

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1095

TITLE R. PULLEY, WARDEN, Petitioner v. ROBERT ALTON HARRIS

PLACE Washington, D. C.

DATE November 7, 1983

PAGES 1 thru 52



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IN THE SUPREME COURT OF THE UNITED STATES

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R. PULLEY, WARDEN,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 82-1095
	:	
ROBERT ALTON HARRIS	:	
-----	x	

Washington, D.C.
November 7, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:44 a.m.

APPEARANCES:

MICHAEL D. WELLINGTON, ESQ., Deputy Attorney General of California, San Diego, California; on behalf of the Petitioner.

ANTHONY G. AMSTERDAM, ESQ., New York, New York, on behalf of the Respondent.

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C O N T E N T S

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1 After the District Court denied relief, appeal
2 was taken to the Ninth Circuit. The Ninth Circuit
3 issued the ruling that we are concerned with here,
4 ruling that this Court's decisions in Gregg and in
5 Proffitt commanded the conducting of a proportionality
6 review by the state, essentially commanding a comparative
7 proportionality review, and also holding that the California
8 courts had on their own required the holding of a proportionality
9 review.

10 Now, we sought cert. from the Ninth Circuit
11 holding to clarify, and in my view, correct the holding
12 of the Ninth Circuit that the Gregg cases required
13 proportionality review. And specifically to correct
14 the holding that California cannot execute Mr. Harris
15 until that review has been conducted.

16 There are four points that I am hoping to
17 raise here today. The first one, in response to Professor
18 Amsterdam's invitation to this Court to not decide
19 the issue, I am going to urge that the issue must be
20 decided on the merits.

21 Second, I wish to address the concept of
22 proportionality and what that term means in this case
23 and to urge that proportionality in this context means
24 precisely what this Court said that it means at the
25 end of last term in *Sollin v. Helm* and in some previous

1 cases this Court has decided.

2 The third point that I am hoping to reach
3 is the question of what review is necessary on the
4 issue of proportionality and I am going to urge that
5 the review of that issue is no different than the review
6 commanded of any other constitutional issue; that is
7 it is an issue that should be addressed by the Court
8 if raised by counsel, if raised by the parties, if
9 raised on a supportive record..

10 And, finally, I am going to urge that this
11 Court should rule as a matter of law that death for
12 personally and intentionally inflicted murder is not
13 disproportionate, something the Court has come very
14 close to doing on two prior occasions.

15 Now, I would like to begin --

16 QUESTION: Mr. Wellington, I would like to
17 ask you if at some time you would explain to us in
18 your view what is the procedure that California courts
19 follow in the review of death cases. It isn't altogether
20 clear to me precisely what it is that the California
21 courts, the appellate courts at the highest level,
22 would look to.

23 MR. WELLINGTON: Certainly, Justice O'Connor.
24 Under the California statutes, every death sentence
25 is automatically appealed to the California Supreme

1 Court and that court reviews any contentions of error
2 raised by the defendant, the appellant, in that court.
3 That is the scope of review in that court.

4 Essentially, it is the same as with any other
5 appeal to the California Supreme Court with the one
6 exception that in death-sentence cases each death-sentence
7 defendant has an automatic right to have his issues
8 heard by the California Supreme Court.

9 So, the court reviews the issues that are
10 raised by the parties, raised by the defendants. That
11 is what happened here, Your Honor.

12 QUESTION: All right. And, if the defendant
13 seeks a proportionality review, then that court would
14 make it? Is that what you are saying?

15 MR. WELLINGTON: What I am saying, Your Honor --
16 I am saying that in essence and perhaps I had best
17 step back just for a second to explain what I perceive
18 proportionality review to be, to explain how the
19 California courts are constituted to give it and has
20 been giving it, in fact, where it has been asked for.

21 That is that I say proportionality review
22 is an addressing by either the California Supreme Court
23 or this Court in an appropriate case of the proportionality
24 of the sentence actually meted out by the sentencing
25 authority and that review --

1 QUESTION: Proportionality to the crime.

2 MR. WELLINGTON: Proportionality in the way
3 this Court defined proportionality last term in *Sollin*
4 *v. Helm* which includes, Your Honor an examination of
5 whether it is proportional to the crime.

6 One of the points I made in my brief, and
7 I think it is crucial to this decision, is that
8 proportionality as this Court defined it very carefully
9 last term and as this Court has used the concept in
10 its previous cases, *Endman v. Florida* and *Coker v.*
11 *Georgia*, is exactly, precisely the same proportionality
12 analysis that the California Supreme Court has used
13 for over a decade, first announced in the early '70's
14 in *In re Lynch*. It uses precisely the same three steps,
15 even announced in precisely the same order as this
16 Court has.

17 QUESTION: May I ask, further on Justice
18 O'Connor's question, does that mean they do not, in
19 the California appellate system, compare this sentence
20 with other similar cases throughout the state?

21 MR. WELLINGTON: Not on what Professor Amsterdam
22 has called a cross-case comparative basis, Your Honor.
23 The primary distinction, I believe, between the kind
24 of proportionality analysis that Harris is urging and
25 that that we are urging is that -- And, the Ninth Circuit,

1 of course, agreed with Harris' position, is that the
2 Ninth Circuit position involves an examination of all
3 of the aspects of each case, all the aggravating and
4 mitigating circumstances of the case before the court,
5 compared them with all the aggravating and mitigating
6 circumstances with every other -- either every other
7 death penalty case or, under some argument, every other
8 death eligible case that has arisen in the state since
9 the drafting of the statute.

10 QUESTION: I thought they said that the
11 California courts had started to do that after this
12 case had been appealed.

13 MR. WELLINGTON: That is inaccurate, Your
14 Honor. That is inaccurate.

15 QUESTION: They are inaccurate or my reading
16 of the opinion is inaccurate?

17 MR. WELLINGTON: The California courts have
18 not --

19 QUESTION: Because the Ninth Circuit was
20 inaccurate in thinking --

21 MR. WELLINGTON: Absolutely, Your Honor.

22 QUESTION: But, the Ninth Circuit did think
23 they were doing that.

24 MR. WELLINGTON: That is apparent from the
25 Ninth Circuit opinion.

1 QUESTION: Okay.

2 MR. WELLINGTON: The Ninth Circuit read two
3 California Supreme Court cases, Frierson and Jackson,
4 to constitute a promise by the State of California
5 to conduct proportionality review.

6 I do not see any reasonable reading of either
7 Frierson or Jackson that says that. What Frierson
8 and Jackson actually said is three things, in fact,
9 when addressed with the question -- faced with the
10 question of whether the Constitution required propor-
11 tionality review and whether the California statute
12 was unconstitutional for its failure to include the
13 proportionality review.

14 The California Supreme Court said first that
15 they do not read the majority of the Justices' opinions
16 in Gregg to require the proportionality review.

17 Second, that, nonetheless, under California
18 law, a disproportionate sentence would constitute error
19 and what they referred to as well established propor-
20 tionality principles, reference to the Lynch case,
21 they were fully capable of addressing the issue of
22 proportionality and that they had recognized in the
23 past that that was part of California's jurisprudence.

24 An examination of California Supreme Court
25 cases, both death penalty cases and non-death penalty

1 cases, makes it absolutely apparent that they do not
2 conduct that review automatically in each case. They
3 conduct the review when the issue is raised. And,
4 they don't conduct that review on this cross-case com-
5 parative basis that the Ninth Circuit and Harris have
6 urged, rather just as this Court decided last year
7 in Sollin. It is an examination of broader factual
8 questions, types of cases, categories of crime.

9 I think the essential point is that the Lynch
10 test, which was adopted as to capital punishment in
11 the Frierson and Jackson cases is precisely the same
12 three-step test that this Court established last term
13 in Sollin v. Helm.

14 So, returning back to Justice O'Connor's
15 question, what does the California Court do, the
16 California Court provides a death sentence to defendant
17 with a very clear three-step test as to what propor-
18 tionality constitutes, precisely the same three-step
19 test that this Court has provided death sentence defendants
20 nationwide.

21 QUESTION: And is not a cross-case comparison.

22 MR. WELLINGTON: That is correct, Your Honor,
23 it is not a cross-case comparative analysis.

24 It is -- I prefer frankly not to use the
25 term "proportionality review," because it implies some special

1 kind of hearing. It is a review of the question of
2 the issue of proportionality, no different, except
3 for the substantive issue itself, no different than
4 a review of the voluntariness of confessions.

5 If the defendant has a case, he raises the
6 issue and the court addresses it.

7 So, that was offered, Your Honor, to Mr.
8 Harris in this case. As the appeal was pending before
9 the California Supreme Court, as the briefs were being
10 written, the Frierson case expressly applied the eight-year
11 old, at that time, Lynch test to capital punishment,
12 applied to this growing issue of proportionality review,
13 inviting, it would seem to me, Mr. Harris to raise
14 the issue of proportionality if he was of the opinion
15 that his sentence was in any way disproportionate.

16 Although Frierson was discussed in Harris'
17 case, in his brief --

18 QUESTION: Mr. Wellington, from the way you
19 describe the California Court's approach to proportionality
20 on the basis of In re Lynch, I take it one could
21 have a proportionality review of a 50-year jail sentence
22 under the --

23 MR. WELLINGTON: Exactly, Your Honor.

24 QUESTION: -- if it is Sollin against Helm
25 you are talking about.

1 MR. WELLINGTON: That is correct, Your Honor.
2 In fact, the proportionality analysis from Lynch from
3 had been applied typically to non-death cases until
4 Frierson and Jackson, at which point the Court made
5 it clear that that same test was applicable to death
6 cases.

7 QUESTION: So you still have the constitutional
8 argument to make, I guess.

9 MR. WELLINGTON: That is correct, Your Honor.
10 The position that the Ninth Circuit has taken
11 very briefly is that this Court has already ruled on
12 the issue of proportionality review and the only language
13 on point, the only language in the entire opinion,
14 the Ninth Circuit opinion, that addresses the federal
15 Constitution issue is the notation that the California
16 Court gave no indication that it had provided the
17 proportionality review required by Gregg and Proffitt.

18 QUESTION: Mr. Wellington, am I right in
19 thinking that the Ninth Circuit opinion didn't even
20 cite our case against Jurek against Texas?

21 MR. WELLINGTON: That is correct, certainly
22 not in what could be called the holding, Your Honor.

23 QUESTION: Yes.

24 MR. WELLINGTON: It was cited in the opinion,
25 but --

1 QUESTION: But not on that point.

2 MR. WELLINGTON: That is right, notwithstanding
3 my repeated argument that Jurek stands for the proposition
4 that no such proportionality review is required.

5 I don't think it is necessary, given the
6 time given in the brief for the issue, it is not necessary
7 to go over the Gregg, Proffitt, and Jurek cases here.
8 The point that I have that I think is clear is that
9 this Court did not in those cases demand proportionality
10 review as part of the death sentence. That is the
11 issue here. That is the issue here.

12 All this Court did in those cases is approve,
13 once they had proportionality review as apart of its
14 statutory system, approve one state, Florida, which
15 the Supreme Court has said it would conduct a
16 proportionality review exactly the same way California
17 has and reading of the Florida cases shows that sometimes
18 they examine proportionality, sometimes they don't
19 examine proportionality. They, like California, address
20 the question when it is raised. Of course, there is
21 Texas which has no such provision at all.

22 I think it is important in looking at the
23 constitutional Eighth Amendment question here to draw the
24 strong distinction between cross-case analysis and
25 what I would refer to as review of proportionality.

1 This Court's decisions, the Furman decision
2 and the Gregg decision, have expressed a very strong
3 concern about the issue of arbitrariness. The procedures
4 that were referred to in the Gregg series of cases
5 whereby it would be ensured that a jury, a sentencing
6 jury, or any sentencing authority would be given fully
7 informed, guided discretion in their decision, was
8 designed to ensure a freedom -- a system designed to
9 be free from arbitrariness. That was the focus of
10 those cases, a concern that the petitions be free of
11 arbitrariness.

12 That is not all, however, that this Court
13 has provided for that area. In addition to requiring
14 the states to establish a system, a statutory system
15 designed to avoid arbitrariness, there is the separate
16 issue of proportionality that this Court has discussed
17 for almost a century since the Weems case and most
18 recently in the context of the death penalty has dis-
19 cussed in the Coker versus Georgia case, Endman versus
20 Florida, and last term I think most clearly coalesced
21 in the Sollin v. Helm case.

22 The Court has said that no matter what the
23 statutory system is, no matter how well defined it
24 is, there still must be a proportionality to the judgment,
25 even if they are a result of a presumptively valid

1 system. They must be proportional, and if, as is the
2 case in the death sentence for rape in Coker and in
3 the death sentence for a non-personally committed,
4 non-intentional murder in Endman, if they are dispro-
5 portionate, then that has to be a way to review that.

6 California has no argument with that.

7 California has used that standard for over a decade.

8 What California urges is that it must be the kind of
9 review that this Court discussed in Helm for a couple
10 of very good reasons. One has to do with the traditional --

11 CHIEF JUSTICE BURGER: We will resume at
12 1:00, Mr. Wellington.

13 (Whereupon, at 12:00 noon, the case in the
14 above-entitled matter was recessed, to reconvene at
15 1:00 p.m., this same day.)

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1 Unless we are to have two very different
2 constitutional motions of proportionality that this
3 Court announced in the Helm case last term and some
4 new one to be announced applicable to death penalty
5 cases, then I think we have to rely on what this Court
6 has said in Helm, which was based on the state work
7 done earlier in both Coker and in Endman, which is
8 precisely the same sort of proportionality that the
9 State of California has offered its death sentence
10 defendants, and, in fact, all defendants for well over
11 a decade.

12 QUESTION: Mr. Wellington, may I ask a question
13 about that? As I understand your position, it is sort
14 of like any other appellate review of sentencing.
15 He just has to raise the question. He has a right
16 to have it heard.

17 MR. WELLINGTON: That is correct, Your Honor.

18 QUESTION: And, he did not, in fact, do so
19 on his direct appeal in this case?

20 MR. WELLINGTON: He did not.

21 QUESTION: Did he do so on his state habeas
22 corpus proceeding?

23 MR. WELLINGTON: He did not address the issue
24 of the proportionality of his sentence as the California
25 Supreme Court has envisioned proportionality and as

1 this Court has envisioned proportionality.

2 There was an allegation among the cloud of
3 allegations in his petition that the California
4 statute -- They operated arbitrarily in that some others
5 have been spared under circumstances no less deserving
6 of the death penalty than Mr. Harris' petition.

7 That is not the consideration that this Court
8 has announced --

9 QUESTION: Let me ask it this way. Did he,
10 in the state proceeding, raise the question that the
11 Court of Appeals for the Ninth Circuit seems to have
12 decided?

13 MR. WELLINGTON: He did demand a proportionality
14 review and to the extent -- That is what the Ninth
15 Circuit concluded that he had a right to, yes.

16 QUESTION: And, did he get that proportionality
17 review in the state system?

18 MR. WELLINGTON: He did not get the proportionality
19 review he demanded, Your Honor. The distinction has
20 to be drawn.

21 QUESTION: Why didn't he?

22 MR. WELLINGTON: Because there is no right
23 to it under state law or under the federal Constitution,
24 Your Honor. What I am urging is that there is a right
25 to have a court consider a claim that a particular

1 sentence is disproportionate under the terms of California
2 and federal cases. That claim was not made. Mr. Harris
3 has never said that his sentence was disproportionate
4 in the terms that that word is used, that phrase is
5 used under California cases and the federal constitutional
6 cases. He has only said I want my review, I want the
7 wheels to spin.

8 QUESTION: He wants this across-the-board
9 review. What if you were to make that claim right
10 now? Would it be open to him?

11 MR. WELLINGTON: Would it be open to him?

12 QUESTION: Yes. Or must it be made on direct
13 review? That is the question I am --

14 MR. WELLINGTON: I am sorry, I didn't hear.

15 QUESTION: Would he have waived it by failing
16 to request it on his direct appeal?

17 MR. WELLINGTON: I am not arguing that Harris
18 has waived. It seems to me under --

19 QUESTION: That is not my question. My
20 question is if he were to make the claim for the first
21 time, that is the one you say is available to him as
22 a matter of California law, could he now make it?

23 MR. WELLINGTON: It is not clear, Your Honor,
24 but I believe that he could. I believe that under
25 the California habeas corpus system he would be empowered

1 to file another petition. What he would have to do
2 is convince the court that there was a prima facie
3 case made of disproportionality so that a writ would
4 be granted. He still has the statutory power to file
5 another writ.

6 QUESTION: Your kind of proportionality.

7 MR. WELLINGTON: That is correct, Your Honor.

8 QUESTION: Not a cross case?

9 MR. WELLINGTON: Not a cross case of
10 proportionality unless, of course, he has some authority
11 for that by that time. That is what I am here, of
12 course, trying to avoid.

13 QUESTION: Yes.

14 MR. WELLINGTON: I think it is important
15 that we look at why the cross case comparative
16 proportionality review is a terrible constitutional
17 idea and it is so for practical reasons as well as
18 theoretical ones.

19 The proportionality review this Court has
20 talked about in Sollin is something the courts can do.
21 It involves an examination of broad range of human
22 behavior, rape of an adult woman, murder committed
23 by someone who wasn't there and didn't intend murder.
24 And, it involves an examination of how such broad ranges
25 of conduct are treated by the legislatures and by the

1 courts.

2 The cross-case comparative review that Harris
3 and the Ninth Circuit speak of, if it is to be done
4 as it is clearly intended, every factor that may be
5 legitimately constitutionally considered by a jury
6 would have to be cranked into that analysis.

7 The courts, the tort courts that conducted
8 this review would have to consider the entire range
9 of considerations justifiably before a jury.

10 I would urge that is simply not possible.
11 I would urge two things. It is simply not possible
12 for any one court to compare the hundreds of cases
13 that would be before them, some -- for this Court to
14 do it, some 1200 nationwide in all of their particulars.
15 It would be directly contrary to this Court's language,
16 Justice Powell's language, writing for the majority
17 in Sollin, where the Court said that absent some specific
18 authority, it is not the role of the appellate court to substitute
19 its judgment for that of the sentencing courts as to
20 the appropriateness of a particular sentence.

21 If we are to look at all of the factors that
22 go into a sentencing authority's determination to con-
23 demn a man, then necessarily, unavoidably, the Court
24 doing that is going to wind up substituting its judgment
25 for that of the sentencing authority.

1 That is something that is not only as a
2 practical matter impossible, it goes far beyond what
3 appellate courts are constituted to do, far beyond
4 what this Court has set its rule out to be with regard
5 to the state sentencing courts.

6 This Court's role has been announced in its
7 proportionality cases and is to examine the broad limits
8 within which a jury's discretion is to operate. That
9 is exactly what the Sollin case, what the Coker case,
10 and the Endman case do. It examines broad limits and
11 expressly returns to the jury or leaves with the jury
12 the power and even the obligation to operate using
13 its own judgment within those limits.

14 To give you an idea of how difficult it would
15 be for a court to exercise this sort of cross-case
16 analysis, two facts which continually strike me about
17 this case would have to be considered. There is the
18 picture that remains so strongly with me of Robert
19 Harris, after killing these two teenaged boys, sitting
20 down eating their hamburgers and laughing at his younger
21 brother for not having the stomach to do the same thing.

22 That is something properly committed to the
23 jury, that picture, their making their own decision
24 as to what kind of person is this and what kind of
25 judgment should be handed down with regard to him.

1 There is the picture of Robert Harris flicking
2 a bit of flesh off the end of his pistol and laughing
3 about how he sure blew that blonde boy's brains out.
4 That is properly commended to the jury for their con-
5 sideration on the issue of death.

6 But, if we are to do a cross-case analysis
7 of all death penalty cases in the nation, some court
8 is going to have to find a way to assign a qualitative
9 value to those --

10 QUESTION: There isn't any claim that a state
11 needs to look at all the cases in the country.

12 MR. WELLINGTON: I am sorry. Well, speaking
13 just within a state, the California Supreme Court --

14 QUESTION: Yes, all right.

15 MR. WELLINGTON: -- would have to look --

16 QUESTION: It is not the nation, it is the
17 state.

18 MR. WELLINGTON: Although the issue specifically
19 in this case is that, Your Honor, and yet, as this
20 Court has applied proportionality, proportionality
21 analysis, it has done the analysis on a nationwide
22 basis. So, it certainly could be extended to the nation.

23 But, looking just at the California Supreme
24 Court's obligation as it is envisioned by the Ninth
25 Circuit, they would have to look at those two factors,

1 those two factual matters, as well as the hundreds
2 of others presented in a case, find some way to compare
3 them in their own minds, in their own hearts, with
4 matters just as horrible but quite different in another
5 case.

6 There is no other case in California, probably
7 not in the nation, that featured facts of the type, of the
8 two types I just mentioned, and the facts in this case
9 would deal with several of those, but there is no other
10 case that has exactly that sort of behavior.

11 So, doing a cross-case analysis is going
12 to have to have find some way to assign like a number value
13 to those kinds of facts that then compares to the number
14 value assigned to the parade of horrors in some other
15 case to judge the jury's determination.

16 This is not the way this Court has operated
17 with juries. I would urge that this is not the way
18 the federal Constitution envisions any court operating
19 with juries.

20 What happens in the death-sentencing process
21 is, in my view, a very spiritual determination is made
22 by whatever body, whether it be a judge sitting as
23 a sentencing authority or whether it be the jury.
24 A very spiritual decision is made as to this individual,
25 guided by the information and the statutory guidance

1 within a state. That decision holds within itself
2 all of the factors, all of the factors.

3 QUESTION: Mr. Wellington, would you think
4 that the federal Constitution might dispense with this
5 cross-case proportionality review in a particular state
6 and insist that it be performed in another because
7 of the differences in the capital punishment system
8 or would you think that if the Constitution doesn't
9 require this cross-case proportionality in California,
10 as you are arguing, it wouldn't anywhere?

11 MR. WELLINGTON: If it does not require it
12 in California, Your Honor, it does not require it anywhere
13 with one exception.

14 QUESTION: What, for example, if it didn't
15 require it in Texas? Would that mean it wouldn't be
16 required any place?

17 MR. WELLINGTON: Absolutely, Your Honor.
18 Absolutely, Your Honor, unless -- There are two unlessees
19 there. I need to do two caveats to that. Unless
20 a court were to find a state that did not provide the
21 assurances against arbitrariness that the --

22 QUESTION: Now you are qualifying your answer.

23 MR. WELLINGTON: Well, certainly, Your Honor.

24 QUESTION: Well, certainly. Well, where
25 might the proportionality, cross-case proportionality

1 review be required? You were about to tell me, weren't
2 you?

3 MR. WELLINGTON: I was hoping to, Your Honor.

4 QUESTION: Yes.

5 MR. WELLINGTON: I can imagine a court finding
6 that a state did not meet the Gregg requirements of
7 informed, guided discretion and concluding that nonetheless,
8 because it had a cross-case comparative approach that
9 might counterbalance the deficit.

10 However, in a case like California, which
11 clearly meets the requirements set out in Gregg, the
12 informed, guided discretion --

13 QUESTION: You have said before you interpret
14 Gregg as not critically depending on proportionality
15 review.

16 MR. WELLINGTON: I think that is correct,
17 Your Honor.

18 QUESTION: I mean cross-case proportionality.

19 MR. WELLINGTON: That is correct, Your Honor.

20 QUESTION: You would have a different view
21 if that were a critical part of Gregg? The California
22 system might then be in trouble.

23 MR. WELLINGTON: I think perhaps not, Your
24 Honor, because the --

25 QUESTION: Perhaps not.

1 MR. WELLINGTON: Well, there is Proffitt
2 and there is Jurek decided at the same time. Jurek,
3 of course, has not only no cross-case analysis, it
4 has no indication there is any proportionality review
5 at all. Proffitt --

6 QUESTION: Well, is the California system
7 like the Georgia system, more like Georgia than Florida?

8 MR. WELLINGTON: As to proportionality review,
9 Your Honor?

10 QUESTION: No, just as a system of --

11 MR. WELLINGTON: Yes, in --

12 QUESTION: It certainly is more like Georgia
13 than it is Texas.

14 MR. WELLINGTON: I would say so, yes. I
15 think that is clearly so, Your Honor, although it would
16 appear to me that the system in Texas, involving answering
17 the three questions, can be seen as providing far fewer
18 safeguards than the California system. The California
19 system at the very least provides the safeguards the
20 Florida system does and the proportionality review,
21 the machinery for reviewing proportionality in California
22 is certainly as efficacious as that in Florida.

23 QUESTION: Your kind of proportionality.

24 MR. WELLINGTON: That is correct, Your Honor,
25 my kind of proportionality.

1 QUESTION: All right.

2 MR. WELLINGTON: I think that -- I think
3 it is important that we look at the role of the jury
4 as this Court has envisioned it in death penalty cases
5 as expressing the conscience of the community and --

6 CHIEF JUSTICE BURGER: Your time has expired
7 now.

8 MR. WELLINGTON: Thank you, Your Honor.

9 CHIEF JUSTICE BURGER: Mr. Amsterdam?

10 ORAL ARGUMENT OF ANTHONY G AMSTERDAM, ESQ.

11 ON BEHALF OF THE RESPONDENT

12 MR. AMSTERDAM: Mr. Chief Justice, and may
13 it please the Court:

14 I would just like to make three points to
15 the Court this afternoon in response to Mr. Wellington's
16 argument.

17 First, I should like to explain why I disagree
18 with Mr. Wellington's answer to Justice O'Connor's
19 question and Justice Stevens' question as to what
20 California law is and why I believe that California
21 law may well offer all of the proportionality review
22 that we are asking for in this case and more.

23 California law in short is not limited to
24 *Sollin v. Helm*.

25 Secondly, I would like to argue that this

1 Court's decisions plainly imply, if they do not already
2 squarely held, that federal Eighth Amendment review
3 is also, in death cases, not limited to *Sollin v. Helm*.

4 And, finally, I would like to clear up any
5 question as to what Harris asked for in the state courts
6 to demonstrate that he has asked in the state courts
7 for exactly the kind of proportionality review that
8 California law does, in fact, allow and that we urge
9 the Eighth Amendment allows.

10 I will then ask that the judgment below for
11 those reasons be affirmed.

12 QUESTION: Eighth Amendment allows or compels?
13 Does the Eighth Amendment allow proportionality review
14 or compelled it?

15 MR. AMSTERDAM: The Eighth Amendment compels,
16 California law allows Eighth Amendment review,
17 proportionality review.

18 Let me start with California law and then
19 I will move to the Eighth Amendment. The important
20 thing to keep in mind about California law is that
21 it is in evolution, that none of us is very sure at
22 the moment exactly what California law does provide
23 or what the California Supreme Court does do.

24 In *Lynch*, the California Supreme Court
25 announced a decision which was quite like this Court's

1 decision in Sollin v. Helm. However, as the California
2 cases, which are collected in our brief in note 18
3 at pages 32 to 33 indicate, California has gone well
4 beyond that. The Rodriguez, for example, holds that
5 22 years imprisonment for a child molester is clear and
6 unusual punishment because it is disproportionate under
7 California law, something I suggest goes rather well
8 beyond Sollin v. Helm.

9 Moreover, in a case which was decided since
10 we filed our brief, although it is cited in the reply
11 brief at page 34, which is People v. Dillon, the
12 California Supreme Court reduced a first degree murder
13 conviction to second degree murder because it violated
14 the California prohibition against excessive punishments.
15 It was clearly first degree murder within the statute.

16 QUESTION: Mr. Amsterdam, is that a state
17 constitutional provision which you refer to as the
18 California prohibition against excessive punishment?

19 MR. AMSTERDAM: State. The California clear
20 or unusual punishment clause, yes.

21 QUESTION: Yes.

22 MR. AMSTERDAM: The Dillon case, the defendant
23 was clearly within the first degree murder statute.
24 It was a killing in the course of a robbery. Moreover,
25 the California Supreme Court held that the defendant

1 had killed intentionally which was why it reduced this
2 punishment to second degree, which in California is
3 intentional murder.

4 Now, we have an intentional killing, one,
5 I might add, which was done by nine bullet wounds in
6 the course of a robbery. And, the California Supreme
7 Court, which could have held that that punishment was
8 not excessive, indeed, which could have held under
9 this Court's decision in Gregg, that the death penalty
10 was not excessive for an intentional killing, went
11 ahead and reduced under California law the sentence
12 of life imprisonment, and, indeed, reduced the degree
13 of offense from first degree murder to second degree
14 murder.

15 Now, to come to Justice Stevens' question
16 and a question Justice White has also been asking,
17 what about cross-case review.

18 There is the beginning of that in Dillon.
19 Dillon finds that the death penalty was excessive --
20 Excuse me, that the first degree murder conviction
21 and a life sentence was excessive on the facts of the
22 Dillon case largely because of individual characteristics
23 of the defendant.

24 But, the court adds, and I am now reading
25 from 194 California Reporter, at page 420, "finally,

1 the excessiveness of defendant's punishment is underscored
2 by the petty chastisement handed out to the six other
3 youths who participated with him in the same offenses."

4 Although this was a conspiracy to commit
5 robbery and a murder in the course of it and all of
6 the coparticipants were guilty of robbery and murder
7 under California law, the Court says the one member
8 of the gang who was an adult was allowed to plead no
9 contest to charges of conspiracy to commit robbery
10 and all of othe other minors were simply made wards
11 of the court.

12 Says the court in short defendant received
13 the heaviest penalty provided by law while those jointly
14 responsible with him received the lightest, the proverbial
15 slap on the wrist.

16 Now, of course, this is not cross-case com-
17 parison in the sense of some other murder case, but
18 it is a beginning of comparing the death sentence with
19 other sentences, those meted out to Dillon's accomplices
20 in this offense.

21 Moreover, in the Dillon case, in a footnote,
22 26 -- Again, I am referring to 194 California Reporter
23 at 413, Footnote 26, the court cites with approval
24 California Court of Appeals cases, including the Keogh
25 case and the Vargas case, which is cited in our brief

1 in Footnote 18.

2 The Keogh case does exactly what Justice
3 Stevens and Justice White have been asking about.
4 It engages in cross-case comparison.

5 Keogh involved a sentence of four consecutive
6 sentences for forgery as a result of which the defendant
7 ended up with a 64-year sentence.

8 The Court of Appeals, in an opinion by Justice
9 Jefferson, looked at the median term of imprisonment
10 served by forgers in California, found that few of
11 them went to jail at all and when they did it was for
12 22 to 24 months, and on that kind of a comparison proceeded
13 to invalidate, again, Justice Rehnquist, under the
14 California cruel or unusual punishment clause, the
15 Lynch clause, the punishment imposed on Keogh.

16 Now, I think it is indisputable that California
17 law goes well beyond *Sollin v. Helm*. It goes beyond,
18 although it is in evolution and it is unclear exactly
19 how far it has gone so far, it goes beyond anything
20 that we need to ask for in order to get the relief
21 that we have requested in this case which is to have the
22 California Supreme Court compare other death sentences
23 and life sentences in comparable cases with *Harris*.

24 QUESTION: Mr. Amsterdam, if you are correct,
25 I take it it is your submission that the California

1 law has changed between the time that Harris' state
2 court proceedings took place and now.

3 MR. AMSTERDAM: Justice Rehnquist, I am not
4 sure I recall that it changed. There is an evolution
5 of the Lynch doctrine, like any doctrine which starts
6 out with a principle and then evolves --

7 QUESTION: If it isn't an actual change,
8 why didn't the Supreme Court of California do for Harris
9 what the Ninth Circuit did for him?

10 MR. AMSTERDAM: I have no idea. That is
11 all we are asking for.

12 QUESTION: Well, certainly the state of the
13 law so far as Harris versus the People are concerned
14 is probably best found in the case involving Harris
15 versus the People, isn't it?

16 MR. AMSTERDAM: The only effect of the decision
17 below is to take the case back to the California Supreme
18 Court and then they will have a chance to take a look
19 at it.

20 QUESTION: Well, they have had one chance
21 and they have given no indication they want a second
22 chance.

23 MR. AMSTERDAM: Well, I am not sure that
24 is entirely true. They have had one chance. There
25 has been no decision on the merits of the proportionality

1 review issue. The Ninth Circuit below squarely found,
2 and I don't think there can be any question, that the
3 California Supreme Court has not, on the merits, given
4 Harris proportionality review.

5 QUESTION: What right would there be for
6 a federal court in a habeas case to send it back to
7 a state court for a matter of state law?

8 QUESTION: None whatever.

9 QUESTION: How could the Ninth Circuit do
10 that anyway if you were right?

11 MR. AMSTERDAM: There is no -- The reason
12 for that, Justice O'Connor, is that there are three
13 other claims in this case which the Ninth Circuit has
14 sent back to the Federal District Court for a hearing
15 on the merits. That ruling has not been challenged
16 in this Court by California.

17 The question of why it should go back to
18 state court is why any unexhausted federal habeas petition
19 goes back to state court.

20 QUESTION: But, if the Ninth Circuit passed
21 on it, why were they passing on an unexhausted claim?

22 MR. AMSTERDAM: The Ninth Circuit?

23 MR. AMSTERDAM: If this is an unexhausted
24 claim in your view, why did the Ninth Circuit consider
25 it at all?

1 MR. AMSTERDAM: Because there is --

2 QUESTION: You can't have it both ways.

3 MR. AMSTERDAM: Perhaps I misspoke myself
4 when I said an unexhausted claim. Technically it is
5 exhausted under the technical rule of Roberts v. LaVallee.
6 We have been into the state courts. And even though,
7 as Your Honor points out, state law changed under Roberts,
8 we are still technically exhausted.

9 Why the Ninth Circuit passed on the claim
10 was that the California courts had all refused to stay
11 Harris' execution. He was due to die --

12 QUESTION: Isn't that a pretty good indication
13 that the California courts thought that he was con-
14 stitutionally punished?

15 MR. AMSTERDAM: No, I don't think that is
16 so. I think that this case, in effect, slipped between
17 the cogs in the California court system.

18 Harris' brief in the California Supreme Court
19 was filed before the California Supreme Court had decided
20 in the Jackson case that proportionality review was
21 required. Frierson preceded the filing of Harris'
22 brief, but Frierson was only a minority opinion on
23 the question of requiring a proportionality review.

24 After Harris' brief was filed, Jackson was
25 decided. The proportionality requirement of Frierson

1 became a majority requirement, and then Harris' case
2 was simply dealt with by saying we dealt with all these
3 issues in Jackson. There was no look on the facts
4 of this case at any question of whether Harris' penalty
5 fit his crime.

6 I think the easiest way to see what the California
7 courts did was to see what they said. The California
8 opinion in Harris' case says at the beginning, we find
9 no merit in any of these claims, but since this is
10 a death case, we are going to talk about all of the
11 issues we are to decide. Then it goes ahead and decides
12 15 distinct questions, none of which have anything
13 to do with the fitness of the death sentence.

14 I think it is inconceivable, reading an opinion
15 like that, to say that the California courts, in fact,
16 gave Harris proportionality review.

17 Now, there is -- Whether because the law
18 has changed or is changing, there is no doubt that
19 there has been an evolution over the course of the
20 term that Harris has been in the courts in California
21 law. At the moment, we believe that the latest pro-
22 nouncements of the California Supreme Court suggests
23 that it is at least very likely that California law
24 allows Harris to review his --

25 QUESTION: Well, if you are correct, I take

1 it even if the decision we are arguing about now were
2 reversed, Harris could go back into the California
3 courts and get exactly what the California courts think
4 he ought to have.

5 MR. AMSTERDAM: Agreed. And, the only question,
6 therefore, is whether a federal stay of execution should
7 remain in effect while he does so and that is the only
8 effect of the decision below.

9 The decision below does nothing more than
10 send him back to the California courts and that is
11 why we have been urging that it stands *Rose v. Lundy*
12 on its head, it stands this Court's usual reluctance
13 to reach federal constitutional questions unnecessarily
14 on its head, for this Court to go ahead and decide
15 the Eighth Amendment issue when two things are true.

16 One, California law may give Harris what
17 he wants, and, two, the only effect of the decision
18 below is to send him back to that court to ask the
19 court to keep him alive.

20 QUESTION: But, one of our responsibilities,
21 as well as to avoid deciding unnecessary constitutional
22 questions ourselves, is to see that courts of appeals
23 and district courts don't unnecessarily wallow into
24 federal constitutional error. And, certainly, if you
25 are right, that is what the Ninth Circuit did here.

1 MR. AMSTERDAM: We would have --

2 QUESTION: Do you agree with me or not?

3 MR. AMSTERDAM: We would have no problem
4 if this Court were to vacate the ground of decision
5 below, say that there is no need to reach an Eighth
6 Amendment question in this case because California
7 law is still unclear and affirm the decision below
8 on the ground that the only relief given in fact below
9 was to say that the California court had to take a
10 look at this issue.

11 QUESTION: How we could both vacate and affirm
12 which you have suggested in a single sentence?

13 MR. AMSTERDAM: The only effect of the judgment
14 below is to give interim relief while Harris proceeds
15 to --

16 QUESTION: What constitutional basis is there
17 for that? We just can't say we think it would be a
18 good idea to look at this case again and stay the state's --
19 and just derail the state system. Just because we
20 think that the California courts made a state law mistake
21 or something we should send it back to them and stay
22 their -- just stay any further proceedings against
23 Harris?

24 MR. AMSTERDAM: Well, in non-death cases,
25 if an unexhausted petition is filed, the appropriate

1 disposition of it --

2 QUESTION: This is exhausted you tell us.
3 You have just said it was technically exhausted.

4 MR. AMSTERDAM: It is technically exhausted,
5 but the policies behind the exhaustion doctrine, which
6 are that if the state court may still give relief in
7 this case, it makes no sense for the federal courts
8 to go jumping in with both feet. Those policies still
9 apply.

10 Now, in a non-death case, the effect of the
11 application of those policies would be to give no relief
12 and simply say to the prisoner go back to state court.

13 In a death case, however, where the state
14 courts refuse to stay execution and it is imminent,
15 the federal courts may act and here is the jurisdictional
16 reason --

17 QUESTION: And the state court refuse to
18 give relief because they have decided that his conviction
19 and his sentence are in accordance with state law and
20 the federal court is suppose to say you really don't
21 understand state law to the state courts?

22 MR. AMSTERDAM: The federal court would only
23 act if there was a viable federal issue and the only
24 reason why it would act is to say we are not ready
25 to reach that issue because there are still state issues

1 that may resolve this case. And, in a situation like
2 that, the court is confronted with the question, do
3 we let the fellow die --

4 QUESTION: But, if the state courts refused
5 to stay his execution and reject any state law claim,
6 how can the federal court nevertheless sustain them
7 or say that you should take another look at it?

8 MR. AMSTERDAM: It has to come back into
9 federal court in any event. There are three other
10 issues in this case that are already in federal court
11 on the merits.

12 The question is -- There are really only
13 three options to the court below and we are asking
14 this Court of approve one of them.

15 One, to let Harris die despite the fact that
16 there are claims clearly ready for hearing in a federal
17 court and a claim that it makes sense to send back
18 to the state courts; to go ahead and adjudicate the
19 Eighth Amendment question and other questions, which
20 we do not think is appropriate; or to say we will stay
21 his execution, we will wait until the California Supreme
22 Court has clarified whether state law gives him the
23 kind of proportionality review that he is asking for,
24 and then we will take all of the federal issues at
25 once and decide them as *Rose v. Lundy* contemplates.

1 QUESTION: When was the Supreme Court of
2 California's decision, what year, affirming Harris'
3 conviction? Do you remember?

4 MR. AMSTERDAM: When?

5 QUESTION: When, what year?

6 MR. AMSTERDAM: It was in -- February 11, 1981.

7 QUESTION: How soon do you suppose this litigation
8 would finally become final if the courts were to follow
9 your suggestion?

10 MR. AMSTERDAM: Harris would immediately
11 file in the California Supreme Court a request for
12 proportionality review. According to the decision,
13 the court below would have to begin such a process
14 in four months and it could have as much time as it
15 then wanted to reach judgment on it.

16 There is one --

17 QUESTION: May I ask a question? I am still
18 somewhat puzzled. In his collateral proceeding in
19 the state court, did he raise the across-the-board
20 proportionality review issue?

21 MR. AMSTERDAM: Yes.

22 QUESTION: Well, then he lost in that case,
23 including in the California Supreme Court, did he not?

24 MR. AMSTERDAM: We are talking now about
25 the California state habeas corpus petition?

1 QUESTION: Yes.

2 MR. AMSTERDAM: He raised it and the California
3 Supreme Court denied the petition without issuing an
4 alternative rule to show cause, which means they did
5 not get to the merits.

6 QUESTION: But, they had an opportunity in
7 that proceeding to do precisely what the Ninth Circuit
8 has now said they should do.

9 MR. AMSTERDAM: I agree. I agree.

10 There is no question in the world what the
11 California Supreme Court did with this case other than
12 to say go away. It is very unclear. We are not con-
13 tending that it is clear what they did. What I am
14 contending is simply that, since it is unclear what
15 they did, and since California law has now evolved
16 to the point where it may very well give the kind of
17 relief which we are seeking under the Eighth Amendment --

18 QUESTION: But, Mr. Amsterdam, is it not true
19 that California law had so evolved by September of
20 1982, which is when -- No, March of 1982, wasn't it,
21 that they denied the -- the California Supreme Court
22 denied the collateral review?

23 MR. AMSTERDAM: Ah --

24 QUESTION: I mean for there to be a change
25 it has to be after the denial of collateral review

1 for it to be relevant, doesn't it?

2 MR. AMSTERDAM: Well, again, California has
3 turned their sharp corners. It is difficult looking
4 backwards to say exactly what California was or wasn't
5 at a given time. It is true that the cases at that
6 time didn't go as far as Dillon does now and as far
7 as the cases go now, all the more reason, we think,
8 why the California court ought to get another crack
9 at it.

10 The only --

11 QUESTION: You think it ought to get another
12 crack at reading what it does or what it might read
13 into the Ninth Circuit opinion about whether cross-
14 case proportionality review is constitutionally required?

15 MR. AMSTERDAM: We would urge, as we did
16 in the state habeas petition, that the California court
17 give that kind of cross --

18 QUESTION: Well, I know, but didn't the --
19 Isn't there substantial indication in the Ninth Circuit
20 opinion that there is a federal constitutional require-
21 ment?

22 MR. AMSTERDAM: The Ninth Circuit opinion
23 finds it a federal constitutional requirement.

24 QUESTION: What do you think the California
25 courts would do in the face of that?

1 MR. AMSTERDAM: We believe that the Ninth
2 Circuit was right on the merits. We also believe this
3 Court need not reach the question. I will be glad
4 to get why we believe it is right on the merits.

5 QUESTION: Well, if you are going to send
6 it back to the California courts, in the face of this
7 holding by the Ninth Circuit, what do you think the
8 California courts would do? I mean they might feel
9 compelled to give them proportionality review even
10 if it wasn't required under state law.

11 MR. AMSTERDAM: The Ninth Circuit decision
12 clearly holds that it is required under the Eighth
13 Amendment whether or not it is required under state
14 law.

15 We are prepared to uphold that view on the
16 merits.

17 QUESTION: I think it might be helpful if
18 you argued --

19 MR. AMSTERDAM: Let's just take a look at
20 exactly what the Eighth Amendment status of proportionality
21 review is.

22 QUESTION: Cross-case proportionality.

23 MR. AMSTERDAM: Cross-case proportionality
24 review.

25 I agree with Mr. Wellington on one point

1 which is that the place one has to look to find the
2 answer to the Eighth Amendment question is in the Gregg,
3 Proffitt, Jurek cases and that explanation of what
4 is demanded of a state -- that sentencing scheme.

5 Recently this Court summed up in a very few
6 words what is demanded by saying that what is demanded
7 is that the states apply the death penalty with reason-
8 able consistency or not at all.

9 Now, the kind of review which is required,
10 we contend, by the Eighth Amendment is only so much
11 appellate review as is required to produce reasonable
12 consistency.

13 What a court needs to do is to look at the
14 facts of the case in front of it, to look at the judgments
15 and the facts of comparable cases and to ask whether,
16 in the class of case, including this one, the death
17 penalty has been so infrequently and erratically imposed
18 that the concerns of Furman are violated. And, the
19 state seems to concede that that is necessary in its
20 reply brief.

21 The court says that -- The state in its reply
22 brief says that Harris has not contended -- This is
23 on page 23 -- Harris has not shown and it cannot be
24 shown that either an overwhelming majority or a significant
25 minority of legislatures, courts, or juries in states

1 with capital punishment have acted to repudiate death
2 as a punishment for such crimes as Harris'.

3 There is no way in which Harris could show
4 or in which a court could find that courts and juries
5 in similar cases have repudiated the death penalty
6 unless Harris is permitted to lay in front of a court,
7 and we say the California Supreme Court, the facts
8 of his case and the judgments rendered in comparable
9 cases so that the court can ask the question, looking
10 at the pool of cases like Harris', has the death penalty
11 been so infrequently applied, so irregularly applied,
12 that the considerations which brought about this Court's
13 Furman decision apply to Harris' death sentence. That
14 is all that is involved. It isn't some special mystic,
15 it is not some special rule, it is simply a straightforward
16 application of the requirement of this Court that con-
17 sistency in death sentencing is a pre-condition of
18 constitutional death sentences.

19 QUESTION: Just what do you mean by a com-
20 parable case? I think you used that term. What elements
21 must be the same? Must the victim be the same age
22 or approximately the same age, must the murder have
23 been committed in the same way, the events after the
24 murder, must they all be compared?

25 MR. AMSTERDAM: The state court has very

1 considerable leeway on all those questions.

2 QUESTION: How do they do it? How do they
3 do it?

4 MR. AMSTERDAM: How do the state courts do
5 it?

6 QUESTION: Yes.

7 MR. AMSTERDAM: A variety of ways. Some
8 state courts look at all first degree murders and then
9 they say do the aggravating circumstances in this case
10 and the aggravating circumstances in that case match
11 those of three, four, or five. After they have found
12 that, they say is death or is life the norm in those
13 other cases.

14 Some states say it is limited to other cases
15 of first degree murder in which the same aggravating
16 circumstance is found.

17 There isn't any one way to do it. There
18 are very sophisticated ways to do it and very simply
19 ways to do it.

20 I would suggest that this Court has, in a
21 sense, done it itself.

22 As far as we are concerned nothing more is
23 constitutionally required than what this Court did
24 in similar judgments in Furman. For example, Justice
25 White's opinion in Furman said essentially I have seen

1 a number of these cases come through. I am left with
2 an abiding conviction, after looking at numbers of
3 these cases, that uniformity and even-handedness are
4 lacking, that some people are going to death while
5 others exactly the same live. All we said is that
6 the federal Constitution requires a state appellate
7 court of general jurisdiction to look at the cases
8 passing through the tubes and make exactly that kind
9 of judgment.

10 QUESTION: Would it be enough for you if
11 instead of calling up on the record all the cases,
12 the judges just said we have a firm conviction, having
13 seen all these cases, that the death penalty conforms
14 to the norm here? That is all they say.

15 MR. AMSTERDAM: If the California Supreme
16 Court looks at cases and says that --

17 QUESTION: Well, it says we have -- All these
18 cases comes before us and we have the general impression
19 now and conviction that this sentence is not out of
20 line or would they have to go through the whole litany,
21 this case, that case?

22 MR. AMSTERDAM: That is right. I am not
23 contending for one minute that the Eighth Amendment
24 tells the state supreme court how to write its opinion.
25 If the court demonstrates that it has engaged in the

1 kind of look at --

2 QUESTION: They just do it by memory. They
3 don't go back to the records and look at them all again,
4 they just do it by memory. They say we have seen all
5 these cases and this case just isn't out of line.

6 MR. AMSTERDAM: Can they do it by memory?
7 Again, I think that they have to listen to counsel's
8 argument. If counsel says here are these other various
9 cases -- Whether a judge believes that he or she
10 remembers the facts of the case ago, reads it in a
11 brief, I have never thought the Constitution imposed
12 any restraints on that.

13 As long as the court does a conscientious
14 job of looking to see whether the death penalty in
15 a kind of case like the one at bar is so erratic that
16 the court can say this is not the regular and even-
17 handed imposition of a death penalty. So long as they
18 make that check, that is all the federal Constitution
19 requires.

20 QUESTION: Mr. Amsterdam, if they must do
21 something, it is not enough to rely on their memory.
22 You say they must look at the cases to which counsel
23 calls to their attention. Did counsel in this case
24 call any court's attention to other cases similar to
25 this?

1 MR. AMSTERDAM: Oh, yes. The state habeas
2 petition -- For example, there were alleged nine cases
3 that had been decided on appeal, but there were seven
4 other cases that were said to be multiple murder cases
5 like Harris' that the court ought to look at. The
6 state habeas petition essentially took this position.
7 The state habeas petition said, and alleged with great
8 specificity and supporting facts, Mr. Wellington's
9 position to the contrary notwithstanding, it alleged
10 with great specificity that --

11 QUESTION: Is that petition in the Joint
12 Appendix?

13 MR. AMSTERDAM: Sir?

14 QUESTION: Is that petition in the Joint
15 Appendix?

16 MR. AMSTERDAM: No. The state petition was
17 somewhat different than the federal petition, although
18 the McCabe affidavit to both petitions is the same
19 and that gives the general tenor of the state position.

20 The state proceedings are not in the federal
21 court record unhappily.

22 QUESTION: Now, the federal habeas petition,
23 does that have the same kind of showing in it?

24 MR. AMSTERDAM: The McCabe affidavit and
25 the allegations in the federal petition, yes, at --

1 If you look at the federal habeas petition at pages
2 5, etc.

3 QUESTION: Where do we find that?

4 MR. AMSTERDAM: Particularly paragraphs 1
5 and 5.

6 QUESTION: Do we have that before us?

7 MR. AMSTERDAM: Of the federal habeas petition.

8 QUESTION: Is that material here in the record?

9 MR. AMSTERDAM: I simply wanted to get --

10 QUESTION: Is it in the record now before
11 this Court?

12 MR. AMSTERDAM: The federal habeas petition
13 is in the paragraphs to which I have referred are.
14 They are not printed in the Joint Appendix, but they
15 are in the record.

16 Moreover, the McCabe affidavit, which is
17 the crucial thing and presents the comparative cases,
18 is attached to the federal habeas petition as well.

19 CHIEF JUSTICE BURGER: Your time has expired
20 now, Mr. Amsterdam. Your time has been used up too.

21 Thank you, gentlemen, the case is submitted.

22 (Whereupon, at 1:44 p.m., the case in the
23 above-entitled matter was submitted.)

24

25

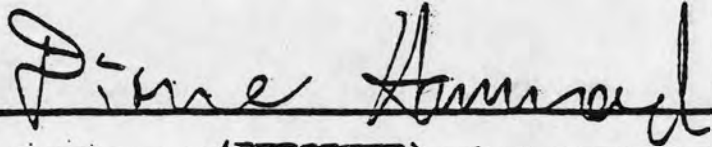
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