

THE STATE OF TEXAS
Ex rel. JANA DUTY
COUNTY ATTORNEY OF
WILLIAMSON COUNTY, TEXAS

VS.

DAN A GATTIS, COUNTY JUDGE
OF WILLIAMSON COUNTY, TEXAS

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IN THE DISTRICT COURT

WILLIAMSON COUNTY,
TEXAS

26TH JUDICIAL DISTRICT

**PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY TO RESPONSE OF
PLAINTIFF TO DEFENDANT'S MOTION TO DISMISS**

Comes now The State of Texas Ex rel. Jana Duty, County Attorney of Williamson County, Texas, Plaintiff, and files this response to the Defendant's Reply to the Response of Plaintiff to Defendant's Motion to Dismiss and would show the Court as follows:

Reliance on *State of Texas ex. Rel. Hugh Russell v. Knorpp*, 575 S.W.2d 401 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.) is misplaced, and constitutes a gross misunderstanding of the nature of the "forgiveness doctrine." Rather, understanding the forgiveness doctrine and its application to the present case requires a brief analysis of the Constitution, Texas statutes, and relevant case law.

DISQUALIFYING ACTS

Prior to 2001, article XVI, section 2 of the Texas Constitution provided for exclusion from office "those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes."¹ The Constitution also provides for mandatory removal and

¹*Minton v. Perez*, 783 S.W.2d 803, 805 (Tex. App.—San Antonio 1990,). Article XVI, § 2 now provides that "[l]aws shall be made to exclude from office persons who have been convicted of bribery, perjury, forgery, or other high crimes."

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Lisa David
District Clerk, Williamson Co., TX

disqualification from office those officers that are impeached² or gave or offered bribes to hold office.³ Other than those constitutionally-mandated removal and disqualification provisions, the Constitution authorized the legislature to “provide by law for the trial and removal from office of all officers of this State.”⁴ As per the constitutional mandate, the Texas legislature determined officers that are convicted by a “petit jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer.”⁵ Wherever an officer is disqualified from office under the Constitution or statute, the officer shall be removed from office regardless of whether the officer’s misdeeds occurred before or after election to office.⁶

NON-DISQUALIFYING ACTS

Pursuant to constitutional mandate, the legislature enacted what is now sub-chapters A and B of Texas Local Government Code chapter 87.⁷ That section authorizes removal of county officers for conduct that is not necessarily “disqualifying,” though amounts to incompetency or official misconduct. Section 87.001⁸ provides “[a]n officer may not be removed under this chapter for an act the officer committed before election to office.” This specific statutory

²TEX. CONST. art. XV, § 4.

³*Id.* at art. XVI, § 5.

⁴*Id.* at art. XV, § 7.

⁵TEX. LOC. GOV'T CODE § 87.031(a); *In re Bazan*, 251 S.W.3d 39, 43–44 (Tex. 2008).
⁶*Bazan*, 251 S.W.3d at 42 (“when the acts in question are themselves disqualifying under the constitution, they cannot be forgiven by the electorate.”) (citing *In re Bates*, 555 S.W.2d 420, 429 (Tex. 1977); *In re Laughlin*, 265 S.W.2d 805, 808 (Tex. 1954); and *McInnis v. State*, 603 S.W.2d 179, 180 n.2 (Tex. 1980)).

⁷TEX. LOC. GOV'T CODE §§ 87.001 – .019 (formerly TEX. REV. CIV. STAT. arts. 5968–5987 (1925); *Bazan*, 251 S.W.3d at 43–44.

⁸Formerly TEX. REV. CIV. STAT. art. 5986 (1925)

provision has come to be known as the “forgiveness doctrine.”⁹

In 1954, the Texas Supreme Court first determined the forgiveness doctrine is not absolute.¹⁰ *Laughlin* involved removal of a district judge pursuant to article XV, section 6 of the Texas Constitution. That article provided that any Texas district court judge “who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct . . . may be removed” from office.¹¹ The Court noted the important distinction between *mandatory and permanent* removal because of acts that disqualify the official, and removal that does not disqualify the official from again holding office after duly elected.¹² The Court ultimately determined the *policy* of the section 87.001 forgiveness doctrine applies not only to removal of a county officer in a proceeding under sections 87.011–87.019 of the Texas Local Government Code, but also to other removal statutes and constitutional provisions that do not mandate the officer’s mandatory and permanent disqualification from office.¹³ The Court further declared that even in those instances of removal where the forgiveness doctrine *might* apply, the doctrine is not available to an official unless the acts complained of “were a matter of public record or otherwise known to the electors and were

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¹⁰*In re Laughlin*, 265 S.W.2d 805 (Tex. 1954).

¹¹*Id.* at 806 (emphasis added).

¹²*Id.* at 810 (referring to *Gordon v. State*, 43 Tex. 330 (Tex. 1875) (“Is the power to remove to carry with the greater punishment a disqualification to hold the office?”)).

¹³*Id.* at 808 (“removal [may not] be predicated upon acts antedating election, not in themselves disqualifying of this State, when such acts were a matter of public record or otherwise known to the electors and were sanctioned and approved or forgiven by them at the election. This holding is in harmony with the public policy declared by the Legislature with respect to other public officials. (citing Article 5986, R.C.S. 1925, Vernon’s Ann. Civ. St. (now TEX. LOC. GOV’T CODE § 87.001))).

sanctioned and approved or forgiven by them at the election.”¹⁴

Following *Laughlin*, the Texas Supreme Court issued a line of cases in keeping with the broad, but not absolute, application of the forgiveness doctrine where the officer’s conduct does not disqualify him from office. For example, in *In re Brown*,¹⁵ the Texas Supreme Court held the forgiveness doctrine might be available in an action to remove a district judge pursuant to a Constitutional provision authorizing, but not mandating, removal of a judge for certain “willful or persistent” conduct.¹⁶ Even so, *Brown* recognized the forgiveness doctrine’s application is limited to those instances where the public, with full knowledge of elected official’s misconduct, re-elects the official anyway.¹⁷

Again the issue was revisited by the Supreme Court in *In re Bates*.¹⁸ Bates involved the same constitutional removal provision as *Brown*. However, the district judge committed acts that were proven to constitute bribery, which would disqualify the judge from holding office.¹⁹

¹⁴*Id.*

¹⁵512 S.W.2d 317 (Tex. 1974).

¹⁶*Id.* at 318 (citing TEX. CONST. art. V, § 1-a(6) (“[A]ny Justice or Judge . . . may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discred upon the judiciary or administration of justice.”)).

¹⁷*Id.* at 321 (“The rationale for the [forgiveness] doctrine is the sound reason that the public, as the ultimate judge and jury in a democratic society, can choose to forgive the misconduct of an elected official. The underlying basis for the principle is that the public can knowingly return one to office in spite of charges of misconduct. Public access to full information was the basis for this court’s approval of the rule in *Laughlin*.”).

¹⁸555 S.W.2d 420 (Tex. 1977).

¹⁹*Id.* at 428 (“[t]he acts of Judge Bates while in office, but which antedate the re-election of Judge Bates, were acts which are “disqualifying under the Constitution and laws of this State. Since the acts of Judge Bates while in office and before his re-election were disqualifying under the constitution, they would not be forgivable under the so-called “forgiveness doctrine.”).

The Court started out by noting section 87.001 only applies to removal proceedings brought under sections 87.011 – 87.019. The Court clarified, however, that “even though [section 87.001] is not applicable to these removal proceedings, this Court has noted the legislative policy announced in [section 87.001]” as it applies to other types of constitutional and legislative removal proceedings.²⁰ The Court recognized, however, the two notable limitations to the forgiveness doctrine: first, it is not available when the acts supporting removal are disqualifying acts under the Constitution and laws of Texas; and second, when it is available, it may only be invoked “when such acts were a matter of public record or otherwise known to the electors and were sanctioned and approved or forgiven by them at the election.”²¹

Finally, the issue was addressed most recently in *In re Bazan*.²² *Bazan* asked whether section 87.001 forbids removal of a county officer who has been convicted of a felony, when the conviction is based on acts that occurred before the officer’s election.²³ Removal in this case was sought pursuant to section 87.031 of the Texas Local Government Code, which provides “the conviction of a county officer . . . for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer.” The Court held that section 87.001 is not available to officers removed pursuant to section 87.031, since the acts set forth in section 87.031 are disqualifying.²⁴ In reviewing the section 87.001’s applicability, the Court stated:

²⁰*Id.*

²¹*Id.*

²²251 S.W.3d 39 (Tex. 2008).

²³*Id.* at 40.

[Section 87.001] expresses what is sometimes called ‘the forgiveness doctrine,’ the idea being that pre-election conduct does not disqualify one from holding office the same way post-election conduct does. The doctrine’s rationale is that the public has the authority to ‘forgive the misconduct of an elected official’ following a campaign in which all the facts would presumably become known. The public’s power to forgive, however, is not without limits. It does not extend, for example, to felony convictions because a convicted felon is not qualified to hold public office, with or without the public’s consent. Thus, when the acts in question are themselves disqualifying under the constitution, they cannot be forgiven by the electorate.²⁵

Again, the Texas Supreme Court recognizes the public policy behind section 87.001, which is based on the public’s knowledge of the official’s misconduct prior to the election.

Gattis attempts to discredit over fifty-six years of Texas Supreme Court precedent by relying on *State ex. Rel. Russell v. Knorpp*²⁶ for the proposition that the forgiveness doctrine is available in this situation even if the public was unaware of Gattis’s misconduct before the last election. Indeed, *Knorpp* is facially compelling. However, as we well know, appellate courts do not always get it right.

In *Knorpp*, removal of the Potter County Attorney was sought pursuant to what is now sections 87.011 – .019 of the Texas Local Government Code.²⁷ Knorpp successfully argued that section 87.001 barred his removal from office for (non-disqualifying) acts charged to have been committed by him during a previous term of office.²⁸ The state argued Knorpp could only rely on section 87.011 if the public knew of the alleged acts prior to the election.²⁹ Reviewing *Laughlin*, the court disagreed. Despite the “public policy” underlying section 87.001 —

²⁴*Id.* at 43–44.

²⁵*Id.* at 42.

²⁶575 S.W.2d 401 (Tex. Civ. App.—Amarillo 1978, writ ref’d n.r.e.).

²⁷*Id.* at 402.

²⁸*Id.*

including the importance of public knowledge of the improper acts prior to re-election — that was recognized by *Laughlin, Brown, and Bates*, the court held only section 87.001's plain language (and hence not the long-recognized policy behind it) should be relied upon.³⁰ Accordingly, since section 87.001 does not expressly require public knowledge of the official's misconduct, the court held no such knowledge was required for section 87.001 to apply.

In reaching its conclusion, the court correctly noted the “forgiveness doctrine” is only available to conduct that is not “disqualifying.”³¹ Incredibly, however, the court proceeded to reason that since Knorpp’s conduct *was* “disqualifying,” the forgiveness doctrine did not apply to his removal. In other words, despite twenty-five years of case law holding that an officer engaging in disqualifying conduct *cannot* invoke the forgiveness doctrine but instead *must* be *permanently* removed from office, the court of appeals allowed Knorpp to invoke the forgiveness doctrine to forgive his disqualifying conduct and retain office.³² This conclusion is completely illogical, unsupported by case law, and completely uproots the public policy both that: 1) the forgiveness doctrine is only available for non-disqualifying conduct, and 2) when available, the doctrine is only effective when the public knew of the misconduct before re-election. Moreover, this approach was rejected by the Texas Supreme Court in the 2008 *Bazan* case. Accordingly, to rely on *Knorpp* in dismissing the petition for removal, the court would be turning over fifty-five years of established Texas Supreme Court precedent on its head in favor of one poorly reasoned court of appeals case. To do so would undermine the incredibly important public policy of

²⁹ *Id.*

³⁰ *Id.*

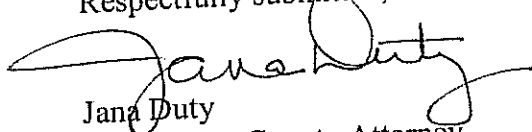
³¹ *Id.*

³² *Id.*

allowing voters to make informed decisions before allowing an officer to take or re-take office.

This court should not so allow.

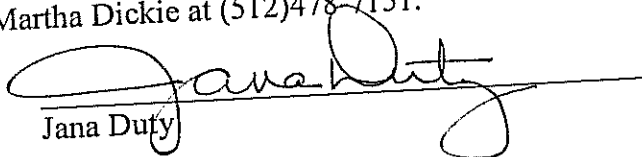
Respectfully submitted,



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Certificate of Service

This is to certify that on January 11, 2010, a true and correct copy of the above and foregoing was forwarded by facsimile to Martha Dickie at (512)478-7151.


Jana Duty