IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

KODY CREE PATTEN,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

CASE NO. 82715

APPENDIX TO RESPONDENT'S BRIEF VOLUME I OF III

Appeal From The Fourth Judicial District Court

Of The State of Nevada

In And For The County Of Elko

THE HONORABLE AARON D. FORD
ATTORNEY GENERAL OF NEVADA
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Dated this 28 day of September, 2021.

TYLER J. INGRAM

Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801
(775) 738-3101

By:_____
TYLER J. INGRAM
Elko County District Attorney
Nevada Bar No.: 11819

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of September, 2021, Electronic Service of the APPENDIX TO RESPONDENT'S BRIEF VOLUME I OF III shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

RICHARD WAYNE SEARS
457 Fifth St.
Ely, NV 89301
Attorney for Appellant

Kurri Sullivan
Kurri Sullivan
ASSISTANT OFFICE MANAGER

DA#: AP-21-00780

Case No. ~~CR-H-03-0~~ CV-HC-13-116

Dept. No. 2

FILED
2013 FEB 20 PM 2:51
ELKO CO DISTRICT COURT
CLERK DEPUTY

IN THE 4th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Elko.

Kody Cree Patten
Petitioner,

v.

Warden Baker
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

2013 MAR 11 PM 2:45
ELKO COUNTY DISTRICT ATTORNEY

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine County

2. Name and location of court which entered the judgment of conviction under attack: Elko County Judicial Court, Elko, Nevada

3. Date of judgment of conviction: August 24, 2012

4. Case number: CR-11-0300

5. (a) Length of sentence: Life in Prison without the possibility of Parole, plus 8-20 yrs for weapons enhancement

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: Murder in the 1st Degree plus weapons enhancement

8. What was your plea? (check one):

(a) Not guilty ____ (b) Guilty X (c) Nolo contendere ____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: A "Guilty Plea" was by the DA. and my lawyers sense the first day of court, according to my lawyers

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ____ (b) Judge without a jury X

11. Did you testify at the trial? Yes ____ No X

12. Did you appeal form the judgment of conviction? Yes ____ No X

13. If you did appeal, answer the following:

(a) Name of Court: _____

(b) Case number or citation: _____

(c) Result: _____

(d) Date of result: _____

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: I was told by my middle lawyer Jeff Kump that I could not appeal my JOC, that I would have to go about it by other means.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ____ No X

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes ____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ____ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) This is my (1st) First petition to the court regarding my current incarceration.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

This being my first Petition, this is the first time I am able to raise these issues and have them heard.

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No X

If yes, state what court and case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: NONE

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No X

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) **Ground One**: Ineffective Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My Lead Lawyer told Judge Paez that I had said everything to the police need to convict me of 1st Degree Murder. Also stating that He (John Ohlson) had been speaking with the DA. about a deal since around pre-lim. Thus not giving me a fair chance at trial or sentencing.

(b) **Ground Two**: Ineffective Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My Lawyers told me that I would be convicted 100% and get the Death Penalty if I went to trial, based on my co-defendants testimony. I was left to take the plea being convinced there was no other way. They also told me that because of my PSI I would not be maxed out at sentencing.

(c) **Ground Three**: Ineffective Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lawyers failed to show that I did NOT inflict the life ending wounds to Micaela Costanzo. Thus providing that Ground (A) be consider, I did not have a chance at a adequate defense.

(d) **Ground Four**: Judge Prejudice

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My assigned Judge retired the following weekend after my sentencing. I believe he had his sentence affirmed long before my sentence date as well as his comments at sentencing. "Mr Patten your blood runs cold" - clearly showing Prejudice towards me and thus again not a fair chance.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 22 day of the month of January, of the year 2013.

Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, KODY PATTEN, hereby certify pursuant to N.R.C.P. 5(b), that on this 13th day of the month of February, of the year 2013 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

Warden Baker
Respondent prison or jail official

Ely State Prison
P.O. Box 1989 Ely, NV 89301
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

Mark Torvenian
District Attorney of County of Conviction

1515 Seventh st
Elko, NV 89801
Address

Signature of Petitioner

(a) **Ground Five**: Denied Constitutional Right to Defend Myself

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lawyer divulged information to the press and unknowingly to the DA. I was convicted before I had a chance to present my defense. I was denied my constitutional right.

(b) **Ground Six**: Lack of pre-trial investigation of evidence, witnesses, etc... Ineffective counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lawyers did not investigate witnesses that I gave to them and my P.I. Depicting a lack of defense that deprived me of a potential defense that could have resulted in a different outcome.

(c) **Ground Seven**: I did not understand my guilty plea.

Supporting **FACTS** (Tell your story briefly without citing cases or law.): when Judge Pace accepted my guilty plea, I was under the impression that I was not actually or factually admitting to the murder. The plea was all wrong. I only took it because my lawyers said I could get a lower sentence and I dont have to admit to a murder I didnt commit. Just go by the basis of the Judges words.

(d) **Ground Eight**: Ineffective Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lawyer told me that the Judge would not accept my guilty plea if I told him the factual basis that I had written for sentencing because it stated that I did not kill Micada Costanzo. He said I would have to go off my very 1st statement or confession to Police.

(a) **Ground Nine**: Ineffective Assistance of Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): I tried to fire my lawyers on the basis that they were not providing me a chance at a defense for trial or otherwise. A closed court hearing was held but my lead lawyer said I was making the second biggest mistake of my life and it would result in me being put on death row.

(b) **Ground Ten**: Ineffective Counsel

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lead lawyer failed to put forth any motion that I asked to be added and also failed to get statements from witnesses and/or evidence to constitute a different outcome.

(c) **Ground Eleven**: Counsel Prejudice by lead lawyer

Supporting **FACTS** (Tell your story briefly without citing cases or law.): My lead lawyer John Ohlson made the comment to me during my first plea deal meeting with the DA. I said "I wasn't the one who killed Mikaela, so why should I take a deal"; this reply was "You being there is as if you put the knife in her throat". I replied "I didn't kill her!" He said ok if your not taking the deal we're done here!"

(d) **Ground Twelve**:

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

AFFIRMATION PURSUANT TO: N.R.S. 239B.010

I, HEREBY CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT THAT IS ENTITLED: Petition For Writ of Habeas Corpus (Post-Conviction), DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON, UNDER THE PAINS AND PENALTIES OF PERJURY, THIS, 22, DAY OF, January, 2013.

SIGNATURE: Kody Cree Patten

INMATE NAME PRINTED: KODY CREE PATTEN
INMATE NUMBER: # 1091721
ADDRESS: **ELY STATE PRISON, P.O. BOX 1989, ELY, NV 89301**

HC-13-00116-01 Kurri

COPY

Case No. HC-

Dept. No. 1

2019 MAR 25 AM 11:37

RECEIVED
ELKO CO. DISTRICT ATTORNEY

IN THE FOURTH JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF ELKO

KODY PATTEN,
PETITIONER,

vs.

THE STATE OF NEVADA,
RESPONDENT.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND REQUEST FOR EVIDENTIARY HEARING

Petitioner, KODY PATTEN, by and through his attorney of record, RICHARD W. SEARS, ESQ., hereby files this Supplement to Patten's original WRIT OF HABEAS CORPUS (POST-CONVICTION) Pursuant to NRS Chapter 34. This Writ along with the facts and law alleged therein, along with the following Points and Authorities, is made upon the pleadings and papers already on file, evidence to be presented at hearing, and any oral argument of counsel deemed necessary by the Court.

DATED this 20 day of March, 2019.

RICHARD W. SEARS, 5489
Sears Law Firm, ltd
457 Fifth Street
Ely, Nevada 89301
775.289.3366

Reviewed By GL Pgs ____

STANDARD OF REVIEW

KODY PATTEN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE 5TH, 6TH, AND 14TH AMENDMENTS.

Kody Patten's conviction was the result of ineffective assistance of trial counsel in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due process, to counsel, and to present a defense, as well as his correlative rights under the Nevada Constitution Article I, Section 8. To prevail on a claim of ineffective assistance of trial counsel, "a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2051, 2069 (1984); *McConnell v. State,* 125 Nev. 243, 247, 212 P. 3d 307, 313 (2009). A defendant is entitled to relief where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. A presumption of prejudice may attach where counsel entirely fails to subject the prosecution's case to adversarial testing. *Hernandez v. State,* 124 Nev. 978, 982, 194 P. 3d 1235, 1241 (2008) *(citing United States v. Cronic,* 466 U.S. 648, 659, 104 S. Ct. 2039 (1984). A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review. *Evans v. State,* 117 Nev. 609, 622, 28 P. 3d 498, 508 (2001).

To state a valid claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice such that any omitted issue would have had a reasonable probability of success on appeal. *Kirksey v. State,* 112 Nev. 980, 998, 923 P. 2d 1002, 113-14 (1996).

Furthermore, a petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell,* 125 Nev. at 247, 212 P. 3d at 309. A petitioner must demonstrate the disputed factual allegations underlying his claims by a preponderance of the evidence. *Hernandez,*124 Nev. at 982, 194 P. 3d at 1241 (2014).

In addition, because Kody Patten resolved his charges by pleading guilty as part of an agreement to settle all charges against him, Kody did not seek direct appeal relief. Under these circumstances, Kody should be allowed to demonstrate that the claims upon which he seeks relief entitle him to withdraw his plea. The Nevada Supreme Court recognized this right in *Warden v. Peters,* which held in relevant part,

> We deem the procedural label to be of little importance. The fact remains that courts which make a mistake in rendering a judgment which works to the extreme detriment of the defendant will not allow it to stand uncorrected. In a situation such as this, where, as discussed below, the court has inherent power to reconsider a judgment for good cause shown, we hold that such an issue may be raised by a motion to vacate judgment, though technically in this state the matter probably should have been raised by a petition for habeas corpus. See State ex rel. *Orsborn v. Fogliani*, 82 Nev. 300, 417 P.2d 148 (1966).
>
> 2. The trial court has inherent jurisdiction to vacate or modify its orders and judgments, *State v. Lopez*, 96 Ariz. 169, 393 P.2d 263 (1964), and discretion to permit withdrawal of a plea in order to effectuate its efforts. *Negelberg v. United States*, 377 U.S. 266, 84 S.Ct. 1252, 12 L.Ed.2d 290 (1964). Justice requires that when a court errs in its adjudication of a defendant, a vacation of the adjudication results in a vacation of the sentence so that the defendant can be returned to his prior status. If a guilty plea is the product of ignorance, fear, inadvertence or coercion, it must be vacated as void since it is violative of constitutional safeguards, *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), and the passage of time does not close the door to its reconsideration. *Ward v. Page*, 238 F.Supp. 431 (D.Okl. 1965).

Warden, Nevada State Prison v. Peters, 429 P.2d 549, 83 Nev. 298 (Nev., 1967)

FACTS

Wendover is a Nevada border town: it sits astride the Utah-Nevada state line. The railroad passes just south of town and Interstate 80 passes north. Approximately 4,000 people resided there in 2010, according to the federal census.

On March 3rd, 2011,[1] Michaela Costanza was allegedly killed by Toni Fratto and Kody Patten. Michaela, Toni, and Kody were all were residents of Wendover, and school acquaintances. Many local residents were called out to search for Michaela when she did not come home after an athletic practice at the school. Her body was ultimately found in a shallow grave near the railroad tracks south of town.

Before Michaela's body was found, Toni and Kody were suspects because of their prior relationships. On March 5th, 2011, Toni Fratto was interviewed by law enforcement, and denied any knowledge of the crime. Toni was again interviewed by law enforcement on March 6th, 2011, and again denied any knowledge of the crime. The March 6th interview was interrupted, and then restarted later the same day. During the second phase of the interview, Michaela's body had been found. During the March 6th interview, Toni was closely questioned by law enforcement to determine whether she had bad feelings against Michaela because of Michaela's prior relationship with her current live-in boyfriend, Kody Patten. Toni denied knowledge of the killing, and denied jealousy of Michaela. Toni was lying with both answers.

Kody was also interviewed by local and outside law enforcement. During his interview with law enforcement on the evening of March 6th, which extended into the morning of March 7th, Kody finally confessed after consulting with his parents. Kody's Dad, Kip Patten,

[1] Kody was born 12/31/1992; he was 18 years and two months old on the day of Michaela's death.

encouraged Kody to "do the right thing" and put this thing behind him. For minor Kody Patten, doing the right thing meant taking the blame and not implicating Toni, whom he had apparently agreed to protect either before or after the murder.

Kody confessed to everything law enforcement could have dreamed of hearing. He yarned how he killed her by himself: Beat her up, stabbed her in the neck, stripped off her top, and promptly dug a hole for her topless body and buried her by the railroad tracks. Kody was arrested in the early morning hours of March 7th, 2011. He had endured sustained questioning by the police because, they told him, they wanted to "clear things up for him." Kody and his parents had been complaining about the threats he was receiving in the community - threats that extended to his parents and siblings.

Kody was convinced to confess to the killing after the police assured him that he could spend the night with his family in the jailhouse.

Kody avoided any mention of Toni's name in connection with Michaela's murder for more than a month. The only reason her participation was revealed was out of Toni's mouth.

Months after her arrest, Toni confessed to a jail friend, Linda Fields, that Toni was the one who set up the killing of Michaela because she was jealous of Michaela's prior and potential future relationship with Toni's boyfriend, Kody. Toni believed that she and Kody were about to be married, and was jealous of anyone or anything that might interfere with that event. Toni called Michaela ugly names in school in the hearing of others, as well as in her diaries. Toni's jealousy of Michaela was suspected in the community. This is why she was suspected by the police of committing Michaela's murder when Michaela failed to appear after leaving high school.

Toni's jailhouse admissions to Linda Fields - discovered post-plea and sentence by Kody Patten - also disclosed the fact that Toni jealously murdered Michaela and probably got

her revenge on Kody as well. According to Toni's admission to Linda, Kody just stood around while Toni did the deed - a scene Toni had earlier painted for law enforcement, with their roles in the murder reversed.

Kody Patten had just turned eighteen years of age at the time of the murder. He had moved out of his parent's house and into his girlfriend's house because Kody's parents were too restrictive. Kody had completed a Marine Corp interview, and was prepared to enter the Corps upon his graduation from High School.

Kody was subject to all the dreams of a romantic young man: A military life in the toughest branch of the service; proof of his manhood, he would become a son who a father could be proud of.

Kody liked girls and girls liked Kody. He was a tall, good-looking redhead who had just enough of a "bad boy" image to attract attention of young ladies, but not enough to require expulsion from high school.

One young divorcee about town let Kody use her vehicle when he wanted, and was gossiped to have provided young men like Kody a place to party and things to party with.

Just prior to Michaela's death, Toni learned that Kody - along with two Mormon Bishops - had gone to Michaela to speak to her about joining the church which Kody had just joined. Arguably, this last fact may have tipped Toni over the edge, because now, not only would she have to deal with Kody's ex-girlfriend in High School with him every day, but would also have to deal with her in church on Sunday.

Kody's parents had managed the apartment house where Michaela lived. Kody and Michaela had grown up together in the same complex, and had been early best friends, playing together during the day and later dating each other.

Toni finally revealed the fact that she was "present" at the scene to Kip Patten (Kody's father), which became the start of a sensational tale picked up by the national press, and climaxed with a television story, with Toni being the featured attraction.

In mid-April, after Kip learned that Toni was present at Michaela's murder, Toni - rather than informing the police - inexplicably gave a confession to Kody's lawyers: John Ohlson and Jeffrey Kump. John Ohlson is a widely recognized criminal defense lawyer who is death penalty qualified. He was appointed to represent only Kody..

The government sought the death penalty in this case. The case was accompanied by publicity in the city of Wendover and throughout Elko County, a so-called "cow county" because of its rural makeup. Jeffrey Kump is a respected Elko county attorney who served with Reno lawyer, John Ohlson.

After Toni's confession to Kump and Ohlson, the number of stories of the murder increased by the participants. Unfortunately, the police investigation essentially stopped after the confessions. Insufficient investigation was performed of the physical evidence to disclose who performed the criminal acts that resulted in Michaela's death. The outlines were obvious to the police: Kody was seen driving a white van-type vehicle around the time of Michaela's murder; the van tires matched tire prints found near Michaela's body; Michaela had a zip tie found near her feet and one on her wrist, suggesting she had been bound; Michaela had knife wounds to her chin area and puncture and slash wounds in her neck; Michaela bled to death. A shallow hole was dug, Michaela's top was missing and appeared to have been cut off, she was covered with a thin layer of dirt and a piece of sagebrush. The burial was hurried, unplanned, virtually certain to be discovered. In fact, a railroad train passed Toni and Kody as they were parked disposing of Michaela's body.

Kody was two months over 18 when the killing took place. Toni was a little older, Michaela was a 16-year-old.

The absence of a murder motive apparently mystified his lawyers and criminal justice professionals in Elko county; however, the green-eyed monster of jealousy arises out of the crime scene and the diaries and research by Investigator Kolsch - especially when one learns that Toni was present at the murder, Michaela was stripped to the waist, her sweater was cut off, Michaela's face was slashed. These are the acts of a woman who wants to embarrass, shame and kill.

However, Kody, apparently compelled by his sense of self to do the "manly" act, or promises made after the killing to Toni, took sole responsibility for the killing, protecting Toni, until it was too late to present a full, and accurate accounting of the facts that law enforcement was predisposed not to believe.

LAW AND ARGUMENT

GROUND ONE: DEFENSE COUNSEL WAS INEFFECTIVE WHEN THEY FAILED TO FULLY ADVISE KODY PATTEN OF ALL HIS DEFENSES TO FIRST-DEGREE MURDER PRIOR TO ENTRY OF A GUILTY PLEA.

Kody Patten plead guilty to First Degree Murder in exchange for withdrawal of the Notice of Intent to Seek the Death Penalty. That plea placed Kody in line for two potential punishments: Life without the possibility of parole, and its corollary, life with parole. Because of the seriousness of the penalty Kody faced, this case is different from the "run of the mill" plea entered in a District Court case. If "death is different", it is also arguably the case that life without parole is also different for the 18-year old criminal defendant.[2]

[2] See *Miller v. Alabama*, 132 S.Ct. 2455 (2012), where in the Supreme Court determined that mandatory life without parole for a person under 18 years of age violates the 8th Amendment's prohibition on cruel and unusual punishment.

During the defendant's canvas before the trial judge, Kody was asked whether or not he and his counsel had discussed the defenses that were available to him to the charge of first-degree murder. Kody advised the Court that he had discussed those defenses. The Court never inquired further to determine the depth of Kody's understanding of the defenses that were available to him. This failure to inquire led to a fundamental misunderstanding by the trial judge of what information was available to Kody at the time he entered his guilty plea.

Legal counsel had a duty to ensure that Kody Patten fully understood the decision to plead guilty to first-degree murder, and to forgo a trial - at which he could have presented various defenses to the charges against him - including the defenses specifically presented by the facts as set forth below. In addition, legal counsel had a duty to ensure that Kody Patten fully understood the defenses that were available to him during the pretrial phase of the defense.

During pretrial, the defense team had filed two motions: 1) a motion to strike the death penalty, 2) a motion to suppress hearsay statements by the defendant. Accordingly, when the defendant went before the trial judge and confessed to the crime of first-degree murder, his understanding of the defenses available to him at trial only involved the pretrial phase defenses of which he had been advised. We are not arguing that he is not guilty of something – but he is not guilty of First Degree Murder.

At the time of the plea, the defendant was still a student in high school even though he was 18 years of age: He was a shop student, and his goal in life was to join the Marine Corps and be a soldier. The defendant was not a premed student, he was not college-bound, he was no candidate for law school. His understanding of the intricacies of the law were entirely dependent upon his defense team.

When Kody told his lawyers that he did not want to plead guilty to first-degree murder, his lawyers explained to him that he would get the death penalty if he went to trial. That fact was the rationale behind Kody Patten pleading guilty to first-degree murder and ultimately receiving a sentence of life in prison without the possibility of parole.

The United States Supreme Court has determined that a life without parole sentence for a minor offender is different in nature from the normal sentencing provided to adult offenders. The United States Supreme Court has already determined that the imposition of the death penalty on juveniles offends the Constitution. The question recently addressed by the Supreme Court looked at whether or not life in prison was similarly offensive to the United States Constitution. Based on the theory that changing societal norms required another look at life in prison for juvenile offenders, the Supreme Court determined that life in prison should not be imposed, absent extraordinary circumstances. In this case a minor, who by a period of months was no longer a juvenile, was sentenced to a term of life in prison without the possibility of parole.

This sentence for this crime is normally appropriate, as long as a reviewing court can be certain that constitutional principles were respected throughout the pretrial and trial phases of the prosecution and defense and a proper balancing of the good and bad of the case occurred at sentencing.

A comprehensive look at the workup done on this case will lead a reviewing court to determine that the pretrial phase lead to mistakes resulting in a plea to a crime that may not have been committed and a sentence to a term that may not have been deserved.

The initial problem facing the defendant in this case was the nature of the crime itself. The nature of the crime was the brutal fashion in which a murder was carried out. The victim was struck with a shovel, apparently pushed down, causing a blow to her head, followed by

convulsions, a slash across her chin, a partial cut across the throat, and a puncture in her throat with a small knife, whereupon she finally died, bleeding to death due to the injuries she had received. *Arguendo*, victims of pre-meditated murderers generally enjoy a quicker dispatch than the victim in this case suffered. Premeditation normally leads to an efficient killing. This was no efficient killing.

Unfortunately, the more inefficient and painful the killing, the greater the likelihood that the killer will be sentenced to death, unless the reviewing court and the sentencing court carefully apply the law to the set of facts placed before it. This is the case because an inefficient, brutal killing leads to outrage in the community. And that is certainly what happened in the case of the killing of Michaela.

> It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. "If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations."

People v. Anderson, 70 Cal.2d 15 (1968) quoting *People v. Caldwell*, 43 Cal.2d 864 (1955).

In this case, there were multiple acts of violence on a young lady that caused her death. There was understandable outrage in the community over her disappearance and the discovery of her brutalized, half-naked body.[3]

The role of the criminal justice system in this kind of vicious crime is to ensure that the punishment meets the unique set of facts presented by each crime. The punishment is to be applied dispassionately but appropriately to meet the goals of the criminal justice system. However, the criminal justice system role described above runs hard up against the popular

[3] The state may argue the facts here fall within the definition of murder by torture, however, "physical suffering, a concomitant of almost all violent deaths, is not enough by itself to show murder by torture. There must also be intent that the victim shall suffer." *People v. Daugherty*, 40 Cal.2d 876. *See also Dominguez v. State*, 112 Nev 683 (1996).

outrage in crimes of this type and the up-close and personal reaction of victim family and friends with all members of the criminal justice system.

Because of the tension that arises in high-profile violent crimes, criminal defendants - especially those in small towns - are entitled to the special protections provided by the Constitution to those persons who are high profile criminal defendants. This is even more important when the person facing the death penalty or life without parole is two months' beyond his eighteenth birthday.

Those protections available under the Constitution were not provided to Kody Patten in this case. His case was inadequately handled during the pre-trial phases, so that the only solution is for the matter is to be remanded for a trial. This is the case - not because Kody was actually innocent of participating in some fashion in a murder - but because he is actually innocent of participating in first degree murder. This is the case because Kody was entitled to a fair prosecution, adequate defense, knowing and informed entry of plea of not guilty, and the proper working of the criminal justice system.

> "Anderson identified three factors commonly present in cases of premeditated murder: `(1) [F]acts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing-what may be characterized as "planning" activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).' (Id. at pp. 26-27.)" (*People v. Koontz, supra*, 27 Cal.4th at p. 1081.) The Supreme Court in Anderson observed that it had "sustain[ed] verdicts of first degree murder typically when there [was] evidence of all three

> 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.)

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 he 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.

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[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.

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[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 enlightned 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)

DA Copy

FILED

2019 JUL -9 PM 2:23

ELKO CO DISTRICT COURT

CLERK ____ DEPUTY ____

CASE NO.: CV-HC-13-0116

DEPT. NO.: 1

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

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

COMES NOW, Plaintiff, State of Nevada, by and through its attorneys, TYLER J. INGRAM, District Attorney for the County of Elko, and submits the following Points and Authorities in support of this Motion, together with all pleadings and papers on file herein.

Dated this 9 day of July, 2019.

TYLER J. INGRAM
ELKO COUNTY DISTRICT ATTORNEY

By: _____
TYLER J. INGRAM
Elko County District Attorney
State Bar No. 11819

Affirmation Pursuant to NRS 239B.030
SSN Does Appear ____
SSN Does Not Appear ____

POINTS AND AUTHORITIES

The Judgment of Conviction (JOC) in this matter was filed on September 7, 2012. A copy of the JOC is attached hereto as Exhibit 1. There was NOT a direct appeal. The original Petition was filed on September 20, 2013. Mr. Sears, attorney for Respondent, was appointed on the 24th day of February, 2014. A copy of that Order is attached hereto as Exhibit 2. That Order specifically states that Mr. Sears was responsible for obtaining a copy of the file related to this matter from the Elko County Clerk's Office. Within that file is an Order from this Court which was signed on the 20th day of May, 2013, which approved the briefing schedule stipulated to by the parties which gave Petitioner 180 days from the entry of the same Order to file any amended or supplemental petition. A copy of those pleadings is attached hereto as Exhibit 3. On November 7, 2013, the parties entered into a stipulation which provided Petitioner an additional 30 days to file the amended or supplemental petition. A copy of that stipulation is attached hereto as Exhibit 4.

First, the original petition was untimely filed because it was filed outside of the one (1) year time limit allowed for by NRS 34.726. As far as the State can tell, good cause was not shown for its untimely filing. *For that reason, the original petition should be dismissed.*

Second, the supplemental petition was filed six (6) years, six (6) months, and eighteen (18) days after the judgment of conviction was filed. Even giving Petitioner the benefit of the doubt given the substation of counsel, the supplemental petition was filed five (5) years, and one (1) month after this Court appointed Mr. Sears as Counsel.

NRS 34.800 states:

> 1. A petition may be dismissed if delay in the filing of the petition:
>
> (a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred; or
>
> (b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings

resulting in the judgment of conviction or sentence.

> 2. A period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State. In a motion to dismiss the petition based on that prejudice, the respondent or the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made.

The State specifically pleads laches under NRS 34.800(2). Not only did Petitioner clearly not follow an Order of this Court with respect to the briefing schedule, more than 5 years has passed which creates a rebuttable presumption of prejudice to the State. As such, not only should the original Petition be dismissed, so too should the Supplemental Petition.

If the Court is not inclined to grant this Motion in its entirety – dismissal of the Petition and its Supplement – the State respectfully moves for an Order allowing it to have an additional one-hundred eighty (180) days from the Order denying this Motion in which to file an answer to the original petition, the supplemental petition, or both. Given the over six (6) year delay by Petitioner in completing this process, one-hundred eighty (180) seems reasonable.

Dated this 9 day of July, 2019.

TYLER J. INGRAM
ELKO COUNTY DISTRICT ATTORNEY

By: _____
TYLER J. INGRAM
Elko County District Attorney
State Bar No. 11819

Unsworn Declaration In Support Of Motion

Pursuant to NRS 53.045

Comes now TYLER J. INGRAM, who declares the following to the above-entitled Court:

1. That the Declarant is presently serving as District Attorney of the Elko County District Attorney's Office.
2. That I have read the assertions of fact set forth in this pleading and incorporate them into this Declaration.
3. This Motion is made in good faith, and not merely for the purposes of delay.
4. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9 day of July, 2019.

TYLER J. INGRAM
Elko County District Attorney
State Bar Number: 11819

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 9th day of July, 2019, I served the foregoing Motion, by hand delivering, mailing or by facsimile transmission or causing to be hand delivered, mailed or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

HONORABLE NANCY PORTER
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

By mailing to:

RICHARD WAYNE SEARS
ATTORNEY AT LAW
457 FIFTH ST.
ELY, NV 89301

Kurri Sullivan

KURRI SULLIVAN
ASSISTANT OFFICE MANAGER

HC-13-00116-01

Exhibit 1

STATE OF NEVADA

VS.

KODY CREE PATTEN

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2012 SEP -7 PM 4:31

ELKO CO DISTRICT COURT

CLERK_____ DEPUTY_____

Case No. CR-FP-11-0300

Dept No. II

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

****

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

JUDGMENT OF CONVICTION AND SENTENCE

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On the 9th day of May, 2012, the above-named Defendant, **KODY CREE PATTEN**, (Date of Birth: December 31, 1992 [19 years of age at time of sentencing]; Place of Birth: Logan, Utah), entered a plea of **GUILTY** pursuant to the terms of a written Statutory Plea Agreement to the criminal offense of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A FELONY AS DEFINED BY NRS 193.165; NRS 200.010, NRS 200.020, AND NRS 200.030**, which crime occurred on or about the 3rd day of March, 2011, near West Wendover, Nevada, and as more fully described in the Fifth Criminal Information filed on May 8, 2011. Appearing with said Defendant at said hearing were his legal counsel, John Ohlson, Esq., and Jeffrey Kump, Esq. The State was present and represented by Elko County District Attorney, Mark Torvinen.

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On the 24th day of August, 2012, the Defendant personally appeared before this Court together with his legal counsel, John Ohlson, Esq., and Jeffrey Kump, Esq., for purpose of entry of final judgment and imposition of sentence. Elko County District Attorney Mark Torvinen was present on behalf of the State of Nevada. Also present at said hearing was Nevada Division of Parole and Probation Officer Maria Cammarano who had previously prepared and provided to the Court, counsel and said Defendant, a Presentence Investigation Report. The Court allowed said Defendant and his counsel an opportunity to provide evidence in mitigation of the crime, and further, allowed said Defendant to personally address the Court. The Court also allowed the State to present victim impact evidence in support of the State's sentencing recommendation. Counsel for said Defendant and for the State were allowed to make sentencing recommendations to the Court.

After considering all evidence, statements and recommendations made to the Court, the court enters judgment and imposes sentence as follows:

ENTRY OF JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that KODY CREE PATTEN is GUILTY of the crime of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, a Category A Felony as defined in NRS 193.165; NRS 200.010, NRS 200.020, and NRS 200.030.

SENTENCE

Upon the Defendant's conviction of:

FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A FELONY AS DEFINED BY NRS 193.165, NRS 200.010, NRS 200.020 AND NRS 200.030;

///

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

The Defendant is hereby sentenced to serve:

1. Life imprisonment in the Nevada State Prison without the possibility of parole (see NRS 200.030.1 and .4[b][1];

2. The Defendant shall receive credit against this sentence in the amount of five-hundred and thirty-five (535) days, calculated to include the day of his arrest which occurred on the 7th day of March, 2011, to and including the day of sentencing which was Friday the 24th day of August, 2012.

For the use of a deadly weapon in the commission of the offense of First Degree Murder, the Defendant, pursuant to the provisions of NRS 193.165, shall serve a term of:

1. Two-hundred and forty (240) months (twenty[20] years) with parole eligibility for this sentencing enhancement to commence after the service of ninety-six (96) months (eight [8] years).

2. The enhancement imposed under the provisions of NRS 193.465 shall, in accordance with the provisions of NRS 193.165, be served consecutively to the sentence of life imprisonment without the possibility of parole imposed upon the Defendant for his conviction of First Degree Murder as described above.

The Court would memorialize, as it recited on the record in open Court at the time of the imposition of sentence in this matter, that in formulating the enhancement imposed pursuant to the provisions of NRS 193.165 in this Case it considered the factors set forth in NRS 193.165.1(a) to (e).

Further the Defendant shall pay to the Nevada Victims Of Crime Program, as restitution for the sums advanced in connection with the funeral expenses incurred by the Victim's, Micaela Costanzo's, family, the sum of five-thousand dollars ($5,000.00). See NRS 217.200 and Roe vs. State 112 Nev. 733 at 735 and 736 (1996).

IT IS HEREBY FURTHER ORDERED that the Defendant shall submit to testing to determine his genetic markers in accordance with the provisions of NRS 176.0913, and shall pay One Hundred Fifty Dollar ($150) genetic testing fee in accordance with the provisions of NRS 176.0915.

IT IS HEREBY FURTHER ORDERED in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-Five Dollars ($25.00), as an administrative assessment fee, and judgment therefore is hereby entered against the Defendant.

NOW THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above-entitled matter pursuant to the provisions of NRS 176.125.

DATED this 30th day of August, 2012.

Dan L. Papez
DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

FILED

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ELKO CO DISTRICT COURT

CLERK ____ DEPUTY ____

Case No.: CR-FP-11-300

Dept No.: 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

/

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department II, and that on this 7 day of September, 2012, I served by the following method of service:

(X) regular U.S. mail
() certified U.S. mail
() registered U.S. mail
() overnight U.S. mail
(X) hand delivery
(Copy placed in agency box located in the Elko County Clerk's Office)

() overnight UPS
() overnight Federal Express
() Fax to #_____
() personal service

a true copy of the ***Judgment of Conviction and Sentence***, addressed to:

///

///

///

///

Elko County District Attorney {hand delivery}

State of Nevada, Division of Parole and Probation {hand delivery}

Elko County Sheriff {hand delivery}

Nevada Department of Corrections
{copy to accompany Defendant at time of transport}

Jeffrey J. Kump, Esq. {hand delivery}

John Ohlson, Esq.
Law Office of John Ohlson
275 Hill St., Ste. 230
Reno, NV 89501
{regular U.S. Mail}

Nevada Department of Corrections
Offender Management Division,
Sentence Management
PO Box 7011
Carson City, NV 89702
{regular U.S. Mail}

Stefanie Pattani

Stefanie Pattani

Exhibit 2

STATE OF NEVADA

VS.

KODY CREE PATTEN

HC-00116-
KW

Case No. CV-HC-13-116

Dept. No. 1

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN,

Petitioner,

V.

RENEE BAKER, Warden of the Ely State Prison,

Respondent.

ORDER APPOINTING ATTORNEY

On February 3, 2014, a Motion to be Relieved as Counsel was filed by Troy C. Jordan, Esq. Mr. Jordan has asked to be relieved of his appointment as attorney of record for Petitioner due to his acceptance of a position with the Carson City, Nevada, District Attorney's Office. It appears to this Court that said Petitioner is indigent and presently incarcerated.

THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

That Troy C. Jordan, Esq., is hereby relieved of his appointment as attorney of record for above-named Petitioner, and that Richard W. Sears, Esq., is hereby appointed to represent said Petitioner in all matters regarding this case.

IT IS FURTHER ORDERED that the office of Richard W. Sears, Esq., shall be responsible for obtaining a copy of the files related to this matter through the Elko County Clerk's office (775-753-4600).

SO ORDERED this 24 day of February, 2014.

NANCY PORTER
District Judge - Dept. No. 1

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 25th day of February, 2014, I personally hand delivered a file stamped copy of the foregoing **ORDER APPOINTING ATTORNEY** to:

Mark D. Torvinen, Esq.
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801
{1 File Stamped Copy}
[Box in Clerk's Office]

Dated this 25th day of February, 2014.

JULIE L. THUEMLER, PLS

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 25th day of February, 2014, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a file stamped copy of the foregoing **ORDER APPOINTING ATTORNEY** addressed to:

Troy C. Jordan, Esq.
3715 Lakeside Drive, Suite A
Reno, NV 89509

Richard W. Sears, Esq.
1330 Aultman Street
Ely, NV 89301

Dated this 25th day of February, 2014.

JULIE L. THUEMLER, PLS

Exhibit 3

STATE OF NEVADA

VS.

KODY CREE PATTEN

CASE NO.: CV-HC-13-0116

DEPT. NUMBER: I

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN, Petitioner, vs. **RENEE BAKER**, Warden Of The Ely State Prison, Respondent.	**STIPULATION BY THE PARTIES TO:** **A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;** **FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013**

COMES NOW RENEE BAKER, the Respondent above-named, by and through her Counsel Of Record, the Elko County District Attorney's Office, and, the Petitioner above-named, by and through his Counsel Of Record, Troy C. Jordan, Esq., who by their signatures hereunder do hereby stipulate and agree as follows:

That:

1. The Petitioner shall have one-hundred and eighty (180) days from the entry of an Order pursuant to this Stipulation within which to file any Amended and/or Supplemental Brief on behalf of the Petitioner which the Petitioner wishes to file in the above-entitled cause.

SCANNED

a. Said one-hundred and eighty (180) days shall be calculated to exclude the day any such Order is entered and include the one-hundred and eightieth (180th) day thereafter unless the same falls upon a non-judicial day in which case until the next judicial day.

2. The Respondent shall have a period of one-hundred and twenty (120) days from service of any Amended and/or Supplemental Brief filed by the Petitioner within which to file its Answer thereto.

a. Said one-hundred and twenty (120) days shall be calculated to exclude the day of service and include the one-hundred and twentieth (120th) day thereafter unless the same falls upon a non-judicial day in which case until the next judicial day.

3. The Petitioner shall thereafter have a period of sixty (60) days from the service of the Respondent's Answer within which to file his Reply thereto.

a. Said sixty (60) days shall be calculated to exclude the day of service and include the sixtieth (60th) day thereafter unless the same falls upon a non-judicial day in which case until the next judicial day.

The Parties further agree that if each, respectively, is so inclined that the pleadings contemplated by this Stipulation may be served by facsimile in accordance with the provisions of NRS178.589.

Counsel for the Parties, in filing this Stipulation, jointly request that the

/ / /

Court enter an Order approving this Stipulation.

Dated this 17th day of May, 2013.

TROY C. JORDAN
State Bar Number: 9073

Counsel For The Petitioner

Dated this 17th day of May, 2013.

MARK TORVINEN
Elko County District Attorney
State Bar Number: 551

Counsel For The Respondent

HC 00116 R.CC

CASE NO.: CV-HC-13-0116

DEPT. NUMBER: I

2013 MAY 20 PM 3:39

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN,

Petitioner,

vs.

RENEE BAKER, Warden Of The Ely State Prison,

Respondent.

ORDER APPROVING THE:

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013

THE COURT HAVING CONSIDERED IN CHAMBERS that certain;

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20TH DAY OF FEBRUARY, 2013;

hereinafter simply the "Stipulation", filed by Counsel for the Parties and good cause appearing therefore:

IT IS HEREBY ORDERED that said Stipulation and the briefing

SCANNED

schedule set forth therein be, and the same is, hereby approved.

Dated this 20 day of May, 2013.

/S/ NANCY PORTER
NANCY PORTER
District Judge – Dept. I

Approval Of Form And Content Of Proposed Order

COMES NOW RESPONDENT, by and through her Counsel of Record, the Elko County District Attorney's Office, and Kody Cree Patten, the Petitioner above-named, by and through Troy C. Jordan, Esq., his Counsel Of Record, who by their respective signatures hereunder do hereby signify to the above-entitled Court that they have reviewed the proposed Order set forth above, and approve the same for its submission to the Court for its review and consideration thereof.

Dated this 17th day of May, 2013.

TROY C. JORDAN
State Bar Number: 9073
Counsel For The Petitioner

Dated this 17th day of May, 2013.

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

CASE NO.: CV-HC-13-0116

DEPT. NUMBER: I

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN,

Petitioner,

vs.

RENEE BAKER, Warden Of The Ely State Prison,

Respondent.

NOTICE OF ENTRY OF:

ORDER APPROVING THE:

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013

TO: THE DEFENDANT ABOVE-NAMED, AND HIS COUNSEL OF RECORD MR. TROY JORDAN;

COMES NOW RENEE BAKER, the Respondent above-named, by and through her Counsel Of Record, the Elko County District Attorney's Office, and hereby notifies the Defendant above-named, and his Counsel Of Record that on the 20th day of May, 2013, there was entered and filed in the above-entitled cause an;

/ / /

SCANNED

ORDER APPROVING THE:

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013;

a copy of which is enclosed with this Notice, and herewith served upon you.

DATED this 24th day of May, 2013.

MARK TORVINEN
Elko County District Attorney
State Bar No. 551

CERTIFICATE OF SERVICE

I Kurri Darby, hereby certify that I am an
(Printed Name)
employee of the Elko County District Attorney's Office, and that on the 24th day of MAY 2013, a true and correct copy (or true and correct copies in the case of multiple addressees) of the foregoing:

NOTICE OF ENTRY OF:

ORDER APPROVING THE:

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013;

along with a copy of the Order referred to therein served upon the following address(es) in the following manner:

Pursuant to the provisions of NRS 178.589[1], a true and correct copy of this pleading was transmitted by facsimile to the Defendant's Counsel of Record, Mr. Troy Jordan at the following facsimile number:

---

[1] NRS 178.589 provides that:

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

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

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

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

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

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

5. As used in this section:

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

proof of the transmission of which is attached to the original of this pleading filed with the Court.

Kami Darby

Signature Of Person
Executing Certificate Of Service

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

Xerox WorkCentre 7428
Transmission Report

G3-ID
Local Name
Company Logo

Date & Time : 05/24/2013 8:37 AM
Page : 1(Last Page)

The job has been sent.
Original Size: 8.5 x 11"

CASE NO.: CV-HC-13-0118
DEPT. NUMBER: I

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

KODY CREE PATTEN, Petitioner,	**NOTICE OF ENTRY OF:**
	ORDER APPROVING THE:
	STIPULATION BY THE PARTIES TO:
vs.	**A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;**
RENEE BAKER, Warden Of The Ely State Prison, Respondent.	**FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013**

TO: THE DEFENDANT ABOVE-NAMED, AND HIS COUNSEL OF RECORD MR. TROY JORDAN;

COMES NOW RENEE BAKER, the Respondent above-named, by and through her Counsel Of Record, the Elko County District Attorney's Office, and hereby notifies the Defendant above-named, and his Counsel Of Record that on the 20th day of May, 2013, there was entered and filed in the above-entitled cause an;

/ / /

#	Job	Remote Station	Start Date & Time	Duration	Pages	Protocol	Contents	Status
1	8050	775 324 0113	5-24; 8:35 AM	1:49	6/6	ECM		Completed

Exhibit 4

STATE OF NEVADA

VS.

KODY CREE PATTEN

CASE NO.: CV-HC-13-0116

DEPT. NUMBER: I

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN, Petitioner, vs. **RENEE BAKER**, Warden Of The Ely State Prison, Respondent.	**STIPULATION BY THE PARTIES TO:** **AN EXTENSION OF TIME WITHIN WHICH THE PETITIONER MAY FILE HIS OPENING BRIEF WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;** **FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013**

COMES NOW RENEE BAKER, the Respondent above-named, by and through her Counsel Of Record, the Elko County District Attorney's Office, and, the Petitioner above-named, by and through his Counsel Of Record, Troy C. Jordan, Esq., who by their signatures hereunder do hereby stipulate and agree as follows:

That:

1. The Petitioner shall have and extension of time of thirty (30) days from the date upon which his Opening Brief in the above-referenced matter would have otherwise been due under that certain;

SCANNED

ORDER APPROVING THE:

STIPULATION BY THE PARTIES TO:

A BRIEFING SCHEDULE WITH RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS;

FILED (IN PRO PER) IN THIS MATTER ON OR ABOUT THE 20th DAY OF FEBRUARY, 2013;

filed in the above-referenced matter on the 20th day of May, 2013 – that is until close of business on the 23rd day of December, 2013.

It is further agreed by and between the Parties that:

2. The Respondent shall have a period of one-hundred and twenty (120) days from service of any Amended and/or Supplemental Brief filed by the Petitioner pursuant to the extension of time provided for by this Stipulation within which to file its Answer thereto.

   a. Said one-hundred and twenty (120) days shall be calculated to exclude the day of service and include the one-hundred and twentieth (120th) day thereafter unless the same falls upon a non-judicial day in which case until the next judicial day.

3. The Petitioner shall thereafter have a period of sixty (60) days from the service of the Respondent's Answer within which to file his Reply, if any, thereto.

   a. Said sixty (60) days shall be calculated to exclude the day of service and include the sixtieth (60th) day thereafter unless the same falls upon a non-judicial day in which case until the next judicial day.

The Parties further agree that if each, respectively, is so inclined that the pleadings contemplated by this Stipulation may be served by facsimile in accordance with the provisions of NRS178.589.

Counsel for the Parties, in filing this Stipulation, jointly request that the Court enter an Order approving this Stipulation.

Dated this 7th day of November, 2013.

TROY C. JORDAN
State Bar Number: 9073
Counsel For The Petitioner

Dated this 7 day of November, 2013.

10248

MARK TORVINEN
Elko County District Attorney
State Bar Number: 551
By Chad Thompson
Deputy District Attorney

Counsel For The Respondent

CASE NO. HC-123456HC-123456

DEPT. NO. 2

2019 AUG 19 PM 4:02

FILED

2019 AUG 15 A 9:26

ELKO CO. DISTRICT COURT
CLERK ____ DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT

COUNTY OF ELKO, STATE OF NEVADA

THE STATE OF NEVADA,
PLAINTIFF,

vs.

KODY C. PATTEN,
DEFENDANT.

OPPOSITION TO DISMISSAL OF SUPPLEMENT TO POST-CONVICTION WRIT

COMES NOW KODY C. PATTEN, Defendant, by and through RICHARD W. SEARS, Attorney at Law, and Moves this court for its Order denying the government's motion to dismiss Patten's Supplemental Writ on the basis of the attached Affidavit in support of this Motion, the Memorandum of Points and Authorities attached, and all the pleadings and evidence contained in the court file.

DATE: AUGUST 8th 2019.

RICHARD W. SEARS, 5489
457 Fifth Street,
Ely, Nevada 89301
775.289.3366

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3366

REVIEWED BY ____ PGS. ____

POINTS AND AUTHORITIES

FACTUAL ALLEGATIONS

Kody Patten was convicted of First Degree murder and sentenced to life in prison without parole. Kody plead guilty after months of litigation after being offered a plea agreement that promised no death penalty would be sought at sentencing. Judge Dan Papez, sitting by designation, sentenced Kody to life in prison without possibility of parole (LWOP). Kody was a minor at the time he committed murder. He was a minor at sentencing. Kody is now in his 20s, serving time at Ely State Prison, a maximum security prison. Within the two years, there have been multiple stabbings and one murder at Ely State Prison. Kody filed his supplemental post-conviction pleading in this case one month late. Kody's case has never been reviewed by the Nevada Supreme Court because he plead guilty and did not file a direct appeal. Kody allegedly untimely filed his writ. He did so without counsel and without ever seeking direct appeal.

This case involved volumes of publicity in addition to hundreds of pages of pleadings, hundreds more pages of investigation, and trial preparation.

There were only two witnesses to the murder able to describe the event: Kody Patten, and his fiance, Tony Fratto. Michaela Costanza, the victim, was Kody's former girlfriend of long standing.

Kody Patten is at Ely State Prison. He has been threatened with substantial bodily harm by other inmates. Multiple stabbings have occurred at ESP over the last year and one half.

APPLICABLE LAW

The Nevada Supreme Court has permitted avoidance of a procedural bar in limited circumstances:

> Holmes does not demonstrate good cause. Holmes' reliance on *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), is misplaced because the

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appointment of postconviction counsel is discretionary, see NRS 34.750(1), and this court has declined to follow Martinez. *Brown v. McDaniel*, 130 Nev. 565, 569, 576, 331 P.3d 867, 870, 874 (2014) (concluding that claims of ineffective assistance of postconviction counsel in noncapital cases do not constitute good cause for a successive petition because there is no entitlement to appointed counsel). Holmes also argued that the ineffective assistance of trial counsel provided good cause. As Holmes' claims of ineffective assistance of trial counsel were reasonably available to be raised in a timely petition and Holmes thus did not show an impediment external to the defense prevented him from complying with the procedural time bar, we conclude that those claims do not provide good cause. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. As Holmes did not show good cause, we conclude that the district court correctly applied the mandatory procedural bars. See *State v. Eighth Judicial Dist. Court* (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). *Holmes v. State*, 2019 Nev. Unpub. LEXIS 48, 433 P.3d 265.

LEGAL ARGUMENT

RESPONSE TO LACHES CONCERNS

The government is entitled to a presumption that due to late filing, their case would be prejudiced by allowing this writ to continue. But this murder case was solved within days of the discovery of Michaela's body. Kody Patten confessed to the murder after hours of questioning by Nevada law enforcement. After being arrested, Kody's fiance came forward to his defense counsel and confessed she was present at the killing. She then described her involvement in the crime. After that, both Kody and Tony provided more confessions to law enforcement.

The murder scene was fresh when photographed. Kody's confessions were taped and transcribed. Tony's confessions were taped and transcribed. The physical evidence was photographed and cataloged and fingerprinted. No claim has been made that any evidence has been lost. The only witness to the confessions unable to testify at a trial is the former Elko County District Attorney. In short, the case has not deteriorated over the years. Any prosecutor could take this case to trial and obtain a murder conviction in any county in Nevada. Post-conviction counsel makes this assertion on more than 20 years of trial experience as both prosecutor and defense counsel. While the prosecutor properly

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specifically plead laches in his opposition, he failed to provide specifics as to what has deteriorated over the course of time to prevent him from presenting his case to a jury, in the unlikely event a retrial were to occur.

There was never an issue of self-defense in this case that could complicate the trial by the government. The only issue was whether or not the defendant satisfied the necessary mental state of a cold-blooded killer, a killer that pre-meditated and planned to murder Constanza. If this matter ever goes to trial, this issue will be resolved by a jury based upon the confessions and physical circumstances of the murder. Criminal agency is not at issue, planning and intention would be at issue in a re-trial and evidence of those facts are available from Tony Fratto, the police investigation, and the defendant, should be choose to testify. There is no impediment to jurors inferring from the facts of this case that a murder occurred and the murder was either first or second degree. Kody argues that the matter should be reviewed and he should be entitled a jury verdict on the issue, since he lacked sufficient understanding of the exact nature and consequences of his plea.

Patten argues that a one month delay in filing the supplemental pleadings in this case did not cause a sufficient laches issue to dismiss a review. Accordingly, Kody Patten should not be punished by having his review denied due to issues he was not sophisticated enough to appreciate when he entered into agreements beyond his ken.

Post-conviction counsel notified the Elko County Prosecutor months ago that he would not insist on strict timelines due to delay. Post-conviction counsel consents to a delay in responding to the issues raised in his supplemental papers filed in this case.

After taking over this case, post-conviction counsel discovered witnesses who needed to be interviewed with respect to their knowledge of additional confessions never disclosed to the District Attorney or counsel. An extensive investigative file had to be reviewed to determine whether important facts had been overlooked. Interviews of the court reporter

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and psychologist - as well as trial counsel - had to be interviewed. All those interviews took time to develop, conduct and analyze. Finally, interviews with the defendant and his parents had to be conducted and analyzed in order to develop a brief that was worthy of consideration by the Court.

While the statutory timelines are important, they permit dismissal, but do not require dismissal if good cause is demonstrated to avoid application of the procedural bars. In his supplemental petition, Patten seeks review because he was actually innocent of first degree murder. His conviction and sentence result in a life sentence for a nineteen-year-old perpetrator. Because of his sentence, he is incarcerated in Ely State Prison. Ely State Prison suffers multiple stabbings per year because the system has been unable to keep prison made stabbing weapons out of the hands of inmates.

Because of the length of his remaining life, compared to other criminal inmates, a life without parole sentence for a nineteen year old is substantially greater than for most other persons. In addition, a teenager's immaturity at the time of criminal conviction causes a concern even when a routine prison sentence is imposed. This case is not routine.

Finally, this Court has ample time after reviewing the file and additional evidence developed at an evidentiary hearing to determine whether dismissal due to the procedural bars is appropriate. Mr. Patten asks the Court to delay that determination until the record is complete.

NEVADA CONSTITUTIONAL CONCERNS WITH SUSPENSION OF THE WRIT

Federal AEDPA rules are the basis for the procedural bars to Habeas Corpus in Nevada. One of the important aspects of AEDPA was deference to state court decisions by federal judges. This principle was highlighted in *Rice v. Collins*. CITE. In this case, there has been no state court decision that is entitled to federal deference. We agree, however, that once a decision is issued, a successive petition has little likelihood of success.

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This is not a case of successive petitions or multiple appeals.

There has been no appeal; there is only one writ. AEDPA was designed to prevent endless appeals that are frivolous. Accordingly, specific timelines and presumptions have been enacted to stop abuses.

This case has not been abusing the system. There have been no successive appeals, there is only one writ. Because of the effect this one writ will have on Kody Patten's life, a review should be granted in order to develop the record and ensure the existing "record" was not created with a "defective needle".

Absent inmate intervention, arguably every lawyer working on this case today will be long dead before Kody could qualify for a humanitarian release due to ill health. The gravity of this situation, along with the fact that no violation of the goals of AEDPA would be violated by review, argues for review before a dismissal order is issued.

Thomas Jefferson, generally conceded to be the primary author of the Declaration of Independence, identified a man's right to rebel against despotic treatment by his government: "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." While this line, at minimum, was used to justify rebellion against Great Britain in the 1760's by the British Colonies south of Canada, subsequent events have fulfilled the initial meaning of the lines.[1]

[1] It is important to understand the substantial gap between 1776, the beginning of the revolution, and 1787, the formation of the Constitution. The 1776 Declaration was the controlling document for the formation of a nation out of a group of colonies. Equality of man was the moving force behind the colonists' revolution from Britain and that idea of equality was a direct rejection of the despotic system controlling Great Britain. Man cannot be equal in despotism. Lincoln, in his debates prior to election to his first term, propounded a broader purpose for the Declaration of Independence than simply freedom from Great Britain. Lincoln expanded the Declaration to encompass equality for all men, interpreting the equality to include equal treatment under law: a concept eventually fought over in the Civil War. Because Lincoln's Union Party, referred to as Lincoln Republicans in this paper, drafted important sections of the Nevada Constitution and imposed it on the territory, Lincoln's pronouncements about equality of treatment under the law provides important context to interpretation of the Nevada Constitution.

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Abraham Lincoln, a successful trial lawyer before becoming a politician and President of the United States, proposed a broad definition of Jefferson's words. During the Lincoln/Douglas presidential debates, equal rights for man was central in the campaign, because slavery was the central issue. In response to Stephen Douglas's argument that the words "all men" in the Declaration of Independence only referred to a British colonists' right to rebel against the British government in England,[2] Lincoln pointed out this narrow interpretation of "all men" was ends directed: to exclude black men from the liberty rights. Unfortunately, under Justice Taney, that definition was the law until the Civil War settled the issue for all time. (The *Dred Scott* decision, authored by Taney, concluded that despite verbage of the Declaration of Independence, the Constitution determined black men were property)[3]. *Dred Scott* then does not find either liberty or equality were fundamental rights of all men in the federal Constitution. (Lincoln may well have agreed, finding the absolute necessity for the thirteenth amendment to settle the issue. One of the reasons the Republican party drafted Nevada's constitution and sought Nevada's admission, was to ensure sufficient votes for the passage of the thirteenth amendment.) However, the Civil War, the thirteenth amendment and reconstruction civil rights laws settled the definition of "all men", and Lincoln and the subsequent legislation settled Lincoln's contention that right to "Liberty" included just treatment under the law as a fundamental right.[4] *See Crisis of the House Divided,*

---

[2] Lincoln, *Collected Works*, Vol. II, Lincoln's Speech at Springfield Illinois, June 26, 1857, pp 398-410, 406.

[3] " The question before us is whether the class of persons described in the plea in abatement [African slaves] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Scott v. Sandford*, 60 U.S. 393,405-406 (1857).

[4] The Nevada Constitution, imposed on the territory in 1864 in the midst of the Civil War, clearly declares: Section. 1. Inalienable rights. All men are by Nature free and equal

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Harry Jaffa, pg 752 quoting Lincoln, *Collected Works*, II, Lincoln's Speech at Springfield Illinois, June 26, 1857, pp 398-410, 406.

Given the fact that liberty is a fundamental right recognized in both the Nevada and U.S. Constitutions, and that Nevada's constitution specifically includes the privilege of habeas corpus along with the verbage of the Declaration of Independence, Nevada's Constitution - unlike the federal constitution which does not even recognize the principles in the declaration - (in fact, it specificially recognized slavery) makes Nevada's Constitution fundamentally different from the federal constitutional enactment. Accordingly, under Nevada's constitution, the privilege of the Writ is clearly declared a fundamental right. Only an important governmental interest that is narrowly tailored to fulfill the government's objective may infringe on that right. Kody Patten argues that the procedural bar application in this case would violate an important privilege specifically granted to Nevada citizens.[5] The

---

and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.] This provision does what the U.S. Constitution does not do: it includes the Declaration of Independence rights provision within the four corners of the document. The enabling ordinance recognizes substantial similarities between slavery and incarceration when it states: "In obedience to the requirements of an act of the Congress of the United States, approved March twenty-first, A.D. eighteen hundred and sixty-four, to enable the people of Nevada to form a constitution and state government, this convention, elected and convened in obedience to said enabling act, do ordain as follows, and this ordinance shall be irrevocable, without the consent of the United States and the people of the State of Nevada: First. That there shall be in this state neither slavery nor involuntary servitude, otherwise than in the punishment for crimes, whereof the party shall have been duly convicted." *See attached* Congressional Enabling Ordinance. The importance of Nevada's 3 electoral votes is reflected in Lincoln's count of electoral votes in the presidential election where the Nevada vote is listed in his tabulation, Lincoln, *Collected Works*, Vol VIII, p.46

[5] Responding to questions from Sen. Arlen Specter at a Senate Judiciary Committee hearing on Jan. 18, Gonzales argued that the Constitution doesn't explicitly bestow *habeas corpus* rights; it merely says when the so-called Great Writ can be suspended.

"There is no expressed grant of *habeas* in the Constitution; there's a prohibition against taking it away," Gonzales said.

Gonzales's remark left Specter, the committee's ranking Republican, stammering.

"Wait a minute," Specter interjected. "The Constitution says you can't take it away except in case of rebellion or invasion. Doesn't that mean you **have** the right of *habeas corpus* unless there's a rebellion or invasion?"

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importance of the difference between the federal and Nevada constitutional enactments is illustrated in the footnote below. Kody argues that the technical argument advanced by Gonzales is not the case in Nevada, because the language of the Declaration of Independence clearly protects rights, like habeas corpus, that are inalienable.

DATE: AUGUST ___, 2019.

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Gonzales continued, "The Constitution doesn't say every individual in the United States or citizen is hereby granted or assured the right of *habeas corpus*. It doesn't say that. It simply says the right shall not be suspended" except in cases of rebellion or invasion." *Baltimore Chronicle and Sentinel*, January 19, 2007.

SWORN DECLARATION OF RICHARD W. SEARS

STATE OF NEVADA
COUNTY OF WHITE PINE | ss.

This sworn declaration is made upon declarant's personal knowledge. Declarant has defended multiple stabbing cases over the last year and one half: counsel has been advised by a senior DAG that thirty knife and stabbing cases remain to be filed. The Attorney General's office is looking for a way to fast track the shank cases because they are overloaded. Declarant has been working with the AG's office to begin pleading these cases in multiple batches in order clear their workload. Declarant has more than 5 prison cases in his current case load including one murder with a deadly weapon and one attack where the inmate suffered substantial bodily harm.

This pleading is not being made for the purposes of delay.

This declaration is made under penalty of perjury.

DATED: August 8th, 2019

Richard W. Sears

SUBSCRIBED AND SWORN to before me
this 8 day of August, 2019.

Tamra M Szewczyk
Notary Public

TAMRA M SZEWCZYK
Notary Public-State of Nevada
APPT. NO. 17-3096-17
My Appt. Expires 07-24-2021

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3366

CERTIFICATE OF MAILING

I hereby certify that I am an employee of Richard W. Sears Law Firm and that on the date below written, I deposited in the United State Post Office, as Ely, Nevada, in a sealed envelope with first class postage fully paid, a true and correct copy of the above and foregoing Opposition to Dismissal of Supplement to Post-Conviction Writ, dated and addressed as follows:

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Ely, Nevada: and/or

☑ Via Facsimile; and/or email

☐ To be hand-delivered to the attorney listed below at the address indicated below:

Mr. Tyler Ingram
Elko County District Attorney
540 Court Street, Suite 201
Elko, NV 89801

Date: August 8th, 2019.

An employee of
Richard W. Sears Law Firm

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3366

HC-13-00116-
Karr

Case No. CV-HC-13-116

Dept. No. 1

2020 JAN 10 PM 3:43
RECEIVED
ELKO COUNTY DISTRICT ATTORNEY

FILED
2020 JAN 10 PM 2:49
ELKO CO DISTRICT COURT
CLERK ____ DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KODY CREE PATTEN,

Petitioner,

V.

WILLIAM GITTERE, Warden of the Ely State Prison,

Respondent.

_____/

ORDER DENYING MOTION TO DISMISS AND ORDER GRANTING MOTION TO EXTEND TIME FOR STATE'S RESPONSE

A Motion to Dismiss (hereinafter "Motion") was filed in this matter on July 9, 2019, by Tyler J. Ingram, Elko County District Attorney, on behalf of Respondent. The Motion states, in error, that Kody Cree Patten's (hereinafter "Petitioner") Petition for Writ of Habeas Corpus is time barred because it was filed beyond the one (1) year time limit set forth in NRS 34.726. Petitioner's Judgment of Conviction was entered on September 7, 2012, and Petitioner filed his original Petition for Writ of Habeas Corpus on February 20, 2013, less than six months after his Judgment of Conviction was entered.

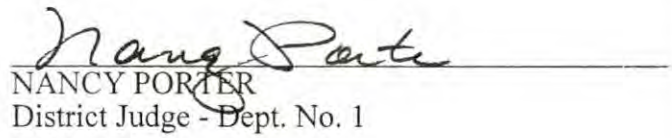
Respondent's Motion further argues that the Petition for Writ of Habeas Corpus should be dismissed under the doctrine of laches due to Petitioner's failure to comply with the briefing schedule in this matter. Respondent argues that laches applies here because Petitioner's Supplemental Petition for Writ of Habeas Corpus was not filed until March 25, 2019, which is five (5) years and one (1) month longer than the parties' stipulations to extend the briefing schedule. Respondent claims that this five (5) year delay in filing the Supplemental Petition has prejudiced Respondent's ability to oppose the Petition and Supplemental Petition.

Reviewed By

The Court finds that there are multiple reasons why the Petition should not be dismissed pursuant to the doctrine of laches and NRS 34.800(2). First, Petitioner's original court-appointed attorney withdrew after accepting a position as a deputy district attorney for Carson City. Second, new counsel was not appointed until February 25, 2014. Third, the parties entered into multiple stipulations to extend the briefing schedule in this matter, giving the second court-appointed attorney the impression that the Elko County District Attorney's Office would not insist on strict deadlines. Fourth, this matter involves a serious offense and it is extremely complex. That the attorneys in this matter require additional time to investigate and familiarize themselves with the case file is to be expected.

Therefore, **IT IS HEREBY ORDERED** that Respondent shall have an additional one-hundred eighty (180) days from the date of entry of this Order to file a response to the Petition and Supplemental Petition.

SO ORDERED this 10 day of January, 2020.



NANCY PORTER
District Judge - Dept. No. 1

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 10th day of ~~December~~ January, 2020, I personally hand delivered a file stamped copy of the foregoing **ORDER DENYING MOTION TO DISMISS AND ORDER GRANTING MOTION TO EXTEND TIME FOR STATE'S RESPONSE** to:

Tyler J. Ingram, Esq.
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801
[Box in Clerk's Office]

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 10th day of ~~December~~ January, 2020, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a file stamped copy of the foregoing **ORDER DENYING MOTION TO DISMISS AND ORDER GRANTING MOTION TO EXTEND TIME FOR STATE'S RESPONSE** addressed to:

Kody Cree Patten #1091721
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

Richard W. Sears, Esq.
Sears Law Firm, ltd
457 Fifth Street
Ely, NV 89301

William Gittere, Warden
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

Aaron D. Ford, Esq.
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

CASE NO.: CV-HC-13-0116

DEPT. NO. 1

FILED
2020 JUL 28 AM 11:46
ELKO CO DISTRICT COURT
CLERK DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

KODY CREE PATTEN,

Petitioner,

vs.

WILLIAM "BILL" GITTERE, WARDEN
ELY STATE PRISON

Respondent.

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND OPPOSITION TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the Elko County District Attorney's Office and TYLER J. INGRAM, District Attorney, and opposes Petitioner's Petition and Supplemental Petition For Writ Of Habeas Corpus. This Opposition is made and based upon the following Points and Authorities in support hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

Dated this 28 day of July, 2020.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____
TYLER J. INGRAM
District Attorney
State Bar Number: 11819

PATTEN'S GROUNDS

As far as the State can discern, Patten raised the following arguments in his original petition filed on February 20, 2013.

GROUND 1

A. Counsel was ineffective because:

1. Counsel "told Judge Papez that I had said everything to the police need [sic] to convict me of 1st Degree Murder;"

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

GROUND 2

A. Counsel was ineffective because:

1. Counsel told Patten he would be convicted and get the death penalty if he went to trial, based on his co-defendant's testimony;

2. Counsel told Patten that because of his PSI (Pre-sentence Investigation) report that he would not be "maxed out at sentencing."

GROUND 3

A. Counsel was ineffective because:

1. Counsel "failed to show that I did not inflict the life ending wounds to Micaela Costanzo.

GROUND 4

A. "Judge Prejudice"

1. Judge Papez showed prejudice towards Patten because Patten believes that Judge Papez already decided his sentence before the sentencing hearing; and

2. Judge Papez said, "Mr. Patten your blood runs cold."

GROUND 5

A. "Denied Constitutional Right to Defend Myself"

1. Counsel divulged information to the press and unknown information to the DA.

GROUND 6

A. Counsel was ineffective because:

1. Counsel did not investigate witnesses

GROUND 7

A. Patten did not understand his guilty plea because:

1. Patten thought he was not admitting to murder; and
2. Patten only took the deal because Counsel told him that he would get a lower sentence and he did not have to admit to a murder that he did not commit.

GROUND 8

A. Counsel was ineffective because:

1. Counsel told Patten that the Judge would not accept his guilty plea if he told the Judge the factual basis that he wrote and instead would have to use his first statement or confession.

GROUND 9

A. Counsel was ineffective because:

1. During a "closed court hearing" Counsel said he (Patten) was making the second biggest mistake of his life and it would result in him being put on death row.

GROUND 10

A. Counsel was ineffective because:

1. Counsel did not "put forth any motion that I asked to be added"
2. Counsel failed to get statements from witnesses;
3. Counsel failed to "get evidence to constitute a different outcome"

GROUND 11

A. "Counsel Prejudice by lead lawyer"

1. During a "plea deal meeting" with the DA, Counsel said to Patten, "You being there is as if you put the knife in her throat." Patten said, "I didn't kill her!" Counsel replied, "Okay if your [sic] not taking the deal we're done here!"

A Supplemental Petition For Writ of Habeas Corpus was filed on March 25, 2019. The captions within the pleading contain only one issue labeled as a ground. For simplicity, unless otherwise directed, the State will list each argument as a Separate Ground. If the State overlooked a ground raised that is not included here, the State respectfully requests court or counsel to point that out. With all due respect to Counsel, it's very difficult to separate the arguments.

GROUND S1

A. Counsel was ineffective because:

1. Counsel failed to fully advise Patten of all of his defenses to first degree murder prior to entry of a guilty plea, including the 'pretrial phase of defense."

GROUND S2

A. Patten's plea was entered without full knowledge of the meaning of first murder:

1. Because Patten made a proffer of evidence in exchange for a plea deal without full knowledge of the consequences of withdrawal from

the plea bargain.

GROUND S3[1]

A. Allowing Patten to make a proffer without knowing whether or not he was Committed to the plea agreement was a mistake.

B. Patten's proffer informed the prosecution of what defenses he would present at trial was a disadvantage to Patten.

GROUND S4

A. Failure to investigate and replicate the injuries on the victim resulted in a decision to plead guilty on insufficient facts.

1. This ground is very confusing as it doesn't allege who failed to investigate or replicate. Is Patten alleging that his Counsel failed to do such things? Is Patten alleging that law enforcement failed to do such things?

GROUND S5

A. Failure to prepare a psychological evaluation of Patten.

1. Again, it is unclear, because it was not stated, who Patten is alleging failed to prepare a psychological examination to determine why he continued to accept blame for the killing.

GROUND S6

A. Patten's plea and Nevada Law virtually removed any balancing by the sentencing court in assessing the propriety of the sentencing options:

1. Because counsel did not "discover what really happened and to dispel any false impression the events left in the mind of law enforcement and the courts.

GROUND S7

A. New Evidence

1. Fratto's jailhouse confession is new evidence that casts doubt upon

[1] Patten did not claim that Counsel was ineffective because of the arguments in Ground S3.

whether Patten's plea was not a miscarriage of justice due to actual innocence.

GROUND S8

A. Disproportionate Sentence

1. Patten's sentence is disproportionate to the sentence imposed on Fratto.

GROUND S9

A. Counsel was ineffective:

1. Because they failed to argue that life without parole is unconstitutional, that the sentence was disproportionate to the crime, and that failed to take into account Patten's youth.

AUTHORITIES

A. PROCEDURAL HISTORY (REQUIRED BY NRS 34.760)

Pursuant to NRS 34.760, the State informs the Court that Petitioner was convicted of First-Degree Murder with the Use of a Deadly Weapon. A copy of the Judgment of Conviction is attached as Exhibit 1. Petitioner has NOT previously applied for relief from his conviction via direct appeal.

Trial transcripts are not available because this case resolved with a plea of guilty. Respondent is not aware of any proceedings that were recorded and not transcribed except perhaps the hearing regarding Patten's satisfaction with his attorneys which the State was not present for. If Respondent learns differently, it will inform the Court.

B. EVIDENTIARY HEARING

Not all post-conviction petitions merit an evidentiary hearing. After reviewing the petition, return and answer, and all supporting documents, the District Court should determine whether an evidentiary hearing is required. See NRS 34.770(1). First, an

evidentiary hearing is not required if the claims are not supported by specific factual allegations.

Second, an evidentiary hearing is not required if the claims are belied by the record. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). Thus, the district court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. Id. at 354-56, 46 P.3d at 1230-31. And the district court cannot make credibility determinations without an evidentiary hearing. See Id. at 356, 46 P.3d at 1231 (rejecting suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

C. STANDARD FOR MOTION TO DISMISS

NRS 34.745(4) allows courts to look beyond the face of a petition to the courts' own records in deciding whether to order summary dismissal of the petition. Furthermore, NRS 34.745(4) is written in mandatory terms. "If the petition is a second or successive petition challenging the validity of a judgment of conviction or sentence and if it plainly appears from the face of the petition or an amended petition and documents and exhibits that are annexed to it, or from records of the court that the petitioner is not entitled to relief based on any of the grounds set forth in subsection 2 of NRS 34.810, the judge or justice **shall** enter an order for its summary dismissal and cause the petitioner to be notified of the entry of the order." (Emphasis added.)

The granting of a motion to dismiss is proper where it appears the non-moving party can "prove no set of facts that would entitle him to relief." Lubin v. Kunin, 117 Nev. 107, 111, 17 P.3d 422 (2001). In reaching such a conclusion, the trial court must construe the pleadings liberally and draw every reasonable inference in favor of the non-moving party. Id.

Accordingly, if the Court finds that Petitioner is not entitled to the relief requested, the Court should summarily deny the petition.

D. PURPOSES OF NEVADA HABEAS CORPUS PETITIONS AND PROCEDURE IN HABEAS PROCEEDINGS

State habeas corpus proceedings in Nevada are governed by statute and the resultant case law interpreting those statutes. McConnell v. State, 212 P.3d 307, 309 (Nev. 2009).

By statute, habeas corpus proceedings permit a person deprived of his liberty to file a habeas corpus petition to inquire into the restraint of that liberty. NRS 34.360. A post-conviction petition allows one to challenge the validity of the conviction and request relief from a wrongful conviction. NRS 34.720. To the extent they do not conflict with habeas corpus statutes, the Nevada Rules of Civil Procedure apply to habeas corpus proceedings. NRS 34.780.

Challenges to the validity of a criminal conviction, or challenges to the computation of time served on a criminal conviction are the only claims cognizable in Nevada habeas corpus proceedings. Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) (Nevada habeas proceedings can challenge validity and duration of confinement, but not the conditions of confinement).

E. PROCEDURAL BAR

Nevada law clearly states a petition is subject to dismissal if the trial court determines the claims could have been raised previously, or if the petition presents a challenge to a guilty plea that does not raise ineffective assistance of counsel. NRS 34.810 provides, in relevant portion:

> 1. The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;
(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post conviction relief; or
(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Supreme Court of Nevada held the application of procedural bars in post-conviction habeas corpus petitions is **mandatory**. State v. Eighth Judicial Dist. Court ex rel. County of Clark, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

F. BURDEN IS ON PATTEN

The Supreme Court of Nevada, in Means v. State, 120 Nev. 1001, 1012-1013 ((2004) held:

> Choosing consistency with federal authority, we now hold that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. To the extent that our decision today conflicts with the "strong and convincing" language of *Davis* and its predecessors, we expressly overrule those cases. Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in *Strickland*, the petitioner must establish that those facts show counsel's performance fell below a standard of objective reasonableness, and finally the petitioner must establish prejudice by showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different.

Also, "A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463 ____, (2002).

G. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review. To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. To establish prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding would have been different. Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. State v. LaPena, 114 Nev. 1159, 1166 (1998)(internal citations omitted). Petitioner bears the burden of "showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment and that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. at 1167 (internal citation and quotation omitted).

ARGUMENT

It seems that a common theme among most of Patten's arguments is his youth. In fact, throughout the Supplemental Petition, Patten is referred to as a "minor" while recognizing that he was not a juvenile. Only one is true. At all relevant times Patten was not a juvenile. Likewise, at all relevant times Patten was NOT a minor. He was over the age of 18 when he committed a horrific and brutal murder of someone who actually was a minor and a juvenile. Under our law, 18 is adult. There isn't a buffer.

GROUND 1

A. Counsel was ineffective because:

a. Counsel "told Judge Papez that I had said everything to the police need [sic] to convict me of 1st Degree Murder;"

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

This claim is bare and conclusory and should be dismissed summarily. There is no reference to the record as to where and when counsel allegedly told the judge as described above. The burden is not on the Respondent. Even if Patten is able to provide proof that such statements were made, the Petition fails to allege how those statements fell below an objective standard of reasonableness and perhaps even more importantly how such statements prejudiced Patten.

While Patten claims that the alleged statements resulted in him not getting a fair chance at trial or sentencing, he fails to counter the fact the he – while under oath in front of the Court – admitted to the elements of first-degree murder with the use of a deadly weapon. Change of Plea Transcript, pages 13-14 (hereinafter COPT), attached hereto as Exhibit 2. In pleading guilty, Patten admitted to each and every element which is exactly the same as the lawyer saying that Patten admitted to everything that the State needed to convict him of first degree murder. Moreover, he did that before sentencing. How, then, can Patten conclude that it was his counsel's statements that amounted to ineffective assistance of counsel? Again, this ground should be denied without an evidentiary hearing.

GROUND 2

A. Counsel was ineffective because:

1. Counsel told Patten he would be convicted and get the death penalty if he went to trial, based on his co-defendant's testimony;

2. Counsel told Patten that because of his PSI (Pre-sentence Investigation) report that he would not be "maxed out at sentencing."

At this point, this ground is bare and conclusory. A convicted petitioner has essentially limitless ability to make allegations about what his or her attorney said to him or didn't say to

him. Even if Patten is able to provide proof that such statements were made, the Petition fails to allege how those statements fell below an objective standard of reasonableness and perhaps even more importantly how such statements prejudiced Patten. Is a defense attorney advising his client about the likelihood of conviction now ineffective assistance? Isn't that precisely part of a defense attorney's job? The State submits that if Counsel did, in fact, tell Patten that his opinion is that Patten would be convicted and get the death penalty, it was a fair and accurate opinion given the overwhelming amount of evidence against Patten, including his confession and his co-defendant's confession which implicated Patten as well. This ground should be denied without an evidentiary hearing.

GROUND 3

A. Counsel was ineffective because:

1. Counsel "Failed to show that I did not inflict the life ending wounds to Micaela Costanzo..."

The charging document, including the Fifth Criminal Information which is Attached hereto as Exhibit 3, alleged that Patten murdered Micaela "in concert with" Toni Fratto. Under Nevada law, it doesn't matter if Patten inflicted the life ending wounds or not. "[A]n intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act." Etcheverry v. State, 107 Nev. 782, 785 (1991). Furthermore, "[a] defendant will not be relieved of criminal liability for murder when his action was a substantial factor in bringing about the death of the victim." Lay v. State, 110 Nev. 1189, 1192-93 (1994).

The autopsy report, attached hereto as Exhibit 4, as well as a transcript of Patten's confession, attached hereto as Exhibit 5, clearly show that Patten was a substantial factor in Micaela's death. In other words, even if the Court determines that Counsel should have done what Patten claims they should have, any result therefrom would not alter the outcome; therefore, Patten was not prejudiced. This ground should be denied without an evidentiary

hearing.

GROUND 4

A. "Judge Prejudice"

1. Judge Papez showed prejudice towards Patten because Patten believes that Judge Papez already decided his sentence before the sentencing hearing; and

2. Judge Papez said, "Mr. Patten your blood runs cold."

This ground is clearly bare and conclusory and should be summarily denied. What Patten "believes" about Judge Papez does not support his claim that the Judge was prejudiced. He received a just sentence for his part in a senseless, disgusting and horrendous murder of an innocent sixteen-year old who had so much life in front of her. The fact that he used a military shovel tool to cause multiple injuries to the victim, including slashing her face and/or neck, certainly supports Judge Papez's statement about Patten's blood. This claim should be denied without an evidentiary hearing.

GROUND 5

A. "Denied Constitutional Right to Defend Myself"

1. Counsel divulged information to the press and unknown information to the DA.

This ground is bare – without any reference to what statements were made – and conclusory. Respondent should not be held to answer this ground when it doesn't even contain what counsel may have said. The burden is on Patten, and Respondent is not responsible for guessing what he is referring to. This ground should be denied without an evidentiary hearing.

GROUND 6

A. Counsel was ineffective because:

1. Counsel did not investigate witnesses.

Again, Patten claims that he gave his attorney and PI (private investigator) "witnesses" and that they did not investigate, but he doesn't say what witnesses or what sort of information, if any, those witnesses would have provided. It is impossible for Respondent to guess what witnesses and what information those witnesses may have provided. More importantly, without knowing that information, and without Patten alleging that information, it is impossible for Respondent to analyze Counsel's performance under Strickland – i.e. you cannot analyze whether counsel was reasonable and whether Patten was prejudiced by it. Moreover, Patten knowingly and voluntarily gave up his ability to call and examine witnesses when he pled guilty. This ground should be denied without an evidentiary hearing.

GROUND 7

A. Patten did not understand his guilty plea because:

1. Patten thought he was not admitting to murder; and

2. Patten only took the deal because Counsel told him that he would get a lower sentence and he did not have to admit to a murder that he did not commit.

This claim is belied by the record. See Exhibit 2 (Change of Plea Transcript). Patten literally admitted to murder on the record, under oath. How could he not know he was admitting to murder? Patten also sign a memorandum of plea agreement, attached hereto as Exhibit 6, which clearly and unequivocally contains a guilty plea. If Counsel told Patten that he would get a lower sentence if he took the deal, he was correct. By taking the offer, Patten avoided the potential to be put to death. Further, the Court and Counsel explained all three possible sentences and the Court fully informed Patten that it was not bound by any recommendation and that it would make an independent determination as to what the

sentence should be. See Exhibit 2 (Change of Plea Transcript, p. 21, lines 3-15.) This ground is belied by the record and should be dismissed without an evidentiary hearing.

GROUND 8

A. Counsel was ineffective because:

1. Counsel told Patten that the Judge would not accept his guilty plea if he told the Judge the factual basis that he wrote and instead would have to use his first statement or confession.

Even if this is true – Patten did not cite to any record where this is captured – the judge didn't rely on his first statement or confession. The judge clearly relied on Patten's sworn testimony at the change of plea hearing where he provided a factual basis for first degree murder with the use of a deadly weapon. See Exhibit 2 (Change of Plea Transcript). Additionally, Patten didn't tell us what his factual basis that he wrote consisted of, so it's impossible to analyze whether his attorney was ineffective. If Patten's factual basis didn't cover the necessary elements of first degree murder with the use of a deadly weapon, then his attorney was correct, not ineffective. This ground is belied by record and should be dismissed without an evidentiary hearing.

GROUND 9

A. Counsel was ineffective because:

1. During a "closed court hearing" Counsel said he (Patten) was making the second biggest mistake of his life and it would result in him being put on death row.

Without more support, Respondent cannot adequately respond to this ground. If this was a closed court hearing then it is likely the State was not present. Given that the burden is on the Petitioner, it is his responsibility not only to offer some proof for this

allegation, but to also prove that his counsel was ineffective for it – neither of which he has done. This ground, without more, should be dismissed.

GROUND 10

A. Counsel was ineffective because:

1. Counsel did not "put forth any motion that I asked to be added"
2. Counsel failed to get statements from witnesses;
3. Counsel failed to "get evidence to constitute a different outcome"

Once again, these are bare claims not supported by anything specific. Patten claims that he 'put forth' motion(s) for his counsel to file. What motions? Given the fact that counsel is not required to file meritless motions even if requested by Patten, without knowing the nature of the motions the Respondent cannot analyze whether counsel was ineffective.

Likewise, what statements from what witnesses is Patten referring to? Are these character witnesses? Are these eye witnesses? What would they say? What evidence to constitute a different outcome is he talking about? Without knowing that, this court cannot make any conclusions about whether counsel was ineffective. With that in mind, and given that the burden is on Patten, the only reasonable conclusion is to deny this claim.

GROUND 11

A. "Counsel Prejudice by lead lawyer"

1. During a "plea deal meeting" with the DA, Counsel said to Patten, "You being there is as if you put the knife in her throat." Patten said, "I didn't kill her!" Counsel replied, "Okay if your [sic] not taking the deal we're done here!"

Assuming this conversation between Patten and his attorney actually happened the way Patten claims it happened, and what he claims was said is accurate, Patten only claims "Counsel Prejudice by lead lawyer" but doesn't say how. Moreover, if Counsel told Patten that he's not taking the deal after Patten told him that he didn't kill Micaela, that would be sound advice because Patten would have been unable to provide a sufficient factual basis for a guilty – not a nolo contendere – plea. This ground is bare and conclusory and should be denied without an evidentiary hearing.

GROUND S1

A. Counsel was ineffective because:

1. Counsel failed to fully advise Patten of all of his defenses to first degree murder prior to entry of a guilty plea, including the 'pretrial phase of defense."

Patten argues that Counsel failed to advise him of the defenses to first degree murder. At this point, without hearing from Patten's attorneys, we don't know what they advised him of or didn't advise him of. Assuming, arguendo, that Counsel didn't advise him of possible defenses – which seems very unlikely given the fact that both attorneys are highly regarded and bring decades of experience – Patten must show that but for his attorney's failure to explain his defenses that he would have proceeded to trial.[2] That's a tough row to hoe given the enormous amount of evidence against him, including his confession and his co-defendant's confession which implicated him, on top of facing the death penalty if this case went to trial.

This was a brutal killing to which the defendant confessed – what defenses did Patten think he had? He didn't do it? No. He committed a lesser degree of murder?

---

[2] It's also important to note that Patten, years after conviction, is the sole source of the assertion that his attorneys didn't fully advise him of defenses. Not only should the court consider faded memory with this length of time, it should also consider that Patten's credibility was completely obliterated years ago.

No – he admitted under oath to all of the elements of first degree murder. Additionally, if the jury didn't believe that it was traditional first degree murder, then undoubtedly they could have convicted him of felony murder given the evidence of zip ties around the victim's hands. That he didn't deliver the death blow? Doesn't matter – he was clearly a substantial factor in her death which is supported at the very least by the fact that he admitted to slashing the victim with the shovel until she stopped making the gurgling sound. See Exhibit 7 (Transcript of Confession, p. 17.) Any reasonable defense attorney would have understood that it was nearly guaranteed that Patten was going to prison – it was simply a matter of being there for a really long time or being there until he was lethally injected. A defense attorney is not under an obligation to fill their client with false hope. This claim must be denied.

GROUND S2

A. Patten's plea was entered without full knowledge of the meaning of first degree murder:

1. Because Patten made a proffer of evidence in exchange for a plea deal without full knowledge of the consequences of withdrawal from the plea bargain.

Patten's claim that he didn't understand first degree murder is belied by the record. While under oath, Mr. Ohlson questioned Patten about the elements of first degree murder. Specifically, Patten was asked about whether he committed the murder maliciously, willfully, and unlawfully. Patten never asserted that he didn't understand what he was pleading to at that time nor did he make such a claim at any other relevant time. Now, years later, he claims that he didn't understand.

While the State is uncertain what the proffer has to do with this claim, the fact that Patten's proffer was shut down before he admitted to anything regarding the murder of the victim means that the proffer was of no consequence. See Exhibit 7

(Transcript of Patten Proffer). It seems as if Patten is arguing that there was some consequence from withdrawing from the plea negotiations; however, even though Patten stopped the proffer, he was still extended an offer by the State which he ultimately accepted. A copy of the agreement that Patten signed and said he spoke to his lawyer about and understood is attached hereto as Exhibit 8 (Agreement for Recorded Statement). It's important to note that the State agreed to not use his statements against him at his trial or any other trial.

Either way, Patten has not demonstrated how his attorneys' performance was unreasonable – his proffer was, in part, in exchange for a plea offer and he agreed to it *in writing*. Patten fails to demonstrate how he was prejudiced by the proffer. This claim must be denied.

GROUND S3[3]

A. Allowing Patten to make a proffer without knowing whether or not he was Committed to the plea agreement was a mistake.

B. Patten's proffer informed the prosecution of what defenses he would present at trial and that was a disadvantage to Patten.

Again, any argument that the partial proffer was a mistake and amounts to ineffective assistance of counsel fails because the proffer was terminated before Patten implicated himself in any crime. See Exhibit 7 (Transcript of Patten Proffer). Besides, he already confessed prior to the proffer. Even so, Patten argues that Counsel should have made sure he was committed to the plea agreement before allowing him to make the proffer; however, that argument is not supported by any authority whatsoever. How can any attorney make absolute sure that his or her client is committed to anything? Requiring a lawyer to make sure there is irrevocable commitment from the client before

[3] Patten did not claim that Counsel was ineffective because of the arguments in Ground S3.

making decisions is requiring a lawyer to do the impossible. Besides that, what proof do we have that counsel didn't make sure he was committed to the plea agreement? This claim must be denied.

GROUND S4

A. Failure to investigate and replicate the injuries on the victim resulted in a Decision to plead guilty on insufficient facts.

Patten essentially claims that he pled guilty because his counsel failed to investigate and replicate the injuries on the victim; however, he does not provide any support for the idea that if his counsel would've done so that it would've made him insist on going to trial instead of taking the offer.

As argued above, it is of no consequence to determine what injuries were caused by Fratto and what injuries were caused by Patten, if that is even possible. While Patten has not provided any scientific proof that someone could reasonably look at photographs of the victim and make a determination as to who caused the injuries based on Patten's stature, it seems highly unlikely that someone could. Even if it's possible, Patten and Counsel were faced with overwhelming evidence that the jury would have heard, including his confession – wherein he admits to beating the victim to make the gurgling sound stop – and Fratto's testimony regarding his involvement when analyzing whether the guilty plea was in his best interest. Any junk science that may have been presented would have been irrelevant. "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina v. State, 120 Nev. 185, 192 (2004). In the case, it would have been an exercise in futility to perform such an investigation. Patten cannot show that he would insisted on a trial instead of taking the offer; therefore, this claim must be denied.

GROUND S5

A. Failure to prepare a psychological evaluation of Patten

"Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina v. State, 120 Nev. 185, 192 (2004). In this case, Patten was evaluated at Lake's Crossing by Drs. Henson and Farmer. Due to the confidential nature of the report, a copy is not attached hereto; however, Respondent will have a copy available to file under seal if the Court requests. If the Court's file already contains a copy, and Counsel does not object, Respondent respectfully requests that it be incorporated by reference herein and be made part of the record in this civil case. Importantly, there is nothing in the reports that raise any red flags about Patten's psychological well-being. In Riley v. State, 110 Nev. 638 (1994), the Supreme Court of Nevada aptly held that where there isn't any indication that a defendant a suffered from mental disorders, counsel is not ineffective for not obtaining a psychological evaluation. As such, Counsel in this case was not required to do so.

Even if Patten wasn't evaluated by Lake's Crossing, he still has the burden to prove that but for his Counsel's failure to obtain an evaluation he would not have entered a guilty plea and would have insisted on a trial. He argues that such an evaluation might explain why he essentially protected his co-defendant by not implicating her in the murder. Is it enough for Patten to say that a psychological examination would have uncovered the reason why he took all of the blame? Even if it did, how does his co-defendant's participation in the murder change his culpability? Regardless of his co-defendant's participation and regardless of why he didn't implicate his co-defendant to the extent that he now feels he should have, he still bludgeoned the

victim with a sharp shovel. Counsel and Patten understood the mountain of evidence against him. This claim must be denied.

GROUND S6

A. Patten's plea and Nevada Law virtually removed any balancing by the sentencing court in assessing the propriety of the sentencing options:

1. Because counsel did not discover what really happened and to dispel any false impression the events left in the mind of law enforcement and the courts.

Respondent incorporates by reference the arguments contained within this pleading that address Patten's assertion that counsel should have figured out what really happened in this case. Regardless of whether Fratto helped kill the victim and regardless of any alleged jealously enraged motive by Fratto, Patten still murdered an innocent juvenile. Additionally, Patten was thoroughly counseled by his attorneys and thoroughly canvassed by the court before his plea was accepted. See Exhibit 2 (Change of Plea Transcript). He knew the facts of the case and he knew the possible sentences that he could receive. But now, while Patten is actually facing the consequences for his cowardly actions, he wants to claim ignorance and retract his acceptance of responsibility by placing blame on others and arguing that his attorneys didn't erase the truth and provide a version of the events that painted him in a better light. The fact of the matter is that Patten's sloppy and merciless killing painted the true facts and any attempt to dress them up with a false narrative would have undoubtedly been recognized by the very experienced sentencing judge.

With regard to the argument that Nevada law removed any balancing for the court in deciding Patten's sentence, it's important to remember that the Respondent, Patten, defense counsel, and the court, all engaged in balancing at the sentencing hearing. Patten pays much attention to his youth – even describing himself as a minor

when in fact he was an adult. The Court considered his youth – so did all of the other parties involved. Just because Patten isn't happy with the outcome of the balancing, doesn't mean it didn't happen or that our law removed it. Moreover, Patten must show that but for Counsel's failures, if any, that there would have been a different outcome at sentencing. Regardless of what counsel did at sentencing, the Court still could have given Patten the same sentence. This claim is truly belied by the record and must be denied.

GROUND S7

A. New Evidence

1. Fratto's jailhouse confession is new evidence that casts doubt upon whether Patten's plea was not a miscarriage of justice due to actual innocence.

Patten argues that Fratto told a fellow inmate, Linda Fields, that she (Fratto) set the murder up and Patten just stood around while Fratto killed the victim. "In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. Actual innocence means that it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Brown v. McDaniel, 130 Nev. 565, 576 (2014)(internal citations and quotations omitted). In Berry v. State, 131 Nev. 957, 968-969 (2015)(internal citations and quotations omitted), the Supreme Court of Nevada further explained the relevant inquiry as follows:

> This requires the district court to evaluate whether the new evidence presents specific facts that are not belied by the record and then, if so, to evaluate whether the new evidence, considered in light of all the evidence at trial, would support a conclusion that the petitioner has met the actual-innocence test—the caveat

being that the district court must assume the new evidence is true when determining whether to conduct an evidentiary hearing.

Above, we provided a recitation of the facts to emphasize that this is a highly factual inquiry, even at the stage of determining whether the petitioner should be granted an evidentiary hearing on his actual innocence claim. The district court must make its determination concerning the petitioner's innocence in light of all the evidence. It must review both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction. Based on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do. Still, the court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. Since the jury did not hear the new evidence, the district court should assess how reasonable jurors would react to the overall, newly supplemented record.

A copy of the transcript of Fratto's proffer is attached hereto as Exhibit 9. Also, Exhibit 10, a copy of the conversation between Fratto and Patten's counsel wherein she confessed to her participation in the killing, is attached hereto. Two times Fratto told the story and she never said that she was solely responsible for setting the murder up. Likewise, she never said that Patten just stood by while she murdered the victim. That's particularly important because even if the jury heard that Fratto told a much different version of the story, they would have heard at least two other versions of the story that certainly would have destroyed Fratto's credibility if she even had any left.[4] Assuming that Fratto actually told Linda Fields what Patten thinks she did, this claim must still be denied because Patten cannot meet his burden under Brown and Berry, supra.

GROUND S8

[4] Fratto also told Patten's counsel a different version of events wherein she claimed she was not present for the murder.

A. Disproportionate Sentence

1. Patten's sentence is disproportionate to the sentence imposed on Fratto.

This claim should be denied because a post-conviction writ cannot be used as an appellate mechanism for a lawful sentence. Moreover, the sentence Patten received was within the statutory possibilities; it was contained within his plea agreement; and he was canvassed about that particular sentence at his change of plea hearing. Moreover, Fratto received the benefit of a bargain in her plea agreement and sentence. See Exhibit 11 (Fratto Plea Agreement). In exchange for her plea of guilty to second degree murder with the use of a deadly weapon, the State secured her testimony at Patten's trial (if it would have gone to trial, of course).

In support of this argument, Patten cites to case law which addresses severe punishment for juveniles. Again, even though Patten is repeatedly referred to as a minor in the Supplemental Petition, he was not. He was an adult when he committed murder. As such, Patten's legal support is inapposite to his claim. Comparing Fratto's sentence to Patten's sentence is not comparing apples to apples. Comparing Patten's sentence to a sentence received as a juvenile isn't accurate. Accordingly, this claim must be denied.

GROUND S9

A. Counsel was ineffective:

1. Because they failed to argue that life without parole is unconstitutional, that the sentence was disproportionate to the crime, and failed to take into account Patten's youth.

First, Counsel is not obligated to make an argument that isn't supported by law. Any

argument by defense counsel that life without parole is unconstitutional for an adult – because that is what Patten was – would have been directly contrary to the law. Interestingly, the Court even contemplated that very issue at sentencing. See Exhibit 12 (Sentencing Hearing Transcript), p. 70-71.

Second, Patten claims that counsel's decisions were unreasonable because the evidence of mitigation was so compelling. What evidence in mitigation is Patten referring to? It's unclear from his pleadings. Despite, Patten's belief, there is very little mitigation in this case. In fact, the only mitigation was his youth and lack of criminal history; however, those pale in comparison to the horrendous crime he committed. Patten's belief that his sentence was disproportionate to the crime is shocking, at minimum. He ended a precious life and did so brutally, in one of the most despicable ways possible. Short of the death penalty, the sentence he received was exactly what he deserved. Micaela isn't living. Micaela didn't get to graduate from high school and chase her dreams. She didn't get to spend any more time with the people she loved. Her life ended at the filthy hands of Patten and Fratto.

Third, Patten argues that the sentence failed to take into account his youth. That claim, even if it was a valid issue to raise in a writ, is belied by the record because the court, in fact, specifically addressed Patten's youth. See Exhibit 12 (Sentencing Hearing Transcript), p. 71. Judge Papez said, "As far as mitigating factors in this case, perhaps the most important mitigating factor for Mr. Patten is his youth, without question his youth." Id. His youth was obviously balanced along with all of the other mitigating and aggravating factors and ultimately the court made a just decision. This claim must be denied.

Dated this 28 day of July, 2019.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____
TYLER J. INGRAM
District Attorney
State Bar Number: 11819

Unsworn Declaration In Support Of Motion

Pursuant to NRS 53.045

Comes now TYLER J. INGRAM, who declares the following to the above-entitled Court:

1. That the Declarant is presently serving as District Attorney for Elko County.
2. That I have read the assertions of fact set forth in this pleading and incorporate them into this Declaration.
3. This Motion is made in good faith, and not merely for the purposes of delay.
4. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 28 day of July, 2019.

TYLER J. INGRAM
District Attorney
State Bar Number: 11819

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 28th day of July, 2019, I served the foregoing OPPOSITION TO WRIT OF HABEAS CORPUS, by delivering or mailing or causing to be delivered or mailed, a copy of said document, to the following:

By delivery to:

THE HONORABLE NANCY PORTER
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

By mailing to:

RICHARD WAYNE SEARS
ATTORNEY AT LAW
457 5TH ST.
ELY, NV 89301

Kurri Sullivan
KURRI SULLIVAN
ASSISTANT OFFICE MANAGER

DA# HC-13-00116-01

Exhibit 1

KODY CREE PATTEN

VS.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON

FILED

2012 SEP -7 PM 4:31

ELKO CO DISTRICT COURT

CLERK_____ DEPUTY_____

Case No. CR-FP-11-0300

Dept No. II

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

****

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

JUDGMENT OF CONVICTION AND SENTENCE

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On the 9th day of May, 2012, the above-named Defendant, **KODY CREE PATTEN**, (Date of Birth: December 31, 1992 [19 years of age at time of sentencing]; Place of Birth: Logan, Utah), entered a plea of **GUILTY** pursuant to the terms of a written Statutory Plea Agreement to the criminal offense of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A FELONY AS DEFINED BY NRS 193.165; NRS 200.010, NRS 200.020, AND NRS 200.030**, which crime occurred on or about the 3rd day of March, 2011, near West Wendover, Nevada, and as more fully described in the Fifth Criminal Information filed on May 8, 2011. Appearing with said Defendant at said hearing were his legal counsel, John Ohlson, Esq., and Jeffrey Kump, Esq. The State was present and represented by Elko County District Attorney, Mark Torvinen.

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On the 24th day of August, 2012, the Defendant personally appeared before this Court together with his legal counsel, John Ohlson, Esq., and Jeffrey Kump, Esq., for purpose of entry of final judgment and imposition of sentence. Elko County District Attorney Mark Torvinen was present on behalf of the State of Nevada. Also present at said hearing was Nevada Division of Parole and Probation Officer Maria Cammarano who had previously prepared and provided to the Court, counsel and said Defendant, a Presentence Investigation Report. The Court allowed said Defendant and his counsel an opportunity to provide evidence in mitigation of the crime, and further, allowed said Defendant to personally address the Court. The Court also allowed the State to present victim impact evidence in support of the State's sentencing recommendation. Counsel for said Defendant and for the State were allowed to make sentencing recommendations to the Court.

After considering all evidence, statements and recommendations made to the Court, the court enters judgment and imposes sentence as follows:

ENTRY OF JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that KODY CREE PATTEN is GUILTY of the crime of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, a Category A Felony as defined in NRS 193.165; NRS 200.010, NRS 200.020, and NRS 200.030.

SENTENCE

Upon the Defendant's conviction of:

FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A FELONY AS DEFINED BY NRS 193.165, NRS 200.010, NRS 200.020 AND NRS 200.030;

///

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

The Defendant is hereby sentenced to serve:

1. Life imprisonment in the Nevada State Prison without the possibility of parole (see NRS 200.030.1 and .4[b][1];

2. The Defendant shall receive credit against this sentence in the amount of five-hundred and thirty-five (535) days, calculated to include the day of his arrest which occurred on the 7th day of March, 2011, to and including the day of sentencing which was Friday the 24th day of August, 2012.

For the use of a deadly weapon in the commission of the offense of First Degree Murder, the Defendant, pursuant to the provisions of NRS 193.165, shall serve a term of:

1. Two-hundred and forty (240) months (twenty[20] years) with parole eligibility for this sentencing enhancement to commence after the service of ninety-six (96) months (eight [8] years).

2. The enhancement imposed under the provisions of NRS 193.465 shall, in accordance with the provisions of NRS 193.165, be served consecutively to the sentence of life imprisonment without the possibility of parole imposed upon the Defendant for his conviction of First Degree Murder as described above.

The Court would memorialize, as it recited on the record in open Court at the time of the imposition of sentence in this matter, that in formulating the enhancement imposed pursuant to the provisions of NRS 193.165 in this Case it considered the factors set forth in NRS 193.165.1(a) to (e).

Further the Defendant shall pay to the Nevada Victims Of Crime Program, as restitution for the sums advanced in connection with the funeral expenses incurred by the Victim's, Micaela Costanzo's, family, the sum of five-thousand dollars ($5,000.00). See NRS 217.200 and Roe vs. State 112 Nev. 733 at 735 and 736 (1996).

IT IS HEREBY FURTHER ORDERED that the Defendant shall submit to testing to determine his genetic markers in accordance with the provisions of NRS 176.0913, and shall pay One Hundred Fifty Dollar ($150) genetic testing fee in accordance with the provisions of NRS 176.0915.

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

IT IS HEREBY FURTHER ORDERED in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-Five Dollars ($25.00), as an administrative assessment fee, and judgment therefore is hereby entered against the Defendant.

NOW THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above-entitled matter pursuant to the provisions of NRS 176.125.

DATED this 30th day of August, 2012.

Dan L. Papez
DISTRICT JUDGE

FILED

2012 SEP -7 PM 4:32

ELKO CO DISTRICT COURT

CLERK_____ DEPUTY_____

Case No.: CR-FP-11-300

Dept No.: 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

_____

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

_____/

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department II, and that on this 7 day of September, 2012, I served by the following method of service:

(X) regular U.S. mail
() certified U.S. mail
() registered U.S. mail
() overnight U.S. mail
(X) hand delivery
(Copy placed in agency box located in the Elko County Clerk's Office)

() overnight UPS
() overnight Federal Express
() Fax to #_____
() personal service

a true copy of the ***Judgment of Conviction and Sentence***, addressed to:

///

///

///

///

Elko County District Attorney {hand delivery}

State of Nevada, Division of Parole and Probation {hand delivery}

Elko County Sheriff {hand delivery}

Nevada Department of Corrections
{copy to accompany Defendant at time of transport}

Jeffrey J. Kump, Esq. {hand delivery}

John Ohlson, Esq.
Law Office of John Ohlson
275 Hill St., Ste. 230
Reno, NV 89501
{regular U.S. Mail}

Nevada Department of Corrections
Offender Management Division,
Sentence Management
PO Box 7011
Carson City, NV 89702
{regular U.S. Mail}

Stefanie Rattani

Stefanie Rattani

Exhibit 2

KODY CREE PATTEN

VS.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON

FILED

COPY

2012 AUG 21 AM 11:39
ELKO CO DISTRICT COURT
CLERK ___ DEPUTY YA

Case No. CR-FP-11-0300
Dept. II

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

ooOoo

THE STATE OF NEVADA	:	
Plaintiff,	:	
v.	:	CHANGE OF PLEA
KODY CREE PATTEN,	:	
Defendant.	:	
_____/		

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on May 9, 2012, at the hour of 11:00 a.m. of said day, before the HONORABLE DAN L. PAPEZ, District Judge.

The plaintiff was represented in court by MARK D. TORVINEN, Elko County District Attorney, 540 Court Street, 2nd Floor, Elko, Nevada, 89801.

The defendant was present in court and represented by JOHN OHLSON, Attorney at Law, 275 Hill

Street, Suite 230, Reno, Nevada, 89501, and JEFFREY J. KUMP, Attorney at Law, 217 Idaho Street, Elko, Nevada, 89801.

PROCEEDINGS

THE COURT: Let the record reflect that we are in court on CR-FP-11-0300, State of Nevada, plaintiff, versus Kody Cree Patten. This is the date and time set for a hearing on change of plea.

The record should reflect that Mr. Patten is present in court today, together with his counsel, attorney John Ohlson and attorney Jeffrey Kump. The State is present and represented by Elko County District Attorney Mark Torvinen.

Are the parties prepared to proceed?

MR. TORVINEN: State is.

MR. OHLSON: Defendant is, Your Honor.

THE COURT: All right. Court would entertain a motion by defense at this time to withdraw the former plea of not guilty entered in this matter.

MR. OHLSON: Your Honor, at this time the defendant moves the Court for its order allowing the defendant Kody Patten to withdraw his previously entered not guilty plea to the Information on file for the purpose,

pursuant to plea bargain, of entering a guilty plea to the Fifth Amended Information on file.

THE COURT: Very well. Any objection by the State?

MR. TORVINEN: No, Your Honor.

THE COURT: Hearing none, the Court orders that Mr. Patten's previous plea of not guilty entered in this matter is withdrawn.

The record should reflect that a Fifth Criminal Information filed pursuant to the plea agreement is present in the court file. So what I will be doing at this point is rearraigning Mr. Patten on the Fifth Criminal Information.

MR. OHLSON: I understand that, Your Honor.

THE COURT: So Mr. Patten, would you please stand with your counsel. Can you hear me okay, Mr. Patten?

DEFENDANT KODY PATTEN: Yes, I can.

THE COURT: All right. Did you receive a copy of the Fifth Criminal Information?

DEFENDANT KODY PATTEN: Yes, I did.

THE COURT: And did you have an opportunity to read it over?

DEFENDANT KODY PATTEN: Yes, I did.

THE COURT: The Fifth Information is captioned State of Nevada, plaintiff, versus Kody Cree Patten. Is

1 that your true and correct name?
2 DEFENDANT KODY PATTEN: Yes, Your Honor.
3 THE COURT: All proceedings will go forward under
4 that name. Do you wish for me to read the Information to
5 you verbatim, or may I simply summarize the charge then ask
6 you to offer your plea?
7 MR. OHLSON: If I may, Your Honor, we waive the
8 formal reading of the Information. Mr. Patten's name is
9 correctly spelled as set forth at about line 12 and a half.
10 THE COURT: All right. I simply then will
11 summarize the Information, ask you to offer your plea.
12 MR. TORVINEN: Your Honor, could I inquire of the
13 Court, is there a certified copy for service on the
14 defendant in the file? I was assured yesterday there would
15 be.
16 THE COURT: A certified copy?
17 MR. TORVINEN: I was assured it was in the file.
18 THE COURT: In the official court file, that's
19 correct.
20 MR. TORVINEN: That's what I was told, sir.
21 THE COURT: Yes.
22 MR. TORVINEN: We usually -- the usual procedure
23 has been they would serve a certified copy on the defendant
24 and there would be another file copy. So there is only one
25 copy in the file, is that it?

THE COURT: I have a copy that was provided to me in my chambers.

MR. OHLSON: Your Honor, we have been provided copies prior to this time and waive any requirement that the Amended be served upon the defendant, either certified or otherwise.

MR. TORVINEN: Thank you.

THE COURT: All right. Very well. The Fifth Criminal Information alleges First-Degree Murder with the use of a deadly weapon, a felony as defined by NRS 193.165, 200.010, 200.020, and 200.030.

It alleges that the defendant, Kody Cree Patten, acting alone or in concert with one Toni Collette Fratto, at a place within Elko County, Nevada, described as located approximately five miles west of the city of West Wendover, Nevada, on or about the 3rd day of March, 2011, did willfully and unlawfully, with malice aforethought, and with premeditation and deliberation kill and murder another human being, one Micaela Costanzo.

Further, that the defendant employed a deadly weapon within the meaning of NRS 193.165 in connection with said murder.

With respect to this charge, what is your plea?

DEFENDANT KODY PATTEN: Guilty.

THE COURT: Guilty. The record will so reflect. In order for the Court to accept the plea of guilty, it is incumbent upon the Court to conduct a canvass of Mr. Patten to ensure that his guilty plea is being voluntarily, knowledgeably given before the Court.

Counsel, would you like to address the Court?

MR. OHLSON: I would, Your Honor. With the Court's permission, I would like Mr. Patten to be sworn, take the witness stand, and I have a series of questions to ask Mr. Patten; at the end of which I would turn Mr. Patten over to the Court to complete the Court's canvassing as required by law.

THE COURT: Very well. Mr. Torvinen, is the procedure adequate for you?

MR. TORVINEN: Yes.

THE COURT: All right. Mr. Patten, please come forward. Please face the clerk. And to the extent that you can, raise your right hand and the clerk will administer your oath.

(WHEREUPON, the witness was sworn)

THE COURT: Please be seated up here. Mr. Patten, please state your name for the record and spell your last name.

THE WITNESS: Kody Cree Patten, P-a-t-t-e-n.

THE COURT: Thank you. Mr. Ohlson.

KODY CREE PATTEN

called as a witness in said case, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OHLSON:

Q. Mr. Patten, are you same Kody Cree Patten who's named in the Fifth Amended Information in this case?

A. Yes, I am.

Q. How old are you?

A. Nineteen.

Q. When did you turn 19?

A. December 31, 2011.

Q. At the date that this homicide was committed, were you above the age of 18 years?

A. Yes, I was.

Q. And were you living in Elko County?

A. Yes, I was.

Q. You've heard us tell the Court that a plea bargain has been arranged in this case. Are you aware of that?

A. Yes, I am.

Q. And before I go into the specifics of that, did you have the opportunity before coming here today to talk to me on the phone and in person about the plea arrangements?

A. Yes, I did.

Q. And did you -- what did you say?

A. Yes, I did.

Q. Did you also have an opportunity to talk to Mr. Kump, together with our investigator, Mr. Savage, about the plea memorandum?

A. Yes, I did.

Q. Did you go over that plea memorandum with Mr. Kump and Mr. Savage?

A. Yes, I did.

Q. Was it read to you out loud?

A. Yes.

Q. While it was being read to you and during that time, if you had any questions, did you raise them?

A. Yes.

Q. And were they answered?

A. Yes, they were.

Q. To your satisfaction?

A. Correct.

Q. Do you now state in court that you understand the plea bargain?

A. Yes, I do.

Q. You understand that essentially you are pleading guilty to first-degree murder with the use of a deadly weapon?

A. Correct.

Q. Of Micaela Costanzo?

A. Yes.

Q. And that that is enhanced by the use of a deadly weapon, correct?

A. Yes.

Q. And in return for that plea, the State would withdraw its intention to seek the death penalty in this case?

A. Yes.

Q. All right. Do you also understand that at your sentencing that both the State and you, through your lawyers, will be free to argue as to what your penalty would be?

A. Yes, I do.

Q. Do you understand that there are only two options for the Court in sentencing you in this case?

A. Correct.

Q. Do you know what they are?

A. Yes, I do.

Q. What are they?

A. Life without and life with possibility of parole, and a deadly weapon could be consecutive one to twenty.

Q. Now, if you receive a sentence of life without

1 the possibility of parole, will you get to go to the parole
2 board and ask for parole?
3 A. I will have to fight for it, appeal it.
4 Q. But you don't have a right within that
5 sentence; is that right?
6 A. Correct.
7 Q. Do you understand that life without the
8 possibility of parole means life without parole?
9 A. Correct.
10 Q. Do you understand that the Court -- and life
11 with parole means you'll have the possibility of seeking
12 parole in how many years?
13 A. Twenty years.
14 Q. Do you understand that the Court must sentence
15 you also for the use of a deadly weapon in addition to the
16 murder in this case?
17 A. Correct.
18 Q. And do you understand that what -- the range
19 of time that will be involved in that sentence?
20 A. Yes, I do.
21 Q. And what is the range of time?
22 A. One to twenty years.
23 Q. Do you understand also that any sentence for
24 use of a deadly weapon will run consecutive to any life
25 sentence you receive from the Court on the murder?

A. Correct.

Q. And by consecutive, that means you have to expire your sentence on the murder before you can start serving the sentence on the use of a deadly weapon?

A. Correct.

Q. Did you sign that plea agreement?

A. Yes, I did.

MR. OHLSON: Your Honor, I believe the original has been filed with the Court.

THE COURT: Yes.

MR. OHLSON: May I show it to the defendant, please.

THE COURT: I have a copy. The original is in the court file.

MR. OHLSON: Do you have a photocopy with a photocopy of the signature, if I can use that.

THE COURT: I do.

MR. OHLSON: Thank you, Your Honor.

Q. I'm showing you a photocopy of a plea agreement. Would you take a look at each page of that plea agreement. You can handle it. Is that the agreement you signed?

A. Yes, it is.

Q. On the last page, did you see your signature? On the last page of this agreement?

1 A. It's not on there. It's the next one.
2 Q. I think it's on the next one. Anyway, when
3 you went through the agreement, did you see your signature
4 on the last page?
5 A. Yes, it is.
6 Q. And is that your true signature?
7 A. Yes, it is.
8 MR. OHLSON: Thank you, Your Honor.
9 Q. Once again, before signing the agreement, did
10 you have the benefit of the advice of counsel?
11 A. Yes, I did.
12 Q. And when you signed that agreement, were you
13 of sound mind?
14 A. Yes.
15 Q. Were you using any medications at all?
16 A. No, I wasn't.
17 Q. Were you in good health?
18 A. Yes.
19 Q. Let me ask you about your condition today.
20 How is your condition today, your mental condition?
21 A. I'm all right, I guess.
22 Q. Are you using any prescription medication
23 today?
24 A. No, I'm not.
25 Q. Have you used any illegal substances?

A. No.

Q. And you feel good today?

A. Yeah.

Q. Good as you can under the circumstances?

A. Yeah.

Q. You're accused of first-degree murder of Micaela Costanzo, correct?

A. Yes.

Q. Did your attorneys attempt to advise you of the meaning of malicious?

A. Yes.

Q. And of malice?

A. Yes.

Q. And according to what you understand the legal term to mean, did you commit that murder maliciously?

A. Yes.

Q. Did you commit that murder willfully; that is, intentionally?

A. Yes.

Q. It was not an accident; is that right?

A. Correct.

Q. And did you commit that murder unlawfully? You had no lawful justification?

A. Yes.

Q. And did you do so with a deadly weapon?

A. Yes.

Q. And you recall telling the police, when you were interviewed early on in this case, that you hit Ms. Costanzo in the throat with the sharp pointed end of the shovel?

A. That's correct.

Q. Do you recall telling them that?

A. Correct.

Q. Are you satisfied with the legal representation that you have received up to this point?

A. So far, yes.

Q. Are you ready to answer the Judge's questions regarding your guilty plea?

A. Yes, I am.

Q. Do you have any questions of the questions I've asked you so far?

A. No.

MR. OHLSON: Your Honor, if you please, I would tender the defendant to you.

THE COURT: Thank you. Mr. Patten, can you hear me all right?

DEFENDANT KODY PATTEN: Yes, I can.

THE COURT: I'm going to ask you some additional questions regarding the case and your guilty plea. As we go through these, if there is anything that you don't

1 understand or you have a question about, be sure and stop
2 me so that you can ask me about it. I want to make sure
3 you understand everything I ask you.
4 DEFENDANT KODY PATTEN: Yes, sir.
5 THE COURT: At the time that this incident
6 occurred, where were you living?
7 DEFENDANT KODY PATTEN: I was living with the
8 Frattos.
9 THE COURT: In Wendover, Nevada?
10 DEFENDANT KODY PATTEN: Correct.
11 THE COURT: All right. And what is your current
12 age?
13 DEFENDANT KODY PATTEN: Nineteen.
14 THE COURT: You're 19 years old right now?
15 DEFENDANT KODY PATTEN: Yes, sir.
16 THE COURT: Okay. What -- what education level
17 did you achieve before you were arrested on this incident?
18 DEFENDANT KODY PATTEN: Eleventh grade.
19 THE COURT: You were in the 11th grade?
20 DEFENDANT KODY PATTEN: I was a senior, but I
21 didn't get to graduate.
22 THE COURT: Okay. So you do read and write?
23 DEFENDANT KODY PATTEN: Correct.
24 THE COURT: All right. Your counsel has brought
25 out, and I'm going to ask you again, you received a copy of

1 the Fifth Criminal Information. And you've already advised
2 me that you read that document over, correct?
3 DEFENDANT KODY PATTEN: Yeah.
4 THE COURT: All right. And your counsel just
5 asked you and you testified that you received a copy of the
6 plea agreement, that you read that document over as well?
7 DEFENDANT KODY PATTEN: Yes, I did.
8 THE COURT: And just so that I can be certain, if
9 you had any questions about anything contained in either
10 the Fifth Criminal Information or the plea agreement, were
11 you able to discuss those matters fully with your counsel?
12 DEFENDANT KODY PATTEN: Yes, I did.
13 THE COURT: Are you a citizen of the United
14 States?
15 DEFENDANT KODY PATTEN: Yes, I am.
16 THE COURT: All right. Mr. Patten, obviously,
17 what you're doing here today is very important and a
18 decision that I'm sure you've pondered for a long time.
19 Have you had enough time to think about and
20 consider the decision that you're making today to change
21 your plea?
22 DEFENDANT KODY PATTEN: Yes, I have.
23 THE COURT: All right. You've already testified
24 that you spoke to your attorneys in detail about changing
25 your plea. Were you also able to speak to other people who

are important in your life about this decision, like parents or --

DEFENDANT KODY PATTEN: Yes, sir.

THE COURT: -- other people who might be important to you?

DEFENDANT KODY PATTEN: Yes, sir.

THE COURT: All right. Do you feel like there is someone that you have not discussed your decision in this case that you need to discuss with?

DEFENDANT KODY PATTEN: No, sir.

THE COURT: All right. Now, you understand, and it's recited in the plea agreement, that there were two motions that were pending before the Court that the Court had not ruled on.

And because you are entering a guilty plea, you will be withdrawing those motions and the Court will not be ruling on those motions.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Mr. Kump and Mr. Ohlson have been with you throughout this case from the case's beginning, they have represented you in this matter. Would it be fair to say that you are satisfied with their representation?

DEFENDANT KODY PATTEN: This far, yes.

THE COURT: Do you wish to continue with them as your counsel?

DEFENDANT KODY PATTEN: Yes.

THE COURT: All right. Some of these questions are going to be repetitive, but I'm going to ask them to make sure I understood your answer.

As we sit here in court today, are you suffering from my physical illness, any medical conditions that I need to know about?

DEFENDANT KODY PATTEN: No, sir.

THE COURT: All right. And is your mental condition good?

DEFENDANT KODY PATTEN: Yes, sir.

THE COURT: All right. And I believe you testified that you are not taking any type of medication; is that correct?

DEFENDANT KODY PATTEN: That's correct.

THE COURT: All right. So would it be fair to say that your health is good, your mind is sound, and that you understand what's happening today in this courtroom?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Now, Mr. Ohlson went over the terms of the plea agreement with you. Just a couple questions relating to that.

You understand that with your plea agreement you

are agreeing to plead guilty to murder in the first degree with the use of deadly weapon; is that correct?

DEFENDANT KODY PATTEN: That's correct.

THE COURT: All right. And in exchange for that plea, the district attorney has agreed to do some things for you.

The district attorney is dismissing all of the charges that were in the other criminal information and he is also withdrawing his Notice of Intent to Seek the Death Penalty. That is the consideration that's flowing to you from the district attorney in exchange for your plea.

Do you understand all of that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: Very well. Mr. Ohlson went over the possible sentences with you: Life with the possibility of parole, life without the possibility of parole. And you understand what those mean?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. There is no probation for this offense. Do you understand that?

DEFENDANT KODY PATTEN: Correct.

THE COURT: Do you have any questions about anything that we've covered so far, Mr. Patten?

DEFENDANT KODY PATTEN: No, sir.

THE COURT: All right. I know that your

1 attorneys have explained to you that this case will be sent
2 on to the Nevada Division of Parole and Probation. They
3 are an independent agency of the State of Nevada.
4 And they will be conducting a pre-sentence
5 investigation which is basically an investigation into your
6 entire life. They will go into all aspects of your life;
7 your family history, your social history, your educational
8 history, your employment history, your criminal history, if
9 you have one.
10 They will discuss the facts and circumstances of
11 this case, and at the conclusion of their report they will
12 make a sentencing recommendation.
13 You and your attorneys will receive a copy of
14 that report, the district attorney will receive a copy of
15 that report, and the Court will receive a copy of that
16 report as well.
17 At the time of your sentencing hearing both you
18 and your attorneys will be given the opportunity to make a
19 sentencing recommendation, present mitigating evidence, and
20 present your recommendations to the Court.
21 Likewise, the district attorney will be allowed
22 to make his recommendations to the Court. Each side in
23 this case, the district attorney and you and your
24 attorneys, have agreed that each of you will be free to
25 argue for the sentence each side believes is appropriate.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Do you understand that the Court is not a party to this plea agreement? The Court in sentencing considerations will examine all the facts and circumstances of the case, will examine the presentence recommendation, and the recommendations from the district attorney, from your attorneys and from you, and the Court will sentence you as the Court believes is just and appropriate.

The Court is not bound to follow any specific recommendation, but will independently make the determination of your sentence.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Any questions, Mr. Patten, about what we've covered so far?

DEFENDANT KODY PATTEN: No, sir.

THE COURT: All right. Now in pleading guilty here in court today you are waiving and giving up a series of trials rights and constitutional rights. And I need to go over those with you so that I may be certain that you know what you are doing.

As you recall, you initially came to court some months ago and the Court arraigned you on a criminal

information. At that time you entered a plea of not guilty.

The Court also advised you at that time of your right to a speedy trial, and you waived your right to a speedy trial, and we had set the trial in this case to commence on July 31st of this year.

Do you recall all of that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Do you understand that by pleading guilty here in court today you are waiving and giving up your right to proceed to trial before a jury in this case?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Do you understand and waive that right?

DEFENDANT KODY PATTEN: Yes.

THE COURT: Had you continued with your plea of not guilty and gone on to trial, at your trial the burden would be upon the district attorney to come into the courtroom and attempt to prove your guilt of any crime that he charges you with, and he would attempt to do that through the attendance of witnesses and introduction of evidence.

You would have the right under the confrontation clause to confront the witnesses and the evidence presented

against you. Your attorneys, Mr. Ohlson and Mr. Kump, would cross-examine all of the State's witnesses on your behalf.

You would also be able to observe the demeanor and manner of these witnesses while testifying, and in these ways they're tested for truthfulness. It's called your right of confrontation.

Because there will not be a trial in this case, the district attorney will not be calling any witnesses, introducing any evidence, and you will not be confronting the same; in effect, waiving this right.

Do you understand and waive your right of confrontation?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: Had you continued with your plea of not guilty and gone on to trial in this matter, under the Fifth Amendment to the Constitution of the United States you would have the right to remain silent during the entire course of your trial. No one could force you or compel you to take the witness stand and testify if you did not wish to do so.

Whether or not you testified at your trial would be your decision alone to make, and your attorneys would be in the courtroom to help you make that very important decision. But you would not have to say anything or do

anything at your trial if you did not wish to do so.

By pleading guilty here today in court today you are in effect confessing to this crime in open court, waiving and giving up your Fifth Amendment right to remain silent.

Do you understand and waive that right?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: By pleading guilty here in court today you're also waiving and giving up your right to appeal certain defects that may exist in this case up to this point in time. And I don't know that there are any defects or that there are not. But it is having that effect as well.

Do you understand and waive that right?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: You do, of course, have the right to appeal any errors that you believe occur in this case from this point forward. If you believe that this Court errs in handling your case, at the conclusion of your case you may file an appeal with the Nevada Supreme Court.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: By pleading guilty here in court today, you are also waiving and giving up your right to call witnesses to appear and testify for you during the

trial.

Had this case proceeded to trial, the Court would have subpoenaed for you, at no cost to you, any witnesses who you felt were appropriate to come into the courtroom and offer testimony on your behalf during the trial.

Of course, because there will now not be a trial, you will not be calling any witnesses for a trial.

Do you understand and waive that right?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. You do, of course, have the right to call witnesses at the sentencing hearing.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Mr. Patten, you have the absolute right to go to trial in this case if you wish to do so, put the State to their burden of proof, which is to prove that you are guilty of any crime that they charge you, and that proof must be beyond a reasonable doubt, and a 12-person jury would have to unanimously find that to be true in order for you to be convicted.

Because you are pleading guilty, there will not be a trial in this case. This matter will not be going to a jury.

Do you understand that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: Also, because you are pleading guilty, your attorneys will not be going through a trial with you. They will, however, remain on the case to assist you during the sentencing hearing.

Do you understand all of that?

DEFENDANT KODY PATTEN: Yes, I do.

THE COURT: All right. Mr. Patten, has anyone coerced you, intimidated you, or placed you in fear to cause you to plead guilty to this charge?

DEFENDANT KODY PATTEN: No.

THE COURT: Has anyone offered you any promises or inducements, secret deals, something not contained in the plea agreement, to cause you to plead guilty to this charge?

DEFENDANT KODY PATTEN: No.

THE COURT: Are you pleading guilty voluntarily?

DEFENDANT KODY PATTEN: Yes.

THE COURT: Are you pleading guilty because you believe it's in your best interest to do so?

DEFENDANT KODY PATTEN: Yes, sir.

THE COURT: Are you pleading guilty because in truth and fact you are guilty?

DEFENDANT KODY PATTEN: Yes.

THE COURT: All right. You already provided Mr. Ohlson upon questioning some of the facts surrounding what

happened.

Is it your admission and confession here in court today that you willfully and unlawfully, with malice aforethought, premeditation and deliberation, killed and murdered Micaela Costanzo on or about March 3, 2011, about five miles west of Wendover, Nevada?

DEFENDANT KODY PATTEN: Yes.

THE COURT: All right. Do you have any questions of any of the material that we've covered so far?

DEFENDANT KODY PATTEN: No, I don't.

THE COURT: All right. Mr. Patten, I'm going to give you one last opportunity to change your mind. If you wish to change your mind at this point, the Court will allow you to do so.

You can withdraw your guilty plea, go back to not guilty, and trial will ensue beginning July 31, if you wish to do so.

The other alternative is for you to stay with your guilty plea pursuant to the terms of your agreement that you have reached with the State, accepting both the benefits and the burdens that it carries.

So you tell me what you would like to do.

DEFENDANT KODY PATTEN: I would like to proceed with my guilty plea.

THE COURT: Very well. Counsel for either side,

1 did you wish the Court to canvass Mr. Patten on any other
2 matters or issues?
3 MR. TORVINEN: The only thing, Judge, is the
4 range of punishment includes an option the Court would
5 have, it's 50 years with eligibility --
6 THE COURT: That -- that's correct. It's a third
7 option. Life with the possibility of parole, life without
8 the possibility of parole, or 50 years and minimum parole
9 eligibility is 20 years.
10 MR. TORVINEN: Yes.
11 THE COURT: Do you understand that, Mr. Patten?
12 DEFENDANT KODY PATTEN: Yes, I do.
13 THE COURT: Any other issues, counsel?
14 MR. OHLSON: No, thank you, Your Honor.
15 MR. TORVINEN: No.
16 THE COURT: All right. Very well. Did you have
17 any further questions that you would like to ask me, Mr.
18 Patten?
19 DEFENDANT KODY PATTEN: No, I don't.
20 THE COURT: All right. Court then makes its
21 finding the defendant has offered his plea voluntarily,
22 knowledgeably and intelligently.
23 The Court finds that he understands the nature of
24 the charges that he has pled guilty to. The Court finds
25 there is a sufficient factual basis to support the guilty

1 plea. And the Court further finds that Mr. Patten
2 understands the range of punishments that can be imposed
3 upon him at the time of sentencing.
4 Good cause appearing, the Court orders the Clerk
5 of Court to formally notify the Division of Parole and
6 Probation to conduct their customary pre-sentence
7 investigation and return a report to the Court to assist
8 the Court with sentencing.
9 As to a sentencing date, counsel, we discussed
10 that matter previously. Subject to the availability of the
11 courtroom, sentencing in this matter will occur on July 31,
12 2012.
13 MR. OHLSON: That's correct, Your Honor. If at
14 all possible, maybe we can secure the larger courtroom.
15 There will be a number of witnesses.
16 THE COURT: All right. Would you prefer to begin
17 in the afternoon or the morning?
18 MR. OHLSON: Whatever the Court's pleasure is.
19 We might take all day, so maybe it's better to start in the
20 morning.
21 THE COURT: All right. We'll begin at 10 a.m.
22 MR. OHLSON: Thank you, Your Honor.
23 THE COURT: Is there anything further that needs
24 to come before the Court today on this case?
25 MR. OHLSON: No, Your Honor.

MR. TORVINEN: Not that I am aware of, Judge. Other than, Judge, I assume that you are vacating the trial date.

THE COURT: Trial date is vacated.

(WHEREUPON, the hearing was concluded at 11:33 a.m.)

STATE OF NEVADA)

) SS.

COUNTY OF ELKO)

I, LISA M. MANLEY, Official Court Reporter of the Fourth Judicial District Court, Dept. II, of the State of Nevada, in and for the County of Elko, do hereby certify that I was present in court during all the proceedings had in the matter of the State of Nevada, plaintiff, versus KODY CREE PATTEN, defendant, heard at Elko, Nevada, on May 9, 2012, and took verbatim stenotype notes thereof; and that the foregoing 30 pages contain a full, true and correct transcription of my stenotype notes so taken, and a full, true and correct copy of all proceedings had.

LISA M. MANLEY - CCR-271

OFFICIAL COURT REPORTER

Exhibit 3

KODY CREE PATTEN

VS.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON

CASE NO.: CR-FP-11-0300

DEPT. NUMBER: II

FILED

2012 MAY -8 A 11: 03

ELKO CO DISTRICT COURT

CLERK ____ DEPUTY ____

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

FIFTH

CRIMINAL INFORMATION[1]

Filed Pursuant To
A Plea Agreement

COMES NOW THE STATE OF NEVADA, the Plaintiff in the above-entitled cause, by and through its Counsel of Record, the Elko County District Attorney's Office, and conditioned upon the Defendant's entry of a plea of guilty to the offense pleaded against him in this Fifth Criminal Information pursuant to the terms of

---

[1] A First Criminal Information was filed in the above-entitled cause the 27th of April, 2011, naming Kody Cree Patten as the Defendant therein, after Mr. Patten had conditionally waived his right to a preliminary examination in order to seek a competency examination. Thereafter, a Second Criminal Information was filed in the above-entitled cause on the 28th day of July, 2011, against Toni Collette Fratto upon her bind-over from the Justice Court after the conduct of a Preliminary Hearing on the 13th and 14th days of July, 2011. A Third Criminal Information was filed in the above-entitled cause upon Mr. Patten's bind-over after the conduct of a Preliminary Hearing on the 3rd and 4th days of August, 2011. A Fourth Criminal Information was filed in the above-entitled cause on the 27th day of January, 2012, filed pursuant to a Plea Agreement filed in this matter on the 20th day of January, 2012. This Fifth Information is, as alluded above, has been filed pursuant to a Plea Agreement filed in this matter on the 4th day of May, 2012, and this procedural history accounts for its denomination as the "Fifth Criminal Information" to be filed in this matter.

Affirmation Pursuant to NRS 239B.030
SSN Does Appear ____
SSN Does Not Appear KC

a Plea Agreement between the Parties filed herein, would, pursuant to the provisions of NRS 173.035, inform the above-entitled Court that the Defendant above-named, Kody Cree Patten, on or about the 3rd day of March, 2011;

At or near a location:

approximately five (5) miles west of the City of West Wendover;

within the County of Elko, and the State of Nevada, committed the following described criminal offense:

COUNT 1

FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 193.165, NRS 200.010, NRS 200.020, AND NRS 200.030

The Defendant, Kody Cree Patten, alone or in concert with one Toni Collette Fratto, at the place within Elko County, Nevada described above located approximately five miles west of the City of West Wendover, Nevada, and on or about the date alleged above, did willfully and unlawfully, with malice aforethought, and with premeditation and deliberation kill and murder another human being, one Micaela Costanzo. Further that the Defendant employed a deadly weapon within the meaning of NRS 193.165 in the commission of said murder.

The Defendant, Kody Cree Patten, committed said murder in the following manner:

The Defendant, on or about the date alleged above, and at the place alleged above:

1. Cut the said Micaela Costanzo's throat with the edge of a shovel and/or a knife and/or some similar edged and/or sharp instrument which constituted a deadly weapon within the meaning of NRS 193.165, and/or

2. Stabbed the said Micaela Costanzo with a knife and/or some similar edged weapon, and/or stabbed Micaela Costanzo with the pick end of an entrenching tool which constituted a deadly weapon within the meaning

of NRS 193.165, and/or some other sharp instrument which constituted a deadly weapon within the meaning of NRS 193.165; and/or

3. In conjunction with any of the acts described in Paragraphs 1 and 2 above, struck the said Micaela Costanzo with a shovel, or similar instrument or object which constituted a deadly weapon within the meaning of NRS 193.165 or some similar instrument upon the said Micaela Costanzo's head and/or body multiple times;

thereby killing and murdering the said Micaela Costanzo.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

Dated 8th day of May, 2011.

MARK TORVINEN
Elko County District Attorney
State Bar Number: 551

Witnesses' names and addresses known to the District Attorney at the time of filing the above Criminal Information, if known, are as follows.

JASON ABRAMS, 1111 N GENE L JONES WAY, W WENDOVER, NV 89883
MATT ALEXANDER, 775 W SILVER STREET, ELKO, NV 89801
RENEE THOMSON ARMSTRONG, WASHOE CRIME LAB, 911 PARR BLVD, RENO, NV 89512
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DR. ELLEN GI CLARK, SIERRA PATHOLOGY, PO BOX 12815, RENO, NV 89510-

2815

CELIA COSTANZO, 1655 W CALLISTO #7, OR WENDOVER NUGGET, W WENDOVER, NV 89883

DELICIA COSTANZO, 804 N 100 W, TOOELE, UT 84074

CASSANDRA COLLETTE FRATTO, 1383 WALL ST., PO BOX 2964, W WENDOVER, NV 89883

CLAUDE FRATTO, 3268 SKY VIEW DR, W WENDOVER, NV 89883

TONI COLLETTE FRATTO, c/o ELKO COUNTY JAIL, 775 W. SILVER STREET, ELKO, NV 89801

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DENNIS JOURNIGAN, 775 W SILVER STREET, ELKO, NV 89801

TRAVIS LANDON, 775 W SILVER STREET, ELKO, NV 89801

KRISTINA SWEAT LININGER, 3100 SKYVIEW DRIVE, W WENDOVER, NV 89883

MICHAEL LYFORD, WASHOE CRIME LAB, 911 PARR BLVD, RENO, NV 89512

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MICK MOORE, 2066 BLUE GRASS CIR, W WENDOVER, NV 89883

KIEARRA LOUISE MURPHY, 480 E 4120 S #4, MURRAY, UT 84107

WENDI MURPHY, 1545 W OXBOW CIRCLE #10, TAYLORSVILLE, UT 84123

DAWNNA PATTEN, 635 6TH ST, W WENDOVER, NV 89883

KIP PATTEN, 3079 TIBBETS BLVD, W WENDOVER, NV 89883

TYLER PETERSON, 32 CAROL ST, W WENDOVER, NV 89883

TIFFANY RASMUSSEN, 30 N 400 E, #F30, EPHRAIM, UT 84627

JEROME REAMER, 1876 BUTTE ST #A, W WENDOVER, NV 89883

VICTOR RUVALCABA, WASHOE CRIME LAB, 911 PARR BLVD, RENO, NV 89512

WILLIAM SAVAGE, 1499 VICENZA DRIVE, SPARKS, NV 89434

GORDON GRANT SMITH, 495 TIBBETTS, W WENDOVER, NV 89883

RONALD E. SUPP, 1111 GENE L JONES WAY, PO BOX 2469, W WENDOVER, NV 89883

T-MOBILE LAW ENFORCEMENT RELATIONS, 4 SYLVAN WAY, PARSIPPANY, NJ 07054

EUGENE RYAN TANGARO, 1111 GENE L JONES WAY, PO BOX 2469, W WENDOVER, NV 89883

KENYA TRUXAL, 775 W SILVER ST, ELKO, NV 89801

PETE TURNER, 1111 GENE L JONES WAY, W WENDOVER, NV 89883

Certificate Of Service

I, Karen Cracraft, hereby certify that I am an employee of the Elko County District Attorney's Office, and that on the 8th day of May, 2012, a true and correct copy (or true and correct copies in the case of multiple addressees) of the foregoing Fifth Criminal Information was/were served upon the addressee(s) identified hereafter in the following manner:

A filed-stamped copy will be, as soon as practicable after the filing thereof, transmitted to the Chambers of:

The Honorable Dan L. Papez
District Court Judge – Assigned

via facsimile number 775-289-1582; and

Further, that pursuant to the provisions of NRS 178.589[2], and the aforementioned Order, a true and correct copy of this pleading was transmitted by facsimile to the Defendant's Counsel of Record, John Ohlson and Jeffrey J. Kump, at the following facsimile numbers:

1. Mr. John Ohlson via facsimile number: 775-323-2705; and

---

[2] NRS 178.589 provides that:

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

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

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

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

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

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

5. As used in this section:

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

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

2. Mr. Jeffrey Kump via facsimile number: 738-0187;

proof of the transmission of which is attached to the original of this pleading filed with the Court.

Karen Cracraft

Signature Of Person
Executing Certificate Of Service

Exhibit 4

KODY CREE PATTEN

VS.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON

Case Information

ME Case #: 11-0592 ELK

ME Case Type: OA (Autopsy) WASHOE COUNTY ME/CORONER

Reported By: Det. Kevin McKinney (775-340-3835)

Reporting Agency: ELKO COUNTY SHERIFFS OFFICE

Investigator: Karen Brown

Date Reported: 03/07/2011 14:50

Date Inv Departed:

Date Inv On Site:

Date Returned:

Last Name: Costanzo **First:** Micaela (Tent) **Middle:** **ALIAS:**

Sex: Female **Race:** Caucasian **Birth Date:** 5/3/1994 **Age:** 16 Years **Birth Place:**

Marital Status: Single **SSN:** **Religion:** **Citizenship:**

Occupation: **Type of Business:** **Weight:** **Height:**

Retired ☐ **Unemployed** ☐ **Veteran:** ☐ **On the Job:** ☐ **Clad:** ☐ **Surviving Spouse:**

Father's Name: **Mother's Maiden Name:**

Location Type	Address	Date / Time
Residence	30789 Tibbets # 3 West Wendover NV 89883	
Injury/Illness	Gravel pit area west of West Wendover along railroad tracks We	
Place of Death	Gravel pit area west of West Wendover along railroad tracks We	03/05/2011 10:56

Mortuary Preference: **Requested By:**

Mortuary Contacted By: **Date Contacted:**

Next of Kin: Celia Costanzo **Relationship:** Mother

Address: 30789 Tibbets # 3 West Wendover, NV 89883 **Phone:**

Next of Kin Notified By: Chief Supp **Date Notified:** 03/06/2011 16:45

Identified By: **Identifier:**

Identification Method: **ID Date:** **Identifier Phone:**

Type of Exam: **Exam By:** **Exam Date:**

Manner of Death: **DC Signed By:** **DC Signed Date:**

Cause of Death:

Other Diagnosis:

Agency: ELK **Case #:** 11-4187 **Jurisdiction:** OTHER NEVADA AGENCY

Unreviewed Document

Washoe County Medical Examiner
10 Kirman Ave.
Reno, NV 89250
(775) 785-6114

REPORT OF INVESTIGATION

ME Case #: 11-0592 ELK

Decedent Name:	Costanzo, Micaela (Tent)	**Date of Birth:**	5/3/1994
Also Known As:		**Age:**	16
Location of Death:	Gravel pit area west of West Wendover along railroad tracks	**SSN:**	
Date of Death:	Saturday, March 05, 2011	**Time of Death:**	10:56:00 AM

[redacted]

Elko County Sheriff's Office, 16 year old female, homicide, found in shallow grave

[redacted]

At 1450 hours on 03/07/11, Detective Kevin McKinney of the Elko County Sheriff's Office reported to the Washoe County Medical Examiner's Office the death of a 16 year old female who was found buried in a shallow grave. The decedent had apparent defects to the neck and the chin. Elko County Sheriff's Office is requesting an autopsy with homicide protocol in this case.

On 03/05/11, a shallow grave was found in a gravel pit area west of West Wendover, Nevada. Chief Supp of the West Wendover Police Department dug until he found a body at 1056 hours on 03/05/11. The scene was secured until the arrival of the Elko County Sheriff's Office and Forensic Investigation Section Personnel from Washoe County Sheriff's Office.The body was recovered and plced in a sealed body bag. Burns Funeral Home will transport the decedent to the Washoe County Medical Examiner's Office for autopsy. Burns should arrive on the evening of 03/07/11.

Detective McKinney faxed the mandatory paperwork and will e-mail photographs. I told Detective McKinney that tentatively, the autopsy would be performed at 1000 hours on 03/08/11. I asked him to call and verify the time on 03/08/11.

Next of kin has been notified

Elkol County Sheriff's Office case # 11-4187

[redacted]

See OA narrative

[redacted]

See OA narrative

Unreviewed Document Unreviewed Document Unreviewed Document Unreviewed Document

DATE OF DEATH:	3/5/2011 10:56:00 AM
DATE OF AUTOPSY:	3/8/2011; 0930 Hours
CONSENT GRANTED BY:	Elko County Sheriff/Coroner
AUTOPSY PERFORMED AT:	Washoe County Medical Examiner's Office
INVESTIGATOR:	Karen Brown
PATHOLOGIST:	Ellen G. I. Clark, M.D.

FINAL PATHOLOGIC DIAGNOSES

1. Sharp force injuries of head and neck:
   a. Stab and slash wounds of face and neck, multiple, bilateral.
   b. Superficial sharp force injuries, left eyebrow and eyelid.
   c. Stab perforation with near complete transection, right jugular vein.
   d. Exsanguination/hemorrhage, associated with stab and slash wounds.
   e. Partial transection of thyroid gland and anterior to lateral neck soft tissue with associated hemorrhage.
   f. Sharp force injuries of larynx, bilateral thyroid cartilage.
   g. Sharp force injuries, rostral parietal scalp.

2. Multiple blunt force injuries of mouth and lips, right greater than left.

3. Evidence of asphyxial injury:
   a. Petechia of anterior eyelids and face, bilateral.
   b. Lip and oral mucosa laceration (s) and contusion (s).

4. Hemoaspiration, scant, bilateral and "swallowed" blood.

5. Contusions and abrasions of extremities and bilateral posterior trunk.

6. Hemorrhagic endometrium, with hemorrhagic luteinized ovarian cyst.

OPINION

This 16 year old Caucasian female, Micaela Costanzo, died due to exsanguination due to multiple stab and slash wounds of her face and neck. Other findings include blunt trauma and evidence of asphyxial injury.

Ellen G. I. Clark, M.D.
Medical Examiner

5/11/2011
Date Signed

Piotr Kubiczek, M.D.
Medical Examiner

An autopsy is performed on the body of Micaela Costanzo, at the Washoe County Medical Examiner's Office, Reno, Nevada on the 8th day of March, 2011, commencing at approximately 0930 hours.

EXTERNAL EXAMINATION

The body is that of a well developed, well nourished young adult Caucasian female who weighs 115 pounds, is 64 inches in height and appears generally compatible with the recorded age of 16 years.

The body is received within a sealed (red plastic 1334178) otherwise silver colored body bag and is identified by a Coroner/Medical Examiner "toe tag" bearing the following printed and handwritten information: "Costanzo, Micaela (Tent) date and time of death 03/05/11 at 1056 Hours (found); Coroner Investigator Karen Brown."

The body is received supine and is clad in a pair of blue denim trousers, pink and white plaid print tennis shoes (each untied at the top), and white and pink stretch socks. The trousers, shoes and socks are essentially normally positioned on the body and overlain by fine and coarse light brown colored dirt, accumulated primarily over the anterior legs (fine grounded in loam) and being more coarse and loosely attached over the back of the pants legs. There is some soiling of the medial/inner aspects of each of the socks. The pants are fully zipped and buttoned at the top. Initially recovered adjacent to/on the top of the body, essentially clenched over the front of the body within/by the right arm, is a now wetted (probable water) and irregularly displaced zip front "hoodie" sweat shirt. On closer inspection, it is noted that the sleeves of the sweat shirt are tied together toward what would be the cuff/distal region of the sleeves. The sweat shirt has been secured in a tight knot that is less intact. There is blood staining of much of the shirt

back and intermittent over fabric folds at the sleeves, also over the hooded portion of the shirt and towards the left front. There is probable droplet type staining at the shirt front, the shirt being partially covered over by fine loam and more coarse sandy soil.

The hands are initially covered by brown paper bags, secured at the wrists with red duct tape. Of note, there is a plastic type strap roughly around the proximal third of the right forearm. This appears sharply cut at one edge, is formed in a complete loop around the forearm and has a blunt tip extremity toward the other edge.

The right hand bag is removed revealing a portion of the sweat shirt sleeve cuff, apparently turned in side out and now residing toward the mid portion of the right forearm. There are two dark colored elastic hair bands around the right wrist. The right hand has moist blood toward the backs of the fingers and at the palmar aspect. This and portions of the hand are partly embedded by generally coarse sandy loam. Blood is between the fingers.

Removal of the left hand bag shows this hand to be in similar condition. Again, there is a cut portion of the sweat shirt sleeve cuff residing apparently inside out over the distal end of the forearm. This hand is similarly covered by dirt and coarse sandy gravel type debris.

Worn beneath the jeans, is a pair of pink bikini brief type women's underwear, normally positioned over the hips and pelvis. Once the shoes are removed, it is noted that the right sock is rolled down at the lower heel and plantar foot region, the left normally positioned. The left sock is silver colored towards its top, the right being pink. Within the crotch of the panties is a white, partially blood stained sanitary napkin.

The body is cold to touch. Rigor remains fixed in the lower extremities and the jaw, but has been reduced or dissipated from the upper extremities. The scalp hair is brown, has "graying" (light coloration) incident to soiling and is partially caught up over the top/upper back of the head by several "bobby pins". The hair is straight and measures to approximately 30 cm in length over the crown. It appears to have a silver type sheen toward the top and some of the strands at the back of the head. The irides are brown and the pupils are round and bilaterally equal at approximately 0.5 cm in diameter. There is heavy dirt soiling accumulation of the mid anterior face and continuing into the medial eye folds and to the facial cheek, more on the right than the left. Upon parting of the eyelids, some dirt becomes displaced onto the front of the left eye. The nose and ears are not unusual. There are no grossly evident patent ornamental piercings. The lips and gums are very pale. The teeth are natural and in a good state of repair. Mouth injuries are subsequently described.

The neck is supple and free of masses. Extensive injury is subsequently further described. The larynx generally resides at the midline. The right medial clavicle is comparatively protuberant relative to the left but not grossly acutely fractured.

The thorax is well developed and symmetrical. The breasts are free of palpable masses. The abdomen is flat/scaphoid and has no palpable organomegaly. The anterior abdomen is firm (rigor). The genitalia are those of a normal young adult female. The pubic hair is short, possibly partially shaved. The upper and lower extremities are well developed and symmetrical without absence of digits. The fingernails are painted white and turquoise blue. The toenails are short trimmed and not painted.

EVIDENCE OF INJURY

HEAD AND NECK:

There is diffused purple red ecchymosis of the right upper and lateral lower eyelids, covering approximately 3/4 of the lids. This is superimposed by numerous fine petechiae, most extensive over the right eye surfaces.

The left upper and lower eyelids have discontinuous contusion/ecchymosis also superimposed by fine petechiae most evident on the upper to lateral eyelid. Toward the medial left brow and extending onto the front of the eyelid, discontinuous over approximately 3 cm diagonal (medial brow toward central eyelid), and varying from approximately 0.1 to 0.3 cm is orange red abrasion and superficial incised wound/laceration. Toward the lateral left brow, there is a separate approximately 0.3 cm red brown abrasion. Passing over the left temporal scalp, are additional petechiae and there is purple red discoloration intermittent over approximately 6 x 3 cm over the temple and lateral left facial cheek.

After cleaning of the face front, it is seen that the outer surfaces of the lips show numerous surface lacerations conspicuous toward the right upper lip, discontinuous over approximately 2.5 cm horizontal x up to 1 cm vertical. These are superimposed by irregularly spaced lacerations on the outer lip surfaces varying from 0.5 to 0.8 cm and on the inner lip as much as 1.5 cm transverse. There are scattered contusions over the lower lip, tending toward the midline and individually up to approximately 1 cm. The lateral edge of the upper lip and extending into the mouth corner, has diffused purple contusion, bilateral, though more extensive toward the left.

On the inner right lip and front mucosa, there is apparent transverse and irregular purple gray ecchymosis intermittent over approximately 1.5 x 1 cm. On the inside of the left upper lip and extending toward the canine to premolar region, also on the buccal mucosa, is purple red ecchymosis, partly assuming vertical and horizontal linear

patterning and altogether confluent over approximately 1 x 0.5 cm on the inferior to lateral aspect and 1 cm toward the lower internal lip region.

SHARP FORCE INJURIES:

1. Commencing toward the central front chin and extending toward the left is a horizontal up to 5.5 cm long x 0.5 deep, incised wound. This has a relative pointed medial extremity and also a pointed lateral extremity with a trailing superficial cut.

2. At the lateral left jaw, approximately midway between the earlobe and front of the chin, is a generally horizontal somewhat curved approximately 2.8 x up to 0.2 cm stab wound. This penetrates approximately 3 cm into the subcutis along the inferior edge of the jaw without discrete visible or palpable cut wounds. There is hemorrhage into the subjacent soft tissue. Trailing inferiorly and medially toward the lateral aspect, is an approximately 1.5 cm long thin trailing scratch like abrasion/superficial incised wound. The medial extremity of this wound is comparatively more blunted than the lateral.

3. Within the anterior neck, residing generally at or slightly above the thyroid cartilage prominence, is a complex incised/slash wound. The superior most aspect has discrete beveling of its upper margin with relative undermining of the lower margin. Toward the central upper aspect, is some irregular scalloping or additional cutting at least at two areas. Toward the inferior wound margin, is some slight scalloping or additional cutting. There is a trailing cut over the superolateral aspect of the wound. Its lateral margin appears relatively blunted with the medial margin also having some blunting. There is also additional cutting and dog earring of the inferior central margin of this wound.

Toward the anterior right (lateral) edge, is a second discrete deep incised wound having a pointed right lateral extremity, and also an apparently pointed left lateral extremity. There is a trailing cut toward the left lateral edge with a dog eared mark. In aggregate, with wound margins reapproximated, the central lower anterior neck defect is approximately 9 cm long. It penetrates deep into the anterior right neck surface, approximately 4 cm. There is somewhat irregular scalloping and cutting of the inferior margin, particularly toward the anterolateral right side.

4. Over the anterior central left neck, is a horizontal up to 5 cm superficial incised wound/abrasion. Toward the lateral aspect, there are four additional up to 0.5 cm superficial incised wounds arranged in a somewhat rectangular or "stellate" fashion. This pattern is approximately 1.8 cm transverse x up to 0.5 cm horizontal. On closer inspection, the more inferior horizontal abrasion/superficial incised wound also has "tram track" patterning.

5. Toward the upper left shoulder/inferolateral left neck crease, is a horizontal to diagonal approximately 2.5 cm stab defect. This penetrates up to 2 cm into the neck musculature. There is relative rectangular configuration at the lateral wound aspect where it is 1 cm vertical x 0.5 cm horizontal. Trailing inferiorly and laterally from this defect is an additional 1.5 cm superficial incised wound/scratch like wound.

6. On the inferolateral right side of the neck, residing approximately 2.5 cm above the medial clavicle, is a seagull shaped approximately 2.5 cm transverse stab wound. With margins reapproximated, this has a right lateral tail approximately 1.8 cm long with a left (anterocentral) tail approximately 1 cm long. There is triangular cutting toward the inferior mid portion. This stab penetrates approximately 3.5 cm into the subcutis.

At least one stab track (smaller dimension) at the inferior to lateral right neck, passes nearly completely through the right internal jugular vein, though complete vessel transection is not present. There is copious dissected hemorrhage into the carotid sheath and virtually all of the right neck musculature. Copious hemorrhage is also throughout the left neck, but there is not sharp force carotid artery or jugular vein injury.

7. Within the anterior left parietal scalp, approximately 5 linear cm to the left of midline, and up to 10 cm above the left external auditory canal, are two horizontal stab/sharp force type defects. The larger of these are 1.5 cm transverse (anterior) and slit like, somewhat V shaped and has undermining of the superior margin to approximately 1 cm. The smaller is more posterior and superior approximately 0.8 cm transverse and penetrates approximately 0.5 cm to the subjacent scalp. Scalp reflection shows relative copious subperiosteal and full thickness deep scalp hemorrhage over an area approximately 4 x 4 cm.

Two discrete unrelated areas of deep scalp contusion are at the bilateral inferior frontal scalp, symmetrically placed, each approximately 2.5 cm lateral to the midline. That on the left is approximately 1.5 cm and the right is slightly smaller.

THORAX AND ABDOMEN:

(SHARP)

Toward the top of the right shoulder, is a horizontal to diagonal approximately 3 cm superficial incised wound, below the center of which is an approximately 1.5 cm second superficial incised wound

(BLUNT)

On the lateral right hip, is a somewhat square angulated approximately 2.5 cm transverse x up to 1 cm vertical pale moist red brown abrasion.

Residing toward the left axillary crease, approximately midway between the top of the shoulder and the top of the anterior axillary fold, is a 2 x 1.5 cm purple orange red contused abrasion.

Within the upper right back, overlying the scapula, are three horizontal up to 1.5 cm orange red superficial abrasions. Continuing from the dorsal to upper right shoulder, to the medial scapula over approximately 20 cm horizontal within up to 15 cm vertical are generally horizontal to diagonal (mid scapula toward mid thoracic spine) superficial red friction abrasions.

On the central lateral left side of the back, commencing toward the inferior scapula/spine and extending to the mid dorsal rib cage, over approximately 10 x 8 cm are vertical friction abrasions. These are traversed inferiorly by a curved horizontal approximately 6 cm transverse x up to 1 cm vertical abrasion.

On the lateral to mid right back, almost in mirror image to those on the left are additional horizontal friction abrasions residing toward the central to lateral mid region of the rib cage. These are discontinuous over approximately 8 x 10 cm.

On the lateral left flank, within approximately 3 x 3 cm are a few minimally hemorrhagic orange red abrasions. Toward the top buttocks crease, over approximately 4 x 2.5 cm are a few vertical superficial orange brown abrasions.

UPPER EXTREMITIES:

Toward the base of the right thumb, proximal right wrist, is a horizontal 1 cm red pink abrasion. Toward the back and side of the left elbow is a 1 x 0.5 cm red brown abrasion. Within the antecubital folds, are diffused blue gray discoloration, not clearly representing injury.

On the proximal anterior left shoulder, is an ovoid 4.5 x up to 3 cm partly lacerated broad puncture like defect having scalloping and comparative square angulation toward the posterolateral margins. This was reportedly created by a "shovel" during excavation of the body. It is further marginated by a discontinuous ring like (approximately 5 cm vertical x up to 4 cm horizontal) light brown parchment like abrasion. Inferior to this, over the proximal lateral left upper arm is additional abrasion.

On the outer right upper arm, over approximately 9 cm vertical x up to 4.5 cm horizontal are at least three diffused purple gray contusions. Toward the distal lateral upper arm, and extending toward the antithenar crease, are vertical to diagonal superficial friction abrasions over 6 x 2 cm On the mid dorsum of the right arm, is a 1 cm dark purple contusion. Toward the lateral right elbow, extending onto the back of the elbow, partially contiguous with the right upper outer arm bruises are at least three additional

purple red diffused up to 3 cm contusions superimposed by vertical and horizontal up to 3 cm long abrasions. These are minimally hemorrhagic and moist, initially covered over by dirt and blood.

LOWER EXTREMITIES:

On the mid anterior left thigh is a diagonal, approximately 6 x 1.5 cm blue gray contusion. On the mid anterior left shin, is a diffused 1.5 cm red gray contusion. Toward the distal anterior right thigh/upper knee is a 0.5 cm blue gray contusion/discoloration.

INTERNAL EXAMINATION

BODY CAVITIES:

The body is opened by the usual thoraco-abdominal, Y-shaped incision and the chest plate is removed. No adhesions or other abnormal collections of fluid are present in any of the body cavities. All body organs are present in the normal anatomical position. The subcutaneous fat layer of the abdominal wall is approximately 1 to 1.5 cm thick.

HEAD (CENTRAL NERVOUS SYSTEM):

The scalp is reflected. The calvarium of the skull is partially removed. The dura mater and falx cerebri are intact. The brain weighs 1,300 grams. The leptomeninges are somewhat congested. The cerebral hemispheres are symmetrical. The structures at the base of the brain, including cranial nerves and blood vessels, are intact. Coronal sections through the cerebral hemispheres reveal no lesions. Transverse sections through the brain stem and cerebellum are unremarkable. The spinal cord is not separately dissected. Internal inspection of the entire length of the spine shows no evidence of acute spinal injury. There is extensive paraspinous soft tissue hemorrhage, but no sharp cuts or puncture (s) of the spine identified.

NECK:

Examination of the soft tissues of the neck, including strap muscles and large vessels, reveals multiple sharp force injury abnormalities as described. The hyoid bone and larynx are intact except for stab/slash wounds cut through the right aspect of the thyroid lobe through the anterolateral right neck musculature (also on the left) with transverse cutting at each side of the anterior to lateral larynx (approximately midway within the aryepiglottic fold). The tongue contains no gross abnormalities.

CARDIOVASCULAR SYSTEM:

The heart weighs 190 grams. The pericardial surfaces are smooth, glistening and unremarkable; the pericardial sac is free of significant fluid or adhesions. The coronary arteries arise normally, follow the usual distribution and are widely patent, without evidence of significant atherosclerosis or thrombosis. The chambers and valves bear the usual size-position relationship and are unremarkable. The myocardium is dark red-brown, firm, and unremarkable; the atrial and ventricular septa are intact. The aorta and its major branches arise normally, follow the usual course and are widely patent, free of significant atherosclerosis and other abnormality. The vena cava and its major tributaries return to the heart in the usual distribution and are free of thrombi.

RESPIRATORY SYSTEM:

The right and left lungs weigh 300 and 240 grams, respectively. The upper airway is generally clear of debris and foreign material; however, there is bilateral (scant) hemoaspiration, more extensive in the right than the left with some dissected hemorrhage also over the right lung apex. The mucosal surfaces are smooth, yellow-tan and unremarkable. The pleural surfaces are smooth, glistening and unremarkable. There is leopard spotting in each of the lungs. There is no evidence of hemothorax, hemomediastinum or cutaneous air dissection. The pulmonary parenchyma is extremely pale pink except for areas of leopard spotting and exudes virtually no blood or frothy fluid from cut sections. No other focal lesions are noted. The pulmonary arteries are normally developed, patent, and without thrombus or embolus.

LIVER AND BILIARY SYSTEM:

The liver weighs 900 grams. The hepatic capsule is smooth, glistening and intact, covering dark red-brown, extremely pale parenchyma, with no focal lesions noted. The gallbladder contains 10 ml of yellow-green-brown, slightly mucoid bile; the mucosa is velvety and unremarkable. The extrahepatic biliary tree is patent, without evidence of calculi.

ALIMENTARY TRACT:

The esophagus is lined by gray-white, smooth mucosa. The gastric mucosa is arranged in the usual rugal folds and the lumen contains approximately 30 ml of grossly bloody pureed consistency material without discrete pill fragments. The small and large bowel are unremarkable. The appendix is present and normally positioned. The pancreas has a normal gray-white, lobulated appearance and the ducts are clear.

GENITOURINARY TRACT:

The right and left kidneys weigh 30 and 60 grams, respectively. The renal capsules are smooth and thin, semitransparent, and strip with ease from the underlying smooth, pale tan slightly and superficially lobulated cortical surface. The cortex is sharply delineated from the medullary pyramids, which are red-purple to tan and unremarkable. The calyces, pelves and ureters are unremarkable. The urinary bladder contains 20 ml of clear yellow urine; the mucosa is gray-tan and smooth. The uterus, fallopian tubes, ovaries and vagina are unremarkable apart from left hemorrhagic corpus luteum cyst and hemorrhagic endometrium. The breast tissue has the usual fibrous and adipose mixture, without abnormality.

RETICULOENDOTHELIAL SYSTEM:

The spleen weighs 70 grams and has a smooth, intact capsule covering red-purple, moderately firm parenchyma; the lymphoid follicles are unremarkable. The regional lymph nodes appear normal. The bone marrow is red-purple, homogeneous, without evidence of focal abnormality.

ENDOCRINE SYSTEM:

The pituitary, thyroid, and adrenal glands are unremarkable.

MUSCULOSKELETAL SYSTEM:

The bony framework is unremarkable except as noted. The supporting musculature and soft tissue are not unusual apart from injuries already described.

SPECIMENS RETAINED:

Blood, urine, vitreous fluid, formalin fixed tissue (2, neck portion), gastric contents, swabs (nasal, oral, vaginal, rectal), hair pullings (scalp, axilla, pubis), fingernail clippings, fingerprints, see evidence tracking forms.

TOXICOLOGY
By: NMS LABS

Central Blood: collected: 3/8/2011; 10:30

Positive Findings: None Detected

Fixed tissue specimens will be retained for 5 years after date of autopsy; body fluid toxicology and laboratory specimens will be retained for 2 years.

NMS Labs
3701 Welsh Road, PO Box 433A, Willow Grove, PA 19090-0437
Phone: (215) 657-4900 Fax: (215) 657-2972
e-mail: nms@nmslabs.com
Robert A. Middleberg, PhD, DABFT, DABCC-TC, Laboratory Director

CONFIDENTIAL

Toxicology Report

Report Issued 03/13/2011 09:02

To: 10324
Washoe County Medical Examiner & Coroner
Attn: Dr. Ellen G.I. Clark
10 Kirman Ave
Reno, NV 89502

Patient Name	COSTANZO, MICAELA
Patient ID	11-0592 ELK
Chain	11270970
Age	16 Y
Gender	Female
Workorder	11060604

Positive Findings:

None Detected

See Detailed Findings section for additional information

Testing Requested:

Analysis Code	Description
8051B	Postmortem Toxicology - Basic, Blood
9096B	Alcohol Screen, Blood (Forensic)

Specimens Received:

ID	Tube/Container	Volume/ Mass	Collection Date/Time	Matrix Source	Miscellaneous Information
001	Gray Top Tube	10 mL	03/08/2011 10:30	Central Blood	
002	Gray Top Tube	9.5 mL	03/08/2011 10:30	Central Blood	
003	Gray Top Tube	2 mL	03/08/2011 10:30	Peripheral Blood	
004	Clear Tube	2 mL	03/08/2011 10:30	Urine	

All sample volumes/weights ae approximations.

Specimens received on 03/10/2011.

Detailed Findings:

Examination of the specimen(s) submitted did not reveal any positive findings of toxicological significance by procedures outlined in the accompanying Analysis Summary.

Chain of custody documentation has been maintained for the analyses performed by NMS Labs.

Unless alternate arrangements are made by you, the remainder of the submitted specimens wil be discarded six (6) weeks from the date of this report; and generated data will be discarded five (5) years from the date the analyses were performed.

Workorder 11060604 was electronically signed on 03/13/2011 08:45 by:

Dawn Sherwood

Dawn N. Sherwood,
Certifying Scientist

Analysis Summary and Reporting Limits:

Acode 8051B - Postmortem Toxicology - Basic, Blood - Central Blood

-Analysis by Enzyme-Linked Immunosorbent Assay (ELISA) for:

Compound	Rpt. Limit	Compound	Rpt. Limit
Amphetamines	20 ng/mL	Methadone	25 ng/mL
Barbiturates	0.040 mcg/mL	Opiates	20 ng/mL
Benzodiazepines	100 ng/mL	Phencyclidine	10 ng/mL
Cannabinoids	10 ng/mL	Propoxyphene	50 ng/mL
Cocaine / Metabolites	20 ng/mL		

-Analysis by Enzyme-Linked Immunosorbent Assay (ELISA) for:

Compound	Rpt. Limit	Compound	Rpt. Limit
Buprenorphine / Metabolite	0.50 ng/mL		

Acode 9096B - Alcohol Screen, Blood (Forensic) - Peripheral Blood

-Analysis by Headspace Gas Chromatography (GC) for:

Compound	Rpt. Limit	Compound	Rpt. Limit
Acetone	1.0 mg/dL	Isopropanol	1.0 mg/dL
Ethanol	10 mg/dL	Methanol	5.0 mg/dL

STATE OF NEVADA - DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEALTH - SECTION OF VITAL STATISTICS
CERTIFICATE OF DEATH

STATE FILE NUMBER

TYPE OR PRINT IN PERMANENT BLACK INK

DECEDENT

1a. DECEASED-NAME (FIRST,MIDDLE,LAST,SUFFIX): Micaela Rae COSTANZO
2. DATE OF DEATH (Mo/Day/Year): March 05, 2011
3a. COUNTY OF DEATH: Elko
3b. CITY, TOWN, OR LOCATION OF DEATH: Rural Of Wendover
3c. HOSPITAL OR OTHER INSTITUTION -Name(if not either, give street and number): 5 miles west of Wendover
3e. If Hosp. or Inst. Indicate DOA,OP,Emer Rm Inpatient(Specify): 5 miles west of Wendover
4. SEX: Female
5. RACE (Specify): White
6. Hispanic Origin? Specify No - Non-Hispanic
7a. AGE-Last birthday (Years): 16
7b. UNDER 1 YEAR: MOS | DAYS
7c. UNDER 1 DAY: HOURS | MINS
8. DATE OF BIRTH (Mo/Day/Yr): May 03, 1994

IF DEATH OCCURRED IN INSTITUTION SEE HANDBOOK REGARDING COMPLETION OF RESIDENCE ITEMS

9a. STATE OF BIRTH (If not U.S.A., name country): Nevada
9b. CITIZEN OF WHAT COUNTRY: United States
10. EDUCATION: 10
11. MARRIED, NEVER MARRIED, WIDOWED, DIVORCED (Specify): Never Married
12. SURVIVING SPOUSE (If wife, give maiden name):
13. SOCIAL SECURITY NUMBER: 680-05-9118
14a. USUAL OCCUPATION (Give Kind of Work Done During Most of Working Life, Even If Retired): Student
14b. KIND OF BUSINESS OR INDUSTRY: Education
Ever in US Armed Forces? No
15a. RESIDENCE - STATE: Nevada
15b. COUNTY: Elko
15c. CITY, TOWN OR LOCATION: Wendover
15d. STREET AND NUMBER: 307 Tibbits Blvd. #3
15e. INSIDE CITY LIMITS (Specify Yes or No): Yes

PARENTS

16. FATHER/PARENT - NAME (First Middle Last Suffix): Theodore COSTANZO
17. MOTHER/PARENT - NAME (First Middle Last Suffix): Celia PAYNE
18a. INFORMANT - NAME (Type or Print): Celia COSTANZO
18b. MAILING ADDRESS (Street or R.F.D. No. City or Town, State, Zip): 307 Tibbits Blvd. #3 Wendover, Nevada 89883

DISPOSITION

19a. BURIAL, CREMATION, REMOVAL, OTHER (Specify): Burial
19b. CEMETERY OR CREMATORY - NAME: Costanzo Family Cemetery
19c. LOCATION City or Town State: Rural Of Montello Nevada
20a. FUNERAL DIRECTOR - SIGNATURE (Or Person Acting as Such): JASON MUTH
SIGNATURE AUTHENTICATED
20b. FUNERAL DIRECTOR LICENSE: 298
20c. NAME AND ADDRESS OF FACILITY: Burns Funeral Home PO BOX 689 Elko NV 89803

TRADE CALL

TRADE CALL - NAME AND ADDRESS

CERTIFIER

To Be Completed by CERTIFYING PHYSICIAN
21a. To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated. (Signature & Title)
21b. DATE SIGNED (Mo/Day/Yr)
21c. HOUR OF DEATH
21d. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print)

To Be Completed by CORONER'S OFFICE
22a. On the basis of examination and/or investigation, in my opinion, death occurred at the time, date and place and due to the cause(s) stated. (Signature & Title)
WILLIAM WEBB CORONER
SIGNATURE AUTHENTICATED
22b. DATE SIGNED (Mo/Day/Yr): June 02, 2011
22c. HOUR OF DEATH: 10:56
22d. PRONOUNCED DEAD (Mo/Day/Yr): March 05, 2011
22e. PRONOUNCED DEAD AT (Hour): 10:56

23a. NAME AND ADDRESS OF CERTIFIER (PHYSICIAN, ATTENDING PHYSICIAN, MEDICAL EXAMINER, OR CORONER) (Type or Print): William Webb CORONER 569 Court St. Elko, NV 89801
23b. LICENSE NUMBER

REGISTRAR

24a. REGISTRAR (Signature)
24b. DATE RECEIVED BY REGISTRAR (Mo/Day/Yr)
24c. DEATH DUE TO COMMUNICABLE DISEASE: YES ☐ NO ☒

CAUSE OF DEATH

CONDITIONS IF ANY WHICH GAVE RISE TO IMMEDIATE CAUSE STATING THE UNDERLYING CAUSE LAST

25. IMMEDIATE CAUSE (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)
PART I
(a) Exsanguination — Interval between onset and death
DUE TO, OR AS A CONSEQUENCE OF
(b) multiple Stab Wounds to face and Neck — Interval between onset and death
DUE TO, OR AS A CONSEQUENCE OF:
(c) blunt Force Trauma and Evidence of Asphyxial Injury — Interval between onset and death
DUE TO, OR AS A CONSEQUENCE OF:
(d) — Interval between onset and death

PART II OTHER SIGNIFICANT CONDITIONS-Conditions contributing to death but not resulting in the underlying cause given in Part I.
25. AUTOPSY (Specify Yes or No): Yes
27. WAS CASE REFERRED TO CORONER (Specify Yes or No): Yes

28a. ACC., SUICIDE, HOM., UNDET. OR PENDING INVEST. (Specify): Homicide
28b. DATE OF INJURY (Mo/Day/Yr): March 05, 2011
28c. HOUR OF INJURY: 1058
28d. DESCRIBE HOW INJURY OCCURRED: M Carla, was taken out of town. The use of an instrument, blunt force trauma was used on this person and then placed in a shallowed grave
28e. INJURY AT WORK (Specify Yes or No): No
28f. PLACE OF INJURY- At home, farm, street, factory, office building, etc. (Specify): Unknown
28g. LOCATION STREET OR R.F.D. No. CITY OR TOWN STATE: no street rural part of Wendover., Nevada Wendover Nevada

HOSPITAL/CORONER

3584092

VSS-Rev.2011/7-04

Exhibit 5

KODY CREE PATTEN

VS.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON

Case No.: 11-4187
Elko County Sheriff's Office
Recorded interview at Elko County Jail of: Kody Patten
March 8, 2011
IDENTITY OF SPEAKERS:
KM: Sergeant Kevin McKinney, Elko County Sheriff's Office.
JB: Jim Bonich, Special Agent, FBI
KP: Kody Patten, Interviewee

KM: Hanging in there?

KP: (No audible response).

KM: Okay. What's the matter?

KP: Just miss my family.

KM: I don't blame you. There's a couple of things we wanted to clear up. Just some, just a couple things that weren't, well, we brought up in the first interview, but now that some things have been done, we kind of wanted to clear up a little better, okay? Have you been appointed an attorney yet?

KP: No, sir.

KM: All right. I still need to advise you of your rights again. We'll just do it all over again, okay? You doing okay?

KP: I guess so.

KM: Yeah?

KP: My dad's going to come see me on Thursday.

KM: Oh, good. 12/31/70 -- I mean, 92?

KP: 92.

KM: 92, okay. Micaela Costanzo. Okay, all right. Again, I'm going to read them through. Before we ask you any questions,

you must understand your rights. You have the right to remain silent. If you give up that right anything you say can be used against you in court. You have the right to speak to an attorney before answering any questions or have an attorney present with you while answering questions. If you cannot afford an attorney, one will be appointed for you at no cost. Do you understand each of these?

KP: Uh-huh.

KM: Okay. Could you put your initials right there, Kody, that says you understand those.

KP: Just initials?

KM: Yeah. Okay. Having these rights in mind, would you speak to us now?

KP: What did my dad tell me to do the first time when we signed this?

KM: Well, your dad said to waive your rights, but, again, it's up to you. He said to speak to us. I mean, you're okay with that?

KP: Yeah.

KM: It's up to you, though. I mean, you know. Will you speak to us now? If it's yes, go ahead and put your initials and sign below. Right there, sign. Okay. All right, Kody. The first thing is, um, the issue with the backpack and the shirts and the cell phone, okay? We didn't find a backpack at her house, okay? We looked. We didn't find the shirts where you said

you burned them. You know, we need to clear that up, and her cell phone. You said you thought it was in her pants pocket and it wasn't.

KP: She had it on her.

KM: Do you have any idea where they might have gone? Could you have, you know, could they have been left in the car and you put them in a dumpster or something? You know, anything to help us locate where those might be. Any ideas at all what might have happened?

KP: Last time I saw her cell phone it was on her, in her pocket.

KM: Well, we didn't find it at the scene anywhere. Could it have got thrown out away from the scene somewhere? Could it have been, it wasn't in the, wasn't underneath or anything when we -- do you know what kind of phone she had? Any idea?

KP: Yeah, she kept saying (inaudible) kind I did before. It was, like, a, I have a green one and she had a white one. It's a Gravity, I think. Samsung Gravity.

KM: Okay. You think that was the kind she had?

KP: Yeah. It's like the same one I had but I've been using that PDA one for a while.

KM: Okay, okay. Do you know what happened to it? I mean, any idea?

KP: I'm trying to think.

KM: Okay. Now, what about the backpack? Did she have it with her when she came?

KP: She did, but then, I don't remember if it was still in the car or it was --

KM: Is it at the house or in the shed?

KP: No. It's -- you checked where I told you, right?

KM: For which?

KP: For the backpack.

KM: No. You said she didn't have it with her. That's what you told us.

KP: No, like, the shirts.

KM: Oh, the shirts. They looked for four hours yesterday and couldn't find what you were describing. So I may have to have you draw me a map.

KP: Yeah, I burned the backpack, too. It was in the same spot.

KM: Okay.

KP: It was all together.

JB: Do you think maybe her phone was in that backpack?

KP: Possibly.

JB: What else was in the backpack?

KP: A book, like, a binder, a little day planner thing, um, I think there was two binders, a day planner and, like, a notebook, or, like, a pamphlet thing. I can't remember what was on the front of it.

KM: Okay.

JB: Did all that burn up totally?

KP: Uh, yeah.

JB: You stayed till the fire was out?

KP: Yeah, it was all ashes.

KM: How did you burn it up?

KP: I had some matches that I found in the glove box of the car.

KM: Because most of that stuff won't burn without --

KP: The paper did. Once the paper started going I just kind of used the wood, like, a broken pallet that was already there.

KM: Okay.

KP: To burn it up.

KM: Okay.

JB: So, before you said it was on, like, a steel drum or something like that. That's what you burned it on?

KP: There was, like, steel things there. There was, like, a rod, a few rods, there was, like, a broken pallet.

KM: Okay. Like, here's the freeway exit, then the road and then it turns to dirt, you know? And then it kind of goes around and then, like, this way. You know what I mean?

KP: Yeah.

KM: And then, you know, she was over here.

KP: Okay.

KM: You know? And I know the tank was, like, this big tank was, like, over here, right?

KP: Yeah.

KM: You said it was on this side of the tank; is that right?

KP: The big sign. It's -- can I see a pen? The big sign I'm

talking about is at the other gravel pit.

KM: The other gravel pit?

KP: The --

JB: It's okay, take your time. We need to get this straight.

KP: Okay. The -- I want to get this all straight.

KM: It's okay.

KP: You go out to Metro, right. You know Metro when I explained?

KM: I'm not sure what you mean by Metro.

KP: Um, this is Carquest at the east end of town and the road goes out like that and the freeway goes out. The overpass comes over, and this road was like that and the freeway comes out from under it. And this one going this way and this one goes that way. Um, I went out and, um, you go past Metro kind of right here, it's a gas station and restaurant. You go out and then you go, before going all the way out, there's, like, a sign and a road that goes left, and you go out. And then it goes up over to the gravel pit and there's, like, a little spot where everybody has bonfires and stuff.

KM: Okay.

KP: And it was right there.

KM: Okay. So it wasn't even near this?

KP: No. I was trying to think of the big sign, not the big tank.

KM: Okay.

KP: There is a sign that says MB Gravel Pit over something and that's what I was trying to think of.

KM: Okay. So this is --

KP: This is Metro and this is Carquest.

KM: Carquest, okay. Now, are we talking, like, this is, like, the Peppermill here?

KP: No, no, no.

KM: Which overpass?

KP: This is out of town. Carquest is the last building before you go out of town on the east end.

KM: Oh, on the Utah side?

KP: Yeah, yeah.

KM: Okay.

KP: That's why I had mistaken the big tank. I meant big sign. It's, like, a sign and it's got a big thing on it that says something gravel pit, and it's where they've been doing all their work and stuff.

KM: Okay. And the Metro, is that that one that's, like, where the restaurant is, the Mexican restaurant?

KP: Yeah, out of town.

KM: Okay. Okay. All right.

KP: And then it's, like, you go up. And instead of going up the hill you go over and kind down past where they are shooting, and it's, like, a little, it's, like, just a cutout where everybody has their bonfires because it keeps the wind out, and it was right there.

KM: Okay. Cutout, bonfires, okay. And you said there was a

gravel, like a business sign, huh?

KP: Yeah. It's, I don't know, maybe twelve feet tall, five feet wide.

KM: Okay. And how close to that sign is it?

KP: Oh, it's past it.

KM: Past it? How far?

KP: Um.

KM: Roughly.

KP: Maybe a football field or so. And you kind of go over the lump. There's a big, round, like, a utility thing that they roll up cords on.

KM: Uh-huh.

KP: For telephone lines. There's one of those laying there and you kind of look down past it and it's, like, right there.

KM: Okay. Wire spool, okay.

KP: The wire spool's about six feet wide.

JB: That spool, is that a wooden one or a metal one?

KP: Yeah, it's a wooden one.

JB: Okay.

KM: Okay. All right. And the phone might have been with it?

KP: The last time I remember it was with her. She could have put it in her bag. I can't remember exactly, honestly.

KM: Okay.

KP: But I burned everything pretty much to where I thought it was ashes and then just left.

KM: Okay. All right. The other thing is the medical examiners indicated that there was some bruising and stuff around her mouth and chin and stuff that might indicate that you put your hand over her mouth.

KP: No. That's from when she hit the car. She, like, kind of, like, it kind of jacked this thing up right here on the inside of her lip.

KM: Uh-huh.

KP: And, um, I don't know. She kind of hit like this.

KM: Okay.

KP: Kind of like that.

KM: Okay. I thought you said she hit the back of her head on the car.

KP: No. She hit her head on the car.

KM: Oh, okay.

JB: So she fell face first?

KP: Yeah. Because when I pushed her she kind of did, like, a twisty somersault thing to, like, catch herself.

KM: Uh-huh.

KP: And she went like that and just went boom and smashed her face up.

JB: On which side?

KP: Um, I think it was this one right here.

JB: So the right side of her face?

KP: Yeah. And it was kind of, I don't know, like, hanging down

like it had cut it open.

KM: Uh-huh.

JB: Uh-huh.

KM: Okay.

KP: That's about it.

JB: And that was the first push?

KP: Yeah, correct.

JB: And then you said later you pushed her again and she fell and hit her head on a rock?

KP: Yeah, or, yeah it was a rock.

KM: Would that have been the back of the head or side? Do you know?

KP: I don't know.

KM: Okay.

KP: I thought it was this side. Like, right here.

KM: Uh-huh.

JB: So above her left ear?

KP: Kind of right here, I think. I don't know.

KM: Okay.

JB: Was she bleeding from that area?

KP: I didn't see any.

JB: Okay.

KP: Most of it was, like, right here and it was kind of, like, on her arms and, like, her hands and stuff.

KM: Okay. Because you had mentioned that she was making some

sounds after, you know, after she fell that really bugged you. Thought maybe you might have tried to cover her mouth to try and --

KP: No. I turned her --

KM: -- slow those sounds.

KP: -- because I was asking her, I was, like, it's not funny anymore --

KM: Uh-huh.

KP: -- when I said that. But, I mean, I didn't, like, push or anything. I just went like that.

KM: Okay.

KP: Nothing hard.

KM: Okay.

JB: What about after you hit her with the shovel? Did you cover her mouth then?

KP: No. I remember -- actually, no. Fuck.

KM: It's all right. Take your time. Take your time.

KP: Yeah. I actually did because the sounds were bothering me. I went like that and I said, Mickie, please just stop. And, like, I tried -- I thought it was her throat that was making the noises and I, like, went like that. Tried to make it stop. But that's when I got the blood on my hands and I kind of just wiped it off with that rag and left it.

KM: Uh-huh. Okay. You have anything else? Hey, there was something else that I wanted to talk to you about, because

we've been getting some conflicting information.

KP: Okay.

KM: Um, it sounded like, talking to her friends and stuff, that she was kind of scared of you. That you had kind of been trying to, I don't know, intimidate her or kind of, just kind of messing with her or something. Was there something going on with that?

KP: No. I never done anything like that.

KM: Well, we had somebody tell us that, I think it was last summer, had seen you kind of yelling at her behind the apartment building and stuff.

KP: No. We always hung out. And when she couldn't come outside, me and a couple of friends would always sit at her window, but nothing yelling.

KM: Hm.

KP: The only time we yelled was that day, you know, a few other times, but nothing.

KM: Okay. All right. Okay. Anything else?

JB: Kody, how about we clear up about how you got to the gravel pit. You never went to her house, did you, her apartment? For a while you were telling us you went over to her apartment and she had left her backpack there and you left from there.

KP: We did go by the apartments. I picked her up on the back side of the fence when I left up by Toni's house. But, I mean, she did, if I remember right, she did have it when she got back in

the car.

JB: So if she went back to her apartment, why would she take her backpack with her when she left with you to go to the gravel pit?

KP: I don't think she went to her apartment. It was only, like, two minutes because I only went by my house to see if anybody was there and left.

JB: Okay. All right. Let's start over. So you went, the last time you left school, you went to your house and then where did you go from there?

KP: Out to the gravel pit.

JB: And so she was with you already when you went to your house?

KP: No. I picked her up on the way back.

JB: Okay. That's what I'm confused about. So you went from the school, to your house and then where did you drive after you left your house?

KP: To the gravel pit. Like, we went down, I picked her up and I left.

JB: Okay. Where exactly did you pick her up?

KP: On the back side of a, like, say this is our last apartment building. There's a fence right here and she was kind of sitting by the rock.

JB: So she was waiting for you by her apartment building?

KP: No, no. Her apartment -- can I see your pen? Her apartment building, the apartments are laid out like this.

JB: By her apartment complex?

KP: Correct. And then there's her building and she lives, like, on the bottom. The fence goes down like that and it's about a 12-foot span or whatever. There's a rock here and, um, another fence that goes like that. And she was standing about right here. Because when I dropped her off the first time she said to drop her off over here.

KM: Uh-huh.

KP: Where nobody could see her. It didn't make sense or whatever, but, I mean, and then when I picked her up the next time she was right here.

JB: Okay. So she got in the Trail Blazer with you at the school?

KP: Correct.

JB: And then you drove from the school to her apartment complex. You dropped her off. And then you drove from her apartment complex to Toni's. And then you came back to the apartment complex?

KP: Correct.

JB: So why did she get out at her apartment complex?

KP: Said she had to grab something. But when she got back in, she still had the same stuff.

JB: And you don't know what it is she would have grabbed?

KP: When I was burning the bag, I mean, I didn't look in it before that, but I didn't see anything else.

JB: Okay. Did you tell her you were going to the gravel pit when

you picked her up?

KP: Yeah.

JB: And why did she think you guys were going to the gravel pit?

KP: I told her, where do you want to go to talk? She said, wherever. I said, okay. I said, we'll go to the gravel pit then because nobody goes out there.

KM: Okay. Think of anything else?

JB: No.

KM: All right. Thanks, Kody, appreciate it. Hope you're doing okay. Everything going okay for you? I mean, other than...

JB: Have there been any problems in here?

KP: No, not really. I mean, one or two of the guards kind of seem, I don't know. Pardon my language, kind of like asses towards me.

JB: Uh-huh.

KP: Everybody else is, as long as I'm nice, they're nice to me type of thing.

KM: Good.

KP: Just kind of, never been in jail before and stuff.

KM: I understand.

KP: They said I'm -- or one of the lady cops or deputy or whatever, said I was under watch or something, so I couldn't go to exercise or anything.

KM: Anybody with these types of charges are under watch for a while, okay? So, that's not just you.

KP: I figured as much.

KM: Okay.

KP: But they said -- they didn't know if I could go exercise or anything and I just want to take a shower.

KM: Right.

KP: At least.

KM: Yeah. That's -- I'll see if I can get you a shower today. In fact, we might just take you back there and see if we can get you one right now.

KP: All right.

KM: Okay. All right.

(Recording ended.)

STATE OF NEVADA,)
) ss.
COUNTY OF ELKO.)

I, Roxanne M. Hofheins, do hereby certify:

That I transcribed from audio the proceedings had in the above-entitled matter;

That the appearances on the cover page are from this transcriber's understanding of who was present during the proceeding;

That speaker identification was identified to the best of my ability through voice recognition;

That the foregoing transcript, consisting of pages 1 through 17, is a full, true and correct transcription of said proceeding to the best of my ability.

Dated at Elko, Nevada, this 31st day of March, 2011.

Roxanne M. Hofheins

Case No.: 11-4187
Elko County Sheriff's Office
Recorded interviews seven and eight of: Kody Patten
March 6, 2011
IDENTITY OF SPEAKERS:
KM: Sergeant Kevin McKinney, Elko County Sheriff's Office
JB: Jim Bonich, Special Agent, FBI
KCP: Kody Cree Patten, Interviewee
KP: Kip Patten, Father

KM: (Inaudible) this is part of what I told you I needed to explain to you, okay? Is your rights, okay? It's Micaela...

KCP: It's spelled wrong.

KM: Oh, did I? How's it spelled?

KCP: M-I-C.

KM: M-I-C.

KCP: A-E-L-A, I believe.

KM: Okay. Micaela.

KCP: Costanzo. Costanzo.

KM: Costanzo, okay. You need to understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask any questions and have him with you during questioning. If you cannot afford a lawyer, one will be appointed before anymore questioning. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You can stop answering questions at any time, okay? You also have the right to stop

answering at any time until you talk to a lawyer, okay? Do you understand all of those? Do you have any questions about them?

KCP: No.

KM: Okay. Can I get you to sign right here, okay?

KCP: But this would mean I'm under arrest.

KM: No. You're not under arrest at this time, okay? What this means, what this means is that we have developed, based upon everything, totality of circumstances, that we've developed enough information to arrest you at this point, okay? That doesn't mean you're under arrest, okay? A lot of what goes on now is up to you, okay? Okay? It doesn't mean you're under arrest. However, right now, you're not free to go, okay? Okay? So, you know, because of everything that's happened, you're not free to go at this point, okay? And we don't want you spending the night in here, you know, and taking off. And if we're going to work with you on this, you need to understand that.

KCP: You said just a minute ago I could spend the night with my parents, though.

KM: I did. And you can, okay? We will work that out, okay? I'm not backing off on that. I'm just saying that, you know, what happens from here on out is kind of up to you. And, you know, if we're going to continue to work together we need full cooperation. You understand what I'm saying?

KCP: Yeah.

KM: Okay. I'm just saying right now you're not free to leave, okay?

KCP: (Inaudible).

JB: Kip, we advised him of his rights.

KP: I know.

JB: At this point, Kody's an adult and he needs to make a decision if he's going to waive his rights where we go from here.

KCP: What do you think? Think about it for a second.

KP: God.

KM: Kip, you know, I know you know that, I mean, you know, he's already, I can imagine he's already told you what happened. At least most of it.

KP: Some. Enough.

KM: Yeah. And, at this point, like I've explained to Kody here, right now we are trying to make the best of a bad situation for Kody, okay? And, I mean, we wouldn't be putting in this effort if we weren't trying to make the best of what we've got. I mean, you know, I don't want to see anything happen to Kody that, you know, isn't fair to him, okay? I want to be as fair to him as we can be. And as fair, you know, by the same token, we have to be fair to uh Micaela, too.

KP: Yes.

KM: And we're trying to do the right thing, okay? And we're trying to get Kody to do the right thing. And right now, a lot of what the right thing is, is standing up and explaining himself,

because that's one of the only ways we can help him out right now.

KP: Tell me what this is.

KM: You can read it. It's basically his rights to Miranda. You know, at this point, he's not free to leave. At that point, we have to advise him of Miranda, okay? I mean, you've probably heard it on TV a thousand times. He has the right to remain silent. Anything he says can be used against him in court. He was the right to talk to a lawyer. If he can't afford one, one will be appointed. You know, if he decides to answer questions, he can stop answering questions at any time. Um, you know, so on and so forth, like I read them to him. And, you know, it's the standard things. Once he's not free to leave, then we have to advise him of his rights. Him and I, we've been talking for over an hour now.

KCP: Two.

KM: Two? I don't know, I have no idea. You've been so cooperative to this point and we want to continue to be cooperative to you, too, you know? We don't want to end this on a bad note. So, and that's why we're trying to get things done right and set up. Because at this point, we need to finish up what we've got to do, okay? And, I mean, I've personally been working on this for 28 hours now, you know? So we've got to finish up. And, yeah, I want you to, I mean, you're not free to leave, you know, but I will get your family in here and, like I said --

KCP: I can't spend the night at my parents' house?

KP: No, you can't. That's not going to happen, Kody. And it's not because I don't want you to and it's not because they -- they can't let you. It's just not going to happen.

KM: Not based upon what happened, you know, what we have to this point, and what's going on.

KP: You can't. You're here. This is the road now.

KM: And I'm, you know, I, actually, to tell you the truth, I'm going to bat for you to let you stay with your family. Because I think, I mean, because right now, I think you need that.

KP: You got to start fixing this now as much as you can. It's not about us anymore. You've got to fix this. What you did was heinous, Kody. You've got to -- I know you want to be with your family and I want to be with you. You've got to start -- there's something wrong, man. I want to be near you as much as I can, okay? Don't think I don't. I don't want to abandon you at all, okay? Like Kevin said, you got to do what's right for Micaela as well. You have got to just go all the way with this. You got to just, you need to put it to bed as quick as you can and start -- you need to get out of this town and you know that I know that. You know what that means. You've got to just, you know, do what they need you to do and, you know, you know what I'm saying? You've got to, you know, do a written statement or whatever it is they need so that this can be done. You know, we're getting our, right now, we are

getting our answers. They need their answers. The family needs their answers, you know?

KCP: I don't want anything to happen to you guys.

KP: Kody --

KCP: You know what I'm saying?

KP: Nothing's going to happen to us. I mean, Jesus Christ. This is it, man. This community can't do anything else to me. We have to fix this. You understand that? You did something that --

KCP: I know. I know.

KP: You've got to think about it --

KCP: Dad, I know.

KP: I know it's horrible. You've got to start, okay? I mean, let's see if they'll let you spend the time with us tonight and then, you know, do what they need to do to get it done, okay? You need to set aside. I'm sorry, what was your name?

JB: Jim.

KP: Jim?

JB: Yes.

KP: What is it that you would like him to do right now?

JB: Well, basically, what Kevin was explaining, we're to a point where he's not free to leave. We're required to advise him of his rights. And it's up to him if he wants to waive his rights or not. And if he doesn't, we can't have anymore conversation with him.

KP: I understand that.

JB: You know, he can talk if you're talking to him but we can't ask him questions from this point on --

KP: Right, right.

JB: -- unless he chooses to waive his rights.

KP: Right.

KCP: It's still recording, right?

JB: It is. This is Jim, also. He's with the sheriff's office. Like you asked, the PD is out of this area. They moved to another part.

KP: So if he waives his rights tonight, I mean, that helps you guys to move forward on this and put it where it needs to be?

JB: Well, it helps him, too. Because it shows that he's taking responsibility.

KP: Right, right. Of course.

JB: And it drastically changes things from here on out.

KM: All right. I cleared it that you can spend as much time tonight as you need to in here, okay? Okay? I got it cleared, it's all done.

KP: I think -- I...

KM: Now, I'm doing everything I can for you, okay? Okay? But we need to get this finished up.

KP: What is it you need to finish up? Tell us.

KM: We need to find out how Micaela got hurt, okay? But you need keep in mind your rights and stuff like that. We got to do it. We got to finish it up. You're dad --

KCP: What? I know, dude, I know, all right?

KM: What do you need, Kody? Before we finish this up?

KCP: You said I could have my family in here tonight.

KM: Right. But not till we're done.

KCP: Yeah, yeah, so, but other than that.

KM: I've done everything I can for you. I mean, you want something else to drink? You need another minute to talk to your dad? I mean, what do you need? I mean...

KCP: I just got to use the restroom, that's it.

KM: Okay. We'll get that done. Do you want to sign that?

KCP: Do you want me to?

KP: Well, I just, I need to process. Okay, so this is his rights and when he signs it, he's agreeing to these, what's on the paper, correct?

KM: Yes.

JB: He's agreeing that he's waiving those.

KP: Okay, so if he signs here he's waiving all these?

KM: It means he's willing to talk to us.

KP: Okay. I have questions, but I think that's a good thing, okay? Because, like I said, you need to start your process, right? Everybody's got to heal from this.

KCP: Yeah.

KP: So he signs this, waives his rights.

KM: Uh-huh.

KP: Then he can talk to you guys and you can, you know, build your case and what you need to do, which, I think at this point, right, you realize that you're going, you know, away, right? You know? God. You realize that, right? Okay?

KM: But --

KP: You got to pay for what, you know.

KM: We're trying to make sure that, you know, like I said, it's not worse than it already is.

KP: Right. Okay, so he waives his rights, um --

KM: If he waives his rights and agrees to speak with us, we'll finish up the interview, and then we'll, I mean, then, you know, we can start, you know, taking care of things here at this point, you know? If he, you know --

KP: Where will he go from here?

KM: Well, basically what I got to do is get ahold of our district attorney, explain to him what's going on, what we have. And, you know, they're going to decide, basically, what the charges will be. You know, what he's charged with at this point and then he'll go to Elko County Jail. And he'll be able to bail out, you know. He'll have an opportunity for bail, um, and, you know, pending the court hearings and trials. So, I mean, realistically, I mean, if he bailed out, he could go back to school, finish up. I mean, I don't know what your options are

at this point, I mean, but you could, you know, start taking care of things, you know?

KP: Um, so I guess, can't, I mean, based upon what he's telling us here today, why does it have to go to a trial?

KM: It doesn't have to.

KP: Because you don't want that, do you?

KCP: I just want it to be done and everybody to be at ease.

KM: I understand. It doesn't have to. I mean, you could, I mean, the judge will advise you of the charges and you could plead guilty or not guilty, you know? But what we want to do is do what's fair to you also, you know what I'm saying?

KP: And fair to Micaela, right?

KCP: I don't care about me. I care about what happens (inaudible).

KP: Right. So we don't want, I mean, you don't want to be drug through the public anymore.

KCP: I don't want anybody. You, mom, (inaudible).

KP: Don't worry about us.

KCP: That's all I'm worried about.

KP: Well, don't.

KCP: I'm fine, Dad.

KP: You're fine?

KCP: I know what's going to happen to me. I understand that. I'm willing to accept it. But I can't bear for you guys to get --

KP: Kody, don't worry about it.

KCP: Well, too bad.

KP: I know, son. I just, I think you should sign it and I think you should talk to them and I think we should just get this moving. Let's get this, okay? You know? Let's...

KCP: Okay.

KP: Because I think, um, so we'll have maybe tonight in here for, like, how many hours, say?

KM: You know I can't, I mean, I, as far as I'm concerned, as long as you need. Of course, can't be, you know, six weeks or something like that.

KP: No, I know.

KM: But I don't have a problem with, you know, I mean, I'll probably have to get ahold of the D.A. tonight. It may take him a few hours to decide anyway, so we're looking, at this point, I don't see why 6:00 or 7:00 isn't unreasonable.

KP: What time is it now?

KM: It's almost 1:00 now, you know?

KCP: That's really (inaudible).

KP: I would like to get, I would like to see, I guess, I don't know. I guess I would like, you know, if we could, you know, maybe set a time of -- I don't know what I want. I don't know. What do you want, Kody? I think the time tonight is plenty sufficient, you know? Honestly, think about if you were at the other end of this thing. You wouldn't want anything for that person, would you?

KCP: No.

KP: So --

KCP: Thankful for what I get.

KP: So it's 1:00. I mean, can we have to at least till five?

KM: Oh, yeah, that's no problem.

KP: Maybe 6:00, (inaudible) still going on with you guys.

KM: Yeah. I'm not --

KCP: Don't set a time. I mean --

KP: I understand. I want a little bit of time just to, I don't know, okay.

KM: You know, I talked to Sup, he's the chief. This is his office. He said no problem, so, I mean, they do shift change at 6:00, you know, that might be the timeframe we're looking at, the shift change.

KP: Yeah. Let's make sure we're done before that, okay? And what I'm kind of hoping is that you guys, you know, take him over to Elko,could it be before that timeframe?

KM: I can, you know, we'll stick around and I don't mind transporting him myself.

KP: You see what I'm saying?

KM: I see exactly what you're saying.

KP: I want to minimize his face in this community.

KM: I completely understand, and I'll transport him myself --

KP: Okay.

KM: -- whenever you guys are done.

KP: That would be great. Um, I mean, first off, before I go any further, thank you. Because I know what you don't have to do. So thank both of you.

KM: We're both dads, you know. We both have sons.

KP: Kody, (inaudible). I'm disappointed, but I love you, you know? I just don't even know what to say. I'm sorry, you know? You got the bad Patten gene, man.

JB: I'm going to turn the recorder off.

(Recording ended.)

(New recording began.)

KM: Okay.

KP: When does this go to the news? I mean, when?

JB: That's not up to us.

KM: That's not really up to us. We're going to have to --

KP: Well, when?

KM: Well, I mean, he won't be booked into custody till tomorrow, at this point, which is Monday morning. The press doesn't get the booking sheets until the next morning, so, you know. But I have no control over, you know, if they issue a separate press release from the bosses, but the normal booking procedures don't happen until the next day.

KP: So does anybody else, like, does the local PD have the right to do their release? I guess what I'm saying is --

KM: Well, I --

KP: -- I don't want my family to hear about it on the news.

KM: I understand, I understand. The, you know, the worst case scenario is the press would get it in the morning. Not tonight. They'd get it in the morning, you know.

KP: Like after 6:00 or something?

KM: Yeah, it wouldn't be till after the typical morning.

KP: Okay. He's going to sign this and I think he's going to spend some time with his girlfriend for just a little bit.

KM: Okay.

KP: And the rest of the time will be with us. And I'm going to try to contact as much of my family as I can and maybe try to have them come out or something.

KM: Okay.

KP: Can they come in and say hi?

KM: Boy, we're really pushing it. I mean, really, allowing you guys to stay with him. I mean, I'm not opposed to it, but we're, we start getting a ton of people in here --

KP: It wouldn't be a ton. I'm talking about probably three people.

KM: I'll have to run that by the chief. But, I mean, I can ask him.

KP: Okay. Please.

KM: I don't have a problem asking.

KP: That's a good start, okay? You're doing the right thing right now.

KM: Do you want to sit in here or do you want to go talk to your wife?

KP: I want to (inaudible). Kody, do you want to (inaudible)?

KM: We'll finish up and then she can come in. At this point, I don't think it will take very long.

KP: Yeah, please. I mean, you understand.

KM: I do. I do. We're trying to do the best we can.

KP: Thanks. Help him out, all right?

KM: I'm trying.

KP: Well --

KM: Oh.

KP: Just do it.

KM: All right, Kody. We've been talking a long time. I know you told your dad a lot of what happened. Tell us what happened. It's the question we've been asking. Tell us what happened.

KCP: (Inaudible) we were driving up there. She started bringing up about how we should get together and all this stuff. And I said, I'm not going to leave Toni, and she started getting upset, and I started getting upset, too. And she said something that (inaudible) and I just kind of yelled at her. I said, it's not going to happen, stop asking. And then she, like, she said, stop the car. And we got out and I said, what the hell are you doing? I was, like, at least let me take you back to town. And she goes, no, and started yelling at me. And said that it's because I'm not leaving Toni, she started, like, pounding on my chest and stuff. And I was just kind of pushing her away at first and then she kind of hit me. She

kind of, like, clipped me on the head and it kind of, I guess, it kind of hurt. I just really -- a good shove and she fell back and hit the back bumper of the car and she didn't move. She didn't move for a minute and I started saying Mickie, it's not funny, get up. It's not funny. I'm sorry I pushed you, it's not funny anymore. She started coming around, so I got down by her side and helped out. I said, are you okay? And she goes, where am I at? And I said, Mickie, come on, seriously, it's not funny. And she goes, where am I at? And I said, Mickie, we are at the same place we was when we were fighting. I started getting more mad and she goes, she stood up, and she goes, you were trying to hurt me, huh? And she started yelling, and I was, like, you're fucking crazy. You have no idea what you're talking about. I said, I'm not trying to hurt you, all I did was push you. And she continues to start, like, pounding on my chest and stuff. And I pushed her away and finally I said, Micaela, enough, and I shoved her pretty hard. She fell down and hit her head and she just laid there and was looking at the sky and her eyes, like, started to turn black and I didn't know what to do. I just sat there and she started to, like, shake and seize. From the ambulance experience at that point, I knew something was wrong. And I looked at where she was at and there was this big rock she had hit her head on, and I was looking at her and she wouldn't hold still and I tried to hold her still. And I knew something

really bad was happening, so I tried to pick her up and put her in the car. And she kept moving and moving and I tried to, like, check her pulse and stuff and I couldn't get anything and she was just flopping. So I had the shovel from prying on my car and I kind of just hit her, tried to hit her on her head right here somewhere, trying to just knock her out. And it hit, like, right here and it tore her up pretty bad, and she started making this fucking awful sound. So I took the little dagger thingy and pushed it right here and the end of it hit her chin and split it open. And she started gurgling more and making this sound, and she wouldn't stop, so I pushed it right here and then she stopped. I didn't know what to do. I was going to call my dad but I knew he would freak out. So I tried to take her clothes off to put her in the little grave thing I dug by the big bush, because I figured her body would decompose faster without clothes. So I covered her up and I took the clothes over in the gravel pit area and I burned them. And I couldn't get the pants undone and I didn't want to disrespect her, so I put her sweater over her and I panicked and I just covered it up really quick and put bushes over it and left. And I went over and I sat there for, like, two hours before I went and got Toni and fucking cried my brains out. I wanted to tell someone because I was so scared. So I just calmed down and cleaned myself up and wiped the shovel off in the dirt. I went and got Toni, and she asked what was wrong and I said,

nothing. We went and got food. Then we went to my cousin Jeffrey's.

KM: Now, you said you cut her on the neck?

KCP: Yes, sir.

KM: And that was with the shovel?

KCP: Yeah, the thing that looks like that.

KM: The blade part?

KCP: I tried to go like that and it didn't work and that's when I pulled, it's like a --

JB: It's an e-tool? An entrenching tool? A military shovel?

KCP: Yeah.

JB: And when you fold it in half it's got, like, a pokey spike on the opposite end of the blade, the shovel blade?

KCP: Yeah. And I just went like that and that's when it, like, made this pop sound and that's when she really made a really horrible sound that I can't fucking get out of my head. (Inaudible) sounds the exact same.

KM: Hm.

KCP: I think I'm going to be sick.

KM: How did the zip tie get on her arm? What happened there?

KCP: I was just going to zip tie her up and try to put her in the car and take her out to the dump and just dump her out there, but -- thank you, sir. But I couldn't do it. I couldn't bring myself to do it. And just put it on and then I just sat there.

KM: Uh-huh.

KCP: And I went like that on her. I sat there and I screamed.

KM: Uh-huh.

KCP: I was so angry and so sad. I didn't know what to do. I just sat there and I was, like, going like this on her. And I said, why didn't you just listen to me?

KM: Um, you said you tried to take her clothes off. Um, but her sweatshirt was still on her. And I noticed the sleeves, like the little bands, were still on her wrists. How did you try to get her clothes off? Did you try to cut them off?

KCP: With the end of the shovel.

KM: You --

KCP: It's got a serrated edge on it.

KM: Okay.

KCP: And I tried to cut it with that and it kept getting caught, so I just cut it, pulled it. She was sitting on her arms and I was just trying to pull, and when it tore one of them I just panicked and I just started going like that trying to cut it.

JB: (Inaudible) burn?

KCP: Huh?

JB: You said you started a fire and --

KCP: I just burned her shirt.

JB: Anything else?

KCP: Her shirts and her, um, her sports bra thing.

JB: Uh-huh.

KCP: And that was it.

JB: And where was that?

KCP: It was at the gravel pit a ways away, like over --

KM: Which direction? Back towards town or...

KCP: Yeah. It's out back on the road out past the can. There was a metal, I want to say barrel, but, like, a metal thingy, like, sitting there and I just put it on there.

KM: Okay.

JB: Where was she when she hit her head on the bumper? Where were you parked?

KCP: I had turned around because when she got out I turned like that and into this, like, little rock/pebble thingy. It looked like quarry-type stuff. And I turned right there and when she hit her head she was just a little out from that. She was probably standing like this from the car and then the car was this way and she was standing, like, right here.

JB: You remember that big tank you mentioned earlier?

KCP: Yeah.

JB: Where were you parked from there?

KCP: Where do you mean?

KM: I guess what he's, and correct me if I'm wrong, after she got cut, did you move her or did you just --

KCP: Yeah.

KM: -- did everything happen right where, right in the same area where we found her?

KCP: Yeah. I just moved, like, kind of picked her up and put her into the hole.

JB: So how far from where she was last, how far did you have to move her to the hole? A couple feet?

KCP: Ten feet.

JB: Okay.

KCP: Ten, twelve feet. I mean, I really, I'm trying to remember. I really --

JB: So what happened to the blood that would have been on the ground ten feet from the hole? Was she bleeding a lot?

KCP: Not really, no. I did the thingy like that when she was in the hole.

JB: Okay. All right. I misunderstood.

KM: Well.

KCP: Anything, just, whatever, ask. I mean, anything. I'll clear it up.

KM: Well, we're just, yeah. Did you, um -- were her shoes untied before or did you try and untie them? Did you untie them?

KCP: I believe I was trying to cut them and they came unloosed.

KM: Okay.

KCP: And I saw a train coming and I just left it on her.

KM: Uh-huh.

KCP: When the train come is when I panicked.

KM: Uh-huh.

KCP: Because I figured they would have called it in, a car just randomly sitting there. I just panicked and just left everything. And I think I put a -- the thing I wiped my hands with. It's like a -- fuck. It's like a little towel. It's in there.

KM: A washcloth?

KCP: Yeah. It's, like, a little bigger than that, I think.

KM: Oh. Where did you put that?

KCP: Under.

KM: Under her?

KCP: Because when I picked her up and sat her in there and I wiped it off and then went like that under there.

KM: Okay. All right. When you -- so you put the dirt over the top of her?

KCP: Correct.

KM: And anything else go over her?

KCP: I put, like, tumble weeds to cover that. That was it.

KM: Okay. Did you try and mark it in any way?

KCP: No, sir. I just wanted to forget.

KM: Uh-huh. Okay. Now, those aren't the shoes you wore out there, are they?

KCP: No.

KM: Where are those?

KCP: In Toni's parents' house, but they're in the other room on the shelf.

KM: Okay. What kind are those?

KCP: I want to say Starters.

KM: Okay.

KCP: They have, like, a circle pattern on the bottom.

KM: Okay.

KCP: With, like, little cut edge.

KM: What room are they in?

KCP: You walk in the front door and you hang a left past the birds and it's the first left and they're in the back corner, on the shelf.

KM: Okay.

KCP: I can -- can I ask that Toni grabs them so her parents -- I can tell her exactly where they're at. I told you where the shovel's at.

KM: You did.

KCP: Just pull the siding and it's right past the insulation.

KM: Okay. All right.

KCP: And I panicked and put bleach on the bottom of my shoes and tried altering my tread and on the shovel, too. So, I mean, I don't know if that helps or not.

KM: Did you get blood on your clothes?

KCP: No, sir.

KM: You didn't get any blood on your clothes?

KCP: Just on my wrists and stuff right here and that's it. Because I didn't have my sweater on.

KM: Okay. Do you have anything else, Jim?

JB: (No audible response).

KM: I don't think I have anything else.

KCP: Can I just say on record that I'm sorry?

KM: Yeah. I mean, I -- you can say whatever you want. I mean, this is your time. I mean...

KCP: I just want to say that I'm sorry and I hate being me and being in the wrong place at the wrong time. And that it had to happen to someone that didn't deserve it.

KM: Anything else you want to say right off hand?

KCP: Just that I'm sorry.

KM: Okay. All right. I think that's all we have.

JB: Okay. I'll turn the recording off in a second. Do you want to visit with your family now? How do you want to do this?

KM: You want to see Toni first, right?

KCP: Yes, please.

JB: Okay. All right. We'll send her in.

(Recording ended.)

STATE OF NEVADA,)
) ss.
COUNTY OF ELKO.)

I, Roxanne M. Hofheins, do hereby certify:
That I transcribed from audio the proceedings had in the above-entitled matter;

That the appearances on the cover page are from this transcriber's understanding of who was present during the proceeding;

That speaker identification was identified to the best of my ability through voice recognition;

That the foregoing transcript, consisting of pages 1 through 25, is a full, true and correct transcription of said proceeding to the best of my ability.

Dated at Elko, Nevada, this 30th day of March, 2011.

Roxanne M. Hofheins

ORIGINAL

RECORDED EXAMINATION OF KODY CREE PATTEN
BY HIS COUNSEL JOHN OHLSON IN CONNECTION
WITH THE TERMINATION OF PLEA NEGOTIATIONS

Elko County Sheriff's Department
775 W. Silver Street
Elko, Nevada 89801

Taken at 3:05 p.m., January 17, 2012

Reported by Lisa M. Manley, CCR #271

MR. TORVINEN: The time is, by my watch, 3:05 p.m. It is still January 17th, 2012. We are still in the conference room at the Elko County Sheriff's office located at 775 West Silver Street.

Present now is myself speaking, Mark Torvinen; Lisa Manley, certified court reporter; Mr. Kody Patten; Tyler Ingram from the Elko County District Attorney's office; James Carpenter from the Elko County Sheriff's department; Jeffrey Kump, attorney at law; John Ohlson, attorney at law; and Mr. Kody Patten, the defendant in the case.

I have been informed that Mr. Ohlson -- we need to terminate this proffer. And I'll let Mr. Ohlson say his piece at this point.

MR. OHLSON: Miss Reporter, I arrived late at these proceedings. They started, I believe, at one o'clock and I arrived about an hour late.

When I arrived the record noted that we suspended the proceedings so that I could consult with my client.

The purpose was that these proceedings were to be preliminary to a potential change of plea in this case.

That was predicated upon Mr. Patten informing Mr. Kump previously -- about ten days ago, Jeff?

MR. KUMP: Yes.

1 MR. OHLSON: That he would be willing to plead
2 guilty to first-degree murder in this case in return for
3 the relinquishment by the State of its intention to seek
4 the death penalty.
5 It was on the strength of that representation
6 that we proceeded with negotiations that I had been
7 attempting for some months unsuccessfully.
8 During the time that we have been off the
9 record, Mr. Patten and Mr. Kump and I have been speaking,
10 have we not, Kody?
11 MR. PATTEN: Yes, we have.
12 MR. OHLSON: And have I advised you as to the
13 pros and cons of entering into such a plea bargain?
14 MR. PATTEN: Yes, you have.
15 MR. OHLSON: And do you understand my advice?
16 MR. PATTEN: Yes, I do.
17 MR. OHLSON: Do you -- have I advised you that it
18 is my opinion, regardless of the death penalty and whether
19 or not it's applied in this case, that if the case were to
20 proceed to trial you would be convicted of first-degree
21 murder?
22 MR. PATTEN: Yes, you did.
23 MR. OHLSON: Have I advised you that that's --
24 upon that conviction a jury would decide your sentence?
25 MR. PATTEN: Yes, you did.

1 MR. OHLSON: And that they would have the
2 possibility, without the death penalty, of a life-without
3 or a life-with-parole sentence?
4 MR. PATTEN: Yes, you did.
5 MR. OHLSON: Did I advise you it is my opinion
6 that a jury in this matter would not only convict you of
7 first-degree murder, but that would -- that jury, given
8 those two options, would sentence you to life in prison
9 without the possibility of parole?
10 MR. PATTEN: Yes, you did.
11 MR. OHLSON: Understanding that, what was your
12 decision as to the plea bargain?
13 MR. PATTEN: After which I decided to decline.
14 MR. TORVINEN: Okay. So you are unwilling to
15 accept the plea bargain?
16 MR. PATTEN: Correct.
17 MR. OHLSON: You understand that this declination
18 of a plea bargain terminates negotiations at this point,
19 puts us back in a posture of litigation, and based upon the
20 timing of the case, although anything can happen,
21 negotiations are off at this point.
22 Is that right, Mr. Torvinen?
23 MR. TORVINEN: Yes.
24 MR. OHLSON: And the offer is off the table?
25 MR. TORVINEN: Yes.

MR. OHLSON: Mr. Patten does not have the option of taking it anymore?

MR. TORVINEN: Not at this point.

MR. OHLSON: That's all I have. Thank you, Miss Reporter.

MR. TORVINEN: The time is three --

MR. OHLSON: Oh, I'm sorry, did you want to -- anything?

MR. TORVINEN: No. No. I just want to make a record. The time is 3:09 by my watch and we are going to terminate this conversation. And I assume Mr. Carpenter will take Mr. Patten back to the jail. And that's where we're at.

MR. OHLSON: Thank you.

(WHEREUPON, the hearing was concluded at 3:09 p.m.)

STATE OF NEVADA)

) SS.

COUNTY OF ELKO)

I, LISA M. MANLEY, a Nevada Certified Court Reporter, do hereby certify that I was present at the Elko County Sheriff's Department, 775 W. Silver Street, Elko, Nevada, during all the proceedings had on January 17, 2012, and took verbatim stenotype notes thereof; and that the foregoing 5 pages contain a full, true and correct transcription of my stenotype notes so taken, and a full, true and correct copy of all proceedings had.

LISA M. MANLEY - CCR-271

CERTIFIED COURT REPORTER