

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0665

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

SCOTT ALAN LEHRKAMP,

Defendant and Appellant.

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**OPPOSED MOTION TO STRIKE**

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Appellant, Scott Alan Lehrkamp, through undersigned counsel, moves to strike Appendix 1 and its attending argument on page 11 of the State's Response Brief, filed in this matter on August 1, 2024.

Appendix 1 is an Affidavit from Lisa Ann Kallio, Deputy Clerk of Court and the District Court Supervisor for the First Judicial District, Lewis and Clark County, dated July 12, 2024. In the affidavit, Ms. Kallio states the number of felony cases filed in Lewis and Clark County between 1988 and 2022.

Montana Rule of Appellate Procedure 8(1) provides in relevant part: " Except as otherwise provided in these rules, the original papers and exhibits filed in the district court, the transcript of proceedings, if

any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.” The appellate rules do not otherwise provide for the introduction of sworn testimony for the first time on appeal. Ms. Kallio’s affidavit was not considered by the District Court and was not available to Mr. Lehrkamp when he prepared his opening brief.

As a reviewing court, this Court does not consider new evidence or testimony for the first time on appeal: “We do not consider evidence that is not in the record on appeal.” *State v. Passmore*, 2014 MT 249, ¶ 16, 376 Mont. 334, 338, 334 P.3d 378 (citation omitted). “It is axiomatic that this Court will not consider ‘evidence’ not contained in the record on appeal.” *State v. Azure*, 2002 MT 22, ¶ 38, 308 Mont. 201, 41 P.3d 899 (citation omitted). “[P]arties on appeal are bound by the record and may not add additional matters in briefs or appendices.” *State v. J.C.*, 2004 MT 75, ¶ 25, 320 Mont. 411, 87 P.3d 501(citations, internal quotation marks omitted) (at the State’s request, striking documents that were not part of the appellate record and declining to consider defendant’s arguments based on those records). *Accord City of Whitefish v. Curran*, 2023 MT 118, ¶ 18 n.2, 412 Mont. 499, 531 P.3d

547 (*en banc*) (admonishing the State for circumventing the appellate rules to supplement the record on appeal and stating the Court would not consider the irregularly added evidence); *State v. Keefe*, 2022 MT 121, ¶ 23, 409 Mont. 86, 512 P.3d 741, *cert. denied*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 619, 214 L. Ed. 2d 366 (2023) (rejecting defendant's request to take judicial notice of extra-record evidence that was not considered by the district court, citing M. R. App. P. 8(1), and ordering the clerk of court to remove the evidence from the record on appeal).

Here, about two weeks before filing its brief in this Court, the State collected an affidavit from a deputy clerk of district court indicating the number of felony cases filed in Lewis and Clark County over a 34-year period between 1988 and 2022. The State incorporates the data from Ms. Kallio's affidavit into its argument on page 11 of its response brief. (Appellee Br. at 11.) This extra-record evidence and the argument based thereon is unequivocally prohibited by Mont. R. App. P. 8(1) and this Court's precedent.

Therefore, Mr. Lehrkamp requests the Court to strike Appendix 1 from the State's brief, as well as the last sentence of the full paragraph on page 11 of its brief, which discusses and cites the data provided by

Ms. Kallio. If the State wished to rely on this data, the Prosecutor needed to file it below and present Ms. Kallio as a witness at a hearing so that she could be cross-examined by the Defense regarding her sworn statement.

Mr. Lehrkamp also requests the Court to order the State to file an amended brief within seven days that omits Appendix 1 and deletes the last sentence on page 11 that cites and discusses the data within Appendix 1. No additional revisions of the State's brief should be permitted. The time frame for filing Mr. Lehrkamp's reply brief should run from the filing date of the State's amended brief.

Counsel for the State has been contacted and objects to this motion.

Respectfully submitted this 5th day of August 2024.

OFFICE OF STATE PUBLIC DEFENDER  
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Helena, MT 59620-0147

By: /s/ Deborah S. Smith  
DEBORAH S. SMITH  
Assistant Appellate Defender

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Motion 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 calculated by Microsoft Word for Windows is 749, excluding caption, Certificate of Service, and Certificate of Compliance.

/s/ Deborah S. Smith  
DEBORAH S. SMITH

## **CERTIFICATE OF SERVICE**

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 08-05-2024:

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Electronically signed by Kim Harrison on behalf of Deborah Susan Smith  
Dated: 08-05-2024