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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA,
9 COUNTY OF MONTEREY

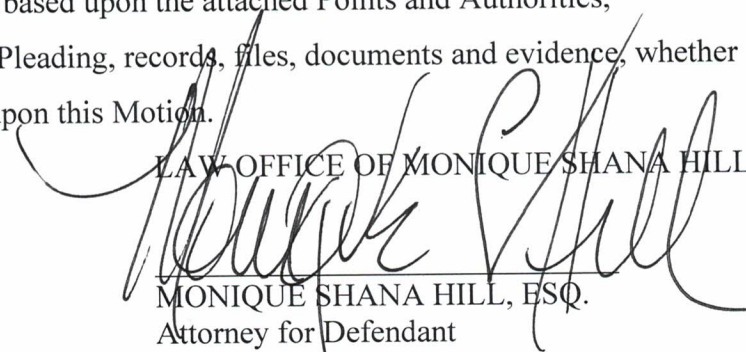
10 PEOPLE OF THE STATE OF CALIFORNIA) Case No.: 18CR005482
11 Plaintiff,) NOTICE OF MOTION AND MOTION TO
12 vs.) CONTINUE TRIAL; MEMORANDUM OF
13 SANTOS FONSECA,) POINTS AND AUTHORITIES;
14 Defendant.) DECLARATION OF MONIQUE SHANA
15) HILL
16)
17) DATE: May 13, 2020
18) TIME: 10:00
19) DEPT: 3

20 To: The District Attorney of Monterey County and to this Honorable Court;

21 **NOTICE IS HEREBY GIVEN** that on May 13, 2020, at 10.m. or as soon thereafter as
22 counsel can be heard in Department 3 of the above-entitled court, defendant, by and through
23 counsel, will move this court to continue trial.

24 The defendant brings this motion pursuant to the United States and California Constitutions
25 and Penal Code § 1050. This motion is based upon the attached Points and Authorities,
26 Declaration of Monique Shana Hill, the Pleading, records, files, documents and evidence, whether
27 oral or written presented at the hearing upon this Motion.

28 DATED: May 10, 2020

LAW OFFICE OF MONIQUE SHANA HILL

MONIQUE SHANA HILL, ESQ.
Attorney for Defendant
Santos Fonseca

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POINTS, AUTHORITIES, AND ARGUMENTS
IN SUPPORT OF MOTION

1. INTRODUCTION.

In a multiple-count criminal information filed on March 26, 2019, Mr. Fonseca is charged with two violations of Penal Code section 187, subdivision (a), for the willful, deliberate, and premeditated murder, in addition to firearm allegations pursuant to Penal Code section 12022.53(a), and a prior conviction pursuant to Penal Code Section 1170.12 (c) (1).

On or about March 17, 2020, California issued a shelter in place order for all residents due to a deadly COVID 19 pandemic like California in our lifetime has never seen. Governmental leaders were helpless to contain this highly contagious virus in any other medically efficient way than to quarantine the State of California. Residents were in effect under house arrest except to perform essential activities, which was to go to and from the grocery store.

Courts throughout California at the direction of the Judicial Council were emptying jails at record numbers. Those with low level felonies, and probation violations otherwise no bail warrant, were release on their own recognizance. The very public discussion and reason for this release of inmates was the risk of harm to the inmates outweighed the rehabilitative effect. In sum, it was a humanitarian issue.

The CDC, and other health authorities spoke to specific segments of the community that were at a higher risk than others. Specifically, the elderly population, those with respiratory ailments, asthma, COPD, etc and those who were immune-compromised were especially susceptible to the more harmful effects, even death from this virus.

We are currently in a State of Emergency, shelter in place environment. The Order is due to expire on May 31, 2020. The Judicial Council has suspended all jury trials at the court's discretion until June 15, 2020. As of May 10, 2020, there is no guarantee that the shelter in place will not be extended as it was previously. As of May 8, 2020, there were 2049 confirmed new cases of COVID-19, and 93 deaths in the State of California.

As of May 7, 2020, California Governor Gavin Newson held a press conference briefing. He discussed the fact that the next phase of the re opening of California is "not a return to normal", "COVID 19 is still spreading", it is still alive. Curbside retailers are required to wear masks and gloves, manufacturers are advised to have "open air breakrooms", all to "reduce risk" to residents

1 of contracting COVID 19. All of the implemented policies and procedures are to “reduce the risk”
2 and to not “lose the gains that we have had during the past weeks”

3 In order to not lose the gains and to reduce the risk of contagion, Governor Newsom and the
4 California Secretary of Health, Dr. Mark Ghaly, stated that California must adopt “industry wide
5 guidance”, and should do the following; 1. Risk assessment, 2. Train employees, 3. Screen for
6 symptoms, 4. Stay home if sick, and they should implement “site specific protocols”, for example,
7 cleaning and disinfecting sites and installing sanitizer dispensers. He added that “regional
8 variance”, in other words, moving further, when counties “can attest they meet California public
9 health guidelines”.

10 Governor Newsom emphasized that these policies and procedures in order to address the
11 future re opening of California are to address the “magnitude of what we are up against”. More
12 engagement and mixing puts more at risk and “this is why guidelines are enacted and enforced”.

13 As of May 8, 2020, the Monterey Superior Court sent out a press release that will allow
14 jurors with “health concerns” to defer their jury service to another day. There general public will
15 be excluded from viewing jury trials due to the accommodation of social distancing.

16 ARGUMENT

17 2. THE COUNTY OF MONTEREY, MONTEREY SUPERIOR COURT IN
18 CONJUNCTION WITH A MEDICAL ADVISOR, CDC, OR DEPARTMENT OF HEALTH,
19 HAS NOT ISSUED ANY POLICIES OR PROCEDURES TO IMPLEMENT AND ENFORCE
20 TO PROTECT LITIGANTS AND THE GENERAL PUBLIC, ESPECIALLY THOSE AT
21 “HIGHER RISK” AS REFERRED TO BY THE GOVERNOR

22 The COVID 19 State of Emergency is still in existence. Governor Newsom stated that
23 “covid 19 is still spreading, and is still alive”. There are policies and procedures being issued for
24 the small amount of retailers that are being allowed to offer curbside service. This re opening is
25 “not a return to normal” as stated by Governor Newsom. Individuals are not allowed to be in a store
26 together, let alone a small area such as a courtroom.

27 From the moment litigants and attorneys enter the Monterey Superior Court, there are
28 currently no policies nor procedures to guarantee health safety from this deadly virus. There are
no test centers, no thermometer readings, no disinfecting stations, no sanitizing stations and no
posted guidelines and enforcement procedures.

1 Monterey County Superior Court must address this issue and protect its litigants. There are
2 no policies and procedures in place from the moment jurors will show up to court for their jury
3 duty to the time that they will deliberate. There are no procedures to address hardship claims that
4 will not doubt arise when jurors are concerned about sitting close to others so close to the
5 quarantine. There are no polices and procedures regarding juror deliberation and social distancing.

6 Counsel for the defense normally sits close to her client. There is no procedure to address
7 how the court is going to achieve social distancing in order to keep litigants safe and at the same
8 time address Mr. Fonseca's right to participate in his defense.

9 The Courts have not addressed the policies and procedures that will affect witnesses while
10 they are on the stand testifying. A mask will interfere with Mr. Fonseca's right to confront and
11 cross examine witnesses. Witnesses testifying remotely will bring up a host of other issues.

12 Without specific scientific data based implemented policies and procedures, a case of this
13 magnitude should not proceed.

14 At this time, it is expected that in the coming months the courts will be expected to develop
15 policies, procedures and deadlines for implementation. At that point the system will have the
16 protections for the litigants and the public.

17 By no means should litigants fail to come to court, go to trial, or litigate for fear of catching
18 COVID 19. However, it is not reasonable to expect the public, Mr. Fonseca or his attorneys to go
19 to trial in the face of the largest most serious pandemic in our lifetime without any polices,
20 procedures and health protections.

21 The Monterey Superior Court, in its press release, has stated that jurors can defer their
22 service for "health concerns" to a later date. But, has completely ignored litigants who have the
23 same health concerns. There are litigants who are 65 and older, from especially vulnerable ethnic
24 groups, asthmatics, COPD, immune-compromised, and a host of other medical issues. Attorneys,
25 reporters and others in the courtroom are at the same risk to themselves if they are vulnerable, or at
26 risk of infecting loved ones who are vulnerable.

27 It is just as unreasonable to order Mr. Fonseca's team to go to trial in this uncertain, and
28 unprotected environment as it is to never return to court insisting on one hundred per cent
29 protection.

1 3. MR. FONSECA IS CONSTITUTIONALLY AND STATUTORILY ENTITLED TO
2 RECEIVE A FAIR TRIAL AND DUE PROCESS UNDER THE LAW; UNDER THE CURRENT
3 CONDITIONS MR FONSECA WILL NOT RECEIVE DUE PROCESS
4

5 The California Constitution, Art. I, sec. 15 and the Sixth and Fourteenth Amendments to
6 the United States Constitution provide a criminal defendant with the right to be represented by
7 counsel. Inherent in this guarantee is the requirement that counsel provide “diligent, substantial
8 representation, not simply a pro forma appearance.” (*People v. Locklar* (1980) 84 CA3d 224,
9 229) The California Supreme Court has stated that the measuring standard is whether counsel has
10 carried out his responsibilities as a “reasonably competent attorney acting as a diligent,
11 conscientious advocate.” (*People v. Pope* (1979) 23 C.3d 412, 424)
12

13 In *People v. Fontana* (1982) 139 CA3d 326 the court noted the importance of having
14 prepared counsel at a probation violation hearing. While the court has discretion regarding the
15 granting of continuances, the *Fontana* court stated:

16 “...that discretion may not be exercised in such a manner as to deprive the
17 defendant of reasonable opportunity to prepare his defense. That counsel for a
18 defendant has a right to reasonable opportunity to prepare ... is as fundamental as
19 is the right to counsel.” [Citations] ” (*Jennings v. Superior Court* (1967) 66
20 C2d 867, 875-876; accord *People v Maddox* (1967) 67 C.2d 647, 652) Put
21 plainly, when a denial of a continuance impairs the fundamental rights of an
22 accused, the trial court abuses its discretion. (*People v. Locklar* (1980) 84 CA3d
23 224, 230)” (*Fontana* at p. 333)

24 In *Hughes v. Superior Court* (1980) 106 CA3d 1, 3 the Court of Appeal found that “To
25 force an unprepared counsel to proceed to trial regardless of the reasons for the lack of
26 preparedness would result in a violation of constitutional rights.”

27 What all of the above cases stand for is that once counsel makes it clear that he is
28 unprepared to render effective assistance, for whatever reasons, it is an abuse of the court’s
discretion to deny the request for the continuance and force the defendant to proceed, with counsel

1 who is unprepared. Counsel herein has put forward good cause as to why she is not prepared to
2 render the required effective assistance to Defendant if the trial is to proceed. Counsel is
3 meaningless unless that counsel is prepared. As the United States Supreme Court has stated:

4 “A myopic insistence upon expeditiousness in the face of a justifiable request for
5 delay can render the right to defend with counsel an empty
6 formality.” (Ungar v. Sarafite (1964) 376 U.S. 575, 589, 11 L.Ed2d 921,
7 931).

8 This environment is one that has never arisen in any of our lifetimes. All of us
9 have been in effect under house arrest, isolated from our clients, our colleagues, and
10 some of us, our families. This was to guarantee that we were safe from this deadly
11 disease. As of composition of this motion, we are still under quarantine, less than three
12 weeks from June 1, 2020.

13 To say that counsel is unprepared to go forward in a pandemic is an
14 understatement. The State of California is unprepared to allow residents to leave their
15 homes for fear of their safety at this point. The State does not believe that it is safe
16 enough at this time for residents to get a haircut or a manicure, or enter a restaurant.
17 This is the environment that we are in at present.

18 Counsel for the defense has a duty of zealous representation and to be effective,
19 according to the Strickland standard. If compelled to go to trial where the client is
20 facing life without the possibility of parole in this environment, Mr. Fonseca faces
21 numerous constitutional violations, among many more.

22 **"5th"= FIFTH AMENDMENT DUE PROCESS**

23 The Fifth Amendment of the U.S. Constitution due process guarantee of a fair trial
24 is made available to the states through the 14th amendment. Franklin v. Duncan (9th Cir. 1995) 70
25 F. 3d 75, *adopting*, 884 F. Supp.1435, 1456 (N.D. Cal. 1995) (denial of introduction of defense
26 evidence to impeach complaining witness denied due process fair trial.)
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2 **"6th"=SIXTH AMENDMENT CONFRONTATION & RIGHT TO PRESENT EVIDENCE**
3 **IN DEFENSE OF THE ACCUSED**

4 This objection stated that the defendant's state and federal constitutional
5 rights to confront witnesses against him as guaranteed by the Sixth and
6 Fourteenth Amendments to the United States Constitution, and under the
7 similar, but separate and independent California Constitutional protections
8 provided by article one, sections seven and fifteen are violated. U.S. v.
9 Kojayan, (9th Cir. 1993) 8 F. 3d 1315, 1321, (prosecution violates the
10 "advocate-witness" rule by asserting "facts" not in evidence); U.S. v. Prantil,
11 (9th Cir. 1985) (unfairly impugning defense counsel denies due process); *in*
12 *accord see* U.S. v. Rodrigues, (9th Cir. 1988) 159 F.3d 439, 451.

13
14 A few, but by no means exhaustive list of the violations of the 5th and 6th
15 amendments that will occur are the following;

- 16
17 1. Suggestive ID of the Defendant if he is the only one to remove his mask
18 during the trial proceeding.
19 2. Improper ID/ if everyone is wearing masks.
20 3. The inability of the jury to competently view and assess witnesses according
21 to CALCRIM jury instructions while they are testifying.
22 4. The inability of the jury to competently and constitutionally view and assess
23 the defendant.
24 5. The inability of the jury to hear and understand litigants through a mask.
25 6. At this time, California is not allowing at this time a gathering of more than
26 ten people in a small room together.
27 7. The court reporter having the inability to fully hear and understand the
28 litigant in order to make a proper record.

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8. The public’s exclusion from the courtroom, directly impacting Mr. Fonseca’s right to a public trial.
9. The exclusion of large segments of a cross section of the community due to certain age and ethnic groups exempting themselves from jury service.
10. The inability of counsel to confer and consult with the client confidentially during trial due to social distancing protocol will directly violate the client’s right to a fair trial and access to counsel.
11. Presently, counsel is not allowed access to the jail because the health conditions are unsafe. Counsel has had no face to face in person consultation with her client since before the quarantine. Thus, preparation has been impaired.
12. Allowing the jury to defer their service out of an Emergency Health pandemic but compelling litigants is patently unsafe and unfair.
13. Allowing the jury to defer their service out of Emergency Health pandemic but compelling witnesses to testify who could likely infect themselves or family members is patently unsafe, unfair and unconstitutional.
14. It is unknown at this time if Defendant Fonseca will be expected to waive all of his constitutional objections in order to accommodate the Superior Court.

The above objections are a small number of many that make the inflexible idea of going to trial an astonishingly bad idea.

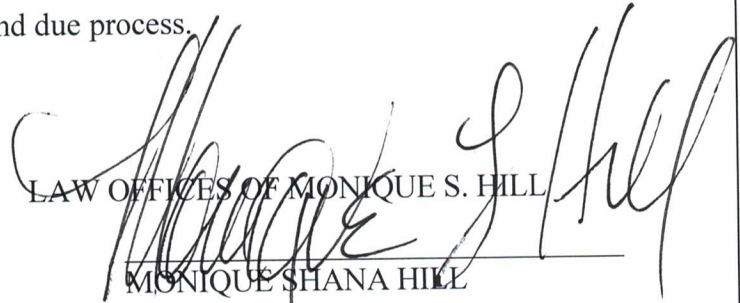
Mr. Fonseca asks this Court to proceed when proper procedures are in place to both accommodate his defense team, his constitutional rights and when the State of California and deemed the lack of rise of new deaths and new cases. This is reasonable and likely to occur in the foreseeable future. It is reckless and unreasonable to risk life and health over a time line that the Defendant is not insisting on.

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4. CONCLUSION

For the above stated reasons, the defendant, by and through counsel, requests that this court continue this trial until policies and procedures can assure both Mr. Fonseca and his attorneys' health & safety and his right to a fair trial and due process.

Dated: May 10, 2020


LAW OFFICES OF MONIQUE S. HILL
MONIQUE SHANA HILL
Attorney for Defendant,
SANTOS FONSECA

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DECLARATION OF MONIQUE SHANA HILL
IN SUPPORT OF MOTION

I, Monique Shana Hill, declare under penalty of perjury as follows:

1. I am an attorney at law, duly licensed to practice law in all courts of the State of California and Federal Court. I have been appointed to represent Santos Fonseca, the defendant herein.

2. Mr. Fonseca is charged with two counts of first degree willful premeditated murder, Penal Code section 12022.53, among other charges. He is facing ultimately life in prison without the possibility of parole.

3. I have been assigned to Mr. Fonseca's case since his private attorney conflicted, approximately one year. Mr. Fonseca has waived time and would like his current defense team to continue representing him. He has acquired two new cases since this original case. I am the attorney representing him on these matters as well. He has waived time. I do not currently have discovery in his latest case, although requested.

4. For approximately 8-9 Weeks, California residents have been confined to their homes due to a deadly infectious virus COVID 19. Attorneys have been limited in their travel to and from court and have not been able to see clients face to face but rather can interact remotely. This disease is so deadly that state prison clients have not been able to see their attorneys, nor been transferred to or from Court. The judicial counsel has ordered record numbers of people released from local jails who would not otherwise have been released due to the health hazard.

5. Mr. Fonseca is set for trial June 1, 2020, and is asking this court for a continuance until the State of California has set out policies and procedures that guarantee both a right to a fair and public trial, and one that does not expose Mr. Fonseca, nor jurors and litigants to a deadly disease.

6. Currently Monterey Superior Court has no defined policies and procedures that will guarantee members of the defense, including attorneys, defendant, investigators, that their health is not compromised. This is a procedure that health professionals, not attorneys, should prepare.

7. Monterey Superior Court has no defined policies and procedures that will guarantee Mr. Fonseca's due process rights that those testifying will be unmasked so that the jury can evaluate them under the established CALCrim jury instruction. If testifying remotely, there is no

1 way to evaluate witnesses to guarantee that there is no one off camera or assisting them with their
2 testimony.

3 8. Monterey Superior Court has no defined policies and procedures that rise to the
4 minimal level that Governor Newsom and Dr. Ghaly referred to at their latest news conference.

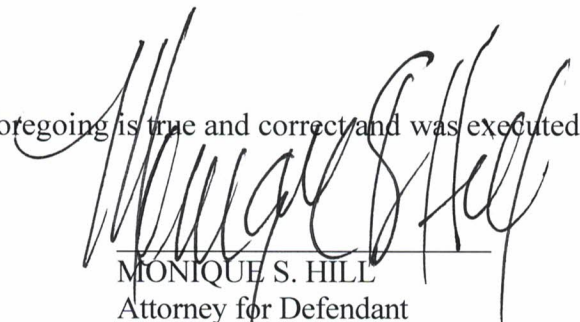
5 9. Monterey Superior Court has no defined policies and procedures regarding jury
6 selection and jury deliberation that guarantee Mr. Fonseca a right to a fair cross section of the
7 community, and due process.

8 10. Monterey Superior Court has no defined policies and procedures regarding “social
9 distancing” and how that will be implemented so that Mr. Fonseca will be able to interact with his
10 defense team so that his right to a fair trial and due process is not compromised. There are no
11 policies and procedures to suggest how social distancing gets accomplished and at the same time
12 Mr. Fonseca’s right to interact confidentially with his attorney.

13 11. The Monterey Superior Court has potentially exempted huge segments of the jury
14 pool based on “health concerns” but has neglected to consider litigants’ concerns. This is patently
15 unfair and of particular concern to those in vulnerable groups.

16 12. I am one who suffers from Asthma. Mr. George, co counsel for Mr. Fonseca, lives
17 with very small children, and two elderly immune-compromised people. These are serious
18 concerns for both counsel.

19 I declare under penalty of perjury that the foregoing is true and correct and was executed at
20 Hollister, California, on May 10, 2020



21 MONIQUE S. HILL
22 Attorney for Defendant
23 SANTOS FONSECA
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