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COUNSEL FOR PLAINTIFF AND APPELLEE

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0317

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DUANE ANGELO BURCHILL,

Defendant and Appellant.

STATE'S MOTION TO DISMISS APPEAL

The Attorney General respectfully moves this Court for an order dismissing this appeal because Burchill exhausted his remedy of appeal, and he is not entitled to a second direct appeal. The State has not contacted Burchill regarding this motion because he is incarcerated and is representing himself pro se. However, the

State presumes that Burchill opposes this motion because the State is seeking to dismiss his appeal.

BACKGROUND

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 the 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). Burchill also filed a motion for a new trial, which the district court denied. This Court affirmed the denial of his motion for a new trial in *State v. Burchill*, 2025 MT 82N, 2025 Mont. LEXIS 430 (*Burchill III*).

On January 10, 2025, Burchill filed a second motion for a new trial. (Doc. 210.) On February 10, 2025, Burchill refiled the same motion with attachments, and he labeled it Motion for New Trial M.C.A. 46-16-702(1) with Incorporated Brief. (Doc. 211.) The district court has not ruled on that motion.

¹ Document 176 is combined with many other documents into an electronic file labeled “DC-16-368 Documents.pdf.”

On April 28, 2025, Burchill filed a notice of appeal in this Court stating that he was appealing from Montana Eighteenth Judicial District Court, Cause No. DC-16-368A, (Docket #211). *State v. Burchill*, DA 25-0317, Notice of Appeal, filed 4/28/25. Burchill's brief does not reference his motion for a new trial. Instead, Burchill argues directly that the district court erred when it admitted testimony by remote two-way video conferencing at Burchill's jury trial. (Appellant's Br.)

ARGUMENT

I. Burchill cannot challenge his conviction in a second appeal filed seven years after he was convicted.

Burchill's appeal should be dismissed because it is an improper second direct appeal filed seven years too late. An appeal of a criminal judgment must be taken within 60 days after the entry of judgment. M. R. App. P. 4(5)(b). Burchill appealed his conviction at the appropriate time in 2017. *Burchill I; State v. Burchill*, DA 18-0193, Notice of Appeal filed 4/11/18. Seven years later, Burchill is attempting to file a second appeal, which is not permissible because a defendant cannot file an appeal after he has exhausted his remedy of appeal. *State v. Schifferns*, No. DA 24-0441, 2024 Mont. LEXIS 840 (Mont. Sup. Ct. August 6, 2024). This appeal should be dismissed because it is untimely and because Burchill exhausted his remedy of appeal and cannot file a second direct appeal.

Burchill also cannot raise his evidentiary claims in a postconviction proceeding because he was afforded an opportunity for a direct appeal and did not raise this ground for relief. Mont. Code Ann. § 46-21-105(2); *see State v. Osborne*, 2005 MT 264, ¶ 14, 329 Mont. 95, 124 P.3d 1085 (stating Mont. Code Ann. § 46-21-105(2) “establishes that the courts lack any authority to consider . . . or decide . . . legal and factual issues that could reasonably have been raised on direct appeal if an adequate remedy of appeal was available to the petitioner.”). Burchill has waived his evidentiary claim by failing to raise it in his original direct appeal.

II. If Burchill is attempting to appeal his motion for a new trial, he has to wait until the court has issued an order denying his motion.

An appeal may be taken in a criminal case “only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.” Mont. Code Ann. § 46-20-104. If Burchill is attempting to appeal the denial of his second motion for a new trial, rather than the underlying conviction,

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he cannot do that because his motion has not yet been denied. Therefore, this appeal is premature.

Respectfully submitted this 3rd day of June, 2025.

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By: /s/ *Mardell Ployhar*
MARDELL PLOYHAR
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, I certify that this motion 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 717 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ *Mardell Ployhar*
MARDELL PLOYHAR

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss to the following on 06-03-2025:

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Electronically signed by LaRay Jenks on behalf of Mardell Lynn Ployhar
Dated: 06-03-2025