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PICCARRETA DAVIS PC  
145 South Sixth Avenue  
Tucson, AZ 85701-2007  
(520) 622-6900  
Michael L. Piccarreta  
State Bar No. 003962  
Email: mlp@pd-law.com  
Jefferson Keenan  
State Bar No. 013896  
Email: jkeenana@pd-law.com  
Attorneys for Defendant

-and-

WRIGHT STANISH & WINCKLER  
300 S. Fourth Street, Suite 701  
Las Vegas, NV 89101  
(702) 382-4004  
Richard A. Wright  
Email: rick@wswlawlv.com  
Nevada Bar No. 000886  
Attorney for Defendant

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

STATE OF ARIZONA,	)	NO. CR-2007-953
	)	
Plaintiff,	)	MOTION TO DETERMINE NATURE,
vs.	)	SCOPE AND EXTENT OF
	)	PROPOSED EXPERT TESTIMONY
	)	
WARREN STEED JEFFS,	)	
	)	[Evidentiary Hearing Requested]
Defendant.	)	[Hon. Steven F. Conn]
	)	

The defendant, Warren Jeffs, by and through his counsel undersigned,  
hereby respectfully requests this Court to hold an evidentiary hearing for the  
purpose of determining the admissibility, and the nature and extent, of the State's

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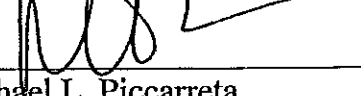
1 proposed expert testimony on the religious beliefs and practices of the  
2 Fundamental Church of Jesus Christ of Latter Day Saints (FLDS). This request is  
3 based on the legal reasoning and authorities set forth in the attached  
4 Memorandum of Points and Authorities.  
5

6 RESPECTFULLY SUBMITTED this 13th day of November, 2009.

7 WRIGHT STANISH & WINCKLER

8 PICCARRETA DAVIS PC

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

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

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 I. STATEMENT OF FACTS

15 The defendant, Warren Jeffs, stands charged in two criminal proceedings  
16 in the State of Arizona with being an accomplice to the crime of sexual conduct  
17 with a minor based on the State's assertion that he conducted religious marriage  
18 ceremonies and subsequently provided some counseling based on the religious  
19 principles of the FLDS. Specifically, in case no. CR-2007-743, Mr. Jeffs stands  
20 charged with being an accomplice to sexual conduct with a minor based upon an  
21 incident that, according to the indictment, occurred on or about May 1, 2002, and  
22 June 30, 2002, wherein Allen Steed had sexual conduct with [redacted], who  
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1 was then under 18 years of age.<sup>1</sup> A second count in that indictment refers to an  
2 incident that allegedly occurred on or between August 15, 2002, and September  
3 15, 2002, between Mr. Steed and \_\_\_\_\_ In case no. CR-2007-953, Mr. Jeffs  
4 stands charged with being an accomplice to sexual conduct with a minor based  
5 upon an incident that, according to the indictment, occurred on or between the  
6 31st day of August 2003, wherein Leonard Barlow allegedly had sexual conduct  
7 with \_\_\_\_\_ who was then under 18 years of age.<sup>2</sup> Mr. Jeffs stands charged  
8 in a second count in the indictment that arises from an incident that allegedly  
9 occurred in September of 2003 between Leonard Barlow and \_\_\_\_\_ Ms.  
10 \_\_\_\_\_ consensual sexual conduct with Leonard Barlow was alleged to have  
11 occurred just before her 18th birthday. Mr. Jeffs is not charged with personally  
12 engaging in any type of sexual conduct with anyone, rather he is charged as an  
13 accomplice to the allegedly illegal sexual activity that is alleged to have occurred  
14 on these dates between these other individuals.

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20 The State has listed Rebecca ("Becky") Musser, Carolyn Jessop, and  
21 Richard Holm as prospective expert witnesses. The State has informed the  
22 Defendant that these proposed "expert" witnesses:  
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26 <sup>1</sup> Mr. Jeffs is alleged to have conducted a religious marriage ceremony between Allen Steed  
27 and \_\_\_\_\_ on April 23, 2001, over one year prior to the first incident listed in the  
28 indictment.

1 will testify about the FLDS Church and its' practices, the role of the  
2 Prophet in controlling the people of the FLDS Church, the power of  
3 the UEP Trust over the people of Hildale and Colorado City, the  
4 practice of arranged marriages between older, married men and  
5 women under the age of 18; the subjugation of women to men under  
6 FLDS culture and practice, the disfavoring of education particularly  
7 in young women under the rule of Rulon and Warren Jeffs....

8 [Correspondence from Mohave County Attorney Matthew Smith, April 2, 2008].

9 From their witness interviews, it is difficult to determine the nature and  
10 extent of the so-called "expert" testimony the State proposes to elicit. These  
11 individuals lived in the FLDS community in the Hildale/Colorado City area for  
12 some time and relay anecdotal factual stories, most of which are in dispute, about  
13 the events they experienced, their perceptions about those events, and why they  
14 left the FLDS. Most of the experiences of these individuals have nothing to do  
15 with the factual allegations in the two pending criminal prosecutions in the state  
16 of Arizona, nor is there any showing that the defendant was even aware of many  
17 of these disputed factual events.

18 The defendant will attempt to provide some additional background in  
19 order to explain the difficulty of trying to determine the nature and extent of the  
20 proposed evidence that he will be placed in the position of having to meet at trial.

21 Becky Musser is \_\_\_\_\_ of complaining witness \_\_\_\_\_ and is a

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26 <sup>2</sup> Mr. Jeffs is alleged to have performed the religious ceremony between Leonard Barlow and  
27 \_\_\_\_\_, if December 21, 2001, nearly two years before the first incident alleged in this  
28 indictment.

1 partial fact witness in that case. She is also a confidential informant and expert  
2 for authorities in the state of Texas and a fact witness relating to the raid of the  
3 FLDS property in Texas. The State apparently wishes to use her an "expert" in  
4 matters FLDS. However, from her witness interview, it appears that the bulk of  
5 her "expert" testimony revolves around the bitterness that members of her family  
6 share about the removal of her mother and her sisters from their father, after her  
7 mother's claims of abuse against the father. The defendant obviously needs to  
8 know whether the introduction of her proposed evidence will require litigating  
9 collateral factual issues relating to the justifications for members of her family  
10 for leaving (voluntarily or otherwise) the FLDS.  
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14 Similarly, Carolyn Jessop is a former member of the FLDS who has  
15 received benefits from former FLDS member Dan Fischer and his Diversity  
16 Foundation. She has also received hundreds of thousands of dollars for authoring  
17 anti-FLDS books relating to her alleged experiences. She readily admits that her  
18 perspectives may differ from those of others who had been members or have had  
19 interactions with the FLDS. In her witness interview, she rails against her ex-  
20 spouse, Merrill Jessop and his wife Barbara, and describes their purportedly bad  
21 behavior. Again, these disputed factual matters have nothing to do with any of  
22 the factual allegations in the two pending prosecutions and are, in fact, more akin  
23 to the type of "he said, she said" allegations that permeate divorce court, or  
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1 afternoon daytime talk shows.

2 Richard Holm is another former member of the FLDS who lost his  
3 standing as a member of the religion due to his behavior. In prior court  
4 proceedings, he has feigned ignorance about the reasons for this removal from  
5 the FLDS, again, necessitating the litigation of collateral factual matters that  
6 have nothing to do with the present cases. His purported "expert" testimony now  
7 consists of saying extremely derogatory things about the defendant and his  
8 conduct prior to and after becoming the leader of the FLDS.  
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10 With all of these individuals, the defendant obviously needs to know the  
11 specific factual matters and other areas they will be permitted to testify about, if  
12 any, so that he can determine who to call as factual witnesses and experts to rebut  
13 these areas of testimony in what will amount to be mini-trials on these collateral  
14 matters.  
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16 The defendant now requests a hearing, well in advance of trial, on the  
17 nature and extent of the State's proposed expert testimony. The defendant  
18 requests the Court to determine the qualifications of the State's proposed experts  
19 and whether the State's proposed expert testimony meets the requirements of the  
20 Arizona Rules of Evidence and the United States and Arizona Constitutions. The  
21 defendant further requests that these determinations be made in advance of trial  
22 so that he can determine what expert or fact witness testimony will be needed to  
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1 rebut the State's proposed expert testimony.

2 II. DISCUSSION

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4 Rule 702 of the Arizona Rules of Evidence states that:

5 If scientific, technical, or other specialized knowledge will assist the  
6 trier of fact to understand the evidence or to determine a fact in  
7 issue, a witness qualified as an expert by knowledge, skill,  
8 experience, training, or education, may testify thereto in the form of  
an opinion or otherwise.

9 Under Rule 702,

10 expert testimony must (1) come from a qualified expert, (2) be  
11 reliable, (3) aid the triers of fact in evaluating and understanding  
12 matters not within their common experience, and (4) have  
13 probative value that outweighs its prejudicial effect.

14 *State v. Moran*, 151 Ariz. 378, 380-81, 728 P.2d 248, 250-51 (1986).

15 Obviously, the proponent of the expert testimony bears the burden of proving the  
16 expert's qualifications under the rule. *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 218,  
17 801 P.2d 445, 453 (App. 1990).

18  
19 It appears that all of the State's so-called experts on the practices and  
20 beliefs of the FLDS share one common trait – an intense dislike for the FLDS  
21 after having left the church. These are, of course, not traditional independent  
22 experts that parties in the courts typically employ to assist the trier of fact.  
23 Accordingly, the Defendant objects to any such proposed expert testimony unless  
24 and until the State has shown that their proposed evidence meets all of the  
25 requirements for admissibility under the Arizona Rules of Evidence and the state  
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1 and federal constitutions.<sup>3</sup> The defendant therefore requests an evidentiary  
2 hearing at which the State will be required to delineate the nature and extent of  
3 any such proposed expert testimony, including:  
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5 1. Requiring the State to choose which expert it will  
6 designate as its expert on the beliefs and practices of the FLDS.<sup>4</sup>

7 2. Requiring the State to establish the qualifications of its  
8 proposed expert.

9 3. Requiring the State to establish the reliability of the  
10 proposed expert testimony.

11 4. Requiring the State to identify the particular issue to  
12 which the proposed expert testimony is relevant.

13 5. Requiring the State to identify the particular evidence  
14 in the case the proposed expert testimony is supposed to assist the  
15 jury in understanding.

16 6. Requiring the State to demonstrate how the proposed

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17 <sup>3</sup> In *State v. Fischer*, 219 Ariz. 408, 199 P.3d 663 (App. 2008), the Arizona Court of Appeals  
18 upheld the admission of certain evidence relating to FLDS practices against hearsay and  
19 confrontation clause objections, but the court did not address the evidentiary and  
20 constitutional issues Mr. Jeffs now raises in the present motion. The defendant in *Fischer* did  
21 not re-urge his foundational and relevancy objections on appeal. In addition, the state  
22 introduced much of this testimony without any objection from the defendant. “[G]iven the  
23 background testimony the state introduced without any objection, we find that admission of  
24 any of the statements objected to as hearsay or on other grounds, even if such admission was  
25 erroneous, was harmless error.” *Id.* at 418, 199 P.3d  
26 at 673. This issue is not squarely presented to the Court.

27 <sup>4</sup> The “one expert per issue” rule is codified in Rule 26(b)(4)(D) of the Arizona Rules of  
28 Civil Procedure which applies in criminal proceedings via rule 19.3(a) of the Arizona Rules  
of Criminal Procedure, which states that “[t]he law of evidence relating to civil actions shall  
apply to criminal proceedings, except as otherwise provided.” See e.g. *State v. Greer*, 118  
Ariz. 349, 576 P.2d 1004 (App. 1978) [applying Rule 44(b) of the Arizona Rules of Civil  
Procedure via Rule 19.3(a)].

1 expert testimony will assist the jury in determining the particular  
2 issue.

3 7. Requiring the State to demonstrate how the probative  
4 value of the proposed expert testimony outweighs its prejudicial  
5 effect.

6 8. Requiring the State to demonstrate that the proposed  
7 expert testimony does not constitute improper evidence of character  
8 under Rule 404(b) of the Arizona Rules of Evidence.

9 The defendant submits that, for the State's proposed expert testimony to  
10 be admissible, it must meet these requirements rather than just being a  
11 generalized rant against the beliefs and practices of the FLDS by former  
12 members, when it just so happens that the leader of that religion, Mr. Jeffs, is  
13 standing trial. The defendant should not be in the position of having to defend an  
14 entire religion in order to defend himself against the criminal charges against  
15 him.  
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18 A. The Testimony Of Carolyn Jessop, Richard Holm, And Becky  
19 Musser As So-Called Experts On Religious Practices Is  
20 Inadmissible Under The Arizona Rules Of Evidence.

21 1. None of the State's proposed witnesses are qualified as  
22 religious experts.

23 The facts will show that Becky Musser and Carolyn Jessop were members  
24 of the FLDS community who, like many others, left the religion because they no  
25 longer believed in it. They are therefore no different than any of the millions of  
26 individuals who, for whatever reason, no longer believe in the religion in which  
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1 they were raised. Richard Holm has also left the religion, but that was the result  
2 of his own personal behavior. None of these people have any particular training,  
3 education, or expertise in comparative religions. Permitting them to testify as  
4 “experts” would be just the same as permitting an ex-Catholic to testify about the  
5 abusive practices of the Catholic religion where Nuns strike defenseless school  
6 children with rulers or abuse of children. Becky Musser and Carolyn Jessop are  
7 no more qualified as religious experts than this hypothetical ex-Catholic would  
8 be.  
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12         Indeed, the basic teachings of the FLDS are essentially the same as the  
13 basic teachings of the “mainstream” LDS, with the exception that the LDS no  
14 longer follows its founders’ belief in the practice of polygamy. However, the  
15 basic teachings are the same and come from the Book of Mormon and the  
16 Teachings of the Prophet Joseph Smith. None of the State’s proposed witnesses  
17 have any special training or expertise in the LDS or the FLDS or the history of  
18 these religions and differences between them. They are simply people who are no  
19 longer members of the FLDS and are critical of its practices.  
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22         The United States Supreme Court has held that the admissibility of all  
23 expert testimony is dependent upon a showing of relevance and reliability.  
24 *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). “If the judge is  
25 not persuaded that a so-called expert has genuine knowledge that can be  
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1 genuinely helpful to the jury, he should not let him testify.” *Wilson v. City of*  
2 *Chicago*, 6 F.3d 1233, 1238-39 (7th Cir. 1993). Moreover, it is well settled that  
3 “a witness can fail to qualify as an expert even if that witness has some limited  
4 special education or experience.” 29 C. Wright & V. Gold, *Federal Practice and*  
5 *Procedure*, §6265 (2009). Becky Musser, Carolyn Jessop, and Richard Holm are  
6 certainly not the type of independent experts that can be counted upon to give  
7 needed guidance to a jury to assist the jury in resolving the issues in the case.  
8 They are simply biased against a religion they left and it appears that some or all  
9 of these individuals are receiving financial or emotional benefits for their anti-  
10 FLDS efforts. For this Court to recognize Becky Musser, Carolyn Jessop, and  
11 Richard Holm as experts under these circumstances would raise the very real  
12 “danger that the jury may be too impressed with the status of a witness classified  
13 by the court as an expert and, thus, overvalue the opinions of someone with only  
14 marginal qualifications.” *Id.*

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20 2. The proposed expert testimony does not meet the threshold  
21 requirement of reliability.

22 The proponent of any kind of expert testimony is required to establish its  
23 reliability. *Kumho Tire*, 526 U.S. at 149; *Moran*, 151 Ariz. at 380-81, 728 P.2d  
24 at 250-51 (1986). The stories of former believers, or apostates, have been  
25 extensively studied and are notoriously unreliable. A book edited by David  
26 Bromley, *The Politics of Religious Apostasy: The Role of Apostates in the*  
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1 *Transformation of Religious Movements* (1998), notes that the phenomena  
2 occurs across all spectrums of religious beliefs, but contains a common thread:  
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4 a “captivity narrative” in which apostates assert that they were  
5 innocently or naively operating in what they had every reason to  
6 believe was a normal, secure, social site; were subjected to  
7 overpowering subversive techniques; endured a period of  
8 subjugation during which they experienced tribulation and  
9 humiliation; ultimately effected escape or rescue from the  
organization; and subsequently renounced their former loyalties  
and issued a public warning of the danger of the former  
organization as a matter of civic responsibility.

10 Constructing such a narrative “then opens the door to being recruited and  
11 used by organizations which seek to use their testimony as a weapon against a  
12 minority religion. [Quoting L. Kliever, Ph.D.]. Another common feature is that  
13 the “apostate narratives are further shaped by a concern that the target of  
14 religious groups be painted in the worst possible light,” *id.* [quoting D.  
15 Johnson] resulting in a distorted view of their former religion “which cannot be  
16 relied upon by responsible journalists, scholars, or jurists.” *Id.*  
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19 As noted above, examples of such apostate narratives are certainly not  
20 limited to former members of the FLDS, or the “mainstream” Mormon LDS.  
21 See, e.g., J. Robertson, *Out of Mormonism: A Woman’s True Story*; E. Decker,  
22 *The God Makers: A Shocking Expose of What the Mormon Church Really*  
23 *Believes*; J. Spencer, *Beyond Mormonism, An Elder’s Story*; J. Worthy, *The*  
24 *Mormon Cult: A Former Missionary Reveals the Secrets of Mormon Mind*  
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1 *Control*; M. Gass, *unCONVENTional WOMEN: 73 Ex-Nuns Tell Their Stories*;  
2 S. Crimp & J. Richardson, *Why We Left Islam: Former Muslims Speak Out*; D.  
3 Wilson, *Awakening of a Jehovah's Witness: Escape From The Watchtower*  
4 *Society*. A simple internet search of Amazon.com reveals that individuals have  
5 left almost every type of major or minor religion and have written books highly  
6 critical of the beliefs and practices of the former religion.<sup>5</sup> These narratives  
7 share another common feature:  
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10           The task of weighing the trustworthiness of the accounts offered  
11           by the various players in instances of apostasy demands  
12           painstaking efforts... -- efforts that, for all their rigor, still often  
13           fail to yield a single story that an objective researcher can tell with  
14           any degree of certitude.

14 *Id.* [Quoting D. Johnson]. The defendant submits that, given all of these  
15 considerations, this type of proposed "expert" testimony simply cannot meet  
16 the foundational requirement of reliability and is therefore inadmissible under  
17 Rule 702 of the Arizona Rules of Evidence. *Moran*, 152 Ariz. at 380-81, 728  
18 P.2d at 250-51; *Kumho Tire*, 526 U.S. at 149.  
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21           3.     The proposed testimony will not assist the trier of fact but  
22           will simply impermissibly bolster the complaining witness'  
23           claims.

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24 <sup>5</sup> There are also hundreds upon hundreds of books critical of all religions, all political parties  
25 and factions, and their leaders. It could hardly be said that the authors of these works should  
26 all be considered to be the type of independent "experts" whose testimony would be  
27 sufficiently reliable to assist the triers of fact in a courtroom.  
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1  
2 The evidence from these so-called experts should also be excluded  
3 because it simply impermissibly bolsters the testimony of the complaining  
4 witnesses. or \_\_\_\_\_ are certainly free to testify, regardless of  
5 their actions, that they felt compelled to follow Mr. Jeffs' words of counseling.  
6 But it would be unfairly prejudicial to permit the State to bolster their  
7 testimony about what they felt compelled to do by bringing in so-called experts  
8 who will merely say that they were telling the truth when they stated that they  
9 felt compelled to do what Mr. Jeffs said. This is not a permissible purpose of  
10 expert testimony because "courts generally exclude expert testimony as to  
11 whether a witness is or is not telling the truth." Wright & Gold, *supra* at §6264.  
12 The permissible purpose of such expert testimony is "not to 'tell the jury' who  
13 is correct or incorrect, who is lying and who is truthful". *State v. Lindsey*, 149  
14 Ariz. 472, 474, 720 P.2d 73, 75 (1986). Moreover, "expert opinion does not  
15 assist if it simply assumes the crucial facts in dispute," such as whether  
16 \_\_\_\_\_ did, in fact, comply with Mr. Jeffs' counseling. Wright &  
17 Gold, *supra*.

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23 Moreover, this proposed expert testimony will not assist the jury because  
24 claims of subjugation of women is hardly unique to the FLDS. It is and has  
25 been a tenet of fundamentalist religions everywhere including the teachings of  
26 the Old Testament, the Koran, the current teachings of the Fundamentalist  
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1 Baptists, and the “mainstream” Mormon Church. Again, the State should not be  
2 able to present so-called experts for the purpose of having them rant against  
3 features of a religion they dislike, complain about ex-spouses or talk about their  
4 personal experiences that may differ from other FLDS members. If the  
5 proposed testimony is admitted, it will be necessary for the defendant to  
6 present additional expert and fact testimony showing that the complained of  
7 features of the FLDS are, indeed, shared by many other religions and explain  
8 the unusual features of almost every organized religion.  
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11 To the extent that the State would like to present evidence that members  
12 of the FLDS are expected to follow the teachings of its church and its leader,  
13 these features are also hardly unique to the FLDS religion. Everyone knows  
14 that adherents of a particular religion are supposed to follow the tenets of that  
15 religion and the pronouncements of the leaders of the church, and that there  
16 may be consequences, in this life and the next, for those who do not. For  
17 Catholics, it would be the teachings of the Catholic Church and the  
18 pronouncements of the Pope. For Christians, the teachings of Christ; for  
19 Buddhists, the teachings of Buddha; and for the Mormons, like the FLDS, the  
20 teachings of the religion’s founder, Joseph Smith, and subsequent prophets.  
21 Again, these features that are shared by many, if not most, religions, will not  
22 assist the jury in the present case and the proposed expert testimony is therefore  
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1 inadmissible.

- 2 4. Any marginal relevance is vastly outweighed by unfair  
3 prejudice to the defendant.

4 “The courts have long held that expert testimony offered under Rule 702  
5 must be relevant under Rule 401 and is subject to exclusion under Rule 403.”

6 29 C. Wright & V. Gold, *Federal Practice and Procedure* § 6263 (2009).

7 Indeed, Rule 702 provides greater authority to the trial court to exclude  
8 evidence than Rule 403:  
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11 Rule 403 favors admissibility, giving courts discretion to exclude  
12 only where probative value is “substantially” outweighed by  
13 competing dangers. In contrast, Rule 702 seems to require  
14 exclusion of expert testimony unless, after weighing costs and  
15 benefits, the court concludes that expert testimony on balance will  
16 help the trier of fact to accurately “determine a fact in issue.”  
17 Thus, where the balance appears even, there is no power to  
18 exclude under Rule 403 but the evidence still may be inadmissible  
19 under Rule 702. Even where expert testimony will assist, Rule 702  
20 merely states that it “may” be admitted suggesting there yet may  
21 be power to exclude. Thus, Rule 702 provides more power than  
22 Rule 403 to exclude evidence where its dangers are balanced  
23 against benefits.

24 *Id.*

25 It appears that the real purpose behind the proposed testimony from these  
26 so-called experts is merely to portray the FLDS as a bad religion, and to falsely  
27 portray the defendant as a prophet or prophet in waiting who controlled  
28 everyone in the FLDS. Mr. Jeffs is therefore criminally accountable for the  
actions of third persons long after any sort of act or involvement by Mr. Jeffs,

1 himself. As noted above, the proposed experts are clearly biased against Mr.  
2 Jeffs and the FLDS. The complaining witnesses, and,  
3 are certainly free to testify about the circumstances that lead to the charges in  
4 the present case and additional expert testimony is not necessary for those facts  
5 to be understood by the jury. Any purported minimal additional probative  
6 value from the proposed expert testimony is vastly outweighed by the fact that  
7 the testimony would therefore be cumulative, and obviously unfairly  
8 prejudicial to the defendant. In addition, the admission of this proposed expert  
9 testimony will require the defense to present expert religious testimony and  
10 rebuttal, all of which will simply confuse the jury and needlessly consume  
11 judicial resources. The proposed expert testimony is therefore inadmissible  
12 under Rule 403 of the Arizona Rules of Evidence, especially considering that  
13 Rule 702 of the Arizona Rules of Evidence provides the Court with even  
14 greater latitude to exclude the proposed expert testimony. 29 C. Wright & V.  
15 Gold, *Federal Practice and Procedure*, § 6263 (2009).

21 5. The proposed expert testimony is really just thinly disguised  
22 character evidence portraying the defendant as a bad person.

23 If allowed to testify, Becky Musser, Carolyn Jessop, and Richard Holm  
24 would all characterize Mr. Jeffs as a controlling tyrant when he was the leader  
25 of the FLDS. Indeed, this is really the State's theory to explain how it is that  
26 Mr. Jeffs is responsible for the acts of third persons, weeks and months after  
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1 any acts of his own. The State would like the jury to convict Mr. Jeffs by  
2 showing that Mr. Jeffs was acting in conformity with his supposed character as  
3 a controlling tyrant in relation to the acts of others, or the FLDS in the eyes of  
4 the State is a bad religion. This is simply an impermissible use of character  
5 evidence under Rule 404(b) of the Arizona Rules of Evidence. Indeed, the trial  
6 court has the special responsibility to control “the natural inclination of  
7 prosecutors, a trait shared with other lawyers, to try to get before the trier of  
8 evidence that will influence it regardless of the niceties of the law of evidence.”  
9 J. Livermore, *et al.*, *Arizona Law of Evidence* § 402:2, p. 151 (Revised Fourth  
10 Edition 2008). In addition,

14 because of the risk of improper use, the trial judge has a special  
15 obligation to ensure that probative value of the evidence for the  
16 purpose offered is sufficiently great in the context of the case to  
17 warrant running that risk. The discretion of the trial judge under  
18 Rule 403 to exclude otherwise relevant evidence because of the  
19 risk of prejudice should find its most frequent application in this  
20 area.

21 *Id.* at 148-49 [quoted in *State v. Taylor*, 169 Ariz. 121, 125, 817 P.2d 482, 492  
(1991)].

22 The Arizona Supreme Court has emphasized that:

23 The rules of evidence are designed to provide fair trials, and trial  
24 judges should not treat Rule 403 as an empty promise. There will  
25 be situations in which evidence sought to be introduced is more  
26 prejudicial than probative, and those situations are very likely to  
27 arise in the prior bad act context. When called upon to weigh  
28 probative value against unfair prejudice under Rule 403, a trial

1 judge must assure the state is not permitted to prove a defendant's  
2 guilt of one act through excessively prejudicial evidence of other  
3 acts.

4 *State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996).

5 Accordingly, the proposed testimony of Becky Musser, Carolyn Jessop  
6 and Richard Holm as co-called experts on the religious practices of the FLDS  
7 is inadmissible under the Arizona Rules of Evidence which require that the:  
8

9 expert testimony must (1) come from a qualified expert, (2) be  
10 reliable, (3) aid the triers of fact in evaluating and understanding  
11 matters not within their common experience, and (4) have  
12 probative value that outweighs its prejudicial effect.

13 *Moran*, 151 Ariz. at 380-81, 728 P.2d at 250-51. In addition, the  
14 admission of this evidence would violate the defendant's rights to due  
15 process and a fair trial under the Arizona and United States  
16 Constitutions.

17  
18 B. The Admission Of The Proposed Evidence Of Religious Practices  
19 As Evidence Of Guilt In A Criminal Proceeding Would Violate The  
20 Establishment And Free Exercise Of Religion Clauses Of The  
21 United States And Arizona Constitutions.

22 The First Amendment to the United States Constitution protects freedom  
23 of religion by providing that "Congress shall make no law respecting an  
24 establishment of religion, or prohibiting the free exercise thereof..." The  
25 Arizona Constitution also "guarantees freedom of worship and belief by  
26 demanding absolute neutrality in the treatment of religious groups." *Kotterman v.*  
27  
28

1 *Killian*, 193 Ariz. 273, 290, 972 P.2d 606, 623 (1999).

2 We believe that the framers of the Arizona Constitution intended ...  
3 to prohibit the use of the power and prestige of the State or any of  
4 its agencies for the support or favor of one religion over another, or  
5 of religion over non-religion. The State is mandated by this  
6 constitutional provision to be absolutely impartial when it comes to  
the question of religious preference....

7 *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974).

8 The defendant has been unable to discover any opinions from the Arizona  
9 courts addressing the use of evidence of a defendant's role in a religious  
10 organization and his acts conducted in that capacity. However, the Supreme  
11 Courts of both Montana and Minnesota have held that the introduction of such  
12 evidence violates the Establishment Clause.  
13  
14

15 In *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286,  
16 852 P.2d 640 (Mont. 1993), *overruled on other grounds*, *Gliko v. Permann*,  
17 331 Mont. 111, 130 P.3d 155 (Mont. 2006), the plaintiff contended "that the  
18 Church used its position of trust and confidence to manipulate and mislead her  
19 and to deter her from asserting her legal rights." *Id.* at 296, 852 P.2d at 646.  
20 The Montana Supreme Court held that evidence of sanctions imposed by the  
21 Mormon Church, or threats of such sanctions, was inadmissible under the First  
22 Amendment and the free exercise of religion clause of the Montana  
23 constitution.  
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27 Admission of evidence of threats of excommunication would  
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1 directly involve the Court in an analysis of religious beliefs and  
2 practices. Excommunication is an exercise of fundamental  
3 religious beliefs which requires a decision as to whether or not a  
4 party must be dismissed or thrown out as a church member.  
5 Clearly such a determination requires an investigation and  
6 interpretation of religious practices and beliefs of the Mormon  
7 Church, which could be allowed only in the presence of a  
8 constitutionally compelling state interest.

9 ...

10 We hold that evidence relating to denial of Temple Recommend,  
11 denial of Church callings, and threats of excommunication, are not  
12 admissible because such evidence is barred under the free exercise  
13 clauses of the United States and Montana constitutions.

14 *Id.* at 301, 852 P.2d at 649.

15 In *State v. Bussmann*, 741 N.W.2d 79 (Minn. 2007), the Minnesota  
16 Supreme Court reversed the conviction of a Catholic priest for having sex with  
17 two female members of the church because the “state relied heavily on  
18 religious expert testimony to prove its case,” *id.* at 92, and the introduction of  
19 evidence of church practices violated the Establishment Clause of the U.S.  
20 Constitution and denied the defendant a fair trial:

21 As noted, the district court allowed the state to introduce extensive  
22 evidence regarding the Catholic Church’s doctrine on the religious  
23 power of priests over parishioners; the church’s official policy on  
24 counseling and pastoral care; the church’s concerns about priests’  
25 sexual misconduct, and the church’s official investigation and  
26 findings regarding Bussmann’s behavior. Through the admission  
27 of this evidence, the court allowed the religious doctrine of the  
28 Catholic Church to become entangled with the criteria set out in  
the clergy sexual conduct statute for determining the criminality of  
Bussmann’s conduct. The jury’s verdict was based on this

1 evidence, and was unavoidably entangled with the religious  
2 doctrine introduced into evidence by the state.

3 *Id.* at 94. Accordingly, the Court held “that Bussmann’s conviction, based on  
4 the admission of extensive evidence concerning religious doctrine and church  
5 policies and practices, violated the Establishment Clause.” *Id.* at 81. In a  
6 footnote, the court added: “Although the official judicial act of conviction is  
7 the state action we focus on in this case, we also note that the district court’s  
8 evidentiary rulings allowing the admission of this testimony may themselves  
9 have been sufficient state action to entangle the court with religion.” *Id.* at 94  
10 n. 8.

11  
12  
13 The State has repeatedly proclaimed that this case is not about religion.  
14 However, somewhat hypocritically, the State will be attempting to introduce  
15 precisely the same type of evidence concerning “the church us[ing] its position  
16 of trust and confidence to manipulate and mislead,” the “denial of Church  
17 callings, and threats of excommunication,” and “the religious power of priests  
18 over parishioners” in order to convict Mr. Jeffs. Indeed, all of the evidence of  
19 Mr. Jeffs purported criminal activity consists entirely of acts performed and  
20 statements made as a part of Mr. Jeffs’ religious duties in the church,  
21 specifically, the performance of religious marriage ceremonies and the giving  
22 of counseling in accordance with the teachings of the church. Accordingly, the  
23 admission of this evidence would violate the establishment and freedom of  
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1 religion clauses of the United States and Arizona Constitutions for the reasons  
2 set forth in *Davis* and *Bussmann*, by the two State Supreme Courts that have  
3 directly addressed the issue.  
4

5 III. CONCLUSION

6 The case is either about religion or not about religion and the defendant  
7 requests the right to learn in advance of trial how much, if any, is religion to  
8 permeate this case.  
9

10 The proposed testimony, nature, scope and extent of Becky Musser,  
11 Carolyn Jessop, and Richard Holm as so-called experts on the religious  
12 practices of the FLDS is inadmissible under the Arizona Rules of Evidence and  
13 would violate the Establishment and Free Exercise of Religion clauses of the  
14 United States and Arizona constitutions. The defendant therefore respectfully  
15 requests this Court to hold an evidentiary hearing for the purpose of  
16 determining the admissibility, and the nature and extent, of the State's  
17 proposed expert testimony on the religious beliefs and practices of the FLDS.  
18  
19  
20

21 RESPECTFULLY SUBMITTED this 13th day of November, 2009.

22 WRIGHT STANISH & WINCKLER

22 PICCARRETA-DAVIS PC

23  
24 By

24 Richard A. Wright  
25 Attorney for Warren Jeffs

23  
24 By

24 Michael L. Piccarreta  
25 Jefferson Keenan  
26 Attorneys for Warren Jeffs

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Original of the foregoing mailed  
this 13th day of November, 2009, to:

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

Copy of the foregoing emailed  
this 13th day of November, 2009, to:

Hon. Steven F. Conn  
Mohave County Superior Court  
401 East Spring Street  
Kingman, AZ 86401

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