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3 COUNTY OF FRESNO
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Filed 8
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AUG 16 2004 *PK*

5 Attorneys for Defendant
6 Peter M. Jones / PD0024
mk07175.mtn

FRESNO COUNTY SUPERIOR COURT
CENTRAL PROCESSING

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF FRESNO

10 THE PEOPLE of the
11 State of California,

12 Plaintiff,

13 vs.

14 MARCUS DELON WESSON,

18 Defendant.

)
) CASE NO.: F04901785-6
)
) MOTION TO COMPEL RELEASE
) OF PROPERTY TO DEFENSE
) EXPERTS FOR EXAMINATION AND
) TESTING WITHOUT
) UNREASONABLE CONDITIONS
) DATE: August 20, 2004
) TIME: 9:00 a.m.
) DEPT.: 53
) EST. TIME: 15 minutes
) Defendant in custody; Transportation
) Order requested.

19 TO THE HONORABLE R.L. PUTNAM AND TO THE CHIEF DISTRICT
20 ATTORNEY, LISA GAMOIAN:

21 The prosecution has proposed a set of stipulations for the Release of
22 Property to our experts, most of which appear to be reasonable and justifiable
23 (See Attachment "A-page 4").

24 The defense is entitled to retain their own experts to independently
25 examine, test and/or retest evidence. *Prince v. Superior Court* (1992) 8
26 Cal.App.4th 1176, 1180-1181; *Alford v. Superior Court* (2003) 29 Cal.4th 1033,
27 1046. (Cites *Prince* to support confidentiality of Pitchess motion information.)
28

1 The prosecution has the right to protect the People's interest in the
2 evidence and the integrity of the evidence. Reasonable stipulations are an
3 acceptable means to protect these interests.

4 The defense has retained two eminently qualified experts to perform the
5 requested services.

6 Proposed stipulation No. 3 (Attachment A) is unreasonable because it
7 requires defense counsel to agree well-in-advance that should a prosecution
8 expert become unavailable at trial, the analysis of said expert will be
9 introducible. This could cover a number of potential witnesses on a variety of
10 subjects. This is an open-ended stipulation that attempts to lock the defense
11 into the submission of potentially incriminating evidence without the benefit of
12 confrontation and cross-examination.

13 It might be more acceptable were the Stipulation to read "If - due solely to
14 a delay created by the defense examination and/or testing of the evidence - a
15 prosecution witness connected to the subject-matter being examined becomes
16 legally unavailable then the defense stipulates the original analysis of said
17 legally unavailable expert may be introduced into evidence."

18 The need for Continuances arise for many reasons. Absent showing that
19 a continuance is likely to result in prejudice to the opposition's case;
20 contingencies that would both require an advance waiver of the right to
21 confrontation and create a chilling effect on the defendant's right to
22 independently examine evidence should be avoided. Stipulation No. 3 should
23 be stricken.

24 Additionally, the right of an attorney to enter into Stipulations comes
25 within their judgment and authority unless it falls within the scope of rights
26 recognized to require the defendant's express consent.

1 The general rule is stated in *Witkin & Epstein, California Criminal Law* (3d
2 Ed. 2000) Ch. IV §243, "Stipulation Admitting Facts in Issue":

3 A stipulation, even though admitting a fact essential to the
4 defendant's conviction, has been held to be within the attorney's
5 authority.

6 In *People v. Hanna* (1939) 36 Cal.App.3d, 336, the Court held: "It is the
7 general rule that counsel in a criminal case has the right to stipulate relative to
8 any of the steps in the action or proceeding."

9 *Witkin* lists areas where an attorney's authority is limited to include: the
10 decision to plead guilty, to withdraw a plea, to submit a cause on a transcript, to
11 waive a jury, to choose a defense (with some limitations), to request a new
12 attorney, and to decide whether or not to testify. *Witkin & Epstein, California
13 Criminal Law* (3d Ed. 2000) Ch. IV § 244-246, "Right to Counsel."

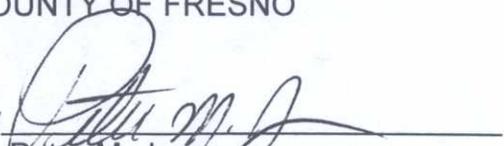
14 *Witkin* also cites examples where an attorney was allowed to stipulate to
15 evidentiary facts, ranging from failure to object to inadmissible evidence, to
16 admission of a factual element, and including admission of guilt of the crime
17 charged to seek mercy in a Death Penalty case.

18 Reasonable stipulations pertaining to the examination and testing of
19 evidence is best left to trial counsel. The line requiring the defendant's signature
20 should be stricken.

21 Dated: August 16, 2004.

22 Respectfully submitted,

23 GEORGE CAJIGA
24 PUBLIC DEFENDER
25 COUNTY OF FRESNO

26 By 

27 Peter M. Jones
28 Chief Defense Attorney

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ATTACHMENT A

1 ELIZABETH A. EGAN
DISTRICT ATTORNEY
2 LISA M. GAMOIAN
CHIEF DEPUTY DISTRICT ATTORNEY
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5 TELEPHONE: (559)488-3141
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8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
9

10 THE PEOPLE OF THE STATE OF) Case No.: F04901785-6
CALIFORNIA,)
11) D.A. No.: 04H9621
12 Plaintiff,)
13 vs.) STIPULATION REGARDING
14 MARCUS DELON WESSON,) EVIDENCE AND ORDER
15 Defendant)
16

17 The parties to this action agree that the following evidence may be
18 released by Fresno Police Department Detective Doug Reese to defense-retained
19 witness Gary Cortner for non-destructive examination:

20 plastic bag	Ppty No. 0410184	Item No. 27
21 45 .22 live cartridges	Ppty No. 0410185	Item No. 28
22 3 .22 live CCI	Ppty No. 0410186	Item No. 29
23 partial box .22 cartridges	Ppty No. 0410187	Item No. 30
24 partial box .22 live CCI (ball)	Ppty No. 0410222	Item No. 31
25 partial box .22 live CCI (hol pt)	Ppty No. 0410223	Item No. 32
5 .22 CCI expended cartridges	Ppty No. 0410224	Item No. 33
D's black band watch	Ppty No. 0410198	Item No. 41

1	items removed from D's hair	Ppty No. 0410199	Item No. 42
2	D's white socks	Ppty No. 0410200	Item No. 43
3	D's underwear	Ppty No. 0410201	Item No. 44
4	D's black T-shirt	Ppty No. 0410202	Item No. 45
5	D's black pants	Ppty No. 0410203	Item No. 46
6	D's black boots	Ppty No. 0410204	Item No. 47
7	live .22 cartridge	Ppty No. 0410206	Item No. 49
8	expended .22 cartridge case	Ppty No. 0410207	Item No. 50
9	expended .22 cartridge case	Ppty No. 0410208	Item No. 51
10	expended bullet fragment	Ppty No. 0410209	Item No. 52
11	3 expended .22 cartridge cases	Ppty No. 0410210	Item No. 53
12	live .22 cartridge	Ppty No. 0410211	Item No. 54
13	deformed live .22 cartridge	Ppty No. 0410168	Item No. 63
14	empty Ruger magazine	Ppty No. 0410176	Item No. 71
15	live .22 cartridge	Ppty No. 0410177	Item No. 72
16	Ruger .22 handgun with magazine	Ppty No. 0415133	Item No. 73
17	4 live .22 cartridges	Ppty No. 0415134	Item No. 74
18	copper jacket bullet fragment	Ppty No. 0422345-80	Item No. 80
19	copper jacket bullet fragment	Ppty No. 0422345-81	Item No. 81
20	live .22 cartridge	Ppty No. 0422345-82	Item No. 82
21	4 lead bullet fragments	Ppty No. 0422345-89	Item No. 89
22	lead bullet fragment	Ppty No. 0422345-90	Item No. 90
23	lead bullet fragment	Ppty No. 0422345-91	Item No. 91
24	copper jacket/lead bullet fragment	Ppty No. 0422345-127	Item No.127
25	2 copper jacket bullet fragments	Ppty No. 0422345-128	Item No.128
26	copper jacket/lead bullet fragment	Ppty No. 0422345-129	Item No.129
27	live .22 cartridge	Ppty No. 0422345-155	Item No.155
28	black handled knife	Ppty No. 0422345-156	Item No.156

1	carpet	Ppty No. 0422345-179	Item No.179
2	2 live M89 cartridges	Ppty No. 0422345-190	Item No.190
3	2 live RP 3-030 cartridges	Ppty No. 0422345-191	Item No.191
4	.22 live cartridge	Ppty No. 0422345-192	Item No.192
5	5 live .22 cartridges	Ppty No. 0422345-193	Item No.193
6	2 live .22 cartridges	Ppty No. 0422345-194	Item No.194
7	3 live .22 cartridges	Ppty No. 0422345-195	Item No.195
8	2 live .22 cartridges	Ppty No. 0422345-196	Item No.196
9	8 expended projectiles	Ppty No. 0422345-207	Item No.207
10	2 percussion caps canisters	Ppty No. 0422345-208	Item No.208
11	bra	Ppty No. 0422345-214	Item No.214
12	blouse	Ppty No. 0422345-215	Item No.215
13	dress	Ppty No. 0422345-216	Item No.216
14	2 hair clips	Ppty No. 0422345-217	Item No.217
15	boots	Ppty No. 0422345-218	Item No.218
16	socks	Ppty No. 0422345-219	Item No.219
17	locket	Ppty No. 0422345-220	Item No.220
18	underwear	Ppty No. 0422345-221	Item No.221
19	pink blouse	Ppty No. 0422345-265	Item No.265
20	bra	Ppty No. 0422345-266	Item No.266
21	panties	Ppty No. 0422345-267	Item No.267
22	sandals	Ppty No. 0422345-268	Item No.268
23	black skirt	Ppty No. 0422345-269	Item No.269
24	4 bullet fragments	Ppty No. 0422345-270	Item No.270
25	bullet fragment	Ppty No. 0422345-271	Item No.271
	4 bullet fragments	Ppty No. 0422345-272	Item No.272
	live ammunition and holster	Ppty No. 0407604	Item No.283

1 The parties further stipulate as follows:

- 2 1. The defendant waives any claim as to loss of or damage to such
3 evidence during the time such evidence is out of the People's
4 custody and control;
- 5 2. The defendant waives any claim as to chain of evidence on such
6 evidence during the time such evidence is out of the People's
7 custody and control;
- 8 3. The defendant stipulates that, should the People's criminalist
9 who did the original analyses become unavailable as a witness,
10 the original analyses may be introduced into evidence;
- 11 4. The defendant agrees that he will make every effort to have the
12 evidence returned to the People's custody and control before the
13 commencement of trial;
- 14 5. The defendant stipulates that, should the evidence not be
15 returned undamaged to the People by the time set for trial to
16 commence, the jury will be instructed as to the reason why it is
17 not present and the People will be allowed to present pictures,
18 testimony, and any other secondary evidence regarding said
19 physical evidence.

20 Upon completion of such examination, the parties further agree that
21 defense-retained witness Gary Cortner will return all of the evidence to
22 Fresno Police Department Detective Doug Reese.

23 _____
24 Rafael Torres
25 Deputy Public Defender
Attorney for Marcus Delon Wesson

Date: _____

Date: _____

Marcus Delon Wesson
Defendant



Lisa M. Gamoian
Chief Deputy District Attorney

Date: 8-6-04

IT IS HEREBY ORDERED.

Judge R.L. Putnam

Date: _____

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NOTICE

**ONLY PART OF THE DOCUMENT
FILED WAS APPROVED FOR FILING
ON THE COURT'S WEB SITE. THE
ENTIRE DOCUMENT IS AVAILABLE
FOR INSPECTION AND COPYING (AT
THE REQUESTING PARTY'S
EXPENSE) IN THE CRIMINAL
CLERK'S OFFICE, B1 LEVEL OF THE
CENTRAL COURTHOUSE.
TELEPHONE: 559-488-1682.**