

1 **WILLIAM P. RING**
2 **COCONINO COUNTY ATTORNEY**

VALERIE WYANT CLECK ✓

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3 Ammon D. Barker
4 Bar # 028010
5 Bryan Shea
6 Bar # 027631
7 Deputy County Attorneys
8 110 E. Cherry Avenue
9 Flagstaff, Arizona 86001-4627
10 PHONE: (928)679-8200
11 FAX: (928) 679-8201
12 Attorneys for the State

13 **IN THE SUPERIOR COURT, THE STATE OF ARIZONA**
14 **IN AND FOR THE COUNTY OF COCONINO**

15 STATE OF ARIZONA,

No. CR2015-00862

16 Plaintiff,

17 vs.

**REPLY RE: MOTION FOR RELEASE OF
JAIL MEDICAL RECORDS FOR STEVEN
JONES**

18 STEVEN EDWARD JONES,

19 Defendant.

Hon. Dan Slayton – Div. 2

20 COMES NOW the State of Arizona, by and through the undersigned deputy, and
21 submits the following Reply regarding the State's Motion for Release of Jail Medical
22 Records for Steven Jones.

23 The State understands why the defense might not want these records released,
24 since they would confirm the State's theory of the case. Nevertheless, that is not a
25 sufficient reason to obstruct the release of this information. Notably, Defendant did not
26 object to the applicability of Rule 15.2(g), the relevance of the State's request, or the right
of this Court to grant such request. Defendant's **sole objection** is that this information is
protected under the physician-patient privilege. Unfortunately for Defendant, the privilege
does not apply in this situation.

WILLIAM P. RING
COCONINO COUNTY ATTORNEY
110 E. CHERRY AVENUE
FLAGSTAFF, ARIZONA 86001-4627
(928) 779-6518

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1 1. Defendant's privilege has been waived.

2 *"In the course of litigation, a party may not use the privilege as 'both a sword*
3 *and a shield,' for example, by asserting a particular factual position and then*
4 *invoking the privilege not only to 'buttress such a position,' but also to prevent the*
5 *opposing party from impeaching or otherwise challenging it."* *State v. Wilson, 200*
6 *Ariz. 390, 397 (App. 2001). As a result, "waiver can be implied when a party injects*
7 *a matter that, in the context of the case, creates such a need for the opponent to*
8 *obtain the information allegedly protected by the privilege that it would be unfair*
9 *to allow that party to assert the privilege." Id. See also, Throop v. F.E. Young & Co.,*
10 *94 Ariz. 146 (a person who defended claim against negligence by asserting he had*
11 *suffered a heart attack waived the physician-patient privilege regarding his heart*
12 *treatment); State v. Turrentine, 152 Ariz. 61, 66 (App. 1986) ("The defendant cannot cast*
13 *aside the protection of the privilege for matters that benefit him and then invoke the*
14 *privilege to prevent the prosecution from inquiring into matters that may be harmful to*
15 *him.").*

16 Of course, whether the privilege has been waived is a factual question and case
17 dependent, which is why the State previously provided the factual basis for its request.
18 Defendant has noticed "self-defense" as justification for his actions. The defense has
19 since repeatedly emphasized the extent of Defendant's injuries, including references to
20 concussions (for which there is no medical proof) and teeth "knocked out" (for which there
21 is no medical proof). The defense's strategy has been quite simple. If they can show
22 that Defendant's injuries were severe, then perhaps his spurious claim of self-defense will
23 have greater impact at trial. However, by claiming these injuries were more serious, they
24 have put Defendant's medical conditions squarely at issue in this case.

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1 The State does not intend on calling a doctor in its case-in-chief to testify about the
2 treatment of Defendant. In that sense, the State's request for medical information differs
3 substantially from *State v. Wilson*, which Defendant relies upon in his Response. The
4 State merely requests the information to meet Defendant's claim that he suffered more
5 injury than previously observed. Unless the defense can avow that no such claim will be
6 made at trial, the State must have an opportunity to challenge or impeach this claim.
7 Barring the State from doing so would allow the defense to use the privilege as both a
8 sword and a shield, a method of gamesmanship not tolerated by Arizona law.
9

10
11 **2. The physician patient privilege is not absolute.**

12 The defense should know this. They cited to *State v. Morales*, which held that the
13 privilege did not apply to all hospital employees. 170 Ariz. 360 (App. 1991). They cited
14 to *State ex rel. Udall v. Superior Court in and For County of Apache*, which held that the
15 privilege does not apply in a situation involving the abuse of a child. 183 Ariz. 462 (App.
16 1995). *Benton*, in fact, states explicitly that "**the physician-patient privilege has never**
17 **been absolute.**" *Benton v. Superior Court in and for County of Navajo*, 182 Ariz. 466,
18 469 (1994). The privilege does not protect Defendant from any and all inquiries, and it
19 does not protect him here.
20

21 **3. These records may not be protected by the "physician-patient" privilege**
22 **because Defendant was not seen by a physician at the jail.**

23
24 The Coconino County Jail does not have an in-house physician. They have a staff
25 of nurses. *Morales* states the following:

26 In order for the privilege to apply, four requirements must be met: First, the patient must not consent to the testimony. **Second, the witness must be a physician or surgeon.** Third, the information was imparted to the physician while he was attending the defendant. Finally, the

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1 information must be necessary to enable the physician to prescribe or
2 act for the treatment of the defendant.
3 *State v. Morales*, 170 Ariz. 360, 363 (App. 1991). *Benton* emphasized the limitations of
4 this privilege, stating that "***the privilege is restricted to physicians.***" *Benton*, 182 Ariz.
5 at 469, citing *Southwest Metals Co. v. Gomez*, 4 F.2d 215, 218 (9th Cir. 1925) ("***[T]he***
6 ***physician-patient privilege does not extend to nurses.***"). Since Defendant could only
7 have been seen by a nurse during his jail stay, this privilege does not apply.

8 **4. Conclusion**

9 For any and all the reasons stated above, the State's request should be granted.

10
11 RESPECTFULLY SUBMITTED this 27 day of January, 2017.

12 WILLIAM P. RING
13 COCONINO COUNTY ATTORNEY

14 By 
15 Ammon D. Barker
16 Deputy County Attorney

17
18
19 COPY of the foregoing mailed/delivered this
20 27 day of January, 2017, to:

21 The Honorable Dan Slayton
22 Division 2
23 Coconino County Courthouse
24 Flagstaff, AZ 86001

25 Burges McCowan
26 Joshua Davidson
Counsel for Defendant

By: 