

FILED

2021 MAR 30 PM 2:39

ELKO CO DISTRICT COURT

Electronically Filed  
Apr 02 2021 02:32 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CLERK DEPT

IN THE FOURTH JUDICIAL DISTRICT COURT

STATE OF NEVADA, ELKO COUNTY

KODY CREE PATTEN,  
Petitioner

v.

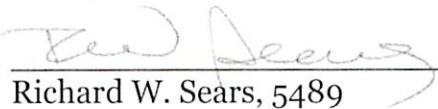
WILLIAM "BILL" GITTERE, WARDEN ELY  
STATE PRISON.

Respondent

### Notice of Appeal

Comes Now Kody Patten by his counsel of record, Richard W. Sears who notifies the court and parties that he seeks a Nevada Supreme Court review of this Court's denial of his Post-Conviction writ without an evidentiary hearing.

Dated this 30<sup>th</sup> day of March, 2021.



Richard W. Sears, 5489  
Sears Law Firm, ltd  
457 Fifth Street, Ely, Nevada 89301  
(775) 289-3366

CERTIFICATE OF MAILING

I hereby certify that I assisted Richard W. Sears Law Firm and that on the date below written, I served the undersigned District Attorney by placing the Notice of Appeal in their courthouse mail box, a true and correct copy of the above and foregoing Notice of Appeal, dated and addressed as follows:

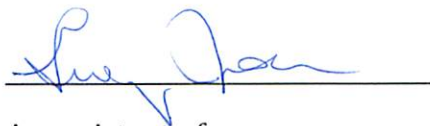
☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Ely, Nevada: and/or

☐ Via Facsimile; and/or

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

Hon. Tyler Ingram  
District Attorney  
540 Court Street, Second Floor  
Elko, NV 89801

Date: March 30 2021.



An assistant of

Richard W. Sears Law

FILED

2021 MAR 30 PM 2:39

ELKO CO DISTRICT COURT

CLERK \_\_\_\_\_ DEPUTY 182

IN THE FOURTH JUDICIAL DISTRICT COURT

STATE OF NEVADA, ELKO COUNTY

KODY CREE PATTEN,  
Petitioner

v.

WILLIAM "BILL" GITTERE, WARDEN ELY  
STATE PRISON.  
Respondent

**CASE APPEAL STATEMENT**

1. Name of appellant filing this case appeal statement: Cody C. Patten
2. Identify the judge issuing the decision, judgment, or order appealed from: Hon. Kirsten Hill.
3. Identify each appellant and the name and address of counsel for each appellant:  
Kody C. Patten, Appellant. Richard W. Sears, 457 Fifth Street, Ely, Nevada 89301,  
Counsel for Appellant.
4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel): WILLIAM "BILL" GITTERE, WARDEN ELY STATE PRISON. Name of Appellate Counsel is Elko County District Attorney, Hon. Tyler Ingram, 540 Court Street, 2<sup>nd</sup> Floor, Elko, Nevada 89801.
5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that

1 attorney permission to appear under SCR 42 (attach a copy of any district court order  
2 granting such permission): All attorneys were licensed to practice law in Nevada.

3 6. Indicate whether appellant was represented by appointed or retained counsel in  
4 the district court: Appellant was represented by appointed counsel in the district court.

5 7. Indicate whether appellant is represented by appointed or retained counsel on  
6 appeal: Appellant is represented by appointed counsel on appeal.

7 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and  
8 the date of entry of the district court order granting such leave: Appellant was granted  
9 leave to appear in forma pauperis on February 23, 2013; Petitioner was appointed counsel  
10 and counsel filed a Supplemental Petition on July 9, 2019.

11 9. Indicate the date the proceedings commenced in the district court (e.g., date  
12 complaint, indictment, information, or petition was filed): Information filed on August 9,  
13 2011 charged First Degree Murder with a Deadly weapon among other lesser crimes.

14 10. Provide a brief description of the nature of the action and result in the district  
15 court, including the type of judgment or order being appealed and the relief granted by the  
16 district court: This was a criminal case. Defendant was charged with First Degree Murder  
17 with the Use of a Deadly Weapon was sought, and Plead Guilty to First Degree Murder  
18 with the Use of a Deadly Weapon after the death penalty was withdrawn. Appellant did  
19 not file a Direct Appeal to the Nevada Supreme Court. Appellant filed a post conviction  
20 writ of habeas corpus on the basis that district court defense counsel was ineffective. The  
21 Elko County District Attorney opposed the writ on the basis the defense counsel was  
22 effective. Hon. Kristen Hill determined trial counsel was competent and evidence of guilt  
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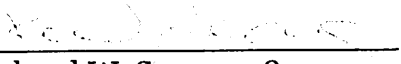
1 was sufficient in the record to deny an evidentiary hearing on the issue of Kody's actual  
2 innocence of first degree murder.

3 11. Indicate whether the case has previously been the subject of an appeal to or  
4 original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court  
5 docket number of the prior proceeding: None filed.

6 12. Indicate whether this appeal involves child custody or visitation: No child  
7 custody or visitation is involved.

8 13. If this is a civil case, indicate whether this appeal involves the possibility of  
9 settlement: N/A

10 Dated this 30<sup>th</sup> day of March, 2021.

11   
12 Richard W. Sears, 5489  
13 Sears Law Firm, ltd  
14 457 Fifth Street, Ely, Nevada 89301  
15 (775) 289-3366  
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CERTIFICATE OF MAILING

I hereby certify that I assisted Richard W. Sears and that on the date below written, I deposited in the Courthouse mail system true and correct copy of the above and foregoing Case Appeal Statement, 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

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

Hon. Tyler Ingram  
District Attorney  
540 Court Street, Second Floor  
Elko, NV 89801

Date: March 30th, 2021.



An assistant of

Richard W. Sears

## Case Summary

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### ECDC-CVHC-13-116 - PATTEN, KODY C VS. BAKER - WARDEN, RENEE

Court: ECDC-CVHC-13-116

Agency: Elko County Clerk's Office

Type: Civil  
Status: Closed

CaseID: 13-406  
Received Date: 2/20/2013  
Status Date: 3/15/2021

Age: 2961 days    Active Age: 2961 days

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#### Involvements

HILL, KRISTON Judge -  
KACIN, ALVIN Judge, Inactive -  
PORTER, NANCY Judge, Inactive -  
PATTEN KODY Petitioner -  
TORVINEN, MARK Attorney, Inactive -  
BAKER - WARDEN, RENEE Respondent -  
SEARS, RICHARD Defense Attorney -

#### Related Name(s)

RENEE BAKER - WARDEN  
ELY STATE PRISONis On Behalf Of

#### Name Attributes

For: RENEE BAKER - WARDEN  
Name Record Source - Name Record Converted  
from JALAN - Court  
For: KODY CREE PATTEN  
Name Record Notes (Converted): NNCC #1091721  
Name Record Source - Name Record Converted  
from JALAN - Court  
Place of Birth: LOGAN UT

#### Related Cases

Related Case (Converted)  
PATTEN, KODY CREE ~ Civil  
Court: CV-HC-13-0116

Agency: Elko County District Attorney's  
Office  
Status Date: 2/20/2013

#### Case History

Status: Pending (Conversion)

Date	Event Type Desc	Status
	Closed - Case Status	
	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS FILED	
2/20/2013	Proceedings (Converted) - Event	
	Event Type Code: F17	
	Event Type Description: FILE OPENED - DC	

## Case Summary

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2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: J25  
                    Event Type Description: JUDGE ASSIGNED

2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: W18  
                    Event Type Description: WRIT OF HABEAS CORP  
                    Note: PETITION (POST CONVICTION)

2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: M21  
                    Event Type Description: MOT FOR LEAVE  
                    Note: TO PROCEED IN FORMA PAUPERIS

2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: M10  
                    Event Type Description: MOTION  
                    Note: FOR THE APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: DAS  
                    Event Type Description: CASE SENT TO DA  
                    Note: CASE SENT ELECTRONICALLY TO DA  
                    Action Code: EX  
                    Action Description: EXPIRED TIME

2/20/2013      Proceedings (Converted) - Event  
                    Event Type Code: F15  
                    Event Type Description: FILE CHECKED OUT BY:  
                    Note: DC 2 for review/signature

2/22/2013      Proceedings (Converted) - Event  
                    Event Type Code: F16  
                    Event Type Description: FILE CHECKED IN BY:

2/22/2013      Proceedings (Converted) - Event  
                    Event Type Code: O51  
                    Event Type Description: ORD DISQUALIFY JUDGE

2/22/2013      Proceedings (Converted) - Event  
                    Event Type Code: F15  
                    Event Type Description: FILE CHECKED OUT BY:  
                    Note: DC 1 for review/signature

3/14/2013      Proceedings (Converted) - Event



## Case Summary

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Event Type Code: D31  
Event Type Description: DECLARATION  
Note: STATE'S INITIAL DECLARATION W/ RESPECT TO PETITIONERS PETITION FOR WRIT OF HC  
FILED 2/20/13 APPL FOR A STAY PENDING RESOLUTION OF THE ISSUE OF THE APPT OF  
COUNSEL AND CERT OF SERVICE PLEADING PLACED IN DC1 PICK UP BOX ON 3/14/13 @9:51

4/17/2013      Proceedings (Converted) - Event  
                  Event Type Code: Q24  
                  Event Type Description: ORD APPOINTING ATTY

4/17/2013      Proceedings (Converted) - Event  
                  Event Type Code: F16  
                  Event Type Description: FILE CHECKED IN BY:

4/17/2013      Proceedings (Converted) - Event  
                  Event Type Code: C35  
                  Event Type Description: COPIES PREPARED FOR  
                  Note: TROY JORDAN OF THE PETITION FOR HC

5/1/2013        Proceedings (Converted) - Event  
                  Event Type Code: C35  
                  Event Type Description: COPIES PREPARED FOR  
                  Note: KAREN @ ELKO CO DA'S OFFICE OF THE ORD APPT ATTORNEY FILED 4/17/13 COPY  
                  PICKED UP & SIGNED FOR BY DA RUNNER, G DALTON ON 5/1/13

5/7/2013        Proceedings (Converted) - Event  
                  Event Type Code: E06  
                  Event Type Description: EX PARTE MOTION  
                  Note: FOR PRIVATE INVESTIGATOR FEES

5/7/2013        Proceedings (Converted) - Event  
                  Event Type Code: F15  
                  Event Type Description: FILE CHECKED OUT BY:  
                  Note: DC I for review/signature TROY JORDAN'S PROPOSED ORD WAS PLACED IN DC1 PICK UP  
                  BOX @ 8:48

5/15/2013      Proceedings (Converted) - Event  
                  Event Type Code: E07  
                  Event Type Description: EX PARTE ORDER  
                  Note: ORD GRANTING EX PARTE MOT FOR PRIVATE INVESTIGATION FEES COPY MAILED BACK TO  
                  TROY JORDAN ON 5/16/13

5/15/2013      Proceedings (Converted) - Event  
                  Event Type Code: F16  
                  Event Type Description: FILE CHECKED IN BY:

5/15/2013      Proceedings (Converted) - Event

## Case Summary

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Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

5/17/2013      Proceedings (Converted) - Event  
                  Event Type Code: S15  
                  Event Type Description: STIPULATION  
                  Note: 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 ABOUT THE 20TH DAY OF FEBRUARY,2013

5/20/2013      Proceedings (Converted) - Event  
                  Event Type Code: Q82  
                  Event Type Description: ORD APPROVING  
                  Note: STIPULATION TO A BRIEFING SCHEDULE W/RESPECT TO THE POST-CONVICTION PETITION FOR A WRIT OF HC; FILED IN PROPER IN THIS MATTER ON OR ABOUT 2/20/2013

5/24/2013      Proceedings (Converted) - Event  
                  Event Type Code: N50  
                  Event Type Description: NOTICE OF ENTRY ORDR

11/7/2013      Proceedings (Converted) - Event  
                  Event Type Code: S25  
                  Event Type Description: STIP FOR EXT OF TIME  
                  Note: RE: OPENING BRIEF

11/8/2013      Proceedings (Converted) - Event  
                  Event Type Code: F15  
                  Event Type Description: FILE CHECKED OUT BY:  
                  Note: DC I for review/signature

11/14/2013      Proceedings (Converted) - Event  
                  Event Type Code: F16  
                  Event Type Description: FILE CHECKED IN BY:

11/14/2013      Proceedings (Converted) - Event  
                  Event Type Code: O12  
                  Event Type Description: ORDER  
                  Note: APPROVING THE 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 (PUT COPIES IN DA

12/20/2013      Proceedings (Converted) - Event

## Case Summary

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Event Type Code: S15  
Event Type Description: STIPULATION  
Note: BY THE PATRIES TO AND 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

12/20/2013      Proceedings (Converted) - Event  
Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

1/2/2014        Proceedings (Converted) - Event  
Event Type Code: O32  
Event Type Description: ORD APPROVING  
Note: EXTENSION OF TIME

1/2/2014        Proceedings (Converted) - Event  
Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

1/22/2014      Proceedings (Converted) - Event  
Event Type Code: N08  
Event Type Description: NOTICE OF  
Note: CHANGE OF ADDRESS OF LAW FIRM

2/3/2014        Proceedings (Converted) - Event  
Event Type Code: M37  
Event Type Description: MOT TO  
Note: TO BE RELIEVED AS COUNSEL

2/3/2014        Proceedings (Converted) - Event  
Event Type Code: R31  
Event Type Description: REQUEST - SUBMISSION

2/3/2014        Proceedings (Converted) - Event  
Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

2/4/2014        Proceedings (Converted) - Event  
Event Type Code: M65  
Event Type Description: MISC PLEADING  
Note: STATE'S SUBMISSION OF TROY JORDAN'S MOTION TO BE RELIEVED AS COUNSEL FILED ON FEBRUARY 3, 2014, TO THE COURT'S DISCRETION AND CERTIFICATE OF SERVICE WITH RESPECT THERETO FILE CHECKED OUT, PLEADING PLACED IN DC1 PICK UP BOX

## Case Summary

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2/25/2014	ORDER APPOINTING ATTORNEY - Document
2/25/2014	Proceedings (Converted) - Event Event Type Code: F16 Event Type Description: FILE CHECKED IN BY:
2/25/2014	Proceedings (Converted) - Event Event Type Code: L01 Event Type Description: LETTER FROM Note: KODY CREE PATTEN
2/25/2014	Proceedings (Converted) - Event Event Type Code: Q26 Event Type Description: ORD APPT COUNSEL
2/28/2014	Proceedings (Converted) - Event Event Type Code: L01 Event Type Description: LETTER FROM Note: DEFENDANT
6/5/2014	Proceedings (Converted) - Event Event Type Code: A38 Event Type Description: APPL FOR ATTY FEES
6/5/2014	Proceedings (Converted) - Event Event Type Code: A56 Event Type Description: AFFID IN SUPPORT Note: OF APPLICATION FOR PAYMENT OF ATTORNEY'S FEES/COSTS
6/5/2014	Proceedings (Converted) - Event Event Type Code: S28 Event Type Description: SUBMISSION OF ORDER Note: ORDER SENT TO JUDGE FOR SIGNATURE FOR PAYMENT OF ATTORNEY FEES
6/6/2014	Proceedings (Converted) - Event Event Type Code: F15 Event Type Description: FILE CHECKED OUT BY: Note: DC I for review/signature
6/10/2014	Proceedings (Converted) - Event Event Type Code: F16 Event Type Description: FILE CHECKED IN BY:
6/10/2014	Proceedings (Converted) - Event

## Case Summary

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Event Type Code: 012  
Event Type Description: ORDER  
Note: ON APPLICATION FOR PAYMENT OF ATTORNEYS FEES AND COSTS

6/13/2014      Proceedings (Converted) - Event  
Event Type Code: F02  
Event Type Description: FAX SENT  
Note: SEARS of Order

6/23/2014      Proceedings (Converted) - Event  
Event Type Code: S38  
Event Type Description: SUPPLEMENTAL  
Note: CERT OF SERVICE WITH RESPECT TO THE PETITIONER'S PROPER PERSON MOTION FOR  
WITHDRAWAL OF ATTORNEY OF RECORD OR IN THE ALTERNATIVE REQUEST FOR  
RECORDS/COURT CASE DOCUMENTS SERVED UPON THE RESPONDENTS COUNSEL ON JUNE 20,  
201

7/30/2014      Proceedings (Converted) - Event  
Event Type Code: E06  
Event Type Description: EX PARTE MOTION  
Note: FOR ATTORNEYS FEES

7/30/2014      Proceedings (Converted) - Event  
Event Type Code: S28  
Event Type Description: SUBMISSION OF ORDER  
Note: ORDER SENT TO JUDGE FOR SIGNATURE - ORDER RE: FEES  
Action Date: 08/12/2014  
Action Code: R99  
Action Description: RESPONSE/ORDER  
Action Comment: ORDER APPROVING FEES

7/30/2014      Proceedings (Converted) - Event  
Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

8/12/2014      Proceedings (Converted) - Event  
Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

8/12/2014      Proceedings (Converted) - Event  
Event Type Code: Q36  
Event Type Description: ORD APPR FEES

12/29/2016      Proceedings (Converted) - Event

## Case Summary

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Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

12/29/2016 Proceedings (Converted) - Event

Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

3/25/2019 Proceedings (Converted) - Event

Event Type Code: S38  
Event Type Description: SUPPLEMENTAL  
Note: PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND REQUEST FOR  
EVIDENTIARY HEARING COPIES IN SASE TO SEARS

3/25/2019 Proceedings (Converted) - Event

Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

6/19/2019 Proceedings (Converted) - Event

Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

6/19/2019 Proceedings (Converted) - Event

Event Type Code: O12  
Event Type Description: ORDER  
Note: DIRECTING RESPONSE

6/24/2019 Proceedings (Converted) - Event

Event Type Code: E31  
Event Type Description: E-MAIL  
Note: PETITION FILED ON 3/25/19 TO NICOLE F. AT THE AG'S OFFICE PER HER REQUEST

7/9/2019 Proceedings (Converted) - Event

Event Type Code: M17  
Event Type Description: MOT TO DISMISS  
Note: PETITION AND SUPPLEMENTAL PETITION FOR UNTIMELINESS (LACHES) AND IN THE  
ALTERNATIVE, MOTION TO EXTEND TIME FOR STATE TO ANSWER WRIT AND/OR SUPPLEMENTAL  
WRIT

8/15/2019 Proceedings (Converted) - Event

Event Type Code: O10  
Event Type Description: OPPOSITION  
Note: TO DISMISSAL OF SUPPLEMENT TO POST CONVICTION WRIT

8/21/2019 Proceedings (Converted) - Event

## Case Summary

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Event Type Code: R29  
Event Type Description: REQUEST FOR REVIEW  
Note: 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

8/21/2019 Proceedings (Converted) - Event

Event Type Code: F15  
Event Type Description: FILE CHECKED OUT BY:  
Note: DC I for review/signature

1/10/2020 Proceedings (Converted) - Event

Event Type Code: O47  
Event Type Description: ORD DENYING MOTION  
Note: TO DISMISSD AND ORDER GRANTING MOTION TO EXTEND TIME FOR STATE'S RESPONSE

1/10/2020 Proceedings (Converted) - Event

Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:

1/10/2020 Proceedings (Converted) - Event

Event Type Code: F16  
Event Type Description: FILE CHECKED IN BY:  
Action Date: 01/13/2020  
Action Code: ERR  
Action Description: ERROR

2/7/2020 Open - Case Status

Case status change.

7/13/2020 SUBMISSION OF ORDER - STIP & ORD TO  
EXTEND RESPONDENT'S TIME - Document

Order Filed

COPIES PROVIDED BY DA'S OFFICE

7/14/2020 STIPULATION & ORDER TO EXTEND  
RESPONDENT'S RESPONSE TIME -  
Document

COPIES PLACED IN DA'S BOX.

7/28/2020 VOLUME 2 CREATED - Document

7/28/2020 OPPOSITION TO PETITION FOR WRIT OF  
HABEAS CORPUS AND OPPOSITION TO  
SUPPLEMENTAL PETITION FOR WRIT OF  
HABEAS CORPUS - Document

7/28/2020 NOTE ADDED TO FILE - Case Notes  
CREATED VOL 2

1/29/2021 ORDER TO FILE DOCUMENTS - Document

## Case Summary

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PLACED IN DC1 BOX

2/4/2021	NOTICE OF FILING OF PETITIONER'S COMPENTENCY EVALUATION UNDER SEAL PER COURT ROOM - Document
	SEALED ENVELOPE ATTACHED FILE CHECKED OUT PLACED IN DC1 P/U BOX
3/15/2021	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS - Document
3/16/2021	NOTICE OF ENTRY OF ORDER - Document
3/30/2021	CASE APPEAL STATEMENT- Document
3/30/2021	NOTICE OF APPEAL - Document
3/31/2021	CLERK'S CERTIFICATION - Document SIGNED AND SEALED



1 Case No. CV-HC-13-116

2 Dept. No. 1

FILED  
2014 FEB 25 AM 10:44  
ELKO CO DISTRICT COURT  
CLERK \_\_\_\_\_ DEPUTY *dl*

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6 IN THE FOURTH JUDICIAL DISTRICT COURT  
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO  
8

9 KODY CREE PATTEN,

10 Petitioner,

**ORDER APPOINTING ATTORNEY**

11 V.

12 RENEE BAKER, Warden of the Ely  
13 State Prison,

Respondent.

14  
15 On February 3, 2014, a Motion to be Relieved as Counsel was filed by Troy C. Jordan, Esq.

16 Mr. Jordan has asked to be relieved of his appointment as attorney of record for Petitioner due to his  
17 acceptance of a position with the Carson City, Nevada, District Attorney's Office. It appears to this Court  
18 that said Petitioner is indigent and presently incarcerated.

19 THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

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

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

25 SO ORDERED this 24 day of February, 2014.

26 *Nancy Porter*  
NANCY PORTER  
District Judge - Dept. No. 1

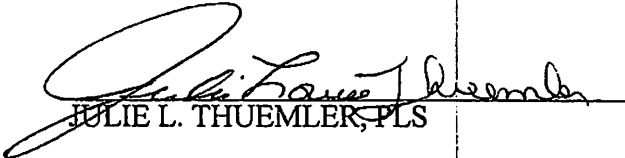
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CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 25<sup>th</sup> 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, 2<sup>nd</sup> Floor  
Elko, NV 89801  
{ 1 File Stamped Copy }  
[Box in Clerk's Office]

Dated this 25<sup>th</sup> day of February, 2014.

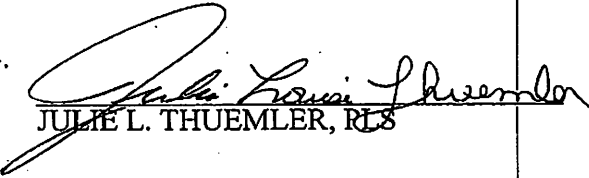
  
JULIE L. THUEMLER, PLS

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 25<sup>th</sup> 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 25<sup>th</sup> day of February, 2014.

  
JULIE L. THUEMLER, PLS

FILED

2021 MAR 15 PM 2:00

ELKO CO DISTRICT COURT

CLERK \_\_\_\_\_ DEPUTY 

CASE NO.: CV-HC-13-116

DEPT. NO.: 1

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

KODY CREE PATTEN,

Petitioner,

V.

WILLIAM "BILL" GITTERE, WARDEN  
ELY STATE PRISON

Respondent.

**ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS**

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

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

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

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

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

21 **A. Ineffective Assistance of Counsel**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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2 **9. Counsel did not "put forth any motion that [Petitioner] asked to be added and**  
3 **also failed to get statements from witnesses."**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 **16. Counsel told Petitioner that he could get the benefit of a lesser sentence without**  
27 **having to admit to a murder he did not commit.**

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

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

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

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

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

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

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

19 **B. Constitutional Objections**

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

5 **C. Misunderstood Guilty Plea**

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

17 **D. Judicial Prejudice**

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

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

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

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

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

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

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

22 **F. Disproportionate Sentencing**

23 Petitioner states that the sentence he received was disproportionately harsher than the  
24 sentence his co-defendant received. The sentence Petitioner received was within the statutory  
25 guidelines under NRS 200.030(4) and was contained within the Memorandum of Plea  
26 agreement that Petitioner signed; Petitioner was also canvassed about this particular sentence  
27 at his Change of Plea hearing. Petitioner's co-defendant received a lesser sentence because  
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2 she pled to a lesser degree of murder than Petitioner did. Although the sentences are different,  
3 this Court sees nothing unlawful about Petitioner's sentence.  
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5 Therefore, as Petitioner has not met his burden as to any of the grounds he has cited  
6 in his Petition, IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus  
7 is DENIED.

8 DATED this 12<sup>th</sup> day of March, 2021.

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

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

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

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14   
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16 CERTIFICATE OF MAILING

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

21 Richard Wayne Sears, Esq.  
22 Sears Law Firm, Ltd  
23 457 5th St.  
24 Ely, NV 89301

25 William Gittere, Warden  
26 Ely State Prison  
27 PO Box 1989  
28 Ely, NV 89301-1989

29 Kody Cree Patten #1091721  
30 Ely State Prison  
31 PO Box 1989  
32 Ely, NV 89301-1989

33 Aaron D. Ford, Esq.  
34 Nevada Attorney General  
35 100 N. Carson St.  
36 Carson City, NV 89701

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Case No. CV-HC-13-116

Dept. No. 1

FILED

2021 MAR 31 PM 1:59

ELKO CO DISTRICT COURT

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

CLERK \_\_\_\_\_ DEPUTY *am*

\_\_\_\_\_  
KODY CREE PATTEN,

Appellant,

vs.

WILLIAM "BILL" GITTERE, WARDEN ELY  
STATE PRISON,

Respondent,  
\_\_\_\_\_ /

**CLERK'S CERTIFICATION**

I, KRISTINE JAKEMAN, the duly elected, acting and qualified County Clerk and Ex-Officio Clerk of the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko, do hereby certify that the annexed are true, full and correct copies of certain documents in Case No. CV-HC-13-116 Dept. 1, KODY CREE PATTEN, Appellant, vs. WILLIAM "BILL" GITTERE, WARDEN ELY STATE PRISON, Respondent, as appears on file and of record in my office.

WITNESS My Hand and Seal of said Court on March 31, 2021.

KRISTINE JAKEMAN, ELKO COUNTY CLERK

By

*Annette Marshall*  
\_\_\_\_\_  
Annette Marshall, DEPUTY CLERK

### CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent electronically and/or mailed a certified copy of the annexed documents in Case No. CV-HC-13-116 Dept. 1, KODY CREE PATTEN, Appellant, vs. WILLIAM "BILL" GITTERE, WARDEN ELY STATE PRISON, Respondent, as appears on file and of record in this Court, to the following:

Richard W. Sears, Esq.  
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DATED this 31<sup>st</sup>, day of March, 2021.

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Annette Marshall, Deputy Clerk