



## The Star-Ledger

### He knows firsthand death row's fatal flaw

Monday, November 06, 2006

Sam Millsap, tall and courtly, displays the relaxed manner and folksy, Bible-infused language expected of what he is, or was: a Texas politician.

"We thought we were doing the Lord's work," he says. "What we were really on was a fool's errand."

More than that, really. More than a fool's errand. The relentless pursuit of what he concedes now was a deadly mistake. The execution of an innocent man.

"I'm probably the prosecutor responsible for the execution of the first innocent man in Texas," says the former San Antonio district attorney, and despite the gravity of the words, there is a touch of humor in the comment. Ironic -- almost literally gallows -- humor.

Because Millsap knows he isn't the first or only prosecutor who presided over the execution of an innocent man. He is simply the only prosecutor willing to admit it.

Not that Texas, which has executed more than 300 men and women since 1976, is ready to admit it killed an innocent man. It still holds with President Bush's comment, when he was governor, that Texas has never put an innocent man to death.

Millsap, 55, came to New Jersey to testify before the state Commission to Study the Death Penalty. He told the commissioners, who finish their work next week, they should recommend an end to the death penalty in New Jersey.

This state hasn't executed anyone in 43 years, but the penalty is still on the books and nine people are on death row.

Millsap says he has come to oppose the death penalty on what he calls "instrumentalist" grounds. He is not, he says, "morally" opposed to it.

"We have to be able to guarantee that there will be no mistakes in a capital case," he says. "Because we are dealing with a system run by imperfect human beings, we can't make that guarantee. It's a system that cannot be fixed."

Millsap says Ruben Cantu was prosecuted in a "perfect" trial. His best assistant tried the case. A good judge presided. Cantu had an experienced defense attorney. An eyewitness -- shot nine times by the murderer in a 1985 incident -- testified against Cantu. The jury deliberated long and thoughtfully. All appeals were exhausted.

Then, in 1992, Texas killed Ruben Cantu for a crime he didn't commit.

"I was thunderstruck when I learned," says Millsap.

Turns out the eyewitness, under pressure to help the police or face deportation as an illegal immigrant, lied at the trial. Cantu wasn't the man who shot him and killed a co-worker at a construction site. The eyewitness, Juan Moreno, has recanted his testimony. The incident became a centerpiece for articles by a Houston Chronicle reporter about corruption among San Antonio police.

Millsap says he believes the recantation because Moreno has nothing to gain from telling the truth now. In fact, he faces serious trouble.

"He has now been threatened with a perjury prosecution," says Millsap, who adds grimly, "maybe they'll convict him of murder by perjury and execute him."

Millsap is a thoroughly likable man who has to be admired for his courage and conscience. Still, Cantu's trial really wasn't the "perfect" trial he says it was. Moreno initially didn't pick the defendant out of photo arrays. Cantu had an alibi witness who placed him in Waco -- stealing cars.

Millsap admits he made a mistake -- allowing prosecution of a capital crime based on only one person's eyewitness testimony. Prosecutors, however, have such discretion, and that's a flaw in the system.

Cantu was convicted because he was a bad guy -- a gang leader who had been in a shootout with San Antonio police -- not because he had committed this crime.

Millsap is right. The system cannot be fixed. Because, as he admits, it is human, and so always imperfect, and founded on the basest human instincts -- revenge and fear. Frankly, it sometimes doesn't matter who pays a debt demanded by revenge, just so long as someone who looks like a bad guy does. Blood lust demands its due.

"It's all about retribution, it's all about vengeance, it's all about getting even," says Millsap. "The only guy who is deterred from committing another crime is the guy you executed, even if he didn't do it."

As prosecutor, he campaigned against abolition of the death penalty when it was introduced in the Texas Legislature. Even legislators with consciences, he says, were not about to risk their careers. They feared -- as they still do -- the political backlash.

Millsap has become an abolitionist -- as death penalty opponents are called -- and has offered to travel anywhere to speak against capital punishment. He is often praised for his courage, but he is embarrassed about that.

"I went along for too long," he says.

Not much stops his easy conversation, but one question in an interview gave him pause. It wasn't about his support for the death penalty when he was a prosecutor, yet it touched a nerve.

When asked now how many people he had sent to their deaths in his four years as prosecutor, Millsap couldn't remember the number. Eight to 12, he said. He became unusually quiet as if he were thinking about that, as if he were wondering why he didn't know what might be, in a different context, an important set of facts.

"I guess I'm a little ashamed about not remembering," he says.

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