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STATE OF NEW JERSEY, Plaintiff, vs. ERNEST V. TOROIANO, JR., et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION/CRIMINAL PART CAPE MAY COUNTY Criminal Matter Indictment Number: 23-3-00038-S Case No.: CPM-22-000535 **ORDER DISMISSING INDICTMENT**

THIS MATTER having been opened to the Court by David A. Stefankiewicz of the Law Firm of Stefankiewicz & Belasco, LLC, attorneys for Defendant, Steven Mikulski, by way of Motion for an Order to Dismiss Indictment and Brian Uzdavinis, Deputy Attorney General, appearing on behalf of the State of New Jersey; and the Court having considered the submissions and arguments of counsel; and for good cause shown;

IT IS on this ___ day of _____, 2023 **ORDERED** and **ADJUDGED** as follows:

1. The above captioned Indictment returned on March 10, 2023 be and hereby is **DISMISSED.**

_____
Bernard E. DeLury, Jr., P.J. Cr.

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STATE OF NEW JERSEY,	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION-CRIMINAL PART : CAPE MAY COUNTY
Plaintiff	:
v.	:
ERNEST V. TROIANO, et al.,	: Case No. CPM-22-000535 : Indictment No.: 23-3-00038-S
Defendants.	: Criminal Action : **NOTICE OF MOTION TO** : **DISMISS INDICTMENT**

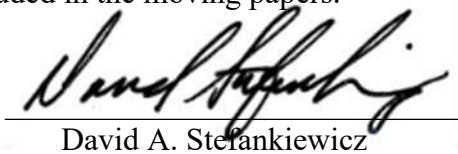
TO: Brian Uzdavinis, DAG
Division of Criminal Justice
25 Market Street, P.O. Box 085
Trenton, NJ 08625
Filed Via NJ E-Courts

PLEASE TAKE NOTICE that on Friday, June 23, 2023 at 11:00 a.m., the undersigned, David A. Stefankiewicz of the Law Firm of Stefankiewicz & Belasco, LLC, attorneys for Defendant, Steven Mikulski, shall make application before the above-named Court for an Order dismissing the afore-mentioned Indictment, and for such other relief as the Court may deem appropriate under the circumstances.

Reliance shall be placed upon the Defendant's Brief and Exhibits attached thereto.

A form of order is also included in the moving papers.

Dated: May 24, 2023



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May 24, 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 (hereinafter, "Mikulski") in connection with his Motion to Dismiss the Indictment now returnable before Your Honor on Friday, June 23, 2023 at 11:00 a.m.

Preliminary Statement

Under Indictment No. 23-3-00038-S, the defendant, Steven Mikulski (hereinafter, "Mikulski") is charged with Official Misconduct in violation of N.J.S.A. 2C: 30-2 (2nd degree) (Count III); Theft by Unlawful Taking in violation of N.J.S.A. 2C: 20-3 (2nd degree) (Count VI); Tampering with Public Records in violation of N.J.S.A. 2C: 28-7a(2) (3rd degree) (Count IX); and Falsifying or Tampering with Records in violation of N.J.S.A. 2C: 2C: 21-4a (4th degree) (Count XII). His co-defendants, Ernest V. Troiano, Jr. (hereinafter, "Troiano") and Peter J. Byron (hereinafter, "Byron") are similarly charged under the same Indictment, although the theory of liability and proofs with respect to these individuals is starkly different. (A copy of the Indictment is attached as **Exhibit A**.)

According to statute, N.J.S.A. 40: 52: 14-17.6(c)(2), in order to obtain State Health Benefits an elected official must work 35 hours per week. The statute does not prescribe how, where, or when the hours must be worked. As importantly, the statute does not define what activities constitute "work" by an elected official, or how the hours are to be tracked. With respect to Mikulski, there is no question that he worked at least 35 hours per week, particularly when one considers not only the hours he spent at City Hall, but also the substantial amount of time he devoted to the position outside of City Hall. However, in prosecuting Mikulski, the State has construed the statute in an overly begrudging fashion and arbitrarily **refuses** to consider the time he dedicated to the job outside of City Hall in applying the 35-hour requirement. Even at that, if one excludes a short vacation and a few days he spent one week tending to his ailing wife, he averaged more than 35 hours per week in City Hall. The State's irrational myopia tainted the entire grand jury presentation because the State orchestrated the grand jury to consider only hours spent in City Hall, and withheld the clearly exculpatory evidence of the time Mikulski devoted to the job outside of City Hall in the determination of whether he worked the requisite hours. In fact, the State withheld clearly exculpatory evidence by not presenting the fact that he devoted in excess of 35 hours per week to his position as commissioner.

In obtaining the aforementioned Indictment against Mikulski, the State's presentation to the grand jury was fatally defective. (Copies of the Transcripts of the February 17, 2023 and March 10, 2023 presentment have been supplied to the Court by the DAG in connection with co-defendant's Motion.) Among other things, the State withheld clearly exculpatory evidence, presented much of the evidence in a false light or in a manner that amounted to "half-truths," solicited improper expert testimony from the investigator who testified, refused to answer inquiries by grand jurors about critical issues that struck to the heart of the charges against Mikulski and the

grand jury's essential function, improperly instructed the grand jury as to the law, confused proofs involving the co-defendants' conduct and the conduct of other third parties with that of Mikulski during questioning, and improperly joined all three defendants into one grand jury proceeding despite the fact that the charges against each defendant were unrelated and involved starkly different proofs, and perhaps antagonistic defenses, thereby prejudicing Mikulski with the taint of the stronger and more inflammatory evidence against co-defendants Troiano and Byron. The presentation also ran afoul of R. 3:6 in that grand jurors who voted were not present for testimony which, according to the State, required a credibility determination. Singularly, or in combination, these defects indelibly stained the presentation and deprived the grand jury of its decision-making function. The egregious errors and omissions on the part of the State rendered it impossible for Mikulski to get a fair and impartial determination by the grand jury.

Brian A. Pelloni, Esquire, has filed a Motion to Dismiss the Indictment on behalf of Troiano which was argued on May 19, 2023, wherein he alleges fatal defects common to all three defendants in the grand jury presentation. On behalf of Mikulski, I join in on his Motion and adopt by reference the legal arguments that are common to Mikulski, particularly those that pertain to the R. 3:6-6 defect.

Under these circumstances, as it relates to Mikulski, the Indictment must be dismissed.

Introduction & Background

The material information in this brief, and in this section in particular, derives **exclusively** from the discovery provided to the defense **prior** to the grand jury presentment, so it was well known to the State when it presented the case on February 17, 2023 and March 10, 2023 respectively.

The City of Wildwood is a municipal entity governed by the Walsh Act, N.J.S.A. 40: 70-1

et seq. which establishes a Commission form of government. In this form of government, all municipal powers are vested in a Board of Commissioners (the, "Board). In Wildwood, three (3) commissioners are elected to serve four (4) year terms. The commissioners elect one commissioner as mayor, who serves as chair of the Board. The mayor has no powers or duties above and beyond those of his fellow commissioners, except to preside over bi-monthly Board meetings. The Board has "complete control' over the municipality's affairs. See N.J.S.A. 40: 72-2. The commissioners serve as department directors in addition to their legislative functions. In Wildwood, the commissioners manage an annual budget of about $37,000,000.00, so their duties are significant.

Mikulski ran for office in 2019. He was a Navy veteran, owned a local luncheonette, had a background in business, and was a family man. He was committed to turning the City of Wildwood around, as it had been in decline for several decades. He was elected to his first term as a commissioner in November of 2019. He was sworn into office on January 2, 2020. Byron, who was an incumbent, was elected mayor. Troiano, who had served as mayor/commissioner for about a decade or so, lost the election, so he was out of the picture. As a commissioner, Mikulski was appointed to be the key position of Director of Public Affairs and Public Safety. As the head of Public Affairs and Public Safety, Mikulski supervised the Police Department, Fire Department, Beach Patrol, Municipal Court and was also in charge of Code Enforcement. He remained in those positions at all relevant times.

The prosecution against Mikulski revolves entirely around his receipt of State Health Insurance Benefits (hereinafter, "health benefits") during his tenure as a commissioner. The State claims that the City paid approximately $31,000.00 in premiums, and the insurance plan paid out approximately $72,000.00 in claims, on his behalf during the relevant time period. As will be discussed, and according to statute, in order to qualify for health benefits, an elected official need

only work 35 hours per week. Again, the statute does not prescribe how, where, or when the work must be performed, what constitutes work, or how hours are to be tracked. The State's entire case rests upon the specious premise that Mikulski did not work 35 hours per week. In fact, Mikulski worked well in excess of 35 hours per week and, indeed, **easily** qualified for health benefits. According to statute, if he did work 35 hours per week, he was then lawfully entitled to receive health benefits. The statute creates no other conditions for eligibility other than "working" 35 hours per week. In prosecuting Mikulski, the State wrongly contends that **only hours worked at City Hall** count toward the 35-hour requirement, and that no hours worked outside of City Hall, no matter how many, or under what circumstances, can be considered. This irrational interpretation has no basis in law and completely ignores the reality of what being a commissioner in a city such as Wildwood entails.

Effective May 21, 2010, the New Jersey Legislature passed a law which limited the eligibility of elected officials for State Health Benefits. As of May 21, 2010, only elected officials who worked at least 35 hours per week were considered "employees" for health benefit eligibility purposes. See N.J.S.A. 52: 14-17.6(c)(2). Prior to passage of the new statutory provisions, "employee" broadly included "appointive or elective officers" without regard to the hours worked. N.J.S.A. 52: 14-17.6(c)(1). The May 21, 2010 enactment defined an eligible employee as follows:

> (i) a full-time appointive or elective officer whose hours of work are fixed at 35 or more per week. A full time employee of the State, or a full-time employee of an employer other than the State who appears on a regular payroll and receives a salary or wages for an average of the number of hours per week as prescribed by the governing body of the participating employer which number of hours worked shall be considered full-time, determined by resolution and not less than 25, or (ii) an appointive or elected officer, an employee of the State, or an employee of an employer other than the State who has or is eligible for health benefits coverage under P.L. 1961, c. 49 (C.52: 14-17.25 et seq.) or

> sections 31 through 41 of the P.L. 2007. c. 103 (C. 52: 14-17.46.1 et seq. on the effective date and continuously thereafter provided the officer or employee is covered by the definition in paragraph (1) of this subsection. Id. (emphasis added)

The intent of the 2010 amendment with regard to appointed or elected officials was to limit eligibility for health benefits to only those officials whose "primary employment" is their position in local government, such as Mikulski. Unfortunately, the 2010 amendment did not identify what constituted "work," or explain how the work hours were to be tracked for the purposes of eligibility, despite the fact that virtually all elected officials in New Jersey are salaried and do not have a set schedule, nor do they typically clock in or out. The 35-hour minimum was a new requirement. Understandably, local governing units required guidance and clarification in order to comply with the law.

The New Jersey Division of Local Government Services ("DLGS") was responsible for providing guidance to local officials on the implementation of the new law. On May 17, 2010 the DLGS issued Local Finance Notice ("LFN") 2010-12. (A copy of this LFN is attached as **Exhibit B**.) When LFN 2010-12 was issued it was anticipated that the question of how to calculate "work hours" in order to determine "full-time" employment, including the impact on elected officials, would be addressed by the State Health Benefits Commission. The LFN provided, **"The State Health Benefits Commission will soon provide guidance about the meaning of "full-time" and certification of time worked for elected officials."** Pending guidance from the State Health Benefits Commission, the LFN explained as follows:

> The law appears intended to limit SHBP benefits to elected and appointed individuals to those whose primary employment (i.e., 35 hours/week) is their government position. **This is a new concept and raises questions, especially regarding elected officials, concerning how the 35 hours minimum is calculated; what activities count as "work hours."**

> The State Health Benefits Commission will need to address the multitude of different circumstances presented by the requirement. **As the law is new, the Commission will address the issue in the near future. In the meantime, local officials should review the law with their legal advisors, and if decisions need to be made in advance of Commission Guidance, carefully consider the law and its intent to make reasonable decisions.** (Emphasis added)

Contrary to the LFN, no guidance whatsoever was ever provided, so municipal units were left to their own on how to administer the law. According to the LFN, elected officials need only make "reasonable decisions" regarding health benefits. Consequently, in absence of guidance, the new legislation created nothing more than an "honor system" for elected officials to follow in terms of the 35-hour requirement. Stated otherwise, the statute left it up to the elected officials and, to some extent municipalities, to determine qualification for the health benefits. This circumstance has not changed and remains the case to this day.

Shortly after the passage of the amended law, and almost a decade before Mikulski took office, Wildwood enacted two Resolutions which addressed the circumstances presented by the statutory requirements. On June 8, 2011 Wildwood adopted Resolution 227-6-11. This Resolution provided, in pertinent part, that, "each member of the Board of Commissioners of the City of Wildwood **is hereby considered a full-time employee** and works a minimum of thirty-five hours per week for the City of Wildwood." (See **Exhibit C** attached. Emphasis added) On that same date, Wildwood also enacted Resolution 226-6-11, which indicated that in order to qualify for State Health Benefits an elected official would have to work an **"average"** of 35 hours per week. (See **Exhibit D** attached. Emphasis added) Like the statute itself, these Resolutions did not contain much, if any, guidance as to how the hours should be calculated or tracked. Thus, the elected officials remained on the "honor system" in connection with the determination of whether or not

they qualified for the health benefits. To reiterate, elected officials were only required to act reasonably in connection with health benefits. That was the case when Mikulski took office, and remains the case.

Discovery provided by the State reveals that shortly after Mikulski was sworn in, he inquired of Human Relations ("HR") whether he could obtain the State Health Benefits. Based upon his own limited research, he believed that he could. Mayor Byron had been receiving the State Health Benefits for several years during his tenure as an elected official. Former Mayor Troiano had always received health benefits during his tenure, as did at least one other commissioner. (There were only 4 other commissioners elected after the law was amended, and 3 of those had received health benefits. The one who did not receive health benefits obtained them through another job.) However, HR advised him that his position was considered "part-time," notwithstanding the aforementioned Resolutions stating otherwise (See Exhibits C & D), and said he did not qualify. HR told him that the State was conducting an investigation into the issue. At that point, he did **not** pursue the health benefits, but thereafter in accordance with the aforementioned LFN consulted with legal counsel. He requested a legal opinion from the City Solicitor, [redacted], Esquire, and outside labor/personnel counsel, [redacted], Esquire. On February 6, 2020 [redacted] rendered a written legal opinion that did not explicitly say whether or not Mikulski qualified for health benefits, but concluded that an elected official working 35 hours a week was indeed eligible to obtain the State Health Benefits. (The February 6, 2022 Legal Opinion is attached hereto as **Exhibit E**.) During a voluntary and recorded interview conducted by NJSP Investigators on October 21, 2020 Mikulski said that [redacted] and [redacted] recommended that he keep track of his hours in the event he applied for health benefits, but did not explain what activities constituted "work" or how he should track his time. (A

Transcript of Mikulski's interview with NJSP investigators on October 21, 2022 is attached hereto as **Exhibit F**.)

Again, Mikulski did not immediately apply for the health benefits, but waited until about 5 months into his freshman term to do so. According to Mikulski, by May of 2020 it was obvious that he was working well in excess of an average of 35 hours per week. This conclusion was based upon the actual time he spent in City Hall for which he clocked in and out, some additional time he spent there, and his outside activities as a commissioner and head of various busy departments. By then, he was typically spending 35 hours or more per week in City Hall, with the exception of a vacation(s) and a few days here and there to care for his wife who was undergoing cancer treatments. He was also working many hours outside the office before, during, and after normal business hours. This work included attending meetings, town hall events, civic events, business openings, parades and festivals, inspections, work with the Fire Department and Beach Patrol, addressing citizen complaints and constituent inquiries, investigating code violations, and performing basic community caretaking and ambassadorship. (See Exhibit F.) Prior to becoming a commissioner, he and his wife owned and operated a luncheonette called the Key West Café for about 13 years. When he ran for office, he trained a replacement for his position, anticipating that he would not be available to work the luncheonette. By the time he applied for the health benefits, Mikulski was working no more 8 hours per week at the luncheonette. He worked those 8 hours on weekends only. He considered his elected position to be his full-time employment. This was the basis of his application for benefits. Although Mikulski was initially designated as "part-time" on a form HR prepared and Mikulski signed when he took office in January of 2022, HR duly prepared a "payroll change in status" form that designated him as "full-time" in May of 2020 corresponding to his application for health benefits. By applying, Mikulski signed another form to reduce his

salary to pay for his health benefit contribution. HR authorized his change of status and approved his application for benefits, as did the New Jersey Division of Pensions and Benefits. Notably, **all** of this information was known to the Prosecutor and NJSP Investigators long before the State's presentment to the grand jury.

When the case was presented to the grand jury, the State withheld clearly exculpatory evidence, materially misled the grand jury both factually and legally, and in contradiction of the plain language of the statutory amendment. The State also presented improper expert opinion testimony to the grand jury, as well as other improper inflammatory evidence that was entirely irrelevant to the charges against Mikulski. In the absence of any claim of conspiracy or collusion, the State improperly joined defendants Troiano and Byron in the grand jury presentation even though their cases were attenuated in time and largely relied upon entirely different evidence and theories of culpability. Arguably, their defenses are antagonistic. This improper joinder not only resulted in an unduly confusing presentation, but more importantly, it substantially prejudiced Mikulski as the evidence of wrongdoing on the part of Troiano and Byron was more compelling. Additionally, the State erred when it permitted grand jurors to deliberate on March 10, 2023 despite the fact that they had not been present for material testimony on February 17, 2023 even though the credibility of State's witness was squarely at issue. See R. 3:6-6.

Argument

It is well settled that an Indictment returned by a properly constituted grand jury is presumed valid, and should not be dismissed except upon the "clearest and plainest grounds." State v. New Jersey Trade Waste Ass'n, 96 N.J. 8 (1984); State v. Welect, 10 N.J. 355, 364 (1952); State v. Clarke, 198 N.J. Super. 219, 228 (App. Div. 1985). Unless the State's misconduct clearly infringes upon the grand jury's decision-making function, an otherwise valid Indictment should

not be dismissed. State v. Buonadonna, 122 N.J. 22, 48-49 (1991); State v. Schamberg, 146 Super. 559, 566 (App. Div. 1977); State v. Engel, 249 N.J. Super. 336 (App. Div. 1991). However, dismissal of an Indictment is certainly appropriate if it is established that a violation substantially influenced the grand jury's decision to indict, or if there is a real doubt that the determination ultimately reached was not arrived at fairly and impartially. When a person's fate is before a grand jury, he is constitutionally entitled to have his case considered by an impartial and unbiased body capable of deciding the issue of probable cause on the evidence **fairly** submitted to it. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), quoting United States v. Mechanick, 475 U.S. 66 (1986). See also, State v. Engel, supra.

The "...grand jury has always occupied a high place as an instrument of justice in our system of criminal law..." State v. Delfino, 100 N.J. 154, 165 (1985). In order to fulfill its "...constitutional role of standing between citizens and the state," Delfino, at 164, the grand jury is asked to determine whether "...a basis exists for subjecting the accused to trial." Trap Rock Indus., Inc. v. Kohl, 59 N.J. 471, 487 (1971). Specifically, the grand jury must determine whether the State has established a *prima facie* case that a crime has been committed, and the accused has committed it. Id. at 487-488.

The duty of the grand jury extends beyond simply bringing the guilty to trial. The grand jury also has the very important responsibility to "...protect the innocent from unfounded prosecution." State v. Murphy, 110 N.J. 20, 29 (1988). This responsibility to protect the innocent has its roots in English history, and this responsibility has "...continued constitutional significance." See State v. LeFurge, 101 N.J. 404, 418 (1986). The LeFurge Court observed that one of the most important functions of the grand jury is "...to safeguard citizens against arbitrary, oppressive and unwarranted criminal accusations." LeFurge, at 418.

The solemn duty of the grand jury "...is to clear the innocent," and that duty is equally as important as the obligation to bring to trial someone who "...may be guilty." State v. Hart, 139 N.J. Super. 565, 568 (App. Div. 1976). Clearly, it is indisputable that the duty of the grand jury is not just to indict guilty people, but to clear those who may be innocent. The question is how that may be accomplished consistent with the Constitution.

Our courts have accorded the grand jury remarkable power and independence. While the New Jersey Supreme Court "...has expressed a reluctance to intervene in the indictment process," a court should not hesitate to dismiss an Indictment when defects in the presentation "trench upon the constitutional rights which a proper criminal charge is designed to protect." State v. Wein, 80 N.J. 491, 501 (1979). The grand jury is not merely a rubber stamp for the whims of the Prosecution.

An indictment will be dismissed for insufficiency of evidence where it is absolutely clear that the State failed to present sufficient evidence to the grand jury to establish a *prima facie* case. State v. Donovan, 129 N.J.L. 478 (Sup. Ct. 1943). In Donovan, the court defined a prima facie case as one in which the State has "...presented evidence which, by itself, if unexplained or uncontradicted establishes first that a crime has been committed, and next, that the defendant has committed it."

Notably, as in the case at bar, even where the State has furnished *prima facie* proof to the grand jury, an Indictment must be dismissed upon a palpable showing of "fundamental unfairness" or when there is conduct on the part of the State that amounts to an "interference with the grand jury's decision-making function." The Court should not hesitate to dismiss an Indictment if the evidence establishes that the Prosecutor's conduct in obtaining an Indictment amounted to subversion of the grand jury process. If the record in the case demonstrates such conduct of that

quality, dismissal of the Indictment is the only appropriate remedy. Wein, at 501 (1979); State v. Murphy, 110 N.J. 20, 35 (1988). The simple burden of fairness upon the State has been described most aptly by the Court in the case of State v. Sivo, 341 N.J. Super. 302 (Law Div. 2001). In Sivo, the Court said:

> In most Grand Jury proceedings, the Defendant is not present. His attorney is not present. The Prosecutor, whose ostensible goal is conviction, is the one upon whom the Defendant must rely for a fair hearing. Exposed to Indictment, not represented, a citizen stands before a Grand Jury as naked as a jaybird in a Kansas snowstorm. In that setting, a Prosecutor bears an enhanced obligation of fair play.
>
> The fact that the State has presented *prima facie* evidence to warrant Indictment does not absolve the State of its "fair play" obligation. Sivo, at 326.

The most detailed and illustrative discussion by the New Jersey Supreme Court of the grand jury process and the State's role in the proceedings can be found in State v. Hogan, 144 N.J. 216 (1996). In State v. Hogan, the Supreme Court held that the Prosecutor has a duty to inform the grand jury of clearly exculpatory evidence that serves to negate the guilt of the accused, and that failure to inform of such evidence mandates dismissal of the Indictment. Additionally, our Supreme Court made it abundantly clear that the State may not deceive the grand jury by presenting its evidence in a way that is tantamount to telling a "half-truth." The Court stated:

> In establishing its *prima facie* case against the accused, the State may not deceive the Grand Jury or present its evidence in a way that is tantamount to telling the Grand Jury a "half-truth." Although the Grand Jury is not the final adjudicator of guilt and innocence, the presence of the right to Indictment in the State Constitution indicates that the Grand Jury was intended to be more than a rubber stamp of the Prosecutor's office. See Engel, supra, 249 N.J. Super. at 359. Our State Constitution envisions a Grand Jury that protects persons who are victims of personal animus, partisanship, or inappropriate zeal on the part of the Prosecutor. See Delfino, supra, 100 N.J. at 164-165; See also, United States v. Serubo, 604 F. 2d 807, 817 (3d

> Cir. 1979) (discussing devastating personal and professional impact of being indicted, and noting that later acquittal often fails to alleviate such impact). Hogan, at 236.

In the case at bar, there can be little question that the State abdicated its duty of fair play in the stilted manner in which it presented the case against Mikulski, and thereby unfairly prejudiced the grand jury. The stilted presentation rendered it impossible for the grand jury to clear Mikulski of the spurious charges against him.

I. The State Withheld Clearly Exculpatory Evidence and Presented the Case in an Underhanded and Unduly Confusing Manner.

One of the challenges for the defense in this Motion is to pinpoint all of the material defects in the grand jury presentation which compel dismissal, as there were numerous missteps by the State in seeking to indict Mikulski. However, there can be little doubt that had the State presented the evidence fairly, it is quite likely that Mikulski would have been cleared of any supposed criminal wrongdoing. In considering the arguments that follow, the Court must consider that **all** of the charges against Mikulski are predicated upon the State's misguided contention that he did not work 35 hours per week as required by P.L. 2010, c.2. The law is straightforward. If Mikulski worked 35 hours per week, he was entitled to health benefits, irrespective of where or when that work was performed. Arguably, he was entitled to benefits no matter how he tracked his hours so long as they averaged 35 hours per week. By the time the case was presented to the grand jury, the State had Mikulski's time sheets which reflected only hours spent in City Hall. The time sheets demonstrated that Mikulski averaged around 35 hours per week at City Hall, except for a couple of weeks when he was on vacation or tending to his wife. (Interestingly, other than 2 timesheets showing that he worked in excess of 35 hours per week, the only other time sheets presented to the grand jury related to a 2 week vacation and the week his wife was ill.) The State also had his

"journal," which demonstrated that he worked additional hours at City Hall above and beyond that which was reflected on the time sheets. Further, the State had his uncontroverted testimony indicting that, like many dedicated elected officials, he worked a substantial number of hours per week outside of City Hall which time was not reflected in his time sheets or journal. The State knew Mikulski was working between 35 hours and 45 hours per week on average, yet withheld this critical information from the grand jury. (See Exhibit F) Further, the State compounded the error by suggesting that the grand jury consider only hours spent in City Hall.

When Mikulski voluntarily agreed to be interviewed by NJSP Investigators [redacted] and [redacted] on October 21, 2020, he was quite clear that he worked at least 35 hours per week on average. (See Exhibit F.) During the interview, he was also clear that his job as commissioner was his "primary" and "full-time" employment. The information provided to the State could not have been clearer. He said, in pertinent part, as follows:

Mikulski: A. He [solicitor] said according to statute you had to have, work a minimum of at least 35 hours. Okay? I'm working 35 hours at, at least in the office, a minimum that's what I'm clocking in and out at.

Det. [redacted]: Q. Okay.

Mikulski: Okay? It doesn't include all the time I spend on the street, um you know meetings on zoom, being up at the beach after hours, uh working with the fire department, you know getting different, you know things that are going with the city, everything that's involved. We are as, as commissioners and mayors of the town we are basically ambassadors. So, everywhere we go, every event that's happening whether its American Legion, whether its VFW, we are involved with everything, parades, events, we're there.

***

Det. [redacted]: Q. Okay. Do you consider the mayor and commissioners of the City of Wildwood to be full-time, part-time or seasonal position?

Mikulski: A. Ha, definitely full-time. All of us, I'm just not going to say the mayor, all of us. Basically, the way it works in our jurisdiction is we're all considered commissioners and commissioners elect the mayor. That's' how it works in our area. Um I know the hours I work. I, I know that I'm there eight o'clock, nine o'clock in the morning

and last night I didn't get out until, I had a zoom meeting until seven o'clock last night. So, it's a long day.

***

Det. [redacted]: Q. Is your position considered full-time, part-time or seasonal?

Mikulski: A. Full time.

***

Det. [redacted]: Q. What's the minimum you work and the maximum per day would you say?

Mikulski: A. Uh, five to ten [hours].

Det. [redacted]: Q. Five to ten. Okay?

Mikulski: A. Mm hm. (Indicating yes.)

Det. [redacted]: Q. And per week?

Mikulski: A. Thirty-five to forty-five in the office. And outside of town I mean I don't get off the phone sometimes until nine, ten o'clock at night.

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Det. [redacted]: Q. And then when and how often are you at city hall? You said uh...

Mikulski: A. Sometimes I can be there seven days a week.

Det. [redacted]: Q. Okay.

Mikulski: A. For the most part its Monday through Friday. And then during the summertime I might be up at the beach with beach patrol on the weekends. They have different things going on at the beach, they have rowing contests, they have things over at Hereford Inlet. They have uh you know just everything.

Throughout the course of Mikulski's lengthy interview with the NJSP investigators, the skein of his testimony was that as a commissioner he performs a lot of work inside and outside City Hall. He persistently testified that he was working between 35 and 45 hours per week on

average. Indeed, it would be shockingly naïve, if not willfully negligent, for the State to believe that Mikulski's role as a commissioner did not require him to engage in a significant amount of activity outside City Hall. Yet, the State withheld this clearly exculpatory evidence (i.e., his statement) from the grand jury, and focused the grand jury exclusively on the hours he spent in City Hall, which were reflected on his time sheets. (The State knew the time sheets reflected only hours spent in City Hall.) In fact, the State misled the grand jury into believing that only hours spent in City Hall were part of the 35-hour calculus. This is not what the statute requires, and thus constituted an erroneous and overriding legal imperative that permeated the grand jury presentation and ultimately poisoned it as well. To punctuate this point, the grand jury rightfully questioned whether they were required to consider only hours spent in City Hall in its determination of whether Mikulski qualified for health benefits, or whether they were permitted to consider hours worked outside of City Hall.

Grand Juror: Q. Where does it [statute] say the 35 hours must be worked at City Hall?

Prosecutor: I can answer that to the effect that I don't believe any of the evidence that would show would address that? (1T65, 1-6)

The Prosecutor's cryptic response was an evasive non-answer. Of course, the honest and **only** answer to that question was that the statute does **not** require that the 35 hours be worked at City Hall. Shame on the Prosecutor for not answering that simple question in a forthright manner, and then for intimating that the question was a factual issue as opposed to one purely of law. Again, this deception compounded the State's dubious tactic to withhold Mikulski's testimony that he worked well in excess of 35 hours per week, consisting of the hours clocked in at City Hall, the extra time he spent at City Hall before and after he clocked out, and his unrefuted testimony that he put in a substantial amount of work outside of City Hall. By arbitrarily suggesting to the grand

jury that it could consider only hours spent at City Hall, and failing to tell the grand jury it could consider the additional hours outside of City Hall (and withholding uncontroverted evidence that Mikulski performed work outside of City Hall), the Prosecutor's presentation to the grand jury amounted to little more than submitting "half-truths."

It's probably no surprise that the grand jury considered hours worked outside of City Hall a significant issue, as evidenced by the aforementioned question and other similar questions they asked during the proceeding. (1T65 to 1T73) For example, when the issue of timesheets was mentioned, one juror asked, **"were they only reporting time when they were in the office not including time like she said they worked 24/7, so it was only time that they were physically in the office?"** The juror groped for an answer to these rather straightforward questions. **"I want to know if they were just City Hall hours?"** (1T66, 1-25) Instead of just answering these simple but crucial questions, the Prosecutor cleverly avoided them. Of course, with respect to Mikulski, the State very well knew that the time sheets included only City Hall hours, and that he provided a journal documenting additional time worked, and had also provided unrefuted evidence that he worked substantial hours outside of City Hall. (See Exhibit F) However, because the entire prosecution against Mikulski rests upon the State's absurd notion that **none** of the time he worked outside the confines of City Hall counts toward the 35-hour requirement, the State wryly refused to answer the pertinent juror questions, and left the grand jury guessing. There is no doubt that truthful answers to the grand jury's simple questions were incongruent with the State's theory of prosecution, so the State largely ignored the questions. To amplify this evasive tactic, the State also withheld the critical evidence that Mikulski worked additional hours above and beyond those reflected in the time sheets, and that he worked a minimum of 35 to 45 hours per week. In the

context of this prosecution, this sharp tactic was not only deceitful, it was outrageous, and retarded the grand jury's primary decision-making function.

Staying on the topic of "half-truths," the State knew that although Mikulski owned a luncheonette in Wildwood, he trained someone to take his position there when he ran for office. The State knew that after he was elected, he devoted less than 8 hours per week to the restaurant, and only worked those scant hours on weekends. (See Exhibit F) Nevertheless, the State offered stilted testimony suggesting that because Mikulski owned a business, he could not be a "full-time" employee of Wildwood and still devote 35 hours per week, and never mentioned the crucial fact that he worked less than 8 hours per week at the luncheonette. In fact, the Prosecutor hammered this point home when he elicited testimony that former commissioner [redacted] only worked about 15-18 hours a week as a commissioner because he ran a hardware store, to create the inference that if a commissioner has a full-time job elsewhere, he or she could not work the requisite 35 hours per week for benefits. The State also elicited testimony that one of Mikulski's fellow commissioners, [redacted], worked fewer hours than Mikulski, as she had a full-time job with the County. After some irrelevant testimony concerning the former commissioner and Commissioner [redacted], the Prosecutor then addressed Mikulski.

Prosecutor: Q. In fact, didn't you learn that every Commissioner we mentioned today, Troiano, Byron, [redacted], Mikulski and of course [redacted], they all had other jobs and businesses?

Det. [redacted]: A. Yes.

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Prosecutor: Q. And Mikulski owns and runs a restaurant in Wildwood, the Key West Café, correct?

Det. [redacted]: A. Yes. (2T79 to 2T80)

This testimony was nothing more than a half-truth. The Detectives had interviewed Mikulski at length, and knew very well that he spent very little time at the restaurant after he was elected commissioner. The State was in possession of no evidence to the contrary. However, the Prosecutor, who has an overriding duty of candor and fair play, never mentioned these critical facts. Obviously, the only reason the Prosecutor adduced this testimony about the topic of owning a restaurant was to create the impression that Mikulski could not devote a full 35 hours per week to the City of Wildwood. Presenting the evidence in this stilted manner was nothing more than an underhanded trick. It also compounded the problem of the withheld exculpatory evidence concerning the hours Mikulski worked and what the grand jury was permitted to consider insofar as hours were concerned.

The Prosecutor continued the sleight of hand when adducing testimony about the memorandum from Solicitor [redacted] concerning the requirements for health benefits. (See Exhibit E.)

Prosecutor: Q. Beyond that, does that memo state anywhere a conclusion or opinion that Mikulski actually was eligible for or should receive State health benefits through the City?

Det. [redacted]: A. No. (2T86 to 2T90)

In fairness, this response is technically truthful, in the same way Inspector [redacted] response to the question of whether or not his dog bites was truthful. In actuality, the memo didn't say whether Mikulski was or was not eligible for the benefits; rather, it indicated that for elected officials to obtain health benefits they had to work 35 hours per week. It was disingenuous on the part of the State to suggest that the memo expressed a negative opinion about whether or not

Mikulski qualified for benefits. It becomes clear that was exactly what the Prosecutor implied when he then concluded the grand jury questioning by improperly eliciting expert opinion testimony from Detective [redacted] (without qualifying her as such) on the ultimate issue of whether or not Mikulski worked 35 hours per week:

Prosecutor: Q. Based on your investigation, the evidence you obtained, and the evidence we've discussed here today, particularly Mikulski's self-reported time sheets, was Mikulski a full-time employee, as defined by the statute and in the city attorney's memo we just discussed, a full-time employee, being one whose hours are fixed at 35 hours per week in his capacity as commissioner?

Det. [redacted]: A. No.

Prosecutor: Q. No as in he did not appear to be based on your investigation and all evidence that you were able to accumulate?

Det. [redacted]: A. Yes. (2T94, 1-14)

With all due respect to the Prosecutor, the determination of whether Mikulski worked 35 hours was a decision the grand jury was exclusively charged to decide. However, the improper expert opinion testimony quoted above deprived the grand jury of its decision-making function when the Prosecutor force fed the decision to the grand jury. Our Courts have eschewed expert testimony on the ultimate issue in the context of jury trials even from properly qualified experts involving issues that are beyond the ken of lay jurists, none of which was present here. See State v. Cain, 224 N.J. 410 (2016) and State v. Simms, 224 N.J. 393 (2016). Although the Court's pronouncements with respect to ultimate opinion testimony in State v. Cain and State v. Simms were in the context of expert testimony in criminal jury trials, the precepts equally extend to grand jury presentations. A grand jury is as likely, if not more likely, to be influenced, perhaps unduly so, by the opinion testimony of experienced police officers. In fact, it is submitted that the Court must be even more vigilant in barring overreaching opinion testimony before a grand jury as in

this setting the defendant has no ability to contest the evidence being presented as he or she would in a jury trial. Thus, the danger of prejudice by such opinion testimony is even greater. As recognized by our Courts, such opinion testimony acutely affects any fact finder's deliberations, irrespective of whether the fact finder is called upon to determine guilt, or simply to determine whether there was enough evidence to indict Mikulski. In the case at bar, without the ill-conceived expert opinion, the grand jury was fully capable of determining whether or not Mikulski worked 35 hours per week as a commissioner. Instead, the Prosecutor had Det. [redacted] testify as an expert, and opine that Mikulski did not qualify for the health benefits. Putting aside the issue that Det. [redacted] reasoning was substantially flawed, Det. [redacted] was certainly **not** qualified as an expert. Also, the subject matter was certainly **not** the proper subject of expert testimony in any event as it was not beyond the ken of a lay person. See N.J.R.E. 702. Stated otherwise, this testimony would not be admissible in **any** context, yet it was presented to the grand jury. There is no doubt that such testimony had the capacity to unduly influence the grand jury and deprive it of its crucial decision-making role. It was up to the grand jury and the grand jury alone to decide whether or not Mikulski qualified for benefits, and not for Det. [redacted] to force feed them the opinion that he did not. Under the circumstances, proffering this pseudo-expert opinion testimony affronted all concepts of due process and fundamental fairness, and indelibly tainted the grand jury presentment as it related to Mikulski. Additionally, the improper testimony amplified the other pervasive defects in the presentation as previously discussed and also discussed below.

Finally, it was unfair for the Prosecutor to repeatedly compare Commissioner [redacted] (and former Commissioner [redacted]) circumstances with that of Mikulski. [redacted] was one of Mikulski's fellow commissioners. She had a full-time 9 to 5 job with Cape May County, and also received State Health Benefits through that County job. Because she had a full-time job with

the County, and already received health benefits, she had less incentive to work 35 hours per week as a commissioner. She was forthright when she told the State's investigators that she worked less than 35 hours as a commissioner. However, in her statement to the State's investigators, she was clear to say that she did not question Mikulski's hours, nor would she say he was not a full-time employee when questioned. The Prosecution presented her statements and time sheets for no other reason than to suggest that because she admittedly worked only part time as a commissioner, Mikulski must also only work part-time. Again, the commissioners do not work a set schedule. Each of the commissioners is in charge of his or her distinct departments, have different supervision responsibilities, different work schedules, different management styles, and different work ethics. Whether or not [redacted] worked 35 hours or less, or whether former Commissioner [redacted] worked less than 35 hours per week, had absolutely no bearing whatsoever on the number of hours Mikulski worked, and was nothing more than a smoke screen. The irrelevant evidence concerning her work hours, and those worked by [redacted], was presented simply to bamboozle the grand jury into thinking that Mikulski "fudged" his hours, even though the State knew he did not. In fact, the State conceded that Mikulski "accurately tracked" the hours he worked on any given day. (2T 116, lines 3-10) Simply stated, there was no legitimate reason to present evidence concerning [redacted] or [redacted], when it was wholly irrelevant to the issues involving Mikulski (and the other defendants), and constituted another "half-truth." In context, presenting this misleading evidence was another insult to the notions of due process and fair play in a grand jury proceeding.

Singularly, and in combination, the defects discussed above poisoned the grand jury presentation. Had the State presented the evidence fairly, Mikulski would have been cleared of any wrongdoing. For these reasons, the Indictment against Mikulski must be dismissed.

II. Joining the Three Defendants in the Same Presentation was Misleading and Unduly Confused the Issues and thereby Prejudiced Mikulski.

Perhaps it was easier for the State, but there was no legal or factual basis to join all three defendants in one grand jury presentation. Indeed, it was improper for the State to join all three defendants in a single indictment, as the there was no claim that the defendants conspired or colluded with one another in their alleged wrongdoing. Moreover, 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 happen to be elected officials in the City of Wildwood charged with illegally obtaining health benefits. The crimes charged against Troiano occurred in the decade prior to Mikulski taking office. Most of the allegations against Byron occurred before Mikulski was sworn in, and certainly 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. Even a cursory review of the defense briefs suggests that the defendants' defenses are antagonistic. Lumping Mikulski and the others together in one grand jury proceeding created undue confusion, and prejudiced Mikulski, whose circumstances were much different than the other defendants.

In State v. Sterling, 215 N.J. 65, 72 (2013), the New Jersey Supreme Court recognized that there are "basic principles governing joinder of offenses" in an indictment. Those principles are set forth in R. 3: 7-6, which provides"

> Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. Relief

from prejudicial joinder shall be afforded by R. 3:15-2.

The Rule "addresses the inherent 'danger[,] when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.'" Sterling, at 73 quoting State v. Pitts, 116 N.J. 580, 601 (1989). No less is true in a grand jury setting. In this case, it is clear that the charges against each defendant would not meet the requirements of R. 3: 7-6. "The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" Sterling, quoting State v. Chenique-Puey, 145 N.J. 334, 341 (1996). In this case, the charges against each, and the evidence supporting the charges, is not only irrelevant to the other defendant's charges, but also misleading and unduly confusing and time consuming when lumped together. See N.J.R.E. 403. Certainly, if Mikulski was tried separately, the State could not introduce evidence against Troiano or Byron in his trial, or vice versa. Consequently, it was improper for the State to join the charges in the same grand jury proceeding.

There can be no doubt that Mikulski was prejudiced by the improper joinder. Indeed, his defenses to the charges against him are nearly bulletproof. He applied for health benefits through normal channels. He performed his due diligence before he applied for same. As the aforementioned LFN recommends, he consulted with the City Solicitor and Labor Counsel before applying. He relied upon their advice. His employment as a commissioner was his "primary employment." He was working well in excess of 35 hours per week in his capacity as commissioner. The City of Wildwood, by Resolution enacted in 2011, recognized the position of commissioner as "full-time" for the purposes of the statute. Reliance upon the Resolution was

reasonable. HR approved his application for health benefits when he applied 5 months after he was sworn in. Indeed, HR completed a "payroll change in status" form and attached a memo to it, both of which indicated that Mikulski was a "full-time" employee. The New Jersey Department of Pensions and Benefits approved his application. Mikulski took a reduction in salary to offset his contribution for the health benefits. According to the LFN, his decision to obtain benefits need only be "reasonable," not necessarily correct. In this case, it was both. In contrast, the only evidence the State can offer to substantiate the charges against Mikulski are its debatable contentions that his time sheets, which include only time spent in City Hall, do not meet the 35 hour per week requirement, and that only time spent in City Hall counts towards the hourly requirement. (Presumably, at trial, the jury will be instructed to consider **all** hours worked, irrespective of whether it was inside or outside of City Hall.)

On the other hand, the grand jury heard testimony that Troiano and Byron certified on time sheets that they worked 7 hours per day 5 days per week, irrespective of whether they actually worked anywhere or came into City Hall. Unlike Mikulski, neither of them tracked any of their time in any verifiable manner whatsoever. As to Troiano and Byron, the State submitted documents demonstrating that they were on vacation or working elsewhere during some of the days and hours they claimed to have worked 7 hours on their time sheets. Thus, unlike Mikulski, the State contends that their time sheets were **fraudulent**. (The State concedes that Mikulski's time sheets were accurate.) Perhaps more importantly, the State presented evidence to the grand jury that the former City Solicitor and former City Administrator actually met with Troiano and Byron and informed them that they were **not** eligible for health benefits and that they were going to get in trouble if they continued collecting health benefits. If true, this is damning evidence. Of course, this meeting would have been several years before Mikulski took office, and he had no

knowledge of such a meeting, if it even occurred, as it was not memorialized or documented in anywhere. Further, Troiano was also the mayor, and Byron was a commissioner, in 2011 when Resolution 227-6-11 was passed which declared the Board of Commissioners as "full-time" employees. The State's position seems to be that the Resolution is "self-serving." However, it remained on the books when Mikulski took office, and Mikulski had every right to rely upon it. Apparently, this may not be the case with the others.

With respect to Byron, in addition to alleging that he falsified his time cards, and was told by the former City Solicitor that he did not qualify for benefits, the State presented evidence that he had another full-time position in Atlantic City during the time period he claimed to be a full-time employee of Wildwood. Additionally, the State presented evidence that he was also employed as a realtor for a local real estate agency, as well as spending significant time away. Other than unfairly implying that Mikulski was tied up at his luncheonette, the State made no such claims against Mikulski.

Additionally, the State presented evidence that numerous present or former employees and officials were interviewed by the State during the investigation. However, when discussing Troiano, Byron and former commissioner [redacted] during the grand jury presentation, the State confused Mikulski with [redacted] when it asked an important question:

Prosecutor: Q. And more specifically, they [witnesses] all essentially told you that, based on their observations and experience, Troiano, Byron and Mikulski just didn't maintain City work schedules of at least 35 hours per week if, for no other reason, the positions simply did not generally involve enough work to require full-time hours, correct?

Det. [redacted]: Yes, that's correct. (2T45, line1 to 2T46, line 2)

It is quite clear that in the context of the colloquy that came immediately before and after the above question that the Prosecutor was referring to Troiano, Byron and [redacted] not Mikulski. (See 2T,

43 – 2T 46) However, the Prosecutor haphazardly injected Mikulski into the question. Moreover, that isn't the only time that the State intermingled Mikulski with the other defendants when discussing evidence that had nothing to do with him or the charges against him. This is evident throughout the transcripts of the February 17, 2023 and March 10, 2023 proceedings.

Finally, the State prejudiced Mikulski immensely when it told the grand jury that, "the grand total of all these public funds expended based on their participation in the State's Benefits Program exceeds a million dollars...." and thereby suggested some concerted conduct on the part of the defendants. In reality, the State's specific contention against Mikulski was that Wildwood paid out $31,000.00 in premiums, and the health plan paid out $72,000.00 in claims, nowhere near a million dollars. Despite the fact that the charges against each defendant involved independent conduct and starkly distinct and separate proofs, and no collusion or conspiracy was alleged, the State aggregated the restitution amounts pertaining to each defendant in order to exaggerate the seriousness of the case against each defendant, particularly Mikulski, when it told the grand jury the case involved over a "million dollars" in stolen funds. In and of itself this tactic may not have abridged Mikulski's right to a fair and impartial grand jury process, but it's certainly inconsistent with s prosecutor's duty of fair play. However, it becomes magnified when considered in combination with the other defects in the presentation, notably those discussed above. Likewise, the acute potential for prejudice underscores the impropriety of the joinder for the purposes the grand jury presentation.

In conclusion, the joinder of the defendants in one grand jury proceeding, combined with the other defects in the presentation, violated the State's duty of fair play, trampled upon the grand jury's decision-making function, and subverted the grand jury process as to Mikulski. For these reasons, the Indictment must be dismissed.

Conclusion

As to Mikulski, he grand jury presentment was fatally defective. The State withheld clearly exculpatory evidence that Mikulski worked in excess of 35 hours per week. Moreover, it presented much of the evidence in a false light or in a manner that amounted to "half-truths." The manner in which the State presented the case was also misleading and unduly confusing. Additionally, the State solicited improper expert testimony from the investigator who testified. The State refused to answer inquiries by grand jurors about critical factual and legal issues. Likewise, the State improperly instructed the grand jury as to the law, confused proofs involving the co-defendants' conduct and that of other third parties with that of Mikulski, and improperly joined all three defendants into one grand jury proceeding despite the fact that the charges against each defendant were unrelated and involved starkly different proofs. Had the State presented the evidence in a fair manner, it is likely that Mikulski would have been cleared of any alleged wrongdoing. Singularly, or in combination, these defects unlawfully tainted the presentation and deprived the grand jury of its decision-making function. For these reasons, the Indictment against Mikulski must be dismissed.

Respectfully yours,

David A. Stefankiewicz

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