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1 P R O C E E D I N G S

2 (10:20 a.m.)

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

9 MR. FISHER: 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 murder who had escaped
10 from prison. Second, he committed the rape in the
11 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 suffer the death penalty. Does it have to
20 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 the law said that,
2 would you come in and say, "Oh, no, you can't just give
3 everybody who commits that crime the death penalty"?

4 You have to narrow the class.

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

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

22 JUSTICE SOUTER: All right. What if --

23 MR. FISHER: -- on average.

24 JUSTICE SOUTER: What if, instead, the State
25 simply defined the class as the class of those who

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

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

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

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

23 MR. FISHER: Let me first say that the State
24 hasn't alleged those things that Justice Powell
25 identified. So, even if Justice Powell's opinion

1 controlled, I think we would prevail here. But remember
2 --

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

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

15 JUSTICE SCALIA: That's a --

16 MR. FISHER: -- the controlling one.

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

19 (Laughter.)

20 JUSTICE SCALIA: Two people who think even
21 the death penalty for murder is no good, they're going
22 to form the majority of people who consider whether a
23 lawful death penalty can be imposed for rape. I think
24 at least in those circumstances, you have to discount
25 the people who would not allow the death penalty under

1 any circumstances for any crime.

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

6 JUSTICE SCALIA: He --

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

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

15 (Laughter.)

16 JUSTICE GINSBURG: At any rate --

17 MR. FISHER: Fair enough.

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

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

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

24 MR. FISHER: Right.

25 JUSTICE SOUTER: -- to forget my question

1 again for a minute.

2 MR. FISHER: Okay. But --

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

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

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

13 MR. FISHER: Yes.

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

22 Now, if there's going to be a trend the
23 other way, how does that happen? As soon as the first
24 State says, well, we're going to impose the death
25 penalty for child rape, you say, well, there isn't a

1 consensus, so it's unconstitutional. And do 20 States
2 have to get together and do it at the same time? Or how
3 are they supposed to move the inquiry under Atkins and
4 Roper in the opposite direction?

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

10 JUSTICE SCALIA: That's nice.

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

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

16 MR. FISHER: I don't --

17 JUSTICE SCALIA: -- about what justify's the
18 death penalty.

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

23 But, Mr. Chief Justice, I want to answer
24 your question and say I think there may be a
25 misunderstanding that this Court really needs to address

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

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

12 MR. FISHER: I think that's right. You have
13 to ask yourself the question whether that is enough.

14 JUSTICE SCALIA: Didn't we say in Atkins
15 that it's the trend that counts; it's not the number?

16 MR. FISHER: I think this Court said in
17 Atkins --

18 JUSTICE SCALIA: The trend -- the trendy
19 expression hoist by your own petard: The trend here is
20 clearly in the direction of permitting more and more --
21 of more and more States permitting the capital
22 punishment for this crime.

23 MR. FISHER: Clearly, I think that Atkins
24 and Roper look at trend among other things. And I think
25 it is important to remember that there were 20 States in

1 each of those cases that allowed the death penalty under
2 those circumstances, but I think we have to ask
3 ourselves whether the movement that's occurred over the
4 past dozen years is enough to matter.

5 CHIEF JUSTICE ROBERTS: Well, let me ask --
6 we will put that to one side, but how much movement you
7 need.

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

14 Well, how does a trend ever get started in
15 the opposite direction?

16 MR. FISHER: Well, as it happened here,
17 States can pass laws, and they can bring prosecutions
18 potentially reaching --

19 CHIEF JUSTICE ROBERTS: But you want to say
20 this is -- you want to say this is unconstitutional
21 because most States do it the other way. And I assume
22 if a similar case arose in Texas involving capital
23 punishment in a nondeath case, you would say well, most
24 go the other way. In other words, if you knock them
25 down one by one, it is kind of hard to get a trend

1 going.

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

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

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

17 MR. FISHER: Of course.

18 JUSTICE SCALIA: Abraham Lincoln should they
19 could, anyway.

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

22 CHIEF JUSTICE ROBERTS: If somebody in this
23 case is tried and convicted under that law, you would
24 say: Well, that's unconstitutional because there is not
25 a sufficient trend in favor of that.

1 And it just seems to me that that
2 understanding of Atkins and Roper prevents the
3 development of the law except in one direction.

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

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

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

21 MR. FISHER: Justice Ginsburg, I think there
22 are two problems with that. First, it is a theoretical
23 argument that doesn't have any factual underpinning.
24 There is no evidence in any State legislature that Coker
25 has stood in the way of enacting statutes like this.

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

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

16 CHIEF JUSTICE ROBERTS: I know, but, as I
17 pointed out, it is very expensive to run a regime in
18 which you have the death penalty. And I can see the
19 legislators in those States saying, well, we've got
20 Coker on the books. We've only got one State. Why
21 would we want to be the second State and go through this
22 process and then have the Supreme Court throw it out?
23 You know, everyone is waiting for the next State.

24 I mean it's a very difficult process, it
25 seems to me, to run the evolution of the law in both

1 directions. And then if you're insisting on a trend of
2 whatever -- I don't know what the number is, 15, or 20,
3 or 30 States -- it just can't materialize when you have
4 Coker there and you have Atkins looking only in one
5 direction.

6 MR. FISHER: There are, no doubt, various
7 legislative considerations. I just would --

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

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

15 JUSTICE SCALIA: That there would be more?

16 MR. FISHER: No. Absolutely, I think that
17 it would not continue.

18 JUSTICE SCALIA: That it would not.

19 MR. FISHER: If -- and I think it is
20 important to understand not just the Louisiana supreme
21 court; but in 2004, when Patrick Kennedy was put on
22 death row in Louisiana, in light of this Court's Atkins
23 and Roper jurisprudence, notice was served in all
24 death-penalty jurisdictions that if you want a law like
25 this, you've got a few years to pass it before this case

1 gets to the Supreme Court.

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

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

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

20 MR. FISHER: I think they may well,
21 Justice Alito. It's important to recognize not just --
22 well, in Roper this Court said -- I think it addressed a
23 similar question. There has to be a line somewhere in
24 terms of the Eighth Amendment.

25 Now, we can imagine a terribly serious case

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

8 But, more importantly, other States would
9 beg to differ. Look at Utah. Utah thinks the next most
10 serious crime after murder is assault, an aggravated
11 assault on a prison guard. South Dakota thinks the next
12 most serious crime after murder is aggravated
13 kidnapping.

14 Once you roll the line back from the line
15 established in Coker, which is requiring the death of
16 the victim, it becomes extraordinarily difficult to
17 figure out where the line is going to be drawn for
18 Eighth Amendment purposes.

19 CHIEF JUSTICE ROBERTS: I wonder if Atkins
20 and Roper are qualitatively different, considering the
21 mental retardation of the offender, the youth of the
22 offender. Those are issues that go, as we said in Roper
23 and Atkins, to culpability. In other words, they are
24 focused on the offender.

25 This is quite different. It is focused on

1 the nature of the offense. And I wonder if that's more
2 something on which we have less basis for determining
3 the issue than a legislature. We can look at the
4 question of characteristics of the offender and make a
5 judgment about that. I don't know how we decide this
6 for the reason you were just saying: What crimes are
7 more serious than others?

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

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

19 JUSTICE KENNEDY: What about treason? What
20 about treason? Even the countries of Europe which have
21 joined the European Convention on Human Rights, I
22 believe they make an exception to the prohibition of the
23 death penalty for treason. You can slaughter your
24 fellow citizens, but if you offend the State you can be
25 put to death.

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

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

6 JUSTICE SCALIA: Isn't there a Federal
7 treason statute?

8 MR. FISHER: Of course. There is every
9 reason to believe --

10 JUSTICE SCALIA: And that doesn't require
11 murder; does it?

12 MR. FISHER: No, it does not. It requires a
13 --

14 JUSTICE SCALIA: Do you think that's
15 unconstitutional?

16 MR. FISHER: No, Your Honor. And I think if
17 anyone thought that the treason laws were implicated
18 here, you might have different parties before the Court.

19 JUSTICE SCALIA: Do you think treason is
20 worse than child rape?

21 MR. FISHER: Well, Blackstone thought
22 treason was more serious than murder. It has
23 traditionally been the most serious crime that a person
24 can commit, and I think historically, as well at
25 nationally, that is still the sentiment that is shared.

1 CHIEF JUSTICE ROBERTS: But we're talking
2 about --

3 MR. FISHER: Now --

4 CHIEF JUSTICE ROBERTS: -- if we were talking
5 about evolving trends, I think it's fair to say that
6 society's recognition of the seriousness of the crime of
7 rape has evolved even since, the period since Coker.

8 Now isn't that something that we should take
9 into consideration?

10 MR. FISHER: I --

11 CHIEF JUSTICE ROBERTS: It certainly
12 involved -- evolved since the time of Blackstone and
13 even since -- as I say, even since Coker. So while
14 Coker may have thought rape of an adult wasn't serious
15 enough to warrant the death penalty when the legislature
16 had made a contrary determination, perhaps that would be
17 addressed differently if -- differently today; and
18 certainly rape of a child would be understood not to be
19 not included in Coker's analysis.

20 MR. FISHER: Well, I don't think societal
21 attitudes have changed very much. But to the extent any
22 of it has, what this Court said in Atkins is you look to
23 the expertise of professional organizations; and I think
24 it is relevant here that if the State stands up and says
25 well, the reason why we are doing this is because of

1 more enlightened attitudes about the harm that occurs in
2 child rape, all of the professional organizations sex
3 assault groups, social workers, and the like that deal
4 with that crime, like here in the amicus --

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

10 MR. FISHER: Perhaps not. I don't know. I
11 mean, this Court chooses its words -- other parts of the
12 Coker decision I think make clear that the Court
13 understood that rape was an extraordinarily serious
14 crime.

15 JUSTICE GINSBURG: There was, at least in
16 the amici briefs in Coker -- may not have been explicit
17 in the Court's decision -- but the argument was made
18 that the rape law in question, the Georgia law, came
19 from an earlier tradition when a woman was regarded as
20 as good as dead once she was raped; and the crime was
21 thought to be an offense against her husband or her
22 father as much as it was to her. And that was the
23 background of Coker, plus the racial element in it was
24 very strong.

25 I imagine that that -- if the question were

1 -- the Coker question were to come up again, those would
2 still be factors. I mean, the notion was that making
3 rape equivalent to murder was no kindness to women,
4 because it said once you've been raped, you're spoiled.

5 That's not -- there's no parallel with child
6 rape.

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

9 MR. FISHER: Justice Ginsburg, I think,
10 although not with the same historical pedigree, the same
11 argument is being put forward by the State today, that
12 by definition, for a child to have been raped is
13 tantamount to having been killed, and the social workers
14 and sex assault experts here today I think are telling
15 you with this one voice, we very much want to
16 avoid sending --

17 JUSTICE GINSBURG: But it isn't -- it isn't
18 the notion that she's somebody else's property; and --
19 which was the history of the rape statutes.

20 MR. FISHER: I think that's fair enough,
21 Justice Ginsburg, but I think also I'd like -- perhaps
22 Justice Alito was right, that looking at the Court's
23 opinion gives us the best indication of the analysis;
24 and I think the parts that you were reading are from the
25 earlier part of the opinion where the Court was saying

1 that rape in general is not as serious as murder, but
2 the end of the plurality win in Coker is very emphatic.
3 It says, that doesn't end the question, because we have
4 two very serious aggravating circumstances and this is a
5 particularly serious incident of rape.

6 Even then, the Court's words were, that does
7 not change the fact that the victim is not killed. So
8 that is --

9 CHIEF JUSTICE ROBERTS: Coker, of course,
10 repeatedly in the statement of the facts and the
11 analysis, repeatedly referred to the victim as an adult
12 woman. It seems to me the Court was taking -- was being
13 very careful to leave open the question of what would be
14 the analysis in the case of a child.

15 MR. FISHER: We don't argue otherwise. We
16 understand Coker says adult woman. What we're saying is
17 that the rationale of Coker, and not just the rationale
18 requiring somebody to have died, but also the objective
19 rationale in Coker, of saying we understand in the past
20 four, five years, there's been a handful; of States that
21 have come forward with laws like this but we nonetheless
22 find a national consensus against it. Look at the
23 numbers in Coker. You had 30 people on death row over
24 the span of five or six years for rape, as compared to
25 this case, you have two people on death row over a span

1 of 13 years. Even the practices on the ground indicate
2 quite strongly that society and even Louisiana -- look
3 at Louisiana where in direct contrast to the way they
4 prosecute murder cases, in which it is common for the
5 prosecution to take the position that the death penalty
6 is the only appropriate punishment for this crime, they
7 offer life imprisonment. They've offered life in prison
8 in every single child rape case they've prosecuted in
9 the in the last 13 years.

10 The only reason you have Patrick Kennedy
11 here today and one other offender on death row is
12 because they insisted on their innocence.

13 If there are no further questions, I --

14 JUSTICE KENNEDY: Mr. Fisher, your white
15 light is on, and you do want to protect your rebuttal
16 right, but you began by indicating that this statute
17 could be narrowed. It could be narrowed by a
18 requirement of recidivist behavior. Are there any other
19 narrowing categories?

20 MR. FISHER: Well, I think there are two
21 ways to decide this case on more narrow grounds, I'll
22 offer this answer to your question. First, this Court
23 could say that Louisiana is the only State that doesn't
24 require recidivism, so it fails the substantive Tison -
25 Roper analysis. It could also say that -- that

1 Louisiana's law isn't sufficiently narrow. Yes,
2 Justice Kennedy, I think if the question is could there
3 be another particularly heinous circumstance that you,
4 just in the context of narrowing would be enough, one
5 might imagine other aggravating circumstances.

6 Coker wouldn't be --

7 JUSTICE SCALIA: Well --

8 JUSTICE KENNEDY: What would they be?

9 MR. FISHER: One could imagine something
10 like torture or extraordinarily serious harm in a case,
11 something like that. But again, that would --

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

17 MR. FISHER: I'm not sure what the question
18 is.

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

24 MR. FISHER: I think that's right, Justice
25 Scalia. Perhaps the States want to speak to that.

1 They're the ones that put it in their law. But it
2 reinforces --

3 JUSTICE GINSBURG: It was 25 years, right?

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Fisher.

12 Ms. Clark.

13 ORAL ARGUMENT OF JULIET L. CLARK

14 ON BEHALF OF THE RESPONDENT

15 MS. CLARK: Mr. Chief Justice, and may it
16 please the Court:

17 This case involves the very savage rape of
18 an 8-year-old child by her stepfather. He raped her so
19 brutally that he tore her entire perineal opening from
20 her vaginal opening and to her anal opening. He tore
21 her vagina on the interior such that it separated
22 partially from her cervix and allowed her rectum to
23 protrude into her vagina. Invasive emergency surgery
24 was required to repair these injuries. It is
25 Louisiana's position that the cruel and unusual

1 punishment clause of the Eighth Amendment does not
2 preclude the State of Louisiana from --

3 JUSTICE STEVENS: Could you just clarify
4 about the -- were those injuries permanent?

5 MS. CLARK: Your Honor, those injuries,
6 after surgery they did heal. So the surgery was
7 required to repair them.

8 JUSTICE STEVENS: They were not permanent
9 injuries.

10 MS. CLARK: In the sense that they healed,
11 that's correct, Your Honor. But I think that was a
12 performance injury inflicted upon a child wants -- just
13 psychologically and mentally as well as physically.

14 As an initial matter, I would like to
15 address the Coker question. I think that it is quite
16 clear that Coker was limited to the rape of an adult
17 woman. There are at lease 14 separate references in the
18 opinion to an adult woman or to an adult female. The
19 only reference --

20 JUSTICE KENNEDY: Both -- both sides have
21 something of a dilemma with Coker, because if you say
22 that it does not control this case, then the consensus
23 or the lack of consensus -- or the consensus is more
24 reliable. If you say it does control this case, then
25 the consensus is not so reliable; and both sides have

1 that duality that they have to confront.

2 MS. CLARK: Yes, Your Honor, I understand
3 that -- that sort of a tension, Justice Kennedy, and I
4 think for the defendant, he's the one asking the Court
5 to create this broad categorical restriction and he's
6 saying that it clearly precludes it. At the same time
7 he's saying that States have -- have responded to -- to
8 Coker, that somehow that -- the fact that there's not a
9 greater existence of the rape of a child rape laws is
10 somehow not controlled by the fact that it has been
11 misinterpreted, and he point out in his brief several
12 instances of courts where they specifically misinterpret
13 that holding.

14 JUSTICE BREYER: There is no -- there is
15 doubt in my mind that this particular kind of crime has
16 not been the subject of a Supreme Court opinion. My
17 problem is I can think of many, many awful, truly
18 horrible circumstances that categorized in many
19 different -- under many different criminal statutes; I'm
20 not a moralist. I'm a judge. As a judge, I look at the
21 law. It seems for 43 years, no one has been executed
22 but for murder.

23 Moreover, this Court has never approved the
24 execution for any crime other than murder in those 43
25 years. Right.

1 If I accept your argument, since I'm not a
2 moralist, since I can think of horrible things all over
3 the place, have I then opened the door so that, in fact,
4 States will find lots of different crimes which are
5 seriously horrible; and suddenly, we will be in the
6 business of creating under the Constitution some kind of
7 highly complex categorization, really a moral
8 categorization of crime, method of commitment, method
9 of, et cetera, et cetera.

10 MS. CLARK: Your Honor, I think the
11 Constitution by only precluding cruel and unusual
12 punishment leaves open the possibility that there are
13 certain crimes that by their nature are so heinous that
14 the death penalty --

15 JUSTICE BREYER: So the answer is yes? Your
16 answer is if we take your position and that's -- I'm not
17 saying it's not a good argument, just take your
18 position, but if we take your position, I can think of
19 instances of kidnapping; I can think of instances of
20 torture. I can think of instances all over the place
21 which are truly horrible.

22 But then to take your position, what we're
23 going to do is we are going to say legislatures all over
24 the country do have the right under the Constitution to
25 go, try to categorize horrible by horrible, not just

1 death. Not just murder.

2 JUSTICE SCALIA: Just the way they used to.

3 MS. CLARK: Exactly, Your Honor.

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

6 (Laughter.)

7 MS. CLARK: I think we have to recognize
8 that with child rape there is something very unique and
9 horrible about this crime. It's not true of every
10 kidnapping. It's not true --

11 JUSTICE BREYER: And it's not true -- I've
12 read the definition of section 41 of rape under the
13 Louisiana code. I won't repeat it but it's very broad.
14 And it can be broad in the sense that rape itself can
15 include a vast number of instances of child molesting,
16 each of which is bad; but there are degrees. So I
17 suppose that child molesting of all those kinds that are
18 listed in 41 (c) (1) and (2), which you know I'm sure,
19 would count as rape if committed on a person under 12.
20 Some are absolutely horrible. Some are just bad. But
21 that's what the other side means when he says it gives
22 tremendous discretion to the prosecutor to pick and
23 choose who should be executed needs further narrowing.
24 What's your response.

25 MS. CLARK: Your Honor, I'm slightly

1 confused as to what you're referring to in terms of a
2 wide variety of acts, because Louisiana Revised Statute
3 14:42 that Patrick Kennedy was convicted under, it only
4 provides that he could be convicted of aggravated rape
5 of a child under 12 where he had anal intercourse or
6 vaginal intercourse with that child. Those are the only
7 two methods --

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

10 MS. CLARK: Exactly, Your Honor.

11 JUSTICE BREYER: Thank you.

12 MS. CLARK: Only anal or vaginal rape. And
13 I would submit that that is in itself a very narrow
14 crime. This is fundamentally different, I think, from
15 homicide, where in homicide the narrowing was required
16 because homicides were committed under circumstances
17 where the offender himself perhaps lacks intent to kill
18 traditionally, but accidentally committed the murder
19 during the course of another felony. Or where the
20 offender himself acted with reckless disregard but
21 another person committed it during the course of the
22 felony.

23 So there was a wide variety of intents with
24 which the crime was committed. There was a wide range
25 of circumstances under which the crime was --

1 JUSTICE SCALIA: Ms. Clark, what do you do
2 with the requirement that our cases have imposed? It is
3 not a requirement I agree with, but it is certainly one
4 our cases have imposed, that you cannot leave -- leave
5 it to the jury whether to impose the death penalty or
6 not even for murder, but rather you have to narrow the
7 class of people who have committed that particular crime
8 so that -- so that the imposition won't be random.
9 Although later, we say you have to let the jury consider
10 any mitigating factory which makes it random; but
11 nonetheless, our cases do say you have to narrow the
12 class of murderers who can be given the death penalty.

13 Wouldn't the same apply to the class of
14 child rapists?

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

16 JUSTICE SCALIA: Why not.

17 MS. CLARK: The point that I was trying to
18 make about murder about the category being so broad, the
19 class being so broad, the range of actions being so
20 broad that when the Court was looking at -- in Furman --
21 what kind of homicides -- how do we know whether -- why
22 this person is getting the death penalty and why this
23 person isn't, what is the standard that guides it, they
24 were looking at situations where murders like the -- ini
25 Furman his actions were described as tripping over a

1 wire as you left the house and accidentally shooting the
2 homeowner through the front door.

3 JUSTICE SCALIA: You think intentional
4 murder of a -- of a law officer would need no further
5 narrowing?

6 MS. CLARK: That's correct, Your Honor. In
7 Louisiana law we define -- we have deliberate murder, a
8 law enforcement official, and that by the category of
9 the victim that is at stake there that crime is
10 narrowed, and that is provided for in Louisiana law.

11 JUSTICE SOUTER: Excuse me.

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

16 MS. CLARK: That is. That's further
17 narrowing. It is, Your Honor. What I'm saying is it is
18 not clear from this Court's jurisprudence that narrowing
19 would be required in a non-homicide circumstance to
20 begin with, especially one where here we have defined
21 the offense so narrowly that it is -- that under the law
22 that Patrick Kennedy was convicted it was only children
23 under 12. Those kind of offenses, rapes under those
24 circumstances are not committed accidentally. They're
25 never committed without some form of premeditation and

1 deliberation. It's just something that is fundamentally
2 and uniquely different for murder.

3 JUSTICE SOUTER: May I go back to your -- to
4 your answer on the murder question? And that was you
5 said there's -- there's a murder analog to this narrow
6 definition, and you gave the example of the murder of
7 the law enforcement officer. And that raises a question
8 that I had about how Lowenfield ought to be read.

9 The example that you gave was one of the
10 five instances which the Court said out in the
11 Lowenfield opinion quoting the Louisiana statute. In
12 each of those five instances, nothing need be proved
13 except, as you have put it, the narrowing circumstance
14 in the law enforcement officer in your example. But
15 under the Louisiana statute which passed muster in
16 Lowenfield, there were five analogs of which the law
17 enforcement officer was one.

18 Each of those crimes was defined as a
19 killing with a specific intent to kill or specific
20 intent to inflict great bodily harm. And then in each
21 one of these instances, there was an extra element
22 added: Law enforcement officer, intent to kill more
23 than three people in Lowenfield, and so on. In fact,
24 child under 12 was one of the examples.

25 It seems to me that the -- one way to read

1 the Louisiana statute there consistently with the --
2 with the value that Justice Scalia's question raised is
3 this: That Louisiana, in effect, had created a general
4 crime of murder with specific intent to kill or inflict
5 great bodily harm. And then it had given five instances
6 in which, as I put it a moment ago, there was an extra
7 element: And that extra element, whether it be killing
8 more than two people, whether it be killing a child
9 under 12, law enforcement officer, functioned like the
10 aggravating circumstance; so that, in fact, we didn't
11 have a statute that merely said if you kill a law
12 officer intentionally, that's capital, period.

13 What we had was a capital scheme that says
14 if you kill with specific intent to kill or inflict
15 great bodily harm, that's murder. And if you commit one
16 of these other five other elements, that narrows it down
17 to capital murder.

18 Isn't that a proper way of reading the
19 Louisiana murder statute from which you took your
20 example? And if it is, isn't that example inconsistent
21 with the theory that you're arguing here that you can
22 simply define child rape as capital and let it go at
23 that?

24 MS. CLARK: No, Your Honor. I think if I --
25 if I understand what you're asking, with regard to

1 murder again, murder traditionally is a very broad
2 crime. So, I think what Louisiana did is they defined
3 murder to account for many ways in which it could be
4 committed. They labeled one class of them as being --

5 JUSTICE SOUTER: I quite agree with that.
6 My point was just this: You made the argument -- as I
7 understood it a moment ago -- that the Louisiana child
8 rape statute is not unique; that, in fact, Louisiana
9 defines other crimes very narrowly, so that you were
10 making a different kind of argument.

11 You were saying we in Louisiana define
12 murder of a law enforcement officer very narrowly. No
13 requirement to add any narrowing or aggravating
14 circumstance there, and the statute passed muster. And
15 my point simply is, I don't think that's the way to read
16 the Louisiana statute.

17 The Louisiana statute instead says killing
18 with intent et cetera is -- is capital murder if there
19 is a further circumstance added to it; and five are
20 given.

21 So all I'm saying is I don't think the fact
22 that your capital murder passed muster under Lowenfield
23 is authority for saying that the child rape statute
24 passes muster here.

25 MS. CLARK: Well, I agree with you on that,

1 though I think that perhaps --

2 JUSTICE SCALIA: Do you? Do you really?

3 MS. CLARK: Well, not -- I agree in the
4 sense that --

5 JUSTICE SOUTER: Well, let's find out how
6 much.

7 (Laughter.)

8 JUSTICE SCALIA: Didn't the -- didn't the
9 Louisiana statute that -- that was at issue in
10 Lowenfield produce the result that if you committed
11 intentional murder of a law enforcement officer, it was
12 up to the jury whether to give you the death penalty or
13 not?

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

15 JUSTICE SCALIA: Would not the same result
16 be -- be achieved by a statute that said if you
17 intentionally kill a law enforcement officer, you are
18 subject to the death penalty? Wouldn't it be precisely
19 the same degree of narrowing?

20 MS. CLARK: That's correct. Yes, Your
21 Honor.

22 JUSTICE SOUTER: And isn't -- isn't the
23 difference -- isn't the difference just what
24 Justice Scalia brought up in an earlier question to
25 Mr. Fisher? He said what seems to count, the way we

1 have targeted our jurisprudence, turns on how you define
2 the class that is narrowed.

3 And my suggestion to you was that the class
4 that is narrowed under your homicide statute is a class
5 that consist of all killing with specific intent to kill
6 et cetera, which is then narrowed by five different
7 circumstances set out.

8 Here, the class is defined as child murder,
9 and there is nothing in the aggravating circumstances,
10 the possible aggravating circumstances that narrows it
11 any more; and isn't that distinction correct?

12 MS. CLARK: I think, if I can address this
13 perhaps without a specific yes or no, what I'm saying is
14 the homicide statute draws specifically a large class
15 and specifically narrows it. The rape statute in itself
16 narrowly defines the target group without making
17 reference to the broader class. I think is --

18 JUSTICE GINSBURG: In one respect is
19 broader, and perhaps whether it assists your position,
20 Coker is a crime that could have only a female victim
21 and a male perpetrator, but this child rape statute as I
22 understand it could be the -- the victim could, male or
23 female; the perpetrator could be male or female.

24 MS. CLARK: That's correct, Your Honor. And
25 actually, in Caddo Parish, the man who was convicted and

1 sentenced to death there had a -- had a female cohort,
2 so to speak who was involved in the rape with him, who I
3 believe has not been tried yet; but she participated in
4 the rape with him, and therefore as a principal who with
5 specific intent is alleged to have committed the offense
6 as well.

7 So both male and female could be convicted
8 of this offense, if he commits this offense, and both
9 male and female children could be victims of this
10 offense; that's correct, Your Honor.

11 I think that --

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

21 They suggest that as a matter of
22 international law, there's sort of a correspondence to
23 our evolving standards of decency that have generally
24 governed our Eighth Amendment jurisprudence. It's kind
25 of a one-way ratchet, we look at trends in one direction

1 but we don't look to see if you suddenly have changed
2 gears and go in the other direction.

3 Could you just comment on that argument?

4 MS. CLARK: Well, first of all, I certainly
5 recognize that there are approximately 28 international
6 countries that would permit the death penalty for rape.
7 However, this Court in its jurisprudence has never, ever
8 based its determination solely upon that factor. In
9 certain instances, the Court has looked to that to
10 confirm its own decision in the matter, but it's never
11 been controlling.

12 I would point out, though, Your Honor, if I
13 may, that -- that there are no -- there are no treaties
14 that are controlling upon the United States or this
15 Court that would --

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

23 MS. CLARK: I think we can, especially
24 where, as here, that turn-around, that determination is
25 based upon a unique understanding of how this crime

1 seriously, gravely affects children in a manner --

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

4 MS. CLARK: Well, I think that we do. I
5 think that that is solely reflected in the child
6 pornography laws that have come about since then. In
7 Osborne versus Ohio, the Court said, after Coker, you
8 can't even possess child pornography in the privacy of
9 your own home.

10 So I think that -- because it is so harmful.
11 And I think that that along with Megan's Law, I think
12 that those sort of cases are also recognition of the
13 fact that we now know more about this crime.

14 JUSTICE BREYER: Can you -- can you give me
15 one second on my own error here, but I just traced the
16 statute through. What I did was I looked at section 42.
17 It says, "aggravated rape is a rape committed upon, et
18 cetera," and then it says "where the victim is under the
19 age of 13." Right. So it doesn't say what rape is. So
20 I assumed it picked up the definition of rape from
21 section 41. And section 41 defines rape as anal or oral
22 or vaginal sexual intercourse, and then in section three
23 it defines oral.

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

1 MS. CLARK: That is the correct statutory
2 thing.

3 JUSTICE BREYER: All right.

4 MS. CLARK: I was trying to make this clear
5 --

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

12 MS. CLARK: Well, I think that all sexual
13 intercourse is -- I think that's a pretty definite
14 offense, despite --

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

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

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

23 MS. CLARK: Right. Right. I would agree
24 that some of the definition of the offenses was narrower
25 under the -- terms that Patrick Kennedy was convicted

1 under than it is today.

2 JUSTICE SOUTER: What do you say about the
3 effect of Enmund and Tison as a -- as a means to
4 understand how we ought to read Coker? You know what
5 I'm getting at.

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Ms. Clark.

24 MS. CLARK: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Mr. Cruz?

1 ORAL ARGUMENT OF R. TED CRUZ,
2 FOR TEXAS, ET AL., AS AMICI CURIAE,
3 IN SUPPORT OF THE RESPONDENT

4 MR. CRUZ: Mr. Chief Justice, and may it
5 please the Court:

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

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

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

1 terms of rape, and the Court repeatedly and I would
2 suggest not accidentally added the word adult.

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

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

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

1 victim of this is under the age of 13.

2 Now, am I right in thinking it's not the
3 worst instances; it's every instance of rape defined
4 that way?

5 MR. CRUZ: You're not exactly right, Justice
6 Breyer.

7 JUSTICE BREYER: Thank you.

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

10 JUSTICE BREYER: So the amendment --

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

15 JUSTICE SCALIA: It was not all child rape.

16 MR. CRUZ: Exactly.

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

19 MR. CRUZ: That's exactly rate. And so that
20 was a substantial narrowing. It was 11 and younger, and
21 it was only vaginal and --

22 JUSTICE BREYER: Thank you. I see.

23 MR. CRUZ: And anal. Beyond that, however,
24 the juries that have considered this so far -- and it
25 has been a limited circumstance because of the

1 distorting effect of Coker -- but the juries that have
2 considered this so far and the prosecutors that have
3 prosecuted have shown every ability to distinguish truly
4 egregious rapes.

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

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

22 What we can say is that the cases that have
23 been prosecuted -- the two individuals currently on
24 death row, Patrick Kennedy and Mr. Davis, committed
25 crimes that are just unspeakable. And in both of them,

1 they were not children that were close to the age; they
2 were in this case an eight-year-old little girl; in
3 Patrick Kennedy's case, a five-year-old child. They
4 were crimes that were -- and that's part of the evolving
5 concept of decency. Part of the reason the States are
6 acting is, in modern times, we're seeing crimes that 20,
7 30, 40, years ago, people wouldn't imagine. We're
8 seeing predators that seek out young children and do
9 abominable things to them. And that's why legislatures
10 are acting.

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

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

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

24 MR. CRUZ: Those professionals -- that is
25 their opinion on a difficult policy question. The amici

1 States are not here advocating that -- that capital
2 punishment for child rape is or isn't a terrific idea.

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

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

21 In this instance, Patrick Kennedy is a
22 300-pound man who violently raped an eight-year-old
23 girl. On any measure, he is exquisitely culpable. And
24 the question, as this Court put it in Roper, as to the
25 Eighth Amendment inquiry as to the death penalty is

1 whether the offender can be reliably, quote, "be
2 classified among the worst offenders."

3 Under almost any analysis, someone who
4 commits the sort of unspeakable crime that Patrick
5 Kennedy commits is reliably classified among the worst
6 offenders.

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

16 (Laughter.)

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

23 JUSTICE STEVENS: But has that sort of a
24 different direction from evolving standards of decency
25 occurred at all since we first announced the evolving

1 standards of decency and jurisprudence in this Court?

2 MR. CRUZ: I'm not aware of a decision doing
3 so, but the analytical predicate for the evolving
4 standards of decency -- this Court said over and over
5 again the most reliable indicium is the objective
6 judgment of elected legislatures. And in this instance,
7 the legislatures --

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

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

1 Constitution.

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

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

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

24 JUSTICE KENNEDY: And that's prior
25 conviction --

1 MR. CRUZ: Prior conviction.

2 JUSTICE KENNEDY: -- not prior offenses?

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

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

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: I would like to address first
23 the narrowing component of this case and then turn to
24 the idea of trends on the first question presented.

25 First, the reasons for this Court's

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

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

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

4 MR. FISHER: It is with respect to
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 is -- contradicts.

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

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

1 to kill a law officer, without any further
2 qualification?

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: I thought -- the
23 bulk of your argument, though, it seems to me, would
24 not -- would be the same in a recidivist case, because,
25 of course, that doesn't result in death either.

1 MR. FISHER: I think --

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

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

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

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

22 MR. FISHER: If we're looking at trends,
23 perhaps I can leave you with this: Again, remember what
24 we have in terms of a trend. All we have done in the
25 past 30 years is returned to the place that we were 30

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

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

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

17 The case is submitted.

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