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Clerk of the Commission

BEFORE THE

STATE COMMISSION ON JUDICIAL CONDUCT

Date 2/19/09 In Re Judge No. 96

By Clairie Thompson

INQUIRY CONCERNING A JUDGE,

No. 96

FILE STAMPED COPY

By et Date 2/19/09

Clerk of the Commission
State Commission on Judicial Conduct

NOTICE OF FORMAL PROCEEDINGS

TO THE HONORABLE SHARON KELLER, PRESIDING JUDGE OF THE TEXAS COURT OF CRIMINAL APPEALS, AUSTIN, TRAVIS COUNTY, TEXAS:

Pursuant to Section 33.022 of the Texas Government Code and Rule 10 of the Procedural Rules for the Removal or Retirement of Judges, as promulgated by the Texas Supreme Court, this NOTICE is hereby given to the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, that formal proceedings have been instituted against her, based upon the following:

FACTUAL ALLEGATIONS

1. At all times relevant hereto, the Honorable Judge Sharon Keller has been the Presiding Judge of the Texas Court of Criminal Appeals ("CCA").
2. Judge Keller was elected to the CCA in 1994. In 2000 she was elected Presiding Judge, and in 2006 she was re-elected for another six year term.
3. The CCA's Execution-day Procedures provide as follows:

A designated judge will be assigned to be in charge of each scheduled execution....

All communications regarding the scheduled execution shall be first 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. Non-assigned judges will provide to the assigned judge an adequate means of contact. "Reasonable

means” includes calling a special conference and contact by electronic communication.

4. The CCA Execution-day Procedures were unwritten until November 2007, when they were put in writing. Judge Keller has acknowledged that these procedures were in effect at all dates relevant to this proceeding and that she was familiar with them.
5. On September 25, 2007, Michael Wayne Richard was scheduled to be executed by the State of Texas. All of the CCA judges, including Judge Keller, were aware that September 25, 2007, was an execution date and that Mr. Richard was scheduled to be executed at 6 p.m. that evening.
6. At approximately 9 a.m. on September 25, 2007, the United States Supreme Court (“USSC”) announced that it would hear oral arguments in *Baze v. Rees* (“*Baze*”) to consider whether the method of lethal injection execution in Kentucky constituted cruel and unusual punishment.
7. The designated judge in charge of Mr. Richard’s execution was the Honorable Judge Cheryl Johnson. Judge Johnson, CCA General Counsel Edward Marty, and several other members of the Court intended to stay at the CCA after hours on September 25, 2007, until word of the execution was received.
8. At 11:29 a.m. on September 25, 2007, Mr. Marty sent an e-mail to all of the CCA judges with the subject line, “Execution Schedule.” In the e-mail Mr. Marty informed the CCA judges, including Judge Keller, that, “The 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.”
9. At 1:30 p.m. the Honorable Judge Cathy Cochran forwarded the members of the CCA, including the General Counsel, Judge Keller, and the other judges, the internet link to the Kentucky Supreme Court’s unanimous decision in *Baze*.
10. All the members of the CCA, including the General Counsel, Judge Keller and the other judges, were aware on September 25 of the USSC’s decision that morning to grant certiorari in *Baze* and to set the case for later argument. Members of the CCA anticipated that Mr. Richard’s counsel would likely make some type of filing with the CCA based on *Baze*.
11. Mr. Richard was represented by lawyers with the Texas Defender Services (“TDS”). Soon after learning of the decision on September 25 to grant certiorari in *Baze*, TDS began to work on a petition to present to the CCA requesting a stay based on the United States constitutional issue presented in *Baze*, since Texas used the same method of lethal injection as Kentucky.
12. In the early afternoon, Mr. Marty began drafting a proposed order for the Court in anticipation of Mr. Richard’s appeal based on *Baze*. The Honorable Judge Tom Price

drafted a dissenting opinion in anticipation of Mr. Richard's appeal and circulated the dissent to the other judges.

13. At approximately 2:40 p.m., Mr. Marty sent an e-mail to all of the CCA judges, including Judge Keller, with the subject line, "Michael Wayne Richard update." In the e-mail, Mr. Marty informed the CCA judges that the Harris County District Attorney's Office had just called and informed him that Mr. Richard's attorneys had called the Harris County District Attorney's office and confirmed that they (Mr. Richard's lawyers) planned to file a writ of prohibition and subsequent application on behalf of Mr. Richard based on the issue in *Baze* for which certiorari had been granted that morning. Mr. Marty promised to keep the judges informed and circulate a copy of any pleadings when he received them.
14. Judge Keller left her chambers at the CCA during the afternoon on September 25, 2007, to meet a repairman at her home. Judge Keller did not return to the CCA that day.
15. TDS had computer problems that they anticipated would prevent them from filing the pleadings with the CCA by 5 p.m. At approximately 4:45 p.m., TDS called the clerk's office of the CCA and requested that it accept their filing a few minutes late. The CCA deputy clerk, Abel Acosta, told TDS that the clerk's office closed at 5 p.m., but that he would call Mr. Marty. He did so.
16. In response to Mr. Acosta's call, Mr. Marty immediately called Judge Keller at her home and asked her whether the clerk's office could stay open past 5 p.m.¹ Judge Keller said "no" and asked "Why?" Mr. Marty replied: "They wanted to file something, but they were not ready." Judge Keller again said "no."
17. Based on Judge Keller's reply, Mr. Marty directed that Mr. Acosta not accept a filing after 5:00 p.m. Mr. Acosta called TDS at approximately 4:48 p.m. and told them that the clerk's office would close promptly at 5 p.m. A TDS paralegal told Mr. Acosta that she would take the filing to the Court and drop it with a security guard. Mr. Acosta replied he did not know what good that would do because no filing would be accepted after 5 p.m. TDS called back and asked if they could e-mail or fax something to the CCA. Mr. Acosta told them that the decision had already been made not to accept a filing after 5 p.m. TDS called Mr. Acosta shortly before 6:00 p.m. and told him that they were headed to the Court to hand deliver the pleadings on behalf of Mr. Richard. Mr. Acosta told TDS not to bother, because no one was there to accept the filing.
18. At the time of her telephone conversation with Mr. Marty, Judge Keller knew and understood that (i) Mr. Marty's call was about Mr. Richard, (ii) Mr. Richard was scheduled to be executed at 6 p.m. that evening, (iii) certiorari had been granted in *Baze* that morning, (iv) a filing by Mr. Richard's lawyers based on the issue in *Baze* had been anticipated, (v) Mr. Richard's lawyers wanted to file something with the CCA, (vi) Mr. Richard's lawyers were not ready to file with the CCA by 5 p.m., and that (vii) Mr. Richard's lawyers had requested that they be permitted to file after 5 p.m. In addition,

¹ Mr. Marty recalls telling Judge Keller "they wanted the Court to stay open late," or "they want to hold the court open." Judge Keller, however, claims that Mr. Marty referred to the *clerk's* office, not the Court, and that he asked her the specific question of whether the clerk's office stayed open past 5 p.m.

Judge Keller knew that it had been common in the past to receive late pleadings on execution days after the clerk's office closed, and she knew that the Execution-day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

19. On September 25, 2007, Judge Keller also knew that she was not the designated judge in charge of Mr. Richard's scheduled execution. Further, she knew that Judge Johnson was the designated judge and that, under the CCA Execution-day Procedures, all communications relating to the scheduled execution of Mr. Richard were required to be first referred to Judge Johnson.
20. Although Judge Keller knew that the communication relayed to her by Mr. Marty related to the scheduled execution, she disregarded the CCA's Execution-day Procedures. Her response to Mr. Marty failed to direct that he relay the communication to the designated judge, Judge Johnson, who was responsible for the handling of Mr. Richard's case and who remained present at the court after 5:00 p.m. to await any filings with the Court. Instead, Judge Keller gave instructions to Mr. Marty that had the effect of closing any further access by Mr. Richard's lawyers with the CCA concerning the effort to obtain a stay of Mr. Richard's execution based on the legal issue for which the USSC had granted certiorari that very day.
21. At approximately 5 p.m., Judge Keller called Mr. Marty from her home and asked him whether Mr. Richard's lawyers had filed anything with the CCA. Mr. Marty told Judge Keller they had not.
22. Judge Keller did not refer Mr. Marty or his inquiries to Judge Johnson, the assigned judge. Neither Judge Johnson nor the other judges who remained at the Court after 5 p.m. were aware that Mr. Richard's lawyers had called to ask whether filings after 5 p.m. could be accepted.
23. Mr. Richard was executed by the State of Texas by lethal injection at approximately 8:20 p.m. on September 25, 2007.
24. The next morning, September 26, 2007, Judge Keller and the other CCA judges met for their weekly conference. At the end of the conference, several of the judges discussed their surprise that Mr. Richard's lawyers had not filed anything with the CCA based on *Baze*. Judge Cochran, who was not yet aware of Mr. Marty's communications with Judge Keller the night before, posed a hypothetical in which someone called the clerk's office before 5 o'clock, said they wanted to file something, but could not get it there before 5 p.m. Judge Cochran's position was that the CCA should allow the late filing. Judge Keller simply responded, "The Clerk's office closes at 5 p.m.; it's not a policy, it's a fact." Judge Keller did not disclose to the other judges her communications with Mr. Marty the night before, nor the fact that Mr. Richard's lawyers had called the CCA to ask whether filings after 5 p.m. could be accepted.
25. Two days after Mr. Richard's execution, the USSC granted a stay in the Carlton Turner execution, which was scheduled to take place in Texas on September 27, 2007. Mr.

Turner had filed a motion for stay with the CCA, which was denied. Although the CCA denied the motion for stay, Mr. Turner's filing with the CCA made him eligible to seek a stay from the USSC. At approximately 10:00 p.m. on the night of Mr. Turner's scheduled execution, the USSC granted the stay. Mr. Turner's stay was based on the exact claim that Mr. Richard was not able to present to the CCA on September 25, 2007.

26. On October 2, 2007, the CCA granted a stay in the Heriberto Chi execution, which was scheduled at 6 p.m. on October 3, 2007. Mr. Chi's stay was based on the exact claim that Mr. Richard was not able to present to the CCA on September 25, 2007.
27. Following the stay by the USSC in *Baze* at 9:00 a.m. on September 25, 2007, Mr. Richard was the only person in the United States to be executed during the 6 months prior to the USSC's April 2008 decision in *Baze*, after full briefing and oral argument, that lethal injection was constitutional under the United States Constitution.
28. Journalists throughout Texas and the nation have weighed in on the Richard case, and the response has been overwhelmingly negative.

- The *Houston Chronicle* began an editorial this way: "The events of Sept. 25 have put a stain on Texas justice that can only be cleaned by the removal of Chief Justice Sharon Keller from the Texas Court of Criminal Appeals." The editorial went on to describe Judge Keller's actions as "legally inexcusable," "mind boggling," and a "miscarriage of justice."

- Describing the event as "unconscionable," an editorial in the *Dallas Morning News* concluded this way: "Hastening the death of a man, even a bad one, because office personnel couldn't be bothered to bend bureaucratic procedure was a breathtakingly petty act and evinced a relish for death that makes the blood of decent people run cold."

- An editorial in the *Austin American Statesman* said, "Keller's court has consistently failed its duty to ensure the integrity of capital trials and death sentences." Referring specifically to the Richard incident: "That cold-hearted response drew international criticism of Keller and the court." And, "it is abundantly clear that Keller and her court have been more concerned with process than justice."

- The Waco newspaper said this: "Sharon Keller, presiding judge of the Texas Court of Criminal Appeals, shamed the state by deciding that 20 minutes of her time was more important than a last minute appeal for a man on death row."

- The *Fort Worth Star-Telegram* noted that the Texas Court of Criminal Appeals under Judge Keller had been "derided" and "scolded" in the past. "But for sheer myopia, it's hard to top Keller's refusal to keep

the court open long enough to accept an emergency appeal from a Death Row inmate about to be executed.”

- Michael Hall, writing for *Texas Monthly*, said this: “When a man’s life is on the line – to say nothing of the U.S. Constitution – our top criminal judge should behave like one: with prudence, fairness, and a calm hand. It’s time for Keller to go.”

- National reporters too have taken note of the controversy. Ralph Blumenthal of the *New York Times*, commented that Judge Keller, “is the target of a rising national outcry after turning away that last appeal of a death row inmate because the rushed filing was delayed past the court’s 5 p.m. closing time.” In *USA Today*, Kevin Johnson wrote about the Richard case, describing the “frenzied, behind-the-scenes legal fight that led to intense criticism of Texas courts and confusion about the actions of the nation’s highest court.”

29. Judge Keller’s current term in office expires in 2012.
30. At the time of this notice Judge Keller continues to perform judicial duties.

RELEVANT STANDARDS

1. Article 5, Section 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 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.”
2. Article 1, Section 13 of the Texas Constitution, provides, in relevant part, that “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”
3. Canon 2A of the Texas Code of Judicial Conduct requires that a judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
4. Cannon 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.

CHARGE I

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that is clearly inconsistent with the

proper performance of her duties as Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE II

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, 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, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE III

Judge Keller's conduct on September 25, 2007, did not accord Mr. 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 Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE IV

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. 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, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE V

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes incompetence in the performance of duties of office, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, and (ii) Canon 2A of the Texas Code of Judicial Conduct.

Judge Keller is hereby notified that she has the right to file a written answer to the foregoing charges within fifteen (15) days after service of the Notice of Formal Proceedings upon her. Judge Keller's answer, which shall be verified, should be forwarded or delivered to the State Commission on Judicial Conduct, P.O. Box 12265, Austin, Texas 78711-2265.

Signed this 18th day of February, 2009

EXAMINERS:

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