

# DEFENDING DEATH

BY MAIZIE PUSICH, ESQ.

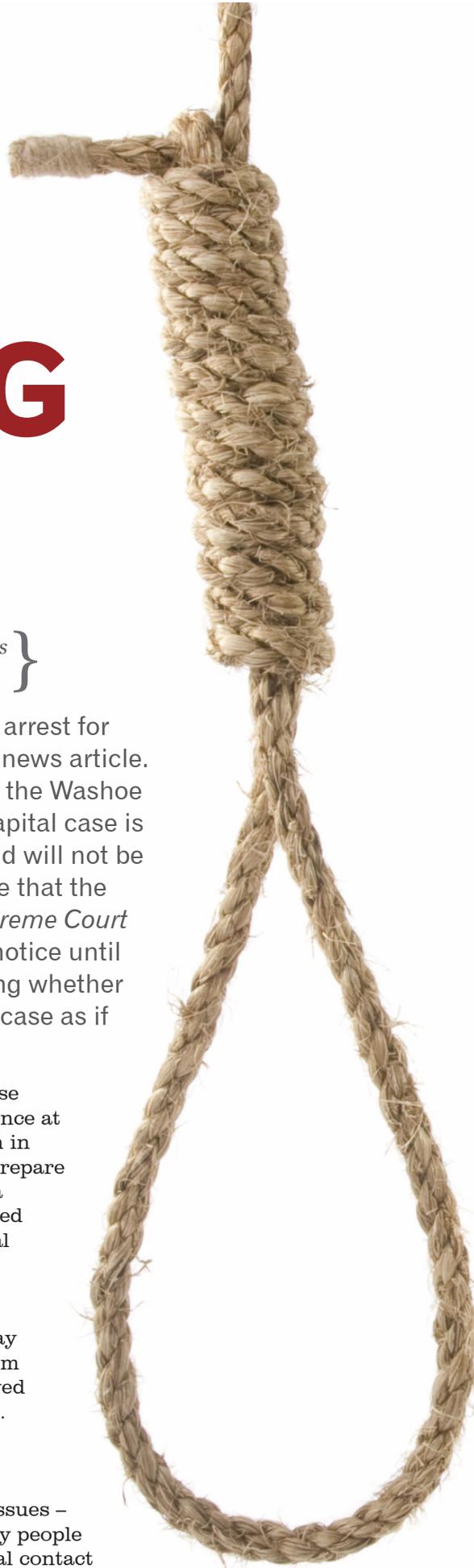
{ Note: because the majority of capital defendants are men, the defendants described below will be referred to by male pronouns. }

Defense starts working on a murder case as soon as an arrest for murder is known. Often the first notice we get is from a news article. We contact the accused to learn if he will be requesting the Washoe County Public Defender. Qualification in a potentially capital case is presumed. Almost all of the defendants are indigent, and will not be given a bail in any amount until a determination is made that the case will not have a Notice of Intent to Seek Death (*Supreme Court Rule, (SCR) 250(4)*). The state is not required to file the notice until 30 days after the District Court arraignment. Not knowing whether the defendant will face death, the defense prepares the case as if it will be governed by Nevada Supreme Court Rule 250.

Rule 250 limits representation in capital cases to criminal defense attorneys with certain levels of experience defending crimes of violence at trial, and with certain minimum levels of continuing legal education in capital issues (SCR 250(b) and 250(e)). But no rule can adequately prepare a defender for the labor-intensive and emotional experience that is a capital case. The rule also requires that two attorneys defend, assisted by an investigator, mitigation specialist and appropriate professional consultants (SCR 250(f) and ADKT 411).

We will first meet our client at the jail infirmary where he is assigned to suicide watch. Suicide watch is the first irony that will confront our client as we prepare his defense. Although the state may have already decided it is trying to kill him, the jail protects him from himself and everyone else from the time of his arrest until he is moved from the jail. Suicide watch is put in place for the client's protection. But, it is isolating. Our client will have limited visits, on a more restricted schedule than other inmates, until he is reclassified.

At the first meeting we gather information about the client's upbringing, education, work history, criminal history and medical issues – past and present. We are strangers to our client, but become the only people he can call for free, communicate with confidentially or have physical contact with – other than his jailers.



The defense team begins receiving hundreds, sometimes thousands, of pages of police reports, witness statements and photographs from the prosecution. We will also get hours of audio and video recordings. We need to discuss this information with our client, but leaving it with him at the jail creates a risk of snitches. Enterprising inmates trying to save themselves may read the documents, then claim our client has confessed the information to them. Although courts have viewed inmate witnesses with increasing skepticism, they often influence juries (*Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

Capital defenders often find we are trying to explain frightening and complex information to clients with limited education and previously untreated mental illness. (A sad reality is that one of the best places for an indigent to get appropriate mental health treatment is at the Washoe County Jail. But, you have to be accused of a crime and incarcerated to take advantage of it.) As is the case with other crimes, a large number

of the people accused of murder also have significant issues with alcoholism and addiction.

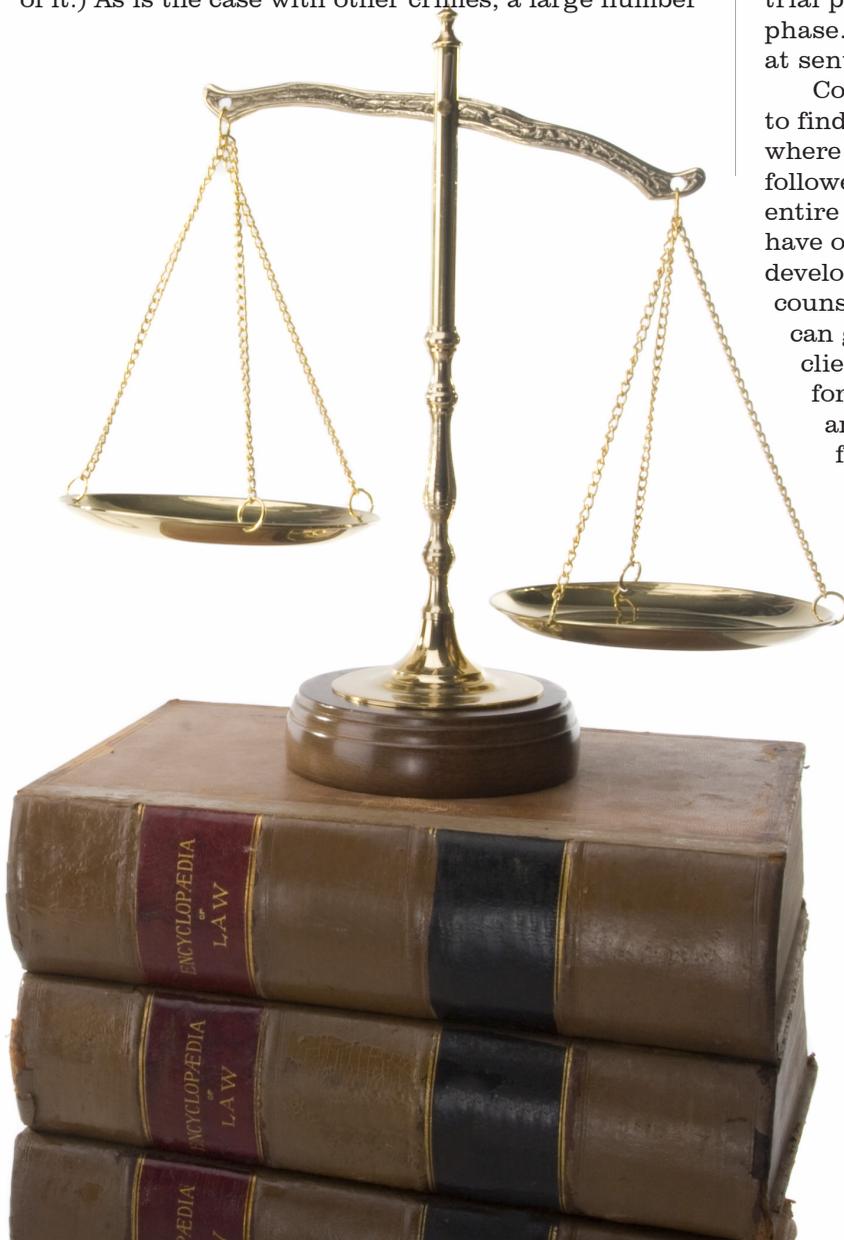
After facing the situation that suicide watch is imposed on a person the state may be trying to kill, the second irony we address is that we prepare the defense back to front. We do this because where the potential penalty is death, our primary focus throughout the case is avoiding that, even in cases with strong trial phases defenses. We have to start with our client and his family, explaining we will be focusing throughout our case on sentencing, even though he has not been convicted of anything. This upsets our client and his loved ones. They do not want us to be asking them about how to mitigate the sentence and save his life. They want us to explain how we are going to walk him out at the end of trial and send him home.

The Public Defender's Office prepares the defense in a capital case in teams. One or more defenders and investigators are assigned to work mostly on the trial phase, often referred to by many as the guilt phase. A separate team begins working on mitigation at sentencing.

Counsel reviews every document and statement to find any weakness in the evidence, or any situation where legal statutes or procedures have not been followed. The investigators look through the client's entire history, including circumstances that may have occurred before his birth, influencing his later development. We find and confer with teachers, counselors, pediatricians, neighbors – anyone who can give us an idea how to explain the murder the client is accused of committing. We need help from forensic experts, mental health professionals, and often interpreters and consular employees for foreign nationals. Although a client may ultimately decide he does not want to live and die in prison, we have to be prepared to present a complete defense at sentencing (*Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 12 LE.d2d 360 (2005); *Wiggins v. Smith*, 549 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

**Defending a death penalty case is a long-term job. Much like child custody, the cases remain open and active for many years.**

The trial itself is likely to be set within a year to 18 months of arrest. Once it is over, a direct appeal is required by statute (NRS 177.055). Decisions on the direct appeal may take a year or more. The defendant then can file for Cert to the United States Supreme Court. He also can pursue post-conviction habeas corpus. This is almost always an attack on trial counsel. The



continued from page 16

# DEFENDING DEATH

continued from page 15

focus is on whether everything that could have been done to attack the evidence and present mitigation for sentencing was done. Capital cases cover a client's entire life and family history. The answer is always no – something will have been missed by even well-prepared and diligent defenders. Then, the courts address how important the omission may have been to the client. Once a client exhausts his post-conviction remedies in Nevada, he can litigate his case in Federal Court.

The state case is governed by Nevada's statutes, and the United States and Nevada Constitutions. But, from the beginning of the state court proceedings counsel must also keep in mind that the case is governed by the AntiTerrorism and Effective Death Penalty Act (AEDPA) (28 U.S.C.A. 2254 et. seq). AEDPA is a federal statute enacted to streamline death cases. One of the aspects involved in streamlining cases is implying waiver of issues not raised.

Capital jury selection presents another unique situation. Juries in capital cases must be "death

qualified" (*Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841). No entrenched death penalty opponents are permitted to serve. Conversely, they must be "life qualified" as well (*Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)). A juror who informs the court during voir dire she would automatically impose death for conviction of first-degree murder, is not legally qualified to serve. **The goal is to find qualified jurors who can consider all legally available options at sentencing, and are willing to give effect to mitigating evidence.**

During jury selection the capital defendant again faces an irony – his potential jurors are seated based primarily upon their position with respect to his sentence. But, he is presumed innocent. During voir dire the jury has heard no evidence and reached no verdict.

Trial proceeds in the same manner as other criminal trials with the state bearing the burden of proof. Although the defendant maintains his right to remain silent and present no evidence, that almost certainly guarantees conviction. If the defendant has a strong legal defense, he may never face the penalty phase. But, if he is convicted, the same jury that has just found him guilty of murder one will now decide what should happen to him.

The victim's right to be heard is protected in two unusual ways. In other criminal cases, a victim impact statement can express the desired penalty. In a capital case a victim impact statement cannot request a sentence of death (*Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). This is an evanescent protection in Nevada, however, because the victim impact witness can request the "most severe" penalty (*Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996), overruled on other grounds, *Byford v. State*, 116 Nev. 215, 994 P.2d. 700 (2000)). Any juror who has been awake up to the penalty phase of the trial is well acquainted with

the “most severe” penalty available. The other unusual circumstance under Nevada law is that the victim gets to speak last – after all other witnesses and counsel for both sides (NRS 176.015(3)). This gives the family of the deceased an advantage in letting their voices be the last thing the jury hears.

Capital defendants also have a right to be heard at sentencing, even where they have not chosen to be sworn as witnesses. A statement in allocution is permitted, provided it only covers certain topics (*Homick v. State*, 108 Nev. 127, 825 P.2d 600 (1992)). A defendant can speak to the jury in mitigation of sentence, without being sworn or subject to cross-examination, if he limits his comments to statements of remorse, plans for the future or pleas for leniency.

**Nevada only requires special qualifications for defense attorneys in death penalty cases (SCR 250). This is an indication both of their complexity and finality.** Mistakes in capital cases can only be remedied up to the point when the sentence is imposed. Beyond that no amount of apology or handwringing can right a wrong.

The modern era of the death penalty is measured starting after 1977. The U.S. Supreme Court set aside all existing death sentences in the cases of *Furman v. Georgia* (408 U.S. 238, 92 S.Ct 2726, 33 L.Ed.2d 436 (1972)) and *Gregg v. Georgia* (428 U.S. 153, 96

S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Nevada then enacted NRS 200.010 to comply with the narrowing requirements imposed by the Supreme Court. Since 1977 Nevada has executed 13 men convicted of murder. Twelve of them waived further appeals and were complicit in their own executions (often referred to as “volunteers”). During that time, some of Nevada’s most notorious murder convicts, including Gerald Gallego and Priscilla Ford, have died of natural causes while litigating their impending executions.

The 2009 Nevada Legislature was asked to consider a bill that would have measured the financial costs of the death penalty. Although testimony on the bill disclosed that neither prosecution nor defense objected to the study occurring, the bill was not presented to the full Legislature for a vote. One thing that appears clear is that following the thousands of hours needed to litigate a capital case, getting the convicted to the gallows appears in Nevada to require his consent. One wonders whether this expense is justified if the result is to accomplish the convicted person’s last choice. ■

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