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A President's Message

from SACDLA's president, Mark Stevens

STARE DECISIS, JUDICIAL ACTIVISM AND THE TEXAS COURT OF CRIMINAL APPEALS

> If, coming to this high position of power and responsibility, I may, moved by a mere personal opinion, in my day and time, unsettle and undo the work of the great men who have preceded me, consistent, coherent, and undoubted from the day when I was yet a briefless lawyer, the man who on the morrow takes my place will have the same warrant to undo and unsettle the rules we establish, and so on to the end of time.
>
> *Lewis v. State*, 127 S.W. 808, 815 (Tex. Crim. App. 1910).

Mark Stevens

Geesa is gone. By now, everyone knows about the *Paulson* case, in which the Texas Court of Criminal Appeals held that trial courts no longer need define "reasonable doubt." Although I have been expecting this ruling for two years, I was still disappointed — to say the least — when it actually came down. My disappointment is largely selfish. Over the last nine years, I grew comfortable with the *Geesa* definition. Unlike the court of criminal appeals, I thought it was a concise and cogent way to explain and define the notion of reasonable doubt for the jury, and I would just as soon not have to learn new ways — and re-learn old ways — of doing so.

As sorry as I am to see *Geesa* pass, worse decisions may — and almost certainly will — be rendered in the future. After all, before *Geesa*, reasonable doubt was not defined in state court, and resourceful defense lawyers still found ways to argue for, and obtain, acquittals. No, the temple of justice surely will not crumble without *Geesa* to prop it up. More important than the fact of *Geesa's* demise, though, is the manner in which it was dispatched. The insight *Paulson* provides about our court of criminal appeals is far more significant than is the mere loss of a definition.

Stare decisis

The court in *Paulson* nodded politely to *stare decisis*, acknowledging that it "should not frivolously overrule established precedent." Ultimately, though, the court found that *Geesa* was "poorly reasoned," and therefore that it should not be followed. "It is ill-advised for us to require trial courts to provide the jury with a redundant, confusing, and logically-flawed definition when the Constitution does not require it, no Texas statute mandates it, and over a hundred years of pre-*Geesa* Texas precedent discourages it."

1. One view of stare decisis: Better to be consistent than right

Two views on *stare decisis* have come out of the court of criminal appeals in recent years. As Judge Keller found in *Busby v. State*: "The doctrine of stare decisis indicates a preference for maintaining consistency even if a particular precedent is wrong." In *Busby*, the court rejected the appellant's argument and affirmed his conviction. The court found that, even if it believed appellant's interpretation of the statute was correct and its prior precedent incorrect, interests underlying the doctrine of *stare decisis* were weighty enough there to require adherence to the precedent.

The *Busby* view — that being consistent is sometimes better than being right — sounds almost radical, but it recognizes the important role *stare decisis* plays in our jurisprudence. As the Supreme Court has held, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." Although *stare decisis* is "not an inexorable command," it "carries such persuasive force that we

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San Antonio criminal defense lawyer, Mark Stevens, formerly SACDLA's Vice President, and Chairperson for the Association's Continuing Legal Education Committee, is the new SACDLA President! Mark Stevens has taught as an adjunct professor at Trinity University, St. Mary's University and St. Mary's University School of Law. He was instrumental in founding the St. Mary's Criminal Justice Clinic, which has received national recognition as a model for such programs, and remains actively involved in the Clinic as a Supervising Attorney. He speaks regularly at CLE courses around the State, was awarded best CLE Paper by the College of the State Bar of Texas (1992), and was Course Director for the Advanced Criminal Law Course in 1993.

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have always required a departure from precedent to be supported by some 'special justification.'"

2. *The other view: Out with the poorly reasoned*

The other attitude toward *stare decisis* is found in *Proctor v. State*, where the court held that "when governing decisions of this Court are unworkable or badly reasoned, we are not constrained to follow precedent." As noted previously, this is the view of *stare decisis* the court took in *Paulson*. Specifically, the court found that *Geesa* was badly, or poorly, reasoned, and therefore refused to follow it.

Even assuming, however, that *Geesa* was poorly reasoned — and I submit that it was not — poor reasoning alone is not the kind of "special justification" that calls for its abandonment. This was Judge Meyers's point in his dissenting opinion in *Paulson*. "Today, personal dislike for precedent has become the standard for overruling it." Whether he would or would not have joined *Geesa* when it was written nine years ago was irrelevant to Judge Meyers.

The problem with the "poorly reasoned" standard is that it allows for overruling precedent based upon nothing more than a change in the Court's membership. Restated, the test is really, "would a current majority on the Court have voted for the prior opinion?" If not, it is "poorly reasoned" and may be overruled. This Court long ago recognized the threat to judicial integrity when the viability of precedent depends upon the personal viewpoint of the current court membership.

Judge Meyers then cited the *Lewis* opinion, with which I begin this month's president's message. You will be hard-pressed to find a more impassioned defense of *stare decisis* than that mounted by Judge Ramsey in *Lewis*.

Judicial activism

It would have been bad enough had the court overruled *Geesa* simply because it was "poorly reasoned." But the *Paulson* court did more than just hold that trial courts are not required to define reasonable doubt. Not content simply to vindicate the trial court below, the court went on in *Paulson* to give the following *advice* to trial courts in the future: "We find that the better practice is to give no definition of reasonable doubt at all to the jury." This sentence in *Paulson* raises at least two questions in my mind. First, is this portion of the opinion advisory, and therefore constitutionally and statutorily inappropriate? Second, in what way is it "the better practice" to give no definition at all?

1. *Is this portion of the opinion advisory and therefore unauthorized?*

The trial court in *Paulson* did not define reasonable doubt. Appellant complained about this omission on appeal, and the court of appeals "reluctantly" agreed, and reversed his conviction. The court of criminal appeals, in turn, reversed the reversal, and held that trial courts are not required to define reasonable doubt.

Holding that the trial court is *not required* to give a definition, though, does not imply that the trial court is *forbidden from* doing so, or even that it *should not* do so. The language in *Paulson*, then, on "the better practice" was *obiter dictum*, because it was entirely unnecessary to the decision of the case. Stated another way, this portion of the opinion was advisory. "An advisory opinion results when a court attempts to decide an issue that does not arise from an actual controversy capable of final adjudication." It is well-established that the court of criminal appeals "is without constitutional or statutory authority to . . . render advisory opinions."

2. *Better for whom?*

The majority of jurisdictions in this country at least permit their trial courts to define reasonable doubt. Why does our court believe we are better off without the definition? More importantly, exactly *who* is better off, if reasonable doubt is undefined?

Is it better for *jurors* to have no definition at all of this crucial phrase? Why would it be? Although the court concluded that the definition is "confusing," it provided not a scintilla of evidence to support the conclusion that jurors are in anyway confused by the *Geesa* definition. My own experience has been to the contrary. When I tried my first definition-less case in nine years, a week after *Paulson* came down, the prosecutor's voir dire contained such helpful platitudes as "reasonable doubt is a doubt based on reason," and, "reasonable doubt, you'll know it when you see it." I spent at least 10 minutes comparing the different standards of proof — scintilla, probable cause, preponderance of the evidence, and clear and convincing evidence — with proof beyond a reasonable doubt. In my opinion, the venire would have been far less confused had it been given the *Geesa* definition.

Is it better for the *trial courts*? Formerly, everyone knew exactly what definition would be used, and this definition was relied on during jury selection, opening statements, summation and in the jury charge. Just because trial courts are not required to define reasonable doubt does not mean, of course, that the respective parties will be forbidden from suggesting to the jury their own definitions and explanations. After *Paulson*, both sides will consume valuable court time explaining what reasonable doubt does and does not mean, and, no doubt, arguing that their opponent's explanations are improper. The trial court will, in turn, have to settle these disputes. It seems inevitable that trials after *Paulson* will take longer, and this cannot be better for the trial courts.

Is it better for the *appellate courts*? The Fifth Circuit clearly believes it is not. "Although we do not require the use of this instruction [defining reasonable doubt], we have encouraged the district courts in this Circuit to adopt this instruction, hoping that '[a] measure of uniformity would ... render appellate review *easier and quicker*.'" I predict that appellate litigation will increase with *Geesa's* demise. While the court of criminal appeals plainly believes that a definition of reasonable doubt is not constitutionally required, I am not sure that the issue has been settled. In *Victor v. Nebraska*, Justice Ginsburg wrote a concurring opinion in which she disagreed with the majority's "suggestion" that the Constitution neither requires nor prohibits a definition of reasonable doubt. In view of Justice Ginsburg's concurring opinion, I intend to request at trial, and argue on appeal, that a definition of reasonable doubt is required by due process and due course of law.

Is it better for the *defense* that reasonable doubt not be defined as it was in *Geesa*? Most lawyers I have talked to prefer the *Geesa* definition over no definition at all. Although reasonable defense lawyers might disagree on the advisability of this definition, few would argue with a straight face that the court's intent in *Paulson* was to protect the defense bar from itself. Fewer still, I think, would agree that the court of criminal appeals is better situated than they to decide "the better practice" in their cases.

Or, when the court said "better," did it mean, better for the *prosecution*? The court did make this observation in *Paulson*: "If a conscientious juror reads the *Geesa* charge and follows it literally, he or she will never convict anyone." Is this, then, the court's real problem with *Geesa*, that it resulted in too many acquittals? Could the court really think this? If so, then the judges of that court are not keeping up with what is happening in the trial courts. Those of us who do, of course, know that the huge majority of people who pass through the criminal justice system are convicted. This was true before and after *Geesa*, and will always be true. More importantly, even if *Geesa* had diminished the number of convictions, would this be a proper concern of an appellate court? I, for one, do not think so. ■

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1. *Geesa v. State*, 820 S.W. 2d 154 (Tex. Crim. App. 1991).

2. *Paulson v. State*, 2000 WL 1468423 (Tex. Crim. App. 2000).

3. There may be alternatives to education and re-education. The *Paulson* Court suggested that, if both the state and the defense agree that the *Geesa* instruction should be given, "it would not constitute reversible error for the trial court to acquiesce to their agreement." *Id.* at *3. Additionally, although the court advised that the "better practice is to give no definition of reasonable doubt at all to the jury," it did not absolutely hold that no definition can be given, even where the state does not acquiesce. Some trial courts may decide to give modified *Geesa* instructions, perhaps deleting the references to "hesitation" that so seemed to bother the court of criminal appeals. Finally, some states legislatively mandate that reasonable doubt be defined. *E.g.*, CAL. PENAL CODE ANN. § 1096. Keith Hampton of the Texas Criminal Defense Lawyers Association is planning to propose such legislation in Texas this term.

4. *Paulson v. State*, at *2.

5. *Id.* at *5.

6. *Busby v. State*, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 803 (2000).

7. *Id.*

8. *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

9. *Dickerson v. United States*, 120 S.Ct. 2326, 2336 (2000).

10. 967 S.W. 2d 840, 844-45 (Tex. Crim. App. 1998).

11. *Paulson v. State*, 2000 WL 1468423*12 (Tex. Crim. App. 2000)(Meyers, J., dissenting).

12. *Id.* at *9.

13. Judge Ramsey concluded this way in *Lewis*: "Against this doctrine of personal rule and unrestrained absolutism we resolutely set our faces, and prefer to follow the law as it has been so long and so often declared, conscious of our responsibility, and saying with all sincerity of the law that it must and will be upheld, and that, though it slay me, yet will I trust in it." *Lewis v. State*, 127 S.W. at 815.

14. *Paulson v. State*, 991 S.W. 2d 907, 917 (Tex. App.—Houston [14th Dist.] 1999), *rev'd*, 2000 WL 1468423 (Tex. Crim. App. 2000).

15. Obiter dictum is defined as:

> Words of an opinion entirely unnecessary for the decision of the case . . . . A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

BLACK'S LAW DICTIONARY 1072 (6th ed. 1990).

16. *Garrett v. State*, 749 S.W.2d 784, 803 (Tex. Crim. App. 1986).

17. *Ex parte Ruiz*, 750 S.W.2d 217, 218 (Tex. Crim. App. 1988); *see also Armstrong v. State*, 805 S.W.2d 791, 794 (Tex. Crim. App. 1991).

18. *Paulson v. State*, 991 S.W. 2d 907, 916 (Tex. App.—Houston [14th Dist.] 1999), *rev'd*, 2000 WL 1468423 (Tex. Crim. App. 2000).

19. *United States v. Williams*, 20 F.3d 125, 129 n. 2 (5th Cir. 1994)(emphasis supplied).

20. "But we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion . . . have we ever held that the Constitution does not require trial courts to define reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 26 (1994)(Ginsburg, J., concurring).

21. *Paulson v. State*, 2000 WL 1468423 *2 (Tex. Crim. App. 2000).