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SUPERIOR COURT OF NEW JERSEY
COUNTY OF CAPE MAY
LAW DIVISION – CRIMINAL
SUPERSEDING IND. NO. 23-7-00109-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 MOTION TO DISMISS SUPERSEDING INDICTMENT AS TO DEFENDANT ERNEST V. TROIANO, JR.

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 Ernest V. Troiano, Jr.'s motion to dismiss the above-captioned superseding indictment as to him, specifically Counts One, Four, Seven and Ten. 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, Ernest V. Troiano, Jr., with second-degree Official Misconduct, in violation of N.J.S.A. 2C:30-2 (Count One), second-degree Theft by Unlawful Taking, in violation of

N.J.S.A. 2C:20-3 (Count Four), third-degree Tampering with Public Records, in violation of N.J.S.A. 2C:28-7a(2) (Count Seven), and fourth-degree Falsifying or Tampering with Records, in violation of N.J.S.A. 2C:21-4a (Count Ten).[1] Defendant subsequently filed a motion to dismiss the indictment, which this Court granted by way of a written decision dated June 23, 2023. On July 31, 2023, a State Grand Jury returned superseding Indictment No. 23-7-00109-S again charging defendant with the same four offenses.[2] 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]. Such testimony consisted predominantly of readbacks of the testimony in chief from transcripts of the two presentations (on February 17 and March 10, 2023) that initially resulted in the first indictment returned on March 10, 2023.[3]

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.

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[1] This indictment further charged co-defendants Peter J. Byron and Steven E. Mikulski separately and individually with those same four offenses.

[2] This superseding indictment also charged co-defendants Byron and Mikulski again separately and individually with those same four offenses.

[3] Those two transcripts from February and March 2023, which were introduced as exhibits, were both redacted to remove all content but for the witness testimony in chief. See State's Exhibits A and B. To note, unlike the jury panel sitting during the two prior sessions, no members of the panel sitting during the July session had any questions at all concerning the facts or evidence presented. See Defense Exhibit H, 160:10-15.

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 N.J.S.A. 52:14-17.26. Prior to the change, with particular regard to elected officials, no such hourly requirement existed for their participation in the SHBP and they could receive benefits even in a part-time capacity. See Defense Exhibit H, 93:11 to 96:17.

The following year, in 2011, defendant Ernest Troiano, co-defendant 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 Defense Exhibit H, 85:14-22, 86:10-20. 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 Defense Exhibit H, 87:16 to 91:17. Prior to these changes in 2010 and 2011, the mayor and commissioners had generally been considered part-time employees, but

they nevertheless received SHBP coverage through the city because that was not previously prohibited.

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, after which Byron became mayor. Until resigning in September 2023, Byron continued serving on the commission and continued receiving benefits until mid-2022 when his coverage was terminated.[4] See Defense Exhibit H, 155:7 to 158:9. [redacted], 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, [redacted], and the city's business administrator, [redacted], both of whom had been appointed in 2013. In becoming aware of and then further reviewing the matter, [redacted] and [redacted] 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.[5] This prompted [redacted] to terminate his benefits, but Troiano and Byron ignored that legal advice, 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 Defense Exhibit H, 101:10 to 103:5.

The commission remained unchanged with those three members – Troiano, Byron and [redacted] – until the 2019 election, when [redacted] left office and Troiano was defeated.

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

[5] As further discussed herein, this perspective was shared by mostly all other city officials who were interviewed in this case.

Again, Byron was re-elected that year and became mayor in 2020. Also elected to commissioner posts that year were Steven Mikulski and [redacted]. See Defense Exhibit H, 85:23 to 87:6. Despite the advice of city officials (and that the matter was openly under criminal investigation at the time), Mikulski, a local restaurant owner, insisted on participating in the SHBP and began receiving health benefits. See Defense Exhibit H, 143:5 to 152:18. [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 Defense Exhibit H, 136:20 to 138:3.[6]

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 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

[6] 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 Defense Exhibit H, 138:23 to 140:10.

supervisor would sign and certify, but the mayor and commissioners signed and certified their own timesheets or, alternatively, had [redacted] sign them on their behalf, typically with a signature stamp. See Defense Exhibit H, 107:15 to 110:8.

For most of the subject period, from 2011 (when Troiano, Byron and [redacted] took office and the health benefits resolutions were passed) through December 2019, [redacted] 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 [redacted] and Mikulski 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. See Defense Exhibit H, 108:6 to 117:23.

With regard to Mikulski and [redacted], 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. [redacted], who received no SHBP benefits through the city and considered herself a "part-time" commissioner, typically reported working between 15 and 20 hours, if that, each week. Mikulski, 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 has continued to the present. 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 Defense Exhibit H, 130:4 to 135:6.

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 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 premiums 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 Mikulski, 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 Defense Exhibit H, 155:7 to 159:12.

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[7] Regarding that "personal day," it should be noted that, unlike just about every other full-time city worker, the commissioners receive no such formally allotted time off in the form of, for example, personal days, sick days or vacation days. See Defense Exhibit H, 143:21-24.

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

LEGAL ARGUMENT

THE STATE GRAND JURY PROPERLY RETURNED THE SUPERSEDING 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 Troiano. 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.

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 that here.

A. 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.[9]

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).]

[9] This Point responds to Point A of defendant's brief.

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). So "severance should not be granted merely because it would offer defendant[s] a better chance of acquittal." Id. at 42-43 (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 codefendant, 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 suggests that merely because there may have been no collusion among the defendants regarding the charged offenses, those defendants should not have been charged in the same indictment. He is wrong, his proposed remedy of dismissal is wrong, and the reasoning for his request is simply flawed. Even if the defendants were not conspiring together to defraud the SHBP, they 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 (mis)reported seven-hour weekday workdays. That

defendant may have worked more city hours than his codefendants 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 described the commissioners' positions as, in reality, part-time posts requiring no more than part-time hours. On that, of defendant, they spoke no differently.

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 amounted to about $287,000 for Troiano, about $609,000 for Byron and more than $103,000 for Mikulski. She further testified how those totals for the latter two defendants were 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 basic mathematics.

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

B. The State Properly Presented the State Grand Jury with Sufficient Relevant Evidence, in an Appropriate Form and Manner of its Determination, to Establish a Prima Facie Case.[10]

The initial indictment in this matter was based on two days of testimony taken from two separate witnesses, the defendants' confidential assistant [redacted] on February 17, 2023

[10] This Point responds to Points B, C and D of defendant's brief.

and New Jersey State Police Detective-Sergeant [redacted] on March 10, 2023. Following this Court's subsequent dismissal of that indictment on purely procedural grounds, the State presented a superseding indictment that replicated the original one. That indictment, presented and returned the same day on July 31, 2023, was based on the same evidence and witness testimony in chief previously presented, with the latter being read from the prior proceedings' transcripts into the record by Detective-Sergeant [redacted] and the prosecutor. Defendant now complains that the State failed to fully read those transcripts and instead only read the witnesses' testimony in chief, omitting readbacks of prior testimony taken only in response to the prior State Grand Jury panel's questions. This is entirely true, and defendant fails to establish in any way why this constitutes error. Defendant takes further issue with the State's use of the detective-witness for those readbacks, which is entirely permissible and subject to the State's discretion. And he additionally complains that the State denied jurors the opportunity to ask questions, which is just untrue. Again, in short, defendant presents no legitimate basis on these grounds to disturb the lawfully returned indictment against him.

"'In seeking an indictment, the prosecutor's sole evidential obligation is to present a prima facie case that the accused has committed a crime.'" State v. Campione, 462 N.J. Super. 466, 499 (App. Div. 2020) (quoting Hogan, supra, 144 N.J. at 236). In that respect, a grand jury proceeding is neither a "mini trial" nor an "adversary hearing" to determine the accused's guilt or innocence. State v. Bell, 241 N.J. 552, 559 (2020) (quoting Hogan, supra, 144 N.J. at 235; United States v. Calandra, 414 U.S. 338, 343-44, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)). Instead, it is an ex parte investigation to determine "whether a crime has been committed and whether criminal proceedings should be instituted against any person." Ibid. As such, a grand jury receives "'broad and unfettered investigative powers' that are largely 'unrestrained by the

technical procedural and evidentiary rules governing the conduct of criminal trials.'" Bell, supra, 241 N.J. at 559-60 (quoting In re Application for Disclosure of Grand Jury Testimony, 124 N.J. 443, 449 (1991) (additional citation omitted). Such a panel "'must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.'" Bell, supra, 241 N.J. at 560 (quoting State v. Francis, 191 N.J. 571, 586 (2007) (additional citation omitted).

Here, in a single-day session, all of the grand jurors received all evidence presented in the same format, and all testimony taken in the same manner, before voting to indict defendant and his co-defendants. Much of that testimony took the form of readbacks of testimony from two prior State Grand Jury sessions before an entirely different State Grand Jury panel. The two transcripts from those prior sessions, which were introduced as exhibits during the superseding indictment's presentation, were both redacted to remove all unnecessary and duplicative content, leaving only the witness testimony in chief. Those redactions included all introductory remarks, the Brooke-Murphy inquiry, the reading of the indictment, instructions on the law, prior juror questions and prior witness responses to the same. See State's Exhibits A and B.

With regard to the manner in which the State may present its evidence, particularly testimony, whether that occurs through a live witness, through readbacks of prior testimony or interviews – and whether by a detective-witness or by the jurors themselves – or even, as also occurred here, through summaries of pertinent parts of investigative interviews provided by that detective-witness, these are all determinations for the State to make, in its discretion, in establishing its prima facie case. As much as defendant may now wish to instruct or direct the State in the form or manner of its presentation to the State Grand Jury, he offers no legal grounds that might permit his doing so.

As for any additional evidence or testimony the State may not have needed during its presentation (such as questions from members of an entirely different grand jury panel), if defendant believes such evidence or testimony may somehow assist him in his defense, he is free to present the same at the appropriate time in the proper forum, before a petit jury at trial. On this subject, defendant correctly articulates the "well settled law in New Jersey that 'the necessary number of grand jurors must be informed of all the evidence before each may legitimately vote." Defendant's Brief at 6 (quoting State v. Ciba-Geigy Corp., 222 N.J. Super. 343, 354 (App. Div. 1988). But this does not require the State, in presenting an indictment, to show the jury the entirety of its investigative file, nor to present the entirety of each and every interview conducted, let alone live testimony from each and every witness with whom investigators may have spoken. Instead, that "well settled law" concerns grand juror qualification to vote on that indictment, the requirement that each participating grand juror must have received and considered all of the evidence and testimony offered during the indictment's presentation such that, if absent for part, such juror must then be "qualified" to continue participating by first becoming as "fully informed" as the other jurors by reviewing any evidence and testimony that may have been missed.[11]

Finally, any notion that the State somehow deprived the jurors of the "opportunity to ask questions," let alone "blocked" them "from potentially forming questions," is absurd. Following its presentation, the State as always asked the grand jury whether it had any questions at all concerning the facts and evidence presented. It had none. See Defense Exhibit H, 160:10-15.

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[11] On this "well settled law" concerning grand jury practice, defendant misplaces any reliance on cases such as State v. A.R., 213 N.J. 542 (2013), State v. Miller, 205 N.J. 109 (2011) or State v. Wilson, 165 N.J. 657 (2000), as those matters concern readbacks of witness testimony provided at trial for a petit jury, typically at that jury's request and after that jury has already observed the witness actually testify. Within the context of grand jury proceedings, those cases are simply irrelevant.

C. The State had No Obligation to Present the State Grand Jury with Clearly Exculpatory Evidence that Did Not Exist.[12]

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.

> 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

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12 This Point responds to Point E of defendant's brief.

> 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.

1. [redacted] recorded interview for the defense is far from "clearly exculpatory" and, rather than provide it to the State Grand Jury, the State opted instead to provide jurors a readback of its own testimony previously taken from her.

Defendant accuses the State of being in possession of, but failing to present jurors with, evidence from a "reliable" and "unbiased" witness that defendant Troiano worked at least 35 hours per week. He refers to a recorded statement taken from [redacted], the defendants' confidential assistant, by a private investigator in which she states that Troiano regularly worked 35 hours per week. See Defense Exhibit C. A bald, unsupported statement of the sort, regardless of the source, is hardly of the "clearly exculpatory" nature requiring its disclosure to jurors. Moreover, the State received a copy of that recording, reviewed it and determined, instead of playing that recording for the State Grand Jury, that it would subpoena [redacted] herself for more comprehensive and sworn, in-person testimony before the same. This was because, given her statements during the State's investigation, compared to her statement to the private investigator, and as confirmed by her State Grand Jury testimony despite defendant's contention to the contrary, [redacted] was inconsistent and not credible.

During her February 2023 testimony, [redacted] was asked whether the commissioners were full-time, part-time or something else. [redacted] responded, "They are considered part time technically. Although I will say with all honesty they are there 24/7 for availability." When asked whether they have always been considered part-time, [redacted] replied, yes. See Defense

Exhibit D, 9:9-14. Asked whether they keep regular daily and weekly schedules, [redacted] said yes, but when asked if their schedules were as regular as her daily 8:00 a.m. to 4:00 p.m. schedule, she said "probably not," that the Commissioners "don't have a set schedule," that their average daily schedule "depends," and that they all essentially come and go as they please. See Defense Exhibit D, 9:18 to 10:23. And when asked about the difference between part-time and full-time, she stated, "Part time from my understanding is like 32 hours or less." See Defense Exhibit D, 8:19-22.

Additionally, when shown the various standardized timesheets that she managed for the commissioners – and certified on their behalf – particularly defendant's, and asked what the X's typically marked each Monday through Friday signified, [redacted] replied, "That he was in the office," and that it would "[n]ot necessarily" indicate he had worked a full day, just that he had been present for some amount of time. See Defense Exhibit D, 19:16 to 21-7. [redacted] then confirmed that the practice of replacing the X's with 7's on the timesheets occurred regardless of the number of hours a given commissioner actually worked, and that an X or a 7 merely denoted, again, that on a given day the given commissioner had spent some time in City Hall doing something. See Defense Exhibit D, 27:24 to 28:6. Later during her testimony, however, when asked yet again about this routine practice, she instead replied that X's or 7's indicated that the given commissioner "worked that day, not necessarily that I saw them," and that "[t]hey may not have necessarily been in the office . . . like when they are on vacation in Florida." Reminded of her contradictory earlier testimony that X's or 7's meant she saw them in the office, [redacted] simply replied, "I don't recall saying that." See Defense Exhibit D, 69:5-16.

Further, as to her credibility, in the defense-supplied [redacted] statement, [redacted] indicated that she was solely responsible for completing defendant's timesheets, that she signed

them with a signature stamp for him, that defendant was not involved in the process and that he may not have even known they existed. See Defense Exhibit C. During her State Grand Jury testimony, on the other hand, she stated that she typically used defendant's signature stamp to sign his timesheets and other documents on his behalf, but confirmed more than once that she would never affix his official signature to anything without his knowledge. See Defense Exhibit D, 23:9-15, 41:23 to 42:4.

Moreover, [redacted] acknowledged during her testimony that the signer of the timesheets was, as indicated on the timesheets themselves, certifying that the information contained therein was truthful and accurate. See Defense Exhibit D, 21:24 to 22:16, 41:23 to 42:4. Nevertheless, despite this and defendant's timesheets uniformly showing X's or 7's each Monday through Friday indicating a regular 35-hour work week, she further testified that none of the commissioners had a set schedule and that the average daily schedule just "depends." See Defense Exhibit D, 9:18 to 10:17. Later, [redacted] was asked, "[A]ll of the timesheets that we've been discussing, the timesheets for Byron and Troiano, they all appear to suggest that the Commissioners were working fixed set schedules that never really varied[, w]as that the case?" She replied, "No." She was then asked, "So then is it your testimony that these certified timesheets are not accurate?" She replied, "Yes." She was asked again, "So they are not accurate?" [redacted] then replied, "Well, yes, they are not accurate because they worked varying hours not necessarily the seven[, i]t could be 10 one day[, i]t could be three the next." See Defense Exhibit D, 44:7-20.

This is why the State did not use the defense-supplied [redacted] statement. This is why the State subpoenaed [redacted] for sworn testimony before the State Grand Jury. This is why the State considers [redacted] lacking in credibility and the defense-supplied [redacted] statement the

furthest thing from what defendant describes as "clearly exculpatory evidence" from a "reliable source." That defendant considers the State's decision to not play that recorded statement for the jurors the "most concerning example" of its "withholding exculpatory evidence" is, itself, concerning.

2. During the indictment presentation, the State accurately presented its voluminous evidence through its detective-witness, including a summarized account of various statements similarly offered by various city officials concerning, among other things, the defendants' typical work hours.

Presented with the names of several Wildwood City officials interviewed during this investigation, the detective-witness testified regarding their similar descriptions concerning the defendants' employment status and general work hours. When asked, she confirmed that those city officials all basically described the commissioners' positions as part-time jobs and that, based on their observations and experience, the defendants while holding those positions did not maintain city work schedules of at least 35 hours per week. 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]; and Municipal Administrator [redacted]. During the State's investigation, all of these witnesses provided recorded statements to detectives and those have been provided in discovery. Defendant's assertion that the State somehow deceived the jurors with inaccurate information based on this testimony is just erroneous.

Defendant focuses on statements provided by four of those witnesses. The first, [redacted], told detectives that the mayor and commissioners did not work set hours and that she might see

defendant Troiano at City Hall every day and defendant Byron maybe a few times a week.[13] The next witness, [redacted], told detectives that prior to the 2011 health-benefits resolutions being passed, the mayor and commissioners had always been considered part-time positions. Asked about the hours they generally maintained, she said she did not see any of them regularly and that none of them worked seven hours a day or fixed schedules. The next witness, [redacted], told detectives she considered the defendants, the mayor and commissioners, to be part-time because she did not believe any of them worked 35 hours a week. Asked about their hours, she said she typically saw defendant Troiano, when he was mayor, at City Hall in the afternoons, but only saw defendant Byron when was he was present for a meeting or working on a project. Last, [redacted] likewise told detectives that she considered the mayor and commissioners to be part-time because they did not work full-time regular hours or remain present at City Hall during normal business hours like other full-time city employees.

Defendant also cites a one-page "certification" from the city to Pensions generally concerning his employment status, work hours and benefits eligibility. See Defense Exhibit B. Prior to referring this matter to the Division of Criminal Justice for more extensive investigation and prosecution, Pensions investigators received information concerning the subject conduct of this case and started to look into it themselves for a few months in 2019. During that time, Pensions investigators created this questionnaire or certification and sent it to the city in an attempt to obtain direct answers about the commissioners' actual SHBP eligibility. The single-page form basically consists of a dozen questions concerning job duties, benefits entitlement,

[13] That [redacted] may have identified defendant's employment status as "ft" on a list of city employees provided to detectives means little considering the resolution declaring the commissioners to be "full-time" employees, defendant's "Payroll Status Change Report" identifying him as neither part-time nor full-time but as "unclassified" (See Defense Exhibit H, 118:18 to 119:17), and the various city officials' accounts describing all of the commissioners, including defendant, as part-time in reality because none were working full-time hours.

weekly hours worked and types of schedules maintained, if any. For both defendants Troiano and Byron (Mikulski had not yet been elected), in answer to "Number of Weekly Hours Worked," the responses were, "See attached Payroll Status Change Report as of 5/17/11, and Resolution No. 227-6-11." To note, although these "certifications" were not used during the indictment presentation, the two referenced documents, the "Payroll Status Change Report" and the resolution, were. The former identifies the defendants not as full-time, but as "unclassified" employees, while the latter is the 2011 resolution in which defendants Troiano and Byron simply declared themselves to be full-time. In answer to questions concerning their schedules, the responses were that they did not work fixed schedules and that their schedules varied. To the question "how is the individual's time tracked for accuracy," for both defendants Troiano and Byron the responses were, "Individual maintains own time." And in answer to the question that flatly asked whether defendants Troiano and Byron were entitled to SHBP participation, the response only referred to the two 2011 health-benefits resolutions.

Although these "certifications" were signed by [redacted] and [redacted], the forms were actually completed with the assistance of a small working group, which consisted of [redacted], [redacted], the city's municipal administrator, [redacted], the human resources director, [redacted], and city Labor Counsel [redacted]. Detectives interviewed all five of those officials specifically about the "certifications," and all of their interviews were generally consistent with one another and with any previously provided statements. According to them, particularly [redacted] and [redacted], the purpose of the working group was to assure that the responses provided on the certification forms were honest and properly worded without necessarily expressly stating – despite the group's members' commonly shared belief – that the city's commissioners were not full-time employees who were entitled to SHBP participation. Notably, when she was asked whether

defendants Troiano and Byron were involved at all in this process, [redacted] responded, "No, did they [the certifications] look like they were done by them [Troiano and Byron] for their benefit? They were done so that somebody could say no, they were not entitled to it [the SHBP benefits]."

At any rate, the detective-witness testified before the State Grand Jury that the four witnesses to which defendant refers – as well as at least eight other city officials, including former Commissioner [redacted], former City Business Administrator [redacted] and former City Solicitor [redacted] – all told her they considered the mayor and commissioner positions to be part-time jobs and that the defendants did not regularly work 35 hours a week. The notion that this was somehow "misleading" or "highly prejudicial," suggesting that it may have somehow led the jurors to reach a decision (to indict) that they otherwise would not have reached, is preposterous.

CONCLUSION

Based on the foregoing, this Court should deny defendant Troiano's motion to dismiss the indictment as to him, specifically Counts One, Four, Seven and Ten.

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