IN THE SUPREME COURT OF THE STATE OF NEVADA

SAYEDBASHE SAYEDZADA, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 71731	**E-File**

FAST TRACK REPLY

A. THE DISTRICT COURT VIOLATED SAYED'S CONSTITUTIONAL RIGHTS DURING VOIR DIRE.

1. Denying Challenges for Cause.

Sayed's constitutional rights to due process and an impartial jury were violated when the court erroneously denied his cause challenges to prospective jurors Karen Shuey-Ridges, Lisa Rich, Cinda Towne and Nethania Bridgewater. See **Ross v. Oklahoma**, 487 U.S. 81, 85 (1988); **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Secs. 1 & 8.**

When the court asked the panel whether "you or anyone close to you, such as a family member or friend, ever been a victim of a crime", multiple jurors raised their hands, including Shuey-Ridges, Rich, Towne and Bridgewater. (III:395). Their responses are set forth below:

///

Karen Shuey-Ridges

PROSPECTIVE JUROR #038: Yes. I've had my bank information stolen and a ATM slash credit card sent to a former address which somebody got a hold of it and did online charges on it. And so that – I was able to get the money bank. I've had to close my bank account twice for fraudulent activity.

THE COURT: Okay. Anything about those experiences you believe would affect your ability to be fair and impartial if you're selected here?

PROSPECTIVE JUROR #038: Possibly.

(III:402-03) (emphasis added).

Lisa Rich

PROSPECTIVE JUROR #029: Yes. My husband and I've had credit cards compromised many times over the years. No involvement in the prosecution. Credit card companies have always taken care of it. I've had my car broken into and valuable scuba diving gear stolen and never recovered.

. . .

THE COURT: Okay. Is there anything about those events that you feel would affect your ability to be fair and impartial here?

PROSPECTIVE JUROR #029: I believe so. It makes me very angry.

THE COURT: Okay. And so how – how would it affect you?

PROSPECTIVE JUROR #029: I don't know.

THE COURT: It makes you mad.

PROSPECTIVE JUROR #029: It makes me mad. I don't know if I could be impartial.

THE COURT: Okay. You have to hear – wait and hear it?

PROSPECTIVE JUROR #029: I would probably have to wait and hear it.

(III:404) (emphasis added).

Cinda Towne

PROSPECTIVE JUROR #007: We had credit card information stolen. The last time was about three years ago and then maybe ten years ago. The last time we really had to fight with the credit card company.

THE COURT: Okay. Is there anything about that experience you believe that you couldn't be fair and impartial if you're selected in this case?

PROSPECTIVE JUROR # 007: I don't know.

(III:400).

Nethania Bridgewater

PROSPECTIVE JUROR #037: Yes. I've had my bank account compromised twice and I was robbed. Last time my bank account was compromised was 2014, about $3,000. The bank was never able to give it back to me and it's still an open case. My purse was stolen out of my car about 2008. I reported it to the police; never found anything. And back in 2009 my bank account was compromised. Utilities were opened and overseas charges. They were able to give me my money back and it's case closed.

THE COURT: Okay. Is there anything about those experiences you believe would affect your ability to be fair and impartial if you're selected here?

PROSPECTIVE JUROR #037: Possibly. I'm not sure.

(III:402) (emphasis added).

Because none of these jurors could assure the court that they would be fair and impartial in this case, Sayed moved to strike them all and the court denied those requests. (III:420;505).

In its Fast Track Response (FTR), the State claims that Shuey-Ridges and Rich "both stated that they could set aside any preconceived views or opinions they may have and base the verdict upon the evidence presented." FTR at 4. However, if you look closely at the language cited by the State, neither juror would state unequivocally that she would be impartial. (III:447-49) (the jurors responded with "I believe so" and "I don't think so" instead of with a definitive "yes" or "no"). Furthermore, the State's argument ignores subsequent comments by both witnesses that cast doubt on their impartiality. Again, both Shuey-Ridges and Rich felt that Sayed should testify in his defense if he were truly innocent, and Rich actually admitted she "could be biased". (VIII:461, 490). In this way, Shuey-Ridges and Rich are similar to the jurors that the Nevada Supreme Court said should have been stricken in **Weber v. State**, 121 Nev. 554, 119 P.3d 107 (2005) and **Preciado v. State**, 130 Nev. --, --, 318 P.3d 176 (2014).

In **Weber**, a juror told the prosecutor she could consider all four penalty options but then retreated from that position when questioned by the defense attorney. A second juror believed that the defense should have to

present evidence before the judge admonished him that the defense bears no burden of proof and the prosecutor attempted to rehabilitate him. The Nevada Supreme Court concluded that both jurors should have been stricken because "[n]either was able to state without reservation that she or he had relinquished views previously expressed which were at odds with their duty as impartial jurors." 124 Nev. at 581, 119 P.3d at 125.

Likewise, in **Preciado**, the Supreme Court said it was not enough for a juror to say she could be impartial where she admitted that "a graphic photo would make her believe the defendant was guilty". 130 Nev. at --, 318 P.3d at 179. Because the juror's statements about impartiality were "equivocal", she should have been stricken. Id.

Ultimately, both Shuey-Ridges and Rich should have been excluded because their experiences and beliefs "'would prevent or substantially impair the performance of [their] duities as a juror in accordance with [their] instructions and [their] oath.'" Id. (quoting **Weber**, 121 Nev. at 580, 119 P.3d at 125).

The district court's failure to strike these two jurors was reversible error because the jury that was empaneled was not fair and impartial. See **Preciado**, 130 Nev. at --, 318 P.3d at 178. While Sayed was able to use peremptory challenges to exclude both Shuey-Ridges and Rich, he did not

have sufficient peremptory challenges left to strike Cinda Towne and Nethania Bridgewater – both of whom he had originally moved to strike for cause. See Fast Track Statement (FTS) at p. 12 and fn.4.

The State claims that "Towne and Bridgewater both acknowledged that they can be fair and impartial." FTR at 6. However, as set forth above and in Sayed's Fast Track Statement, neither witness could state unequivocally that they were unbiased after having experienced identity theft similar to that involved in Sayed's case. Towne said, "I don't know" when asked if she could be "fair and impartial". (III:400). And Bridgewater conceded that her experiences as a victim of identity theft and purse theft would "possibly" affect her ability to be fair. (III:402). These are not just "bare and naked allegation[s]" of bias, as the State claims -- the record shows that these witnesses could not guarantee they were unbiased. C.f. FTR at 7.

Furthermore, the State is incorrect when it claims that "Bridgewater stated that she could be fair and impartial during voir dire." C.f. FTR at 7. If you look at the transcript pages cited by the State, Bridgewater only said that she could "follow the law", which is not the same as saying she could be fair and impartial. (III:446-47) (state asks Bridgewater "if the Court were to

instruct you that the law was one thing, but you did not agree with it, would you still be able to follow the law?").

Again, where two seated jurors were victims of the same crimes that were charged against Sayed, and where those jurors could not guarantee that they would not hold their personal experiences against Sayed, he is entitled to a new trial. See **Weber**, 121 Nev. at 581, 119 P.3d at 125-26 (defendant not entitled to relief unless he can "establish that any of the jurors who sat in judgment against him were not fair and impartial").

2. Denying Fair Cross-Section Challenge Without an Evidentiary Hearing.

The district court committed structural error by denying Sayed's fair-cross section challenge to the venire without first holding an evidentiary hearing. See **U.S.C.A. VI & XIV, Nev. Const. Art 1, Secs. 1 & 8, Taylor v. Louisiana**, 419 U.S. 522, 528 (1975); **Afzali v. State**, 326 P.3d 1, 3 (Nev. 2014); **Buchanan v. State**, 335 P.3d 207 (Nev. 2014).

In order to make a prima facie showing that his jury pool violated the fair cross-section requirement, Sayed needed to establish:

> (1) that the group alleged to be excluded is a *'distinctive' group* in the community; (2) that the *representation of this group in venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is *due to systematic exclusion* of the group *in the jury-selection process*.

Williams v. State, 121 Nev. 934, 940 (2005) (emphasis in original) (quoting **Evans v. State**, 112 Nev. 1172, 1186 (1996)).

The State's Fast Track Response all but concedes that Sayed satisfied the first two prongs of this three-part test. FTR at 9. The State also agrees that Sayed could not have satisfied the third part of the test without "evidence that the jury rolls in Clark County systematically exclude African-Americans or Latinos. FTR at 9. Unfortunately, when Sayed specifically requested an evidentiary hearing with the jury commissioner so he could present the necessary evidence of systematic exclusion, the district court denied that request and prevented Sayed from making this showing. (III:438). This was structural error.

As the Nevada Supreme Court recognized in **Afzali v. State**, 326 P.3d 1, 3 (2014),[1] the fair cross-section "requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." While the **Afzali** case held that a defendant was entitled to discover the racial composition of a grand jury conducted in secret, the lesson from that case is directly applicable here: a court cannot preclude the defense from obtaining information necessary to make a fair cross-section challenge without undermining that right.

[1] Quoting **State ex rel. Garrett v. Saitz**, 594 S.W.2d 606, 608 (Mo. 1980).

Unlike the defendant in **Battle v. State**, No. 68755, 2016 WL 4445494 (Nev. 2016) (unpublished), Sayed was not requesting an evidentiary hearing to determine how many members of a "distinctive group" were in the venire. Sayed already had that information, and that information did support his fair-cross section challenge. See Fast Track Statement at 14-15. The information Sayed did not have was information about the county's jury selection practices, and the district court prevented him from obtaining that information in violation of **Afzali**.

The court's denial of Sayed's fair-cross section challenge without allowing Sayed to question the jury commissioner at an evidentiary hearing is a structural error that requires a new trial. See also **Buchanan v. State**, 335 P.3d 207, 210 (2014) ("when a defendant moves the court to strike a jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion"); c.f., **Williams v. State**, No. 65986, 2016 WL 1092438, (Nev. 2016)(unpublished) (where defendant did not allege that underrepresentation of African Americans in a venire was the result of systematic exclusion and defendant did not request an evidentiary hearing into the jury selection

process, court could rule on fair cross-section challenge to venire without evidentiary hearing).

B. The District Court Erred in Failing to Exclude Evidence of the Purse Theft as a Discovery Sanction.

The State incorrectly argues that Sayed must satisfy the 3-part **Brady** "materiality" test to establish that the court erred by refusing a discovery sanction requested pursuant to **NRS 174.235**. See FTR at 13-14. In reality, Sayed need only show that the court abused its discretion. See **Langford v. State**, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979). Because the State's untimely disclosure of the police report regarding Jamie's stolen purse resulted in substantial prejudice to appellant, the court should have precluded the State from discussing the purse theft at trial. See **Jones v. State**, 113 Nev. 454, 471, 937 P.2d 55, 66 (1997) (quoting **Langford**, 95 Nev. at 635, 600 P.2d at 234).

C. The Remaining Errors.

Sayed is satisfied that his Fast Track Statement adequately addresses the remaining assignments of error and he incorporates by reference each of those arguments herein.

///

///

///

Sayed respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully submitted,
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ Deborah L. Westbrook_*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

VERIFICATION

1. I hereby certify that this fast track reply 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) because:

This fast track reply has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track reply complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 2,114 words which does not exceed the 2,333 word limit.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track reply and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track reply, or failing to raise material issues or arguments in the fast track reply, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track reply is true and complete to the best of my knowledge, information and belief.

DATED this 24th day of August, 2017.

Respectfully submitted,
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of August, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

SAYEDBASHE SAYEDZADA
NDOC No. 79356
c/o Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office