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February 8, 2024

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.: 23-07-00109-S

Dear Judge DeLury:

At our most recent status conference on January 26, 2024, I indicated that I would be filing a Motion to Sever on behalf of my client, Steven Mikulski ("Mikulski") pursuant to R. 3: 15-2 and the precepts of N.J.R.E. 403. Your Honor preferred that I not submit additional legal argument, and just outline some of the fact-related trial issues that warrant severance. Please accept this letter in lieu of a more formal brief on behalf of my client, Mikulski, in support of the Motion.

While all three defendants, including co-defendants Ernest Troiano ("Troiano") and Peter Byron ("Byron"), are similarly charged with unlawfully accepting State Health Benefits ("DHBs"), there is no claim that the defendants conspired or colluded with one another in their alleged wrongdoing. The evidence against each defendant is largely separate and distinct from the others, and the only common thread between the three is that they all happened to be elected officials in the City of Wildwood charged with illegally obtaining health benefits. Indeed, the crimes charged against Troiano occurred in the decade prior to Mikulski taking office. Most of the allegations against Byron occurred long before Mikulski was sworn into office in 2020, and certainly occurred under much different circumstances. From Mikulski's point of view, the evidence against Troiano and Byron is far more compelling than the evidence against him, albeit different. More importantly, even a cursory review of the defense briefs submitted in connection with the various motions demonstrate that the defendants' defenses are antagonistic.

Of course, the purpose of this brief is not to condemn Troiano or Byron, or challenge their defenses, as they could probably do the same to Mikulski. However, this inherent antagonism will permeate trial, and simply confuse the jury and harm each of their defenses. And that's exactly what should never happen, and can only happen, if they are required to defend themselves in a

joint trial. At the end of the day, the Court must understand that although the defendants are charged with the same crimes, they are alleged to have occurred at completely different times and under substantially different circumstances. Lumping the defendants together in one megatrial will only serve to create undue confusion and prejudice for each defendant.

The fact that the defendants' defenses are antagonistic is evident by even a perfunctory review of the many briefs filed by the defense attorneys and the State throughout the course of this litigation, and also from the two grand jury presentations, which the Court is certainly familiar with. For example, in the grand jury presentation(s), the State used a broad brush and repeatedly compared and contrasted the record keeping practices, and activities of the three defendants (and other commissioners), to demonstrate culpability on the part of each. Indeed, in the most recent brief filed by defense counsel for Troiano, much of the brief is devoted to pointing out how Troiano, as Mayor, had "additional responsibilities" and was required to work more hours than the other defendants and that he, in fact, worked more hours. From my perspective, this is not accurate. Thus, in a trial, I would find myself not only defending Mikulski from the State's attack, but also from the implicit attack by Troiano. I would be forced to impeach Troiano should he testify, by pointing out that under the Walsh Act, N.J.S.A. 40: 70-1 *et seq.*, which establishes the Commission form of government, that the mayor has absolutely no powers or duties above and beyond those of his fellow commissioners, except to preside over the bi-monthly Commission meetings, which the other commissioners also attend. This is just but one example of the defendants' antagonistic defenses. There are other obvious examples.

Mikulski was sworn into office on January 2, 2020. He told investigators that he conducted his own due diligence as to whether he qualified for SHBs, which he obtained in or about May, 2020. Troiano served as a commissioner/mayor between 2011 and 2019, when he was defeated. Byron was an incumbent, and appointed mayor, when Mikulski was elected. As part of Mikulski's investigation, he learned that Troiano and Byron, both commissioners, attained SHBs throughout their tenure, all of which occurred after the 2010 change in law which circumscribed eligibility. Not only did they obtain SHBs, at least one of his more experienced co-defendants directly informed Mikulski he was entitled to them as a commissioner, as commissioners were considered full-time employees. Mikulski relied, in part, upon this information when he accepted SHBs.

As the Court knows, in 2011 the City passed Resolution 227-6-11, which declared, in pertinent part, that, "**each member of the Board of Commissioners…is hereby considered a full- time employee, and works a minimum of 35 hours per week for the City of Wildwood."** The City also passed Resolution 226-6-11, which fixed the number of hours an elected official had to work in order to participate in SHBs at an average of 35 hours per week. In its various briefs, and before the grand jury(s), the State has consistently implied that these two Resolutions, which were enacted during the tenures of Troiano and Byron, were simply legislative shams aimed at permitting them to obtain SHBs. Nevertheless, these Resolutions had not been rescinded and were still in effect when Mikulski took office. He had every right to rely upon them. Indeed, he had a solemn duty to follow Wildwood's legislative enactments. Troiano and Byron's motivations in passing the legislation are irrelevant (an antagonistic) to Mikulski's defense, as both Resolutions remained in place when he was sworn in. At trial, as in the grand jury presentations, the State will attack the very Resolutions that Mikulski relied upon. It is submitted that this dichotomy will be unduly confusing to any jury, and prejudicial to Mikulski.

The State has proffered proof that during Troiano and Byron's tenure as mayor and commissioner, and long before Mikulski was elected, that the City Solicitor and City Administrator met with them for the specific purpose of advising them that they were **not** full-time employees and, therefore, **not** entitled to SHBs. Further, the Solicitor and Administrator told them they would get in serious trouble should they continue to obtain SHBs. This meeting supposedly occurred some years before Mikulski took office, but was not memorialized anywhere. However, if the former Solicitor and Administrator are believed at trial, this is damning evidence against Troiano and Byron, and very prejudicial to Mikulski, as it essentially forces him to prove that he knew nothing about it. It may also force Mikulski to attack the veracity of the witnesses claiming to have conducted such a meeting, which can also confuse the jury. Further, and foremost, it is Mikulski's understandable concern that these circumstances relating to the co-defendants may negatively impact the jury's perception of him.

Also, it is expected that the State will present substantial evidence concerning the hours worked by each defendant, which will engender more confusion and prejudice, and perhaps even guilt by association. In this case, it is uncontroverted that Troiano and Byron did **not** keep any record whatsoever of the hours they worked in City Hall during the relevant time period. To the contrary, they directed the executive secretary, [redacted], to sign time cards on their behalf indicating they worked 7 hours per day, every day, irrespective of the amount of time they actually worked, if any. Even when they never set foot in City Hall, or were on vacation, or were working elsewhere, they had [redacted] sign a card indicating they worked 7 hours. At best, this odd practice seems dodgy. At worst, it suggests fabrication and, on the surface, appears quite incriminating. In contrast, Mikulski kept accurate records of the time he spent in City Hall. The State concedes this. Indeed, his time cards understated the amount of time he actually spent in City Hall, as he was often in City Hall before and after he punched his time card, and usually punched out even when he left City Hall to conduct City business elsewhere. The stark contrast in the record keeping practices of Troiano and Byron and that of Mikulski engenders an obvious antagonism between their defenses. There is no doubt that Mikulski will have to contrast his record keeping practices with that of the other defendants, which may cast them in a bad light.

In another compare and contrast argument, there is persuasive proof that Troiano actively ran a hands-on masonry company during the time period he participated in the SHBP. Likewise, Byron had a job in Atlantic City which he was required to attend most days, and was an active realtor in a busy market. In contrast, Mikulski, who owned a luncheonette, reduced his work schedule to 8 hours per week, primarily on the weekends, once he took office. The State has argued these businesses and jobs constituted the primary employment for each defendant, even though it was clearly not the case for Mikulski. These are additional circumstances that will unduly challenge the jury to separate the actions and culpability of each defendant, potentially resulting in a conviction based on association rather than guilt.

The State has lined up a bevy of witnesses, who are or were employed by the City, to testify that the position of commissioner and mayor were considered part-time jobs, not full-time positions. Given the State's position that the aforementioned Resolutions were suspect, this testimony may be admissible and relevant against Troiano and Byron, as they enacted the legislation, but it is absolutely irrelevant and inadmissible as to Mikulski. When he took office,

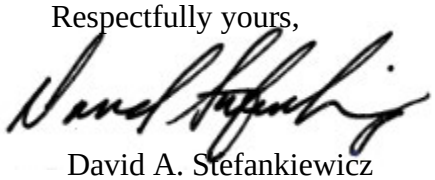
and throughout the relevant time period, the Resolutions remained on the books, and defined his position as "full-time." The personal opinions of these so-called "fact" witnesses on this topic are contradicted by the Resolutions, and have no place in Mikulski's trial, as such testimony will only cause undue confusion and prejudice to him.

The aforementioned topics and examples are just a few of the potential pratfalls that may be occasioned by a joint trial of all three defendants. These topics are so complex that no curative instruction or focused cross-examination will counterbalance the potential confusion and prejudice that may be visited upon Mikulski, and/or the other defendants, should the State proceed as indicated above, or should one (or both) defendant denigrate another defendant's work practices or conduct to enhance his own defense. The inherent danger in trying all three defendants at once substantially outweighs the State's desire to proceed against all three defendants in a joint trial.

For these reasons, the defendant's Motion to sever must be granted.

Thank you for your kind attention to this matter.

Respectfully yours,



David A. Stefankiewicz

DAS/mvk
cc: Brain Uzdavinis, DAG
S. Mikulski