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SUPERIOR COURT OF NEW JERSEY
COUNTY OF CAPE MAY
LAW DIVISION – CRIMINAL
INDICTMENT NO. 23-3-00038-S
CASE NO. CPM-22-000535

STATE OF NEW JERSEY, :

Plaintiff, :

v. :

ERNEST V. TROIANO, JR., et al., :

Defendants. :

CRIMINAL ACTION

STATE'S RESPONSE TO DEFENDANT STEVEN E. MIKULSKI'S MOTION TO DISMISS THE INDICTMENT

TO: HON. BERNARD E. DELURY, JR., P.J.Cr.
Cape May County Courthouse
Criminal Division
9 North Main Street
Cape May Courthouse, New Jersey 08210

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Please accept this letter in lieu of a more formal brief in response to defendant Steven E. Mikulski's motion to dismiss the above-captioned indictment. For the reasons set forth herein, this Court should deny that motion.

RELEVANT FACTS AND PROCEDURAL HISTORY

On March 10, 2023, a State Grand Jury returned Indictment No. 23-3-00038-S charging defendant, Steven E. Mikulski, with second-degree Official Misconduct, in violation of N.J.S.A. 2C:30-2 (Count Three), second-degree Theft by Unlawful Taking, in violation of N.J.S.A. 2C:20-3 (Count Six), third-degree Tampering with Public Records, in violation of

N.J.S.A. 2C:28-7a(2) (Count Nine), and fourth-degree Falsifying or Tampering with Records, in violation of N.J.S.A. 2C:21-4a (Count Twelve).[1] The following is a synopsis of the relevant facts presented to that State Grand Jury through an array of evidence and testimony from New Jersey State Police Detective-Sergeant [redacted].

In brief, the central allegations of this matter are as follows: state law requires local elected officials to work full-time in those positions to participate in the publicly funded State Health Benefits Program (SHBP); the defendants, as locally elected Wildwood City officials, were not working full-time hours, maintaining set schedules or even accurately documenting any of the time that they actually worked; instead, they had simply passed and/or relied upon a resolution declaring themselves to be full-time employees, at least in name, in order to gain access to SHBP coverage any way.

More specifically, in 2010, the state Legislature enacted changes to the eligibility requirements for participation in the SHBP. Among other modifications, pursuant to Chapter 2, P.L. 2010 and effective May 21 that year, all future elected and appointed officials had to be "full-time" employees of their respective localities "whose hours of work are fixed at 35 or more per week" to qualify for employer-provided SHBP health benefits. See State's Exhibit B, 32:3 to 35:9. See also N.J.S.A. 52:14-17.26. This change was intended to limit SHBP participation solely to those elected officials "whose primary employment (i.e., minimum 35 hours/week) is their government position." See State's Exhibit B, 32:3 to 35:9. See also Defense Exhibit B. Prior to the change, with particular regard to elected officials, no such hourly requirement existed for their participation in the

[1] This indictment further charged co-defendants Ernest V. Troiano, Jr. and Peter J. Byron separately and individually with those same four offenses.

SHBP and they could receive benefits even if holding their respective positions only in a part-time capacity.[2] See State's Exhibit B, 32:3 to 35:9.

The following year, in 2011, Ernest Troiano, Peter Byron and [redacted] were elected to the Wildwood city commission, a three-member governing body from which the mayor is appointed, with all members serving four-year terms. See State's Exhibit B, 24:6-14, 25:2-12. After formally assuming those elected posts, with Troiano taking the mayor's seat, they then enacted two resolutions that June concerning health coverage. Passed on June 8, 2011, Resolution No. 226-6-11 formally acknowledged and authorized the change described above in the number of work hours required per week for eligibility as a "full-time" city employee to participate in the SHBP. According to the resolution, the number of hours, "as of June 1, 2010, may not be . . . less than thirty-five (35) hours per week for elected or appointed officials." That same day, the commission then passed Resolution No. 227-6-11, which simply declared "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 (35) hours per week for the City of Wildwood." See State's Exhibit B, 26:8 to 30:9.[3] Notably, prior to these changes in 2010 and 2011, the Wildwood mayor and commissioners had generally been considered part-time employees, but they nevertheless

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[2] Regarding interpretation of the change, legislative history indicates that it was plainly intended as a major cost-saving measure to restrict or limit access to the SHBP only to those officials who actually worked "full-time" hours in their elected positions. The Senate Statement issued upon the legislation's introduction noted that "significant savings to local public employers and their taxpayers are possible by bringing them into conformity with State practice and ensuring that only genuinely full-time employees and their dependents are eligible for the desirable and costly benefits of SHBP coverage." See State's Exhibit B, 32:3 to 35:9. See also Statement on Introduction of 2010 Bill Text NJ S.B. 3 (February 8, 2010).

[3] Despite defendant's assertion to the contrary, the 2011 resolution did not allow the commissioners to maintain "average" weekly schedules of 35 hours, it expressly required them to work "a minimum" of 35 hours per week for the city. See Defense Brief at 7, 14.

received SHBP coverage through the city because that was not previously prohibited. See State's Exhibit A, 9:9-17; State's Exhibit B, 42:8 to 45:21.

As of July 17, 2011, all three commissioners had enrolled in the SHBP. Troiano continued participating and receiving benefits through the end of his final term in December 2019. Byron still serves on the commission, now as mayor, and had continued receiving benefits until mid-2022 when his coverage was terminated.[4] See State's Exhibit B, 94:19 to 97:21. , on the other hand, continued receiving benefits until the end of 2016, when he withdrew from the SHBP. This was based on advice provided to all three commissioners at the time by the city solicitor, Mary , and the city's business administrator, , both of whom had been appointed in 2013. In becoming aware of and then further reviewing the matter, and had determined: that the commission posts did not qualify as full-time positions under the law because they did not require full-time hours; that the commissioners were not really full-time employees because they did not work sufficient hours; and that, therefore, they were not eligible for SHBP coverage through the city. See State's Exhibit B, 40:2 to 41:22. This perspective, notably, was shared by mostly all other city officials whom detectives interviewed this case. See State's Exhibit B, 42:8 to 46:6. advice prompted , who typically worked 15 to 20 hours a week for the city, to immediately terminate his benefits, but Troiano and Byron ignored that legal guidance, stated that they needed the health insurance and continued receiving the benefits. This was apparently the first occasion when an attorney provided the commissioners with any sort of legal consultation on the subject. See State's Exhibit B, 40:2 to 41:22.

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[4] This occurred shortly after the defendants were initially charged by complaint in this matter in June 2022.

The commission remained unchanged with those three members – Troiano, Byron and [redacted] – until the 2019 election, when [redacted] left office and Troiano was defeated. Byron was re-elected and became mayor in 2020. Also elected to commission posts that year were defendant Steven Mikulski and [redacted]. See State's Exhibit B, 24:15 to 25:23. Despite the advice of city officials (and that the matter was openly under criminal investigation at the time), defendant, a local restaurant owner, insisted on participating in the SHBP and began receiving health benefits. See State's Exhibit B, 82:17 to 92:5. [redacted], on the other hand, expressed no interest in such coverage because she considered the new role a part-time job and already received health benefits through her actual full-time position as a program coordinator and planner with the Cape May County Division of Aging and Disability Services – notably, that is, despite Resolution No. 227-6-11's express declaration that city commission posts were full-time and required schedules of at least 35 hours per week. See State's Exhibit B, 76:7 to 77:15.[5]

With regard to timekeeping, as explained by the various city officials with whom detectives spoke, for several years no one generally monitored or recorded the actual hours and days worked by the mayor and commissioners. The only such regularly generated documentation would have been timesheets created and generally completed for the commissioners by their confidential assistant, [redacted]. These timesheets are single-page documents, each with a graph showing a two-week pay period, with each week running from Saturday through Friday. At the bottom of each sheet is a signature line

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[5] Every commissioner during the subject period either had other employment or owned a business. [redacted] owned "The Hardware Store" in Wildwood Crest. Mikulski owns the Key West Café in Wildwood. Troiano has a family-owned concrete and masonry business in Wildwood, Holly Beach Concrete. And Byron is a real estate agent who also worked for some time for the South Jersey Transportation Authority. See State's Exhibit B, 78:10 to 79:22.

beside the language, "I certify that the City of Wildwood employees listed above rendered the number of hours as indicated herein." Typically, for other city workers, the employee's supervisor would sign and certify, but the mayor and commissioners signed and certified their own timesheets or, alternatively, had ███ sign them on their behalf, typically with a signature stamp. See State's Exhibit B, 46:7 to 48:25.

For most of the subject period, from 2011 (when Troiano, Byron and ███ took office and the health benefits resolutions were passed) through December 2019, ███ uniformly completed the timesheets for all three commissioners to simply show them working 70 hours each on a biweekly basis, with "H's" for holidays and either "X's" (until 2017) or "7's" (from 2017 forward) entered each day Monday through Friday. After January 2020, when Byron became mayor and ███ and defendant joined the commission, this practice changed, at least for the latter two. For Byron, nothing changed, and he continued to sign and certify his timesheets (or have them signed on his behalf) showing, aside from "H's" for holidays, all "7's" from Monday through Friday, with all weeks uniformly amounting to 35 hours.[6] See State's Exhibit B, 46:23 to 56:15.

With regard to defendant and ███, aside from "H's" for holidays, their timesheets initially show, like Byron's, all "7's" from Monday through Friday until March 2020. Thereafter, however, their timesheets appear, or at least purport, to record the time worked more accurately and their reported days and hours worked began to widely vary. ███, who received no SHBP benefits through the city and considered herself a "part-

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[6] Despite this appearance of full-time regularity, ███ testified that the hours maintained by the commissioners were anything but regular, that an "X" or a "7" could actually mean three hours or 10 hours, that the commissioners could basically come and go as they saw fit, and that the timesheets she was certifying on their behalf were basically all inaccurate. See State's Exhibit A, 27:16 to 28:6, 38:3 to 39:16, 44:7 to 45:1.

time" commissioner, typically reported working between 15 and 20 hours, if that, each week. Defendant, who did receive SHBP benefits and did consider himself "full-time," reported various weekdays – and even full weeks – with no time recorded at all. Although Mikulski's self-reported hours and days worked were by no means regular, they often amounted to 35 or more per week from Monday through Friday, with some Saturdays, until about August 2020. He then reported a personal day on August 17, 2020 and his timesheet shows 28.5 hours worked that week.[7] Mikulski then reported 34.25 hours the following week, 30 hours the next week and 26 hours the week after that. For the week of October 3, 2020, he reported no hours at all. He reported 33.5 hours worked the week of October 17, 2020, 29.5 hours worked the week of October 24, 2020, 21.75 hours worked the week of November 28, 2020, and 23 hours worked the week of January 23, 2021. Mikulski then reported zero hours worked the week of January 30, 2021, and the same, zero hours, for the next two weeks as well. This irregular pattern continued on from there. In that respect, although Mikulski had been logging his hours and often reporting 35 or more hours per week, his schedule was not at all consistent and showed numerous weeks with far less than 35 hours worked, including several with zero. See State's Exhibit B, 68:21 to 74:6.

Information provided by the state Division of Pensions and Benefits (Pensions) provided a relatively specific tally of the cost of these SHBP benefits. Troiano received

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[7] Reinforcing the notion that the defendants, as commissioners, are "full-time" only by their own declaration, the mayor commissioners are the only "full-time" Wildwood city employees who do not receive any annually allotted or banked vacation, sick or personal time. See State's Exhibit B, 82:24 to 84:6. As non-full-time employees who work neither fixed hours nor regular schedules, the mayor and commissioners have never received, let alone needed, such leave-time benefits because they could simply come and go as they pleased and take time off whenever they chose to do so. This also means that the only hours credited toward their 35-hour weekly requirement for health benefits must actually be worked and cannot be supplemented by a personal day or a day off for any reason in substitution, even if spent assisting an ailing family member.

SHBP coverage with his wife and dependents from July 17, 2011 through the end of his final term in December 2019. During that period, the total amount paid for Troiano through the SHBP for health coverage, prescription benefits and claims for treatment and care was about $287,000. For Byron, who had received SHBP coverage with his wife and dependents from July 17, 2011 through mid-2022, that total amount was about $609,000. And for defendant, who had only received SHBP coverage with his wife from July 2020 through mid-2022, that total amount was more than $103,000.[8] See State's Exhibit B, 94:19 to 98:24.

LEGAL ARGUMENT

THE STATE GRAND JURY PROPERLY RETURNED THE INDICTMENT AGAINST DEFENDANT AND HE OFFERS NO LEGITIMATE BASIS TO DISTURB THAT DETERMINATION NOW.

The State Grand Jury received ample evidence in support of the indictment it returned against the three defendants, including defendant Mikulski. As summarized above and further herein, that evidence showed how those defendants used their official elected positions to fraudulently gain access to publicly funded state health benefits. The evidence showed how pursuant to state law, in order to participate in the SHBP, locally elected officials must hold their elected positions as their full-time primary employment. The evidence further showed how the defendants were, in reality and despite the resolution and timesheets declaring otherwise, not full-time employees working full-time hours, and therefore they were not entitled to participate in the SHBP. As such, that evidence firmly established a prima facie case that satisfied the elements of the charged offenses and defendant's motion to dismiss the indictment should therefore be denied.

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[8] As with Byron's coverage, defendant's was likewise terminated after the defendants were initially charged by complaint in this matter in June 2022.

It is well recognized that grand juries play a unique constitutional role in "standing between citizens and the state" to determine "whether a basis exists for subjecting the accused to a trial." State v. Hogan, 144 N.J. 216, 227 (1996) (citations and internal quotations omitted). More specifically, the grand jury must determine whether the State has established a prima facie case that a crime has been committed and that the accused has committed it. Ibid. (citations omitted). The Supreme Court has acknowledged the grand jury's independence in fulfilling that role, and has thus "expressed a reluctance to intervene in the indictment process." Hogan, supra, 144 N.J. at 228 (citations omitted). As such, once the grand jury has acted and returned an indictment, that "indictment should be disturbed only on the clearest and plainest ground" and "only when the indictment is manifestly deficient or palpably defective." Id. at 228-29 (citing State v. Perry, 124 N.J. 128, 168 (1991); State v. Wein, 80 N.J. 491, 501 (1979)) (internal quotations omitted). Defendant has failed to establish any of that here.

I. The State Properly Presented the Grand Jury with Voluminous Evidence of Defendant's Guilt while Withholding No Evidence of a "Clearly Exculpatory" Nature Because Such Evidence Did Not Exist.

Defendant contends that the State withheld evidence from the State Grand Jury that may have somehow "cleared" him, evidence that if presented – or presented in his preferred manner – would have somehow resulted in the jury reaching a different result than it did. Defendant points mainly to his timesheets, timekeeping records, some legal advice he received from city attorneys and comparisons drawn between him and other commissioners, while accusing the State of using the same to somehow deceive the jury with "half-truths" and "sleight of hand." In short, defendant's exaggerated claims are simply erroneous and should be rejected.

It is well established that the grand jury's role is a limited one; it only investigates potential defendants to determine whether criminal proceedings should continue. Hogan, supra,

144 N.J. at 235-36 (citations omitted). It does not weigh evidence presented by the parties, nor does it render credibility assessments or resolve factual disputes, tasks "reserved almost exclusively for the petit jury" at trial. Ibid. To be sure, the State may not deceive the grand jury or present evidence in a way "tantamount to telling . . . a 'half-truth,'" and so it must acknowledge credible and material exculpatory evidence. Ibid. But the State need not present such evidence to the grand jury unless it is "clearly exculpatory" such that it "directly negates the defendant's guilt," i.e., "squarely refutes an element of the crime." Hogan, supra, 144 N.J. at 237.

In that respect, our Supreme Court has explained that the State need not inform grand jurors of evidence showing, for example, that a defendant had no motive for the crime, or that the credibility of the State's witnesses before them can be impeached with criminal records. Ibid. Grand jurors should be informed, on the other hand, only of that which is "clearly exculpatory," such as the credible testimony of a reliable and unbiased alibi witness, or any unquestionably reliable physical evidence showing that the defendant did not commit the alleged crime. Hogan, supra, 144 N.J. at 238. In any event, however, prosecutors "need not construct a case for the accused or search for evidence that would exculpate" him. Id. at 238-39 (emphasis added).

> Only when the prosecuting attorney has actual knowledge of clearly exculpatory evidence that directly negates guilt must such evidence be presented to the grand jury. Moreover, courts should dismiss indictments on this ground only after giving due regard to the prosecutor's own evaluation of whether the evidence in question is "clearly exculpatory." Ascertaining the exculpatory value of evidence at such an early stage of the proceedings can be difficult, and courts should act with substantial caution before concluding that a prosecutor's decision in that regard was erroneous.
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> [Id. at 238-39 (citations omitted).]

Here, defendant fails to show how the State in any way failed to adhere to its prosecutorial obligations under the applicable law described above.

A. Evidence Concerning Timekeeping

In his brief, defendant repeatedly refers to his timekeeping records, claiming the State improperly described them and their contents while it "knew [he] was working between 35 hours and 45 hours per week" and that his timesheets "reflected only hours spent in City Hall." This is completely false. During his interview with detectives in October 2020, defendant claimed at the time to be working 35 to 45 hours a week "in the office" while working additional time "on the street," for example, taking meetings and calls and going to the beach or a parade. See Defense Brief at 15-16. But it does not matter what defendant said, what matters is what he did. As he acknowledged in that interview, city officials initially advised him he was part-time and not eligible for SHBP participation, but he insisted he was and would be working full-time hours, 35 hours a week, so his status was changed to full-time and he was granted health benefits provided that he justify that status by documenting his hours. See Defense Exhibit F. Defendant did this primarily by way of the timesheets used by all city employees as a well as a journal, in which he described in more detail what he was doing or working on. These records were obtained and analyzed by detectives and their contents were described, and examples were provided, to the State Grand Jury. As the detective witness testified, those timesheets showed defendant's hours to be irregular and varied, his hours not uniformly amounting to 35 or more each week, and in various instances that he did not work at all during given weeks. See State's Exhibit B, 68:21 to 71:9. See also State's Exhibit C.

Defendant in his brief insists that those timesheets failed to document all of his time, that his "journal" further documented "additional time worked," that beyond that he also worked even more undocumented hours and, finally, that the State was aware of all of this and withheld it from the jury. See Defense Brief at 15-18. To say he is mistaken would be quite the

understatement. And even he, in his interview with detectives, acknowledged the untruthfulness of those statements when he told them that the "journal," see State's Exhibit D, basically just documented the hours he was working and described some of the specific work he was doing during those hours, which were the same hours he claimed to be working in his timesheets, which themselves would have been the official recordation of all of his time worked. See Defense Exhibit F. And as indicated in the "journal," those hours documented in both the "journal" and the timesheets – which, again, he told detectives described the same hours, not additional hours – show that he indeed spent many of those working hours outside City Hall at, for example, the Convention Center, the American Legion or the beach. See State's Exhibit D. Those work hours, as reflected in the "journal" and duplicated on his timesheets, were the hours analyzed by detectives and presented by the detective-witness to the State Grand Jury. Aside from that, it remains perplexing why, if defendant was working so many more undocumented hours, he would not have simply documented them along with all of the others as he was instructed to do. But without evidence of that additional time, there is no proof and there is certainly no obligation – nor even a means in reality – for the State to present the non-existent to the State Grand Jury.

And to be sure, despite defendant's repeated insistence to the contrary, the State never represented to jurors that the timesheets reflected only hours worked in City Hall, let alone that only hours worked in City Hall counted toward the 35-hour weekly requirement. In that respect, defendant points to what he describes as the State's "cryptic" and "evasive" responses to a few questions posed by jurors concerning the hours documented by the timesheets and whether those hours reflected hours worked generally or only at "City Hall." Notably, these questions were posed three weeks before the actual indictment presentation during a separate session February

17, 2023 solely for sworn testimony from a witness, [redacted], the defendants' confidential assistant. Following [redacted]'s testimony, the jurors posed an array of questions touching on a number of issues, including inconsistencies in her testimony. This required recalling the witness for supplemental testimony to address those questions, which were first collected by the State after she had left the stand and the room. Defendant specifically takes issue with the State's response to a juror question, "where does it say the 35 hours must be worked at City Hall?" To this question, prior to recalling the witness, the State correctly responded that none of the evidence shown that day would expressly address that because none of it did. None of the documentary evidence shown to [redacted] during her testimony that day expressly indicated where the requisite 35 hours per week had to be worked.

Regardless, [redacted] was then brought back into the room to take the stand and then asked, among several other questions, regarding the hours documented on the timesheets (in reference to all of the commissioners' timesheets, including defendant's), "Would that only reflect time that was spent actually working in City Hall?" And she responded, no. Then asked, "So that would be a comprehensive amount of time spent regardless of where they were?" To that, she responded, "Wherever they were." See State's Exhibit A, 72:18-25. So, to clarify, the jurors were informed that day by the witness that the hours on the timesheets reflected time worked regardless of location, and by the State that none of the evidence presented that day would have addressed any possible requirement that hours worked by the commissioners had to be at City Hall.

Moreover, during the indictment presentation three weeks later, on March 10, 2023, the law on the subject was extensively addressed. The detective-witness read into the record not only the applicable statute, but also the legislative history behind the statutory change and an

interpretive document, a Local Finance Notice, issued in 2010 by the State Department of Community Affairs. See Defense Exhibit B. See also State's Exhibit B, 34:9 to 39:19. From the last, the detective-witness read the following:

> The Law appears intended to limit SHBP benefits to elected and appointed individuals to those whose primary employment (i.e., minimum 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.
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> [See State's Exhibit B, 39:4-19 (emphasis added). See also Defense Exhibit B.]

This material, which might touch upon the notion of a workplace location requirement, was not presented during the [REDACTED] testimonial session because it was not relevant at the time. When it was presented three weeks later, before voting to return the indictment against all three defendants, the jurors did not raise the question again. And, as the record clearly reflects, the State assuredly made no representations beyond that evidence that the timesheets only showed "City Hall" hours or that only "City Hall" hours counted toward the 35-hour weekly requirement. For defendant's brief to state otherwise, and repeatedly so, is simply disingenuous.

B. Evidence Concerning the Legal Advice

Before voting to indict defendant, the State Grand Jury learned of the following evidence. Not long after he took office in 2020, defendant approached the city's Human Resources director, [REDACTED], and told her he wanted SHBP coverage through the city. See State's Exhibit B, 82:17 to 91:8. Advising him that commissioner positions were really only part-time and that the matter was actually under criminal investigation, [REDACTED] initially refused him such coverage. Ibid. Defendant subsequently consulted with the city's solicitor (who, at the time,

was no longer [redacted]) and its labor counsel, who in turn generated a short memorandum on the issue. Ibid. Dated February 6, 2020, the document briefly describes the city's 2011 health-benefits resolutions and the legislative history behind N.J.S.A. 52:14-17.26 before reaching its ultimate conclusion. Ibid. See also Defense Exhibit E.

> The City of Wildwood Commissioners are eligible for State Health Benefits only if they are actually full-time employees in their capacity as Commissioners who work at least 35 hours per week, regardless of Resolution 227-6-11 designating them as such. The Commissioners should keep complete, accurate time records of all of their hours worked in their capacity as Commissioners to support their eligibility for State Health Benefits.
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> [See Defense Exhibit E.]

The memorandum actually states that recommendation multiple times: "If it is questionable as to whether the City of Wildwood Commissioners are truly full-time employees working a minimum of 35 hours per week, they should keep complete, accurate records of their hours worked to support their eligibility." Ibid. But nowhere does the memorandum state that the commissioners do indeed qualify as "full-time" workers, nor does it conclude that they are entitled to SHBP benefits.

In his brief, defendant confusingly accuses the State of continuing its "sleight of hand" by having "disingenuously" elicited "truthful" testimony from the detective-witness concerning this memorandum. See Defense Brief at 20-21. The testimony at issue, rather, the question – to which the detective-witness responded no – was, "Does that memo state anywhere a conclusion or opinion that [defendant] Mikulski actually was eligible for or should receive State health benefits through the City?" As defendant's brief similarly states, "the memo didn't say whether

[defendant] was or was not eligible for the benefits." Simply put, this is all just factually correct, so it is difficult to comprehend let alone otherwise address the alleged error.[9]

C. Evidence Concerning Comparisons to Other Commissioners

Defendant cites another example of the State's "sleight of hand" in its presentation to the State Grand Jury the reality that all of the commissioners during the subject period, not just the defendants, similarly had other sources of income, jobs or businesses. But the State's reference to defendant's restaurant, and in fact to all of the commissioners' other jobs or businesses, was not to "create the impression that [defendant or any of the other commissioners] could not devote a full 35 hours per week to the City of Wildwood." See Defense Brief at 19-20. It was instead to show that defendant, like all the commissioners, had ample time to pursue other livelihoods because the commissioners' positions, in reality and as various city officials confirmed to detectives, did not regularly require nearly as many weekly work hours as defendant suggests, let alone 35. See State's Exhibit B, 42:8 to 46:6.

On this topic, defendant also accuses the State of "underhandedly" failing to inform the jury of the hours he claimed to have worked at his restaurant, which he told detectives during his October 2020 interview had declined to only about eight per week since he had become a commissioner. For one, the State bears no obligation whatsoever to present information sourced

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[9] Defendant also suggests that, in her testimony concerning defendant's actual apparent employment status, the detective-witness improperly "force fed" an "expert" opinion to the State Grand Jury. See Defense Brief at 21-22. This is absurd. As cited and quoted by defendant's brief, the detective basically testified: that the applicable SHBP-eligibility statute defines a full-time employee as one whose hours are fixed at 35 per week; that the legal memorandum described above acknowledged, and advised defendant of, the same; that defendant's self-reported timesheets showed he was not working those hours; and that that would appear to show he would not be a full-time employee as defined by the statute and the legal memorandum. This was not expert testimony, nor did it require an expert to weigh in, nor was there any intimation that the detective-witness possessed any sort of interpretive expertise on the subject beyond the ken of any lay person who could easily surmise the same.

only from defendant's self-serving statement and otherwise lacking in any confirmation. But perhaps more importantly, it was never suggested to jurors how much time defendant may have spent at his business, they were only informed that he owned one.

Defendant additionally accuses the State of further "bamboozling" the State Grand Jury by providing it evidence of the hours other commissioners had been working for the city, specifically [redacted] and [redacted], both of whom openly maintained part-time hours. As the jury heard, [redacted], who also owned a hardware store, told detectives he typically only worked 15 to 20 hours a week as a commissioner and, further, that despite the 2011 resolutions, the commissioners' positions had always been considered part-time. See State's Exhibit B, 42:18 to 43:4.[10] Again, this perspective, regarding the commissioners' part-time roles, was shared by mostly all other city officials whom detectives interviewed this case.[11] See State's Exhibit B, 42:8 to 46:6. [redacted], who has a full-time job with county government and is officially considered a part-time commissioner (despite the 2011 resolution declaring those positions to require full-time hours), was not as direct on the subject when asked during her interview whether she generally considered the commissioners' positions as part-time or full-time, telling

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[10] To note, the State's investigation in this case began in late 2019. [redacted] was one of the first people interviewed, being in October 2019. Defendant Byron was interviewed the following month. Mikulski, who did not take office until January 2020, was not interviewed until October 2020. [redacted] was interviewed that same month. Defendant Troiano never provided a statement.

[11] Those city officials included: Director of License and Inspections [redacted]; Municipal Clerk [redacted]; Director of Human Resources [redacted]; Benefits Coordinator [redacted]; Assistant Municipal Treasurer [redacted]; Municipal Accountant [redacted]; Chief Financial Officer [redacted]; Municipal Administrator [redacted]; former City Business Administrator [redacted]; and former City Solicitor [redacted]. Even [redacted], the commissioners' confidential assistant who handled their timekeeping, has testified under oath that the commissioners "are considered part time technically," that they had always been considered part-time, that they "don't have a set schedule," that their average daily schedule "depends" and that they all essentially just come and go as they please. See State's Exhibit A, 9:9-14, 9:18 to 10:23.

detectives that she considered the posts to be a "lifestyle" rather than a job. See State's Exhibit B, 76:7 to 78:9. The jury further learned from [redacted] timesheets that she typically worked, like [redacted], just about 15 to 20 hours per week as a commissioner for the city. See State's Exhibit B, 71:15 to 74:6.

Defendant asserts that the State presented this information to the jurors "for no other reason than to suggest that because [[redacted]] admittedly worked only part time as a commissioner, Mikulski must also only work part time." See Defense Brief at 23. Even if correct, this is of no import. The jurors were fully aware of Mikulski's self-reported timekeeping and the irregular hours it reflected him certifying that he had worked, with those hours by no means consistently amounting to at least 35 per week. Regardless, this evidence concerning the non-defendant commissioners, [redacted] and [redacted], on a much broader basis spoke to the fiction created by the 2011 resolution (declaring commissioners to be full-time employees) and reinforced the notion confirmed by the array of city officials with whom detectives spoke that 35 hours simply are not necessary for a city commissioner's job, which is why, despite the 2011 resolution, that job had always been considered a part-time post.

As such, the State properly offered its evidence to the State Grand Jury without withholding any material so "clearly exculpatory" that it warranted presentation, again, because such evidence did not exist. Defendant presents no lawful basis to disturb the indictment on such grounds and his motion should therefore fail.

II. The Three Defendants were Jointly Indicted Because They Hold or Held the Same Elected Positions in the Same Municipality and the Case Against Them Involves the Same General Conduct, the Same Witnesses, the Same Type of Evidence and the Exact Same Applicable Healthcare-Coverage Law.

Rule 3:7-7, governing joinder of defendants, provides that:

> Two or more defendants may be charged in the same indictment or accusation if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charge in each count. The disposition of the indictment or accusation as to one or more of several defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants.

Beyond that, there is a "general preference to try co-defendants jointly," State v. Robinson, 253 N.J. Super. 346, 364 (App. Div. 2012), particularly when "much of the same evidence is needed to prosecute each defendant," State v. Brown, 118 N.J. 595, 605 (1990). That said, "a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." State v. Sanchez, 143 N.J. 273, 290 (1996). In that respect, under certain circumstances, Rule 3:7-7 also states that "[r]elief from prejudicial joinder shall be afforded as provided by R. 3:15-2," which allows for separate trials – not, as defendant asks, an indictment's dismissal – where jointly indicted defendants may be prejudiced by being tried jointly.

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.
>
> [R. 3:15-2(b).]

Regarding that provision, separate trials generally "are necessary when [the] co-defendants' defenses are antagonistic and mutually exclusive or irreconcilable." State v. Brown, 170 N.J. 138, 160 (2001) (internal quotations and citation omitted). Nevertheless, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). As such, "severance should not be granted merely because it would offer defendant[s] a better chance of acquittal." Id. at 42-43 (emphasis added; internal quotations and citation omitted). For example,

courts have specifically held that severance was not warranted where the only basis for separate trials was that some evidence would be admissible as to only one co-defendant, State v. Mayberry, 52 N.J. 413, 421 (1968), or where the evidence against one defendant was stronger than that against another, State v. Laws, 50 N.J. 159, 175-76 (1967). The "danger of guilt by association . . . can generally be defeated by forceful instructions to the jury to consider each defendant separately." Scioscia, supra, 200 N.J. Super. at 43.

Here, defendant seems to assert primarily that, in his opinion, he should not have been jointly indicted with his co-defendants because the evidence against them "is far more compelling," their defenses are "antagonistic," and unlike the others, "his defenses to the charges against him are nearly bulletproof." See Defense Brief at 24-25. Based on the facts and evidence described in this brief, the State would assuredly disagree. But beyond that, defendant's proposed remedy for this alleged improper joinder, dismissal of the indictment, is simply wrong, as applicable law provides for severance of the co-defendants, if necessary, for individual trials.

That said, the three defendants in this matter all basically committed the same offenses while holding the same public offices in the same municipality during overlapping timeframes. The evidence against the defendants all takes the same basic form and involves all of the same witnesses, particularly the multitude of city officials with whom they worked. Likewise, the defendants' timesheets were all of the same type and all, but for defendant Mikulski's from March 2020 forward, were completed in the same manner showing the same uniformly reported seven-hour weekday workdays. That defendant may have worked more city hours than his codefendants and that he may have attempted to more accurately document them does not mean, as he appears to suggest, that he was working enough city hours to satisfy the weekly 35-hour

requirement for SHBP participation, let alone that he should have been separately indicted. And regardless of any official employment status on paper, the State's various witnesses consistently described the commissioners' positions as, in reality, part-time posts requiring no more than part-time hours, despite what the defendants, the 2011 resolutions or any other city paperwork might say.

Moreover, although defendant contends his defense strategy may differ in some respects from those of his co-defendants, it would not appear to be at all "antagonistic" to or irreconcilable with them. Even it that were true, again, the remedy would be severance for trial purposes, not the indictment's dismissal. Regardless, as for a defense, the defendants all basically just say the same thing. That is, that they were working sufficient hours to satisfy the 35-hour weekly requirement to participate in the SHBP and receive publicly funded health benefits. And that is so, even if those hours were not properly or fully documented and even if the State's witnesses did not see them working all the hours they worked outside City Hall and outside normal business hours.[12]

Additionally, it is difficult to see any impropriety in quantifying for the jurors the total theft of public funds that resulted from the jointly indicted defendants' crimes. During her testimony, the detective-witness testified how the total funds expended for public health benefits in this matter amounted to about a million dollars, which would include about $287,000 for defendant Troiano, about $609,000 for defendant Byron and more than $103,000 for defendant Mikulski. She further testified how those totals for the latter two defendants were

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[12] Despite defendant's assertion to the contrary, the State makes no concession that his timesheets were "accurate." <u>See</u> Defense Brief at 26. Given the irregular and varying hours he reported working on those documents, they may <u>purport</u> to <u>more accurately</u> account for his time than those of his co-defendants, whose timesheets uniformly show only "X's" or "7's" Monday through Friday each week. But this difference by no means automatically grants defendant's timesheets some air of total legitimacy.

missing about six months of additional SHBP participation for which the State was awaiting additional data from Pensions. Despite defendant's protestations, the State is unaware of any prohibition against assisting the jurors in such basic mathematics.

In short, defendant presents no reasonable basis on these grounds to disturb the indictment against him and his co-defendants. Even if he could credibly show that he was somehow prejudiced by being jointly indicted with his codefendants, which he cannot, the appropriate remedy would involve a possible severance for trial, not the dismissal of a properly returned indictment. See R. 3:15-2(b).

CONCLUSION

Based on the foregoing, this Court should deny defendant's motion to dismiss the indictment.

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