

CV- _____

IN THE ARKANSAS SUPREME COURT

**CHIEF JUSTICE JOHN DAN KEMP,
ASSOCIATE JUSTICE JOSEPHINE L. HART,
ASSOCIATE JUSTICE SHAWN A. WOMACK,
ASSOCIATE JUSTICE KAREN R. BAKER, and
ASSOCIATE JUSTICE RHONDA K. WOOD,
PETITIONERS**

v.

**EXECUTIVE DIRECTOR DAVID SACHAR,
SPECIAL COUNSEL J. BRENT STANDRIDGE, and
ARKANSAS JUDICIAL DISCIPLINE &
DISABILITY COMMISSION,
RESPONDENTS.**

RECEIVED
SUPREME COURT OF ARKANSAS
CLERK'S OFFICE
2018 OCT 17 P 4:43
CLERK PECTOL, CLERK

**EXPEDITED PETITION FOR WRIT OF MANDAMUS, WRIT OF
PROHIBITION, AND/OR WRIT OF CERTIORARI; REQUEST FOR
EXPEDITED RESPONSE TIME**

I. INTRODUCTION

Petitioners, Chief Justice John Dan Kemp, Associate Justice Josephine L. Hart, Associate Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood, in their official capacities, file this Expedited Petition seeking immediate dismissal of the Complaint in Arkansas Judicial Discipline and Disability Commission Case No.'s 17-181, 17-184, 17-185, 17-186,

and 17-187, as a non-discretionary action that Respondents are without jurisdiction to undertake. Petitioners request this Court consider this matter on an expedited basis and order expedited responses. In support of this Petition, Petitioners provide the following reasons:

1. Petitioners are justices of the Supreme Court of the State of Arkansas. Respondents filed Complaints with Formal Charges against the justices that rely on no specified provision of the Arkansas Code of Judicial Conduct that unambiguously pertains to actions taken by the justices. The Complaints erroneously charge the Justices with failing to provide the trial judge with an adequate opportunity to respond to an emergency motion made to the Supreme Court that sought the trial judge's recusal. The Respondents mistakenly treat the order of recusal as a disciplinary measure, although, as a matter of law, recusal is not disciplinary in nature, but mandated to assure the Due Process rights of litigants. Moreover, the charge of a due process violation here was adjudicated in the federal courts and found meritless, precluding re-litigation. There is no basis for the Commission to assert jurisdiction over this matter.

II. FACTUAL AND PROCEDURAL BACKGROUND

2. On April 14, 2017, Judge Wendell Griffen of the Pulaski County Circuit Court, Fifth Division, participated in an anti-death penalty rally and prayer vigil on the steps of the Arkansas Capitol and outside the Arkansas Governor's mansion,

respectively. On that same day, McKesson Medical Surgical, Inc. filed a complaint in the circuit court of Pulaski County seeking the return of Vecuronium Bromide it had sold to the State of Arkansas, which the State used in administering capital punishment. *McKesson Medical Surgical, Inc. v. State of Arkansas*, Case No. 60CV-17-1921. Assigned the case, Judge Griffen granted a TRO within minutes of its filing.

3. The following day, a Saturday, the Arkansas Attorney General, on behalf of the McKesson defendants, filed an emergency petition in the Arkansas Supreme Court, seeking to vacate the TRO and remove Judge Griffen from the case based on his participation in the protest, prayer vigil, and his posting of anti-death penalty commentary in his online blog.

4. On April 17, 2017, the Arkansas Supreme Court entered an order that recused Judge Griffen from the McKesson case, referred the judge to the Judicial Discipline and Disability Commission for a determination of whether he had violated the Code of Judicial Conduct, and instructed the Sixth Judicial District to submit a new administrative plan that permanently reassigned all cases involving the death penalty or the State's execution protocol from Judge Griffen to appropriate division(s) to "ensure that all litigants in this district receive a fair and impartial tribunal." Order, *In re Pulaski County Circuit Court*, No. 17-155 (Apr. 17, 2017).

Ex. 1.

5. The Order explained that the authority to take this action was derived from the Arkansas Constitution, which provides that the Supreme Court exercises general superintending control over all state courts, Rule 2.11 of the Arkansas Code of Judicial Conduct, which requires judges disqualify themselves where the judge has “made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy,” the requirements of Due Process contained in the Fourteenth Amendment of the U.S. Constitution, and from the Court’s obligation “to protect the integrity of the judicial system,” and “to ensure that all are given a fair and impartial tribunal.” Ex. 1.

6. Judge Griffen did not seek delay or reconsideration of the Order.

7. On April 27, 2017, Judge Griffen filed a complaint against all justices with Respondent Arkansas Judicial Disciplinary & Disability Commission (JDDC), alleging that the justices violated the Code of Judicial Conduct. *See* Ex. 2 (Complaint). Amendment 66 of the Arkansas Constitution establishes the JDDC, assigning it responsibility to “receive and investigate, complaints concerning [judicial] misconduct.” *See also* Ark. Code § 16-10-404(a)(1). Respondent David Sachar serves as executive director of the JDDC. Respondent J. Brent Standridge was engaged by the JDDC as special counsel and was the signatory on the charges issued by the JDDC.

8. Judge Griffen separately filed a case against the Arkansas Supreme Court and each of its justices in federal court asserting that Order 17-155 violated his civil rights. On July 2, 2018, the U.S. Court of Appeals for the Eighth Circuit ordered Judge Griffen's complaint dismissed, holding, *inter alia*, that "[r]ecusal from death penalty cases is not an adverse employment action," that "Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary," and that Judge Griffen had "no cognizable life, liberty, or property interest" on which to base any due-process claim. *In re Kemp*, 894 F.3d at 906, 908. On August 29, 2018, the Eighth Circuit denied Judge Griffen's petition for rehearing and rehearing en banc.

9. On May 19, 2017, Chief Justice Kemp, on behalf of the Justices, filed a response to Judge Griffen's Complaint to the JDDC, explaining that the JDDC did not have jurisdiction or authority to act on the Complaint. *See Ex. 3 (Kemp Response)*.

10. JDDC Rule 6(B), Jurisdiction, provides "[i]n the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it."

11. The Complaint did not allege the justices conduct constituted "fraud, corrupt motive, or bad faith."

12. JDDC Rule 8 requires that the Executive Director “dismiss all complaints that are “clearly outside of the Commission’s jurisdiction.” Executive Director Sachar failed to dismiss.

13. On September 20, 2018, the JDDC issued a press release, announcing that it was filing formal charges against Chief Justice Kemp and Justices Wynne, Goodson, Hart, Baker, and Wood. On October 4, 2018, the JDDC issued a press release, announcing it was filing the same formal charges against Justice Womack. Ex. 4 (Press Release and Formal Charges).

14. The Formal Charges do not allege any of the three exceptions, fraud, corrupt motive, or bad faith to provide the JDDC jurisdiction over the justices for issuing Order 17-155.

15. The Formal Charges do not allege the violation of any provision of the Code of Judicial Conduct, but assert that the Order improperly disciplined Judge Griffen without due process, an allegation that the Eighth Circuit determined was without merit.

III. DISCUSSION

A. Standard for a Writ of Prohibition

16. A writ of prohibition lies to prevent an entity with judicial authority from acting wholly without jurisdiction. *Entergy Ark, Inc. v. Pope County Circuit Clerk*, 2014 Ark. 509, *5, 452 S.W.3d 81, 84 (2014). The JDDC is a judicial entity

with authority only to investigate complaints about judges and make recommendations to the Supreme Court. *See Arkansas Judicial Discipline & Disability Comm'n v. Proctor*, 2010 Ark. 38, 6, 360 S.W.3d 61, 70 (2010). The Supreme Court also promulgates its rules. *See Matter of Rules 7 & 9 of Rules of Procedure of Arkansas Judicial Discipline & Disability Comm'n*, 302 Ark. 633, 790 S.W.2d 143, 144 (1990). It is thus unquestionably an agency of the judicial branch and falls within the “exercise of supervisory control [vested in the Supreme Court] ... to prevent [an] unauthorized proceeding by the issuance of a writ of prohibition.” *Tucker Enterprises, Inc. v. Hartje*, 278 Ark. 320, 322, 650 S.W.2d 559, 560 (1983). *Cf. State ex rel. Workman v. Carmichael*, 2018 WL 4941057, * (W. Va. Oct. 11, 2018) (even a state legislature, acting as a “quasi-judicial body [as a] Court of Impeachment is subject to the writ of prohibition”).

17. The issuance of a writ of prohibition is proper to prevent the exercise of judicial branch authority not authorized by law when there is no adequate remedy by appeal or otherwise. *Reynolds Metal Co. v. Circuit Court of Clark Cty.*, 2013 Ark. 287, *3, 428 S.W.3d 506, 508 (2013). Long ago, the Supreme Court of the United States observed, if “a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded [but] his usefulness destroyed.” *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871). Immunity for judicial decision-making “frees the judicial process of harassment or intimidation.”

Forrester v. White, 484 U.S. 219, 226 (1988). A proceeding aimed at judges for their decisions on issues of law creates an impermissible “burden on judges” that “would contribute not to principled and fearless decisionmaking but to intimidation.” *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Thus, awaiting the process to run, rather than seeking immediate relief, will have a profound adverse effect on the Arkansas Supreme Court, the duties of the justices of that Court, and the hallowed constitutional policy of judicial independence.

18. In addition, JDDC Rule 12(h), promulgated by this Court, provides that the supreme court “may bring up for review *any action* taken upon any complaint filed with the Commission.” (emphasis added). Thus, the Court need not await an appeal to address the jurisdictional authority of the JDDC. In fact, this Court has repeatedly held that when the matter is jurisdictional and depends upon resolution of a legal question, it will issue the writ. *See, e.g., Conner v. Simes*, 355 Ark. 422, 425-26, 139 S.W.3d 476, 478 (2003). Here, the underlying facts are undisputed; only legal issues remain to be resolved.

B. Standard for a Writ of Mandamus

19. The purpose of a writ of mandamus “is to enforce an established right or to enforce the performance of a duty.” *City of N. Little Rock v. Pfeifer*, 2017 Ark. 113, *4-5, 515 S.W.3d 593, 596 (2017). This Court issues the writ “to compel an official or judge to take some action.” *Centerpoint Energy, Inc. v. Miller Cty. Circuit*

Court, 372 Ark. 343, 349, 276 S.W.3d 231, 236 (2008). It is available when the petitioner shows “a clear and certain right to the relief sought and the absence of any other adequate remedy.” *Id.* It is available to when the decision-maker has abused its discretion, such as “when it makes a decision that is arbitrary or capricious,” *id.*, or committed legal error. *SMG 1054, Inc. v. Thompson*, 2014 Ark. App. 524, *5, 443 S.W.3d 574, 577 (2014). Mandamus is proper, in accordance with JDDC Rule 8, to compel dismissal of a complaint clearly outside the JDDC’s jurisdiction.

20. This Court will enter both a writ of mandamus and a writ of prohibition when a body is acting outside its jurisdiction. *See, e.g., Centerpoint Energy*, 372 Ark. at 356, 276 S.W.3d at 241.

C. Standard for a Writ of Certiorari

21. A writ of certiorari lies to correct erroneous and irregular proceedings. It is axiomatic that “[e]rrors in the assumption of jurisdiction are properly correctible on certiorari.” *Hardin v. Norsworthy*, 204 Ark. 943, 165 S.W.2d 609, 611 (1942). *See also Duty v. Arkansas Judicial Discipline & Disability Comm’n*, 304 Ark. 294, 295, 801 S.W.2d 46, 47 (1990) (“Certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy.”).

22. This Court has occasionally “treated a petition for a writ of prohibition as a petition for certiorari.” *Patsy Simmons Ltd. P’ship v. Finch*, 2010 Ark. 451, *8-*9, 370 S.W.3d 257, 262 (2010). In those instances, this Court “will carve through

the technicalities and treat the application for a writ of prohibition as one for certiorari.” *Id.* A writ of certiorari is an “exercise of this court's superintending control over a tribunal which is proceeding illegally where no other mode of review has been provided.” *Id.* It is also “appropriate where a party claims that a lower court did not have jurisdiction to hear a claim or to issue a particular type of remedy.” *Id.*

23. JDDC Rule 12(h), “Certiorari,” explicitly states that the: “Supreme Court may bring up for review any action taken upon any complaint filed with the Commission.” As such, this Court has certiorari jurisdiction over this matter.

D. Respondent Had No Jurisdiction to Issue a Complaint Against the Justices Based upon a Ruling of Law.

24. The jurisdiction of the JDDC is governed by Rule 6 of the JDDC’s Rules of Procedure. Rule 6(B) provides:

In the absence of fraud, corrupt motive or bad faith, the Commission shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it. Claims of error shall be considered only in appeals from court proceedings.

25. Neither the Complaint nor the Formal Charges allege fraud, corrupt motive, or bad faith.

26. Moreover, this Court, however, has interpreted bad faith under the rule as “(1) performing a judicial act with knowledge that the act is beyond the judge’s lawful judicial power, or (2) performing a judicial act that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority.” *Simes*, 2011

Ark. 193, *8, 381 S.W.3d at 771. No action was taken beyond the justices' lawful power, and bad faith is not present.

27. Without fraud, corrupt motive, or bad faith, the Commission has no jurisdiction over Petitioners' issuance of Order 17-155. Moreover, as the limitation on jurisdiction contained in JDDC Rule 6(B) makes plain, the Commission has no jurisdiction over decisions of a judge rendering a decision on issues of law.

28. Respondents acknowledged this restriction on the jurisdiction of the JDDC. Complaint, p. 9 (Ex. 4). Nevertheless, the Commission stated, "however, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge."

Id.

29. The statement, which plainly and ineffectively attempts to excuse the action it took in excess of its jurisdiction, highlights three related but additional extra-jurisdictional problems with the JDDC's failure to dismiss the Complaint. First, and contrary to law, the JDDC erroneously treats a recusal order as a disciplinary action. The Eighth Circuit held that "[r]ecusal from death penalty cases is not an adverse employment action" and incurs no due process violation on these very facts. *In re Kemp*, 894 F.3d at 906, 908. JDDC is collaterally estopped from re-

litigating the same issue on the same facts that was determined by the Eighth Circuit. *See Riverdale Dev. Co., LLC v. Ruffin Bldg. Sys., Inc.*, 356 Ark. 90, 96, 146 S.W.3d 852, 855 (2004). Like the Eighth Circuit, the Second Circuit also held that “reassignment is not a legal injury to the [trial] judge” because that “judge has no legal interest in a case or its outcome, and, consequently, suffers no legal injury by reassignment.” *Ligon v. City of New York*, 736 F.3d 166, 171 (2d Cir. 2013). After all, an order of recusal “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009). It is therefore not a reflection on the judge and not a disciplinary action.

30. Second, Due Process requires recusal of judges with an appearance of bias as viewed from the perspective of the general public. *See Caperton*, 556 U.S. at 886 (“Due process ‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’”) (citation omitted). Thus, “reassignment allows the courts to ensure that cases are decided by judges without even an appearance of partiality.” *Ligon*, 736 F.3d at 171. As a decision on an issue of law, it is not subject to review in the JDDC and is therefore outside the JDDC’s jurisdiction.

31. Third, the Formal Charges suggests that the scope of Order 17-155 was, in the JDDC's view, "such arbitrary and capricious conduct could form the basis for disciplinary action." Ex. 4, at 9. Yet, Order 17-155 was an exercise of judicial authority on the motion before it was an issue of law. As JDDC Rule 6(B) makes clear, the JDDC cannot "take action against a judge for ... reaching a legal conclusion or applying the law as he or she understands it. The JDDC has explained it will "not investigate claims that a judge should have, for example, been more lenient or more severe in sentencing, admitted or excluded certain evidence, made a larger or smaller award of damages or child support, or believed a different witness." JDDC, Authority and Jurisdiction, <http://jddc.publishpath.com/authority-jurisdiction> (last visited Oct. 13, 2018). Yet, that is exactly what the Formal Charges do.

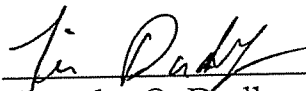
32. Thus, the JDDC was without jurisdiction to review the Supreme Court's action in issuing Order 17-155. In addition, Respondents are without authority to change the rules of the Commission and expand Respondents' jurisdiction by characterizing a legal decision as arbitrary and capricious. *Cf. Whitehead v. Nevada Comm'n on Judicial Discipline*, 906 P.2d 230 (Nev. 1994); *In re Keller*, 357 S.W.3d 413, 430 (Tex. Spec. Ct. Rev. 2010); *Harrod v. The Illinois Courts Comm'n*, 372 N.E.2d 53 (1978).

33. Moreover, the charge that the Supreme Court went beyond the relief requested by the parties is meritless. A party's request does not define a court's authority to fashion relief, particularly when the court is the Supreme Court, which has general superintending authority over all state courts, Ark. Const. amend. 80, section 4, and inherent judicial authority to protect the integrity of the judicial system. *Arkansas Dep't of Health & Human Servs. v. Briley*, 366 Ark. 496, 507, 237 S.W.3d 7, 15 (2006).

34. The Petitioners' responses to the formal charges are due in a matter of weeks and Petitioners are placed in the difficult position of responding to entity which has no jurisdiction. Therefore, the Petitioners request expedited response time to their petition as follows: response due Friday, October 19, 2018 by 4:30 p.m. and any reply due Monday, October 22, 2018 by 4:30 p.m.

WHEREFORE, Petitioners pray that their Petition for writs of prohibition, mandamus, and certiorari be granted.

Respectfully submitted,

By: 

Timothy O. Dudley, ABA #82055
TIM DUDLEY, LTD.
114 South Pulaski Street
Little Rock, AR 72201
(501) 372-0080

By: Robert Peck
Robert S. Peck (*pro hac vice* forthcoming)
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Avenue, N.W.
Suite 152
Washington, DC 20001
(202) 944-2874

Attorneys for Petitioners


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was served upon the Respondents by mailing a copy of same to the following counsel:

Mr. J. Brent Standridge, Special Counsel
ARKANSAS JUDICIAL DISCIPLE AND
DISABILITY COMMISSION
323 Center Street, Suite 1060
Little Rock, Arkansas 72201

Mr. David J. Sachar, Executive Director
ARKANSAS JUDICIAL DISCIPLE AND
DISABILITY COMMISSION
323 Center Street, Suite 1060
Little Rock, Arkansas 72201

on this 17th day of October, 2018.



Timothy O. Dudley