A President's Message

from SACDLA's new president, Mark Stevens

Criminal defense lawyers suffer from dual personality disorder. On the one hand, ost of us prefer to work alone, lest yone infringe on our jealously guarded lependence. On the other hand, even e most independent among us needs a tle help from time to time. There is mfort in numbers, and sometimes our os are too difficult, our responsibilities o heavy, for one person to handle one. The San Antonio Criminal efense Lawyers Association is meant r those times when you need a little lp.

Our organization just turned one ar old. Two previous efforts to ganize criminal defense lawyers cally failed to last as long, not because ere was no need, but rather because ere was a shortage of persons willing to are the necessary commitment. The esent organization has lasted a year cause more people have become volved. Our continued existence will quire the involvement of more people ill. Specifically, we need three things.

First -- not to beat around the bush - we need your money. You will be ceiving your annual dues statement ry soon, and we request that you return ur checks immediately. Our dues are odest by any standard, but especially considering the benefits we offer. Our agazine, *The San Antonio Defender*, d the free CLE available to members, y themselves easily justify the cost of ur membership. I hope that our dues ways remain this low, and you can sure that by paying yourselves, and by lping us recruit more members.

Second, we need your help. If you e on the Board of Directors, we need u to attend our quarterly Board meetings, the first one of which is scheduled for June 28, 2000 at 5:00 p.m. at a location soon-to-be announced. Members who are not Board members are welcome to attend as well. Anne Burnham, editor-in-chief of *The San Antonio Defender*, is always in need of written materials. If you have done anything in court lately that has worked well for you, or if you have an idea about something that might work that the rest of us need to know about, or if you just want to publish something useful, get in touch with Anne at 226-1463. We are trying to establish a fund of resources which local lawyers can make use of. To that end, if you have transcripts of prior testimony of frequently-appearing witnesses (*e.g.*, McDougall, Kellogg, DiMaio, etc.), creative motions or jury charges, or interesting appellate briefs, please share them with us and we will make them available to the membership.

Mark Stevens

Third, we need your ideas. We will be continuing our free CLE Programs and expect to put one out every month. If you want to present a topic, or if you can give us ideas for topics or speakers, we would like to hear from you. Finally, we need to know what you want from **your organization**. A number of ideas have already been suggested, and we will appoint committees at our next Board meeting to study their feasibility. I would like to conduct and publish a poll of San Antonio lawyers concerning the performance of our local judiciary. Others have asked about obtaining badges to permit lawyers to bypass state courthouse metal detectors. George Scharmen believes we need to form a political action committee. I know you have ideas, and I would like to hear them. Come to the next Board meeting, or contact me at:

Mark Stevens
310 S. St. Mary's, Suite 1505
San Antonio, Texas, 78205
226-1433
223-8708 (fax)

We have survived and grown over the last year in large part because of the hard work of Anne Burnham, Diana Hoermann, Marina Douenat and Annette Richter. Special credit, of course, is due George Sharmen, without whose vision, persistence and dedication the San Antonio Criminal Defense Lawyers Association certainly would not exist. With your help, we can continue to grow. I look forward to hearing from and working with you.

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 events 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.

A President's Message

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CAVEAT REGARDING JUDGE SHARON KELLER

While running in the Republican primary for Presiding Judge of the Texas Court of Criminal Appeals, Judge Sharon Keller accomplished the unheard of: she lost the endorsement of the San Antonio Express-News by acting *too* prosecutorial on the bench. Commenting on Judge Keller's previous experience as a prosecutor, editorial page editor Lynell Burkett wrote on March 12, 2000: "But the role of a judge and that of a prosecutor are different. Some people are able to make the switch. Keller appears not to have."

Mark Stevens

Judge Keller won the primary anyway, and, on November 7, Texas voters will decide between her and the Democratic candidate, Justice Bill Vance of the Waco Court of Appeals. For several years now Justice Keller has had the reputation as the most state's-minded judge on the Court. In light of the upcoming election, I decided to examine the written record Judge Keller has created during almost six years on the Court, to see whether she deserves this reputation. To do this, I considered how often she has voted with the defendant; her attitudes about *stare decisis*; the importance of some of her decisions to the jurisprudence of Texas; and, her record in death penalty cases.[1] This examination convinces me that Judge Keller's reputation is well founded.[2]

Judge Keller Almost Always Sides With The Prosecution

Before this study, I would have said that Judge Keller has rarely seen a defense argument she finds persuasive. I still believe this to be true, although frankly, she did vote "for" the defense more often than I would have thought. Specifically, in 86 published opinions that I found which listed her as the author, Judge Keller voted for the defense 11 times.[3] Although the raw numbers were higher than I expected, it is fair to say that, with a only a few exceptions, the defense "victories" were routine at best, and double-edged at worst.

For an example of a double-edged victory, consider *Ransom v. State*, 920 S.W. 2d 288 (Tex. Crim. App. 1994). There, on original submission, the Court ordered a new trial on guilt/innocence for the death-sentenced defendant after holding that the trial court had erroneously granted the state's challenge for cause. The Court then granted the state's motion for rehearing, and, through Judge Keller, continued to hold that the trial court had erred, but went on to hold that the proper remedy was only to grant a new *sentencing* trial, and not a new trial altogether. So, the defendant "won," but the scope of his victory was considerably narrower when Judge Keller wrote for the majority. Most of the other "victories" were routine decisions, dictated by precedent, and provoking little controversy in the way of dissenting opinions from other members of the Court.[4]

Three of Judge Keller's decisions, in my judgment, cannot fairly be dismissed by the defense bar as routine. In *Long v. State*, 931 S.W. 2d 285 (Tex. Crim. App. 1996), the Court found the stalking portion of the harassment statute unconstitutional. Any time the Court finds legislation unconstitutional, it takes a bold step, and should be credited for having done so. In *Mims v. State*, 3 S.W. 3d 923 (Tex. Crim. App. 1999), the question was whether a defendant convicted of *attempted* murder was entitled to submission of the "sudden passion" issue at punishment. The intermediate court of appeals had accepted the state's literal interpretation of the statute, holding that sudden passion could only be

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President's Message *(cont'd from pg. 2)*

submitted in murder, not attempted murder, cases. The Court of Criminal Appeals, speaking through Judge Keller, disagreed, and reversed both the court of appeals and the trial court. In *State v. Williams*, 938 S.W. 2d 456 (Tex. Crim. App. 1997), the trial court dismissed the indictments against the defendant because the state had not tried him within 120 days of his arrival in Texas, in violation of the Interstate Agreement on Detainers Act. On appeal the state asserted that this act violated the separation of powers doctrine, and both the court of appeals and the Court of Criminal Appeals rejected this argument. I do not think any of these cases are "routine," because they all constituted important victories for the defense bar. On the other hand, all three were unanimous decisions, which is rare for the Texas Court of Criminal Appeals in recent years. Unanimity here may suggest that, though important, these decisions were non-controversial and dictated by precedent.[5]

Judge Keller And Stare Decisis

According to the United States Supreme Court, "the important doctrine of *stare decisis* [is]

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine 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.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). Recently the Supreme Court refused to overrule *Miranda v. Arizona*, citing *stare decisis* as one of its reasons. Recognizing that *stare decisis* is "not an inexorable command," the Court nonetheless agreed that "the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 120 S.Ct. 2326, 2336 (2000). Presumably, mere disagreement is not a "special justification" for overruling precedent.

Judge Keller has both expressly relied on -- and expressly discounted -- *stare decisis* on the way to affirming convictions. In *Busby v. State*, 990 S.W. 2d 263, 267 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 803 (2000), prior case law supported the trial court's ruling involving the content of an affidavit controverting a motion to change venue. The Court, through Judge Keller, pointed out that it was not "writing on a clean slate concerning this issue. The doctrine of stare decisis indicates a preference for maintaining consistency even if a particular precedent is wrong." Appellant's conviction for capital murder was affirmed. That is, *stare decisis* was invoked and the defendant lost.

In *Malik v. State*, 953 S.W. 2d 234, 236 (Tex. Crim. App. 1997), *stare decisis* was downplayed, and the defendant lost. Judge Keller, explaining the Court's decision to overrule the *Benson/Boozer* doctrine, wrote this about *stare decisis*: "Often, it is better to be consistent than right. But, when a particular court-made rule does not produce consistency and/or the rule regularly produces results unanticipated by the constitutional doctrine on which it is based, then we should be prepared to disavow the rule and overrule the line of cases embodying the rule." The opinion by the court of appeals which had relied on *Benson/Boozer* and reversed appellant's conviction was vacated. *Accord Awadelkariem v. State*, 974 S.W. 2d 721, 728 (Tex. Crim. App. 1998)(overruling 100 years of precedent concerning right of trial court to rescind an order granting motion for new trial); *see also Angleton v. State*, 971 S.W. 2d 65, 69 (Tex. Crim. App. 1998)(overruling four year old precedent concerning predicate for admissibility of tape recorded evidence); *Brooks v. State*, 957 S.W. 2d 30, 33-34 (Tex. Crim. App. 1997)(overruling precedent to hold that prior convictions used for enhancement need not be pled in the indictment).

Judge Keller's Landmark Decisions For The State

It is important to consider not only the frequency with which Judge Keller tends to agree with the state's argument, but also the impact that her cases have had on Texas criminal jurisprudence. I find three opinions she authored particularly revealing.

Cain v. State, 947 S.W. 2d 262 (Tex. Crim. App. 1997), is a case of sweeping importance. There the Court, speaking through Judge Keller, said this about harmless error: "Except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis." *Id.* at 264. Anyone who has done much appellate work for the defense knows that the doctrine of harmless error has historically been used to negate reversible error. *Cain* will certainly be used by the state to successfully argue that even more errors are harmless, and must therefore be ignored on appeal.

As previously discussed, *Malik v. State*, overruled the so-called *Benson/Boozer* line of authority to hold that sufficiency of the evidence on appeal is to be measured, not against the jury charge actually given, but rather by the hypothetically correct jury charge. *Malik* will make it much more difficult for the defense to win sufficiency arguments on appeal.

And, in *Ex parte Fierro*, 934 S.W. 2d 370, 371-72 (Tex. Crim. App. 1996), the Court concluded that the applicant was denied due process of law when the state knowingly used perjured testimony to convict him for capital murder, but that this constitutional error was harmless. In other words, it is fundamentally and constitutionally unfair for the prosecutor to sponsor a lying police officer, but, so what?

Published Death Penalty Decisions

In no other category does Judge Keller seem more prosecution-oriented than with regard to the death penalty. According to the San Antonio

President's Message

from SACDLA's president, Mark Stevens

WHEN JUSTICE SLEEPS

28 STEPS TO A NON-ARBITRARY, NON-CAPRICIOUS DEATH PENALTY

"Justice asleep is justice denied."
Robert McGlasson
habeas lawyer for
Calvin Jerold Burdine

Mark Stevens

Recently I received a letter from a non-lawyer who was seeking assistance on a paper she was writing about the death penalty. She was against the death penalty, and preferred to write her paper from this viewpoint, but was concerned about information she had discovered on the Internet. This information, typical of that which can be found in that undisciplined resource, confidently proclaims that "[t]here are at least 28 procedures necessary in reaching a death sentence." Because of these procedures — among which are remarkable innovations like, "the suspect is presumed innocent," and "trial is conducted" — the authors conclude that: "The American Death Penalty is overwhelmingly, the least arbitrary and the least capricious of all the world's legal sanctions for violent crime." She sent me the Internet article and asked me for my comment.

Of course, I strongly disagree with the conclusion. Few other civilized countries in the world even have a death penalty, and none of those civilized few use it so frequently as we do. It is nothing short of preposterous to conclude that our system is — overwhelmingly or otherwise — the least arbitrary and capricious in the world. My initial reaction was to send the woman a copy of my complaints about the death penalty previously registered in this column, in which I assert that the process is broken and is unfixable because of the trilogy of race, poverty and politics.[1] Although these are my beliefs (and I'm sticking to them), I also know that similar arguments have consistently failed to persuade in the courts of law, and in the court of public opinion, in this country. I wished I had something more persuasive to convince her that, the "28 procedures" notwithstanding, the death penalty is still fundamentally and inherently flawed.

Then, on October 27, 2000, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Burdine v. Johnson*[2]. There the court held that counsel might sleep through parts of a death penalty trial and still be constitutionally effective. It immediately struck me that here was the best proof of all that our death penalty scheme is broken and unfixable.

Burdine's Case, Before Reaching The Fifth Circuit

1. State district court

Judge Jay Burnett conducted a habeas hearing in the *Burdine* case in state court and, based on evidence from three trial jurors and the clerk of the court, made a factual finding that the defendant's lawyer had "repeatedly dozed and/or actually slept during substantial portions" of the trial.[3] Judge Burnett concluded that trial counsel was therefore absent, and that this constituted a *per se* denial of the right to counsel guaranteed by the Sixth Amendment. Accordingly, the trial court recommended that Mr. Burdine receive a new trial, without having to prove that he was prejudiced by his counsel's deficient performance.[4]

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2. The Texas Court of Criminal Appeals

The majority of the Texas Court of Criminal Appeals found that Judge Burnett's factual findings were supported by the record, but denied relief because it found that the defense had not demonstrated prejudice.[5] The majority's opinion was unpublished. Judge Maloney, joined by Judges Baird and Overstreet, filed a published dissent, asserting that, because this precise issue had not been decided by that court or by the Supreme Court, the court had a duty to at least file and set the case for submission.[6]

3. Federal district court

The *Burdine* case then went to federal district court. Evidently, this problem is not unique to Texas, as other jurisdictions have created rules to deal with the sleeping lawyer.[7] Examining cases from several such jurisdictions, Judge Hittner formulated the following rule:

> To be successful on such a per se ineffective assistance of counsel claim, the defendant must show that counsel slept for a substantial portion of the trial. The Court shall determine what constitutes a substantial portion of trial. In its determination, the Court shall address the frequency or length of the attorney's lapses, the state of consciousness of the attorney during these lapses, and whether the defendant's interests were at stake during these lapses.[8]

Judge Hittner held that Mr. Burdine carried his burden under this test, in light of evidence that showed that the trial lawyer "slept on at least two to five occasions during the prosecution's case, at least one episode which lasted a minimum of ten minutes in length."[9]

> This Court therefore concludes that when a defense attorney sleeps through a "substantial" portion . . . of his client's criminal trial, prejudice is to be presumed as a matter of law. A sleeping counsel is equivalent to no counsel at all.[10]

Burdine In The Fifth Circuit

1. The majority

That conclusion — that a sleeping lawyer is the same as no lawyer at all — seems eminently reasonable. Here, the lower courts found, not just that counsel slept, but that he slept through "substantial" portions of the trial. The Fifth Circuit, though, was concerned that the periods when the lawyer slept were "unidentified," and the crucial question became this: "The linchpin to this appeal is whether, under the Sixth Amendment, prejudice must be presumed when appointed defense counsel sleeps during *unidentified* portions of a capital murder trial."[11] With the question framed this way, that Court's holding was not surprising. Although it was undisputed that the lawyer slept, since Mr. Burdine was unable to prove precisely *when* his lawyer slept[12], he could not show that anything significant had happened during the sleeping portions of the trial, and therefore, he lost.

> [I]t is possible that unobjection- able evidence (or evidence which Cannon was already anticipating) may have been introduced while Cannon slept, without having any substantial effect on the reliability or fairness of Burdine's trial. But, Burdine essentially asks us to assume that Cannon slept during the portions of the proceedings for which the transcript reflects no activity by him. In the light of the foregoing discussion and the rather vague testimony of the witnesses at the state habeas evidentiary hearing regarding when Cannon slept, it would be inappropriate for us to engage in such speculation. In sum, on this record, we cannot determine whether Cannon slept during a "critical stage" of Burdine's trial.[13]

In deciding against Burdine, the court did not hold that prejudice could never be presumed from a sleeping lawyer, just that, "under the above described circumstances, presumptive prejudice is not warranted."[14] The court was careful not to condone sleeping during capital murder trials, "or any other trial, for that matter."[15]

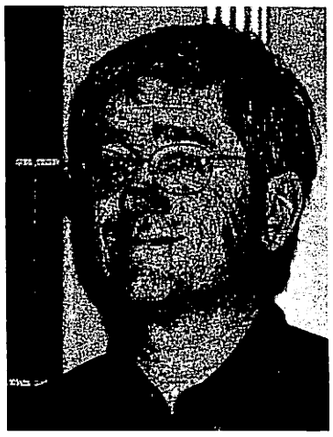
> Again, we hold only that, under the specific circumstances of this case, in which it is impossible to determine--instead, only to speculate--that counsel's sleeping was at a critical stage of the trial, prejudice cannot be presumed; the *Strickland* prejudice analysis is adequate to safeguard the Sixth Amendment guarantee of effective assistance of counsel.[16]

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 [illegible] that 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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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.

President's Message

from SACDLA's new president, Mark Stevens

INNOCENCE, PROCESS AND THE DEATH PENALTY

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.

Callins v. Collins, 510 U.S. 1141 (1994)(Blackmun, J., dissenting from denial of certiorari).

The Disturbing Prospect of Innocence

"No issue posed by capital punishment is more disturbing to the public than the prospect that the government might execute an innocent person." The recent spectacle surrounding Gary Graham seems to support this viewpoint. Media people from all over the world descended on Huntsville trying to find out whether Texas executes innocent persons. The question — indeed, the fear — of innocence is truly haunting, and it is

Mark Stevens

not something just dreamed up by political foes of George W. Bush. A couple of centuries ago, Thomas Jefferson wrote that he would not support capital punishment until he became convinced of the infallibility of man. Surely even the staunchest supporters of the death penalty recoil in horror at the idea of executing an innocent person. I have opposed the death penalty as long as I can remember, and I welcome any argument that increases the number of abolitionists. That said, however, I do think there are better reasons to oppose the death penalty than the possibility that innocent persons have been or will be executed.

Is Innocence Disturbing Enough?

For one thing, as any criminal defense lawyer knows only too well, actual innocence is almost impossible to prove. This is probably why our constitution has been interpreted to require the prosecution to prove guilt beyond a reasonable doubt. The fact that Gary Graham was convicted on the basis of a single eyewitness would cause any reasonable person to pause, but it does not prove Graham innocent of the capital murder he was convicted of. Similarly, that Roy Criner's DNA was not found is something that his jury should have known about, but this absence of evidence would not and could not prove his innocence. The simple truth is that in most criminal cases, we will never *know* whether the person convicted and sentenced to death was guilty.

Additionally, anyone with passing familiarity of the subject would have to acknowledge, albeit begrudgingly, that many on death row are in fact guilty. While it is possible, even probable perhaps, that an innocent person has been executed in recent times, even the stoutest abolitionists have no proof that this has happened. Without such proof, it is difficult to fashion a compelling argument that the death penalty should be abolished because we execute innocent people. Although death *is* different, the mere possibility that an innocent person could be executed is no better an argu-

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San Antonio criminal defense lawyer, Mark Stevens, former SACDLA Vice-President and Chairman of 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 1998.

ment for abolishing the death penalty than the possibility that an innocent person could be jailed would be for abolishing incarceration as punishment for non-capital crimes.

Finally, the problem of innocence does not seem to be much of a problem for the average Texan. A survey released by the Houston Chronicle on June 22, 2000 informs us that 73% of the people in Texas favor the death penalty. On the other hand 57% believe that innocent people have been executed in Texas. I am no statistician, but the conclusion from these numbers seems inescapable: a substantial number of Texans believe that we have executed innocent people, and yet still support executions.

The Machinery of Death

In my judgment, process — or lack thereof — is the better argument for abolition. Even if we never execute an innocent defendant, we should abolish capital punishment because the procedure by which we decide who lives and who dies — Justice Blackmun's "machinery of death" — is fundamentally flawed. Because of the unholy alliance of race, poverty and politics, society can rarely, if ever, be sure that the system has reliably determined who should be executed. And, if this awesome determination cannot be made reliably, it should not be made at all.

Race Matters

The elaborate *Baldus* study, which examined more than 2000 murder cases committed in Georgia during the 1970's, demonstrated that black defendants who kill white victims have the greatest likelihood of receiving the death penalty. Although the Supreme Court assumed in *McClesky v. Kemp* that this study was statistically valid, it nonetheless rejected the defendant's constitutional challenges to the resulting death sentence, finding that the study showed nothing more than the "risk that the factor of race entered into some capital sentencing decisions . . . . Subsequently, when required to do so by the Anti-Drug Abuse Act of 1988, the United States General Accounting Office conducted a "review and critique of existing research" to determine the effect of the race of the victim and the defendant in capital sentencing. "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision." The most recent statistics published by the NAACP Legal Defense and Educational Fund, Inc., show that 41% of people on death row in Texas are black, a significantly higher number than the percentage of blacks in the population as a whole. Statistics strongly suggest that race matters a lot when it comes to the death penalty. There is no justice when skin color has this much to do with the imposition of the ultimate punishment.

Money Matters

When was the last rich person executed in Texas? Clarence Darrow correctly argued that "it is the poor who fill prisons and who go to the scaffold . . . ." He spoke from personal experience, of course, having himself obtained a life sentence for the wealthy scions, Leopold and Loeb. It is more than coincidence that O.J. Simpson and Allen Blackthorne, though death eligible, were not prosecuted for the death penalty, and that T. Cullen Davis, the richest Texan ever prosecuted for capital murder, was acquitted. That there are few if any rich people on death row in the United States is due to more than the infrequency with which the wealthy commit murder. The most obvious explanation is that the rich hire the best lawyers, investigators and experts. In *Martinez-Macias v. Collins*, the Fifth Circuit did the math and concluded that court-appointed counsel in that Texas death penalty case was paid $11.84 per hour. "Unfortunately, the justice system got only what it paid for." There is no justice where the death sentence is imposed, not for committing the worst crime, but instead for having the worst lawyer.

Politics Matters More Than Anything

Race and money matter, but nothing matters as much as politics, and nothing condemns our system more completely. The elected district attorney ultimately decides whether a death-eligible defendant will actually face the death penalty, and it is naive to think that politics is not a major factor in every such decision. Elected trial judges rule on crucial questions of law, and these rulings are reviewed by elected appellate judges. Clemency decisions are made by the governor and by the board of pardons and paroles which he appoints. If you doubt that politicians make political decisions concerning criminal justice, watch the next race for district attorney or attorney general, and see if the candidates don't boast about the number of death penalties obtained or enforced during their administrations. Better, watch this presidential election. The last candidate to come out against the death penalty was Michael Dukakis. Nobody has made the mistake since, nor will anyone likely make it in the foreseeable future. Governor Clinton rushed back to Arkansas in 1992 to preside over the execution of a brain-damaged killer. Expect candidates Gore and Bush to try and outdo each other this campaign in their support for capital punishment. As long as the politicians run for office every two or four years based on their statistics, there will always be the risk that politics have played a part in death sentences sought, imposed and administered, and this risk is intolerable in a society which is based on the rule of law.

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PRESIDENT'S MESSAGE
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Tinkering Should Stop

When originally installed on the Supreme Court, Justice Blackmun struggled *personally* with the death penalty, but fully believed it passed constitutional muster. After sitting on the Court for more than 20 years, though, he changed his mind, and, in 1994, he penned the dissenting opinion which begins this message. Justice Blackmun was right. It is time we stop tinkering with the machinery of death. Although we have devised a constitutionally acceptable means of determining guilt or innocence, there is no reliable and accurate way to consistently decide who should live and die. Every other Western democracy in the world has abolished its death penalty. It is time for the United States to join those ranks. ❖