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**IN THE FIFTH DISTRICT COURT**

**WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**DEFENDANT'S RESPONSE TO  
STATE'S MOTIONS FOR  
PROTECTIVE MEASURES**

**(Filed Under Seal)**

**Case No. 061500526**

**Judge James L. Shumate**

**INTRODUCTION**

In two separate motions, the State has sought to prevent the dissemination of information regarding the new identity and location of its witness, Jane Doe IV, and her family. (Mot. Regarding Names; Mem. Supp. Mot. Protect. Meas. Victim.) Regarding testimony of the witnesses at trial, the State asks that the witnesses' previous names be true and correct responses, (Mot. Regarding Names), and that no other locating information be given, (Mem. Supp. Mot. Protect. Meas. Victim, 2), all in accordance with Utah Code Ann. § 77-38-6. The State also offers reasons why the Court should prohibit

photography of the witness and family members in accordance with Rule 4-401(4) of the Utah Rules of Judicial Administration, and asks that the video record be directed away from the witness during testimony, for the same reasons. (Id. at 2).

The defendant has no objections to the foregoing requests. However, the State also seeks, without any supporting argument, "an order requiring that the defendant have no contact with Jane Doe IV or her immediate family directly or indirectly while this matter is proceeding." (Id. at 2, 8). If such an order were granted by the Court, the defendant, and presumably his attorneys, would be restricted from contacting the accusing witness or her family. This request should be denied on the grounds that such an order would interfere with the defendant's right to seek a pretrial interview with material witnesses.

Further, while the State has not expressly sought to keep the witnesses' new names and other locating information from the defendant, the defendant nevertheless asks that such information be disclosed to his counsel. Such information will facilitate the Defendant's right to request pretrial interviews, and may also aid in the discovery of a plethora of additional exculpatory evidence.

**I. DEFENDANT HAS THE RIGHT TO REQUEST A PRETRIAL INTERVIEW WITH HIS ACCUSER AND OTHER PROSECUTION WITNESSES.**

The defendant has the right to request an interview with the State's intended witnesses prior to the trial. See, e.g., *United States v. Black*, 767 F.2d 1334, 1337 (9<sup>th</sup> Cir. 1985) (citing *United States v. Cook*, 608 F.2d 1175, 1180 (9<sup>th</sup> Cir. 1979)); *Callahan v. United States*, 371 F.2d 658, 660 (9<sup>th</sup> Cir. 1967). This right reflects the idea that "[w]itnesses... are not the property of the prosecution or the defense and both sides

have an equal right and should have an equal opportunity to interview them." *United States v. Long*, 449 F.2d 288, 295 (8<sup>th</sup> Cir. 1971) (citing *Callahan*, 371 F.2d at 660; *Gregory v. United States*, 369 F.2d 185, 188 (1966)). While witnesses are free to turn down such requests in the absence of a subpoena, *Long*, 449 F.2d at 295, the State "may not interfere with defense access to witnesses," *Black*, 767 F.2d at 1337 (citing *Cook*, 608 F.2d at 1180). "Exceptions to this rule are justifiable only under the 'clearest and most compelling circumstances.'" *Cook*, 608 F.2d at 1180 (quoting *Dennis v. United States*, 384 U.S. 855 (1966)).

The State has not asserted any supporting argument as to why the defendant may not, directly or indirectly, have any contact with the State's witnesses. Such a request clearly interferes with the defendant's right to interview those witnesses, and as such, the defendant moves the Court to deny the State's request for an order prohibiting contact with essential witnesses.

## II. THE DEFENDANT'S RIGHT TO REQUEST AN INTERVIEW NECESSITATES DISCLOSURE OF LOCATING INFORMATION.

While the State has asked that the witnesses not be compelled to reveal their new names or other locating information while testifying at trial, the State has not expressly sought to restrict the defendant from learning that same information. Nevertheless, the defendant wishes to clarify that such information *must* be disclosed as a part of the discovery process. In support of this request, the defendant offers two compelling reasons. First, the disclosure of such information will facilitate the defendant's right, as previously discussed, to request interviews with the State's

witnesses. Second, the disclosure will also allow additional pretrial investigation and discovery, which could produce a plethora of exculpatory evidence.

If, for example, the locating information is itself probative of the witness's credibility, or if, more probably, it allows the defense to discover evidence that is probative of the witness's credibility, then that information is exculpatory evidence, the suppression of which would be violative of the defendant's constitutional right to due process. See *Brady v. Maryland*, 373 U.S. 83, 87 (U.S. 1963) ("the suppression... of evidence favorable to an accused... violates due process"); *United States v. Gears*, 427 F.3d 1333, 1336-37 (10<sup>th</sup> Cir. 2005) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (evidence affecting credibility is exculpatory and must be disclosed). Because the defendant has a right to discover exculpatory evidence, and because the locating information may allow the defense to investigate and discover such evidence, disclosure to the defendant of the otherwise safeguarded information is necessary.

In *Cannon v. Keller*, the defendant in a criminal trial "filed a discovery motion, requesting... the identity of [an] informant." *Cannon v. Keller*, 692 P.2d 740, 741 (Utah 1984). In response, the prosecution "argued that the identity of the 'confidential informant' was privileged." *Id.*, 692 P.2d at 741. The trial court ordered the State to disclose the information, *id.*, 692 P.2d at 741, but the State sought, and was granted, a writ of mandamus by the district court, which voided the discovery order, *id.*, 692 P.2d at 741. On appeal of the writ, the Supreme Court of Utah found that the trial judge, in ordering the disclosure of the witness's identity, had "acted well within his discretion," *id.*, 692 P.2d at 743, and accordingly the order granting the writ of mandamus was reversed, *id.*, 692 P.2d at 743.

In *Cannon*, the State failed to make any showing of potential harm to the witness that might result from disclosure. *Id.*, 569 P.2d at 742. In the present case, the State has asserted that the witnesses' privacy or safety could be compromised by Jeffs' followers, (Mem. Supp. Mot. Protect. Meas. Victim), but has not suggested or shown that any harm could result from disclosure to the defendant or his counsel. In *United States v. Tipton*, the federal government had placed a number of its witnesses under the Government Protection Program, which interfered with the defendants' access to those witnesses prior to the trial. *United States v. Tipton*, 90 F.3d 861, 888 (4<sup>th</sup> Cir. 1996). The trial court denied a motion by the defense to have the prosecution reveal *in camera* the addresses of the protected witnesses. *Id.*, 90 F.3d at 889 (4<sup>th</sup> Cir. 1996). The defendant appealed, claiming a right to the information under 18 U.S.C. § 3432, which mandates disclosure of witnesses and their addresses, and the Court of Appeals held that "[t]he failure to provide the addresses of protected witnesses was a technical violation of § 3432." *Id.*, 90 F.3d at 889 (error not reversible, since defendant failed to show actual prejudice). The defendant was eventually granted delayed access to the witnesses, *Id.*, 90 F.3d at 889, and the delay was justifiable because "the threat of violence [had been] palpable." *Id.*, 90 F.3d at 889 (citing *United States v. Walton*, 602 F.2d 1176, 1179-80 (4<sup>th</sup> Cir. 1979)).

In the present case, the defendant asserts the threat of violence is not "palpable" and is purely speculative. The same could be said in every criminal case. While no decisive test has been set forth to determine what constitutes a "palpable" objection to disclosure, see *Walton*, 602 F.2d at 1179-80; *United States v. Murray*, 492 F.2d 178, 194-95 (9<sup>th</sup> Cir. 1973), the defendant believes that the non-violent nature of the charged

crime is a crucial determining factor. The defendants in *Tipton*, for example, were initially indicted on multiple counts of capital murder. *United States v. Tipton*, 90 F.3d 861, 867-68 (4<sup>th</sup> Cir. 1996). On the other hand, the defendant in *Walton* was accused of various crimes relating to controlled substances, and in that case "it was error for [Walton] to be deprived of access to the witness." *Walton*, 602 F.2d at 1180 (ultimately upheld because error not prejudicial). The non-violent nature of the defendant's charged crimes in the present case, coupled with the fact that he has made no threats against the witnesses, show that failure to disclose the information would cause undue delay in access to the witnesses and prejudice the development of potentially exculpatory material.

However, should the Court find that safety or privacy concerns would, in fact, allow a delay in access to the witnesses by preventing the disclosure of the requested information, the defendant asks that the otherwise privileged information be given only to his attorneys, with the limitation that his counsel may not disseminate the information to the defendant. Under Rule 16 of the Utah Rules of Criminal Procedure, the State may disclose the information subject to "limitations on the further dissemination of sensitive information... to protect victims and witnesses from harassment, abuse or undue invasion of privacy." URCrP Rule 16(e); see also URCrP Rule 16(f). Such a ruling would balance the interests of the State with the rights of the defendant to investigate and interview the witnesses.

#### **CONCLUSION**


The defendant asks the Court to deny the State's request for an order prohibiting contact with the witnesses because the defendant has the right to seek interviews prior

to the trial. And while the State has not expressly sought to keep the locating information from the defendant, the Defendant maintains that such information should be disclosed, not only to facilitate requests for pretrial interviews, but also to aid in the potential discovery of exculpatory evidence. The witnesses' locating information should be disclosed to the defendant or, alternatively, to his counsel only with an imposed restriction not to disseminate to the defendant.

DATED this 15<sup>th</sup> day of November, 2006.

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