

**UNITED STATES DISTRICT COURT
SOUTHERN DIVISION OF TEXAS
HOUSTON DIVISION**

MARSHA RICHARD,)
)
 Plaintiff,) **CIVIL ACTION NO.:** _____
)
 V.)
)
 HONORABLE SHARON KELLER,)
 Individually, and in an official capacity,)
 and JOHN DOES, individually, and in an)
 official capacity.)
)
 Defendants.)

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Plaintiff Marsha Richard and complains of Honorable Sharon Keller, individually, and in an individual capacity and John Does, individually, and in their official capacities and will show the Court the following:

STATEMENT OF THE CASE

1. Texas Court of Criminal Appeals Judge Sharon Keller without any authority to do so, or, in the alternative, in her administrative function, prevented a death penalty appeal (the Appeal) to be filed with the Texas Court of Criminal Appeals, thereby, causing the death of plaintiff's husband, Michael Richard, by lethal injection on September 25, 2007.

JURISDICTION AND VENUE

2. This Court has jurisdiction over Plaintiff's federal claims, under 28 U.S.C. §§ 1331 and, 2201, 42 U.S.C. §§ 1983, 1985 and 1988, and supplemental jurisdiction, under 28 U.S.C. § 1367(a), to hear Plaintiff's state law claims.

3. Venue is proper in this Court, under 28 U.S.C. § 1391(b), because the incident at issue took place in Huntsville, Walker County, Texas, within the United States Southern District of Texas.

PARTIES

4. Plaintiff is a resident of Harris County, Texas.

5. Defendant Sharon Keller is a resident of Travis County, Texas, and a Judge on the Texas Court of Criminal Appeals and can be served with process at the Texas Court of Criminal Appeals, Supreme Court Building, 201 West 14th Street, Austin, Texas 78701.

6. Defendant John Does are those state actors, who by action or inaction, along with Defendant Keller caused the Appeal not to be filed.

FACTS

NOT EXECUTING CONVICTED MURDERERS IS A “*HUMAN RIGHTS VIOLATION*”

7. Defendant Keller was first elected to the Texas Court of Criminal Appeals (the CCA) in 1994.¹ Defendant Keller was elected presiding judge of the CCA in 2000 and re-elected to that position in 2006. During her 1994 campaign Defendant Keller criticized the CCA as too lenient and openly supported the death penalty. While campaigning Defendant Keller called the failure to impose capital punishment on convicted murderers “a human rights violation.”² Since Defendant Keller assumed the CCA bench THREE HUNDRED TWENTY-ONE (321) people have been executed in Texas and over FOUR HUNDRED (400) have received a sentence of death. Judge Keller has reviewed hundreds of, if not more than a thousand, appeals in death penalty cases making her intimately familiar with procedures and the law, including all the laws

¹ The Texas Court of Criminal Appeal is the highest state court having jurisdiction over criminal cases.

² *Houston Chronicle*, February 7, 2001, quoting an earlier election editorial.

contained in the instant pleading.

8. Plaintiff Marsha Richard is the wife³ of deceased Michael Richard who was executed by the State of Texas, the evening of September 25, 2007, by lethal injection--the 25th such execution by the State of Texas for the year.⁴ Richard's execution occurred in Huntsville, Texas in Walker County in the United States Southern District of Texas.

9. The morning of September 25, 2007, the Supreme Court of the United States (the Supreme Court) granted writ of certiorari to answer the question of whether or not the current method of lethal injection execution is Cruel and Unusual Punishment and, therefore, constitutionally prohibited by the 8th Amendment to the Constitution.⁵

10. On September 25, 2007, Judge Keller ordered the clerk of the CCA not to accept any paperwork concerning Michael Richard after 5:00 pm. Prior to 5:00 pm and throughout the day attorneys for Michael Richard were working feverishly to finish and file the necessary paperwork (the Appeal) to stay the execution based on the same issues that the Supreme Court of the United States had granted writ of certiorari in the *Baze* case.

11. Prior to 5:00 pm Michael Richard's attorneys made it clear to Judge Keller, the clerk of the CCA, and others that the appeal paperwork was forthcoming but that, due to circumstances beyond their control, the paperwork would be filed a few minutes past 5:00 pm. Because of the actions of Judge Keller and other unknown government employees and officials

³Plaintiff and Michael Richard were married November 2, 2002.

⁴In 2007 Texas has executed 25 while all 36 other death penalty states combined have execute 16.

⁵While the case before the Supreme Court, *Ralph Baze, et al., v. John D. Rees, et al.*, is from Kentucky, all 37 states, including Texas, that perform lethal injections use the same three-drug lethal injection method. The three drugs consist of an anesthetic--sodium thiopental, a muscle paralyzer--pancuronium bromide, and a substance to stop the heart--potassium chloride. Besides Eight Amendment considerations appellants in *Baze* also raise the question of whether substantive due process requires halting an execution if a stay is granted during the lethal injection process.

(the John Does) the Appeal was not accepted by the CCA⁶ and Michael Richard was executed. At least three other CCA judges were waiting after 5:00 pm for the Appeal so that they could rule on it not knowing that Defendant Keller had stopped the filing of the Appeal. Previously other death penalty appeals had been considered after 5:00 pm by the CCA.

12. Every scheduled execution in the United States after Michael Richard's has been stayed because of the writ of certiorari granted by the Supreme Court of the United States including all scheduled executions in Texas.

13. No law or rule gave Defendant Keller the authority to close the court to prevent the Appeal. Moreover, at least three CCA judges waited after 5:00 pm for an appeal to be filed as was the custom and procedure and which had occurred on occasions prior to September 25, 2007.

I. PROCEDURAL DUE PROCESS

14. Procedural due process' function is to provide "an opportunity to be heard...at a meaningful time and a meaningful place," promoting fairness in dispute resolution. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The 5th and 14th Amendments require that deprivations of life, liberty, or property activates due process guarantees. Liberty interests are "those privileges long recognized as essential to the orderly pursuit of happiness by free men". *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

15. Defendant Kellers' act of stopping the filing of the Appeal denied Michael Richard an opportunity to be heard at a meaningful time and a meaningful place. Michael Richard had a dispute concerning lethal injection and due to Defendant Keller's acts was not

⁶ In order for the Supreme Court to consider the Michael's appeal the Appeal must, by law, have first been considered by the CCA.

allowed to resolve the issue.

II. DEFENDANT KELLER'S ACTS WERE *ULTRA VIRES*

16. Defendant Keller can point to no law, authority, statute or any colorable basis for stopping the filing the Appeal subjecting Defendant Keller to individual liability for death of Mr. Richard. 11th Amendment immunity does not prevent an action in federal court against a state official for *ultra vires* actions beyond the scope of statutory authority, or pursuant to authority deemed to be unconstitutional. *Pennhurst*, supra, 465 U.S. at 101-102, n. 11; *Scham v. District Courts*, 967 F. Supp 230, 232-233 (S.D.Tex. 1997). *Ultra vires* actions are those “without any authority whatever;” claim rests on the officer’s lack of delegated power. *Pennhurst*, supra, , 465 U.S. at 101-102, n. 11. The test has been stated as whether there was any “colorable basis for the exercise of authority by state officials.” A claim of error in the exercise of that power is insufficient.

III. DEFENDANT KELLER FAILS TO HAVE QUALIFIED IMMUNITY

17. Alternatively to her acts being *ultra vires*, if Defendant Keller has administrative authority to stop the appeal, then an analysis of her qualified immunity is in order, however, such analysis can only lead to a denial of qualified immunity. Qualified immunity is designed to shield government officials from actions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

18. Here Judge Keller has participated in hundreds of death penalty appeals and knew the consequence of her actions would be the death of Michael Richard without a due process review of his issue regarding lethal injection and a violation of Michael Richard’s right to an open court under the Texas Constitution.

IV. DEFENDANT KELLER VIOLATED THE “OPEN COURTS” PROVISION OF THE TEXAS CONSTITUTION

19. The Texas Constitution, Article 1, section 13 provides that:

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.

20. Defendant Keller’s act of closing the court with an execution looming could not more clearly violate this provision.

V. ARBITRARY AND CAPRICIOUS

21. A ruling is arbitrary and capricious in the absence of a rational connection between the facts found and the choice made. *Natural Resources. v. U.S.*, 966 F.2d 1292, 97, (9th Cir. 1992). Defendant Keller’s decision to close the court to Michael Richard’s appeal had no rational basis.

VI. VIOLATION OF FOURTH AMENDMENT

22. The Fourth Amendment guarantees everyone the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” *U.S. Const. amend. IV.*

23. Defendants violated Michael Richard’s Fourth Amendment rights when they unlawfully executed him--seizing his person--without considering his appeal.

VII. WRONGFUL DEATH AND SURVIVAL ACTION

24. A person is liable for damages for wrongful death arising from an injury that causes an individual death if the injury was caused by the person(s) or agent(s) or servant(s) wrongful act, neglect, carelessness, unskillfulness or default.” **Tex. Civ. Prac. & Rem. Code**

Ann. §71.002(b). Plaintiff Marsha Richard as the wife of Michael Richard is a statutory beneficiary under the Texas wrongful death statute.

25. Plaintiff Marsha Richard also contemplates a survival action under the Texas Survival Statute and as the wife she is the natural choice as administrator of the estate. A probate action creating the Estate of Michel Richard with Marsha Richard as administrator will be filed in the appropriate probate court as time allows. Defendants through their action and inaction caused plaintiff the loss of his protection, care, assistance, society, companionship, comfort, guidance, counsel and advice, and funeral and burial expenses.

26. Plaintiff Marsha Richard as the representative of the Estate of David Brian Scott, deceased, seeks to recover damages to compensate the conscious pain and suffering, economic losses and damages for the awareness of impending death, all of which were suffered by Michael Richard before his untimely, painful and unnecessary death.

42 USC SECTION 1983

27. A 42 USC Section 1983 claim requires that a state actor violate an individual's right. While 42 USC Section 1983 is not a source of substantive rights it allows rights found elsewhere to be addressed in federal (and state) court. Michael Richard had a Fourteenth Amendment right to due process both procedural and substantial yet these rights and the other rights--wrongful death, survivor action, open courts, fourth amendment--described herein were met with deliberate indifference by Defendant Keller and the John Does.

28. The deliberate indifference and the injury must have a causal connection. *Thompson v. Upshur County, Texas*, 245 F.3d 447, 457 (5th Cir. 2001). [D]eliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence. *Farrow v. West*, 320 F.3d 1235, 1245

(11th Cir. 2003). The evil intent of deliberate indifference can be inferred from the acts of state actor. *Hope v. Pelzer*, 536 U.S. 730 (2002). In the case at bar Defendant Keller knew that death was coming for Michael Richard without the legal intervention of his appellate attorneys and deliberately disregarded that risk by closing the courthouse.

29. As Judge Keller claims to be a policymaker in the area of accepting or rejecting appeals the State is liable for injunctive relief and damages under 42 USC Section 1983

COUNT--42 U.S.C. SECTION 1985

30. In order to state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. *Id.* at 828-29; *Griffin v. Breckenridge*, 403 U.S. at 102-03403 U.S. 88 (1971); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). Defendant Keller and the John Does acted in concert to deprive Michael Richard of his rights to due process, life and liberty, his day in court, and to be free from arbitrary and capricious acts and unlawful seizure of his person.

31. Defendants all acted in callous and total disregard of the United States and Texas Constitution, and violated well-established law and precedent. Defendants' actions were objectively unreasonable and done in bad faith.

RATIFICATION

32. Despite the solid evidence of Defendant Keller having improperly caused the death of Michael Richard Judge Keller is still serving on the bench. As such the State of Texas has ratified the conduct of Defendant Keller as its own policy, practice, custom and procedure.

Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

MENTAL ANGUISH and INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

33. The tort of intentional infliction of emotional distress has four elements: (1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe emotional distress. Defendants acted willfully and recklessly, and their conduct was extreme and outrageous. Plaintiff has suffered at least depression, fear, anxiety, loss of sleep, and remorse as a result of defendant's acts.

ASSAULT AND BATTERY

34. Defendants knowing caused the assault and battered, and caused bodily injury to, Plaintiff, intentionally, knowingly, and recklessly when Michael Richard was executed by lethal injection.

DECLARATORY RELIEF

35. Plaintiff seeks declaratory relief against Defendants, delineating his rights under, and Defendants' violations of, the United States and Texas Constitutions.

PUNITIVE DAMAGES

36. Plaintiff is entitled to punitive damages against all individual (natural persons) defendants in their individual capacities due to malice, gross negligence and purposeful acts in violation of the federal and state rights described herein.

INJUNCTIVE RELIEF

37. Marsha Richard requests injunctive relief in the form of an order directed to Defendant Keller, the clerk of the CCA, and the CCA that emergency death penalty appeals whether in electronic or paper form not be stopped from being filed.

ATTORNEYS' FEES

38. Marsh Richard is entitled to recover attorneys' fees and costs to enforce his Constitutional rights and under 42 U.S.C. Section 1983 and 1985 from Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Marsha Richard requests that the Court:

A. Enter declaratory judgment, specifying Plaintiff's US Constitutional Rights and Texas Constitution's Bill of Rights;

B. Find that Plaintiff Marsha Richard is the prevailing party in this case and award attorneys' fees and costs, pursuant to federal law, as noted;

C. Award damages to Marsha Richard against Defendants, separately and jointly; for the violations of Michael Richard's rights under the United States Constitution and his rights under the Texas constitution and tort law as noted above;

D. Award punitive damages against each individual Defendant to Marsha Richard for violations of Michael Richard rights his rights and under Texas law, as noted above;

E. Enter injunctive relief against Defendants, preventing them from again unlawfully interfering with the due process appeal rights of the condemned under the United States and Texas Constitutions; and,

F. Grant such other and further relief as appears reasonable and just, to which, Marsha Richard shows herself entitled.

RESPECTFULLY SUBMITTED,
LAW OFFICE OF RANDALL L. KALLINEN

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS <i>Marsha Richard Harris</i></p> <p>(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES) <i>Harris</i></p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) <i>Randall Kallinen 713/320 3785</i> <i>1406 Castle Ct. Houston TX 77006</i></p>	<p>DEFENDANTS <i>Judge Sharon Keller</i></p> <p>County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY) <i>Travis</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY - Med. Malpractice</p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p>SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR		
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V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 USC § 1983

Brief description of cause:
42 USC § 1983. Judge stopped filing of a death penalty appeal.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMANDS: CHECK YES only if demanded in complaint.

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____