

1 [Attorney Name], SBN [        ]  
2 Firm Name  
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4 City, State Zip  
5 Tel:  
6 Email:

7 Attorney for Defendant

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF [COUNTY]**

10 THE PEOPLE OF THE STATE OF

11 CALIFORNIA

12 Plaintiff,

13 vs.

14 [DEFENDANT'S NAME]

15 Defendant

CASE NO. [CASE NUMBER]

**POINTS AND AUTHORITIES IN SUPPORT OF TO COMPEL  
DISCLOSURE OF BRADY  
MATERIAL; DECLARATION OF [Attorney Name]**

**Date:**

**Time:**

**Dept:**

**Current Trial Date:**

**Case Filed:**

17  
18 PLEASE TAKE NOTICE that on [DATE], at 9TIME] or as soon thereafter as counsel  
19 may be heard, Defendant will move the court for an order dismissing certain counts from the  
20 Information in the within case.

21 This motion will be based upon this Notice; upon the attached Points & Authorities; upon  
22 the pleadings, records, and papers of the case, and upon such argument as the court may entertain  
23 at the hearing on the motion.  
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25 Respectfully submitted

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[NAME OF ATTORNEY]

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POINTS AND AUTHORITIES

**I**

**CALIFORNIA PENAL CODE SECTION 995 PROVIDES STATUTORY AUTHORITY  
FOR SETTING ASIDE AN INFORMATION OR INDICTMENT**

The statutory authority for the setting aside of an Information or Indictment is found in California Penal Code Section 995 which reads;

Section 995. Grounds; motion to set aside; delay in final ruling

(a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in this code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information:

(A) That before the filing thereof the defendant had not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause.

(b) In cases in which the procedure set out in subdivision (b) of Section 995a is utilized, the court shall reserve a final ruling on the motion until those procedures have been completed.

**II**

**IT IS IMPROPER TO HOLD A DEFENDANT TO ANSWER UNLESS THE EVIDENCE  
PRODUCED AT THE PRELIMINARY HEARING IS SUFFICIENT TO SUPPORT THE  
EXISTENCE OF EACH ESSENTIAL ELEMENT OF THE CHARGE AND THERE IS  
PROBABLE CAUSE TO BELIEVE THE DEFENDANT GUILTY.**

California Penal Code Section 872 provides for the committing of a Defendant to the Superior Court following a preliminary hearing where "it appears from the examination that a public

1 offense has been committed, and there is sufficient cause to believe the Defendant guilty  
2 thereof..." The term "sufficient cause" within the meaning of section 872 has been stated to be  
3 the functional equivalent of the term "reasonable or probable cause," [People v. Green (1969) 70  
4 Cal.2d 654, 663] and means such a state of facts that would lead a man of ordinary caution or  
5 prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.  
6 People v. Nagle (1944) 25 Cal.2d 216, 222, Rideout v. Superior Court (1967) 67 Cal.2d 471.

8 When the evidence produced at the Preliminary Hearing does not meet the foregoing test,  
9 the order of the Magistrate holding the Defendant to answer should be set aside following a  
10 motion under Section 995 of the Penal Code. See, Williams v. Superior Court (1969) 71 Cal.2d  
11 1144, 1147, and to survive such a challenge the reviewing court must inquire "...whether the  
12 evidence presented at the preliminary examination discloses circumstances from which the  
13 Magistrate might reasonably have inferred the existence of each element." (Id. at 1148-49,  
14 emphasis added.)

16 While every legitimate inference which can be drawn in favor of the Information must  
17 be, still, the burden of proof rests with the prosecution to present some evidence regarding each  
18 element of the crime of which a Defendant is accused. See, People v. Mardian (1975) 47  
19 Cal.App.3d 16, 38-40.

21 In the absence of such evidence, the court should grant the Defendant's motion and  
22 dismiss the Information.

24 At the time of the preliminary hearing on the within case, defendant Anaya was charged  
25 by Complaint with 7 counts of child molestation. At the conclusion of the preliminary hearing,  
26 Judge Charles McGrath dismissed Counts 3 and 5. (Preliminary Hearing Transcript, p. 67, lines  
27 7-8). These counts were alleged as violation of California Penal Code section 288.5(a) and  
28

1 involved alleged victims Cynthia A. and Kesia C. In dismissing these counts, the Court  
2 indicated that it did not believe that the People had proven substantial sexual conduct.  
3 (Preliminary Hearing Transcript, p. 63, lines 2-3) The Court further made a finding of law that the  
4 conduct established by the People did not fit the description of a lewd act upon a child.

5 (Preliminary Hearing Transcript, p. 63, line 27 through p. 65, line 20)

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7 Defendant was subsequently arraigned on the People's Information on April 4, 2000.  
8 The Information contains 15 counts. Count 3 of the Complaint - which was dismissed - is now  
9 represented by Counts 3, 4, 5, 6, 7, 8, and 9 of the Information. Similarly, Count 5 of the  
10 Complaint - which was also dismissed - is now represented by Counts 11, 12, and 13 of the  
11 Information.

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13 Defendant respectfully argues that these counts in the Information must be dismissed.  
14 Each of the re-introduced counts charges the defendant with a lewd act upon a child - something  
15 which the Magistrate found had not been established by the evidence. The Court commented  
16 that while the proven acts probably amounted to child annoyance, they did not rise to the level of  
17 child molestation. (Preliminary Hearing Transcript, p. 65, lines 7-20)

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21 [NAME OF ATTORNEY]

22 Attorney for [NAME OF DEFENDANT]  
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