

FILED
IN SUPREME COURT
OF TEXAS

JUL 29 2010

EMERGENCY RELIEF REQUESTED

BLAKE HAWTHORNE, Clerk
By _____ Deputy

NO. **10-0566**

IN THE SUPREME COURT OF TEXAS

IN RE: THE HONORABLE SHARON KELLER

RELATOR

Original Proceeding from *Inquiry Concerning a Judge, No. 96*,
in the State Commission on Judicial Conduct (State Commission on Judicial Conduct,
Mr. Jorge C. Rangel, Hon. Jan P. Patterson, Ms. Janelle Shepard, Hon. Sid Harle, Ms.
Ann Appling Bradford, Hon. Michael R. Fields, Mr. Tom Cunningham, Mr. William
Lawrence, Ms. Karry K. Matson, Ms. Patti H. Johnson, Hon. Joel Baker, Hon. Edward J.
Spillane, III, and Hon. Steven L. Seider, presiding)

PETITION FOR WRIT OF MANDAMUS

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HONORABLE SHARON KELLER**

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July 29, 2010

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STATEMENT OF THE CASE

Judge Sharon Keller (“Relator”), the Presiding Judge of the Texas Court of Criminal Appeals (“CCA”), challenges the July 16, 2010, Order (“The Order,” included at Appendix (“App.”) A) of the individual Respondents and Respondent State Commission on Judicial Conduct (collectively, “SCJC” or “Commission”) which purported to impose against Judge Keller a public warning. Judge Keller seeks mandamus relief from this Court because: (i) as the Examiner and Executive Director of the Commission has publicly admitted, “the order . . . does not comport with the Texas Constitution;”¹ (ii) the Commission allowed three of its members to deliberate regarding the Order even though they were disqualified from serving by the Texas Constitution; (iii) the Commission relied on and cited a rule that states the SCJC may act with as few as six votes when the Constitution mandates seven votes, and where the Commission did not disclose the votes of its members despite being urged to do so by Relator’s counsel; (iv) despite being advised by its own Special Counsel, Mike McKetta, that it must give deference to the findings of Special Master David Berchermann, Jr., who presided over a four-day trial and found that Relator “did not violate any written or unwritten rules or laws”² and should not be sanctioned, the Commission disregarded what it referred to as Judge Berchermann’s “observations” and found facts directly contrary to the evidence and opposed to the Judge’s findings and, in some instances, found “facts” for which there

¹ M. A. Robbins, *Bad Law? Judicial Conduct Commission Examiner Questions Basis for Public Warning in Keller Case*, Texas Lawyer, July 26, 2010. App. B.

² Special Master’s Findings of Fact, filed January 20, 2010. App. C, at 16.

was no evidence at all; (v) the Commission, after ignoring Judge Berchermann's findings, substituted its own findings based upon a preponderance of the evidence standard when constitutional due process demands a heightened evidentiary standard; and (vi) the Order did not include a finding of good cause that Relator should be either removed from office or censured, whereas the Constitution demands such a finding before it may act against a judge. In short, the SCJC acted in a lawless, unconstitutional manner in issuing the Order. The Order should be declared void because it was unconstitutionally rendered and because it deprives Judge Keller of her constitutional rights.

Judge Keller requests that this Court grant mandamus relief, vacate the Order, and dismiss all charges against her because:

(1) The Respondents' Order issues a public warning, whereas Article 5, Section 1-a(8) of the Constitution restricts the sanctions available to the Commission after it institutes formal proceedings, as it did here, to only three remedies: dismissal of all charges, an order of public censure, or a recommendation of the removal or retirement of the judge. None of these three available remedies were ordered. Accordingly, the remedy ordered by the SCJC – a public warning – is not authorized by the Constitution. (Article 5, Section 1-a of the Texas Constitution is at Appendix D). Respondents issued the public warning pursuant to Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges (Order, App. A, at 17), which cannot be reconciled with the requirements of the Constitution. Rule 10(m) (App. E) also conflicts with provisions of Chapter 33 of the Texas Government Code (App. F).

(2) The Respondents' Order was rendered by an illegally constituted Commission. Three members of the Commission who participated in the hearing which resulted in the Order were disqualified from serving because their term had expired and/or because they reside in the same appellate judicial district as another member of the Commission, which is prohibited by the Constitution. Tex. Const., Art.5, § 1-a(2), (3).

(3) The Respondents' Order states that the Respondents acted pursuant to Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges (Order, App. A, at 17). Rule 10(m) allows Commission action on the basis of only six votes, whereas Article 5, Section 1-a(5) of the Constitution requires that the Commission act by a majority, in this case seven members. The Respondents' Order states that the Commission acted under the authority of the six-vote rule, and not the seven-vote rule required by the Constitution. Order, App. A, at 17.

(4) The Respondents' Order does not include an express or implied finding of good cause, whereas both Rule 10(m) and Article 5, Section 1-a(8) of the Constitution provide that the Commission may discipline a judge only upon a finding of good cause.

(5) The Commission abused its discretion by giving no deference to Judge Berchermann's Findings of Fact.

(6) The Commission abused its discretion by basing its findings of fact on no evidence or insufficient evidence. The examples of such unsupported findings in the Record are legion, and Relator cannot address them all in this brief Petition. Accordingly, Relator respectfully requests that the Court request full briefing under Texas Rule of Appellate Procedure 55. See Tex. R. App. P. 52.8(b)(2).

STATEMENT OF JURISDICTION

The Court may exercise its original jurisdiction to order the Commission to vacate the void Order and expunge the same from its records, whether because the Commission was illegally constituted or because it had no jurisdiction to issue the Order. *See In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *Fulton v. Finch*, 346 S.W.2d 823, 830 (Tex. 1961); *State Board of Insurance v. Betts*, 315 S.W.2d 279 (Tex. 1958); *State v. Ferguson*, 125 S.W.2d 272, 274 (Tex. 1939).

The Court also may exercise jurisdiction pursuant to its inherent and implied authority to regulate judicial affairs and direct the administration of justice in the judicial department, pursuant to Article 2, Section 1, and Article 5, Section 1-a, of the Texas Constitution. The SCJC is part of the judicial department of the State of Texas. *See Tex. Const. Art. 5, § 1-a.* As part of the judicial department of the State of Texas, the Commission is subject to this Court's review and regulation in the exercise of its inherent and implied powers. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) ("The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."); *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (discussing the Court's "obligation, as the head of the judicial department, to regulate judicial affairs").

The Court also has jurisdiction pursuant to Texas Government Code § 22.002(a), which authorizes this Court to issue writs of mandamus against "any officer of state government," which includes the Respondents, the Commission and its members. The

Commission and its members are the chief administrative officers of the State responsible for the removal, retirement, and discipline of judges. *See* Tex. Const. Art. 5, § 1-a. The Commission has admitted that its members are state officers.³ Unlike other members of State commissions, Respondents are not subject to the writ authority of district courts, because only the Commission has jurisdiction over matters concerning the removal, retirement, and discipline of members of the judiciary.⁴ *See id.* Accordingly, under this Court's decisions, this Court's writ power extends to the Commission. *See Betts v. Johnson*, 96 Tex. 360, 4 S.W. 73, 74 (1903) (stating that "the main purpose of the article" granting writ authority was "to authorize the Supreme Court to issue the writ only in cases in which the district courts had no power to issue it"); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 400 (Tex. 1979) ("A patent anomaly would exist if, within the sovereign State of Texas, no department, branch or official had the power to enforce in

³ In response to an e-mail and letter from Relator's counsel pointing out the fact that the terms of certain members of the Commission had expired, Apps. G, H, the Commission's General Counsel sent Relator's counsel e-mails indicating that the members of the Commission were officers of the state for purposes of the holdover provision in Article 16, Section 17 of the Texas Constitution. Apps. G, I.

⁴ In *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 776 (1999), this Court declined to exercise mandamus jurisdiction over the members of the State Bar's Unauthorized Practice of Law Committee under Section 22.002(a) because they were not "within the small circle to which Section 22.002(a) refers." Relator submits that the SCJC and its members are covered by Section 22.002(a). In addition, this case is distinguishable from *Nolo*. In *Nolo*, the Court granted relief on a discovery matter through the exercise of its administrative authority, *see id.* at 776-78, whereas this case concerns the SCJC's issuance of an unconstitutional Order; administrative relief is not available. Accordingly, if this Court does not exercise its jurisdiction over the SCJC – whether under Section 22.002(a), its inherent authority, or because the Order is void – the SCJC's rogue conduct would be completely immune from review by this Court, even though this Court is the head of the judicial department of which the SCJC is an inferior part.

this case the mandate of the federal Supremacy Clause and the recognition of that supremacy by Tex. Const. Art. I, Sec. 1.”).

Pursuant to Texas Rule of Appellate Procedure 52.3(e), Relator states that this Petition is being filed in the Supreme Court without being first presented to a court of appeals for the following compelling reasons: (1) pursuant to this Court’s decisions, a void order need not be appealed before relief is requested from this Court, *see Fulton v. Finch*, 346 S.W.2d 823, 830 (Tex. 1961); and (2) no court of appeals exists which has jurisdiction to hear this matter, by appeal or otherwise. *See* Tex. Gov’t Code § 33.034.

ISSUES PRESENTED

1. Whether the Order is void because the Texas Constitution does not grant the Commission jurisdiction to issue a Public Warning after it initiates formal proceedings.
2. Whether the Order is void because the Commission included members who were disqualified under the Texas Constitution.
3. Whether the Order was void because it was issued by authority of a rule that requires only six votes, while the Constitution requires at least seven votes.
4. In the event the Court determines the Order is not void, whether the Commission abused its discretion in issuing the Order and whether Judge Keller has an adequate remedy by appeal.

TO THE HONORABLE SUPREME COURT:

Relator The Honorable Sharon Keller files this Petition for Writ of Mandamus because the Order is void. In the alternative, mandamus should issue because the SCJC abused its discretion and Judge Keller lacks an adequate remedy by appeal.

STATEMENT OF FACTS

A. FACTS RELATING TO THE COMMISSION'S CONSTITUTIONAL VIOLATIONS.

1. The Order is Unconstitutional.

This proceeding arises out of the July 16, 2010, Order of the SCJC, wherein the Commission issued a public warning against Judge Keller pursuant to Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges (App. E), which provides that “the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition.” Rule 10(m) is in conflict with this provision of the Texas Constitution:

If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be of the person in question . . .

Tex. Const., Art. 5, § 1-a(8) (App. D). The SCJC did not “issue an order of public censure or . . . recommend to a review tribunal the removal or retirement” of Judge Keller, because a public warning is not a censure. *Id.*

The events giving rise to the SCJC’s initiation of formal proceedings and issuance of the Order concern a condemned inmate’s lawyers’ failure to file any pleading requesting a stay of execution with the CCA on September 25, 2007. Following the events of that day, the SCJC conducted a year-long confidential investigation. On

February 19, 2009, the SCJC filed its Notice of Formal Proceedings against Judge Keller in *Inquiry Concerning a Judge, No. 96*. App. J.

The Commission requested the appointment of a Special Master, App. K, and on April 9, 2009, this Court appointed Judge Berchermann Special Master. App. L. On June 15, 2009, the Examiner filed her First Amended Notice of Formal Proceedings. App. M. The Amended Notice was filed without the knowledge or approval of the SCJC, App. N, and added to the charges the allegation that Judge Keller failed to “require or assure compliance” with the CCA’s execution-day procedures by the CCA’s General Counsel and clerk’s office staff. App. M, at 8.

Judge Keller prevailed at the August 17-20 trial held by Judge Berchermann, who found that Judge Keller “did not violate any written or unwritten rules or laws,” and that her conduct “does not warrant removal from office, or even further reprimand beyond the public humiliation she has surely suffered.” Findings of Fact, App. C, at 16.

The Examiner objected to the judge’s findings. The SCJC held a hearing on June 18, 2010. The July 16 Order states that that the SCJC could act “by affirmative vote of six of its members[.]” Order, App. A, at 17 (quoting Rule 10(m)). The Order ignores Judge Berchermann’s findings and imposes a public warning against Judge Keller:

Pursuant to the Authority contained in Article 5, sec. 1-a(8) of the Texas Constitution, it is ordered that Judge Keller’s conduct described above be made the subject of a **PUBLIC WARNING** by the State Commission on Judicial Conduct.

Order, App. A, at 19.

2. The SCJC Was Unconstitutionally Composed.

Three Commissioners were disqualified from serving on the SCJC. Commissioner Michael Fields was disqualified because his term had expired. He and Commissioner Tom Cunningham were disqualified because they live in the same appellate court district; and Commissioner Jan Patterson was disqualified because she lives in the same appellate court district as Commissioners Karry Matson and Patti Johnson.

The relevant facts are these: Commissioner Fields is a judge of the County Criminal Court in Harris County. His term expired on November 19, 2009. App. O at 1, 4. Commissioner Cunningham is a Houston attorney. *Id.* at 6, 9. Commissioner Patterson is a Member of the Austin Court of Appeals. *Id.* at 10, 14. Commissioner Matson resides in Georgetown, which is in Williamson County. *Id.* at 16, 19. Commissioner Johnson resides in Canyon Lake, which is in Comal County. *Id.* at 21, 24.

B. FACTS RELATING TO THE COMMISSION'S ABUSES OF DISCRETION.

1. The SCJC Did Not Defer to Judge Berchermann's Findings of Fact.

At the June 18 hearing, its Special Counsel stated the following about the standard of review and the degree of deference the SCJC should apply to the Special Master's Findings of Fact:

I believe that you do not have a de novo review on this type of Section 10 formal proceeding. I believe that your review would be guided by substantial evidence principles.

....

If I were in your shoes and saw a conflict that supported the finding, though there was contrary evidence, I would give deference to the finding.

J. McKetta statement, Transcript of Hearing, App. P, at 44:4-7, 71:8-11.

As Special Counsel to the Commission, Mr. McKetta spoke for the Commission. *See* Tex. Gov't Code §§ 33.001(5), 33.021(3) (App. F). Yet the SCJC, which heard no additional evidence, gave the Special Master no deference at all, referring to his Findings of Fact as mere "observations." Order, App. A, at 2. The failure of the SCJC to give any deference whatsoever to Judge Berchermann's findings is an abuse of discretion and an affront to this Court's appointment of Judge Berchermann as Special Master.

2. No Evidence Supported Findings Made by the Commission.

The Order lists 119 Findings of Fact "proven by a preponderance of the evidence."⁵ Instead of deferring to Judge Berchermann, the SCJC substituted findings that were contrary to his, found as facts matters that are refuted by the record, and made up facts out of thin air. We here cite a few examples, but request full briefing so that we can prove the complete disregard for the trial record shown by the SCJC's Findings.

The SCJC found that CCA General Counsel "Marty did not then know that the TCCA's Execution-day Procedures required that all communications regarding the scheduled execution must be first referred to the assigned judge." Order, App. A, at 8 (Finding 43). In fact, the undisputed evidence was that Marty was the *author* of those procedures. E. Marty Test., Rec. 01125, (Tr. at vol. 4, 107:12-16). The SCJC presumably made this finding to support the charge that Judge Keller failed to properly train and supervise Mr. Marty. This charge was not one of the charges the SCJC brought against the Relator; it was added by Examiner Willing four months after the formal

⁵ The SCJC denied (Order, App. A, at 2) Relator's Motion for Application of Proper Evidentiary Standard (Rec. 00344-61), which argued for the application of a clear and convincing standard.

proceedings were instituted, without, as she testified, the knowledge or approval of the SCJC. App. M. This was similar to what Ms. Willing attempted to do in the Hecht case, but there the Court struck the amendment. App. Q. Here the SCJC overruled Relator's motion to strike the amended charges (Order, App. A, at 2) and found "facts" to support them, all of which are refuted by the record.

For example, the SCJC's Finding 40 states that Mr. Richard's lawyers at the Texas Defender Service ("TDS") "had computer and/or e-mail problems" that they thought would prevent a filing by 5:00 p.m. This finding contradicts Judge Berchermann's explicit finding that TDS had no such problems. App. C, at 12-13. This point is important because, as Judge Berchermann found, TDS concocted a story which it sold to the press that it had a "series of computer crashes," that it would only be 20 minutes late in filing, and that its lawyers pleaded with Judge Keller four times to accept the late filing. This led to the public uproar that resulted in complaints to the Commission, including one by Mr. McKetta, who the Commission later chose as its Special Counsel to prosecute Judge Keller. (Resp. Ex. 57-A, Rec. 02103-2126.) But, as Judge Berchermann found, it was all a lie, including the "computer crash" component, which was proven false when Relator's counsel subpoenaed records from four separate companies which TDS identified as companies which had supposedly serviced TDS that day. The records proved that none of the companies had provided service to TDS on the day in question and the e-mail provider's records showed that it had no systems problems at the time TDS was claiming the "computer crashes." App. C at 12-13. One would have to willfully disregard the evidence, as well as Judge Berchermann, to make Finding No. 40.

The SCJC also made up facts. In its findings Nos. 95 and 96, the SCJC finds that “Judge Keller’s addressing and disposing of the September 25, 2007, communications” denied Richard’s “right to a hearing as required by law under [Texas Rule of Appellate Procedure Rule] 9.2(a).” But Rule 9.2 has nothing to do with a party’s “right to a hearing;” it concerns only the *filing of documents*, and states that “[a] document is filed with an appellate court by delivering it to . . . a justice or judge of that court who is willing to accept delivery.” The SCJC’s findings Nos. 95 and 96 not only have no record support, they are incomprehensible. Likewise, the SCJC found that Judge Keller “interfered with Richard’s and his counsel’s opportunity to be heard by the judge assigned to Richard’s execution.” Order, App. A, at 16 (Finding 117). But in its own Responses to Judge Keller’s Requests for Admissions, the Commission admitted that “a stay of execution could have been filed with any CCA judge on September 25, 2007 after 5 p.m.” App. R, at 5. And, the CCA Judge assigned to Mr. Richard’s execution, Judge Johnson, testified that Judge Keller did not block access to her. Rec. 00748 (Tr. at vol. 2, 128:10-19).

Because there are many more baseless findings, Relator requests full briefing.

ARGUMENT

The SCJC was illegally constituted and trod upon the Constitution in its quest to punish a popularly elected judge for performing her duties. The Court should exercise its mandamus authority to declare the Order void and to order the SCJC to expunge the Order from its records. Alternatively, mandamus should issue because the SCJC abused its discretion and Judge Keller lacks an adequate remedy by appeal.

A. THE COMMISSION LACKED AUTHORITY TO RENDER A PUBLIC WARNING.

The laws of this State confer upon this Court the power, in original proceedings, to issue a writ of mandamus to correct or vacate a void order – one which the issuer “had no power to enter.” *State v. Ferguson*, 125 S.W.2d 272, 274 (Tex. 1939). “A judgment which discloses its invalidity on its face anywhere at any time is a nullity and may be disregarded anywhere at any time.” *Fulton v. Finch*, 346 S.W.2d 823, 827 (Tex. 1961).

If the court is exercising special statutory powers the measure of its authority is the statute itself, and a judgment in excess thereof is null and void and subject to collateral attack[.]

Cline v. Niblo, 117 Tex. 474, 8 S.W.2d 633, 638 (1928) (emphasis in original).

Furthermore, this Court may exercise mandamus jurisdiction regardless of the availability of an appellate remedy. As this Court stated:

An order which proclaims its voidness upon its face needs no appellate action to proclaim its invalidity. It is one thing to say that a void order *may* be appealed from but it is another thing to say that it *must* be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded.

Fulton v. Finch, 346 S.W.2d at 830; *see In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (“because the order was void, the relator need not show it did not have an adequate appellate remedy, and mandamus relief is appropriate”).

In this case, the Order is void on its face because it was rendered contrary to limiting constitutional authority; the SCJC had no more jurisdiction to render a public warning against Judge Keller than it would to order her home to be forfeited. The SCJC based its public warning on Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges. Order, App. A, at 17. That rule does purport to allow the SCJC to

issue a public warning after it initiates formal proceedings. App. E. But the Rule must give way to the Constitution;⁶ the Texas Constitution defines and limits the sanctions the SCJC has jurisdiction to impose. Under the Constitution, after a confidential investigation, but before formal proceedings, “the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education[.]” Tex. Const., Art. 5, § 1-a(8) (App. D).

After the Commission initiates formal proceedings against a judge, as in this case, the Constitution grants authority to the Commission to impose only three remedies: dismissal of charges, public censure, or a recommendation for removal or retirement:

After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education, *or* if the Commission determines that the situation merits such action, *it may institute formal proceedings and order a formal hearing to be held before it concerning the censure, removal, or retirement of a person holding an office . . . or it may in its discretion request the Supreme Court to appoint an active or retired District Judge . . . as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. . . . If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be of the person in question . . .*

Tex. Const., Art. 5, § 1-a(8) (App. D, emphasis added).

⁶ Rule 10(m) also conflicts with the Texas Government Code (App. F), which defines “formal proceedings” as “the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge.” § 33.001(7). Ultimately, of course, it is the Constitution’s requirements which control. *See State v. Shoppers World, Inc.*, 380 S.W.2d 107 (Tex. 1964); *Duncan v. Gabler*, 147 Tex. 229, 215 S.W.2d 155 (1948).

The Constitution is clear. Once the SCJC initiated formal proceedings against Judge Keller on February 18, 2009, it had authority to dismiss the charges against her; it had authority to censure her; and it had authority to recommend her removal or retirement; but the SCJC did *not* have authority to issue a public warning against her. Under Texas law, a public warning is not a censure; they are different forms of admonition under both the Constitution and the Government Code.⁷

There is a second, independent reason the Order is unconstitutional. The SCJC explicitly stated that could act “by affirmative vote of six of its members[.]” Order, App. A, at 17 (quoting Rule 10(m) (App. E)). The Constitution, however, requires the affirmative vote of seven members to recommend removal or retirement, or for public censure. Tex. Const., Article 5, sec. 1-a(5) (App. D). For all other acts of the Commission, the Constitution requires a “majority vote of those present,” *id.*, which in this case also would be seven members, as twelve Commissioners heard the case. (The Honorable Steven L. Seider did not participate in the SCJC proceeding. App. G.)

⁷ A public warning is a sanction:

“Sanction” means an order issued by the commission under Section 1-a(8), Article V, Texas Constitution, providing for a private or public admonition, warning, or reprimand or requiring that a person obtain additional training or education.

Tex. Gov’t Code § 33.001(10) (App. F). A public warning is not a censure:

“Censure” means an order of denunciation issued by the commission under Section 1-a(8), Article V, Texas Constitution, or an order issued by a review tribunal under Section 1-a(9), Article V, Texas Constitution.

Tex. Gov’t Code § 33.001(1) (App. F).

In addition, the Constitution requires a finding of “good cause” by the SCJC as a prerequisite to the sanctions that it allows following the initiation of formal proceedings. Here, the Order is devoid of an explicit finding of good cause for any admonition. Moreover, no such finding may be inferred. The language of the Constitution is mandatory: if “the Commission finds good cause therefor, it *shall* issue an order of public censure . . .” Tex. Const., Art. 5, § 1-a(8) (App. D, emphasis added). Because no order of public censure was issued, it must be presumed that the Commission did not find good cause to censure Judge Keller. Such a presumption comports not only with the law, but with common sense: if the Commission had found good cause to issue a public censure, it would have done so.

B. THE COMMISSION WAS UNCONSTITUTIONALLY CONSTITUTED.

This Court’s rule concerning disqualified judges is clear:

When a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge’s mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal. This makes sense, because *any orders or judgments rendered by a judge who is constitutionally disqualified are void and without effect.*

In re Union Pacific Resources Co., 969 S.W.2d 427, 428 (Tex. 1998) (citations omitted; emphasis added).

Commissioner Fields was disqualified because the face of his Appointment Order shows that his term expired on November 19, 2009, seven months before the SCJC’s hearing concerning Judge Keller. App. O at 1. He was disqualified from serving under Article 5, Section 1-a(3) of the Constitution (App. D), which provides that “[t]he regular term of office of Commissioners shall be six (6) years[.]”.

In addition, Commissioners Fields, Cunningham, and Patterson, were disqualified under the Constitution's mandatory residency restrictions for Commissioners. The Texas Constitution provides that "a Commissioner of class (i), (ii), (iii), (vii), or (viii) may not reside or hold a judgeship in the same court of appeals as another member of the Commission." Tex. Const. Art. 5, § 1-a(2) (App. D).

In this case, Commissioner Patterson is a class (i) Commissioner, as she is a Member of the Austin Court of Appeals (in the Third Court of Appeals District), App. O at 10, 14 at; Commissioner Cunningham is a class (iii) Commissioner, as he is a Houston (Harris County) attorney (in the First and Fourteenth Courts of Appeals Districts), *id.* at 6, 9; and Commissioner Fields is a class (vii) Commissioner, as he is a County Court of Law Judge in Harris County (in the First and Fourteenth Districts). *Id.* at 1, 4. Commissioner Karry Matson resides in Georgetown, which is in Williamson County, *id.* at 16, 19, and Commissioner Patti Johnson resides in Canyon Lake, which is in Comal County. *Id.* at 21, 24. Williamson County and Comal County are both in the Third Court of Appeals District. Tex. Gov't Code § 22.201.

Commissioner Fields resides and holds office in the same court of appeals districts (First and Fourteenth) as Commissioner Cunningham, and therefore they could not serve together on the SCJC. Commissioner Patterson resides and holds office in the same court of appeals district (Third) as Commissioners Matson and Johnson, and therefore is disqualified from serving. Accordingly, Commissioners Patterson, Cunningham and Fields were disqualified under the Constitution from sitting on the case.

The Commission which rendered the Order was unconstitutionally composed. All three of the disqualified Commissioners participated in the June 18 hearing, *see* App. P at 2, even after Judge Keller informed the Commission of their constitutional disabilities. App. H. The Order is void, because the SCJC violated the Constitution by allowing three disqualified members to participate in the proceedings which resulted in the Order.

The Order does not disclose how the disqualified Commissioners voted, or what the vote was. All we know is that the SCJC stated that it could act “by affirmative vote of six of its members[.]” Order, App. A, at 17 (quoting Rule 10(m)). Given the disqualification of three Commissioners, the Order could have been rendered by as few as *three* qualified Commissioners – out of a total of 13! The fact that we do not know who voted for the public warning is the SCJC’s doing; it decided to deliberate secretly and to keep secret its members’ votes, even though Judge Keller’s counsel urged the SCJC to disclose its vote. C. Babcock statement, Transcript of Hearing, App. P, at 114:14-19.⁸

The SCJC denied Judge Keller her right to be judged only by qualified Commissioners. The damage done runs deep, as this Court cannot divine what influence the disqualified Commissioners had on their colleagues. In light of the illegality of the

⁸ Given the secrecy of the SCJC’s deliberations and its refusal to disclose the identities of the Commissioners voting for the Order, the SCJC’s deliberations and Order are more analogous to a jury deliberation and verdict than to a court ruling. It is presumptively harmful when objectionable jurors are improperly allowed to participate in the rendering of a verdict: the harm is caused not by the verdict, but by the corruption of the process. *See Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005).

Order, there is no basis for this Court to presume that the participation of three disqualified members in issuing the Order resulted in anything other than a void Order.

C. MANDAMUS SHOULD ISSUE BECAUSE THE SCJC ABUSED ITS DISCRETION AND JUDGE KELLER HAS NO ADEQUATE REMEDY BY APPEAL.

Even if the Order is not void, and it certainly is, Relator is entitled to mandamus relief under this Court's normal standard of review. Mandamus is a proper remedy when the court has abused its discretion and the relator has no adequate remedy by appeal. A court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).

The SCJC's abuse of discretion is plain. Allowing unqualified Commissioners to participate in its proceedings and issuing the Order in violation of the Constitution constitutes a clear and prejudicial error of law. Beyond the constitutional violations, the SCJC did not give Judge Berchermann's Findings of Fact any deference; it premised its conclusions and the public warning against Judge Keller on findings of fact which were without any, or without sufficient, evidentiary bases.

As to appellate review, none is available which is adequate. The only provision for review of this case is under the Government Code, which provides as follows:

(e) The review by the court under this section: . . . (2) of a sanction is by trial de novo as that term is used in the appeal of cases from justice to county court.

Tex. Gov't Code § 33.034 (App. F). There is no provision for appeal of a decision of a Special Court of Review. *Id.*

Assuming Section 33.034(e)(2) applies here, which is not assured,⁹ Relator's only available remedy is not an appeal – it is a retrial, with no subsequent appeal allowed. As this Court has recognized, a trial de novo “is not an ‘appeal’ but is a new proceeding.” *Central Ed. Agency v. Upshur Cty. Commissioners Court*, 731 S.W.2d 559, 561 (Tex. 1987). So Section 33.034(e)(2) does not provide for an appeal at all.

The inadequacy of the (non)appeal which may be afforded Relator is plain.

An adequate remedy which will prevent resort to the writ must be “plain, accurate, certain, speedy * * * must be specific and appropriate to the particular circumstances * * * must also be equally as convenient, beneficial, and effective as the remedy by mandamus.

Simpson v. Williams Rural High Sch. Dist., 153 S.W.2d 852, 856 (Tex. Civ. App. – Amarillo 1941, writ ref'd).

It is difficult to imagine how a trial de novo before a court which will not exist until appointed by lot by this Court's Chief Justice; which will be comprised of appellate judges not of the same court; and which allows the SCJC *to add charges*, Tex. Gov't Code § 33.034(d), could possibly be “as convenient, beneficial, and effective as the remedy by mandamus.” Judge Keller had a full trial, which she convincingly won. A new trial would deny her the ability to rely on the record of that trial or the Special

⁹ Although Rule 1(e) of the Procedural Rules for the Removal and Retirement of Judges defines a “sanction” as “any . . . warning . . . issued publicly or privately, by the Commission,” it also provides that “[a] sanction is remedial in nature” and “is issued prior to the institution of formal proceedings[.]” *Id.* It is therefore arguable that there is no right to an appeal of a sanction issued after the initiation of formal proceedings, in which case Judge Keller's appellate remedy is not just inadequate, it is nonexistent.

Master's findings, which exonerated her of all charges. A new trial is an inadequate remedy for the SCJC's unconstitutional order.

D. CONCLUSION.

The Order violates the Constitution and is void. At the very least, it is a gross abuse of discretion and Judge Keller does not have an adequate remedy by appeal. Mandamus should issue to the SCJC to vacate the Order and have it expunged from its records. Also, inasmuch as there exists no constitutional or statutory basis for remand of this action to the SCJC, this Court should render judgment that all charges against Judge Keller are dismissed. The SCJC should not be given rein to wreak additional mischief.

PRAYER

For the reasons set forth herein, Relator Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, respectfully asks the Court to grant her Petition for Writ of Mandamus and vacate the July 16, 2010, Order of the State Commission on Judicial Conduct, direct Respondents to expunge that Order from the records of the State Commission on Judicial Conduct, and render judgment that all charges against Relator The Honorable Sharon Keller be dismissed.

Respectfully submitted,

Charles L. Babcock by permission
Charles L. Babcock *CAS*

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**ATTORNEYS FOR RELATOR THE
HONORABLE SHARON KELLER**

CERTIFICATION

STATE OF TEXAS

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§
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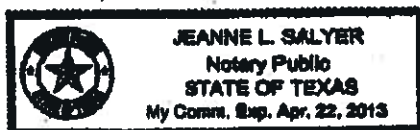
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, on this day personally appeared Sharon Keller, who being by me first duly sworn, stated on his oath the following:

"My name is Sharon Keller. I am over twenty-one years of age, am of sound mind, and am competent to make this affidavit and to testify to the facts stated herein. I certify that I have reviewed the Petition for Writ of Mandamus and conclude that every factual statement therein is supported by competent evidence included in the Appendix or Record."

Sharon Keller
Sharon Keller

SUBSCRIBED AND SWORN TO BEFORE ME on July 28 2010, to certify which witness my hand and official seal.



Jeanne L. Salyer
Notary Public in and for the State of Texas

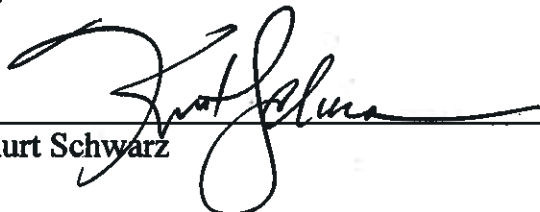
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STATE OF TEXAS §
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COUNTY OF DALLAS §

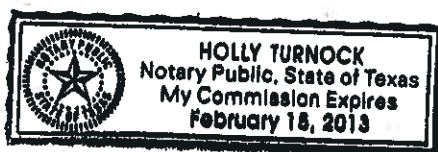
BEFORE ME, the undersigned authority, on this day personally appeared Kurt Schwarz, who being by me first duly sworn, stated on his oath the following:


“My name is Kurt Schwarz. I am over twenty-one years of age, am of sound mind, and competent to make this affidavit. Unless otherwise stated, all facts set forth in this Verification are true and based on my personal knowledge.

“I am one of the attorneys for Relator Sharon Keller. True and correct copies of transcripts of the July 2009, motion hearing, the August 2009 trial before Judge Berchermann, and the June 2010 SCJC hearing, are included in the Appendix in Support of Petition for Writ of Mandamus and/or the Record in Support of Petition for Writ of Mandamus. The Appendix in Support of Petition for Writ of Mandamus and the Record in Support of Petition for Writ of Mandamus contain true and correct copies of orders and other documents filed in the State Commission on Judicial Conduct, which are material to Relator’s claim for relief in this proceeding.”


Kurt Schwarz

SUBSCRIBED AND SWORN TO BEFORE ME on July 29, 2010, to certify which witness my hand and official seal.




Notary Public in and for the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2010, true and correct copies of the foregoing Petition for Writ of Mandamus, with accompanying Appendix and Record, were served upon the following interested parties by certified mail, return receipt requested and/or by electronic transmission and/or by hand delivery:

Mr. John J. McKetta, III
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701
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Kurt Schwarz