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



SUPERIOR COURT OF NEW JERSEY
VICINAGE 1

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Presiding Judge

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July 12, 2024

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Re: **State v. Ernest V. Troiano, Jr., Steven Mikulski & Peter Byron**
Ind. No.: 23-07-00109-S

Dear Counselors:

This letter decision is rendered in response to the Defense's motion to sever Defendant Troiano and Defendant Mikulski.¹ The Court has considered the written submissions and oral arguments of counsel on the record on June 14, 2024. For the reasons stated herein, the Court finds to ensure a fundamentally fair trial for the defendants involved, all three defendants will be severed. Therefore, the court has determined to **GRANT** the Defense's motion to sever Defendant Troiano and Defendant Mikulski.

¹ Co-defendant Byron did not file a motion to sever, nor did he join in either of the pending applications. Given the Court's decision in the pending motions, co-defendant Byron will be severed for trial, nonetheless.

STATEMENT OF FACTS

This case stems from the time when Defendant Troiano held the elected position as commissioner and appointed position of mayor in the City of Wildwood between 2011 to 2019. Defendant Mikulski was sworn into office as commissioner in 2020. In 2010, the State Legislature enacted changes to the eligibility requirements for participation in the State Health Benefits Program (SHBP). Pursuant to that change, 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 hours per week” to qualify for employer provided SHBP health benefits. See N.J.S.A. 52:14-17.26. The following year on June 8, 2011, the Board, then consisting of Troiano and his co-defendant Byron, passed Resolution No. 227-6-11 which declared “that each member of the Board of Commissioners of the City of Wildwood” would be considered a full-time employee, and works a minimum of thirty-five (35) hours per week. Prior to this change, the mayor and commissioner had generally been considered part-time employees, but they nevertheless received SHBP coverage through the city because such was not previously prohibited before the 2010 legislative change.

In 2011, Troiano started receiving benefits and subsequently stopped receiving benefits in 2019 when his final term had ended. It is alleged that for several years, in regard to timekeeping, 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]. From 2011 through December 2019, [REDACTED] uniformly completed the timesheets for all three commissioners to indicate each having worked 70 hours on a biweekly basis with “H’s” for holidays, and “X’s” entered each Monday through Friday.

During the above time 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. Byron received SHBP coverage with his wife and dependents from July 27, 2011, through mid-2022, totaling \$609,000. Mikulski had only been receiving SHBP coverage with his wife from July 2020 through mid-2020, totaling more than \$103,000.

PROCEDURAL HISTORY

State Grand Jury Indictment No. 23-3-00038-S was returned on March 10, 2023, charging defendants with second-degree Official Misconduct, second-degree Theft by Unlawful Taking, third-degree Tampering with Public Records, and fourth-degree Falsifying or Tampering with Records. All three defendants filed a motion to dismiss the indictment, which this Court granted in a written decision dated June 23, 2023.

Superseding State Grand Jury Indictment No. 23-7-00109-S was returned on July 31, 2023, charging each defendant with the same four offenses. Defendant Troiano filed a motion to dismiss the superseding indictment on September 14, 2023. Oral argument was heard in Cape May Superior Court on November 17, 2023. This Court denied the Defendant's motion to dismiss the superseding indictment on December 8, 2023. The Defense then filed this motion to sever Ernest Troiano and Steven Mikulski from the other co-defendants on January 9, 2024, and February 7, 2024.

DEFENDANT MIKULSKI'S ARGUMENT

Defendant Mikulski notes there is no claim that the defendants conspired or colluded with one another in their alleged wrongdoing. The Defense argues the only common thread between the three defendants is that they all happened to be elected officials in the City of Wildwood charged with illegally obtaining health benefits. Defendant Mikulski asserts the crimes charged against Troiano occurred in the decade prior to Mikulski taking office and most of the allegations against Byron occurred long before Mikulski was sworn into office in 2020. Defense counsel states all occurred under much different circumstances. Defense counsel argues the evidence against his co-defendants is far more compelling and different than the evidence against Defendant Mikulski.

Defense Counsel's main argument is that the defendants' defenses are antagonistic. The Defense argues Troiano's point that he had additional responsibilities and was required to work more hours than the other defendants is not accurate and something that Defense counsel would feel the need to impeach Troiano about while also defending Mikulski from the State's attack.²

² Defense argues Troiano would be impeached under Walsh Act, N.J.S.A. 40:70-1, which established the Commission form of government that the mayor has absolutely no powers or duties above and beyond those of his fellow commissioners.

Defense counsel argues Mikulski conducted his own due diligence as to whether he qualified for SHBPs. During his investigation, he learned that both Troiano and Byron, both commissioners, attained SHBPs throughout their tenure, all of which occurred after the 2010 change in law. Defense counsel also notes at least one of his more experienced co-defendants directly informed Mikulski he was entitled to them as commissioner, as commissioners were considered full-time employees, to which Mikulski relied upon. The Defense additionally claims that Mikulski had every right to rely on the Resolution 227-6-11 which declared commissioner's full-time employees. The Defense argues this resolution was enacted during the tenures of Troiano and Byron and was still in effect when Mikulski took office. Although the State claims that the passing of these this resolution was a sham aimed to permit the commissioner to obtain SHBP benefits, Troiano and Byron's motivations in passing the legislation are irrelevant to Mikulski's defense since the resolution was already in place when Mikulski was sworn in.

The Defense asserts that the State's proof that Troiano and Byron were specifically advised in a meeting with the City Solicitor and City Administrator that they were not full-time employees and therefore not entitled to SHBP benefits happened at a time before Mikulski was elected and was never relayed to Mikulski. The Defense argues that if this comes out at trial and the jury believes that the codefendants were informed and warned, then it would be prejudicial to Mikulski and negatively impact the jury's perception of him.

The Defense argues the presentation of substantial evidence concerning the hours worked by each defendant will engender more confusion and prejudice and potentially bring guilt by association towards Mikulski. The Defense also states the codefendants in this case did not keep record of the hours they worked at City Hall, unlike Mikulski who did keep accurate records of the time he spent in City Hall, which the State concedes. The Defense finds the record keeping practices of all three defendants engenders an obvious antagonism between their defenses.

The Defense finds the fact witnesses who will speak to the idea that the commissioners and mayor were considered part time positions, not full time, is irrelevant and inadmissible as to Mikulski. When he took office, the resolution remained on the books and defined his position as full-time. The evidence by these fact witnesses is contradicted by the resolutions and such evidence has no place in Mikulski's trial since the testimony will cause undue confusion and prejudice to him.

Therefore, the Defense argues the topics are so complex that no curative instruction or focused cross-examination will counterbalance the potential confusion and prejudice that may be visited upon Mikulski or the other co-defendants. The Defense respectfully request Defendant Mikulski be severed from his codefendants.

DEFENDANT TROIANO'S ARGUMENT

The Defense argues Troiano should be severed from his other co-defendants, especially Byron. The Defense first points to the fact that the three defendants have not been charged as conspirators. Without such a charge, the Defense contends there is no compelling reason to have a joint trial of the three defendants.

The second argument the Defense maintains is that there are important facts that relate to Troiano specifically that make a joint trial unfair. The Defense states that Troiano has been intimately involved in public service in Wildwood for about 25 years, since 1999. Troiano has been mayor of Wildwood three times and is currently mayor. The Defense notes that Troiano and Byron are political rivals and with such rivalry, they are likely to become adversarial in trial. There are dissimilarities between the two, that Defense counsel finds may prejudice Troiano. Such things like Troiano has never been forced to resign from public office, Troiano has never been charged with any other crime, Troiano has never been convicted of any other crime, state or federal, and Troiano does not have any other criminal pending charges against him. All of which Byron has done or currently has. The Defense argues there is a substantial potential that a jury's negative perception of Byron could unduly influence their perception of Troiano, even though the facts and defenses are unrelated. To bring Byron's baggage in Troiano's trial, the Defense argues will taint Troiano in the eyes of the jury. The Defense also notes that the limiting instruction the State will probably argue has limited efficacy.

Additionally, Troiano's defenses are significantly different than Byron's or Mikulski's. Although Troiano had a business during the time he was in public office, which was in Wildwood, this business did not require his full-time attention, and was not 40 miles away in another county. Troiano also has multiple witnesses who will testify that he was "always at City Hall" and was seen "everywhere". The Defense argues Byron cannot make this same claim. The Defense additionally points out that the fact that Byron has not filed a motion for severance is also telling.

The Defense alleges the existence of these facts make it important for Troiano, in any defense, to aggressively distance himself from Byron. If not severed, the Defense argues counsel would be required to spend a considerable amount of time on opening statements, direct examination, cross examination, and closing arguments, not only defending Troiano from the State, but also from the evidence against Byron. The Defense finds Troiano's charges are hostile to Byron's, and therefore, antagonistic.

The Defense maintains that Troiano will be required to make considerable efforts during the trial to ensure that the jury understands the difference between the defendants and may even be forced to argue Byron's culpability in order to properly defend himself. The Defense argues Troiano may be forced to limit his evidence, witnesses, cross-examination and more due to Byron. The Defense argues fairness should never be compromised, and if the defendants are tried together, it will be.

Lastly, the Defense argues trying these defendants together not only makes life easier for the State, but more importantly gives the State a tactical advantage by fomenting, intentionally or not, discord and tension. The Defense argues, if severed, that issue is cured, and prejudice is eliminated. A trial with all the defendants will magnify hostility and antagonism where the State is then assisted in proving its case by forcing the defendants to go on the offense and criticize or blame co-defendants. Therefore, Defendant Troiano argues he should not be put in that position. The Defense argues fairness to the defendant outweighs convenience to the State and Court. Any reasonable weighing and balancing of the issues strongly favor severance. Therefore, the Defense requests this Court grant the severance motion.

STATE'S ARGUMENT

The State argues the defendants in this matter 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 same exact applicable healthcare-coverage law.

The State asserts the Defense's argument, that since there is no collusion between the defendants meaning they should not be tried together, fails to put forth a legitimate basis for severance. The State argues collusion, conspiracy, and common scheme are not necessary to justify a joint trial of multiple defendants. The State claims even if there was no conspiracy

between the defendants, each defendant 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 the same witnesses, mostly city officials with whom they worked. Specifically, the defendants' timekeeping records and timesheets were all of the same type and were completed in the same manner showing the same uniformly misreported seven-hour workdays. The State finds that Defendant Troiano may have worked more city hours than his co-defendants, however, that does not mean he was working enough city hours to satisfy the full-time weekly 35-hour requirement for SHBP participation, let alone that he should receive a separate trial. The State responds to the Defendant's assertion that his mayor position required more duties and hours than his co-defendants positions by clarifying that the State's proofs rely not on assumptions based on such enumerated duties but rather on actual timekeeping records and the testimony of official witness accounts.

Additionally, the State notes one of the fundamental arguments in this matter is that none of the defendants and commissioners were regularly working full-time hours because the positions simply do not involve schedules and workloads regularly requiring that much time. There were five people who held city commissioner positions, three of which have been indicted in this current matter, and the other two who are witnesses speaking for this matter. The State asserts that considering all five individuals held the same position during the same period, that proofs concerning timekeeping records and general schedules are not personal to each individual defendant but establish more than that all defendants were not regularly working full-time hours, the defendants should not be severed. The two commissioners who were not indicted acknowledged the commissioner position was indeed part-time in nature, as well as the other city officials who spoke in this matter. The proofs of all city officials reinforce the fact by showing how none of the commissioners were working full-time hours because the position neither called for nor entailed regular full-time hours or schedules.

Lastly, the State agrees with the Defendant's argument that there is simply no direct evidence of how many hours the commissioners were working for several years and that no one generally monitored or recorded their time. However, the State clarifies such argument was a large part of the problem, the defendants commonly shared complete lack of accountability. Therefore, the

State asks the Court to deny the Defendants' motion to sever themselves from each other for trial.

LEGAL ANALYSIS

Offenses may be joined in the same indictment pursuant to R. 3:7-6 ("Joinder of Offenses"), 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.

Offenses may be severed from a single indictment pursuant to R. 3:15-2(b), which provides:

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 severance of defendants, or direct other appropriate relief.

The trial court has broad discretion to order separate trials of counts if it appears that a defendant will be prejudiced by the joinder of offenses. R. 3:15-2(b). A motion for severance should be "liberally granted" if it is possible that joinder will present substantial harm to the defendant. Pressler, Current New Jersey Court Rules, comment 1.1 on R. 3:7-6 (2015). There is a general preference to try co-defendants jointly, particularly when "much of the same evidence is needed to prosecute each defendant." State v. Brown, 118 N.J. 595, 605 (1990). However, "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). The relief afforded by R. 3:15-2(b) 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 such might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." State v. Sterling, 215 N.J. 65, 73 (2013) (quoting State v. Pitts, 116 N.J. 580, 601 (1989)).

Courts have generally held that defendants cannot be tried together fairly when their defenses are antagonistic and mutually exclusive or irreconcilable. Brown, 118 N.J. at 605. Separate trials

are required only when defendants “present defenses that are antagonistic at their core.” United State v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981). The mere existence of hostility, conflict, or antagonism between defendants is not enough. Brown, 118 N.J. at 606.

Determination of central or core antagonism necessarily focuses on the mutual exclusivity of defenses. Id. “‘Mutual exclusivity’ demands that the jury’s universe of choices be limited to two: the jury can believe *only* either one defendant or the other.” Id. The prosecutor’s theory of the case, and the defense themselves, must force the jury to choose between the defendants’ conflicting accounts and to find only one defendant guilty. Id. If the jury can return a verdict against one or both defendants by believing neither, or believing portions of both, or, indeed, believing both completely, the defendants are not mutually exclusive. Id. Defenses that do not demand the jury to choose one or the other in order to return a verdict, though clearly in conflict and antagonistic, are not mutually exclusive. Id.

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). “A severance should not be granted ‘merely’ because it would offer defendant[s] a better chance of acquittal.” State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975). It is incumbent upon the trial judge to weigh the interest of judicial economy and efficiency against the right of every accused to have the merits of his case fairly decided. State v. Aiello, 91 N.J. Super. 457, 466 (App. Div. 1966). The main issue is the fairness of the trial as to each defendant. Scioscia, 200 N.J. Super. at 43. The danger of guilt by association underlies all joint trials; however, “this peril can generally be defeated by forceful instruction to the jury to consider each defendant separately.” Id.

The Supreme Court urges severance of Defendants if the trial court is reasonably sure of the following test: the defendant will call his co-defendant as a witness in a separate trial; the co-defendant will testify either prior or subsequent to his own trial; the co-defendant’s proffered testimony will be credible and substantially exculpatory; and judges should also consider the State’s case, the interest of judicial economy, the quality of the testimony, and use more than a mere possibility that the co-defendant will testify as a basis for severance. Sanchez, 143 N.J. at 293-94.

I. SAME OR SIMILAR CHARACTER OF OFFENSES CHARGED.

Under Rule 3:7-6, offenses may be charged in the same indictment if the offenses are of the same or similar character. Our Supreme Court has held courts should considered “the nature of the offenses, the time and place of each offense, whether the evidence submitted as to one count of an indictment is necessary and/or sufficient to sustain a conviction under another count, whether one offense is an integral part of the larger scheme, intent of the accused and the consequences of the criminal standards transgressed.” State v. Best, 70 N.J. 56, 63 (1976).

a) DEFENDANT MIKULSKI

The circumstances surrounding Defendant Mikulski’s involvement in this matter differ significantly from that of his co-defendants as to not constitute the same or similar circumstances under the joinder rule.

Defendant Mikulski was sworn into office on January 2, 2020, nine years after the enactment of Resolution 227-6-11 and Resolution 226-6-11, both of which were passed during the tenures of Troiano and Byron. Defendants Troiano and Byron were in office for a substantial amount of time prior to the election of Mikulski. Troiano and Byron had a hand in passing both resolutions, which could lead the jury to find they are more culpable due to their contribution to passing the “legislative sham” aimed at permitting them to obtain SHBPs. Since Mikulski had no part in passing both resolutions and was sworn in nine years after these resolutions had been in place, his joint trial with his co-defendant’s may confuse the jury or cause undue prejudice to Mikulski, that would make his joint trial fundamentally unfair.

Further, Defendant Mikulski asserts that at some point in time Troiano and Byron were advised that they were not full-time employees and therefore, were not entitled to SHBP benefits. This meeting, although not memorialized, took place sometime before Mikulski was sworn into office. As it is assumed that the State will likely call the individuals involved in this meeting to testify against the defendants, such evidence would be prejudicial to Mikulski.

Evidence against Mikulski would not be as extensive as the evidence against Troiano and Byron due to the fact that Mikulski was sworn into office in 2020, nine years after Troiano and Byron. Mikulski also was not involved in the passing of the resolutions. In addition to the difference in time in office, Mikulski allegedly kept his own records of his timesheets unlike Byron and Troiano. Byron and Troiano had their secretary [REDACTED] fill out and submit their time sheets on a bi-weekly basis. In doing so, [REDACTED] documented “7s” on each day for

both Byron and Troiano no matter the hours they worked. Mikulski on the other hand, documented and submitted his own timesheets where he indicated the amount of time he worked each week. Therefore, the evidence establishing the hours worked each week for Mikulski would be significantly different from that of Troiano and Byron.

Although Mikulski is indicted for the same crimes as Troiano and Byron, the set of circumstances is different. Mikulski would not only be prejudiced by having a joint trial with Byron and Troiano, but also most evidence submitted for Bryon and Troiano's case would not apply to Mikulski. The nine-year difference in appointment, the absence of Mikulski's presence in passing the resolution, and the self-submitted time sheets are all circumstances that place Mikulski outside of the common scheme that is Byron and Troiano's case. Therefore, fundamental fairness demands that Mikulski should be severed from co-defendants Troiano and Byron.

b) DEFENDANT TROIANO

Defendant Troiano argues that his circumstances are different than his co-defendant Byron and co-defendant Mikulski. Troiano argues that the difference in his outside employment and time in the city office, compared to that of his co-defendants, is significantly different that joinder of the three in trial would cast a bad light on Troiano.

The proofs of whether Troiano worked the 35 hours per week is personal and distinct from that of his co-defendants, as is Mikulski's stated above. Troiano was commissioner and mayor during his time in Wildwood. Many of the State's witnesses, as brought forth in the presentment before the grand jury, singled Troiano out over his co-defendants as being much more present in both City Hall and around the city in general.

Although the State's argument is that none of the three were working the required hours to obtain SHBP benefits, whether one, two or all three worked the required hours is wholly irrelevant to the opposing co-defendants. This case consists of three individual defendants all with different conduct during time spent at City Hall. The only similarity between Troiano and his co-defendants is that each individual allegedly overreported their hours work and allegedly obtained SHBP benefits illegally during the same time period. What is distinct and unique to each individual is the actual amount of hours worked, the tasks done during those hours, who in City Hall saw each individual and their timesheet practices. The State's main contention in its

argument against severance is the existence of the overlapping time frame between these three defendants; however, that alone does not require all three defendants to remain in one joint trial.

Therefore, the circumstances as to Troiano are not similarly situated so as to require a joint trial. Defendant Troiano should be severed from Defendant Mikulski and Defendant Byron.

II. DEFENSES ARE ANTAGONISTIC AND MUTUALLY EXCLUSIVE.

If a jury is able to return a verdict against one or both Defendants by believing neither, or believing portions of both, or indeed, believing both completely, the defenses are not mutually exclusive. Brown, 170 N.J. at 605.

a) DEFENDANT MIKULSKI

Here, Defendant Mikulski asserts that the proposed defenses are antagonistic and would confuse the jury if permitted to be tried in the same trial.

The Defense has also demonstrated some mutual exclusivity between Mikulski's defense and the other two defendants as Mikulski's defense is that he was never informed that he was not entitled to the benefits, unlike his co-defendants.

Defendant Mikulski's main contention is that Troiano was in office when the resolution designating commissioners as full-time employees was passed and that Troiano was informed that declaring himself as a full-time employee was illegal and would get him in trouble. Mikulski asserts that he was following the already set in place resolution and was never told that such a resolution was unlawful. Mikulski also argues that out of the three defendants, he is the only one who regularly kept a timesheet or record of the actual number of hours he worked, unlike his co-defendants. Mikulski's strategy is that he was following the already set in place rules and was never told what he was doing was wrong.

Defendant also argues the absence of conspiracy shows there was no collusion or indication that Defendant and his co-defendants were working together with regard to the activity in this indictment. The Defendants argue trying all three Defendants together without a charge of conspiracy will likely confuse the jury. They further argue that comparing each Defendant to the other will create an unfair impression on each Defendant individually and bring forth the danger of guilt by association.

The jury would most likely be able to compartmentalize each defendant separately; however, the timing and specifics of each defendant's involvement may cause some confusion to the jury. Mikulski at one point may also have to inculcate his co-defendants when informing the jury that

he was never told he was not entitled to the benefits, unlike Byron and Troiano who were told. In doing so, Mikulski may have to assert that he was not present at the meeting Byron and Troiano attended where they were informed that full-time status was not permissible. Such a statement may exculpate Mikulski, while inculcating Byron and Troiano.

Further, Mikulski alleges he kept accurate records detailing the time he spent in City Hall, which the State concedes. The Defense alleges his timecards understate the amount of time he actually spent in City Hall, as he was often in the building before and after he punched his timecard. If tried together, Mikulski will have to contrast his record keeping practices with that of his co-defendants who both had the same way of documenting their time. Mikulski's co-defendants had [REDACTED] fill out and sign their timecards indicating 7 hours worked per day regardless of whether those hours were accurate. Therefore, with the difference in time keeping, a major factor in this trial, this point furthers that Mikulski should be severed from his co-defendants.

Although a jury may be able to find either one defendant, the other or all three defendants guilty, Mikulski should still be severed due to the extensive difference in the evidence that would be brought forth for him versus the other two.

b) DEFENDANT TROIANO

Defendant Troiano argues that his defenses are significantly different than that of his co-defendants. Defendant Troiano notes he did have a business during his time in public office; however, his business was in Wildwood and did not require his full-time attention. Troiano argues this is different from his co-defendants, specifically one who had a job 40 miles away in another county. Troiano's main defense is that he was at City Hall during the required hours and will present witnesses who will testify that Troiano was "always at City Hall" and was seen "everywhere".

Defendant Troiano notes that the existence of these alternative defenses will require Troiano to aggressively distance himself from his codefendants, specifically Byron. Further, Troiano argues he would be required to make a considerable effort to ensure the jury understands the difference between the defendants and may very well be forced to argue Byron's culpability in order to properly defend himself.

In Brown, the mere existence of hostility between Troiano and Byron is not enough to sever the defendants. Therefore, the argument that Troiano and Byron are political rivals does not aid in the Defendant's argument for severance.

However, the defenses presented for Troiano lead the Court to find some mutual exclusivity. Defense counsel for Troiano would be required to argue on behalf of Troiano that he was in City Hall more than Byron, who will most likely claim that he was in City Hall more than Troiano. A joint trial with Byron would also bring forth the allegations of guilt by association. As per the Defense's argument, Troiano has defenses and proofs to demonstrate, although he had an outside business, he worked the required hours to obtain SHBP benefits.

The grouping of Troiano and Byron together would force Troiano's counsel to not only defend his client from the State's allegations, but also vigorously point out the differences between Troiano and Byron so that the jury does not consider the two alike. Byron's claims of being in City Hall and working the required hours are not as robust or frequent as are that of Troiano. There are substantially more individuals who have attested to seeing Troiano at work than Byron. Byron has a separate job, similar to Troiano, however Byron's job is in a different county and over 40 miles away. If the jury hears evidence against Byron, the jury may inevitably assume or find that such evidence relates to Troiano and find him guilty by mere association.

Defendant Troiano alleges he was present at City Hall for the hours as documented on his timesheets. Defendant Byron may very well argue that Troiano and himself were both there and knew of each other's whereabouts so as to attest to their time at City Hall. However, Troiano's defenses do not involve the whereabouts of Byron and what he did and did not work. A joint trial of these individuals will require the jury to either believe Troiano was working the required hours with witnesses to allegedly attest to such or the Byron and Troiano were working the required hours and virtually doing the same practice of timekeeping and hours worked.

To avoid prejudice to Troiano and by a showing that Troiano's defenses are mutually exclusive to those predicted of Byron, Defendant Troiano will be severed from Defendant Mikulski and Defendant Byron. The Court finds to avoid prejudice and ensure a fair trial for all defendants, each defendant will be tried separately.

III. PREFERENCE TO JOINTLY TRY DEFENDANTS

There is a general preference to try co-defendants jointly. State v. Robinson, 253, N.J. Super. 346, 364 (App. Div. 1995). This preference is even more so when most of the evidence used for each defendant is similar if not the same. Brown, 170 N.J. at 605.

The State asserts that all three Defendants, even if they were not conspiring together, committed the same offenses while holding the same public office in the same municipality during overlapping timeframes. The State furthers that the evidence against all Defendants takes the same basic form and involves all of the same witnesses, particularly the multitude of city officials with whom they worked. However, contrary to the State's assertion, the evidence in relation to Defendant Mikulski differs from the rest of his co-defendants. Mikulski kept track of and recorded his own timesheets each week. Also pertaining to the passing of resolutions, Mikulski was neither involved nor in office at that time. Mikulski was sworn in nine years after the passing of both resolutions. If Mikulski is not severed from his co-defendants, there would be at least nine years' worth of evidence admitted into trial that does not pertain to Mikulski whatsoever.

As for Defendant Troiano, the evidence pertaining to Troiano's involvement in this case is similar to the evidence pertaining to Byron in this case. However, the actual time in the office and evidence of outside work is substantially different. Although the same secretary recorded both Troiano and Byron's hours, their conduct in the office and outside of the office to demonstrate time spent working is significantly different.

Although the court recognizes there is a general preference to try co-defendants jointly, the evidence that would be used in a trial for Mikulski would be significantly different from that used against his co-defendants and the evidence as alleged by Troiano would be substantially different from that of Byron. As stated in Brown, preference for joint trials is greater when the evidence used for each defendant is similar if not the same; however, in this present case there is different evidence for each different defendant to establish their own individual conduct. Therefore, the Court finds severing all three defendants into separate trials is in the best interest of each defendant.

IV. CO-DEFENDANTS' TESTIMONY

To ensure a thorough record, although the Supreme Court has urged a severance for reasons such as a co-defendant called as a witness, co-defendant's testimony being credible and exculpatory, or a co-defendant testifying either prior or subsequent to his own trial as stated in

Sanchez, none of that is applicable here. The Defendants do not assert that they anticipate calling one particular co-defendant to testify. Although Mikulski mentions that if Troiano were to testify, Mikulski's attorney would have no choice but to impeach him on the premise that the mayor is not to have more assigned duties or control over more departments than the commissioners as stated in Defense counsel's argument above. However, it is neither asserted that Troiano would be called as a witness, nor that evidence would be brought out by the State. Even if this is brought out, Troiano need not be called to the stand to bring in the Walsh Act statement.

Aside from this one contention, there is no other assertion that a co-defendant would be called to testify as a witness, especially since it is each defense counsel's argument that none of the three were working together. With none of the defendants working together, there will be a lack of witness testimony from any of them accounting for their co-defendants' behalf. Therefore, the Court need not address the Sanchez test in depth for these reasons.

CONCLUSION

Based on the foregoing reasons, the Court finds severing all three defendants from each other will avoid prejudice and the presence of mutually exclusive defenses. Mikulski's time in office is significantly shorter than that of his co-defendants, he had no hand in passing the resolution at issue in this matter, and Mikulski was the only one out of the three that kept a detailed record of his time at City Hall. Therefore, to avoid prejudice to Mikulski, he should be severed from his co-defendants. Troiano has individual witnesses to attest to his time spent in City Hall and has proof that his outside employment did not consume much of his time, unlike Byron's. Therefore, Troiano should be severed from his co-defendants.

As stated in Sanchez, however desirable from the point of view of efficient and expeditious criminal adjudication, a joint trial may not be had at the expense of a defendant's right to a fundamentally fair trial. To ensure a fundamentally fair trial for all defendants, the Court finds that severance is required.

Therefore, the Defendants' motion to sever is GRANTED. The Court has entered and attached an Order to that effect.

Very Truly Yours,



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

Order Encl.