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| COMPANY NAME: <i>District Attorney Mark Torvinen</i> | DEPARTMENT: <i>Elko Justice Court</i> |
| DATE: <i>6/28/11 Attorney John Springgate</i> | |
| SUBJECT: <i>Order Granting Motion in Limine</i> | |
| FAX NUMBER: <i>738-0177 738-1928 (775) 323-2705</i> | <i>738-0160 (775) 323-2705</i> |

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NO. 11 CR 00300 4E 002

**In The Justice's/Municipal Court
of Elko Township, County of Elko
State of Nevada**

FILED
ELKO TOWNSHIP
JUSTICE/MUNICIPAL
11 JUN 28 AM 11:59
CLERK

STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN, AND
TONI COLLETTE FRATTO,

Defendants.

**ORDER GRANTING MOTION
IN LIMINE CONCERNING THE
ADMISSIBILITY OF TONI
FRATTO'S STATEMENT TO
KODY CREE PATTEN'S LAWYERS**

Defendant Toni Fratto (Fratto) stands charged with, among other things, Open Murder With the Use of a Deadly Weapon in a First Amended Felony Criminal Complaint filed May 9, 2011. In that pleading, Fratto and her codefendant, Kody Cree Patten (Defendant Patten), are alleged to have killed one Michaela Costanzo (Costanzo).

On June 6, 2011, Plaintiff State of Nevada (State) filed a Motion in Limine Concerning the Admissibility of Toni Fratto's Statement to Kody Cree Patten's Lawyers (Motion in Limine). Fratto opposed the Motion in Limine on June 15, 2011. The State filed its reply to Defendant's Opposition to the Motion in Limine on June 20, 2011.

The court held a hearing on the Motion in Limine on June 22, 2011. At that hearing, Kip Patten (Kip), Detective Kevin McKinney (McKinney) and Defendant Patten's lawyers, Jeff Kump (Kump) and John Ohlson (Ohlson), testified.¹ At the conclusion of the hearing, the court took the matter under consideration to issue this written order.

1. Short Summary of the Most Pertinent Facts

On March 17, 2011, and April 22, 2011, Kump and Ohlson interviewed Fratto in the course of representing Defendant Patten. Fratto was not charged with a crime in this case as of those dates.

At the March interview, Fratto never claimed to have been present at the homicide alleged here.

At the April interview, Fratto told Kump and Ohlson that she was present and actively participated

¹ Kip is Defendant Patten's father.

in the killing of Costanzo.²

In the days before the April interview, Fratto told Kip that she actively participated in the homicide.³

On the day of the April interview, Kip transported Fratto to from her home in West Wendover, Nevada, to Elko, Nevada, to talk with Kump and Ohlson. Fratto was expecting to be arrested following the interview. Before leaving for Elko, Fratto left letters for her parents at their home.⁴

Upon her arrival at Kump's law office in Elko, Fratto consented to be interviewed.⁵ Kump and Ohlson interviewed Fratto alone and outside the presence of Kip. During the interview, Kump was with Fratto, and Ohlson was in some other location participating via speaker phone.

Before the recorded portion of the interview, Kump and Ohlson told Fratto that what they learned during the interview would be used for Defendant Patten and could possibly be disclosed to law enforcement authorities. Before the interview, Kump and Ohlson did not know what Fratto was going to say, other than that she was "present at the killing." See Motion in Limine (Page 6 of 31, line 10 - line 11). This statement was made before any discussion about legal representation for Fratto came up.

During a recorded portion of the interview, an exchange about legal representation occurred.⁶ This exchange occurred after it became apparent to Kump that Fratto might make more damning inculpatory statements. After the exchange, which was covered extensively in testimony by Kump and Ohlson, Fratto made the statements that resulted in the filing of the First Amended Complaint.⁷

Near the April interview's conclusion, Ohlson informed Fratto that he would turn over the recording to members of law enforcement, and that she should expect to be arrested. According to Ohlson, Fratto expressed no surprise at that assertion, and stated that she knew she would be arrested.⁸

After the interview, Fratto left Kump's office and returned to West Wendover with Kip. Fratto told Kip that she had given his son's lawyers the inculpatory information that she had shared with him before the April interview.

2. Short Legal Analysis

The parties agree that a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications to her lawyer. NRS 45.095. The parties also appear to

² See Exhibit 2 to Motion in Limine (Affidavit of John Ohlson, Esq.)

³ Having observed Kip testify at the hearing on the Motion in Limine, the court finds his testimony to be credible and reliable.

⁴ From the testimony adduced on this subject, the court has drawn the inference that the letters were intended to disclose her participation in the killing of Costanzo.

⁵ She also consented to the tape-recording of that interview.

⁶ This exchange is recounted on page 6, line 18, through page 7, line 28, of the Motion in Limine. The court will not recount verbatim either the Kump or Ohlson testimony on this subject.

⁷ Before the State filed the First Amended Complaint, Kump and Ohlson turned the interview recording to McKinney.

⁸ Having observed Ohlson testify at the hearing on the Motion in Limine, the court also finds his testimony to be credible and reliable.

agree that the remedy for a violation of NRS 45.95 is essentially suppression of the offending disclosure.

At bottom, the issue is whether the statements that Fratto made at the April interview are "confidential" within the meaning of NRS 49.055. Because the court has concluded that they are not, they are not subject to suppression.

Given the testimony of Kip, Kump and Ohlson, the court has no trouble concluding that Fratto made the April interview statements while fully intending them 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." NRS 45.055. In this case, those "other" third persons happen to be members of law enforcement.

The court has reached this conclusion even though: (a) Fratto asked Kump and Ohlson if they would be able to represent her before she made the inculpatory statements; and (b) Ohlson told Fratto that she did not need a lawyer before proceeding with the portion of the interview that includes her inculpatory statements.⁹

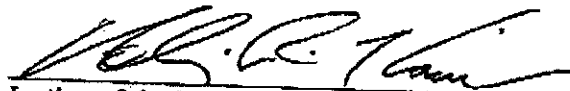
It is clear that Fratto was seeking counsel at the time she posed these questions to Kump and Ohlson. The court has concluded that Fratto, *in her mind*, proceeded to make inculpatory statements at least in part "for the purpose of facilitating the rendition of professional legal services" to her from *some* lawyer.¹⁰ NRS 49.095. However, given the context in which the subsequent interview was conducted, there is little doubt that Fratto fully intended and expected Kump and Ohlson to *eventually* share the inculpatory interview statements that she wanted to make with law enforcement authorities.

Clients who hope to be represented by the lawyer with whom they are talking or some other attorney that the lawyer promises to secure for them at least occasionally make statements that are not confidential because they are specifically calculated for disclosure to members of law enforcement. That is the case here. Fratto may have wanted a lawyer when she spoke to Kump and Ohlson. Fratto may have made inculpatory statements to Kump and Ohlson in some effort to have them secure legal counsel for her. However, the court concludes that she *also* wanted them to tell law enforcement officers what she said during the remainder of the interview in a hope that it would help Defendant Patten.

3. Conclusion

The Motion in Limine is hereby granted. At Fratto's preliminary hearing, the court will permit the State to adduce testimony from Kump and/or Ohlson about any statements that she made to them on April 22, 2011.

DATED this 28 day of June, 2011.


Justice of the Peace

⁹ Fratto has argued that Ohlson violated the Nevada Rules of Professional Conduct when he also, among other things, represented that: (a) the remainder of the interview would be "[r]ight now . . . just a conversation between us . . ." and (b) Kump and he did not intend "to do anything bad to [Fratto]." However, that is not a question for this court to decide now.

¹⁰ If Fratto did not make the statements for the purpose of getting legal services from Ohlson and Kump, it is obvious to the court that she made them at least in part to facilitate a meeting with the lawyer that Ohlson promised to "set up" for her. See Motion in Limine, page 7, line 20 – line 22.