

November 6, 2007

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

From: The Undersigned Members of the Public

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 immediate and severe disciplinary action. Keller may have abused her official position to impede Michael Richard's access to her court and thus to justice on the day he was executed by the State of Texas. It is clear from her actions that Judge Keller can no longer be expected to preside over death penalty cases with the requisite fair, bias-free and even-handed disposition so critical to such serious life and death matters. Justice was not done in the Richard case, and if it was not done because Keller dishonestly said "We close at 5", then there is no question that Keller is unfit to be a judge and should be removed from office.

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 has been quoted in the media as having told the clerk of the Court to convey to Richard's lawyers that "We close at 5". However, other judges have said in the media that they were in the building and willing to accept the submission. It appears that Keller may have lied by saying, "We close at 5",

when she knew very well that the appeal could be accepted after 5 and that the court does not “close” at 5, because judges on her court are able to be reached and able to issue orders to stay executions even after 5.

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. In addition, her actions may make it more difficult for law enforcement personnel to bring offenders to justice, if people do not believe that they will be accorded due process and fair treatment by the Presiding Judge of the Texas Court of Criminal Appeals.

FACTS

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. 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 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. At least three judges were working in the courthouse at the time, including the judge assigned to the Richard case, and others were available by phone, if needed, according to court personnel. 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. Judge Keller did not consult Judge Cheryl Johnson, who was assigned the case. Judge Keller acknowledged she [Johnson] was at the court at the time. Johnson told the Austin American-Statesman she was dismayed by Keller's decision. "And I was angry," she told the paper. "If I'm in charge of the execution, I ought to have known about those things ... I mean this is a death."

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.

In an opinion piece the Houston Chronicle published a month before Keller was elected, she called the failure to impose capital punishment on convicted murderers "a human rights violation -- particularly if we take into account the human rights that murderers violate when left alive to kill again." This statement shows an extreme bias towards the use of capital punishment that is inconsistent with the duties of a judge. Keller’s action in the Richard case show that she believed her self-declared human right to impose capital punishment was more important than protecting the constitutional rights of a man about to be executed.

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(B)(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 his 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

(5) A judge shall perform judicial duties without bias or prejudice.

(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...

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

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.

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

Thank you for your attention to this matter. We look forward to hearing back from you. Attached is a list of witnesses to the event.

Sincerely,

The Undersigned
(list of signers will be attached)

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)