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FILED
BY: LO
2008 APR 11 PM 2:27
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SUPERIOR COURT CLERK

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

8 STATE OF ARIZONA,
9 Plaintiff,

No. CR-2007-0743 & CR-2007-953

10 vs

RESPONSE TO DEFENDANT'S
MOTIONS TO DISMISS
COUNTS 2 & 4

11 WARREN STEED JEFFS,
Defendant

12 The State of Arizona, by the Mohave County Attorney, hereby moves the Court
13 to deny Defendant's Motion to Dismiss Counts 2 and 4 of the Indictment in both of the
14 above-mentioned cause numbers. The State is consolidating its response because the
15 issues, facts, and law are identical with respect to both cases.

16 The State does not dispute the facts as stated in both of the defendant's motions
17 and were both under 18 years of age at the time of the
18 charged incidents that resulted in the incest counts of the indictment. Defendant
19 Warren Jeffs used his position of power and trust to place both victims into so-called
20 "marriages" with men who were over 18 years of age and are related to the victims as
21 first cousins of the half-blood.

22 The defendant advances two arguments in support of his motion. The first
23 argument deals with the age requirement of the incest statute and second argument
24 with the "degree of relationship" between the involved parties. Both arguments will be
25 addressed in this response.
26

1
2 ARGUMENT

3 A. The Defendant's Contention That A.R.S. § 13-3608 Requires That Both The
4 Perpetrator And The Victim Be 18 Years Of Age Results In An Absurd
Application Of The Statute.

5 While a plain reading of the statute might support the defense contention that the
6 crime of incest applies only to situations in which both parties are eighteen or more
7 years of age, a court must go beyond the plain reading of a statute where such a
8 reading leads to impossible or absurd results.¹ In the present case, the defendant
9 urges the Court to reach a conclusion that is inconsistent with the legislative intent
10 behind the statute and leads to an absurd result.

11 Consider the following example under the defendant's reading of the statute. An
12 uncle has two nieces – one being 15 years of age and another being 18 years old. This
13 uncle has sexual intercourse with both of the nieces. Under the defendant's
14 interpretation of the statute, the man cannot be prosecuted for incest with the younger
15 niece. He can only be convicted of a class 6 felony for sexual intercourse with his 15
16 year old niece. But he can be convicted of a class 4 felony for incest for the exact same
17 act with his adult niece.

18 Interpreting the statute's mention of "eighteen or more" as *guarding against*
19 prosecutions of minor victims of incest results in a fair, just, and logical interpretation.

20 We can see this concern being voiced in the California case of

21 *People v Tobias*². There, the court cited the California incest statute, which provided

22 "[p]ersons being within the degrees of consanguinity within which marriages are

23 declared by law to be incestuous and void, . . . who commit fornication or adultery with

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25 ¹ *Bilke v State*, 206 Ariz. 462, 464, 80 P.3d 269, 271 (Ariz. 2003); *State v Medrano-Barraza*, 190 Ariz.
472, 474, 949 P.2d 561, 563 (Ariz. Ct. App. 1997).

26 ² 25 Cal.4th 327, 21 P.3d 758 (Cal. 2001).

1 each other, are punishable by imprisonment in the state prison "³ The court went on to
2 voice its concern about this statute's applicability to minors who might be subject to
3 prosecution because the statute was silent as to age, explaining, "[d]espite the
4 unambiguous wording of these statutes, which make no express exception for minors,
5 the Court of Appeals has held that a minor who has incestuous sexual intercourse with
6 an adult is not guilty of incest, even if the minor is older than 14 and participates
7 voluntarily in the incestuous act "⁴

8 A review of Arizona case law under the older statutes leads to the same
9 conclusion reached by the California Court in *Tobias* ⁵ In *State v. Haston*,⁶ the
10 defendant raped both his fourteen year old daughter and his eight year old daughter.
11 The State proceeded to trial on charges of incest, rape, assault with the intent to commit
12 rape, and statutory rape In upholding all of the convictions, the Supreme Court Stated:
13 "This is a case where the crime of rape alleged could not be committed without the
14 commission of the offenses of incest "⁷

15 The Court reached a similar result in *State v. Laney*,⁸ holding: "[I]f the child
16 was incapable of giving her consent to the act of sexual intercourse, it follows that she
17 was incapable of giving her consent to the crime of incest" and "[b]eing incapable of
18 consenting to the crime of incest she cannot be an accomplice "⁹ In *Laney*, the
19 defendant argued that he could not be convicted on the uncorroborated word of the

20 ³ *Id.* at 331, 760

21 ⁴ *Id.* at 332, 761

22 ⁵ While not controlling authority, Arizona's incest statute was adopted from the language of the California Statute at
issue in this case See Statutory Note to A.R.S. § 13-3608 Accordingly this case has strong persuasive value

23 ⁶ 64 Ariz. 72, 166 P.2d 141 (1946)

24 ⁷ *Id.* at 76, 143

25 ⁸ 78 Ariz. 19, 22, 274 P.2d 838, 840 (1954), *reversed in part (on other grounds)* *State v. Zakhar* 105 Ariz. 31
459 P.2d 83 (1969)

26 ⁹ *Id.*

1 woman who was the other party and an accomplice to incest ¹⁰ The court reasoned that
2 "if the prosecutrix here is an accomplice in the commission of such crime the position of
3 defendant must be sustained, otherwise it may not be", and the Court held that the
4 incest conviction stands ¹¹ It is important to note that the court did not feel that the
5 crime of incest required both parties to be equally culpable

6 In the Jeffs case, the defendant's reading of the statute leads to equally
7 absurd results. A prosecution of the defendant for incest or accomplice to incest is
8 proper in Mr. Jeff's case because he was an adult when the crime occurred. However,
9 with respect to victims _____ and _____ the two victims cannot be
10 prosecuted because they were both minor children under the age 18 when the crimes
11 occurred.

12 **B. The Defendant's Contention That _____ And Mr. Steed As Well As
13 _____ and Mr. Barlow Are Not Prohibited From Marrying Under A.R.S. §
14 13-3608 Is In Violation Of Arizona's Public Policy And The General
15 Purposes Of Title 25.**

16 A review of A.R.S. § 25-101 refutes the defendant's half blood argument. The
17 statute provides, in pertinent part:

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

22 B Notwithstanding subsection A, first cousins may marry if both are sixty-
23 five years of age or older or if one or both first cousins are under sixty-five
24 years of age, upon approval of any superior court judge in the state if proof
25 has been presented to the judge that one of the cousins is unable to
26 reproduce

27 The fact that Section B provides an exception for first cousins whose union will
28 not produce children demonstrates that the legislature intended to prevent persons of

¹⁰ *Id*
¹¹ *Id* at 20, 838
Jeffer/CR-2007-0743

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1 close blood lines from producing children. Further, this part of the statute goes into
2 detail and outlines the legal procedure that allows some first cousins to marry

3 Through the enactment of A.R.S. § 25-103, the legislature specifically provided
4 its reasoning behind prohibiting persons of close blood lines from marrying and
5 producing children. The statute states:

6 "It is declared that the public policy of this state and the general purposes of
7 this title are:

- 8 1. To promote strong families;
- 9 2. To promote strong family values."

10 Strong families and strong family values cannot be promoted through the
11 marriages of first cousins, whether of the half-blood or whole blood, due to the risk of
12 birth defects in their offspring. The aspect of procreation and the absence of an
13 exception for cousins of the half-blood in A.R.S. § 25-101(B) is important to note
14 because these factors provide a frame of reference in applying the civil statute to the
15 relationships at issue in the Jeffs case.

16 First, the relationships between [redacted] and Leonard Barlow and between
17 [redacted] and Allen Steed are exactly the relationships the civil prohibitions were
18 designed to prevent – relationships between people of close blood lines who are likely
19 to have children. Not only were these marriages likely to produce children, the evidence
20 shows that these relationships were designed and intended to produce many children.

21 Second, if the legislature intended to allow first cousins of the half-blood who
22 could reproduce to marry, it would have expressly provided such an exception. The
23 absence of this exception proves that marriages between any cousins violate Arizona's
24 public policy and the very purposes for the enactment of A.R.S. § 25-101.

25 The defendant relies on the Latin phrase, "expressio unius est exclusio alterius"
26 for its position that the Arizona legislature did not intend A.R.S. § 25-101(A) to apply to

1 first cousins of the half-blood. The United States Supreme Court discussed this Latin
2 phrase and concluded that this phrase invoked by the defense expresses a rule of
3 construction, not of substantive law, and only serves as an aid in discovering legislative
4 intent when that is not otherwise manifest.¹²

5 In A.R.S. §25-101(A) the modifying phrase "of the one-half as well as the whole
6 blood" applies only to the relationship involving brothers and sisters. That part of the
7 statute is set off by commas, making it clear that the one-half as well as the whole blood
8 modifying phrase applies only to the relationship between brothers and sisters. It is not
9 found in any other part or phrase of the statute. Furthermore, if you were to take the
10 logic behind the defense position to its extreme, one could just as easily assert that
11 since the legislature did not include the phrase "whole blood" with reference to any of
12 the other relationships delineated in the statute, that "whole blood" does not apply to
13 anyone else other than brothers and sisters.

14 Other jurisdictions have interpreted statutes similar to Arizona's in keeping with
15 the States' position. The Supreme Court of Louisiana held that a half-niece is within the
16 prohibitory degree of "brother or sister, whether of the whole or half blood, and also
17 between the uncle and the niece, the aunt and the nephew."¹³ Although this case is
18 old, it is still good law in the State of Louisiana. The Supreme Court of Louisiana
19 concludes that the term "brother and sister" as used would include brother and sister of
20 the half blood, without the qualifying words in the statute dealing with half blood and
21 whole blood.¹⁴ Finally, the Louisiana Court discusses a similar holding in the State of
22 Vermont in *State vs. Wyman*, 59 Vt. 527, 8 Atl. 900.

25 ¹² United States vs. B.H. Barnes, 222 U.S. 113, 32 S.Ct. 117, 56 L.Ed. 291 (1912)

26 ¹³ State vs. Gupton, 51 La. Ann. 155, 24 So. 784 (1898)

¹⁴ *Id.*

1 CONCLUSION

2 For the foregoing reasons, the State requests the Court deny the Defendant's
3 Motion to Dismiss Counts 2 & 4 of the Indictment in both of the above cause numbers.

4 RESPECTFULLY SUBMITTED THIS 11TH DAY OF APRIL, 2008

5
6 By *Matthew J. Smith*
7 COUNTY ATTORNEY
MATTHEW J. SMITH

8 A copy of the foregoing
9 sent this same day to.

10 HONORABLE STEVEN F. CONN
SUPERIOR COURT JUDGE

11 MICHAEL L. PICCARRETA
ATTORNEY FOR DEFENDANT

12 RICHARD WRIGHT
13 ATTORNEY FOR DEFENDANT

14 By *Ben Brooks*

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