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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 PRESENTENCING MEMORANDUM**

Defendant James Arthur Ray, by and through his counsel of record, respectfully requests that this Court grant him probation with credit for time served, and appropriate terms and conditions, for the three counts of Negligent Homicide, Ariz. Rev. Stat. § 13-1102(A), each a Class 4 felony and probation-eligible offense. Mr. Ray's request is based on all pleadings and files in this matter; testimony and evidence presented at pre-trial, trial and penalty phases, including evidence offered in support of mitigation; and the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Arizona's sentencing scheme requires trial courts to tailor punishment to fit the offender, the offense, and the interests of justice. *See, e.g., State v. LeMaster*, 137 Ariz. 159, 165 (App. 1983) ("The trial court should consider not only the offenses charged, but also the past conduct and moral character of the defendant so that the punishment may fit both the offense and the offender."). A critical part of this scheme is the trial judge's ability to suspend the imposition of a sentence and order probation. Probation serves the goals of retribution and deterrence while facilitating the rehabilitation of offenders; limiting the economic and other costs that imprisonment creates for society and family members; limiting the infringement on individual liberty to that which is necessary to achieve the desired results; and "alleviat[ing] overcrowding in [Arizona] prisons by not incarcerating those people with whom the state can adequately deal in other ways." *State v. Christopher*, 133 Ariz. 508, 510 (1982). In light of these considerations, courts have imposed probation in other negligent homicide cases—including the more egregious case of *State v. Far West Water & Sewer*, 224 Ariz. 173, 180–81 (App. 2010), and in the companion prosecution of that corporation's president. In those cases, like in this case, probation best serves the goals of criminal punishment.

The substantial mitigating evidence in this case make clear that probation is appropriate and just. Mr. Ray is a 54 year-old man with no prior criminal history, including arrests or convictions, a demonstrated record of good character and community service, and who has been convicted of unintentional, non-violent crimes for which he, like many others touched by the tragedy, feels devastation and extreme sorrow. He is not and has never been violent, and he poses no risk to society. To the contrary, he is an integral part of a loving family and a relied-upon caregiver to his ailing parents: his mother, Joyce Ray, who has metastasized thyroid cancer, and his father, Gordon Ray, who suffers from dementia. The State's attempt to minimize Mr. Ray's good character by depicting him as wealthy is mistaken. Mr. Ray is unable to pay his bills, and his house has been foreclosed on. He now lives with his parents, and if this Court grants probation, would continue to reside with and care for them.

The State's rigid, unreasoned demand for this Court to impose whatever sentence is "the maximum allowed" does not serve the ends of justice. State's Presentence Memorandum at 2. The State's demand is unsurprising in a trial typified by prosecutorial excess and misdeeds: the setting of bail at $5,000,000 for an accused who posed no threat to public safety and was not a flight risk; the State's failure to comply with disclosure obligations, necessitating judicially imposed sanctions; the violation of constitutional *Brady* obligations; the reckless attempts to elicit improper witness testimony at odds with Mr. Ray's constitutional rights; the repeated, impermissible burden-shifting in closing arguments; the reckless introduction of unadmitted evidence at the *Blakely* hearing; and most recently, the opposition to a continuance of sentencing, in disregard of the Sixth Amendment right to counsel, after defense counsel suffered a heart-attack. *See generally* Defendant's Motion for New Trial at 2–3. But Arizona's constitutional separation of powers and statutory sentencing scheme protect against prosecutorial excess by interposing this Court as the arbiter of individualized, just punishment. This Court is vested with the "heavy responsibility" of ensuring a fair sentence, and with the "discretionary power to temper justice with mercy." *State v. Douglas*, 87 Ariz. 182, 188 (1960).

However, should the Court find it appropriate to impose some term of incarceration, Mr. Ray requests that the Court exercise its discretion and power, under A.R.S. §13-901(F), to order that such incarceration commence only after Mr. Ray's appeal in this case or only after such appeal is unsuccessful. Throughout the course of trial, this Court repeatedly recognized serious legal and constitutional issues, close questions, near mistrials, and apparent errors—all of which could lead to reversal of Mr. Ray's convictions. Yet as the Court is aware, Arizona statute prohibits bail pending appeal for a defendant who "has received a sentence of imprisonment" after conviction for a felony. *See* A.R.S. § 13-3961.01. By imposing probation and delaying service of any jail time until after appeal, this Court can ensure that justice is served while avoiding an undue and potentially erroneous deprivation of Mr. Ray's liberty.

Given the substantial mitigation evidence in this case, the absence of legitimate aggravating factors, and the interests of justice, probation is appropriate. This Court should

therefore impose probation with appropriate conditions, including possible payment of restitution to the victims as set forth below.

II. THE COURT HAS AUTHORITY AND DISCRETION TO DEFER ANY INCARCERATION IMPOSED AS A CONDITION OF PROBATION[1]

Pursuant to 13-901(F), this Court does have the express authority to defer or delay imposition of any incarceration ordered as a condition of probation, if it finds incarceration appropriate for Mr. Ray. For the reasons set forth below in Part IV, incarceration is not a necessary or appropriate result in this case: Mr. Ray is a non-violent first-time offender who was convicted of an unintentional crime, and who wishes to rehabilitate himself and make amends through community service. But if the Court were inclined to impose jail time as a condition of probation, the Court has authority to order that such incarceration commence only after Mr. Ray's appeal in this case or only after such appeal is unsuccessful.

The Court's authority to delay service of jail time is explicit in the statute, which provides:

> When granting probation the court may require that the defendant be imprisoned in the county jail *at whatever time or intervals, consecutive or nonconsecutive, the court shall determine*, within the period of probation, as long as the period actually spent in confinement does not exceed one year or the maximum period of imprisonment permitted under chapter 7 of this title, [FN3] whichever is the shorter.

A.R.S. §13-901(F) (emphasis added). "The focus of A.R.S. § 13-901(F) is to permit the court to structure a rehabilitative and deterrent program designed to encourage behavioral changes in the offender." *State v. Richardson*, 172 Ariz. 43, 46 (App. 1992). To that end, "[i]ncluded in the statute's language are the options of *delayed* and consecutive time periods of incarceration in the order of probation." *Id.* (emphasis added).

The interests of justice in this case would require an order delaying incarceration. There is a significant possibility that Mr. Ray will prevail on appeal. Indeed, throughout Mr. Ray's lengthy trial, this Court repeatedly acknowledged serious legal issues raised by trial rulings with

[1] This Court's minute order issued September 14, 2011 states that the Court "instructs Counsel to be prepared to address legal issues regarding any incarceration components." Counsel is available to provide any further briefing on this issue that would assist the Court.

which an appellate court might disagree. Delaying jail time would not prejudice the State and would avoid an unnecessary and potentially erroneous deprivation of liberty.

III. PROBATION SERVES THE GOALS OF CRIMINAL PUNISHMENT AND THE ENDS OF JUSTICE IN MR. RAY'S CASE

Probation is "a form of punishment" under Arizona law. *State v. Montgomery*, 115 Ariz. 583, 584 (Ariz. 1977) (citing *State v. Fuentes*, 26 Ariz. App. 444, 549 (1976)). It is not a sentence, but rather is the "suspension of sentencing for such period and upon such terms as the trial court deems appropriate within the statutory parameters." *State v. Everhart,* 169 Ariz. 404, 406 (App. 1991).[2]

Arizona law authorizes trial courts to impose probation in appropriate cases. *See* A.R.S. § 13-603 (B) ("If a person is convicted of an offense, the court, if authorized by chapter 9 of this title, may suspend the imposition or execution of sentence and grant such person a period of probation except as otherwise provided by law."); A.R.S. §13-901(A) ("If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence . . . ."). Under Arizona's statutory scheme, a court is authorized to impose

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[2] The Supreme Court of Arizona has explained the difference between probation and sentence as follows:

> Probation is not a sentence. . . . A sentence is a judicial order requiring a defendant convicted in a criminal case to presently suffer a specified sanction such as incarceration, monetary fine, or both. Probation is a judicial order allowing a criminal defendant a period of time in which to perform certain conditions and thereby avoid imposition of a sentence. With probation, the imposition or execution of sentence is suspended or deferred to some future date, in order that the conditions of probation may be performed. If the conditions are performed, the court need not impose the sentence because the defendant has proven himself or herself worthy not to suffer such sentence. If the conditions of probation are not performed, however, the court may vacate the order suspending the imposition of sentence, and then impose sentence, including such sanctions as it might have in the first instance.
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> . . .
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> Although the acts required to be performed as conditions of probation may be onerous, they are not criminal sanctions or sentences. They are opportunities to avoid criminal sentencing.

State v. Muldoon, 159 Ariz. 295, 298 (1988).

probation unless an exception applies. *See, e.g.*, A.R.S. § 13-703 (O) (certain repetitive offenders ineligible for probation).

The decision whether to suspend imposition of sentence and impose probation is not tied to any formula. Unlike the determination of the length of a prison sentence, a decision to grant probation does not depend on the finding of a particular number of aggravating or mitigating circumstances. Rather, the court must consider the purposes of criminal punishment and the functions of probation in the context of the case before it. As the Arizona Supreme Court has explained regarding "the discretion vested in the trial court to grant probation," "[t]here are no rules prescribed as to when this discretion shall be exercised, or as to what evidence is necessary to satisfy the trial judge that the case is a proper one for its exercise." *State v. Bigelow*, 76 Ariz. 13, 16-17 (1953) (quoting *Varela v. Merrill*, 51 Ariz. 64, 76 (1937)). The decision, instead, is "entrusted solely to the discretion of the trial court." *State v. Oliver*, 9 Ariz. App. 364, 367 (App. 1969).

A court may elect probation when, "in its sound judicial discretion," the court determines that "the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment." *State v. Smith*, 112 Ariz. 416, 419 (1975). Arizona courts have noted that probation serves to promote retribution and deterrence while facilitating the rehabilitation of offenders; limiting the economic and other costs that imprisonment creates for society and family members; constraining the infringement on individual liberty to that which is necessary to achieve the desired results; and "alleviat[ing] overcrowding in [Arizona] prisons by not incarcerating those people with whom the state can adequately deal in other ways." *State v. Christopher*, 133 Ariz. 508, 510 (1982).

Mr. Ray, a first-time offender convicted of a Class 4, unintentional crime, is an eligible and ideal candidate for probation. The Court can achieve each of the goals of criminal punishment by subjecting Mr. Ray to "restrictive freedom" rather than imprisonment. *Smith*, 112 Ariz. at 419. The mitigating circumstances set out in Part IV.A below underscore the propriety of probation here. So too does the absence of aggravating circumstances, described in Part IV.B.

Imposing probation would also be consistent with the sentencing disposition of numerous other negligent homicide convictions, including far more egregious crimes and offenders. Throughout trial, the parties and this Court made reference to the case of *State v. Far West Water & Sewer*—a case where the defendant was prosecuted for reckless manslaughter and ultimately convicted of lesser offenses, including negligent homicide. *See, e.g.*, Trial Transcript 3/1/11, at 38–39; *id.* 3/10/11 at 293–94, 296–97; *id.* 3/17/11 at 9–10, 15, 20–24; *id.* 6/7/11, at 23–25, 37–38; *id.* 6/14/11, at 67, 124–25; *id.* 6/15/11, at 34–42, 54–55; *id.* 6/28/11, at 49–50; *see also, e.g.*, Under Advisement Ruling on Defendant's MIL No. 8 to Exclude Testimony of Steven Pace, 4/11/11, at 2 (discussing *Far West*). Notably, the Yuma Superior Court judge in *Far West* suspended imposition of sentence and imposed probation, both for the corporation and in the separate trial of the corporation's president. This exercise of discretion reflected a judgment that probation, not imprisonment, best served the multiple goals of criminal sentencing. *A fortiori*, probation is the appropriate result in this case, which involved less egregious criminal conduct.

IV. THE EXTENSIVE MITIGATING CIRCUMSTANCES IN MR. RAY'S CASE WARRANT PROBATION

Although a court's discretion to impose probation is not confined by any formula or number of findings of mitigating and aggravating factors, the extensive mitigating circumstances in this case make clear that probation is the appropriate result. These circumstances, set forth in detail below and to be developed at the presentencing hearing, include:

1. The crime was unintentional and non-violent
2. Mr. Ray has no prior criminal history, including arrests or convictions
3. Mr. Ray's ailing family members need his care
4. Mr. Ray is amenable to rehabilitation
5. Mr. Ray has close family ties
6. Mr. Ray has good moral character
7. Mr. Ray has demonstrated past good conduct and good deeds
8. Mr. Ray has a reputation for non-violence
9. Mr. Ray has a record of community service

10. Mr. Ray has expressed remorse

11. Mr. Ray has exhibited good conduct and appropriate demeanor in court

12. Mr. Ray loves, and is loved by, his family

13. Mr. Ray has continued support from family and friends

14. Mr. Ray is a contributing member of his household

15. Mr. Ray has a history of good employment and is a productive member of society

16. Mr. Ray cooperated with authorities

17. Residual and lingering doubt exists as to the State's proof of aggravating factors and Mr. Ray's guilt

In addition, probation is warranted here because the State lacks legitimate aggravation evidence, and because the State's aggravation presentation to the jury was irretrievably tainted by misconduct and prejudice.

A. Mitigating Circumstances

"In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term." A.R.S. § 13-701(F). This Court must consider all mitigating factors appropriate to the ends of justice. In evaluating mitigation, the Court must consider "*any* evidence or information submitted to the court or the trier of fact before sentencing or any evidence presented at trial." *Id.* § 13-702(C) (emphasis added). On the basis of that evidence, the Court must consider as mitigating circumstances *"any* . . . factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating." A.R.S. § 13-701(E)(6).

The list of mitigating factors identified by defense counsel does not limit the Court. Both the Yavapai County Attorney and this Court have the responsibility to identify the existence of mitigating factors which may add to those set forth in this Memorandum. *See* Ariz. R. Crim. P. 26.8(b) ("Special Duty of the Prosecutor. The prosecutor shall disclose any information in the prosecutor's possession or control, not already disclosed, which would tend to reduce the

punishment to be imposed."); *State v. Baum*, 182 Ariz. 138, 140 (App. 1995) (trial court must "conduct an adequate investigation into the facts relevant to sentencing," and "to conduct an adequate investigation, the court must consider all pertinent mitigating and aggravating circumstances").

1. The crime was unintentional

The Arizona Supreme Court regards the accidental nature of a crime as a substantial mitigating circumstance. In *State v. Bailey*, 772 P.2d 1130 (Ariz. 1989), for example, the Supreme Court reviewed a defendant's life sentence for felony murder. The defendant had accidentally shot the victim during a robbery attempt. The trial court concluded that "the accidental discharge of the [defendant's] weapon and defendant's genuine remorse constituted sufficient mitigation to outweigh imposition of the death penalty." *Id.* at 1131. The Arizona Supreme Court affirmed the sentence. *Id.* at 1135.

Here, it is undisputed that Mr. Ray did not intend to cause the deaths of the three victims. *See, e.g.*, Trial Transcript, 3/2/11, at 36:22–23 (opening statement by Ms. Polk) ("No one alleges that Mr. Ray intended to kill anyone in his tent."). By definition, negligent homicide is an unintentional crime. *See* A.R.S. §13-1102(A); A.R.S. §13-105(10)(d) (defining "criminal negligence"). Moreover, by finding Mr. Ray not guilty of reckless manslaughter, the jury rejected the State's argument that Mr. Ray was even aware of the risk that his conduct would cause death. *Cf. id.* at §13-105(10)(c) (defining "recklessly"). Mr. Ray simply is not a defendant who must be punished for intentional misconduct, or taught the difference between right and wrong. Under Arizona law, this Court should weigh the unintentional nature of the crime as a significant mitigating circumstance.

2. Mr. Ray has no prior criminal history, let alone any prior convictions

The lack of a prior felony conviction is a well-recognized mitigating factor considered by Arizona courts. *See, e.g.*, *State v. Pena*, 209 Ariz. 503, 507–08 (App. 2005) ("[T]he cases support the notion that punishment may be mitigated based on the absence of prior felonies"; "no doubt exists that this is a proper mitigating circumstance."); *State v. Aleman*, 210 Ariz. 232, 238–39 (App. 2005) (trial court found as a mitigating circumstance that defendant had no felony record,

even though defendant did have prior DUI conviction, which constituted an aggravator); *State v. Smith*, 138 Ariz. 79, 82 (1983) (trial court found lack of prior felony record as a mitigator). In *Pena*, an intermediate appellate court reviewed the defendant's sentence for aggravated assault. The defendant had no prior felony convictions, and the trial court, concluding that the mitigating circumstances "slightly outweigh[ed]" the aggravating circumstances, imposed a partially mitigated sentence. 209 Ariz. at 507. The Court of Appeals agreed that lack of prior felony convictions was a mitigator, but found insufficient evidence of aggravating circumstances—in particular, there was no evidence that the victim had suffered emotional harm. *Id.* The appellate court thus remanded for resentencing, because it could not rule out the possibility that the trial court would have mitigated the sentence even further had it not considered the improper aggravator. *Id.* at 509.

In this case, this Court should give the mitigating factor of no prior convictions significant weight. Mr. Ray has neither prior felony convictions nor any criminal history at all. He is a law-abiding citizen who is committed to getting his life back on track and contributing to a peaceful society. This case is thus markedly different from the cases in which courts assign scant weight to the absence of felony convictions on the ground that the defendant has a history of other criminal convictions. *See, e.g.*, *State v. Greene*, 192 Ariz. 431, 442 (1998) (assigning little weight to the defendant's lack of felony convictions because he had a misdemeanor theft conviction); *State v. Stokley*, 182 Ariz. 505, 523 (1995) (concluding that the "defendant's lack of a felony record is a nonstatutory mitigating circumstance, but the weight to be given it is substantially reduced by his other past problems with the law," which included a misdemeanor conviction for disorderly conduct and multiple arrests for assault and public drunkenness). This Court should give significant mitigating weight to the fact that Mr. Ray has no prior felony convictions and no criminal history.

3. Family members needing help and support

The fact that a defendant's family members depend on him for care is a mitigating circumstance. *See, e.g.*, *Aleman*, 210 Ariz. at 238 (trial court found as a mitigating circumstance that defendant "had minor children to support").

This mitigator is vitally important in this case. Both of Mr. Ray's parents depend on him for medical care and support; their only other son resides in Kansas City, Missouri. Mr. Ray's mother, Joyce, is a breast cancer survivor who is now battling thyroid cancer. As will be explained through her hearing testimony, Mrs. Ray's thyroid cancer has metastasized to other organs, and she additionally has a mass in her abdomen that likely requires surgical intervention. Mr. Ray's father, Gordon, suffers from dementia—a condition that requires support and treatment, and that makes it difficult for Gordon to assist Joyce. Both Gordon and Joyce count on Mr. Ray to help them through their painful and life-threatening illnesses. Mr. Ray's role as critical caregiver is a substantial mitigating factor that this Court must weigh. This Court can conclude that the interests of society would best be served by imposing a set of probation conditions that permit Mr. Ray to provide medical and emotional care to his parents.

4. Mr. Ray is a prime candidate for rehabilitation.

A defendant's capacity to be rehabilitated is a mitigating factor. *See, e.g., State v. Rossi*, 154 Ariz. 245, 248-9 (1987) (remanding for resentencing where trial judge incorrectly concluded that evidence did not support the mitigating factor of the defendant's ability to be rehabilitated). Furthermore, the possibility of rehabilitation counsels in favor of probation, which serves "rehabilitative goals." *Bowsher*, 225 Ariz. at 590.

As testimony and evidence at the presentencing will confirm, James Ray is amenable to rehabilitation. Hearing testimony from Mr. Ray's family and friends will characterize him as a loving, conscientious, and caring person who has led a peaceful and productive life. The letters filed in Mr. Ray's support convey the same sentiments. Hearing testimony will reflect Mr. Ray's deep concern for the welfare of his family and friends and his desire to improve himself and lead a productive life. Mr. Ray has indicated to both his family and friends that his goal is to learn from this tragic experience, and by doing so, to contribute to the good of society. All of these circumstances indicate that James Ray is amenable to rehabilitation, and that mitigation and probation are appropriate.

5. Close family ties

"The existence of family ties is a mitigating factor." *State v. Moore*, 222 Ariz. 1, 22–23, (2009) (quoting *State v. McGill*, 213 Ariz. 147 (2006)). In *Moore*, for example, the mitigator was established where the defendant's mother, father, sisters, and grandmother provided testimony or interviews expressing, inter alia, their love for him. *See id.*

Here, Mr. Ray retains extremely close ties with his mother, father, and brother. Hearing testimony will establish that Mr. Ray and his relatives continue to share a close bond and remain in constant contact. These family ties are also apparent through the conduct of Mr. Ray's family members over the course of the past year. Mr. Ray's parents attended as much of trial as their health conditions would allow. Mr. Ray's brother, Jon, repeatedly drove across the country to the Camp Verde courthouse—a 19-hour drive from Kansas City— to support his brother notwithstanding the needs of his own family and the demands of his full-time job. Furthermore, Mr. Ray's family has maintained constant contact and communication with him throughout the pendency of this matter, and Mr. Ray now resides with his parents.

6. Good moral character

Good moral character is a mitigating factor. *See, e.g., State v. Arnett,* 119 Ariz. 38, 48 (1978). Mr. Ray is the son of a Baptist Preacher and was raised with a strong respect for human life and moral values. Throughout his personal life and professional career, he has endeavored to help others through personal motivation and a non-denominational, faith-based philosophy. As testimony at trial and at the presentencing hearing reflect, Mr. Ray has good intentions, compassion, and a true desire to help those in need. *See, e.g.*, Trial Transcript 3/17/11, at 17:14–16 (testimony of Lou Caci) ("Q. And you've told folks that Mr. Ray is a really good man? A. Of course he is."). This tragedy will strengthen Mr. Ray's commitment to helping others in safe and positive ways. Mr. Ray's family and friends agree that he has approached the difficulties in his path with humility and grace.

7. Past good character and good deeds.

Past good character and conduct "can be a *significant* mitigating factor" under Arizona law. *State v. Harrod*, 218 Ariz. 268, 283 (2008) (emphasis added). The Arizona Supreme Court

has held that "proof of a great number of past good deeds. . . has *considerable* mitigating value." *State v. Willoughby*, 181 Ariz. 530, 549 (1995) (emphasis added). "Attestations to [a] defendant's good character" from those who know a defendant are sufficient to establish the mitigating factor. *State v. Rossi*, 171 Ariz. 276, 279 (1992).

In this case, several witnesses will testify at the presentencing hearing as to Mr. Ray's good character, good reputation and numerous good deeds. Hundreds of people submitted letters on his behalf emphasizing his good character, good deeds and his contributions to their personal and professional lives. Several nonprofit organizations have outlined his community contribution. The testimony at the hearing, together with the submitted statements, will clearly establish this mitigating factor.

Where courts have not accorded significant weight to a defendant's past good deeds, it is generally because the defendant committed an intentional, violent crime. *See Harrod*, 218 Ariz. at 283 ("Although good character can be a significant mitigating factor, it deserves less weight in a case involving a murder planned in advance."). In *Greene*, *Willoughby*, and *Harrod*, the defendants did not receive mitigation because they had been convicted of an intentional crime, first-degree murder. Here, in contrast, Mr. Ray was convicted of an unintentional, non-violent crime. There has never been evidence or argument that he intended for anyone to die; the deaths in this case were a tragic accident that shocked and devastated everyone including Mr. Ray. Thus, Mr. Ray's good character should be a "significant mitigating factor." *Id.* Moreover, two other mitigating factors—Mr. Ray's community service and his productive life—strengthen the good-character argument.

8. Reputation for non-violence

A reputation for non-violence can also be considered a non-statutory mitigating factor. *See, e.g., State v. Miles*, 186 Ariz. 10, 20 (1996) (noting that trial court found as a mitigator, and State did not contest on appeal, that defendant "at one time . . . had a reputation for nonviolence"). Mr. Ray is repeatedly described by family and friends as a peaceful, nonviolent person. Moreover, there is no evidence, suspicion or indication of any type that Mr. Ray possesses violent tendencies. This mitigating factor should be considered by the Court for

purposes of sentencing. The Court should also consider that Mr. Ray's nonviolent nature counsels in favor of probation. Mr. Ray poses no threat to public safety and thus incarceration is not necessary to restrain Mr. Ray from harming others.

9. Community service.

Arizona courts have recognized a record of community service as a strong mitigating factor. *Willoughby*, 181 Ariz. at 549. In *Willoughby*, the Arizona Supreme Court held that "a long record of significant good deeds for others and the community as a whole is entitled to *substantial weight*," and noted that "in many cases [the defendant's] record of significant good deeds and community service would weigh heavily in favor of leniency." *Id.* In that case, however, because the defendant had committed premeditated murder for pecuniary gain, the court found that the record of good deeds was outweighed. *See id.* (noting that the crime was the result of the defendant's "deliberate, carefully conceived, meticulously planned, and cold-blooded scheme to kill, rather than divorce, his unsuspecting wife").

In contrast, Mr. Ray has a substantial record of community service establishing the mitigating circumstance, and there is no intentional crime on the other side of the balance, much less a premeditated or cold-blooded crime. Among other charitable endeavors, Mr. Ray has donated money and time to organizations such as the Boys and Girls Club and South Bay Community Services. This mitigating circumstance should "weigh heavily in favor of leniency." *Id.*

In light of the State's arguments, it bears noting that the mitigating weight accorded to a record of community service does not depend on *why* the defendant did good deeds. In Mr. Ray's case, the State has insinuated that Mr. Ray's many efforts to help others lack value because some subset of these efforts were part of paid JRI programs. The State's position is wrong as a matter of fact and law. On the facts, the hearing testimony will reflect that Mr. Ray's service to the community extends far beyond his work at JRI and includes his personal efforts to counsel and assist people in need, his charitable efforts, and his relationships with friends and family. But to the extent Mr. Ray has been compensated for his service to others, this fact would not in any way decrease the weight of the mitigator. The court explicitly so held in *Willoughby*, rejecting a trial

court's conclusion that a defendant's good deeds were not mitigating factors if they were not "altruistic." *See Willoughby*, 181 Ariz. at 549 ("Thus, a long record of significant good deeds for others and the community as a whole is entitled to substantial weight even if not entirely engendered by virtuous motives.").

10. Remorse

A defendant's remorse is a mitigating circumstance. *See State v. Brewer*, 170 Ariz. 486, 507 (1992) ("Remorse may be a mitigating factor if found to exist."); *State v. James*, 685 P.2d 1293, 1300 (Ariz. 1984) (recognizing remorse as a mitigator but affirming finding that defendant had not conveyed remorse). Courts may rely on witness testimony or the defendant's own statements to decide whether the defendant is remorseful. *See, e.g.*, *Brewer*, 170 Ariz. at 507 (comparing remorse-related testimony of defendant and his pastor).

As set forth through the testimony of witnesses, Mr. Ray's letter to the Court, and his statements to his probation officer, Mr. Ray has expressed deep remorse for what happened. He has conveyed his sorrow and regret to the victims and his own family. These heartfelt statements establish the mitigating factor.

11. Good conduct and appropriate demeanor in the presence of judge and jury

Good conduct and appropriate demeanor in the presence of the judge or jury may constitute a mitigating circumstance. *Cf. State v. Spears*, 184 Ariz. 277, 295 (1996) (noting that such good conduct is not *necessarily* a mitigating circumstance). James Ray has exhibited exemplary behavior at all pretrial hearings in this matter. His demeanor was respectful, considerate and attentive at all times.

12. Love for and of family

"Love for and of family may be a mitigating circumstance." *Spears,* 184 Ariz. at 294; *State v. Carriger*, 143 Ariz. 142, 162 (1984). This factor applies forcefully here. At the presentencing hearing, Mr. Ray's mother, Joyce, and his brother, Jon, will testify to the love that Mr. Ray feels for them and has shown over the course of his life. The love of his family constitutes a mitigating factor. So too is the supportive, caring attitude that Joyce Ray, Jon Ray,

and Gordon Ray have toward Mr. Ray. *See, e.g., State v. Dickens,* 187 Ariz. 1, 25 (1996) (defendant's "loving and caring mother" and "supportive family" were mitigation factors found by the trial court).

13. Continued support from family and community

Continued support from family is a mitigating circumstance. *See, e.g., State v. Dann*, 220 Ariz. 351, 376 (2009). The testimony at the presentencing hearing, in conjunction with the many letters submitted in support of Mr. Ray, establish the continued support he receives from family, friends, and other supporters. One striking example is Mr. Ray's close relationship with his parents. When Mr. Ray's house was recently foreclosed on, his parents took him in, and he has since resided in their home in Oceanside, California. While living there, Mr. Ray is able to monitor their medical conditions and assist them in attending medical appointments and in daily tasks with which they would otherwise struggle. These same individuals will continue to support James during probation and in the future when he tries to rebuild his life and career.

14. Contributing member of household

Being a contributing member to a household is a mitigating circumstance and should be considered. *State v. Stanley*, 167 Ariz. 519, 529 (1991) (trial court found as a mitigating circumstance that the defendant "was an adequate family man"). Here, Mr. Ray is more than an "adequate family man"; he is a caretaker of his parents, with whom he resides, and is an important part of the household. Unfortunately, with the progression of the medical conditions of each of his parents, Mr. Ray's contributions to the household will become even more important. The Court should place weight on these important mitigating facts.

15. Good employment records and productive member of society

Having a good employment record and being a productive member of society is a mitigating factor. *See, e.g., State v. Lavers*, 168 Ariz. 376, 398 (1991) (accepting trial court's finding of "good military and employment record" as a mitigating circumstance); *Rossi*, 171 Ariz. at 278 (defendant's "history as a productive member of society" was a mitigating factor); *State v. Greene*, 192 Ariz. 431, 443 (1998) ("As for leading a productive life, we have found mitigation where the defendant had for some periods been gainfully employed. . . and refused to find

mitigation where the defendant was unable to hold down a job for any significant period and was frequently unemployed . . . ." (citations omitted)).

Mr. Ray has a history of consistent and gainful employment which should be considered a mitigating factor in this case. Mr. Ray has spent a lifetime as a productive, contributing member of society. He has maintained full-time employment and has worked for a number of companies, including AT&T. Beginning in 1992, he founded James Ray International, and in the years that followed, maintained an active professional life endeavoring to teach and motivate others through programs at JRI.

15. Not a danger to society

A finding that a defendant is not a danger to society is a mitigating factor. *See State v. Just*, 138 Ariz. 534, 550 (App. 1983) (discussing court's disagreement with psychologist's conclusion that defendant was not a danger to society, and ultimately remanding for resentencing).

Mr. Ray is not a danger to society. The trial evidence, probation report, letters submitted on Mr. Ray's behalf, and testimony at the sentencing hearing all support the conclusion that Mr. Ray has never been violent and has never intentionally violated the law or harmed others. Furthermore, the probation report reflects Mr. Ray's determination to live the rest of his life as a good citizen. These are mitigating factors. That Mr. Ray is not a danger to society also indicates that this a case where the Court can attain the aims of criminal punishment through probation rather than imprisonment. *See generally Christopher*, 133 Ariz. at 510.

16. Cooperation with authorities

A defendant's cooperation with authorities can be a mitigating circumstance. *See, e.g., State v. LeMaster*, 137 Ariz. 159, 165 (App. 1983) ("The cooperative attitude or lack of one is an appropriate factor in sentencing."); *State v. Atwood*, 832 P.2d 593, 670 (Ariz. 1992) (cooperation at the time of defendant's arrest). Here, Mr. Ray cooperated with law enforcement throughout the investigation of this matter, and voluntarily surrendered himself into custody even before his indictment.

In addition, a defendant's status as a model prisoner can be a mitigating circumstance entitled to significant weight. *See, e.g.*, *State v. Lehr*, 205 Ariz. 107, 109 (2003); *State v. Watson*, 129 Ariz. 60, 63–64 (1981). In *Watson*, the Supreme Court set aside a defendant's death sentence, concluding that the defendant's model prison behavior, along with his age at the time of the murder and a codefendant's lesser sentence, warranted a life sentence rather than the death sentence. *See* 129 Ariz. at 63–64 ("The fact that he has been a model prisoner and has attempted to further his education can and should be considered."). Here, Mr. Ray spent roughly three weeks in jail prior to trial and was a model detainee. This mitigating circumstance is entitled to some weight.

17. Residual doubt

Lingering doubt about guilt may be a mitigating circumstance. In an earlier *State v. Lehr* case, 201 Ariz. 509 (2002), the Arizona Supreme Court reviewed a defendant's death sentence. In passing, the court noted that the trial court had viewed lingering doubt as to guilt as a valid mitigator, but that the defendant had failed to prove this factor by a preponderance of the evidence. *See id.* at 523. *See also Heiney v. Florida*, 469 U.S. 920, 921 (1984) (Marshall, J., dissenting from denial of certiorari) (noting that the existence of "lingering doubts to guilt" "has been raised as a valid basis for mitigation by a variety of authorities").

This Court has repeatedly noted the many legal problems in the State's case, including the State's failure to identify a legitimate legal duty that could justify prosecution for Mr. Ray's failure to act. *See, e.g.*, Trial Transcript, 6/15/11, at 41:10–42:16 (describing the jury instructions regarding duty as presenting "a tremendous legal issue" and noting that the appellate court might disagree with the Court's conclusion that "a duty would attach in this situation").

B. <u>Aggravation/Lingering Doubt</u>

As stated earlier, this Court's decision whether to impose probation lies within the Court's substantial discretion and does not depend on any formula or number of mitigating or aggravating circumstances. It bears noting, however, that the sole aggravating circumstance the State has purportedly proved was tainted by the State's own misconduct. After vigorously denying its

error,[3] the State has now conceded that it played extrinsic evidence for the jury during the aggravation phase—an audio recording containing some of Mr. Ray's remarks during the Spiritual Warrior Retreat. *See* State's Notice of Error in Playing Of Exhibit 744 During Aggravation Hearing (Jul. 11, 2011). Jurors have stated publicly that hearing audio recordings of Mr. Ray's voice made all the difference in their deliberations, because the voice on the recording sounded forceful, unlike the mild man they saw in court. *See* Defendant's Motion to Strike Aggravators, filed 11/3/11, at 2 (citing transcript from Dateline NBC).

V. ERRORS IN STATE'S PRESENTENCE MEMORANDUM

The State's Presentence Memorandum advances several flawed arguments that this Court should reject. The State asks the Court, erroneously: to determine Mr. Ray's sentence on the basis of corporate conduct; to impose consecutive sentences without proper justification; to require restitution without necessary facts; and to award prosecution costs that Arizona law does not allow.

A. Erroneous Reliance on Corporate Conduct

In the absence of legitimate aggravation evidence, the State continues to rely impermissibly on the actions and reputation of the corporation James Ray International ("JRI"). The State argues that the "deterrent effect of the sentence imposed . . . has perhaps never been more vital than in this case where a defendant, operating as a business, neglects his obligation to conduct his highly lucrative business in such a way as to ensure the safety of his participants." State's Presentencing Memorandum at 3. The State posits that "[w]hen an individual *or business* causes the death of another in a manner found to be criminally negligent, courts must ensure proper punishment and consequences in order to deter *other businesses* from operating in an unsafe fashion." *Id.* at 4 (emphasis added).

The State's argument repeats the prejudicial error it repeated throughout trial. Mr. Ray cannot be held criminally responsible for the acts of JRI. As extensive briefing in this case has established, both the federal Constitution and Arizona law would prohibit such vicarious criminal

[3] *See, e.g., See* Trial Transcript, 6/29/11, at 14:15–18 ("MS. POLK: Your Honor, it was played in my opening. And then I moved to admit all those audios, and it was admitted at the beginning of trial.").

liability. For the same reason, the State's apparent intent to introduce at sentencing testimony regarding prior JRI events, or the lack of safety measures at such events, is misplaced. This argument is the law, not an attempt "to hide behind a corporate veil to escape responsibility." *Cf. id.* at 3. Mr. Ray can be criminally punished ***only*** for his own conduct and mental state.

B. Consecutive sentencing is not appropriate.

Arizona law is clear that neither A.R.S. § 13-711[4] nor Criminal Rule 26.13[5] creates a presumption that sentences shall run consecutively, nor do they in any way bind or limit the court's discretion to impose concurrent sentences. *See State v. Garza*, 192 Ariz. 171, 174-75 (1998) (holding that § 13-711 "does not create a statutory presumption designed to bind judicial discretion," but "merely requires the judge to set forth reasons for imposing concurrent rather than consecutive sentences and creates a default designation of consecutive sentences when the judge fails to indicate whether the sentences are to run concurrently or consecutively"); *State v. Van Alcorn*, 136 Ariz. 215, 219 (1983). "A trial court must choose, among concurrent and consecutive sentences, whichever mix best fits a defendant's crimes." *State v. Fillmore*, 187 Ariz. 174, 184 (1996); *see id.* (holding that § 13-711 does not "diminish the trial court's discretion to impose concurrent sentences").

The State devotes the consecutive sentencing section of its Presentence Memorandum to arguing that imposing consecutive sentences would not violate the constitutional prohibition on double jeopardy. State's Presentence Memorandum at 7-9. But the State identifies no reason why consecutive sentences are appropriate in this case. They are not. "[W]hen determining whether to . . . to impose concurrent or consecutive sentences, [Arizona] trial courts are allowed to consider any evidence or circumstance that the court deems relevant, including the culpability

[4] § 13-711 provides as follows: "Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence."

[5] Arizona Rule of Criminal Procedure 26.13 provides as follows: "Separate sentences of imprisonment imposed on a defendant for 2 or more offenses, whether they are charged in the same indictment or information, shall run consecutively unless the judge expressly directs otherwise."

of the defendant." *State v. Monaco*, 207 Ariz. 75, 79 (2004). For all of the reasons discussed in Part IV— including the fact the crime was unintentional and non-violent, Mr. Ray's lack of any criminal history, Mr. Ray's expressions of remorse, and Mr. Ray's amenability to rehabilitation— Mr. Ray's case is not suited to consecutive sentences, and indeed is far different from many cases in which consecutive sentences were imposed. *See, e.g.*, *State v. Griffin*, 148 Ariz. 82, 86 (1986) (prior conviction, use of a weapon, and lack of remorse were proper grounds for imposing consecutive sentences); *State v. Lee*, 147 Ariz. 11, 18 (1985) (consecutive sentence justified by repetitive nature of the acts and belief that defendant would pose extreme danger to other people if released); *State v. Meeker*, 143 Ariz. 256, 265-66 (1984) (extensive prior criminal record was valid reason for imposing consecutive sentences).

C. Restitution Is Warranted Only To The Extent Economic Loss Exceeds The Amount of Civil Settlement.

The State seeks restitution to victims in the amount of $67,255.31. This request may be improper. First, the settlements between Mr. Ray and the Brown and Shore families include releases that, by their terms, appear to waive any restitution. Second, because the substantial civil settlements—available for the Court's inspection upon request—far exceed the amounts the State now seeks for the victims' families, this Court needs to make findings as to whether these settlements cover the victim's economic losses, or whether more is owed.[6] Third, some of the sums the State seeks as restitution may not fall within the category of recoverable restitution under Arizona's three-part test.

These questions cannot be resolved without further facts, and Mr. Ray therefore respectfully asserts his Due Process right to contest the amount of restitution, and requests a hearing thereon. *See, e.g.*, *State v. Steffy*, 173 Ariz. 90, 93 (App. 1992) ("A defendant has a due process right to contest the information on which the amount of a restitution order is based," and at sentencing, may make objection to amount of asserted loss and request a restitution hearing); A.R.S. § 13–804(G) ("If the court does not have sufficient evidence to support a finding of the

[6] The confidentiality provisions of the settlement agreements explicitly permit disclosure of settlement terms at Mr. Ray's trial and sentencing. The Defense can provide the agreements upon the Court's request or at a restitution hearing.

amount of restitution or the manner in which the restitution should be paid, it may conduct a hearing upon the issue according to procedures established by rule of court. The court may call the defendant to testify and to produce information or evidence. The state does not represent persons who have suffered economic loss at the hearing but may present evidence or information relevant to the issue of restitution."). "[S]ome evidence must be presented that the amount bears a reasonable relationship to the victim's loss before restitution can be imposed." *State v. Scroggins*, 168 Ariz. 8, 9 (App. 1991). "The state has the burden of proving a restitution claim by a preponderance of the evidence." *State v. Lewis*, 222 Ariz. 321, 324 (App. 2009).

1. This Court Must Make Findings As To Whether The Releases Preclude Restitution.

As will be shown at a restitution hearing, the releases between Mr. Ray and the Brown and Shore families each include a broad release that includes, *inter alia*, "compensation of any nature whatsoever":

> In consideration of the payments called for herein, Releasors hereby completely RELEASE ACQUIT, AND FOREVER DISCHARGE WITH PREJUDICE Releasees of and from any and all past, present or future claims, appeals, suits, rights, losses, charges, debts, liabilities, demands, obligations, actions, causes of action, rights, damages, costs, losses of services, expenses and ***compensation of any nature whatsoever***, whether based on tort, contract or any other theory of recovery, and whether for compensatory or punitive damages, whether foreseen or unforeseen, disclosed or undisclosed, matured or unmatured, in law, equity or otherwise, which Releasors now have, or which may hereafter accrue or otherwise be acquired on account of, ***or in any way growing out of***, or which are the subject of their claims, including, without limitation, ***any and all known or unknown claims*** which now exist or may hereafter arise in favor of Releasors or their marital communities, if any, ***in connection with the alleged injuries or damages to Releasors arising from the Incident.*** This Settlement Agreement shall be fully binding and a complete settlement between Releasors and Releasees.

This provision presents an issue for the Court as to whether the settlement agreement extinguishes any right of restitution to the Brown and Shore families. In *State v. Andersen*, 177 Ariz. 381, 387 (App. 1993), the Court of Appeals held that the trial court had erred in summarily rejecting a defendant's motion to declare paid his restitution obligation to the victim's parents.

On remand, the trial court was instructed to "determine the existence of the *Damron* agreement and the degree of its conclusive effect."[7] *Id.* "If the agreement extinguishes any right of restitution that the victim's family has against the defendant," the Court of Appeals explained, "the restitution order should be vacated." *Id.*

2. The Requested Restitution Amounts Appear To Be Covered By The Civil Settlements.

Whether or not the Court concludes that further recovery is precluded by the release, the State acknowledges that "[s]ettlement of a civil lawsuit may extinguish a defendant's restitution obligation to the extent that the settlement compensates the victim's family's economic loss." *State v. Andersen*, 177 Ariz. 381, 387 (App. 1993). This is so because "[t]he Legislature intended to fully compensate the victim for economic loss," but not "to go beyond full compensation and confer a windfall." *See also State v. Iniguez*, 169 Ariz. 533, 537 (App. 1991). The State asserts that the amount it seeks "is not covered by the civil settlements either because it involves a family member or other individual that was not a party or because it seeks costs for victims directly related to attending the trial which were incurred following the settlement of claims." State's Presentencing Memorandum at 14. The actual amounts of the settlements, however, call into doubt whether further amounts are in fact owed. "[T]he Legislature intended that the courts coordinate criminal restitution and civil damage recoveries," *Iniguez*, 169 Ariz. at 537, and the State bears the burden of proving that the amounts are in fact still owed.

3. Some Of The Amounts Requested May Not Be Recoverable As Restitution.

Apart from the effect of the civil settlements, more facts are necessary to determine whether the sums the State seeks are recoverable as restitution. "[S]everal statutes define the circumstances under which and the extent to which a court may award restitution." *State v. Wilkinson*, 202 Ariz. 27, 28-29 (2002). Specifically, A.R.S. §13-603(C) directs the court to "require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic

[7] This reference is to *Damron v. Sledge*, 105 Ariz. 151 (1969).

loss as determined by the court . . . ." The term "economic loss" is defined at A.R.S. §13-105, and "does not include damages for pain and suffering, punitive damages, and consequential damages." And section 13-804(B) instructs the court to "consider all losses caused by the criminal offense" when "ordering restitution for economic loss." Taken together, these statutes impose three requirements:

> First, the loss must be economic. Second, the loss must be one that the victim would not have incurred but for the defendant's criminal offense. As the court of appeals noted, however, "'but for' causation does not suffice to support restitution, for if it did, restitution would extend to consequential damages. Yet our criminal code expressly provides the contrary." . . . By eliminating consequential damages, the statutory scheme imposes a third requirement: the criminal conduct must directly cause the economic loss. If the loss results from the concurrence of some causal event other than the defendant's criminal conduct, the loss is indirect and consequential and cannot qualify for restitution under Arizona's statutes.

Id. at 29.

A hearing is the appropriate forum in which to assess whether the amounts the State seeks satisfy this three-part test. *See* A.R.S. § 13–804(G).

4. Reimbursement for the Costs of Prosecution Is Not Warranted Here.

The State argues that Mr. Ray should pay $67,795.84 to reimburse the State for the costs of prosecution. This request is legally unsupported and inconsistent with the interests of justice. The State is correct that the Arizona Court of Appeals held in *State v. Maupin* that A.R.S. §13-804 authorized the Court to order, as part of a fine, that the defendant reimburse the State for the costs of extradition where the defendant's plea agreement specified that he would make such payment.[8] *State v. Maupin*, 801 P.2d 485, 487 (App. 1990). But *Maupin* is distinguishable from this case, and more recent case law has limited *Maupin* to its facts.

In *State v. Guilliams*, 208 Ariz. 48, 55 (App. 2004), the trial court ordered a defendant to pay $47,626.55 in restitution to the Arizona Department of Corrections after his conviction for

[8] A.R.S. § 13-804(A) provides: "Upon a defendant's conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct."

attempted escape. Noting that the applicable statutes authorize payment only for economic loss, the Court of Appeals held that portions of the restitution award were legally unsupported, because "many of these costs were attenuated from Guilliams's criminal act, temporally if not factually." The court explained:

> In other words, we see a difference, in this case at least, between extraordinary costs directly resulting from an escape and attenuated costs incurred in investigating an escape that has been successful. We are struck by how most of these latter costs are similar to, if not indistinguishable from, the normal costs of investigating any crime and arresting and capturing the suspect. ***Indeed, extending the state's argument to its logical conclusion, the FBI and the Pinal County Attorney's office are also arguably entitled to restitution for their costs in the Hummert case.*** For that matter, so is the jail, the superior court, the probation department, and even this court.

208 Ariz. at 55 (emphasis added). The court rejected the State's position. Critically, the court held:

> ***We decline to construe the restitution laws to encompass costs incurred by governmental entities that are performing their routine functions, regardless of whether those costs can be traced back to a criminal act.***

Id. (emphasis added). The *Guilliams* Court also did not agree that *State v. Maupin* supported the restitution award, noting that the defendant in *Maupin* had explicitly stipulated to payment of extradition costs in his plea agreement and was therefore distinguishable. *Id.* Neither *Guilliams* nor *Maupin* supports the payment the State requests here.

Moreover, the amount the State seeks is unreasonable. As the Court knows, the State's prosecution of this case lasted four months. The State exceeded even its own projected end date, despite objections from the Defense and warnings from the Court. The State also expended time and resources preparing and seeking to introduce witnesses who were not qualified or whose testimony was not relevant. The State now seeks to foist upon Mr. Ray the substantial costs of these ill-advised and legally improper attempts—including some $5,157.00 for cult expert Rick Ross, whom the Court excluded from trial; $2,644.28 for Richard Haddow, whose Preliminary Report was the subject of a *Brady* violation found by this Court on April 13, 2011, and whom the State subsequently attempted, but was not permitted, to call as a witness; and $1,175.00 for

Steven Pace, whose testimony the Court opined on April 11, 2011 would be irrelevant and thus inadmissible. Even if Arizona law could be construed to permit recovery of some prosecution costs in the absence of a plea agreement so providing, it surely does not authorize the collection of excessive, unlawful, and even *unconstitutional* practices by the State of Arizona.

VI. CONCLUSION

Mr. Ray is a 54-year-old man who has no criminal history and who was convicted of an unintentional and non-violent crime. He is a caregiver to his ailing parents, a loyal brother, and a productive and charitable member of the community. He is devastated by the tragedy and deeply remorseful. As a non-violent person with a record of good deeds, he presents no threat whatsoever to the community. Incarceration is not necessary or appropriate in Mr. Ray's case. Instead, it is respectfully requested that this Court suspend imposition of sentence and impose a term of probation, subject to any terms and conditions this Court deems appropriate to best serve the interests of justice.

DATED: November 14, 2011.

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