

NEW JERSEY STATE BAR ASSOCIATION
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STATE OF NEW JERSEY,

Plaintiff,

v.

JASON BURGOS,

Defendant.

:
: SUPERIOR COURT OF NEW JERSEY,
: CHANCERY DIVISION, FAMILY PARTK
: CAMDEN COUNTY
:
: Docket No. FO-04-000384-23
:
: CIVIL ACTION
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BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

OF COUNSEL:

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PRELIMINARY STATEMENT

Thirty years ago, the Supreme Court of New Jersey recognized the constitutional right of indigent defendants facing consequences of magnitude to have effective counsel. Madden v. Twp. of Delran, 126 N.J. 591 (1992). Falling short of ordering such right to be publicly funded, the Court created the Madden system of assignments seeking to equitably impose these assignments on attorneys as a “stop-gap measure,” at the same time acknowledging that there would be times that an attorney may not be experienced to handle the assignment. “We have no doubt that on occasion [an attorney’s] inexperience has affected their representation, but the fact is that over these many years no substantial complaints of a failure of justice have been brought to our attention.” Id., at 607-08. Three decades later, that time has not just arrived, it has revisited itself over and over again. This is one such case.

As a result of Madden, an attorney who, while having passed the bar, has worked as a computer programmer and a non-attorney consultant for almost 23 years has been assigned to defend a contempt of domestic violence charge. He is not simply “rusty” in the practice of law, he has not seen a courtroom as an attorney for over 20 years. This attorney should be excused from service.

More importantly, the indigent defendant in this case and all indigent defendants subject to a Madden-assigned attorney, deserve more than a “physical

presence” at their court proceedings. This is not what the constitution envisioned – nor could it be what the Court envisioned. The effective right to counsel enshrined in the federal and state constitutions is purposeless without an effective way to ensure competent, knowledgeable counsel.

The Court acknowledged its implicit power to require another branch to provide funding to secure effective assistance of counsel for indigent defendants, but has declined to go that far. See Madden, 126 at 612-13. Instead, the Court has taken piecemeal steps to encourage or obtain funding for discrete types of cases, and, in some instances has declined to impose consequences of magnitude where the provision of such counsel was not readily available.

Against this backdrop, Madden assignments, such as the one in this case, continue. In light of Michael Haya’s certification about his lack of knowledge and expertise to competently represent the defendant in this matter, the NJSBA urges this court to relieve him of this assignment and to take immediate, affirmative steps to protect future indigent litigants from a two-tiered system of justice that provides representation by counsel in name only in many cases.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies upon the Order to Show Cause and accompanying certification.

LEGAL ARGUMENT

POINT I

MICHAEL HAYA SHOULD BE RELIEVED AS COUNSEL BECAUSE HE HAS CERTIFIED THAT HE CANNOT PROVIDE THE CONSTITUTIONALLY AFFORDED EFFECTIVE COUNSEL REQUIRED TO REPRESENT JASON BURGOS

A. The Madden System of Assignments Has Been Used as a Repository for Right to Counsel Matters, the Expansion of Which Under the Current Madden Assignment System Belies the Underlying Principles to Ensure Effective Counsel for Indigent Defendants.

The Supreme Court in Madden recognized at least infrequent or inconsequential “failures” resulting from a mandatory pro bono system. “We touch on the problems underlying the foregoing system. With its fairness goes the possibly, indeed the certainty, that some attorneys will be assigned who have no experience either in municipal court or indeed in any court.” Madden, 126 N.J. at 607. Nevertheless, since the Madden decision, the Court has continued to expand the right to counsel for indigent defendants without further acknowledging the limited resources to meet that mandate absent a publicly funded, compensated counsel system. This has resulted in the “specter of a two-tiered system” that leaves indigent litigants with a “physical presence” in the courtroom – not constitutionally mandated effective counsel. See State v. Miller, 216 N.J. 40, 54 (2013). Acknowledging that indigent litigants deserve effective counsel and then defining effective counsel as

the random assignment of an attorney required to provide assistance at no cost, regardless of the attorney's background, knowledge, training or expertise, is an injustice that cannot be countenanced. Indigent litigants have a right to more than a mere "physical presence" to represent them.

A person's right to counsel in matters affecting fundamental rights is enshrined in the federal and state constitutions. Penson v. Ohio, 488 U.S. 75, 84 (1988) (United States Constitution's equal protection clause). Time and again, the New Jersey Supreme Court has found that the right to due process of law is implicit in Article I, Paragraph 2 of the state Constitution. Pasqua v. Council, 186 N.J. 127, 147 n.5 (2006); see also In re Adoption of J.E.V., 226 N.J. 90, 106 (the right to counsel emanates from New Jersey Constitution's equal protection guarantee); Rodriguez v. Rosenblatt, 58 N.J. 281, 205 (1971) ("[A]s a matter of simple justice, no indigent defendant should be subjected to conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.")

The right to counsel is not just for a "physical presence" but for effective counsel. United States v. Cronin, 466 U.S. 648, 654 (1984) ("The special value of the right to assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.'" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))). Indeed, effective counsel is a

prerequisite to the assertion of nearly every other right. As the U.S. Supreme Court observed, “it is through counsel that all other rights of the accused are protected: ‘Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have.’” Penson, 488 U.S. at 84 (1988) (internal citations omitted).

Over the years, the Court has continued to expand the right to counsel, recognizing that fundamental rights are meaningless without a corresponding way to assert them. Since Madden, assignments have increased in complexity from municipal court matters that could take one day to complex private adoption cases that could take weeks or months. See Bolyard v. Berman, 274 N.J. Super. 565 (App. Div. 1994) (parole revocation hearings); Doe v. Poritz, 142 N.J. 1 (1995) (Megan’s Law review); In re Civil Commitment of D.L., 351 N.J. Super. 77 (App. Div. 2002) (appeals from orders of commitment pursuant to the Sexually Violent Predator Act); Pasqua v. Council, 186 N.J. 127 (2006) (child support obligors facing potential incarceration); J.E.V., 226 N.J. 90 (2016) (indigent parents facing termination of parental rights in private adoption proceedings); New Jersey Dep’t of Child & Fams. v. L.O., 460 N.J. Super 1 (App. Div. 2019) (administrative proceedings in child abuse and neglect determinations); Kavadas v. Martinez, Docket No. MER-L-1004-15 (Law Div. 2019) (child support obligors facing suspension of driver’s licenses). Despite its serious limitations, the Madden system of random assignments has been

the default mechanism utilized by the court to attempt to provide indigent defendants with their due process. While that system provides representation, it does not provide equal access to justice. Principles of fundamental fairness dictate that if representation is constitutionally mandated, that representation must be effective. Equal justice and due process in matters of fundamental rights should not be illusory for people in need.

This was not lost on the Madden Court, which noted that there is “the possibility, indeed the certainty, that some attorneys will be assigned who have no experience” to perform the mandated pro bono assignment. Madden, 126 N.J. at 607. Rather than expound upon the issue in its decision, the Court seemingly dismissed the notion as unsubstantial. Id., at 607-08. Over 30 years later, the NJSBA has not only pointed out the substantial injustice, the courts have witnessed it firsthand through the humbling pleas of attorneys who have been forced to admit those “failures” more often than not, to no avail.¹

In 2020, the Appellate Division addressed the representation provided by assigned counsel in an appellate case involving a contested adoption and referred to

¹ There does not appear to be a public source to identify how many times courts have received requests to be relieved from a Madden assignment and the outcome of such requests. Such lack of information makes the Madden pronouncement difficult to gauge without a measurable source of whether requests for relief were made or a litigant suffered a substantial failure as a result of counsel whose plea to be excused or reassigned was denied.

it as a “structural failure”. In Matter of Adoption of Child by C.J., 463 N.J. Super. 254, 261 (App. Div. 2020). The court noted not just the complexity of appellate practice, but also contested adoptions. While it was clear that assigned counsel was ill-equipped to represent the indigent litigant, the Appellate Division simply acknowledged Madden’s shortcomings and admonished assigned counsel. Its answer? Counsel should have read the website material on the New Jersey Courts website concerning contested adoptions and Part II of the Rules of Court. Id. at 260. Another option provided was for assigned counsel to hire substitute counsel to fulfill the obligation placed on counsel by the court to effectively represent the indigent litigant. Id. The result? An adjournment to seek new appellate counsel and re-hear the matter. Id., at 262. The result, the Madden assignment system failed the indigent litigant and wasted the court’s resources at the expense of an attorney presumably attempting to answer the call under the Judiciary’s mandatory pro bono assignment system.

These are not new issues. Perceived failures of the Madden assignment system have been raised early in its implementation by the Judiciary. In 1995, the *New Jersey Law Journal* highlighted concerns with the mandatory pro bono assignment system:

“The present system serves only one goal: it provides a sense of comfort to the court which justifiably believes that counsel should be provided in these matters. We agree. But this burden is one that should be handled on a

full-time basis by attorneys skilled and experienced in these matters. And this is not the burden of the legal profession alone. Its costs should be paid for by taxpayers.”

“Assigned Counsel”, New Jersey Law Journal, 139 N.J.L.J. 222 (1/16/95).

In 1997, the Supreme Court convened the Supreme Court Ad Hoc Committee on Pro Bono Assignments, led by the Hon. Eugene D. Serpentelli, A.J.S.C., to review a number of issues regarding mandatory pro bono services. In its findings, the committee said “[i]f attorneys must be asked to provide free representation which more appropriately should be paid for by the government, then they should be granted the greatest degree of flexibility in helping to devise a response to this need, consistent with the constitutional mandate that representation be provided.” Report of The Supreme Court Ad Hoc Committee on Pro Bono Assignments, p. 12 (Nov. 23, 1998). The committee went on to recommend the establishment of a voluntary pro bono assignment system, “particularly one where attorneys handle cases in their area of expertise” because it serves the interests of the Bar, the public and the judiciary. Id.

The Madden assignment system assures that counsel will be provided to an indigent defendant who has asked for one. But that alone does not justify the mere appointment of any counsel, especially one who in this instance is now caught in the unenviable position of having to profess, on the record, that he is not qualified to handle this matter. “The mere appointment of counsel, however competent, does not

alone satisfy the constitutional guarantee of the right to effective counsel.” Miller, 216 N.J. at 79 (Albin dissent) (citing Avery v. Alabama, 308 U.S. 444, 446 (1940)); see also State v. Sugar, 84 N.J. 1, 17 (1980) (“The right to counsel would be an empty assurance if a formal appearance by an attorney were sufficient to satisfy it.”). The mere appointment of counsel is not the standard in providing effective counsel and can certainly be characterized as “a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel.” Avery, 308 U.S. at 446. That was not the intent of Madden, nor can it be. The principles of Madden belie any such conclusion.

B. The Judiciary has the Implicit, if Not Express Authority to Mandate a Publicly Funded Compensated Counsel System to Meet the Constitutional Mandate of Effective Counsel for Indigent Litigants

Funding for representation of indigent defendants has been debated in New Jersey for the past 50 years. In 1992, the Court held that indigent defendants are entitled to representation and urged the Legislature to take action, but it stopped short of ordering such action. Madden, 126 N.J. at 595. The Court created the current Madden system providing a random appointment of counsel to represent litigants at no cost as a stop-gap measure until the Legislature acted. Although New Jersey now has a funded municipal court public defender system, the rationale of Madden has been used repeatedly to solve the issue of inaction by the Legislature to fund representation in a multitude of right to counsel matters. Moreover, while the

Madden Court acknowledged an implied power to require funding of counsel in assigned cases, no such mandate has been imposed. Id. at 613-14 (citing to Antini, 53 N.J. at 494-95). The Madden Court stopped short of ordering funding because of the budget implications that would stem from it. There was no statewide municipal public defender system and less than half of municipalities had one; Jersey City, one of New Jersey's largest cities, had just announced its cancellation of such system. Since this time, the Court has worked cooperatively with other branches of government and interested stakeholders to implement a statewide system of municipal public defenders. Similar work was done to allow the state Office of the Public Defender to take on certain quasi-criminal right to counsel cases, such as representation of defendants challenging a Megan's Law tier classification, parents facing termination of parental rights, litigants facing orders of commitment issued pursuant to the Sexually Violent Predator Act and, most recently, parents defending against child abuse allegations in administrative proceedings. Aside from this piecemeal action, little else has been done to resolve the overarching funding issue with regard to matters of right to counsel. Yet, Madden assignments, such as the one at issue in this case, continue.

There is precedent where the Court has recognized a constitutional right and required other branches of government to take action. See Lewis v. Harris, 188 N.J. 415, 464 (2006) (requiring the Legislature to either amend the marriage statutes or

enact an appropriate statutory structure within 180 days following the decision); Abbott by Abbott v. Burke, 153 N.J. 480, 518-19 (1998) (outlining "remedial measures that must be implemented in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them.").

Absent such action, in at least two instances, the right to counsel has been recognized, but pursuit of such matters was restricted due to lack of funding. In 2006, the Court held that child support obligors facing potential incarceration were entitled to counsel. Pasqua, 186 N.J. at 149. But coercive incarceration as an available sanction was disallowed absent a funding source for such right to counsel. Id. at 153. In 2014, indigent parents facing license suspensions were held to be entitled to counsel, but the judge again disallowed such suspensions unless appointed counsel was made available. Kavadas v. Martinez, Docket No. MER-L-1004-15 (Law Div. 2019).

In its report, Achieving Effective Representation in Right to Counsel Matters, the NJSBA's Right to Counsel Committee urged the Court to recognize that the Madden assignment system has proven to be an obstacle to equality, a barrier to access and justice, and a disservice to all. NJ State Bar Association, Achieving Effective Representation in Right to Counsel Matters, njsba.com/personifybusiness/Leadership/NJSBARReports/ReportsandComments,

(April 6, 2021), at p. 3. It outlined 13 recommendations to address how to implement the constitutional right in a more effective manner than the current system of Madden assignments, including using a multi-pronged approach to funding the right to counsel including additional funding to the Office of the Public Defender to handle cases most aligned with their current work (parole revocation, contempt of domestic violence hearings, civil commitments, and other such cases); authorizing municipal public defenders to handle municipal appeals; funding non-profit providers with expertise in particular types of cases (private adoptions, guardianship, paternity); and increasing pool attorney rates. Id. These recommendations provide a potential roadmap to address the need for representation of indigent litigants absent a disparate impact on attorneys who are inexperienced, overworked, or simply unable to take on a mandatory pro bono assignment.

The simple, but dispositive fact is that the Judiciary is in the position to institute – and in doing so order payment of - a publicly funded compensated counsel system, or at least take proactive steps to dismantle the Madden system of assignments to more effectively meet the constitutional mandate of providing indigent litigants with effective counsel. Until it does, the “structural failures” of ineffective counsel remain.

CONCLUSION

For the foregoing reasons, the NJSBA urges this Court to relieve Michael Haya as counsel, assign experienced publicly compensated counsel for Jason Burgos, and take any all appropriate steps to ensure the provision of constitutionally-mandated effective counsel for future indigent defendants.

Respectfully submitted,

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Dated: January 17, 2023