

1 **III. Expedited Discovery Must be Ordered.....** 9

2

3 **IV. The Specific Pre-Prelim Discovery that Wesson Seeks.** 9

4 **1. The gunshot residue test results of Mr. Wesson himself, of the deceased persons,**

5 **and of anybody else who was tested.....** 10

6 **2. Any and all statements by Mr. Wesson.** 11

7

8 **3. Any and all statements made by people who were at or near the scene of the**

9 **crime.....** 11

10 **4. The autopsy and coroner’s reports.** 11

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12 **5. The results of any ballistic tests.** 12

13

14 **6. The results of any fingerprint, and similar, tests done on the gun that was**

15 **found.....** 12

16 **7. The dispatch tapes, radio logs, transcripts, and tapes from this incident.....** 12

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18 **8. The report from the Police Legal Advisor reporting the call from the scene. ...** 13

19 **9. The search warrants and affidavits in support.....** 13

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21 **10. Photographs and diagrams of the scene.....** 13

22 **11. All Material Favorable to the Defense on the Issue of Guilt or Punishment.** 14

23

24

25 **V. Conclusion** 14

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1 **I. Mr. Wesson's U.S. Constitutional Rights to Effective Assistance of**
2 **Counsel and Due Process Apply to Pre-Prelim Discovery.**

3
4 Penal Code section 1054, subdivision (e), provides that (underlines added): "... no
5 discovery shall occur in criminal cases except as provided by this chapter, other express
6 statutory provisions, or as mandated by the Constitution of the United States."

7 The United States Constitution mandates that all criminal defendants, including
8 Mr. Wesson, receive the effective assistance of counsel (6th Amendment) and due
9 process of law (14th Amendment).

10 These U.S. Constitutional rights certainly apply at the preliminary examination.
11 The California Supreme Court, in *People v. Cudjo* (1993) 6 Cal.4th 585, 615, wrote the
12 following. "A criminal defendant has a constitutional right to the assistance of counsel
13 (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15). This right to counsel
14 extends to every critical stage of the proceeding, including the preliminary hearing.
15 (*Coleman v. Alabama* (1970) 399 U.S. 1 [right to counsel at prelim.]) The right
16 comprehends more than just the formality of representation by a lawyer; it entitles the
17 defendant to competent and effective legal assistance. [Citation omitted]."

18 It is sometimes erroneously said that California's Discovery Chapter, Penal Code
19 sections 1054 to 1054.10 (a.k.a. Prop. 115 Discovery), prohibits discovery at the
20 preliminary examination.

21 The fact is that, with the sole exception of the provision already quoted, Penal
22 Code section 1054, subdivision (e), none of the provisions of California's Discovery
23 Chapter have any application at all to discovery that is sought directly under the United
24 States Constitution.

25 An example of this fact was given by the California Supreme Court in *Izazaga v.*
26 *Superior Court* (1991) 54 Cal.3d 356. The court, writing about the prosecutor's due

1 process obligation under the 14th Amendment, and *Brady v. Maryland* (1963) 373 U.S.
2 83, to disclose evidence favorable to the accused, wrote the following (italics in original).

3
4 “The prosecutor's duties of disclosure under the due process clause are
5 *wholly independent* of any statutory scheme of reciprocal discovery. The
6 due process requirements are self-executing and need no statutory support
7 to be effective. Such obligations exist whether or not the state has adopted
8 a reciprocal discovery statute. Furthermore, if a statutory discovery scheme
9 exists, these due process requirements operate outside such a scheme. The
10 prosecutor is obligated to disclose such evidence *voluntarily*, whether or
11 not the defendant makes a request for discovery. [¶] No statute can limit
12 the foregoing due process rights of criminal defendants, and the new
13 discovery chapter does not attempt to do so. On the contrary, the new
14 discovery chapter contemplates disclosure *outside* the statutory scheme
15 pursuant to constitutional requirements as enunciated in *Brady, supra*, 373
16 U.S. 83 and its progeny.”

17
18 Likewise, other due process discovery and effective counsel obligations, including
19 those at the preliminary examination, also operate wholly independently of the California
20 state discovery statute.

21 It is also sometimes erroneously said that Penal Code section 866, subdivision (b),
22 prohibits pre-preliminary examination discovery. If it did, it would violate the U.S.
23 Constitution. As just explained, the mandates of the U.S. Constitution operate wholly
24 independently.

1 Section 866, subd. (b), states the following. "It is the purpose of a preliminary
2 examination to establish whether there exists probable cause to believe that the defendant
3 has committed a felony. The examination shall not be used for purposes of discovery."

4 Manifestly, Section 866, subdivision (b) refers to the examination itself, not to
5 defense counsel's preparation for it. In line with that, for example, Section 866,
6 subdivision (c) states "This section shall not be construed to compel or authorize the
7 taking of depositions of witnesses."

8 To repeat, Section 866 does not prohibit pre-prelim discovery.
9
10

11 **II. The U.S. Constitution Mandates Pre-Prelim Discovery to Protect Mr.** 12 **Wesson's Substantial Rights.** 13

14 An example of this is found in *Stanton v. Superior Court* (1987) 193 Cal.App.3d
15 265. *Stanton* applied a case called *People v. Rutherford* (1975) 14 Cal.3d 399 to strike a
16 portion of an Information because the prosecutor failed to provide pre-prelim discovery.
17 *Rutherford* was, at the time, the leading California case that applied *Brady v. Maryland*,
18 *supra*, to California cases. *Rutherford*, 14 Cal.3d at 405.

19 In *Stanton*, the prosecutor had failed, before the prelim, to provide evidence
20 favorable to the defense. The court, citing *Rutherford*, (and thus, by inclusion and
21 necessary implication, *Brady*) characterized the prosecutor's pre-prelim failure to
22 provide discovery of evidence favorable to the defendant as "the prosecution's
23 dereliction."¹

24 Accordingly, the court struck a particular allegation (gross negligence) from the
25 information because, on the facts of that case, the non-disclosure had, concerning that
26

1 allegation, deprived the defendant of the substantial right of cross-examination.² In other
2 words, had the prosecutor disclosed that information pre-prelim, as required by the 14th
3 Amendment's due process clause, the defense attorney could have effectively, as required
4 by the 6th Amendment's right to counsel clause, cross-examined the prosecution's
5 witness on concerning that allegation.

6 This is how the U.S. Constitution's 6th and 14th amendment's mandates work at
7 the pre-prelim discovery stage. The court must order discovery at this stage where that
8 appears reasonably necessary to protect the defendant's ability to exercise the defendant's
9 substantial rights.

10 Putting this another way: if any defendant, including Mr. Wesson, was required to
11 proceed at the prelim without adequate pre-prelim discovery, the preliminary
12 examination would be hollow indeed., with the prosecutor knowing all of its evidence
13 and the defendant knowing none.

14 The United States Supreme Court has said, in *U.S. v. Reynolds* (1953) 345 U.S. 1,
15 12, "since the Government which prosecutes an accused also has the duty to see that
16 justice is done, it is unconscionable to allow it to undertake prosecution and then invoke
17 its governmental privileges to deprive the accused of anything which might be material to
18 his defense."

24 ¹ *Stanton v. Superior Court, supra*, 193 Cal.App.3d at 269, paragraphs 1 and 2.

25 ² *Stanton v. Superior Court, supra*, 193 Cal.App.3d. 3d at 270 to 273 (Part III of the
26 Opinion). See also Penal Code section 865, which provides that at the preliminary
examination, all criminal defendants, including Mr. Wesson, have the right to be
present and to cross-examine the prosecution's witnesses.

1 The *Reynolds* court did not purport to say that this rule applies only at trial.
2 Although the Court did not identify a source for this rule, the California courts have
3 identified the source as the due process clause.³

4 Of course, *Reynolds* was speaking of withholding crucial evidence under a
5 statutory privilege: the court said that privilege cannot operate to deprive the defendant of
6 “anything which might be material to his defense.” But the *Reynolds* principle is not
7 weaker, on the contrary, it is stronger, where, as here, the prosecutor has not claimed a
8 statutory privilege, but has simply not provided the discovery anyway.

9
10 In the *Stanton* case, discussed above, the source of the defendant’s substantial
11 right that required pre-prelim discovery, was the right of cross-examination, found in
12 Penal Code section 865.

13
14 Other rights that all defendants, including Mr. Wesson, have at preliminary
15 examinations, include the right to call of defense witnesses. “When the examination of
16 witnesses on the part of the people is closed, any witness the defendant may produce shall
17 be sworn and examined.” Penal Code section 866.

18 Of course, if the prosecutor so-requests, the magistrate must require an offer of
19 proof from the defense. Penal Code section 866. Upon that offer, the magistrate must
20 permit the testimony, if the magistrate is satisfied that the testimony, if believed, would
21 be reasonably likely to establish an affirmative defense, negate an element of the crime
22 charged, or impeach the testimony of a prosecution witness or the statement of a
23 declarant testified to by a prosecution witness. Penal Code section 866.

24
25 ³ *Fletcher v. Superior Court* (2000) 100 Cal.App.4th 386, 394 (Noting “the due process
26 then demanded by the United States Supreme court in [*Reynolds*]. *Reynolds* was also
cited as a reason why peace officer personnel records must, in a proper case, be given
to the defense, in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

1 Despite these qualifications, the right to call defense witnesses can obviously be a
2 substantial right: indeed that is precisely the reason for the offer of proof. But the
3 defendant cannot make that offer without adequate pre-prelim discovery. Again, the
4 right to make an offer of proof and present defense evidence would be a hollow right if
5 the prosecutor, by withholding pre-prelim discovery, could, thereby, deprive the
6 defendant of the ability to do so.

7
8 Another substantial right can be the right of any criminal defendant, including Mr.
9 Wesson, to make a motion, at the preliminary examination, to suppress any illegally
10 seized evidence that the prosecutor seeks to introduce at that hearing. Penal Code section
11 1538.5, subdivision (f)(2). Again, that right would be a hollow right if, because of lack
12 of discovery, the prosecutor could prevent Mr. Wesson from exercising it.

13
14 Another substantial right, of course, it goes almost without saying, is Mr.
15 Wesson's right to object to any questions that the prosecutor might ask of its witnesses
16 that violate the Evidence Code, and, by that objection, to prevent improper evidence from
17 infecting the court's decision on whether to hold Mr. Wesson to answer to the charges..
18 Just as obviously, Mr. Wesson could be denied that substantial right if, because of lack of
19 discovery, he lacks the knowledge to make proper objection to a crucial line of questions.

20
21 Without adequate pre-prelim discovery, Mr. Wesson's right to a prelim would be
22 meaningless, and he would have only the "formality of representation by a lawyer;" that
23 was condemned in the *Cudjo* case above, rather than what *Cudjo* required, "competent
24 and effective legal assistance."
25
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1 **III. Expedited Discovery Must be Ordered.**

2
3 “Both the defendant and the people have the right to a preliminary examination at
4 the earliest possible time.” Penal Code section 859b, paragraph 2, first sentence.

5 Mr. Wesson is loath to give up his right to a preliminary examination at the
6 earliest possible time. He is asking this court to, both, enforce his U.S. Constitutional
7 right to pre-prelim discovery, and his statutory right to a preliminary examination at the
8 earliest possible time.

9
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11 **IV. The Specific Pre-Prelim Discovery that Wesson Seeks.**

12
13 In making these requests, it is helpful to begin with a brief summary of the facts.⁴

14 On March 12, shortly before 2:30 P.M., police were called to a domestic
15 disturbance at 761 N. Hammond in the City of Fresno. On arrival they found several
16 people involved in a child custody dispute. The police, after consulting with the Fresno
17 Police Legal Advisor at some point during this incident, did not enter the house. During
18 part of the time the police were at the scene, Mr. Wesson was at the front door to the
19 house involved. At some time after police arrived, Mr. Wesson went inside the house,
20 out of view. Some time after that, he emerged again. At some point during this incident,
21 police removed one or more adults from the house. The evidence is conflicting whether,
22 and, if so, when, neighbors heard gunshots during this incident. The evidence is also
23 conflicting on whether, and, if so, when, the police were advised that a gun may be
24

25 ⁴ Wesson has been able to glean this much from the limited discovery provided by the
26 prosecution. To save time and space, citations to that discovery are omitted, but, if the
prosecutor disputes this summary, Wesson will provide them. Everything in this
summary has already appeared in the public media.

1 involved. After Mr. Wesson emerged from the house, the police entered, and discovered
2 nine dead human bodies: seven small children, a 17-year-old girl, and a 26-year-old
3 woman. All had been shot to death. Among the evidence collected inside the house was
4 a gun. A test was taken from the body of at least one of the deceased to see if the body
5 had gunshot residue.

6
7 The discovery that Mr. Wesson seeks, none of which has been provided to him as
8 of this writing, is the following:

9
10
11 ***1. The gunshot residue test results of Mr. Wesson himself, of the deceased persons,***
12 ***and of anybody else who was tested.***

13
14 Obviously, if Mr. Wesson's test is negative, and one or more of the deceased (or
15 anyone else) is positive, that could, indeed surely would, result in Public Defender's
16 effective cross-examination of prosecution witnesses, a substantial right within the
17 meaning of *Stanton v. Superior Court, supra*. This evidence, if believed, could also
18 negate an element of the charge, within the meaning of Penal Code section 866,
19 subdivision (a), paragraph 2.⁵ If those tests are not yet concluded, the court should order
20 that done expeditiously.

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25 ⁵ The identity of the person who committed the crime is not normally thought of as an
26 element of the crime. But for Section 866 purposes, surely identity must be an
element. Otherwise the defendant would not be allowed to present, for example,
irrefutable evidence of factual innocence. That result would be absurd.

1 **2. Any and all statements by Mr. Wesson.**

2
3 Mr. Wesson must have copies of the tapes upon which these statements were
4 recorded, or transcripts, or summaries of these statements, so that he can conduct proper
5 cross-examination, and for substantial-rights purposes. If only tapes, but not yet
6 transcripts, exist, the court should not permit the prosecutor to delay for transcribing
7 them; copies of the tapes should be delivered expeditiously.

8
9
10 **3. Any and all statements made by people who were at or near the scene of the**
11 **crime.**

12
13 The prosecutor has disclosed some statements of neighbors who lived nearby, but
14 no statements by anyone in the crowd milling inside, and directly outside, of the
15 Hammond-house itself. Obviously, Mr. Wesson cannot determine whether to make an
16 offer of proof, and call these people, or the police officers to whom they gave statements,
17 unless he has copies of the tapes upon which these statements were recorded, or
18 transcripts, or summaries of these statements. If only tapes, but not yet transcripts, exist,
19 the court should not permit the prosecutor to delay for transcribing them; copies of the
20 tapes should be delivered expeditiously.

21
22
23 **4. The autopsy and coroner's reports.**

24
25 These are essential to determine if the deaths likely occurred during this incident
26 or at some prior time, and if the victims likely died from gunshot wounds or from other

1 causes. Mr. Wesson must know this to conduct an effective cross examination of the
2 prosecution witnesses about finding the bodies. If these are not completed, the court
3 should order them to be completed expeditiously.

4
5
6 **5. *The results of any ballistic tests.***

7
8 These are essential to determine if the gun found was the likely murder weapon.
9 This is essential for effective cross-examination. If these are not completed, the court
10 should order them completed expeditiously.

11
12
13 **6. *The results of any fingerprint, and similar, tests done on the gun that was found.***

14
15 Obviously, if Mr. Wesson's prints are not on the gun, particularly if someone
16 else's prints are, Mr. Wesson could present this through cross-examination or through
17 calling his own witnesses. If these have not been completed, the court should order them
18 completed expeditiously.

19
20
21 **7. *The dispatch tapes, radio logs, transcripts, and tapes from this incident.***

22
23 This information is essential to establish a timeline for the purpose of cross-
24 examining and impeaching prosecution witnesses.

1 **8. *The report from the Police Legal Advisor reporting the call from the scene.***

2
3 Surely the Legal Advisor made one; if not, one should be ordered expeditiously.
4 That report would contain statements of the police officers at the scene. These could be
5 critical in cross-examination, or in Wesson's making an offer of proof and calling a
6 peace officer witness.

7
8
9 **9. *The search warrants and affidavits in support.***

10
11 The news media report that up to three search warrants were served. Obviously,
12 Wesson must have this material in determining whether to file a motion to suppress. In
13 addition, this material will contain statements of the prosecution's witnesses that could be
14 critical in cross-examination, or in Wesson's making an offer of proof and calling a
15 peace officer witness.

16
17
18 **10. *Photographs and diagrams of the scene.***

19
20 According to the news media, the house involved has been almost entirely
21 cleaned, wholly or in large part before Public Defender was appointed. The only way
22 possible to reconstruct the scene, therefore, is now through photographs and diagrams.
23 These are essential to cross-examination and impeachment of prosecution witnesses.

1 **11. All Material Favorable to the Defense on the Issue of Guilt or Punishment.**

2
3 *Brady v. Maryland, supra.*

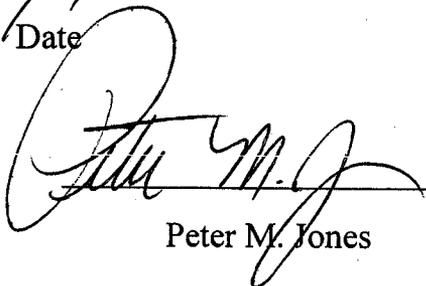
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5
6 **V. Conclusion**

7
8 This court should enforce the U.S. Constitution, and both parties' rights to a
9 speedy prelim by requiring the prosecutor to expeditiously provide all of the discovery
10 listed above.

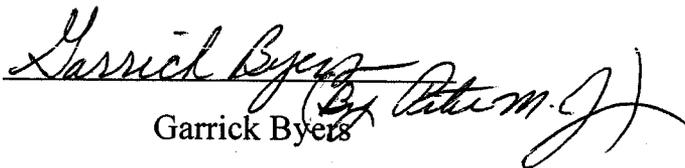
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12 Respectfully Submitted,

13
14 4/5/04

15 Date

16
17 

18 Peter M. Jones

17 

18 Garrick Byers

19 Attorneys for Marcus Wesson

AFFIDAVIT OF PROOF OF SERVICE
(2009, 2015.5 C.C.P.)

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)
County of Fresno)

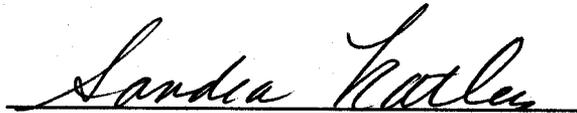
Comes now the undersigned, who hereby declares as follows:

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 5th day of April, 2004, I served a copy of the attached MOTION TO CONTINUE AND DECLARATION OF PETER M. JONES [WITH ATTACHMENT] 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 5, 2004.



RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: _____

BY: _____

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DATE: _____

BY: _____

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DATE: _____

BY: _____