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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	**CASE NO. V1300CR201080049** Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S MOTION TO LIMIT EVIDENCE OF PRIOR SWEAT LODGE CEREMONIES PURSUANT TO ARIZ. R. EVID. 401, 402, AND 403**

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves this court to limit testimony regarding prior sweat lodge ceremonies. This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State's relentless bid to introduce irrelevant and prejudicial evidence from prior sweat lodges is repugnant to Mr. Ray's constitutional right to a fair trial. Notwithstanding the *months* that the State has already consumed litigating this issue, including days of evidentiary hearings, multiple rounds of briefing, and a volumes-thick record, the State now casually sidesteps this Court's careful, legally anchored ruling in hopes of a more convenient result. But there is no merit in the State's new, scarcely explained suggestion—the State's sixth proffered argument—that prior ceremonies are somehow probative of the cause of death in 2009. As a matter of law, fact, and logic, two incidents with disparate results and unknown causes do not yield *any* explanation of the operative causal mechanisms. The State must not be permitted to raise unsupported theories in perpetuity in the hopes that one will stick. *See United States v. Schiff*, 538 F. Supp. 2d 818, 841 (D.N.J. 2008) (rejecting, as a violation of Due Process, the prosecution's attempt to "toss out a new theory" after "many months and reams of paper" were devoted to pre-trial hearing, noting that "a post-hearing brief is not the place for new theories"). Concerns of fundamental fairness and the need for finality impel the Court to stand by its initial ruling—and thereby safeguard the integrity of this criminal trial.

II. ARGUMENT

A. The State's constantly changing theory offends the Due Process Clause.

Two aspects of this case were established from the very beginning. First, until recently, the State has proceeded on a theory that Mr. Ray committed a crime because—*and only because*—alleged incidents at prior sweat lodge ceremonies put him on notice of the risk of death in 2009. *See* Transcript of 404(b) hearing, Nov. 10, 2010, at 21–22; *see also* Defendant's Response to State's Motion for Reconsideration of MIL No. 1, at 6–7. Second, from the very beginning, in March 2010, Mr. Ray disclosed and adhered to his intention to meet the State on every element of the charged crime, *including, explicitly, causation*. *See* Defendant's First

Disclosure Pursuant to Ariz. R. Crim. P. 15.2, March 15, 2010. A brief review of the ensuing events underscores the fundamental unfairness now afoot.

In the summer of 2010, the State informed the Defense that it intended to introduce alleged incidents from prior sweat lodge ceremonies as prior-act evidence under Rule 404(b). In the extensive briefing that followed, the Defense argued that these alleged incidents did not fall within any permissible 404(b) purpose. Among other failings, the Defense pointed out, there was no evidence of any life-threatening condition in prior years, much less any evidence that Mr. Ray "knew" of such life-threatening conditions.

A three-day evidentiary hearing followed on November 9, 10, and 16, 2010. Although the State called five witnesses and introduced 24 statements of hearsay witnesses, it did not produce *any* medical evidence that would in any way prove the existence of a life-threatening condition in prior years, or the existence of any particular cause of the prior symptoms. Instead, as this Court is well aware, unqualified lay witnesses were permitted to spend days testifying about people being in "medical distress" or "out of it." These same witnesses, whose bias is by now well-known, contradicted themselves and each other, suggesting in one breath that circumstances were dire and in the next breath that no serious injuries had occurred at Angel Valley. *See, e.g.*, Exhibit 79, at 3 (affidavit of Amayra Hamilton) ("Numerous sweat lodge ceremonies had been performed at Angel Valley's property in the past, without mishap, including at James Ray's 2008 Spiritual Warrior Retreat."); *see also* Transcript of 404(b) hearing, Nov. 10, at 119:7–9 (testimony of Debra Mercer) ("nobody had been pulled out unconscious before" the 2009 ceremony).

After yet another round of post-hearing briefing and the submission of hundreds of exhibits comprising thousands of pages and hours of audio recordings, on February 3, 2011 this Court issued a well-reasoned ruling that the evidence was not admissible to prove Mr. Ray's mental state—the purpose the State had vigorously asserted.

The State now asks this Court to throw away three full days of evidentiary hearings, months of briefing, hundreds of pages of record, and the Court's well-reasoned decision. In its new effort, raised for the first time *in a reply brief after trial began* and explained in a single

paragraph, the State now says that the existence of limited symptoms in prior years is somehow relevant to "causation"—*viz*, to prove that the decedents in 2009 died of heat stroke and not something else. This endeavor is procedurally unacceptable. A criminal defendant's right to a fair trial requires a court, absent extenuating circumstances, to rigorously enforce the requirements of both notice and finality. Consistent with these principles, "[a] post-hearing brief is not the place for new legal theories. This is not arbitrary, but rather essential for a fair hearing process." *United States. v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. 2008).

In *Schiff*, for example, the prosecution sought, in extensive pretrial *Daubert* proceedings, to qualify a key expert. Having realized that its theory of admissibility made "little analytic sense," the government decided after the hearing concluded "to raise new arguments, to make a new factual proffer, or to advance a new legal theory in the post-hearing submission." *Id.* at 841. The federal district court rejected the attempt. As the court explained, "[m]any months and reams of paper have been devoted to the *Daubert* process, and it is a violation of the procedural rules set forth in the Federal Rules of Criminal Procedure, the FRE, and fundamental due process to toss out a new theory now." *Id.* The court chided the government for its "bare bones factual proffer" and "ever-shifting theories of this case." *Id.* "There is just no excuse," the court explained, "for waiting until the eve of trial (and the end of the *Daubert* hearing) to launch a new theory (especially one that requires a new factual proffer)." *Id.* at 840.

So too here: the Constitution protects Mr. Ray from being forced to defend his liberty on ever-shifting sands. And here, as in *Schiff*, there is no excuse for the State's failure to raise causation arguments in the approximately *eight months* of proceedings regarding the prior sweat lodge evidence. The State has been on notice since March 2010—a year ago—that Mr. Ray would defend himself against the charges on the element of causation, and Mr. Ray has pursued that defense ever since. Moreover, the evidence that bolsters Mr. Ray's defense—some of which was recorded by the State on the night of the accident—was provided to him *by the State*. This court must adhere to its February 3 ruling so that Mr. Ray can prepare his defense and receive a fair trial.

B. The evidence from prior sweat lodge ceremonies is not probative of the cause of death in 2009.

Even if procedural fairness did not bar the State's late and scatter-shot attempt, the new theory fails as a matter of law. The State's position is that because some individuals in 2005 and 2008 experienced symptoms like disorientation and vomiting, the medical cause of which has never been identified, heat stroke must have been the cause of death in 2009. The State's argument is a logical non-sequitur. *Cf. Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, 48 So.3d 976, 993 (Fla. Ct. App. 2010) ("[E]vidence of prior claims is not admissible to prove causation.").

The only way such evidence could potentially be relevant to causation is if the State could first prove what caused the prior incidents, and then demonstrate substantial similarity between the prior incidents and the instant case. *See, e.g.*, *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981) (collecting cases); *Prashker v. Beech Aircraft Corp*, 258 F.2d 602, 608-09 (3d Cir. 1958); *Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726, 735 (Pa. Super. Ct. 1996). The State can do neither.

Consider the facts that would need to be true for this argument to get off the ground:

1. The State would need to establish, by competent evidence, that specific symptoms existed in prior sweat lodge ceremonies.
2. The State would need to establish, by competent *medical* evidence, that those symptoms were actually caused by a specific illness or pathology.
3. The State would need to establish that the surrounding circumstances—including the participants, the materials, the environmental factors, and the sweat lodge structure—were the same in 2005, 2007, 2008, and 2009.
4. The State would need to establish that the fatal condition of the three decedents in 2009 was the same as the symptoms alleged in 2005, 2007, 2008, and 2009.

The State cannot satisfy these requirements, for the record does not support them. First, even assuming the State could prove by competent evidence the existence of discrete and

legitimate symptoms, the State cannot prove that heat stroke caused the pre-2009 symptoms. As this Court has explained, "other than the medical records relating to Mr. Daniel P, a participant in the 2005 sweat lodge," the Court explained, "there is no evidence that any other participant in a pre-2009 sweat lodge ceremony ever sought or was administered actual, professional medical care of any kind as a result of that activity." Under Advisement Ruling on MIL No. 1, 2/3/11, at 2. "And, as noted by the defense, the evidence does not suggest that Daniel P was suffering a life-threatening condition." *Id.* Nor did the State provide "medical testimony connecting the observations of physical and mental distress exhibited by the pre-2009 sweat lodge participants with a risk of death." *Id.* These evidentiary failings, which barred the State's attempt under Rule 404(b), also bar the admission of the evidence under Rules 401, 402, and 403. Without medical evidence that (1) identifies the cause of the symptoms in 2005 and 2008 and (2) connects the symptoms to the life-threatening conditions in 2009, the prior ceremonies cannot even begin to make any more probable the State's asserted cause of death.

Second, that the prior incidents involved only relatively minor symptoms, all of which can be observed at many 10K races, while the instant case involves three deaths, renders the cases substantially dissimilar for purposes of proving causation. If anything, the drastic difference in the severity of the harms, as here, tends to suggest that *different* causes were at play.

Third, even if the State could satisfy the initial factual prerequisites, the State would need to provide some basis for concluding that the symptoms it identifies are more likely caused by heat stroke than by the Defense's alternative theories. The State cannot do so. The very nature of the defense is that the symptoms of illnesses caused by toxins overlap with the symptoms brought on by heat stroke.

C. The evidence from prior sweat lodge ceremonies should be excluded pursuant to Rule 403.

"Even when substantial identity of the circumstances is proven" with respect to prior incidents, moreover—which in this case it is not—"the admissibility of such evidence lies within the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue

expenditure of time in the trial of collateral issues against the factors favoring admissibility." *McKinnon*, 638 F.2d at 277.

Here, the tendency of the evidence of disorientation in 2005 and of vomiting or shaking in 2008 to prove anything about the cause of the three deaths in 2009 is negligible. In contrast, the prejudice of the evidence the State intends to elicit, as the Court will recall from the *Terrazas* hearing, is high. These are witnesses who plainly have negative feelings toward Mr. Ray and have an established track record of aggressively expressing those feelings, without regard for the Rules of Evidence or courtroom procedure. Furthermore, the State's amended witness list, filed March 3, lists approximately thirteen additional witnesses who will be called to testify *only* as to prior sweat lodge ceremonies—and compelling the defense to call witnesses to rebut the predictably outlandish claims made by the State's witnesses. The State's averment that this will not become a mini-trial is hollow. Given the patent irrelevance of the evidence to causation, the highly prejudicial nature of the expected testimony, and the tendency of evidence of past events to confuse the jury and require an extensive mini-trial, Rule 403 weighs strongly in favor of exclusion.

III. CONCLUSION

It is too late for the State to adopt a new theory of admissibility for evidence that this Court has ruled against. And the new theory has no basis in law. The prior sweat lodge evidence should, once more, be excluded.

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