

1 CASE NO.: 11-CR-0300

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4 **IN THE JUSTICE'S COURT OF THE ELKO TOWNSHIP**  
5 **IN AND FOR THE COUNTY OF ELKO, AND THE STATE OF NEVADA**  
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7 **THE STATE OF NEVADA,**

8 Plaintiff,

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15 vs.

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26 **TONI COLLETTE FRATTO,**

27 Defendant.  
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**THE STATE OF NEVADA'S:**

1. **MOTION IN LIMINE CONCERNING  
THE ADMISSIBILITY OF TONI FRATTO'S  
STATEMENT TO KODY CREE PATTEN'S  
LAWYERS IN ANTICIPATION OF AN  
ASSERTION BY TONI FRATTO THAT  
THE SAME CONSTITUTES A  
PRIVILEGED ATTORNEY-CLIENT  
COMMUNICATION INCLUDING;**

**A. AN OFFER OF PROOF IN  
SUPPORT OF MOTION; AND**

**B. POINTS, AUTHORITIES, AND  
WRITTEN ARGUMENT IN SUPPORT  
OF THE STATE'S POSITION WITH  
RESPECT TO THE ISSUE  
PRESENTED IN ITS MOTION IN  
LIMINE;**

2. **DECLARATION IN SUPPORT OF  
MOTION;**

3. **SUBMISSION OF PROPOSED  
FORMAL ORDER CONFIRMING THE  
DATE AND TIME SET FOR A HEARING  
ON THE STATE'S MOTION IN LIMINE;  
AND**

4. **CERTIFICATE OF SERVICE WITH  
RESEPECT THERETO**

Motion In Limine

COMES NOW THE STATE OF NEVADA, the Plaintiff in the above-entitled cause, by and through its Counsel Of Record, the Elko County District Attorney's Office, and hereby moves for the an Order of the above-entitled Court providing for the following relief:

That the Court:

1. Conduct an evidentiary hearing in advance of Ms. Toni Fratto's Preliminary Hearing, currently set for the 13<sup>th</sup> and 14<sup>th</sup> days of July, 2011, which the Court has already set for the Wednesday the 22<sup>nd</sup> day of June, 2011, at 1:00 o'clock p.m. to determine, in advance of said Preliminary Hearing, the admissibility of Ms. Toni Fratto's recorded statement concerning the murder of one Micaela Costanzo on the 3<sup>rd</sup> day of March, 2011.

a. Although the party asserting any given evidentiary privilege has the burden of asserting and proving the same (see infra) as the Court is aware based upon the hearing conducted in the above-entitled cause on the 3<sup>rd</sup> day of June, 2011, it is clear that the Defendant Ms. Toni Fratto intends to assert an objection to the admissibility of the record of her statement made to John Ohlson and Jeffrey Kump on the 22<sup>nd</sup> day of April, 2011, upon the theory that it constituted a confidential communication within the meaning of NRS 49.055, and is thus subject to the attorney-client privilege in an effort to preclude the State's declared

1 intent to use her April 22<sup>nd</sup>, 2011, statement to Mr. Ohlson and Mr. Kump  
2 against her.

3  
4 b. That being the case, the State concluded it was obliged to take the  
5 initiative of insuring that this issue was raised in advance of Ms. Fratto's  
6 Preliminary Hearing to try and insure the orderly litigation of her  
7 Preliminary Hearing. Hence this Motion In Limine.  
8

9 2. The State is asking that the above-entitled Court find, as the State maintains,  
10 that Ms. Fratto's April 22<sup>nd</sup>, 2011, statement was not a confidential attorney-  
11 client communication, but a "...party's own statement..." within the meaning of  
12 NRS 51.035 which provides in pertinent part that:  
13

14 "Hearsay" means a statement offered in evidence to prove the  
15 truth of the matter asserted unless:

16 ... 3. The statement is offered against a party and is:

17 (a) The party's own statement, in either the party's individual  
18 or a representative capacity;

19 which the State is entitled to proffer against Ms. Fratto; and  
20

21 3. That if the Court after considering the same finds that the statement was not a  
22 confidential communication which is protected by the attorney-client privilege  
23 that it enter an Order providing that the State will be entitled to adduce  
24 evidence of the Statement, in its entirety, at Ms. Fratto's Preliminary Hearing  
25 currently scheduled for the 13<sup>th</sup> and 14<sup>th</sup> days of July, 2011.  
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Offer Of Proof In Support Of Motion

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3 **COMES NOW THE STATE OF NEVADA**, and so that the Court and  
4 Counsel will have a factual backdrop against which to analyze the State's Motion vis-  
5 à-vis the application of the legal principles which the State asserts are applicable to  
6 the issue raised herein, the State would make the following offer of proof with respect  
7 to the procedural posture of the case where relevant, and the facts - that is the  
8 prospective evidence which the State believes the evidence adduced during the  
9 hearing scheduled for the 22<sup>nd</sup> of June, 2011, will disclose, and upon which the State  
10 will seek to rely at the time of the Court's hearing of this Motion:  
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13           On the 3<sup>rd</sup> day of May, 2011, during a Hearing conducted in Department  
14 II of the District Court concerning Mr. Kody Cree Patten's efforts to have a  
15 competency evaluation conducted in the above-entitled matter, Mr. John Ohlson and  
16 Mr. Jeffrey Kump, Mr. Kody Cree Patten's appointed Counsel Of Record disclosed to  
17 the Court that:  
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- 19
- 20 1. On the 22<sup>nd</sup> day of April, 2011, they had conducted a recorded interview of Ms.  
21 Toni Fratto during the course of which she had acknowledged her personal  
22 participation in the murder of Micaela Costanzo; and  
23
  - 24 2. During said hearing, Mr. Ohlson and Mr. Kump surrendered to Det. Kevin  
25 McKinney of the Elko County Sheriff's Department the original recording of that  
26 interview.  
27       a. The recording consisted of two mini-cassettes which Mr. Kump delivered  
28

to Det. McKinney.

b. The recording was thereafter copied and converted to a digital format, and copies of that digital recording have been provided to both Mr. Patten's and Ms. Fratto's Counsel.

(See the first three [3] pages of the Record Of Court Proceedings<sup>1</sup> in District Court Case Number CR-FP-11-0300 attached hereto as Exhibit 1)

3. The objection which the State anticipates Ms. Fratto will be making to the admissibility of her Statement is, the State perceives, grounded in the initial exchange between Ms. Fratto and Mr. Ohlson and Mr. Kump during their April 22<sup>nd</sup>, 2011, interview of her which is reflected in the aforementioned recording (as transcribed by the State) the relevant portion of which discloses the following:

John Ohlson: Tell me when we're on.

Jeffrey Kump: John, we're on.

J. Ohlson: Okay. For the recording, this is John Ohlson by telephone. We're in Jeff Kump's office where this recording is being made. It's Jeff Kump and Toni. Your last name again is?

Toni Fratto: Fratto.

J. Ohlson: Okay. Today is the 21st day of April -- 22nd day of April, 2011. It's approximately 12:58 p.m., and we are speaking privately with Toni's consent; is that right, Toni?

<sup>1</sup> The fourth (4<sup>th</sup>) page of said Record Of Court Proceedings reflects the conduct of ex-parte proceedings conducted between the Court and Mr. Patten's Counsel concerning fees and costs, and the State does not believe it appropriate to publish that portion of said Record.

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T. Fratto: Yes.

J. Ohlson: Okay. Jeff, can you hear me clearly?

J. Kump: I can, John.

J. Ohlson: So because of that you assume that the recorder is picking up my voice?

J. Kump: Yes.

J. Ohlson: Okay. Toni, you talked to us previously; is that right?

T. Fratto: Yes.

J. Ohlson: And when you previously talked to us, you did not tell us that you were present at the killing.

T. Fratto: That's correct.

**Note:** A portion of this excerpt from the transcript of Ms. Fratto's April 22<sup>nd</sup>, 2011, interview by Mr. Ohlson and Mr. Kump has been redacted from this transcript at this point at the request of Ms. Fratto's Counsel. In agreeing to redact the same as it no appears in this pleading the State reserves the right to utilize an un-redacted version of this excerpt during the hearing scheduled on the 22<sup>nd</sup> day of June, 2011.

J. Ohlson: Will you tell us what happened that day -- did you go to school that day?

T. Fratto: Can I ask a question real quick?

J. Ohlson: Sure.

T. Fratto: Um, will you guys be able to represent me?

J. Ohlson: You know, I don't know what you're going to say. And depending on what you're going to say, we may or may not be able to if your interests conflict with Kody's. If we are not able to represent you, we will get counsel for you.

T. Fratto: Okay.

- 1 J. Ohlson: Okay?
- 2 T. Fratto: Then would I need to get my own attorney first?
- 3 J. Ohlson: We'll get a lawyer for you. But you don't need to. Right now  
4 it's just a conversation between us and a statement that  
5 you're making to us. We're not the law enforcement.  
6
- 7 T. Fratto: Okay.
- 8 J. Ohlson: Okay?
- 9 T. Fratto: Okay.
- 10 J. Ohlson: So are you willing to proceed, Toni?
- 11 T. Fratto: I think so, yeah.
- 12 J. Ohlson: Okay. If you have any questions about what's happening or  
13 what's going on, stop and ask me, all right?
- 14 T. Fratto: Okay. Are your best interest to help me and Kody, or...
- 15 J. Ohlson: We're Kody's lawyers and we're hired and we're retained by  
16 the State to represent him and his interests. It is not our  
17 intention to do anything bad to you.  
18
- 19 T. Fratto: Okay.
- 20 J. Ohlson: And it's our intention to find out the truth of this matter. And  
21 if during -- I think that, what I have in mind, is that once we  
22 conclude today to get you set up with a lawyer.  
23
- 24 T. Fratto: Okay.
- 25 J. Ohlson: And I think that would be -- I think that would make you feel  
26 real comfortable.
- 27 T. Fratto: Okay.
- 28 J. Ohlson: Okay?

1 T. Fratto: Okay ...

2 4. Thereafter a conversation ensued which was, as noted above, recorded; the  
3 original of said recording was, as noted above, surrendered to Det. Kevin  
4 McKinney of the Elko County Sheriff's Department by Mr. John Ohlson and Mr.  
5 Jeffrey Kump on the 3<sup>rd</sup> day of May, 2011; and said recording engendered the  
6 filing of the First Amended Complaint in the above-entitled cause on the 9<sup>th</sup> of  
7 May, 2011, charging Ms. Fratto, amongst other things, with alternative theories  
8 of First Degree Murder. (See the Declaration In Support Of Criminal Complaint  
9 set forth in the aforementioned First Amended Criminal Complaint)

12 **Additional Circumstances Not Disclosed**  
13 **By The Record Described Above**

14  
15 However, in addition to the events summarized above, the State is  
16 informed (see infra), and based upon that information believes and avers that the  
17 following described events occurred prior to the interview of Ms. Fratto on the 22<sup>nd</sup> of  
18 April, 2011, by Mr. Ohlson and Mr. Kump which are directly relevant to the issue  
19 presented by the State's Motion In Limine, and which the State would summarize as a  
20 further and additional Offer Of Proof in support of its Motion In Limine. Specifically,  
21 the State believes and avers that Mr. John Ohlson will testify that:

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23  
24 1. During the course of Mr. Ohlson's and Mr. Kump's efforts to initially investigate  
25 the charge of Open Murder which had been filed against Mr. Kody Patten whom  
26 they had been appointed to represent on the 11<sup>th</sup> day of March, 2011, Mr.  
27 Ohlson and Mr. Kump had sought and arranged an appointment to interview  
28



1 Ms. Toni Fratto, as a potential witness in the matter who had been twice  
2 interviewed in early March of 2011 by the law enforcement officers investigating  
3 the death of Micaela Costanzo, and arrangements were made to conduct such  
4 an interview on the 17<sup>th</sup> day of March, 2011.

- 5  
6 2. On the 17<sup>th</sup> day of March, 2011, Mr. Ohlson and Mr. Kump met with Ms. Toni  
7 Fratto and her parents, Claude and Cassie Fratto, in Mr. Kump's Office. At that  
8 time Mr. Ohlson declared to Toni Fratto and her Parents that:  
9  
10 a. He and Mr. Kump represented Kody Patten exclusively;  
11  
12 b. That if they gained information which exculpated, or tended to exculpate,  
13 Mr. Patten that no matter who any such information might incriminate that  
14 they (Mr. Ohlson and Mr. Kump) had an obligation to use that information  
15 in Mr. Patten's Defense.  
16  
17 3. Upon Mr. Ohlson's inquiry during the March 17<sup>th</sup>, 2011 meeting, Ms. Fratto  
18 advised that:  
19  
20 a. She was not represented by Counsel; and  
21  
22 b. Did not believe she needed Counsel as she was not involved in the  
23 homicide with which Mr. Patten had been charged.  
24  
25 4. An interview was then conducted of Ms. Fratto in, the State believes, her  
26 parents' presence in which she essentially related the same information that  
27 she had already related to law enforcement in early March of 2011.  
28  
5. At the conclusion of the interview of Ms. Toni Fratto on the 17<sup>th</sup> of March, 2011,  
Mr. Ohlson specifically informed Ms. Fratto and her parents that:

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- a. He and Mr. Kump represented Mr. Patten exclusively;
  - b. That he would not, and could not, render legal advice to them because to do so would constitute a conflict of interest for either he or Mr. Kump to act as Counsel for any of them.
6. Thereafter, Mr. Ohlson and Mr. Kump were notified that Ms. Fratto wished to speak to them again, and a meeting was arranged for the 22<sup>nd</sup> of April, 2011.
- a. Mr. Ohlson and Mr. Kump in advance thereof concluded to record any further interview of Ms. Toni Fratto which occurred; and
  - b. Further it was Mr. Ohlson's intent to attend the scheduled meeting by telephone.
7. On Friday the 22<sup>nd</sup> day of April, 2011, sometime around the noon hour, Ms. Fratto arrived at Mr. Kump's Office in Elko, Nevada with Mr. Kip Patten, Mr. Kody Cree Patten's father, as Mr. Ohlson understood it because Ms. Toni Fratto's parents were out of town.
8. At the outset of the meeting, Mr. Ohlson asked Ms. Fratto if she had any objection to speaking to him and Mr. Kump outside of Mr. Kip Patten's presence.
- a. Mr. Ohlson made this inquiry because he did not want to create an inference that whatever Ms. Fratto was going to say was somehow influenced by Mr. Kip Patten's presence.
  - b. Ms. Fratto indicated that she had no objection to Mr. Kip Patten leaving

1  
2 the room, which he did.

3  
4 9. Thereafter before Mr. Ohlson's and Mr. Kump's interview of Ms. Fratto on the  
5 22<sup>nd</sup> day of April, 2011 continued, Mr. Ohlson:

- 6 a. Asked Ms. Fratto if she had any objection to speaking to he and Mr.  
7 Kump in her parents' absence and she indicated that she did not;  
8  
9 b. Mr. Ohlson further informed Ms. Fratto that he intended to record any  
10 conversation that had with her, and the presence of the tape recorder  
11 was physically pointed out to her;  
12  
13 c. Ms. Fratto indicated that she had no objection to her conversation with  
14 them being recorded;  
15  
16 d. Mr. Ohlson then asked Ms. Fratto why she wanted to talk to them, and  
17 she replied that she wanted to help Kody – i.e. Kody Patten.  
18  
19 e. Mr. Ohlson then declared to Ms. Fratto that he was not aware what she  
20 intended to say to them, but she needed to be aware of the fact that if  
21 anything she said to them constituted evidence in the case, that he and  
22 Mr. Kump may be obligated to turn the recording over to law  
23 enforcement authorities; and  
24  
25 f. Mr. Ohlson then inquired of her if she was still willing to talk to him and  
26 Mr. Kump without her parents being present and she indicated that she  
27 was.  
28

12. At that point the recorder was turned on and the interview reflected in the

1  
2 recording thereof which was later surrendered to Det. McKinney (see supra)  
3  
4 ensued.

5 13. The State further believes that Mr. Ohlson will testify that at the time of his  
6 contact with Ms. Toni Fratto on the 22<sup>nd</sup> day of April, 2011, he had no idea what  
7 she was going to say to them and expected that she was going to relate some  
8 knowledge of the events in question that would mitigate Mr. Kody Patten's  
9 liability for the homicide at issue but not implicate herself personally.

10  
11 a. In that regard it is important for the Court to understand that by time of  
12 the April 22<sup>nd</sup>, 2011, interview of Ms. Fratto, Mr. Ohlson and Mr. Kump  
13 had been provided with discovery concerning a recorded statement made  
14 by Mr. Kody Cree Patten on the 6<sup>th</sup> of March, 2011, in which Mr. Patten  
15 acknowledge killing Ms. Costanzo, and during which he made absolutely  
16 no assertion or reference what-so-ever concerning the involvement of  
17 anyone else therein.

18  
19 a. Mr. Ohlson was surprised when, during the course of the interview, Ms.  
20 Fratto personally implicated herself in the homicide at issue.

21  
22 14. Near the end of the conversation, the tape recorder which was being utilized  
23  
24 in the interview ceased recording.

25  
26 15. Thereafter Mr. Ohlson informed Ms. Fratto that he and Mr. Kump were probably  
27 obligated to turn the recording of the interview which had just concluded to law  
28 enforcement and, if they did, it was likely that she would be arrested.

1  
2 a. Ms. Fratto indicated that she understood that she would be arrested.  
3  
4 15. At that point Mr. Ohlson informed Ms. Fratto that he would attempt to get her in  
5 communication with Mr. David Lockie that afternoon – which he in fact  
6 attempted to do, and the interview ended at that time.

7  
8 (See the "Affidavit Of John Ohlson, Esq." attached hereto as Exhibit 2)

9 With the above Offer Of Proof in mind, the State will now proceed to its  
10 discussion of the applicable legal authority which the State offers in support of its  
11 position with respect to the issue raised herein relative to the admissibility of Ms.  
12 Fratto's statement.  
13

14 **Points, Authorities, And Written Argument**  
15 **In Support Of Motion In Limine**

16 **COMES NOW THE STATE OF NEVADA** by and through its Counsel  
17 of Record, the Elko County District Attorney's Office, and in support of the Motion In  
18 Limine set forth above, would offer the following:

19  
20 As a starting point for the State's discussion of this issue, the State would  
21 invite the Court's attention to Nevada's current legislative treatment of the attorney-  
22 client privilege which is set forth in the provisions of NRS 49.035 to NRS 49.115, the  
23 relevant sections of which provide as follows:  
24

25 NRS 49.045 in defining "client" provides that:

26  
27 "Client" means a person, including a public officer, corporation,  
28 association or other organization or entity, either public or private, who is  
rendered professional legal services by a lawyer, or who consults a  
lawyer with a view to obtaining professional legal services from the

1 lawyer.

2 NRS 49.055 defining the concept of "confidential" which provides that:

3  
4 A communication is "confidential" if it is not intended to be disclosed to  
5 third persons other than those to whom disclosure is in furtherance of the  
6 rendition of professional legal services to the client or those reasonably  
7 necessary for the transmission of the communication.

8 NRS 49.095 entitled "general rule of privilege" which provides that:

9 A client has a privilege to refuse to disclose, and to prevent any other  
10 person from disclosing, confidential communications:

- 11 1. Between the client or the client's representative and the client's lawyer  
12 or the representative of the client's lawyer.
- 13 2. Between the client's lawyer and the lawyer's representative.
- 14 3. Made for the purpose of facilitating the rendition of professional legal  
15 services to the client, by the client or the client's lawyer to a lawyer  
16 representing another in a matter of common interest.

17 The issue which is presented to the Court by the case at bar is the  
18 question of what constitutes the "formation" of an attorney client privilege – i.e when  
19 and under what circumstances can such a relationship be deemed to have been  
20 formed by implication, and whether or not Ms. Fratto could have reasonably perceived  
21 that the statement which she ultimately made on the 22<sup>nd</sup> day of April, 2011, was being  
22 made to *her* "attorneys" and that it would be treated confidentially – which the State is  
23 urging, given the circumstances under which it was made, including those which  
24 occurred on the 17<sup>th</sup> of March, 2011, simply cannot be the case under the applicable  
25 legal principles discussed hereafter  
26  
27

28 In what one commentator referred to as a "classic statement of the

1 privilege<sup>2</sup> the Federal District Court for the District Of Columbia in U.S. vs. United Shoe  
2 Machinery Corp., 89 F. Supp. 357 at 358 and 359 (DC Mass., 1950), observed the  
3  
4 following:

5       The privilege applies only if (1) the asserted holder of the privilege  
6 is or sought to become a client; (2) the person to whom the  
7 communication was made (a) is a member of the bar of a court, or his  
8 subordinate and (b) in connection with this communication is acting as a  
9 lawyer; (3) the communication relates to a fact of which the attorney was  
10 informed (a) by his client (b) without the presence of strangers (c) for the  
11 purpose of securing primarily either (i) an opinion on law or (ii) legal  
12 services or (iii) assistance in some legal proceeding, and not (d) for the  
13 purpose of committing a crime or tort; and (4) the privilege has been (a)  
14 claimed and (b) not waived by the client.

15       The State does not contest that in the appropriate circumstances that an  
16 attorney-client relationship to which the privilege may be found to apply can arise by  
17 implication, however as the First Circuit Court Of Appeals observed in Sheinkopf vs.  
18 Stone, 927 F.2d 1259 at 1264 (1<sup>st</sup> Cir., 1991):

19       To imply an attorney-client relationship, therefore, the law requires  
20 more than an individual's subjective, unspoken belief that the person with  
21 whom he is dealing, who happens to be a lawyer, has become *his*  
22 *lawyer. If any such belief is to form a foundation for the implication*  
23 *of a relationship of trust and confidence, it must be objectively*  
24 *reasonable under the totality of the circumstances* (emphasis added  
25 by the State).

26       Additionally as the Third Circuit Court Of Appeals observed in In Re:  
27 Grand Jury Investigation, Unites State Of America, 599 F.2d 1224 at 1235 (3<sup>rd</sup> Cir.  
28 1979):

Confronted with such an array of possibilities, we feel compelled to

<sup>2</sup> See "Applicability Of Attorney-Client Privilege To Communications Made In Presence Of Or Solely To Or By Third Persons", 14 A.R.L. 4<sup>th</sup> 594 (2011)

1 examine certain basic principles. First, as all courts and commentators  
2 seem to agree, the attorney-client privilege exists to foster disclosure and  
3 communication between the attorney and the client. See 8 Wigmore on  
4 Evidence § 2291, at 545 (McNaughton rev. 1961). Nevertheless,  
5 because the privilege obstructs the search for the truth and  
6 because its benefits are, at best, "indirect and speculative," it must  
7 be "strictly confined within the narrowest possible limits consistent  
8 with the logic of its principle." (Emphasis added by the State) *Id.* at  
9 554. Cf. *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115  
10 (1979) ("Evidentiary privileges in litigation are not favored . . .").<sup>3</sup>

11 This concept is reflected in the provisions of NRS 49.015 which provide in  
12 pertinent part that:

13 1. Except as otherwise required by the Constitution of the United States  
14 or of the State of Nevada, and except as otherwise provided in this title or  
15 title 14 of NRS, or NRS 41.071, no person has a privilege to:

16 ... (d) Prevent another from being a witness or disclosing any matter or  
17 producing any object or writing.

18 Moreover, in *U.S. vs. Bump*, 605 F.2d 548 at 550 and 551 (1979) the 10<sup>th</sup>  
19 Circuit Court Of Appeals observed that:

20 An important element of the lawyer-client privilege is a showing  
21 that the communication was meant to be kept secret. When a matter is  
22 communicated to the lawyer with the intention or understanding it is to be  
23 repeated to another, the content of the statement is not within the  
24 privilege ...

25 ... The burden of proving a communication is privileged is upon the  
26 person asserting the privilege...<sup>4</sup>

27 See also *Weil v. Investment Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 at 24  
28 (9<sup>th</sup> Cir., 1981) wherein the Ninth Circuit Court again observed that:

Because it impedes full and free discovery of the truth, the attorney-client  
privilege is strictly construed.

With respect to this specific issue the State would again urge that it is, in the State's  
view, extremely important that the Court, either before the Hearing scheduled on the 22<sup>nd</sup> day  
of June, 2011, and if not by then, before it makes its decision on the State's Motion, review



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2 That State would suggest that nothing occurred in the events leading up  
3 to, or surrounding Ms. Fratto's statement on the 22<sup>nd</sup> day of April, 2011, from which it  
4 could be asserted that an express attorney-client relationship was formed between Mr.  
5 Ohlson and Mr. Kump on that date.  
6

7 If this Court is to find that the attorney-client privilege applies to Ms.  
8 Fratto's statement, then it must first find that:  
9

- 10 1. The facts and circumstances surrounding Mr. Ohlson's and Mr. Kump's  
11 interview of her gave rise to an implied attorney-client relationship *which Ms.*  
12 *Fratto reasonably, under the totality of the circumstances, which include*  
13 *the events of the interview of Ms. Fratto by Mr. Ohlson and Mr. Kump on*  
14 *the 22<sup>nd</sup> day of March, 2011, perceived as such, and that she reasonably*  
15 *expected that her communications to Mr. Ohlson and Mr. Kump on the 22<sup>nd</sup>*  
16 *of April, 2011, would be treated confidentially by them; and*  
17  
18 2. Ms. Fratto bears the burden of establishing that an attorney-client relationship  
19 was, in fact, established on the 22<sup>nd</sup> day of April, 2011. As the Court in *Yveil*,  
20 *supra*, 647 F.2d 18 at 25 (9<sup>th</sup> Cir., 1981) observed:  
21  
22

23 As with all evidentiary privileges, the burden of proving that the  
24 attorney-client privilege applies rests not with the party contesting the  
25 privilege, *but with the party asserting it* (emphasis added by the State).  
26

27 The only Nevada Case specifically addressed to the formation of the

28 the recording of, and a transcript of the statement made by Ms. Fratto on the 22<sup>nd</sup> day of  
April, 2011, to Mr. Ohlson and Mr. Kump, because it is the State's position that there are  
aspects of it which suggest an understanding on Ms. Fratto's part that the statement she  
made to Mr. Ohlson and Mr. Kump would in fact be disclosed.

1 attorney-client relationship by implication that the State has been able to discern is  
 2 Todd vs. State, 113 Nev. 18 (1997), wherein the Court quoting Deveux v. American  
 3 Home Assurance Co., 387 Mass. 814, 444 N.E.2d 355, 357 (Mass. 1983)  
 4 (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977)) observed that:

6 An attorney-client relationship may be implied "when (1) a person  
 7 seeks advice or assistance from an attorney, (2) the advice or assistance  
 8 sought pertains to matters within the attorney's professional competence,  
 9 and (3) the attorney expressly or impliedly agrees to give or actually  
 10 gives the desired advice or assistance."

11 The facts out of which the Court's decision in Todd, supra, arose were  
 12 these:

13 While reviewing the record during the evaluation of this appeal, this  
 14 court discovered in the confidential envelope containing Todd's parole  
 15 and probation report, which had originally been sealed and sent to the  
 16 district judge by the Department of Parole and Probation, a cover letter  
 17 authored by Samuel T. Bull, Esq. (Bull), a private attorney not associated  
 18 with these proceedings, and attached to the cover letter were five pages  
 19 of handwritten notes authored by Todd. The letter and attached notes  
 20 were sent to and received by the district judge who heard this case. In  
 21 the letter, Bull explained that while he was in the county jail visiting a  
 22 client, Todd, who was incarcerated in the same facility, asked to speak to  
 23 him regarding a possible civil lawsuit against the Eldorado Casino for  
 24 police brutality. Bull wrote that he spoke with Todd because he "never  
 25 turned anybody down." It is obvious that Todd wanted to speak to Bull  
 26 because he was a lawyer. Because it was 10:30 p.m. when he and Todd  
 met, Bull asked Todd to write down what had happened at the Eldorado  
 Hotel, leaving nothing out, and to give this written account to him later,  
 presumably the next day. At some point, Todd delivered to Bull his  
 handwritten account of the events that occurred at the Eldorado Hotel.

See Todd, supra, 113 Nev.18, at 23 (1997)

Juxtaposed against the decision in Todd, supra, the State would invite the  
 Court's and Counsels' attention to the Nevada Supreme Court's decision in Collins vs.

1 State, 113 Nev. 1177 (1997) which the State would suggest is more comparable,  
2 factually and therefore more relevant to the circumstances in Ms. Fratto's case.

3  
4 Although the particular facts and circumstances which gave rise to the issue of the  
5 applicability of the attorney-client privilege in Collins, supra, are not described in any  
6 great detail by the Court, the outline thereof can be inferred from the following:

7  
8 On September 11, 1989, Jeanne Collins reported to the Washoe  
9 County Sheriff's Department that her home had been burglarized.  
10 Thereafter, she and her husband, Robert Collins, collected  
11 reimbursement for the stolen items from Farmers Insurance Company  
12 ("Farmers").

13 On February 3, 1991, Nevada Highway Patrol ("NHP") Trooper  
14 Ken Gager pulled over and ultimately arrested Mr. Collins. A subsequent  
15 search of the car revealed, among other things, a spiral notebook and a  
16 tape recorder containing secret access codes to a secured storage unit  
17 ("The Vault") in Reno, vice grips, a blank key, two-way radios, electronic  
18 gear and two rare coins that were ultimately determined to be the subject  
19 of the insurance claim lodged with Farmers ...

20 ... Mr. Collins argues that the convictions should be reversed  
21 because the district court admitted statements that Mr. Collins made to  
22 Mrs. Collins' former attorney, Annabelle Hall, in violation of the attorney-  
23 client privilege.

24 See Collins, supra, 113 Nev. 1177 at pages 1179 and 1183 (1997)

25 Again, while the Court in Collins, supra, does not reveal, specifically, what  
26 it was that Mr. Collins said to Ms. Hall, his wife's attorney, that was ultimately disclosed  
27 and admitted against him in his trial, the State would suggest that it can be fairly  
28 inferred from what is revealed by the Court about the facts surrounding the case that  
Mr. Collins' wife, Jeanne Collins, was also charged in connection with the events which  
gave rise to the prosecution and conviction Mr. Collins was appealing; that Ms. Hall

1 represented Jeanne Collins in connection therewith; that at some point Mr. Collins  
2 made statements to Ms. Hall *which she later disclosed to law enforcement*, and that  
3 those statements were later proffered and admitted against him at his trial.

4  
5 The Court in Collins, supra, in rejecting Mr. Collins efforts to have it apply  
6 the attorney-client privilege to the statements made to Ms. Hall, his wife's attorney, and  
7 ultimately admitted against him at trial held that:

8  
9 The privilege does not protect such statements because there is no  
10 evidence that Mr. Collins was either speaking to Hall as Mrs. Collins'  
11 representative, or engaged in a joint defense with Mrs. Collins. See NRS  
12 49.095; NRS 49.075; *Naum v. State*, 630 P.2d 785, 788 (Okla. Ct. App.  
13 1981) (holding that there must be evidence the representative is  
14 empowered to act for the client upon any advice rendered by counsel);  
15 *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), cert.  
16 *denied*, 502 U.S. 810, 116 L. Ed. 2d 31, 112 S. Ct. 55 (1991); *Eisenberg*  
17 *v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985) (protecting only  
18 communications made in the course of an ongoing and joint effort to set  
19 up a common defense strategy).

#### 20 The State's Argument Concerning The Application Of 21 The Legal Principles Outlined Above To The Case At Bar

22 The first observation the State would make in support of its position that  
23 the statement made by Ms. Fratto to Mr. Ohlson and Mr. Kump on the 22<sup>nd</sup> day of  
24 April, 2011, is that the meeting of the 22<sup>nd</sup> of April, 2011, cannot be divorced from or  
25 considered without reference to the original meeting between Mr. Ohlson, Mr. Kump  
26 and Ms. Fratto conducted on the 17<sup>th</sup> of March, 2011, because the events of the March  
27 17<sup>th</sup>, 2011 meeting are an integral part of the "totality of circumstances", see  
28 Sheinkopf vs. Stone, 927 F.2d 1259 at 1284 (1<sup>st</sup> Cir., 1991), supra, under which the  
reasonableness of Ms. Fratto's assertion that her statement of the 22<sup>nd</sup> of April, 2011,

1 was a confidential attorney-client communication must be judged.

2 During the course of the March 17<sup>th</sup>, 2011, meeting Ms. Fratto was  
3 specifically informed by Mr. Ohlson and Mr. Kump that:  
4

- 5 1. That they represented Mr. Kody Patten only;
- 6 2. That if they gained any information perceived as helpful to Kody Patten that they  
7 would use it on his behalf – regardless of whether or not that information  
8 incriminated someone else; and
- 9 3. That Mr. Ohlson and Mr. Kump could not and would not render legal advice to  
10 them, and that it would constitute a conflict of interest for either he or Mr. Kump  
11 to represent “them”.  
12  
13

14 Despite her questions propounded to Mr. Ohlson as reflected in the  
15 excerpt of the April 22<sup>nd</sup>, 2011, interview set forth above in the Offer Of Proof  
16 concerning whether or not Mr. Ohlson and Mr. Kump could represent her, she could  
17 not reasonably have expected that they could do so.  
18

19 Moreover in the context of what she had related to Mr. Ohlson and Mr.  
20 Kump during the March 17<sup>th</sup>, 2011, meeting when they interviewed her as a potential  
21 witness – i.e. that she had no liability in connection the events in connection with  
22 which they were representing Mr. Kody Patten, it is understandable that when she  
23 posed that question in the April 22<sup>nd</sup>, 2011, interview that Mr. Ohlson replied that:  
24  
25

26 You know, I don't know what you're going to say. And depending on what  
27 you're going to say, we may or may not be able to if your interests conflict  
28 with Kody's. If we are not able to represent you, we will get counsel for  
you.

1 As an additional Offer Of Proof the State would allege that as of the 22<sup>nd</sup>  
 2 of April, 2011, Ms. Fratto had been interviewed twice by law enforcement authorities –  
 3 once by Mr. Donald Burnum of the West Wendover Police Department on the 5<sup>th</sup> day  
 4 of March, 2011, and once on the 6<sup>th</sup> of March, 2011, by Det. James Carpenter and  
 5 Det. Dennis Journigan of the Elko County Sheriff's Department wherein she had  
 6 consistently maintained she had no personal knowledge concerning the events  
 7 surrounding the death of Micaela Constanzo; the discovery reflecting those interviews  
 8 had already been disseminated to Mr. Ohlson and Mr. Kump; that discovery was  
 9 consistent with their previous March 17<sup>th</sup>, 2011, interview of her; and in Mr. Ohlson's  
 10 reply to Ms. Fratto's question concerning Mr. Ohlson and Mr. Kump's ability to  
 11 represent her, he reiterated what she had been told on the 17<sup>th</sup> of March, 2011 – that  
 12 if her interests conflicted with Kody Patten's they could not represent her.  
 13  
 14  
 15  
 16

17 This circumstance is also critical in understanding Mr. Ohlson's response  
 18 to Ms. Fratto's inquiry about whether or not she needed to get her own attorney which  
 19 the State anticipates that the Defendant will be emphasizing which was:  
 20

- 21 T. Fratto: Then would I need to get my own attorney first?
- 22 J. Ohlson: We'll get a lawyer for you. But you don't need to. Right now  
 23 it's just a conversation between us and a statement that  
 24 you're making to us. We're not the law enforcement.
- 25 T Fratto: Okay.
- 26 J. Ohlson: Okay?
- 27 T. Fratto: Okay.
- 28

1 J. Ohlson: So are you willing to proceed, Toni?

2 T. Fratto: I think so, yeah.

3 J. Ohlson: Okay. If you have any questions about what's happening or

4 what's going on, stop and ask me, all right?

5 T. Fratto: Okay. Are your best interest to help me and Kody, or...

6 J. Ohlson: We're Kody's lawyers and we're hired and we're retained by

7 the State to represent him and his interests. It is not our

8 intention to do anything bad to you.

9

10 There was nothing that had been disclosed by Ms. Fratto prior to that

11 point in time, including during her prior personal conversation with Mr. Ohlson and Mr.

12 Kump on the 17<sup>th</sup> day of March, 2011, or in the discovery which had been

13 disseminated at the time which would have foreshadowed the statement she ended

14 up making to Mr. Ohlson and Mr. Kump on the 22<sup>nd</sup> day of April, 2011, or which Mr.

15 Ohlson and Mr. Kump could have possibly reasonably foreseen, and which

16 ultimately engendered the prosecution currently pending against her.

17

18

19 Even then, during the exchange set forth above, Mr. Ohlson again

20 emphasized to Ms. Fratto that he and Mr. Kump represented Mr. Kody Patton, and

21 that their obligation was to represent his interests, and asked Ms. Fratto if, given that

22 that was the case, she still wanted to talk to them, and she replied in the affirmative.

23

24

25 Additionally – it is extremely important, and of great weight, that before

26 the recorded interview of Ms. Fratto on the 22<sup>nd</sup> of April, 2011, took place, she was

27 again specifically advised that:

28

1. Any further conversation would be recorded;
2. That if what she was going to say constituted evidence in the case it may very well be disclosed to law enforcement authorities; and
3. She specifically consented to having her forthcoming conversation with Mr. Ohlson and Mr. Kump recorded.

Ms. Fratto simply could not, under these circumstances, or any possible conjuring of them have reasonably concluded that:

1. Mr. Ohlson and Mr. Kump were willing to act as her lawyers; or
2. That anything she said to them thereafter would be considered by them to be confidential – she was specifically informed of the opposite.

Considered objectively, the mere fact that Mr. Ohlson and Mr. Kump clearly articulated to her that that conversation *would be tape recorded* and the fact that Ms. Fratto was admonished – i.e. *warned* that if whatever it was she had to say constituted evidence in the case pending against Kody Patten, that it was entirely likely that it may be revealed to law enforcement authorities precludes a finding that Ms. Fratto reasonably believed that her conversation with Mr. Ohlson and Mr. Kump on the 22<sup>nd</sup> day of April, 2011, would be treated confidentially by them.

NRS 49.055 in defining "confidential" provides that:

A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Considered in their totality, the circumstances surrounding Ms. Fratto's



1 April 22<sup>nd</sup>, 2011, statement lead, inescapably, to the conclusion that Ms. Fratto fully  
 2 expected that the statement she intended to make to Mr. Ohlson and Mr. Kump on the  
 3 22<sup>nd</sup> of April, 2011, would be disclosed by them, and that it was her intent and  
 4 understanding that it would be. Ms. Fratto:

- 6 1. Was informed during the March 17<sup>th</sup>, 2011, interview that Mr. Ohlson and Mr.  
 7 Kump could not represent her, and that any information they came into  
 8 possession of which was helpful to Mr. Kody Patten would in all likelihood be  
 9 surrendered to law enforcement authorities – regardless of who it might  
 10 otherwise incriminate;
- 13 2. When asked by Mr. Ohlson on the 22<sup>nd</sup> of April, 2011, before the recording of  
 14 her statement was commenced when asked why she wanted to talk to he and  
 15 Mr. Kump professed that her intent was to help Kody;
- 17 2. She was specifically informed before the recorded conversation commenced  
 18 that if what she said constituted evidence in the case it would be in all likelihood  
 19 surrendered to law enforcement authorities; and
- 21 3. When, at the conclusion thereof she was informed that it was likely that she was  
 22 going to be arrested, she declared that she understood that she would be  
 23 arrested.

25 The sequence of events leading up to and surrounding Ms. Fratto's April  
 26 22<sup>nd</sup>, 2011, statement make it clear that she was not consulting Mr. Ohlson and Mr.  
 27 Kump "... with a view to obtaining professional legal services from the lawyer..." within  
 28 the meaning of NRS 49.045 – she was thereto disclose her own liability with respect to

1 the death of Micaela Costanzo, knowing that it would be disclosed – she had been  
2 repeatedly warned that it would be, because however misguided her perception in that  
3 regard might have been, she perceived that doing so would help Mr. Kody Patten.  
4


5 The State would suggest that the circumstances of the case suggest that  
6 Ms. Fratto fully expected that she was going to be arrested as a result of her  
7 disclosures, and it was her anticipation of that circumstance which prompted her  
8 questions about whether or not Mr. Ohlson and Mr. Kump would be able to represent  
9 her.  
10

### 11 Conclusion

12 Based upon the above the State would ask that the Court find that :

- 13
- 14 1. Ms. Fratto's statement to Mr. John Ohlson and Mr. Jeffrey Kump on the 22<sup>nd</sup> day  
15 of April, 2011, was not confidential within the meaning of NRS 49.055;
  - 16 2. Is not subject to the attorney-client privilege defined in NRS 49.095; and
  - 17 3. That the State will be entitled to adduce evidence of her April 22<sup>nd</sup>, 2011,  
18 statement in its entirety.  
19  
20

21 Dated this 6<sup>th</sup> day of June, 2011.

22  
23  
24   
25 **MARK TORVINEN**  
26 State Bar Number: 551  
27 Elko County District Attorney  
28 Counsel For The Plaintiff

**Submission Of A Formal Order Confirming The Date And Time Previously Set By The Court For A Hearing On The State's Motion In Limine**

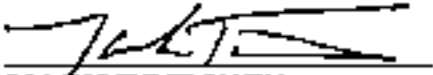
**COMES NOW THE STATE OF NEVADA**, the Plaintiff in the above-entitled cause, by and through its Counsel Of Record the Elko County District Attorney's Office, and in connection with the filing of this pleading would submit for the Court's consideration the proposed:

**ORDER:**

**CONFIRMING THE DATE AND TIME SET FOR THE CONDUCT OF AN EVIDENTIARY HEARING UPON THE STATE'S MOTION IN LIMINE WITH RESPECT TO THE ISSUE OF THE ADMISSIBILITY OF MS. TONI FRATTO'S STATEMENT TO JOHN OHLSON AND JEFFREY KUMP;**

attached hereto as Exhibit 3.

Dated this 6<sup>th</sup> day of June, 2011.

  
**MARK TORVINEN**  
State Bar Number: 551  
Elko County District Attorney  
Counsel For The Plaintiff

///  
///  
///  
///  
///

Unsworn Declaration In Support Of Motion In Limine<sup>5</sup>

**COMES NOW MARK D. TORVINEN** who declares the following to the above-entitled Court:

- 1. That your Declarant, who will present the remainder of this Declaration in the first person, is presently serving as the District Attorney of Elko County.
- 2. That I have read the assertion of fact(s) set forth in this pleading under the legend "Offer Of Proof" at Page 4, Line 13 to Page 13, Line 8i hereof, and incorporate said assertions of fact into this Declaration as if the same were set forth in this Declaration verbatim..
- 3. In executing this Declaration I declare, under the penalties of perjury, that I believe, upon information and belief, the assertions of fact set forth in this

///  
///  
///  
///  
///

<sup>5</sup> See NRS 53.045 which provides in pertinent part as follows:

Any matter whose existence or truth may be established by an affidavit or other sworn declaration *may be established with the same effect* (emphasis added by the State) by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form:

1. If executed in this state: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on \_\_\_\_\_  
(date) (signature)

1 Declaration, to be true.

2 **FURTHER YOUR DECLARANT SAYETH NOT.**

3  
4 Dated this 6<sup>th</sup> day of June, 2011.

5  
6   
7 **MARK TORVINEN**  
8 State Bar Number: 551  
9 Elko County District Attorney

10 **CERTIFICATE OF SERVICE**

11 I Karen Crocmet, hereby certify that I am an  
12 (Printed Name)

13 employee of the Elko County District Attorney's Office, and that on the 6<sup>th</sup> day of  
14 June, 2011, a true and correct copy (or true and correct copies in the case of multiple  
15 addressees) of the foregoing;

16 THE STATE OF NEVADA'S:

17  
18 1. MOTION IN LIMINE CONCERNING THE ADMISSIBILITY OF TONI  
19 FRATTO'S STATEMENT TO KODY CREE PATTEN'S LAWYERS IN  
20 ANTICIPATION OF AN ASSERTION BY TONI FRATTO THAT THE  
21 SAME CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT  
22 COMMUNICATION INCLUDING;

23 A. OFFER OF PROOF IN SUPPORT OF MOTION; AND

24 B. POINTS, AUTHORITIES, AND WRITTEN ARGUMENT IN SUPPORT  
25 OF THE STATE'S POSITION WITH RESEPCT TO THE ISSUE  
26 PRESENTED IN ITS MOTION IN LIMINE;

27 2. DECLARATION IN SUPPORT OF MOTION;

28 3. SUBMISSION OF PROPOSED FORMAL ORDER CONFIRMING  
THE DATE AND TIME SET FOR A HEARING ON THE STATE'S  
MOTION IN LIMINE; AND

1           **4. CERTIFICATE SERVICE WITH RESEPECT THERETO;**

2 together with a copy of the proposed Order Setting Hearing, and a copy of the cover  
3 letter under which said proposed Order was submitted to the Court by the State at the  
4 time this pleading was filed was/were served upon the addressee(s) identified  
5 hereafter in the following manner:  
6

7                           Pursuant to the provisions of NRS 178.589<sup>b</sup>, a true and correct copy of

8  
9  
10           NRS 178.589 provides that:

11           1. Except when personal service of a person is ordered by the court or required by  
12 specific statute, a person who is represented by an attorney may be lawfully served  
13 with any motion, notice or other legal document by means of a facsimile machine if:

14           (a) The document is transmitted to the office of the attorney representing the person;  
15 and

16           (b) The facsimile machine is operational and is maintained by the attorney  
17 representing the person or the employer of that attorney.

18           2. In addition to any other document required by the court, a person who uses a  
19 facsimile machine pursuant to subsection 1 to serve any motion, notice or other legal  
20 document that is required to be filed with the court shall attach to or include with the  
21 original document filed with the court a copy of the confirmation report or other  
22 comparable evidence of the transmittal of the legal document.

23           3. Service of any motion, notice or other legal document by facsimile machine after 5  
24 p.m. on the day that the document is transmitted shall be deemed delivered on the  
25 next judicial day. The time of transmittal set forth in this subsection is determined  
26 according to the time at the location of the recipient of the legal document.

27           4. Service of any motion, notice or other legal document by facsimile machine as  
28 authorized by this section is supplemental to and does not affect the validity of any  
other manner of service authorized by law.

5. As used in this section:

(a) "Facsimile machine" means a device that sends or receives a reproduction or  
facsimile of a document or photograph which is transmitted electronically or  
telephonically by telecommunications lines.

1 this pleading was transmitted by facsimile to the following individuals at the following  
2 facsimile numbers:

- 3 1. Mr. John Ohlson via facsimile number: 775-323-2705;
- 4 2. Mr. Jeffrey Kump via facsimile number: 738-0187;
- 5 3. Mr. John P. Springgate via facsimile number: 775-323-3889; and
- 6 4. Lockie And Macfarlan via facsimile number: 738-1928;

7  
8  
9 proof of the transmission of which is attached to the original of this pleading filed with  
10 the Court.

11  
12  
13   
14 Signature Of Person  
15 Executing Certificate Of Service  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

---

(b) "Person" includes, without limitation, a government, governmental agency or political subdivision of a government.

**EXHIBIT 1 TO THE STATE'S MOTION IN LIMINE IN  
STATE VS. TONI COLLETTE FRATTO**



**IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA**

**RECORD OF COURT PROCEEDINGS**

Present - Honorable **ANDREW J PUCCHINELLI**, District Judge,  
and Officers of the Court.

STATE OF NEVADA,

Plaintiff,

Date: 5/3/11

VS.

Case No.: CR-FP-11-300

Dept: 2

KODY CREE PATTEN,

Defendant.

State of Nevada represented by Mark D. Torvinen, Esq.  
Defendant present, in custody, and represented by  
John Ohlson, Esq. and Jeffrey J. Kump, Esq.  
Court Clerk, Barbara Cook, present.  
Lisa Manley present as Court Reporter.

**HEARING ON MOTION TO EVALUATE AND  
MOTION TO EMPLOY PRIVATE INVESTIGATOR**

The Court noted the presence of the parties.

This was the date and time set for a hearing on a Motion for Order to Evaluate, and the Defendant's Ex-Parte Motion for Authorization to Employ Private Investigator.

The Court noted it had jurisdiction in this matter pursuant to the Defendant's conditional waiver of preliminary hearing for purposes of a competency evaluation.

Mr. Ohlson so confirmed.

Mr. Torvinen addressed the matter, and submitted it to the Court's discretion. He further noted both counsel had suggested to the Justice Court that the Defendant be transferred to the District Court for the matter of a competency evaluation.

Mr. Ohlson advised that the Defendant had waived on the record in Justice Court.

The Court advised that it wished to have the Defendant waive on the record in this court as well.

Mr. Ohlson concurred.

The Court asked the Defendant if he conditionally waived the preliminary hearing.

The Defendant so waived.

Mr. Ohlson advised that since this was a potential death penalty case, there needed to be two attorneys. Therefore, Mr. Kump was present today as well.

The Court so noted.

Mr. Torvinen advised that he spoke with the Administrator at Lakes Crossing about time frames and materials needed, and she indicated it would be helpful to have the Defendant's juvenile records. Counsel therefore agreed to have those records released and transmitted to Lakes Crossing, and an Order to that effect had been prepared.

The Court advised that it received an email from the Juvenile Probation Office about that request. It asked Mr. Ohlson if he agreed with the release of the records.

Mr. Ohlson advised that he agreed.

The Court explained to the Defendant that the psychiatrist at Lake's Crossing would like to have his juvenile records to help in the competency evaluation. However, they could not be released without his consent. It asked the Defendant if he agreed that the records could be released.

The Defendant responded that he agreed.

Mr. Ohlson advised that he saw the Order, and it was acceptable in form and substance.

Mr. Torvinen handed to the Court an Order Committing the Defendant to Lake's Crossing Center for the Conduct of a Competency Evaluation Pursuant to the Provisions of NRS 178.415.

The Court reviewed and signed the Order.

Mr. Torvinen asked that the clerk file the order and provide conformed copies to him. He would then provide copies to the appropriate parties.

The Court asked if there were any other matters to hear in the presence of the State.

Mr. Ohlson advised that there was, and conferred with Mr. Kump and Mr. Torvinen off the record.

Mr. Ohlson advised for the record that on Friday April 22nd, a woman by the name of Toni Fratto, fiancé of the Defendant, called Mr. Kump's office with information on the case. Mr. Ohlson

participated by phone, and the conference was audiotaped. They advised Ms. Fratto that they were not acting as her attorneys, and Ms. Fratto then made certain disclosures about having been involved in the murder.

Mr. Torvinen advised that he was nervous about citing this evidence on the record.

Mr. Ohlson explained that they did so because they believed they were obliged to turn over the original audiotape to the State as evidence. The original tape was in Mr. Kump's possession, and he was prepared to deliver it to the State and wished to do so on the record. They retained copies.

Mr. Torvinen asked what kind of tape it was.

Mr. Ohlson stated the original was a minicassette tape. They copied it to CD, and were here today to provide him with the original.

The Court asked Mr. Kump, as an officer of the court, if he had not altered or erased any portion of the tape.

Mr. Kump so confirmed, as an officer of the court.

The Court disclosed for the record that Mr. Kump had called chambers and stated he had a tape with relevant evidence and inquired whether the Court believed it should be turned over. The Court told him that the tape should be turned over on the record with everyone present.

Mr. Ohlson confirmed that was a fair representation of the phone call.

The Court ORDERED that the tape be turned over to the State.

Mr. Torvinen advised that he did not wish to be in the chain of custody, and asked that the tape be surrendered to the appropriate person.

Mr. Kump advised that there were actually two cassettes, and both were rewound.

The Court ORDERED that the tapes be turned over to Det. Sgt. Kevin McKinney.

Mr. Kump handed the tapes to Mr. McKinney.

The Court asked if the State had anything further.

Mr. Torvinen asked Det. McKinney if he could convert the recording to digital.

Det. McKinney stated he had that ability.

Mr. Ohlson advised that they had copies and also had a transcript.

Mr. Torvinen had nothing further.

The State was excused.

Mr. Torvinen and law enforcement in the audience left the courtroom.

**EXHIBIT 2 TO THE STATE'S MOTION IN LIMINE IN  
STATE VS. TONI COLLETTE FRATTO**

1 John Olson, Esq.  
 2 Bar Number 1672  
 275 Hill Street, Suite 230  
 3 Reno, NV 89501  
 Telephone: (775) 323-2700  
 4 Facsimile: (775) 323-2705

5 Jeff Kump, Esq.  
 Marvel & Kump, Ltd.  
 6 217 Idaho St.  
 Elko, Nevada 89801  
 7 Telephone: (775) 777-1204  
 Attorneys for Kody Patten

9  
 10 **IN THE JUSTICES' COURT OF THE ELKO TOWNSHIP**  
 11 **COUNTY OF ELKO, STATE OF NEVADA**

12 STATE OF NEVADA,

13 Plaintiff,

Case No.: 11-CR-00300

14 vs.

15 KODY PATTEN,  
 16 TONI COLLETTE FRATTO,

17 Defendant.

18  
 19 **AFFIDAVIT OF JOHN OLSON, ESQ.**

20 STATE OF NEVADA )  
 21 ) ss.  
 22 COUNTY OF WASHOE )

23 I, John Olson, being first duly sworn, do hereby affirm under penalty of perjury that the  
 24 assertions of this affidavit are true, that I have personal knowledge of the matters stated in this  
 25 affidavit, except as to those matters stated on information and belief, and as to those matters, I  
 26 believe them to be true, and that if called as a witness, I could competently testify to the matters  
 27 contained herein.  
 28

Initials 

1 Affiant knows of his own personal knowledge, or maintains opinions as follows:

- 2 1. Affiant is licensed to practice law in the State of Nevada, and is appointed by the above  
3 Court to Represent Kody Patten, a defendant herein.
- 4 2. Shortly after affiant's appointment, affiant and co-counsel Jeff Kump, Esq. began the  
5 process of actively representing Mr. Patten by gathering whatever information about the  
6 alleged crime that was reasonably available at the time. We were informed that Mr.  
7 Patten's girl friend, Toni Fratto, might be willing to speak to us regarding events in the  
8 case. Since affiant had an appearance on another matter pending on Elko on March 17,  
9 2011, Mr. Kump arranged with Ms. Fratto and her parents (Ms. Fratto, while 18 years  
10 old, is a high school senior, living at home) to meet with us and speak with us about the  
11 case at approximately 4:00 PM at Mr. Kump's office in Elko.
- 12 3. We did meet with Ms. Fratto and her mother and father in Mr. Kump's conference room  
13 at the appointed time. During the meeting we explained to Ms. Fratto and her parents that  
14 we represented Mr. Patten only, and were charged with the responsibility of protecting his  
15 interests. We told the Fratto's that if we gained information that assisted Mr. Patten, no  
16 matter whoever else that information might implicate, we had an obligation to use that  
17 information in Mr. Patten's defense. Ms. Fratto told us that she was not represented by  
18 counsel, and didn't feel she needed a lawyer as she was not involved in the homicide. Ms  
19 Fratto told us a version of events in which she said she was not present at the homicide.
- 20 4. At the conclusion of the conversation, I told all the Fratto's that I could not give any of  
21 them legal advice because I represented Mr. Patten only and it would be a conflict of  
22 interest to act as counsel for any of them. However, as a matter of personal advice, I told  
23 Ms. Fratto that it would not be in her interests to continue a relationship with Mr. Patten,  
24 as he would likely be incarcerated for a long time.
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- 1 5. Subsequent to this meeting, Mr. Kump and affiant were informed that Ms. Fratto wished  
2 to speak to us again. A meeting was arranged for April 22, 2011 at Mr. Kump's office in  
3 Elko. Mr. Kump was present in person, and affiant attended by telephone. Ms. Fratto was  
4 brought to Mr. Kump's office by Mr. Patten's father as her parents were out of town. We  
5 planned to record the conversation, but I asked to speak to Ms. Fratto before we began,  
6 outside the presence of Mr. Patten's father. (I wanted to avoid the inference that Ms.  
7 Fratto was influenced by Mr. Patten's father). Ms. Fratto agreed.
- 9 6. Affiant then asked Ms. Fratto if she was willing to talk with us without her parents  
10 present, and she agreed. I informed her that we intended to record the conversation and  
11 Mr. Kump showed her the tape recorder. She agreed to the taping. I asked her why she  
12 wanted to talk to us and she said that she wanted to help Kody. I told her that was our  
13 responsibility as well. I then told her that I didn't know what she was going to say, but  
14 that if what she said was evidence in the case, Mr. Kump and I might be obliged to turn  
15 the recording over to the police. I asked her again if she was willing to talk to us on tape,  
16 and she replied affirmatively.
- 18 7. During the early part of the interview Ms. Fratto asked "... will you guys be able to  
19 represent me?"  
20 I responded: "I don't know what you are going to say. And depending on what you are  
21 going to say we may or not be able to if your interests conflict with Kody's. If we're not  
22 able to represent you, we will get counsel for you."
- 24 8. At that time I had no idea what Ms. Fratto was going to say. Based on her prior statement,  
25 I assumed she was going to tell us a version of events that somehow mitigated Mr.  
26 Patten's guilt, but did not implicate her. When she went on to admit inflicting injury on  
27 the deceased, I was shocked.
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9. Near the end of our conversation, the tape ceased recording. We concluded the conversation by telling Ms. Fratto that we would probably be required to turn the tape over to law enforcement and that she would likely be arrested. Ms. Fratto said that she realized she would be arrested. We told her that we would attempt to connect her with attorney David Lockie that afternoon, and concluded the interview.

  
JOHN OLSON



JOHN OLSON  
NOTARY PUBLIC  
STATE OF NEVADA  
MY COMMISSION EXPIRES 06/30/2012

SUBSCRIBED AND SWORN TO THIS  
2 DAY OF JUNE, 2011.

  
NOTARY PUBLIC





**EXHIBIT 3 TO THE STATE'S MOTION IN LIMINE IN  
STATE VS. TONI COLLETTE FRATTO**

1 CASE NO.: 11-CR-0300  
2  
3

4 **IN THE JUSTICE'S COURT OF THE ELKO TOWNSHIP**  
5 **IN AND FOR THE COUNTY OF ELKO, AND THE STATE OF NEVADA**  
6

7 \_\_\_\_\_  
8 **THE STATE OF NEVADA,**

9 Plaintiff,

10 vs.

11  
12  
13 **TONI COLLETTE FRATTO,**

14 Defendant.  
15 \_\_\_\_\_

**PROPOSED**

**ORDER:**

**CONFIRMING THE DATE AND TIME  
SET FOR THE CONDUCT OF AN  
EVIDENTIARY HEARING UPON THE  
STATE'S MOTION IN LIMINE WITH  
RESPECT TO THE ISSUE OF THE  
ADMISSIBILITY MS. TONI FRATTO'S  
STATEMENT TO JOHN OHLSON  
AND JEFFREY KUMP**

16 **THE COURT HAVING CONSIDERED IN CHAMBERS** that certain:

17  
18 **SUBMISSION OF PROPOSED FORMAL ORDER CONFIRMING THE  
DATE AND TIME SET FOR A HEARING ON THE STATE'S MOTION IN  
LIMINE;**

19  
20 **contained within the State's Motion In Limine filed herein by the State, and good  
21 cause appearing therefore;**

22  
23 **IT IS HEREBY ORDERED,** and the Court would confirm by this Order  
24 that an evidentiary hearing has been set, with the consent and participation of  
25 Counsel for both Toni Collette Fratto, and Kody Cree Patten with respect to the  
26 State's aforementioned Motion In Limine for.  
27  
28

1 **Wednesday the 22<sup>nd</sup> day of June, 2011, at the hour of 1:00 o'clock**  
2 **p.m., and that a period of three (3) hours has been set aside for said**  
3 **hearing.**

4  
5 **IN THAT REGARD,** the Court would note that during the course of a  
6 hearing conducted in the above-entitled cause on the 3<sup>rd</sup> day of June, 2011, which was  
7 attended by:

- 8 1. **Mark Torvinen, Elko County District Attorney, on behalf of the State**
- 9 2. **Mr. Kody Cree Patten, in proper person, and by Mr. John Ohlson (by**  
10 **telephone), and Mr. Jeffrey Kump his Counsel of Record; and**
- 11 3. **Ms. Toni Collette Fratto, in proper person, and by Mr. John Springgate (by**  
12 **telephone), and Mr. Sherburne Macfarlan of the Law Firm of Lockie &**  
13 **Macfarlan, her Counsel of Record;**

14  
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16  
17 **Mr. Ohlson indicated in response to the State's declaration in connection with the issue**  
18 **of setting an evidentiary hearing upon State's Motion In Limine that it would need time**  
19 **to subpoena Mr. Ohlson and Mr. Kump to said Hearing, Mr. Ohlson declared that as**  
20 **an Officer of the Court it would not be necessary to subpoena him to attend the**  
21 **Hearing described above; that he would appear voluntarily; and the Court accepted**  
22 **that representation. That being the case;**

23  
24  
25 **IT IS ORDERED that the State is relieved of having to formally subpoena**  
26 **Mr. Ohlson to appear as a witness at said hearing, and in the event that some**  
27 **unforeseen circumstance prevented his appearance, the State shall be deemed to be**  
28

1 in the same position, legally and procedurally, as if it had done so.

2 **FINALLY IT IS FURTHER ORDERED** that upon the Court's execution  
3 of this Order, the Court's Calendar Clerk shall forthwith:  
4

- 5 1. File the completed Order with the Clerk of the above-entitled Court; and
- 6 3. Shall then place file-stamped copies of said completed and filed Order in the  
7 State's, Mr. Kump's, and Lockie & Macfarlan's Counsel Boxes at the Elko  
8 Justice Court Clerk's Office.

9  
10 **IT IS ORDERED** that no further service of this Order shall be required.

11 Dated this \_\_\_\_\_ day of June, 2011.

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15 ALVIN R. KACIN  
16 Justice Of The Peace  
17 Elko Township Justice Court  
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**MARK TOBVLINEN**  
District Attorney

**KRISTIN A. McQUEARY**  
Chief Civil Deputy

**OFFICE OF THE DISTRICT ATTORNEY  
OF ELKO COUNTY, NEVADA**

540 Court Street, Second Floor  
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775-738-3101 - 775-738-0160 fax

**ROBERT J. LOWE**  
**JENNIFER M. SPENCER**  
**CHAD B. THOMPSON**  
**DAVID A. BUCHNER**  
**MARK S. MILLS**  
**TYLER J. INGRAM**  
Deputy District Attorney

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Monday The 6<sup>th</sup> Day Of June, 2011

The Honorable Alvin R. Kacin  
Elko Justice Of The Peace  
Elko County Court House  
Elko, Nevada 89801

**Re: Submission Of A Proposed Order Confirming Setting With  
Respect To The Oral Order Setting A Hearing On The State's  
Motion In Limine Filed In State Vs. Toni Collette Frizzo, Justice  
Court Case Number 11-CR-0300.**

Dear Judge Kacin;

A review of the Court's file in the above-referenced matter will reveal that I have filed therein the Motion In Limine with respect to which you, orally from the bench on the 3<sup>rd</sup> day of June, 2011, set a hearing for Wednesday the 22<sup>nd</sup> of June, 2011, at 1:00 o'clock p.m.

Included within the Motion In Limine at Page 27, Line 13, to Page 28, Line 8 thereof, is a:

**Submission Of A Formal Order Confirming The Date And Time  
And Time Previously Set By The Court For A Hearing On The  
State's Motion In Limine**

A proposed version of the Order which I am submitting for your consideration is attached as Exhibit 3 to the Motion.

To that end you will find with this letter an original and several copies of the proposed:

**ORDER:**

The Honorable Alvin R. Kacin - Elko Justice Of The Peace

Re: **Submission Of A Proposed Order Confirming Setting With Respect To The Oral Order Setting A Hearing On The State's Motion In Limine Filed In State Vs. Toni Collette Fratto, Justice Court Case Number 11-CR-0300**

Monday June 6<sup>th</sup>, 2011

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**CONFIRMING THE DATE AND TIME SET FOR THE CONDUCT OF AN EVIDENTIARY HEARING UPON THE STATE'S MOTION IN LIMINE WITH RESPECT TO THE ISSUE OF THE ADMISSIBILITY MR. TONI FRATTO'S STATEMENT TO JOHN OHLSON AND JEFFREY KUMP;**

which I am offering for your consideration.

If you are inclined to issue a formal Order confirming the date and time previously set for a hearing on the State's Motion In Limine, but the form of the submitted proposed Order needs revision before you are willing to execute, please have your staff advise in what regard it needs to be revised and I shall endeavor to comply with your direction in that regard.

If you are disinclined to issue such an Order if you would have your staff so advise I would appreciate it.

Thank you for your time.

Sincerely



**MARK TORVINEN**  
Deputy District Attorney

cc: Mr. John Ohlson via facsimile number: 775-323-2705;  
Mr. Jeffrey Kump via facsimile number: 738-0187;  
Mr. John P. Springgate via facsimile number: 775-323-3889; and  
Lockie And Macfarlan via facsimile number: 738-1928