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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

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| STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br>JAMES ARTHUR RAY,<br><br>Defendant. | CASE NO. V1300CR201080049<br><br>Hon. Warren Darrow<br><br>DIVISION PTB<br><br>**DEFENDANT JAMES ARTHUR RAY'S MOTION *IN LIMINE* (NO. 9) TO EXCLUDE TESTIMONY OF RICK ROSS** |

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The prosecution seeks to call as an expert witness Rick Ross—a self-proclaimed expert in "destructive cults, controversial groups and movements." Expert Witness Report of Rick Ross, dated Jan. 5, 2011 ("Ross Report") (Exhibit A). According to the State, Ross's testimony will explain to the jury why participants felt they could not leave the sweat lodge during the 2009 JRI ceremony. In particular, Ross will testify that Mr. Ray used specialized "techniques" of "neuro-linguistic programming" (NLP) and "large group awareness training" (LGAT) to "control" participants in the 2009 JRI sweat lodge, causing them to remain inside the sweat lodge "notwithstanding becoming ill." Letter from Bill Hughes to Truc Do, Jan. 12, 2011 (Exhibit B); State's Bench Memorandum Regarding 404(b) Acts (filed 10/21/10).

Ross's proposed testimony fails multiple independent hurdles of admissibility and must therefore be excluded. *First*, Ross's proposed testimony is irrelevant. Ross's opinions on supposed psychological techniques address only one question: why participants felt they could not leave the sweat lodge. But that question is not in issue at this trial. Not a *single* witness will say they did not feel free to leave the sweat lodge. Indeed, the evidence will show that participants felt free to leave the sweat lodge at any time, were in fact free to leave, and did leave when they wanted to. And many who left chose to return to finish the sweat lodge ceremony. Because Ross's testimony hinges on a counterfactual scenario, it is irrelevant and has no probative value whatsoever. This basic failing is dispositive of the State's attempt to introduce Ross's opinions.

*Second*, Ross's proposed testimony is barred by Arizona Rule of Evidence 702. An expert witness, even if properly qualified, may not opine on how general behavioral tendencies manifested themselves in the case under review. *See State v. Montijo*, 160 Ariz. 576, 580 (App. 1989); *State v. Moran*, 151 Ariz. 378 (1986). And Ross, in any event, is *not* qualified to testify regarding the mental state of JRI participants. By his own admission, Ross has not spoken to a

single participant from the JRI sweat lodge and has never met Mr. Ray.[1] His *only* source of information regarding the sweat lodge comes from media accounts and a PowerPoint presentation provided by the Yavapai County Attorney.[2] This fact also casts doubt on whether Ross's opinion could be admissible under Rule 703, which requires that opinions be based on materials that experts in the field would "reasonably rel[y] upon."

The State cannot surmount the glaring Rule 702 deficiencies in Ross's opinions regarding JRI participants by portraying Ross as an expert in the alleged psychiatric and psychological phenomena of "LGAT" and "NLP" who can simply "educate the jury" in these concepts. State's 1/12 Letter, Exhibit B at 1. Even assuming these concepts—for which Ross could provide no accepted definition—could be considered a legitimate subject of expert testimony, Ross surely is not qualified to educate others in their supposedly psychological mechanisms. Ross has no education or training other than a high school degree, has no specialized training in counseling or mental health matters, and has never worked with the psychologists and psychiatrists that his report cites.

*Third*, even if Ross's proposed testimony could clear all of these hurdles, it must be excluded pursuant to Rule 403. The prejudice attendant to introducing a cult expert at trial is plain. It is yet another attempt by the State to try this case on the basis of Mr. Ray's character, rather than the merits of its evidence. And given the lack of any connection between Ross's opinions and the facts in evidence, such prejudice would be profoundly unfair. Ross's testimony must be excluded.

Moreover, the testimony—irrelevant and inflammatory speculation by an individual whose worrisome agenda and troubled past far outrun his virtually non-existent qualifications—would degrade the integrity of this Court and imperil Mr. Ray's right to a fair trial. As discussed in further detail below, Ross also serves as a "consultant" who performs "interventions" and "cult

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[1] References to Ross's statements are based on notes taken at the Defense's interview of Ross on January 21, 2011. Attorneys from both sides attended and recorded the interview, but a transcript has not yet been prepared.

[2] This is the same PowerPoint presentation given to the medical examiners which the State had refused to disclose to the Defense under a claim of attorney work product.

deprogramming." Some of his work has been violent and unlawful, resulting in criminal prosecution and civil sanction.

## II. FACTUAL BACKGROUND

According to Ross's Expert Witness Report, he is "one of the most readily recognized experts offering analysis about destructive cults, controversial groups and movements." Ross Report at 2. As he stated in his interview with Mr. Ray's attorneys on January 21, 2011, this "recognition" refers mainly to his media appearances, which fill over half of his 9-page CV. Ross has no college degree and no graduate degree. He has taken no college classes on psychology, medicine, group dynamics, sociology, or therapy, and has no training in any mental health field. His main professional activity is serving as "Executive Director" of the "Ross Institute," an entity with no employees other than Ross and no physical offices, and with "board members" consisting of two acquaintances and his brother. Ross's "work" at the "Institute" involves archiving news stories related to groups that, in his view, constitute cults or controversial groups or movements.

Ross also serves as a "consultant" who performs "interventions" and "cult deprogramming." Some of his work has been violent and unlawful. In 1991, for example, a Washington jury found him guilty of civil rights violations for abducting an 18-year-old man and conducting a 5-day, involuntary religious deprogramming. In upholding a punitive damages award against Ross of $2.5 million dollars, the district court judge noted that Ross "actively participated in the plan to abduct Mr. Scott, restrain him with handcuffs and duct tape, and hold him involuntarily while demeaning his religious beliefs," and that "[a] large award of punitive damages [was] also necessary" for "recidivism and mitigation" purposes, since "Mr. Ross himself testified that he had acted similarly in the past and would continue to conduct 'deprogrammings' in the future." *See* Order, *Scott v.* Ross, Case No. C94-0079C (W.D. Wash. Nov. 29, 1995).[3]

The State represents that Ross is an expert in "NLP," "LGAT," and the "'Human Potential' Movement." According to the State, Ross will:

[3] The State has also disclosed to the Defense that in 1976, Ross was convicted of the felony of conspiracy to commit grand theft.

- testify "about all the matters set forth in his report including Large Group Awareness Training and the 'Human Potential' movement," Letter from Sheila Polk to Truc Do and Luis Li, January 7, 2011 (Exhibit C), at 1;
- testify "about how these techniques affect the behaviors of group participants and the Defendant's use of these techniques to influence the decisions of participants to participate and remain inside the sweat lodge," *id.*;
- testify "to educate the jury regarding Large Group Awareness Training (LGAT)"; 1/12/11 Letter, Exhibit B, at 1;
- testify about "the persuasive power that LGAT can hold over participants," *id.*;
- "be asked to apply hypothetical fact scenarios (mirroring the facts in this case) to his knowledge of LGAT," *id.*; and
- "give the opinion that defendant exerted a high level of control over the victims, and defendant's control over the victims was such that they would remain inside the sweat lodge until the sweat lodge ceremony ended, notwithstanding becoming ill." *Id.*

Ross himself stated in his interview that he does not consider himself an expert in neuro-lingustic programming. As to "LGAT," Ross professes expertise but stated that he is unaware of any academically accepted definition of LGAT. Similarly, Ross stated that he is unaware of academically accepted definitions of other apparent terms of art used in his Report, such as the "Human Potential" movement, "psychonoxious," "countertransference reactions," and "encounter groups." *See* Ross Report, Exhibit A. Ross also stated that he has never worked with any of the scholars whose work provides the "supporting documents" for the existence of a category called "LGAT" and its alleged criteria and effects. *See id.* at 2–3.

## III. ARGUMENT

### A. Ross's proposed testimony must be excluded because it is irrelevant.

#### 1. The proposed testimony is not probative of any fact in issue in this case.

"Expert testimony, of course, must meet the tests of relevancy and materiality." 1 Ariz. Practice § 702:1 (Rev. 4th ed.). Testimony fails these basic tests when it pertains only to facts that are not at issue or when its relevance hinges on a counterfactual scenario. *See, e.g.*, *Menendez v. Paddock Pool Const. Co.*, 172 Ariz. 258, 269 (App. 1991) (expert opinion that

swimming pool was intrinsically dangerous due to absence of a "deep end" and insufficient signage was "immaterial" where injury occurred in the shallow end; the expert's affidavit "fail[ed] to provide any reasonable linkage between the condition alleged and the injury"). *See also State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990) (expert testimony regarding general political situation in El Salvador was irrelevant to voluntariness of El Salvadoran defendant's confession where there was no connection between the political situation and the actual circumstances of the confession). Put simply, if the expert's opinion bears only on a question that is not in issue in the case, that opinion is not relevant and not admissible.

This most basic rule of admissibility bars Ross's proposed testimony. The State seeks to introduce Ross's testimony regarding the effects of "NLP" and "LGAT" solely to address the question of why participants felt they were not free to leave the sweat lodge. As the Defense has pointed out in a recent motion,[4] this question presumes a counterfactual scenario. Not a *single* participant states that he or she was not free to leave the sweat lodge. To the contrary, the evidence will show that participants felt free to leave the sweat lodge at any time, were in fact free to leave, and did leave when they wanted to.

Three participants in the Spiritual Warrior weekend—Elsa Hafsted, Simin Marzvan, and Soheyla Marzvan—chose not to do the sweat lodge at all. Three others entered the sweat lodge but decided to leave after the first round. *See* Transcript of Interview of Sylvia De La Paz by Det. Willingham, 10/27/09, at 12:13-14 (stating that "there were two other people that left in the first round with me: Carl and his wife Louise [Nelson]"); *id.* at 12:25 ("those of us in physical distress got the hell out of there"). Many participants came and left throughout the ceremony, including two participants who left *in the middle* of subsequent rounds. *See* Transcript of Interview of John Ebert by Det. Parkison, 10/8/09, at 3:20-21 (Ebert left in Round 4 and went back in for Round 7); Transcript of Interview of Dawn Gordon by Sgt. Boelts, 10/12/09, at 23:19-23 (John Ebert exited through the side flap during Round 4); Transcript of Interview of Bill Leversee by Det. Surak, 10/8/09, at 9:27 ("I left in the middle of a round."). And the State's own witnesses will testify

[4] *See* Defendant's Reply in support of MIL to Exclude YouTube Videos, filed 1/10/2011, at 3.

consistently that they were always free to leave if they chose. *See, e.g.*, Transcript of Interview of Randall Potter by Det. Surak, 10/8/09, at 10:7-8 ("You know, if anybody wanted to leave they would have left."); Transcript of Interview of Danita Oleson by Det. Parkison, 10/8/09, at 5:8 ("Anybody could have left at anytime.").

The State plainly has not met its burden of showing that Ross's testimony will bear on a fact of consequence in this case. Indeed, given the affirmative evidence that participants *were* free to leave and were *not* under Mr. Ray's "control," the State *cannot* meet this burden.[5] Ross's proposed testimony is irrelevant and void of any probative value. It must be excluded.

**2. Hypothetical questions cannot rest on facts not in evidence.**

The same principles of relevance preclude testimony that the State may attempt to elicit through *hypothetical* questions based on facts contrary to the evidence. The State has indicated that it may seek to elicit Ross's opinions regarding why participants were not free to leave the sweat lodge through hypothetical questions. *See* State's 1/7/11 Letter, Exhibit C, at 1 ("Hypothetical questions will be posed as necessary."); State's 1/12/11 Letter, Exhibit B, at 1 ("Mr. Ross . . . will be asked to apply hypothetical fact scenarios (mirroring the facts in this case) to his knowledge of LGAT."). It is well-established that hypothetical questions, like other questions, must be "based on facts in evidence" and must not be a vehicle for "bootstrapping" unfounded allegations. *West v. Sundance Development Co.*, 169 Ariz. 579, 584 (App. 1991). In *West*, for example, an expert was not permitted to testify about the effect of alcohol on plaintiff "if she had consumed more than 17 ounces of wine," where there was no evidence she had consumed that amount. *Id.* It was of no moment that "the jury did not have to believe her testimony as to the amount she drank." *Id.*

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[5] Moreover, as the Court noted in its recent ruling on Defendant's Motion to Exclude Evidence of Financial Condition, a victim's mental state is not relevant to a reckless manslaughter charge unless the "***defendant is aware*** that a particular mental state of another person will result in the other person being placed at such a risk by the conduct of the defendant, the mental state of the other person is relevant to the question of whether the defendant acted recklessly." *See* Court's Under Advisement Ruling Regarding on Defendant's Motion in Limine (No. 2), January 13, 2011, page 4. Here, even if the State could prove that some participants decided not to leave the sweat lodge because of some words or actions by Mr. Ray, the State could not prove that Mr. Ray knew that participants had such a mental state. All evidence—in particular, of Mr. Ray instructing people that they could leave the sweat lodge, and of people in fact coming and going throughout the ceremony—was to the contrary.

**B. Ross's disclosed opinions are not appropriate topics of expert testimony.**

Even if Ross's proposed testimony could somehow clear the insurmountable relevance hurdles, his disclosed opinions are not appropriate topics of expert testimony under Rule 702.[6] This is true both because the opinions Ross professes would not "assist the trier of fact" within the meaning of Arizona law, and because Ross is not qualified to offer such opinions.

**1. Ross's testimony regarding why participants did not leave the sweat lodge is not an appropriate topic for expert testimony.**

As an initial matter, Ross's reasoning appears to follow a track that Rule 702 forbids. In Ross's view, leaders or participants of "LGATs" exhibit certain behavioral profiles, and the individuals in this case therefore must have behaved in accordance with those alleged tendencies.

Rule 702 bars this course. An expert testifying as to general behavioral tendencies may not opine on whether or why a particular victim behaved in a particular way during the incident under review. *Montijo*, 160 Ariz. at 580 ("psychiatric autopsy" not admissible to "inform the trier not only about decedent's character but what decedent did and why he did it on the night of his death"). This type of opinion, Arizona courts have held, does not "assist the trier of fact" for purposes of Rule 702. *See Moran*, 151 Ariz. at 385 ("we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred"); *Montijo*, 160 Ariz. at 580. Such testimony does no more than advise the jury on how to decide the case. *Montijo*, 160 Ariz. at 580.

Moreover, the State may not avoid Rule 702's prohibition by asking Ross hypothetical questions.[7] In *State v. Tucker*, the prosecution offered "hypotheticals" that asked the expert "whether the specific facts of this case . . . fit into the child molesting pattern that he had described." 165 Ariz. 340, 348 (App. 1990). These questions were held improper. As the court explained, the so-called hypotheticals were "nothing more than the expert explaining to the jury

[6] Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ariz. R. Evid. 702.

[7] Neither Ross nor the State has articulated exactly what "hypothetical" questions the State intends to ask.

how the child's testimony was, in fact, consistent with the crime having occurred"—the very approach "condemned in *Moran*." *Id.* at 349.

**2. Ross is not qualified to offer expert opinions regarding JRI participants' mental states.**

Furthermore, regardless of the reasoning he employs, Ross is plainly not qualified to offer expert testimony in this case. Pursuant to Rule 702, "[t]he court must determine whether the witness' expertise is *applicable to the subject about which he intends to testify*, and specifically whether the witness' training and experience qualify him to render opinions which will be useful to the trier of fact." *Lay v. City of Mesa*, 168 Ariz. 552, 554 (App. 1991) (emphasis added). "A witness must indicate that his training and experience qualify him to render enlightened opinions and draw sophisticated conclusions from the particular type of evidence available in a given accident." *Englehart v. Jeep Corp.*, 122 Ariz. 256, 258 (Ariz. 1979).

The State seeks to elicit Ross's opinions on the mental states of JRI participants on the night of October 8, 2009. Yet Ross has never met or spoken to any of the participants. Nor has he met or spoken with Mr. Ray, or had *any* first-hand experience, *ever*, with a JRI seminar.[8] Ross cannot be said to have any "knowledge, skill, experience, training, or education" regarding the 2009 sweat lodge that would qualify him as an expert under Rule 702. These glaring deficiencies flatly bar Ross's proposed testimony.[9]

The State cannot avoid Ross's lack of relevant experience by portraying him as an expert who is qualified to "educate the jury" on the general attributes and criteria of NLP or LGAT. As an initial matter, it is highly doubtful that these theories are appropriate topics for expert testimony at all. Even apparently credentialed witnesses have been barred from offering related testimony on the ground that the theories lack scientific acceptance. *See United States v.*

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[8] In his defense interview (but not his expert witness report), Ross stated that he once received a phone call from someone who claimed she had attended JRI seminars. Ross did not recall the person's name or the details of the call and thus cannot verify if the person actually ever did attend a JRI event..

[9] Furthermore, the materials Ross *has* relied on to learn about the 2009 sweat lodge—media and internet stories and a PowerPoint presentation prepared by the prosecution—would seem to form the basis for exclusion under Rule 703. These are not the materials "reasonably relied upon" by experts in any relevant field of expertise.

*Fishman*, 743 F. Supp. 713, 720 (N.D. Cal. 1990) (excluding under *Frye v. United States* the "coercive persuasion" testimony of Margaret Singer and Richard Ofshe—two psychologists extensively cited in Ross's Expert Witness Report—for lack of scientific acceptance). In any event, by his own admission during his interview, Ross is *not* an expert in NLP. As for LGAT, which Ross describes as a term of art among psychiatrists and psychologists but for which he cannot provide an academically accepted definition, Ross lacks any of the qualifications one might expect to see in an expert in psychiatry or psychology: he has no higher education, no specialized training, has never worked in the mental health field, and has never worked with any of the people whose studies he describes. It would strain credulity for the State to argue that Ross could somehow educate the jury on these supposedly sophisticated theories—in which Ross himself has no education and for which he cannot provide any more than summaries of the work of others—or apply them to the facts of this case.

**C. To the extent any balancing is required, Ross's proposed testimony should be excluded under Rule 403.**

The irrelevance of Ross's opinions, and their inadmissibility under Rule 702 and 703, obviate the need for a 403 balancing analysis here. *See, e.g.*, *Moran*, 151 Ariz. at 382 (a "Rule 403 balancing situation" does not arise where "Rule 702 precludes admission"). Any such balancing, however, would clearly favor excluding the testimony as unfairly prejudicial. Ross is a self-proclaimed expert in "destructive cults, controversial groups and movements." Ross Report at 1. He plans to testify regarding his theories on nefarious "mind control" and "thought reform." *Id.* at 2. He will opine, moreover, that "[t]he net results of such persuasion techniques . . . can be quite destructive, rendering those involved largely unable to think independently and/or critically and therefore essentially defenseless." *Id.* at 5. Finally, Ross's opinion is that "[t]hese techniques . . . may produce 'psychiatric causalities'" (a term Ross was unable to define in his interview). *Id.* The prejudice infused in such opinions is not subtle, and it far outweighs any probative value the testimony could have. *See, e.g., U.S. v. Fishman*, 743 F.Supp. 713, 722 (N.D. Cal. 1990) (sociology professor Ofshe's testimony on the "thought reform" practices of the

Church of Scientology "has a probative value which is substantially outweighed by its danger of unfair prejudice").

**D. The State may not use Ross's testimony to introduce otherwise inadmissible evidence**

In earlier motions and correspondence, the State indicated its intent to provide Ross with "video and other documentation" regarding other "several JRI events." State's Bench Memorandum Regarding 404(b) Acts at 2. The State suggested that it would then seek to introduce such materials into evidence. *See id.* Ross's Expert Witness Report mentions no such materials, however, and in his interview he stated that he had been provided no materials other than the State's PowerPoint presentation. The Defense therefore assumes the State no longer intends to provide Ross with such materials or introduce them into evidence. The Defense reserves, however, its right to object to any opinions based on such materials and the introduction of any such materials into evidence. *See generally* Ariz. R. Evid. 703.

## IV. CONCLUSION

The testimony the State seeks to elicit at trial from Rick Ross is inadmissible for multiple independent reasons. Furthermore, Ross's opinions are so dubious, and their connection to this case so remote, that their introduction at this trial would imperil its fundamental fairness. The testimony should be excluded.

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