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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,)
)
vs.) REPLY TO RESPONSE TO
) MOTION TO
) DETERMINE NATURE, SCOPE
) AND EXTENT OF PROPOSED
) EXPERT TESTIMONY
WARREN STEED JEFFS,)
)
Defendant.)
_____) [Hon. Steven F. Conn]



1 The defendant, Warren Jeffs, by and through his counsel undersigned,
2 hereby replies to the State's response to his motion to determine the nature, scope
3 and extent of the State's proposed expert testimony on the beliefs and practices of
4 the Fundamental Church of Jesus Christ of Latter-day Saints (FLDS).
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6 Rule 15.1 of the Arizona Rules of Criminal Procedure requires the state to
7 produce certain disclosure regarding its proposed experts and their testimony. The
8 State has listed Becky Musser, Carolyn Jessop, and Richard Holm as prospective
9 "expert" witnesses on the beliefs and practices of the FLDS, but has not disclosed
10 any Rule 15.1 type disclosure regarding their testimony, even in summary form.¹
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12 The State has only produced a vague, one-sentence description of the proposed
13 testimony. Accordingly, the defendant filed a motion with the Court challenging
14 the admissibility of the proposed testimony, and requiring the State, as the
15 proponent of the evidence, to outline the nature of the proposed testimony, and to
16 make the required showing of admissibility. The State simply asserts, in
17 conclusory fashion, that its experts are qualified and there is no need for a hearing.
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19 The State then asserts that the defendant can file a motion *in limine* to challenge
20 the proposed testimony.
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23 The State seems to have ignored the fact that the present motion is,
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26 ¹ Presumably, the State has not made any such disclosure because its "experts" have not
27 produced any written reports, statements, or examination notes concerning their proposed
28 testimony.

1 essentially, a motion *in limine* which sets forth, in detail, the showing of
2 admissibility that the State must make and also showing, in detail, how the State's
3 proposed expert testimony fails to meet the requirements of admissibility under
4 the Arizona rules of evidence. The motion also shows how the admission of the
5 State's proposed evidence would violate the Arizona and United States
6 constitutions. Obviously, courts in the state of Arizona are well equipped to
7 conduct pretrial hearings on the admissibility of proposed expert testimony. *See*
8 *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000). The purpose of the
9 requested hearing is simply to determine the nature of the proposed testimony,
10 whether it is admissible, and to determine what type of expert testimony the
11 defendant will need to rebut the State's evidence. Because the State keeps insisting
12 that this trial is not about religion, this should be a fairly limited inquiry.

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17 The State is correct that there is much information about statements these
18 individuals have made in the past. That is part of the problem. For example,
19 Carolyn Jessop has written a whole book in which she characterizes Mr. Jeffs as a
20 bad man and the FLDS as a bad religion. She, of course, characterizes herself as
21 intelligent, wonderful and almost perfect. The defendant does not believe that any
22 of this is admissible but, at a minimum, the defendant needs to know how much, if
23 any, of this type of evidence he will need to meet at trial. In other words, the
24 defendant needs at least some sort of Rule 15.1 information about the State's
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1 proposed expert testimony. This is especially true considering that the State has
2 not even identified its single expert in this area, as required by Rule 19.3(a) of the
3 Arizona Rules of Criminal Procedure which incorporates Rule 26(b)(4)(D) of the
4 Arizona Rules of Civil Procedure.²

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6 These issues regarding the nature, extent, and admissibility of the State's
7 proposed expert testimony must be resolved pretrial, rather than in the midst of
8 trial, in order to avoid the possibility of a mistrial, multiple sidebars, or the
9 necessity of dismissing the jurors or other delays in the middle of the trial. This
10 Court will also be required to make its Rule 403 rulings concerning the prejudicial
11 impact of the State's proposed testimony and will need to craft appropriate
12 limiting instructions. One would think that the State would also welcome such pre-
13 trial guidance in order to avoid possible pitfalls and, if nothing else, to have
14 guidance in the preparation of opening statements.

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18 Finally, the fact that the court of appeals upheld the admission of certain
19 portions of Richard Holm's testimony against hearsay and confrontation clause
20 objections in *State v. Fischer*, 219 Ariz. 408, 199 P.3d 663 (App. 2008), does not
21 settle the evidentiary in this trial. First and foremost, Mr. Jeffs was not on trial in
22 *Fischer*, and this is the first case in which the State of Arizona is prosecuting this
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27 ² A good beginning would be for the State to submit a list of expert opinions/issues it intends
28 to introduce and which of the experts will address which issue.

1 defendant, the leader of the FLDS. Thus, the evidentiary issues in the present trial
2 will be much different. As noted above, the State wants to present multiple
3 individuals to testify that Mr. Jeffs is a bad person and the FLDS is a bad religion,
4 and Mr. Jeffs controls everything and everyone and is therefore responsible for all
5 of the actions of other people, months and even years after any acts of his own. In
6 other words, for apparently the first time ever, the State of Arizona is attempting to
7 use evidence of the words and actions of a religious leader, performed in his
8 religious capacity, as evidence of criminal guilt for actions engaged in by others.
9 The defendant does not believe that any of the State's proposed "expert"
10 testimony is relevant or admissible, and the State certainly has not made the
11 requisite showing of admissibility thus far.

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16 The defendant does not currently anticipate raising the hearsay and
17 confrontation clause objections that were addressed in the *Fischer* opinion,
18 although it is certainly possible that may change.³ Moreover, it must be
19 remembered that, in *Fischer*, the court of appeals specifically noted that much of
20 the state's "background testimony" was introduced "without any objection," *id.* at
21 418, 199 P.3d at 673, and the defendant did not re-urge his foundational and
22 relevancy objections on appeal. In addition, Fischer, himself, filed "a motion in
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27 ³ In any event, as the defendant in the present case, unlike Fischer, Mr. Jeffs will obviously
28 have no hearsay or confrontation clause objections to the admission of his own statements.
This is another key difference in the evidentiary issues involved in the two cases.

1 limine seeking to include evidence of FLDS history, culture and practices.” *Id.* at
2 410, 199 P.3d at 665.⁴ Mr. Fischer certainly did not raise the constitutional,
3 establishment clause objections Mr. Jeffs now raises. *See Davis v. Church of Jesus*
4 *Christ of Latter-day Saints*, 258 Mont. 286, 852 P.2d 640 (1993); *State v.*
5 *Bussmann*, 741 N.W.2d 79 (Minn. 2000). The present case is therefore in a much
6 different posture with regard to all of these evidentiary matters.
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9 Accordingly, the defendant opposes the admission of the State’s proposed
10 testimony unless and until the State carries its burden of showing the qualifications
11 of its experts, and the relevance and admissibility of the proposed testimony under
12 the Arizona Rules of Evidence and the Arizona and United States Constitutions,
13 which the State has not done thus far. The defendant therefore respectfully
14 requests this Court to conduct a hearing at which the State will be put to its burden
15 and the defendant can then determine the nature and extent of the State’s proposed
16 testimony and determine what type of expert evidence he will need to present in
17 return.
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25 ⁴ The court further held that “given the background testimony the state introduced without
26 any objection, we find that admission of any of the statements objected to as hearsay or on
27 other grounds, even if such admission was erroneous, was harmless error.” *Id.* at 418, 199
28 P.3d at 673.


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RESPECTFULLY SUBMITTED this 7th day of December, 2009.

WRIGHT STANISH & WINCKLER

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