

COPY

BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT

IN RE: §  
HONORABLE SHARON KELLER §  
PRESIDING JUDGE OF THE §  
TEXAS COURT OF CRIMINAL §  
APPEALS §

INQUIRY CONCERNING  
JUDGE, NO. 96 FILE STAMPED COPY

By st Date 1/20/10  
Clerk of the Commission  
State Commission on Judicial Conduct

SPECIAL MASTER'S FINDINGS OF FACT

On September 25, 2007, the Texas criminal justice system suffered several lapses of communication at various levels—and in particular, at both the Texas Court of Criminal Appeals (“TCCA”) and the Texas Defender Service (“TDS”). The Examiner for the Commission on Judicial Conduct (the “Examiner”) filed five charges against TCCA Presiding Judge Sharon Keller (“Judge Keller”) stemming from the events of that day.<sup>1</sup> Both the TDS and Judge Keller point fingers at each other, claiming that the other caused the execution of Michael Wayne Richard (“Richard”) that evening, even though, earlier in the day, the Supreme Court had indicated that it

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<sup>1</sup> Charge I states, “Judge Keller’s willful and persistent failure to follow CCA’s Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as Presiding Judge . . . .” Charge II provides, “Judge Keller’s willful and persistent failure to follow CCA’s Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice . . . .” In Charge III, the Examiner alleges, “Judge Keller’s conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Judge Keller’s conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as Presiding Judge . . . .” Charge IV states, “Judge Keller’s conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Keller’s conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice . . . .” Finally, Charge V provides, “Judge Keller’s willful and persistent failure to follow CCA’s Execution-day Procedures on September 25, 2007, constitutes incompetence in the performance of duties of office . . . .” The Examiner claims in the Charges that Judge Keller acted “in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.”

wanted to review the constitutionality of execution by lethal injection. Ultimately, the TDS never presented a lethal injection challenge to the TCCA. What is clear is that all sides are at fault for these communication failures. What is also clear is that, although Judge Keller's conduct on that day was not exemplary, she did not engage in conduct so egregious that she should be removed from office. Indeed, although Judge Keller's actions did not help the situation, the majority of the problems involving the Richard execution were the responsibility of the TDS.

#### I.

A Texas jury convicted Richard of capital murder stemming from an incident that occurred on August 18, 1986. He was sentenced to death and went through the state and federal appeals processes. After exhausting his then-available appeals, he was scheduled for execution on September 25, 2007.

The execution was scheduled to occur anytime after 6:00 p.m. That morning, the United States Supreme Court announced that it would hear a case called *Baze v. Rees*, which raised the issue of whether Kentucky's three-drug protocol for lethal injection violated the Eighth Amendment's prohibition against cruel and unusual punishment. Texas uses the same three-drug protocol; accordingly, the decision in *Baze* would impact Texas's death penalty procedure.

With the benefit of 20/20 hindsight, we now know that the Supreme Court stayed all executions in the United States besides Richard's until it resolved *Baze* on April 16, 2008. *See Baze v. Rees*, 553 U.S. 35 (2008). However, on the morning the Court announced that it would hear *Baze*, the legal community did not fully appreciate the impact the decision to review Kentucky's death penalty procedure

would have on all other executions in the United States. The TDS, which represented Richard, thus had only a few hours to seek a stay of Richard's execution based on the Supreme Court's decision that morning.

Because the TDS would likely ask the Supreme Court to stay Richard's execution pursuant to the Court's decision to hear the lethal injection case (assuming the lower courts did not first grant a stay), it had to do so through a writ of habeas corpus. To present a habeas claim to the Supreme Court, a litigant must exhaust all possible state remedies. That is, the Supreme Court will not consider a habeas claim—even in a death penalty case—unless the state courts first pass upon the issue. *See* 28 U.S.C. § 2254. This procedural mechanism is well known among death penalty lawyers. Accordingly, before the United States Supreme Court would even consider whether to stay Richard's execution based on its decision to hear *Baze*, Richard had to exhaust that argument before the Texas courts. That is, he had to present a lethal injection argument to the TCCA. Only after the TCCA rejected the claim would he be able to seek relief from the Supreme Court. Thus, his lawyer's failure to raise the lethal injection argument to the TCCA doomed his ability to successfully ask the Supreme Court to stay his execution.<sup>2</sup>

## II.

At around 9:00 a.m. central time on the morning of September 25, 2007, the Supreme Court announced that it would review *Baze*. At approximately 11:40 a.m., TDS lawyers—including David Dow ("Dow"), Greg Wiercioch ("Wiercioch"), and

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<sup>2</sup> Indeed, the TDS eventually submitted its lethal injection claim to the Supreme Court, but the Court denied the request for a stay without comment.

Alma Lagarda (“Lagarda”)—participated in a conference call, during which they first discussed the Supreme Court’s decision that morning. These lawyers were working in TDS’s Houston office. After the call, Dow, a professor of law at the University of Houston and TDS’s Litigation Director, instructed Lagarda, a junior attorney, to draft a writ of prohibition, a motion for leave to file the writ, a successor application for a writ of habeas corpus, and a motion to stay the execution, based on the Supreme Court’s decision to review Kentucky’s lethal injection procedure. Dow and Wiercioch continued to focus on an *Atkins* claim they planned to raise, challenging Richard’s execution based on mental retardation. Dow admitted that he believed the *Atkins* claim was a more effective vehicle for obtaining a stay of execution, especially because the Supreme Court had never before entered the fray of considering the constitutionality of lethal injection.

Around 3:30, Lagarda completed her draft of the petition for a writ of prohibition and sent it to Dow, and he began to revise it. She had not yet started working on the other filings. Dow returned the petition for a writ of prohibition to Lagarda at 4:00, and she completed the document by 4:45. Meanwhile, Wiercioch was working on the *Atkins* claim, and he filed a motion with the United States Supreme Court. He then offered to assist on the lethal injection claim. The TDS did not complete the lethal injection pleadings until after 5:00, when the TCCA’s clerk’s office closes.

There is a dispute among the parties regarding whether the TDS was embarking on the correct strategy to raise the lethal injection argument to the TCCA. The TDS asserts that it was preparing the proper motions, while Judge Keller

contends that there were easier vehicles to raise a lethal injection claim. Whether there were better avenues to pursue this claim, however, is largely irrelevant given the TDS's other mistakes that day. The mechanism the TDS planned to use to raise this argument also had no impact on Judge Keller's decisions in this matter.

### III.

Just because the TDS did not have its lethal injection papers ready by 5:00 did not mean that it was absolutely foreclosed from filing them at all. The TDS simply had to find the correct way to file the documents. The question, then, is whether the TDS adequately pursued the proper avenues to present the pleadings to the TCCA, and whether Judge Keller acted reasonably in directing the TCCA's staff as to what to tell the TDS after it inquired if it could file something past 5:00.

At 4:35 on September 25, 2007, Dorinda "Rindy" Fox ("Fox"), a paralegal in TDS's Austin office who was at a doctor's appointment at that time, received a phone call from Melissa "Liz" Waters ("Waters"), another TDS Austin paralegal. Waters relayed to Fox that Dow told Waters that the TDS planned to file a motion with the TCCA, but that it was not yet ready. Waters asked Fox to call Abel Acosta ("Acosta"), a deputy clerk at the TCCA. Fox knew Acosta from previous interactions with him.

At 4:40, Fox called Acosta and explained that the TCCA would be filing something in the Richard case, but that she did not think it would be ready by 5:00, when the TCCA's clerk's office closed. Acosta said that he needed to check with someone to find out if it would be possible for the TDS to file something in the clerk's office after 5:00. Acosta had accepted "late" filings in the past, but in doing so

he had simply taken the papers after 5:00 and waited until the next day to stamp them—something that of course was not possible in the Richard case.

Acosta then called Edward Marty (“Marty”), the TCCA General Counsel. Marty, in turn, called Judge Keller, who was at home but was accessible. Although the parties dispute the precise words Judge Keller used and exactly what she was trying to convey, the gist is that Judge Keller told Marty that the TCCA would not be able to formally file any documents past 5:00. Judge Keller and Marty both assert that Judge Keller was referring to whether the clerk’s office, and not the TCCA as a whole, could stay open past 5:00, to which she twice replied “no.” The Examiner contends that Judge Keller in essence was saying that the “court,” as opposed to merely the clerk’s office, would close at 5:00 regardless of the TDS’s attempt to file something in the Richard case. Marty then called Acosta, relaying the information that the clerk’s office (or the court) would close at 5:00. Acosta called Fox, stating, “I was told to tell you that we close at 5:00.” It is unclear whether he was referring to the clerk’s office or the court. Most likely, neither he nor anyone else during these communications was making a precise distinction between the two.

Upon learning this news, Fox called TDS’s Houston office and spoke with Lagarda. At 4:59, Judge Keller called Marty, asking whether the TDS had filed anything. Marty told her that it had not. At 5:07, Waters, the other TDS paralegal, called Acosta, seeking to confirm that the TCCA would not accept any late filings. Waters claims that she mentioned the TDS’s alleged computer problems in preparing the documents during this conversation; Acosta does not remember learning this information from either Waters or Fox. Waters also asked if the TDS

could email or fax the documents; Acosta responded no. Acosta reiterated that the clerk's office (or the court) closed at 5:00.

At 5:56, Fox called Acosta, telling him that the TDS had the filing ready and asking how she should proceed. Acosta told her not to bother coming over to the court, as the clerk's office (or the court) was closed. Fox asked whether she could leave it with a security guard at the courthouse. Acosta explained that the guard would not be able to file the document. At that point, Fox believed that she had explored all avenues for filing the lethal injection papers, and she did not attempt to file them in any other way. Importantly, no TDS lawyers were involved in speaking with the TCCA staff or attempting to file the documents. This highlights one of the TDS's vital mistakes: it should have had its lawyers—the licensed experts in the organization with experience in last-minute death penalty appeals—verify the information from the TCCA and try to find other ways to file the papers.

#### IV.

On September 25, 2007, the TCCA did not have written procedures for execution days, but it had an "oral tradition" on how to proceed. That 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. That is, for every scheduled execution, the TCCA's General Counsel would assign one of the judges (based on a rotating schedule) to receive all communications regarding that case on the execution day and to coordinate the court's response. The purpose of this rule was to ensure that one judge was the point person for anything related

to the case. The public, however, was not aware of which judge was the assigned judge for any particular death penalty case.

For the *Richard* matter, Ed Marty, the General Counsel, assigned Judge Cheryl Johnson as the assigned judge. Thus, Judge Johnson should have received all communications regarding the *Richard* case on September 25, 2007. Although this oral tradition was not a court or statutory rule, the TCCA Judges knew that there was an assigned judge for every death penalty case, and they knew that Judge Johnson was the assigned judge for the *Richard* matter. They therefore understood that all communications regarding the scheduled execution should have been directed to Judge Johnson. After the events in the *Richard* case became widely known, the TCCA reduced the execution day procedures to written rules for the Court.

The TCCA's staff also knew of this oral tradition. Indeed, Marty, as the General Counsel, was the person who named Judge Johnson the assigned judge. Thus, when he received the phone call from Acosta explaining that the TDS was requesting more time to file a lethal injection claim, he should have referred the question to Judge Johnson, not Judge Keller.<sup>3</sup> Judge Keller also should have told Marty to refer the TDS's call to Judge Johnson instead of answering it herself.

But Judge Keller had a reason to answer the TDS's question. She construed its inquiry as a request to keep the clerk's office open after 5:00 (as opposed to the court as a whole). Under Tex. Gov't Code 658.005(a), "Normal office hours of a state

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<sup>3</sup> It is unclear whether Acosta knew of the oral tradition regarding execution day communications, but he too should have referred the question to Judge Johnson.



agency are from 8 a.m. to 5 p.m., Monday through Friday,” but under subsection (b), “if a chief administrator of a state agency considers it necessary or advisable, offices also may be kept open during other hours and on other days.” Judge Keller, as the Presiding Judge and chief administrator of the TCCA (a state agency), therefore could decide to keep the clerk’s office open past 5:00 p.m. If the TDS was asking for the clerk’s office to stay open past 5:00, then Judge Keller was the only person who could approve or deny that request.

This explanation does not fully absolve Judge Keller for failing to refer the TDS’s request to Judge Johnson. But it does suggest that her actions were not nefarious or a purposeful attempt to circumvent the TCCA’s execution day procedures. Indeed, she argues that she chose not to keep the clerk’s office open because she did not want to require the clerk’s office staff to stay late, especially given that, as discussed below, there were other ways for the TDS to file its motion. The TCCA had never kept the clerk’s office open past 5:00 on an execution day. Further, there is simply no evidence that by saying “no” twice, Judge Keller was indicating to Marty that the entire court should close at 5:00; nor did she have the power to close the court or access to all judges. Under the Texas Government Code, she refused what she deemed to be a request to keep the clerk’s office open beyond its statutory closing time. Although Judge Keller might have exhibited poor judgment in making this decision, it was within her sole discretion. Further, although she certainly exhibited poor judgment in not reminding Marty of the TCCA’s execution day procedure and in failing to notify Judge Johnson of the TDS’s

communication, this inaction does not rise to the level of willful or purposeful incompetence.

As noted above, Judge Keller could not shut off all access to the TCCA judges. Texas Rule of Appellate Procedure 9.2(a) provides,

With Whom. A document is filed in an appellate court by delivering it to:

- (1) the clerk of the court in which the document is to be filed; or
- (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

Thus, there were *two* ways for the TDS to file its lethal injection claim with the TCCA. It could have submitted its motion to the clerk's office—an option that was no longer available after Judge Keller chose not to keep the clerk's office open past 5:00. But it also could have sought to find a judge of the court that would accept the filing. Judge Johnson explicitly stated that she would have accepted a filing from the TDS, even after 5:00.<sup>4</sup> Judge Johnson's chamber's phone number, much like the

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<sup>4</sup> The parties in this case disagree vehemently regarding whether Marty told Judge Johnson about the TDS's request to file a pleading after 5:00. This dispute centers around a hallway meeting between Judge Johnson and Judges Womack and Price at around 5:30 that afternoon. Judge Johnson stated that the three judges were expressing their surprise that Richard had not filed anything to challenge Texas's use of lethal injection given the Supreme Court's decision in *Baze* earlier that day. According to Judge Johnson, Marty was standing nearby and was listening to the conversation, but he did not say anything or notify the judges that the TDS had called the court but that Judge Keller had refused their request to stay open late. Judge Keller posits that it would be implausible for Marty to stand only a few feet away from the judges and remain silent, in essence eavesdropping. Whether this occurred, however, is largely irrelevant to the complaints levied against Judge Keller. Even if Marty had stood there quietly listening to the judges, his actions have nothing to do with whether Judge Keller was responsible for the TDS's failure to present the lethal injection claim. Further, assuming Marty told the judges that the TDS had sought to file something late but that Judge Keller had refused, this likely would not have changed anything; Judge Johnson does not suggest that she would have affirmatively reached out to the TDS to tell it

phone numbers of the other TCCA judges and the General Counsel, is in the Austin phone book. Accordingly, had the TDS simply called the chambers of each TCCA judge, it would have found a judge who would accept the filing after 5:00.

Additionally, it is not as if the TDS's lawyers were unaware of Rule 9.2(a)(2). They knew that the previous General Counsel, Rick Wetzel ("Wetzel"), had a policy of accepting filings after 5:00 in death penalty cases. They also had worked on the *Rivera* case in August 2003, in which they had presented a late pleading to Wetzel on the day of the scheduled execution. Further, as experienced death penalty appellate lawyers, the TDS counsel should have known of the ways in which they could file last-minute documents. It is not up to the court or its staff to tell the TDS how to present its filings. The TDS, however, did not even have its lawyers communicate with the TCCA as it sought to determine how to file the lethal injection papers. Dow and Wiercioch instead relied on the TDS's paralegals to communicate with Acosta. This was a crucial mistake; had they themselves called Marty or any of the TCCA judges, they likely would have been able to present the lethal injection claim. Their error does not implicate Judge Keller.

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.

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that she would accept the pleading. The hallway conversation—and whether Judge Johnson learned that day that the TDS had called the court—thus has little bearing on the resolution of the key issues before the Special Master.

Further, Judge Keller should have spoken up the next morning when, during a conference of 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. But it did not impact the TDS's ability to file its pleading before Richard's execution.

#### V.

Both in the media and during this proceeding, the Examiner has faulted Judge Keller for choosing not to allow the TDS to file the lethal injection papers late given that the TDS was experiencing severe computer problems—including a “series of computer crashes”—which was purportedly the cause of the delay. But the evidence demonstrates that the TDS was not having major computer problems. Lagarda agreed that no computer issues prevented her from creating or completing the necessary documents. The alleged problems were with the TDS's email, and specifically, the ability to email from one person in the Houston office to another.

In an effort to dig deeper into the TDS's allegations of computer problems, Judge Keller subpoenaed the TDS for documentation regarding the technological issues it encountered on September 25, 2007. The TDS was unable to produce anything to corroborate its complaints of computer problems. Judge Keller then contacted Bayou City Connected, the company the TDS said had dealt with their computer issues. But Bayou City Connected first worked on the TDS's computer systems on November 13, 2007. The TDS changed its story again, saying that it had

actually used Bone Computer on September 25, 2007. But the last invoice Bone Computer could find for work it performed for the TDS was dated April 11, 2007. Judge Keller then inquired into whether Internet America, TDS's internet provider, reported any outages on September 25, 2007. Internet America's records showed a system-wide problem with a spam filter on the morning of September 25, 2007, which it corrected before noon that day.

In sum, there is no evidence in the record to confirm that the TDS suffered any computer issues that slowed its ability to prepare the lethal injection claim on September 25, 2007. The TDS lawyers may have had an internal problem emailing the files from one person to another in the Houston office. But there is nothing to suggest that the reason it was late with the filings was because of a serious computer malfunction. Much like a lot of the other allegations in this case, the "serious computer crash" story seems to be an embellishment that was blown out of proportion in the media. In sum, the Examiner has not shown that the TDS was late because of unprecedented computer problems. The TDS's failure to have the documents ready was due to its own issues unrelated to any computer malfunction. Thus, the TDS has only itself to blame for not having the pleadings prepared by 5:00.

## VI.

Before Judge Keller faced official charges of judicial incompetence, the TDS in essence tried this case through the media. The news articles and accompanying public outcry rendered a "verdict" of guilty as charged. But much like the children's game of telephone, the media's reporting began with minor inaccuracies and became more and more embellished, leading to plainly false assumptions about

Judge Keller's role in the Richard execution. The TDS was the catalyst for this media and public groundswell of opposition against Judge Keller.

Several newspaper stories quoted Dow shortly after Richard was executed on September 25, 2007. Dow told the newspapers that the TDS had suffered a computer crash, which impeded its ability to file the lethal injection claim. But there is little evidence that computer problems significantly slowed the preparation of these documents. An article in the Dallas Morning News quoted Dow as stating, "I think that Michael Richard got executed because the Court of Criminal Appeals couldn't be bothered to stay open 20 minutes late so we could get all our briefs in." Dow repeated this claim in the New York Times, the Washington Post, and the Houston Chronicle, among others, and the story was spread nationwide. The evidence demonstrates, however, that the TDS was not ready to file the lethal injection claim until 5:56, not 5:20. Dow has now admitted that his quote inaccurately represented what actually occurred that day. Similarly, Dow stated in news reports that TDS lawyers "pleaded" with Judge Keller to stay open to allow the filing, but TDS paralegals, not lawyers, were the ones to call the deputy clerk to ask about filing the papers after 5:00. These distortions effectively placed blame on Judge Keller for Richard's execution that day. They also led to increased public scrutiny of Judge Keller's actions, and, ultimately, the Examiner's charges. That is, the Examiner's charges largely rest on what ended up being misleading media reports, which started from Dow's inaccurate statements in the press and spun out of control.

## VII.

As the foregoing discussion demonstrates, the TDS bears the bulk of fault for what occurred on September 25, 2007. Although its mission and goal of assisting death penalty litigants is certainly an admirable one, its actions in the *Richard* case did not match its typically estimable practice. The TDS did not begin contemplating the lethal injection claim until over two hours after the Supreme Court agreed to hear *Baze*. It assigned a junior attorney to draft all of the necessary papers, and did not have the first document ready until 4:45 and the remaining documents ready until 5:56. It failed to pursue all possible ways to file the claim. It relied on its paralegals, instead of its experienced lawyers, to communicate with the TCCA's staff. Then, after it became clear that the Supreme Court would be staying all executions until it resolved *Baze*, the TDS embellished the computer problems it suffered and untruthfully told the media that it was ready to file at 5:20 but that Judge Keller had already closed the court house doors. Indeed, the TDS was quite successful in causing a public uproar against Judge Keller, much of which was unwarranted.

Judge Keller's conduct, however, 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. She should have directed the TDS's communication to Judge Johnson. Although 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 hectic few hours before an execution, would benefit the interests of justice. Further, her judgment in not keeping the clerk's

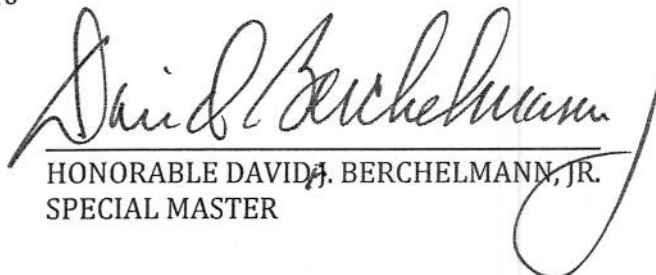
office open past 5:00 to allow the TDS to file was highly questionable. In sum, there is a valid reason why many in the legal community are not proud of Judge Keller's actions.

Judge Keller's silence on several occasions conflicts with the ideal that courts should foster open communication among court staff and litigants. But Judge Keller's omission did not *cause* the TDS to be late in its filing, to forget the other available avenues, or to fail to have any of its experienced lawyers contact the TCCA. She did not violate any written or unwritten rules or laws. Of course, that does not absolve her of the responsibility to ensure that the courts remain fair and just. Her conduct, however, does not warrant removal from office, or even further reprimand beyond the public humiliation she has surely suffered.

In the end, perhaps this entire ordeal can have positive consequences for the future. The TCCA has reduced its oral tradition for its execution day procedure to written form, which will provide clarity and certainty moving forward. Appellate counsel, including death penalty lawyers, certainly now know of all of the available avenues to present a claim, even after the clerk's office has closed. Finally, we should all be reminded of the responsibilities a public servant has to ensure and promote fairness in the criminal justice system.

SO FOUND.

DATED: January 19, 2010

  
HONORABLE DAVID A. BERCHELMANN, JR.  
SPECIAL MASTER