

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0345

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DUANE ANGELO BURCHILL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Peter Ohman, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court erred when it denied Burchill's motion for a new trial filed six years after he was convicted when the motion did not establish any error occurred in notifying potential jurors in his case.
2. Whether the court erred in failing to issue subpoenas for information about the formation of Burchill's jury before denying his motion for a new trial.

STATEMENT OF THE CASE

Appellant Duane Angelo Burchill filed a motion for a new trial six years after he was convicted of two counts of robbery and one count of criminal possession of dangerous drugs and after his convictions were affirmed on appeal. (Doc. 195.) Relying on information from other counties about the notification of potential jurors in those counties years after his trial, he alleged that the clerk of court had failed to comply with Mont. Code Ann. § 3-15-405. (Doc. 195.)

After filing the motion for a new trial, Burchill moved for subpoenas for the production of evidence regarding the formation of his 2017 jury. (Doc. 197.) The district court denied Burchill's motion for a new trial without ruling on his motion for subpoenas. (Doc. 205.)

STATEMENT OF THE FACTS

Burchill was convicted of two counts of robbery and one count of criminal possession of dangerous drugs on August 2, 2017. *State v. Burchill*, 2019 MT 285, ¶¶ 1, 11, 398 Mont. 52, 454 P.3d 633 (*Burchill I*). The court issued a judgment on February 13, 2018. (Doc. 176.)¹ Burchill appealed, and this Court affirmed his convictions on December 10, 2019. *Burchill I*, ¶ 39. Next, Burchill filed a petition for postconviction relief. This Court affirmed the denial of his petition for postconviction relief on February 6, 2024. *Burchill v. State*, 2024 MT 20, 415 Mont. 129, 542 P.3d 742 (*Burchill II*).

On January 18, 2024, while Burchill’s postconviction appeal was pending in this Court, Burchill filed a Motion for a New Trial with Incorporated Brief. (Doc. 195.) Burchill requested a new trial “due to newly discovered information of jury selection . . . that was not complying with statutes to impanel proper jury selection.” (Doc. 195 at 1.) Burchill did not provide any evidence about the process by which his jury was selected. Rather, he relied on facts from other counties to argue that he was entitled to a new trial. (*Id.* at 7.)

More than a month later, on February 28, 2024, Burchill “move[d] the Court to Order Subpoenas for Production of Evidence . . . in support of Burchill’s Motion

¹ Documents 1-25 and 100-194 are scanned as one document and are contained in a folder labeled “DC-16-368 Documents.”

for a New Trial and the newly discovered information of jury selection”

(Doc. 197.) Burchill stated that the “subpoenas would produce affidavits” from the Gallatin County Clerk of the District Court and the Gallatin County Sheriff “of testimony as to compliance of impaneling jury selection at the time of Burchill’s 2017 trial.” (*Id.*) Burchill also filed a Motion for Discovery of New Evidence, and attached three documents: (1) a social media post from the Gallatin County Sheriff’s Office from October 2023 in which the office requested that people respond to their jury summons; (2) a page filed by an attorney in another case arguing that the defendant’s rights had been violated; and (3) a news article about the jury formation process in Flathead County. (Doc. 201.)

After receiving a response from the State (Doc. 198), the court denied Burchill’s motion for a new trial (Doc. 205). The court concluded that his motion for a new trial was untimely filed and his challenge to the jury was also untimely. The court assessed whether it should nevertheless grant a new trial in the interests of justice and whether there was good cause for Burchill’s untimely challenge to the jury. The court noted that Burchill did not provide any evidence about the selection of his jury. (Doc. 205 at 5.) The court also noted that it had already determined in another case that there was no evidence that any person of any identifiable group was excluded as a result of the process followed by the Gallatin County Clerk of District Court. (*Id.* at 5-6.) The court concluded that there was no

reason to reach a different result in this case. (*Id.* at 6.) As a result, the court concluded that there was not good cause to consider Burchill's untimely challenge to the jury and that the interests of justice did not require the court to hold a hearing or grant his motion for a new trial. (*Id.* at 6.)

On May 30, 2024, Burchill appealed the denial of his motion for a new trial. On June 24, 2024, he moved to stay that appeal and to have the case remanded for the district court to rule on his motion for subpoenas. This Court denied Burchill's motion for a stay. (Order dated 5/17/24.)

SUMMARY OF THE ARGUMENT

The district court correctly denied Burchill's extremely untimely motion for a new trial that did not present any newly discovered evidence relating to his guilt and failed to establish that the jury procurement statutes were violated in his case. A motion for a new trial is never appropriate six years after a jury has reached its verdict when the defendant's conviction has already been affirmed on appeal. And, even if a motion for a new trial could be filed that late, it was appropriate to deny the motion in this case because there was not any evidence to support the motion.

Further, it was appropriate to deny Burchill's request to issue subpoenas for information regarding the formation of his jury six years earlier. A defendant cannot use an untimely motion for a new trial to force a clerk's office to provide

information, which may no longer be available, about how the office notified jurors six years earlier. Defendants are required to challenge a jury before trial under Mont. Code Ann. § 46-16-112, and a defendant who fails to raise a timely challenge forfeits his claim.

Further, the district court correctly concluded that Burchill did not demonstrate good cause to excuse his failure to timely challenge the jury.

ARGUMENT

I. Standard of review

This Court reviews the denial of a motion for a new trial for an abuse of discretion. *State v. Hammer*, 2013 MT 203, ¶ 12, 371 Mont. 121, 305 P.3d 843.

II. The district court did not abuse its discretion when it denied Burchill’s motion for a new trial that was filed more than six years too late.

A. A motion for a new trial must be filed within 30 days of the verdict.

The district court properly exercised its discretion to deny Burchill’s motion that was filed six years too late. Trial courts have the authority under Mont. Code Ann. § 46-16-702(1) to grant a new trial “if required in the interest of justice.” A court may order a new trial “without a motion or . . . after motion and hearing.” Mont. Code Ann. § 46-16-702(1). A “motion must be filed by the defendant

within 30 days following a verdict or finding of guilty” Mont. Code Ann. § 46-16-702(2).

This Court has held that a motion for a new trial must be filed within 30 days of the verdict, and there is no provision for extending the time limit. *Hammer*, ¶ 23. However, this Court subsequently held in *State v. Morse*, 2015 MT 51, 378 Mont. 249, 343 P.3d 1196, that a district court erred when it failed to exercise its authority to grant a new trial sua sponte based on information that the district court learned when the defendant filed an untimely motion for a new trial before the sentencing hearing. The motion established that the victim had recanted some of her statements. *Morse*, ¶ 12. The district court had found the statements to be “concerning” but denied the motion because it was untimely and no exception to the time bar applied. *Morse*, ¶¶ 16, 30. This Court reversed, holding that because all of the factors for a new trial based on newly discovered evidence had been established, the district court should have granted a new trial under its sua sponte authority to grant a new trial in the interests of justice. *Morse*, ¶¶ 30-36.

Since *Morse*, this Court has repeatedly applied the 30-day time limit for filing a motion for a new trial. In *Marble v. State*, 2015 MT 242, ¶ 26, 380 Mont. 366, 355 P.3d 742, the Court explained that the “window of time” for filing a motion for a new trial “invariably closes before the imposition of a judgment of conviction . . . and sentencing has been entered” because Mont. Code Ann. § 46-16-702(2) requires

a defendant to file a motion for a new trial within 30 days following the verdict.

See also Marble, ¶ 28. And in *Worthan v. State*, 2023 MT 151, ¶ 30 n.5, 413 Mont. 155, 533 P.3d 1033, this Court stated that “[a] new trial motion must be filed within 30 days following a verdict or finding of guilt[.]” This Court explained that a motion for a new trial was not available to Worthan, whose conviction was 16 years old, so he was limited to pursuing postconviction relief. *Id.*

Similarly, this Court recently concluded that a motion for a new trial filed by a defendant many years after he was convicted and had his conviction affirmed on appeal was improper. *See State v. Ariegwe*, DA 24-0135, 2024 Mont. LEXIS 585 (Mont. Sup. Ct. May 29, 2024). This Court explained that Ariegwe’s motion for a new trial and his appeal were improper because he “had his day in court” and “[h]e cannot resurrect his criminal proceeding with an untimely motion in the sentencing court” *Id.* at *4.

Here, the district court concluded that it would have the authority to grant an untimely motion for a new trial if required in the interests of justice, but then determined that Burchill failed to demonstrate that a new trial was required in the interests of justice. (Doc. 205.) Although this Court has not placed a clear time limit on a court’s authority to grant a new trial in the interests of justice, a new trial should never be granted after a defendant has been sentenced. The 30-day deadline in Mont. Code Ann. § 46-16-702(2) demonstrates that the Legislature

intended to limit motions for a new trial to the time period shortly after the verdict, when the conviction is not yet final. Burchill's motion was filed more than six years after his deadline for filing a motion for a new trial expired. Further, Burchill filed his motion for a new trial after his direct appeal in this Court had been completed and while his postconviction appeal was pending. There is no statutory authority for a court to grant a new trial at that time.

Unlike Burchill, Morse filed his motion for a new trial before his sentencing hearing, and his motion established that he was entitled to a new trial based on newly discovered evidence under the standard set out in *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099. This Court's subsequent cases demonstrate that *Morse* is confined to the unique facts of that case and does not create a never-ending right to file a motion for a new trial. See *Marble*, ¶ 26; *Worthan*, ¶ 30 n.5; *Ariegwe*, DA 24-0135, 2024 Mont. LEXIS 585. Because Burchill filed his motion six years too late, when his convictions had already been affirmed on appeal, the court did not abuse its discretion when it denied his motion.

B. The court correctly concluded that Burchill was not entitled to a new trial in the interests of justice.

Even if a motion for a new trial can be granted six years after a verdict is entered, the court correctly concluded that Burchill did not demonstrate that he was entitled to a new trial in the interests of justice. "A new trial is not warranted unless the defendant can show that he or she was 'deprived of a fair and impartial trial.'"

State v. Hoffman, 2003 MT 26, ¶ 49, 314 Mont. 155, 64 P.3d 1013. Burchill did not make any showing that his trial was not fair and impartial. Even if his unsupported allegations are true, and potential jurors were not personally served, he failed to demonstrate that the service of jurors affected the fairness of his trial.

Unlike Morse, Burchill did not demonstrate that he was entitled to a new trial based on newly discovered evidence under *Clark*. In *Clark*, this Court held that to prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must demonstrate:

- (1) The evidence must have been discovered since the defendant's trial;
- (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part;
- (3) the evidence must be material to the issues at trial;
- (4) the evidence must be neither cumulative nor merely impeaching;
and
- (5) the evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome.

Clark, ¶ 34.

The *Clark* test does not apply to Burchill's challenge because he does not have any "new evidence" related to his convictions. Further, applying the *Clark* test to Burchill's claim demonstrates that he is not entitled to a new trial under *Clark*. Burchill waited until six years after his trial and relied on information from

other counties to speculate that the jury statutes may have not been properly applied in his case. Burchill's failure to discover information about the jury formation earlier demonstrates a lack of diligence.

More importantly, factors three through five are not satisfied because the service of potential jurors does not have any bearing on the evidence presented at trial. As a result, Burchill cannot demonstrate that the purportedly new evidence is material to the issues at trial, that it is "neither cumulative nor merely impeaching," or that it "indicate[s] that a new trial has a reasonable probability of resulting in a different outcome." *See Clark*, ¶ 34. Information about the jury is not newly discovered evidence that has any connection to the evidence presented at trial. Because Burchill, unlike Morse, did not demonstrate that he satisfied the standard to obtain a new trial under *Clark*, he did not demonstrate that the interests of justice required a new trial.

III. The court also correctly determined that Burchill's challenge to the jury was untimely under Mont. Code Ann. § 46-16-112(1).

The district court correctly concluded that Burchill did not demonstrate good cause to excuse his failure to timely challenge the formation of the jury as required by Mont. Code Ann. § 46-16-112(1).

Montana Code Annotated § 46-16-112(1) provides:

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

(Emphasis added.) A motion to discharge the jury panel “must be in writing supported by affidavit and must state facts that show that the jury panel was improperly selected or drawn.” Mont. Code Ann. § 46-16-112(2). If the motion provides evidence showing the jury panel has been improperly selected or drawn, the court must hold a hearing. Mont. Code Ann. § 46-16-112(3). The burden of proof is on the movant. Mont. Code Ann. § 46-16-112(3).

Montana Code Annotated § 46-16-112 demonstrates the Legislature’s intent to require defendants to raise challenges to a jury panel at least five days before a trial begins so that any procedural irregularities can be remedied before the trial. This serves the important purpose of avoiding the needless reversal of convictions after a trial has been held.

There is a strong public policy supporting the time bar in Mont. Code Ann. § 46-16-112(1), and many other jurisdictions have a similar time bar. Generally, a challenge to the array must be supported as specified by statute or rule, and interposed in a timely fashion Rules typically provide that absent a showing of good cause for later filing, the challenge must be made before trial or before commencement of the voir dire examination.

6 Wayne R. LaFave et al., *Criminal Procedure* § 22.2(f), 70-71 (3d ed., West 2007).

In federal courts, challenges to compliance with the jury selection procedures must be raised “before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*[.]” 28 U.S.C. § 1867(a) (emphasis added). This time limit “is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act.” *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir. 1981); *see also United States v. Young*, 570 F.2d 152 (6th Cir. 1978).

Similarly, a constitutional claim arguing the jury does not represent a fair cross-section has to be raised before trial in federal court under Fed. R. Crim. P. 12(b)(3), formerly Rule 12(b)(2). The Supreme Court has explained the important interest served by the pretrial objection requirement:

the possible avoidance of an unnecessary trial or of a retrial, the difficulty of making factual determinations concerning grand juries long after the indictment has been handed down and the grand jury disbanded, and the potential disruption to numerous convictions of finding a defect in a grand jury only after the jury has handed down indictments in many cases.

Coleman v. Thompson, 501 U.S. 722, 745-46 (1991); *see also Davis v. United States*, 411 U.S. 233, 241 (1973) (explaining that, absent the rule, “[s]trong tactical considerations would militate in favor of delaying the raising of the claim”).

The source of Mont. Code Ann. § 46-16-112 is the Illinois Code of Criminal Procedure, Chapter 38, section 114-3. Comm’n Comments to Mont. Code Ann.

§ 46-16-112. The Illinois Supreme Court has held section 114-3 bars a challenge after voir dire begins. *People v. Gill*, 297 N.E.2d 135, 139 (Ill. 1973) (citing Ill. Rev. Stat. 1965, ch. 38, par. 114-3(a)).

Other state courts have barred challenges made after voir dire has begun based on a statutory time bar. *State v. Dangcil*, 256 A.3d 1016, 1027 (N.J. 2021) (time bar is “strictly enforced” and is relaxed only where there is a showing of actual prejudice to the defendant’s right to a fair and impartial jury because to do otherwise “would impede the orderly administration of [the] criminal justice system” (quotation marks and citation omitted, alteration in original)); *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991); *People v. Green*, 759 P.2d 814, 816 (Colo. App. 1988).

This Court should similarly interpret Mont. Code Ann. § 46-16-112(1) to bar an untimely challenge to a failure to personally serve notice on potential jurors. The State acknowledges this Court narrowly construed Mont. Code Ann. § 46-16-112(1) in *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359, *overruled on other grounds in State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204. This Court applied Mont. Code Ann. § 46-16-112(1) to bar an untimely challenge to “drawing” the jury, but did not apply the time bar to a challenge to the manner by which the jury was summoned under Mont. Code Ann. § 3-15-505

(1997), *repealed by* 1999 Mont. Laws, ch. 241, § 9, *replaced by* Mont. Code Ann. § 3-15-405 (1999). *Robbins*, ¶¶ 47-51.

Here, Burchill challenges the alleged failure to personally serve, which occurs after the drawing of “regular” jurors, who serve for a year, and before the drawing of trial jurors, who are later summoned. Personal service is part of the process of drawing and selecting, and a challenge to the failure to personally serve is a challenge to the “manner in which a jury panel has been selected or drawn”² as that term is used in Mont. Code Ann. § 46-16-112(1). Further, *Robbins* erroneously parses out summoning from drawing and selecting. Montana Code Annotated § 46-16-112 demonstrates the Legislature’s intent to bar challenges to a jury pool that are not timely raised, consistent with general practice in other jurisdictions.

Significantly, *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 639 P.2d 62 (1981), and *Solberg v. County of Yellowstone*, 203 Mont. 79, 659 P.2d 290 (1983), do not apply and cannot override the legislative mandate that a criminal defendant must raise a challenge to the formation of the jury pool before trial. *Dvorak* and *Solberg* are civil cases in which this Court reversed the verdicts based on the clerk’s failure to properly draw trial jurors. Because they are civil cases, the

² The terms “draw” and “select” are used interchangeably throughout Title 3, chapter 15, parts 4 and 5, and do not appear to have separate meanings.

time bar in Mont. Code Ann. § 46-16-112(1) did not apply. Montana Code Annotated § 46-16-112(1), rather than *Dvorak* and *Solberg*, controls criminal cases.

Further, *Dvorak* and *Solberg* rely on a misstatement of this Court's caselaw and should be overruled. Both cases misquote *Ledger v. McKenzie*, 107 Mont. 335, 85 P.2d 352 (1938), and rely on the misstatement to conclude an irregularity in the drawing of a jury may be raised for the first time on a motion for a new trial if counsel does not have the knowledge or means of knowledge of the irregularity. *Dvorak*, 196 Mont. at 171, 639 P.2d at 64; *Solberg*, 203 Mont. at 83, 659 P.2d at 292. *Ledger* actually stated that the plaintiff urged the Court to adopt the above rule, which was contrary to the general rule. This Court concluded it did not matter which rule applied because the court minutes gave the plaintiff the means of knowledge of the irregularity. *Ledger*, 107 Mont. at 340, 85 P.2d at 353. *Dvorak* and *Solberg* are flawed and should not be followed.

Burchill should not be able to avoid the consequences of Mont. Code Ann. § 46-16-112 by claiming he did not know what process was followed. The time bar places defendants on notice that they must inquire about the jury selection process and raise any claim before trial, or they waive their objection.

The district court correctly concluded that Burchill did not demonstrate good cause for his failure to raise a timely challenge because he did not present any evidence about the how the jury was notified in his case, and he did not present any

evidence that he had attempted to obtain that information earlier. Burchill's attempt to obtain information about his jury six years after his trial demonstrates the need for the time limitation created by Mont. Code Ann. § 46-16-112. To allow defendants to request information about jury formation years after their trials would impose significant burdens on the clerks' offices and would jeopardize the finality of convictions. Montana Code Annotated § 46-16-112 wisely requires defendants to raise a challenge before their trial because that is when the information is available and when steps could be taken to remedy any problem. Burchill has failed to demonstrate good cause for his failure to obtain information sooner and has still not demonstrated that the jury in his trial was improperly formed. Burchill's motion for a new trial was properly denied because he forfeited his challenge to the jury panel by failing to raise the challenge before trial.

IV. The district court did not err in denying Burchill's motion for a new trial without granting his request for subpoenas.

Burchill was not entitled to obtain subpoenas for information about the formation of his jury six years earlier. A motion for a new trial "must be in writing and must specify the grounds for a new trial." Mont. Code Ann. § 46-16-702(2). To specify the grounds for a new trial, the defendant must have evidence to support his claim that he is entitled to a new trial. A defendant may not use a motion for a new trial that is unsupported by evidence as a discovery device to investigate the

formation of his trial several years earlier. This Court has stated that a postconviction “petitioner may not conduct a ‘fishing expedition’ in an attempt to establish the right to an evidentiary hearing.” *Heath v. State*, 2009 MT 7, ¶ 27, 348 Mont. 361, 202 P.3d 118. The same rule should apply when a defendant moves for a new trial. This Court has explained that a petitioner seeking a new trial based on newly discovered evidence has the burden to establish that the new evidence meets the five *Clark* factors. *Clark*, ¶ 34. Similarly, Burchill had a burden to provide evidence to support his initial motion, and he failed to do so.

Burchill’s motion was based on information about irregularities in jury notification that occurred in different counties years after he was tried. He speculated, without evidence, that the same problems occurred during his trial. Allowing all defendants to obtain subpoenas requesting information from clerks’ offices years after their trials are complete would significantly burden clerks’ offices. Further, the information sought may no longer be available. To avoid this problem, Mont. Code Ann. § 46-16-112(2) requires that a motion to discharge a jury panel “must be in writing supported by affidavit and must state facts that show that the jury panel was improperly selected or drawn.” Because Burchill did not establish any facts demonstrating that his jury was improperly formed, he was not entitled to a new trial and was not entitled to subpoena information about the formation of his jury six years earlier. Like Ariegwe, Burchill had his day in court

and is not entitled to resurrect his criminal proceedings with an untimely motion in the sentencing court. *See Ariegwe*, *4.

V. The district court could also deny Burchill’s motion for a new trial on the merits because he did not demonstrate that his constitutional rights were violated or that the clerk failed to substantially comply with the jury formation statutes.

A. Burchill has not demonstrated that any error occurred in the formation of his jury.

Burchill asserts that the clerk and the sheriff did not comply with Mont. Code Ann. § 3-15-405, but he has not provided any evidence to support that assertion. Burchill relies on information about the notification of potential jurors years later in other counties to speculate that potential jurors in his trial were not personally served. Nothing in the record demonstrates that the Gallatin County Clerk violated Mont. Code Ann. § 3-15-405. A district court should not be required to hold a hearing when the defendant fails to provide any evidence to support a motion for a new trial.

B. Burchill did not establish a constitutional violation.

Burchill argues that his right to a fair trial under the Sixth Amendment to the United States Constitution and article II, sections 9, 17, 24, and 26, of the Montana Constitution was violated because the clerk failed to notify nonresponding potential jurors as required by Mont. Code Ann. § 3-15-405. He did not provide

any authority for his assertion that his constitutional rights were violated. Even if the clerk and the sheriff failed to take steps to have nonresponding potential jurors personally served, as Burchill speculated, that would not establish a constitutional violation. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979); *LaMere*, ¶ 62 (noting that although the clerk's failure to notify potential jurors by mail improperly excluded impoverished jurors, who were disproportionately Native American, *LaMere* did not establish a constitutional violation under *Duren*).

C. Even if the potential jurors were not personally served, there was not a substantial violation of Mont. Code Ann. § 3-15-405.

1. Violations of the jury selection statutes that are not substantial are subject to harmless error analysis.

Even if potential jurors were not personally served, that failure would not establish a substantial violation requiring reversal of Burchill's convictions. This Court has held that a substantial failure to comply with the jury statutes requires reversal of a conviction, but a technical violation that does not threaten the goals of random selection and objective disqualification is subject to the harmless error standard. *State v. Bearchild*, 2004 MT 355, ¶ 16, 324 Mont. 435, 103 P.3d 1006; *LaMere*, ¶¶ 56-61. A failure to personally serve nonresponsive jurors is not a material deviation from the statutes and is harmless because it does not affect whether a jury is randomly drawn from a fair cross-section of the community.

This Court has taken “guidance from federal case law developed under the Jury Selection and Service Act of 1968 (JSSA)” to clarify “the substantial compliance standard.” *LaMere*, ¶ 56. To show a violation under the JSSA, “a defendant must show that the government substantially failed to comply with the methods set forth by statute for the selection of the jury.” *LaMere*, ¶ 56 (citing 28 U.S.C. § 1867(a) (1994)). In *LaMere*, this Court adopted the standard from federal law, which construes a substantial failure to comply as “a violation that contravenes one of two basic principles under the JSSA: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria.” *LaMere*, ¶ 57 (citing *United States v. Royal*, 174 F.3d 1, 11 (1st Cir. 1999)).

This Court explained that “[a] substantial failure to comply encompasses a statutory violation that affects the random nature or objectivity of the selection process.” *LaMere*, ¶ 57 (citation and quotation marks omitted). “[T]echnical 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. This Court noted that the Commission Comments to Mont. Code Ann. § 46-16-112 provide that “a successful challenge to the jury panel can be founded only upon a ‘*material departure* from the law’ with respect

to the manner in which the jury was selected, drawn, or summoned.” *LaMere*, ¶ 59 (emphasis in original).

Thus, if a “statutory violation is ‘substantial’ or ‘material’—viewed in terms of the underlying principles of ensuring that jury venires are selected randomly and on the basis of objective criteria—then it cannot be considered non-prejudicial to the defendant. A departure from the statutory scheme that directly or materially affects the random nature or objectivity of the jury selection process establishes a substantial violation independently of the departure’s consequences in an individual case.” *LaMere*, ¶ 60. “Conversely, a mere ‘technical’ or ‘immaterial’ violation—one that does not undermine the objective procedures designed to produce a jury venire consisting of a fair cross-section of the community—constitutes non-prejudicial error under the substantial compliance standard.” *Id.*

In *LaMere*, this Court held that summoning potential jurors by telephone, rather than by mail, materially undermined the goal of the jury selection statutes to provide for random selection of jurors on the basis of objective criteria, requiring reversal. *LaMere*, ¶¶ 17, 75-76. *LaMere* moved to strike the jury panel before trial and presented statistics demonstrating a significant percentage of residents in Cascade County were Native American and a significant percentage of Native Americans lacked a telephone. *LaMere*, ¶¶ 5-8. The trial court denied the motion. On appeal, this Court held that telephone summoning failed to substantially

comply with Mont. Code Ann. § 3-15-505 (1997), and that a substantial failure to comply with the statutory process of forming a jury requires reversal. *LaMere*, ¶¶ 25, 55-61. Because LaMere demonstrated the error undermined the random selection of jurors and the removal of jurors based on objective criteria, this Court reversed his conviction. *LaMere*, ¶ 75. This Court noted that LaMere did not establish that he was denied his right to a jury composed of a fair cross-section of the community under *Duren*, but it reversed his conviction based on the substantial violation of the statutes governing the formation of the jury. *LaMere*, ¶¶ 62, 75.

Similarly, this Court reversed the defendant's conviction in *State v. Highpine*, 2000 MT 368, 303 Mont. 422, 15 P.3d 938, because the clerk served notice on potential jurors by telephone. Highpine, like LaMere, presented statistical analysis demonstrating the clerk's method excluded economically disadvantaged people from the jury. *Highpine*, ¶ 40.

But this Court has found violations that did not impact the random nature or objectivity of the jury selection process to be technical violations, which are not reversible absent a showing of prejudice. This Court found that a judge's improper dismissal of a juror before trial was not a material failure to substantially comply and was harmless because the potential juror would not have served, and her dismissal did not affect the defendant's right to an impartial jury. *Bearchild*, ¶¶ 19-23. Similarly, this Court held an error was harmless when the wrong

alternate juror deliberated on the case. *State v. Oschmann*, 2019 MT 33, ¶ 19, 394 Mont. 237, 434 P.3d 280.

2. Federal law provides guidance on the meaning of “substantial.”

This Court’s reliance on federal law to interpret “substantial failure” demonstrates that guidance on the meaning of “substantial” can be gleaned from federal case law. *See LaMere*, ¶¶ 56-57. Federal courts have concluded that even multiple violations of the JSSA do not constitute “substantial” violations if the jury was still randomly selected and potential jurors were removed based on objective, even if incorrect, factors. *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1167-70 (9th Cir. 2013) (use of an incorrect English proficiency test that may have excluded additional jurors, disqualification of prospective jurors by unsupervised clerks, and failure to send back questionnaires of jurors who did not answer a question about their race were not substantial violations of the JSSA); *United States v. Carmichael*, 560 F.3d 1270, 1276-79 (11th Cir. 2009) (including more jurors whose service had been deferred in the qualified jury wheel than allowed by the jury plan and allowing excusals for longer than allowed in the jury plan were not substantial violations of the JSSA); *United States v. Savides*, 787 F.2d 751 (1st Cir. 1986) (use of a commercial mailing firm to select the names of potential jurors not a substantial violation); *United States v. Nelson*, 718 F.2d 315, 318-19 (9th Cir. 1983) (inclusion of person on jury panel who mistakenly appeared for

jury duty on the wrong day not a substantial violation); *United States v. Capone*, 683 F.2d 582 (1st Cir. 1982) (failure to publicly draw names of grand jurors not substantial); *Bearden*, 659 F.2d at 602-08 (failure to use a wheel to pick numbers not substantial and improper exclusion of jurors based on objective factors not substantial where not quantitatively significant); *United States v. Evans*, 526 F.2d 701, 706 (5th Cir. 1976) (having clerks, rather than a judge, determine disqualifications was a “technical” error that did not necessitate reversal); *but see United States v. Calabrese*, 942 F.2d 218, 227-30 (3d Cir. 1991) (automatically excluding potential jurors who knew the defendant was a substantial violation); *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977) (use of emergency volunteer jurors was a substantial violation).

For example, in *Bearden*, a clerk of court failed to use a wheel to obtain the starting numbers that were used to select jurors, as required by the JSSA. Instead, the clerk obtained numbers by flipping to pages in a book or picking a number out of her head. *Bearden*, 659 F.2d at 601. The Fifth Circuit concluded that this was not a “substantial violation” of the JSSA because there was no showing that the method used “allowed discriminatory selection of jurors or otherwise prevented jury panels from consisting of fair cross sections of the community.” *Id.* at 602-03. Relying on the legislative history of the JSSA, the court explained that the JSSA does not require statistical randomness. *Id.* at 602. Instead, the JSSA is designed

to prevent discrimination among cognizable groups of prospective jurors. *Id.*

Although the clerk did not follow the procedure set out by the JSSA, the violation was not substantial because it did not frustrate the requirement that jurors be chosen randomly. *Id.* at 603.

The court also held in *Bearden* that the clerk's failure to post public notices about the jury selection was not a substantial violation of the JSSA because it "did not substantially affect the randomness or objectivity of the selection process" and was not done in an attempt to conceal the manner in which the clerk chose numbers. *Id.* at 604.

Similarly, the court held that the improper exclusion of hundreds of potential jurors on the basis of their age, occupation, intradistrict moves, or prior jury service was not a substantial violation of the JSSA where the percentage of people improperly excused was very small. *Id.* at 605-08. The court explained that if the number of people wrongfully excluded is small, there will not be a substantial violation of the JSSA. *Id.* at 607.

And, even if the number is quantitatively significant, there will not be a substantial violation unless "there has been a frustration of the Act's underlying principle of exclusions on the basis of objective criteria only." *Id.* Although the jury selection officials improperly excused potential jurors based on their incorrect

interpretation of the rules, the court concluded that they did so in good faith and their errors did not contravene the principle of objectivity. *Id.* at 608.

The court concluded that “[t]he mere misinterpretation or misapplication of the objective criteria [to disqualify jurors] by a clerk’s office does not violate the objectivity principle, in the absence of a discriminatory potential or effect.” *Id.* The court explained that the legislative history of the JSSA demonstrated that the subjective criteria the court intended to prohibit “included such notions as good character, approved integrity, sound judgment and fair education.” *Id.* at 607 (citation and quotation marks omitted). The court explained that Congress sought to prohibit reliance on such subjective factors that could produce discriminatory results. *Id.*

Similarly, the Ninth Circuit held that several violations of the JSSA were not substantial violations of the Act when the violations did not contravene the goals of random selection and objective disqualification. *Hernandez-Estrada*, 749 F.3d at 1167-69. In *Hernandez-Estrada*, the clerk’s office incorrectly excused jurors based on an outdated, more challenging English proficiency questionnaire. *Id.* at 1167. But the violation was not substantial because the number of people who may have been improperly excluded constituted a small percentage of the potential jurors (2.05% of the people who returned questionnaires and 3.49% of the qualified jury wheel). *Id.* at 1168.

The court clerks in *Hernandez-Estrada* also violated the JSSA by disqualifying jurors without the supervision of the court. *Id.* at 1168-69. But the Ninth Circuit concluded that the error was not substantial because only a small number of potential jurors were affected and the violation did not intrude on the random selection of jurors from voter lists or introduce subjective criteria into the selection process. *Id.* at 1169.

3. The failure to personally serve is a technical violation that is harmless.

In this case, even if the clerk failed to certify a list to the sheriff, and the sheriff failed to personally serve, there is no indication that undermined the goals of producing a randomly drawn jury composed of a fair cross-section of the community with excuses based only on objective criteria.

Burchill does not dispute that names were randomly selected from the list of eligible jurors to form the large pool of jurors for the year, as required by Mont. Code Ann. § 3-15-404. Nor does he dispute that the panel of potential trial jurors was randomly drawn from the annual pool, as required by Mont. Code Ann. § 3-15-501.

The failure of the sheriff to personally serve nonresponsive potential jurors, if that occurred, would not undermine the randomness of the pool of trial jurors. People were still randomly drawn from the list of names provided by the office of the court administrator, pursuant to Mont. Code Ann. § 3-15-402, and the panel of

potential trial jurors was randomly drawn from that pool. Failing to serve nonresponders would not make the results any less random.

And federal cases, which this Court has relied on for guidance, explain that statistical randomness is not required as long as the system does not discriminate among cognizable groups of prospective jurors. *Bearden*, 659 F.2d at 602. There is no indication that those who failed to return their questionnaire were more likely to belong to any cognizable group. There are infinite reasons why a person may fail to return a questionnaire, including the likelihood that many people no longer live at the address where they were served. Failing to personally serve those people does not discriminate among any cognizable group. Thus, the failure to personally serve nonresponsive potential jurors does not contravene the principle that jurors should be drawn from a fair cross-section of the community.

It also does not contravene the principle that excuses should be granted based only on objective factors. Failing to personally serve potential jurors does not involve granting any excuses or exemptions.

Indeed, the JSSA, which was designed to promote the random selection of jurors and the determination of disqualifications and excuses based on objective criteria, does not require personal service of potential jurors. The personal service requirement was removed from federal statutes in 1970, and federal statutes have allowed potential jurors to be served by first-class mail since 1983. Pub. L. No.

91-543, 84 Stat. 1408 (codified at 28 U.S.C. § 1866 (1970)); Pub. L. No. 97-463, § 2, 96 Stat. 2531 (codified at 28 U.S.C. § 1866 (1983)).

Further, federal clerks are not required to follow up with individuals who do not respond to their jury summons. *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984); *United States v. Santos*, 588 F.2d 1300, 1303 (9th Cir. 1979). In *Gometz*, the Seventh Circuit acknowledged that failing to follow up with those who failed to respond may allow people to avoid jury duty by failing to return their juror qualification form, but the court concluded that the JSSA was not concerned with that as long as there was a sufficient number of potential jurors. *Gometz*, 730 F.2d at 480-82. The court concluded that “Congress was not concerned with anything so esoteric as nonresponse bias when it enacted the Jury Selection and Service Act.” *Id.* at 482. The court also observed that “anyone with experience as a trial judge knows that a person forced against his will to serve on a jury is apt to be an angry juror and that an angry juror is a bad juror.” *Id.* at 480.

The fact that the JSSA, which was designed to promote the principles of random selection and exclusion based on objective factors, does not require personal service supports the conclusion that failing to personally serve does not violate those principles or produce an unfair jury.

Further, failing to personally serve is far different than the violations that occurred in *LaMere* and *Highpine*. In those cases, potential jurors were never

notified of jury service if they did not have a phone number. LaMere presented statistics demonstrating that Native Americans were less likely to have a telephone. *LaMere*, ¶¶ 6-8. As a result, they were less likely to receive any form of notice about jury duty. In contrast, every person who was selected for the annual jury pool in this case was notified by mail, as required by Mont. Code Ann. § 3-15-405. Even if jurors were not personally served, there is no evidence indicating that any cognizable group was less likely to receive notice or less likely to respond to the notice sent out. Given that lack of evidence, there is no indication that failing to personally serve would contravene the principle that a defendant should have a jury made up of a fair cross-section of his community.

Because there is no indication that failing to personally serve nonresponsive jurors would jeopardize a defendant's right to an impartial jury, the violation would be harmless.

CONCLUSION

This Court should affirm the district court’s denial of Burchill’s motion for a new trial.

Respectfully submitted this 6th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,374 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-06-2024:

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