IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LETRICE TOWNSEL, Defendant and Appellant.	No. S022998 (Madera County Sup. Ct. No. 8926)

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Madera

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ARGUMENT

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A. Introduction

As Mr. Townsel argued in his second supplemental opening brief, the erroneous omission of the confidential appellate record of the trial court's second-step penalty phase *Pitchess* ruling, which could not be reconstructed or substituted on remand, has deprived him of his rights to appellate review of that ruling in violation of state law and the Due Process Clause and Eighth Amendment to the United States Constitution. (Appellant's Second Supplemental Opening Brief ["2SAOB"] 9-35; see also Appellant's Opening Brief ["AOB"] 257-261, Argument VIII; Appellant's First Supplemental Opening Brief ["1SAOB"] 1-24, 38-39.) Further, respondent cannot carry its burden of proving the deprivation harmless beyond a reasonable doubt. (2SAOB 35-47, citing *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

In an abrupt and startling about-face from its successful prior positions both before this Court and the superior court which resulted in this court's remand ruling and the extensive proceedings that followed in an unsuccessful effort to remedy the omission, respondent now contends that the existing, pre-remand public record is adequate to enable this Court to

determine the contents of the missing record and review the trial court's ruling. (Respondent's Second Supplemental Brief ["2SRB"] 16-17, 19, 21.) Alternatively, respondent contends, even "[a]ssuming arguendo that this Court finds the record insufficient for review" (2SRB 19), the error violated state law only but not Mr. Townsel's "constitutional rights" because the *agency custodians* of the original files did not destroy their *own* records in "bad faith" (2SRB 17-18). Apparently based on the same premise, respondent argues that the deprivation of Mr. Townsel's right to appellate review was harmless because Mr. Townsel has not proved a "reasonable probability" of a different result absent the error. (2SRB 19-26.)

As set forth below, this Court should refuse to entertain respondent's new position that the existing, pre-remand public record is adequate to enable this Court to conduct appellate review of the trial court's *Pitchess* ruling as being inconsistent with its prior judicial admission to the contrary, as well as under the doctrines of judicial estoppel and waiver. (Part B-1, *post.*) In any event, respondent's new position is without merit. (Part B-2, *post.*) Moreover, if "this Court finds the record insufficient for review" (2SRB 19), it necessarily follows that Mr. Townsel's state and federal constitutional rights to appellate review have been violated notwithstanding how and why the custodians of the original files destroyed their own records. (Part C, *post.*) In any event, whether the error affecting the penalty phase violates state law only or the federal constitution, the harmless error test is the same and imposes on respondent the burden of proving it harmless beyond a reasonable doubt. (Part D, *post.*) Respondent does not dispute that it cannot satisfy that burden under the appropriate test nor do its arguments under the inappropriate "reasonable probability" test satisfy its burden. (*Ibid.*) Whether the impact of the error is considered

alone or in combination with any of the other guilt and penalty phase errors set forth in the original briefing, the death judgment must be reversed.

B. The Existing, Pre-Remand Record is Inadequate To Identify or Describe the Contents of the Erroneously Omitted Confidential Record And Thus Enable This Court to Conduct the Appellate Review of the Trial Court's Penalty Phase *Pitchess* Ruling to Which Mr. Townsel is Entitled

Respondent successfully argued before this Court that the existing, pre-remand record was inadequate for this Court to determine "what specific records" the trial court reviewed in ruling on Mr. Townsel's *Pitchess* motion. (1SRB 11-14.) Although Mr. Townsel agreed that the record was inadequate for purposes of appellate review, he urged this Court to avoid an unnecessary remand that would waste judicial resources and instead attempt to remedy the error on its own. (1SAOB 4-5, 19-37; 1SARB 4, 9.) Respondent disagreed, successfully arguing that remand to the superior court to take additional evidence necessary to reconstruct the record or obtain "a settled statement" of its contents was required. (1SRB 10-14.) This Court agreed, ordering remand for further proceedings to reconstruct the missing record "to enable this court to review [the trial court's *Pitchess*] ruling." (4/16/14 SCT 13.)[1] As discussed below, extensive

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[1] A number of supplemental Clerk's Transcripts on appeal have been filed in this case. "4/16/14 SCT" refers to the volume entitled "Supplemental Clerk's Transcript on Appeal Pursuant to Supreme Court Order of April 16, 2014," reflecting the proceedings on remand, which was filed in this Court on September 15, 2014. "4/16/14 SRT" refers to the volume of supplemental Reporter's Transcript of the proceedings held on remand from May 4, 2014 through July 11, 2014, entitled "Court Reporter's Corrected Supplemental Transcript on Appeal Pursuant to Supreme Court Order of April 16, 2014."

proceedings over the course of three months were held on remand, during which respondent continued to successfully press its position that settlement proceedings were appropriate and necessary to remedy the missing record. Respondent does not dispute that those proceedings were ultimately unsuccessful and that the missing record is incapable of reconstruction or substitution through settlement.

Faced with the indisputable result of the very proceedings respondent insisted upon, respondent now essentially contends that those proceedings were never necessary in the first place. This is so, according to respondent's new position, because the existing, pre-remand public record is, after all, adequate for this Court to determine "what specific records" (1SRB 12) the trial court examined and thereby review the trial court's ruling (2SRB 19, 21).

This Court should refuse to entertain respondent's "opportunistic flip-flop" (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558) as contrary to its prior judicial admission, judicially estopped, and otherwise waived or forfeited. In any event, respondent's new position is without merit.

1. This Court Should Refuse to Entertain Respondent's New Position that the Existing, Pre-Remand Record is Adequate for this Court to Determine What Specific Confidential Documents The Trial Court Reviewed And Refused to Disclose And Thereby Subject the Trial Court's *Pitchess* Ruling to Appellate Review Under the Doctrines of Judicial Estoppel or Waiver

a. Judicial Admissions and Judicial Estoppel

"Briefs and arguments . . . are 'reliable indications of a party's position on the facts as well as the law, and a reviewing court may use

statements in them as admissions against the party.' [Citations]." (*Luceras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 93-94 [discussing authorities].) Similarly,"'[a]n express concession or assertion in a brief is frequently treated as an admission of a legal or factual point, controlling in the disposition of the case.' [Citations]." (*Ibid.*; see, e.g., *Federer v. County of Sacramento* (1983) 141 Cal.App.3d 184, 186 [admission in appellate brief was "the equivalent of a concession," which, taken together with the failure to allege a necessary element, "controls the disposition of the case"]; *Williams v. Superior Court* (1964) 226 Cal.App.2d 666, 673-674 [applying judicial admission to Attorney General's concession in brief].) Such "a judicial admission cannot be rebutted; it estops the maker." (*Ulrich v. State Farm Fire and Cas. Co.* (2003) 109 Cal.App.4th 598, 613.)

Similarly, judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. Los Angeles* (1997) 60 Cal.App.4th 171, 181; accord, e.g., *People v. Castillo* (2010) 49 Cal.4th 145, 155.)

As this Court has explained:

> ""Application of the doctrine is discretionary."" (Citation.) The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'

(Citations.)" [Citations.]

(*People v. Castillo*, *supra*, 49 Cal.4th at p. 155 [applying doctrine to estop the People from taking inconsistent positions in the same proceeding]; accord, e.g., *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037-1038 [applying doctrine to estop the State from taking inconsistent positions].)

Furthermore, even setting aside a prior inconsistent position, policy concerns over the orderly administration of justice and the conservation of scarce judicial resources generally require that a party raise all of his or her claims or objections in a *timely* manner or risk waiving or forfeiting them. (See, e.g., *People v. Senior* (1995) 33 Cal.App.4th 531, 534-538, and authorities cited therein [where party could have raised an issue in first appeal but did not, court later hearing same case following remand on second appeal should not consider the issue]; *People v. Duff* (2014) 58 Cal.4th 527, 550 & fn. 9 [recognizing general rule against raising claim for first time in reply brief, notwithstanding opposing party's ability to respond to it at oral argument or request supplemental briefing in order to do so]; *People v. Simon* (2001) 25 Cal.4th 1082, 1101-11-4, 1107 [objection to venue must be raised prior to trial or waived]; *In re Clark* (1993) 5 Cal.4th 750, 770, 780-782 [general rule barring presentation of successive claims that could have been raised in original, even still pending, habeas corpus petition but were not]; see also *Martin v. Atlantic Coast Line Railroad Company* (5th Cir. 1961) 289 F.2d 414, 416 ["We cannot try cases piecemeal simply because . . . in writing a brief on a second appeal,the attorneys generate an idea they should have advanced by specification of error on the first appeal"].) In recognition of these principles, the Rules of Court explicitly "limit[]" a party's supplemental briefing to new authorities, new legislation, or other matters *that were not available in time to be*

included in the party's brief on the merits." (Calif. Rules of Court, Rule 8.520, subd. (d)(1), italics added.)

Pursuant to all of these principles, this should Court refuse to entertain respondent's new and inconsistent position that the existing, pre-remand public record is adequate for this Court to determine "what specific records" the trial court examined and thereby review the trial court's ruling. (1SRB 12.)

b. Respondent's Prior Position that the Existing, Pre-Remand Record Was Inadequate for this Court to Determine "What Specific Records" The Trial Court Examined for Purposes of Appellate Review and Hence Remand for Proceedings to Reconstruct the Confidential Record or Obtain a Substitute Through Settlement Was Necessary

Of course, both Mr. Townsel and respondent agreed in the original briefing that Mr. Townsel was entitled to appellate review of the trial court's second-step *Pitchess* ruling based on the confidential record thereof. When this Court subsequently discovered that the confidential record was missing, it "directed [the parties] to file supplemental briefing addressing the impact on this appeal of the files' absence from the record." (September 18, 2013 Order.)

In his response, Mr. Townsel filed his first supplemental brief in which he argued that omission of the confidential record was erroneous and compromised his "rights to meaningful appellate review and a highly reliable death judgment." Therefore, the error required remedy through reconstruction in order to facilitate Mr. Townsel's rights to appellate review of the trial court's ruling under state law and the federal constitution. (1SAOB 5-10 [Argument heading "B" and accompanying text]; *Id.* 38-39

[Argument heading "E" and accompanying text].)

Mr. Townsel further urged this Court not to waste judicial resources and delay the proceedings further with an unnecessary remand. That is, although Judge Martin's contemporaneous identification on the existing public record of the files County Counsel lodged and he examined was inadequate to describe the *confidential contents* of those files for purposes of appellate review, Mr. Townsel argued that it was sufficient for this Court to attempt to remedy the error on its own by directly ordering the custodians of the original files to produce them as they existed at the time of the trial court's ruling and, if produced, make copies of the contents of those files to physically include in the confidential record. (1SAOB 4-5, 19-23; 1SARB 4.) In the interests of judicial economy, he argued that the Court should first attempt that remedy on its own rather remanding the matter to the superior court. (1SAOB 19, citing *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 165, fn. 12 [where matters may be disposed of or decided without further proceedings, court should do so "without further waste of judicial resources"]; 1SARB 4.) Moreover, although Judge Martin erroneously refused to identify the single "report" that he did disclose to the parties from those files, Mr. Townsel argued that the state's own evidence produced at the post-judgment record completion and certification proceedings on the existing record was adequate for this Court to identify it as Officer Reiland's incident report. Hence, although Judge Martin erred in failing to formally identify the disclosed report, Mr. Townsel argued that the error was harmless to the exercise of his appellate rights because the existing record was otherwise adequate for this Court to identify it and therefore remedial action for that particular error was unnecessary. (1SAOB 24-37; 1 SARB 9.)

By Mr. Townsel's own reasoning applied to the identity of the disclosed report, if the existing record were likewise adequate for this Court to determine what specific confidential documents the trial court reviewed and refused to disclose, the erroneous omission of the documents themselves would likewise be harmless to the appellate rights Mr. Townsel asserted. Put another way, if the existing record were already adequate to enable this Court to review the trial court's ruling, the state's response to this Court's order directing the parties to direct the "impact on this appeal" from the missing record would have been a short and simple one: the missing record had no "impact on this appeal." (See September 18, 2013 Order.) Therefore, pursuant to the authorities Mr. Townsel himself cited in his own supplemental briefing, the appeal could and should be decided without need for any remedial action. (See 1SAOB 19, citing *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 165, fn. 12.) Obviously, the time for respondent to make such arguments was in response to this Court's September 18, 2013 order for supplemental briefing. But respondent not only failed to make them at that time; respondent affirmatively argued to the contrary, which had significant legal consequences.

The introductory paragraph to respondent's legal argument began by acknowledging that it was responding to this Court's order "direct[ing] the parties to provide supplemental briefing addressing the impact on this appeal of the absence of the files that the trial court reviewed in camera in ruling on appellant's [*Pitchess*] motion for discovery . . . ." (1SRB 8.) Respondent also cited authorities to support the propositions that a defendant is entitled "'"'only to an appellate record adequate to permit (him or her) to argue"' the points raised on the appeal"'" or "'sufficient to permit

adequate and effective appellate review' [Citations]," as well as two cases in which this Court held that the records were adequate to permit appellate review of the trial courts' second-step *Pitchess* ruling despite the absence of copies of the actual documents reviewed. (1SRB 9-10, and authorities cited therein.)

However, respondent did *not* argue that the omission of the files in this case had no "impact on this appeal" because the existing record was adequate for this Court to review the trial court's ruling. (1SRB 8-14.) Instead, respondent "submit[ted]" that the omission should be "remedied" by "ordering the contents of the files reviewed by the trial court to be reconstructed or settled upon in the superior court and then having a copy of the [settled] statement or reviewed file provided to this Court." (1SRB 8, 11-14.)

In this regard, respondent disputed Mr. Townsel's arguments that the existing record furnished adequate information for: (1) this Court to attempt to remedy the error itself by directly obtaining the original files from the custodians and, if produced, reconstruct the missing confidential record with copies of their contents; and (2) this Court to determine the identity of the disclosed report without need for further remedy.

Instead, respondent explicitly and affirmatively argued that the existing record was not even adequate for this Court to attempt to remedy the error on its own by directly ordering the custodians of the original files to produce them to this Court and include copies thereof in the record. (1SRB 11-13.) To the contrary, respondent argued that the trial court's contemporaneous description of the lodged and reviewed files and other remarks on the existing record were inadequate for this Court to determine "what specific records" were contained in those files and whether or not

they were complete. (1SRB 12-13.) That determination could only be made by the superior court on remand based on evidence de hors the record from County Counsel who produced the files, perhaps aided by Judge Martin, now retired, who reviewed them. (1SRB 11-13 & fns. 9 & 10.) Once the superior court took further evidence adequate to identify "what specific records" were lodged and reviewed, the erroneously omitted record could be remedied through reconstruction or substitution with a settled statement of its contents. (1SRB 11-13; see also *Id.* 10-11.)

As to the disclosed report, although it was respondent – through the prosecutor who received the report at trial and the Deputy Attorney General who produced a copy thereof during the initial postjudgment record completion proceedings – who identified it as the incident report on the existing record without contradiction, respondent refused to accept Mr. Townsel's concession thereto on appeal, without explanation. (1SRB 13, fn. 12; 1SARB 8-9.) For this reason as well, respondent argued that the error could only be remedied with evidence de hors the existing record on remand. (1SRB 10-14.)

Hence, throughout its pre-remand briefing, respondent explicitly and by necessary implication not only conceded but affirmatively argued that the existing record was inadequate for this Court to determine "what specific records" the trial court reviewed in ruling on Mr. Townsel's *Pitchess* motion and effectuate Mr. Townsel's right to appellate review of that ruling. The only way to remedy the erroneous omission of the confidential record and provide this Court with a record of "what specific records" the trial court reviewed adequate to review the trial court's ruling was with evidence outside of the existing record to be taken on remand. Respondent got what it wanted.

c. This Court's Resulting Ruling and Order Remanding the Matter to the Superior Court for Proceedings to Take Further Evidence Necessary to Remedy the Erroneous Record Omission and "Enable this Court to Review the [Trial Court's *Pitchess*] Ruling" and the Subsequent Proceedings In Which Respondent Continued to Successfully Press its Position that Further Evidence Was Necessary to Obtain a Substitute for the Record Through Settlement

In response to the parties supplemental briefing, this Court issued an order for a limited remand to the superior court which provided in relevant part:

> *To enable this court to review the* [*trial court's Pitchess*] *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 Mr. Townsel's *Pitchess* motion, (2) when the records are produced, to review them and confirm whether they are the records it reviewed in ruling on Mr. Townsel's *Pitchess* motion, (3) to identify the particular document it ordered disclosed to Mr. Townsel 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 . . . .

(4/16/14 SCT 13.)

Thus, at respondent's urging, the Court explicitly and by necessary implication determined that the existing, pre-remand record was inadequate

to identify or describe "what specific records" the trial court reviewed in ruling on appellant's *Pitchess* motion (1SRB 12) and thus inadequate to "enable this court to review the [trial court's] ruling" (4/16/14 SCT 13). Put another way, by ruling that remand to the superior court for proceedings to take evidence identifying "the records" the trial judge "reviewed in ruling on Mr. Townsel's *Pitchess* motion" and reconstruct the missing confidential record with copies thereof was required in order "to enable this court to review the [trial court's] ruling," the Court necessarily determined that the existing record was inadequate in that regard. Once again, were it otherwise, remand would have been an unnecessary waste of judicial resources pursuant to the very authorities Mr. Townsel cited in his briefing. (1SAOB 19, citing *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 165, fn. 12; see also, Code of Civ. Proc., § 3532 ["the law neither does nor require idle acts"]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1231-1232 [where erroneous gap in appellate record of second-step *Pitchess* ruling is harmless to appellate court's ability to review ruling, remand and resulting delay in attempting to remedy error "imprudent" and "unnecessary"].)

The superior court thereafter conducted extensive proceedings on remand, involving five hearings over the course of three months. (See 2SAOB 7-8, 23-32.) Not once did respondent retreat from its position that those proceedings were necessary to provide this Court with the record of the trial court's ruling. To the contrary, respondent continued to actively and affirmatively advocate for their necessity.

After the superior court took evidence establishing that it was impossible to remedy the erroneous omission of the confidential record through reconstruction because the custodians of the original files had

destroyed them, counsel for Mr. Townsel pointed out that this Court's remand order did not explicitly did not "instruct us to move towards settlement. . . . [I]f the Supreme Court had wanted us to engage in settlement, they would have asked us to," but "it's specifically not part of the order." (4/16/14 SRT 109-110.) While Mr. Townsel had no objection to identifying the disclosed report as the incident report – as he had argued that the existing record already did (1SAOB 34-38; 1SARB 6-9) and as he was willing to stipulate on remand (4/16/14 SRT 111, 113-114) – the contents of the missing confidential record was another matter (4/16/14 SRT 110-112). Only two people were privy to the confidential contents of the files: County Counsel Doug Nelson, who produced and lodged them with the judge and the retired trial judge who reviewed them. (4/16/14 SRT 109-110.) Mr. Townsel's appellate counsel reminded the superior court of the 22-year passage of time since the now-retired trial judge's *Pitchess* review and ruling and noted his remarks on the existing record of the original postjudgment record correction and certification proceedings that he did not at that time have any recollection of the motion or the document he had disclosed. (4/16/14 SRT 116-117; see also 1 RC-CT 87-88; 2 RC-CT 364-365.)[2] In addition, appellate counsel advised the superior court, in the presence of respondent and County Counsel Nelson, who had been present throughout all of the proceedings on remand, that County Counsel Nelson had indicated he could not recall or determine the contents of those files now. (4/16/14 SRT 109.) Given the likelihood that settlement would

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[2] "RC-CT" refers to the reporter's transcript of the original post-judgment record correction and certification proceedings, which is contained in two volumes of a separately bound and paginated clerk's transcript on appeal.

prove to be futile, Mr. Townsel argued that the superior court should not sua sponte embark upon settlement proceedings but rather should conclude the proceedings and await further direction from this Court, if any, regarding the matter of settlement. (4/16/14 SRT 110-112, 116-117.)

Counsel for respondent disagreed, arguing that this Court's order was "broader than that," in that it encompassed "hearings" as were "necessary" to reconstruct the record and "enable this court to review the [trial court's] ruling" (4/16/14 SCT 13), and hence encompassed proceedings to "attempt to settle" the contents of the missing confidential record by examining the trial judge and his notes. (4/16/14 SRT 110-112; see also *Id.* 80-82.) Again, respondent's arguments were successful; the superior court ruled that this Court's order by necessary implication encompassed proceedings to "see[] if we can settle what documents it was that the judge reviewed" during the 1991 in-camera review with County Counsel Nelson. (4/16/14 SRT 111-112, 115, 125.)

There followed protracted arguments over the appropriate method by which settlement of the confidential record would be attempted, respondent insisting that the trial judge and his notes be examined in-camera, and Mr. Townsel arguing that he was entitled to participate in the settlement proceedings and examine Judge Martin and the trial notes on which he intended to rely to attempt to refresh his recollection, who was effectively respondent's witness since it was at respondent's insistence that the settlement proceedings go forward without direction from this Court. (4/16/14 SRT 114-129, 140-151.) Again, respondent's arguments were successful; the superior court ruled that it would conduct proceedings in-camera with Judge Martin and County Counsel Nelson, in which Judge Martin would review his trial notes and the existing public record relating to

the motion and his ruling, in an attempt to settle the contents of the missing record. Appellate counsel would not be permitted to participate in those proceedings, examine Judge Martin, or review his trial notes. (4/16/14 SRT 123, 129, 145-147.)

Of course, the existing record already contained defense counsel's query of the court if its ruling meant that there was "no evidence in the file of any complaints against Officer Reiland for excessive use of force or harrassment [sic]," and the court's brief response in the affirmative (15 RT 3519-3420), as respondent now emphasizes (see 2SRB 21). Since there would be no need to settle the confidential record if the existing record were already an adequate substitute therefor, appellate counsel addressed what the superior court would need to determine in-camera in order to make a record "sufficient to allow adequate Supreme Court review" of the trial judge's ruling (4/16/14 146-150), or, as this Court put it in its remand order, to "enable this court to review the ruling" (4/16/14 SCT 13).

Consistent with respondent's position before this Court that the existing record was inadequate for the Court to determine "what specific records" the trial court reviewed (1SRB 12), appellate counsel explained that the superior court must determine the full scope of documents the trial judge reviewed and could not "short-circuit" the inquiry by simply asking for the judge's conclusion as to whether the files contained relevant complaints of "violence or harassment." (4/16/14 RT 146-150.) Once the documents were lodged and reviewed by the trial judge, he was obligated to turn over any discoverable material under *Brady v. Maryland* (1963) 373 U.S. 83 and *United States v. Bagley* (1985) 473 U.S. 667. (4/16/14 RT 146-150; see also 1SAOB 24-26.) Such information would include, for instance, any evidence of dishonesty or making false reports since Officer

Reiland was the author of the incident report that formed the basis of his penalty phase testimony, sustained as well as unsustained complaints for relevant misconduct, or any other material or potentially exculpatory evidence. (4/16/14 SRT 146-150; see also 1SAOB 24-26, citing, inter alia, *People v. Hustead* (1999) Cal.App.4th 410, 418.) Therefore, the superior court could not limit its inquiry into the judge's legal conclusion or ruling about the contents of the files which was already reflected on the existing but inadequate record, but rather needed to determine the full scope of the materials he reviewed in order to provide a record adequate for this Court to review the trial judge's ruling. (*Ibid.*)

The superior court agreed that the question for it to resolve with the trial judge in-camera was "'what documents were reviewed without limitation.'" (4/16/14 SRT 149-150.) Not surprisingly, since it was respondent who insisted that settlement was necessary to comply with this Court's order to create a record "to enable this court to review [the trial judge's] ruling," and thus by necessary implication insisted that the existing record was insufficient to do so, respondent made no objection to these statements of the record that would be necessary to comply with that order. (See, e.g., *Barsamyan v. Appellate Div. of Superior Court* (2008) 44 Cal.4th 960, 969-970 [counsel's silence indicates acquiescence].)

Of course, the trial judge, as well as County Counsel, did review the existing record and his notes of the trial in-camera. However, neither he nor County Counsel was able to provide *any* information regarding the documents that County Counsel lodged and the trial judge reviewed in ruling on Mr. Townsel's *Pitchess* motion. (2SAOB 8, 29-31; 4/16/14 SRT

135-172, 194-198; see also 4/16/14 SCT 75-76, 84-86, 98-107, 120-121.)[3]

d. Respondent's new position that the existing record is adequate for this Court to determine the contents of the missing record adequate to enable it to review the trial court's ruling is inconsistent with its prior position and should be rejected.

Now, after respondent got what it asked for and obtained remand and proceedings to reconstruct or settle the record, respondent takes the position that the proceedings were never necessary in the first place because the existing public record is, after all, adequate to enable this Court to determine what specific documents County Counsel produced and the trial court examined in ruling on Mr. Townsel's *Pitchess* motion and subject that ruling to meaningful appellate review. (2SRB 19, 21.) Respondent's post-remand position is inconsistent with its pre-remand admission that the existing record is inadequate for this Court to determine "what specific records" the trial court examined and its necessarily implied admission that the record was therefore inadequate "to enable this court to review the [trial court's *Pitchess*] ruling" (4/16/14 SCT 13). (*Luceras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 93-94.) As such, respondent should be estopped from rebutting its prior admissions. (See, e.g., *Ulrich v. State Farm Fire and Cas. Co.*, *supra*, 109 Cal.App.4th 598, 613.)

Furthermore, because respondent's inconsistent pre-remand position was successful, resulting in this Court's April 16, 2014 order that remand to

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[3] The only document that could be identified by anyone was the disclosed report. That is, just as respondent had already done on the existing record (1SAOB 29-38; 1SARB 6-9), respondent through the trial prosecutor identified the disclosed report as Officer Reiland's incident report without contradiction from trial defense counsel (2SAOB 8, 32).

take evidence de hors the existing record was necessary to reconstruct the missing record and "to enable this Court to review the ruling," the elements of judicial estoppel have been satisfied. (*People v. Castillo*, *saupra*, 49 Cal.4th at p. 155.) If respondent's new position were accepted, it would lead to the ineluctable conclusion that respondent's prior position led this Court into an erroneous remand order and determination. In other words, as noted above and pursuant to the logic and authorities cited in Mr. Townsel's own briefing, if the existing record were already adequate to enable this Court to review the trial court's ruling, the erroneous omission of the confidential record would be harmless to the appellate rights Mr. Townsel asserted – or, in response to this Court's September 18, 2013 order, would have no "impact on this appeal" – and therefore further remedial proceedings would constitute amount to a waste of judicial resources on an empty act. (*Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 165, fn. 12; Code of Civ. Proc., § 3532 ["the law neither does nor require idle acts"].) Compelling policy considerations militate in favor of this Court's discretionary application of that doctrine to respondent's new position.

To paraphrase the United States Supreme Court, accepting respondent's new and inconsistent position "would create the perception that either" this Court was "misled" by respondent's first position into making its April 16, 2014 remand order or that this Court was misled into making an inconsistent determination now that the existing pre-remand record is itself adequate to enable this Court to review the trial court's *Pitchess* ruling. (See *New Hampshire v. Maine* (2001) 532 U.S. 742, 750 [justifying application of judicial estoppel].)

Moreover, this Court's remand order, made at respondent's behalf,

had significant consequences on the judicial sytem and the orderly administration of justice. The superior court held extensive proceedings entailing five hearings over three months in which it took live testimony and documentary evidence from representatives of three local government agencies, the retired trial judge, the trial prosecutor who is currently a superior court judge, and lead trial defense counsel who is currently the Public Defender of another county; County Counsel was present throughout the hearings, respondent was represented by both a deputy attorney general and a deputy district attorney, and Mr. Townsel was represented by at least one and sometimes two deputy state public defenders whose Oakland office was 150 miles from the Madera County Courthouse where the hearings were held. The proceedings were reported, minutes taken, motions were filed, and a clerk's and reporter's transcript were prepared, certified as accurate and complete, and transmitted to this Court. In short, the proceedings held at respondent's insistence consumed considerable judicial and public resources at taxpayer expense and delayed the resolution of this capital appeal. For the Court to now entertain respondent's totally inconsistent new position that those proceedings amounted to an unnecessary empty formalism because the existing record provides a record adequate to enable this Court to review the trial court's ruling would subvert important policies against wasting judicial resource and unnecessary delay in the orderly administration of justice and erode public confidence in the judicial system. (See, e.g., *People v. Ledbetter* (2014) 222 Cal.App.4th 896, 904 [while Penal Code section 1260 confers power on appellate courts to "remand the cause for further proceedings as may be just under the circumstances," remand for empty formalism that will have no practical, *actual* impact on outcome of proceedings is not "just under the

circumstances"]; *In re I.W.* (2009) 170 Cal.App.4th 396, 401-402 [interests in judicial economy and efficiency without unnecessary delay militate against a "limited remand [that] would be an empty formality and a waste of ever more scarce judicial resources"]; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473 ["futility and expense" of remanding for resentencing on an issue that would only affect formal sentence but have no impact on actual prison time "militates against it"]; cf. *Pierotti v.Torian* (2000) 81 Cal.App.4th 17, 35 ["'the appellate system and the taxpayers of this state are damaged by what amounts to a waste of the appellate court's time and resources'" from a frivolous appeal].)

Furthermore, this is not the first time that respondent has taken starkly inconsistent positions in these proceedings in an effort to "win" at all costs. As previously discussed, in its pre-remand briefing, respondent insisted that if the missing confidential record could not be reconstructed, efforts to obtain a "settled statement" of its contents were both appropriate and necessary. (1SRB 8-14.) Indeed, respondent argued that County Counsel, as the representative of the custodians who produced the files, was the most reliable source for settlement. (1SRB 12-13 & fn. 13 [County Counsel as the representative of the custodians of records who provided the files to the trial court "is in the best position to know exactly the meaning of the trial court's description [on the existing record], that is the custodian knows what was provided to the trial court for review"].) Furthermore, as discussed in Part c, *ante*, respondent likewise convinced the superior court on remand that proceedings to attempt to settle the contents of the missing record were necessary and appropriate. To that end, appellate counsel represented to the superior court – in the presence of both respondent and County Counsel Doug Nelson who had been present throughout the

proceedings – that Mr. Nelson had no recollection of the contents of the files he had produced and lodged with the trial court in 1991. (4/16/14 SRT 109; see also (4/16/14 SCT 98-107 [motion summarizing this portion of proceedings].) That representation was never questioned by any of the participants, including County Counsel himself, respondent, or the superior court who thereafter focused entirely on what information the trial judge might be able to add. (4/16/14 SRT 114-129, 140-151; see also 4/16/14 SCT 98-107 [motion].) That fact, however, was omitted from the superior court's initial written "order" summarizing the evidence that had been produced in the proceedings on remand. (4/16/14 SCT 75-76.) Therefore, upon receiving the written order, appellate counsel filed a written motion to amend the order to include that heretofore undisputed fact and – to make the record as clear as possible – included County Counsel's sworn declaration to that effect as an exhibit. (4/16/14 SCT 98-107, 115-121, citing, inter alia, *Marks v. Superior Court* (2002) 27 Cal.4th 176, 196-197 [in attempting to settle contents of missing record, court must consult "'trial judge's own memory and those of the other participants'"].)

Given that Mr. Townsel's motion was entirely consistent with respondent's position throughout the proceedings to that point, no opposition was expected. Respondent, however, did file a written opposition to the motion on the ground, inter alia, that record settlement is limited to "oral proceedings," does not extend to other parts of the appellate record such as the documents the trial judge reviewed in ruling on Mr. Townsel's *Pitchess* motion, and hence the proceedings held on remand were not proper "settlement" proceedings and County Counsel's input was irrelevant and unnecessary. (4/16/14 SCT 143-144.) In reply, appellate counsel pointed out that respondent's position was totally inconsistent with

its position throughout the proceedings on remand, as well as its position before this Court. To illustrate, appellate counsel attached the supplemental respondent's brief respondent filed in this Court advocating for settlement proceeding and citing authorities to support the proposition that settlement of missing *Pitchess* materials was appropriate. (4/16/15 SCT 147-178.) As appellate counsel explained, respondent's own summary of the law was just as correct when it did not suit respondent's goal of "winning" as it was when it did. (4/16/14 SCT 151-152.)

The doctrine of judicial estoppel "rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth, and justice. It is quite the reverse. Our adversarial system limits the affirmative duties owed by an advocate to his adversary, but that does not mean it frees him to deceive courts, argue out of both sides of his mouth, fabricate facts and rules of law, or seek affirmatively to obscure the relevant issues and considerations behind a smokescreen of self-contradictions and opportunistic flip-flops." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558.)

Ultimately – after yet more protracted and unnecessary litigation created by respondent's misleading tactics – the superior court correctly ruled that County Counsel's own recollection or lack thereof regarding the contents of the missing record was relevant and admissible on the question of whether a substitute could be obtained through settlement. (4/16/14 SRT 194-198.) Although respondent's opportunistic flip-flop was not successful below, it does serve to illustrate respondent's propensity for gamesmanship and thus justify application of the doctrine of judicial estoppel to

respondent's similar opportunistic flip flop here as a deterrent measure.[4]

Finally, whatever else might be said about respondent's new position that the existing pre-remand public record is adequate for this Court to determine the specific documents the trial court examined and thereby review its ruling, it is clear that it could and should have been raised in its first supplemental briefing in response to this Court's September 18, 2013 order directing the parties to "address[] the impact on this appeal of the files' absence from the record." Respondent's current supplemental brief, therefore, is not "*limit*[*ed*]" to "matters *that were not available in time to be included*" in its first supplemental brief. (Calif. Rules of Court, Rule 8.520, subd. (d)(1), italics added.) As such, respondent's new position is not properly raised and therefore should be deemed waived or forfeited for this reason, as well. In any event, even if this Court were to entertain respondent's new and inconsistent position, it is without merit.

2. The Existing, Pre-Remand Public Record and Identification of the Disclosed Report as Officer Reiland's "Incident Report" That Formed the Basis for His Penalty Phase Testimony Is Inadequate for this Court to Determine What Confidential Documents the Trial Court Reviewed in Ruling on Mr. Townsel's *Pitchess* Motion and Hence Inadequate for this Court to Conduct Meaningful Appellate Review of the Trial Court's Ruling.

Respondent briefly describes the public record of the trial court's ruling (2SRB 16-17), then perfunctorily concludes that it "provides an adequate record for this Court to meaningfully review the trial court's

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[4] The same deputy attorney general has represented respondent throughout the postjudgment proceedings, from the preliminary record correction and certification proceedings through today.

ruling for an abuse of discretion" (2SRB 19). Respondent makes this contention without any supporting argument; instead, respondent simply cites to this Court's decisions in *People v. Myles* (2012) 53 Cal.4th 1181, 1209, *People v. Prince* (2007) 40 Cal.4th 1179, 1285-1286, and *People v. Mooc*, *supra*, 26 Cal.4th at p. 1229, without any analysis of those decisions or how they apply to this particular case. (2SRB 19.) This should Court pass respondent's point without consideration for this reason, as well. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1182 [claim presented without "adequate" supporting legal argument was "not properly raised"]; *People v. Williams* (1997) 16 Cal.4th 153, 206, 66 Cal.Rptr.2d 123, 940 P.2d 710 ["Points 'perfunctorily asserted without argument in support' are not properly raised"].) In any event, to the extent that respondent's contention is taken to mean that the record here is indistinguishable from those in *Prince, Myles,* and *Mooc* and hence is adequate to enable this Court to determine what records the trial court reviewed and subject the court's ruling to appellate review, it is without merit.

In *People v. Mooc*, this Court held that in order to "obtain meaningful appellate review" of a trial court's second-step *Pitchess* ruling, there must be a confidential record of the confidential documents that the trial judge reviewed. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1228.) Indeed, the Court held that the appellate court must be able to review the documents themselves; hence, the trial court must either include copies therof in the confidential appellate record or make a confidential written or oral log of the documents it reviewed, adequate for an appellate court to be able to obtain and review them. (*Id.* at pp. 1228-1231.) In that case, because the trial court failed to make such a record, the appellate court was unable to examine the documents the trial court examined (or at least a

substitute therefore) and thus "defendant was unable to obtain meaningful appellate review of the" trial court's *Pitchess* ruling. (*Id.* at p. 1228.) Ultimately, the confidential contents of the officer's entire personnel file were produced for appellate review. (*Id.* at p. 1231.) Although this Court held that the record remained inadequate to determine what documents from that file the trial court did review, the error was harmless for purposes of appellate review because this Court was able to determine that none of the available confidential documents contained material that the court would have been required to disclose. (*Ibid.*) In other words, it was only by reviewing all of the actual confidential documents that conceivably could have been reviewed by the trial court that this Court was able to provide the defendant with the appellate review to which he was entitled.

To be sure, since *Mooc*, this Court recognized in *People v. Prince*, *supra*, 40 Cal.4th at pp. 1285-1286 and *People v. Myles*, *supra*, 53 Cal.4th at p. 1209, that an adequate substitute for the confidential documents themselves may be created for purposes of appellate review if the trial judge orally identifies and describes the documents on the confidential record of a reported in-camera proceeding and the sealed transcript thereof is provided to the reviewing court. In *Prince*, although the officer's entire personnel file was not "copied and inserted into the record," the Court held that the trial court created an adequate record for purposes of appellate review where: (1) it conducted a reported in-camera proceeding in which it reviewed records from the file and "adequately stated . . . the contents of that file" on that sealed record, a transcript of which was provided to the Court; and (2) included in the sealed record copies of "the documents that formed the basis for the court's conclusion that defendant was not entitled to the complaints that had been filed against" the officer. (*People v. Prince*,

supra, at pp. 1285-1286.) In *Myles*, the Court held the record was "adequate for purposes of conducting appellate review" where the trial court conducted three reported in-camera proceedings in which it adequately "'stated for the record what documents it examined'" and provided the sealed transcript thereof to this Court for review. (*People v. Myles*, *supra*, at pp. 1208-1209.)

Here, in contrast to both *Prince* and *Myles*, the trial court did not conduct any reported oral in-camera proceeding relating to the motion at all, much less make a confidential oral record in which it stated or described the contents of the reviewed files. Nor, unlike in *Prince*, did the trial court physically include the "documents that formed the basis" of its ruling in the record. (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1285-1286.) Instead, the *entire confidential record* of the trial court's ruling has been erroneously omitted. The record here is just as inadequate as the record in *Mooc* – it does not contain the confidential documents the trial court examined nor does it contain any oral or written log or description of those documents. While the defendant in *Mooc* was ultimately able to obtain appellate review of the trial court's ruling because this Court was able to obtain and review *all* available confidential records that conceivably could have been before the trial judge in that case, no such result was obtained here.

Curiously, respondent contends that even "assuming arguendo that this Court find the record insufficient for review" (2SRBG 20), the error is harmless because the public record establishes that the confidential record contained "'no evidence of any complaints against Officer Reiland for excessive use of force or harassment'" (2SRB 21, quoting 15 RT 3519-3520) and "nothing 'of any relevance whatsoever . . . that might affect the defendant'" (2 SRB 21, quoting from 15 RT 3519-3520.) While phrased

under the rubric of harmless error from a "record insufficient for review," respondent's argument is really just another way of saying that the public record is an adequate substitute for the confidential record and hence *is* "sufficient for [appellate] review." (2SRB 19.) Again, the contention is without merit: just as respondent and this Court recognized that this record was not an adequate substitute for the missing confidential record to enable this Court to review the trial court's ruling before remand (and indeed during the remand proceedings), it remains inadequate after remand.

The remarks on the public record reflect the trial judge's *ruling*. That is, the judge ruled that the incident report was the only document in the unspecified confidential materials that "appears to be significant to this case," and "the only thing that is in there that is really of any relevance whatsoever in this case that might affect the defendant." (15 RT 3519.) When defense counsel inquired if the court's ruling was that there's "no evidence in the file of any complaints against Officer Reiland for excessive use of force or harrassment [sic]," the court simply responded in the affirmative. (15 RT 3519-3520.)

While the brief colloquy between the court and defense counsel may have described the court's ultimate ruling that there was no *discoverable* evidence of "complaints" for "excessive use of force or harassment" in the materials, it was inadequate to provide a sufficiently reliable record of the documentary evidence on which that ruling was based to protect Mr. Townsel's state and federal constitutional rights to appellate review of that ruling. By definition, the court's remarks on the public record could not reveal whether the confidential files contained potentially relevant evidence that the trial court had deemed non-discoverable. This is no doubt why an adequate substitute for the confidential documents themselves must be

made in-camera, on the confidential record. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1229 ["of course," any record of the documents the trial court reviewed – whether copies of the documents themselves or a log or description thereof – must be contained in a sealed record].) Hence, the court's remarks on the public record cannot be taken as anything other than a reflection of its public ruling – the very ruling that this Court must independently review based on a confidential record of the materials actually examined.

Furthermore, as respondent itself pointed out in its first supplemental briefing, this Court cannot determine from the trial court's public remarks whether the custodians produced the complete contents of the files for review. For instance, this Court cannot determine whether the trial court properly exercised its discretion based on a review of both sustained and unsustained, or unfounded complaints or whether the produced files indicated that they only included sustained complaints and that unsustained complaints were maintained in separate files that had not been produced. (See *People v. Zamora* (1980) 28 Cal.3d 1, 93 & fn. 1 [*Pitchess* discovery encompasses both sustained and unsustained complaints]; 4/16/14 SRT 97-99, 103-104, 107 [Custodian of records for Department of Corrections testifying to current policy of maintaining unsustained complaints in separately file but lack of knowledge as to where unsustained complaints were maintained in 1991]; cf. Pen. Code, § 832.5, subd. (c) [current provision enacted in 1996 requiring that "unfounded or exonerated" citizen complaints shall not be maintained in the officer's "general personnel file" but shall be retained in other, separate files for purposes, inter alia, of disclosure under *Pitchess* procedure].) Whether the custodians produced the complete personnel files or withheld certain materials is another matter

that must be shown on the confidential record. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1229-1232.) At bottom, based solely on the public record of the trial court's ruling, this Court simply cannot be confident about the scope of materials the trial court reviewed or that the confidential record contained no sustained or unsustained complaints or reports against Officer Reiland for inappropriate use of force, threatened use of force, or acts of intimidation that could be relevant to Mr. Townsel's defense. Even assuming otherwise for the sake of argument, the public record is still inadequate to enable this Court to review the trial court's ruling.

As Mr. Townsel argued in his first supplemental briefing, his right to discovery was not limited solely to "complaints" for "excessive use of force or harassment." Rather, once the judge reviewed the produced documents, Mr. Townsel was entitled to evidence that Reiland had made false reports, which would be relevant to impeach his written "incident report" on which his testimony was based (*People v. Hustead*, *supra*, Cal.App.4th at p. 418), as well as any favorable and material evidence, including exculpatory and impeachment evidence, that is otherwise mandated under *Brady v. Maryland*, *supra*, 373 U.S. 83, and *United States v. Bagley*, *supra*, 473 U.S. 667. (1SAOB 24-26.) Respondent made no objection to these arguments in its first supplemental brief in which it successfully argued for remand to reconstruct or settle on the contents of the missing confidential record. (See 1SRB 1-14.) Likewise, this issue was litigated and conceded by respondent on remand. As set forth in Part B-1-c, *ante*, for the foregoing reasons, Mr. Townsel argued below that a statement simply reflecting that the reviewed materials contained no evidence of allegations against Officer Reiland for excessive force or harassment would not be "sufficient to allow adequate Supreme Court review" of the trial judge's ruling (4/16/14 RT 146-150), or,

as this Court put it in its remand order, to "enable this court to review the ruling" (4/16/14 SCT 13). (4/16/14 RT 146-150.) The superior court agreed, ruling that the settlement proceedings urged by respondent must be directed to settling the full confidential record of the materials examined. (4/16/14 RT 149-150.) Although respondent evinced no hesitation to mount repeated objections to Mr. Townsel's various points throughout the proceedings on remand, respondent significantly made no objection to Mr. Townsel's argument or the court's ruling. (See 4/16/14 RT 146-150.) Hence, respondent impliedly conceded Mr. Townsel's position not only as a matter of law but also as a matter of fact. (See, e.g., *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [People impliedly conceded point made by appellant by failing to dispute it in briefing or at oral argument]; *People v. Isaac* (2014) 224 Cal.App.4th 143, 147; see also *Barsamyan v. Appellate Div. of Superior Court, supra,* 44 Cal.4th at pp. 969-970 [counsel's silence indicates acquiescence].) To the extent that respondent's current position is inconsistent with its prior concession, this Court should dismiss it as waived or, in any event, without merit.

The trial court's qualifying language in its public ruling that Officer Reiland's incident report was the only document in the file that "appears to be *significant to this case*" or that is "*really* of any *relevance* whatsoever *in this case that might affect the defendant*" certainly left open the possibility that the files contained documents which could be "significant" or "really . . . relevan[t]" in some other case. (15 RT 3519.) Whether that *legal* conclusion was correct can only be determined by examining the facts on which it was based – i.e., the actual documents themselves or an adequate confidential substitute describing their contents.

Indeed, Judge Martin, as well as County Counsel, did review the

existing record and the Judge Martin's trial notes on remand, in-camera. However, neither Judge Martin nor County Counsel was able to provide *any* information regarding the documents that County Counsel lodged and the Judge Martin reviewed in ruling on Mr. Townsel's *Pitchess* motion. (2SAOB 8, 29-31; 4/16/14 SRT 135-172, 194-198; see also 4/16/14 SCT 75-76, 84-86, 98-107, 120-121.) If the existing record were insufficient for the parties who were actually privy to the contents of the confidential record to shed any light on its contents, surely the same record is insufficient for this Court to be able to determine that it contained no potentially relevant and discoverable information.

For all of the foregoing reasons, and just as this Court ruled on August 16, 2014, the existing public record is inadequate for this Court to determine the contents of the confidential record and "enable this court to review [the trial court's *Pitchess*] ruling." (4/16/14 SCT 13.) The omission has therefore deprived Mr. Townsel of his long standing state law right to appellate review of that ruling which, in turn, has deprived him of his Due Process and Eighth Amendment rights to meaningful appellate review of his death judgment.

C. Respondent's Contention that Appellant's "Constitutional Rights" Were Not Violated By a Prosecutor's Or Law Enforcement Agency's "Bad Faith" Destruction of Evidence Has No Bearing on Appellant's Claim That He Was Deprived of the *Appellate Record* to Which He Was Entitled and Thus Deprived of His State and Federeral Constitutional Rights to Meaningful Appellate Review of the Trial Court's *Pitchess* Ruling

Next, respondent argues that even if the record is inadequate for this Court to subject the trial court's ruling to appellate review, the deficiency does not amount to a violation of Mr. Townsel's "constitutional rights."

(2SRB 17-18.) Respondent's argument is a puzzling one that is without merit.

At the outset, respondent briefly recognizes that a defendant has the right to appellate review of a trial court's second-step *Pitchess* ruling based on the appellate court's review of the "'record of the [sealed] documents examined by the trial court'" in-camera in making its ruling. (2SRB 14-15, quoting *People v. Mooc*, *supra*, 26 Cal.4th at p. 1229.) Respondent likewise seems to acknowledge a state's failure to provide a criminal defendant with an appellate record "'adequate to permit (him or her) to argue' the points raised in the appeal," or "sufficient to permit adequate and effective appellate review," violates state law and the federal constitution. (2SRB 15, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 857-858.) So far so good: it necessarily follows from these principles (as further reflected in the law detailed in Mr. Townsel's second supplemental opening brief) that deprivation of the appellate record required to facilitate appellate review of a trial court's second-step *Pitchess* ruling violates not only state law but also the defendant's federal constitutional right to a "meaningful appeal." (2SAOB 9-21, citing, inter alia, *Evitts v. Lucey* (1985) 469 U.S. 387, 393, 400-401, *Parker v. Dugger* (1991) 498 U.S. 308, 321, *People v. Mooc*, *supra*, 26 Cal.4th at p. 1228, *People v. Galland* (2008) 45 Cal.4th 354, 370, and *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 971-974.) But rather than following the clear path from those acknowledged principles to its logical conclusion, respondent takes an abrupt and inexplicable detour into decidedly different territory.

That is, following its brief summary of the law governing the state and federal constitutional rights to a meaningful appeal and corresponding right to a record adequate to effectuate those rights, respondent asserts that

the deficient appellate record "did not violate appellant's constitutional rights" because *the custodians* who produced the original files did not lose or destroy their *own records* in "bad faith." (RB 17-18.) In support of that proposition, respondent cites authorities governing a claim that a *prosecutor* or *law enforcement agency*'s destruction of *evidence* that is *not* part of the trial record amounts to a due process violation. (2SRB 17-18, citing *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 12, in turn citing *California v. Trombetta* (1984) 467 U.S. 479, 488-489 and *Arizona v. Youngblood* (1988) 488 U.S. 51, 56.) Respondent mixes apples and oranges.

The error raised here is not *the custodians'* destruction of their own records or evidence that is *not* part of the record, to which the legal principles respondent cites would apply. Instead, the error is the *trial court's* omission and irretrievable loss of *part of the trial and appellate record*, to which the different legal principles outlined in Mr. Townsel's second supplemental opening brief and alluded to in respondent's own brief apply. (See 2SAOB 9-21.)

As set forth in Mr. Townsel's first and second supplemental briefs, once the documents were lodged with the trial court for review, they (or copies thereof) automatically became part of the appellate record in this capital case under long standing law. (1SAOB 8-9, 18 & 2SAOB 2, and authorities cited therein; see also *People v. Galland* (2008) 45 Cal.4th 354, 367-369 [sealed documents lodged and reviewed by trial court in-camera are part of appellate record and must be physically maintained in court's files absent exceptional circumstances].) Indeed, the trial court recognized as much when it explicitly ordered that the contents of the files be included in the confidential appellate record and transmitted to this Court in 1997. (7

CT 1655; see also 1 RC-CT 86, 88.) Thus, the superior court erred in physically omitting the lodged and reviewed documents from the confidential appellate record (or in otherwise failing to create any confidential record of the contents of the reviewed files). (1SRB 11-12; 1SARB 1.) In his first supplemental opening brief, Mr. Townsel argued that erroneous omission of the confidential record compromised his rights to appellate review of the trial court's ruling under state law and the federal constitution. (1SAOB 5-10, 38-39.)

The question to be resolved on remand, as respondent itself put it, was whether that "error may be remedied" by reconstructing the appellate record with copies of the actual documents or obtaining an adequate substitute through settlement. (1SRB 12.) The fact that the evidence adduced on remand established that the erroneous deficiency in the appellate record could not be remedied through reconstruction with copies of the actual documents because the custodians destroyed their own records of them did not shift the constitutional focus to the good faith or bad faith of the custodians in destroying evidence in their possession. The constitutional focus was and remains on an erroneous deficiency in the appellate record. (2SAOB 12-14, citing, inter alia, *People v. Galland*, *supra*, 45 Cal.4th at p. 370; *People v. Samayoa* (1997) 15 Cal.4th 795, 820-821; *In re Steven B.* (1979) 25 Cal.3d 1, 7-9.) The question of whether that error could be remedied on remand having been answered in the negative, the question now before this Court is whether the erroneous gap in the appellate record precludes the meaningful appellate review of the trial court's second-step *Pitchess* ruling to which Mr. Townsel is entitled under state law and the Due Process Clause and Eighth Amendment of the federal constitution. (2SAOB 9-14.) The good faith or bad faith of the custodians

of other agencies in destroying their own records has no bearing on that constitutional question. For the reasons set forth above, as well as in appellant's second supplemental opening brief, the erroneously deficient appellate record precludes the appellate review of the trial court's second-step *Pitchess* ruling to which appellant is entitled under long-standing law. The deprivation of appellant's right to appeal the court's penalty phase ruling, in turn, has deprived Mr. Townsel of his rights to a meaningful appeal from the judgment of death, in violation of the Due Process Clause and Eighth Amendment of the federal constitution.

D. Respondent Has Not Even Acknowledged, Much Less Carried, Its Burden of Demonstrating that the Deprivation of Mr. Townsel's Right to Appeal the Trial Court's Penalty Phase *Pitchess* Ruling is Harmless Beyond a Reasonable Doubt

1. It is Respondent's Burden to Prove the Error Harmless Beyond a Reasonable Doubt, Not Mr. Townsel's Burden to Prove the Error Was Prejudicial Under the "Reasonable Probability" Test

Respondent further contends that even "assuming arguendo that this Court finds the record insufficient for review," it makes no difference because Mr. Townsel has failed to carry his burden of proving that it is reasonably probable that the result would be more favorable if his rights to appellate review were honored. (2SRB 19-21.) Of course, the "reasonably probability" test for prejudice applies only to state law errors affecting the guilt phase. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.) That test has no application here.

As discussed in Part C, *ante*, respondent's assumed premise that "the record [is] insufficient for review" compels the conclusion that Mr. Townsel has been deprived of his federal constitutional rights to meaningful

appellate review of the trial court's ruling. Hence, as set forth in Mr. Townsel's second supplemental opening brief but ignored by respondent, the *Chapman* harmless error test applied to federal constitutional violations applies to the federal constitutional violation here. (2SAOB 35, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Indeed, even if the error was one of state law only, it affected the penalty phase and this Court's ability to meaningfully review the death judgment. Hence, as Mr. Townsel further discussed in his last brief but respondent ignores, the same test applies. (2SAOB 35, citing *People v. Gonzalez* (2006) 38 Cal.4th 932, 961 [harmless error analysis applicable to violations of state law that affect the penalty phase is the "same in substance and effect" as *Chapman* standard]; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

Under the *Chapman* harmless error test, the state bears the burden of proving the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The "beyond a reasonable doubt" standard under *Chapman* is equivalent to the same standard required to prove guilt at trial. Hence, just as that standard necessarily implies a presumption of innocence that the state bears the burden of rebutting beyond a reasonable doubt in the minds of the jurors at trial (see, e.g., *Delo v. Lashley* (1993) 507 U.S. 272, 278, discussing and citing authorities), so too does it necessarily imply a presumption or a rebuttable presumption of prejudice that the state bears the burden of rebutting beyond a reasonable doubt in the mind of the reviewing court on appeal (2 SAOB 35-36). In other words, the defendant bears no burden of proving "actual prejudice" from a federal constitutional violation (since such prejudice is presumed, albeit not conclusively); it is the respondent's burden to demonstrate the absence of such prejudice beyond a reasonable doubt. (See, e.g., *Deck v.*

Missouri (2005) 544 U.S. 622, 635; *Riggins v. Nevada* (1992) 504 U.S. 127, 137-138; see also *Brecht v. Abrahamson* (1993) 507 U.S. 618, 637-638 [distinguishing between harmless error test applied on federal habeas corpus, which requires showing of "actual prejudice," from *Chapman* harmless error test, which requires state to prove its absence].)

As set forth in Mr. Townsel's supplemental opening brief, application of the *Chapman* harmless error test (or the equivalent harmless error test applied to violations of state law that affect the penalty phase of a capital case) first requires respondent to prove beyond a reasonable doubt that had Mr. Townsel been afforded his right to appellate review, there is no reasonable possibility that the confidential record contained discoverable information that would have led to the impeachment of Officer Reiland and hence no reasonable possibility that appellate review would have resulted in a finding that the trial court's penalty phase *Pitchess* ruling was erroneous. If respondent cannot satisfy that burden, respondent must further demonstrate that there is no reasonable possibility the disclosure of discoverable evidence leading to the impeachment of Officer Reiland affected the jurors' verdict and hence would affect the outcome of this appeal. Put another way, respondent must demonstrate beyond a reasonable doubt that Officer Reiland's *unimpeached* testimony did not influence the jurors' death verdict and hence the death judgment must be affirmed notwithstanding the violation of Mr. Townsel's appellate rights. (2SAOB 37-43, and authorities cited therein.) Respondent has not even acknowledged, much less satisfied, its burden.

2. Respondent Has Failed to Carry its Burden of Proving Beyond a Reasonable Doubt that the Deprivation of Mr. Townsel's Appeal Rights Is Harmless Because Meaningful Appellate Review Would Reveal that the Trial Court's Ruling Was Correct

As to whether appellate review would have revealed that the trial court's ruling was erroneous, respondent's sole argument is that Mr. Townsel has not proved its "reasonable probability." (2SRB 19-26.) Respondent does not dispute that it cannot prove beyond a reasonable doubt that appellate review would reveal the trial court's ruling to be correct. (See 2SRB 19-26.) This Court should treat respondent's failure to address harmless error under the appropriate legal test as a concession that it cannot satisfy that test. (See, e.g., *People v. Bouzas*, *supra*, 53 Cal.3d at p. 480.)

Respondent next argues that even if the confidential record contained discoverable information leading to the impeachment of Officer Reiland, it is not reasonably probable that the impeachment of Reiland's testimony would have produced a more favorable result. (2SRB 19-26.) Under the appropriate harmless error test, respondent has failed to prove that the jurors' death verdict was surely unattributable to Reiland's unimpeached testimony.

With regard to the relative strength and weakness of the state's case for death versus the defense case for life, respondent reiterates essentially the same harmless error arguments from its original respondent's brief. (RB 243-245; see also RB 162-169, 170-177, 239-243.) Accordingly, Mr. Townsel incorporates by this reference his discussion of the closeness of the evidence from his original opening and reply briefs without further discussion here. (See AOB 228-243, 254-256; ARB 314-316; see also AOB 223-228; ARB 155-185.)

As to the impact of Officer Reiland's unimpeached testimony on the jury's penalty assessment against this background, the state here argues that Reiland's testimony was insignificant and unimportant to its case for death. (2SRB 24-26.) The true case in aggravation, the state here contends, was based entirely on the circumstances of the crimes themselves. (*Ibid.*) Any other evidence was insignificant and unnecessary to the prosecution's case. (*Ibid.*)

Of course, respondent's position in this regard is contrary to the position it took at trial. As set forth in appellant's supplemental opening brief but largely ignored by respondent, the prosecutor's first words to the jurors in his opening penalty phase statement emphasized the battery on Officer Reiland before any of the other aggravating evidence (15 RT 3525-3526); in his penalty phase summation, the prosecutor emphasized the battery on Reiland as "significant" (16 RT 3690); and in his final words to the jury in his penalty phase rebuttal, the prosecutor again emphasized the battery on Reiland as proof that Mr. Townsel's commission of the death-eligible crimes did not represent an isolated "temper tantrum" or episode of "aberrant behavior," but rather reflected his propensity for violence that continued even while in custody (16 RT 3736, 3739). (2SAOB 41-43.) Given the People's emphasis on Reiland's testimony at every opportunity the prosecutor had to address the jurors, their position on appeal that it was an unimportant part of their case for death is disinenuous. (See, e.g., *Johnson v. Mississippi* (1978) 486 U.S. 578, 586 [prosecutor's reliance on evidence in summation is indication of its importance to case and impact on jurors]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877.) Reiland's testimony was obviously an important part of the state's case for death and "[t]here is no reason why [this Court] should treat this evidence as any less

crucial than the prosecutor – and so presumably the jury – treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, internal quotation marks omitted.)

Furthermore, respondent ignores the inherent nature of such aggravating evidence as leading inevitably to the inference that a sentence of life without the possibility of parole is inadequate to protect innocent victims. (2SAOB 38-39, 43.) Even behind bars, the defendant has committed acts of violence against prison officials and thus will likely continue to do so if his life is spared. The only way to ensure that the defendant will not harm anyone else in the future is by executing him. The significance of such evidence as weighing on death's side of the scale cannot be ignored. For these and all of the other reasons set forth in Mr. Townsel's second supplemental opening brief, respondent cannot carry its burden of demonstrating beyond a reasonable doubt that Officer Reiland's unimpeached testimony did not influence the jurors' death verdict. (2SAOB 37-47.)

More to the point, respondent cannot prove beyond a reasonable doubt that the deprivation of Mr. Townsel's rights to meaningful appellate review of the trial court's penalty phase *Pitchess* ruling under state law and the Due Process Clause and Eighth Amendment is harmless. (See 2SAOB 35-47.) Indeed, respondent does not dispute that it cannot meet this test of harmless error. (See 2SRB 19-26 [limiting harmless error analysis to "reasonable probability" for prejudice].) Whether the effect of the deprivation is considered alone or in combination with any of the guilt or penalty phase errors raised in Mr. Townsel's opening brief, the death judgment must be reversed. (2SAOB 47, AOB 228-244; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-590; *People v. Gonzalez*, *supra*, 38

Cal.4th 932, 961; *People v. Brown* (1986) 46 Cal.3d 432, 438.)

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Mr. Townsel's opening and reply briefs and his first supplemental opening and reply briefs, the death judgment must be reversed.

DATE: February 27, 2015

Respectfully submitted,

MICHAEL J. HERSEK
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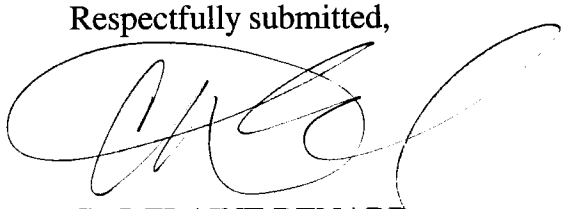
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent appellant, Anthony Letrice Townsel, in this automatic appeal. Accompanying this brief is an Application for Permission to File an Oversized Brief in excess of the 2,800 word count limit under the Rules of Court. (Calif. Rules of Court, Rules 8.630, subdivisions (b)(5) & (d) and 8.520, subdivision (d).) I have conducted a word count of this supplemental brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 11,964 words.

Date: February 27, 2015

Respectfully submitted,



C . DELAINE RENARD
Senior Deputy State Public Defender
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony Letrice Townsel*

Superior Court No. 8926
Supreme Court No. S022998

I, KECIA BAILEY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607, that I served a true copy of the attached:

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

on each of the following, by placing the same in an envelope addressed (respectively) as follows:

Louis Vasquez
Supervising Deputy Attorney General
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Mr. Anthony Letrice Townsel, H-10300
CSP-SQ
3-EB-22
San Quentin, CA 94974

Madera County Superior Court
Clerk of the Court
209 West Yosemite Avenue
Madera, CA 93637

Each said envelope was then, on February 27, 2015, sealed and deposited in the United States Mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2015, at Oakland, California.

DECLARANT