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FRESNO COUNTY  
SUPERIOR COURT

April 21, 2004, 8:30 A.M.

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2004 APR 19 PM 3:23

Department 60  
Est. time 30 min.

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Attorneys for Marcus Wesson<sup>1</sup>

requested  
**FILED**

APR 19 2004

FRESNO COUNTY SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF FRESNO  
CENTRAL DIVISION

By  DEPUTY

The People of the State of California,  
Plaintiff,

Case No.: F049017856

vs.

**Wesson's Brief re:  
Sealed Search Warrant Records.**

Marcus Wesson,  
Defendant

***The Fresno Bee Lacks Standing to  
Bring This Motion in This Criminal  
Action.***

- TO: (1) The Honorable Judge of the Above-Entitled Court,
- (2) The People of the State of California by and through its attorney, the District Attorney of Fresno County,
- (3) The Fresno County Police Department, by and through its attorney, Sr. Deputy Fresno City Attorney Larry Donaldson, and

<sup>1</sup> Other members of Wesson's defense team include Ralph Torres and Michael O. Castro.



1 (4) The McClatchy Company doing business and *The Fresno Bee*,  
2 (hereafter referred, to, simply, as *The Fresno Bee*) by and through its  
3 attorney Bruce Owdom.  
4

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15 **I. Statement of the Case and of the Facts Relevant to the Sealing-Issue.**  
16

17  
18 1. On March 16, 2004, the Fresno County District Attorney filed a nine count  
19 complaint in this case, charging that on March 12, 2004, Wesson with nine counts of first  
20 degree murder, in violation of Penal Code section 187. To each count was attached, *inter*  
21 *alia*, a special circumstance of multiple murder in violation of Penal Code section 190.2,  
22 subdivision (a)(3).

23  
24 2. On March 25, 2004, Wesson was arraigned. The Fresno County Public  
25 Defender was appointed to represent him. Wesson entered a plea of “not guilty.” A  
26 preliminary examination was set for April 7, 2004.

1           3.       On March 30, 2004, four documents were filed in court. The first of those  
2 four documents is discussed here; the other three, being nearly identical, are all discussed  
3 in "4," below.

4           The first document was filed by *The Fresno Bee* newspaper, and was titled "*The*  
5 *Fresno Bee's* Opposition to Sealing of Search Warrant." (Hereafter, sometimes, "*The*  
6 *Bee's* Opposition to Sealing").

7           *The Fresno Bee* did not state why it was entitled to file this document in this  
8 criminal case.

9           The Proof of Service shows that *The Fresno Bee* served neither the Plaintiff, the  
10 People of the State of California, nor the Defendant, Marcus Wesson. Instead *The*  
11 *Fresno Bee* served only the Fresno City Attorney Police Legal Advisor.

12           The document stated that it was about the "search warrant documents in  
13 connection with the Marcus Wesson investigation."<sup>2</sup> The document stated that *The Bee*  
14 was "informed that the subject search warrants have been fully executed and the returns  
15 are to be filed shortly."<sup>3</sup>

16           The document concluded that "the court should refuse to enter any sealing orders  
17 without its proponent having made the showings required by *Press Enterprise II* [*Press-*  
18 *Enterprise v. Superior Court* (1986) 478 U.S. 1] and California Rules of Court, rule  
19 243.1.... [by means of] a noticed, docketed motion supported by a memorandum of law  
20 and evidence .... Otherwise, [under] Penal Code section 1534, these documents are ...  
21 open to the public."<sup>4</sup>

22           Hand-written on that document (by an unknown hand), next to this case's number,  
23 were three other case numbers, W04912037-9, W04912038-7, and W04912039-5. (The  
24

25 <sup>2</sup> "*The Bee's* Opposition to Sealing" page 1, lines 20 - 21.

26 <sup>3</sup> "*The Bee's* Opposition to Sealing," page 2, lines 1 -2.

<sup>4</sup>

1 clerk normally gives the prefix "W" to search warrant files, when the return is filed as  
2 required by Penal Code section 1534.)  
3

4           4.       The next three documents filed on March 30, 2004, were nearly  
5 identical to each other, right down to the line numbers. The only difference between the  
6 three documents was the case number and the judge's signature. Each document has one  
7 of the three case numbers that were handwritten into "*The Fresno Bee's* Opposition to  
8 Sealing of Search Warrant," discussed in "3," above. One document has case number  
9 W04912037-9, and is signed by the Hon. Ralph L. Putnam; the second document has  
10 case number W04912038-7, and is signed by the Hon. Bruce M. Smith, and the third  
11 document has case number W04912029-5, and is also signed by the Hon. Bruce M.  
12 Smith. Each document recites that it was signed on March 30, 2004.

13           Each document, at page 1, lines 4 to 5, is titled "In re Sealed Search Warrant  
14 Affidavit and Return. Each document states, at page 1, lines 5 to 7, that it is an "Order  
15 sealing Warrant, Affidavit, Return, and Affidavit Request for Order Sealing Search  
16 Warrants Documents." And each document cites, at page 1, lines 7 to 8, California Rules  
17 of Court, rule 243.1.

18           Each document states, at page 1, lines 10 to 14, that "... [T]he investigation of  
19 Marcus Delon Wesson is ongoing, and ... would be compromised by a public disclosure  
20 of the warrant and any items obtained ...."

21           And each documents states, at page 1, lines 14 to 16, that the search warrant,  
22 affidavit in support thereof, and any return to the warrant is to remain sealed only  
23 "pending further order of this court."

24           It is not clear how those documents came to be filed in this case.  
25  
26

1           5.       A hearing on “*The Fresno Bee’s* Opposition to Sealing of Search Warrant”  
2 was held on April 1, 2004, in Department 60, the Hon. Lawrence Jones presiding, in  
3 chambers.<sup>5</sup> The court notified Deputy District Attorney Lisa Gamoian, and Chief  
4 Defense Attorney Peter M. Jones, so they were present, along with Sr. Deputy Fresno  
5 City Attorney Larry Donaldson representing the Fresno Police Department and Bruce  
6 Owdom, Attorney at Law, representing *The Fresno Bee*.

7           Attorney Jones waived Mr. Wesson’s presence “reluctantly.”<sup>6</sup>

8           Following a discussion, the court ordered Mr. Donaldson to file points and  
9 authorities on the issue of which judge should hear the motion. Donaldson’s papers were  
10 due on April 7, 2004. “Opposing counsel” were given ten days to respond.<sup>7</sup> (The tenth  
11 day April 17, 2004, having been a Saturday, this response, filed on Monday, April 19,  
12 2004, meets that deadline.)

13           The court set a hearing for April 21, 2004 at 8:30 A.M., in Department 60.<sup>8</sup>

14  
15           6.       On April 5, 2004, Defendant Wesson filed his Motion for Expedited  
16 Discovery. At item IV 9, (page 13), of that motion he pointed out that he has not  
17 received any discovery of the search warrants, affidavits, and related material in this case.

18           (That motion for expedited discovery was not explicitly ruled on. The  
19 continuance motion to which Wesson originally attached it was withdrawn, and it was, by  
20 reference, attached to his Motion to Dismiss, filed on April 8, 2004. The court denied  
21 that Motion to Dismiss on April 8.)

22  
23 \_\_\_\_\_  
24 <sup>5</sup> Minute Order, April 1, 2003. The proceeding was reported, but, as already noted,  
Wesson’s attorneys have not yet received the daily transcript.

25 <sup>6</sup> Minute Order, April 1, 2003, unnumbered paragraph 2.

26 <sup>7</sup> Minute Order, April 1, 2003, unnumbered paragraph 5.

<sup>8</sup> Minute Order, April 1, 2004, paragraph 6.

1  
2           7.       On April 7, 2004, the prosecutor filed a First Amended Complaint, adding  
3 33 counts of child molestation and related sex offenses. Mr. Wesson was arraigned on  
4 that First Amended Complaint on April 8, 2004, and entered a plea of "Not Guilty."  
5

6           8.       Also, as will be seen below, a fourth search warrant was sealed on April 7,  
7 2004, the day before the first preliminary-examination evidence was taken, but the  
8 sealing-order was not filed until April 16, 2004.  
9

10          9.       Also on April 7, 2004, the Fresno Police Department filed a document titled  
11 "Plaintiff's Notice of Motion and Motion to Have Judge Who Sealed Search Warrants  
12 hear Motion to Unseal Warrants...."

13               (Seemingly highlighting the confusion being caused by *The Fresno Bee's* having  
14 filed a motion in this criminal action, the Police Department's document stated, on page  
15 1, lines 1 to 5, that Fresno City Attorney Hilda Cantu Montoy, and her Senior Deputy,  
16 Larry A. Donaldson, are the "Attorneys for the plaintiff, People of the State of  
17 California." The signature on page 5, line 19, also identified Donaldson as "Attorney for  
18 Plaintiff." Presumably, of course, this is a mistake, since the document contains nothing  
19 stating that the Fresno County District Attorney authorized the Fresno City Attorney to  
20 appear as attorney for the People.)  
21

22          10.       The preliminary examination in this case proceeded on April 8, 2004, and  
23 April 12, 2004. At the close of the evidence, the prosecution made a motion, which the  
24 court granted, to amend four of the sex offense counts. The court then held Wesson to  
25 answer on the nine murder counts, and thirteen of the sex offense counts. The court set  
26 April 27, 2004, for arraignment on the Information. Wesson does not know if the

1 prosecutor introduced into evidence at the preliminary examination any of the evidence  
2 obtained from the search warrants, or if any of the fruits thereof. The reason Wesson  
3 does not know this is that he has not seen the search warrants, their affidavits, their  
4 returns, or any related material.

5  
6 11. On April 9, 2004, *The Fresno Bee* filed a document titled "Third Party the  
7 McClatchy Company Doing Business as *The Fresno Bee*'s Non-Opposition to and  
8 Comment on Plaintiff's Motion to Have Judge Who Sealed the Search Warrants hear  
9 Motion to Unseal the Warrants." In the introductory paragraph, this document referred to  
10 "third party ... *The Fresno Bee*, and its Fresno Bee reporter Matt Leedy ...." This  
11 document did not state why *The Fresno Bee*, or Mr. Leedy is a third party.

12 That document did not object to the Police Department's request to have the  
13 unsealing-motion heard by the judge who sealed the warrant material. It did comment,  
14 however, that even though two different judges signed the sealing-orders, the unsealing-  
15 motion should be heard by just one.

16  
17 12. On April 15, 2004, the Presiding Judge, the Hon. Brad R. Hill, assigned this  
18 case to the Hon. R.L. Putnam "for all purposes ..., with the exception of any hearings  
19 currently scheduled before Judge Lawrence Jones."

20  
21 13. On April 16, 2004, a fourth sealing-document was filed. This document  
22 was identical in every respect to the documents described in item 4 above, except for the  
23 date it was signed (April 7, 2004), the case number (W04912450-4), and signing-judge  
24 (the Hon. Bruce M. Smith).

1           14.    Wesson still has not received any of the search warrant material from any  
2 of the four (or any other) search warrants in this case. This Brief follows.

3  
4  
5 **II.    *The Fresno Bee* Lacks Standing to Bring This Motion in This Criminal**  
6 **Case.**

7  
8           The parties to a criminal case are the People of the State of California and the  
9 person accused. Penal Code sections 683 and 684.

10          The Penal Code contains no provision for “third parties,” nor for intervention.

11          Not even the complaining witness is considered a party in a criminal case. *People*  
12 *v. Parriera* (1965) 237 Cal.App.2d 275, 282 – 283 (hearsay of prosecutrix not admissible  
13 under hearsay exception for party–opponent’s statements).

14          In a recent criminal case where a factually innocent defendant petitioned to seal  
15 his arrest record, the court of appeal held that because the case was being prosecuted by  
16 the People, the City Police Department had no standing at all. In *People v. Punzalan*  
17 (2003) 112 Cal.App.4th 1307, the prosecutor did not object to defendant’s petition to seal  
18 his arrest record, but the City Police Department did. When the trial court granted the  
19 defendant’s petition, the Police Department appealed. The court of appeal wrote, at 112  
20 Cal.App.4th page 1312, that the relevant statute, Penal Code section 851.8, which  
21 governs sealing of arrest records, gave the Police Department “no standing as to [the  
22 Defendant’s] petition. [The Police Department] is therefore out of place.”

23          Likewise, in our case, no statute, and no case, gives *The Fresno Bee* the right to  
24 intervene or appear as a “third party” in this criminal case. To be sure, Penal Code  
25 section 1534, which *The Fresno Bee* has invoked, states that a returned search warrant is  
26 a public record. But even if, perhaps, that gives *The Fresno Bee* standing to appear in the



1 four search warrant cases,<sup>9</sup> or standing to bring some other action, still that does not give  
2 *The Fresno Bee* any standing or status in this criminal case.

3 Compare, California Rules of Court, rule 980, that does grant the news media  
4 leave to file a request with the court for permission to photograph, broadcast, or record  
5 court proceedings. This present motion is nothing like that.

6 Finally, permitting *The Fresno Bee* status in this criminal action can lead to much  
7 confusion. Some of that is shown already by the Fresno Police Department's pleading, in  
8 which the plaintiff, and the plaintiff's attorney have become unclear.

9 *The Fresno Bee's* petition must be dismissed.

10  
11  
12 **III. In Deciding Whether to Unseal the Search Warrant Material, the Court**  
13 **Should Consider Whether This Might Affect Wesson's Fair Trial**  
14 **Rights.**

15  
16 The court will not reach this point unless the court has determined that *The Fresno*  
17 *Bee* does have standing to bring this motion in this criminal case.

18 Search warrant affidavits sometimes contain extremely inflammatory material that  
19 often is speculative, and even false, and that, in any case, can deprive the defendant of a  
20 fair trial. Search warrant returns, likewise, can contain explosive material.

21 For example, in *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, one reason  
22 the court granted a change of venue was because the magistrate released search warrant  
23 affidavits and returns. The court of appeal noted, at 24 Cal.App.3d, page 880, fn 7, that  
24 "the magistrate had decided to release the documents to the press because, once filed,

25 \_\_\_\_\_  
26 <sup>9</sup> Those cases are, as previously stated, W04912037-9, W04912038-7, W04912039-5,  
and W04912450-4.

1 they became public records and could not be withheld lawfully. Penal Code section  
2 1534.” (That law has changed, the Police Department is, in effect, alleging, with the  
3 enactment of the sealing provisions in California Rules of Court, rules 243.1 and 243.2.)  
4 Then, the court wrote, at 24 Cal.App.3d at page 880, “Newspaper and television  
5 broadcasts reported on the [items listed in the warrant’s return], as supplying the first  
6 physical evidence linking Corona to the killing.”

7 Moreover, if the affidavit does contain material that turns out to be incorrect, and  
8 that is publicized, Mr. Wesson’s counsel will probably not be able to correct that, because  
9 of the attorney–client privilege, ethical restrictions on attorney’s seeking news coverage,  
10 and the need to prepare for trial.

11  
12  
13  
14 **IV. Conclusion: *The Fresno Bee’s* Motion Must Be Dismissed, or Denied.**

15  
16  
17 Respectfully Submitted,

18 April 19, 2004

19 Date

20  
21 Michael O. Castro for Peter Jones

22 Peter M. Jones

23  
24  
25 Garrick Byers  
26 Garrick Byers

AFFIDAVIT OF PROOF OF SERVICE

State of California )  
County of Fresno )

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 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 19 day of April, 2004, I served the attached WESSON'S BRIEF RE: SEALED SEARCH WARRANT RECORDS. THE FRESNO BEE LACKS STANDING TO BRING THIS MOTION IN THIS CRIMINAL ACTION. WESSON IS ENTITLED TO ALL THE RECORDS FROM ALL FOUR (AND ANY OTHER) SEARCH WARRANTS on the following in said action:

By personal delivery of a true copy thereof on the office of the Fresno County District Attorney, c/o District Attorney Lisa Gamoian.

and by (1) placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Post Office mailbox in the City of Fresno, County of Fresno, State of California, addressed as follows: and (2) by sending a facsimile to the number stated.

Fresno Police Department by and through its attorney:  
Larry A. Donaldson - Sr. Deputy City Attorney  
2600 Fresno St.  
Fresno, California 93721-3602  
Facsimile: (559)488-1084

The McClatchy Company, doing business as The Fresno Bee, by and through its attorney:  
Bruce Owdom, Esq.  
Dietrich, Glasrud, Mallek, & Aune  
5250 N. Palm Avenue, Suite 402  
Fresno, California 93704  
Facsimile: (559) 435-8776

That there is delivery service by United States mail at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

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

Dated: April 19, 2004.



RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.  
DATE: \_\_\_\_\_  
BY: \_\_\_\_\_

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