Link to the full document

The PROFESSIONAL

A PUBLICATION OF THE HENRY LATIMER CENTER FOR PROFESSIONALISM

VOLUME XVIII, NO. 1 WWW.FLORIDABAR.ORG/PROF/ SPRING 2021

THE FLORIDA BAR STANDING COMMITTEE ON PROFESSIONALISM

CHAIR:
Ita Neymotin

VICE-CHAIR:
Elizabeth Hunter

BOARD LIAISON:
Steven Davis

HENRY LATIMER CENTER FOR PROFESSIONALISM

DIRECTOR:
Rebecca Bandy

ASSISTANT DIRECTOR:
Katie Young

PROGRAM COORDINATOR:
Beth Kirkland

STUDENT EDUCATION AND ADMISSION TO THE BAR COMMITTEE

CHAIR:
Brijesh Patel

VICE-CHAIR:
Joshua Magidson

BOARD LIAISON:
Todd Baker

Professionalism: Helping to Overcome Unjust Sentencing and Discrimination in Death Penalty Litigation

By Ita M. Neymotin, Regional Counsel Second District Court of Appeal
Chair of the Florida Bar Standing Committee on Professionalism



Chris Boldt, Homicide Division Managing Attorney for The Office of Criminal Conflict & Civil Regional Counsel, Second District Court of Appeal



Byron Hileman, Homicide Chief for The Office of Criminal Conflict & Civil Regional Counsel, Second District Court of Appeal



Ita M. Neymotin, Regional Counsel for The Office of Criminal Conflict & Civil Regional Counsel, Second District Court of Appeal, & Chair of The Florida Bar Standing Committee on Professionalism



Honorable Brian Haas, State Attorney for the Tenth Judicial Circuit of Florida



Honorable Howard 'Rex' Dimmig, Public Defender for the Tenth Judicial Circuit of Florida

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications" (Oath of Admission to The Florida Bar, 2011, p. 1). Professionalism must be adhered to for our justice system to function properly. This is especially important in death penalty litigation when the stakes are so high.

In order for a justice system to work, the people subject to the justice system must believe in its effectiveness, and trust in its fairness. Professionalism helps to ensure that the justice system functions as it was intended, where both the prosecution and defense can present their evidence without fear of retribution and criticism from the bench, as well as opposing parties.



Dr. Evsey Neymotin: Dean of Kazakh State University. Refusenik 1974-1979.

In the former Soviet Union, professionalism was never in place in court proceedings. The Soviet system was a corrupt justice system, and was never concerned with impartiality, or the perception of impartiality. My father and I were both born, at the same Birthing Center of Almaty, in Kazakhstan, which is a country in Asia, in the former Soviet Union. As an immigrant from the Asian part of the former Soviet Union, I have lived witnessing the effects of discrimination firsthand.

In 1972, my father, Dr. Evsey Neymotin, became the youngest Dean of Kazakh State University, at the age of 28. He defended two dissertations, the first in Applied Mathematics, and the second in Physics. When he declared his wish to leave the Soviet Union, my parents and I were immediately labeled, "enemies of the people" and we became Refuseniks for 5 years, because that is how long it took for the Soviet Union to finally release us from its horrible clutches. We were lucky to eventually leave, but unfortunately not everyone had the same luck.

When we arrived in the United States, in New York City in 1979, my father had a very difficult time finding a job as an immigrant, from the Asian part of the former Soviet Union. He would wake up every morning, walk to the subway station, and purchase a copy of the newspaper, *The New York Times*. He looked through the wanted advertisements daily, for a total of 6 months, in an attempt to find a job. As soon as he would see a position advertised in his field, he would travel on the subway to the place of employment, to hand deliver his resume. Unfortunately, the outcome was always the same, as soon as they would see my father, and hear his accent, they would immediately tell him the position had already been filled. The employers, at that time, were not interested in hiring an immigrant from the Asian part of the Soviet Union, no matter what his qualifications. Despite the fact that my father studied English in Kazakhstan for 5 years before we left the Soviet Union, and was fluent in English, he was always denied an interview for employment based on how he looked and spoke. It was only after a friend of the family recommended my father to an employer, that he was finally hired at the Rockefeller Institute, to calculate mathematical models of the growth rate of Malaria.

My personal experience with discrimination starts from when I was an immigrant from Kazakhstan, to when I decided to apply for the position of Regional Counsel for the Office of Criminal Conflict and Civil Regional Counsel, Second District Court of Appeal. At that time, I chose to seek guidance from others, prior to applying, and I was told by many people, "You can't be the Regional Counsel, you're under 40, and you're a woman! All the Regional Counsels are men." Regardless of this negative and discriminatory feedback, I chose to pursue my dream, and I applied

continued...

Unjust Sentencing and Discrimination

from page 10

for the position of Regional Counsel for the Second District Court of Appeal. My mentors were Ms. Michel Doherty, our community leader in Fort Myers, Florida, retired Sheriff of Lee County Mike Scott, as well as the Honorable Kathleen Smith, Public Defender for the 20th Judicial Circuit. They did not buy into these discriminatory statements and told me they believed I could be Regional Counsel, and supported me then, as well as to date. In December 2011, I was very honored to become the first female, and the youngest attorney in the State of Florida, to be appointed as the Regional Counsel for the Office of Criminal Conflict and Civil Regional Counsel, Second District Court of Appeal.



Samuel Neymotin: Executed on August 29th, 1937 – USSR. Exonerated and sentence commuted on August 19th, 1957.

I know firsthand the importance of a fair and impartial justice system. The Soviet Union had a corrupt justice system and the death penalty was not given out justly or fairly, and often, innocent people were executed. One example was my great-grandfather Samuel Neymotin, who in the former Soviet Union was a political prisoner. He was tortured until he confessed to his crime of teaching religion to his children, and then executed by firing squad on August 29, 1937. On August 19, 1957, by order of the USSR, he was proven innocent, and his sentence was to be commuted. Although the Soviet justice system was very different from our justice system, one thing remains constant in both. In death penalty litigation there is not always room for second chances. We need to get it right the first time.

To truly understand the importance of professionalism in death penalty litigation, it is important to examine the background of the death penalty, as well as its many transitions in the State of Florida. No other category of cases has as many requirements of the attorneys imposed by the Supreme Court of Florida, as death penalty litigation. Death penalty defense teams are required to have first and second chair attorneys. Each of those attorneys has to meet additional stringent requirements to be able to defend death penalty clients.

The death penalty has been around since the formation of the United States of America. As of 2019, the death penalty was enforced by 27 states, according to the Death Penalty Information Center. Many changes have ensued within the death penalty in recent years (Death Penalty Information Center, 2021, p.1).

During the 1970s, attorneys in Florida were not required to meet the now heightened standards required by Florida Rule of Criminal Procedure 3.112, regarding attorney eligibility to litigate death penalty cases. Judges might have appointed a tax attorney to try a death penalty case; because of the absence of minimum standards of professionalism and experience, many death penalty cases were overturned on appeal (Neymotin, 2019, p. 19).

In 1972, the landmark case of *Furman v. Georgia* was decided. In that case, the United States Supreme Court held that arbitrary and discriminatory matters cannot be utilized in implementation of the death penalty because the 8th and 14th Amendments prohibit cruel and unusual punishments (U.S. Const. amend. VIII. XIV.). Due to the *Furman v. Georgia (1972)* decision, the sentences of 633 prisoners, who at that time were on death row, were invalidated. In 1972, a moratorium on death penalty came into effect (Johnson, 2001, p. 1101). The case of *Gregg v. Georgia (1976)*, a United States Supreme Court case, which was decided in 1976, ended the moratorium on death penalty case.

The effects of unreasonable, arbitrary, and discriminatory matters seen in Furman, were addressed in the *Gregg v. Georgia (1976)* case by requiring juries to be instructed on specific sentencing guidelines. Juries were instructed that they could recommend life in prison for the defendant, if mitigating factors were presented. Juries were likewise instructed that they could recommend the death penalty for the defendant, if the prosecuting attorney was able to prove aggravating circumstances.

Gregg v. Georgia (1976) case allowed death penalty litigation to go forward (Johnson, 2001, p. 1102). As a result of the *Gregg v. Georgia (1976)* decision, Georgia's new constitutional death penalty statute now included the bifurcation of the guilt and penalty phase (Johnson, 2001, p. 1102). Although the new standards which were implemented in the *Gregg v. Georgia (1976)* state statute reduced arbitrary and wrongful death sentences, it also served to greatly complicate the death penalty process, making it much more expensive (Johnson, 2001, p. 1102).

The case of *Asay v. State (2016)*, decided by the Florida Supreme Court, held that *Hurst v. State (2016)* was only retroactive to cases which occurred after the case of *Ring v. Arizona (2002)*. As a result, all of the defendants who were on death row sentenced after 2002, were now entitled to have a new penalty phase trial. The Florida Supreme Court further held that for the imposition of the death penalty, a unanimous jury verdict must be obtained in the penalty phase. At that time, roughly 200 cases were in need of having a new penalty phase trial (Auslen & Clark, 2016, p. 1).

On January 12, 2016, the U.S. Supreme Court issued its opinion in *Hurst v. Florida (2016)* finding Florida's death penalty scheme unconstitutional, in so far as it relied on judicial fact-finding to sentence a defendant to death, treating the jury function as only advisory in nature. In issuing this ruling, the Court relied on its 2002 decision in *Ring v. Arizona (2002)*, which held that a jury, not a judge, must find the aggravating factors necessary to impose a death sentence. In all capital cases prior to 2016, Florida juries gave the judge a sentencing recommendation, which the judge considered before weighing the aggravating and mitigating factors, and imposing a sentence. The jury verdict forms did not specify how the jurors decided the existence of aggravating factors, mitigating factors, and whether the aggravators outweighed the mitigators. In March 2016, in response to the U.S. Supreme Court's decision, the Florida legislature re-wrote its capital sentencing statute to require juries unanimously find the existence of at least one aggravating factor and recommend a sentence of death by a vote of at least 10-2.

In October 2016, however, the Florida Supreme Court issued its ruling in *Hurst v. State (2016)*, holding that under state and federal law, Florida juries 1) must unanimously find aggravating factors proven beyond a reasonable doubt, 2) unanimously find that the aggravating factors are sufficient to impose death, 3) unanimously find that the aggravating factors outweigh the mitigating factors, and 4) unanimously recommend a sentence of death.

The court ruled that the legislative amendment to the state's death penalty statute made in March of 2016 was unconstitutional, because it did not require a unanimous recommendation for death. The court also held that the decision applied retroactively to cases that were not final as of the date of the 2002 *Ring* ruling.

continued...

Unjust Sentencing and Discrimination

from page 11

Due to this fact, over 150 Florida death row prisoners became eligible for resentencing. In March 2017, the Florida Legislature again amended its death penalty statute, this time requiring a unanimous jury recommendation for death.

Another possible transition may come with the Florida Supreme Court case of *State v. Poole (2020)*. The Court in *Poole* held that the only relevant question when evaluating a death sentence under *Hurst,* was whether the jury had found one aggravating factor sufficient to expose the defendant to a possible death sentence.

In an interview, the Honorable State Attorney Brian Haas, for the Tenth Judicial Circuit, stated, "The case of *Poole* was a significant case in death penalty litigation. It seemed to provide some clarity from the uncertainty of the *Hurst* case." Mr. Haas' office prosecuted the case. Mr. Haas further went on to explain that in regular cases, the victim knows, as well as the other parties in the case, that conclusion of the case means the ability for the parties to move forward. In a death penalty case, however, "the job never ends." He explained how the families of the victim(s) are instructed with the current law at the time of the trial. If the defendant is sentenced to death, the victim's family believes that it is what will occur, and they will finally get closure, and move on. Unfortunately, when the law changes, sometimes those families must be told that a new penalty phase must occur for the defendant, which is what happened in some of the *Hurst* re-sentencing cases. At this point, the healing process for the families is interrupted, "and the band-aid is ripped off." Mr. Haas went on to explain that the stakes are extremely high in death penalty cases, and honesty and professionalism are crucial aspects in these cases. Mr. Haas further stated that he expects the attorneys in his office to always be professional, but in death penalty cases, professionalism must be on a higher level. For this reason Mr. Haas stated, "We must make certain that attorneys trying death penalty cases meet the highest burden of professionalism, because the stakes are so high for both the prosecution and defense" (B. Haas, personal communication, March 11, 2021).

The Office of the Public Defender for the Tenth Judicial Circuit has been one of the leaders in preparing defense attorneys to try death penalty cases. The Death Penalty Steering Committee of the Florida Public Defender Association (FPDA) developed a continuing legal education program specific to death penalty litigation and was instrumental in having minimum standards for capital attorneys added to the Florida Rules of Criminal Procedure. One of the minimum standards required of both lead counsel and co-counsel is to attend at least once every two years a capital case training program such as the FPDA's "Life Over Death" conference. Two Assistant Public Defenders from the Tenth Judicial Circuit, Austin Maslanik followed by Pete Mills, have served as Chair of the Death Penalty Steering Committee, and both have been frequent speakers at death penalty training programs.

The Honorable Public Defender Rex Dimmig, for the Tenth Judicial Circuit, was lead counsel on the *Poole* case. During his interview, Mr. Dimmig explained how professionalism is now more important than ever in death penalty litigation. Since the Florida Supreme Court has recently ruled it will no longer engage in proportionality review of death sentences, the appropriateness of a prosecutor's decision to seek the death penalty is not subject to appellate review. The likelihood of disparate application of the death penalty within Florida's 20 Judicial Circuits is greater now than at any time since *Furman*. Further, Mr. Dimmig went on to say that both, the defense attorneys, as well as the prosecuting attorneys, need to be held to similar standards of professionalism. As it stands now, if a defense attorney is found to have provided ineffective assistance of counsel in 2 cases, he or she is not allowed to practice death penalty litigation for 5 years. No such sanction exists for the assistant state attorney if he or she is found guilty of prosecutorial misconduct.

Mr. Dimmig went on to further address the "false view" that the defense bar is not sympathetic to the families of the victims. He states, "We see firsthand the impact that these offenses have on all the parties involved, and it causes us to be very cautious and respectful when we are speaking with the survivors of the victim." Mr. Dimmig further stated that he and his office spend a great deal of time focusing on professionalism in death penalty litigation because he understands its importance within these cases (R. Dimmig, personal communication, March 15, 2021).

Over the past 10 years, I, as The Regional Counsel for The Second District Court of Appeal (1st chair qualified) and Byron Hileman, my Homicide Chief for the Office of Regional Counsel Second District Court of Appeal, who has tried 50 capital cases since 1977, and my Managing Homicide attorney Chris Boldt, have carefully chosen and trained attorneys in the Regional Counsel Second District Office to be qualified to litigate capital cases under Supreme Court rules.

Homicide Chief Byron Hileman stated:

> Our client's trust and confidence are essential to professional representation. To that end we use The Golden Rule to treat clients and their families as you would want to be treated if the situation were reversed. You have to be as thorough as possible and not cut any corners.

Mr. Hileman further stated, "You literally have a person's life in your hands, not just their freedom." Mr. Hileman went on to explain that the attorney trying death penalty cases must take professionalism very seriously because, "If you don't, you are literally risking the client's life" (B. Hileman, personal communication, March 8, 2021).

Mr. Chris Boldt, in an interview stated that, "Florida is number one in the country for exonerations and false convictions, and professionalism must never be overlooked in death penalty litigation." Mr. Boldt further stated that this is the reason that, "the level of scrutiny in death penalty cases is on a much higher level than in any other criminal cases" (C. Boldt, personal communication, March 8, 2021).

Due to the heightened requirements imposed by the Supreme Court, the cost of death penalty litigation continues to rise, in large part due to attorney labor costs, as well as investigation and mitigation costs (Neymotin & Neymotin, 2019, P.1059). To combat this continuing crisis, and to ensure proper representation for death penalty clients, Regional Counsel, Second District Court of Appeal has proposed The Cross Jurisdictional Death Penalty Program, which is currently being examined by the Florida Legislature, for its possible implementation. This program would save a great deal of taxpayer dollars, as well as ensure that death penalty clients are ethically and effectively represented.

Looking back at the story of my great-grandfather, Samuel

continued...

Unjust Sentencing and Discrimination

from page 12

Neymotin, who was executed prior to being declared innocent, proves that professionalism in our justice system helps to safeguard against this type of flagrant injustice. Professionalism is key in ensuring that our justice system continues to be fair and impartial. This is especially important in death penalty litigation since it can mean the difference between a person's life and death. The appearance of impartiality, as well as impartiality itself, becomes a vital aspect for the people to have faith in their justice system. For true impartiality to occur, professionalism must be in practice. It is crucial for all of us to protect the integrity of our justice system, and to ensure that fairness and professionalism are intact, for it is that same justice system that must work to truly protect us all.

References

Asay v. State, 210 So. 3d 1 (Fla. 2016)

Auslen, M., & Clark, K. (2016, December 22). Florida Supreme Court: More Than 200 Prisoners Unconstitutionally Sentenced to Death May Get New Sentencing Hearing. Retrieved September 20, 2018, from https://deathpenaltyinfo.org/node/6636

"Death Penalty Information Center - State by State." *Death Penalty Information Center*, 2021, deathpenaltyinfo.org/state-and-federal-info/state-by-state.

Dieter, R. C., Esq., Executive Director, 1994, Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty.

Fla. R. Crim. P. 3.112

Furman v. Georgia, 408 U.S. 238 (1972)

Gregg v. Georgia, 428 U.S. 153 (1976)

Hurst v. State, 147 So. 3d 435 (2015)

Hurst v. Florida, 136 S. Ct. 616 (2016)

Johnson, A. D. (2001). The Illusory Death Penalty: Why America 's Death Penalty Process Fails to Support the Economic Theories of Criminal Sanctions and Deterrence. Hastings Law Journal, 52(5), 3rd ser., 1101-1130. Retrieved February 13, 2019, from https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3455&context=hastings_law_journal.

"Oath of Admission to The Florida Bar." *The Florida Bar*, 2011, www.floridabar.org/prof/presources/oath-of-admission-to-the-florida-bar/.

McLaughlin, J. (2014). THE PRICE OF JUSTICE: INTEREST-CONVERGENCE, COST, AND THE ANTI-DEATH PENALTY MOVEMENT. Northwestern University Law Review, 108(2), 675-710. Retrieved from http://ezproxy.fgcu.edu/login?url=https://search-proquest-com.ezproxy.fgcu.edu/docview/1528366179?accountid=10919

Neymotin, E. (2017). *Hunted by The Hammer and Sickle*. Fort Myers, FL: CreateSpace.

Neymotin, I. M. "A Case Study on the Rising Cost of Death Penalty Cases." *Florida Gulf Coast University*, 2019.

Neymotin, I. M., Neymotin, F. "Minimizing the 'Price' of the Death Penalty in Florida." *The Empirical Economics Letters*, vol. 18, no. 10, Oct. 2019, pp. 1057–1061.

Neymotin, Y. (2018). *The Story of My Life*. Fort Myers, FL: CreateSpace.

State v. Poole, 292 So.3d 694 (Fla. Jan. 23, 2020)

Ring v. Arizona, 536 U.S. 584 (2002)

U.S. Const. amend. VIII.

U.S. Const. amend. XIV.

The Center's very own Rebecca Bandy helped promote professionalism in the community by speaking with Miss Jackson's 5th grade class at Killearn Lakes Elementary about the brain's limbic system and emotions. She also shared The Florida Bar resources and discussed the importance of teaching attorneys about emotional intelligence. The students experienced nothing but positive emotions while creating their stress relieving glitter jars!

