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RESPONSE DUE BY PWBG&L  
May 18, 2007

IN THE FIFTH DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

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STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION TO  
EXCLUDE CAMERAS  
IN COURTROOM **NKB**

Case No. 061500526

Judge James L. Shumate

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**INTRODUCTION**

On April 5, 2007, the *Deseret Morning News* contained a front-page article with the heading "I am not the Prophet' says note by Jeffs." The article contained an enhancement of a photograph of a note which Mr. Jeffs had written in his own

handwriting and was showing to his defense counsel at the end of the motion hearings on March 27, 2007. Defense counsel huddled around the note to read it for the first time. The *Deseret News* hired a digital enhancement expert to “flip” or mirror the printing on the stationery. A copy of the *Deseret News* article is attached hereto as **Exhibit A.**

### **ARGUMENT**

The document held and read by defense counsel was not a public document. Although defense counsel reviewed the document in open court, defense counsel did not carelessly or recklessly display the note to the media. Admittedly, defense counsel were aware that a “pooled” photographer was present in the courtroom. However, the Defendant’s note was never turned toward the photograph to permit him to photograph it. On the contrary, defense counsel huddled together and viewed the note under circumstances that were obviously intended to be confidential and private.

Judges, counsel and litigants have a legitimate expectation that they can handle documents in a courtroom setting and that those documents will not be read by opposing counsel, the public, or the media. Similarly, the litigants have an expectation that private papers will neither be photographed nor published on the front page of one of the major newspapers in Utah. In this case, the *Deseret News* devised a means through digital photography to violate the sanctity and privacy of the attorney / client communications.

Moreover, the publication of the private communication of Mr. Jeffs with his counsel is all the more shocking because the *Deseret News* was specifically told by defense counsel prior to the publication that the document was a private

communication. On the evening before the *Deseret News* published the article, Ms. Isaacson, a member of the defense team, made it abundantly clear that the defense team considered the note was a privileged communication between the Defendant and his counsel. Ms. Isaacson further explained to the *Deseret News* staff—Messrs. Cannon and Winslow—that it was never the intention of the attorneys to waive the attorney / client privilege nor to forfeit the confidentiality of this communication. The *Deseret News* published the confidential communication notwithstanding Ms. Isaacson's specific assertion that the *Deseret News* was violating the attorney / client privilege through telephoto photography and digital enhancement. By publishing the private communication of the Defendant, the *Deseret News* has contributed to the difficulty in finding a fair and impartial jury in this case.

The media, through the use of the telephoto lens and digital technology, invaded the defense camp. What the media did is no different than pointing a sensitive microphone in the direction of defense counsel and eavesdropping on a confidential communication between a client and his attorneys at the defense table.

It strains credulity to suggest that the media could have possibly believed that they were entitled to use the "pooled" photographer to invade the private communications and writings of a defendant with his counsel. Surely, the media can understand that a litigant expects to have private communication with his counsel in the courtroom. The *Deseret News'* unbridled invasion of confidential communications between Mr. Jeffs and his counsel cannot be countenanced.

Rule 4-401 of the Code of Judicial Administration addresses media in the courtroom. It states that the intent is "to permit access to the courtroom by the news

media while preserving the participant's rights to privacy and a fair trial." The *Deseret News* clearly violated the Defendant's right of privacy and has jeopardized his right to receive a fair trial. The same rule provides that in determining whether to permit still photography, the presiding judge should consider whether "there is a substantial likelihood that photography would jeopardize the right to a fair hearing or trial." (4)(B). A copy of Rule 4-401. Media in the courtroom is attached hereto as **Exhibit B**.

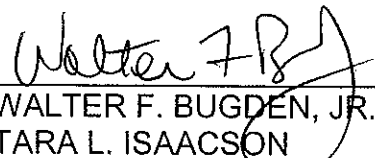
The publication of the private communication of the Defendant is an appalling assault on the Defendant's right to receive a fair trial.

### CONCLUSION

The only appropriate sanction, under these circumstances, to ensure that Mr. Jeffs is able to communicate confidentiality with his counsel and to ensure that he receives a fair trial, is to exclude the "pooled" photographer from the courtroom. Alternatively, the Decorum Order should be amended to prohibit the "pooled" photographer or media sound technicians from intruding upon the private communications between the Defendant and his counsel.

DATED this 15<sup>th</sup> day of May, 2007.

BUGDEN & ISAACSON, L.L.C.

By:   
WALTER F. BUGDEN, JR.  
TARA L. ISAACSON

WRIGHT, JUDD & WINCKLER  
RICHARD A. WRIGHT

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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 26 day of May, 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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EXHIBIT A



RECYCLED PAPER MADE FROM 20% POST CONSUMER WASTE

Deseret Morning News, Thursday, April 05, 2007

## 'I am not the Prophet,' says note by Jeffs

Copyright 2007 Deseret Morning News

By **Ben Winslow**

Deseret Morning News

Warren Jeffs apparently abdicated his position as president of the Fundamentalist LDS Church in a note he wanted to give to the judge handling the criminal case against him.

The note is partially visible in photographs taken at the end of Jeffs' court appearance last week. The Deseret Morning News had the photographs analyzed by a digital enhancement expert, a forensic handwriting analyst and a genealogist.



Defense attorney Walter Bugden Jr., left, takes a paper that Warren Jeffs, right, had attempted to give to Judge James Shumate after a motion hearing on Tuesday in St. George.

*Scott G. Winterton, Deseret Morning News*

"I have not been a Prophet and am not the Prophet," one line that is visible reads.

The contents of the note were also corroborated by law enforcement sources who spoke to the Deseret Morning News on the condition of anonymity.

A thin and frail-looking Jeffs attempted to speak to the judge after a long day of hearings in St. George's 5th District Court last week.

"May I approach the bench?" Jeffs asked Judge James Shumate. "I need to just take care of one matter."

Shumate refused to hear it, urging Jeffs to speak to his lawyers.

"Can I take care of it now?" Jeffs asked again.

The polygamist sect leader then bent over and wrote something down on a pad of paper. His hands shaking, he fumbled as he tried to tear at the paper, but he needed help. A Deseret Morning News photographer representing the media in the courtroom took pictures of the event.

The image of the note was shot from a distance, and the writing is fuzzy. Some sentences have been deciphered, including a line Jeffs wrote saying he "failed (to) lead the people of the Fundamentalist Church."

Jeffs was immediately surrounded by Washington County sheriff's deputies, and his lawyers took the paper from him. Outside of court, Jeffs' defense attorney, Walter Bugden Jr., declined to comment on why his client wanted to speak to the judge. He said they would appeal the judge's rejection of his motions challenging the criminal case against the FLDS leader.

Bugden declined to comment to the Deseret Morning News Wednesday.

The Washington County Sheriff's Office also refused to comment on the note. The Utah Attorney General's Office said it was unaware of the note's contents.

"I can't acknowledge the existence or lack of existence of a statement by the defendant Jeffs," Deputy Washington County Attorney Brian Filter said.

The Deseret Morning News reported last week that Jeffs had reportedly renounced his position as prophet of the FLDS Church in a jailhouse conversation with one of his brothers. A law enforcement source said the conversation was recorded by Purgatory Jail officials, who monitor his calls. That tape is in the custody of the Washington County attorney, who would not comment.

Other law enforcement agencies have refused to confirm or deny the tape's existence.

In Arizona, where Jeffs faces charges accusing him of performing more child-bride marriages, Mohave County Attorney Matt Smith would not rule out using any tape as evidence.

"It would not be appropriate for me to comment on anything that I've learned about what's going on in Washington County," Smith said in an e-mail to the Deseret Morning News. "Obviously, if Warren Jeffs made statements along the lines suggested in the newspaper article, I would be very interested in their potential use at our trial."



This is a close-up of the note shown reversed which was used for graphic analysis by the Deseret Morning News. Scott G. Winterton, Deseret Morning News

Jeffs, 51, faces criminal charges in Utah of rape as an accomplice, a first-degree felony. He is accused of performing a child-bride marriage. A hearing is scheduled April 23 to discuss a motion suppressing evidence in the case against the polygamist leader.

Late Tuesday, Bugden filed a petition under seal in court. Court minutes indicate an order was also filed under seal. Typically, such filings deal with matters of evidence, medical or psychological issues. Bugden also declined to discuss the filings when contacted by the Deseret Morning News Wednesday.

In August 2006, Jeffs was arrested in a traffic stop outside Las Vegas. At the time, he was on the FBI's Ten Most Wanted list. The computers, documents, cell phones, credit cards and other evidence seized from the Cadillac Escalade are at the center of an evidence battle.

Defense attorneys have asked to delay a hearing in a Nevada federal court pending the outcome of a similar fight over evidence in Utah. Last month, Jeffs was indicted by a federal grand jury in Salt Lake City on a single charge of unlawful flight to avoid prosecution.

**ORIGINAL PHOTO**

**Enhancing a photo** How the Deseret Morning News was able to identify a note as easily shown after a hearing.

The photo is flipped (or reversed) to make the note read right.

Flipped photo

The photograph was then processed by a digital enhancement lab and a graphicist, who were able to pick out some of the words.

"I have not been a Prophet and can not be Prophet" was found through the digital enhancement.

"And if you lead the people of the Church and the Church"

- found by a forensic lab working on the document and comparing it to a prior example of Jeffs handwriting.

E-mail: [bwinslow@desnews.com](mailto:bwinslow@desnews.com)



**EXHIBIT B**



RECYCLED PAPER MADE FROM 20% POST CONSUMER

**Rule 4-401. Media in the courtroom.**

**Intent:**

To establish uniform standards and procedures for conduct and the use of photographic equipment in the courts of the state.

To permit access to the courtroom by the news media while preserving the participants' rights to privacy and a fair trial.

**Applicability:**

This rule applies to the courts of record and not of record.

This rule governs photography and conduct during sessions of court and recesses between sessions.

This rule shall not diminish the authority, conferred by statute, rule or common law, of the judge to control the conduct of proceedings in the courtroom.

As used in this rule, the term "courtroom" includes the courtroom and areas immediately adjacent to the courtroom.

**Statement of the Rule:**

(1) Filming, video recording, and audio recording in a trial courtroom are prohibited except to preserve the record of proceedings. The trial court's video signal of proceedings may be transmitted to an overflow room. No recording of the video may be made in the overflow room, except as part of a pilot program approved by the Judicial Council with the permission of the presiding judge of the court and the judge presiding at the hearing.

(1)(B) Filming, video recording, and audio recording in an appellate courtroom are permitted to preserve the record of proceedings and as permitted by procedures of those courts. A video signal of proceedings may be transmitted to an overflow room where it may be copied.

(2) Still photography, filming and audio and video recording in the courtroom for ceremonial

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or court approved public information programs are permitted when arranged through the presiding judge of the court.

(3) No one may photograph a juror or prospective juror before the person is dismissed.

(4) Still photography in a courtroom is prohibited, but it may be permitted in the discretion of the judge presiding at the hearing. A request to photograph in a courtroom shall be filed with the judge presiding at the hearing at least 24 hours prior to the hearing. A judge may permit photography with less than 24 hours notice upon a showing of good cause. In determining whether to permit still photography and, if so, how to regulate it, the judge presiding at the hearing should consider whether:

(4)(A) photography can be accommodated without distracting the participants;

(4)(B) there is a substantial likelihood photography would jeopardize the right to a fair hearing or trial; or

(4)(C) the privacy interests of the victim of a crime, a party in a civil case or a witness outweigh the interest of the public in access to a photograph of the person.

(5) Conduct in the courtroom.

(5)(A) The judge presiding at the hearing may position reporters and equipment in the courtroom to permit reasonable news coverage. The judge may require reporters to share a single photographer.

(5)(B) Photographers shall not use flash or strobe lights. Media representatives shall use normally available courtroom equipment unless the presiding judge and the judge presiding at the hearing approve modifications, which shall be installed and maintained without public expense.

(5)(C) Proceedings in the courtroom shall not be disrupted. Members of the public in the courtroom shall:

(5)(C)(i) avoid calling attention to themselves;

(5)(C)(ii) not place equipment in or remove equipment from the courtroom while court is in session;

(5)(C)(iii) not make comments in the courtroom during the court proceedings;

(5)(C)(iv) not comment to or within the hearing of the jury or any member thereof at any time before the jury is dismissed;

(5)(C)(v) present a neat appearance in keeping with the dignity of the proceedings;

(5)(C)(vi) not conduct interviews in the courtroom until the hearing is concluded and the court is recessed;

(5)(C)(vii) not, if the hearing is a trial, conduct interviews in the courtroom until the trial is concluded;

(5)(C)(viii) not use a camera or tape recorder to conduct interviews in the courtroom; and

(5)(C)(ix) comply with the orders and directives of the court.

(6) The court may remove anyone violating these rules from the courtroom and revoke the privileges contained in this rule.

**History: Amended effective January 15, 1990; April 1, 1997.**

#### NOTES TO DECISIONS

##### Refusal to exclude media.

Press photography was held not prejudicial, despite defendant's request to prohibit it on the grounds that it would be distracting and irritating and would infringe upon his ability to represent himself. Defendant chose to seek the death penalty and chose not to present meaningful mitigation evidence; the appellate court was not convinced that exclusion of photographers would have led defendant to change his strategy. *State v. Arguelles*, 2003 UT 1, 465 Utah Adv. Rep. 3, 63 P.3d 731, cert. dismissed, 540 U.S. 1098, 124 S. Ct. 980, 157 L. Ed. 2d 810 (2004).

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