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**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE ANTICIPATED
TESTIMONY OF JETHRO BARLOW**

[FILED UNDER SEAL]

Case No. 061500526

Judge James L. Shumate

INTRODUCTION

The State has indicated, through discovery, that investigators have interviewed Jethro Barlow in anticipation of calling him as a potential witness. In an interview with Sergeant Jake Schultz on January 3, 2007, Mr. Barlow made various statements

regarding the Mr. Jeffs, his leadership in the FLDS religion and involvement in underage marriages and Mr. Jeffs counseling of abusive marriages. His expected testimony should be excluded from evidence at trial.

ARGUMENT

I. THE ANTICIPATED TESTIMONY OF MR. BARLOW REGARDING MR. JEFFS IS INADMISSIBLE FOR LACK OF RELEVANCE AND RISK OF UNFAIR PREJUDICE.

In his interview, Mr. Barlow told Sergeant Schultz that when Warren Jeffs became the prophet of the FLDS religion, "he (Mr. Barlow) was not pleased with the direction that Warren was taking the religion or the community." He said that "Warren found out that he was displeased and announced at a public meeting that Mr. Barlow was 'cut off' from the community," and Mr. Barlow and his family subsequently left the area. Mr. Barlow also expressed dissatisfaction with what he perceived to be the Mr. Jeffs' "specific movements... to take control of the church," and likened this to "a hostile takeover." None of this expected testimony is admissible into evidence.

Mr. Barlow's statements are not probative of any fact material to the present case, because they fail to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Utah Rules of Evidence Rule 401. The Mr. Jeffs has been charged as an accomplice to rape, but Mr. Barlow's displeasure with the "direction that Warren was taking the religion or the community," does not make any of the consequential facts in the present case more or less probable. Nor does his perception of the Mr. Jeffs' eventual rise to a leadership position

provide any insight into the facts relevant to the criminal charges. Because they are irrelevant, the statements should be excluded from testimony.

Further, Mr. Barlow's testimony that he was "cut off" from the community as a result of his dissatisfaction with the Mr. Jeffs' leadership, while having little or no probative value, would create a high risk of unfair prejudice to the Mr. Jeffs. Evidence is "unfairly prejudicial, and therefore inadmissible, 'if it "appeals to the jury's sympathies, arouses a sense of horror, provokes the instinct to punish," or otherwise "may cause the jury to base its decision on something other than the established propositions of the case.'" *State v. Lindgren*, 910 P.2d 1268, 1272 (Utah Ct. App. 1996) (quoting *Carter v. Hewitt*, 617 F.2d 961, 972-73 (3d Cir. 1980) (citation omitted); *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989)). Mr. Barlow's perception that he was ostracized from the community as a result of his disapproval of the Mr. Jeffs could easily appeal to the jury's sympathies and insight the instinct to punish. Any probative value that Mr. Barlow's statements may have is substantially outweighed by this risk of unfair prejudice, and the testimony should be excluded under Rule 403.

II. THE ANTICIPATED TESTIMONY OF MR. BARLOW REGARDING THE MR. JEFFS' LEADERSHIP IS INADMISSIBLE CHARACTER EVIDENCE, AND WOULD CAUSE UNFAIR PREJUDICE TO THE MR. JEFFS.

Mr. Barlow told Sergeant Schultz that, after the Mr. Jeffs became the leader of the FLDS religion, "he witnessed a progressive shift in the religion and the community," and "[h]e described the shift as a change from a humanitarian regime... to an authoritarian regime.: Mr. Barlow further "described the authoritarian regime as 'very intrusive,'" and "indicated that under Warren's leadership there was no questioning policy." He claimed that the Mr. Jeffs' "teachings were more directive than suggestive,"

and "that Warren was 'an extreme example' of an authoritarian" because he "controlled the economy and directed all the marriages, relationships, work projects and economics." None of this expected testimony relevant or admissible.

Evidence of the Mr. Jeffs' "character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Utah Rules of Evidence, Rule 404(a). Mr. Barlow's statements regarding the Mr. Jeffs as "an authoritarian," and his statements referring to the Mr. Jeffs' leadership as "an authoritarian regime," cannot be offered to show that he acted as an accomplice to rape in the present case. Mr. Barlow did not indicate that he knew the complaining witness or her husband, nor did he offer any insight into the Mr. Jeffs' involvement in their marriage. Instead, he suggested that the Mr. Jeffs was controlling of all the marriages. First, it should be noted that Mr. Barlow was not in a position to know the specific details of how marriages were being arranged or performed and his opinion about Mr. Jeffs role in these marriages is simply an attempt to introduce inflammatory character evidence. Mr. Barlow's statements would be offered to attempt to show that the Mr. Jeffs acted in conformity with his character as seen in other instances, and this testimony must be excluded from evidence.

Even if Mr. Barlow's testimony were offered for a proper, non-character purpose, the risk of unfair prejudice that would result substantially outweighs the probative value of his statements. His account of the Mr. Jeffs as "'an extreme example' of an authoritarian," who "controlled the economy and directed all the marriages, relationships, work projects and economics," is highly inflammatory. Mr. Barlow is an individual who was once a member of the FLDS faith and simply disagrees with how Mr.

Jeffs has managed the church and who resents how he was treated by Mr. Jeffs. His language and personal feelings towards the Mr. Jeffs would appeal to the jury's sympathies and provoke the instinct to punish. See *Lindgren*, 910 P.2d at 1272 (quoting *Carter*, 617 F.2d at 972-73 (citation omitted); *Maurer*, 770 P.2d at 984). The risk of unfair prejudice from this expected testimony substantially outweighs any proper, non-character probative value, and the statements must be excluded from evidence under Rule 403.

III. THE ANTICIPATED TESTIMONY OF MR. BARLOW REGARDING UNDERAGE MARRIAGES IN THE FLDS COMMUNITY IS INADMISSIBLE FOR LACK OF PERSONAL KNOWLEDGE, FOR LACK OF RELEVANCE, FOR CONSISTING OF IMPROPER CHARACTER EVIDENCE, AND FOR RISK OF UNFAIR PREJUDICE

In his interview with Sergeant Schultz, Mr. Barlow claimed that, "as Warren began to take over, girls were married younger and weddings were more secretive." He said that, because of "changes in state legislation, these secretive weddings were being held in 'remote locations,'" and that "marriages were done on very short notice and sometimes a person did not know who they were marrying until they were 'on the spot,'" He said that, while women previously had a choice in choosing a husband, that Mr. Jeffs "gave specific training declaring that individuals should not have anything in their mind and should block any ideas about who they want to marry," He also "indicated that under Warren it would be very difficult for a woman to refuse marriage," because "any refusal would be a form of insubordination and... saying no would be the equivalent of declaring apostasy." Mr. Barlow's personal perception of how marriages were being performed should be excluded from evidence.

First, Mr. Barlow gave no indication that he had any personal knowledge of marriages involving young or underage girls, or of weddings becoming more secretive, or of marriage ceremonies being conducted on short notice. He gave no examples or personal experiences to indicate that his statements were more than mere rumor or speculation. Accordingly, Mr. Barlow's expected testimony is inadmissible on the grounds that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Utah Rules of Evidence, Rule 602. Mr. Barlow's interview suggests that he simply had a belief about how marriages were being performed, without any personal knowledge.

Even if Mr. Barlow were to have personal knowledge, however, his statements about underage marriages becoming more secretive are completely irrelevant to the charges against the Mr. Jeffs. Evidence is only relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah Rules of Evidence, Rule 401. Mr. Jeffs has been charged as an accomplice to rape, not for conducting underage marriages, and Mr. Barlow's expected testimony is not probative of any of the issues surrounding the charges against the Mr. Jeffs. Because they are irrelevant, these statements should be excluded from testimony.

Mr. Barlow's accusation that the Mr. Jeffs was involved in conducting illegal marriages in which women had no choice and could not refuse may not be offered as character propensity evidence. Mr. Barlow's testimony, if at all relevant, would suggest only that the Mr. Jeffs committed prior bad acts, in which he forced or coerced underage girls into marriage. Since the charge against him in the present case is not for coercing

the complaining witness into marriage, but rather, for allegedly coercing her into unwanted sexual conduct, Mr. Barlow's testimony could only be offered to suggest that the Mr. Jeffs' has a general propensity for coercing underage girls into unwanted conduct. But the Mr. Jeffs' character and past acts are not elements of the charges against him, and evidence of his past "crimes, wrongs or acts is not admissible to prove [his] character... in order to show action in conformity therewith." Utah Rules of Evidence Rule 404(b). Accordingly, Mr. Barlow's expected testimony must be excluded from evidence.

Finally, evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah Rules of Evidence, Rule 403. Even if the Court were to conclude that the State were offering Mr. Barlow's statements for a proper, relevant purpose, they must nevertheless be excluded under Rule 403. First, the probative value of Mr. Barlow's statements is insignificant at best. He provided no insight into any of the facts or circumstances surrounding the present case, and the probative value of his statements is substantially outweighed by the risk of unfair prejudice that would result from allegations of other crimes and bad acts. Not only are such allegations unfairly prejudicial, but they would also serve to confuse the issues and mislead the jury, since the Mr. Jeffs is on trial for accomplice to rape, not for conducting underage marriages. Mr. Barlow's statements should be excluded from testimony at trial.

IV. THE ANTICIPATED TESTIMONY OF MR. BARLOW REGARDING MR. JEFFS' INVOLVEMENT IN MARITAL RELATIONSHIPS IS INADMISSIBLE FOR A LACK OF PERSONAL KNOWLEDGE, FOR CONSISTING OF IMPROPER CHARACTER EVIDENCE, AND FOR UNFAIR PREJUDICE.

Mr. Barlow told Sergeant Schultz "that through Warren's teachings and direction the church became more intrusive into these relationships, including when it was appropriate or inappropriate to have intimate contact." He *felt* "that Warren changed the concept of marriage from a covenant between two people to a triangle which included husband, wife and Warren." And he described the Mr. Jeffs as "a 'sex broker,' instructing people on when to come together and when to separate intimately." Mr. Barlow's testimony as to the Mr. Jeffs' involvement in marital relationships should not be admitted into evidence.

As was indicated *supra*, Mr. Barlow gave no indication that he had any personal knowledge of Mr. Jeffs' involvement in marital relations. He gave no examples or personal experiences to support his conclusory allegation that the Mr. Jeffs was a "sex broker," and provided no evidence to substantiate his statements as something more than speculation or the reiteration of mere rumor. Thus his expected testimony is inadmissible, since there is no evidence "to support a finding that the witness has personal knowledge of the matter." Utah Rules of Evidence, Rule 602. Mr. Barlow's expected testimony may not be admitted into evidence.

Mr. Barlow also gave no indication that he knew anything about the nature of the Mr. Jeffs' relationship with the complaining witness and her husband. Thus his testimony would only be relevant to suggest that the Mr. Jeffs has a tendency or propensity to involve himself in the intimate relations of married couples, in order to

Jeffs "was the only person with the authority to arrange a marriage or with the authority

to separate a marriage that was not working," This expected testimony is inadmissible, and must be excluded from evidence.

The fact that Mr. Barlow claims to be aware of some situations in which he believes Mr. Jeffs did not handle the situation to his satisfaction has no relevance to the allegations in this case. As in any organization or religious group, there will always be dissenters or those who are critical of the leadership. Their opinion and experience is not evidence about what happened in a specific instance. Again, since there is no evidence "to support a finding that the witness has personal knowledge of the matter," Utah Rules of Evidence, Rule 602, and since Mr. Barlow's statements cannot be said to be more than speculation or rumor, his expected testimony should not be admitted into evidence.

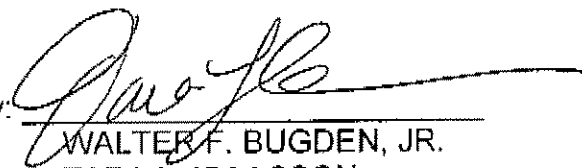
Even if Mr. Barlow could testify to the statements he made to Sergeant Schultz, the probative value of such testimony would be incredibly limited. Mr. Barlow did not indicate that he knew the complaining witness, and he did not offer any insight into the allegedly abusive relationship between her and her husband. On the other hand, his suggestion that the Mr. Jeffs was ineffective as a marriage counselor risks inflaming the jury by appealing to its sympathies and arousing a sense of horror or an instinct to punish, and is thus unfairly prejudicial. See *Lindgren*, 910 P.2d at 1272 (quoting *Carter*, 617 F.2d at 972-73 (citation omitted); *Maurer*, 770 P.2d at 984). This risk of unfair prejudice substantially outweighs the limited probative value of Mr. Barlow's statements, and his expected testimony should thus be excluded from evidence under Rule 403.

CONCLUSION

Jethro Barlow's expected testimony is based primarily on speculation and belief that stems from great hostility towards the FLDS church and Warren Jeffs in particular. Mr. Barlow lacks personal knowledge about the issues it is anticipated he would testify to. In addition, his testimony is not relevant to the present case, and includes improper character testimony. In sum, the testimony of Mr. Barlow creates a risk of unfair prejudice against Mr. Jeffs that substantially outweighs any probative value his statements might otherwise have. Accordingly, his testimony should be excluded from evidence.

DATED this 9th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 9 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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