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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CESAR AGUIRRE,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A144117

(Alameda County
Super. Ct. No. C168733)

THE COURT:*

A jury convicted petitioner Cesar Aguirre of felony vandalism causing more than \$400 in damage, arising from the destruction of plate glass windows at Oakland Police Department offices during an Occupy Oakland demonstration. (Pen. Code, § 594, subs. (a), (b)(1).) We affirmed the judgment of conviction on appeal. (*People v. Aguirre* (March 27, 2014, A136522) [nonpub. opn.])

During the pendency of petitioner’s appeal, we considered a companion habeas corpus petition filed by petitioner’s appellate counsel in case No. A139835. That petition argued petitioner was entitled to a new trial due to the prosecution’s failure to disclose material and exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83, 87

* Before Jones, P.J., Needham, J. and Bruiniers, J.

(*Brady*). Concluding petitioner had articulated a prima facie case for relief, we issued an order to show cause returnable in the superior court. Without conducting an evidentiary hearing on petitioner's claim, the superior court denied habeas corpus relief.

Petitioner, through counsel, filed a second habeas corpus petition in this court, raising four main issues.¹ Petitioner argues the merits of his *Brady* claim, and asserts the superior court erred in failing to consider certain materials submitted with the traverse and in denying petitioner's discovery requests. Finally, the petition maintains the superior court's failure to hold an evidentiary hearing was a miscarriage of justice. We issued an order deeming the petition as seeking a writ of mandate in addition to habeas corpus, requested briefing, and provided notice to the parties that we might proceed by issuing a peremptory writ in the first instance, pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180 (*Palma*).

Having reviewed the filed briefs and the record,² we conclude petitioner is plainly entitled to relief under *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 574-575 (*Rose*) as to the superior court's failure to conduct an evidentiary hearing. In issuing our order to show cause, this court concluded an evidentiary hearing was necessary to resolve the numerous factual issues presented by petitioner's claims. By way of example, and without comprising an exhaustive list, this court found factual issues existed about the extent to which the videotapes and police dispatch logs appended to the habeas corpus petition in case No. A139835 called into question, and potentially impeached, eyewitness Officer Tedesco's trial testimony. Our order specifically cited the following language from *In re Hochberg* (1970) 2 Cal.3d 870, 875-876, footnote 4, disapproved on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070, footnote 3: "When we order the respondent to show cause before the superior court why the relief prayed for in a petition for habeas corpus should not be granted, we do more than simply transfer the petition to

¹ Petitioner sought, and we granted, petitioner's unopposed application for stay of execution of sentence pending determination of the petition.

² We take judicial notice of our file in the prior writ proceeding, case No. A139835. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

that court and more than simply afford the petitioner an opportunity to present evidence in support of the allegations of the petition; we institute a proceeding in which issues of fact are to be framed and decided.” (Italics omitted.) Our review of the return and traverse filed by the parties in the superior court following issuance of our order to show cause reveals the continued existence of numerous factual issues material to the resolution of petitioner’s claim.

We decline petitioner’s request that we order the case reassigned to a different judge pursuant to Code of Civil Procedure section 170.1, subdivision (c). That remedy should be sparingly used and only where the interests of justice require it (*Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 840), and this case does not warrant such action. We observe that the petition before us is distinguishable from *Rose*, in which the court ordered the evidentiary hearing heard by a different trial court judge. (*Rose, supra*, 81 Cal.App.4th at pp. 575-576.) In *Rose*, the superior court not only failed to conduct an evidentiary hearing pursuant to the appellate court’s order to show cause, but also issued an order denying habeas relief without explanation, and submitted a letter as a return in the appellate court that the *Rose* court found gave the superior court “the appearance of an adversary, rather than a neutral.” (*Rose, supra*, 81 Cal.App.4th at pp. 569-570, 574.) The latter circumstances are not present here, and petitioner suggests no other reason we should require a different judge to conduct the evidentiary hearing.

In accordance with our prior notification to the parties that we might do so, we will direct issuance of a peremptory writ in the first instance.³ (*Palma, supra*, 36 Cal.3d at pp. 177-180.) Petitioner’s right to relief is obvious, and no useful purpose would be served

³ In light of our disposition, it is unnecessary for us to reach petitioner’s arguments concerning the superior court’s refusal to consider certain exhibits submitted with petitioner’s traverse and denial of discovery, since the superior court may, but is not required to, reconsider those rulings during the evidentiary hearing and further habeas corpus proceedings. Additionally, it is unnecessary, and indeed premature, for us to discuss the merits of petitioner’s *Brady* claim, which will be reconsidered by the superior court following its evidentiary hearing. (See *In re Hillery* (1962) 202 Cal.App.2d 293, 294.) To the extent the petition seeks habeas corpus relief, the petition is denied without prejudice.

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; *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)

Let a peremptory writ of mandate issue directing respondent superior court to vacate its December 4, 2014, “Order Denying Petition for Writ of Habeas Corpus After Order to Show Cause” and to thereafter hold an evidentiary hearing on petitioner’s habeas corpus petition before issuing a ruling on that petition. In the interests of justice, and to prevent further delays, this decision shall be final as to this court 20 days after it is filed. (Cal. Rules of Court, rule 8.490(b)(2)(A).) The previously issued stay of execution of sentence shall remain in place for 30 days following issuance of the superior court’s final ruling on petitioner’s habeas corpus petition.

Dated: _____, P. J.