

# P E N N S Y L V A N I A LAW WEEKLY

July 7, 2008; 31 PLW 697

## **SUFFER THE LITTLE CHILDREN**

### **The decision banning the death penalty for those who rape children is a capital affront**

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Special to the Law Weekly

One of this year's end-of-term decisions of the U.S. Supreme Court stands for the proposition that imposing the death penalty for the crime of rape of a child violates the Eighth Amendment prohibition on cruel and unusual punishment.

The majority opinion written by Justice Anthony Kennedy, writing for the majority in *Kennedy v. Louisiana*, 554 U.S. \_\_\_ (June 25, 2008) Kennedy, J.; Alito, J. dissenting (Docket No. 07-343), concluded that the only crime for which the death penalty was suitable was a crime which took a life.

"Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape," Kennedy wrote.

In *Kennedy v. Louisiana*, the child was 8 years old and suffered "a laceration to the left wall of the vagina which separated her cervix from the back of her vagina causing her rectum to protrude into the vaginal structure and her entire perineum was torn from the posterior fourchette to the anus, requiring emergency surgery. The perpetrator was her stepfather who had abused another 8-year-old and raped her. The expert in pediatric forensic medicine testified that the child's injuries were the most severe he had seen from a sexual assault. Had the child in *Kennedy* died, then the capital punishment for child rape would have passed constitutional muster. The child having been ripped apart was not sufficient.

In *Coker v. Georgia*, 433 U.S. 584 (1977), the court had the opportunity to consider whether a Georgia statute, which provided for capital punishment for the rape of an adult under certain aggravating circumstances, was constitutional. In that matter, the defendant had been serving various sentences for murder, rape, kidnapping and aggravated assault when he escaped from jail and committed an armed robbery and other crimes and raped an adult woman. Under the Georgia capital punishment statute, a jury found the defendant guilty of rape, armed robbery and other offenses and sentenced him to death on the rape charge. The Georgia Supreme Court had affirmed both the conviction and the sentence. The United States Supreme Court stated in *Coker*:

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“Rape is without 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,” the Coker court said.

The question left open by Coker was whether capital punishment could be justified under the Eighth Amendment for the rape of a child.

The Kennedy court began its analysis with a historical review of capital punishment for rape. Since 1925, 18 states and the District of Columbia, as well as the federal government, authorized capital punishment for the rape of an adult female. By 1971, that number had declined to 16 states and the federal government.

However, a major change came when the Supreme Court decided *Furman v. Georgia*, 408 U.S. 238 (1972), in which three of the petitioners (all African American) had been convicted in a state court and sentenced to death after trial by jury. One was convicted of murder and two were convicted of rape.

In *Furman*, the U.S. Supreme Court reversed and remanded, finding that imposition of the death penalty as applied was discretionary, haphazard and discriminatory and violated the Eighth Amendment as cruel and unusual punishment. The effect of *Furman* was to invalidate most state statutes which authorized the death penalty for the crime of rape. *Furman* also invalidated many of the states’ death penalty statutes and many states were required to modify their capital punishment laws.

*Dicta*, in *Furman*, indicated that the court was appalled that all three defendants were “Negro” and that persons with little power could so easily be discriminated against by haphazard application of capital punishment statutes. I posit whether there is any group of persons with so little power as children in child rape situations? The purpose of the U.S. Constitution is to protect those persons with no voice and power who cannot protect themselves. Can there be a more powerless group than children?

Oddly enough capital punishment per se is not considered cruel and unusual punishment. After *Furman*, by 1976, 35 states enacted new statutes which provided for the death penalty for crimes resulting in the death of another person. Today, 36 states and the Federal government impose capital punishment, but only six do so for child rape. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the U.S. Supreme Court had no problem affirming the decision of the Georgia Supreme Court wherein the death penalty was the sentence in a case resulting in murder. The Kennedy court stated that after *Furman v. Georgia*, most of the states’ statutes which authorized the death penalty for the crime of rape were invalidated. After *Furman*, only six states re-enacted their capital rape provisions and eventually, the six statutes were invalidated.

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Louisiana reintroduced the death penalty for rape of the child in 1995. Following suit were Georgia, Montana, Oklahoma, South Carolina and Texas. The Kennedy court was quick to note that 44 states have not made child rape a capital offense.

## **Evolving Standards**

Thus, because only a few states since 1995 have enacted a death penalty provision for the crime of rape of a child, the U.S. Supreme Court found that there is not a trend or change of direction of the legislatures of the states to impose capital punishment for the crime of rape of a child. The court concluded that evolving standards of decency do not include the imposition of the death penalty for rape of a child.

At the same time, the court also observed that Louisiana was the only state since 1964 which has sentenced a man to death for child rape, a non-homicide offense.

The court went on to reason that it cannot be said with any certainty that the death penalty for child rape serves as a deterrent or as retribution. This writer notes that there is no proof that the death penalty for homicide acts as a deterrent. Certainly, the death penalty acts as retribution for the victims and their families whether for child rape or homicide. In the majority's words the "goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused (citations omitted) does not justify the harshness of the death penalty here."

The court also stated:

"Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child who is not of mature age to make that choice."

The Kennedy court further noted that the only witnesses to the crime of child rape are the child and the perpetrator. Therefore, it concluded that the main witness is the child and the court worried that the death penalty could add to the risk of non-reporting which is a common problem with respect to child sexual abuse.

I cannot accept the argument that there is a moral dilemma in forcing a child to assist the government in asking for capital punishment. This is 2008 where DNA testing is readily available and serves to rule out a suspect as well as rule in with certainty that a particular person committed the act.

## **An Outraged Dissent**

Interestingly enough, the dissent written by Justice Samuel A. Alito Jr. expressed outrage stating:

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“The court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted and no matter how heinous the perpetrator’s prior criminal record may be.”

Alito also inquired as follows:

"With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly but was not the triggerman and did not intend to kill him.” (Citations omitted). In the second case, a previously convicted child rapist kidnaps, repeatedly rapes and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?”

Finally, he went on to state:

"I have little doubt, that, in the eyes of ordinary Americans, the very worst child rapists — predators who seek out and inflict serious physical and emotional injury on defenseless young children — are the epitome of moral depravity.”

The dissenters queried why it is that only the loss of human life is sufficient to justify a death sentence. The dissent inquired why the majority imposed so many policy considerations when the only question facing the court was whether the imposition of the death sentence in a child rape case constituted a violation of the prohibition by the Eighth Amendment of cruel and unusual punishment. The dissent found that the heinous crime of child rape with safeguards built in as to when the death penalty can be applied required the death penalty be a sentencing choice available under very well-defined circumstances. Such limiting factors could be whether the victim was kidnapped or was raped multiple times or whether there were multiple victims or whether there was a prior conviction for a felony sex offense.

The Constitution of the United States was not drafted to protect the majority. The purpose of the Constitution is to protect those people with no voice and power. Who can be more vulnerable than children? Who has less voice in the government than children? Who is powerless to avoid the heinous crime of child rape? That capital punishment has since the time of the enactment of the Constitution been controversial is without question. However, capital punishment has been held constitutional and not cruel and unusual punishment in cases where a life has been taken. This is so in the event of felony murder.

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If a repeated sex offender kidnaps a child 3 years old and repeatedly rapes the child but does not kill her, why is that crime not punishable by the death penalty? Is that not enough moral depravity to justify capital punishment? *Kennedy v. Louisiana* is not about whether capital punishment per se is cruel and unusual punishment; the U.S. Supreme Court decided long ago that it is not. The case is about not protecting children who are too powerless to protect themselves.

The day after deciding *Kennedy*, the same justices decided *District of Columbia v. Heller*, 554 U.S. \_\_ (June 26, 2008) Scalia, J.; Stevens and Breyer, JJ., both dissenting (Docket No. 07-290) holding that individuals who are law-abiding responsible citizens have the right to bear arms for self-defense. Children are citizens incapable of self defense in child rape matters.

I believe that since the death penalty has been approved by the U.S. Supreme Court and by the majority of states as not constituting cruel and unusual punishment in certain circumstances, surely it should be made available in other certain narrow circumstances to protect the most vulnerable and voiceless of our citizens — our children. . •