In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY LETRICE TOWNSEL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S022998

Madera County Superior Court Case No. 08926
Honorable Paul R. Martin, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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PROCEDURAL BACKGROUND

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

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

(2 CT 489; 15 RT 3512.) Having found good cause, the trial court reviewed Officer Reiland's "personnel file maintained at DOC;" a "file of reports written by Officer . . .Reiland;" a "pre-employment background file;" and, a "personnel file maintained at [the] County Personnel Office" regarding Officer Reiland. The court found "only one report written which [sic] Officer Reiland appears to be significant to this case." The court had copies made of the report and provided them to the parties. (15 RT 3519.) Defense counsel confirmed with the court that there was "no evidence in the file of any complaints against Officer Reiland for excessive use of force or harassment." (15 RT 3519-1520.)[2]

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[1] "CT" refers to the Clerk's Transcript On Appeal; "RC CT" refers to the Clerk's Transcript on Appeal of the record correction proceedings; "RT" refers to the Reporter's Transcript. Where appropriate, volume numbers will be indicated. "AOB" refers to Appellant's Opening Brief; "ASOB" refers to Appellant's Supplemental Opening Brief; "RB" refers to Respondent's Brief.

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

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

At a hearing held December 18, 1997, respondent stated he had no objection to augmenting the record with the report provided to counsel as part of the *Pitchess* proceeding. Respondent contended that any other records reviewed by the Court should remain sealed and provided solely to the California Supreme Court. (1 RC CT 85.)

Citing *People v. Barnard* (1982) 138 Cal.App.3d 400, appellant argued that a record may be augmented to include a law enforcement file examined by the trial court and returned to the agency that provided the file. "In this case we have the trial court not only reviewing the report but then submitting it to both sides." (1 RC CT 86.) Counsel stated "if the court can review those portions which were reviewed and submitted, those portions I would stipulate to be part of the record." (1 RC CT 86.)

The court stated it did not believe it "retained copies, copies provided to the prosecutor or defense" and suggested that the parties get copies of the released material from trial counsel. (1 RC CT 86.) The court agreed with respondent that the "original file . . . probably still in the officer's file, a copy of that should be sent under seal to the Supreme Court." (1 RC CT 86.)

Respondent and appellant were uncertain whether the prosecutor or trial defense counsel would have copies of the released document still available. Appellant made an "alternative suggestion" to have the "agency"

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

send the file to the court so that the court could review it and recollect "which part was submitted." The court stated it had been a long time since the hearing and the report was "with the agency now." The court reiterated that the parties should check with trial counsel. (1 RC CT 86-88.)

> Ms. Johnston [appellant's counsel]: We can report back. The ruling is that the copies of the original file will be sent to the Supreme Court under seal and then we will go from there.
>
> The Court: And try to make your diligent search before you ask me to review that file.
>
> Ms. Johnston: Okay." (1 RC CT 88.)

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

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

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

(7 CT 1651, 1655.)

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

At a status conference on September 1, 1998, respondent informed the court that he had been in contact with the District Attorney and a report of Officer Reiland had been faxed to respondent, but it may have been

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

misplaced. Respondent stated if he could not locate it he would again be in contact with the District Attorney. (1 RC CT 121.)[5]

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

At a hearing held August 7, 2001, respondent stated he filed with the court a copy of the incident report, previously provided to appellant, with a cover letter.[6] Respondent said he spoke with the prosecutor to ask whether the document should or should not be sealed like the personnel file. The prosecutor's

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

(2 RC CT 363.) Respondent stated the court needed to decide whether the document should be part of the record on appeal, whether it should be

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[5] During this period the parties were addressing numerous complex issues. (See e.g., ASOB 29-30.)

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

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

> The court again stated that during a *Pitchess* in camera review it always make[s] copies of the appropriate documents and suppl[ies] copies to both sides so both sides see copies of whatever was deemed admissible by the Court.

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

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

(2 RC CT 365.)

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

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

(1 RC CT 365.) Respondent could not recall the context for seeking the report but recalled that appellant's counsel, Kate Johnston,[7] had raised the

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[7] At this hearing, Deputy State Public Defenders Audry Chavez and Denise Anton were both representing appellant. (2 RC CT 350.) Previously, appellant was represented by Deputy State Public Defenders Ron Turner (e.g., RC CT 271), Debra Huston. (See e.g., 2 RC CT 301, 309), or Kate Johnston. (See e.g., 1 RC CT 67.) The record does not reflect any specific efforts by appellant's counsel to comply with the trial court's directive to seek the released document from trial counsel. (See e.g., 1 RC CT 246 [trial cocounsel had provided all of his file but no

(continued...)

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

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

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

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

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

In argument VIII of the respondent's brief, filed September 15, 2011, respondent did not oppose appellant's request that this Court independently review the confidential documents reviewed by the trial court pursuant to appellant's discovery motion to ensure that Offer Reiland's records contained no discoverable material. (RB 252-253.)

On August 26, 2013, Deputy Clerk Doina McFarland filed a declaration in response to a request by this Court for the personnel file as it

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(...continued)
mention is made of the document released at the *Pitchess* motion]; 2 RC CT 256-366 [no mention of difficulty accessing trial counsel file or efforts to seek the *Pitchess* document.].)

existed at the time of the *Pitchess* motion. The records were apparently omitted from the appellate record sent to this Court. Ms. McFarland declared:

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

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

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

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

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

provide supplemental briefing addressing the impact on this appeal of the files' absence from the record.

On November 27, 2013, appellant filed a supplemental opening brief. Pursuant to this Court's directive, respondent submits this supplemental respondent's brief.

ARGUMENT

I. THIS COURT SHOULD ORDER THE SUPERIOR COURT TO RECONSTRUCT OR SETTLE THE RECORD AND PROVIDE A COPY OF THE STATEMENT OR REVIEWED FILE TO THIS COURT

This Court has directed the parties to provide supplemental briefing addressing the impact on this appeal of the absence of the files that the trial court reviewed in camera in ruling on appellant's motion for discovery under *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at page 531. (Order, September 18, 2013.) Respondent submits that the absence of the files reviewed by the trial court may be remedied by this Court ordering the contents of the files reviewed by the trial court to be reconstructed or settled upon in the superior court and then having a copy of the statement or reviewed file provided to this Court.

A. Applicable Legal Principles

1. Pitchess Motion

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

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

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

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

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

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

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

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

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

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

record the contents of that file"]; *People v. Myles* (2012) 53 Cal.4th 1181, 1209 [appellate review of transcript sufficient.].)[8]

2. Record On Appeal

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

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

> When gaps occur in the record, rule 8.137 (former rule 7) of the California Rules of Court provides a mechanism for creating a settled statement. (*Marks*, at p. 192; see also Cal. Rules of Court, rules 8.346 [providing for the use of settled statement procedures in criminal appeals] & 8.619(d)(3) [providing for the use of settled statements in capital cases].)

(*People v. Virgil* (2011) 51 Cal.4th 1210, 1265-1266; also see, *People v. Galland* (2008) 45 Cal.4th 354, 373 [proper procedure is remand to

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[8] Appellant seems to argue that in a capital case a trial court does not have the option of listing on the record the files it reviewed. (ASOB 8.) As demonstrated in *Prince* and *Myles*, however, appellant is incorrect. (7 CT 1651, 1655.)

superior court with directions to hold a hearing to reconstruct or settle the record as to the missing document.])

B. The Contents Of The Files Reviewed By The Trial Court Should Be Reconstructed or Settled Upon In The Superior Court And Then Provided To This Court

Respondent submits that the contents of the files reviewed by the trial court should be reconstructed or settled upon in the superior court and then a copy of the statement or reviewed file provided to this Court.

1. Files Reviewed By The Trial Court

As previously noted, appellant filed a *Pitchess* discovery motion seeking "complaints filed or reports made against" Officer Reiland of the "Madera Department of Corrections for excessive or unreasonable force or harassment including copies of any investigation reports made thereof." (2 CT 489.) After finding good cause, the court conducted an in camera review of the files provided by the custodian. (15 RT 3519.)[9]

The record does not indicate whether copies of the files were made for the trial court file (see V CT 1133-1134), but the trial court properly documented on the record what files it reviewed. (15 RT 3519; *Mooc, supra*, 26 Cal.4th at p. 1228; see e.g., *People v. Prince* , *supra*, 40 Cal.4th at pp. 1285-1286.) At the 1991 hearing, the court stated it reviewed Officer Reiland's "personnel file maintained at DOC;" a "file of reports written by Officer . . . Reiland;" a "pre-employment background file;" and, a "personnel file maintained at [the] County Personnel Office" regarding Officer Reiland. (15 RT 3519.)

The trial court subsequently ordered that Officer Reiland's

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[9] As appellant acknowledges, it appears the representative from the Madera County Counsel's office provided for review far more documents than are required for a *Pitchess* motion. (ASOB 20; see *Mooc, supra*, 26 Cal.4th at pp. 1228-1229.).

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

(7 CT 1651, 1655; see Pen. Code, §190.7, subd. (a)(2)(P); Cal. Rules of Court, rule 8.610, subd. (a)(1); *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Appellant speculates as to why the trial court's order was not carried out (ASOB 15-17), however, respondent submits such speculation is unnecessary. Respondent instead agrees with appellant's ultimate conclusion that "[n]o matter what the cause," if it was possible to accomplish, the ordered files should have been provided to this Court. (ASOB 18.) However, the error may be remedied.

Respondent submits that the contents of the files reviewed by the trial court should be reconstructed or settled upon in the superior court and then provided to this Court. (See *People v. Galland, supra,* 45 Cal.4th at p. 373; *People v. Mooc, supra*, 26 Cal.4th at p. 1231; Cal. Rules of Court, rules 8.346 & 8.619(d)(3).) Respondent agrees with appellant that the court's description of the files is adequate for the custodian of records to determine what records were provided to the trial court for review on April 16, 1991. (ASOB 21-22.) Respondent disagrees with appellant that the appellate parties should attempt to interpret from the court's description what specific records should be included. (See ASOB 20-21; compare, *Mooc, supra,* 26 Cal.4th at pp. 1230-1231 [appellate court erred in directing the custodian to turn over the officer's complete personnel file directly to the appellate court.]) The 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.[10]

Once the superior court reconstructs the file it reviewed, or produces a settled statement regarding the in camera review, the superior court should then provide a copy of the statement or reviewed file to this Court.

2. The Document Provided To The Parties

In open court at the *Pitchess* hearing, the trial court stated that of the records it reviewed during the in camera proceeding, "only one report written which [sic] Officer Reiland appears to be significant to this case." The court had copies made of the report and provided them to the parties after the in camera hearing. (15 RT 3519.)

This report is problematic because, at least in open court, it was not specifically identified on the record by the trial court or the parties who received copies of the document. (15 RT 3519-3520.)[11] It is clear, however, that the document provided was not a complaint filed or report made against Officer Reiland. (15 RT 3519-3520.)[12] It is possible that this

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[10] If the superior court deems it necessary, the court may also subpoena or consult the original trial judge that reviewed the records in camera to assist with reconstruction or production of a settled statement regarding the in camera review.

[11] It is also not clear if this document was further described during the in camera record review. The record does not reflect whether or not the in camera hearing was transcribed by a court reporter. (V CT 1133-1134.)

[12] It 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 following the hearing, it would not have been relevant for purposes of the *Pitchess* motion. (See Pen. Code § 832.8; 2 CT 489 [appellant specifically seeking ""complaints filed or reports made against Officer[] . . . Reiland"]; 2 RC CT 341-342, 363-365 [appellant thought it was not the type of document normally produced at a *Pitchess* motion].) In any event, as understood by respondent, the trial court made the incident report part of the sealed record

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document will also be in the files provided by the custodian of records to the superior court, since that is where it appears to have originated. The superior court may also be able to settle this matter as it determines the state of the file reviewed for the *Pitchess* motion.

3. Conclusion

In summary, the contents of the files should be reconstructed or settled upon in the superior court and then a copy of the statement or reviewed file provided to this Court.

C. If The Confidential Files Cannot Be Satisfactorily Reconstructed, Additional Briefing Is Warranted

If it is ultimately determined that the file reviewed by the trial court cannot be reconstructed or settled, respondent agrees with appellant that additional briefing is warranted to address the impact, if any, on this appeal. (See *People v. Rogers, supra,* 39 Cal.4th at pp. 857-858; see *People v. Guevara* (2007) 148 Cal.App.4th 62, 69; ASOB 39.)

(...continued)
to be provided to this Court. (2 RC CT 363-364; also see ASOB 37-38 fn. 8.).

CONCLUSION

For the forgoing reasons, respondent submits that the contents of the files reviewed by the trial court should be reconstructed and or settled upon in the superior court and then a copy of the statement or reviewed file provided to this Court.

Dated: February 20, 2014

Respectfully submitted,

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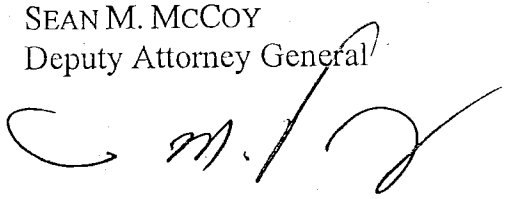

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 3,840 words.

Dated: February 20, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Townsel**
No.: **S022998**

I declare:

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

On February 20, 2014, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2014, at Fresno, California.

Lynda Gonzales
Declarant

Signature

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