To Furman or Not to Furman

Robert M. Sanger
TO FURMAN OR NOT TO FURMAN:
THAT IS NOT THE QUESTION

By Robert M. Sanger

Introduction

Two law review articles have been published simultaneously in the last couple of months that seem to directly contradict each other. One makes the remarkable claim that capital litigators should “forget” the Supreme Court’s Furman v. Georgia decision while the other makes the claim that litigators need to “wake up” Furman. One says that Furman is relied on almost exclusively while the other claims that, until recently, Furman has been abandoned. In a sense, they pose the question, “To Furman or not to Furman?”

Capital litigation is one of the areas of law in which law review articles and scholarship are critical. As practitioners, we attempt to keep abreast of the latest developments both in academic scholarship and in what is making its way through the courts. These two new articles are provocative. At least on their faces, they really raise the bigger question of whether it would ever be appropriate in capital cases to strategically select some claims at the expense of others. For actual capital litigators, the answer is that in any given capital case all issues specific to the case have to researched and briefed. In addition, in a capital case, all plausible systemic challenges to the death penalty itself need to be raised comprehensively even if they have been previously litigated.

Capital Case Briefing in Practice and the Dueling Articles

Capital litigation is different than other litigation. It might be possible to “pick your battles” and raise only certain claims in civil litigation or, perhaps, in non-capital criminal cases. There is a theory that to do so will make it more likely that the appellate court will seize the important claims and take them more seriously. But that is not the case in capital litigation. There is no legitimate basis to withhold arguable challenges, even those which may have been overruled previously. For a lawyer to forego arguable claims in post-conviction proceedings would raise issues of effective representation under the Sixth Amendment. The United States Supreme Court has reconsidered issues and given defendants relief on issues that seemed to have been resolved. Any given capital case brief will have a theme and emphasize certain issues but nothing should be left on the table.

These two law review articles seem to have been released simultaneously and without any indication that they are intended as part of a debate between the authors. They do appear to adopt diametrically opposed views regarding the raising of Furman issues in capital litigation. They not only make opposing claims about what ought to be done but about what has been done. The “Furman issues” referred to can be characterized as “narrowing.” That is, although the Furman decision was certainly “fractured” with separate opinions, both it and subsequent cases stand for an identifiable proposition: to avoid the death penalty being imposed arbitrarily, there must be a mechanism that “narrows” the choice of who dies. This “narrowing” is intended to impose death on the “worst of the worst.” Neither of the authors of these two articles (or anyone else, for that matter) believes that the capital punishment system in any jurisdiction even comes close to achieving this


2 The California Supreme Court reluctantly acknowledged that this is required practice in order to exhaust claims even in second, third or subsequent petitions for writs of habeas corpus. The remedy was to try to streamline the practice. In re Reno, 55 Cal.4th 428 (2012).

3 There is debate on this issue even in “ordinary” criminal appeals based on the Sixth Amendment right of the defendant to the effective assistance of counsel.

PROP 47 TRAINING FOR CACJ MEMBERS

http://www.cacj.org/Legislation/Prop-47.aspx

California voters passed Proposition 47, with 58.5% of the vote. Proposition 47 takes effect immediately and changes sentences for low-level nonviolent crimes such as simple drug possession and petty theft from felonies (or wobblers) to straight misdemeanors. The provisions of Proposition 47 are fully retroactive, setting forth a mechanism for relief for defendants who are either currently serving sentences or have already completed their sentences. The savings from this sentencing reform will directly finance K-12 schools, mental health treatment, and victim services.

Statutes affected by Prop. 47

1. PC 459 – commercial burglary not exceeding $950 is now a misdemeanor called "Shoplifting."
2. PC 470, 471, 472, 473, 475, 476, 484f, & 484i (forgery statutes) – are now misdemeanors, unless a defendant is also convicted of identity theft under PC 530.
3. PC 476a – checks with nonsufficient funds not exceeding $950 if defendant does not have three or more priors for PC 470, 475, or 476.
4. PC 490.2 – Grand theft – obtaining property by theft not exceeding $950 is now considered petty theft and a misdemeanor.
5. PC 496 – Receiving stolen property is now a misdemeanor if the value of the property does not exceed $950.
6. PC 484/666 – Petty theft with a prior.
7. H&S 11350, 11357a, 11377 – certain specified categories of drug possession are now misdemeanors

Disqualifying Priors

The above sentencing reductions to straight misdemeanors under Prop. 47 do not apply to those with one or more convictions for PC 667, subd. (e)(2)(C)(iv) which include several registerable sex offenses, homicide including attempt and solicitation, life in prison and death offenses; OR an offense requiring 290 registration.

Previously Convicted Persons/ Resentencing

If a person is serving a sentence for any of the affected statutes, a person may petition for a recall of sentence before the trial court that entered the judgment of conviction. This recall of sentence will be granted unless the court finds that resentencing would pose an unreasonable risk of danger to public safety.
goal in practice but that is where the agreement ends.

The first article is by Robert Smith, an Assistant Professor of Law at the University of North Carolina and the Litigation Director of the new 8th Amendment Project which is seeking to establish a voice among abolition groups. Smith’s article entitled “Forgetting Furman” makes a rather bold claim that scholars and capital litigators have been inattentive. He claims that he has developed a strategy to attack capital punishment based on an expansion of the Roper v. Simmons6 and Atkins v. Virginia7 rationale. That is, he claims that attacks on the death penalty should be based on the culpability of defendants and should not be focused on Furman “narrowing.”

Roper v. Simmons was the Supreme Court case that abolished capital punishment for a defendant who was a minor at the time of the offense. It is, in part, based on the recognition that children are not as developed mentally and, therefore, not as culpable as adults. Atkins v. Virginia was the case that ended the death penalty for defendants who are intellectually disabled (mentally retarded) — again, in part, based on culpability. Together, the cases represent a jurisprudence that can arguably be expanded to cover other aspects or degrees of culpability. The ultimate argument is that, once this process is taken beyond strict boundaries, the entire capital punishment system is not sustainable.

Smith promotes this claim but also takes a dismissive view of the work of scholars and capital defense practitioners. He says, “This insufficient culpability problem is the biggest obstacle to a constitutionally sound death penalty, and it is a fatal one. It is not, however, the theory most often advanced by scholars or relied upon by defense lawyers. Instead, Furman v. Georgia remains the darling of capital punishment scholars and lawyers.” In the words of the title, Smith claims that we need to forget the alleged shortsighted reliance on Furman and follow his approach. He predicts that he will win.

Ironically, at virtually the same time, the opposing point of view was published by Sam Kamin and Justin Marceau. Kamin and Marceau are Professors of Law at the University of Denver and have written extensively on capital case issues. Their article claims that Furman, far from being a “darling,” has actually been ignored. Their article is entitled “Waking the Furman Giant.” On the face of it, the authors seem to disagree with both the historical claims of Smith and with his formula for winning capital cases. Kamin and Marceau are less polemical than Smith but do say, “… over the last twenty-five years of constitutional litigation over the death penalty, Furman has been relegated to the status of a historic relic.” They claim that the key to ending the death penalty is to reinvigorate the efforts to use Furman’s “narrowing” as the fatal blow to capital punishment.

Portions of Robert Smith’s Forgetting Furman text make valid arguments. Contrary to his polemic about his theory being ignored by others, the expansion of Roper and Atkins as an attack on the death penalty is a well-known theory and well used by actual criminal practitioners. It has been briefed routinely in capital litigation and it has been the subject of capital case training sessions for several years. It has been used because it raises fundamental problems with the death penalty.

This valid observation in Forgetting is tarnished by the larger claim that employs “straw person” and ad hominem criticism of scholars and practitioners for being foolishly blinded by the attraction of Furman and its progeny. He makes no factual showing that Furman is, in fact, regarded as a “darling.” Setting up scholars and practitioners is attention-getting but is not necessary to the valid points made in his article. Contrasting the article to the real world of capital litigation, the historical claim of Forgetting Furman seems unsupported. Yet, the challenge of Kamin and Marceau to “wake” Furman is left unanswered.

What to Do?

The juxtaposition of these two articles, Forgetting Furman and Waking the Furman Giant, at least on the surface, frames a question for scholars and lawyers: Should the capital practitioner raise issues related to “narrowing” under Furman v. Georgia8 and subsequent cases, or not? The answer, as intimated from the beginning of this piece, is: Whether or not to raise Furman should not be the question at all.

First, all those who litigate capital cases harbor the fantasy that the case they are currently working on will be the case to get the attention of the Court and that it will end the death penalty. If a lawyer or a project emphasizes one theory of litigation, it does not mean that, in representing real clients, other claims should not be made. It is inevitable that capital punishment will be abolished some-
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day. It may be the result of a court decision or the result of a political effort like that of California’s Proposition 34, which almost passed in 2012. If capital punishment is abolished by a court decision, whatever issue (among the many issues) raised that got the attention of the court will be the winner—and the lawyers on the case will have the right to be proud. However, no serious practitioner will limit the claims to a favorite claim or two.

For instance, dozens of claims were raised in the course of litigating the case of Jones v. Chappell. Of those claims, the claim of uncertainty and delay was the one that persuaded Judge Carmac Carney to declare the death penalty unconstitutional. As that case makes its way through the Ninth Circuit and, perhaps, to the United States Supreme Court, we will all watch to see if that claim is the claim that finally does the trick. The rest of us will all continue to raise that issue in our current briefs, as we have for many years, but we will not proclaim that this is the solution unless and until it is finally successful.

Second, of course, we not only raise all the issues we can in actual litigation with the hope that one or more will be successful, we also hope that the constant raising of all of the issues will weaken the resolve of the courts to continue to tinker with the machinery of death. While Judge Carney did not discuss other issues regarding the in-

12 United States District Court, Central District of California, Case No. CV 09-02158-CJC.
13 Document 117 Filed 07/16/14.

firms of capital punishment in California in his written order, one might suspect that other odious aspects of capital punishment had, at least, a subtle influence on him in reaching the decision that he did. But, whether abolition comes down as a result of a case or as the result a vote, the fact is that the entire abolition movement continues to loosen the screws that will make the ultimate dismantling of the death penalty possible. No one lawyer, one project, one political group or one issue will ever be able to take credit for that result.

Third, narrowing, as I pointed out in my 2003 Santa Clara Law Review article was just one of 83 points made by the Illinois Commission in criticizing the Illinois capital punishment system. However, as I also pointed out, California suffered from almost all of the same defects and narrowing was (and is) an even bigger defect here than there. Remember, proponents of Proposition 7, the Briggs Initiative, argued in the voter pamphlet that the new (1978) law would make all first degree murders death eligible. Steven Shatz and Nina Rivkind painstakingly surveyed the actual practice in homicide cases in California. Steve Parnes and others at the California Appellate Project (CAP) in the Tuilaepa case did a meticulous review of the briefs and appellate records on file to show how, for instance, “circumstances of the crime” were used to support death no matter what they were (e.g., time of the crime: early in the morning, mid-morning, noon, afternoon, evening, middle of the night). Although the argument was rejected, for the time being, in Tuilaepa v. California, we have continued to incorporate CAP’s research in our narrowing claims in every case thereafter with the hope it will prevail someday.

Fourth, Smith’s argument is that he believes that capital scholars and litigators haven’t noticed (due to being infatuated with the “darling” Furman) that there is a powerful argument to be made that Roper and Atkins undermine the validity of the entire concept of capital punishment. I certainly agree that it is a powerful argument, particularly in cases with compelling facts, and that is precisely why it has not gone unnoticed. In one of our cases, we filed the Roper/Atkins expansion argument (over a year ago) in our Supreme Court brief on behalf of the client who was 18 years and four weeks old and a Special Education (but arguably not Atkins) high school student at the time of the incident. Even where the argument is not as fact specific as it was in that case, it should be and is argued. This is not a secret and we have had specific sessions dedicated to this precise theory in capital defense seminars for several years. Smith has a good point but it detracts from by his dismissiveness toward current scholars and practitioners and the claim that Furman should be forgotten.

Fifth, it turns out that Kamin and Marceau actually take a more holistic approach to their argument. On the face of it, or by reading the title of the article, Waking the Furman Giant, one might
think that they are the poster children for those very scholars and lawyers that Smith was criticizing. However, that is not the case. Kamin and Marceau develop the Furman argument and incorporate the Roper and Atkins arguments. This is, in fact, what has been done in actual practice and what is advocated in capital case trainings. Their article is a welcome review of the cases and literature and, to the extent that the polemics are set aside, the substantive argument in Smith’s article blends with Kamin and Marceau to make an overall cogent set of arguments.

**Conclusion**

Despite the dueling law review articles, “To Furman or not to Furman” is not the question. Both articles make valid points and practitioners should read them. But, ultimately, we have to raise every plausible argument in the real world of capital litigation.

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