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Justices to Decide if Rape of a Child Merits Death

By [LINDA GREENHOUSE](#)

WASHINGTON — The Supreme Court agreed on Friday to decide whether the Constitution allows the death penalty for the rape of a child.

The justices acted only three days before a scheduled argument in another important death penalty case, on the standard for judging whether chemicals used to administer lethal injections make that method of execution unconstitutionally cruel.

The new case, from Louisiana, is likely to be argued in April, meaning that during the course of its current term, the Supreme Court will be examining both the most common method of execution and a categorical question about which crimes are appropriate for the death penalty.

No one has been executed in the United States for a crime other than murder since 1964. Of some 3,300 inmates of death row today, only two are facing execution for an offense that did not involve a killing. Both are on Louisiana's death row. The Supreme Court agreed to hear an appeal from one of them, Patrick Kennedy, who was convicted and sentenced to death in 2004 for raping his 8-year-old stepdaughter.

In 1977, as part of its wide-ranging re-examination of capital punishment, the Supreme Court prohibited the death penalty for rape. While that ruling, *Coker v. Georgia*, did not specifically discuss the rape of a child — the victim, although only 16, was a married woman who was raped at knifepoint — the decision has been widely understood as limiting the death penalty to the crime of murder.

In the principal opinion in the *Coker* case, Justice [Byron R. White](#) wrote that “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.”

But in recent years, a handful of states, responding to public outcries about sex crimes against children, have amended their death penalty statutes to make the rape of a child a capital offense. Louisiana was the first to do so, amending its death-penalty law in 1995 to apply to the rape of a child under the age of 12. The other states with similar provisions are Georgia, Montana, Oklahoma, South Carolina and Texas. Unlike Louisiana, most limit the death penalty to defendants who were previously convicted of sexual assault against a child.

The Louisiana Supreme Court rejected Mr. Kennedy's appeal last year in a 64-page opinion that concluded that “rape of a child under the age of 12 years of age is like no other crime” and that death was not a disproportionate punishment. Taking note of the recent state laws, the court said there was “compelling” evidence of a national trend toward treating the crime as distinct from others.

The United States Supreme Court's recent death penalty jurisprudence has paid close attention to evidence of whether contemporary society has reached a consensus on particular applications of capital punishment. The court relied on such an analysis to rule out the death penalty for mentally retarded defendants in 2002 and for juvenile killers in

2005. Louisiana is now invoking the same approach to argue that an application of the death penalty once widely deemed unconstitutional has become permissible.

Mr. Kennedy's lawyers are arguing that any such "trend" is illusory. "By any objective measure," their brief says, Mr. Kennedy's sentence "is not only cruel and unusual; it is cruel and unique."

The other inmate is Richard Davis, who was sentenced to death on Dec. 12 for sexually molesting a 5-year-old girl.

The appeal, *Kennedy v. Louisiana*, No. 07-343, was filed by lawyers from the Capital Appeals Project, in New Orleans; the Stanford Law School Supreme Court Litigation Clinic; and a New Orleans law firm, Adams and Reese.

Among other briefs filed at the court on Mr. Kennedy's behalf was one from the National Association of Criminal Defense Lawyers, arguing that the Louisiana law presents "an intolerably high risk" that innocent defendants will be put to death. The reason, the group asserts, is that testimony by children, who are usually the principal witnesses in child rape cases, is often unreliable.

Another brief, from social workers and organizations working with sexual assault victims, describes the Louisiana law, with its broad definition of rape and its drastic penalty, as counterproductive and likely to lead to under reporting of offenses, especially within families.

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