No. 80720-5

J.M. JOHNSON, J. (dissenting)—Deputy Brian LaFrance committed numerous acts of misconduct, including dishonesty, mishandling evidence, and disobeying direct orders. Not surprisingly, the Kitsap County sheriff moved to terminate LaFrance. An arbitrator appointed to interpret the labor contract between deputies and the county determined that terminating LaFrance was too severe a penalty and required Kitsap County to reinstate LaFrance.[1] Kitsap County argues that the arbitrator's order to reinstate LaFrance is contrary to public policy and should not be enforced by the courts. I agree, and dissent from a majority that fails to discern the strong public policy against employing police officers with serious, documented dishonesty and misconduct.

Sheriff's Deputy LaFrance swore an oath to truly, faithfully, and

[1] Subject to passing a fitness exam.

impartially perform his duties, as does each such officer. Clerk's Papers (CP) at 520. Kitsap County terminated LaFrance only after he failed to comply with this oath. As the majority admits, his conduct frequently and dramatically violated the oath (and its underlying public policy, as shown below).[2] Majority at 2-3. Requiring the reinstatement to duty of a police officer such as LaFrance who has violated this oath and engaged in repeated misconduct undermines several clear public policy goals important to our legal system as well as the confidence of our citizens in that system. Under the public policy exception to the presumption in favor of enforcing results of arbitration, there is ample justification to vacate the decision of the arbitrator

[2] The arbitrator found that LaFrance committed multiple acts of misconduct while handling warrants and investigating cases for Kitsap County during his tenure, including failure to follow direct orders, failure to properly handle evidence, failure to secure arrest warrants, and failure to file charges. CP at 60-63. LaFrance was also found to have kept pornographic evidence in the trunk of his car and downloaded and transferred pornographic images onto computers belonging to Kitsap County and to the Kitsap County Sheriff's Office. CP at 62. LaFrance was repeatedly dishonest when questioned about his actions and lied about evidence that had been entrusted to his possession. CP at 53-54. The arbitrator ultimately found that the vast weight of evidence established that LaFrance was guilty of both misconduct and incompetence. CP at 76. The arbitrator furthermore agreed that LaFrance had engaged in serious acts of misconduct sufficient to warrant his discharge. CP at 81. Nevertheless, the arbitrator ruled that termination was too harsh a penalty because LaFrance's supervisor should have recognized that LaFrance's misconduct evidenced a mental health problem and referred him for mental health and fitness exams; the arbitrator reached this conclusion despite the fact that LaFrance himself had no idea of the problem and did not raise it in his defense until well after his termination. CP at 81-82. The arbitrator noted that, had the burden been on LaFrance to show that a reasonable employer would have known of his alleged disability, his findings "would have been different." CP at 80 n.74.

and sustain the county's decision to terminate LaFrance. Indeed, the courts cannot engage in violating important policy through ordinary reinstatement of a disqualified officer. According, I dissent.

The majority admits that courts decline to enforce arbitration decisions that violate public policy. Majority at 7. This says nothing more than that the county must not, by other orders, directly violates public policy. Indeed, the United States Supreme Court has recognized that courts *should not* enforce arbitration awards that violate an "explicit," "well defined," and "dominant" public policy. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987); *W.R. Grace & Co. v. Local Union 759*, *Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983); *see, e.g., Newsday, Inc. v. Long Island Typographical Union, No. 915,* 915 F.2d 840, 844-45 (2d Cir. 1990) (arbitration decision reinstating employee who sexually harassed co-workers should be vacated as contrary to public policy against sexual harassment).

The public policy exception is particularly important in cases such as this where courts are asked to review arbitration decisions involving public

officials. The work and responsibility of public officials is being more heavily intertwined with public policy considerations than that of private persons or companies. Public policy considerations accordingly become more obviously important in cases involving public officials such as the sheriff and Deputy LaFrance, who are integrally involved in our legal system and the protection of citizens and their rights.

After examining the entirety of the case law from which the public policy exception originates, I disagree with the majority's conclusion that there is no explicit, well defined, and dominant public policy against requiring Kitsap County and its elected sheriff to employ a dishonest and disobedient deputy. Majority at 11. In reaching its conclusion on this issue, the majority seems to be laboring under the misconception that an "explicit" public policy may be derived only from statutory language. *Id.* at 9. This assumption is mistaken. Although some case law lends support to the majority's analysis, all such language in cases upon which the majority relies is rooted in an older case, *Muschany v. United States*, 324 U.S. 49, 65 S. Ct. 442, 89 L. Ed. 744 (1945), which more fully describes the standard. *See United Paperworkers*, 484 U.S. at 43 (quoting *W.R. Grace & Co.*, 461 U.S. at 766 (quoting

Muschany, 324 U.S. at 66)).

In *Muschany*, landowners challenged the United States' repudiation on public policy grounds of contracts which bound the government. 324 U.S. at 54. The Supreme Court, in discussing whether the government had a valid public policy justification for doing so, stated that "[o]nly dominant public policy would justify" repudiation. *Id.* at 66. The Court clarified that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* However, the Supreme Court also suggested that public policy can originate from "a plain indication of that policy through long governmental practice" or from "obvious ethical or moral standards." *Id.* at 66-67. Thus, according to the seminal case upon which the authorities cited by the majority rely, controlling public policies may be derived not just from statutes but from other important legal and constitutional principles outside of statute.

I have no difficulty identifying in many sources the public policies violated by enforcement of an arbitrator's decision requiring the reinstatement of an incompetent, insubordinate, and confirmedly dishonest deputy. Requiring Kitsap County to employ such a deputy violates long standing

Washington policies and runs counter to obvious ethical standards per the terms of *Muschany*. This renders the arbitration decision to require reinstatement contrary to public policy.

Before going further, it bears note that the public policies violated in this case are violated by the arbitrator's decision to require reinstatement and the enforcement of that decision by the courts, not by the misconduct of LaFrance, reprehensible though his behavior may be. This comports with the direction in *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57, 62-63, 121 S. Ct. 462, 467, 148 L. Ed. 2d 354 (2000), to evaluate in cases such as this "not whether [the employee's conduct] itself violates public policy, but whether the agreement to reinstate him does so." It also echoes the warning given by a federal court in Washington in *Columbia Aluminum Corp. v. United Steelworkers of Am., Local 8147*:

> "If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement.* Courts cannot determine merely that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy."

922 F. Supp. 412, 420 (E.D. Wash. 1995) (quoting *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212-13 (9th Cir. 1989)). Here, strong public policy is violated by mandating the reinstatement of a deputy sheriff who has conducted himself in the manner such as LaFrance's.

The first of these policies is actually reflected in our statute law. This policy was restated by the voters more than half a century ago through adoption of Initiative 23 (I-23), now codified in chapter 41.14 RCW. The initiative provides that the tenure of deputy sheriffs "shall be only during good behavior" and that they may be dismissed, inter alia, for such transgressions as incompetency, dishonesty, insubordination, or willful failure to conduct themselves in a manner befitting a deputy sheriff. RCW 41.14.110. To enforce this policy, the initiative established "a merit system of employment for county deputy sheriffs and other employees of the office of county sheriff, thereby raising the standards and efficiency of such offices and law enforcement in general." *Id.*

Expecting deputy sheriffs to meet high standards of conduct and performance was not new to Washington at the time of I-23. Rather, it was a governmental policy that evidenced the value to our populace of promoting

the twin public policies of efficiency and excellence in law enforcement. Employing a deputy who fails to meet these high standards through dishonesty or misconduct, on the other hand, has no such foundation in our legal heritage. A court decision upholding an order of reinstatement thus contradicts long standing government practice and violates the public policies that motivated I-23 so many years ago. As such, it should be vacated.

A second clear public policy violated by the arbitrator's decision is found in our constitution. In Washington, sheriffs are constitutional officers elected by the public. Wash. Const. art. XI, § 5. The constitutional, elected status of the office has important ramifications regarding who may discharge the duties of a county sheriff:

> "[T]he framers . . . , in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices *discharged only by persons elected* as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers for the discharge of such functions. . . . If these constitutional offices can be stripped of a portion of the inherent functions thereof, they can be stripped of all such functions, and the same can be vested in newly created appointive officers, and the will of the framers of the constitution thereby thwarted."

State ex rel. Johnston v. Melton, 192 Wash. 379, 390, 73 P.2d 1334 (1937)

(emphasis added) (quoting *Ex parte Corliss*, 16 N.D. 470, 114 N.W. 962, 964 (1907)). Similarly, a later court indicated that:

> "[T]he powers thus granted are powers which the people of the state expressly provided in the constitution *should be executed only by persons elected* by themselves. The people are the source of all governmental power, and, in setting up a constitutional government, they provided that certain of their powers should be exercised through county governments, governments close to the people; and they further provided, in § 5 of Art. 11 of the constitution, that the powers to be thus exercised through county governments should be exercised only through officials elected by themselves. In § 5 of Art. 11, they named the officers whom they then thought needful, [including] county . . . sheriffs . . . ."

Fritz v. Gorton, 83 Wn.2d 275, 325, 517 P.2d 911 (1974) (emphasis added) (quoting *State ex rel. Johnston*, 192 Wash. at 385).

This court, in the passages quoted above, indicates that the powers of constitutional officers such as county sheriffs may be executed *only* by those elected to hold those offices and officers designated or deputized by them. With respect to county sheriffs, these powers include a statutorily defined set of duties, including, inter alia, the duties to execute warrants, defend the county against those who would endanger public safety, keep the peace, and make complaint of all violations of the law which come to their knowledge. RCW 36.28.010, .011. In executing these duties, sheriffs may "call to their

aid such . . . power of their county as they may deem necessary." RCW 36.28.010(6).

LaFrance's acts of misconduct certainly did not aid the Kitsap County sheriff to perform his duties. In fact, LaFrance's failure to properly handle evidence, secure arrest warrants, and file charges in several cases impaired the sheriff's performance. If the sheriff has the power to perform his duties, then he must have the power to prevent others in his employ from hindering his performance of those duties. Thus, the Kitsap County sheriff exercised his powers—the exclusive powers of a constitutional officer—when he, under the auspices of Kitsap County, terminated LaFrance for documented misconduct that interfered with the sheriff's performance. That the judgment of a county sheriff with respect to a core matter such as whom to deputize should now be overturned by the decision of an unelected arbitrator, runs contrary to the policy analyses of the cases of this court cited and quoted above. Those cases articulate the policy that constitutional officers have *exclusive* authority to exercise powers of their offices. It unmistakably violates the public policy articulated by those cases, that of preserving for constitutional officers the core duties and powers delegated, to allow an

arbitrator (or a court) to force reinstatement here.

Another public policy grounded in fundamental aspects of our constitutional system and violated by the decision requiring reinstatement becomes apparent when one reflects further that the office of sheriff is an elected position. Our electoral system ensures that public officials effectively execute their duties, including terminating incompetent or dishonest employees such as LaFrance, by giving voters a clear-cut mechanism to check performance. If a public official fails to execute his duties properly, the public can simply vote him out of office.[3] Here, by usurping the county sheriff's control over a seriously misbehaving staff member, an unelected arbitrator (as approved by this court's majority), deprives the public of the opportunity to hold its officials accountable. The voters of Kitsap County cannot vote the arbitrator out of office to express their disapproval of LaFrance's reinstatement. As a result, the decision requiring reinstatement of LaFrance violates a public policy inherent in our democratic design that favors enabling the electorate to hold constitutional officers accountable. It is

[3] *See also* Wash. Const. art. I, § 33 (providing for recall of an elected public officer and his replacement by special election "whenever . . . such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office . . .").

difficult to imagine public policies of greater value or authority than our constitution and electoral system. These are not only "general considerations of supposed public interests," *Muschany*, 324 U.S. at 66, but the very foundation of our form of government.

Another source of public policy violated by the decision requiring reinstatement of LaFrance is illuminated by consideration of the effect on law enforcement if such an officer is employed by Kitsap County. In criminal prosecutions, the state must disclose material information to the defense. Indeed, the United States Supreme Court has held that failure by the prosecution to disclose such material violates due process, leading to reversal. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Thomas*, 150 Wn.2d 821, 850, 83 P.3d 970 (2004). This may often require county prosecutors to disclose evidence that tends to negate the guilt of the accused, including impeachment evidence related to the credibility of parties who testify against the accused at trial—here, the officer charged with investigating a crime. *See State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993) ("'[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule'" (alterations in original) (quoting *United States v.*

Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))). This arguably includes evidence of discipline for misconduct or untruthfulness related to any officer who is a witness. *See*, *e.g.*, *United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008) (internal investigation of police officer for misconduct should be disclosed); *United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007) (police officer's reputation for untruthfulness is admissible at trial).

LaFrance has a documented history of dishonesty and misconduct, a disciplinary history that poses a serious problem for the Kitsap County Sheriff's Office. This history must be disclosed and may be used to impeach if LaFrance testifies in any criminal proceedings. As pointed out by three amici with special expertise on the subject matter—the Washington Association of Prosecuting Attorneys, the Washington State Association of Municipal Attorneys, and the Attorney General—this compromises any use of LaFrance to testify, *see, e.g.*, Amicus Curiae Brief of the Attorney General at 9, thus likely preventing him from performing the most essential functions of his job as a law enforcement officer, *id.* at 10.

It is axiomatic that a public employee incapable of performing his job

may be terminated regardless of disabilities such as the mental health issues suggested of LaFrance. *See* RCW 49.60.180 (Washington Law Against Discrimination does not prohibit termination if the disability prevents the employee from properly performing his or her job); *Havlina v. Wash. State Dep't of Transp.*, 142 Wn. App. 510, 517, 178 P.3d 354 (2007) (citing *Dedman v. Wash. Pers. Appeals Bd.*, 98 Wn. App. 471, 486, 989 P.2d 1214 (1999) (same)). In keeping with this policy, the Kitsap County sheriff acted properly when he terminated LaFrance. It is objectively impossible to accommodate LaFrance in order to enable him to perform his job as a deputy sheriff: LaFrance's documented misconduct and dishonesty cannot be purged from files or denied to enable him to testify without being impeached. The arbitrator's decision mandating reinstatement of LaFrance thus forces Kitsap County to employ an incompetent employee, an outcome clearly at odds with the public policy goal articulated above. This contradiction alone warrants vacation of the decision.

Finally, it is also important to consider policies derived from "obvious ethical and moral standards" which the reinstatement violates. *Muschany*, 324 U.S. at 66-67. Public law enforcement officers are necessarily endowed

with a great deal of moral authority and public trust. As "'a trustee of the public interest,'" *Seattle Police Officer's Guild v. City of Seattle*, 80 Wn.2d 307, 312, 494 P.2d 485 (1972) (quoting *Gardner v. Broderick*, 392 U.S. 273, 277, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968)), an officer must demonstrate "a high level of trustworthiness and personal integrity," *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 123, 821 P.2d 44 (1991). It is especially important that law enforcement agencies "must be free from corruption and employ persons of integrity if they are to function effectively." *Id.* These cases evidence the strong public policy in favor of promoting honesty and integrity in law enforcement employees, the goal of this policy being the encouragement of public trust in law enforcement. This policy goal is firmly grounded in "obvious ethical and moral standards," which, as indicated by *Muschany*, constitute one permissible source from which to ascertain public policy. *Muschany*, 324 U.S. at 66-67.[4]

Even the arbitrator held that LaFrance has demonstrated neither honesty nor integrity as a deputy sheriff, finding him "guilty of much more

[4] The public policy favoring honesty and integrity in law enforcement officials can also be found in our statutory law, which states that "[e]very public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor." RCW 42.20.040.

than a few isolated episodes of untruthfulness." CP at 77. One example is in this record: L.S. was the victim of a burglary whose case was seriously or totally neglected by LaFrance.[5] CP at 53. Reinstatement of an officer like LaFrance conflicts with the paramount policy of fostering public trust in law enforcement. No other remedy than removal would adequately preserve the special moral stature of law enforcement officials in our criminal justice system.

The majority concludes that these public policy considerations do not satisfy the public policy exception as described in *W.R. Grace & Co.* and *United Paperworkers* because they are not sufficiently explicit, well defined, and dominant. Majority at 7-8. However, the majority reads the test far too narrowly. The precedent upon which those cases rely in forming the public policy exception supports a much broader conception of public policy, *see Muschany*, 324 U.S. at 66, one that encompasses the constitutional, statutory and morally derived policies discussed above.

Conclusion

The arbitrator's decision requiring Kitsap County to reinstate a deputy

[5] L.S. phoned several times to ask LaFrance about the status of her case. CP at 53. Deputy LaFrance did not return any of her calls, despite assuring others in the office that he had done so. *Id.* at 53-54.

sheriff, who was found to be not only incompetent, but also untruthful, violates important public policies and should be vacated. That the *courts* would enforce an order requiring employment of a deputy sheriff who committed numerous acts of misconduct, including dishonesty, mishandling evidence, and disobeying direct orders, greatly offends the public policies of this state. Rather than sign such an opinion, I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander
Teresa C. Kulik, Justice Pro Tem.