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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 37906
	)	
v.	)	
	)	
VANCE A. WATKINS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

COPY

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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District Judge

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Supreme Court Court of Appeals
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Vance Watkins was charged with a single count of lewd conduct with a minor. His case originally went to trial in 2005 and he was found guilty by the jury; however, his conviction and sentence were eventually vacated by the Idaho Supreme Court and his case was remanded for a new trial.

In 2010, Mr. Watkins' case went to trial for a second time. During the retrial, despite a stipulation that no mention be made of the first trial, one of the State's witnesses revealed to the jury that, not only had there been a previous trial, but also an appeal. Based on this testimony, which Mr. Watkins argued was tantamount to informing the jury that he had previously been convicted, Mr. Watkins moved for a mistrial. That motion, however, was denied by the district and, at the conclusion of the second trial, Mr. Watkins was again found guilty by the jury.

Mr. Watkins appeals. On appeal, he contends that the district court erred in denying his motion for a mistrial because the testimony informing the jury of his previous conviction in this case denied him a fair trial.

Statement of the Facts and Course of Proceedings

On December 8, 2004, Vance Watkins was charged with one count of lewd conduct with a minor for allegedly having sexual contact with six-year old R.N.W. (No. 35687 R., pp.10-11.)[1] His trial commenced on August 30, 2005 and concluded on

[1] This is the second direct appeal in this case. In the first appeal, originally designated No. 32710 (before the Court of Appeals), but later re-designated No. 35687 (before the Supreme Court when on review), Mr. Watkins' conviction and sentence were vacated, and case was remanded for a new trial. On remand, he was again found guilty, and he again appealed—this time, initiating the present appeal, No. 37906. At the outset of the present appeal, the Supreme Court entered an order augmenting the record on appeal

September 6, 2005. (*See* No. 35687 R., pp.95-99 (court minutes for first day of trial, August 30, 2005), pp.100-104 (second day, August 31, 2005), pp.112-13 (third day, September 1, 2005), 116-20 (fourth day, September 6, 2005).) Ultimately, the jury found Mr. Watkins guilty as charged. (No. 35687 R., p.121.) On December 28, 2005, the district court imposed upon Mr. Watkins a unified sentence of life, with fifteen years fixed (No. 35687 R., pp.138, 141) and, on January 5, 2006, it entered a judgment of conviction (No. 35687 R., pp.141-42).

Mr. Watkins timely appealed his original conviction in this case. (No. 35687 R., pp.143-46.) In that appeal, his first of two direct appeals in this case (*see* note 1, *supra*), Mr. Watkins argued that the district court erred in his 2005 trial by allowing the State's DNA expert to testify as to her lab technician's handling, testing, and observations concerning certain evidence. Ultimately, the Supreme Court agreed, holding that the expert's testimony in this regard was inadmissible hearsay. *State v. Watkins*, 148 Idaho 418, 423-27 (2009). Further, it held that the error was not harmless because, "[a]lthough the child told an interviewer from CARES that Watkins had sexual intercourse with her, other evidence introduced during the trial indicated that she had made similar, unfounded allegations against her uncle, and a medical examination of the child's vagina and anus did not result in 'definitive abnormal findings.'" *Id.* at 427. Thus, the Court vacated Mr. Watkins' conviction and remanded his case for a new trial. *Id.*

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in this case (No. 37906) with the appellate record from Mr. Watkins' previous appeal (No. 32710 / 35687). (Order Augmenting Appeal (Aug. 11, 2010).) In this brief, references to the appellate records are given with a prefix containing the appropriate case number (No. 37906 for the instant appeal, and No. 35687 for the earlier appeal).

Prior to Mr. Watkins' June 21-23, 2010 retrial, the parties stipulated that there would be no mention of the fact that there had been a previous trial in the case. (*See* No. 37906 Jun. 21, 2010 Tr., p.89, Ls.6-9 (referencing a pre-trial stipulation "to avoid reference to a previous trial in the case"); No. 37906 Jun. 21, 2010 Tr., p.92, Ls.18-22 (prosecutor referencing the "agreement of the parties" not to mention Mr. Watkins' first trial).) In accordance with this stipulation, the prosecutor apparently instructed her witnesses not to mention Mr. Watkins' first trial. (*See* No. 37906 Jun. 21, 2010 Tr., p.92, Ls.18-22.) Further, at the outset of the jury selection process, apparently concerned that the jurors would speculate as to why they were just now (in 2010) hearing about a crime allegedly committed in 2005, the district court admonished the jurors as follows: "Please disregard the fact that this is a case that is five-and-a-half years old. You should simply understand that the wheels of justice sometimes grind very slowly." (No. 37906 Jun. 21, 2010 Supp. Tr., p.4, Ls.11-14.)

Despite the parties' stipulation and the prosecutor's instruction to her witnesses, on the first day of Mr. Watkins' three-day retrial, the State's second witness, Officer Matthew Archuleta of the Nampa Police Department, spontaneously blurted out the fact that there had been a previous trial in this case and, when the district court attempted to steer Officer Archuleta away from that fact and back to the question at hand, Officer Archuleta went further and revealed that there had also been an appeal. (No. 37906 Jun. 21, 2010 Tr., p.88, L.13 – p.89, L.1.) The testimony in question, which came during the defense's cross-examination of Officer Archuleta, went as follows:

> Q. Okay. All right. Well, once again, referring back to an earlier time when you testified about this, do you remember talking about opening bags and then moving two pieces of paper around to find the condom?
>
> A. In my transcript from the—well, can I say that because I was told I can't talk about the prior trial.

> THE COURT: With regard to your prior testimony, do you recall making a different testimony than you are today?
>
> THE WITNESS: I don't remember recalling. I read the transcript of the prior trial after the appeals court—so if that's what you're asking.

(No. 37906 Jun. 21, 2010 Tr., p.88, L.13 – p.89, L.1.) At that point, the district court sent the jury out to take up the matter of the jury having been "informed that there has been a previous trial and an appeal in the case." (No. 37906 Jun. 21, 2010 Tr., p.89, Ls.6-11.)

After the jury retired, the prosecutor pointed out that Officer Archuleta's blunder was not her fault, as she "certainly instructed [her] witnesses not to raise the prior trial" (No. 37906 Jun. 21, 2010 Tr., p.92, Ls.19-22), and she argued that the prejudice to Mr. Watkins was insufficient to deprive Mr. Watkins of a fair trial (No. 37906 Jun. 21, 2010 Tr., p.92, L.23 – p.93, L.1) and, likewise, insufficient to warrant "a mistrial or anything like that" (No. 37906 Jun. 21, 2010 Tr., p.90, Ls.8-11). On the other hand, defense counsel argued that Officer Archuleta's testimony was highly prejudicial because the jurors would wonder if Mr. Watkins "got off on a technicality" the first time around, and he implicitly requested a mistrial. (No. 37906 Jun. 21, 2010 Tr., p.90, L.16 – p.91, L.24.) Ultimately, the district court decided to take the matter under advisement and recess for the evening. (*See* No. 37906 Jun. 21, 2010 Tr., p.93, Ls.2-13.)

The following morning, the district court again took up the defense "motion for a mistrial . . . ." (No. 37906 Jun. 22, 2010 Tr., p.97, Ls.8-11.) In discussing numerous out-of-state cases dealing with the issue of whether a reference to the defendant's previous trial in the same case warranted a mistrial, the prosecutor conceded that mention of the fact that the defendant had been *convicted* in that previous trial would

warrant a mistrial,[2] but argued that, in this case, an instruction to disregard Officer Archuleta's reference to the first trial would be sufficient. (*See* No. 37906 Jun. 22, 2010 Tr., p.98, L.4 – p.101, L.1.) The implication of this argument, of course, was that, because Officer Archuleta never uttered the words "guilty" or "convicted" in this case, his testimony did not warrant a mistrial. (*See* No. 37906 Jun. 22, 2010 Tr., p.98, L.4 – p.101, L.1.)

In response, defense counsel distinguished the present case from those in which there was a mere comment about the existence of a prior trial, the outcome of which was unrevealed, arguing that, based on Officer Archuleta's reference to the "appeal," "[t]here's really only one conclusion the jury can come to, and that is he [Mr. Watkins] lost, he appealed, he won, and now he's back here," and that this conclusion is highly prejudicial. (No. 37906 Jun. 22, 2010 Tr., p.102, Ls.2-8.) In response to the district court's pointed inquiries about why the jury would necessarily infer from Officer Archuleta's testimony that Mr. Watkins had been previously convicted, defense counsel continued to argue that, based on common perception, a lay juror would understand the process to be that, most likely, the defendant was convicted and successfully appealed, perhaps getting "off on a technicality the last time . . . ." (No. 37906 Jun. 22, 2010 Tr., p.102, L.9 – p.104, L.25.)

Ultimately, the district court denied the motion for a mistrial. (No. 37906 Jun. 22, 2010 Tr., p.106, L.5 - p.110, L.22.) The district court observed that "[t]he jury has been told there was a prior trial, and the jury has been told that there was an appeal"; however, it went on to find that "[t]he jury has not been told what the results were at the

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[2] Notably, the district court agreed that mention of a conviction absolutely warrants a mistrial. (No. 37906 Jun. 22, 2010 Tr., p.100, Ls.5-6.)

first trial" so it was "unknown" to the jury whether the result of the first trial was "favorable to the state or favorable to the defendant . . . ." (No. 37906 Jun. 22, 2010 Tr., p.107, L.21 - p.108, L.1.) It opined as follows: "In my view the jury could equally find that a verdict in the first case was unfavorable to the state just as it could find that it was unfavorable to the defendant." (No. 37906 Jun. 22, 2010 Tr., p.108, Ls.18-21.) Thus, the district court declined to "make the finding that there's a strong likelihood that the effect of this evidence would be devastating to the defendant."[3] (No. 37906 Jun. 22, 2010 Tr., p.108, Ls.15-17.) In the end, it reasoned as follows:

> [W]e don't know—or the jury does not know whether the verdict in the first case was favorable or unfavorable to the defendant. And there are many witnesses that are yet to testify in this case, and for each one of these witnesses we have this risk. And even if the court were to grant the new trial now and restart the jury selection process, we still have this risk that something will be blurted out by these witnesses regarding a previous trial.
>
> I think that it would prudent not only if the court granted a new trial or even a mistrial to inform this jury that we had a previous trial in some form of an instruction that attempts to deal with that issue without unnecessarily highlighting it any more than we have to and to not disclose whether the result was favorable or unfavorable to wither the state or the defendant.
>
> And finally, I guess one of the criteria that the court's considering and deciding whether a mistrial would take place is that basically the court—the court's overwhelming or overriding consideration is the interest of justice.
>
> And as part of that consideration, the court, I think has to consider that starting the trial anew would require that this child witness would be required to now testify a third time, which I find difficult to reconcile that that would be the interest of justice.
>
> So for those reasons the Motion for Mistrial is denied.

(No. 37906 Jun. 22, 2010 Tr., p.109, L.17 - p.110, L.22.)

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[3] Again, the district court acknowledged that any explicit mention of the fact that Mr. Watkins had been convicted in the first trial, "or that Mr. Watkins was in the state penitentiary," would result in a mistrial. (No. 37906 Jun. 22, 2010 Tr., p.109, Ls.10-13.)

With the parties' assent,[4] the district court provided the jury with the following instruction concerning Officer Archuleta's testimony: "You have heard testimony that there was a previous trial in this matter. You are not to speculate as to the result of that previous trial." (No. 37906 Jun. 22, 2010 Tr., p.115, L.24 - p.116, L.1.)

At the conclusion of the trial, the jury found Mr. Watkins guilty. (No. 37906 R., pp.166-67.) Subsequently, the district court imposed a unified sentence of life, with fifteen years fixed. (No. 37906 R., pp.171, 182.) The district court then filed its judgment of conviction on July 23, 2010. (No. 37906 R., pp.182-83.)

In the meantime, on July 22, 2010, Mr. Watkins had filed a notice of appeal (No. 37906 R., pp.176-78) which was timely from the judgment of conviction. *See* I.A.R. 17(e)(2). On appeal, Mr. Watkins contends that the district court erred in denying his motion for a mistrial because, based on Officer Archuleta's testimony about Mr. Watkins' earlier trial and appeal, a reasonable juror would have believed that Mr. Watkins had previously been found guilty by a different jury of the same crime for which he was then on trial, and this information is so prejudicial that its dissemination deprived Mr. Watkins of a fair trial.

[4] In agreeing to the wording of the jury instruction, defense counsel made it clear that he was in no way abandoning his request for a mistrial. (*See* No. 37906 Jun. 22, 2010 Tr., p.113, Ls.3-9.) Besides, by that point, his motion for a mistrial had already been denied.

ISSUE

Did the district court err in denying Mr. Watkins' motion for a mistrial, made after a State's witness revealed that Mr. Watkins had had an earlier trial and appeal in this case?

ARGUMENT

The District Court Erred In Denying Mr. Watkins' Motion For A Mistrial, Made After A State's Witness Revealed That Mr. Watkins Had Had An Earlier Trial And Appeal In This Case

A. Introduction

When Officer Archuleta testified that Mr. Watkins had a previous trial, and an appeal, in this case, the most reasonable inference for the jury to draw was that Mr. Watkins had previously been found guilty, but had had his conviction overturned on appeal. Given the overwhelming prejudice attendant to such a disclosure to a lay jury, Mr. Watkins submits that this testimony deprived him of a fair trial and, therefore, it was error for the district court to have denied his motion for a mistrial.

B. Applicable Legal Standards

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. Further, the Fourteenth Amendment guarantees that no one may be deprived "of life, liberty, or property, without due process of the law." U.S. CONST. amend. VI. Taken together, these provisions guarantee every criminal defendant a fair trial. *See Strickland v. Washington* 466 U.S. 668, 685-686 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . .").

A number of courts have recognized that jurors' knowledge that the defendant was previously found guilty of the same offense for which he is now on trial is so prejudicial as to constitute a denial of the Constitutional right to a fair trial. *See, e.g., Hughes v. State*, 490 A.2d 1034, 1044-46 (Del. 1985) (holding that jurors' knowledge of

the defendant's prior conviction (obtained outside the courtroom) was so prejudicial as to constitute a violation of due process); *State v. Lee*, 346 So. 2d 682, 683-85 (La. 1977) (finding a violation of the defendant's constitutional right to a fair trial where the prosecutor, during closing arguments, highlighted the fact that the defendant had previously been found guilty).[5] *See also, e.g., Fullwood v. Lee*, 290 F3d 663, 682-83 (4th Cir. 2002) (recognizing, in *dicta*, that a violation of the defendant's Sixth Amendment right to an impartial jury may be present if the jury learned that the defendant had previously been found guilty of murder and sentenced to death). Other courts that have dealt with this issue, although not necessarily asked to rule on Constitutional grounds, have nearly universally found that, although a reference to a prior trial is a relatively minor error that can be corrected with a curative instruction, a reference to the outcome of the first trial is so extraordinarily prejudicial that it will typically require a new trial. *See, e.g., Arthur v. Bordenkircher*, 715 F.2d 118, 118-20 (4th Cir. 1983) (finding ineffective assistance of counsel where defense counsel suggested , and drafted, a jury instruction informing the jurors that the defendant had previously been convicted but his conviction was reversed, and his case remanded for a new trial, on "procedural grounds"); *United States v. Attell*, 655 F.2d 703, 704-05 (5th Cir. 1981) (reversing the defendant's conviction where mid-trial publicity revealed that the defendant had previously been convicted, but had won a new trial on appeal, and where the trial judge had refused to poll the jurors to determine if any had been witness to the publicity in question); *Frazier v. State*, 632 So.2d 1002, 1007 (Ala. Ct. App. 1993) (holding that it is

[5] *Compare State v. Williams*, 445 So.2d 1171, 1177 (La. 1984) (finding no error in the trial court's denial of the defendant's motion for a mistrial when a witness referenced the defendant's prior trial, in part, because the witness did not reveal the outcome of that trial).

plain, reversible error for a prosecutor to inform the jury that the defendant had previously been convicted)[6]; *Williams v. State*, 629 P.2d 54, 58-60 (Alaska 1981) (finding error in the denial of the defendant's motion for a mistrial where the prosecutor revealed that the defendant's first trial resulted in a hung jury, with the jurors voting 11-1 in favor of a guilty verdict); *State v. Lawrence*, 599 P.2d 754, 758 (Ariz. 1979) (finding no error in a witness's reference to an earlier trial because that reference did not reveal the outcome of that trial); *Bailey v. State*, 521 A.2d 1069, 1076-77 (Del. 1987) (finding no error in the trial court's decision to declare a mistrial where multiple prosecution witnesses referred to the defendant's first trial and one of those witnesses revealed that the defendant had been convicted at that trial); *Duque v. State*, 498 So.2d 1334, 1337 (Fla. Dist. Ct. App. 1986) (finding error in the prosecutor's comment on a witness's testimony that defendant was sentenced to jail following first trial)[7]; *Hood v. State*, 537 S.E.2d 788, 790 (Ga. Ct. App. 2000) ("Where there is no mention of the result of a prior judicial proceeding, the bare reference to an earlier trial does not necessarily imply a conviction and reversal on appeal. . . . Since the record contains no reference to the earlier verdict of guilt, the trial court's curative instructions were adequate to remove the subject from the jury's consideration."); *People v. Jones*, 528 N.E.2d 648, 658 (Ill. 1988)

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[6] *Compare Sneed v. State*, 1 So.3d 104, 114-15 (Ala. Ct. App. 2007) ("In this case, none of the references to a first trial or to prior proceedings specifically informed the jury that the appellant had previously been convicted of capital murder and sentenced to death. Accordingly, we do not find that there was any plain error in this regard.").

[7] *See also Weber v. State*, 501 So.2d 1379, 1381-85 (Fla. Dist. Ct. App. 1987) (finding error in the trial court's failure to declare a mistrial where the jury learned (from outside information) that the defendant had previously been found guilty and had received a 99-year sentence, and that the defendant had won a new trial based on a "technicality"). *Compare Brooks v. State*, 918 So.2d 181, 208 (Fla. 2005) (affirming the trial court's denial of the defendant's motion for a mistrial where the government repeatedly referenced the defendant's previous trial but did not reveal that the defendant had been convicted at that trial).

(finding no error in the decision to deny the defendant's motion for a mistrial where a prosecution witness alluded to the defendant's first trial but did not reveal the outcome of that trial)[8]; *Major v. Commonwealth*, 275 S.W.3d 706, 716-17 (Ky. 2009) (finding no error in the decision to deny the defendant's motion for a mistrial where a witness mentioned the defendant's first trial but "did not indicate any favorable or unfavorable outcome"); *Coffey v. State*, 642 A.2d 276, 281-85 (Md. Ct. App. 1994) (holding that a jury instruction was insufficient to cure the error and, therefore, the trial court erred in refusing to declare mistrial, where a prosecution witness revealed that the defendant had been found guilty at first trial). The rationale for this standard was well-put by the Delaware Supreme Court:

> "[W]e are hard-pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978). It seems unreasonable to expect a juror to divorce from his deliberative process, knowledge that a defendant has been previously tried and convicted, and following a reversal has been once again subjected to prosecution. The mere expenditure of so much time and expense on the part of the State might lead the average lay person to assume that such a defendant must, in fact, be guilty.

Hughes, 490 A.2d at 1044 (quoted with approval in *Bailey*, 521 A.2d at 1076, and *Coffey*, 642 A.2d at 282). *See also Bordenkircher*, 715 F.2d at 119 (quoting, with approval, the quoted language from *Williams*); *Attell*, 655 F.2d at 705 (same).

In Idaho, Idaho Criminal Rule 29.1 governs motions for mistrials. Under that, "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair

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[8] *Cf. McDonnell v. McPartlin*, 736 N.E.2d 1074, 1091 (Ill. 2000) (holding, in the civil context, that the trial court did not err in denying a motion for a mistrial where a witness referenced the first trial of the matter, but did not disclose the result of that trial).

trial." I.C.R. 29.1(a). Although this Rule is couched in permissive terms, and it has been said that "[t]he decision whether to grant a mistrial rests within the sound discretion of the district court and will not be disturbed on appeal absent an abuse of discretion," *State v. Atkinson*, 124 Idaho 816, 818 (Ct. App. 1993), the reality is that the district court's decision to grant or deny a mistrial will be subject to *de novo* review on appeal:

> The standard of review of a trial court's refusal to grant a mistrial has been set forth by the Court of Appeals.
>
> > [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.
>
> *State v. Shepherd*, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct.App.1993) (quoting *State v. Urquhart*, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct.App.1983)).

State v. Sandoval-Tena, 138 Idaho 908, 912 (2003). And, of course, a reversible error is an error that did not contribute to the jury's verdict. *Chapman v. California,* 386 U.S. 24 (1967). In determining whether the error did not contribute to the jury's verdict, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993).

C. The District Court Erred In Denying Mr. Watkins' Motion For A Mistrial

When Officer Archuleta testified that Mr. Watkins had already had one trial, as well as an appeal, the inference that was most likely to have been drawn by the jury is that Mr. Watkins had a previous trial, he was found guilty, and he had his conviction overturned on appeal (perhaps on the basis of a "technicality"). (*See* No. 37906 Jun. 21, 2010 Tr., p.88, L.13 – p.89, L.1.) As defense counsel explained below, the layman's likely understanding of the criminal justice system (derived as much from the crime fiction and sensationalized criminal cases that permeate pop culture, as from our educational system, no doubt) is that it is the criminal *defendant* who appeals (typically after having been found guilty by a jury), not the government. (*See* No. 37906 Jun. 22, 2010 Tr., p.101, L.22 – p.104, L.25.) More than that though, if the jurors did have a working knowledge of the criminal justice system, they would know that the government cannot appeal in many (or most) cases that have gone to trial and the government is unsatisfied by the result because the government cannot appeal an acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-76 (1977).

Since the jury's likely *perception* of the evidence at issue that informs the question of whether it was prejudiced by exposure to that evidence, *see State v. Ellington*, 151 Idaho 53, 65 (2011) (noting that the term "homicide" is prejudicial because, even though it is not technically synonymous with the term "murder," "it still contained the risk that an average juror would equate it with 'murder'"), and, as noted, Officer Archuleta's testimony in this case likely led the jurors to believe that Mr. Watkins had previously been found guilty, by another jury, for the same crime for which he was on trial in this case, there can be little doubt that Officer Archuleta's testimony was prejudicial. The only remaining question then is whether that testimony was so

prejudicial as to have undermined Mr. Watkins right to a fair trial and, thus, required declaration of a mistrial. As discussed above, however, this question has been addressed by numerous other courts which have nearly universally held that jurors' knowledge that another jury has found the defendant guilty of the precise offense at issue is uniquely prejudicial, such that it requires that the defendant be granted a new trial. *See, e.g., Bordenkircher*, 715 F.2d at 118-20; *Fullwood*, 290 F3d at 682-83; *Attell*, 655 F.2d at 704-05; *Frazier*, 632 So.2d at 1007; *Williams*, 629 P.2d at 58-60; *Bailey*, 521 A.2d at 1076-77; *Hughes*, 490 A.2d at 1044-46; *Weber*, 501 So.2d at 1381-85; *Duque*, 498 So.2d at 1337; *Lee*, 346 So. 2d at 683-85; *Coffey*, 642 A.2d at 281-85. As noted, a number of these courts have concluded that there is nothing "more damning to an accused than information that a jury had previously convicted him for the crime charged." *Williams*, 568 F.2d at 471. *Accord Bordenkircher*, 715 F.2d at 119 (quoting *Williams*); *Attell*, 655 F.2d at 705 (same); *Hughes*, 490 A.2d at 1044 (same); *Bailey*, 521 A.2d at 1076 (quoting *Hughes* quoting *Williams*); *Coffey*, 642 A.2d at 282 (same). Partly this is because the "[t]he mere expenditure of so much time and expense on the part of the State might lead the average lay person to assume that such a defendant must, in fact, be guilty." *Hughes*, 490 A.2d at 1044 (quoted with approval in *Bailey*, 521 A.2d at 1076, and *Coffey*, 642 A.2d at 282). In addition, knowledge that a different group of twelve disinterested jurors found Mr. Watkins guilty would likely have a subconscious effect on the jurors, making it easier for them to convict Mr. Watkins. Jurors would not only feel a certain amount of subtle pressure to conform by voting for guilt as others had, but they would also feel a diminished sense of responsibility for the ultimate verdict.

Given the tremendously prejudicial effect of informing the jury that Mr. Watkins was previously found guilty by a different jury, it simply cannot be said that the jury's guilty verdict in this case "was surely unattributable" to Officer Archuleta's testimony. Accordingly, it was error for the district court to have denied Mr. Watkins' motion for a mistrial.

CONCLUSION

For the foregoing reasons, Mr. Watkins respectfully requests that this Court vacate his conviction and sentence, and that it remand his case for a new trial.

DATED this 16th day of August, 2011.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of August, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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ISCI
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THOMAS J RYAN
DISTRICT COURT JUDGE
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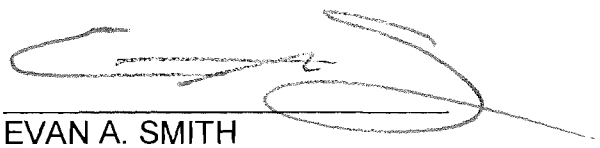
BOISE ID 83720-0010
Hand delivered to the Attorney General's mailbox at the Supreme Court.



EVAN A. SMITH
Administrative Assistant

ERL/eas