

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHERINE DEE FLETCHER

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 82047

Appeal from a Judgment of Conviction After Jury Verdict
in Case CR17-0690(A)
Second Judicial District Court of the State of Nevada, Washoe County
Honorable Egan Walker, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
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DATED this 18th day of November, 2021.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a jury verdict. 8 Appellant's Appendix (AA) 1790. A Notice of Appeal was filed on October 29, November 16, 2020 and November 19, 2020. 8 AA 1490-1493. This Court has appellate jurisdiction pursuant to NRAP 4(b)(1)(A).

ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) as it is a direct appeal of a jury verdict that involves the conviction of a category A felony.

STATEMENT OF THE ISSUES

A. Did the District Court commit reversible error by denying Appellant's request to disqualify Judge Walker, and/or did Judge Walker commit reversible error by not voluntarily recusing himself from Appellant's case?

B. Did the District Court commit reversible error by allowing incriminating statements given by Appellant to Dr. Piasecki and related doctor notes which were compiled and presented pursuant to a court ordered Not Guilty by Reason of Insanity (NGRI) mental health examination, to be admitted into evidence and read to the jury through the testimony of Dr. Piasecki?

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STATEMENT OF THE CASE

The State filed an Information charging Appellant Katherine Fletcher ("Fletcher") with one Count of Murder with the Use of a Deadly Weapon for the murder of Robert Jeffrey Trask at Oxbow Park on Dickerson Road in Reno, Nevada, on July 28, 2016. 1 AA 0001. Fletcher was additionally charged with Burglary in Possession of a Firearm and Grand Larceny of a Firearm. 1 AA 0002.¹

After a five-day jury trial, Fletcher was found guilty of First-Degree Murder with the use of a Deadly Weapon. 8 AA 1317. Fletcher was sentenced to life without the possibility of parole for First Degree Murder, and to a consecutive term of Ninety-Six (96) to Two Hundred Forty (240) months for the Use of a Deadly Weapon. 8 AA 1488. Fletcher filed a timely Notice of Appeal. 8 AA 1490-1493.

STATEMENT OF FACTS

A. Robert Trask's Death and the Investigation

Just before 7:41 p.m. on July 28, 2016, Robert Trask ("Trask") was shot and killed at Oxbow Park on Dickerson Road in Reno, Nevada ("the Park"). 4 AA 0698-699, 714, 729-731, 737. Trask had been at the Park that day with his son, Max Trask, and his son's mother, Fletcher, on one of the Park's patio docks when Trask was shot in the back. 4 AA 0725-0727; 6 AA 1110-1115.

¹ The burglary and possession charges were subsequently severed from the Information.

Eric Preciado (“Preciado”) was at the Park with his children on the same day and during the same time as Fletcher and Trask and when Trask was shot. 4 AA 0725-0727. When Preciado and his children arrived at the park, Preciado and Trask exchanged pleasantries as Preciado and his children walked past the patio dock where Trask, Fletcher, and Max were. *Id.* Later, when Preciado was in the Park’s parking lot at his vehicle preparing to leave, he heard a single gunshot behind him and immediately looked in the direction of the gunshot in time to see Trask stumble and fall forward, face first. 4 AA 0729-0732. After Preciado ran to and tried to provide aid to Trask, who was not responsive, he approached Fletcher at her car to ask what happened², and called 911. 4 AA 0735-0739.

Reno Police Officer Scott Smith arrived with other units on the scene and was the first of the responding officers to get to Trask. 4 AA 0709. Officer Smith, who found Trask laying on his back and unresponsive, began and continued to provide chest compressions until REMSA arrived. 4 AA 0694-0695, 0698-0699, 0709-0710. REMSA transported Trask to the hospital where, despite efforts to save him, Trask was pronounced dead at just after 8:00 p.m. 4 AA 0714. Having been nonresponsive prior to arriving at the hospital, Trask was believed to have not been viable prior to being transported. 4 AA 0716. Washoe County’s Medical Examiner and Coroner

² Preciado had passed Fletcher and Max, who were heading to the parking lot, on the trail that led to Trask. 4 AA 0735-0736. At the time he was rendering aid to Trask, Preciado could not figure out how he had gotten shot. 4 AA 0733, 0737.

determined Trask's cause of death to be a gunshot wound of the chest (being shot through the back). 7 AA 1311.

Police investigation of the patio dock on which or near where Trask was shot and killed revealed, among various personal effects, a single 9mm shell casing. 5 AA 0876, 0903-0904. Despite searching the Park and the area and water surrounding the patio dock, both immediately and days after the shooting, the police and other law enforcement agencies that assisted did not find a firearm or anything else of evidentiary value as it related to the shooting. 5 AA 0888, 0906-0913, 0974-0976, 0986-0987, 0991-0992; 6 AA 1127-1130

Fletcher was arrested and charged with Trask's death. 5 AA 0940. Fletcher had been pulled over by police on the evening of July 28, 2016, as a result of surveillance that had been conducted following Trask's death, and was taken to the Reno Police Department and interviewed by Reno Police Detective Scott Johnson. 7 AA 1208-1233. After the clothing Fletcher had worn the day of the shooting and samples from her vehicle were tested for gunshot residue, and after firearms located at Fletcher's residence were taken and compared to the bullet that killed Trask and the shell casing found at the scene, forensic analyses related to gunshot residue and ammunition comparisons indicated:

- Particles consistent with gunshot residue on Fletcher's clothing and from her vehicle was from two different types of ammunition being discharged

and deposited on those surface, either from a gun being fired near them or touching them with an object containing gunshot residue.³ 7 AA 1264.

- The presence of gunshot residue on an item does not indicate at what point in time it came in contact with the item; as to clothing, any gunshot residue would have come into contact with the garment sometime before the garment was laundered. 7 AA 1269.
- Firearms that had been located at the home in which Fletcher was living and compared to the shell casing found at the scene and the bullet that killed Trask did not match. 7 AA 1277.
- The bullet that killed Trask could not be matched to the shell casing police found at the Park. 7 AA 1282.

Indeed, there is no evidence that anyone saw Fletcher shoot Trask, saw Fletcher with a gun, or heard Fletcher say that she shot Trask. 4 AA 0750-0751, 761; 5 AA 0960. And, the police who investigated Trask's shooting never located the gun that shot the bullet that killed Trask.

B. Pre-Trial Motions

Pretrial motions included: (1) Fletcher's motion seeking Judge Walker's recusal based upon his involvement in Fletcher's proceedings before the family court and the risk and perception of his bias against Fletcher based upon comments he made to and about her and information he had (1 AA 0084-0100); and (2) the State's motion regarding Fletcher's statements to Dr. Melissa Piasecki as it concerned a

³ Evidence at trial was that Fletcher had worked at a gun show and had purchased a gun in or around late spring, early summer of 2016 and that she had used the gun for target practice. 5 AA 950-954; 6 AA 1138; 5 AA 966, 970.

letter Fletcher wrote in the context of her previous plea of not guilty by reason of insanity (3 AA 0485-0495). Fletcher's motion seeking Judge Walker's recusal was referred to Judge Elliott Sattler (Department 10) for consideration and determination. 1 AA 0141-0142. After a hearing on the motion (1 AA 0143-0150, 2 AA 0151-0194), Judge Sattler denied Fletcher's request (2 AA 0195-0207). After a hearing on the State's motion regarding Fletcher's statements to Dr. Piasecki (3 AA 0503-0536), the district court required that Fletcher produce to the State her statements to Dr. Piasecki and that the State was permitted to admit those statements through Dr. Piasecki's testimony.

1. Fletcher's Motion to Recuse Judge Walker

In her motion for Judge Walker's recusal, Fletcher explained that, separate and apart from the criminal proceedings against her in this case, she was also involved in: (1) a guardianship case in reference to her two minor children (GR15-00192); and (2) a child welfare case concerning the removal of her two minor children (JV10-00351A). 1 AA 0085. Judge Walker presided over and/or was involved in both of those cases while he was a family court judge with the Second Judicial District Court and until December 2017, when he was appointed to Department 7 of the Second Judicial District Court to replace the late Chief Judge Patrick Flanagan. *Id.* Throughout the time Judge Walker presided over Fletcher's family court cases, he was involved in substantive determinations regarding Fletcher

and her children and had information that was applied in the criminal proceedings, but to which counsel involved in the criminal case did not and could not have access. *Id.*; 1 AA 0087, 0137; 2 AA 0156-0158, 0169, 0171 (Fletcher’s counsel noting that and giving examples of Judge Walker’s prior decisions in family court that were favoring the decisions he was making in the criminal case and creating the perception of bias). Fletcher sought Judge Walker’s recusal from presiding over the criminal case before her pursuant to NRS 1.230 based upon comments Judge Walker made to and about her in both the family court proceedings and at that point in the criminal proceedings. 1 AA 0087-0088, 0137; 2 AA 0166. Those comments included references in the family court cases to Fletcher luring Trask to a park where Fletcher allegedly killed him in front of Max, and inflammatory characterizations of the crime with which Fletcher was accused. 1 AA 0088; 2 AA 0155-0156. Fletcher highlighted the standard for disqualification in cases of *perceived* or *potential* – not actual – bias as stated in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009) and *Rippo v. State*, 134 Nev. ____ (Adv. Op. 53), 423 P.3d 1084 (Nev. 2018). 1 AA 0089, 0135.

In his substantive response to Fletcher’s motion⁴, Judge Walker conceded the standard to be applied in determining judicial bias – whether considering all the

⁴ Judge Walker made a number of procedural challenges to Fletcher’s motion, none of which got traction in the proceedings before Judge Sattler. 2 AA 0197, n. 4.

circumstances alleged, the risk of bias is too high to be constitutionally tolerable (*Rippo, supra*) – but stated that the comments and conduct that Fletcher attributed to him did not demonstrate that risk of bias. 1 AA 0101-0102, 0115. To that end, Judge Walker addressed and explained some of the comments attributed to him, and in so doing, denied that they revealed any bias in Fletcher’s criminal case. 1 AA 0111-0114.

Judge Sattler’s Order denying Fletcher’s motion for Judge Walker’s recusal generally found nothing inappropriate about Judge Walker’s comments or about his presiding over both Fletcher’s family court matters and the criminal case against her in the context of the legal framework it presented. 2 AA 0198-0206. Based on that analysis, Judge Sattler concluded that “[t]here is no impropriety, nor is there the appearance of impropriety, necessitating Judge Walker’s recusal from these cases.” 2 AA 0205:25-0206:1.

2. The State’s Motion Regarding Fletcher’s Statements to Dr. Piasecki.

On February 1, 2019, Fletcher filed a *Notice of Defense* that she would be adding an additional plea of not guilty by reason of insanity (NGRI) pursuant to NRS 174.035(6). 1 AA 0227. On February 22, 2019, the State filed a *Motion for Mental Examination* on the grounds Fletcher pleaded NGRI. 2 AA 0254. The State argued, *inter alia*, that it was entitled to compel a medical examination related to Fletcher’s mental state at the time of the crime, and that a mental exam would provide

the prosecution with the most reliable means to confront her insanity claim. 2 AA 0254-0255. On May 24, 2019, the district court granted the motion and issued an *Order for Criminal Responsibility Examination*. 2 AA 0267. The district court found the State was entitled to an independent psychiatric or psychological evaluation so that the State could adequately address the insanity defense, stating:

The State bears the burden of proving that defendant's conduct was not justifiable or excusable. The State can only effectively rebut Defendant's defense by presenting contradictory expert opinion testimony. A psychiatric evaluation is the most reliable means for the State to assess defendant's culpability.

Id.

In the State's September 18, 2019, *Motion for Discovery Related to Insanity Defense* (2 AA 0288), the State sought the production of the facts and data underlying Dr. Piasecki's opinion on the NGRI defense (3 AA 0289). Fletcher opposed the Motion (3 AA 0338), and the State filed its Reply on October 19, 2019 (3 AA 0342). After a hearing, the district court ruled that the defense had to disclose any information Dr. Piasecki used in forming her NGRI opinion. 3 AA 0346, 0430-0432.

On September 19, 2019, Fletcher filed her *Notice of Expert Witness*, providing notice that Dr. Piasecki would testify regarding Fletcher's beliefs and thoughts and how they may have affected her actions so as to address NGRI defense. 3 AA 0292. Dr. Piasecki's Report was filed on September 23, 2019. 3 AA 0332. The

report concluded that Fletcher met Nevada's criteria for a NGRI finding, *inter alia*, Fletcher had a chronic mental illness characterized by delusional beliefs, hallucinations, irrational behaviors, irritability and grandiosity, and that she was delusional at the time of the events leading to her arrest. *Id.* at 0336-337.

On October 29, 2019, due to a potential conflict of interest discovered by the district court judge, in that one of the public defenders on the case had briefly appeared in the child dependency case (JV10-00351) and represented the victim, the public defender was removed from the case and an alternate public defender was appointed. *See* 3 AA 0441. Thereafter, on January 8, 2020, Fletcher withdrew her NGRI plea. 3 AA 0479.

On January 17, 2020, the State filed its *Motion Regarding Defendant's Statements to Dr. Piasecki*. 3 AA 0485. The State argued that, notwithstanding Fletcher withdrew her NGRI defense, it was still entitled to Dr. Piasecki's report and the underlying data that was prepared (solely for the NGRI defense) to use for its case-in-chief. 3 AA 0485. Fletcher opposed the motion, 3 AA 0496, and the State filed a reply. 3 AA 0498. On January 27, 2020, the district court issued a written order (after Fletcher withdrew her NGRI defense), finding that Fletcher had to produce the underlying facts and data supporting Dr. Piasecki's NGRI opinion, to include documentation of any statements made and any documents produced by Fletcher to Dr. Piasecki. 3 AA 0537. As to the admission of statements made to Dr.

Piasecki in the case-in-chief of the State, the district court found, *inter alia*, that the Fifth Amendment did not protect the statements because they were made voluntarily and for the purpose of supporting her NGRI plea and, for the same reason, there was no due process protection. 3 AA 0537-0541.

C. Trial

1. Judge Walker's comments and narratives about and to Fletcher

During the trial in this case, Judge Egan Walker had several direct exchanges with Fletcher and, in those exchanges, made repeated references to his familiarity with Fletcher, the two of them having interacted on many occasions in different cases. 6 AA 1028, 1036-1038, 1041-1045 (Judge Walker noting the number of times in different cases Fletcher has been before him); 7 AA 1292 (Judge Walker again noting the many hours he has spent in court with Fletcher in this case and other cases across several years). During one of those exchanges – an exchange in which Fletcher sought a *Young* hearing⁵ – Judge Walker revealed clear exasperation and anger with Fletcher that both preceded and included the case before him. 6 AA 1036-1038 (Judge Walker noting how Fletcher had conducted in cases in which she had previously been before him), 1041-1045 (among other things, Judge Walker

⁵ See, *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

characterizing Fletcher’s challenges to her attorneys in previous proceedings before him).⁶

Shortly after that scolding, Judge Walker addressed the need for the written stipulation confirming that any sentencing would be conducted by the Court rather than the jury. 6 AA 1054. In response to Judge Walker’s request for the written stipulation, Fletcher’s counsel advised that Fletcher refused to sign it. *Id.* In directly addressing Fletcher about her refusal to sign the stipulation, Judge Walker warned Fletcher about the grave consequences to her of changing her mind about sentencing after the jury had previously (prior to Judge Walker’s directly rebuking her) been told that the Court, not the jury, would be sentencing her – a warning that resulted in Fletcher signing the stipulation and waiver of a jury penalty hearing. 6 AA 1055-1057, 1058.

In sentencing Fletcher, Judge Walker made a point of stating that he had been the first judicial officer to develop the plan to terminate Fletcher’s parental rights, and that he was very aware of the child dependency case regarding Max as it was

⁶ Indeed, this exchange was preceded by Judge Walker’s comments about Fletcher and the criminal case after Fletcher’s motion to disqualify him was denied and just before trial began. During a hearing on transporting Fletcher for the purpose of changing her plea from not guilty by reason of insanity, Judge Walker reminded counsel that he has known Fletcher for several years in several different contexts and informed them about Fletcher raising and waffling on competency issues. 3 AA 0472. He also described the criminal case as having “...a long and tortured history to say the least.” 3 AA 0477:18-19.

his responsibility to handle it. 8 AA 1436. Judge Walker also clarified that he at one time presided over the guardianship case concerning Max, the child welfare case concerning Bay (Fletcher's daughter), and the child custody case between the victim and Fletcher. 8 AA 1441.

2. Dr. Piasecki's Testimony

In its case in chief, the State called Dr. Piasecki to testify regarding certain written statements Fletcher had provided to the doctor, including a multi-page narrative written by Fletcher that described the day of the homicide and the aftermath (Trial Exhibit 53). 6 AA 1062-1097. Dr. Piasecki read portions of the narrative to the jury wherein Fletcher described the events of July 28, 2016. Dr. Piasecki had conducted two interviews with Fletcher regarding the document in February 2019. 6 AA 1062-1064.⁷ Among other things, Fletcher described in her letter that she was going to meet the victim and her son at Little Caesar's in order to follow the victim to Oxbow Park. 6 AA 1069. In the letter Fletcher stated that prior to going to Little Caesar's an angel of the lord told her to get her gun, which she did, and placed it in her purse and went to Little Caesar's to meet the victim and her son. 6 AA 1067-1072. The multi-page narrative went on to describe Fletcher's version of the events of July 28, 2016, the shooting, and the aftermath leading up to her arrest. 6 AA

⁷ Fletcher asserted her NGRI defense on February 1, 2019. 2 AA 0292. Dr. Piasecki's report indicates she met with Fletcher on March 4, 2019. 2 AA 336.

1072-1092. Dr. Piasecki also testified regarding the notes she made when interviewing Fletcher regarding her statements in February 2019, which were also admitted at trial (Trial Exhibit 54). *Id.* at 1071.

SUMMARY OF THE ARGUMENT

The District Court committed reversible error by denying Fletcher's request to disqualify Judge Walker, and because Judge Walker did not recuse himself in this case. The facts establish that Judge Walker had a long term and contentious relationship with Fletcher that built up to a level of potential or perceived bias that warranted disqualification or recusal under the relevant legal standard. In addition, the district court's decision on the Motion to Recuse was erroneous as a matter of law, all of which undermined and violated Fletcher's Fourteenth Amendment right to a fair trial.

The District Court also committed reversible error by allowing incriminating statements given by Fletcher to Dr. Piasecki, and related doctor notes, compiled and presented pursuant to a court ordered Not Guilty by Reason of Insanity (NGRI) mental health evaluation, to be admitted into evidence and read to the jury through the testimony of Dr. Piasecki, in violation of Fletcher's Fifth Amendment Right against self-incrimination and her Fourteenth Amendment right to Due Process.

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ARGUMENT

A. Judge Sattler erred by denying Fletcher's request to disqualify Judge Walker; Judge Walker should have recused himself in this case.

There can be no dispute that a fair trial in a fair tribunal is a most basic requirement of due process. *Accord, Caperton v. A.T. Massey Coal Company*, 556 U.S. 868, 876 (2009). In considering judicial bias in that context, the determination to be made is whether an average judge in the position of the judge at issue is likely to be neutral, or whether there is an unconstitutional potential for bias. *Id.*, 556 U.S. at 879.

[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'

Id., 556 U.S. at 883-84. To that end, considering all of the circumstances alleged, the question is whether the *risk of bias* is too high to be constitutionally tolerable. *Rippo v. Baker*, 137 S.Ct. 905 (2017); *accord, Rippo v. State, supra*, 423 P.3d at 1102.

Indeed, due process 'may sometimes require recusal of judges who have no actual bias and who would do their very best to weigh the scales of justice equally.'

Echavarria v. Filson, 896 F.3d 1118, 1130 (9th Cir. 2018), *citing Hurles v. Ryan*, 752 F.3d 768, 789 (9th Cir. 2014). Thus, the question of bias reaches every procedure

that would offer a possible temptation to the average judge that *might* lead him not to hold the balance nice, clear and true between the State and the accused. *Echavarria, supra*, 896 F.3d at 1131, *citing Hurles, supra*, 752 F.3d at 789.

At that time Judge Sattler heard and considered Fletcher's motion for Judge Walker's recusal, there was sufficient information and bases to grant that motion pursuant to the governing standard for considering judicial bias. Fletcher provided specific references to Judge Walker's various comments about and characterizations of Fletcher as it concerned both the family law cases that had been before him and the criminal case against her – comments and characterizations that had been made in both the family law cases and the criminal case. 1 AA 0086-0088; 2 AA 0154-0157. Fletcher highlighted the inflammatory nature of words that Judge Walker used, what came through based upon his language, and how those comments and characterizations were flavoring the decisions he was making in this case. *Id.* Fletcher described Judge Walker's various comments and characterizations as the building blocks that built up to the level of potential or perceived bias that warrants disqualification or recusal under the relevant legal standard. 2 AA 0158, 0164-0168.

In his order denying Fletcher's motion, Judge Sattler determined that Fletcher did not meet her burden regardless of the standard applied to her claims, and that Judge Walker did not do or say anything that would lead a reasonable person to question his impartiality toward Fletcher. 2 AA 0205. In so doing, Judge Sattler

cited to cases in which extreme judicial conduct required disqualification on Constitutional grounds and comparing those cases to the comments and characterizations Fletcher attributed to Judge Walker in this case. 2 AA 0199-0202. Judge Sattler also concluded that there was neither “impropriety” nor “an appearance of impropriety” necessitating Judge Walker’s recusal. Notwithstanding that a judge’s “impropriety” is not the standard as it relates to what was at issue, those comparisons and Judge Sattler’s conclusion side-step the issue of whether Judge Walker’s comments and characterizations created a *perception* or *posed a risk* of bias. *See, supra*. Thus, Judge Sattler’s ruling on Fletcher’s motion for Judge Walker’s recusal appeared to be results-oriented and was otherwise erroneous.

Be that as it may, Judge Walker’s judicial conduct that continued after Judge Sattler entered his order necessarily reveals the basis on which he should have been disqualified or was otherwise required to recuse himself in this case. Building on what Fletcher identified in her motion for Judge Walker’s recusal (*supra*), Judge Walker continued his comments about and characterizations of Fletcher. Both in talking about and to Fletcher, Judge Walker made clear the danger that he would not be able to hold the clear balance between the State and Fletcher. *Accord, Echavarria, supra*. Not only did he continue to remind counsel in Fletcher’s criminal case how long he has known Fletcher, characterize Fletcher’s conduct in other cases, and described the criminal proceedings against Fletcher as having a long

and tortured history (*see* footnote 6, *supra*), his angered rebuke of Fletcher during the trial anchored the perception of his bias and substantively impacted Fletcher's ability to make a meaningful decision related to sentencing (6 AA 1036-1038, 1041-1045, *supra*). Indeed, Fletcher's post-rebuke refusal to sign the stipulation confirming that any sentencing would be conducted by Judge Walker rather than the jury (6 AA 1054) was abundantly understandable. That Judge Walker responded to Fletcher by warning her of the grave consequences of changing her mind about who would impose sentence (6 AA 1055-1057), however, left her with no meaningful choice about a critical stage of her criminal trial. As a consequence, it compelled her to agree that Judge Walker, despite the animosity he directed at her, would be determining any sentence imposed on her (6 AA 1058).

What Judge Walker revealed throughout the time he presided over Fletcher's criminal case was a constant and obvious undercurrent of potential and perceived bias or a risk of bias that required, but did not result in, Judge Walker's recusal or disqualification. What resulted were criminal proceedings that fundamentally undermined and violated Fletcher's right to a fair trial, warranting a reversal of Fletcher's conviction and a new trial in this case.

B. The District Court committed reversible error by admitting into evidence statements Fletcher provided to Dr. Piasecki, and Dr. Piasecki's notes regarding those statements, through the testimony of Dr. Piasecki.

The Nevada Supreme Court has made it clear that fair play dictates that trial courts do not appoint a psychiatrist to examine a defendant and then employ the confidential contents of the interview to obtain a conviction. *McKenna v. State*, 98 Nev. 38, 639 P.2d 557 (1982). The Court stated that its opinion was consistent with *Estelle v. Smith*, 101 S.Ct. 1866 (1981), where the Supreme Court held that a defendant's fifth amendment privilege against self-incrimination was violated by the introduction of statements made during a court ordered psychiatric evaluation. *Id.*

Here, the narrative read by Dr. Piasecki was akin to Fletcher waiving her right against self-incrimination and testifying at trial in violation of her Fifth Amendment rights; such is contrary to the dictates of fair play. While the letter was provided to Dr. Piasecki prior to the May 24, 2019 court ordered NGRI examination of Fletcher, but for the court ordered examination, the letter and Dr. Piasecki's notes on her interviews of Fletcher pertaining to the letter would not have been compiled for court ordered disclosure of the underlying data related to Dr. Piasecki's NGRI findings. The letter and Dr. Piasecki's notes would not have been discoverable as the defense no longer placed Fletcher's sanity or mental capacity at issue, thus such evidence would have been irrelevant, unduly prejudicial, and likely privileged.

Because the admission of Dr. Piasecki's testimony and related exhibits amounted to a violation of Fletcher's constitutional rights, the next step is to apply the test established in *Chapman v. California*, which is whether the constitutional

error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1966). Clearly, the error was not harmless beyond a reasonable doubt. The State was unable to produce evidence at trial that Fletcher had a gun on July 28, 2016, a critical element of its case-in-chief. Only through the testimony of Dr. Piasecki was the jury able to infer that Fletcher had a gun in her purse that day, tending to prove Fletcher's guilt. In addition, the letter and Dr. Piasecki's notes indicted inconsistencies stated by Fletcher which likely bore on the jury's opinion of Fletcher's credibility even though she never took the stand.

Permitting the introduction of Dr. Piasecki's notes, the letter Fletcher provided to her, and Dr. Piasecki's testimony to the same clearly violated Fletcher's constitutional rights against self-incrimination and the right to a fair trial under the *McKenna v. State* warranting a reversal of Fletcher's conviction and a new trial in this case.

CONCLUSION

Based on the foregoing, Fletcher requests that this Court reverse her conviction and sentence and remand this case to the district court for a new trial.

DATED this 18th day of November 2021.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 5,567 words.

3. Finally, I certify that I have read the appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) (1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of November, 2021.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

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

Washoe County District Attorney
Jennifer P. Noble, Chief Appellant Deputy

Aaron D. Ford
Nevada Attorney General

Via USPS

Ms. Katherine Dee Fletcher, #1220599
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DATED this 18th day of November, 2021.

Victoria T. Oldenburg
Attorney for Appellant