

PREPARED BY THE COURT

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	
Plaintiff	:	LAW DIVISION – CRIMINAL PART
	:	CAPE MAY COUNTY
v.	:	
	:	INDICTMENT No. CPM 23-07-109-S
ERNEST V. TROIANO, JR.,	:	
	:	ORDER
Defendant	:	

THIS MATTER having come before the Court on this 10th day of July, 2025, and Charles H. Nugent, Jr., Esq., appearing on behalf of defendant; and Laura Croce, Esq. and Krysta Chotkowski, Esq., appearing on behalf of the State of New Jersey; and the court having considered the arguments of counsel and for good cause shown;

IT IS ON THIS 15th DAY OF AUGUST, 2025:

ORDERED that the State's Motion to preclude defendant from arguing selective prosecution and/or improper prosecution is hereby **DENIED**.

ORDERED that the State's Motion to preclude defendant from arguing jury nullification at trial is hereby **GRANTED**.

ORDERED that the State's Motion to have the court take judicial notice of certain law, regulations and other legal documents is hereby **DENIED** without prejudice. The court will rehear this motion, if necessary, on November 18, 2025, at the final pretrial conference.

ORDERED that Defendant's Motion to preclude irrelevant testimony of Krista Fitzsimons and Anthony Leonetti is hereby **GRANTED** for the reasons set forth in the attached Memorandum of Decision.

ORDERED that Defendant's Motion to prevent testimony that commissioners do not receive sick, personal, or vacation days is hereby **GRANTED** as follows: If there are deviations on defendant's timesheets allocating "time off" to account for the lack of 35 hours worked, the State will be permitted to explore that distinction. The State shall be permitted to offer testimony that a Commissioner does not receive sick, personal, or vacation days to explain the content of defendant's various timesheets and hours worked or not worked. The State will not be permitted to suggest to the jury that because a Commissioner does not receive sick, personal, or vacation days, they are then, de facto, part-time employees.

ORDERED that the Defendant's Motion to preclude the State from arguing that the defendant's business ownership is evidence that his role as Commissioner prevented him from ever working 35 hours per week is **GRANTED** as follows: The State may only offer testimony of

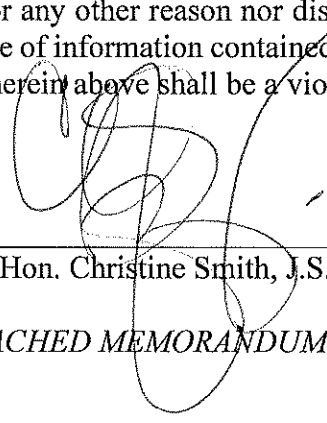
defendant's other employment if there is evidence to suggest that defendant was working at his business during the hours he reported he was working as a Commissioner.

ORDERED that the Defendant's Motion to bar the State from arguing that his activities outside of City Hall do not qualify as work is hereby GRANTED.

ORDERED that the Defendant's Motion to preclude opinion testimony of Susan Maxwell is hereby GRANTED. The State is hereby precluded from offering witness testimony as to whether the position of Commission is considered part-time or full-time by any staff member. If a staff member has personal knowledge that the defendant did not actually work the hours he reported in his timesheets, then that testimony would be permissible.

ORDERED that the Defendant's Motion to preclude opinion testimony of Det. Sgt. Caitlin Brennan is GRANTED.

ORDERED that Defendant's Motion to compel discovery is GRANTED. The State shall furnish (1) a list of any and all referrals for investigation made by the Department of Pensions and Benefits to the Attorney General's Office regarding abuse of the SHBP by publicly elected officials seated after 2010; (2) a list of the findings as to the results of the investigations conducted by the Attorney General's Office into any municipality with publicly elected officials seated after 2010 who received SHBP coverage or opt out payments; and, (3) any and all communications with or within the Attorney General's Office regarding the decision to bring charges against Troiano and his co-defendants. Further all information contained therein shall be subject to a protective order and used only in the pending matter of State of New Jersey v. Ernest V. Troiano, Jr., and shall not be used in any other matter in the absence of further order of the court and upon proper notice to the office of the Attorney General. All information contained in or derived from said records shall not be disclosed to any other person for any other reason nor disseminated or made public by any means direct or indirect. Further the use of information contained in or derived from said records for any purpose other than as set forth herein above shall be a violation of this Order and subject to the contempt powers of this court.



Hon. Christine Smith, J.S.C.

FOR THE REASONS SET FORTH IN THE ATTACHED MEMORANDUM OF DECISION



**SUPERIOR COURT OF NEW JERSEY
COUNTIES OF ATLANTIC AND CAPE MAY
*VICINAGE 1***

CHRISTINE SMITH, J.S.C.
Criminal Division

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**NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS**

MEMORANDUM OF DECISION

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RE: State of New Jersey v.
Ernest V. Troiano, Jr.

CASE NO. CPM 22-535

Dear Counselors:

This matter comes before the court on pretrial Motions in Limine. After oral argument, the court reserved its decision on all matters in dispute. This Memorandum now serves as the court's decision.

NATURE OF THE CASE AND PROCEDURAL HISTORY

On April 23, 2025 defendant filed a motion in limine. The court subsequently entered an amended Trial Order setting forth a pretrial motion schedule. On June 20, 2025 the State filed opposition and their own motions in limine. Defense opposition was timely filed, and oral argument was heard July 10, 2025.

ISSUES IN CONTENTION

DEFENDANT

At trial, defendant seeks:

- (1) to preclude testimony of Krista Fitzsimons and former Commissioner Anthony Leonetti as irrelevant and posing significant risk of undue prejudice, confusion, misleading the jury, and a waste of time;
- (2) to preclude testimony that commissioners do not receive sick days, personal days or vacation days;
- (3) to preclude improper opinion testimony of Susan Maxwell and Det. Sgt. Caitlin Brennan;
- (4) to preclude the State from arguing that the defendant's ownership of a construction company prevented him from working 35 hours per week as a commissioner; and,
- (5) to bar the State from arguing that the defendant's activities outside of City Hall do not qualify as "work" under the legislation mandating a 35-hour work week.

STATE OF NEW JERSEY

At trial, the State seeks:

- (1) to preclude the defendant from arguing selective prosecution and/or improper prosecution of this case;
- (2) to preclude argument to the jury of jury nullification; and,
- (3) to take judicial notice of certain law, regulations, and other legal documents including but not limited to presentation of the defendant's Driscoll duties (Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1952)), Chapter 2, P.L. 2010 (State Health Benefits law at issue) with legislative comments, N.J.S.A. 52:14-17.26, definitions relative to Health Care Benefits for Public Employees, New Jersey Department of Community Services/Division of Local Government Services Local Finance

notice 2010-12, City of Wildwood Resolutions 226-6-11 and 227-6-11.

FINDINGS OF FACT

1. In 2010, N.J.S.A. 52:14-17.26 was enacted and changed the eligibility requirements for participation in the SHBP.
2. The State asserts that the law requires local elected officials to work full-time in those positions in order to participate in the publicly funded SHBP. The defendants, as locally elected City of Wildwood officials, were allegedly not working full-time hours, maintaining set schedules or accurately documenting any of the time that they worked. The State maintains the defendants relied upon city resolutions declaring them to be full-time employees, at least in name, so as to qualify for benefits under the SHBP. (Memorandum of Decision, June 23, 2023, Hon. Bernard E. DeLury, Jr.).
3. The State relies on the Legislature's 2010 enactment of changes to the eligibility requirements for participation in the SHBP. Among other modifications, pursuant to Chapter 2, P.L. 2010 and effective May 21, 2010, 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. N.J.S.A. 52:14-17.26. Prior to the statutory change, with particular regard to elected officials, no such hourly requirement existed for participation in the SHBP. Local elected officials could receive benefits even in a part-time capacity. Ibid.
4. The municipal government for the City of Wildwood, New Jersey operates under a three-member Board of Commissioners who are elected at large and who serve for a term of four years. (Municipal Code, ch. 1A.)
5. The commissioners choose one of their number to be designated mayor in accordance with N.J.S.A. 40:72-10. (Ibid.)
6. In 2011, defendant Ernest V. Troiano, Jr. was elected commissioner and appointed Mayor, a position he held from 2011 to 2019.
7. Co-defendant Peter J. Byron was elected to the commission in 2011 and was appointed Mayor in 2020.
8. Byron resigned from his office in September 2023 and pleaded guilty to 2nd degree theft in relation to his receipt of State health benefits while a commissioner.
9. Mikulski was elected in 2020, and presently serves as Commissioner and deputy mayor.

10. In 2011, the commission enacted two resolutions concerning health coverage and participation in the SHBP.
 - a. June 8, 2011, Resolution No. 226-11 acknowledged changes made by the Legislature which expressly limited participation in the SHBP to those elected officials who work a fixed full-time schedule and a minimum of 35 hours per week.
 - b. June 8, 2011, Resolution No. 227-6-11 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."
11. Following these Resolutions, Troiano enrolled in the SHBP in July 2011 and received those benefits until he left office in 2019.
12. Byron also enrolled in the SHBP.
13. After his election, Mikulski enrolled in the SHBP.
14. Information provided by the State Division of Pensions and Benefits provided a tally of the cost of the SHBP benefits provided to the defendants after the change in the law.
 - a. Troiano received family SHBP coverage from July 17, 2011, through the end of his final term in December 2019. During that period, the total SHBP benefit received by Troiano was about \$287,000.
 - b. Byron received family SHBP coverage from July 27, 2011, through mid-2022. The total SHBP benefit received by Byron was about \$609,000.
 - c. Mikulski received spousal SHBP coverage with the benefit totaling more than \$103,000.
15. Mikulski was elected as a commissioner for the City of Wildwood in 2019 and officially assumed office in 2020.
16. Mikulski knew the State was conducting a criminal investigation into the City of Wildwood's Commissioner's SHBP participation.
17. Mikulski was initially classified as a part-time employee.
18. Mikulski later sought, and received, reclassification as a full-time employee.
19. Thereafter, Mikulski sought health benefits through the SHBP.
20. On February 6, 2020, counsel for the City of Wildwood generated a memorandum advising, "if it is questionable as to whether the City of Wildwood Commissioners are truly full-time employees working a minimum of thirty-five hours a week, they should

keep complete and accurate records of their hours worked to support eligibility for the SHBP.”

21. Mikulski regularly completed timesheets that varied in number of hours worked each week, including weeks with as little as zero hours worked.
22. On June 24, 2022, Troiano was charged on Complaint S-2022-131-0514 in relation to the State’s investigation into the improper receipt of State health benefits.
23. The summon charges Troiano with 2nd degree Theft and 3rd degree Tampering with Public Records or Information, for conduct that occurred on or about January 1, 2012.
24. On June 24, 2022, Mikulski was charged on Complaint S-2022-133-0514 with 2nd degree Theft and 3rd degree Tampering with Public Records or Information, for conduct that occurred on or about July 1, 2020.
25. On June 24, 2022, Byron was charged on Complaint S-2022-132-0514 with 2nd degree Theft and 3rd degree Tampering with Public Records or Information, for conduct that occurred on or about January 1, 2012.
26. On March 10, 2023 the State Grand Jury returned a multi-count indictment (23-03-00038-I) as to Troiano, Byron and Mikulski.

27. Troiano was indicted for:

Count 1: Official Misconduct – Second Degree, contrary to N.J.S.A. 2C:30-2a.

Count 4: Theft by Unlawful Taking – Second Degree, contrary to N.J.S.A. 2C:20-3a.

Count 7: Tampering with Public Records – Third Degree, contrary to N.J.S.A. 2C:28-7a(2).

Count 10: Falsifying or Tampering with Records – Fourth Degree, contrary to N.J.S.A. 2C:21-4a.

28. Byron was indicted for:

Count 2: Official Misconduct – Second Degree, contrary to N.J.S.A. 2C:30-2a.

Count 5: Theft by Unlawful Taking – Second Degree, contrary to N.J.S.A. 2C:20-3a.

Count 8: Tampering with Public Records – Third Degree, contrary to N.J.S.A. 2C:28-7a(2).

Count 11: Falsifying or Tampering with Records – Fourth Degree, contrary to N.J.S.A. 2C:21-4a.

29. Mikulski was indicted for:

- **Count 3:** Official Misconduct – Second Degree, contrary to N.J.S.A. 2C:30-2a.
- **Count 6:** Theft by Unlawful Taking – Second Degree, contrary to N.J.S.A. 2C:20-3a.
- **Count 9:** Tampering with Public Records – Third Degree, contrary to N.J.S.A. 2C:28-7a(2).

- **Count 12:** Falsifying or Tampering with Records – Fourth Degree, contrary to N.J.S.A. 2C:21-4a.

30. Troiano filed a motion to dismiss the indictment on May 1, 2023, which Mikulski joined.

31. On June 23, 2023, the motion was granted as to each defendant.

32. On July 31, 2023, the indictment was superseded, and the defendants indicted for the same charges as set forth above.

33. A subsequent motion to dismiss the superseding indictment was filed and denied.

34. The defendants' cases were severed and scheduled for trial.

35. A change in assigned trial judge took place in early 2025, and a new trial date was scheduled.

LAW AND DISCUSSION¹

PRECLUDE IRRELEVANT EVIDENCE

A. TESTIMONY OF KRISTA FITZSIMONS AND ANTHONY LEONETTI

The defendant seeks to preclude the State from calling current Commissioner Fitzsimons and former Commissioner Leonetti to offer testimony that the work of a Commissioner is part-time. During the grand jury presentation, the State introduced evidence that Fitzsimons and Leonetti only worked 15 hours per week in their elected positions. Defendant argues that the State now seeks to introduce this evidence to imply that the position of Commissioner is not a full-time job and does not require a 35-hour week, to support its position that the defendant did not work 35 hours per week. Fitzsimons has a full-time job and Leonetti had a full-time job. Further, neither Fitzsimons nor Leonetti testified that defendant did not work 35 hours per week. The defense argues that the number of hours any commissioner works depends entirely upon their circumstances, responsibilities, management style, devotion to their positions, loyalty to their constituents, and work ethic. Defendant suggests that Fitzsimons and Leonetti not working 35 hours per week in their capacity as Commissioner has no relevance to the issue of whether defendant worked 35 hours per week. Moreover, their perception of whether the position is part-time or full-time is irrelevant to the issue of whether or not defendant actually worked the required number of hours to qualify for State health benefits. Defendant further argues that this evidence poses a significant risk of undue prejudice, confusion, misleading the jury, and wasting the court's time.

¹ Much of Troiano's and the State's motions in limine address the same or similar issues earlier argued July 8, 2025 before this court in State v. Mikulski. That resulting August 12, 2025 Memorandum of Decision is hereby attached for reference only.

The State argues that the testimony of Fitzsimons and Leonetti, the only post-2010 elected officials, other than the codefendants, will offer relevant testimony describing the Commissioner position, the work required, and the amount of time the position typically demands. The State offers this testimony to negate the fiction created by the 2011 Resolution declaring the Commissioners to be full-time employees. Their testimony will also reinforce the idea that none of the Commissioners were regularly working full-time 35-hour work weeks because the position neither called for, nor entailed, regular full-time hours or schedules. Fitzsimons and Leonetti's testimony will confirm how full-time work weeks simply are not necessary for a Commissioner's job.

Here, defendant seeks to prevent the State from offering evidence from other Commissioners about their own work duties as a Commissioner, the typical amount of time those duties took them to perform, and their weekly hours actually worked. None of this testimony is relevant to whether this defendant actually worked a fixed 35-hour work week. Further, this testimony is sought to have the jury make an impermissible inference that if Fitzsimons and Leonetti did not work 35 hours per week, then neither did defendant. The court cannot permit such testimony. If Fitzsimons or Leonetti have firsthand knowledge of the number of hours defendant worked during the timeframe he accepted the State benefits, then clearly their testimony is relevant. However, that is not the issue before the court. To allow the State's witnesses to offer irrelevant evidence for an impermissible purpose, would derail the trial from what the State must actually prove – that this defendant did not work a fixed 35-hour work week yet received State health benefits.

For these reasons, the defendant's motion is granted.

B. SICK, PERSONAL AND VACATION TIME

During the grand jury presentation, the State provided testimony that the commissioners do not receive sick, personal, or vacation days, suggesting that a Commissioner's job must be part-time, not the required full-time status for the purposes of collecting State health benefits. Defendant argues that this evidence is confusing and misleading because accruing sick, personal, or vacation days is neither a requirement for enrollment in the State health benefits plan, nor a factor that differentiates part-time and full-time employees under Wildwood's regulations and policies. As such, defendant asks the court to find the evidence of sick, personal, or vacation days not relevant to any issue of material consequence at this trial. What little probative value this might have may be substantially outweighed by the risk of undue prejudice and confusion of the issues.

The State argues that testimony regarding the lack of sick, personal, or vacation days allocated to defendant is relevant because it would mean that the Commissioners are unlike any other actual full-time City of Wildwood employee. This also means that the only hours that can be credited toward a Commissioner's 35-hour weekly requirement must actually be worked and cannot be supplemented by illness, vacation, or personal reasons. This is necessary to address the appearance of such absences in defendant's timesheets, specifically paid holidays and vacation time.

If there are deviations on defendant's timesheets allocating "time off" to account for the lack of 35 hours worked, the State should be permitted to explore that distinction. The State may be permitted to offer testimony that a Commissioner does not receive sick, personal, or vacation days to explain the content of defendant's various timesheets and hours worked, or not worked, and the reason provided on the timesheet as to why defendant did not work the required weekly hours. The State will not be permitted, however, to suggest to the jury that because a Commissioner does not receive sick, personal, or vacation days, they are then, de facto, part-time employees.

For these reasons, the motion is granted with the exceptions set forth in the accompanying Order.

PRECLUDE OPINION TESTIMONY

A. OPINION TESTIMONY OF FULL-TIME AND PART-TIME STATUS

During the grand jury presentation, and through the testimony of confidential assistant Susan Maxwell, the State introduced evidence that the Commissioner position is part-time and has always been considered part-time. Defendant argues that the testimony is inaccurate and contradicts the City Resolutions which define the position as full-time. Defendant further argues that other than Fitzsimons, every elected official in Wildwood received State health benefits which are only conferred upon full-time status. Defendant also asserts that personal opinions as to whether or not the position of Commissioner was classified as part-time or full-time are irrelevant, as it is only the number of hours worked that is germane to the determination of whether the defendant qualified for health benefits.

The State argues that the defendant's eligibility to lawfully participate as a full-time employee and receive SHBP is not determined by a mere declaration that he is a "full-time employee" but that he must qualify for the designation by actually working 35 or more hours per week. The State further asserts that these considerations are essential to evaluating the credibility

and legitimacy of the resolution defendant continually relies upon, which they assert is a self-serving document, personally adopted by defendant and his fellow commissioners. The City's own contemporaneous personnel documents and records described the Commissioner position, at varying times, as part-time or "unclassified," directly refuting defendant's argument that Commissioners were considered full-time employees following passage of the resolution. The State further argues that this evidence underscores the well-established understanding that the Commissioners were long considered part-time employees. The actual job, duties, customs, and obligations never changed. Only after the change in State law restricting access to State health benefits, did the defendant and his fellow Commissioners "plot" to circumvent the law by fiat and declare that they were full-time employees. The State further asserts that this evidence speaks directly to the meaninglessness of such blind designations crafted by this defendant when it comes to the position of Commissioner.

Here, the defendant is correct – no opinion as to whether the position of Commissioner is considered part-time or full-time by a staff member is relevant to the issue of whether this defendant actually worked 35 hours per week. If Maxwell has knowledge that the defendant did not actually work the hours he reported in his timesheets, then her testimony would be relevant, otherwise it would be impermissible opinion testimony.

For these reasons, defendant's motion is granted with the exceptions set forth in the accompanying Order.

B. OPINION TESTIMONY OF DET. SGT. BRENNAN

Defendant argues that the State introduced improper expert testimony through Brennan on the ultimate issue of the case – whether or not defendant was a full-time employee who worked 35 hours per week. Specifically, Brennan testified that defendant was not a full-time employee. At trial the State must be barred from presenting this testimony as it constitutes improper opinion testimony on the ultimate issue. Determination of whether defendant worked 35 hours per week and was qualified to accept State health benefits is firmly within the purview of the jury.

Further, defendant argues that Evidence Rule 702 establishes the standard for the admissibility of expert testimony. An expert can be qualified if the opinion requires "scientific, technical, or other specialized knowledge" necessary to determine a fact in issue. Any opinion testified to by Brennan is a lay opinion which is inadmissible under Evidence Rule 701. Opinion testimony from a police officer has a significant impact on a fact finder's deliberations, especially when determining guilt or innocence. Defendant contends that a jury is capable of evaluating the

evidence and determining whether he worked 35 hours per week as a Commissioner and had the required mental state to commit the crimes alleged.

The State asserts that it has no intention of qualifying Brennan as an expert at trial. Nor does the State intend to have Brennan offer an opinion on the defendant's employment status. The State seeks to have Brennan offer lay opinion testimony as to the facts and information gathered during her investigation, including what was learned about the Commissioner position itself, the defendant's conduct, and the history and practices of the City. The State contends this testimony is permissible under Evidence Rule 701.

A law enforcement officer may be permitted to express a lay opinion. Lay opinion testimony is admissible "if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." N.J.R.E. 701. "The central purpose of N.J.R.E. 701 is to ensure that lay opinion is based on a sufficient foundation, and not inadmissible hearsay." Rice v. Miller, 455 N.J. Super. 90, 104 (App. Div. 2018) (citing Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence*, cmt. 1 on N.J.R.E. 701 (2018)). Thus, "lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." State v. McLean, 205 N.J. 438, 460 (2011). Thus, an officer is not permitted to provide opinion testimony at trial when that opinion is based primarily on the statements of others. Neno v. Clinton, 167 N.J. 573, 585 (2001).

Opinion testimony as to the ultimate issue is impermissible. The State concedes that Brennan is not being offered as an expert witness, and further admits that her testimony "is not even opinion testimony, but purely based on relevant, admissible facts." (State's Brief, p. 8). Certainly, Brennan can testify as to her investigation and what she learned after a review of defendant's timesheets. Further, Brennan can testify about the applicable SHBP eligibility statute and the legal memorandum obtained by the co-defendant from the City attorney, defendant's notice about the weekly work requirement, that defendant self-reported and self-certified his time sheets, and whether this defendant actually worked 35 hours per week during the time he received those State benefits.

As there is no discernable objection from the State, then, defendant's motion is granted.

C. DEFENDANT'S OUTSIDE EMPLOYMENT

Defendant argues that the State should be prohibited from arguing that his other employment with Troiano & Sons Concrete and Masonry prevented him from working 35 hours per week in his capacity as a Commissioner. During the grand jury proceedings, the State implied

that because defendant owned a construction company, he could not be a full-time Commissioner, devoting 35 hours per week in that role. There was no testimony as to how many hours defendant actually worked at his company. Defendant argues that the mere fact that he owns a business may be marginally relevant to the proposition that he is less available to put time in as a Commissioner, making it more difficult to devote 35 hours per week to that position; however, the State has no evidence that anything defendant did in connection with his business compromised his ability to work full time as a Commissioner. Defendant argues that the State's reliance on his business ownership, without additional relevant evidence, amounts to an unfounded attempt to sway the jury.

The State intends to introduce evidence at trial that the defendant, while claiming to work a full-time schedule of 35 hours per week as a Commissioner, was also employed full-time at his family-owned business. The State contends that the defendant's outside employment is highly relevant and will allow the jury to assess and draw reasonable inferences about the actual number of hours defendant dedicated to his official position as Commissioner. The State further argues that if the defendant maintained employment outside of his position as Commissioner that served as his primary source of income, the jury is entitled to consider whether that work limited the time he could have reasonably devoted to his duties for the City. Additionally, the State asserts that this information is relevant in light of defendant's claim that his position as a Commissioner was full-time and that he worked at least 35 hours per week, exclusive of any sick, vacation, or paid holidays. Further, the State wants the jury to consider that defendant's co-defendants, as well as Commissioner Fitzsimons and former Commissioner Leonetti, all held outside employment while a City Commissioner. The State contends that this information is relevant and admissible and from which a jury could reasonably and fairly infer that such financial pursuits are normal, if not necessary, because the Commissioner position is a part-time obligation.

The State may only offer testimony of defendant's other employment if there is evidence to suggest that defendant was working at his business during the hours he reported he was working as a Commissioner, otherwise this evidence is not relevant. What other Commissioners did with their time, whether they engaged in outside employment, and what if any impact that had on their ability to work as a Commissioner, is simply not relevant to whether this defendant worked 35 hours per week for the City of Wildwood during the time he accepted State Health Benefits.

For these reasons, defendant's motion is granted.

D. WHAT CONSTITUTES “WORK”

The defendant asks the court to bar the State from arguing that his activities outside of City Hall do not qualify as “work” under the legislation mandating the full-time 35-hour work week. Because the statute places no such restriction on the type of work that counts toward the 35 hour per week work week requirement, the State must not be permitted now to superimpose such a limitation before the jury.

The State argues that it has never taken the position that only hours worked in City Hall count toward the 35-hour weekly requirement for lawful SHBP participation.

With no specific objection, this motion is granted.

SELECTIVE PROSECUTION / COMPEL DISCOVERY

As acknowledged by the United States Supreme Court, “[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden in the Constitution.” United States v. Armstrong, 517 U.S. 456, 463 (1996). In order to be successful, the defendant must provide “clear evidence” that they were unconstitutionally selected for prosecution so exclusively due to their belonging to a specific group so as to rise to a “practical denial” of equal protection under the law. State v. Ballard, 331 N.J. Super. 529, 539-40 (App. Div. 2000) (*quoting Armstrong*, 517 U.S. at 464-65). Specifically, the defendant must show that “similarly situated individuals of a different class were not prosecuted for similar crimes.” *Ibid.* Thus, defendants face serious evidentiary obstacles to meet their burden of “clear evidence,” especially in light of the presumption of deference in prosecutorial decisions enjoyed by the State. *Ibid.* “A criminal defendant, however, will not often have access to the information, statistical or otherwise, that might satisfy a “clear evidence” burden.” United States v. Washington, 869 F.3d 193, 214 (3rd Cir. 2017). “Thus, the two component cases that make up the Armstrong/Bass test – United States v. Armstrong, [517 U.S. 456] and United States v. Bass, [536 U.S. 862 (2002)] both of which arose from selective prosecution challenges – propounded a facially less rigorous standard for criminal defendants seeking discovery on an anticipated selective prosecution claim.” *Ibid.* “Instead of “clear evidence,” a successful discovery motion can rest on “some evidence.”” *Ibid.* “Some evidence must still include a showing that similarly situated persons were not prosecuted.” *Ibid.* Furthermore, under Armstrong/Bass, a defendant’s showing must be “credible.” *Id.* at 215.

Selective prosecution extends beyond de facto policies by law enforcement and may not be “deliberately based on an unjustifiable standard such as race, religion, or other arbitrary

classification.” Wayte v. United States, 470 U.S. 598, 608 (1985). Further, “just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or ... as a member of a group unpopular with the government.” United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

The State asserts that defendant should be precluded from arguing selective prosecution and improper motivation by the State. In defendant’s July 1, 2025 opposition brief, he indicates that he has no intention of arguing selective prosecution and/or improper prosecution before the jury. However, during oral argument he changed his position, indicating he wished to join in co-defendant Mikulski’s earlier motion to compel discovery in an effort to argue selective prosecution to the jury. Defendant indicated he would rely on Mikulski’s moving papers and subsequent argument to the court. After oral argument, defendant filed a letter with the court joining Mikulski’s motion to compel discovery.

The court now sets forth the relevant portion of that decision:

The State asserts that defendant should be precluded from arguing selective prosecution and improper motivation by the State. Although defendant suggests political bias – pointing to a years old presidential visit to his town – he offers no evidence that his own party affiliation played any role in the charging decision, let alone that similarly situated people of different views were treated more favorably. *See State v. Halsey*, 340 N.J. 492, 501 (App. Div. 2001) (*quoting Armstrong*, 517 U.S. at 465). The State notes that the timeline of events suggested by defendant defeats his claim that he was targeted for his politics. Defendant’s brief points out that Wildwood was the only municipality in New Jersey to host Donald Trump in 2020; however, the Wildwood investigation that led to these charges began in summer 2019, while the defendant was running for office. The State further argues that the defendant appears to be arguing that because he was an elected official in a city that hosted a Republican campaign rally the State must have improperly targeted Wildwood – and Mikulski – based on political animosity. The State argues that this claim makes little sense given the Wildwood Commissioner’s government is expressly nonpartisan. *See Wildwood v. DeMarzo*, 412 N.J. 105, 108 (App. Div. 2010) (citations omitted). Moreover, defendant does not assert that he is a member of a particular political party or that he supports a particular political candidate.

The State also argues that defendant’s motion to compel discovery seeks privileged and irrelevant internal materials about possible investigations, including attorney work product,

precluded in R. 3:13-3. Additionally, the documents sought by the defense would contain commentary about potential criminal conduct, reasoning about whether an individual should be charged, and documents prepared in anticipation of litigation. The State argues that New Jersey “recognizes that law enforcement investigative materials are subject to “the general, common-law, qualified privilege, variously referred to as the ‘official information,’ ‘governmental,’ or ‘executive privilege.’”” Am. Zurich Ins. Co. v. Meridia Downtown Urban Renewal Bound Brook, LLC, 474 N.J. Super. 171, 179-80 (App. Div. 2022) (*quoting* Loigman v. Kimmelman, 102 N.J. 98, 107 (1986) (precluding disclosure of “official information” of the State when “harmful to the interests of the public.”) The “qualified privilege” concerning access to criminal investigative materials “is premised upon the government’s need to conduct such affairs with skill, with sensitivity to the privacy interests involved, and in an atmosphere of confidentiality that encourages the utmost candor.” Id. at 180 (*quoting* Loigman, 102 N.J. at 197). Furthermore, the State argues that “[t]he deliberative process privilege is a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The State additionally claims that defendant cannot demonstrate any discrimination on the part of the State in prosecuting him specifically, and his argument is merely a distraction.

Any “defenses or objections based on defects in the institution of the prosecution ... must be raised by motion before trial.” R. 3:10-2(c). Subsumed in Mikulski’s motion to dismiss the indictment is his notice of intent to bring a claim of selective/vindictive prosecution. Defendant relies on State v. Kennedy, 247 N.J. Super. 21 (1991), and a 2023 Star-Ledger² investigation in furtherance of its position that the State is engaged in selective/vindictive prosecution.

In Kennedy, the two defendants were African American males, who sought review of their convictions from the Superior Court, Warren County, arguing that the State Police engaged in a de facto policy of targeting minority groups and that invidious, institutional racism had been occurring. Ibid. The defendants supported their claim with a study prepared by the Warren County Public Defender’s Office. Id. at 27. The study showed that “in 43 of its cases involving motor vehicle stops on Route 80 in a three-year period, 70% related to African American occupants, 7% Hispanics and 23% Caucasians. It was said that these figures were disproportionate to the Warren

² The investigation was initiated by N.J. Advance Media and discussed at length by Riley Yates & Steve Strunsky, *Part-time officials, full-time perks*, NJ.COM (Dec. 4, 2023, 8:00 AM), <https://www.nj.com/news/2023/12/part-time-officials-full-time-perks.html>.

County Public Defender's caseload within the last eight months which was comprised of 76% Caucasians and 17% African Americans." Ibid. Our Appellate Court found that "the Public Defender's statistical survey was marginally sufficient to raise a colorable claim of selective enforcement," and "at the very least, the data contained in the study took "the question past the frivolous state and raise[d] a reasonable doubt" as to whether the State Police are enforcing the traffic laws in an evenhanded fashion without regard to non-germane racial criteria." Id. at 33 (*citing United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983)).

Here, the defendant relies upon the N.J. Advance Media investigation that found from 2014 – 2023, over 32 current and former officials throughout the State of New Jersey were provided over \$2.3 million dollars in healthcare benefits for part-time work. Yates & Strunsky, *supra* note 1. Defendant asserts that of the 32 identified elected officials, from 13 separate municipalities, seated after 2010 and receiving State healthcare benefits or opt-out payments in exchange for their full-time work hours, only three have been prosecuted – these three co-defendants – which translates to a prosecution rate of .09%.

Defendant argues that the only event that sets Wildwood apart from these other municipalities, is "Wildwood's public welcoming of a polarizing political figure, President Donald Trump, in January 2020, and then again in 2024." (Defendant's Brief, 6). Defendant asserts that the 2020 event took place just weeks into Byron's and Mikulski's tenure as elected officials. Defendant further asserts that "no other municipality in the State has hosted a campaign rally with President Trump" and Mayor Byron "extensively commented on President Trump's arrival" calling it "an *exciting* time for Wildwood" and the exposure for his town "incredible." Ibid. Defendant further suggests that the day after the 2020 event, Governor Phil Murphy openly criticized the event. Ibid.

Defendant contends that his prosecution is a concerted effort by the State's highest law enforcement office to select and oust local politicians "who do not stay in line." Defendant recognizes that this "circumstantial correlation" is not the "clear evidence" needed to rebut the State's presumption of good faith prosecution; however, the statistical data from N.J. Advance Media sufficiently satisfies the "some evidence" requirement to engage in further discovery.

Despite the State's arguments, defendant's reliance on the N.J. Advance Media investigation provides marginally sufficient proof to raise a colorable claim of selective prosecution and sufficiently satisfies the "some evidence" requirement to engage in further discovery. Defendant's allegations raise doubt as to whether the State is enforcing the law in an

evenhanded fashion without regard to non-germane First Amendment protections. Cognizant of the confidentiality associated with criminal investigations; the court is satisfied that it can fashion an order protecting all parties while ensuring defendant has a fair opportunity to explore his claim of selective prosecution.

The State's motion to prevent the defendant from arguing selective prosecution and/or improper prosecution in this case is hereby denied without prejudice.

The defendant's motion to compel discovery is hereby granted as set forth with specificity in the attached Order.

JURY NULLIFICATION

"Our State and Federal Constitutions guarantee the right to trial by an impartial jury." State v. Fortin, 178 N.J. 540, 575 (2004) (*citing* U.S. CONST. amend. VI, XIV; N.J. CONST. art I, ¶ 10). It is well settled law that a jury does not have the right to nullification; but rather, nullification is a power the jury possesses, which is undesirable. *See State v. Ragland*, 105 N.J. 185, 205 (1986) (Explaining that judicial attempts to strengthen the power of nullification are not only contrary to settled practice in this state, but unwise both as a matter of governmental policy and as a matter of sound administration of criminal justice.) Thus, "our courts routinely use jury instructions as safeguards to adequately address concerns relating to jury nullification." State v. Jackson, 243 N.J. 52, 72 (2020).

The State's motion contends that the defendant should be precluded from arguing to the jury that his case could, or should, have been decided in an administrative venue in lieu of a criminal one. Defendant acknowledges that jury nullification arguments are not favored, and has no intention of arguing that to the jury.

With no discernable opposition, the State's motion is hereby granted.

JUDICIAL NOTICE

Evidence Rule 201(a), provides, "[l]aw which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States [and] this state ... as well as ordinances, regulations and determinations of all governmental subdivisions and agencies." Further, under N.J.R.E. 201(d), "[t]he court shall take judicial notice if a party requests it on notice to all other parties and the court is supplied with the necessary information."

Here, the State seeks the court take judicial notice of:

- (1) the duties incumbent upon all public officials as provided by

Driscoll, 8 N.J. 433, Chapter 2, P.L. 2010, which encompasses the State Health Benefits law at issue, along with its legislative commentary;

(2) N.J.S.A. 52:14-17.26, definitions relative to health care benefits for public employees;

(3) New Jersey Department of Community Services Division of Local Government Services local finance notice 2010-12, containing further discussion of the law, definitions and guidance; and,

(4) the City of Wildwood Resolutions 226-6-11 and 227-6-11, regarding the nature of the commissioner position.

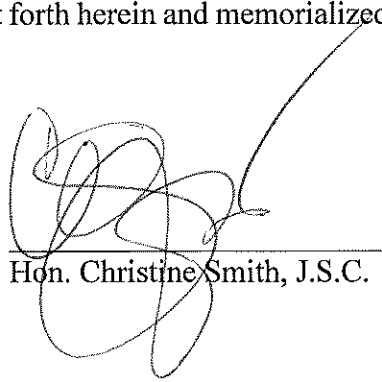
First, neither the State nor the defense have discussed potential stipulations to the items for which the State seeks the court take judicial notice. This should occur pre-trial. Second, the defendant does not object to the court taking judicial notice of the documents set forth above, but does not believe the court needs to charge the jury on the Driscoll duties, beyond a tailored jury charge.

At this time the court denies the motion as premature. The court will rehear this application, if required, on November 18, 2025, at the final pretrial conference. The court remains cautiously optimistic that once the parties discuss possible stipulations regarding the documents set forth herein, including how to handle the Driscoll duties, the renewal of this application will not be necessary.

CONCLUSION

For the abovementioned findings of fact and conclusions of law, the court hereby **GRANTS** and **DENIES** the motions in limine as set forth herein and memorialized in the attached Order.

Date: August 15, 2025


Hon. Christine Smith, J.S.C.