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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

16 IN AND FOR THE COUNTY OF MOHAVE

17
18 STATE OF ARIZONA,) NO. CR-2007-743
19)
20 Plaintiff,) RESPONSE TO STIPULATION
21 vs.) OFFERED BY THE STATE
22) REGARDING USE OF
23 WARREN STEED JEFFS,) ILLEGALLY SEIZED EVIDENCE
24)
25 Defendant.) [Hon. Steven F. Conn]
26)
27)
28)

24 The defendant, Warren Jeffs, by and through his counsel undersigned,
25 hereby responds to the stipulation offered by the State regarding the use of
26 evidence that was illegally seized from property belonging to Fundamental Church
27 of Jesus Christ of Latter-day Saints (FLDS) in the state of Texas. The State's
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1 stipulation asserts that, in order to avoid an evidentiary hearing on defendant's
2 Motion to Suppress Evidence Obtained in Unlawful Searches of FLDS Property,
3 "it will not use any evidence seized by the Texas authorities from the YFZ Ranch
4 in its case-in-chief, during cross-examination of any called defense witnesses or as
5 rebuttal evidence. In summary, the State will agree not to use this evidence for any
6 purpose whatsoever in either of the two cases pending against the Defendant,
7 Warren Jeffs." Given the State's position, it is apparent that there is no prejudice
8 whatsoever in simply granting the defendant's motion to suppress for the purposes
9 of the defendant's ongoing prosecutions in the state of Arizona. Accordingly, the
10 defendant requests an order from this Court granting defendant's motion to
11 suppress and precluding the State from using directly or indirectly any of the
12 illegally seized evidence at trial.

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17 However, there is a serious additional matter raised in defendant's motion
18 to suppress that is not addressed by the State's stipulation, namely, the fact that
19 Arizona law enforcement authorities and some of the State's proposed witnesses
20 have been tainted by their exposure to, and in some cases total emersion in, the
21 illegally seized materials. As defendant has noted in prior pleadings, Arizona law
22 enforcement officials, including Assistant Attorney General Timothy Linnins and
23 Mohave County Investigator Gary Engels, have spent days in Texas reviewing
24 these illegally seized items (including the defendant's personal property and
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1 effects) and have obtained and reviewed literally thousands of illegally seized
2 documents and other items.¹ These individuals have figuratively bathed
3 themselves in the documents and it is believed brought disks containing the tainted
4 documents for potential use in the Arizona prosecution back to Arizona. It is
5 uncertain as to who, if anyone else, has seen the illegally seized documents or
6 have been tainted by review of them. Some of those items have been previously
7 disclosed to the defendant in the present prosecutions, but the State later asserted
8 that it did not intend to use those items in evidence. The State also disclosed an
9 “FLDS Evidence Inventory” of items received and reviewed by the State of
10 Arizona from the Texas raids. The inventory, itself, comprises 23 pages and
11 references thousands of documents and other items, including religious materials
12 that are obviously constitutionally protected and other privileged communications.
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17 In the present case, the taint of the illegally seized evidence is not limited to
18 members of the prosecution team; it extends to the State’s proposed witnesses. For
19 example, during the interview of Rebecca (Becky) Musser, it was discovered that
20 she was allowed into the FLDS Temple by Texas law enforcement officials – an
21 act forbidden by the church because she is not a member anymore. Further, she
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25 ¹ The Arizona authorities have associated themselves with the items obtained in the Texas
26 raids despite the fact that undersigned counsel specifically cautioned the State about the
27 problems concerning tainted evidence that would unquestionably arise. [Correspondence to
28 Matthew J. Smith, Esq., April 11, 2008].

1 was asked to specifically review and identify certain sacred church documents that
2 were taken from the Temple. [Interview of Rebecca Musser, September 24, 2009,
3 pp. 123-30]. Accordingly, Ms. Musser, one of the State's proposed "expert"
4 witnesses on matters FLDS and a known informant for the Texas authorities and
5 an informant in the Texas search warrant, has reviewed and examined these
6 illegally seized items.² She has testified in Texas regarding their contents and
7 meanings. Carolyn Jessop, another of the State's proposed "expert" witnesses, has
8 also spent large amounts of time in Texas conferring with Texas and Arizona
9 authorities and has also testified in Texas. It is also unknown at this point who else
10 may have been exposed to the illegally seized materials by Mohave County
11 Investigator Gary Engels. It is believed that the State's third proposed "expert"
12 witness, Richard Holm, may have reviewed some of these items.

17 Under these circumstances, whether or not this court accepts the State's
18 promise that no evidence illegally obtained in the Texas raids will be used in the
19 present proceedings, this court must still hold a hearing to determine whether
20 Arizona law enforcement officials and State witnesses have been tainted by their
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25 ² In addition, complaining witness [redacted] was also on the FLDS property in Texas prior to
26 Becky Musser's arrival and participated in the YFZ investigation. She was present and assisted
27 in interviews of some of the illegally removed children. [*Id.*, p. 131]. Because [redacted] was not
28 agreed to be interviewed, the level of her possible exposure to the illegally seized materials is
presently unknown.

1 cooperation with the Texas authorities and their receipt and review of the evidence
2 illegally obtained in the raids.

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4 The State's response does not dispute in any manner defendant's factual
5 assertions that Arizona law enforcement officials, including Assistant Attorney
6 General Timothy Linnins and Mohave County Investigator Gary Engels, have
7 cooperated with Texas law enforcement officials, have spent days in Texas with
8 items illegally seized in the raids of the Texas property, and have obtained literally
9 thousands of seized documents. However, the defendant would like to remind the
10 Court of the extraordinary extent of assistance and cooperation that exists between
11 various law enforcement agencies involved in the prosecution of the FLDS in
12 Arizona, Texas, and elsewhere.

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15 Brett Tolman, United States Attorney for the District of Utah, testified
16 before the United States Senate Judiciary Committee regarding "how the existing
17 coordinated efforts have been successful" and added:
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20 Without going into the details of non-public past or present
21 investigations, such efforts have involved the full cooperation,
22 coordination, and communication of multiple federal, State, and local
23 agencies, including, but not limited to, the FBI in Utah, Nevada, and
24 Dallas, Texas, the Arizona Attorney General's Office, the Utah
25 Attorney General's Office, the United States Attorneys' Offices in
26 Arizona, Utah, Nevada, and the Northern District of Texas, county
27 authorities from Mohave County, Arizona, and Washington County,
28 Utah, and other federal agencies such as IRS Criminal Investigations
and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

1 [Testimony of Brett L. Tolman, United States Attorney for the District of Utah,
2 before the United States Senate Committee on the Judiciary, July 24, 2008, pp. 1-
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4 2].

5 Mr. Tolman testified about the creation of a central database for information
6 sharing and further noted that:

7 the United States Attorney's Office in Arizona sent a prosecutor to
8 Texas to talk with the Texas Attorney General's Office, the Texas
9 Rangers, local sheriffs offices as well as federal law enforcement in
10 Texas. The purpose of the meetings was [sic] to offer assistance to
11 Texas law enforcement and to ascertain the facts as they may relate
12 to any matters in Arizona. In addition, federal prosecutors in Arizona
13 continued to partner with the Arizona Attorney General's Office to
14 investigate crimes within the State.

15 [*Id.*, p. 2] [emphasis added].

16 The raid of the FLDS property in Texas was clearly a part of an over-
17 arching, coordinated effort to obtain and share information relating to the
18 prosecution of the FLDS and its leadership and members in Texas, Arizona, and
19 elsewhere. Given the extraordinary extent of these coordinated prosecution
20 efforts, the Court may understand the defendant's reluctance to accept the State's
21 assurance that those efforts, designed specifically to obtain evidence against him
22 and others, will have no bearing on the current criminal proceedings.

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24 Even if none of the evidence seized in the raids is introduced in evidence in
25 the present proceedings, there are numerous ways in which such evidence may be
26 used indirectly against Mr. Jeffs in violation of his constitutional rights. The most
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1 obvious example would be any information obtained from Mr. Linnins or Mr.
2 Engels through their exposure to and review of the illegally obtained evidence
3 which would then become the basis for investigative leads and/or questions
4 propounded to witnesses or prospective witnesses which could easily turn into
5 testimony or tangible evidence presented against Mr. Jeffs in the current Arizona
6 proceedings.
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9 As noted in defendant's motion to suppress, the State clearly bears the
10 burden of proving that no evidence presented in these Arizona proceedings was
11 obtained, directly or indirectly, from the raids of the Texas property. See *Nix v.*
12 *Williams*, 467 U.S. 431, 444 (1984); *Alderman v. United States*, 394 U.S. 165, 183
13 (1969). At the very least, the State will be required to show that its evidence
14 presented in the present case was derived from an independent source.³ "The
15 government cannot violate the Fourth Amendment...and use the fruits of such
16 unlawful conduct to secure a conviction...or support a conviction on evidence
17 obtained through leads from the unlawfully obtained evidence...." *Walder v.*
18 *United States*, 347 U.S. 62, 64-65 (1954) [citations omitted]. The State's
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25 ³ That should not be difficult for witnesses and evidence that were obtained before the
26 search. This is sometimes referred to as evidence that has been "canned" before there has
27 been any opportunity for taint to occur. See *United States v. North*, 910 F.2d 843, 872,
28 *modified*, 920 F.2d 940 (D.C. Cir. 1990).

1 stipulation does not address this important issue at all, presumably because the
2 State recognizes the difficulty, if not impossibility, of meeting its burden.

3
4 Because of the absence of reported cases in which a prosecuting agency
5 agrees to forego the use of any allegedly illegally obtained evidence, there is
6 admittedly little guidance on how the State could meet its burden. The defendant
7 therefore submits that it is instructive to look to the analogous situation in which
8 courts consider whether the prosecution's evidence has been tainted by exposure
9 to immunized testimony which cannot be used, directly or indirectly, against a
10 defendant.
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13 The United States Court of Appeals for the District of Columbia Circuit
14 considered the issue of how the government could prove that its prosecution was
15 not tainted by exposure to immunized testimony in *United States v. North*, 910
16 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990). The problem in the case was
17 the fact that Lieutenant Oliver North's immunized testimony in the Iran/Contra
18 hearings had been broadcast worldwide. The court quoted a memo submitted by
19 the Independent Counsel discussing the prosecution's burden of showing that the
20 immunized testimony was not used in any way:
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24 the prosecution must not only prove that all of its evidence was
25 derived from sources independent of the immunized testimony, but
26 also demonstrate that no non-evidentiary or strategic use was made
27 of the immunized testimony or the fruits of the testimony. In practice,
28 these burdens are often very difficult to satisfy.

1 *Id.*, 910 F.2d at 863. Accordingly, the Court held that the district court was
2 required to hold a:

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4 hearing that will inquire into the *content* as well as the *sources* of
5 the...trial witnesses' testimony. That inquiry must proceed witness-
6 by-witness; if necessary, it will proceed line-by-line and item-by-
7 item. For each...trial witness, the prosecution must show by a
8 preponderance of the evidence that no use whatsoever was made of
9 any of any of the immunized testimony either by the witness or by
10 the Office of Independent Counsel in questioning the witness. This
11 burden may be met by establishing that the witness was never
12 exposed to North's immunized testimony, or that the allegedly
13 tainted testimony contains no evidence not "canned" by the
14 prosecution before such exposure occurred.

15 *Id.* at 872 [emphasis in original].

16 In *State v. Gertz*, 186 Ariz. 38, 918 P.2d 1056 (App. 1995), the Arizona
17 Court of Appeals noted that Arizona's immunity statute, A.R.S. § 41-1066,
18 prohibits the use of immunized testimony "in any manner," and "the state faces a
19 heavy burden" of proving that such testimony was not used "for any purpose –
20 evidentiary, preparatory, or strategic – in the prosecution of a defendant." *Id.* at
21 44, 918 P.2d at 1062. The court noted that, in order to eliminate the possibility
22 that a prosecutor or investigator has been tainted by the exposure to such evidence,
23 some courts require, and the United States Attorney's Manual recommends, a per
24 se recusal of prosecutors and investigators "who may have been exposed" to the
25 evidence. *Id.* at n. 5.

1 While the court declined to adopt a per se rule of recusal, the court's
2 holding indicates that, at a minimum, the State in the present case must prove by a
3 preponderance of the evidence at a pretrial hearing that:

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5 1. It has followed reliable procedures for segregating evidence obtained
6 in the Texas raids and its fruits from any officials pursuing any subsequent
7 prosecution;

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9 2. That the State has a source for all of its evidence wholly independent
10 of the evidence seized in the Texas raids; and

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12 3. That the State has not put any of the evidence seized from the Texas
13 raids to any non-evidentiary, derivative use.

14 *Id.* at 45, 918 P.2d at 1063.

15 It is believed an application of these provisions may require the preclusion
16 in part of the testimony of Becky Musser, Carolyn Jessop, Richard Holm and Gary
17 Engels. It may also apply in part to the testimony of one of the accusers, _____

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19 _____ It may impact the role of Assistant Attorney General Timothy Linnins.

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21 In the present case, it is simply unrealistic for the defendant to believe that
22 his constitutional rights will be adequately protected through the State's avowal
23 that none of the evidence obtained in the Texas raids will be used against him.
24 Accordingly, the defendant respectfully submits that it will be necessary for the
25 Court to issue specific orders that will require the State to prove in verifiable ways
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1 that no evidence obtained in the Texas raids has been used, directly or indirectly.
2 In order to avoid the problems discussed above, the defendant requests this Court
3 to order not only that none of the evidence obtained in the Texas raids can be used
4 against Mr. Jeffs in its case in chief or rebuttal, but also that it cannot be the basis
5 for any questions propounded to witnesses in interviews or at trial including Mr.
6 Jeffs should he choose to testify, that it cannot be the basis for any investigative
7 leads, and that it cannot be the basis for any other strategic decisions on the part of
8 the prosecution.
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12 RESPECTFULLY SUBMITTED this 26th day of January, 2010.

13 WRIGHT STANISH & WINCKLER

14 By 

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13 PICCARRETA DAVIS PC

14 By 

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