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May 14, 2007

Opinion No. 07-67

Capital Punishment for the Rape of a Child Ten Years of Age or Less

QUESTIONS

1. Is it constitutional to impose the death penalty as punishment for rape of a child? Is it constitutional to impose capital punishment for the rape of a child 10 years of age or younger?

2. If a statute were adopted extending capital punishment to offenses involving rape of a child 10 years of age or younger, would existing procedures for capital punishment require amendment?

OPINIONS

1. Neither the United States Supreme Court nor the Tennessee Supreme Court has expressly addressed whether extending the death penalty to the crime of child rape would violate the Eighth Amendment to the United States Constitution or Article 1, section 16, of the Tennessee Constitution. Although the issue is not free from doubt, there are non-frivolous arguments in support of the constitutionality of such a penalty.

2. Yes. If capital punishment is extended to offenses involving rape of a child 10 years of age or younger, many of the existing procedures for capital punishment would be in need of amendment because they specifically refer to capital punishment in first degree murder cases.

ANALYSIS

1. The question of whether it is constitutional under the United States Constitution to impose the death penalty for the crime of rape of a child 10 years of age or younger is evaluated under the Eighth Amendment's "cruel and unusual punishment" clause made applicable to the states by the Fourteenth Amendment's Due Process Clause. *See Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. In the case of the death penalty, the United States Supreme Court has established a test of proportionality that requires that punishment for crimes be "graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Eighth Amendment proportionality review confined to the death penalty). Under this test, the punishment is evaluated in light of "the evolving standards of decency that mark the progress of a maturing nation," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), as determined with reference to "objective factors

to the maximum extent possible." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

The test involves a search for evidence of a national consensus and consideration of the retributive and deterrent effects of the death penalty.[1] *Roper v. Simmons*, 543 U.S. 551 (2005). First, the Supreme Court looks for evidence of a national consensus "sufficient to label a punishment cruel and unusual." *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989). To that end, the Court has concluded that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *see Coker v. Georgia*, 433 U.S. 584, 593-596 (1977); *Enmund v. Florida*, 458 U.S. 782, 789-793 (1982). In seeking such evidence, the court typically weighs the number of states that permit the death penalty in particular circumstances against those states that do not. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (finding national consensus against execution of juveniles because 30 states prohibited the death penalty for juveniles and 20 permitted it). However, the court has noted that "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315. Additionally, the court has taken particular notice of the "current legislative judgment" evidenced by laws enacted by "the legislatures that have recently addressed the matter." *Id.* at 312-13.

Second, once a consensus has been identified, the analysis turns to the Supreme Court's "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). In making that judgment, the Supreme Court considers "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Coker*, 433 U.S. at 597. This inquiry is informed by the Court's assessment of whether the sentence "will measurably advance the deterrent or the retributive purpose of the death penalty," *Atkins*, 536 U.S. at 321, and whether the crime falls into the "narrow category of crimes and offenders" for which the death penalty is reserved. *Roper*, 543 U.S. at 568-69.

The question presented here has been addressed by two state supreme courts. In 1981, the Florida Supreme Court invalidated that state's capital child rape statute. *Buford v. Florida*, 403 So.2d 943 (Fla. 1981) (holding Fla. Stat. § 794.011(2) (1977) unconstitutional under the Eighth Amendment). In doing so, the *Buford* Court adopted, without any analysis or explanation, the reasoning of the United States Supreme Court in *Coker v. Georgia*, 433 U.S. 584 (1977) (holding unconstitutional the death penalty for rape of adult woman not also involving murder). *Id.* at 950-51. Notably, the court did not independently conduct a proportionality analysis under the Eighth Amendment. *Id.*

More recently, in 1996, the Louisiana Supreme Court considered the constitutionality of that

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[1] In search of a national consensus, the Court has taken note of public opinion, legislative attitudes toward a particular punishment, "the response of juries reflected in their sentencing decisions," and the frequency of jury verdicts, *Coker*, 433 U.S. at 592, as well as indications of a "broader social and professional consensus" among "organizations with germane expertise" and "representatives of widely diverse religious communities." *Atkins*, 536 U.S., at 316 n.21. Furthermore, the Court has looked for confirmation of its decision in the "world community" by reviewing the laws of other nations. *Roper*, 543 U.S. at 575. However, that determination is "not controlling." *Id.*

state's capital child rape statute, which had been enacted the previous year. *Louisiana v. Wilson*, 685 So.2d 1063 (La. 1996). The *Wilson* Court concluded that the offense of rape of an adult woman at issue in *Coker* was distinguishable from child rape for several reasons:

> Rape of a child less than twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves. A "maturing society," through its legislature[,] has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community.

Id. at 1067. Additionally, the *Wilson* Court reviewed the trend of legislation in this area after *Furman v. Georgia*, 408 U.S. 238 (1972), and found evidence of a moral evolution in favor of capital punishment for child rape. *Id.* at 1068. Moreover, the court concluded that the statute should not be deemed unconstitutional simply because it was, at the time, the only state statute authorizing the death penalty as a sanction for child rape. Such a constitutional principle, the court reasoned, would render legislative innovation impossible. *Id.* at 1069. Finally, addressing the argument that the death penalty was reserved for those who murder, the court returned to the egregious nature of the offense. Distinguishing child rape from aiding and abetting a robbery, the court concluded that child rape "is deserving of the death penalty because of its deplorable nature, being a grievous affront to humanity." *Id. Compare Enmund v. Florida*, 458 U.S. 782 (1982) (holding unconstitutional the death penalty for a defendant who aided a robbery but did not participate or intend to participate in murder). Ultimately, the *Wilson* Court concluded, "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old." *Id.* at 1070.

Neither the United States Supreme Court nor the Tennessee Supreme Court has decided this or any reasonably analogous issue, however. Under both the state and federal constitutions, legislative enactments are afforded a presumption of constitutionality, and the burden is on those who challenge them to prove their invalidity. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976); *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). In *Gregg*, the United States Supreme Court stated:

> in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. Accordingly, the burden of establishing the existence of a "national consensus" against capital

punishment for the crime of child rape will rest upon those who initiate such challenges.

In this instance, there does not appear to be a national consensus among the state legislatures either for or against capital punishment for child rape. Thirty-eight states, the military, and the federal government still impose the death penalty; thirteen states and the federal government extend capital punishment to a variety of crimes that do not involve homicide. *See* Bureau of Justice Statistics, U.S. Dept. Of Justice, "Capital Punishment, 2005" (December 2006). We take this as an indication that there is no general consensus that the death penalty is reserved for homicides alone. More specifically with respect to the death penalty for child rape, prior to the 1990s, only three states — Tennessee, Florida, and Mississippi — had statutes authorizing the death penalty for rape of a child, but all three states had their statutes invalidated by the courts. There was no movement to repeal these statutes among the legislatures themselves. As previously mentioned, the Florida statute was found unconstitutional under *Coker* without analysis or explanation. *See Buford v. State*, 403 So.2d 943, 951 (Fla. 1981). The Tennessee statute was invalidated because it imposed a mandatory death sentence. *See Collins v. State*, 550 S.W.2d 643 (Tenn. 1977). The Mississippi statute permitting the death penalty for child rape was invalidated because it conflicted with another statute prohibiting the death penalty for child rape. *Leatherwood v. State*, 548 S.2d 389, 403 (Miss. 1989).

In 1995, Louisiana became the first state to revisit the issue when it extended capital punishment to the offense of child rape. In the years that followed, proposals were introduced in several states. *See, e.g.,* A.B. 35, 1999 Leg. Reg. Sess. (Cal. 1999); H.B. 558, 1997 Reg. Sess. (Miss. 1997). Five of those bills were enacted into law. Currently, six states have statutes authorizing imposition of the death penalty for child rape, namely, Louisiana, Florida, Georgia, Montana, Oklahoma, and South Carolina. *See* Fla. Stat. Ann. § 794.001 (2000); Ga. Stat. Ann. § 16-6-1 (2001); La. Rev. Stat. 14:42 (1997); Mont. Stat Ann. § 45-5-503 (2005); Okla. Stat. Ann. 21, 45 § 1115 (2006); 2006 S.C. Acts 346. More recently, Mississippi has continued to debate the issue, the Texas and Utah legislatures have joined the debate, and the Alabama legislature is reconsidering the issue. 2004 Bill Text MS H.B. 1331; 2007 Bill Text MS H.B. 449; 2007 Bill Text AL H.B. 335 (March 13, 2007); 2007 Bill Text TX HB 8 (March 19, 2007); 2007 Bill Text UT H.B. 86 (January 25, 2007).

Accordingly, it appears that, of the thirty-eight death penalty states, only fourteen states have recently considered the matter. Of those fourteen states, six currently authorize the death penalty for child rape, four do not, and four are currently debating proposed legislation. Based upon the foregoing, there is reason to conclude that there is currently no national consensus against capital punishment for child rape. Moreover, the trend among state legislatures since 1995 seems to tilt slightly toward favoring the death penalty for child rape.

On the other hand, two cases from the United States Supreme Court — *Coker v. Georgia*, 433 U.S. 584 (1977) and *Enmund v. Florida*, 458 U.S. 782 (1982) — have been interpreted by some as limiting the death penalty to crimes involving a homicide. *See, e.g., State v. Black* , 815 S.W.2d 166, 190 (Tenn. 1991) (citing *Coker* for the proposition that the death penalty "may be disproportionate per se when the offense does not involve the death of the victim"); *United States v. Cheely*, 36 F.3d 1439, 1457 n.3 (9th Cir. 1994) (Alarcon, J., concurring and dissenting) (stating

that Supreme Court decisions in *Coker* and *Enmund* suggest that the death penalty may not be imposed absent a homicide). However, other courts have rejected that interpretation as overly broad. *See, e.g., Louisiana v. Wilson*, 685 So.2d 1063, 1069-1070 (La. 1996) (noting that the Supreme Court focused on the defendant's conduct in *Enmund* in determining the appropriateness of the death penalty); *State v. Keith*, 231 Mont. 214, 227, 754 P.2d 474, 482 (Mont. 1988) ("we do not believe that capital punishment is constitutionally prohibited in all cases unless the defendant is responsible for an intentional killing"); *Gilson v. State*, 8 P.3d 883, 922 (Okla. Crim. App. 2000) ("we find the facts support a finding that Appellant's major participation in the felony of child abuse, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement"). Moreover, as previously noted, thirteen states and the federal government have extended capital punishment to crimes that do not involve homicide. In sum, we conclude that legislation extending capital punishment to the crime of child rape is at least defensible under the "national consensus" prong of the Eighth Amendment's proportionality test.

However, the second prong is another matter. The United States Supreme Court has reserved for itself the authority independently to consider the proportionality of any punishment under the Eighth Amendment. There is no way to know how that analysis will be resolved until the Court actually decides a case on the merits. *See Atkins*, 536 U.S. at 337 (arguing that no national consensus existed and the Court's decision "rested so obviously upon nothing but the personal views of its Members") (Scalia, J., dissenting). Nevertheless, as will be demonstrated in the discussion of the state constitution, it is certainly arguable that extending the death penalty to child rape would serve both the retributive and deterrent purposes of the death penalty.

Under the state constitution, the question is evaluated under Article 1, section 16, which states: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Tenn. Const. Art. 1, § 16; *see State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992). In *Harris*, the Tennessee Supreme Court noted that Article I, section 16, of the Tennessee Constitution is subject to a more expansive interpretation than the Eighth Amendment to the Federal Constitution and, accordingly, held that the Tennessee Constitution mandates a proportionality inquiry, even in noncapital cases. 844 S.W.2d at 602-03. To that end, the Court adopted a proportionality analysis according to which courts initially compare the sentence imposed to the crime committed. *Id.* at 603. "Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends — the sentence is constitutional." *Id.* The factors relevant in determining whether the sentence imposed for an offense raises an inference of gross disproportionality include:

> (1) the nature of the crime, including whether society views the crime as serious or relatively minor and whether the crime is violent or non-violent; (2) the circumstances of the crime, including the culpability of the offender, as reflected by his intent and motive, and the magnitude of the crime; and (3) the existence and nature of any prior felonies if used to enhance the defendant's penalty.

State v. Smith, 48 S.W.3d 159, 171 (Tenn. Crim. App. 2000) (*citing Solem v. Helm*, 463 U.S. 277, 290-91 (1983)).

There is a substantial argument that imposing the death penalty for the offense of child rape would not be unconstitutional under the state constitution as a "grossly disproportionate" sentence. Child rape is a violent crime that is among the most serious of offenses. *See* Tenn. Code Ann. § 39-13-522 (Rape of a child is a Class A felony); Tenn. Code Ann. § 40-35-110 (classification of offenses); Tenn. Code Ann. § 40-35-111 (authorized term of imprisonment for Class A felony is 15 to 60 years). Additionally, the circumstances of the offense and the culpability of the child rapist may be argued to support imposition of the death penalty. One commentator described child rape as follows:

> Rape has been called a "fate worse than death" and "one of the most egregiously brutal acts one human being can inflict upon another." Justice Powell, concurring in Coker, noted that "[t]he deliberate viciousness of the rapist may be greater than that of the murderer. . . . Some victims are so grievously injured physically or psychologically that life is beyond repair." Justice Powell's statement is even more powerful in the context of child rape. Children suffer devastating and long-term physical, emotional, and mental trauma after being raped. Long-term follow-up studies with child sexual abuse victims demonstrate that childhood sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate."
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> "Physical problems resulting from child rape include . . . abdominal pain, vomiting, urinary tract infections, perineal bruises and tears, pharyngeal infections, and venereal diseases." Moreover, a possible cause of the early onset of cervical cancer may be the result of the trauma sustained by a child during a rape. According to one study, twenty-seven percent of those females raped as children had subsequent infections severe enough that they were forced to undergo hysterectomies.
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> Aside from these severe, often life-threatening physical injuries, there are potentially severe psychological problems. Psychological problems stemming from child rape include depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying. The child who has been raped is also subject to feelings of guilt, poor self-esteem, feelings of inferiority, self-destructive behavior, a greater likelihood of becoming a drug or alcohol addict, and increased suicide attempts. Furthermore, evidence suggests that these disturbances follow the child into adulthood. In short, rape of a child "not only immediately traumatizes the child, but it also alters the child's life forever. . . ." That child must not only recover physically, but must attempt to resume a normal existence. The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped. The psychological trauma of child rape is even greater when a family member rapes the child—such victimization at the hands of someone the child trusts can lead to lifelong familial and trust issues.

Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 197, 208-209 (2003) (internal footnotes and citations omitted). To be sure, child rape is among the most sinister of crimes, both because the rapist preys upon innocent and defenseless children under the guise of appropriate adult behavior and because the damage done to the victim and society is arguably as devastating as that caused by murder.

Indeed, Tennessee courts have recognized that the physical and mental injuries inflicted during the commission of a child rape are "particularly great," a matter of "common sense awareness." *See, e.g., State v. James Cordell Johnson*, No. 02C01-9604-CC-00127, 1997 WL 746020 (Tenn. Crim. App. 1997) (app. denied Sept. 21, 1998) ("The victim impact statement reveals specific, identifiable facts supporting significant emotional injury, which when considered with the trial court's own common sense awareness of the degree of child rape victims' psychological injuries in general, supports a conclusion [the victim's] injuries were particularly great"); *see also State v. Smith*, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994) (holding that "personal injury" includes emotional and psychological injury inflicted during rape). In *Smith*, the Court of Criminal Appeals described the rape victim's injuries:

> The term "personal injury" is broad enough to embrace the severe emotional injuries and the psychological [scarring] that the victim has suffered and will continue to suffer as a result of the appellant's actions. The victim could not enter her home alone for several months after the rape. In fact, she lived with friends for three months following the attack. When visiting a friend in California, the victim arose every thirty minutes during the night to make sure the doors and windows were locked. Her close friends testified that she has incurred a drastic personality change. She has undergone counseling to help her cope with everyday life. In short, the emotional scars inflicted by the appellant are deep and will last the remainder of the victim's life.

State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994).

Moreover, many of the sentence enhancement factors in our criminal statutes apply to the circumstances of the offense of child rape. *See, e.g.*, Tenn. Code Ann. § 40-35-114(4) (victim particularly vulnerable because of age), -114(5) (exceptional cruelty); -114(6) (personal injuries inflicted were particularly great); -114(7) (offense committed to gratify desire for pleasure); -114(14) (defendant abused a position of trust). Furthermore, the state has a "special duty" to protect, and a compelling interest in protecting, children from physical and mental harm. *See, e.g.*, Tenn. Code Ann. § 36-6-101 (in a divorce, the court determines custody "as the welfare and interest of the child or children may demand"); Tenn. Code Ann. § 37-1-113 (in child abuse and neglect proceedings the state seeks to prevent physical harm to the child); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) (state has a special duty to protect children). Accordingly, this office concludes that extending the death penalty to the offense of child rape may in good faith be defended against claims that such a sentence would be "grossly disproportionate" under the state constitution.

2. Generally speaking, if a new capital offense other than a new form of first degree murder

is created, the existing procedures for capital punishment will need comprehensive amendment because the current procedures are applicable only to convictions for first degree murder. For example, Tenn. Code Ann. § 39-13-203 proscribes the imposition of a sentence of death upon a defendant "with mental retardation at the time of committing first degree murder." Similarly, the only statutory means of imposing a sentence of death is codified at Tenn. Code Ann. § 39-13-204 and applies only when the jury "find[s] the defendant guilty of first degree murder." Moreover, all but one of the aggravating circumstances established in Tenn. Code Ann. § 39-13-204(i) make specific references to the offense of "murder" or the death of the victim. *See* Tenn. Code Ann. § 39-13-204(i)(2) (aggravating circumstance for prior violent felony convictions). And many of the mitigating circumstance specifically reference the offense of murder. *See, e.g.*, Tenn. Code Ann. § 39-13-204(j)(2) (mitigating circumstance where murder committed under the influence of extreme mental or emotional disturbance); Tenn. Code Ann. § 39-13-204(j)(4) (murder committed under circumstances that defendant believed provided moral justification). Likewise, the statute providing for mandatory appellate review of death sentences is limited to cases in which "the death penalty is imposed for first degree murder." Tenn. Code Ann. § 39-13-206. And the statute governing pretrial notice of the State's intention to seek the death penalty provides for a life sentence in those cases in which neither the death penalty nor life without parole is sought and the defendant is "found guilty of murder in the first degree." Tenn. Code Ann. § 39-13-208. Finally, the rule governing qualifications and compensation of capital case counsel will also need to be amended because it identifies a "capital case" as "a case in which the defendant is charged with first-degree murder and a notice of intent to seek the death penalty . . . has been filed." *See* Tenn. Sup. Ct. R. 13, §3.

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