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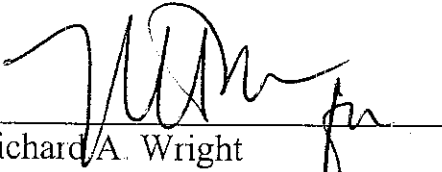
IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

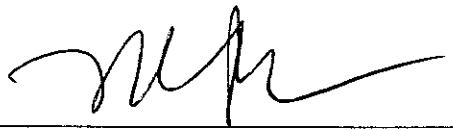
STATE OF ARIZONA,) NO. CR-2007-953
)
)
Plaintiff,) REPLY TO RESPONSE TO
) DEFENDANT'S MOTION
) TO DISMISS COUNTS 2 & 4
vs.)
)
WARREN STEED JEFFS,)
)
Defendant.) [Hon. Steven F. Conn]

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.

1
2 RESPECTFULLY SUBMITTED this 21st day of April, 2008.

3 WRIGHT STANISH & WINCKLER PICCARRETA DAVIS PC

4
5 By 
6 Richard A. Wright
7 Attorney for Warren Jeffs

8
9 By 
10 Michael L. Piccarreta
11 Jefferson Keenan
12 Attorneys for Warren Jeffs

13
14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. STATEMENT OF FACTS

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

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

7 The State appears to concede, as it must, that the plain language of A.R.S. §
8 13-3608 prohibits prosecutions of incest involving minors. The State's only
9 argument is that it would be "absurd" to punish incest involving adults more
10 harshly than incest involving minors. The problem with the State's argument is
11 that there is no such offense of "incest with a minor." The Arizona legislature
12 eliminated that offense ten years ago when it amended the statute to its current
13 form. Law 1998, Ch. 291, § 1. This is not an absurd consequence that arises out
14 of application of the statute – it is the clear and unmistakable result that the
15 legislature intended. The State's real argument appears to be that it was absurd for
16 the legislature to eliminate the offense of incest with a minor. There is nothing
17 absurd about the legislature's decision not to criminalize activity that is already
18 criminalized elsewhere,¹ but even if it were, there is absolutely nothing this Court
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23 ¹ The Arizona legislature has clearly considered all matters relating to sexual offenses very carefully as
24 evidenced by the numerous revisions to these statutes over the years including, of course, the amendments
25 adding an age requirement to the incest statute. All non-consensual acts of sexual intercourse or oral sexual
26 contact are criminalized as class 2 felonies, regardless of the age of the participants or the degree of blood
27 relationship. Consensual sexual activity with minors is criminalized under A.R.S. § 13-1405. Consensual
28 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.

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

3
4 Arizona's incest statute was amended over 30 years ago to eliminate the
5 offense of incest with a minor under the age of 15. Laws 1985, Ch. 364 § 29. The
6 law was then amended in 1998 to eliminate the offense of incest with a minor
7
8 Prosecutions in this state have proceeded since these enactments without any hue
9 and cry on the part of the prosecution. There are no reported cases in Arizona
10 where the State has even contended that the amendments to these statutes should
11 be ignored and the prior versions of the statutes should be applied to prosecute an
12 individual. Along comes a high profile defendant, Warren Jeffs, and the State now
13 contends that the rules should be changed specifically for him. The State forgets
14 that the crime of incest is a statutory creation, and if there is no liability under the
15 statute, there is no offense. There is nothing for the court to interpret or construe,
16
17 period.
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20 The State has not cited any authority from any jurisdiction for the
21 proposition that a criminal statute that clearly does not apply on its face may
22 nonetheless be applied to impose criminal liability on a person not subject to the
23 statute's reach. It would be astounding if any such authority existed because it
24 would violate the most basic principles of due process that govern criminal
25 prosecutions.
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1 Due process under both the Arizona and United States constitutions
2 requires, at a minimum, that citizens be given fair notice of what conduct and
3 persons will be subject to prosecution. "Because no one should be required at the
4 risk of his liberty to speculate as to the meaning of penal statutes, due process
5 requires offenses to be defined with sufficient specificity as to be understood by a
6 person of common intelligence. *State v. Pickett*, 121 Ariz. 142, 589 P.2d 16
7 (1978)." *State v. Zack*, 138 Ariz. 266, 268, 674 P.2d 329, 331 (App. 1983). In the
8 present case, Arizona's incest statute is perfectly clear and requires that both
9 individuals involved be at least 18 years of age or older. Indeed, the legislature
10 specifically amended the statute to include the age requirement as a central
11 element. A defendant should not have to face the risk that a criminal statute that
12 clearly and unequivocally does not apply will nevertheless be used to prosecute
13 him on the basis of purported "policy" reasons. Otherwise, the criminal statutes
14 would provide no real notice at all because there is nothing to prevent the State
15 from contending that any statutory provision that does not apply as written, ought
16 to be applied to a certain unpopular defendant under certain circumstances for
17 "policy" reasons. There should not be new criminal rules or statutes for Mr. Jeffs.

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24 The most fundamental rule of statutory construction is that the plain
25 meaning of the statute must be given effect. This rule must have its most rigorous
26 application in the context of criminal prosecutions. This has been the law in
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1 Arizona since before statehood. “If the letter of the law clearly excludes the state
2 of fact propounded in the pleading, or does not reasonably include them, even
3 though they be within the reason and policy of the legislation, the courts cannot,
4 by implication or construction, declare a person charged with them guilty of a
5 crime.” *State v Behringer*, 19 Ariz. 502, 506, 172 P. 660, 661 (1918) [emphasis
6 added]. “Constructive crimes – crimes built up by the courts, with the aid of
7 inference, implication, or strained interpretation – are repugnant to the spirit and
8 letter of English and American criminal law.” *Id.* [citations omitted] The
9 Arizona Supreme Court later stated, “by the same reasoning we are not permitted
10 to ignore an element designated by the legislature to be essential to the
11 commission of a criminal offense.” *State v Ferraro*, 67 Ariz. 397, 401, 198 P.2d
12 120, 123 (1948) [emphasis added].

17 There is no absurd result here. The legislature clearly intended to eliminate
18 the offense of incest involving minors, and it did so by making the minimum age
19 requirement an essential element of the offense. However, even if there were
20 some purported absurd result, the rule of statutory construction that permits
21 ignoring the plain language of a statute simply has no application in the context of
22 the elements of a criminal offense. *Ferraro, supra; Behringer, supra* Even if the
23 State were correct that there was some purportedly “absurd” result that would
24 prohibit the application of the statute as written by the legislature, such a result
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1 would, at best, render the statute ambiguous. 73 Am. Jur 2d Statutes § 114.
2 Therefore, such a construction of the statute would not help the State because,
3 under the rule of lenity, any such ambiguity would have to be resolved against the
4 state, in any event. *State v Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302
5 (1996). [“When a statute is susceptible to more than one interpretation, the rule of
6 lenity dictates that any doubt should be resolved in favor of the defendant”]
7 [citation omitted].
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10 Because even an ambiguous statute can never be construed against a
11 criminal defendant, it follows that a statute that clearly and unambiguously does
12 not apply to a defendant can never be construed against him, either. *Ferraro*,
13 *supra*; *Behringer, supra*; *State v. Phelps*, 12 Ariz. App. 83, 86, 467 P.2d 923, 926
14 (1970) [“it must be remembered that this being a crime, the statute must be strictly
15 construed and not broadened beyond the clear and express intent of the
16 legislature”].
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20 The cases cited by the State have no persuasive value because they do not
21 involve the interpretation of incest statutes that contain a minimum age
22 requirement for both participants as an essential element. As noted in defendant’s
23 motions to dismiss, Arizona’s incest statute was adopted from the California Penal
24 Code § 285, which had no age requirement. However, because Arizona’s incest
25 statute has been twice amended to include a minimum age requirement for both
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1 participants, *People v. Tobias*, 25 Cal.4th 327, 21 P.3d 758 (2001), in which the
2 California Supreme Court interpreted the California statute, has no persuasive
3 value whatsoever. Indeed, four years after *Tobias* was decided, the California
4 statute was amended to prohibit incestuous sexual activity between persons “14
5 years of age or older.” 2005 Cal. Legis. Serv. Ch. 477 (S.B. 33). The
6 amendment abrogated the result of *Tobias* which involved allegedly incestuous
7 activity between an adult and a 16 year old minor because the minor involved in
8 the case would clearly be subject to the minimum age requirement set forth in
9 the amended statute. The California legislature’s response to *Tobias* is
10 therefore hardly a ringing endorsement. Moreover, the age requirement inserted
11 into the California statutes shows that California is following Arizona’s lead in
12 this matter, not vice versa. With respect to the *Tobias* court’s concern that
13 minor victims not be prosecuted under the incest statute, Arizona has eliminated
14 that possibility by requiring both participants to be 18 years of age or older. As
15 noted above, the conduct of an adult engaged in any such activity with a minor
16 is clearly criminalized elsewhere in Arizona’s criminal code. *See* fn. 1, *supra*.

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22 The older Arizona cases cited by the State are equally unavailing because
23 they address the statute before it contained any age requirement and, not
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1 surprisingly, reached similar results as the *Tobias* court.² *State v. Haston*, 64
2 Ariz. 72, 166 P.2d 141 (1946); *State v. Laney*, 78 Ariz. 19, 274 P.2d 838
3 (1954), *overruled in part on other grounds*, *State v. Zakhar*, 105 Ariz. 31, 459
4 P.2d 83 (1969). This Court cannot simply ignore the amendment to the statute,
5 fail to give effect to its plain language, and pretend that the law was never
6 changed.
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9 There is a strong presumption that legislatures do not create
10 statutes containing provisions which are redundant, void, inert and
11 trivial. . . . Furthermore, it is presumed when a legislature alters the
12 language of a statute that it intended to create a change in the
existing law.

13 *State v. Kozlowski*, 143 Ariz. 137, 138, 692 P.2d 316, 317 (App. 1984). This, of
14 course, includes the case law interpreting the previous statute. *Id.* Most
15 importantly, in none of these cases did the court judicially alter the elements of
16 the offense to permit the prosecution of an individual who was not otherwise
17 subject to the statute. For all of the reasons set forth above, the courts simply
18 cannot do this
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21 Accordingly, these constitutional and statutory considerations also prohibit
22 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

1 statute urged by the State. Because counts 2 and 4 of the indictments do not
2 involve or allege activity between persons who are 18 years of age or older, as
3 required by the statute, they are legally insufficient and must be dismissed
4 pursuant to Rule 16 6(b) of the Arizona Rules of Criminal Procedure.
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6 B. Persons Who Are Not First Cousins, But Rather First Cousins Of
7 The Half-Blood, Are Not Within The Degrees Of Consanguinity
8 Within Which Marriages Are Declared By Arizona Law To Be
9 Incestuous And Void And Their Conduct Cannot Therefore Be The
Basis For A Charge Of Incest.

10 It is clear that the Arizona legislature knows how to refer to relationships of
11 the half-blood when it wishes to do so, and has done so with regard to siblings, but
12 not with regard to first cousins. Nevertheless, the State attributes to the legislature
13 a policy that the legislators chose not to adopt in enacting the marriage statute, i e
14 a prohibition against marriages between first cousins of the half-blood. Once
15 again, the Prosecutor believes that the statute should be different than it is and
16 urges the Court to change the statute for purported policy reasons. Once again, the
17 Prosecutor's approach violates numerous tenets of statutory construction.
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21 For all of the reasons set forth in detail above, the best indication of the
22 policy adopted by the legislature is the plain language of the statute, itself, and
23 courts are not free to alter statutes to impose their own views of what the policy
24 ought to be. If the legislature wished to prohibit marriage between cousins of the
25 first blood, or wished to prohibit marriage between other relationships of the half-
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1 blood, it could have done so. For example, the Oregon Revised Statutes, §
2 106.020 prohibits marriage: “When the parties thereto are first cousins or any
3 nearer of kin to each other, whether of the whole or half blood . . .” In contrast, the
4 Arizona statute, A.R.S. § 25-101, provides:
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6 Marriage between parents and children, including grandparents and
7 grandchildren of every degree between brothers and sisters of the
8 one-half as well as the whole blood, and between uncles and nieces,
9 aunts and nephews and between first cousins, is prohibited and void.

10 A.R.S. § 25-101(A) [emphasis added].

11 The statute therefore applies to the qualifying phrase “of every degree” to
12 parents and children, including grandparents and grandchildren. It applies the
13 qualifying phrase “of the one-half as well as the whole blood” to brothers and
14 sisters. It does not apply any other qualifying phrase to first cousins. The State’s
15 argument that, despite this language, the Arizona legislature intended to prohibit
16 marriage between first cousins of the half-blood is therefore untenable for several
17 reasons
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20 If the Arizona legislature were truly concerned about procreation between
21 first cousins of the half-blood, it would have explicitly prohibited such marriages,
22 as it did with half brothers and half sisters. The reason there is no exception
23 allowing first cousins of the half-blood to marry as long as they cannot reproduce
24 is obviously because such marriages are not prohibited under the statute to begin
25 with. *Id.* Similarly, the State’s argument that, if “half-blood” applies only to
26 with. *Id.* Similarly, the State’s argument that, if “half-blood” applies only to
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1 brothers and sisters, then “whole blood” must, too, is completely specious. It is
2 obvious from reading the statute that any blood relations referred to are assumed
3 to be of the whole blood, unless specifically qualified further, i.e. “of every
4 degree” and “of the one-half as well as the whole blood ”

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

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16 In construing a criminal statute, a defendant ‘must be given the
17 benefit of every reasonable doubt as to whether the statute was
18 applicable to him.’ . . . The sanctions of Penal Code § 285 apply to
19 sexual relations only when, pursuant to Civil Code section 59, the act
20 occurs ‘between parents and children, ancestors and descendants of
21 every degree, and between brothers and sisters of the half as well as
22 the whole blood, and between uncles and nieces ***.’ [Emphasis
23 added]. The phrase, ‘of the half as well as the whole blood’
24 obviously refers to brothers and sisters. It cannot be interpreted to
25 also modify ‘uncles and nieces’ for it is a well established rule of
26 construction that ‘relative or modifying phrases are to be applied to
27 words immediately preceding them and are not to be construed as
28 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.

1 *Id.* at 46-47, 442 P.2d at 676. The court specifically stated that “*State v. Guiton*,
2 51 La Ann. 155, 24 So. 784, is inappropriate since the court admittedly relied on a
3 canon of construction unique to the French civil law in interpreting the statute.”
4

5 *Id.* at 48, 442 P.2d at 677. The court continued:

6 We therefore see no reason to disregard the plain meaning of civil
7 code § 59 and adopt the strained, tortured construction urged by the
8 Attorney General.

9 We conclude that the Legislature intended, and expressed its intent,
10 to condemn sexual relations between persons related by the half
11 blood only when they are brothers and sisters. ‘We must assume that
12 the legislature meant this section to be read as it was written ***.
13 We cannot create *** an offense by enlarging the statute, or by
14 inserting or deleting words, nor should we do so by giving it false
15 meaning to its words. (Citations). Such a practice makes it
16 impossible for anyone to rely on the written word of the legislature
17 and only adds confusion to the already difficult task of drafting
18 statutes.’

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

17 Under the Arizona statute, the term “first cousin,” like the term “niece” in
18 the California statute, cannot be subjected to the qualifying phrase “of the half-
19 blood” Accordingly, the relationship between the principals engaged in the
20 allegedly unlawful sexual activity is not defined as incestuous under Arizona’s
21 marriage statutes and A.R.S. § 13-3608 cannot be applied in the prosecution of
22 Mr. Jeffs as an accomplice to that activity. Counts 2 and 4 of the indictment are
23 therefore also insufficient as a matter of law on this ground and the counts must be
24 dismissed pursuant to Rule 16 6(b) of the Arizona Rules of Criminal Procedure.
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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

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