IN THE SUPREME COURT OF FLORIDA

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 16, AFL-CIO,

Petitioner,

vs. Case Number: 94,427

PUBLIC EMPLOYEES RELATIONS COMMISSION, et al.,

Respondents.
_________________________________/

BRIEF OF AMICUS CURIAE

Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees

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STATEMENT OF INTEREST

The Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees (FPD/AHPE) is a labor organization which represents numerous public and private employees in Florida and throughout the United States. The FPD/AHPE has had, and will continue to have, the opportunity to represent employees of various state, county and municipal officers through one or more of its affiliate organizations and therefore has a vital interest in whether persons serving as deputies or officers of these public employers enjoy the right to collectively bargaining guaranteed by Article I, Section 6 of the Florida Constitution. In particular, one affiliate organization, State Employees Attorneys Guild, seeks to represent attorneys employed by various state and local employers where the issue of deputy or appointee status is likely to arise in defining the appropriate bargaining unit. This case addresses the fundamental issue which will control the result in these cases.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to consider for the first time the efficacy of its decision in *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978), in light of this Court's subsequent decisions interpreting and applying Article I, Section 6 of the Florida Constitution, beginning with *City of Tallahassee v. Public Employees Relations Commission*, 410 So.2d 47 (Fla. 1981). These decisions establish that Article I, Section 6 guarantees the right to collectively bargain to all persons who are employees in the ordinary sense of the term and that this right may not be denied or abridged except based upon a compelling state interest implemented in the least intrusive means possible. Because this Court has itself determined that deputy sheriffs are employees in the commonly understood meaning of the term, they are presumptively covered by Article I, Section 6. So, too, are deputies of other officers such as the clerk of the circuit court. Any legislative or judicial abridgment of this right must pass the compelling state interest test.

The rationale of *Murphy* does not meet this exacting standard. In *Murphy*, this Court concluded that because the legislature had not specifically included deputy sheriffs in the statutory definition of "public employee," it would not do so either, based upon its prior case law interpreting and applying the common law as it pertains to sheriffs and their deputies. The strict scrutiny

standard, neither considered or applied in *Murphy*, requires precisely the opposite approach and should be applied in this case.

Moreover, this Court's decision in *Ison v. Zimmerman*, 372 So.2d 431 (Fla. 1979), fatally undermines the argument, found persuasive in *Murphy*, that restrictions on the sheriff's otherwise absolute control over the selection and retention of his deputies would unconstitutionally restrict the duties of the office of sheriff. In *Ison*, this Court summarily rejected the contention that deputy sheriffs should not be afforded civil service protection because of the encroachment that such protection would have upon the sheriff's absolute control over his choice of deputies, basing its decision on Article III, Section 14 of the Florida Constitution, mandating the establishment of civil service systems, and the intent of the Legislature in Section 30.53, Florida Statutes (1997), which specifically authorized the applicability of civil service systems to the office of sheriff. The impact of collective bargaining upon the independence of the sheriff in personnel matters is not materially different than, and may, in some circumstances, be less than, that of civil service systems. Consequently, the independence rationale of *Blackburn v. Brorein*, 70 So.2d 293 (Fla. 1954), adopted by the Court in *Murphy*, cannot constitute a compelling state interest sufficient to justify the wholesale exclusion of all deputy sheriffs or other deputies from the fundamental right to collectively bargain.

Murphy and the cases applying it to other officers create the anomalous result that appointed deputies are denied the fundamental right to collectively bargain but are guaranteed the right to a civil service system which, at the whim of the legislature, grants them essentially the same benefits and job security which they could expect to obtain through collective bargaining. There is no rational, much less compelling basis justifying this result which raises serious concerns about equal protection of the law.

As this Court recognized in *Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority*, 522 So.2d 358 (Fla. 1988), both the constitution and Chapter 447, Part II, Florida Statutes (1997), contemplate the simultaneous existence of both collective bargaining and civil service systems, but give priority to collective bargaining rights where a conflict arises. There can therefore be no justification for denying all appointed deputies fundamental collective bargaining rights while preserving their important, but not fundamental, rights under Article III, Section 14.

The concern which led the district court to certify this case to this Court applies, therefore, to deputy sheriffs as well as other appointed deputies: they look strikingly similar to other deputy sheriffs who are public employees by virtue of their inclusion under a local civil service system. The artificial distinctions applied in *Murphy* and subsequent decisions cannot

justify the denial of a fundamental constitutional right. If appointed deputies are public employees for purposes of civil service, they must be public employees for purposes of collective bargaining as well.

Accordingly, the Court should reevaluate *Murphy* in light of Article I, Section 6 and hold that neither deputy sheriffs nor deputies to other elected or appointed officers may be denied the fundamental right to collectively bargain merely because they are appointed.

ARGUMENT

THE RATIONALE OF *MURPHY V. MACK* IS NO LONGER VIABLE IN DETERMINING WHETHER PERSONS SERVING AS DEPUTIES TO ELECTED OR APPOINTED OFFICERS ARE PUBLIC EMPLOYEES ENTITLED TO EXERCISE THE RIGHT TO COLLECTIVELY BARGAIN GUARANTEED BY ARTICLE I, SECTION 6

The decision of the district court below was, as were the cases upon which it relies, based upon a literal and mechanical application of the rationale of *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978), to other officers who appoint deputies to exercise some or all of their powers. The district court correctly perceived that the result in *Murphy* was based upon special concerns about the impact of collective bargaining upon the sheriff's law enforcement duties which were inapplicable to other officers, including the clerk of the circuit court. While this distinction is a valid one and provides this Court with the opportunity to reverse the district court on that basis, this Court should take this opportunity to reconsider the rationale of *Murphy* itself in light of its subsequent decisions interpreting and applying Article I, Section 6 of the Florida Constitution.

This line of cases, beginning with *City of Tallahassee v. Public Employees Relations Commission*, 410 So.2d 47 (Fla. 1981), holds that Article I, Section 6 guarantees to persons who are employees in the ordinary sense of the term the right to collectively bargain which may not be denied or abridged based upon a compelling state interest implemented in the least intrusive

means possible. *Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority*, 522 So.2d 358, 362 (Fla. 1988); *State Employees Attorneys Guild v. State*, 653 So.2d 487 (Fla. 1st DCA 1995); *United Faculty of Florida v. Board of Regents*, 417 So.2d 1055, 1059 (Fla. 1st DCA 1982). Application of this test to the rationale of *Murphy* reveals that it is no longer a viable basis for determining the collective bargaining rights of deputy sheriffs or deputies to any other elected or appointed officers.

A. Persons Serving as Deputies to Elected or Appointed Officers Are Employees Within The Meaning of Article I, Section 6

Article I, Section 6 applies to persons who are, or who want to be, employees.[1] Consequently, the first question to ask in determining whether the right to collectively bargain applies is a question never asked by the Court in *Murphy*: Is the individual an employee as contemplated by Article I, Section 6?

[1] The term "persons" is used in the first sentence of Article I, Section 6 to assure that job applicants who are not yet employees are afforded protection from discrimination based upon membership or nonmembership in a union. This distinction has no application to cases such as this one where the individuals involved already have a job.

As noted by the First District Court of Appeal in *United Faculty*, 417 So.2d at 1058, Article I, Section 6 applies to employees in the common, ordinary understanding of the term, which was defined by this Court in *City of Boca Raton v. Mattef*, 81 So.2d 644, 647 (Fla. 1956):

> An employee is one who for a consideration agrees to work subject to the orders and direction of another, usually for regular wages but not necessarily so, and, further, agrees to subject himself at all times during the period of service to the lawful orders and directions of the other in respect to the work to be done.

Thus, the First District concluded that Article I, Section 6

> prevents the legislature from denying employee status to persons who are in fact employees unless the state can demonstrate a compelling interest justifying that abridgement.

417 So.2d at 1059.

In *Ison v. Zimmerman*, 372 So.2d 431, 436 (Fla. 1979), this Court held that "in the common meaning of the word 'employee', a deputy sheriff is an employee of the sheriff, or a person whose services are engaged and recompensed by the sheriff." There can be no question, therefore, that deputy sheriffs, as well as deputies to other officers, are employees as contemplated by Article I, Section 6.

The *Ison* Court was deciding whether there was a title defect in the special civil service act which applied to employees of the sheriff. Noting that the constitutional test for a title defect

must be strictly applied, this Court stated as follows in addressing the argument that deputy sheriffs are appointed officers, not employees:

> It is true that a deputy also is technically an officer of the sheriff as distinguished from an employee in the legalistic sense of the historic distinction between officers and employees. But this precisionist refinement upon the common meaning of 'employee' will not suffice to defeat the constitutionality of the Act's title.

372 So.2d at 436. Nor will such a precisionist argument defeat the application of the fundamental constitutional right to collectively bargain, the deprivation of which is subject to a constitutional test even more strict than that applicable to title defects. The constitution must also be interpreted in accordance with the plain and ordinary meaning of its terms. *In re Advisory Opinion to the Governor*, 374 So.2d 959, 964 (Fla. 1979).

Paraphrasing Judge Wigginton in *United Faculty*, because deputies to officers are unquestionably employees in the common understanding of the term, the pervading issue in this case is not whether the Petitioners have attempted to raise deputies to the level of collective bargaining - they obtained that right in 1968 with the adoption of Article I, Section 6 - but instead, whether they are to be deprived of that constitutional right. 417 So.2d at 1059.

B.
The Rationale of *Murphy v. Mack* Cannot Pass the Compelling State Interest Test

As this Court noted in *Hillsborough*, the compelling state interest test, also referred to as the strict scrutiny standard, is difficult to meet under any circumstance. 522 So.2d at 362. The rationale of *Murphy* does not present one of those rare occasions when the test is satisfied.

Based upon the language in the *Murphy* opinion, no consideration whatsoever was given to the question whether deputy sheriffs were employees as contemplated by Article I, Section 6. Rather, the Court analyzed the case as presenting only an issue of legislative intent to include deputy sheriffs within the meaning of "public employee" set forth in Section 447.203(3), Florida Statutes (1975). Finding no clear legislative intent to overrule its prior decisions holding that deputy sheriffs were not employees, this Court declined to include deputy sheriffs despite the failure of the legislature to specifically exclude the deputies to officers from the definition of "public employee" as it had done with respect to other persons holding positions by appointment in subsections (a) and (b) of Section 447.203(3), Florida Statutes (1975). 358 So.2d at 826. The apparent rationale for this construction was the special status the Court had afforded sheriffs in its prior decisions involving attempts to place restrictions on the otherwise absolute control of the sheriff over his deputies,

particularly *Blackburn v. Brorein*, 70 So.2d 293 (Fla. 1954). 358 So.2d at 824-25.

In *Blackburn*, this Court held that deputy sheriffs were appointees, not employees, and that, therefore, a Hillsborough County civil service law providing that deputy sheriffs were covered as employees was an unconstitutional encroachment upon the office of sheriff. In *Murphy*, this Court appeared to give particular significance to that portion of *Blackburn* which

> explained the necessity of a sheriff maintaining absolute control over the selection and retention of his deputies in order that law enforcement be centralized in a county and in order that the people be enabled to place responsibility upon a particular officer for failure of law enforcement.

358 So.2d at 825. Apparently, the Court perceived the imposition of collective bargaining and its attendant restrictions on the otherwise absolute control of sheriffs over their deputies as being unacceptable without an express statement by the legislature that it intended such a result.

Support for this interpretation of *Murphy* is found in *Ison* where the sheriff of Brevard County challenged a special act which created a civil service system for employees of the sheriff, including deputies, as an unconstitutional restriction on the duties of the office of sheriff. 372 So.2d at 433. Invoking the rationales of *Blackburn* and *Murphy*, the sheriff argued that deputy sheriffs should not be protected by civil service because of the

necessary encroachment such action would have on the absolute control of the sheriff over his choice of deputies. In response, this Court stated:

> We may dispose summarily of appellee's related contention that deputy sheriffs should not be protected by civil service. Appellee contends that deputies historically have been considered not employees but officers, imbued with some degree of sovereign power of the sheriff's office. Therefore, appellee concludes, a sheriff should have absolute control over his choice of deputies. However, we decline to approve judicially such a sweeping view of the sheriff's duties to retain his deputies. For this view would obviously contradict both: (1) the spirit of article III, section 14, the constitutional mandate for the establishment of civil service for "employees and officers" and (2) the clear legislative intent in section 30.53, with its specific exception to the independence of the sheriff's duties in furtherance of civil service systems.

372 So.2d at 435. In effect, this Court held that the enactment of Article III, Section 14 of the 1968 constitution overruled *Blackburn* to the extent that it held that a civil service system for deputies would unconstitutionally restrict the duties of the office of sheriff.

This holding is fatal to the rationale of *Murphy* as well because, if the restrictions imposed by a civil service system on a sheriff's control of his deputies is not unlawful, then neither can similar restrictions imposed by the process of collective bargaining. In fact, in *Florida Police Benevolent Association, Inc. v. Escambia County Sheriff's Department*, 5 FPER ¶ 1007 (1978),

PERC certified a bargaining unit for deputy sheriffs in Escambia County who were granted coverage under the Escambia County Civil Service Act as well as the right to collectively bargain by special act of the legislature. The First District Court of Appeal affirmed, relying upon *Ison* to reject the sheriff's claim that the legislature could not contravene the common law status of deputies by special act. *Escambia County Sheriff's Department v. Florida Police Benevolent Association, Inc.*, 376 So.2d 435, 436 (Fla. 1st DCA 1979). Simply put, whatever vitality the "unconstitutional encroachment on the office of the sheriff" theory had after *Murphy* was destroyed by this Court's decision in *Ison*.

The Respondents will probably argue that this assertion cannot be true because this Court in *Ison* specifically rejected the deputy's claim of rights as a public employee under Section 447.401, Florida Statutes (Supp. 1976), relying upon *Murphy*. The response is that, just as was the case when *Murphy* was decided, *Ison* was decided without the benefit of this Court's later line of cases refining the test for evaluation of the constitutionality of abridgments of Article I, Section 6. It therefore overlooked the applicability of this provision. There is, however, no reason to continue to do so.

The impact of collective bargaining upon the authority of the sheriff to select, control, and retain his deputies is not materially different from the impact of a civil service system.

Both processes seek to achieve the same result, providing uniformity, due process, and job security for covered employees. Moreover, because a public employer is not required to agree to a just cause provision in a collective bargaining agreement, collective bargaining arguably restricts the authority of the sheriff less than a civil service system. *In re Communication Workers of America*, 4 FPER ¶ 4135 (1978). There can be, therefore, no compelling state interest in excluding deputies from collective bargaining while at the same time permitting them to enjoy the benefits of civil service.

Continuing to apply the *Murphy* rationale to deputy sheriffs and deputies of other officers would create the anomalous result that these persons are denied a fundamental constitutional right set forth in the Declaration of Rights, but are guaranteed the right to enjoy the benefits of a civil service system having essentially the same impact upon the officer for whom they work. This result is made even more anomalous when one considers that whether persons performing essentially the same jobs as deputies have the benefit of collective bargaining or civil service protection is based solely upon the whim of the legislature, or more precisely, the politics of the local legislative delegation which effectively controls the enactment of special acts creating local civil service systems. Such a result fails to meet even the

rational basis test, much less the much stricter compelling state interest test.

This result also raises serious equal protection concerns. Under *Murphy* and its progeny, the legislature is permitted to treat similarly situated deputies differently for no reason other than the vagaries of state or local politics. Some deputies have civil service protection, some can collectively bargain, some have both benefits, but the vast majority have neither. This situation violates the equal protection provisions of both the state and federal constitutions even if the right denied was not a fundamental one such as the right to collectively bargain. *State v. Leicht*, 402 So.2d 1153, 1155 (Fla. 1981) (to be constitutionally permissible, a classification must apply equally and uniformly to all persons within a class and bear a reasonable and just relationship to a legitimate state objective).

Fortunately, this Court can rectify this situation by overruling *Murphy*. All deputies who are not serving as managerial or confidential employees would then enjoy the right to engage in or refrain from collective bargaining the same as other public employees. This Court has already recognized that both the constitution and Chapter 447, Part II, Florida Statutes (1997), contemplate the simultaneous existence of both collective bargaining and civil service systems. In *Hillsborough*, this Court found that there is no real conflict between the rights established

by Article I, Section 6 and Article III, Section 14, because both provisions are intended to benefit public employees. 522 So.2d at 362. This Court noted, however, that where the implementation of a civil service system conflicts with collective bargaining rights, the rights guaranteed by Article I, Section 6 must prevail. *Id*. There would be no conflict, therefore, with *Ison* and the legislature would remain free to implement Article III, Section 14 by law as it always has.

CONCLUSION

Deputies to elected or appointed officers are employees in the commonly understood meaning of that term as used in Article I, Section 6. They therefore presumptively enjoy the right to collectively bargain unless there is a compelling state interest implemented by the least intrusive means possible which justifies the denial of that fundamental right.

No reasonable argument can be made that there is a compelling state interest in denying such deputies this fundamental right where other similarly situated deputies performing identical duties are in fact granted the right to collectively bargain or enjoy the benefits of civil service protection which has essentially the same impact upon the authority of the officer to control his or her deputies as collective bargaining.

This Court's decision in *Murphy* creates no barrier to this conclusion because that case plainly did not consider the impact of Article I, Section 6 on deputy sheriffs and therefore never purported to apply the compelling state interest test. This Court should take this opportunity to so declare and restore to the hundreds of deputy sheriffs and deputies to other elected or appointed officials in this state the fundamental right to collectively bargain guaranteed by Article I, Section 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this ________ day of February, 1999, to: Joseph Egan, Jr., Esquire EGAN, LEV & SIWICA, P.A., Post Office Box 2231, Orlando, Florida 32802; Allen McKenna, Esquire, GARWOOD, MCKENNA, MCKENNA & WOLF, P.A., Post Office Box 60, Orlando, Florida 32802; Lorence Jon Bielby, Esquire, GREENBERG & TRAURIG, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and Steve Meck, Esquire and Christi Gray Sundberg, Esquire, PUBLIC EMPLOYEES RELATIONS COMMISSION, Suite 100, 2586 Seagate Drive, Tallahassee, Florida 32301-5032.

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