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June 20, 2023

Hon. Bernard E. DeLury, Jr., P.J.Cr.
Superior Court of New Jersey
Atlantic/Cape May County
Law Division-Criminal Part
4997 Unami Boulevard
Mays Landing, NJ 08233

RE: State v. Earnest. V. Troiano, Jr., et al
Indictment No.: 23-3-00038-S

Dear Judge DeLury:

Please accept this letter brief on behalf of the defendant, Steven Mikulski in reply to the State's response brief in connection with our Motion to Dismiss the Indictment now returnable before Your Honor on Friday, June 23, 2023 at 11:00 a.m. Initially, most of the facts and procedural history referred to by the State in the pages 1 through 8 of its brief are immaterial to the prosecution against Mikulski, and largely relate to co-defendants, Troiano and Byron, and, to a certain extent, former commissioner [REDACTED]. Many of these supposed facts which were presented to the grand jury during its two-day presentation only convoluted and confused the presentation, particularly as it related to Mikulski. Not only was much of the evidence immaterial, much of it would not be remotely admissible, at least as to Mikulski, in a trial. Injecting inadmissible evidence and also entwining evidence that only related to co-defendants, Troiano and Byron, only served to unduly confuse the grand jury.

By way of example, the State presented evidence that the former solicitor, [REDACTED] and the former City Administrator, [REDACTED] advised Troiano and Byron (and [REDACTED] that they weren't entitled to SHBP benefits. This meeting allegedly occurred years before Mikulski was elected. No record of this meeting was ever made, nor was any formal or even informal action taken or memorialized thereafter. If the meeting even occurred, Mikulski was never made unaware of it, nor was he made aware of the admonition of the former solicitor. The State presented evidence that present Commissioner [REDACTED] worked only part time and did not apply for health benefits through the City of Wildwood. They presented similar evidence as to former Commissioner [REDACTED], presumably to suggest that the position of commissioner was not a full-time position. However, their circumstances were not relevant to the issue of whether Mikulski worked 35 hours per week, as each commissioner has different departments, different responsibilities, a different management style, and a different work ethic. Likewise, whether Troiano and Byron did or did not work 35 hours per week has no relevance to the number of hours Mikulski worked. Additionally,

the State presented evidence that some employees expressed the belief that the job of a mayor/commissioner was not a full-time job. However, those opinions were not based upon any firsthand knowledge, nor upon any facts backing them up, at least with respect to Mikulski. The State presented evidence that the commissioners were not entitled to sick days, personal days or vacation time in order to demonstrate that they were not full-time employees so as to qualify for health insurance. Respectfully, nowhere in the legislation, is this circumstance part of the calculus for determining whether an elected official is entitled to health benefits. According to the Employer's Pension and Benefits Manual promulgated by the NJDPB, in order to be eligible for the SHBP benefits, a municipality is required to pass a Resolution authorizing participation into the plan by the relevant employees/elected officials. In this case, the City of Wildwood did so in 2011. (See Resolutions 226-6-11 and 227-6-11 attached to my initial brief as Exhibits C & D.) Apparently, these Resolutions were accepted by the NJDPB. These Resolutions remained in full force and effect when Mikulski obtained and received benefits. My point is that the manner in which the State presented the case, and the introduction of clearly immaterial and/or inadmissible information, created undue confusion and prejudiced Mikulski.

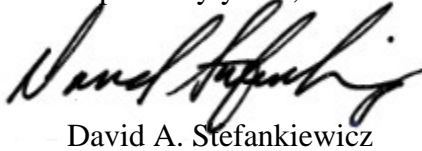
To be sure, Mikulski provided a lengthy recorded statement to the State's investigators wherein he repeatedly told them he worked at least 35 to 45 hours per week, and that he considered the job of commissioner to be a fulltime job. He explained that work hours included time he spent at City Hall, and time he devoted to the job outside of City Hall. This important evidence was simply not provided to the grand jury. In fact, Mikulski's interview was never mentioned at all over the two-day presentation, despite the fact that much of it was clearly exculpatory. Instead, and contrary to the State's recitation on page 7 of its brief, only a few time sheets were presented to the grand jury depicting a 5 week period wherein he worked more than 35 hours per week in City Hall during some of the weeks, slightly less in another week, and included a 2 vacation period wherein he did not punch the clock at City Hall. This was not a complete, or perhaps even fair, depiction of the hours he worked.

In essence, this case is only about the average number of hours per week worked by Mikulski. How many hours another commissioner may work, someone's opinion of whether the position of commissioner is part-time or full-time, what advice a former solicitor may have given to another commissioner(s), whether or not an HR employee considered Mikulski's position to be part-time when he initially inquired into health benefits, whether or not he and/or a former commissioner owned a business, and even what advice the present solicitor may have given to him on the topic, is irrelevant to the issue of whether or not Mikulski qualified for the health benefits. The salient consideration is whether or not he worked an average of 35 hours per week, regardless of where or when he worked, or the type of activities he engaged in so long as they were commensurate with his role as a commissioner. It's for this reason that the failure of the State to advise the grand jury that **all** work hours count in the benefits qualification calculus, not just those hours spent in City Hall, was such a critical omission. At the very least, the grand jury should have been informed that it could consider hours spent outside of City Hall to determine if Mikulski qualified for the State health benefits. Further, the prejudice occasioned by this conspicuous omission was compounded by the fact that the State failed to inform the grand jury that Mikulski had provided testimony indicating that he worked many hours outside of City Hall, and that he devoted an average of about 35 to 45 hours per week to his elected position. Without this information, it was impossible for the grand jury to decide the issues before it fairly and impartially.

Finally, the Prosecutor strenuously argues that he did not elicit improper expert testimony on the “ultimate issue” from Detective [REDACTED] when in response to his leading and loaded question asking for it, she opined that the Mikulski was not a full-time employee and thereby did not qualify for SHBP health benefits. Contrary to the Prosecutor’s contention, it is evident from the cited colloquy in the transcript that he did. (2T94, 1-14) Although the Prosecutor calls this defense argument “absurd,” the fact of the matter is that he asked a question that called for an expert opinion, injected the factual basis underlying the opinion into the question, and received the “ultimate opinion” that Mikulski was not a full-time employee and therefore did not qualify for health benefits. This question was highly improper and prejudicial. Detective [REDACTED] is not an expert, and the subject matter is not beyond the ken of a layperson. See N.J.R.E. 702. With all due respect to the State, whether or not Mikulski qualified for health benefits, based upon the evidence presented, was the critical determination that the grand jury was called upon to make, not a State’s witness masquerading as an expert. This circumstance, in and of itself, was fatal to a fair grand jury presentation because the improper testimony struck to the heart of the charges against Mikulski. In combination with the other defects in the presentation, there is little question that the State trampled upon Mikulski’s right to a fair and just grand jury presentation.

For these reasons, and the reasons set forth in my initial brief, it is respectfully requested that Your Honor dismiss the Indictment against Mikulski.

Respectfully yours,



David A. Stefankiewicz

DAS/mvk

cc: Brain Uzdavinis, DAG
S. Mikulski