INQUIRY CONCERNING JUDGE,
NO. 96

IN RE:	§	BEFORE THE
HONORABLE SHARON KELLER,	§	COMMISSION ON
PRESIDING JUDGE OF THE TEXAS	§	JUDICIAL CONDUCT
COURT OF CRIMINAL APPEALS,	§	
AUSTIN, TRAVIS COUNTY, TEXAS	§	

THE HONORABLE SHARON KELLER'S ORIGINAL VERIFIED ANSWER TO THE NOTICE OF FORMAL PROCEEDINGS OF THE TEXAS STATE COMMISSION ON JUDICIAL CONDUCT

TO THE STATE COMMISSION ON JUDICIAL CONDUCT ("CJC"):

The Honorable Sharon Keller ("Respondent") submits her original verified answer to the Notice of Formal Proceedings as follows:

I. GENERAL DENIAL

1. Respondent denies each and every, all and singular, the five Charges of the Notice of Formal Proceedings. With respect to the Factual Allegations she admits only the following and in all other respects the factual allegations are denied:

2. Judge Keller is now and was on September 25, 2007 the Presiding Judge of the Texas Court of Criminal Appeals ("CCA"). She was elected to the CCA in 1994 and, in 2000 was elected Presiding Judge and was reelected to that position in 2006. Her term expires in 2012 and she is currently serving on the CCA.

3. On September 25, 2007 there were no written Execution-Day Procedures. The Procedures that did exist at that time, with some revisions, were later reduced to writing in November 2007.

4. On September 25, 2007 Michael Wayne Richard ("Richard") was scheduled to be executed by the state of Texas, a date that had been set the previous June. Judge Keller

was aware on September 25, 2007 that Richard was to be executed at 6:00 p.m. that night.

5. At approximately 8am (Central Time) on September 25, 2007 the United States Supreme Court ("USSC") entered an order in *Baze v. Rees* (Cause Number 07-5439) which granted petitioners' writ of certiorari. The writ was granted to determine whether Kentucky's lethal injection protocol satisfied the Eighth Amendment. Judge Keller was generally aware of the USSC's order.

6. Judge Keller was not the judge assigned to the Richard case ("Duty Judge") and she did not know who was. The General Counsel Ed Marty was responsible for assigning the duty judge at that time. On September 25, 2007 Mr. Marty sent an email to the judges including Judge Keller at 11:29 AM which was titled "Execution Schedule" and cited an Associated Press report about "two Kentucky cases". The email speaks for itself but it does contain the following language: "I (Marty) do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue and in what court."

7. Judge Tom Price drafted a dissenting opinion in anticipation that Richard might file something with the CCA and further anticipating that a majority of the judges would deny it.

8. Judge Keller arrived at the court at 6am on September 25, 2007 and left sometime during the afternoon to meet a repairman at her house. She did not return to court that day but was available by telephone.

9. Shortly before 5:00 p.m. on that day Mr. Marty called Judge Keller at home to ask a question about closing time, which she understood to refer to whether the clerk's office stayed open past 5:00 p.m. Judge Keller said no in accordance with long standing custom.

She asked why and Mr. Marty said something to the effect that they wanted to file something but they were not ready. Judge Keller knew that pleadings had been filed after hours on execution days but not with the clerk's office. She also knew that the general counsel, in this case Mr. Marty, stayed after hours on execution day. She also knew that after hours filings are specifically provided for in the Texas Rules of Appellate Procedure, Rule 9.2 (a). She also knew that the regular office hours for State employees were established by state law to be from 8:00 a.m. to 5:00 p.m.

10. Richard was executed sometime after 6:00 p.m. on September 25, 2007.

11. On September 26, 2007 Judge Keller did not tell the other judges about her conversation the previous night with Mr. Marty assuming that they already knew about it.

12. On September 27, 2007 the USSC granted a stay in the Turner case. He has since been executed.

13. On October 2, 2207 the CCA granted a stay in the Heriberto Chi execution. He has since been executed.

II. ADDITIONAL FACTS OMITTED BY THE COMMISSION

14. Respondent further states that the Notice of Formal Proceedings omits certain material facts including, but not limited to, the following:

A. On September 19, 2007, the Attorney General for the State of Texas, the Honorable Greg Abbott issued a press release ("Press Release") which advised the public and the media that Michael Wayne Richard ("Richard") was scheduled to be executed after 6:00 p.m. Tuesday, September 25, 2007. The Press Release noted that "on the afternoon of August 18, 1986 and just two months after he had been paroled from prison, (Richard) approached Marguerite Dixon's son, Albert, in front of the Dixon home in Hockley. When Albert and his sister, Paula, left a few minutes later, Richard returned and entered the house. He took two television sets ..., sexually assaulted Mrs. Dixon and shot her in the head with a .25 caliber automatic pistol." See attached Exhibit "A."

B. The press release continued: "Mrs. Dixon's children returned home around 9:30 p.m. on the day of the killing to find the sliding-glass door open and all the lights in the house turned off. Frightened by the condition of the house, they got a neighbor, who entered the house with a flashlight and a gun. They discovered Mrs. Dixon dead in the bedroom." See attached Exhibit "A."

C. Richard was apprehended by the police and confessed to Mrs. Dixon's murder. He was indicted by a Harris County Grand Jury for capital murder on October 29, 1986. Approximately one year later (September 4, 1987) Richard was found guilty of capital murder and sentenced to death. Five years later the Texas Court of Criminal Appeals reversed Richard's conviction because of a flaw in the jury instructions. Richard's second trial began in May of 1995 and one month later the jury found him guilty of capital murder and he was sentenced to death. See attached Exhibit "A."

D. The Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on June 18, 1997, and the United States Supreme Court declined to review his case. See attached Exhibit "A."

E. On April 3, 1998, Richard filed an application for a writ of habeas corpus in Harris County District Court. The District Court recommended that the writ be denied. The District Court's recommendation was accepted by the Texas Court of Criminal Appeals. His state habeas corpus writ was denied by the Texas Court of Criminal Appeals on February 7, 2001.

F. Richard next filed a federal petition for writ of habeas corpus which was denied by United States District Judge David Hittner in Houston on December 31, 2002, in a written opinion. On June 27, 2003, the United States Court of Appeals for the Fifth Circuit affirmed Judge Hittner and refused Richard permission to further appeal. See attached Exhibits "B" and "C."

G. Richard then filed another state application for a writ of habeas corpus claiming ineligibility for execution based on mental retardation. The Texas Court of Criminal Appeals sent this claim to the trial court for resolution and the State District Judge recommended that the claim be denied. On March 21, 2007, the Texas Court of Criminal Appeals denied, by a vote of 8-1, Richard's second state habeas corpus application. See attached Exhibit "D."

H. Richard then attempted to file another habeas corpus petition in federal court claiming ineligibility for execution based on mental retardation but the 5th Circuit denied that motion on May 15, 2007. See attached Exhibits "E" and "F."

I. On June 12, 2007, the Harris County District Court set Richard's execution date for September 25, 2007. See attached Exhibit "A."

J. On September 17, 2007, the Texas Defender Service ("TDS"), on Richard's behalf, filed a motion for authorization to file successive petitions for writ of habeas corpus with the 5th Circuit on the same grounds (mental retardation) that the Court had previously denied on May 15, 2007. On the cover of the Motion filed in the Fifth Circuit, TDS wrote in bold letters: "**THIS IS A DEATH PENALTY CASE. MICHAEL WAYNE RICHARD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 25, 2007.**" See Exhibit "G."

K. TDS's motion in the Fifth Circuit was 43 pages long. It attached a proposed petition for writ of habeas corpus which (with attachments) was 240 pages long. Nowhere in the motion or the attached "Proposed Petition" did Richard claim that Texas' method of lethal injection was unconstitutional. In fact, in over 20 years of litigation Richard never once made that claim until September 25, 2007.

L. Richard did not file any pleading in the Texas Court of Criminal Appeals between June 12, 2007, (the date his execution date was set) and September 25, 2007 (the date he was executed). See attached Exhibit "H."

M. By the time he was executed Richard had two trials, two direct appeals (including to the United States Supreme Court), two state habeas corpus proceedings and three federal habeas corpus hearings or motions. Accordingly, the suggestion in Charge IV that Richard was not accorded "access to open courts or the right to be heard according to law" is patently without merit. Indeed, Richard was not seeking on September 25, 2007 "to avoid execution." See Exhibit "I." He merely wanted Texas not to "include chemicals that are unnecessary to the effectuation of his death." *Id* at page 3.

N. Richard insisted on a trial but did not testify. Had he accepted the state's offer of life in prison in exchange for a guilty plea he would not have been executed. Richard told the Prosecutor in his first trial that he "wasn't pleading to anything," and, according to the Prosecutor, Richard said "the death penalty is the last, ultimate high." See Attached Exhibit "O."

O. Sometime after May 15, 2007, but well before September 25, 2007, TDS took over representation of Richard.

P. The Court heard nothing from Richard's lawyers at TDS on September 25, 2007.

Q. A person identifying herself as a TDS paralegal phoned the deputy clerk of the court at approximately 4:45 p.m. She was in her car having been to

a doctor's appointment and speaking from her cell phone. She asked if the clerk's office could stay open beyond 5:00 p.m.

R. For well over 100 years Texas has been administering the death penalty. As of September 25, 2007, to Respondent's knowledge, the Clerk's office had never stayed open beyond 5:00 p.m. on execution day which does not mean that after hour filings were not allowed. Indeed TDS, in another death penalty case, on the day of execution, filed a motion to stay with the Texas Court of Criminal Appeals after hours. See Exhibit "N" attached hereto. This procedure is expressly authorized by Rule 9.2 (a) (2) of the Texas Rules of Appellate Procedure which states:

> (a) 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.

The Judges of the CCA's phone numbers at the Court are, and were on September 25, 2007, all listed in the blue pages of the phone book. Mr. Marty's phone number was listed on his letterhead and known to TDS.

S. Sometime shortly before 5:00 p.m. the deputy clerk relayed the request of the TDS paralegal about keeping the clerk's office open to the court's general counsel Ed Marty who then called Judge Keller at home to ask a question about closing time, which she understood to refer to whether the clerk's office stayed open past 5:00 p.m. Her answer was "No" which had been the practice of the court on other execution days all during Judge Keller's tenure with the court. Mr. Marty confirmed that he had already advised the deputy clerk that the Clerk's office would close at 5 p.m. but just wanted to check with her. Judge Keller did not, and could not have, if she had wanted to, close access to the court in light of TRAP Rule 9.2 (a), a fact well known to TDS.

T. Judge Keller was not told by Mr. Marty (the only person she spoke with about this matter on September 25, 2007) that TDS was having computer problems. It is still not clear whether TDS was, in fact, encountering computer problems on that day but in any event the motion to stay based on the *Baze* case was a simple document which could have said:

> Today, the Supreme Court agreed to review the issue of the constitutionality of lethal injection as practiced by States like Texas. See *Baze v. Rees*, No. 07-5439. The Court will

> now decide whether the administration of a lethal injection materially indistinguishable from Texas' violates the Eight and Fourteenth Amendments. Mr. Richard asserts his right to remain free from cruel and unusual punishment, and asks this Court to stay his execution pending the Supreme Court's resolution of this important question, which will definitively determine whether he is entitled to the relief herein sought.

It did not take a computer to prepare and timely file this document; it could have been hand written and the court would have accepted it as Judge Keller informed the Commission or he could have filed an application for a writ habeas corpus in the trial court pursuant to Article 11.071 Section 5 of the Code of Criminal Procedure.

U. Respondent questions whether newspaper articles, like the ones cited by the Commission, are ever appropriate to prove charges against a popularly elected judge like Respondent. However, Respondent notes that last Sunday the Houston Chronicle reported that attorneys for death penalty defendants failed to timely file pleadings in nine cases and in six of those cases the defendant was executed. See Exhibit "P." By the Commission's logic the ethics of the judges in those cases should have been questioned because they did not insure that the pleadings were filed in a timely manner, a position Respondent finds illogical.

V. On September 25, 2007 Richard's lawyers filed a 2 page motion to stay with the Harris County District Clerk's office at 5:56 p.m. and filed a motion for stay of execution in the USSC both based on the grant of cert in the *Baze* case that day. See Exhibit "I" and "J." The evening of September 25, 2007, the United States Supreme Court denied Richard's motion to stay and he was thereafter executed. See attached Exhibit "K."

W. The CCA's Execution Day Procedures were not reduced to writing on September 25, 2007. However, under those procedures the deputy clerk and, perhaps, Mr. Marty (who were both personally present at the court) should possibly have informed the duty judge about the request to keep the clerk's office open beyond 5:00 p.m. Mr. Marty did not do so, he says, because he thought this was not a substantive matter relating to the merits of a pleading. Regardless it is clear that Judge Keller did not have a duty to do anything other than what she did which was to answer a question about whether the clerk's office closes at 5:00 p.m.

X. Richard's lawyers, on the other hand, had a duty to follow the law, timely file pleadings and zealously represent their client. But on September 25, 2007 (i) no lawyer for Richard ever once contacted any CCA judge, its general counsel, or staff member (ii) no attempt was made to file an after hour pleading in accordance with TRAP Rule 9.2(a); and (iii) Richard in

twenty years of litigation never once challenged the Texas protocol of administering a lethal injection until September 25, 2007[1].

15. Respondent respectfully requests that CJC be required to prove their charges against Respondent by clear and convincing evidence as is required by the Constitution and laws of the State of Texas.

III. AFFIRMATIVE DEFENSES

Respondent asserts the to following affirmative defenses to the CJC charges:

16. The CJC fails to state a claim upon which relief could be granted.

17. The CJC lacks subject matter jurisdiction over this matter.

18. Canon 2A of the Code of Judicial Conduct ("Canon 2A") does not apply to these charges.

19. If applied to these charges Canon 2A is unconstitutional under the United States and Texas Constitutions.

20. Canon 3B(8) of the Code of Judicial Conduct ("Canon 3B(8)") does not apply to these charges.

21. If applied to these charges Canon 3B (8) is unconstitutional under the United States and Texas Constitutions.

22. Article 5, Section 1-a (6) A of the Texas Constitution ("Section 1-a (6) A") does not apply to these proceedings.

23. If applied to these charges Section 1-a (6) A is unconstitutional under the United States and Texas Constitutions.

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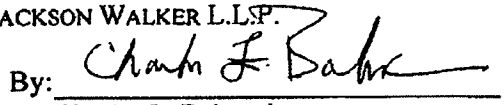
[1] Richard acknowledged this in the motion for stay that he filed in the USSC when he wrote: "although he himself did not previously present the issue, the issue, as presented in Baze, is identical to the issue he seeks to present." See Exhibit "I" at page 2.

24. The charges are unconstitutional because Respondent has been denied the right to counsel guaranteed by the Texas and United States Constitutions, Texas statutes and the Commission's own rules. In this regard Respondent has requested that the Commission appoint the undersigned law firm as her counsel and pay its reasonable and customary fees for services rendered in responding to these charges. When that request was denied respondent asked the Texas Ethics Commission ("TEC") whether the undersigned firm could defend her on a pro bono basis (as the undersigned has agreed to do if permitted) and if not, on a reduced fee basis and if not, on an alternate billing arrangement such as a fixed fee. The TEC, citing its own rules, refused to answer Respondent's questions despite the fact that the CJC is pursuing these charges through a reputable law firm and skilled counsel who are only charging $1 for their services. See Exhibits "L" and "M." The net effect is that these two arms of Texas government are forcing Respondent to an election; either defend herself pro se or risk a financially ruinous legal bill to defend against these charges which are without merit.

Wherefore, Premises Considered, Respondent prays that the CJC charges be dismissed and that she be awarded her reasonable attorneys fees and costs and for such further relief as to which she may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: 

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ATTORNEYS FOR RESPONDENT THE HONORABLE SHARON KELLER

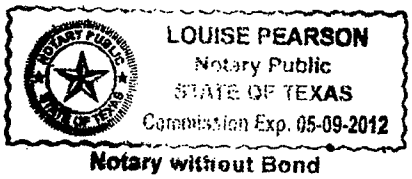
VERIFICATION

STATE OF TEXAS §
§
TRAVIS COUNTY §

BEFORE ME, the undersigned authority, on this day personally appeared the Honorable Sharon Keller who, after being duly sworn, stated under oath that she has read the foregoing Original Answer and that the factual statements contained therein are true and correct.

Sharon Keller
The Honorable Sharon Keller

SUBSCRIBED AND SWORN TO BEFORE ME on this 24th day of March, 2009.



Louise Pearson
NOTARY PUBLIC, STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Verified Answer has been provided the State Commission on Judicial Conduct, on this the 24th day of March, via facsimile and/or hand delivery a copy of the Verified answer to the following:

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