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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

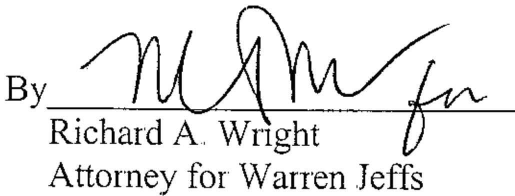
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	NO. CR-2007-743 REPLY TO RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNTS 2 & 4 [Hon. Steven F. Conn]

The defendant, Warren Jeffs, by and through his undersigned attorney, hereby replies to the State's response to his motions to dismiss counts 2 and 4 of his indictment. The clear language of A.R.S. § 13-3608 mandates dismissal and the State's arguments are without merit for the reasons set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 21st day of April, 2008.

WRIGHT STANISH & WINCKLER



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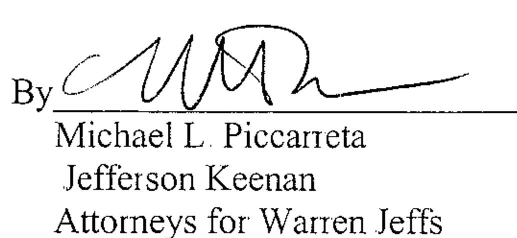

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

The State does not dispute the operative facts. In counts 2 and 4 of the indictment, the defendant, Warren Jeffs, stands charged as an accomplice to allegedly incestual activity that took place between others. However, one of the participants to the alleged act of incest does not meet the age requirement element of the offense for both participants clearly set forth in the statute. In addition, the participants to these alleged acts are not full first cousins as required by statute, but rather first cousins of the half-blood, and therefore do not fall within the reach of the incest statute Nonetheless, the State urges this Court to ignore the statute, engage in judicial activism, and effectively repeal an amendment that was duly enacted by the legislature ten years ago.

II. DISCUSSION

A. Arizona's Incest Statute, A.R.S. § 13-3608, Clearly Requires That Both Participants Be 18 Or More Years Of Age And This Court Should Decline The State's Invitation To Rewrite The Statute Simply Because Counsel For The State In This Case Believes That The Legislature Should Not Have Eliminated The Offense Of Incest With A Minor.

The State appears to concede, as it must, that the plain language of A.R.S. § 13-3608 prohibits prosecutions of incest involving minors. The State's only argument is that it would be "absurd" to punish incest involving adults more harshly than incest involving minors. The problem with the State's argument is that there is no such offense of "incest with a minor." The Arizona legislature eliminated that offense ten years ago when it amended the statute to its current form. Law 1998, Ch. 291, § 1. This is not an absurd consequence that arises out of application of the statute – it is the clear and unmistakable result that the legislature intended. The State's real argument appears to be that it was absurd for the legislature to eliminate the offense of incest with a minor. There is nothing absurd about the legislature's decision not to criminalize activity that is already criminalized elsewhere,[1] but even if it were, there is absolutely nothing this Court

[1] The Arizona legislature has clearly considered all matters relating to sexual offenses very carefully as evidenced by the numerous revisions to these statutes over the years including, of course, the amendments adding an age requirement to the incest statute. All non-consensual acts of sexual intercourse or oral sexual contact are criminalized as class 2 felonies, regardless of the age of the participants or the degree of blood relationship. Consensual sexual activity with minors is criminalized under A.R.S. § 13-1405. Consensual incestuous activity with minors is a class 2 felony with mandatory incarceration for parents or guardians engaging in such activity. A.R.S. § 13-1405(B). It is therefore perfectly logical for the Arizona legislature to limit the incest statute to consensual behavior between adults, the only activity that is not already criminalized under Arizona's criminal code.

can do about it. This Court certainly does not have the authority to resurrect a criminal offense that the legislature put to rest ten years ago.

Arizona's incest statute was amended over 30 years ago to eliminate the offense of incest with a minor under the age of 15. Laws 1985, Ch. 364 § 29 The law was then amended in 1998 to eliminate the offense of incest with a minor. Prosecutions in this state have proceeded since these enactments without any hue and cry on the part of the prosecution. There are no reported cases in Arizona where the State has even contended that the amendments to these statutes should be ignored and the prior versions of the statutes should be applied to prosecute an individual. Along comes a high profile defendant, Warren Jeffs, and the State now contends that the rules should be changed specifically for him The State forgets that the crime of incest is a statutory creation, and if there is no liability under the statute, there is no offense. There is nothing for the court to interpret or construe, period.

The State has not cited any authority from any jurisdiction for the proposition that a criminal statute that clearly does not apply on its face may nonetheless be applied to impose criminal liability on a person not subject to the statute's reach. It would be astounding if any such authority existed because it would violate the most basic principles of due process that govern criminal prosecutions.

Due process under both the Arizona and United States constitutions requires, at a minimum, that citizens be given fair notice of what conduct and persons will be subject to prosecution. "Because no one should be required at the risk of his liberty to speculate as to the meaning of penal statutes, due process requires offenses to be defined with sufficient specificity as to be understood by a person of common intelligence. *State v. Pickett*, 121 Ariz. 142, 589 P.2d 16 (1978)." *State v. Zack*, 138 Ariz. 266, 268, 674 P.2d 329, 331 (App. 1983). In the present case, Arizona's incest statute is perfectly clear and requires that both individuals involved be at least 18 years of age or older. Indeed, the legislature specifically amended the statute to include the age requirement as a central element. A defendant should not have to face the risk that a criminal statute that clearly and unequivocally does not apply will nevertheless be used to prosecute him on the basis of purported "policy" reasons. Otherwise, the criminal statutes would provide no real notice at all because there is nothing to prevent the State from contending that any statutory provision that does not apply as written, ought to be applied to a certain unpopular defendant under certain circumstances for "policy" reasons. There should not be new criminal rules or statutes for Mr. Jeffs.

The most fundamental rule of statutory construction is that the plain meaning of the statute must be given effect. This rule must have its most rigorous application in the context of criminal prosecutions. This has been the law in

Arizona since before statehood. "If the letter of the law clearly excludes the state of fact propounded in the pleading, or does not reasonably include them, even though they be within the reason and policy of the legislation, the courts cannot, by implication or construction, declare a person charged with them guilty of a crime." *State v Behringer*, 19 Ariz. 502, 506, 172 P. 660, 661 (1918) [emphasis added]. "'Constructive crimes – crimes built up by the courts, with the aid of inference, implication, or strained interpretation – are repugnant to the spirit and letter of English and American criminal law.'" *Id.* [citations omitted]. The Arizona Supreme Court later stated, "by the same reasoning we are not permitted to ignore an element designated by the legislature to be essential to the commission of a criminal offense." *State v Ferraro*, 67 Ariz. 397, 401, 198 P.2d 120, 123 (1948) [emphasis added].

There is no absurd result here. The legislature clearly intended to eliminate the offense of incest involving minors, and it did so by making the minimum age requirement an essential element of the offense. However, even if there were some purported absurd result, the rule of statutory construction that permits ignoring the plain language of a statute simply has no application in the context of the elements of a criminal offense. *Ferraro, supra, Behringer, supra*. Even if the State were correct that there was some purportedly "absurd" result that would prohibit the application of the statute as written by the legislature, such a result

would, at best, render the statute ambiguous 73 Am. Jur.2d Statutes § 114. Therefore, such a construction of the statute would not help the State because, under the rule of lenity, any such ambiguity would have to be resolved against the state, in any event. *State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996). ["When a statute is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant'"] [citation omitted].

Because even an ambiguous statute can never be construed against a criminal defendant, it follows that a statute that clearly and unambiguously does not apply to a defendant can never be construed against him, either. *Ferraro, supra*; *Behringer, supra*; *State v. Phelps*, 12 Ariz. App. 83, 86, 467 P.2d 923, 926 (1970) ["it must be remembered that this being a crime, the statute must be strictly construed and not broadened beyond the clear and express intent of the legislature"].

The cases cited by the State have no persuasive value because they do not involve the interpretation of incest statutes that contain a minimum age requirement for both participants as an essential element. As noted in defendant's motions to dismiss, Arizona's incest statute was adopted from the California Penal Code § 285, which had no age requirement. However, because Arizona's incest statute has been twice amended to include a minimum age requirement for both

participants, *People v. Tobias*, 25 Cal 4th 327, 21 P.3d 758 (2001), in which the California Supreme Court interpreted the California statute, has no persuasive value whatsoever. Indeed, four years after *Tobias* was decided, the California statute was amended to prohibit incestuous sexual activity between persons "14 years of age or older." 2005 Cal. Legis. Serv. Ch. 477 (S.B. 33). The amendment abrogated the result of *Tobias* which involved allegedly incestuous activity between an adult and a 16 year old minor because the minor involved in the case would clearly be subject to the minimum age requirement set forth in the amended statute. The California legislature's response to *Tobias* is therefore hardly a ringing endorsement. Moreover, the age requirement inserted into the California statutes shows that California is following Arizona's lead in this matter, not vice versa. With respect to the *Tobias* court's concern that minor victims not be prosecuted under the incest statute, Arizona has eliminated that possibility by requiring both participants to be 18 years of age or older. As noted above, the conduct of an adult engaged in any such activity with a minor is clearly criminalized elsewhere in Arizona's criminal code. *See* fn. 1, *supra*.

The older Arizona cases cited by the State are equally unavailing because they address the statute before it contained any age requirement and, not

surprisingly, reached similar results as the *Tobias* court.[2] *State v. Haston*, 64 Ariz. 72, 166 P.2d 141 (1946); *State v. Laney*, 78 Ariz. 19, 274 P.2d 838 (1954), *overruled in part on other grounds*, *State v. Zakhar*, 105 Ariz. 31, 459 P.2d 83 (1969). This Court cannot simply ignore the amendment to the statute, fail to give effect to its plain language, and pretend that the law was never changed.

> There is a strong presumption that legislatures do not create statutes containing provisions which are redundant, void, inert and trivial. ... Furthermore, it is presumed when a legislature alters the language of a statute that it intended to create a change in the existing law.

State v. Kozlowski, 143 Ariz. 137, 138, 692 P.2d 316, 317 (App. 1984). This, of course, includes the case law interpreting the previous statute. *Id.* Most importantly, in none of these cases did the court judicially alter the elements of the offense to permit the prosecution of an individual who was not otherwise subject to the statute. For all of the reasons set forth above, the courts simply cannot do this.

Accordingly, these constitutional and statutory considerations also prohibit the Court from adopting the literally unprecedented interpretation of the incest

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[2] The actual issue in *Tobias* was whether the minor could be considered an accomplice and whether her testimony would therefore be subject to the jury instruction that such testimony must be considered with extra care. *Id.* at 338, 21 P.3d at 765. The rule that the minor's testimony would not be subject to such an instruction represented a judicial gloss on the statute that had been established "in a consistent line of cases dating back nearly 75 years. ..." *Id.*, 25 Cal.4th at 343, 21 P.3d at 92 [Werdegar, J., concurring]. Because Arizona's statute does contain a specific age requirement, this type of judicial gloss is neither necessary nor a legitimate exercise of the judicial function.

statute urged by the State. Because counts 2 and 4 of the indictments do not involve or allege activity between persons who are 18 years of age or older, as required by the statute, they are legally insufficient and must be dismissed pursuant to Rule 16.6(b) of the Arizona Rules of Criminal Procedure.

B. Persons Who Are Not First Cousins, But Rather First Cousins Of The Half-Blood, Are Not Within The Degrees Of Consanguinity Within Which Marriages Are Declared By Arizona Law To Be Incestuous And Void And Their Conduct Cannot Therefore Be The Basis For A Charge Of Incest.

It is clear that the Arizona legislature knows how to refer to relationships of the half-blood when it wishes to do so, and has done so with regard to siblings, but not with regard to first cousins. Nevertheless, the State attributes to the legislature a policy that the legislators chose not to adopt in enacting the marriage statute, i.e. a prohibition against marriages between first cousins of the half-blood. Once again, the Prosecutor believes that the statute should be different than it is and urges the Court to change the statute for purported policy reasons. Once again, the Prosecutor's approach violates numerous tenets of statutory construction.

For all of the reasons set forth in detail above, the best indication of the policy adopted by the legislature is the plain language of the statute, itself, and courts are not free to alter statutes to impose their own views of what the policy ought to be. If the legislature wished to prohibit marriage between cousins of the first blood, or wished to prohibit marriage between other relationships of the half-

blood, it could have done so. For example, the Oregon Revised Statutes, § 106.020 prohibits marriage: "When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood. . ." In contrast, the Arizona statute, A.R.S. § 25-101, provides:

> Marriage between parents and children, including grandparents and grandchildren of every degree between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.

A.R.S. § 25-101(A) [emphasis added].

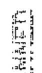
The statute therefore applies to the qualifying phrase "of every degree" to parents and children, including grandparents and grandchildren. It applies the qualifying phrase "of the one-half as well as the whole blood" to brothers and sisters. It does not apply any other qualifying phrase to first cousins. The State's argument that, despite this language, the Arizona legislature intended to prohibit marriage between first cousins of the half-blood is therefore untenable for several reasons.

If the Arizona legislature were truly concerned about procreation between first cousins of the half-blood, it would have explicitly prohibited such marriages, as it did with half brothers and half sisters. The reason there is no exception allowing first cousins of the half-blood to marry as long as they cannot reproduce is obviously because such marriages are not prohibited under the statute to begin with. *Id.* Similarly, the State's argument that, if "half-blood" applies only to

brothers and sisters, then "whole blood" must, too, is completely specious. It is obvious from reading the statute that any blood relations referred to are assumed to be of the whole blood, unless specifically qualified further, i.e. "of every degree" and "of the one-half as well as the whole blood."

Finally, the State's reliance on a case from Louisiana in 1898, *State v. Guiton*, 24 So. 784 (La. 1898), holding that a "half-niece" was within the degrees of consanguinity prohibited by Louisiana law carries little persuasive weight given the fact that the California Supreme Court reached precisely the opposite result in a well reasoned decision that specifically rejected the result reached by the Louisiana court. *People v. Baker*, 69 Cal.2d 44, 442 P.2d 675 (1968). The court's cogent analysis merits quotation at length:

> In construing a criminal statute, a defendant 'must be given the benefit of every reasonable doubt as to whether the statute was applicable to him.' ... The sanctions of Penal Code § 285 apply to sexual relations only when, pursuant to Civil Code section 59, the act occurs 'between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces ***.' [Emphasis added]. The phrase, 'of the half as well as the whole blood' obviously refers to brothers and sisters. It cannot be interpreted to also modify 'uncles and nieces' for it is a well established rule of construction that 'relative or modifying phrases are to be applied to words immediately preceding them and are not to be construed as extending or more remote phrases.' ... It follows that the Legislature by expressly including relationships between brothers and sisters of the half blood and not so specifying as to more distant relatives has evinced the intention to exclude such persons from the prohibition of the statute.



Id. at 46-47, 442 P.2d at 676. The court specifically stated that "*State v. Guiton*, 51 La. Ann. 155, 24 So. 784, is inappropriate since the court admittedly relied on a canon of construction unique to the French civil law in interpreting the statute." *Id.* at 48, 442 P.2d at 677. The court continued:

> We therefore see no reason to disregard the plain meaning of civil code § 59 and adopt the strained, tortured construction urged by the Attorney General.
>
> We conclude that the Legislature intended, and expressed its intent, to condemn sexual relations between persons related by the half blood only when they are brothers and sisters. 'We must assume that the legislature meant this section to be read as it was written ***. We cannot create *** an offense by enlarging the statute, or by inserting or deleting words, nor should we do so by giving it false meaning to its words. (Citations). Such a practice makes it impossible for anyone to rely on the written word of the legislature and only adds confusion to the already difficult task of drafting statutes.'

Id. at 50, 442 P.2d at 678-79 [emphasis added].

Under the Arizona statute, the term "first cousin," like the term "niece" in the California statute, cannot be subjected to the qualifying phrase "of the half-blood." Accordingly, the relationship between the principals engaged in the allegedly unlawful sexual activity is not defined as incestuous under Arizona's marriage statutes and A.R.S. § 13-3608 cannot be applied in the prosecution of Mr. Jeffs as an accomplice to that activity. Counts 2 and 4 of the indictment are therefore also insufficient as a matter of law on this ground and the counts must be dismissed pursuant to Rule 16.6(b) of the Arizona Rules of Criminal Procedure.

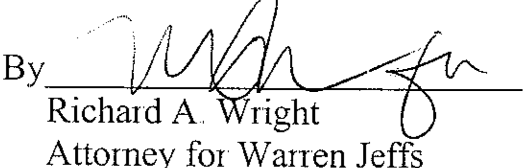
III CONCLUSION

If the prosecution wishes to broaden criminal statutes, change the language of the statute, or eliminate essential elements of the offense, the proper forum is the state legislature, not a superior court judge.

For the foregoing reasons, the defendant, Warren Jeffs, by and through his undersigned attorney, hereby respectfully requests this Court to issue its order dismissing counts 2 and 4 of his indictment

RESPECTFULLY SUBMITTED this 21st day of April, 2008.

WRIGHT STANISH & WINCKLER



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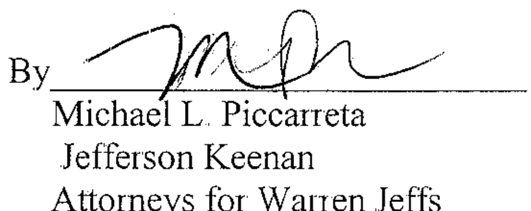

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