

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY**STATE OF MONTANA,  
Plaintiff,

vs.

JUSTIN DEAN KALINA,  
Defendant.CAUSE NO. DC 20-1474  
JUDGE DONALD L. HARRIS**ORDER DENYING MOTION FOR NEW TRIAL**

BEFORE THE COURT is Defendant, JUSTIN DEAN KALINA's, *Opposed Motion for New Trial Based on Jury Structural Error*. Kalina alleges that the procedure used to assemble the jury in his trial did not substantially comply with the statutory scheme set forth under Montana law and, therefore, he did not receive a fair trial. The State asserts any deviation from the jury selection statutes was a technical violation, not a substantial violation, and the motion should be denied. The Court has reviewed the briefs and the record, and now deems this matter ripe for decision without a hearing.

**FACTUAL BACKGROUND**

The State charged Kalina with Count I: Assault with a Weapon (Felony); Count II: Violation of Order of Protection 3<sup>rd</sup> of Subsequent (Felony); and Count III: Tampering and Witnesses and Informants (Felony). On December 28, 2020, Kalina's counsel signed the Omnibus Hearing Memorandum. On December 30, 2020, the Court approved the Omnibus Hearing Memorandum.

1 Under the subsection titled “XV. TRIAL MATTERS,” page five of the omnibus form states “3. The  
2 parties agreed that the jury panel will be called in the order drawn by the Clerk of Court, and waive  
3 being present at the drawing.” Dkt. 78, p. 5. Trial commenced on October 31, 2022. A jury convicted  
4 Kalina of all three counts on November 3, 2022.

5  
6 Bernie Wahl, the Senior Deputy Jury Clerk for the District Court in Yellowstone County  
7 submitted an Affidavit in support of the State’s response brief. *See* Dkt. 238, Ex. A (hereinafter “Wahl  
8 Aff.”). Ms. Wahl also testified at hearings before The Hon. Judge Knisely and the Hon. Judge Fehr  
9 regarding this issue. *See* Thirteenth Judicial District Court Cause Nos. DC 21-1336; DC 20-1260. On  
10 November 21, 2023, Ms. Wahl testified about the process for jury selection during the term of  
11 September 1<sup>st</sup> 2022, through August 31<sup>st</sup> 2023. *See* Wallace Transcript, p. 5 at l. 14. Ms. Wahl testified  
12 to the following facts which are also documented in her Affidavit:  
13

- 14 1. As Senior Deputy Jury Clerk of Yellowstone County, Ms. Wahl’s duties include managing  
15 the jury pool for jury trials in Yellowstone County, making determinations about juror’s  
16 requests for excusal for reasons allowed under Montana statute, and drawing jury venires  
17 as ordered per the court. Wallace Transcript. p. 4, ln. 24- p.5, ln. 8; Wahl Aff. p.3. *See*  
18 Mont. Code Ann. §§ 3-15-312 and 3-15-313.  
19
- 20 2. Ms. Wahl was responsible for drawing jury venires for the 2022-23 jury term, including  
21 the jury venire for Kalina’s trial. Wallace Transcript p. 5, ln. 21-24; Wahl Aff. ¶ 23.  
22

### 23 **General Jury Pool Formation**

- 24 3. Jury terms occur from September 1<sup>st</sup> through August 31<sup>st</sup> of any given year. Wallace  
25 Transcript, p. 5 at ll. 9-10. In May of each year, the Supreme Court Administrator’s Office  
26 (OCA) generates a jury list for each county that includes all active registered voters,  
27 licensed drivers, and holders of Montana identification cards who are 18 years of age or  
28

1 older in that county. Wahl Aff. ¶ 2. The OCA provides the juror list to each clerk of district  
2 court in each respective county. *Id.*

- 3 4. Ms. Wahl uses the OCA's list in her duties as jury clerk<sup>1</sup>. The list is imported into the  
4 Clerk's State-provided jury software program. Wahl Aff. ¶ 2. The jury software uses a  
5 randomized computer process to assign a number to each name on the OCA's initial list.  
6 Wallace Transcript, p. 26 at ll.1-11; Mont. Code Ann. § 3-15-402. The Clerk creates sub-  
7 pools of jurors for each court in the jurisdiction, accounting for the total number of jurors  
8 each court needs in the upcoming term. Mont. Code Ann. § 3-15-404(6). A person's name  
9 cannot appear on more than one court's jury sub-pool list for the ensuing year. Mont. Code  
10 Ann. §§ 3-15-402 and 404(5).  
11  
12 5. The Clerk has been using the same process for many years. Ms. Wahl was trained on the  
13 same process when she started the job in 2015. Wallace Transcript, pp. 26-27.  
14  
15 6. The Clerk uses the jury software to manage the list of names and addresses, to mail juror  
16 questionnaires, and to pull jury venires. Wallace Transcript, p. 5 at ll. 1-5.  
17  
18 7. The jury software allows each name/address to be designated a status. At the beginning of  
19 jury term, the software designates each juror "no status" by default. Wallace Transcript, p.  
20 10 at ll. 21-22. The Clerk may categorize the names into the following statuses:  
21  
22 • "Temporary Excusal" includes jurors the Clerk has excused from jury service for  
23 that trial term only.  
24 • "Notice Not Deliverable" includes jurors whose jury notice was returned by the  
25 United States Postal Service (USPS) as undeliverable with no forwarding address  
26 or a forwarding address outside of Yellowstone County.  
27 • "Available With Questionnaire" includes jurors who responded to the jury notice  
28 by submitting a questionnaire.  
• "Deceased/Permanently Excused" includes jurors who the Clerk has determined is  
deceased or the Clerk has permanently excused from jury service.

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<sup>1</sup> The Court will refer to the Yellowstone County Clerk of District Court, the Senior Deputy Jury Clerk, or employees conducting official business on their behalf as "the Clerk."

- “No Status” includes jurors whose jury notice was not returned as undeliverable, but the person did not return a jury questionnaire and had no contact with the Clerk.<sup>2</sup>

*See* Wahl Aff. ¶¶ 11-15.

8. The Clerk uses a third-party contractor, Mail Technical Services, to identify any invalid addresses contained in the data from the OCA’s list and removes them. Wahl Aff. ¶ 7.
9. At the end of May, the Clerk prepares and mails questionnaires to the list of prospective jurors. Wallace Transcript, p. 5 at ll. 6-7. The Clerk includes a stamped return envelope for the juror to mail their completed questionnaire. See Transcript for December 15, 2023 Hearing in *State v. Shen* Thirteenth Judicial District Court Cause No. DC 20-1260, p. 5.
10. There are always questionnaires that are deemed “undeliverable.” Wahl Aff. ¶ 8. The postal service makes the determination that mail is undeliverable and returns the mail to the Clerk. *Id.*
11. The postal service returns some jurors’ questionnaires as “undeliverable” but includes a forwarding address. Wallace Transcript p. 12, ll. 3-14. If the forwarding address is in Yellowstone County, the Clerk sends a questionnaire to the new address. *Id.*, p. 11 at ll. 20-24.
12. The Clerk’s office does not attempt service on questionnaires that are returned as “undeliverable” with no forwarding address. Wahl Aff. ¶ 8.
13. Jurors entered as “Notice Not Deliverable” due to an invalid address or returned mail are done so using a toggle system that is switched back at the start of the new jury term. Wahl Aff. ¶ 13.

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<sup>2</sup> After September 5, 2023, the jury software was updated to include an additional status called “Available Without Questionnaire,” but this status was not in place during the 2022-23 jury term in question. Wahl Aff. ¶ 9.

- 1 14. The Clerk has the duty and responsibility to excuse jurors from jury service for qualifying  
2 reasons under Mont. Code Ann. §§ 3-15-312, -313; Wahl Aff. ¶ 14.
- 3 15. Jurors who write jokes or derogatory remarks on a juror questionnaire are not  
4 automatically dismissed from the jury pool. Wahl Aff. ¶ 17. Similarly, jurors who return  
5 incomplete questionnaires are not automatically dismissed. *Id.* These jurors remain in the  
6 jury pool. *Id.*
- 7 16. The jury software is not able to generate a number for permanently excused jurors each  
8 year. *Id.* Permanent excusals fall into the following categories:  
9  
10 a) Deceased;  
11 b) Medical reasons that are supported by medical provider's statement; or  
12 c) Duplicate juror profiles.
- 13 Wahl Aff. ¶ 15.
- 14 17. Individuals who are 75 years old and older may request to be excused without medical  
15 documentation. Wallace Transcript, p. 14 at ll. 1-4. Those individuals over 75 years old are  
16 not removed from the jury pool unless they request to be removed. Wahl Aff. ¶ 18; *See*  
17 Wallace Transcript, p. 27 at ll. 14-16.
- 18 18. For those jurors who have medical issues but have not provided a doctor's statement, the  
19 Clerk mails a letter requesting such documentation. Wallace Transcript, p. 28 at ll. 1-3.  
20 Once the Clerk receives the doctor's note, the juror is either temporarily or permanently  
21 excused depending on the note. Wahl Aff. ¶ 19.
- 22 19. For jurors who leave Montana in the winter months, the Clerk notes in the jury software  
23 which dates they are gone so those jurors are not called for jury duty while out of state.  
24 Wahl Aff. ¶ 20.
- 25  
26  
27  
28

1 20. The Clerk continues to process any questionnaires that are returned throughout the jury  
2 term and changes the juror's status as appropriate. Wallace Transcript, p. 30 at ll. 2-3.

3 **Jury Pool Formation for the Term of Kalina's Trial**

4 21. For the 2022-23 jury term, the Clerk sent out between 25,000 and 30,000 questionnaires.

5 Wahl Aff. ¶ 3; Wallace Transcript, p. 6 at ll. 12-14.

6 22. The State updated the jury software that the Clerk uses in May of 2023. Wahl Aff. ¶ 21.

7 During the software update, some addresses with unit and apartment numbers were  
8 incorrectly imported. *Id.* The update did not impact juror addresses for the 2022-23 jury  
9 pool. *Id.* ¶21

10 23. The number of jurors in each status category when Kalina's jury venire was pulled were:

- 11  
12 a) Temporary Excusal—492  
13 b) Notice Not Deliverable—1,900  
14 c) Available with Questionnaire—9,500  
15 d) No Status—13,610

16 Wahl Aff. ¶ 12.

17 24. The jury venire for Kalina's trial was randomly drawn by the jury software from jurors  
18 with the status "Available with Questionnaire." Wahl Aff. ¶ 10. At the time of Kalina's  
19 trial, the jury software did not have a mechanism that would allow a jury venire to be  
20 pulled from both the status "Available with Questionnaire" and those jurors with "No  
21 Status." *Id.*

22 25. Per order of this Court, 125 jurors were randomly drawn and summoned for trial. Wahl  
23 Aff. ¶ 23; *See also* Wallace Transcript, p. 25 at l. 23 – p. 26 at l. 8. The Clerk mailed each  
24 juror a summons to attend voir dire on October 31, 2022, per the usual process. Wahl Aff.  
25 ¶ 23; Wallace Transcript, p. 25 at ll. 4-10.

1 26. This Court reviewed and determined each affidavit of excusal prior to Kalina's trial. Wahl  
2 Aff. ¶ 23. The Court found good cause to excuse 32 jurors based upon their affidavits.

3 Wahl Aff. ¶ 23.

4 27. Eight jurors did not appear at voir dire on October 31, 2022, per the summons. Wahl Aff. ¶  
5 23.

6 28. There were no objections to the qualifications of the empaneled jury, and the parties  
7 passed the jury for cause.

8  
9 Kalina alleges structural error in the formation of the jury venire from which the jury for his  
10 trial was selected. Kalina argues that the Clerk is required, under Mont. Code Ann. § 3-15-405, to  
11 certify a list of individuals who did not respond to the jury questionnaire to the Yellowstone County  
12 Sheriff's Office for personal service. Kalina contends that the Clerk's failure to do so amounts to an  
13 infringement on his right to a fair and impartial jury.

14  
15 The State argues that Kalina's motion is untimely, and unsupported by an affidavit as required  
16 under Montana law. The State contends that the District Court's method of assembling jurors  
17 substantially complied with Montana's jury selection statutes and any deviation from the statutes is a  
18 technical error which did not affect Kalina's rights.

## 19 20 **DISCUSSION**

### 21 **I. Kalina's Motion is Untimely under Mont. Code Ann. § 46-16-112.**

22 Montana law provides the procedure for challenging the manner a jury panel has been selected  
23 or drawn, stating:

24  
25 (1) Any objection to the manner in which a jury panel has been selected or  
26 drawn must be raised by a motion to discharge the jury panel. Except for  
27 good cause shown, the motion must be made at least 5 days prior to the  
28 term for which the jury is drawn.

(2) The motion must be in writing supported by affidavit and must state  
facts that show that the jury panel was improperly selected or drawn.

1 (3) If the motion states facts that show that the jury panel has been  
2 improperly selected or drawn, it is the duty of the court to conduct a  
hearing. The burden of proof is on the movant.

3 (4) If the court finds that the jury panel was improperly selected or drawn,  
4 the court shall order the jury panel discharged and the selection or drawing  
of a new panel in the manner provided by law.

5 Mont. Code Ann. § 46-16-112.

6 Kalina's trial began on October 31, 2022, and this motion was filed on March 6, 2024. Kalina  
7 contends that, in the absence of evidence to the contrary, he presumed the Clerk and Sheriff complied  
8 with the requirements of Mont. Code Ann. § 3-15-405.  
9

10 Mont. Code Ann. § 46-16-112 creates a duty to raise *any* objection to the jury panel prior to  
11 trial. This duty implies that the parties also have a duty to *investigate* any potential objections prior to  
12 trial. In *Dvorak v. Huntley Project Irrigation District*, the Montana Supreme Court held that the  
13 parties had a right to rely on the judge and the clerk to follow their statutory duties in the context of  
14 the statutory method for achieving random jury selection. *Dvorak v. Huntley Project Irrigation*  
15 *Dist.* (1981), 196 Mont. 167, 639 P.2d 62. The Montana Supreme Court has contemplated no such  
16 right to presume the requirements of Mont. Code Ann. § 3-15-405 are strictly followed because minor  
17 deviations, as alleged here, do not constitute a substantial failure to comply and do not give rise to a  
18 presumption of prejudice. *See State v. LaMere*, 2000 MT 45, ¶ 55, 298 Mont. 358, ¶ 55, 2 P.3d 204, ¶  
19 55.  
20  
21

22 In *State v. LaMere*, the Montana Supreme Court took guidance from federal caselaw  
23 developed under the Jury Selection and Service Act of 1968 (JSSA). The *LaMere* Court reasoned that  
24 both the JSSA and Montana law utilize a “substantial compliance” standard for reversal, and both  
25 ensure these same basic objectives—random selection of prospective jurors and determining juror  
26 competency and excuses on the basis of objective criteria. *LaMere*, 2000 MT 45 ¶ 56-57, P.3d 204 ¶  
27 56-57. *See generally* 28 U.S.C.S. §§ 1861-1878. Similar to the Montana statute for a motion to  
28



1 discharge jury panel, the JSSA requires that a motion to dismiss or stay the proceedings on the  
2 grounds of substantial failure to comply with the provision of the JSSA in selecting the jury be made  
3 “before the voir dire examination begins, or within seven days after the defendant discovered or could  
4 have discovered, by the exercise of diligence, the grounds therefor.” 28 U.S.C.S. § 1687. To establish  
5 a violation under the JSSA, a defendant must make a *timely* showing that the government  
6 substantially failed to comply with the methods set forth by statute for jury selection. Federal caselaw  
7 has required strict adherence to the statutory deadline for challenging jury selection procedures. *See*  
8 *United States v. Silverman* (2d Cir. 1971), 449 F.2d 1341 (Because the defendant failed to raise any  
9 objection to a juror’s serving on the jury until after his conviction, his attack on that conviction could  
10 not be grounded on the juror’s disqualification under the JSSA); *United States v. Nix* (W.D.N.Y.  
11 2017), 264 F. Supp. 3d 429 (Following their convictions, defendants were not entitled to dismissal of  
12 their indictments on the grounds that the jury venire, which contained only three African-Americans,  
13 violated the fair cross-section of the community requirements of the JSSA because the motion was  
14 untimely and procedurally defective pursuant to 28 U.S.C.S. § 1867).

15 The Court finds the federal caselaw instructive. Here, the remedy to be afforded is not a new  
16 trial but a stay of proceedings until a new jury can be selected in conformity with the statute.  
17 Accordingly, the time period set by the statute must be strictly enforced, and a challenge to the panel  
18 on the grounds that it was not selected from a fair cross-section of the community must be made prior  
19 to voir dire.

## 20 **II. Kalina’s Motion is Procedurally Defective.**

21 Under Mont. Code Ann. § 46-16-112, the movant has the burden of proof to show that the jury  
22 panel has been improperly selected or drawn. Kalina’s motion does not include a sworn affidavit to  
23 suggest any facts that would require the Court to conduct a hearing. While the Court takes judicial  
24

1 notice of the established facts surrounding this issue, those facts do not amount to a violation of  
2 Kalina’s right to a fair and impartial jury (see discussion below). The Court declines Kalina’s request  
3 for a hearing on the issue because there is no indication that Kalina could present evidence to show  
4 that the jury panel was improperly drawn or selected.  
5

6 **III. Kalina’s Counsel had Actual Notice of the Problem, and the Motion is Untimely.**

7 Montana law governs motions for new trial, providing,

8 (1) Following a verdict or finding of guilty, the court may grant the defendant  
9 a new trial if required in the interest of justice. A new trial may be ordered by  
10 the court without a motion or may be granted after motion and hearing.

11 (2) The motion for a new trial must be in writing and must specify the grounds  
12 for a new trial. The motion must be filed by the defendant within 30 days  
13 following a verdict or finding of guilty and be served upon the prosecution.

14 Mont. Code Ann. §46-16-702. The grounds for new trial include “newly discovered evidence material  
15 for the party making the application that the party could not, with reasonable diligence, have  
16 discovered and produced at the trial.” Mont. Code Ann. § 25-11-102. For this type of motion, the rule  
17 states that “the motion shall be made only on affidavits.” Mont. Code Ann. § 25-11-104.

18 Kalina argues that the motion is timely under Mont. Code Ann. § 46-16-702 because he filed  
19 his first motion for new trial within 30 days of his guilty verdict, but neither he nor the Court  
20 discovered the evidence within those 30 days. He also argues that he filed this motion, his second  
21 motion for new trial, within 30 days of discovering the issue. Kalina states, without a supporting  
22 affidavit, that he did not discover evidence of the alleged structural error in the drawing of the jury  
23 venire for his October 31<sup>st</sup> 2022 trial until February 14, 2024, after defense counsel contacted the  
24 Clerk about jury selection in his case. *See* Dkt. 234, p. 2. In his brief, Kalina also acknowledges that  
25 his counsel knew of the issue on September 5, 2023, when some of the Departments of the Thirteenth  
26 Judicial District Court issued a stay on jury trials. Kalina does not attempt to explain the six-month  
27  
28

1 lapse between the time his counsel received notice of the Clerk's deviation, and the date this motion  
2 was filed.

3 Kalina cites caselaw to support his position that this issue is timely. In *Dvorak*, the appellant  
4 first objected to the manner of drawing the preselected jury list for the trial a week after the verdict  
5 had been entered but before filing a motion for new trial. *Dvorak v. Huntley Project Irrigation*  
6 *Dist.* (1981), 196 Mont. 167, 171, 639 P.2d 62, 64. The appellant presented evidence that the clerk  
7 drew jurors' names on paper slips (that were not in capsules) from a metal box. *Id.* The box was not  
8 shaken before the clerk drew the names, and the clerk drew the names outside of the presence of the  
9 district judge. *Id.* The Montana Supreme Court noted that "if counsel does not have the knowledge, or  
10 means of knowledge, of the irregularity in the drawing of the jury, or the panel from which it is  
11 selected until after the verdict, the question may be raised for the first time on a motion for new trial."  
12 *Id.* (citing *Ledger v. McKenzie* (1938), 107 Mont. 335, 85 P.2d 352). In *Dvorak*, the appellant could  
13 not have known that the clerk drew slips in violation of Mont. Code Ann. §§ 25-7-202 and -204 until  
14 after the clerk drew the slips. *See Solberg v. Cty. of Yellowstone* (1983), 203 Mont. 79, 84, 659 P.2d  
15 290, 292 (Counsel had a right to rely on the judge and clerk to follow their statutory duties because,  
16 although appellant's counsel knew that the jury was preselected, it does not follow that he knew or  
17 should have known that the proper procedures were not followed).

18  
19 The Court finds that this case is distinguishable from *Dvorak* and *Solberg*. The court in  
20 *Dvorak* and *Solberg* addressed deviations that impacted the randomness of the jury draw, which is not  
21 the issue here. Kalina asserts, without supporting affidavit, that counsel could not have known of the  
22 deviation from the statutory process prior to trial. However, the Court finds this unpersuasive. The  
23 process that the Clerk used in Kalina's trial had been in place for many years. If a simple email sent  
24 on February 13, 2024 illuminated the Clerk's practices, it follows that counsel could have inquired  
25  
26  
27  
28

1 prior to trial to ensure the jury selection process was satisfactory. Furthermore, Kalina acknowledges  
2 that his counsel had notice of the deviation in the Clerk's process on September 5, 2023, yet his  
3 counsel did not reach out to the Clerk about Kalina's case until February 13, 2024, over five months  
4 after counsel had notice of the issue. The Court finds that Kalina has not presented good cause for the  
5 delay in raising his objection.  
6

7 The Court concludes that Kalina had notice of the issue on September 5, 2023, and the  
8 opportunity to investigate the issue within 30 days of that date. Kalina was represented by counsel  
9 before trial, during trial, and during the pendency of his post-trial motions. The Court finds that  
10 Kalina could have discovered the issue with reasonable diligence. Kalina presented no evidence why  
11 counsel could not have contacted the Clerk prior to trial to inquire about the jury selection process. If  
12 not before trial, counsel had actual notice on September 5, 2023, when some of the departments of the  
13 Thirteenth Judicial District Court acknowledged deviation from the jury selection statutes. Thus, the  
14 30-day deadline for filing a motion for new trial expired at the latest on October 5, 2023. Kalina filed  
15 this motion On March 6, 2024, over six months after the district court acknowledged the issue.  
16  
17

18 The holdings in *Dvorak* and *Solberg* are not meant to indefinitely extend the deadline for  
19 filing a motion for new trial. It is antithetical to the purpose of the deadline in the statute for a party to  
20 be allowed to neglect its duty to investigate the jury selection process and hold the clock from ticking  
21 until the party decides to investigate. The Court is not persuaded by Kalina's argument that he could  
22 not have discovered this evidence until February 14, 2024. The motion is untimely under Mont. Code  
23 Ann. § 46-6-702.  
24

25 In *State v. Morse*, 2015 MT 51, 379 Mont. 249, 343 P.3d 1196, the Montana Supreme Court  
26 observed that a district court is not rendered powerless to act upon learning of facts potentially  
27 warranting a new trial simply because it learned of those facts through an untimely defense motion  
28

1 for a new trial. *Morse*, ¶¶ 25-29. The *Morse* Court held that under Mont. Code Ann. § 46-16-702(1), a  
2 court may provide a remedy under such circumstances when required by the interests of justice. *Id.* In  
3 light of the Court’s discussion above finding that Kalina had actual notice of the irregularity on  
4 September 5, 2023, the Court concludes the interests of justice and judicial economy are not served  
5 by allowing defense counsel to delay raising the objection for over six months after the issue was  
6 known.  
7

#### 8 **IV. Kalina’s Constitutional Challenge to the Jury Selection Process is Waived.**

9 Montana law states “failure of a party to raise objections or to make requests that must be  
10 made prior to trial” constitutes a waiver of the defense, objection, or request. Mont. Code Ann. § 46-  
11 13-101. Kalina explicitly agreed that “the jury panel will be called in the order drawn by the Clerk of  
12 Court” on the Omnibus Memorandum form. The process the Clerk has used to call jurors was in place  
13 for many years, and inquiry of the Clerk could have revealed the jury selection process that Kalina  
14 consented to on the omnibus form. An acquiescence in error takes away the right of objecting to it.  
15 Mont. Code Ann. § 1-3-207; *State v. Jackson*, 2009 MT 427, 354 Mont. 63, P.3d 1213 (Defendant  
16 waived an argument regarding the use of a non-visible leg restraint during trial without a finding that  
17 his behavior warranted the brace because his only objection was to the visibility of the restraints).  
18 Here, Kalina’s acquiescence to the process of drawing the jury venire from those individuals who had  
19 returned their questionnaires waives his right to object to it later.  
20  
21  
22

#### 23 **V. Even if Timely Raised, Kalina Fails to Establish a Constitutional Violation.**

24 The Sixth Amendment guarantees criminal defendants the right to be tried by an impartial  
25 jury. U.S. Const. amend. VI. The United States Supreme Court has stated, “[t]he Constitution  
26 presupposes that a jury selected from a fair cross section of the community is impartial, regardless of  
27 the mix of individual viewpoints actually represented on the jury, so long as the jurors can  
28

1 conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular  
2 case.” *Lockhard v. McCree*, 476 U.S. 162, 184 (1986). The Montana Supreme Court has  
3 acknowledged that although a defendant has no right to have a particular juror sit on his/her case, a  
4 defendant is “entitled to a fair cross section of the jury panel” from which the trial jury is chosen.  
5  
6 *State v. LaMere*, 2000 MT 45, ¶ 37, 298 Mont. 358, 2 P.3d 204 (citations omitted).

7 In order to establish a prima facie violation of the fair cross-section requirement, the  
8 defendant must show:

- 9 (1) that the group alleged to be excluded is a "distinctive" group in the  
10 community;  
11 (2) that the representation of this group in venires from which juries are  
12 selected is not fair and reasonable in relation to the number of such persons  
13 in the community; and  
14 (3) that this underrepresentation is due to systematic exclusion of the group  
15 in the jury-selection process.

16 *Duren v. Missouri*, 439 U.S. 357, 357, 99S. Ct. 664, (1979).

17 In *State v. LaMere*, the Montana Supreme Court held that substantial compliance with the  
18 statutory procedures for jury selection is necessary to meet the constitutional requirement of a speedy,  
19 public trial by an impartial jury. *LaMere*. ¶32 (citations omitted). However, “not every violation of the  
20 statutory process governing the formation of a trial jury results in reversal.” *State v. Bearchild*, 2004  
21 MT 355, ¶ 15, 324 Mont. 435, 103 P.3d 1006. Technical departures from the jury selection statutes  
22 and violations which do not threaten the goals of random selection and objective disqualification do  
23 not constitute a substantial failure to comply. *Bearchild* ¶ 15 (citing *LaMere*, ¶38). Harmless error  
24 applies to technical or immaterial violations of the jury selection statutory scheme. *Bearchild* ¶ 24  
25 (citing *LaMere*, ¶¶ 60-61). Montana’s harmless error statutes provides that “[a]ny error, defect,  
26 irregularity, or variance that does not affect substantial rights must be disregarded.” Mont. Code Ann.  
27 § 46-20-701(2).  
28

1 In *LaMere*, a Native American defendant appealed the district court's denial of a pre-trial  
2 motion to strike the entire jury panel on the grounds that the clerk's process of summoning jurors only  
3 by telephone constituted a substantial failure to comply with the statutory procedures for jury panel  
4 selection. *Bearchild*, ¶ 16. The defendant presented statistical data showing that a disproportionate  
5 number of Native Americans and persons living below the poverty line were excluded from the jury  
6 pool because they did not own a telephone. The *LaMere* Court held that the failure to summon jurors  
7 by mailing or personally serving prospective jurors with written jury summons constituted a material  
8 failure to substantially comply with the statute and was structural error affecting the essential fairness  
9 of the trial, resulting in *per se* reversible error. *Bearchild*, ¶ 16 (*citing* *LaMere*, ¶ 75).

12 Under Mont. Code Ann. § 46-16-112, the moving party bears the burden of proving a  
13 substantial violation of Montana's jury assembly statutes. The moving party must present evidence  
14 sufficient to support the claim that the process used to impanel the trial jury did not substantially  
15 comply with Mont. Code Ann. § 3-15-405. The purpose of the jury selection statutes is "to preserve  
16 the impartiality of juries through a truly random drawing," and the court will overlook mistakes that  
17 do not undermine the randomness and impartiality of the jury drawing absent a material deviation  
18 from the statutory process. *Suzor v. Int'l Paper Co.*, 2016 MT 344 ¶ 34, 386 Mont. 54, 386 P.3d 584.

20 Montana law provides how the Clerk must give notice to jurors:

21 The clerk of court shall serve notice by mail on the persons drawn as jurors  
22 and require the persons to respond by mail as to their qualifications to serve  
23 as jurors. The clerk of court may attach to the notice a jury questionnaire  
24 and a form for an affidavit claiming an excuse from service provided for  
25 in 3-15-313. If a person fails to respond to the notice, the clerk shall certify  
the failure to the sheriff, who shall serve the notice personally on the person  
and make reasonable efforts to require the person to respond to the notice.

26 Mont Code Ann. § 3-15-405.

1 The Court finds that the Clerk's failure to certify a list to the Sheriff was a technical violation  
2 of the law. Each juror was mailed a summons to appear for voir dire on October 31, 2022. Each juror  
3 had returned a completed questionnaire as to their qualifications to serve because the jurors were  
4 pulled from the "Available With Questionnaire" status. Eight of the 125 jurors summoned did not  
5 appear on October 31, 2022, as ordered. All others who did not appear had provided an affidavit and  
6 were excused based upon objective criteria. The goal of a truly random drawing was achieved as  
7 required by the jury selection statutes. Therefore, the technical violation of the Clerk not certifying a  
8 list of non-responders is disregarded under the harmless error standard. The Court concludes that the  
9 method for selecting the jury in Kalina's trial substantially complied with the statutory framework.  
10

11 This case is distinguishable from *LaMere*. Kalina cannot establish a prima facie violation of  
12 the fair-cross-section requirement because he does not demonstrate that a distinctive group was  
13 disproportionately represented in the jury pool; nor that the practices of the Clerk systematically  
14 excluded a distinctive group. *See Duren v. Missouri*, 439 U.S. 357. While Kalina asserts, without an  
15 affidavit, that all individuals 70 years old or older are excluded from the prospective jury pool, the  
16 evidence before the Court shows that the Clerk only excuses persons 75 years old or older from  
17 serving on a jury upon their individual request. Kalina also asserts that "from Mr. Kalina's memory of  
18 the trial," non-whites were underrepresented in the jury panel. Again, this assertion is not supported  
19 by the evidence before the Court.  
20

21 Kalina presented no evidence that the jury software program did not appropriately randomize  
22 the selection of eligible Yellowstone County residents. *See Suzor v. Int'l Paper Co.*, 2016 MT 344 ¶  
23 34. Kalina does not allege or demonstrate that the jury in his trial was unable to "carry out their sworn  
24 duty" as jurors. *See Lockhard v. McCree*, 476 U.S. 162. Kalina cannot demonstrate prejudice in his  
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28



1 right to an impartial jury because the Clerk’s method substantially complied with the jury selection  
2 statute. The Court concludes that the motion must be denied.

3 Kalina cites *United States v. Gometz*, to support his argument that the Clerk’s deviation  
4 impermissibly limited the jury pool. Kalina argues that the 9,500 jurors in the “Available With  
5 Questionnaire” category represent only 7.2% of the entire population of Yellowstone County, and that  
6 under *Gometz* drawing a jury venire from 7.2% could not be a fair cross-section of the community.  
7 However, that is not the holding of *Gometz*. The Seventh Circuit Court of Appeal held that the  
8 District Court Clerk for the Southern District of Illinois did not abuse its discretion in deciding that a  
9 30% return rate of juror qualification forms, resulting in a jury pool of over 4,000 qualified jurors,  
10 was a sufficient cross-section of the community. *United States v. Gometz* (7th Cir. 1984), 730 F.2d  
11 475, 482. The Southern District of Illinois was created in 1978 and is comprised of 38 different  
12 counties. 28 U.S.C.S. § 93. The combined population for those 38 counties in 1980 was 1,264,735  
13 people.<sup>3</sup> Thus, the 4,000 names from which the clerk pulled the trial jury in *Gometz* represented  
14 merely 0.32% of the population of the jurisdiction. The *Gometz* Court also noted that 4,000 names “is  
15 a large sample of the eligible population, bearing in mind that it is the absolute size of a sample rather  
16 than its ratio to the population from which it is drawn that determines the sample's reliability.”  
17 *Gometz*, 730 F.2d. at 482. Here, the Court finds that Kalina’s argument fails and that a jury pool of  
18 9,500 eligible Yellowstone County jurors is a reliable cross-section of the community under *Gometz*.

19 Similar motions in other cases have previously been denied by District Court Judges in  
20 Montana. On June 13, 2024, the Hon. Judge Fehr of the Thirteenth Judicial District denied the  
21 Defendant’s Supplemental Motion for New Trial (Jury Issues). *See State v. Shen*, Thirteenth Judicial  
22 District Cause Number DC 2020-1260. Judge Fehr ruled that nothing about the apparent deficiencies  
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28 <sup>3</sup> Illinois Department of Public Health, *Illinois Population Data*, accessed August 8, 2024, at <https://dph.illinois.gov/data-statistics/vital-statistics/illinois-population-data.html>.

1 in the statutorily described process for drawing and summoning jurors has been shown to have  
2 impacted the random nature of the jury selection process or the impartiality of the pool from whom  
3 the venire panel was selected, or the trial ultimately selected. *Id.* at Dkt. 294 p. 14. Judge Fehr denied  
4 the defendant's motion for a new trial.

5  
6 On November 9, 2023, the Hon. Judge Wilson ruled on the same issue. *See State v. Shaw*,  
7 Eleventh Judicial District Cause Number DC 15-2021-378 (D). Judge Wilson opined that in enacting  
8 Mont. Code Ann. § 3-15-405, the Legislature intended to provide a mechanism ensuring enough  
9 jurors for any particular case rather than to ensure, strictly, that every person who potentially may  
10 serve during a jury term, in fact, makes himself or herself available for service. *Id.* at Dkt. 101 p. 25.  
11 Judge Wilson found the defendant's assumption that the clerk's apparent deficiencies in certifying  
12 non-responders resulted in a jury pool that did not reflect a fair cross-section of the community to be  
13 unfounded. *Id.* at p. 22. Judge Wilson stated that there is no evidence to suggest that persons  
14 belonging to various groups based on classifications such as age, race, color, national origin, religion,  
15 sex/gender identity, or disability are less likely than the members of the general population to respond  
16 to the initial jury service notice and questionnaire served upon them by mail. *Id.* Judge Wilson denied  
17 the defendant's motion for new trial.

18  
19 The Hon. Shane Vannatta of the Fourth Judicial District Court in Missoula County denied a  
20 similar motion on October 10, 2023, in *State v. McAlpine-Dixon*. *See* Fourth Judicial District Court  
21 Cause No. DC-32-2023-26 at Dkt. 30. Judge Vannatta concluded that while there was deviation from  
22 Mont. Code Ann. § 3-15-405, the deviation was not material to the purpose of jury drawing and  
23 notification, so no presumption of prejudice attached. *Id.* at p. 22. Judge Vannatta ruled that the  
24 language of the statute is not meant to ensure that defendants receive a random and impartial jury;  
25 rather "[i]n intention and effect, the language of § 3-15-405 is remedial to ensure citizens do not  
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28

neglect their duty to serve on a jury.” *Id.* at p. 23. Judge Vannatta concluded that the certification and service requirements of § 3-15-405 were intended to force unwilling citizens to serve on a jury, rather than to ensure a fair and impartial jury venire. *Id.* Judge Vannatta denied the defendant’s motion for a new trial. While these rulings are not binding, the Court finds them persuasive.

### CONCLUSION

Therefore, for the reasons discussed above,

IT IS HEREBY ORDERED that Kalina’s *Opposed Motion for New Trial Based on Jury Structural Error* is DENIED.

DATED this 26<sup>th</sup> day of August, 2024.

/s/ Donald L. Harris

DONALD L. HARRIS, District Court Judge

cc: Jami Rebsom, Attorney for Defendant  
YCAO- Sabrina Currie, Holly Metzger

#### CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by email/mail/hand/inter-office delivery upon the parties or their attorneys of record at their last known addresses this:

26<sup>th</sup> day of August, 2024

By: /s/ Savannah Main

Law Clerk to the Hon. Donald L. Harris