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September 18, 2003

By Fax

The Honorable Robert Neustadter, J.S.C.  
Criminal Courthouse Building  
5909 Main Street  
Mays Landing, NJ 08330

RE: State v. Concetta Gitto  
Complaint No. S-2003-153-116 (Improper Behavior)  
Sat Below: The Honorable James Savio, J.M.C.  
**Notice of Request for Leave for Interlocutory Appeal from Margate Municipal Court**  
(Unified Notice and Letter Brief)

Your Honor:

I have addressed this to Judge Neustadter because he is the Judge who last handled an appeal regarding this client in the Spring of 2002. As such, I believe that he is the Judge with the most familiarity with Ms. Gitto and her particular mental disabilities and I suggest that this matter be forwarded to his attention. Obviously, any other Judge could also handle the matter.

As stated above, I am combining all elements required for this Request for Leave for Interlocutory Appeal (Notice, Brief, Certification of Counsel that transcript is not needed) in this one letter for simplicity and to save time. On this note, I would like to point out that I am working *pro bono* at a time when I am between chemotherapy treatments for Hepatitis C, have nominally been substituted as counsel in this case and am only practicing law in two other cases (both also basically *pro bono*). To add to this, I am also supposed to be moving today but the closing(s) were cancelled due to the possible hurricane. As a result, I would ask the court's indulgence for any Rules violations or other errors which may be apparent in this filing.

As to the fact that James Robertson is now Ms. Gitto's attorney of record, he agrees that this Request should be filed but he has no time to do it himself. Since there is a risk that the filing is due today (10 days from the 8th when the Order below was announced from the bench), I have consented to write this brief. Mr. Robertson is co-counsel on this brief. As he is attorney of record, questions should be directed to him at 272-1111. If anyone wishes to contact me, the above numbers are valid but may not answer due to the move so call my cell phone at 457-6700.

## **PRELIMINARY STATEMENT**

Mr. Robertson and I both wish this Request for an Interlocutory Appeal to be as limited in scope as possible. The case involves Concetta Gitto (Connie) who is a mentally ill woman who is living in the community of Margate. The Court below had granted Mr. Robertson's motion to hire a psychiatrist based a possible defense of mental disease or defect. The Solicitor of Margate then made a motion that Ms. Gitto should not be entitled to lawyer or psychiatrist at public expense because she owns her house in Margate. It was not disputed that Connie's income from Social Security Disability leaves her near or below "the poverty line."

After the urging of Mr. Robertson, Judge Savio did realize the illiquidity of the house but His Honor still thought her ownership of it made her ineligible for a publicly compensated lawyer and psychiatrist if she could get a loan against her equity in the house. As a result, Judge Savio ordered her to make one application (reduced to one from the original three at Mr. Robertson's urging that she could ill-afford any possible application fee) for a home owner's credit line (HOCL) or similar loan on the equity in her house. We object to having to make this application (there is no such provision in the Public Defender Law) but we are making such application tomorrow at a bank I found that is taking applications without fee. We would like to be relieved from making this application by this appeal but such application is not the main reason the appeal.

The main reason is that, whether or not the HOCL is granted, we believe that the Judge is totally proceeding down the wrong path to making sure that Ms. Gitto has proper legal representation. If she gets a HOCL, she is supposed to pay for her own lawyer and psychiatrist. If she does not, she is to have some type of undefined lien placed on her residence in favor of the City of Margate for funds expended for her lawyer and psychiatrist. Either way, we believe that Judge is getting it wrong and, worse yet, along the way His Honor is subjecting Connie to extreme emotional distress and holding her up to public ridicule.

Essentially, as we will show in the remainder of this brief, there is no requirement in this State that the indigent (much less the mentally ill) choose between having a roof over their heads and having a proper legal defense. This policy consideration is built into the Public Defender Law (PDL), N.J.S.A. 2A:158A, which we believe that the Court below has nearly totally ignored.

## **FACTS & PROCEDURAL HISTORY**

To fully understand this case it is necessary to review the last 7 years of history between Connie and the City of Margate. Connie was committed about 7 years ago for over 10 days to the ACMC PIP unit at the behest of Margate. The result of this commitment was that psychiatrist Marilouise Venditti, M.D. came to the conclusion that Connie was suffering from "paranoid delusional disorder" but that she was not a danger to herself or others so she was returned to the community. This analysis was consistent with other psychiatric exams and diagnoses by other doctors and, I am rather certain, is not questioned by the Court below or by any party to this appeal.

This evidence of Connie's mental illness was submitted to the Judge below along with my testimony and that of her bother, Bruce Gitto, at a hearing that was convened in response to Mr. Robertson's motion that he needed to retain a psychiatrist to defend Connie properly. At the conclusion of the hearing, the request was granted.

Apparently, it was thought that the City of Margate would have to bear this expense. As a result, the City Solicitor filed an objection to Connie's being entitled to a defense at public expense based solely on the fact of her ownership of a small "bungalow" home at 210 North Argyle Avenue in Margate. The Judge convened another hearing and basically agreed with the notion that she either was not entitled to a public defense or, if she could not liquidate her home, would have to compensate the City for the expense at a future time via a lien on the house (see Preliminary Statement above). Right now, Connie is under Order to make a HOCL application to see if she can pay for her own defense. She will make such application under protest.

I am slightly hesitant to mention the following three because they may require a transcript to verify but I feel they are important so I will mention them and see if they draw an objection. First, when Mr. Robertson pointed out to the Court that it was a little late to be considering Connie's eligibility for a public defense (after all, he had been appointed and a Order was outstanding for him to hire a psychiatrist), His Honor bluntly admitted that he had erred and stated he was seeking to correct such error. His Honor seemed to think this error centered around not requiring Connie to file a Public Defender (PD) application. His Honor apparently had relied on my representation that this court (Law Division - Criminal Part) had found her indigent and the Prosecutor's recommendation that she be provided with a PD to avoid issues on appeal (as had happened in a previous reversal by the Appellate Division).

Second, my co-counsel is very concerned that I point out his main argument below was that the PDL did not make home ownership a determinative factor in indigency. In fact, he argued -- exactly as I do in the legal analysis below -- that since homes are illiquid assets they are excluded from consideration under the plain language of the PDL. He also pointed out that this Court had granted the defendant indigency status despite full disclosure of home ownership.

Third, Judge Savio was very concerned, following the lead of the City Solicitor, with the burden on the Margate Taxpayers. We share his concern but believe it is misplaced because Mr. Robertson is on a general retainer with the City of Margate (*i.e.* there is no marginal cost to the taxpayer for his representation) and our legal research shows either the County or State must pay for the psychiatrist.

Findings in prior cases may be relevant to this case. In a prior opinion involving two harassment charges (if I recall), the Appellate Division made it very clear that Connie should never appear *pro se* as she had in the Municipal Court in that case. Based on this problem and the fact that a private prosecutor appeared without filing a Storm certification, the Court reversed with an instruction to the public prosecutor that he should very carefully consider the Interests of Justice before proceeding against Connie in a new trial. Following the Appellate Division's rather large hint that the cases should be dismissed, Mr. Sayegh did dismiss them. (There was a third charge that was dismissed by the Court itself for having totally no evidence to support it.) I regret that I do not have this opinion available due to the move but I will furnish it as soon as possible.

In another prior case, now in the Appellate Division, this Court found the defendant indigent despite full disclosure of her ownership of her home and Social Security Disability

income. The Appellate Division has followed suit and has granted her a free transcript and free lawyer to replace me while I was getting chemotherapy.

### **LEGAL ANALYSIS**

First, we object to the timing of request to revoke the PD and the standing of the Solicitor to make such a request. The Administration of Justice cannot turn on every person or entity that must bear some cost of such Administration objecting, taking up the Court's time and forcing new hearings rehashing old issues. Ms. Gitto had already been granted a PD and a psychiatrist to assist the PD. We would claim that became the law of this case and the Court below should not have reconsidered. There are adequate procedures in the PDL to recoup costs from defendants if the State wishes to use them. We suggest that they be used in the future, if ever, and that the Judge in this case continue to concern himself with Connie's right to a fair trial (which he had admirably done until the Solicitor's motion) rather than being distracted by the public fisc.

It is probably the Solicitor's job (among many others) to worry about the public fisc while representing the Mayor, Council and taxpayers of Margate. Unfortunately for him, he does not have any standing in the Criminal court. Now I realize that his motion was joined by the prosecutor (who does have general standing in the Municipal Court) but I believe that the Prosecutor does not have standing to question the appointment of a PD at anytime and that he absolutely should not have any standing to raise such an objection **AFTER** his adversary has been appointed. (The Judge below seems to have agreed with this proposition because he would not hear from the Prosecutor on the application for revoke the PD status of the defendant, in effect denying him standing.)

The way the Judge in this case has paid homage to public officials who would ordinarily have no place in the Court raises a serious question of the appearance of impropriety -- or, at least, the specter that the public fisc is more important than Constitutional considerations. This is especially true when the Judge would not hear from the Prosecutor but did take argument from the Solicitor who has absolutely no place before the Court and grants the Solicitor's "motion." This means that the Solicitor has been allowed to barge into the courtroom, complain about motions already granted and their associated costs and perform an act the Prosecutor may be ethically forbidden to do: removing his adversary after his adversary has been appointed and, not coincidentally, has raised a defense that has considerable merit. And, all of this is being allowed to deny counsel in a case where the Appellate Division has clearly spoken before that Ms. Gitto must have counsel.

Additionally, the great fear that the Citizens of Margate may alone get "stuck" for the cost of the defense is misplaced based on our analysis of the law. It seems that either the County or the State (though the State PD's office) must pay for the costs of psychiatrists, interpreters and other facilitators of a Constitutionally adequate defense. This is keeping with the economic theory that social costs should be born as broadly as possible. See State v. Lippincott, 124 N.J.Super. 498 (Mun. Ct. 1973) (expert witness paid from County funds); State v. Ryan, 133 N.J.Super. 1 (Cty. Ct. 1975) (turning down request for expert but agreeing that, if granted, fee should be paid by County) but see State v. Linares, 192 N.J. Super. 391 (Law Div. 1983) (relying on the two previous cases, the PD's office sought to be reimbursed for interpreters by the County was turned down leaving the cost with the State PD's office). It is believed that this Court is the repository of knowledge of how Municipalities are reimbursed for expert costs and the court below needs instructions in this matter.

Even if the City has to pay the costs, reimbursement is a process to be handled later by the PD's office itself -- after the case and the representation are over. N.J.S.A. 2A:158A-17 *et seq.* The Judge involving himself in the minute details of the payment process is very unseemly and, as stated earlier, lends the impression that he is guided more by the public fisc than the Constitution.

Finally, we do not believe that Judge Savio erred by following this Court's lead and allowing Connie to proceed as an indigent. If we look to the PDL, there are numerous factors cited for "Determination of Need" in N.J.S.A. 2A:158A-14. The Judge has focused on subparagraph (c), the sole factor which **MAY** count against Ms. Gitto: "The **liquid** assets of the defendant, including all real and personal property and bank accounts." N.J.S.A. 2A:158A-14(c) (emphasis added). I have obviously emphasized "may" and "liquid" because it is very clear that the house should not be considered if it is an illiquid asset. I believe that the Court can take judicial notice of illiquidity of Real Estate -- particularly one's home. Even Judge Savio's Order is rather clear on that point given that he has to order Connie to take out a loan on the illiquid asset to attempt to circumvent its inherent illiquidity.

Much has been made of homelessness in the last 20 years -- and with just cause. It is a horrible scourge on our capitalist system and, as a result, much has been done to ameliorate it during the same time period. I believe that the legislature has wisely considered the risk of indigent people becoming worse off by becoming homeless when it included only "liquid assets" in the determination of need. Judge Savio would have this State risk this woman becoming homeless (at incalculable cost) or ending up in "Section 8" subsidized housing for the rest of her life (assuming she avoided homelessness) (at a cost of \$500 per month or more to the taxpayers) over a few thousand dollars for a defense. The legislature has already made this decision for Judge Savio and the home should not be considered.

I have a final point to make in closing. Under my analysis above, this point is too early to be made because my analysis is that Connie gets a PD and a psychiatrist and who bears the ultimate cost is an issue for another day -- if ever. If the Court disagrees with this analysis, however, I believe that there is another totally independent rationale for Connie's public defense based on the handicap accommodation statutes -- be it the ADA, the LAD or the Federal Rehabilitation Act.

Connie has a severe mental disability: she does not perceive reality the same as the rest of us (my understanding of the term delusional) and she thinks the rest of us are all out "to get" her (my understanding of paranoia). The Appellate Division has already wisely and accurately weighed in with the opinion (though *dicta*) that Connie should never appear *pro se*. She needs a lawyer in the courtroom to have any hope of "interfacing" with the real world that the rest of us know. The lawyer, in turn, needs a psychiatrist both to understand her world and to provide a defense.

In this respect, the lawyer and the psychiatrist are like interpreters for non-English speakers (where there are only Constitutional considerations) or for the hearing disabled (where there also both Constitutional and handicap accommodation issues). Under this view, the ultimate beneficiary of the public defense is the Judge and the Administration of Justice, both of which require a view into Ms. Gitto's world if they are to make a fair determination of her possible criminal culpability. Under this interpreter analogy when relying on the handicap accommodation statutes, all reasonable accommodations must be provided free of any charge or lien by the State without regard to the wealth of the handicapped person. To state this rule simply, even rich people with hearing impairments receive a free interpreter when they go to court -- even in a civil matter.

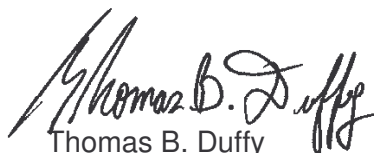
This later argument, as I stated earlier, is more properly made if and when the State attempts to put a lien on Connie's home for her defense.

**CONCLUSION**

The defendant urges the Court to grant leave to appeal from the Municipal Court's determination that her home ownership affects her constitutional right (or statutory right under handicap accommodation laws) to be provided with a Public Defender and a psychiatrist and, after due consideration, to reinstate the Order providing for a public defense and to direct the proper entities (whatever they may be) to pay for such defense.

Thank you for Your Honor's consideration.

Respectfully yours,

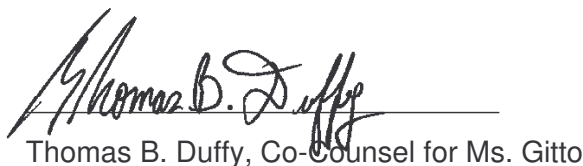
  
Thomas B. Duffy

cc: Joseph E. Sayegh, Public Prosecutor (by fax)  
Margate Municipal Court Clerk (by fax)

**CERTIFICATION OF COUNSEL AS TO TRANSCRIPT**

I certify that I believe that this matter can be addressed by this Court without need for a transcript. I do not believe that the essential holdings of the Judge are in dispute or that the case turns on the exact wording of the Court's holdings below. In this brief, for the sake of clarity, I have occasionally mentioned some statements in the Court below. I believe that these representations are accurate to the best of my belief. I realize that if anything in this Certification is wilfully false, I am liable for punishment.

Date: September 18, 2003

  
Thomas B. Duffy, Co-Counsel for Ms. Gitto