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SANDRA K. MARKHAM, Clerk
By: Rita Storms

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO RULE 15.7 BASED ON VIOLATION OF *BRADY V. MARYLAND*** **STATE'S RESPONSE TO MOTION TO EXCLUDE TESTIMONY OF RICHARD HADDOW;** **STATE'S RESPONSE TO DEFENDANT'S RENEWED MOTION FOR SANCTIONS PURSUANT TO RULE 15.7 BASED ON VIOLATION OF *BRADY V. MARYLAND*** **(Evidentiary Hearing Requested)** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, respectfully files this Response to Defendant's Motion for Sanctions Pursuant to Rule 15.7 Based on Violations of *Brady v. Maryland.* This Response also responds to the issues raised in Defendant's Motion to Exclude Testimony of Richard Haddow and Defendant's Renewed Motion for Sanctions Pursuant to Rule 15.7 based on Violation of *Brady v. Maryland.* This response is further supported by the following Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

On April 4th, 2011, in response to a request from Defendant, the State disclosed an e-mail received from Richard Haddow on April 29, 2010. This e-mail subsequently became the basis for Defendant's Motion for Mistrial based on a claim that the late disclosure of the e-mail was a violation of the State's disclosure obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). Defendant's Motion was filed on Monday, April 11, 2011. The State was ordered to file its response by 5:00 p.m. the following day and oral argument was set for Wednesday April 13, 2011.

In its Response to Defendant's motion, the State set forth its recollection of the contact it had with Mr. Haddow and the scope of the State's relationship with him to include the fact that it had never retained Mr. Haddow or paid him for any services and that it ultimately decided not to retain Mr. Haddow because of concerns regarding his qualifications as an expert. The information in the State's response was based upon a review of the State's file on Mr. Haddow.

When Detective Diskin reviewed the response after it had been filed, he indicated he had talked to Mr. Haddow prior to the Grand Jury presentation and believed he had spoken to him the day before the presentation because during his testimony he referenced speaking with an "air quality specialist or someone like that." *Grand Jury Transcript* at 112: 5-11, Detective Diskin indicated this reference must have been to Mr. Haddow. During the State's argument on the motion, the State brought this inaccuracy in the State's response to the Court's attention.

On April 13, 2011, following oral argument, this Court found the State's failure to disclose the April 29, 2010 was a violation of *Brady.* In its Order, the Court concluded a mistrial was not warranted and specifically found:

> Although the previously undisclosed evidence is material, the Court notes that the Defendant still has an opportunity to present to the jury the favorable information contained in the Haddow report. That information appears to be consistent with the

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> defense being presented at trial, as was articulated by counsel at oral argument on the motion for mistrial. Furthermore, circumstances regarding the late disclosure can be the subject of cross-examination of both future witnesses and witnesses who are recalled to testify.

Under Advisement Ruling on Defendant's Motion for Mistrial Filed April 11, 2011.

On April 14, 2011, Defendant requested a continuance to allow him to obtain records from Mr. Haddow and the State and to interview Mr. Haddow and Detective Diskin. In response this Court granted a continuance of the trial until April 20th to allow this disclosure to occur.

On April 15, 2011, Defendant and the State conducted a lengthy interview with Mr. Haddow. Prior to the meeting, the State provided Defendant with Deputy County Attorney Bill Hughes' notes from the telephonic interview of Mr. Haddow when the State was considering him as an expert witness. Mr. Haddow also provided several hundred pages of his records and notes, to include communication records. Based on these records, it was clear that Mr. Haddow had more contact with Detective Diskin than was set forth in the State's Response or recalled by Detective Diskin. In addition, Mr. Haddow indicated the telephonic interview with the State had lasted 68 minutes. This information had not been reflected in the State's file or in Detective Diskin's records. On April 20, 2011, the State filed an addendum to its response to apprise the Court of this information which differed from the history reflected in the State's response.

On April 20, 2011, during the cross-examination for Debra Mercer, Mr. Kelly questioned Ms. Mercer in front of the jury and asked her if she knew that an expert had provided the State with a report that showed the construction of the sweat lodge was responsible for the victims' deaths. The State objected. Following recess of the trial for lunch, the State's objection was argued before the Court.

> THE COURT: Ms. Polk objected about foundation. I'm just looking at the question now. Ms. Polk.

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MS. POLK: Your Honor, first of all, this witness would have no personal knowledge of that. The rule clearly indicates you don't ask questions of a witness that are rhetorical in nature only.

Secondly, that report is hearsay. So the state would ask does the defense intend to call Mr. Haddow to give his opinions and lay proper foundation for that report?

Third, I think it's a mischaracterization of the report to characterize it as criticizing the construction of the sweat lodge. The subsequent interview that the parties had of Mr. Haddow, I believe, we will be discussing later. But – I'll leave it at that for now, Your Honor. But the question would be that report is hearsay, and does the defense intend to call Mr. Haddow as a witness?

THE COURT: Mr. Kelly.

MR. KELLY: Judge, this is cross-examination. It's unlimited in the state of Arizona. All I have to have is a good-faith basis to ask the question. And I have a very good basis to ask it. It's the state's late disclosed reported expert, Mr. Haddow.

And if I perhaps used the wrong terminology, I can rephrase the question to were you aware that there is an expert who opined that the construction of the sweat lodge was a contributing factor in the cause of death, which would be more accurate, and not use the word "criticize."

Again Judge, it's cross-examination. I have good faith basis to ask it. It's the state's own report. And whether – I can tell you we did not intend to call Mr. Haddow. He was not disclosed timely as a witness in this case. We understand your court order. He can't testify. But I'm still entitled to ask the question.

THE COURT: I didn't say he could not testify if the defense chose to call him.

MR. KELLY: Well, Judge, when -- I understood a clear order from this Court a couple weeks ago that the time for the investigation is ended. And if we're provided the option of calling him, I appreciate that. But as we stand here today, I don't want to mislead the Court. We had the chance to interview. But we don't intend to call him.

THE COURT: Well, I wanted it clear that this was an unusual circumstance. And we continued the trial. And if you want to call an expert, you were and are given that opportunity.

> But with regard to the objection – I've said this before – I don't believe it is appropriate to call a witness without knowledge in order to make statements to that witness and, essentially, get them before the jury. There can be questions about knowledge of a report. If the person doesn't know there is a report, then – and doesn't have knowledge of it, just bringing in the evidence in that fashion through a witness without knowledge, it's not something I've really seen to any large extent.

Partial Trial Transcript, April 20, 2011, at 43:18-46:6 (Exhibit A).

On April 20, 2011, Defendant filed the Motion for Sanctions proposing three lengthy jury instructions that he requested to have repeatedly read to the jury during the trial.

On April 22, 2011, the State added Mr. Haddow to its List of Witnesses and provided Defendant notice of its intent to call Mr. Haddow following the testimony of Amyra Hamilton. The State also offered to make Mr. Haddow available for an additional interview if requested.

On April 25, 2011, Defendant filed a Motion to Exclude Testimony of Richard Haddow and a Renewed Motion for Sanctions Pursuant to Rule 15.7 Based on Violation of *Brady v. Maryland.*

Legal Argument

I. The interview with Mr. Haddow confirmed the State's representation regarding the nature of his report and his qualifications.

During Mr. Haddow's interview on April 15, 2011, he confirmed the following: (1) he had never been retained by the State; (2) he never received any payment from the State; (3) any work he preformed relating to the October 8, 2009 event was paid for by Mr. Lou Diesel as a part of the civil lawsuit; (4) his contact with the State, either through Detective Diskin or the County Attorney's Office, was to gather information needed to complete his work in the civil case; (5) the e-mail containing his preliminary findings was not requested by the State and was an attempt to convince the State to retain him as an expert; and (5) he never completed his analysis and the e-mail

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containing his opinion was incomplete and preliminary. As noted in Defendant's Motion to Exclude Mr. Haddow's testimony, Mr. Haddow made it clear his report was preliminary and incomplete:

> You know I'd really like you to understand this report was written around Liz and I did not weigh or contribute the circumstances to any other individuals other than I did pay attention to both Kirby and James on where they were just for my own understanding, and I pass that on even though that wasn't my objective. And so the report is focused on Liz and not everybody and so just so you know. That's one of the reasons why it was incomplete. I don't – that's the reason I called it a preliminary report, because I didn't have all the facts. I didn't have the materials, I didn't get the rocks, I didn't get to calculate the heat and what they were experiencing. There's a ton of stuff that I didn't do. I only spent like, less than a week on it.

Haddow Interview Transcript, Part 4, at 42:9-19 (Defendant's Exhibit B).

Moreover, the interview with Mr. Haddow confirmed the State's theory of the case that it was the extreme heat and the conditions inside the sweat lodge, which were under the control of Defendant that cased the deaths of the victims.[1]

> DO: Okay. So where did you get hyperthermia?
>
> HADDOW: Well it was … I, I, I …this is my opinion.
>
> DO: Yes.
>
> HADDOW: I believe the doctors saw these people in a very, very hot compartment and all the symptoms as have documented here reflect the symptomatology. Reflects heat stress.
>
> DO: Okay,
>
> HADDOW: And it was … it doesn't take a rocket scientist to know that the heating, hyperthermia and organ failure were related.

Haddow Transcript, Part 2, at 87:23-88:3.

> HADDOW: In addition to that the CO2 that was in the air being heavier than the air would be closer to the ground and so what was happening between the water

[1] Mr. Haddow's opinion about the construction of the sweat lodge (i.e. airtight construction with poor ventilation), would apparently apply to the lodges constructed at Angel Valley and used by facilitators other than Mr. Ray.

which water and the air is stored energy. So if you have a very humid hot environment, it would be much more dangerous then a dry environment.

DO: Mmm hmm.

HADDOW: So when you inhale the heated water moisture, it's going heat up your core.

Haddow Transcript, Part 2, at 91:18-24 (Defendant's Exhibit B).

HADDOW: It's, it's –now, you know, I don't want – I don't how to address this and please if I'm going the wrong way – the amount of rocks put in there

DO: Sure.

HADDOW: ...would be significantly much more weighted...

DO: Okay.

HADDOW: ... than the location of the pit. So, the location of the pit isn't the problem, it was the amount of heated rocks that was put in there.

DO: Okay.

HADDOW: And if it was even a poorly designed and had some ventilation or draft ability...

DO: Mm hmm.

HADDOW...the amount of heat that was put in there would overcome that draft – ability to draft.

Haddow Transcript, Part 3 at 16:12-18 (Defendant's Exhibit B).

Later in the interview, Mr. Haddow again confirmed the heat, the moisture and the amount of people in the sweat lodge were what created the dangerous environment and, more importantly, completely refuted Defendant's theory that the wood used to heat the rocks could have introduced some toxin into the environment that lead to the deaths.

POLK: So the construction of the sweat lodge itself doesn't necessarily create carbon dioxide? It's what introduced into that structure?

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HADDOW: The people.

POLK: The people?

HADDOW: Yes.

POLK: And…

HADDOW: Water, the heat.

POLK: Water, heat.

HADDOW: The smoke. I don't … never determined how much sandalwood, what other chemicals, organics … what other chem. … stuff was being put onto the fire, and, as any type in complete combustion, will have a particulate and a carbon monoxide. So I don't know. I never found out how much, what was put on there. I'm not too fearful of any of the, of the wood that was used on heating the rocks because the temperature of the rock of any volatiles or any kind of anything that would have been on the rocks would not have been an issue for …from how I saw it was designed and used.

HUGHES: Can you expound on that a little more, Explain, maybe more for a lay person, what you mean by volatiles and the wood.

HADDOW: They … usually the pressure treated woods will have some sort of oil or a hydrocarbon based material to slow decomposition of the wood. So, you know, if they were trying to use railroad ties to heat up the rocks, your question would "Oh, would the poisons in the natch … nasty stuff in the railroad ties contribute to inside the sweat lodge?" and my evaluation is a glowing, red rock that has no … no materials on it, would not have … would not subject the, the participants to any, any dangers.

POLK: And that's not part of that email you sent out. Is that something you thought of before today?

HADDOW: No, I've had all this stuff. Once you know, you know I was so consumed in doing this. But once Lou and I got the case settled, I didn't need to continue investigating anything on my own, and that's one of the reasons why my notes don't reflect too much of our meeting, 'cause it wasn't part of Lou's.

DO: You just told Ms. Polk that you had considered wood before? I'm sorry, I wasn't sure I heard that right.

HADDOW: No, I had … in my analysis, when I very first started, I wanted to know where the rock … how things were being heated, what was the wood, what

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> was the contribution. But then as I did a little more research, I understood that the rocks were actually glowing hot and they were actually pulled from the fire and removed, so anything … any volatile, pretty much anything that was subjected to a glowing, red rock, is going to be not whatever it was before it got to the red rock. So even if it was an ash, I would not feel the participants would have an environmental constituent of some, of something dangerous for them.

Haddow Transcript, Part 4 at 15:3-16: 3 (Defendant's Exhibit B).

Prior to the conclusion of the interview, Mr. Haddow confirmed that the conditions inside the sweat lodge would result in the loss of cognitive functions:

> POLK: Would you – would your testimony be though that your analysis of the conditions inside the sweat lodge would cause loss of cognitive functions?
>
> HADDOW: Yes. I also think that would be, equate to the reason why everybody is doing, doing the, the event.
>
> POLK: Do you understand that the altered state is the result of moving toward heat stroke?
>
> HADDOW. Yes.

Haddow Transcript, Part 4 at 34:18-28 (Defendant's Exhibit B).

The above excerpts from the April 15, 2011 interview of Mr. Haddow are provided to illustrate the true character of Mr. Haddow's opinion. As the State noted in its response to the motion for mistrial, Mr. Haddow's report and conclusions, although incomplete and preliminary, support the State's theory of the case and are not exculpatory toward Defendant. The State does not contest that the e-mail should have been disclosed. It was error for the State not to do so. But Defendant's continued misrepresentation of Mr. Haddow's opinion cannot go unchallenged.

Defendant has indicated he does not intend to call Mr. Haddow as a witness at trial, yet continues to claim that his opinions are exculpatory in nature, and; therefore, the State's failure to disclose the e-mail was a violation of *Brady v. Maryland.* Defendant has now referred to the report in front of the jury. He has also indicated the State has intentionally misrepresented both its relationship

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with Mr. Haddow and the extent of its contacts with him to the Court. In order to properly assess the accuracy of Defendant's portrayal of facts in the motions pending before this Court, the State believes it is appropriate to conduct an evidentiary hearing and call Mr. Haddow to testify.

II. The State should be allowed to call Mr. Haddow to rebut Defendant's mischaracterization of his report to the jury.

Defendant has now referenced Mr. Haddow's report at least twice in front of the jury. In questioning witnesses that Defendant knew had no knowledge of the e-mail, the defense has provided the jury with information that misstates Mr. Haddow's opinion. Despite the fact that they intentionally presented this information to the jury, the defense has now indicated they have no intention of calling Mr. Haddow to testify. The State should have an opportunity to correct the mischaracterization by Defendant. It is ***not*** Mr. Haddow's opinion that the construction of the sweat lodge and not the actions of Defendant in controlling the people, heat and humidity lead to the victims' deaths. Calling Mr. Haddow, the individual who prepared the report, whether he is qualified as an expert or not, is the only way to accurately present his opinion to the jury and correct the misrepresentation of his findings now in front of the jury.

III. This Court previously imposed reasonable sanctions in granting a continuance to allow Defendant to interview Mr. Haddow and call him as a witness at trial.

In determining whether to impose sanctions and what sanctions should be imposed, the court should consider "the significance of the information not timely disclosed, the impact of the sanction on the party and the victim and the stage of the proceedings at which the disclosure is ultimately made." Rule 15.7(a), Ariz. R. Crim. P., as well as any other relevant factor. *State v. Towery,* 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). Sanctions should be proportionate to the harm caused, and cure it to the maximum extent that is practicable. *State v. Krone,* 182 Ariz. 319,

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322, 897 P.2d 621, 624 (1995). "In selecting the appropriate sanction, the trial court should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases." *State v. Roque,* 213 Ariz. 193, 210, 141 P.3d 368, 386 (2006) (citing *State v. Fisher,* 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984)).

After finding the State's late disclosure of the Haddow e-mail was a violation of *Brady v. Maryland* and its progeny, Defendant's request for a continuation was granted. Defendant has now interviewed Mr. Haddow and re-interviewed Det. Diskin. Defendant has also been provided with the opportunity to call Mr. Haddow, or another expert, to testify regarding his findings. Given the fact that the State is still presenting its case-in-chief and that witnesses involved in the construction of the sweat lodge remain subject to recall, these sanctions are reasonable and appropriate. '"As long as ultimate disclosure is made before it is too late for the defendant [] to make use of any benefits of the evidence, Due Process is satisfied."' *Untied States v. Warhop,* 732 F.2d 775, 777 (10 Cir. 1984) (quoting *United States v. Ziperstein,* 601 F.2d 281, 291 (7th Cir.1979)

IV. Defendant's jury instructions are unprecedented and not appropriate.

Defendant has presented this Court with three proposed jury instructions it claims are appropriate sanctions for the State's late disclosure of the Haddow e-mail. The instructions proposed by Defendant are not supported by the authority cited in Defendant's motion and are clearly inappropriate.

One instance where Arizona case law supports the use of a negative inference jury instruction is when the State negligently fails to preserve potentially exculpatory evidence. In such cases, a instruction pursuant to *State v. Willits,* 96 Ariz. 184, 393 P.2d 274 (1964) allows the jury to draw an inference from the State's destruction of material evidence that the lost or destroyed

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evidence would be unfavorable to the State. *State v. Fulminante,* 193 Ariz. 485, 503 ¶ 62, 975 P.2d 75, 93 (1990). A defendant is entitled to *Willits* instruction when (1) the State fails to preserve accessible, material evidence that "might tend to exonerate him" and (2) there is resulting prejudice. *Id.* Further, the exculpatory potential of the evidence must have been apparent at the time the State lost or destroyed it. *State v. Davis,* 205 Ariz. ¶ 37. 68 P.3d 127, 133 (App. 2002).

In the instance case, there is no lost or destroyed evidence which would be unavailable to the jury to consider. As noted above, Defendant now has the e-mail and has had the opportunity to interview Mr. Haddow. Mr. Haddow is available and willing to testify. The instructions entitled "Delay in Trial" and "Suppression of Evidence" are not related to any evidence that will be presented to the jury. Instead they are intended to have the jury try the State for its late disclosure. Such instructions are clearly not appropriate.[2]

In the case cited by Defendant, *People v. Jackson,* 168 Misc.2d 182, 637 N.Y.S.2d 158 (1995), the State failed to turn over the clearly exculpatory statements of witness for over three years. The witness who made the statements had a learning disability and by the time his statement was disclosed he had no "substantive memory of the events at issue." *Id.* at 185, 637 N.Y.S.2d at 160. In considering what sanctions to be appropriate, the court noted that normally "the production of a witness willing to cooperate with defendants prior to trial would obviate the need for any sanctions. *Id.* at 189, 637 N.Y.S.2d at 163. However, given the unusual circumstance of the witness's learning disability that affected his ability to recall his prior observations, the trial court found an appropriate sanction was to allow the defendant to introduce the statements at trial. *Id.* at 191, 637 N.Y.S.2d at 164. In addition, the court found an "adverse inference charge regarding the *Brady* violation" was

[2] The instruction would also require a mini-trial for the jury to learn of the circumstances surrounding the nondisclosure of the email, and to determine the evidentiary value of a report which apparently will not be admitted into evidence if Mr. Haddow does not testify.

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appropriate. *Id.* While the Jackson opinion does not contain the wording of the instruction, an unreported opinion involving Jackson's co-defendant, Pedro Rosario, indicates that in Rosario's trial the following "adverse inference" instruction was allowed:

> Members of the jury to explain those statements or why they were read to you the People are under obligation to provide the defendant with evidence which may aid the defendant that detailed statement may aid the defense, that these statements were not turned over for almost three and a half years, that the jury may but is not required to draw adverse inference against the People for failing to comply with the decision called People against Brady.

2009 WL 1787715 (S.D.N.Y.) at 9 (wording as in the original). This is the only instruction of this type that the State could find. As recognized by the court in *Jackson,* the sanctions were fashioned to address a very unique situation created by a witness who no longer recalled relevant facts, were read once to the jury following the introduction of the statement and were very much like the instruction that Arizona case law suggests is appropriate pursuant to *State v. Willits,* 96 Ariz. 184, 393 P.2d 274 (1964). Defendant has not and cannot find any law that would suggest the instructions proposed by Defendant would ever be justified. Moreover, the instructions would shift the jury's attention from the facts of case to improper speculation regarding what information was not disclosed.

In *Gardner v. Fisher,* 556 F.Supp.2d 183 (E.D.N.Y. 2008), the court rejected the defendant's request for a jury instruction relating to a *Brady* violation and noted that the proposed instruction "merely sought to substitute speculation about hypothetical jury inferences for investigation." *Id.* at 196. The court concluded as follows:

> The proposed jury instruction would not have created more confidence in the outcome; in fact, if the proposed instruction had been given, the verdict would arguably have been *less* worthy of confidence because the instruction would have encouraged the jury to engage in improper speculation, without evidence, as to what investigations were or were not conducted. I therefore find petitioner's *Brady* claim without merit, under any standard of review.

Id. (emphasis in original). The same is true in the instant case.

Finally, the State would note that the third jury instruction proposed by Defendant entitled "Evidence Regarding Other Sweat Lodge Ceremonies" which was requested to be read after the testimony of Debra Mercer, is moot as Ms. Mercer's testimony has since been completed.

RESPECTFULLY submitted this 2nd day of May, 2011.

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Exhibit A

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

STATE OF ARIZONA,
Plaintiff,
vs.
JAMES ARTHUR RAY,
Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WARREN R. DARROW
TRIAL DAY THIRTY-THREE
APRIL 20, 2011
Camp Verde, Arizona
(Partial transcript)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

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EXHIBITS ADMITTED

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Proceedings had before the Honorable WARREN R. DARROW, Judge, taken on Wednesday, April 20, 2011, at Yavapai County Superior Court, Division Pro Tem B, 2840 North Commonwealth Drive, Camp Verde, Arizona, before Mina G. Hunt, Certified Reporter within and for the State of Arizona.

PROCEEDINGS

(Partial transcript -- discussions held out of presence of jury and sidebar conferences.)

THE COURT: The record will show the presence of the defendant, Mr. Ray; the attorneys. The jury is not present.

Ms. Polk, Ms. Rybar indicated you had an issue you wanted to take up before we started.

MS. POLK: Yes, Your Honor. Thank you.

08:47:51AM Yesterday afternoon the state received a motion or a memorandum filed by defense called "Defendant, James Arthur Ray's Bench Memorandum Regarding Angel Valley Unrelated Business Taxable Income."

This morning the Court had provided to counsel copies of various rulings that you have issued. I believe that you have addressed the issue raised in this memorandum. And this memorandum specifically seems to continue to address the issue of whether or not the tax status

08:48:22AM of the Hamiltons can be raised.

What I wanted to clarify for Court and counsel is that, as set forth in the complaint by Angel Valley against James Arthur Ray and James Ray International, that the Hamiltons have a church called "Angel Valley Ministries." It's an Arizona

1 when the witness got into trying to interpret what
2 something meant. That certainly would be my intent
3 not to let testimony like that be out there.
4 MR. KELLY: Judge, I'll make the final
5 comment. And it is that we did interview
6 Dr. Mosley yesterday. You're going to read his
7 exact opinion provided during that interview. He
8 is a medical doctor. And we have some significant
9 concerns now about this causation theory as it was
10:45:17AM 10 again articulated by Ms. Polk at the sidebar
11 conference. We believe we have some real problems
12 in this case.
13 THE COURT: And I mentioned this could be an
14 issue that involves expert testimony. I mentioned
15 that. I thought we had the testimony completed,
16 essentially, on prior sweat lodges. I gave the
17 limiting instruction at one point at the request.
18 I thought that was, basically, the conclusion of
19 that.
10:45:46AM 20 But the other matter is this question
21 that involves the breathing.
22 And, Ms. Polk, you started off with
23 attempting to clarify that.
24 And I thought that was one of your
25 objections, Mr. Kelly, is that reference to

1 unresponsive or breathing.
2 MR. KELLY: Correct, Judge.
3 THE COURT: Ms. Polk, you keep mentioning the
4 not breathing.
5 MS. POLK: Your Honor, I was trying to -- the
6 rules allow the question to be framed in such a way
7 as to direct a witness to a specific area of
8 testimony. And I was trying to direct her
9 specifically to whether or not she heard anything
10:46:32AM 10 similar in 2008. And the answer is no.
11 THE COURT: And I understand that purpose.
12 MS. POLK: If I misphrased her testimony, that
13 was unintentional. I was tying to direct
14 specifically to the conversations that she had
15 overheard pertained to Liz Neuman and to Kirby
16 Brown.
17 THE COURT: We will recess. I want to resume
18 about five after.
19 Thank you.
20 (Recess.)
21 (Proceedings continued in the presence of
22 jury.)
23 (Proceedings continued outside presence
24 of jury.)
25 THE COURT: The record will show the jury and

1 the witness have left the courtroom. And Ms. Polk
2 had made an objection. I sustained it.
3 Mr. Kelly, you wanted to approach?
4 MR. KELLY: Perhaps I misstated. Maybe it
5 wasn't last week. Maybe it was the end of the
6 previous week. But we received the disclosure of
7 the expert witness, disclosed by the state,
8 Mr. Richard Haddow, who did, in fact, criticize the
9 construction of the sweat lodge.
11:56:34AM 10 So I definitely have a good-faith basis
11 to ask that question of this witness. So I'm not
12 sure the basis of the objection. But I clearly
13 have a good-faith basis. I know this Court has a
14 copy of Mr. Haddow's report. And it indicates the
15 construction of the sweat lodge was a contributing
16 factor to the deaths of the three individuals. And
17 this is the lady that built it.
18 THE COURT: Ms. Polk objected about
19 foundation. I'm just looking at the question now.
11:57:05AM 20 Ms. Polk.
21 MS. POLK: Your Honor, first of all, this
22 witness would have no personal knowledge of that.
23 The rule clearly indicates you don't ask questions
24 of a witness that are rhetorical in nature only.
25 Secondly, that report is hearsay. So the

1 state would ask does the defense intend to call
2 Mr. Haddow to give his opinions and lay proper
3 foundation for that report?
4 Third, I think it's a mischaracterization
5 of the report to characterize it as criticizing the
6 construction of the sweat lodge. The subsequent
7 interview that the parties had of Mr. Haddow, I
8 believe, we will be discussing later. But -- I'll
9 leave it at that for now, Your Honor. But the
11:57:46AM 10 question would be that report is hearsay, and does
11 the defense intend to call Mr. Haddow as a witness?
12 THE COURT: Mr. Kelly.
13 MR. KELLY: Judge, this is cross-examination.
14 It's unlimited in the state of Arizona. We've been
15 to this rodeo before. All I have to have is a
16 good-faith basis to ask the question. And I have a
17 very good basis to ask it. It's the state's late
18 disclosed reported expert, Mr. Haddow.
19 And if I perhaps used the wrong
11:58:16AM 20 terminology, I can rephrase the question to were
21 you aware that there is an expert who opined that
22 the construction of the sweat lodge was a
23 contributing factor in the cause of death, which
24 would be more accurate, and not use the word
25 "criticize."

1 Again, Judge, it's cross-examination. I
2 have good-faith basis to ask it. It's the state's
3 own report. And whether -- I can tell you we did
4 not intend to call Mr. Haddow. He was not
5 disclosed timely as a witness in this case. We
6 understand your court order. He can't testify.
7 But I'm still entitled to ask the question.
8 THE COURT: I didn't say he could not testify
9 if the defense chose to call him.
11:59:01AM 10 MR. KELLY: Well, Judge, when -- I understood
11 a clear order from this Court a couple weeks ago
12 that the time for investigation is ended. And if
13 we're provided the option of calling him, I
14 appreciate that. But as we stand here today, I
15 don't want to mislead the Court. We had the chance
16 to interview him. But we don't intend to call him.
17 THE COURT: Well, I wanted it clear that this
18 was an unusual circumstance. And we continued the
19 trial. And if you want to call an expert, you were
11:59:31AM 20 and are given that opportunity.
21 But with regard to the objection -- I've
22 said this before -- I don't believe it is
23 appropriate to call a witness without knowledge in
24 order to make statements to that witness and,
25 essentially, get them before the jury. There can

1 be questions about knowledge of a report. If the
2 person doesn't know there is a report, then -- and
3 doesn't have knowledge of it, just bringing in the
4 evidence in that fashion through a witness without
5 knowledge, it's not something I've really seen to
6 any large extent.
7 Ms. Polk.
8 MS. POLK: Your Honor, particularly because it
9 is hearsay in the fashion that Mr. Kelly asks that
12:00:19PM 10 question. The only way he can prove it is by
11 bringing in Mr. Haddow. He has to have a
12 good-faith basis that he can prove up the
13 information that he's trying to give to the jury.
14 He can only prove up that information by calling
15 Mr. Haddow.
16 It is improper to be asking this witness
17 a question without the good-faith basis that he
18 will offer up, that he will prove up, the
19 information to the jury.
12:00:42PM 20 And, Your Honor, I just want to correct
21 something that Mr. Kelly said. He just said again
22 that Mr. Haddow was the state's expert and that he
23 gave us an opinion. The defense continues to
24 misrepresent what occurred. We never retained
25 Mr. Haddow. He gave us the information. He

1 admitted freely to the defense that he was trying
2 to get a job with the state and sent us that email
3 unsolicited. So for Mr. Kelly to continue to call
4 this person the state's expert is not accurate.
5 And finally if --
6 MR. KELLY: I'll put an end to that. I agree
7 with that. I misspoke.
8 MS. POLK: And if Mr. Haddow's information is
9 exculpatory, perhaps the defense would like to call
12:01:28PM 10 him at trial.
11 THE COURT: Well, first of all, I don't think
12 the prove up requires absolutely admissible
13 testimony. It requires a good-faith basis. We
14 talked about this in the context of another
15 witness, and I didn't get any additional law on a
16 good-faith basis. I recall looking at it. In
17 Arizona it is recognized it a basic doctrine.
18 So, first of all, Ms. Polk, I don't
19 believe there has to be absolute admissible
12:01:50PM 20 testimony if they have a valid prove up.
21 But at the same time, though, Mr. Kelly,
22 questions to a witness without knowledge, to just
23 convey statements of fact, I find to be
24 inappropriate. And we're going to take a lunch
25 recess. And if you think there is law to the

1 contrary, that's fine.
2 There can be questions about knowledge of
3 a report coming in about this subject if she has
4 knowledge. But if she does not have knowledge,
5 certainly further questions would be only an avenue
6 of bringing in hearsay and inadmissible testimony.
7 MR. KELLY: But, Judge, am I permitted to ask
8 her questions about the construction of the sweat
9 lodge?
12:02:32PM 10 THE COURT: Ms. Polk --
11 Before I say that, you have been, as a
12 matter of fact.
13 MR. KELLY: Including its deficiencies? She
14 can answer however she knows it or not.
15 THE COURT: Ms. Polk, go ahead.
16 MS. POLK: I think that Mr. Kelly can ask
17 questions of the witness about her knowledge of the
18 construction of the sweat lodge. But to suggest
19 that there is a report out there that says that
12:02:59PM 20 there are deficiencies with the construction would
21 be a mischaracterization of what that report is and
22 a mischaracterization of what the defense knows
23 Mr. Haddow would testify to if he took the stand.
24 But he can ask questions of the witness
25 about the construction but cannot mischaracterize