Capital Punishment for the Rape of a Child is Cruel and Unusual Punishment Under the Eighth Amendment of the United States Constitution: *Kennedy v. Louisiana*

CONSTITUTIONAL LAW – EIGHTH AMENDMENT – CRUEL AND UNUSUAL PUNISHMENT – CAPITAL PUNISHMENT – SENTENCING PROPORTIONALITY - The U.S. Supreme Court held that the Eighth 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 death of the victim.

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

On August 25, 2003, a Louisiana jury found Patrick Kennedy ("Kennedy") guilty of aggravated rape of his then eight-year old stepdaughter.[1] In accordance with Louisiana state law, the prosecution sought the death penalty for Kennedy.[2] On August 26, 2003, an undivided jury concluded that the death penalty was an appropriate punishment for Kennedy's crime.[3]

Kennedy appealed his sentence to the Supreme Court of Louisiana, which upheld the death sentence.[4] In his appeal, Kennedy relied heavily on *Coker v. Georgia*.[5] The Louisiana Supreme Court noted that while *Coker* held that it was inconsistent with the Eighth Amendment to punish someone by death for the rape of an adult woman, the U.S. Supreme Court had left open the question as to whether the rape of a child could be punishable by death.[6] A dissenting opinion was filed by Louisiana Supreme Court Chief Justice Calogero.[7] The Chief Justice applied *Coker* with the Eighth Amendment to set out a clearly-defined rule that prohibited the

---

1. Louisiana v. Kennedy, 128 S.Ct. 2641, 2646 (2008).
2. *Id.* at 2647-48. The Louisiana Statute states:

> A. Aggravated rape is a rape committed … where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is 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. Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
> (1) However, if the victim was under the age of 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 benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

LA. STAT. ANN. § 14:42 (West 1997 and Supp. 1998).

3. *Kennedy*, 128 S.Ct. at 2648.
4. *Id.*
5. 433 U.S. 584 (1977) (invalidating a death sentence for the crime of rape as excessive punishment in violation of the Eighth Amendment).
6. State v. Kennedy, 957 So.2d 757, 781 (La. 2007).
7. *Id.* at 793-94.

use of the death penalty where the crime did not result in the victim's death.[8] Consistent with his opinion, Chief Justice Calogero would have granted a rehearing.[9]

Upon a grant of certiorari, and in a 5-4 decision, the United States Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.[10]

The Court reached this conclusion on the grounds that (1) the "national consensus" was opposed to the use of the death penalty for child rape; and, (2) through the Court's own "independent judgment," imposing the death penalty for the rape of a child is inconsistent with the "the evolving standards of decency that mark the progress of a maturing society."[11] Justice Kennedy, who wrote the opinion, began by explaining that the Eighth Amendment's cruel and unusual punishment clause of the U.S. Constitution is enforceable to the states through the Fourteenth Amendment[12] of the U.S. Constitution.[13] The Court stated that the concept of cruel and unusual punishment, as indicated in the Eighth Amendment, calls for a punishment that is not disproportionate to the nature of the crime committed.[14] A punishment is violative of the Eighth Amendment if it is inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[15] The Court relied on past decisions where the death penalty had been overturned because the sentence would have been inconsistent with the crime or the offender.[16]

Justice Kennedy proceeded to analyze the history of capital punishment for the crime of rape, stating that in 1925, nineteen jurisdictions (eighteen states and the District of Columbia) and the federal government authorized the use of the death penalty for the rape of an adult or child.[17] In 1972, after the *Furman v. Georgia*[18] decision, most legislation that allowed the death penalty for rape was abrogated and, as of 2008, only six states passed legislation that would

---

8. *Id.* at 794.

9. *Id.*

10. *Kennedy*, 128 S.Ct. at 2646. The majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* A dissent was written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia and Thomas. *Id.*

11. *Id.* at 2649-51 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)). A plurality opinion is "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." BLACK'S LAW DICTIONARY 922 (8th ed. 2005).

12. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. VIX, § 1.

13. *Kennedy*, 128 S.Ct. at 2649.

14. *Id.* (quoting Weems v. U.S., 217 U.S. 349, 367 (1910)).

15. *Kennedy*, 128 S.Ct. at 2649 (quoting *Trop*, 356 U.S. at 100-01

16. *Kennedy*, 128 S.Ct. at 2650. The Court specifically listed: Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); and, Enmund v. Florida, 458 U.S. 782 (1982). *Id.*

17. *Kennedy*, 128 S.Ct. at 2651.

18. 408 U.S. 238 (1972) (per curiam) (holding that the imposition of the death penalty for the defendants convicted of murder and rape, in this case, were cruel and unusual punishment and violated the Eighth Amendment of the U.S. Constitution). A *per curiam* opinion is "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 922 (8th ed. 2005).

authorize the death penalty for rape cases.[19] The majority noted that forty-four other states did not have statutes authorizing the death penalty for child rape;[20] the Court additionally stated that in the Federal Death Penalty Act of 1994,[21] Congress broadened the federal crimes for which capital punishment could be imposed but did not list child rape or abuse.[22]

The Court compared the number of jurisdictions using the death penalty for child rape with the prior analyses of *Atkins v. Virginia*,[23] *Roper v. Simmons*,[24] and *Enmund v. Florida*.[25] In 2002, when *Atkins* was decided, thirty states forbid capital punishment for mentally retarded individuals.[26] In 2005, when *Roper* was decided, thirty states prohibited the execution of juveniles.[27] When *Enmund* was decided in 1982, eight jurisdictions permitted the use of the death penalty for an individual who participated in a robbery where a murder had been committed by an accomplice.[28] The Court concluded that there was no unanimous opinion regarding the use of capital punishment for child rapists, mentally retarded individuals, individuals under the age of eighteen, and individuals who participate in a criminal act where an accomplice commits murder, but the majority of jurisdictions are opposed to it.[29]

The Court then addressed a misunderstanding, argued by the state of Louisiana derived from the U.S. Supreme Court's capital punishment jurisprudence, specifically, the *Coker* decision applying to the rape of a child.[30] Justice Kennedy proceeded to clarify the misunderstanding by analyzing the holding in *Coker*.[31] In *Coker*, the rape victim was sixteen-years old; however, the Court characterized the victim as an adult.[32] The Court offered no explanation why such a distinction was made, but it may have been that the victim had been married at the time, was a homeowner, and a mother.[33] Because the Court made the distinction between an adult woman and a child in *Coker*, Justice Kennedy stated that it was incorrect to apply the *Coker* holding to the issue that was presently before the Court.[34]

The State of Louisiana argued that state legislatures could have reached the conclusion that *Coker* applied to all rapes and not just the rape of an adult woman and that could have prevented state lawmakers from ever trying to pass statutes making the rape of a child a capital

---

19. *Kennedy*, 128 S.Ct. at 2651. The other states that had statutes authorizing the death penalty for rape of a child were Georgia, Montana, Oklahoma, South Carolina, and Texas. *Id.*

20. *Id.* at 2652.

21. Pub. L. No. 103-322, §§ 60001-600026, 108 Stat. 1796 (codified as amended at 18 U.S.C. §§ 3591-3598 (2006)).

22. *Kennedy*, 128 S.Ct. at 2652. There were a total of sixty crimes which could give rise to the utilization of the death penalty, some of those crimes were kidnapping where death results, the killing of government officials, contract murder, sexual abuse or rape resulting in death, or operating a large drug distribution enterprise. CapitalPunishmentinContext.org, Expansion of the Federal Death Penalty, http://www.capitalpunishmentincontext.org/issues/expansion (last visited Aug. 13, 2009).

23. 536 U.S. 304 (2002).

24. 543 U.S. 551 (2005).

25. 458 U.S. 782 (1982); *Kennedy*, 128 S.Ct. at 2652-53.

26. *Kennedy*, 128 S.Ct. at 2653 (citing *Atkins*, 536 U.S. at 313-15).

27. *Kennedy*, 128 S.Ct. at 2653 (citing *Roper*, 543 U.S. at 564).

28. *Kennedy*, 128 S.Ct. at 2653 (citing *Enmund*, 458 U.S. at 789).

29. *Kennedy*, 128 S.Ct. at 2653.

30. *Id.* at 2653.

31. *Id.*

32. *Kennedy*, 128 S.Ct. at 2653 (citing *Coker*, 443 U.S. at 593).

33. *Kennedy*, 128 S.Ct. at 2653-54 (citing *Coker*, 443 U.S. at 593-600).

34. *Kennedy*, 128 S.Ct. at 2654.

crime.[35] Justice Kennedy dismissed this claim as having little reliability and explained that where there is no evidence to such a claim, the Court will not speculate into the motivations and intentions of the state legislators.[36] The majority cited state case-law in which Florida's Supreme Court acknowledged the distinction this Court articulated in the *Coker* holding.[37] The Court concluded that there was no indication that *Coker* was incorrectly relied upon by the state lawmakers to bar the death penalty for the rape of a child.[38]

Next, the Court addressed the State of Louisiana's contention that the six states that have child rape as a capital offense, in addition to those states that have proposals for similar legislation, represent empirical evidence supporting the use of the death penalty for offenders who commit child rape.[39] Justice Kennedy dismissed this claim because of its lack of evidence and rebutted it by divulging into the "national consensus" derived from the majority of states that do not use the death penalty for non-homicide crimes.[40] The Court concluded that based on the current status of statutes, the number of individuals executed since 1964, and the history of the death penalty use for crimes in which a homicide did not occur, the "national consensus" was opposed to the death penalty in this case.[41]

The Court began to address the ethical grounds for capital punishment regarding a crime in which death of the victim was not the result.[42] The majority stated that "decency presumes respect of individuals" and thus the death penalty should be used with restraint.[43] In addition, the Court also noted that if this sentence were to be affirmed and the category of child rapists that could be sentenced to death was narrowed, that would not ensure that this punishment would not be used arbitrarily.[44]

The majority defended its holding by citing *Gregg v. Georgia*,[45] where the Court stated that capital punishment is excessive when it does not satisfy either the purpose of retribution or deterrence or if it is grossly disproportionate with the crime.[46] Justice Kennedy acknowledged that capital punishment is too severe a punishment for the crime of child rape and does not satisfy the goal of retribution.[47] The Court noted that in situations where the death penalty is sought, the victim would be needed to testify over a long period of time, making the incident and the experience more difficult.[48] This would also include requiring a child to make the decision as to whether they desire to see their attacker put to death.[49]

Another potential problem acknowledged by the Court is the unreliability of the testimony of a child which could be derived from inducement and could possibly lead to the

---

35. *Id.*
36. *Id.* at 2654-55.
37. *Id.* at 2655-56 (citing Buford v. State, 403 So.2d 943 (Fla.1981)).
38. *Kennedy*, 128 S.Ct. at 2656.
39. *Id.*
40. *Id.* at 2656-57.
41. *Id.* at 2657-58.
42. *Id.* at 2658.
43. *Kennedy*, 128 S.Ct. at 2658.
44. *Id.* at 2660-61.
45. 428 U.S. 153 (1976) (plurality opinion) (holding that a punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments).
46. *Kennedy*, 128 S.Ct. at 2661.
47. *Id.* at 2662.
48. *Id.*
49. *Id.* at 2662-63.

execution of an innocent individual.[50] Also, the Court viewed under-reporting as a potential problem where the relationship of the victim and the perpetrator is familial or a close friend.[51] One final, potential problem the Court addressed was whether the punishment of death would displace the incentive for a reasonable person who rapes a child not to kill the child.[52] In taking into account the sum of these potential problems, the issues that would arise for allowing capital punishment for child rapists, the "national consensus" against capital punishment for the crime of child rape, and through the Court's own "independent judgment," the Court concluded that the death penalty is not proportionate to the crime of child rape, ordered the capital punishment sentenced reversed and remanded the case for further proceedings.[53]

A dissenting opinion was written by Justice Alito, who began by expressing his disagreement toward the blanket-ruling that the Court had bestowed upon the nation and viewed the two grounds on which the majority had reached its conclusion as unsound.[54] The analysis of the dissent started with the assertion that the statistics used by the Court that only six out of fifty States had statutes permitting capital punishment for child rape was inaccurate in assessing the views of state law-making bodies.[55] Justice Alito believed that *Coker* had blocked legislation from being passed in states fearing that it would be struck down.[56] This led to states strongly being discouraged from passing such statutes.[57] The dissenters thought the dicta of *Coker*, while correctly interpreted by some courts and law-making bodies, had an impact as to whether or not state legislators would attempt to pass laws making child rape a capital offense.[58] The dissent indicated that the majority should not have dismissed the *Coker* dicta, in that states could reasonably conclude that the U.S. Supreme Court would not uphold the death penalty for the crime of child rape.[59] Here, Justice Alito provided evidence from the State of Oklahoma, where opposition to capital punishment for child rape legislation was contested on the grounds that *Coker* had already ruled that the death penalty for rape was unconstitutional.[60]

Justice Alito then stated that there is an increasing concern regarding children being the victims of sexual abuse.[61] Recently states had been taking steps towards enacting laws regarding this issue, including the possibility of following Louisiana and the other five states that have statutes authorizing the death penalty for various forms of child rape.[62] Specifically, the dissent cited an example from Colorado, where the Senate Appropriations Committee voted six to four against Senate Bill 195, which would have made child rape a crime subject to capital punishment.[63] Justice Alito believed that since this bill was introduced after certiorari was

---

50. *Id.* at 2663.
51. *Kennedy*, 128 S.Ct. at 2664.
52. *Id.* at 2664.
53. *Id.* at 2664-65.
54. *Id.* at 2665 (Alito, J., dissenting).
55. *Id.*
56. *Kennedy*, 128 S.Ct. at 2665 (Alito, J., dissenting).
57. *Id.* at 2665-66.
58. *Id.* at 2666-68.
59. *Id.* at 2668.
60. *Id.*
61. *Kennedy*, 128 S.Ct. at 2669-70 (Alito, J., dissenting).
62. *Id.* at 2669-71.
63. *Id.* at 2671.

granted for this case, the bill was delayed for a ruling on the issue and the bill's narrow defeat was in anticipation of the Court's ruling.[64]

Next, the dissent argued that the Court's rationale of its own "independent judgment" was what actually created the "national consensus" against the death penalty for child rape.[65] Finally, the dissent stated that the majority's theories that the death penalty would remove the incentive for a child rapist not to kill the victim, the difficult decision for the victim, and the procedural problems of reliability of testimony from the child, are not relevant to the issue of "cruel and unusual" punishment.[66]

The Eighth Amendment of the U.S. Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[67] The U.S. Supreme Court's first landmark death penalty case came in 1972 in *Furman v. Georgia*.[68] In *Furman*, the U.S. Supreme Court issued a *per curiam* opinion in which the Court invalidated the death sentences in three cases, two of which involved rape.[69] The Court believed that capital punishment was being administered in an "arbitrary and discriminatory way,"[70] specifically against the poor and minorities, but never reached a decision on the merits as to whether the death penalty could be administered for rape.[71]

In *Coker v. Georgia*, the U.S. Supreme Court was asked to decide whether a person convicted of rape could be put to death without offending the Eighth Amendment.[72] The Court held that a death sentence for a man convicted of rape was "grossly disproportionate and excessive punishment forbidden by the Eighth Amendment."[73] In *Coker*, the petitioner was serving sentences for the crimes of murder, kidnapping, rape, and aggravated assault.[74] The petitioner escaped from a prison in Georgia and, subsequently, committed a series of crimes, specifically, the rape of an adult woman.[75] The petitioner was apprehended and convicted of, *inter alia*,[76] rape and was sentenced to death.[77] At sentencing, the jury found two aggravating circumstances which would allow for a death sentence to be issued.[78] After the Georgia

---

64. *Id.* If the bill had been passed and invalidated, then approximately $616,000 would have been wasted on trials, public defenders, appeals, and prison costs. *Id.*

65. *Id.* at 2672-73.

66. *Kennedy*, 128 S.Ct. at 2673 (Alito, J., dissenting).

67. U.S. CONST. amend. VIII.

68. Furman v. Georgia, 408 U.S. 238 (1972).

69. *Furman*, 408 U.S. at 238-40.

70. A study conducted in Texas found that African-Americans were being executed far more frequently than whites and believed the use of the death penalty was discriminatory. Rupert Koeninger, *Capital Punishment in Texas*, 1924-1968, 15 Crime & Delin. 132, 141 (1969). A similar study was conducted in Pennsylvania in which death row inmates were analyzed from 1914-1958, producing similar results about the "discriminatory" practice and the lack of pardons issued to African-American on death row. Frank Hartung, *Trends in the Use of Capital Punishment*, 284 Annals 8, 14-17 (1952).

71. *Furman*, 408 U.S. at 249-250.

72. Coker v. Georgia, 433 U.S. 584 (1977).

73. *Coker*, 433 U.S. at 593.

74. *Id.* at 587.

75. *Id.*

76. *Inter alia* means "[a]mong other things." BLACK'S LAW DICTIONARY 671 (8th ed. 2005).

77. *Coker*, 433 U.S. at 587, 591.

78. *Id.* at 591. The two aggravating circumstances that the jury found were: "that the rape was committed (1) by a person with prior capital-felony convictions and (2) in the course of committing another capital felony, armed robbery." *Id.* at 588-91.

Supreme Court affirmed the sentence, the U.S. Supreme Court reversed, holding that the death penalty, in this case, was prohibited by the Eighth Amendment.[79]

In Justice White's opinion for the Court, he first acknowledged that punishment is deemed to be "excessive" if it is disproportionate to the offense and lacks any objective regarding retribution or deterence.[80] Second, the Court used the objective evidence of the attitudes of state legislatures, sentencing juries, and present public opinion regarding the acceptability of the death penalty for the rape of an adult woman.[81] Justice White then went on to address the lack of justification for the use of the death penalty against the petitioner since no human life was taken.[82]

Prior to the decisions of *Furman* and *Coker*, sixteen states and the federal government had statutes authorizing capital punishment for a defendant convicted of raping an adult woman.[83] *Furman* found most of these statutes unconstitutional due to their arbitrary and discriminatory use and state legislatures were left with the option of modifying their capital punishment statutes or eliminating them.[84] Shortly thereafter, thirty-five states revised statutes authorizing, or mandating, capital punishment crimes.[85] Of the original sixteen states that had statutes authorizing capital punishment for rape, only three revised their statutes to allow the use of the death penalty for an individual convicted of rape.[86] Justice White declared that the current judgment in state legislatures is not unanimous, but believed a majority of jurisdictions rejected the use of the death penalty for the rape of an adult woman.[87]

In 1976, two influential death penalty cases were decided by the U.S. Supreme Court, *Gregg v. Georgia*[88] and *Woodson v. North Carolina*.[89] In *Gregg*, the U.S. Supreme Court acknowledged that the Eighth Amendment does not, in all circumstances, prohibit the use of the death penalty and upheld the death sentence for the petitioner who had been convicted of armed robbery and murder.[90] In *Woodson*, the U.S. Supreme Court held that North Carolina's statute mandating the death penalty was in "violat[ion] [of] the Eighth and Fourteenth Amendments and therefore must be set aside."[91]

Several years later, in 1982, the U.S. Supreme Court was confronted with a different scenario and issue regarding the use of capital punishment in the case of *Enmund v. Florida*.[92] In

---

79. *Id.* at 584.
80. *Id.* at 592.
81. *Id.*
82. *Coker,* 433 U.S. at 593-97.
83. *Id.* at 593.
84. *Id.*
85. *Id.* at 593-94. The thirty-fives states that revised their statutes were Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Gregg*, 428 U.S. at 179.
86. *Coker*, 433 U.S. at 594. Georgia, North Carolina, and Louisiana were the three states which modified death penalty statutes for the rape of an adult woman. *Id.*
87. *Id.* at 596.
88. 428 U.S. 153 (1976).
89. 428 U.S. 280 (1976).
90. *See Gregg*, 428 U.S. 153 (1976).
91. *Woodson*, 428 U.S. at 305.
92. 458 U.S. 782 (1982).

Enmund, the Court was asked to decide whether the death penalty could be imposed on an individual who acted as an accomplice in the commission of a felony where a killing took place, even though the individual did not do the killing himself, attempt to kill, or intend for any lethal force to be employed.[93]

Enmund and two others were charged with first-degree murder and robbery.[94] The three individuals robbed an elderly couple in central Florida which resulted in the death of the elderly couple.[95] The two main actors, Jeanette and Sampson Armstrong, used lethal force during the robbery when one of the victims resisted with a gun.[96] It was believed that one or both of the Armstrongs shot and killed the elderly couple while Enmund was waiting in the car for them to return from the victims' house.[97] Sampson Armstrong and Enmund were tried together and the judge instructed the jury that, even absent intent to kill, the murder of an individual during the commissionion of robbery is first-degree murder.[98] The jury found both Enmund and Sampson Armstrong guilty and, in different sentencing hearings, the jury recommended the death penalty for both.[99] Upon the recommendation of the jury, the trial judge sentenced Enmund to death.[100] Enmund appealed and the Florida Supreme Court affirmed his conviction and sentence.[101]

When the case reached the U.S. Supreme, again, Justice White delivered the opinion for the Court, and in this opinion he relied on the judgment of prosecutors, juries, and legislatures and their rejection of capital punishment for the petitioner's crime.[102] The majority cited *Gregg v. Georgia*,[103] finding that, even though robbery is a felony and a serious criminal act, it is not "so grievous an affront to humanity that the only adequate response may be the penalty of death."[104] Justice White also stated that the death penalty did not satisfy the goals of deterrence or retribution, since murder was not the intention of the petitioner, his culpability was limited to his involvement in the robbery.[105]

In 2002, in *Atkins v. Virginia*, Atkins was convicted of abduction, armed robbery, and murder.[106] During the sentencing phase of the case, the defense argued that Atkins was "mildly mentally retarded."[107] After the need for several re-hearings due to procedural errors, a jury sentenced Atkins to death and the Supreme Court of Virginia affirmed the sentence.[108] The U.S.

---

93. *Enmund*458 U.S.. at 787-88.
94. *Id.* at 784.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Enmund*, 458 U.S. at 784-85.
99. *Id.* at 785.
100. *Id.*
101. *Id.* at 785-86.
102. *Id.* at 788-96.
103. *Gregg v. Georgia*, 428 U.S 153 (1976).
104. *Enmund*, 458 U.S. at 797. (quoting *Gregg,* 428 U.S. at 184.)
105. *Enmund*, 458 U.S. at 797-801.
106. *Atkins*, 536 U.S. at 307.
107. *Id.* at 308-09.
108. *Id.* at 309-10.

Supreme Court held that executions of mentally retarded individuals are "cruel and unusual punishments" in violation of the Eighth Amendment.[109]

In reaching this decision, the Court analyzed the term "excessive" and concluded that a punishment is excessive if it is not proportionate to the offense committed by the individual, and, in addition, found that the Constitution contemplated that the Supreme Court to use its own independent judgment when asked to agree or disagree with opinions of state courts and legislatures.[110] The Court also found objective evidence that there is a general consensus against utilizing capital punishment for offenders who are mentally retarded.[111] Finally, the Court analyzed the reasons for that consensus and evaluated the retributive and deterrent aspects as well as the procedural problems that can lead to wrongful executions.[112] The Court ultimately concluded that the use of the death penalty for mentally retarded offenders is prohibited by the Eighth Amendment.[113]

In 2005, in *Roper v. Simmons*, Christopher Simmons committed murder while he was only seventeen years old.[114] The murder involved a home invasion where Simmons and another juvenile entered the home of a woman, tied her up, took her to a bridge, and threw the woman over the bridge which caused her to die by drowning.[115] Shortly after the murder took place, Simmons was arrested and charged with burglary, kidnapping, stealing and first degree murder.[116] Simmons did not turn eighteen years old until approximately nine months after he committed the murder.[117] The jury found Simmons guilty of murder and the State of Missouri sought the death penalty.[118] The state introduced several aggravating factors and the jury recommended the death penalty, the trial judge agreed and a sentence of death was imposed.[119]

Simmons filed for post-conviction relief, arguing that the *Atkins* line of precedent would bar the use of the death penalty against an individual where the individual was a juvenile at the time of the offense.[120] The Missouri Supreme Court reversed the trial court's decision and instituted a new sentence of life imprisonment.[121] The case was appealed by the state and the U.S. Supreme Court affirmed the decision of the Missouri Supreme Court.[122]

In reaching its conclusion, the Court in *Roper* stated three major reasons for reaching its conclusion: (1) "cruel and unusual punishments" must be interpreted by considering a number of things, including, precedent, tradition, history, text and "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are "cruel and

---

109. *Id.* at 321. In a 6-3 decision, Justice Stevens authored the opinion with Justices O'Connor, Kennedy, Souter, Breyer and Ginsburg joining and Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissenting. *Id.* at 306, 321.

110. *Id.* at 311-13.

111 . *Atkins*, 536 U.S. at 313-16.

112. *Id.* at 317-21.

113. *Id.* at 321.

114. *Roper,* 543 U.S. at 556.

115. *Id.* at 556-57.

116. *Id.* at 557.

117. *Id.* at 556.

118. *Id.* at 557.

119. *Roper*, 543 U.S. at 557-58.

120. *Id.* at 559.

121. *Id.* at 559-60.

122. *Id.* at 560.

unusual;"[123] (2) evidence of a "national consensus" and the Court's own independent judgment that the use of the death penalty on juvenile offenders is a disproportionate punishment, even in the area of murder;[124] and, (3) the evidence of international opinion against the use of the death penalty on juvenile offenders provided support to the Court's determination that the death penalty is not a proportionate punishment for offenders under eighteen years of age.[125]

The *Kennedy* and *Roper* opinions have cited the case of *Trop v. Dulles*,[126] in which the U.S. Supreme Court held "that the Eighth Amendment forbids Congress to punish by taking away citizenship."[127] The Court did not address the issue of capital punishment in the case, however, the Court interpreted the scope of the Eighth Amendment's "cruel and unusual punishment" clause.[128] The Court stated that the words of the Eighth Amendment were not precise and "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[129] This phrase has become the standard of consideration when the U.S. Supreme Court is deciding whether a state's issuance of a death sentence violates the Eighth Amendment.[130]

The Court's opinion in *Kennedy v. Louisiana* is an abuse of power for two reasons: (1) it is a federal confiscation of the states' power to "police" themselves; and (2) it is a continuing use of a standard for "cruel and unusual punishment" cases, which is a subjective standard relying on the Justices' personal opinions.

The Court's first rationale, the "national consensus" against the death penalty for individuals who commit child rape, is not justifiable grounds for the ruling in this case.[131] Furthermore, the "national consensus" was created by the U.S. Supreme Court in the 1970's in *Furman* and *Coker*. Before *Furman* and *Coker* ever reached the U.S. Supreme Court, sixteen states and the federal government had statutes that authorized the use of capital punishment for the crime of rape.[132] Only after the *Furman* decision was handed down did the number of states that had statutes authorizing the death penalty for rape, specifically the rape of a child, drop to three, while an additional thirty-two states still had statutes authorizing capital punishment.[133] In 2008, when the decision for this case was issued, the number of states authorizing the death penalty for child rape increased from three to six.[134] In addition to that, the dissent evidenced additional states that had legislation pending, awaiting the outcome of this case.[135] There was also an issue regarding the facts of *Coker* and whether or not the ruling and dicta were in opposition to the use of the death penalty for all cases of rape or just cases where an adult woman was raped. The Court dismissed this allegation, stating that it was clearly articulated by

---

123. *Id.* at 560-61. (citing *Trop,* 356 U.S. at 100-01.)
124. *Roper*, 543 U.S. at 564-75.
125. *Id.* at 575-78.
126. 356 U.S. 86 (1958).
127. *See Trop*, 356 U.S. 86.
128. *Id.* at 99-101.
129. *Id.* at 100-01.
130 . *See Kennedy*, 128 S.Ct. 2641; *Roper*, 543 U.S.551.
131. *Kennedy*, 128 S.Ct. at 2648-49.
132. *Coker*, 433 U.S. at 593.
133. *Id.* at 593-94. (citing *Gregg*, 428 U.S. at 179).
134. *Kennedy*, 128 S.Ct. at 2651. In 1972, post-*Furman*, Florida, Mississippi and Tennessee authorized the death penalty for child rape. *Id.* In 2008, Louisiana, Georgia, Montana, Oklahoma, South Carolina and Texas authorized the death penalty for child rape. *Id.*
135. *Id.* at 2671 (Alito, J., dissenting).

the *Coker* Court that the woman raped was an "adult," even though she was only sixteen-years old at the time, and that the Court would not speculate into the motivations of state legislatures.[136] Justice Alito provided specific evidence against the majority's assessment, or lack thereof, of *Coker's* holding in the state of Oklahoma.[137]

There is no evidence to suggest that from 1972-1977 the majority of states that had statutes authorizing the administration of the death penalty for child rape, or rape in general, were going to repeal their laws because they believed that the death penalty was grossly disproportionate to the crime of rape. The states were forced to throw out their statutes or try to amend them to fit the vague and confused theories of the U.S. Supreme Court. Several states responded to the ruling in *Furman* by trying to resolve the arbitrary and discretionary use of the death penalty through creation of mandatory death sentences for specific crimes; however, those efforts were found to violate the Eighth and Fourteenth Amendments.[138] The fact that the Court began invalidating death sentences and statutes authorizing the discretionary or mandatory use of the death penalty, and then later counted the states that made the effort to comply, using the number of states as indicator of a "national consensus," is a new form of the circular cause and consequence issue.[139] It is highly unlikely that states are repealing capital punishment statutes due to "evolving standards of decency that mark the progress of a maturing society."[140]

In addition to the confusing death penalty jurisprudence that the Court has bestowed upon the nation since 1972, the U.S. Supreme Court continues to seize governing power from the States. The Eighth Amendment gives the U.S. Supreme Court a great deal of discretion and it should be used carefully, so as not to deprive the states of the power to govern themselves and act on behalf of their citizens. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[141]

The Court's second rationale, its' own "independent judgment" and "the evolving standards of decency that mark the progress of a maturing society," is not a legal justification.[142]

---

136. *Id.* at 2654-55 (majority opinion).

137. *Id.* at 2668 (Alito, J., dissenting).

138. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (holding that North Carolina's *mandatory* death sentence for first-degree murder violated the Eighth and Fourteenth Amendments of the U.S Constitution); Roberts v. Louisiana, 428 U.S. 325 (1976) (striking down a Louisiana mandatory death penalty statute); Lockett v. Ohio, 438 U.S. 586 (1978) (striking down a statute that required a trial judge, once a verdict of aggravated murder with specifications had been returned, to impose the death sentence unless he found a mitigating circumstance present).

139. The traditional form of the circular cause and consequence issue is, "[w]hich came first, the chicken or the egg?"

140. *Trop*, 356 U.S. 100-01.

141. U.S. CONST. amend. X. The state sovereignty that is articulated in the Tenth Amendment is given further support by the Federalist Papers:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (James Madison).

142. *Kennedy*, 128 S.Ct. at 2650.

It is presumptuous for the Supreme Court to believe that they are more capable of administering justice than state legislatures, elected representatives of their citizens, and the juries hearing the cases. The states are in a far better position to redress the grievances of their citizens than the U.S. Supreme Court. If a state's people prefer the death penalty for child rapists they will elect representatives to carry out their will; if they do not, then they will elect representatives who support their voice, as a people, against such punishments.

The majority also incorporates speculative evidence that children may be induced to testify inaccurately or that there may be issues with under-reporting where there is a special relationship between the perpetrator and the victim.[143] The dissent, in response to this, points out that while the issues of under-reporting and unreliable, induced child testimony may be difficult issues, they are procedural problems and are not pertinent to the issue of whether a punishment is "cruel or unusual."[144] The presence of procedural problems, issues of reliability, and under-reporting speculation addressed in the majority's opinion is simply an argument of persuasion expressing why their personal view of the death penalty shall be the law of the land.

Next, the U.S. Supreme Court continues to use a standard which is not a standard of review. The phrase "the evolving standards of decency that mark the progress of a maturing society,"[145] is not a standard of review; rather, it is merely an expression of the Justices' personal opinions. It is very difficult to resolve issues under the Eighth Amendment, the language of the Eighth Amendment is very broad and subjective and leaves a great deal of discretionary power to the group of individuals trying to decide a case. However, there needs to be an actual standard of review for the Court to use regarding the utilization of the death penalty. An example of a suitable standard to use, when deciding whether a state legislature has crossed the constitutional bounds for punishing its citizens, would be a "shocks the conscience" test. It is unlikely that it would "shock the conscience" of a reasonable person to know that individuals who brutally rape young children in Louisiana *could* be put to death.

The U.S. Supreme Court has created inconsistent jurisprudence in this area over the last thirty-seven years. The Court has not spoken clearly on any issues regarding the death penalty; the Court continues to issue five-four decisions,[146] *per curiam* opinions,[147] plurality opinions,[148] strikes down statutes that allow discretion for the administration of the death penalty, and then subsequently strikes down statutes that mandate the use of the death penalty, finding both set of circumstances as "arbitrary."[149]

The Supreme Court has been eliminating groups which it personally feels should not be put to death: juveniles,[150] the mentally retarded,[151] individuals involved in the commission of a felony who did not personally do any killing,[152] and child rapists.[153] It seems that the Court is

---

143. *Id.* at 2663-64.
144. *Id.* at 2663.
145 . *Trop*, 356 U.S. 100-01.
146 . *See Woodson*, 428 U.S. 280; *Enmund*, 458 U.S. 782; *Roper*, 543 U.S. 551; *Kennedy*, 128 S.Ct. 2641.
147 . *See Furman*, 408 U.S. 238.
148 . *See Gregg*, 428 U.S. 153.
149 . *See Furman*, 408 U.S. 238; *Woodson*, 428 U.S. 280; *Roberts*, 428 U.S. 325; *Lockett*, 438 U.S. 586.
150. *See Roper*, 543 U.S. 551.
151. *See Atkins*, 536 U.S. 304.
152. *See Enmunds*, 458 U.S. 782.
153. *See Kennedy*, 128 S.Ct. 2641.

willing to only uphold death sentences in cases where the defendant is neither mentally retarded, nor a juvenile, and has been convicted of pre-meditated murder. If the Court would not allow Kennedy to be put to death after raping his eight-year old stepdaughter,[154] then nothing short of pre-meditated murder will be sufficient.

The death penalty is likely to stay in effect in the United States so long as additional states do not repeal their death penalty statutes. If additional states with death penalty legislation begin repealing their statutes, the U.S. Supreme Court may take away the states' sentencing power by handing down a decision invalidating all death penalties through the Court's "own independent judgment" and a "national consensus."

Brian Lucot

154. *Kennedy*, 128 S.Ct. at 2648.