 12.42(c)(3); S.C. Code Ann. § 16-3-655(C)(1).

[10] 433 U.S. 584 (1977).

[11] Although the Court stated the issue in the context of the rape of an adult woman, the opinion at no point sought to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. *Id.* at 601.

[12] *Id.* at 592.

attitudes, and the response of juries reflected in their sentencing decisions...."[13] While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of 10 cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill, stating that rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public."[14] Although the Court in *Coker* did not explicitly hold the death penalty unconstitutional for all crimes not involving homicide,[15] many have read the decision as such, since the Court based its holding largely on the distinction between crimes that cause death and crimes that do not.[16] The Court reasoned that because the crime of rape does not result in death, punishing rape by death would be unconstitutionally excessive.[17]

The Court utilized the same type of proportionality analysis in *Enmund v. Florida*[18] by applying its reasoning from *Coker* to hold that the death penalty is a disproportionate punishment for the crime of felony/murder,[19] imposed on the getaway driver in a robbery gone wrong, because robbery, like rape, "does not compare with murder, which does involve the unjustified taking of human life."[20] The Court stated that "[a]s was said of the crime of rape in *Coker*, we have the 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."[21] Thus, the Court seemed to say that for a crime to be proportional to the punishment of death, the crime committed must cause death.

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[13] *Id.*

[14] *Id.* at 598.

[15] *See Coker*, 433 U.S. at 600 (plurality opinion) (stating that "[I]n Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits the crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim.").

[16] *See, e.g.*, Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM L. & CRIMINOLOGY 717, 727 (1999).

[17] *See, Coker*, 433 U.S. at 598. Even though Coker was under a life sentence at the time of the rape, if he could not be executed, he was in effect beyond punishment.

[18] 458 U.S. 782 (1982).

[19] Generally, felony-murder occurs when a victim dies accidently or without specific intent during the course of an applicable felony,

[20] *Id.* at 797 (quoting *Coker*, 433 U.S. at 598).

[21] *Id.* at 797 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)) (citation omitted).

Since *Coker* and *Enmund*, the Court has refined its proportionality analysis, first articulated in *Weems v. United States*,[22] to determine which punishments are unconstitutionally excessive. In *Weems*, the Court explained that the cruel and unusual punishment clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[23] As such, in determining what is constitutional under the Eighth Amendment, the Court generally looks to "evolving standards of decency that mark the progress of a maturing society."[24]

The "evolving standards of decency" principle appears to be a flexible rule of construction intended to evolve with societal norms as they develop so that the Court may reflect these norms in its constitutionality review. This principle now appears to be the primary framework within which the Court reviews constitutional claims challenging the application of the death penalty. The Court employed this framework in both *Atkins v. Virginia*[25] and *Roper v. Simmons*[26], cases that narrowed the category of offenders eligible for capital punishment to exclude the mentally retarded and juvenile offenders. The Court's methodology in deciding these cases had a different focus from its prior jurisprudence regarding the constitutionality of capital statutes. In both *Roper* and *Atkins*, the Court examined objective indicia of national consensus to determine whether the "evolving standards of decency" demonstrated that the death penalty was unconstitutional under the circumstances.

In *Atkins* and *Roper*, the Court employed a three-part analysis to determine whether, under "evolving standards of decency," imposing the death penalty would have been so disproportionate as to be "cruel and unusual" under the Eighth Amendment. In both cases, the Court first looked for a national consensus as evidenced by the acts of the state legislatures.[27] The Court then assessed the proportionality of the punishment to the relevant crimes, considering whether the death penalty was being limited, as required, to the most serious classes of crimes and offenders, and whether its application would serve the goals of retribution and deterrence.[28] Lastly, the Court looked to international opinion to inform its analysis.[29]

State Supreme Court Decision. On May 22, 2007, the Louisiana Supreme Court held that the U.S. Supreme Court's decision in *Coke*r prohibiting the death penalty does not apply when the victim is a child under the age of 12.[30] The defendant was convicted and sentenced to death for the aggravated rape of his 8-year-old stepdaughter.

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[22] 217 U.S. 349, 367 (1910).

[23] *Id.* at 378.

[24] *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

[25] 536 U.S. 304 (2002).

[26] 543 U.S. 551 (2005).

[27] *See*, 543 U.S. at 609-11; 536 U.S. at 343-48.

[28] *See*, 543 U.S. at 560-64; 536 U.S. at 311-13.

[29] *See*, 543 U.S. at 575-78; 536 U.S. at 318 n.21.

[30] *Louisiana v. Kennedy*, 957 So. 2d 757 (2007).

In *Louisiana v. Kennedy*,[31] the Louisiana court explained that capital sentences for rape of a child were justifiable under the Eighth Amendment. In reaching its conclusion, the court followed the Eighth Amendment framework set forth by the U.S. Supreme Court in *Atkins v. Virginia*[32] and *Roper v. Simmons*,[33] first examining whether there is a national consensus on the punishment and then considering whether the Court would find the punishment excessive.

The Louisiana court determined that because five states had adopted similar laws in the past decade, the national trend was toward capital punishment for child rape. Moreover, the court held that because children are uniquely vulnerable, permitting the death penalty for child rape is not unduly harsh, and is proportionate to the crime.

On January 4, 2008, the U.S. Supreme Court announced that it will examine the constitutionality of permitting the execution of a child molester who did not kill his victim.[34] The questions presented are as follows: (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; and (2) if so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it genuinely fails to narrow the class of such offenders eligible for the death penalty. If the Court reverses the Louisiana Supreme Court, its decision will not only likely affect the state statutes authorizing the death penalty for child rape, but may also affect all criminal statutes authorizing capital punishment for all non-homicide crimes. If the Court affirms the Louisiana Supreme Court's decision, it may leave the boundaries of cruel and unusual punishment for non-homicide crimes less clear. One argument for sustaining the Louisiana law pertains to the issue of deterrence. Arguably, if a defendant can face death for raping a child, there would be less of an incentive to allow a potential witness to live.

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[31] No. 05-KA-1981, May 22, 2007.

[32] 536 U.S. 304 (2002).

[33] 543 U.S. 551 (2005).

[34] 128 S. Ct. 829 (2008).