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WIRLYNN JIMMELL
SUPERIOR COURT CLERK

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

9 STATE OF ARIZONA,
10 Plaintiff,

No. CR-2007-953

11 vs.

**RESPONSE TO DEFENDANT'S
MOTION FOR SUBPOENA DUCES
TECUM**

12 **WARREN STEED JEFFS,**
13 Defendant.

14 The State of Arizona, by the Mohave County Attorney, pursuant to Rule 15 of the
15 Arizona Rules of Criminal Procedure, A.R.S. § 13-4071, The Arizona Victim's Bill of
16 Rights, *Carpenter v. Superior Court*, and 45 CFR 164 512, hereby responds opposing
17 the defendant's Motion for Subpoena Duces Tecum. The defendant's request violates
18 Arizona Statutes, circumvents the criminal discovery rules, and violates federal
19 regulations. This response is supported by the following memorandum

20 RESPECTFULLY SUBMITTED THIS 4th DAY OF MAY, 2008

21 **MATTHEW J. SMITH**
MOHAVE COUNTY ATTORNEY

22
23 By *Matthew J. Smith for*
24 **SPECIAL DEPUTY COUNTY ATTORNEY**
25 **TIMOTHY P. LINNINS**
26

1 MEMORANDUM

2 I. ARGUMENT

3 **A. The Defendant's Request Violates Arizona Statute.**

4 In support of his request for a subpoena duces tecum, the defendant relies, in
5 part, on A.R.S. § 13-4071. However, a review of the language of the statute shows that
6 his reliance is misplaced:

7 The clerk, at any time, on application of the defendant, and without
8 charge, shall issue as many blank subpoenas, subscribed by the
9 clerk as clerk, for witnesses as the defendant requires. **Blank
10 subpoenas shall not be used to procure discovery in a criminal
11 case, including to access the records of a victim.** Records
12 relating to recovered memories or disassociated memories may be
13 subject to subpoena only if the state seeks to introduce evidence of
14 the victim's recovered or disassociated memory, the records are not
15 otherwise privileged and the court approves the subpoena after a
16 hearing. **The victim shall be given notice of and the right to be
17 heard at any proceeding involving a subpoena for records of
18 the victim from a third party.**¹

19 The defendant's request amounts to a blank subpoena for unfettered access to
20 the Victim's medical records. Further, the defendant asks this Court to issue the
21 subpoena duces tecum without mention of a hearing to provide [REDACTED] an
22 opportunity to be heard in opposition to the disclosure of her personal medical records.
23 So, the statute the defendant cites does not support his position.

24 The defendant's request also violates the victim's right to refuse discovery
25 requests. "[U]nder the Victim's Bill of Rights, the victim may assert the right and refuse
26 to make available to the defense a victim's medical records"² While this right is not an
absolute bar to the disclosure of medical records defense, the trial judge should still

25 ¹ A R S § 13-4071(D)

26 ² 172 Ariz at 238, 836 P 2d at 451

1 conduct an in camera review of any and all of the requested records to determine if
2 disclosure of any portion of the records is appropriate.³

3 The defendant argues that _____ waived any privilege relating to these
4 records. However, as shown above, the defendant cannot receive unbridled access to
5 _____ medical records. Thus, this Court must deny the defendant's motion

6 **B. The Defendant's Request Circumvents The Criminal Discovery Rules.**

7 Instead of attempting to obtain these records through the subpoena process, the
8 defendant must request that the State obtain and provide the records, thereby giving the
9 State the opportunity to evaluate and possibly oppose such a request. The Arizona
10 Court of Appeals has held that a criminal defendant cannot use the subpoena power of
11 the court to circumvent the rules of criminal procedure.⁴ In so holding, the Court
12 explained:

13 If a defendant has reason to believe that the prosecutor has
14 not disclosed information within the possession or control of
15 such an agency, his proper recourse is to seek relief
16 pursuant to Rule 15.7 rather than to circumvent the Rules of
17 Criminal Procedure. We therefore conclude that if
18 petitioners= requested information falls within the required
19 disclosure provisions, the Rules of Criminal Procedure direct
20 the proper means to obtain that information.⁵

21 In the present case, the defendant has requested that a subpoena duces tecum
22 be issued by this Court. Accordingly, he has attempted to obtain discovery through
23 improper means, circumventing the criminal discovery process

24 In addition to requiring the defendant to obtain disclosure through the
25 prosecution, the Court of Appeals clearly ruled that a defendant cannot employ a
26

24 ³ See *Id* and *Catrone v Miles*, 215 Ariz 446, 160 P.3d 1204 (Ct. App. 2007).

25 ⁴ See *Carpenter v. Superior Court*, 176 Ariz 486, 862 P 2d 246 (Ct. App. 1993)

26 ⁵ *Id* at 490

1 subpoena as an investigative technique, after the criminal discovery process has
2 started:

3 The defendant triggers the criminal discovery process
4 encompassed in Rule 15, however, when he attempts to use
5 the court's subpoena power to order production of materials
6 or information. Once the defendant elects to utilize the
7 court's authority to obtain records, he must do so according
8 to the rules adopted by the Arizona Supreme Court.⁶

9 The defendant cannot bypass the State and the Victim by obtaining the Victim's
10 medical records through a court issued subpoena. The defendant triggered the criminal
11 discovery process in this case. He cannot use of a subpoena duces tecum as method
12 of discovery authorized by Rule 15 of the Arizona Rules of Criminal Procedure or an
13 improper investigatory tool. So, this subpoena must not be issued.

14 **C. Allowing The Defense Access To The Victim's Medical Records In The
15 Manner Requested Violates Federal Law.**

16 The relevant federal regulation provides:

17 (3) Permitted disclosure: Victims of a crime. Except for disclosures
18 required by law as permitted by paragraph (f)(1)⁷ of this section; a

19 ⁶ *Id* at 491

20 ⁷ Standard: Disclosures for law enforcement purposes. A covered entity *may disclose protected
21 health information for a law enforcement purpose to a law enforcement official* if the conditions in
22 paragraphs (f)(1) through (f)(6) of this section are met, as applicable

23 (1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity
24 may disclose protected health information:

25 (i) As required by law including laws that require the reporting of certain types of wounds or other
26 physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial
officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an
authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

1 covered entity may disclose protected health information in response
2 to a law enforcement official's request for such information about an
3 individual who is or is suspected to be a victim of a crime, other than
4 disclosures that are subject to paragraph (b) or (c) of this section, if:

5 (i) The individual agrees to the disclosure; or

6 (ii) The covered entity is unable to obtain the individual's agreement
7 because of incapacity or other emergency circumstance, provided
8 that:

9 (A) The law enforcement official represents that such information is
10 needed to determine whether a violation of law by a person other
11 than the victim has occurred, and such information is not intended to
12 be used against the victim;

13 (B) The law enforcement official represents that immediate law
14 enforcement activity that depends upon the disclosure would be
15 materially and adversely affected by waiting until the individual is
16 able to agree to the disclosure; and

17 (C) The disclosure is in the best interests of the individual as
18 determined by the covered entity, in the exercise of professional
19 judgment.⁸

20 The defendant did not obtain _____ consent for the release of her
21 personal medical records. The defendant cannot show that the reason he is unable to
22 obtain _____ agreement is due to her incapacity or other emergency
23 circumstances.⁹ And, the defendant is not a member of a law enforcement agency.
24 Consequently, the listed health care providers cannot legally comply with a subpoena
25 issued by this court on behalf of the defendant.

26 (2) The request is specific and limited in scope to the extent reasonably practicable in light
of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used. 45 CFR 164.512(f).

⁸ 45 CFR 164.512(f)(3)

⁹ The defendant cannot contact _____ to obtain her consent without going through the prosecutor.
He has not even attempted that option.

1 **III. CONCLUSION**

2 The defendant's motion is in violation of Arizona Statute, circumvents the criminal
3 discovery rules, and violates Federal Regulations. Based on the foregoing, the State
4 respectfully requests that this Court deny the defendant's request for a subpoena duces
5 tecum.

6 RESPECTFULLY SUBMITTED THIS 9th DAY OF MAY, 2008.

7 **MATTHEW J. SMITH**
8 **MOHAVE COUNTY ATTORNEY**

9 By Matthew J. Smith
10 SPECIAL DEPUTY COUNTY ATTORNEY
11 TIMOTHY P. LINNINS

12 A copy of the foregoing
13 sent this same day to:

14 HONORABLE STEVEN F. CONN
15 SUPERIOR COURT JUDGE

16 MICHAEL L. PICCARRETA
17 ATTORNEY FOR DEFENDANT

18 RICHARD WRIGHT
19 ATTORNEY FOR DEFENDANT

20 By Ben Brooks