

**FILED**

DEC 08 2023

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

**PREPARED BY THE COURT**  
**Superior Court of New Jersey**  
**Criminal Courts Complex**  
**4997 Unami Boulevard**  
**Mays Landing, NJ 08330**

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<b>STATE OF NEW JERSEY</b>	:	<b><u>CRIMINAL ACTION</u></b>
	:	
	:	<b>Indictment No.: 23-07-00109-S</b>
<b>v.</b>	:	<b>State Grand Jury No.: SGJ789-23-5-S</b>
	:	
<b>ERNEST V. TROIANO, JR.</b>	:	<b><u>ORDER</u> - Amended</b>

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**THIS MATTER** having been brought before the Court by Defense's Motion to Dismiss the Indictment of Ernest V. Troiano, Jr., and the Court having considered the transcripts of the presentation to the State Grand Jury, the certification, written submissions, supplemental submissions, and arguments of counsel on the record on November 17, 2023;

**IT IS** on this 8th day of December 2023, **ORDERED** that the Defendant's Motion to Dismiss the Indictment is **DENIED** for the reasons as set forth in the Court's letter decision.

  
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Bernard E. DeLury, P.J.Cr.

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**SUPERIOR COURT OF NEW JERSEY**

VICINAGE 1

**Bernard E. DeLury, Jr.**  
Presiding Judge

Criminal Division  
Criminal Court Complex  
4997 Unami Boulevard  
Mays Landing, N.J. 08330-1701  
609-402-0100 x47360

December 8, 2023

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Re: State of New Jersey v. Ernest V. Troiano, Jr.  
Ind. No.: 23-07-00109-S

Dear Counselors:

This letter decision is rendered in response to Defense's motion to dismiss the indictment against Ernest Troiano. The Court has considered the written submissions and oral arguments of counsel on the record on November 17, 2023. For the reasons stated herein, the Court finds that the Defendant did not establish clearly and plainly that the indictment is manifestly deficient or palpably defective. Therefore, the court has determined to **DENY** the Defense's motion to dismiss the indictment.

## STATEMENT OF FACTS<sup>1</sup>

This indictment stems from the time period when Defendant held the elected position as commissioner and appointed position of mayor in the City of Wildwood between 2011 to 2019. 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, the Board, then consisting of Troiano and his co-defendants, passed a Resolution that declared “that each member of the Board of Commissioners of the City of Wildwood” is 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 that was not previously prohibited before the 2010 legislative change.

In 2011, Troiano started receiving benefits and he 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, Susan Maxwell. From 2011 through December 2019, Maxwell 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. Troiano’s claims under the health insurance amounted to a total of \$287,000 in SHBP benefits.

## PROCEDURAL HISTORY

State Grand Jury Indictment No. 23-3-00038-S was returned on March 10, 2023, charging Defendant 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. Defendant filed a motion to dismiss the indictment, which this Court granted in a written decision dated June 23, 2023.

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<sup>1</sup> The Statement of Facts and Procedural History were taken from Defense Counsel’s brief dated September 14, 2023, and the State’s reply brief dated October 6, 2023.

Superseding State Grand Jury Indictment No. 23-7-00109-S was returned on July 31, 2023, charging Defendant with the same four offenses. Defendant filed this motion to dismiss the superseding indictment on September 14, 2023.<sup>2</sup> Oral argument was heard in Cape May Superior Court on November 17, 2023. This letter opinion and order follow.

## ARGUMENT

### DEFENSE'S ARGUMENT

The Defense argues there were multiple deficiencies within this indictment that affected the grand jurors' ability to make an informed decision whether to indict the Defendant. The Defense proffers that the only possible fair result is the dismissal of the superseding indictment against Defendant Troiano.

The Defense states the entirety of the State's case rests on the premise that Defendant failed to work the 35 hours per week necessary to claim benefits from the SHBP. The Defense argues, if in fact Defendant did work the required hours, then his receipt of benefits was lawful regardless of how those hours were recorded and/or submitted. The Defense argues that any personal opinions expressed by witnesses as to whether or not the Defendant was classified as part-time or full-time by the City of Wildwood are wholly irrelevant, since it is *only* the number of hours worked which counts.

#### **A. THE STATE ERRED IN PRESENTING THREE UNRELATED MATTERS TOGETHER IN A SINGLE INDICTMENT.**

The Defense argues it was improper for the State in this matter to join all three defendants in a single indictment since each matter was unique to each defendant, there was no common scheme between them, and the alleged evidence against one is wholly irrelevant to the others.

The Defendant alleges the offenses were clearly independent actions committed by multiple individuals without any collusion or common scheme between them. The Defense maintains that since no conspiracy was charged, there is no suggestion that the three defendants were somehow

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<sup>2</sup> On November 13, 2023, the Court received a supplemental brief from the Defense. The brief restated the reasons for the motion as indicated in the first brief. However, the Defense emphasized the argument that the State has failed to account for the 15,530 hours that are in question within this indictment and that the testimony provided, that the State suggests is "voluminous evidence," fails to address the key question in this matter. Therefore, the Defense concluded the indictment should be dismissed.

working together. The Defense cites to the original grand jury proceeding where a juror had asked if the individuals involved were all aware of each other's activity and the detective had responded that no such indication of collusion was identified by the investigation. This testimony was not represented in the superseding grand jury proceeding.

The Defense also argues that repeatedly relating Defendant to the other co-defendants is concerning in light of how many witnesses reported that Defendant put in significantly more time into the job than the others. Finding no connection between Defendant and the co-defendants, the Defense argues this comparison and connection between all three defendants harms this Defendant more than the others. The Defense states the State further inflated the seriousness of the matter by telling the grand jury almost immediately that the Defendants "unlawful participation in this publicly funded program resulted in their unlawful receipt of public health benefits totaling more than \$1,000,000 in payouts for premiums and claims for treatment and services during the time of their participation." (Defense Exhibit H, p. 8, 1.3-7). The fact that Defendant only received a quarter of that amount in benefits, the Defense argues, it was inappropriate and prejudicial to tell the jury that the matter involved over a million dollars in allegedly fraudulent benefits.

The Defense concludes that there was no connection between the alleged actions of the defendant, the vast amounts of evidence offered to the grand jury would be wholly inadmissible against the Defendant individually, and the Defendant suffered prejudicial effects from combining the damages with those of the other defendants. Therefore, the superseding indictment should be dismissed.

**B. THE STATE ERRED IN WITHHOLDING PORTIONS OF PRIOR WITNESSES TESTIMONY FROM THE GRAND JURY.**

The Defense argues the State presented the grand jurors in this superseding indictment with only a portion of the prior testimony of two witnesses, and therefore prevented the grand jurors from being fully informed before returning their vote. The Defense cites Ciba-Geigy Corp. stating it is New Jersey law that "the necessary number of grand jurors must be 'informed' of all the evidence before each may legitimately vote." State v. Ciba-Geigy Corp., 222 N.J. Super. 343, 354 (App. Div. 1988). The Defense states this rule mirrors those that apply to the readback of trial testimony, based upon the potential prejudice when highlighting only certain portions of witness testimony.

The testimony of witness Susan Maxwell and Detective Sergeant Caitlin Brennan are of concern to the Defense.

In regard to Susan Maxwell's testimony from the initial grand jury proceeding in February, Detective Brennan redacted the final seven (7) pages of Ms. Maxwell's testimony in the superseding proceeding even though the jurors were told they heard the entirety of Ms. Maxwell's prior testimony. The specific issues that Maxwell addressed in those redacted portions included: (1) that Defendant was a salaried employee, so recording specific hours worked was unnecessary so long as he worked at least 35 per week; (2) that using X's on timesheets related to days that Maxwell had personal knowledge of the Defendant working, and (3) that Defendant was not only permitted to, but actually did, work outside of City Hall on a regular basis.

This similarly was done with Detective Brennan's own prior testimony from the March grand jury, where thirteen (13) pages of her testimony were excluded and redacted from the superseding grand jury proceeding. In this redaction, the Defense alleges the State deprived the grand jury of learning: (1) that no additional guidance was ever offered by the State Health Benefits Commission after the Local Finance Notice was issued, (2) that neither the Deputy City Solicitor or anyone else from the City objected to the passage of relevant resolutions in 2011 when they were offered at a regular public meeting of the City Commission, (3) that Defendant did not enroll himself in the SHBP, it was done by the human resources department, and (4) that there was no common scheme between the defendants regarding how the timesheets were completed, since it was just the standard practice at the City.

The Defense finds nothing offered to the new grand jury would have provided an alternative source for the missing information since these parts of the testimony were redacted. The Defense finds the grand jury could not be considered "fully informed" prior to voting on the new indictment and that they were intentionally deprived of the relevant information that addressed Defendant's culpability. Therefore, the Defense finds the superseding indictment is defective and must be dismissed.

**C. THE STATE FAILED TO GIVE GRAND JURORS THE OPPORTUNITY TO ASK QUESTIONS OF A KEY WITNESS.**

The Defense alleges the State deprive the grand jury of its essential fact-finding function and prevented it from having the opportunity to ask questions of a key witness. Here, the Defense finds

[REDACTED]

that by presenting the testimony of Susan Maxwell by way of a partial reading of a prior transcript instead of calling her to testify in person, and by preventing any follow-up by the grand jurors, the State infringed upon the right of the grand jury to fulfill its duty.

After the reading of Maxwell's testimony, the State took a five-minute recess then immediately moved on to reading a portion of Detective Brennan's prior testimony, the grand jurors were never notified that they had the option of having Ms. Maxwell recalled or that they were permitted to ask any questions about her testimony. The Defense proffers that the State *only* asked the grand jurors if they had any additional questions specifically for the Detective, no indication of any for Ms. Maxwell.

Ms. Maxwell was the only lay witness called to testify and the witness with the most direct information about how many hours the Defendant worked. The grand jury was deprived of two witnesses' whole testimony, the ability to ask Ms. Maxwell questions, and the ability to potentially form questions on the information that was intentionally omitted. Therefore, it is the Defense's position that the grand jury's vote should be rendered meaningless, and the superseding indictment should be dismissed.

**D. THE STATE ERRED BY ALLOWING AN INTERESTED STATE'S WITNESS TO READBACK THE TESTIMONY OF A LAY WITNESS.**

The Defense alleges the State committed a prejudicial error by having its lead detective, arguably the most interested witness in the case, perform the readback of transcript testimony from Susan Maxwell that the State has previously argued lacked credibility. The Defense also expressed the concern that when reading back a transcript, it should be done by a neutral party, typically a court report that transcribed the testimony in the first place.

The Defense notes that it would be impossible to know from the written record if Detective Brennan purposefully or intentionally attempted to alter the tone, character, or nature of Ms. Maxwell's testimony. Defense, however, points out that Detective Brennan was not present for Maxwell's testimony, was not a trained court reporter or other individual qualified to present a neutral readback, and could only read it using her interpretation of how it may have gone. The Defense suggests the grand jurors were deprived of the opportunity to reach their own conclusions with respect to Susan Maxwell's prior testimony and their ultimate decision process was inherently flawed.

## **E. THE STATE FAILED TO PRESENT CLEARLY EXCULPATORY EVIDENCE.**

The Defense argues that the State was in possession of evidence from credible and reliable sources that the Defendant worked at least 35 hours per week and failed to present that evidence to the superseding grand jury, despite the clear obligation to do so.

The Defense cites that New Jersey law requires "in establishing its prima facie case against the accused, the State may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'" State v. Hogan, 144 N.J. 216, 236 (1996). The Defense states the two-part test to evaluate a prosecutor's duty is that the evidence "must directly negate guilt and must also be clearly exculpatory." Id. at 237. The Defense finds, if credible, material, and exculpatory evidence "is withheld from the grand jury, the prosecutor, in essence, presents a distorted version of the facts ... and interferes with the grand jury's decision-making function." Id. at 236.

The Defense argues there are several instances where exculpatory evidence was either withheld from the grand jury completely or was misrepresented by the witness in response to generalized questions from the prosecutor, resulting in the requirement that the indictment be dismissed against this Defendant.

### **(1) Exculpatory Evidence that Defendant Worked 35 Hours Per Week.**

The Defense claims Ms. Susan Maxwell, a confidential assistant for the City of Wildwood, is the person with the closest and most direct knowledge of Defendant's schedule and activities on behalf of the City of Wildwood. Ms. Maxwell was the one responsible for Defendant's timesheets, calendar, and schedule. The Defense finds the most concerning example of withholding exculpatory evidence concerns the February testimony of Ms. Maxwell.

The Defense states the State was provided a letter and recording of Maxwell where she clearly stated that Defendant without a doubt worked more than 35 hours per week. This information was based on her frequent communications with the Defendant. However, the DAG did not ask Maxwell about the numbers of hours Defendant worked in the February grand jury. The Defense finds that the State knowing this information and not providing it to the grand jury was an error and requires the dismissal of the indictment.

### **(2) The State Presented Misleading and Inaccurate Testimony.**



[REDACTED]

The Defense states the opinions and remarks of four individuals by Detective Brennan answering questions based on their interviews were inaccurate and mislead the grand jury. Detective Brennan answered that all four individuals had stated Defendant and the other two co-defendants did not maintain City work schedules of at least 35 hours a week and that the individuals considered the Commissioner positions as part-time jobs. However, the Defense claims this is wrong.

The Defense states that Hope Pinot, Director of Human Resource, stated she considered Defendant to be a full-time employee and even marked such in her handwriting on the payroll printouts. Pinto also stated she would see Defendant at City Hall every day.

The Defense states Jeanette Powers, Chief Financial Officer, never stated that Defendant did not work 35 hours per week, rather she stated Defendant was always at City Hall, she would hear him, and he would hold meetings often. Powers also stated that Defendant had job duties that justified full-time employment.

The Defense included Susan Plaza, Municipal Accountant, who never indicated any personal knowledge of how many hours Defendant worked. Plaza did state, she considered most of the Mayor and Commissioners of the City of Wildwood to be a part-time position, but Defendant put in a lot of time, and she would see him everywhere.

Lastly, Defendant quotes Rachel Fleck, Assistant Municipal Treasurer, who stated specifically that she could not attest to the hours a day/week Defendant and the others worked because her office is on the other end of City Hall. However, she added that she saw Defendant the most at City Hall.

The Defense claims that by Detective Brennan's statement, the true opinions of these four individuals were falsely stated and mislead the grand jury. Therefore, the superseding indictment should be dismissed.

#### STATE'S ARGUMENT

The State argues the grand jury received ample evidence in support of the indictment it returned against the three defendants, including the Defendant here. The State finds that the evidence showed the Defendant was not a full-time employee working full-time hours, and therefore he was not entitled to participate in the SHBP.

**A. IT WAS PROPER TO JOINTLY INDICT THE DEFENDANTS.**

The State cites Robinson stating there is a general preference to try co-defendants jointly. State v. Robinson, 253 N.J. Super. 346, 364 (App. Div. 2012). Such is true specifically when “much of the same evidence is needed to prosecute each defendant.” State v. Brown, 118 N.J. 595, 605 (1990).

The State finds that 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. Defendants’ timesheets were all of the same type and all were completed in the same manner showing the same uniformly misreported seven-hour weekday workdays. Defendant may have worked more city hours but that does not mean he was working enough city hours to satisfy the 35-hours.

As for the total funds expressed to the jurors, the detective-witness testified to about \$287,000 for Troiano in public health benefits, as well as two other specific amounts for Byron and Mikulski. The grand total stated to the grand jury was to assist the grand jury in understand the grand scheme of the benefits and, as the State puts it, to assist the jurors in basic mathematics.

The State concludes the Defendant has no basis to disturb the indictment. However, if he was unduly prejudiced the proper remedy would be severance for trial, not dismissal of a properly returned indictment.

**B. THE EVIDENCE PRESENTED WAS SUFFICIENTLY RELEVANT TO ESTABLISH A PRIMA FACIE CASE.**

The State argues the Defendant fails to establish that only reading a portion of the prior testimony and having the State’s detective read said testimony constitutes error. The State argues that having the detective for those readback is entirely permissible and subject to the State’s discretion. Additionally, the contention that the State denied jurors the opportunity to ask question, the State argues is just untrue.

The State clarifies that the testimony given in the form of readbacks was from two prior grand jury sessions where information was redacted that was considered unnecessary and duplicative content. Things such as introductory remarks, reading of the indictment, instructions on the law and prior questions were redacted.

With regard to the manner in which the State may present its evidence, the State suggests these determinations are all for the State to make in its discretion. The State contends there is no legal ground for the Defendant to instruct or direct the State in the form or manner of its presentation to the grand jury. The State maintains that it is not required that the State show the jury the entirety of its investigative file nor present the entirety of every interview it conducted.

The State adds that at the end of every grand jury presentation the jury is asked whether it had any questions at all concerning the facts and evidence presented. In this indictment presentation, the grand jurors had no questions at the conclusion of the case.

**C. THERE WAS NO OBLIGATION TO PRESENT CLEARLY EXCULPATORY EVIDENCE THAT DID NOT EXIST.**

The State must acknowledge credible and material exculpatory evidence, 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." State v. Hogan, 144 N.J. 216, 235-37. Grand jurors should be informed of clearly exculpatory evidence such as the credible testimony of a reliable and unbiased alibi witness. Id. at 238. However, prosecutors need not construct a case for the accused or search for evidence that would exculpate him. Id. 238-39.

The State claims the Defendant fails to show how the State failed to adhere to its prosecutorial obligations.

**(1) Susan Maxwell.**

The State argues the testimony regarding the number of hours Defendant worked as stated by Susan Maxwell was inconsistent and not credible. The State contends that as demonstrated by the variety of Maxwell's testimony, her statements are not concrete and not reliable. Maxwell's statements concerning the amount of hours Defendant and the others worked changes between saying they're full-time, part-time, available 24/7, have no concrete or regular schedule, come and go as they please, and that the "x" placed on Defendants timesheet signified 7 hours worked even though Maxwell stated she didn't necessarily see them in the office that day when marking the "x".

The State found that Maxwell was lacking credibility which is the main reason she was not called for sworn testimony before the grand jury. The State argues Maxwell's testimony is the furthest thing from what Defendant describes as "clearly exculpatory evidence."

**(2) The Summaries of Various County Officials' Statements Were Accurately Presented.**

[REDACTED]

The State argues the statements of the four individuals as stated above by the Defense were not misleading or inaccurately stated.

Pinto told Detective Brennan that the mayor and commissioners did not work set hours and that she might see Defendant every day at City Hall. Powers told detectives that Defendant and the co-defendants were never seen on a regular basis and never worked seven hours a day or a set fixed schedule. Plaza told detectives she considered the defendants to be part-time because she did not believe any of them worked 35 hours a week. Plaza also stated she typically saw Defendant at City Hall in the afternoons. Lastly, Fleck stated to the 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.

The State argues the detective accurately expressed the collection of the witness's statements by saying all the individuals considered the mayor and commissioner positions to be part-time jobs and that the defendants did not regularly work 35 hours a week.

Therefore, the State contends the motion to dismiss should be denied, as the indictment was properly presented to the grand jury and is not defective.

### **LEGAL ANALYSIS**

The Defendant has the burden to show that an indictment should be dismissed, whether the basis for dismissal is procedural or substantive. Here, the Court has concluded that the Defendant has failed to show that the indictment must be dismissed.

#### **A. OVERVIEW OF THE LAW SURROUNDING A MOTION TO DISMISS AN INDICTMENT.**

“An indictment is presumed to be valid and should only be dismissed if it is ‘manifestly deficient or palpably defective.’” State v. Feliciano, 224 N.J. 351, 380 (2016) (citing State v. Hogan, 144 N.J. 216, 229 (1996)). It is in the discretion of the trial court whether or not to dismiss an indictment, but that discretion should only be exercised on the “clearest and plainest ground.” Feliciano, 224 N.J. at 380 (citing State v. New Jersey Trade Waste Association, 96 N.J. 8, 18 (1984)). As long as the State has presented “some evidence” so as to establish a *prima facie* case that a crime has been committed and that the accused has committed it, an indictment should not be dismissed. Feliciano, 224 N.J. at 380 (citing State v. Saavedra, 222 N.J. 39, 57 (2015)). See also

[REDACTED]

State v. Triestman, 416 N.J. Super. 195, 204 (App. Div. 2010) (quoting Hogan, 144 N.J. at 227-28)). There must be a showing that the State failed to present evidence that both directly negates an element of the offense and is clearly exculpatory. Hogan, 144 N.J. at 237.

When deciding a motion to dismiss the indictment, the trial court determines, “whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred, and that the defendant committed it.” State v. Saavedra, 222 N.J. 39, 56-57 (2015) (citing State v. Reyes, 50 N.J. 454, 459 (1967)). Nevertheless, if no evidence is presented to support a given charge, the indictment is palpably defective and must be dismissed. State v. Morrison, 188 N.J. 2, 12 (2006). There is broad discretion granted to the State during grand jury presentment and a presumption of validity attached on review of the grand jury proceedings. State v. Smith, 269 N.J. Super. 86, 92 (App. Div. 1993); see State v. Graham, 284 N.J. Super. 413, 416 (App. Div. 1995) (“[i]n determining the sufficiency of the evidence to sustain the indictment, every reasonable inference is to be given to the State”) (internal quotations omitted).

#### **B. JOINDER IS PERMISSIBLE FOR PURPOSES OF THIS INDICTMENT.**

Under New Jersey Court Rule 3:7-7, “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.” There is a general preference to try co-defendants jointly, especially when much of the same evidence is needed to prosecute each defendant. Brown, 118 N.J. at 605. Rule 3:7-7 continues by stating, “such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”

If the 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. N.J. Court Rule 3:15-2(b).

In this present case, the joinder of Defendant with the other two defendants, Byron and Mikulski, was proper for purposes of the indictment. Defendant and his co-defendants all participated in the same acts alleged to have misreported their correct hours of work on each timesheet when employed with the City of Wildwood. The evidence presented to the grand jury

consisted of the same witnesses who could attest to the actions of all three defendants concerning this incident. Susan Maxwell and Detective Brennan's testimony encompassed actions taken by all three defendants and evidence to support the charges brought against them.

As Rule 3:7-7 states, these defendants may be charged in the same indictment due to the allegations that all defendants participated in the same acts or same series of acts constituting these offenses described in the indictment. Defendant and co-defendant Byron began enrollment in SHBP in 2011. Such enrollment lasted until Defendant's final term in 2019. Throughout eight years of receiving SHBP benefits and coverage, timekeeping was kept by the commissioners' confidential assistant, Susan Maxwell. Both Defendant and Byron signed and certified their timesheets were correct with annotations of "7s" from Monday through Friday amounting to 35 hours every week. In 2020, the testimony revealed that Mikulski joined this timekeeping practice. During the time period of the alleged offenses, the same practice and manner of alleged overreporting the hours worked each week was consistent between Defendant and his co-defendants. Given the broad discretion afforded prosecutors in presenting evidence to a grand jury and given the similarity of the proofs involving each defendant, joinder of the defendants for purposes of the indictment was proper.

As for Defense counsel's argument concerning the absence of a conspiracy charge, there need not be such a charge to include multiple defendants in a single indictment. The more appropriate juncture to raise an argument regarding the facts related to each defendant's involvement may be in a motion to sever defendant for trial which may be made at the appropriate time.

The Defense has argued that the testimony concerning the amount of public funds expended, and the breakdown of the amount attributable to each defendant given was improper, as was the evidence pertaining to the total stated to the grand jury. The Court concludes that the State did not err in presenting both the separate amount and the total of the benefits provided to each defendant. Such evidence was not unduly prejudicial to any defendant. Rather, the evidence was necessary to satisfy the element of value in second degree offenses.

As such, Defendant Troiano was properly joined with Defendant Mikulski and Defendant Byron for the purposes of the indictment.

**C. THE STATE DID NOT ERR IN NOT PRESENTING SOME PRIOR WITNESS TESTIMONY.**

[REDACTED]

When presenting an indictment to the grand jury, the grand jurors must be informed of all the evidence before each may legitimately vote. Ciba-Geigy Corp., 222 N.J. Super. at 354. The Defense cites this case for the purposes of alleging that the State has a duty to supply transcripts of prior testimony to grand jurors with the intention of implying the transcripts must be whole and not redacted. However, the reason for the ruling in Ciba-Geigy Corp. was due to the fact that certain grand jurors had missed days of a testimony and needed to be informed of the testimony they had missed before returning a vote on the indictment. That is not the case here.

Here, the State read back the prior testimony from the two original grand jury proceedings of witness Susan Maxwell and Detective Brennan. The State redacted portions of the testimony which included the section where the first grand jury asked questions of the two witnesses and the witnesses were thus called back to answer the questions. Although this information was not included in the July indictment, all information needed to return an indictment was presented to the grand jury. The members of the July grand jury all heard the same substantive evidence and testimony, there was not one grand juror who was more informed than another when voting, unlike the case in Ciba-Geigy Corp.

With regard to the standard of evidence needed to be present for a grand jury to return a legally sufficient indictment, Hogan held there must be some evidence establishing each element of the crime to make out a prima facie case. Hogan, 144 N.J. at 236. Specifically, in reviewing the grand jury record on a motion to dismiss an indictment, the trial court should evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred, and that the defendant committed it. State v. Morrison, 188 N.J. 2, 13 (2006). "A court should not disturb an indictment if there is some evidence establishing each element of the crime to make out a prima facie case." Id. at 12. There is no rule to suggest that the entire, verbatim, prior testimony of an original grand jury hearing must be re-presented to a grand jury considering the evidence anew. All that is required is that the State present enough evidence for the jurors to believe a crime occurred and the defendant committed it.

For the above reasons, the State did not err in redacting portions of the prior testimony given by both witnesses before the original grand jury panel.

**D. THE STATE DID NOT ERR BY FAILING TO GIVE THE JURORS AN OPPORTUNITY TO ASK QUESTIONS AFTER EACH WITNESS.**

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Each grand jury panel is presented with a Standard Grand Jury Charge informing each of their duties and responsibilities prior to the start of their term. Within this charge, the grand jurors are specifically told the grand jury does not assist the prosecutor, the prosecutor assists the grand jury. The grand jurors are also informed that they are empowered to require the production of evidence, to compel witnesses to appear before them, and to return indictments if the evidence justifies that action. Lastly, the grand jurors are instructed that the prosecuting attorney is available to advise on legal questions and, if necessary, the jurors may request additional instructions from the court. Administrative Directive #12-06, "Standard Grand Jury Charge" (July 20, 2006), as amended and repromulgated by the "Implementation of Supreme Court Amendments to Rule 3:6-6" Memo (August 16, 2021).

At the end of the testimony in the July grand jury proceeding, the State asked the grand jurors if there were any questions regarding the facts and evidence presented to them that day. The grand jury remained silent, asking no questions. The jurors were informed that an opportunity to ask questions was allowed, the panel was also informed in their charging that they may ask legal questions or request additional instructions. However, it is not the job of the grand jury to ask questions to assist the State, rather it is the State's obligation to adduce evidence to assist the grand jury in its function to decide whether a crime has been committed and the accused committed it.

Therefore, the Court concludes that the State made a proper presentation of the evidence to the grand jury to permit the jurors to fulfil their accusatory function and return a true bill.

**E. THE USE OF THE STATE'S DETECTIVE FOR WITNESS READBACKS WAS PERMISSIBLE.**

The Defense's argument that the indictment must be dismissed because the State allowed an interested law enforcement witness to read the testimony of a lay witness is unavailing.

The State has the discretion to present evidence to a grand jury in the manner suitable to establish a crime has occurred and the accused committed that crime. As for Defense's argument that the credibility of Maxwell is of concern to the Defense, credibility is not a matter for the grand jury to decide. "Credibility determinations and resolution of factual disputes are reserved almost exclusively for the petit jury." Hogan, 144 N.J. at 235. However, the State "may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'" Id. at 236. The State did neither in this case.



The State's witness appears to have read word-for-word from Maxwell's original testimony, adding nothing extra to her testimony. Nothing in the record would indicate that the witness who read the testimony to the grand jurors did or said anything improper that would have deprived the grand jurors of their accusatory function.

**F. THE STATE COMPLIED WITH ITS DUTY REGARDING THE PRESENTATION OF ANY CLEARLY EXCULPATORY EVIDENCE.**

"The State is required to present exculpatory evidence in the rare case in which evidence both directly negates the guilt of the accused and is clearly exculpatory; the evidence must squarely refute an element of the crime." Saavedra, 222 N.J. at 63; (citing Hogan, 144 N.J. at 237). It is not the job of the prosecutor to construct a case for the accused or search for evidence that would exculpate the accused. Id. If the prosecutor has actual knowledge of clearly exculpatory evidence that directly negates guilt, such evidence must be presented to the grand jury. Id. The New Jersey Supreme Court has held "only in the exceptional case will a prosecutor's failure to present exculpatory evidence to a grand jury constitute grounds for challenging an indictment." Hogan, 144 N.J. at 238-39.

Evidence that has been found to constitute "clearly exculpatory" is evidence 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. Id. The Defense fails to show what, if any, clearly exculpatory evidence was withheld from the grand jury by the State.

**(1) Susan Maxwell's Testimony.**

The clearly exculpatory evidence suggested by the Defense is the portion from Susan Maxwell's recorded statement stating Defendant regularly worked 35 hours per week. However, Maxwell gave statements during the State's investigation, to the Defense's private investigator, and in the form of sworn testimony before the State Grand Jury. All three statements were inconsistent in the State's view. Maxwell's statement wavered between various conclusions such as the Defendant worked part-time, was available 24/7, didn't have a set schedule, varied his average daily schedule, and he came and went as he pleased. These assertions varied throughout her statements and testimony. In any event, such evidence is not clearly exculpatory. While the evidence of Ms. Maxwell may or may not help Defendant's case before a petit jury, it is not evidence that "squarely refutes an element of the crime in question." If anything, Ms. Maxwell's

[REDACTED]

various statements are more confusing and inconsistent than concrete proof. Nevertheless, her testimony in the totality of the circumstances and based on reasonable inference, was sufficient to satisfy the State's burden before the grand jury.

**(2) City of Wildwood Employee Statements.**

The Defense argues that various employees of the City of Wildwood gave statements to Detective Brennan that were presented inaccurately and in a misleading way. Detective Brennan stated that all the individuals interviewed essentially considered the commissioner positions as part-time jobs and that based on their observations Defendant and co-defendants did not maintain City work schedules of at least 35 hours a week. The Defense argues this was deceiving to the grand jurors concerning the claims of each witness.

The witnesses in questions are Hope Pinto, Jeanette Powers, Susan Plaza, and Rachel Fleck. The Defense asserts that the testimony regarding their statements was misleading and inaccurate is unpersuasive.

Hope Pinto's statements concerned her observation of the Defendant at City Hall every day (but not the times or duration), and that on the payroll printouts she manually wrote full-time "ft" next to all full-time employees, which included Defendant. However, Pinto never stated specifically that she knew Defendant worked 35 hours a week. Pinto indicated that she would see Defendant every day, but duration was not indicated, and that for the purposes of payroll documentation she would indicate that Defendant was full-time but did not include her basis for doing such. None of these assertions show that Defendant worked the required 35 hours a week.

Jeanette Power's statements claim Defendant was always at City Hall. She stated she would hear him, and Defendant would often hold meetings. The Pension and Benefits department had contacted Power's regarding Defendant's eligibility and she had confirmed that he was eligible. However, Power's never specified that Defendant was known to work 35 hours per week.

Rachel Fleck stated that she could not attest to the dates or weekly hours Defendant or the others worked because her office is on the other side of City Hall. However, Fleck did add she saw Defendant mostly at City Hall. Fleck stated she considered the mayor and commissioners to be part-time positions because they were not at City Hall like the rest of the employees. She clarified that although they may work at their homes, being physically present in City Hall makes someone full time.

[REDACTED]

It is Defense's assertion that these statements do not show that the Defendant was considered to work less than 35 hours a week. However, these statements do not present evidence to support the actual amount of hours Defendant did work. These statements show that the Defendant was seen at City Hall by people, but no one can attest to whether he was there seven hours a day five days a week equaling the required time of 35 hours needed to be eligible for benefits. The Defense belabors the point that no one stated Defendant did not work 35 hours per week. However, the Defense fails to show that any witness asserted that the Defendant worked 35 hours a week as required for full-time employment. In any event, the factual details and the reasonable inferences that may be discerned from such are matters for trial. Their presence in or absence from the grand jury testimony are not determinative.

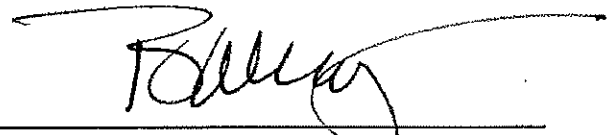
Therefore, the Defense's argument that the State failed to present clearly exculpatory and accurate evidence that it had in its possession fails as there is nothing in the record to show that the State failed to produce clearly exculpatory evidence negating guilt.

#### CONCLUSION

Based on the foregoing reasons, the Court concludes the Defense has failed to show the indictment is palpably defective requiring dismissal. The Court finds that the State met its burden before the Grand Jury by eliciting testimony that provided some evidence as to each element of the offenses charged thereby establishing reason to believe that the Defendant committed the offenses charged as determined by the Grand Jury returning a true bill.

Therefore, the Defense's motion to dismiss the indictment is **DENIED**. The Court has executed, filed, and enclosed an Order reflecting the Court's decision for the reasons set forth herein.

Very Truly Yours,



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