

IN THE SUPREME COURT OF THE STATE OF NEVADA

Kody Cree Patten,
Appellant,

vs.

William “Bill” Gittere, Warden Ely
State Prison,
Respondent

Case No.: 82715

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Appellant’s Opening Brief

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Routing Statement: This case should be routed to the Nevada Supreme Court Based upon NRAP 17(b)(3).

NRAP Rule 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP Rule 26.1: NO ONE. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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On March, 3 2011, Michaela Costanza, an 18 year old well-liked Elko County high school student went missing after high school. AA I:183. A search was organized by family and friends. Michaela's dead body was found not long after the search began near the Union Pacific railroad tracks just outside of Wendover Nevada, in a shallow grave. Id. 234-235. Prior to her being found but after she was reported missing, rumors went through the community that Kody Patten, a former boyfriend of hers, was responsible. Id. 276-277; 287-288..

After discovery of her body in a shallow grave, local police with the assistance from outside agencies began to investigate the homicide. Suicide was never a possibility due to the circumstances of the body, lacerations to her neck and that were visible while she was being disinterred where the obvious signs of homicide, not suicide. Kody Patten was taken to a law enforcement office and questioned. Kody signed Miranda waivers, and initially denied involvement in the homicide, on March 7, 2011, he confessed after questioning, and being advised by his father to tell the truth. AA I:49-53, II:298.

Toni Fratto, was also suspected in the homicide. AA I:1-13. She interviewed with the law enforcement investigators and denied involvement. *Id.*

Approximately one month later, she volunteered to Kody's defense lawyers and admitted her involvement. David Lockie of Elko was appointed to represent her. AA I:179. She accepted a plea agreement and was sentenced for second degree murder with a deadly weapon. *Id.* Part of her agreement was to testify truthfully to the homicide.

After Ohlson interviewed Toni Fratto's father, Claude Fratto, Claude noted to police investigators on June 16, 2021:

I didn't like him at all. He was too much --- the impression I got was, okay, he took this case. He's going to get Kody off the death sentence, off the death part of it, and then go the next thing, make some other offer it was good . . . I didn't feel like he would represent Kody and investigate all avenues. AA I:159.

ARGUMENT

ISSUE 1: WHETHER DEFENSE COUNSEL WERE DEFICIENT IN THEIR PERFORMANCE AND IF SO, DID THAT DEFICIENCY PREJUDICE THE DEFENDANT, WHAT RELEVANT FACTS ARE NEEDED TO RESOLVE THE FALSE CONFESSION IN THIS CASE?

The dilemma this case has presented to defense counsel from its inception is not whether or not a homicide occurred. The dilemma in this case is whether the failure to investigate multiple false confessions resulted in an unjust result.

Law enforcement personnel interviewed Kody Patten on three consecutive days, on the third day Kody confessed murdering Michaela

Costanza, a lifelong friend of his. AA I:49-53. He gave details confirming the facts that only the someone who saw her before burial could have known. *Id., passim*. After Kody's homicide confession the case ran along relatively smoothly. Kody was then living in the Elko county jail and his two attorneys were preparing for trial. John Ohlson and Jeffrey Kump undertook the defense of the case and the case proceeded in the normal fashion for a little over a month.

Delays were of course required in the normal course of preparation for a preliminary hearing in an open murder case and during those delays an unexpected event occurred. Kody went to Lake's Crossing for a competency evaluation by District Court order on May 3, 2011, a report was completed on June 2, 2011. AA I:131. He was competent to stand trial. *Id.* Kody advised the evaluators his chances the charges could be changed because. "I was just there." *Id.*, AA I:135.

Slightly more than a month and before his Competency Evaluation but after his confession, Kody Patten's live-in girlfriend, Toni Fratto, came forward and told Kody's father Kip, that she was present when Michaela died. AA II:290.

After that fact was revealed, Kody's father eventually drove Tony Fratto to a meeting with Ohlson and Kump shortly after April 16, 2011. Id. Ohlson and Kump listened to her story and after she was finished, they realize she needed independent legal counsel, and David Lockie was appointed to represent her.

The revelation by Toni Fratto leads to a few logical conclusions, one was the original confession that was made by Kody Patten was false in material aspects.

Also, the original interview denying involvement or participation that Tony Fratto gave to the investigators was false.

At this point the defense lawyers had multiple confessions by two percipient witnesses to the homicide of Michaela Costanza. In addition, one obvious question must have arisen in defense counsel's mind: Why did Toni Fratto come forward and confess to homicide when everybody "knew all along" Kody Patten committed the crime, and his confession never involved Toni Fratto in its commission?

As this case continued to work its way toward trial, the prosecutor, District Attorney Mark Torvinen, made an offer to the defense attorneys agreeing to resolve the case without the death penalty, at least, for the first

defendant who would tell what happened causing the death of Michaela Costanza.

At first, Kody Patten appeared willing to give an accurate account of the events, but after providing a recorded proffer to the district attorney, Patton changed his mind and refused to make a deal. AA 91-111. There is no information in the record about why this deal was rejected.

Apparently, Toni Fratto accepted the deal offered by DA Torvinen and was granted the privilege pleading to a second-degree murder charge which carried a lesser sentence. *See* AA I-II, 178-343. She then gave another recorded confession that resulted in Kody Patten pleading guilty to first degree murder in exchange for the government's promise not to seek the death penalty in his case. *Id.*

The defendants were sentenced in due course, and Kody was given life in prison without the possibility of parole.

Since this post-conviction writ case is only concerned with the performance of Ohlson and Kump, only the facts, options and arguments available to them are relevant for any reviewing court's consideration, if the case is entitled to review at all. Because of the nature of the crime and the multiple confessions by Kody and Toni implicating --- or not --- themselves

and each other, the “doors” for both criminal detainees was never “cake or prison”: the doors were 1) death, 2) prison for their natural life, 3) or prison for a term of years. Kody eventually took door 2.

On one hand, a reviewing court may decide whether after reviewing the facts, options, and arguments available to Ohlson and Kump, their performance was consistent with the standards for effective assistance of counsel.

On the other hand, a reviewing court may ignore the performance issue if there was no prejudice to the defendant without regard to counsel’s performance. A failure of proof on either issue resolves ineffective assistance of counsel claims to nil.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not

become so burdensome to defense counsel that the entire criminal justice system suffers as a result.
Strickland v. Washington, 466 U.S. 668 (1984).

In short, the mere fact that Ohlson and Kump committed errors is only important when the errors worked prejudice to the defendant. If their performance did work prejudice, Kody must show the performance amounted to deficient performance.

This is a very high burden when the case involves a plea agreement. this is because a thorough plea canvas was completed by the court in this matter and the court found that the plea was entered knowingly, voluntarily and a full factual basis was provided by Kody at the plea hearing.

In many ways, this case is somewhat similar to the *Strickland* case quoted above. In *Strickland*, the defendant entered a plea to three homicides, and the alleged errors revolved around deficiencies during sentencing preparation: failures to investigate and call mitigating witnesses, and a tactical decision not to seek a presentence report from the state, among others.

The significant difference in this case is, at minimum the first confession to the homicide provided by Kody during the pre-sentence phases were false with respect to important material facts. After deceiving

the investigators about his lack of involvement, Kody lied in his initial confession by deceiving the investigating officers into believing he was the only participant in the murder, hiding his girlfriend, Toni Fratto's active participation in the homicide. Participation which she later confessed to Ohlson and Kump, DA Torvinen, her legal counsel David Lockie, and ultimately to the court.

In simple terms the proceedings to commitment were initiated by a false confession, a matter of significance due to the extensive work done by the well-known Innocence Project. That project has successfully freed hundreds of persons who were found to be innocent of criminal acts for which they were convicted and imprisoned.

A significant percentage of those innocent persons confessed to crimes they did not commit. A false confession of guilt runs counter to common sense: *No one would confess to a serious felony crime unless they had committed the crime*, on the other hand, one would be expected to lie about one's involvement to avoid prosecution.

This common sense conclusion was relied upon by the *Strickland* court when it determined that plea agreements were different because there was no trial; therefore the performance prong and prejudice prong of

defense counsel were not material if the deficiencies occurred before the plea.

When discussing the circuit court's analysis of the investigation issue, the Supreme Court noted the lower court's treatment of guilty-plea cases:

Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial. *Id.*, at 680.

Despite this statement about plea cases, the Supreme Court determined that the sentencing proceeding in *Strickland* was sufficiently trial like that their analysis applied to the sentencing proceeding.¹ No other statement was made regarding the scope of the duty to investigate that should occur in a guilty plea case. Conceivably, at least under *Strickland*, the only duty that kicks in once a plea has been entered is an investigation regarding sentencing factors: mitigation and aggravation.

¹ that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial. *Id.*, 687.

The underpinnings of this then new *Strickland* standard of judging counsel's performance was grounded in the Sixth Amendment to the federal constitution:

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.
Id., at 685.

In this case, counsel argues that even though this was a plea, the goal of plea proceedings remains the same, a just result.

This can be seen in the jurisprudence in Nevada that focuses the analysis in a post-conviction writ case on a fundamental miscarriage of justice, in other words, actual innocence not legal innocence:

In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; see *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). Actual innocence means that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.
Brown v. McDaniel, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014).

The District Court here denied Kody's Post-Conviction Petition summarily, without granting an evidentiary hearing. The principal reasoning was simply the absence of prejudice because Kody Patten confessed to first degree murder. The court concluded the confession precludes any performance error, because he confessed; in the same vein, there was no prejudice, because he confessed. This circularity in reasoning is not uncommon, it is normal in plea appeals. Almost all plea cases a waiver of silence at the plea hearing and a judicial confession, and that confession ripens into the reason for denying post-conviction relief. In *Strickland*, the court was aware that Strickland's counsel gave evidence of a feeling of hopelessness due to the many confessions by his client, that he did not perform some investigations for sentencing as a tactical matter. The Supreme Court analyzed the facts of his performance and prejudice concerns and found that the evidence when compared to their newly decided standard did not rise to the level of significant deficiencies or prejudice.

Because we have no evidence from either Ohlson or Kump in the record of their investigation or options or decisions, we cannot know if either deficiency occurred or prejudice happened.

The District Court here denied Kody's Post-Conviction Petition summarily, without granting an evidentiary hearing. The principal reasoning was simply the absence of prejudice because Kody Patten confessed to first degree murder. The court concluded the confession precludes any performance error, because he confessed; similarly there was no prejudice, because he confessed. This circularity in reasoning is not uncommon, it is normal in plea appeals. Almost every plea involves a confession, and the confession is the reason for denying post-conviction evidentiary hearing.

But, we know that both counsel were lied to by Kody from the start of the representation. We do not know if, or when the lying stopped. We believe that lawyers who are bound by professional ethics to maintain client confidences are not obligated to reveal those confidences unless a waiver occurs, as in a post-conviction writ. Therefore, neither counsel has revealed any client confidences.

We have been advised that Toni Fratto made jail statements exonerating Kody from participation in the murder. We do not know whether that evidence was investigated for either sentencing mitigation or guilt purposes.

We do know that all counsel interviewed Toni Fratto, someone who was, or would be, clearly in conflict with Kody Patten once she confessed her presence at the homicide. Joint homicide perpetrators often point fingers at each other to lessen their own guilt, whether effective or not. We argue that once learning of Toni Fratto's presence at the homicide, any conversations with her should have stopped to prevent a conflict. They apparently did not since the recorded conversation continued. However, we cannot find out why it was not stopped because no evidentiary hearing has been granted in this matter.²

During a portion of the time after Toni Fratto's incarceration, this case was still a death penalty case, whether during that phase of the representation actions were taken to determine the truth behind Fratto's admissions are unknown. Whether that investigation should have been undertaken is clear based on Federal case law that was not disapproved of by the Supreme Court in *Strickland v. Washington*.

² Relying upon the decision of the former fifth circuit in [*Beavers v. Balkcom*, 636 F.2d 114, 116 \(5th Cir.1981\)](#), the court held that defense counsel in a capital case has a duty to investigate mitigating evidence irrespective of whether counsel's strategy at trial would require the use of such evidence.

Washington v. Strickland, 693 F.2d 1243, 1249 (11th Circuit Court,1982).

Even Strickland's attorney was able to give evidence under oath that bore on his competence at sentencing; we argue that Patten's attorneys should be granted the same opportunity.³

It is true that The Supreme Court in *Strickland* did not require evidentiary hearings in every case; it is also true that attempting to demonstrate "manifest injustice" in a plea case has been described as a Herculean effort, but neither observation means that this case is not appropriate for an evidentiary hearing to examine performance and prejudice. Here's why.

If, for example, the Fratto admissions are sufficient to indicate that Toni was the actual killer, and Kody, instead of aiding and abetting, stood by stunned until Michaela was dead, would that material difference in the facts of the case matter? If not, then potentially no evidentiary hearing would be required.

³ Mr. Tunkey was Strickland's trial and plea counsel, he was widely recognized as a fine defense lawyer, he did not represent Strickland at the post-conviction proceeding but did give evidence at a federal district court hearing, not in the Florida court because there, as here, no evidentiary hearing was provided in state court.

But that set of facts just posited does not, without much more, support aiding and abetting, conspiracy, principal liability, or even felony murder. The law reads:

NRS 195.020 Principals. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.

Counsel is not “supposing” that Kody was committed to taking the blame, (AA II:289) Kody demonstrated his desire to take full responsibility for the homicide in this case by telling lies to investigators about Toni’s absence from the scene. Toni was in agreement with Kody’s deception tactics by telling similar lies to investigators about her ignorance of the murder. *Id.*

These two serial deceivers may have planned their approach to accusation within a short time after the homicide. Kody was on track to enter the Marine Corps upon graduation from high school which he

expected to achieve in a couple months. The decision to murder Michaela Costanza was not consistent with the plan to serve his country and made no sense under the circumstances. His desire to take the blame is completely consistent with a young man's desire to protect his lover whatever the result or injury to him. However, none of this was explored from a review of the record below and once his change of plea was complete, her admissions were apparently never investigated by anyone, based upon an absence in the record. After review of the exoneration statistics from the University of Michigan in the publication EXONERATIONS IN THE UNITED STATES, 1989-2012, available at www.exonerations.org, such false confessions are not terribly unusual but we have little way to measure the real scope of the problem systemwide.⁴

⁴ About one-fourth of the exonerees who confessed in police interrogations later pled guilty in court (35/135), compared to 5% of exonerees who did not confess (36/738). The rest recanted their false confessions and went to trial. Overall, 8% of exonerees in our data were convicted by guilty pleas (71/873), a higher rate than in the 2003 Report – 6% (20/340) – but startlingly few for a system in which 95% of felony convictions are the products of guilty pleas.

This does not mean that innocent defendants hardly ever plead guilty. Very likely, the great majority of those innocent criminal defendants who are convicted do plead guilty – but they are rarely exonerated. Defendants who plead guilty have an exceptionally hard time convincing anybody of their innocence or even getting a hearing. Even more important, they almost always get much lighter sentences than defendants who go to trial – that's *why* they plead guilty – so neither they nor anybody else has much of an incentive to pursue exoneration. Consider this case:

In April 2004, after four hours of aggressive interrogation without his parents or a lawyer, 12-year-old Jonathan Adams admitted that he killed nine-year-old Amy Yates in Carrollton,

In this case, on the record, no false confession investigation was conducted and no defense was asserted. This is puzzling where we have clear evidence in the record that both suspects deceived law enforcement throughout their investigation. After all that deception, either both of Kody's counsel and the plea court assumed the deception had stopped, or did not care whether it had stopped or not. The extent of the false confessions by both Kody and Toni may be significant, or insignificant to a just cause. Without at least some evidence, a just cause may be out of reach in this case.

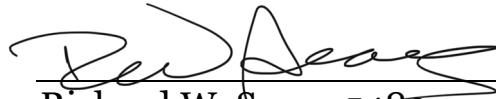
Georgia. About a year later, he pled guilty in juvenile court and was sentenced to 12 months in a residential psychiatric treatment facility. Six months later, a mentally-challenged 18-year-old confessed to killing the girl, saying he wanted to make the truth known as part of a spiritual transformation. Two months later, Adams was released.

If the actual killer had not voluntarily come forward, Adams would never have been exonerated. Chances are that nobody would even have tried to prove his innocence. We know of 28 exonerated defendants who confessed, pled guilty and received long prison sentences ranging from 10 years to life, but only six (including Adams) who were sentenced to less than 10 years. It may well be that most innocent defendants who plead guilty, like Adams, get comparatively light sentences, and try to put the whole episode behind them as rapidly as possible. It makes sense: confessions are extremely hard to overcome in court, and the penalty for going to trial and losing may be huge, up to and including the defendant's life.⁸⁵ But we don't know. By trial or by plea, with or without a confession, the only false convictions we know about are those few that end in exoneration.

Exonerations in the U.S., 1989-2012 6/22/2012, pp.60-61

CONCLUSION

For the foregoing reasons, counsel seeks this court's order instructing the district court to conduct an evidentiary hearing.



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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. The brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7). This brief is typeset using font Georgia, 14 point, and contains 3619 words.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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