

1 BIRGIT FLADAGER
Stanislaus County District Attorney
2 832 12th Street, Suite 300
Modesto, CA 95354
3 Telephone: (209) 525-5550
Facsimile: (209) 558-4027

4 Attorney for the Plaintiff

FILED

2015 SEP 30 AM 11:58

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY Ana Valencia DEPUTY CLERK

5
6
7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF STANISLAUS**

10 -----o0o-----

11 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO.: 1490969

12 Plaintiff,)

13 vs.)

14 FRANK CLIFFORD CARSON,
BALJIT ATWAL,
15 DALJIT ATWAL,
WALTER WESTLEY WELLS,
16 GEORGIA DEFILIPPO,
CHRISTINA DEFILIPPO,
17 EDUARDO QUINTARA, and
SCOTT MCFARLANE,

) **PEOPLE'S MOTION TO**
) **DEFENDANT'S MOTION TO**
) **CONTINUE**

) Date: October 1, 2015

) Time: 10:00 a.m.

) Dept: 26

) The Honorable Barbara Zúñiga

18 Defendants.

19 -----o0o-----

20
21 **I.**
Introduction

22 The People oppose defendant's recent motion to continue based on his failure to comply
23 with Cal. Pen. Code section 1050 and his failure to establish good cause. Multiple witnesses have
24 been subpoenaed for the October 1st hearing date by both defense and the People. The scheduling
25 of this specific matter entails multiple resources including a separate facility for the hearing,
26 additional security and staff. The People's opposition is supported by the following points and
27 authorities.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

POINTS AND AUTHORITIES

A. The Court Should Disregard Defendant's Motion as it was not filed by Counsel of Record

'It is settled that the attorney of record has the exclusive right to appear in court for his client and to control the court proceedings, so that neither the party himself (*Anglo California Trust Co. v. Kelly*, 95 Cal.App. 390; *Boca, etc., R. Co. v. Superior Court*, 150 Cal. 147; *Id.*, 150 Cal. 153; *Electric Utilities Co. v. Smallpage*, 137 Cal.App. 640, 642, 643; *Toy v. Haskell*, 128 Cal. 558; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 P. 797; *Wylie v. Sierra Gold Co.*, 120 Cal. 485; *Mott v. Foster*, 45 Cal. 72; *Board of Commissioners (of Funded Debt of City of San Jose) v. Younger*, 29 Cal. 147), nor another attorney (*Johnston v. City of San Fernando*, 35 Cal.App.2d 244, 247; *Drummond v. West*, 212 Cal. 766, 769; *McMahon v. Thomas*, 114 Cal. 588, 46 P. 732; *Prescott v. Salthouse*, 53 Cal. 221; *Hobbs v. Duff*, 43 Cal. 485; 3 Cal.Jur. 637), can be recognized by the court in the conduct or disposition of the case. (*Board of Commissioners (of Funded Debt of City of San Jose) v. Younger, supra*; *Crescent Canal Co. v. Montgomery, supra*. ' Emphasis added; *Wells Fargo & Co. v. City, etc., of San Francisco*, 25 Cal.2d 37, 42, 43; *Zurich General Accident & Liability Ins. Co., Ltd. v. Kinsler*, 12 Cal.2d 98, 105, 106.

(*People v. Merkouris* (1956) 46 Cal.2d 540, 554-55.) (Emphasis added.) (See also *Townsend v. Superior Court* (1975) 15 Cal.3d 774; *People v. Sampson* (1987, Fifth District Court of Appeal) 191 Cal.App.3d 1409.)

A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable to the decorum of the Court, and the due and orderly conduct of a cause that such attorney shall have the management and control of the action and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record the Court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney the law points out a remedy. He may move the Court for leave to change his attorney, ... Until that has been done, **the client cannot assume control of the case.** While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court unless the same is signed or assented to by such attorney. ... Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover ... it is proper to add, that to entirely ignore the attorney of record ... is unbecoming the dignity of the legal profession, ..." (*Board of Commissioners v. Younger* (1865) 29 Cal. 147, 149.) (Emphasis added.)

Magee v. Superior Court (1973) 34 Cal.App.3d 201, 213 disapproved on other grounds by *People v. Norris* (1985) 40 Cal.3d 51.

1 On August 18, 2015, defendant Carson appeared before this court with his retained
2 counsel, Preciliano Martinez. Since that date, Attorney Martinez has appeared and filed multiple
3 pleadings on defendant's behalf. Therefore, as held in the long line of cases prior to and following
4 *Magee* and *Merkouris*, defendant's submission purportedly filed by himself but signed by another
5 attorney in his stead, Steven O'Connor, is deficient and may be disregarded.

6
7 **B. In addition, Defendant's Motion to Continue is not in Compliance with the
Requirements of Penal Code section 1050**

8 Cal. Pen. Code section 1050 subdivision b provides,

9 To continue any hearing in a criminal proceeding, including the trial, (1) a written
10 notice shall be filed and served on all parties to the proceeding at least two court
11 days before the hearing sought to be continued, together with affidavits or
12 declarations detailing specific facts showing that a continuance is necessary and
13 (2) within two court days of learning that he or she has a conflict in the scheduling
of any court hearing, including a trial, an attorney shall notify the calendar clerk
of each court involved, in writing, indicating which hearing was set first.

14 Defendant's motion declares an intent to retain new counsel and various other issues
15 regarding defendant's extensive notes regarding the recusal motion and even suggestion that his
16 current counsel has failed to prepare specific pleadings. However, defendant's motion fails to
17 include a declaration under penalty of perjury or affidavits which are required pursuant to Cal.
18 Pen. Code section 1050(b)(1).

19
20 **C. Defendant's Cited Case does not Support Defendant's Request for Continuance**

21 Defendant makes a reference to *People v. Courts* (1985) 37 Cal.3d 784 in support of his
22 motion to continue, however defendant fails to note his distinct differences from defendant
23 Courts. In *Courts*, defendant was appointed a public defender at arraignment and a trial date was
24 set. *Id.* Defendant decided one month prior to trial to obtain his own counsel and he was in the
25 midst of retaining counsel but was unable to secure during the month prior to trial, as the new
26 counsel was on vacation. *Id.* When new counsel arrived, defendant and his public defender
27 attempted to obtain a court date to request a continuance but the request was denied. *Id.* At the
28 hearing on defendant's motion, the court allowed defendant to file a declaration as to the process

1 of obtaining counsel. *Id.* The court reviewed the declaration and still denied defendant's motion
2 without stating the reason. *Id.*

3 In making its decision, the Court remarked,

4 These facts are to be sharply contrasted with cases which have upheld the denial
5 of a continuance on the ground that participation by a particular private attorney
6 was still quite speculative at the time the motion for continuance was made. (See
7 *People v. Massie* (1967) 66 Cal.2d 899, 910; *People v. Murphy* (1973) 35
8 Cal.App.3d 905, 915-916; *People v. Johnson* (1970) 5 Cal.App.3d 851, 858-859;
9 *People v. Glover* (1969) 270 Cal.App.2d 255, 258-259; *People v. Farley* (1968)
10 267 Cal.App.2d 214, 220-221.) The facts here also differ from cases in which the
11 continuance request was premised on the accused's representation that he would
12 eventually be able to hire counsel of his own choosing. (See *People v. Lefer*
13 (1968) 264 Cal.App.2d 48, 50.)

14 *People v. Courts* (1985) 37 Cal.3d 784, 792 [210 Cal.Rptr. 193, 693 P.2d 778]

15 In the case noted by Courts, the *Lefer* Court noted,

16 The right to counsel, even counsel of one's choice, is to promote a just and prompt
17 administration of the law, not to thwart it. Any interpretation authorizing
18 continuances because of whim or alleged personal satisfaction of defendant rather
19 than by the judgment of the court would prostitute the recognized right to counsel
20 into a convenient tactic for delay.

21 *People v. Lefer* (1968) 264 Cal.App.2d 48, 50 (See *People v. Shaw* [1941] 46
22 Cal.App.2d 768, 774; *People v. Powers*, 256 Cal.App.2d. 904.)

23 In *Lefer*, defendant requested time to obtain funds to hire his own counsel at preliminary
24 hearing, although the court had previously appointed defendant counsel. *Id.* The Second District
25 Court of Appeal affirmed the trial court's denial of defendant's request for continuance. Here,
26 since August 18, 2015, when defendant appeared before this court, defendant has been represented
27 by counsel of his choosing. This matter is currently set for October 1, 2015, wherein multiple
28 witnesses have been subpoenaed by both the prosecution and defendant, and specific
arrangements have been made. As noted in *Lefer*, *Powers*, and *Shaw*, defendant's attempt to
obtain counsel of his choosing is not an acceptable tactic for delay.

Another significant difference from the case cited by defendant, *Courts*, is the recognition
in *Courts* that there was a retainer agreement. (*Id.* at 794 fn. 8.) Here, defendant fails to name the

1 new counsel in addition to stating that the new counsel will likely be unable to appear, requiring
2 another delay and a special appearance by another unnamed attorney.

3 In *Courts*, the appellate court found that there was no inconvenience to the court or parties
4 because “there was no evidence in the record that Shasta County Superior Courts were particularly
5 congested during this period “and because “the prosecutor failed to express any concern about an
6 inconvenience to witnesses which might have resulted if a continuance had been granted.” The
7 Court also noted that the prosecution also did not raise any hardship issues for witnesses if the
8 matter were continued.

9 Unlike *Courts*, this matter is taking place in a separate facility due to the unavailability of
10 room within the courthouse and the requirements for additional security. In addition, the Court’s
11 current congestion was made public in an article in the Modesto Bee recently depicting the logjam
12 of murder cases in Stanislaus County to be one of the worst in the state. The most recent murder
13 tried in the Stanislaus County Superior Court involved incidents from 2009. (*People v. Sifuentez*
14 et. al.) To say there is no evidence that this county is not congested similar to status of Shasta
15 County in *Courts* is wholly inaccurate.

16 Also, different from *Courts*, multiple witnesses from the District Attorney’s Office,
17 Modesto Police Department and other investigative agencies have been subpoenaed for the
18 hearing set for October 1, 2015 based on defendant’s motion for recusal of the Stanislaus County
19 District Attorney’s Office. In addition, representatives from the Attorney General’s Office of the
20 State of California are also scheduled to appear.

21 While this matter is not set for trial, defendant’s continuance request places hardship on
22 the Stanislaus County Superior Court, multiple law enforcement agencies, the Stanislaus County
23 District Attorney’s Office and the Attorney General of the State of California.

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

Based on the foregoing, the People respectfully request this court deny defendant's motion to continue.

Dated: September 29th, 2015

Respectfully submitted,

BIRGIT FLADAGER
District Attorney



MARLISA A. FERREIRA
Chief Deputy District Attorney

PROOF OF SERVICE BY ELECTRONIC MAIL

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney's Office, 832 12th Street, Suite 300, Modesto, California.

That I served a copy of the **People's Opposition to Defendant's Motion to Continue** on September 29, 2015 pursuant to California Code of Civil Procedure section 1010.6(a)(6) by electronically sending a copy thereof to the offices of Timothy Rien at rienlaw@sbcglobal.net, Tim Allen Pori at tim@defense-attorney-pori.com, Martha Carlton-Magana at carltnm@hotmail.com, Preciliano Martinez at attymartinezp@yahoo.com, Hans Hjertonsson at Hans.hjertonsson@gmail.com, Alonzo Gradford at gradfordlaw@gmail.com, Lawrence Niermeyer at lniermeyer@aol.com, Ryan Roth at rroth@Roth-LEgal.com, Bruce Perry at brucerperry@msn.com and Stephanie Mitchell at stephanie.mitchell@stanct.org.

That I placed a hard copy in the box assigned to each attorney located at the District Attorney's Office at 832 12th Street, Suite 300, Modesto, California.

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

Executed this 30th day of September 2015, at Modesto, California.


Declarant

Case No. 1490969
People v. Carson et al.
Hearing: 10/1/2015
Dept. 26