No. 07-343

In the Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to Louisiana Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, LOUISIANA CHAPTER; THE LOUISIANA FOUNDATION AGAINST SEXUAL ASSAULT; THE TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT; AND THE NATIONAL ALLIANCE TO END SEXUAL VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations of social workers and sexual assault crisis centers. They have substantial experience in treating child rape victims, helping their healing processes, and attempting to reduce the sexual exploitation of children. The *amici* thus have a strong interest in ensuring that sentencing schemes promote rather than hinder those goals.[1]

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 145,000 members and 56 chapters. The NASW, Louisiana Chapter has 2,500 members. As part of its mission to improve the quality and effectiveness of social work practice—including with respect to the detection, treatment, and prevention of child sexual abuse—NASW promulgates professional standards and the *NASW Code of Ethics*, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus* briefs in appropriate cases, before this Court and other courts).

The Louisiana Foundation Against Sexual Assault (LAFASA) is a private nonprofit organization composed principally of Louisiana's sexual assault

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, *amici* state 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 of this brief. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

crisis centers. LAFASA provides a voice for victims of sexual assault; its activities include consulting with law enforcement, social workers, nurses, schools, and employers on sexual assault prevention, intervention, and investigation; coordinating the peer monitoring of its members' crisis centers; educating the public on sexual assault issues; and collaborating with state agencies and crime victims' groups on developing state and federal policies on sexual violence.

The Texas Association Against Sexual Assault (TAASA) is a private nonprofit organization of over 80 crisis centers in Texas. TAASA works to end sexual violence and to assist victims in obtaining healing and justice through community education, youth outreach, law enforcement training, and public policy advocacy. Because of the recent passage of a Texas statute that is similar to the Louisiana statute at issue here (The Jessica Lunsford Act, 2007 TEX. GEN. LAWS ch. 593), TAASA has a particular interest in the outcome of this case.

The National Alliance to End Sexual Violence (NAESV) is a private nonprofit organization that advocates on behalf of the victims of sexual violence in support of efforts to create and improve services for victims and to combat sexual violence. The NAESV Board of Directors consists of leaders of state sexual assault coalitions and national law, policy, and tribal experts who promote the NAESV's mission.

The *amici* have particular insight into the degree to which child rape is a terrible crime that greatly harms its victims. Accordingly, ending the scourge of sexual violence against children and aiding its victims are among the primary missions of the *amici*. The *amici* believe that certiorari is warranted in this case because Louisiana's aggravated rape law, La.

Rev. Stat. § 14:42 undermines that quest. That statute provides that any act of oral-genital contact or anal or vaginal penetration of a child under the age of 13 years is a capital offense. *Id.* §§ 14:41–14:42. By permitting the execution of perpetrators of child sexual abuse, the statute will likely have exactly the wrong effect: rather than protecting children, this statute will increase the number of victimized children, encourage offenders to kill their victims, and interfere with victims' healing process.

SUMMARY OF ARGUMENT

This Court has held that the death penalty for the offense of raping a 16-year-old woman violates the Eighth Amendment's prohibition of cruel and unusual punishment because such a penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). Louisiana's capital aggravated rape statute is, if anything, even worse than the statute at issue in *Coker* because the imposition of the death penalty for child rape in fact *harms* the very children whom it is intended to help. The Court therefore should intervene now to invalidate the Louisiana statute in order to prevent these harms from continuing.

A. Executing child rapists will likely worsen the problem of underreporting that already frustrates efforts to combat child sexual offenses. The overwhelming majority of sexual abuse is committed by family members or close family friends. These relationships lead many victims—as well as family members who witness or suspect the abuse—to remain silent rather than to report the crime. For example, victims and other family members may fear the conse-

quences of the abuser's prosecution and incarceration. Louisiana's capital rape statute dramatically aggravates this problem. By magnifying the possible effects of a report of child rape, the Louisiana statute will likely ensure that fewer victims are identified and receive treatment—and that fewer abusers are stopped from continuing to abuse their victims and from victimizing even more children.

The increasing failure of the system to identify victims will produce a variety of harms for decades to come. Some harm will be immediate, in the form of continued abuse, while others will take years to manifest. Beyond the rise in the number of victims per offender, many former abuse victims may face a host of long-term mental-health and substance-abuse problems.

B. Because Louisiana's penalty scheme does away with the marginal deterrence that is a central feature of punishment theory, the scheme will also encourage abusers to *kill* their victims. Under Louisiana law, abusers face no greater penalty for raping and killing their victims than for merely raping them; thus, it is more likely that an abuser will choose to eliminate the victim, who is in many instances the sole witness to the crime.

C. Even were Louisiana's penalty scheme to function as the legislature presumably hoped—*i.e.*, with abusers brought to trial and child victims testifying against them—Louisiana's law would magnify the trauma that child victims experience in the criminal justice process. Even ordinary trials are highly traumatic for child victims. Death penalty trials, with their vastly increased publicity, expansive hearings, and multiplying pre-trial and post-conviction proceedings, will intensify that trauma by

increasing the scope and duration of the child victim's participation in the criminal justice system. Not only is increased exposure to trials known to hinder child victims' healing process, but the imposition of a death sentence will add to the guilt child victims sometimes feel and may preclude the possibility of a future therapeutic meeting between the victim and his or her abuser.

ARGUMENT

The Court Should Intervene Now To Eliminate The Death Penalty For Child Rape, A Penalty That Harms Abused Children Rather Than Helps Them.

In *Coker* v. *Georgia*, *supra*, this Court held that the Eighth Amendment to the United States Constitution forbids a state from executing the rapist of a 16-year-old woman because the penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." 433 U.S. at 592. Louisiana's capital aggravated rape statute is similarly wanton. First, imposing the death penalty for child rape will reduce the likelihood that abuse will be reported and stopped, thus increasing the amount of abuse the victim suffers as well as the number of children who each abuser can victimize. Second, by equalizing the penalties for child rape and murder, Louisiana's statute encourages abusers to kill their victims. Finally, when a case does go to trial under Louisiana's law, the trauma caused by the extensive trial process itself and the prolonged notoriety the case will generate will be even more severe and long-lasting. Certiorari is therefore warranted so that this Court may reaffirm *Coker* and clarify that the Eighth Amendment

precludes imposition of the death penalty for rape of any form, regardless of the victim's age.

A. Permitting the death penalty for child rape will worsen the problem of under-reporting sexual abuse.

1. Child sexual abuse is disturbingly frequent. Estimates on the reported number of yearly victims range from about 83,000 to 217,000 children.[2] The actual number of victims is almost certainly much higher than even these numbers would suggest. In one of the most frequently cited articles on the prevalence of child sexual abuse, the author evaluated data from multiple retrospective surveys of adults and concluded that "there is considerable accumulated evidence that at least 20% of American women and 5% to 10% of American men experienced some form of abuse as children." David Finkelhor, *Current Information on the Scope and Nature of Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 42 (Summer/Fall 1994).[3] This suggests that a relatively con-

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[2] See, *e.g.*, U.S. Department of Health and Human Services, *Child Maltreatment 2005* 41 tbl. 3-6 (2007) (estimating 83,810 reported incidents in 2005 by aggregating data from Child Protective Services reports); Andrea J. Sedlak & Diane D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect* 2-1 through 2-3, 3-3 tbl. 3-1 (1996) (estimating 217,700 victims in 1993 by canvassing more types of law enforcement agencies as well as reports from schools, day care centers, and mental health agencies).

[3] The number of male children who have been sexually abused may be even higher than this study suggests because males may be "more reluctant to disclose abuse than girls" even years later. Tina B. Goodman-Brown *et al.*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 527 (2003) (reviewing the literature and noting

servative estimate would be that 500,000 children are sexually abused in America each year. See *id.* at 34.

The overwhelming majority of these victims were abused by family members or others close to the family. Nearly 70 percent were abused by parental figures, family members, daycare providers, or a friend or neighbor. See U.S. Department of Health & Human Services, *supra*, at 59 tbl. 3-17. In one study of rapes of girls under the age of twelve, 96 percent of the victims reported that they knew the rapist.[4]

2. Researchers have shown that most victims "do not disclose their abuse to anyone." Gail E. Wyatt *et al.*, *The Prevalence and Circumstances of Child Sexual Abuse: Changes Across a Decade*, 23 CHILD ABUSE & NEGLECT 45, 46 (1996) (collecting studies).[5]

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that, in retrospective studies of child sexual abuse victims, men were less likely to have disclosed their abuse during childhood).

[4] See Patrick A. Langan & Caroline Wolf Harlow, U.S. Department of Justice, *Child Rape Victims, 1992* 2 (June 1994) (estimating that about 17,000 girls under age twelve were raped in 1992, with the father being the offender one-fifth of the time).

[5] See also Rochelle F. Hanson *et al.*, *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559, 564 (1999) (reporting that 82.9 percent of female rape victims under the age of 18 did not report the abuse to the authorities); Daniel W. Smith *et al.*, *Delay in Disclosure of Childhood Rape: Results From a National Survey*, 24 CHILD ABUSE & NEGLECT 273, 278 (2000) (reporting that 9 percent of surveyed women had been raped as a child and that 28 percent of those victims had never previously disclosed the abuse to anyone); Kamala London *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 201 (2005) (reporting that ten out of eleven retrospective studies "indicated that only one third of

The reluctance to report sexual abuse is particularly high for abuse by family members.[6]

Victims are inhibited from coming forward out of shame, fear of being punished, and fear that the abuser will retaliate against the victim or other family members.[7] Victims also remain silent because they fear the consequences for the *abuser*, either out of confused loyalty or love or because the abuser has explained that "the family would become destitute should others learn of their behavior [and the abuser be arrested]." Gene G. Abel *et al.*, *Complications,*

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adults who suffered [child sexual abuse] revealed the abuse to anyone during childhood").

[6] See, *e.g.*, Tina B. Goodman-Brown *et al.*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 537 (2003) (reporting that "[c]hildren whose abuse was intrafamilial took longer to disclose their abuse than did children whose abuse was extrafamilial"); Smith, 24 CHILD ABUSE & NEGLECT at 279, 283 (finding that only 12 percent of child rape victims reported their assaults to authorities and that delayed disclosure was associated with a familial relationship); see also *id.* at 284–85 (reporting that "[r]apes perpetrated by strangers were much more likely to be disclosed to someone within 1 month than rapes by either family members or non-family acquaintances" and that "rape by a stranger was the best individual predictor of whether a child would tell someone else about her rape relatively quickly").

[7] See*, e.g.*, SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION 54–67 (2d ed. 1999); Wyatt *et al.*, 23 CHILD ABUSE & NEGLECT at 46 (collecting studies and noting that some victims do not disclose abuse "due to perceptions that the reporting process will * * * hurt other people important to the survivor"); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 537 (noting the desire to protect family members other than the abuser and citing fears about how non-offending parents will react, as well as a sense of responsibility for the abuse.).

Consent, and Cognitions in Sex Between Children and Adults, 7 INT'L J. L. & PSYCHIATRY 89, 99 (1984).[8]

Other relatives may also be reluctant to disclose abuse for related reasons: because of their positive feelings for the abuser or because they fear the collateral consequences to themselves or the family if they disclose the abuse.[9] Indeed, as states have enacting statutes mandating that health professionals report child abuse, the actual number of reports has *declined*, apparently because families decide not to go to professionals when they know that doing so will mean that the abuse will be reported to authorities.[10]

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[8] See also JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 18 (2005) (listing fear of harm to the abuser as among the "cogent reasons" for not reporting); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 ("Fear of negative consequences of disclosure may be particularly salient in cases of incest because children may fear their parent will be punished.") (citations omitted); Smith, 24 CHILD ABUSE & NEGLECT at 274 ("[I]n cases of intrafamilial abuse victims often experience significant emotional conflict about making disclosures that implicate caretakers or other loved ones * * *.") (citation omitted).

[9] See STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES 86 (2d ed. 2002) (noting that a dependent spouse may not report abuse because of the stigma and economic consequences of her partner being incarcerated); DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE 94 (1990) ("Conscious denial [of abuse] is often related to a parent's fear of family disintegration, legal consequences or the reaction of the other spouse."); Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 99 (noting that some feared repercussions may actually occur).

[10] F.S. Berlin *et al.*, *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449 (1991).

3. The threat of capital punishment for child sexual abusers greatly amplifies the concerns that already prevent many victims and relatives from reporting abuse. Victims who love their abusers may be all the more reluctant to report abuse to police when the possible consequences include lethal injection.[11] The reluctance may also be a product of the victim's own sense of responsibility for the abuse.[12]

Likewise, a non-offending family member, already facing "a difficult decision to make," HOLMES & HOLMES, *supra*, at 86, will face an even harder choice. Instead of encouraging the best positioned witnesses—the victim and other family members—to report abuse, Louisiana's law will reinforce the internal constraints that victims and their family members may already feel.

4. Fewer reports by victims and family members will cause the victims to endure continued abuse that otherwise would have been averted, with increasingly severe consequences.[13] The wounds caused by child abuse are deep, but treatment, if obtained, can

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[11] *Cf.* ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE 216 (1988) (noting, in the context of treating victims, that "[p]articularly in incest cases, where the child may be very attached to the father, fear of loss may take precedence over the anger.").

[12] See Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 (noting that many sexually abused children "come to believe that they are at least partially responsible for their own abuse").

[13] See GOLDSTEIN, *supra*, at 70; Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 91.

help the healing process.[14] By contrast, the treatment prognosis for children who suffer from *prolonged* sexual abuse is much more bleak; for example, such abuse increases the likelihood that the victim will subsequently engage in crime, become pregnant while a minor, drop out of school, abuse alcohol or drugs, and suffer from psychological disorders, such as depression, anxiety disorders, and posttraumatic stress disorder.[15]

But the damage caused by Louisiana's statute will not be limited to predators' current victims. "Sex offenders who are not arrested, convicted, and sent to prison remain free to commit more sex crimes." LA FOND, *supra*, at 32; see also HOLMES & HOLMES, *supra*, at 89. Rates of recidivism are lower than popular perception would have it, but they are still significant: one study found that 10 percent of child molesters offend again within 4 to 5 years; other studies

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[14] See SALTER, *supra*, at 248 ("In cases in which there is no intervention, the powerlessness of the victim often continues even after the abuse itself has stopped.").

[15] See Barbara Tatem Kelly, U.S. Department of Justice, *In the Wake of Childhood Maltreatment* 2 (Aug. 1997); PAULA K. LUNDBERG-LOVE, THE RESILIENCE OF THE HUMAN PSYCHE: RECOGNITION AND TREATMENT OF THE ADULT SURVIVOR OF INCEST, IN THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK 5–8 (Michele Antoinette Paludi ed., 1999). See also Jill Goldman *et al.*, U.S. Department of Health and Human Services, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* 36 (2003) (in reaction to "persistent stress associated with ongoing maltreatment, the child's brain may strengthen the pathways among neurons that are involved in the fear response. As a result, the brain may become 'wired' to experience the world as be hostile and uncaring.").

have found that recidivism rates grow higher when the time span is extended.[16]

5. Nor will these effects remain confined to Louisiana's borders. Laypersons, who may not comprehend the finer points of our federal system, would view the doubtless-well-publicized execution of Patrick Kennedy as a signal that any state (perhaps their own) can impose the same penalties for the same conduct. Moreover, offenders in Louisiana who will go undetected may commit offenses in other states. Finally, the increasing number of victims mean that more former abuse victims will ultimately leave the state, emigrating with the burdens that Louisiana's law makes worse.

* * * * *

Accordingly, the Court should intervene now to strike down Louisiana's capital punishment scheme, which will otherwise worsen the underreporting problem, causing ripple effects that will linger for decades.

B. Allowing Louisiana to execute child rapists will increase the incentives on child molesters to kill their victims.

By tying the level of punishment to the severity of the crime, criminal law seeks to reduce the severity of criminal activity.[17] Imposing the death penalty

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[16] See R. Karl Hanson, *Who is Dangerous and When are they Safe? Risk Assessment with Sexual Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 64–65 (Bruce J. Winick and John Q. La Fond eds., 2003).

[17] See, *e.g.*, *United States* v. *Beier*, 490 F.3d 572, 575 (7th Cir. 2007) ("[T]he concept of marginal deterrence * * * is that punishing two crimes of different gravity the same is unsound

for child rape upsets this basic tenet of penalty schemes—marginal deterrence—with potentially devastating effects nationwide.

If the death penalty is reserved for murder, then sex offenders have an incentive to stop short of killing their victims. Louisiana's statute, by imposing the death penalty for child rape, dangerously realigns sex offenders' incentives. If an offender believes that he will be sentenced to death if convicted of either raping a child or murdering that child, the offender will have every incentive to kill his victim and thus eliminate the primary witness to the crime.[18] The offender will as a result also be more likely to remain free to abuse additional children, in Louisiana and elsewhere.[19]

Moreover, abusers who are not known by their victims will have the strongest incentive to kill. Studies show that these abusers are already the most likely to kill their victims.[20] Because these

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when to do so would encourage additional crimes."); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 518–19 (2004); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 178 (1789); CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS 21 (Richard Bellamy ed., 1995) (1767).

[18] See*, e.g.*, Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1159 (2004) ("If murder does not incur additional punishment, then the motivation to kill the primary witness to the crime is strong.").

[19] Indeed, even child molesters in states that do not impose the death penalty may decide to kill their victims in response to news reports about Louisiana's punishment scheme.

[20] See Lawrence A. Greenfeld, U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* 30 (Feb. 1997) (re-

cases are the ones in which child victims are most likely to report the abuse, the Louisiana law eliminates the increase in penalty that may have dissuaded some stranger perpetrators from killing—and thus silencing—their victims. Thus, not only does the Louisiana statute inhibit reporting in the majority of child sexual assaults, which are committed by family members or acquaintances, see Part A, *supra*; the scheme also encourages stranger perpetrators to kill their victims. The perverse consequence of this is to reduce the likelihood that the offender will be apprehended and that the victim will survive and receive treatment.

C. The Louisiana statute would subject child victims to an increased number of trials and appeals, forcing them to relive painful events repeatedly and disrupting the healing process.

It is well established that sexually abused children find the criminal justice process to be highly traumatic. Louisiana's statute will greatly increase the extent of this trauma.

1. As a general matter, court proceedings increase and extend the harm to children that began with the abuse:

> In the midst of * * * vulnerability [following disclosure of abuse], the criminal justice, health, and social service systems may descend upon a child and family with such a devastating impact that its recipients are

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porting that "[s]exual assault murders were about twice as likely as all murders * * * to involve victims and offenders who were strangers").

> left with the feeling that the "cure" is far worse than the symptoms.

Kee MacFarlane, *Sexual Abuse of Children*, *in* THE VICTIMIZATION OF WOMEN 81, 97 (Jane Roberts Chapman & Margaret Gates eds., 1978). Indeed, some experts conclude that "children are often *more* traumatized by the court proceedings than by the sexual abuse." KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 26 (2d ed. 2007) (emphasis added).[21]

Perhaps the most comprehensive study to have examined the effects of testifying on abused children was conducted by Gail S. Goodman. She found that child victims find testifying in criminal court to be traumatic, not cathartic. See GAIL S. GOODMAN ET AL., TESTIFYING IN CRIMINAL COURT 50 (1992).[22] Moreover, repeated courtroom testimony especially hinders healing. See *id.* at 51.

Goodman and other researchers recently updated her original study and interviewed about 80 percent of that study's participants. They found that, ten years later, having testified repeatedly was "associated with poorer later mental health, including more trauma-related symptoms" and that these negative effects appeared even "for individuals who had im-

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[21] See also Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 L. & PSYCHOL. REV. 59, 82 (1995) ("The best data shows that the likelihood that intervention, under the current system, may fail or even harm the child victim is greater than we wish to acknowledge.").

[22] This Court cited an earlier version of this study in *Maryland* v. *Craig*, 497 U.S. 836, 855 (1990) (noting the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court").

proved in the short term." JODI A. QUAS ET AL., CHILDHOOD SEXUAL ASSAULT VICTIMS: LONG-TERM OUTCOMES AFTER TESTIFYING IN CRIMINAL COURT 72 (2005). The authors concluded that "testifying in the adversarial system appears to be a salient feature in and of itself with direct implications for negative outcomes, including years after legal cases have ended." *Ibid.*

2. These findings strongly suggest that Louisiana's penalty scheme will impede victims' healing process. The unique nature of the penalty here—the death penalty—will magnify the traumatic nature of the judicial process.

First, the introduction of the death penalty will likely increase the extent of the victim's exposure to the trial process. Capital cases tend to feature more and lengthier pretrial proceedings than noncapital cases. In fact, a recent study found that capital rape cases in Louisiana averaged 633 days from arrest to disposition, whereas noncapital rape cases averaged less than half as long—283 days.[23] The death penalty process itself also necessitates bifurcated trials, see *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), at each stage of which the victim may be called to testify.

In addition to producing more court proceedings requiring the victim's attendance or participation, the intensity of that participation is also likely to increase. Child abuse victims are more likely to be required to testify in person in a death penalty case because the protections that child abuse victims have traditionally enjoyed in court may be eroded as "the

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[23] See Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156, 183 (2002).

acute need for reliable decisionmaking when the death penalty is at issue" (*Deck* v. *Missouri*, 544 U.S. 622, 632 (2005) (internal quotation marks omitted)) tilts the constitutional balance in favor of an abuser's "right to face his or her accusers in court" and against the "State's interest in the physical and psychological well-being of child abuse victims." *Craig*, 497 U.S. at 853; see also *ibid.* (noting that only "in some cases" would the State's interest in protecting the child witness "outweigh" the defendant's Confrontation Clause rights).

The fact that a capital case could result in the execution of the defendant also heightens the stakes for a testifying child victim, who in many cases may feel tremendous guilt and remain emotionally attached to the perpetrator. But one of the findings of the updated Goodman study is that the greater the distress of the victim while testifying—recorded by researchers using measures such as how emotional the child was on the witness stand—the poorer his or her adjustment ten or more years later.[24]

Thus, one therapist recounts her first-hand observation of the effects of putting victims on the witness stand:

> [I] will never forget the look on the face of a 9-year-old incest victim when her father was brought into the courtroom with chains and handcuffs around his hands and waist. * * * Her only comment before she withdrew into a spasmodic, twitching epi-

[24] See QUAS, *supra*, at 102 (concluding that "[f]eeling more negative about having to testify * * * was associated with higher levels of" multiple measures of adverse mental health.).

> sode * * * was, "I did *that* to my Daddy?"

MacFarlane, *Sexual Abuse of Children*, *supra*, at 99 (emphasis in original). Because testifying against a parent or other loved one with the knowledge that death may follow conviction will assuredly make the experience even more distressing for the child, victims are more likely to experience intense and lasting negative effects.[25] Indeed, the Louisiana Supreme Court noted that when the victim in this case was on the stand, she wept repeatedly and at length—including one interlude of at least 23 minutes. See Pet. App. 16a.

Moreover, the added publicity from a death penalty trial could alone be sufficient to increase the trauma experienced by a victim. The greater the public attention that is focused on the victim, the more traumatic the experience of testifying is likely to be. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting) ("having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers," and which "may be expanded to include a live television audience, with reruns on the evening news," may be a "devastating" experience "leav[ing] permanent scars" for a child victim of a sex crime). More generally, when an instance of child sexual abuse gains notoriety, "negative consequences for the child are more likely to result." Abel, 7 INT'L J. L. & PSYCHIATRY at 93.

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[25] See QUAS, *supra*, at 102 (noting that a greater awareness of legal consequences "probably contribute[s]" to increased distress while testifying).

In addition, the extended appeals process that inevitably follows a death sentence will draw out the trauma and hinder the healing process. The original Goodman study found that "by the time the cases were resolved, the behavioral adjustment of most, but not all children who testified was similar to that of children who did not take the stand." GOODMAN, *supra*, at 114–15. While subsequent work reveals a more lasting impact, and the study did not and could not examine the effects of drawn out death penalty appeals, Louisiana's scheme will necessarily mean that cases are not "resolved" for years. As of 2005, the length of time between sentencing and execution averaged 12 years and three months. Tracy L. Snell, U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2005*, at 11 tbl 11 (Dec. 2006). During this period, not only would the publicity accompanying each stage of the appellate process dredge up traumatic memories for the victims, the high reversal rate in capital cases[26] would subject many victims to one or more retrials at which they would again relive the abuse. This lack of closure—as well as the trauma of the eventual execution itself and the enormous publicity attendant to such an execution—could very well hamper the healing process. *Cf.* LA FOND, *supra*, at 25 (noting that triggering events may push "horrible memories of the crime" to the fore).

Finally, the fact that the abuser ultimately is executed precludes the option of future healing through a possible structured visit, which provides

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[26] See, *e.g.*, James S. Liebman *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (68 percent reversal rate).

the victim with the opportunity to confront his or her abuser. The Louisiana Department of Public Safety and Corrections maintains a Victim/Offender Dialogue program.[27] An executed offender could not participate in this process.

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The consequences of the Louisiana statute authorizing the death penalty for child rape are perverse—almost certainly increasing the amount of child sexual abuse, placing the victims of child abuse at great risk of death, and increasing the trauma that such victims suffer. This Court should grant the petition for certiorari to protect the victims of child rape and to clarify that, despite the heinous nature of this crime, the Eighth Amendment forbids the execution of child rapists.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[27] See Louisiana Department of Public Safety and Corrections, Victims Services, *at* http://www.doc.louisiana.gov/Victim%20Services/victim_services.htm.

Respectfully submitted.

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