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CLERK OF DISTRICT COURT
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DEPUTY

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9 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

10 STATE OF MONTANA,

11 Plaintiff,

12 vs.

13 CORY ROBERT FRANKLIN,

14 Defendant.

) Cause No.: DC-04-015(C)

) **RESPONSE TO MOTION FOR
ADDITIONAL HEARING ON MOTION
FOR RULE 11 SANCTIONS AND
MOTION TO STRIKE**

15 * * * * *

16 COMES NOW Plaintiff, State of Montana, by and through Stacy Boman, Deputy Flathead
17 County Attorney, and responds in opposition to Defendant's motion for additional hearing on motion
18 for Rule 11 sanctions. Defendant's motion requests the court re-open the hearing held on September 5,
19 2014 to allow Defendant to offer additional evidence in support of Defendant's motion for Rule 11
20 sanctions, namely testimony of Flathead County Sheriff's Deputy McKeag Johns and a recorded
21 conversation between Kristina Franklin and Johns. The State opposes Defendant's motion on the
22 grounds that Defendant could have presented the additional evidence on September 5 and to hold an
23 additional hearing at this time does not serve judicial economy.
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26 **FACTUAL BACKGROUND**

27 On May 8, 2014, the State filed a Petition for Revocation of Suspended Sentence in the above
28 entitled cause based upon a Report of Violation written by Defendant's probation officer, Paul Parrish.

Through his counsel, Defendant filed a motion for Rule 11 sanctions on July 16, 2014, alleging
STATE'S RESPONSE TO DEFENDANT'S MOTION FOR ADDITIONAL HEARING ON MOTION FOR RULE 11 SANCTIONS
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1 misconduct by Deputy Flathead County Attorney Kenneth Park and Flathead County Attorney Ed
2 Corrigan. On July 31, 2014 the Defendant appeared with counsel, Tim Baldwin, for a hearing on the
3 petition for revocation. Probation officers Rick Jones and Paul Parrish testified on behalf of the State
4 regarding Defendant's probation violations. The Court took the petition for revocation under
5 advisement and Defendant subsequently requested a hearing on the motion for sanctions.
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7 The hearing on motion for sanctions was set for September 5, 2014. On that date, Defendant
8 and Mr. Baldwin appeared and called Mr. Park and Mr. Corrigan as witnesses and Defendant testified
9 on his own behalf. The State called Paul Parrish to testify. At the conclusion of the hearing Mr.
10 Baldwin made a closing argument on behalf of Defendant and stated his requested relief. The matter
11 was again taken under advisement and the Court set a disposition date of October 23, 2014. On
12 September 16, 2014 Defendant filed a motion requesting an additional hearing on the motion for
13 sanctions, indicating the defense would like to call Flathead County Sheriff's Deputy McKeag Johns as
14 an additional witness to offer testimony regarding a June 4, 2014 recorded phone call between Deputy
15 Johns and Kristina Franklin.
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18 ARGUMENT

19 Defendant's request for additional hearing should be denied as the motion does not offer any
20 newly discovered evidence and frustrates judicial economy. Defendant's motion for additional hearing
21 claims that additional evidence, an audio recording of a June 4, 2014 conversation between Officer
22 Johns and Ms. Franklin, is available and necessary for the Court's consideration of the motion for Rule
23 11 sanctions. Defendant cannot demonstrate the additional testimony he seeks to admit is newly
24 discovered evidence that would warrant an additional hearing. Further, Defendant's request
25 undermines the principles of judicial economy.
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1 **A. Defendant's motion should be denied because Defendant cannot establish the additional**
2 **evidence he seeks to offer was unavailable at the time of the September 5th hearing.**

3 While the State is unaware of specific authority governing whether or not to reopen a sanctions
4 hearing, there is well established case law outlining when a court may grant a request for a new
5 criminal trial or a petition for post-conviction relief based upon newly discovered evidence. A court
6 may grant a criminal defendant's motion for a new trial based upon newly discovered evidence if the
7 defendant demonstrates:
8

- 9 (1) that the evidence must have come to the knowledge of the applicant since the trial;
10 (2) that it was not through want of diligence that it was not discovered earlier;
11 (3) that it is so material that it would probably produce a different result upon another
12 trial;
13 (4) that it is not cumulative merely – that is, does not speak as to facts in relation to which
14 there was evidence at trial;
15 (5) that the application must be supported by the affidavit of the witness whose evidence
16 is alleged to have been newly discovered, or its absence accounted for; and
17 (6) that the evidence must not be such as will only tend to impeach the character or credit
18 of a witness.

19 *State v. Raugust*, 2003 MT 367, ¶ 19, 319 Mont. 97, 82 P.3d 890, citing *State v. Greeno*, 135 Mont.
20 580, 586, 342 P.2d 1052, 1055 (1959); *see also State v. Cline*, 275 Mont. 46, 52, 909 P.2d 1171, 1175
21 (1996). All six factors must be established in order for a court to grant a new criminal trial. *Cline*, 275
22 Mont. at 52, 909 P.2d at 1175. The Montana Supreme Court has also applied these factors to determine
23 whether a petition for post-conviction relief should be granted on the basis of newly discovered
24 evidence. *State v. Sullivan*, 286 Mont. 235, 241, 948 P.2d 215, 219 (1995).

25 These factors are instructive in determining whether to grant Defendant's motion for additional
26 hearing. Defendant seeks to offer additional testimony from Deputy Johns regarding a conversation
27 with Ms. Franklin that she recorded, without Deputy Johns' knowledge or consent, on June 4, 2014. In
28 support of his request, Defendant attached affidavits from Ms. Franklin, a transcript of the phone call,
and an audio recording of the phone to his motion. Defendant does not state that he was unaware of the
conversation between Ms. Franklin and Deputy Johns prior to the September 5 hearing.

1 In fact, Defendant's motion suggests Defendant and his attorney were in possession of the
2 recorded conversation well in advance of the hearing, perhaps as early as June 4, 2014. If Defendant
3 wanted to present this evidence at the September 5 hearing, he could have subpoenaed Deputy Johns as
4 a witness. Defendant could also have called Ms. Franklin to testify on September 5, as she was present
5 in the courtroom during the hearing. Defendant's motion states Mr. Baldwin was not authorized to use
6 this evidence prior to September 15, 2014 because it would expose Ms. Franklin to criminal liability as
7 she illegally recorded the phone conversation with Deputy Johns. This does not explain why Defendant
8 failed to call Deputy Johns to testify about the conversation, or even to have Ms. Franklin testify about
9 the conversation without offering the recording into evidence.
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12 Additionally, Defendant's exhibits A1, A2, and B attached to the motion for additional hearing
13 are cumulative to the testimony offered by Mr. Park and defense exhibits admitted into evidence at the
14 September 5 hearing. Mr. Baldwin asked Mr. Park questions regarding a June 4, 2014 phone
15 conversation between Deputy Johns and Ms. Franklin and also admitted into evidence two affidavits
16 from Ms. Franklin as exhibit A and exhibit B at the September 5 hearing in which Ms. Franklin
17 references the June conversation. Transcr. of Proceedings 20-28 (Sept. 5, 2014).
18

19 The additional evidence Defendant seeks to offer was within the knowledge of Defendant and
20 his counsel prior to the September 5 hearing on motion for Rule 11 sanctions. Defendant has not
21 provided a compelling reason why the evidence could not have been discovered and brought forth at
22 the previous hearing. Further, it is not so material that it would probably produce a different result and
23 it is cumulative to the testimony offered by Deputy County Attorney Park and exhibits admitted on
24 September 5. Because there is no reason why Defendant could not have called Ms. Franklin or Deputy
25 Johns to testify on September 5, Defendant's motion for additional hearing should be denied. The State
26 also notes Ms. Franklin unlawfully recorded a conversation with Deputy Johns; Defendant should not
27 have the benefit of offering illegally obtained evidence. Finally, the State moves to strike exhibits
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1 attached to Defendant's motion for additional hearing as these exhibits have not been offered into
2 evidence through sworn testimony. The Court should not consider these exhibits in ruling upon
3 Defendant's motion for Rule 11 sanctions.
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5 **B. Defendant's motion frustrates the principles of judicial economy.**

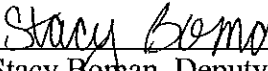
6 Defendant's motion for additional hearing does not serve judicial economy. When a court sets a
7 hearing date to allow the parties to offer evidence, the parties are expected to prepare in advance of the
8 hearing and offer all relevant evidence at the time specified by the court. In this case, the Court issued
9 an order on August 5, 2014 scheduling the hearing on the motion for Rule 11 sanctions for September
10 5. Defendant had ample time to prepare for the hearing and determine what evidence he wished to
11 present. To allow Defendant to reopen the hearing without good cause is a misuse of this Court's
12 limited resources. Defendant's motion for additional hearing is a waste of judicial resources and his
13 motion should be denied.
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16 **CONCLUSION**

17 Defendant's motion for additional hearing should be denied. Defendant could have offered the
18 evidence on September 5, 2014. Defendant could have called Deputy Johns, Ms. Franklin, or both to
19 testify at the previous hearing. Further, Defendant elicited testimony from Mr. Park regarding the June
20 4, 2014 phone conversation between Ms. Franklin and Deputy Johns and introduced affidavits from
21 Ms. Franklin regarding her conversation with Deputy Johns at the previous hearing. There is no reason
22 why Defendant could not have offered the additional testimony he now seeks at the hearing on
23 September 5, 2014. Finally, to hold an additional hearing when Defendant has not demonstrated he has
24 newly discovered evidence frustrates judicial economy and imposes an unnecessary burden on the
25 Court's crowded docket. For these reasons, the State requests the Court deny Defendant's motion for
26 additional hearing and requests the Court strike the exhibits attached to Defendant's motion.
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1 RESPECTFULLY SUBMITTED this 20th day of September, 2014.

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3 OFFICE OF THE COUNTY ATTORNEY
4 Flathead County, Montana

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7 Stacy Boman, Deputy

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CERTIFICATE OF SERVICE

The undersigned, Secretary for the Office of the Flathead County Attorney, does hereby certify that on the 2nd day of September, 2014, a copy of the foregoing document was provided to the following named individual(s) in the manner indicated below:

Timothy Baldwin
QUATMAN & QUATMAN, PC
P.O. Box 1520
Kalispell, MT 59903

- U.S. mail, first class postage prepaid.
- Public Defender folder, Flathead County Attorneys Office.
- Hand delivery.
- Personal service.
- Sent by fax to fax _____.

