

Tuesday, May 29, 2007

**Supreme Court likely to review capital punishment for rape of child.**

Â Death penalty: Always unjustÂ Thirty years ago, a 6-3 majority of the United States Supreme Court (Justices White, Blackmun, Stevens, and StewartÂ in the plurality,Â withÂ Justices Brennan and Marshall adding their belief that the death penalty itself is unconstitutional)Â issued a black letter ruling that rape is not a death-penalty-eligible crime. *Coker v. Georgia*,Â 433 U.S. 584 (1977). Â Preferring a shade of gray,Â Justice Powell concurred in part and dissented in part fromÂ Coker'sÂ outcome, finding that the rape by Mr. Coker was not vicious and violent enough to permit a death sentence but that "it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's 'evolving standards of decency,' particularly legislative enactments and the responses of juries in capital cases." *Coker*,Â 433 U.S. at 604.Â The dissenters were bothÂ Nixon appointees: the lateÂ Chief Justice Burger and the late then-Chief Justice-to-be Rehnquist. The pair voted against the Supreme Court's 1972 effective moratorium on the death penalty pending death states' re-writing of their statutes for legalized murder/capital punishment in *Furman v. Georgia*, 408 U.S. 238 (1972), which was followed by the moratorium's end withÂ *Gregg v. Georgia*, 428 U.S. 153 (1976). To be fair to them, theyÂ were joined byÂ frequent swing voter Justice Powell and Justice Blackmun, who twenty-two years later proclaimed: "From this day forward, I no longer shall tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994). Justice Blackmun retired the same year, by then having long broken away from the 1970's "Minnesota twins" characterization of him and Chief Justice Burger. Â Perhaps seeking a factual distinction from *Coker*, which involved a sixteen-year-old rape victim, Louisiana's legislature made the death penalty availableÂ where the rapeÂ victim is underÂ thirteen years old.Â Â La. R.S. 14:42.Â Â Bowing to the foregoing Louisiana legislation and trying to gray *Coker's*Â black-letter rule against the death penalty for rapeÂ ,Â Louisiana's Supreme CourtÂ recently upheld the death penalty for a child rapist.Â *State v. Patrick Kennedy*, No. 05-KA-1981 (La., May 22, 2007). The victim's physical injuries -- let alone mental damage -- were so horrific that I will just refer readers to page 2 of the Kennedy slip opinion. As an aside, one of my biggest hurdles to becoming a public defender lawyer was the prospect of defending people who actually committed rape and other heinous crimes. I describe here how I finally overcame this hurdle long ago. Â In any event, Louisiana's Supreme Court sounds most disingenuous inÂ trying to explain what part ofÂ no it does not understand inÂ *Coker's* black-letter prohibition of capital punishment for rape. Â Unless the Louisiana Supreme Court reverses itself, this case looks bound for the United States Supreme Court, which only has one member left that voted in *Coker*, that being Justice Stevens. I think the United States Supreme Court will reverse *Patrick Kennedy's* death sentence for child rape with the following voting lineup: Voting toÂ reverse underÂ *Coker*Â as settled law should be the four ordinarily more liberal (often only by comparison to the remaining justices) Justices Stevens, Souter, Ginsburg (who participated in the ACLU's amicus brief against the death penalty in *Coker*), and Breyer. Justice Kennedy, now often the Supreme Court's swing vote on civil liberties and criminal law issues, likely will vote to reverse Mr. Kennedy's death sentence, in recognition of *Coker's* thirty-year precedential status. Perhaps even one or more of the four justices from the conservative wing will recognize the value of following *stare decisis* (giving precedential value to a case even though the Supreme Court is free to overturn or otherwise modify any of its precedents) in this instance. Â As a final aside, winning *Coker*Â at oral argument was Bill Clinton's later lawyer David Kendall, who at the time was just six years out of law school and with the NAACP Legal Defense and Education Fund when his Yale law degree and Rhodes scholarship would have immediately opened the doors to the highest paying law firms, which he delayed doing until seven years out of law school. His law firm biography recounts that Mr. Kendall "was arrested several times (but convicted only once) in Mississippi during the summer of 1964 while attempting to register voters." I hope his thirst for justice has stayed alive and well.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 21:00