

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MONMOUTH COUNTY
DOCKET NO. MON-L-2210-13
APP. DIV. NO. _____

IN THE MATTER OF:	:	
	:	
DANIEL HARRIS, III,	:	TRANSCRIPT
	:	
CANDIDATE FOR THE	:	OF
CITY COUNCIL OF	:	
ASBURY PARK,	:	MOTION HEARING
	:	
Petitioner.	:	
	:	

Place: Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728

Date: September 27, 2013

BEFORE:

HONORABLE DENNIS R. O'BRIEN, J.S.C.

TRANSCRIPT ORDERED BY:

MEREDITH DeMARCO, Pro Se
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Bradley Beach, N.J. 07720

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Elections and Monmouth County Superintendent of
Elections

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Attorney for Monmouth County Clerk

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1 (Hearing commenced at 2:02 p.m.)

2 THE COURT: This is In the Matter of Daniel
3 Harris, III. It's docket L-2210-13. May I have
4 counsel's appearances, starting to my left?

5 MR. DAVIS: Nathaniel Davis on behalf of the
6 Law Office of Kristie Howard for the plaintiff, Your
7 Honor.

8 MR. COHEN: George Cohen, Deputy Attorney
9 General on behalf of the Monmouth County Board of
10 Election and Superintendent of Elections.

11 MR. BROPHY: Good afternoon, Your Honor.
12 Eric Brophy from the firm of Diegnan & Brophy on behalf
13 of defendants Loffredo and Henderson.

14 MR. KLEINMAN: And good afternoon, Your
15 Honor. Steven W. Kleinman, K-L-E-I-N-M-A-N. I'm
16 Special Monmouth County Counsel on behalf of the
17 Monmouth County Clerk.

18 THE COURT: Okay, have a seat.

19 This matter arises out of an election for the
20 Asbury Park City Council resulting in the petitioner's
21 unsuccessful run for office.

22 According to the petitioner, 252 mail-in
23 ballots were voided. Petitioner claims voters who used
24 these voided ballots completed an application to
25 receive a mail-in ballot. The application was then

1 reviewed by the County Clerk's Office and an approved
2 voter received a mail-in ballot upon which he cast, he
3 or she cast a vote, and assumed the vote to have been
4 properly cast.

5 During a July 2nd, 2013 Order to Show Cause
6 heard by this Court, a hearing was ordered to determine
7 why the Board did not count the 252 ballots before
8 resolving the issue of whether the ballots should have
9 been counted at all. The Court ordered the parties to
10 provide Mr. Harris's attorney with any discovery, and
11 the attorney subsequently served subpoenas on all four
12 members of the Board of Elections and the staff of the
13 Board of Elections.

14 Petitioner alleges that despite the
15 attorney's objections, none of these individuals were
16 called to testify. That's not completely correct,
17 because one, Christine Hanlon was.

18 At the July 17th, 2013 hearing, two witnesses
19 testified, M. Claire French, the Monmouth County Clerk,
20 and Christine Hanlon, a member of the Board of
21 Elections. According to the petitioner, these two
22 witnesses testified regarding the process of how an
23 application for a mail-in ballot is processed, how a
24 voter receives a ballot, and how the ballots are
25 supposed to be filled out and then voided.

1 Petitioner also mentions that there was a
2 busload of voters who appeared to testify but were not
3 heard from, and that he himself did not testify. He
4 alleges not hearing this testimony falls within the
5 second prong of the motion to reconsider standard, that
6 the Court did not consider or failed to appreciate the
7 significance of probative competent evidence.

8 Petitioner further alleges the Court's
9 decision to uphold the original counting of the ballots
10 was based upon a palpably incorrect or irrational basis
11 when it denied the petitioner's request to conduct a
12 hearing to determine the validity of the contested
13 absentee ballots.

14 Mr. Davis.

15 MR. DAVIS: Yes, Your Honor.

16 THE COURT: I've read everything.

17 MR. DAVIS: Yes.

18 THE COURT: For one, you did not provide a
19 transcript of the Court's decision back in July, from
20 which you could say I was right, wrong or indifferent.

21 MR. DAVIS: Okay.

22 THE COURT: But my recollection of the
23 proceedings were that Ms. Howard wanted the opportunity
24 to look at ballots.

25 MR. DAVIS: Yes.

1 THE COURT: And rather than -- and we didn't
2 get -- at the Order to Show Cause hearing on July 2nd,
3 I gave her the opportunity. It didn't happen quite as
4 anybody anticipated, but the first day they were back
5 for a hearing -- and I don't recall the date -- the
6 parties spent all day going through and looking at all
7 of the contested ballots, they were in the courtroom.

8 MR. DAVIS: Yes.

9 THE COURT: And Mr. Harris was present, a
10 number of the people, the attorneys were present. And
11 Ms. Hanlon, and I believe Ms. French or somebody from
12 the Clerk's office, because none of this was on the
13 record, described what was going on and what the
14 problems were and what was considered and all that.

15 MR. DAVIS: Yes.

16 THE COURT: Then, counsel met in the jury
17 room with the Court, and we decided that there were
18 basically three ways to go.

19 MR. DAVIS: Yes.

20 THE COURT: The most inefficient would have
21 been to hear from any potential voter, the proverbial
22 busload of people that had come out here.

23 MR. DAVIS: Yes.

24 THE COURT: That the most efficient was for
25 the Court to hear from the clerk, the County Clerk, and

1 a member of the Board, to determine what process they
2 used --

3 MR. DAVIS: Yes.

4 THE COURT: -- to not count the ballots, as
5 the case may be, or the case was. And then the third
6 was a hybrid, and I don't recall which, how that quite
7 would have shook out procedurally, but because of the,
8 what I would call the urgency of trying to get this
9 resolved, because the new Council took over on July
10 1st --

11 MR. DAVIS: Yes.

12 THE COURT: -- it was agreed that we would go
13 with the procedure where I would hear from the clerk
14 and the board member. We did that. And my
15 determination was, pursuant to the statute, that the
16 Board -- let me back up.

17 The statute vests with the Board great
18 discretion in determining whether or not to count a
19 ballot. And my ruling was essentially that the Board
20 exercise that discretion properly. And because from
21 the testimony we got, ballots -- applications -- let's
22 make sure we use the right nomenclature, all right?

23 MR. DAVIS: Yes.

24 THE COURT: Applications are one thing.

25 MR. DAVIS: Yes.

1 THE COURT: Ballots are another.

2 MR. DAVIS: Yes, we all agree to that.

3 THE COURT: Applications come in on a
4 periodic basis --

5 MR. DAVIS: Yes.

6 THE COURT: -- to the Clerk's Office.

7 MR. DAVIS: Yes.

8 THE COURT: The clerk's procedure was to
9 check the signature of the voter, make sure that it was
10 a valid registered voter, and then out a ballot went --

11 MR. DAVIS: Yes.

12 THE COURT: -- in the mail.

13 MR. DAVIS: Yes.

14 THE COURT: The clerk doesn't count the
15 ballot when it comes back.

16 MR. DAVIS: No.

17 THE COURT: It just goes into a holding area.

18 MR. DAVIS: Yes.

19 THE COURT: And then the Board checks the
20 ballot and the application on Election Day --

21 MR. DAVIS: Yes.

22 THE COURT: -- to count them.

23 MR. DAVIS: Yes.

24 THE COURT: We then go fast forward to Ms.
25 Hanlon's testimony, and what they saw were a number of

1 applications which had the same handwriting on them --
2 MR. DAVIS: Yes.
3 THE COURT: -- and a signature for the voter.
4 MR. DAVIS: Yes.
5 THE COURT: The section of the application
6 which says there was an assistor --
7 MR. DAVIS: Yes.
8 THE COURT: -- meaning somebody helped the
9 voter --
10 MR. DAVIS: Yes.
11 THE COURT: -- to secure the ballot, to fill
12 out the application --
13 MR. DAVIS: Yes.
14 THE COURT: -- were then compared against the
15 handwriting on the outside envelope of the ballot. The
16 inner envelope contains the ballot itself --
17 MR. DAVIS: Yes.
18 THE COURT: -- which is anonymous.
19 MR. DAVIS: Yes.
20 THE COURT: But the tear-off sheet has the
21 voter's signature, and it has in presumably their
22 handwriting that they filled this out by themselves.
23 MR. DAVIS: Yes.
24 THE COURT: And what they noticed was a
25 pattern of, I don't remember the exact number, but

1 application and ballot didn't match. And therefore,
2 they said these should be voided, because it's clear
3 there was an assistor. There were several that were
4 procedurally flawed that they absolutely didn't count,
5 nobody disputed those. I think there were 99 of them,
6 if memory serves. And there were a number of
7 applications and ballots that were indicative to them
8 that there was more than one assistor, with no
9 signature of an assistor.
10 And my ruling was in essence that the Board
11 exercised proper discretion in not counting those
12 ballots because the voter did not follow the law in
13 noting that there was an assistor. And therefore, the
14 -- since they had not followed the law with respect to
15 the application, they don't get to a ballot.
16 And as I recall, I used the example of if I
17 went into a polling place, normally, at least the
18 procedure at my polling place is, I walk in, I sign the
19 book, I sign a piece of paper that they tear off, they
20 hand to the voting booth attendant, and then I go in
21 and cast my ballot. If I didn't sign the book, or if I
22 didn't sign the paper, they wouldn't let me in the
23 ballot box, they wouldn't let me in the voting booth.
24 I likened this to that. If you don't fill
25 the application out correctly, you don't get a ballot.

1 So, therefore, the Board acted properly because it was
 2 clear to them that the process was flawed, so the
 3 voters lost their right to cast the ballot. And the
 4 two cases that dealt with the issue, both arising out
 5 of Asbury Park, Barrett and Battle, are different in
 6 their findings, but the factual bases were also very
 7 different. And I went with Battle versus Barrett.
 8 Because Barrett was clearly a ministerial error by the
 9 people who were assistors who testified that they were
 10 assistors. And Battle was no such thing.

11 So, my problem is, where is the error here,
 12 because it seems that your papers, or Ms. Howard's
 13 papers, confuse application and ballot. It's a long
 14 way to get to the question.

15 MR. DAVIS: I don't think so, Your Honor. I
 16 think that our papers are very clear that application
 17 and ballot are two separate issues here. And we have
 18 to look at procedure, as you said. The first procedure
 19 is that --

20 THE COURT: My point was --

21 MR. DAVIS: -- the application --

22 THE COURT: -- my point was you don't get to
 23 ballot if you don't do application correctly.

24 MR. DAVIS: But let's look at what you said.
 25 The application comes in to the clerk. The clerk

1 reviewed that. That's their responsibility. They
 2 found nothing wrong with the applications.

3 THE COURT: Oh, no, no, no. You missed
 4 something there.

5 MR. DAVIS: Okay.

6 THE COURT: Okay? The one key thing is the
 7 clerk gets them in dribs and drabs.

8 MR. DAVIS: Okay.

9 THE COURT: Doesn't get -- the first time
 10 anybody looks at the entire pile of these things is
 11 Election Day.

12 MR. DAVIS: Understand.

13 THE COURT: And that's where the pattern was
 14 noticed by the Board.

15 MR. DAVIS: Okay, but let's understand
 16 something. But regardless if the pattern comes at
 17 Election Day, the signatures, if they didn't match, the
 18 clerk is still looking at whether signatures match or
 19 not, am I correct?

20 THE COURT: They did that.

21 MR. DAVIS: And they sent them a ballot
 22 anyway saying we find no problem with this.

23 THE COURT: But the Board -- the clerk
 24 doesn't have the discretion that the Board has. The
 25 clerk has to make sure that it's a legitimate voter,

1 meaning Daniel Davis, address 123 Main Street, Asbury
 2 Park, there's a signature of Daniel Davis, they check
 3 the book, yes, we have a Daniel Davis registered, 123
 4 Main Street, Asbury Park, that's the signature, send
 5 Mr. Davis a ballot.

6 MR. DAVIS: Each office is responsible for
 7 holding up the integrity of the voting process, meaning
 8 is there any fraud there. All right? The clerk is the
 9 first step in finding if there's any fraud.

10 THE COURT: But the clerk doesn't see the
 11 pattern.

12 MR. DAVIS: But it doesn't matter if they see
 13 the pattern, they see the signatures. If the Board --

14 THE COURT: Yes, but the signature of the
 15 voter is not at issue.

16 MR. DAVIS: No, but you're saying there's no
 17 -- they said there was distinct different signatures,
 18 Your Honor. You said the Board noticed that.

19 THE COURT: No, no, no. You misunderstood
 20 me.

21 MR. DAVIS: All right.

22 THE COURT: The signature of the voter
 23 matches.

24 MR. DAVIS: Yes.

25 THE COURT: On both the ballot and the

1 application.

2 MR. DAVIS: Yes.

3 THE COURT: The handwriting, meaning the
 4 printed of the address and the biographical
 5 information, doesn't.

6 MR. DAVIS: I understand. And that's --

7 THE COURT: And that's where the flaw is.

8 MR. DAVIS: That's on the handwriting.

9 THE COURT: The handwriting on the
 10 application doesn't match the handwriting on the inner
 11 envelope of the ballot, the tear-away sheet. The
 12 signatures match --

13 MR. DAVIS: Okay.

14 THE COURT: -- but that is indicative to them
 15 that an assistor helped.

16 MR. DAVIS: Okay.

17 THE COURT: There's no signature on the
 18 assistor line.

19 MR. DAVIS: All right.

20 THE COURT: And the clerk is not capable,
 21 based on the way the process moves, to make that
 22 determination.

23 MR. DAVIS: Okay.

24 THE COURT: It only happens when the Board
 25 meets and starts counting.

MR. DAVIS: Okay. And that would be -- so then we move on to the Board. So the Board looks at the ballots and the application and says that doesn't match. But then they have to say well, is there fraud here, did someone attempt to steal the votes? They did not find that. They just found that there was a mistake and --

THE COURT: They don't have to go there. They're not looking to find fraud.

MR. DAVIS: Well, that's what the legislature said, that the main, the main gist of the statute is to make sure that there is integrity in the process as far as voter fraud. Am I correct? And --

THE COURT: Among other things.

MR. DAVIS: -- and make sure voters are enfranchised, not disenfranchised. So even if there's a ministerial problem with the --

THE COURT: It's not that simple. It's not that simple.

MR. DAVIS: But the Barrett case is very clear on that.

THE COURT: Because the integrity of the election is paramount.

MR. DAVIS: Attending over the voting right is paramount.

THE COURT: The integrity of the election itself, not the integrity of the right to vote, the integrity of the entire process.

MR. DAVIS: No, Your Honor. That's where we disagree, Your Honor. Because we have a right under the Federal Constitution and State Constitution, a right to vote. There is no right for a --

THE COURT: But you have to follow the procedure --

MR. DAVIS: -- integrity of process --

THE COURT: The procedure that I described when I go to the voting, the polling place, sign the book, sign the ticket, go into the booth.

MR. DAVIS: But we can't think of it like that. We have to look at the process we have now. And in the Barrett case it was clear that --

THE COURT: But the process is -- the process that I just described --

MR. DAVIS: Yes.

THE COURT: -- sign the book, sign the ticket, cast your ballot.

MR. DAVIS: Yes, and when --

THE COURT: If I skip one of those things, I don't get to cast a ballot. Do we agree on that?

MR. DAVIS: That's not true because in the

1 Barrett case there were mistakes made and they still
2 allowed the vote to count anyway.

3 THE COURT: We agree on that, do we not?
4 That I can't cast a ballot if I don't sign the two
5 things.

6 MR. DAVIS: But as --

7 THE COURT: We agree on that?

8 MR. DAVIS: We agree that if you go into the
9 ballot box.

10 THE COURT: That I can't get in the ballot
11 box unless I sign the two --

12 MR. DAVIS: Exactly.

13 THE COURT: Okay.

14 MR. DAVIS: But this is different.

15 THE COURT: The difference is, in the Barrett
16 case, you had a bunch of people in the nursing home --

17 MR. DAVIS: Yes.

18 THE COURT: -- after dinner, everybody has
19 their application, and assistors help them.

20 MR. DAVIS: Yes.

21 THE COURT: And they were, you know, some
22 sort of aides at the nursing home, employees of the
23 nursing home.

24 MR. DAVIS: Yes.

25 THE COURT: And they made sure that you know,

1 Mrs. Smith and Mrs. Jones filled out everything
2 correctly.

3 MR. DAVIS: Okay.

4 THE COURT: And maybe they even hand wrote
5 out the application for a few of the people because the
6 handwriting was really bad or they were incapacitated
7 or something like that.

8 MR. DAVIS: Okay.

9 THE COURT: And there, they testified, hey,
10 you know, there was no intent to defraud anybody, there
11 was nothing like that. It was just we ministerially
12 helped them out.

13 MR. DAVIS: Your Honor, that's -- I mean the
14 key thing is they had a hearing, and testimony was
15 taken by the assistors and the voters. In this case,
16 we haven't got to that point. So --

17 THE COURT: Because I found, I found that we
18 didn't get to that point because the Board exercised
19 its discretion properly. So you don't get to a hearing
20 if the Board exercises their discretion properly in
21 voiding the ballot. You never should have gotten a
22 ballot in the first place was my ruling --

23 MR. DAVIS: All right, but now --

24 THE COURT: -- because, because the people
25 didn't properly fill out the application.

1 MR. DAVIS: But they did anyway, and their
2 vote didn't count. They voted.

3 THE COURT: But they didn't.

4 MR. DAVIS: But they didn't fill it out, but
5 their vote was -- a ballot was given for them to vote
6 and then that vote was taken away.

7 THE COURT: And the other thing that I
8 determined was, with the number of votes that we were
9 talking about --

10 MR. DAVIS: Yes.

11 THE COURT: -- between the lowest vote getter
12 and the next closest vote getter --

13 MR. DAVIS: Yes.

14 THE COURT: -- the amount that were not
15 counted would not have made a difference.

16 MR. DAVIS: I'm not sure about that, Your
17 Honor. I think that 300 votes would have made a big
18 difference in the election and --

19 THE COURT: But it wasn't 300, because
20 everybody agreed that there were, I believe it was 99
21 -- Mr. Cohen will correct me --

22 MR. DAVIS: No, I believe they only reviewed
23 99 but I believe there --

24 THE COURT: No.

25 MR. DAVIS: -- if I'm not mistaken, I think

1 they reviewed a certain amount but there was still 300
2 that were not -- more than 200, 300 that were not
3 reviewed.

4 THE COURT: Three hundred and twenty were in
5 dispute.

6 MR. DAVIS: Yes.

7 THE COURT: Everybody agreed 32 were properly
8 rejected, 252 were voided for assistors, an additional
9 68 were voided for signature problems, 99 did not list
10 any assistor, 147 had multiple assistors, 5 had, were
11 rejected for other reasons.

12 So, so that's 252.

13 MR. DAVIS: Two fifty-two.

14 THE COURT: Right.

15 MR. DAVIS: And that 252 would have been the
16 big difference between --

17 THE COURT: Maybe, maybe not.

18 MR. DAVIS: -- no, that's definitely. If you
19 look at the numbers in the voting, Your Honor, that 252
20 would have been the difference in the election for --

21 THE COURT: We don't know who they voted for.

22 MR. DAVIS: We don't.

23 THE COURT: That's right. Because they
24 didn't properly follow --

25 MR. DAVIS: But they should have been allowed

1 to have their vote counted. The issue is, Your Honor,
2 that --

3 THE COURT: See, that's where we disagree,
4 Mr. Davis.

5 MR. DAVIS: -- is it process over a voting
6 right or right over process? And the issue is I think
7 everyone say, even the Barrett case would say it's the
8 right to vote over process, even if you make -- if
9 there are no mistakes --

10 THE COURT: And the Battle case says the
11 exact opposite.

12 MR. DAVIS: Well, and that's a different
13 issue, Your Honor, altogether, I think. Barrett is
14 factually different. But the Barrett case is right on
15 point, and it's the same exact --

16 THE COURT: So is Battle.

17 MR. DAVIS: No, Your Honor, I think Battle is
18 a little bit different, Your Honor. And the Battle
19 case relies on Friends of Jim Usry and Matthews which
20 goes to this case we're talking about, Your Honor, and
21 that's Friends of Jim Usry v. Matthews 187 N.J. Super.
22 176 (App. Div. 1982), where it says,

23 "A failure by a voter to adhere to a
24 statutory requirement such as N.J.S.A. 19:31-11 would
25 have provided a basis upon which to deny the voter his

1 franchise at the time he or she attempted to vote.
2 That, however, is not the issue. Here, the voters were
3 permitted to and did vote. The votes having been cast,
4 we must consider whether any legislative purpose would
5 be served by expunging them, a consideration that must
6 be exercised from a perspective of construction."

7 As such, if they were allowed to vote, the
8 vote should have been counted. And that's a case cited
9 in Battle.

10 THE COURT: I understand your point.

11 MR. DAVIS: So we have Barrett and Friends of
12 Jim Usry v. Matthews overriding Battle. So at this
13 point --

14 THE COURT: I don't think they override it.

15 MR. DAVIS: Well, I think it's very clear
16 that the case law leans more towards the right to vote
17 rather than the process which I guess Battle would fall
18 under.

19 THE COURT: Mr. Cohen?

20 MR. COHEN: Your Honor, I don't have much to
21 add to our letter brief. We think the Court exercised
22 its discretion properly in ruling that the Board acted
23 properly. We think the reference -- the reliance on In
24 Re: Battle is appropriate. We don't think that there
25 was any violation of the requirements of the rule

1 regarding a motion for reconsideration.

2 The Court could have gone either way on this
3 case. But the fact that the Court ruled against the
4 petitioners doesn't mean that the Court did anything
5 that was improper, inappropriate or illegal. And we
6 think that there's no basis for granting the motion for
7 reconsideration.

8 THE COURT: Mr. Brophy.

9 MR. BROPHY: I have nothing, Your Honor.

10 THE COURT: Mr. Kleinman?

11 MR. KLEINMAN: I have nothing to add, Your
12 Honor.

13 THE COURT: Mr. Davis, anything you wish to
14 add, sir?

15 MR. DAVIS: Yeah, Your Honor. I just think
16 that even in Battle the case says the importance of the
17 legislation is to safeguard the secrecy of the ballot
18 and prevent fraud.

19 There is no allegations here that the secrecy
20 of the ballot was interfered with, nor was there any
21 fraud. So at that point, the only thing we have here
22 is the interference of voter's rights to move forward.

23 And I believe that any -- anyone looking at
24 this, especially the voter, would believe that the lack
25 of signatures or any problems with the application or

1 ballot would be ministerial in nature, and not
2 substantive.

3 THE COURT: I specifically said, because
4 there were no proofs in front of me when I ruled, that
5 there was any type of fraudulent activity --

6 MR. DAVIS: Yeah, I understand that.

7 THE COURT: -- because I don't know. I don't
8 have any testimony to that effect. But there's no
9 question that at least on a serious number of these
10 ballots, there was a concerted effort, by somebody, one
11 of the campaigns, one of the candidates, to get
12 vote-by-mail ballots out to people in various portions
13 of the town.

14 And the problem is that, that has the
15 potential for fraud, when the law is not followed. And
16 the law is very simple. Whoever that person was that
17 filled out however many of them there were, went into,
18 or went to, whatever it was, whether it was a housing,
19 an apartment complex, a nursing home, you know, any
20 type of place where there was a large number of voters,
21 somebody sat down with those applications, and wrote
22 Daniel Davis, Apartment 1, George Cohen, Apartment 2,
23 filled them all out. Okay? And then somebody went to
24 door to door and said, "You want us to bring you a
25 ballot, get you a ballot?" Sure, sign.

1 All they had to do, all they had to do was go
2 back to whoever's handwriting was on that thing and
3 sign it as an assistor. We would not be having this
4 discussion.

5 MR. DAVIS: That is true, Your Honor.

6 THE COURT: We would not have that
7 discussion. Because those ballots would have been
8 validly secured. And we could have counted them.

9 Now the ones where it looked like there were
10 two handwritings, we can agree that there's one line,
11 but the same thing. Not that difficult it was Mr.
12 Brophy and Mr. Kleinman who were the two people who
13 coordinated this in the, whatever candidate's office,
14 to sign it. Problem solved.

15 So, whoever put this together simply didn't
16 follow the law that requires them to do X, Y, and Z,
17 steps A, B, C, to get a ballot. Had we had those
18 signatures, whether it's one or two, every single one
19 of them would have been counted on Election Day, not
20 six months later, five months later. Election is in
21 May.

22 So, somebody, somewhere along the line, in
23 one of the candidate's campaigns, or whether it was a
24 group or whatever, screwed up, royally.

25 My ruling was you don't get a ballot in the

1 first place if you can't follow the simple
2 instructions.

3 MR. DAVIS: Your Honor, but I agree with
4 everything you said --

5 THE COURT: Good. Then you should sit down.

6 MR. DAVIS: No, no, but you made my argument
7 for me. Because what you're saying is they made a
8 ministerial problem --

9 THE COURT: It's worse than that though.

10 MR. DAVIS: -- not substantive. You just
11 made my argument, saying that's ministerial because all
12 you did was forget to sign.

13 THE COURT: Right, but the problem is --

14 MR. DAVIS: So now --

15 THE COURT: -- the problem is, when you catch
16 it well after the fact, the clerk can't do it, because
17 the clerk is not in a position to do it. The clerk
18 only sees them as they walk in, or as they get received
19 by mail. You know, and I didn't even get into the
20 issues with this case with -- I forget the term that
21 they used -- messengers, that there were issues with
22 messengers with these ballots.

23 MR. DAVIS: That's the Battle case, Your
24 Honor, that's not this case here. The Battle case
25 dealt with messengers.

1 THE COURT: We didn't even deal with that
 2 here.
 3 MR. DAVIS: Okay.
 4 THE COURT: Okay. But there were issues with
 5 messengers here that were also brought up.
 6 MR. DAVIS: All right.
 7 THE COURT: I didn't go into it.
 8 MR. DAVIS: All right.
 9 THE COURT: As far as I was concerned, my
 10 reasoning was sound. You don't like it, that's fine.
 11 Your right is to go to the Appellate Division.
 12 MR. DAVIS: But, Your Honor, you made another
 13 argument for me which I agree with, in what you said
 14 that the clerk made a mistake and sent out the ballots
 15 and they allowed the vote.
 16 THE COURT: No, the clerk didn't make a
 17 mistake. You're misunderstanding me --
 18 MR. DAVIS: Okay.
 19 THE COURT: -- Mr. Davis. The clerk did her
 20 job.
 21 MR. DAVIS: Exactly.
 22 THE COURT: The clerk is not in a position to
 23 determine whether or not there is some concerted
 24 effort, be it fraudulent or not.
 25 MR. DAVIS: But one --

1 THE COURT: Because she only seems them as
 2 they come in one by one, by mail. The Board has the
 3 ability. And your criticism was I didn't bring all
 4 four people of the Board in. To me that would have
 5 been cumulative, because I would expect that the other
 6 three members would have testified exactly the same way
 7 as Ms. Hanlon did about what their procedures were.
 8 My determination was that their procedure was
 9 perfectly fine. And the question was, did they abuse
 10 their discretion. I acknowledged, as did Judge Lehrer
 11 in Barrett that there are flaws in the statute. But I
 12 also looked at Battle which said that the integrity of
 13 an election and the result is very important to our
 14 governance. People have to know that the people who
 15 were elected were elected properly.
 16 So whoever made these mistakes with the
 17 applications, they're to blame for these people not
 18 being able to vote. And whether that's a concentrated
 19 effort by one candidate, two candidates, a campaign,
 20 doesn't matter. They're the ones who didn't follow the
 21 law. If you don't follow the law, it goes back to my
 22 example of me not signing the book, or not signing the
 23 ticket, you lose your right to vote. While it's a
 24 precious right, you have to follow the law to get it,
 25 to exercise it. If you don't, you're out.

1 MR. DAVIS: But Your Honor --

2 THE COURT: You can't -- if you don't, if you
3 don't follow the law, although a driver's license is a
4 privilege, not a right, if you don't follow the law in
5 doing the test and all that kind of stuff, you don't
6 get a driver's license.

7 MR. DAVIS: But Your Honor, I think that if
8 there's a mistake on a ballot, I think all the case
9 laws say if there's a mistake on the ballot, and you
10 still are allowed to vote, as they were in this case,
11 that your vote should count.

12 THE COURT: I understand your argument.

13 MR. DAVIS: So I mean, I have the Barrett
14 case and the case I just cited that say that. Because
15 even if they didn't follow the law, which I agree there
16 were mistakes on the ballot, but once they were allowed
17 to vote, and not even notified that they could have
18 voted by mail --

19 THE COURT: The problem is the error -- and
20 I'm calling it an error, I'm not calling it a fraud --

21 MR. DAVIS: Yes.

22 THE COURT: -- because I don't know that it's
23 a fraud --

24 MR. DAVIS: Okay.

25 THE COURT: -- or any attempt at it. The

1 error was not discovered until Election Day. So
2 there's no way to tell a voter "hey, your vote-by-mail
3 ballot never should have been issued." If they catch
4 it early, wrong signature, something like that, they
5 have the opportunity to correct it.

6 So, again, the fault lies with whomever
7 created this program for these -- you know, to try and
8 get these vote-by-mail ballots.

9 Look, I mean, I made a passing reference to
10 Hudson County when I made my ruling, and everybody in
11 the courtroom laughed, and I scolded everybody about
12 it. Because it's not funny. Because elections have
13 consequences. We're finding that out right now, on the
14 national level. And even on a state level. And the
15 problem is if people can't trust the electoral process
16 and the outcome, then we're going to have anarchy.

17 Whoever coordinated this program, on behalf
18 of a candidate or a campaign, screwed up, big time.
19 Because they didn't follow a simple instruction, the
20 law. What they did was they disenfranchised these
21 people. Not the Board. Not the County Clerk. The
22 campaign, whoever that was, that went out with this
23 program, they're the ones who disenfranchised their own
24 citizens. Because they couldn't follow a simple
25 application.

1 MR. DAVIS: But Your Honor --

2 THE COURT: And that's -- that's where you
3 and I -- you could sit down, Mr. Davis -- that's where
4 you and I differ --

5 MR. DAVIS: Yes.

6 THE COURT: -- okay? Because as far as I'm
7 concerned, we're all familiar with Rule 4:49-2
8 regarding the standard for reconsideration, which says,

9 "The motion shall state with specificity the
10 basis on which it's made, including the statement
11 of matters or controlling decisions which counsel
12 believes the Court has overlooked or as to which
13 it has erred."

14 The Court in Cummings vs. Bahr 295 N.J.
15 Super. 374 (App. Div. 1996) stated that,

16 "Rule 4:49-2 is only applicable when the
17 prior decision was based on a plainly incorrect
18 reasoning, or where the Court failed to consider
19 evidence, or if there was good reason to
20 reconsider the prior decision due to new
21 information."

22 Here, there's no controlling decisions I
23 overlooked. The prior decision isn't based on
24 incorrect reasoning, as the petitioner suggests.

25 The petitioner didn't provide a transcript of

1 the Court's oral decision. Even without that, I was
2 satisfied that when I made that ruling, the Board acted
3 within its discretion in not counting the vote-by-mail
4 ballots based on the testimony of Ms. Hanlon.

5 The testimony from other members of the Board
6 would be cumulative, and wouldn't have helped me in
7 making the decision.

8 The petitioner objects to the procedure I
9 used. But the procedure was agreed to by all parties.
10 The clear facts pointed out that the ballots should not
11 have been issued to voters in the first place by the
12 County Clerk, for violation of the requirement of
13 identifying assistors.

14 The voters were disenfranchised themselves by
15 either failing to read the application, or they were
16 disenfranchised by the people who assisted them,
17 whether that was on behalf of a candidate or a
18 campaign, because it didn't disclose the fact that they
19 had utilized the services of an assistor, or assistors;
20 those people who didn't sign the application.

21 Remember, I ruled in the first place, the
22 ballots never should have gone out. But it's not the
23 clerk's place to make that determination. They
24 determine if the person is a registered voter, and if
25 the signature matches.

1 I doubt very seriously after a period of time
 2 when you first register -- I know people's signature
 3 tends to evolve over time. When I registered at 18,
 4 I'm sure my signature was a lot different than it looks
 5 like now. One only needs to look at my Social Security
 6 card to see the difference. But then I signed that
 7 when I was 10, so.

8 But any event, that's what the clerk does.

9 As I said, the parties agreed that the
 10 process I utilized would be proper. Here the
 11 petitioner again, and I respectfully say this,
 12 misconstrues the voter's right to get a vote-by-mail
 13 ballot in the first place versus their right to cast a
 14 vote-by-mail ballot. And the role the clerk plays in
 15 issuing a vote-by-mail ballot versus the Board in
 16 counting and verifying the vote-by-mail ballots.

17 The Court's decision was based on what I
 18 considered to be improperly obtained ballots, and the
 19 Board's proper exercise of its discretion in not
 20 counting those ballots. Once those ballots were
 21 disqualified, the claim became mathematically moot.

22 So, the testimony of all those voters would
 23 not have helped me, because it would have simply said I
 24 voted for Mr. Smith, Mr. Jones, Mr. whomever, and that
 25 would have been all well and good. But they never

1 should have got it in a ballot in the first place.

2 And what we have is a difference in
 3 interpretation of the two cases that deal with this
 4 process. The petitioner believes Barrett controls; the
 5 Court believes Battle controls, and the reasoning in
 6 Battle.

7 That's this Court having to interpret two
 8 different Appellate Division cases that stand for
 9 different reasoning. And I'm stuck with them. Based
 10 on what I heard and what I saw in the courtroom, the
 11 testimony I heard, I made the best decision I could.
 12 The remedy is not for me to reconsider it, because I
 13 didn't overlook any decision. I interpreted the
 14 decision, as is my responsibility, in the way that I
 15 did. You urge different interpretation. I don't agree
 16 with that interpretation. And I say that very
 17 respectfully.

18 I do think that somebody, whether it be a
 19 candidate or a group of candidates or a group of people
 20 acting on behalf of a candidate or candidates, simply
 21 didn't follow what is a relatively simple procedure to
 22 get a vote-by-mail ballot. And by doing that, they
 23 disenfranchise the voters.

24 But to say after the fact, well, we'll count
 25 them anyway, is problematic in my mind, because it's

1 not just a ministerial matter. It's more significant
2 than that.

3 Because what is clear is, at least on many
4 that I saw, there was a concerted effort by somebody to
5 get vote-by-mail ballots in various parts of the City.
6 In theory, not a problem. But because whoever that was
7 didn't follow the simple instructions -- I mean, if it
8 was -- I'll use you, Mr. Davis, as the individual. If
9 it was your handwriting on every single one of those,
10 and you had filled them all out for a, you know, a
11 nursing home, an apartment complex, whatever it was,
12 all you had to do was sign as an assistor, and every
13 single one of those would have been counted. It
14 wouldn't have been a problem, because it would have
15 been properly obtained.

16 But because whoever that was missed that
17 step, it's more than ministerial. It goes right to the
18 integrity of getting a vote-by-mail ballot. The old
19 days, absentee ballots were for people who were either
20 going to be out of town, or were too ill or infirmed to
21 go to the ballot, to the polling place.

22 To increase voter participation, the
23 legislature, and nationwide as well, has gone with
24 vote-by-mail or motor-voter type registration, to get
25 more people to exercise their franchise. Quite

1 frankly, you know, we are going under an ancient system
2 where we vote on Tuesdays because that was market day
3 when we had a agrarian society. That's when people,
4 farmers used to come into town to the market to bring
5 their goods. And that's why we have Tuesdays. And if
6 you think about it, most people work a day shift. It's
7 inconvenient to get to the polls, even though they're
8 open from 6 till 8 or 9 at night, people don't, it's
9 inconvenient. If we voted on a Saturday or a Sunday,
10 or both, like they do in other nations, we would have a
11 much better turnout, and it would really truly be
12 representative of democracy. But that's not what we
13 have, and quite frankly, the people who are in charge
14 of the system, the politicians who benefit most by it,
15 aren't about to change it when they benefit most by it.

16 So, but that being said, there are rules that
17 have to be followed to assure the integrity of the
18 process. They were not followed here. And I can't --
19 you know, I feel badly that these people did not have
20 their votes counted, I really do. But, the remedy of
21 "just count them, go ahead, it's okay, it's no big
22 deal," it's not that simple to me.

23 I think that whoever came up with this
24 program on behalf of a candidate or candidates, by
25 failing to follow the steps, created the problem for

both themselves, because if these votes were in fact for them, they hurt themselves by not following the rules, or certainly the voters by disenfranchising them.

But it's not enough for me to reconsider the decision. You're welcome to take an appeal and let the Appellate Division tell me I'm wrong in my interpretation of Battle versus Barrett. But I'm satisfied that I didn't overlook anything, and that my interpretation was correct. And my interpretation of the statute, which allows the Board to have the discretion to void ballots, and that they exercised it properly, is the correct decision.

So the motion for reconsideration based on those reasons will be denied.

Thank you, gentlemen.

MR. DAVIS: Now, Your Honor, are you going to make a written decision because we're probably going to take an appeal.

THE COURT: It won't be written, sir. You've got an oral decision.

MR. DAVIS: All right, thank you very much.

THE COURT: You're welcome.

(Matter concluded at 2:41 p.m.)

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CERTIFICATION

I, SANDRA CARBONARO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 2:02:57 to 2:41:49 is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings, as recorded.

/s/ Sandra Carbonaro

Sandra Carbonaro

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