UNORTHODOX PROCEDURAL HISTORY

1. At approximately 11:30 AM, on October 27, 2008, I faxed an official Appellate Division form "Fact Sheet On Application For Emergent Relief" to the chamber of Judge Sabatino concerning Appellant's need to file a Complaint in Lieu of Prerogative Writs, as per N.J. Ct. R. 2:2-3(a)(2), regarding the failure of Respondent, Nina Mitchell Wells, Secretary of State of the State of New Jersey, to adequately perform ministerial and discretional duties regarding her dominion of security as to the integrity of ballots and the electoral process for the November 4th, 2008 election. Question 14 of the Fact Sheet requires a description of the relief sought. I asked for three things:

- an injunction compelling the Secretary of State to execute her statutory and Constitutional duty to make certain which candidates for President were eligible under Article 2, Section 1, of the Constitution

- a stay of the defective ballots

- injunction for new ballots to be printed

2. Approximately two hours later, I was contacted by Judge Sabatino's law clerk, Matt Nunn, Esq., and informed that his Honor had denied the application, and that a fax was being sent to me including a letter from his Honor to such effect, but also stating that I was welcome to resubmit a more detailed fact sheet. Mr. Nunn told me that I was no longer limited to the constraints of the form for purposes of the supplemental fact sheet and that Judge Sabatino genuinely wanted to hear more.

3. Along with the letter from Judge Sabatino, I was faxed a list containing phone/fax numbers for the Hon. Philip Carchman, Presiding Judge of the Appellate Division, the Secretary of State, and the Attorney General's office with instructions to fax copies of all future papers submitted by me

4. I prepared and faxed a three page summary SUPPLEMENTAL FACT SHEET UPON APPLICATION FOR EMERGENT RELIEF of the matter and forwarded it to his office at 6:10 PM that evening.

5. The next morning, I spoke with Mr. Nunn, and he informed me that Judges Sabatino and Carchman would entertain my application. I was then told to submit a *Notice of Motion* and an Appellate brief. But this didn't sit right with me. My fact sheet application and supplement clearly stated that I was going to file a "Complaint In Lie of Prerogative Writs" as a *direct* appeal as of right under N.J. Ct. R. 2:2-3(a)(2), but Mr. Nunn said the Judge wanted it in the form of a motion and appellate brief. I was given until 4:00 PM to write this out and also drive over an hour to Trenton. I was also told to send a letter to Judge Carchman, Secretary Wells and the Attorney General regarding the schedule of paper submission.

6. I put together a quick pleading sufficient to make my case as a Complaint In Lieu of

Prerogative Writs. I wrote "Complaint In Lieu of Prerogative Writs" - as is required by N.J. Ct. R. 4:69-1 - on the motion form sheet, and I submitted my complaint and haphazard brief knowing that as long as I wrote "In Lieu of Prerogative Writs" on the pleading, then the case must, by law, be treated as an a direct appeal, not a motion. The difference is procedurally critical. An action In Lieu of Prerogative Writs to compel a ministerial duty is allowed by *direct* appeal straight to the Appellate Division, and once filed can be immediately followed by a Motion for Summary Judgment without leave of the court, but rather by law and by right.

7. I was instructed to file my papers with Judge Sabatino's law clerk and not the Appellate Division Clerk's office. I thought this was a bit odd, but being a Pro Se plaintiff, I trusted that this was proper. That evening, I filed the Complaint In Lieu of Prerogative Writs with Judge Sabatino's law clerk and also gave him a $200 Money Order which I was told to bring. Mr. Nunn had me make it out to the "Clerk of the Appellate Divsion". I was given no receipt, no Docket number and stamp for my records.

8. I stayed up through the night preparing a very thorough Motion for Summary Judgment and a much stronger, more thorough brief.

9. Early on October 29, 2008, I called Judge Sabatino's office and informed his receptionist that I would be submitting an additional filing with brief. Later that morning Judge Sabatino's secretary called to inform me that his Honor would *not* accept any other papers from me. This was very strange. According to N.J. Ct. R. 4:46-2, a plaintiff in an action in lieu of prerogative writs may move for summary judgment in an action demanding the performance of a ministerial act or duty at any time after filing the original complaint. That meant I was entitled, by law, to file the motion for summary judgment and Judge Sabatino had no authority to deny me that right.

10. I then then prepared a letter to Judge Sabatino apologizing for the cosmetic deficiencies of the Action In Lieu Of Prerogative Writs. The letter also respectfully informed his office that I did not expect his Honor would accept an uninvited supplement to my original filing, nor would I disrespect the bench by attempting such, but rather, pursuant to *N.J. Ct. R. 4:69-2*, I would be submitting the Motion For Summary Judgment according to the Rule of law.

11. Appellant arrived at the Court House later that afternoon with 9 copies of the bound Motion and supporting brief, affidavits, proposed orders and a money order for $30. Mr. Nunn spoke to me on the lobby phone and inquired as to why I had come to submit the Motion and brief since he had informed me earlier that his Honor would not be accepting another brief. I respectfully explained to Mr. Nunn that I was entitled by the rule of law, specifically *N.J. Ct. R. 4:69-2*, to file the Motion for Summary Judgment and brief. I also told Mr. Nunn that I did not want to impose on him or his Honor improperly and that I would simply file the Motion with the Clerk of the Appellate Division. To this, Mr. Nunn responded, "No. I'll come right down and get it," which he did.

12. Nunn met me in the lobby and accepted seven copies of the Motion for Summary Judgment and brief in support thereof as

well as a Money Order for $30 made out to the Clerk of the Appellate Division. I inquired of Mr. Nunn as to why I had not received a docket number since I'd paid the $200 fee along with my pleadings. Nunn informed me that it was standard operating procedure that a docket number wouldn't be issued in instances like this. I asked him, if in the alternative, I could at least have my pleadings stamped by the Judge. I was informed by Nunn that his Honor had instructed his office not to give me "anything." That really got my attention. I've never heard of a case being dealt with in this manner.

13. Nunn asked me to wait while he served my papers on the Attorney General's office. And once again, I felt like this was very unorthodox. When Nunn returned, he gave me the AG's reply brief, which also did not have a docket number on it. Then the clerk handed me a copy of my Motion For Summary Judgment which had been stamped by Judge Sabatino.

14. Sample ballots had arrived earlier in the mail that day, and later that evening I became aware of the candidate for the Socialist Workers Party, Roger Calero. The Socialist Workers Party gained official access to ballots in ten States. And, despite the fact that the Socialist Workers Party qualified to have their chosen candidate listed on those ballots, state election officials from Colorado, Florida, Iowa, Louisiana, and Washington have all, for good and legal cause, **refused** to list Mr. Calero on the ballots since, having been born in Nicaragua, he is not a "natural born citizen" as is required by Article 2, Section 1, of the United States Constitution. In those states, a stand-in candidate, Mr. James Harris, was listed in place of Mr. Calero.

15. I phoned Judge Sabatino's chambers, informed Nunn about Mr. Calero and requested to amend my pleadings so as to include demands that Mr. Calero also be removed from the ballots. But most important was the fact that this Calero matter proved that other Secretaries from various states were actually exercising their prescribed authority to protect ballots from fraudulent candidates whereas the defendant-Secretary of State here in New Jersey was remiss in allowing such a fraud to be perpetrated upon New Jersey voters. Mr. Nunn told me that Judge Sabatino wanted me to call the Elections Division and complain to them about Mr. Calero's name being on the ballots. Specifically, Mr. Nunn told me to "exhaust my administrative remedy". So I called that office and faxed a letter objecting to Mr. Calero being on the ballots. The I called back Judge Sabatino's office for guidance as to making an amended complaint, as Nunn had told me to do, but my calls weren't taken.

16. Later that day, October 30, 2008, at approximately 5:00 PM, I received word from Mr. Nunn that Judge Sabatino had denied my application for emergency relief. Mr. Nunn actually *suggested* that I might appeal his Honor's decision, and I should speak with Mark Nealy, a staff attorney at the New Jersey Supreme Court. Why was Judge Sabatino's law clerk giving me Ex Parte communications pushing me to appeal a decision of his boss to a specific staff attorney at the NJ Supreme Court?

17. Then Mr. Nunn told me that the Judge had treated my original application as a "Motion" and not an "appeal" and that they were going to return my $200 money order. This is unprecedented. I never received a docket number, and now they wanted to give me my money back. Nunn then asked me if I wanted to pick it up, or would I rather he

mailed it to me. I told him to hold onto it because I wasn't sure what all of this meant to the procedural aspects of the case.

18. At approximately 5:17 PM, I received a fax transmission containing Judge Sabatino's five page order dismissing the action and all relief requested. This was now four days past the date *he specifically initiated such review* by accepting this Pro Se Appellant's original submission of Appellate Division form, "Fact Sheet On Application of Emergency Relief" and supplement thereto. Judge Sabatino effectively ran the clock down to the election by four full days. The five page opinion doesn't discuss the Constitutional question at all; doesn't discuss the oath of office; doesn't discuss the undisputed fact that a high placed Elections Division official admitted the Secretary did nothing to verify the candidates; doesn't mention the Motion for Summary judgment; does accept that the AG brief's contentions are convincing even though they are completely off point and specious.

19. Judge Sabatino's order appears to deny a "Motion For Leave to Appeal" even though Appellant never submitted such a Motion as Appellant was not involved in any lower court matter or controversy which would have invited such an interlocutory Appeal. Furthermore, Appellant, as to Question number 5 listed on his original Appellate Division form, "Fact Sheet Upon Application For Emergent Relief", specifically answered "N/A". Question number 5 reads exactly as follows (emphasis added in original form, and not by Appellant):

> "5. Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? **IF SO, THE DECISION IS NOT FINAL, BUT RATHER INTERLOCUTORY, AND LEAVE TO APPEAL MUST BE SOUGHT."**

Once again, Appellant, to this question, answered, "N/A".

The front page of the NJ Appellate Division web site includes the following guidance to potential litigants:

> "The Appellate Division considers appeals timely taken **as of right** from the final judgments of the Law Division and the Chancery Division of the Superior Court, **in addition to the final decisions of State administrative agencies.** Litigants requiring Appellate Division review of interlocutory or interim orders of a trial court or agency may do so **only with leave of the Court**."

How could Judge Sabatino deny a "motion for leave to appeal" when no such motion had been made by me? Furthermore, I couldn't have made such a Motion even if I wanted to since I wasn't involved in a lower court case. My pleading was taken "as of right", no leave to appeal was necessary as is explicitly made clear on the Fact Sheet and on the front page of the Appellate Division web site.

(See http://www.judiciary.state.nj.us/appdiv/index.htm)

The Fact Sheet On Application For Emergent Relief was Appellant's initial filing and Appellant's intentions were made explicitly clear in Question Number 1:

> "1. What is the vicinage of the matter? (i.e, what judge, in what county or what agency entered the decision?)"

And to this, Appellant answered:

> "The Office of the Secretary of State of the State of New Jersey. It will be filed as a Complaint In Lieu of Prerogative Writs in the App. Div..."

Appellant's intention was clear and procedurally correct, in that both the official Appellate Division form/Fact Sheet, as well as a three page letter supplement thereto, detailed *exactly* the nature of Appellants claim, a Complaint In Lieu Of Prerogative Writs, which, by demand of N.J. Ct. R, 2:2-3(a)(2), is the exclusive method for reviewing a final action or inaction of a state administrative agency or officer, such method being allowed by *direct appeal* to the Appellate Division. Judge Sabatino's order, at the bottom of page 5 states:

> "Appellant's motion for leave to appeal the Secretary's alleged inaction is denied and his emergent application is consequently dismissed."

I became very upset in that the order and decision appeared to be pertaining to *an action I never took*, nor did I have standing or reason to take, from a procedural point of view. I made no "Motion For Leave To Appeal". This was never part of my case, but looking back on it now, it appears as if Appellant was being led somewhere he had no reason to go. Perhaps this is why Judge Sabatino wanted to give me back my original $200 Money Order.

I was a Pro Se party involved in one of the most complex legal situations one could ever imagine, and I was subjected to Judicial Misconduct and delay. Why did Judge Sabatino accept review in the first place? Why did he try to transform the nature of my pleadings? One possible answer springs forth: to stop the case from gaining the full attention of the US Supreme Court.

I expressed distress to Mr. Nunn over the phone and a total lack of respect for Judge Sabatino's order and opinion. I was very distraught. Mr. Nunn kept saying things like, "I tried for you," and also something to the effect of, "You raised good issues but there's other factors." At this time, I also mentioned to Mr. Nunn that myself and my sister, a retired prosecutor who helped with some of the legal research, had been subjected to electronic treachery via our private cell phones having been hacked. At this time, Mr. Nunn said something like, "Well you know which candidate was responsible for that, right? The candidate that's been known to pull that kind of thing right?" And then I told him, "Matt, stop. You've gone too far." I was very upset but I didn't have a clear suspect in mind. I had just sued the Secretary of State in her own backyard. I had tried to get both major candidates thrown off the ballots as well as attacking the eligibility of the Socialist Workers Party candidate. It could have been any of the above or supporters thereof. I felt like Mr. Nunn was trying to eleicit a defamatory comment about one of the candidates, and I wouldn't be surprised if the conversation had been taped.

20. Appellant stayed up through the night preparing a Motion For Emergency Injunctive Relief for submission to the New Jersey Supreme Court along with a seventy-five page appendix generated by this very unorthodox litigation.

21. The next morning I made my way to the US Supreme Court and was introduced to Staff Attorney Carol Huxe who took a serious look at my Motion, had a short talk with me about the case and then decided to accept the Motion for the review of a NJ Supreme Court Justice. She assured me that a Justice of the Supreme Court would examine my case and then she told me one of three outcomes would apply:

- a single Justice would deny the application

- a single Justice could grant the emergency relief

- a single Justice could call in the other Justices on an emergency basis

22. Later that afternoon, I spoke with Ms. Huxe on the phone, and she informed me that my papers were in good shape and that the the Justices were looking it over and to expect a decision within the next 45 minutes.

23. About ten minutes later, I received a fax a phone-call from a clerk at the NJ Supreme Court. I was told that an order had been written and I should expect it by FAX as soon as we hung up the phone. They then faxed me an order from the New Jersey Supreme Court, Justice Virginia A, Long, denying my motion for emergency relief. Here is the full text of the denial motion:

> "This matter having come before the court on an application for emergent relief pursuant to *RULE* 2:9-8, and the undersigned having reviewed the *movant's papers* and the papers filed by the defendant in the Superior Court, Appellate Division, it is hereby Ordered that the application for emergent relief is denied." (Emphasis added.)

This particular wording is very significant for two reasons. First, while it cross references the lower court case, it makes *no mention* of Sabatino, his order or his five page decision. This has the effect of causing an incredible procedural legal right in that it gave me the proper legal authority to bring my case, on an emergency basis, directly to the United States Supreme Court.

Judge Sabatino's order and decision never made any reference to the Constitutional issues involved in the case. But Justice Virginia Long's carefully worded order specifically relied upon "movant's papers", and *Movant's papers* include a Constitutional issue of first impression as to the "natural born citizen" clause which was now ripe to be put squarely before the United States Supreme Court for the first time in US history.

24. I then called the US Supreme Court and left a message for the stay clerk, Mr. Danny Bickell, but received no return phone call.

25. Over the weekend of Nov1st and 2nd, I prepared a twenty page Application For Emergency Stay according to Supreme Court Rules 22 and 23. An application seeking

review of a state court matter must be addressed to the Justice for the Circuit the state is in. For New Jersey it's Justice Souter. According to the common practice involved with *Rule* 22, an emergency application *must* be read by the Justice it is addressed to on the same day it's filed. The reason for this is that, if it is denied, the Appellant is entitled to resubmit it to any other Justice of his choice. My second choice was Justice Clarence Thomas.

On Sunday evening, I left New Jersey in order to be in DC to file the application before the court closed at 4:30 PM. This would assure that the Supreme Court had a chance to stay the popular vote in the National Election before election day polls opened.

26. The Application For Emergency Stay was filed by me on Monday November 3rd, 2008, at 3:33 PM. A few minutes later, while still in the Supreme Court, I phoned the Stay Clerk, Mr. Danny Bickell, and we spoke for 7:00 minutes (according to my phone log). I told Mr. Bickell the whole story insisting that the Court Rule required the Application to be delivered *promptly* to Justice Souter. Mr. Bickell assured me that Justice Souter would have the case on his desk that evening if my papers were in order,w which they were.

It was very important to me that the Court Rules be followed since I didn't expect Justice Souter to grant the application, but I was ready to resubmit it to Justice Clarence Thomas.

27. I arrived at the SCOTUS on Monday Nov 3rd, got the case filed and stamped at 3:30PM, then went back inside and pleaded with the stay clerk for 7 minutes (as shown by my phone log) to please follow the rules and get this on Justice Souter's desk as was required by Rule 22(1):

> "1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief." (Emphasis added.)

Mr. Bickell agreed that if my papers were in order, Justice Souter would receive the case that night, sometime after 4:30 pm.

> "Rule 22(6). The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application."

It's important that the disposition be delivered by speedy means because the denial of a stay sets the trigger for resubmission to a Justice of your choice under Rule 22(4).

28. The next day, election day, I received no message from the Court. I went back to the SCOTUS on Election Day with my sister who is also retired from the practice of law (she was an Assistant DA in Detroit for many years), and was told Mr. Bickell wasn't available to speak with me. He also was not picking up his phone.

29. On Thursday, I finally got through to Mr. Bickell and was informed by him that the case *was never passed on to Justice Souter because Mr. Bickell didn't think it was an appropriate Application*. I was absolutely astounded. Mr. Bickell told me that I should

have made a full Petition for Writ of Certiorari. And I told him he was flat out wrong, because :

- I followed the Court Rules perfectly

- he and I spoke all about this on Monday in a seven minute phone conversation wherein he agreed to forward the Application

- the case was properly before the court from the Supreme Court of NJ

- the precedent was Bush v. Gore where no Petition was necessary since the court decided to treat the Stay application as a full Petition

for Writ of Certiorari

All the while speaking to Mr. Bickell, I stayed calm and gentle while the anger was seething inside of me hoping he would Docket it, even at this late stage so I would have something to show people when I finally went public. It's not the Clerk's job job to play Supreme Court Justice. The Stay Clerk's job is to collect the papers and pass them onto the Justices, but as to this action *Mr. Bickell basically made a substantive judgment of law and denied my application on his own.* That must be criminal in some way, perhaps impersonating a US Supreme Court Justice, or subordination of Judicial intent? It's just wrong and Mr. Bickell needs to be called on it.

Either he did this on his own volition or somebody pressured him to do it.

After explaining the precedent in Bush v. Gore to him, where the Court treated the Stay application as a Petition for Cert. and then granted that virtual Petition, he blinked and agreed to Docket the case, but he still tried to persuade me to drop it anyway stating, "Do you want to redo the election?"

[See Bush v. Gore, page 1, http://www.law.cornell.edu/supct/html/00-949.ZPC.html]

Mr. Bickell kept trying to convince me to let it go stating that, "Justice Souter will deny it and so will Justice Thomas", but I wouldn't let it go and finally he agreed to Docket the case.

30. The next day, I checked the Supreme Court Docket and the case had finally been docketed but in a completely *incorrect* manner. Mr. Bickell docketed the case incorrectly as follows (this is from my screen-shot of the original Docket):

~~~Date~~~ ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~

Nov 6 2008 Application (08A407) for injunction pending the filing and disposition of a petition for a writ of

certiorari, submitted to Justice Souter.

Three glaring errors:
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- The case was actually filed and stamped received on November 3rd, not November 6th as Mr. Bickell had listed above.

- My application was for a "Stay" not an "injunction". Filing for an injunction does *not* bring expedited review, while a Stay *is* entitled to the most expedited review the SCOTUS has to offer. The distinction is *very* important.

- I never submitted a full Petition nor did I submit a letter stating any such intention to do so. The Stay Clerk just took this out of thin air. He made it up out of the blue. Nothing in my Application indicates I intended to file a full Petition for Write of Certiorari. There was no time for that. The proper procedural tool was a Stay application as per the precedent set in *Bush v. Gore*.

31. I then called Mr. Bickell and left three loud and direct messages to the effect of, "Fix my docket or I'm going to suggest criminal charges against you as well as a civil suit against the Clerk's office." I also told Mr. Bickell that I suspected he was being pressured from within, and that he should inform whoever was pressuring him that I'd kept solid phone records and that my pleadings were stamped on Nov. 3rd.

32. Approximately one hour later, I checked the US Supreme Court docket search engine again, and saw that Mr. Bickell had corrected the Docket to reflect that the case had been filed on November 3rd and he also now had it listed as a "Stay" application.

However, this second Docket listing was equally bizarre. Whereas the first Docket listing discussed a pending application for injunction, the new Docket reflected that Justice Souter had *already* denied the Stay application a day earlier on Nov. 6th, which is very confusing since this was now Friday November 7th and the first Docket listed no such disposition. Here is the Docket as it appeared one hour after the first Docket listing. And this is also how it appears today, Nov. 11th:

~~~Date~~~ ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~

Nov 3 2008 Application (08A407) for stay pending the filing and disposition of a petition for a writ of certiorari,

submitted to Justice Souter.

Nov 6 2008 Application (08A407) denied by Justice Souter.

None of this makes any sense. Calling this activity "unorthodox" is to be very kind. It's Judicial misconduct and perhaps it's even worse.

The reference to a "pending" Petition is incorrect and should be removed because it effects the favor-ability of review available to the case as resubmissions for Stay applications are not looked on favorably if the Stay denial is "without prejudice". If I were actually in the process of submitting a full Petition for Cert., which I'm not, then the denial might be considered "without prejudice", and in that case, Mr. Bickell might ,*once again*, decide not to pass on the Stay Application to Justice Clarence Thomas.
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Seeing as how the Electoral College is just one month away, this is still an emergency, and *Bush v. Gore* is still precedent. I have made no submission of a full Petition, so the Docket is still incorrect as I intend to resubmit the "Stay Application" this week and the case will live or die on the resubmission.

If the Court Rules had been followed to the letter of the law, as we should expect of the highest court in the land, then this is how things should have gone down: Since I put the case properly before the Supreme Court a day before the election, it should have been "promptly" given to Justice Souter who should have granted or denied it right away and then I should have been informed by "speedy means" of the disposition according to Rule 22(6) which says:

> 6. The Clerk will advise all parties concerned, by **appropriately speedy means**, of the disposition made of an application. (Emphasis added.)

These Court Rules are no joke. They have a purpose. On Monday November 3rd, Mr. Bickell disposed of my Application acting as if he were a United States Supreme Court Justice. That's certainly bad enough, if not criminal, but then he did nothing between then and Thursday November 6th to notify me, certainly not by "speedy means", of the disposition of my Stay Application. This is Judicial misconduct.

Mr. Bickell took my cell number on Monday Nov. 3rd, and had I been notified properly, by a phone call, that my Stay Application was not going to be forwarded to Justice Souter, then I could have corrected Mr. Bickell as I did on Thursday Nov. 6th.

This case was stopped in its tracks. I don't have enough information to say who was behind it and why, but it should be obvious this case has not been handled correctly. The law and the facts of this case have the ability to strip Obama of the Presidency just as the law and the facts of this case would have had the power to also strip McCain of the Presidency is he had won. I argued the same law as to McCain and Roger Colera as well as Obama. I need people to help spread the word about this case so that it has a chance of getting to Justice Clarence Thomas's desk and to the rest of the Court.

This is NOT the way the US Supreme Court usually does business. And the citizens of this country should be angry that this institution has slipped to this level.

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

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Leo C. Donofrio, Pro Se