SUPREME COURT COPY

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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 REPLY BRIEF

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

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THIS COURT SHOULD REMEDY THE ERRONEOUS OMISSION OF THE FILES THE TRIAL COURT REVIEWED IN RULING ON APPELLANT'S *PITCHESS* MOTION BY COMPLETING THE RECORD WITH THE FILES DESCRIBED AND IDENTIFYING THE REPORT DISCLOSED AS THE JUNE 28, 1990 INCIDENT REPORT RESPONDENT PROFFERED BELOW

A. Introduction

The parties agree that the omission from the record of the files the trial court reviewed in ruling on appellant's so-called "*Pitchess*" motion is erroneous, which must be remedied by completing the record through reconstruction. (Supplemental Opening Brief ["SAOB"] 1-38; Supplemental Respondent's Brief ["SRB"] 1-14; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, §§ 1043 and 1045.). The only disputed issue is the scope and manner of that remedy.

B. By Respondent's Own Reasoning, the Trial Court's Description of the Reviewed Files is Adequate for this Court to Attempt to Remedy the Error Without Need for Remand

The parties agree on the trial court's contemporaneous description of the files it reviewed on April 16, 1991: (1) Officer Frank Reiland's "personnel file maintained at the 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; SAOB 1-2; SRB 11.) Indeed, respondent contends that this description satisfied the adequate record requirement this Court set forth in *People v. Mooc* (2001) 26 Cal.4th 1216, 1228 ("*Mooc*") and was adequate for the custodian to be able to identify the files it originally produced. (SRB 11-13.)

Nevertheless, respondent disagrees with appellant's contention that the record is adequate for this Court to order the custodian to produce the described files and complete the record with a sealed and confidential copy thereof, without need for remand. (SRB 11-13; see SAOB 19-23.) Instead, respondent contends that the Court should remand for the reviewed files to "be reconstructed or settled upon in the superior court and then provided to this Court." (SRB 12.)

According to respondent, "[t]he custodian of records is in the best position to know exactly the meaning of the trial court's description, that is, the custodian knows what was provided to the trial court for review. Therefore, the custodian should provide those records to the superior court, and confirm for the court what was in the file at the time it was presented to the trial court." (SRB 12-13.) Indeed, respondent contends that only the custodian's input is required; respondent observes in a footnote that the court "may" – but is not necessarily required to – "subpoena or consult with the original trial judge" who actually reviewed the files in order to "assist with" reconstruction. (RB 13, fn. 10.) Respondent is mistaken.

Respondent's conclusion that the court's description of the reviewed files is inadequate for this Court to complete the record itself is plainly inconsistent with its premise that the description satisfied the adequate record requirement of *Mooc*. (SRB 11.) In *Mooc*, this Court held that the trial court must make an adequate record of a *Pitchess* ruling by: (1) making and maintaining a sealed copy of the reviewed materials; or – at least in noncapital cases – (2) describing the reviewed materials with sufficient specificity to enable the reviewing court to augment or complete the record with them without need for remand. (SAOB 7-10, citing, inter alia, *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1231.) Thus, if the trial court's

description is adequate to satisfy the alternative method – as respondent here contends – it is necessarily sufficient for the reviewing court to directly augment or complete the record with a copy of the described files, without need for remand. (*Mooc, supra*, at pp. 1228, 1231; see also SAOB 9-10, 19-23, and authorities cited therein.)

In this regard, the trial court unambiguously stated that it had reviewed the described "*file*[*s*]" without qualification or any suggestion that it only reviewed "documents" or "records" pulled from those files. (Compare *Mooc*, *supra*, 26 Cal.4th at pp. 1222-1223, 1228 [trial court's statement that it had reviewed "records" and "documents" did not demonstrate that it had reviewed entire files and was otherwise insufficient to make an adequate record of what documents it did review].) Its unqualified description of the files was made in the presence of the custodian who produced them and who acquiesced in the court's description through his silence. And indeed the court subsequently ordered that a copy of the "original file[s]" (1 RC-CT 88), or "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" – noting "that file will be thicker now [in 1997] than it was" at the time of its April 1991 review (1 RC-CT 88) – "be made part of the sealed record on appeal and provided solely to the California Supreme Court" (7 CT 1655, italics added). If there is any doubt over the plain meaning of the court's contemporaneous description that it reviewed the files as described without qualification or redaction, it is resolved by the substantial other record evidence detailed in appellant's supplemental opening brief but ignored by respondent. (SAOB 9-12, 14-15,

20-21.)[1]

In short, based on the record and by respondent's own reasoning that the trial court's description of the reviewed files was not only adequate under *Mooc* but also "adequate for the custodian of records to determine what records were provided to the trial court for review . . . ." (SRB 11, 13), it necessarily follows that it is sufficient for this Court to order the custodian to produce those files and complete the record with a sealed and confidential copy thereof, without wasting judicial resources on an unnecessary remand. (See SAOB 19-23.)

Alternatively, should this Court reject respondent's contention that the trial court's description of the reviewed files satisfied *Mooc* and therefore determine that a remand is necessary to settle upon the contents of

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[1] In an apparent attempt to inject some uncertainty into the record where it does not exist, respondent notes that "the record does not reflect whether or not the in camera hearing was transcribed by a court reporter." (RB 13, fn. 11.) As a preliminary matter, a trial court's in camera review of produced *Pitchess* materials does not necessarily entail a "hearing" or oral proceedings to be reported. (See *Mooc*, *supra*, 26 Cal.4th at p. 1229; see also Pen. Code, § 190.9 [oral proceedings held in chambers must be reported].) To be sure, if the custodian withholds parts of a personnel file, he must say so on the record and explain his or her reasons and a court reporter must transcribe those oral statements, as well as any questions the court might ask the custodian regarding the completeness of the produced files. (*Mooc*, *supra*, 26 Cal.4th at p. 1229.) Presuming that the court reporter performed his official duty to transcribe all oral proceedings, the absence of any reporter's transcript reflecting any such statements presumptively establishes that none were made. (See Evid. Code, § 664 [presumption that official duty has regularly been performed]; *People v. Ayala* (2000) 23 Cal.4th 225, 289 [presumption applies to court reporters].) Hence, the absence of a reporter's transcript of the trial court's in camera review of the produced files *supports* appellant's position that the record leaves no room for doubt that the court reviewed the complete files as described and undermines respondent's suggestion to the contrary.

the reviewed materials, the Court should do so with directions to hold a full and complete hearing on the matter. (*Chessman v. Teets* (1957) 354 U.S. 156, 162-166; e.g., *Marks v. Superior Court* (2002) 27 Cal.4th 176, 192-197.) The hearing may not be limited to input from the custodian of the records, County Counsel, as respondent contends. (RB 12-13 & fn. 10.) To the contrary, if available, the trial judge's participation in the settlement process is mandatory. (Cal. Rules of Court, Rule 8.137, subd. (c); *Marks, supra*, at pp. 196-197; *People v. Cervantes* (2007) 150 Cal.App.4th 1117, 1121-1123 [trial judge's participation requires adequate and reliable memory of what occurred].)[2] Further, the parties must have access to, and a meaningful opportunity to present, relevant evidence from other sources, including but not limited to: (1) trial defense counsel, who personally served the motion on the custodian, Doug Nelson of County Counsel, and had an off-the-record discussion with him in his office regarding the files he would produce (15 RT 3513-3515); (2) the trial prosecutor; and (3) any other evidence relevant to the common practice, habit or custom of the custodians' responses to *Pitchess* motions at or near the time of the April 16, 1991 motion in this case. (See, e.g., *Marks*, *supra*, at pp. 192-197; *People v. Gzikowski* (1982) 32 Cal.3d 580, 484, fn. 2; *People v. Cervantes*,

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[2] As respondent obliquely recognizes in suggesting that the superior court may choose to "subpoena" the trial judge to assist in the record reconstruction and settlement process (RB 13, fn. 10), the trial judge who actually reviewed the files, the Honorable Paul Martin, is no longer a sitting judge in the Madera County Superior Court. (madera.courts.ca.gov/MaderaJudiciaryAndStaff.htm). In requesting settlement, respondent makes no attempt to show that the trial judge's necessary participation would be possible. (Cf. *People v. Scott* (1972) 23 Cal.App.3d 80, 82-83 [retired trial judge temporarily appointed to preside and participate in settlement proceedings].)

supra, at pp. 1121-1123 [trial court cannot resolve conflicts over contents of missing record without input from all participants in proceedings to be reconstructed].)

C. This Court Can and Should Identify the Disclosed Report Based on the Existing Record, Including Respondent's Own Representations, Without the Need for Remand

Respondent agrees that appellant satisfied the foundational prerequisites under Evidence Code section 1043 and therefore does not dispute that 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" (unless specifically prohibited by the exceptions codified in section 1045). (*People v. Gaines* (2009) 46 Cal.4th 172, 179, 183; SAOB 24-26; see SRB 1, 9, 11.) Hence, as discussed in the supplemental opening brief, in order for this Court to determine whether the trial court erred in withholding any relevant and discoverable information from the reviewed files, it must be able to identify the one report that the trial court did disclose from them. (SAOB 24-26.) Although the trial court erred in failing to formally identify it for the record and in the manner requested by appellate counsel during the postjudgment record correction and certification proceedings, the record as a whole is sufficient for this Court to identify it as the June 28, 1990 report written by Officer Reiland alleging appellant's assault upon him, which was contained in the reviewed "report file which is a file of reports written by Officer Frank Reiland . . . ." (15 RT 3519; see SAOB 24-37.) The state's response to appellant's argument in this regard is perfunctory and puzzling.

Respondent does agree that although the trial court did not provide a complete contemporaneous description of the disclosed report, "it is clear, however, that the document provided was *not* a complaint filed or report

made against Officer Reiland." (SRB 13, italics added.) Proceeding on the assumption that this Court will remand to the superior court for settlement and reconstruction of the reviewed files, respondent observes in a footnote that the report "*may have* been the two page incident or disciplinary report dated June 28, 1990, related to appellant and written by Officer Reiland, and acquired by respondent from the prosecutor. But even if the superior court determines that this was the document produced . . . it would not have been relevant for purposes of the *Pitchess* motion." (SRB 13, fn. 12, italics added; compare SAOB 26-37.) Otherwise, respondent simply observes that it is "*possible*" that the disclosed report will be contained in the reviewed records the custodian provides to the superior court on remand "since that is where it *appears* to have originated" and therefore that "the superior court *may* also be able to settle this matter . . . ." (SRB 13-14, italics added.)

To the extent that respondent is conceding that the disclosed report was "not a complaint filed or report made against Officer Reiland" and did not contain otherwise relevant and discoverable information, appellant will stipulate to that concession without the need to further identify the report. Identifying the report with any further specificity would be unnecessary because this Court could therefore determine that no relevant or discoverable information was disclosed from the files.

If this is not respondent's position, then it has failed to provide a meaningful response to the need to identify, and the record evidence identifying, the disclosed report. (See SAOB 24-37.) For the reasons discussed in the supplemental opening brief but essentially ignored by respondent, the disclosed report must be identified in able to review the trial court's ruling. (SAOB 24-35.) Respondent's observation that it is simply "possible" that the disclosed report was contained in the files the trial court

reviewed, and its apparent but oblique contention that the report's origin cannot be determined without remand, is contradicted by the record. (SRB 13-14.) The trial court described the files it reviewed, including "[a] report file which is a file of reports written by Officer Frank Reiland," and unequivocally stated that the report was contained in those reviewed files. (15 RT 3519-3520.)

As to the identity of that report, respondent acknowledges in its procedural summary that the trial court refused to identify the disclosed report in the manner requested by appellate counsel and unopposed by respondent and instead directed the parties to obtain a copy from one of the trial attorneys for inclusion in the record. (SRB 2-3; see SAOB 27-37.) Respondent's counsel, Supervising Deputy Attorney General Vasquez, also acknowledges that in response to the court's ruling, he submitted written requests to the trial prosecutor for "a copy of the released record [from] his file," the trial prosecutor responded by faxing him a copy of the "two-page Madera County Department of Corrections incident report, dated June 28, 1990" (hereafter "incident report"), and respondent's counsel filed a copy with the court. (SRB 3-6; see also SAOB 27-37.)

Nevertheless, inconsistent with its representations below, respondent now contends that the disclosed report simply "may have" been the incident report. (SRB 13, fn. 12; SAOB 27-37.) Respondent offers no explanation for its inconsistent positions or any suggestion that it is prepared to present any contrary evidence regarding the identity of the report on remand. Nor does respondent suggest that the trial judge would even be available to identify the disclosed report on remand, much less that there is any reason to think that he would identify it as something other than the incident report respondent proffered below, which he "assume[d]" was the report he had

ordered disclosed. (2 RC-CT 341; see SAOB 27-37.) To the contrary, as previously noted, respondent erroneously suggests that the trial judge's participation is not even necessary. (SRB 13, fn. 10; see Footnote 2 and Part B, *ante*.) Absent any explanation for its inconsistent positions or any reason for why a remand is necessary, respondent should be held to its representations below that the disclosed report was the incident report. (See SAOB 37-39; cf., *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1134, 1350, fn. 12, and authorities cited therein ["A party is not permitted to change his position and adopt a new and different theory on appeal"].)

However, should this Court determine that a remand is nevertheless necessary to identify the disclosed report, then it should order remand with directions for a full hearing in which the trial judge's participation is necessary, for the reasons set forth in Part B, *ante*, and the supplemental opening brief. (SAOB 28, 38.)

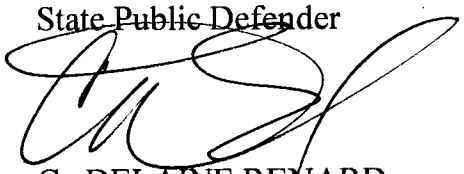
CONCLUSION

For all of the foregoing reasons, as well as those set forth in appellant's supplemental opening brief, this Court should remedy the erroneous omission of the files lodged with and reviewed by the trial court in ruling on appellant's *Pitchess* motion by ordering their production from the custodian, completing the record with a sealed and confidential copy thereof, and identifying the disclosed report as the June 28, 1990 incident report written by Officer Reiland.

DATED: March 24, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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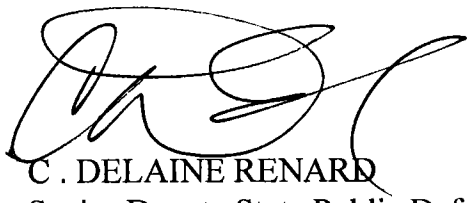
CERTIFICATE OF COUNSEL

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent appellant, Anthony Letrice Townsel, in this automatic appeal. 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 2,707 words. (See Calif. Rules of Court, Rule 8.630, subd. (d).)

Date: March 24, 2014

Respectfully submitted,



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DECLARATION OF SERVICE

Re: *People v. Anthony Letrice Townsel*

Superior Court No. 8926
Supreme Court No. S022998

I, JILL SHAW, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, CA 94607; and that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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Each said envelope was then, on March 24, 2014, sealed and deposited in the United States Mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

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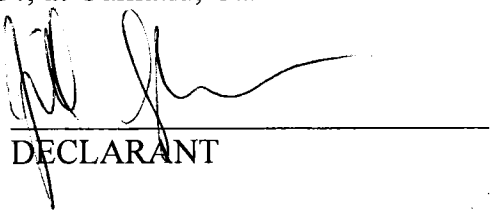

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