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Supreme Court of Texas.
James VanDevender, Petitioner,
v.
Honorable G. Mitch Woods, in his official capacity as Sheriff of
Jefferson
County, Texas and Jefferson County, Texas, Respondents.
No. 05-0956.

December 5, 2006

Appearances:
Philip Durst, Deats Durst Owen & Levy, P.L.L.C., Austin, TX, for
petitioner.
Thomas F. Rugg, Jefferson County Criminal District Attorney's
Office, Beaumont, TX, for respondents.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht,
Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett,
Wallace B. Jefferson, Supreme Court Justices.

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JUSTICE: Be seated please. The Court is ready to hear argument in
05-0956 James VanDevender versus Mitch Woods.

CLERK: May it please the Court. Mr. Durst present an arguments for
the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF PHILIP DURST ON BEHALF OF THE PETITIONER

MR. DURST: May it please the Court. We all agree that salary
benefits in Article III, Section 52(e) ends at the term that used to
determined. The issue today is that the Constitution require an
additional limits to this salary benefits that they only apply with the
term in which the injury actually occurs. To sort that out-- we're do
we have to begin the language of the statute, the language of the
constitutional amendments and I'd like to begin with that then very
briefly walk the Court through the three provisions of Article III,
Section 52. Clause one of course and the other handout provides that if
a count-- county has the ability and it all requires that they have the
ability to pay medical bills if and a law enforcement officer if
they're injured in course of their official duties. Secondly, if there
is an on-the-job injury and there is some hospitalization wherein the

Counselee, the county must pay, the maximum salary. Not a percentage of the percentage, the maximum salary during that period of hospitalization or incapacity. Clause three is if there is such such hospitalization or incapacity and salary benefits were being paid, those who cannot stand past the term of the deputies term of office. So no one claims that this is benefits for life, permanent benefits as they say in their brief. If a sheriff or a deputy is so seriously injured that if he still only going to last through the end of that term of employment as long as they are employed ...

JUSTICE: So just bring this up to date as Mr. VanDevender is now, not getting salary.

MR. DURST: That's correct. He ...

JUSTICE: So that ended at the end of 2004?

MR. DURST: Yes, your Honor. And we have a little chronology to pull the dates out of the record in the brief.

JUSTICE: So when does the payment which you say required by the Constitution for a certain length of time. When do they end?

MR. DURST: They end ...

JUSTICE: What they-- the entry last for the life of the person 50-60 more years.

MR. DURST: Sir, they ends at the date when that person is no longer deputized by the county and by the sheriff, which is a date that they themselves controlled. It abandon VanDevender or anyone from the cases as you note is not reappointed by the Sheriff and your still injured, their benefits cut off then. If someone is injured or gets re-injured but is reappointed, is serving the County, tax payers, if being put in harms way for an additional term. The benefits ends at the end of that term.

JUSTICE: Well, you said put in the harms way-- from my perspective this officers always put in the harms way when they're 'ut there doing their jobs. What difference does that make if they get hurt from the day-- first day that they're going to the last day. It seems to me that if you read the statute it gives, it gives the County reason to terminate them because they don't want to be responsible for continuing injury.

MR. DURST: Well, as you know Justice Willett, you make the arguments-- threaten may not be the right word, but it's the first word that comes to mind-- that I'm going to give these officers extra scrutiny. And he's-- anybody's going to put on the job and their terms has come to an end. On deepens extra scrutiny-- I may not be reappointed, but that's not an Article 52(e) issue, that's democracy issue. A Sheriff in that situations is left with two choices. Choice number one is I'm not going to reappoint, as you say any deputy that's been injured on the job, 'cause I don't want to bear the risk of some future expense. May not never happen but it may and I don't want to bear that expense-- I don't care how good you are. Right? And that's the democracy issue. If a County wants to have the flower morons of law enforcement. Right? We just want to agree, what's this. We don't want to any extra expenses for people who have experience ...

JUSTICE: You said the flower morons?

MR. DURST: Yes.

JUSTICE: They want it to work serious.

MR. DURST: Exactly, and then we know what happens. They don't keep them like our to start again.

JUSTICE: If they don't reappoint them. Do their workers income benefits keep going as to them under the same worker's code?

MR. DURST: Of course, which sort of cuts both ways because they

would still have this financial business settled-- they still want to preserved future exposure. But on the other side of the next, if the Sheriff chooses to have deputies around to a totally walking mood-- did they can't do their job? Then we're in the same position as the Sheriff to decides. I just want my buddies on the force. Right? And I don't care if they can or can't do their job. Again that's democracy issue. Department of 45 so nephews is not in article 52(e) issue. The statute-- the amendment requires says us benefits through the end of the terms that they're appointed.

JUSTICE O'NEILL: Does it make any difference that this injury that, that, the, that when he was born? When injury re-manifested itself. Does it make any difference that it related back to the injury from the prior term? 'Cause seems to me like there be no question here if they had a new injury that he will be entitled from acts-- from salary benefits. So thus he somehow getting date that his incapacity now relates back.

MR. DURST: Of course, to double that he gets. If, if it's relates back he get thing and then of course we have a causation argument that never going to reach by Court of Appeals, but totally it was totally new injury with required another surgery, I don't think there would be any dispute. But the fact that it's a previous injury, if your shot once and then you have a complication from that, your being denied. If you have a complication in a lured later term of office ...

JUSTICE O'NEILL: So from the beginning of the second term in March 2001, he was working full time. Correct?

MR. DURST: Yes, your Honor.

JUSTICE O'NEILL: And so he received note 52(e) benefits really during that time-- that was his salary.

MR. DURST: Yes, your Honor.

JUSTICE O'NEILL: Okay.

MR. DURST: And then for whatever it's worth--he actually received 52(e) benefits for better not a year after that, as the record shows ...

JUSTICE: At the end of that procedural postulate case, the trial judge did not find in your favor on the causation issue.

MR. DURST: We're, we're losers.

JUSTICE: Yeah. And so you feel bad?

MR. DURST: Yes, your Honor.

JUSTICE: And I suppose you challenge the factual what-- must of factual sufficiency challenge.

MR. DURST: Yes.

JUSTICE: That, that the trial court's failure to find in your favor was against the great way in propounds.

MR. DURST: And some other causation arguments as well, of course.

JUSTICE: And the Court of Appeals didn't reach those issues?

MR. DURST: We're still losers.

JUSTICE: Yeah. Ordinarily, the Court's are reluctant to, to-- to decide difficult constitutional issues. When you could dispose of the case on evidentiary review because if the Court of Appeals found against you on that-- that would be the end of the case. Was that-- the Court of Appeals indicate why they didn't reach the evidentiary issue?

MR. DURST: I'm just what's state in opinion they felt that they didn't have to.

JUSTICE: Right.

MR. DURST: And so I understand this one of the issue at the time commitment of this Court and they have two reasons why the Court needs to continue deciding this issue.

JUSTICE: But, but in a-- in an answer that given those. Why shouldn't the case just go back for an answer to evidentiary question show that we continue our prudential reasons for not reviewing the constitutional issues that we don't have to.

MR DURST: Well, of course the County doesn't argue that. We've all agreed this is a good news to courts perhaps.

JUSTICE: More appreciated.

JUSTICE: More importantly ...

MR. DURST: If the Court it didn't-- if the court ruled against us on either if she likes it, I can see that for being the case but here we have an opinion now published on the books that says "This is why 52(e) works. It conflicts with that the civil case and so it's not our choosing of course the upper bottom view." But we know this issue on the book by answers to constitutional question. And we think an answers it wrong-- we're going to have to go back to approve our causation or take care of the issue about if that's a new injury then, one of them get benefits that way. Well, he never even get the chance to have our daily record on that and we've got the wrong opinion on the books on the constitutional question that conflicts with another Court of Appeals address the same issue.

JUSTICE: But that cannot close your-- it's a little troubling that our answer, well, what I think is a difficult constitutional question. That's not making difference in the case [inaudible].

MR. DURST: Well, it'll certainly-- I think it will make a difference in the case, but certainly is going to help every other County and every other law enforcement officer because we have to reserve this conflict sooner or later. But certainly the evidence is pretty clear that causation was laid up. The Judge made some-- judge made happen, you know because that made some evidentially rulings. And I think we'll have to began as soon as we beg the Court Appeals of course to get to, but we're not here, not on our own court. We don't choose to be with this ...

JUSTICE #2: As I recall under the Sheriff statutes? The Sheriff has the right to earn each-- the end of each term or beginning of each new term to borrow the deputy sheriff part of new it if he wants to.

MR. DURST: Absolutely.

JUSTICE #2: With regard to Constables-- the Deputy Constables, the Statutes Constables were not quite as clear about whether the Constables can fire a body and start a fresh. They don't have the same scope or extent of authority in that regard as the sheriff statutes. If the constitution provision talks about them all in the same threat. Should we be concern if we're going to address the constitutional issues that, that the treatment of Sheriff Constables in this regard as the same. 'Cause essentially what you're saying is the 52(e) payments can be cut off by just not re-appointing the constables. Did it not?

MR. DURST: Of course, anyone.

JUSTICE #2: But there may not be an absolute right to do that.

MR. DURST: Well, ...

JUSTICE #2: May you or may not be.

MR. DURST: Well, that's correct. And for example as the Court knows about David Brooks personally wrote the Three County Special Government Laws says, "Actually it's the other way around says Sheriffs-- Deputy Sheriffs, they one's who are most entitle to 52(e) payments until the end of their term." And so in that's in the Three as County Government Law 20-- 20.17 on page 134. So I agree in the sense-- I think we're in stronger position of constables and of court is saying, "We want a narrow as possible constitutional issue we're going

to take." In this case involve Sheriffs will decide-- Sheriff is made in making up constable for different K or F, [inaudible] fish, will decide better another day that's not before us, then lose the ordeal. But I do think it's the same general theory the terms that the Tredis Riders and Brailey point this out that everybody seems to be that there is similar position if not identify. The language there of course is not include the red, they want the red line. They want something that says, "The term of office is not the general tenure, as Brooks points out." But the first term of office in which the hospitalization or incapacity occurs. If you used it in that first term so it's being innovative is not better than it's first term, we've been there of 16 years. But the first time that you use this for your hospitalization or incapacity-- if your shot and you need some hospitalization, then you used it, and that's the end of the term-- and that's the only term you get. They want the red exclusion language which is considerably possible, but it's not in the constitution. In addition to the text, there's three other sort of arguments that we need to look at based upon the Legislative in the code of record. And we've already covered one in his idea of the compassion of the choice. The second one is the ballot language. The ballot language in this situation, clearly does not explain it to the voters what they're actually voting on the counting place. It doesn't show any indication that this is a one term limit. And as you all know what they want is a four year count. Before we get this benefits once or if you get it in January 1st, it's an absolute maximum of four year count, that's the most forever going to get pays ...

JUSTICE #4: Who drafted the ballot language?

MR. DURST: At a legal ex-lit Counsel of the Secretary of State, but that's not in any of the theory of this case than there in the record. It's not of course the same language in the 71 resolution built analysis. But if their link does not key this into the singular, it says states the opposite, benefits get are limited to the employees' terms of office. Why would that be? Well, everyone agrees that this was a worker's compensation provision to provide workers compensation life benefits at the time when there was no workers comp for this employees. And so all that's left is history and the ballot and the Bill analysis showed the primary intent is to give a pro-law enforcement benefit in two respects. Number one, it's supposed to help injured officers in the time of need when the financial effects maybe insurmountable according to the legislative analysis. And secondly, it's a recruiting tool, it's a way to make sure that law enforcement has people coming into it's rights even though it is so ultra hazardous. And the legislative history which we submitted shows this was a dire need at the time. Why do I express that? Because this Court has expressly ready and quoted recently that it is the intent at the time a constitutional amendment was enacted that controls not how we look back at it now, and that's *Cramie versus Sheperd*. The meaning of a constitutional provision is fixed when it is adapted and it's not thicker in any subsequent time, it should be construed in the life of the conditions existing at the time of the adaption. And even though that's a 1940 case about Justice Brister and Justice Hecht decided very recently. So even in hindsight if we now say today, "Well, now we have workers compensation and we have other ways to improve people into law enforcement," it does not change the focus which was the amendment at the time. The language then, clearly shows that this is not supposed to be as we've already discussed, "There's no pigs in the backyard." The medical benefits are such that if someone's tragically is in a comma and has huge medical

bill that are totally unforeseen, then they're not going to get those. Right? The County has the election of deciding whether or not to pay those. There's no pig on the paw-- there's no expenditure that cannot be booked.

JUSTICE WILLETT: Yes, it was the first one, the time runs out. Back to Judge Hecht's question. What does that mean when the trial judge says, "Causation is need to proved or disproved?" Is that mean it didn't at preponderance it cannot read that to be the preponderance evidence its get. There was some evidence but not prong ...

MR. DURST: We're on the knife edge and we don't want to blown us over one way or another.

JUSTICE WILLETT: I've never heard of such a finding-- I'm just 80 percent ...

MR. DURST: Exactly, exactly. And for what is worth the project. And it was reluctantly hoping that. And we only wouldn't have said that. So there's-- my time is over.

JUSTICE WILLETT: Are there any further questions? Thank you, Counsel. Court is ready to hear argument from the respondent.

CLERK: May it please the Court. Mr. Rugg will present an arguments for the respondent.

ORAL ARGUMENT OF THOMAS F. RUGG ON BEHALF OF THE RESPONDENT

MR. RUGG: May it please the Court. We got a lot of trial judge who reluctantly is compelled with conclusion based on evidence even if he's willing to say so. These are recorded. Right?

JUSTICE: Yes.

MR. RUGG: I, I want to try it before we get to far in a road. I love law enforcement people. I love all of them, they're important, they're important to elections and I like the legislators done here now, in providing benefits. In terms of what they do and what they provide for us. But let me respectfully suggest to the Court that the issue is not-- whether or not a disability payment on the 52(e) re-constitution has to occur on same term that an injury occur. The question before the Court is whether or not a person has been injured in the course of employment and as law enforcement emplo-- employment and then is pay day period of disability. And then on subsequent term to rely upon on that injury and disability payments that have occurred before to again brought disability payments. And let me tell you right, I think that leads as to a problem if we hold the fact it can. Where that leads us is to a limitation term-- a limitation provision in the constitutional provision that comes meaningless. And here's how that happens. My Sheriff is an elected official. And in Jefferson County, the law enforcement community is very close, they rely on one another. They rely upon each other. They know each other spouses and shelter. Now, if I had an officer whose been injured in a course of his employment and rendered a [inaudible]. And he's always going to pair of legit and he's never going go back in the patrol call on need. Never going to do those law enforcement functions for making at ill. And here I am as the elected Sheriff and now I am not only vested with the authority but a responsibility to determine whether not to re-deputize him for a new term and I know if I don't, the economic consequences to him and his family are substantial. What do you think a politician's going to do on that circumstances. It's not going to thank Jefferson

County, re-deputize him. Four years from now, he's still in a wheel chair. He's still can't perform law enforcement functions. I'm still the Sheriff, he's a friend of mine. He is liferous, he spells. They're friend's of mine, knows children I'm watching grow up. What am I going to do when it comes time to make that re-deputizing decision again. I'm going to re-deputize him again. And then where I am is the end of that and where's the limit. That clearly is expressed in the constitution

...

JUSTICE: Were is that to the voters of Jefferson County as opposing Counsel says "If they want to keep electing that Sheriff will keep deputizing [inaudible]." Isn't that-- isn't that their choice?

MR. RUGG: And what prevents that Sheriff from making his own choice? ...

JUSTICE: Nobody, nobody's [inaudible] Jefferson County's chores.

JUSTICE: Can't the County Commissioner's say, "You're not getting any more budget for that?"

MR. RUGG: Well, I don't-- I don't think so. I don't think they can-- I don't think the County Commissioner's can abrogate a constitutional right. If the Sheriff has the authority to confer that benefit on the Deputy, I don't think that County Commissioner's had the authority to take that away, simply by saying, "we're not going to find it."

JUSTICE: But I have found over the years that a Commission of Court can be very creative in bringing pressure by a ...

MR. RUGG: I've, I've noticed that answers, oh no.

JUSTICE: We're all know Officials to-- to get what they want that. And it seems to me that if that were the wrong decision, that County, County of a-- pressure to like should Sheriff could do that.

MR. RUGG: Yeah. In, in agree Board pressure or they can simply say, down. We're going to find one last law enforcement position for you because you've chosen just like a law enforcement position an award to somebody who can't perform most functions. And that sounds like maybe that a real matter a pressure on the Sheriff. But guess what, those assign law enforcement people not just bought the sheriff's licence. They bought the Commissioner's vote licence's, the County Judge's licence's. They're getting influential on that. So I'm not sure that's realistic to say that that those pressures can be brought to bear. But the real problem is-- is what the constitution has confer of you, is why don't somebody in the ability to collect that right-- my right to receive that benefit fund is now dependent upon the right or wrong when or decision of another elected official. So that while in Jefferson County that right might very well be one that goes on for term after term after term. Where as in the neighboring County where the Sheriff isn't, for whatever reason, doesn't have quite the same philosophy may some do. I ain't sure he couldn't be on that street I'm not re-deputizing him.

JUSTICE O'NEILL: But I've heard of the-- okay, I hear you.

MR. RUGG: People situated exactly -

JUSTICE O'NEILL: But, but ...

MR. RUGG: - the same situation rely on-

JUSTICE O'NEILL: That-- that the ...

MR. RUGG: - the same situation rely on the same constitution -

JUSTICE O'NEILL: So ...

MR. RUGG: - provision have different result.

JUSTICE O'NEILL: So in your view the purpose of the step-- of the-- of the constitutional language is to get the Sheriff out of this quandering -

MR. RUGG: No.

JUSTICE O'NEILL: -and protect the County [inaudible].

MR. RUGG: No, I don't believe that she get that Sheriff out of the quandering. The point is that when the provision was enacted there was a limit. All right? And now the limit -

JUSTICE O'NEILL: Yeah. I understand ...

MR. RUGG: - if we can understand that the people understood anything about benefits provided to employees. They understood worker's compensation that is existed back there on, which was a maximum of 401 week benefit from the day of injury regardless when the disability manifested itself. And regardless of how unfair that result was. There was an ending date and certainly ending date. And I think consistent with that-- with what was known about that the-- the framework of the law as of existed at the time this constitutional provision was enacted. The voter's must have thought-- the legislator must have thought where putting that end date. End dates are always arbitrary and always unfair that Sunday but it's an ending day. And it's seems to me that the ending day in a proper construction of this statute is it ends when the term ends-- where the disability is running.

JUSTICE O'NEILL: Where's does Worker's Comp end? If he's relegated to work was gone. When will this benefits end? or does that go on?

MR. RUGG: Well, in, his Worker's Compensation benefits has nothing to do with the term of office.

JUSTICE O'NEILL: So it continues beyond the term of office.

MR. RUGG: Sure -

JUSTICE O'NEILL: Is it ...

MR. RUGG: - it also beyond the date of yeah-- of termination for employment. Or his compensation benefits are not dependent on that.

JUSTICE O'NEILL: So if the purpose of the provision was to mirror a Worker's Comp sort of scheme, well then if it will continue, then how can we say that should interpreted to cut those benefits off.

MR. RUGG: Because of the time that this-- that this statute was enacted, there was an ending date to Workers Compensation Benefits. It wasn't related to term of employment and it wasn't related to continued employment but if you have an ending date. It's not a lifelong scheme, it ended and glad that it been a lot nicer if they given a better language to work with in terms of an ending but what they've given us is-- a benefit and I'm not sure it it serve what it intended to be interpret it this way. But they've given us a benefit. The, the depending on who your Sheriff is. My in bolt stop for one person to go on forever for another one [inaudible]. The whim of the Sheriff-- there are no guiding principles-- legal principles for Sheriff to apply in making a decision that's going to have those kind of consequences. And it seems to me that would be a particularly unusual interpretation of a constitutional provision to place benefits on the hands of another person with no guiding principles perhaps to be decided. And if, if that's what it means then aren't we putting ourselves in a position where I'm the Deputy whose benefits been cut off. Don't I have a legal right to come before the court and claim that the decision is somehow arbitrary and capricious and all be entitled to. If the Sheriff treated another Deputy exactly in the opposite way because he was friends and I wouldn't a friend with, with the Sheriff. But where's the legal right created in this constitutional provision to make that kind of attainment. That's where you go if we leave this the discretion of the Sheriff to decide whether or not this benefit is continued or not continued. So the construction in terms of, of change than other one. If we decide that we can have any what that periods of disability and

we taken as exactly to that point that I'm talking about. Where Sheriff now has to decide do I confer this benefit on a friend and fellow law enforcement officer 'cause the law allows me to do it or do I not confered on this fellow law officer it might not such be a good point.

JUSTICE: No, if we going to put this state of jurisprudence in that sort of a position and I agree with you-- this is a tough one.

JUSTICE: But Justice Johnson makes a good point, you know, there, there's a campaign could be run by an opponent of that sort, that sort of crony right? And you say you know-- this is what this officer do. And, and, and, and, and, and, and, and that's what we need how to conform the job. And those kind of process on going to point, tv commercials ads etc in the voters just decide that issue -

MR. RUGG: You got it.

JUSTICE: Oh why isn't that the answer?

MR. RUGG: Because that's not-- well, that is an answer. But is that the answer we are going to have for the constitution benefit, that's in our Texas Constitutional ...

JUSTICE: But what are I'm talking about that you started out, you started out policy and I'm just responding on that. We're not-- I'm not talking of the text right now. But why isn't that the answer to that policy remedy you paused?

MR. RUGG: No I agree but-- but again-- then, then we're, we're, we're at a, we're at a poise where a constitutional benefit now it's not only dependent upon the position of the Sheriff but on the political wheel of the electrode and again it seems to me that this is benefit confered by the Constitution. We ought to be able to uniformly apply to officers across the State without concern about how the political consequences of those range might fall.

JUSTICE: It remind me, can Sheriff fire the remedies at will?

MR. RUGG: Yes, in our County-- yes.

JUSTICE: So wouldn't that be-- so but if-- if sub question is you could fire him at will would that be the end of that term or you have to keep paying him maximum salary.

MR. RUGG: Yeah, sort out-- I, I believe the end of their term is the term of the officers coincident with-- the same as the term of the Sheriff, and I don't think a termination interrupts that term of such a different date forward.

JUSTICE: Go to the text, can you point to any language either in the current constitutional provision or the history of it. But the balance support, it could limit the benefit to the term in which the injury occur.

MR. RUGG: No. And I don't think it's so limited, and maybe I didn't make myself clear-- start again I agree that's what Court of Appeals opinion says but that's the facts they we're faced with. I think I have the facts in the injury occur in one term but the disability started in a subsequent term and then-- that would be the term-- the term where the disability of hospitalization starts is the term where the benefit is paid in-- at the-- it's the end of that term where the benefits stops. And, and it's not facts of our case.

JUSTICE: Fine. And where's the language that support now?

MR. RUGG: Well, I just-- to tell you that is clearly there either way I can't tell you that-- that's the ambiguity of the-- of the constitutional provision we're dealing with. And I don't think anyone could stand here and tell you "oh, here it is" that's why we're here -

JUSTICE: Face it but it doesn't appear to me its unlimited to that, may that could be read in that provision.

MR. RUGG: It clearly says that it's-- that it-- it expires at the

end of the term to which's he's appointed. So I'm not sure--the problem we're all having is what term are we talking about -

JUSTICE O'NEILL: What ...

MR. RUGG: - I understand that.

JUSTICE O'NEILL: What weight should we give the ballot language? If this is an ambiguous term-- shouldn't we give the language the better side on some difference?

MR. RUGG: Well, my, my problem is that ballot language is, is that often is not a direct quote of what is ultimately going to be in the Constitution. The ballot language is usually somebody interpretation of what the constitutional provision means ...

JUSTICE O'NEILL: I think were stuck with an ambiguous term. Shouldn't that language the voters voted on carry some weight?

MR. RUGG: Well, I agree the language of voter's voted on should have some weight because that is some implication of what they thought they were voting.

JUSTICE: Or we should presume they read the papers and knew what the acts or provision -

MR. RUGG: Well, and if I read the paper then according to the Austin American Statesman and they thought, they thought this benefit was in fact optional. When clearly this caption in mandatory language like in the Austin American Statesman didn't understand it either. So I don't know that, that provides is a lot of useful guidelines in terms of-- what I can say to difficult issue.

JUSTICE: Mr. Rugg, let me think here just a moment, there are some discussion about that the origin of this that a County could not-- could not pay salary to an incapacitated officer. Is there some provision in your County at this point that if the officer is incapacitate can or and you read not wondering who is this, seems like this might put the County's in a quandary because it has no authorization for them to pay. For example, your County paid beyond and then decided not to pay did it have the authorization to actually pay if, if went beyond the term that you're arguing for here which was the first term? -

MR. RUGG: I don't think, no ...

JUSTICE: - or is that a -

MR. RUGG: No there's a ...

JUSTICE: - gift or a public funds, and the reason that I cite this we have to know to know who to try try and decide issue in the back of what to do. The same like the County made a problem ...

MR. RUGG: You know, that was-- that was an issue that came out in the early stages of this, this old matter when it first came to my attention that, that with repaying James Vanderver into a different term of office in-- in the visibility first look at that was when they came to me and wanted to know are we doing the right thing, not doing the right thing.

JUSTICE: You don't have to tell us your attorney-client conversation -

MR. RUGG. Yes ...

JUSTICE: - unless you want to.

MR. RUGG: It's a-- it's not a big deal, I'm not that privileged. It-- my understanding of, of the-- of the constitutional provision that I came to then was of very little guidance. It's the same as it's yesterday. I believe the language compelled a conclusion that when a disability comes started in one term when that term of office ended that disability claim ended it. Subsequent dis-- disability periods whenever they occur related back to that original injury didn't give

rise another claim.

JUSTICE: See ...

MR. RUGG: - we voluntarily overpaid some [inaudible]

JUSTICE: And if the County have authority to do that for public fund -

MR. RUGG: I said no ...

JUSTICE: - just a question.

MR. RUGG: I said no ...

JUSTICE: And this, this one stops the conclusion-- at that point we can't, we can't, we can't ...

MR. RUGG: We understand ...

JUSTICE: We can't, we can't, we can't ...

MR. RUGG: When highest County's attorney advice them but I thought those framers were not authorized [inaudible].

JUSTICE: And to lessen situation at this point unless there's some authority to somewhere else. A county that does pay and is guessed about whether having authority to do that for public funds or not.

MR. RUGG: And I think that's why this is such an important issue for this Court. Clearly whatever way we decide on this, on this particular issue. This particular case is going to go back to the Court of Appeals where the determination of the facts relates on causation. I mean, I think everybody is clear on that. But in terms of how the other county in this Jefferson County and all the other County's of the-- of the state, administer this provision it is a question that needs to be resolved in, in-- in a difficult question to resolve, because I think they're-- they're good arguments to be made on both sides of the issue. And frankly don't [inaudible] the court making a decision but it's, it's, it's were it is. I think we, we put ourselves if we go on to what they a-- what the petitioner wants this Court to do. Then we put ourselves in exactly that quandary I'm talking about where we have our constitutional right that will be desimilarly administered to cross the state opinion on a Sheriff's sensibility-- to batch in need of sensibility to the law enforcement community. And I think that not a good place to place a constitutional right.

JUSTICE: Could a County authorize-- this I think someway that a county could own on it's own authorize-- this type of thing of its own funds?

MR. RUGG: No. I, I think that probably those County's that have labor agreements and we are one with its law enforcement officers. That-- that is a benefit of employment that could possibly be negotiated into a labor agreement. I think otherwise you're standing on-- on other constitutional provisions that prohibit the gift of, of public funds. And that's that's where this whole issue came from in the first instance, was because those are the constitutional provisions. If there are no other questions. Thank you.

MR. RUGG: Thank you, Counsel.

JUSTICE: Besides answer to the original hypothetical that dearly beloved officers and juries and the time reappointment comes and maybe counted by sympathy or whatever since reappointed. Putting aside [inaudible]. Do we have a legal provision for that?

REBUTTAL ARGUMENT OF PHILIP DURST ON BEHALF OF PETITIONER

MR. DURST: Well, I think we just heard about how hard has County

attorney comes in and says "no can spent the money on this-- I don't care how much you like him or dislike him, and so they're all illegal checks." And of course we discussed commissioner's court but the true nature of it-- in this simple hypothetical is that's. Cronyism is that only reason for making decision to keeps someone on and on. You would think somewhere in that nexus can the person do the job, is there some job they can't do, what's the benefits they're going to offer the taxpayers and -

JUSTICE: Assuming that they can't do the job, does 52e permit those payments in perpetuity.

MR. DURST: No, it's never in perpetuity it's only as long as the sheriff formerly grants the right to reappoint someone which it is in his total discretion. If a sheriff was totally strando and was just keep on for someone on but honestly said that democracy issue. But if not -

JUSTICE: But if ...

MR. DURST: - a constitutional interpretation but does the language that we drawn back to.

JUSTICE: Let me hear to review what would happen if the term was interruptive-- it wasn't a successive term.

MR. DURST: Successive term of officer-- successive injury.

JUSTICE: Successive term of office.

MR. DURST: So ...

JUSTICE: In what-- in danger-- just like this case except that instead of being reappointed the-- times passes like four years it's not reappointed. Then the injury appointed for and the incapacity meant as it off.

MR. DURST: Of course, that's not this case but I would think then in the years certain of serving-- it would march through the three clauses of the Constitution. 'Clause one is that truly related to first term of injury. Yes, then 'clause two be with them gets if there's a true period of hospitalization or incapacity-- you get it. 'Clause three ends at the end of that term of office. He's got to march with the language. I would like also to use my time and also come back to this issue of this kids has too many choices-- there's is too many whims here and there's three sub arguments here. Number one beside the admit can of the sheriff making scandalous decision-- where a County made a scandalous w decision. Well, the medical benefits section 'clause one is totally optional-- the county can make any kind decision therein, therein they're hospital benefits and that's within with discretion of the Constitution. They can decide it for whatever reasons-- you will figure post and post for that figure that we're appoint to but it is scandalous. And we all agree that would that means. Secondly, county versus county disparity well, that will the election of county local control is. Some county will have some sheriff of this part of people that one hour of accident and some would keep someone on for whatever reason under argue very insisted how elected official in county's that a witness could rapture business, shift by the voters. But the real argument is this idea of the whim and a county sheriff is going to have a whim to construe constitutional benefits for a longer period of time. But it's not a case of all, fringe benefits-- you get more fringe benefits on your job the longer you associated with your employee, which means two things. First of all I like to table pounding sound if you dont-- we can't have weapons and uniforms being conveyed on a whim of the sheriff but we determine that around we convey those items to people based upon by the heart of the sheriff decision to hire them or reappoint.

JUSTICE: What about the argument that you could create a perceived light to some deputy that was terminated because of the disability or for whatever reason?

MR. RUGG: Well, I'm not sure how that planned. If someone was terminated not to disregarding Workers Comp benefits but because I just don't want to pay that extra deuce-- the extra difference such salary-- such maximum salary and that's the form we're getting to. I don't think that that would be Workers Comp retaliation. It is-- I don't see how that officer would have any relief given-- at least existing case of why-- when this built ending as to totally the manner of discretion as the sheriff to constables as to fire people at the end of the term. So I don't see that that's going to affect, that's a style of concern for Workers Comp as to getting more response to anyone but I don't think that would influence the Sheriff decision one way or another and so if the Sheriff exercises discretion to keep someone on and that person-- again there's no pigs in the . They are only obligated to pay for the time they authorized to employ the procedure.

JUSTICE: Any further question? Thank you, Counsel. The case is submitted. The court will another brief recess.

CLERK: All rise.

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