In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY LETRICE TOWNSEL,** **Defendant and Appellant.**

Case No. S022998

Madera County Superior Court, Case No. 8926
Honorable Paul R. Martin

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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PROCEDURAL BACKGROUND

On April 16, 1991, appellant filed a pre-penalty phase motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and a hearing was held on the motion the same day. (2 CT 498; 15 RT 3519.)[1] In his motion, appellant sought the following:

> complaints filed or reports made against Officer[] . . . Reiland of the Madera Department of Corrections for excessive or unreasonable force or harassment including copies of any investigation reports made thereof.

(2 CT 489; 15 RT 3512.) The trial court found good cause, and reviewed Officer Reiland's "personnel file maintained at DOC;" a "file of reports written by Officer . . .Reiland;" a "pre-employment background file;" and, a "personnel file maintained at [the] County Personnel Office" regarding Officer Reiland. The court found "only one report written which [sic] Officer Reiland appears to be significant to this case." The court had copies made of that report and provided them to the parties. (15 RT 3519.) Defense counsel confirmed with the court that there was "no evidence in

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[1] "CT" refers to the Clerk's Transcript On Appeal; "RC CT" refers to the Clerk's Transcript on Appeal of the record correction proceedings; "RT" refers to the Reporter's Transcript. Where appropriate, volume numbers will be indicated; Respondent references the Supplemental Clerk's Transcript On Appeal Pursuant To Supreme Court Order of April 16, 1994, prepared for these *Pitches*s related proceedings and filed September 9, 2014, as "SPCT" and the corresponding Court Reporter's Corrected Supplemental Transcript On Appeal Pursuant to Supreme Court Order Of April 16, 2014, filed September 2, 2013, as "SPRT;" "AOB" refers to Appellant's Opening Brief; "SAOB" refers to Appellant's Supplemental Appellant's Opening Brief; "SAOB2" refers to Appellant's Second Supplemental Opening Brief; "RB" refers to Respondent's Brief.

the file of any complaints against Officer Reiland for excessive use of force or harassment." (15 RT 3519-1520.)[2]

In a post-trial written request for correction and completion of the record filed November 12, 1996,[3] appellant requested that the record be augmented with a copy of the report provided to both trial counsel at the hearing on the "*Pitchess* Motion." (6 CT 1277.)

At a hearing held December 18, 1997, citing *People v. Barnard* (1982) 138 Cal.App.3d 400, appellant argued that a record may be augmented to include a law enforcement file examined by the trial court and returned to the agency that provided the file. "In this case we have the trial court not only reviewing the report but then submitting it to both sides." (1 RC CT 86.) Counsel stated "if the court can review those portions which were reviewed and submitted, those portions I would stipulate to be part of the record." (1 RC CT 86.) Respondent stated he had no objection to augmenting the record with the report provided to counsel as part of the *Pitchess* proceeding. Respondent contended that any other records reviewed by the court should remain sealed and provided solely to the California Supreme Court. (1 RC CT 85.)

The trial court stated it did not believe it "retained copies, copies provided to the prosecutor or defense" and suggested that the parties get copies of the released material from trial counsel. (1 RC CT 86.) The court

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[2] On April 17, 1991, the penalty phase trial commenced. (V CT 1135.) During the penalty phase, Officer Frank Reiland testified about an incident that occurred at the jail on June 28, 1990. During the event, appellant kicked the officer and took a punch at him, grazing his temple. (15 RT 3547-3553.)

[3] The 105 page motion is conformed with a file stamp, however, the date on respondent's copy is unclear. (6 CT 1174.) For purposes of this motion respondent references the date used in appellant's first supplemental opening brief. (SAOB 12.)

agreed with respondent that the "original file . . . probably still in the officer's file, a copy of that should be sent under seal to the Supreme Court." (1 RC CT 86.)

Respondent and appellant were uncertain whether the prosecutor or trial defense counsel would have copies of the released document still available. Appellant made an "alternative suggestion" to have the "agency" send the file to the court so that the court could review it and recollect "which part was submitted." The court stated it had been a long time since the hearing and the report was "with the agency now." The court reiterated that the parties should check with trial counsel. (1 RC CT 86-88.)

> Ms. Johnston [appellant's counsel]: We can report back. The ruling is that the copies of the original file will be sent to the Supreme Court under seal and then we will go from there.
>
> The Court: And try to make your diligent search before you ask me to review that file.
>
> Ms. Johnston: Okay.

(1 RC CT 88.)

On December 24, 1997, respondent wrote to the prosecutor to inquire if he had a copy of the released record in his file. (7 CT 1745.)[4]

In a written order filed December 31, 1997, as part of the record certification proceedings, the court ordered that Officer Reiland's

> personnel file, as it existed at the time of the *Pitchess* Motion in the instant case when it was examined by the trial court, be made part of the sealed record on appeal and provided solely to the California Supreme Court.

(7 CT 1651, 1655.)

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[4] The date of the letter incorrectly indicates 1996 instead of 1997.

On May 19, 1998, respondent again wrote to the prosecutor to inquire about the material that had been released by the court at the *Pitchess* hearing. (7 CT 1744.)

At a status conference on September 1, 1998, respondent informed the court that he had been in contact with the District Attorney, and a report of Officer Reiland had been faxed to respondent, but it may have been misplaced. Respondent stated if he could not locate it he would again be in contact with the District Attorney. (1 RC CT 121.)

At a hearing on April 23, 2001, respondent stated he had received a two-page Madera County Department of Corrections incident report, dated June 28, 1990, from the prosecutor. With the court's permission, respondent handed a copy of that report to appellant's counsel. Respondent offered to provide a copy to the court so it could confirm whether or not the document should be part of the appellate record. Respondent stated he would try to gain additional information about the document before the next hearing. The court stated that during a *Pitchess* motion record review, the court typically examines the "entire file or personnel file" in chambers and "pulls from that copies for both sides of documents they're entitled to." The court assumed that is what respondent had acquired from the prosecutor. The court did not have an independent recollection "at that moment." (2 RC CT 340-343.)

At a hearing held August 7, 2001, respondent filed with the court a copy of the June 28, 1990, incident report, previously provided to appellant, with a cover letter.[5] Respondent said he spoke with the prosecutor to ask whether the document should or should not be sealed like the personnel file. Respondent informed the court that the prosecutor's

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[5] Respondent had also provided appellant with a copy of the cover letter. (2 RC CT 363.)

> best recollection was that this particular report was utilized during testimony by Officer Reiland during the penalty phase. He didn't think it needed to be sealed.

(2 RC CT 363.) Respondent stated the court needed to decide whether the document should be part of the record on appeal, whether it should be sealed, and whether counsel should retain copies of the report. (2 RC CT 364.) Appellant stated the report is "probably not material from the *Pitchess* motion[] since it seems to be a disciplinary report relating to Mr. Townsel" and it was not something that Officer Reiland would have a privacy interest in. (2 RC CT 364.) Appellant thought unless it was used during trial he did not "see where the basis is for making it a part of the record." (2 RC CT 364.)

The court again stated that during a *Pitchess* in camera review it

> always make[s] copies of the appropriate documents and suppl[ies] copies to both sides so both sides see copies of whatever was deemed admissible by the Court.

(2 RC CT 364-365.) The court stated

> if I ordered it sealed then it stays sealed. It will go up as part of the record [on] appeal as a sealed document. Let the Supreme Court decide whether it should be opened or not.

(2 RC CT 365.)

Appellant reiterated that it did not seem like the document would have been provided through a *Pitchess* motion:

> It doesn't seem like it would have since it's not a personnel file document. It's a disciplinary report from the jail related to [appellant]. It's from [appellant's] file.

(1 RC CT 365.) Respondent could not recall the context for seeking the report but recalled that appellant's counsel, Kate Johnston,[6] had raised the

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[6] At this hearing, Deputy State Public Defenders Audry Chavez and Denise Anton were both representing appellant. (2 RC CT 350.)

(continued...)

report issue and respondent had sought the report at her request. (2 RC CT 365.)

The court stated that someone else would need to "figure out what to do with it." It allowed counsel to retain copies "as confidential documents." (2 RC CT 365-366.)

On October 14, 2004, the trial court filed an order certifying the record. (1 SCT 187.)

On September 9, 2005, the trial court filed an order augmenting and again certifying the record. (SCT 2 365-367.)

In argument VIII of his opening brief, filed May 13, 2010, appellant requested that this Court conduct an independent review of the files that the trial court reviewed pursuant to his pre-penalty phase motion for discovery of any complaints filed against Officer Frank Reiland. Appellant asked this Court to determine whether the trial court should have ordered the disclosure of any additional materials in Officer Reiland's personnel records because they were relevant to his ability to defend against the aggravating evidence provided by Officer Reiland. (AOB 257, 260-261; 2 CT 499; Pen. Code, § 190.3, subd. (b).).

In argument VIII of the respondent's brief, filed September 15, 2011, respondent did not oppose appellant's request that this Court independently review the confidential documents reviewed by the trial court pursuant to

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(...continued)
Previously, appellant was represented by Deputy State Public Defenders Ron Turner (e.g., 1 RC CT 271), Debra Huston (e.g., 2 RC CT 301, 309), or Kate Johnston. (E.g., 1 RC CT 67.) The record does not reflect any specific efforts by appellant's counsel to comply with the trial court's directive to seek the released document from trial counsel. (See, e.g., 1 RC CT 246 [trial co-counsel had provided all of his file but no mention is made of the document released at the *Pitchess* motion]; 2 RC CT 256-366 [no mention of difficulty accessing trial counsel's file or efforts to seek the *Pitchess* document].)

appellant's discovery motion to ensure that Offer Reiland's records contained no discoverable material. (RB 252-253.)

On August 26, 2013, Madera Superior Court Deputy Clerk Doina McFarland filed a declaration in response to a request by this Court for the personnel file as it existed at the time of the *Pitchess* motion. The records were omitted from the appellate record sent to this Court. (SPCT 13.) Ms. McFarland declared:

> This record would have been copied and the original sent back to the agency. After an exhaustive search, I was unable to locate the copy of the personnel file. Right around the time, the District Attorney's office and a great deal of Madera Court's files were either burned or destroyed in the process of extinguishing the fire. If at some point we are able to retrieve a copy from the agency, a copy will be prepared and sent to the Supreme Court.

(McFarland 2013 Declaration.)

On September 9, 2013, Madera Superior Court Deputy Clerk Erin Kinney filed a declaration further responding to this Court's request. She declared:

> An exhaustive search of the court's file, Exhibit Rooms, and the District Attorney's file was performed in hopes of recovering the Officer's personnel file.
>
> I personally contacted the District Attorney's Office and spoke with John Thackray on August 14th, 2013, who referred me to Deputy District Attorney Mary Thornton as the D.A.'s file had been relocated to her location.
>
> I called Miss Thornton and explained our situation and she invited me to come to her office to examine the[m]. On September 4th, 2013, both Doina McFarland and I examined all documents in the 5 boxes thoroughly for any document mentioning Officer Reiland's or his personnel file; unfortunately we found no such record.

On September 18, 2013, this Court filed an order in pertinent part stating:

> Regarding Argument VIII of appellant's opening brief, the parties are advised that the record on appeal does not contain the files that the trial court reviewed in camera in ruling on appellant's motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and that, as reflected in declarations by Deputy Clerk Doina McFarland and Deputy Clerk Erin Kinney, filed on August 26, 2013, and September 9, 2013, respectively, a diligent search of the trial court's records has failed to locate the files. The parties are therefore directed to provide supplemental briefing addressing the impact on this appeal of the files' absence from the record.

(Kinney 2013 Declaration.)

On November 27, 2013, appellant filed a supplemental opening brief. (SAOB.) On February 21, 2014, respondent filed a supplemental respondent's brief. (SRB.). On March 24, 2014, appellant filed a supplemental reply brief. (Supp. Reply.)

On April 16, 2014, this Court filed an order stating:

> During the trial of this matter, the superior court reviewed certain records in ruling on appellant Anthony Letrice Townsel's Pitchess motion. (See 15 RT 3519; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) During record correction proceedings, the superior court ordered that those records be sealed and transmitted to this court. (See 7 CT 1651, 1655.) That order was not complied with, and the record on appeal consequently does not contain the material the superior court reviewed in ruling on appellant's *Pitchess* motion. To enable this court to review the ruling, the superior court is directed (1) to order the custodian of the records to produce in the superior court the records that the custodian previously produced and the court reviewed in ruling on appellant's *Pitchess* motion, (2) when the records are produced, to review them and confirm whether they are the records it reviewed in ruling on appellant's Pitchess motion, (3) to identify the particular document it ordered disclosed to appellant at trial, and then (4) to transmit all of the documents it has reviewed under seal to this court. If the custodian is unable to produce the files, he or she must submit a declaration under penalty of perjury so stating, with an explanation of why such production is not possible, and the superior court must then transmit that declaration to this court.

> The superior court is further directed to hold any hearings it may deem necessary to comply with this order, and is directed to transmit a record of any such hearings and any resultant findings, along with any sealed files and any declaration by the custodian of records, to this court by June 20, 2014.

(See Clerk's Docket, April 16, 2014.)[7]

Subsequently, the superior court issued an order for the custodian of the confidential records pertaining to appellant's *Pitchess* motion, to produce such records. (SPCT 14-15.)

On May 5, 2014, the Madera County Department of Corrections Records Supervisor, Sergeant Chris Rodriguez, filed a declaration stating a search was made for records pertaining to Officer Frank Reiland as they would have existed as of April 1996, but no records could be found pertaining to that officer. Sergeant Rodriguez declared that he was informed and believed that Officer Frank Reiland's last day of county employment was in November of 1992, and pursuant to Madera County guidelines, Officer Reiland's personnel file and report file were routinely destroyed ten years after that date. (SPCT 27-28.)[8]

Also, on May 5, 2014, Madera County Administrative Officer for Human Resources Adrienne Calip filed a declaration stating she is the

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[7] The superior court subsequently received an extension of time from June 20, 2014, date to September 15, 2014, to submits transcripts to this court. (See Clerk's Docket.)

[8] According to Sgt. Rodriguez' declaration:

"All files maintained by the Madera County Department of Corrections pertaining to former employees are routinely destroyed according to Madera County guidelines (Madera County Code Chapter 2.57 CIVIL SERVICE RULES Policy 2-12 (e)(1) which provides as follows: (c) Records, papers and documents on file in the personnel department may be destroyed after 2 years subject to the following conditions:

(1) no record other than examination papers relating to any person employed by the county shall be destroyed until 10 years following his last employment." (SPCT 27-28.)

custodian of records for the Division of the Administrative Management Department. She declared that a search had been made in her division for the personnel and pre-employment history files pertaining to Officer Frank Reiland that would have existed as of April 1996, but she was unable to locate any files that pertained to Officer Reiland.

> Many of the personnel files maintained by the Human Resources Department prior to 1998 were destroyed in a fire that occurred that year. I am informed and believe that the Frank Reiland's personnel file and pre-employment history file were destroyed.

(SPCT 29-30.)

On May 30, 2014, the superior court held a hearing at appellant's request to allow him the opportunity to question the declarants. (SPRT 64-70, 76, 84, 93.)[9] Ms. Calip testified that personnel files are maintained by her department in Human Resources. (SPRT 85-86.) The file normally contains initial hire paperwork (i.e., application, notification forms of the hire, applicant address, birth data, social security number, position the applicant is filing, department hiring the person, status of employment, as well as salary range and steps). The file would also contain complaints related to disciplinary actions taken and supporting documentation. The complainant's identifying information would be deleted. (SPRT 87-89.) Officer Reiland is no longer with the Department of Corrections. She does not have personal knowledge when his employment ceased. She believes

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[9] Appellant, as he did in the superior court, attempts to characterize the hearings as formal settlement proceedings. (E.g., Second Supp. AOB, pp. 7-8, 33-34.) However, the proceedings were instead attempts by the superior court to comply with the terms of this Court's April 16, 2014 order, by identifying the record that was provided to counsel after the in camera *Pitchess* proceeding and determining whether a record could be made of what confidential records were actually reviewed by Judge Martin during the in camera *Pitchess* proceeding. (SPRT 109-111,121-123, 143-144, 150, 183-185; see SPCT 143-144 and citations therein.)

his personnel file could have been destroyed in a fire although she has no personal knowledge of that. The pre-employment file mentioned in her declaration may have been recruitment records. (SPRT 90.) She believes the process of maintaining records was the same in 1991, although she was not then employed by the department. (SPRT 91-92.)

Sergeant Christopher Rodriquez testified that he is the custodian or records for the Madera County Department of Corrections. (SPRT 93-94.) He believed in 1991 his department maintained disciplinary reports, classification reports, inmate requests and grievances. (SPRT 94.) A personnel file would be maintained while the person is employed. (SPRT 95.) Pre-employment background is part of the personnel file. (SPRT 100.) Currently, per policy, a personnel file would contain official complaints for a period of five years. (SPRT 96-98, 105-106.) Where a complaint is sustained and discipline in imposed he believes identifying information of the complainant is in the file. (SPRT 99-100.) He does not know what the policy was regarding unsustained complaints in 1991. (SPRT 98-99.) Currently, report files contain reports of the officer. They also contain sustained grievances. He does not know if in 1991 they included grievances brought against the subject officer. Nor does he know where unsustained or sustained complaints were kept in 1991. (SPRT 100-102, 105-108.)

Sergeant Rodriguez's staff attempted to find files related to Officer Reiland, but was unable to locate them. (SPRT 102-103.) He believes the records were destroyed around 2002, but does not personally know when they were destroyed. (SPRT 103.)

On June 6, 2014, respondent filed a copy of an incident report with the court. In a declaration from the prosecutor, now judge, Ernest Licalsi, he identified the incident report, written by Officer Reiland and dated June 28, 1990, as the document provided to trial counsel by the trial judge after

the in camera *Pitchess* proceeding. Linda Thompson, lead trial counsel, and now Mendocino County Public Defender, also identified by declaration the same document as "probably the document that Judge Martin disclosed to the parties . . . ." (SPCT 55-62; SPCT 137-1140.)

In testimony provided June 9, 2014, co-defense counsel Roger Litman stated that he had formed the opinion that the June 28, 1990, incident report was the document released by Judge Martin to trial counsel. (SPRT 155-157.)[10] Judge Martin, now retired, also reviewed his sealed notes in camera. Those notes and the reporters transcript of the in camera proceeding were sealed and ordered provided to this Court. In open court, Judge Martin stated that review of his notes and pertinent portions of the transcript did not refresh his memory as to the specific documents he reviewed during the 1991 *Pitchess* in camera proceeding. (SPRT 169-170; SPCT 124.) County Counsel Douglas Nelson, who provided the records for the *Pitchess* in camera proceeding in 1991, also submitted a declaration stating that he had no recollection of the files he produced. (SPCT 120-121; SPRT 197.)

On June 12, 2014, as amended June 18, 2014, the superior court filed an order summarizing the evidence that was presented. (SPCT 84-86,123-124.)

On October 1, 2014, this Court filed an order stating in part:

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[10] On June 9, 2014, at respondent's request, the Court ordered the clerk to contact the court reporter, now retired, who transcribed the reporter's transcript for the public portion of the *Pitchess* hearing. The clerk was to determine if the reporter had notes for the in camera hearing. If the court reporter had notes he was to transcribe those notes and provide the transcript for submission to this court. (SPRT 178-181.) It appears that the court reporter did not have notes of the in camera review. (See SPCT 87-88.)

> In view of the superior court's order dated June 12, 2014, acknowledging that the custodian is unable to produce the records the superior court reviewed in ruling on appellant's *Pitchess* motion (see *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; XV RT 3520), the parties are directed to provide supplemental briefing addressing the impact on this appeal, including as to the merits of Claim VIII as raised in appellant's opening brief, of the records' absence from the appellate record.

On December 1, 2014, appellant filed his second supplemental opening brief. (SAOB2.) Respondent herein submits our second supplemental respondent's brief.

ARGUMENT

I. THE ERRONEOUS OMISSION OF THE CONFIDENTIAL RECORDS FROM THE APPELLATE RECORD DOES NOT DEPRIVE APPELLANT OF HIS RIGHT TO MEANINGFUL APPELLATE REVIEW; MOREOVER, EVEN IF THE RECORD IS INSUFFICIENT FOR APPELLATE REVIEW, THERE IS NO PREJUDICE

Appellant contends the inability to reconstruct the files reviewed by the trial court during the in camera portion of the *Pitchess* hearing violates state law and deprives him of meaningful appellate review, violating his right to due process under the Fourteenth and Eighth Amendment. Appellant asserts that his death judgment must therefore be reversed. (SAOB2 9, 22.) Respondent submits that the record is adequate for meaningful review, and even if this Court deems it insufficient for review, there was no prejudice. The death judgment should be upheld.

A. Applicable Legal Principles

1. Pitchess Motion

A defendant seeking to initiate *Pitchess* discovery must file a written motion that includes "[a] description of the type of records or information sought[,]" supported by

> [a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has the records or information from the records.

(Evid. Code, § 1043, subd. (b)(2) & (3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*); see *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1020.)

> A showing of good cause is measured by "relatively relaxed standards" that serve to "insure the production" for trial court review of "all potentially relevant documents." [Citation.]

(*Warrick* at p. 1016.) To establish good cause, the defendant must present a "plausible scenario of officer misconduct . . . that might or could have occurred." (*Id.* at p. 1026.)

As summarized by this Court in *People v. Gaines* (2009) 46 Cal.4th 172, 179:

> If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], "the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the pending litigation.'" [Citations.]

In *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*) this Court detailed the trial court's duty to make and preserve a record adequate for appellate review of a *Pitchess* motion:

> The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined.

(*Mooc, supra*, 26 Cal.4th at p. 1229; see *People v. Prince* (2007) 40 Cal.4th 1179, 1285-1286 ["The court directed that the officer's personnel file not be copied and inserted into the record, but the court adequately stated for the record the contents of that file"]; *People v. Myles* (2012) 53 Cal.4th 1181, 1209 [appellate review of transcript sufficient].)

On appeal, the court is required to review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel records. (*Mooc, supra*, 26 Cal.4th at p. 1229; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

2. Record On Appeal

> On appeal, state law entitles a defendant only to a record that is "adequate to permit [him or her] to argue" the points raised in the appeal. [Citation.] Federal constitutional requirements are similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. [Citations.] Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. [Citation.] The defendant has the burden of showing the record is inadequate to permit meaningful appellate review. [Citation.]

(*People v. Rogers* (2006) 39 Cal.4th 826, 857–858; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1349; see *People v. Prince, supra*, 40 Cal.4th at p. 1285.) It is the "defendant's burden to show that deficiencies in the record are prejudicial." (*People v. Howard* (1992) 1 Cal.4th 1132, 1165; *People v. Taylor* (2010) 48 Cal.4th 574, 660.)

B. The Record Is Sufficient For Meaningful Review; Assuming This Court Finds Otherwise, There Was No Prejudice

Respondent submits that the description of the record provided by the trial court, coupled with the identification of the released record, provides a sufficient basis for meaningful appellate review by this Court. Alternatively, assuming this Court finds the record insufficient for review, appellant fails to show prejudice.

In 1991 appellant filed a *Pitchess* discovery motion seeking "complaints filed or reports made against" Officer Reiland of the "Madera Department of Corrections for excessive or unreasonable force or harassment including copies of any investigation reports made thereof." (2 CT 489.) After finding good cause, the court conducted an in camera review of the files provided by the custodian. (15 RT 3519.)[11]

At that original *Pitchess* hearing, the trial court properly documented on the record what files it reviewed. (15 RT 3519; *Mooc, supra*, 26 Cal.4th at p. 1228; see, e.g., *People v. Prince, supra*, 40 Cal.4th at pp. 1285-1286.) The trial court did so even though the hearing took place before having this Court's *Mooc* opinion available as guidance. In open court, Judge Martin stated he reviewed Officer Reiland's "personnel file maintained at DOC;" a "file of reports written by Officer . . . Reiland;" a "pre-employment background file;" and, a "personnel file maintained at [the] County Personnel Office" regarding Officer Reiland. (15 RT 3519.) The court found "only one report written which [sic] Officer Reiland appears to be significant to this case." The court elaborated, "that's the only thing that is

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[11] As appellant acknowledged in his first supplemental brief, it appears the representative from the Madera County Counsel's office provided for review more documents than are required for a *Pitchess* motion. (SAOB 20; see *Mooc, supra*, 26 Cal.4th at pp. 1228-1229.).

in there that is really of any relevance whatsoever in this case that might affect the defendant." The court had copies made of that report and provided them to the parties. (15 RT 3519.) Defense counsel then confirmed with the court that there was "no evidence in the file of any complaints against Officer Reiland for excessive use of force or harassment." (15 RT 3519-1520.)

Pursuant to this Court's directive, on remand to the superior court the document released to the parties by the trial court has now been identified. It was the June 28, 1990, incident report written by Correctional Officer Frank Reiland documenting appellant's attack on the officer at the correctional facility. (SPCT 55-62; SPCT 137-1140; see 15 RT 3547-3553.) However, the confidential files reviewed by the trial court during the in camera proceeding appear to have been destroyed pursuant to established policy and possibly during a courthouse fire. (SPRT 181-182, 184.)

Appellant claims that the omission of the confidential records from the record and their destruction violated his constitutional rights. (SAOB2 15-35.) Respondent disagrees.

This Court has held that "routine record destruction after five years" does not deny a defendant's due process rights. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 12.) "Unless there is bad faith by the law enforcement agency, the destruction of records does not implicate a defendant's constitutional right to a fair trial; routine destruction by a law enforcement agency 'acting . . . "in accord with [its] normal practice"' tends to indicate "'good faith"' [citations]." (*Ibid.*)

> [D]ue process does not prohibit a law enforcement agency from destroying records of citizen complaints that are more than five years old and whose exculpatory value to a specific case is not readily apparent . . . .

(*Ibid.*) Such destruction

> violates a defendant's right to due process only when the complaint's exculpatory value to a particular criminal case is readily apparent before its destruction. [Citation.] The mere "possibility" that the complaint might be exculpatory in some future case is insufficient. [Citation.]

(*Id.* at pp. 11-12; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1221, fn. 10 [no due process violation for routine destruction of complaints in accordance with existing departmental policies].)

Here, the record evidences that the confidential personnel records reviewed by the trial court at the 1991 in camera proceeding are unavailable as they were routinely destroyed pursuant to Madera County policy. (SPCT 27-28; SPRT 103, 181-182; compare, Gov. Code, § 34090.) There is also evidence that some of those records were destroyed in one of two courthouse fires. (SPCT 29-30; SPRT 54, 65-67, 90, 181-182; see SAOB p. 15 [One fire apparently occurred in March 1997; substantial portions of record damaged].) In either case, there is no evidence that the personnel information was destroyed in bad faith, that any exculpatory value of the records to appellant's case was readily apparent, or that Madera County's retention policy was enacted to enable the destruction of these specific records. Nor does appellant claim otherwise. Thus, the destruction of the confidential files did not violate appellant's constitutional rights. (*City of Los Angeles v. Superior Court, supra*, 29 Cal.4th at p. 12; *People v. Memro* (1995) 11 Cal.4th 786, 831-832, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18.)[12]

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[12] Appellant asserts that in 1997 the clerk could have notified the court and parties that the documents could not be located, or the trial court should have reviewed the sealed documents in December 1997. However, these speculative assertions are not relevant to the issue before this court as his claims do not show bad faith by either the clerk or the trial court. Nor does he claim otherwise. (SAOB2, pp. 27-28, fn. 6.) Likewise, petitioner asserts Sergeant Rodriguez testified that, "contrary to the routine county

(continued...)

Furthermore, contrary to appellant's assertion (SAOB2 22-23), the trial court's description of those records in the reporter's transcript of the original *Pitchess* hearing, and the current identification of the released record, provides an adequate record for this Court to meaningfully review the trial court's ruling for an abuse of discretion. (15 RT 3519-1520; see *People v. Myles* (2012) 53 Cal.4th 1181, 1209 [a trial court's statement of the documents it examined is adequate for purposes of conducting a meaningful appellate review]; *People v. Prince* (2007) 40 Cal.4th 1179, 1285-1286; *People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)[13] Respondent submits that this Court should proceed with its review of the available record, including the record sent under seal.

Assuming arguendo that this Court finds the record insufficient for review, appellant fails to demonstrate prejudice. (See *Gaines, supra*, 46 Cal.4th at p. 181 [it is settled that an accused must demonstrate that

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(...continued)
policy under which Officer Reiland's files had been destroyed, his agency had not maintained any log or record of the destroyed files." (SAOB2 31, citing SPRT 103.) Actually, at the cited page, Sergeant Rodriguez testified that he had been a supervisor for *five years* and "[s]ince that time we've been keeping tabs on purged files . . ." He then went on to state he had no information on Officer Reiland's file as he believed it had been destroyed around *2002*. (SPRT 103.) Again, no bad faith is shown or claimed.

[13] Appellant states that respondent forcefully argued in our first supplemental respondent's brief that the description was insufficient to determine what specific records were reviewed. (SAOB2 22, citing SRB p. 12.) Actually, in the context of this court's September 18, 2013 order, respondent stated at the cited page that the parties should not try to interpret the court's statements as it was then still possible that the custodian of records would know specifically what the court was referencing. As shown by the declarations and testimony, the custodians did provide some clarification about the types of records involved. Respondent merely sought to be as accurate as possible. Thus, appellant's assertion does not support his claim that the record is insufficient. (SRB p. 12.)

prejudice resulted from trial court's error in denying discovery]; *People v. Memro* (1985) 38 Cal.3d 658, 684 [prejudice required for relief on appeal], disapproved on another point in *Gaines*, at p. 181, fn. 2.; see *People v. Samayoa* (1997) 15 Cal.4th 795, 820 ["No presumption of prejudice arises from the absence of materials from the appellate record"].)[14] To establish prejudice, appellant must show there was a reasonable probability that the outcome of the case would have been different had information been disclosed to the defense. (*Gaines* at pp. 182-183.)

"The reasonable-probability standard of prejudice [this Court has] applied in *Pitchess* cases is the same standard [this Court has] applied generally to claims that the prosecution improperly withheld exculpatory evidence in violation of a defendant's right to due process" under *Brady*.[15] (*Gaines, supra*, 46 Cal.4th at p. 183.) However, *Pitchess* and *Brady* "employ different standards of materiality." (*Gaines* at p. 183, citation omitted.)

> [The *Pitchess*] discovery scheme entitles a defendant to information that will "facilitate the ascertainment of the facts" at trial, that is, "all information pertinent to the defense." Consequently, a finding that material evidence was wrongfully withheld under *Pitchess* does not invariably mean that a defendant's right to due process was denied, "since 'the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.'" To establish a due process violation, a defendant must do more than show that "helpful" evidence was withheld; a defendant must go on to show that "there is a reasonable

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[14] None of appellant's cited authority places the burden on respondent to show the confidential files reviewed pursuant to a *Pitchess* motion did not contain discoverable information. Indeed, as appellant indicates in the parentheticals to his citations, none of his cited cases for this point even address a *Pitchess* review. (SAOB2 35-36.)

[15] *Brady v. Maryland* (1963) 373 U.S. 83.

> probability that, had [the evidence] been disclosed to the defense, the result ... would have been different."

(*Gaines* at p. 183, citations omitted.)

Appellant's *Pitchess* motion sought documentation related to excessive or unreasonable force or harassment by Officer Reiland in order to impeach his penalty phase testimony about the incident that occurred on June 28, 1990. (2 CT 489; 15 RT 3512.) The trial court conducted an in camera review of the confidential files, and found "only one report" that appeared to be significant to the case. That report, Officer Reiland's incident report for June 28, 1990, was provided to the parties. (SPCT 137-1140; 15 RT 3519.) The court had copies made of that report and provided them to the parties. Appellant's trial counsel confirmed with the court at that time that there was "*no evidence* in the file of *any complaints* against Officer Reiland for excessive use of force or harassment." (15 RT 3519-1520, emphasis added.) Indeed, there was nothing "of any relevance whatsoever" in the file "that might affect the defendant." (15 RT 3519.) Because there was *no evidence* in the confidential files regarding excessive force or harassment by Officer Reiland, there was no prejudice.

Even if this Court were to presume some other document in the file could have been disclosed as part of the *Pitchess* discovery, it is not reasonably probable the outcome of this case would have been different had such information been disclosed to the defense. (See, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 842-843.)

As previously shown in briefing, the prosecutor presented an exceptionally strong case of two very brutal and callous first degree murders. The evidence presented during the guilt phase demonstrated that appellant, having received news that a criminal complaint had been filed against him for abusing his girlfriend, victim Diaz, who was pregnant with his child, angrily terrorized and threatened her to try dissuading her from

pursuing the complaint. Appellant then planned and carried out the execution of Diaz. On the day of the murders, he was dropped off by an accomplice a short distance away and then walked to the residence where Diaz was living with her sister and brother-in-law, Mauricio Jr.. Appellant entered the home uninvited. He bumped into Mauricio Jr. in the hallway, and shot him. Then appellant shot Mauricio Jr. a second time. Appellant then walked down the hallway and located Diaz in a back bedroom. With Diaz's child standing nearby, appellant shot Diaz repeatedly. Both victims died. Appellant then exited the house and possibly headed toward the residence next door where Teresa and other family members were located, but appellant himself was shot before reaching that residence. At the scene after the murders, appellant made verbal admissions (e.g., "I did it") and threats (e.g., someone else was going to return and "finish the job"), and later appellant wrote incriminating statements showing his continued desire for violence even though he was incarcerated (e.g., "I'm still young I could do 20 years, [a]ll I want is to get out and get revenge, that['']s all I['']m living for baby"). (See RB 3-20, 46-48, fns. 32 and 33, 165-169.)

The prosecutor further demonstrated through cross-examination and rebuttal evidence that the results of appellant's intelligence tests by his trial experts were unreliably subjective, Dr. Christensen's test results were admittedly exceptionally low and inaccurate due to horrendous testing conditions, and appellant malingered on all his experts' testing. (See RB 23-24, 27-32, 35-37,39, 42-44, 52-53, 55-75, 170-177.)[16]

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[16] Appellant himself in correspondence to a friend wrote:

> These dump trucks found another way to dump, now they use your I.Q. I bet a lot of people laughed at that one. That's their new way of bullshitting us in court. Another one of Madera's
>
> (continued...)

In addition, during the penalty phase the prosecutor presented testimony in aggravation demonstrating: (1) on August 31, 1989, appellant assaulted Diaz by punching her twice causing injury to her mouth; (2) on May 31, 1990, appellant threw a chair at Madera County Correctional Sergeant Rebecca Davis, but she stepped to the side so the chair did not hit her; (3) on April 14, 1986, appellant punched Beatrice Cruz in the mouth, threatened her for calling the police, threatened to kill her boyfriend, and subsequently plead guilty to committing a battery; (4) a bullet shell was left on top of victim Diaz's crotch after she was killed by appellant; and (5) on June 28, 1990, petitioner kicked and took a punch at Correctional Officer Frank Reiland. (See RB 76-78.)[17]

During the penalty phase, appellant presented: testimony from his mother, father and grandfather about his background and upbringing; testimony from his mother about her disbelief in the death penalty and willingness to visit appellant if he got a life without possibility of parole sentence; testimony from friends that he was a nice person and testimony from bailiffs stating he had not presented any difficulties for them; testimony from an employer that he was a good employee; testimony from Correctional Sergeant Allen Patchell that he determined, regarding the

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(...continued)

> finest, ha-ha. [And] which has nothing to do with the crime itself.

(16 RT 3640; 13 CT 3137.)

[17] More specifically, Correctional Officer Frank Reiland testified that on June 28, 1990, at about 7:00 a.m., he was in uniform and went to appellant's cell to try and calm him. He opened appellant's cell door. Appellant tried to force his way by the officer. The officer stuck his hand out to prevent him from going out. Appellant then kicked the officer and took a punch at him, grazing his temple. Officer Reiland needed no medical care as a result of the attack. (15 RT 3547-3553.)

incident involving Sergeant Davis, that appellant slammed the chair on the ground and then it hit Sergeant Davis, and appellant did not intend to hit her; and, Dr. Powell's testimony expressing why he continued to opine appellant was intellectually disabled. (See RB 78-81.)

Appellant asserts that the testimony of Officer Reiland may have given Officer Davis' testimony an aura of truth. He further asserts that the prosecutor highly relied on Officer Reiland's testimony about the attack by appellant to show his future dangerousness and that demonstrates prejudice. (SAOB2 pp. 37-40.) Appellant is incorrect.

As the prosecutor argued to the jury, the circumstances of the crime *alone* "substantially outweigh[ed] anything in mitigation in this case." There were "[t]wo premeditated first degree murders." Appellant "killed a fetus and terminated a pregnancy" that was his "own child." Appellant killed Diaz because she was a witness in another case, and killed Mauricio Jr. because "he was standing in the way of killing Martha Diaz." Mauricio Jr. was shot in front of his wife and young son, endangering them as well, and died trying to exit the house. Likewise appellant shot Diaz multiple times in front of her young son, endangering him and leaving him crying near his mother. After these callous killings appellant threatened a witness and Teresa, and bragged about the shooting. (16 RT 3684-3688.)

With this evidence before the jury, any impeachment of Officer Reiland simply could not have changed the penalty outcome. Moreover, it would not add substantively to the evidence already presented by appellant in his attempt to impeach Officer Davis.[18]

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[18] Indeed, while the prosecutor argued that the conflict in evidence between Officer Davis and Sergeant Patchell reflects a mistake in Sergeant Patchell's recollection, it was nevertheless his position that the incident "should not be given as much weight as the other batteries in this case . . ." (continued...)

In addition, the prosecutor emphasized the uncontradicted evidence of appellant's assault on Cruz, the threats he made to her and her boyfriend, and appellant's admission to a battery. Appellant's threats to Cruz were chillingly similar to those he made to Diaz. (16 RT 3689.) The prosecutor also argued the evidence of a prior battery appellant committed against Diaz, wherein appellant punched her twice in the mouth. (16 RT 3689-3690.)

Only then did the prosecutor argue that appellant's battery upon Officer Reiland was significant. (16 RT 3690.) However, the evidence presented by Officer Reiland consisted of only seven pages of testimony (15 RT 3547-3533), and it represented significantly less violence than the murders or appellant's assaults and threats upon the two non-peace officer female victims, Diaz and Cruz. (See 15 RT 3536-3537, 3540-3541, 3560-3563.) Indeed, due to appellant's attack, Diaz' mouth became very swollen and was bleeding. She held her head and complained about how it felt. (15 RT 3537, 3541.) Cruz' mouth was bleeding after appellant hit her in the mouth. (15 RT 3560-3562.) In contrast, there were three officers in the module during appellant's attack of Officer Reiland and Officer Reiland was in need of no medical care. (15 RT 3551; compare 16 RT 3721-3725 [defense argued the attack involved minimal violence, Officer Reiland did not consider it significant, and basically involved a tantrum by appellant; similar argument regarding the Sergeant Davis incident and strong argument regarding Sergeant Patchell's testimony.])

Given the strong case in aggravation, speculative evidence that might have offered some impeachment of Officer Reiland, the existence of which

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(...continued)
(16 RT 3690-3691.) The prosecutor's reliance on this incident was therefore minimal.

was not obvious to a judicial officer specifically looking for reports of excessive force and harassment (see Evid. Code, § 664), would not have affected the trial jury's determination that appellant's brutal murders of Mauricio Jr. and Diaz, pregnant with appellant's child, warranted the death penalty.

Thus, even assuming there is insufficient record for review, any error in failing to make an adequate record was harmless because there is not a reasonable probability of a different outcome had impeaching evidence been disclosed pursuant to appellant's *Pitchess* motion, and there is no reasonable possibility that the error affected the penalty verdict. (*People v. Fuiava* (2012) 53 Cal.4th 622, 721.)

CONCLUSION

For the foregoing reasons, this Court should review the available record related to the 1991 *Pitchess* hearing and determine if the trial court abused its discretion. If the Court finds the record insufficient for review, the Court should find any error harmless. The death judgment should be affirmed.

Dated: January 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SECOND SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 6,840 words.

Dated: January 29, 2015

KAMALA D. HARRIS
Attorney General of California

LOUIS M. VASQUEZ
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Townsel**

No.: **S022998**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 29, 2015, I served the attached **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

C. Delaine Renard
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District Attorney
Madera County District Attorney's Office
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Superior Court of California
209 West Yosemite Avenue
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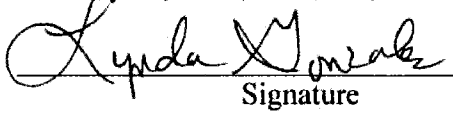
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 29, 2015, at Fresno, California.

Lynda Gonzales
Declarant


Signature

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