

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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CLERK
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9
10 **IN THE SUPERIOR COURT**

11 **STATE OF ARIZONA, COUNTY OF YAVAPAI**

12 STATE OF ARIZONA,
13
14 Plaintiff,

V1300CR201080049

15 **STATE'S MOTION TO COMPEL
16 DISCLOSURE OF AUDIO RECORDING
17 OF 2009 SPIRITUAL WARRIOR
18 RETREAT**

19 vs.

20 JAMES ARTHUR RAY,
21
22 Defendant.

(Evidentiary Hearing Required)

Division PTB

23 Comes now the State of Arizona, by and through Sheila Polk, Yavapai County Attorney,
24 and hereby moves this Court for an order compelling the disclosure of the audio recording of the
25 2009 Spiritual Warrior Seminar including the audio recording of the briefing prior to the sweat
26 lodge ceremony on October 8, 2009. This motion is made pursuant to Rule 15.2(g), Ariz. R.
Crim. P. The State has attempted to obtain the recording from the Defendant who has refused to
produce it. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Relevant Facts:

On October 8, 2009 just prior to leading the sweat lodge ceremony, Defendant held a meeting to brief the participants about the event. Many of the participants reported Defendant

1 made several statements relating to what physical reactions they might experience while in the
2 sweat lodge. Included in these comments were statements that "You may feel like you are going
3 to die, but you won't;" "If your bodies are feeling pain, that's alright you are stronger than that,"
4 and "It's okay if you pass out, you will not die."

5
6 Prior to the Indictment in this matter, Defendant's attorneys sent the State a letter, which
7 they also posted on his web site as a "white paper," indicating these statements have been taken
8 out of context.

9 On June 10, 2010, Detective Diskin interviewed Michael Barber. Mr. Barber is an
10 independent contractor who was hired by James Ray International to record the events at
11 Spiritual Warrior 2009. Mr. Barber informed Detective Diskin that he audio recorded
12 Defendant's "briefing" prior to the sweat lodge ceremony and had retained a copy of the
13 recording. Detective Diskin requested a copy of the recording and Mr. Barber agreed to send it
14 the Detective. Mr. Barber subsequently left a message for Detective Diskin indicating he had
15 taped over his recording, but had provided a 350 GB external hard drive to Josh Fredrickson, an
16 employee of James Ray International, which contained the recording of the October 8 briefing.
17

18 On October 14, 2009, detectives executed a search warrant at the offices of James Ray
19 International in Carlsbad, California, and seized various computers and equipment. However,
20 according to Mr. Barber, the recording of the pre-sweat lodge ceremony briefing was provided to
21 Josh Fredrickson at James Ray International after the execution of the search warrant.
22

23 On June 24, 2010, the State requested that Defendant provide the State with a copy of the
24 recording. In response, Defendant stated that "Rule 15.2 mandatory disclosure obligations do not
25 require him to provide the State with evidence to sustain its burden of proof."
26

1 **Legal Argument:**

2 **I. Rule 15.2(g) gives a trial court authority to order a defendant to disclose material**
3 **or information the state needs, but is unable to obtain with undue hardship.**

4 Rule 15.2(g) of the Arizona Rules of Criminal Procedure provides that the trial court
5 may order a defendant to disclose to the State material or information the State needs when the
6 State is not able to obtain the substantial equivalent by other means without undue hardship.
7 Clearly the recording is relevant to the State's case. Although the State intends to call multiple
8 witnesses to testify as to the statements Defendant made to participants prior to entering the
9 sweat lodge, the best evidence of these statements is the actual recording. The briefing before
10 the sweat lodge is extremely relevant to establish the mindset of the participants; it also
11 addresses the issue of why so many participants remained in the sweat lodge, ignoring the
12 physical indications that they were suffering from the exposure to the intense heat. Moreover,
13 the recording is relevant to refute Defendant's repeated assertions that the statements have been
14 taken out of context.
15

16 The State has requested that Defendant provide the recording and he has refused. It is
17 clear that the recording would have fallen within the scope of the search warrant served on
18 James Ray International had it been there on the date the warrant was executed. However, the
19 recording was not delivered to James Ray International until after the search warrant was
20 executed. The State has no alternative means of obtaining the recording.
21

22 **II. Defendant's Fifth Amendment protection against compelled self-incrimination is**
23 **not violated by the production of the recording.**

24 Defendant's Fifth Amendment protection against compelled self-incrimination is not
25 violated by the production of the recording. The recording was made by an independent
26 contractor under contract to James Ray International. The recording was delivered to an

1 employee of James Ray International and is a corporate record. The United States Supreme
2 Court has long recognized that, “for the purposes of the Fifth Amendment, corporations and
3 other collective entities are treated differently from individuals.” *Braswell v. United States*, 108
4 S.Ct. 2284, 2287, 487 U.S. 99, 104 (1988). In *Braswell*, the Court examined the “lengthy and
5 distinguished pedigree” of this doctrine, known as the “collective entities rule,” and affirmed the
6 Fifth Circuit Court of Appeals’ ruling that a president and sole shareholder of a corporation
7 could not resist a subpoena for corporate documents on the grounds that the act of producing the
8 records might prove personally incriminating. *Id.* at 2296, 487 U.S. at 119.

10 Even if the recording is not a corporate record, its disclosure will not violate Defendant’s
11 Fifth Amendment right against compulsory self-incrimination. First, the State has knowledge
12 that the recording exists. Therefore, its production and admission at trial does not require
13 Defendant to admit to anything. See *State ex rel. Hyder v. Superior Court*, 625 128 Ariz. 253,
14 257, 625 P.2d 316, 320 (1981) (holding that a subpoena directing a defendant to produce “[a]ny
15 and all personal letters written by [the defendant],” would require the defendant to admit he was
16 the author of the letters and violate the privilege against self-incrimination.) The foundation for
17 the recording will be made through the testimony of Michael Barber, who created it, and Joshua
18 Fredrickson, who received the recording on behalf of James Ray International.

20 Defendant’s statements on the recording were not compelled in any manner. They were
21 voluntarily made at an event sponsored by Defendant. In *Fisher v. United States*, 96 S.Ct. 1569,
22 425 U.S. 391 (1976), the Court considered whether a subpoena served on a taxpayer that
23 required him to produce an accountant’s workpapers in his possession violated the taxpayer’s
24 Fifth Amendment rights. The Court found no violation and specifically noted:
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A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. **Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else.** The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Id. 425 U.S. at 409-410, 96 S.Ct. at 1580 – 1581 (internal citations omitted, emphasis added.)

The State respectfully requests this Court order Defendant to disclose the recording of the 2009 Spiritual Warrior Seminar, including the pre-sweat lodge ceremony "briefing." A proposed form of Order is attached.

RESPECTFULLY submitted this 2nd day of December, 2010.

By Sheila Spilk
SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing emailed this 2nd day of December, 2010:

COPIES of the foregoing delivered this 2nd day of December, 2010, to

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Thomas Kelly
Via courthouse mailbox

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