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IN THE SUPREME COURT OF PENNSYLVANIA

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NO. 83 MAP 2013

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MARK BANFIELD, *et al.*,

Appellants,

v.

CAROL AICHELE, Secretary of the Commonwealth,

Appellee.

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Appeal from the October 15, 2013 Order of the  
Commonwealth Court in 442 MD 2006

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**BRIEF OF AMICUS CURIAE THE RUTGERS SCHOOL OF LAW  
CONSTITUTIONAL RIGHTS CLINIC IN SUPPORT OF APPELLANTS**

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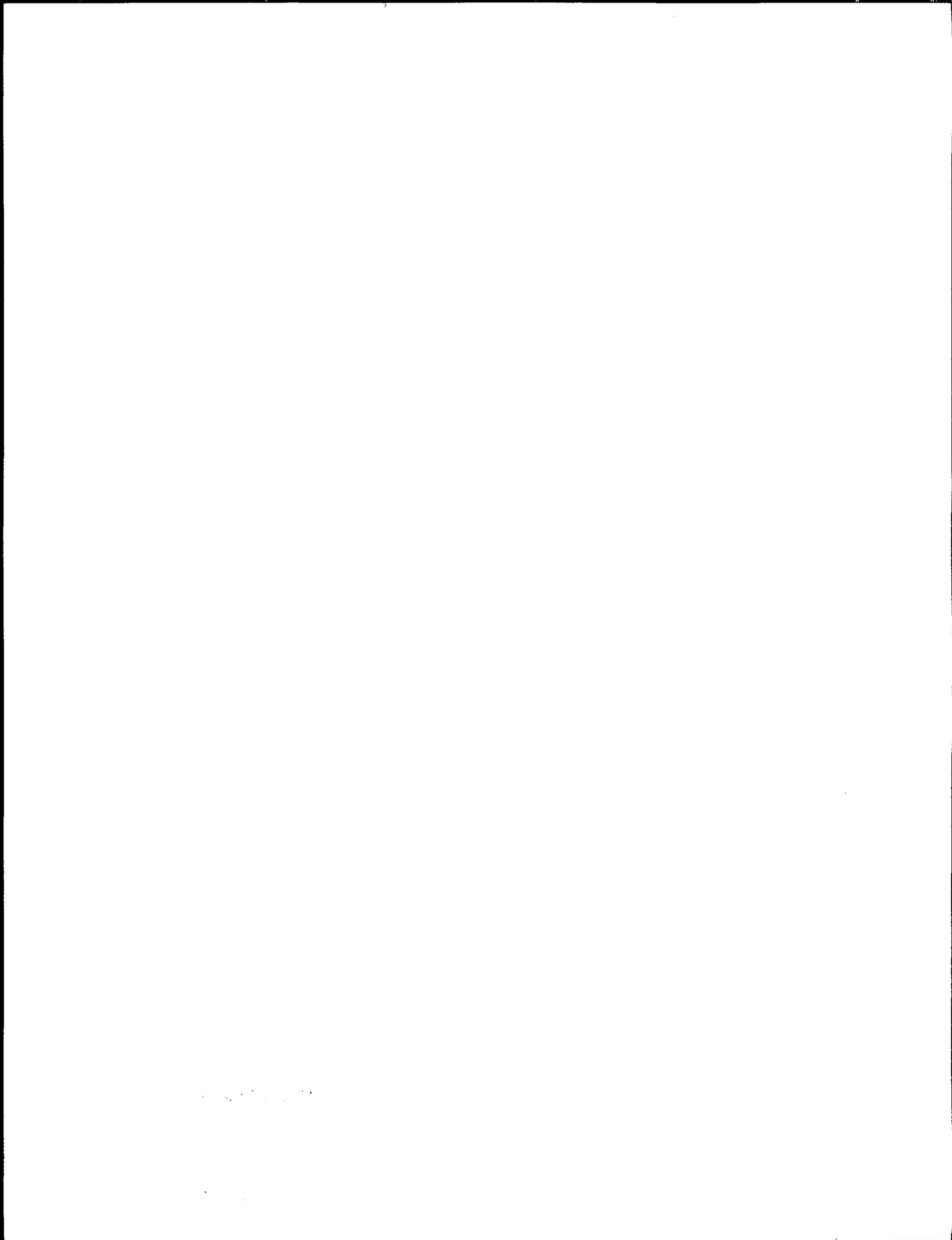


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### INTEREST OF AMICUS

*Amicus*, the Constitutional Rights Clinic, has been part of the curriculum of the Rutgers School of Law-Newark since 1970. Its main goals are to successfully represent clients whose most fundamental rights have been violated; to protect and promote civil liberties and human rights; and to train law students (through the medium of impact litigation) to be creative and ethical lawyers of the highest quality.

The Constitutional Rights Clinic is one of the oldest legal clinics in the country. It has litigated civil rights and human rights cases of first impression in federal and state courts in this country and throughout the world, including in the U. S. Supreme Court. The Clinic also participates in drafting and commenting on proposed civil rights legislation, writing reports on constitutional violations, coordinating voter registration programs, and representing individual voters who have been denied the

right to vote.

*Amicus* has been litigating for a decade a lawsuit challenging voting machines that do not produce voter verified paper ballots in New Jersey. *Amicus'* lawsuit, Gusciora et al. v. Christie, is currently awaiting certification before the New Jersey Supreme Court. A remand of the case, recently ordered by the New Jersey Superior Court Appellate Division, has been stayed while the New Jersey Supreme Court considers the constitutional issues in the suit.

The same Sequoia AVC Advantage DRE challenged in *amicus'* lawsuit is also being challenged in the present matter. DREs can miscount votes inadvertently through errors or intentionally through hacking. Without voter verified paper ballots, there is no practical way to audit DRE vote results to determine if they are valid.

In Petitioners' action before the Commonwealth Court of Pennsylvania, Petitioners provided reports and expert witnesses to demonstrate the various

insecurities and vulnerabilities of paperless DREs. Despite this compelling evidence, the Commonwealth Court held that Petitioners' experts failed to establish that DREs create more than a "mere possibility" of error in recording and tabulating votes. Banfield v. Aichele, No. 442 M.D. 2006, \*8-9 (Pa. Commw. Ct. Oct. 1, 2013). To the extent the Court meant to hold that the Election Code tolerates insecurities and vulnerabilities that are possible simply because they may not have manifested yet, it erred as a matter of law. See Petitioners' Opening Brief at 35-42. And to the extent the Court meant to find that such insecurities and vulnerabilities have not manifested yet, it ignored the record and the great weight of scientific authority. See id. at 9-12.

In this brief, *amicus* will discuss that the insecurities and vulnerabilities of DREs raised by Petitioners in this suit are more than "mere

possibilities," as they have in fact resulted in vote miscounts in two recent New Jersey elections.

The Sequoia AVC Advantage DREs miscounted votes in two New Jersey elections. Voters were disenfranchised during the "Super Tuesday" Presidential Primary Election in 2008, and in 2011 in a Cumberland County Democratic primary election. Continued use of DREs that are inherently insecure and unreliable threatens every citizen's fundamental to right to vote.

#### QUESTION PRESENTED

Did the Commonwealth Court err in ignoring uncontroverted scientific evidence that computerized voting machines ("DREs") can be made to cheat, and that DREs contain bugs and other systemic vulnerabilities that can cause them to record and report inaccurate election results?

## SUMMARY OF ARGUMENT

Every scientific study conducted of DREs, paperless voting machines, has concluded that they are insecure and easy to manipulate, and that a hacker, bug or virus can change the outcome of an election.

DRE use proliferated in the wake of the 2000 Presidential election, when it became clear that antiquated voting machines (that made it impossible for election officials to determine voter intent when tabulating votes) could affect the outcome of a Presidential election. Florida's "hanging chads" made infamous during the 2000 Presidential election led to the enactment of HAVA, the Help America Vote Act, 42 U.S.C. §§ 15301-15545 (2009). HAVA provided tens of millions of dollars to states to modernize their voting systems. States throughout the country used their HAVA funds to purchase computerized voting systems, or DREs, believing that computerized voting technology would be more effective in tabulating votes.

Computer scientists, who are not normally associated with political advocacy, were the first to speak out about the fatal flaw of computerized voting machines: they can be made to cheat. A computer will do what you tell it to do, and only what you tell it to do. You can program a computer to play chess, Jeopardy, or cheat during elections. With a little extra work, you can tell the computer to cover its tracks. In addition, a computer that is not programmed properly can declare the losers as victors, and the victors as losers. That is precisely what happened in Cumberland County, New Jersey in June 2011, after a Sequoia AVC Advantage DRE misattributed votes, and gave the election to what ultimately proved to be losing candidates. Additionally, a software bug caused New Jersey voters to be disenfranchised in 2008.

## ARGUMENT

### I. SEQUOIA AVC ADVANTAGE DRES HAVE MISCOUNTED VOTES IN AT LEAST TWO NEW JERSEY ELECTIONS

#### A. IN 2011 AVC ADVANTAGE DRES SWITCHED VOTES AND GAVE THE ELECTION TO THE LOSING CANDIDATES IN A CUMBERLAND COUNTY NEW JERSEY PRIMARY ELECTION

On June 7, 2011, a Democratic primary election was held in Cumberland County, New Jersey for two open seats on the Democratic Executive Committee. The Sequoia AVC Advantage used in District 3 attributed votes to the wrong candidates. (7/11/11 Certification of Lizbeth Hernandez, Zirkle v. Henry, No. CUM-L-000567-11.<sup>1</sup>) In that election, Ernest and Cynthia Zirkle ran against Vivian and Mark Henry. Forty-three people voted and eighty-six votes were cast. According to the election results report generated by the DRE, Cynthia Zirkle received ten votes, Ernest Zirkle received nine votes, Vivian Henry received thirty-four votes and Mark Henry received thirty-three.

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<sup>1</sup> The Hernandez Certification is attached hereto as Exhibit A.

After the June 7, 2011 election, several voters who were surprised by the election results informed the Zirkles they had cast their votes for them, and were confused about how the Zirkles lost. In total, twenty-eight registered voters signed affidavits certifying they had voted for the Zirkles. (See 9/1/11 Hr'g Tr., Zirkle v. Henry, No. CUM-L-000567-11, at 43:11- 44:5.<sup>2</sup>) The Zirkles challenged the election.

The Cumberland County Board of Elections and the State Attorney General's Office immediately admitted that the Sequoia Advantage DRE used in the election switched votes, allegedly due to a programming error. The DRE itself had no mechanism or program to catch the error. (Hernandez 6/5/11 Cert. ¶ 3.) Nobody in the Cumberland County Board of Elections caught the programming error.

As a result of the DRE switching votes, the Zirkles, who should have won, lost the election. Similarly, the

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<sup>2</sup> The 9/1/11 Hearing Transcript is attached hereto as Exhibit B.

DRE showed the Henrys to be the victors, even though they received fewer votes than the Zirkles.

The Zirkles filed suit challenging both the election results and the DREs. Judge Krell heard arguments for Zirkle v. Henry in Cumberland County Superior Court, Law Division. Judge Krell ordered that the DRE that misattributed votes be impounded until the Chair of the Princeton Computer Science Department, Prof. Andrew Appel, could evaluate it.<sup>3</sup>

Judge Krell ordered a new election. (9/1/11 Hr'g Tr. at 6:21 to 7:1, 14:1.) On September 26, 2011 in a special election, the Zirkles took home thirty-three

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<sup>3</sup> The day before Prof. Appel was to evaluate it, the DRE was "scrubbed clean." This means that all evidence that would have helped Judge Krell understand why the DRE misattributed votes was erased. Judge Krell referred the matter to the State Attorney General's Office for criminal investigation. Greg Adomaitis, Zirkles Win Fairfield Election; State Can't Confirm Investigation. The News of Cumberland County, Sept. 27, 2011, available at [http://www.NJ.com/Cumberland/index.ssf/2011/09/Zirkles\\_win\\_Fairfield\\_election.html](http://www.NJ.com/Cumberland/index.ssf/2011/09/Zirkles_win_Fairfield_election.html) (last visited Oct. 12, 2011).

percent of the vote over the seventeen percent that went to the Henrys. (Greg Adomaitis, Zirkles Win Fairfield Election, September 27, 2011, [http://www.nj.com/cumberland/index.ssf/2011/09/zirkles\\_win\\_fairfield\\_election.html](http://www.nj.com/cumberland/index.ssf/2011/09/zirkles_win_fairfield_election.html).)

In reaching his decision in Zirkle, Judge Krell reviewed the, then, most recent decision in the Constitutional Rights Clinic's case issued by Judge Linda Feinberg in the New Jersey Superior Court in Mercer County. Judge Krell questioned Judge Feinberg's conclusions that DREs had never been hacked in New Jersey, and that DRE software does not allow votes to be miscounted. (Zirkle, 9/1/11 Hr'g Tr. at 38:12-39:1, 6:21-7:1.)

Judge Krell found that many of Judge Feinberg's findings in Gusciora v. Corzine, No. MER-L-2691-04 (Law Div. February 1, 2010) about the security and accuracy of the State's DREs were not correct, and were not in place in Cumberland County. Contrary to Judge

Feinberg's declaration of strong statewide procedures, (Gusciora v. Corzine, No. MER-L-2691-04 (Law Div. Feb. 1, 2010) (slip op. at 157-63.)), no procedures existed to catch the programming mistake, including the pre-LAT test. Judge Krell was very concerned that Cumberland County officials did not catch the programming error that led to losers being declared victors. (Zirkle v. Henry, 9/1/11 Hr'g Tr. at 46:19-47:3.)

The Zirkle case demonstrates that Sequoia Advantage DREs can misattribute votes anywhere they are used, including Pennsylvania, and that there are no safeguards to catch this misattribution.

The New Jersey Superior Court Appellate Division in, Gusciora v. Christie, also expressed great concern about the Sequoia Advantage DRE errors that occurred in the Zirkle case. It found that had the election been larger, the vote switching DRE error would never have been caught, and that the democratic process would have been subverted.

It is obvious that but for the very limited pool of voters in the Zirkle litigation, the human error that led to completely erroneous election results would never have been detected. In other words, had the election involved 10,000 votes, the fact that the DREs were erroneously programmed would never have been discovered, because it is highly unlikely that a challenger could have established the results were wrong through the affidavits of voters or other proof.

[Gusciora v. Christie, No. A-5608-10T3, slip op. at 43-44. (N.J. Super. Ct. App. Div. Sept. 16, 2013)]

The Appellate Division was so concerned about the DRE errors in the Zirkle case that it remanded the case to the trial court for further fact finding. (Id. at 49-50.) The Appellate Division ordered that the trial court look into whether the State had implemented mandatory pre-election testing of DREs to make sure that the DREs were recording votes correctly. (Id.)

The Zirkle case shows that DRE errors can result in losing candidates being declared victors. It was fortuitous that the Zirkles discovered that a tabulation error had occurred. That was only possible

because fewer than 30 voters cast their ballots. The Appellate Division even noted that in larger election districts where many more votes are cast, or where voters do not personally know candidates, it is almost certain that DRE vote misattribution would not be discovered. (Id. at 43-44.)

The Zirkle case is not unique to New Jersey. Any state that relies on paperless DREs, particularly the Sequoia AVC Advantage, to conduct elections runs the risk of errors, bugs or hacks to the DRE that can manipulate votes and result in fraudulent election outcomes. Pennsylvania is no exception. The threats to the accuracy of Pennsylvania elections, which the Petitioners clearly outline in their brief, are real and not hypothetical in any way.

**B. THE OPTION SWITCH BUG DISENFRANCHISED NEW JERSEY PRIMARY VOTERS IN 2008.**

On the "Super Tuesday" Presidential Primary Election, February 5, 2008, at least 37 Advantage 9.00H

Sequoia AVC Advantage DREs disenfranchised voters in eight New Jersey counties. (Appel Report, § 56.1, at 115.)<sup>4</sup> It also illegally allowed voters to cast votes in the primary election of the party in which they were not registered to vote. (Id.)<sup>5</sup> This problem was attributed to the "option switch bug."

During a primary election, when a voter approaches a poll, the poll worker activates the Sequoia AVC Advantage DRE for the voter by pressing a button labeled with the appropriate party name, and then the "Activate" button. (Id. § C2 at 149.)<sup>6</sup> A voting machine

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<sup>4</sup> Parts, but not all, of Prof. Appel's Expert Report, issued on August 29, 2008, are part of the record of this case. The full report can be found at: <http://citpsite.s3-website-us-east-1.amazonaws.com/oldsite-htdocs/voting/advantage/appel-expert-report-unredacted.pdf> To the extent *amicus* refers to portions of Prof. Appel's report not in the record, *amicus* will direct the Court to the appropriate portions of the full Appel Expert report, which the Court can find at the hyperlink listed directly above.

<sup>5</sup> Appel Report, *supra* note 4.

<sup>6</sup> Appel Report, *supra* note 4.

that functions according to New Jersey law should allow a Democratic voter to vote only for Democratic candidates and a Republican voter to vote for a Republican candidate. See N.J.S.A. § 19:23-45. In *amicus'* case in New Jersey, both Plaintiffs' and Defendants' witnesses presented significant evidence that a bug exists in the Sequoia AVC Advantage software that can manipulate that straightforward and legally mandated process. (See Appel Report, § 56.1, at 115.)<sup>7</sup>

When the option switch bug is triggered, the DRE will not allow a voter to vote in the correct party primary. (Appel Report, § 56.22, at 121.)<sup>8</sup> Instead, the bug causes the DRE to activate the slate of candidates for the other party! (Id.)<sup>9</sup> So, in violation of State law, a Republican is allowed to vote for a Democratic candidate in the Democratic primary, and vice versa.

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<sup>7</sup> Appel Report, *supra* note 4.

<sup>8</sup> Appel Report, *supra* note 4.

<sup>9</sup> Appel Report, *supra* note 4.

N.J.S.A. §19:23-45.

This "option switch bug" causes the AVC Advantage DREs to behave incorrectly when a poll worker, accidentally or deliberately, presses the wrong button on the operator panel of the DRE while activating the voting machine for a primary election. (Appel Report, § 56.11-13 at 118.)<sup>10</sup> Prof. Appel actually demonstrated for the New Jersey trial court how the option switch bug can be deliberately activated. (Id. § 56.11-13 at 118; § 56.1, at 115.)<sup>11</sup>

As a result of the option switch bug, on February 5, 2008, at least thirty-seven DREs in eight New Jersey counties lost votes, or allowed Republican or Democratic voters to vote in the primary of the other party. (Id. § 56.1, at 115.)<sup>12</sup>

The option switch bug caused vote totals for each

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<sup>10</sup> Appel Report, *supra* note 4.

<sup>11</sup> Appel Report, *supra* note 4.

<sup>12</sup> Appel Report, *supra* note 4.

party to disagree with the candidate total figures. For example, in Union County, one DRE reported 361 votes for Democratic candidates, but reported that 362 Democratic voters had cast a vote. (Appel Report, § 56.11-13, at 118.)<sup>13</sup> The same DRE reported 61 total votes for Republican candidates, but reported that 60 Republican votes had been cast. (Appel Report, §56.11-12, at 118.)<sup>14</sup> Both of these results should be impossible. (Id. § 56.11-13, at 118.)<sup>15</sup> The ballot definition file for the February 5, 2008 primary requires that each voter cast exactly one vote for a candidate of the voter's party. (Id.)<sup>16</sup> It should be impossible for: a) a voter to fail to cast a vote in the primary election; and b) to vote for someone in the

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<sup>13</sup> Appel Report, *supra* note 4.

<sup>14</sup> Appel Report, *supra* note 4.

<sup>15</sup> Appel Report, *supra* note 4.

<sup>16</sup> Appel Report, *supra* note 4.

opposite party. (Id.)<sup>17</sup>

In Mercer County's DREs, there were more votes than voters. (See id. § 56.4 at 116.)<sup>18</sup> On 27 of those DREs, the number of overvotes for one party equaled the undervotes for the other party. (See id.)<sup>19</sup> Voters who were registered Republicans had been presented with the Democratic slate of candidates, and vice versa. (See id. §56.19 at 120.)<sup>20</sup> Multiple Democrats attempted to write-in "Hillary Clinton" in the Republican primary. (Sollami-Covello Test., 2/26 Trial Tr. at 30:25-31:12.) These votes were not counted, because Democratic voters may not vote in the Republican primary. (Id.)

Notably, independent testing authorities, the New Jersey Voting Machine Certification Committee, and Sequoia all had no idea that the option switch bug in

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<sup>17</sup> Appel Report, *supra* note 4.

<sup>18</sup> Appel Report, *supra* note 4.

<sup>19</sup> Appel Report, *supra* note 4.

<sup>20</sup> Appel Report, *supra* note 4.

the Sequoia DREs existed. Most notably, Pre-LAT tests performed in all New Jersey counties in preparation for the February 5, 2008 Presidential primary did not uncover the option switch bug (Appel Report, §56.1 at 115.)<sup>21</sup>

Sequoia's proffered "solution" to this software bug was to attach a piece of plastic to the DRE with velcro in an attempt to prevent poll workers from pressing the buttons which trigger the bug. This solution does nothing to remedy the unreliability caused by the option switch bug. A piece of plastic attached by Velcro clearly does not prevent poll workers from inadvertently or purposely triggering the bug.

The option switch bug makes the Sequoia Advantage DRE unreliable because voters are prevented from voting in their party's primary, and they are permitted to vote in the opposite party's primary. (Appel Report, §

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<sup>21</sup> Appel Report, *supra* note 4.

56.22, at 121.)<sup>22</sup> The option switch bug still exists in the software of all 11,000 of New Jersey's DREs. There is no evidence that the option switch bug is absent from Pennsylvania's Sequoia AVC Advantage DREs.

**C. OTHER BUGS EXIST IN THE SEQUOIA AVC ADVANTAGE DRES THAT LEAVE VOTES VULNERABLE**

*Amicus'* experts also discovered other bugs in the Sequoia Advantage DREs' source code. (Appel Report, § 38.5 at 88.)<sup>23</sup> One such bug, the buffer overrun, occurs when the AVC Advantage's daughterboard sends a malformed message to the motherboard, causing the system to crash and endlessly reset itself. (Id. § 24.7 at 70.)<sup>24</sup> Viruses can be designed to exploit this, effectively disabling the DRE. (Id.)<sup>25</sup> This can shut down polling places and/or cause unacceptably long

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<sup>22</sup> Appel Report, *supra* note 4.

<sup>23</sup> Appel Report, *supra* note 4.

<sup>24</sup> Appel Report, *supra* note 4.

<sup>25</sup> Appel Report, *supra* note 4.

lines at the polls.

Due to Sequoia's sloppy coding practices, the likelihood of future bugs being discovered is high. (Id. § 51.8 at 107-108.)<sup>26</sup> These sloppy practices include using an outdated version of the C computer language, which cannot be tested with modern error detection tools. (Id. § 51.7 at 107.)<sup>27</sup> Sequoia's source code was also designed in a sloppy manner that makes it hard for subsequent coders to proceed effectively with updates and fixes. (See id. § 51.8 at 107.)<sup>28</sup>

A pattern of sloppy coding would lead a reasonable person to believe that not only are there more bugs to be discovered in models already purchased, but that any new hardware and software deriving from the same producer may contain just as many bugs. Vulnerabilities to accuracy uncovered by *amicus'* experts are critical

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<sup>26</sup> Appel Report, *supra* note 4.

<sup>27</sup> Appel Report, *supra* note 4.

<sup>28</sup> Appel Report, *supra* note 4.

to this lawsuit, because the same exact DREs are used in both New Jersey and Pennsylvania.

## II. NEW JERSEY AND PENNSYLVANIA USE THE SAME FLAWED DRE AND VOTE TABULATING SOFTWARE

The flawed and problematic Sequoia AVC Advantage DREs used in New Jersey are also used by Pennsylvania. Pennsylvania currently uses the Sequoia AVC Advantage DRE in two counties. (Petitioners' Memorandum in Support of Motion for Summary Judgment at 19, Banfield v. Aichele, 442 M.D. 2006 (Pa. Commw. Ct. 2012).) Both states also use the WinEDS system to tabulate votes. (See Appel Report § 20.4 at 60; see Petitioners' Memorandum in Support of Motion for Summary Judgment at 18, Banfield, 442 M.D. 2006.)<sup>29</sup>

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<sup>29</sup> Appel Report, *supra* note 4.

**A. SECURITY VULNERABILITIES EXIST IN ALL SEQUOIA AVC  
ADVANTAGE DRES**

Because all Sequoia AVC Advantages have the same software, security vulnerabilities uncovered in one AVC Advantage exist in all of those DREs. All Sequoia AVC Advantage DREs contain a motherboard with four ROMs attached. (Appel Report § 5.2 at 21; § A1 at 145.)<sup>30</sup> All Sequoia AVC Advantages contain a Z80 processor. (Id. § 12.2 at 44.)<sup>31</sup> The Central Processing Unit ("CPU") chip that "masterminds" the AVC Advantage is the Z80 processor. (Id. § 12.2 at 44.)<sup>32</sup> In 2003, the Sequoia AVC Advantage was upgraded with a daughterboard that provided more memory, allowing audio voting for disabled voters. (Id. § 66.1 at 130; § 66.2 at 131.)<sup>33</sup> Firmware that controls the Sequoia AVC Advantage DRE

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<sup>30</sup> Appel Report, *supra* note 4.

<sup>31</sup> Appel Report, *supra* note 4.

<sup>32</sup> Appel Report, *supra* note 4.

<sup>33</sup> Appel Report, *supra* note 4.

resides on four ROM chips on the motherboard, as well as within the flash memory of the daughterboard. (Id. § 5.2 at 21; § 18.3 at 55.)<sup>34</sup>

*Amicus'* experts discovered the Sequoia AVC Advantage could be infected with vote stealing firmware. (Appel Report § 1.6 at 9.)<sup>35</sup> This vote stealing firmware can easily infect a Sequoia AVC Advantage through a fraudulent Z80 processor, fraudulent ROM chip, or the daughterboard. (See id. § 68.1, 68.2 at 143.)<sup>36</sup>

Even newer models, such as the Sequoia AVC Advantage D10, are highly vulnerable to security exploits. The D10 stores firmware for the DRE extensively on the daughterboard, and does so in flash memory rather than read-only memory. (Id. § 61.6 at 134.)<sup>37</sup> Utilizing an easily accessible PCMCIA slot on the

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<sup>34</sup> Appel Report, *supra* note 4.

<sup>35</sup> Appel Report, *supra* note 4.

<sup>36</sup> Appel Report, *supra* note 4.

<sup>37</sup> Appel Report, *supra* note 4.

DRE's exterior, an attacker can overwrite the entirety of the D10's flash memory firmware with malicious vote stealing firmware. (See id. § 19 at 56.)<sup>38</sup> This makes newer models like the D10 even less secure than its predecessors. (Id. § 19.10 at 56-57.)<sup>39</sup>

*Amicus'* experts are renowned nationally in their respective fields of computer science, computer security, and physical site security. Professor Andrew Appel is a leading expert in computer science and computer security. He is currently the Chair of the Department of Computer Science at Princeton, where he has taught for twenty-eight years. Professor Appel has been conducting computer science research since 1980 and computer security research in particular since 1994. He has received research grants from both federal and private sources, including from the Defense Advanced Research Projects Agency ("DARPA"), the Advanced

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<sup>38</sup> Appel Report, *supra* note 4.

<sup>39</sup> Appel Report, *supra* note 4.

Research and Development Activity, the Air Force Office of Scientific Research, IBM, Microsoft, and Sun Microsystems. His curriculum vitae enumerates ninety publications, of which eighty-three, including two books and a chapter of another book, were published in peer reviewed venues.

Professor Wayne Wolf is an expert in the field of processor design and embedded security. He serves as the Professor Rhesa, Ray. S. Farmer, Jr., Distinguished Chair of Embedded Computing Systems and Georgia Research Alliance Eminent Scholar at Georgia Institute of Technology. He has consulted for various companies and currently is the director, secretary, and vice-president at Verificon Corporation. Professor Wolf was the founding editor-in-chief of the journal for the Association for Computing Machinery, TRANSACTIONS ON EMBEDDED COMPUTER SYSTEMS. He also served as editor-in-chief of the Institute of Electrical and Electronics Engineers ("IEEE") journal, TRANSACTIONS ON VLSI

SYSTEMS. He has authored four major textbooks, including texts on Very Large Scale Integration, FPGA-based system design, and embedded computing. He has conducted research on microprocessors and taught classes on microprocessors and embedded computing at Princeton and Georgia Tech.

Dr. Roger Johnston is one of the world's leading experts regarding issues of physical security and security culture. He is the Senior Systems Engineer at Argonne National Laboratories. Dr. Johnston is the Section Manager of Argonne's Vulnerability Assessment team, which examines security devices, systems, and programs. Prior to working at Argonne, Dr. Johnston worked at Los Alamos National Laboratories where he founded and led the Los Alamos National Laboratories Vulnerability Assessment Team for fifteen years. He has consulted for the Department of Energy, the Department of Defense, the Nuclear Regulatory Commission, the National Institutes of Health, and numerous private

corporations. He has published over 115 articles on seals and security, and is the current Editor of the Journal of Physical Security. Dr. Johnston has one of the U.S. government's highest security clearances, allowing him to work on nuclear safeguards and other national-security applications. He has worked on *amicus'* case pro bono for nearly ten years because he believes that DRE vulnerability is a national security issue.

*Amicus'* experts testified extensively that anyone with a bachelors degree in computer science or engineering could design a fraudulent ROM chip with vote stealing software. (Appel Report § 7.1 at 26.)<sup>40</sup> Once the vote stealing software was designed, an individual with only a technician's level of skill could install the rest of the hacks.

*Amicus'* physical security expert Dr. Johnston discovered a security vulnerability that did not even require a computer science background. The Sequoia AVC

---

<sup>40</sup> Appel Report, *supra* note 4.

Advantage can be attacked through removal of its unsecured front panel.<sup>41</sup> Under the cover of the voting booth, a malicious party could easily remove the front panel and alter the subpanels to steal votes. (Id.) This can be achieved remotely via a device similar to a garage door opener, letting the perpetrator manipulate an election from a distance. (Id.) This particular vulnerability does not involve manipulating software at all. Sharing the same DRE hardware as New Jersey, Pennsylvania's DREs are vulnerable to the same low tech attack.

Given the ease with which the hacks described above were achieved by *amicus'* experts in New Jersey, identical DREs in Pennsylvania are highly vulnerable.

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<sup>41</sup> Parts, but not all, of Dr. Johnston's Expert Report are part of the record of this case. The full unredacted expert report is part of the record of *amicus'* case and can be provided to the court if requested. The portion of Dr. Johnston's report described here has been discussed publicly by Dr. Johnston, available at: <http://www.cs.princeton.edu/~appel/voting/Johnston-AnalysisOfNJSeals.pdf>, §142-153 at 28-30.

*Amicus'* experts succeeded in their hacks with an extremely low budget. The cost of an erasable programmable ROM that would be used to insert vote stealing software is \$3.87. (Id. § 5.3 at 21.) The device for writing firmware onto this ROM costs \$150 and can be used to program as many ROMs as necessary. (Id.) The fraudulent ROM attack took a total of seven minutes. (Id. § 68.1 at 143.) A fraudulent Z80 processor that appeared identical to a legitimate processor would cost \$40 per unit. (Id. § 12.5 at 45.)

**B. SECURITY VULNERABILITIES EXIST IN ALL WINEDS SYSTEMS**

Both Pennsylvania and New Jersey use WinEDS software to tabulate the votes from the Sequoia AVC Advantage DREs. (See Appel Report § 20.4 at 60; see Petitioners' Memorandum in Support of Motion for Summary Judgment at 18-19, Banfield, No. 442 M.D.

2006.)<sup>42</sup> The WinEDS applications serves a very prominent role in the election process: (1) before an election, WinEDS is used to prepare ballot definitions for Sequoia's DREs in conjunction with the Results Cartridge and Audio Ballot Cartridge; and (2) after an election, it is used to culminate the results from the same DREs. (See Appel Report, § 20.4, 20.5 at 60; see Petitioners' Memorandum in Support of Motion for Summary Judgment at 19, Banfield, No. 442 M.D. 2006.)<sup>43</sup> WinEDS runs on ordinary, commercially available personal computers. (Appel Report, § 20.4 at 60.)<sup>44</sup>

WinEDS serves as another vector of attack for a potential hacker - particularly if the computer running it is connected to the Internet. (Id. § 20.6 at 60.)<sup>45</sup> *Amicus'* experts discovered that it was common practice

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<sup>42</sup> Appel Report, *supra* note 4.

<sup>43</sup> Appel Report, *supra* note 4.

<sup>44</sup> Appel Report, *supra* note 4.

<sup>45</sup> Appel Report, *supra* note 4.

for systems with WinEDS installed to be connected to the Internet. (Id. § 23.4 at 66.)<sup>46</sup> Other unrelated programs running on the system with WinEDS, including even its Windows operating system, pose high security risks of their own. (Id. § 23.3 at 66.)<sup>47</sup> Even when used correctly, WinEDS is unable to determine if the votes it is tabulating are fraudulent or corrupted. (Id. § 40.4 at 90.)<sup>48</sup>

Because the same WinEDS software is used in both New Jersey and Pennsylvania to tabulate and program the vote, the tabulations software vulnerabilities *amicus'* experts discovered with the system in New Jersey are present in Pennsylvania.

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<sup>46</sup> Appel Report, *supra* note 4.

<sup>47</sup> Appel Report, *supra* note 4.

<sup>48</sup> Appel Report, *supra* note 4.

### III. THE COMMONWEALTH COURT ERRED IN RELYING ON OBSOLETE CASES

Courts that have ruled on the issue of paperless DREs have unfortunately looked to rulings of other jurisdictions for guidance instead of reviewing the facts of the case in front of them and relevant state case law and statutes. As such, the Commonwealth Court erred in citing to Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003), and Wexler v. Anderson, 452 F.3d 1226, 1227 (11th Cir. 2006), cert. denied, 549 U.S. 1111 (2007).

Weber is a federal lawsuit filed pursuant to 42 U.S.C.A. § 1983 that alleged that paperless touchscreen voting systems used in Riverside County, California violated the U.S. Constitution. The Weber court upheld the use of the Sequoia AVC Edge and declined to find that paperless voting machines severely restricted the right to vote under the U.S. Constitution, and also found that the court had no authority to second-guess the California legislature. Weber, 347 F.3d at 1107.

Weber is inapplicable for several reasons. First, federal constitutional rights were at issue in Weber. The federal court did not believe it was appropriate to tell California counties what voting machines to use. The present case, in contrast, is a state law case that asks the judiciary to find that the Pennsylvania Secretary of the Commonwealth failed to comply with State election code in certifying the use of paperless AVC Sequoia Advantage DREs. There are no issues of federalism involved. There are no doubts whatsoever over the authority of Pennsylvania courts to review decisions made by state authorities concerning voting systems used in the state.

Second, events subsequent to the Weber decision undermined the factual basis upon which Weber was decided. Shortly after Weber was decided, the State of California decertified the Sequoia AVC Edge due to serious, endemic flaws discovered in the voting machines by computer security experts hired by the

State.<sup>49</sup>

The Commonwealth Court also cited to Wexler, a federal case from Florida in which plaintiffs challenged the use of touchscreen voting systems that, unlike other voting systems in the state (i.e. optical scan), required a different recount procedure, thereby violating equal protection and due process rights under the U.S. Constitution. Wexler, 452 F.3d at 1231. As such, the issue before the Wexler court was whether Florida's different recount procedures violated voters' rights. Id.

By contrast, Petitioners here are not pitting one type of voting system endorsed by state statute against another. Pennsylvania law requires the use of accurate, tamper-proof voting machines. Petitioners are

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<sup>49</sup> In 2007, California Secretary of State Debra Bowen ordered a "top-to-bottom review" of the state's voting machines. As a result of the study, Secretary Bowen mandated several security improvements. See California Secretary of State Debra Bowen, Top-to-Bottom Review, <http://www.sos.ca.gov/votingsystems/oversight/top-to-bottom-review.htm>.

challenging the failure to implement that requirement, and the continued use of the insecure Sequoia AVC Advantage 9.00H.

Moreover, Wexler and Weber (as well as other similar cases) were overruled by subsequent legislation-the strictest in the country-that requires that every computerized voting machine produce a VVPB. See Fla. Stat. Ann. §101.591 (West, Westlaw through 2013 1st Reg. Sess. of the Twenty-Third Legislature); Cal. Elec. Code § 19250 (West 2004). This overruling does not mean that the courts should leave it to the legislatures to determine when DREs should be replaced with auditable systems. To the contrary, legislative overruling here means that the reasoning in the Wexler and Weber opinions was seriously flawed, and thus should not be the basis of any judicial analysis.<sup>50</sup>

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<sup>50</sup> See, Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e (2009) (overruling Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), which held a woman could not bring a gender discrimination claim under Title VII more than 180 days after the discrimination

## CONCLUSION

DREs, like all other computers, make errors. Whether those errors are due to flawed design or malicious interference is inconsequential. In the end, as demonstrated in the 2011 Cumberland County New Jersey Primary Election, either type of error can swing an election.

Experts agree that paperless DREs like the Sequoia AVC Advantage are too insecure to use in elections, because any errors or interference would be undetectable and uncorrectable. (Appel Report, § 2.8 at 13.)<sup>51</sup> Software independent voting machines provide an independent audit mechanism that can be used to discover and correct such errors.

All but one computer scientist who has studied voting machines or who has published material

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occurred, even if she was not aware of that discrimination.)

<sup>51</sup> Appel Report, *supra* note 4.

evaluating voting system security has embraced software independence. There is no real controversy in this area.

(Id. § 64.1 at 140.)<sup>52</sup> Software independent approaches have been deemed to be superior to paperless DREs by virtually every scientist and election technology related group that has weighed in on the subject. (See e.g., ACM Statement on Voting Systems. Comm. ACM 47(10).

Oct. 2004, available at:

<http://cacm.acm.org/magazines/2004/10/6402-acm-statement-on-voting-systems/fulltext>) (ACM has more

than 100,000 members, and is the world's largest educational and scientific computing society). Some of the experts have published papers to that effect, others have endorsed the Resolution on Electronic Voting, and some have done both. (See Resolution on

Electronic Voting, available at:

<http://www.verifiedvotingfoundation.org/projects/electronic-voting-resolution/>)

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<sup>52</sup> Appel Report, *supra* note 4.

Voting machines should not be purchased or used unless they provide a voter-verifiable audit trail; when such machines are already in use, they should be replaced or modified to provide a voter-verifiable audit trail. Providing a voter-verifiable audit trail should be one of the essential requirements for certification of new voting systems.

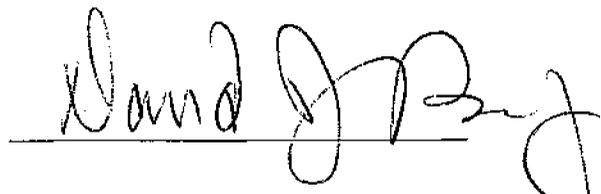
Id.

The Election Assistance Commission's ("EAC") Technical Guidelines Development Committee ("TGDC") adopted a resolution that would require software independence in future voting machine iterations in 2006. (Electronic Assistance Commission-Technical Guidelines Development Committee Resolution adopted December 4-5, 2006, available at: <http://vote.nist.gov/DraftWhitePaperOnSIinVVSG2007-20061120.pdf>.) The resolution was based on a report by the National Institute of Standards and Technology ("NIST") that adopted the definition of "software independence" coined by Professor Rivest, and recommended that software independence serve as a baseline requirement in all voting systems. (See

National Institute of Standards and Technology, Draft White Paper, posted December 1, 2006, available at: <http://vote.nist.gov/DraftWhitePaperOnSIinVVSG2007-20061120.pdf>.)

Therefore, *amicus* respectfully asks this Court to overturn the decision below, and prohibit the use of paperless DREs in all future elections in Pennsylvania. This Court should find that paperless DREs are fundamentally incapable of meeting Pennsylvania statutory and constitutional requirements for security, accuracy and reliability.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David J. Berney", is written over a horizontal line.

David J. Berney (No. 67882)  
Law Offices of David J. Berney  
1628 JFK Boulevard  
Suite 1000  
Philadelphia, PA 19103



# **EXHIBIT A**

---



Cumberland County  
Liz Hernandez Certification



*State of New Jersey*

OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 MARKET STREET  
PO Box 112  
TRENTON, NJ 08625-0112

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

PAULA T. DOW  
*Attorney General*

ROBERT M. HANNA  
*Director*

July 6, 2011

Honorable David E. Krell, J.S.C.  
Superior Court of New Jersey  
Cumberland County Courthouse  
60 W. Broad Street  
Bridgeton, New Jersey 08302

Re: I/M/O Petition of Ernest and Cynthia Zirkle  
v. Vivian and Mark Henry, et al.  
Docket No. CUM-L-000567-11

Dear Judge Krell:

Please accept this letter on behalf of respondent Cumberland County Board of Election ("Board") in the above-captioned matter. As set forth in the certification of Lizbeth Hernandez, Administrator of the Board, as a result of human error in the programming of the one voting machine used in the June 7, 2011 election for Democratic County Committee from Fairfield Township, District 3, the votes cast for candidates Cynthia and Ernest Zirkle registered for Vivian and Mark Henry, and the votes cast for Vivian and Mark Henry registered for Cynthia and Ernest Zirkle. See Certification of Lizbeth Hernandez, ¶¶2-3; Exhibit A.



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1635a

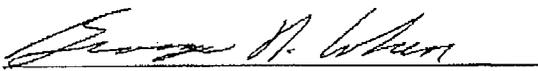
July 6, 2011  
Page 2

Based upon the facts set forth by Administrator Hernandez, the Board supports the petition to conduct a new election for the office of Democratic County Committee from Fairfield Township, District 3, since the error in the instant case would change the result of the election. N.J.S.A. 19:29-1(f). The Board requests that the Court provide the Board with at least 50 days prior to a new election date in which to take the required statutory steps necessary for conducting a new election.

Respectfully submitted,

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY

By:

  
George N. Cohen  
Deputy Attorney General

c: Samuel J. Serata, Esq.  
Mark and Vivian Henry  
Kimberly Procopio, Esq.

Cumberland County  
Liz Hernandez Certification

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Respondent, Cumberland  
County Board of Election  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, New Jersey 08625

By: George N. Cohen  
Deputy Attorney General  
(609) 943-5626

SUPERIOR COURT OF NEW JERSEY  
CUMBERLAND COUNTY-LAW DIVISION  
DOCKET NO. CUM-L-000567-11

IN THE MATTER OF THE PETITION OF )  
ERNEST ZIRKLE and CYNTHIA ZIRKLE )  
CONTESTING PURSUANT TO N.J.S.A. )  
19:29-1 THE ELECTION OF VIVIAN )  
HENRY and MARK HENRY AS DEMOCRATIC )  
EXECUTIVE COMMITTEE PERSONS FROM )  
DISTRICT 3 OF FAIRFIELD TOWNSHIP )  
CUMBERLAND COUNTY, )

Civil Action

ERNEST ZIRKLE AND CYNTHIA ZIRKLE )

Petitioners, )

v. )

VIVIAN HENRY, MARK HENRY, THE )  
CUMBERLAND COUNTY BOARD OF )  
ELECTION, and GLORIA NOTO, )  
CUMBERLAND COUNTY CLERK, )

Respondents. )

CERTIFICATION OF  
LIZBETH HERNANDEZ

LIZBETH HERNANDEZ, of full age, hereby certifies:

1. I am the Administrator of the Cumberland County  
Board of Elections. I have held the position of Administrator

Cumberland County  
Liz Hernandez Certification

since 2008 and have been employed by the Cumberland County Board of Elections since 2002. As such, I am familiar with the facts in the above-captioned matter.

2. On June 7, 2011, an election was held for the office of Democratic County Committee from Fairfield Township, District 3, in Cumberland County. The candidates were Vivian Henry and Mark Henry as one ticket and Cynthia Zirkle and Ernest Zirkle as a second candidate ticket. One voting machine was used in this election.

3. As a result of human error in programming the voting machine used in this election, the votes cast for Cynthia and Ernest Zirkle registered for Vivian and Mark Henry, and the votes cast for Vivian and Mark Henry registered for Cynthia and Ernest Zirkle. The facts describing this error are set forth in my memo dated June 24, 2011. A true and accurate copy of this document is attached hereto as Exhibit A.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are wilfully false, I am subject to punishment.

  
Lizbeth Hernandez

Dated: July 5, 2011



**CUMBERLAND COUNTY  
BOARD OF ELECTIONS**  
555 Shiloh Pike - Bridgeton, NJ 08302



Telephone (856) 453-5801  
Fax (856) 451-3172

Ned Sawyers, Chairman  
Nancy Sungaris, Commissioner of Registration  
John Bunting, Member  
Lizbeth Hernandez, Administrator  
Georgia Vanaman, Assistant Administrator

June 24, 2011

To All Affected By The Democratic County Committee Contest from Fairfield Township  
District 3 Held On The June 7<sup>th</sup> 2011 Primary Election:

After further review, it is with my deepest regret that I am informing you the error that occurred with the Democratic County Committee contest from Fairfield Township District 3 which affected candidates Cynthia Zirkle, Ernest Zirkle, Vivian Henry, and Mark Henry was due to human error. On June 7, 2011, the votes that were cast for Cynthia and Ernest Zirkle registered for Vivian and Mark Henry in error and vice-versa. I, Lizbeth Hernandez, administrator and programmer of the Sequoia AVC Advantage voting machines for the Cumberland County Board of Elections take full responsibility for this mistake. I send my sincerest apologies to all parties involve for their inconvenience, trouble, and any expense that this error has caused.

I have programmed the Sequoia AVC Advantage voting machines since 2006 to avoid the cost to the county of hiring a programmer. In June of 2008, I became administrator of the Board of Elections and continued what I felt was my duty to all tax payers in Cumberland County as programmer. On this occasion, I received the necessary data as usual for me to begin programming the election. It is with this information that I have always followed to program the electronic voting machines. What I did not realize at that time was that the document given to me for the contest of Democratic County Committee for Fairfield Township District 3 had shown Cynthia and Ernest Zirkle before Vivian and Mark Henry, but the voting machine should have been programmed with Vivian and Mark Henry first, then Cynthia and Ernest Zirkle. Therefore, I mistakenly placed the position for Vivian and Mark Henry onto the position of Cynthia and

Exhibit A  
1639a

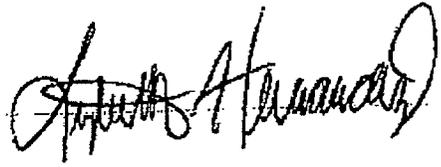
Ernest Zirkle and vice-versa. I then created the voting machine cartridge and sent it to our warehouse for testing.

At that point, the voting machine technicians inserted the cartridge into the voting machine and began the necessary testing. Along with hardware and software tests that are performed, this examination involves the technicians pushing every button for the contests, candidates, and personal choice selections to check for accuracy. Like me, these voting machine technicians are human and did not catch the error that I had made. Consequently, the machine was sent to the polling location with this error undetected. On Election Day, the votes cast for Vivian and Mark Henry registered for Cynthia and Ernest Zirkle respectively and the votes cast for Cynthia and Ernest Zirkle registered for Vivian and Mark Henry respectively. This concludes that Candidates Cynthia and Ernest Zirkle are the actual winners for Democratic County Committee for Fairfield Township District 3 receiving 34 and 33 votes respectively and Candidates Vivian and Mark Henry receiving 10 and 9 votes respectively.

As a result of this discovery, we have performed a thorough inspection of the other 91 districts involved in the 2011 Primary Election in the County of Cumberland and verified that there were no discrepancies neither in the programming nor election results for these districts. No other contest in the 2011 Primary Election in the Township of Fairfield District 3 or in Cumberland County was affected by this error. Our policies and procedures will change for programming and voting machine setup. It is through unfortunate events that we learn what needs to be corrected to prevent incidents like this from happening again. Although we strive for perfection, we are human and therefore, perfection is not always attained.

It is like they say, "Nobody grows up wishing to be an election official," but when you become one a passion overtakes you. You realize why our forefathers fought for us to have this privilege and your job becomes to maintain the integrity of all elections. I am deeply saddened that due to my mistake, I put doubt in the voter's mind about our election process and the integrity of our voting machines. I can assure you that this was human error and not a voting machine problem. The Cumberland County Board of Elections will use this as a lesson learned and will correct the flaws that caused this problem to happen. Again, I express my deepest apologies to all, especially the candidates affected.

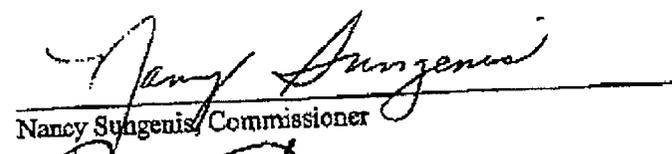
Sincerely,



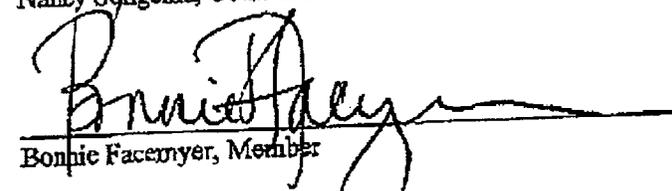
Lizbeth Hernandez, Administrator  
Cumberland County Board of Elections



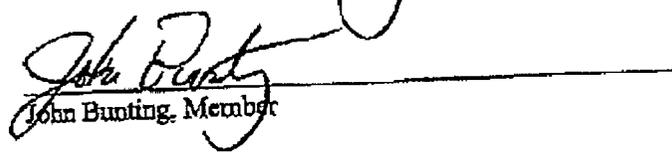
Ned Sawyer, Chairman



Nancy Sungenis, Commissioner



Bonnie Facemyer, Member



John Bunting, Member

Cumberland County  
Liz Hernandez Certification

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Respondent, Cumberland  
County Board of Election  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, New Jersey 08625

By: George N. Cohen  
Deputy Attorney General  
(609) 943-5626

SUPERIOR COURT OF NEW JERSEY  
CUMBERLAND COUNTY-LAW DIVISION  
DOCKET NO. CUM-L-000567-11

IN THE MATTER OF THE PETITION OF )	<u>Civil Action</u>
ERNEST ZIRKLE and CYNTHIA ZIRKLE )	
CONTESTING PURSUANT TO <u>N.J.S.A.</u> )	
19:29-1 THE ELECTION OF VIVIAN )	
HENRY and MARK HENRY AS DEMOCRATIC) )	
EXECUTIVE COMMITTEE PERSONS FROM )	CERTIFICATION
DISTRICT 3 OF FAIRFIELD TOWNSHIP )	OF SERVICE
CUMBERLAND COUNTY, )	
)	
ERNEST ZIRKLE AND CYNTHIA ZIRKLE )	
)	
Petitioners, )	
)	
v. )	
)	
VIVIAN HENRY, MARK HENRY, THE )	
CUMBERLAND COUNTY BOARD OF )	
ELECTION, and GLORIA NOTO, )	
CUMBERLAND COUNTY CLERK, )	
)	
Respondents. )	

CAROL BURTON, of full age, hereby certifies:

1. I am a legal secretary in the Division of Law,  
Department of Law and Public Safety, State of New Jersey.

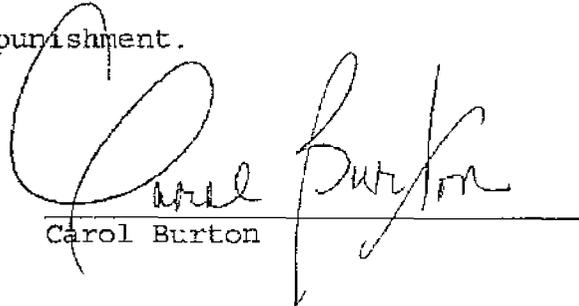
2. On July 6, 2011, at the direction of Deputy Attorney General George N. Cohen, I sent a copy of a letter and certification of Lizbeth Hernandez on behalf of respondent Cumberland County Board of Election in the above matter, by overnight mail, to:

Samuel J. Serata, Esq.  
20 Franklin Street  
Bridgeton, New Jersey 08302

Kimberly Procopio, Esq.  
Jasinski PC  
Bayport One  
Suite 470  
8025 Black Horse Pike  
West Atlantic City, New Jersey 08232

Mark and Vivian Henry  
4 Greenway  
Bridgeton, New Jersey 08302

3. I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are wilfully false, I am subject to punishment.

  
Carol Burton







ERNEST ZIRKLE and  
CYNTHIA ZIRKLE,

Plaintiff(s),

vs.

VIVIAN HENRY and  
MARK HENRY, et al,

Defendant(s).

TRANSCRIPT

OF

RETURN OF  
ORDER TO SHOW CAUSE

Place: Cumberland County Courthouse  
60 West Broad/Fayette Streets  
Bridgeton, NJ 08302

Date: September 1, 2011

BEFORE:

THE HONORABLE DAVID E. KRELL, J.S.C.

TRANSCRIPT ORDERED BY:

SAMUEL J. SERATA, ESQUIRE

A P P E A R A N C E S:

SAMUEL J. SERATA, ESQUIRE  
Attorney on Behalf of the Plaintiffs

PENNY VENETIS, ESQUIRE  
Attorney on Behalf of the Plaintiffs

VIVIAN HENRY, DEFENDANT, PRO SE

MARK HENRY, DEFENDANT, PRO SE

KIMBERLY PROCOPIO, ESQUIRE  
Attorney on Behalf of the Defendant Clerk's Office

GEORGE COHEN, DEPUTY ATTORNEY GENERAL  
Attorney on Behalf of the Defendant Cumberland County  
Board of Elections

**Certified Original**

THE TYPE-RIGHT-ER  
Carol H. Vendzules, AD/CTR  
State of New Jersey, #268  
Phone (856) 881-2422  
Fax (856) 494-7806  
Recording Operator:  
S. Brisbane

I N D E X

WITNESSES                      DIRECT   CROSS   REDIRECT   RE CROSS

(No Witnesses Sworn)

EXHIBITS                                      IDENTIFICATION      EVIDENCE

(No Exhibits Marked)

DECISION - 43

1 THE COURT: -- (audio on) take the Zirkle  
2 matter. This is Docket L-567-11, the Petition of  
3 Ernest Zirkle and Cynthia Zirkle vs. Vivian Henry, Mark  
4 Henry, et al.  
5 May I have appearances, please, Mr. Serata?  
6 MR. SERATA: My name is Samuel J. Serata. I'm  
7 one of the attorneys for the Petitioners.  
8 MS. VENETIS:: Penny Venetis, Rutgers  
9 Constitutional Litigation Clinic, on behalf of the  
10 Petitioners.  
11 THE COURT: Thank you.  
12 MS. PROCOPIO: Good afternoon, Your Honor.  
13 Kim Procopio on behalf of the County Clerk,  
14 Gloria Noto.  
15 MR. COHEN: And Your Honor, George Cohen,  
16 Deputy Attorney General, on behalf of the Cumberland  
17 County Board of Elections.  
18 THE COURT: Thank you. Please be seated.  
19 Feel free to remain seated while you address me. Where  
20 are we here?  
21 MR. SERATA: Judge --  
22 THE COURT: We -- do we -- I mean, I -- do we  
23 need testimony of anything?  
24 MR. SERATA: I beg your pardon?  
25 THE COURT: Do we need testimony of anything?

## Colloquy

5

1 I think the record's pretty complete here of what's  
2 going on.  
3 MR. SERATA: I think it's fairly complete,  
4 Judge. There are two things that are pending. There's  
5 a return day of an Order to Show Cause of why the  
6 Petitioner's should not get information that's set  
7 forth in that Order to Show Cause.  
8 That reflects upon the interference, I'll put  
9 it that way, whether it's delivered or not, I don't  
10 know, with the computer when we went there with our  
11 expert to inspect it.  
12 That's returnable today and there's a Motion  
13 pending that is sort of like an offer of judgment on  
14 the part of the Cumberland County Board of Elections.  
15 THE COURT: Well, let's -- let me try to  
16 address what I think the issues are. Let's start with,  
17 in reading all of your pleadings, in reading everything  
18 that all the parties have submitted.  
19 And by the way, are Vivian Henry and  
20 Mark Henry here today?  
21 MR. HENRY: Yes. Yes.  
22 THE COURT: Okay. Would you come up, please?  
23 MS. HENRY: Sure.  
24 THE COURT: And you can sit in those two  
25 chairs right behind them. Mr. and Mrs. -- are you

1 Mr. and Mrs.?  
2 MR. HENRY: Yes.  
3 THE COURT: You're parties in this litigation.  
4 You're not represented by attorneys. I assume you  
5 decided to represent yourselves?  
6 MR. HENRY: Yes. I mean, it's very simple.  
7 Should votes -- whatever the votes are, that's what it  
8 should be. I have the right --  
9 THE COURT: I'm sorry, sir?  
10 MR. HENRY: Whatever the votes are, that's  
11 what it should be. If they find something, then that's  
12 what it should be. Whoever won, won, and that's where  
13 I am with the issue.  
14 I don't think I need any legal, you know,  
15 counseling for that. It's whatever is right and  
16 whatever is just.  
17 THE COURT: All right. Well, as I was saying,  
18 looking at all the pleadings, it appears that there is  
19 a clear conclusion that something was wrong with this  
20 election.  
21 And that the way that the machine was  
22 programmed or alternatively, some altercation -- some  
23 alteration took place, someone altered what was done.  
24 The votes that were cast at the election were  
25 not properly reflected in the results that were

## Colloquy

7

1 certified to the Clerk. Does everyone agree with that?  
2 Mr. Serata, do you agree with that?  
3 MR. SERATA: Yes, Judge. I can't disagree but  
4 I think that's only part of the conclusion.  
5 The net result is, I believe, that for one  
6 reason or another votes that were cast for Henry went  
7 to the Zirkle's and the Zirkle's -- and the Henry's got  
8 the votes that were cast for the Zirkle's. That I  
9 agree with but I think that there's --  
10 THE COURT: That's not what I said.  
11 MR. SERATA: I'm sorry.  
12 THE COURT: I said that the votes that were  
13 certified were not accurate. That's what I'm saying.  
14 MR. SERATA: Yes, that's correct, Judge.  
15 THE COURT: Okay. Do you agree with that?  
16 MS. PROCOPIO: I do, Your Honor.  
17 THE COURT: Do you agree with that?  
18 MR. COHEN: I do, Your Honor.  
19 THE COURT: Mr. and Mrs. Henry, do you  
20 disagree with that?  
21 MR. HENRY: Yes. Well, I don't have no answer  
22 because I haven't done any research so I wouldn't know.  
23 I'm just taking that based on what I'm hearing today.  
24 THE COURT: So if we all agree on that item,  
25 then it seems that we get to the next step, which is

1 that either there has to be a new election or I certify  
2 the Zirkle's as the winner of the election that took  
3 place; okay?

4 So the first issue I want you to address is  
5 whether you believe there should be a new election or  
6 whether I should certify or declare the Zirkle's as the  
7 winner of the election that took place; okay?

8 Once we get around that, if there's a new  
9 election is the result, then I need to set a date for a  
10 new election. When we get beyond that, then the  
11 question becomes; what more do I need to do in this  
12 case?

13 As far as with respect to everything that has  
14 been raised by the Plaintiffs, as to the supposed human  
15 error in connection with the programming of the machine  
16 and the testing of the machine.

17 And then what appears to be the deletion of  
18 certain files that took place before the Plaintiff's  
19 experts could examine the machine.

20 So the second issue I want you to address is,  
21 once I get over the first issue, what do I do with the  
22 second issue? Do I hold onto this case and continue  
23 your investigations, your discovery?

24 Or do I say enough, I've ordered a new  
25 election. You got what you wanted in this and if

## Colloquy

9

1 there's any irregularity, that's for the Attorney  
2 General to look into, investigate. Bring charges if  
3 they are appropriate. Illegality, criminality that took  
4 place here.

5 That's the way I see it as the two primary  
6 issues I need to address here today. Now, does anyone  
7 see any other issues I need to address?

8 MR. SERATA: I think you have a good analysis  
9 of the issues, Judge. I am -- I filed and I don't know  
10 if you had an opportunity this morning.

11 THE COURT: I looked at everything.

12 MR. SERATA: A Motion with regard to  
13 spoliation of the evidence.

14 THE COURT: Right. Well that, and that goes  
15 to your question of whether I should impose sanctions,  
16 counsel fees, et cetera. We'll leave that until the  
17 very end.

18 MR. SERATA: It goes to the issue of the  
19 investigation, also, into it.

20 THE COURT: It does, if I'm going to let you  
21 investigate any further. If I reach that that is the  
22 conclusion.

23 MR. SERATA: Yes.

24 THE COURT: So let's first have you each  
25 address the first issue; new election versus declare

1 the Zirkle's the winner. Mr. Serata, I'll hear from  
2 you first, sir.

3 MR. SERATA: On that issue, Judge, I think  
4 that it is not very difficult to indicate that the  
5 Zirkle's have won the election. It doesn't matter  
6 which of the Certifications you look at.

7 And if you assume that whatever was done to  
8 the machine or wasn't done, or as far as the  
9 programming of the buttons on the machine, it was --  
10 it's acknowledged by the Board of Elections.

11 That votes cast were -- for the Henry's were  
12 attributed to the Zirkle's and the Zirkle's votes were  
13 attributed to the Henry's, and I don't see any -- there  
14 seems to be no disagreement.

15 THE COURT: Does your own expert conclude  
16 that?

17 MR. SERATA: Yes.

18 THE COURT: Does Mr. Appel (Phonetic) -- is  
19 that --

20 MR. SERATA: Yes.

21 THE COURT: Is it Mr. or Dr. Appel?

22 MS. VENETIS:: Doctor and Professor. He's  
23 head of the Computer Science --

24 THE COURT: Does he have a PhD?

25 MS. VENETIS:: He does have a PhD.

## Colloquy

11

1 THE COURT: Call him a doctor. Dr. Appel  
2 seems to, if I read his latest Certification, he says  
3 that because of the deletion of the files when he went  
4 to inspect.

5 He's having difficulty determining whether  
6 there was simply a programming error and an error by  
7 the technicians in testing, or whether something more  
8 nefarious took place here. Am I correct that that's  
9 what he's concluding.

10 MR. SERATA: He can't tell that, Judge.

11 THE COURT: Okay.

12 MS. VENETIS:: Right. But Your Honor, he does  
13 -- if I may? He does in his Certification say that,  
14 regardless of what happened, he can actually tell that  
15 the Zirkle's did win the election.

16 I believe he talks about that in great detail  
17 about he measured the particular buttons and the  
18 spacing on the ballot and he is confident that the  
19 Zirkle's did win the election, based on his  
20 investigation.

21 THE COURT: Okay. Let me -- Attorney General,  
22 what's your position, Mr. Cohen?

23 MR. COHEN: Your Honor, we agree. The  
24 Professor Appel's Certification actually says exactly  
25 what Ms. Hernandez said; that there was a switch.

1 Not that he thinks that there was but based  
2 upon the computer programming, that the -- I mean, they  
3 say either the programming or whatever other means they  
4 want to allege.

5 But they say it shows that votes cast for  
6 Henry went to the Zirkle's and votes cast for the  
7 Zirkle's went to the Henry's. So that --

8 THE COURT: So you don't think I should order  
9 a new election? I should just declare Zirkle the  
10 winner?

11 MR. COHEN: We don't take a position on that.  
12 It's -- you know, normally we would say you need a new  
13 election but if the Court is satisfied that that's  
14 exactly what happened and that there are no other votes  
15 lost.

16 And we do know from the discovery that the  
17 Court ordered on July 11, all discovery took place.  
18 All the documents were given and we know from looking  
19 at the number of people who voted were 43 and each had  
20 the right to vote twice for council.

21 There were in fact 86 votes. No votes were  
22 lost. No people -- there were no illegal votes in  
23 there. All the votes were counted so if the Court is  
24 satisfied, the Court could in fact say the Board can  
25 certify the Zirkle's.

## Colloquy

13

1 THE COURT: Ms. Procopio, do you have a  
2 position on that?

3 MS. PROCOPIO: The County Clerk's position is  
4 that as long as there's a free, fair and representative  
5 election of the residents of Cumberland County, we take  
6 no position as to whether Your Honor calls it for the  
7 Zirkle's or orders a new election.

8 The County Clerk's position has always been  
9 whatever is necessary for a fair election for the  
10 people of Cumberland County is all that matters.

11 THE COURT: Mr. Harvey, do you want to be  
12 heard on that issue?

13 MR. COHEN: Henry.

14 MR. HENRY: Henry.

15 THE COURT: Mr. Henry. I'm sorry.

16 MR. HENRY: Yes. Personally, if they feel as  
17 though that they've won and everyone feels all that  
18 confident about that, I take it that we should have a  
19 re-election to prove that because if they won, they'll  
20 win again if that was the --

21 THE COURT: Mrs. Henry, do you want to be  
22 heard on that?

23 MS. HENRY: No, thank you.

24 THE COURT: Okay. All right. Let's go to the  
25 second issue. Mr. Serata, what do I do with this now?

1 Something went wrong. We know something went wrong.  
2 Is your goal to re-open Judge Feinberg's litigation, as  
3 the Attorney General seems to imply?

4 That what you're doing here is really trying  
5 to have this Court get involved in this statewide issue  
6 of whether the Sequoia machine is a good machine that  
7 the State of New Jersey should be using.

8 Or should I confine myself just to this one  
9 district election and getting it right?

10 MR. SERATA: Judge, I think --

11 THE COURT: Because it does appear that what  
12 you want to do now is go much farther than that.

13 MR. SERATA: That's not true, Judge. What we  
14 want to do is, we want to find out why it was that the  
15 Cumberland County Board of Elections did not secure the  
16 machines, secure the computer. Allowed somebody else  
17 to tamper with it or touch it, without a Court Order.

18 THE COURT: Are we talking about before the  
19 election or before your inspection?

20 MR. SERATA: Before our inspection. That's  
21 the problem.

22 THE COURT: Well, we have the Certification of  
23 the computer guy.

24 MS. PROCOPIO: Mr. Cossaboon (Phonetic).

25 MR. SERATA: Yes.

## Colloquy

15

1 THE COURT: Yeah. He says what happened.  
2 What more are we going to find out? Going to put  
3 people under lie detectors? What are we going to do?

4 MR. SERATA: Well, I think that we -- I think  
5 that -- I don't understand why, when there's a Court  
6 Order sequestering the machine and all the --

7 THE COURT: It didn't sequester the laptop.

8 MR. SERATA: No, but it secured all the -- it  
9 sequestered all of the --

10 THE COURT: I read the Order. It didn't say  
11 anything about the laptop.

12 MR. SERATA: I know. But you sequestered all  
13 of the documents that were involved with that election.  
14 Those documents are now unobtainable for anybody to  
15 examine in that laptop.

16 Because of the interference with the evidence  
17 and the destruction of the evidence that was  
18 accomplished, interestingly enough, the day before the  
19 inspection was scheduled.

20 And you had scheduled the inspection of that  
21 laptop and it was part of the Order that you gave. So  
22 that you have a spoliation of evidence that was  
23 involved in this case, Judge, and I --

24 THE COURT: So let's say I find -- let's say  
25 we do find that. Then what?

1 MR. SERATA: Then we're entitled to sanctions.  
2 We're entitled at least to our attorneys fees but I  
3 think that it's more important than that.  
4 THE COURT: Would there be a crime that was  
5 committed?  
6 MR. SERATA: I don't know, Judge.  
7 THE COURT: Wouldn't it be Obstruction of  
8 Justice?  
9 MR. SERATA: I don't know, Judge. I don't  
10 know. There's a specific criminal aspect to the  
11 section of the elections law that deals with computers.  
12 I'm not here --  
13 THE COURT: But I mean, isn't that a classic  
14 Obstruction of Justice situation? If somebody with the  
15 proper culpability decided to destroy documents --  
16 MR. SERATA: Well, frankly --  
17 THE COURT: -- that were part of this  
18 litigation, isn't that an Obstruction of Justice?  
19 MR. SERATA: Could be, but it's also --  
20 THE COURT: Who investigates criminal cases?  
21 Not me?  
22 MR. SERATA: No, not you. You --  
23 THE COURT: Separation of powers. It seems  
24 that's the Attorney General's role.  
25 MR. SERATA: In the application that I have

## Colloquy

17

1 pending before you, I suggested, I filed this morning  
2 or we filed this morning, we asked that you perhaps  
3 think in terms of a Standing Master to investigate the  
4 matter or the --  
5 THE COURT: What do I do with the results?  
6 MR. SERATA: The results could be --  
7 THE COURT: The Standing Master comes back and  
8 says there was criminality here. Then what do I do?  
9 MR. SERATA: Very good. Then the duty of the  
10 Court is to refer to the proper enforcement agency.  
11 THE COURT: I can do that now. I don't need a  
12 Special Master for that.  
13 MR. SERATA: Then --  
14 THE COURT: He's got a lot of investigators, a  
15 lot of lawyers in that office, the Attorney General's  
16 Office, and that's what they're there to do, is  
17 investigate crimes.  
18 MR. SERATA: I understand and they'll  
19 partition this case off from the rest of their office,  
20 I would assume.  
21 THE COURT: I don't know what they'd do but I  
22 assume that -- I don't think the Attorney that's before  
23 me, Mr. Cohen, is in the criminal section of the  
24 Attorney General's Office.  
25 MR. SERATA: But I --

1 THE COURT: I assume he can send a letter to  
2 the criminal section and say, something happened down  
3 there in Cumberland County and the Judge is requesting  
4 that you look into this, and they can look into it.

5 And if there's crime, they can do what  
6 Prosecutors do, so if a Special Master says there's  
7 crimes. Now, if the Special Master says that there  
8 wasn't a crime, then what do I do?

9 MR. SERATA: If he says what? That --

10 THE COURT: That there wasn't a crime. That  
11 it was just an innocent mistake.

12 MR. SERATA: Then you have your report, Judge.  
13 I don't know the answer to that. We haven't been able  
14 to determine it and I'm very concerned because it  
15 involves the validity of the voting system in  
16 Cumberland County.

17 And it does have bearing, unfortunately,  
18 since you want to keep away from the Gusciora case, but  
19 the problem is, Judge, that there the State was  
20 mandated to do certain things with regard to training  
21 the people who handle elections throughout the State.

22 And apparently, it wasn't done in this  
23 instance and in this instance, the Board of Elections  
24 did not observe the sanctity of your Order that said  
25 that these materials were supposed to be preserved and

1 protected because they --

2 THE COURT: What's my legal authority to go on  
3 this quest of investigation? What section of the  
4 election law --

5 MR. SERATA: Well, I indicated --

6 THE COURT: -- or of any law gives me the  
7 authority to go on this quest?

8 MR. SERATA: Judge, that's a Motion that I  
9 filed this morning and I indicated that we would have a  
10 Brief to support it within five working days and we  
11 will support that position.

12 THE COURT: Are you aware of any law that says  
13 that or you need five days to find one?

14 MR. SERATA: I -- Judge, Judge, this case is,  
15 as far as I'm concerned, just the local case has become  
16 a thing of its own, as far as I am concerned. There  
17 are limits as to what you can do time-wise.

18 THE COURT: But I guess my question is, you  
19 bring an election contest before a Superior Court  
20 Judge. Something comes up that causes that Judge to be  
21 concerned about whether some criminality took place.

22 And you're asking me to take steps; appoint a  
23 Special Master, allow you to go on a full investigatory  
24 mission. What -- where am I -- where's my authority by  
25 law to do that?

1 MR. SERATA: Judge, Judge, number one; that  
2 Motion I filed this morning, I don't -- we're going to  
3 -- and we're not prepared completely to start with that  
4 but my associate counsel would like to address.

5 MS. VENETIS:: Your Honor, if I may? We have  
6 -- the Brief is almost finished. It was not polished  
7 enough on such short notice to be able to file it with  
8 the Court today. We will have it filed with the Court  
9 in five days. But let me --

10 THE COURT: Is there any statute that you can  
11 turn to that says that I have this authority?

12 MS. VENETIS:: Your Honor, you do. We have a  
13 case pending before you; there is an obstruction of  
14 justice and spoliation of evidence. We have a filed a  
15 Motion so that the Court can make certain findings of  
16 fact.

17 One finding of fact is that evidence was  
18 destroyed. The second is that the Court certainly does  
19 have the legal authority to make a legal conclusion and  
20 this is supported by numerous spoliation cases  
21 including ones from the New Jersey Supreme Court.

22 That if evidence is destroyed, the Court has  
23 within its authority the ability to make an adverse  
24 finding of fact, as it relates to the party that  
25 spoliated the evidence. In this case, we're requesting

1 as the Order --

2 THE COURT: But that adverse finding of fact  
3 gives you the result that you're asking for. The  
4 adverse finding of fact is that the election's no good  
5 and I should order a new election or declare the  
6 Zirkle's the winner.

7 MS. VENETIS:: Well, that actually conclude --

8 THE COURT: You're asking me, if I -- I'm  
9 giving you the relief you want. I'm finding the  
10 election was no good and then I'll address whether I  
11 order a new election or whether I declare the Zirkle's  
12 the winner.

13 MS. VENETIS:: Right. But there are also --

14 THE COURT: But you're asking me to go  
15 further. You're asking me -- I believe in France,  
16 courts do prosecution, they do investigations.

17 Here in this country, we have Grand Juries  
18 for that. We have prosecutors, we have separation of  
19 powers. The Court is not an investigatory body.

20 MS. VENETIS:: We understand that. That's why  
21 our application requested that if the Court deems it  
22 necessary, that the Court appoint a Special Master. We  
23 have made an application for attorneys fees --

24 THE COURT: But what's my authority?

25 MS. VENETIS:: Your authority to do it is that

1 there was an obstruction of justice and if the Court  
2 suspects that in this election matter that is still  
3 pending before the Court, there was a criminal act  
4 involved.

5 That the Court can actually ask an  
6 investigative body, whether it be the Prosecutor's  
7 Office, the Attorney General's Office or an independent  
8 Master, to actually conduct an investigation. Then --

9 THE COURT: So you agree I have the option to  
10 say the Attorney General can investigate it?

11 MS. VENETIS:: In this case -- under normal  
12 circumstances, I think the answer would be yes. In  
13 this circumstance where the Attorney General is a party  
14 appearing in the case.

15 Where the Attorney General's Office was  
16 involved and in coming to the investigation and --

17 THE COURT: The criminal division of the  
18 Attorney General is not a party in this case.

19 MS. VENETIS:: Your Honor --

20 THE COURT: A totally separate -- it's a total  
21 separate -- I don't believe -- I don't know what walls  
22 are created in your office, Mr. Cohen, but I -- my  
23 understanding is criminal justice is totally separate  
24 than the civil part of your office.

25 MR. COHEN: It's a total separate division. I

## Argument - Ms. Venetis

23

1 am employed by the Division of Law in the office and  
2 the Department of Law and Public Safety.

3 There is a Division of Criminal Justice in  
4 the Department of Law and Public Safety. It's a  
5 totally separate division.

6 MS. VENETIS:: Your Honor, we believe that  
7 because this is linked so closely to a civil case that  
8 the Court -- and that there was a direct flouting, a  
9 deliberate flouting of the Court's Order, that very few  
10 items be secured.

11 The Court didn't issue a broad Order  
12 impounding the entire contents of the warehouse at the  
13 Board of Elections. The Court issued a very, very  
14 targeted and specific Order that included --

15 THE COURT: That you prepared.

16 MS. VENETIS:: That we prepared, exactly. And  
17 the Court -- the Orders talk about the examination of  
18 the computers. It talks about anything related to the  
19 election of --

20 THE COURT: But your Order didn't say the  
21 laptop of the administrator.

22 MR. SERATA: Oh, yes it did.

23 MS. VENETIS:: Your Honor, it says documents.  
24 The documents related to the ballot were contained on  
25 the laptop, which is what we -- which is why we wanted

1 to examine it.

2 And the Court issued an Order granting us  
3 permission to examine it. I have to tell you, the  
4 Order was quite strict. Professor Appel wasn't even  
5 permitted to touch these materials.

6 And we didn't fight that provision when the  
7 Attorney General's Office was negotiating it with us  
8 because the Court had issued an Order asking that  
9 nobody touch the voting machines unless everybody were  
10 present.

11 We don't quite understand how, given the  
12 Court's specific Orders, how -- and the State and the  
13 County's concern about our expert touching it, even in  
14 the presence of six other people.

15 How they let somebody else in, who has  
16 nothing to do with this case, to come in and erase all  
17 the contents of what would have provided material  
18 evidence in determining what happened on June 7 in  
19 Cumberland County.

20 You know, this case really calls into  
21 question, as my co-counsel said, the integrity of  
22 elections in Cumberland County, and because of the  
23 actions taken by the Board of Elections, it has become  
24 a bigger issue.

25 And ultimately, if the Court wants the voters

1 of Cumberland County to have faith that their votes are  
2 going to be counted and that the system is not  
3 insecure, then I believe that the Court has an  
4 obligation to actually retain jurisdiction over this  
5 case and order an investigation.

6 What would the investigation turn up? I  
7 don't know but frankly, it seems very unusual that the  
8 day before our expert is to go in to figure out what  
9 happened on June 7, the contents of the machine that  
10 would have given him that information was erased. It  
11 is very, very difficult --

12 THE COURT: Who do I order to do this  
13 investigation? A Special Master?

14 MS. VENETIS:: Yes, Your Honor. We believe a  
15 Special --

16 THE COURT: Who mays that Special Master?

17 MS. VENETIS:: We believe the County has to  
18 pay for the Special Master. The evidence was there in  
19 that voting -- in that computer, Your Honor. Our  
20 expert would have gone in. They didn't want him  
21 touching anything.

22 He had to take photographs of what happened,  
23 of the files that he needed to see and I believe  
24 Ms. Hernandez is the person who pressed the button.

25 So it's really the County. The County

1 brought in somebody who got rid of the evidence that  
2 would have allowed the Court to actually make the  
3 determination.

4 Frankly, if Dr. Appel had gotten the  
5 information, your first statement would have been  
6 answered, which is what happened here.

7 The Court would have known whether or not  
8 there was deliberate manipulation or inadvertent  
9 manipulation. We would have had the answer today,  
10 after Professor Appel's examination.

11 Because the evidence that would have given us  
12 and hence, the Court, the answer was destroyed, we  
13 don't have an answer to that and the Court --

14 THE COURT: The --

15 MS. VENETIS:: -- actually doesn't know  
16 whether he's going to order the Zirkle's the winners or  
17 order a special election. With that --

18 THE COURT: Can anybody answer that? The  
19 pre-lat testing, if it was done at all; did that  
20 produce any documents or were they only on the laptop?

21 MS. VENETIS:: Your Honor, the pre-lat tests  
22 -- first of all, we have not gotten full discovery in  
23 this case and Your Honor made a statement when he came  
24 on the bench, saying that the record is fairly  
25 complete.

1 The record is not complete. We have not  
2 gotten discovery. This would have been a critical part  
3 of discovery. We haven't gotten all of the documents  
4 and now the case has taken a turn.

5 We really would have liked to have had a  
6 evidentiary hearing today or to actually be able to  
7 sort out what happened on June 7. We don't know. It  
8 seems from Certifications that Ms. Hernandez has  
9 submitted in the past, that they did not do any sort of  
10 tests.

11 Judge Feinberg, in her Opinion, talks about  
12 various checks that are performed in the State and we  
13 disagree. There was only one county that performed any  
14 sort of checks.

15 But putting that aside, that's something  
16 we're going to take up with the Appellate Division.  
17 Clearly, there's no checks and balances in Cumberland  
18 County, which means that Judge Feinberg got it wrong in  
19 her Opinion.

20 There's no instructions from the State on how  
21 to run elections. There's no requirement that testing  
22 takes place. There's no requirement that these voting  
23 machines be secured. Professor Appel, in his  
24 Certification --

25 THE COURT: You say, though, that -- the

1 question I asked is, because as I understand it, the  
2 pre-lat, the results are supposed to be printed and you  
3 asked for that in discovery, the printed results?  
4 MS. VENETIS:: Right. Your Honor, they --  
5 THE COURT: Have they been -- they have not  
6 been supplied?  
7 MS. VENETIS:: Many discovery items have not  
8 been supplied. That --  
9 THE COURT: Does that mean they don't exist or  
10 does that mean they haven't been supplied?  
11 MS. VENETIS:: I don't -- Your Honor, I don't  
12 know and as --  
13 THE COURT: Well, let me ask the Attorney  
14 General? Do you know the answer to that?  
15 MR. COHEN: Yeah. Judge, this is a new one on  
16 me. You -- on July 11, you gave us ten days to provide  
17 discovery. In three days, we provided all discovery.  
18 There was one item that -- one or two items  
19 that Mr. Serata said we didn't give and we did give him  
20 that. We have gotten no requests, no letters, nothing  
21 saying that we haven't fully complied with all  
22 discovery. I have no idea what she's talking about.  
23 THE COURT: Well, clearly, I have Judge  
24 Feinberg -- I have to remember. Upstairs we have  
25 Fineman and that's --

## Colloquy

29

1 MS. VENETIS:: It's Feinberg, Your Honor.  
2 THE COURT: As Judge Feinberg laid out in her  
3 beautiful Decision; you may not agree with it but it  
4 certainly gives us a good handle on how this all works.  
5 There are these pre-lat tests that are done  
6 and they're supposed to be printed. Certainly, someone  
7 could answer pretty quickly whether there is a --  
8 anything that was printed in these pre -- maybe  
9 Ms. Hernandez can answer that.  
10 MS. HERNANDEZ: (inaudible), Your Honor.  
11 Actually, Professor Appel took pictures of those on  
12 August 17.  
13 THE COURT: Pictures of --  
14 MS. HERNANDEZ: Of the things that --  
15 THE COURT: -- something on the computer or  
16 something that was actually --  
17 MS. HERNANDEZ: No, something that was  
18 actually printed. All the pre-lat testing, all the  
19 testing, he took pictures of on that day.  
20 MS. PROCOPIO: They were tape, like a register  
21 tape, and he photographed them.  
22 MS. VENETIS:: Right, Your Honor.  
23 THE COURT: So you have them?  
24 MS. VENETIS:: Your Honor, if I may say  
25 something? The pre-lat test is something that's called  
1705a

1 a pre-logic accuracy test.

2 THE COURT: Logic and accuracy test.

3 MS. VENETIS:: Yes. Thank you for correcting  
4 me. That's supposed to be generated before the  
5 election.

6 It's supposed to be a way -- basically, it's  
7 like a false election, where someone casts a number of  
8 votes to determine whether the buttons are actually --  
9 the votes counts correspond with the candidates so that  
10 would --

11 THE COURT: Yeah. The technician is actually  
12 supposed to conduct a mock election; right?

13 MS. VENETIS:: And Ms. Hernandez admitted in  
14 her Certification that she didn't test, she didn't  
15 check those results so there were no checks that were  
16 performed.

17 THE COURT: Well, she wouldn't. The  
18 technicians would do it.

19 MS. VENETIS:: Somebody, but whoever it was  
20 didn't do it and that's part of the problem. There's  
21 no uniform --

22 MR. COHEN: Your Honor, if I --

23 MS. VENETIS:: -- anything, excuse me, from  
24 the State. There's no uniform way to conduct pre-lat  
25 tests. There's no uniform requirement that anybody

1 check the pre-lat results.

2 THE COURT: Can anybody answer for me this  
3 simple question? Did the technicians who did the  
4 pre-lat tests conduct a mock election, where they put  
5 five votes in for Zirkle, three in for Henry or  
6 whatever they did, and print out the results to see if  
7 they came in right?

8 MS. VENETIS:: I think --

9 THE COURT: Can anybody answer that simple  
10 question for me?

11 MS. VENETIS:: I think Ms. Hernandez says --  
12 Your Honor --

13 THE COURT: Ms. Hernandez is standing up. Let  
14 her answer.

15 MS. VENETIS:: Yes. And Your Honor, there is  
16 no open discovery in this case. Full discovery --

17 THE COURT: But she's saying there is. She's  
18 saying that Mr. Appel photographed all that  
19 information.

20 MS. VENETIS:: Right. And Mr. -- and  
21 Professor Appel went back to his office, looked at what  
22 he photographed and immediately called Mr. Serata and  
23 me, saying critical evidence that I needed has been  
24 destroyed.

25 As a result, Mr. Serata filed the current

1 Order to Show Cause and we started working on the  
2 spoliation Brief. So for the time being that  
3 discovery, again, that would --  
4 THE COURT: We lost sight of that issue.  
5 MS. VENETIS:: -- have been critical for us,  
6 has been shelved.  
7 THE COURT: We lost sight of that issue.  
8 MS. VENETIS:: So, which is important. And I  
9 think also, the Court needs to know two things. Number  
10 one; what happened on June 7?  
11 Is Cumberland County following any sort of  
12 procedures to prepare and (inaudible) the voting  
13 machines?  
14 So that's the first question that we don't  
15 have answers to and the second question is; what  
16 happened the day before our expert was supposed to  
17 examine the evidence? Why did it disappear?  
18 THE COURT: Okay. Let me ask Ms. Hernandez;  
19 can you answer my question?  
20 MS. HERNANDEZ: Yes. It was performed.  
21 THE COURT: It was?  
22 MS. HERNANDEZ: Yes, it was performed. There  
23 was that pre-lat done. What the technicians missed is  
24 where they actually pushed the button to hear people's  
25 names, to hear the candidate's names.

1 That's their mistake. That's where they  
2 missed the Zirkle mistake.  
3 MR. COHEN: What that means, Judge, is when  
4 they pushed the button for Zirkle, it should have said  
5 Zirkle and when they pushed the button for Henry, it  
6 should have said Henry.  
7 In this instance, if they had done that and  
8 pushed Zirkle, they would have heard Henry and then  
9 they pushed Henry, they would have heard Zirkle. That  
10 apparently was not done.  
11 MS. VENETIS:: But again, Your Honor, we don't  
12 have sworn testimony. We don't have any sworn  
13 interrogatories, any deposition testimony. Again, it's  
14 important to find out what happened so that it doesn't  
15 happen again.  
16 This was fortuitous in that there were only a  
17 few voters and they happened to come up to the Zirkle's  
18 afterwards and say, how did you lose? We voted for  
19 you.  
20 But can you imagine if this were a general  
21 election? You can't recreate what happened in --  
22 THE COURT: We'd be standing there looking at  
23 chads hanging out? Is that what we'd be doing?  
24 MS. VENETIS:: Well, it's --  
25 THE COURT: Yeah.

1 MS. VENETIS:: It's of that magnitude,  
2 Your Honor.

3 THE COURT: Yeah.

4 MS. VENETIS:: I mean, people who, as  
5 Mr. Henry put it so I --

6 THE COURT: So my point -- by the way, I  
7 didn't mean to be sarcastic. I meant how very  
8 important that is --

9 MS. VENETIS:: Yeah. I know, it is and --

10 THE COURT: -- that these elections be  
11 reliable.

12 MS. VENETIS:: And I think Mr. Henry got it  
13 right by saying whoever is the just winner should win.  
14 But we can't -- we -- the process is such that for this  
15 election, you're able to figure it out.

16 But for subsequent elections, we have no  
17 confidence in either the way the Board of Elections  
18 runs the elections or whether the machines are secure  
19 enough to prevent from deliberate tampering and that's  
20 a problem.

21 THE COURT: All right. I agree.

22 MR. SERATA: May I just say one thing? One of  
23 the things that you ordered, Judge, that I asked for in  
24 the original Order that you signed, that the Attorney  
25 General agreed to provide us, asked for any prior --

## Argument - Mr. Serata

35

1 THE COURT: Well, there was only one Order so  
2 I don't know what you're talking about, original.

3 MR. SERATA: Well, there's an original, an  
4 Order to Show Cause and then there was a --

5 THE COURT: There's only one Discovery Order I  
6 signed.

7 MR. SERATA: -- an Order, yeah, the Discovery  
8 Order. The Discovery Order provided that we were  
9 supposed to get documentation of any and all  
10 instructions that the Cumberland County Board of  
11 Elections had on dealing with these machines.

12 Now, it borders on the Gusciora case because  
13 in the opinion, in the Decision, in the fact findings  
14 of Judge Feinberg in that case, she mandated the State  
15 of New Jersey, that was a party to that action.

16 That they were to instruct the local Boards  
17 of Election on how they were supposed to prepare the  
18 machines. And I can only assume -- and in the Giles  
19 Affidavit or Certification, he says that he notified  
20 them by email.

21 We don't have one email. We don't have one  
22 document. We have nothing where the State gave  
23 instructions to the Cumberland County Board of  
24 Elections.

25 Now, I understand we're at the southern part

1 of the County and we're isolated but my vote in  
2 Cumberland County is important to me and yours is  
3 important to you in Salem County and that's the  
4 problem.

5 THE COURT: Mr. Serata was able to get in that  
6 I'm not a resident of Cumberland County, which is  
7 actually, I think, very good that you have a Judge  
8 that's not a resident of Cumberland County deciding  
9 this case. Don't you think, Mr. Serata?

10 MR. SERATA: I think it's splendid, Judge, and  
11 maybe you ought to look at Salem County.

12 THE COURT: I'm assigned to Cumberland County.  
13 Anything else anyone wants to say? I'm ready to make  
14 some decisions here.

15 MR. COHEN: Well, Judge, you've seen the  
16 Certification of Mr. Cossaboon. I'll make it short.  
17 We know exactly what happened. You know that he wasn't  
18 trying to do anything improper or illegal.

19 If he had asked me and said, should I delete  
20 anything and I'm not even counsel to him. I'm not  
21 counsel to the Cumberland County Clerk. I would have  
22 said no, of course, you don't touch anything.

23 THE COURT: It's awfully bizarre, though,  
24 don't you think?

25 MR. COHEN: He was -- what he was --

## The Court

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1 THE COURT: I mean, don't you think it's  
2 awfully strange that we have an election where the --  
3 despite a pretty good program, the Win EDS program, the  
4 names are programmed in wrong by a competent  
5 administrator?

6 That we have a lack of proper procedures or  
7 incompetence in doing the pre-lat test that would have  
8 picked up a mistake by the administrator in the  
9 programming under the Win EDS.

10 And that then, when I order you to provide  
11 information and they go out and they get an expert, the  
12 day before, the day before the expert's going to come  
13 in is the administrator makes a decision to come in and  
14 bring in a technician. And look to see if we got this,  
15 what is it called? The --

16 MS. VENETIS: Hardening.

17 THE COURT: Hardening in the computer and the  
18 technician comes in and looks at it and all of a sudden  
19 says, boy, this computer's running slow. I'd better do  
20 something about it, and deletes the files that are  
21 important to this case.

22 Don't you think that those are like three  
23 awfully strange coincidences? Don't you think you  
24 should be --

25 MR. COHEN: Well --

1 THE COURT: -- sending a letter to your  
2 criminal section, saying someone ought to look into  
3 this?

4 MR. COHEN: Well, I think we're definitely  
5 going to look into it. Whether it goes to the Criminal  
6 Division or whether or not the Attorney General's  
7 Office, someone responsible sends it to the Division of  
8 Elections who has a Director.

9 And they look into it because they're  
10 responsible for making sure the 21 Boards are  
11 complying.

12 But let me answer this, Judge. First, to put  
13 it into perspective; of all the elections that occurred  
14 on June 7, none of them had that problem. This one  
15 did. That's a --

16 THE COURT: Well, you know what? We don't  
17 know that. We have no way of knowing that. You  
18 haven't gone out and done any surveys or anything.  
19 That's like --

20 MR. COHEN: No, Judge, we have all --

21 THE COURT: That's like an attorney stood in  
22 here the other day and told me that his client hasn't  
23 tested positive on a drug test in a year and a half.  
24 When I asked him how many he took, he told me none.  
25 So that's kind of a similar statement. They

1 -- you haven't checked any of these other elections.

2 MR. COHEN: Well, you know what's really --  
3 Judge, you know what it's more similar to? Saying that  
4 we've got the Certification of Mr. Cossaboon saying, I  
5 didn't delete anything having to do with the election.

6 I have the Certification of Ms. Hernandez,  
7 saying we didn't do anything with the election. We  
8 don't know that something wasn't deleted. Even though  
9 they say there wasn't, it could have been.

10 You're right, Judge. Anything could have  
11 happened. It could have been. There are no facts, no  
12 facts whatsoever to support their claims at all.

13 Mr. Cossaboon, under penalty of law,  
14 Ms. Hernandez, under penalty of law, have certified  
15 that nothing used for the June 7 election to program  
16 the machines was deleted.

17 THE COURT: Okay.

18 MR. COHEN: Thank you.

19 THE COURT: All right. Anybody else wish to  
20 be heard?

21 MS. VENETIS:: Your Honor, I have one more  
22 comment, if I could be heard.

23 THE COURT: I don't know why I asked.

24 MS. VENETIS:: I didn't hear your comment,  
25 Your Honor.

1 THE COURT: No, I said I don't know why I  
2 asked that last question.

3 MS. VENETIS:: I'll make it very brief,  
4 Your Honor.

5 THE COURT: Go ahead.

6 MS. VENETIS:: Mr. Giles -- Mr. Cohen said he  
7 will refer this matter to the Division of Elections.  
8 That would be a possibility. Mr. Giles is here. He  
9 has been involved in the DCR case.

10 He was the one who Judge Feinberg ordered to  
11 make sure that all the counties are complying with her  
12 Orders. Clearly, there was a problem there and I  
13 respectfully request that this matter not be referred  
14 to the Board of Elections.

15 THE COURT: Well, what if I find he didn't  
16 comply with Judge Feinberg's Order? What do I do about  
17 that?

18 MS. VENETIS:: Excuse me, Your Honor?

19 THE COURT: What do I do if I find he hasn't  
20 complied with Judge Feinberg's Order? Isn't that why  
21 you got Judge Feinberg up in Mercer County to deal with  
22 that? It's her Order. You can go back to her.

23 MS. VENETIS:: And Your Honor, Your Honor,  
24 just to let the Court know, Judge Feinberg issued her  
25 findings in February of 2010 and an Order in March of

## Argument - Ms. Venetis

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1 2010. She issued deadlines.

2 The reason she issued only a Final Order a  
3 few weeks ago is because the Attorney General's Office  
4 and Mr. Giles' office kept missing every single  
5 deadline that was imposed by the Court.

6 One of the things, and this is in the  
7 transcript, that we found quite comical and Judge  
8 Feinberg was very upset about, was she ordered the  
9 State to notify all of the counties how they were to  
10 secure the voting machines.

11 Well, what happened is, they sent them emails  
12 and there was no followup, and we brought that to the  
13 Judge's attention and she was quite upset. She said,  
14 sending an email is not enough.

15 When I order you to make sure that they are  
16 implementing security measures, it means actually  
17 giving them information. It means making sure that  
18 they comply with the directive that you give them.

19 And then the Judge asked them to bring  
20 Certifications to her that everyone was in compliance.  
21 So Your Honor, the reason why -- Judge Feinberg no  
22 longer has jurisdiction of the case because she finally  
23 signed a Final Order, but the State missed every single  
24 deadline --

25 THE COURT: Well, you could go back to her for

1 enforcement of litigant's rights.  
2 MS. VENETIS:: We could, Your Honor.  
3 THE COURT: It's her Order. You can go back  
4 to her for enforcement of litigant's rights.  
5 MS. VENETIS:: We can.  
6 MR. SERATA: Then the Appellate Division.  
7 MS. VENETIS:: Your Honor, we're in the  
8 Appellate Division. We have a Brief due in a few days.  
9 We believe that even though Judge Feinberg issued a  
10 very lengthy Opinion, that it's quite problematic.  
11 Nonetheless --  
12 THE COURT: Well, but it's not -- the problem  
13 isn't solved by asking a Judge in Cumberland County to  
14 enforce --  
15 MS. VENETIS:: No, Your Honor.  
16 THE COURT: -- that Order.  
17 MS. VENETIS:: This is a separate matter.  
18 This really goes to the integrity.  
19 THE COURT: Exactly. It goes to the integrity  
20 of the election on this history.  
21 MS. VENETIS:: Exactly, Your Honor. And the  
22 evidence that would have permitted the Court to make a  
23 determination about how the Court should proceed and  
24 what happened on June 7 is destroyed, and it's  
25 destroyed by someone who was brought in by the

## Decision - The Court

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1 Defendants.  
2 THE COURT: And I think I've expressed my  
3 grave concern about that.  
4 MS. VENETIS:: Yes.  
5 MR. COHEN: And Your Honor, that statement is  
6 absolutely false, based upon the facts here, besides  
7 them saying we don't know what's destroyed.  
8 You're got those Certifications. Nothing was  
9 destroyed that had anything to do with the June 7  
10 election.  
11 THE COURT: All right. The 2011 New Jersey  
12 Primary Election was held on June 7, 2011. In District  
13 Three of Fairfield Township, Cumberland County, four  
14 individuals ran for two open seats on the Democratic  
15 Executive Committee.  
16 Following the election, the County Clerk  
17 certified the results as Vivian Henry, 34 votes;  
18 Mark Henry, 33 votes; Ernest Zirkle, 9 votes and  
19 Cynthia Zirkle, 10 votes.  
20 On June 20, 2011, the Plaintiffs,  
21 Ernest Zirkle and Cynthia Zirkle, filed a Petition to  
22 declare the election void and of no effect and to order  
23 a recount or a new election.  
24 In their Petition, they asserted that the  
25 voting machine used in the election, a Sequoia -- was a

1 Sequoia ABC Advantage Direct Recording Electronic  
2 Voting Machine.

3 They also produced Affidavits of in excess of  
4 28 voters, who stated under oath that they had voted  
5 for the Zirkle's in the primary election.

6 As a result of the filing of the June 20,  
7 Petition, the Court on June 21, 2011, executed an Order  
8 to Show Cause, requiring the Defendants Henry's, the  
9 Cumberland County Board of Election and the County  
10 Clerk, to show cause why the relief grant -- in the  
11 Petition should not be granted.

12 The Court also at that time issued an Order  
13 directing the Cumberland County Board of Elections to  
14 impound the Sequoia ABC Direct Recording Electronic  
15 Voting Machine and all documents pertaining to the  
16 election, until a determination of the issues raised in  
17 the Petition.

18 On July 11, 2011, the parties and their  
19 attorneys, with the exception of the Henry's, appeared  
20 before the Court in response to the Order to Show  
21 Cause.

22 Prior to the return date of the Order to Show  
23 Cause the Attorney General, on behalf of the Cumberland  
24 County Board of Elections, filed a Response with the  
25 Court.

1 In this Response, the Attorney General  
2 submitted a Certification of Lisbeth Hernandez, the  
3 Administrator of the Cumberland County Board of  
4 Elections.

5 Ms. Hernandez in her Certification stated;  
6 "As a result of human error in the programming of the  
7 voting machine used in this election, the votes cast  
8 for Cynthia and Ernest Zirkle registered for Vivian and  
9 Mark Henry.

10 And the votes cast for Vivian and Mark Henry  
11 registered for Cynthia and Ernest Zirkle."  
12 Ms. Hernandez attached to her Certification a Memo,  
13 dated June 24, 2011, in which she provided the claimed  
14 -- her claims and facts that she believed led to the --  
15 this error in programming.

16 In the June 24, 2011 Memo, Ms. Hernandez  
17 claimed that she has programmed the voting machines in  
18 Cumberland County since June of 2008, to avoid the cost  
19 of the County of hiring a programmer.

20 She further claimed that she mistakenly  
21 placed the position for Vivian and Mark Henry onto the  
22 position of Cynthia and Ernest Zirkle, and vice versa.

23 This information was then put into the voting  
24 machine cartridge and sent to the warehouse for  
25 testing. The voting machine technicians inserted the

1 cartridge into the voting machine and began the  
2 necessary testing.

3 Ms. Hernandez then claims that the voting  
4 machine technicians did not catch her error in the  
5 programming.

6 On July 11, 2011, this Court conducted a  
7 hearing on the Order to Show Cause. At that hearing,  
8 the Attorney General conceded that there was a mistake  
9 in the results of the particular election and  
10 encouraged the Court to order a new election.

11 By this time, the Court had read in full the  
12 February 1, 2010 Opinion of Mercer County Assignment  
13 Judge Linda R. Feinberg in the Gusciora vs. Corzine  
14 case.

15 This case involved a broad challenge to the  
16 use of direct recording electronic voting machines in  
17 the State of New Jersey and specifically, the ABC  
18 Advantage made by the Sequoia Voting Systems.

19 Judge Feinberg, in her very lengthy Decision,  
20 went into great detail as to how the ABC Advantage  
21 works and the various testing procedures that are  
22 available to avoid the type of problem and mistakes,  
23 which the Administrator claims occurred in this case.

24 As a result of the Court's review of Judge  
25 Feinberg's Decision, at the hearing on July 11, the

1 Court raised a number of questions as to the  
2 Administrator's claim that these erroneous results were  
3 simply the result of human error.

4 The Court questioned whether it had an  
5 obligation to investigate further, to make sure that  
6 the claims of human error could be supported.

7 The Sequoia ABC Advantage is a direct  
8 recording electronic voting machine. The preparation  
9 of the machine for an election begins with the County  
10 Clerk preparing the ballot definition.

11 Which includes the names of the candidates,  
12 the names of the contests and the identification of the  
13 buttons on the voting machine that correspond to each  
14 candidate.

15 The County Clerk, after preparing the ballot  
16 definition, delivers the ballot definition to the  
17 County Board of Elections. A specific software has  
18 been developed in order to program the ballot  
19 definition information into each voting machine.

20 This software is known as Win EDS, W-I-N,  
21 EDS, and runs on a Microsoft Windows operating system.  
22 The ballot definition is copied to a results cartridge,  
23 which is the size of a standard VHS tape.

24 This is accomplished with the use of an  
25 ordinary Windows laptop computer, which has been

1 installed with the appropriate Win EDS software. The  
2 laptops and the result cartridge are to be kept in a  
3 secured room.

4 The technicians who are to test the machine  
5 conduct tests known as pre-lat, P-R-E dash L-A-T.  
6 These are logic and accuracy tests, to make sure the  
7 machines have been programmed properly.

8 Essentially, the testing technicians are to  
9 conduct a mock election, where they enter a certain  
10 number of votes for each candidate and with the use of  
11 simulation cartridges, will determine and assure that  
12 the machine has been properly programmed.

13 So that the votes for each candidate are  
14 properly recorded for that candidate. Pre-lat results  
15 are printed or supposed to be printed and kept with the  
16 machine and there are to be seals placed on the machine  
17 after the pre-lat tests are conducted.

18 Following the July 11 hearing on the Order to  
19 Show Cause, the Court entered what I would describe as  
20 a Discovery Order, which was prepared by the parties,  
21 after back and forth I believe negotiations. That  
22 Order declared the results of the June 7, 2011 election  
23 to be void and of no effect.

24 The Order further provided that the Sequoia  
25 ABC Advantage machine used in the election, together

1 with election results report and results cartridge, and  
2 all other documents pertaining to the election, shall  
3 remain impounded.

4 The Order further permitted additional  
5 discovery, including giving expert witnesses an  
6 opportunity to examine, take notes of, photograph or  
7 otherwise copy the voting machine paper results report  
8 and result cartridge.

9 Any laptop used to program the ballot and any  
10 files for that purpose stored in removable storage  
11 media.

12 And finally, that Order provided for a  
13 Plenary Hearing to be held August 29, and I believe it  
14 was continued to today, at the request of the parties.  
15 I forget the exact reason but today is September 1 and  
16 it's only two days later.

17 On August 17, 2011, an expert retained by the  
18 Plaintiffs, Dr. Andrew W. Appel, made an inspection of  
19 the voting machine and the laptop, pursuant to the  
20 Order following the July 11 hearing.

21 In conducting this inspection, Mr. Appel  
22 found certain concerns with the security procedures,  
23 which the Administrator had put in place.

24 He also discovered that his ability to  
25 examine the Administrator's Win EDS laptop was

1 seriously compromised by what appeared to be an action  
2 that someone performed on the computer on August 16,  
3 2011, which erased a number of files, which Mr. Appel  
4 or Dr. Appel wanted to examine.

5 As a result of this discovery, the Plaintiffs  
6 filed a Notice of Motion for an Order to Show Cause and  
7 presented this Motion to the Court. That Order to Show  
8 Cause is returnable today.

9 The Court in fact signed a Second Order to  
10 Show Cause, dated August 22, requiring the defense to  
11 appear today and show cause.

12 As to whether the Court should enter further  
13 Discovery Orders for Plaintiffs to explore this  
14 activity, which took place on the Administrator's  
15 laptop on August 16.

16 In response to the August 22, 2011 Order to  
17 Show Cause, the Attorney General filed a Certification  
18 of Jason W. Cossaboon, Sr., a Computer System Analyst  
19 employed by Cumberland County.

20 Mr. Cossaboon, in his Certification, states  
21 that on August 16, 2011, he was asked by the  
22 Administrator to determine the date the hardening  
23 process was applied to the laptop used to program the  
24 voting machines.

25 He apparently was not able to find a log file

1 for the laptop to indicate the date the hardening was  
2 done, however -- last week we had an earthquake in this  
3 courtroom so I get nervous when I hear noises.

4 However, he states that while working on the  
5 laptop, he noticed the computer was running very  
6 slowly. As a result, he deleted certain "temporary  
7 files." He also, for some reason, deleted the event  
8 view logs.

9 In the Attorney General's responsive papers,  
10 he asserts that further investigation of this election  
11 is not necessary by the Court and that the Court should  
12 simply order a new election or declare the Plaintiffs  
13 the winners of the election.

14 In response to the Attorney General's filing  
15 and the position the Plaintiffs have submitted -- and  
16 position, the Plaintiffs submitted an additional  
17 Certification from Andrew W. Appel.

18 In which he set forth five possible scenarios  
19 for what has taken place in this case. The first  
20 scenario, which he rejects, is that the votes recorded  
21 on election day are accurate.

22 The Court, and I believe the parties, agree  
23 that this scenario seems extremely unlikely, based on  
24 the position that all are taking that this election was  
25 wrong.

1           The second scenario proposed by Dr. Appel is  
2 that the internals of the voting machine were  
3 manipulated so that the election results bear no  
4 correspondence to the voter's actions.

5           Dr. Appel rejects this scenario and the Court  
6 agrees that there has been no competent evidence  
7 offered to suggest that the voting machine was  
8 manipulated improperly or illegally prior to the  
9 election.

10           The third scenario he poses is that poll  
11 workers manipulated the voting machine during the  
12 election, so that some votes were not recorded.

13           He rejects this scenario and I agree, the  
14 Court agrees, as again there is no competent evidence  
15 to support this theory.

16           The fourth scenario is that the positions of  
17 the parties were swapped in the election ballot files  
18 by an unauthorized intruder, wishing to flip the  
19 election results, either through Internet access to the  
20 Win EDS laptop or by physical access to the Win EDS  
21 laptop.

22           Dr. Appel concludes that he cannot exclude  
23 this scenario, although there is no evidence to support  
24 this or to suggest this in the case.

25           Other than the rather circumstantial and

1           curious concurrence of the two human errors in the  
2 programming and testing of the machine prior to the  
3 election, and the technician's erasing of files one day  
4 prior to the inspection.

5           The fifth scenario posed by Dr. Appel is that  
6 the programmer switched the names in programming the  
7 computer and the voting machine and this is what the  
8 Administrator claims happened.

9           Dr. Appel also concludes that he cannot  
10 exclude this scenario and the Court tends to believe  
11 that this is the most likely explanation for the  
12 erroneous results in this case, but cannot totally  
13 conclude that.

14           Based on all of the above, it is clear that  
15 the election at issue was defective and must be voided  
16 by the Court.

17           While I do believe I have the authority to  
18 certify the Plaintiffs as the winners, I do not feel  
19 that this is the ideal result in this matter.

20           I do not know and may never know exactly why  
21 this election was defective. I have suspicions that  
22 something happened here that was improper and I even  
23 question whether something happened here that may have  
24 been criminal.

25           And I strongly encourage the Attorney General

1 to turn this over to the Attorney General Division of  
2 Criminal Justice, so that appropriate criminal  
3 investigators can conduct a full and complete  
4 investigation of this matter, to assure that  
5 criminality did not take place.

6 Although the Board of Elections and the  
7 Administrator maintain that human error was all that  
8 was involved here, for me to believe that I have to  
9 believe that three independent errors, human errors  
10 occurred here, and that somewhat stretches my belief of  
11 common sense and reality, but it's possible.

12 Accordingly, I am ordering a new election to  
13 be conducted on September 27 of 2011. The County Clerk  
14 is in the room. That date, I'm told, is a date we can  
15 accommodate. Is that correct?

16 MS. PROCOPIO: That is, Your Honor. In the  
17 anticipation that Your Honor may have leaned in that  
18 direction, I conferred with the County Clerk in  
19 advance, spoke to their office and got that date as a  
20 date they could accommodate.

21 THE COURT: And that covers all statutory  
22 requirements of notice and whatnot? You can get --

23 MS. PROCOPIO: The statutory requirement of  
24 notice is ten days of advertising and then they need  
25 time to print the ballots.

1 So that gives them a sufficient amount of  
2 time to accommodate both the printing of the ballots  
3 and the notice requirements that are statutorily  
4 mandated in Title 19.

5 THE COURT: Now, with respect to the one  
6 remaining issue, which is whether the Plaintiffs are  
7 entitled to sanctions, further discovery, I will leave  
8 that issue open.

9 I will let you brief that, Mr. Serata and  
10 Ms. Venetis. I'm not leaning in that direction but I  
11 will give you the opportunity to give me whatever  
12 authority you feel I have.

13 I do think this is something that has to be  
14 investigated by the Attorney General under our  
15 separation of powers.

16 Attorney General Mr. Cohen, you are to  
17 prepare an Order --

18 MR. COHEN: Yes, sir.

19 THE COURT: -- in accordance with my Decision.  
20 I want it on my desk tomorrow, copies to counsel.

21 Madam Clerk, you're on notice of the date for  
22 the new election. You can start what is needed. You  
23 don't have to wait for a written Order from me, so we  
24 can get this done by September 27.

25 I thought I could do it possibly in the

1 general election but I don't think that's practically  
2 possible because I don't believe you can ask or require  
3 voters at a general election to declare their  
4 affiliation.  
5 And I -- it just doesn't seem to me to make  
6 sense that I can do it that way. So we -- and it's  
7 only one district so I don't think it's a tremendous  
8 expense. Anything else?  
9 MR. COHEN: Your Honor, just quickly. When  
10 would you like the return date for our response to  
11 their Brief? Can we have a week?  
12 THE COURT: You can have more than that.  
13 MR. COHEN: Okay.  
14 THE COURT: Because my schedule in September,  
15 we're not coming back to these issues probably until  
16 October of so.  
17 MR. COHEN: Okay.  
18 THE COURT: You can have 30 days to respond.  
19 MR. COHEN: How long?  
20 THE COURT: You can have 30 days to respond.  
21 MR. COHEN: Thank you, Your Honor.  
22 MS. VENETIS:: Your Honor, my concern -- I  
23 have concerns about this new election. Clearly,  
24 there's no security of the voting machines at all,  
25 certainly in Cumberland County, and throughout the

1 State.  
2 There are no requirements that any sort of  
3 steps be taken in the pre-lat phase. Documents are not  
4 secured that should be secured.  
5 How do we know this isn't going to happen  
6 again? And that's, again, why the Zirkle's brought  
7 this case, why Mr. Serata has been involved. They live  
8 here. They want to make sure --  
9 THE COURT: Everything you just said, ma'am,  
10 can apply to every election that's coming up, too.  
11 MS. VENETIS:: Exactly, Your Honor.  
12 THE COURT: And that's why I'm not going  
13 there.  
14 MS. VENETIS:: That's very problematic,  
15 Your Honor.  
16 THE COURT: That's for Judge Feinberg and for  
17 you to argue before the Appellate Division. That is  
18 why I'm not -- I mean, if it's not clear, I'm focused  
19 on Fairfield Township, District 3.  
20 MS. VENETIS:: Right, but --  
21 THE COURT: And I'm not going to blaze down  
22 the same path that Judge Feinberg went down. That's  
23 what Judge Feinberg did and that's, apparently, what a  
24 panel of the Appellate Division is going to be doing  
25 soon.

1 MS. VENETIS:: Your Honor, but this Court  
2 certainly had the authority to require in this new  
3 election that's taking place, that certain security  
4 measures be implemented. None exist here and who knows  
5 what's going to happen in the next election.

6 There was no checking by Ms. Hernandez.  
7 There was no checking by any technicians. So really,  
8 you're asking the same parties who goofed up royally,  
9 if you excuse my colloquial expression, to do it again.

10 THE COURT: And those same parties are going  
11 to be responsible for the general election on November  
12 -- I don't know what the date is -- November the 8<sup>th</sup>  
13 this year and they'll be responsible, I assume, for  
14 what many people say will be a very important election  
15 next November.

16 And you know, this is for the Appellate  
17 Division to address, as to whether the voting Board of  
18 Elections are taking appropriate actions here. I'm  
19 only focused on District 3.

20 And I have great confidence that this County  
21 Board of Elections will make sure this is programmed  
22 properly and that we'll get this done right this time.

23 MS. VENETIS:: Your Honor, I'm not asking you  
24 to focus beyond Cumberland County. The Court certainly  
25 has and I'm not asking you to that, as you know.

## Colloquy

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1 But I respectfully request that the Court  
2 take under consideration imposing certain steps that  
3 should be taken in this and other elections. In  
4 addition, I also --

5 THE COURT: I'm not prepared to go further  
6 than what I've already ordered.

7 MS. VENETIS:: I also respectfully request  
8 that the Court actually contact the Criminal Division  
9 of the Attorney General's Office and say that something  
10 -- some criminal action had taken place here.

11 THE COURT: I will require the Attorney  
12 General to put in the Order that the Attorney General  
13 will direct, will consider making a referral to the  
14 criminal -- what do you call it; the Division of  
15 Criminal Justice?

16 MR. COHEN: Yes, the Division of Criminal  
17 Justice. That is, Judge, obviously not my call or even  
18 my superior's calls but we will take, obviously --

19 THE COURT: I said the Attorney General.

20 MR. COHEN: Yes, Your Honor. We'll take your  
21 Order and it's going to be passed up to -- in the  
22 office.

23 MR. SERATA: Just, for the assistance of the  
24 Deputy Attorney General, Judge, are we to assume that  
25 you are authorizing us to get the information that was

1 listed in the Order to Show Cause, that's returnable  
 2 today? Or are you saying no to that? And just for --  
 3 THE COURT: I'm saying no more discovery at  
 4 this point.  
 5 MR. SERATA: No?  
 6 THE COURT: I'll review what you want to  
 7 submit to me on sanctions and what other steps I want  
 8 to take. You say you'll Brief that, which goes to  
 9 whether I have any authority to go beyond what I'm  
 10 doing today.  
 11 I'll look at that. He can respond to that  
 12 but at this point, there's no need for any additional  
 13 discovery.  
 14 MR. SERATA: So you're denying this?  
 15 THE COURT: Yes.  
 16 MR. SERATA: Thank you.  
 17 THE COURT: Okay. Thank you, folks.  
 18 MR. COHEN: Thank you, Your Honor.  
 19 (Whereupon the hearing concluded at this  
 20 time)  
 21  
 22  
 23  
 24  
 25

CERTIFICATION

1  
 2  
 3 I, CAROL H. VENDZULES, the assigned transcriber,  
 4 do hereby certify the forgoing transcript of  
 5 proceedings on Recording Number (2011-09-01), Index  
 6 1:37:34 to 2:40:52, from Cumberland County Superior  
 7 Court, on September 1, 2011, is prepared in full  
 8 compliance with the current Transcript Format for  
 9 Judicial Proceedings and is a true and accurate  
 10 compressed transcript of the proceedings as recorded.  
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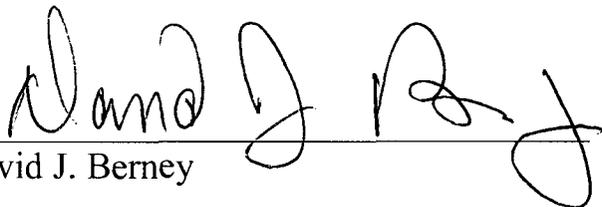
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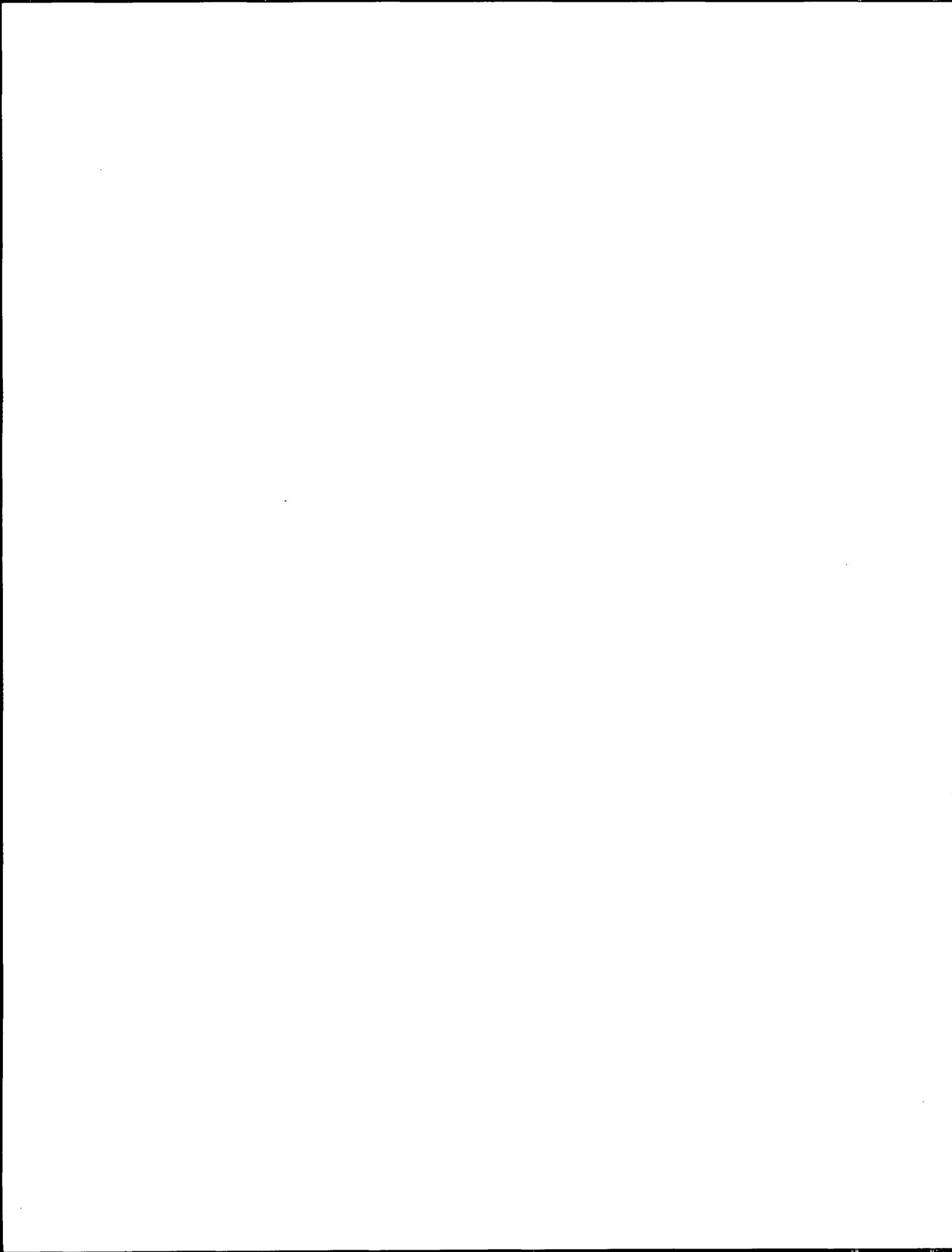


**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document complies with the 14,000 word limit established by Pa. R.A.P. 2135.

  
\_\_\_\_\_  
David J. Berney

DATED: February 4, 2014



## PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Application For Leave To File Amicus Curiae Brief And Proposed Amicus Curiae Brief Of The Rutgers School Of Law Constitutional Rights Clinic In Support Of Appellants upon the following individuals by First Class Mail, postage prepaid, which satisfies the requirements of Pa. R.A.P. 121 and 122:

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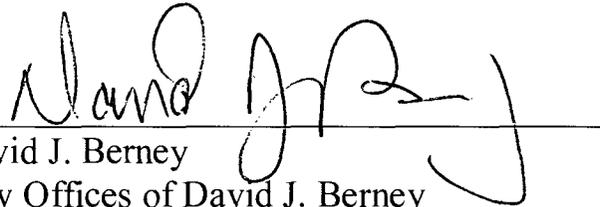
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