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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**

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
2011 MAR -7 PM 2:17,  
JENNIFER HICKS, CLERK  
BY: BOBBI JO BALL

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.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The State's relentless bid to introduce irrelevant and prejudicial evidence from prior sweat  
4 lodges is repugnant to Mr. Ray's constitutional right to a fair trial. Notwithstanding the *months*  
5 that the State has already consumed litigating this issue, including days of evidentiary hearings,  
6 multiple rounds of briefing, and a volumes-thick record, the State now casually sidesteps this  
7 Court's careful, legally anchored ruling in hopes of a more convenient result. But there is no  
8 merit in the State's new, scarcely explained suggestion—the State's sixth proffered argument—  
9 that prior ceremonies are somehow probative of the cause of death in 2009. As a matter of law,  
10 fact, and logic, two incidents with disparate results and unknown causes do not yield *any*  
11 explanation of the operative causal mechanisms. The State must not be permitted to raise  
12 unsupported theories in perpetuity in the hopes that one will stick. *See United States v. Schiff*,  
13 538 F. Supp. 2d 818, 841 (D.N.J. 2008) (rejecting, as a violation of Due Process, the  
14 prosecution's attempt to "toss out a new theory" after "many months and reams of paper" were  
15 devoted to pre-trial hearing, noting that "a post-hearing brief is not the place for new theories").  
16 Concerns of fundamental fairness and the need for finality impel the Court to stand by its initial  
17 ruling—and thereby safeguard the integrity of this criminal trial.

18 **II. ARGUMENT**

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

20 Two aspects of this case were established from the very beginning. First, until recently,  
21 the State has proceeded on a theory that Mr. Ray committed a crime because—and *only*  
22 *because*—alleged incidents at prior sweat lodge ceremonies put him on notice of the risk of death  
23 in 2009. *See* Transcript of 404(b) hearing, Nov. 10, 2010, at 21–22; *see also* Defendant's  
24 Response to State's Motion for Reconsideration of MIL No. 1, at 6–7. Second, from the very  
25 beginning, in March 2010, Mr. Ray disclosed and adhered to his intention to meet the State on  
26 every element of the charged crime, *including, explicitly, causation*. *See* Defendant's First  
27  
28

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

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

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

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

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

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

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

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

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

3           Even if procedural fairness did not bar the State's late and scatter-shot attempt, the new  
4 theory fails as a matter of law. The State's position is that because some individuals in 2005 and  
5 2008 experienced symptoms like disorientation and vomiting, the medical cause of which has  
6 never been identified, heat stroke must have been the cause of death in 2009. The State's  
7 argument is a logical non-sequitur. *Cf. Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.,*  
8 *Inc.*, 48 So.3d 976, 993 (Fla. Ct. App. 2010) (“[E]vidence of prior claims is not admissible to  
9 prove causation.”).

10           The only way such evidence could potentially be relevant to causation is if the State could  
11 first prove what caused the prior incidents, and then demonstrate substantial similarity between  
12 the prior incidents and the instant case. *See, e.g., McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st  
13 Cir. 1981) (collecting cases); *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 608-09 (3d Cir.  
14 1958); *Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726, 735 (Pa. Super. Ct. 1996). The State  
15 can do neither.

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

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

26           The State cannot satisfy these requirements, for the record does not support them. First,  
27 even assuming the State could prove by competent evidence the existence of discrete and  
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1 legitimate symptoms, the State cannot prove that heat stroke caused the pre-2009 symptoms. As  
2 this Court has explained, “other than the medical records relating to Mr. Daniel P, a participant in  
3 the 2005 sweat lodge,” the Court explained, “there is no evidence that any other participant in a  
4 pre-2009 sweat lodge ceremony ever sought or was administered actual, professional medical  
5 care of any kind as a result of that activity.” Under Advisement Ruling on MIL No. 1, 2/3/11, at  
6 2. “And, as noted by the defense, the evidence does not suggest that Daniel P was suffering a  
7 life-threatening condition.” *Id.* Nor did the State provide “medical testimony connecting the  
8 observations of physical and mental distress exhibited by the pre-2009 sweat lodge participants  
9 with a risk of death.” *Id.* These evidentiary failings, which barred the State’s attempt under Rule  
10 404(b), also bar the admission of the evidence under Rules 401, 402, and 403. Without medical  
11 evidence that (1) identifies the cause of the symptoms in 2005 and 2008 and (2) connects the  
12 symptoms to the life-threatening conditions in 2009, the prior ceremonies cannot even begin to  
13 make any more probable the State’s asserted cause of death.

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

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

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

25 “Even when substantial identity of the circumstances is proven” with respect to prior  
26 incidents, moreover—which in this case it is not—“the admissibility of such evidence lies within  
27 the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue  
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1 expenditure of time in the trial of collateral issues against the factors favoring admissibility.”  
2 *McKinnon*, 638 F.2d at 277.

3 Here, the tendency of the evidence of disorientation in 2005 and of vomiting or shaking in  
4 2008 to prove anything about the cause of the three deaths in 2009 is negligible. In contrast, the  
5 prejudice of the evidence the State intends to elicit, as the Court will recall from the *Terrazas*  
6 hearing, is high. These are witnesses who plainly have negative feelings toward Mr. Ray and  
7 have an established track record of aggressively expressing those feelings, without regard for the  
8 Rules of Evidence or courtroom procedure. Furthermore, the State’s amended witness list, filed  
9 March 3, lists approximately thirteen additional witnesses who will be called to testify *only* as to  
10 prior sweat lodge ceremonies—and compelling the defense to call witnesses to rebut the  
11 predictably outlandish claims made by the State’s witnesses. The State’s averment that this will  
12 not become a mini-trial is hollow. Given the patent irrelevance of the evidence to causation, the  
13 highly prejudicial nature of the expected testimony, and the tendency of evidence of past events  
14 to confuse the jury and require an extensive mini-trial, Rule 403 weighs strongly in favor of  
15 exclusion.

16 **III. CONCLUSION**

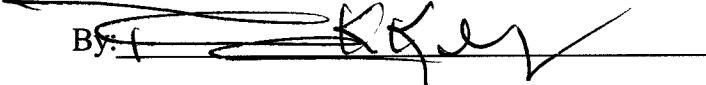
17 It is too late for the State to adopt a new theory of admissibility for evidence that this  
18 Court has ruled against. And the new theory has no basis in law. The prior sweat lodge evidence  
19 should, once more, be excluded.

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1 DATED: March 7, 2011

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6 By:   
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8 Copy of the foregoing delivered this 7<sup>th</sup> day  
9 of March, 2011, to:

10 Sheila Polk  
11 Yavapai County Attorney  
12 Prescott, Arizona 86301

13 by M. Deines

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