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SUPREME COURT  
CLERK'S OFFICE

April 10, 2014

The Honorable Barry T. Albin  
Supreme Court of New Jersey  
25 Market Street  
Trenton, NJ 08560

Dear Justice Albin:

This office represents the plaintiff class in the matter of Pasqua v. Council, 186 N.J. 127 (2006). I have drafted a motion to enforce litigant's rights but write in the hope that some method short of litigation can be utilized to address what I have learned is an ongoing crisis situation.

It has been brought to my attention that there has been widespread non-compliance with the mandate that no litigant be coercively incarcerated unless a finding is made, based on evidence in the record, that there is a current ability to pay any release amount established. By way of one example only, the Appellate Division very recently decided the unpublished case of Barron v. Crump, A-3305-11T4 wherein three highly respected and experienced judges state:

...our Supreme Court has recognized two prerequisites that must be established before an order requiring coercive incarceration can be entered. First, the court must find that the parent was capable of providing the required support, but willfully refused to do so.

Second, counsel must be provided if the individual facing incarceration is indigent.

As the Pasqua decision, case law going back at least 100 years, our Constitutional prohibition on Debtor's Prison, and Administrative Office of the Courts Directive #15-08 make clear, this is not the complete standard that must be applied before a litigant can be coercively deprived of her or his liberty.<sup>1</sup> It is only a portion of the equation. The remaining mandate (that any release amount must be established based on competent evidence of a current ability to pay that amount) is missing and is being consistently ignored by the lower courts.

I understand that the Supreme Court has granted emergent relief in approximately a half dozen cases over the past five months where the Appellate Division declined to summarily reverse incarceration orders that were made without evidence in the record that the obligor has the current ability to pay whatever release amount was established.

These litigants include Mr. Crump, who was released via an order on emergent application issued March 26, 2014 (ten days after the above-cited Appellate Division decision in his case). In its decision on the emergent application, Chief Justice Rabner reiterated the standard that was missing from the Appellate

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<sup>1</sup> Review of the Barron v. Crump matter is not being sought; the case is referenced for illustrative purposes only.

decision - that the trial court must make findings, based on evidence in the record, that the obligor has the current ability to pay any release amount imposed.

In contrast to the holding of the Appellate Division (in this and in at least 7 other cases I have been presented with), it is not enough to find only "that the parent was capable of providing the required support, but willfully refused to do so [and], second, counsel must be provided if the individual facing incarceration is indigent."<sup>2</sup>

As this Court and the AOC have repeatedly stated, coercive

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<sup>2</sup> In his decision releasing Mr. Crump, Chief Justice Rabner stresses this issue and the importance of a trial court making a contemporaneous finding of a current ability to pay any release amount by paraphrasing Pasqua, changing the word "refused to do so" to "refuse[s] to do so" in reference to the payment of support (3a). Support for Justice Rabner's holding is additionally found in Article I, Section 17 of the New Jersey Constitution ("No person shall be imprisoned for debt in any action..."), Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996), Pierce v. Pierce, 122 N.J.Super. 359 (App.Div. 1973); Federbush v. Federbush, 5 N.J.Super. 107, (App.Div. 1949); Biddle v. Biddle, 150 N.J.Super. 185 (Ch.Div. 1977); Department of Health v. Roselle, 34 N.J. 331 (1961), Commentary to R. 1:10-3, Current New Jersey Court Rules.

incarceration is only appropriate where an obligor "holds the key to the cell" and is refusing (as opposed to unable) to pay.

By way of final example on this matter, I am attaching an order (4a-5a) issued last week by a trial court in the matter of Cristiani v. Censulo.<sup>3</sup> In the order, the trial court notes defendant's sworn testimony he could pay \$1,500 toward his arrears to avoid jail. Without any evidence whatsoever in the record that an additional amount could be paid, the trial court nonetheless set the obligor's release amount at \$4,828 (5a). The obligor remains incarcerated. Emergent review of this obviously erroneous order was denied by the Appellate Division and an application is being drafted for this court to again intervene.

Additionally, certain counties now utilize a "work release" program, wherein litigants are required to report to the jail every evening and weekend. Many of them are employed in minimum wage jobs and are required to sign over their paychecks each week. Their entire earnings (less an "administrative / work release fee" to the jail) is retained. The litigants are kept in this program until a release amount is paid. No parenting time (except formal visitation at the jail) is possible as the litigant is required to report to work and then back to the jail.

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<sup>3</sup> Review of the Cristiani v. Censulo matter is not being sought; this case is also referenced for illustrative purposes only.

Can anyone truly believe that a person who is working a minimum wage job and signing over their check every week actually has \$3,000 or \$5,000 hidden anyway somewhere that they are refusing to pay? I understand that at least one litigant has been in this program for over a year, and that one litigant recently attempted suicide after six months in this program.

As indicated, I have drafted a motion to enforce litigant's rights in the Pasqua case but hope that some method short of litigation can be utilized to address this situation.

I cannot tell where the breakdown in the system is occurring. The AOC has properly stated the standard to be applied in Directive #15-08, stressing that any release amount must be based on evidence in the record that the obligor has the current ability to pay it (i.e., not simply that there was past wilful non-compliance). This court has intervened and clearly reiterated the standard on multiple occasions. Yet the trial courts and many appellate courts continue to fail to adhere to this Constitutional mandate.<sup>4</sup>

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<sup>4</sup> One appellate panel has noted that in Turner v. Rogers, 131 S. Ct. 2507 (2011), the United States Supreme Court disagreed with Pasqua's holding that the Constitution demands counsel be appointed when an indigent litigant is facing incarceration for support.

When Hon. Linda Feinberg, AJSC (ret) originally ruled in favor of the plaintiff class in Pasqua, she suggested various remedies to ensure that the rule of law was adhered to when an incarceration order is entered. I respectfully suggest that this Court, perhaps in conjunction with the AOC, the Division on Child Support, and/or the Supreme Court Family Practice Committee, re-examine whether those remedies (including expedited appellate review) would be an appropriate method of addressing this crisis.

I ask that this matter receive priority. While precise numbers are difficult to ascertain (as many inmates are held for more than one reason), it appears that there are in excess of 350 New Jersey citizens currently being held on child support warrants across the state. Of all those I have reviewed, precisely two are being held in compliance with the law.

Again, my preference is to resolve this issue in the most

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This is irrelevant for two reasons.

Initially, the Pasqua decision explicitly rests on the New Jersey Constitution, which has traditionally extended more protection of Civil Rights than the Federal Constitution.

Second, the issue being brought to this court is not the appointment of counsel - it is the failure of the trial court to make adequate (if any) findings as to evidence of a current ability of an obligor to pay any release amount set. This is a completely separate issue from the appointment of counsel.



cooperative method possible, however I believe that an application to enforce Pasqua and to seek a complete moratorium on support-related coercive incarceration until this issue can be reviewed would be justified by the facts at this point.

Please feel free to contact me at the above email address or telephone number if there are any questions or to further discuss this matter.

Respectfully,



David Perry Davis, Esq.

Cc: John Jay Hoffman, Esq.  
Acting Attorney General

Hon. Glenn Grant, JAD  
Director, Administrative Office of the Courts

Beverly Murphy, Esq.  
General Counsel, Child Support Enforcement Services

Hon. Linda Feinberg, AJSC (ret)  
Szaferman Lakind

Various appellate division and trial court judges

SUPREME COURT OF NEW JERSEY  
M-955 September Term 2013  
074048

TAMMY BARRON,  
PLAINTIFF,

v.

JEREMY CRUMP,  
DEFENDANT-MOVANT.

**FILED**

MAR 26 2014

O R D E R

CHRISTINA AVELLA,  
PLAINTIFF,

v.

JEREMY CRUMP,  
DEFENDANT-MOVANT.

*[Signature]*  
CLERK

This matter having come before the Court on defendant's -  
application for emergent relief pursuant to Rule 2:9-8, seeking  
a stay of the trial court's two orders of incarceration for non-  
payment of child and/or spousal support, both dated February 21,  
2012; and

The Appellate Division having entered a judgment on  
February 29, 2012, granting defendant's emergent motion for  
release from custody pending appeal; and

The Appellate Division having entered a judgment on March  
14, 2014, finding that "[t]he proceedings against [defendant]  
did not meet the standards and procedures required by the AOC  
Directive [#15-08, dated November 17, 2008] and the New Jersey



Constitution," but nonetheless dismissing defendant's appeal as moot; and

Defendant having filed an application with the Appellate Division for permission to file an emergent motion on short notice for a stay of the Appellate Division's March 14, 2014, judgment, and a single judge of the Appellate Division having denied the same on March 19, 2014; and

Defendant having filed the instant application for emergent relief with this Court seeking a "[s]tay on enforcement of support through incarceration," among other relief; and

The Chief Justice having entered a single-Justice disposition in this matter on March 20, 2014, (S-69-13), providing that "[e]nforcement of child support through incarceration under the February 21, 2012 orders of the trial court is stayed pending further review and order of the Court"; and

The Court having reviewed the papers submitted by defendant; it is hereby

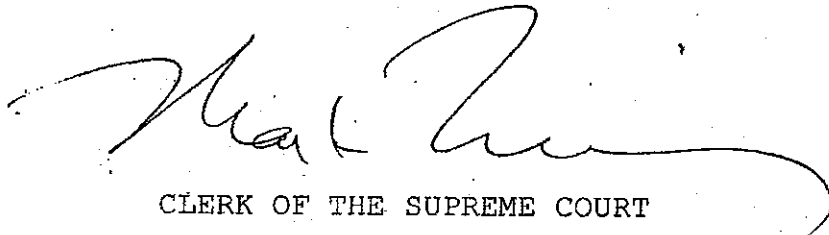
ORDERED that defendant may not be incarcerated pursuant to the trial court's February 21, 2012 orders; and

It is further ORDERED that enforcement of defendant's child support obligations in both matters (FD-02-000076-03 and (FM-02-000348-07), short of incarceration, may continue.

This Order is without prejudice to coercive incarceration imposed in the future pursuant to an appropriate ability to pay hearing, provided that such hearing complies with Pasqua v. Council, 186 N.J. 127 (2006), and Administrative Directive #15-08, including the requirement that the court find, "before ordering coercive incarceration, . . . that [defendant is] capable of providing the required support, but willfully refuse[s] to do so." Pasqua, supra, 186 N.J. at 141 n.2.

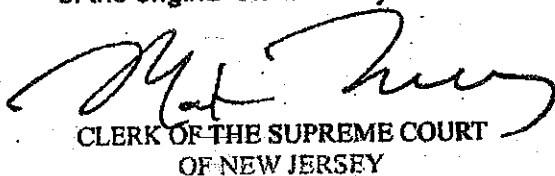
Jurisdiction is not retained.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of March, 2014.



CLERK OF THE SUPREME COURT

The foregoing is a true copy  
of the original on file in my office.



CLERK OF THE SUPREME COURT  
OF NEW JERSEY

3d

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION, FAMILY PARTCRISTIANI ANNMARIEPlaintiff ☒ Obligea ☐ Obligor

vs.

BERGEN COUNTYDocket No. FM-02-002616-08Probation Account No. CS42940115ACENSULLO PAUL RDefendant ☐ Obligea ☒ ObligorORDER FOR RELIEF TO LITIGANT -  
ENFORCEMENT OF LITIGANT'S RIGHTS

With appearance by:

☒ Plaintiff ☐ Attorney for Plaintiff  
☒ Defendant ☐ Attorney for Defendant  
☐ IV-D Attorney  
☒ BERGEN COUNTY Probation Division RELIST

THIS MATTER having come before the Court on the 31 day of MARCH, 2014;

AND the Court having considered the evidence and arguments presented, and having found that:

The obligor is under a Court Order to pay \$ 1,398.00 per MONTHLY for the support of 2 child(ren); \$ 3,000.00 per monthly for spousal support and \$ 50.00 per WEEKLY toward arrearages effective 01/01/2009;The obligor has failed to make payments and owes arrearages totaling \$ 92,523.00 as of 03/31/2014 due to the Obligea and/or \_\_\_\_\_ Welfare;

- ☒ The obligor is indigent and: ☐ qualifies for court appointed counsel, but none is available;  
☒ qualifies for court appointed counsel THOMAS MASON ESQ and is appointed;
- ☐ The obligor is not indigent and does not qualify for court appointed counsel;
- ☐ The obligor has the current ability to pay \$ \_\_\_\_\_ toward the arrearages;
- ☒ The obligor has the financial ability to pay and refuses to do so, and that incarceration of the obligor is necessary to coerce compliance;

AND the Court having further found that:

Therefore it is hereby ORDERED that:

- ☒ The obligor be incarcerated in the BERGEN County Jail until the Obligor pays \$ 4,828.00 to be applied to said arrears or until further Order of this Court. The Court will review the continuing efficacy of this Order for coercive incarceration no later than two weeks from the date of this Order so long as the above release payment is not paid and the Obligor remains incarcerated.
- ☐ The obligor be released from custody in this matter;
- ☐ The support-related bench warrant currently issued in this matter is discharged;



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- ☐ Payments shall be made by Income Withholding on current and future income sources, including:  
Name of income source: \_\_\_\_\_ Address of income source: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Obligor shall, however, make payments at any time that the full amount of support and arrears is not withheld.

- ☒ The Obligor shall make support payments of \$ 4,398.00 per M plus \$ 216.66 per M toward arrears for a total amount of \$ 4,614.66 per M.
- ☐ A lump sum payment of \$ \_\_\_\_\_ must be paid by the obligor by \_\_\_\_\_ or a bench warrant for the arrest of the obligor shall issue without further notice.
- ☒ Effective 03/31/2014 future missed payment(s) numbering 1 or more may result in the issuance of a warrant, without further notice.
- ☐ An employment search must be conducted by the obligor. Written records of at least # contacts per week must be presented to the Probation Division. If employed, proof of income and the full name and address of employer must be provided immediately to the Probation Division.
- ☒ The obligor is hereby noticed to appear before this court on 04/14/2014 at 130 PM in BC JAIL for further review and possible modification of the child support obligation. The BERGEN COUNTY Family/ Probation Division shall serve notice to the Obligor and other interested parties, if any, in this matter.
- ☐ The Motor Vehicle Commission, State of New Jersey, shall TAKE NOTICE that the suspension of the Obligor's Drivers License caused by the non-payment of child support is hereby removed; the Obligor must take note, however, that the Commission requires a fee for restoration of the license, and that this order does not pertain to any reason for license suspension other than non-payment of child support.
- ☒ It is further ORDERED:  
FOR THE LIMITED PURPOSES OF THIS PROCEEDING THE OBLIGOR HAS BEEN FOUND TO BE INDIGENT  
W/O PREJUDICE PENDING. MR. THOMAS MASON, ESQ IS APPOINTED COUNSEL FOR THE OBLIGOR.  
THIS HEARING IS CONSIDERED AN ABILITY TO PAY HEARING. DEF TESTIFIED TO ADDRESS. DEF  
IS SELF-EMPLOYED. DEF ADVISED OF HIS RIGHT TO FILE AN APPLICATION FOR DOWNWARD  
MODIFICATION AT THE FAMILY DIVISION - ROOM 163. DEF STATES HE CAN MAKE A \$1500 PAYMENT BY  
END OF THIS WEEK. DEF IS ORDERED TO UPDATE PROBATION WITH ANY TELEPHONE OR ADDRESS  
CHANGES.  
REMAND TO WORK RELEASE W/ COR \$4828 IN ADDITION TO OBLIGATION & BCSD FEES.  
REVIEW REQUIRED ONLY IF COR IS NOT PAID.  
DEF HAS A WORK MEETING AT 7:30 PM TONIGHT.  
DEF MAY GO TO THIS WORK MEETING BUT HE MUST SURRENDER TO WORK RELEASE BY 10 PM  
TONIGHT OR A WARRANT FOR ESCAPE WILL ISSUE.

It is further ORDERED that all provisions of any prior Orders in this matter, not in conflict with this Order, shall remain in full force and effect.

03/31/2014

Date

*Ronny Jo Siegal*

RONNY JO SIEGAL, J.S.C.



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