

TEXAS CIVIL RIGHTS PROJECT

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10 October 2007

State Commission on Judicial Conduct
PO Box 12265
Austin, TX 78711-2265

Re: Judge Sharon Keller
Presiding Judge, Texas Court of Criminal Appeals

Dear Members of the Commission:

We wish to file a formal complaint against Judge Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals) and ask that you take appropriate, immediate, and severe disciplinary action. The Texas Civil Rights Project is a nonprofit foundation that promotes civil rights and economic and racial justice throughout Texas.

SUMMARY STATEMENT

This complaint involves a situation in which Judge Keller refused to allow the attorneys for Michael Richard, scheduled to be executed on the same day, to file pleadings on his behalf, based on a grant of certiorari by the U.S. Supreme Court that same day on the question of the constitutionality of lethal injection. The attorneys had requested that the court clerk's office remain open twenty minutes past the 5pm closing time because they had experienced computer failure in the preparation of their pleading. Judge Keller refused the request, even though she was not the judge assigned to the *Richard* case. As a result, Richard then was executed by lethal injection.

Judge Keller's actions denied Michael Richard two constitutional rights, access to the courts and due process, which led to his execution. Her actions also brought the integrity of the Texas judiciary and of her court into disrepute and was a source of scandal to the citizens of the state.

FACTS

Court of Criminal Appeals judges were standing by on September 25 to work the evening on which Michael Richard was executed because they expected his lawyers (one of whom was the distinguished University of Houston law professor David Dow) to file an emergency appeal based on the U.S. Supreme Court's decision earlier in the day to consider a Kentucky case challenging the constitutionality of lethal injection. Without a ruling by the Texas Court of Criminal Appeals on Richard's appeal, the U.S. Supreme Court could not consider his appeal or a request to stay his execution, pending a Supreme Court decision.

At least three judges were working in the courthouse at the time, including the judge assigned to the Richards case, and others were available by phone, if needed, according to court personnel. However, unbeknownst to them, Presiding Judge Keller refused to allow the emergency 11th-hour appeal to be filed after 5pm. Richard's lawyers had requested the court clerk to stay open for an extra twenty minutes so they could file their petition for stay of execution. They had experienced severe computer problems in preparing the pleading and so informed the clerk. Judge Keller refused the request, and Richard was put to death.

Neither Judge Keller nor the court's general counsel, Edward Marty, who had consulted with Judge Keller on the request to stay open, advised any of the judges of the request by Richard's attorneys. More pointedly, Judge Keller did not consult Judge Cheryl Johnson, who was assigned the case and who Judge Keller has acknowledged was at the court at the time. Marty himself shares culpability, because from calls earlier in the day from Richard's counsel, he was aware of the pending appeal and that it would be coming in to the court later in the day.

According to undisputed press accounts, Judge Cathy Cochran said, "There were plenty of judges here, and there were plenty of other personnel here. A number of judges stayed very late that evening, waiting for a filing from the defense attorney." She said she herself had gone home, but was available by telephone. Judge Cochran said, at the least, a decision should have been made by the full court on whether to accept the appeal. "I would definitely accept anything at any time from someone who was about to be executed," she said.

Judge Paul Womack said, "All I can tell you is that night I stayed at the court until 7 o'clock in case some late filing came in. I was under the impression we might get something."

Judge Keller's response is unfathomable in view of the fact that Richard's attorneys David Dow, who runs the Texas Innocence Network at the University of Houston Law Center, and his colleagues had to decide legal strategy and craft a filing as to how the case before the Supreme Court applied to Richard's situation, all in less than one day, and on the day of the Supreme Court decision itself.

The computer problem was exacerbated because the Court of Criminal Appeals, unlike other courts, does not accept filings by e-mail. If it had, Prof. Dow and his colleagues would have met the 5pm deadline because it was printing the filing that took extra time. The lawyers needed about another 20 minutes.

Judge Johnson, when she read about the request to stay open past 5pm in an *Austin American-Statesman* story the following day, said her reaction was "utter dismay. And I was angry. If I'm in charge of the execution, I ought to have known about those things, and I ought to have been asked whether I was willing to stay late and accept those filings." Judge Johnson would have accepted the brief for consideration by the court. "Sure," she said. "I mean, this is a death case."

Judge Cochran also said the Richard case raised troubling questions. "First off, was justice done in the Richard case? And secondly, will the public perceive that justice was done and agree that justice was done? Our courts should be open to always redress a true wrong, and as speedily as possible. That's what courts exist for."

Rather amazingly, Judge Keller has voiced no second thoughts in the weeks following her decision. In fact, her rather implausible response has been, "...I think the question ought to be why didn't they file something on time? They had all day." Judge Keller has defended her actions, denying she was informed of any reason behind the request to stay open and saying she was enforcing the court's longstanding practice to close on time.

As a result of Judge Keller's actions, Richard was executed by lethal injection and denied the opportunity seek a stay for the U.S. Supreme Court. Judge Keller's actions denied Michael Richard two constitutional rights, access to the courts and due process, which led to his execution. Her actions also brought the integrity of the Texas judiciary and of her court into disrepute and was a source of scandal to the citizens of the state and of the country.

CONSTITUTIONAL RIGHTS IMPLICATED

Texas Constitution, Article I, Section 13:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. 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.

U.S. Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These constitutional rights have specific applicability with regard to Canon 3(A)(8), which follows.

APPLICABLE CANONS

Judge Keller's actions appear to have violated at least four provisions of the Texas Code of Judicial Conduct and the goals set forth in the Preamble:

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should

govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. 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.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(8) 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....

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

Witnesses:

Hon. Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals)
Hon. Cathy Cochran (Judge, Texas Court of Criminal Appeals)
Hon. Paul Womack (Judge, Texas Court of Criminal Appeals)
Hon. Cheryl Johnson (Judge, Texas Court of Criminal Appeals)
Hon. Tom Price (Judge, Texas Court of Criminal Appeals)
Edward Marty (General Counsel, Texas Court of Criminal Appeals)
Clerk, Texas Court of Criminal Appeals
Professor David Dow (Texas Innocence Network, University of Houston Law Center)
Andrea Keilen (Executive Director, Texas Defender Service)
James C. Harrington (Director, Texas Civil Rights Project)

We ask that the Commission determine the underlying facts and, if they are similar to the facts described above and in news accounts, ask that you take appropriate disciplinary action.

Thank you for your attention to this matter. We look forward to hearing back from you.

Sincerely,

James C. Harrington

For and on behalf of:

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