EMERGENCY RELIEF REQUESTED

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)

RELATOR'S REPLY IN SUPPORT OF HER PETITION FOR WRIT OF MANDAMUS

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TO THE HONORABLE SUPREME COURT:

Pursuant to Texas Rule of Appellate Procedure 52.5, Relator The Honorable Sharon Keller files this Reply in Support of Her Petition for Writ of Mandamus.

A. THIS COURT HAS MANDAMUS JURISDICTION OVER THE SCJC.

The Examiner argues that this Court does not have mandamus jurisdiction over the SCJC because the Government Code "does not authorize mandamus against a board or a commission, or the individual members of those bodies." Response at vii. In support of her position, Respondent cites a number of cases from the last century. *See id*. Respondent is wrong. In *In re TXU Electric Co.*, 67 S.W.3d 130, 134, 158 (Tex. 2001), seven members of this Court ruled that "this Court has jurisdiction to mandamus individual members" of a State commission – in *TXU*, the Public Utility Commission.[1] That is precisely the relief requested by Relator, and this Court plainly has jurisdiction to grant such relief.

The case upon which the Examiner's jurisdictional argument largely rests, *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999), concerned this Court's authority to mandamus the State Bar of Texas concerning a discovery dispute. By contrast, this case concerns an unconstitutional Order issued against the popularly elected Presiding Judge of the Texas Court of Criminal Appeals by the only unelected state officers empowered by the Constitution to judge her conduct. This case could not be more

[1] Actually, even the two members of the *TXU* Court who disputed the Court's mandamus jurisdiction did so on a ground which simply does not exist here. Justice Baker, joined by Justice Rodriguez, stated that this Court lacked mandamus jurisdiction over "a board or commission as an entity *because that power lies not in our Court but in a Travis County District Court*." *Id*. at 144 (emphasis added). Here, by contrast, no other court has mandamus authority over the Commission.

different from *Nolo Press*.[2] Jurisdictionally, this case is analogous to *Eichelberger*, a case ignored by the Examiner, in which this Court explained its inherent powers as follows:

> In addition to the express grants of judicial power to each court, there are other powers which courts may exercise though not expressly authorized or described by constitution or statute. These powers are woven into the fabric of the constitution by virtue of their origin in the common law and the mandate of Tex. Const. Art. II, Sec. 1, of the separation of powers between three co-equal branches. . . .
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> . . . .
>
> The *inherent* judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities. *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. . . .This power exists to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity*.

Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (second emphasis added). In this proceeding, Judge Keller asks this Court to exercise its mandamus authority to stop an assault on the dignity, independence, and integrity of the Court of Criminal Appeals by the SCJC. Remarkably, the SCJC argues that, absent an attempt to remove a judge from office,[3] it is entirely immune from this Court's supervision and authority. It is unthinkable that the Court with ultimate responsibility over the judicial

[2] The Examiner cites *Nolo Press* in support of her argument that this Court's inherent powers are merely "administrative." The Examiner is wrong. In *Eichelberger*, after all, this Court reversed a decision of the Court of Civil Appeals on the ground that the lower court's decision conflicted with a decision of the U.S. Supreme Court – hardly an administrative matter. And in a case quoted in *Eichelberger*, *Ex Parte Hughes*, 133 Tex. 505, 510-11, 129 S.W.2d 270 (1939), the Court recognized its implied powers in a case in which it reversed a contempt conviction – again, a judicial, not an administrative, matter.

[3] This Court has appellate jurisdiction over only those cases in which the SCJC recommends the removal or retirement of a judge. *See* Tex. Const. Art. 5, § 1-a(9).

branch would give carte blanche to a feral Commission which has trod upon the Constitution in its pursuit of Judge Keller.

Finally, Relator notes that the Examiner does not dispute this Court's jurisdiction to declare void the Order of the Commission, nor does she contest this Court's implied power to exercise mandamus jurisdiction over this controversy.

B. THE EXAMINER ADMITTED THAT THE ORDER IS UNCONSTITUTIONAL.

When construing the Texas Constitution, courts "rely heavily on its literal text and must give effect to its plain language." *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 355 (Tex. 2000). Where, as in this case, the Constitution's language is "clear and unambiguous, [the Court] must apply its words according to their common meaning without resort to rules of construction or extrinsic aids." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (construing statute).

As explained in Relator's opening brief, the SCJC's Order, and Rule 10(m), on which it is based, conflict with the Texas Constitution. The Constitution plainly states that, once the SCJC initiates formal proceedings against a judge, it may only dismiss the charges, issue a censure, or recommend removal of the judge.

> 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). This Court does not need to resort, as the Examiner now does, to arcane rules of statutory construction to interpret the plain words of the Constitution and how the Order violates its strictures.

Indeed, as pointed out in Relator's opening brief, the Examiner publicly recognized the unconstitutionality of the Order. Given the fact that her Response does not even acknowledge, much less dispute, her public statements on this issue, it is worth quoting them at length:

> Seana Willing, the commission's examiner, contends in an e-mail that the order is based on a rule that does not comport with the Texas Constitution. . . .
>
> . . .
>
> She argues the commission should have based its order on the constitution, which allows the commission only three options after it begins formal proceedings against a judge and after a special master issues a report: issue a censure, recommend removal or retirement, or dismiss the charges.
>
> . . . .
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> Willing . . . argues the commission based its order on a rule that provides a larger range of possible sanctions than the constitution does. As proof that the rule does not comport with constitutional requirements, she points to a disparity between it and a constitutional provision regarding the number of commission votes needed to form a majority. . . .
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> . . . .
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> According to Willing's e-mail, Rule 10(m) is inconsistent with Texas Constitution Article 5, § 1-a(8). In Willing's view, the Constitution controls.

M. A. Robbins, *Bad Law? Judicial Conduct Commission Examiner Questions Basis for Public Warning in* Keller *Case*, Texas Lawyer, July 22, 2010, App. B.

The Examiner does not dispute the accuracy of her public remarks, which are corroborated by her e-mails to the *Texas Lawyer*; she simply ignores them now as inconvenient admissions of the truth. She now argues to this Court a position that is

completely at odds with her public statements at the time of the SCJC's Order. As her public statements prove, the Examiner's argument for the constitutionality of the Order is merely rhetorical sleight of hand. The Examiner claims to be guardian of public confidence in the judiciary, but one wonders how that obligation is served when she makes statements to the public through the press which are then disavowed, within a matter of days, in a brief she presents to this Court.

C. RELATOR LACKS AN ADEQUATE APPELLATE REMEDY.

Respondent argues, citing only *Grimm v. Garner*, 589 S.W.2d 955 (Tex. 1979), that "Judge Keller has an adequate remedy at law through a trial *de novo*." Response at 15. *Grimm* is inapposite, and reading the case shows that it actually bolsters Judge Keller's position. *Grimm* concerned a speeding charge against Mr. Garner which resulted in a mistrial in justice court. When he was not retried within 30 days, as required by the Speedy Trial Act, Garner moved to have the charges dismissed. That motion was denied, and prompted Garner to seek a writ of mandamus compelling the dismissal of the charges, which the district court granted. *See id*. at 955-56.

This Court reversed, finding that mandamus was not appropriate, and that a new trial was an adequate remedy, because not only could Garner reurge his Speedy Trial Act motion, but also because "[t]he rulings of the county court on the motion would then be reviewable by the court of criminal appeals." *Id*. at 957. Here, in contrast, a new trial will *not* permit review of the constitutionality of the Order nor allow any subsequent appellate review. *See* Tex. Gov't Code § 33.034(i) (App. F). In contrast to the situation in *Grimm*, here there is no statutory provision for appeal of the Order. Section

33.034(e)(1) of the Government Code provides for review based on the record only of a censure of a judge, but Judge Keller was not censured; and a new trial under subsection (e)(2), which applies to the sanction purportedly imposed by the SCJC, would deny Relator the ability to rely on the record of her trial or the Special Master's findings, which cleared her of all charges. A new trial may have been adequate under the facts in *Grimm*, but is inadequate under the facts of this case.

Judge Keller had a full trial before Judge Berchelmann, at which she prevailed. She had a hearing before the Commission, which issued an unconstitutional and therefore void Order of public warning. Because the only remedies the SCJC could legally have rendered were not chosen, she effectively prevailed before the SCJC. Now the Examiner says that Judge Keller has to win a *third time* in order to vindicate her rights.

Once again, the Examiner seems to be changing her tune, since in her prior public statements she said she did not want a new trial:

> When the Commission issues a public warning to a judge in informal proceedings, that judge has the right to ask the state Supreme Court to appoint three appellate justices to a special court of review to hear the appeal. Willing says in an interview that in such appeals, the three-justice panel reviews the evidence de novo, amounting to a new trial.[4]
>
> But because the commission initiated formal proceedings against Keller, Keller already has had a trial – before the special master. Willing says a new trial would be a waste of resources. She is concerned about Keller getting what amounts to a second trial on the taxpayer's dime.
>
> "This is taxpayers' resources being expended for a second trial," Willing says. "I have a problem with that."

[4] The Examiner appears to believe that the parties can rely upon the record of the hearing before the Special Master in a new trial before a Special Court of Review. As shown above, there is no statutory support for such a view.

M. A. Robbins, *supra*, App. B.

The irony of the Commission's Executive Director complaining about having to retry a case because the Commission acted illegally is thick; but her complaining about Judge Keller receiving something "on the taxpayers' dime" is insulting, both because it is the SCJC's misconduct and its plainly unconstitutional Order which has made further proceedings necessary and because Judge Keller has been forced to incur substantial legal fees due to the SCJC's lawlessness.

D. QUO WARRANTO IS NOT REQUIRED.

The Examiner argues that mandamus is not an appropriate mechanism for challenging the Order because, to the extent that her challenge is based on the fact that three Commissioners were disqualified from serving, Judge Keller was required to bring a quo warranto proceeding.[5] Response at 9-11. The Examiner misconstrues either the nature of this mandamus proceeding, or the remedies available in a quo warranto action, or both. Relator's argument is simple: because three members of the SCJC were disqualified from serving, the Order is void. Since the damage has already been done, Judge Keller does not seek the removal of the disqualified Commissioners, but rather seeks to vacate the SCJC's unconstitutional Order. Such a remedy cannot be had by a quo warranto proceeding.

The law provides only these remedies in a quo warranto action: (1) removal from office; (2) a judgment for costs of prosecution; and (3) a fine for unlawfully holding the

[5] A quo warranto proceeding is one where the State challenges the authority of an individual to hold office. *See* Civ. Prac. & Rem. Code §§ 66.001, 66.002.

office. *See* Civ. Prac. & Rem. Code § 66.003. These limited remedies show that a quo warranto action is brought only to examine whether a person has authority to hold office. *See Newsom v. State*, 922 S.W.2d 274, 278 (Tex. App.- Austin 1996, writ denied). A quo warranto action is not proper to challenge the actions of an office holder. *See id*. at 279 (quo warranto action against officers of a private corporation was not proper because the State only questioned the validity of their actions).

Judge Keller did not have to bring a quo warranto action to challenge the Order.

E. CONCLUSION.

The Examiner cannot get her story straight. She argues that this Court cannot issue a writ of mandamus against members of a State commission, when this Court has ruled that it can. She declared to the citizens of Texas that the Commission's Order was unconstitutional, but now inexplicably refutes her public statements and asks this Court to believe a contrary tale. She says a new trial – a *third* trial – would be a waste of time, but also argues that a new trial is an adequate appellate remedy. She claims a quo warranto proceeding is Relator's exclusive mechanism for challenging the composition of the SCJC, when quo warranto does not provide a remedy for the SCJC's illegal conduct.

The Examiner's arguments all are lacking. The Examiner's arguments prove that the SCJC seeks this Court's imprimatur of its arrogant assertion that it can subject Relator to unconstitutional abuse free of this Court's supervision. The laws of Texas say otherwise. Judge Keller is entitled to mandamus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2010, a true and correct copy of the foregoing Reply in Support of Petition for Writ of Mandamus was filed with the Clerk of the Court, and electronic copies were sent by e-mail to the Clerk of the Court at scebriefs@courts.state.tx.us and, simultaneously, to lead counsel by hand delivery and by e-mail at mmcketta@gdhm.com, in accordance to the Court's Amended Order Requiring Electronic Documents In The Supreme Court, along with a courtesy copy to Blake A. Hawthorne at blake.hawthorne@courts.state.tx.us:

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