IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0226

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRADLEY JAY HILLIOUS,

Defendant and Appellant.

BRIEF FOR THE MONTANA COUNTY ATTORNEYS' ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLEE STATE OF MONTANA

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Robert B. Allison, Presiding

APPEARANCES

Matthew T. Cochenour
Cochenour Law Office, PLLC
7 West 6th Avenue, Suite 4F
Helena, MT 59601
Phone: 406-413-7004
matt@cochenourlawoffice.com

Attorney for Amicus Curiae
Montana County Attorneys'
Association

Chad Wright
Appellate Defender
Jeff N. Wilson
Assistant Appellate Defender
Office of the State Public
Defender Appellate Defender
Division
PO Box 200147
Helena, MT 59620-0147
JWilson@mt.gov
(406) 444-9505

Attorneys for Defendant
and Appellant

Austin Knudsen
Montana Attorney General
Mardell Ployhar
Assistant Attorney General
215 North Sanders
PO Box 20141
Helena, MT 59620-1401
Phone: 406-444-2026
mployhar@mt.gov

Travis R. Ahner
Flathead County Attorney
John Donovan
Deputy County Attorney
820 South Main Street
Kalispell, MT 59901

Attorneys for Plaintiff
and Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF AMICUS INTEREST

Amicus Montana County Attorneys' Association (MCAA) writes in support of Appellee, State of Montana, to affirm the judgment below. MCAA is a non-profit organization made up of Montana county attorneys, who have a significant interest in the interpretation and application of the jury selection statute at issue: Mont. Code Ann. § 3-15-405. This interest stems from each county attorney's role in ensuring the fair and efficient administration of justice.

MCAA also has an interest in the proper application of the statute and the correct interpretation of what constitutes a substantial violation versus a technical violation. The question presented here—whether, after serving a notice and requesting a response from persons drawn as jurors, the district court clerk's failure to certify and the sheriff's subsequent failure to personally serve non-responders amounts to a "substantial failure to comply" with the jury selection statute—has been addressed in several judicial districts over the past year, with differing approaches.

Most courts have approached whether the clerk and sheriff's failure to follow up on nonresponses constitutes a substantial failure to

comply with the statute by analyzing whether the statutory departure threatens the goals of random selection and objective exclusion of prospective jurors. *See, e.g.,* Doc. 217, Ex. 1 at 21-32 (Order Denying Def.s' Mot. New Trial, *State v. Shaw*, DC-15-2021-378 (Mont. 11th Jud. Dist. Ct. Nov. 9, 2023).

But some courts have taken different approaches, and at least one has sua sponte raised the issue and vacated a jury trial based on its view that there was "no compliance" with the statute, without any analysis of whether the statutory violation impaired the goals of the jury selection statutes. Doc. 211, Ex. A at 5-6 (Order Striking Jury List and Directing the Clerk of District Court to Draw a New Panel, *State v. McCarty*, DC-23-152(A) (Mont. 11th Jud. Dist. Ct. Sept. 1, 2023).

Based on this Court's precedent and federal law relating to the Jury Selection and Service Act of 1968, MCAA's view is that a departure from the jury selection statutes rises to the level of a "substantial" violation only when the departure threatens the twin goals of the jury selection statutes. It asks this Court to confirm that understanding.

Additionally, MCAA asks this Court to revisit its decision in *State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204, applying structural error principles, which are typically reserved for a narrow segment of constitutional violations, to a statutory violation of Montana's jury selection statutes. MCAA fully supports the result of the Court's decision in *LaMere*, given the showing there that the clerk of court's phone-only juror notification process omitted a demographic that was necessary for a fair cross-section of jurors. MCAA asks only that the Court reconsider *LaMere*'s analytical "approach that in practice is difficult to administer and which produces anomalous results." *Sandin v. Connor*, 515 U.S. 472, 483 n.5 (1995).

SUMMARY OF THE ARGUMENT

Not every deviation from the jury selection statutes results in automatic reversal. Only substantial failures to comply—violations that directly or materially affect the random nature or objectivity of the jury selection process—rise to the level of prejudicial error. Technical departures or violations that do not threaten the goals of random selection and objective disqualification do not constitute substantial failures to comply. Based on Montana law, federal law, and the

underlying goals of the jury selection statutes, the failure to follow up on nonresponsive jury notices amounts to a technical violation, not a substantial violation. The absence of follow up does not undermine the goals of random selection and objective disqualification.

Under a correct application of the substantial compliance standard, this Court should affirm the district court's decision denying Hillious's motion for a new trial. While applying the standard can resolve this issue, MCAA urges the Court to reexamine *LaMere* and its application of structural error principles to a statutory violation. Structural error and the remedy of automatic reversal should be limited to only constitutional violations that contaminate the framework of a trial process.

MCAA does not question that the result of reversal in *LaMere* was correct—under the circumstances there, the clerk's phone-only notification disproportionately excluded Native Americans and economically-disadvantaged jurors. Under *LaMere*'s broad analysis, however, automatic reversal can be a remedy for a statutory violation of the jury selection statutes, even in the absence of any constitutional violation. *LaMere*'s analysis is flawed and its application of structural

error to a statutory violation was unnecessary. A reconsideration of *LaMere*'s analysis would not threaten the principles of fairness and integrity central to the jury selection process, but it would prevent unnecessary reversals of convictions for statutory violations that do not prejudice substantial rights.

ARGUMENT

Hillious argues that the district court erred in denying his motion for a new trial based on his view that the clerk's and sheriff's failure to follow up on nonresponsive juror notices constitutes a substantial failure to comply with the jury selection statutes. The State responds that Hillious waived his challenges by failing to raise a timely objection and that his claims are now time barred. *See* Appellee's Br. 31-38. The State also argues that the clerk substantially complied with the jury selection statutes and that, alternatively, this Court should overrule *LaMere* and apply harmless error.

MCAA agrees with the State that the time bars should apply to Hillious's jury challenges and that his claims are untimely under Mont. Code Ann. §§ 46-16-112 and -701. MCAA also agrees with the State's arguments on substantial compliance and its analysis of *State v.*

LaMere, 2000 MT 45, 298 Mont. 358, 2 P.3d 204. Based on MCAA's broader interest in the proper application of the substantial compliance standard and the effect of the *LaMere* decision, this amicus brief focuses on those two issues.

I. The failure to follow up on non-responding juror notices does not constitute a substantial failure to comply with Mont. Code Ann. § 3-15-405.

The United States and Montana Constitutions guarantee criminal defendants the right to a trial by an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24. This includes the right to a jury drawn from sources representing a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *LaMere*, ¶¶ 36-37. Both Congress and the Montana Legislature have enacted statutory procedures to govern the jury selection process and to protect the right to an impartial jury. *See LaMere*, ¶ 57; 18 U.S.C. §§ 1861-1869. The underlying goals of both the state and federal statutes are the random selection of jurors and the exclusion of jurors based on objective criteria. *LaMere*, ¶ 57.

Montana's jury selection statutes direct the clerk of court to "serve notice by mail on the persons drawn as jurors and require the persons

to respond by mail as to their qualifications to serve as jurors." Mont. Code Ann. § 3-15-405. If a person does not respond, the clerk is to "certify the failure to the sheriff, who shall serve the notice personally on the person." *Id*. Based on the record and the parties' briefing, the clerk in this case properly mailed notices to the persons drawn as jurors, but did not certify nonresponsive notices to the sheriff, who in turn, did not personally serve the notices.

A. Under the "substantial compliance" standard, only violations that threaten the goals of random selection and objective juror disqualification are presumptively prejudicial.

Not every deviation from statutory jury selection procedures constitutes prejudicial error. Instead, the Court reviews statutory violations under the "substantial compliance" standard, which examines whether a statutory violation frustrates the goals of the jury selection statutes. Whether a violation is prejudicial hinges on whether it is considered a technical violation or a substantial violation.

A "technical" departure or violation from the jury selection statutes is one that does "not threaten the goals of random selection and objective disqualification." *State v. Bearchild*, 2004 MT 355, ¶ 15, 324 Mont. 435, 103 P.3d 1006. Technical violations, even if they are

numerous, do not constitute a substantial failure to comply. *LaMere*, ¶ 58. Examples of technical violations include removing a juror without the statutorily required in-court examination and failing to follow the statutes concerning the seating of alternate jurors. *Bearchild*, ¶ 14 (juror removal before voir dire); *State v. Oschmann*, 2019 MT 33, ¶¶ 15-16, 394 Mont. 237, 434 P.3d 280 (alternate juror). Technical violations are subject to harmless error analysis. *Bearchild*, ¶ 24.

Unlike a technical violation, a statutory deviation that conflicts with the goals of random selection and objective disqualification amounts to a substantial failure to comply with the jury selection statutes and is presumptively prejudicial. *LaMere*, ¶¶ 60-61. The defendant bears the burden of showing that a statutory violation contravenes the goals of random selection or objective disqualification. *LaMere*, ¶¶ 56, 61. In *LaMere*, the Court determined that the clerk's phone-only notification method of summoning prospective jurors, rather than summoning by mail or personal service as the statute required, undermined the goals of having a randomly drawn jury that was representative of the community and of objectivity in excusing potential jurors. *LaMere*, ¶¶ 70-71.

B. Federal law supports that failing to follow up on nonresponsive juror notices does not threaten the goals of random selection and objective disqualification.

In applying the substantial compliance standard, this Court looks to federal decisions construing the Jury Selection and Service Act of 1968 (JSSA). *LaMere*, ¶ 56. Like Montana's jury selection statutes, the JSSA is intended to protect the right to an impartial jury. The JSSA's underlying policy is in ensuring that juries are "selected at random from a fair cross section of the community" and that all citizens "shall have an obligation to serve as jurors when summoned for that purpose." 28 U.S.C. § 1861. Congress enacted the JSSA to respond to "numerous complaints of racial discrimination" in the jury selection process. *United States v. Esquivel*, 88 F.3d 722, 725 (9th Cir. 1996).

This Court has found federal decisions applying the JSSA "instructive because the Act, like Montana law, utilizes a 'substantial compliance' standard for a reversal" that is designed to protect the same objectives of random selection of jurors and objective criteria in the jury selection process. *LaMere*, ¶¶ 56, 57. As with violations of Montana's jury selection statutes, not every violation of the JSSA is prejudicial. Only violations that constitute a "substantial failure to comply" may be

grounds for dismissal. 28 U.S.C. § 1867. Technical violations that do not frustrate the JSSA's goals of random selection of jurors and objective disqualification are considered insubstantial. *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1167 (9th Cir. 2014) (en banc).

Federal law helps clarify whether a failure to follow up on nonresponsive juror notices constitutes a substantial failure to comply with jury selection statutes. First, the JSSA does not itself mandate that the clerk follow up with nonresponding potential jurors, but allows for discretionary follow-up, backed by criminal sanctions. The JSSA provides that "[a]ny person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form." 28 U.S.C. § 1864(a). Failing to respond is punishable by fines and imprisonment. 28 U.S.C. § 1864(b).

The absence of a mandatory follow-up requirement in the federal Act emphasizes that such follow-up is not a necessary component to fulfilling the goals of randomly selecting juries or objectivity in the selection process. While Montana's statutory requirements differ from the JSSA, the federal and state provisions implement the same

objectives and goals. It would be an incongruous result if the goals of random selection and objective disqualification could be served under a federal system that does not require follow up on unreturned juror notices, yet somehow be violated under the state system when the clerk does not follow up on unreturned juror notices. Thus, failing to follow up under Montana's "certify and serve" provision amounts to a technical violation of the statute, rather than a substantial failure.

Federal courts have rejected challenges based on a failure to follow up on juror questionnaires so long as enough potential jurors responded to meet the needs of the district. *E.g.*, *United States v. Gometz*, 730 F.2d 475, 479-81 (7th Cir. 1984) (although only 30% of people who were sent questionnaires responded, the clerk was not required to follow up when there were sufficient jurors to staff the district's juries and there was no evidence of minority groups being underrepresented due to discrimination); *United States v. Santos*, 588 F.2d 1300, 1303 (9th Cir. 1979) (rejecting challenge to clerk's failure to follow up on unreturned questionnaires and reasoning that the "clerk apparently believed that an 87% Response to the questionnaires was sufficient. We do not disagree.")

Federal courts have also rejected substantial compliance challenges when the defendant fails to link the asserted failure to a constitutional violation. For example, in *United State v. Royal*, which this Court cited heavily in *LaMere*, the First Circuit concluded that the "failure to follow up on the qualification forms, enclosed with summonses, that are not completed and returned does not constitute a substantial violation of the Act in this case, where no fair cross-section violation has been established." 174 F.3d 1, 11 (1st Cir. 1999).

More recently, the Ninth Circuit rejected challenges to a juror questionnaire that used outdated text in the English proficiency question and that contained non-responses to the race and ethnicity questions. *Hernandez-Estrada*, 749 F.3d 1154. Although the government conceded that the questionnaire was outdated and did not use language mandated by the JSSA, the court still required Hernandez to "show that this violation is substantial in that it contravenes the twin policies of the Jury Selection Act." *Hernandez-Estrada*, 749 F.3d at 1167. The court found that no "subjective criteria seeped into the district court's qualification determinations" and that Hernandez had

failed to "show a significant number of wrongful exclusions to render the [JSSA] violation substantial." *Id.* at 1168.

As to the failure of the clerk to follow-up on the unanswered race and ethnicity questions, the Ninth Circuit held that, even if the clerk should have sent back the questionnaires, the violation did not amount to a substantial violation because the failure did not contravene the JSSA's policy goals. The court noted that Hernandez had "not sufficiently established a link between the failure to return the jury questionnaires and any underrepresentation of various distinctive groups in the 2009 qualified jury wheel." *Id.* at 1169-70. Because Hernandez failed to provide sufficient evidence showing substantial violations of the JSSA, the court affirmed the denial of his motion to dismiss. *Id.* at 1170.

C. This Court should determine that the clerk's and sheriff's failure to follow up on unreturned juror notices does not constitute a failure to substantially comply with jury selection statutes.

This Court should hold that the departure from the "certify and serve" provision does not rise to the level of a substantial failure to comply with the jury selection statutes. First, unlike the phone-only notification at issue in *LaMere*, the clerk here employed the method of

notifying jurors described by statute when the clerk served the jury notices by mail, thus avoiding the potential for "human subjectivity to influence the objective, random system" of selecting potential jurors. *LaMere*, ¶ 72 (quotation omitted).

Further, while the clerk and sheriff's office did not certify and personally serve the unreturned notices, those are not failures to substantially comply. As the federal jurisprudence cited above makes clear, the lack of follow-up on unreturned jury notices does not threaten the goals of the jury selection statutes. As mentioned, the JSSA does not mandate follow up and courts have held that the lack of follow up does not amount to a substantial violation. *See Royal*, 174 F.3d at 11; *Gometz*, 730 F.2d at 479-81; *Santos*, 588 F.2d at 1303. The JSSA and federal decisions counsel strongly in favor of holding that a failure to follow up on unreturned juror notices does not undermine the goals of random jury selection and objective disqualification and thus is not a substantial failure to comply.

That is particularly true here given Hillious's failure to even acknowledge his burden under the substantial compliance standard to show that a statutory violation contravenes the goals of random

selection or objective disqualification. *See LaMere*, ¶¶ 56, 61. Further, the arguments that Hillious raises under substantial compliance are unpersuasive. For example, Hillious argues that three out of four requirements of Mont. Code Ann. § 3-15-405, were not satisfied and that this "is plainly not substantial compliance." Appellant's Br. 23. But that misapplies the inquiry. The question is not whether there may have been violations, even several violations, but whether a violation harms the goals of random selection and objective disqualification. *Bearchild*, ¶ 15. Statutory "technical violations—even numerous such violations—that do not frustrate these goals or result in discrimination and arbitrariness do not constitute a substantial failure to comply." *LaMere*, ¶ 58 (citing *Royal*, 174 F.3d at 11).

Hillious also argues that the district court erred by requiring him to show prejudice, a requirement he says this Court overruled in *LaMere*. Appellant's Br. 24. But this Court has held that no showing of prejudice is required only when there has been a substantial failure to comply with the jury selection statutes. *LaMere*, ¶ 66. Indeed, the JSSA's use of the word "substantial" was specifically intended "to allow room for the doctrine of harmless error." *United States v. Bearden*, 659

F.2d 590, 600 (5th Cir. 1981). For technical violations, this Court applies the harmless error standard and requires defendants to show prejudice. *E.g. Oschmann*, ¶ 16. Hillious's argument presumes that the clerk and sheriff's failure to follow up amounts to a substantial failure to comply. But as shown above, it does not.

Moreover, even within the context of substantial compliance, Hillious must show that the failure to follow up constitutes "a violation that undermines the random nature or objectivity of the selection process." *LaMere*, ¶ 61. He has failed to meet that burden. Instead, Hillious speculates that the process here allowed prospective jurors to "shirk jury duty" just as in *LaMere,* but he fails to support that speculation with citation. He also fails to reconcile that the process used involved mailed notices, which is the method authorized by statute, rather than *LaMere*'s phone-only notification method, which automatically excluded people without phones.

Hillious's argument further ignores that, under the statute effective when *LaMere* was decided, the sheriff was bound to "require a response" from a nonresponsive juror. *See* Mont. Code Ann. § 3-15-505 (1997) (compelling sheriff to "require a response to the notice"); *LaMere*,

¶ 15. Under the current statute, the sheriff lacks any authority to "require" a response. *See* Mont. Code Ann. § 3-15-405. If a person wants to "shirk" their duty by not responding, nothing in Mont. Code Ann. § 3-15-405 stands in the way.

For that matter, it is unclear why the statute requires certification and personal service at all given that the statute expressly removed the sheriff's authority to require a response and substituted a requirement to instead "make reasonable efforts to require the person to respond to the notice." *Id*. As the *Shaw* district court observed, this language appears "to be based on the supposition or notion that personal service of a jury notice by a sheriff's officer on a non-responder (who has *already* been lawfully served by mail) and the nebulous 'reasonable efforts' of a sheriff's officers will somehow urge, persuade, cajole, intimidate, or otherwise 'require' a non-responder to respond" to a jury notice. (Doc. 217, Ex. 1 at 23.)

Setting aside whether having sheriff's departments "urge" or "intimidate" non-responsive jurors into responding is good policy, nothing indicates that personal service furthers the goals of the jury selection statutes in providing for random juror selection and objective

reasons for disqualification. As detailed in the *Shaw* district court order and the State's response brief, the personal service requirement does not ensure randomness in the jury selection process, and no evidence supports that an identifiable group is less likely to respond to a jury notice. *See* Doc. 217, Ex. 1 at 21-23; Appellee's Br. 29-30.

Further, as a practical matter, personal service has little to no impact on juror response; indeed, the sheriff's department is successful in personally serving potential jurors only around 10% of the time and it is unknown whether those persons respond to the notice. (Doc. 217, Ex. 1 at 17.) More often, the sheriff's department learns that the person is no longer living at the address. *Id.* Hillious says there has been "significant improvement" since the clerk and sheriff began personally serving jurors. Appellant's Br. 15, 24 (quoting Doc. 218, Ex. E at 76-77). This overstates the clerk's testimony, which explained that there had been improvement based on raised awareness among Montana communities as well as an additional notification mailer, which is not statutorily required. (Doc. 218, Ex. E at 77.)

Finally, Hillious argues that the clerk's and sheriff's failure to follow up "may have" excluded people who are illiterate, poor, or

minorities, and points to "evidence," largely consisting of hearsay articles. Appellant's Br. 26-27. Hillious did not raise these arguments or theories in the district court briefing, and thus, they are not properly before the Court. *See State v. Stewart*, 2000 MT 379, ¶ 30, 303 Mont. 507, 16 P.3d 391 (holding "we do not address issues or theories raised for the first time on appeal.")

In conclusion, the failure of the clerk and the sheriff to follow up on the nonresponsive juror notices, while a deviation from jury selection statutes, does not rise to the level of a substantial failure to comply because it does not undermine the twin goals random selection and objective disqualification.

II. This Court should reexamine *LaMere* and hold that structural error does not apply to statutory violations of jury selection statutes.

MCAA joins the State in asking this Court to reexamine and overrule *LaMere*'s application of structural error principles, which generally apply in only a rare subset of constitutional violations, to violations of the jury selection statutes. MCAA does not make this request lightly. The Court understandably reconsiders decisions rarely, but it will not be bound to manifestly wrong decisions. *Allstate v.*

Wagner-Ellsworth, 2008 MT 240, ¶ 39, 344 Mont. 445, 188 P.3d 1042. In deciding whether to overrule a decision, courts consider factors such as the quality of the decision's reasoning, its practical application, and its consistency with other decisions. *Knick v. Township of Scott*, 588 U.S. 180, 202-03 (2019). These factors favor revisiting *LaMere*.

In general, structural error and its remedy of automatic reversal apply only to the rare type of constitutional violations that render a trial process itself necessarily unfair. Structural errors "are constitutional violations which so infect and contaminate the framework of a trial as to render it fundamentally unfair, requiring automatic reversal." *State v. Blake*, 2016 MT 212, ¶ 9, 384 Mont. 407, 377 P.3d 1213 (quoting *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934). As the Supreme Court has put it, "*[m]ost* constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness. Only the rare type of error—in general, one that 'infect[s] the entire trial process,' and 'necessarily render[s] [it] fundamentally unfair'—requires automatic reversal." *Glebe v. Frost*, 574 U.S. 21, 23 (2014) (internal citation and quotation marks omitted).

LaMere went astray when it adopted a remedy applicable to only "rare" types of constitutional error in a case involving a statutory violation and *no* constitutional error. Curiously, *LaMere* itself recognized that structural error applies to constitutional violations. Indeed, the Court began its analysis by framing the issue as "whether a transgression of the Sixth Amendment's fair cross-section guarantee is amenable to harmless error review." *LaMere*, ¶ 39.

The problem with this inquiry, however, is that LaMere did not bring his claims under the Sixth Amendment. Indeed, the Court stressed that point in rejecting the State's arguments urging the Court to apply the settled three-part test for determining whether the Sixth Amendment's fair cross-section guarantee has been violated under *Duren v. Missouri*, 439 U.S. 357 (1979). *LaMere*, ¶ 62. Ironically, the Court reasoned that applying the *Duren* test would "misapply the constitutional test to an alleged statutory violation." *LaMere*, ¶ 62.

Moreover, nothing in the cases cited by the *LaMere* Court supported applying structural error/automatic reversal to statutory violations. In its analysis, *LaMere* embarked on a deep dive of Supreme Court precedent on trial error and structural error, along the way

noting that, since 1967, the Supreme Court had determined that "most *constitutional* errors can be harmless," and that "only a limited class of *constitutional* violations—'structural errors'—are entitled to a presumption of prejudice." *LaMere*, ¶ 43 (quoting and citing *Arizona v. Fulminante*, 499 U.S. 279, 306, 307-110) (1991) (emphasis added).

After tracing many precedents—all of which concerned constitutional violations—*LaMere* announced that the *Fulminante* decision's discussion of structural error "clearly supports a per se rule of reversal for a statutory violation that affects the fair cross-section guarantee." *LaMere*, ¶ 48. But *Fulminante* said nothing about statutory violations at all. Rather, the issue there was whether harmless error could apply to a wrongly admitted coerced confession.

Fulminante is a deeply splintered decision, with the Court dividing 5-4 in favor of applying harmless error in the context of coerced confessions. And while the Court devoted significant discussion to two types of *constitutional* error—trial error, which is subject to harmless-error review, and structural error, which is subject to automatic reversal—it said nothing about automatic reversal for statutory violations. *See Fulminante*, 499 U.S. at 306-310. The decisions

underlying *LaMere*'s analysis do not support applying a rare constitutional remedy to a statutory violation.

It was also unnecessary to adopt a structural error analysis because there is already an established test for determining whether jury selection procedures satisfy the fair cross-section requirement of the Sixth Amendment. Under *Duren*, a defendant can show a violation of the fair cross-section guarantee by demonstrating (1) that the group allegedly excluded is a "distinctive" group within the community; (2) that the representation of the group in the venires is "not fair and reasonable" relative to the group's numbers in the community; and (3) that the underrepresentation is due to the group's "systematic exclusion" in the jury selection process. *Duren*, 439 U.S. at 364. Notably, federal courts apply *Duren*'s three-part test to determine whether jury selection procedures meet the fair cross-section requirement under both the Sixth Amendment and the JSSA. *See Hernandez-Estrada*, 749 F.3d at 1158.

Although the *Duren* test is designed to determine whether a Sixth Amendment fair cross-section violation has occurred, the Court declined to apply it in *LaMere*. As just discussed, the Court rejected the test

because it felt that would be a misapplication of a "constitutional test to an alleged statutory violation," notwithstanding its application of a constitutional remedy to a statutory violation just paragraphs before. *LaMere*, ¶ 62.

The Court also attempted to distinguish the constitutional test, reasoning that *Duren* applied to challenges to the "jury-selection system" or framework, rather than to challenges based on a failure to comply with the system. *LaMere*, ¶ 64. According to the Court, "LaMere's challenge is premised upon a material failure to comply with the statutory scheme; he is not challenging the jury-selection scheme itself as failing to comport with the Sixth Amendment." *Id*. But in the context of sending juror notifications, this is a distinction without a difference. If the clerk's office routinely sends jurors notice in a way that deviates from the statute, then that has become the applicable "jury-selection system." In other words, a challenge to a systematic "failure to comply" with the statutes amounts to the same thing as a challenge to the jury-selection system itself.

There was no reason to seemingly limit *Duren* to challenges to a statutory jury-selection system. Moreover, as *LaMere* observed,

Montana's jury selection statutes are intended to protect the Sixth Amendment rights to an impartial jury, including the fair cross-section guarantee. *LaMere*, ¶ 35. Given that the *Duren* test provides a framework to determine whether a jury-selection system has violated the Sixth Amendment's fair cross-section guarantee, there is no need for structural error or automatic reversal in this context.

In sum, while *LaMere*'s discussion and analysis of structural error might justify treating a constitutional violation of the Sixth Amendment's fair cross-section guarantee as a structural error, there is no reason to treat a statutory violation as a structural error. The problem under *LaMere* is that it is possible to have a structural error and automatic reversal even when there has been no constitutional violation. Indeed, in the past year, a court struck a jury panel based on its view that county officials had committed structural error in the jury selection process, even though the defendant had filed no motion with the court. Doc. 211, Ex. A. In doing so, the court observed that, "Significantly, the Court is not determining this failure violated any of the Defendant's constitutional rights, which would require a different analysis and likely evidence of prejudice." *Id.* at 5 n.2. But this rationale

highlights the problem: in the absence of a constitutional violation, structural error should not apply. MCAA thus asks this Court to revisit its decision in *LaMere* applying structural error to statutory violations.

CONCLUSION

MCAA asks this Court to determine that the county officials' failure to follow up on nonresponsive juror notices is not a substantial failure to comply with the jury selection statutes. Additionally, MCAA asks this Court to reexamine *LaMere* and hold that the structural error principles do not apply to statutory violations.

Respectfully submitted this 27th day of June 2024.

/s/ *Matthew T. Cochenour*
Matthew T. Cochenour
Attorney for Montana County Attorneys' Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count excluding caption, tables, certificates, and signature blocks is 4,947 as calculated by Microsoft Word.

Dated this 27th day of June 2024.

/s/ *Matthew T. Cochenour*
Matthew T. Cochenour
Attorney for Montana County Attorneys' Association

CERTIFICATE OF SERVICE

I, Matthew Thompson Cochenour, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 06-27-2024:

Travis R. Ahner (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: State of Montana
Service Method: eService

Jeff N. Wilson (Attorney)
PO Box 200147
Helena MT 59620
Representing: Bradley Jay Hillious
Service Method: eService

Mardell Lynn Ployhar (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Electronically Signed By: Matthew Thompson Cochenour
Dated: 06-27-2024