

Judge blames defense for executed inmate's botched appeal

Special master says Keller could have done better, though

By PEGGY FIKAC and CRAIG KAPITAN
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Texas Court of Criminal Appeals Presiding Judge Sharon Keller shouldn't lose her job or be punished "beyond the public humiliation she has surely suffered" for refusing to accept a last-minute appeal from a death row inmate, a special master presiding over her ethics trial concluded Wednesday.

In his report, State District Judge David Berchelmann also wrote that the Texas Defender Service, which represented death row inmate Michael Wayne Richard, "bears the bulk of fault for what occurred on September 25, 2007."

The 16-page report was released five months after a high-profile hearing in which the State Commission on Judicial Conduct accused the state's highest-ranking criminal judge of bringing "public discredit" to the judiciary. Despite the allegations, Keller has remained the presiding judge of the Texas Court of Criminal Appeals.

Seana Willing, the commission's executive director, said Berchelmann's report is a recommendation and that Keller still faces five judicial misconduct charges. She said the 13-member commission will decide whether to dismiss the charges, reprimand her or recommend that the Texas Supreme Court remove Keller from office. No date has been set for a hearing. In a brief statement made through her attorney, Keller said she was gratified for Berchelmann's report, which finds that she "did not violate any written or unwritten rules or laws."

"In terms of the charges, that's a 100 percent vindication," said her attorney, Chip Babcock. "I don't think the judge could have been any clearer."

Andrea Keilen, executive director for Texas Defender Service, said shifting blame from Keller to her organization was "akin to blaming a paramedic for a car crash victim's injuries."

"It is clear that Mr. Richard would not have been executed but for the violation of the (Court of Criminal Appeals') own execution day protocol and the decision to refuse to allow Mr. Richard to file his pleading after five o'clock," Keilen wrote in an e-mailed statement.

Keller took a telephoned request just before 5 p.m., an hour before Richard's scheduled execution, that the court clerk's office stay open past normal business hours so his lawyers could file a final appeal. Richard's attorneys alleged computer problems delayed their efforts to submit the paperwork.

Keller twice said no.

In making his decision, Berchermann noted that Keller asserted she was referring only to closing the clerk's office, not the court as a whole. He wrote that if Richard's attorneys had called one of the other judges, the attorneys likely would have been able to present the claim.

Judge also criticized

But Berchermann also described Keller's decision not to keep the clerk's office open past 5 p.m. as "highly questionable," adding "there is valid reason why many in the legal community are not proud of Judge Keller's actions."

Keller's conduct was "not exemplary of a public servant," he wrote, adding, "She should have been more open and helpful about the way in which (Texas Defender Service) could present the lethal injection claim."

"Although she says that if she could do it all over again she would not change any of her actions, this cannot be true," he wrote. "Any reasonable person, having gone through this ordeal, surely would realize that open communication, particularly during the hectic few hours before an execution, would benefit the interests of justice."

Keller's attorney acknowledged the criticism of his client's "collegiality and communication skills."

"She is very much going to take that to heart," Babcock said.

Berchermann, in blaming the Texas Defender Service for the bulk of the problem, wrote that the group didn't begin contemplating an appeal until two hours after the U.S. Supreme Court agreed to hear a Kentucky case questioning the use of lethal injections.

He also wrote that Richard's attorneys failed to pursue all possible ways to file the claim, with the court and that it relied on paralegals instead of its experienced lawyers to communicate with court staff.

Executed for rape, murder

In her statement, Keilen wrote, "Justice should not depend on such semantics."

"Judge Keller knew exactly what was being asked of her," Keilen wrote. "She responded with an unequivocal 'no' and closed the courthouse doors."

Richard was executed for the Aug. 18, 1986, rape and murder of Hockley resident Marguerite Dixon, whose home he burglarized less than two months after being released from prison on another burglary charge. Police said Richard admitted to the killing and led them to the murder weapon.

pfikac@express-news.net

ckapitan@express-news.net