07-343

IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

—v.—

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF LOUISIANA, AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Louisiana is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding the constitutionality of the use of the death penalty as a punishment for child rape. Given its longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of those questions is a matter of substantial importance to the ACLU and its members.

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* their members or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the death penalty in particular. Accordingly, LDF represented the defendants in, *inter alia, Furman v. Georgia*, 408 U.S. 238 (1972), *Coker v. Georgia,* 433 U.S. 584 (1977), *McClesky v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973), and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), and *Roper v. Simmons*, 543 U.S. 551 (2005).

SUMMARY OF ARGUMENT

In this brief, *amici* explore the historical record of the use of the death penalty for rape. This record establishes a longstanding societal consensus that the death penalty is a disproportionate penalty for the rape of victims of all ages. The sole exception has been the historical willingness of southern states to execute blacks for rape, especially those convicted of raping white women and children.

Historically, the use of the death penalty for rape, far more than any other crime, has been driven by obvious racial discrimination. Apparently, no white man has ever been executed in the U.S. for the non-homicide rape of a black woman or child. Capital punishment for rape has its roots in the antebellum South, where even the attempted rape of a white

female by a slave mandated a death sentence, but where a slave woman could not be raped by her master, and where her rape by another white man was merely a trespass against her master. The end of the Civil War saw an extraordinary rise in the frequency of lynching, and the most common justification was that white women needed protection from black rapists and attempted rapists.

The scourge of racial bias continued unabated through much of the 20th century, when black men convicted of rape in the South received death sentences in grossly disproportionate numbers, especially when they were convicted of raping a white woman or child. Between 1930 and 1972, 455 people were executed for rape in the United States; 405, or 89.1 percent, were black, and 443 were executed in former Confederate states. During this period, Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia did not execute a single white man for rape, but together these jurisdictions executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed one white man for rape during this period, but together they executed 71 blacks.

This blot on the historical record, particularly in light of the stark racial biases and tensions that continue to affect Louisiana and other parts of the nation, is yet another compelling reason for this Court to refuse to countenance the use of the death penalty for rapists, including child rapists.

ARGUMENT

APART FROM THE HISTORICAL WILLINGNESS OF SOUTHERN STATES TO EXECUTE BLACKS FOR RAPING WHITE WOMEN AND CHILDREN, AMERICAN SOCIETY HAS LONG VIEWED DEATH AS A DISPROPORTIONATE PENALTY FOR THE RAPE OF A VICTIM OF ANY AGE.

Under the Eighth Amendment, death is an excessive penalty for a crime when its imposition is contrary to "'civilized'" or "'evolving'" "'standards of decency.'" *Roper v. Simmons*, 543 U.S. at 561 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)); *Penry v. Lynaugh*, 492 U.S. 302, 331, 335 (1989) (citing *Coker v. Georgia*, 433 U.S. at 593-97, and *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court has consistently held that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331. This Court has also made it clear that, in addition to legislative enactments, courts should look to the "[]frequency of [the death penalty's] use even where it remains on the books," and the direction of any change on the issue. *Roper*, 543 U.S. at 567; *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). Finally, this Court has held that it must exercise its "own judgment" whether the death penalty is a disproportionate punishment for juveniles. *Coker*, 433 U.S. at 597; *Roper*, 543 U.S. at 563.

In his brief, petitioner Patrick Kennedy persuasively demonstrates that contemporary data

regarding both the number of states that authorize the death penalty for child rape and the infrequency of its imposition reveal an overwhelming national consensus that the death penalty is a disproportionate punishment for this crime. Here, *amici* examine the historical record of the use of the death penalty for rape, which shows a longstanding societal consensus that the death penalty is a disproportionate penalty for the rape of victims of all ages—except when a black defendant raped a white woman or child in the South.

A. Historically, prosecutors and jurors have been unwilling to authorize the death penalty for rape, including child rape.

The historical record demonstrates that prosecutors and juries have been singularly unwilling to impose death on rapists, including child rapists.

In its 1977 decision in *Coker*, this Court reviewed the available evidence concerning the willingness of prosecutors to seek and juries to return death sentences in rape cases. 433 U.S. at 596-97. This Court found that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence," and concluded that this factor weighed heavily in favor of finding capital punishment a disproportionate penalty for rape. *Id.* Other analyses have confirmed this finding. *See, e.g.*, James W. Marquart, et al., THE ROPE, THE CHAIR, AND THE NEEDLE 64 (1994) ("Between 1923 and 1971, prison records reveal, 2,308 persons were convicted of rape in the state of Texas. Among those offenders, only 5 percent (118) received the death penalty; the rest served a prison sentence."); Marvin

E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the Am. Acad. of Pol. and Soc. Sci. 119, 129 (1973) (among the 1,265 persons convicted of rape in Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee between 1945 and 1965, less than 9.5 percent received a death sentence).

Evidence from Mississippi after 1972 also suggests that jurors and prosecutors view death as a disproportionate penalty for child rape. At the time *Coker* was decided, Mississippi had a statute authorizing capital punishment for the rape of a child.[2] *See Coker*, 433 U.S. at 595 (citing Miss. Code Ann. § 97-3-65 (Supp. 1976)). In 1989, the Mississippi Supreme Court ruled that a defendant convicted under this statute could be sentenced to death only if, in addition to committing rape, he or she killed, attempted to kill, intended to kill, or contemplated using lethal force. *Leatherwood v. State*, 548 So.2d 389, 402-03 (Miss. 1989). In the intervening thirteen years when child rape by itself was punishable by death, Mississippi juries returned only two death sentences. *See id.*; *Upshaw v. State*, 350 So.2d 1358 (Miss. 1977).

In short, both the contemporary and the historical evidence demonstrate that prosecutors and juries have been, and remain, singularly unwilling to authorize the execution of rapists, including child rapists.

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[2] Mississippi was one of only two states that authorized the death penalty for child rape. The other was Florida, and four years after *Coker* the Florida Supreme Court declared its state law unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla. 1981).

B. Historically, the death penalty for rape was reserved for blacks in the South, especially those convicted of raping white women and children.

There is, however, one profoundly unsettling exception to this otherwise nearly universal refusal by prosecutors and juries to authorize death as a punishment for rape: the historical willingness of prosecutors and juries in the South to impose the death penalty on black men convicted of rape, especially those convicted of raping white women and children.

Historically, the use of death as a penalty for rape, far more than any other crime, has been driven by obvious racial discrimination. Apparently, no white man has ever been executed in the U.S. for the non-homicide rape of a black woman or child. *See* Michael L. Radelet, *Executions of White for Crimes Against Blacks: Exceptions to the Rule?*, 30 Soc. Q. 529, 537-41 (1989) (describing all white-on-black cases that have resulted in an execution); *see also* Wolfgang & Riedel, *supra*, at 125 (reporting on a study by the Florida ACLU of sentences imposed in Florida for rape between 1940 and 1964, which found that "none of the eight white offenders who raped black females received the death penalty").

As petitioner noted in his petition for a writ of certiorari, "executing people for rape has its roots in the Southern antebellum practice of hanging slaves believed to have committed this crime." Petition for a Writ of Certiorari at 21, *Kennedy v. Louisiana*, No. 07-343 (U.S. Sept. 2007) (citing Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY 139-42 (2002)). The "rape of a white woman ... [was a]

capital crime[] in all slaveholding states." John Hope Franklin & Alfred A. Moss., Jr., FROM SLAVERY TO FREEDOM 115 (1988). However, "[n]o white rapists are known to have been hanged in the antebellum South." Banner, *supra*, at 139; *see also* William J. Bowers, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982 139-40 (1984); Banner, *supra*, at 140-43 (under the statutes of two states capital punishment was reserved solely for black rapists).

In much of the antebellum South, even "[a]ttempted rape of a white woman was a capital crime for blacks," although not for whites. Banner, *supra*, at 140-41. Louisiana's legal provisions mandated capital punishment for both the rape and the attempted rape of a white female by a slave. *See* La. Sess. Acts 1857 p. 230 (death penalty mandatory for rape or attempted rape of any white female by a slave); Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865*, 24 S.U. L. Rev. 145, 147-53 (1997) (detailing Louisiana's Black Code of 1806, which made the "rape or attempted rape of any white woman or girl" by a slave punishable by death); *see also* Bowers, *supra*, at 139-40 (describing nineteenth-century "rape statutes that specified punishment according to the race of both offender and victim," and which "underscored restrictions on the kinds of interracial contact that could be tolerated"); Ga. Penal Code of 1816, §§ 33-34.[3]

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[3] In 1816, the Georgia penal code expressly provided that rape committed by a white man would be punished by a term of imprisonment of not more than twenty years, and attempted rape by not more than five years, but that slaves and "free persons of color" were to be put to death for the crimes of rape or attempted rape of a free white female. Ga. Penal Code of

A slave woman could not be raped by her master, and her rape by other white men was merely a trespass against her master's property. Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 153-70 (1975) (rape of black female slaves by their masters was not recognized because the women were the masters' property); Franklin & Moss, *supra*, 114 ("The rape of a female slave was regarded as a crime, but only because it involved trespassing."); Stanley Elkins, SLAVERY 59 (1976) (describing slaves as absolute possessions of their masters). "No Louisiana law made rape of a black woman, slave or free, a crime. Rape was specifically limited to white women under the state's law." Judith Kelleher Schafer, SLAVERY, THE CIVIL WAR, AND THE SUPREME COURT OF LOUISIANA 85-87 (1994).

With the end of the Civil War and emancipation came an appalling increase in the lynching of blacks, "a form of unofficial capital punishment, adjudication of guilt and execution by groups lacking the formal authority for either." Banner, *supra,* at 229; *see also* Franklin & Moss, *supra*, at 312-13 (describing the rise of the Klu Klux Klan, which "stimulated the lawlessness and violence

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1816, §§ 33-34; Ga. Acts of 1816 No. 508 § 1, Lamar, Compilation of the Laws of Georgia, 571, 804 (1821). At the end of the century, the Georgia Supreme Court explained that race might properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female upon failure of which he would abandon his purpose to have sexual intercourse with her." *Dorsey v. State*, 108 Ga. 477, 480, 34 S.E. 135, 136, 137 (1899). Soon thereafter, the court ruled that no *Dorsey* charge was necessary when both persons were "of color, and there was no evidence as to difference in their social standing." *Washington v. State*, 138 Ga. 370, 370, 75 S.E. 253, 253 (1912).

that characterized the postwar period in the United States"). Studies have estimated that between 1880 and 1950 nearly 5,000 people were lynched, which means that "nearly six people were lynched every month for seventy years." Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 23-24 (2007). Three-quarters were black. *Id.* The racial biases found in slavery-era rape laws continued during this period as "[t]he most common public reason for lynching was that White women needed to be protected from Black rapists and attempted rapists." *Id.*

Even as the frequency of lynching decreased in the early 20th century, the scourge of racial bias continued unabated. Between 1930 and 1972, 455 people were executed for rape; 405, or 89.1 percent, were black. U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (1969). Moreover, 443 of the 455 were executed in former Confederate states. Marquart, et al., *supra*, at 39.[4]

In Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee between 1945 and 1965, "among the 823 blacks convicted of rape, 110, or 13 percent, were sentenced to death; among the 442 whites convicted of rape, only 9, or 2 percent, were sentenced to death." Wolfgang & Riedel, *supra*, at 129; *see also* Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 365 n.278 (January 1997). "In

[4] *All* of the executions took place in southern or border states or the District of Columbia. U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (1969).

Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia not a single white man was executed for rape over the forty-two-year period from 1930 to 1972. Together, these jurisdictions executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed 1 white man for rape since 1930, but together they have executed 71 blacks." Wolfgang & Riedel, *supra*, at 125-26.

Louisiana has executed only fourteen defendants for rape since 1941, and all fourteen were black. Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties*, available at http://www.burkfoster.com/StruckbyLightning.htm., tbl. 1. All fourteen raped whites save one -- a serial rapist of black women. *Id*. Since 1941, Louisiana has executed only one defendant for raping a child under twelve; the defendant was black and the child was white. *Id*.

These stark figures lead inexorably to the conclusion that "racial differentials are most clear among death sentences for rape." Wolfgang & Riedel, *supra*, at 125; Robert J. Hunter, et al., *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 Am. J. Crim. L. 313, 326 (1993) ("[C]omparison of [term-sentenced and death-sentenced offenders] confirms that a substantial difference exists in the sentencing of rapists based on race.").

In the 20th century, as before, capital punishment for rape was generally reserved for black defendants whose victims were white. A comprehensive study of the death penalty for rape in the South, including in Louisiana, from 1945 to 1965

found that "black defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim." Wolfgang & Riedel, *supra*, at 126-33.

A study of all of the executions for rape carried out in Texas between 1924 and 1972 concluded:

> The majority of [death-sentenced rapists] were uneducated, young African-American males without lengthy records of property or violent crime convictions. Most had no prior prison record. …
>
> The victims of 95 percent of the death-sentenced offenders were Anglo women, compared with 62 percent among the prison-sentenced cases. Even more dramatically, when a black offender was convicted of raping a white woman, *he was virtually assured of a death sentence.*

Marquart, et al., *supra*, at 64-65 (emphasis added). When the authors compared Texas inmates sentenced to death for rape with those sentenced to prison between 1942 and 1971, they found that "[w]hen males from an African-American background raped an Anglo female, the case was approximately thirty-five times more likely to result in capital punishment than a prison sentence." *Id.* at 56; *see also* Hunter, et al., *supra*, at 337 ("[B]lacks who raped whites stood the greatest chance of being sentenced to death.... This variation under any circumstance is extreme, and disparity based on the race of the victim was explicit.").

The Texas study also found that, in the state's rape cases that resulted in a death sentence between

1924 and 1972, 95.6% of the victims were white, 2.6% were black, and 1.8% Hispanic. Marquart, et al., *supra*, at 47-48, tbl. 3.3.[5] The study determined that during the same time period "[i]n only one case did the rape of a black female result in a death sentence and actual execution. Roscoe Gibson…, a black male, was sentenced to death in June 1962 for raping a nine-year-old black girl in Houston. He was executed on October 6, 1962." *Id.*, at 58.

In their study, Wolfgang and Riedel considered "[o]ver two dozen possibly aggravating nonracial variables," including the age of the victim(s), that might have accounted for the vastly divergent sentences received by black and white defendants. *Id.* at 132. The authors concluded that none of the variables accounted for the racial discrimination:

> It cannot be said that blacks are more frequently sentenced to death because they have a longer prior criminal record than whites, because they used more force on the victim, because they entered premises without authorization, because they used a weapon or threatened the victim with a weapon, because they had an accomplice in the commission of the rape, because they impregnated the victim,

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[5] These figures are all the more startling because "the percentage of interracial rape is a remarkably small fraction of all rapes in our society...." Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law,* 110 Harv. L. Rev. 563, 594-95 (1997). Nearly seventy percent of victims of child rape are abused by parental figures, family members, day-care providers, or a friend or neighbor. *See* U.S. Department of Health & Human Services, *Child Maltreatment 2005*, at 59 tbl. 3-17 (2007).

> *because they more frequently attacked persons under age sixteen*, and so forth. All the nonracial factors in each of the states analyzed "wash out," that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. *The only variable of statistical significance that remains is race.*

Id. at 132-33 (emphasis added); *see also* Hunter, et al., *supra*, at 333 ("[T]he youth of the victim did not appear to be an extra-legal factor that influenced the sentencing decision.").

Thus, the contemporary evidence and the historical evidence demonstrate that prosecutors and juries have been, and remain, singularly unwilling to authorize the execution of rapists, including child rapists. The only exception has arisen from the historical scourge of racial animus. This animus, particularly in light of the stark racial biases and tensions which, as described below, continue to affect Louisiana and other parts of the nation, is one of many compelling reasons for this Court to refuse to countenance the use of the death penalty for rapists, including child rapists.

C. Stark racial biases and tensions continue to affect Louisiana and other parts of the nation.

Contemporary evidence of persistent racial biases and tensions in Louisiana and elsewhere in the nation, including in the criminal justice system, raises the unacceptable possibility that the historical pattern of reserving the death penalty primarily for black-on-white rape will return if this Court declines to declare capital punishment unconstitutional for all rapists, including child rapists.

Race still matters in American society. *See Parents Involved in Community Schools v. Seattle School District No. 1*, __ U.S. __, 127 S.Ct. 2738, 2788, 2791 (2007) (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does"; noting that "our [nation's] highest aspirations" with regard to race relations "are yet unfulfilled"); *id.* at 2800, 2833, 2837 (Breyer, J., dissenting) (highlighting nation's "serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race"). *Cf. id.* at 2738, 2768 (Thomas, J., concurring) (disparate treatment by government based on race "is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and 'provoke[s] resentment among those who believe that they have been wronged by the government's use of race'") (quoting *Adarand Constructors Inc., v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

One arena that continues to experience racial bias and racial disproportionality is the criminal justice system, where racial discrimination persists in jury selection, the exercise of prosecutorial discretion, and sentencing.

The criminal justice system continues to discriminate against both black defendants convicted of rape and black rape victims. Black defendants are subjected to a disproportionate number of wrongful convictions for rape. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 66-67 (2008) ("Many more exonerees were minorities (71%) than is typical even among average populations of rape and murder convicts. Most strikingly, 73% of

innocent rape convicts were Black or Hispanic, while one study indicates that only approximately 37% of all rape convicts are minorities." (footnotes omitted)).

Moreover, "black men are punished far more harshly than their white counterparts who are convicted of rape." Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 586, n.126 (1997) (citations omitted); *see also id*. at 594 ("[B]lack men still receive more severe penalties for rape. One study in Dallas found that the median sentence for a black man who raped a white woman was nineteen years, whereas a white man who raped a black woman received a ten-year sentence. Black men who rape white women receive much greater penalties than do other men who rape white women." (citations omitted)).

"The legal system also clearly discriminates against black women.... Today, men of all races who are convicted of raping black women are sentenced less severely than men convicted of raping white women." *Id*. at 594-95. As one commentator concludes:

> The disparate treatment of the black rapist and the legal indifference to black women victims helps solidify a belief that rape is only heinous if a black man rapes a white woman.

Id. at 594-95.

Additionally, racial discrimination at the critical stage of jury selection[6] remains a widespread

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[6] This Court has often recognized the harm caused by discriminatory jury selection:

problem. *Miller-El v. Dretke*, 545 U.S. at 268-69 (2005) (Breyer, J., concurring). Discriminatory jury selection is the issue in *Snyder v. Louisiana*, No. 06-10119 (U.S. Dec. 4, 2007) (pending in this Court), a case that arose in Jefferson Parish and came before this Court last fall. An *amicus* brief filed by nine ministers from the parish details the Jefferson Parish District Attorney's Office's "historical record of racial discrimination and animus in capital jury selection," and states that "the frequent use of peremptory challenges to exclude African Americans from criminal jury service has greatly undermined [their] confidence in Jefferson Parish's criminal justice system." Brief of Nine Jefferson Parish Ministers as *Amici* Curiae Supporting Petitioner at 2-3, *Snyder v. Louisiana*, No. 06-10119 (U.S. 2007). The *amicus* brief also decries the racial insensitivities of prosecutors in Jefferson Parish, including a prosecutor who joked about wanting "to seat Nazis on capital juries" and prosecutors who wore ties "depicting a grim reaper and a hangman's

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> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, ... but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."

Miller-El v. Dretke, 545 U.S. 231, 237-38 (2005) (citations omitted). Recently, an issue of racism within a jury arose in Massachusetts, where a judge is considering what effect racist statements made by jurors during deliberations had on the verdict. Hilary Russ, *McCowen Jurors Face Bias Complaints*, Cape Cod Times, Jan. 10, 2008, available at http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20080110/NEWS/801100336/-1/SPECIAL02.

noose" during capital trials. *Id.* at 7-14.[7] Race clearly remains a significant problem in Louisiana's criminal justice system.

Louisiana is not alone in continuing to experience problems with racial bias in the administration of criminal justice. *Cf. Kimbrough v. U.S.*, 128 S.Ct. 558, 568 (2007) (noting Sentencing Commission report that crack/powder sentencing differential "'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race'" (quoting U. S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 103 (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackerpt.pdf)). Indeed, other states that impose the death penalty on child sex offenders experience similar difficulties.

For example, recent litigation in Texas has uncovered racist emails and jokes sent and received by the Harris County District Attorney Chuck Rosenthal on his government computer.[8] Bud

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[7] In yet another parish in Louisiana, Terrebonne, a judge in 2004 was suspended from office after he attended a Halloween party "dressed as a prisoner, wearing an orange prison jumpsuit and handcuffs…, as well as a black afro wig" and black facial makeup. *In re Ellender*, 889 So.2d 225, 227 (La. 2004).

[8] Among the emails was "a photograph titled, 'Fatal Overdose,' of a black man lying on a sidewalk amid watermelon peels and Kentucky Fried Chicken containers." Ralph Blumenthal, *New Investigation in Texas E-mail Case,* N.Y Times, January 9, 2008, at A12. Another included a "joke" that "Bill Clinton was like 'having a black man as President' because 'he smoked weed'

Kennedy, *Ghosts From Yesterday's Gaffes Spookier in Writing*, Fort Worth Star-Telegram, Jan. 13, 2008, at B1. As a result, many local African American leaders demanded and obtained the District Attorney's resignation. Ralph Blumenthal, *Prosecutor, Under Fire, Steps Down in Houston*, N.Y. Times, February 16, 2008; Leslie Casimir, et al., *Black Leaders Urge Rosenthal to Step Down*, Houston Chronicle, Jan. 12, 2008, at A1. Local pastors and a Houston City Councilwoman have suggested that the emails and the District Attorney's attitude reveal latent institutional racism in the DA's office. *Id.* One pastor wondered "'[h]ow many black kids have been locked up while they laugh at us?,'" while another said that "'[t]he overpopulation of our jails and prisons is in some cases due to the way [they] were prosecuted…. And [the DA] has a negative attitude toward minorities, which makes it easier to prosecute blacks and Latinos.'" *Id*.

Oklahoma's criminal justice system also experiences racial problems. In 2005, the Oklahoma Criminal Justice Resource Center found that "[s]tatewide, a disproportionate number of black people are prosecuted," with black people "20 percent less likely to receive a community sentence… [,] 40 percent less likely to be diverted to drug court… [,] 30 percent less likely to receive a warning during traffic stops.... [,] 60 percent more likely to be stopped for record checks," and "four times more likely to be searched without consent." Devona Walker, *Oklahomans to Protest Sentences*, The Daily Oklahoman, Sept. 20, 2007.

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and 'he gets a check from the government every month.'" Bud Kennedy, *Ghosts From Yesterday's Gaffes Spookier in Writing*, Fort Worth Star-Telegram, Jan. 13, 2008, at B1.

In short, racial biases and tensions continue to exist in this nation and its criminal justice system, including Louisiana and the other states that have authorized the death penalty for child rapists. This contemporary racial animus presents a plainly unacceptable risk that the historical pattern of imposing the death penalty primarily for black-on-white rape will return unless this Court holds that capital punishment is unconstitutional for all rapists, including child rapists.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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