IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE EDWARD T. BUCKINGHAM,
Petitioner.

SUPREME COURT NO. 2012-SCC-0028-PET
SUPERIOR COURT NO. 12-0134

Cite as: 2012 MP 15

Decided December 5, 2012

Brian Sers Nicholas, Saipan, MP, for Petitioner Edward T. Buckingham
George L. Hasselback, Saipan, MP, for Respondent Office of the Public Auditor

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; ROBERT C. NARAJA, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Former Attorney General of the Commonwealth of the Northern Mariana Islands Edward T. Buckingham ("Buckingham") petitions this Court for writs of mandamus and prohibition, challenging the trial court's exercise of the fugitive disentitlement doctrine in the underlying criminal case against him. For the reasons stated herein, we deny both petitions.

I

¶ 2 On August 3, 2012, Respondent Office of the Public Auditor ("OPA"), acting as an assistant attorney general pursuant to 1 CMC § 7847(b),[1] obtained a penal summons based on a criminal information against Buckingham. The summons set an arraignment date of August 6, 2012, at 9:00 a.m., in the Superior Court. OPA attempted to serve the summons throughout the day on August 3. That evening, Buckingham received a police escort to the Francisco C. Ada International Airport, where Federal Bureau of Investigation Special Agent Hae Jun Park served Buckingham early the next morning. After being served, Buckingham boarded a plane, left the Commonwealth, and has yet to return. Following Buckingham's departure, OPA filed an amended information adding charges of evasion of service and misuse of public funds.

¶ 3 On August 6, 2012, the scheduled arraignment took place with Assistant Attorney General Gilbert Birnbrich representing Buckingham. Buckingham did not appear. After questioning the propriety of Birnbrich's representation of Buckingham, the trial court issued a $50,000 bench warrant for the arrest of Buckingham.

¶ 4 Thereafter, Buckingham obtained private counsel and filed a motion to quash the bench warrant or, in the alternative, hold the bench warrant in abeyance. After briefing and oral argument, the trial court denied the motion without prejudice. *Commonwealth v. Buckingham*, Crim. No. 12-0134 (NMI Super. Ct. Sept. 11, 2012) (Order Denying Defendant's Motion to Quash Arrest Warrant without Prejudice at 8) ("Order"). In denying the motion to quash, the court relied on the fugitive disentitlement doctrine, an equitable doctrine which "'disentitles the defendant to call upon the resources of the Court for determination of his claims' while he remains outside the court's jurisdiction." *Id.* at 3 (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993)). Buckingham then filed a motion to reconsider but the trial court disallowed the motion, again relying on the fugitive disentitlement doctrine. The court

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[1] As discussed herein, we need not reach the constitutionality of 1 CMC § 7847(b), which reads in full:

> If the Public Auditor has reasonable grounds to believe the Governor or Attorney General has violated federal or Commonwealth criminal law, the Public Auditor may use the legal counsel for the office of the Public Auditor or retain special counsel who shall serve as an assistant attorney general for purposes of investigating and prosecuting, if necessary, the criminal law violations.

reasoned that "[b]ecause Defendant is still absent from the Court's jurisdiction, he remains disentitled from having the Court consider any motion or argument on his behalf, as explained in the Court's prior order." *Commonwealth v. Buckingham*, Crim. No. 12-0134 (NMI Super. Ct. Sept. 29, 2012) (Order Disallowing Defendant's Motion to Reconsider at 1).

II

¶ 5 We have original jurisdiction to issue writs of mandamus and prohibition. 1 CMC § 3102(b); *see also* NMI Const. art. IV, § 3 ("The supreme court shall have all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth.").

III

¶ 6 Buckingham challenges the trial court's Order on the following grounds: (1) lack of personal jurisdiction over Buckingham; (2) lack of subject matter jurisdiction; (3) ineffective service of process; (4) facial inadequacy of penal summons; and (5) unconstitutionality of 1 CMC § 7847(b). However, since the trial court's Order relied solely on the fugitive disentitlement doctrine to deny without prejudice Buckingham's motion to quash, the trial court's use of that equitable doctrine is the only issue properly before this Court. Thus, we will focus our analysis on the trial court's application of the fugitive disentitlement doctrine.

¶ 7 Writs of mandamus and prohibition are forms of extraordinary relief that are only available in "the most dire of instances." *In re Cushnie*, 2012 MP 3 ¶ 6 (quoting *Commonwealth v. Namauleg*, 2009 MP 13 ¶ 5). Commonwealth courts apply the following five-factor test (also known as the "*Tenorio* factors") to determine whether writ relief is appropriate:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

Id. ¶ 7 (citing *Tenorio v. Superior Court*, 1 NMI 1, 9-10 (1989)). All five factors need not be present for a writ to issue. Instead, the Court must balance the factors and determine whether to exercise its discretion and issue the extraordinary relief. *Tenorio*, 1 NMI at 10. Because factors one and two are similar, we will address them together. *Liu v. Commonwealth*, 2006 MP 5 ¶ 12. Similarly, since factors four and five represent "opposite sides of the same coin," we will also address them together. *Id.* ¶ 20.

A. Factors One and Two: Lack of Adequate Means for Relief and Prejudice

¶ 8 Buckingham argues it is "very clear" he has no other means of seeking relief apart from petitioning this Court for an extraordinary writ. Buckingham Petition at 7. He continues that it is "very clear in that, without a doubt, [Buckingham] has been prejudiced" by the trial court refusing to hear further motions. *Id.* We disagree.

¶ 9 The trial court denied Buckingham's motion to quash without prejudice. As such, Buckingham is free to reassert all of his claims regarding the motion to quash as soon as he returns to the Commonwealth. Because the only impediment to presenting his claims to the trial court is of his own making, we hold that Buckingham has an adequate means to attain the relief desired. As for damage or prejudice not correctable on appeal, Buckingham alleges no prejudice that he will face if he returns to the Commonwealth and submits to the jurisdiction of the trial court. For these reasons, factors one and two weigh against granting writ relief.

B. Factor Three: Clearly Erroneous Order

¶ 10 In order to obtain writ relief, Buckingham must show that the trial court's order was clearly erroneous. In applying this factor, we give "high deference" to the trial court's decision. *Liu*, 2006 MP 5 ¶ 17. We will not find error where "a rational and substantial legal argument can be made in support of the questioned . . . ruling even though on normal appeal a reviewing court may find reversible error." *Id.* (quoting *Tenorio,* 1 NMI at 8). Instead, we must be "firmly convinced that the [Superior] Court has erred." *Id.* ¶ 19 (citation omitted). The third factor is important because, while a petitioner need not show that every factor supports the granting of a writ, we will not grant a writ unless the third factor is present. *Sablan v. Superior Court*, 2 NMI 165, 168 (1991) ("One seeking mandamus *must* show that the lower court order is clearly erroneous." (emphasis added)).

¶ 11 As stated above, we will only address whether the trial court's application of the fugitive disentitlement doctrine was clearly erroneous. To do so, we must decide two issues: (1) whether the trial court's determination that the fugitive disentitlement doctrine applies in the Commonwealth was clearly erroneous; and (2) whether the trial court's application of the fugitive disentitlement doctrine to Buckingham was clearly erroneous.

1. The Fugitive Disentitlement Doctrine's Application in the Commonwealth

¶ 12 In its Order, the trial court noted that the fugitive disentitlement doctrine had never been analyzed or adopted by any Commonwealth court. Order at 3 n.2. The court then cited 7 CMC § 3401 ("section 3401") and applied the doctrine against Buckingham. *Id.* Section 3401 reads:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the

> contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

7 CMC § 3401. While the meaning of this provision is somewhat opaque, when broken down the hierarchy of applicable law in the Commonwealth established by section 3401 becomes apparent. At the top of the hierarchy is "written law," which "includes the NMI Constitution and NMI statutes, case law, court rules, legislative rules and administrative rules, as well as the Covenant and provisions of the U.S. Constitution, laws and treaties applicable under the Covenant," *Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11 ¶ 59 n.21 (quoting *Borja v. Goodman*, 1 NMI 225, 242 (1990) (Villagomez, J., concurring)), and "local customary law." 7 CMC § 3401. If there is no controlling written law or local customary law, the "restatements of the law approved by the American Law Institute" control. 7 CMC § 3401. The Restatements control regardless of whether the relevant Restatement provision accords with United States common law. *Ogumoro*, 2011 MP 11 ¶ 64. Finally, if there is no written, customary, or Restatement law on point, "the common law . . . as generally understood and applied in the United States" governs. 7 CMC § 3401.[2]

¶ 13 Applying section 3401 here, with the exception of the trial court's two orders in the underlying matter, no Commonwealth written law or local customary law has addressed the fugitive disentitlement doctrine. Similarly, no Restatement provision makes mention of the fugitive disentitlement doctrine. Thus, we are left to consult "the common law . . . as generally understood and applied in the United States." 7 CMC § 3401. In applying the fugitive disentitlement doctrine against Buckingham, the trial court found that the doctrine is part of the common law. We agree.

¶ 14 The United States Supreme Court has long recognized that courts have inherent authority to refuse to hear claims brought by defendants who are currently fugitives from the jurisdiction. *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993). In addition to the United States Supreme Court, all but one state[3] that has addressed the fugitive disentitlement doctrine has adopted it in some form.[4] These

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[2] Though not relevant here, only the written law of the Commonwealth can be used as a basis for a criminal prosecution. 7 CMC § 3401.

[3] Our review found Louisiana as the only state that reviewed the fugitive disentitlement doctrine without explicitly adopting it. *State v. Gonzalez*, 680 So. 2d 1253 (La. Ct. App. 1996). However, while the court did not adopt the doctrine in that case, it stated that "failure of this Court to follow *Ortega-Rodriguez*, [507 U.S. 234] in the instant case does not foreclose the possibility of following it at some future date should circumstances so warrant." *Id.* at 1257.

[4] *See Polanski v. Superior Court*, 102 Cal. Rptr. 3d 696, 716 (Cal. Ct. App. 2009); *People v. Brown*, 250 P.3d 679, 681 (Colo. App. 2010); *State v. Brabham*, 21 A.3d 800, 806-07 (Conn. 2011); *Redden v. State*, 418 A.2d 996, 997 (Del. 1980); *In re S.H.*, 570 A.2d 814, 815-16 (D.C. 1990); *Tejada v. $406,626.11 in United States Currency*, 820 So. 2d 385, 387-88 (Fla. Dist. Ct. App. 2002); *Harper v. State*, 684 S.E.2d 96, 98 (Ga. Ct. App. 2009); *State v. Larrea*, 939 P.2d 866, 867-68 (Idaho Ct. App. 1997); *People v. Box*, 633 N.E.2d 242, 244-45 (Ill. App. Ct. 1994); *State v. Dyer*, 551 N.W.2d 320, 321 (Iowa 1996); *State v. Raiburn*, 212 P.3d 1029, 1038 (Kan. 2009); *Hires v. State*, 882 So. 2d 225, 227-28 (Miss. 2004); *State v. Gillispie*, 790 S.W.2d 519, 520 (Mo. Ct. App. 1990); *Guerin v. Guerin*, 993 P.2d 1256, 1258 (Nev. 2000); *State v. Gaylor*, 969 A.2d 333, 335-36 (N.H. 2009);

authorities make clear that the fugitive disentitlement doctrine "does not strip the case of its character as an adjudicable case or controversy" and is therefore not a jurisdictional bar to the action. *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970). Instead, the decision whether to apply the doctrine is left to the sound discretion of the court hearing the matter. *Ortega-Rodriguez*, 507 U.S. at 250 n.23.

¶ 15 Courts provide various rationales for the fugitive disentitlement doctrine. First, it ensures the enforceability of court orders by requiring a fugitive to return to the jurisdiction to take advantage of the judicial system. *Id.* at 239-40. Without requiring the presence of the fugitive defendant, "there [can] be no assurance that any judgment [the court] issue[s] [will] prove enforceable." *Id.* Second, like the concept of "unclean hands," *Polanski v. Superior Court*, 102 Cal. Rptr. 3d 696, 717 (Cal. Ct. App. 2009), the doctrine serves a disentitlement rationale by taking away a fleeing defendant's "right to invoke the jurisdiction of the court." *Id.* (citation omitted). Third, it prevents affronts to the integrity of the "justice system arising from a fugitive's appropriation to himself or herself of the power to dictate the ultimate result of the criminal proceedings." *Id.* Finally, the doctrine deters escape and encourages voluntary surrender. *Id.* at 717-18. This deterrent effect is stronger in the event of a high profile defendant in a case that has garnered media attention. *Id.* at 723. In sum, "the fugitive disentitlement doctrine has come to signify the unwillingness of courts to waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings of the court." *United States v. Oliveri*, 190 F. Supp. 2d 933, 935 (S.D. Tex. 2001).

¶ 16 The longstanding acceptance of the fugitive disentitlement doctrine by an overwhelming majority of United States jurisdictions leads us to conclude that the fugitive disentitlement doctrine is part of "the common law . . . as generally understood and applied in the United States." 7 CMC § 3401. Because it is part of the common law, the trial court's decision that the fugitive disentitlement doctrine applies in the Commonwealth was not clear error.

2. Trial Court's Application of the Fugitive Disentitlement Doctrine Against Buckingham

¶ 17 Having determined that the fugitive disentitlement doctrine is applicable in the Commonwealth, we must now determine whether the trial court's application of the doctrine to Buckingham's criminal

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Matsumoto v. Matsumoto, 792 A.2d 1222, 1227-28 (N.J. 2002); *People v. Taveras*, 885 N.E.2d 181, 184 (N.Y. 2008); *Johnson v. Johnson*, 812 N.W.2d 455, 458 (N.D. 2012); *Williams v. State*, 236 P.3d 133, 134 (Okla. Crim. App. 2010); *State v. Moss*, 279 P.3d 200, 203 (Or. 2012); *Commonwealth v. Judge*, 797 A.2d 250, 258 (Penn. 2002); *Posner v. Posner*, 677 S.E.2d 616, 620-21 (S.C. Ct. App. 2009); *Searle v. Juvenile Court*, 188 S.W.3d 547, 550 (Tenn. 2006); *Ortiz v. State*, 862 S.W.2d 170, 173 (Tex. Ct. App. 1993); *Sasson v. Shenhar*, 667 S.E.2d 555, 561 (Va. 2008); *State v. Rogers*, 434 S.E.2d 402, 405-06 (W. Va. 1993).

case was clearly erroneous.[5] First, however, we must address whether the trial court correctly concluded that Buckingham is a "fugitive" for purposes of the fugitive disentitlement doctrine.

¶ 18 The trial court rejected Buckingham's contention that he is not a fugitive from justice, reasoning that Buckingham "'absented himself from the jurisdiction with the intent to avoid prosecution.'" Order at 4 (quoting *United States v. Nabepanha*, 200 F.R.D. 480, 482 (S.D. Fla. 2001). In his petition, Buckingham claims the trial court's conclusion on this point was clearly erroneous.

¶ 19 When determining whether to apply the fugitive disentitlement doctrine, federal courts rely on the definition of "fugitive" that originated with interpretation of 18 U.S.C. § 3290,[6] a statute that tolls the statute of limitations to bring criminal claims against "any person fleeing from justice." *See United States v. Oliveri*, 190 F. Supp. 2d 933, 936 (S.D. Tex. 2001) (fugitive disentitlement case applying "fugitive" definition from *United States v. Catino*, 735 F.2d 718 (2d Cir. 1984), an 18 U.S.C. § 3290 case). Whether a defendant is a fugitive is a question of fact involving two elements: (1) absence from the jurisdiction; and (2) intent to avoid arrest or prosecution. *Nabepanha*, 200 F.R.D. at 482. "Mere absence" from the Commonwealth does not necessarily make a defendant a fugitive. *Id.* Instead, to be a fugitive the defendant must have left "with the intent to avoid prosecution." *Id.* (citation omitted). This intent to avoid prosecution can be inferred where the defendant is aware of pending charges and refuses to surrender to the authorities or return to the Commonwealth. *Id.*

¶ 20 With these principles in mind, we turn to the trial court's decision. It is undisputed that Buckingham is currently absent from the Commonwealth. Thus, the first element is met. It is also undisputed that he received a penal summons prior to departing the Commonwealth. Receipt of the summons, as well as the police escort Buckingham used to travel to the airport, led the trial court to conclude that Buckingham left with the intent to avoid prosecution. Order at 5. Thus, the second element is met.

¶ 21 We find no clear error in the trial court's conclusion that Buckingham is a fugitive. Regardless of Buckingham's travel plans prior to learning about the pending criminal matter against him, his decision to depart the Commonwealth clearly occurred after he received the penal summons. Because Buckingham was aware of the criminal charges against him and still chose not to submit to the jurisdiction of the Commonwealth judiciary, he meets the definition of a "fugitive." As such, the trial court did not err in so holding.

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[5] While the standard of review for a direct appeal of a case where the fugitive disentitlement doctrine is applied is abuse of discretion, *Polanski*, 102 Cal. Rptr. 3d at 721, we apply the clearly erroneous standard here since the issue arises in the context of an extraordinary writ. *Liu*, 2006 MP 5 ¶ 17.

[6] 18 U.S.C. § 3290 reads, in full: "No statute of limitations shall extend to any person fleeing from justice."

¶ 22 After concluding that Buckingham is a "fugitive," the trial court decided to exercise its discretion and apply the fugitive disentitlement doctrine against him. In reviewing the trial court's decision on this point, we find *Polanski v. Superior Court* instructive due to its factual and procedural similarities. 102 Cal. Rptr. 3d 696. In March 1977, a district attorney indicted actor and director Roman Polanski for, among other things, unlawful sexual intercourse with a minor. *Id.* at 701. Polanski pled guilty to certain offenses, but failed to appear at his sentencing hearing, leading to issuance of a bench warrant for his arrest in February 1978. *Id.* at 702. Several years of legal wrangling later, the trial court in February 2009 applied the fugitive disentitlement doctrine to bar Polanski from seeking any further affirmative relief from the court prior to his return to California. *Id.* at 712. The trial court also dismissed Polanski's motion to dismiss the case without prejudice pending his return to the state. *Id.* Polanski then filed a petition for writ of mandamus with the court of appeal, asking the court to reverse the trial court's application of the fugitive disentitlement doctrine and to dismiss the criminal proceeding. *Id.*

¶ 23 The California appellate court first recognized the inherent authority of courts to dismiss appeals filed by fugitive appellants, noting that the fugitive disentitlement doctrine has existed in California since 1880. *Polanski*, 102 Cal. Rptr. 3d at 716. The court noted that the fugitive disentitlement doctrine is a tool that should be applied only "when the balance of all equitable concerns leads the court to conclude that it is a proper sanction for . . . flight." *Id.* at 718. The court ultimately determined that the trial court did not abuse its discretion in applying the fugitive disentitlement doctrine against Polanski despite possible prosecutorial and judicial misconduct in the case. *Id.* at 722.

¶ 24 In support of its conclusion to uphold the trial court's application of the fugitive disentitlement doctrine against Polanski, the court pointed to several fugitive disentitlement doctrine rationales. First, application of the doctrine against Polanski preserved the enforceability of orders of the California court. *Id.* The court looked with displeasure at Polanski's attempt to "seek[] relief from the courts while 'insulating [himself] from the consequences of an unfavorable result.'" *Id.* (quoting *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003)). Second, the court noted that the trial court's order encouraged Polanski's voluntary return by denying the motion to dismiss without prejudice because the continuing availability of the motion provided Polanski with an incentive to return. *Id.* Third, since Polanski is a public figure and the case received a large amount of media coverage, using the doctrine against him deterred other individuals from fleeing the jurisdiction. *Id.* at 723. Finally, the trial court's decision protected the dignity of the court from individuals like Polanski who defy the court's authority. *Id.* While not dispositive, the court stressed that protecting the court was "one factor among many that support disentitlement." *Id.*

¶ 25 Turning to the trial court's Order in this case, the court exhaustively analyzed numerous fugitive disentitlement doctrine cases from other jurisdictions and provided abundant reasons for the exercise of

its discretion. For one, the court reasoned that applying the doctrine against Buckingham would maintain the dignity of the court. Order at 5. Additionally, the court noted that refusing to hear matters until Buckingham returns to the Commonwealth ensures that orders issued by the court will be fully enforceable against the defendant. *Id.* at 7 n.6. Further, the court stated that application of the doctrine punished Buckingham for flouting his penal summons while discouraging him and others from fleeing the Commonwealth. *Id.* Finally, relying on *Polanski*, the court denied Buckingham's motion to quash *without prejudice* in order to encourage Buckingham to return and submit to the jurisdiction of the Commonwealth Superior Court. *Id.* (citing *Polanski*, 102 Cal. Rptr. 3d at 722).

¶ 26 After reviewing the facts surrounding this case and the trial court's Order, we cannot conclude that the trial court's exercise of discretion in applying the fugitive disentitlement doctrine against Buckingham was clearly erroneous. Maintaining the dignity of the court and ensuring the enforceability of court orders are important concerns. Equally important is the goal of deterring avoidance of legal process by flight from the jurisdiction. Like *Polanski*, Buckingham is a public figure and the trial court's Order received a great deal of media attention. Through this attention, applying the fugitive disentitlement doctrine serves a deterrent function outside the confines of this individual prosecution. Finally, though the Order rightfully punishes Buckingham for fleeing the Commonwealth in direct disregard of a penal summons issued by the Superior Court, it also encourages Buckingham's return to the Commonwealth by denying the motion to quash *without prejudice* until Buckingham submits to the jurisdiction of the Commonwealth courts. Because the trial court was well within its discretion in applying the fugitive disentitlement doctrine against Buckingham, we do not find any clear error in the trial court's Order.

C. Factors Four and Five: Oft-Repeated Error or Issues of Law of First Impression

¶ 27 Factors four and five represent "opposite sides of the same coin" and are, thus, almost never present together. *Liu*, 2006 MP 5 ¶ 20. Buckingham's argument related to factor four is limited to a discussion of alleged deficiencies in service and Buckingham's facial challenge to 1 CMC § 7847(b). As discussed previously, however, the only issue properly before this Court is the trial court's application of the fugitive disentitlement doctrine. Because the fugitive disentitlement doctrine had never been applied previously in the Commonwealth before the trial court's Order, the trial court's conduct does not constitute an "oft-repeated error." *In re Cushnie*, 2012 MP 3 ¶ 7. Therefore, factor four does not support Buckingham's petition.

¶ 28 Regarding factor five, Buckingham's argument is similarly deficient since he focuses solely on issues that are not properly before this Court. Though not addressed by Buckingham, the fugitive disentitlement doctrine is an issue of first impression in the Commonwealth. Because the fifth *Tenorio* factor asks whether there are issues of law of first impression related to the requested writ relief, *Id.*,

factor five supports issuance of a writ. Nonetheless, while factor five supports issuance of a writ, the foregoing analysis demonstrates that the other four factors weigh heavily against Buckingham.

IV

¶ 29 In conclusion, *Tenorio* factors one through four weigh heavily against issuance of either a writ of mandamus or prohibition. ACCORDINGLY, Buckingham's petitions are hereby DENIED.

SO ORDERED this 5th day of December, 2012.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT C. NARAJA
Justice Pro Tem