



I.  
**INTRODUCTION**

On March 29, 2004 the Fresno Police Department submitted an Application Sealing the Affidavits and Returns for Search Warrant numbers W04912037-9, W04912038-8 and W04312039-8 to the Honorable Judges R. L. Putnam, Bruce Smith, and Robert Oliver. The Judges orally denied the application and continued the matter for the Fresno Police Department to amend its application and to file the Return of the Search Warrants to March 30, 2004.

On March 30, 2004 an in camera hearing was held before the Honorable R. L. Putnam and Bruce Smith. After review of the affidavit in support of the sealing order the court found good cause to seal the warrants and also determined that the declaration must be sealed also because they contained Hobbs information.

The Court made the necessary findings that there was an overriding interest that overcomes the right of public access to the records, the overriding interest supports the sealing of the records, a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, the sealing is narrowly tailored, and no least restrictive means exists to achieve the overriding interest.

On April 7, 2004 Search Warrant number W04912450 was returned and sealed. The Fresno Bee has now filed their Motion to unseal all of the above search warrants.

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II.

NO AUTHORITY EXISTS FOR THE ALLEGATION THAT THE HEARING TO  
SEAL SEARCH WARRANTS SHOULD HAVE BEEN DOCKETED OR  
NOTICE GIVEN PRIOR TO HEARING

The Fresno Bee asserts that California Rules of Court 243.1 and 243.2 require a public docketed motion for an order sealing the records. There is absolutely no language in Rule 243.1 or 243.2 that requires a hearing on an application to seal a search warrant nor suggests such a procedure.

The Fresno Bee appears to incorporate the language in NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4<sup>th</sup> 1178, 1217 as part of Rule 243.1 and 243.2. The Bee states without citing any authority that

"[T]he procedure for giving notice to the public is the same as for motions to close court proceedings."

Then they quote from The Advisory Committee Comment (2004) to California Rule of Court rule 243.1 as follows:

"This rule and rule 243.2 provide a standard and procedure for courts to use when a request is made to seal a record. The standard is based on NBC Subsidiary(KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4<sup>th</sup> 1178. These rules apply to civil and criminal cases. They recognize the First Amendment

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right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law."

This comment does not support the contention of the Fresno Bee. In fact it supports the opposite conclusion. NBC Subsidiary, supra, which deals with an in-progress trial, at page 1217 does state that when a closure motion is made, some notice that closure may be ordered is required which includes posting on the docket reasonably in advance of a hearing on or disposition of a closure motion.

In drafting Rules of Court 243.1 and 243.2 even though the rules were based on NBC Subsidiary, supra, this requirement was not included, thus it must be assumed that the intent was not to make docketing a requirement.

III.

**RULES 243.1 AND 243.2 ARE NOT APPLICABLE TO SEALING OF THE SEARCH WARRANTS IN THIS CASE**

The circumstances of the NBC Subsidiary, supra, are not applicable to the sealing of a search warrant as it does not deal with search warrant issues.

Rules of Court 243.1 and 243.2, as stated in the Advisory Committee Comment to the rules, apply to the sealing of court

1 records that are "used at trial or as a basis of adjudication.

2 The rules do not apply to records that courts must keep  
3 confidential by law. Examples of confidential records to which  
4 public access is restricted by law are records of search warrant  
5 affidavits sealed under People v. Hobbs (1994) 7 Cal. 4th 948.

6 The sealed records rules also do not apply to discovery  
7 proceedings, motion, and materials that are not used at trial or  
8 submitted to the court as a basis for adjudication." (Rule  
9 243.1(a)(2)).

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11 The information in the search warrants, affidavits and returns  
12 may or may not be used at trial and they have not been submitted  
13 to the court as a basis for adjudication. They are a discovery  
14 proceeding.

15 In Allegrezza v. Superior Court (1975) 47 Cal.  
16 App.3d 948, 951, where the court was addressing a request for an  
17 in camera hearing concerning the voluntariness of a pretrial  
18 confession. The court said:

19 We are concerned with a purported  
20 confession (hereafter, for convenience  
21 only, "confession") of one accused and  
22 awaiting trial for murder. A question is  
23 raised whether the confession was  
24 involuntary, or coerced, and therefore  
25 inadmissible as evidence at the trial.  
26 The superior court hearing might disclose  
27 that it was obtained under circumstances  
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1 establishing its untrustworthiness,  
2 something not unknown in the  
3 administration of criminal law. Or it  
4 might appear to have been secured in  
5 disregard of Allegrezza's constitutional  
6 rights. In either event it will not be  
7 placed in evidence before the jury. By  
8 the same token any concern for fairness  
9 demands that such a confession,  
10 disallowed as evidence, should not reach  
11 the eyes or ears of persons who may  
12 become jurors of the case. Any reasonable  
13 doubt whether it will should be resolved  
14 in favor of the accused.  
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17 The affidavit submitted in the application to seal the  
18 warrants contains People v. Hobbs, supra, material and is  
19 confidential. For these reasons Rules of Court 243.1 and 243.2  
20 do not apply.  
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23 **IV.**

24 **UNSEALING OF THE WARRANTS WOULD CREATE A SUBSTANTIAL**  
25 **RISK OF DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL**  
26 **RIGHT TO A FAIR TRIAL**

27 In addition, the rules do not apply to records that the  
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2 courts must keep confidential by law. While no statutory law  
3 requires search warrants to be kept confidential, case law  
4 requires courts to keep information confidential so long  
5 as the release of the information could deprive a defendant of a  
6 fair trial. Creamer v. Superior Court of Marin County (1968) 265  
7 Cal.App. 2d 216; Allegrezza v. Superior Court, supra, 47 Cal.  
8 App. 3d 948, 951. As held by the Craemer court:

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10 " [t]he superior court was not obliged to  
11 strike a proper balance between the First  
12 Amendment right of freedom of the press, and  
13 the Fifth Amendment's guaranty of a fair  
14 trial. In the context of this case the  
15 rights of the press are no greater than the  
16 rights of the public generally. And the  
17 public generally has no right to pretrial  
18 disclosure of questionable evidence, a  
19 disclosure which might well deny to the  
20 accused the fair and impartial trial which  
21 is his due."

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24 And as held by the United States Supreme Court:

25 "Due process requires that the accused  
26 receive a trial by an impartial jury free  
27 from outside influences. Given the  
28 pervasiveness of modern communications and

1 the difficulty of effacing prejudicial  
2 publicity from the minds of the jurors, the  
3 **trial courts must take strong measures to**  
4 **ensure that the balance is never weighed**  
5 **against the accused."** (Sheppard v. Maxwell  
6 (1966) 384 U.S. 333, 362.) (emphasis added)  
7 (See also People v. Sirhan (1972) 7 Cal.3d  
8 710, 730.)

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11 "[The] atmosphere essential to the  
12 preservation of a fair trial -- the most  
13 fundamental of all freedoms -- **must be**  
14 **maintained at all costs."** (Estes v. Texas  
15 (1965) 3 U.S. 532, 540.) (emphasis added.)

16 The trial of defendant Wesson will start on June 21, 2004.  
17 The publication of information contained in the affidavit which  
18 is read by prospective jurors would be highly prejudicial to the  
19 defendant particularly in light of the very short time from the  
20 occurrence of the killings. Some or all of the information may  
21 not even be offered at trial.

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24 V.

25 **UNSEALING OF THE WARRANTS WOULD CREATE A SUBSTANTIAL PROBABILITY**  
26 **THAT THE ONGOING INVESTIGATION WOULD BE COMPROMISED**

27 The investigation of the killings of the nine people, which  
28 is the subject of this proceeding, is highly complex and time

1 consuming. Much of the evidence has not been processed nor  
2 tested at this time. It is highly likely due to the short time  
3 before trial that important parts of this investigation will  
4 still be going on at the time of and even during trial.

5 The People have an overriding interest in protecting the  
6 integrity of the investigation and protect the integrity of  
7 witness testimony.

8 Unsealing the warrants would pose a substantial risk that  
9 contact by the press with people mentioned in the affidavits  
10 could influence and taint their testimony. In addition the  
11 unsealing of the warrants may very well provide information to  
12 potential additional suspects that may assist them in avoiding  
13 justice. (County of Orange v. The Superior Court of Orange  
14 County(2000) 79 Cal. App. 4th 759.)

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16 **VI.**

17 **THE COURT SHOULD NOT TAKE**

18 **JUDICIAL NOTICE OF AB2986**

19 The request of The Fresno Bee for the court to take judicial  
20 notice of AB2986 is inappropriate. The Assembly Bill was not  
21 enacted. It would be pure speculation as to the reasons why it  
22 was not enacted. It is not within a category listed in Evidence  
23 Code § 452. In order for a court to take judicial notice, the  
24 matter must have a high degree of reliability. AB2986 fails that  
25 test badly.

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27 **VI.**

28 **CONCLUSION**

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For the reasons stated above, the People respectfully  
request that The Fresno Bee's Motion to Unseal Search Warrant  
Records be summarily denied.

Dated: May 17, 2004

Respectfully submitted,

ELIZABETH A. EGAN  
DISTRICT ATTORNEY



LISA M. GAMOIAN  
Chief Deputy District Attorney  
Homicide Unit



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2 PROOF OF SERVICE BY FACSIMILE - 1013a, 2015.5 C.C.P.

3 I, THE UNDERSIGNED, DECLARE AND SAY;

4 I am a citizen of the United States and a resident of  
5 the County of Fresno, State of California; I am over the age of  
6 eighteen (18) years, residing or employed in the County of  
7 Fresno, and not a party to the within action; my business  
8 address is Fresno County District Attorney's Office, 2220 Tulare  
9 Street, Suite 1000, Fresno, California, 93721.

10 On May 17, 2004, I personally served the within copy of  
11 the "People's Response in Opposition to Motion to Unseal Search  
12 Warrant Records", in RE: Marcus D. Wesson, Fresno County Court  
13 Case No. F04901785-6 to: Bruce A. Owdom, Attorney at Law,  
14 Dietrich, Glasrud, Mallek & Aune, FAX number (559) 435-8776.  
15 (See attached confirmation)  
16

17 I declare, under penalty of perjury, under the laws of  
18 the State of California, that the foregoing is true and correct  
19 and that this declaration was executed this 17th day of May,  
20 2004, at Fresno, California.

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22 Debbie Duncan, Secretary IV  
23 Fresno County District Attorney's Office  
24 Homicide Unit  
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## TRANSMIT CONFIRMATION REPORT

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I, THE UNDERSIGNED, DECLARE AND SAY;

I am a citizen of the United States and a resident of the County of Fresno, State of California; I am over the age of eighteen (18) years, residing or employed in the County of Fresno, and not a party to the within action; my business address is Fresno County District Attorney's Office, 2220 Tulare Street, Suite 1000, Fresno, California, 93721.

On May 17, 2004, I served the within copy of the "People's Response in Opposition to Motion to Unseal Search Warrant Records", in RE: Marcus D. Wesson, Fresno County Court Case No. F04901785-6, by placing said in envelope with appropriate stamp(s) and mailing to: Bruce A. Owdom, Attorney at Law, Dietrich, Glasrud, Mallek & Aune, 5250 N. Palm Ave., #420, Fresno, CA 93704.

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed this 17th day of May, 2004, at Fresno, California.



Debbie Duncan, Secretary IV  
Fresno County District Attorney's Office  
Homicide Unit