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
Case No. CR17-0690(A)
Second Judicial District Court of the State of Nevada, Washoe County
Honorable Egan Walker, District Judge

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person 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 the 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
3. Law Firm appearing in the Court(s) below: Oldenburg law Office

DATED this 7th day of March, 2022.

VICTORIA T. OLDENBURG, ESQ.
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Appellant KATHERINE DEE FLETCHER, by and through her attorney, Victoria T. Oldenburg, Esq., and pursuant to NRAP 28(c), hereby submits her Reply Brief in response to the State's Answering Brief, as follows:

ARGUMENT

Fletcher has appealed her murder conviction and life sentence based on her challenges to: (1) Judge Sattler's order denying Fletcher's request to disqualify Judge Walker and Judge Walker's failure to recuse himself from presiding over her criminal case and trial; and (2) the admission into evidence, through Dr. Piasecki's testimony, of Fletcher's incriminating statements to Dr. Piasecki. In its response to Fletcher's appeal, the State contends that Judge Sattler properly denied Fletcher's motion to recuse Judge Walker on both legal and factual grounds, and that the district court's admission of Fletcher's statements to Dr. Piasecki was not error and, even if it was, it was harmless error. The State's contentions, however, fail to overcome the substantive errors that Fletcher assigns to the issues she raises on appeal, and are otherwise entirely without merit.

A. The legal and factual bases on which Fletcher has challenged Judge Walker having presided over her criminal case and trial required Judge Walker's recusal.

In its response to Fletcher's challenge to Judge Sattler's order denying Fletcher's request to disqualify Judge Walker and Judge Walker's failure to recuse himself from presiding over her criminal case and trial, the State asserts:

- Judge Sattler did not err by denying Fletcher's due process challenge to Judge Walker presiding in this case because Fletcher did not demonstrate error based upon the due process standard, which the State characterizes as being concerned only with "actual bias"

- Fletcher did not establish Judge Walker's bias based upon his comments to her during a *Young* hearing

- Fletcher did not establish Judge Walker's bias in reference to Fletcher's cases before him in the Family Court

- Fletcher's "newly asserted" claims of bias do not warrant relief

The State, however, not only misstates the applicable due process standard, it compartmentalizes the factual bases on which Fletcher has made her challenge to minimize the impact of Judge Walker's conduct in its entirety and to circumvent that due process requires consideration on a case-by-case basis. Fletcher has met the due process standard by which she has challenged Judge Walker having presided over her criminal case and trial.

1. *The State misstates and mischaracterizes the applicable due process standard, which considers the* ***risk*** *of bias based upon the circumstances and relationships at issue in the case.*

The State contends that Fletcher has not carried her burden to demonstrate Judge Sattler's error in denying her request for Judge Walker's recusal under the due process basis on which she made her request. According to the State, a due process bias claim is concerned with actual bias, citing to *Ybarra v. State,* 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) and *Ybarra's* citation to *Suh v. Pierce,* 630 F.3d 685, 691-692 (7th Cir. 2011). The State goes on to state that, pursuant to *Williams*

v. Pennsylvania, 579 U.S. 1 (2016) and *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009), due process only permits recusal when a judge has a qualifying interest in the case or when the probability of actual bias on the part of the judge is too high to be constitutionally tolerable. Finally, the State cites to *Kirksey v. State,* 112 Nev. 980, 923 P.2d 1102 (1996) and *Liteky v. U.S.,* 510 U.S. 540 (1994) as permitting recusal only when the judge develops an opinion in the course of current or prior proceedings that displays deep-seated favoritism or antagonism that would make fair judgment impossible. The State's citation and analysis of most of those cases in reference to the basis on which Fletcher challenges Judge Walker having presided over her criminal case, however, are inapposite to the case at hand. It is the *risk* of bias based upon the circumstances and relationships at issue in the case that is the standard by which a due process violation is considered in reference to whether recusal is required.

a. <u>The State's citation and analysis of those cases in reference to the basis on which Fletcher challenges Judge Walker having presided over her criminal case are inapposite to the case at hand.</u>

Initially, the basis on which the State cites to *Ybarra* and *Suh, supra,* is overstated as it concerns this case. At issue in *Ybarra* and *Suh* was judicial bias as it concerned the presiding judge's: (1) prior legal representation of the victim's family in an unrelated legal matter (*Ybarra, supra*); and (2) and personal relationship with/ties to the victim's family (*Suh, supra*). The State's citation to

Suh, through *Ybarra,* as stating that the United States Supreme Court has never held that due process requires recusal based solely on the appearance of bias was specific to what was at issue in those cases, and especially in *Suh, supra.* That is, the "appearance of bias" *to an outside observer* based upon the Judges' purported relationships with/ties to the victim's family.[1] That is not the basis on which Fletcher has challenged Judge Walker presiding over her case. What is at issue in this case is Judge Walker's numerous and consistent derogatory comments to and characterizations about Fletcher throughout Fletcher's criminal case, both before she sought his recusal and after, that rise to the level of an unconstitutional *risk* of bias.

Moreover, the State's reliance on *Kirksey v. State,* 112 Nev. 980, 923 P.2d 1102 (1996) and *Liteky v. U.S.,* 510 U.S. 540 (1994) is entirely erroneous. The State cites *Kirksey* and *Liteky, supra,* for the general premise that support for a bias or recusal motion can be found when an opinion develops in the course of current or prior proceedings that display a deep-seated favoritism or antagonism that would make fair judgment impossible. *See,* the State's Answering Brief (AB) at 17. While that recitation is generally an accurate statement, it has no application to

[1] In *Suh, supra,* the defendant took issue with how the judge's ties to the victim's family – ties of which the judge was completely unaware – appeared to an outside observer. The language the State attributes to *Suh* as cited in *Ybarra* was stated in that context.

Fletcher's due process challenge. In *Liteky*, the Supreme Court did not consider a Due Process violation, but rather the statutory effect of the federal recusal statutes and the reach of the extra-judicial source rule. *See, Buntion v. Quarterman,* 524 F.3d 664, 673 (5th Cir. 2008) (noting that *Liteky* does not even mention due process), *citing Liteky,* 510 U.S. at 541, 114 S.Ct. 1147. *Kirksey* cites to *Liteky* in that limited context. *Kirksey, supra,* 112 Nev. at 1007. Because Fletcher has not asserted her challenge to Judge Walker having presided over her criminal case and trial based upon federal recusal statutes, neither *Kirksey* nor *Liteky,* as cited by the State, have any application here.

Finally, while the State correctly recites the language from *Williams* and *Caperton, supra,* that it selected for its brief, it is incomplete and too narrow in reference to the overall standard by which a due process challenge in the context of recusal is considered. As a consequence, and as more fully explained below, the State's citation to *Williams* and *Caperton, supra,* is misplaced as applied to the case at hand.

b. <u>It is the *risk* of bias based upon the circumstances and relationships at issue in the case that is the standard by which a due process violation is considered in reference to whether recusal is required.</u>

In her Opening Brief, Fletcher outlined the overall standard by which her due process challenge to Judge Walker having presided over her criminal case and trial – that a fair trial in a fair tribunal is a most basic requirement of due process,

and 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. *Caperton, supra,* 556 U.S. at 876, 879. Contrary to what the State seems to suggest, proof of actual bias by a judge is not required to establish a due process violation when recusal is denied. While fairness requires an absence of actual bias in the trial of cases, our system of law endeavors to prevent *even the probability of unfairness*. *Echavarria v. Filson,* 896 F.3d 1118, 1128 (9th Cir. 2018). To that end, the objective standards by which the Due Process clause has been implemented *do not require proof of actual bias*. *Caperton, supra,* 556 U.S. at 883-884; *accord, Johnson v. Mississippi,* 403 U.S. 212, 215 (1971) and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Rather, those standards consider the realistic appraisal of psychological tendencies and human weaknesses and whether they pose such a *risk of bias* or prejudgment. *Id.* That is because the legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. *Hurles v. Ryan,* 650 F.3d 1301, 1309 (9th Cir. 2011), *citing Mistretta v. United States,* 488 U.S. 361, 407 (1989). This most basic tenet of our judicial system helps to ensure both litigants' and the public's confidence that each case has been fairly adjudicated by a neutral and detached arbiter. *Hurles, supra,* 650 F.3d at 1309. Thus, due process mandates a stringent rule for judicial conduct, and requires recusal even of judges

who would do their very best to weigh the scales of justice equally if the risk of bias is too high. *Id.,* 650 F.3d at 1310*, citing In re Murchison,* 349 U.S. 133, 136 (1955).

In determining what constitutes a risk of bias that is "too high," the Supreme Court has emphasized that no mechanical definition exists. *Hurles, supra,* 650 F.3d at 1310. Cases that require recusal cannot be defined with precision because ***the circumstances and relationships must be considered***. *Id., citing Murchison, supra* and *Lavoie*, *supra*, 475 U.S. at 822; *see also, Caperton,* 129 S.Ct. at 2265-66 (reaffirming that functional approach). Thus, a determination of whether the risk of bias violates a party's due process rights must be made on a case-by-case basis. *Ivey v. Eighth Judicial District Court,* 129 Nev. 154, 299 P.3d 354 (Nev. 2013).

2. *Based on the content, nature, and basis of Judge Walker's derogatory comments to and characterizations of Fletcher while he presided over her criminal case and trial, Fletcher met the due process standard by which Judge Walker should have either recused himself or should have been recused.*

The State asserts that Fletcher did not establish Judge Walker's bias against her based upon comments he made during a *Young* hearing or in reference to her prior experience with Judge Walker in the family court because, pursuant to *Liteky, supra,* his comments and prior information about Fletcher were as a result of other judicial proceedings and did not reveal a high degree of favoritism or antagonism to make fair judgment impossible, as explained by Judge Sattler in his order

denying Fletcher's motion for Judge Walker's recusal. 2 AA 0195-0206. For the reasons stated above and incorporated here by reference, however, the *Liteky* standard, as stated in that case and applied by other cited authority, is not applicable to Fletcher's challenge in this case. And, Judge Sattler's comparison of this case with the facts of the cases to which he cited as a basis for denying Fletcher's motion (*Id.*) ignores that due process required his consideration of whether Judge Walker should be recused on a case-by-case basis in reference to the circumstances and relationships at issue *in this case*. *Hurles, supra,* 650 F.3d at 1310; *Ivey, supra,* 299 P.3d at 357. Most importantly, however, Judge Sattler's determination that the evidence before him did not "evince[] bias on the part of Judge Walker…." that would warrant recusal (2 AA 0203) does not account for the proper standard that considers the ***risk*** of bias, not evidence of actual bias. *See, supra.*

The State goes on to challenge what it describes as Fletcher's newly asserted allegations of bias – those related to Judge Walker's post-recusal order comments and characterizations about Fletcher in the criminal case and trial before him. The State asserts that: (1) because Fletcher did not raise those issues before the trial court, they cannot be considered on appeal; and (2) in any event, they fall under the same *Liteky* analysis. Those assertions, however, compartmentalize the basis on which Fletcher contests Judge Walker having presided over her criminal case and

trial into a separate appeal claim rather than what it is – the continuation of Judge Walker's conduct toward Fletcher that establishes the pattern of his conduct throughout Fletcher's criminal case before him. It is that pattern of conduct by which Fletcher's requested Judge Walker's recusal that was to be considered based upon the *risk of bias* that it evidences and that necessitates this Court's review of Fletcher's due process claim in its entirety to prevent a miscarriage of justice or to preserve the integrity of the judicial process (*United States v. Obendorg,* 894 F.3d 1094, 1098 (9th Cir. 2018)). Based on the derogatory and inflammatory content and nature of Judge Walker's comments and characterizations of and to Fletcher during her criminal case and trial before him, the instances of which are replete in Fletcher's Opening Brief (OB at 16, 18) and incorporated here by reference, and considering the facts and circumstances of *this* case, Judge Walker posed an unconstitutional perception or proposed risk of bias against Fletcher that prevented him from presiding over Fletcher's criminal case. Thus, Judge Walker improperly refused to recuse himself from the case, and Judge Sattler erred by denying Fletcher's motion to recuse Judge Walker.

B. The district court erroneous admission, through Dr. Piasecki, of Fletcher's written and verbal statements to Dr. Piasecki requires reversal.

Fletcher's written and verbal statements that were made part of Dr. Piasecki's report in support of Fletcher's later withdrawn NGRI plea were

necessarily both a result of and contemplated by the various competency orders in this case. Because the constitutional magnitude of the district court's erroneous admission of Fletcher's written and verbal statements through Dr. Piasecki's testimony was not harmless, Fletcher's conviction should be reversed.

1. *Fletcher's written and verbal statements that were made part of Dr. Piasecki's report in support of Fletcher's later withdrawn NGRI plea were both a result of and contemplated by the various competency orders in this case.*

In response to Fletcher's challenge to the district court's admission, through Dr. Piasecki's testimony, of Fletcher's verbal and written statements to Dr. Piasecki, the State contends that Fletcher has not established plain error that would permit this Court's review because there was no court order requiring Dr. Piasecki's evaluation of Fletcher and that, in any event, any error in admitting those statements would not require reversal based on the evidence against her. Considered in the context and history of this case in its entirety, however, the admission of Fletcher's statements to Dr. Piasecki was wholly and constitutionally improper and, in light of the evidence in this case, resulted in a conviction that the State would not likely have otherwise been able to get.

As noted in Fletcher's opening brief, Dr. Piasecki's interviews with and evaluation of Fletcher during which Fletcher made the statements at issue in this case were for a very specific purpose – Fletcher's plea of not guilty by reason of insanity (NGRI). Once Fletcher withdrew her NGRI plea and her sanity or mental

capacity was no longer at issue for that purpose, the statements she made during Dr. Piasecki's interviews and evaluations became entirely irrelevant and obsolete, and therefore inadmissible. *Accord,* NRS 48.015 (defining relevant evidence), 48.025 (irrelevant evidence is not admissible).

Be that as it may, prior to when Fletcher entered her NGRI plea, her mental health had been significantly at issue and was the subject of previous court orders for competency examinations. 1 AA 0018-0019 (August 24, 2017. Order, at Fletcher's request, for two competency evaluations); 1 AA 0035-0036 (October 23, 2017, Order for Alternate Doctor for Psychiatric Exam). Fletcher's counsel noted during an August 28, 2017, hearing that there were inconsistent competency findings regarding Fletcher among mental health professionals that had evaluated her (August 28, 2017, 1 AA 0024). Indeed, Dr. Piasecki had previously been in the picture in relation to Fletcher, as the district court also noted that Fletcher had previously disagreed with Dr. Piasecki's prior evaluations. 1 AA 0051. Fletcher's statements to Dr. Piasecki that are at issue in this case – those to which Dr. Piasecki testified during Fletcher's criminal trial – proceeded the district court's August and October 2017 Competency Examination Orders (*supra*) and preceded this district court's May 24, 2019, Order for Criminal Responsibility Examination (2 AA 0267-0268). Fletcher's Notice of Expert Witness (3 AA 0292-0294) and Dr. Piasecki's report that supported Fletcher's NGRI defense (3 AA 0332-0337)

followed and resulted from the district court's May 2019 Competency Examination Order. But for that order, Fletcher's written and oral statements to Dr. Piasecki would not have been compiled for the NGRI report. Thus, Dr. Piasecki's interviews and examinations of Fletcher, which included Fletcher's incriminating statements to which Dr. Piasecki testified, were a result of and compelled by the competency examinations that took place pursuant to the district court's August and October 2017 Competency Evaluation Orders and were necessarily contemplated by the district court's May 2019 Order for Criminal Responsibility Examination (2 AA 0267-0268). To that end, they were statements made in the context of the various court-ordered competency evaluations and for the specific purpose of her NGRI defense in reference to a determination of Fletcher's mental condition at the time of the crime. *Accord, Collins v. Auger,* 428 F.Supp. 1079, 1082 (S.D. Iowa 1977), as quoted in *McKenna v. State,* 98 Nev. 38, 639 P.2d 557, 558 (1982). 3 AA 0292-0293. As a consequence, their admission into evidence violated Fletcher's Fifth Amendment right against self-incrimination. *Id.*

2. *Because the constitutional magnitude of the district court's erroneous admission of Fletcher's written and verbal statements through Dr. Piasecki's testimony was not harmless, Fletcher's conviction should be reversed.*

The State goes on to assert that, even if the district court's admission into evidence of Fletcher's written and verbal statements to Dr. Piasecki was error, that error does not warrant reversal of Fletcher's conviction because the evidence

against her was sufficient to support the conviction. The evidence to which the State refers was that of a custody dispute between Fletcher and Robert Trask and Fletcher's demeanor before and after the murder, as well as other circumstantial evidence. The State's recitation of that evidence, however, falls far short of overcoming the lack of substantive, direct evidence the State did not have – no gun, no eyewitness to the shooting, and either inclusive or exculpatory forensic analyses. *See* Opening Brief at 4-5.

It is Fletcher's written and verbal statements to Piasecki, which were made in the limited context of Fletcher's later-withdrawn NGRI defense as a result of the substantial issues relating to Fletcher's mental competence in this case, that most directly bridged the State's substantial evidentiary gaps. Without the admission of those statements, proof of Fletcher's guilt was significantly more tenuous, obviating the State's assertion that their admission was harmless error. Because those statements were admitted in violation of Fletcher's Fifth Amendment right against self-incrimination (*see, supra*), the State has the burden of establishing that the error did not contribute to the verdict. *Chapman v. California,* 386 U.S. 18, 24 (1967); *accord, Valdez v. State,* 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (where error is constitutional, it is harmless only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error). Considering the nature and content of Fletcher's statements to Dr. Piasecki as it

relates to consideration of the State's evidence against Fletcher without those statements, the State has not, and cannot, meet that burden. As a consequence, Fletcher's conviction should be reversed, and a new trial ordered 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 before a different judge.

DATED this 7th day of March, 2022.

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 4,393 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 7th day of March, 2022.

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:

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DATED this 7th day of March, 2022.

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