

1 CASE NO. CR-FP-11-0300

FILED

2
3 DEPT. NO. II

2011 DEC 12 P 3:04

4 ELKO CO DISTRICT COURT

5 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF ELKO DEPUTY VA

7 THE STATE OF NEVADA,

DEFENDANT'S MOTION TO STRIKE
8 THE STATE OF NEVADA'S NOTICE OF
9 INTENT TO SEEK THE IMPOSITION
10 OF THE PENALTY OF DEATH

Plaintiff,

vs.

11 TONI COLLETTE FRATTO,

12 Defendant.

13
14 Comes now Defendant TONI COLLETTE FRATTO, by and through her counsel, JOHN
15 P. SPRINGGATE, Esq., and DAVID LOCKIE, Esq., and moves this Court for its Order striking
16 the State of Nevada's Notice of Intent to Seek the Imposition of the Death Penalty in this case, or
17 in the alternative, precluding the State from seeking a conviction based upon the Felony Murder
18 Rule. This motion is made and based upon *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606
19 (2004)(McConnell I), SCR 250(4)(c), and the attached Memorandum of points and authorities.

20
21 Dated this 7th day of December, 2011.

22
23
24 John P. Springgate
25 JOHN P. SPRINGGATE, ESQ.

1 POINTS AND AUTHORITIES

2 I. OVERVIEW

3
4 When the State conceded the necessity of proceeding by way of two separate trials in this
5 case as a result of KODY PATTEN'S attorneys status as witnesses, the State charged Defendant
6 TONI COLLETTE FRATTO ("FRATTO") by a Second Criminal Information, dated July 28,
7 2011, which charged Fratto with First Degree Kidnapping, Principal to First Degree Kidnapping,
8 Conspiracy to commit Murder, Open Murder, and Principal to Open Murder, plus lesser charges
9 relating to the destruction of evidence, all concerning the March 3, 2011, death of Micaela
10 Costanzo.
11

12
13 The former co-defendant, KODY CREE PATTEN, was charged separately in a Third
14 Criminal Information dated August 9, 2011, in which the State alleges an additional count of First
15 Degree Murder Committed during the Perpetration of a Kidnapping, (Felony Murder). The
16 specific Felony Murder count was not alleged against FRATTO.
17

18 On August 24, 2011, the State filed its notice of intent to seek the death penalty pursuant
19 to SCR 250, citing first degree kidnapping as the aggravating circumstance on which its notice
20 was based (NRS 200.033(4)(a) and (b)). Specifically, the State alleged as follows:
21

22 4. The murder was committed while the person was engaged, alone or with
23 others, in the commission of, or an attempt to commit or flight after committing
24 or attempting to commit...kidnapping in the first degree, and the person charged:

25 (a) Killed or attempted to kill the person murdered; or

26 (b) Knew or had reason to know that life would be taken or lethal force used.
27
28

1 In support of its Notice of its intent to seek the death penalty, the State relies on and cites
2 to "...testimony and evidence developed during the investigation of the events which have given
3 rise to the prosecution of Toni Collette Fratto and/or the litigation of the Preliminary Hearing
4 upon which the State would be relying to support the imposition of the penalty of death,"
5 identifying various witnesses who have testified in this case and the nature of their testimony that
6 purportedly supports the State's notice.
7

8
9 KODY CREE PATTEN, through his counsel, has filed concurrently a Motion to strike
10 the imposition of the death penalty, arguing that the State's notice is not only contrary to the
11 prohibition against using the basis of a felony murder charge as an aggravating circumstance to
12 justify capital punishment, cf. *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), it also
13 fails to provide any testimony from any witness in this case that substantiates, or even suggests,
14 that Micaela Costanzo was kidnaped by PATTEN before she died. There is an even greater lack
15 of credible evidence implicating FRATTO, including a complete absence of forensic evidence
16 tying her to the crime scene. Thus, FRATTO requests that this Court strike the State's notice of
17 intent to seek the death penalty in this case, or alternatively, clarify that the State is precluded
18 from proceeding on or arguing any theory of felony murder at trial.
19
20

21 II. ARGUMENT

22 The State is not permitted to pursue the death penalty based upon an aggravator on which
23 a charge of felony murder is based. Moreover, the State has failed to satisfy the requirements of
24 SCR 250(4)(c) to state any facts on which it can prove the aggravating circumstance of first
25 degree kidnapping. Thus, an order striking the State's notice of intent to seek the death penalty
26 is warranted.

1 A. *The State is not Permitted to Pursue the Death Penalty Based Upon an*
2 *Aggravator on Which a Charge of Felony Murder is Based.*

3 In *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), the State alleged two murder
4 theories against the defendant — deliberate, premeditated murder and felony murder during the
5 perpetration of a burglary — and then sought the death penalty based upon the felony on which
6 the felony murder charge was based. Based upon the basic analytic framework provided in
7 *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (challenge to a death sentence on the basis that 1 sole
8 aggravating circumstance was identical to an element of capital murder) in the context of the
9 narrowing function required for capital punishment (*McConnell*, 102 P.3d at 620-625), the
10 Nevada Supreme Court deemed it "...impermissible under the United States and Nevada
11 Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon
12 which a felony murder is predicated" (120 Nev. 1043, 102 P.3d 606 at 624 (2004)).

13 The *McConnell* opinion reflected some concerns based upon multiple theories of
14 prosecution, advising prosecutors to use a special verdict form, allowing jurors to indicate
15 whether they find first degree murder based upon premeditation and deliberation, felony murder,
16 or both. In denying rehearing, the Supreme Court made it clear that if one or more jurors decide
17 to convict based only on a finding of felony murder, then prosecutors cannot use the underlying
18 felony as an aggravator in the penalty phase. *McConnell v. State (McConnell II)*, 121 Nev. 25,
19 30, 107 P.3d 1287, 1290-91 (2005). The Nevada Supreme Court recently decided that the
20 underlying felony could be used as an aggravator, when the defendant explicitly plead guilty on
21 both premeditation and deliberation, and felony murder. *Wilson v. State*, 127 Nev. Adv. Op. 68,
22 Oct. 27, 2011.

1 The recent affirming and expansion of *McConnell* in the *Wilson* decision makes it clear
2 that in TONI FRATTO's case, the State will have to prove that FRATTO killed Ms. Costanzo,
3 or knew or had reason to know that her life would be taken while engaged in the commission of
4 a first degree kidnapping, by competent evidence beyond a reasonable doubt. NRS 200.033(4)(a)
5 & (b). However, as above, this is only available to the State because it has intentionally failed
6 to charge a theory of felony murder against FRATTO.
7

8
9 ***B. The State has Failed to Satisfy the Requirement of SCR 250(4)(c) to State***
10 ***any Facts on Which it can Prove the Aggravating Circumstance of First***
11 ***Degree Kidnapping.***

12 Even granting that the State can proceed against FRATTO on the kidnapping aggravator
13 without violating *McConnell*, because it has not alleged a theory of felony murder, the State has
14 failed to establish any facts necessary to support its intention to seek the death penalty. The
15 death penalty is only an available sentence in cases in which a defendant is convicted of first
16 degree murder, and one or more aggravating circumstances (first degree kidnapping being one)
17 are found and are not outweighed by any mitigating circumstances. NRS 200.030(4)(a). Rule
18 250(4)(c) of the Supreme Court Rules, which governs the notice of intent to seek the death
19 penalty, states:

20 No later than 30 days after the filing of an information or indictment, the state must file
21 in the district court a notice of intent to seek the death penalty. The notice must allege all
22 aggravating circumstances which the state intends to prove and allege with specificity the
23 facts on which the state will rely to prove each aggravating circumstance.

24 In this case, the State's notice of intent to seek the death penalty based upon first degree
25 kidnapping as the aggravating circumstance identifies numerous witnesses and makes specific
26 references to portions of their testimony. The State characterizes that testimony as "...clear
27 evidence from which it can be inferred, beyond a reasonable doubt, that Micaela Costanzo was
28 killed during the perpetration of a first degree kidnapping of her persona and/or that the

1 Defendant, Toni Collette Fratto, knew or had reason to know that lethal force would be employed
2 during the perpetration of said kidnapping." Notice of Intent to Seek the Death Penalty at p. 19.
3 While the State outlines the testimony on which it bases its notice over sixteen pages of its notice,
4 there is no testimony that provides any specific facts on which the State can prove first degree
5 kidnapping.
6

7 First degree kidnapping occurs when one:

8 "...willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps
9 or carries away a person by any means whatsoever with the intent to hold or
0 detain, or who holds or detains, the person for ransom, or reward, or for the
1 purpose of committing sexual assault, extortion or robbery upon . or from the
2 person, or for the purpose of killing the person or inflicting substantial bodily
3 harm upon the person, or to exact from relatives, friends, or any other person any
4 money or valuable thing for the return or disposition of the kidnaped person, and
5 a person who leads, takes, entices, or carries away or detains any minor with the
6 intent to keep, imprison, or confine the minor from his or her parents, guardians,
7 or any other person having lawful custody of the minor, or with the intent to hold
8 the minor to unlawful service, or perpetrate upon the person of the minor any
9 unlawful act..."

0 NRS 200.310(1). At best, the salient facts, as put together by the State based upon the testimony
1 of the witnesses identified and cited by the State, are as follows:
2

3 1. Micaela Costanzo knew Kody Patten, and lived in the same apartment complex until
4 one year prior.

5 2. Micaela Costanzo did not return home from school on March 3, 2011, and her mother
6 began looking for her at 6:00 p.m.

7 3. Tyler Petersen observed Kody Patten drive up to the school in Wendi Murphy's car (not
8 Toni Fratto).

9 4. Tiffany Rasmussen left Michaela at 5:00 p.m. at the school.

0 5. When Wendi Murphy got the car back at 8:45 p.m., Toni Fratto was with Patten.

1 When she got the car the next day, there was picture wire in it.

2 6. School surveillance cameras saw Patten at the school at 5.15 p.m., (not Toni Fratto).

3 7. Kiaerra Murphy saw Kody Patten (alone) driving the car at 5:30 p.m.

4 8. Chief Supp discovered Micaela's body at a disturbed patch of dirt on March 6, 2011.

5 Subsequent investigation would fail to reveal any evidence of Toni Fratto's presence in the area.

6 9. The forensic examination of Micaela's body revealed plastic zip ties on one arm. No
7 wires similar to the picture wire were found binding her body.

8 10. A later DNA analysis of the knotted sleeves of Micaela's sweatshirt revealed the
9 presence of DNA of Kody Patten, or his male relatives. **No DNA was found from Toni Fratto.**

10 [11. The State omits from its recitation the statements made to police investigators by
11 Kody Patten, which statements and confessions fail to mention Toni Fratto as being present at the
12 killing.]

13 12. Kip Patten states that Toni Fratto told him, some 45 days later, that Kody Patten,
14 Micaela, and Fratto drove to the crime scene together. The alleged Fratto statement to Kip Patten
15 contains nothing of holding Micaela against her will, transporting or decoying her against her
16 will.

17 13. Toni Fratto's statements to Patten's attorneys indicated only that Patten and Micaela
18 were already in the truck, apparently voluntarily, and they picked Fratto up to travel to the crime
19 scene. Further, that Micaela voluntarily exited the vehicle on her own will.

20 All of the above are from the State's Recitation of the Factual Basis for seeking the death
21 penalty. Statements in bold are counsel's comments.

22 Based on the State's own version of the facts — even in the broadest reading in a light
23
24
25
26
27
28

1 most favorable to the State — there is *no* evidence or testimony that Micaela was "kidnaped" by
2 Toni Fratto, as defined by NRS 200.310(1). In fact, there is no evidence or testimony that
3 Micaela did anything other than go with Kody Patten, to the "gravel pits" to talk through whatever
4 was going on between them, and that once they got there, an argument escalated to a physical
5 altercation in which Micaela was killed.
6

7
8 The State's theory of first degree kidnapping requires the creations of a story about what
9 happened between the time when Kody and Micaela left the school to when Micaela died; which
10 story is with pure speculation, which is neither evidence nor fact, and is contrary to the only
11 evidence presented by the State that accounts for that time. Thus, the State has failed to *allege*
12 *with specificity the facts on which it will rely to prove the aggravating circumstance* of first
13 degree murder as required by SCR 250(4)(c). Indeed, under the "facts" set forth above, there can
14 be no kidnapping at all, much less a death penalty aggravator.
15

16 III. CONCLUSION

17
18 Based on the foregoing, Toni Collette Fratto requests that this Court strike the State's
19 Notice of Intent to Seek the Penalty of Death in this case, and enter a further order precluding the
20 State from proceeding under a theory of felony murder, as the case is now plead.
21

22 DATED this 7th day of December, 2011.
23
24
25

26 John Springgate
27 JOHN P. SPRINGGATE, ESQ.
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRC P 5(b), I hereby certify that I am an employee of THE LAW OFFICES
3 OF JOHN SPRINGGATE, and that on this date I personally served at Reno, Nevada, a true copy
4 of the within DEFENDANT'S MOTION TO STRIKE THE STATE OF NEVADA'S
5 NOTICE OF INTENT TO SEEK THE IMPOSITION OF THE PENALTY OF DEATH
6

7 fully addressed to:

8
9 Mark D. Torvinen, Esq.
10 Elko County District Attorney's Office
11 1515 7th Street
12 Elko, NV 89801

13 David B. Lockie
14 Lockie & Macfarlan, Ltd.
15 919 Idaho Street
16 Elko, NV 89801

17 _____ for mailing by first class mail, postage prepaid

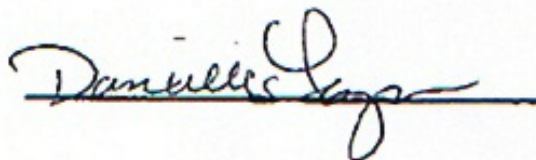
18 by personal delivery

19 _____ by telefax

20 AFFIRMATION PURSUANT TO NRS 239B.030

21 The undersigned does hereby affirm that the preceding document does not contain the
22 social security number of any person.

23 Dated this 12 day of December, 2011.

24
25 
26
27
28