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3 **II. The Court's Authority to Shorten Time.**  
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5 At this morning's hearing, the court expressed two concerns about shortening  
6 time.

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8 **A. The Local Rules of Court**

9 The court, of course, is correct, that the Local Rules for the Superior Court of  
10 California, County of Fresno, rule 16.2, subdivision A, does require that motions be filed  
11 five days in advance of the hearing.

12 The full rule, however, does provide that the court can order otherwise.

13 The full rule does not require that a request to shorten time be in writing.  
14 However, Wesson hereby requests the court to shorten time for him to provide notice of  
15 his motion to dismiss, so that he will be deemed to have timely filed it as of this morning,  
16 when he filed it in open court.

17 Rule 16.2, subdivision A does require, however, that a proof of service be filed.  
18 We served the prosecution with our Motion to Dismiss in open court, and so did not file a  
19 proof of service. One is being filed today, as a separate document.

20 The full text of Local Rule 16.2 A is as follows:

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22 "Unless otherwise ordered by the court, motions in felony cases shall be  
23 filed in writing no later than five (5) court days before the hearing, with  
24 proof of service on all parties."  
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<sup>1</sup> Other members of Wesson's defense team include Ralph Torres and Michael O. Castro.

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2 **III. Wesson's Discovery Motion and His Motion to Dismiss are Both on the**  
3 **Table.**  
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5 To avoid confusion:

6 1. Wesson's Continuance Motion is Withdrawn. As stated in his Motion to  
7 Dismiss, it is withdrawn because, when he filed it he believed the prosecution was  
8 making every reasonable effort to provide him the discovery his lawyers needed to be  
9 effective, but now he has found out that the prosecution's attention was diverted to filing  
10 an entirely separate case (and calling it an amended complaint).

11 2. Wesson stands by his Discovery Motion that was filed attached to the  
12 Continuance Motion. The United States Constitution, Amendments 6 and 14 require the  
13 prosecution to provide those items to Wesson's attorneys so that they can be prepared for  
14 his preliminary examination on the original complaint, and provide him effective  
15 assistance of counsel thereon. Wesson hereby incorporates that discovery motion into his  
16 Motion to Dismiss.

17 3. Wesson's Motion to Dismiss is also on the table. Wesson contends that the  
18 original complaint must be dismissed because the prosecution, instead of making every  
19 reasonable effort to provide his attorneys with timely discovery so his hearing could be  
20 held at the time required by statute, with prepared, effective counsel, instead, the  
21 prosecution worked on an entirely separate case, thereby causing Wesson to faced with  
22 the untenable choice of waiving time or having unprepared counsel.  
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1 **IV. By Operation of Law, the Prosecution Possesses Everything the**  
2 **Investigating Agencies Possess.**

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4 The prosecution stated today in court that she has given Wesson “everything she  
5 possesses.”

6 As a matter of law, however, the prosecution is deemed to possess everything that  
7 the investigating agencies possess. Indeed, this is true whether or not the prosecution  
8 even knows that material is in their possession. For that reason, the prosecution has a  
9 duty of “simple advertence” to look in the investigating files, and provide the defense any  
10 required material.

11 For example, in *In re Brown* (1998) 17 Cal.4th 873, 880 – 881, the California  
12 Supreme stated the following.

13  
14 “We believe that the purposes of *Brady*[v. *Maryland* (1963) 373 U.S. 83]  
15 would not be served by allowing material exculpatory evidence to be  
16 withheld simply because the police, rather than the prosecutions, are  
17 responsible for the nondisclosure. [Citation.] .... [¶] Any other rule would  
18 leave the defendant's due process rights to the fortuity of a subordinate  
19 agency's procedural protocol, which the Supreme Court has squarely  
20 rejected. “[A]ny argument for excusing a prosecution from disclosing what  
21 he does not happen to know about boils down to a plea to substitute the  
22 police for the prosecution, and even for the courts themselves, as the final  
23 arbiters of the government's obligation to ensure fair trials. [Citation  
24 omitted].”

1 This is why *Brown* required the prosecution to exercise a duty of “simple  
2 advertence .... [because in most instances the] evidence [i]s readily accessible to the  
3 prosecution.”<sup>2</sup> Photographs, search warrant affidavits, completed test results, these are  
4 examples of evidence that is readily available to the prosecution, and which it had, and  
5 still has, a duty of “simple advertence” to look for and provide to the defense.

6 Although *Brown* was speaking specifically of *Brady* material, this same rule  
7 obviously must apply to all material that the prosecution is required by the U.S.  
8 Constitution’s 6th and 14th Amendments to provide to the defense. Accordingly, this  
9 must include all of the Discovery that Wesson has requested in his Discovery Motion.

## 10 11 12 **V. The Discovery Provided So Far.**

13  
14 Wesson believes it appropriate to build a record of the Discovery he has received  
15 to date. This is to avoid disputes later on, if Wesson files a non-statutory motion to  
16 dismiss on the grounds that he was denied a substantial right caused by a Discovery-  
17 failure.<sup>3</sup> Wesson wishes to avoid disputes over whether he did or did not have the  
18 Discovery material sought.

19 For the record, Wesson, as of this writing, has received documents from the  
20 prosecution bearing “Bates Stamp numbers” 000001 to 000156, received last week, and  
21 pages 000157 to 000466, received this week.” Wesson has not received any photographs  
22 or other non-documentary material.

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23  
24 <sup>2</sup> *In re Brown*, *supra*, 17 Cal.4th at 883

25 <sup>3</sup> These are often called “*Stanton*” motions, after a leading case in which such a motion  
26 was filed, *Stanton* (1987) 193 Cal.App.3d 265. As will be seen, however, they arise in  
other Constitutionally-required Discovery contexts as well.

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3 **VI. Non-Statutory Motions to Dismiss Can Be Granted for Violations other**  
4 **then *Brady* Violations.**  
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6 At this morning's hearing, the court pointed out that *Stanton* was a *Brady*-  
7 violation case.

8 However, non-statutory motions to dismiss are not limited to those involving  
9 *Brady* material, but can extend to any denial of a substantial right that is not apparent on  
10 the record. See, most recently, *People v. Duncan* (2000) 78 Cal.App.4th 765. In *Duncan*  
11 the defendant was denied a substantial right because extra-record evidence showed he  
12 was incompetent at the time of the prelim. The court wrote the following, at 78  
13 Cal.App.4th 772:

14 Denial of a substantial right at the preliminary hearing renders a defendant's  
15 commitment illegal and entitles him to a dismissal of the information on timely motion.  
16 ([Citation omitted] .... (*Stanton* 193 Cal.App.3d at 270)....) .... [A]n error that is not  
17 known or visible at the hearing itself (such as the competency issue in this case), may be  
18 called to the court's attention through a nonstatutory motion to dismiss. ([Citation  
19 omitted] .... (*Stanton, supra*, at p. 269) [Footnote omitted] .... [¶] .... ¶] Use of the  
20 nonstatutory or pretrial motion to dismiss has been sanctioned by our Supreme Court....  
21 (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 29[3], fn 4 ....) A pretrial  
22 nonstatutory motion to dismiss is now accepted as an appropriate vehicle to raise a  
23 variety of defects. (*Stanton v. Superior Court, supra*, 193 Cal.App.3d at p. 271.)  
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1 **VII. Wesson Requests an Evidentiary Hearing.**

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3 Wesson , in his Motion to Dismiss has pointed out that the prosecution, instead of  
4 making reasonable efforts to provide Wesson discovery in a timely manner, instead  
5 worked on filing a separate case under the guise of an amended complaint.

6 Although the filing of that so-called amended complaint, and the mid-march date  
7 of many of the police reports, is itself some evidence that the prosecution did not make  
8 all reasonable efforts to provide Wesson timely discovery, Wesson believes the court  
9 should hold an evidentiary hearing to determine how much time the prosecution spent  
10 compiling that case, why Discovery was not provided sooner.

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13 Respectfully Submitted,

14  
15 APR 07 2004

16 Date

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18  
19 PETER M. JONES

20 Peter M. Jones

GARRICK A. BYERS

Garrick Byers

21 Attorneys for Marcus Wesson  
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23  
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AFFIDAVIT OF PROOF OF SERVICE  
(2009, 2015.5 C.C.P.)

State of California )  
  )  
County of Fresno    )

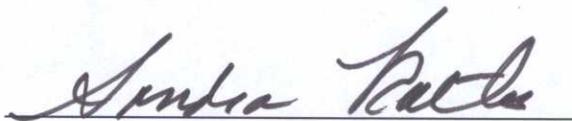
Comes now the undersigned, who hereby declares as follows:

I am a citizen of the United States of America and am employed in the county aforesaid. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Public Defender's Office, County of Fresno, 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 7th day of April, 2004, I served a copy of the attached WESSON'S SUPPLEMENTAL POINTS AND AUTHORITIES SUPPORTING HIS DISCOVERY MOTION AND MOTION TO DISMISS on the office of the District Attorney's Office of Fresno County, by delivering and depositing a true copy thereof with an employee of said office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 7, 2004.



RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: \_\_\_\_\_

BY: \_\_\_\_\_

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