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By et Date 7/16/10
Clerk of the Commission

State Commission on Judicial Conduct



BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT

INQUIRY CONCERNING
HONORABLE SHARON KELLER
JUDGE NO. 96

COMMISSION'S FINDINGS, CONCLUSIONS AND
ORDER OF PUBLIC WARNING

On the 18th day of June, 2010, the State Commission on Judicial Conduct considered the Record of the Formal Proceedings involving Judge No. 96, the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, Austin, Travis County, Texas. The Record included the *Special Master's Findings of Fact* signed on January 19, 2010 by the Honorable David A. Berchelmann, Jr., Special Master presiding, as well as the transcript of the testimony and the exhibits presented at the evidentiary hearing before Judge Berchelmann.

Before taking action on the Record of the Formal Proceedings, the Commission also considered the *Notice of Formal Proceedings* filed with the Commission on February 19, 2009; *The Honorable Sharon Keller's Original Verified Answer to the Notice of Formal Proceedings of the Texas State Commission on Judicial Conduct* filed on March 24, 2009; the *First Amended Notice of Formal Proceedings* filed on June 15, 2009; *The Honorable Sharon Keller's Verified Answer to the First Amended Notice of Formal Proceedings of the Texas State Commission on Judicial Conduct and Special Exception* filed on August 14, 2009; *Examiner's Objections and Responses to Special Master's Findings of Fact* filed on February 17, 2010; *The Honorable*

Sharon Keller's Objections to the Special Master's Findings of Fact filed on February 18, 2010; *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, *The Examiner's Reply to Judge Keller's June 4, 2010 'Response'* filed on June 14, 2010; *Judge Keller's Surreply to the Examiner's Reply to Judge Keller's June 14, 2010 'Response'* filed on June 15, 2010; and heard extensive oral argument from Judge Keller's counsel, Charles A. Babcock, and Special Counsel John J. McKetta, III, on June 18, 2010.

After due consideration, the Commission enters the following:

RULINGS

Regarding the *Motion for Application of Proper Evidentiary Standard of Respondent, the Honorable Judge Keller* filed on July 31, 2009, and reurged before the Commission in *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, the Commission **DENIES** the Motion.

Regarding *Respondent, the Honorable Sharon Keller's Motion to Strike First Amended Notice of Formal Proceedings, Motion to Show Authority, and Brief in Support* filed on June 24, 2009, and reurged before the Commission in *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, the Commission **DENIES** the Motion.

REVIEW BY THE COMMISSION

Pursuant to Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges, adopted and promulgated by Order of the Supreme Court of Texas pursuant to its authority under Article 5, sec. 1-a(11) of the Texas Constitution, the Commission has carefully reviewed and considered the Report of the Special Master with due regard to the observations of the Special Master as to the conduct of Judge Keller and the others involved in the events in question. It is the duty and the function of the Commission to determine the proper disposition of this matter based upon the record of the proceedings, the Special Master's Report, the objections and responses to the Special Master's Report submitted by the Examiner and Judge Keller, as well as the arguments of counsel and any other materials properly before the Commission.

FINDINGS OF FACT

The Commission makes the following findings of fact, having been proven by a preponderance of the evidence:

1. At all times relevant hereto, the Honorable Judge Sharon Keller has been the Presiding Judge of the Texas Court of Criminal Appeals ("TCCA") and continues to perform her judicial duties.

2. Judge Keller was elected to the TCCA in 1994. In 2000 she was elected Presiding Judge, and in 2006 she was re-elected for another six-year term that expires in 2012.
3. A Texas jury convicted Michael Wayne Richard ("Richard") of capital murder stemming from an incident that occurred on August 18, 1986. He was sentenced to death and went through the state and federal appeals processes. After exhausting his then-available appeals, he was scheduled for execution on September 25, 2007, anytime after 6:00 p.m.
4. On the morning of September 25, 2007, the United States Supreme Court announced that it would hear the case *Baze v. Rees*, which raised the issue whether Kentucky's three-drug protocol for lethal injection violated the Eighth Amendment's prohibition against cruel and unusual punishment. The decision in *Baze* would probably impact Texas's death penalty procedure, which uses a similar three drug protocol.
5. The Texas Defender Service ("TDS"), which represented Richard, thus had only a few hours to seek a stay of Richard's execution based on the United States Supreme Court's decision that morning.
6. Because TDS would likely ask the United States Supreme Court to stay Richard's execution pursuant to the Court's decision in *Baze* to hear the lethal injection case (assuming the lower courts did not first grant a stay), TDS had to do so through a writ of habeas corpus.
7. To present a habeas claim to the United States Supreme Court, a litigant must exhaust all possible state remedies; that is, the United States Supreme Court will not consider a habeas claim—even in a death penalty case—unless the state courts first pass on the issue. See 28 U.S.C. § 2254.
8. Before the United States Supreme Court would even consider whether to stay Richard's execution based on its decision to hear *Baze*, Richard had to exhaust that argument before the Texas courts; that is, he had to present a lethal injection argument to the TCCA.
9. Only after the TCCA rejected the claim would Richard be able to seek relief from the United States Supreme Court.
10. Richard's lawyer's failure to raise the lethal injection argument to the TCCA impaired his ability to successfully ask the United States Supreme Court to stay his execution.
11. The TCCA's Execution-day Procedures call for the assignment of a designated judge to be in charge of each scheduled execution, and provide as follows:

All communications regarding the scheduled execution shall first be referred to the assigned judge. The term "communications" includes pleadings, telephone calls, faxes, e-mails, and any other means of communication with the Court. The assigned judge may call a special conference or gather votes by telephone, e-mail, fax, or other form of communication.

If the communication includes a request for stay of execution, the assigned judge shall contact, by any reasonable means, the other members of the court and request a vote on the motion to stay. "Reasonable means" includes calling a special conference and contact by electronic communication. Non-assigned judges will provide to the assigned judge an adequate means of contact, such as home and cellular telephone numbers or other means of prompt contact.

12. The TCCA Execution-day Procedures were unwritten until November 2007, when they were put in writing. It is undisputed that the oral policy in effect on September 25, 2007 was identical to the written procedures created in November 2007.
13. The procedures set out in paragraph 11, above, were in effect at all dates relevant to this proceeding, and Judge Keller knew and was familiar with them.
14. The TCCA Execution-day Procedures are the vehicle by which the TCCA assures that one judge will be informed about the circumstances of the scheduled execution and will be available at all times on execution day up until the event of execution, no matter how late that may occur. The TCCA Execution-day Procedures were adopted as part of the Court's responsibility for due process. They assure that persons scheduled to be executed on a given day will have access to an open Court at all times prior to the event of execution. The TCCA Execution-day Procedures require that all communications on that date regarding the scheduled execution be first referred to the assigned judge, so that there will be no inconsistency or unintended consequences in the addressing and disposition of those communications. The TCCA Execution-day Procedures had no exception for administrative or non-substantive communications, but encompassed all communications regarding the scheduled execution.
15. The term "communications" in the TCCA Execution-day Procedures in effect on September 25, 2007 included pleadings, telephone calls, faxes, e-mails, and other means of communication.

16. The TCCA's Execution-day Procedures are a method to assure that no delay or misdirection might occur to last-minute communications regarding the scheduled execution. Its mandatory "shall" and its encompassing "all communications" are safeguards to assure that the Court remains open up to the moment of execution, in case any issue – slight or great – needs attention before the irreversible event of death. Thus, the TCCA's Execution-day Procedures are a means to safeguard against erroneous or improvident execution.
17. Texas Rule of Appellate Procedure 9.2(a) provides as follows:
 - (a) *With Whom*. A document is filed in an appellate court by delivering it to:
 - (1) the clerk of the court in which the document is to be filed; or
 - (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.
18. TRAP 9.2(a) provides persons with a legal interest in a proceeding a means of access to the appellate courts beyond the normal office hours of the court clerks and the right to be heard by the clerk or a judge as to the acceptance of a filing after hours.
19. On the date of a scheduled execution, the TCCA's Execution-day Procedures mandated that every communication regarding the day's scheduled execution be first referred to the assigned judge. All of the TCCA judges, including Judge Keller, knew that September 25, 2007 was an execution date.
20. On September 25, 2007, Judge Keller knew that Richard was the person scheduled to be executed at 6:00 p.m. that evening.
21. The Honorable Judge Cheryl Johnson was the assigned judge under the TCCA's Execution-day Procedures with respect to Richard's execution on September 25, 2007.
22. The identity of the assigned judge for the September 25, 2007 execution was not public information.
23. The assigned Judge for the September 25, 2007 execution under the TCCA's Execution-day Procedures was unknown to Richard's representatives.

24. Judge Johnson and some other TCCA judges intended to stay at the TCCA on September 25, 2007, and remain available until word of the execution was received.
25. At 11:12 a.m., on September 25, 2007, Judge Keller received a copy of the *Baze* petition for certiorari, which the United States Supreme Court had granted, and a copy of the Kentucky Supreme Court decision in *Baze*. At 11:13 a.m., Judge Keller acknowledged her receipt of the information.
26. At 11:29 a.m., on September 25, 2007, TCCA General Counsel Edward Marty ("Marty") sent an e-mail to all of the TCCA judges with the subject line, "Execution Schedule." In the e-mail Marty informed the TCCA judges, including Judge Keller, that, "The [United States] Supreme Court has just granted cert on two Kentucky cases in which lethal injection was claimed to be cruel and unusual . . . I do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue or in what court."
27. At 1:30 p.m., on September 25, 2007, the Honorable Judge Cathy Cochran informed members of the TCCA, including Judge Keller, and Marty of an internet link to the Kentucky Supreme Court's unanimous decision in *Baze*.
28. Members of the TCCA, including Judge Keller, and Marty were aware on September 25, 2007 of the United States Supreme Court's decision that morning to grant certiorari in *Baze* and to set the case for argument.
29. Members of the TCCA anticipated that Richard's counsel would likely attempt some type of filing with the TCCA based on *Baze*.
30. At approximately 11:40 a.m., on September 25, 2007, TDS lawyers—including David Dow ("Dow"), Greg Wiercioch ("Wiercioch"), and Alma Lagarda ("Lagarda")—participated in a conference call, during which they first discussed the United States Supreme Court's decision that morning. These lawyers were working in TDS's Houston office.
31. After the 11:40 a.m. call, Dow, a professor of law at the University of Houston and TDS's Litigation Director, instructed Lagarda, a junior attorney, to draft a writ of prohibition, a motion for leave to file the writ, a successor application for a writ of habeas corpus, and a motion to stay the execution, based on the United States Supreme Court's decision to review Kentucky's lethal injection procedure.
32. Dow and Wiercioch focused on a so-called *Atkins* claim that they planned to raise, challenging Richard's execution based on mental retardation.

33. Dow believed the *Atkins* claim was a more effective vehicle for obtaining a stay of execution, especially because the United States Supreme Court had never before considered the constitutionality of lethal injection.
34. In the early afternoon of September 25, 2007, Marty began drafting a proposed order for the TCCA in anticipation of Richard's filing based on *Baze*. By 3:20 p.m., Marty had completed his preparation of a draft order denying relief, if any such filing were to occur.
35. The Honorable Judge Tom Price drafted a dissenting opinion in the event Richard's anticipated request for stay was denied.
36. At approximately 2:40 p.m., on September 25, 2007, Marty sent an e-mail to all of the TCCA judges, including Judge Keller, with the subject line, "Michael Wayne Richard update." In the e-mail, Marty informed the TCCA judges that the Harris County District Attorney's Office had just called and informed him that Richard's lawyers had called the Harris County District Attorney's office and confirmed that Richard's lawyers planned to file a writ of prohibition and subsequent application on behalf of Richard based on the issue in *Baze* for which certiorari had been granted that morning. Marty promised to keep the judges informed and circulate a copy of any pleadings when he received them.
37. Judge Keller left her chambers at the TCCA at about 3:45 p.m., on September 25, 2007, and returned home. Judge Keller did not return to the TCCA that day. Before she left for the day, Judge Keller had seen the 2:40 p.m. e-mail from Marty concerning anticipated filings on behalf of Richard.
38. Around 3:30 p.m., on September 25, 2007, Lagarda completed her draft of the petition of the writ of prohibition and sent it to Dow, and he began to revise it. She had not yet started working on the other filings. Dow returned the petition for a writ of prohibition to Lagarda at 4:00 p.m., and she completed the document by 4:45 p.m.
39. Meanwhile, Wiercioch was working on the *Atkins* claim, and he filed a motion with the United States Supreme Court. He then offered to assist on the lethal injection claim that TDS was preparing on behalf of Richard.
40. TDS had computer and/or e-mail problems that it anticipated would prevent them from filing with the TCCA by 5:00 p.m.
41. At approximately 4:40 p.m., on September 25, 2007 Dorinda Fox ("Fox") of TDS called the TCCA deputy clerk, Abel Acosta ("Acosta"), and told Acosta that TDS wanted to file

something, that it was running late and would like to file late. Acosta told Fox that he would need to check with someone.

42. Immediately after speaking with Fox, Acosta called Marty and told him of the telephone call from Fox. According to Marty, Acosta said, “[t]hey were having trouble getting it and want[ed] the Court to stay open late.”
43. Marty did not then know that the TCCA’s Execution-day Procedures required that all communications regarding the scheduled execution must be first referred to the assigned judge.
44. In response to Acosta’s call, Marty called Judge Keller at her home at about 4:45 p.m. on September 25, 2007 looking for direction. Marty recalled telling Judge Keller that a representative of Richard’s legal team had asked to keep the Court open past 5:00 p.m. Marty thought that Judge Keller might say “yes,” or at least something other than “no,” but Judge Keller said “no.” She then asked, “Why?” Marty explained that they wanted to file something, but they were not ready. “They were having trouble getting it,” he said. Judge Keller again responded “no.” She said, “We close at 5:00 p.m.”
45. Based on Judge Keller’s reply, Marty told Acosta (i) that the Presiding Judge said we close at 5:00 p.m. and (ii) that the Court wasn’t going to accept something after 5:00 p.m.
46. Acosta called Fox of TDS at approximately 4:48 p.m. on September 25, 2007 and told her that he had been told to tell her, “We close at 5:00 p.m.” Fox of TDS asked Acosta if she could take the filing to the Court and drop it with a security guard. Acosta replied he did not know what good that would do because a security guard would not accept it.
47. At about 5:07 p.m., on September 25, 2007 Melissa Waters (“Waters”) of TDS called Acosta to make sure that TDS understood his message. She asked Acosta to confirm whether the Court would not accept a late filing, as it had done so on previous occasions. She also asked him if TDS could e-mail or fax the filing to the TCCA.
48. Acosta told Waters that the decision had already been made not to accept a filing after 5:00 p.m. He also said that fax or e-mail filings would not be permitted.
49. Acosta regularly works at the clerk’s office from 8:30 a.m. until 5:30 p.m. On September 25, 2007, he planned to and did stay in the clerk’s office until 7:00 p.m. He testified that if the decision had been his, he would have accepted the filing after 5:00 p.m. and that it would have caused him no hardship. Acosta believed that “the decision had been made” and that he had received instructions from Presiding Judge Keller and that he could not

act differently. He believed he could not talk to a different judge about the communication because it would have been going behind the Presiding Judge's back and would have been disloyal to her.

50. Acosta knew that a judge was assigned for the Richard execution day, but Acosta did not know of the Execution-day Procedures or of any requirement that the communication be first directed to the assigned judge. As of September 25, 2007, he had never received any training concerning the Execution-day Procedures in his 17 years at the TCCA.
51. If Acosta had been told by Marty or by Judge Keller to refer the communication immediately to Judge Johnson, the assigned judge, he would have done so.
52. At approximately 4:59 p.m. on September 25, 2007, Judge Keller called Marty from her home and asked him whether representatives for the person scheduled to be executed on that day had filed anything with the TCCA concerning the scheduled execution. Marty told Judge Keller they had not.
53. Either in the 4:45 p.m. call or the 4:59 p.m. call, on September 25, 2007, Judge Keller asked Marty why the clerk's staff should be made to remain after hours for lawyers who cannot get their work done on time.
54. The TDS did not complete the lethal injection pleadings until after 5:00 p.m., when the TCCA's clerk's office closes.
55. Fox called Acosta at approximately 5:56 p.m. on September 25, 2007 and told him that she was headed to the Court to hand-deliver the filing on behalf of Richard. Acosta told Fox, "Don't bother. We're closed." Fox also asked, either in the 4:48 p.m. or the 5:56 p.m. telephone call, whether electronic filing might be accepted, and she was told no.
56. In her telephone conversations with Marty on September 25, 2007, Judge Keller did not give Marty any guidance about the Execution-day Procedures and did not tell Marty to direct the TDS inquiries to Judge Johnson, the assigned judge. Instead, Judge Keller addressed and disposed of the communications from TDS. Both Acosta and Marty understood and treated Judge Keller's responses to be her decision and their marching orders. Hence, Acosta told TDS that the decision not to accept a late filing had already been made.
57. Neither Judge Johnson nor the other judges who remained at the Court after 5:00 p.m. were aware on September 25, 2007, that Richard's legal team had called to ask whether

filings after 5:00 p.m. could be accepted. When Judge Johnson left the Court that evening, she was “quite surprised” that nothing had been filed.

58. If the assigned judge, Judge Johnson, had learned of the TDS communications on September 25, 2007, she would have accepted the filing.
59. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that Marty’s calls were about the execution that was scheduled that evening.
60. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that certiorari had been granted in *Baze* that morning.
61. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the United States Supreme Court’s grant of certiorari in *Baze* was for the purpose of reviewing whether Kentucky’s lethal injection protocol violated the “cruel and unusual punishment” clause of the United States Constitution.
62. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that Texas’ method of execution used a lethal injection protocol and that a decision in *Baze* could have an impact on executions in Texas.
63. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the person scheduled to be executed that evening was likely to attempt to file a motion to prevent the execution based on the issue in *Baze*, as had been brought to her attention in the 2:40 p.m. e-mail from Marty; and she knew that she therefore might be called upon later that day to vote whether to grant or deny relief in the event any motions were filed.
64. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that representatives for the person scheduled to be executed that evening wanted to file something with the TCCA.
65. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the representatives for the person scheduled to be executed that evening were not ready to file with the TCCA by 5:00 p.m.
66. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the representatives for the person scheduled to be

executed that evening had requested that they be permitted to file with the TCCA after 5:00 p.m.

67. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the Execution-day Procedures called for the assigned judge to remain available after hours to receive last-minute communications regarding the scheduled execution.
68. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew that she was not the assigned judge in charge of that evening's scheduled execution, that a specific judge was the assigned judge, and that under the TCCA Execution-day Procedures, all communications relating to the scheduled execution that evening were required to be first referred to the assigned judge.
69. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller did not know whether Acosta or Marty did, or did not, know applicable requirements under the Execution-day Procedures. She knew that she had never given training to either of them concerning the Execution-day Procedures, and she was unaware of their having received training from any other source.
70. On September 25, 2007, Judge Keller did not tell Marty to direct the communications to the assigned judge.
71. On September 25, 2007, Judge Keller's duties of office required her to abide by the Execution-day Procedures.
72. Judge Keller testified that, if she were asked the same questions she was asked on September 25, 2007, and knowing the same things she knew on September 25, 2007, she would do nothing differently today.
73. At approximately 6:10 p.m., on September 25, 2007, TDS faxed a motion to stay Richard's execution to the United States Supreme Court.
74. At approximately 6:22 p.m., on September 25, 2007, Marty called Judge Keller and described to her several activities, including the late effort at or about 5:57 p.m. to file papers on Richard's behalf in the Harris County district courts, the efforts on Richard's behalf to achieve relief in the United States Supreme Court, and the fact that Richard had not yet been executed. As was the case with Judge Keller's 4:45 p.m. and 4:59 p.m. communications with Marty, she did not insist that he comply with the Execution-day Procedures during the 6:22 p.m. call.

75. On September 25, 2007, the United States Supreme Court denied Richard's motion to stay as stated in a fax at 8:01 p.m.
76. The failure of the TCCA to consider and rule on Richard's application for relief on September 25, 2007, compromised his counsel's efforts in seeking a stay of execution on behalf of Richard from the United States Supreme Court.
77. Richard was executed by the State of Texas by lethal injection at 8:23 p.m. on September 25, 2007.
78. At 8:30 p.m. on September 25, 2007, Marty called Judge Keller to inform her that Richard had been executed.
79. The next morning, September 26, 2007, Judge Keller and the other TCCA judges met for a conference. At the end of the conference, several of the judges discussed their surprise that Richard's lawyers had not filed anything with the TCCA based on *Baze*.
80. During the September 26, 2007 conference, Judge Cochran, who was not yet aware of Marty's communications with Judge Keller the night before, posed a hypothetical in which someone called the TCCA before 5:00 p.m., said they wanted to file something, but could not get it there before 5:00 p.m. Judge Cochran's position was that the TCCA should allow the late filing. Other judges expressed agreement with that viewpoint.
81. Judge Keller was present for that discussion at the September 26, 2007 conference but did not disclose to the other judges her communications with Marty the night before, nor the fact that TDS had called the TCCA concerning requests to file after 5:00 p.m.
82. Two days after Richard's execution, the United States Supreme Court granted a stay in the Carlton Turner execution, which was scheduled to take place in Texas on September 27, 2007. Turner had filed a motion for stay with the TCCA, which was denied. Although the TCCA denied the motion for stay, Turner's filing with the TCCA made him eligible to seek a stay from the United States Supreme Court. At approximately 10:00 p.m. on the night of Turner's scheduled execution, the Supreme Court granted the stay. Turner's stay was based on the same *Baze* claim that Richard was not able to present to the TCCA on September 25, 2007.
83. On October 2, 2007, the TCCA granted a stay in the Heriberto Chi execution, which was scheduled at 6:00 p.m. on October 3, 2007. Chi's stay was based on the exact same *Baze* claim that Richard was not able to present to the TCCA on September 25, 2007.

84. In April 2008, the United States Supreme Court issued an opinion in *Baze*, ruling that Kentucky's method of lethal injection was constitutional under the Eighth Amendment to the United States Constitution.
85. Between the time that the United States Supreme Court granted certiorari in *Baze* on September 25, 2007 and the time that the United States Supreme Court issued its opinion in *Baze* in April 2008, Richard was the only person in the United States to be executed.
86. Journalists throughout Texas and the nation strongly criticized Judge Keller's conduct in the *Richard* case on September 25, 2007, as casting public discredit on Judge Keller, the judiciary, and the administration of justice.
87. Numerous complaints were received by the Texas Commission on Judicial Conduct asserting that Judge Keller's conduct in the *Richard* case on September 25, 2007 cast public discredit on the administration of justice in Texas and predominantly asking that Judge Keller be sanctioned or removed from office.
88. Judges of the TCCA received numerous letters and e-mails relating to Judge Keller's conduct in the *Richard* case on September 25, 2007, predominantly asserting that Judge Keller be sanctioned or removed from office.
89. Relatives of Richard filed a civil lawsuit against Judge Keller in Federal court. Judge Keller obtained a dismissal of that civil lawsuit. Part of Judge Keller's defense was based upon the doctrine of judicial immunity. Judge Keller stated in her pleadings that she "is entitled to judicial immunity" (i) "[b]ecause the grant or denial of a stay is a judicial act, not an administrative one," and (ii) the TDS communication that had been brought to her attention on September 25, 2007 "effectively was an oral request for a stay of execution."
90. As a Judge of the TCCA, Judge Keller was required to abide by the TCCA's Execution-day Procedures on September 25, 2007.
91. Judge Keller knew on September 25, 2007 that the TCCA Execution-day Procedures required all communications regarding the scheduled execution to be first referred to the assigned judge.
92. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007 was regarding the scheduled execution that evening.

93. Judge Keller intentionally did not refer Marty's 4:45 p.m. communication regarding the scheduled execution to the assigned judge.
94. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above failed to comply with the Execution-day Procedures.
95. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above interfered with Richard's access to court and right to a hearing as required by law under TRAP 9.2(a).
96. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above was a failure to accord Richard access to court and right to a hearing as required by law under TRAP 9.2(a).
97. On September 25, 2007, Marty was part of the TCCA court personnel, responsible to all nine judges. He was subject to Judge Keller's direction and control. Marty looked to Judge Keller as his supervisor, as the person to whom he had immediate reporting responsibilities, and as the person he would approach for direction, guidance, or interpretation of a rule.
98. On September 25, 2007, Acosta was part of the TCCA court personnel, responsible to all nine judges. He was subject to Judge Keller's direction and control.
99. Marty was seeking direction from Judge Keller at 4:45 p.m. on September 25, 2007 regarding the request from representatives for the person scheduled to be executed that evening to file with the TCCA after 5:00 p.m.
100. On September 25, 2007, Judge Keller intentionally did not direct Marty to relay the 4:45 p.m. communication to the assigned judge.
101. On September 25, 2007, Judge Keller intentionally did not direct Acosta to relay the 4:45 p.m. communication to the assigned judge.
102. Judge Keller's failure to direct Marty or Acosta to relay the 4:45 p.m. communication to the assigned judge on September 25, 2007, as stated above, failed to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007.

103. By failing to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007, Judge Keller interfered with Richard's access to court and right to a hearing as required by law under TRAP 9.2(a).
104. By failing to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007, Judge Keller failed to require that staff subject to her direction and control accord Richard access to court and right to a hearing as required by law under TRAP 9.2(a).
105. Judge Keller knew that Marty's communications at 4:45 p.m. on September 25, 2007 related to a request by representatives for the person scheduled to be executed that evening to file with the TCCA after 5:00 p.m.
106. At the time of her communications with Marty at 4:45 p.m. on September 25, 2007, Judge Keller knew that representatives for the person scheduled to be executed that evening wanted to file with the TCCA, but were not ready to file with the TCCA by 5:00 p.m.
107. At the time of her communication with Marty at 4:45 p.m. on September 25, 2007, Judge Keller was unaware as to the reason representatives for the person scheduled to be executed that evening were not ready to file with the TCCA by 5:00 p.m.
108. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct to close the clerk's office promptly at 5:00 p.m. without referring the matter to the assigned judge.
109. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. that same evening without referring the matter to the assigned judge.
110. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct not to accommodate the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m. without referring the matter to the assigned judge.
111. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something - - was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that

was scheduled at 6:00 p.m. that same evening without referring the matter to the assigned judge.

112. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something but were not ready- - was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. that same evening.
113. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something - but were not ready - - was intentional conduct to deny the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m. without referring the matter to the assigned judge.
114. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct to assure closing of the clerk's office promptly at 5:00 p.m. without referring the matter to the assigned judge.
115. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct that the clerk's office not accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. without referring the matter to the assigned judge.
116. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct not to accommodate the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m.
117. Judge Keller's conduct on September 25, 2007, interfered with Richard's and his counsel's opportunity to be heard by the judge assigned to Richard's execution under the TCCA's Execution-day Procedures.
118. On September 25, 2007, Judge Keller gave instructions to Marty that had the effect of closing any further access by Richard's lawyers to the TCCA concerning the effort to obtain a stay of Richard's execution based on the legal issue for which the United States Supreme Court had granted certiorari that day.
119. The failure of the TCCA to consider and rule on Richard's Stay of Execution on September 25, 2007 compromised Richard's counsel's efforts in seeking a stay of execution from the United States Supreme Court.

RELEVANT STANDARDS

1. Article 5, sec. 1-a(6)A of the Texas Constitution provides, in relevant part, that any justice or judge of the courts established by the Constitution or created by the Legislature may be removed from office for “incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. . . .”
2. Article 5, sec. 1-a(8) of the Texas Constitution provides the Commission’s authority to take appropriate action upon a finding of judicial misconduct.
3. Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges, promulgated by Order of the Supreme Court of Texas pursuant to its authority under Article 5, sec. 1-a(11) of the Texas Constitution, provides: “If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, by affirmative vote of six of its members, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition. Six votes are required for a recommendation of removal or retirement.”
4. Section 33.001(b) of the Texas Government Code defines “willful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties” as, among other things: “(1) willful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business; (2) willful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct; (3) persistent or willful violation of the rules promulgated by the supreme court;. . .”
5. Canon 3B(8) of the Texas Code of Judicial Conduct requires that a judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall require compliance with this subsection by court personnel subject to the judge’s direction and control.
6. Canon 3C(1) of the Texas Code of Judicial Conduct requires that a judge . . . should cooperate with other judges and court officials in the administration of court business.
7. Canon 3C(2) of the Texas Code of Judicial Conduct requires that a judge should require staff, court officials and others subject to the judge’s direction and control to observe the standards of fidelity and diligence that apply to the judge . . . in the performance of their official duties.

8. Canon 8B(1) of the Texas Code of Judicial Conduct defines “shall” as used in the Code as denoting “binding obligations the violation of which can result in disciplinary action.”
9. Canon 8B(2) of the Texas Code of Judicial Conduct defines “should” as used in the Code as “relat[ing] to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.”

CONCLUSIONS REGARDING BINDING OBLIGATIONS

1. Judge Keller’s failure to follow Texas Court of Criminal Appeals’ Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the Court of Criminal Appeals General Counsel and clerk staff with respect to Richard’s right to be heard, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the Court of Criminal Appeals and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
2. Judge Keller’s failure to follow Texas Court of Criminal Appeals’ Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the Court of Criminal Appeals General Counsel and clerk staff with respect to Richard’s right to be heard, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
3. Judge Keller’s conduct on September 25, 2007, did not accord Richard access to open courts or the right to be heard according to law. Judge Keller’s conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the Court of Criminal Appeals and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
4. Judge Keller’s conduct on September 25, 2007, did not accord Richard access to open courts or the right to be heard according to law. Judge Keller’s conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.

CONCLUSIONS REGARDING ASPIRATIONAL GOALS

1. Judge Keller's conduct on September 25, 2007 demonstrated a failure to cooperate with other judges and court officials in the administration of court business, contrary to the aspirational goals set forth in Canon 3C(1) of the Texas Code of Judicial Conduct.
2. Judge Keller's conduct on September 25, 2007 demonstrated a failure to require court staff under her direction and control to observe the standards of fidelity and diligence that apply to herself, contrary to the aspirational goals set forth in Canon 3C(2) of the Texas Code of Judicial Conduct.

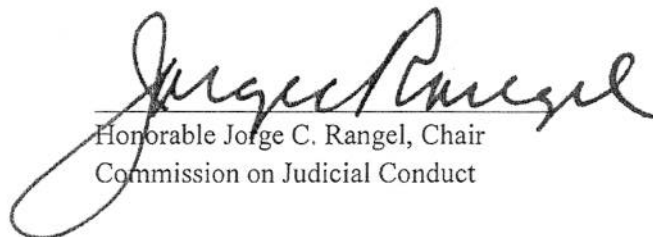
In condemnation of the conduct described above that violated Article 5, sec. 1-a(6)A of the Texas Constitution and Canon 3B(8) of the Texas Code of Judicial Conduct, it is the Commission's decision to issue a **PUBLIC WARNING** to the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, Austin, Travis County, Texas.

Pursuant to the authority contained in Article 5, sec. 1-a(8) of the Texas Constitution, it is ordered that Judge Keller's conduct described above be made the subject of a **PUBLIC WARNING** by the State Commission on Judicial Conduct.

Finally, the Commission reiterates the importance of the goals denoted in Canons 3C(1) & (2) of the Texas Code of Judicial Conduct. While aspirational in application (see Canon 8B(2) of the Texas Code of Judicial Conduct), these Canons convey a need for open communication, congeniality, and collegiality that are especially important to the function of the State's appellate courts, and the TCCA in particular. The Commission strongly urges that Judge Keller and all the judges of the TCCA reflect on the importance of achieving the goals stated therein.

The Commission takes this action in a continuing effort to protect public confidence in the judicial system, and to assist the state judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Code of Judicial Conduct.

Issued this 16th day of July, 2010.


Honorable Jorge C. Rangel, Chair
Commission on Judicial Conduct