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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MINH CHAU,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

D062432

(San Diego County
Super. Ct. No. SCD203402)

Proceedings in mandate after the superior court denied a petition for a writ of habeas corpus without an evidentiary hearing. Judge Peter Deddeh. Petition granted.

FACTUAL AND PROCEDURAL BACKGROUND

A jury found Minh Chau guilty of attempted premeditated murder and other crimes. The trial court sentenced Chau to life with possibility of parole plus an

indeterminate term of 25 years to life in prison. This court affirmed the judgment on August 7, 2009, (D052350).

Chau then petitioned for a writ of habeas corpus in the California Supreme Court on a claim of ineffective assistance of trial counsel. He sought to vacate the judgment of conviction or alternatively, to have an evidentiary hearing on his claim. In its informal response, the Attorney General conceded Chau had stated a prima face case of ineffective assistance of counsel and requested the Supreme Court "issue an order to show cause as to that issue so that an evidentiary hearing may be held in the superior court." On December 14, 2011, the Supreme Court issued an order as follows:

"The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause before the San Diego County Superior Court, when the matter is placed on calendar, why petitioner is not entitled to relief based on ineffective assistance of counsel, as conceded by the Attorney General in her informal response filed with this court on September 14, 2011. The return is to be filed on or before January 13, 2012."

The district attorney filed a return in the superior court, Chau filed a traverse, and on July 16, 2012, without conducting an evidentiary hearing, the superior court issued a 10-page order denying the petition. Chau filed this petition to compel the superior court to vacate its order and conduct an evidentiary hearing before a different judge. We requested a response from both the Attorney General and the district attorney and issued *Palma* notice. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

The district attorney contends the superior court was not required to conduct an evidentiary hearing and properly decided the petition on the pleadings. The Attorney General also asserts the superior court's order complied with the Supreme Court's order

but concedes questions of fact remain to determine whether trial counsel was ineffective and "[a]n evidentiary hearing is appropriate"

DISCUSSION

The Supreme Court stated in *In re Hochberg* (1970) 2 Cal.3d 870, 875-876, fn. 4, "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 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*."

Here Chau prayed for an evidentiary hearing, the Attorney General requested an evidentiary hearing and the Supreme Court ordered the matter placed on calendar and the People to show cause why Chau was not entitled to relief. As explained in a similar scenario in *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 572, when a higher court issues an order for the People "to show cause before the [superior court], when the matter is placed on calendar, *why the relief prayed for in the petition should not be granted*" the court has a clear choice: "either release [the petitioner] or hold an evidentiary hearing." Because the superior court improperly failed to conduct an evidentiary hearing, we grant the petition.

Where the facts are undisputed and the law is well settled, a peremptory writ in the first instance is appropriate. (Code Civ. Proc., § 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy*

American River Hospital (2003) 31 Cal.4th 709, 724, fn. 4; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate the July 16, 2012, order denying the petition for a writ of habeas corpus and to conduct an evidentiary hearing. In the interests of justice, further proceedings shall be before a different judge. (Code Civ. Proc., § 170.1, subd. (c).) This opinion is made final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).)

IRION, J.

WE CONCUR:

McINTYRE, J.

HALLER, Acting P. J.