Journal of Criminal Law and Criminology

Volume 75
Issue 3 *Fall*

Article 15

Fall 1984

# Eighth Amendment--Proportionality Review of Death Sentences Not Required

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0091-4169/84/7503-839
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 75, No. 3

Printed in U.S.A.

# EIGHTH AMENDMENT—PROPORTIONALITY REVIEW OF DEATH SENTENCES NOT REQUIRED

**Pulley v. Harris, 104 S. Ct. 871 (1984).**

## I. INTRODUCTION

The Supreme Court has never defined clearly the required elements of a constitutional capital sentencing scheme. In *Pulley v. Harris*,[1] the Court held that the eighth amendment[2] does not require a state appellate court to conduct a proportionality review of every death sentence to determine if the sentence is equivalent to sentences imposed in similar cases, unless the state capital sentencing scheme lacks other adequate checks on arbitrary sentencing.[3] The Court found that although the California capital sentencing procedures do not include proportionality review, they are constitutional because they require California juries to find that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt. Trial judges also must specify reasons for affirming the sentence and the state supreme court must review each sentence.[4]

In arriving at its decision in *Pulley v. Harris*, the Court reviewed prior death penalty decisions and concluded that the constitutional proscription against cruel and unusual punishment does not require proportionality review.[5] Yet *Pulley v. Harris* departs from prior cases that approved the constitutionality of several state capital sentencing procedures. In those cases, the Court lauded proportionality review as an effective safeguard against the arbitrary imposition of the death penalty by aberrant juries.[6] In *Pulley v. Harris*, however,

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1 104 S. Ct. 871 (1984).

2 The eighth amendment states in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3 104 S. Ct. at 880.

4 *Id.* at 881.

5 *See id.* at 879-80.

6 *See, e.g.*, Proffitt v. Florida, 428 U.S. 242, 250-51 (1976); Gregg v. Georgia, 428 U.S. 153, 207 (1976). See also *infra* notes 46-64 and accompanying text for a discussion

the Court has approved a state scheme that contains no proportionality review provision.[7]

This Note argues that the Court could have reached a different result based on a number of considerations. First, the precedent upon which the Court relied did not compel the Court to reject proportionality review as a constitutional requirement, but rather suggests that proportionality review is an important safeguard against arbitrary sentencing. Second, empirical evidence shows that disproportionate sentencing occurs in the absence of proportionality review. Third, most states with provisions for capital punishment require a state appellate court to conduct proportionality review. Last, recent Court decisions on proportionate sentencing provide a basis for a constitutional requirement of proportionality review of death sentences. This Note then suggests that despite these considerations, policy reasons validate the Court's holding in *Pulley v. Harris*.

## II. Facts and Procedural History

On July 5, 1978, Robert Alton Harris and his brother kidnapped two teenage boys in order to use the boys' car in a bank robbery.[8] When the two boys moved away from the car, Harris shot and killed them and then used the vehicle to rob a bank.[9]

A California jury convicted Harris of kidnapping, robbery, and the first degree murder of the two boys.[10] After finding that the state had proved statutory "special circumstances" beyond a reasonable doubt,[11] the jury, in a separate hearing, sentenced Harris to death for the murders.[12] On his automatic appeal,[13] the California

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of the Court's treatment of the proportionality review procedures of Georgia and Florida.

7 Pulley v. Harris, 104 S. Ct. 871 (1984).

8 People v. Harris, 28 Cal. 3d 935, 944, 623 P.2d 240, 244, 171 Cal. Rptr. 679, 683 (1981).

9 *Harris*, 104 S. Ct. at 873 n.1.

10 *Id.*

11 *Id.* Because the trial court convicted Harris of more than one count of murder, *see* Cal. Penal Code § 190.2(c)(5) (West 1977), and of committing a murder willfully and deliberately during the commission of a robbery and kidnapping, *see id.* at § 190.2(c)(3)(i), (ii), the jury found that the prosecution proved statutory aggravating circumstances beyond a reasonable doubt. *Harris*, 104 S. Ct. at 873 n.1.

12 *Harris*, 104 S. Ct. at 873 n.1. The California statute, *see* Cal. Penal Code § 190.3 (West 1977), required the jury to consider several additional factors in the separate sentencing. During the hearing, the prosecution presented evidence that Harris had sodomized other inmates while in jail, had threatened other inmates' lives, and had been found in possession of a jail-made knife and a wire garrote. The defense presented evidence for jury consideration that established that Harris' father had been an alcoholic who had served two prison terms for having sexual intercourse with Harris' sisters and

Supreme Court affirmed Harris' conviction and sentence, and dismissed his claims of unfair pretrial publicity, evidentiary errors, and the unconstitutionality of the death penalty statute.[14] The United States Supreme Court denied certiorari.[15]

Harris then pursued a writ of habeas corpus to three levels of the California state courts, claiming that the appellate court had failed to provide him with a constitutionally required proportionality review of his sentence.[16] Courts at all three levels denied the writ.[17] The United States Supreme Court denied certiorari again.[18]

Harris next sought habeas relief from the United States District Court for the Southern District of California claiming, *inter alia*, that the Constitution required the California appellate court to conduct a proportionality review of his sentence.[19] The district court denied his claim without written opinion,[20] but issued a certificate of probable cause.[21]

The Ninth Circuit reversed the district court and held that earlier Supreme Court decisions established that the Constitution required a state appellate court to conduct a proportionality review of a death sentence.[22] The Supreme Court granted certiorari to consider whether the Constitution requires states to conduct proportionality reviews of death sentences.[23]

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that Harris' mother kicked him out of the house at the age of fourteen. *Harris*, 104 S. Ct. at 873 n.1.

13 *See* CAL. PENAL CODE § 190.4 (West 1977).

14 People v. Harris, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981) (rejecting defendant's constitutional claim by citation to People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1983); People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979)).

15 Harris v. California, 454 U.S. 882 (1981) (denial of certiorari).

16 *Harris*, 104 S. Ct. at 874.

17 *Id.*

18 Harris v. California, 457 U.S. 1111 (1982) (denial of certiorari).

19 Harris sought federal habeas corpus relief through 28 U.S.C. § 2254 (1976), which provides that a federal court may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws and treaties of the United States."

20 The district court judge issued a statement in which he said that the Supreme Court has not mandated a proportionality review; thus, the district court judge held that the California statute was constitutional. Joint Appendix at 14-15, Pulley v. Harris, 104 S. Ct. 871 (1984).

21 Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984). *See* 28 U.S.C. § 2253 (1976) (prisoner must obtain certificate of probable cause before he can appeal district court's denial of habeas corpus to federal court of appeals).

22 Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984).

23 Pulley v. Harris, 103 S. Ct. 1425 (1983) (grant of certiorari).

## III. The Supreme Court Opinion

In a seven-to-two decision, the Court reversed the Ninth Circuit and held that the eighth amendment did not require a state appellate court to conduct proportionality reviews of death sentences.[24] Writing for the majority, Justice White concluded that prior decisions of the Court did not establish proportionality review as a constitutional requirement, and that such review was not necessary to control arbitrary death sentencing under the California scheme.[25]

The Court first held that Harris was not entitled to a proportionality review under California state law.[26] The Court determined that the California Supreme Court had stated clearly that a prisoner sentenced to death did not have a right to a review of the proportionality of his sentence.[27]

The Court next considered the eighth amendment issue and reaffirmed its own prior holding that the eighth amendment's ban on cruel and unusual punishment requires that courts not impose death sentences arbitrarily.[28] In *Pulley v. Harris*, the Court reviewed prior cases in which it had upheld capital sentencing schemes and concluded that the proportionality review element of state schemes that contained such review[29] was merely an additional safeguard against arbitrariness.[30] The Court held that procedures other than proportionality review were more essential in preventing arbitrary and indiscriminate sentencing.[31]

The Court broadly construed its decision in *Jurek v. Texas*[32] and

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24 Pulley v. Harris, 104 S. Ct. 871, 881 (1984), *rev'g* 692 F.2d 1189 (9th Cir. 1982).

25 *Id.* at 879-80.

26 *Id.* at 874-75. The Court held that it could not grant Harris' federal habeas corpus petition on a perceived error of state law. *Id.* Additionally, the Court held that there was no error in state law because the California courts had rejected Harris' demand for proportionality review without departing from precedent. *Id.*

27 *Id.* (question of whether state law has evolved to afford petitioner a proportionality review is matter for state court to decide).

28 *Id.* at 876 (citing Furman v. Georgia, 408 U.S. 238 (1972)).

29 *See, e.g.*, Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

30 *See* 104 S. Ct. at 876-80.

31 *Id.* at 876-79. The Court mentioned alternative procedures in the Georgia scheme that limited jury discretion, including bifurcated trials for conviction and sentencing, a limited number of crimes that are punishable by death, the requirement that at least one aggravating circumstance be present, and jury consideration of mitigating factors. *Id.* at 876-77 (citing *Gregg*, 428 U.S. at 196-99).

The Court noted the existence of similar provisions in the Florida scheme, including bifurcated proceedings, the requirement of a statutory aggravating circumstance, and the vesting of ultimate sentencing authority in the judge rather than the jury. *Id.* at 878-79 (citing *Proffitt*, 428 U.S. at 247-53).

32 428 U.S. 262 (1976).

held that that decision conclusively showed that proportionality review is not a requirement of a constitutional capital sentencing scheme.[33] Although the Texas scheme calls for prompt judicial review of death sentences, it does not require proportionality review.[34]

The Court then examined the elements of the California capital sentencing scheme and concluded that because of its limitation of jury discretion and requirement of review of the jury's decision by the trial judge and an appellate court, the scheme contained sufficient constitutional checks on arbitrariness.[35] The existence of these elements satisfied the Court's eighth amendment concerns.[36] The Court concluded by recognizing that no sentencing scheme could be perfect, but distinguished any defects in the present system as trivial compared to the defects that caused the Court to invalidate the death sentencing schemes considered in *Furman v. Georgia*.[37]

Justice Stevens concurred in the judgment, expressing his view that capital sentencing schemes must contain some form of meaningful appellate review to meet constitutional requirements.[38] Justice Stevens noted that all statutory capital sentencing schemes approved by the Court, including the California scheme, have guaranteed some form of meaningful appellate review.[39] Justice Stevens did not specify the elements of meaningful appellate review, but stated that it did not necessarily include proportionality review.[40]

In dissent, Justice Brennan, joined by Justice Marshall, argued that the eighth amendment's ban on cruel and unusual punishment requires a state appellate court to conduct reviews of all death sentences to determine if they are proportionate to sentences in similar cases.[41] According to Justice Brennan, actual experience in

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33 *Harris*, 104 S. Ct. at 879.

34 *Id.* at 878.

35 *Id.* at 880-81. Specifically, the California sentencing scheme of 1977, under which the Court sentenced Harris to death, provided that a person could be sentenced to death only if the jury found that one or more "special circumstances" existed. CAL. PENAL CODE § 190.2 (West 1977). When the state proves a special circumstance beyond a reasonable doubt, the defendant receives a separate hearing in which counsel presents mitigating and aggravating factors to the jury. *Id.* at § 190.3. The jury determination of either death or life imprisonment without parole is subject to review not only by the trial judge, but also by appellate courts. *Id.* at §§ 190.4(e), 1239(b).

36 104 S. Ct. at 881. The Court, however, did leave open the possibility that it would require proportionality review under a different scheme if the scheme lacked adequate checks on arbitrariness. *Id.* at 880.

37 *Id.*

38 *Id.* at 881-84 (Stevens, J., concurring in part and concurring in the judgment).

39 *Id.* at 884 (Stevens, J., concurring in part and concurring in the judgment).

40 *Id.*

41 *Id.* at 885 (Brennan, J., dissenting).

the administration of the death penalty demonstrates that states have not eliminated arbitrariness in sentencing.[42] Justice Brennan reasoned that proportionality review is necessary to remove some, if only a small part, of the irrationality of capital sentencing.[43]

Discounting fears that proportionality review would be burdensome, Justice Brennan emphasized the ease with which state courts could conduct such reviews.[44] Taking issue with the majority's failure to address the merits of proportionality review, Justice Brennan argued that state courts already have effectively used such procedures to eliminate inconsistencies in sentencing.[45]

## IV. Prior Supreme Court Decisions

Rather than establishing that a capital sentencing scheme is constitutional without proportionality review, earlier Court decisions suggest that proportionality review checks sentencing aberrations that could make a death sentence unconstitutionally cruel and unusual. Four years after ruling in *Furman v. Georgia*[46] that capital punishment as it was then administered was cruel and unusual,[47] the Supreme Court upheld revitalized capital sentencing schemes in

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42 *Id.* at 886-88 (Brennan, J., dissenting). Justice Brennan stated that no one has yet compiled complete evidence of discriminatory and irrational imposition of the death penalty. He did, however, cite studies suggesting that the race of both the defendant and the victim affect the probability of the sentencing authority imposing a death sentence. *Id.* at 887-88 (Brennan, J., dissenting) (citing Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 Am. Soc. Rev. 783 (1981); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981)).

43 *Id.* at 888 (Brennan, J., dissenting). Justice Brennan recognized that proportionality review could not measure and correct certain forms of irrational sentencing, such as sentences based on race, gender, socio-economic status, or geographic location within a state. *Id.*

44 *Id.* at 890 (Brennan, J., dissenting). Justice Brennan noted that over thirty states require, either by statute or judicial decision, some form of proportionality review. *Id.*

45 *Id.* at 890-91 (Brennan, J., dissenting).

46 408 U.S. 238 (1972) (per curiam).

47 *Id.* at 239. *Furman* involved Georgia and Texas death penalty procedures. The Court issued a per curiam opinion in which it held that both statutes were unconstitutional. *Id.* Each Justice voting to invalidate the death sentence wrote a separate opinion, as did each dissenting Justice. Justices Brennan and Marshall viewed the death penalty as cruel and unusual punishment in all instances. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Justices Douglas, Stewart, and White each expressed the view that the death penalty constituted cruel and unusual punishment because the states imposed the sentence in an arbitrary and capricious manner. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). The Court, in later death penalty decisions, has regarded the opinions of the latter three Justices as forming the holding of *Furman* that the penalty of death is unconstitutional if states do not impose it rationally. *See Harris*, 104 S. Ct. at 876; *Gregg*, 428 U.S. at 188.

*Gregg v. Georgia*,[48] *Proffitt v. Florida*,[49] and *Jurek v. Texas*[50] because the schemes satisfied the concerns about arbitrary sentencing that the Court had expressed in *Furman*.[51] In all of these decisions, the Court mentioned several aspects of the new state capital sentencing schemes that limit arbitrariness.[52] The Court did not require in any of these cases that all capital sentencing schemes have proportionality review, but it also did not address directly the issue of whether this review is constitutionally required. These cases, therefore, do not compel the view that a state appellate court may affirm a death sentence without reviewing it to ensure that it is proportionate to sentences imposed for similar crimes.

The opinions in *Gregg v. Georgia*[53] demonstrate the importance of proportionality review. In *Gregg*, the Court examined the procedures of Georgia's revised capital sentencing statute to determine whether they reduce arbitrariness and capriciousness.[54] The post-*Furman* Georgia sentencing scheme includes a proportionality review, and *Gregg* supports the contention that proportionality review is necessary to a constitutional death sentencing scheme. Justices Stewart, Powell, and Stevens, writing jointly, concluded that Georgia's proportionality review "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[55] In a concurring opinion, Justice White, joined by Chief Justice Burger and Justice Rehnquist, noted that the provision for appellate review was an "important aspect of the new Georgia

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48 428 U.S. 153 (1976) (plurality opinion).

49 428 U.S. 242 (1976) (plurality opinion).

50 428 U.S. 262 (1976) (plurality opinion).

51 *See Gregg*, 428 U.S. at 207; *Proffitt*, 428 U.S. at 259-60; *Jurek*, 428 U.S. at 276.

52 *See Gregg*, 428 U.S. at 196-98; *Proffitt*, 428 U.S. at 247-51; *Jurek*, 428 U.S. at 268-70 (limiting class of murders for which juries may impose death sentences, requiring that jury find statutory aggravating circumstance before imposing death, and automatic appeal of death sentences to higher court all limit arbitrariness).

53 428 U.S. 153 (1976) (plurality opinion).

54 *Id.* at 198.

55 *Id.* at 206 (Stewart, Powell, and Stevens, JJ., concurring). The new Georgia scheme requires that in reviewing death sentences, the Georgia Supreme Court must determine:

> (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
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> (2) whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . and
>
> (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

GA. CODE ANN. § 27-2537(c) (Supp. 1975). The statute also requires the Georgia Supreme Court to include a list of similar cases and their holdings in its decision. *Id.* at § 27-2537(e). Additionally, the court must appoint a special assistant to maintain records of all death penalty cases. *Id.* at § 27-2537(f)-(h).

legislative scheme."[56] Although the Court discussed other elements of the Georgia scheme that limited arbitrariness, it did not distinguish which of the elements was most essential to the scheme's constitutionality.[57]

Building on *Gregg* in *Zant v. Stephens*,[58] the Supreme Court noted that the state court review of death sentences, which included proportionality review, was one of the features that led the Court to approve Georgia's scheme in *Gregg*.[59] The Court in *Zant* also stated that the proportionality review procedure provides a safeguard against arbitrary sentencing when a court sentences a defendant to death based upon a jury finding of a statutory aggravating circumstance that the state supreme court later holds unconstitutionally vague.[60]

The Supreme Court's opinion in *Proffitt v. Florida*[61] further indicates the importance of proportionality review. In Florida, the state supreme court conducts proportionality review pursuant to judicial decision rather than by statute.[62] The United States Supreme Court in *Proffitt* noted that Florida's review procedures "can assure consistency, fairness and rationality in the evenhanded operation of the state law."[63] In fact, the *Proffitt* opinion stated that because Florida had in effect adopted the Georgia procedure of proportionality review, Florida's review procedures were not subjective or unpredictable.[64]

## V. ANALYSIS

The Court in *Pulley v. Harris* concluded that prior Court deci-

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56 *Gregg*, 428 U.S. at 211 (White, J., concurring).

57 *Id.* at 196-98 (holding that ten statutory aggravating circumstances, consideration by jury of appropriate aggravating and mitigating circumstances, and automatic appeal to Georgia Supreme Court all serve to limit arbitrariness in capital punishment cases).

58 103 S. Ct. 2733 (1983).

59 *Id.* at 2742.

60 *Id.* at 2738 (citing Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), for proposition that statutory aggravating circumstance allowing for capital punishment of defendants with substantial histories of serious assaultive criminal convictions is unconstitutionally vague).

61 428 U.S. 242 (1976) (plurality opinion).

62 The Florida statute on capital sentencing requires the Florida Supreme Court to automatically review each death sentence, but contains no specific provision for proportionality review. FLA. STAT. ANN. § 921.141(4) (West Supp. 1984). Nevertheless, in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), the Florida Supreme Court undertook to conduct reviews of death sentences for proportionality to guarantee that "the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." *Id.*

63 *Proffitt*, 428 U.S. at 260.

64 *Id.* at 258-59.

sions compel the holding that the Constitution does not require proportionality review and that such review is unnecessary to reduce arbitrary sentencing in the California scheme. The Court, however, could have arrived at a different result based upon an analysis of its prior case law, empirical evidence, state practice, and principles of proportionate sentencing. First, in prior death penalty decisions that mention proportionality review, the Court lauded the procedure for minimizing arbitrariness. Second, empirical evidence suggests that disproportionate sentencing can occur under a state scheme that does not include proportionality review procedures. Third, most states that allow capital punishment include proportionality review procedures as part of their sentencing schemes. Finally, the Court in *Solem v. Helm*[65] announced principles upon which it could model a review procedure for death sentences to determine whether they are proportionate to penalties in similar cases. Nevertheless, policy considerations against requiring proportionality review of each death sentence validate the Court's holding.

Although the *Gregg*, *Zant*, and *Proffitt* decisions all emphasized the importance of proportionality review in capital sentencing schemes, the Court in *Pulley v. Harris* chose to narrowly interpret these three decisions. The *Pulley v. Harris* majority's reliance on *Gregg* misapplied that precedent in two respects. First, the Court mistakenly found that proportionality review was not a critical factor in the decision to uphold the constitutionality of the Georgia death penalty scheme in *Gregg*.[66] *Pulley v. Harris* focused on a section of the *Gregg* opinion in which the Court referred to appellate review as "an additional safeguard against arbitrary and capricious sentencing."[67] The Court's analysis is unconvincing, however, because the *Gregg* opinion listed the elements of the Georgia scheme in the order they occur in the trial process, starting with jury criteria and ending with appellate review. The Court used words such as "additional" more as temporal transitions than as indications of the relative importance of various elements of the system.[68] Second, the Court in *Pulley v. Harris* ignored the part of the *Gregg* opinion in which the Court analyzed the petitioner's claim that the lower court did not properly conduct his proportionality review; in this section of *Gregg*, the Court held that Georgia's method of conducting proportionality review was not unconstitutional.[69] If the proportionality review pro-

65 103 S. Ct. 3001 (1983).

66 *See Harris*, 104 S. Ct. at 877.

67 *Id.* at 877 (citing *Gregg*, 428 U.S. at 198, 204-06, 222-23).

68 *See Gregg*, 428 U.S. at 196-98.

69 *Id.* at 204 n.56. The petitioner in *Gregg* claimed that the types of cases the Georgia

cedure is merely supplementary to the scheme's constitutionality, as the majority in *Pulley v. Harris* maintained, the Court in *Gregg* could have dismissed the petitioner's claim without analyzing whether the methods of implementation were proper.[70]

The Court distinguished both *Gregg* and *Zant* from *Pulley v. Harris* by asserting that those cases did not expressly require that a constitutional capital punishment statute contain provisions for proportionality review at the appellate level.[71] Neither *Gregg* nor *Zant* expressly stated that the Constitution requires another state scheme to duplicate any specific procedure of the Georgia system.[72] Yet the language of these opinions suggests that proportionality review is a sufficiently important part of a capital sentencing scheme to merit consideration as a constitutional requirement.

The Court in *Pulley v. Harris* similarly distinguished *Proffitt v. Florida*. It dismissed the importance of Florida's proportionality review procedure, as it had that of Georgia, by reiterating the other elements of the sentencing scheme that also channeled jury discretion and limited arbitrariness.[73] The Court noted that the concurring opinion in *Proffitt* had not even mentioned Florida's appellate review procedures.[74] Justice White, writing the concurring opinion in *Proffitt*, had stated, however, that he would not repeat the statutory procedures of Florida's capital sentencing scheme in that opinion.[75] Because the joint opinions in *Gregg* and *Proffitt* by Justices Stewart, Powell, and Stevens, and Justice White's concurring opinion in *Gregg* lauded proportionality review, it is doubtful that a decision requiring such review in all cases would "substantially depart from the sense" of those opinions, as the Court claimed in *Pulley v.*

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Supreme Court had considered resulted in an ineffective basis for measuring the proportionality of a death sentence. *Id.* Specifically, the petitioner alleged that effective review required the court to consider nonappealed capital convictions where courts imposed only a life sentence and homicides that did not result in capital convictions. *Id.* Additionally, the petitioner alleged that the inclusion of pre-*Furman* death sentences was an inadequate basis for review. *Id.*

70 In *Gregg*, the Court stated that the Georgia Supreme Court had the authority to consider homicide cases where courts had not imposed the death penalty. *Id.* at 204 n.56. The Court also found that the Georgia courts had to examine pre-*Furman* cases because of the paucity of post-*Furman* cases at the beginning of the new procedure. *Id.*

71 *Harris*, 104 S. Ct. at 879.

72 *See Zant*, 103 S. Ct. at 2741; *Gregg*, 428 U.S. at 195.

73 *Harris*, 104 S. Ct. at 877-78. The Court mentioned the bifurcated guilt and sentencing procedure, the requirement that the sentencing authority find a statutory aggravating circumstance that is not outweighed by any mitigating circumstances, the focus on individualized sentencing, and the vesting of ultimate sentencing authority in the judge rather than the jury. *Id.* at 877.

74 *Id.* at 877-78.

75 *Proffitt*, 428 U.S. at 260 (White, J., concurring).

*Harris*.[76]

Rather than broadly interpret the *Gregg*, *Zant*, and *Proffitt* decisions, the Court instead chose to interpret broadly its decision in *Jurek v. Texas*,[77] in which it upheld the Texas capital sentencing scheme. Because the Texas scheme does not mandate a proportionality review, the Court in *Pulley v. Harris* ruled that prior case law does not require proportionality review as part of a constitutional capital sentencing scheme. The Court in *Jurek*, however, did not directly address the contention that the Texas scheme was invalid for failure to include proportionality review. Additionally, because the Court in *Jurek* emphasized that the Texas scheme would ensure evenhanded sentencing, it may have presumed that the Texas appeals court would conduct proportionality review.[78]

Analysis of *Gregg*, *Zant*, and *Proffitt* shows that the Court could have decided *Pulley v. Harris* differently without "effectively overrul[ing] *Jurek*."[79] The Texas capital sentencing scheme in *Jurek* contains narrower grounds for imposing the death penalty than do the schemes of Georgia, Florida, and California. The Court's review of the California scheme in the second part of *Pulley v. Harris* demonstrates that the California scheme bears greater similarity to the schemes of Georgia and Florida than to that of Texas. California, like Georgia and Florida, allows a sentencing authority to impose a death sentence based on the existence of statutory aggravating factors that it must balance against mitigating factors. The Texas statutory scheme differs from those of Georgia, Florida, and California in that it limits the application of the death penalty to homicides occurring in five specific situations.[80] Furthermore, before it may impose a death sentence under the Texas scheme, the jury must answer affirmatively each of three questions concerning the deliberateness of the defendant's conduct, the future danger of the defendant to society, and the possibility that the defendant's conduct was a re-

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[76] *Harris*, 104 S. Ct. at 879 (requiring procedure of proportionality review for every death sentence would "substantially depart from the sense of *Gregg* and *Proffitt*").

[77] 428 U.S. 262 (1976) (plurality opinion).

[78] Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 793 (1983). The author suggested reading the *Jurek* Court's language on evenhanded sentencing to presume that Texas would conduct proportionality review. *But see* Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 142 (1979) (Texas appellate courts limit their review of death sentence cases to whether substantial evidence supports the jury's findings of fact in answering the special questions put to it by the state). See *infra* note 81 for the list of special questions in Texas death penalty scheme.

[79] 104 S. Ct. at 879 (requiring procedure of proportionality review for every death sentence "would effectively overrule *Jurek*").

[80] The Texas Code provides that a jury can impose a death sentence on a person guilty of murder when:

sponse to provocation.[81] The Texas statute also provides for automatic review of the sentence by the Court of Criminal Appeals.[82] The Court in *Jurek* may have assumed that proportionality review was unnecessary under the Texas scheme because Texas juries can impose death sentences on narrower grounds than can juries in Georgia and Florida.[83] Thus, the majority in *Pulley v. Harris* should have demonstrated that California's scheme was similar to that of Texas before deciding that the California Supreme Court need not conduct proportionality review of death sentences.

In addition to interpreting its prior case law differently, the Court in *Pulley v. Harris* could have reached a different result by analyzing empirical evidence that suggested that arbitrary sentencing can occur under a state statutory scheme that lacks proportionality review. The Court could have used a rationale similar to that used in *Godfrey v. Georgia*,[84] in which the Court ruled that a statutory aggravating circumstance listed in Georgia's capital sentencing statute was unconstitutionally vague, even though the Court had approved the same provision in *Gregg*.[85] The Court in *Godfrey* reasoned that the statutory provision had become unconstitutional because the manner in which the Georgia courts applied the provision marked a

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(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

TEX. PENAL CODE ANN. § 19.03(a) (Vernon 1974).

81 The Texas statute specifies that to obtain the death penalty against a defendant, the state must prove to the jury each of the following issues beyond a reasonable doubt:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1974).

82 *Id.* at art. 37.071(f).

83 Goodpaster, *supra* note 78, at 793.

84 446 U.S. 420 (1980).

85 *Id.* at 427-33. The Court found that the provision of the Georgia code that allowed the sentencing authority to sentence a person to death for a homicide that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," did not sufficiently narrow jury discretion. *Id.* at 429.

return to arbitrary and standardless sentencing.[86] Similarly, the Court in *Pulley v. Harris* could have avoided *Jurek* by noting that the manner in which courts without proportionality review procedures currently impose death sentences marks a return to unevenhanded sentencing.

*Brooks v. Estelle*[87] exemplifies the current disproportionality of the Texas scheme. In *Brooks*, the jury sentenced Charles Brooks to death for committing a homicide, although the jury did not determine whether Brooks or his co-felon fired the fatal shot.[88] Four years after the jury imposed the death sentence, Brooks' co-felon plea-bargained to a sentence of forty years in prison by pleading guilty to a noncapital murder charge.[89] The Court in *Pulley v. Harris* could have used this case to hold that sentencing practices under the Texas capital sentencing scheme after *Jurek* demonstrated that proportionality review was necessary to avoid the type of unfair sentencing that occurred in *Brooks*.[90]

In addition to analyzing the disproportionate effects of the current Texas scheme as exemplified by *Brooks*, the Court could have surveyed capital sentencing statutes across the country to support a different holding. Most states that specify the nature of appellate review require that the reviewing court consider whether a sentence is disproportionate to sentences in similar cases.[91] California, along

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86 *Id.* at 431-33.

87 697 F.2d 586 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1490 (1983).

88 *Id.* at 588. *See* Goodpaster, *supra* note 78, at 786.

89 697 F.2d at 588. The co-defendant, Woody Lourdes, plea-bargained with the state after an appeals court reversed his conviction for the offense. *Id.*

90 The history of the *Brooks* case would have presented a peculiar problem to the Court had it used *Brooks* to demonstrate disproportionality. The Court of Appeals for the Fifth Circuit had dismissed Brooks' claim that his sentence should be reduced because it was disproportionate to that of his co-felon. *Brooks*, 697 F.2d at 588. After the Supreme Court denied certiorari in the case, the State of Texas executed Brooks on December 7, 1982. N.Y. Times, Dec. 7, 1982, at 1, col. 6. Any decision that suggests that Brooks' sentence was disproportionate would acknowledge the possibility that the Supreme Court denied the appeal of a man who was wrongly executed.

91 *See, e.g.*, ALA. CODE § 13A-5-53 (1982); CONN. GEN. STAT. ANN. § 53a-46b(b) (West Supp. 1982); DEL. CODE ANN. tit. 11, § 4209(g)(2) (1979); GA. CODE ANN. § 17-10-35(e) (1982); IDAHO CODE § 19-2827(c) (1979); KY. REV. STAT. ANN. § 532.075(3) (Supp. 1982); LA. CODE CRIM. PROC. ANN. art. 905.9 (West Supp. 1983); MD. ANN. CODE art. 27, § 414(e) (1982); MASS. GEN. LAWS ANN. ch. 279, § 71 (West Supp. 1982); MISS. CODE ANN. § 99-19-105(3) (Supp. 1982); MO. ANN. STAT. § 565.014(3) (Vernon 1979); MONT. CODE ANN. § 46-18-310 (1981); NEB. REV. STAT. §§ 29-2521.01(5) to -.03 (1979); NEV. REV. STAT. § 177.055(2) (1981); N.H. REV. STAT. ANN. § 630.5 (VII(c)) (Supp. 1981); N.J. STAT. ANN. § 2C: 11-3(e) (West 1982); N.M. STAT. ANN. § 31-20A-4(c) (Supp. 1981); N.C. GEN. STAT. § 15A-2000(d)(2) (1978); OHIO REV. CODE ANN. § 2929.05(A) (Baldwin 1982); OKLA. STAT. ANN. tit. 21, § 701.13(c) (West 1981); PA. STAT. ANN. tit. 42, § 9711(h)(3) (Purdon 1982); S.C. CODE ANN. § 16-3-25(c) (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-12 (1979); TENN. CODE ANN. § 39-2-205(c) (1982);

with Texas, is one of the few states whose statute, although providing for special appellate review of death sentences, does not specify the form of the review. Of thirty-seven states that impose capital punishment, twenty-seven had proportionality review procedures as part of their statutory schemes at the time of *Pulley v. Harris*.[92] Additionally, several other states required proportionality review by judicial decision.[93] This indicates that a clear majority of state legislatures and courts consider proportionality review by a state appellate court to be an important safeguard in preventing unfair sentencing.[94] The majority opinion in *Pulley v. Harris*, however, took no notice of the extent to which states already require proportionality reviews as part of their appellate review procedures.

In addition to considering the prevalence of proportionality review in state capital sentencing schemes, the Supreme Court could have arrived at a different result based upon principles of proportionate sentencing established in *Solem v. Helm*.[95] In *Solem*, the Court overturned a life sentence for passing bad checks that was imposed under the South Dakota recidivist statute because the sentence was disproportionate to the crime.[96] In deciding *Solem*, the Court enunciated standards to guide courts in reviewing sentences for disproportionality under the eighth amendment. Although courts ostensibly were to apply these standards to determine whether a sentence was proportionate to a crime,[97] courts may also use these standards as a measure of whether sentences for similar crimes are proportionate. These standards include the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the

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VA. CODE § 17-110.1(c) (1982); WASH. REV. CODE ANN. § 10.95.130(2) (Supp. 1983); WYO. STAT. § 6-2-103(d) (1983).

92 *See supra* note 91 and statutes cited therein.

93 State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976); Collins v. State, 261 Ark. 195, 221-22, 548 S.W.2d 106, 120-21 (1977); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); People v. Gleckler, 82 Ill. 2d 145, 161-71, 411 N.E.2d 849, 856-61 (1980).

94 The California Supreme Court, although it held that the Constitution does not require a proportionality review procedure, indicated a willingness to conduct such review if the United States Supreme Court required it to do so. People v. Frierson, 25 Cal. 3d 142, 182-85, 599 P.2d 587, 610-12, 158 Cal. Rptr. 281, 303-06 (1979). In *Frierson*, the California Supreme Court stressed the importance of proportionate sentencing, but questioned the necessity of the proportionality review procedure to achieve this goal. *Id.*

95 103 S. Ct. 3001 (1983).

96 *Id.* at 3016.

97 The Court had decided the issue of whether the penalty of death was proportionate to the crime of murder in *Gregg* and concluded that death was proportionate. *Gregg*, 428 U.S. at 187.

same crime in other jurisdictions.[98] The second standard, requiring review of sentences imposed on other criminals in the same jurisdiction, is of particular relevance to the issue in *Pulley v. Harris*.[99]

The Court in *Solem* stated that a comparison of sentences imposed in different criminal cases would be helpful in determining whether sentences were cruel or unusual under the eighth amendment.[100] It stated that a sentence would be excessive if "more serious crimes are subject to the same penalty, or to less serious penalties."[101] Statutory distinctions on aggravating and mitigating circumstances make some homicides punishable by death more serious than others. An appellate court would be able to measure excessiveness among death sentences by conducting a proportionality review of the type requested by the respondent in *Pulley v. Harris*.

Despite the fact that the proportionality principles of *Solem*, prior case statements on proportionality review, current state practice, and empirical evidence of disproportionality could have supported a different result in *Pulley v. Harris*, policy considerations validate the holding that proportionality review is not a constitutional requirement of a state capital sentencing scheme. Although the majority opinion in *Pulley v. Harris* barely alluded to any of these policy considerations, the considerations do support the Court's holding. First, the Court indicated that it considered a proportionality review procedure as a superfluous safeguard against indiscriminate sentencing.[102] Second, the Court acknowledged that no sentencing scheme could achieve perfectly uniform sentencing.[103] Third, the Court avoided the problem of having to define the proper scope of proportionality review. In defining this scope, the

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98 *Solem*, 103 S. Ct. at 3010.

99 The standard requiring review of the gravity of the offense and the harshness of the penalty is not relevant to a death sentence proportionality inquiry because the Court has already determined that the gravity of the offense of murder justifies the penalty of death. *See Gregg*, 428 U.S. at 187. The standard of reviewing a sentence in terms of sentences imposed for the same crime in other jurisdictions is particularly difficult to apply in a death sentence inquiry because many jurisdictions do not impose the death penalty.

100 *Solem*, 103 S. Ct. at 3010.

101 *Id.*

102 *Harris*, 104 S. Ct. at 881.

103 *Id.* Some scholars have echoed the Court's doubts about the effectiveness of proportionality review in achieving uniform sentencing within a system that emphasizes individual differences among defendants. *See, e.g.*, Dix, *supra* note 78, at 161. Dix notes that appellate review procedures have failed to meet expectations that such schemes would achieve uniform sentencing. The author attributes this to the practical impossibility of achieving uniform sentencing within a system of individualized sentencing where the sentencing authority takes all the circumstances of the individual defendant and the crime into account before imposing a punishment. *Id.* at 160-61.

Court would have had to either intrude into the legislative arena by mandating a far-reaching proportionality review procedure or mandate a procedure that it considered superfluous and ineffective. Finally, the Court may have feared imposing a burden on state and federal courts by opening a new avenue for extensive appeals on proportionality grounds by death row inmates.

## V. CONCLUSION

In *Pulley v. Harris*, the Court held that the Constitution does not require a capital sentencing scheme to have a provision for proportionality review of each sentence. The Court based its decision on the lack of importance it previously had attached to the procedure when it approved sentencing schemes that provided for proportionality review, as well as the absence of the procedure in other approved schemes. Thus, the Court ruled that the procedures of the California system eliminated arbitrariness without a review for proportionality. The Court could have come out differently, however, based on an analysis of its earlier death penalty decisions in which it lauded proportionality review, a review of empirical evidence that suggests that disproportionate sentencing may occur under a scheme without proportionality review, a consideration of current state practice of proportionality review, and an application of its proportionality principles announced in *Solem v. Helm*.

The *Pulley v. Harris* decision probably will minimize state appellate court concern with conducting thorough proportionality review procedures. A possible implication of *Pulley v. Harris* is that state appellate courts may conduct fewer cross-case comparisons, reviewing death sentences to determine only whether substantial evidence supports the sentence. Furthermore, states without a proportionality review procedure will be unlikely to adopt one unless the Supreme Court decides that a state capital sentencing scheme does not adequately check arbitrariness without proportionality review.

Despite the Court's failure to require proportionality review, *Pulley v. Harris* does help to establish appellate review as a necessary part of a constitutional capital sentencing scheme. The majority emphasized that automatic appellate review is one of the elements of California's sentencing scheme that made it constitutional. Buttressed by Justice Steven's concurrence, *Pulley v. Harris* thus establishes that a constitutional sentencing scheme requires some form of appellate review of death sentences.

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