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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NICOLA CHRISTOPHER BUCCI,

Petitioner,

v.

**THE SUPERIOR COURT OF
SOLANO COUNTY,**

Respondent;

THE PEOPLE,

Real Party in Interest.

A135321

**(Solano County
Super. Ct. No. FCR290146)**

THE COURT:*

Petitioner Nicola Christopher Bucci was convicted of two counts of second degree murder, with an enhancement found true, and was sentenced to 23 years to life in state prison. We affirmed the judgment of conviction on appeal in *People v. Bucci* (June 23, 2010, A124228 [nonpub. opn.]). Petitioner now collaterally attacks his conviction by way of habeas corpus petition.

Petitioner initially sought habeas corpus relief in respondent superior court. By an order filed March 6, 2012, respondent superior court, through the Honorable Harry S. Kinnicutt, denied the requested relief.

* Before Simons, Acting P.J., Needham, J. and Bruiniers, J.

The parties to this proceeding agree that Judge Kinnicutt was disqualified from ruling on petitioner's postconviction habeas corpus petition, since on December 20, 2006, during the underlying criminal case (*People v. Bucci* (Super. Ct. Solano County No. FCR238111)), Judge Kinnicutt accepted petitioner's peremptory challenge. (Code Civ. Proc., § 170.6; *Yokley v. Superior Court* (1980) 108 Cal.App.3d 622.)

We previously notified the parties that we might deem the petition for writ of habeas corpus as seeking a writ of mandate to compel respondent superior court to vacate its March 6, 2012 order denying habeas corpus relief, and to order the presiding judge of respondent superior court, or his or her designee, to reassign petitioner's habeas corpus petition to a different judge for decision. The parties have filed briefs in response to our notice.

The Attorney General argues that petitioner has forfeited, or waived, any objection to Judge Kinnicutt's involvement in the superior court habeas corpus proceeding. But as petitioner's reply aptly notes, the Attorney General's argument assumes petitioner had *notice* of Judge Kinnicutt's assignment to decide petitioner's habeas corpus petition *before* Judge Kinnicutt rendered his decision. The Attorney General has proffered no evidence suggesting petitioner had advance notice of Judge Kinnicutt's assignment, and petitioner's counsel has filed a declaration denying such notice. Since the record before us does not demonstrate that petitioner had advance notice of Judge Kinnicutt's assignment to decide petitioner's habeas corpus petition, we cannot sustain the Attorney General's argument.

In accordance with our notification to the parties that we might do so, we will deem the petition herein as seeking a writ of mandate, and direct issuance of a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) Petitioner's right to relief is obvious, and no useful purpose would be served by issuance of an alternative writ, further briefing, and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see *Lewis v. Superior Court* (1999) 19

Cal.4th 1232, 1236-1237, 1240-1241; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)¹

Let a peremptory writ of mandate issue directing respondent superior court to vacate its March 6, 2012 “Order Denying Petition for Writ of Habeas Corpus” in *People v. Bucci* (Super. Ct. Solano County No. FCR290146). Thereafter, the Presiding Judge, or his or her designee, shall reassign petitioner’s habeas corpus petition for decision by a judge other than the Honorable Harry S. Kinnicutt. This decision shall be final as to this court within five (5) court days. (Cal. Rules of Court, rule 8.490(b)(3).)

¹ We decline petitioner’s suggestion that, in the context of the habeas corpus petition, we issue an order to show cause returnable to the superior court. An order to show cause does not issue unless and until this court determines petitioner has articulated a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) Since this opinion directs respondent superior court to issue a new decision on petitioner’s superior court habeas petition, it would be premature for this court to review the merits of the petition filed in this court. (See *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)