SUPREME COURT OF FLORIDA

SERVICE EMPLOYEES INTERNATIONAL,
LOCAL 16, AFL-CIO,

Petitioner,

CASE NO. 94,427

vs.

District Court of Appeal,
5th District - No. 97-3506

PUBLIC EMPLOYEES RELATIONS
COMMISSION, et al.,

Respondents.

_____/

On Appeal from the Fifth District Court of Appeal

AMENDED BRIEF ON THE MERITS OF PETITIONER

By: Joseph Egan, Jr., Esq.
Florida Bar No. 180102

Kathryn S. Piscitelli, Esq.
Florida Bar No. 368598

EGAN, LEV & SIWICA, P.A.
P.O. Box 2231
Orlando, FL 32802
(407) 422-1400

Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

The issue before this Court involves the constitutional rights of persons employed as deputy court clerks under Chapter 447, Part II, Florida Statutes, which was enacted to carry out the rights guaranteed to public employees under Article I, Section 6 of the Florida Constitution. Petitioner Service Employees International Union, Local 16, AFL-CIO ("Local 16," "Union," "Charging Party" or "Petitioner") seeks (1) an affirmative answer to a question concerning the constitutional and statutory rights deputy court clerks that has been certified by the Fifth District Court of Appeal as one of great public importance and, in connection with such affirmative answer, (2) reversal of a decision of the Fifth District affirming the summary dismissal of an unfair labor practice charge by the Public Employees Relations Commission ("PERC" or "Commission"). In that charge, Local 16 alleged that the Clerk of the Circuit and County Courts of the Ninth Judicial Circuit of Orange County ("Clerk") violated Section 447.501(a) and (b), Florida Statutes, by discharging Patricia O'Brien, a deputy court clerk, for engaging in protected union activities. The charge further asserted that O'Brien was a "public employee" within the meaning of Section 447.203(3), Florida Statutes. Although the Fifth District affirmed the summary dismissal, it certified the following question as one of great public importance:

ARE DEPUTY COURT CLERKS, UNLIKE DEPUTY

> SHERIFFS, PUBLIC EMPLOYEES WITHIN THE CONTEMPLATION OF ARTICLE 1, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 447.203(3), FLORIDA STATUTES?

(5th DCA decision, p. 3.) Petitioner urges the Court to answer affirmatively that deputy court clerks are covered under these constitutional and statutory provisions.[1]

The Charge

On October 1, 1997, Local 16 filed with PERC the unfair labor practice charge challenging O'Brien's discharge. (R. 1–7.) [2] The charge alleged that the Clerk terminated Patricia O'Brien from her position as "Court Specialist V" because she engaged in protected concerted activities. With respect to statutory coverage of O'Brien, Local 16 alleged that O'Brien was a "public employee" within the meaning of Section 447.203(3), Florida Statutes, because while employed with the Clerk, O'Brien:

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[1] However, Petitioner respectfully disagrees with the underlying assumption of the certified question that deputy sheriffs are not covered under Article I, Section 6, Florida Constitution, or Section 447.203(3), Florida Statutes.

[2] Petitioner wishes to note that it is citing to the record according to the page numbering provided by PERC in its Index to Record on Appeal. Petitioner has confirmed with PERC that there is no page 8 between pages 7 and 9 of the Record. Apparently, a blank page had been inadvertently counted as page 8 when PERC compiled the record. Accordingly, the Charge Against Employer appears on pages 1–7, followed by the Sworn Statement of Patricia O'Brien on page 9.

A. Was not appointed by the Governor or elected by the people, agency heads, or members of boards or commissions within the meaning of Section 447.203(3)(a), Florida Statutes.

B. Did not hold a position by appointment or employment in the organized militia within the meaning of Section 447.203(3)(b), Florida Statutes.

C. Did not act as a negotiating representative for employer authorities within the meaning of Section 447.203(3)(c), Florida Statutes.

D. Was not designated by the commission as a managerial or confidential employee pursuant to the criteria set forth in the Public Employees Relations Act within the meaning of Section 447.203(3)(d), Florida Statutes.

E. Did not hold a position of employment with the Florida Legislature within the meaning of Section 447.203(3)(e), Florida Statutes.

F. Was not convicted of a crime and was an inmate confined to an institution within the state within the meaning of Section 447.203(3)(F), Florida Statutes.

G. Was not appointed to an inspection position in federal/state fruit and vegetable inspection service within the meaning of Section 447.203(3)(g), Florida Statutes.

H. Was not employed by the Public Employees Relations Commission within the meaning of Section 447.203(3)(h), Florida Statutes.

I. Was not enrolled as a graduate student in the State University System and was not employed as a graduate assistant, graduate teaching assistant, graduate teaching

> associate, graduate research assistant or graduate research associate and was not enrolled as an undergraduate student in the State University System performing part-time work for the State University System, within the meaning of 447.203(3)(i), Florida Statutes.

(R. 2–4.) Local 16 also stated its belief that *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978), which held that deputy sheriffs are not public employees, and *Federation of Public Employees, Dist. No. I, Pacific Coast Dist., M.E.B.A., AFL-CIO* v. PERC, 478 So.2d 117 (Fla. 4th DCA 1985) (hereafter "*Federation of Public Employees v. PERC*"), which subsequently held that deputy court clerks are not public employees, were inapposite. (R. 3 at n. 1.) In this regard, Local 16 asserted that *Federation of Public Employees v. PERC* had erroneously extended *Murphy* to deputy court clerks. (*Id.*)

In support of its unfair labor practice claim, Local 16 made the following allegations:

- O'Brien had been employed by the employer for nearly 24 years.
- Approximately two weeks after meeting with the Union's president and signing a card, and shortly after voicing her support with fellow employees for unionization, O'Brien was summarily discharged, without due process.
- O'Brien's discharge notice stated that "termination of employment is required due to employee misconduct. Employee reported and was paid for more hours than she actually worked on repeated occasions."

However, she was not provided with any detail as to the nature of the "employee misconduct" or when and/or how she "reported and was paid for more hours than she actually worked on repeated occasions."

- The Unemployment Compensation Appeals Bureau concluded that O'Brien was not discharged for "misconduct."

- Prior to O'Brien's discharge, she was never asked about procedures she utilized for reporting hours worked and otherwise was never put on notice that she allegedly was doing anything improper.

- Prior to O'Brien's discharge, she had never been disciplined for any reason.

- During a post-discharge meeting with the Clerk, scheduled by O'Brien to find out why she had been fired, the first thing the Clerk said was "first of all, for the record, let me get this straight— I am not for the Union." The Clerk also said: "let me give you a word of advice— watch who you speak to and what you say."

- After O'Brien's termination, the Clerk conducted captive audience speeches with employees to speak against unionization, during which she referred to O'Brien's discharge.

(R. 4–5.)

General Counsel's Summary Dismissal

The General Counsel summarily dismissed the charge on October 13, 1997. (R. 15-

20.) As a threshold matter, the General Counsel found that Local 16 did not provide evidence that O'Brien was a "public employee" at the time she was discharged. (R. 17.) In reaching this result, the General Counsel relied on the decision of the Fourth District Court of Appeal in *Federation of Public Employees v. PERC, supra*. (R. 17.) The General Counsel stated that in view of the case law holding that appointed deputy clerks are not public employees, it was "incumbent upon Local 16 to provide evidence that O'Brien was not an appointed deputy clerk at the time she was dismissed." (R. 17.) The General Counsel further stated that "Local 16's disagreement with those decisions is not a basis upon which its charge can be determined sufficient." (R. 17.)

Alternatively, the General Counsel concluded that "[e]ven if Local 16 can show that O'Brien was a public employee at the time she was dismissed, the charge is nevertheless insufficient because it fails to provide evidence of a nexus between her protected activity and her dismissal." (R. 17.) According to the General Counsel, Local 16's charge did not allege "facts to show that the Clerk was aware of O'Brien's activities in support of the Union prior to her dismissal" and provide "evidence of animus toward either O'Brien or Local 16 prior to her dismissal." (R. 18-19.) The General Counsel refused to consider Local 16's allegation that the Clerk referred to O'Brien in anti-union speeches to employees after O'Brien's termination because the charge was not accompanied by an affidavit from a witness with personal knowledge

of what the Clerk said. (R. 19.) As for the Clerk's post-discharge comments to O'Brien that she disfavored unions and that O'Brien should "watch who you speak to and what you say," the General Counsel said such statements were "legal comment and may not be considered as evidence of an unfair labor practice so long as [they do] not threaten reprisal or force." (R. 18.) Although finding that the "proximate timing between O'Brien's activities in support of the Union created a suspicion that O'Brien was dismissed as a result of those activities," the General Counsel said that timing alone was insufficient to establish a prima facie violation of discrimination. (R. 17-18.)

Appeal to PERC

Local 16 appealed the General Counsel's summary dismissal to PERC on November 3, 1997. (R. 21–28.) With respect to the coverage issue, Local 16 argued that neither the Commission nor the Fourth District Court of Appeal had addressed the underlying rationale of *Murphy v. Mack*, *supra*.— the status of the employee at issue at common law— and the absence of any viable common law relationship between deputy clerks and clerks of the court. (R. 24–25.) Local 16 contended that summary dismissal was improper given that the Florida Supreme Court had yet to extend *Murphy* to deputy clerks, and fundamental constitutional rights of public employees to organize and bargain collectively were at issue. (R. 25.) Local 16 argued that the General Counsel should have at least allowed it an opportunity to make a record on this

issue, so as to permit appellate review. (R. 25.)

In its appeal to PERC, Local 16 challenged as well the General Counsel's alternative holding that the charge did not sufficiently allege a nexus between O'Brien's protected activity and her dismissal. Local 16 argued that the General Counsel inappropriately required it to prove its case in the charge itself, rather than merely requiring prima facie evidence. (R. 25.) It also contended that the charge alleged far more than mere timing. (R. 26.) The Union further asserted that the Clerk's anti-union statements to O'Brien were damaging admissions that should have been considered as evidence of unlawful motive and knowledge of O'Brien's union sympathies. (R. 27.)

On November 19, 1997, the Commission dismissed Local 16's appeal. (R. 29–32.) The Commission adopted the General Counsel's analysis of the charge and conclusion that the charge did not state a prima facie unfair labor practice violation. (R. 31.) According to the Commission, Local 16 failed to allege facts sufficient to demonstrate that O'Brien was a public employee and not an appointed deputy and that a nexus existed between O'Brien's protected activity and her termination. (R. 30–31.)

Appeal to Fifth District Court of Appeal

Local 16 appealed the Commission's decision to the Fifth District Court of Appeal on December 19, 1997. PERC and the Clerk were the party-appellees. The Florida

Association of Court Clerks, Inc., appeared as *amicus curiae* on behalf of the Clerk.

On November 6, 1998, the court affirmed the Commission's decision but certified the issue of whether a deputy court clerk is in fact a "public employee" within the contemplation of Article I, Section 6 of the Florida Constitution and Section 447.203(3), Florida Statutes. The court said it affirmed because "[w]e recognize the logical extension of *Murphy* (from deputy sheriff to deputy clerk) made by the *Federation* court based on its interpretation of the *Murphy* holding."(5th DCA decision, p. 3.) In this regard, the court noted that deputy court clerks are similar to deputy sheriffs in that they are "appointed" rather than "employed" pursuant to statute, and they have the power to act for their principal, the clerk of court, who is subject to liability for their misdeeds. According to the court:

> If the "appointed" as opposed to "employed" language in the statute relative to obtaining the services of deputies and the fact that they have the power to act for the sheriff and subject the sheriff to liability for their misdeeds or maldeeds were the sole bases for the decision in *Murphy*, then clearly our task is at an end. Indeed, *Federation of Public Employees v. Public Employees Relations Commission*, 478 So. 2d 117 (Fla. 4th DCA 1985), so interpreted the *Murphy* decision and held that deputy court clerks are not public employees.

(5th DCA decision, p. 2.)

However, the court certified its question regarding constitutional and statutory coverage of deputy court clerks "because of the material differences between the duties

and common law traditions of deputy sheriffs and deputy court clerks and because some of the considerations which influenced the *Murphy* court do not apply to deputy court clerks." (5th DCA decision, p. 3.) With respect to those differences, the court said:

> Our concern is that the supreme court in *Murphy* seemed to emphasize the law enforcement aspect of the deputies' powers and duties and the common law treatment of the position of sheriff and deputy. Such simply cannot be said of the office of Clerk of Court and those subordinates of the Clerk.
>
> We are also hesitant to compare deputy court clerks with deputy sheriffs because deputy sheriffs act constantly "on behalf of the sheriff" in their enforcement of the law. Such deputies are called upon to exercise independent discretion and judgment in carrying out their duties, duties that often involve life or death situations. On the other hand, deputy court clerks do not tote a gun or carry a badge; they take notes and file evidence. Their work is generally routine and involves very little discretion. Just observing them at work it would be difficult to distinguish between a deputy court clerk and a secretary. This is not to diminish the importance of the work performed by the deputy clerks of court, it is merely to point out that they look surprisingly like other public employees.

(5th DCA decision, pp. 2–3.)

Regarding the Commission's alternative ruling that summary dismissal of the charge was warranted because the charge insufficiently alleged a nexus between O'Brien's protected activity and her termination, the court stated:

> We recognize the Commission's position that the claim, in any event, did not meet the requirements of its rules, but believe that if O'Brien

> qualifies as a public employee, she should be permitted to file an amended claim.

(5th DCA decision, p. 3.)

SUMMARY OF THE ARGUMENT

A. Deputy court clerks employed by the Clerk of the Circuit and County Courts of Ninth Judicial District of Orange County are "public employees" within plain meaning of Chapter 447, Part II, Florida Statutes. Only those excepted categories of employees specificallyenumerated in Section 447.203(3), Florida Statutes, are excluded from the definitionof "public employee" under Chapter 447, Part II. Deputy court clerks are not excluded under the terms of the statute.

B. This Court's decision in *Murphy v. Mack* is inapplicable to deputy court clerks. The underlying rationale used by the Court*Murphy* in excepting deputy sheriffs from the protection of Chapter 447, Part II was based upon the strong common law history of treating deputy sheriffs as public officers rather than employees of sheriffs. There is no comparable common law history to support excluding deputy court clerks. Moreover, other considerations that may have influenced the Court's decision in *Murphy* do not apply to deputy court clerks.

C. The fact that deputy court clerks are "appointees" or "deputies" does not and cannot create a conclusive presumption that they are not "employees" for purposes of

Chapter 447, Part II. So long as they are "employees" within the common meaning of the term, they are presumptively covered under the statute. Indeed, evidence shows that they are regarded by the Clerk and courts to be "employees" in the usual sense of the word.

D. Deputy court clerks are public employees within the contemplation of Article I, Section 6 of the Florida Constitution. Article I, Section 6 guarantees the right to join or not to join a union to "persons," and the right to collectively bargain to "employees." Deputy court clerks are "persons" and "employees" within the common meaning of those terms. Arcane, legalistic doctrines that have been used in other contexts to create a fiction that a deputy is not an employee have no bearing on the construction of this constitutional provision.

E. Chapter 447, Part II implements the rights guaranteed to public employees by Article I, Section 6 of the Florida Constitution. There is no showing of a compelling state interest to abridge the fundamental rights that deputy court clerks have under Article I, Section 6.

F. To imply from *Murphy* an exception from Chapter 447, Part II for all deputies of elected county officers is completely unwarranted. Not only did *Murphy* not purport to create such a sweeping exception, but such an exception would constitute an unconstitutional judicial usurpation of the legislative function and abridgment of

fundamental rights under Article I, Section 6, Florida Constitution.

ARGUMENT

I. DEPUTY COURT CLERKS ARE PUBLIC EMPLOYEES WITHIN THE CONTEMPLATION OF SECTION 447.203(3), FLORIDA STATUTES

A. Deputy Court Clerks Are "Public Employees" Within the Plain Meaning of the Statute

"Public employee" is defined under Section 447.203(3), Florida Statutes, as follows:

> (3) "Public employee" means any person employed by a public employer except:
>
> (a) Those persons appointed by the Governor or elected by the people, agency heads, and members of boards and commissions.
>
> (b) Those persons holding positions by appointment or employment in the organized militia.
>
> (c) Those individuals acting as negotiating representatives for employer authorities.
>
> (d) Those persons who are designated by the commission as managerial or confidential employees pursuant to criteria contained herein.
>
> (e) Those persons holding positions of employment with the Florida Legislature.
>
> (f) Those persons who have been convicted of a crime and are inmates confined to institutions within the state.
>
> (g) Those persons appointed to inspection positions in federal/state fruit

and vegetable inspection service whose conditions of appointment are affected by the following:

1. Federal license requirement.

2. Federal autonomy regarding investigation and disciplining of appointees.

3. Frequent transfers due to harvesting conditions.

(h) Those persons employed by the Public Employees Relations Commission.

(i) Those persons enrolled as graduate students in the State University System who are employed as graduate assistants, graduate teaching assistants, graduate teaching associates, graduate research assistants, or graduate research associates and those persons enrolled as undergraduate students in the State University System who perform part-timework for the State University System.[3]

(j) Those persons who by virtue of their positions of employment are regulated by the Florida Supreme Court pursuant to s. 15, Art. V of the State Constitution.[4]

Section 447.203(3) sets forth two criteria determining whether a person is a "public

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[3] The exemption for several categories of graduate student employees contained in Section 447.203(3)(i) has been held to violate Article I, Section 6, Florida Constitution. *United Faculty of Florida v. Board of Regents, State University System*, 417 So.2d 1055 (Fla. 1st DCA 1982), *as clarified and modified*, 423 So.2d 429 (Fla. 1st DCA 1982).

[4] The exemption for publicly-employed attorneys contained in Section 447.203(3)(j) has been held to violate Article I, Section 6, Florida Constitution. *Chiles v. State Employees Attorneys Guild*, 714 So.2d 502 (Fla. 1st DCA 1998), *appeal pending*, Fla. Sup. Ct. Case No. 93,665.

employee": (1) the person must be an employee of a public employer; and (2) the person's position must not fall into any of the categories of exempted positions enumerated in Section 447.203(3)(a)–(j). Given that Petitioner's unfair labor practice charge challenging O'Brien's termination was summarily dismissed, Petitioner never had an opportunity to develop a record to show that O'Brien satisfied this two-prong test. Petitioner should have at least been given such an opportunity. Nevertheless, Petitioner will take the opportunity now to express its conviction that O'Brien satisfied the two statutory criteria for public employee status.

With respect to the first prong of the two-part test, Petitioner asserts that O'Brien was an "employee" of a "public employer." The Clerk's status as a "public employer" has not been contested. In fact, the Commission has previously found a clerk of circuit and county courts to be a "public employer" as that term is defined in Section 447.203(2), Florida Statutes. *Federation of Public Employees, District No. 1, Pacific Coast District, M.E.B.A., AFL-CIO v. Clerk of the Circuit and County Courts of the Seventeenth Judicial Circuit of Broward County*, 10 FPER (LRP) ¶15,287 (PERC 1984) (hereafter "*Federation of Public Employees v. Clerk"), aff'd, Federation of Public Employees v. PERC, supra*. As to O'Brien's status as an "employee," the Florida Supreme Court has defined an "employee" as:

> 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.

City of Boca Raton v. Mattef, 91 So.2d 644, 647 (Fla. 1956). Petitioner contends that O'Brien, in her position as deputy court clerk, fell within this definition of "employee." Indeed, the Clerk herself viewed O'Brien as an "employee," as is shown by her calling O'Brien an "employee" throughout her notice of termination of O'Brien's employment. (R. 11.)

Regarding the second prong of the two-part test, O'Brien's position as deputy clerk did not fall into any of the categories of exempted positions enumerated in Section 447.203(3)(a)–(j). Indeed, Petitioner specifically alleged in its unfair labor practice charge that O'Brien did not hold any of the excepted positions when she worked for the Clerk. There is no question that O'Brien was "appointed" to serve as a "deputy." But there simply is no language in subsections (a)–(j) that would remove her from the "public employee" definition on the basis of her status as a "deputy" or "appointee." The provision contains no express exclusion for deputies of any type, and, although certain other types of appointees are exempted, it provides no explicit exemption for appointees of clerks of the courts.

Accordingly, on the face of Section 407.203(3), deputy court clerks such as O'Brien

clearly fall within the definition of "public employee." Where, as here, the language of a statute is clear and unambiguous, departure from the plain meaning of the language is not authorized. *See St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982).

B. ***Murphy v. Mack*** **Has Been Mechanically Applied Beyond the Sheriff-Deputy Context**

Nearly fifteen years ago, the Fourth District Court of Appeal set back the clock on deputy court clerks' unionization and collective bargaining rights under Chapter 447, Part II, Florida Statutes, when it held in *Federation of Public Employees v. PERC*, *supra*, that deputy clerks of a circuit court are not "public employees" under Chapter 447. The Fourth District's short *per curiam* decision reflexively relied on the Florida Supreme Court's decision in *Murphy v. Mack*, *supra.* In merely four sentences, the court decided the matter as follows:

> The Hearing Officer, the Commission and appellee relied upon the case of *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978), which held that, although the sheriff is a public employer under Florida law, deputy sheriffs are not public employees— they are appointed pursuant to section 30.07, Florida Statutes (1975). Therefore, deputy sheriffs are not governed by the provisions of Chapter 447, Florida Statutes (1975). The ratio decidendi of that case is entirely applicable to deputy clerks of the circuit court. They are appointed by the clerk to act for him and are not public employees in the statutory sense used in Chapter 447, Florida Statutes.

478 So.2d at 118. The underlying PERC decision in *Federation of Public Employees*

similarly applied *Murphy* in a mechanical fashion. *Federation of Public Employees v. Clerk, supra*. Moreover, that decision was issued over a vigorous, well-reasoned dissent by Commissioner Grizzard.

Significantly, the Fourth District failed to address the underlying rationale of *Murphy*—the common law status of the "employee" at issue— and other important considerations that influenced the *Murphy* decision. In the absence of any careful analysis of *Murphy*, the Fourth District read *Murphy* as standing for the proposition that any deputy hired by a public employer pursuant to a law authorizing the employer to "appoint" deputies to act on the employer's behalf is not a "public employee" covered under the statute. This interpretation of *Murphy* was subsequently used by the First District Court of Appeal to find that deputies of a property appraiser were not public employees. *Florida Public Employees Council 79, AFSCME v. Martin County Property Appraiser*, 521 So.2d 243 (Fla.1st DCA 1988).

In the instant case, the Fifth District Court of Appeal applied the Fourth District's reading of *Murphy* in finding that O'Brien was not a "public employee." However, the Fifth District did not put on blinders to the underpinnings of *Murphy*. Recognizing that material differences exist between the duties and common law traditions of deputy sheriffs and deputy clerks and that some of the considerations that influenced the *Murphy* court do not apply to deputy court clerks, the Fifth District appropriately

certified the question of whether deputy courts clerks are public employees as one of great public importance.

C. Deputy Court Clerks Are Distinguishable from Deputy Sheriffs

Deputies of the Clerk are similar to deputy sheriffs in that they are "deputies" of an elected county officer, they are "appointed" pursuant to statute, the officer is liable for their official acts, and the officer's powers may be delegated to them. Article VIII, Section 1(d), Florida Constitution; §§ 28.06, 30.07 and 34.032(1), Fla. Stat. (1997). Despite these similarities, there are material differences between deputy court clerks and deputy sheriffs that preclude application of *Murphy* to deputy court clerks.

1. Common Law Status

In *Murphy*, the Florida Supreme Court declined to identify deputy sheriffs as "public employees" on grounds that doing so would violate established principles of common law. In this regard, the Court quoted with approval the following excerpt from 70 Am.Jur.2d Sheriffs, Police and Constables §2, 358 So.2d at 825:

> The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment, as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or municipal officer within the meaning of constitutional provisions. . . .

The Court noted that its prior decisions had adhered to the common-law principle

that the relationship between sheriff and deputy is not an employer-employee relationship:

> The relationship between sheriff and deputy has not been recognized by this Court to be that of employer and employee. To the contrary, this Court has expressly held that a deputy is not an employee, which is consistent with the common-law concept of deputy sheriffs. . . .
>
> * * *
>
> Rather than changing or modifying the traditional conception of the relationship between a sheriff and his deputy, this Court has ofttimes recognized the peculiar status of the deputy.

358 So.2d at 825. In light of this backdrop of case law, the Court refused to presume any legislative intent to cover deputy sheriffs as "public employees" under Chapter 447, Part II, Florida Statutes:

> Since deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them within the definition of public employee without express language to that effect. In the absence of express language including deputy sheriffs within the definition set forth in Chapter 447, Florida Statutes (1975), we find they are not encompassed by the act.

358 So.2d at 826.

In contrast, identification of deputy court clerks as "public employees" would not be contrary to established common law principles. In his scholarly dissenting opinion in *Federation of Public Employees v. Clerk*, *supra*, at 666–69 (dissent), Commissioner Grizzard explored the question of whether the common law still governed the

employment status of deputy court clerks. His research yielded a negative answer to this question:

> The status of deputy clerks at common law has not received definitive treatment in Florida judicial decisions, apparently because the question of the liability of the clerk for the actions of his deputies has long been governed by specific statutory provisions. See *Peninsula Land Co. v. Howard*, 6 So.2d 384 (Fla. 1942); 28.06 and 34.032, Fla. Stat. (1983). In other states the issue has arisen almost exclusively as a question of when a clerk is liable for the acts of deputies, with conflicting results. . . . Such decisions offer little guidance because they often hold that liability attaches, or does not attach, regardless of whether a deputy clerk is viewed as "a distinct and independent officer, or as the mere agent or servant of the principal." *City of Duluth v. Ross*, 140 Minn. 161, 167 N.W. 485, 487 (1918) (quoting 9 Am. & Eng. Ency. of Law at 390 (2d ed.)). From this examination of the status at common law of the clerk, deputy clerks and the relationship between the two, I conclude that the common law which once governed the clerk and deputy clerks has little or no vitality in Florida or other states. . . .

Federation of Public Employees v. Clerk, supra, at 668 (dissent).

Rather than being governed by common law, the relationship between clerks of court and their deputies in Florida today is governed by statute. Clerks of the Florida Supreme Court and the district courts of appeal are statutorily authorized to "employ," rather than "appoint," deputy clerks. §§ 25.241(2) and 35.22(2), Fla. Stat. (1997). While clerks of the circuit courts "appoint" deputy clerks of the circuit and county courts, statutes are the source of their appointment power. §§ 28.06, 34.032(1), Fla. Stat. (1997). Moreover, appointments of deputy clerks of the county courts must be

"[w]ith the concurrence of the chief circuit judge of the circuit." § 34.032(1), Fla. Stat. (1997). Such a limitation on appointment authority did not exist at common law. *Federation of Public Employees v. Clerk, supra,* at 669 (dissent).

That the power of circuit courts clerks to appoint deputies is derived from statute, rather than common law, is consistent with the mandate of Article II, Section 5(c) of the Florida Constitution:

> The powers, duties, compensation and method of payment of state and county officers shall be fixed by law.

Thus, clerks of the circuit courts, being county officers, possess only those powers that have been granted to them by statute. *See Alachua County v. Powers,* 351 So.2d 32, 35 (Fla. 1977) ("[t]he Clerk is a constitutional officer deriving his authority and responsibility from both constitutional and statutory provisions");*Security Finance Co. v. Gentry*, 109 So. 220, 222 (Fla. 1926) ("[t]he Clerk's authority is entirely statutory and his official action to be binding upon others must be in conformity with the Statutes"); Op. Att'y Gen. Fla. 081-31 (1981) ("the clerk of the circuit court possesses no inherent powers and can exercise only such authority as has been expressly, or by necessary implication, conferred upon him by law"); Op. Att'y Gen. Fla. 98-65 (1998) ("the clerk of court is a ministerial officer whose authority and responsibility are derived from both statutory and constitutional provisions").

Because the common law thus has no present force and effect in Florida with respect to deputy clerks of the circuit and county courts, *Murphy* does not require a finding that they lack "public employee" status. Although not expressly doing so, the *Murphy* court applied the principle of statutory construction that statutes in derogation of the common law must be strictly construed. *See In re Estate of Levy,* 141 So.2d 803,805 (Fla. 2d DCA 1962) (and cases cited therein). That principle has no application to coverage under Section 447.203(3), Florida Statutes, of deputy clerks of the circuit and county courts, whose status as "appointees" is based upon Florida *statutory* law. Indeed, given that the common law status of deputy court clerks had long been eroded by 1974, the year that Chapter 447, Part II, Florida Statutes, was enacted, the legislature could not have intended to exclude deputy clerks from the definition of "public employee," as it may have in the case of deputy sheriffs.

2. Nature of Duties

As the Fifth District Court of Appeal observed in its decision below, "the supreme court in *Murphy* seemed to emphasize the law enforcement aspect of the deputies' powers and duties." (5th DCA decision, p. 2.) The Court in *Murphy* favorably cited and discussed its prior decision in *Blackburn v. Brorein*, 70 So.2d 293 (Fla. 1954), which held that deputy sheriffs were not employees and thus not subject to coverage under a civil service act. *Blackburn* stressed the importance of law enforcement in examining

the sheriff-deputy sheriff relationship, and such emphasis was specially noted in *Murphy*:

> [In *Blackburn*], this Court incidentally 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.

Of course, court clerks and their deputies do not have law enforcement responsibilities. So, to the extent that *Murphy* was premised on the law enforcement aspect of deputy sheriffs' powers and duties, that basis for denying employee status is absent in this case.

Besides the fact that deputy court clerks are not responsible for law enforcement, the nature of their work fundamentally differs from that of deputy sheriffs in that they are not called upon to exercise discretion and independent judgment in carrying out their duties. As the Fifth District noted below, the work of deputy sheriffs often involves life or death situations. Indeed, deputy sheriffs may face circumstances where they must independently decide whether to kill another person. *See Blackburn v. Brorein*, 70 So.2d at 297 ("[p]erhaps the highest executive duty imposed upon a sheriff is that of taking a human life pursuant to lawful authority"). By contrast, as the Fifth District observed, the work of deputy court clerks, such as filing evidence and taking

notes, is generally routine and involves very little discretion. Indeed, courts have recognized that court clerks' duties are ministerial rather than discretionary in nature. *See Ferlita v. State*, 380 So.2d 1118, 1119 (Fla. 2d DCA 1980) ("[a] clerk acts in a purely ministerial capacity, and has no discretion to pass upon the sufficiency of documents presented for filing") (and cases cited therein). Accordingly, if the exercise of discretion and independent judgment in carrying out delegated duties was a key consideration in *Murphy*, such a criterion for denying employee status is absent with respect to deputy court clerks.

3. Constitutional Recognition

The Florida Supreme Court's conclusion in *Blackburn v. Brorein, supra*, that deputy sheriffs were not employees rested in part on the fact that the Florida Constitution "definitely recognized the existence of deputy sheriffs" by making "special mention" of them. 70 So.2d at 295. The 1885 Florida Constitution was in effect at the time of *Blackburn*, and the constitutional provision to which the *Blackburn* court referred concerned the residence of the sheriffs. *Id.* (quoting Article XVI, Section 4, Florida Constitution (1885)). The same provision also addressed the residence of circuit court clerks and mentioned deputy clerks:

> . . . [T]he Clerk and Sheriff shall either reside or have a sworn deputy

within two miles of the county seat.

Article XVI, Section 4, Florida Constitution (1885).

That provision does not appear in the current Florida Constitution. The current constitution mentions deputy sheriffs in Article V, Sections 3(c) and 4(c). Those sections empower the marshals of the Florida Supreme Court and district courts of appeal to deputize the sheriff or a deputy sheriff in any county to execute process.

However, no mention is made of deputy court clerks in the current Florida Constitution. Accordingly, there is no "constitutional recognition" basis for concluding that a deputy clerk is not an "employee."

4. Statutory Delegation

Although at first blush, the extent of power delegated to the deputy clerks of the circuit and county courts under the Florida Statutes appears to be as extensive as that of deputy sheriffs, a comparison of the statutory language shows that this is not necessarily so. Deputy sheriffs "shall have the same power as the sheriff appointing them" (except the power to appoint deputies). §§ 30.07, 30.073, Fla. Stat. (1997). With respect to the deputy clerks of the circuit and county courts, "said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk may exercise" (except the power to appoint deputies). §§ 28.06, 34.032(1), Fla. Stat. (1997). Deputy sheriffs are clearly delegated the same power as the sheriff. However,

in the case of circuit and county court deputy clerks, the statutory language seems to contemplate a parceling out of duties among the deputies, rather than a full delegation to each of them of all the powers of the clerk.

Significantly, prior to 1943 amendments, Section 28.06, Florida Statutes, which establishes the power of the clerks of the circuit court to appoint deputies, provided that the clerks' deputies had and exercised "the same powers as the clerks themselves."[5] § 28.06, Fla. Stat. (1941). The 1943 amendments, among other things, replaced "same powers" with "each and every power." Ch. 21956, § 1, Laws of Fla. (1943) (amending §28.06, Fla. Stat. (1941)). The removal of the "same powers" language may have been intended to allow for a limited, rather than blanket, delegation of a clerk's powers to individual deputies.

5. Acting as Substitute

Although, as described in *Murphy*, a deputy sheriff is authorized to act as the sheriff's substitute, that is not necessarily so with respect to deputy clerks of the circuit and county courts. As a result of the summary dismissal in the instant case, no record was developed as to whether O'Brien was in reality authorized to be the Clerk's substitute. However, the facts behind a 1988 Attorney General opinion illustrate the

[5] Section 34.032, Florida Statutes, providing for appointment of deputy clerks of the county courts, had not yet been enacted. When enacted, it contained the "each and every power" language.

point that a deputy court clerk may lack authority to act in the clerk's stead.

In that opinion, the Attorney General determined that a deputy circuit court clerk's position as deputy clerk was an "employment" rather than an "office" for purposes of the dual office prohibition of Article II, Section 5(a) of the Florida Constitution. Op. Att'y Gen. Fla. 88-56 (1988). All employees of the clerk's office were designated as deputies, and this particular clerk was not authorized to exercise the duties of the clerk in the clerk's absence. The Attorney General concluded that in these circumstances, the deputy performed "largely the ministerial duties of an assistant to the clerk of the circuit court rather than the functions of a true substitute deputy." *Id.*

6. Coverage Under Other Employment Laws

One of the decisions cited as authority in *Murphy* was *Parker v. Hill*, 72 So.2d 820 (Fla. 1954), which held that a deputy sheriff was not an "employee" under the Workmen's Compensation Statute, but did come under the law's purview as an officer "not elected at the polls." This is not the case with respect to deputy court clerks such as O'Brien under the current version of that statute, titled the "Workers' Compensation Law." An "employee" is "any person engaged in any employment under any appointment," and "employment" includes performance of any service for an elected government officer. § 440.02(13)(a), (15)(a)–(b)1, Fla. Stat. (1997). Even a deputy sheriff would be an "employee" under the law.

Moreover, other Florida employment statutes today cover appointed deputy court clerks as employees. They are covered under the Florida Occupational Safety and Health Act, which incorporates by reference the Workers' Compensation Law's definitions of "employee" and "employment." *See* §442.002, Fla. Stat. (1997). They are "public employees" under the Unemployment Compensation Law. §443.036(19)(b), Fla. Stat. (1997). Indeed, O'Brien herself was found eligible to receive unemployment compensation after her termination. (R. 12–13.)

Deputy clerks like O'Brien are apparently covered as well under the Florida Civil Rights Act. §§760.02–.11, Fla. Stat. (1997). In *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. 1st DCA 1991), a deputy sheriff was successful in her claim that she was unlawfully discriminated against when she was terminated because of her pregnancy. Significantly, there was no question as to whether the deputy sheriff's appointee or deputy status removed her from the law's coverage. If deputy sheriffs are covered by the Civil Rights Act, surely deputy court clerks are also included.

An array of federal employment laws also would generally cover deputy court clerks such as O'Brien. These include the Social Security Act, 42 U.S.C. § 301 *et seq.*; the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the Age

Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; the Equal Pay Act, 29 U.S.C. § 206(d); the Government Employee Rights Act of 1991, 2 U.S.C. 1220; and the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*

It is important to recognize, too, that the very activities alleged to have triggered O'Brien's termination— signing a union card and advocating support for unionization to fellow employees— are protected under the United States Constitution. The First Amendment guarantees of free speech and association extend to protection of an individual's right to join a labor union and persuade others to do so. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979); *United Steel Workers v. University of Alabama*, 599 F.2d 56, 61 (5th Cir. 1979) (and cases cited therein). Consequently, state action having the purpose of either intimidating public employees from joining or taking active part in a union or retaliating against those who do so violates the First Amendment. *Professional Ass'n of College Educators, TSTA/NEA v. El Paso Community College Dist.*, 730 F.2d 258, 262 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1984).

Accordingly, if lack of coverage under other employment-related laws influenced the conclusion in *Murphy* that deputy sheriffs are not employees, such criterion is clearly absent in the case of deputy court clerks. To the contrary, their coverage under

such other laws is extensive.

D. A "Deputy" or "Appointee" Can Still Be An "Employee"

The fact that a deputy court clerk holds the status of "deputy" or "appointee" does not and should not create a conclusive presumption that the person is not an "employee" for purposes of Chapter 447, Part II, Florida Statutes. So long as a deputy court clerk is an "employee" within the common meaning of the word, the person presumptively falls within the coverage of Chapter 447, Part II. That presumption can be rebutted, but only upon a showing that the individual falls under one of the express exemptions from the "public employee" definition.[6]

1. Appointment Laws Do Not Remove "Employee" Status

Sections 28.06 and 34.032(1), Florida Statutes, provide for the "appointment" of the Clerk's deputies. These laws are the *only* source for the "appointee" and "deputy" status of the Clerk's deputies. The Florida Constitution does not specifically authorize the clerks of the circuit courts to appoint deputies. Nor does it even recognize the position of "deputy clerk."

There is no language in the appointment laws or Chapter 447, Part II, Florida Statutes, that creates a specific exemption for appointed deputy court clerks. If in

[6] For instance, a deputy court clerk might be exempted as a managerial or confidential employee. § 447.203(3)(d), Fla. Stat. (1997).

creating the appointment powers of the clerks of the circuit and county courts the legislature had intended to exempt the clerks' "appointed" deputies from the rights and protections under Chapter 447, Part II, it would have done so. In the absence of such an express exception, one cannot be presumed. *See* 49 Fla. Jur. 2d *Statutes* § 120 (1994) ("The general rule is the courts may not, in the process of construction, insert words or phrases in a statute, or supply an omission that to all appearances was not in the minds of legislators when the law was enacted.").

Nor is there anything in these appointment statutes that magically transforms deputy court clerks into nonemployees. While the statutes make a clerk liable for deputies' acts and authorize delegation to deputies of a clerk's powers, these facts do not necessarily establish a relationship other than one of employer and employee.

Moreover, the appointment laws cannot be used as a basis for excluding deputy court clerks as a class from the fundamental rights guaranteed under Article I, Section 6 of the Florida Constitution, the very rights implemented by Chapter 447, Part II. § 447.201, Fla. Stat. (1997). While the notion of a statute trumping a constitutional provision is absurd, that is precisely what occurs when the appointment laws are misconstrued as creating an exemption for deputy court clerks (and other deputies) from coverage under Chapter 447, Part II.

2. Deputy Court Clerks Are Viewed as "Employees"

Evidence that deputy court clerks are "employees" in the commonly understood sense lies in the fact that they have been recognized as such. As noted earlier, the Attorney General found that a deputy circuit court clerk's position was an "employment" rather than an "office" for purposes of the dual office prohibition of the Florida Constitution, is illustrative. Op. Att'y Gen. Fla. 88-56 (1988). Furthermore, references to deputy court clerks as "employees" in court decisions indicate that there has been judicial recognition that they are indeed employees within the common meaning of the term. *See, e.g.*, *Morse v. Moxley*, 691 So.2d 504 (Fla. 5th DCA 1997); *City of Jacksonville v. Slaughter*, 344 So.2d 271 (Fla. 1st DCA 1977); *Deremo v. Watkins*, 939 F.2d 908 (11th Cir. 1991) (a Florida case). In fact, this Court has expressly stated that a deputy sheriff is an "employee" within the common meaning of the word. *See Ison v. Zimmerman*, 372 So.2d 431, 436 (Fla. 1979) ("[i]n the common meaning of the word 'employee,' a deputy sheriff is an employee of the sheriff, or a person whose services are engaged in and recompensed by the sheriff"). If a deputy sheriff is an "employee" as that term is commonly understood, so too must be a deputy court clerk.

The only Florida decisions denying deputy court clerks employee status are the PERC and Fourth District Court of Appeal decisions in the *Federation of Public*

Employees case and the PERC and Fifth District Court of Appeal decisions below in the instant case. However, PERC stated in its decision in the *Federation of Public Employees* case that had the case arisen before *Murphy v. Mack*, it "would undoubtedly have concluded that these individuals are public employees." *Federation of Public Employees v. Clerk, supra,* at 666. Moreover, the Fifth District noted in this case that "[j]ust observing them at work it would difficult to distinguish between a deputy court clerk and a secretary," and that "they look surprisingly like other public employees." (5th DCA decision, p. 3.)

Particularly telling is that the Clerk viewed O'Brien as an employee, as is revealed by the Clerk's notice of termination of O'Brien's employment, which was attached as Exhibit A to Local 16's charge. (R. 11.) The document is titled "*Employee* Change Notice" (emphasis added). (R. 11.) O'Brien's date of hire, "09/24/73," is called her "*employment* date" (emphasis added). (R. 11.) The "Remarks" box shows O'Brien's "*employee* number" and states the following:

> Termination of *employment* is required due to *employee* misconduct. *Employee* reported and was paid for more hours than she actually worked on repeated occasions.

(R. 11, emphasis added.) Indeed, the Clerk's references to O'Brien as an "employee" and to O'Brien's job as an "employment" are an admission that O'Brien was an employee within the common meaning of the term.

3. Other Employment Laws Apply

As discussed earlier, an array of state and federal employment laws cover deputy court clerks. Nothing inherent in deputy court clerks' status has prevented their coverage as "employees" under these laws. It makes no sense for Chapter 447, Part II to be arbitrarily singled out as a statute from which to carve out an implied exception for them, especially given the fact that the law implements fundamental constitutional rights.

E. Compelling Interest to Exclude Deputy Court Clerks Has Not Been Shown

Neither the Commission nor the Fifth District addressed how a construction of Section 447.203(3) as excluding deputy court clerks comports with the constitutional rights of employees in Florida to be free from employment discrimination on the basis of union membership and to bargain collectively. Nor was the issue addressed by either the Commission or the Fourth District in the *Federation of Public Employees* case.

Article I, Section 6, Florida Constitution, provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees

shall not have the right to strike.

With the exception of the right to strike, public employees have the same rights of collective bargaining under Article I, Section 6 as do private employees. *Dade County Classroom Teachers Association, Inc. v. Legislature,* 269 So.2d 684, 685 (Fla. 1972); *Dade County Classroom Teachers Association, Inc. v. Ryan,* 225 So.2d 903, 905 (Fla. 1969). Because public employee rights under Article I, Section 6 are part of the Florida Constitution's declaration of rights, these rights are fundamental rights. *Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority, Inc.*, 522 So.2d 358, 362 (Fla. 1988). Consequently, such rights are subject to official abridgement only upon a showing of a compelling state interest. *Id.* This compelling interest or "strict scrutiny" standard "is one that is difficult to meet under any circumstance." *Id.* It imposes a heavy burden of justification upon the state to show (1) an important societal need and (2) the use of the least intrusive means to meet that goal. *Florida Bd. of Bar Examiners re: Applicant No. 63,161,* 443 So.2d 71, 74 (Fla. 1983).

Chapter 447, Part II implements public employees' fundamental rights under Article I, Section 6. § 447.201, Fla. Stat. (1997). Because Chapter 447, Part II implements public employee rights under Article I, Section 6, an exception from the statute for any class of public employees would be unconstitutional in the absence of

a showing of a compelling state interest. *See United Faculty of Florida v. Board of Regents*, *supra* (compelling interest not shown for exemption for graduate student employees contained in Section 447.203(3)(i), Florida Statutes); *Chiles v. State Employees Attorneys Guild*, *supra* (exemption for publicly-employed attorneys contained in Section 447.203(3)(j) unconstitutional because state failed to show that blanket ban on collective bargaining by such attorneys was least onerous means of protecting attorney-client relationships between them and public entities employing them).

With respect to deputy court clerks, neither the Commission nor the Fifth District made any attempt at all to set forth a compelling interest that would justify excluding deputy court clerks as a class from coverage under Chapter 447, Part II.[7] Thus, the Commission's decision and the Fifth District's decision were decided in an unconstitutional manner, as were the Commission's decision and the Fourth District's decision in the *Federation of Public Employees* case.

F. Implied Exception for Appointees of Elected County Officers Is Unwarranted

While there may superficially appear to be a "logical extension" of *Murphy* from

[7] Petitioner assumes in Part I of its brief that deputy court clerks are covered under Article I, Section 6, Florida Constitution. Part II of Petitioner's brief addresses the specific question of whether deputy court clerks are covered under Article I, Section 6.

deputy sheriff to other types of deputies "appointed" by elected county officers, such an across-the-board implied exemption from public employee coverage under Chapter 447, Part II is completely unwarranted.

1. *Murphy* Did Not Create Exception

Murphy did not create any such sweeping exception to Section 447.203(3). The Court's decision concerned only deputy sheriffs, not other types of persons appointed by elected county officers. Furthermore, the Court did not purport to deviate from the statutory language in its decision. Rather, as discussed earlier in this brief, the Court concluded, based on common law and Florida case law, that deputy sheriffs were not "employees" under Section 447.203(3).

In other words, the Court determined that the first prong of the two-part coverage test was not satisfied. Further evidence that the Court was confining itself to the statutory language is the fact that when quoting Section 447.203(3), the Court added emphasis to the word "employed" in introductory clause "any person *employed* by a public employer." 358 So.2d at 824 (emphasis in original).

2. Exception Would Violate Separation of Powers

Nor would a court or PERC have constitutional authority to create such an exemption. To do so would amount to judicial encroachment upon the legislative function in violation of the Florida Constitution's mandate of separation of powers.

Article II, Section 3, Florida Constitution.

3. Legislative Intent to Create Exception Is Lacking

A legislative intent to exclude from coverage under Section 447.203(3) deputies appointed by elected county officers is lacking. Section 447.203(3) already expressly exempts other types of appointees. Had the Florida Legislature intended an exemption for deputies of elected county officers, it would have included such exemption within the statute. In fact, in the 20 years since *Murphy* was decided, the Legislature has on three occasions added new exceptions to Section 447.203(3), but has not included one for appointees of elected county officers.[8]

The legislature has enacted special acts that transform deputies of elected county officers into "employees," thereby enabling them to enjoy collective bargaining rights. *See Escambia County Sheriff's Dep't v. Florida Police Benevolent Ass'n*, 376 So.2d 435 (Fla. 1st DCA 1979); Ch. 88-522, Laws of Fla., subsequently repealed by Ch. 89-418, Laws of Fla. Such enactments may be based on a legislative intent to circumvent court decisions that have obstructed the operation of Chapter 447, Part II, with respect to these employees. In fact, the special act cited above— Ch. 88-522, Laws of Fla.— concerned deputies ofthe Clerk of the Circuit and County Courts of Broward

[8] Ch. 76-39, Laws of Fla., added subsections (e) and (f). Ch. 81-305, §2, Laws of Fla., added subsections (g)–(i). Ch. 94-89, §1, Laws of Fla., added subsection (j).

County, the same deputy clerks who were held to be exempt from Chapter 447, Part II by the Fourth District in *Federation of Public Employees v. PERC, supra.*

Moreover, given the clear and unambiguous language of Section 447.203(3), any presumption of a legislative intent contrary to the plain meaning of the language contained in Section 447.203(3) is unauthorized. "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Van Pelt v. Hilliard*, 78 So. 693, 694 (Fla. 1918).

4. Legislative Intent to Exclude Would Not Be Controlling

Even if the legislature had intended to exempt deputies appointed by elected county officers, such exemption would be unconstitutional in the absence of a showing of a compelling state interest. "In Florida, Article I, Section 6 of the Constitution prevents the legislature from denying employee status to persons who are in fact employees unless the state can demonstrate a compelling interest in justifying that abridgement." *United Faculty of Florida v. Board of Regents, supra.*

Furthermore, the legislature has an affirmative obligation to *include* public employees in fulfillment of their rights under Article I, Section 6. One year after

adoption of the 1968 Florida Constitution, which included Article I, Section 6, the Florida Supreme Court urged the legislature to develop legislation implementing public employee rights under Article I, Section 6. *Dade County Classroom Teachers Ass'n, Inc. v. Ryan*, 225 So.2d 903 (Fla. 1969). The Court stated that "in the sensitive area of labor relations between public employees and public employer, it is *requisite* that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of . . . Section 6." 225 So.2d at 906 (emphasis added). In 1972, in response to the continued absence of such legislation, the Court threatened to judicially implement public employee rights under Article I, Section 6 if the legislature failed to do so "within a reasonable time." *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So.2d 684, 688 (Fla. 1972). The Court cautioned that legislative opposition to collective bargaining by public employees is not grounds for denying implementation of public employees' Article I, Section 6 rights:

> . . . [I]t is fair to assume that many Legislators . . . may be opposed to the principle of collective bargaining for public employees and to incorporating this principle into our State constitution[.] . . . But the people of this State have now spoken on this question in adopting Section 6 of Article I[.] . . . The question of the right of public employees to bargain collectively is no longer open to debate. It is a constitutionally protected right which may be enforced by the courts, if not protected by other agencies of government. . . .

269 So.2d at 687.

Two years later, the legislature enacted Part II of Chapter 447. The expression of legislative intent contained in the statute leaves no doubt that the legislature heard the Supreme Court's message loud and clear:

> It is declared that the public policy of the state, and the purpose of this part, is to provide statutory implementation of s. 6, Art. I of the State Constitution, with respect to public employees[.] . . .

§ 447.201, Fla. Stat. (1997).

II. DEPUTY COURT CLERKS ARE PUBLIC EMPLOYEES WITHIN THE CONTEMPLATION OF ARTICLE I, SECTION 6 OF THE FLORIDA CONSTITUTION

Because Chapter 447, Part II, Florida Statutes implements public employee rights under Article I, Section 6 of the Florida Constitution, the question of constitutional coverage of deputy court clerks goes hand-in-hand with that of statutory coverage. It is Petitioner's that position Article I, Section 6 applies to deputy court clerks.

A. Deputy Court Clerks Are "Employees" Under Article I, Section 6

In Part I of this brief, Petitioner has made it clear that deputy court clerks' status as appointees or deputies does not necessarily preclude them from being "employees" within the common meaning of the term. Indeed, the common meaning of "employee" is all that matters where, as here, the construction of a constitutional provision adopted by the voters of this state is concerned. *See* 10 Fla. Jur. 2d *Constitutional Law* § 45 (1997) ("[T]he words in a constitution should be construed in their plain, ordinary and

commonly accepted meaning or in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense.") (and cases cited therein). Certainly most of the voters, who undoubtedly included deputy court clerks and other types of deputies, were oblivious to any ancient, arcane common law doctrines that have been used by courts to create a legal fiction that deputies are not employees.

In fact, this Court has acknowledged that a deputy sheriff is an "employee" within the common meaning of the word. *See Ison v. Zimmerman*, *supra*, 372 So.2d at 436. Surely if a deputy sheriff is an "employee" as that word is commonly understood, then so is a deputy court clerk.

B. *Murphy* Did Not Address Constitutional Coverage

In *Brevard County Police Benevolent Ass'n, Inc. v. Brevard County Sheriff's Dep't*, 416 So.2d 20 (Fla. 1st DCA 1982), the First District Court of Appeal held that Article I, Section 6 does not confer collective bargaining rights upon deputy sheriffs. The First District relied on the holding of *Murphy v. Mack* that deputy sheriffs are not "employees" within the meaning of Chapter 447, Part II to reach this conclusion.

However, it is Petitioner's position that *Murphy* is not controlling on the question of coverage under Article I, Section 6 of deputy court clerks. First, as Petitioner has shown, the rationale underlying *Murphy's* conclusion that deputy sheriffs are not "employees" does not apply to deputy court clerks.

Second, the Court in *Murphy* did not address the question of how or whether its decision squared with Article I, Section 6. In fact, the issue was apparentlynot even brought to the Court's attention. Nowhere in the Court's opinion nor that of the lower court, reported at 341 So.2d 1008 (Fla. 1977), is there any mention of Article I, Section 6. Thus, *Murphy* neither decided whether deputy sheriffs are covered under Article I, Section 6, nor whether, if they are, a compelling state interest justifies their exclusion as a class from enjoyment of the rights granted by Article I, Section 6. Accordingly, *Murphy* is not authority for the proposition that deputies (of any type) are exempt from the fundamental rights guaranteed by Article I, Section 6.

C. <u>Deputy Court Clerks Are "Persons" Under Article I, Section 6</u>

In its *Brevard County* decision, the First District incorrectly stated that "Article I, Section 6 speaks only of employees, not persons, and does not, therefore, have applicabilityto persons who are not defined as employees."416 So.2d at 21. The court overlooked the express use of the word "persons" in the first sentence of Article I, Section 6, which states: "[t]he right of *persons* to work shall not be denied or abridged on account of any membership or non-membership in any labor union or labor organization" (emphasis added). Indeed, this was the right alleged to have been abridged in the instant case.

There is no inconsistency between the grant of the right to join or refrain from

joining a union to "persons" in the first sentence of Article I, Section 6 and the grant of collective bargaining rights to "employees" in the second sentence, this is not the case. Use of the term "persons" is necessary to broadly include within the first sentence's protection not just employees but job applicants, who, in the absence of this protection, may suffer hiring discrimination due to their membership or non-membership in a union. Once hired, applicants join the ranks of employees, who, as such, enjoy the right to engage in collective bargaining granted by the second sentence of Article I, Section 6.

Given that deputy court clerks are unquestionably "persons" and "employees" as those words are commonly understood, there is no doubt that they are entitled to full enjoyment of the twin rights granted under Article I, Section 6— the right to join labor unions *and* the right to engage in collective bargaining.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court (1) hold that deputy court clerks are "public employees" within the contemplation of Article I, Section 6 of the Florida Constitution; (2) hold that deputy court clerks are "public employees" within the contemplation of Section 447.203(3), Florida Statutes; and (3) reverse the Fifth District's affirmance of PERC's summary dismissal of the unfair labor practice charge filed on behalf of Patricia O'Brien.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits, typed in proportionately spaced 14 point Times New Roman, was furnished via U.S. Mail this _____ day of February 1999 to Allen McKenna, Esq., GARWOOD, MCKENNA, MCKENNA & WOLF, P.A., Post Office Box 60, Orlando, Florida 32802; Stephen A. Meck, General Counsel, and Christi Gray Sundberg, Staff Attorney, Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Turner Building, Tallahassee, Florida 32301-5032; Lorence Jon Bielby, Esq., GREENBERG & TRAURIG, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and Thomas W. Brooks, Esq., MEYER AND BROOKS, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302.

Joseph Egan, Jr., Esquire
Florida Bar No. 180102

Kathryn S. Piscitelli, Esquire
Florida Bar No.: 368598
EGAN, LEV & SIWICA, P.A.
Post Office Box 2231
Orlando, Florida 32802
Telephone No. (407) 422-1400
Facsimile No. (407) 422-3658