

# The Burger Court Opinion Writing Database

## *Pulley v. Harris*

465 U.S. 37 (1984)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

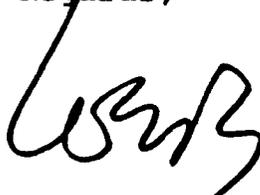
December 10, 1983

Re: 82-1095 Pulley, Warden v. Harris, Robert Alton

Dear Byron:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. White', written in a cursive style.

Justice White

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

No. 82-1095

RECEIVED  
SUPREME COURT U.S.  
JAN 18 1977

R. PULLEY, WARDEN, PETITIONER v. ROBERT ALTON HARRIS

'84 JAN 18 AIO:05

From: Justice Brennan

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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

JUSTICE BRENNAN, dissenting.

Almost twelve years ago, in Furman v. Georgia, 408 U.S. 238 (1972), the Court concluded that the death penalty, as then administered under various state and federal statutes, constituted a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. At that time, the Court was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.<sup>1</sup> Four years later,

---

<sup>1</sup>In a concurring opinion, I expressed the view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 153, 257 (1972) (concurring opinion). See also Gregg v. Georgia, 428 U.S. 153, 227 (1976) (BRENNAN, J., dissenting). Nothing that has occurred during the past twelve years has given me any reason to change these views; if anything, I am today more persuaded of the unconstitutionality of the death penalty than ever before. I therefore adhere to the views I expressed in Furman and Gregg, and would vacate the death sentence imposed on the respondent, Robert Alton Harris.

To: The Chief Justice  
Justice White  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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~~DLB~~  
1/20/84  
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1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1095

**R. PULLEY, WARDEN, PETITIONER v. ROBERT ALTON HARRIS**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE BRENNAN, dissenting.

Almost 12 years ago, in *Furman v. Georgia*, 408 U. S. 238 (1972), the Court concluded that the death penalty, as then administered under various state and federal statutes, constituted a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. At that time, the Court was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.<sup>1</sup> Four years later, faced with new death penalty statutes enacted by the States of Georgia, Florida, and Texas, a majority of the Court concluded that the procedural mechanisms included in those statutes provided sufficient protection to ensure their constitutional application. See *Gregg v. Georgia*, 428 U. S. 153 (1976); *Proffitt v. Florida*, 428 U. S.

<sup>1</sup> In a concurring opinion, I expressed the view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U. S. 153, 257 (1972) (concurring opinion). See also *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Nothing that has occurred during the past 12 years has given me any reason to change these views; if anything, I am today more persuaded of the unconstitutionality of the death penalty than ever before. I therefore adhere to the views I expressed in *Furman* and *Gregg*, and would vacate the death sentence imposed on the respondent, Robert Alton Harris.

Sty Reshe + 1, 8

Justice White  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1095

**R. PULLEY, WARDEN, PETITIONER v.  
ROBERT ALTON HARRIS**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,  
dissenting.

Almost 12 years ago, in *Furman v. Georgia*, 408 U. S. 238 (1972), the Court concluded that the death penalty, as then administered under various state and federal statutes, constituted a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. At that time, the Court was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.<sup>1</sup> Four years later, faced with new death penalty statutes enacted by the States of Georgia, Florida, and Texas, a majority of the Court concluded that the procedural mechanisms included in those statutes provided sufficient protection to ensure their constitutional application. See *Gregg v.*

<sup>1</sup>In a concurring opinion, I expressed the view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U. S. 153, 257 (1972) (concurring opinion). See also *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Nothing that has occurred during the past 12 years has given me any reason to change these views; if anything, I am today more persuaded of the unconstitutionality of the death penalty than ever before. I therefore adhere to the views I expressed in *Furman* and *Gregg*, and would vacate the death sentence imposed on the respondent, Robert Alton Harris.

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: NOV 28 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[November —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

Respondent Harris was convicted of a capital crime in a California court and was sentenced to death.<sup>1</sup> Along with

<sup>1</sup>The evidence at trial established that on July 5, 1978, respondent and his brother decided to steal a get-away car for a bank robbery in Mira Mesa, California. Respondent approached two teenaged boys eating hamburgers in their car, and forced them at gunpoint to drive him to a nearby wooded area. His brother followed. They parked the cars, and walked part up a trail. Respondent told the boys he was going to use their car to rob a bank. They offered to walk to the top of the hill, wait a while, and then report the car as stolen, giving misleading descriptions of the thieves. Respondent approved the plan, but when one of the boys moved off into the bushes, he shot the other. He pursued and killed the fleeing boy, then returned and fired several more shots into the body of his first victim. Respondent finished the boys' hamburgers, and he and his brother then went ahead with the bank robbery. They were apprehended soon thereafter and confessed to the killings and the robbery.

A jury convicted respondent of kidnapping, robbery, and the first degree murder of both boys. In accordance with the California death sentencing scheme then in effect, it also found that the statutory "special circumstances" charged by the prosecution were proved beyond a reasonable doubt: respondent had been convicted of more than one offense of first degree murder, Cal. Pen. Code § 190.2(c)(5) (West 1977), and each of the murders was willful, deliberate, premeditated, and committed during the commission of kidnapping and robbery, *id.*, § 190.2(c)(3)(i),(ii). The proper punishment was therefore either death or life imprisonment without the possibility of parole, to be determined at a separate sentencing hearing. At that hearing, the State introduced evidence that respondent

ND

To: The Chief Justice  
Justice Brennan  
✓ Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 4

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Stylistic and  
pp. 8, 9, 11, 12, 15

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[December —, 1983]

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*Handwritten initials and scribbles*

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To: The Chief Justice  
Justice Brennan  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 7, 9-10

From: Justice White

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4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

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*Ward  
Wife*

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

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JUSTICE MARSHALL

pp. 5, 7, 9-11

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JAN 9 1984

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

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JUSTICE MARSHALL  
p. 10; footnotes  
9-15 renumbered  
84 JAN 18 10:11

6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 19, 1984

Re: No. 82-1095 - Pulley v. Harris

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 2, 1983

Re: No. 82-1095 - Pulley v. Harris

Dear Byron:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 30, 1983

82-1095 Pulley v. Harris

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Justice White

lfp/ss

cc: The Conference

December 21, 1983

82-1095 Pulley v. Harris

Dear Byron:

It seems to me that John's opinion unnecessarily causes some doubt as to the scope of your opinion.

The dissent, p. 4, states that "some form of meaningful appellate review" is "essential". This should be clear from Part III of your opinion, but the language in the dissent plus the fact that John declines to join it may create doubt as to whether appellate review is necessary to assure "even handed, rational and consistent imposition of death sentences". See, Jurek.

It may be desirable to make clear, as we have said, that appellate review is necessary but it need not include proportionality review.

I am still with you, however, whether or not you think this suggestion is meritorious.

Sincerely,

Justice White

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 28, 1983

Re: No. 82-1095 Pulley v. Harris

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

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JUSTICE STEVENS

'83 DEC 16 A11:15

From: Justice Stevens

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

While I agree with the basic conclusion of part III of the Court's opinion—our case law does not establish a constitutional requirement that comparative proportionality review be conducted by an appellate court in every case in which the death penalty is imposed—my understanding of our decisions in *Gregg v. Georgia*, 428 U. S. 153 (1976); *Proffitt v. Florida*, 428 U. S. 242 (1976); *Jurek v. Texas*, 428 U. S. 262 (1976); and *Zant v. Stephens*, — U. S. — (1983) is sufficiently different from that reflected in part III to prevent me from joining that portion of the opinion.

While the cases relied upon by respondent do not establish that comparative proportionality review is a constitutionally required element of a capital sentencing system, I believe the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, 408 U. S. 238 (1972), and hence that some form of meaningful appellate review is constitutionally required.

The systemic arbitrariness and capriciousness in the imposition of capital punishment under statutory schemes invalidated by *Furman* resulted from two basic defects in those schemes. First, the systems were permitting the imposition

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 2, 3, 5, 7

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1095

R. PULLEY, WARDEN, PETITIONER *v.*  
ROBERT ALTON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE STEVENS, concurring in part and concurring in  
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While I agree with the basic conclusion of part III of the  
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priciousness which infected death penalty schemes invali-  
dated by *Furman v. Georgia*, 408 U. S. 238 (1972), and hence  
that some form of meaningful appellate review is constitu-  
tionally required.<sup>1</sup>

<sup>1</sup>This conclusion finds support in the opinions written by JUSTICE  
WHITE in *Gregg*, *Proffitt*, and *Jurek*, as well as in the opinions announcing  
the judgments of the Court in those cases. At page 224 of his opinion in  
*Gregg*, JUSTICE WHITE wrote:

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

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SUPREME COURT U.S.  
JUSTICE

From: **Justice Stevens**

'84 JAN 11 A9:56

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Recirculated: JAN 10 '84

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1095

**R. PULLEY, WARDEN, PETITIONER v.  
ROBERT ALTON HARRIS**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1984]

JUSTICE STEVENS, concurring in part and concurring in  
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*deletion*

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 29, 1983

Re: No. 82-1095 Pulley v. Harris

Dear Byron,

Please join me.

Sincerely,



Justice White

Copies to the Conference