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Supreme Court of Texas.
In re Eduardo 'WALO' Gracia BAZAN.
No. 06-0952.

September 26, 2007

Appearances:
Kelly K. McKinnis, McAllen, Texas, for Eduardo Walo Gracia Bazan,
for Petitioner.
CHERYL HOLE, Hidalgo County District, Edinburg, Texas, for
Respondent.

Before:

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

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MARSHALL: Be seated please.
CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-
0952 Eduardo Gracia Bazan v. -- rather, it's In Re Eduardo Gracia Brazan
[In re Bazan, 251 S.W.3d 39, Tex., 2008].
MARSHALL: Order in the Court.
CLERK OF COURT: Mr. McKinnis will present argument for the relator.
Relator has reserved five minutes for rebuttal

ORAL ARGUMENT OF KELLY K. MCKINNIS ON BEHALF OF THE PETITIONER

MR. MCKINNIS: May it please the Court. Good morning everybody. I'm
here representing Mr. Bazan. Mr. Bazan was a constable. He was tried and
convicted of a -- of felony. His case -- criminal case is on appeal.

JUSTICE: What kind of felony was it?

MR. MCKINNIS: It was a theft by a public servant.

JUSTICE BRISTER: What did he do, allegedly?

MR. MCKINNIS: They alleged that he had purchased a stolen car and
there was -- he -- he got a hold of a car that was not -- he wasn't
supposed to.

JUSTICE BRISTER: And what's the status of the criminal case?

MR. MCKINNIS: On appeal, pending appeal.

JUSTICE BRISTER: What is the status, for how long?

MR. MCKINNIS: Thirteenth District Court of Appeals. Corpus Christi
is approximately been on appeal since -- 'cause this has been pretty

close to a year and nine months or so. Yes, your Honor.

JUSTICE: Why did the state say it was bribery?

MR. MCKINNIS: There's no allegations of bribery. They were just quoting as I read the state's brief, I believe they were quoting from Article -- a particular Article of the -- Article 16, Section 2 of the constitution, your Honor, which says that, 'Law shall be made to exclude from office persons of being convicted of bribery, perjury, forgery, or other high crimes.' In the Exhibit 3, I believe it is to our -- to our -- our petition for mandamus shows the indictment and shows that it is theft by public servant. It was not bribery, your Honor.

CHIEF JUSTICE JEFFERSON: But it's a high crime.

MR. MCKINNIS: It is, yes, it is. That is pending on appeal. The thing that makes this complicated or the thing that gives us a position is Section 87.001 of the Local Government Code which says and I quote, 'An officer may not be removed under this chapter for an act the officer committed before election to office' -- Chapter 87, Local Government Code. The trial court judge purports to suspend, first to remove him from office and remove the relator from office and then to suspend him pending appeal under Chapter 87 of the Government Code. As the facts indicate and I believe it's undisputed and the indictment alleged an offense had occurred prior to Mr. Bazan taking office.

JUSTICE DAVID M. MEDINA: Doesn't that conflict with the Texas Constitution which states that laws shall be made to exclude from office, persons who have been or shall there -- hereafter be convicted with list of things including high crimes?

MR. MCKINNIS: Justice Medina, at first glance it would appear to conflict but he had -- that Section which you were reading from Article Section -- Article 16 Section 2 of the constitution has to also be read in conjunction with Article 16 Section 7 of Texas Constitution, which is entitled 'Removal of officers when mode not provided in constitution', and that says and I quote, it is very short, 'The legislature shall provide by law for the trial and removal from office of all officers of the state, the modes of which have not been provided in this Constitution'. And what it basically boils down to was that if there's a provision in the Constitution to remove an office holder -- that controls. If there's not, then you have to look to the law that the legislature enacts.

JUSTICE O'NEILL: So does resolution of this case depend upon whether the crime he committed was a high crime?

MR. MCKINNIS: No.

JUSTICE O'NEILL: Why not?

MR. MCKINNIS: Because even assuming arguendo that it is a high crime, the only way you get the removal -- Article 16 Section 2 says 'that law shall be made'. It did not say, how they're supposed to be made. It did not say this is the provision to be made. Section 7 says legislations provided by law and the constitution doesn't provide for a mechanism or laws to remove the person. So in this particular case, there is no provision in the constitution that provides for removal of a constable specifically. He's -- he's lumped in under the -- under the no modes have been provided in this constitution. That being the case, we go to Chapter 87 perhaps or we go to quo warranto under Chapter 66 of the Civil Practice and Remedies Code.

JUSTICE MEDINA: You said there was no provision specifically for constables, is that what your argument is?

MR. MCKINNIS: That's correct. There is a provision -- there is provision under chapter 87 of the Local Government Code which provides for removal of county officials and the constables included in that list

of under -- under the code, but is -- in the constitution itself there are specific provisions of the constitution that provide for removal of certain high officers, for example in some of the cases that the -- that the appellee has cited In Re Brown [In re Brown, 512 S.W.2d 317, 321 (Tex.1974)] for example. That was a case where they were trying to discipline a judge under Article 5 Section 1(a) of the constitution. That Section provides for a specific procedural mechanism to remove a judge.

JUSTICE MEDINA: So what's the purpose of Article 16 Section 2?

MR. MCKINNIS: Section 2, it -- it states -- it's to give the court the authority. It allows the legislature authority to enact laws in compliance with that, but it does not set for the specific mechanism by which an officer would be removed. The const--

JUSTICE O'NEILL: But didn't we -- didn't we pass across that bridge In Re Laughlin [In re Laughlin, 153 Tex. 183, 265 S.W.2d 805, 808 (1954)] and In Re Bates [In re Bates, 555 S.W.2d 420, 428 (Tex.1977)]?

MR. MCKINNIS: Well --

JUSTICE O'NEILL: We said that if they're unconstitutionally disqualifying, then they really don't meet the forgiveness doctrine or the constitution does prevail.

MR. MCKINNIS: Well, I would -- I would, your Honor, I would -- I would say that all of those cases In Re Laughlin for example was a case where lawyers were trying to remove a judge. Once again, we get to remove the judge, the case that goes under Article 60 -- Article 15 Section 6 which applies directly to judges and the mechanism to remove a judge is provided for expressly in the constitution. In the case at hand, there was no provision in the constitution that says to remove a constable, this is how you do it, 1, 2, 3. But there was in the Laughlin and in the Brown case. All those cases I submit arise under Section, though enacted under Section 7 of Article 16 which says pardon me -- let me state that again. The constitution with these cases like Laughlin and cases like Brown, they remove -- they sought to remove judges under specific Sections of the constitution, where those Sections provided the mechanism on how to remove the judge.

JUSTICE MEDINA: Well, how can a constable be removed then if it's not specifically stated in the constitution?

MR. MCKINNIS: The constable is removed one of two ways. Either under Chapter 87 where you can file a petition for removal of the Local Government Code as you can for any other county officials that's -- and they -- and they delineate -- they name by position of the county holders. The other mechanism to remove a constable would be under Chapter 66 of the Civil Practice and Remedies Code which is quo warranto or for district attorney or the attorney general believes that someone is conducting office without proper authority.

JUSTICE WILLETT: When did your client first take office? When was he first elected? And the alleged crime happened in October of '01. The re-election was in November of '04. What is the indication when he was first elected?

MR. MCKINNIS: I believe it was even before then, your Honor. I don't -- we do not have any --

JUSTICE WILLETT: But he was -- he was holding office at the time the alleged theft occurred.

MR. MCKINNIS: That is correct. But then he was reelected and under the --

JUSTICE WILLETT: But the conviction was for theft by a public servant? So --

MR. MCKINNIS: Correct, your Honor. But under the -- he was re-

elected -- he was charged with committing a crime in October 2001, that's what the indictment said. He wasn't indicted till 2006. From 2001, he gets reelected in 2004.

JUSTICE WILLETT: Well, the crux to me is OO-1 and his language is about committed, let me find the language, before election to office, does that mean a first election or only the most recent election?

MR. MCKINNIS: The Talamantez [Talamantez v. Strauss, 774 S.W.2d 661, Tex., 1989] case with Texas Supreme Court, Talamantez v. Strauss construed it to believe after, you know, every time he is elected so--

JUSTICE: So is that right?

MR. MCKINNIS: I believe-- I believe it's correct. I believe that the legislature has written Section 87.001 in such a way that -- that it is a little quark in the system. It's a quark and if they --

JUSTICE BRISTER: [inaudible] election to office. And I can imagine certainly a circumstance where somebody who is private citizen. They win a contested election. People that did not want him to win or mad at him, so they indict him for something that happened before the election. But it didn't say before being reelected. It says before election to office and in your guy's case, if he was elected in 2000 or before his election to office, we would -- if we just said, 'when was he elected to office?'. We would think 2000 or before. It wouldn't say, well, he was elected in office for 2000 and 2004.

MR. MCKINNIS: Your Honor, but by definition, one cannot be reelected without being elected.

JUSTICE BRISTER: Right. Right.

MR. MCKINNIS: And -- and he was elected and that -- it -- he was actually elected again and the Section doesn't say, you know, said and except when he has not been re-elected. We're looking at the code that the legislature has drafted and you know, that's what it says. It just says that if he is elected, and he was elected. Now, he was reelected too. But he was elected.

JUSTICE HECHT: If he had been charged and convicted during that -- during the same term that the crime was committed?

MR. MCKINNIS: Yes, your Honor.

JUSTICE HECHT: Then you agree he could be removed from office?

MR. MCKINNIS: If he was charged and convicted, or he hadn't been reelected in the interim, yes.

JUSTICE HECHT: And -- but then he could be run again, I suppose.

MR. MCKINNIS: If he got these problems cleared up and was no longer -- had a felony conviction, yes.

JUSTICE HECHT: And then he couldn't be removed so it seems to sort of depend on whether when things happened as opposed to whether they happened.

MR. MCKINNIS: Correct. Correct, I would agree with that.

JUSTICE WILLET: Constable's terms are four years?

MR. MCKINNIS: Yes, your Honor.

JUSTICE WILLET: So his term expires -- I guess at the end of '08?

MR. MCKINNIS: That's correct.

JUSTICE WILLET: Did he intend to run for reelection in '08?

MR. MCKINNIS: If he has his problems cleared up, I would imagine he would.

CHIEF JUSTICE JEFFERSON: He stayed in office or --

MR. MCKINNIS: He's been in office for sometime.

JUSTICE MEDINA: Is there any argument that this issue shouldn't be resolved until it's worked its way through the appellate cycle.

MR. MCKINNIS: Well, the thing that I -- I would -- I would say that that would not be appropriate, your Honor, Justice Medina, for the

reason that we're talking about that's before this Honorable Court, the workings of Sections 87.031 and 87.032. 87.031 says you can -- you can remove him from office when he gets convicted. And 87.032 says you can suspend him during the pendency and that's what they're trying to do. The thing that trumps all that -- though as 87.001 says, don't apply this. You can't -- you can't use this until somebody who gets reelected. He gets elected to office. So I would think that -- that at some point in time, this issue has got to be confronted by the court. It's gonna come up again one or another. It has come up before in the past.

And the cases that my opponent -- my learned opponent has quoted in her brief, the Brown case, the bar case, and the Laughlin cases, those are all cases where the Constitution provides specific mechanisms for removing that particular office holder. The Constitution talks about how you remove a judge. The Constitution talks about, how you remove a governor, how do you remove these high officers?

The Minton v. Perez [Minton v. Perez, 783 S.W.2d 803 (Tex.App.-San Antonio 1990, orig. proceeding)] case which has been discredited by the Texas Supreme Court, that was a case that involved the county commissioner. And in that case, they said well even though the code says that, they didn't really mean that. That's in essence what they said. 87.001 was a codification and codifications don't change the existing law or the existing primary codification.

Then the -- in the Fleming Foods v. Rylander [Fleming Foods of Texas, Inc. v. Rylander, 6 S.W.3d 278, Tex., 1999], the Texas Supreme Court, you all, came back and said that that's not the case. If -- if there's a change after codification, you go with the change. The law is what the law says it is. And I would -- I acknowledge that this is an unusual --

JUSTICE BRISTER: What [inaudible] this is -- this is difficult. We don't -- we don't want to encourage office holders to commit high crimes and misdemeanors and bribery the last year in office because they know they are up for reelection and therefore nothing could happen to them. And if we interpret 87.001 like you say, what would discourage him from the -- other than the fact that they could make them put it in finally and I guess --

MR. MCKINNIS: That's about --

JUSTICE BRISTER: -- I guess if under your authority, if he's unsuccessful and if he weren't probated, he would serve the rest of his term from prison?

MR. MCKINNIS: No. Once -- once -- once his conviction would become final, he got -- he got community supervision, your Honor.

JUSTICE BRISTER: Right.

MR. MCKINNIS: But once the conviction became final, that point in time, it would be appropriate to remove him from office.

JUSTICE BRISTER: Under what statute?

MR. MCKINNIS: Well, the appeal would no longer be -- be pending so they could remove him under the 87.031.

JUSTICE BRISTER: Not if 87.001 says --

MR. MCKINNIS: Oh, I'm sorry. They can remove under a quo warranto proceeding and it's Chapter 66 of the Civil Practice and Remedies Code.

CHIEF JUSTICE JEFFERSON: Do you think the legislature would say if they knew in advance that this conviction was going to be upheld, that it's okay to have a constable serve who is a theft -- a felon, someone who by -- that's where there -- the policy is all about because the electors thought it was okay? I mean, is that the policy?

MR. MCKINNIS: I think -- I think that the policy that the legislature was trying to enact is that a person is not -- a person

is entitled to his day in court and to exhaust his appellate remedies before being painted with a conviction. In this particular case where the voters have taken upon themselves to put this person back into office. They want the appellate process to play out before he is removed from office.

JUSTICE WILLETT: Did your client's alleged crime come to light before he was reelected? Was it known to the public at that point?

MR. MCKINNIS: I do not know that. A court -- I believe they are alleging that the crime happened in 2001.

JUSTICE WILLETT: Right.

MR. MCKINNIS: And I think that he was discovered -- you know, I don't know that. I think it was in 2004.

CHIEF JUSTICE JEFFERSON: Indicted in '06, is that right?

MR. MCKINNIS: He was indicted in 2006 and that's part of the problem too.

JUSTICE WILLETT: So, you wouldn't know if voters have this in their mind when they went to the polls in '04?

MR. MCKINNIS: I don't know. There was no evidence at that point. I am down to my 18 seconds unless I call a timeout or throw a pass out of bounds to stop the clock, I'm going to run out of time. I can answer any questions that you may have now or I can direct them in rebuttal. Thank you.

CHIEF JUSTICE JEFFERSON: [inaudible]. The Court is ready to hear argument from the state.

CLERK OF COURT: May it please the Court. Ms. Hole will present argument for the real party in interest.

ORAL ARGUMENT OF CHERYL HOLE ON BEHALF OF THE RESPONDENT

MS. HOLE: Please the Court. First thing I wanted to point out was two inaccuracies in the little synopsis which was in today's -- I hate to start out this way. There are two inaccuracies in the little summary that's supposed to be here today and I believe both of them both of them have been brought out. One is -- and I -- apparently the court wasn't concerned of the first one. It does say that this was for a conviction that occurred years before his reelection and I think that's been clarified. The conviction wasn't years before. The conviction was after the reelection. And we all submit that there was no -- certainly no great public knowledge that -- of the incident before the reelection.

JUSTICE MEDINA: Why would that -- why would that matter?

MS. HOLE: Excuse me.

JUSTICE MEDINA: Why would that matter?

MS. HOLE: It would matter for the -- if the Laughlin standard for upheld -- the forgiveness doctrine, that if the voters knew about it and elected him anyway that would -- then it is considered forgiven. I don't know that that applies in a situation where the party is constitutionally ineligible to hold office which we are submitting that is of standard here.

JUSTICE MEDINA: Why was there such a delay from the -- the time of the alleged incident and the time of an indictment? There's like five years.

MS. HOLE: Because the district attorney's office was not aware of it until Kellet (Spelling) went before the grand jury until shortly before there was enough evidence to present to the grand jury. So

we're saying if a person commits a heinous crime and is successful in concealing it until his reelection, you know, I -- I -- I'm free. That -- that doesn't make either good policy or just it does not make sense.

JUSTICE HECHT: Well, relator says you still got quo warranto. You have quo warranto available to you in that situation.

MS. HOLE: We do but not until as he said it's a final conviction or -- well -- quo warranto -- he has to be ineligible and if he has not been finally convicted, then he's not --

JUSTICE WILLET: So 031 doesn't --

MS. HOLE: -- under --

JUSTICE WILLETT: -- so 031 does not kick in until there's a final --

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MS. HOLE: Yes.

JUSTICE WILLETT: -- procedure.

MS. HOLE: And -- and just as a matter of fact, we -- constable Bazan apparently was -- had his peace officer's license revoked last December. We did not find out about it until last week and quo warranto that which since he no longer has a valid Texas peace officer's license he is ineligible to hold the office of constable and quo warranto has been filed in that case, but which could make this moot before this Court finally rules on it. But then again it's also in flux so at the moment it is not a moot situation. And we think we would like very much to have this situation resolved because, it does cause some conflict as to whether 8.001 trumps, 0--86.1 86.31 and 32.

JUSTICE HECHT: Do you wish that -- this statute goes back to at least 1879?

MS. HOLE: Yes it does.

JUSTICE HECHT: Right after the constitution was adopted.

MS. HOLE: Correct.

JUSTICE HECHT: And the only difference -- the only principal difference between Chapter 87 and 1879 statute was that, this 87.01 was at the end and now it's in the beginning. But it's hard to see that it could be any clearer than this, you're saying that -- here's all this process before convicting officers and removing him from office and then, when we get to the end of the it says but no officers shall be -- and even said prosecuted or removed. So, it was even broader for any act you may have committed prior to his election to office. How -- it just seems to me you can read them together because this is just an exception to the rest of the statutes.

MS. HOLE: Well, for one thing we would -- the Williams [Williams v. State, 142 Tex.Crim. 155, 150 S.W.2d 803, 805 (1941)] case addressed that back in 1941 and when it was the prosecution. And their -- the court's comment then was it was the most monstrous proposition that the writer or opinion ever heard advanced. You could be elected and therefore hold bets where you could be prosecuted, and you could murder, get elected then, you know, then it is not in common sense at all for that.

JUSTICE HECHT: But --

MS. HOLE: But --

JUSTICE HECHT: -- I mean, we can't rule out that the legislature may have intended, a monstrous situation. --

MS. HOLE: It may have.

JUSTICE HECHT: And it is just clear as a bell --

MS. HOLE: -- interesting thing over the course --

JUSTICE HECHT: And it is an 1879 and it even cites the constitutional provision that says, 'the legislature should make laws.' It looks to me like that they were doing what they thought was right.

MS. HOLE: However, it does not necessarily that, okay, there are other ways to remove an officer other than quo warranto and under 86 in the Predecessor's statutes, the removal statutes. One way is a conviction. But you can also remove an officer, without actually being convicted. And you can remove him for things other than the constitutional prohibitions, which I really don't see how anything the legislature does can trump the constitution without specifically saying so. It is true that constitution said, well, we'll provide these ways to remove certain officials and then the legislature will do the rest. That's common sense. They can't do everything. And the constitution shouldn't be too specific. But it also -- in the article that we say is a conflict 16 Section 2, doesn't specifically say removal it says that they may not be -- I have gone blank -- but it is -- they are excluded, just excluded, whether they are removed or they can't even hold office and if they get an office somehow they're still constitutionally excluded, they are not eligible to hold that office. That is a different proposition than removal and our argument is that removal statutes don't trump, the fact that the constitution said that law shall be made to exclude these -- these particular offenses.

JUSTICE BRISTER: Does talk with Talamantez rightly decided?

MS. HOLE: Talamantez is -- there's an odd opinion. And it's -- I counted 115 words and it is not particularly specific. We know that he was removed for --

JUSTICE BRISTER: So is it clear to your mind or not that 87.001 applies to his reelection as well as the initial election.

MS. HOLE: I have to play the devil's advocate I think it may well do so. I would not say that it doesn't, I would like to say no, it absolutely does not. But I think that it may and for the reason that it was mentioned. The purpose apparently of 001 is to prevent somebody who doesn't like to elect -- the person elected finding something -- digging up something to get him out of office even though the voters have specifically decided that this is the person they want. If they could for instance come up with a malfeasance of office, which doesn't necessarily have to be a crime because a certain thing was mishandled, a contract was given that some of the people didn't like, they make a case that this was malfeasance of office. He didn't investigate it well enough. It wasn't necessarily a crime but you could make a case that it was a malfeasance of office and he can be removed under several sections of 86 for that. --

JUSTICE BRISTER: There has to be a crime. Got to be -- you don't get removed unless it's a felony or misdemeanor.

MS. HOLE: Under 8 -- and I apologize I don't have those other Sections with me. There are other Sections of the Local Government Code.

JUSTICE BRISTER: Well, 87 -- I am just looking 87031 and it says, 'there's got to be conviction for a felony or misdemeanor.'

MS. HOLE: That is correct. That is a conviction. But, there are other Sections between 001 and 032. There are some other Sections for remove of -- of -- removing an official from office that do not require a conviction.

JUSTICE WILLETT: The brief refers, generally, to other constitutional provisions that exclude convicted persons from holding office you don't cite them specifically and I've got a -- (Inaudible) -- and I think I've found the ones that you are referring to. But do you have the specific Article and Section numbers before, if not that is all right but --

MS. HOLE: Not with me now.

JUSTICE WILLETT: I think I found it.

MS. HOLE: I'm deeply sorry.

JUSTICE WILLETT: Okay.

JUSTICE O'NEILL: What is a high crime?

MS. HOLE: I believe that the general definition of that is felony.

JUSTICE O'NEILL: Okay.

JUSTICE WAINWRIGHT: It sounded like you are suggesting that 87.001 and its reference to removing officer is not as broad as Article 16 Section 2 of the Constitution, which refers to excluding persons from office. If the legislature hadn't made a law, you're right, that's as broad as excluding. On what basis should we act to effect the more broad language in the Constitution? You don't -- you're not suggesting that we write a statute and then enforce it, are you?

MS. HOLE: No. Not -- not by any --

JUSTICE WAINWRIGHT: Is there a statute that is as broad as you are saying Section 2 is?

MS. HOLE: I think Section 2 covers it. It excludes from office, a person who has been convicted of, has been or will be convicted of either before and I -- I think the wording of that has been or will be in -- indicates before election to office or after election to office of the ---

JUSTICE WAINWRIGHT: But the Section -- the Section also says that, 'Law shall be made to effect that purpose.'

MS. HOLE: Correct.

JUSTICE WAINWRIGHT: Suggesting that -- I presume the legislature should make such laws --

MS. HOLE: Yes. And I -- I --

JUSTICE WAINWRIGHT: - and if the legislature has not made such laws, has the provision been effectuated.

MS. HOLE: I believe that it has by 0031 and 32. I believe that is the effectuating the exclusion from office because anybody convicted of under 031 or 32 also is gonna fall under the provisions of the Constitution.

JUSTICE WAINWRIGHT: As you pointed out, those provisions are for the removal not exclusion.

MS. HOLE: Correct.

JUSTICE WAINWRIGHT: I thought that was the distinction you are drawing?

MS. HOLE: Well, but I have to go back to the Election Code and hope that there is something in the Election Code and I believe there is. And I apologize I don't have, I can't give you a cite that excludes persons who had previously -- felons from being elected to certain public office -- went to public office. But --

JUSTICE HECHT: But reading all these together couldn't we say, that yes we have to make laws excluding some office persons who have been convicted and that law is quo warranto. And then we also have what has come to us now is Chapter 87 and this involves trials that may take place during an officer's term and if the offense and the conviction happened during the term, we can remove him but not, otherwise, you have to quo warranto and that harmonizes the whole thing.

MS. HOLE: If that's the case, there is no point in even having Section 31 and 32.

JUSTICE HECHT: Sure, there is. If it all happens in the same term you can, in that same -- very same order, remove him from office.

MS. HOLE: By that person who is convicted of -- of high crimes, bribery and so forth is not even eligible. And I -- it's our opinion -- that's why --

JUSTICE HECHT: You could -- there's a way to remove him, right?

There's a way to remove him.

MS. HOLE: There's a way to remove him but not immediately while Section 31 and 32 provides for immediate removal.

JUSTICE HECHT: Right. But the legislature could say, well if it happens during the same term of office, then -- it ought to be immediate, because you ought to get him out of there. He -- he'd done it while he was on duty. But if it happened before, go file the quo warranto and go through to the usual process.

MS. HOLE: But to file happening before is not going to help us at all because he still serve -- is in the term as Constable Bazan. It wasn't found out until this term of office, so he is still serving to possibly have a constable who has been convicted of murder or robbery, of theft. That doesn't give the public a good warm feeling that the person who is enforcing the law who has been convicted by a jury of his peers and I will point out that once a person is convicted, he no longer has a presumption of innocence. There is an appellate process and now the burden shifts on him to show why his conviction should not be upheld.

JUSTICE HECHT: But just so I'll be clear, your position is that it ought to be immediate, because he can be removed.

MS. HOLE: It ought to be immediate and in certain it is appropriate that the judge does not -- the trial court judge does not have to suspend it. --

JUSTICE HECHT: Right.

MS. HOLE: He can suspend, but he can't suspend if inappropriate case. He can suspend the --

JUSTICE HECHT: But you could have him --

MS. HOLE: -- removal and let the appellate process play out. And --

JUSTICE HECHT: But you could have him removed in a little time as it took to get a quo warranto.

MS. HOLE: You certainly could, and well except you can't fix the quo warranto until it's finished. So, meanwhile, you can have somebody who is convicted shortly after he is elected to serve another three plus years with a felony conviction over his head and certainly a lack of confidence in the public. And that's why legally there is a reason for removing him. If he is found -- if he's overturned on appeal, then the constable or the official isn't -- there's certainly some damage but then he can be reinstated with his full pay and he has not been replaced, only a temporary fill in can be appointed to serve while on the appeal. So there's not gonna be confusion that two elected officials.

JUSTICE WILLETT: All of Section one talks about immediate removal of persons convicted but you agree that you have to wait the final ultimate, once and for all.

MS. HOLE: That's correct. Meanwhile, all we need and want to do is suspend him waiting until this appellate process plays out --

JUSTICE WILLETT: What is the status of the appellate process?

MS. HOLE: Correct.

JUSTICE WILLETT: What is the status of the appellate process?

MS. HOLE: Excuse me.

JUSTICE WILLETT: What is the status of the criminal appeal?

MS. HOLE: In this case it is just, before the Thirteenth nothing has happened. We don't know. But it can take a while for the appellate process to play. And he could certainly appeal it on the up to the Court of Appeals --

JUSTICE WILLETT: Has it been argued at the Thirteenth Court?

MS. HOLE: It is at the Thirteenth Court. It has been -- as I

believe my Honorable opponent said for some -- over a year now.

JUSTICE GREEN: Has it been submitted? Has the case--

JUSTICE WILLETT: Have they had oral argument?

MS. HOLE: They have not to my -- to my knowledge. I can't say for sure, but I had not heard that it has been and I don't believe it has. I would --

JUSTICE O'NEILL: What statute would you give 87.001?

MS. HOLE: I would-- I think that Laughlin, if I'm putting the right case cite. Well, the Williams case of 1941, Williams v. State -- it's quoted in my brief-- court of criminal appeal's said that we think that the legislature in the act in of said law which referring to the predecessor to elective of 86.001 meant that the same should apply to any offense committed relating to malfeasance of office and certainly not to make him immune to punishment for other offenses. And we would say because the law change, certainly not to make him immune to removal and for any other offense, for the offenses which are constitutionally prohibited. If he is convicted of something that does not make him constitutionally eligible for removal, then 80.001 would serve as a--

MS. HOLE: -- misdemeanor.

JUSTICE WILLETT: What's the legal impact, if any, if we go home today, we take the case, we chew on it, contemplate, deliberate, it takes us a while to reach a decision as a practical matter you got the election process, you know, the political process, the judicial process here. And if things unfold on '08 say he wins in March and wins in November, takes office again. Does that have any legal impact on our decision today or on this case?

MS. HOLE: That I can't tell you. What I can tell you is that if this Court can clarify this matter and so we don't have to decide whether 80.01 trumps -- or 80.32 or whether the Constitution trumps everything. It will certainly be a great assistance in the future, because we've had number of incidents in our part of the country with elected officials and this generally comes up. And it would be I think a great service to the entire State of Texas if this could be resolved in a manner that slowly attorneys could understand and follow.

What we would ask this Court is that you overrule Talamantez to the extent that it conflicts with the Constitution, with Article 16 Section 2 of the Constitution. And it may not-- that case is so brief that it really doesn't let us know what the facts were and whether it is in conflict with the Constitution or not. But to the extent that it does, it should be overruled.

And we applied the doctrine found in the Laughlin case what's commonly being known to this district -- known as the forgiveness doctrine. And it is correct that that does specifically apply to the constitutional provision concerning judges. But in Laughlin they specifically have said, 'This holding is in harmony with public policy declared by the legislature with respect to other public officials in Article 5986, which is the predecessor to 86.001. I believe, it's the predecessor 86.01. But it's one of the predecessor about removal statutes. And even though it was specifically decided concerning a judge, there is just really not a lot of cases of on removal that can get up, as far as the Supreme Court or even to the Appellate Courts.

JUSTICE O'NEILL: Talamantez was convicted of official misconduct. Is that a high crime?

MS. HOLE: No.

JUSTICE O'NEILL: Or we do not know?

MS. HOLE: We do not know. That's true. But assuming it is not a

felony, then it would not -- would not come under the constitutional prohibition. They may just not have liked something that the commissioner did. I -- I -- we just don't know. I don't know.

CHIEF JUSTICE JEFFERSON: Are there any other questions?

MS. HOLE: No. No, of course the other thing is we would ask that you deny relief in this case.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

MS. HOLE: Thank you. I had 37 seconds.

CHIEF JUSTICE JEFFERSON: Appreciate it. Thanks.

REBUTTAL ARGUMENT OF KELLY K. MCKINNIS ON BEHALF OF THE PETITIONER

MR. MCKINNIS: May it please the Court. I wanted to answer a question that was put to me a few minutes ago and I didn't know the answer to it. And that was, when did this first get a notion that -- when did they first know that Mr. Bazan may have committed a crime. I went back and looked at the trial record and there was an exhibit submitted during trial which shows that the Hidalgo County Tax Office Fraud Investigation Division filed an offense report for abuse of official capacity against my client. And that was back on -- the date offense reported October 24, 2001. Why did they wait for almost five years to prosecute it? I don't know. I live in a political part of the country. I do not know why it took 4 1/2-5 years to prosecute it. But nevertheless it did.

JUSTICE HECHT: So does the filing -- if they filed, what was found?

MR. MCKINNIS: There is a -- official report to investigate a claim that my client had abused official capacity. In other words, there was the car incident came to light in that report.

JUSTICE HECHT: So does that mean that the public then was aware of it?

MR. MCKINNIS: Well, somebody was aware of it. At least the investigators were aware of it. I can't say that the public themselves knew about it ' cause the public would have well been aware of it. The DA had promptly prosecuted it but they waited for 4-1/2 years to go after him.

JUSTICE HECHT: The offense report is a public report?

MR. MCKINNIS: No, it's not. It is not a public report, your Honor.

JUSTICE: If so, that relates to the -- to the ultimate conviction under -- of your client?

MR. MCKINNIS: Yes. It was admitted into evidence at the time of the trial of the -- of the defense.

JUSTICE GREEN: Let me ask you a question followup with Justice Hecht, I'm trying to harmonize all of this. It makes of course a lot of sense that if somebody is convicted of official misconduct, that is misconduct while in office that you shouldn't be removed for things that you did before you were in office.

MR. MCKINNIS: Yes.

JUSTICE GREEN: So if Talamantez is correct or incorrect or maybe you don't know but it says all the acts to which Talamantez was convicted were committed prior to his reelection. That does not seem to conform with what the -- what statute says. If you took to 're' off of that in Talamantez, wouldn't that harmonize the statutes as Justice Hecht suggested? So, in other words, it doesn't matter. If you are in office with the election and reelection but you're in office then, he

cannot be removed for anything before you were in office and the reelection has nothing to do with it.

MR. MCKINNIS: Correct -- correct. I would agree with that. I would think that the election -- the fact that you got elected again comes into play. And I think that there is no significant distinction between election and reelection because to be reelected you must be elected.

JUSTICE GREEN: So, if that's true then you would lose.

MR. MCKINNIS: How -- how so?

JUSTICE GREEN: Well, because if -- if -- if your client was committing official misconduct while he held office, then he could be removed because that was not before he -- I think he held office.

MR. MCKINNIS: Well, but --

JUSTICE GREEN: In fact, he committed it before he --

MR. MCKINNIS: -- but he has been elected to position subsequent to that point and the offense would have committed -- that he was elected in 2004 and the offense occurred in 2001.

JUSTICE GREEN: Then you are saying that the reelection does make a difference.

MR. MCKINNIS: Well the -- yes. It does -- it does -- for the purpose of the statute --

CHIEF JUSTICE JEFFERSON: Mr. McKinnis, is what you are saying.

MR. MCKINNIS: Yes -- yes, your Honor. And you may not agree with 87.001. There's -- I have the advantage of doing a lot of federal work. I often see laws I don't agree with too much and I can't make any rhyme or reason of them. But is it -- I would submit to the Court that if the legislature, if there is a problem with the statute, it's really the legislature's job to come back and say, 'Look. We need to clear this up.'

JUSTICE GREEN: What is the status of the direct appeal on the Thirteenth Court?

MR. MCKINNIS: It is pending -- the records have been prepared -- extensive record and it hasn't gone to submission yet.

JUSTICE MEDINA: Mr. McKinnis, there was some discussion that -- the constables -- the peace officer's license has been revoked. What -- what impression does that have with us, if any?

MR. MCKINNIS: I do not think it has any position, as to the merits of this case, has any position in one way or the other because we have an officer in office regardless of whether you like him or not, whether he has been convicted or not. He is there and the law has to provide -- if they want to get him out, we have to go through a legal process. And I would think that -- that this issue would need to be decided regardless of that 'cause there are other ways to -- to remove an officer. 87 -- Chapter 87 says an expedited means to remove a constable or a county official from office. There are other means that are not so expedited.

JUSTICE MEDINA: Well, if he -- if he is removed because he doesn't hold a license as required by law prior to the time we resolve this case. Why wouldn't our issue --

MR. MCKINNIS: We would notify the Court if that -- that -- that might -- make this issue moot at that point. But that has not happened yet and he is entitled to a jury trial on that issue.

So, in closing and I would just say that there was one other statute rather Section of the Constitution which is Article 5 Section 4 which talks specifically about -- Section 24 -- Article 5 Section 24 which talks about removals of county officials including constables where incompetency, official misconduct, habitual drunkenness or other causes defined by law says here he's entitled to charges in writing and

a jury trial. So, with that, I'll ask if there's any more questions and if not, I thank you very much for your time.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes the arguments for today, and Marshall will adjourn the Court.

MARSHALL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

2007 WL 5233014 (Tex.)