

# Inside the small legal community defending Colorado death penalty clients, a wary hope for repeal



'It's a horrible business. Never should have gotten involved in it.'

By **Susan Greene** - February 21, 2020



Mary Claire Mulligan has been defending clients facing the death penalty for a decade. "It can be very disheartening to not actually win anything in ten years." (Photo by [unreadable])



It was late December 2019 and defense lawyer Mary Claire Mulligan spent the last week of the decade accompanying her client through his murder sentencing, visiting other clients in jail, and writing motions at home in her pajamas.

Exhausted and irked by all the folks on Facebook listing 10 years of happy achievements, she posted a list

“What I accomplished this decade: I gave up a private practice fighting the death penalty. I lived apart from death penalty. I caught pneumonia fighting the death penalty. I lost my beliefs fighting the death penalty,” s

Mulligan, 54, from Boulder County, has spent 10 years trying to overturn capital sentences against one — a [Colorado’s three death row inmates](#). She wrote she has lost “any belief that the system was fair, or just, or

Some of her colleagues echoed her frustrations about a sentencing law they, too, see as political, ineffectiv

“The system is so broken,” one of them commented on her post.

“F@#% the death penalty and the people who seek it,” wrote another.

The thread offered a rare glimpse into the small corps of legal experts who specialize in trying to keep mu row in Colorado. Theirs is a dogged, close-knit bunch of about 100 lawyers and investigators accustomed setbacks in their clients’ cases, and prone to bouts of frustration and burnout. They tell themselves what th Expect the worst so you won’t be disappointed.

That’s how they weathered the six legislative sessions since 2007 during which Democratic lawmakers so the death penalty. And it’s how they approached this year’s session as lawmakers drafted yet another rep

With bipartisan support, that bill managed to clear the high bar of the state Senate in January. [It breezed th Judiciary Committee](#) on Tuesday and is likely to do the same before the full House early next week. If fast- could sign it into law by early spring.

Even the most wary among Colorado’s capital defenders admits she is hopeful.

“We’ve all wanted this so badly for so long,” Mulligan says. “Nothing would make us happier than getting c business.”

## **The calling**

Jim Castle, one of Colorado’s longest-practicing capital defense lawyers, was drawn to the work by geogr

He grew up in Auburn, NY, home to the first prison to use an electric chair. He remembers corrections offi “always bragging about that, as if it were something to be proud of.” And he was creeped out just passing

“I was raised Catholic and thought it was just really, uh, depressing,” he says. “Although I probably don’t ta because I use salty language, my opposition to the death penalty remains rooted in my religion.”

David Wymore, a former public defender who helped train Castle in the 1980s, traces his calling to a mov was the 1958 film noir “I Want to Live!” in which Susan Hayward played a prostitute wrongly convicted of he says, when her character was handed a death sentence.

“I must have been 9 or 10 years old watching as they were about to kill her and I was like, ‘What is the poi What?’” he says. “The whole execution thing, the whole reaping lethal vengeance on the citizenry thing, ye big on that.”

Tamara Brady, who represented Aurora theater shooter James Holmes, didn't plan to defend death penalty public defender, she says she "naively assumed that Wymore and the people of his generation would be t cases, and I always took comfort that they were really good at it."

But most burned out, retired or died, she says, "So I sort of found myself involved in it."

"Nothing in law school comes close to teaching you how to tell some mother that the state of Colorado is a terrifying job." Brady retired from capital defense shortly after persuading Holmes' jury in 2015 to spare h

As David Lane, a veteran capital defense litigator tells it, the work calls for a badass and bleeding heart.

"It takes an incredibly persuasive trial lawyer to convince at least one juror to save someone's life after tha an absolutely atrocious crime," he says. "You have to be able to withstand the terror of it when the govern other side of the room are trying to kill the guy sitting next to you. You better be cutthroat or you're going t

He notes that private, appointed lawyers work capital cases for the state's \$90 hourly rate even though h may cost more than twice that per hour.

"Money-wise, it's a losing proposition," Lane says. "People are doing this work for one reason: They believ is wrong and that we owe it to society, to basic human dignity, to fight it as hard as we can."

## The details

In Colorado, capital defense work is done in teams, which typically consist of at least two lawyers, an inve "mitigation specialist" tasked with researching aspects of a client's history that lawyers, in the penalty pha: trying to persuade a judge or jury to spare his or her life. (Disclosure: I worked as a mitigation specialist on a year with Lane and several others in 2012.)

Because murder defendants tend to be indigent, the teams are either provided by the Colorado Public Def cases when that office has a conflict, appointed by Colorado's Office of the Alternate Defense Counsel, als expense.

U.S. Supreme Court decisions and American Bar Association guidelines require defenders to "leave no sto clients. Colorado — whose public defender system is one of the strongest in the nation — ensures capital c representation at every stage of their trial, appeal, and post-conviction proceedings.

Defense teams learn their clients' cases inside and out. They pour over 911 calls, police files, and reports or blood spatter and autopsies. They investigate witnesses, alternate suspects and even the first responders.

Investigators comb through birth and medical records, IQ and psychological tests, report cards, photos, le of their clients, but also of their clients' family members going back three generations. They interview child neighbors, teachers, principals, social workers, doctors, coworkers, lovers, gang affiliates, drug dealers, ce They look for signs of childhood neglect, physical, sexual and emotional abuse, diseases, brain injuries, ad humiliations or abandonment — anything that might help explain why their clients became killers.

"I've never had a capital client who wasn't severely damaged in some way. I'm not saying anything to justi

way to explain how they got there,” says former Colorado Public Defender Doug Wilson.

“The truth is that we usually have a victim sitting next to us as well as victims on the other side of the court. If you don’t understand the pain, you can’t do the work.”

Mitigation entails investigating not just what is wrong with their clients, but also what is good about them. Is their life honorable. Have they apologized, expressed remorse or sought redemption? Who needs them and why? Are they capable of loving? And what about them is worth saving? They are not blind to the irony of trying to validate a person who is facing possible execution because he or she robbed the humanity of another.

“You can’t, I think, effectively present the humanity of your clients to a jury or a judge unless you feel it. You can’t help but bond with you can tell their stories,” Mulligan says. “And, in the intensity of that process, you can’t help but bond with

## The tolls

Colorado’s death penalty was reinstated in the mid-’70s, but it wasn’t until 1997 that the state put it to use on a convicted murderer and rapist Gary Davis.

How much taxpayers have spent prosecuting and defending capital cases since then is one of the state’s r

District attorneys have for decades refused to quantify the cost of their death penalty work. They say it’s in the hundreds of hours their prosecutors, paralegals, investigators, victims’ advocates and records managers spend in the context of their broader workloads. Some also, in certain judicial districts more than others, have refused to pay for consultants, expert witnesses, and the travel- and other expenses associated with them.

Likewise, the offices of the Colorado Public Defender and the Alternate Defense Counsel won’t divulge the costs of their efforts, arguing it would breach attorney-client privilege. Wilson, the former state public defender who now works out of an office in Aurora, spent years fighting transparency efforts.

“It’s not about secrecy as much as us following our constitutional and ethical obligation to that individual c

The ACLU of Colorado [estimated in 2013](#) that a state death penalty trial cost taxpayers approximately \$3.5 million and \$150,000 for a life-without-parole trial. That didn’t include the costs of appeals.

Wilson acknowledges that leaving “no stone unturned” in a capital case isn’t cheap: “Let’s just say that on top of what’s said and done, it probably costs many more millions.”

Other costs are incalculable. Like the extra time victims’ families spend waiting for outcomes in capital cases, the threat of a death sentence takes emotionally on defendants’ families. And, of course, the emotional toll it takes on themselves, a factor many death penalty proponents see as a plus. Murders for which the death penalty is most heinous. Understandably, many victims’ families want killers to suffer.

Capital defenders don’t seek pity for their clients, nor for themselves. Little is ever said, though, about the toll of the defense work.

“I don’t think most people understand the extent of time and sweat and commitment that goes into these

them, the responsibility for someone's life, it's like a weight bearing down on you, and it's bad, so bad for an attorney that walks into that arena comes away with some scarring."

Those scars often appear at night. Most capital defense experts interviewed for this story say they dream, about failing to file an important pleading or forgetting their closing arguments. Some dream about lethal injection chairs. Wymore describes a nightmare in which he was forced to cross-examine a key witness from behind a balcony of the Boulder Theater where nobody could see or hear him.

"Ugh, I hate that dream. So powerless," he says.

For many in the capital defense community, scarring also has come in the forms of alcoholism and drug addiction and failed health. Lawyers describe having lost friends and colleagues to illnesses or accidents they attribute to stress. The veterans still grieve a particularly talented and beloved capital defender who in 2002 drowned in an isolation tank. They speak of the incident in hushed tones. *It could have been any of us, they say. There but for the grace of God go we.*

Brady, for her part, looks back on the impact her capital defense career had on her family. Her daughter watched her first death penalty case in 2000. Two weeks after the verdict in her last one, Holmes', she drove that car

Along the way she worried what the long hours and dark corners of her work were doing to her daughter, when schoolmates asked what kind of monster would defend the Aurora theater shooter. Brady, nearly in tears, saying, "I wouldn't leave you to do this trial unless it was super important and someone needs my help, and the world thinks I should do this, I need to because that's what I think is right."

She remembers her husband warning her during Holmes' trial not to search her name on Twitter.

"People were saying horrible things about the defense team and I didn't need a million voices from around me with my head," she says. At one point, a letter arrived threatening Brady if she continued defending Holmes. "I repeat it," she says. "It was pretty graphic."

Brady's father was diagnosed with late-stage cancer and died shortly before the trial began.

"We were a month away. In any other kind of case you can take time off and do what you need for your family. In a case where someone could die, you approach the work like you can never rest, like you can't let down me. I have guilt that I wasn't more available to be with my dad and help him at that time, and I'm not sure that guilt is ever going to go away."

Capital defenders are keenly aware of the horror and grief their clients have caused. They know that many people do not understand their work.

Brady is quick to note that fighting and seeking abolition of the death penalty is "never, ever meant in any way to harm victims and their families."

"We've always tried really hard to be respectful to them and what they're going through to do our job and not cause additional suffering," she says. "But it really is just an antiquated and barbaric thing for a government to try to do."

The work also takes a toll socially, sometimes isolating capital defenders from people they love. Mulligan r

friend commented that one of her clients deserved to be executed.

Mulligan understood those eye-for-an-eye sense instincts. She knew that most people who live and work don't have a nuanced understanding of "how unjust, how racist, how horrible it is," she says. She told hers not know that prosecutors have withheld key evidence from capital defense teams or that, in a state with each of its three death row inmates was African American. She tried keeping in mind that her friend, like n likely to have studied the [ACLU white papers](#) [on racism and other problems with capital prosecutions] be affect their lives."

Still, the comment was indelible.

"It pretty much ended our relationship," she says.

Wymore has even less tolerance for people who tolerate the death penalty. Once you see how it works a broadly for Colorado and the nation, he says, it's impossible to look away.

"You know the ugliest part of the death penalty, the part that's not talked about a lot? The ugliest part is w African American men and Hispanic men, families with a historical context of deprivation, non-privilege, g everything, the whole mishmash. It's watching them in the penalty phase begging a jury of white people f ones. And you look at the jurors' faces, they're screaming, 'We wouldn't have done that, so you shouldn't you're hoping, you're hoping for one juror, just one, to see what's happening here. And it's like, oh my God medieval, the picture of it, it's so obscene, so unseemly, so pathetic that we do nothing but repeat this hist repeat it. You're watching this going down over the years and it really just takes you and drives you to a pc frustration."

"It's a horrible business," he added. "Never should have gotten involved in it."

## **What next?**

Those who know Wymore get that his indignation and rage power his work. He has, after all, chosen to sp teaching younger lawyers throughout the country the "Colorado Method" — a strategy for jury selection he prevent death sentences. He plans to continue doing so even if repeal passes and the method is no longer where it started.

Those who know Mulligan likewise understand that what underlies her disillusionment and disappointmer need to believe that the justice system is, in fact, just. On behalf of her death row client, she spent years re about things that went wrong with his trial. Mulligan and her client have been waiting almost two years fo post-conviction order. In a state whose judicial system almost always preserves its outcomes, overturning longshot. And the repeal bill, should it pass, would not apply to him retroactively.

This in part explains her despair that day on Facebook.

"I don't know what it's like to have a client executed," she says. "And I hope, frankly, that I never have to fir

Members of Colorado's capital defense bar are schooled in the ethos that you save someone's life, you be for it. It speaks to their training and commitment that when their cases are over, and even long after they r close touch with the people they used to represent.

“Once a client, always a client,” says Brady who still writes and visits Holmes and others.

Lane, like all his colleagues, has been closely following the repeal bill as it inches forward at the state Capitol more freely than some more skeptical colleagues, “is within sight.”

“I have been trying to put myself out of business for 40 years now and am right on the cusp of succeeding

But he is quick to point out that, should the time come, there will be no back slapping, no beating of the drum over the death of Colorado’s death penalty.

“When violence — I’d argue ultra-violence — ends, you don’t throw a party,” Lane says. “What you do is sit back and let it sink in that none of it should have happened in the first place.”

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A recovering newspaper journalist, Susan reported for papers in California and Nevada before her 13 years as a reporter and metro columnist at The Denver Post. “Trashing the Truth,” a series she reported with Miles Moffeit, prompted reforms on evidence preservation and was a finalist for the Pulitzer Prize in investigative journalism. “I Box,” exposed the effects of long-term solitary confinement. The ACLU honored her in 2017 for her years of civil rights work. The Society of Professional Journalists honored her in April with its First Amendment Award. Susan and her two boys, Hymie whom they’re pretty sure is the messiah.

