

No. 07-343

In The Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

versus

LOUISIANA,
Respondent.

On Writ of Certiorari
To the Louisiana Supreme Court

**BRIEF OF *AMICI CURIAE* THE
LOUISIANA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AND THE LOUISIANA
PUBLIC DEFENDERS ASSOCIATION IN
SUPPORT OF PETITIONER**

PAUL R. BAIER
Counsel of Record
Paul M. Hebert Law Center
Louisiana State University
1 East Campus Drive
Baton Rouge, LA 70803
(225) 578-8326

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. Because “Death Is Different,” Capital Defense Representation Is Uniquely Demanding.	3
II. Louisiana’s Indigent Defense System Suffers From Being Under–Funded and Over–Burdened.	5
III. Allowing Aggravated Rape To Remain A Capital Offense Will Strain An Already Crippled System And Risk Arbitrary Imposition of Death Sentences.	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page(s)
<i>State v. Citizen</i> , 04-KA-1841 (La. 04/01/2005), 898 So.2d 325	3, 5
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	10
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	2
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	3
<i>McFarland v. Scott</i> , 512 U.S. 849 (1994).....	3
<i>State v. Peart</i> , 621 So.2d 780 (La. 1993)	3, 5
<i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	3
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	4, 10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) ...	4, 9
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	4, 9
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	2
 Constitutional Provisions, Statutes, and Rules	
U.S. CONST. amend VI.....	10
La. Rev. Stat. § 14:42	2
U.S. S. Ct. R. 37.6.....	1
La. S.Ct. R. XXXI	4
La. C.Cr.P. art. 61	11
S. Con. Res. 25, 2006 Leg., 1 st Ex. Sess. (La. 2006) ..	6
 Other Authorities	
<i>ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> (rev. ed. 2003), 31 Hofstra L. Rev. 913 (2003)	3, 4, 7, 9, 10
ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (May 13, 2006).....	7
<i>ABA Ten Principles of a Public Defense Delivery System</i> (Feb. 2002)	7
Bedeau, <i>The Death Penalty in America</i> (1967).....	10

Judge Helen “Ginger” Berrigan, United States District Court, Eastern District of Louisiana, Oct. 31, 2003	5
Brennan Center for Justice, <i>The Case for Community Defense in New Orleans</i> (May 2006)	6
Brief <i>Amici Curiae</i> of the American Civil Liberties Union, <i>et al.</i> , <i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	10, 11
Michael M. Kurth and Daryl V. Burckel, <i>Defending the Indigent in Southwest Louisiana</i> , (July 2004).....	6
Louisiana Standards on Indigent Defense.....	7
Louisiana Standards Relating to the Provision of Counsel to Indigents Accused of Capital Crimes.....	4, 9
Stacey Moak, <i>Indigent Defense in Northeast Louisiana</i> (Dec. 2004).....	6
National Legal Aid & Defender Association, <i>In Defense of Public Access to Justice</i> (March 2004).....	5, 6
National Legal Aid & Defender Association, <i>A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana’s Criminal Courts</i> (Sept. 2006)	6
National Legal Aid & Defender Association, <i>American Council of Chief Defenders Statement on Caseloads and Workloads</i> (Aug. 2007).....	7
Bernadette Jones Palombo & Jeff Shadow, <i>The Provision of the Right to Counsel in Caddo Parish, Louisiana</i> (July 2004).....	6
Douglas W. Vick, <i>Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences</i> , 43 <i>Buff. L.Rev.</i> 329 (1995).....	2

INTEREST OF AMICI CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) and the Louisiana Public Defenders Association (LaPDA) are voluntary professional organizations of private and public defense attorneys practicing in the state of Louisiana.¹ LACDL and LaPDA count among its members the vast majority of the criminal defense bar in Louisiana. LACDL and LaPDA's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated.

The case before the Court raises critically important issues that implicate basic trial rights, including the right to counsel. Members of *amici curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

The members of *amici curiae* represent indigent persons in Louisiana who are charged with capital offenses. Currently there are at least 70 pending aggravated child (capital) rape indictments in

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. The parties have filed letters giving their blanket consent to the filing of *amicus* briefs in this case.

Louisiana.² Because a sentence of death is “qualitatively different from a sentence of imprisonment, however long,” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), “[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.” Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L.Rev. 329, 357 (1995).

Louisiana’s indigent defense system is overburdened and under-funded and there are simply not enough resources to defend this class of capital defendants. If the capital provisions of La. Rev. Stat. § 14:42 are upheld, Louisiana’s already crippled indigent defense system will suffer severely. The continued additional burden of capital rape cases will undermine constitutionally adequate representation in all other indigent criminal cases inasmuch as the system is already strained to the limit.

ARGUMENT

This Court declared in *Gideon v. Wainwright* that “lawyers in criminal courts are necessities, not luxuries.” 372 U.S. 335, 344 (1963). Despite Louisiana’s attempts to provide indigent defense

² Unfortunately, no office, entity, or organization within the State of Louisiana maintains a current list of open capital indictments. With the assistance and dedication of volunteer students, *amici* have been able to confirm that currently there are *at least* 70 open capital child rape indictments. The true number of pending capital rape indictments, however, is surely much higher than 70—most likely well over 100. See n. 12, *infra*.

services, thirty years after *Gideon* there was still a “general pattern . . . of chronic underfunding of indigent defense programs in most areas of the state.” *State v. Peart*, 621 So.2d 780, 789 (La. 1993). As recently as three years ago, the Louisiana Supreme Court again visited the failures of the state to properly fund indigent defense, holding that the trial court may halt the prosecution of capital cases where, as there, there was a lack of adequate funds “to provide for . . . defendants' constitutionally protected right to counsel.” *State v. Citizen*, 04-KA-1841 (La. 04/01/2005), 898 So.2d 325, 339.

I. Because “Death Is Different,” Capital Defense Representation Is Uniquely Demanding.

This Court has consistently held that death is different: “[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.” *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

Capital defense representation is complex and specialized. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence). The responsibilities of capital defense counsel “are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master.” *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death*

Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 923 (2003) (*ABA Guidelines*).

This qualitative difference in capital cases has spawned the creation of national guidelines for the performance of defense counsel in capital cases by the American Bar Association. These Guidelines have been approvingly cited by this Court as minimum professional standards. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005).

In 1994, Louisiana adopted standards similar to the *ABA Guidelines* for the representation of indigent defendants charged with capital offenses. *Louisiana Supreme Court*, Rule XXXI.³ Pursuant to Rule XXXI, the Louisiana Public Defender Board⁴ also promulgated Standards Relating to the Provision of Counsel to Indigents Accused of Capital Crimes (*LPDB Standards*)⁵.

The *ABA Guidelines* and *LPDB Standards* establish national and state standards of practice “to ensure high quality legal representation for all persons” facing a potential death sentence. *ABA Guidelines*, Guideline 1.1(A). Because of the pressure-filled, high-stakes, complex litigation involved in capital defense, these national and state

³ Rule XXXI provides, *inter alia*, for the appointment of “no less than two attorneys to represent the defendant” in all capital cases where the defendant is found to be indigent.

⁴ Rule XXXI created the Louisiana Indigent Defender Board in 1994. That board was later renamed the Louisiana Indigent Defense Assistance Board, and again renamed in 2007 to the Louisiana Public Defender Board.

⁵ Located at <http://www.lidab.com/standards.htm> (last visited Feb. 12, 2007).

standards demand that the quality of counsel's "guiding hand" ensure a reliable determination of guilt and of the appropriate sentence. The purpose of *Amici's* brief is not to detail the ABA and LPDB's standards, but rather to impress upon the Court the complex, intense, and rigorous litigation surrounding capital defense.

II. Louisiana's Indigent Defense System Suffers From Being Under-Funded and Over-Burdened.

The indigent defense system in Louisiana has long been crippled with over-burdened and under-resourced public defenders. *See, e.g., State v. Peart*, 621 So.2d at 790 ("[W]e find that because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in [Orleans Criminal District Court] are generally not provided with the effective assistance of counsel the constitution requires."); *State v. Citizen*, 898 So.2d at 336 (noting the need for "sweeping reform of the system and . . . adequate funding for indigent defense" in Louisiana).

Studies of various rural and urban jurisdictions across the state have revealed that "Louisiana fails to meet its federal obligations under *Gideon*." National Legal Aid & Defender Association (NLADA), *In Defense of Public Access to Justice* (March 2004).⁶ Indeed, the Louisiana Senate

⁶ In noting the importance of indigent defense, one federal judge stated, "As one maritime lawyer commented to me, even a cargo claim over soggy bags of coffee beans gets a better defense than a person capitally charged in Louisiana. . . ." Judge Helen "Ginger" Berrigan, United States District Court, Eastern District of Louisiana, Oct. 31, 2003. For full text of speech, *see*

unanimously passed a Concurrent Resolution in 2006 calling for “the Congress of the United States to take such actions as are necessary to providing funding for Louisiana’s indigent defense system”⁷

The primary causes of the state’s failing indigent defense system are inadequate funding and crushing caseloads of public defenders. As one report put it: “The indigent defense system in Louisiana is beyond the point of crisis and is so weakened in relation to the other criminal justice system components that it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly.” NLADA, *In Defense of Public Access to Justice*.⁸

www.criminaljustice.org/public.nsf/newsreleases/2003mn032?op=fulltext (last visited Feb. 11, 2008).

⁷ S. Con. Res. 25, 2006 Leg., 1st Ex. Sess. (La. 2006).

⁸ See also, Michael M. Kurth and Daryl V. Burckel, *Defending the Indigent in Southwest Louisiana*, (July 2004) (the Calcasieu Parish Public Defender Office “is obviously over-burdened” with “more than 3 times the [LPDB] standard and more than 4 times the national standard.”); Bernadette Jones Palombo & Jeff Shadow, *The Provision of the Right to Counsel in Caddo Parish, Louisiana* (July 2004) (“Inadequate and imbalanced funding forces public defenders to carry caseloads far in excess of the standards set by the [LPDB]. . . . The inadequate staffing precludes public defense attorneys from . . . providing effective representation.”); Stacey Moak, *Indigent Defense in Northeast Louisiana* (Dec. 2004) (noting the need for funding for and accountability by public defenders in the northeast judicial districts of the state); Brennan Center for Justice, *The Case for Community Defense in New Orleans* (May 2006) (“New Orleans’s system of public defense is broken. This much has been known for a long time.”); NLADA, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana’s Criminal Courts* (Sept. 2006) (“The current Orleans Parish indigent defense crisis is inextricably linked to the right to

Members of the defense bar are obligated—professionally and ethically—to avoid excessive caseloads. *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (May 13, 2006) (noting attorneys’ ethical obligation to control their workload).⁹ The LPDB recommends that capital defense counsel handle no more than 3–5 capital cases simultaneously.¹⁰ The addition of another class of persons to the group of

counsel struggles of . . . Avoyelles, East Baton Rouge, Caddo or Calcasieu Parish.”)

⁹ Found at http://www.abanet.org/cpr/06_441.pdf (last visited Feb. 12, 2008). *See also* *ABA Guidelines*, commentary to Guideline 6.1 (“In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case.”); *ABA Ten Principles of a Public Defense Delivery System* (Feb. 2002), Principle 5 (“National caseload standards should in no event be exceeded”) and n. 19 (“The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea.”); NLADA, *American Council of Chief Defenders Statement on Caseloads and Workloads* (Aug. 2007) (“Capital defense can require thousands of attorney hours. . . . The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.”).

¹⁰ LPDB Louisiana Standards on Indigent Defense, Standard 12-2.1, found at www.lidab.com/Acrobat%20files/Chapter%2012.PDF (last visited Feb. 12, 2008). The ABA does not set a specific number for capital caseload standards, but notes that “[t]he workload demands of capital cases are unique . . .” *ABA Ten Principles of a Public Defense Delivery System*, n. 9, *supra*.

offenses that are subject to the death penalty has only increased the ethical, professional, and financial strains on what is a fast collapsing public defense system.

III. Allowing Aggravated Rape To Remain A Capital Offense Will Strain An Already Crippled System And Risk Arbitrary Imposition of Death Sentences.

The parties' Joint Appendix filed with this Court states that there were 180 prosecutions for capital rape in Louisiana between 1995 and 2006. This number does not include Richard Davis who now sits with Patrick Kennedy on Louisiana's death row for non-homicide rape.¹¹ Nor does it include the 70-plus additional pending capital rape prosecutions in the state.¹² Similarly, the 180 does not include the 42

¹¹ Richard Davis is now the second person—Patrick Kennedy, Petitioner, being the first—sentenced to death for non-homicide rape since 1964. Mr. Davis was tried in Caddo Parish, Louisiana and defended at trial by two public defenders. In December 2007, Mr. Davis's jury unanimously recommended a sentence of death. *State v. Richard Lee Davis*, Case No. 262,971, Sec. 3, 1st Judicial District Court, Caddo Parish, Louisiana.

¹² The actual number of pending capital rape indictments is surely larger than 70. Because of budget and time restraints, *amici* were not able to obtain case information from the following parishes: Ascension, Beauregard, Caddo, Calcasieu, East Baton Rouge, Jefferson, Jefferson Davis, Lafayette, LaSalle, Lincoln, Livingston, Natchitoches, Ouachita, St. Charles, Tangipahoa, and Webster. The Clerks of Court from these various parishes either would not provide the requested information by telephone or required fees up to \$12/page to search for or fax the information. Given that some of the parishes are large population areas of the state (Caddo, Calcasieu, East Baton Rouge, Jefferson, Lafayette, Ouachita),

recent capital rape arrests and cases in which the defendant resolved his charges short of a death sentence.¹³

Indigent defense in Louisiana has been in a state of disaster for years. Study after study has shown that it is simply not providing indigent defendants with the effective assistance of counsel, even in non-capital cases. The simple reality is that the state cannot provide indigent capital defendants with the qualitatively raised standard of representation required by the *ABA Guidelines* and *LPDB Standards* given the state's failing indigent defense system. There are over 200 currently pending indictments for first degree (capital) murder in Louisiana. The addition of aggravated non-homicide rape to the list of capital offenses has strained a collapsing system beyond its limit.

This Court has held that representation falling short of the *ABA Guidelines* runs afoul of the prevailing norms of practice. *Strickland, Wiggins,*

amici are confident that the actual number of pending capital rape indictments is surely larger than 70. In fact, of the parishes in which information was forthcoming, *amici* volunteers identified an additional 45 aggravated rape indictments which could be capital but not counted as such by *amici* for purposes of this brief since death qualifying information was not included in the indictments. Thus, given the omitted parishes and the additional 45 indictments, the number of actual pending capital rape indictments is more likely well over 100.

¹³ *Amici* count 42 more cases (in addition to the 70) in Louisiana between 2006 and Feb. 13, 2008 where: (i) an arrest was made for capital rape (14 cases); (ii) a defendant charged with capital child rape resolved the case with a sentence less than death (the sentences imposed range from 5 years to life imprisonment) (26 cases); or (iii) the defendant was pre-trial on a capital rape indictment (2 cases).

Rompilla, supra. These *ABA Guidelines* are clear in mandating high quality representation:

At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

31 Hofstra L. Rev. at 923.

Amici curiae in *Coker v. Georgia*, 433 U.S. 584 (1977), warned of the consequences that would follow upholding the death penalty in non-homicide rape cases. Where rape as well as murder is made a capital crime, “the criminal has every reason to kill his victim, since in this way he removes at a stroke the best possible witness against him without appreciably increasing the severity of his punishment if he is caught.” Brief *Amici Curiae* of the American Civil Liberties Union, *et al.*, at 30 n.* (quoting Bedeau, *The Death Penalty in America* 273 (1967)), *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444). “[S]evere statutory penalties, epitomized by the death penalty, are unacceptable since they do not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape.” *Id.*, at 31.

What *amici* say here is that upholding the death penalty in non-homicide aggravated rape cases will seriously threaten the Sixth Amendment right to effective representation of counsel in capital murder

cases, a right already strained to the limit in Louisiana. Coker *amici* further emphasized the “essentially unfettered discretion” of the district attorney in capital rape prosecutions. *Id.* at 29. The same thing is true here. *See* La. C.Cr.P. art. 61.

Amici are convinced that Louisiana’s capital rape scheme increases the risk of ineffective representation of counsel in all other capital murder prosecutions and risks the arbitrary imposition of sentences of death in those few cases pushed to the limit of Louisiana’s novel law by overzealous prosecutors.¹⁴

CONCLUSION

This Court should reverse the judgment of the Louisiana Supreme Court.

Respectfully submitted,

PAUL R. BAIER
Counsel of Record
Paul M. Hebert Law Center
Louisiana State University
1 East Campus Drive
Baton Rouge, LA 70803
(225) 578-8326

¹⁴ By way of example, *amici* refer the Court to Petitioner’s Sentence Review Memorandum contained within the parties’ Joint Appendix filed in this Court. The Memorandum describes 180 cases in which the defendants were sentenced to a penalty less than death for aggravated rape. *Amici* submit that nothing distinguishes Petitioner Patrick Kennedy and Richard Davis’s (n. 11, *supra*) cases from the facts of the 180 cases described in the Memorandum or the additional 26 cases identified by *amici* where sentences less than death were imposed.

JULIE HAYES KILBORN
Co-Chair, Amicus Committee
LOUISIANA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

G. PAUL MARX
Executive Counsel
LOUISIANA PUBLIC DEFENDERS
ASSOCIATION
P. O. Box 82394
Lafayette, LA 70598
(337) 237-2537