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16 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
17 IN AND FOR THE COUNTY OF MOHAVE

18 STATE OF ARIZONA,)

NO. CR-2007-743

19 Plaintiff,)

REPLY TO RESPONSE

20 vs.)

TO MOTION TO SUPPRESS

EVIDENCE OBTAINED IN

UNLAWFUL SEARCHES OF

FLDS PROPERTY

21 WARREN STEED JEFFS,)

22 Defendant.)

[Hon. Steven F. Conn]

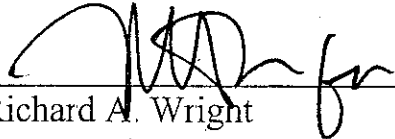
23 The defendant, Warren Jeffs, by and through his counsel undersigned,
24 hereby replies, in part, to the State's response to his motion to suppress evidence
25 obtained in the unlawful searches of FLDS property. For the Court's information,
26 the initial argument raised in the State's response is that the illegality of the raid of
27 church property belonging to the Fundamentalist Church of Jesus Christ of Latter
28 Saints (FLDS) in Eldorado, Texas, is not "ripe" for adjudication at this point


1 because the State claims that it does not intend to use any evidence obtained
2 thereby in the above-captioned proceedings. The parties have therefore agreed
3 that the interests of judicial economy would be best served through obtaining a
4 ruling on the ripeness issue before completing the briefing regarding the merits of
5 defendant's motion to suppress, providing, of course, that this is acceptable to the
6 Court. Defendant is also in the process of attempting to arrange interviews with
7 law enforcement personnel involved in the raid of the FLDS property in Texas,
8 and would wish to supplement his reply on the merits of the motion to suppress in
9 any event. Accordingly, this reply will address the ripeness issue and the related
10 issue of whether Arizona law enforcement officials who have cooperated with the
11 Texas authorities have been tainted by their exposure to literally thousands of
12 illegally seized documents that Arizona authorities have received and reviewed.
13 The defendant submits that the illegality of the raid on the FLDS property in Texas
14 is ripe for consideration and even if it were not, this Court must nonetheless
15 conduct a hearing to ensure that no illegally obtained evidence is used, directly or
16 indirectly, in any manner in the above-captioned proceedings. This reply is based
17 on the legal reasoning and authorities set forth in the attached Memorandum of
18 Points and Authorities.
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1 RESPECTFULLY SUBMITTED this 22nd day of October, 2008.

2 WRIGHT STANISH & WINCKLER

PICCARRETA DAVIS PC

3
4 By 
Richard A. Wright
5 Attorney for Warren Jeffs

By 
Michael L. Piccarreta
6 Jefferson Keenan
Attorneys for Warren Jeffs

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. The Illegality Of The Raid Of The FLDS Property In Texas Is Ripe For
9 Adjudication Because Law Enforcement Authorities Cannot Evade Judicial
10 Scrutiny Of Their Actions Simply Through A Unilateral Promise Not To
11 Use Illegally Obtained Evidence.

12 The defendant has examined the authorities in the State's response
13 regarding whether defendant's motion to suppress is ripe for judicial consideration
14 at this point. None of those cases involved an effort by law enforcement officials
15 to shield their conduct from judicial scrutiny through a unilateral promise to not
16 use any unlawfully obtained evidence (yet). Defendant's research has not revealed
17 any such cases, either. All of the cases cited by the State arise in significantly
18 different contexts, and are therefore easily distinguishable. In *Warshak v. United*
19 *States*, 532 F.3d 521 (6th Cir. 2008), the court held merely that it would not be
20 "ripe" for the court to consider the plaintiff's request to enjoin future *ex parte*
21 searches of the plaintiff's email accounts by the government. *National Park*
22 *Hospitality Ass'n v. Department of Interior*, 538 U.S. 803 (2003), merely stated
23 the long-standing principle that the actions of an administrative agency would be
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1 protected “from judicial interference until an administrative decision has been
2 formalized and its effects felt in a concrete way by the challenging parties.” *Id.* at
3 807 [citation omitted]. In *Texas v. United States*, 523 U.S. 296 (1998), the
4 Supreme Court stated that it would be premature to consider whether it was
5 permissible for provisions of the Voting Rights Act to permit Texas to appoint
6 masters as a sanction for the violation of state mandated educational requirements,
7 prior to any such appointments. Finally, in *Winkle v. City of Tucson*, 190 Ariz.
8 413, 949 P.2d 502 (1997), the Arizona Supreme Court held that it would not
9 decide a constitutional challenge to a voter initiative prior to its enactment by the
10 voters.
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14 In the present case, the defendant is under criminal prosecution in the state
15 of Arizona. Individuals involved in prosecuting him in the state of Arizona,
16 including Assistant Attorney General Timothy Linnins and Mohave County
17 Investigator Gary Engels, have spent days in Texas with items seized illegally
18 from FLDS property (including the defendant’s personal property and effects) and
19 have obtained and reviewed literally thousands of illegally seized documents and
20 other items. As noted in the State’s response, some of those items have been
21 disclosed to the defendant in the present case. In addition, the State has just
22 disclosed an “FLDS Evidence Inventory” of items received and reviewed by the
23 State of Arizona from the Texas raids. The inventory, itself, comprises 23 pages
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1 and references thousands of documents and other items, including religious
2 materials that are obviously constitutionally protected and other privileged
3 communications. None of this is disputed by the State. Rather, the State claims
4 that its unilateral promise not to use any evidence seized from the Texas raids
5 should shield the conduct of those raids from judicial review. As noted above,
6 there does not appear to be any authority for such a proposition in the context of a
7 motion to suppress in a pending criminal prosecution.
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10 Moreover, it appears that the State's claim is really not that the matter is not
11 "ripe," but rather that it is "moot" given the State's announcement that it will not
12 use any evidence illegally seized in the Texas raids. In that case, there is no
13 prejudice whatsoever to simply granting the defendant's motion to suppress for the
14 purposes of the defendant's ongoing prosecutions in the state of Arizona. While
15 the defendant believes that the merits of the arguments raised in his motion to
16 suppress are ripe for adjudication at this point, the State has not indicated how it
17 would be prejudiced in any manner by an adverse ruling on the merits in the
18 above-captioned proceedings. In any event, in order to protect the defendant's
19 constitutional rights, the Court must still hold a hearing to ensure that no such
20 evidence is used, directly or indirectly, against him in the present proceedings.
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1 II. Whether Or Not This Court Accepts The State's Promise That No Evidence
2 Illegally Obtained In The Texas Raids Will Be Used In The Present
3 Proceedings, This Court Must Still Hold A Hearing To Determine Whether
4 Arizona Law Enforcement Officials Have Been Tainted By Their
5 Cooperation With The Texas Authorities And Their Receipt And Review
6 Of The Evidence Illegally Obtained In The Raids.

7 The State's response does not dispute in any manner defendant's factual
8 assertions that Arizona law enforcement officials, including Assistant Attorney
9 General Timothy Linnins and Mohave County Investigator Gary Engels, have
10 cooperated with Texas law enforcement officials, have spent days in Texas with
11 items illegally seized in the raids of the Texas property, and have obtained literally
12 thousands of seized documents. However, the Court may not be aware of the
13 extraordinary extent of assistance and cooperation that exists between various law
14 enforcement agencies involved in the prosecution of the FLDS in Arizona, Texas,
15 and elsewhere.¹

16 Indeed, Brett Tolman, United States Attorney for the District of Utah,
17 recently testified before the United States Senate Judiciary Committee regarding
18 "how the existing coordinated efforts have been successful" and added:
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21 Without going into the details of non-public past or present
22 investigations, such efforts have involved the full cooperation,
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24 ¹ Indeed, the State's response to defendant's motion to suppress is a perfect example of the
25 extent of this cooperation because, except for the State's ripeness argument and standing issues
26 relating to the defendant, the State's response is essentially a verbatim recitation of the "State's
27 Response to Request for Issuing Magistrate to Conduct Hearing Regarding Issuance of Search
28 and Arrest Warrants and Motion to Include Conditions of Confidentiality in Safekeeping," filed
on or about September 12, 2008, in proceedings in the state of Texas captioned "In Re Search
Warrants Executed at the Yearning For Zion Ranch."

1 coordination, and communication of multiple federal, State, and local
2 agencies, including, but not limited to, the FBI in Utah, Nevada, and
3 Dallas, Texas, the Arizona Attorney General's Office, the Utah
4 Attorney General's Office, the United States Attorneys' Offices in
5 Arizona, Utah, Nevada, and the Northern District of Texas, county
6 authorities from Mohave County, Arizona, and Washington County,
Utah, and other federal agencies such as IRS Criminal Investigations
and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

7 [Testimony of Brett L. Tolman, United States Attorney for the District of Utah,
8 before the United States Senate Committee on the Judiciary, July 24, 2008, pp. 1-
9 2, attached hereto as Exhibit 1].

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

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

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

21 The raid of the FLDS property in Texas was clearly a part of an over-
22 arching, coordinated effort to obtain and share information relating to the
23 prosecution of the FLDS and its leadership and members in Texas, Arizona, and
24 elsewhere. Given the extraordinary extent of these coordinated prosecution
25 efforts, the Court may understand the defendant's reluctance to accept the State's
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1 assurance that those efforts, designed specifically to obtain evidence against him
2 and others, will have no bearing on the current criminal proceedings.
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4 Even if none of the evidence seized in the raids is introduced in evidence in
5 the present proceedings, there are numerous ways in which such evidence may be
6 used indirectly against Mr. Jeffs in violation of his constitutional rights. The most
7 obvious example would be any information obtained from Mr. Linnins or Mr.
8 Engels through their exposure to and review of the illegally obtained evidence
9 which would then become the basis for investigative leads and/or questions
10 propounded to witnesses or prospective witnesses which could easily turn into
11 testimony or tangible evidence presented against Mr. Jeffs in the current Arizona
12 proceedings.
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16 As noted in defendant's motion to suppress, the State clearly bears the
17 burden of proving that no evidence presented in these Arizona proceedings was
18 obtained, directly or indirectly, from the raids of the Texas property. See *Nix v.*
19 *Williams*, 467 U.S. 431, 444 (1984); *Alderman v. United States*, 394 U.S. 165, 183
20 (1969). At the very least, the State will be required to show that its evidence
21 presented in the present case was derived from an independent source.² "The
22 government cannot violate the Fourth Amendment...and use the fruits of such
23 unlawful conduct to secure a conviction...or support a conviction on evidence
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1 obtained through leads from the unlawfully obtained evidence....” *Walder v.*
2 *United States*, 347 U.S. 62, 64-65 (1954) [citations omitted]. The State’s response
3 does not address this important issue at all, presumably because the State
4 recognizes the difficulty, if not impossibility, of meeting its burden.
5

6 Again, because of the absence of reported cases in which a prosecuting
7 agency agrees to forego the use of any allegedly illegally obtained evidence, there
8 is admittedly little guidance on how the State could meet its burden. The
9 defendant therefore submits that it is instructive to look to the analogous situation
10 in which courts consider whether the prosecution’s evidence has been tainted by
11 exposure to immunized testimony which cannot be used, directly or indirectly,
12 against a defendant. In *State v. Gertz*, 186 Ariz. 38, 918 P.2d 1056 (App. 1995),
13 the court noted that Arizona’s immunity statute, A.R.S. § 41-1066, prohibits the
14 use of immunized testimony “in any manner,” and “the state faces a heavy
15 burden” of proving that such testimony was not used “for any purpose –
16 evidentiary, preparatory, or strategic – in the prosecution of a defendant.” *Id.* at
17 44, 918 P.2d at 1062. The court noted that, in order to eliminate the possibility
18 that a prosecutor or investigator has been tainted by the exposure to such evidence,
19 some courts require, and the United States Attorney’s Manual recommends, a per
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27 ² That should not be difficult for witnesses and evidence that were obtained before the
28 search.

1 se recusal of prosecutors and investigators “who may have been exposed” to the
2 evidence. *Id.* at n. 5.

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4 While the court declined to adopt a per se rule of recusal, the court’s
5 holding indicates that, at a minimum, the State in the present case must prove by a
6 preponderance of the evidence at a pretrial hearing that:

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

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

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

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

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

8 CONCLUSION

9
10 The defendant submits that the merits of the arguments raised in his motion
11 to suppress evidence obtained in unlawful searches of FLDS property are ripe for
12 consideration at this time and requests leave to supplement this reply with respect
13 to those issues and after the defendant has had the chance to complete his
14 interviews with the law enforcement officials involved. If the Court is inclined to
15 accept the State's argument that these issues are not "ripe" for judicial
16 consideration in light of the State's avowal that it will not use any evidence
17 obtained in the Texas raids against the defendant in the present prosecution, then
18 the defendant requests the Court to simply grant the motion to suppress for the
19 purposes of these proceedings. Finally, in light of the State's avowal that it will
20 not use any evidence obtained in the Texas raids, the defendant requests this Court
21 to conduct a hearing pursuant to *State v. Gertz, supra*, at which the State will bear
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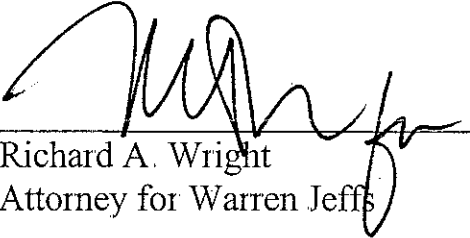
1 the burden of proving that it has not made and will not make any such use, direct
2 or indirect, of items seized in the Texas raids.
3

4 RESPECTFULLY SUBMITTED this 22nd day of October, 2008.

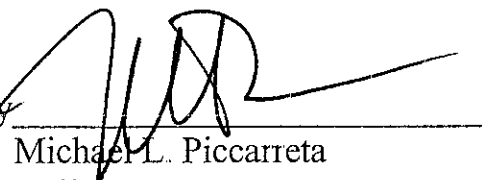
5 WRIGHT STANISH & WINCKLER

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7 By


Richard A. Wright
Attorney for Warren Jeffs

By


Michael L. Piccarreta
Jefferson Keenan
Attorneys for Warren Jeffs

8
9
10 Copy of the foregoing mailed
11 this 22nd day of October, 2008, to:

12 Clerk of Mohave County Superior Court
13 401 East Spring Street
14 Kingman, AZ 86401

15 Copy of the foregoing faxed and mailed
16 this 22nd day of October, 2008, to:

17 Hon. Steven F. Conn
18 Mohave County Superior Court
19 401 East Spring Street
20 Kingman, AZ. 86401
Fax: 928-753-8938

21 Copy of the foregoing emailed and
22 mailed this 22nd day of October, 2008, to:

23 Matthew J. Smith, Esq.
24 Mohave County Attorney's Office
25 315 North Fourth Street
26 P.O. Box 7000
27 Kingman, AZ 86402-7000
28

EXHIBIT 1

Testimony
United States Senate Committee on the Judiciary
Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response
July 24, 2008

Brett Tolman

BRETT L. TOLMAN
UNITED STATES ATTORNEY
DISTRICT OF UTAH
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

“CRIMES ASSOCIATED WITH POLYGAMY: THE NEED FOR A COORDINATED STATE
AND FEDERAL RESPONSE”

PRESENTED

JULY 24, 2008

Chairman Leahy, Ranking Member Specter, and Members of the Committee, I am Brett Tolman, United States Attorney for the District of Utah. The title of this hearing is, “Crimes Associated with Polygamy: The Need for a Coordinated States and Federal Response”. I am here to testify that Utah has a proud history of a coordinated State and federal response. For years now, my office and various agencies such as the Federal Bureau of Investigation (FBI), Drug Enforcement Administration, Internal Revenue Service (IRS), and Department of Health and Human Services have worked with state and local agencies to investigate allegations that crimes such as sexual exploitation of children, fraud, structuring financial transactions to avoid Bank Secrecy Act reporting requirements, drug trafficking, and violent crimes were being committed by members of various polygamist groups in Utah. In fact, a large reason why several states and even other countries have confronted the issues surrounding polygamist communities is because of the great investigative and prosecutive efforts in Utah.

The aggressive prosecutions by the Utah Attorney General’s Office, various county attorney offices, and the U.S. Attorney’s Office have pushed some members of polygamist groups from Utah to other states and countries, resulting in Utah’s inter-state coordination efforts.

Let me now speak to how the existing coordinated efforts have been successful. It is public knowledge that there are ongoing federal investigations involving potential federal criminal activity at polygamist communities. On April 10, 2008, the FBI and the United States Attorney’s Office for the Northern District of Texas announced that a federal search warrant had been executed at the YFZ Ranch in Eldorado, Texas. At that time, they also stated that the application and affidavit were under seal, and that no further comment could be made because of the pending investigation. I understand that the investigation may be of interest at this hearing, but I am unable to discuss it as the

investigation is still pending.

But I can assure the Committee that other federal efforts are ongoing. Without going into the details of non-public past or present investigations, such efforts have involved the full cooperation, coordination, and communication of multiple federal, State, and local agencies, including, but not limited to, the FBI in Utah, Nevada, and Dallas, Texas, the Arizona Attorney General's Office, the Utah Attorney General's Office, the United States Attorney's Offices in Arizona, Utah, Nevada, and the Northern District of Texas, county authorities from Mohave County, Arizona and Washington County, Utah, and other federal agencies such as IRS Criminal Investigations and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Just recently, on June 11, 2008, I personally met with many high-level State and federal law enforcement officials from Utah, Arizona, Texas, and Nevada to discuss these issues. United States Attorneys from throughout the country were present. The group agreed that the federal, State, and local prosecuting and investigating agencies have a proven and effective working relationship, but that we can do a better job of sharing information.

We shared a lot of information at the meeting and have continued to do so since. The group has been communicating by email, and a Special Interest Group on Law Enforcement On-Line and a central database for information sharing have been created. We have already experienced and expect to continue to experience great results from these new avenues of communication.

In addition to this, for example, the United States Attorney's Office in Arizona sent a prosecutor to Texas to talk with the Texas Attorney General's Office, the Texas Rangers, local sheriff's offices as well as federal law enforcement in Texas. The purpose of the meetings was to offer assistance to Texas law enforcement and to ascertain the facts as they may relate to any matters in Arizona. In addition, federal prosecutors in Arizona continue to partner with the Arizona Attorney General's Office to investigate crimes within the State.

Some have suggested creating a task force to deal specifically with these polygamist issues. With respect to crimes associated with polygamist groups, however, I believe that there is already substantial communication and coordination among federal, State, and local offices, indeed, just as much as there would be were a formal task force in place. Moreover, although task forces are an effective mechanism to combat many types of criminal conduct, they just may not be a good fit in this context. Polygamist communities are highly self-contained and insular, which makes them difficult for law enforcement to infiltrate. Moreover, whether it is due to loyalty, sincere religious belief, or coercion, their members are frequently uncooperative with law enforcement.

In large measure, when past investigations have stalled, it has been a result of these witness issues. In this context, a task force may be too blunt an instrument to accomplish an effective investigation, and subtler and more covert methods may be more profitably employed.

Let me turn now to some public cases in which federal law enforcement resources have been brought to bear on this issue. One example from the recent past is the case of Warren Jeffs, the leader of a polygamist sect in Utah.

Jeffs was charged by Utah with being an accomplice to rape, for using his religious influence over his followers to coerce a 14-year-old girl into marriage to her 19-year-old cousin. Jeffs went on the run and was missing for two years. The United States Attorney's Offices for the District of Utah and the District of Arizona brought federal "unlawful flight to avoid prosecution" (UFAP) charges, and a

federal warrant was obtained. The federal UFAP statute, 18 U.S.C. § 1073, makes it a federal felony for a person to travel across State lines to avoid a State prosecution, or imprisonment after a State conviction. This statute allows a federal arrest warrant to be obtained and federal resources to be employed to capture state fugitives.

Jeffs was ultimately placed on the FBI's Ten Most Wanted Fugitives list, and, after a nationwide manhunt, he was eventually captured in Nevada and returned to face justice in Utah. He was convicted and is serving two consecutive terms of five years to life. He still faces charges in Arizona relating to the alleged arranged marriages of underage girls. After he faces State charges in Arizona, Jeffs will be returned to Utah, where he will be prosecuted by the U.S. Attorney's Office on a federal felony UFAP charge. Federal search warrants were also used to obtain evidence against Jeffs.

Another serious example occurred several years earlier in the case of Addam Swapp, his brother, Jonathan, and members of the Singer family – all members of a small polygamist clan in Utah. On January 16, 1988, they placed a bomb in a church building owned by the Church of Jesus Christ of Latter-day Saints in Marion, Utah, which exploded causing massive damage. A subsequent standoff with law enforcement authorities ended with a shootout at the family's compound on January 28, 2008.

A Utah Department of Corrections Officer, Lt. Fred House, working as a part of a federal-State law enforcement joint effort, was killed. Four family members from the Swapp/Singer families were prosecuted and convicted in Federal court on charges ranging from attempted murder of federal agents, bombing the church, and resisting arrest. Sentences ranged from 20 years to five years. John Timothy Singer and Addam Swapp were convicted of State charges arising out of the killing of the Utah corrections officer. Addam Swapp finished his federal sentence and is currently serving his State sentence.

This concludes my prepared comments. Thank you again for this opportunity to address you, and I would be happy to answer any questions you may have for me.