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 SUPPLEMENTAL OPENING BRIEF ON COURT'S REQUEST PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.630 SUBDIVISION (F)

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

HONORABLE PAUL R. MARTIN

MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
State Bar No. 1699893
Senior Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712
Renard@ospd.ca.gov

Attorneys for Appellant

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THE APPROPRIATE REMEDY FOR THE SUPERIOR COURT'S FAILURE TO EFFECTUATE ITS 1997 ORDER TO INCLUDE IN THE APPELLATE RECORD A SEALED COPY OF THE FILES THE TRIAL COURT REVIEWED IN RULING ON APPELLANT'S *PITCHESS* MOTION AND TRANSMIT IT TO THIS COURT IS TO ORDER RECONSTRUCTION OF THAT RECORD

Pursuant to this Court's September 18, 2013 order, appellant submits this supplemental brief on the Court's request pursuant to California Rules of Court, rule 8.630 subdivision (f).

A. Introduction

On April 16, 1990, and prior to the commencement of the penalty phase, defense counsel made a so-called "*Pitchess* motion" for discovery of "any and all 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 investigative reports thereof." (2 CT 498-505; see *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, §§ 1043, 1045; Appellant's Opening Brief ["AOB"] 257-261 [Argument VIII].)[1] On the same date, Madera County Counsel, as the representative of the Madera County Department of Corrections ("DOC") and the Personnel Office produced and lodged with the trial court the following files for in-camera review: (1) Officer Reiland's "personnel file maintained at the

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[1] "CT" refers to the clerk's transcript on appeal, preceded by volume number and followed by page number. "SCT" refers to the supplemental clerk's transcript and utilizes the same format. "RT" refers to the reporter's transcript utilizing the same format. "RC-CT" refers to the reporter's transcript of the record correction and completion proceedings, which is contained in two volumes of a separately bound and paginated clerk's transcript.

DOC"; (2) "[a] report file which is a file of reports written by Officer Frank Reiland"; (3) a "pre-employment background file"; and (4) "the personnel file maintained at County Personnel Office." (15 RT 3513-3520; Respondent's Brief ["RB"] 252-253; AOB 258.) Following the court's in-camera review of those files, the court ruled that only one report contained therein was relevant and disclosed it to counsel for both parties; the court ruled that the remaining information in the files was irrelevant and thus not discoverable. (15 RT 3519-3520; AOB 258-259.)

The parties agree that after judgment was imposed and during the record correction, completion and certification proceedings in the superior court, the trial court issued the following written order on December 30, 1997: "the court orders Officer Reilland's [sic] 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 1655; see also 1 RC-CT 86, 88 [oral orders to the same effect on December 18, 1997]; AOB 259 [citing December 30, 1997 order at 7 CT 1655]; RB 252-253 [same].) On September 9, 2005, the superior court certified the record as accurate and complete. (2 SCT 365-367.)[2]

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[2] As will be demonstrated below, the factual background relevant to the issue on which supplemental briefing has been ordered is complicated. For ease of reference, appellant will hereafter refer to:

(1) the files the trial court reviewed in ruling on appellant's *Pitchess* motion on April 16, 1991, which included not only Officer Reiland's personnel files but additional files concerning him, as "*Pitchess* files";

(2) its April 16, 1991 review of those files as its "*Pitchess* review;"

(3) its April 16, 1991 ruling on appellant's *Pitchess* motion

(continued...)

Absent evidence to the contrary, the parties presumed that the superior court clerk had regularly performed his or her duty to effectuate the court's 1997 order and included a sealed copy of the reviewed *Pitchess* files in the certified confidential record transmitted to this Court. (See Evid. Code, § 664; Calif. Rules of Court, rule 8.625, subds. (c) & (d).) On May 13, 2010, appellant filed his opening brief in which he moved for this Court to review the trial court's *Pitchess* ruling based, inter alia, on that ordered sealed record. (AOB 257-261, and authorities cited therein.) On September 15, 2011, respondent filed its brief in which it agreed that such review was appropriate. (RB 252-253.)

On September 18, 2013, this Court issued an order stating that: "the parties [have been] advised the record on appeal does not contain the files that the trial court reviewed in camera in ruling on appellant's" *Pitchess* motion ("September 18, 2013 Order"). On August 26, 2013, Madera County Superior Court Deputy Clerk Doina McFarland filed a declaration in this Court ("McFarland 2013 Declaration"), apparently in response to this Court's inquiry into the whereabouts of that confidential record. (See also September 18, 2013 Order, citing McFarland 2013 Declaration). In that declaration, Deputy Clerk McFarland represented that the reviewed personnel file "would have been copied and the original sent back to the agency [that produced it]. After an exhaustive search, I was unable to

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[2](...continued)
following that review at its *"Pitchess* ruling";
(4) the report the trial court ordered disclosed in that ruling as the "disclosed report"; and
(5) the trial court's December 1997 oral and written orders to include a sealed copy of the *Pitchess* files in the appellate record and transmit it to this Court for review as its "December 1997 orders."

locate a copy of the personnel file. Right around the time, the District Attorney's Office and a great deal of the 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 County Superior Court Deputy Clerk Erin Kinney filed a similar declaration ("Kinney 2013 Declaration") attesting that "[a]n exhaustive search of the court's file, Exhibit Rooms, and the District Attorney's file was performed in hopes of recovering the . . . personnel file" without success. (See also September 18, 2013 Order, citing Kinney 2013 Declaration.) Like Deputy Clerk McFarland, Deputy Clerk Kinney represented, "[i]f at some point we are able to retrieve a copy from the agency [that produced the files], a copy will be prepared and sent to the Supreme Court immediately." (Kinney 2013 Declaration.) Based on the foregoing, this Court has directed the parties "to provide supplemental briefing addressing the impact on this appeal of the files' absence from the record." (September 18, 2013 Order; See also Rule 8.630, subd.(f).)

As set forth below, the failure to effectuate the superior court's December 1997 order to the clerk to include a copy of the reviewed *Pitchess* files in the confidential record on appeal and transmit it to this Court was erroneous. However, the error can be remedied if the record can be reconstructed. It appears that the Clerk's Office has not attempted to reconstruct the record or effectuate the trial court's December 1997 order now by attempting to retrieve the original files from the agencies that produced them and making a copy thereof for inclusion in the confidential record and transmittal to this Court, as ordered. Because the trial court generally described the lodged and reviewed files on the record, this Court

can directly order reconstruction without the need for further proceedings on remand.

Similarly, although the trial court failed to identify the report that it did disclose from originally lodged files, the record as a whole is sufficient for this Court to identify it in the reconstructed record and determine whether the reviewed files contained relevant and discoverable information that the trial court erroneously failed to disclose. Alternatively, should there be any reasonable dispute regarding the identity of the disclosed report in the reconstructed record, this Court should order a limited remand with directions to the trial court to identify what report in that record it ordered disclosed.

Finally, if it is discovered that the custodians of the originally lodged files have since lost or destroyed them and hence the erroneously omitted record is incapable of remedy with reconstruction, appellant requests leave to file supplemental briefing on the impact of the irretrievable loss or destruction of a critical part of the appellate record on this capital appeal and the appropriate remedy.

B. A Defendant Is Entitled to the Entire Record of His Trial Resulting in the Imposition of a Death Judgment, Including Any Personnel or Other Files Lodged with the Trial Court for Review on a *Pitchess* Motion, in Order to Effectuate His Rights to Meaningful Appellate Review and A Highly Reliable Death Judgment

A complete and accurate appellate record is essential to the meaningful appellate review and effective assistance of appellate counsel guaranteed by state law, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution. (See, e.g., *Chessman v. Teets* (1957) 354 U.S. 156, 165-166;

Hardy v. United States (1964) 375 U.S. 277, 279-280, 282; *People v. Frye* (1998) 18 Cal.4th 894, 941; *People v. Hawthorne* (1992) 4 Cal.4th 43, 63; *People v. Barton* (1978) 21 Cal.3d 513, 518-520; Cal. Const., art. 1, §§ 7, 15 & 17.) It is particularly crucial in capital cases given the Eighth and Fourteenth Amendments' heightened demand for reliability in death judgments. (*Dobbs v. Zant* (1993) 506 U.S. 357, 358; *Parker v. Dugger* (1991) 498 U.S. 308, 321; *Gardner v. Florida* (1977) 430 U.S. 349, 361; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

These principles are reflected in the California Penal Code and Rules of Court governing the preparation, content, and certification of appellate records in capital cases. As relevant here, Penal Code section 190.7, subdivision (a) (eff. Jan. 1, 1997) provides in relevant part that the "entire record" to which defendants are entitled in capital cases includes, but is not limited to:

> (1) The normal and additional record prescribed in the rules adopted by the Judicial Council pertaining to an appeal taken by the defendant from a judgment of conviction.
>
> (2) *A copy of any other paper or record on file or lodged with the superior or municipal court* and a transcript of any other oral proceeding reported in the superior or municipal court pertaining to the trial of the cause.

(Italics added; see also Pen. Code, § 190.9 [all proceedings shall be reported in a capital case and a reporter's transcript included in the appellate record]; Calif. Rules of Court, rule 8.610.)[3]

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[3] All further statutory references are to the Penal Code unless otherwise noted. All further references to court rules are to the California Rules of Court.

Consistent with these rules and principles, this Court has emphasized the critical importance of a complete record to facilitate appellate review of trial court rulings on so-called "*Pitchess* motions" for discovery pursuant to Evidence Code sections 1043 and 1045. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230.) Therefore, "the trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion." (*Id.* at p. 1229.)

As a preliminary matter, if the custodian has not produced the officer's entire personnel file for the trial court's review because it has deemed certain parts to be irrelevant or nonresponsive to the *Pitchess* motion, the custodian:

> should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record.

(*People v. Mooc*, *supra*, 26 Cal.4th at p. 1229.)

In noncapital cases, there are alternative methods for ensuring the availability of the lodged files for review on appeal:

> 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.

(*People v. Mooc*, *supra*, 26 Cal.4th at p. 1229.) The second "alternative"

method is appropriate only in noncapital cases. It is based on the long standing rule that documents lodged with the court and reviewed in-camera are necessarily part of the trial record even if not required in the "normal record" on appeal in noncapital cases or physically maintained by the trial court. (See, e.g., *People v. Barnard* (1982) 138 Cal.App.3d 400, 405-407.) In such cases, they are the proper subject of augmentation to the appellate record of the record on appeal (*Ibid.*, citing, inter alia, Former Rule 12, subds. (a) & (b); see also Rule 8.155, subd. (a)(1)(A) (eff. Jan. 1, 2007).) If the trial court in a noncapital case elects not to maintain a copy of the reviewed files, it must make a record identifying the files it reviewed adequate for an appellate court to augment or reconstruct the record with copies by ordering the custodian to produce the originals. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1231.)

In capital cases, however, copies of *Pitchess* files lodged with and reviewed by the trial court are part of the entire record that *must* be included in a confidential clerk's transcript on appeal and transmitted to this Court. (Pen. Code, § 190.7, subd. (a)(2); Rule 8.610, subd. (a)(1)(P) [clerk's transcript in capital cases must include "any . . . document . . . lodged with the court . . . ."]; Rule 2.585, subd. (b) ["records examined by the court in confidence . . . or copies of them, must be filed with the clerk under seal . . . ."].) This rule existed and applied to all documents lodged with the superior court in capital cases long before this Court's decision in *Mooc*. (See Former Pen. Code. § 190.6 (en. 1977) [requirement for preparation and certification of "entire record"]; Former Rule 39.5, subd. (c)(3) (eff. 1983) ["entire record" to be "prepared" in capital cases includes "any . . . paper or record . . . lodged with the superior court . . . ."]; Former Rule 39.51 (eff. March 1, 1997) [clerk's transcript "shall include all documents . . . lodged

in the . . . superior court"]; Pen. Code, § 190.7 (eff. Jan. 1, 1997).) If the superior court fails to make a copy of lodged and reviewed *Pitchess* files before returning the originals to their custodian, it must order that a copy be made and included in a confidential clerk's transcript for transmittal to this Court before it can certify the record as accurate and complete. (See Pen. Code, § 190.8 [certification of capital appellate record]; Rule 8.622 (eff. Jan. 1, 2007) [certifying record in capital trials held after January 1, 1997]; Rule 8.625 (eff. Jan. 1, 2007) [certifying record in pre-1997 capital trials]; Former Rule 35.2 (eff. Jan. 1, 2004); Former Rule 35.3 (eff. Jan. 1, 2004); Former Rule 39.53 (eff. March 1, 1997).)

If the certified clerk's transcript erroneously omits a confidential copy of lodged and reviewed *Pitchess* materials, there are two avenues by which the error can be remedied on appeal depending on the adequacy of the existing record. If the trial court adequately identified the materials on the record, the appellate court can order the custodian or custodians to produce the original materials and augment or reconstruct the record with a copy thereof. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1231; Rule 8.634, subd. (c) ["At any time, on motion of a party or on its own motion, the Supreme Court may order the record augmented or corrected as provided in rule 8.155"]; Rule 8.155, subd. (a)(1)(A) ["At any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include . . . Any document filed or lodged in the case in the superior court"]; Rule 8.610, subd. (a)(4) ["the superior court or the Supreme Court may order that the record include additional material"].) However, if the record is unclear in this regard, the appellate court should ordered a limited remand for the trial court to retrieve the original files, certify a copy of the files it reviewed and include it in a confidential clerk's

transcript as part of the appellate record, and transmit it to the appellate court. (*People v. Mooc*, *supra*, at pp. 1228-1231; see also Rule 8.155, subd. (c)(1) & (2) [reviewing court may order correction or certification of any part of the record and "may order the superior court to settle disputes about omissions or errors in the record"].)

C. The Erroneous Failure to Include a Sealed Copy of the Lodged and Reviewed *Pitchess* Files In a Confidential Clerk's Transcript and Transmit it to this Court Only, As the Trial Court Ordered in December 1997, Can be Remedied Through Reconstruction

1. The Record at the Time of the *Pitchess* Motion and Ruling

On the morning appellant filed his *Pitchess* motion, the trial judge expressed his understanding that the motion was "in the nature of a *Pitchess* motion, which the court would review in chambers the personnel file," to which defense counsel agreed. (15 RT 3512.) The prosecutor's only objection was that counsel had failed to serve the motion on the "Department of Corrections or their attorneys, the [Madera] County Counsel . . . ." (*Ibid.*) The court directed counsel to serve the motion on County Counsel that morning after which the court would hear it that afternoon. (15 RT 3513-3514.) After a brief pause in the morning's proceedings, defense counsel stated for the record that during the break, they had personally served the motion on County Counsel attorney Doug Nelson, who had accepted service and stated that he would immediately contact the Department of Corrections, "obtain the personnel file," and produce it in court that afternoon. (15 RT 3514-3515.) The matter was then recessed. (15 RT 3515, 3518.)

When the proceedings were resumed that afternoon, the trial court

stated for the record that Mr. Nelson from County Counsel was present and ordered that the:

> Record will reflect Mr. Nelson has provided the court with a series of files. And the Court – Mr. Nelson having no objection, the Court has reviewed those files. The files the Court has reviewed provided by Mr. Nelson is the employee's personnel file maintained at DOC. A report file which is a file of reports written by Officer Frank Reiland, that pre-employment background file, and the personnel file maintained at County Personnel Office and these all having to do with . . . Officer Frank Reiland.
>
> Reviewing those, only one report written which [sic] Officer Reiland appears to be significant to this case. And the Court having reviewed it, and I had copies of those made, I provided copies to counsel for the defense and for the People. And that's the only thing that is in there that is really of any relevance whatsoever in this case that might affect the defendant. So with that, I believe that is, in effect, granting your motion which you're entitled to.

(15 RT 3519.) Having received the disclosed report, defense counsel confirmed with the court that "what the court is saying, then, there weren't any – there's no evidence in the file of any complaints against Officer Reiland for excessive use of force or harrassment [sic][.]" (15 RT 3519-3520.)

The court made no reported record of its in-camera review of the files. Mr. Nelson for County Counsel made no remarks on the record, but rather acquiesced through his silence to the trial court's representation that he had produced the described files for the court's review without objection. The record of this proceeding bears no indication that the court or the clerk made a copy of the lodged files for inclusion in the record before returning them to County Counsel. (15 RT 3512-3520; 5 CT 1133-

1134 [clerk's minutes of April 16, 1991 proceedings]; see Pen. Code, § 190.7, subd. (a)(2).) While the court did generally describe the materials County Counsel produced and it reviewed (see *People v. Mooc*, *supra*, 26 Cal.4th at p. 1229), it did not identify or describe the report it had ordered disclosed from them.

The parties and the court subsequently attempted to fill these gaps in the record during the postjudgment record correction, completion and certification proceedings in the superior court.

2. Postjudgment Record Correction, Completion, and Certification Proceedings, Rulings and Order to Include a Sealed Copy of the Reviewed Files in the Confidential Appellate Record and Transmit it to this Court Only, and the Erroneous Failure to Effectuate That Order

On November 12, 1996, Deputy State Public Defender ("DSPD") Kate Johnston on behalf of appellant filed appellant's initial postjudgment motion to correct, complete and settle the record on appeal in the superior court. (6 CT 1174-1283.)[4] In that motion, DSPD Johnston moved, inter

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[4] The record certification proceedings lasted nine years due to the confluence of a remarkable number of unusual problems and disputes, throughout which the State Public Defender represented appellant. DSPD Kate Johnston (initially assisted by DSPD Gerowitz) filed the original, relevant record correction and completion motions in 1996 and 1997 and litigated them through November 17, 1998. (6 CT 1174-1283, 1313-1356; 1 RC-CT 1-132.) Thereafter, the matter was assigned and reassigned to various deputies (see, e.g., 1 RC-CT 132 [DSPD Debra Huston]; 1 RC-CT 192, 240 and 2 RC-CT 258, 271-272 [DSPD Ron Turner]; 2 RC-CT 215-316 [DSPD Johnston's reassignment]) until DSPD Audrey Chavez was assigned to the case on April 23, 2001, and litigated the matter until the record was finally certified in September 2005. (See 2 RC-CT 326, 372, 400, 432, 484.) Approximately two years after the record was certified, the (continued...)

alia, for the record to be completed with the report from Officer Reiland's files that the trial court did disclose to the parties in ruling on appellant's *Pitchess* motion. (6 CT 1277.) Based on the premise that all of the files, including the disclosed report, that were lodged with and reviewed by the court were part of the appellate record in this capital case even if they had been returned to the custodian, DSPD Johnson argued that the disclosed report, as an unsealed part of the appellate record, should be included in the publicly filed record on appeal. (6 CT 1337-1338, citing *People v. Barnard*, *supra*, 138 Cal.App.3d at p. 405-406; see Part B, *ante*, and authorities cited therein.)

On December 18, 1997, the trial court heard, inter alia, appellant's motion to complete the record with the report the court disclosed from its *Pitchess* review of Officer Reiland's files. (1 RC-CT 67, 85.) Deputy Attorney General ("DAG") Luis Vasquez on behalf of respondent stated that he had no objection to the request "to the extent those reports were provided to trial counsel." (1 RC-CT 85.)

In addition, DAG Vasquez correctly requested that the materials in the *Pitchess* files that the court reviewed and ruled not relevant or discoverable "remain sealed" and transmitted as part of the appellate record to this Court. (1 RC-CT 85; see Part B, *ante*.) DSPD Johnston reiterated the point from her moving papers that a law enforcement file examined in-camera is part of the appellate record, even if returned to the producing agency, and hence the proper subject of augmentation under *People v.*

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[4](...continued)
current DSPD was assigned to the appeal and prepared and filed appellant's opening and reply briefs. (AOB 280 [by DSPD C. Delaine Renard]; ARB 318 [same].)

Benard [sic] (1982) 138 Cal.App.3d 400, 405. (1 RC-CT 86.)

The court ruled: "I think we agree, Mr. Vasquez, the original file, whoever it is with – probably still in the officer's file, a copy of that should be sent under seal to the Supreme Court. They can review it, determine if I made an error in what I disclosed to the parties." (1 RC-CT 86.)

As to just what was "disclosed to the parties," DSPD Johnson asked that the court make a record of it by re-reviewing the *Pitchess* files, identifying the report it had disclosed from them, and including it in the record. (1 RC-CT 86.) The trial court declined to do so on the basis that "the Court – I don't believe, retained copies, copies provided to the prosecutor and the defense[,]" and therefore directed DSPD Johnston to obtain a copy of the disclosed report from the trial attorneys or DAG Vasquez. (*Ibid.*) DSPD Johnston expressed her "doubt it's still with counsel," but confirmed with the court that it would still be "with the agency" that produced the files (1 RC-CT 87.) On that ground, DSPD Johnston moved in the alternative for the court to order the "agency" or custodian of records to produce under seal to the court the same files it had lodged and the court reviewed at trial, re-review those original files, and identify the disclosed report from them for inclusion in the record. (*Ibid.*) Expressing its own doubt over its ability to recall which report it had disclosed "that long back," the court denied the request and ordered appellate counsel to conduct a "diligent search" for the disclosed report from trial counsel "before you ask me to review that file." (1 RC-CT 87-88.)

The court concluded by reiterating: "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." (1 RC-CT 88.) Consistent with its oral orders on

December 18, 1997, the court issued a written order on December 30, 1997, reading as follows: "the court orders Officer Reilland's [sic] 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 1655.)

The court's 1997 orders stood unchanged throughout the remainder of the record certification proceedings. It is true, as Madera County Deputy Clerk McFarland represents in her recent August 2013 declaration, that a fire in the courthouse resulted in damage to substantial portions of the record. The fire apparently occurred on March 22, 1997. (13 CT 3204.) The issue of the fire's impact of the record and the resulting need to reconstruct portions thereof was discussed and litigated extensively over the course of several years, with the clerks making regular status reports on the matter. (See, e.g., 1 RC-CT 119-214, 240-242; 2 RC-CT 260-321.) Ultimately, the clerk represented that the entire file had been located or reconstructed and the trial court certified it as such. (1 RC-CT 176-177; 2 RC-CT 315-316.) However, the clerks never represented that a sealed copy of the *Pitchess* files had been lost or destroyed or that they could not comply with the court's December 1997 order to include a sealed copy in the appellate record because one could not be located in the court's records. To the contrary, there were references to the court's 1997 order throughout the proceedings without any indication that it was not, or could not be, effectuated. (See, e.g., 2 RC-CT 340-342, 363-365; 15 CT 3635 [March 12, 2001 working order on status of record completion and correction reflecting court's 1997 order without change or amendment].) Thus, when the trial court finally certified the record as accurate and complete in September 2005, it was necessarily based on the understanding that a sealed copy of

the reviewed *Pitchess* files had been transmitted to this Court only as part of the appellate record as the trial court ordered. Indeed, as evidenced by appellant's and respondent's briefs citing and relying upon that order, it is plain that appellate counsel for both parties presumed that the court clerk had regularly performed his or her duty to effectuate the order. (AOB 259 [citing December 30, 1997 order at 7 CT 1655]; RB 252-253 [same]; see also Evid. Code, § 664 [presumption that official duty has been regularly performed]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1213 [pursuant to section 664, it is presumed that court clerk performed his or her official duty to prepare court documents in manner consistent with court's rulings and orders].)

It is only now, 16 years after the court's 1997 order and eight years after the record was certified as accurate and complete, that the Madera County Clerk's Office, through Deputy Clerks McFarland and Kinney, have notified the parties and this Court that the court's order was not effectuated, the prepared appellate record transmitted to this Court is therefore incomplete, and the ordered copy of the reviewed *Pitchess* files cannot be located in the superior court's own trial records. (McFarland 2013 Declaration; Kinney 2013 Declaration.) On this record, it now appears that the trial court's oral and written 1997 orders are susceptible of different interpretations and the absence of the sealed record both from the appellate record and the superior court's trial records are attributable to different explanations.

One is that the court's 1997 rulings and order referred to an already-existing sealed copy of the *Pitchess* files that had been made when the files were lodged in 1991 (see, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at p. 1229; Pen. Code, § 190.7, subd. (a)(2)), the clerk failed to transmit it to this

Court as part of the sealed confidential appellate record as ordered, and it has since been lost or destroyed due to unknown circumstances or it was lost and destroyed before the record was certified and the clerk failed to notify the court and the parties.

Another is that a copy of the reviewed *Pitchess* files was not made before the originals were returned to their custodian and that the court's 1997 order was for the clerk to retrieve the original files from the custodian, or "agency," and make a confidential copy thereof for inclusion in the appellate record and transmittal to this Court for review (see, e.g., *People v. Barnard*, *supra*, 138 Cal.App.3d at pp. 405-407), and the clerk failed to effectuate that order in its entirety. It now appears that the latter interpretation is most likely given: (1) the absence of any affirmative indication on the record of the court's April 16, 1991 *Pitchess* ruling that a copy of the reviewed materials had been made and maintained by the clerk for inclusion in the record before they were returned to County Counsel; (2) the court's repeated references on December 18, 1997 to the "original file," as well as its location in the custody of the "agency," when it ordered that a copy thereof be included in the sealed appellate record and transmitted to this Court; and (3) the court's remarks on the same date that it believed that it had not retained a complete copy of the "original file" that included the report ultimately disclosed and its oral ruling and order that a complete "copy of the original file, *whoever it is with* – probably still in the officer's file, a copy of that should be sent under seal to the Supreme Court. . . . [to] review it, determine if I made an error in what I disclosed to the parties." (1 RC-CT 86; accord 7 CT 1655.) This interpretation would explain the newly discovered absence of the sealed record from both the appellate record transmitted to this Court and from the superior court's own trial records.

In any event, although the method by which the court intended its order to be effectuated may not have been entirely clear at the time it was made, the order itself certainly was: "Officer Reilland's [sic] 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 1648-1656; accord 1 RC-CT 86, 88.) No matter what the cause, the failure to effectuate the order was erroneous. If the clerk believed that she could not comply with the order because she could not locate a copy in the court's files – regardless of whether it had been lost or whether one had never been made – it was incumbent upon her to notify the court and the parties of the problem rather than simply disregard the order. Of course, if a sealed copy did exist in the court's files at the time, then the clerk's failure to transmit it as ordered and his or her subsequent loss or destruction of those records in this capital case was equally erroneous. The end result is that a critical part of the appellate record required by law and ordered by the court has erroneously been omitted and the certified record is incomplete.

The question now becomes how and whether that error can be remedied so as to provide appellant with the "entire record" to which he is entitled by law. (See, e.g., Pen. Code, § 190.7, subd. (a)(2).)

3. The Erroneous Omission of the Confidential Record of the *Pitchess* Files Can be Remedied Through Reconstruction by this Court Based on the Trial Court's Description Thereof

As discussed in Part B, *ante*, when a trial court does not make and physically maintain a copy of lodged and reviewed *Pitchess* files and they are erroneously omitted from the appellate record, the error can be remedied through reconstruction. Where, as here, the trial court describes the reviewed files on the record, the appellate court can reconstruct the record with copies thereof by directly ordering the custodian or custodians to produce the originals. (*People v. Mooc*, *supra*, at pp. 1228, 1231; Rule 8.634, subd. (c); Rule 8.155, subd. (a)(1)(A); Rule 8.610, subd. (a)(4); see also *People v. Barnard*, *supra*, 138 Cal.App.3d t pp. 405-407.) This remedy is not only permissible when the appellate record contains an adequate description of the lodged and reviewed files; it is the remedy that should be ordered to avoid the waste of judicial resources on an unnecessary remand for further proceedings. (See, e.g., *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, it is appropriate to do so "without further waste of judicial resources"].) As shown below, it is the appropriate remedy for the erroneous omission of the reviewed *Pitchess* materials from the prepared appellate record and the trial record physically maintained by the superior court in this case.

As discussed in Part C, *ante*, the trial court represented that County Counsel had produced and the court had reviewed: Officer Reiland's "personnel file maintained at DOC. A report file which is a file of reports written by Officer Frank Reiland, that pre-employment background file, and the personnel file maintained at County Personnel Office." (15 RT 3519-

3520; see also RB 252-253.) Although it may not have been required to do so, it is clear from this description that County Counsel produced, and the court reviewed, Officer Reiland's complete personnel files maintained by both the Madera County Department of Corrections and the County Personnel Office. The court described having reviewed the personnel files without objection from County Counsel and without any suggestion that County Counsel had produce or it had reviewed only parts of those files. (See *People v. Mooc*, *supra*, *supra*, 26 Cal.4th at p. 1229.) Other evidence buttresses the plain meaning of the court's description as encompassing Officer Reiland's complete personnel files.

Defense counsel represented that when they served County Counsel with their motion, Mr. Nelson had informed them that he would obtain "the personnel file" and produce it in court, without any suggestion that he would produce only parts he deemed relevant or responsive. (15 RT 3514-3515.) Similarly, when the motion was made, the trial court expressed its understanding when the motion was filed that it was "in the nature of a *Pitchess* motion, which the court would review in chambers the personnel file," without any suggestion that it would review only portions thereof. (15 RT 3512.) In the later postjudgment record correction and completion proceedings, the court described its habit and custom that "[t]ypically in a *Pitchess* motion the Court reviews in chambers the *entire file* or the personnel file and pulls from that copies for both sides of documents they're entitled to." (2 RC-CT 340-242, italics added.)[5] Furthermore, when the

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[5] It was not until 2001 – 10 years after the trial court's 1991 *Pitchess* ruling in this case – that this Court held the custodian is not legally required to produce, or the trial court to review, an officer's complete or entire personnel file in ruling on a proper *Pitchess* motion because it often

(continued...)

court ruled on December 18, 1997, that "copies of the original file will be sent to the Supreme Court under seal," it pointedly observed "that file will be thicker now than it was" on April 16, 1997, when the court reviewed it, thereby indicating that the only difference between the personnel files it reviewed in 1991 and the personnel files in the custody of the producing agencies in 1997 was the addition of documents after its April 1997 review. (1 RC-CT 88.) In other words, the personnel files it reviewed in 1991 were the same, complete "original files" as they existed in the custody of those agencies at that time. Indeed, as the court's subsequent written order read: "the court orders Officer Reilland's [sic] 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 1655, italics added.) This record clearly demonstrates that the trial court reviewed Officer Reiland's complete personnel files maintained by the Madera County Department of Corrections and the Personnel Office as they existed on April 16, 1991. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1231.)

On this record and pursuant to the authorities set forth in Part B, *ante*, this Court can and should attempt to remedy the erroneous omission of the sealed record of the lodged and reviewed *Pitchess* materials from the appellate record transmitted to this Court and the superior court's own records by directly ordering the Madera County Department of Corrections and Personnel Office or their representative, Madera County Counsel, to

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[5](...continued)
includes irrelevant information such as marital status and health information. (*People v. Mooc*, *supra*, 1224-1225, 1229- 1230 [overruling appellate court's holding that custodian was required to produce, and trial court required to review, complete personnel file].)

produce before this Court: (1) Officer Frank Reiland's entire "personnel file maintained at" the Madera County Department of Corrections; (2) his "report file which is a file of reports written by Officer Frank Reiland"; (3) his "pre-employment background file"; and (4) and his entire "personnel file maintained at County Personnel Office," as they existed as of April 16, 1991. (15 RT 3519-3520.) Should those agencies or their representative be able to produce those materials, this Court can reconstruct the sealed record with a copy thereof. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1231; accord, *People v. Galland* (2008) 45 Cal.4th 354, 369; Rule 8.634, subd. (c); Rule 8.155, subd. (a)(1)(A); Rule 8.610, subd. (a)(4); see also *People v. Barnard*, *supra*, 138 Cal.App.3d t pp. 405-407.)

Alternatively, should this Court determine that the trial court's 1997 order was for the Madera County Clerk's Office to retrieve the original files from the custodian and make a sealed copy thereof for inclusion in the prepared certified record and transmittal to this Court, this Court can order the Clerk's Office to comply with that order now. (See Rule 8.625, subd. (e)(2) ["if, after the record is certified, the superior court clerk . . . learns that the record omits a document . . . that any court order requests to be included, the clerk must promptly copy and certify the document . . . [and send it] as an augmentation of the record . . . ."].)[6] It does not appear from Ms. McFarland and Ms. Kinney's 2013 declarations that they have attempted to reconstruct the missing record by obtaining the original files from the Madera Department of Corrections or Personnel Office as the producing agencies. Although the declarations state that the "original" files

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[6] Rule 8.625 governs the completion, correction, and certification of the appellate record in capital cases tried before January 1, 1997 and hence applies to this case.

would have been "sent back to the agency" (McFarland 2013 Declaration), they only attempted to locate the missing records by searching through "the court's file, Exhibit Rooms, and the District Attorney's file . . . ." (Kinney 2013 Declaration.) Otherwise, they simply state: "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 immediately." (Kinney 2013 Declaration; McFarland 2013 Declaration.) Thus, the declarations indicate that the clerks have not attempted "to retrieve" the "original" files from the agency in order to make or reconstruct the record the clerk was ordered to make in 1997, although that is an effort that they could make "at some point." Consequently, as an alternative to this Court's direct reconstruction of the record, the Court may elect to order the Madera County Clerk's Office "to retrieve" the original files described above and effectuate the trial court's 1997 order to include a copy thereof in a sealed and confidential clerk's transcript on appeal and transmit it to this Court for review.

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D. Although the Trial Court Erroneously Failed to Identify or Certify a Copy of the Disclosed Report for the Record, the Reconstructed Record Will Include a Copy and the Record as a Whole is Sufficient to Identify it for Appellate Review; Alternatively, Should There be Any Reasonable Dispute Regarding the Identity of the Disclosed Report, the Court Should Order a Limited Remand With Directions to the Trial Court to Complete or Settle the Record in this Regard

1. The General Legal Principles Governing the Trial Court's Duty to Disclose Relevant and Discoverable Information from the Reviewed *Pitchess* Files And The Necessary Record for this Court to Review its Ruling Disclosing Only One Report

It was undisputed below that appellant's *Pitchess* motion satisfied the foundational prerequisites under Evidence Code section 1043 for the trial court to review Officer Reiland's personnel files for relevant, discoverable information under Evidence Code section 1045. (See 15 RT 3512-3520; 2 CT 499-506.) Upon the unopposed review of those files, the trial court had a duty to "disclose to the defendant such information [contained therein that was] relevant to the subject matter involved in the pending litigation" and "pertinent to the defense" proposed in appellant's *Pitchess* motion (unless specifically prohibited by the exceptions codified in Evidence Code section 1045). (*People v. Gaines* (2009) 46 Cal.4th 172, 179, 183, and authorities cited therein, internal quotation marks and citations omitted]; *People v. Mooc*, *supra*, 26 Cal.4th at p. 1226; Evid. Code, § 1045, subds. (a) & (b); see also RB 253-254.)

Defense counsel's affidavit in support of the *Pitchess* motion attested that the proposed defense to the allegation reported by Officer Reiland that appellant had assaulted him on June 28, 1990, would be that "if in fact the

defendant used force against the officer[], such force was in defense of his person against acts of excessive and illegal force used by the . . . officer[] against him" and thus was not "acting with . . . unwarranted use of force" as alleged. (2 CT 505.) As relevant to that defense, defense counsel specifically requested without objection any "complaints filed or reports made against Officer . . . Reiland . . . for excessive or unreasonable force or harassment including copies of any investigative reports thereof." (2 CT 499.) Moreover, because Officer Reiland was the reporting officer of the June 28, 1990 incident, the proposed defense "led to a reasonable inference that the officer may not have been truthful" in writing the report and therefore information in the reviewed files that he had filed similar false reports in the past also became relevant and discoverable. (*People v. Hustead* (1999) Cal.App.4th 410, 418; see also 2 CT 500 [arguing right to evidence "which might aid the defense"] and 2 CT 503-504 [alleging on information and belief that Department of Corrections maintains in its personnel and other files complaints against its correctional officers for, inter alia, "acts of misconduct [and] dishonesty"].) Moreover, the trial court had a duty to disclose from the reviewed files any favorable and material evidence, including exculpatory and impeachment evidence, that is otherwise mandated under *Brady v. Maryland* (1963) 373 U.S. 83 even absent a specific request (*United States v. Bagley* (1985) 473 U.S. 667, 676). (See, e.g., *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474 and fn. 6, and authorities cited therein, cited with approval in *People v. Gaines, supra*, 46 Cal.4th at p. 184; see also 2 CT 500 [arguing right to disclosure of material evidence favorable to accused even without request].)

In order for this Court to determine whether the trial court erred in withholding any relevant and discoverable information from the reviewed

files under the foregoing standards, this Court must be able to identify the one report that the trial court did disclose from them. (15 RT 32519-3520.) The reconstructed record of the lodged and reviewed files (Part C-3, *ante*) will necessarily include the disclosed report. (See 2 RC-CT 87.) And in ordering that "the original file, whoever it is with . . . a copy of that should be sent under seal to the Supreme Court," the trial court recognized that the appellate record must be adequate for this Court to review its ruling and "determine if I made an error in what I disclosed to the parties" (or in what it did not disclose). (1 RC-CT 86.) Despite this recognition, as shown below, the trial court erroneously failed to identify the disclosed report for the record at the time of its *Pitchess* ruling and in the subsequent record certification proceedings. Nevertheless, appellant submits that other evidence contained in the record and read as a whole is sufficient to identify the disclosed report for purposes of this Court's review. (See, e.g., *People v. Galland, supra*, 45 Cal.4th 371-373 [in absence of magistrate's identification and certification of document as the sealed search warrant affidavit on which he issued warrant, extrinsic evidence could be relied upon to identify it as such].)

2. The Trial Court's Description of the Disclosed Report at the Time of its Ruling

As discussed in Part C-1, *ante*, at the time of its *Pitchess* review and ruling, the trial court represented that it had reviewed in camera, inter alia, a "report file which is a file of reports written by Officer Frank Reiland . . . ." (15 RT 3519.) Following its review of all of the lodged files, the court ruled that "one report written which [sic] Officer Reiland appears to be significant to this case. . . .. that's the only thing that is in there that is really of any relevance whatsoever in this case that might affect the defendant,"

and provided copies of that "report" to counsel for both parties. (15 RT 3519-3520.) After receiving a copy of that report, defense counsel confirmed with the court that the reviewed files did not contain evidence of "any complaints against Officer Reiland for excessive use of force or harrassment [sic][.]" (15 RT 3519-3520; see also RB 253.) Hence, while this record does demonstrate what the disclosed report was *not* – a "complaint[] against Officer Reiland for excessive use of force or harrassment [sic]" – it does not identify what the disclosed report was. Of course, if this Court's review of the reconstructed record reveals that the reviewed *Pitchess* files *do* contain any "complaints against Officer Reiland for excessive use of force or harrassment [sic]," this record is sufficient for the Court to determine that the trial court did not disclose that information and decide whether the court erred. However, if this Court's review of the reconstructed record reveals other relevant and discoverable information, this record is insufficient for the Court to determine whether the trial court disclosed it or not.

3. The Trial Court's Ruling Refusing to Identify and Certify a Copy of the Disclosed Report From the Reviewed *Pitchess* Files and Directing Appellate Counsel to Obtain a Copy From One of the Trial Attorneys

As discussed in Part C-2, *ante*, DSPD Johnston requested that the disclosed report be identified and included in the record and DAG Vasquez specifically stated that he had no opposition to the request at the December 18, 1997 hearing to correct and complete the appellate record. (1 RC-CT 84-85.) The trial court also agreed that a copy of the original files it had reviewed in ruling on appellant's *Pitchess* motion must be included in the record to facilitate appellate review. (1 RC-CT 86, 88.) Nevertheless, the

trial court denied DSPD Johnston's request for the trial court to identify the disclosed report by re-reviewing those files on two grounds: (1) the court did not "believe" that it had retained copies of the disclosed report; and (2) although the disclosed report would be contained in the "original files" that were maintained by "the agency" that produced them at trial and which could be produced again for the court's re-review, the court was doubtful that it could identify which report it had disclosed to the trial attorneys "that long back[.]" (1 RC-CT 86-88.)

Under the principles set forth in Part B, *ante*, the trial court erred in denying DSPD Johnston's requests. (See Part B, *ante*.) Had the court ordered production of the original files and reviewed them itself during the record correction and completion proceedings, as requested, the problems presented now may well have been avoided. It would have ensured that the lodged and reviewed files were in the custody of the court and available for the clerk to effectuate its order to include a sealed copy thereof in the confidential appellate record to be transmitted to this Court. (7 CT 1655; 1 RC-CT 86, 88.) Certainly, given the court's *Pitchess* ruling that only "one report written which [sic] Officer Reiland appears to be significant to this case. . . . . [a]nd that's the only thing that is in there that is really of any relevance whatsoever in this case that might affect the defendant" (15 RT 3519-3520), the report *should* have been readily identifiable from the court's re-review of the complete original files, no matter how "long back" it had ordered disclosure (1 RC-CT 87-88). It would only have been difficult to identify the disclosed report if – contrary to the court's *Pitchess* ruling – there was more than one potentially relevant document in the files. The court's failure to identify the disclosed report at the time and in the manner requested by DSPD Johnston and unopposed by DAG Vasquez on

December 18, 1997, only invited the potential for confusion and further error, which was eventually realized.

Rather than identify the disclosed report as requested, the court directed both appellate attorneys to conduct a "diligent search" for the disclosed report from the trial attorneys "before you ask me to review that file." (1 RC-CT 87-88.) Implicit in this December 18, 1997 ruling was the understanding that if and when one of the parties could obtain it from one of the trial attorneys, as the court directed, it would be produced in court for identification and certification.

4. Later Proceedings Resulting in Confusion and the Court's Failure to Identify the Disclosed Report But Which Nevertheless Provides Sufficient Evidence for this Court to Identify It

In the months that followed the court's December 18, 1997 rulings, DAG Vasquez submitted to the trial prosecutor, Mr. LiCalsi, specific written requests for a copy of the report the court disclosed to the parties in ruling on appellant's *Pitchess* motion. (7 CT 1744-1745 [letters from DAG Vasquez to Mr. LiCalsi].)[7] On September 1, 1998, DAG Vasquez and DSPD Johnston appeared before the court and represented that DAG Vasquez had finally obtained a copy of the requested report from Mr. LiCalsi and would provide it to the court and appellate counsel at the next session. (1 RC-CT 121.)

Unfortunately, the matter of the disclosed report was not revisited at the next session or any of the others held over the next two and a half years,

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[7] Appellate counsel was unable to access lead defense counsel's trial files for some years after the 1997 ruling and hence was presumably unable to obtain the disclosed report from her. (See, e.g., 2 RC-CT 226-236, 242-245.)

which were devoted to a series of unusual and complex matters such as the reconstruction of parts of the record and corrections to the reconstructed record (see, e.g., 1 RC-CT 132-490); a bank's seizure of defense counsel's trial files as the contents of the house she had abandoned, the subsequent transfer of the trial files to the County Risk Manager, and appellate counsel's inability to access them (see, e.g., 2 RC-CT 226-236, 242-245); and appellant's ongoing requests for jury commissioner data and litigation over the ability to contact the jurors and potential jurors (see,.e.g., 2 RC-CT 185-186, 224-227, 248-252, 276-277, 296-287, 317-321).

The matter of the disclosed report was not addressed again until April 23, 2001 – nearly three and a half years after the superior court's December 18, 1997 rulings on appellant's requests to complete the record with the disclosed report and 11 years after the court's ruling on appellant's *Pitchess* motion disclosing that report. At that hearing, DSPD Audrey Chavez appeared for DSPD Johnston, who had been in a car accident that morning. (2 RC-CT 326.) DSPD Chavez represented that she had not anticipated having to appear, she had "just been assigned to the case," had not even read the record, and was entirely unprepared to go forward. (2 RC-CT 326.)

Nevertheless, DAG Vasquez revisited the matter of DSPD Johnston's outstanding request for identification and certification of the disclosed report and attempted to summarize its procedural history and status:

> There was also a question, and the Court indicated that the Court read the moving papers and the response on the correction of the record. There was one request regarding Officer or a report by Officer Reiland. *I did some looking and I found the report that Ms. Johnston was referring to.* . . . If I

> recall correctly, there was a *Pitchess* motion involving Officer Reiland. The Court had ordered that those documents be settled [sic – sealed] and sent to the Supreme Court only. I believe there was some problem in trying to locate those reports. And I think there was a discussion after that to try to find out whether or not counsel, trial counsel, had any access to any of these reports. From Mr. LiCalsi I received a two-page report.

(2 RC-CT 340, italics added.) DAG Vasquez described the document as a two-page "Madera County Department of Corrections incident report" written by Officer Reiland and dated June 28, 1990. (2 RC-CT 341-342.) He provided a copy to DSPD Chavez and offered to file a copy with the clerk of the court if the court wished to accept it. (2 RC-CT 341-342.) The court replied:

> I would say if it should be part of the record you file it with the clerk or a copy with the clerk. She can mark it, seal it and it would become part of the developed Court record. I can't verify that's the entire file or anything else at this point.

(2 RC-CT 341.)

Curiously, although DAG Vasquez had just described the provenance of the report (as he had on September 1, 1998), he responded, "Right. [N]either can I really, that's my point. I have no idea what context this report may or may not have been used." (2 RC-CT 341.) The court replied:

> Typically in a *Pitchess* motion the Court reviews in chambers the entire file or the personnel file and pulls from that copies for both sides of documents they're entitled to. . . . . I assume that's what that is with [sic] the document, parties were entitled to. I don't have an independent recollection at this moment.

(2 RC-CT 341.) DAG Vasquez concluded with the representation that he would "send a copy to the Court – to the clerk's office with a cover letter explaining this is what I received and that's in response to a particular request" and suggested that they "discuss it at the next hearing just to be certain whether or not it belongs in the record or doesn't belong in the record. Again, what I understood the Court's order to be is that *Pitchess* motion material would be sealed and sent to the Supreme Court only." (2 RC-CT 342.) DSPD Chavez, unprepared to participate, offered no input. (2 RC-CT 342; see also 2 RC-CT 326, 329.)

It is clear from the foregoing discussion that neither the court nor DAG Vasquez recalled the December 18, 1997 hearing and ruling on DSPD Johnston's request to identify and include the disclosed report in the record. The critical issue was not whether that report should be included in the sealed or unsealed appellate record – a question that DAG Vasquez had already resolved to his satisfaction at the December 18, 1997 hearing. (1 RC-CT 85.) The critical outstanding matter was the court's need to identify the report that was disclosed – whether ordered sealed or not – in order to facilitate this Court's review of what it did and did not disclose in ruling on appellant's *Pitchess* motion.

The next session was held on August 7, 2001. DSPD Chavez again appeared on appellant's behalf, but this time as his assigned counsel replacing DSPD Johnston. (2 RC-CT 350; see also 2 RC-CT 372, 400, 432, 484; 1 SCT 78; 2 SCT 317, 321.) At that hearing, DAG Vasquez again raised the outstanding matter of the disclosed report:

> I believe the next item at the last hearing I provided an incident report to counsel relating to Officer Reiland. And I provided a cover letter and a copy of that incident report to the court, filed with the Court, made a copy of the cover letter

to counsel. There were some *Pitchess* motions I understand during this trial. Some reports were sealed by the Court, and made part of the record on appeal. With regard to the specific report, I asked the DA, Mr. Ernie LiCalsi, about this report to see whether or not it was something that should be sealed or shouldn't be sealed.

That was his best recollection. His 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. That's really about all the information I have on that particular report. I filed again the cover letter and a copy of the report with the Court so the Court would have that available to it. The Court needs to decide whether or not that should be part of the record on Appeal. Whether it should be sealed, and whether Counsel should retain copies of that report.

(2 RC-CT 363-364.)

DSPD Chavez responded with her guess that:

it's probably not material from the *Pitchess* motions since it seems to be a disciplinary report relating to Mr. Townsel [written by Office Reiland]. And not anything that Mr. Reiland would have had a privacy interest in since the only person who would have a privacy interest in it is Mr. Townsel. And so I don't think it really relates to doesn't seem like it relates to the *Pitchess* motion whether it was used during the testimony at the penalty phase. I'd like, you know, some of the reporters' transcripts that indicate that it was in use, too, because otherwise I don't see where the basis is for making it a part of the record.

(2 RC-CT 364.) Thereafter, the following colloquy between the court and the parties occurred:

THE COURT: Well, if we had a *Pitchess* motion, and my recollection is void at this point without thinking about it. But my routine on a *Pitchess* motion is always to make copies of the appropriate documents and supply copies to both sides so

> both sides see copies of whatever was deemed admissible by the Court. And if I ordered it sealed then it stays sealed. It will go up as part of the record appeal as a sealed document. Let the Supreme Court decide whether it should be opened or not.
>
> MS. CHAVEZ: Right, your Honor. It's not clear that this – I mean there is no way to tell as far as I can tell whether or not this document was – what came out of that *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 my client. It's from my client's file.
>
> MR. VASQUEZ: My recollection is that issue was raised by Ms. Johnston. She was aware of the report, and I can't even remember the contents. In any event, she became aware of the report, and I sought the report at her request. I thought at the time she believed it should be part of the record on appeal, but I really don't – I really don't speak for her at the time. I'm making part of the record on appeal to remain sealed.
>
> THE COURT: Someone else is going to have to figure out what to do with it. I'm not going to worry about that.

(2 RC-CT 364-365.)

From DAG Vasquez and DSPD Chavez's descriptions of the report supplied by Mr. LiCalsi and produced by DAG Vasquez, it seems clear that it was Officer Reiland's report of the alleged June 28, 1990 assault on him by appellant to which he testified at trial. (15 RT 3547-3553.) Based on DSPD Johnston's original motion to identify and include a copy of the disclosed report for the record, the trial court's December 18, 1997 rulings directing the parties to obtain a copy from one of the trial attorneys, DAG Vasquez's resulting written requests to the trial prosecutor for a copy of the disclosed report and his subsequent representations that he had obtained the

requested report from the prosecutor, it seems equally clear that the report he finally produced on April 23, 2001 was the disclosed report and that the trial court's unverified "assum[ption] that's what that is . . . the document [the] parties were entitled [to]" was correct. (2 RC-CT 342.)

Pursuant to the legal principles set forth in Part B, *ante*, and based on the record summarized above, the trial court should have identified and verified the produced document as the disclosed report for the record. If the court felt it could not so verify, then it should have taken the necessary steps to identify the disclosed report from the reviewed *Pitchess* files as DSPD Johnston requested on December 18, 1997. Instead, the court ordered that the unverified report DAG Vasquez produced be filed and included in the sealed record of the *Pitchess* materials to be transmitted to this Court, where "[s]omeone else is going to have to figure out what to do with it. I'm not going to worry about that." (2 RC-CT 363-365.) This ruling was error and the direct result of its original errors in failing to make an adequate record at the time of its 1991 *Pitchess* ruling and later refusing to identify the disclosed report in the manner DSPD Johnston requested in December 1997.

It is true that DSPD Chavez acquiesced in the court's August 7, 2001 ruling based on her guess that the produced report did not "seem" like a document that would have been disclosed from a *Pitchess* ruling. (2 RC-CT 364-365.) However, DSPD Chavez was not the author of the original request for the disclosed report and apparently lacked sufficient familiarity with the nature of the original request, the trial record on which it was based, and the record completion proceedings addressing the matter. Her guess was based solely on the nature of the produced report as an incident report written by Officer Reiland about appellant (to which appellant was

entitled without a *Pitchess* motion) and not a confidential "personnel file document." (2 RC-CT 364-365; see Pen. Code, § 832.8.)

However, as discussed in Part C-1, *ante*, the trial court explained at the time of its *Pitchess* review that it had reviewed, inter alia, a "report file which is a file of reports written by Officer Frank Reiland . . . ." (15 RT 3519.) Although such a "report file" is not listed among the contents of "personnel records" defined in Penal Code section 832.8, County Counsel produced and lodged it with the court in response to appellant's *Pitchess* motion and the court reviewed it in ruling on that motion. Hence, the produced June 28, 1990 incident report written by Officer Reiland about appellant not only could have been produced from the files the court reviewed in ruling on appellant's *Pitchess* motion. The record as a whole, summarized above, demonstrates that the trial prosecutor subsequently identified it as such by providing it to DAG Vasquez in response to his specific requests. (See *People v. Galland*, *supra*, 45 Cal.4th at p. 371, and authorities cited therein [extrinsic evidence can be sufficient to identify a document as a true copy of court record that was sealed and lost].) And that was precisely what the court ordered the parties to do on December 18, 1997 – obtain a copy of the disclosed report from one of the trial attorneys in order for the court to complete the record with an identified copy thereof. (1 RC-CT 87-88.)

While it might be said that DSPD Chavez contributed to the trial court's erroneous failure to verify the produced document on August 7, 2001, her mistake was invited by the trial court's original errors. DSPD Johnston's December 18, 1997 request for the trial court itself to identify the report disclosed from the lodged files it reviewed was the most efficient method to produce the most reliable appellate record and should have been

granted. Its erroneous refusal to do so in favor of directing the parties to obtain a copy from one of the trial attorneys only invited time-consuming, "cumbersome record-authentication procedures," confusion, and the potential for errors that were eventually realized. (*People v. Galland*, *supra*, 45 Cal.4th at p. 368.) Although "neither the trial court nor counsel may decline to include any portion of the proceedings in the record on appeal" (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 190), that is just what resulted. Had the court identified the disclosed report in the manner requested by DSPD Johnston on December 18, 1997, the error would have been avoided.

While the court's rulings were erroneous, appellant submits that they were harmless to the extent that the record as a whole is sufficient to identify the disclosed report as a two-page "Madera County Department of Corrections incident report" or "disciplinary report" relating to appellant, written by Officer Reiland on June 28, 1990. Given that it was respondent through its representatives, DAG Vasquez and the trial prosecutor, who produced that document as a copy of the requested disclosed report, appellant does not expect that respondent will dispute the identity of that report now. Hence, should the omitted sealed record of the lodged and reviewed *Pitchess* materials be reconstructed as set forth in Part C, *ante*, the record as a whole will be adequate for this Court to review the trial court's ruling on appellant's *Pitchess* motion that the only discoverable material contained in the reviewed files was the June 28, 1990 incident report written by Officer Reiland about appellant.[8]

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[8] While the trial court ordered that the June 28, 1990 incident report be included in the sealed record and transmitted to this Court for review (2

(continued...)

However, should there be any reasonable dispute regarding the identity of the disclosed report, then this Court should order a limited remand to the trial court to remedy its failure to identify it and complete the appellate record. On remand, the trial court should be directed to re-review the *Pitchess* files it originally reviewed and identify the disclosed report from them, just as DSPD Johnston requested in December 1997. (See, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1231; Rule 8.155, subds. (c)(1) & (2); cf. *People v. Galland*, *supra*, 45 Cal.4th at p. 373, and authorities cited therein.)

E. Should the Confidential Record be Incapable of Reconstruction Because the Custodians of the Original Files Have Lost or Destroyed Them, This Court Should Order Supplemental Briefing On the Appropriate Remedy

Pursuant to the authorities cited and discussed in Part B, *ante*, a defendant who has been sentenced to death is entitled to an appellate record adequate to ensure the meaningful appellate review guaranteed by state law and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the effective assistance of appellate counsel guaranteed by the Sixth Amendment and Equal Protection Clause of the Fourteenth

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[8](...continued)
RC-CT 364-365), the face of the record does not affirmatively demonstrate whether that August 7, 2001 order was actually complied with or whether – like the court's December 1997 order to include a copy of all the reviewed files in the sealed record and transmit it to this Court – it was not. If it was not, the report would nevertheless be included in the original files with which the complete record of the reviewed *Pitchess* materials would be reconstructed, as set forth in Part C, *ante*. The specific description of that report in the record is sufficient for this Court to identify it among the documents contained in the proposed reconstructed record, even if it is currently missing from the sealed appellate record.

Amendment, and the heightened demand for a reliable death judgment guaranteed by the Eighth and Fourteenth Amendments. These rights are compromised and reversal or other appropriate remedy may be required ""where critical evidence or a substantial part of a (record) is irretrievably lost or destroyed, and there is no alternative way to provide an adequate record so that the appellate court may pass upon the question sought to be raised."" (*People v. Galland, supra*, 45 Cal.4th at p. 370, and authorities cited therein.)

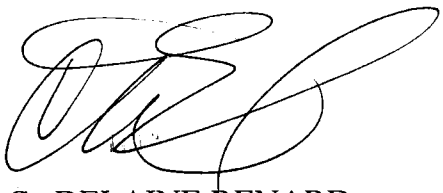
Because the viable method of reconstructing the confidential record described in Parts C and D, *ante*, has not yet been attempted, it has not been demonstrated that it has been "irretrievably lost or destroyed." (See also, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 66 [before reviewing court will consider challenge to inadequacy of record, appellate counsel must make reasonable efforts to reconstruct the missing materials].) However, should the confidential record prove to be incapable of the reconstruction sought in Part C, *ante*, because the custodians of the original files have lost or destroyed them, they will be irretrievably lost or destroyed without an "alternative way to provide an adequate record" for meaningful appellate review. Therefore, if the reconstruction proceedings sought in Parts C and D, *ante*, result in the discovery that the sealed record has been irretrievably lost or destroyed, appellant requests leave to file supplemental briefing addressing the impact thereof on this capital appeal and the appropriate remedy.

CONCLUSION

For all of the foregoing reasons, appellant requests that this Court order reconstruction of the lodged and reviewed *Pitchess* files and identification of the one report ordered disclosed from them.

DATED: November 18, 2013

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



C . DELAINE RENARD
Senior Deputy State Public Defender

Attorneys 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 SUPPLEMENTAL OPENING 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 November 18, 2013, 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 November 18, 2013, at Oakland, California.

Kecia Bailey

DECLARANT