

6-7-2017

## State v. Calvillo Appellant's Brief Dckt. 44520

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"State v. Calvillo Appellant's Brief Dckt. 44520" (2017). *Not Reported*. 3591.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/3591](https://digitalcommons.law.uidaho.edu/not_reported/3591)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 44520
Plaintiff-Respondent,	)	
	)	TWIN FALLS COUNTY NO.
v.	)	CR 2010-6298
	)	
VALENTIN CALVILLO,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
<hr style="border: 0.5px solid black;"/>		

---

**BRIEF OF APPELLANT**

---

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

---

**HONORABLE JOHN K. BUTLER**  
District Judge

---

**ERIC D. FREDERICKSEN**  
State Appellate Public Defender  
State of Idaho  
I.S.B. #6555

**JENNY C. SWINFORD**  
Deputy State Appellate Public Defender  
I.S.B. #9263  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**ATTORNEY FOR  
PLAINTIFF-RESPONDENT**

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUE PRESENTED ON APPEAL .....	5
ARGUMENT .....	6
Mr. Calvillo’s Right To A Fair Trial By An Impartial Jury Was Violated Due To The District Court’s Denial Of His Motion For A Mistrial After Two Prospective Jurors Told The Entire Jury Panel That Mr. Calvillo Was Incarcerated And Went Missing .....	6
A. Introduction .....	6
B. The Standard Of Review For The Denial Of A Motion For Mistrial Due To A Biased Jury Is Reversible Error .....	6
C. The Two Prospective Jurors’ Statements That Mr. Calvillo “Was Incarcerated” And “Went Missing” Tainted The Entire Jury Panel Because These Specific Facts Informed The Jury That Mr. Calvillo Was Previously Convicted Of The Instant Offenses Or Other Crimes, Was A Flight Risk Or A Danger To Society, And Had A Guilty Conscience .....	10
D. If The Court Adopts The Harmless Error Standard Of Review, The State Cannot Show Harmless .....	16
CONCLUSION .....	16
CERTIFICATE OF MAILING .....	17

## **TABLE OF AUTHORITIES**

### Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	7, 10
<i>Chapman v. California</i> , 386 U.S. 18 (1967) .....	9
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	9
<i>Estelle v. Williams</i> , 425 U.S. 501 (1976) .....	14
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	7
<i>Gomez v. United States</i> , 490 U.S. 858 (1989) .....	9
<i>Gray v. Mississippi</i> , 481 U.S. 648 (1987) .....	9
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	10
<i>McKaskle v. Wiggins</i> , 465 U.S. 168 (1984) .....	7
<i>Morgan v. Ininois</i> , 504 U.S. 719 (1992) .....	10
<i>Neder v. United States</i> , 527 U.S. 1 (1999) .....	6
<i>Ross v. Oklahoma</i> , 487 U.S. 81 (1988).....	10
<i>State v. Bitz</i> , 93 Idaho 239 (1969).....	13
<i>State v. Calvillo</i> , No. 39529, 156 Idaho 283 (Ct. App. 2014) .....	2
<i>State v. Ellington</i> , 151 Idaho 53 (2011) .....	8, 10, 15
<i>State v. Field</i> , 144 Idaho 559 (2007).....	8
<i>State v. Miller</i> , 131 Idaho 288 (Ct. App. 1997) .....	14
<i>State v. Perry</i> , 150 Idaho 209 (2010) .....	6, 7, 16
<i>State v. Pratt</i> , 160 Idaho 248 (2016).....	11, 13
<i>State v. Slater</i> , 136 Idaho 293 (Ct. App. 2001).....	14
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993) .....	7, 9
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927) .....	7, 9

<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006).....	7
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986).....	7
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	7

Statutes

I.C. § 18-1506.....	1
I.C. § 18-1508.....	1

Rules

I.C.R. 29.1(a).....	10
I.R.E. 404(b).....	2

Constitutional Provisions

IDAHO CONST. art. 1, §§ 7, 13.....	8, 10
U.S. CONST. amends. V, VI, XIV.....	8, 10

## STATEMENT OF THE CASE

### Nature of the Case

At the start of Valentin Calvillo's jury trial, two prospective jurors made inherently prejudicial statements in front of the entire jury panel. These prospective jurors' statements informed the entire jury Mr. Calvillo "was incarcerated" and "went missing." The district court denied Mr. Calvillo's motion for a mistrial based on these statements. The jury found Mr. Calvillo guilty of one count of sexual abuse of a child and six counts of lewd conduct with a minor. Mr. Calvillo now appeals from the district court's judgment of conviction. He asserts his constitutional right to a fair, impartial jury was violated by the prospective jurors' statements, which tainted the entire panel. Due to this constitutional violation, the district court should have granted his motion for a mistrial.

### Statement of Facts and Course of Proceedings

This case began almost seven years ago. In June of 2010, the grand jury indicted Mr. Calvillo on eight counts of lewd and lascivious conduct with a minor (Counts 1, 3–8, and 10), in violation of I.C. § 18-1508, and two counts of sexual abuse of a child (Counts 2 and 9), in violation of I.C. § 18-1506. (Aug. R.,<sup>1</sup> pp.11–15; *see also* Aug. R., pp.48–52 (Amended Indictment).) The alleged conduct occurred between November 16, 2008, and April 20, 2010. (Aug. R., pp.11–15.) Mr. Calvillo pled not guilty and proceeded to trial. (Aug. R., p.56.)

The trial was held in November of 2010. (Aug. R., pp.183–84, 204–07, 208–09, 213–14 (court minutes from four-day jury trial).) On the third day of trial, Mr. Calvillo failed to appear.

---

<sup>1</sup> This Court issued an order augmenting the record with the record from the prior appeal of this case, No. 39529. Citations to the Augmented Record refer to the Clerk's Record in No. 39529 (504 pages).

(Aug. R., pp.208–09, 383.) The trial continued without him. (Aug. R., pp.208–09, 213–14.) Mr. Calvillo’s trial counsel moved to dismiss one of the two counts of sexual abuse (Count 9), which the district court granted, but his counsel failed to present any witnesses in Mr. Calvillo’s defense and waived closing argument. (Aug. R., pp.208–09, 213.) The remaining nine counts were sent to the jury. (Aug. R., pp.213–14.) The jury found Mr. Calvillo guilty on eight of the nine counts, but was unable to reach a unanimous verdict on one of the counts of lewd conduct (Count 3). (Aug. R., pp.213–14, 247–50.) The district court declared a mistrial on that count. (Aug. R., p.214.)

In May of 2011, Mr. Calvillo was located in the San Diego County Jail. (Aug. R., pp.254–55.) His bonding company had returned him from Mexico to California. (Aug. R., p.389; R., p.116 n.1.) The Twin Falls Sheriff’s Office then transported him to the Twin Falls County Jail for sentencing. (Aug. R., pp.265, 276–79, 296.) Mr. Calvillo was sentenced to an aggregate sentence of thirty years, with fifteen years fixed. (Aug. R., pp.419, 429–37.) He timely appealed. (Aug. R., pp.471–74.) The Court of Appeals affirmed the district court’s judgment of conviction. *State v. Calvillo*, No. 39529, 156 Idaho 283 (Ct. App. 2014).

Then, in October of 2015, the district court granted Mr. Calvillo’s petition post-conviction relief and ordered a new trial. (R., p.116.) The State had stipulated Mr. Calvillo’s trial counsel was ineffective. (R., p.116.) In November of 2015, the district court held a status conference and set a new trial date. (R., p.33.)

Before the new trial, the State provided notice of its intent to present evidence of Mr. Calvillo’s “flight to Mexico in the middle of his November, 2010, trial and subsequent return to America,” pursuant to Idaho Rule of Evidence 404(b). (R., pp.92–93.) The State argued the evidence of flight showed consciousness of guilt. (R., pp.94–98.) Mr. Calvillo objected.

(R., pp.109–11.) The district court ruled the evidence of flight was inadmissible. (R., p.123.) The district court reasoned the probative value was substantially outweighed by the prejudicial effect because, in order for Mr. Calvillo to rebut the alleged consciousness of guilt, Mr. Calvillo would have to inform the jury of the circumstances and outcome of the first jury trial.<sup>2</sup> (R., pp.120–23.)

Just prior to trial, the district court ordered the first jury verdict and judgment of conviction vacated. (R., p.171.) The district court also confirmed the dismissed count of sexual abuse from the 2010 trial would not go to the jury (Count 9). (R., p.140.) Therefore, the following nine counts would be presented to the jury: one count of sexual abuse (Count 2) and eight counts of lewd conduct (Counts 1, 3–8, 10).

The district court held a three-day jury trial, beginning on May 31, 2016. (R., pp.176–78, 206–08, 215–16; *see generally* Tr., p.20, L.1–p.562, L.3.) During voir dire, one prospective juror

---

<sup>2</sup> The district court explained:

The defendant and/or his prior attorney have previously offered a number of explanations as to why he failed to appear in the middle of his jury trial: (1) according to his prior attorney the defendant was ill and had gone to obtain medical attention; (2) according to the defendant his attorney “told him to leave”; and (3) according to the defendant he was dissatisfied with his attorney and if [sic] he thought if he did not appear the trial would stop and he could get a new attorney and a new trial.

....

The defendant has previously proffered an explanation for his failure to appear at his jury trial which, in part, relates to what he perceived to be a poor performance or representation on the part of his prior counsel. It is undisputed that the State in the underlying post-conviction case has stipulated to ineffective assistance of counsel which has afforded the defendant a new trial. With this new trial the defendant again has his constitutional presumption of innocence. For the defendant to be compelled to proffer such an explanation may necessarily bring into evidence his prior verdict of guilty which would clearly prejudice the defendant and which this court would not want to be before a new jury

(R., pp.121, 122 (footnote omitted).)



stated in front of the entire jury panel that she “worked at the jail as a nurse while Mr. Calvillo was incarcerated,” and a second prospective juror stated in front of the entire jury panel that he knew Mr. Calvillo from “about 2008 until about the time he went missing.” (Tr., p.37, Ls.4–17.) Mr. Calvillo moved for a mistrial based on the prospective jurors’ statements. (Tr., p.152, L.6–p.153, L.10.) The district court denied his motion. (Tr., p.154, L.15–p.155, L.23.)

After the State’s case-in-chief, the district court granted Mr. Calvillo’s Idaho Criminal Rule 29 motion to dismiss Count 1 of lewd conduct due to insufficient evidence. (Tr., p.424, Ls.9–22, p.425, L.6–p.426, L.17.)

The jury returned a guilty verdict on seven of the remaining eight counts. Specifically, the jury found Mr. Calvillo guilty of one count of sexual abuse (Count 2) and six counts of lewd conduct (Counts 3–7, 10.) (R., pp.209–11; Tr., p.541, L.16–p.543, L.14.) The jury found Mr. Calvillo not guilty of Count 8 of lewd conduct. (R., p.210; Tr., Ls.543, Ls.1–4.) The district court sentenced Mr. Calvillo to an aggregate sentence of thirty years, with fifteen years fixed. (Tr., p.601, L.20–p.602, L.19; R., pp.261–65.) Mr. Calvillo timely appealed from the district court’s judgment of conviction. (R., pp.278–82.)

## ISSUE

Was Mr. Calvillo's right to a fair trial by an impartial jury violated due to the district court's denial of his motion for a mistrial after two prospective jurors told the entire jury panel that Mr. Calvillo was incarcerated and went missing?

## ARGUMENT

### Mr. Calvillo's Right To A Fair Trial By An Impartial Jury Was Violated Due To The District Court's Denial Of His Motion For A Mistrial After Two Prospective Jurors Told The Entire Jury Panel That Mr. Calvillo Was Incarcerated And Went Missing

#### A. Introduction

The Fifth and Sixth Amendments, through the Fourteenth Amendment's due process clause, guarantee criminal defendants the right to a trial by an unbiased jury. Here, Mr. Calvillo asserts his right to an unbiased jury was violated after the entire jury panel learned from two prospective jurors that Mr. Calvillo "was incarcerated" and "went missing." He contends the district court erred by denying his motion for a mistrial due to the prospective jurors' inherently prejudicial statements. Mr. Calvillo further asserts this error amounts to a structural defect, which requires automatic reversal.

#### B. The Standard Of Review For The Denial Of A Motion For Mistrial Due To A Biased Jury Is Reversible Error

In *State v. Perry*, the seminal case on appellate standards of review, this Court outlined the use of certain standards of review to analyze constitutional trial errors.<sup>3</sup> "[A]s a general rule, most constitutional violations will be subject to harmless error analysis." *State v. Perry*, 150 Idaho 209, 223 (2010) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)). The harmless error standard does not require reversal—if the State can show the constitutional error did not contribute to the verdict actually obtained, the error will be deemed harmless. *Id.* at 221–22, 227. Some constitutional violations, however, "so affect the core of the trial process that they require an automatic reversal." *Id.* at 223; *see also id.* at 222 ("some constitutional rights are so basic to

---

<sup>3</sup> This discussion refers to preserved errors only. It excludes unpreserved errors, which are subject to the fundamental error standard. *See Perry*, 150 Idaho at 224–27, 228.

a fair trial that the violation of those rights requires an automatic reversal and is not subject to harmless error analysis”). A structural defect affects “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). “[W]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Perry*, 150 Idaho at 222 (quoting *Fulminante*, 499 U.S. at 310). For this reason, structural defects are “so inherently unfair,” *Perry*, 150 Idaho at 222, that they “defy analysis by the harmless-error standards,” *Fulminante*, 449 U.S. at 309. *Perry*, therefore, designated two distinct standards of review for alleged constitutional errors—reversible error for structural defects<sup>4</sup> and harmless error for all other constitutional violations.

In conflict with *Perry*, the current standard of review for the district court’s denial of a motion for a mistrial combines the reversible and harmless error standard. This Court described the standard of review as follows:

[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

---

<sup>4</sup> The U.S. Supreme Court has found that the following errors constitute structural defects: (1) complete denial of counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)); (2) biased trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)); (3) racial discrimination in the selection of a grand jury (*Vasquez v. Hillery*, 474 U.S. 254 (1986)); (4) denial of self-representation at trial (*McKaskle v. Wiggins*, 465 U.S. 168 (1984)); (5) denial of a public trial (*Waller v. Georgia*, 467 U.S. 39 (1984)); (6) defective reasonable-doubt instruction (*Sullivan v. Louisiana*, 508 U.S. 275 (1993)); and (7) erroneous deprivation of the right to counsel of choice (*United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)).

*Perry*, 150 Idaho at 222.

mistrial will be disturbed *only if that incident, viewed retrospectively, constituted reversible error.*

*State v. Ellington*, 151 Idaho 53, 68 (2011) (emphasis added) (quoting *State v. Field*, 144 Idaho 559, 571 (2007) (pre-*Perry* opinion reviewing the denial of motion for a mistrial due to prosecutorial misconduct)). This standard of review for the denial of a motion for a mistrial refers to a “reversible error,” but also requires the appellate court to view the error “retrospectively” “in the context of the full record” and to consider “the continuing impact on the trial.” *Id.* These requirements that the appellate court consider if, and how, the error ultimately impacted the trial based on all the evidence invoke the “harmless” part of the harmless error standard. As a result, this standard of review contains elements of the reversible *and* harmless error standards. By conflating these two standards, this standard of review is inconsistent with *Perry*.

This Court appeared to recognize this inconsistency in *Ellington*. The *Ellington* Court first described this standard of review “well-settled,” but later explicitly declined to evaluate whether the alleged constitutional error (jury bias) was harmless or reversible. 151 Idaho at 68, 70. Such evaluation was unnecessary in *Ellington* because the Court determined there was no error—the defendant failed to show prospective jurors’ statements biased the empaneled jurors. *Id.* at 70.

However, this conflict in the standard of review is easily resolved. If the alleged constitutional error is one of jury bias caused by a prospective juror’s statement during voir dire, reversible error is the appropriate standard. An unbiased, impartial jury is a constitutional right so basic to a fair trial that it affects the very framework of the trial itself. U.S. CONST. amends. V, VI, XIV; IDAHO CONST. art. 1, §§ 7, 13. “The right to trial by jury reflects . . . ‘a profound judgment about the way in which law should be enforced and justice administered.’ The

deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)) (defective reasonable-doubt instruction is reversible error). In *Gray v. Mississippi*, for example, the U.S. Supreme Court refused to apply the harmless error standard to the improper excusal of a juror for cause “because the impartiality of the adjudicator goes to the very integrity of the legal system.” 481 U.S. 648, 668 (1987) (capital case). The U.S. Supreme Court explained:

We have recognized that “some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. California*, 386 U.S. 18, 23 (1967). The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.* at 23 n.8 (citing, among other cases, *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge)).

*Gray*, 481 U.S. at 668. A couple of years later, in *Gomez v. United States*, the U.S. Supreme Court reiterated this concept in a case where the presiding federal district court judge for a felony trial delegated jury selection to a federal magistrate:

Among those basic fair trial rights that “‘can never be treated as harmless’” is a defendant’s “right to an impartial adjudicator, be it judge or jury.” *Gray*, 481 U.S. at 668 (quoting *Chapman*, 386 U.S. at 23). Equally basic is a defendant’s right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant’s objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

490 U.S. 858, 876 (1989). Similarly, in *Morgan v. Illinois*, the U.S. Supreme Court stated:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. A fair trial in a fair tribunal is a basic requirement of due process. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as indifferent as he stands unsworne. His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 . . . . The theory of the law is that a juror who has formed an opinion cannot be impartial.

504 U.S. 719, 727 (1992) (citations and quotation marks omitted) (quoting *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961) (footnote omitted)) (capital case). As explored in these cases, the right to a trial by a fair, impartial jury is a fundamental right incapable of being harmless. A biased jury, like a biased trial judge or a defective reasonable-doubt instruction, affects “the framework within which the trial proceeds.” *Fulminante*, 499 U.S. at 310. Therefore, this Court should clarify that the jury’s exposure to a prospective juror’s prejudicial statement during voir dire is a structural defect. As a structural defect, this Court should hold that appellate review of the district court’s denial of a motion for a mistrial due to a biased jury is subject to the reversible error standard.

C. The Two Prospective Jurors’ Statements That Mr. Calvillo “Was Incarcerated” And “Went Missing” Tainted The Entire Jury Panel Because These Specific Facts Informed The Jury That Mr. Calvillo Was Previously Convicted Of The Instant Offenses Or Other Crimes, Was A Flight Risk Or A Danger To Society, And Had A Guilty Conscience

As explored above, “A criminal defendant has a constitutional right to trial by an impartial jury.” *Ellington*, 151 Idaho at 69 (citing U.S. CONST. amends. V, VI, XIV; IDAHO CONST. art. 1, §§ 7, 13).

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

*Id.* (quoting *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988) (alteration in original)).

Idaho Criminal Rule 29.1(a) governs a defendant’s motion for a mistrial: “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 trial.” I.C.R. 29.1(a). A defendant’s motion

for a mistrial based on a prospective juror's statement, and the district court's denial of that motion, is *not* sufficient to preserve the issue for appeal. *State v. Pratt*, 160 Idaho 248, 250–51 (2016). Whether or not the defendant renewed his challenge prior to passing the jury for cause is determinative. *Id.* If the defendant subsequently passes the jury for cause, the defendant has “waived any claim that the jury panel was biased.” *Id.* at 250.

Here, the district court posed the following opening question to the prospective jurors:

First, you have heard the charges made in the indictment against the defendant. Other than what I have told you, do any of you know anything about this case either through your own personal knowledge, by discussion with anyone else, or from radio, television, or newspapers? If so, please raise your juror card now.

(Tr., p.35, Ls.20–25.) Four jurors raised their cards. (Tr., p.36, L.1–p.39, L.12.) The first juror (Juror 6) told the district court, “I just seen it television,” but he believed he could be impartial. (Tr., p.36, L.1–p.37, L.2.) After this inquiry, the district court had an exchange with the second and third jurors (Jurors 65 and 70), producing the statements at issue here:

THE COURT: Juror Number 65, Ms. Boston, what is your source of information of this case?

JUROR 65: *I worked at the jail as a nurse while Mr. Calvillo was incarcerated.*

THE COURT: Then, Ms. Boston, you are excused with the thanks for the Court. Juror No. 70, Mr. Bixler, what is your source of information of this case?

JUROR 70: *I had a professional relationship with the defendant.*

THE COURT: Okay. And how long ago might that have been?

JUROR 70: *It was about 2008 until about the time he went missing.*

THE COURT: Okay. And that was -- so have you had any dealings with the defendant since 2008?

JUROR 70: No, sir.

THE COURT: Okay. And do you have -- this is just a yes or no question. Do you have any information relative to this case?



JUROR 70: No.

THE COURT: Do you believe that you can be a fair and impartial juror?

JUROR 70: You know, I knew the defendant.

THE COURT: Hold on. Hold on. It just calls for a yes or no.

JUROR 70: No, sir.

THE COURT: All right. Then, Mr. Bixler, you are excused with the thanks of the Court.

(Tr., p.37, L.4–p.38, L.7 (emphasis added).) The district court then inquired with the fourth juror (Juror 82), who, similar to the first juror, read about the case in the newspaper, but believed he could be impartial. (Tr., p.38, L.8–p.39, L.11.) The district continued with voir dire and allowed the parties to inquire. (Tr., p.39, L.13–p.150, L.13.)

After voir dire, the district court asked, “Pass for cause? May I see counsel for a minute.” (Tr., p.150, Ls.14–15.) The transcript shows a discussion was held off the record. (Tr., p.150, L.16.) After this, the district court informed the prospective jury that “counsel have, at this time, passed for cause” and recessed for lunch. (Tr., p.150, L.17–p.151, L.9.) About five minutes later, and outside the presence of the prospective jury, the district court explained that Mr. Calvillo had “indicated [he] had a motion that [he] wanted to make regarding two juror responses during the Court’s voir dire.” (Tr., p.151, L.19–p.152, L.3.) The district court “indicated that counsel could pass for cause, reserving this issue.” (Tr., p.151, Ls.3–5.) Mr. Calvillo then moved for a mistrial based on Juror 65’s and Juror 70’s statements that Mr. Calvillo “was incarcerated” and “went missing.” (Tr., p.152, L.6–p.153, L.10.) The State objected. (Tr., p.153, L.13–p.154, L.1.) In addition, the prosecutor and Mr. Calvillo disagreed on the prospective jury’s reaction to the statements—the prosecutor did not notice any reaction from the jurors, but Mr. Calvillo observed

“jerks of the head up, eyes widening,” especially with the “went missing” statement. (Tr., p.153, Ls.16–18, p.154, Ls.4–14.)

With regard to the “went missing” statement, the district court reasoned: “The jurors were previously instructed by this Court that the statements of any jurors during the course of voir dire are not evidence for purposes of this proceeding. My assumption is that those jurors, assuming they recall that statement, will follow that instruction.” (Tr., p.155, Ls.3–8.) For the “was incarcerated” statement, the district court reasoned: “Certainly, there’s an inference there that Mr. Calvillo was, perhaps, incarcerated at some time. While I think it is an unfortunate statement, I do not believe that it is a basis for a mistrial.” (Tr., p.155, Ls.12–16.) The district court concluded:

All of the jurors who remain have promised that they would decide this case solely based upon the evidence presented here. Certainly, the two offending jurors were previously excused, so there is no possible further contamination, and so the Court would deny the request for a mistrial at this time.

(Tr., p.155, Ls.17–23.) The district court asked, “Anything further?” and Mr. Calvillo responded, “With that, Judge, just for the record, I will pass the panel for cause, *withholding that objection.*” (Tr., p.155. L.25–p.156, L.3 (emphasis added).)

As an initial matter, Mr. Calvillo asserts his motion for a mistrial and subsequent pass for cause “withholding that objection” preserved this issue for appeal. If an appellant was “dissatisfied with the jury and believed that any juror was prejudiced against him, he should have raised the issue by challenging that juror for cause. His failure to do so indicates a satisfaction with the jury as finally constituted.” *Pratt*, 160 Idaho at 250–51 (quoting *State v. Bitz*, 93 Idaho 239, 243 (1969)). Here, Mr. Calvillo did not waive this issue and “indicate[ ] a satisfaction” with the jury. *Id.* Mr. Calvillo first raised the issue by moving for a mistrial based on the prospective jurors’ statements. (*See* Tr., p.151, L.19–p.152, L.3, p.152, L.6–p.153, L.10.) Then, upon the

district court's denial of his motion, Mr. Calvillo did not give an unqualified pass for cause. He maintained his objection to the jury panel due to the prospective jurors' statements. (*See* Tr., p.155. L.25–p.156, L.3 (“withholding that objection”).) Therefore, as required by *Pratt*, Mr. Calvillo preserved this issue for appeal.

Turning to the statements themselves, Mr. Calvillo contends these statements, taken individually or together, were so prejudicial as to infect the entire jury panel. Each will be addressed in turn.

First, it was improper for the jury to learn from a jail nurse that Mr. Calvillo “was incarcerated.” (Tr., p.37, Ls.6–7.) “The presumption of innocence is a basic component of a fair trial under our system of criminal justice.” *State v. Miller*, 131 Idaho 288, 293 (Ct. App. 1997). “A criminal defendant should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption of innocence guaranteed as part of a defendant’s due process right to a fair trial.” *State v. Slater*, 136 Idaho 293, 301 (Ct. App. 2001) (citing *Estelle v. Williams*, 425 U.S. 501, 504 (1976)). This holding “has been extended to a defendant’s appearance in handcuffs or shackles.” *Id.* Like jail clothes or shackles, the jury’s knowledge that a defendant was incarcerated raises serious due process concerns. This fact of incarceration completely undermined Mr. Calvillo’s presumption of innocence because the jury knew Mr. Calvillo had been in jail or possibly prison. Thus, it informed the jury that Mr. Calvillo had been convicted of other crimes, was previously convicted of the instant offenses, was flight risk for the instant case, or presented such a danger to society that he must be incarcerated pretrial. Further, the statement invited harmful speculation. The jury was left to wonder when Mr. Calvillo was incarcerated, for how long, and why. This incarceration statement and its inferences were inherently prejudicial and therefore biased the jury against Mr. Calvillo.

Second, it was improper for the jury to learn that Mr. Calvillo “went missing” sometime after 2008. (Tr., p.37, Ls.16–17.) The harmful effect of this statement had already been established by the district court. Prior to trial, the district court ruled that evidence of Mr. Calvillo’s flight from the 2010 trial was prejudicial and thus inadmissible. (R., pp.120–23.) The prejudicial effect of Mr. Calvillo’s flight is almost identical to the prejudicial effect of Mr. Calvillo going missing. Both informed the jury of Mr. Calvillo’s guilty conscience. And, again, the jury was left to speculate. Even though the alleged criminal conduct occurred between 2008 and 2010, the trial did not occur until May of 2016. Yet the very first fact the jury learned about Mr. Calvillo during this time period was that he “went missing.” Undoubtedly, questions and inferences arose as to when exactly Mr. Calvillo went missing, where he went, for how long, and why. Like the incarceration statement, this statement was inherently prejudicial and therefore biased the jury against Mr. Calvillo.

Finally, these two statements combined have a prejudicial effect. The entire jury panel was read the charging document of nine sex offenses against a child, learned almost immediately thereafter Mr. Calvillo was incarcerated at some point, and then learned Mr. Calvillo also went missing during or after he committed these offenses. It cannot be said that this chain of events did not prejudice the jury against Mr. Calvillo. Moreover, the district court provided no specific curative instruction for these statements. (*See* Tr., p.23, L.23–p.158, L.20 (initial jury instructions read, voir dire, and preliminary instructions read); R., pp.179–92 (initial instructions), 193–205 (preliminary instructions).) Unlike a “second-hand opinion” from a prospective juror that a defendant was guilty, the jury here received “specific facts” to bias them against Mr. Calvillo. *See Ellington*, 151 Idaho at 69 (“At worst, the jurors who actually deliberated received a second-hand opinion from those three prospective jurors that

Mr. Ellington was guilty. They did not receive any specific facts as to why . . . .”). These statements strongly implied Mr. Calvillo was already guilty of a crime and had a guilty conscience. Because these statements tainted the entire jury panel, the district court should have granted Mr. Calvillo’s motion for a mistrial. Therefore, Mr. Calvillo’s right to a fair, impartial jury was violated and this constitutional error amounts to a structural defect.

D. If The Court Adopts The Harmless Error Standard Of Review, The State Cannot Show Harmlessness

In the alternative, if this Court holds that the harmless error standard applies to appellate review of the denial of a motion for a mistrial based on a biased jury, Mr. Calvillo has met his burden to show a violation of his constitutional right to a fair, impartial jury due to the prospective jurors’ prejudicial statements. *See* Part C. He also contends the district court abused its discretion by denying his motion for a mistrial because it failed to act consistently with the legal standards. The legal standards, outlined in Parts B and C, require the declaration of mistrial due to a biased jury. Further, the State cannot meet its burden to show this constitutional error was harmless beyond a reasonable doubt. *See Perry*, 150 Idaho at 221–22.

CONCLUSION

Mr. Calvillo respectfully requests that this Court vacate the district court’s judgment of conviction and remand this case for a new trial.

DATED this 7<sup>th</sup> day of June, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7<sup>th</sup> day of June, 2017, 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:

VALENTIN CALVILLO  
INMATE #100731  
ISCI  
PO BOX 14  
BOISE ID 83707

JOHN K BUTLER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

JCS/eas