FILED
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JAN 13 2011
JEANNE HICKS, Clerk
BY Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: January 13, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam L. Seifter Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

UNDER ADVISEMENT RULING ON STATE'S MOTION TO COMPEL DISCLOSURE OF AUDIO RECORDING OF 2009 SPIRITUAL WARRIOR RETREAT AND ORDER GRANTING MOTION TO COMPEL

The Court has considered the State's motion, the response and the reply. The parties have not requested hearing and oral argument, and the Court concludes that the matter can be determined on the basis of the written pleadings.

In *Barrett v. Acevedo*, 169 F.3d 1155 (8th Cir.1999), a case cited by the defense, the Court of Appeals stated that

> [i]t is now clear, at least with respect to business records, that "if the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." *Doe*, 465 U.S. at 612 n. 10, 104 S.Ct. 1237. However, whether *Doe's* rationale extends to purely personal papers in a defendant's possession is still open to debate.

Id., 169 F.3d at 1167-68 (internal quotations in original; citations omitted). Based on the description of the audio recording at issue here, this disclosure dispute does not involve "purely personal papers" or the type of "intensely personal and intimate documents" the content of which may still receive Fifth Amendment protection from compelled disclosure. The audio recording was voluntarily prepared in conjunction with a business endeavor and apparently contains statements made to numerous prospective participants in one of the sweat lodge activities sponsored by James Ray International. The Court therefore determines that with regard to content the rule represented by the general trend in authority noted in *Barrett v. Acevedo* would control this case. The Court also determines that any violation of the Fifth Amendment would result from the compelled "act of production" and not from the content of the recording.

The Defendant argues that *State ex rel. Hyder v. Superior Court,* 128 Ariz. 253, 625 P.2d 316 (1981) is "binding precedent" that "forecloses the State's attempt to compel disclosure." The Arizona Supreme Court in *Hyder* based its decision on the technical ground that production of letters pursuant to a subpoena duces tecum would constitute an "incriminating communicative act" because of the forced authentication of the letters that would result from the defendant's complying with the subpoena. The Court did not foreclose the state from obtaining the information by some means other than a subpoena, which, in fact, did occur. *See Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (App.1983). Although there may be additional ways to authenticate the audio recording in the present case, this aspect of *Hyder* prohibiting Fifth Amendment violations brought about by forced authentication through compliance with a subpoena duces tecum could apply; presumably, under the facts in *Hyder*, the state could have authenticated the letters through the victim's testimony or possibly some other means.

> It is not relevant that the letters have been read by others, that they were sent to another with apparently no desire to have them returned or even that the letters could be authenticated by some other means than through Wayman's compliance with the subpoena . . . . This becomes obvious when it is understood that the evil to be prevented is not the invasion of Wayman's privacy or the production of the letters, but the fact that Wayman wrote the letters, which results from the compelled production. The "Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information."

Id., 128 Ariz. at 257, 625 P.2d at 320 (internal quotations in original; citations omitted).

Although *Hyder* was decided thirty years ago, the holding in that case is binding on this Court and would appear to prohibit this Court from granting a request for an order directing the defendant to produce the audio recording if his compliance with that order resulted in self-incrimination. Whether in the form of a subpoena or a disclosure order,

Hyder protects a Defendant from such compelled disclosure if the disclosure amounts to "an incriminating communicative act."

This motion is controlled by the holding in *Braswell v. United* States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), a case cited by the State in its motion and reply. The State's Motion to Compel was made pursuant to Rule 15.2(g) of the Arizona Rules of Criminal Procedure, which "allows the court in its discretion" to order "any person" to make material or information available to the prosecutor, so long as the other conditions of the rule are met. The facts recited by the State, which are not contradicted by the defense, indicate that the audio recording was produced by Michael Barber for James Ray International. If this is the case, production of JRI's copy of the audio recording, in whatever form it may be in, does not require an "incriminating communicative act" by Mr. Ray. Based on the information provided to this Court, Mr. Ray's Fifth Amendment rights would not be violated by an order compelling James Ray International – presumably a distinct and separate person or entity – to provide the audio recording. Whether or not the attorneys for Mr. Ray currently have possession of the recording would not affect the fact that the production of the recording would not constitute an incriminating communicative act by Mr. Ray.

The Defendant also argues that the State has not made a showing of substantial need for the audio recording. Based on the theory of the case articulated in the State's motions and responses in this case, the audio recording could contain relevant evidence. The fact that there may be testimony that would duplicate the contents of the recording does not negate the significance of the possible availability of an actual recording of statements by the Defendant. Aside from any question concerning the relevance the recording may have to the state of mind of the alleged victims and concerning the materiality of the participants' state of mind, the information could be relevant to any issue relating to the Defendant's knowledge of the physical effects of participation in sweat lodge ceremonies. The Court concludes that the State has substantial need in the preparation of its case for the audio recording of the 2009 Spiritual Warrior Seminar and that the prosecutor is unable to obtain the substantial equivalent through the testimony of witnesses or otherwise. In many instances, there simply is no testimonial equivalent of clear and accurate electronic recordings of actual events in a case. Any questions going to the accuracy and clarity of the recording and any questions of relevancy and materiality can be addressed should the need arise.

For the reasons set forth above,

IT IS ORDERED *granting* the Motion to Compel Disclosure and directing the State to prepare a proposed order that complies with the opinion and decision in *Braswell v. United States.*

DATED this 13th day of January, 2011.

Warren R. Darrow
Superior Court Judge

cc: Victim Services Division