

BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT

INQUIRY CONCERNING A JUDGE,

No. 96

EXAMINER'S OBJECTIONS AND RESPONSES TO SPECIAL MASTER'S FINDINGS OF FACT

To the Honorable Commissioners of the State Commission on Judicial Conduct:

The Examiner files these objections and responses to the "Special Master's Findings of Fact," which were filed by the Honorable David Berchelmann as Special Master on January 20, 2010.

I. INTRODUCTION

The Special Master was assigned by the Commission to conduct a hearing and file a report containing his Findings of Fact based on a preponderance of the evidence related to the charges filed by the Examiner. These charges make factual allegations that Judge Keller's willful and persistent failures to follow the mandatory Execution-Day Procedures, well known by her, violated the cited provisions of the Texas Constitution and statutes, and Canons of the Texas Code of Judicial Conduct.¹

1. **Irrelevant Causation Findings.** The Special Master addressed the unrelated and irrelevant question of whether Judge Keller's conduct, or the conduct of Mr. Richard's counsel, Texas Defender Service (TDS), ultimately caused the ultimate failure of TDS to obtain a stay of execution from the United States Supreme Court (USSC). In effect, the Special Master improperly turned the proceeding before him into the semblance of a tort case or other proceeding in which comparative responsibility or fault is an issue.

The issue here is not TDS's conduct, but Judge Keller's conduct. The Special Master's conclusions concerning causation are irrelevant to the issue of whether Judge Keller by her conduct violated the constitutional, statutory and canon provisions cited by the Examiner. The Commission should not be diverted by the Special Master's erroneous attempt to frame this case in terms of who ultimately caused the failure of the USSC to grant a stay.

¹ These charges are correctly noted by the Special Master. Special Master's Findings of Fact, page 1 note 1.

2. **Findings of Improper Conduct.** The Special Master's Findings of Fact did include the following findings of improper conduct by Presiding Judge Keller.

(a) a finding that Presiding Judge Keller "certainly exhibited poor judgment [i] in not reminding [General Counsel] Marty of the TCCA's execution day procedure and [ii] in failing to notify Judge Johnson of the TDS's communication...."²

(b) a finding that "Judge Keller certainly did not exhibit a model of open communication. She should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson of the TDS's call. She also could have called Judge Johnson herself, for she knew that Judge Johnson was the assigned judge for the Richard matter that day."³

(c) a finding that "Judge Keller's conduct ... was not exemplary of a public servant. She should have been more open and helpful about the way in which the TDS could present the lethal injection claim to the TCCA."⁴

(d) a finding that "[s]he should have directed the TDS's communication to Judge Johnson."⁵

(e) a finding that "her judgment in not keeping the clerk's office open past 5:00 to allow the TDS to file was highly questionable."⁶

(f) a finding that "there is a valid reason why many in the legal community are not proud of Judge Keller's actions."⁷

(g) a finding that "Judge Keller's silence on several occasions conflicts with the ideal that courts should foster open communication among court staff and litigants."⁸

² Special Master's Findings of Fact, page 9-10.

³ *Id.*, page 11.

⁴ *Id.*, page 15.

⁵ *Id.*

⁶ *Id.*, pages 15-16.

⁷ *Id.*, page 16.

⁸ *Id.* "Further Judge Keller should have spoken up the next morning when, during a conference with the judges, some of her colleagues expressed surprise that Richard had not filed anything the night before. Indeed, many of the judges, including Judge Johnson, learned that the TDS had sought to file a lethal injection claim by reading the newspaper that weekend. Judge Keller's silence at this meeting goes contrary to the ideals of judicial collegiality." *Id.*, page 12.

(h) a finding that the absence of a formal rule or statute “does not absolve her of her responsibility to ensure that the courts remain fair and just.”⁹

(i) a finding that “[a]lthough she says that if she could do it all over again she would not change any of her actions, this cannot be true. Any reasonable person, having gone through this ordeal, surely would realize that open communication, particularly during the few hectic hours before an execution, would benefit the interests of justice.”¹⁰

II. THE SPECIAL MASTER’S ERRONEOUS ACTIONS

1. The Special Master failed to address whether Judge Keller’s conduct was “**willful or persistent**,” on the one hand, or whether her conduct constitutes **incompetence** in her performance of an important duty of office, on the other hand.¹¹ The Special Master focused on what actions “*caused* the execution of Michael Wayne Richard,” which is irrelevant in this proceeding.

2. The Special Master’s treatment of the Execution-Day Procedures as “an oral tradition” fails to give effect to undisputed admissions by Judge Keller that

(a) she knew (and had known for years) the details of the Execution-Day Procedures,

(b) she knew that the Execution-Day Procedures were mandatory,

(c) she knew that the Execution-Day Procedures applied to all communications on an execution day regarding the scheduled execution,

(d) she knew that all such communications were required to be “first referred to the assigned judge,”

(e) she knew that she was not the assigned judge on September 25, 2007, and

(f) she knew that the inquiry she received on September 25, 2007, was a communication regarding the scheduled execution.

⁹ *Id.*, page 16.

¹⁰ *Id.*

¹¹ The finding that Judge Keller’s “inaction does not rise to the level of willful or purposeful incompetence” (page 10) is a blend of words that does not address willfulness, on the one hand, or incompetence in the performance of this duty of office, on the other hand.

Judge Keller did not merely vary from some “oral tradition.” She disregarded an important mandatory court protocol at a critical time when failures in communication could be irreversible and could involve fatal consequences.

3. The Special Master spent the vast majority of his Findings of Fact assessing the conduct of a non-party, the Texas Defender Service (TDS), nearly all of which conduct was not known to Judge Keller on September 25, 2007. Things unknown to Judge Keller on September 25, 2007, cannot be any basis for exonerating her. A judge’s conduct must be evaluated based upon what she *did* know, hear, think, say, do, decide and fail to do – not on the basis of what someone else may have done or not done unknown to her at the time.

4. The Special Master failed to make findings as to many matters that were presented to him, and for which findings were requested, including many facts which were not disputed.

5. The Special Master failed to give adequate effect to Judge Keller’s remarkable and emphatic testimony – repeatedly at the evidentiary hearing and in her deposition earlier in this proceeding – that, if presented with the same circumstances, she would do nothing different today.

6. The Special Master exceeded his role by making recommendations as to sanctions, if any.

III. SPECIFIC OBJECTIONS AND RESPONSES

1. **Execution-Day Procedures.** The Special Master’s characterization that the Execution-Day Procedures were “an oral tradition”¹² should be modified to reflect the undisputed testimony – including the admissions by Judge Keller – that the unwritten Execution-Day Procedures were (a) known by her, (b) verbatim identical to the subsequently written instrument, and (c) mandatory.¹³

The Special Master said “[t]hat oral tradition provided that all communications from any lawyers to the TCCA on the day of a scheduled execution were to be made to the assigned judge for that execution.”¹⁴ Instead, we propose the following finding, including the text of the mandatory protocol, in light of Judge Keller’s testimony that the unwritten protocol on September 25, 2007, was known by her and was verbatim the same as what was reduced to writing in November 2007:

¹² Special Master’s Findings of Fact, page 7.

¹³ Please see paragraphs 3-8 of the Examiner’s Proposed Findings Of Fact By The Special Master, which is attached and which identifies specific record citations in detail.

¹⁴ Special Master’s Findings of Fact, page 7.

At all pertinent times, the TCCA's Execution-Day Procedures called for the assignment of a designated judge to be in charge of each scheduled execution, and provided as follows:

“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.”¹⁵

2. **What Judge Keller Knew.** The Special Master failed to make findings, despite the Examiner's request, concerning what Judge Keller knew at the time of the conduct at issue on September 25, 2007. Undisputed evidence shows the following, which should be adopted as findings concerning what Judge Keller knew at the time of her conduct at issue.¹⁶

(a) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that September 25, 2007 was an execution date.

(b) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that the execution was scheduled to occur at 6:00 p.m.

(c) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that the Supreme Court that morning had granted certiorari to review whether Kentucky's lethal injection protocol violated the “cruel and unusual punishment” clause of the United States Constitution.

(d) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that Texas' method of execution used a lethal injection protocol and that a decision in *Baze* could have impact on executions in Texas.

(e) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that a man scheduled to be executed that evening was planning to file a motion to prevent the execution based on the issue in *Baze*, as had been brought to her attention in the 2:40 p.m. email from Mr. Marty; and she knew that she therefore might be called upon later that day to vote whether to grant or deny relief in the event the motion were filed.

(f) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew and understood that Mr. Marty's call was about a communication regarding the execution that was scheduled that evening.

¹⁵ See Examiner's Proposed Findings, ¶¶ 3-5 and detailed record citations in notes 4-5.

¹⁶ See Examiner's Proposed Findings, ¶¶ 50-61, 63, and detailed record citations in notes 61-72, 74.

(g) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that representatives for the man scheduled to be executed that evening wanted to file something with the TCCA.

(h) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that the representatives for the man scheduled to be executed that evening were not ready to file with the TCCA by 5 p.m.

(i) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that the representatives for the man scheduled to be executed that evening had requested that they be permitted to file after 5 p.m.

(j) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that the Execution-Day Procedures called for the assigned judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

(k) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that she was not the assigned judge in charge of that evening's scheduled execution, that a specific judge was the assigned judge and that, under the TCCA Execution-Day Procedures, all communications regarding the scheduled execution must be first referred to the assigned judge.

(l) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller did not know whether Mr. Acosta or Mr. Marty did, or did not, know applicable requirements under the Execution-Day Procedures. She knew that she had never given training to either of them concerning the Execution-Day Procedures, and she was unaware of their having received training from any other source.

(m) At the time of Mr. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007, Judge Keller knew that (i) the matter was important and (ii) her decision could have life-or-death consequences.

3. **“Causation.”** The Special Master's findings concerning causation are irrelevant and should be disregarded.

(a) This is not a tort case, in which comparative responsibility may be important to determine.

(b) This is a review of judicial conduct. A judge's disregard of important mandatory court protocol, in matters dealing with urgency and in which miscommunications may have irreversible and fatal consequences, is misconduct. This is so regardless of whether the judge's conduct alone, or mixed with conduct of others, does or does not “cause” a death. The propriety or impropriety of Judge Keller's conduct is not enhanced or diminished by conduct of others that was then unknown to her.

4. **Texas Defender Service.** The Special Master’s findings concerning conduct by Texas Defender Service, to the extent it addresses matters not known by Judge Keller on September 25, 2007, are irrelevant and should be disregarded in assessing Judge Keller’s September 25, 2007 conduct.

(a) Judge Keller’s conduct on September 25, 2007, should be examined based on what she knew, heard, thought, said, did, decided and failed to do – and not on things that she did not know.

(b) It is undisputed that Judge Keller, at the time of her September 25, 2007 conduct at issue, did not know or consider (i) Mr. Richard’s actual identity, (ii) the identity of his defense team, (iii) the strategic choices or staffing undertaken by TDS that day, or (iv) the reasons why a late-filing was requested.¹⁷

(c) None of those matters – unknown to Judge Keller at the time of her conduct – are relevant to evaluation of Judge Keller’s conduct.

5. **Judge Johnson.** Despite the Examiner’s request, the Special Master did not make an express finding whether Judge Johnson was, or was not, informed that TDS had asked to file after hours.¹⁸ The Special Master’s implicit findings imply this result.¹⁹ The overwhelming preponderance of the evidence supports the implicit findings, and thus warrants an express finding, that Judge Johnson was never advised on September 25, 2007, that TDS was requesting the opportunity to file after hours.²⁰

6. **Supervision and Control.** The Special Master failed to make any finding, despite the Examiner’s request, as to whether Mr. Acosta and Mr. Marty were “subject to [Judge Keller’s] supervision or control.” The overwhelming preponderance of the evidence supports, and thus warrants an express finding, that both Mr. Acosta and Mr. Marty were subject to her supervision and control.²¹

¹⁷ See Examiner’s Proposed Findings, ¶¶ 67-69 and detailed record citations in notes 78-79.

¹⁸ See Special Master’s Findings of Fact, page 10 n.4.

¹⁹ See Special Master’s Findings of Fact, page 8 & n.3 (Marty “should have referred the question to Judge Johnson, not Judge Keller”; Acosta “should have referred the question to Judge Johnson); page 9 (referring to Judge Keller’s “failure to refer the TDS’s request to Judge Johnson” and to Judge Keller’s “poor judgment ... in failing to notify Judge Johnson of the TDS’s communication”); page 11 (Judge Keller “should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson of the TDS’s call”); page 12 (“many of the judges, including Judge Johnson, learned that the TDS had sought to file a lethal injection claim by reading the news paper that [next] weekend”).

²⁰ See Examiner’s Proposed Findings, ¶ 48 and detailed record citations in notes 57-58.

²¹ See Examiner’s Proposed Findings, ¶ 100 and detailed record citations in notes 104-105.

