

CASE NO.: CR-FP-11-0300

DEPT. NO.: II

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ELKO COUNTY CLERK

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

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THE STATE OF NEVADA,

Plaintiff,

vs.

KODY CREE PATTEN,

Defendant.

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

Defendant KODY CREE PATTEN, by and through his counsel, JOHN OHLSON, and moves to strike the State of Nevada's Notice of Intent to Seek the Imposition of the Death Penalty in this case. This motion is made and based upon *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) and SCR 250(4)(c), and is further supported by the following points and authorities.

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**I. OVERVIEW**

By way of its August 9, 2011, Third Criminal Information, the State has charged Defendant KODY CREE PATTEN ("Kody") with the March 3, 2011, death of Micaela Costanzo, which the State alleges occurred during the perpetration of a kidnapping (felony murder). On August 24, 2011, the State filed its notice of its intent to seek the death penalty pursuant to SCR 250, citing first degree kidnapping as the aggravating circumstance on which its notice was based (NRS 200.033(4)(a) and (b)). In support of its notice of its intent to seek the death penalty, the State relies on and cites to "...testimony and evidence developed during the

investigation of the events which have given rise to the prosecution of Kody Cree Patten and/or the litigation of the Preliminary Hearing upon which the State would be relying to support the imposition of the penalty of death," identifying various witnesses who have testified in this case and the nature of their testimony that purportedly supports the State's notice. The State's notice, however, is not only contrary to the prohibition against using the basis of a felony murder charge as an aggravating circumstance to justify capital punishment, it also fails to provide any testimony from any witness in this case that substantiates, or even suggests, that Micaela Costanzo was kidnapped by Kody before she died. Thus, Kody requests that this Court strike the State's notice of intent to seek the death penalty in this case.

## II. ARGUMENT

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

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

According to its Third Criminal Information, the State has charged Kody Cree Patten with first degree murder based upon its charge that Micaela Costanzo was killed during the perpetration of a kidnapping (felony murder). The State now also seeks to use the kidnapping allegation and charge as the basis on which it seeks the death penalty in this State. The State, however, cannot have it both ways.

In *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), the State alleged two murder theories against the defendant – deliberate, premeditated murder and felony murder during the perpetration of a burglary – and then sought the death penalty based upon the felony on which the felony murder charge was based. Based upon the basic analytic framework provided in *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (challenge to a death sentence on the basis that the

sole aggravating circumstances was identical to an element of capital murder) in the context of the narrowing function required for capital punishment (*McCormell*, 102 P.3d at 620-625), the Nevada Supreme Court deemed it "...impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated" (*Id.*, 102 P.3d at 624, *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005)). Thus, the kidnapping on which the charge against Kody for felony murder is based cannot be considered as an aggravating circumstance in seeking the death penalty.

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

Notwithstanding that the State is impermissibly using the basis for its felony murder charge as an aggravating circumstance on which it seeks the death penalty, the State has failed to establish any facts to support its intention to seek the death penalty. The death penalty is only an available sentencing in cases in which a defendant is convicted of first degree murder, and one or more aggravating circumstances (first degree kidnapping being one) are found and are not outweighed by any mitigating circumstances. NRS 200.030(4)(a). Rule 250(4)(c) of the Supreme Court Rules, which governs the notice of intent to seek the death penalty, states:

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

(emphasis added). In this case, the State's notice of intent to seek the death penalty based upon first degree kidnapping as the aggravating circumstance identifies numerous witnesses and makes specific references to portions of their testimony. The State characterizes that testimony as "...clear evidence . . . from which it can be inferred, beyond a reasonable doubt, that Micaela Costanzo was killed during the perpetration of a first degree kidnapping of her persona and/or that the Defendant, Kody Cree Patten, knew or had reason to know that lethal force would be employed during the perpetration of said kidnapping." Notice of Intent to Seek the Death Penalty at p. 19. While the State outlines the testimony on which it bases its notice over sixteen

pages of its notice, there is no testimony that provides any specific facts on which the State can prove first degree kidnapping.

First degree kidnapping occurs when one:

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

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

Micaela went to school on March 3, 2011, and after school, to track practice. (Testimony of Celia Costanzo, Micaela's mother, that she dropped her off at school and that she knew she had track practice that day; Testimony of Tyler Peterson and Tiffany Rasmussen, Micaela's track coach and classmate, respectively, with whom Micaela was talking after school on March 3, 2011). Shortly after track practice, Kody Cree Patten drove up behind the school in a white Chevrolet Trailblazer, parked, and went toward the school. (Testimony of Tyler Peterson and Tiffany Rasmussen that they were talking with Micaela after school on March 3, 2011, when they saw Kody drive up behind the school, park, and go toward the school; Testimony of Wendi Murphy, who loaned Kody her Chevrolet Trailblazer earlier that day).

Kody and Micaela had been childhood friends, having lived in the same

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<sup>1</sup> Kody recites these facts as they appear to be presented by the State only for purposes of challenging the State's notice to seek the death penalty in light of the requirements of SCR 250(4)(c). By this summary of the evidence highlighted and outlined by the State, Kody neither acquiesces to nor concedes these facts, their admissibility, or their evidentiary significance in this case.

apartment complex until about a year prior to Micaela's death. (Testimony of Celia Costanzo). At about 5:09 that evening, Kody exited the school building, and three minutes later, Micaela left the school building through the same door as Kody. (Testimony of Tiffany Rasmussen that she and Micaela were in the locker room together at about 5:00 p.m., when Tiffany left Micaela alone in the locker room; Testimony of Travis Landon and Jerome Reamer regarding video surveillance of Kody and Micaela leaving the school through the same door three minutes apart). At about 5:30 that evening, Kody was seen driving the Chevrolet Trailblazer on a road that headed out of town. (Testimony of Kiearra Murphy, whose mother, Wendi Murphy, loaned Kody her Chevrolet Trailblazer). Kody returned the Chevrolet Trailblazer to Ms. Murphy at about 8:45 that night. (Testimony of Wendi Murphy). When he returned the vehicle, Toni Collette Fratto (with whose parents Kody lived) was with him, and the vehicle was dustier than when it was given to him. (*Id.*; Testimony of Ronald Supp and Det. Donald Burnum that Kody lived with Claude and Cassi Fratto, Toni Fratto's parents). The next day, Wendi Murphy found picture hanging wire in her car that she did not believe had been in the car when Kody borrowed it. (Testimony of Wendi Murphy).

On March 5, 2011, a shallow grave containing a body was discovered about 5 miles west of Wendover. (Testimony of Michael "Mick" Moore, a volunteer who participated in the search for Micaela; Testimony of Ronald Supp and Det. Donald Burnum of the Wendover Police Department, who also participated in the search for Micaela). Based on the location of the discovery, the Elko County Sheriff's department was requested to take over the investigation, and representatives of the Washoe County Crime lab arrived to conduct the excavation of the grave, which revealed the remains of Micaela Costanzo. (Testimony of Ronald Supp and Det. Donald Burnum; Testimony of

Renee Armstrong (Thomson) and Victor Ruvalcaba). Micaela was found with a grey sweatshirt between her right arm and her torso, two zip ties connected end-to-end around her right forearm, and the end of the sleeves of a sweatshirt around her wrists. (Testimony of Renee Armstrong (Thomson) and Victor Ruvalcaba). The sleeves of the sweatshirt found with Micaela's body were tied in a knot and the end of the sleeves had been cut or severed from the sweatshirt, matching the sweatshirt sleeve ends on her wrists. (*Id.*). During the investigation of Micaela's death, a military entrenching tool was recovered from the Fratto residence, and on March 18, 2011, various burned belongings and personal effects belonging to Micaela as well as a folding knife were discovered about 3 miles outside of West Wendover (Testimony of Ronald Supp and Det. Donald Burnum).

An autopsy of Micaela's body revealed that she died as a result of multiple stab and slash wounds of her face and neck, blunt force trauma, and asphyxia. (Testimony of Dr. Ellen Clark). Moreover, the entrenching tool that was recovered from the Fratto residence was consistent with at least one injury to Micaela's neck. (*Id.*).

According to Kody and his father, Kip Patten, Kody had picked up Micaela after track practice, drove with her to the "gravel pit" (the area where Micaela's body was eventually discovered) to talk about the nature of their relationship. (Testimony of Detective Kevin McKinney and/or Special Agent James Bonich). Kody and Micaela got into an argument, and that argument escalated to a physical altercation in which Toni Collete Fratto was involved and resulted in Micaela's death. (*Id.*). DNA samples taken from evidence that was collected from the investigation of Micaela's death, including the sweatshirt that was found with Micaela's body, were consistent with that of Kody Cree Patten or any of his male paternal biological relatives. (*Id.*).

Based on the State's own version of the facts – even in the broadest reading in a light most

favorable to the State – there is *no* evidence or testimony that Micaela was “kidnapped” by Kody Cree Patten as defined by NRS 200.310(1). In fact, there is no evidence or testimony that Micaela did anything other than go with Kody, her childhood and long-time friend, to the “gravel pits” to talk through whatever was going on between them, and that once they got there, an argument escalated to a physical altercation in which Micaela was killed. To introduce a theory of first degree kidnapping to create a story about what happened between the time when Kody and Micaela left the school to when Micaela died is bridging an enormous gap bridged with pure speculation, which is neither evidence nor fact, and is contrary to the only evidence presented by the State that accounts for that time. Thus, the State has failed to *allege with specificity the facts on which it will rely to prove the aggravating circumstance* of first degree murder as required by SCR 250(4)(c).

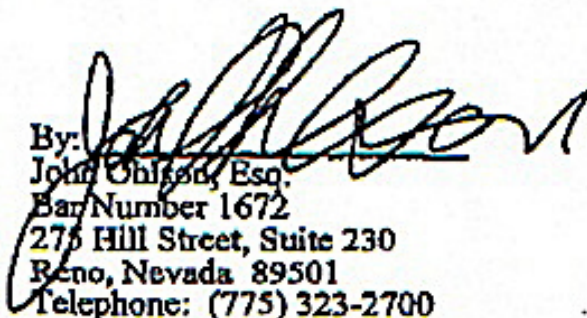
### III. CONCLUSION

Based on the foregoing, Kody Cree Patten requests that this Court strike the State's Notice of Intent to Seek the Penalty of Death in this case.

#### AFFIRMATION Pursuant to NRS 239B.030

The undersigned affirms that the preceding document does not contain the social security number of any person.

DATED this 3 of October, 2011.

  
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