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Attorney for Defendant

GEORGE MICHAEL SHIRAKAWA

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF SANTA CLARA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs.GEORGE MICHAEL SHIRAKAWA, Defendant. | )))))))))))))) | Case No.: 213265 **NOTICE OF MOTION AND MOTION TO CONTINUE JURY TRIAL**Date: March 12, 2014Time: 1:30 Dep 24Dept. 24 |

TO: THE CLERK OF THE ABOVE-ENTITLED COURT AND ASSISTANT DISTRICT ATTORNEY JOHN CHASE:

PLEASE TAKE NOTICE THAT on March 12, 2014, at 1:30 or as soon thereafter as the matter may be heard in Department 24 of the above-entitled Court, the defendant GEORGE SHIRAKAWA will make a motion that the Court order the above-entitled matter continued pursuant to Penal Code section 1050 until a such time as counsel is reasonably able to review the discovery, thoroughly investigate the case, and file any motions necessary to safeguard Mr. Shirakawa’s constitutional rights in these proceedings.

 To summarize, this Motion is based on the following grounds:

1. Undersigned counsel has two trials set to begin between now and the third week of April, both of which were scheduled before the trial this case.
2. The trial in this case was set for April 1, 2014 over an objection by defense counsel;
3. Undersigned counsel was originally retained on this case in May, 2013 for a limited purpose and was not appointed to represent Mr. Shirakawa until October 2, 2013. At the time of appointment, counsel commenced reviewing and evaluating the voluminous discovery, court transcripts, and publicity in this case. That review is ongoing as new case materials and publicity come to light.
4. Based on the review thus far of these materials, counsel intends to file—at minimum—a Motion to Suppress, a Motion to Dismiss the Indictment (“995 Motion”), and a Motion for Change of Venue. These motions are all necessary to safeguard Mr. Shirakawa’s right to a fair trial, but they will require some time to prepare. Counsel is actively researching and drafting the first two motions at the time of this writing. The defense has already retained an expert for the Change of Venue Motion and preparations for the requisite analysis for that motion are underway. (See attached Declaration of Dr. Bryan Edelman).
5. Bicka Barlow has been retained to conduct an independent evaluation of the DNA evidence in this case in collaboration with an expert. (See attached Declaration of Bicka Barlow). There is voluminous discovery needed before they can complete this task. In addition, Mrs. Barlow has a number of scheduling conflicts that prevent her from being ready for trial by April.

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Due to these scheduling conflicts and the nature and complexity of this case,

defense counsel cannot be prepared for trial by April 1, 2014. A continuance is respectfully requested.

Dated: March 9, 2014

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 JAY RORTY

 Attorney for GEORGE SHIRAKAWA

**PROCEDURAL HISTORY RELEVANT TO CONTINUANCE**

 Defense counsel was originally retained on this case in May, 2013 for the limited purpose of researching and filing a Motion to Dismiss.[[1]](#footnote-1) That Motion was based on procedural grounds and required minimal review of the case materials. When prior counsel became a witness to certain procedural matters in the case, undersigned counsel was formally appointed to represent Mr. Shirakawa. That appointment took place on October 2, 2013.

 At that time, defense counsel began reviewing the discovery and other case materials as well as the extensive pretrial publicity about Mr. Shirakawa. This publicity commenced on or about September 2012, before the district attorney formally launched their investigation, and has continued until the time of this writing. The media coverage has spanned two criminal cases, often discussing them in tandem. All of these articles remain available on the Internet. Details of the allegations and court proceedings were also broadcast on local news networks.

 On October 23, 2013, the prosecution convened a grand jury in this case. The grand jury returned an indictment the following day. Defense counsel received a copy of the grand jury transcript on November 4, 2013.

 On November 27, 2013, police officers executed a search warrant on Mr. Shirakawa’s home. The warrant and affidavit were discovered to defense counsel on December 6, 2013.

 On February 6, 2014, the prosecution requested a trial date in this matter. A trial date was set for April 1, 2014, over defense counsel’s objection. Defense counsel subsequently received additional discovery from the prosecution on February 28, 2014.

**MEMORANDUM OF POINTS AND AUTHORITIES**

1. **THE DEFENDANT IS ENTITLED TO A CONTINUANCE UPON A SHOWING OF GOOD CAUSE.**

Penal Code section 1050, subdivision (b) provides that:

To continue any hearing in a criminal proceeding, including the trial, a written notice shall be filed and served on all the parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary . . . .

Subsection (e) further provides that “Continuances shall be granted only upon a showing of good cause . . . .” The request must be supported by declarations, unless the court finds good cause to excuse the notice and declarations requirement. The declaration may be executed on information and belief by counsel as long as it contains sufficient indicia of reliability and trustworthiness. (*People v. Gloria* (1988) 206 Cal.App.3d 1263.)

 The grant or denial of a motion for continuance is an act within the court’s discretion (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589), but this discretion is not without bounds:

While the determination of whether in any given case a continuance should be granted normally rests in the discretion of the trial court, that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. (Jennings v. Superior Court (1967) 66 Cal.2d 867.)

Although the court must consider whether the welfare of witnesses (Penal Code section 1050, subdivision (g)) and the right of the People to a speedy disposition (subsection (a)), it must also consider the right of the defendant to a fair trial. (*People v. Courts* (1985) 37 Cal.3d 784, 794-795. See also *People v. Murphy* (1963) 59 Cal.2d 818 (error to deny continuance to prepare following last minute amendment by prosecution.)

**Scheduling conflicts of Defense Counsel**

 As the court was aware when it set the trial date in this matter, undersigned counsel is scheduled to begin trial in *People v. Kenneth Clamp*, a three strikes case in Santa Cruz County, on March 24, 2014. That trial is expected to last one to two weeks. In addition, counsel is scheduled to begin a trial in *People. v. Edgar Gomar* in Monterey County on April 21, 2014. This is a homicide with gang allegations that has been set for over six months and a court room is reserved for that date. The parties have had regular conferences over the last six months and all parties anticipate going forward on April 21. That trial requires extensive preparation in the weeks prior to the trial date.

**Voluminous and Incomplete Discovery**

 Undersigned counsel was formally appointed to represent Mr. Shirakawa on October 2, 2013. Because counsel’s involvement in the case up to that point was for a limited purpose, it was only after formal appointment that counsel began reviewing the bulk of the discovery in the case. To date, counsel has received over 3,000 pages of discovery, including 1948 pages of bank records, over 250 pages related to forensic analysis, over 560 pages related to execution of search warrants, over 125 pages related to Xavier Campos’ campaign financials, and dozens of records from other aspects of the investigation. Counsel has also received over 27 hours of audio interviews and over 4 hours of jail calls. Due to counsel’s relatively recent appointment to the case and the volume of discovery involved, additional time is needed to review what has already been received.

 In addition, some of the above-mentioned discovery—such as evidence seized during the search of Mr. Shirakawa’s home—was only provided by the prosecution *after* the trial date in this matter was set at the insistence of the prosecution. There is simply not enough time between now and the trial date for defense counsel to review the discovery already provided.

**Pretrial Publicity and Change of Venue Motion**

 The pretrial publicity related to the instant case dates back to May, 2010, when the alleged offense occurred. The media coverage of Mr. Shirakawa has now spanned two criminal cases, often discussing them in tandem. New articles are published with each calling of the case. All of these articles remain available on the Internet. Details of the allegations and court proceedings have also been broadcast on local news networks.

 This prejudicial, widespread publicity raises significant concerns about Mr. Shirakawa’s ability to receive a fair trial in Santa Clara County. The defense has retained an expert, Dr. Bryan Edelman, to assess the need for a Motion for Change of Venue. Dr. Edelman has a three-stage process for assessing whether a change of venue is warranted in criminal cases. First, he conducts a preliminary review of the media coverage about the case. Second, if warranted by the media coverage, he conducts a survey to determine the extent to which the media exposure has jeopardized the defendant’s ability to receive a fair trial in that jurisdiction. He then reviews the initial results of the survey to determine whether to move on to the third stage—content analysis of the publicity, statistical analysis of the survey results, and preparation for trial. (See attached Declaration of Dr. Bryan Edelman.)

 Based on a preliminary review of certain pretrial publicity in this case, Dr. Edelman believes a community survey is warranted. The survey will take at least seven weeks to prepare, conduct, and analyze. If the results of the survey argue in favor of a change of venue, Dr. Edelman will require at least another seven weeks to conduct a detailed analysis of the survey data and prepare for the hearing on that Motion. (Declaration of Dr. Bryan Edelman.) A trial date of April 1, 2014 does not give Dr. Edelman nearly enough to time to assess the extent to which the community has been prejudiced by the media in this case. Furthermore, given that the preliminary review of the media argues in favor of a change of venue, there is some question as to where the trial will eventually take place. It is premature to set this case for trial before that question can be answered.

**Other Motions Currently Underway**

 Based on the a grand jury transcript received on November 4, 2013, defense counsel is researching and preparing a Motion to Dismiss the Indictment pursuant to Penal Code section 995. The Motion is necessary to protect Mr. Shirakawa’s right to due process at the grand jury proceeding at which he was not entitled to be present.

 Defense counsel is also researching and drafting a Motion to Suppress the items seized during the execution of a search warrant on November 23, 2013. The warrant was not provided to defense counsel until December 6, 2013. Materials seized during the execution of that warrant were not provided to defense counsel until February 4, 2014 which delayed the research and drafting process of the Motion.

**DNA Analysis and Availability of Counsel and Expert**

 The prosecution will rely heavily on DNA evidence to prove their case at trial because the evidence against Mr. Shirakawa is otherwise entirely circumstantial. Attorney Bicka Barlow has been retained to assist in conducting an independent evaluation of the DNA evidence in this case. A DNA expert was also retained on February 6, 2014. Together, they are in the process of reviewing thousands of pages of related discovery. (See attached Declaration of Bicka Barlow).

To prepare for trial, Mrs. Barlow reviews and assesses data underlying the DNA reports, consults with other experts regarding the testing and any problems or concerns with the test results or opinions of the lab, drafts *in limine* motions specific to the issues identified via document review and consultation, gathers exhibits such as journal articles and images for both in limine hearings as well as trial, and prepares testimony for hearings and trial. Due to the large volume of information in this case and the fact that two separate test systems were used, the review process itself is extensive and will take a substantial amount of time. This work cannot be completed by the time of the trial data currently set on April 1, 2014. (Declaration of Bicka Barlow).

In addition, discovery regarding DNA evidence is ongoing. The defense plans to file a Motion to Compel production of certain documents that may be voluminous and take additional time to review and analyze. Mrs. Barlow has a number of pre-existing commitments, including other trials, which prevent her from being ready for trial by April 1, 2014. (Declaration of Bicka Barlow).

Mrs. Barlow has spoken with the expert retained by the defense to review the discovery received so far. That expert will not be ready to proceed on April 1, 2014 due, in part, to the large volume of information provided to him through this case including new discovery. The expert will also be out of the country from April 9 through April 18, 2014. (Declaration of Bicka Barlow).

**CONCLUSION**

For all the above-mentioned reasons, the defense will not be prepared to proceed with trial on April 1, 2014. Mr. Shirakawa respectfully asks that the court refrain from setting a trial date in this matter until the following steps have been completed:

* 1. Dr. Edelman has determined whether pretrial publicity in this case warrants a change of venue;
	2. The defense has received and reviewed all discovery in this case, including that necessary for an independent evaluation of the DNA evidence;
	3. The defense has had a reasonable amount of time to prepare and file Motions to Dismiss pursuant to Penal Code section 995 and a Motion to Suppress.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2014 Respectfully Submitted,

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 JAY RORTY

 Attorney for Defendant

 GEORGE SHIRAKAWA**DECLARATION OF ATTORNEY JAY RORTY**

I, JAY RORTY hereby declare that:

1. I am an attorney licensed to practice law in the State of California, and I represent defendant George Michael Shirakawa in the above-entitled matter.
2. Mr. Shirakawa is charged with violating Penal Code section 594(b)(1)—vandalism—a misdemeanor. A trial date is currently set in this matter for April 1, 2014.
3. I am scheduled to begin trial in *People v. Kenneth Clamp* a three strikes case in Santa Cruz County, on March 24, 2014. It is estimated that trial will last 1-2 weeks.
4. I am also scheduled to begin a trial in *People. v. Edgar Gomar* in Monterey County on April 21, 2014. This is a homicide with gang allegations that has been set for over six months and a court room is reserved for that date. We have had regular conferences over the last six months and all parties anticipate going forward on April 21. This trial will involve extensive preparation in the weeks prior to trial and I cannot go directly from the trial of this case into trial in a homicide without this necessary preparatory period.
5. I was originally retained on Mr. Shirakawa’s case in May, 2013 for the limited purpose of filing a Motion to Dismiss. That Motion was based on procedural grounds and required minimal review of the case materials.
6. I was formally appointed to this case on October 2, 2013. At that time, I began reviewing the discovery and other case materials.
7. On October 24, 2013, a grand jury indicted Mr. Shirakawa in this case. Defense counsel received a copy of the grand jury transcript on November 4, 2013. Based on the transcript, I am currently researching and preparing a Motion to Dismiss the Indictment pursuant to Penal Code section 995.
8. On November 27, 2013, police officers executed a search warrant on Mr. Shirakawa’s home. The warrant and affidavit were discovered to defense counsel on December 6, 2013. I am currently researching and drafting a Motion to Suppress the items seized.
9. In light of the charges and Mr. Shirakawa’s political career, I also began gathering examples of pretrial publicity concerning Mr. Shirakawa and his criminal cases. My review of the extensive coverage of this case led me to contact and retain Dr. Edward Bronson, an expert on change of venue issues. Dr. Bronson began the initial inquiry into whether the extensive pretrial publicity suggested the need for a change of venue in this case.
10. Due to scheduling conflicts with Dr. Bronson, I then retained his colleague, Dr. Bryan Edelman, to take over the change of venue analysis. Drs. Bronson and Edelman share the same three-stage process for assessing whether a change of venue is warranted in criminal cases, which is described in Dr. Edelman’s accompanying Declaration.[[2]](#footnote-2) Dr. Edelman will not be able to complete the second stage of the change of venue analysis, let alone the third stage, in time for trial on April 1, 2014.
11. Bicka Barlow has been appointed to conduct an independent evaluation of the DNA evidence in this case in cooperation with a retained DNA expert. I discussed the current trial date with Mrs. Barlow and she informed me it would be impossible for her to complete the DNA analysis prior to April 1, 2014. She has provided a separate Declaration detailing the status of discovery related to DNA evidence and the Motions that need to be heard before trial.
12. I last appeared on this matter on February 6, 2014, at which time the prosecution insisted on setting the case for trial. I subsequently received additional discovery on February 8, 2014 and February 28, 2014. I am still in the process of reviewing these materials.
13. The discovery received to date totals over 3,000 pages, including 1948 pages of bank records, over 250 pages related to forensic analysis, over 560 pages related to execution of search warrants, over 125 pages related to Xavier Campos’ campaign financials, and dozens of records from other aspects of the investigation. I have also received over 27 hours of audio interviews and over 4 hours of jail calls. I am still in the process of reviewing this written and recorded discovery.
14. In addition to the above-mentioned discovery, I have received two separate packages of discovery since the trial of this matter was set.

On February 28, 2014, I received a packet of discovery including three recorded interviews that had not been previously provided, CV and other professional data regarding crime lab analysts as well as a report containing the forensic analysis of three computers seized in the search of Mr. Shirakawa’s home.

1. For all the above-mentioned reasons, I will not be prepared to proceed with trial on April 1, 2014. I respectfully ask that the court refrain from setting a trial date in this matter until the following steps have been completed:
	1. Dr. Edelman has determined whether pretrial publicity in this case warrants a change of venue;
	2. The defense has received and reviewed all discovery in this case, including that necessary for an independent evaluation of the DNA evidence;
	3. The defense has had a reasonable amount of time to prepare and file a Motion to Dismiss pursuant to Penal Code section 995 and a Motion to Suppress certain evidence in this case.
2. I will not be able to provide Mr. Shirakawa with effective assistance at trial as currently scheduled and until all those tasks are completed.

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I declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated on information and belief and, as to those matters, I believe them to be true.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2014 Respectfully Submitted,

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 JAY RORTY

 Attorney for Defendant

 GEORGE SHIRAKAWA

**PROOF OF SERVICE**

The undersigned declares:

I am a citizen of the United States. My business address is 831 California Street, Santa Cruz, California, 95060. I am over the age of eighteen years and am not a party to the above-entitled action.

On the date set forth below, I caused a true and correct copy of the within:

**NOTICE OF MOTION AND MOTION TO CONTINUE JURY TRIAL**

To be served on the following parties in the specified manner:

Via \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Superior Court of California

County of Santa Clara

190 West Hedding Street

San Jose, CA 95110

Santa Clara County District Attorney

70 West Hedding Street, West Wing

San Jose, CA 95110

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 2014 at Santa Cruz, CA.

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 JAY RORTY

Attorney for Defendant

 GEORGE SHIRAKAWA

1. Undersigned counsel was asked to step in when previous defense counsel, John Williams, became a witness to the plea negotiations in the fraud case, which formed the basis for a Motion to Dismiss the campaign mailer case. [↑](#footnote-ref-1)
2. See attached Declaration of Dr. Bryan Edelman. [↑](#footnote-ref-2)