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February 2, 2009

Congressional Research Service

Report RS22844

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

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March 21, 2008

Abstract. 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 nonhomicide 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*.

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CRS Report for Congress

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

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Summary

In *Kennedy v. Louisiana*, the United States Supreme Court, by a vote of 5 to 4, held that the 8th Amendment prohibits the death penalty for the rape of a child where the crime did not result and was not intended to result in the victim's death. The Court established a bright-line rule regarding the constitutionality of imposing capital punishment for a non-homicide crime against an individual. After reviewing the history of the death penalty for other non-homicide crimes against individuals, state legislative enactments, and jury practices since 1964, the Court concluded that there was a national consensus against the imposition of capital punishment for the crime of child rape. Based on precedent as well as other subjective factors, the Court concluded that the death penalty is a disproportionate punishment for such a crime. The immediate effect of this decision is to invalidate statutes authorizing the death penalty for non-homicide cases of child rape.

Legal Background. The 8th Amendment, applicable to the federal government and to the states through the 14th 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 the worst” category of offenders and/or

¹ U.S. Const. Amend. VIII.

² *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that the 8th Amendment's Cruel and Unusual Clause requires that punishment for a crime be proportional to its severity).

³ *See, Roper v. Simmons*, 543 U.S. 551, 568 (2005) (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)).

offenses. The Court has held 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

In *Coker v. Georgia*,⁶ the Court held that the state may not impose a death sentence upon a rapist who does not take a human life.⁷ The Court announced that the standard under the 8th 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.”⁸ 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 attitudes, and the response of juries reflected in their sentencing decisions....”⁹ 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.”¹⁰ Although the Court in *Coker* did not explicitly hold the death penalty unconstitutional for all crimes not involving homicide,¹¹ many have read the decision as such, since the Court based its holding largely on the distinction between crimes that cause death and crimes

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)

⁶ 433 U.S. 584 (1977).

⁷ 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.

⁸ *Id.* at 592.

⁹ *Id.*

¹⁰ *Id.* at 598.

¹¹ 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.”).

that do not.¹² The Court reasoned that because the crime of rape does not result in death, punishing rape by death would be unconstitutionally excessive.¹³

The Court utilized the same type of proportionality analysis in *Enmund v. Florida*¹⁴ by applying its reasoning from *Coker* to hold that the death penalty is a disproportionate punishment for the crime of felony/murder,¹⁵ 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.”¹⁶ 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.”¹⁷ Thus, the Court seemed to say that for a crime to be proportional to the punishment of death, the crime committed must cause death.

Since *Coker* and *Enmund*, the Court has refined its proportionality analysis, first articulated in *Weems v. United States*,¹⁸ 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.”¹⁹ As such, in determining what is constitutional under the 8th Amendment, the Court generally looks to “evolving standards of decency that mark the progress of a maturing society.”²⁰

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*²¹ and *Roper v. Simmons*,²² 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

¹² 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).

¹³ See, *Coker*, 433 U.S. at 598.

¹⁴ 458 U.S. 782 (1982).

¹⁵ Generally, felony-murder occurs when a victim dies accidentally or without specific intent during the course of an applicable felony,

¹⁶ *Id.* at 797 (quoting *Coker*, 433 U.S. at 598).

¹⁷ *Id.* at 797 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)) (citation omitted).

¹⁸ 217 U.S. 349, 367 (1910).

¹⁹ *Id.* at 378.

²⁰ *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

²¹ 536 U.S. 304 (2002).

²² 543 U.S. 551 (2005).

“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 8th Amendment. In both cases, the Court first looked for a national consensus as evidenced by the acts of the state legislatures.²³ 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.²⁴ Lastly, the Court looked to international opinion to inform its analysis.²⁵

State Supreme Court Decision. On May 22, 2007, in *Louisiana v. Kennedy*,²⁶ the Louisiana Supreme Court held that the U.S. Supreme Court’s decision in *Coker* prohibiting the death penalty does not apply when the victim is a child under the age of 12. The defendant was convicted and sentenced to death for the aggravated rape of his 8-year-old stepdaughter. The Louisiana court explained that capital sentences for rape of a child were justifiable under the 8th Amendment. In reaching its conclusion, the court followed the 8th Amendment framework set forth by the U.S. Supreme Court in *Atkins v. Virginia*²⁷ and *Roper v. Simmons*,²⁸ 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 would examine the constitutionality of permitting the execution of a child molester who did not kill his victim.²⁹

United States Supreme Court Decision. In *Kennedy v. Louisiana*,³⁰ a divided Court held, by a vote of 5 to 4, that capital punishment for a defendant convicted of a non-homicide child rape is unconstitutional. Writing for the majority,³¹ Justice Kennedy stated that such a punishment would be excessive, violating the 8th Amendment’s ban on

²³ See, 543 U.S. at 609-11; 536 U.S. at 343-48.

²⁴ See, 543 U.S. at 560-64; 536 U.S. at 311-13.

²⁵ See, 543 U.S. at 575-78; 536 U.S. at 318 n.21.

²⁶ 957 So. 2d 757 (2007).

²⁷ 536 U.S. 304 (2002).

²⁸ 543 U.S. 551 (2005).

²⁹ 128 S. Ct. 829 (2008).

³⁰ No. 07-343, 2008 WL 2511282 (June 25, 2008).

³¹ The majority consisted of Justices Kennedy, Breyer, Ginsburg, Souter, and Stevens.

cruel and unusual punishment. Following the standard set forth in *Atkins* and *Roper*, the Court rested its decision on several rationales. First, there is a national consensus against the imposition of the death penalty for child rape. Second, evolving standards of decency require that the categories of capital offenses not be expanded, but rather be reserved for the most heinous crimes. Lastly, imposition of capital punishment for the non-homicide crime of child rape does not fulfill the death penalty's social purposes of retribution and deterrence.

In determining objective indicia of national consensus regarding capital punishment for non-homicide child rape, the Court looked at legislative enactments and state practices with respect to executions.³² The Court noted that while six states have made child rape a capital offense, 44 states and the federal government had not. According to the Court, the relatively small number of states which make child rape a capital offense is analogous to the activity in *Enmund*, where the Court found a national consensus against the death penalty for felony/murder despite eight jurisdictions allowing capital punishment.³³ In addition, the Court noted that Louisiana was the only state since 1964 to sentence a defendant to death for child rape.³⁴ The Court rejected Louisiana's contention that the *Coker* decision itself deterred states from adopting capital child rape statutes and thereby influenced the Court's view of a developing national consensus. The Court explained that several state courts recognized that *Coker's* holding was limited to the crime of rape against an adult woman and did not expressly prohibit imposition of capital punishment for child rape. Moreover, the Court noted that the state failed to cite any reliable data to support its assertion.³⁵ The Court also concluded that the absence of executions for rape or any other non-homicide crime since 1964 demonstrated that there is a national consensus against capital punishment for the crime of child rape.³⁶ As such, the Court determined that, viewed in its totality, the limited number of states authorizing the death penalty for child rape, as well as the absence of executions for rape or any other non-homicide crime since 1964, demonstrates a national consensus against capital punishment for child rape.

After looking at objective evidence of a national consensus, the Court moved to a subjective analysis. While the Court acknowledged that rape is a heinous crime causing traumatic and long-lasting anguish which is exacerbated when the victim is a child, it "does not follow though, that capital punishment is a proportionate penalty for the crime." The Court reasoned that the evolving standards of decency require restraint in the application of capital punishment. As such, capital punishment should be reserved for a narrow category of crimes and/or offenses. The Court acknowledged the reprehensibility of the crime of rape. However, the Court reasoned that child rape cannot be compared to murder in terms of "severity and irrevocability."³⁷

³² 2008 WL 2511282 at *11.

³³ *Id.* at *17.

³⁴ *Id.* at *18.

³⁵ *Id.* at *14.

³⁶ *Id.* at *18.

³⁷ *Id.* at *21.

The majority found that imposition of the death penalty for non-homicide child rape would be counterproductive to the goals of rehabilitation, deterrence, and retribution. As for retribution, the Court questioned whether the death penalty for non-homicide crimes balances the wrong done to the victim. The Court concluded that there was no evidence that a child rape victim's hurt would be diminished when the law allows capital punishment for the perpetrator. Instead, it reasoned that it is likely there would be additional harm as minors would be forced to endure the stressors of reliving the traumatic events repeatedly. In addition, the Court noted systematic concerns in prosecuting child rape cases, including the problem of "unreliable, induced, and even imagined child testimony" that may lead to "wrongful execution" in some cases.³⁸ The majority felt that allowing capital punishment for the crime of child rape had additional negative implications that are counterproductive to the goal of deterrence. For example, victims may be "more likely to shield the perpetrator from discovery, thus increasing underreporting."³⁹ In addition, punishing child rape with death may remove a strong incentive for the rapist to spare the victim's life.⁴⁰

In its analysis, the Court distinguished child rape from other death-eligible crimes because it is a crime against an individual person. It ruled that the death penalty should not be permitted when the victim's life was not taken. However, the Court did not address, and consequently left open, the possibility of imposing the death penalty for non-homicide crimes against the state, such as treason, espionage, terrorism, and drug kingpin activity.⁴¹

Justice Alito, writing for the dissent,⁴² expressed the view that the majority's decision conflicts with the original meaning of the 8th Amendment and ignores the moral depravity of the crime. In addition, he felt that the small number of states which enacted child rape statutes was not based on a national consensus against execution of child rapists, but rather on the broad dicta presented in *Coker*. Also, he felt that the 8th Amendment protects an accused's right, and does not authorize the majority to strike down criminal laws on the ground that they are not in the best interest of crime victims or society at large.

³⁸ *Id.* at *24.

³⁹ *Id.* at *25.

⁴⁰ *Id.* (stating that "assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime.").

⁴¹ *Id.* at *20.

⁴² Joined by Chief Justice Roberts and Justices Scalia and Thomas.