

types and otherwise require[d] at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson*, supra, 70 Cal.2d 15, 27.)

"The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. (*People v. Anderson*, supra, 70 Cal.2d at p. 27.) (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) "Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. (*People v. Daniels* (1991) 52 Cal.3d 815, 869-870 . . .)" (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) "The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez*, supra, 2 Cal.4th at p. 1125.)

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This case is a textbook example of what happens in a prosecution where the victim suffered greatly, because either the killer did not know how to kill, or the killer had a motive to make the victim suffer. It is interesting that Toni's diaries point to a substantial motive to kill both Michaela and Kody. If Toni was jealous of Michaela, she was certainly also jealous of Kody, who was not sufficiently reassuring her of his love and affection. The ultimate result of her motivations would have been a total success: Michaela is dead, and Kody is in prison for the balance of his life while she gets out after a time.

The defense in this case should have explored Toni's hatred, motive, and plan to destroy both Michaela and Kody using the arguments clearly arising from a thorough understanding of the murder that they were presented with: the jealous murder of a female rival. This theory of the case is the only one that fits all the facts presented by the investigation that was, in fact, performed. Unfortunately, this defense was never presented either to Kody or to a jury.

The Nevada Revised Statutes provide that first-degree murder is: "willful, deliberate and premeditated killing." As in the California codes, the repetition of the words "willful, deliberate and premeditated" must have some meaning, or the words are mere surplus verbage when only one of the three words is actually required. "Willful" acts clearly connote acts that are voluntary rather than those acts called accidental or unintentional. "Deliberate" clearly connotes intention, along with the idea that some thought process precedes the act. "Premeditated" has broadened the concept of deliberation in Nevada to include a rapid string of thoughts that need not precede by much time the violent act that ends the life of a human being. Arguably, the result of the Nevada analysis has been to blur the analysis for jurors, rather than to sharpen the instruction in a juror's mind. The *Anderson* factors noted above guide a reviewing court to engage in a consideration of whether or not the killer engaged in "reflection" and the "weighing of considerations before the violent, killing act."

California courts have struggled with the *Anderson* factors; courts have found them helpful in some case reviews, and departed from the factors in other case reviews. The fact that cannot be denied is that, while the factors may not be good jury instructions, the factors do provide review guidance for practitioners and judges who must sort through the various factual permutations that occur in murder cases when trying to narrow down the classes of murders between the "worst" and the "worst of the worst" who deserve death or life without parole.

II. THE PLEA IN THIS CASE WAS ENTERED WITHOUT KODY'S FULL KNOWLEDGE OF THE MEANING OF FIRST DEGREE MURDER AS ANNOUNCED BY THE NEVADA SUPREME COURT.

A. Kody made a proffer of evidence in exchange for a plea deal without full knowledge of the consequences of withdrawal from the plea bargain.

The problem here began in January 2012. Kump and Kody meet with Elko District Attorney Mark Torvinen as part of a proffer agreement. The proffer was recorded.

Toni Fratto later described herself as the principal actor in the killing in her talks with Linda Fields.

During the interview, at some point prior to 3:05, John Ohlson arrived. John paused the interview and took Kody out, with Jeff Kump, co-counsel, where they counseled Kody. Upon return to the meeting, John Ohlson put on the record his advice to Kody of the potential consequences of a trial - whereupon Kody withdrew from the agreement and negotiations ceased! Kody decided, inexplicably, that he could not put the blame on his girlfriend, Toni Fratto.

Allowing Kody to make a proffer of evidence without knowing whether or not Kody was committed to the plea agreement was a mistake. Kody should have been thoroughly counseled of the consequences of a proffer. One risk from a proffer is the DA will withdraw from the deal after hearing the proffer. But that is not what happened here. Kody withdrew from the agreement.

The damage this proffer and subsequent withdrawal was manifest: The government learned information it could not otherwise have obtained. The information would be used to double check their physical evidence and make arguments to counter Kody's expected testimony if he takes the stand at his own trial. It gives the government the opportunity to claim Kody had another story - potentially a fourth version of events - and destroy Kody's credibility before a jury. This proffer foreclosed Kody taking the stand. Therefore at a trial, Toni Fratto's testimony becomes unrebutted by an alternate account of the facts.

It is significant that Kody withdrew from the negotiations because he could not implicate his girlfriend. Kody clearly did not understand the consequences of failing to proceed with this deal. Kody's proffer informed the prosecution of what defenses he would

present at trial, which was a clear disadvantage to Kody's defense, with no benefit in return once the deal was withdrawn.

From March 7th, this case was based on the confession of Kody Patten. There were no living witnesses to the incident and the investigation stopped when Kody confessed.

III. FAILURE TO INVESTIGATE AND REPLICATE THE INJURIES ON THE VICTIM RESULTED IN A DECISION TO PLEAD GUILTY ON INSUFFICIENT FACTS.

Failure to replicate the alleged criminal acts to determine whether the physical injuries were consistent with blows from a 6'6" tall young man who was in excellent physical condition, or blows from a 5' tall female who lacked the physical strength to deliver a killing blow with the equipment used to commit the murder prevented a reasoned conclusion of who committed each act resulting in Michaela's death.

A competent crime scene investigator would have been able to recreate the circumstances of the criminal act with the tools that were known to have been used in the killing. This sequencing and recreation of the crime was never performed. If performed, such an investigation would have pointed to the obvious facts that Kody could have killed Michaela, without help, with a single blow from the entrenching tool used to dig the grave. Every soldier, including Marines, is trained to use an entrenching tool as a weapon in hand to hand combat. The confessions offered by both Kody and Toni point to a slow death with multiple injuries incapable of causing death. This account does not mesh with Kody's physical skills. He was 6'6" tall, a strong young man, if Kody was the killer, his inability to quickly kill Michaela with an entrenching tool, does not mesh with a first degree murder theory. If they deliberated and planned to kill her, and brought along an entrenching tool to perform the task, Michaela should have been killed almost instantly at the hands of Kody Patten.

It was vital to explore the mechanism of the murder to prepare for trial.

Unfortunately, no proper crime scene investigation was every completed. No explanation was ever offered as to why Michaela suffered so many nonfatal injuries. For example, Why was she stripped? Repeated blows from the entrenching tool would have surely and swiftly ended her life. A blow from the edge would have decapitated her. Instead, the accounts from both Kody and Toni indicate she lingered for a long time until she finally suffered and died.

A. Failure to properly prepare a psychological evaluation to determine Kody's rationale in continuing to accept full blame for the Murder when Toni was a significant participant, or prime mover, in the crime.

The record discloses no psychological workup of Kody to explain why Kody would have failed to explain that Toni Fratto participated in the murder after his confession and arrest. Toni's secret was held back by Kody all the way through plea and sentencing when he took the blame for first degree murder.

Kody continued to lie to police about Tony Fratto's participation in the murder for months while he sat in jail during pretrial preparations.

The fact of Toni's dislike for Michaela became clear when her diaries disclosed her intense dislike and jealousy of Kody's ex-girlfriend, Michaela. When her dislike is considered together with the physical circumstances of Michaela's body, the motive and awkward criminal agency suddenly begin to make sense.

The crime scene and position of Michaela's body raise multiple questions: Why was she naked from the waist up exposing her breasts, while the rest of her body remained clothed? Why did she have a cut across her chin? Why was there no injury evidence supporting wrist restraints? Why did it take so many blows to kill her, when a military entrenching tool was used in the killing, and that tool could have easily killed Michaela with a single blow from an adult male? Rather than conduct a thorough investigation to answer

these questions, the defense team struggled with multiple accounts of how the murder occurred.

This could be explained, in part, because for the first thirty days, everyone believed Kody killed Michaela. However, once Toni Frattos' involvement became clear, a complete understanding of the mechanics of the criminal acts could have revealed what happened during the murder and who performed the killing acts.

A thorough workup of Kody's personality and intelligence may have revealed why he continued to take the blame, even in the face of life imprisonment or the death penalty.

B. Kody's plea and Nevada law virtually removed any balancing by the sentencing court in assessing the propriety of the sentencing options.

There is no question that either Kody or Toni delivered violent blows to Michaela. The body was hidden and they were both untruthful when Law Enforcement Officer's (LEO's) questioned them about the crime. As a former boyfriend and schoolmate of Michaela, Kody quickly bubbled to the top of the suspect list when Michaela failed to come home on the day of the incident.

Once Kody confessed to LEOs, the investigation stopped, understandably. LEO's had their killer and there was no need to explore further. Kody "did the right thing", as he had been told by his father and the LEOs in the room with him, and took responsibility for his actions.

By the time Toni confessed to her participation, the theory of mechanical causation was thoroughly in everyone's mind. Kody's initial confession and the mystery behind Toni's late confession firmly implanted in everyone's mind that Kody was the perpetrator in this crime and Toni was just along for the ride.

The defense had a duty to discover what really happened and to dispel any false impression the events left in the mind of law enforcement and the courts. Because this was not done, the court's role was sidetracked, and the plea agreement reached reinforced the initial faulty conclusion about how this murder took place.

The role of the Court in sentencing was to ensure proportionality, to the extent possible, to the perpetrator of this crime. The contrast between the sentencing of the two is dramatic: Kody was the cold-blooded killer who would never see the outside of a prison. Toni was a killer but her penalty was not, in any sense of the word, similar to Kody Patten's penalty. Toni will get out.

There is an inherent difference between Second Degree murder and First Degree murder: 2nd degree requires an intent to kill and malice express or implied, but premeditation and deliberation are missing. 1st degree requires those elements because those elements justify the ultimate penalty: the government will kill those persons who performed premeditation and deliberation prior to the murder. The resulting penalties are also very different: one has a sentence of years, the other encompasses both life and death.

Where Nevada has arguably gone astray is by blurring the meaning of the words premeditation and deliberation. The assertion that premeditation can occur as quickly as "successive thoughts of the mind" is incompatible with the definition of premeditation and deliberation. Merriam Webster defines premeditation as:

an act or instance of *premeditating*; *specifically* : consideration or planning of an act beforehand that shows intent to commit that act

The Nevada Supreme Court defines willfulness as "the intent to kill," deliberation as "the process of determining upon a course of action to kill as a result of thought," and premeditation as "having the determination to kill, distinctly formed in the mind by the time of the killing." Byford, 116 Nev. at 236-37, 994 P.2d at 714. Premeditation "may be as instantaneous as successive

thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated." *Id.* at 237, 994 P.2d at 714. Circumstantial evidence can establish premeditation and deliberation. *Leonard v. State*, 117 Nev. 53, 75, 17 P.3d 397, 411 (2001).

Dumas v. State (Nev. App., 2018)

To clarify first-degree murder law and to set forth the distinct meanings of willful, deliberate and premeditated, the Nevada Supreme Court in *Byford* instructed the district courts as follows:

Accordingly, we set forth the following instructions for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing.

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements—willfulness, deliberation, and premeditation—must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.⁴

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent

to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. **A cold, calculated judgment and decision** may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

In this case, two minors were accused of participating in exactly the same murder. Toni's dislike of Michaela and jealousy of Michaela and Kody's potential relationship with Michaela support either murder in the Second Degree or First Degree. But Kody had only one rationale for being involved in his confession and plea: a desire to support and protect his current girl friend and future wife. Kody had no intense emotional motivation for murder. Kody was not jealous of Toni and Michaela's relationship.

The statement by Kody's defense counsel at sentencing that he could not give the Court a reason for this murder *tee'd* Kody up for life without parole, especially in the light of the *Byford* instructions. The sentencing judge told Kody he was a cold-blooded murderer, and this statement by the court virtually insured a sentence of life without parole. The Court knew the elements of premeditated murder. The Information and Plea meant to the Court that Kody committed a planned, deliberate murder as set forth in *Byford*. *Byford* teaches the murder had to be cold, calculated judgment by Kody to qualify for first-degree murder. By failing to provide the Court with the obvious reasons for the premeditated murder of a 16-year-old girl, and failing to demonstrate to the Court Kody's dilemma under the circumstances, the Court had no choice but to conclude this premeditated murder was absolutely cold blooded in the most severe way. However, the only person who had a reason

to murder was Toni! Because of the elements of the plea, Kody admitted to a cold-blooded killing, but the calculation that was behind the murder was relevant to the sentence.

Counsel for Kody was ineffective in failing to present to the Court the dilemma that Kody faced at the crime scene. Did he support his girlfriend in her act of murder? Did he help her commit the murder? Did he allow her to command him to commit the murder? Did she convince him that murder was the only way for Kody to prove that he loved her? None of these scenarios was explored by a qualified psychologist or presented to the Court as factors to consider the lesser penalty. In the light of the legally compelled conclusion that a 1st degree murderer was a cold, calculating killer, no facts and no argument would make any difference to a sentencing judge. Whoever stands before a judge after such a plea is a cold-blooded killer. Cold-blooded killers are entitled to life without parole, no matter their age.

The problem created for the defense is whether any argument can result in a balancing of characteristics and factors that will result in a sentence less than life without parole. Nevada's Supreme Court has never thoroughly considered the multiple rationales that accompany murder, including inexperience; there are no opinions resembling the analysis conducted in *Anderson, infra*. When Nevada's juries, and judges, are confronted with a killing that involves multiple violent acts and substantial victim suffering, they sentence based upon emotion alone that arises from a slow painful death.

In this case, facing the Court was an 18-year-old, still in high school because of his failure to progress in academic endeavors at the time of the crime, a minor who did not make good judgments about doing his homework, much less demonstrate good judgment about a cold, calculated murder decision. Combined with Kody's poor judgment was an emotional component that an 18-year-old was incapable of dealing with in the same manner as a mature adult. Kody was living with an 18-year-old girl, out of wedlock, in her parents' home, who

was probably looking forward to marrying him to justify their illicit relationship, who was jealous of his ex-girlfriend. This is not to say Kody had no options.

Kody had clear options: a) blame his girlfriend, b) run from the crime scene when he saw what Toni was doing; c) call the police; d) immediately report the crime upon leaving the scene; e) refuse to help arrange a fight. Kody, not unexpectedly, did everything wrong. He failed to protect or defend Michaela and he failed to protect or defend himself.

Without understanding the effect of *Byford's* teaching on guilty pleas to First Degree murder, and planning on ways to blunt the obvious conclusion by the Court that a First Degree murderer is a cold calculating killer, every person who pleads guilty to a First Degree murder should be sentenced to a life without parole.

Even considering that the *Byford* instruction using the words "cold" and "calculating" may be an example of hyperbole, the *Byford* case leaves a sentencing judge with no choice but to name the First Degree murderer as a cold, calculating killer: they are cold, calculating killers in Nevada as a matter of law.

With that knowledge, counsel had two options: be thoroughly prepared at sentencing in order to blunt, to the extent possible, the only logical conclusion a Court can draw from Nevada law: i.e., this criminal defendant is not a cold-blooded killer: or, ensure the defendant understands in advance he is getting life without parole.

Defense counsel thus has a substantial dilemma. No one wants to do a multi-week jury trial and deal with the kinds of facts present in this case. The murder was clumsily performed, the victim suffered needlessly if the plan from the beginning was to kill her, and any jury would be reluctant to return home after delivering a decision of anything less than First Degree murder and death to Kody Patten. Once the First Degree murder verdict is made, the result is foregone. Kody is a cold, calculating killer with no reason for the killing.

The pressure to settle was enormous because the result is so predictable: a death penalty in a rural community after a jury trial.

Mark Torvinen described the murder at the sentencing as the most horrific murder the Court had ever seen. There are lots of reasons this killing could be described as horrific: the age of the victim; the suffering the victim endured before death; the multiple injuries inflicted on her that did not result in death - all factors that point to a killer who did not know what she was doing (or an angry woman who wanted to inflict pain and shame on the victim).⁴ Unfortunately, the statement by Kody's counsel that there was no apparent reason for the killing is eerily similar to an aggravating factor justifying the death penalty. The only difference was the randomness factor.

In the light of the foregoing facts, defense counsel had a duty to fully inform Kody in advance of his plea the conclusion that would be drawn by the court at sentencing. Kody's sentence, given the state of Nevada law after *Byford*, would be life without parole for a cold-blooded killer. Kody needed to understand that no judge, sitting before a cold-blooded killer, would allow the person ever to be released from the confines of a prison.

Kody was advised by his counsel that he had a chance of receiving a sentence that allowed for release from prison. Kody clung to that hope when agreeing to enter into a plea agreement. If Kody had been advised he was admitting to being a cold, calculating killer by entering into his plea, he would have never plead guilty and would have, instead, put the government to its burden of proof. Even if Kody lost, the only practical difference in Nevada between life without parole and the death penalty is the location of one's bed in prison. Kody

⁴ NRS 200.033(9), lists factors aggravating first degree murder qualifying a perpetrator for the death penalty is: The murder was committed upon one or more persons ... without apparent motive.

should have been fully advised of this fact prior to plea, but he never knew. Kody was shocked when he received life in prison without parole: he described it as having a knife pushed into his body, and then having the knife broken off inside of him.

This is precisely the scheme SCOTUS was concerned about when considering cruel and unusual punishment appeals.

Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U.S. 48, ----, ----, 130 S.Ct. 2011, 2026–2027, 2029–2030, 176 L.Ed.2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties.

Miller v. Alabama, *Graham v. Florida*, and *Roper v. Simmons*,⁵ require an individualized sentencing for defendants facing the most serious penalties.

Roper established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S., at 569, 125 S.Ct. 1183. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569–570, 125 S.Ct. 1183. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573, 125 S.Ct.

⁵ Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *Roper*, at 554.

1183. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569, 125 S.Ct. 1183. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra*, at 835, 108 S.Ct. 2687 (plurality opinion).

Graham v. Florida, 176 L.Ed. 2d 825, 130 S. Ct. 2011, 560 U.S. 48 (2010).

While Kody was not a juvenile at the time of the crime, he was also not fully an adult, he was still a minor. He was two months' into the no man's land between being a juvenile (18) and adult (21) with full privileges of citizenship. Kody was entitled to a sentencing proceeding that considered salient characteristics that accompany persons who are not fully matured. Kody admits that his sentencing counsel was trying - under difficult circumstances with an angry audience - to argue for parole at the end of a lengthy term of years. Under the circumstances of this case and the pronouncements of Nevada law, he arguably had no chance of any sentence less than life without parole. There could be no balancing of Kody's characteristics in light of the fact the Court found him to be a cold blooded killer, as described in *Byford's* instructions.

No consideration of the salient characteristics of youth were going to be considered under the circumstances of this case.⁶ The killing was clumsily performed, resulting in multiple injuries; the victim was beautiful and clearly exposed and shamed during the course of the murder; the defense advised the killing was for no reason the defense understood. When these factors are considered along with the determination mandatory by the *Byford* instruction, Kody was going to prison for life without parole.

Judge Papez advised Kody: "You (have) tried to minimize your involvement in Michaela's murder. I don't believe you. You were the primary perpetrator of the murder."

"Your acts of planning this murder, carrying out this murder in such a vicious

⁶ It is true that Judge Papez "tipped his hat" to the characteristics but there was no serious consideration or analysis of any characteristics listed by SCOTUS.

manner and attempting to cover up this murder, are hardly the acts of an impulsive, irrational, immature teenage mind. You always had the power and the ability, Mr. Patten, to stop the wheels of this murder that you put into motion. You chose not to. Your blood runs cold."

The sentencing judge completely disregarded the salient characteristics of youth, all youth, in determining the appropriate sentence: characteristics pointed out by SCOTUS. Part of the concern of SCOTUS with juvenile offender sentencing is the very conclusions that Judge Papez reached: Kody had the power and ability to stop the wheels of murder and failed to do so. Kody's blood ran cold. But one of the characteristics of youth, *all youth*, is they get themselves into situations they have no judgment or ability to get themselves out of.

If, in fact, Michaela was being repeatedly struck by Toni in the process of a fist fight, logically she would fall down and hit her head, and convulsions could naturally follow a head injury. Kody believed Michaela's convulsion were evidence of dying, not a recoverable medical incident. Under those circumstances, a juvenile would believe it is proper to end Michaela's suffering.⁷ But given the legal consequences of a First Degree murder plea arising out of the *Byford* instructions, Kody was conclusively a cold, calculating killer and was entitled to no consideration of salient characteristics of youth. Nevada's legal description of a First Degree murderer creates a sentencing scheme that forecloses juvenile balancing.

The problem that arises with *Byford's* instruction, it excludes juvenile and minor offenders who have plead guilty to First Degree murder to be cold and calculating, such murderers are excluded from life with parole offenders because they are by necessity of law, cold and calculating. Such killers deserve, as Judge Papez sentenced, to never see freedom.

⁷ Assuming for argument's sake that some of the common elements of the several descriptions of the incident given by the defendants were true; these facts appear across the accounts. The variations involve the perpetrator and the specifics of the criminal agency causing Michaela's death.

TONI FRATTO'S JAILHOUSE CONFESSION IS NEW EVIDENCE THAT CASTS DOUBT UPON WHETHER KODY'S PLEA WAS NOT A MISCARRIAGE OF JUSTICE DUE TO ACTUAL INNOCENCE.

Toni Fratto's claim that she performed the murder while Kody just stood around is substantial evidence that Kody was not guilty of first-degree murder. During the proffer to the District Attorney, Kody stated that he was only facilitating the two young girls' settling their differences. This supports the Fratto claim to Linda Fields. Those two statements bely any claim that Kody kidnapped Michaela to the place of the crime or that Kody assisted Toni in her criminal deed of murder.

A colorable showing of actual innocence may overcome the procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). However, Matthews has not made a colorable showing of actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (emphasis added) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).
Matthews v. State (Nev. App., 2015)

Because this case involved a unique murder pattern, where one of the participants remained hidden for months, the actual roles played by each is very important. If Kody had no motive, and Toni did, a jury may well regard the absence of motive, along with the jailhouse confession of Toni Fratto, as substantial evidence creating reasonable doubt as to Kody's involvement in this crime.

KODY'S SENTENCE WAS DISPROPORTIONATE TO THE SENTENCE IMPOSED ON TONI FRATTO FOR THE IDENTICAL CRIME.

Toni Fratto and Kody Patten plead to the identical criminal incident. The distinguishing factor in the two cases was Toni's willingness to testify against Kody at trial. No trial was ever conducted. Yet Toni received the benefit of future parole consideration, a penalty absolutely denied to Kody.

While the unique characteristics of children must be considered differently than adults for the purposes of sentencing, the Eighth Amendment does not prohibit a sentence of life with the possibility of parole for juveniles. See *Graham v. Florida*, 560 U.S. ----, ----, 130 S.Ct. 2011, 2030 (2010) (holding that "[T]he Eighth Amendment does not foreclose the possibility that persons convicted of ... crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society"). Moreover, while Cruz' sentences are severe, they are not "so unreasonably disproportionate to the offense as to shock the conscience," even considering his youth and his role in the offense. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

Cruz v. State, 381 P.3d 605(Table) (Nev., 2012).

The United States Supreme Court has addressed the issue of juveniles and death sentences and life without parole sentences in the recent past. A good review of the issues is provided by Justice Sotomayor in the *Campbell* decision (a denial of certiorari):

Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility, and the fact that Ohio has set up a scheme under which those determinations "cannot be reviewed" is deeply concerning. Life without parole "is the second-most severe penalty permitted by law." *Harmelin v. Michigan*, 501 U.S. 957 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment). In recent years this Court has recognized that, although death is different, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida*, 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). "Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller v. Alabama*, 567 U.S. 460, 474-475, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (quoting *Graham*, 560 U.S., at 69, 130 S.Ct. 2011). A life-without-parole sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Id.*, at 70, 130 S.Ct. 2011 (internal quotation marks and bracket omitted).

Campbell v. Ohio, 138 S.Ct. 1059(Mem), 200 L.Ed.2d 502(Mem) (2018).

It is true, but facile, that Kody was not 18 at the time of the commission of the crime in this case. But there is no magic line that occurs between 18 years and 18 years plus a couple months that justifies the difference between "life with" and "life without." While SCOTUS has not rejected a sentence of death in prison for juveniles, the issue remains open depending upon the makeup of SCOTUS and changing sentencing patterns throughout the states. Nevada's sentencing scheme does not violate the ills found in other state sentencing schemes respecting juveniles: Nevada's scheme provides for balancing mitigating circumstances against aggravating circumstances.

However, because even defense counsel in this case emphasized an aggravating factor: murder without apparent reason, the sentence ultimately imposed was inadvertently skewed to life without parole.

FOR ALL THE REASONS STATED ABOVE, ALONG WITH THE EVOLVING KNOWLEDGE BASE ABOUT YOUTHFUL OFFENDERS, KODY SHOULD BE ALLOWED TO WITHDRAW HIS PLEA AND SEEK JUSTICE BEFORE AN ELKO COUNTY JURY.

It was clear from the beginning of the case that the State intended to seek the harshest punishment available against Patten, filing a notice of intent to seek the death penalty almost immediately. Defense counsel were ineffective for failing to argue that the sentence was disproportionate to the crime, given Kody's youth and other factors. Counsel's decisions were unreasonable - particularly where the evidence of mitigation was so compelling.

Patten also alleges his trial counsel were ineffective for failing to argue to the trial court that a sentence of life without the possibility of parole violated the Eighth Amendments of the Constitution of the United States and Article I, Section 6 of the Nevada Constitution, where the punishment was grossly disproportionate to the crime, particularly when the sentence failed to take into full account Patten's youth and all the implications of that youth. To make matters worse, counsel failed to point out the jealousy motivation as the reason for Toni's participation, at any level, in the crime.

In sum, defense counsel mounted no adequate defense to spare the life of an eighteen-year-old defendant. Patten's sentence cannot withstand scrutiny under *Graham* and *Miller*.

The *Graham* Court reviewed its capital proportionality analysis precedent and applied it to non-homicide juvenile offenses in determining that life without parole sentences violate the Eighth and Fourteenth Amendments. 130 S.Ct. 2011, citing *Harmelin v. Michigan*, 501 U.S. 957; *Roper v. Simmons*, 543 U.S. 551; *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); and *Atkins v.*

Virginia, 536 U.S. 304 (2002). In particular, the Court looked to, and rejected, the penological justifications for life without parole sentences for juvenile offenders. The Court rejected **retribution**, because “the case for retribution is not as strong with a minor as with an adult.” *Graham*, 130 S.Ct. at 2028. SCOTUS said **deterrence** cannot justify the severe sentence, because “the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence.” *Id.* (quoting *Roper*, 543 U.S. at 571). SCOTUS said **incapacitation** also lacked justification for a life without parole sentence. “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 2029 (quoting *Roper*, 543 U.S. at 573). Finally, SCOTUS said the sentencing goal of **rehabilitation** is not served with a life without parole sentence, because denying a defendant the right to at some time reenter society “is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.” *Id.* at 2030.

The sentencing court’s conclusion that Kody Patten, an eighteen-year-old minor, possessed the quality of a “cold blooded killer” arose out of Nevada jurisprudence, but fails to take into account the disabilities of an eighteen-year-old youth whose prior history gave no clue of such an unbalanced personality.

A young man who decides to take the blame for a murder crime, on his own shoulders, in order to protect his girlfriend does not jive with a young man who brutally strips and kills an ex-girlfriend for no reason. This logical gap should have been argued to the sentencing judge in mitigation of his sentence. Even though it was imperfectly argued, what is worse, it was never seriously considered.

Nevada’s legislature has addressed life in prison for juvenile offenders and the Nevada

Supreme Court noted the change:

The Legislature amended NRS 176.025 in 2015 to prohibit a sentence of life without the possibility of parole for a juvenile offender convicted of any crime, see 2015 Nev. Stat., ch. 152, § 2, at 618, but made this provision applicable only to crimes committed after October 1, 2015, or before October 1, 2015, if the person is convicted after October 1, 2015, see 2015 Nev. Stat., ch. 152, § 5, at 619

Hicks v. State (2016)

This legislative change, at a minimum, is evidence of an enlightened policy to limit the imposition of life without possibility of parole to those youthful offenders who patently fail to appreciate the consequences of their actions. This change also supports the argument provided above with regard to SCOTUS's views of the effectiveness of justifications for retribution, deterrence, incapacitation and rehabilitation on juveniles.

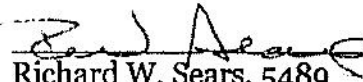
Patten submits that his plea and sentence should be withdrawn for each argument cited above regarding the ineffective performance of his counsel, and because his prosecution and sentence runs afoul of the justifications rejected by SCOTUS. He also submits that his sentence is grossly disproportionate to the crime charged, thereby violating his right to be free from cruel and unusual punishments. U.S. Const. amend. VIII & XIV.

CONCLUSION

Because of multiple failures by the defense to prepare a thorough investigation of the facts of the case, Kody plead guilty to a first degree murder charge he did not commit, and should be entitled to litigate before a jury. His plea was made without a thorough understanding of what was awaiting him at sentencing. Kody was told at arraignment that the Court would fashion a sentence that was just: he was not fully informed prior to his plea that the only just sentence for a cold, calculating killer was life without parole.

Kody's youth and inexperience led to substantial mistakes in the handling of his case. Kody determined to take the blame for the murder, and ultimately was forced by circumstances to acknowledge an accomplice. However, even after her role was disclosed, Kody continued in his error to take the blame and not report the true facts of the case until it was too late.

Dated: 20 March '19


Richard W. Sears, 5489
457 Fifth Street
Ely, Nevada 89301
Attorney for Kody Patten

VERIFICATION

KODY PATTEN, being first duly sworn, upon oath deposes and says:

That he is the Petitioner in the above-entitled matter; that he has read the within and foregoing WRIT OF HABEAS CORPUS - POST CONVICTION and knows the contents thereof; that the same is true to his knowledge, except for those matters therein stated on information and belief, and as to those matters, he believes them to be true.


KODY PATTEN

Subscribed and Sworn to before me
this 15th day of March, 2019.

NOTARY PUBLIC

STATE OF NEVADA)
)
COUNTY OF WHITE PINE)

FILED

2021 MAR 15 PM 2:01
ELKO CO DISTRICT COURT

CLERK _____ DEPUTY B

CASE NO.: CV-HC-13-116
DEPT. NO.: 1

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

KODY CREE PATTEN,

Petitioner,

V.

WILLIAM "BILL" GITTERE, WARDEN
ELY STATE PRISON

Respondent.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS

Before this Court is a Petition for Writ of Habeas Corpus (hereinafter "Petition") filed by Kody Cree Patten (hereinafter "Petitioner"), *in propria persona*, on February 20, 2013. Petitioner then filed a Supplemental Petition for Writ of Habeas Corpus (Post Conviction) and Request for Evidentiary Hearing (hereinafter "Supplement"), by and through Richard W. Sears, Esq. Thereafter, the State of Nevada (hereinafter "Respondent"), by and through Elko County District Attorney, Tyler J. Ingram, Esq., filed a Motion to Dismiss Petition and Supplemental Petition for Untimeliness (Laches); and in the Alternative, Motion to Extend Time for State to Answer Writ and/or Supplemental Writ on July 9, 2019. Petitioner filed an Opposition to Dismissal of Supplement to Post-Conviction Writ on August 15, 2019. This Court issued an Order Denying Motion to Dismiss and Order Granting Motion to Extend Time for State's Response on January 10, 2020. Thereafter, Respondent filed an Opposition to Petition for Writ

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2 of Habeas Corpus and Opposition to Supplemental Petition for Writ of Habeas Corpus on July
3 28, 2020.

4 Petitioner is currently incarcerated at Ely State Prison. On May 9, 2012, Petitioner
5 entered a plea of guilty to the criminal offense of First-Degree Murder with the Use of a Deadly
6 Weapon pursuant to the terms of a written Statutory Plea Agreement.

7 "Any person convicted of a crime and under sentence of death or imprisonment who
8 claims that the conviction was obtained, or that the sentence was imposed, in violation of the
9 Constitution of the United States or the Constitution or laws of this State . . ." may file a post-
10 conviction petition for writ of habeas corpus. NRS 34.724(1). In cases where the conviction
11 was obtained through a plea of guilty, a petition for writ of habeas corpus is limited to claims
12 that the plea was "involuntarily or unknowingly entered or that the plea was entered without
13 effective assistance of counsel." NRS 34.810(1)(a). A post-conviction habeas petitioner "is
14 entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific
15 factual allegations not belied by the record that, if true, would entitle him to relief." Mann v.
16 State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002).

17 Petitioner makes several contentions in both his Petition and Supplement. This Court
18 will address each contention in turn. As a preliminary matter, Petitioner refers to himself
19 several times in his Supplement as a "minor." Nevada law recognizes those who attained the
20 age of 18 as adults. At all relevant times, Petitioner had attained 18 years of age or older.

21 A. Ineffective Assistance of Counsel

22 A defendant who pleads guilty upon the advice of counsel may attack the validity of the
23 guilty plea by showing that he received ineffective assistance of counsel under the Sixth
24 Amendment to the United States Constitution. To succeed on such a claim, a defendant must
25 prove both that: (1) counsel's performance fell below an objective standard of reasonableness;
26 and (2) there is a reasonable probability that, but for counsel's errors, the defendant would not
27 have pled guilty. Strickland v. Washington, 466 U.S. 668 (1984). The objective standard of
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2 reasonableness is measured by prevailing professional norms. *Id.* at 688.

3 **1. Defense Counsel "told Hon. Papez that [Petitioner] had said everything to the**
4 **police need [sic] to convict [Petitioner] of 1st Degree Murder."**

5 Petitioner does not identify where in the record Defense Counsel ("Counsel") made this
6 statement to Hon. Papez. Even if Counsel had made this statement to Hon. Papez, Petitioner
7 does not show how Counsel's performance fell below an objective standard of
8 reasonableness, nor how, but for this failure, there is a reasonable probability that Petitioner
9 would not have pled guilty.

10 At his Change of Plea hearing prior to the Sentencing hearing, Petitioner admitted to
11 every element of first-degree murder with the use of a deadly weapon while under oath. It thus
12 perplexes this Court how Counsel's alleged statement, which essentially acknowledged
13 Petitioner's admissions, would amount to ineffective assistance of counsel. The Court
14 therefore denies the Petition as to this ground.

15 **2. Counsel said that he "had been speaking with the DA [sic] about a deal since**
16 **around pre-lim [sic]."**

17 Petitioner alleges that Counsel had been negotiating with the District Attorney's Office
18 since around the time of the Preliminary hearing. Again, Petitioner fails to show how Counsel's
19 plea bargain strategy fell below an objective standard of reasonableness. Plea bargaining is a
20 normal segment of a criminal defense attorney's job. Again, even if Petitioner were able to
21 show that Counsel's strategy was objectively unreasonable, he has still not shown how, but
22 for this strategy, there is a reasonable probability that Petitioner would not have pled guilty.
23 The Court therefore denies the Petition as to this ground.

24 **3. Counsel told Petitioner that he would be convicted and get the death penalty if**
25 **he went to trial, based on the testimony of Toni Fratto, his co-defendant.**

26 Petitioner alleges that Counsel told him that he would be convicted and sentenced to
27 death if he chose to go to trial. Petitioner fails to show where in the record these statements
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2 were made, nor does he show how these statements, if made, fell below an objective standard
3 of reasonableness for Counsel. Counsel advising Petitioner about the likelihood of conviction,
4 given the extensive evidence against Petitioner, is not ineffective assistance of counsel. Even
5 if so advising Petitioner were found to be objectively unreasonable, however, Petitioner has
6 also not shown how, but for Counsel's advice, there is a reasonable probability that Petitioner
7 would have chosen to go to trial. The Court therefore denies the Petition as to this ground.

8 **4. Counsel told Petitioner that because of his Pre-Sentence Investigation report he**
9 **would not be "maxed out at sentencing."**

10 Petitioner alleges that Counsel told him that his Pre-Sentence Investigation report ("PSI
11 report"), militated against him being placed in the high end of the sentencing guidelines.
12 Petitioner again fails to show where in the record this statement was made or state how
13 Counsel making it fell below an objective standard of reasonableness. Even assuming that it
14 was objectively unreasonable for Counsel to make such a statement, however, Petitioner's
15 claim still fails.

16 Regardless of any alleged statement by Counsel, Petitioner was aware of all possible
17 sentences before him, as well as the fact that the Court did not have to follow the sentencing
18 recommendations of Parole and Probation in its PSI report or that of any of the parties.
19 Petitioner's choices were to go to trial and risk the possibility of being sentenced to death, or
20 to take the plea deal and risk that he would be sentenced to life without the possibility of parole
21 instead of life with the possibility of parole. Petitioner was aware too of the details of the
22 heinous, violent, sadistic murder to which he was pleading and which the Court would have to
23 weigh against any mitigating factors to determine his sentence. Nothing in the Petition provides
24 any support for the contention that Petitioner would have chosen to go to trial and risk death
25 but for Counsel's statement about the PSI report. The Court therefore denies the Petition as
26 to this ground.

27 **5. Counsel failed to show that Petitioner did not inflict the life-ending wounds to**
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2 **Micaela Costanzo.**

3 Petitioner states that his counsel was ineffective for failing to show that Petitioner did
4 not personally deal the blow that killed victim Micaela Costanzo. As Respondent aptly points
5 out, however, "a defendant will not be relieved of criminal liability for murder when his action
6 was a substantial factor in bringing about the death of the victim." Lay v. State, 110 Nev. 1189,
7 1192-93 (1994). The record clearly demonstrates that Petitioner's actions were a significant
8 factor in the victim's death-- during his Change of Plea hearing, Petitioner confessed to
9 stabbing the victim in the neck with the serrated end of an entrenching tool; the autopsy report
10 stated that the victim died due to exsanguination caused by multiple stab and slash wounds to
11 her face and neck. Petitioner's actions were thus clearly a substantial factor in bringing about
12 the victim's death. It was therefore not objectively unreasonable for Counsel not to focus on
13 showing which particular act by which particular defendant actually killed the victim. Further,
14 Petitioner has not shown that there is a reasonable probability that he would not have pled
15 guilty had Counsel been able to show who struck the final killing blow. The Court therefore
16 denies the Petition as to this ground.

17 **6. Counsel did not investigate witnesses.**

18 Petitioner next claims that he gave Counsel and private investigator the names of
19 witnesses, which Counsel failed to investigate. Petitioner does not identify these witnesses, or
20 what information they would have provided-- it is therefore impossible to deduce how Counsel
21 not calling these unknown persons to provide unknown testimony could have fallen below an
22 objective standard of reasonableness. Petitioner also neither states nor shows that there is a
23 reasonable probability that Petitioner would not have pled guilty had Counsel found and/or
24 investigated these unknown witnesses. The Court therefore denies the Petition as to this
25 ground.

26 **7. Counsel told Petitioner that the Court would not accept his guilty plea if he based**
27 **it on the factual basis that he himself prepared and that he would instead have to**
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2 **base it on his first statement or confession.**

3 Petitioner next states that Counsel prevented him from using his prepared factual basis,
4 which would have stated that he did not kill the victim, in court. Taking Petitioner's allegations
5 as true, and therefore assuming that Counsel did provide this advice to Petitioner, Counsel
6 would have been exactly correct. The Court could not have accepted a guilty plea to murder
7 where the factual basis for that plea stated that Petitioner did not kill the victim. Petitioner has
8 therefore not shown that this advice fell below an objective standard of reasonableness.

9 Further, if Counsel had not explained to Petitioner that his personally prepared factual
10 basis was insufficient, the Court would have had to have done so. Regardless of Counsel's
11 advice, therefore, Petitioner would have been in the same position: either stand by the factual
12 basis he had prepared and go to trial, with all its uncertainties, or present a factual basis that
13 admitted to killing Micaela Costanzo. Petitioner has therefore not shown that there is a
14 reasonable probability that he would not have pled guilty without Counsel's advice. The Court
15 therefore denies the Petition as to this ground.

16 **8. During a "closed court hearing," Petitioner tried to fire his counsel and counsel**
17 **said that Petitioner was making the second biggest mistake of his life and it would**
18 **result in him being put on death row.**

19 Petitioner states that he attempted to fire Counsel, but that Counsel told him that doing
20 so would be a mistake and result in him likely receiving a death sentence. Petitioner does not
21 allege how this statement by Counsel fell below an objective standard of reasonableness.
22 Petitioner further does not allege that, without this statement, there is a reasonable probability
23 that he would not have pled guilty. At most, without this statement, Petitioner might have fired
24 Counsel and been appointed or retained a different attorney. There is no way to know what
25 attorney's advice would have been, nor how that advice would have changed Petitioner's
26 predilection for accepting a plea agreement. The Court therefore denies the Petition as to this
27 ground.
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2 **9. Counsel did not "put forth any motion that [Petitioner] asked to be added and**
3 **also failed to get statements from witnesses."**

4 Petitioner states that Counsel did not file the motions he asked to be filed, nor did he
5 investigate the witnesses and evidence that he asked Counsel to investigate. The failure to
6 investigate witnesses ground has already been addressed, *supra*.

7 As to the failure to file motions, Petitioner has failed to state with specificity what facts
8 and claims for relief those motions would have contained. It is therefore unclear how Counsel's
9 failure to file those motions fell below an objective standard of reasonableness. Petitioner also
10 does not allege or show that, but for the failure to file these motions, there is a reasonable
11 probability that he would not have pled guilty. The Court is therefore denying the Petition as to
12 this ground.

13 **10. Counsel failed to "get evidence to constitute a different outcome."**

14 Petitioner states that Counsel failed to get evidence to constitute a different outcome.
15 Petitioner does not suggest what evidence Counsel should have found, nor how that evidence
16 would create a different outcome. Without knowing what evidence Counsel did not find, the
17 Court cannot say that Counsel was deficient for not finding it. Petitioner has failed to show that
18 Counsel's actions fell below an objective standard of reasonableness as to this ground.
19 Further, Petitioner has not shown that there is a reasonable probability that he would not have
20 pled guilty had Counsel found this unknown evidence. The Court therefore denies the Petition
21 as to this ground as well.

22 **11. Counsel failed to fully advise Petitioner of all of his defenses to first-degree**
23 **murder prior to entry of a guilty plea, including the "pretrial phase of defense."**

24 Petitioner claims that Counsel failed to advise him of all his defenses to first-degree
25 murder prior to his decision to enter a guilty plea. Petitioner does not specify of what defenses
26 Counsel should have informed him; i.e., how Counsel's advice was deficient such that it fell
27 below an objective standard of reasonableness. Without knowing how Counsel's advice was
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2 deficient, the Court cannot know whether, but for that deficient advice, there is a reasonable
3 probability that Petitioner would not have pled guilty. The Court must deny the Petition as to
4 this ground as well.

5 **12. Counsel allowed Petitioner to make a proffer without knowing whether or not he**
6 **was committed to the plea agreement.**

7 Here, Petitioner argues that Counsel was ineffective because Counsel did not inform
8 Petitioner of all the consequences of withdrawing from a proffer. Petitioner does not state of
9 what consequences Counsel should have informed him, nor how Counsel's failure to do so fell
10 below an objective standard of reasonableness. Petitioner merely states that the government
11 learned information it could not have otherwise obtained. As Petitioner had already confessed
12 before the proffer, it is unknown what information Petitioner believes the District Attorney
13 learned only at the proffer.

14 As Petitioner has failed to show that Counsel's failure to inform him of unknown
15 consequences of withdrawing from the proffer fell below an objective standard of
16 reasonableness, and as Petitioner has not alleged that, had he been informed of these
17 consequences, there is a reasonable probability that he would not have pled guilty, the Petition
18 is denied as to this ground.

19 **13. Counsel failed to investigate and replicate the injuries on the victim, resulting in**
20 **a decision to plead guilty on insufficient facts.**

21 Petitioner contends that Counsel should have replicated the injuries on the victim so as
22 to determine which injuries Petitioner made and which were caused by his co-defendant. As
23 Petitioner had already confessed to shoving, hitting, and stabbing the victim, actions that were
24 substantial factors in causing the victim's death, Petitioner cannot show why Counsel's
25 decision not to replicate the injuries to the victim fell below an objective standard of
26 reasonableness for a defense attorney. Petitioner is also unable to show that there is a
27 reasonable probability that, had Counsel been able to replicate these injuries, Petitioner would
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2 not have entered a guilty plea. The Petition is denied as to this ground.

3 **14. Counsel failed to prepare a psychological evaluation of Petitioner to explain his**
4 **rationale in protecting his co-defendant.**

5 Petitioner states that Counsel failed to seek a psychological evaluation that would have
6 explained his rationale for not revealing that his co-defendant had participated in the victim's
7 murder with him. Petitioner admitted to causing many of the severe cuts that caused the
8 exsanguination that led to the victim's death in this case. He is, a substantial cause of her
9 death. Petitioner's rationale for not mentioning his co-defendant does not mitigate his own
10 culpability, and so it cannot be said that Counsel's failure to inquire into this fell below an
11 objective standard of reasonableness. Petitioner also does not show how getting this
12 evaluation would have created a reasonable probability that Petitioner would not have entered
13 a guilty plea.

14 Further, there were two mental health evaluations prepared for Petitioner: a psychiatric
15 evaluation by Dr. H. Hale Henson, MD, and a psychological competency evaluation by Dr.
16 Sally Farmer, PhD. Both evaluations indicated that Petitioner had no compromised cognitive
17 functions, and that he understood the charges and parties involved in his criminal case. Dr.
18 Henson, given the opportunity to diagnose Petitioner with a mental illness, stated that he found
19 "no diagnosis or condition"; Dr. Farmer indicated that Petitioner had been evaluated for a
20 period of approximately two weeks, during which Petitioner did not show any symptoms of any
21 mental disorder that could interfere with his competency. Petitioner has not stated what mental
22 health disorder he believes Counsel would have discovered, had another evaluation been
23 performed, nor how not doing a third evaluation fell below an objective standard of
24 reasonableness, nor how the performance of this third evaluation would have created a
25 reasonable probability that Petitioner would not have entered a guilty plea. The Petition is
26 therefore denied as to this ground.

27 **15. Petitioner argues that Counsel should have informed him that it was virtually**
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2 **certain the Court would sentence him to life without the possibility of parole.**

3 Petitioner argues that Counsel should have informed him that it was virtually certain
4 that between the options the Court had of sentencing Petitioner to life with the possibility of
5 parole or life without the possibility of parole, the Court would choose to sentence Petitioner to
6 life without parole. Petitioner claims that he was "shocked when he received life in prison
7 without parole" describing it as "having a knife pushed into his body." This Court notes the
8 glaring irony in Petitioner's statement.

9 Petitioner was informed by the Court when he entered his plea that it was not a party to
10 the plea agreement between Counsel and the District Attorney, and that the Court was not
11 bound to follow the recommendations of either party. Petitioner stated on the record that he
12 understood this.

13 Further, Petitioner's Memorandum of Plea agreement also stated that the Court could
14 sentence Petitioner to life with or without parole, and that that decision would be made solely
15 by the Court, regardless of the recommendations by Counsel or the District Attorney. Petitioner
16 signed that agreement. Petitioner was thus informed exactly what could happen upon him
17 taking the plea. Counsel's actions thus did not fall below an objective standard of
18 reasonableness.

19 Yet further, Petitioner has neither alleged nor shown how, but for Counsel's actions,
20 there is a reasonable probability that Petitioner would not have pled guilty. Even if Petitioner
21 had not been informed by Counsel that the Court had final sentencing authority, the Court so
22 informed Petitioner at his Change of Plea hearing. Petitioner was then given the opportunity
23 to decide whether he wanted to go forward with changing his plea, or whether he wanted to
24 withdraw his guilty plea and go to trial. Petitioner stated that he still wanted to plead. As he has
25 met neither prong of Strickland, the Petition fails as to this ground as well.

26 **16. Counsel told Petitioner that he could get the benefit of a lesser sentence without**
27 **having to admit to a murder he did not commit.**
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2 Petitioner alleges that Counsel told him he could plead to murder without having to
3 admit to committing a murder. If true, this allegation would fall below an objective standard of
4 reasonableness for an attorney. This allegation is belied by the record, however. Petitioner
5 was specifically questioned about understanding his plea by both Counsel and the Court at his
6 Change of Plea hearing and given an opportunity to withdraw his plea and go to trial, should
7 he change his mind. He also admitted to committing the murder in his Memorandum of Plea
8 agreement, which he signed. Therefore, there is no basis to believe Counsel provided this
9 advice to Petitioner. Further, as the facts of this allegation are belied by the record, there is
10 also not a reasonable probability that, without this advice, Petitioner would have chosen to go
11 to trial. As the facts do not support this allegation, the Court denies the Petition as to this
12 ground.

13 **17. Counsel divulged information to the press and unknown information to the**
14 **District Attorney.**

15 Petitioner states that Counsel divulged information to the press and District Attorney
16 that harmed his case. Petitioner provides no information as to what was said to the press or
17 District Attorney. Even if this Court assumes what Petitioner alleges is true, it cannot be
18 determined, without more, whether Counsel's actions fell below an objective standard of
19 reasonableness, nor whether, without these communications, Petitioner would have chosen
20 to go to trial in lieu of pleading guilty. As Petitioner has not provided any substantive grounds
21 to support his allegations, the Court must deny his Petition as to this ground as well.

22 **18. During a "plea deal meeting" with the District Attorney, Defense Counsel said to**
23 **Petitioner that, "You being there is as if you put the knife in her throat." Petitioner**
24 **replied "I didn't kill her!" Defense Counsel then said, "Okay, if your [sic] not**
25 **taking the deal we're done here."**

26 Petitioner next states that Counsel told Petitioner he was just as culpable of killing the
27 victim in this case whether he stuck the final blow to her or not. Assuming this conversation
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2 between Petitioner and his attorney took place as he claims it did, Petitioner still fails to show
3 how Counsel's advice fell below an objective standard of reasonableness or that there is a
4 reasonable probability that, but for this statement by Counsel, Petitioner would not have
5 entered a guilty plea.

6 Petitioner has admitted to engaging in many of the violent stabs and cuts that led the
7 victim in this case to exsanguinate; as indicated above, it is irrelevant whether Petitioner or his
8 co-defendant thrust the final, killing blow. The Court thus finds it necessary to deny the Petition
9 as to this ground as well.

10 The Court notes that Petitioner also alleges under this ground that Counsel was
11 prejudiced against him. Petitioner has alleged only that Counsel essentially explained to him
12 that his not dealing the final blow to the victim was immaterial, and that Counsel decided on
13 ending the plea negotiations after Petitioner indicated he would not be taking the plea deal.
14 There is nothing in those statements to support that Counsel was prejudiced against his client
15 and so provided ineffective assistance; further, there is no reason to believe, even if Counsel
16 were prejudiced against his client, that, absent that prejudice, the effect of which is unknown,
17 that Petitioner would not have eventually chosen to plead guilty. The Court denies this ground
18 under either theory of ineffective assistance, therefore.

19 **B. Constitutional Objections**

20 Petitioner argues that the sentencing Court and Nevada law removed the possibility for
21 balancing mitigating and aggravating factors in determining his sentence, and that this lack of
22 balancing is violative of the Eighth Amendment. Firstly, there was, in fact, balancing at the
23 Sentencing hearing— Counsel, the District Attorney, and the Court all addressed both the
24 mitigating factor of Petitioner's young adult age, as well as the aggravating factor of the
25 heinous, vicious nature of the underlying offense. Secondly, the caselaw Petitioner cites to
26 finds that it is cruel and unusual punishment in violation of the Eighth Amendment to sentence
27 juveniles to life in prison without the possibility of parole. Although Petitioner was a young man
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2 when he committed his crime, he was not a juvenile. Petitioner fails to provide any applicable
3 caselaw regarding sentencing adults to life in prison without the possibility of parole. As his
4 sentence does not violate the Eighth Amendment, his Petition is denied as to this ground.

5 **C. Misunderstood Guilty Plea**

6 Petitioner next states that he did not understand the plea he made. Petitioner admitted
7 to murder in the first-degree with the use of a deadly weapon on the record, under oath, after
8 being extensively canvassed by the Court and Counsel about whether he understood the
9 nature and elements of the offense to which he was pleading. He also had the opportunity to
10 stop the hearing to ask questions. He specifically stated on the record that he murdered
11 Micaela Costanzo maliciously, willfully, without lawful justification, and that the crime was not
12 an accident. He further stated that he did this with a deadly weapon. These facts are also laid
13 out in Petitioner's signed Memorandum of Plea agreement. Petitioner's decision to plead guilty
14 to first-degree murder was knowing and voluntary. As the record directly contradicts
15 Petitioner's claim that he misunderstood his guilty plea. The Court is denying the petition as to
16 this ground as well.

17 **D. Judicial Prejudice**

18 **1. Hon. Papez had already decided Petitioner's sentence prior to the Sentencing**
19 **hearing.**

20 Petitioner states that he believes Hon. Papez had already decided Petitioner's sentence
21 before the Sentencing hearing. Petitioner puts forth no evidence as to how Hon. Papez was
22 unduly prejudiced against him, however. Further, this Court sees nothing in the record which
23 evidences bias or prejudice by Hon. Papez for or against any party or attorney in this matter.
24 Therefore, the Court denies the Petition as to this ground as well.

25 **2. Hon. Papez told the Petitioner, "Mr. Patten, your blood runs cold."**

26 Petitioner believes that Hon. Papez was unduly prejudiced against him because Hon.
27 Papez made this statement about Petitioner during his Sentencing hearing. Petitioner had by
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2 this time confessed to beating a sixteen-year-old girl, his childhood friend, with a shovel, cutting
3 and stabbing her with a dagger; stripping her of her clothing, and leaving her in a shallow
4 grave. Hon. Papez was tasked with assessing Petitioner's crimes and deciding the appropriate
5 sentencing under the law. The record supports Hon. Papez's statement. This Court sees no
6 evidence of prejudice by Hon. Papez. The Petition is denied as to this ground as well.

7 **E. New Evidence and Actual Innocence**

8 Following the precedent of the Federal Circuit Courts, the Nevada Supreme Court has
9 held that an evidentiary hearing regarding actual innocence is required where the new
10 evidence, "if credited," would show that it is more likely than not that no reasonable jury would
11 find the petitioner guilty beyond a reasonable doubt. Berry v. State, 131 Nev. 957, 967-968
12 (2015). The Court "must make its determination concerning the petitioner's innocence in light
13 of all the evidence." Schlup v. Delo, 513 U.S. 298, 328.

14 Petitioner claims that Toni Fratto, his co-defendant, made a jailhouse confession
15 wherein she stated that she had committed the murder by herself while Petitioner "just stood
16 around." This Court must take co-defendant's alleged jailhouse confession and consider it in
17 light of all the evidence in this case, including Petitioner's confession, the specificities of which
18 were previously corroborated by co-defendant's proffer. In light of all the evidence in this case,
19 co-defendant's alleged jailhouse confession does not make it more likely than not that no
20 reasonable juror would have convicted the petitioner of the charged offenses. Thus, this Court
21 denies Petitioner's request for an evidentiary hearing as to this ground.

22 **F. Disproportionate Sentencing**

23 Petitioner states that the sentence he received was disproportionately harsher than the
24 sentence his co-defendant received. The sentence Petitioner received was within the statutory
25 guidelines under NRS 200.030(4) and was contained within the Memorandum of Plea
26 agreement that Petitioner signed; Petitioner was also canvassed about this particular sentence
27 at his Change of Plea hearing. Petitioner's co-defendant received a lesser sentence because
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2 she pled to a lesser degree of murder than Petitioner did. Although the sentences are different,
3 this Court sees nothing unlawful about Petitioner's sentence.
4

5 Therefore, as Petitioner has not met his burden as to any of the grounds he has cited
6 in his Petition, IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus
7 is DENIED.

8 DATED this 12th day of March, 2021.

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KRISTON N. HILL
DISTRICT JUDGE. - DEPT. 1
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2 CERTIFICATE OF HAND DELIVERY

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District
4 Court, Department 1, and that on this 15th day of March, 2021, I personally hand delivered
5 a file stamped copy of the foregoing ORDER DENYING PETITION FOR WRIT OF HABEAS
6 CORPUS addressed to:

7
8 Tyler J. Ingram
9 Elko County District Attorney
540 Court Street, 2nd floor
10 Elko, Nevada 89801
[Box in Clerk's Office]

11 *McMann*
12

13
14 CERTIFICATE OF MAILING

15 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District
16 Court, Department 1, and that on this 15th day of March, 2021, I personally deposited for
17 mailing in the U.S. mail at Elko, Nevada, postage prepaid, a file stamped copy of the foregoing
18 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS addressed to:

19 Richard Wayne Sears, Esq.
20 Sears Law Firm, Ltd
457 5th St.
21 Ely, NV 89301

William Gittere, Warden
Ely State Prison
PO Box 1989
Ely, NV 89301-1989

22
23 Kody Cree Patten #1091721
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24 PO Box 1989
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Aaron D. Ford, Esq.
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100 N. Carson St.
Carson City, NV 89701

25
26 *McMann*
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

Kody Cree Patten,
Appellant,

vs.

The State of Nevada
Respondent.

No. 82715

APPELLANT'S APPENDIX VOLUME II PAGES 250-438

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the ____ day of _____, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

TYLER INGRAM

AARON FORD

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

KODY CREE PATTEN #1091721
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

BY _____
Employee of Richard W. Sears Law Firm