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P R O C E E D I N G S

(10:20 a.m.)

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2
3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 07-343, Kennedy versus
5 Louisiana.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Thank you. Mr. Chief Justice,
10 and may it please the Court:

11 This country has not executed anyone for a
12 rape of any kind in over 43 years. Louisiana's attempt
13 to reintroduce this practice into American society
14 violates the Eighth Amendment for two distinct reasons.

15 First, a long-standing national consensus
16 exists against it. Indeed, Louisiana's capital rape law
17 is particularly at odds with national values because
18 Louisiana is the only State in which Petitioner, as a
19 non-recidivist, could be subject to the death penalty.

20 Second, Louisiana's law violates this
21 Court's Eighth Amendment-narrowing jurisprudence. It
22 gives juries unfettered discretion to choose who, among
23 the vast class of offenders convicted of child rape, may
24 be subject to the death penalty. Now, this is in stark
25 contrast to the handful of other States that have

1 capital rape laws that they've recently enacted. Texas,
2 for example, requires an offender to have served a prior
3 sentence for the same crime of 25 years before --

4 JUSTICE SCALIA: Well, our jurisprudence
5 just requires the narrowing of the death penalty to
6 be -- to particularly heinous crimes. And one could say
7 that rape is in and of itself particularly heinous, rape
8 of a -- of a child of 12 or under.

9 MR. FISHER: It's -- it's no doubt a serious crime,
10 Justice Scalia, but I believe this Court's narrowing
11 jurisprudence requires narrowing beyond a particularly
12 heinous crime. Of course, in Godfrey and Gregg against
13 Georgia, this Court said that deliberate murder is not
14 on its own enough to subject an offender to the death
15 penalty.

16 So there's two problems that arise with
17 Louisiana's statute in the context of this Court's
18 narrowing jurisprudence --

19 JUSTICE SCALIA: How would you describe a
20 particularly heinous rape of a child under 12? What
21 would make it particularly heinous?

22 MR. FISHER: Well, there could be several
23 aggravating facts that would make a rape of a child, or
24 indeed of any person, a particularly egregious crime,
25 but in Coker against Georgia, this Court did not simply

1 hold that the Eighth Amendment prohibited imposing the
2 death penalty for the crime of rape; it held that this
3 Court -- that the Eighth Amendment prohibited imposing
4 the death penalty for rape with aggravating
5 circumstances.

6 Remember in Coker against Georgia, there
7 were two aggravating circumstances in that case. First,
8 the offender was a recidivist. He had been convicted of
9 rape three times, was a convicted murderer who had
10 escaped from prison. Second, he committed the rape in
11 the course of committing other very serious felonies,
12 including kidnapping and robbery.

13 And so, at the very minimum, the State
14 stands here with the burden today to say that an average
15 child rape is worse than the crime in Coker, that this
16 Court held was not sufficiently superior --

17 JUSTICE SCALIA: Suppose -- suppose the
18 State says that all recidivist rapists of children under
19 12 will -- will suffer the death penalty. Does it have
20 to narrow that class further? I mean, the need for
21 narrowing depends upon how narrow the class is described
22 in the first place. Right?

23 MR. FISHER: If --

24 JUSTICE SCALIA: I mean, if the law says you
25 have to be a recidivist, you have to have all the other

1 factors that you just mentioned, if-- if the law said
2 that, would you come in and say, "Oh, no, you can't --
3 you can't just give everybody who commits that crime the
4 death penalty"?

5 You have to narrow the class.

6 MR. FISHER: Well, no question that would be
7 a much stronger argument under this Court's narrowing
8 jurisprudence. Now, you'd still be left with two
9 problems with that kind of a statute: First, you'd
10 still potentially be left with the problem that this
11 Court addressed in Furman and all the subsequent cases
12 of having a large class of offenders of which only a few
13 get the death penalty. Now, there needs to be some
14 reason to differentiate.

15 The State might well say -- especially the
16 State of Texas and other States that have these very
17 severe recidivist requirements might say that is good
18 enough, but they'd still be left with the -- with the
19 argument that they would have to make that a person who
20 convicts -- who commits child rape and does not -- it
21 does not result any death, is a worse offender than
22 somebody who deliberately kills somebody --

23 JUSTICE SOUTER: All right. What if --

24 MR. FISHER: -- on average.

25 JUSTICE SOUTER: What if, instead, the State

1 simply defined the class as the class of those who
2 commit rape, and then listed as an aggravating
3 circumstance the rape of a child under 12 years old?
4 That would be perfectly consistent with the narrowing
5 jurisprudence, wouldn't it?

6 MR. FISHER: I'm not sure it would,
7 Justice Souter. Remember Coker tells us, I think, that
8 you can't simply start with rape and then add an
9 aggravating circumstance, in terms of this Court's
10 Eighth Amendment jurisprudence. But even if you're
11 asking, just in terms --

12 JUSTICE GINSBURG: Can you go over that,
13 Mr. Fisher? Because the -- there was a plurality
14 opinion, right, in Coker? And Justice Powell wrote
15 separately, and I thought he left open an outrageous
16 rape resulting in serious, lasting harm to the victim.

17 He said that the Coker jury was not asked to
18 find and could not have found from the facts in that
19 case that the offense was outrageous or wanton vile in
20 that it involved a aggravated battery. So you don't
21 have an opinion of five Justices saying that, in any and
22 all circumstances, rape that leaves the victim alive
23 cannot be punished by the death penalty.

24 MR. FISHER: Let me first say that the State
25 hasn't alleged those things that Justice Powell

1 identified. So, even if Justice Powell's opinion
2 controlled, I think we would prevail here. But remember
3 Justice --

4 JUSTICE GINSBURG: I'm questioning -- you're
5 saying it's off the chart because the Court held that
6 you cannot have a death penalty for rape. And I
7 suggested that that's not so clear.

8 MR. FISHER: Well, my understanding of this
9 Court's Marks rule is that the narrowest opinion that
10 commands a majority -- so Justice Powell's opinion was
11 actually a seventh vote. If you count the two Justices
12 on this Court who held the death penalty was
13 unconstitutional across the board and add the four that
14 constituted the plurality in Coker, we think the
15 plurality opinion becomes --

16 JUSTICE SCALIA: That's a --

17 MR. FISHER: -- the controlling one.

18 JUSTICE SCALIA: That's strange way of
19 making a majority, isn't it?

20 (Laughter.)

21 JUSTICE SCALIA: Two people who think even
22 the death penalty for murder is no good, they're going
23 to form the majority of people who consider whether a
24 lawful death penalty can be imposed for rape. I think
25 at least in those circumstances, you have to discount

1 the people who would not allow the death penalty under
2 any circumstances for any crime.

3 MR. FISHER: Well, I'm not aware of any
4 wrinkle in this Court's jurisprudence that says that if
5 a Justice is too far out of the mainstream that their
6 vote is discounted --

7 JUSTICE SCALIA: He --

8 MR. FISHER: But I want to try to --

9 JUSTICE SCALIA: He -- he is not considering
10 the issue that is before the Court. The issue before
11 the Court is whether -- whether a permissible death
12 penalty can be imposed for this crime. These parties
13 say there's no such thing as a permissible death
14 penalty. I mean, it would be -- if that wrinkle isn't
15 there, we should iron it in pretty quickly.

16 (Laughter.)

17 JUSTICE GINSBURG: At any rate --

18 MR. FISHER: Fair enough.

19 JUSTICE GINSBURG: There were four justices
20 on the plurality opinion. That was the only point I
21 wanted to make.

22 MR. FISHER: Okay. Thank you. But --

23 JUSTICE SOUTER: Even -- even with respect
24 to -- now, I'm asking you to --

25 MR. FISHER: Right.

1 JUSTICE SOUTER: -- to forget my question
2 again for a minute.

3 MR. FISHER: Okay. But --

4 JUSTICE SOUTER: Even -- even on the -- on
5 the plurality analysis, your argument, as I understand
6 it is, if there is any question left in Coker, in effect
7 it's answered by Enmund/Tison.

8 MR. FISHER: I think that's right, and it's
9 also answered by simply the empirics across the country
10 right now, if you did nothing more than applied the
11 Roper and Atkins cases.

12 JUSTICE SOUTER: Okay, but then that's a
13 different reason.

14 MR. FISHER: Yes.

15 CHIEF JUSTICE ROBERTS: Well, speaking of
16 Roper and Atkins, is it -- does it only work in one way?
17 How are you ever supposed to get consensus moving in the
18 opposite direction? In other words, you look to the
19 number of States under Roper and Atkins who impose it,
20 and you say, well, most of them are abolishing it, so we
21 think it's unconstitutional, combined with other
22 factors.

23 Now, if there's going to be a trend the
24 other way, how does that happen? As soon as the first
25 State says, well, we're going to impose the death

1 penalty for child rape, you say, well, there isn't a
2 consensus, so it's unconstitutional. I mean, do 20
3 States have to get together and do it at the same time?
4 Or how are they supposed to move the inquiry under
5 Atkins and Roper in the opposite direction?

6 MR. FISHER: Well, I think it's possible,
7 but this Court has understood -- I think well understood
8 that it is a practical problem. It is one that gives
9 this Court caution before ruling a law unconstitutional.
10 Here, I don't think --

11 JUSTICE SCALIA: That's nice.

12 MR. FISHER: -- you're going to need to
13 gravel --

14 JUSTICE SCALIA: I say that's nice. We're
15 in effect -- in effect prohibiting the people from
16 changing their mind.

17 MR. FISHER: I don't --

18 JUSTICE SCALIA: -- about what -- what
19 justifies the death penalty.

20 MR. FISHER: I don't think that's
21 necessarily the case, Justice Scalia. And, of course,
22 there are narrower ways to decide this case that could
23 leave open the possibility of future developments.

24 But, Justice -- Mr. Chief Justice, I want to
25 answer your question and say I think there may be a

1 misunderstanding that this Court really needs to address
2 that in this case, because we have had, since 1995 when
3 the State of Louisiana passed this law and the year
4 after when the supreme court of Louisiana upheld it in a
5 very widely covered opinion from which this Court denied
6 certiorari, there has been a national debate for 12 or
7 13 years already as to the propriety of imposing
8 the death --

9 CHIEF JUSTICE ROBERTS: And the trend -- the
10 trend since 1995, '90, has been more and more States are
11 passing statutes imposing the death penalty in
12 situations that do not result in death.

13 MR. FISHER: I think that's right. So you
14 have to ask yourself the question whether that is
15 enough. And if we --

16 JUSTICE SCALIA: Didn't we say in -- in
17 Atkins that it's the trend that counts; it's not the
18 number?

19 MR. FISHER: I think this Court said in
20 Atkins --

21 JUSTICE SCALIA: It's the trend -- you've
22 heard the expression hoist by your own petard: The
23 trend here is clearly in the direction of permitting
24 more and more -- of more and more States permitting the
25 capital punishment for this crime.

1 MR. FISHER: Clearly, I think that Atkins
2 and Roper look at trend among other things. And I think
3 it is important to remember that there were 20 States in
4 each of those cases that allowed the death penalty under
5 those circumstances, but I think we have to ask
6 ourselves whether the movement that's occurred over the
7 past dozen years is enough to matter. Remember --

8 CHIEF JUSTICE ROBERTS: Well, let me ask --
9 we will put that to one side, how much movement you
10 need.

11 I'm more interested in the analytic
12 question: How does it happen? I mean because your
13 position would be every one -- a case in every one of
14 those States, whatever the number is, is
15 unconstitutional because we've said the trend is the
16 other way.

17 Well, how does a trend get -- ever get
18 started in the opposite direction?

19 MR. FISHER: Well, as it happened here,
20 States can pass laws, and they can bring prosecutions
21 potentially reaching --

22 CHIEF JUSTICE ROBERTS: But you want to say
23 this is -- you want to say this is unconstitutional
24 because most States do it the other way. And I assume
25 if a similar case arose in Texas involving -- capital

1 punishment in a nondeath case, you would say well, most
2 go the other way. In other words, if you knock them
3 down one by one, it is kind of hard to get a trend
4 going.

5 MR. FISHER: Well, a State could do
6 something like what Georgia has done, which is pass a
7 law that says that -- that the death penalty is
8 permissible in a given crime -- in, for example, rape --
9 to the extent allowed by the United States Supreme
10 Court, or to the extent allowed by the Eighth Amendment.

11 If several States pass laws like that,
12 eventually this Court even -- let's say the Court
13 decides this case in my favor today. Eventually this
14 Court could take notice of that and take certiorari and
15 again decide whether or not the Eighth Amendment was --

16 JUSTICE SCALIA: They don't even have to say
17 "the extent allowed by the United States Supreme Court."
18 They can pass a law that -- that seems to contradict a
19 prior opinion of ours; can't they?

20 MR. FISHER: Of course.

21 JUSTICE SCALIA: Abraham Lincoln should they
22 could, anyway.

23 MR. FISHER: There's no double about that,
24 and it happens frequently. Now I want to ask about --

25 CHIEF JUSTICE ROBERTS: If somebody in this

1 case is tried and convicted under that law, you would
2 say: Well, that's unconstitutional because there is not
3 a sufficient trend in favor of that.

4 And it just seems to me that that
5 understanding of Atkins and Roper prevents the
6 development of the law except in one direction.

7 MR. FISHER: As I said, it may be
8 practically difficult, but it's not impossible, because
9 this Court could eventually take notice of what it was
10 seeing. Now, I think it is important to ask --

11 JUSTICE GINSBURG: There's a brief in this
12 case on behalf of several States, and the argument he --
13 that's made in that brief on the point that the Chief
14 Justice has raised is we can never know whether there is
15 a consensus one way or another so long as Coker seems to
16 cover the waterfront, so long as Coker admits of the
17 interpretation that you cannot have a death penalty for
18 rape, period.

19 So the argument is on this question -- not
20 talking about the universe -- universe of crimes, but as
21 to rape -- we cannot know if there is a consensus one
22 way or another until this Court clarifies what Coker
23 stands for.

24 MR. FISHER: Well, Justice Ginsburg, I think
25 there are two problems with that. First, it is a

1 theoretical argument that doesn't have any factual
2 underpinning. There is no evidence in any State
3 legislature that Coker has stood in the way of enacting
4 statutes like this.

5 And, again, I want to emphasize to this
6 Court to remember, if there were any overhang or
7 distorting effect of Coker, it certainly would have gone
8 away by 1996 when the Louisiana supreme court laid out a
9 very detailed opinion explaining why a law like this
10 could be constitutional and, in effect, exhorting other
11 States to pass laws like it.

12 And so for a dozen years in death-penalty
13 jurisdictions there has been a very vigorous effort by
14 proponents of these laws to get statutes like this
15 passed. And look what we end up with. And Mr. Chief
16 Justice, I want to bring myself back to your trend
17 question. What we end up with is exactly the same
18 number of States allowing the death penalty here as
19 allowed it in Coker in 1977.

20 CHIEF JUSTICE ROBERTS: Well, but, as I
21 pointed out, it is very expensive to run a regime in
22 which you have the death penalty. And I can see the
23 legislators in those States saying, well, we've got
24 Coker on the -- on the books. We've only got one State.
25 Why would we want to be the second State and go through

1 this process and then have the Supreme Court throw it
2 out? You know, everyone is waiting for the next State.

3 I mean it's -- it's a very difficult
4 process, it seems to me, to run the evolution of the law
5 in both directions. And then if you're insisting on a
6 trend of whatever -- I don't know what the number is,
7 15, or 20, or 30 States -- it just can't materialize
8 when you have Coker there and you have Atkins looking
9 only in one direction.

10 MR. FISHER: There are, no doubt, various
11 legislative considerations. I just would suggest to you
12 that --

13 JUSTICE SCALIA: Do you really think that if
14 this Court held in the present case that the death
15 penalty can be imposed for the rape of a child under 12,
16 you really think that the trend would not continue,
17 that there would not be more States to enact such a
18 penalty?

19 MR. FISHER: Oh, absolutely, Justice Scalia.

20 JUSTICE SCALIA: It would be more?

21 MR. FISHER: No. Absolutely, I think that
22 it would not continue. Forgive me.

23 JUSTICE SCALIA: It would not.

24 MR. FISHER: If -- and I think it is
25 important to understand not just the Louisiana supreme

1 court; but in 2004, when Patrick Kennedy was put on
2 death row in Louisiana, in light of this Court's Atkins
3 and Roper jurisprudence, notice was served in all
4 death-penalty jurisdictions that if you want a law like
5 this, you've got a few years to pass it before this case
6 gets to the Supreme Court.

7 I think that's why you have seen an uptick
8 of two or three other States passing laws in the last
9 couple of years. But, again, all that has done is
10 recreate the situation this Court faced in 1977 in
11 Coker, where six States would have allowed the death
12 penalty for child rape.

13 And in Roper this Court emphasized that it
14 would be very ironic to -- to find a trend or a lack of
15 movement dispositive if the reason for that action more
16 recently is because long ago society recognized that
17 this was an improper punishment and this Court --

18 JUSTICE ALITO: Do you think that all these
19 other States, if told that it is permissible to have the
20 death penalty for child rape at least under some
21 circumstances, would come to the conclusion that the
22 worst case of child rape that can be envisioned is still
23 less heinous than any murder that qualifies for the
24 death penalty?

25 MR. FISHER: I think they may well,

1 Justice Alito. And it's important to recognize not
2 just -- well, in Roper this Court said -- I think it
3 addressed a similar question. There has to be a line
4 somewhere in terms of the Eighth Amendment.

5 Now, we can imagine a terribly serious case
6 with a juvenile offender who is 17 years old, for
7 example, but drawing a line in a place that is -- makes
8 sense almost all of the time is the best we can do. If
9 a State were to come up and make the argument today
10 that: Imagine the most heinous child rape you can,
11 first of all, it wouldn't say that under the narrowing
12 problem because of Maynard against Cartwright.

13 But, more importantly, other States would
14 beg to differ. Look at Utah. Utah thinks the next most
15 serious crime after murder is an assault, an aggravated
16 assault on a prison guard. South Dakota thinks the next
17 most serious crime after murder is aggravated
18 kidnapping.

19 Once you roll the line back from the line
20 established in Coker, which is requiring the death of
21 the victim, it becomes extraordinarily difficult to
22 figure out where the line is going to be drawn for
23 Eighth Amendment purposes.

24 CHIEF JUSTICE ROBERTS: What -- I -- I
25 wonder if Atkins and Roper are qualitatively different,

1 considering the mental retardation of the offender, the
2 youth of the offender. Those are issues that go, as we
3 said in Roper and Atkins, go to culpability. In other
4 words, they are focused on the offender.

5 This is quite different. It is focused on
6 the nature of the offense. And I wonder if that's more
7 something on which we have less basis for determining
8 the issue than a legislature. We can look at the
9 question of characteristics of the offender and make a
10 judgment about that. I don't know how we decide this
11 for the reason you were just saying: What crimes are
12 more serious than others?

13 I wonder if it brings into play our
14 jurisprudence on things like the three-strikes law and
15 others where we sort of say: We can't judge how serious
16 crimes are and which ones are more serious than others,
17 and so we leave that to another branch.

18 MR. FISHER: Well, this Court has always
19 differentiated its proportionality analysis from capital
20 to a non-capital context. In Coker, Enmund, Tison, all
21 of those cases, rest to a significant degree on the
22 seriousness of the crime. I think perhaps the best
23 discussion is made --

24 JUSTICE KENNEDY: What about treason? What
25 about treason? Even -- even the -- the countries of

1 Europe which have joined the European Convention on
2 Human Rights, I believe they make an exception to the
3 prohibition of the death penalty for treason. You can
4 slaughter your fellow citizens, but if you offend the
5 State you can be put to death.

6 Is treason an exception from the -- our ban
7 on the death penalty except for murder?

8 MR. FISHER: Well, of course, this Court has
9 never answered that, but I think there is every reason
10 to believe --

11 JUSTICE SCALIA: Isn't there a Federal
12 treason statute?

13 MR. FISHER: Of course. There is every
14 reason to believe --

15 JUSTICE SCALIA: And that doesn't require
16 murder; does it?

17 MR. FISHER: No, it does not. It requires a
18 --

19 JUSTICE SCALIA: Do you think that's
20 unconstitutional?

21 MR. FISHER: No, Your Honor. And I think if
22 anyone thought that the treason laws were implicated
23 here --

24 JUSTICE SCALIA: Wow.

25 MR. FISHER: -- you might have different

1 parties before the Court today.

2 JUSTICE SCALIA: Do you think treason is
3 worse than -- than child rape?

4 MR. FISHER: Well, Blackstone thought
5 treason was more serious than murder. It has
6 traditionally been the most serious crime that a person
7 can commit, and I think historically, as well as
8 nationally, that is still the sentiment that is shared.

9 CHIEF JUSTICE ROBERTS: But we're talking
10 about --

11 MR. FISHER: Now --

12 CHIEF JUSTICE ROBERTS: -- if were talking
13 about evolving trends, I think it's fair to say that
14 society's recognition of the seriousness of the crime of
15 rape has evolved even since, the period since Coker.

16 Now isn't that something that we should take
17 into consideration?

18 MR. FISHER: I --

19 CHIEF JUSTICE ROBERTS: It certainly
20 involved -- evolved since the time of Blackstone and
21 even since -- as I said, even since Coker. So while
22 Coker may have thought rape of an adult wasn't serious
23 enough to warrant the death penalty when the legislature
24 had made a contrary determination, perhaps that would be
25 addressed differently if -- differently today; and

1 certainly rape of a child would be understood not to be
2 not included in Coker's analysis.

3 MR. FISHER: Well, I don't think societal
4 attitudes have changed very much. But to the extent any
5 of it has, what this Court said in Atkins is you look to
6 the expertise of professional organizations; and I think
7 it is relevant here that if the State stands up and says
8 well, the reason why we are doing this is because of
9 more enlightened attitudes about the harm that occurs in
10 child rape, all of the professional organizations: sex
11 assault groups, social workers, and the like that deal
12 with that crime, are here in the amicus --

13 JUSTICE ALITO: The plurality opinion in
14 Coker said this: Life is over for the victim of the
15 murderer. For the rape victim, life may not be nearly
16 so happy as it was. Now, you think that's something
17 that would be written today?

18 MR. FISHER: Perhaps not. I don't know. I
19 mean, this Court chooses its words -- the other parts of
20 the Coker decision I think make clear the Court
21 understood that rape was an extraordinarily serious
22 crime.

23 JUSTICE GINSBURG: There was, at least in
24 the amici briefs in Coker -- may not have been explicit
25 in the Court's decision -- but the argument was made

1 that the rape law in question, the Georgia law, came
2 from an earlier tradition when a woman was regarded as
3 as good as dead once she was raped; and the crime was
4 thought to be an offense against her husband or her
5 father as much as it was to her. And that was the
6 background of Coker, plus the racial element in it was
7 very strong.

8 I imagine that that -- if the question were
9 -- the Coker question were to come up again, those would
10 still be factors. I mean, the notion was that making
11 rape equivalent to murder was no kindness to women,
12 because it said once you've been raped, you're spoiled.

13 That's not -- there's no parallel with child
14 rape.

15 So I think that what was going on under the
16 surface in Coker is quite different.

17 MR. FISHER: Well, Justice Ginsburg, I
18 think, although not with the same historical pedigree,
19 the same argument is being put forward by the State
20 today, that by definition, for a child to have been
21 raped is tantamount to having been killed, and the
22 social workers and sex assault experts here today I
23 think are telling you with this one voice, we very much
24 want to avoid sending --

25 JUSTICE GINSBURG: But it isn't -- it isn't

1 the notion that she's somebody else's property; and --
2 which was the history of the rape statutes.

3 MR. FISHER: I think that's fair enough,
4 Justice Ginsburg, but I think also I'd like -- perhaps
5 Justice Alito was right, that looking at the Court's
6 opinion gives us the best indication of the analysis;
7 and I think the parts that you were reading are from the
8 earlier part of the opinion where the Court was saying
9 that rape in general is not as serious as murder, but
10 the end of the plurality win in Coker is very emphatic.
11 It says, that doesn't end the question, because here we
12 have two very serious aggravating circumstances and this
13 is a particularly serious incident of rape.

14 Even then, the Court's words were, that does
15 not change the fact that the victim is not killed. So
16 that is --

17 CHIEF JUSTICE ROBERTS: Coker, of course,
18 repeatedly in the statement of the facts and the
19 analysis, repeatedly referred to the victim as an adult
20 woman. It seems to me the Court was taking -- was being
21 very careful to leave open the question of what would be
22 the analysis in the case of a -- of a child.

23 MR. FISHER: We don't argue otherwise. We
24 understand Coker says "adult woman." What we're saying
25 is that the rationale of Coker, and not just the

1 rationale requiring somebody to have died, but also the
2 objective rationale in Coker, of saying we understand in
3 the past four, five years, there's been a handful of
4 States that have come forward with laws like this but we
5 nonetheless find a national consensus against it. Look
6 at the numbers in Coker. You had 30 people on death row
7 over just a span of five or six years for rape, as
8 compared to this case, you have two people on death row
9 over a span of 13 years. So, even the practices on the
10 ground indicate quite strongly that society and even
11 Louisiana -- look at Louisiana where in direct contrast
12 to the way they prosecute murder cases, in which it is
13 common for the prosecution to take the position that the
14 death penalty is the only appropriate punishment for
15 this crime, they offer life in prison. They've offered
16 life in prison in every single child rape case they've
17 prosecuted in the in the last 13 years.

18 The only reason you have Patrick Kennedy
19 here today and one other offender on death row is
20 because they insisted on their innocence.

21 If there are no further questions, I --

22 JUSTICE KENNEDY: Mr. Fisher. Your -- your
23 white light is on, and you do want to protect your
24 rebuttal right, but you began by indicating that this
25 statute could be narrowed. It could be narrowed by a

1 requirement of recidivist behavior. Are there any other
2 narrowing categories?

3 MR. FISHER: Well, I think there are two
4 ways to decide this case on more narrow grounds, perhaps
5 that this answers your question. First, this Court
6 could say that Louisiana is the only State that doesn't
7 require recidivism, so it fails the substantive Atkins -
8 Roper analysis. It could also say that -- that
9 Louisiana's law isn't sufficiently narrow. Yes,
10 Justice Kennedy, I think if the question is could there
11 be another particularly heinous circumstance that you,
12 just in the context of narrowing would be enough, one
13 might imagine other aggravating circumstances.

14 The ones in Coker wouldn't be enough.

15 JUSTICE SCALIA: Well --

16 JUSTICE KENNEDY: What would they be?

17 MR. FISHER: One could imagine something
18 like torture or extraordinarily serious harm in a case,
19 something like that. But again, that would do
20 nothing --

21 JUSTICE SCALIA: How do you do view
22 recidivism? I mean, I assume even if you don't oppose
23 the death penalty, you're going to get a good number of
24 years, right? So you are going to be 40 years in
25 prison, come out and do it again? I don't think so.

1 MR. FISHER: I'm not sure what the question
2 is.

3 JUSTICE SCALIA: I mean, it is an
4 unrealistic condition that you have raped a 12-year -- a
5 child twice. The first time you do it and are convicted
6 of it, you'll be sent up for long enough that you won't
7 have the chance to do it a second time.

8 MR. FISHER: I think that's right, Justice
9 Scalia. Perhaps the States want to speak to that.
10 They're the ones that put it in their law. But it
11 reinforces --

12 JUSTICE GINSBURG: But it -- it was 25
13 years, right?

14 MR. FISHER: Yes, in Texas and a couple of
15 other States. I think it reinforces the fact that they
16 think that by and large child rape is not serious enough
17 even in those States to trigger the death penalty, and
18 so they're looking for an extraordinarily small class.
19 If there are no further questions, I'll reserve my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Fisher.

22 Ms. Clark.

23 ORAL ARGUMENT OF JULIET L. CLARK

24 ON BEHALF OF THE RESPONDENT

25 MS. CLARK: Mr. Chief Justice, and may it

1 please the Court:

2 This case involves the very savage rape of
3 an 8-year-old child by her stepfather. He raped her so
4 brutally that he tore her entire perineum opening from
5 her vaginal opening and to her anal opening. He tore
6 her vagina in -- on the interior such that it separated
7 partially from her cervix and allowed her rectum to
8 protrude into her vagina. Invasive emergency surgery
9 was required to repair these injuries. It is
10 Louisiana's position that the cruel and unusual
11 punishment clause of the Eighth Amendment does not
12 preclude the State of Louisiana from --

13 JUSTICE STEVENS: Could you just clarify
14 about the -- were those injuries permanent?

15 MS. CLARK: Your Honor, those injuries,
16 after surgery, did heal. So -- but the surgery was
17 required to repair them. And it was not --

18 JUSTICE STEVENS: They were not permanent
19 injuries.

20 MS. CLARK: In the sense that they healed,
21 that's correct, Your Honor. But I think that was a
22 permanent injury inflicted upon a child once -- just
23 psychologically and mentally as well as physically.

24 As an initial matter, I would like to
25 address the Coker question. I think that it is quite

1 clear that Coker was limited to the rape of an adult
2 woman. There are at least 14 separate references in the
3 opinion to an adult woman or to an adult female. The
4 only reference --

5 JUSTICE KENNEDY: Both -- both sides have
6 something of a dilemma with Coker, because if you say
7 that it does not control this case, then the consensus
8 or the lack of consensus -- or the consensus is more
9 reliable. If you say it does control this case, then
10 the consensus is not so reliable; and both sides have
11 that duality that they have to confront.

12 MS. CLARK: Yes, Your Honor, I understand
13 that -- that sort of a tension, Justice Kennedy. And I
14 think for the defendant, he's the one asking the Court
15 to create this broad categorical restriction and he's
16 saying that it clearly precludes it. At the same time
17 he's saying that -- that States have -- have responded
18 to -- to Coker, that somehow that -- the fact that
19 there's not a greater existence of the rape of -- child
20 rape laws is somehow not controlled by the fact that it
21 has been misinterpreted, and he points out in his brief
22 several instances of courts where they specifically
23 misinterpret that holding.

24 JUSTICE BREYER: There is no -- there is
25 doubt in my mind that -- that this particular kind of

1 crime has not been the subject of a Supreme Court
2 opinion.

3 MS. CLARK: Yes, Your Honor.

4 JUSTICE BREYER: My problem is I can think
5 of many, many awful, truly horrible circumstances that
6 categorized in many different -- under many different
7 criminal statutes; I'm not a moralist. I'm a judge.
8 And as a judge, I look at the law. It seems for 43
9 years, no one has been executed but for murder.

10 Moreover, this Court has never approved the
11 execution for any crime other than murder in those 43
12 years. Right.

13 If I accept your argument, since I'm not a
14 moralist, since I can think of horrible things all over
15 the place, have I then opened the door so that, in fact,
16 States will find lots of different crimes which are
17 seriously horrible; and suddenly, we will be in the
18 business of creating under the Constitution some kind of
19 highly complex categorization, really a moral
20 categorization of crime, method of commitment, method
21 of, et cetera, et cetera.

22 MS. CLARK: Your Honor, I think the
23 Constitution by only precluding cruel and unusual
24 punishments leaves open the possibility that -- that
25 there are certain crimes that by their nature are so

1 heinous that the death penalty --

2 JUSTICE BREYER: So the answer is yes? Your
3 answer is if we take your position and that's -- I'm not
4 saying it's not a good argument, just take your
5 position, but if we take your position, I can think of
6 instances of kidnapping; I can think of instances of
7 torture. I can think of instances all over the place
8 which are truly horrible.

9 But then to take your position, what we're
10 going to do is we are going to say legislatures all over
11 the country do have the right under the Constitution to
12 go, try to categorize horrible by horrible, not just
13 death. Not just murder.

14 JUSTICE SCALIA: Just the way they used to.
15 Right?

16 MS. CLARK: Exactly, Your Honor. I would
17 agree.

18 JUSTICE BREYER: Perhaps at the time, 200
19 years ago, that's true.

20 (Laughter.)

21 MS. CLARK: We are -- I think that we have
22 to recognize that with child rape there is something
23 very unique and horrible about this crime. It's not
24 true of every kidnapping. It's not true of robbery --

25 JUSTICE BREYER: And it's not true -- I've

1 read the definition of section 41 of rape under the
2 Louisiana code. I won't repeat it but it's very broad.
3 And it can be broad in the sense that rape itself can
4 include a vast number of instances of child molesting,
5 each of which is bad; but there are degrees. So I
6 suppose that child molesting of all those kinds that are
7 listed in 41 (c) (1) and (2), which you know I'm sure,
8 would count as rape if committed on a person under 12.
9 Some are absolutely horrible. Some are just bad. But
10 that's what the other side means when he says it gives
11 tremendous discretion to the prosecutor to pick and
12 choose who should be executed needs further narrowing.

13 What's your response?

14 MS. CLARK: Your Honor, I'm slightly
15 confused as to what you're referring to in terms of a
16 wide variety of acts, because Louisiana Revised Statute
17 14:42 that Patrick Kennedy was convicted under, it only
18 provides that he could be convicted of aggravated rape
19 of a child under 12 where he had anal intercourse or
20 vaginal intercourse with that child. Those are the only
21 two methods I would --

22 JUSTICE BREYER: Those are the only two. So
23 these other things don't count.

24 MS. CLARK: Exactly, Your Honor.

25 JUSTICE BREYER: Thank you.

1 MS. CLARK: It's only anal or vaginal rape.
2 And I would submit that that is in itself a very narrow
3 crime. This is fundamentally different, I think, from
4 homicide, where in homicide the narrowing was required
5 because homicides were committed under circumstances
6 where the offender himself perhaps lacks intent to kill
7 traditionally, but accidentally committed the murder
8 during the course of another felony. Or where the
9 offender himself acted with reckless disregard but
10 another person committed it during the course of a
11 felony.

12 So there was a wide variety of intents with
13 which the crime was committed. There was a wide range
14 of circumstances under which the crime was --

15 JUSTICE SCALIA: Ms. Clark, what do you do
16 with the requirement that our cases have imposed? It is
17 not a requirement I agree with, but it is certainly one
18 our cases have imposed, that you cannot leave -- leave
19 it to the jury whether to impose the death penalty or
20 not even for murder, but rather you have to narrow the
21 class of people who have committed that particular crime
22 so that -- so that the imposition won't be random.
23 Although later, we say you have to let the jury consider
24 any mitigating factor which makes it random; but
25 nonetheless, our cases do say you have to narrow the

1 class of murderers who can be given the death penalty.

2 Wouldn't the same apply to the class of
3 child rapists?

4 MS. CLARK: No, Your Honor. I think the --

5 JUSTICE SCALIA: Why not.

6 MS. CLARK: The point that I was trying to
7 make about murder about the category being so broad, the
8 class being so broad, the range of actions being so
9 broad that when the Court was looking at -- in Furman --
10 what kind of homicides -- how do we know whether -- why
11 this person is getting the death penalty and why this
12 person isn't, what is the standard that guides it, they
13 were looking at situations where murders like the -- in
14 Furman his actions were described as -- as tripping over
15 a wire as you left the house and accidentally shooting
16 the homeowner through the front door.

17 JUSTICE SCALIA: You think intentional
18 murder of a -- of a law officer would need no further
19 narrowing?

20 MS. CLARK: That's correct, Your Honor. In
21 Louisiana law we define -- we have deliberate murder, a
22 law enforcement official, and that by -- by the category
23 of the victim that is at stake there that crime is
24 narrowed, and that is provided for in Louisiana law.

25 CHIEF JUSTICE ROBERTS: Why --

1 JUSTICE SOUTER: Was -- excuse me.

2 CHIEF JUSTICE ROBERTS: Why is it
3 sufficient -- why isn't it sufficient narrowing, even
4 after Coker, that they make the death eligibility rape
5 of a child under 12 as opposed to under 16?

6 MS. CLARK: Well, that is. That's further
7 narrowing. It is, Your Honor. I guess, what I'm saying
8 is it is not clear from this Court's jurisprudence that
9 narrowing would be required in a non-homicide
10 circumstance to begin with, especially one where here we
11 have defined the offense so narrowly that it is -- that
12 under the law that Patrick Kennedy was convicted it was
13 only children under 12. Those kind of offenses, rapes
14 under those circumstances -- they are not committed
15 accidentally. They're never committed without some form
16 of premeditation and deliberation. It's just something
17 that is fundamentally and uniquely different for murder.

18 JUSTICE SOUTER: May I go back to your -- to
19 your answer on the murder question? And that was you
20 said there's -- there's a murder analog to this narrow
21 definition, and you gave the example of the -- of the
22 murder of the law enforcement officer. And that raises
23 a question that I had about how Lowenfield ought to be
24 read.

25 The example that you gave was one of the

1 five instances which the Court said out in the
2 Lowenfield opinion quoting the Louisiana statute. In
3 each of those five instances, nothing need be proved
4 except, as you have put it, the narrowing circumstance
5 in the law enforcement officer in your example. But
6 under the Louisiana statute which passed muster in
7 Lowenfield, there were five analogs of which the law
8 enforcement officer was one.

9 Each of those crimes was defined as a -- a
10 killing with a specific intent to kill or specific
11 intent to inflict great bodily harm. And then in each
12 one of these instances, there was an extra element
13 added: Law enforcement officer, intent to kill more
14 than three people in Lowenfield, and so on. In fact,
15 child under 12 was one of the examples.

16 And it seems to me that the -- one way to
17 read the Louisiana statute there consistently with
18 the -- with the -- the value that Justice Scalia's
19 question raised is this: That Louisiana, in effect,
20 had created a general crime of murder with specific
21 intent to kill or inflict great bodily harm. And then
22 it had given five instances in which, as I put it a
23 moment ago, there was an extra element: And that extra
24 element, whether it be killing more than two people,
25 whether it be killing a child under 12, law enforcement

1 officer, functioned like the aggravating circumstance;
2 so that, in fact, we didn't have a statute that merely
3 said if you kill a law officer intentionally, that's
4 capital, period.

5 What we had was a capital scheme that says
6 if you kill with specific intent to kill or inflict
7 great bodily harm, that's murder. And if you commit one
8 of these other five other elements, that narrows it down
9 to capital murder.

10 Isn't that a proper way of reading the
11 Louisiana murder statute from which you took your
12 example? And if it is, isn't that example inconsistent
13 with the theory that you're arguing here that you can
14 simply define child rape as -- as capital and let it go
15 at that?

16 MS. CLARK: No, Your Honor. I think if I --
17 if I understand what you're asking, with regard to
18 murder again, murder traditionally is a very broad
19 crime. So, I think what Louisiana did is they defined
20 murder to account for many ways in which it could be
21 committed. They labeled one class of them as being --

22 JUSTICE SOUTER: No, I -- I quite agree with
23 that. My point was just this: You made the argument --
24 as I understood it a moment ago -- that the Louisiana
25 child rape statute is not unique; that, in fact,

1 Louisiana defines other crimes very narrowly, so that
2 you were making a different kind of argument.

3 You were saying we in Louisiana define
4 murder of a law enforcement officer very narrowly. No
5 requirement to add any narrowing or aggravating
6 circumstance there, and the statute passed muster. And
7 my point simply is, I don't think that's the way to read
8 the Louisiana statute.

9 The Louisiana statute instead says killing
10 with intent et cetera is -- is capital murder if there
11 is a further circumstance added to it; and five are
12 given.

13 So all I'm saying is I don't think the fact
14 that your capital murder passed muster under Lowenfield
15 is authority for saying that the child rape statute
16 passes muster here.

17 MS. CLARK: No -- Well, I agree with you on
18 that, though I think that perhaps --

19 JUSTICE SCALIA: Do you? Do you really?

20 MS. CLARK: Well, not -- I agree in the
21 sense that --

22 JUSTICE SOUTER: Well, let's find out how
23 much.

24 (Laughter.)

25 JUSTICE SCALIA: Didn't the -- didn't the

1 Louisiana statute that -- that was at issue in
2 Lowenfield produce the result that if you committed
3 intentional murder of a law enforcement officer, it was
4 up to the jury whether to give you the death penalty or
5 not?

6 MS. CLARK: Yes, correct, Your Honor.

7 JUSTICE SCALIA: Would not the same result
8 be -- be achieved by a statute that said if you
9 intentionally kill a law enforcement officer, you are
10 subject to the death penalty? Wouldn't it be precisely
11 the same degree of narrowing?

12 MS. CLARK: Yes, Your Honor. That's
13 correct.

14 JUSTICE SOUTER: And isn't -- isn't the
15 difference -- isn't the difference just what
16 Justice Scalia brought up in an earlier question to
17 Mr. Fisher? He said what seems to count, the way we
18 have targeted our jurisprudence, turns on how you define
19 the class that is narrowed.

20 And my suggestion to you was that the class
21 that is narrowed under your homicide statute is a class
22 that consists of all killing with -- with specific
23 intent to kill et cetera, which is then narrowed by five
24 different circumstances set out.

25 Here, the class is defined as child murder,

1 and there is nothing in the aggravating circumstances,
2 the -- the possible aggravating circumstances that
3 narrows it any more; and isn't that distinction correct?

4 MS. CLARK: I think, if I can address this
5 perhaps without a specific yes or no, what -- what I'm
6 saying is the homicide statute draws specifically a
7 large class and specifically narrows it. The rape
8 statute in itself narrowly defines the target group
9 without making reference to the broader class. I think
10 is what I'm --

11 JUSTICE GINSBURG: In one respect is
12 broader, and perhaps that assists your position, is that
13 Coker was a crime that could have only a female victim
14 and a male perpetrator, but this child rape statute as I
15 understand it could be the -- the victim could, male or
16 female; the perpetrator could be male or female.

17 MS. CLARK: That's correct, Your Honor. And
18 actually, in Caddo Parish, the man who was convicted and
19 sentenced to death there had a -- had a female cohort,
20 so to speak who was involved in the rape with him, who I
21 believe has not been tried yet; but she participated in
22 the rape with him, and therefore as a -- as a principal
23 who with specific intent would -- is alleged to have
24 committed the offense as well.

25 So both male and females could -- could be

1 convicted of this offense, and could commit this
2 offense, and both male and female children could be
3 victims of this offense; that's correct, Your Honor.

4 I think that --

5 JUSTICE STEVENS: If you're looking for
6 time, let me ask you one -- one question that interests
7 me but is a little divorced from the terms of the
8 arguments so far. I know it is not popular to refer to
9 refer to international commentary on issues like this,
10 but the English law lords have filed an amicus brief
11 discussing the -- the international principle that
12 nations that retain the death penalty may not extend the
13 death penalty to crimes to which it does not presently
14 apply.

15 They suggest that as a matter of
16 international law, there's sort of a correspondence to
17 our evolving standards of decency that have generally
18 governed our Eighth Amendment jurisprudence. It's kind
19 of a one-way ratchet, we look at trends in one direction
20 but we don't look to see if you can suddenly change
21 gears and go in the other direction.

22 Would you just comment on that argument?

23 MS. CLARK: Well, first of all, I certainly
24 recognize that there are approximately 28 international
25 countries that would permit the death penalty for rape.

1 However, this Court in its jurisprudence has never based
2 its determination solely upon that factor. And in
3 certain instances, the Court has looked to that to
4 confirm its -- its own decision in the matter, but it's
5 never been controlling.

6 I would point out, though, Your Honor, if I
7 may, that -- that there are no -- there are no treaties
8 that are controlling upon the United States or this
9 Court that would require --

10 JUSTICE STEVENS: I'm not asking that. I
11 just used that as an analogy to our evolving standards
12 of decency cases which has been part of our Eighth
13 Amendment jurisprudence, that there sort of is a -- one
14 way direction in which these cases go. Do you think
15 it's appropriate -- are you aware of any case saying we
16 can turn around and go in another direction?

17 MS. CLARK: I think we can, especially
18 where, as here, that that turn-around, that
19 determination is based upon a unique understanding of
20 how this crime seriously, gravely affects children in a
21 manner --

22 JUSTICE STEVENS: Do we know more about the
23 crime now than we did 40 years ago?

24 MS. CLARK: Well, I think that we do. I
25 think that that is solely reflected in the child

1 pornography laws that have come about since then. In
2 Osborne versus Ohio, the Court says, after Coker, you
3 can't even possess child pornography in the privacy of
4 your own home.

5 So I think that -- because it is so harmful.
6 And I think that that along with the Megan's Laws, I
7 think that those sort of cases are also recognition
8 of -- of the fact that we now know more about this
9 crime. And we recognize --

10 JUSTICE BREYER: Can you -- can you give me
11 one second on my own error here, but I just traced the
12 statute through. What I did was I looked at section 42.
13 It says, "aggravated rape is a rape committed upon, et
14 cetera," and then it says "where the victim is under the
15 age of 13." Right.

16 MS. CLARK: Right.

17 JUSTICE BREYER: So it doesn't say what rape
18 is. So I assumed it picked up the definition of rape
19 from section 41. And section 41 defines rape as anal or
20 oral or vaginal sexual intercourse, and then in section
21 three it defines oral.

22 Now am I right; is that the correct
23 statutory thing, or is there some other statute?

24 MS. CLARK: No, that is the correct
25 statutory thing.

1 JUSTICE BREYER: All right.

2 MS. CLARK: I think what I was trying to
3 make as well --

4 JUSTICE BREYER: Then I go back to my if
5 that is the correct statutory thing, because it seems
6 to cover, particularly in its definition of oral
7 intercourse, a very wide range of child molesting, all
8 of which I agree is quite bad, but it's still a very,
9 very wide range.

10 MS. CLARK: Well, I think that oral sexual
11 intercourse is -- I think that's pretty -- a definite
12 offense, but --

13 JUSTICE BREYER: I didn't say it wasn't.

14 MS. CLARK: But also I would suggest that
15 the point is here is that Patrick Kennedy was not
16 convicted under that provision. He was convicted under
17 the earlier --

18 JUSTICE BREYER: No, I mean, my question
19 relates back to what Justice Souter was talking about,
20 about the narrowing of the statute.

21 MS. CLARK: Right. Right. I would agree
22 that some of the definition of the offenses was narrower
23 under the -- under the terms that Patrick Kennedy was
24 convicted under than it is today.

25 JUSTICE SOUTER: What do you say about the

1 effect of Enmund and Tison as a -- as a means to
2 understand how we ought to read Coker? You know what
3 I'm getting at.

4 MS. CLARK: Yes, Your Honor. I believe in
5 Enmund what the Court was looking at was, when the Court
6 addressed the issue it didn't simply say a human life
7 wasn't taken. It went on to look at is robbery in
8 itself, the underlying offense, a crime serious enough
9 to warrant the death penalty? In Tison, the Court was
10 trying to address what are the limits, I believe of the
11 felony murder doctrine as applied to homicides when the
12 defendant himself -- what -- what participation in the
13 offense did he have to reach that level in which we
14 would consider the death penalty. I think that's very
15 different from a case like this where the offender
16 absolutely committed the offense, where the offender
17 absolutely does not act by accident or without
18 premeditation or deliberation, and directly causes that
19 terrible harm himself. I think that's very --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Ms. Clark.

22 MS. CLARK: Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Mr. Cruz.

24 ORAL ARGUMENT OF R. TED CRUZ,
25 FOR TEXAS, ET AL., AS AMICI CURIAE,

1 IN SUPPORT OF THE RESPONDENT

2 MR. CRUZ: Mr. Chief Justice, and may it
3 please the Court:

4 Few evolving standards of decency are more
5 pronounced than the growing understanding in modern
6 society of the unique and irreparable harm caused by
7 violent child rape. From Jessica's Laws to Megan's Laws
8 to the laws at issue here, elected legislatures have
9 repeatedly acted to deter and to punish violent child
10 rape.

11 In particular, the legislatures of seven
12 States have determined that the very worst child rapists
13 should be eligible for the most serious punishment.

14 I'd like to begin by talking about the
15 effect of Coker. And Justice Kennedy, you raised in
16 particular the dual aspects of Coker. What we suggest
17 the effects of Coker is, is that it has been under a
18 cloud of confusion. A fair reading, a careful reading
19 of Coker in my judgment, it's clear Coker does not reach
20 this instance. The Court bent over backwards to
21 explicitly specify that it was adult rape, and indeed
22 the question presented in the briefing in Coker not use
23 the word adult rape at all. It was phrased generally in
24 terms of rape, and the Court repeatedly and I would
25 suggest not accidentally added the word adult.

1 But that being said, the States have
2 operated since Coker under a great deal of confusion as
3 to what exactly Coker meant. And, indeed, in 1981 the
4 Florida Supreme Court struck down their law believing
5 that it was, quote, "compelled" by Coker. And the State
6 legislatures when they act today -- in the State of
7 Texas -- Texas is the most recent State to even act one
8 of these laws. When the State legislature was
9 considering it, the State legislature asked the Attorney
10 General's Office for advice specifically on whether
11 Coker allowed that.

12 And there's a great deal of confusion. As
13 Petitioner argues quite passionately, those that are
14 opposed to the death penalty for child rape argue
15 vociferously that Coker does not allow it, as Petitioner
16 has done in many, many pages of briefing.

17 JUSTICE BREYER: You started out by saying
18 it's the worst cases of child abuse, and that's -- child
19 rape -- and that's why I was interested in the
20 definition. It seems to me this definition simply
21 covers all instances of some kind of physical
22 intercourse with a child, including oral, vaginal, anal.
23 I can't imagine one that wouldn't be covered if the
24 victim of this is under the age of 13.

25 Am I right in thinking it's not the worst

1 instances; it's every instance of rape defined that way?

2 MR. CRUZ: You're not exactly right, Justice
3 Breyer.

4 JUSTICE BREYER: Thank you.

5 MR. CRUZ: The statute that is being
6 challenged in this case was the pre-amended statute.

7 JUSTICE BREYER: So the amendment --

8 MR. CRUZ: So oral was not in it. And it
9 wasn't 13; it was 12. So the statute under which
10 Patrick Kennedy was convicted was only vaginal or anal
11 rape.

12 JUSTICE SCALIA: It was not all child rape.

13 MR. CRUZ: Exactly.

14 JUSTICE SCALIA: It was not all child rape.
15 It was only children up to the age of 11.

16 MR. CRUZ: That's exactly right. And so
17 that was a substantial narrowing. It was 11 and
18 younger, and it was only vaginal and --

19 JUSTICE BREYER: Thank you. I see.

20 MR. CRUZ: And anal. Beyond that, however,
21 the juries that have considered this so far -- and it
22 has been a limited circumstance because of the
23 distorting effect of Coker -- but the juries that have
24 considered this so far and the prosecutors that have
25 prosecuted have shown every ability to distinguish truly

1 egregious rapes.

2 JUSTICE KENNEDY: But there was some
3 indication that in most cases the prosecutors, in part
4 to see if they can get a plea bargain, begin by saying
5 they're going to charge with the death penalty. And I'd
6 like you to comment on prosecutorial discretion. Again,
7 it cuts to weight. In one sense, it's -- it's a check,
8 so that only the most egregious cases are covered.
9 On the other hand, there's a temptation to overreach,
10 and it's an argument that Petitioners make for saying
11 that the death penalty should not apply.

12 MR. CRUZ: Justice Kennedy, Petitioners
13 assert that that is the case, that -- that a plea
14 bargain has been offered in every instance. I'm not
15 sure the source of that assertion, but at least with
16 respect to the State of Texas, we don't have information
17 one way or the other in terms of the conduct of
18 Louisiana prosecutors.

19 What we can say is that the cases that have
20 been prosecuted -- the two individuals currently on
21 death row, Patrick Kennedy and Mr. Davis, committed
22 crimes that are just unspeakable. And in both of them,
23 they were not children that were close to the age; they
24 were in this case an eight-year-old little girl; in
25 Patrick Kennedy's case, a five-year-old child. They --

1 they were crimes that were -- and that's part of the
2 evolving concept of decency. Part of the reason the
3 States are acting is, in modern times, we're seeing
4 crimes that 20, 30, 40, years ago, people wouldn't
5 imagine. We're seeing predators that seek out young
6 children and do abominable things to them. And that's
7 why legislatures are acting.

8 I will point out Mr. Fisher speculated that
9 if this Court made clear that Coker does not prevent a
10 narrow statute focused at child rapists, he speculated
11 that the States would not act.

12 I'm standing here on behalf of nine States.
13 There's an additional State, Missouri, that is
14 implicated; there's the State of Louisiana. You have 11
15 States. And I say I find that speculation extremely
16 difficult to believe.

17 JUSTICE BREYER: Will you give us one
18 sentence or two on -- on the response to all the
19 professionals who've commented in the briefs in saying
20 the death penalty here will make this situation worse?

21 MR. CRUZ: Those professionals -- that is
22 their opinion on a difficult policy question. The amici
23 States are not here advocating that -- that capital
24 punishment for child rape is or isn't a terrific idea.

25 What we are advocating is that there is an

1 evolving understanding of the enormous, unique,
2 irreparable harms to children, and it's elected
3 legislatures that can sit and listen to those advocates
4 from the groups, listen to the empirical data, consider
5 the deterrence effects -- consider all of these and
6 decide one way or the other. I would fully expect, in
7 time, some States would act to establish capital
8 punishment and others would not. And that that's
9 precisely how the laboratories of democracy should
10 operate.

11 With respect to the decisions, the prior
12 decisions, that this Court has had in Atkins, in Roper,
13 and also Tison and Enmund, I think all of those, as the
14 Chief Justice suggested, are about culpability. They
15 are about saying -- Atkins and Roper both dealt with a
16 class of offenders that, for characteristics, have
17 limited culpability.

18 In this instance, Patrick Kennedy is a
19 300-pound man who violently raped an eight-year-old
20 girl. On any measure, he is exquisitely culpable. And
21 the question, as this Court put it in Roper, as to -- to
22 the Eighth Amendment inquiry as to the death penalty is
23 whether the offender can be reliably, quote, "be
24 classified among the worst offenders."

25 Under almost any analysis, someone who

1 commits the sort of unspeakable crime that Patrick
2 Kennedy commits is reliably classified among the worst
3 offenders.

4 I would point out -- a question
5 Justice Stevens asked, you know, has any nation
6 internationally gone backwards? It's interesting if you
7 look at the history in England. England actually has
8 gone back and forth. Blackstone actually talks about
9 how rape under Saxon law was punishable by death, and
10 then there was a period in 1285 where the punishment was
11 relaxed to loss of the eyes and testicles. That was
12 William the Conqueror's kinder, gentler version.

13 (Laughter.)

14 MR. CRUZ: And Blackstone describes, quote,
15 "That previous lenity being productive of the most
16 terrible consequences, it was subsequently necessary to
17 return to making it a capital offense." And so England
18 had that history. It is not presently a capital offense
19 in England.

20 JUSTICE STEVENS: But has that sort of a
21 different direction from evolving standards of decency
22 occurred at all since we first announced the evolving
23 standards of decency and jurisprudence in this Court --
24 country?

25 MR. CRUZ: I'm not aware of a decision doing

1 so, but the analytical predicate for the evolving
2 standards of decency -- this Court said over and over
3 again the most reliable indicium is the objective
4 judgment of elected legislatures. And in this instance,
5 the legislatures --

6 JUSTICE STEVENS: But what about a comment
7 on the international community's view that it is really
8 a one way ratchet?

9 MR.CRUZ: You know, the Law Lords' brief --
10 I have to admit personally I found really quite
11 astonishing, and I was harkened back to some of the
12 issues this Court considered in the Medeillin case
13 because the Law Lords' brief argued that the United
14 States -- that this Court has no ability to determine
15 that any other crime is subject to the death penalty.
16 And there were two bases: One was a treaty that the
17 United States has never ratified. And secondly was this
18 inchoate international law understanding that, because
19 other nations have made a policy determination about the
20 death penalty, that it is forbidden to the U.S.
21 Congress, it is forbidden to the States of the United
22 States, and it is forbidden to this Court to ever
23 acknowledge there is a crime that is consistent with our
24 Constitution.

25 That -- that brief, to my mind, embodied all

1 of the dangers of the very broad arguments that were
2 being presented in Medeillin, that -- that ultimately the
3 Constitution and the people of this country determine
4 what is permissible and what is lawful. This Court has
5 chosen to look to other nations for guidance, but that
6 brief didn't say this is guidance. That brief said the
7 United States is foreclosed from ever doing this because
8 other nations have made determinations under their law.

9 JUSTICE KENNEDY: If you were asked to draft
10 this statute that we have here and you have just the
11 definition of the first statute with the -- what we call
12 aggravated kind of -- and you have the age limit,
13 would any other limiting categories occur to you as
14 being inconsistent with sound statutory drafting and
15 sound policy?

16 MR. CRUZ: Justice Kennedy, there are three
17 possible narrowing factors that occur to me. We would
18 submit the statute is sufficiently narrow as drafted,
19 but beyond that, the one that has been -- the four
20 States that have most recently acted have used
21 recidivism as a narrowing factor.

22 JUSTICE KENNEDY: And that's prior
23 conviction --

24 MR. CRUZ: Prior conviction.

25 JUSTICE KENNEDY: -- not prior offenses?

1 MR. CRUZ: Correct. There are two other
2 narrowing -- narrowing aggravators that could be
3 applied. One would be especially heinous or vile rapes.
4 The aggravated rape that Justice Powell discussed in his
5 Coker opinion, a really brutal case, which both Florida
6 and Georgia have -- I would note Petitioner says Patrick
7 Kennedy could not be convicted in any other State. In
8 Florida and Georgia, if they concluded that his violent
9 rape requiring surgery to correct was especially violent
10 and heinous, he could be convicted in either of those
11 States. Or, finally, there could be, as in Lowenfield,
12 an aggravator for multiple victims. Some of the worst
13 of these child rapists rape more than one child. And so
14 that is another potential aggravator that a State could
15 choose.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.
17 Mr. Fisher, we'll give you five minutes.

18 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
19 ON BEHALF OF THE PETITIONER

20 MR. FISHER: Mr. Chief Justice, I would like
21 to address first the narrowing component of this case
22 and then turn to the idea of trends on the first question
23 presented.

24 First, the reasons for this Court's
25 narrowing jurisprudence is to avoid a situation in which

1 a few, only a few offenders out of a vast pool are given
2 the death penalty, and there's no legal principled
3 explanation to describe why those offenders get the
4 death penalty.

5 Ms. Clark says that Louisiana's law is
6 narrow. Well, if you just look at empirics, as best as
7 we've been able to gather statistics and the Texas --
8 has some similar statistics in its brief, we're talking
9 about under Louisiana's definition of child rape about
10 five times as many individuals per year as are convicted
11 of deliberate murder. So this is enormous class. And
12 what you end up with is only one every several years
13 getting the death penalty. And that is the definition
14 of arbitrary and capriciousness.

15 Justice Breyer, Mr. Cruz is right, the
16 Louisiana Supreme Court at 58(a) addressed -- addressed
17 the statute and said -- as it existed at trial, it
18 included oral rape. I'm not sure exactly under ex post
19 facto which is the operative one or not, but it doesn't
20 matter because even the anal or vaginal component
21 statute still gets you five times as many -- than just
22 absolutely being struck by lightning. Even in Louisiana
23 simply consensual sex between an 18-year-old and a
24 12-year-old is a capital offense.

25 And so we don't think Louisiana's law

1 sufficiently narrows. Mr. Cruz says --

2 JUSTICE KENNEDY: I don't understand -- is
3 that in front of us here?

4 MR. FISHER: It is in the respect of
5 narrowing, because Mr. Cruz -- the only answer to that,
6 I think is what Mr. Cruz --

7 JUSTICE KENNEDY: This is not a speech case
8 where you have standing to object to the statute that
9 can -- would be unconstitutional as applied to others --

10 MR. FISHER: We absolutely do --

11 JUSTICE KENNEDY: Or I mean -- or is there
12 precedent that contradicts.

13 MR. FISHER: There's square precedent,
14 unanimous holding of this Court in Maynard against
15 Cartwright so that you can't justify a statute that
16 fails to narrow on as applied grounds. The
17 constitutional infirmity is the fact that it gives
18 unfettered discretion to prosecutors and juries to
19 choose who to give the death sentence to.

20 JUSTICE SCALIA: But I -- I don't understand
21 the difference. If you have a general murder law with
22 an aggravating factor of killing of a law officer, okay,
23 the jury can decide from the whole category of killings
24 of law officers who gets the death penalty and who
25 doesn't. Why is that any different from what happens

1 when you have a statute that makes it a capital offense
2 to kill a law officer, without any further
3 qualification?

4 It's exactly the same result. It goes to
5 the jury. This person killed a law officer. It is up
6 to you whether you give him the death penalty or not.

7 MR. FISHER: At the end of the day the jury
8 has discretion. But the difference between that case
9 and this case is that you have a much smaller pool of
10 offenders and a much higher likelihood the jury is going
11 to return death. Here you have a vast pool and
12 literally person one out of every several years getting
13 the death penalty.

14 If I could say a thing -- two things about
15 the trend argument that the states have put forward?

16 First, remember there's no trend whatsoever
17 with respect to non-recidivists. The -- the other
18 states that have passed laws in child rape context for
19 capital -- making it a capital crime and even in the
20 Meagan laws and others is all about recidivism.

21 Louisiana is not part of that trend.
22 Louisiana stands alone.

23 CHIEF JUSTICE ROBERTS: I thought -- the
24 bulk of your argument, though, it seems to me, would
25 not -- would be the same in a recidivist case, because,

1 of course, that doesn't result in death either.

2 MR. FISHER: I think --

3 CHIEF JUSTICE ROBERTS: I mean, I don't --
4 it is sort of a factual distinction but I don't see how
5 it helps your argument.

6 MR. FISHER: Well, it would give you a
7 narrower way to do this case. You could say that under
8 the analysis in Roper and Atkins, Louisiana stands alone
9 in terms of whether there is national consensus.

10 In Enmund this Court said that it is not
11 enough for other states to make the basic crime a
12 capital offense. We look to see whether if the other
13 states require an aggravating circumstance, that the
14 State before the Court does not; an aggravating
15 circumstance that makes the offender more culpable or
16 the crime more serious. We exclude those states from
17 our bean counting analysis.

18 CHIEF JUSTICE ROBERTS: I'm not sure that
19 the sort of trends that they look to in Roper and
20 Atkins -- I mean, you had different crimes that carried
21 the capital -- capital punishment as well. I don't think we're
22 looking at trends in that regard.

23 MR. FISHER: Well, if we're looking at trends,
24 perhaps I can leave you with this: Again, remember what
25 we have in terms of a trend. All we have done in the

1 past 30 years is returned to the place that we were 30
2 years ago in Coker. In Coker when you read that
3 opinion, six states made child rape a capital offense.
4 Through all the might and effort of proponents of these
5 laws, what they've been able to accomplish over 31 years
6 is to bring us back exactly where we were in Coker this.

7 This Court's whole Eighth Amendment
8 jurisprudence is based on the idea that a few states may
9 well have laws making something a capital crime and may
10 choose to be outliers, but the very notion of this
11 Court's proportionality jurisprudence is that when
12 states are outliers, and especially in a case like this,
13 when even are those outlier states impose the death
14 penalty so rarely and freakishly, that is a situation
15 where the Eighth Amendment does not tolerate it.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Fisher.

18 The case is submitted.

19 (Whereupon, at 11:24 a.m., the case in the
20 above-entitled matter was submitted.)

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