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9 PHONG TRAN

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF ALAMEDA

12 PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 vs.

15 PHONG TRAN,

16 Defendant.

Case No. 23-CR-003838

**OPPOSITION TO MOTION TO  
CONTINUE PRELIMINARY HEARING**

Date: June 12, 2023

Time: 9:00 a.m.

Dept.: 11

17  
18 **TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT AND**  
19 **THE DISTRICT ATTORNEY FOR COUNTY OF ALAMEDA:**

20 COMES NOW DEFENDANT, PHONG TRAN, by and through counsel, and  
21 respectfully submits this Opposition to the People's Motion to Continue Preliminary Hearing.  
22 As will be explained below, the People have not stated, and do not have, good cause to  
23 continue the preliminary hearing as required by Penal Code section 1050. The defendant  
24 reserves the right to make additional oral argument at the hearing on this matter.

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1 **I. INTRODUCTION**

2 The District Attorney made a decision, without evidence of any crime(s), to file  
3 criminal charges and obtain an illegal no-bail warrant<sup>1</sup> for events dating as far back as 11+  
4 years ago. As a result of the charges, as well as completely inaccurate public statements issued  
5 by the District Attorney about the facts of the case (despite claims in other cases that such  
6 comments would violate ethical requirements)<sup>2</sup> and the media attention that followed, Phong  
7 Tran and his reputation have suffered extreme and undue harm. Now that this criminal case  
8 has been set in motion, the District Attorney is attempting to buy more time in a transparent  
9 attempt to cobble together the semblance of a case that they hope might convince a judge to  
10 ignore the law and get them past a preliminary hearing. Eagerly seeking to clear his name, the  
11 defendant invoked his right to a speedy preliminary hearing, and demands to proceed.

12 **II. THE STRICT REQUIREMENTS OF PENAL CODE SECTION 1050**

13 The subsections of Penal Code section 1050 pertinent to this Motion and Opposition  
14 state:

15 (b) To continue any hearing in a criminal proceeding, including the trial, (1) a  
16 written notice shall be filed and served on all parties to the proceeding at least two  
17 court days before the hearing sought to be continued, together with affidavits or  
18 declarations detailing specific facts showing that a continuance is necessary...

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18 <sup>1</sup> The California Constitution, Article I, Section XII of the California Constitution provides in pertinent part that,  
19 “a person shall be released on bail by sufficient sureties except for:

20 (a) Capital crimes when the facts are evidence or the presumption great;

21 (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on  
22 another person, when the facts are evident or the presumption great and the Court finds based upon clear  
23 and convincing evidence that there is a substantial likelihood the person’s release would result in great  
24 bodily harm to others; or

25 (c) Felony offenses when the facts are evident or the presumption great and the Court finds based on clear  
26 and convincing evidence that the person has threatened another with great bodily harm and that there is a  
27 substantial likelihood that the person would carry out the threat if released.”

28 The defendant is not charged with any crimes remotely within the purview of Section XII and was committed  
illegally without bail as a result of the warrant issued by the District Attorney.

<sup>2</sup> In cases not involving law enforcement defendants, the District Attorney has explicitly declined to comment on  
the facts of the case(s), citing ethical requirements: See, for example, [https://www.alcoda.org/a-statement-from-  
alameda-county-district-attorney-pamela-y-price/](https://www.alcoda.org/a-statement-from-alameda-county-district-attorney-pamela-y-price/) beginning at approximately 35 seconds running time. See also,  
[https://www.youtube.com/watch?v= pTGj0cSmU4](https://www.youtube.com/watch?v=pTGj0cSmU4) beginning at approximately 59 seconds running time.

Contrast these public statements with that relating to the present case, wherein the District Attorney provides an  
inaccurate and in-depth commentary about the facts of the instant case:

<https://www.youtube.com/watch?v=G3o8QheDeC0&t=8s>

1 (c) Notwithstanding subdivision (b), a party may make a motion for a continuance  
2 without complying with the requirements of that subdivision. However, unless the  
3 moving party shows good cause for the failure to comply with those requirements,  
the court may impose sanctions as provided in Section 1050.5.

4 (d) When a party makes a motion for a continuance without complying with the  
5 requirements of subdivision (b), the court shall hold a hearing on whether there is  
6 good cause for the failure to comply with those requirements. At the conclusion of  
7 the hearing, the court shall make a finding whether good cause has been shown  
8 and, if it finds that there is good cause, shall state on the record the facts proved  
9 that justify its finding. A statement of the finding and a statement of facts proved  
10 shall be entered in the minutes. If the moving party is unable to show good cause  
11 for the failure to give notice, the motion for continuance shall not be granted.

12 (e) Continuances shall be granted only upon a showing of good cause. Neither the  
13 convenience of the parties nor a stipulation of the parties is in and of itself good  
14 cause.

15 **A. Good Cause Has Not Been Stated, Nor Does It Exist, as Required for this**  
16 **Continuance**

17 In their one-paragraph Motion, followed by a four-sentence Declaration from assigned  
18 Deputy District Attorney Zachary Linowitz (“DDA Linowitz”), the prosecution claims that  
19 they have good cause to continue the preliminary hearing. It is baldly asserted that Inspector  
20 Michael Brown is a “necessary and material” witness, and that he will be “out of town” and  
21 unavailable. We do not know where he will be, for how long, the importance of the supposed  
22 vacation/travel, why he is unable to attend court, and when this apparent travel was planned.  
23 This matter was set for preliminary hearing at the time of arraignment on Wednesday April 26,  
24 2023, on a no-time-waiver basis as to the “60<sup>th</sup> day” or “last day” for hearing. The defendant,  
25 nor the Court was alerted to any such witness issue until more than a month later, on June 5,  
26 2023; one week before the preliminary hearing.

27 The convenience of the parties is not good cause, as cited above. To establish good  
28 cause for a continuance, the People must show they have "exercised due diligence to secure the  
witness's attendance, that the witness's expected testimony was material and not cumulative,  
that the testimony could be obtained within a reasonable time, and that the facts to which the  
witness would testify could not otherwise be proven." (*People v. Roybal* (1998) 19 Cal.4th  
1231A, 504, *as modified* (Jan. 13, 1999).) We have no information regarding what, if any,

1 efforts have been made to secure the attendance of this witness.

2 We do have information regarding the nature of his expected testimony, and the other  
3 options available. As far as the defendant is aware, Inspector Brown was not involved in the  
4 instant case until on or about June 1, 2023. This would be over a month after charges were  
5 filed. On Friday, June 2, 2023, DDA Linowitz provided discovery to the defense that included  
6 Inspector Brown for the first time. Inspector Brown was interviewed twice by the assigned  
7 Inspector in the instant case, Andrew Koltuniak, on June 1 and June 2, 2023, respectively. The  
8 conversation centered around the service of subpoenas on witnesses for the underlying  
9 homicide preliminary hearing back in 2014. The information provided bears no relevance to  
10 the instant matter.

11 Even assuming, for the sake of argument, that there is some potential relevance to  
12 Inspector Brown's testimony at the preliminary hearing, it defies logic to suggest that it is  
13 necessary or material, since his involvement was not apparently known at the time of charging.  
14 Again, with the preliminary hearing date fast-approaching, the defense received on a Friday  
15 this peculiar discovery of two audio-recorded interviews occurring on June 1 and June 2 of  
16 2023, one District Attorney Inspector interviewing another, on issues that do not appear to  
17 relate in any relevant way to the charges. The People then filed their Motion to Continue on  
18 the following Monday.

19 Further, even if the testimony of Inspector Brown was relevant and otherwise  
20 admissible, if there is another way to prove the facts at issue, good cause does not exist to  
21 continue the matter. Obviously, at a preliminary hearing, Proposition 115 allows qualified  
22 witnesses to testify as to some hearsay. In fact, at the conclusion of his interview of Inspector  
23 Brown on June 1, 2023, Inspector Koltuniak states, "I don't think there's going to be really too  
24 much to make out of this...I'll 115 it for this conversation..."

25 The People's Motion to Continue must be denied because the testimony from Inspector  
26 Brown is irrelevant, likely inadmissible, certainly not material or necessary, and even if it was,  
27 can be and was intended to be introduced through another witness anyway.

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1           **B.     The People Failed to Comply with the Strict Requirement That They Detail,**  
2           **with Specific Facts, the Necessity for the Requested Continuance**

3           Section 1050(b), cited above, requires that a party moving to continue a hearing,  
4 regardless of the defendant’s assertion of speedy hearing or trial rights, submit affidavits or  
5 declarations detailing specific facts showing that a continuance is necessary. The People  
6 merely submitted a Declaration from DDA Linowitz stating the following:

- 7           1. I am a deputy district attorney in the Public Accountability Unit of the Alameda  
8 County District Attorney’s Office, based in Oakland, California;  
9           2. The preliminary hearing in this case is currently scheduled for June 12, 2023,  
10           and the 60<sup>th</sup> day is June 26, 2023;  
11           3. DA Inspector Michael Brown, a necessary and material witness, is out of town  
12           and unavailable to testify on the date currently scheduled; and  
13           4. I am requesting that the court reset the preliminary hearing on June 16, 2023.

14           The Declaration comes not from the allegedly unavailable Inspector, but from the DDA  
15 assigned to the case. As to items 1, 2 and 4, the information contained therein is known or a  
16 given. There is no relevance and there are no specific facts included in those sentences that  
17 bear on the issue of good cause. The scant information provided as to the “need” for the  
18 continuance is the conclusory statement in line-item number 3: that Inspector Brown is  
19 “necessary and material” and that he “is out of town” and unavailable to testify on June 12,  
20 2023. That is it.

21           This is the virtual opposite of “specific facts.” Presumably, an attempt will be made at  
22 the hearing on this Motion to supplement those facts. While we do not anticipate additional  
23 information would help, that is beside the issue as to the legal requirement cited above. The  
24 Penal Code specifically and strictly requires that the Motion be accompanied by an affidavit or  
25 declaration detailing the specific facts as to why the continuance is necessary. The failure to  
26 provide that information in their filing is fatal to the request, and cannot be rehabilitated by oral  
27 argument, other than as stated below. If the Court grants the continuance despite this failure to  
28 comply with the pleading requirements of Section 1050(b), it renders the requirement  
meaningless, again, unless at a hearing on that issue, the Court finds good cause for the failure,  
as will be outlined below.

1           **C. If the People Believe They Had Good Cause to Fail to Comply with the**  
2           **Requirements of Section 1050(b), a Hearing Must Be Held on That Issue**

3           Because the People did not comply with Section 1050(b), should the People contend  
4 that they had good cause for the failure, the Court must hold a hearing to decide whether in fact  
5 there *was* good cause for the failure pursuant to 1050(d). At the conclusion of this hearing, the  
6 Court must make a finding whether good cause has been shown for the failure to comply with  
7 the pleading requirements, and, if it finds that there is good cause, shall state on the record the  
8 facts proved that justify its finding. A statement of the finding and a statement of facts proved  
9 must be entered in the minutes. The failure to show good cause for the failure to comply with  
10 Section 1050(b) must result in the denial motion of the motion to continue.

11           There is no conceivable basis that the People would have to suggest that there was good  
12 cause for the lack of any facts or specificity in their Declaration, or for Inspector Brown to aver  
13 to his unavailability. This is a high-profile and clearly important case to the District Attorney.  
14 They took great pains and efforts to make a public display of his (illegal) incarceration and  
15 issue public statements maligning Detective Tran, yet here we have an utter failure to comply  
16 with the good cause and pleading requirements that would allow for a continuance. If there is  
17 an explanation as to why no facts were provided in a Declaration supporting the request for a  
18 continuance, the defense looks forward to hearing it.

19           **III. CONCLUSION**

20           The Alameda County District Attorney's Office made a decision to cause a man to be  
21 illegally jailed and to face felony charges. We believe they are not prepared to prove them,  
22 because there is no basis for the charges.

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1 They now seek to delay the hearing where they will be required to put on evidence of guilt,  
2 without the required good cause, and without having complied with the strict procedural  
3 requirements that protect the rights of defendants; including, even, a cop. Their motion to  
4 continue the preliminary hearing must be denied.

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Dated: June 9, 2023

Respectfully submitted,  
**RAINS LUCIA STERN**  
**ST. PHALLE & SILVER, PC**



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By: Andrew M. Ganz  
Attorneys for Defendant  
PHONG TRAN

1 **PROOF OF SERVICE**

2 I am employed in the City of Pleasant Hill, State of California. I am over 18 years of  
3 age and not a party to this action. My business address is Rains Lucia Stern St. Phalle & Silver,  
PC, 2300 Contra Costa Blvd., Suite 500, Pleasant Hill, California 94523.

4 On the date below I served a true copy of the following document(s):

5 **OPPOSITION TO MOTION TO CONTINUE PRELIMINARY HEARING**

6 on the interested parties to said action by the following means:

- 7  **(BY MAIL)** By placing a true copy of the above, enclosed in a sealed envelope with  
8 appropriate postage, for collection and mailing following our ordinary business  
9 practices. I am readily familiar with this business's practice for collecting and  
10 processing correspondence for mailing. On the same day that the correspondence is  
11 placed for collection and mailing, it is deposited in the ordinary course of business  
12 with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- 13  **(BY FACSIMILE TRANSMISSION)** By transmitting a true copy of the above by  
14 facsimile transmission from facsimile number (925) 609-1690 to the attorney(s) or  
15 party(ies) shown below.
- 16  **(BY MESSENGER)** By placing a true copy of the above in a sealed envelope and by  
17 giving said envelope to an employee of First Legal for guaranteed, same-day delivery  
18 to the address(es) shown below.
- 19  **(BY HAND DELIVERY)** By personal delivery of a true copy of the above to the  
20 attorneys or parties shown below
- 21  **(BY E-MAIL or ELECTRONIC TRANSMISSION)** Based on a court order or an  
22 agreement of the parties to accept service by e-mail or electronic transmission, I  
23 caused the documents to be sent to the persons at the e-mail addresses listed below. I  
24 did not receive, within a reasonable period of time, after the transmission, any  
25 electronic message or other indication that the transmission was unsuccessful.

26 Zachary Linowitz  
27 Assistant District Attorney  
28 Alameda County District Attorney's Office  
1225 Fallon St., #900  
Oakland, CA 94612  
Zachary.Linowitz@acgov.org

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

DATED: June 9, 2023

  
\_\_\_\_\_  
Amy Mulligan