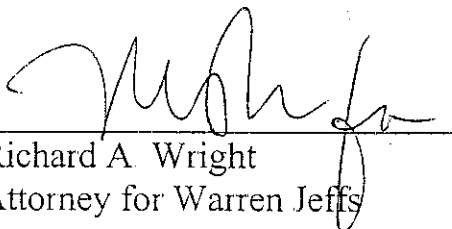



1 testimony regarding the alleged sexual activity that forms the basis for
2 the charges in the present case. Mr. Jeffs requests for this Court to order the
3 issuance of the subpoena *duces tecum* should be granted for the reasons set forth in
4 the attached Memorandum of Points and Authorities.
5

6 RESPECTFULLY SUBMITTED this 15th day of May, 2008.

7
8 WRIGHT STANISH & WINCKLER PICCARRETA DAVIS PC

9
10 By 
11 Richard A. Wright
12 Attorney for Warren Jeffs

10 By 
11 Michael L. Piccarreta
12 Jefferson Keenan
13 Attorneys for Warren Jeffs

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 A. _____ HAS WAIVED ANY CLAIM OF PRIVILEGE AS
16 TO MEDICAL RECORDS CONCERNING PREGNANCY BY
17 DISCUSSING THESE MATTERS IN HER INTERVIEWS
18 WHICH HAVE BEEN DISCLOSED TO THE DEFENSE BY
19 DISCLOSING MEDICAL RECORDS TO THE PROSECUTION
20 WHICH HAVE ALSO BEEN DISCLOSED TO THE DEFENSE
21 AND, BY PLACING HER MEDICAL CONDITION AT ISSUE
22 AND BY HER CONDUCT INCONSISTENT WITH THE
23 ASSERTION OF ANY PRIVILEGE.

22 As noted in Mr. Jeffs' motion, _____ has waived any privilege
23 relating to medical information about pregnancy by revealing this information in
24 her interview with law enforcement authorities on May 3, 2007. In addition, it
25 appears that _____ may have made false statements about having as many as
26 11 miscarriages. _____ also waived the privilege by presumably providing
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1 medical information regarding pregnancies to the State, which have, in turn, been
2 disclosed to the defendant. The State has announced that there are “copies of
3 documents from Hildale Health Service Center indicating that _____ was pregnant
4 and includes some pictures of a sonogram done on _____.” Obviously, the
5 birth certificate, photographs, medical records and sonograms would be potential
6 exhibits at _____ trial.” [Correspondence from Matthew J. Smith,
7 March 18, 2008, attached hereto as Exhibit A]

8
9
10 Arizona courts recognize that the physician-patient privilege may be waived
11 by disclosure of medical information *Bain v. Superior Court*, 148 Ariz. 331, 334,
12 714 P.2d 824, 827 (1986). The privilege is waived when an individual “places a
13 particular medical condition at issue” or when the individual “pursues a course of
14 conduct inconsistent with observance of the privilege.” *Id.* An alleged victim
15 in a criminal case may also waive the privilege by providing medical records to
16 the prosecutor *State ex rel Romley v Superior Court*, 172 Ariz. 232, 239, 836
17 P.2d 445, 452 (App. 1992) [“We do not know in this case whether the victim has
18 waived this privilege by giving his medical records to the prosecutor”]. The
19 defendant submits that, as in the present case, where there has been a waiver as to
20 the requested medical information, no *in camera* review is necessary
21 “[P]rivileges as to confidential communications may be waived and the privileged
22 information thereafter is no longer protected.” *Bain*, 148 Ariz. at 333, 714 P.2d at
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1 826 [emphasis added].¹

2 B. THE DEFENDANT'S REQUEST FOR
3 MEDICAL RECORDS CONCERNING PREGNANCY IS
4 CLEARLY SUPPORTED UNDER ARIZONA LAW.

5 In *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 836 P.2d 445
6 (App. 1992), the state argued, as in the present case, that Arizona's victims' bill of
7 rights precluded a defendant from access to an alleged victim's medical records
8
9 The court's holding was unequivocal:

10 We therefore hold that when the defendant's constitutional right to
11 due process conflicts with the Victims' Bill of Rights in a direct
12 manner... then due process is the superior right. This is so because
13 due process is the foundation of our system of laws, having been first
14 provided to the people in the Magna Carta and given to us by our
founders in the United States Constitution.

15 *Id.* at 236, 836 P.2d at 449. The court added that the victims' bill of rights "should
16 not be a sword in the hands of victims to thwart a defendant's ability to effectively
17 present a legitimate defense. Nor should the amendment be a fortress behind
18 which prosecutors may isolate themselves from their constitutional duty to afford
19 a criminal defendant a fair trial." *Id.* at 241, 836 P.2d at 454. The court held that
20 the defendant could not be denied access to medical records which could possibly
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24 ¹ The case cited by the State in support of its claim that *in camera* review is appropriate is
25 clearly distinguishable. *Catrone v. Miles*, 215 Ariz. 446, 160 P.3d 1204 (App. 2007), was a
26 civil case in which a criminal defendant's confrontation rights under the Sixth and
27 Fourteenth Amendments to the United States Constitution were not applicable. See section
28 B., *infra*. In addition, there had been no waiver, by conduct or otherwise, as to the medical
records.

1 be used to exculpate the defendant or impeach the alleged victim's credibility. *Id.*
2 at 235, 238, 836 P.2d at 448, 451. "A defendant must be afforded an opportunity
3 to effectively cross-examine or impeach the victim, and must be allowed to
4 cross-examine even on matters that may be potentially revealing, embarrassing or
5 prejudicial to the victim." *Id.* at 240, 836 P.2d at 453.

6
7
8 In the present case, _____'s medical records are necessary to both
9 exculpate the defendant and impeach the alleged victim's credibility. First,
10 defendant believes that such records will show that sexual activity did not occur
11 during the timeframes alleged in the indictment. Second, it appears that _____
12 _____ may have made false statements about having as many as 11 miscarriages

13
14 The Arizona Supreme Court has also recognized that the right to confront
15 and effectively cross-examine adverse witnesses is guaranteed through the Sixth
16 and Fourteenth Amendments to the United States Constitution. *State v Riggs*, 189
17 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997). Therefore, "if, in a given case, the
18 victim's state constitutional rights conflict with a defendant's federal constitutional
19 rights to due process and effective cross-examination, the victim's rights must
20 yield." *Id.* Accordingly, Arizona case law firmly supports defendant's request for
21 _____ medical information and the victims' bill of rights does not preclude
22 their discovery.
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1 C. THE DEFENDANT IS NOT REQUESTING A BLANK
2 SUBPOENA AND A.R.S. § 13-4071 DOES NOT PROHIBIT HIS
3 REQUEST FOR A SUBPOENA *DUCES TECUM*

4 The State's response speciously characterizes defendant's request as a
5 "blank subpoena for unfettered access to the Victim's medical records"
6 [Response, p. 2]. The State is well aware that the defendant is not requesting the
7 "clerk" of the court to issue a "blank subpoena" under A.R.S. § 13-4071(D).
8 Rather, the defendant is clearly requesting this Court to issue a subpoena
9 specifically directed at "Hildale Health Service entities" requesting copies of all
10 medical records, business records, and any other documents relating to the
11 treatment of _____ for any miscarriage or other problem relating to
12 pregnancy for which she may have been treated between December 21, 2001,
13 through June 30, 2004, i.e. from the date of her marriage through the timeframe set
14 forth in the indictment, plus nine months. The charges in the indictment are
15 sexual conduct with a minor and incest. Obviously, medical records relating to
16 sexual activity, or the lack thereof, during the timeframe set forth in the indictment
17 are relevant, especially because the State has acknowledged its intention to use
18 such records. The defendant is clearly not requesting "unbridled access,"
19 [Response, p. 3], to all of _____ medical records. Furthermore, no hearing
20 is required under A.R.S. § 13-4071, because the defendant is not requesting the
21 clerk to issue a blank subpoena. The State conveniently ignores the fact that the
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1 defendant is requesting the Court to issue the subpoena directed to these specific
2 entities pursuant to its authority under Rules 15.1(g) and 15.3(c) of the Arizona
3 Rules of Criminal Procedure.
4

5 D. THE ARIZONA RULES OF CRIMINAL PROCEDURE
6 CLEARLY AUTHORIZE DEFENDANT'S REQUEST.

7 As noted above, defendant's request is made pursuant to Rules 15.1(g) and
8 15.3(c) of the Arizona Rules of Criminal Procedure. Rule 15.1(g) states that, in
9 pertinent part:
10

11 Upon motion of the defendant showing that the defendant has
12 substantial need in the preparation of defendant's case for material or
13 information not otherwise covered by Rule 15.1, and that the
14 defendant is unable without undue hardship to obtain the substantial
15 equivalent by other means, the court in its discretion may order any
16 person to make it available to the defendant.

17 Rule 15.3(c) provides for court-ordered depositions of witnesses "together with
18 designated papers, documents, photographs or other tangible objects, not
19 privileged, to be produced at the same time and place." Thus, the State's claim
20 that the defendant is attempting to circumvent the rules by using the rules is
21 difficult to fathom.

22 The only case cited by the State, *Carpenter v. Superior Court*, 176 Ariz.
23 486, 862 P.2d 246 (App. 1993), provides no support whatsoever for the State's
24 position. First, the defendant in that case was attempting to obtain information
25 from an agency within the control of the prosecutor, specifically, the Phoenix
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1 Police Department. The Arizona Supreme Court, not surprisingly, held that
2 “Arizona Rule of Criminal Procedure 15.1 governs formal discovery requests
3 made on behalf of a defendant in a criminal action and directed to the law
4 enforcement agency involved in investigating the action.” *Id* at 487, 862 P 2d at
5 247 [emphasis added]. The court noted that Rule 15.1(d) delineates the extent of
6 the prosecutor’s duty to obtain and disclose information and extends to “any other
7 persons who have participated in the investigation or evaluation of the case and
8 who are under the prosecutor’s control.” *Id* at 489, 862 P.2d at 249 [quoting
9 rule].
10

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13 In the present case, the defendant is obviously requesting records from third
14 party medical facilities, not any agency or entity that falls within the ambit of Rule
15 15.1. The defendant has made no claim that the Hildale Health Services entities
16 fall within this provision. Presumably, the State makes no such claim, either.
17 Accordingly, the State’s attempted reliance on Rule 15.1 and *Carpenter* is
18 incomprehensible.
19

20
21 Moreover, the State’s contention that “a criminal defendant cannot use the
22 subpoena power of the court to circumvent the rules of criminal procedure,”
23 [Response, p 3], ignores a critical portion of the actual quote from the court which
24 is:
25

26 Here, the trial court concluded that a criminal defendant cannot use
27 the subpoena power of the court to circumvent the rules of criminal
28

1 procedure and thereby obtain discovery without the knowledge of the
2 state or consent of the trial court. We agree.

3 *Id.* at 489, 862 P.2d at 249 [emphasis added]. In the present case, Mr. Jeffs is
4 obviously seeking the consent of the trial court, with the knowledge of the State,
5 via his motion for a subpoena *duces tecum*. The State's argument simply has no
6 basis in the law.
7

8 E. THE DEFENDANT'S REQUEST IS CLEARLY AUTHORIZED
9 BY ARIZONA STATUTE, RULES OF COURT, AND CASE
10 LAW, AND IS NOT PRECLUDED BY THE CODE OF FEDERAL
11 REGULATIONS.

12 The State's final argument that the Code of Federal Regulations precludes
13 defendant's request is also without any factual or legal support. Indeed, the State
14 cites no authority whatsoever for the proposition that the Code of Federal
15 Regulations "preempts" the specific provisions of Arizona law that permit
16 disclosure of the requested information. Furthermore, because a criminal
17 defendant's rights to confront and effectively cross examine adverse witnesses are
18 guaranteed by the Sixth and Fourteenth Amendments to the United States
19 Constitution, *Riggs, supra*, the federal regulations must give way to the
20 defendant's constitutional rights. *Romley*, at 240, 836 P.2d at 453 [discussing
21 numerous decisions by the United States Supreme Court]
22
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25 Moreover, the desperation in the State's argument is revealed by the lengths
26 to which it is willing to stretch. The cited federal regulations were promulgated by
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28

1 the Department of Health and Human Services and, to the extent that the
2 regulations have any applicability to anything, the regulations would appear to
3 apply only to a “health care provider who transmits any health information in
4 electronic form in connection with a transaction covered by this subchapter.” 45
5 CFR § 164.104 (a)(3). In any event, the State conveniently ignores the provisions
6 of the regulations that specifically permits access to the requested information:
7

8
9 (e) *Standard. Disclosure for judicial and administrative*
10 *proceedings – (1) Permitted disclosures* A covered entity may
11 disclose protective health information in the course of any judicial or
12 administrative proceeding: (i) in response to an order of a court or
13 administrative tribunal, provided that the governing entity discloses
14 only the protected health information expressly authorized by such
15 order.

16 45 CFR § 164.512(e) [emphasis added]. In the present case, the defendant is
17 obviously requesting an order from the Court for the issuance of a subpoena for
18 the requested information.

19 The regulations also permit subpoenas or discovery requests, without a
20 court order, if the patient has been given notice of the request. 45 CFR §
21 164.512(e)(1)(ii)(A). As the State correctly notes, [redacted] may only be
22 contacted through the state. [Response, p 5 n. 9]. Although undersigned counsel
23 was not aware of these provisions of the CFR’s, and is unaware of any authority
24 indicating that the regulations apply to the present proceedings, undersigned
25 counsel, in fact, contacted the State about this matter and provided all the notice
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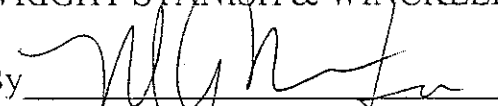
1 that would have been required had he not sought an order from this Court.
2 [Correspondence from Undersigned Counsel, May 13, 2008, attached hereto as
3 Exhibit B]. Accordingly, the State's appeal to the federal regulations also fails.
4

5 CONCLUSION

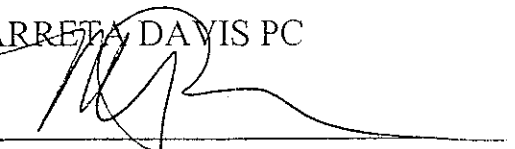
6 [REDACTED] has clearly waived any claim of privilege by her course of
7 conduct in disclosing matters related to pregnancy in her interview and through the
8 release of medical records which have been disclosed to the defendant, and by her
9 course of conduct in this matter. *Bain, supra*. Under these circumstances, the
10 defendant submits that an *in camera* review of the requested materials is not
11 necessary because the information "is no longer protected." *Id.* at 333, 714 P.2d at
12 826. If the Court concludes that an *in camera* review is nonetheless appropriate,
13 the defendant respectfully requests the Court to follow the directives for such
14 review set forth in *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 239, 836
15 P.2d 445, 452 (1992), which require the Court to determine whether the requested
16 information is necessary to the presentation of the defense and/or for impeachment
17 of the testimony of the alleged victim.
18
19
20
21

22 RESPECTFULLY SUBMITTED this 15th day of May, 2008.

23
24 WRIGHT STANISH & WINCKLER

25 By 
26 Richard A. Wright
27 Attorney for Warren Jeffs

PICCARRETA DAVIS PC

25 By 
26 Michael L. Piccarreta
27 Jefferson Keenan
28 Attorneys for Warren Jeffs

1 Copy of the foregoing mailed
2 this 15th day of May, 2008, to:

3 Clerk of Mohave County Superior Court
4 401 East Spring Street
5 Kingman, AZ 86401

6 Copy of the foregoing faxed and mailed
7 this 15th day of May, 2008, to:

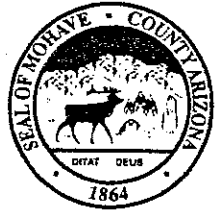
8 Hon. Steven F Conn
9 Mohave County Superior Court
10 401 East Spring Street
11 Kingman, AZ 86401
12 Fax: 928-753-8938

13 Copy of the foregoing emailed and
14 mailed this 15th day of May, 2008, to:

15 Matthew J. Smith, Esq
16 Mohave County Attorney's Office
17 315 North Fourth Street
18 P.O. Box 7000
19 Kingman, AZ 86402-7000
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22
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26
27
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EXHIBIT A

MOHAVE COUNTY ATTORNEY



Main Office:
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315 N. 4th Street
Kingman, AZ 86402-7000 X
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Fax (928) 753-2669

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Bullhead City - (928) 758-0727
Lake Havasu City - (928) 854-3501

Civil Division:
(928) 753-0770
Fax (928) 753-4290

March 18, 2008

Michael L. Piccarreta
PICCARRETA, DAVIS & STORIE, P.C.
145 South Sixth Avenue
Tucson, Arizona 85701

Re: *State vs Warren Jeffs*
CR-2007-743 and CR-2007-953

Dear Mike,

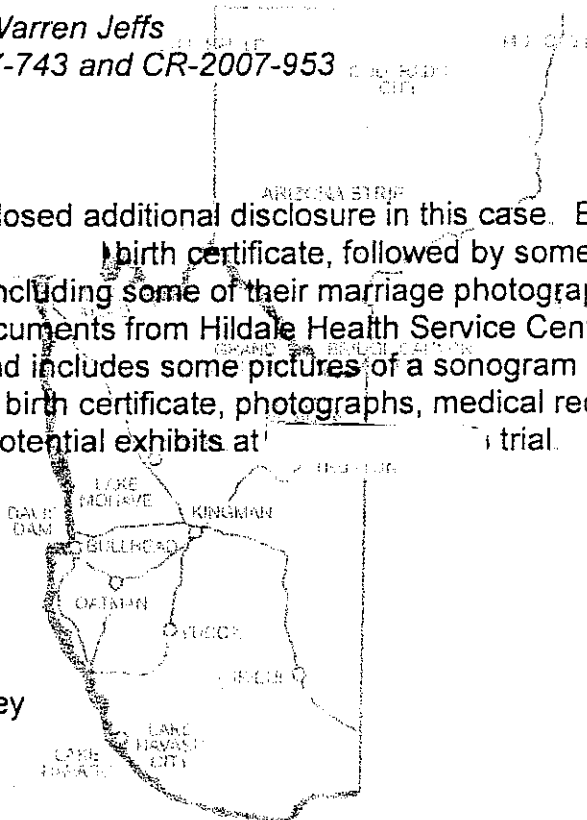
Please find enclosed additional disclosure in this case. Enclosed is a copy of victim's birth certificate, followed by some pictures of her and Leonard Barlow, including some of their marriage photographs. The last page has copies of documents from Hildale Health Service Center indicating that she was pregnant and includes some pictures of a sonogram done on 10/10/07. Obviously the birth certificate, photographs, medical records and sonograms would be potential exhibits at trial.

Sincerely,

Matthew J. Smith
Mohave County Attorney

MJS/brb

Enc (Disclosure pages 1006 - 1011)



#1006

EXHIBIT B

LAW OFFICES
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BARRY M. DAVIS
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145 SOUTH SIXTH AVENUE
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FAX (520) 622-0521
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May 13, 2008

VIA FAX: 928-753-2669

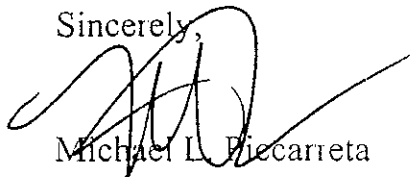
Matthew J. Smith, Esq.
Mohave County Attorney
315 North Fourth Street
P.O. Box 7000
Kingman, AZ 86402-7000

Re: State v. Warren Jeffs
Nos: CR-2007-743 and CR-2007-953

Dear Matt:

Since I am unable to talk to _____; I had assumed that you would forward a copy of my motion to her and, if possible, obtain permission for the limited release of her medical records. If I am mistaken in that assumption, please send her a copy of the motion and advise her of her opportunity to be heard this Friday. If she is agreeable or has any other position, please let me know, if possible, before the hearing. Thanks a lot

Sincerely,



Michael L. Piccarreta

MLP:bp

cc: Richard Wright, Esq