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FOREWORD

DEATH ROW AND THE CANCER WARD

On March 21, 2003, I argued a summary judgment motion before the United States District Court in Dallas on behalf of my client, Gary Sterling, who sought federal habeas corpus relief from a Texas death sentence. The Judge was well prepared, asking the kind of pointed questions that sharpen the issues. This argument could well be the most pivotal point in Gary's case, and I left the courtroom convinced that the Court would give serious attention to the matters addressed at the hearing.

Within three weeks or so, however, I was forced to seek an emergency change of counsel. The sense that I have abandoned my client is almost overwhelming. I can only hope that Gary, my client and my friend for some ten years, will understand. In the month following that argument, everything has changed.

About a week ago, my wife noticed that I was jaundiced and implored me to call the doctor the following morning. I had been fatigued for a couple of weeks, having filed a petition for rehearing en banc, and two cert petitions to the United States Supreme Court. I had worked that Thursday until six in the morning, filed by mail that afternoon, and struggled home to take a nap. Suzy observed my change in color when I awoke.

On Friday morning the resident on call in the clinic at the University of Arkansas for Medical Sciences (whose wife had once been a student of mine) focused on the possibility that I had hepatitis. After having blood taken, I went on to the law

school to teach a class. I was tired, which caused me to give perhaps the most organized and slowly delivered lecture of the term. When I returned to my office, Suzy called to tell me that the internist supervising the resident wanted to admit me immediately. I was soon undergoing a bone marrow biopsy.

I spent the night believing that I had contracted hepatitis on a recent trip to San Antonio or tuberculosis while visiting the death facility of the Texas Department of Criminal Justice in Livingston, or maybe that last year's tick bite had left me with some rare, but treatable, viral infection. But the next morning, I learned that the diagnosis was leukemia. The hematologist stopped by to confirm that I had acute myelogenous leukemia, which is known to the medical community as "AML." Her preliminary discussion of survival was grim, leading me to pass the first part of that night wondering whether it would not be best to go home, spend time with my wife and daughters, and face death with comfort care.

Later that night I knew that I would have to fight for whatever hope of survival there was for my family, and for me. Faith is a wonderful thing, but it does not guarantee that there will be no fear of dying. I was afraid. My friends had called and stressed their belief in me as a fighter, willing to undertake the hopeless cases. But I knew better. While I was willing to fight and always believed that I would win each case, I still knew that I would almost always lose. I resigned myself to fighting this last time knowing that I would probably lose again.

On Sunday morning I experienced one of those small victories that can turn things around, one of those events that will—I hope—prove pivotal in retrospect. I had almost decided to stay at UAMS so that I could avoid disrupting my family's routine and remain near my support group, but even though UAMS has a world-class reputation for treatment of multiple myeloma, its experts don't focus as strongly on the treatment of AML. The hematologist, concerned because the disease apparently had attacked my liver, suggested that she call a friend who is an AML specialist. She believed that he could prescribe a course of treatment that would not further compromise my liver function, which would be critical to processing the powerful chemicals used in the treatment of AML. Within thirty minutes her old colleague was on the

phone from Houston, telling me that he could see me on Monday afternoon, that I could survive the disease, and that he expected at the end of my treatment to consider me a success.

I had not flown in seventeen years, but on Monday morning, I was far more concerned about the cancer within my body than my fears about danger in the sky. Suzy and I held hands throughout much of the flight. Brent Newton, a brilliant lawyer and better friend, who had negotiated his own wife's cancer treatment over the past several years, picked us up at the airport and spent eight hours helping us to navigate the complexities of the M. D. Anderson campus. After three days of evaluation and testing to confirm or rule out possible explanations for my malfunctioning liver, I started chemotherapy two days ago. My body appears to be responding positively to these first doses, and my oncologist remains an enthusiastic and positive physician.

Tomorrow, one month after that pivotal argument in Gary's case, I will enter an isolation unit designed to prevent infection as my immune system is destroyed by the drugs employed to heal me. In a very odd way, I will enter an environment much like that experienced by Gary and every other death-row inmate in Texas ever since they were moved to a fashionably punitive facility operated on the principle of sensory deprivation. I will have no direct contact with anyone but medical personnel, much as the inmates have direct contact only with their guards. I can communicate with visitors, who sit in cubicles with large plate-glass windows, only by telephone, much as I used to talk with Gary when I visited him on death row.

There will be differences, of course. I have a television with more than sixty channels, a VCR, and the laptop on which I am writing this essay. But I will not leave this room for even the one hour a day that a death-row inmate is allowed for "recreation," which is what the Texas Department of Criminal Justice calls the opportunity to visit a day room where the condemned prisoner has some chance at restricted communication with others.

I once asked another of my death-row clients, Jon Reed, how he could live in that deprived environment. He paused and then explained that he had to deal with what he had in life because he had no option. So the mundane act of smuggling

and smoking a cigarette can become a major challenge for the day. I have always remembered that conversation, and Suzy and I have for years sent puzzle books to Jon and searched for paperbacks with African-American protagonists to send to Gary. His favorite thus far was a history of the Buffalo Soldiers.

Jon's case remains pending in the federal courts. He has lived on death row since 1979—a lifetime. Gary's case is still pending too, though he might yet obtain relief. But all three of us are essentially in isolation now, under sentences of death.

I always knew that my visits to death row were particularly meaningful for Jon and Gary, that a meeting with me provided them with an opportunity to leave their confinement and engage in some interaction with the free world. No matter how draining the visits were for me, they reinforced my sense of self as a lawyer, and as a human being.[1] Now, however, I have a more immediate understanding of the condemned prisoner's need for visits, and my inability to see Jon and Gary through the remaining course of litigation troubles me deeply as their lawyer and their friend.

My clemency depends on the power of the chemicals that destroy my immune system and the power of the prayers being offered by people who care for me and my family. Jon and Gary must depend on the rule of law to free them from their sentences of death, and that rule has become, in the aftermath of the 1996 amendment of the federal habeas process, particularly harsh and unforgiving. But there are also people praying for them, people like me, who pray for justice and mercy. I fear, though, that in the face of the Texas execution machine, these prayers will not help them avoid the punishment imposed in this life.

JTS
M.D. Anderson Cancer Center/Houston
Easter Sunday, 2003

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[1] *See* Matthew 25:36-40 (New Intl.) ("'I was in prison and you came to visit me.' Then the righteous will answer him, 'Lord, . . . When did we see you sick or in prison and go to visit you?' The King will reply, 'I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.'")