

Capital Cases Stalling as Costs Grow Daunting

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But now, two years later, the truly thankless nature of Judge Fuller's task has become evident. The legislature has threatened to impeach him. Columnists have taken him to task. On Friday, the district attorney sued him in State Supreme Court. Even fellow judges have abandoned their usual reticence. On a recent afternoon, he received a copy of an e-mail message from a colleague calling him a “debacle,” an “embarrassment” and a “fool.” And the trial has yet to begin.

The anger directed at Judge Fuller revolves around an issue more and more states are being forced to confront — the rising cost of an adequate defense in death-penalty cases. Even as an examination of lethal injection by the Supreme Court has seemingly suspended the practice across the country, many experts predict that the cost issue will have far broader implications for the future of the death penalty.

States unwilling to pay the huge costs of defending people charged in capital cases may be unable to conduct executions.

For Brian Nichols, accused of killing four in the courthouse shooting in March 2005, the costs have already reached \$1.2 million. That, together with legislative cuts, has left the state public defender system with no money. Until the bills are paid, the judge has delayed the trial, saying that it is unconstitutional not to pay the defense and thus pointless to proceed. In turn, lawmakers have accused him of conspiring to end the death penalty in Georgia.

The state could avoid the multimillion-dollar trial by dropping the death penalty option. Mr. Nichols has offered to plead guilty in exchange for a sentence of life without parole, but the district attorney, Paul L. Howard Jr., has declined.

Judge Fuller is not the only jurist to try to force states to pay for a defense that will pass muster with higher courts. Last month, the New Mexico Supreme Court suspended the prosecution of two prison inmates accused of killing a guard, saying their lawyers' pay was so low it was unlikely they could be effective. In Utah, a judge has asked if he can force a lawyer to represent a convicted killer on appeal because, at fees amounting to less than \$10 an hour, no one wants the job.

In California, a federal judge complained in May that death row inmates were waiting more than three years to get a lawyer because the state would not raise the hourly rate. Arizona, Texas and Louisiana are having similar troubles.

"I don't think there's any question that lethal injection is going to be allowed, it's just a question of how," said Stephen B. Bright, a capital defense lawyer and president of the Southern Center for Human Rights in Atlanta. "But the right to counsel is as fundamental as it gets — every other right depends on it."

Defense costs are just one factor in the steep price states are beginning to consider. A 2005 study by New Jersey Policy Perspective, a liberal research group, estimated that capital punishment had cost the state \$256 million since 1983, including \$60 million for defense, and the state has not executed a single inmate in that time. A bill to abolish the death penalty is given a fair chance of passing.

But the issue has come into sharpest relief here, thanks to the scrutiny of the courthouse case, arguably the most complicated murder case in state history.

State Senator Preston W. Smith, the Republican chairman of the Judiciary Committee, has complained that Mr. Nichols is receiving a "high-end, O.J.-style defense" that most taxpayers could not afford. But while the price sounds high, especially for a man whose guilt no one doubts, the cost of even a minimal capital defense has been driven up by technology and the increasing sophistication of law enforcement.

Mr. Nichols faces a 54-count indictment, a team of five prosecutors, and 400 potential prosecution witnesses. Prosecutors gave the defense team 32,000 pages of documents and 400 hours of taped telephone calls. The defense team has an obligation to review all of the information and investigate each witness. To the irritation of lawmakers, Judge Fuller has kept budget requests sealed to keep the defense strategy from becoming public.

Judge Fuller is bound by recent Supreme Court decisions that have underscored the importance of the defense counsel's performance during the sentencing phase of the trial, when juries consider mitigating and aggravating factors in deciding whether to impose the death penalty. In a 2003 case, the court ordered a new sentencing hearing because defense lawyers failed to fully investigate their client's background and present evidence

of severe childhood sexual and physical abuse. In a 2005 case, the Supreme Court again found that a more thorough review by the defense would have unearthed information that the jury should have heard.

In both cases, the court cited guidelines issued by the American Bar Association in 2003, which detail the special skills capital defenders must have and the “extraordinary efforts” they must undertake because of the irreversible punishment. Capital defendants must have at least two lawyers, the guidelines say, and each phase of the appeals process should include an independent investigation.

Exonerations have also highlighted the need for a competent defense. “We have all this new evidence being discovered 10 years later,” said George H. Kendall, who has monitored capital defense in Georgia and now works in the New York office of Holland & Knight. “If there was a real defense at the time, it would have come up then.”

The Nichols defense team, which plans to argue that its client was suffering from a mental disorder, says the anger at Judge Fuller is misplaced. The defense budgets are first presented to the Georgia Public Defender Standards Council, which has not objected to any of the requests as unreasonable. It has simply said it cannot pay.

But neither the judge nor the council has been spared.

The council was established as a statewide public defense system in 2005 in response to widespread problems, including divorce lawyers assigned to capital cases and lawyers sleeping through trials. Three months later, the Nichols trial became the first major test of lawmakers’ commitment to the new system. They have seized control of the council and gutted its capital defense budget, cutting it to \$4.8 million from \$7 million a year.

Courts have repeatedly demanded a better defense in capital cases, but states have repeatedly refused to pay for it. In 1996, Congress established a “fast track” that would shorten federal deadlines in capital cases if states agreed to provide competent representation to death row inmates. No state has fulfilled the requirements.

Capital defense lawyers face the highest possible stakes, but in many states the job is one of the lowest-paid in the legal system. In New Mexico, for example, appointed capital defenders work under a contract system that caps their fee at \$24,500, a salary that amounts to an hourly wage of just \$19.50 for the average death penalty case, not enough to cover their overhead, according to a brief filed by the New Mexico Criminal Defense Lawyers. In contrast, private criminal defense lawyers in New Mexico made an average of \$161 per hour in 2004.

The lead lawyer in the Nichols case, Henderson Hill, is billing \$175 an hour instead of his usual \$325. Another of his four lawyers has waived her fee. None have been paid since July.

Lawmakers say Judge Fuller and the defense lawyers are deliberately driving up the costs to make sure that the death penalty is too expensive for the state.

And in fact, better-financed systems do reduce the number of capital cases — coming closer, advocates say, to ensuring that the death penalty is reserved for the worst of the worst offenders. North Carolina, which instituted what is often pointed to as a model capital defense system in 2001, has gone from an average of 24 capital convictions a year to 5. It is too soon to know if the reversal rate, extraordinarily high in death penalty cases, has also been reduced.

When Judge Fuller took on the Nichols trial, prosecutors and defense lawyers alike praised the choice, saying he had rarely, if ever, been overturned on appeal. But his reputation has since taken a beating.

“I’m beginning to think I am a fool for taking this case,” the judge said, rereading the e-mail message in which a fellow judge called him one. “I thought people would give me the benefit of the doubt. That was naïve.”