PREPARED BY THE COURT
HONORABLE SUSAN J. STEELE, P.J.Cr.
BERGEN COUNTY SUPERIOR COURT
10 MAIN STREET
HACKENSACK, NEW JERSEY 07601

STATE OF NEW JERSEY, Plaintiff v. CHARLES KENNETH ZISA, Defendant	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY LAW DIVISION: CRIMINAL PART INDICTMENT No.: 10-10-01812-I **DIMISSAL ORDER**

FILED
AUG 23 2016
SUPERIOR COURT OF NEW JERSEY
SUSAN J. STEELE, P.J.S.C.

THIS MATTER having been brought before the Court on behalf of defendant, by and through his attorney, Patricia Prezioso, Esq., on a motion for an Order dismissing indictment number 10-10-01812-I with prejudice; and Assistant Prosecutor, Daniel Keitel, Esq., having opposed the motion; and the Court having read and considered the written submissions, the record, and having heard oral argument, and for good cause shown,

IT IS on this 23rd day of August, 2016;

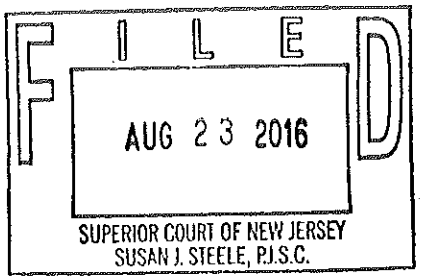
ORDERED that defendant's motion to dismiss indictment number 10-10-01812-I with prejudice is hereby **GRANTED** for the reasons stated in the written opinion dated August 23, 2016.

Susan Steele
HONORABLE SUSAN J. STEELE, P.J.Cr.

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION: CRIMINAL PART
INDICTMENT NO: 10-10-01812

THE STATE OF NEW JERSEY, Plaintiff,	:	
v.	:	OPINION ON MOTION TO DISMISS THE INDICTMENT
CHARLES K. ZISA, Defendant.	:	



BEFORE: The Honorable Susan J. Steele, P.J.Cr.

ARGUED: February 4, 2016

DECIDED: August 23, 2016

ATTORNEYS: Senior Assistant Prosecutor Daniel Keitel and Senior Assistant Prosecutor Catherine Foddai for the State of New Jersey
Patricia Prezioso for Charles K. Zisa

STEELE, P.J.Cr.

I. Introduction

This motion to dismiss the remaining count of indictment 10-10-01812-I on behalf of defendant Charles K. Zisa ("defendant" or "Zisa") comes before the court pursuant to an Appellate Division remand for retrial. Defendant moves to dismiss the indictment on the grounds that retrial of the remaining count violates his constitutionally protected right against double jeopardy and principles of fundamental fairness. After an extensive review of the parties' submissions, evidence of record, arguments raised orally, and trial transcripts, for the reasons stated herein, the court finds defendant's retrial is barred by both double jeopardy principles and principles of fundamental

fairness. Accordingly, defendant's motion to dismiss the indictment with prejudice is hereby **GRANTED**.

II. Procedural History

On October 19, 2010, a Bergen County grand jury returned indictment number 10-10-01812-I, charging defendant with second degree conspiracy to commit official misconduct, contrary to N.J.S.A. 2C:5-2a(1) and 2C:30-2a (counts one and eight); second degree official misconduct, contrary to N.J.S.A. 2C:30-2 (counts two, three, nine, and ten); third degree witness tampering, contrary to N.J.S.A. 2C:28-5a(2) (count eleven); third degree insurance fraud, contrary to N.J.S.A. 2C:21-4.6a (count twelve), and second degree pattern of official misconduct, contrary to N.J.S.A. 2C:30-7a (count thirteen).

Defendant and KT[1] were jointly tried in a jury trial before the Honorable Joseph S. Conte, J.S.C., from March 26, 2012 through May 16, 2012. The jury acquitted defendant of conspiracy (counts one and eight), witness tampering (count eleven), and official misconduct (count two), and convicted him of insurance fraud (count twelve), pattern of official misconduct (count thirteen) and three counts of official misconduct (counts three, nine and ten).

On September 12, 2012, Judge Conte granted defendant's motion for a judgment notwithstanding the verdict with respect to counts three, ten, and thirteen, finding the State did not present enough evidence to sustain the verdict.

On September 20, 2012, defendant was sentenced on count nine, (official misconduct), to five years imprisonment, to be served without parole, pursuant to N.J.S.A. 2C:43-6.5a, and on

[1] KT, defendant's then girlfriend, was charged in the same indictment with conspiracy to commit official misconduct and insurance fraud. Both parties were tried together at trial; however, the charges against KT have since been dropped and she is not a party to this remand.

count twelve, (insurance fraud), to a concurrent three year term, with restitution of $11,391.88 to the Palisades Safety and Insurance Association.

On October 2, 2012, defendant filed a notice of appeal. The State filed a notice of cross-appeal on Judge Conte's judgments of acquittal notwithstanding the verdict on counts three, ten, and thirteen.

In an opinion dated July 31, 2015, the Appellate Division reversed defendant's conviction on insurance fraud (count twelve) for insufficiency of the evidence, reversed defendant's conviction of official misconduct (count nine), remanding it for retrial, and affirmed Judge Conte's decision granting judgment of acquittal notwithstanding the verdicts on counts three, ten and thirteen. State v. Zisa, No. A-0653-12T4 2105 N.J. Super. Unpub. LEXIS 1842 (App. Div. July 31, 2015). The court noted that prior to retrial, defendant could present to the trial court "his argument that a retrial is barred by double jeopardy principles." Id. at *39.

Defendant filed his Notice of Motion for Dismissal on November 25, 2015. After extensive rounds of briefing, the court heard oral argument on February 4, 2016.

III. Statement of Facts

The record before the court is voluminous, with the trial spanning over seven weeks and thousands of pages of exhibits and trial court transcripts. The facts are convoluted, replete with references to events that took place over the course of nearly a decade, and the numerous individuals involved in those events. While the court will endeavor to reference only the facts relevant to the issues raised in the instant motion, this court considered many details and nuances in reaching its conclusion.

Charles Kenneth Zisa served the City of Hackensack Police Department ("HPD") for thirty-four years, fifteen of those as the Chief of Police, when he was arrested and suspended from

his position in 2010. Two incidents gave rise to the charges brought against defendant: one in 2004, and one in 2008 ("2004 incident;" "2008 incident," respectively). As to the 2004 incident, the indictment charged defendant with two counts of official misconduct and one count of conspiracy to commit official misconduct. As to the 2008 incident, the indictment charged him with two counts of official misconduct, one count of conspiracy to commit official misconduct, one count of witness tampering, and one count of insurance fraud. Finally, the indictment charged defendant with a pattern of official misconduct with respect to both incidents. Although the alleged wrongdoings occurred in 2004 and 2008, the allegations came to light in 2010, following an HPD departmental disciplinary hearing.[2]

Much of the State's case hinged on the testimony and credibility of its witnesses. The State's key witness to the 2004 incident, HPD Officer Laura Campos ("Campos"), was significantly impeached on cross-examination. As to the 2008 incident, the State's case depended on the testimony of three witnesses: HPD Joseph Al-Ayoubi ("Al-Ayoubi"), HPD Officer John Herrmann ("Herrmann") and Sheriff's Officer Eric Arosemowicz ("Arosemowicz"). As the Appellate Division noted, each of these witnesses "had a demonstrable bias against defendant."

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[2] The Appellate Division concisely summed up the context:

> In late January 2010, Hackensack's Labor Counsel wrote a letter to the Bergen County Prosecutor stating that allegations of official misconduct against defendant, Hackensack's Chief of Police since 1995, had arisen during a departmental disciplinary hearing involving Hackensack Police Officer Anthony Ferraioli, who was also the president of the local police union. Defendant had filed those administrative charges against Ferraioli. In February 2010, the attorney who represented Ferraioli at the disciplinary hearing wrote the prosecutor a similar letter. That attorney also represented two witnesses who would later appear at defendant's 2012 trial, Patrol Officers Joseph Al-Ayoubi and John Herrmann.
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> According to Raymond Wiss, counsel to the departmental hearing officer, during a break in the disciplinary hearing, Ferraioli's attorney had told Wiss and others that he had information from Al-Ayoubi and Herrmann about an inaccurate police report and some alleged wrongdoing by defendant. The attorney said that he would not disclose that report to the press or to the Bergen County Prosecutor's Office if defendant agreed to dismiss the disciplinary charges against Ferraioli. Wiss testified that defendant refused the deal, and Ferraioli's disciplinary hearing continued.
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> [Zisa, supra at *2.]

Zisa, supra at *19. Campos, Al-Ayoubi, and Herrmann had all filed civil suits against defendant on unrelated matters, and Arosemowicz was an ally of the PBA president whom Zisa had filed disciplinary charges against. Moreover, "[n]one of the key police witnesses in either [incident] came forward with their incriminating information about defendant until after they had filed civil suits against him." Id. at *6.

Given the volume of prejudicial extraneous issues, the parties underwent extensive motion practice to limit the evidence that would be introduced at trial. The defense filed a number of motions *in limine* to limit the introduction of alleged prior bad acts and civil claims against Zisa, which the court granted, "subject to the relevance of other pending lawsuits against Mr. Zisa." Def. Ex. N.

a. The 2004 Incident

The charges pertaining to the 2004 incident arose out of defendant's alleged involvement in the HPD's handling of an altercation among a group of teenagers. Of the five young men involved, two were KT's sons: RT, then sixteen years old, and MT, then thirteen years old.[3] It is uncontested that sometime around 12:00 a.m. on September 1, 2004, RT and three of his high school friends assaulted a fellow high school classmate, AA. On the evening of August 31, 2004, MT was out with AA and updating RT of their whereabouts, as RT and his friends planned to confront AA. With the help of MT, RT and his friends found AA and surrounded him near a 7-11 convenience store. A scuffle took place whereby RT was holding AA when one of his friends punched AA, knocking out one of his front teeth.[4] RT and his friends left in their vehicle, taking with them AA's baseball cap. A witness placed a 911 call and the HPD responded to the scene,

[3] Consistent with the Appellate Division opinion, and in an effort to maintain KT's privacy, the privacy of her sons, and other individuals who were minors at the time of this incident, the court refers to them by their initials.
[4] There are slight variations in the statements the boys made to officers at the police station, however, by all accounts, RT was not the actor who punched AA, knocking his tooth out.

where a medical unit would then transport the victim to the hospital to treat him for his injury. Both the victim and his father declined to file criminal complaints against the teenagers. Instead, the parents of the boys involved in the fight agreed to pay the victim's father restitution in the amount of $3,000 for the cost of AA's dental care, thus resolving the case to the victim's satisfaction.

Both sides heavily contest the events that followed and gave rise to defendant's criminal charges. Campos, the State's key witness to the 2004 incident, responded to the scene, as well as Detective Thomas Aletta[5] ("Aletta") of the HPD juvenile division, though the State and the defense dispute who arrived to the scene first.[6]

Aletta investigated the incident and later read RT his Miranda[7] rights and took a written statement from him at the Hackensack Police Station ("stationhouse"). Neither party seems to dispute that defendant and KT were present when RT was at the stationhouse, yet, each party disputes the timeline of events. As the responding officer, Campos was responsible for writing the police report. She would later allege, per Zisa, a superior ordered her to change the police report and remove RT's name.

i. State's Key Witness to 2004 Incident

Without Campos' testimony, the State would not have had a case against Zisa for the 2004 incident. In exchange for her truthful testimony, the prosecutor entered into an unwritten immunity agreement with Campos that protected her from criminal prosecution[8] for allegedly falsifying the

[5] Aletta, as well as Captain Danilo Garcia, were both charged with official misconduct related to the 2004 incident in the same indictment; however, both defendants were severed from Zisa and KT's trial.

[6] While Campos testified that she had barely any recollection of the scene, she had an independent recollection that Aletta was there before she was. T10 185:3-10. Defendant, howeveon the other hand, submitted Campos was first to arrive.

[7] Miranda v. Arizona, 384 U.S. 436 (1966).

[8] The prosecutor insisted he only granted Campos immunity from criminal prosecution and not from administrative charges. Yet, the defense elicited testimony indicating Campos, as well as the other witnesses granted immunity, were

police report. Campos gave varying and inconsistent accounts, many of them under oath, as to who ordered her to change the report, whether or not defendant Zisa was present when she was ordered to change it, and how she was able to recall certain details with "crystal clarity" while only having a vague recollection, at best, as to the rest of the incident.

On March 16, 2010, Campos gave a sworn statement at the Bergen County Prosecutor's Office ("BCPO") regarding the 2004 incident in which she claimed having to rewrite the investigation report multiple times. Campos alleged Aletta specifically told her to take RT out of the report. She stated she did not learn RT was the son of Zisa's then girlfriend until weeks later, when she had overheard it in the locker room. When asked whether she had seen Zisa in the stationhouse the night of the incident, Campos answered several times that she had not. See Def. Ex. BB.

On May 18, 2010, Campos filed a federal lawsuit against Zisa, former HPD Captain Danilo Garcia ("Garcia"), former HPD Captain Tomas Padilla ("Padilla"), and the City of Hackensack. The complaint alleged Garcia had ordered her, "under threat and fear of retaliation," to change the report so as not to implicate RT, and indicated the order came from defendant Zisa. The complaint further alleged Zisa had shredded documents and reports pertaining to the 2004 incident, knowing they could be used against him in the future. Notably absent from the lawsuit and the complaint is any mention of Aletta or his alleged involvement in the changing of the report. See id.

After Campos filed the federal lawsuit, Sergeant John Haviland ("Haviland") of the BCPO instructed the HPD to open an internal affairs case file on Campos for an administrative charge of

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of the understanding they had been granted total immunity, an immunity agreement that must be in writing and approved by the Attorney General.

misconduct for admitting to changing a police report[9] at the order of Garcia. Pursuant to the BCPO's supersession of the HPD internal affairs unit,[10] Haviland notified Campos to report to the BCPO for questioning. See id.

On June 4, 2010, Campos once again gave a sworn statement to the BCPO, this time in response to questions concerning the internal affairs investigation against her. In this statement, Campos swore to the following: (1) she had no recollection of responding to the scene or who was present at the scene; (2) she specifically recalled using a computer in the Youth Division to type up the report; (3) Garcia and Aletta told her to remove RT's name from the report, per Zisa; (4) she referred to old journals and spoke with Lieutenant Fred Puglisi ("Puglisi") to refresh her recollection of the evening in question; (5) she saw Zisa and Garcia in the stationhouse that evening; and, (6) she specifically recalled calling her ex-fiancé, Brian Corcoran, that evening because she was so frustrated that she had to change the report several times.[11]

Defendant requested a copy of the journals Campos referred to in her testimony, which she claimed had refreshed her recollection of having seen Zisa at the stationhouse the night of the incident. On June 21, 2011, the State produced a memo Haviland had written in which he detailed

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[9] Interestingly, on May 15, 2010, Haviland claimed to have *just* discovered that Campos allegedly changed the police report due to the filing of the federal lawsuit, despite the BCPO having Campos' sworn statement from March 16, 2010, in which she claimed to have changed the report.

[10] On April 30, 2010, the City of Hackensack and the Bergen County Prosecutor's Office issued a Memorandum of Understanding whereby the BCPO would, among other things, directly oversee the HPD internal affairs department. The memorandum provided any investigation, proceeding, or charge, be it criminal or administrative, would not commence "without the prior express written approval of the Office of the Bergen County Prosecutor's Office." Def. Ex. G, at 4.

[11] Campos' June 4, 2010 sworn statement to the BCPO was directly contradicted either by evidence at trial or by Campos herself. Compare the following to the statements above: (1) On cross-examination, Campos testified that she had a specific recollection that Aletta was at the scene before she was; (2) Campos could not recall whether she handwrote or typed the report; (3) Prior to filing the federal lawsuit in which she named Garcia, she had only mentioned Aletta as the officer who told her to change the report; (4) Approximately one year after the June 4, 2010 statement, Campos first represented to Judge Jerejian she could not find the journals, and then later admitted she had destroyed the journals in 2008, years before she claimed to have referred to them to refresh her recollection; (5) Campos testified several times she had not seen Zisa in the stationhouse on the evening in question. Additionally, there was no evidence that Garcia was working or even present on the evening in question; and (6) phone records later revealed that she did not call her ex-fiancé, Brian Corcoran, on the evening in question.

his attempts to obtain the journals from Campos. The memo provides on February 28, 2011, Haviland requested the journals from Campos, to which she responded she would consider his request. On March 3, 2011, Campos advised Haviland she had reviewed her journal, there was nothing in there about the 2004 incident, and for privacy reasons she would not turn it over for inspection.

Defendant subsequently served a subpoena on Campos requiring her to produce the journal for inspection. On July 28, 2011, Campos appeared before Judge Jerejian and testified she did not currently have the journals, as she had just moved. Judge Jerejian instructed Campos to locate the journal and to appear again on August 11, 2011. When she appeared on August 11, 2011, she testified when she moved in 2008, she had discarded the journals in which she had jotted down her notes.[12]

With full knowledge of Campos' inconsistent accounts and the many misrepresentations she made under oath, the State nonetheless called her as witness and granted her immunity in exchange for her truthful testimony.[13] To say Campos was impeached on cross-examination would be an understatement: as the Appellate Division noted, "[n]ot surprisingly, Campos, whom the State presented as a key witness respecting the 2004 incident, was savaged on cross-examination." Zisa, supra at *6.

b. The 2008 Incident

[12] On August 28, 2011, counsel for Zisa wrote former Bergen County Prosecutor, John Molinelli, a letter outlining Campos' misleading statements and the various inconsistencies therein. In her letter, counsel noted without Campos' testimony, the State would not be able to make out a prima facie case of misconduct for the 2004 incident. In light of Campos' lack of credibility, counsel urged the BCPO to dismiss the charges pertaining to the 2004 incident. Def. Ex. BB. According to defendant, to date, the BCPO never responded.

[13] At trial, Detective Haviland testified that he and Assistant Prosecutor Keitel were aware that she had lied at some point in her previous sworn statements, but they both agreed to wait until the trial was over before deciding whether to administratively charge Campos. See 19T 96:11 100:24.

The 2008 incident arose out of a single motor-vehicle accident in Hackensack at approximately 12:45 a.m. on February 4, 2008. The driver and only person involved in the accident was KT, who was driving defendant's Trail Blazer SUV when she swerved and hit a utility pole. Sheriff's Officer Eric Arosemowicz of the Bergen County Sheriff's Department ("BCSD") was on duty that evening and happened to drive past KT moments before the crash. He turned his patrol vehicle around and proceeded to the scene of the accident. He reported the incident to the Sheriff's Department, which would then alert local law enforcement. Officer Joseph Al-Ayoubi of the HPD was the second to arrive on the scene, and the first HPD officer on the scene. Once again, the State and defense contest the events surrounding the 2008 incident.

As to the State's version of events, the State submits Arosemowicz, Al-Ayoubi, and Herrmann were all present at the scene of the accident. All three witnesses testified KT appeared to be intoxicated, albeit to varying degrees.[14] It is undisputed none of the officers made any report or notation as to KT's alleged condition, nor did any of the officers ask KT if she had been drinking. Arosemowicz testified KT told him she was Zisa's girlfriend and Zisa was on his way. Apparently, Arosemowicz advised Al-Ayoubi to call a supervisor before attempting to cite KT for DUI, as she was the Chief's girlfriend.

Arosemowicz testified he left the scene before John Herrmann arrived. Herrmann testified he arrived at the scene and Zisa arrives shortly thereafter. Herrmann and Al-Ayoubi testified once Zisa arrived, he walked directly to the vehicle to assess the damage and said it appeared KT had swerved to avoid hitting an animal. He then helped her out of the SUV and took her back to his

[14] Arosemowicz testified he smelled alcohol on KT's breath, though he did not indicate she exhibited any other signs of intoxication such as slurred speech. Al-Ayoubi testified he smelled alcohol on KT, and Herrmann testified KT was staggering and slurring her words. In its post-trial decision, the trial court noted, "Some of the descriptions given on direct examination to [KT's] condition were different than previous statements made." Post-Trial Decision, 23:9-11 (Sept. 12, 2012).

vehicle. Al-Ayoubi testified he prepared his police report with Herrmann in accordance with what Zisa said at the scene: KT swerved to avoid hitting an animal and hit a utility pole.

Herrmann testified the day after the accident, he was dispatched to a local car dealership to pick up an officer and drive him back to headquarters. He claimed he arrived at the dealership to find he was picking up Zisa. During the drive back to the stationhouse, Zisa allegedly warned Herrmann only three people knew of the incident the night before, thus, if news of the incident became public, he would know who it came from. This alleged interaction was the basis for the single count of witness tampering in the indictment.

The defense, on the other hand, submits KT swerved to avoid hitting an animal and hit a utility pole. The only evidence of KT's alleged intoxication came from three State witnesses, none of whom had documented in any writing that KT appeared intoxicated. Arosemowicz, the only witness who saw KT driving moments before the crash, testified he did not observe KT driving erratically; rather, he saw her come to a full stop just prior to the accident, therefore she had not been speeding. The defense submits KT called Zisa and asked him to pick her up from the accident because the SUV was not drivable. The greatest point of contention among the parties, aside from KT's condition, is whether or not Herrmann was actually present at the scene of the accident, as the defense introduced ample evidence indicating he was not. Furthermore, the defense cast significant doubt on whether Herrmann had been dispatched to the dealership the following day, as there was no record of it.

i. State's Key Witnesses to 2008 Incident

The State's ability to prove the 2008 incident relied heavily, if not entirely, on the testimony of its three key witnesses to the car accident: Arosemowicz, Al-Ayoubi, and Herrmann. All three witnesses had a bias against Zisa. Arosemowicz was active in the local PBA and an ally to the

PBA president whom Zisa had administratively investigated. Al-Ayoubi and Herrmann both had filed civil suits against Zisa, yet, neither of them came forward with incriminating information about Zisa until after filing their lawsuits. Finally, each witness at some point had been subject to one or more internal affairs ("IA") investigations.

Al-Ayoubi's IA investigation arose out of a suspicion of steroid use. In 2009, he tested positive for steroids, which resulted in a sixteen-month suspension and criminal charges. The criminal charges were eventually dismissed.

Arosemowicz's IA investigations arose in the following context. In or about June 2011, he was charged with a number of infractions, including sleeping on the job and executing a motor vehicle stop while transporting a prisoner. At the conclusion of the investigation, he signed a Stipulation of Settlement and Release, admitting to eighty-two separate charges. The agreement contained a "last chance" clause indicating he could face immediate termination if he committed any major infraction. A few months later, Arosemowicz failed to notify the BCSD that he would be giving deposition testimony in a civil case involving Zisa. Zisa's civil attorney, who was at the deposition, found several of Arosemowicz's statements inconsistent or untruthful. This prompted a truthfulness investigation into Arosemowicz, which then evolved to perjury charges. The perjury charges, which constitute a "major infraction," were eventually dismissed. Shortly thereafter, Arosemowicz agreed to early retirement with reduced benefits.[15]

The defense sought materials related to these investigations from the State in discovery, presumably to use them on cross-examination. Following an *in camera* review, some materials were released to the parties under protective order.

[15] The court reviewed Arosemowicz's IA investigation materials *in camera* and only released materials related to the second IA investigation involving the deposition in Zisa's civil matter. The defense did not receive the rest of the IA investigation files until after the prosecutor's opening, in which he blamed Arosemowicz's early retirement on Zisa, his civil attorney, and Inspector Bradley of the BCSD.

The State introduced these investigations, as well as information that had not been yet disclosed to the defense, during his opening statement. The prosecutor accused Zisa of playing a role in instituting the IA investigations against these witnesses, as well as Hackensack's application for Laura Campos' involuntary disability, in an effort to retaliate against, intimidate, or weaken the witnesses for testifying against him at trial.

c. The Trial

On April 3, 2012, Assistant Prosecutor Daniel Keitel delivered his opening statement for the State. The prosecutor's opening statement was filled with a series of inadmissible statements and allegations of witness tampering that were not a part of the indictment. The opening set the tone for the trial, completely surprised the court and the defense, and forced the defense into having to rebut uncharged and unsubstantiated allegations of witness tampering. The prosecutor, anticipating his witnesses' credibility would be attacked, justified his presentation of inadmissible evidence as an attempt to preemptively rehabilitate his witnesses before their credibility had been called into question. His opening resulted in a series of evidentiary hearings, caused requests from the defense for additional discovery at the eleventh hour,[16] caused additional witnesses to be added to the witness list, left both defense attorneys scrambling to prepare for cross-examination, and overall led to an inordinate number of delays.[17]

i. The State's Opening

The prosecutor opened by explaining to the jurors the purpose of the opening statement is to give the jury an overview of what each party expects to prove. Next, he embarked on a theme

[16] In the middle of Arosemowicz's direct examination, the defense requested his internal investigations files, as the prosecutor was eliciting information contained therein that had not been produced to the defense. Both Zisa and K.T.'s counsel waited in the courtroom that evening until 8:00 p.m. for the files to be delivered so that they could review them and prepare for cross-examination, which was to happen the next day. See generally 4T.

[17] Ironically, on the several occasions the defense moved for mistrial or requested an evidentiary hearing to respond to the prejudice caused by the State's opening, the prosecutor complained the defense was causing unnecessary delays.

of the United States being a "nation of free people" and as a free people, we are subject to the law, "instead of people's whims." 1T 19:18 – 20:6 (April 3, 2012). He continued, "that's so important [ ] because the law applies to all of us . . . . It doesn't matter who you are, who you know. At least it's not supposed to." Id. at 20:4-9. The prosecutor segued from this theme directly into a history of the Zisa family. He noted the Zisa family, well known throughout Hackensack, has been involved in politics within the City of Hackensack, and, "over a period of [forty] years, [has] had a vast amount of influence and power in and about Hackensack." Id. at 21:21 – 22:1.

The prosecutor continued in presenting the State's versions of the 2004 and 2008 incidents. What followed, however, was a sharp turn into uncharged accusations that defendant used his influence to retaliate against and intimidate the State's witnesses; specifically, Sheriff's Officer Arosmowicz, Officer Campos, Officer Al-Ayoubi, Officer Herrmann and William Connelly.[18]

The prosecutor began by telling the jury in the twenty years Arosemowicz had served the BCSD, he had not been subject to any major disciplinary action; however, since having been identified as a witness in this case, he was in danger of losing his job. The prosecutor continued:

> Starting sometime in 2011, after being identified as a witness in this case, he's currently trying to cling onto his job over there, because he's being what they called packaged. And that's when they're coming after you. And they are coming after him. And he's going to tell you that. In detail. Because you can't separate what's happening to him from this case.
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> [1T 43:12-19.]

Although the Bergen County Sherriff Department is completely separate and apart from the Hackensack Police Department, the prosecutor insinuated Zisa, the former police chief, had orchestrated the internal affairs investigations against Arosemowicz, a sheriff's officer. The

[18] Apparently, Connelly had worked the overnight shift for years. He was switched to day shifts, which interfered with him running his business. The prosecutor claimed Zisa played a role in this solely because Connelly would testify for the State that he saw Zisa at the stationhouse the night of the incident.

prosecutor made this connection because Richard Malagiere, defendant's personal attorney, and Mickey Bradley, a "politically connected sheriff's officer," played a role in the investigations.

The prosecutor continued by delving into the circumstances surrounding Arosemowicz's truthfulness investigation and perjury allegation. The BCPO could not investigate the charge because Arosemowicz would be called to testify in the instant trial as a State witness, therefore the investigation was sent to Hudson County. The prosecutor represented to the jury that in less than a week, Hudson County sent it back to Bergen County: "Hudson County says, it's not perjury. We're done with it. We're sending it back to you."[19] 1T 48:5-7. Finally, the prosecutor told the jury as of one week prior, the BCSD was forcing Arosemowicz to retire when he reached his twenty-year anniversary with fifty percent of his benefits and without health insurance, as opposed to letting him keep his job and retire at twenty-five years, keeping sixty-five percent of his benefits.

The prosecutor segued from the alleged "packaging" of Arosemowicz with more allegations of witness-tampering and intimidation at the behest of Zisa: "[b]ut what's really sad, he's just one of the five witnesses that have been put through the same grist." 1T 48:16-18. He next mentioned Campos, who was on modified duty due to a work injury, was being placed on involuntary disability. The prosecutor claimed he did not know whether Campos would still be a police officer by the time she testified, and she was being "forced out with [forty] percent, no insurance, after [eleven] years." 1T 49:4-5.

[19] The disposition of the Hudson County charges were not disclosed to defense prior to the prosecutor's opening statement, and the prosecutor's knowledge of such disposition was based on "second-, third-, and fourth-hand information." 5T 23:17-19. The prosecutor, when pressed by defense counsel and the court, admitted he came to know about the disposition of the Hudson County charges through his own experience and personal knowledge of how internal affairs investigations work, to which the court replied, "So you're almost opening yourself to be a witness in this case as to all your knowledge of this matter. Where are the documents that say this? You're just making all these assumptions based on your history." 2T 63:24 – 64:3.

He next began speaking about Al-Ayoubi, who was drug tested in 2009: one year after the 2008 incident, and one year prior to any allegations of official misconduct against Zisa came to light.

> Joseph Al-Ayoubi, the second officer on the scene but the first Hackensack officer, a year after this incident, was drug tested. You will hear there was not anything approaching reasonable suspicion, which is the standard. And he works out avidly. And he takes a lot of supplements. And some form of steroid was picked up in that test. And he'll tell you, he never injected it. You'll look at him, and you'll believe him. He was suspended for [sixteen] months. And Mr. Zisa's hand-picked internal affairs officer, Thomas Salcedo, criminally charged Joseph Al-Ayoubi with a drug charge. He gets charged, arrested, and is now – was now awaiting trial. This is in 2009, a year after the DWI. He goes to court, and the presiding judge of the municipal court, Bergen County, throws the case out.
>
> [1T 49:6-21.]

At this point, defense counsel objected. At sidebar, defendant noted how prejudicial the opening statement was to the defense: defendant had no knowledge of the disposition of Arosemowicz's criminal matter; defendant had no knowledge of Campos' disability, nor did he have any control over what was happening to her;[20] the prosecutor had just implied that the criminal charges against Al-Ayoubi were meritless, when in fact, the Attorney General guidelines made his drug test inadmissible, thus resulting in a dismissal of the charges; finally, a federal judge had ruled that there had been reasonable suspicion to drug test Al-Ayoubi. The prosecutor's response was simply, "I don't see any prejudice. I don't see what the issue is." 1T 51:2-3. It quickly became apparent the prosecutor had no direct evidence of Arosemowicz's dismissed criminal charges when the following colloquy took place at sidebar:

> MR. KEITEL:[21] We don't have the case. Arosemowicz believes it's going back there now because they're looking to settle with him. I mean, I faxed her –

[20] Campos' disability postdated Zisa's suspension from his position as Chief of the HPD; thus, he had no authority to institute any such involuntary disability application.

[21] Senior Assistant Prosecutor, Daniel Keitel, for the State of New Jersey.

MS. PREZIOSO:[22]	I'm sorry, wait. Did Mr. Keitel just say he doesn't know for sure that that's the outcome and he's surmising it because Mr. Arosemowicz is trying to settle his retirement? Is that was Mr. Keitel just said?
THE COURT:	I think so.
MS. PREZIOSO:	After you –
MR. KEITEL:	I know for sure –
MS. PREZIOSO:	Okay. Then I want to know. I'd like this jury taken out. I'd like him put under oath, and I want to know how he knows that from the prosecutor's office.
MR. KEITEL:	This is the same BS I've had to put up with for two years.
MS. PREZIOSO:	You just did that in an opening that we took a week and a half and went through 500 jurors to get to this trial, and you cited to something that you did not even –
THE COURT:	Let me hear from Mr. Meehan[23]
MR. MEEHAN:	Judge, I think we should excuse the jury and hash this out and see what it's about. Really, I had no idea that there was any activity on Mr. Arosemowicz's case in Hudson County or anything having to do with Ms. Campos. I thought we were going to great pains to avoid going into all this stuff.
MS. PREZIOSO:	Absolutely. Your Honor, I'm going to ask, please, take the jury out.
THE COURT:	I will do that.
MR. KEITEL:	This is much ado about nothing.

[1T 53:1-54:8.]

The Appellate Division admonished the prosecutor for his opening statement, calling it "riddled with impropriety" and noting the "astonishingly improper remarks" he made were "not brief or made in passing," but rather were the "central themes" of his opening. Zisa, supra at *12-14.

The prosecutor's opening statement set the stage for the repeated requests for mistrials that would ensue.

ii. First Motion for Mistrial

[22] Patricia Prezioso for defendant Zisa.
[23] Counsel for former co-defendant, K.T.

At the end of the prosecutor's opening statement, defendant moved for a mistrial. Counsel for Zisa argued, in light of the State's concern that introducing evidence of civil suits and IA investigations would result in "mini trials," it was shocking that the State would introduce evidence the defense did not even have knowledge of. Counsel argued introducing theories of witness tampering, by the BCSD, at the behest of Zisa, was highly prejudicial, was not at all material or relevant to Mr. Zisa's guilt, and was going to be difficult, if not impossible, to recover from. Moreover, allegations that Zisa had retaliated against Campos and Al-Ayoubi, and thus tampered with the State's witnesses, were not anywhere in the indictment, and thus should not have been in the prosecutor's opening.

Finally, counsel reiterated much of what the prosecutor had introduced in his opening came as a surprise to the defense, as it had neither been disclosed in discovery, nor had it been raised in any of the number of *in limine* motions. See 1T 75:4 – 76:12.

The prosecutor responded to the two requests for a mistrial by first stating he was not surprised, as the defense had done everything to delay the case and damage witnesses. He then claimed because the defense sought IA investigation files on the State's witnesses in pretrial discovery, the defense had "opened the door." This, he claimed, permitted him to introduce his theory that the investigations were meritless and only instituted to tamper with and retaliate against the State's witnesses. The prosecutor once again embarked on his theory that Zisa was behind orchestrating the IA investigations and the perjury charges against Arosemowicz, to which the court responded, "I thought Mr. Zisa and [KT] were on trial. I didn't realize the Bergen County Sheriff's Office was on trial for conspiring to bring charges against someone improperly." 1T 79:11-14. The prosecutor continued to insist Mickey Bradley of the BCSD and Richard Malagiere,

Zisa's civil attorney, conspired to investigate Arosemowicz on administrative untruthfulness charges, and to improperly charge Arosemowicz with perjury on defendant's behalf.

The court clarified, "so you're objecting to any kind of mistrial in this case, even though you seem to have opened up a lot of doors and windows as to other areas that really are not a part of this trial." 1T 80:5-8. Again, the prosecutor responded as though he had done nothing wrong in his opening, stating the defense would have an opportunity to cross-examine the witnesses that planned to testify about Zisa's orchestrated retaliation against them. When the court pressed the prosecutor as to how the defense would have any knowledge of the Campos involuntary disability matter, the prosecutor responded "[w]ell, first of all, it was in the paper two weeks ago, but beyond that, he's the chief of the Hackensack Police Department."[24] 1T 81:10-12. Finally, the court asked the prosecutor "shouldn't this information be given to defense counsel before you gave [sic] it to the jurors?" 1T 81:21-22. The prosecutor responded the defense has a right to cross examine the witnesses and by asserting it was "common knowledge" that "as a result of [Campos] witnessing these events and also as a result of her not voting for [defendant's] union in the PBA election, [ ] she was transferred, which led to her . . . getting a back injury." 1T 82:2-5.

The following day, before continuing to argue the motion for mistrial, defense counsel asked the court for additional time to work through the issues should the court deny the motion. The prosecutor replied, "There's no reason that we shouldn't be starting, assuming you deny the motion, which I fully, respectfully, expect to happen. Opening should start in about [fifteen] minutes. There is no reason this case should be delayed one minute longer." 2T 4:20-24.

Counsel for Zisa argued first, reiterating many of the arguments raised the day prior, and adding the following. The prosecutor referenced Al-Ayoubi's drug test and represented to the jury

[24] The court responded to the prosecutor that defendant had been suspended from his position as chief for two years, and that he seemed to be improperly relying on discovery that might be in the local newspaper.

there was no reasonable suspicion to order a drug test; however, a federal judge reviewing the same case determined that not only was there reasonable suspicion to order the drug test, but had Zisa failed to order it, he would not have been doing his job. Counsel argued this was beyond mischaracterizing evidence; the prosecutor expressly gave the jury false information. Finally, counsel noted her disbelief in how the prosecutor opened:

> Your Honor, I can't imagine, I can't imagine after all the struggles we have had with this case, the motions *in limine*, the pretrial rulings about the civil cases, the numerous discussion about the internal affairs case, I can't imagine how what Mr. Keitel did yesterday wasn't purposeful. . . . So what are we supposed to do, Judge? I tried last night to write a curative instruction. I can't. I don't think there are any words that could take away what was done yesterday . . . what the State did yesterday was they hijacked this trial. And I don't know how to fix it.
>
> [2T 15:6 – 17:15.]

Counsel for KT echoed much of what Zisa's counsel argued, and expressed his surprise by the tenor of the prosecutor's opening and the lengths he went to portray Mr. Zisa as someone who is "in essence destroying people's lives . . . person after person. From the dispatcher to [ ] Arosemowicz to [ ] Al-Ayoubi, Campos." 2T 19:10-17. Counsel argued there was no evidence to substantiate anything the prosecutor had alleged in his opening; the trial had become "trial by innuendo, [ ] not trial by evidence." 2T 20:18-19. Finally, he noted the futility of attempting to cure the prejudice with an instruction:

> Judge, that damage cannot be undone by any type of curative instruction. You can't say, pretend you never heard that when he went into detail about it. . . . I don't think there's any way to cure this. It's well beyond our expectations of what this trial would be about coming in here. This jury has heard things they [sic] shouldn't have heard.
>
> [2T 20:22 – 21:14.]
>
> The prosecutor began his response:

> Judge, these objections are about one thing and one thing only. I weaved together exactly what the State expects to prove, and it's devastating and they don't like it. That's what this is about. Nothing more.
>
> [2T 21:17-21.]

When the court asked how the State intended to prove Zisa was conspiring to intimidate Arosemowicz and Campos, the prosecutor indicated he would do so through testimony. The court noted the prosecutor's theories were based on speculation, and then added that it, too, was surprised by the State's opening statement:

> I just am surprised after all the conferences we had as to what this case is about and what you would be limited to do . . . some of the things you said in your opening statement were surprising to this court.
>
> [2T 26:11-15.]

Immediately before ruling on the motions for mistrial, the court continued:

> The Court was surprised by the tenor and the statements made by the prosecutor during the opening statement. That was something this Court did not anticipate, especially the attacks on Captain Bradley and the attacks on Mr. Zisa as to things happening after he was suspended. And somehow this has to be resolved by way of a 404 hearing with all of those witnesses before they testify as to other bad acts. But the Court is denying both requests for a mistrial. I put together I think what may be a curative instruction that may suffice in this case. Of course the defense is going to have to open dealing with the same issues raised by Mr. Keitel in his opening and almost in a way defending against people they're not even representing.
>
> [2T 34:4-18.]

After denying the motions for mistrial, the trial court gave the jurors a curative instruction, which the Appellate Division quoted in full in its opinion, and referred to as "weak and inadequate." The Appellate Division noted in his instruction to the jurors, the judge did not identify with any specificity what parts of the opening the jurors should disregard, and he failed to tell the jurors the prosecutor's allegations of witness tampering and his comments about

defendant's family were improper: "In short, the trial was tainted from the outset, and the judge's comments were ineffective to purge the taint." Zisa, supra at *19-20.

iii. Defendant's Motion for 404(b) Hearing[25]

The State's first witness was Eric Arosemowicz, whose testimony spanned three days of trial. After he had already been on the witness stand for two days, and before continuing his cross-examination, counsel for KT, joined by counsel for Zisa, urged the court to conduct a 404(b) hearing and to make findings as to the relevance of the continued testimony regarding Arosemowicz's IA investigations and the State's allegations of witness tampering. Counsel noted the many pretrial motions and motions *in limine* that had been geared toward tailoring the issues to the specific allegations in the indictment; yet, the prosecutor's opening statement forced the trial to turn in a direction neither defendant had anticipated:

> And then we find out, without having any records, without having any forewarning, that the trial is now about an inspector in the Sheriff's Department, allegedly, Mr. Zisa's civil attorney, allegedly, and a cast of characters. An Officer Wilkins, I suppose, is somehow involved in this. All based upon what? What is the evidence? That's what I'm asking the court to look at. What is the evidence of any vendetta against Officer Arosemowicz? And is that the issue we really want the jury to be thinking about in this case?
> [. . .]
> [T]he state's theory as to why this evidence is admissible [is] that it affects Officer Arosemowicz's credibility. Well, first of all, his credibility hadn't even been called into question when [the prosecutor] had opened up on this information . . . . I don't think the State is allowed to preemptively bolster its own witness by presenting evidence of all these extraneous issues.
>
> [5T 14:22-16:19.]

Counsel continued urging the court to consider the irrelevance of the testimony that had been presented thus far. Testimony on such issues as Arosemowicz's perjury allegations, "his internal affairs issues, his sleeping on duty, [and] his not wearing a holster" resulted in a waste of

[25] N.J.R.E. 404(b).

time and confusion of the issues. Moreover, the defense would have to vet each internal affairs investigation and add additional witnesses to respond to the confusion and prejudice created by testimony that lacked the tendency to prove or disprove the any of the crimes charged in the indictment. Finally, counsel responded to the State's assertion that such testimony was admissible because it spoke to the credibility of the witnesses by noting the witnesses' credibility had not yet been called into question, thus, the State was not permitted to preemptively bolster its own witnesses.

When asked for his input, the prosecutor responded, "I thought we argued this maybe twice, three times already. Why are we arguing it again? You already ruled no mistrial." 5T 21:19-21. Without addressing defendants' arguments, the prosecutor continued speaking of the alleged conspiracy to "package" Arosemowicz, stating he was "more than happy" to continue exploring these issues, as it was "fascinating stuff." 5T 22:10; 23:5-6.

The court responded:

> Mr. Keitel, there's no doubt in this court's mind that you created all of this by your opening statement; accusing the sheriff's office of witness tampering, which was not part of this trial. You just came up with this through second-, third-, fourth-hand information.
> I'm giving the defense at least an opportunity to investigate it. I don't know how the court can deal with it other than a mistrial. And a mistrial would probably lead to a double jeopardy issue.
>
> [5T 23:14-24.]

During the State's redirect examination of Arosemowicz, the prosecutor attempted to elicit testimony regarding Arosemowicz's negotiations with the BCSD about his retirement. Defendant objected, as the defense had not received any discovery about Arosemowicz's retirement negotiations. At sidebar, the prosecutor argued this testimony was exactly how he intended to

prove the witness tampering. As he continued offering his theory that Arosemowicz's forced retirement came at the hands of Mickey Bradley and Richard Malagiere, the court interjected:

> Mr. Keitel, the court's real concern is that neither one of [the defense] attorneys is representing the Sheriff's Department . . . . Neither one of them is representing your witness. And you're putting everyone else on trial except the parties that should be on trial. And you're creating a nightmare of this case as far as these accusations of witness tampering against the Sheriff's Department . . . . And you have no proof to show other than what you think happened . . . . You have not proffered any proof that the Sheriff's Department is tampering with a witness other than what you're surmising.
>
> [5T 109:14 – 110:6.]

Yet, the prosecutor continued to argue in his twenty-five years as a prosecutor, he had never seen a department "go after somebody to take him down as a witness while a case is pending." 5T 112:21–23. After much colloquy in which the prosecutor argued the State's witnesses were being tampered with and the court pressed him for his proofs,[26] the court expressed its concerns and put the State on notice.

> Mr. Keitel, the court's problem is you being the accuser, the trier, and finding Bradley guilty of witness tampering before a jury. You've done everything possible to find this man guilty of witness tampering, and you're putting that before the jury . . . . You're accusing him. You're an assistant prosecutor . . . . You're comfortable as an assistant prosecutor taking this trial way off the tracks and going against sheriff's officers in Bergen County because your witness has been charged with an internal investigation?
> [. . .]
> This trial is about Mr. Zisa, [KT] and the State of New Jersey. It's not about Mickey Bradley. It's not about the Bergen County Sheriff's Department investigations or anyone else. The State is now put on notice to get off this train as far as accusing

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[26] THE COURT: Isn't is a possibility some of [Arosemowicz's charges] were rightfully brought against him? You're assuming they're all bogus.
MR. KEITEL: That's going to be for the jury to decide.
THE COURT: You're arguing they're bogus charges.
MR. KEITEL: I'm arguing that the perjury allegations are bogus. They're absolutely bogus, and they were created in Malagiere's office with Mickey Bradley and Undersheriff Smith in the office. It's outrageous.
THE COURT: How can you just make these statements off the top of your head? [. . .] There's no proof. I don't know where you're getting all this information from except you're just trying to protect the witness you called.
[5T 116:6 – 117:3.]

other people of tampering with witnesses. It's not appropriate . . . . There's nothing in this you have shown to this court that anyone is involved in witness tampering other than your feeling that there is. You need to get off that.

[5T 124:6 – 127:14.]

iv. Second Motion for Mistrial

On April 12, 2012, the defense moved for a mistrial a second time. The basis, again, was the prosecutor's opening statement. At this point in the trial, Arosemowicz had finished testifying and the State had failed to put forth any evidence of the alleged conspiracy to "package" Arosemowicz. Counsel for KT presented a lengthy argument highlighting the disadvantages to the defense caused by the prosecutor's opening statement, and noting the prosecutor's strategy in confusing the issues[27] before the jury and continuing to insert prejudice into the trial.

When asked if he wished to respond to the motion for a mistrial, the prosecutor seemed to ignore the substantive argument before him and again assumed the court would deny the motion:

> My response is, you addressed this, I don't know, two days ago, maybe, three days ago. . . . [I]f you are respectfully just going to deny the motion based on your ruling the other day, I won't rehash it at this time. . . . I'll be happy to put the State's lengthy position about what the State believes is witness tampering on the record if Your Honor wants me to do that. I would prefer at this point, since we're in the middle of cross, to have you respectfully rely on your prior ruling, since nothing new has come up since then and move on.

[7T 28:25 – 29:24.]

Notwithstanding the court's admonishment two days prior putting the State on notice to stop making accusations of witness tampering, the prosecutor argued it was reckless that the State was "attempting to put on a fair case with witnesses who have been intimidated on their way to the witness stand." 7T 30:22-23. The court interjected "[w]e can't go over this over and over

[27] "[Y]ou can see what the strategy is. [The prosecutor] asked five questions about the [2008 incident] and then we get into [twenty-five] questions about all his other problems, and then we have to try to rehabilitate, rebut all of that." 7T 25:24 – 26:3.

again. Mr. Keitel, I don't know how many times I've said it to you. This is only your position. There's no proof." 7T 31:3-6. Nonetheless, the trial court judge denied the second motion for mistrial:

> I'm denying your motion at this point in time for a mistrial. . . . [Y]ou reserve the right to come back with that again. But the State has been told by this Court numerous times that the only two people on trial are Mr. Zisa and [KT], not the Bergen County Sheriff's Office, not anyone else who's doing inappropriate testing or anything. That's the only case that's on trial. So let's stick to what the proofs are and what information was exchanged between the parties.
>
> [7T 32:10-21.]

v. 404(b) Hearing and Third Motion for Mistrial

On April 16, 2012, the defense argued its ongoing application for a 404(b) hearing so as to limit the scope of the testimony the State would be permitted to elicit from the next witnesses. The defense also renewed its application for a mistrial, to which the prosecutor responded he had not anticipated arguing against a motion for mistrial, as it was a "major issue that can't possibly be responded to," because it wasn't in writing.[28] The prosecutor resisted arguing the motion, stating he did not want to "stand up and wing an argument on a mistrial," and the defense could not expect him to verbally respond to it in five minutes. 8T 10:13-14. Since the defense had repeatedly moved for mistrial, the defense pointed out how patently unfair it was of the prosecutor to complain of surprise at this point.

As to the 404(b) hearing, the defense argued the prosecutor's attempt to introduce evidence of the internal affairs investigations and witness tampering constituted other crimes evidence, and thus, any such testimony should be inadmissible, as its prejudicial effect far outweighed any probative value it might have.

[28] Both defense attorneys noted they had already briefed these issues in writing, though the record is unclear whether the prosecutor responded to the same. See 8T 9:10-25.

The prosecutor began his argument against exclusion of such evidence: "I believe these acts are admissible under credibility, under bias, under interest, and also under tampering on the eve of trial." 8T 24:7-9. The prosecutor first argued it was the defense that relentlessly sought the internal affairs investigation files on the State's main witnesses. He noted following an *in camera* review, Judge Jerejian had released certain internal affairs files. The prosecutor argued Judge Jerejian released these records because he must have determined they did not constitute other crimes evidence, but rather, evidence of bias or credibility. The prosecutor then claimed the defense had the same material the State did, and he simply had a different interpretation of the materials, thus, what he opened on was permissible.

Counsel for Zisa responded by first pointing out the discovery rules are clear that because something is discoverable, it is not necessarily admissible. Next, counsel argued the necessity of investigating the internal affairs files in light of the BCPO superseding the internal affairs department at the HPD, as well as the witnesses' "unwritten immunity deals." 8T: 32:6. Finally, counsel noted the prosecutor's opening referred to information in the internal affairs files that had not been released to the defense prior to the opening.

Counsel for KT argued there should be a clear finding of the prosecutor's intent for introducing such evidence so as to determine whether it constituted other crimes evidence. Counsel pointed out the prosecutor had just clarified his rationale for admitting such testimony: to prove witness tampering, a crime that did not appear in the indictment.[29] He continued:

> The other thing we learned is, his basis for coming to his own private conclusion, without telling anyone that the evidence was admissible, is because the defense requested it. Which is an amazing assertion. He's saying that because Judge Jerejian said that some of the evidence could be turned over to the defense regarding personnel issues of the witnesses, [ ] that was a ruling, that was a finding that [this]

[29] Zisa was indicted of one single count of witness tampering with regard to John Herrmann only. Here, counsel referred to the prosecutor's allegations of witness tampering regarding Al-Ayoubi, Campos, Arosemowicz, and Connelly.

evidence was now probative, admissible . . . . And once he said we could look at it, then that meant it was coming into the trial.

[8T 37:8-19.]

The trial court judge noted, in his years in the Criminal Division, 404(b) evidence seems to set off "fireworks" because of how highly prejudicial such evidence can be. The court then proceeded through the Cofield[30] analysis and ruled the evidence constituted other crimes evidence. The court found the evidence could leave the jurors free to infer Zisa had the propensity to bully. Further, the evidence would create confusion of the issues, result in undue delays, and take the focus off the indicted charges. In finding the probative value of the evidence was substantially outweighed by the harm that could ensue, the court ruled the evidence inadmissible, thus precluding the prosecutor from introducing or eliciting any evidence to support his theory of witness tampering.

When the defense asked whether the court would hear the application for mistrial, the judge replied he would address it at a later time, so as to afford the State additional time to respond. The court then added, "[I] will consider that later. I think they'll [sic] be a couple other mistrial motions in this trial anyway I'll have to deal with as we go along." 8T 50:16-19. Counsel for KT urged his motion contained the same arguments he had been raising since the start of trial, and in light of the court's ruling that none of the allegations of witness tampering should have come in, the court should grant a mistrial:

MR. MEEHAN: Based on the Court's just ruling, none of this should have ever come in. The jury has heard it now. It can't be undone. I don't see how there can't be a mistrial, judge, respectfully.

THE COURT: Well, the Court will try and deal with the situation the best it can based upon all the information, and without a doubt will be giving a limiting instruction how they have to deal with the first two witnesses.

[30] State v. Cofield, 127 N.J. 328 (1992).

MR. MEEHAN: Judge, that is utterly impossible to do. After hearing a week or more of testimony from Officer Arosemowicz, the prosecutor's opening statement accusing Mr. Zisa of retaliating and intimidating witnesses, there's no possible way the court can give a limiting instruction . . . . [T]he Court has just found that the prosecutor improperly injected this issue of witness intimidation, other crimes, into the trial, from the very beginning . . . . It should have been dealt with immediately. [The jurors] have now heard . . . a week and a half of testimony regarding these other issues . . . . There is no way that can be cured . . . . [T]his prosecutor didn't just start working last week. He knew full well what he was doing.

[. . .]

[T]his isn't just a slip. This is calculated. It's to paint the Court into a corner, knowing that we had spent a week, six days, picking a jury . . . . [H]e not only just mentioned one, he mentioned five people who were intimidated and lives ruined by Mr. Zisa, supposedly, which the court now says there's no evidence of. How do you undo that?

[8T 50:24 – 53:1.]

Immediately following this, the prosecutor suddenly raised a motion to have the trial court judge recuse himself for "failing to disclose to the extent necessary pretrial your relationship with Sue Bradley[31] and Inspector Michael Bradley." 8T 53:9-12. The prosecutor continued, the parties were entitled to know how well the judge knew them both before the trial started. He argued, since the judge had reviewed the internal affairs files, it should have been clear to him that Inspector Bradley was the "driving force" behind the discipline of Arosemowicz. Knowing that Inspector Bradley would be a key witness, the prosecutor argued the judge should have taken it upon himself to reveal the extent of his relationship and afford the attorneys an opportunity to say whether the judge could "sit and be fair." 8T 54:8. The prosecutor said to the judge, "the State has no

[31] Suzanne Bradley, Mickey Bradley's wife, worked in the trial judge's chambers for several years; interestingly, this very prosecutor had also been assigned to the trial judge's chambers. The judge clarified he never socialized with the Bradleys. He later responded on the record, "I've been in this courthouse I think [eighteen] years or so. I sat in the criminal division for [twelve] years. Mr. Keitel was assigned to me for a while. Sheriff's Officer Eric Arosemowicz was assigned to me for a while. And Ms. Bradley was assigned to the team leader [position]." 8T 58:7-11.

confidence at this point in your ability given the central part that Inspector Michael Bradley played in what happened to Arosemowicz with you being fair to the State, judge." 8T 55:3-6.

Counsel for Zisa stated her astonishment at the prosecutor's statements, and added it seemed to be a tactic to further derail the trial. Counsel noted, "now that the record established other crimes evidence exists, we all know what that means, this is the final Hail Mary." 8T 56:21-23. Counsel for KT stated he wholeheartedly agreed with Zisa's counsel, and saw the prosecutor's motion "as an attempt to influence the court's decision on the mistrial application." 8T 58:2-3. The court subsequently addressed the parties and denied having any personal relationship with the Bradleys, thus extinguishing any alleged impropriety. Again, the court denied the motion for mistrial.

vi. Fourth Motion for Mistrial

On April 17, 2012, John Herrman was on the witness stand for the second consecutive day. Herrmann testified he had been at the scene of KT's accident, he had observed a visibly intoxicated KT, and Zisa had removed her from the scene of the accident before the officers had an opportunity to administer field sobriety tests.

On his first day of testimony, both the prosecutor and Zisa's counsel presented Herrmann with a daily activity report dated February 3, 2008, which outlined his activities during his 5:00 P.M. – 4:00 A.M. shift. This report, among other contemporaneous reports, placed Herrmann in at a domestic violence call at 12:26 A.M. on February 4, 2008. According to the report, Herrmann was involved with the arrest and processing for the domestic violence matter until 2:20 A.M. This time frame completely eclipsed the time period during which KT's accident took place, which was at approximately 12:45 A.M.

During both direct examination and cross examination the day prior, Herrmann never once testified this particular activity report had been falsified. Additionally, the State never disclosed to the defense Herrmann had falsified this particular report, although there were others he had allegedly falsified. Nonetheless, on his second day on the witness stand, as counsel for KT cross-examined him, Herrmann testified for the first time he had falsified his February 3, 2008 daily activity report.

Counsel for KT immediately asked for a recess to address the court out of the presence of the jurors. Counsel argued this was the first time he had heard any assertion of the report having been falsified. The defense, in preparing for the trial, had a right to know everything that was falsified by Herrmann prior to learning it for the first time on cross examination. Counsel again moved for a mistrial, arguing if the State knew the daily activity report was falsified, it should have disclosed such to the defense. He argued:

> When Officer Al-Ayoubi puts down that he responded to the accident, I assume that he responded to the accident. When [Herrmann] doesn't put anything about responding to the accident and instead puts that he was somewhere else at the same time, we could have saved a lot of trouble with this witness if somebody [had said] . . . don't even waste your time, because it's false. But, again, we don't get that information before trial. We don't get that information before the witness testifies.
>
> [9T 141:2-13.]

The prosecutor's response to the argument was, "[I]t's a silly argument." 9T 139:18-19. He continued, it was obvious the report was falsified, since the defense knew of Herrmann's prior statements in which he claimed to have been at the scene of the accident: "Obviously it has to be false. I mean, how could it not be? And he's testified that he's falsified things in order to cover it up. As have other witnesses." 9T 142:3-6.

Counsel for Zisa responded, based on the timeline in which the parties received discovery and when certain disclosures were made,[32] it was either (a) unlikely the State knew this report had been falsified; or (b) the State knew it had been falsified, and failed to disclose it. Counsel noted in light of the Herrmann's immunity agreement, it didn't seem to matter whether he was lying. Instead, it was allowing him to rehabilitate himself by simply testifying that he had falsified this document as well as several others.

Counsel argued the case was becoming akin to a witch trial, where no matter what the witness says, the witness will not be wrong because it's the fault of the person on trial. Counsel continued, the witness should not be permitted to "wiggle out" of his contradictory statements, with the State giving him immunity.

The prosecutor, when asked to comment, replied:

> I repeat what I said earlier. It's a silly argument.
> [. . .]
> They've had discovery in this case, an enormous amount of discovery. Where under oath, on at least three occasions, Officer Herrmann has described that he was at the scene of the accident. Chief Zisa came up, said what he said, and they covered up this as a result of that . . . . They know that he's not going to be prosecuted for that. They know that that's inconsistent with other discovery that [they were] given where he didn't include being at the DWI scene covering it up. What's so hard to figure out? Either he lied under oath three times and was never at the DWI scene or he didn't include that in his daily activity report, which they have, where he didn't include it.

[9T 146:8 – 147:12.]

The court noted the defense was concerned whether Herrmann lied in his three previous statements, or whether he lied to the jury, he was going to be immune because of the unwritten agreement: "So he is immune whether he lied before, lied to you or lied to the jury." 9T 147:16-

[32] It appears evidence of the domestic violence arrest did not come to light until just prior to trial, when both the defense and the State subpoenaed the domestic violence arrest report on the same day. Thus, for the witness to claim the State knew about it raised serious implications: either the State knew and did not disclose it, or the State did not know and the witness was lying on the stand. See 9T 142:14 – 146:6.

17. The prosecutor responded Herrmann was immune if "he tells the truth to the jury," and further stated "I believe [he] was truthful and he was at the scene." 9T 147:18-22. The following colloquy then took place:

THE COURT:	The concern is, Mr. Keitel, you're stating to this court that everything this witness said to you is the truth, and they're saying everything he said to you is a lie. So the ultimate decision, of course, is for the jury to determine.
MR. KEITEL:	It is.
THE COURT:	Based upon the facts. But you're making a strong argument everything he said was truthful, and they're saying everything he said was a lie.
MR. MEEHAN:	Everything is truthful except for the lies. And we're supposed to guess at what they are as we go through this process here.
THE COURT:	We need to move this process ahead. There's no immunity agreement, correct; nothing in writing as to what he's immune from?
MR. KEITEL:	No. One condition: tell the truth when you get up there.
MR. MEEHAN:	So self-serving. So ridiculous.
MS. PREZIOSO:	Your Honor, we don't know that. We don't know who's the arbitrator of what the truth is . . . . But it is disconcerting that I know I got the information on [domestic violence matter] the same day as the State, and in a normal course . . . if a prosecutor comes across something that's this conflicting, they're either going to take a statement from the witness and find out what's going on here, why does this conflict, or they're going to convince themselves that this witness cannot possibly be telling the truth.

[9T 148:7 – 149:11.]

Counsel for KT continued arguing, if the State knew this in advance, then its failure to disclose it is a violation of the discovery rules. He reiterated, this made his argument for a mistrial even stronger, as the case had "devolved into a circus," where the defense was finding things out as they went along. Counsel urged the court to have a hearing with Herrmann so the defense could determine when he disclosed for the first time, and to whom he disclosed it, that his report was falsified. The court expressed its concerns:

> The court's more concerned with the State putting a witness on the stand who maybe was not fully investigated as to where he was that whole time, since his report says he was investigating a domestic violence report. He's under oath and he may not be telling the truth. We have no way of knowing that other than that the State says he's truthful.
>
> [9T 152:2-8.]

The prosecutor responded it was the jury's task to determine the witness's credibility, to which the court replied, "So it doesn't really matter to the State that you have called a witness that may be not telling the truth under oath? That's not a concern to the State, you're saying? Let the jury make the determination?" 9T 152:12-16. The prosecutor responded to him, there was no question; he believed the witness was telling the truth.

It appears the court did not rule on the mistrial motion, as it postponed doing so until after the jury was gone for the day; however, the record indicates the matter was not addressed at the conclusion of the day. The court ruled it did not find a discovery violation, though it expressed its concerns as to the issues raised and the comments made by both the prosecutor and KT's counsel.

vii. Fifth Motion for Mistrial

On April 18, 2012, Officer Laura Campos began her testimony. When the prosecutor had nearly reached the end of his direct examination, he asked Campos where she was currently assigned. She answered she was on modified duty in traffic, "pending an involuntary disability application that the City of Hackensack and Captain Padilla have submitted on my behalf." 10T 125:18-20. The prosecutor then approached the witness with a document he was about to introduce into evidence: a letter from the City of Hackensack advising Campos the city filed an application for her disability retirement as of April 1, 2012. Before he continued, counsel for Zisa objected, and after a brief sidebar, the court excused the jury to hear the parties.

Outside the presence of the jury, the defense again renewed its application for a mistrial, this time, based on the prosecutor "knowingly and intentionally circumvent[ing] the court's ruling." 10T 137:19-20.

The prosecutor responded the attorneys did not object to his questioning Campos about her current status, and only objected once he tried to introduce the document. He argued:

> There wasn't an objection when I asked what is your current status. There was no objection. There's two attorneys sitting there. They're capable attorneys. If they thought it was a dangerous area, they could have objected. I thought she was going to say modified duty, which she did say modified duty, but elaborated.
>
> [10T 142:5-12.]

The prosecutor continued to argue he did not elicit Campos' testimony regarding her involuntary disability. He further submitted the question he asked of Campos was proper, and the defense should have objected to the question if either attorney thought there was anything improper about it.

Counsel for KT asked the court what the relevance of the prosecutor's question was, to which the prosecutor replied, all officers take the stand and testify as to how much time they have served in law enforcement, where they are currently assigned, and what their current rank is. The court denied the motion for mistrial, finding what had happened was neither substantial nor significant.

Counsel for KT urged the court to investigate the relevance of eliciting such testimony. He then asked the court whether it considered testimony about Campos' involuntary disability evidence of other crimes the court had previously ruled would be inadmissible, to which the court replied it did. Counsel then requested the court hear a more detailed motion for mistrial at a later time, which the court heard the following day.

On April 19, 2012, at the conclusion of the day's testimony, the court began to address the defense's motion for a mistrial. The court first clarified its 404(b) ruling that any evidence or testimony regarding the witnesses' personnel issues was off limits; however, the court expected the defense may have wanted to question the witnesses a bit in that area, otherwise all the jury would have on the subject was the prosecutor's position in his opening statement.

Counsel for KT stated he would read from the transcript of the prosecutor's opening statement, and there was some colloquy regarding whether the prosecutor had received a copy of the transcript, which he had not. Zisa's counsel offered to provide the prosecutor with a copy of the rough transcript the following day. The prosecutor argued it was the defense's obligation, when making the most basic of motions, to supply a copy of the transcript at issue to everyone so that all parties and the court are working off the exact same words. He continued:

> In a case of this magnitude, what I've had to hear for weeks now is, Mr. Keitel said this, Mr. Keitel said that. People are standing up making representations, without even any remote reference to where in the transcript it is.
> [. . .]
> In the absence of a motion, it's not their obligation. But to stand up and wing – which is what's happened. That's why I asked what number mistrial motion this is, because nearly every day it seems like there's one. And each day I'm quoted as saying something different. But it's not quotes where they're pulled out of a record. It's somebody paraphrasing what they think I said. That's not the appropriate way to address something as heavy in magnitude as a motion for a mistrial. It should be in writing. People should brief them. People should attach transcripts and pull out exact language. And not once has that been done yet.[33]

[11T 152:5 – 153:2.]

KT's counsel proceeded to read excerpts of the prosecutor's opening statement into the record and then recounted what had happened since the opening statement. Counsel reiterated his disagreement with the court's curative instruction and restated his position that the statements

[33] Zisa's counsel noted her disagreement with the prosecutor, stating not once, in any trial with a motion for mistrial, has there been a requirement to have the transcripts available.

made during opening were highly inflammatory, prejudicial, inappropriate and a complete surprise to everyone. He then continued:

> So what happens? The Court's placed in a position where it either has to grant a mistrial, and [consider that] double jeopardy could arise because the prosecutor brought this about by circumventing the Court's pretrial rulings in this matter and going to other crimes evidence knowing – I say that the prosecutor knew. Any prosecutor would know. You don't bring up other crimes evidence in an opening statement unless the evidence has been vetted pretrial and rulings have been made that it's relevant, that it's probative, that it's proven by clear and convincing evidence. All the Cofield tests, which the Court has said now were never met.
>
> [11T 167:14 – 168:2.]

Counsel summarized the prosecutor's rationale for his opening statement as follows: (1) the IA investigations spoke to the witnesses' credibility; (2) the alleged witness tampering did not constitute 404(b) evidence; and, (3) because the defense sought the IA investigation records during discovery, he reasoned he could comment on his theory that Zisa's alleged witness tampering gave rise to those internal affairs investigations.

During all the pretrial motions, the prosecutor never once mentioned he intended to bring in such evidence and never once requested a 404(b) hearing. Counsel questioned how the prosecutor could possibly have gone into trial not knowing the prejudicial impact and the inadmissibility of his comments during his opening. Nonetheless, the trial continued, and nearly two weeks after the opening, the court issued a 404(b) ruling that the comments made during the State's opening, Arosemowicz's lengthy testimony regarding his IA investigations should not have made their way into trial.

Two days after the 404(b) ruling, Campos was testifying for the State when the prosecutor asked her what her current status was. Counsel continued:

> [A]nd he still brings it up, in total contravention of the court's ruling two days earlier, and then the excuse is well, I wasn't expecting her to say that. I asked three times that he state what the relevance of that testimony was. And he finally said

> something to the effect that, well, we ask all police officers [. . .] what their titles are, [. . .] how many years they've been on the force . . . . Well, she had said that, judge. That was like the second question she was asked. Started with the [HPD] in 2002. Been on patrol since 2004 . . . . But then three-quarters of the way through, we hear about the fact that she's being run out of the department for some reason . . . . [The prosecutor] already told [the jurors] they're going to be shocked about what they're going to hear twice. Maybe that stuck in their heads from two weeks ago . . . . [A]nd the very next question, the very next question is going to be to have [Campos] identify this letter from the City of Hackensack on March 8, 2012, to Laura Campos. 'Disability retirement. This letter is to confirm that on March 1, 2012, the city has filed an application for disability retirement as of April 1, 2012.' Where in the world is he going with that question, or that document? What relevance could that possibly have to whether or not this woman was a police officer?
>
> [11T 175:15 – 177:3.]

KT's counsel continued to argue in his long career as a trial attorney, he knows when something is not right, and something was clearly not right in this case. He noted the court had been put in a terrible position, and the prosecutor just continued to push the limits, in flagrant disregard of the court's 404(b) ruling. Counsel argued the prosecutor's actions were intentional:

> How does that happen? That's just a mistake? That just was a blurt-out followed by a reference to a letter which, you know, seals the deal that she's being run out of the department by the City of Hackensack? That wasn't a mistake, Judge. It was calculated. I submit that opening statement was calculated. Mr. Keitel has been doing this far too long not to know that you have to vet that kind of evidence. Even if it's a question of whether or not it's other crimes evidence. He doesn't get to determine that. So we're left here with this fiasco.
> [. . .]
> But that's the reason you do these things before trial; so people can get an idea of what it's about. We had no clue where we were going . . . . And we're thinking, [] let's see if we can salvage something at this point in the trial. Because, again, we don't want to lose this jury. We like the way this case is going for us.
> But, nonetheless, Judge, this was so inappropriate that the Court, I feel, has no other choice. Because . . . as your Honor said the other day, a 404(b) is the reason more cases get reversed than anything else. And that's after a Court has vetted the evidence. [Imagine] what an appellate court is going to say when they look at a situation where the prosecutor on his own decided to bring it up and just left the court to pick up the pieces. It isn't right.
>
> [11T 177:14 – 180:7.]

The court responded by asking "Are you almost insinuating the prosecutor is doing that purposely to get a mistrial?" 11T 180:8-9. KT's counsel replied:

> I have thought long and hard about that. I really have. I can't believe that Mr. Keitel was that oblivious or that unknowledgeable about the rules of evidence. He's been doing this long enough to know that you don't do this kind of thing. You just don't do it. There's no question . . . . So I have no other choice but to believe that.
>
> [11T 180:10-23.]

Zisa's counsel next stated her position, first noting while she joined the motion for mistrial, she was not asking for a defendant's mistrial, but rather a court-ordered mistrial. Counsel agreed wholeheartedly with KT's counsel that she, too, was happy with the jury. Finally, she addressed whether the prosecutor's conduct was intentional:

> When there's an intent element to prove before the jury, the standard argument is, you can't see into somebody's mind. You have to look at the circumstances and facts surrounding it. And your Honor just asked Mr. Meehan if he thought was Mr. Keitel did was purposeful.
> If we look to the circumstances here, your Honor couldn't have been more clear that the State was not to go into this anymore. And while [ ] the question to Officer Campos was, what was your status, I would remind the Court . . . that the rank of police officer isn't a status, it's a rank. And that had been elicited already. And when she said that she's pending an involuntary disability, Mr. Keitel already has in his hand the document he was seeking to introduce, which wasn't about any fact in the indictment. It was about Laura Campos's hearing for her involuntary – alleged involuntary retirement.
> So, your Honor, I would ask the Court to consider those facts and circumstances when you're determining whether this was a purposeful, intentional act on the part of the state.
> [. . .]
> And, your Honor, if we look at what's taken place here – I'm not the jury. I'm not the arbitrator of facts . . . . But the four main witnesses that [the State] has called . . . I would describe their testimony as train wrecks for the State.
> [. . .]
> I think almost any prosecutor in the State outside of this county having access to the information that came from the stand, having access to the discovery, your Honor, because that's what I've used to cross examine them, wouldn't even have brought this case to trial. So when you combine the lack of scrutiny that this prosecutor's office has given this evidence and the presentation that's gone on and the hijinks with the opening and then going back to it yesterday as a reminder to

just ring that bell again, I think the Court has been put in a position by the State where it has no choice.

[11T 183:22 – 185:21.]

The court asked the prosecutor for a response, and he began first by pointing out, "both defendants absolutely love this jury. Both defendants think the State's main witnesses are train wrecks. Both defendants as a result of that are asking for a mistrial. That tells you all you need to know about how confident they are in what this jury may do." 11T 186:23 – 187:2. The prosecutor then addressed approaching Campos with the letter, arguing the court had released it after an *in camera* review. The prosecutor asserted the IA investigations records did not constitute other crimes evidence under N.J.R.E. 404(b); rather, they were offered to prove bias, interest and credibility. The prosecutor continued arguing the defense sought these materials for months, filing motion after motion to release them, and then acted surprised when the materials made their way into trial:

MR. KEITEL: The matters were litigated to death. And then your Honor gets up here and says, gee, this should have all been decided pretrial. It was all decided pretrial by two court orders from Judge Jerejian and one from you on March 19, 2012. One week before my opening, when you released a whole flood of this material. With an instruction that it could only be used in this trial. That's where it was used, in this trial. We're supposed to then have within one week of trial a whole series of hearings as to whether it can be used when you just released it to the State and to defense to use in this trial. It's unbelievable that we're standing here discussing that instead of discussing how unconscionable it has been in this case to put witnesses who witnesses something and did something more than want to come before a court and tell what they witnessed. And two of them – Arosemowicz is out of a job as a result of that; for seeing what he saw for eight minutes. The guy got canned from the sheriff's department.

THE COURT: Your argument never changes.

MR. KEITEL: Why would it change?

THE COURT: You never tied in Zisa or [KT] as to what happened to the sheriff's officer.

MR. KEITEL: First of all, you've never allowed me to do that, because you shut me down.

THE COURT: You can prove that Zisa had him fired? Is that what you're saying?

MR. KEITEL: I can prove enough connections to show. You wouldn't let me. And you're the one who said, have Mickey Bradley drive over the IA files. Sarcastic? Do you know Mickey Bradley?

THE COURT: I don't know Mickey Bradley.

MR. KEITEL: You know Susan Bradley?

THE COURT: She worked for me six years ago, like everyone else in this courtroom did. I'm not on trial, so please –

MR. KEITEL: I'm not either.

THE COURT: -- make your comments pertaining to the motion to dismiss this matter.

MR. KEITEL: My comment is that in [twenty-five] years of practice and [sixteen] as an assistant prosecutor, I've never, ever observed anything close to what's happened to witnesses in this case. The level of witness tampering and intimidation has reached far beyond anything I've ever imagined.

[. . .]

THE COURT: I don't know how many times I have reminded the State that the only two people that are on trial is what the State should be proving; not tampering with witnesses, not other crimes. All the thought you have that they're been involved with this, there's no evidence presented to the court.

MR. KEITEL: There's a lot of evidence. You won't let it in. And that's your decision. But when Mr. Meehan read that opening, I never said Mr. Zisa intimidated these witnesses. I said, Eric Arosemowicz got packaged, which he did get packaged. I didn't tie – that's so that when he takes the stand and tells how he went through three IAs and a perjury investigation, they understand why . . . . Mr. Meehan the other day repeated, he keeps tying us to Mr. Zisa. You heard his – a good chunk of my opening read word for word. And I sat there and listened to it, and there wasn't one word that said Mr. Zisa intimidated these witnesses.

[. . .]

What I'm saying is, what you hear from these witnesses, yeah, the credibility is going to be questions, because they got packaged. That's exactly what happened. For this to be turned around like I did something is a disgrace. This case probably should have been tried by the feds and should have been tried as a racketeer influence in a corrupt organization

> case, because it was too big to try in Hackensack, in Bergen County, before a judge who knows the court person and the court team leader and everybody knows everybody and jokes are made about who's driving the IA files over.

[11T 190:16 – 195:21.]

Following the prosecutor's argument, Zisa's counsel clarified for the record that while the defense indeed sought the IA files, it had been the prosecutor who insisted on an *in camera* review. What the prosecutor left out of his argument was that most of what he mentioned in his opening had not been made available to the defense. Finally, the prosecutor's statement that the case should have been tried by the federal government and should have been racketeering further clarifies he was trying to introduce other crimes evidence.

Following a recess, the court ruled on the motion for mistrial:

> We're faced again with a request by the defense for a mistrial. And the defense has said quite a few times, I actually like this jury. But they're requesting a mistrial. A mistrial means that if there is not double jeopardy here, then we start all over again. The State has, obviously, based upon the State's comments, Mr. Keitel has made this more personal than it is a legal matter. And the Court cannot accept personal attacks on the Court just because of Mr. Keitel's feelings. This Court needs to make a decision based upon the law and the evidence, and the rules of evidence and the court rules.
> Granting a mistrial is a very serious, dramatic matter to do, especially when a trial has had this much preparation by all sides. As I said in the beginning, the opening statement by Mr. Keitel put this Court in a little bit of a surprise based upon what appears to be bias or statements that other people are interfering with his witnesses. I denied those mistrial applications, and I made an opinion based upon the fact that any future witnesses that were testifying after Arosemowicz would be 404(b)-type evidence, and they cannot come in.
> It appears that Mr. Keitel's witnesses, even though this Court has instructed him to personally prepare them for trial, are very determined to get information out that's inappropriate for this trial. They want to seem to try their own personal matter, notwithstanding what they're called to testify for. I numerous times instructed them, this is not their trial, this is not a civil trial. This is a trial pertaining to the indictment against Mr. Zisa and [KT] . . . . Unfortunately, Ms. Campos went off into an area that was part of my original ruling as to her status as a police officer. That was not appropriate. I did instruct the jury and I will instruct them again. It did not raise the level, based on Mr. Meehan's argument, that this should be another

request for a mistrial . . . . This does not raise itself to a mistrial, and your motion for mistrial is denied.

[11T 200:25 – 204:12.]

d. Verdict & Post-Trial Motions

At the conclusion of the trial, the jury acquitted defendant of official misconduct by affirmatively interfering in the 2004 juvenile case, both counts of conspiracy in the 2004 and 2008 incidents, and tampering with witness John Herrmann. The jury convicted defendant of official misconduct for failing to recuse himself from the 2004 incident, insurance fraud, both counts of official misconduct with respect to the 2008 incident, and of engaging in a pattern of official misconduct.

The trial judge later acquitted defendant NOV on the remaining count of official misconduct for the 2004 incident, one of the counts of official misconduct for the 2008 incident, and engaging in a pattern of official misconduct for both the 2004 and 2008 incidents. Finally, the judge let stand defendant's conviction on one count of 2008-related official misconduct for affirmatively interfering in the investigation, and one count of 2008-related insurance fraud.

e. Appeal

Defendant filed his notice of appeal on October 2, 2012. In his moving papers, defendant raised nine points:

POINT I – The prosecutor's opening statement violated fundamental constraints against prosecutorial excess by arguing, without any factual basis, that defendant Zisa had tampered with the law enforcement witnesses against him and worse, made the claim without providing the court or counsel with prior notice that he intended to make Zisa's propensity to abuse his official position the centerpiece of his opening.

POINT II – The court committed reversible error, when, instead of correctly answering "no" to the jury's deliberation question of whether the "oath of office constituted a ministerial duty," it told them it was a question of fact to be determined under its prior instruction defining a ministerial act, which it was not, thereby effectively directing a verdict of guilt in violation of defendant's right to due process and a fair trial. U.S. Const. Amend. XIV; N.J. Const. (1947) Art. I, Pars 1, 9, 10.

POINT III – The defendant's conviction on count twelve for insurance fraud must be set aside because the prosecution, having provided no evidence that payment of the damage claim could or even would be denied because of evidence of intoxication, failed to show the required element of materiality necessary for conviction.

POINT IV – The conviction on count nine should be reversed because the evidence was insufficient to establish Zisa's knowledge either that a sobriety test had not already been conducted on KT or that one was intended to be conducted.

POINT V – The prosecutor's misrepresentations to the court and counsel that witness interview notes had not been destroyed, when in fact they were ordered destroyed by the prosecutor's chief investigator, working under his immediate supervision, was a violation of a clear legal responsibility, an unprecedented betrayal to the administration of justice, and a violation of the appellant Zisa's due process right to a fair trial; his convictions should be reversed and the indictment dismissed.

POINT VI – The so-called "just tell the truth" immunity agreements between the prosecutor and his witnesses served to deprive Zisa of a fair trial.

POINT VII – The inclusion in the indictment of the 2004 charges was for the sole purpose of clothing in apparent respectability what amounted to nothing less than the prosecutor's knowing

endorsement of Laura Campos' perjury testimony thereby enabling him to parade before the jury forbidden "other crimes" evidence; the 2004 charges should have been severed by the court once Campos had been conclusively demonstrated by the defense to be a perjurer.

POINT VIII – Should the court not find reversible error in any one point advanced, the cumulative errors in the case require reversal.

POINT IX – Should a new trial be ordered by the court, the order of remand should require the trial court to first determine whether the double jeopardy clause protects the defendant from a retrial.

In its cross-appeal, the State presented one point of argument: The trial court erred when it usurped the jury's function and overturned the guilty verdicts on counts three, ten, and thirteen.

On January 27, 2016, the Appellate Division rendered its decision affirming the order granting a judgment of acquittal NOV on defendant's conviction on two counts of official misconduct under N.J.S.A. 2C:30-2(b). They reversed defendant's conviction for insurance fraud, and directed the court on remand to enter a judgment of acquittal on that count.

Further, it reversed defendant's conviction for official misconduct in violation of N.J.S.A. 2C:30-2(a), and remanded for retrial on that count. The court noted, prior to the retrial, defendant was permitted to present to the trial court his argument that a retrial is barred by double jeopardy principles. In making this statement, the Appellate Division was clear it intimated no view on the merits of that argument.

In reaching its conclusions, the court noted the various improprieties relevant to defendant's pending motion. Initially, the court noted the prosecutor began by giving the jury extensive inadmissible information about defendant's family and their political activities culminating in the statement that defendant's family was like royalty. "All of those comments

were improper and prejudicial. Defendant was not on trial for being politically connected, and his family was not on trial." Zisa, supra at *12. The court noted the prosecutor proceeded by setting forth "a litany of alleged bad acts, all of which were inadmissible under N.J.R.E. 404(b) and were highly prejudicial." Ibid. (citing State v. Cofield, 127 N.J. 328, 336 (1992)).

The list of bad acts the prosecutor alleged in his opening statement include repeatedly accusing defendant of attempting to intimidate witnesses and fomenting administrative reprisals again them; injecting accusations that defendant tampered with several other witnesses and implied that defendant abused his office by arranging for unjustified administrative disciplinary actions to be filed against trial witnesses; and making unfavorable, inappropriate comments about an attorney who was representing defendant in a civil matter filed by several of the State's witnesses and posited that the attorney arranged with a high-ranking officer in the sheriff's department to have disciplinary charges filed against Arosemowicz.

The court went on to say:

> Those astonishingly improper remarks were not brief or made in passing. They were central themes of the prosecutor's opening, and comprised many pages of transcript. Although at some point during this prosecutorial tirade defense counsel objected, the judge did not intervene. Moreover, the jury was permitted to go home shortly after the prosecutor finished his opening, without being given any curative instructions.
>
> [Zisa, supra at *14.]

The Appellate Division characterized the trial court's curative instruction the day after the opening statement as being "weak and inadequate to cleanse the taint the prosecutor created in his opening". Zisa, supra at *19 (quoting Frost, supra 158 N.J. at 87-87). The Appellate Division cited numerous flaws in the judge's instruction, finding it woefully inadequate. It noted with particularity that "[i]t is well understood that 'other-crimes evidence should not be admitted solely to bolster the credibility of a witness against a defendant.'" Zisa, supra at *21 (quoting State v.

P.S., 202 N.J. 232, 256 (2010)). On this issue, the court held "The prosecutor's comments aimed at bolstering the credibility of the State's witnesses, and inferring that defendant must be guilty of the charged crimes because of his propensity to abuse his office were 'clearly and unmistakably improper' and had the clear capacity to produce an unjust result." Zisa, supra at *21 (internal citation omitted).

The Appellate Division expressed its disapproval for the trial court's response, stating "the trial court's ineffective response to the improprieties added to the unfairness of the trial." Ibid. The court continued:

> To make matters worse, the prosecutor persisted in presenting the same type of prejudicial and improper evidence during the trial, requiring defense counsel to respond to it by attempting to show that no witness-tampering had occurred. The judge acknowledged that the trial was going off-course, but failed to take effective corrective action.
>
> [Id. at *22.]

The court also held the judge's closing instructions, coming at the end of a several week trial were too little, too late. The Appellate Division then concluded it must reverse defendant's conviction, and in closing stated, "Lastly, we remind all concerned that 'the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.' We trust that the improprieties noted herein will not recur on remand." Zisa, supra at *39 (quoting Frost, supra 158 N.J. at 83 (1999)).

IV. The Instant Motion

On November 25, 2015, Zisa filed the instant motion to dismiss the indictment on the grounds of double jeopardy and fundamental fairness.

a. Defendant's Arguments

Defendant presented an elaborate argument addressing two issues: (1) The remaining count against defendant must be dismissed, as there was a violation of his constitutional rights against double jeopardy; and (2) The doctrine of fundamental fairness requires the remaining count to be dismissed.

i. *POINT ONE: Retrial of the Remaining Count for Official Misconduct in Violation of N.J.S.A. 2c:30-2(a) against Mr. Zisa Violates his Constitutional Right Against Double Jeopardy*

Relying primarily on the seminal case regarding double jeopardy and mistrials, Oregon v. Kennedy, 456 U.S. 667 (1982) and its progeny, defendant avers he must not be subjected to another trial on the sole remaining count against him for official misconduct when evaluating the case by applying the four factors in determining whether a prosecutor intended a mistrial. State v. Torres, 328 N.J. Super. 77 (App. Div. 2000). The factors include:

> (1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial;
> (2) whether the prosecutor resisted the motion for a mistrial;
> (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial; and
> (4) the timing of the error
>
> [Id. at 88.]

Defendant avers it is irrelevant that one of the factors does not apply in the instant matter. "The necessary inquiry is whether the objective facts and circumstances of the case tend to support or negate an inference that the State provoked a defense request for mistrial." State v. Martin, 2011 WL 2582531, at *4 (App. Div. July 1, 2011)(quoting Kennedy and Torres). Here, the remaining three factors support a finding that a second trial is barred by principles of double jeopardy.

1. *The Sequence of Mr. Keitel's Conduct Weighs Heavily in Favor of Finding Intent*

Defendant claims the assistant prosecutor's conduct was not one act; rather, it was an intentional sequence of prejudicial misconduct. Indeed, the Appellate Division agreed, finding the prosecutor's opening statement "was riddled with impropriety." Zisa, supra at *12. This theme and conduct continued even to the closing arguments, where the prosecutor tangentially referred to Zisa and his family as dictators and kings in his summation.

Defendant notes as the trial progressed, the prosecutor set forth a litany of inadmissible alleged bad acts and injected accusations that defendant tampered with several State witnesses. The prosecutor implied defendant abused his office by arranging for unjustified administrative disciplinary actions to be filed against trial witnesses. These references to administrative proceedings were improper and not relevant to the issues at trial.

Further, the prosecutor made unfavorable, inappropriate comments about defendant's civil attorney who was representing him in a civil litigation filed by several of the State's witnesses. He suggested there was an omnibus conspiracy among various county and municipal law enforcement agencies to assist defendant in thwarting the prosecution.

Defendant argues the prosecutor's conduct continued throughout the trial, in spite of the Judge's repeated admonishments to cease. In sum, defendant urges the prosecutor's inappropriate conduct throughout the trial can leave no doubt but that he intended to goad defendant into seeking a mistrial from the outset.

2. *Mr. Keitel's Failure to Comprehensively Argue Against a Mistrial Weighs in Favor of Finding Intent*

Defendant additionally agues the second Torres factor, whether the prosecutor resisted the motion for a mistrial, is readily identified in the case at hand. Here, the record is replete with various motions for mistrial and rather than resist the motions, the prosecutor repeatedly failed to

wage an argument against them. Rather, his responses included mocking the request, using the opportunity to repeat the allegations made in his opening statement, and launching into attacks on the judge's conduct and impartiality. Zisa first raised the issue of mistrial immediately after the prosecutor made his opening statement. The prosecutor's response was simply, "I don't see what the issue is," and "This is much ado about nothing."

As the trial progressed, there were any number of requests for a mistrial, to which the prosecutor, rather than opposing, replied most often with non-sequiturs. As noted by defendant, the record is replete with numerous instances in which he requested a mistrial but rather than strenuously object, Keitel sidelined the issue, not addressing it squarely. Thus, the court can have no other conclusion but that the prosecutor did not resist mistrial.

3. *The Timing of Mr. Keitel's Misconduct Weighs in Favor of Finding Intent*

Defendant argues the prosecutor knew coming into the trial, he had significant weaknesses with the case and therefore, from the trial's onset, he attempted to goad defendant into seeking a mistrial, thus fulfilling the last Torres factor. The State knew from the outset that recent developments would make it highly unlikely it would prevail in this high profile case. Thus, the prosecutor set out to purposefully cause a mistrial allowing the opportunity to blame the outcome on the judge, whose action he would be able to publicly disagree with.

Defendant claims the Bergen County Prosecutor's Office must have feared the following facts, among others, from being exposed:

- The purposeful destruction of investigators' notes upon the order of the supervising investigator;
- The direct involvement in the case by the County Prosecutor who had publicly recused himself;
- Illegal immunity deals which had been struck with the key witnesses;

- Testimony of their own investigators as to the malice upon which this prosecution was based;

- The dismissal of an administrative proceeding to terminate an officer who had tested positive for illegal drugs, thus rewarding a witness for his testimony;

- Failing to acknowledge the untruthfulness of the key witness to the 2004 allegations, and remaining silent as to that fact while it had objected to a severance motion; and

- Prosecuting a police chief and life-long public servant, based on a stunning lack or complete absence of physical and documentary evidence.

Indeed, as the case unfolded, these issues came to light. Further, as noted by the Appellate Division, the State's case hinged on the credibility of its witnesses. Yet, the record is replete with credibility issues in connection with most of its key witnesses, including Campos, Arosemowicz, Hermann, and Al-Ayoubi.

Thus, it is undisputable the prosecutor had a significant motive for goading a mistrial even from its beginning.

4. *The Objective Evidence of Mr. Keitel's Sequence of Misconduct and the Context of Mr. Zisa's Trial Makes His Motion Uniquely Suited for Application of the Double Jeopardy Clause to Bar His Retrial*

Zisa's argument with respect to double jeopardy focuses on his belief his situation is so unique, it warrants application of the Kennedy doctrine and therefore, a retrial should not be conducted on the remaining count. In support of this argument, defendant claims his case has met three of the four Torres factors. What's more, all of the evidence demonstrates the prosecutor intentionally goaded a mistrial. Zisa contrasts both federal and New Jersey caselaw to highlight his argument, noting the majority of the cases do not include even one of the Torres factors evidencing the required prosecutorial intent. See e.g., State v. Sullivan, 2010 WL 537651, at *3 (App. Div. Nov. 18, 2010.)("because the Torres factors weigh heavily against defendant's argument on appeal, we affirm."; State v. Hix 2009 WL 1491398, at *2 (App. Div. May 29,

2009)(no Torres factor present, "There is nothing in the record to indicate that the prosecutor suborned Flatley's response or that she had any reason to do so. Nor is there anything in the record to indicate prosecutorial 'bad faith' or 'overreaching.'"); Torres, supra, 328 N.J. Super. at 88-89 ("Applying these standards, we find nothing in the record to support the conclusion that the assistant prosecutor intentionally goaded defendant into requesting a mistrial.")

Defendant notes the case, State v. Young, 2008 WL 794459, at *4-6 (App. Div. Mar. 27, 2008), provides an instructive example. It appears to be one of the only, if not the only, case where at first glance, the first Torres factor, requiring a "sequence of overreaching or error," was present. There, the prosecutor made a number of what the court described as "errors," which led to a mistrial, including: mischaracterizing anticipated testimony during her opening statement; asking leading questions on direct of testifying officer that alluded to facts not in evidence; and failing to ensure that a testifying detective would not testify to non-admissible evidence. Id. Nevertheless, the Appellate Division affirmed the trial court's finding that none of the four Torres factors evidenced the requisite intent on the part of the prosecutor to goad the defendant into seeking a mistrial. Thus, the court properly declined to grant a mistrial.

The Young court went through each of the four Torres factors and held that, individually and collectively, they did not evidence any intent by the prosecutor to goad the defendant into seeking a mistrial. First, the court found that, although the prosecutor made more than one transgression, they amounted to innocent mistakes that evidenced merely a lack of preparation. Ibid. Second, the court recognized the prosecutor "was actively arguing and defending her position with regard to the errors she was found to have made." Ibid. Third, the Appellate Division credited the trial court's finding, upon hearing oral argument, that the mistrial was the result of inadequate preparation rather than an intentional scheme. Ibid. Finally, the Appellate Division held there was

no motive with regard to the timing or context of the trial that could evidence intent on the part of the prosecutor to goad a mistrial. Id.

Defendant contrasts the situation in his matter, noting the facts of this case are distinguishable on each Torres factor:

> 1. The sequence of transgressions committed by Mr. Keitel were not the consequences of lack of preparation or innocent mistakes. AP Keitel's actions were planned and calculated, as evidenced by the exhaustive pretrial litigation.
>
> 2. Mr. Keitel did not offer comprehensive or even reasonably colorable argument against Mr. Zisa's various motions for a mistrial.
>
> 3. The trial court did not make any immediate findings regarding application of double jeopardy and did not hear oral argument by Mr. Keitel regarding his intent. However, the trial transcript shows that counsel for both defendants asserted that his conduct was intentional.
>
> 4. The State had extensive negative exposure in a case that was reported widely in the media. Its witnesses were significantly discredited; it knew that evidence was destroyed and strategically decided to ignore that a key witness was lying. Mr. Zisa was vindicated on eight out of nine charges through the jury's verdict, the trial court's JNOV decision, and the Appellate Division's review.
>
> [Def. Br. at 55-56.]

Thus, these factors are relevant under the Kennedy decision, adopted in New Jersey, providing a narrow exception regarding application of the Double Jeopardy Clause when a defendant moves for mistrial. Defendant urges where all of these factors pointed to the intent to goad defendant into seeking a mistrial, the exception must be found and the Double Jeopardy Clause must bar retrial – or this constitutional protection is utterly meaningless and a defendant can be forced into seeking a mistrial by extreme and continuous misconduct by a prosecutor with no available remedy.

ii. *POINT TWO: The Doctrine of Fundamental Fairness Precludes Retrial of Mr. Zisa on the Remaining Count for Official Misconduct in Violation of N.J.S.A. 2C:30-2(a) and Mandates Dismissal of the Indictment*

Along with his argument regarding double jeopardy, defendant urges the remaining count against him should be dismissed based upon the doctrine of fundamental fairness.

1. *Fundamental Fairness Concerns Weigh in Favor of Dismissal*

Relying on caselaw, defendant claims this court should review what has occurred in this case to determine whether a retrial of the pending count would violate his right to fundamental fairness. He avers after such review, the court will find the State's case is weak, and, when combined with the State's purposeful actions from the outset, there cannot be any conclusion other than a bar to retrial due to the doctrine of fundamental fairness.

2. *Mr. Zisa Cannot Have Due Process in Light of the State's Destruction of Critical Evidence*

Defendant notes the BCPO detectives were ordered to destroy their notes after defense counsel specifically requested their preservation and production. The Appellate Court acknowledged the notes' destruction. See Zisa, supra at *7-8. Defendant points to State v. W.B., 205 N.J. 588 (2011) in which the court recognized as the basis for a directive issued by New Jersey's Attorney General in May 2011. The decision extended the preservation requirements already in effect.

Defendant notes Rule 3:13-3(c) provides the prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package including a wide array of documentation. As per the W.B. Court, the county prosecutor is the chief law enforcement office and it is incumbent upon his office to preserve its notes and other documentation. Contrary to the requirement to preserve the notes under the rule, the assistant prosecutor here elicited testimony at trial that falsely established the purposeful destruction of evidence was fine and aligned with the law. The Appellate Division determined that the denial of due process resulting from this action was not accidental and further, that the defendant could raise

the issue again on remand and could seek any relief that may be appropriate in light of the evidence at that time. Zisa, supra at *36.

In determining whether physical evidence that was suppressed, lost, or destroyed violates a defendant's right to due process, New Jersey Courts look to three factors: (1) whether there was bad faith or connivance by the government; (2) whether the evidence was sufficiently material to the defense; and (3) whether the defendant was prejudiced. See, State v. Hollander, 201 N.J. Super. 453, 479 (App. Div.), certify. denied, 101 N.J. 335 (1985)

a. The Notes Were Destroyed in Bad Faith

According to defendant, as explained by the United States Supreme Court, bad faith in instances of the preservation of evidence is demonstrated when "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Here, the testimony regarding the intentional destruction of the notes included the fact that the prosecutor was a witness to the events. The apparent animus against defendant in the prosecution cannot be denied. Thus, one can only assume the notes were destroyed in bad faith.

b. The Notes Are Material

Defendant argues in order for evidence to be material, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Hollander, supra 201 N.J. Super. at 479-80. Here, the officers' contemporaneous notes from the evening in 2008 comprise the only reliable evidence as to what transpired. The officers' credibility was severely damaged on cross examination, and as witnesses, they were shown to be wholly unreliable. Thus, according to defendant, there can be no question the officers' contemporaneous

notes as to what transpired when they came upon the scene was crucial, material evidence in establishing what they actually considered in coming to their conclusions.

c. Mr. Zisa is Hopelessly Prejudiced by the Destruction of the Notes

Defendant urges the intentional destruction of the notes cannot be remedied in a retrial. There is no adverse interest charge to the jury that could tell them what the notes actually said, or what promises were made to the investigator working for the attorney who was then representing two of the State's three key witnesses to the remaining count, and had already spoken to the third. Thus, he is irreparably prejudiced by the lack of the notes.

3. *Mr. Zisa's Retrial Would Continue the Egregious Deprivation that he Already Suffered*

Defendant argues his life has been in continual upheaval since his arrest more than five years ago. He has suffered emotional devastation including among other things, three years of confinement to his home; he cannot wear jewelry, and gets anxiety attacks from having had to wear an ankle bracelet continuously for three years; he has developed pain in his left leg, possibly as a consequence to the pressure from the bracelet; he was caused to sit next to an electrical outlet for over two hours daily to re-charge the ankle bracelet, thus exacerbating his depression; he was required to report weekly to probation where at times, he was mocked by other probationers; the local newspaper published a front page article about his home being in foreclosure; he was cut off from co-workers who were instructed not to communicate with him; and he was forced to resign as a 200 Club of Bergen County Trustee.

Defendant also suffered financial devastation since his salary from the City of Hackensack was terminated as of June 2010. Along with numerous other financial compromises, he paid hundreds of thousands of dollars in legal fees, owing even more; exhausted his life savings; has

lost paid appointments; has had to surrender his New Jersey real estate license; has lost potential employment opportunities; has had to pay for the ankle bracelet; has lost his credit worthiness; was forced to sell his shore house as well as a local tenant-occupied house; was forced to turn over a commercial property to the bank; and was caused to sell three personal vehicles at a loss.

4. *The Weaknesses of the State's Case Makes a Second Trial Government Harassment so that Fundamental Fairness Favors Dismissal*

Defendant avers from an evidentiary standpoint, and as noted by the Appellate Division, the State's case wholly lacks credibility. The weakness of the State's case going forward is relevant to the court's consideration of the fundamental fairness doctrine as it highlights the fundamental unfairness in making defendant undergo the trauma of a second trial. Further, the weakness of the State's case is also relevant because it evidences the abuse of the BCPO's discretion to pursue a second trial, which is another avenue by which this court may consider the doctrine of fundamental fairness.

5. *A Second Trial for the Remaining Count, in light of the State's Actions, Would be Malicious and in Violation of Fundamental Fairness*

Defendant urges the fundamental fairness doctrine mandates dismissal of the indictment with prejudice because it would constitute harassment to subject him both financially and emotionally to another trial. The State set out to manipulate the grand jury process as well as the trial in order to defeat him, not to pursue justice. According to defendant, the State's scheme was so obvious, the Appellate Division was forced to fiercely criticize the State's action in a scathing correction, stating, "we remind all concerned that 'the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.'" Zisa, supra at *39.

The Bergen County Prosecutor's ("BCPO") strategically combined the 2004 and 2008 allegations before the grand jury for one indictment. The State was attempting to create the illusion of guilt by marrying two terrible cases together, in hopes that the jury would speculate the defendant committed crimes despite the weakness of its evidence.

6. *This Court Has the Authority to Dismiss the Indictment for Abuse of Discretion*

Defendant also argues this court may consider application of the fundamental fairness doctrine from the perspective of whether the BCPO is abusing its discretion by pursuing a conviction on the remaining count. Defendant points the court to the analysis of the Abbati, court that held in the face of an abuse of discretion by the prosecutor, it is unquestionable the court has the authority to dismiss the indictment. As the court noted:

> Dismissal of an indictment has always been proper where a prosecutor has abused his discretion. Indeed, the prosecutor is a quasi-judicial officer. His or her duty is to seek justice; the duty is not merely to prosecute the guilty but to protect the innocent as well. Thus, the prosecutor's decision to reprosecute is not immune from judicial supersession even absent a finding of abuse of prosecutorial discretion.
>
> [State v. Abbati, 99 N.J. 418, 434 (1985)(internal citations omitted).]

Defendant avers BCPO's conduct is such an abuse of its discretion, the court should exercise its judicial power to prevent the case from going forward.

7. *Application of the Five* Abbati *Factors Weigh in Favor of Dismissal*

After acknowledging the court's power to dismiss an indictment, the Abbati court set out five guidelines for a court to consider in determining whether fundamental fairness may be violated, and a prosecutor's discretion abused. Defendant claims, although not completely applicable, Abbati's five-point analysis is instructive to the within case:

> We hold that a trial court may dismiss an indictment with prejudice after successive juries have failed to agree on a verdict when it determines that the chance of the

> State's obtaining a conviction upon further retrial is highly unlikely. The trial court must carefully and expressly considered the following factors, which shall govern the ultimate decision whether to dismiss the indictment: (1) the number of prior mistrials and the outcome of the juries' deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney.
>
> [Id. at 435.]
>
> The Abbati court further noted:
>
> Thus, we do not undertake to define all the circumstances in which it would be proper to order a dismissal, just as it is infeasible to suggest which factors would be weightier in any particular case. The decision is left to the court's judgment of our trial courts to be exercised in the unique circumstances in such cases.
>
> [Id. At 436.]

In sum, defendant argues the BCPO's conduct warrants dismissal of the remaining count on both the basis of double jeopardy and fundamental fairness

b. The State's Opposition

The State responded to each of defendant's arguments in turn

i. ***Because Defendant's Convictions Were Reversed on Appeal, the Double Jeopardy Clause Does not Preclude Retrial on Count Nine***

Initially, the State notes defendant's double jeopardy claim on appeal requested only that "the remand include a direction to the trial court to hold a hearing, in advance of any retrial, to determine, whether the prosecutor's opening was given in bad faith and that, in the event it is determined it was so given, to dismiss the indictment on ground of the double jeopardy provision

[the federal; and state constitutions]." The State avers defendant is attempting to reformulate and expand that request to include other claims or error, which should be rejected by this court.[34]

The State acknowledges both the United States and New Jersey Constitutions provide a defendant relief from double jeopardy. Ohio v. Johnson, 467 U.S. 493 (1984); State v. Schubert, 212 N.J. 295, 304-05 (2012). The Double Jeopardy Clause affords defendant three basic protections: it precludes a second prosecution for the same offenses after conviction, it protects against multiple punishments for the same offense, and it is intended to prevent the State from making repeated attempts to convict an individual and to preserve the finality of judgment. Yeager v. United States, 557 U.S. 110, 119 (2009).

Nevertheless, the Supreme Court has generally held that the double jeopardy clause does not prohibit a new trial either after a mistrial or when a conviction is reversed on appeal. Id.; Lockhart v. Nelson, 488 U.S. 33, 38-39 (1988). New Jersey courts hold similarly. State v. Koedatich, 118 N.J. 513, 519 (1990).

The States concedes the sole exception is when a prosecutor deliberately acts in a manner intended to goad the defense into requesting a mistrial, which is granted. In that circumstance, the Constitution treats the matter as if the prosecutor had requested the mistrial and bars further proceedings. Kennedy, supra 456 U.S. at 676; State v. D'Amato, 218 N.J. Super. 595, 602 (App. Div. 1987). certif. denied, 100 N.J. 170 (1988).

The State notes other jurisdictions in which courts have declined to expand upon the Kennedy holding. States which have broadened the rule of Kennedy and have concluded that double jeopardy could bar retrial after a conviction if prosecutorial misconduct was intended to

[34] The court notes in his appellate filing, defendant proposed the court hold a hearing on remand, regarding the bad faith issue. However, the Appellate Division did not order such hearing and left the matter open as to how it should be handled by this court.

deny a defendant the opportunity for an acquittal include Oregon, State v. Kennedy, 666 P. 2d 1316, 1319 (1983) and Pennsylvania, Commonwealth v. Smith, 615 A.2d 321, 325 (Pa., 1992). The Second Circuit has suggested that double jeopardy might bar retrial after a conviction only if the prosecutor commits misconduct to prevent an acquittal which the prosecutor believed at the time was likely to occur in the absence of his or her misconduct. United States v. Wallach, 979 F. 2d 912, 916 (2d Cir. 1992).

Notably, New Jersey has not expanded on the Kennedy rule and according to the State, the Double Jeopardy Clause does not bar the State from retrying the defendant. Defendant has failed to cite any case supporting his position where the Supreme Court or Appellate Division has employed the Double Jeopardy Clause to bar the State from retrying the defendant after a reversal of a defendant's conviction on appeal. Indeed, in State v. Frost, 158 N.J. 76, 89 (1999), in which the New Jersey Supreme Court reversed a defendant's convictions based upon prosecutorial misconduct, the Court remanded for retrial. Further, the New Jersey Supreme Court's double jeopardy jurisprudence is consistent with federal case law, and the United States Supreme Court has not deviated from the holding in Kennedy that reversal of a conviction on appeal will not preclude retrial.

The State urges further, even if this court were to apply the Wallach standard, dismissal would not be warranted. The assistant prosecutor's alleged impropriety occurred during his opening statement, before any witness had testified. The record is clear the assistant prosecutor acted in a good faith belief that his comments were appropriate.

ii. *Fundamental Fairness Does Not Bar the State From Re-Trying Defendant on Count Nine*

On this issue, the State first notes a dismissal of an indictment is a "draconian" remedy and should not be exercised except on the clearest and plainest ground. State v. Williams, 441 N.J.

Super. 266, 271-72 (App. Div. 2015). The doctrine of fundamental fairness serves to protect citizens generally against unjust and arbitrary government action, and specifically against government procedures that tend to operate arbitrarily. State v. Saavedra, 222 N.J. 39, 67 (2015). The doctrine of fundamental fairness is applicable "only in those instances where the interests involved are especially compelling." Doe v. Poritz, 142 N.J. 1, 108 (1995). It should be considered only in those rare cases where not to do so would subject a defendant to oppression, harassment or egregious deprivation. State v. Saavedra, 222 N.J. at 67. The State cites numerous cases in which the doctrine was applied.

As the State notes, defendant claims the court should dismiss the indictment on fundamental fairness grounds because, allegedly, 1) notes, which were material to the case, were destroyed in bad faith and defendant has been "hopelessly prejudiced" by their destruction; 2) a retrial would continue the deprivation defendant has suffered; 3) the State's case is weak, 4) a retrial would be fundamentally unfair given the State's malicious actions, and 5) retrying the case would be an abuse of discretion. According to the State, none of these arguments are sufficient to warrant dismissal of the indictment.

Concerning the defendant's argument that the State's case is weak, the State claims it bears noting the defendant claimed on appeal that there was insufficient evidence to support his conviction for official misconduct on count nine. The State specifically notes the Appellate Division rejected the contention, finding the argument to be "without sufficient merit to warrant discussion in a written opinion." Zisa, supra at *35.

The State also claims defendant's argument regarding the alleged destruction of the notes is similarly without merit. Sergeant Haviland, who testified as a defense witness, denied instructing the detectives to destroy any notes. Detective Pasquariello claimed to have destroyed

three or four pages of notes. Detective Rodgers conceded on cross-examination that the e-mail he received from Sergeant Haviland did not tell him to destroy notes, but told him to "please get rid of what we don't need. We're still missing Puglisi's memorandum and Capital One Credit card response." He also admitted that he might have taken some notes which were not encompassed by the video statements, but he could not recall any and that he still had all e-mails. Finally, Detective Robinson, after claiming that Sergeant Haviland instructed him to destroy his notes, admitted on cross examination that he did not destroy his notes or his emails.

Since Detective Robinson's notes still exist, and were available to be used at defendant's trial if defendant chose, since Detective Rodgers admitted that he could not recall taking any notes which were not encompassed in the video statements and that he still had all his e-mails, and since Detective Pasquariello claimed to have destroyed at best three or four pages of notes and never testified that whatever was in those notes was exculpatory or inconsistent with the video statements, defendant's attempts to seek dismissal of the indictment on this ground must be denied.

Concerning defendant's statement that he has suffered "egregious deprivation," the State notes every defendant can be impacted by a trial but that does not justify dismissing an indictment.

With further regard to defendant's claim that the State acted "maliciously," the State notes the trial court twice denied defendant's motion for a severance. Further, as for the assistant prosecutor preventing defendant from testifying before the grand jury, except under certain conditions, only the jurors, the prosecutor, the clerk of the grand jury, the witness under examination, interpreters when needed, a stenographer or operator of a recording device, may be present when the grand jury is in session. R. 3:6-6(a). Thus, the defendant had no right to appear before the grand jury. State v. Spano, 64 N.J. 566, 568 (1974).

Regarding defendant's concerns on the late "analysis" of the Hackensack Police Department computer server, defendant admits that his expert was able to reconstruct the documents.

Further, with respect to defendant's allegation that the State willingly proffered a witness it allegedly knew was lying, the jury heard all the alleged inconsistencies about Officer Campos' statements. The jury also heard from Sergeant Haviland that a decision was made to await the testimony of various witnesses under oath at trial before deciding what action, if any, to take against them, including criminal prosecution. Yet, the jury still convicted defendant on several counts.

Lastly, with respect to defendant's argument that the court may dismiss the indictment on an abuse of discretion standard, the State argues defendant's reliance upon Abbati is misplaced, as Abbati has no relevance to the case at bar. Abbati involved the judiciary's authority to dismiss an indictment with prejudice "after successive mistrials due to jury deadlock." State v. Cruz, 171 N.J. 419, 430 (2002). "A trial court may dismiss an indictment with prejudice after successive juries have failed to agree on a verdict when it determines that the chance of the State's obtaining a conviction upon further retrial is highly unlikely." Abbati at 427. Those circumstances are clearly not at issue here and therefore this court cannot apply Abbati.

c. Defendant's Reply

i. *Retrial of the Remaining Count for Official Misconduct in Violation of N.J.S.A. 2C:30-2(a) Against Mr. Zisa Violates His Constitutional Rights Against Double Jeopardy*

In reply, defendant notes the State admits the Kennedy exception states that, while the retrial of a criminal defendant is not prohibited by the Fifth Amendment's Double Jeopardy Clause when that defendant moves for a mistrial to end his or her first trial, if such motion was goaded by

the prosecution, then a retrial is barred. Defendant urges the integrity of the Fifth Amendment's prohibition against double jeopardy and the Kennedy exception does not turn on which court – the trial court or an appellate court – finds that a criminal defendant should have been granted a mistrial upon the prosecution's goading.

Defendant further relies upon the guidance found in United States v. Curtis, 683 F. 2d 769, 775 (3d Cir. 1982), in which the court declined to definitively determine whether a retrial would be barred by Double Jeopardy where an appellate court reverses a trial court's denial of a mistrial motion. Nevertheless, the Curtis court applied the Kennedy exception, following an appellate reversal of a denial of a mistrial, where prosecutorial misconduct goaded the motion which was erroneously denied by the trial court. The court simply and fully assumed its application.

In reference to other caselaw, defendant avers while the State admits the Kennedy analysis clearly prohibits a second prosecution under the Fifth Amendment's bar against Double Jeopardy where the prosecution goads the defendant into seeking a mistrial, it contends that the doctrine only bars reprosecution where the mistrial was actually granted by the trial court and not where an appellate court rules that the trial court's denial of the mistrial motion was erroneous – as here. Defendant claims the State would have this court hold defendant's constitutional right against double jeopardy turns – not on whether the prosecution goaded him into seeking a mistrial, but rather, on which court grants the motion, i.e. the trial court or the appellate court. Defendant avers this position directly undermines the purpose of the Kennedy standard and is not supported by caselaw. See Curtis, supra, 683 F. 2d at 775; United States v. Liburd, 405 App'x 670, 671-72 (3rd Cir. 2010).

Defendant also argues essentially none of the cases cited in the State's brief even involve any motion for a mistrial made by the defendant. Thus, they are inapplicable to the situation here.

Indeed, none of the twelve cases cited by the State involve a criminal defendant being goaded into moving for a mistrial and having an appellate court reverse the trial court's denial of same, as is the case here.

Defendant urges, while there is no New Jersey case directly on point, not only does the State completely ignores Third Circuit precedent that is on all fours with the premise of Zisa's motion – that the Kennedy exception applies, whether or not the trial court grants it, or the appellate court finds the trial court should have granted it. Moreover, the State cites to completely irrelevant New Jersey cases. Notably, the State's reliance on State v. Frost, 158 N.J. 76 (1999) is misplaced as in that case, although the court did not consider the double jeopardy issue, the defendant had not made any motion for a mistrial. The State's reliance on State v. Vallejo, 198 N.J. 122 (2009) is also misplaced as in that case there was similarly no motion for a mistrial.

Defendant finds it incredible the State did not more fully respond to his substantive argument that Keitel goaded the defense into seeking a mistrial. Indeed, the State responded in just three short sentences to his extensive argument on this, which is the underpinning of his argument regarding double jeopardy.

ii. *The Doctrine of Fundamental Fairness Precludes Retrial of Mr. Zisa on the Remaining Count for Official Misconduct in Violation of N.J.S.A. 2C:30-2(a) and Mandates Dismissal of the Indictment*

Defendant again avers the rareness of his situation warrants the dismissal on the remaining count on the basis of fundamental fairness. He argued the State's position on this point is inherently contradictory. Zisa notes first, the State admits the parameters of the fundamental fairness doctrine is "elusive," it nonetheless claims to somehow be sure that defendant's case does not present the rare circumstances necessary for its application. Zisa complains the State looks at each of his claims of unfairness individually, without regarding them as a whole to acknowledge

to support his argument regarding fundamental fairness is warranted. Indeed, their combined effect is what fully supports the doctrine. The State simply says, "None of these arguments are sufficient to warrant dismissal of the indictment." St. Br. at 33. However, according to defendant, that misses the point entirely, as the record is replete with overwhelming evidence in support of the doctrine's application. Briefly, the bases include:

1. The State opened by alleging to the jury that Zisa committed uncharged crimes, in that his "henchmen" intimidated the witnesses;

2. The State's intentional destruction of documents;

3. Zisa has already suffered egregious deprivation;

4. The weakness of the State's case;

5. The State knowingly offered a witness who was lying;

6. The State fought and succeeded to keep charges surrounding two discreet incidences, separated by approximately four years, together for trial despite its internal acknowledgment that the key witness to the 2004 charges was lying;

7. The State granted secret immunity deals which were never reduced to writing or approved by the Attorney general; and

8. The State acted maliciously.

Zisa complains not only did the State fail to consider the combined effect of these factors, its individual examination of each is erroneous. Defendant discusses each factor in turn, finding fault with the State's analysis on each point.

Regarding the destruction of notes, defendant notes the State references Detective Haviland's testimony denying having instructed the notes and documents to be destroyed and completely ignoring testimony by three other Bergen County detectives that he instructed them to do so. Nevertheless, incredulously the State claims the destruction is not significant as it only

involves three or four pages on notes. This is wholly unacceptable in the face of defendant's two written requests for the preservation of the documents at issue.

Defendant deems the State's opposition on his claim of egregious deprivation to be "flippant." He claims the BCPO has intentionally strategized and succeeded in destroying him on an emotional, financial, professional and personal level.

Regarding his point the BCPO pursued him for both the 2004 and 2008 incidents, intending to demonstrate a pattern of misconduct, defendant argues the State knew the key witness for the 2004 charges was lying from the inception of the case and therefore, the BCPO should not have pursued it. In its opposition, the State characterized Campos as having credibility issues, but her issues were far more egregious and the State should have weighed this in deciding to pursue the 2004 charges. In further support of its position, the State points to the fact that defendant's severance motion was twice defeated, however as urged by defendant, it was twice defeated because the State failed to disclose it had internally acknowledged its key witness in the 2004 matter was lying. Having this witness ready to testify on this issue predisposed the jury to believe the defendant likely breached his duties.

With regard to the computer forensics and Campos lying on the stand, the State takes the "no harm, no foul" position it did with respect to the destruction of evidence. Defendant argues that does not undermine the indisputable conclusion that the State acted maliciously. Addressing the late production of the HPD computer image, the State purposely circumvented defendant from examining it relative to the 2008 incident. Indeed, defendant still does not know what was contained on the HPD server relative to the 2008 charge. He was only given access to the HPD image for the 2004 incident late in the process. The denial of this access was prejudicial for a variety of reasons.

The fact the Appellate Division remanded the case for only one count does not negate the obvious weakness in the State's case. Indeed, it is significant that the Appellate Division noted it is a weak case. Also significant is the fact the Appellate Division's ruling the State was wrong in its insistence to the trial court that it instruct the jury that the oath of office created an official duty that could form the basis for a verdict on this count. It specifically held that the oath of office does not create any definable duty about which Zisa could be found guilty of breaching.

In closing, defendant reiterates his argument that this court has the inherent authority to dismiss the indictment where its pursuit would constitute an abuse of discretion on the part of the BCPO. Defendant again states that even though his situation differs from that of the Abbati Court, where the State sough retrial after multiple mistrials, nothing in the decision or its progeny bar this court from dismissing his case.

d. Oral Argument

On February 4, 2016, this court heard oral argument on the instant motion. While both parties maintained the positions they set forth in their submissions, they argued the following in addition.

Defendant highlighted the two main overarching arguments in support of dismissal of the indictment with prejudice: (1) the prosecutor's misconduct was purposeful and intentional; and (2) the State's case was incredibly weak.

The State argued it would be illogical to say the prosecutor intended to provoke a mistrial at the time he gave his opening statement because he was worried about an acquittal. The State submitted there was no reason to go through all of the trial preparation and jury selection and then intentionally attempt to provoke a mistrial during the opening statement. The State noted, "[T]he goading of the mistrial is when you do something knowing full well that it's error and that it will

have someone move and successfully do it. So you present evidence, you present inadmissible evidence, perhaps hearsay or something like that." Tr. Mtn. 49:13-17 (Feb. 4, 2016).

Defendant responded by noting the weaknesses that were exposed on the eve of trial[35] and arguing the temporal proximity of these disclosures to the start of trial make it more likely the State intentionally sought to provoke a mistrial as of the opening statement. The State maintained the prosecutor thought his statements during oral argument were admissible, while the defense argued any attorney with as much trial experience as the prosecutor in this matter would have known better.

V. Law

a. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides a safeguard to criminal defendants against subsequent prosecutions of the same offense. See Oregon v. Kennedy, 456 U.S. 667, 671 (1982) (citing United States v. Dinitz, 424 U.S. 600, 606 (1976)). The clause provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. 5. The Double Jeopardy Clause applies to all the states through the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 794 (1969); see also U.S. Const. Amend. 14. The New Jersey Constitution, New Jersey statutory law, and New Jersey caselaw provide the same protection against such prosecutions. See N.J. Const., Art. I, Para. 11 ("No person shall, after acquittal, be tried for the same offense."); see also N.J.S.A.

[35] The parties received the computer expert's forensic report which provided that other documents that allegedly corroborated Campos' story were unrelated to the 2004 incident. Additionally, the police report placing John Herrmann at a domestic violence arrest during the same time he was supposedly at the scene of the 2008 incident was produced by way of subpoena mid-March 2012. Defense counsel posited these issues significantly weakened the State's case right before the trial was to begin. See Mtn. Tr. 50:17 – 51:17.

2C:1-9; see also State v. Schubert, 212 N.J. 295, 304 (2012) (quoting State v. Kelly, 201 N.J. 471, 484 (2010) ("[o]ur State's double-jeopardy jurisprudence mirrors federal law."));

Under N.J.S.A. 2C:1-9, double jeopardy bars prosecution in the following circumstances:

> (a) The former prosecution resulted in an acquittal by a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction.; (b) The former prosecution was terminated, after the complaint had been filed or the indictment found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.; (c) The former prosecution resulted in a conviction.; and (d) The former prosecution was *improperly terminated.*
>
> [Ibid. (emphasis added).]

N.J.S.A. 2C:1-9(d) carves out a number of situations that do not constitute an improper termination. See ibid. The defendant will typically be precluded from raising a double jeopardy defense when: (1) defendant consents to termination or otherwise waives his right to object to the same; (2) a mistrial is declared because of a hung jury; or (3) the trial court finds termination is required by "manifest necessity." See ibid. The foregoing circumstances protect the State from having to "vindicate its societal interest in the enforcement of the criminal law in one proceeding." Kennedy, 456 U.S. at 672 (citing United States v. Jorn, 400 U.S. 470, 483-84 (1971)).

It is well established that where a defendant successfully moves for a mistrial, double jeopardy principles will not bar re-prosecution. See Kennedy, 456 U.S. at 672-673 (citing Dinitz, 424 U.S. at 607-610) (quoting United States v. Tateo, 377 U.S. 463, 467 (1964) ("If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the government would not have been barred from retrying him.")). Where the defendant successfully moves for mistrial, such termination of the trial is not considered "improper" under N.J.S.A. 2C:1-9(d)(1).

The Supreme Court of the United States, however, has recognized a narrow exception to this rule. See Dinitz, supra 424 U.S. at 611 ("The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."); see also United States v. DiFrancesco, 449 U.S. 117, 130 (1980) ("reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." (citing Dinitz, supra 424 U.S. at 606-611)).

Following Dinitz, the Kennedy court later employed this exception, holding "a defendant may invoke the bar of double jeopardy" when it is clear the State "intended to provoke the defendant into moving for a mistrial." See Kennedy, supra 456 U.S. at 679; see also id. at 676 ("Only where the government conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."). While Kennedy adhered to stare decisis, in an attempt to provide more clarity to an ambiguous area of the law, Chief Justice Rehnquist refined the traditional subjective interpretation of the exception with a more objective interpretation. See id. at 674-75.[36]

[36] Chief Justice Rehnquist recognized the language of earlier decisions broadened the "intent" requirement to merely a finding of "bad faith conduct" on the part of judges and prosecutors. See id. at 674. It is for this reason, Justice Rehnquist noted, the Oregon Court of Appeals reached its decision to bar re-prosecution because, in their opinion, the prosecutor's actions amounted to "overreaching." See ibid.

The problem with employing the "overreaching" standard, according to Rehnquist, is that in the event prosecutorial misconduct warrants granting a defendant's motion for a mistrial, the scope of prosecutorial error is broadened without a way to properly evaluate the errors. See id. at 675. Rehnquist proffered the "intent" requirement is instead a more practical standard; one that would require a simple finding of fact by the court. See ibid. Under this reasoning, prosecutorial misconduct that is sufficient to warrant defendant's mistrial motion will not necessarily bar reprosecution, unless there is a finding of intent on the part of the prosecutor. See id. at 676. In other words, unless the prosecutor aimed to "goad" the defendant to motion for a mistrial, defendants who are granted mistrials will still be susceptible to subsequent prosecutions. See ibid. Finding evidence of "intent" or "goading" should not be a difficult task for the courts Rehnquist reasoned, as they are often called on to infer whether intent exists in different situations. See id. at 675.

Since Kennedy, New Jersey courts have been guided by its principles when adjudicating double jeopardy matters involving mistrials and prosecutorial misconduct. See State v. Gallegan, 117 N.J. 345, 358 (1989); see also Torres, supra 328 N.J. Super. at 87-88. In adopting Kennedy, New Jersey courts incorporated the factors Justice Powell mentioned in his concurring opinion. See Torres, 328 N.J. Super. at 89; see also Kennedy, 456 U.S. at 680. The Appellate Division announced those factors in Torres:

> (1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial, (2) whether the prosecutor resisted the motion for a mistrial, (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial, and (4) the timing of the error.
>
> [Torres, 328 N. J. Super. at 88.]

In Torres, the prosecutor said in his opening statement that the defendant's accomplice would testify against the defendant, and, because the accomplice had already been convicted, he had no incentive to lie. Id. at 83-84. After the accomplice refused to testify, the court granted the defendant's motion for mistrial and dismissed the case on grounds of double jeopardy and fundamental fairness. See id. at 84-85. Using the four elements Justice Powell set forth in Kennedy, the Appellate Court did not find the prosecutor "intentionally goaded defendant into requesting a mistrial." See Torres, 328 N.J. Super. at 88-89.

Applying the first factor, the court found no evidence of consistent error on the part of the prosecutor. See id. at 89. Applying the second factor, the court found the prosecutor aggressively opposed defendant's motion for a mistrial. See ibid. Applying the third factor, the court found the prosecutor had testified at the court below that he had no intention to goad a mistrial and fully expected the co-conspirator would testify. See ibid. Finally, applying the fourth factor, the court found that because the error occurred during the prosecutor's opening statement, the outcome of

the case could not clearly be determined and, therefore, created no visible incentive for the prosecutor to purposefully provoke a mistrial. See ibid.

In addition to Justice Powell's four elements, the Torres court acknowledged other factors that aided its decision. The court found no reasonable motivation for the prosecutor to goad a mistrial. See ibid. The court found the State had a strong case and no noticeable issues occurred during the introduction of the State's evidence. See ibid. The court recognized the judges below also could not find the prosecutor purposefully provoked the defendant's motion for mistrial. See ibid. Finally, the court noted, even had the lower courts found the prosecutor purposefully provoked the defendant's motion for mistrial, the objective evidence would not support this conclusion. See ibid.

b. Prosecutorial Misconduct

The Kennedy Court aimed to resolve the ambiguities of prior decisions that dealt with prosecutorial misconduct. See 456 U.S. at 679. In doing so, the court dismissed the notion that prosecutorial misconduct in and of itself could bar retrial and instead limited the double jeopardy bar "to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Ibid.

In United States v. Wallach, the Second Circuit of the United States Court of Appeals suggested an extension of Kennedy where prosecutorial misconduct would bar a retrial on double jeopardy grounds. See United States v. Wallach, 979 F.2d 912, 915-917 (2nd Cir. 1992). Although the Wallach court ultimately held the double jeopardy clause did not bar a retrial of the defendant, the defendant's argument for a broader reading of Kennedy resonated with the court. See ibid. While Kennedy protects against retrial where the State goads a successful mistrial motion by the defendant, which necessarily precludes an opportunity for acquittal, the Wallach court believed

this protection could be extended to additional situations where prosecutorial misconduct is intended to rob the defendant the chance of acquittal. Id. at 916.

Although the Wallach court argued for an extension of Kennedy, it believed the role of the prosecutor must be taken into consideration. See ibid. The court noted it would be remiss to ignore the simple fact that "every action of a prosecutor in the course of trial is taken 'with the intention of preventing an acquittal.'" Ibid. (quoting Kennedy, 456 U.S. at 674)("Every act on the part of a rational prosecutor during trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt."). The Wallach court noted, if it were to apply the extension as suggested by the defendant, retrial would be barred for all defendants who had convictions reversed due to prosecutorial misconduct. See ibid. Instead, the court stressed the significance of continuing the distinction made in Kennedy, among prosecutorial misconduct that results in a mistrial and prosecutorial misconduct specifically intended to goad a mistrial. See Wallach, 979 F.2d at 916. In adhering to this distinction, the court concluded:

> If any extension of Kennedy beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely.
>
> [Wallach, 979 F.2d at 916.]

Thus, the salient point of any double jeopardy analysis dealing with prosecutorial misconduct is whether the prosecutor intended to goad a mistrial.

c. Intent

The dispositive question this court must answer in determining whether or not the single remaining count of defendant's indictment should be dismissed is whether the prosecutor's

misconduct at trial was "intended to provoke the defendant into moving for a mistrial." Kennedy supra 456 U.S. at 675. Although the Kennedy plurality did not identify specific factors a court should look to when determining whether the prosecutor acted with the requisite intent, the Court observed that the concept of inferring intent is not a foreign one for courts:

> [A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.
>
> [Ibid.]

Indeed, courts routinely undertake the inherently difficult task of finding intent. To do so, courts must essentially determine what an actor was thinking at the time he engaged in certain conduct. A court may rely on direct or circumstantial evidence to properly draw an inference that an act was intentional. Direct evidence of this, however, is rare. Absent an express admission from the actor that his conduct was intentional, courts are left with circumstantial evidence to infer an actor's intent. This is a fairly common practice across various areas of law.

For instance, in Property Law, intent may be inferred by "acts and circumstances," and not merely the actor's "words or declarations." Johnston v. Fitzgeorge, 50 N.J.L. 470, 472 (Sup. Ct. 1888) (noting that in adverse possession actions, while the act of enclosing a property would "doubtless afford clear proof" of the actor's intent to possess, "any act indicative of dominion will afford some proof of intent.").

In Tort Law, courts look to the consequences of an act rather than the act itself to determine whether the act was intentional. See Restatement (Second) of Torts, § 8A (Am. Law Inst. 1965). Whether an act is substantially certain to result in a specific consequence is indicative of the actor's intent. New Jersey courts have consistently relied on the substantial certainty test: "[W]e have

often defined intent in terms of the certainty that the conduct will bring about a particular result." Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 269 (2004); Cf. Laidlow v. Hariton Mach. Co., 170 N.J. 602, 613 (2002) ("an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm.").

In Contract Law, a finding of bad motive or intent is essential in determining whether a party acted in bad faith. Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001). That such evidence can be established through circumstantial evidence "cannot be disputed, for 'it has been recognized that one's state of mind is seldom capable of direct proof and ordinarily must be inferred from the circumstances.'" Id. at 254 (quoting Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 249 (Law Div. 1976)

Some courts have gone as far as recognizing a "doctrine of chances," also known as the "doctrine of objective improbability." See People v. Crawford, 458 Mich. 376, 392. The crux of the doctrine is based on the principle that "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidently or innocently." See Crawford, 458 Mich. at 393 (quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, at 45). The doctrine relies solely on inferences of objective likelihood in light of surrounding facts and events. See Crawford, 458 Mich. at 393.

i. Prosecutorial Intent

Although the Kennedy plurality did not opine as to what specific facts are more probative of finding a prosecutor's intent, courts across various jurisdictions have adopted their own approaches in answering this inquiry, with some drawing on the very levels of culpability articulated in the Model Penal Code.

Arizona, though partially expanding the Kennedy analysis, asks whether all of the prosecutor's actions leading up to error, taken as a whole, amount to "intentional conduct which the prosecutor knows to be improper and prejudicial." Pool v. Superior Court, 139 Ariz. 98, 108 (1984). The judge measures intent or knowledge by looking at objective factors such as "the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion." Pool, supra 139 Ariz. at 108 n.9. The trial judge may also consider "the prosecutor's own explanations of his 'knowledge' and 'intent' to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers." Ibid.

Texas expanded its approach and adopted a standard of recklessness, reasoning it was constitutionally indistinguishable if a prosecutor's misconduct was intended to cause a mistrial or produce a necessarily unfair trial. Bauder v. State 921 S.W.2d 696 (Tex. Crim. App. 1996). Thus, Texas courts look not only to whether the prosecutor's actions were intentional, but also whether the prosecutor "was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial." Id. at 699.

New Mexico, also expanding Kennedy, held that "willful disregard" was a more precise standard than a recklessness or indifferent standard used by other courts in determining intentional prosecutorial misconduct. State v. Breit, 122 N.M. 655 (1996). The court observed the prosecutor must be "actually aware, or is presumed to be aware, of the potential consequences of his or her actions. The term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal." Id. at 666.

d. Fundamental Fairness

When criminal defendants fall outside the realm of certain constitutional protections, New Jersey courts have, in some instances, applied the doctrine of fundamental fairness. See State v. Yoskowitz, 116 N.J. 679, 705 (1989). In such exceptional instances, New Jersey courts wield this doctrine to halt certain governmental efforts. See State v. Tropea, 78 N.J. 309, 315-16 (1978).

The doctrine of fundamental fairness is not typically the first line of defense for a defendant, nor the first line of reasoning for a judge. Instead, the doctrine is applied only in rare circumstances, where the litigation process has been exhausted beyond the acceptable notions of due process. See Cal. v. Trombetta, 467 U.S. 479, 485 (1984). In State v. Abbati, after two mistrials caused by hung juries, the New Jersey Supreme Court dismissed a subsequent indictment of the defendant on the basis of fundamental fairness. 99 N.J. 418, 427 (1985). In reaching its conclusion, the court highlighted the following factors in deciding whether to dismiss the indictment:

> (1) [T]he number of prior mistrials and the outcome of the juries' deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney.
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> [Id. at 435]

The Abbati court also emphasized the importance of considering the interests of both the State and the defendant. See ibid. In doing so, the court should balance the relevant reasons for reprosecuting a defendant, including "the gravity of the criminal charges and the public's concern in the effective and definitive conclusion of criminal prosecutions against whether or not an additional trial would result in "untoward hardship and unfairness" to the defendant. See ibid.

In State v. Dunns, the State attempted to convict the defendant for a third time, but the New Jersey Appellate Division dismissed the indictment. Ibid. Aided by the doctrine of fundamental

fairness, as described in Abbati, the court reasoned that additional attempts by the State to try the defendant would result in only harassment and additional expense on the part of the defendant, without a strong likelihood of succeeding on the part of the State. See Dunns, 266 N.J. Super. at 378-79.

Conversely, in State v. Cruz, where the trial court failed to reach a unanimous verdict on the charge of capital murder, the Supreme Court of New Jersey elected not to apply the doctrine of fundamental fairness. See State v. Cruz, 171 N.J. 419, 434-35 (2002). In Cruz, only one mistrial occurred, which distinguished it from Abbati and Dunns, both of which had "involved two or three prior trials before judicial intervention to dismiss the underlying indictment." See Ibid. at 434-35. In considering this distinction, because defendant's subsequent prosecution for capital murder occurred only after a single mistrial, resulting from jury deadlock, the Cruz court held the doctrine of fundamental fairness would not be applied and, therefore, denied defendant's post-trial motion to dismiss the capital-murder charge. See ibid.

VI. Analysis

The Appellate Division remanded the single remaining count of Indictment 10-10-01812 for retrial, but provided, "prior to retrial, defendant may present to the trial court his argument that a retrial is barred by double jeopardy principles." Zisa, surpa at *39. This court's task is to determine whether, in light of the improprieties that took place during trial, a retrial would be an appropriate and just remedy, or, whether this court may properly dismiss the indictment with prejudice.

Defendant seeks a dismissal of the indictment with prejudice and sets forth two overarching arguments in support: the indictment should be dismissed because a retrial is barred by double

jeopardy principles, or, the indictment should be dismissed on the grounds of fundamental fairness. The parties raised a number of arguments that this court will endeavor to address in turn.

a. Double Jeopardy

i. Threshold Jurisdictional Issue – Whether the Issue of Double Jeopardy is Properly Before This Court

Before addressing the merits of defendant's double jeopardy argument, this court is faced with a question our New Jersey courts have not yet squarely addressed: whether the Double Jeopardy Clause protects a defendant who *unsuccessfully* moves for a mistrial where the conduct that gave rise to defendant's motion was "intended to provoke the defendant into moving for a mistrial," and the defendant succeeds in obtaining a reversal based on that misconduct. Kennedy, supra 456 U.S. at 679.

Of the protections embodied by double jeopardy, "one of the principle threads . . . is the right of the defendant to have his trial completed before the *first jury* empaneled to try him." Kennedy 456 U.S. at 673 (emphasis added); see Wade v. Hunter, 336 U.S. 684, 689 (1949) (double jeopardy protects a defendant's "valued right to have his trial completed by a particular tribunal."). Thus, the general rule has been that in cases where a trial is terminated by a defendant's motion for a mistrial, the defendant has waived or renounced his right to raise a double jeopardy defense in a subsequent prosecution. This principle is codified in the New Jersey Criminal Code, which provides that a defendant who "consents to the termination [of his trial] or waives, by motion to dismiss or otherwise, his right to object to the termination" is not barred from re-prosecution. N.J.S.A. 2C:1-9(d)(1).

Courts, however, have recognized the great difficulty of applying this rule where a prosecutor's misconduct gives rise to the defendant's motion for a mistrial. See Kennedy, supra 456 U.S. at 673; see also Dinitz, supra 424 U.S. at 611. Accordingly, the United States Supreme

Court carved out what is now a well-established, yet rarely invoked, narrow exception to the rule: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Kennedy, supra 456 U.S. at 676.

The record clearly establishes the trial court judge denied all of defendant's motions for mistrial, thus, this narrow exception would appear inapplicable at first blush, as the defendant did not "succeed[] in aborting" the trial. Ibid. Indeed, the State argues, based on a plain reading of the exception, defendant's failure to obtain a mistrial precludes him from raising a double jeopardy defense, as the first trial was not "improperly terminated." N.J.S.A. 2C:1-9(d). Therefore, the State avers, defendant's only remedy in the instant matter is a retrial, not a dismissal of the indictment.

Defendant, on the other hand, argues this is not a case involving misconduct that was the product of an unintentional or otherwise innocent error. Nor was this a case involving a single error. Rather, the prosecutor's conduct was so egregious and pervasive throughout trial, there is but one explanation for it: the prosecutor was intentionally goading defendant into moving for a mistrial. Had the trial court ordered a mistrial, defendant would now have the opportunity to prove the prosecutor's actions were intentional. In so proving, defendant would be afforded the full protection of the Double Jeopardy Clause under Kennedy and Torres. Accordingly, defendant argues he should not lose his constitutional protection against double jeopardy merely because the trial court erred in denying his motion for mistrial.

Generally, the State's argument is correct and supported by case law. It is well established that a defendant's remedy for a reversed conviction is a retrial. Lockhart v. Nelson, 488 U.S. 33, 38 (1988) ("It has long been settled . . . that the Double Jeopardy Clause's general prohibition

against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." (citing United States v. Ball, 163 U.S. 662 (1896))). The main exception to this rule arises in cases where a reviewing court reverses the conviction for insufficiency of the evidence, in which case a retrial is barred by double jeopardy principles. See Burks v. United States, 437 U.S. 1 (1978). Finally, an exception arises in cases where a prosecutor's misconduct is intended to provoke the defendant into moving for a mistrial. Kennedy, supra 456 U.S. 667.

Few courts have addressed the whether a defendant is still protected by double jeopardy where defendant's conviction is reversed because of prosecutorial misconduct intended to goad defendant into moving for a mistrial. The court finds the unique circumstances and facts in this matter implicate an important and valid concern that this court is now in the unenviable position of addressing: whether a defendant's constitutional rights should hinge on which court recognizes the prejudicial error first.

The United States Supreme Court recognized a similar but distinguishable concern in Burks, supra 437 U.S. 1. In Burks, the trial court denied defendant's motion for a judgment of acquittal at the conclusion of the trial. On appeal, the Sixth Circuit reversed the conviction for insufficiency of the evidence, but, rather than terminating the matter, remanded it back to the District Court to determine whether the appropriate remedy was an acquittal or a retrial. See id. On certiorari, the Supreme Court reversed and remanded the case for entry of a judgment of acquittal, holding that a second trial was precluded when a reviewing court reverses a conviction for insufficiency of the evidence. Id. The Court's holding in Burks is now well-established law,

and while the issue in Burks is not the same as the one at bar, the Supreme Court reasoning recognized basic principles that offer some guidance.[37]

In Burks, the defendant contended the Court of Appeals' reversal, based on its finding that the District Court erred in not entering a directed verdict, was the operative equivalent of the District Court entering a judgment of acquittal. Had the District Court found the evidence at trial insufficient, as the Court of Appeals said it should have done, a second trial would have been barred by double jeopardy principles. The Supreme Court recognized "it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient." Id. at 11 (citing to Sapir v. United States, 348 U.S. 373 (1955)). The Court noted that the current framework created "a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the [trial] court." Burks, supra 437 U.S. at 11.

In United States v. Roberts, 640 F.2d 225 (9th Cir. 1981), Judge Norris, in his dissent, identified several doctrinal considerations that support finding an exception in "the difficult issue" of "whether double jeopardy protects against [prosecutorial misconduct] which results in a mistrial when the [misconduct] results in a conviction which has been reversed on appeal." Id. at 230 (Norris, J., dissenting). First, Judge Norris noted the Supreme Court's concern in Banks, supra: "[A]n important consideration in double jeopardy cases is to avoid a result which would 'create a purely arbitrary distinction' between defendants who enjoyed a correct decision on a motion to

[37] Much of the Burks analysis focused on the issue of a reviewing court entering a directed verdict where the evidence is insufficient to sustain a conviction, an issue that is not in dispute here. In fact, Burks stands for the proposition that the *only* exception to retrial following a successful challenge to a conviction is where the reviewing court reverses the conviction for insufficiency of the evidence. Nonetheless, the Court's reasoning is particularly noteworthy and relevant in that it recognized the arbitrary distinction created by allowing a defendant's constitutional rights to turn on which court correctly decides an issue.

end the proceedings in the trial court and those who did not." Roberts, supra 640 F.2d at 230 (Norris, J., dissenting) (quoting Burks, supra 437 U.S. at 11). Judge Norris continued:

> Second, intentional prosecutorial misconduct strongly implicates a number of the defendant's double jeopardy interests. Intentional misconduct is more likely to be highly prejudicial and so to cause an inaccurate jury verdict. The prosecutor thus illegitimately increases the likely expense, embarrassment, and ordeal the defendant will have to suffer, as well as the possibility that the defendant, although innocent, will ultimately be found guilty. Just as the retrial bar is used to deter prosecutors from requesting unnecessary mistrials and so damaging the defendant's double jeopardy right to his particular tribunal, it may be necessary to bar retrial after reversal for intentional prosecutorial misconduct to protect the defendant's other double jeopardy concerns.
>
> [Roberts, supra 640 F.2d at 231 (Norris, J., dissenting) (internal citations omitted).]

Finally, Judge Norris noted that if all reversals were to allow retrial, "a defendant who makes a meritorious motion for mistrial will not face retrial if the motion is granted, but will face retrial if the motion is erroneously denied and the following conviction is reversed on appeal." Id. at 230-31.

One year later, in Curtis, supra 683 F.2d 769, the Third Circuit faced a dilemma similar to the one at bar in United States v. Curtis, 683 F.2d 769 (3rd Cir. 1982). In Curtis, the trial court denied defendant's motion for a mistrial, which was made in response to the prosecutor's closing statement. Defendant was convicted, and on appeal his conviction was reversed due to prosecutorial misconduct and remanded for a retrial. On remand, the trial court dismissed the case on double jeopardy grounds, and the State appealed the dismissal.

On the second appeal, the Curtis court noted the defendant's argument:

> [Defendant] argues that the concerns underlying application of the double jeopardy clause to mistrials should apply with equal weight to appellate reversals that result from prosecutorial misconduct committed with the intent to provoke a mistrial request. *There is considerable force to this proposition.* Given sufficiently prejudicial prosecutorial misconduct, a mistrial will result if the trial judge correctly recognizes the nature of the violation; appellate reversal is necessary only if the trial judge errs. *It would appear inconsistent to afford a defendant less*

constitutional protection simply because a trial judge erred in denying a mistrial request. If an appellate reversal does not preclude retrial in a situation where the granting of a mistrial for the same misconduct would have done so, the rights of the defendant appear to turn on which of the two – the trial or appellate court – first recognizes the impropriety of the prosecutor's actions.

[Id. at 775 (emphasis added).]

While the Curtis court ultimately declined to rule on this issue, it concluded that if appellate reversal for prosecutorial misconduct were to foreclose retrial, "such an exception would be an extremely narrow one, arising only under very limited circumstances." Id. at 776. In so concluding, the Third Circuit found that the prosecutorial misconduct before it was insufficient to bring the case within any such narrow exception.

In United States v. Wallach, the Second Circuit addressed Kennedy's application where the defendant, who neither moved for mistrial nor obtained a mistrial, successfully overturned his conviction due to prosecutorial misconduct. Wallach, supra 979 F.2d 912. In Wallach, the defendant urged the court to adopt a broad rule expanding the Kennedy rule beyond the mistrial context: "The Supreme Court's rationale [in Kennedy] is that the Double Jeopardy Clause bars a second prosecution when the prosecutor engages in serious misconduct with the intention of preventing an acquittal." Wallach, supra 979 F.2d at 915 (quoting defendant's brief). The Second Circuit, while agreeing with defendant's argument for some sort of extension, noted that if it were to extend Kennedy beyond the mistrial context, the rule could not be so broad as that advocated by defendant. Simply stated, since all actions of a prosecutor are made with the intent to prevent an acquittal, such a broad sweeping rule would "obliterate the precise distinction drawn in Kennedy between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial." Id. at 916. Contemplating a limited extension of Kennedy, the Second Circuit observed:

> If any extension of Kennedy beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a retrial were a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the Kennedy rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, *if Kennedy is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.*
>
> [Ibid. (emphasis added).]

Turning to the case at bar, a review of the trial court transcript and the Appellate Division opinion makes readily apparent that, although the trial court judge should have ordered a mistrial, he was committed to completing the trial to its end.[38] The trial court judge acknowledged the prejudice created by the prosecutor warranted a mistrial:

> Mr. Keitel, there's no doubt in this court's mind that you created all of this by your opening statement;
> [. . .]
> *I don't know how the court can deal with it other than a mistrial. And a mistrial would probably lead to a double jeopardy issue.*
>
> [5T 23:14-24 (emphasis added).]

While ordering a mistrial is sure to result in undue burden, inconvenience and cost to the parties, the attorneys, and the court alike, such concerns should never outweigh a defendant's constitutional rights to due process and a fair trial, which is precisely what happened here.

[38] Although it does not appear in the court's copy of the transcript, several times during their arguments, both defense counsel stated on the record that just prior to the prosecutor's opening, the judge cautioned the attorneys not to do anything that might cause a mistrial.

Looking to the Appellate Division's opinion, the court finds its discussion on the prosecutor's misconduct particularly noteworthy. Addressing defendant's first argument on appeal, the court began: "Defendant first contends that the prosecutor's opening statement contained improper prejudicial comments, and that a mistrial was required. Having read the prosecutor's opening, we must agree with defendant that it was riddled with impropriety." Zisa, supra at *12.

The Appellate Division continued admonishing the prosecutor, referring to his opening statement as a "tirade" which contained "improper," "inadmissible" and "highly prejudicial" comments. The court further indicated the prosecutor's "astonishingly improper remarks were not brief or made in passing," but were the central themes of his opening. Id. at *13-14. The Appellate Division noted the trial judge "essentially conceded that a curative instruction was going to be inadequate . . . [h]owever, with virtually no additional explanation, he stated that he would not declare a mistrial." Id. at *15. The court then quoted the trial judge's curative instruction in full, and stated "Unfortunately, *even assuming a mistrial could have been avoided*, this curative instruction was weak and inadequate to cleanse the taint the prosecutor created in his opening." Id. at *19 (emphasis added).

Finally, without reaching the merits of double jeopardy, the Appellate Division laid the foundation for the defendant to raise a double jeopardy argument before this court. See id. at *24 n.10 ("We do not decide here whether a retrial would be barred by double jeopardy principles.[39] Defendant may present that issue to the trial court on remand."); see also id. at *39 ("[A]s previously noted, prior to the retrial defendant may present to the trial court his argument that a retrial is barred by double jeopardy principles. We intimate no view on the merits of that

[39] The issue of double jeopardy was not before the Appellate Division; it was not, and could not be, ripe for review.

argument."). Although defendant's double jeopardy defense was not ripe for review before the Appellate Division, this court finds it significant that the Appellate Division *invited* defendant to raise double jeopardy on remand, where the merits of such application may properly be ruled on.

Additionally, the Appellate Division's review of whether a mistrial should have been granted was necessarily limited. In reviewing this issue, the Appellate Division could have commented on whether it was error for the trial court to deny the motion for a mistrial;[40] however, it could not effectively "grant" the erroneously denied motion for mistrial, as that could only have been achieved by way of interlocutory appeal. Neither defense attorney asked for leave to appeal the trial court's repeated denial of the numerous motions for mistrial. Had defendant succeeded in his motions for mistrial before the trial court, he could have properly raised a double jeopardy defense under Kennedy. Because the court denied the motion for mistrial, defendant's only other recourse was to file an interlocutory appeal, which, if successful, would have entitled him to the same double jeopardy defense. This result necessarily begs the question: Does our current framework require a defendant to file an interlocutory appeal when his motion for mistrial, based on misconduct intended to provoke a mistrial, is erroneously denied? Certainly, this arbitrary distinction cannot be the line that separates those entitled to the constitutional protections embodied in the Double Jeopardy Clause from those who are not.

This is precisely the type of "purely arbitrary distinction" contemplated by the Burks Court. Were this court to preclude defendant's otherwise potentially meritorious double jeopardy defense under Kennedy and Torres due solely to the fact that he did not obtain a mistrial, defendant is left with an unresolved issue without any forum in which to address it. Such result would compel the

[40] Without expressly stating that it was error, the Appellate Division made clear that the trial court's failure to "take corrective action" after the repeated instances of prosecutorial misconduct contributed to a proceeding that was tainted from the outset and denied defendant's right to a fair trial.

conclusion that defendant not only had to endure the prejudice of an unfair trial due to prosecutorial error; he must now also suffer loss of his constitutional protection against double jeopardy due to judicial error. This result, based on such an arbitrary distinction, cannot be reconciled with the fundamental principles that underlie the Double Jeopardy Clause.

An "errant prosecutor" who recognizes the weaknesses of his case and anticipates an acquittal may try to provoke the defendant into moving for a mistrial. The Torres court observed:

> Since an acquittal would bar a retrial, it is only fair that in such a situation the same result should attach to a mistrial deliberately provoked by the prosecutor. In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if a mistrial provoked by the prosecutor would not invoke the double jeopardy prohibition. And surely, a prosecutor who has deliberately provoked a mistrial in order to avoid an acquittal has had his day in court and cannot complain.
>
> [Torres, supra 328 N.J. Super. at 86-87.]

Here, the defendants moved for a mistrial no fewer than five times. Each time, the trial court denied the motion. The Appellate Division expressly disapproved of the trial court's failure to declare a mistrial and its curative instructions that did little, if anything, to salvage defendant's opportunity to have a fair trial before the first jury empaneled to him.[41] In sum, defendant was forced to proceed through a trial which had been tainted from the outset, and in which he had been highly prejudiced. It is undisputed that the jurors in the instant matter were exposed to repeated inadmissible, improper and prejudicial statements made by the assistant prosecutor, including relentless attempts to bolster the witnesses' credibility, unseemly comments about the defendant's family members and their role in local politics, and, perhaps most injurious, unsubstantiated allegations of defendant orchestrating an omnibus conspiracy to intimidate or tamper with the State's witnesses.

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[41] "The judge acknowledged that the trial was going off-course, but failed to take effective corrective action." Zisa, supra at *21.

The conduct at issue in the instant matter, however, rises to a level of such extreme egregiousness and pervasive prosecutorial misconduct, it far exceeds that of any found in most reported decision. Indeed, from the trial's beginning, the prosecutor's conduct was woefully inappropriate and that conduct continued unendingly, even in the face of the court's repeated admonishments. Thus, the court is compelled to evaluate the facts and circumstances of this matter in depth to determine the prosecutor's intent.

b. Torres Intent Analysis

In determining whether a prosecutor's misconduct is intentional, although different considerations come into play, the underlying framework for finding intent is still the same: absent direct evidence, or an express admission from the prosecutor that his conduct leading up to the error was intentional, courts must "[i]nfer[] the existence or nonexistence of intent from the objective facts and circumstances." Kennedy supra 456 U.S. at 675.

While other jurisdictions have adopted their own approaches or expanded upon the existing one articulated in Kennedy, New Jersey adopted the four factors announced by Justice Powell in his concurring opinion as the basic framework for determining whether a prosecutor intended to provoke a defendant into moving for mistrial. The Appellate Division relied on those very factors in deciding Torres:

> (1) whether there was a sequence of overreaching or error prior to the error resulting in mistrial, (2) whether the prosecutor resisted the motion for a mistrial, (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial, and (4) the timing of the error.
>
> [Torres, supra 328 N.J. Super. at 88 (citing Kennedy, supra 456 U.S. at 680 (Powell, J., concurring).]

i. Sequence of Error

Looking to the first inquiry, it is unquestionable that the prosecutor's misconduct and overreaching was not limited to a single instance: rather, his overreaching began with his opening statement, continued throughout the trial, and was hinted at in his summation.[42] As the Appellate Division observed, his "astonishingly improper remarks were not brief or made in passing. They were central themes of [his] opening and comprised many pages of the transcript. Zisa, supra at *14. The record clearly establishes that as a result of the prosecutor's conduct, the attorneys argued for a mistrial on at least five occasions. Furthermore, the prosecutor's introduction of inadmissible and improper evidence necessitated a 404(b) hearing as well as several evidentiary hearings prior to the State's witnesses testifying.

The Appellate Division further noted the misconduct continued throughout the trial: "the prosecutor persisted in presenting the same type of prejudicial and improper evidence during the trial, requiring defense counsel to respond to it by attempting to show that no witness tampering had occurred." Id. at *21.

Throughout Arosemowicz's testimony, the prosecutor pursued a line of questioning meant solely to elicit support for his inadmissible and prejudicial theory of an omnibus conspiracy of witness tampering the defendant was supposedly responsible for. By the time Arosemowicz had been on the witness stand for two days, the judge told the prosecutor he was "creating a nightmare" of the case, and cautioned him in light of the accusations he was making and the direction he was steering the case in. The judge reminded him that he was a representative of the State, and outright asked him, "You're comfortable as an assistant prosecutor taking this trial way off the tracks and going against sheriff's officers in Bergen County because your witness has been charged with an

[42] Referring to the improper comments about defendant's family the prosecutor made during his opening statement, the Appellate Division noted he "also touched on this theme in his summation, telling the jury that we don't have 'dictatorships and kings' in this country and that the law was the same for everyone, even if 'you're . . . a Zisa.'" Zisa, supra at *12-13 n.8.

internal investigation?" Finally, the judge told the prosecutor he was "on notice to get off this train as far as accusing other people of tampering with witnesses. It's not appropriate." 5T 124:6 – 127:14. As the Appellate Division observed, however, not only did the judge fail to issue any curative instruction to the jury at this point, but the prosecutor also "continued the same pattern of questioning during the testimony of Officer Al-Ayoubi." Zisa, supra at *22.

Merely two days after the court ruled that the introduction of any evidence relating to alleged retaliation against the witnesses would be inadmissible under N.J.R.E. 404(b), the prosecutor, in direct violation of the judge's order, attempted to elicit testimony from Campos about her involuntary disability, and went as far as trying to introduce a document into evidence that could serve but one purpose: to put before the jury evidence that the City of Hackensack was placing her on involuntary disability. Campos' involuntary disability, in isolation, is largely irrelevant to anything tending to prove or disprove that defendant engaged in official misconduct in either 2004 or 2008. It is, however, probative of the inadmissible and prejudicial allegations the prosecutor attempted to inject into the trial from the outset: that the State's witnesses were suffering retaliation for testifying against the defendant. The prosecutor's attempt to introduce this evidence once again resulted in a motion for a mistrial.

Thus, the prosecutor's misconduct did not constitute a single error, but rather, his misconduct unequivocally constituted a sequence, if not, a pattern of error that resulted in the several motions for mistrial.

ii. Whether the Prosecutor Resisted the Motion

The trial court transcript reveals that the each time a motion for a mistrial was before the court, the prosecutor's response to the motions consisted of: (1) sarcasm and lack of surprise; (2) a continuing argument attempting to justify his introduction of improper and inadmissible

evidence, even *after* the judge had repeatedly ruled such evidence inadmissible under N.J.R.E. 404(b); (3) an express resistance to even arguing against the motions; and (4) an unprovoked attack on the judge's fitness to preside over the case due to an alleged conflict of interest.

As to the first motion for mistrial, the prosecutor responded that he was not surprised at the defendants' motion for a mistrial, characterizing the motion as an attempt by the defendants to delay the trial. The prosecutor's immediate reaction to the defendant's objection to his opening statement, which the Appellate Division referred to as a prosecutorial tirade full of inadmissible, improper, and highly prejudicial comments, was "I don't see any prejudice. I don't see what the issue is." 1T 76:15-24. He dismissed the defendants' arguments by simply stating "This is much ado about nothing." 1T 54:7-8. It is noteworthy that at no time did the prosecutor put any opposition to the motion on the record. Before recessing for the day, defense counsel for Zisa stated if the judge was considering a lesser remedy that a retrial, she would like the opportunity to discuss it the following day. The judge replied, "that's always an option," to which the prosecutor replied, "Doing nothing is always an option too, which is my position, because I think it was proper." 1T 99:16. The judge then summed up that both defense attorneys were requesting a mistrial, and the prosecutor was indicating the court should do nothing, to which the prosecutor responded, "I don't even see where a curative instruction is required." 1T 100:3. Astoundingly, the prosecutor not only stated there was no need for a curative instruction for the defense, he had the audacity to also ask for a curative instruction for the *State*, as the court's delay in dealing with the opening statement was prejudicial to the State.

The prosecutor rationalized that his comments during his opening statement were admissible under "credibility, under bias, under interest, and also under tampering on the eve of trial." 8T 24:7-9.

When the defense moved a second time for mistrial, the prosecutor responded as follows:

> My response is, you addressed this, I don't know, two days ago, maybe three days ago . . . . [I]f you are respectfully just going to deny the motion based on your ruling the other day, I won't rehash it at this time . . . . I'll be happy to put the State's lengthy position about what the State believes is witness tampering on the record if your Honor wants me to do that.
>
> [7T 28:25 – 29:24.]

On April 16, 2012, the court held an N.J.R.E. 404(b) hearing and the defense moved a third time for mistrial. Inasmuch as the prosecutor's arguments may have constituted objections to the mistrial motions up until this point of the trial, his reaction to the third motion indicates that he had not yet even begun arguing the motions for mistrial. The prosecutor's reaction to the third motion for mistrial is quite telling.

It appears following the opening statement, the defense attorneys submitted briefs in support of ordering a mistrial. In response to the first and second motions for mistrial, the prosecutor simply dismissed the arguments, noting he was not surprised, and essentially implying the defense was overreacting. By the third motion, however, the prosecutor resisted even *arguing* against the motion. Astonishingly, in direct contradiction to his earlier lack of surprise that the defense was moving for mistrial, and, notwithstanding his cavalier suggestion the parties had argued the motion "twice, three times already," he suddenly expressed surprise that he was expected to "stand up and wing an argument on a mistrial," and complained he could not respond to the motion because it was not in writing. The prosecutor's sudden and belated realization that a motion for mistrial is a "serious issue that can't possibly be responded to" because it wasn't in writing was nothing short of preposterous at this point in the trial. Moreover, his unwillingness to argue the third motion leads to the conclusion that, up until this point, he had not actually argued against the motions at all. Rather, his responses to each of the motions are better characterized as

continuing attempts to inject prejudicial and inappropriate theories of witness tampering on the record and in front of the press.[43] His reaction is especially striking, as it appears defense counsel briefed these very same issues in writing immediately following the opening statement.

When the defense moved for the fourth motion for mistrial, the prosecutor mocked the defense, repeatedly stating defendants raised a "silly argument" and that it was *obvious* Herrmann had falsified his report. The court finds the basis on which defense moved for the fourth motion to be anything but silly; rather, the implications are quite troubling. Nonetheless, rather than addressing the concerns raised by the defense, the prosecutor flippantly dismissed the request for a mistrial.

The defense moved for a mistrial a fifth time when the prosecutor attempted to elicit testimony and introduce evidence of Campos' involuntary disability during her direct examination, which was in direct violation of the judge's order ruling such evidence inadmissible under N.J.R.E. 404(b) just two days prior. The prosecutor's response to the fifth motion for mistrial can be summed up as follows. First, he responded with an argument that lacked both merit and credibility. Next, he responded with arrogance and sarcasm. He followed with an argument that directly contradicted the previous positions he had taken. Finally, he seemed to be inviting a termination of the trial when he declared the case should never have been tried in Bergen County, notwithstanding his opposition to the defense's motion for change of venue a few months prior.

The prosecutor's responses to the motions for mistrial, when looked at in the entirety of the trial, and given the prosecutor's knowledge and experience, do not represent vehement oppositions. The prosecutor seemed to use his responses to the motions for mistrial as his platform to repeat the prejudicial and inadmissible statements from his opening. The arguments he

[43] This trial was highly publicized in the local media. Although the jurors were not present for many of the arguments, the courtroom was filled with audience members and news reporters each day.

presented rarely addressed the substantive issues. When he was not insisting that the State's witnesses had been tampered with, the prosecutor outright refused to argue against the motion for mistrial and, on at least two occasions, he seemed to be inviting a termination of the trial.

In sum, the court finds the prosecutor's responses do not constitute the kind of "vociferous[]" arguments the Appellate Division contemplated when it decided Torres. See Torres, supra 328 N.J. Super. at 89.

iii. Whether the Prosecutor Testified

This factor is not directly relevant to the case at bar: the prosecutor did not testify before the trial court as to whether he acted intentionally to goad a mistrial, and the trial court did not make any findings regarding the same. In accord with Justice Stevens' observation in Kennedy, even if the prosecutor had testified as to his motives, such testimony would marginally influence the court's analysis in this case. See Kennedy, supra 456 U.S. at 688 n.25 ("[A] standard that requires a prosecutor to take the stand to explain his trial strategy and his train of thought prior to making a serious error is of questionable wisdom.").

Though the prosecutor did not testify before the trial court, several times throughout the trial his adversaries accused him of acting intentionally in open court. In his submissions for the instant motion, defendant extensively briefed the issue of the prosecutor's intent. During oral argument, defendant repeatedly stated his position on the record that the prosecutor acted intentionally to goad a mistrial. Remarkably, the prosecutor did little, if anything, to refute these accusations.[44] While the prosecutor's failure to defend himself is hardly the equivalent of

[44] During the fifth motion for mistrial, both defense counsel argued at length that the prosecutor must have been acting intentionally to goad a mistrial, as there was simply no other explanation for his conduct, given his experience. Rather than defending against such assertion, the prosecutor responded with sarcasm and yet again repeated his unsubstantiated theory of witness tampering. As to the instant motion, the prosecutor did not attempt to refute defendant's allegations that he acted intentionally, neither in writing nor at oral argument.

conducting a hearing on the matter, the court is astonished that he did not seize a single opportunity to openly state that he did not act intentionally to cause a mistrial. Rather, he presented incredulous justifications for his conduct and repeatedly found a way to insert inadmissible allegations of witness tampering into the record.

iv. Timing of the Error

The timing of the prosecutor's error, misconduct or overreaching may be instructive in determining the prosecutor's intent, as it provides insight into the prosecutor's confidence in his case at that particular point in time. For instance, a prosecutor who commits an error early in a trial may be viewed as having done so unintentionally, since it is unlikely that a prosecutor would intentionally try to cause a mistrial at the start of the case, unless, of course, the odds of obtaining a conviction are slim at the outset.

In the instant case, the prosecutor's errors and misconduct were spread throughout the State's case in chief, beginning first with the opening statement. In his opening statement, the prosecutor introduced: (1) inadmissible other crimes evidence of charges not in the indictment; (2) improper references to defendant's family and its involvement in local politics; (3) information about internal affairs investigations that had not been disclosed to the defense (4) information about a witness's criminal prosecution that had not been made available to the defense; (5) information about witnesses' involuntary disability early retirement that had not been made available the defense; (6) false and misleading information regarding a witness's IA and criminal investigations; and (7) irrelevant and improper accusations of third parties who were unrelated to the case.

The comments made in the opening statement made up the most egregious error of the trial. The prosecutor continued to rehash the theories he presented in his opening throughout the trial,

prompting the judge to repeatedly caution him against making uncharged and unsubstantiated allegations. One week after the opening statement, the judge put the State on notice to stop making accusations of witness tampering; two days later, the judge again said to the prosecutor, "[w]e can't go over this over and over again. Mr. Keitel, I don't know how many times I've said it to you." 7T 31:3-6. Yet, the prosecutor's conduct continued throughout the trial.

As the trial continued, the court ruled against the State on the 404(b) hearing, taking away the prosecutor's ability to make any further mention of evidence that supported his theory of witness tampering that he continually tried to present. To put this ruling into perspective, if this ruling had been made at the start of trial, more than half of Arosemowicz's three day testimony would not have been elicited.

Immediately after the judge issued his ruling, the defense moved for mistrial again, as the ruling meant that the jurors had now been exposed to days of 404(b) evidence that was now inadmissible. Just as KT's counsel paused during his argument, the prosecutor launched into a bewildering attack on the trial judge for failing to disclose to the parties his alleged close relationship with Inspector Bradley. He moved for the judge to recuse himself based on this alleged conflict of interest.

By the fifth motion for mistrial, the State had nearly concluded its case and presented most of its witnesses. A mere two days after the judge issued his 404(b) ruling, the prosecutor attempted to introduce evidence that had just been ruled inadmissible.

Finally, the prosecutor referenced the prejudicial statements about the Zisa family from his opening statement in his closing argument.

v. Objective Facts and Circumstances Indicating the Prosecutor's Intent

After carefully considering the record in its entirety, the sequence of misconduct, the prosecutor's responses to the motions for mistrial, the timing of his misconduct, and the objective facts and circumstances, the court is convinced the prosecutor acted intentionally to goad a mistrial.

The very concept of a prosecutor intentionally goading a mistrial seems fundamentally counterintuitive at first glance. Indeed, it is only in exceptionally rare circumstances that such a standard could be met. Moreover, it immediately raises the question of why a prosecutor would want a mistrial in the first place.

In Kennedy, Justice Stevens observed, "a prosecutor might wish to provoke a mistrial in order to shop for a more favorable trier of fact, or to correct deficiencies in [his] case, or to obtain an unwarranted preview of the defendant's evidence." Kennedy, supra 456 U.S. at 686 n.18 (Stevens, J., concurring) (internal citations omitted). Essentially, a prosecutor may be motivated to provoke a mistrial where the odds of obtaining a conviction are stacked against the State, be it by an unfavorable jury, weaknesses in the case, or uncertainty as to the defense's evidence.

The Torres factors above highlight objective circumstances that would give a court insight into the prosecutor's motive for seeking a defendant's mistrial. As Justice Powell emphasized in Kennedy, courts should "primarily rely upon the objective facts and circumstances of the particular case." Kennedy, supra 456 U.S. at 680 (Powell, J., concurring).

Looking first to the prosecutor's conduct and whether it was limited to a single instance, it is unnecessary to belabor the point: the prosecutor's conduct unequivocally constituted a sequence of error that was pervasive throughout the trial.

The timing of the prosecutor's error began with the opening statement. Ordinarily, an error made during the opening statement, "prior to the point in which success or failure in the

prosecution of the defendant could [be] reasonably assessed," would weigh against a finding of intentional goading. Torres, supra 328 N.J. Super. at 89. However, the extraordinary circumstances of this case indicate otherwise. A close look at the State's case reveals the prosecutor was well aware of the significant weaknesses of the case going into trial and of the reasonable likelihood that defendant would be acquitted of the charges. The State's case was not "formidable" in any sense. See ibid. It relied entirely upon testimony of its key witnesses, all of whom had significant credibility and bias issues that the prosecutor knew the defense would expose. Underscoring the weaknesses of the State's case is the final disposition of the charges. Zisa was indicted on nine separate counts involving the 2004 and 2008 incidents. Of those nine counts, a single count survives. Notwithstanding the prejudicial and improper statements the prosecutor presented, the jury acquitted defendant of four counts. The trial judge found there was insufficient evidence to uphold the conviction for three of the remaining five counts. Finally, the Appellate Division reversed one of the two counts for insufficiency of the evidence.

Prior to the opening statement, the State was well aware of the following. First, the State would not be presenting any tangible evidence tending to support the charges; rather, the reports and writings related to both incidents supported the opposite conclusion and would be used to impeach the witnesses. Second, the majority of the State's key witnesses gave inconsistent accounts in sworn statements pretrial, either to the BCPO or in depositions, and one of the key witnesses had been under investigation for perjury just months prior to the trial.[45] Third, exacerbating the witnesses' lack of credibility was their bias against defendant, which the defense

[45] In a pretrial hearing before the Honorable Peter E. Doyne, A.J.S.C., Assistant Prosecutor Catherine Foddai acknowledged the weaknesses of the State's case. Referring to the credibility of the witnesses, she stated, "We know the problems we're going to have in that sense. We know about the problems that will fully be brought out." See Def. Ex. MM – Pretrial Hearing, 77:12 (Nov. 10, 2011).

was certain to introduce to the limited extent permitted by the motions *in limine*. Finally, most of the key witnesses were promised immunity in exchange for their truthful testimony, the breadth of which remains unclear to this day.[46] These circumstances essentially provided the defense with an arsenal to impeach the State's witnesses. Moreover, the witnesses' bias and the immunity agreements were likely to create a strong inference that the witnesses had reasons to lie and were protected from prosecution if they did so.

The prosecutor's awareness of these weaknesses prior to the start of trial casts his opening statement in a different light and makes it much more likely that he intended to throw the trial at the outset.

When the defense's first motion for mistrial was denied, the prosecutor's misconduct continued and took a turn even more puzzling. The prosecutor's conduct following the 404(b) motion and third motion for mistrial was significant for its timing.

As if the State's case was not already weak enough, the judge's 404(b) ruling took away the prosecutor's only theory to rehabilitate the witnesses' credibility and inspire some kind of sympathy for them from the jurors. Immediately following this ruling, the defense's motion for mistrial was as ripe as it would be: because the jury had just been exposed to an opening statement

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[46] Judge Conte's post-trial decision illustrates the paramount importance of the witnesses' testimony to the success of the State's case, and further notes the ambiguity of the immunity agreements:

> The defense did elicit that the immunity agreements offered to the State's witnesses [Herrmann], [Al-Ayoubi], and Campos were much broader than represented by Assistant Prosecutor led in that they encompass civil and administrative charges, and gave transactional immunity instead of just use and fruit immunity. The breadth and extent of the immunity agreements remains unknown, which is why there's a statutory requirement to get approval of the Attorney General's Office. More importantly, if it deprived the defense of the opportunity and right to confront their accusers through a valid cross examination of the parameters and details of an unknown oral immunity agreement. *But for the testimony of these immunity [sic] witnesses, the State would've had minimal or no evidence to proffer any of the counts in the indictment.*
>
> [Post-Trial Decision, 29:10 – 30:2 (Sept. 12, 2012) (emphasis added).]

and over a week of testimony that had just been ruled inadmissible, any curative instruction would be insufficient and a mistrial was in order. Defense counsel submitted that the prosecutor's conduct during the opening was calculated and intentional. Precisely at this moment, the prosecutor inexplicably moved for the judge to recuse himself for failing to disclose an alleged conflict of interest.

Both defense attorneys were astonished that the prosecutor would accuse the judge of such impropriety. Zisa's counsel added that this stunt was the prosecutor's "Hail Mary," and KT's counsel saw it as "an attempt to influence the court's decision on the mistrial application." See 8T 58:2-3. Viewing the record as a whole, the court agrees with the defense. Not only were the prosecutor's accusations baseless, they also seemed entirely disingenuous considering that he had both worked in the courthouse for years and had at one point been assigned to the trial judge's chambers himself. Taking into account the implications of the 404(b) ruling on the State's case, the precise timing of the prosecutor's outburst, and the incredible and meritless basis of the motion for recusal, the court views the prosecutor's motion as having no explanation other than the prosecutor inviting a termination of the trial.

Finally, the conduct that gave rise to the fifth motion for mistrial was indefensible. The 404(b) ruling restricted the prosecutor from presenting any more extraneous proceedings that supported his theory of witness tampering. In his opening, the prosecutor told the jurors they would be shocked to hear Campos' story, as she was facing involuntary disability in retaliation for testifying against Zisa. Just two short days after the judge's 404(b) ruling, the prosecutor attempted to introduce evidence of Campos' involuntary disability during her direct examination.

Nearly one month into trial, the defense had moved for mistrial four times, the judge had repeatedly warned the prosecutor to stop introducing evidence of witness tampering and the court

had ruled against the State on the 404(b) motion. Without a doubt, the prosecutor had been on notice to cease his misconduct. The prosecutor's attempt to introduce evidence of Campos' disability on the heels of the 404(b) ruling was plainly inexcusable. He acted intentionally, and in flagrant and knowing disregard of the judge's 404(b) ruling.

The sequence and timing of the prosecutor's misconduct and the weaknesses of the State's case are strongly indicative of the prosecutor's intent to goad the defense into moving for mistrial.

The prosecutor's resistance, or lack thereof, to the defense's motions for mistrial lends further support to the court's finding of intent. His responses constituted, for the most part, continuing attempts to justify his opening statement by reiterating his theory of witness tampering on the record and before the press. The court finds little merit and even less credibility in the prosecutor's assertion that such inflammatory and prejudicial statements were admissible.

With regard to the third motion for mistrial, the prosecutor's resistance to even argue an opposition to the motion for mistrial leaves the court to infer that he had not yet officially opposed the first and second motions for mistrial inasmuch as he derailed the motions to repeat his prejudicial remarks. That the prosecutor could not "stand up and wing" a mistrial motion that was raised for the *third time* and *on the same basis* as the first two motions leaves ample room to view the first two motions for mistrial as unopposed by the State.

The court is baffled by the prosecutor's arguments, given his twenty-five years in practice, sixteen of them as a prosecutor. It strains credibility that such a seasoned prosecutor, with years of trial experience, could be so ignorant to the rules of evidence. Even more inconceivable is the notion that the prosecutor, in good faith, believed the inflammatory and prejudicial statements he completely derailed the trial with in his opening statement were admissible. The court is convinced the prosecutor, with his years of trial experience, knew precisely what he was doing. "Rare are

the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing." Breit, supra 122 N.M. at 666. By innuendo and implication, the prosecutor's opening statement made certain that the jurors were free to infer that Zisa had orchestrated the omnibus conspiracy to tamper with witnesses.

Finally, looking at the totality of the circumstances, the court finds this case presented a unique set of circumstances and arguably created the perfect storm for a prosecutor in this prosecutor's position to seek a mistrial. It is no secret that this case was highly political. It was, and still remains, a relatively high-profile case which caught the attention of local media outlets.

Considering the State's lack of proofs and the weaknesses of its case, it is surprising this case was prosecuted to begin with. Looking to the trial itself, it is equally surprising a mistrial was not ordered at any point. The court is not charged with venturing to guess why the charges were not dismissed or why a mistrial was not called.

Irrespective of the prosecutor's motivation for desiring a mistrial, such conduct simply cannot and should not be tolerated. The United States Constitution and our New Jersey Constitution protects individuals from repeated attempts to convict. "The bedrock principle is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual, thus compelling him to live in a continuing state of anxiety and insecurity." Torres, supra 328 N.J. Super. at 85 (citing Green v. United States, 355 U.S. 184, 187-88 (1957)). The prosecutor had a full opportunity to try this case without injecting any prejudice into the trial. Yet, that is not what happened here. Instead, he chose to taint the proceedings at the outset, with full knowledge that he was crossing the line; after all, he was not surprised when the defense moved for mistrial the first time. This court cannot fathom a single reason why the State, after sabotaging the first trial, should have another bite at the apple and put the defendant through

another trial for the one count that remains. "The law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not." Pool, supra 677 P.2d at 270.

Given the "substantial factual evidence of intent" in the record before the court, and the court finds a retrial to be an insufficient remedy as it would violate the defendant's right against double jeopardy. Kennedy, supra 456 U.S. at 680 (Powell, J., concurring). Accordingly, the remaining count of the indictment is dismissed with prejudice.

Fundamental Fairness

Moving to defendant's motion to dismiss on the basis of fundamental fairness, the court is mindful the doctrine is rarely applied. Further, it is aware of the scant caselaw in this area. The seminal case, State v. Abbati, 99 N.J. 418 (1985), provides a number of factors a court may weigh in deciding whether to dismiss an indictment:

> (1) the number of prior mistrials and the outcome of the juries' deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney.
>
> [Id. at 435.]

Looking at each of these factors in turn, the court notes they do not all apply. Certainly there was no prior mistrial.

The trial involved some nine different counts covering a period of more than six weeks. It evolved into a complex web of testimony, issues, and motions in spite of extensive pretrial motion practice. Although there is but one remaining count, it is significant the facts in the prior trial were complex and inextricably interwoven and thus, it is would appear any subsequent trial, even on one count, could be similarly complicated, contentious, and lengthy.

As above, there is only one count remaining from the original complaint. Thus, there is a distinction the new trial would concentrate solely on that issue.

Perhaps most noteworthy is the assessment of the strength of the State's case. See discussion, supra Section IV(b)(v). Further, it would seem were the State to not rely on inadmissible evidence, it would have scant evidence, if any, to support its case.

The last factor in the analysis is also telling. As discussed throughout this opinion and as noted repeatedly by both the trial and appellate courts, the prosecutor's conduct was woefully unprofessional. Not only did the prosecutor ignore the trial court's repeated rulings, forbidding his reliance on impermissible testimony and evidence, he was openly hostile to the court, leading eventually to his motion for the trial judge to recuse himself. See discussion, supra Section VI(b)(i).

Further, the Abbati court emphasized the importance of considering the interests of both the State and the defendant. The court advised a court must weigh the gravity of the criminal changes and the public's concern in the effective and definitive conclusion of criminal prosecutions."[47] Id. at 435.

Here, the nature of the remaining count of the indictment is for official misconduct. Defendant is not charged with a violent crime. The remaining count of the indictment is essentially a victimless crime: defendant showed up to the scene of his ex-girlfriend's single-vehicle car accident, which injured no person or property except for the vehicle itself. He did this despite the conflict of interest created by his position as the former Chief of Police. In doing so, the State

[47] Additionally, the court notes that weighed against the defendant's right to be free from repeated prosecution is society's interest in the "vigilant enforcement of criminal laws." Torres, supra 328 N.J. Super. at 86. Every individual's first right is "to be protected from criminal attack, as the preamble to the Federal Constitution plainly says." Ibid. (citing State v. Bisaccia, 58 N.J. 586, 590 (1971)). Thus, setting a criminal suspect free when a trial is aborted denies innocent individuals "the protection due them and defeat[s] the social contract upon which government is based." Torres, supra 328 N.J. Super. at 86.

alleged he committed official misconduct for interfering with the investigation. Whether the defendant, on the night of the 2008 incident, should be found guilty of professional misconduct is not before this court. However, whether he crossed the arbitrary line from doing something permissible to doing something prohibited during the 2008 incident does not in any way threaten society today. He has been suspended from the HPD for nearly six years. He is not a violent killer, nor is he a drug dealer, a rapist or a terrorist. He is a former officer of the law accused of not following rules enacted as part of the state's general policy against abusing the title of one's position or office. Thus, setting free this "criminal suspect" does not run counter to the protections embodied in the preamble to the Federal Constitution. Balancing the defendant's right to be free from repeated criminal prosecutions against the public's right to be protected from potentially violent criminal suspects by the vigilant enforcement of our criminal laws, the court finds the circumstances of this case tip in favor of the defendant.

Considering these factors in total, the court also grants defendant's motion to dismiss on this ground.

VII. Conclusion

The court apologizes for the apparent meanderings through the voluminous record and caselaw. It intensively and extensively explored the nether reaches of each. As a result, the court finds the State vaulted the threshold of prosecutorial misconduct to goad defendant to seek a mistrial not once, but repeatedly, five times. But for the trial court's reluctance, a mistrial would have been granted. It is unequivocal the record is rife with repeated attempts by the State to goad defendant from the outset and by blatantly refusing to heed the admonishments of the court thereafter. Rather, the State continued in its quest to admit foreclosed testimony and evidence. A

careful scrutiny of the record shocks the conscience and can leave this court with no other conclusion.

As strikingly noted by the Appellate Division, "Lastly, we remind all concerned that 'the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.'" Zisa at *39. That was not done here and for that reason defendant's motion is granted. The sole pending count is dismissed with prejudice.