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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

DEFENDANT JAMES ARTHUR RAY'S RESPONSE TO STATE'S MOTION TO COMPEL DISCLOSURE OF AUDIO RECORDING

I. INTRODUCTION

The Fifth Amendment does not permit this Court to order disclosure of the audio recording that the State seeks—a quintessentially testimonial record containing Mr. Ray's own statements. As the Arizona Supreme Court has explained, compelling a criminal defendant to "produce his own records is . . . the equivalent of requiring him to take the stand and admit their genuineness." *State ex rel. Hyder v. Superior Court*, 128 Ariz. 253, 257 n.3 (1981) (quoting *United States v. Beattie*, 522 F.2d 267, 270 (2d Cir. 1975) (Friendly, J.)). Because a defendant's act of producing his own statements would authenticate the evidence, "the production would be a communicative act that provides the key to the admission of the [evidence] against him," and thus "would be an incriminating communicative act within the protective ambit of the Fifth and Fourteenth Amendments to the federal Constitution." *Id.* at 257 n.3 (1981). The Self-Incrimination clause bars the compelled disclosure of such evidence *even* if the State has knowledge that the evidence exists, and *even* if the evidence "could be authenticated by some other means." *Id.* at 257.

This binding precedent forecloses the State's attempt to compel disclosure here. Mr. Ray's production of the audio recording that the State seeks would authenticate the recording and facilitate its admission into evidence. Moreover, the nature of the evidence the State seeks—Mr. Ray's own, personal statements—raises independent constitutional privacy concerns. *See Boyd v. United States*, 116 U.S. 616, 631–32 (1886) ("any compulsory discovery by . . . compelling the production of [a party's] private books and papers, to convict him of crime . . . is contrary to the principles of a free government"); *Barrett v. Acevedo*, 169 F.3d 1155, 1167–68 (8th Cir. 1999) (noting that, despite decisions criticizing *Boyd*, the Fifth Amendment protection of personal papers is still debated in federal appellate courts). The State therefore cannot "show[] . . . that disclosure . . . will not violate the defendant's constitutional rights," as is required to trigger this court's discretion to order disclosure. Arizona Rule Criminal Procedure 15.2(g).[1]

[1] The rule provides: "Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of his or her case for material or information not otherwise covered by Rule 15.2, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other means, *and that disclosure thereof will not violate the defendant's constitutional rights*, the court in its discretion may order any person to make such material or information available to the prosecutor. The court may, upon

In addition, the State has failed to establish the second prerequisite to this Court's discretion: that the prosecutor "has substantial need" for the information. The requested evidence here has little probative value; the State does not seek the alleged statements to prove their truth, but instead asserts they are relevant to "the mindset of the participants." State's Motion at 3. Even assuming the *participants*' mental state could be relevant in a reckless manslaughter case, the State can obtain the information it seeks by asking the many percipient witnesses what they heard and how they reacted. Indeed, the State's motion indicates the State's intention to do just that. *See* State's Motion at 3. Yet the State nevertheless seeks to amass additional material, asking the defense to provide what the prosecution believes is the "best evidence" for meeting its burden of proof. *Id.* This situation simply does not involve the sort of "substantial need" that Rule 15.2(g) contemplates.

Finally, even if the State had made the required showings such that this Court had discretion, compelling disclosure would not be warranted. Ordering disclosure would require this Court to go beyond existing precedent and significantly narrow a defendant's Fifth Amendment right. Such constitutional abandon is unnecessary here, given the minimal need for the evidence. The State's motion should be denied.

II. ARGUMENT

A. <u>The Fifth Amendment privilege against self-incrimination prohibits compelled disclosure of the evidence the State seeks.</u>

1. The audio recording sought by the State is not a corporate record.

The State asserts, without any explanation, that the audio recording it seeks is a "corporate record" subject to the collective entity rule. That is incorrect as a matter of both law and fact. The collective entity rule provides that corporate records receive no Fifth Amendment protection because the testimony therein is that of the corporation, which lacks Fifth Amendment rights; the custodian possesses the record solely in a representative capacity. *See Braswell v. United States*, 487 U.S. 99, 109–110 (1988). Accordingly, in *Braswell*, upon which the State relies, the Court

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request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive." Ariz. Rule Crim. Proc. 15.2(g) (emphasis added).

held that a corporate custodian could not resist a subpoena for a business's *financial records and contracts*. *See id.* at 102 & n.1, 113. Here, in contrast, the State seeks Mr. Ray's own oral statements, not ledgers or regularly kept records held for JRI. The requested evidence is quintessentially personal and testimonial.

2. The act of producing the requested evidence would amount to compelled testimony within the meaning of the Fifth Amendment.

Contrary to the State's assertion, forcing Mr. Ray to disclose the evidence would itself be a form of compelled testimony prohibited by the Fifth Amendment. "The testimonial component involved in compliance with an order for production of documents or chattels 'is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded.'" *Fisher v. United States*, 425 U.S. 391, 413 n.12 (1976) (quoting 8 J. Wigmore, Evidence, s.2264, p.380 (McNaughton rev. 1961)). Where the act of producing evidence would serve to authenticate the evidence, the Arizona Supreme Court has squarely recognized, the Fifth Amendment prohibits compelled disclosure. *See Hyder*, 128 Ariz. at 257.

The State cites *Hyder* for the proposition that because "the State has knowledge that the recording exists," "its production and admission at trial does not require Defendant to admit anything." State's Motion at 4. But *Hyder* indicates the opposite. In that case, a defendant accused of child molestation had written potentially incriminating letters to his daughter while she lived in another State. 128 Ariz. at 254. The letters were received and read, and the daughter later brought them to her parents' home and abandoned them. *See id.* at 254, 257. In that case, as here, the State had some knowledge of the letters, their contents, and their author. But the court held that forcing the defendant to produce the letters would violate the Fifth Amendment, because the production "would authenticate th[e] letters" and thus "would be a communicative act that provides the key to the admission of the letters into evidence against him." 128 Ariz. at 256. Critically, the court noted that it was "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***." *Id.* at 257 (emphasis added). What mattered was that the defendant could not be required to confirm for the State that the statements were his. *Id.*

Hyder controls here and forecloses the State's motion. Like in *Hyder*, the State seeks quintessentially testimonial evidence—the defendant's own personal statements. This situation is thus entirely distinguishable from that in *Fisher*, upon which the State relies, where the government sought production of an *accountant*'s workpapers in the defendant's possession; the defendant there "did not prepare the papers and could not vouch for their accuracy," and thus was not even "competent to authenticate" them. 425 U.S. at 413. Unlike the defendant's letters at issue in *Hyder*, and the recording of Mr. Ray's own words here, *Fisher* involved business records that "contain[ed] no testimonial declarations" by the defendant. *Id.* at 410.

Like in *Hyder*, Mr. Ray's production of the requested audio recording here would authenticate the evidence. And as in *Hyder*, the Fifth Amendment violation resulting from compelled disclosure would not be avoided even if the evidence "could be authenticated by some other means." *Id.* at 257. Thus, even if the State "has knowledge" that the recording it seeks exists, State's Motion at 4, the Fifth Amendment prohibits compelled disclosure.

3. Compelling disclosure of personal statements raises additional constitutional privacy concerns.

In addition, the personal nature of the evidence the State seeks raises constitutional privacy concerns. Since its 1886 decision in *Boyd*, the United States Supreme Court has repeated numerous times that the Fifth Amendment prohibits the government from compelling a defendant to produce personal statements that may incriminate him. The right "is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to *force him to produce and authenticate any personal documents or effects* that might incriminate him.'" *Bellis v. United States*, 417 U.S. 85, 87–88 (1974) (emphasis added) (quoting *United States v. White*, 322 U.S. 694, 698 (1944)).

Although the Supreme Court has since criticized *Boyd*'s rationale, the Court has always stopped short of overruling *Boyd*'s protection of personal statements. *See Fisher*, 425 U.S. at 409–410. ("The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain *no testimonial declarations by him* (emphasis added)); *id.* at 414 ("Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in

his possession is a question not involved here."). *See also Hyder*, 128 Ariz. at 256–57 (1981) (noting the eroding rationale for *Boyd*, but holding that the act of production in the case at bar would have violated the Fifth Amendment). Compelled disclosure of private statements thus remains sensitive constitutional territory. The federal appellate courts have divided on this Fifth Amendment issue, making it ripe for *certiorari*. *See Barrett v. Acevedo*, 169 F.3d 1155, 1167–68 (8th Cir. 1999) (acknowledging that the question remains open and describing the division in the federal circuits). Given this legal landscape, the State cannot "show[] . . . that disclosure . . . will not violate the defendant's constitutional rights," as is required to trigger this court's discretion to order disclosure. Arizona Rule Criminal Procedure 15.2(g).

B. <u>The State has not established a "substantial need" for the requested evidence.</u>

Nor has the State shown the required "substantial need" for the requested evidence. The State asserts that Mr. Ray's statements prior to the sweat lodge ceremony are "extremely relevant to establish the mindset of the participants." State's Motion at 3. As an initial matter, the State has failed to explain how participants' mental states are relevant to the reckless manslaughter charges at issue. It is Mr. Ray's mental state, not that of the participants, that the State must prove. To the extent that *any* participants' mental state could possibly be relevant, it would be those of the decedents. But there is no way the State can prove the decedents' mental states by playing for jurors a collection of statements by Mr. Ray.

Even assuming participants' mental states could be relevant to the reckless manslaughter charges, the audio recording sought by the State is not necessary. The State "intends to call multiple witnesses to testify to the statements Defendant made to participants." State's Motion at 3. The State can ask each of those participants how the statements affected their mindsets, and indeed, the State pursued this line of questioning at the *Terrazas* hearing. The State thus seeks the audio recording not out of "substantial need," but to amass what it perceives as the "best evidence" to bolster its case. State's Motion at 3. This is not what Arizona's Rules of Criminal Procedure contemplate.

C. Even assuming this court had discretion, it should not order disclosure here.

Even if this Court found Rule 15.2(g)'s prerequisites satisfied, and thus concluded that it has discretion to compel disclosure of the alleged audio recording, such a ruling is not warranted here. As noted above, the State's request threatens grave constitutional interests. It does so without substantial need for the evidence. The minimal interest in obtaining this evidence simply cannot justify the risk of constitutional infringement.

DATED: December ___, 2010

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